

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 20, 2015

CLAIM NO. 201165822

MARK BAIN

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

SAM SWOPE AUTO GROUP LLC
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, & REMANDING

* * * * *

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

ALVEY, Chairman. Mark Bain ("Bain") appeals from the Opinion, Award and Order rendered October 3, 2014, by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a right knee injury he sustained on June 14, 2010, but

finding his alleged left shoulder injury not work-related. Bain also seeks review of the November 5, 2014 order denying his petition for reconsideration finding his alleged low back condition not work-related, and resulted in no permanent impairment.

On appeal, Bain argues the ALJ's finding that his low back and left shoulder conditions are not work-related is not supported by substantial evidence. Bain also argues the ALJ erred by applying an incorrect standard in finding he is not entitled the three multiplier pursuant to KRS 342.730(1)(c)1. Since substantial evidence supports the ALJ's finding the left shoulder condition is unrelated to the work injury and the three multiplier pursuant to KRS 342.730(1)(c)1 is inapplicable, and no contrary result is compelled, we affirm that portion of the ALJ's decision. However, we vacate and remand for additional findings of fact regarding Bain's alleged low back injury since the medical evidence the ALJ relied on does not support his findings.

Bain filed a Form 101 on June 6, 2013 alleging he injured his back and right knee on June 14, 2010, when he tripped over concrete and fell while working for Sam Swope Auto Group, LLC ("Sam Swope") as a car salesman. Bain also

alleged his right knee gave way at a later date causing him to fall, injuring his left shoulder.

Bain testified by deposition on June 18, 2010 and at the hearing held July 23, 2014. He has worked as a car salesman since 1984. On June 14, 2010, Bain was working at Toyota of Louisville when he tripped over a protruding piece of concrete. He twisted his back and jammed his right knee in an attempt to catch himself, and experienced immediate pain. Bain sought medical attention a couple of days later when his symptoms did not resolve. He treated at Baptistworx, and was referred to Dr. Ellen Ballard and Dr. Frank Bonnarens. He underwent a course of conservative treatment for both his back and right knee. Bain treated with Dr. Ballard from August 2010 to January 2011, and agreed she did not restrict his activities. Dr. Bonnarens eventually performed two surgical procedures on Bain's right knee. Dr. Bonnarens released Bain to work without restrictions after he recovered from the second surgery.

After Bain's first knee surgery, Dr. Bonnarens took him off crutches. On December 30 or 31, 2011, Bain was standing outside his home in his yard when he experienced a sharp, shooting pain in his right knee, causing him to fall. Bain testified he injured his left shoulder when he extended his left arm to protect himself. Dr. Bonnarens subsequently

began treating Bain's left shoulder in addition to the right knee, which included a manipulation under anesthesia. Bain testified he continued to work as a car salesman for Sam Swope until his first knee surgery. He returned to work in March 2012, and continued to work until his second knee surgery. Bain did not return to Sam Swope after his second surgery. Bain worked for a short period of time at Dealer Car Search. At his deposition, Bain stated he was working for Kelly Temporary Services, and was being trained to open an insurance office. Bain testified he has not earned the same or greater wages since his June 14, 2010 injury.

Bain experiences constant pain in his left shoulder, right knee and back radiating into his left calf. At his deposition, Bain indicated he did not plan on returning to the car industry because "I can't compete like I used to, and I was very good at it. . ." Likewise, at the hearing, Bain emphasized his work injuries and residual pain have affected his ability to compete with other salespeople and "work the lot." He explained when a potential buyer pulls into a dealership, "the first person that greets them is going to have the opportunity to sell them a car, and that's what I made sure I did." Since the accident, Bain is no longer able to be the first salesperson to greet customers, and is unable to stand and walk the dealership

lot. Bain testified he can no longer sell cars because he cannot compete with other salespeople due to his back and left leg pain. Bain testified he experiences symptoms in his knee and back after approximately ten minutes of standing or walking. Bain disputed the testimony of Dennis Fante ("Fante"), stating he had "very, very, very few" car sales stemming from internet leads.

