

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 29, 2022

CLAIM NO. 202079796

STANLEY CANARY

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

MECHANICAL SYSTEMS, INC.
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

STIVERS, Member. Stanley Canary (“Canary”) seeks review of the December 18, 2021, Opinion, Award, and Order and the January 5, 2022, Order overruling his Petition for Reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits and concluded “Canary failed to satisfy his burden to establish entitlement to permanent income benefits.” The ALJ found Canary was entitled to medical benefits through

the date he attained maximum medical improvement (“MMI”), but did not award medical benefits.

On appeal, Canary charges the ALJ erred in finding his impairment was merely “a temporary exacerbation of symptoms relating to a pre-existing right shoulder condition.” Canary also contends the ALJ erred in finding he did not sustain a permanent impairment as a result of the work injury.

BACKGROUND

Canary’s Form 101 alleges he sustained a May 26, 2020, work injury while in the employ of Mechanical Systems, Inc. (“Mechanical Systems”). Canary described the accident as follows: “Plaintiff was on a scissor lift about 15’ up helping two coworkers hang a pipe when one of them let the pipe fall about 8-12 inches onto Plaintiff’s right shoulder and neck. He went to his knees and had to be helped down to get to urgent care for xrays.” He alleged injuries to multiple upper extremities.

Canary testified at a January 27, 2021, deposition and at the October 19, 2021, hearing. Canary’s deposition establishes he was born September 30, 1973, and sustained serious injuries in a 2002 motor vehicle accident (“MVA”). Canary described the injuries and the treatment resulting from the 2002 MVA:

Q: What did you hurt in that motor vehicle accident?

A: Dr. Moore did a Weaver-Dunn procedure on my right shoulder and a broke neck and a broke back or fractured C-7 and fractured T-11 in my neck and back and scalped.

Q: So did Dr. Moore treat just your right shoulder and do that surgery or did he also –

A: Yes.

Q: Who treated your neck?

A: Dr. Cannon.

Q: So Dr. Moore performed surgery on your right shoulder. How long did you continue to treat with Dr. Moore that time around?

A: He actually did two shoulder surgeries. About two years – two and a half years.

Q: So in the 2004, 2005 range you think?

A: No, probably 2002, '03, and '04.

Q: And did you ever return to Dr. Moore after that until you had this work injury we're talking about today?

A: No, sir.

Q: How about Dr. Cannon? What did he do for you back then?

A: He put me in a neck brace for I think it was like nine or ten weeks and pretty much bedridden for a few months.

Q: And when did you stop treating with Dr. Cannon?

A: Dr. Cannon in 2003.

Q: When you stopped seeing Dr. Cannon in 2003, what type of symptoms were you having in your neck, if any, then?

A: None.

Q: How about when you stopped treating with Dr. Moore? What type of symptoms were you having in your right shoulder?

A: None.

Except for one occasion when he developed cellulitis around his elbow and shoulder in 2017 or 2018, Canary denied experiencing right shoulder problems between 2004 and 2020. He was treated by Dr. Anthony McBride following the injury in 2017 or 2018. He also denied experiencing neck symptoms between 2004

and the 2020 injury. Canary began experiencing right shoulder symptoms in May 2020 when his boss dropped a 300 to 350-pound pipe on his shoulder.

Canary testified the cellulitis developed when he fell on his elbow while incarcerated. Dr. McBride treated the cellulitis. He explained the only doctors who provided treatment between the 2002 MVA and the May 26, 2020, injury were Drs. McBride, Harold Cannon, and Keith Moore.

Canary denied experiencing any injuries while working as a welder for Brantley Construction between January and February 2007 or for Mechanical Contractors from June 2012 to December 2012. He explained the gap in his employment from February 2007 until June 2012 resulted from his incarceration. He returned to work at Mechanical Systems as a welder in January 2013 where he worked until January 2015. He then worked for Local 633 as a welder from June 2015 through December 2016. He worked for Duke's Mechanical as a welder from February 2017 through April 2018. He experienced no injuries during the time he worked for Mechanical Systems, Local 633, or Duke's Mechanical. He also experienced no injuries at Trifecta Steel where he worked as a welder from March 2019 through sometime in April 2019. Canary fell at the jail injuring his right elbow between his employment with Duke's Mechanical and Trifecta Steel. He returned to work as a welder with Mechanical Systems on April 15, 2019. He denied experiencing any neck or right shoulder symptoms or being on medication at the time he returned to work for Mechanical Systems in April 2019. The only elbow and shoulder symptoms between 2002 and the subject injury occurred when he fell at the jail. He provided the following account of the May 26, 2020, injury:

A: On May 26, 2020, I'd just return back to work from a hernia – umbilical hernia operation and was on restrictions not to lift over 10 pounds due to the hernia operation I was recovering from, and I was at work and we was at Bertolli Foods, which they make Ragu sauce and spaghetti sauce and all that. Well, there was two manlifts. Each manlift they had backed into each other and Kevin and Robbie picked up a pipe that was either a four-and-a-half or a five-and-a-half-inch schedule 80, 21-foot piece of pipe, which weighs anywhere from, I'm not going to give an exact weight, but I'm going to say anywhere from 300 to 400 pounds. So they lift his pipe up and set it on top of the two manlifts. Well, they then get in the manlifts and together they take the pipe up using the manlifts 15 to 18 foot in the air to put this pipe in what's called ring hangers. Well, they get up there and Robbie gets his end in and Kevin can't get his end in, so he sets it on another pipe just to hold it steady where it ain't got no weight on it and he hollers down there and asked me if I could help them and I told them I could try because they was in a bind and should have tied the pipe off but didn't. So Robbie has his end in the ring hanger and he comes down and gets me. I crawl in the manlift with him and we go up. Like I said, they was back to back, so whenever we get up there and get level with Kevin, I crawled over into the other lift with Kevin because – I was crawling because I had to go under the handrail. As I crawled over in there, I started to stand up and Kevin then – then the pipe slides off of whatever it was on down and into my shoulder and neck, right in this area.

