

**Commonwealth of Kentucky  
Workers' Compensation Board**

**OPINION ENTERED: December 20, 2019**

CLAIM NO. 201563685

SCHNELL CONTRACTORS

PETITIONER/  
CROSS-RESPONDENT

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE**

ELLIS POOLE  
AND  
HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENT/  
CROSS-PETITIONER  
  
RESPONDENT

**OPINION  
AFFIRMING IN PART,  
VACATING IN PART  
& REMANDING**

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**ALVEY, Chairman.** Schnell Contractors (“Schnell”) appeals and Ellis Poole (“Poole”) cross-appeals from the Opinion, Order and Award rendered May 15, 2018, and the Orders on Petition for Reconsideration rendered June 12, 2018 by Hon. John. H. McCracken, Administrative Law Judge (“ALJ”). The ALJ determined

Poole sustained work-related injuries to his right shoulder and “neck/right arm/right thumb” due to an October 21, 2015 accident, and he is permanently totally disabled.

On appeal, Schnell argues the ALJ erred pursuant to the Act in finding Poole sustained a work-related cervical injury. Schnell also argues the award of permanent total disability (“PTD”) benefits should terminate on the date Poole reaches the age of 70 in light of the legislative amendments to KRS 342.730(4), effective July 14, 2018, and Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019).

On appeal, Poole argues retroactive application of the legislative amendments to KRS 342.730(4), effective July 14, 2018, violates the Contracts Clause of the United States and Kentucky Constitution, and is an exercise of arbitrary power in contravention of Section 2 of the Kentucky Constitution. Instead, Poole asserts he is entitled to income benefits for the duration of his disability.

This Board placed the claim in abeyance in an order dated September 20, 2018, pending the finality of Lafarge Holcim v. James Swinford, Claim Number 2016-90245, 2018-CA-000414-WC (rendered September 7, 2018)(Designated to be Published). The case became final on September 24, 2019, and is now ripe for decision on appeal. We affirm in part, vacate in part, and remand the claim to the ALJ for clarification regarding the right upper extremity condition, and to amend the award of PTD benefits to conform to KRS 342.730(4), effective July 14, 2018.

Poole filed a Form 101 alleging he injured his right shoulder on October 21, 2015, by repetitively lifting eighty-pound bags of concrete while working as a construction laborer for Schnell. Subsequently, Poole’s Form 101 was amended to include injuries to his “neck and right upper extremity/hand.” We will not

discuss in detail the evidence addressing Poole's right shoulder condition since that is not an issue on appeal.

Poole testified by deposition on November 1, 2017, and at the hearing held March 22, 2018. Poole worked as a construction laborer for Schnell beginning in 1999. Poole began working at approximately 6:00 a.m. at a parking garage located in Evansville, Indiana, on October 21, 2015. On that day, Poole repetitively lifted eighty-pound bags of concrete into a mixer. He estimated he lifted approximately one hundred and eighty bags that day. Later in the afternoon, Poole began experiencing pain in his right shoulder and reported his symptoms to his foreman. When his symptoms did not improve, Schnell sent Poole to St. Mary's Convenient Care on October 26, 2015, and then to St. Mary's Occupational Medicine where he received conservative treatment for his right shoulder.

Poole then began treating with Dr. William Martin in December 2015. Dr. Martin performed three surgeries on Poole's right shoulder and bicep, the first of which occurred on February 22, 2016. At both his deposition and hearing, Poole testified the first surgery did not resolve his right shoulder symptoms. Poole testified that in addition to his right shoulder complaints, he began experiencing numbness in the right thumb after the first surgery. Poole underwent two additional right shoulder surgeries in August 2016 and January 2017, neither of which improved his right shoulder symptoms. His shoulder pain extended into his biceps and he continued to experience the numbness in his right thumb. Poole indicated Dr. Martin ordered a cervical MRI and two EMG/NCV studies to determine the etiology of his right thumb symptoms. Poole was referred to Dr. Mark Smith for a

second opinion regarding his continuing right shoulder and right thumb complaints.

When asked about his right thumb treatment and diagnosis, Poole stated as follows:

Trying to figure out where. And after I did the nerve study - - you know, the two nerve studies, and they can't figure out nothing. But Martin told me one time it might be from a nerve or something where it might have done something in there or something. He told me that a long time ago. And Mark Smith said maybe in surgery they had my arm stretched out, sort of like that, and he got that nerve stretched and caused it. I mean, nobody has really said definitely what caused it.

Poole continued to experience persistent right shoulder and bicep pain, as well as right thumb numbness. Poole denied experiencing cervical symptoms at any time following the accident. Dr. Martin has recommended a fourth surgery for the right shoulder, which Poole has declined to undergo.