Fante, a general sales manager for Toyota of Louisville, testified by deposition on July 18, 2014. Fante described the position of a car salesperson as sedentary, with no physical requirements. Fante testified a person with standing/walking restrictions would be able to perform the job of a car salesperson since the majority of his or her time is spent at a desk, setting up appointments with customers. Fante explained seventy percent of customers who visit the car lot are internet leads. Potential buyers visit their website, and submit an email inquiry about a specific car. These emails are then distributed to salespeople, who follow up with the potential buyer by email or phone, and set up appointments.

In support of his claim, Bain filed the treatment records from Baptistworx, Dr. Ballard, Dr. Bonnarens, and Dr. Craig Roberts. Bain first sought treatment for his right knee and back with Baptistworx on June 18, 2010, and

was diagnosed with lumbar and right knee sprains. Following a course of treatment with medication and physical therapy, Bain was referred to Dr. Ballard.

Bain treated with Dr. Ballard from August 5, 2010 through January 5, 2011 for complaints of right knee and back pain. She ordered an MRI of the lumbar spine and x-ray of the right knee. The August 13, 2010 lumbar MRI demonstrated degenerative disc disease and facet arthropathy at L5-S1 with moderate bilateral foraminal narrowing; foraminal narrowing at L4-5; and facet arthropathy at L1-L2 and L2-3. The right knee x-ray demonstrated chondrocalcinosis. Dr. Ballard prescribed medication, as well as a TENS unit, and referred Bain to Dr. Bonnarens for treatment of the right knee. Dr. Ballard did not assign restrictions.

Bain treated with Dr. Bonnarens for his right knee and left shoulder from December 2010 through June 2014. A December 15, 2010 right knee MRI demonstrated a tear in the medial meniscus; medial compartment degenerative changes and chondromalacia; lateral facet patellar degenerative changes and chondromalacia; small joint effusion; and an abnormal proximal anterior cruciate ligament. After noting the MRI showed a meniscus tear, a chronic partial tear of the ACL, and significant degenerative changes, Dr. Bonnarens

recommended arthroscopic surgery. On November 29, 2011, he performed partial medial and lateral meniscectomies. He subsequently ordered physical therapy and restricted Bain from work.

During his period of recovery, Bain returned to Dr. Bonnarens on January 4, 2012. Bain reported on December 30, 2011, he was standing in his yard when "[h]e had pain in his knee, ended up falling to the ground, landing against his left shoulder." Afterward, Bain complained of weakness and lack of mobility in his left arm. Dr. Bonnarens diagnosed rotator cuff tendonitis, a possible partial undersurface tear, and AC joint arthropathy following an MRI of the left shoulder. As his right knee continued to improve, Bain developed a frozen left shoulder. On February 28, 2012, Dr. Bonnarens manipulated the left shoulder under anesthesia. He restricted Bain to using only his right arm until April 27, 2012, when he was released to regular duty for his left shoulder.

In July 2012, Dr. Bonnarens ordered a right knee MRI after Bain complained of increased pain. Dr. Bonnarens noted the MRI showed degenerative changes, the previous meniscectomy, and the ACL deficiency. On January 17, 2013, Dr. Bonnarens performed an ACL reconstruction allograft, as well as an unexpected partial medial meniscectomy. After a

period of physical therapy and sit-down duty restrictions, Bain was released to regular duty on April 29, 2013. Thereafter, Bain continued to complain of pain in both his left shoulder and right knee.

Sam Swope submitted an August 5, 2013 questionnaire for Dr. Bonnarens to complete. Dr. Bonnarens indicated Bain's left shoulder problem and arthroscopic evaluation are not work-related. He was also asked whether the two knee surgeries were for the correction of a pre-existing, non-work-related condition. Dr. Bonnarens wrote "arthritis not work related meniscus and ACL were work related." Dr. Bonnarens indicated Bain had attained maximum medical improvement ("MMI") by the "last visit" and released him to regular duty. He also indicated he would assess a 4 to 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Sam Swope also submitted the August 12, 2013 and May 22, 2013 letters prepared by Dr. Ballard. In the first letter, Dr. Ballard assessed a 5% impairment rating pursuant to the AMA Guides for Bain's lumbar spine, and opined he could return to his regular occupation of selling cars. In the second letter, Dr. Ballard stated Dr. M.G. Schiller's 0% impairment rating for the lumbar spine condition was

possibly the more appropriate rating since his evaluation occurred closer in time.