Q: Okay, and so the judge knows what you're talking about, you're talking about by your trapezius muscle between your neck and your shoulder blade?

A: Yes, my neck and my shoulder right here, all through there, and like I said, it's a schedule 80 pipe that's four-and-a-half-inch pipe that's about five-eighths, about that thick, you know. It's real thick for steam line, you know, and it's real heavy piping and it just fell. At that time I went down to my hands and knees because like I said I started – I was getting up. Well, it knocked me to my hands and knees. Since I was down there, I crawled right back over into Robbie's lift and told Robbie, I said Robbie, I've got to go. He said did it hurt you. I said yes,

bad. Get me down. So Robbie gets me down, and whenever I get down, Robbie helps me take off my harness, which I had a safety harness on, and Robbie asks me where I'm going and I told him I'm going to the emergency room and I left.

His immediate symptoms were:

A: Well, I couldn't – I couldn't hardly move my head and my right arm, I mean, I couldn't use it hardly at all. I could move from my elbow down, but as far as my elbow up, no, it was – and I had this big knot pop up right here and I've still got this big knot right here.

When Canary eventually saw Dr. Moore, he ordered an MRI and physical therapy. Physical therapy helped “quite a bit.” Dr. Moore referred Canary to Dr. Cannon whom he saw on one occasion. Dr. Cannon believed there was nothing wrong with his neck. He recommended more physical therapy and returned Canary to Dr. Moore. Canary also saw Joni Flaherty for “dry needling” which “helped a lot.” He sought a second opinion from Dr. Mitchell Campbell in Louisville concerning his neck problems. Dr. Campbell obtained an MRI and recommended physical therapy. At the time of his deposition, Canary was still treating with Dr. Campbell, who had recommended eight more weeks of physical therapy and if the pain persists to return to him. Canary no longer sees Dr. Moore. Canary described what transpired when he was released by Dr. Moore to return to work in July or August 2020:

Q: ... Did you ever return to work at Mechanical Systems after your injury?

A: Yes, sir, I did.

Q: When was that?

A: That was – I went and seen Dr. Moore on a Friday and he had given me a note of no return. This was on

the Friday. At 3:45 I seen Dr. Moore and he give me a note not to return back to work. Friday at about 4:15 or 4:30 I got a phone call from Dr. Moore's office saying that they was going to release me with some restrictions that my work and workers' comp had them new restrictions because like I said it was Friday at 4:15 or 4:30 right before they closed, and I couldn't get back up there to get the new work orders. She told me I could come back in and get it Monday. Well, Monday I returned to work and I worked four and a half hours. I hadn't seen my new work orders yet. I got there to work and they wanted me to sort nuts and bolts and whatnot and to sort nuts and bolts you've got to --- you're moving your neck, you're moving your arm. I couldn't do it. I told them I couldn't do it because it was too strenuous on me and I couldn't do it, and mind to say I have not seen these new work orders. So I told Monte Troutman, which was my foreman or supervisor there at the time, I told him that I couldn't do it. Monte Troutman then asked me and I told him I was leaving. Monte Troutman then asked me to get on the fork truck and move that pallet. I said Monte I can't get on this fork truck. There's no way I can climb up on that fork truck, so I left after four and a half hours. Went down to the doctor's office and got my new work order, my work restrictions that they'd already sent to workers' comp and Mechanical Systems, and it plainly states on them new work orders that I'm not to operate heavy equipment, no lifting over zero pounds, no movement of right arm, no movement of right shoulder, and that was the first time I had seen the new work orders, and like I said, Monte Troutman had asked me to do that.

Canary testified that since the injury he has worked a total of four and half hours which occurred when he returned to work at Mechanical Systems. He was unsure of his current employment status with Mechanical Systems. Canary testified his only symptom following his 2018 slip and fall at the jail was a very sore elbow. He denied experiencing any shoulder symptoms. He detailed his current symptoms:

A: My right shoulder hurts all the way up into under my ear. If I move it, it pulls there, and I got tingling, not

numbness, I got tingling and like pins in my fingers and hand.

Q: Which fingers?

A: It's my thumb and my index finger most of it. Well, all of it really.

Q: Is that present all the time or just some of the time?

A: Most of the time, yeah. Like it ain't so bad right now, but I can still feel it and I sit and do my fingers like – I just do this a lot (indicating).

Q: And how about your range of motion of that arm, your right arm? How's it?

A: Well, it's not very good is what workers' comp's doctor said to me Saturday. Said it's not real good.

Q: Can you lift it above your head?

A: No way.

Canary had a future appointment with Dr. McBride for treatment of his shoulder.

The October 5, 2021, Benefit Review Conference Order and Memorandum reflects the parties stipulated an employment relationship existed between Canary and Mechanical Systems at all times relevant. However, there was no stipulation regarding the injury. The parties stipulated TTD benefits were paid from the date of injury until July 30, 2020, and from August 19, 2020, through November 11, 2020. The parties also stipulated Canary's average weekly wage is \$764.61. The contested issues were TTD benefits paid, medical expenses unpaid or contested, exclusion for pre-existing impairment, permanent income benefits per KRS 342.730 including multipliers, and vocational rehabilitation.

