Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2015

CLAIM NO. 201297997

PEPSI/PC METRO BOTTLING PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

CLINTON JUSTICE
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Pepsi/PC Metro Bottling ("Pepsi") appeals from the January 13, 2015, Opinion, Order, and Award and the February 23, 2015, Order on Petition for Reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ awarded Clinton Justice ("Justice") permanent total disability ("PTD") benefits, with Pepsi

receiving credit for all temporary total disability ("TTD") benefits paid, and medical benefits.

Pepsi advances three arguments on appeal. First, Pepsi argues the finding of a compensable neck injury is not supported by substantial evidence. Second, Pepsi asserts the ALJ's finding of permanent total disability is not supported by substantial evidence. Finally, Pepsi asserts the "medical evidence is not contradicted that any knee replacement would be due to the non-work related varus deformity."

The Form 101 filed on October 22, 2012, (Claim # 2010-72583) alleges while working as a delivery man and laborer for Pepsi, Justice sustained injuries on the following dates:

> 10/25/10: Left knee
> 11/1/2010: Neck
> 7/1/11: Neck, back and spine

The Form 101 alleges the injuries occurred in the following manner:

> 10/25/10: Stepped into water puddle, twisting left knee
> 11/1/10: Soft drink exploded, injury to neck
> 7/1/11: Jumped from truck, injured neck, back and spine

Under "medical treatment" the following is listed:

> 11/1/10: Surgery
> 10/25/10: Conservative treatment

> 7/1/11: Diagnostic studies, physical therapy

The Form 101 (Claim # 2012-97997), filed on May 12, 2014, alleges while working as a commissioned salesman for Pepsi, Justice injured his left knee, left shoulder, and low back on January 13, 2012, in the following manner: "Stepped/slipped from delivery truck and fell, injuring left knee, left shoulder, low back." His last day of work was January 13, 2012. Under "medical treatment" the following is listed:

> Left shoulder surgery x 2
> Left knee surgery, physical therapy
> chiropractic treatment and conservative care for low back

The attached Form 104 reflects Justice had worked for Pepsi since August 3, 1993.

By order dated July 31, 2014, the claims were consolidated.

On August 21, 2014, Justice filed a "Motion to Amend Form 101 Application For Adjustment of Claim So As To Include Anxiety and Depression" which was granted.

Dr. Kaveh R. Sajadi’s November 9, 2010, medical record was introduced which contains the following history:

> The patient is here in follow up of his right shoulder. He had a rotator cuff repair. He is almost seven-and-a-half months out. He notes a one-week history of onset while he was driving of a

> severe pain in his right shoulder. It radiates out from his neck all of the way down into his hands. It is associated with numbness and tingling and swelling of his index finger and thumb. He denies any new trauma. He notes an unrelenting, burning pain since this started. He still has maintained good motion in this shoulder. He has had no other treatment thus far except to take Mobic. He had a pain medicine shot in the emergency room, which sounds like tramadol, but it did not help much.

Dr. Sajadi's assessment was "Cervical disc disease with possible radiculopathy."

Dr. Thomas Menke's medical records were introduced. His December 20, 2010, record provides the following medical history:

> The patient is a 38-year-old male who reports on 11-01-10 he was working for Pepsi. He works as a 'conventional route salesman'. He drives and delivers but also works as a salesman while doing that. It is physically demanding because he is handling a lot of material.
>
> On 11-01-10, he was helping a vending technician. They were emptying out a vending machine where the soda was frozen. He was carrying a case and when he set it down one of the cans blew up. Her [sic] jerked back suddenly. At first he didn't think that he was injured but within 10-15 minutes he started to feel severe pain in the right shoulder, in the back of the shoulder and down the right arm.