Bain submitted Dr. Roberts' December 9, 2013 report. Regarding his right knee, Dr. Roberts diagnosed "post traumatic arthrofibrosis and [ACL] injury, and medial compartment arthrosis which required [ACL] reconstruction", partially related to the June 14, 2010 work injury. Dr. Roberts stated Bain's right knee diagnoses are partially related to the work-related injury of June 14, 2010, noting he had a pre-existing condition regarding the medial compartment knee arthrosis. Dr. Roberts assessed an 8% impairment rating pursuant to the AMA Guides.

Regarding the low back, Dr. Roberts diagnosed musculoskeletal low back pain and symptomatic L5-S1 disc disease. Dr. Roberts opined Bain's low back condition was a pre-existing dormant, non-disabling condition brought into disabling reality by the June 14, 2010 work accident, and therefore work-related. Dr. Roberts assessed a 7% impairment rating pursuant to the AMA Guides.

Regarding the left shoulder, Dr. Roberts diagnosed a contusion and acromioclavicular joint sprain with residual post-traumatic arthrofibrosis, due to the June 14, 2010 work injury. Dr. Roberts assessed a 7% impairment rating pursuant to the AMA Guides.

Combining the three impairment ratings, Dr. Roberts assessed a total 19% impairment rating, of which he attributed 2 to 3% to the pre-existing active medial compartment arthrosis. Dr. Roberts opined Bain had reached MMI and recommended additional treatment, including a right total knee replacement in the future. Dr. Roberts restricted Bain from standing/walking more than two hours total in an eight hour work day. He indicated Bain can sit for a total of six hours in a work day, and must periodically alternate sitting and standing. Dr. Roberts indicated Bain can lift up to ten pounds occasionally and less than ten pounds frequently. Dr. Roberts restricted Bain from climbing, balancing, kneeling, crouching, crawling or stooping.

Dr. Roberts also testified by deposition on May 1, 2014. He stated Bain should be able to drive a car, and return to his regular job as a car salesman assuming he is not required to do a lot of lifting. On cross-examination, Dr. Roberts stated the standing/walking restrictions found in his report remain unchanged.

Sam Swope submitted the August 15, 2013 report of Dr. Schiller, who noted the April 14, 2010 fall at work and the subsequent fall at home. He performed an examination and reviewed the medical records. Regarding the low back

condition, Dr. Schiller noted diagnostic studies revealed degenerative disc disease and facet hypertrophy consistent with Bain's long history of back pain, and due to the aging process. Dr. Schiller opined Bain sustained a lumbosacral strain as a result of the work injury. He stated the low back injury fell within DRE category I and he assessed a 0% impairment rating pursuant to the AMA Guides.

Regarding the right knee condition, Dr. Schiller diagnosed a twisting injury which caused right knee pain, but did not cause the development of chondrocalcinosis, a metabolic abnormality, or degenerative arthritis. Dr. Schiller stated Bain may have suffered a tear of his medial and lateral meniscus when he fell at work, and assessed a 4% impairment rating pursuant to the AMA Guides. Dr. Schiller noted Bain might be a candidate for a total knee replacement in the future, which would not be work-related.

Regarding the left shoulder, Dr. Schiller noted Bain complained of left shoulder pain to Dr. Bonnarens on January 20, 2012, after falling in his yard when his right knee gave way. A subsequent MRI showed a partial thickness tear of the supraspinatus tendon, bursitis, and mild AC joint and glenohumeral degenerative joint disease. On February 28, 2012, Dr. Bonnarens performed a manipulation under anesthesia to improve the range of motion. Dr.

Schiller agreed with Dr. Bonnarens the shoulder injury apparently occurred after the fall in the yard and is not related to the fall at work. He further stated the shoulder manipulation procedure was the result of Bain's fall in the yard, and not due to the work-related injury. He opined the partial tear of the rotator cuff is due to the aging process and not due to the fall in his yard. He also stated the left shoulder "clearly was not related to a work injury but nonetheless, it appears that the changes seen on the MRI are consistent with aging and are not due to a traumatic injury of the left shoulder." He did not assess an impairment rating for the left shoulder since it was not work-related.

Dr. Schiller stated Bain is at MMI and could return to work. He restricted Bain from kneeling, squatting, or crawling, "but should be able to do a job that is sedentary and is the job of a salesman."