At the hearing, the following exchange took place:

Judge Weatherby: Thank you. I note that on the 5th of October of this year, a Benefit Review Conference was held in this matter and the following stipulations were agreed to, that there is jurisdiction under the Act, that an employment/relationship existed at all relevant times. Let's see. That TTD was paid at a weekly rate of 509.77 from May 26 of 2020 to July 30th of 2020. And at the same rate again from October 19th of 2020 to November 11th of 2020, for totals of \$4,842.81 and 6,117.24 respectively. Mr. Caslin, you have a – this – the form indicates that no medical expenses were paid. That is not correct. Do you have the updated figure for that, sir?

Mr. Caslin: Yes. Rod Mayer gave it to us in the last meeting. \$4,155.32.

Judge Weatherby: Thank you. The stipulated average weekly wages is \$764.61. And it remains at issue whether he has the physical capacity to return. The plaintiffs [sic] date of birth is listed as September 30th of '73; is that correct, sir?

Witness: Yes.

Judge Weatherby: Thank you. He is a high school graduate. The contested issues, although not listed, work-relatedness and causation. We have benefits per KRS 342.730, including multipliers, exclusion for pre-existing active disability impairment, vocational rehabilitation, unpaid or contested medical expenses, and Temporary Total Disability; is that correct, Gentlemen?

Mr. Caslin: Yes, sir.

Canary testified that on May 26, 2020, he was on light duty recovering from umbilical hernia surgery. He reiterated his deposition testimony regarding the events of May 26, 2020, resulting in his work injury. He explained the pipe which fell on his right shoulder weighed between 300 and 350 pounds. He immediately went to Springs Urgent Care which referred him to Owensboro Sports Medicine. When he talked to someone at Owensboro Sports Medicine, he requested Dr. Moore treat him

because he had treated him eighteen years earlier and was familiar with his previous situation.

Except for falling on his elbow which caused a period of cellulitis, Canary denied experiencing any physical problems until the May 26, 2020, injury. He testified he could do anything he desired and had no restrictions except for the restrictions imposed after his hernia surgery. Following the subject injury, Canary underwent “lots of physical therapy and the dry needling.” Although the dry needling was more beneficial, it did not provide long term relief. When he returned to work for Mechanical Systems in July 2020 with light duty restrictions, he was unaware of the restrictions. Mechanical Systems’ personnel asked him to perform work beyond his restrictions. Eventually, Canary told his supervisor he could not sort the nuts and bolts and place them in bins because he was still in a lot of pain. He provided the following explanation:

A: ... And that involved moving from here to here. And I was having to look – look everywhere and that involved me moving my head back and forth and it was pulling down through this area.

Canary’s supervisor then requested he operate a fork truck moving a pallet from the back of the shop to the front. He declined to operate the fork truck because he could not use the levers with his right arm. He provided the following regarding the work restrictions of which he ultimately became aware:

A: ... the new restrictive work orders that I hadn’t seen yet that the doctor’s office faxed to workers’ comp and MSI, plainly said no lifting over zero pounds, no use of the right arm, right shoulder, right hand, no operative heavy equipment. ...

After he declined to operate the fork truck, Canary informed his supervisor he was leaving work. He believed he worked approximately five hours and thirty-seven minutes that day. When he returned to Dr. Moore two or three days later, Canary was placed off work because Dr. Moore believed he needed additional physical therapy.

Canary believes he is unable to work as a welder. He has engaged in a couple of side jobs helping people. In performing those tasks, he worked at his own pace. He still has no grip strength in the right hand and experiences tingling in his fingers. Because of the injury, he no longer owns a number of vehicles and had to vacate his apartment. Currently, he lived in a camper. Canary testified he has a knot on his right shoulder which first appeared after the pipe fell on it. He is unable to lift over ten to fifteen pounds.

Canary testified he severely injured his right shoulder in a 2002 MVA necessitating two surgeries. He fractured his C7 and T11.

He agreed the medical records reveal he was seen by Dr. Moore on August 23, 2018, with right shoulder pain. He saw Dr. Moore because he fell at the jail. When he saw Dr. McBride on April 23, 2019, he complained of cellulitis. Although he denied undergoing an MRI, he could not recall whether Dr. McBride ordered an MRI on April 23, 2019. He offered the following testimony regarding his return to Dr. McBride on April 30, 2019:

Q: Okay. And then I have you returning to Dr. McBride on April 30th, 2019. And his notes indicate that you had right shoulder pain then. Do you remember telling him that you had right shoulder pain?

A: That – that was the elbow. I told him that the jar from where I fell into the wall on the elbow, felt like it jarred my shoulder. The pain was in my elbow.

Q: So your –

A: (Interrupting) That's where they – that was where he come up with I had cellulitis.

Q: Okay. Now, so your belief is back then, the pain was in the elbow as opposed to the shoulder?

A: Yes. Yes. I told him that it jarred my shoulder and that I had previous surgeries on my shoulder back in 2002.

Q: Okay. Now, he also documented at that office visit that you had right shoulder popping. Do you remember –

A: (Interrupting) What?

Q: -- having right shoulder popping? A right shoulder popping?

A: Popping?

Q: Pocking – or popping. I'm sorry.