Poole testified that at the time of the October 21, 2015 accident, he neither experienced nor treated for any pain or symptoms in his neck, right arm, right hand, and fingers. Poole continued to work for Schnell on light duty through December 21, 2015, when his treating physician restricted him from working. Schnell has not returned to any work since that time and is permanently restricted from using his right arm. Schnell does not believe he has the physical capacity to return to any type of work.

Poole filed the treatment records from St. Mary's Convenient Care and St. Mary's Occupational Medicine for his right shoulder complaints spanning October 26, 2015 through November 2015. Poole was referred to an orthopedic surgeon after conservative treatment failed. Poole began treating with Dr. Martin in December 2015 for his right shoulder complaints. Dr. Martin performed an

arthroscopic procedure of the right shoulder with rotator cuff repair, biceps tenodesis, and subacromial and subcoracoid decompression on February 22, 2016. The operative report reflects post-operative diagnoses of extensive partial tear of the subscapularis with partial tear of the long head biceps. Thereafter, Poole continued to experience right shoulder and bicep pain. He additionally complained of numbness in his third, fourth and fifth fingers of his right hand.

Dr. Martin ordered a repeat right shoulder MRI and EMG/NCV studies of the upper extremity, which demonstrated mid-cervical root irritation on the right. Dr. Martin performed a second right shoulder surgery on August 8, 2016, consisting of a repeat subscapularis repair and posterior capsular release. Despite the second surgery, Poole continued to complain of right shoulder and biceps symptoms, and constant numbness in the third, fourth and fifth fingers of his right hand. Therefore, Dr. Martin ordered a cervical MRI, which was read as negative, and a MR arthrogram of the right shoulder. Dr. Martin performed a third shoulder surgery on January 23, 2017, consisting of arthroscopic repair of the rotator cuff and a subacromial decompression. Poole's symptoms did not improve after the third surgery. The records indicate Dr. Martin suspected the numbness and tingling in the right hand was either due to a brachial plexus or a cervical issue. However, in light of the conflicting diagnostic studies, Dr. Martin stated he did not know what was causing the numbness in the right thumb. Dr. Martin recommended that Poole obtain a second opinion.

Poole treated with Dr. Smith, who first obtained a second EMG/NCV study on the right upper extremity. The October 2, 2017 report found membrane

instability in the right mid/low cervical paraspinals suggestive of right cervical root irritation though not diagnostic of radiculopathy. The study was largely unchanged from the July 13, 2016 electrodiagnostic testing. The study demonstrated no evidence of right brachial plexopathy and produced normal right median and ulnar nerve responses. Dr. Smith recommended another right shoulder arthroscopic procedure in December 2017.

The December 7, 2017 vocational report by Robert Tiell and the February 2, 2018 vocational report by Dr. Ralph Crystal were also filed into evidence.

Schnell filed the October 29, 2016 report by Dr. Muhammad Ajmal.

Under "Diagnosis," Dr. Ajmal provided the following:

Based on the clinical evaluation and documentation in the provided medical records, the claimant sustained a rotator cuff injury to the right shoulder and what appears to be a cervical nerve root injury as a result of heavy labor work on October 20, 2015. This is consistent with the diagnostic studies, an EMG and MRI, noting there is documentation by Dr. White and physical therapist, Nathan Ladd, on October 26, 2015; November 13, 2015; November 19, 2015; and December 11, 2015, which notes radiation of pain to the arm and intermittent numbness of the right thumb consistent with a diagnosis of some sort of cervical nerve injury and pointing out that on examination today there is hypoesthesia involving the right thumb and right ulnar fingers; otherwise, the cervical examination today was essentially normal.

Dr. Ajmal opined Poole had not attained maximum medical improvement ("MMI") for the right shoulder and paresthesia related to the right upper extremity. He noted the records indicate "there is evaluation underway to determine cervical spine pathology versus a brachial plexus injury as a result of

interscalene block or perhaps from a traction injury during surgery.” Dr. Ajmal opined Poole does not have the physical capacity to return to his prior job. After noting the diagnostic studies are indicative of a cervical nerve injury that is not fully defined at this point, Dr. Ajmal opined the right shoulder and the cervical complaints are related to the October 21, 2015 work incident. He recommended further treatment for the right shoulder and apparent cervical nerve injury, as well as possible surgical intervention.

