OPINION ENTERED: JANUARY 2, 2013

CLAIM NO. 201070498

LUBRIZOL ADVANCED MATERIALS, INC. PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

DENNIS SLAUGHTER
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

SMITH, Member. Lubrizol Advanced Materials, Inc. ("Lubrizol") appeals from the June 15, 2012 Opinion, Award and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), and from the July 20, 2012 order denying its petition for reconsideration. Lubrizol argues the ALJ erred in his findings regarding causation, pre-existing active disability and application of the three multiplier. We disagree and affirm.

Dennis Scott Slaughter ("Slaughter") filed a Form 101, Application for Resolution of Injury Claim, on July 8, 2011, alleging injury to his right shoulder on September 13, 2008 as he was pushing a 1,400 pound box on a conveyor as part of his duties with Lubrizol. He testified by deposition on August 26, 2011 and at the formal hearing held April 25, 2012. Slaughter was employed by Lubrizol, a chemical plant that makes pellets for industrial piping. Slaughter stated his job involved dumping raw materials from 55 pound bags. He also operated a forklift and made boxes with liners and lids.

On September 13, 2008, he was working with "Gaylord boxes" which he described as weighing 1,400 pounds. The boxes came down a conveyor line and had to be taken off with a forklift, lined and labeled. At the time of his injury, he was attempting to move a box. He went behind the box to grab it and shove it and felt a pop in his right shoulder and experienced a sharp pain. He reported the incident to his supervisor before he left that day and continued to work, believing his shoulder symptoms would improve.

Slaughter testified he sought medical treatment approximately six months to a year later when his shoulder gradually worsened. He first saw the plant nurse and Dr. Rose on several occasions. Dr. Rose gave him exercises to

do at home. He also applied heat to his shoulder which seemed to ease the pain somewhat. Dr. Rose referred him to Dr. Frank Bonnarens for follow-up treatment.

Slaughter underwent right shoulder surgery on December 7, 2010 and thereafter had twenty-one sessions of physical therapy. He has constant pain in his shoulder, an aching feeling in his right arm, and sharp pain and popping when he puts any pressure or weight against it. Slaughter takes Naproxen because he has difficulty sleeping. He continues to work full-time on light duty in the control room. Although he receives greater wages due to his cost-of-living increases, he works less overtime due to his restrictions.

At the formal hearing, Slaughter denied any injuries to his shoulder prior to September 13, 2008. However, he admitted he had shoulder problems in 2007, which he described as inflammation or “like it was a strain.” He saw Dr. Greg Rennirt who referred him to another physician to check his joints. Slaughter stated he fully recovered after the 2007 incident without the need for medication or additional treatment.

Slaughter indicated the Lubrizol was a union facility and, through a bid process, a worker with more seniority could bump him from a job. He testified workers are cross-trained and rotate through five different jobs. Slaughter

stated he was only capable of performing one of those jobs. He is concerned he will lose his job when his case is decided. On cross-examination at the final hearing, Slaughter acknowledged he failed to tell Dr. Warren Bilkey about the prior shoulder treatment. Slaughter stated it was not until he received Dr. Bilkey's report that he remembered having been seen for his shoulder prior to September 13, 2008. Slaughter also acknowledged he failed to tell Dr. Robert Jacob or Dr. Frank Bonnarens about the prior treatment. Slaughter stated he did not have an MRI performed in 2007 and never followed up with Dr. Norman Cummings. He did not miss any work as a result of his right shoulder condition and was able to perform his regular activities as a chemical operator after 2007 until the date of his surgery in December 2010.

Slaughter submitted the June 13, 2011 report of a right shoulder MRI arthrogram performed at Jewish Hospital, which revealed moderate glenohumeral joint osteoarthritis with mild synovitis and a focal area of active chondromalacia along the superior aspect of the humeral head with a small amount of associated subchondral edema, mild supraspinatus tendinopathy without tear, status-post distal clavicular resection, circumferential tearing of the labrum most

prominent involving the superior and posterior labrum, and tendinopathy.