A: I said, I can't understand you. Right shoulder what?

Q: Yeah. He said in that office note that you were having right shoulder – and this is his words – popping? P-O-P-P –

A: (Interrupting) Popping?

Q: P-O-P-P-I-N-G.

A: Okay. No, because I told him – just seemed like it was my elbow. That's what he come up with. Whenever I fell – I was mopping the floor. Whenever I fell against the wall, I hit my elbow real hard. And I might have said that it popped whenever I hit my elbow, but I don't recall no popping.

Q: Okay. He also –

A: (Interrupting) That was one –

Q: (Interrupting) He also mentioned in his notes that you were having right shoulder locking. Do you remember telling him that you were having right shoulder locking during that office visit?

A: Locking?

Q: Locking?

A: No, I don't. No, I don't.

Canary denied experiencing right shoulder issues immediately prior to the May 26, 2020, work event. He had not experienced shoulder problems for eighteen years.

Both parties introduced the records of Drs. Moore and Campbell. Canary introduced the undated medical report of Dr. James Carothers, an evaluating physician, generated after performing an Independent Medical Evaluation (“IME”) on April 15, 2001. His impression is:

1. Workplace injury with significant depressing clavicular blow at junction of lateral two-thirds and medial third dorsally with posttraumatic periosteal clavicular bossing.
2. Pre-existing degenerative disc disease, degenerative joint disease of lower cervical spine without neurological compromise or involvement.
3. Unusual ulnar sensory neuropathy right upper extremity, (etiology uncertain).
4. C6 nerve root impingement and compromise/arousal secondary to workplace injury #1.
5. Status post Weaver-Dunn procedure and Mumford resection of distal clavicle without AC joint sequelae.
6. Probable subacromial bursitis, supraspinatus infraspinatus tendinopathy tendonitis.

7. Loss of shoulder motion and neck motion secondary to #1.

8. Chronic pain syndrome secondary to #1.

Dr. Carothers assessed the following impairment and opined, in relevant part, as follows:

Based on the AMA Guides To The Evaluation of Permanent Impairment, 5th Edition.

Mr. Canary fits 15-6 DRE cervical spine, pp. 392, Category III, with significant signs of radiculopathy, pain, sensory loss, and dermatomal distribution. Loss of a relevant reflex (brachioradialis), loss of muscle strength, (C6-7 innervated musculature). This range is from 15-18% impairment to the whole person.

It is well established that Mr. Canary had absolutely no radicular symptoms prior to this injury, despite his pre-existing osteoarthritic changes and foraminal changes and recess changes on the right side of the levels involved. Something in the mechanism of this injury aroused/encumbered/precipitated neurological symptoms that have not diminished since his injury on 05/06/2020 [sic]. I can say that the mechanisms of injury were right to cause this/these nerve root problems that have persisted.

...

I am in agreement with Dr. Kusnezov that Mr. Canary is at maximum medical improvement and could benefit from a chronic pain management evaluation, as well as, a reconsideration of surgical intervention for his C6 pain symptoms.

...

I agree with Dr. Kusnezov that he is unable to return to his previous job and its requirements. I would also agree that a 15-pound limit would be appropriate for his right upper extremity. My only true disagreement is the cause of the radiculopathy.

His radiculopathy could have occurred with a trivial injury or just a simple activity of daily living, but it didn't. It started with a blow to his clavicle and has not resolved since. That is indisputable.

1. Based on that, Table 15-5 pp. 392 in the AMA Guides To The Evaluation Of Permanent Impairment, 5th Edition, Category III, equals 15% impairment to the whole person, based on his residuals from his workplace injury.

2. I also disagree that any injury from 2002 had anything to contribute to his current situation, and that he had completely recovered from those problems and worked without restrictions for 15 years.

Mechanical Systems introduced the medical records of Owensboro Regional Hospital, Orthopedic Sports Medicine Owensboro, Dr. McBride, and Owensboro Health Medical Group Orthopedics. Mechanical Systems submitted three reports of Dr. Nick Kuznezov, an evaluating physician, who provided the following in his January 23, 2021, IME report:

1. Diagnosis of Mr. Canary's right shoulder, cervical spine injury.

The objective findings included decreased cervical range of motion, tenderness, and right upper extremity radiculopathy as evidenced by positive Spurling's and motor weakness, which were consistent with his imaging findings. Additionally, his shoulder range of motion and strength was independently limited as well, with positive impingement signs.

Based on my exam the following diagnoses are present:

1. Degenerative cervical spondylosis with radiculopathy.
2. Right shoulder myofascial pain.
3. Right shoulder subacromial bursitis, rotator cuff tendinitis, postsurgical pain.

2. Recommendation for ongoing treatment of Mr. Canary's right shoulder and cervical spine injury. If you are recommending further treatment, please be specific on the treatment that is needed.

... it is my opinion that the claimant requires further management to consist potentially of referral to Pain Management for consideration of injections for the cervical spine, as well as potentially the right shoulder, for which he would benefit from trigger point and subacromial corticosteroid injection. Additionally, having seen and evaluated him and reviewed his prior medical documentation, and imaging findings, he would, in my opinion, be a candidate for surgical management of the cervical pathology at this point given the concomitant radiculopathy which contributes significantly to superimposed right shoulder pathology.

As to whether Canary had reached MMI for his right shoulder and cervical spine injury, Dr. Kuznezov responded as follows:

Yes, Mr. Canary has reached maximum medical improvement for both his right shoulder and cervical spine injury. That is, the myofascial pain from the injury has had have [sic] ample time to resolve at this point and the underlying problems for which he is currently treating for are not due to this injury. (emphasis added).