Sam Swope submitted the May 12, 2014 report of Dr. Michael Moskal. Regarding the lumbar spine condition, Dr. Moskal diagnosed temporary acute nonspecific back pain due to the June 14, 2010 work event, which has since resolved. He stated Bain is at MMI, assessed a 0% impairment rating, and assigned no permanent restrictions for the work-related lumbar injury. Dr. Moskal stated Bain could return to work

as a car salesman. He further stated Bain's ongoing symptoms and findings were unrelated to the June 2010 event.

Regarding the right knee, Dr. Moskal diagnosed status post meniscectomy (first surgery) and calf strain, resolved. He stated the calf strain was caused by the June 14, 2010 event, and the right knee meniscal pathology was brought into disabling reality due to the June 14, 2010 event, requiring the first surgery. Dr. Moskal also diagnosed ACL reconstruction and partial meniscectomy (second surgery) and mild loss of motion with chronic arthrosis, both unrelated to Bain's work and/or the June 14, 2010 work event. Dr. Moskal stated Bain has attained MMI, assessed a 4% impairment rating pursuant to the AMA Guides for the work-related partial meniscectomies, and assigned no permanent restrictions.

Regarding the left shoulder, Dr. Moskal diagnosed a loss of range of motion which had resolved, rotator cuff tendon strain which had resolved, and degenerative arthrosis with concomitant anatomy of the glenohumeral joint. Dr. Moskal opined the temporary rotator cuff strain may be related to the fall at home, and Bain had attained MMI. He recommended no additional treatment, assessed a 0% impairment rating, and assigned no permanent restrictions.

In his October 3, 2014 opinion, the ALJ only addressed the alleged right knee and left shoulder injuries. After summarizing the lay and medical evidence, the ALJ found Bain suffered a work-related right knee injury arising out of and in the course of his employment with Sam Swope, and specifically found both surgeries work-related. Relying upon Drs. Bonnarens and Moskal, the ALJ awarded PPD benefits based on a 4% impairment rating for the right knee injury, and found Bain had reached MMI.

The ALJ determined the subsequent December 30, 2011, left shoulder injury was not work-related by relying upon the opinions of Drs. Bonnarens, Schiller and Moskal. He also cited to Bain's hearing testimony, and stated he could not understand how his description of the fall could have resulted in the injury he claims to have suffered, stating as follows:

His testimony is that he was standing still and his right leg simply collapsed. The laws of physics and common experience would indicate that if the leg on the right side collapsed while the body was not in motion, the weight of the body would tend to fall to the right. Thus, if one were attempting to soften or protect from the effects of the fall, one would extend the right arm rather than the left. I just cannot conceive of how one could sustain a left shoulder injury when the body is falling to the right side. Nevertheless, my opinion is also outweighed by the great

weight of the medical evidence upon which I rely in making this finding.

As to the left shoulder injury, I therefore find that it is not work-related. . . .

The ALJ next determined Bain retains the physical capacity to return to the type of work performed at the time of injury, a car salesman, and is not entitled to the three multiplier. In support of his determination, the ALJ relied upon the opinions of Drs. Bonnarens, Schiller, and Moskal, who opined Bain could perform full duty work with no restrictions. The ALJ also pointed to Bain's testimony, stating he "never really said he couldn't perform the duties of a car salesman. He just felt he was not fast enough on his feet, but that is a matter of strategy, not physicality, as demonstrated by the testimony of Mr. Fante." The ALJ also noted Bain testified he has now transferred to an insurance sales position, and no longer has to perform the duties of a car salesman.

The ALJ determined Bain had not returned to work at a wage equal to or greater than he earned at the time of his injury, and therefore, the two multiplier is inapplicable and a Fawbush analysis is not appropriate. The ALJ awarded TTD benefits, PPD benefits based upon a 4% impairment rating, and medical benefits.

Sam Swope filed a petition for reconsideration arguing the ALJ erred in awarding additional TTD benefits outside of what it had already voluntarily paid. It argued the parties had withdrawn the issue of additional TTD benefits, agreeing it had properly paid Bain benefits in the amount of \$18,709.84.

Bain filed a petition for reconsideration requesting additional findings of fact regarding his alleged back injury, and requested an award of PPD benefits based upon a 5% impairment rating assessed by Dr. Roberts and Dr. Ballard, and medical benefits. Bain also made the same arguments he now raises on appeal regarding his left shoulder condition, and the applicability of the three multiplier requesting additional findings of fact on both issues.