> The patient had prior rotator cuff surgery. He thought maybe something had happened there. He went to an Emergency Room initially and followed up with Dr. Sajadi who had done his rotator cuff repair. Dr. Sajadi placed him on a prednisone taper which gave him some temporary relief but it didn't last. He got the patient into physical therapy for the neck which only made it worse. He developed headaches with the traction. They did some [sic] ultrasound which may have given a little bit of temporary relief.
>
> His symptoms have changed a little bit. The worst of the stabbing pain has seemed to ease off but he now has more numbness and discomfort all the way down the right arm. It goes from the neck, to the shoulder, down the elbow, to the back of the wrist, and then the thumb and index finger.

Dr. Menke's October 7, 2014, deposition was introduced. Dr. Menke first saw Justice in December of 2010 and performed surgery for a herniated disc at C5-6. Dr. Menke provided the following explanation as to how individuals can sustain a herniated disc:

> There's lots of different ways. The most common history for a herniated disc, in general, is the patient doesn't know exactly how it happened. The second most common history, when they do think there was an event, is usually a bending and rotation type event because rotation is really where the discs are the most vulnerable.

Dr. Menke agreed the history he received is different from the history provided to Dr. Sajadi. He testified as follows:

> Q: Doctor, I'd like to hand you a history that he gave another physician, Dr. Sajadi, on November 9, 2010. Could you please read that? It's in the first paragraph there.
>
> A: The patient is here in follow-up of his right shoulder. He had a rotator cuff repair. He is almost seven and a half months out. He notes a one-week history of onset, while he was driving, of a severe pain in his right shoulder. It radiates out from his neck all the way down into his hands. It is associated with numbness and tingling and swelling of his index finger and thumb. He denies any new trauma. He notes an unrelenting burning pain since this started. Is that enough?
>
> Q: That's enough. Is that a different history than that which you received?
>
> A: Yes.
>
> Q: And is this history that he gave to Dr. Sajadi a normal history that you receive as to the onset of a herniated disc, in your experience?
>
> A: It's within the range of normal. Like I say, a lot of times people, it just starts and they don't know exactly what they did, if anything.
>
> Q: If you were just to rely upon Dr. Sajadi's history, which was received just shortly after the incident, would it be true that you would probably find his neck condition to be not work-related or at least you would not be

> able to ascribe it to any particular event?
>
> ...
>
> A: The issue with that would be was he driving his own personal car or was he driving in the line of work. If it was his own personal car, you know, and that's when it happened, while he was driving his own personal car, I would not ascribe it to a work event.

Dr. David Muffly's May 15, 2014, report was introduced in which he provided the following history:

> I saw Clinton Justice for an orthopedic evaluation today. He is a 41 year old route salesman for Pepsi who has had multiple work related accidents. This is a complicated case. He had a 10-25-2010 left knee work injury when he twisted his left knee. He had an 11-1-2010 work injury to his cervical spine when a frozen can exploded and he jerked his neck. He had a 7-1-2011 cervical and lumbar strain when he stepped off a truck. He had a 1-13-2012 injury to his left knee, left shoulder and lumbar spine as he slipped in ice when he stepped down from a truck. He's not returned to work since 1-13-2012.
>
> Under "assessment," Dr. Muffly wrote as follows:
>
> Cervical disc herniation related to the 11-1-2010 work accident resulting in fusion of the cervical spine- he has mild residual cervical stiffness and pain. Left knee injury related to the 10-25-2010 and 1-13-2012 work accidents resulting in partial medial and lateral meniscectomy. He has advanced left knee osteoarthritis related in part or his

> previous left femur fractures on 2 occasions but also aroused by his work injuries from 10-25-10 and 1-13-12. He has left shoulder rotator cuff tear related to the 1-13-2012 work accident requiring 2 surgical procedures with residual weakness in abduction and flexion but with excellent range of motion. He has a history of low back pain related to these work accidents with findings of degenerative change but I do not have enough medical information to make a more complete diagnosis.
>
> Impairment to the cervical spine is 25% Category DRE IV. He has 10% impairment to the left knee using Table 17-31 of the 5th Edition AMA Guidelines related to arthritis. (There is 4% impairment to the left knee directly caused by the 10-25-2010 and 1-13-2012 work injuries which resulted in partial medial and lateral meniscectomy. Table 17-33 is used). There is 5% whole person impairment to the left shoulder related to weakness of flexion and weakness of abduction Grade 4/5 using Table 16-35 and following example 16-72. The 5th Edition AMA Guidelines are used. Combined impairment is 36% to the whole person. Of this impairment 32% is directly caused by the work injuries and 4% of the total 36% impairment is related to his past femur fracture.