Schnell filed Dr. Rafid Kakel’s July 22, 2017 report. He diagnosed Poole with right shoulder pain status post-surgical repair of the rotator cuff twice. Dr. Kakel opined Poole had attained MMI for the right shoulder, and assessed an 11% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He opined Poole does not retain the physical capacity to return to work as a laborer and restricted him from climbing of ladders and overhead work activities.

Dr. Kakel noted Poole also reported numbness in the right thumb, but concluded the basis for that condition is indeterminate based on the available medical evidence. Dr. Kakel found it premature to address MMI and to assign an impairment rating for the right thumb numbness since the basis for the condition is indeterminate. Dr. Kakel opined there is insufficient objective medical evidence to determine whether the work injury is the basis for Poole’s complaints of right thumb, finger and hand numbness. Dr. Kakel recommended a second EMG/NCV study.

Dr. Kakel also prepared a November 15, 2017 addendum after reviewing additional medical records and the October 2, 2017 EMG/NCV. Dr.

Kakel stated, "it remains my opinion that the basis for his complaints of right thumbness(sic) is indeterminate. The October 2, 2017 EMG/NCV results were essentially unchanged from the July 13, 2016, electrodiagnostic testing results."

Poole filed Dr. Jules Barefoot's October 3, 2017 report. Dr. Barefoot diagnosed Poole with right rotator cuff tear secondary to the October 21, 2015, work place incident; February 28, 2016 right shoulder arthroscopy with rotator cuff repair, biceps tenodesis, and subacromial and subcoracoid decompression; August 8, 2016 right shoulder arthroscopy with a repeat subscapularis repair and posterior capsular release; January 23, 2017 right shoulder arthroscopy with a rotator cuff repair of the supraspinatus and subacromial decompression with extensive bursectomy; and partial upper trunk brachial plexus injury with persistent diffuse hypesthesia of the right thumb. Dr. Barefoot opined the diagnoses are related to the October 21, 2015 work injury. Dr. Barefoot specifically opined Poole's persistent hypesthesia present in right thumb resulted from his first surgery, which was due to the October 21, 2015 work injury.

Dr. Barefoot opined Poole has reached MMI for both the right shoulder and right thumb unless further treatment is recommended. Dr. Barefoot assessed a 20% upper extremity impairment for the right shoulder and a 9% upper extremity impairment for the hypesthesia affecting the right thumb yielding a combined 27% upper extremity impairment rating pursuant to the AMA Guides. Dr. Barefoot converted the upper extremity impairment into a 16% whole person impairment rating, wholly attributable to the October 21, 2015 work injury. Dr. Barefoot opined Poole is unable to return to work as a laborer and assigned

restrictions affecting his right arm and hand. Dr. Barefoot deferred to Dr. Smith for further treatment recommendations.

A benefit review conference (“BRC”) was held on March 22, 2018. The BRC order indicates the parties stipulated Poole sustained a work related injury on October 21, 2015, “except right upper ext + neck.” The parties stipulated to Poole’s pre-injury average weekly wage and that he does not have the physical capacity to return to work. The contested issues were identified as: work-related injury/causation regarding neck and right upper extremity, benefits pursuant to KRS 342.730, TTD benefits, and “PTD, duration + rate of benefits post Parker, application of Parker decision.” The ALJ also noted, “Defendant accepts right shoulder but contests neck + right upper extremity including rt. Thumb.”

In the May 15, 2018 opinion, the ALJ determined Poole sustained a work-related right shoulder injury on October 21, 2015 while working for Schnell warranting a 12% impairment rating. The ALJ found as follows regarding the work-relatedness/causation of the cervical/right thumb injury:

In Coleman v. Emily Enterprises, 58 S.W. 3d 459 (Ky. 2001), the Kentucky Supreme Court held that all of the injurious consequences flowing from a work-related physical injury and which are not attributable to unrelated causes are compensable. The employer is responsible if work-related treatment, or treatment intended to treat a work-related injury, even if it is the wrong treatment, causes a disability or impairment. Elizabethtown Sportswear v. Stice, 720 S.W. 2d 732, 733 (Ky. App. 1986).

Mr. Poole did not have any physical, medical, issues in his neck or right thumb prior to the subject work accident. Actually, the proof is clear that the right arm/thumb symptoms began after the first shoulder surgery.

Dr. Barefoot diagnosed Mr. Poole with a partial upper trunk brachial plexus injury with persistent diffuse hypesthesia of the right thumb. Dr. Ajmal stated that Mr. Poole sustained a work-related nerve injury that affected his right arm. He described it as what appeared to be a cervical nerve root injury that occurred as a result of heavy labor work on October 20, 2015. Dr. Kakel did not know what was causing the right thumb condition.