Slaughter also submitted the report of Dr. Bilkey, who evaluated him on October 25, 2011. Dr. Bilkey noted a history of a September 13, 2008 right shoulder injury when Slaughter felt a pop in his shoulder while pushing a box on a conveyor. He experienced right shoulder pain with occasional radiation into the upper extremity. Dr. Bilkey reviewed records from Drs. Rennirt and Cummings from 2007 relating to prior treatment for right shoulder symptoms. He then performed a physical examination diagnosing a right shoulder strain superimposed on degenerative joint disease of the shoulder, rotator cuff tear, and impingement syndrome. He also noted Slaughter had undergone surgical repair including distal clavicle resection.

Dr. Bilkey further noted Slaughter had chronic right shoulder pain, limitation of motion and impairment. He determined Slaughter was at maximum medical improvement ("MMI") and assigned an 11% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") based upon deficits in range of motion and the distal clavicle resection. He also recommended restrictions of no lifting over twenty pounds occasionally, no overhead

work or work activities involving repetitive or strenuous use involving the right shoulder.

Dr. Bilkey determined it was appropriate to apportion the impairment related to loss of range of motion due to the significant limitation recorded by Dr. Rennirt on March 9, 2007. He acknowledged there was no documentation of a persistent loss of motion after 2007, but he anticipated there would be some loss of motion and therefore some active impairment predating the work injury. Dr. Bilkey apportioned a 4% impairment for loss of motion related to the work injury which, when combined with the impairment for the distal clavicle resection, produced an 8% whole person impairment attributable to the work injury.

Both parties submitted treatment records from Dr. Cummings, who saw Slaughter on March 16, 2007. Slaughter reported he had been aching in various areas for at least five years, but his pain had become worse in the past six to twelve months. He complained of pain in his hands, wrists, shoulders, left hip, low back and knees. Dr. Cummings diagnosed arthralgias, low back pain and probable carpal tunnel syndrome. In a March 20, 2007 report to Dr. Bryan Iglehart, Dr. Cummings noted Slaughter “did not have much in the way of objective findings of an inflammatory arthropathy although his right shoulder pain and limitation was

considerable." He felt Slaughter had carpal tunnel syndrome, arthralgias and low back pain. He noted that a shoulder MRI and bone scan might be indicated.

Both parties submitted the March 9, 2007 treatment note from Dr. Rennirt of Bluegrass Sports Medicine. Slaughter reported complaints of right shoulder pain of several months duration. Dr. Rennirt reviewed x-rays and indicated Slaughter had "nearly bone on bone arthritis" at the clinical humeral joint with spurring at the humeral head. Slaughter also had posterior subluxation of the humeral head on the glenoid and sclerotic changes at the rotator cuff insertion consistent with a chronic rotator cuff tendinopathy. Dr. Rennirt diagnosed osteoarthritis at the glenohumeral joint and noted Slaughter was scheduled to see a rheumatologist. He deferred treatment pending that evaluation.

Slaughter submitted office notes from Dr. Iglehart. A May 4, 2007 note indicates Slaughter presented for blood work and follow-up for "shoulder + arthritis." For the most part, the hand written portions of Dr. Iglehart's notes are illegible.

Lubrizol submitted treatment records from Occupational Physician Services of Louisville, indicating Slaughter was seen on October 4, 2010 for a right shoulder strain

occurring on September 13, 2008. Slaughter was initially treated by Dr. Rose at the plant and diagnosed with strain of the right shoulder joint. He was released for regular work and was to follow up as directed.

Lubrizol submitted the report of Dr. Bonnarens who saw Slaughter on November 5, 2010. Slaughter gave a history of a September 2008 injury when pushing a box that was hung up on a conveyor belt. He reported he had seen the nurse a couple of times and recently the condition had been flaring up on him. Slaughter reported it was difficult for him to perform his activities of daily living or to sleep. He stated he had never had a problem like this before. X-rays showed a goat's beard deformity in addition to AC joint arthropathy and a type II acromion. In addition, an MRI showed tears of the labrum and partial tear of the rotator cuff.