He did not believe Canary could return to work and imposed the following restrictions:

No, after having seen and evaluated the claimant and discussed potential restrictions secondary to his subjective complaints and objective findings, the claimant would require further restrictions to include no lifting greater than 15 pounds with the right upper extremity, or overhead activities above the level of the shoulder. These restrictions would be at odds with continuing to work as a welder, given the laborious nature of the location.

As to whether Canary suffered a permanent impairment due to his right shoulder and/or cervical spine injury, Dr. Kuznezov opined:

Did Mr. Canary suffer any permanent impairment on his right shoulder and/or cervical spine injury? If so, please provide rating pursuant to the 5th edition of the *AMA Guides*.

After having seen and evaluate the claimant and reviewed the medical documentation, considering the previous right shoulder and cervical spine injury from which he was documented to have made a complete recovery, his symptoms were likely exacerbated by the work-related injury alleged on May 26, 2020. (emphasis added). However, the underlying degenerative cervical spondylosis in the absence of any significant disc protrusion, even in the presence of radiculopathy, likely was not exacerbated to any significant extent and certainly was not caused by the work related injury, but instead the myofascial pain was, though this should be assigned based on this work-related injury, but his impairment is instead in all likelihood related to underlying chronic degenerative conditions which were exacerbated by his previous cervical and right shoulder injuries following his non-work-related motor vehicle collision in 2002. I therefore assign 0% impairment for this injury.

In an April 12, 2021, IME addendum report, Dr. Kuznezov indicated he had reviewed additional medical information. He responded to the following questions:

1. Did Mr. Canary sustain an injury to his right shoulder on July 8, 2002 with a re-injury to the right shoulder after a fall in prison on July 23, 2018?

Yes, the medical records made available support a right shoulder injury sustained in an MVA on July 8, 2002 with a re-injury after a fall in prison on July 23, 2018.

2. Was Mr. Canary's right shoulder symptomatic at the time he last saw Mr. McBride on April 30, 2019? What is the significance of the report that he was experiencing popping and locking at the time?

Yes, the medical records indicate that the claimant's right shoulder was symptomatic at the time he last saw Dr. McBride on April 30, 2019. Popping and locking

may be attributable to a number of sources, including the previous acromioclavicular joint surgery, post-surgical scarring, or labral tearing. There was otherwise no evidence of other significant pathology within the shoulder on MRI which would contribute to these symptoms.

3. You have diagnosed right shoulder myofascial pain, subacromial bursitis, rotator cuff tendinitis, and postsurgical pain. After your review of these recent records, is it more likely than not that these diagnosed conditions were active and symptomatic during the time period leading directly up to Mr. Canary's alleged May 26 2020 work injury? If so, please explain.

Based on review of the records, the claimant had an active and symptomatic right shoulder condition during the time period leading directly up to his alleged May 26, 2020 work injury. In my opinion the May 26, 2020 work injury caused a temporary exacerbation of his right shoulder condition which has since returned to baseline.

4. Did the work injury cause a temporary exacerbation of right shoulder pain that has returned to baseline? If so, please explain.

Yes, in my medical opinion the work injury caused a temporary exacerbation of his right shoulder pain which had ample time to return to baseline, by nature of the minor injury.

5. On January 6, 2021, Dr. Campbell diagnosed cervical spondylosis, stated the condition was not caused by the pipe injury (work injury), and stated he would not recommend surgical intervention. Do you agree with Dr. Campbell that Mr. Canary's cervical condition is not work-related? Do you agree that there is no need for surgical intervention at this point? If so, please explain.

I agree that the claimant's underlying diagnosis of cervical spondylosis is degenerative and not caused by the work injury; however, I do not agree with his surgical assessment. Degenerative, cervical spondylosis with radiculopathy is an indication for surgical intervention, and while this is not related to the work injury, he would be indicated for surgery, namely cervical decompression and fusion.

6. Did Mr. Canary have an active and symptomatic cervical spine condition at the time of the alleged May 26, 2020 work injury?

Yes, Mr. Canary had an active and symptomatic cervical spine condition at the time of the alleged work injury of May 26, 2020.

In a July 16, 2021, addendum, Dr. Kuznezov reviewed additional records including his previous reports, the records of Dr. Carothers, and the records of the Department of Workers' Claims. As to whether he agreed with Dr. Carothers' diagnosis, he opined:

1. Do you agree with the diagnosis given by Dr. Carothers? Please explain for each condition diagnosed.

I do agree with the following diagnoses:

Clavicular bossing – this is certainly possible, but was not specifically diagnosed on my exam. This arguably may have resulted from the impact of the pipe of the clavicle and could explain a palpable mid-clavicular mass, though the implications of the shoulder function are unclear and such an injury would not be definitively correlated with any permanent shoulder impairment, which is more likely related to the other shoulder diagnoses.

The claim is s/p Weaver-Dunn with subacromial bursitis and rotator cuff tendonitis.

Finally, loss of shoulder motion and chronic pain are additionally present.