The ALJ believes that there is sufficient evidence to find that Mr. Poole sustained a neck/right arm/right thumb injury as a result of the October 21, 2015 injury. The ALJ relies on the testimony of Mr. Poole and Dr. Barefoot to find that on October 21, 2015, Mr. Poole sustained a work-related injury to his cervical/right arm/right thumb while working for Defendant. The ALJ believes that Dr. Barefoot is correct in his diagnosis and his impairment. The ALJ relies on Dr. Barefoot to find that Mr. Poole sustained a 5% impairment to the right hand as diagnosed by Dr. Barefoot. These, when combined, equal a 16% whole person impairment including the shoulder.

The ALJ found Poole is permanently totally disabled and is not entitled to additional temporary total disability benefits for the time he continued to work after his work injury. The ALJ awarded PTD benefits beginning October 21, 2015 “consistent with the 1994 version of KRS 342.730(4) including the tier down of benefits consistent with that statute.” The ALJ awarded medical benefits for the cure and relief from the effects of the work-related “right shoulder, cervical, right arm and right thumb injuries.”

Schnell filed a petition for reconsideration asserting the ALJ erred in finding a cervical injury occurred and that his determination is overly broad. Schnell points out that Dr. Ajmal is the only physician offering an opinion regarding a cervical injury. Schnell asserts Dr. Ajmal’s opinion was premature since Poole had yet to attain MMI and did not make a definitive diagnosis. Schnell asserts the ALJ

erroneously took the preliminary statements by Dr. Ajmal as evidence of a cervical spine injury. Schnell requested the ALJ amend his findings to reflect treatment of and any compensation related to the right thumb symptoms is compensable, and find Poole did not sustain a cervical injury for which it will have future liability. Schnell also argued the award should be amended to reflect benefits should be paid in accordance with KRS 342.730 in effect at the time the claim becomes final.

Poole filed a petition for reconsideration requesting the ALJ correct a typographical error contained in the award.

The ALJ granted Poole's petition in an order dated June 12, 2018, and corrected the error contained in the award of PTD benefits. In a separate order dated June 12, 2018, the ALJ denied Schnell's petition stating as follows:

Defendant filed a Petition for Reconsideration requesting that the ALJ amend the findings to not include a cervical injury and asserting that the tier down provisions should not apply. With regards to the cervical injury, it appears as though Defendant is attempting to re-argue its case. The ALJ reviewed Dr. Ajmal's report and made findings in the Opinion, Award and Order that he believes are consistent with Dr. Ajmal's report. This portion of the Petition is denied.

Defendant asserts that the ALJ should not have applied the tier down provisions from the 1994 version of KRS 342.730(4). The new legislation is not effective at this time, and the ALJ believes that the 1994 version of KRS 342.730(4) is the current law. This portion of Defendant's Petition for Reconsideration is denied.

On appeal, Schnell argues the ALJ erred in finding a cervical injury occurred pursuant to the Act since there was no such evidence in the record. It again argues Dr. Ajmal's cervical spine diagnosis is too speculative and was still "under investigation" by Poole's treating physicians at the time he rendered the opinion. It

notes Dr. Barefoot diagnosed a brachial injury nearly a year later, and found no cervical diagnosis or impairment. Schnell again states the ALJ should have limited his findings to a compensable right thumb injury, noting it was unnecessary for the ALJ to find the complaints caused by a cervical condition. “Indeed, in accepting and awarding the 5% rating from Dr. Barefoot, the ALJ made the overly broad finding that claimant sustained a cervical/right arm/right thumb injury. This is not the basis on which Dr. Barefoot assigned impairment. He made no reference to any cervical condition.” Schnell requests that this Board determine the ALJ’s cervical award is not supported by substantial evidence.

Schnell also argues the recent amendments to KRS 342.730(4), effective July 14, 2018, are retroactive pursuant to the holding in Holcim v. Swinford, supra. Schnell notes this claim was not yet final when the amendments became effective, and therefore, the PTD award should terminate on the date Poole reaches the age of 70.

On appeal, Poole argues retroactive application of the legislative amendments to KRS 342.730(4), effective July 14, 2018, violates the Contracts Clause of the United States and Kentucky Constitution, and is an exercise of arbitrary power in contravention of Section 2 of the Kentucky Constitution. Poole also argues reversion to the tier-down provision contained in the 1994 version of KRS 342.730(4) does not apply. Instead, Poole asserts he is entitled to income benefits for the duration of his disability.