On December 7, 2010, Dr. Bonnarens performed “arthroscopic acromioplasty, arthroscopic Mumford, debridement of labral tears, trepanation of the partial tear of the rotator cuff with insertion of platelet gel [and] insertion of platelet gel.” On January 7, 2011, Dr. Bonnarens released Slaughter to return to work with a restriction of no use of his right arm. On May 9, 2011, Dr. Bonnarens increased Slaughter’s restrictions allowing

lifting up to twenty pounds. On June 6, 2011, Slaughter complained of increased pain. Dr. Bonnarens ordered an MRI. On July 25, 2011, Dr. Bonnarens noted Slaughter had advanced degenerative changes in the shoulder and degeneration of the labrum. On August 22, 2011 Dr. Bonnarens noted extensive degenerative joint disease of the shoulder.

Lubrizol submitted reports of Dr. Jacob who performed an independent medical evaluation on October 19, 2011. Slaughter gave a history of the September 13, 2008 work injury and denied any history of right shoulder complaints, injuries or medical attention prior to the work incident. Dr. Jacob indicated his review of medical records revealed Slaughter was treated for right shoulder problems in 2007 and severe osteoarthritis was documented. Following the 2008 work incident, the first medical record reflecting treatment for the right shoulder was in October 2010.

On physical examination, Dr. Jacob found Slaughter had a greater range of motion than was documented by Dr. Rennirt in 2007. Dr. Jacob assigned a 6% whole person impairment rating as a result of the distal clavicle resection with no additional impairment for the slight motion differential between the right and left shoulders. Dr. Jacob opined Slaughter had documented active pre-existing advanced right shoulder arthritis prior to the alleged work injury as

documented by Drs. Iglehart, Rennirt and Cummings. Dr. Jacob indicated none of the impairment was work related. He opined Slaughter was fully capable of working in his current position. Based upon the long-standing glenohumeral osteoarthritis, which was neither exacerbated nor aggravated by the work incident, Dr. Jacob stated Slaughter should avoid repetitive overhead use and lifting greater than 20 pounds.

In a supplemental report issued on November 22, 2011, Dr. Jacob indicated he reviewed Dr. Bilkey's IME report and it did not change his previously reported opinions. He opined the work incident had no effect on Slaughter’s shoulder and his range of motion had actually improved since surgery was performed. Dr. Jacob indicated an argument could be made that Slaughter had an impairment of at least 8% for loss of motion in 2007 but that now, with no shoulder differential for motion loss, his range of motion rating was 0%. Taking into consideration that Slaughter has a 6% impairment for a distal clavicle resection, he felt Slaughter had a net improvement of 2% impairment since 2007.

In a February 2, 2012 supplemental report, Dr. Jacob stated any symptoms Slaughter currently experienced were secondary to his pre-existing disease and independent of his work activities or any alleged work incident. He stated

Slaughter's current restrictions would be secondary to the non-occupationally related pre-existing active disease. Dr. Jacob took issue with Dr. Bilkey's assessment that only 50% of the loss of motion impairment was attributable to the pre-existing disease and felt Dr. Bilkey failed to account for the fact Slaughter’s motion is now better than it was in 2007.

Dr. Jacob testified by deposition on April 4, 2012. He stated his review of medical records established that Slaughter had advanced osteoarthritis of the shoulder which would secondarily affect the rotator cuff. It was not uncommon for patients with arthritic changes to also have rotator cuff disease. The records reflect Slaughter had classic presentations of carpal tunnel syndrome in 2007 for which wrist splints had been recommended. Dr. Jacob felt it was fair to say Slaughter had a pre-existing active condition in his right shoulder predating September 13, 2008. He stated the 6% whole person impairment rating he assigned with respect to the right shoulder would not be related to the September 13, 2008 incident. He stated the rotator cuff surgery performed by Dr. Bonnarens would not be associated with the September 13, 2008 injury but was due to the pre-existing active conditions.

Dr. Jacob stated Dr. Bilkey could not make an assumption that Slaughter’s range of motion improved between 2007 and 2008 in light of the severe changes seen in September 2008. He acknowledged nothing in the medical records from Drs. Iglehart, Rennirt or Cummings suggested Slaughter missed any time from work for his shoulder in 2007, nor was surgery performed or recommended at that time. Dr. Jacob was not aware of any additional follow-up treatment from either Dr. Rennirt or Dr. Cummings.