In the October 30, 2014 Order on reconsideration, the ALJ granted Sam Swope's petition for reconsideration and corrected the award of TTD benefits. In the November 5, 2014 Order on Bain's petition for reconsideration, the ALJ amended his opinion to add the additional finding Bain's low back condition is not work-related and resulted in a 0% impairment rating, relying upon the opinions of Drs. Schiller and Moskal. The ALJ dismissed the remaining

arguments, finding they were merely re-arguments of the evidence.

On appeal, Bain argues the ALJ's finding the low back condition not work-related is not supported by substantial evidence. He points to the conservative treatment rendered by Dr. Ballard for his low back pain, and her assessment of a 5% impairment rating. Likewise, Dr. Roberts assessed a 5% impairment rating. Bain states Dr. Schiller, upon whom the ALJ relied, stated the knee twisting injury caused an acute lumbosacral strain. Similarly, Dr. Moskal diagnosed acute nonspecific back pain due to the June 14, 2010 fall.

Bain argues the ALJ's finding of a non-work-related left shoulder condition is likewise not supported by substantial evidence. He first argues the ALJ's assessment of Bain's testimony regarding causation was improper since this issue should only be addressed by medical evidence. Bain argues Drs. Schiller and Bonnarens did not address whether the fall in the yard was a consequence of the work-related right knee injury. He also points to Dr. Moskal's statement the left shoulder rotator cuff strain may have been related to a fall, and the opinion of Dr. Roberts.

Finally Bain argues the ALJ "overlooked/misconstrued controlling precedent and erred in utilizing an

incorrect standard to determine the application of KRS 342.730(1)(c)1. Bain states whether he can strategically return to the same job classification is not a determining factor in the application of the three multiplier, and cited to Ford Motor Company v. Forman, 1423 S.W.3d 141 (Ky. 2004). Bain also pointed to his testimony indicating he cannot perform the duties of a car salesman.

As the claimant in a workers' compensation proceeding, Bain had the burden of proving each of the essential elements of his cause of action, including causation/work-relatedness and the application of the three multipliers pursuant to KRS 342.730(1)(c)1 Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Bain was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable based on the evidence they must be reversed as a matter of law. Ira

A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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, supra.

Despite Bain's argument to the contrary, we find substantial evidence exists supporting the ALJ's determination the December 30, 2011 left shoulder injury is not work-related, and no contrary result is compelled. The ALJ made a determination based on the lay and medical evidence, and expressed his disbelief how Bain could sustain a left shoulder injury when the body is falling to the right side, as he testified at the deposition and hearing.

In support of his determination, the ALJ relied upon the opinions of Drs. Bonnarens, Schiller and Moskal, and also doubted Bain's description of how the injury occurred. While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation, or a lack of causation, from the totality of the circumstances as evidenced by the lay and expert testimony of record. See Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981); and Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995). An ALJ is vested with broad authority to decide questions

involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, supra; Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969).

In the August 5, 2013 letter, Dr. Bonnarens answered "yes" to the question "Is it your opinion that the left shoulder problem and the left shoulder arthroscopic evaluation which you have performed are not work-related." In his August 15, 2013 report, Dr. Schiller agreed with Dr. Bonnarens the shoulder injury apparently occurred after the fall in the yard and is not related to the fall at work. He stated the shoulder manipulation procedure resulted from the fall in the yard, and was not due to the work-related injury. He opined the partial tear of the rotator cuff is due to the aging process. He also stated the left shoulder "clearly was not related to a work injury but nonetheless, it appears that the changes seen on the MRI are consistent with aging and are not due to a traumatic injury of the left shoulder."

Dr. Moskal's opinion is less clear. In his May 29, 2014 report, Dr. Moskal diagnosed a loss of range of motion which had resolved; a rotator cuff tendon strain which had resolved; and degenerative arthrosis with

concomitant anatomy of the glenohumeral joint. In the conclusion section, Dr. Moskal stated "the left shoulder condition is unrelated to work." Under the causation section, Dr. Moskal stated the "rotator cuff strain may have been related to a fall," the "lost glenohumeral motion occurred after the reported fall and was likely multifactorial," and the degenerative arthritis is unrelated to the fall.