I do not agree that the claimant has new neurologic compromise from the injury. Aside from the claimant's subjective report that he had no neck issues or radiculopathic pain prior to the injury, there is no objective evidence of any new injury of substantial aggravation. Dr. Carothers [sic] notes "Pre-existing DDD ... without neurologic compromise" but without previous documentation one is unable to ascertain if there was any pre-existing neurologic compression. In fact, the MRI findings all appear chronic, as both my

interpretation and the reads confirm. There is no evidence of acute disc herniation resulting in any acute root or cord compromise. As a result, I am not able to determine whether any neurologic symptoms were new and/or causally related to the work-related injury. Dr. Carothers notes in his report that the MRI findings of the C-spine are chronic and that these chronic changes can contribute to radiculopathy.

2. Do you agree with Dr. Carothers' opinions on causation? Please address each condition individually.

Please see the prior response. I generally agree with Dr. Carothers [sic] report; however, I do not agree that the cervical radiculopathy was caused by the May 26, 2020 injury. As indicated, it is my opinion this was due to chronic changes present in the cervical spine.

3. Dr. Carothers noted that the [sic] Mr. Canary was in a 2002 motor vehicle accident in which he 'sustained a nondisplaced C-spine fracture.' Would this fracture have qualified the [sic] Mr. Canary for an impairment rating under DRE II? If so, what would be the impairment?

Accepting that Mr. Canary had a prior nondisplaced cervical fracture, according to Table 15-5 on page 392, the claimant would have qualified for DRE Cervical Category II which has a range of 5-8% impairment. With no evidence of ongoing difficulty and reports that he had healed and recovered from the 2002 injury, I would assign a 6% whole person impairment for the previous cervical non-displaced fracture.

4. Please advise as to any other thoughts you have about the report.

With the exception of the causality of the cervical radiculopathy, which I believe is chronic, I otherwise agree with Dr. Carothers' thorough and well-composed evaluation.

Canary submitted Dr. Carothers' August 16, 2021, letter addressing

Dr. Kusnezov's reports in which he concluded:

We are in agreement on all diagnoses but differ in our conclusions regarding the cause of Mr. Canary's cervical

radiculopathy. Dr. Kusnezov makes the point that no previous documentation of pre-existing neurological compression was available to be included in the determination of symptomatic C6 radiculopathy. I agree with his premise, but I also have to consider the fact that the reason for the lack of documentation is because he had no symptoms, did not seek out any medical treatment, and the veracity of his history with me speaks for itself.

Based on that, I conclude that my original impairment rating is correct, and his C6 radiculopathy arousal is due to his workplace injury.

I am certain that there are multiple individuals who have similar degenerative changes to Mr. Canary that are asymptomatic, but could be aroused by an injury or something less traumatic than what Mr. Canary experienced.

I also need to amend my impairment rating on Mr. Canary, based on the fact that I omitted the Mumford procedure (resection of the distal centimeter of the clavicle), that is associated with his distal clavicle reconstruction (Weaver-Dunn), which assigns 10% impairment to the upper extremity based on Table 16-27, pg. 506, which translates to 6% impairment to the whole person based on Table 16-3, pg. 439 in the AMA Guides To The Evaluation of Permanent Impairment, 5th Edition.

And, based on the Combined Values Chart, $15+6 = 20\%$ impairment to the whole person.

After summarizing the evidence, the ALJ provided, in relevant part, the following findings of fact and conclusions of law which are set forth *verbatim*:

4. The ALJ is compelled to reference the Plaintiff's denial of his documented right shoulder symptoms that existed prior to the date of injury herein when asked by medical providers and when testifying. The Plaintiff testified that, prior to the work injury, it had been 18 years since he had had any problems with the right shoulder despite being presented with evidence to the contrary.

5. The evidence in this matter that the ALJ finds most credible indicates that the Plaintiff's right shoulder was symptomatic and impairment ratable at the time of the alleged injury. The Plaintiff reported to Dr. McBride that he suffered an injury to the right shoulder in July of 2018 for which he was suffering pain that he rated as a 6 out of a possible 10.

6. The Plaintiff also had an MRI that he denied on April 25, 2019, and reported having pain since an injury to the right shoulder the prior year. Dr. Kusnezov, who demonstrated a familiarity with the Plaintiff's true medical history, concluded that the Plaintiff had a symptomatic and ratable right shoulder condition at the time of the work incident explaining that the work event only caused a temporary exacerbation of the existing right shoulder condition that returned to baseline.

7. The ALJ finds based upon the medical records and the opinion of Dr. Kuzenov that the Plaintiff suffered from a pre-existing and active right shoulder condition and suffered no harmful change due to the May 26, 2020, incident.

8. Dr. Kusnezov stated that the claimant's cervical spine condition was not caused or exacerbated to any significant extent by the alleged work injury and that other than the claimant's subjective reports, there was no objective evidence of any injury or aggravation.

9. Dr. Kusnezov concluded that the Plaintiff's underlying problem was not due to the work injury and that his MRI findings all appeared to be chronic. He also credibly said that there was no objective evidence of a work injury.

10. The ALJ finds that only Dr. Kusnezov possessed an accurate understanding of the Plaintiff's medical history and finds that his opinions constitute objective medical findings upon which a dispositive finding may be made.

11. Accordingly the ALJ finds that the Plaintiff has failed to satisfy his burden to establish entitlement to permanent income benefits per the Workers' Compensation Act.

TTD benefits were awarded as previously stipulated. Although the ALJ concluded Canary was entitled to medical benefits between the date of injury and the date he attained MMI on January 23, 2021, the award fails to award any medical benefits.