The ALJ, in his Opinion, Award and Order rendered on June 15, 2012, made the following findings relating to causation:

> Having carefully reviewed all of the medical evidence as well as the plaintiff's testimony and the briefs submitted by the parties, the ALJ finds that the plaintiff has sustained his burden of proving that he experienced a work-related injury on September 13, 2008, and that the right shoulder symptoms and pathology of which he complained and which were surgically addressed by Dr. Bonnarens are directly and causally related to that work injury. In so finding, the ALJ relies upon the opinion and report of Dr. Bilkey. While the defendant argues vigorously that the plaintiff did not reveal his prior right shoulder treatment to Dr. Bilkey, it is clear from reading Dr. Bilkey's report that he reviewed medical records from Dr. Rennirt and Dr. Cummings both of which documented, among other complaints, right shoulder complaints. Dr. Bilkey

noted that while the plaintiff had osteoarthritis of the shoulder he was able to function “at a higher level” until the work injury of September 13, 2008. According to Dr. Bilkey, the September 13, 2008 work injury resulted in a right shoulder strain superimposed on degenerative joint disease of the shoulder, rotator cuff tear and impingement syndrome. Plaintiff retains chronic right shoulder pain, limitations of motion and impairment. The undersigned acknowledges the report and deposition testimony of Dr. Jacob to the contrary but finds it less persuasive than the report and opinions of Dr. Bilkey. In this regard, the ALJ notes that the defendant appears to [have] based its argument in its brief with respect to the issue of work-related injury and causation on what it perceives to be a 2007 diagnosis of a right rotator cuff tear. Specifically, the defendant argues that Dr. Cummings diagnosed the plaintiff with a “possible rotator cuff tear.” The defendant contends that Dr. Cummings, a rheumatologist, in a letter to Dr. Iglehart, plaintiff's primary care physician, recommended an MRI of the right shoulder and discussed the possibility of the plaintiff “needing a secondary rotator arthroscopy.” Initially, the ALJ notes that he has read and reread Dr. Cummings March 16, 2007 office note and finds nowhere therein a diagnosis of a possible rotator cuff tear. Dr. Cummings’ impressions, or diagnoses, are “arthralgias, low back pain, probable carpal tunnel syndrome.” The only reference to plaintiff's rotator cuff comes in Dr. Cummings recitation of the history provided by the plaintiff as follows:

> One week ago he was seen by Dr. Rennirt, an orthopedist, who took x-ray of his right shoulder, said that he had spurs & arthritis, possible rotator cuff arthropathy but knew he was coming here & did not treat.

Dr. Cummings, therefore, did not diagnose a rotator cuff tear. In his March 20, 2007 letter to Dr. Iglehart, Dr. Cummings noted that the plaintiff had developed carpal tunnel syndrome along with arthralgias and low back pain and recommended regular use of NSAIDs along with splints. He noted that if the plaintiff did not receive adequate relief then an MRI of the right shoulder "may be indicated to be certain we are not dealing with a secondary rotator cuff arthropathy." Two things stand out about this: first, contrary to defendant's assertion, Dr. Cummings did not recommended rotator cuff <u>arthroscopy</u> [*sic*], and second, Dr. Cummings was uncertain as to the nature of plaintiff's right shoulder pathology and seemed to recommend a possible right shoulder MRI to <u>rule out</u> any right shoulder pathology. Likewise, it is significant to the ALJ that plaintiff did not require follow-up medical treatment subsequent to these one-time examinations 18 months prior to the work incident. The medical records establish beyond question that plaintiff had a pre-existing arthritic condition in his right shoulder as of September 13, 2008, but there is no evidence that the plaintiff was symptomatic in the right shoulder immediately prior to September 13, 2008. Although the defendant argues that the plaintiff was "actively seeking treatment" for the very same right shoulder pathology treated at surgery before September 13, 2008, the records reflect only single visits with limited