These opinions regarding work-relatedness/causation of Bain's left shoulder condition by Drs. Bonnarens, Schiller, and Moskal constitute substantial evidence supporting the ALJ's determination, and no contrary result is compelled. Although Bain is able to point to evidence to the contrary, this is not adequate to require reversal on appeal. We also find no error in the ALJ's critique of Bain's testimony regarding how he injured his left shoulder, and acted well within his discretion as fact-finder. Magic Coal Co. v. Fox, supra; Union Underwear Co. v. Scarce, supra; Hudson v. Owens, supra. The ALJ's finding of a lack of causation is based upon the totality of the lay and expert testimony, and his decision will not be disturbed on appeal.

Likewise substantial evidence exists in the record supporting the ALJ's determination the three multiplier is

inapplicable. KRS 342.730(1)(c)1 provides if, due to any injury, an employee does not retain the physical capacity to return to the type of work he or she performed at the time of injury, the award of PPD benefits shall be enhanced by the three multiplier. In this instance, the ALJ relied upon the fact Dr. Bonnarens, the treating physician, released Bain to return to work without restriction on April 29, 2013. He also relied upon Dr. Moskal, who assigned no permanent restrictions and specifically stated Bain can return to work as a car salesman. Dr. Schiller restricted Bain from kneeling, squatting, or crawling, "but should be able to do a job that is sedentary and is the job of a salesman." The above opinions constitute the requisite substantial evidence in support of the ALJ's determination and no contrary result is compelled.

We specifically reject Bain's argument the ALJ failed to use the correct standard by stating he "never really said he couldn't perform the duties of a car salesman. He just felt he was not fast enough on his feet, but that is a matter of strategy, not physicality, as demonstrated by the testimony of Mr. Fante." We find this sentence is merely the ALJ's assessment of Bain's testimony regarding his own ability to return to work as a car salesman. It is well-established the claimant's own

testimony as to his condition has some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The ALJ properly considered Bain's testimony, as well as the above referenced medical evidence, in determining the three multiplier is inapplicable. Therefore, his decision will not be disturbed on appeal.

With that said, we vacate and remand the claim to the ALJ for additional findings regarding Bain's alleged low back injury. In the October 3, 2014 opinion, the ALJ failed to make specific findings regarding Bain's claim he sustained a low back injury as a result of the June 14, 2010 fall. Bain pointed this out in his petition for reconsideration. In the November 5, 2014 order on reconsideration, the ALJ made the following additional finding: "[T]he Plaintiff's low back condition is not work related and resulted in a 0% whole person impairment, and consequently is not compensable. In making this finding, I rely on the medical opinion of Dr. M.G. Schiller, M.D., and Dr. Michael J. Moskal, M.D." However, a review of Dr. Schiller's and Moskal's opinions does not support the ALJ's conclusion.

In his August 15, 2013 report, Dr. Schiller opined Bain sustained a lumbosacral strain as a result of the work

injury. He placed the low back injury in the DRE category I and assessed a 0% impairment rating pursuant to the AMA Guides. He also found Bain's degenerative disc disease and facet hypertrophy were due to the aging process, and not work-related. Likewise, in his May 29, 2014 report, Dr. Moskal diagnosed Bain with temporary, acute nonspecific back pain due to the June 14, 2010 work event, which has since resolved. He stated Bain is at MMI, assessed a 0% impairment rating pursuant to the AMA Guides, and assigned no permanent restrictions. Both physicians opined Bain sustained a low back injury due to the June 14, 2010 work injury, one of which opined it was temporary and had resolved. Both opined Bain's low back condition warranted a 0% impairment rating.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical

expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286.

On remand, the ALJ is directed to reconsider the opinions of Drs. Moskal and Schiller in addressing whether Bain sustained a low back injury, permanent or temporary, as a result of the June 14, 2010 work injury, and to include an analysis of whether Bain is entitled to temporary benefits pursuant to Robertson v. United Parcel Service, supra, and FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007).

Accordingly, the October 3, 2014 Opinion, Award and Order and the November 5, 2014 order on Bain's petition for reconsideration by Hon. Steven B. Bolton, Administrative Law Judge, is hereby **AFFIRMED IN PART**, and **VACATED IN PART**. This claim is **REMANDED** to the ALJ for additional findings

regarding the alleged low back injury, and whether Bain is entitled to temporary income and medical benefits.

ALL CONCUR.

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