Canary filed a Petition for Reconsideration observing the ALJ relied upon Dr. Kuznezov's opinion that he had a symptomatic and ratable right shoulder condition at the time of the work injury and the May 26, 2020, event only caused a temporary exacerbation of an existing right shoulder condition which returned to baseline. Canary argued this finding is inconsistent with Dr. Kuznezov's opinion that he is not able to return to his primary skill. He asserted an injury is not temporary if he "was unrestricted and non-symptomatic immediately prior to his work injury and is now permanently unable to perform in the workplace."

Canary also set forth the opinions of Drs. Kuznezov and Carothers which he contended supported a finding of a permanent work injury. Canary maintained that until the work injury he was able to work as a welder without restrictions or medical care. He asserted he is not a liar and was almost entirely asymptomatic prior to the injury.

Canary also pointed out the ALJ did not award future medical benefits for an injury resulting in him being unemployable. He asserted future medical benefits to treat this permanent injury are needed. Concluding Canary had failed to cite to a patent error, the ALJ overruled his Petition for Reconsideration.

On appeal, Canary first contends the ALJ erred in finding he sustained a temporary exacerbation of symptoms relating to a pre-existing right shoulder

condition. He notes the ALJ attached significance to the documented right shoulder pain he experienced in 2018 due to a fall. Canary asserts the ALJ was overly influenced by his “mistaken memory” and concluded Canary was trying to deceive him. Regardless, Canary insists the temporary symptoms he experienced in 2018 and his treatment in May 2019 do not establish an ongoing active condition. He points out that in 2018 and 2019 there was no interruption of his work. Canary asserts an MRI performed almost a year to the day of his work injury resulted in the following:

The MRI results were, “prior AC joint arthroplasty. Tendinopathic changes of supraspinatus, infraspinatus and subscapularis tendons. No evidence of muscle strain.” There was no evidence of rotator cuff tear or even bursitis. Dr. McBride wrote a note indicating Canary still had no restrictions. There were no additional medical visits after that time until Canary’s work injury. (See Carothers’ report p. 3).

Canary also takes issue with the ALJ’s finding that only Dr. Kuznezov possessed an accurate understanding of his medical history. He maintains Dr. Carothers was also aware of his prior medical history. Canary asserts Dr. Kuznezov’s opinions are internally inconsistent and cannot comprise substantial evidence. Canary emphasizes that although Dr. Kuznezov found Canary’s work injury to be temporary he also found appropriate the need to restrict Canary from working at his only occupation as a welder. Canary cites to the testimony of Drs. Kuznezov and Carothers supporting his argument.

Canary emphasizes that prior to the work injury, his right shoulder was almost entirely asymptomatic, and he worked fulltime without restrictions. Except for a short period in 2019, he sought no medical care. Canary also emphasizes that for at least one year prior to the subject injury, he had not sought

treatment for his temporary elbow and shoulder issues and had worked continuously as a welder.

Next, Canary asserts the ALJ erred in finding he did not sustain a permanent impairment. He again asserts that for almost twenty years he engaged in gainful employment without any significant symptoms or pain until the May 26, 2020, injury. Since the injury, he can no longer work as a welder. Alternatively, Canary asserts although Dr. Kuznezov opined he had a 6% pre-existing active impairment rating due to the prior MVA, “it would make sense to subtract that 6% from the rating Dr. Carothers found after Canary’s work injury and make a PPD award based on the remainder.” Canary requests the decision be vacated and the claim remanded for adequate findings and consideration of an award of permanent income and medical benefits.

ANALYSIS

Because the ALJ’s decision contains no findings regarding the nature of Canary’s injury or injuries, we vacate the decision and order ruling on the Petition for Reconsideration and remand. In numerical paragraphs 4 through 6 of the findings of fact and conclusions of law, the ALJ found the medical evidence establishes Canary had right shoulder symptoms immediately prior to the injury of May 26, 2020. He cited to the medical evidence upon which he relied in reaching the conclusion Canary suffered an injury to his right shoulder in July 2018. In reliance upon the opinions of Dr. Kuznezov, the ALJ found Canary had a symptomatic right shoulder condition at the time of the work incident explaining the work event only

caused a “temporary exacerbation of the existing right shoulder condition that returned to baseline.”

In numerical paragraphs 7 through 10, the ALJ expressed his reliance upon Dr. Kuznezov’s opinions. In numerical paragraph 7, he found Canary suffered from a pre-existing right shoulder condition and “suffered no harmful change due to the May 26, 2020, incident.” In numerical paragraph 8, the ALJ found Canary’s “cervical spine condition was not caused or exacerbated to any significant extent by the alleged work injury and that other than the claimant’s subjective reports, there was no objective evidence of any injury or aggravation.” In numerical paragraph 9, the ALJ stated Dr. Kuznezov “concluded that [Canary] underlying problem was not due to the work injury and that his MRI findings all appeared to be chronic. He also credibly said that there was no objective evidence of a work injury.” In numerical paragraph 10, the ALJ found that “only Dr. Kusnezov possessed an accurate understanding of [Canary’s] medical history and finds that his opinions constitute objective medical findings upon which a dispositive finding may be made.”

In numerical paragraph 11, the ALJ found Canary failed to satisfy his burden to establish entitlement to permanent income benefits per the Workers’ Compensation Act. In numerical paragraph 13, the ALJ found based upon the opinions of Dr. Kuznezov, Canary was entitled to TTD benefits from the date of injury through the date of MMI on January 23, 2021. In numerical paragraph 14, the ALJ found medical expenses incurred after the date upon which Canary attained MMI on January 23, 2021, were not compensable.