> treatment recommendations and no follow-up a year and a half before the incident. Nowhere in the medical records does it appear that a right shoulder rotator cuff repair surgery was recommended before September 13, 2008. At best, the prior medical records establish possible right shoulder arthropathy or tendinopathy and nothing more. While the defendant stresses the plaintiff's lack of candor or questionable lack of memory with respect to his prior right shoulder symptoms medical treatment, the ALJ notes that the only two physicians to express an opinion on causation, Drs. Jacob and Bilkey, had complete access to those prior medical records and that their opinions on causation, therefore, are based on a full and accurate medical history. The ALJ finds and concludes, therefore, that the plaintiff sustained a work-related injury to his right shoulder on September 13, 2008, and that his symptoms and complaints subsequent thereto including the pathology addressed and corrected by Dr. Bonnarens at surgery including rotator cuff repair and distal clavicle excision are directly and causally related to that work injury.

Relying on the assessments of Drs. Bilkey and Jacob, the ALJ found Slaughter had a 6% impairment rating as a result of the work injury referable to the distal clavicle surgery performed by Dr. Bonnarens. The ALJ was not persuaded any impairment related to Slaughter’s range of motion was applicable or appropriate in this claim. The ALJ then made the following findings regarding prior active impairment and the appropriate multiplier:

With regard to the issue of prior active disability/impairment, the Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007) explained that in order to be considered pre-existing and active, a condition must be both impairment ratable and symptomatic immediately prior to the work injury. The burden of proving prior active impairment rests with the defendant. It is axiomatic that in the absence of a prior distal clavicle excision, plaintiff could have no impairment rating for that procedure immediately prior to September 13, 2008. More importantly, there is no evidence establishing that the plaintiff was symptomatic in the right shoulder immediately prior to September 13, 2008. The ALJ acknowledges uncontroverted testimony that the plaintiff had a pre-existing arthritic condition in the right shoulder prior to the work injury, the ALJ is not persuaded that that condition was either impairment ratable or symptomatic as of September 13, 2008 and that, therefore, no carve-out for a pre-existing active disability is appropriate. Further, having rejected Dr. Bilkey's assessment rating attributable to range of motion deficits, Dr. Bilkey's analysis with respect to the issue of prior active disability or impairment attributable to speculated range of motion deficits prior to September 13, 2008 is moot.

With regard to the application of statutory multipliers, the plaintiff contends that as a result of the work injury he does not retain the physical capacity to return to the type of work performed at the time of injury. The testimony is clear that at the time of his work injury plaintiff was employed as a chemical operator for Lubrizol and that that employment required him to

repetitively lift up to 50 pounds including working at or above shoulder level during the course of his work day. All of the medical evidence submitted by the parties is to the effect that plaintiff should lift no more than 20 pounds and avoid overhead work activity. Moreover, plaintiff testified that in light of his ongoing right shoulder symptoms, he is no longer able to perform his work as a chemical operator and has been relegated to working solely as a control room operator, a position which he described as basically sitting and monitoring the production process. Based specifically on the restrictions assigned by Dr. Bonnarens as plaintiff's treating orthopedic surgeon and Dr. Bilkey as plaintiff's evaluating physician, the ALJ finds that the plaintiff does not retain the physical capacity to return to the type of work performed at the time of injury.

In light of the plaintiff's return to work at a higher hourly rate than the hourly rate at the date of injury, at first blush an analysis under the precepts of *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) would be appropriate to determine whether the triple multiplier of KRS 342.730(1)(c)(1) is applicable or whether the single or double multiplier of KRS 342.730 (1)(c)(2) would be more applicable. According to KRS 342.730(1)(c)(2).