After reviewing the medical evidence, we vacate in part and remand to the ALJ for clarification addressing the “right shoulder, cervical, right arm and right

thumb injuries.” We begin by noting the findings relating to the right shoulder injury and of permanent total disability are not challenged on appeal. Poole testified he began experiencing numbness in the right thumb after the first surgery in February 2016, which has not improved or resolved. Poole’s treating physician, Dr. Martin, suspected the numbness and tingling in the right hand was due to either a brachial plexus or cervical issue, but could not provide a definitive opinion on the cause of the right hand symptoms. Dr. Ajmal diagnosed, “what appears to be a cervical nerve root injury as a result of heavy labor work on October 20, 2015,” but found it premature to find MMI or to assign an impairment rating. Dr. Barefoot diagnosed Poole with a partial upper trunk brachial plexus injury with persistent diffuse hypesthesia of the right thumb due to the October 21, 2015 work injury, warranting a 9% upper extremity impairment. Pursuant to the AMA Guides, this converts into a 5% whole person impairment rating. Dr. Kakel acknowledged Poole’s complaints of right thumb numbness, but opined the basis for his complaints is indeterminate based upon the available medical evidence.

In the May 2018 opinion, the ALJ noted Poole did not have any issues in his neck or right thumb prior to the subject work accident, and the medical records establish his right arm/thumb symptoms began after the first shoulder surgery. After summarizing the opinions of Drs. Barefoot, Ajmal, and Kakel, the ALJ found Poole “sustained a neck/right arm/right thumb injury as a result of the October 21, 2015 injury” based upon the testimony of Poole and Dr. Barefoot’s opinion. The ALJ adopted the diagnosis and impairment of Dr. Barefoot. As noted above, Dr. Barefoot diagnosed a partial upper trunk brachial plexus injury with persistent diffuse

hypesthesia of the right thumb due to the October 21, 2015 work injury and assessed a 5% impairment rating. The ALJ awarded PTD benefits and medical benefits for the work related “right shoulder, cervical, right arm and right thumb injuries.” In the Order on reconsideration, the ALJ addressed Poole’s request to amend his findings to not include a cervical injury. In denying the petition, the ALJ noted the findings he made in the Opinion which are consistent with Dr. Ajmal's report. As noted above, Dr. Ajmal diagnosed an apparent cervical nerve root injury.

We note certain findings contained in the opinion and order on reconsideration are inconsistent and warrant clarification on remand, particularly since Schnell requested additional findings in its petition for reconsideration. The inconsistent findings include whether Poole sustained a work-related injury to his cervical/right arm/right thumb while working for Schnell, whether Dr. Barefoot is correct in his diagnosis and impairment (partial upper trunk brachial plexus injury with persistent diffuse hypesthesia of the right thumb warranting a 5% impairment rating) and whether his findings are consistent with the opinion of Dr. Ajmal who diagnosed a work-related cervical root injury. Therefore, we vacate in part and remand to the ALJ to clarify the compensable body part and/or condition related to the numbness in Poole’s right hand. We note it appears there is little dispute Poole experiences right thumb numbness, however, the medical opinions differ as to its cause. We direct no particular result. However, we agree the finding of a right cervical, right arm and right thumb injuries could cause confusion and unnecessary litigation in determining future compensable medical treatment.

We next note House Bill 2, effective July 14, 2018, KRS 342.730(4) mandates as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In Holcim v. Swinford, supra, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. Because the Kentucky Supreme Court has determined the newly enacted amendment applies retroactively, we vacate the ALJ's decision of the applicability of the 1994 version of KRS 342.730(4), and remand for an amended award terminating Poole's entitlement to PTD benefits pursuant to KRS 342.730(4), which became effective July 14, 2018.

Finally, Poole asserts retroactive applicability of the amended version of KRS 342.730(4) is unconstitutional. The Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Because this Board has no authority or jurisdiction to reverse rulings of the Kentucky courts, we can render no determination on this issue.

Accordingly, the May 15, 2018 Opinion, Order and Award, and the June 12, 2018, Orders on Petition for Reconsideration issued by Hon. John H. McCracken,

Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for an amended award as set forth above.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR SCHNELL CONTRACTORS:**

**LMS**

HON DOUGLAS A U'SELLIS  
600 EAST MAIN ST, STE 100  
LOUISVILLE, KY 40202

**COUNSEL FOR POOLE:**

**LMS**

HON CHRISTOPHER P EVENSEN  
6011 BROWNSBORO PARK BLVD, STE A  
LOUISVILLE, KY 40207

**ADMINISTRATIVE LAW JUDGE:**

**LMS**

HON JOHN H MCCRACKEN  
MAYO-UNDERWOOD BLDG  
500 MERO ST, 3<sup>rd</sup> FLOOR  
FRANKFORT, KY 40601