The ALJ's findings are not in accordance with the three reports of Dr. Kuznezov. In his initial report, Dr. Kuznezov unequivocally opined Canary suffered right shoulder and cervical work injuries. Dr. Kuznezov provided a diagnosis of right shoulder and cervical spine injuries. His diagnosis was degenerative cervical spondylosis with radiculopathy, right shoulder myofascial pain, right shoulder subacromial bursitis, rotator cuff tendinitis, and post-surgical pain. He also indicated Canary needed additional treatment for both his right shoulder and cervical spine injuries. However, in answer to question 3, Dr. Kuznezov clarified his opinion as to whether Canary had reached MMI for his right shoulder and cervical spine injuries. He explained the "myofascial pain from the injury has had ample time to resolve at this point and the underlying problem for Canary is currently treating are not due to the injury." With respect to whether Canary suffered a permanent impairment of his right shoulder and/or cervical spine injury, Dr. Kuznezov stated in light of the previous right shoulder and cervical spine injury from which Canary was documented to have made a complete recovery, his symptoms were likely exacerbated by the work-related injury alleged on May 26, 2020. Dr. Kuznezov concluded a permanent impairment was not appropriate for either work-related injury. Rather, any impairment rating would be due to chronic degenerative conditions which were exacerbated by Canary's previous cervical and right shoulder injuries following the non-work-related 2002 MVA.

Dr. Kuznezov clearly opined Canary sustained work-related injuries, albeit it temporary. However, the ALJ made no finding that Canary sustained a work-related injury. The ALJ did not make a specific finding based on Dr.

Kuznezov's opinion as to whether the May 26, 2020, event exacerbated Canary's pre-existing active right shoulder condition and/or his pre-existing active cervical condition. In his April 12, 2021, report, Dr. Kuznezov opined Canary's right shoulder was symptomatic at the time he saw Dr. McBride on April 30, 2019. He also stated that in his opinion, the subject injury caused a temporary exacerbation of Canary's right shoulder pain which had since returned to baseline.

In his July 15, 2021, report, Dr. Kuznezov set forth the portions of Dr. Carothers' report with which he disagreed. He did not retreat from any of the opinions previously expressed in the other two reports. Those three reports demonstrate Dr. Kuznezov concluded the May 26, 2020, event exacerbated Canary's pre-existing active right shoulder and cervical conditions. In his findings of fact, the ALJ does not make any findings as to whether Canary sustained a temporary work-related injury to either his right shoulder or cervical region. The ALJ's decision only addresses the presence of any permanent injury. More importantly, there are no findings of fact supporting an award of TTD benefits as the ALJ made no finding Canary sustained a temporary work-related injury and the nature of the temporary injury, i.e., whether he sustained a temporary injury to the right shoulder or cervical region or both.

Since the ALJ relied upon Dr. Kuznezov's opinions and Dr. Kuznezov clearly opined Canary sustained temporary right shoulder and cervical spine work injuries, the December 18, 2021, Opinion, Award, and Order must be vacated and the claim remanded for additional findings as to the nature of any injury Canary sustained as a result of the May 26, 2020, work event. In light of the lack of

findings identifying a specific work injury or injuries, the Board is left to guess as to the basis for the award of TTD benefits. Stated another way, we do not know if the award is based upon a temporary right shoulder injury, a temporary cervical injury, or both. Further, although the ALJ found Canary is entitled to medical benefits from the date of the injury through January 23, 2021, the date he found Canary reached MMI, the Order section does not award medical benefits.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985) Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990).

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reach a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are

reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Here, the ALJ failed to provide findings setting forth the particular injury or injuries Canary sustained as a result of the May 26, 2020, work injury. Thus, the matter must be remanded to the ALJ for additional findings because his findings are insufficient to allow this Board to conduct a meaningful review of his decision as to the work injury or injuries Canary sustained. As noted in Shields, supra:

The issue on appeal in the present case is not whether the Board properly translated an undisputed functional disability into a percentage of occupational disability. Instead, the issue is whether the Board complied with the statute by making adequate findings of fact. The question whether claimant was suffering from pneumoconiosis was sharply disputed by the physicians who testified in the case; and inasmuch as a finding of the existence of pneumoconiosis requires some expertise, all parties should have the benefit of knowing the factual basis for such a determination.

...

The case law dealing with administrative bodies clearly indicates that it is required that basic facts be clearly set out to support the ultimate conclusions. *Caller v. Ison*, *supra*; *Marshall County v. South Central Bell Telephone Co.*, *supra*; *Energy Regulation Commission of Kentucky v. Kentucky Power Co.*, *supra*; and *Pearl v. Marshall*, *supra*. The Workers' Compensation Board is not exempted from this requirement. It is not the intention of the Court to place an impossible burden on the Workers' Compensation Board but only to point out that the statute and the case law require the Board to support its conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision. As the circuit court said, "Concededly, it takes more time in writing an Opinion to tailor it to the specific facts in an

individual case, however, this Court feels that the litigants are entitled to at least a modicum of attention and consideration to their individual case.”

Id. at 444.

Because we are unable to determine the nature of Canary’s injury or injuries supporting an award of income and medical benefits, the claim must be remanded to the ALJ for further findings. We express no opinion as to the outcome on remand.

Accordingly, the December 18, 2021, Opinion, Award, and Order and the January 5, 2022, Order overruling the Petition for Reconsideration are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended decision with additional findings and an award in accordance with the views expressed herein.

ALL CONCUR.

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