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment,

> temporary or permanent, for any reason, [with] or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

The lynchpin of this subsection and the threshold requirement in a Fawbush analysis is that the plaintiff must have returned to work at a weekly wage equal to or greater than the average weekly wage at the time of injury. As set forth above, the plaintiff's average weekly wage at the date of injury was $1076.04. Although the defendant agreed to submit wage records post-hearing with respect to plaintiff's post injury earnings, no such records were submitted and there is scant evidence with respect to the plaintiff's post-injury average weekly wage. While plaintiff testified that he received cost-of-living raises increasing his hourly rate on two occasions post-injury, he also testified that he has fewer overtime opportunities. Further, while the plaintiff continued to work at his full regular duty from the date of injury up until the time of his surgery on December 7, 2010, no evidence has been presented with respect to the plaintiff's actual earnings during any of those intervening weeks. No specific evidence has been presented which would allow the ALJ to make a credible and accurate determination as to the plaintiff's average weekly wage at any point subsequent to September 13, 2008. Therefore, neither Fawbush nor KRS 342.730(1)(c)(2) are applicable and plaintiff is entitled to the benefit of the triple multiplier of KRS

> 342.730(1)(c)(1) based on the finding that he does not retain the physical capacity to return to the type of work performed at the time of injury.

Lubrizol filed a petition for reconsideration on July 2, 2012, raising essentially the same arguments it now directs to the Board on appeal.

By order dated July 20, 2012, the ALJ denied Lubrizol's petition for reconsideration. The ALJ indicated Lubrizol was impermissibly rearguing the merits of the pre-existing, active impairment issue. The ALJ noted the arguments had been presented in Lubrizol's brief and had been considered and rejected. Additionally the ALJ explained as follows:

> Further, in the Opinion, Award and Order, page 19, the ALJ analyzed the evidence presented by the parties in light of the definition of pre-existing, active impairment provided in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). The ALJ notes that the defendant did not specifically address the *Finley* standard in its petition for reconsideration. Moreover, it appears that the defendant/employer's position is simply that because the plaintiff had right shoulder symptoms and medical treatment in 2007, this compels a finding that plaintiff had a pre-existing, active disability at the time of the injury on September 13, 2008. It is pointed out in the Opinion, however, that the defendant did not offer any proof that the plaintiff was symptomatic immediately prior to September 13, 2008. Likewise, the ALJ found no substantial nor persuasive evidence to support a conclusion that the plaintiff had any

> impairment ratable condition with respect to the right shoulder immediately prior to September 13, 2008. The ALJ finds no patent error as to the issue of pre-existing, active impairment.

With regard to the multiplier issue, the ALJ noted he did not engage in a Fawbush analysis because Lubrizol did not submit sufficient proof "to place *Fawbush* in play." Specifically, the ALJ noted Lubrizol failed to submit evidence with respect to post injury wages and there was no basis on which he could make a credible and accurate determination as to plaintiff's average weekly wage ("AWW") at any point subsequent to September 13, 2008. Therefore, the ALJ concluded neither Fawbush nor KRS 342.730(1)(c)2 were applicable and Slaughter was entitled to the benefit of the triple multiplier.

On appeal, Lubrizol argues the ALJ erred in his findings regarding causation and pre-existing active disability. Lubrizol argues the condition giving rise to the surgery was evident and active and Slaughter was actively treating long before September 13, 2008. Lubrizol notes Slaughter saw at least three specialists for right shoulder problems in 2007. Lubrizol contends the ALJ refused to address and adequately explain the overwhelming evidence of pre-existing active disability. Lubrizol notes

the records establish Slaughter had a reduced range of motion in 2007 as a result of ongoing active shoulder pathology predating September 13, 2008. Lubrizol states Slaughter was less than forthright in disclosing his pre-existing active right shoulder problems on his initial Form 101, Form 105 and in his deposition. Lubrizol contends Slaughter was diagnosed with right shoulder rotator cuff tear long before the purported incident at Lubrizol. Lubrizol asserts the purported problem in 2008 was not an acute trauma for which Slaughter sought immediate care. It asserts his problems tend to wax and wane. Lubrizol notes he did not seek medical care for the 2008 right shoulder flare-up until 2010. He continued to perform his normal duties without any loss of time or need for assistance. Lubrizol argues Slaughter failed to prove a causal relationship between the work and his condition. It notes more than a mere temporal relationship must be demonstrated to establish the necessary causal link. Further, it notes the history Slaughter provided was not accurate and complete since he failed to disclose his prior treatment to his treating physician, Dr. Bonnarens, and failed to disclose the surgery Dr. Bonnarens eventually performed had been recommended two years earlier.

Lubrizol argues the application of the three multiplier is clearly inappropriate. It contends there was no evidence to support Slaughter's speculation that he would not maintain his employment at Lubrizol. Lubrizol contends all the factors in Fawbush v. Gwinn, *supra,* show Slaughter's employment is secure and thus he is likely to continue to earn an AWW equal to or greater than that earned at the time of his injury.

Since Slaughter was successful before the ALJ in establishing causation/work-relatedness of his condition and entitlement to the three multiplier, the question on appeal is whether there was substantial evidence to support the ALJ's finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Lubrizol had the burden of proving the existence of a pre-existing condition. See Wolf Creek Collieries v. Crum, *supra*, and Finley v. DBM Technologies, 217 S.W.3d 361 (Ky. App. 2007). Since Lubrizol was unsuccessful in its burden, the question on appeal with regard to pre-existing active disability is whether the evidence compels a finding in Lubrizol's favor.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse an appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be

disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The ALJ was well within his authority in determining Slaughter had a 6% impairment as a result of the September 2008, injury. Dr. Bilkey assessed an impairment based upon the diagnoses of a right shoulder strain, rotator cuff tear, impingement syndrome and distal clavicle resection due to the work injury. Additionally, Dr. Jacob assigned a 6% impairment rating as a result of the distal clavicle resection. Since the record contains medical evidence indicating the work injury necessitated the surgery, there is substantial evidence supporting the ALJ's award of permanent partial disability benefits based upon the 6% impairment specifically assigned based upon performance of that surgery.

While there is evidence establishing Slaughter had shoulder complaints in 2007 and had a diagnosis of arthralgias, osteoarthritis and/or tendinopathy prior to the work injury, the ALJ correctly observed the record revealed no diagnosis of a rotator cuff or labral tear in 2007. It is true there is evidence that some loss of motion was observed in 2007, but there is no indication Slaughter was at maximum medical improvement at the time the measurements were taken. The record does not establish any ongoing

treatment for the shoulder condition prior to the work injury. Slaughter denied any ongoing treatment and did not miss work. Were we to assume Slaughter had some residual loss of range of motion following his medical treatment in 2007, the loss of motion is irrelevant since the impairment assessment accepted by the ALJ was for the distal clavical resection and not for loss of range of motion. As the ALJ also correctly observed, Dr. Cummings did not recommend rotator cuff surgery in 2007 and there is no indication in the record surgery was recommended prior to September 13, 2008. Slaughter testified there was no ongoing treatment for his shoulder condition after the 2007 incident and prior to the September 2008 injury. There is no medical evidence to contradict his testimony.

Finally, as noted by the ALJ, Drs. Jacob and Bilkey had access to and reviewed the medical records from 2007 when formulating their opinions regarding causation. The ALJ could reasonably find the record did not establish Slaughter's condition that necessitated surgery was not a ratable condition immediately prior to the work injury.

The ALJ, in his Opinion, Award and Order, set forth the proper standard for determining the existence of prior active impairment pursuant to Finley v. DBM Technologies, *supra*. Substantial evidence supports the ALJ's conclusions

and he applied the appropriate methodology. Thus, we must affirm the ALJ's finding Lubrizol was not entitled to a carve-out for pre-existing active disability.

With regard to the multiplier issue, the evidence establishes Slaughter cannot perform the chemical operator job as a result of his lifting restriction. Clearly the three multiplier could apply in this case. As noted by the ALJ, Lubrizol argued Slaughter returned to work at the same or greater wage but failed to file wage records to enable the ALJ to calculate a post-injury AWW. Therefore, the evidence does not establish a return to work at the same or greater wage than that earned at the time of the injury. The ALJ correctly held that wherethere is not sufficient evidence to calculate the post-injury AWW, a Fawbush analysis is inapplicable. A Fawbush analysis is only required where the facts establish both KRS 342.730(1)(c)1 and 2 could apply.

Accordingly, the June 15, 2012 Opinion, Award and Order and the July 20, 2012 order on petition for reconsideration, rendered by Hon. Robert L. Swisher, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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