Dr. Muffly imposed the following restrictions: "He cannot return to his previous route sales job. Permanent restrictions are 20 lbs of maximum lift and carry. He needs to avoid overhead reaching and overhead lifting." Regarding the need for total left knee

replacement, Dr. Muffly opined as follows: "I agree that he needs left total knee replacement as he has failed all other types of treatment."

The May 15, 2014, Physical Residual Functional Capacity Assessment was introduced delineating the following restrictions: occasionally lift and/or carry (including upward pulling) a maximum of twenty pounds; frequently lift and/or carry (including upward pulling) a maximum of ten pounds; stand and/or walk (with normal breaks) for a total of at least two hours in an eight-hour workday [handwritten: "needs knee replacement"]; sit (with normal breaks) for a total of about six hours in an eight-hour workday; push and/or pull (including operation of hand and/or foot controls) limited in upper extremities (handwritten: "avoid overhead").

Voluminous medical records of Dr. Kevin Pugh were introduced. A November 8, 2013, record indicates as follows:

> I had a long discussion with the patient. At this point they [sic] have advanced anteromedial knee arthritis. The knee appears to correct with valgus stress radiograph. Treatment options discussed were NSAIDs, injections, total knee arthroplasty, and unicompartmental knee arthroplasty. At some point in order to get the most complete pain relief they [sic] would benefit from some type of knee

> arthroplasty. I do think that given their [sic] anteromedial arthritic pattern that they [sic] are a good candidate for UKA. I explained the course of treatment is their [sic] decision. No guarantee of result was given. After discussion of the risks, benefits, and alternatives, the patient has elected to proceed with arthroplasty. We will schedule a Unicompartmental Knee Arthroplasty. We will see them [sic] back pre-operatively for further discussion.

Justice's June 18, 2014, deposition was introduced. Justice's only employment has been with Pepsi where he began working in 1993. Regarding his various duties at Pepsi, he testified as follows:

> A: A merchandiser, when I done [sic] it- it's changed a little bit over the years, but when I done [sic] it it was a three-man bulk system. I just stocked shelves and built displays. That's what I started out at Pepsi doing. That's all I did.
>
> Q: So would you wheel the product into the store?
>
> A: No, sir. It is delivered to you. At that time a manager would take an order, truck driver delivered it, I merchandised it and put it on the shelves for customers to purchase.
>
> Q: Okay. How long did you do that?
>
> A: About a year and a half.
>
> Q: Okay. And then what job did you do?

A: Relief driver. We called it extra man. It's called a salesman in training or a trainee. After I got my CDL I went out on my time while I was a merchandiser, on my days off. I would have odd days off during the week, and went out with other drivers to get to practice driving so I could get my CDL. I didn't care much for merchandising. You're dependent on two other people, and you were at the bottom of the food chain.

Q: So once you became a relief driver, what would you do?

A: You go in, it might be- it was something different every day. If a driver called in or something like that, you'd run his route or you would set stores, what we call resets, just anything.

Q: Okay. Did you have to do any lifting in that job?

A: Oh, yes, sir. As far as I know, there's not a job at Pepsi you don't lift.

Q: Okay. What kind of amounts would you lift?

A: Average is 26 pounds, I believe, for a case of cans.

Q: Okay. Now, what did you have to do after the relief driver position?

A: CR, customer representative, which is a route driver.

Q: Okay. And then what would you do in that job?

A: You do it all. You sell, deliver merchandise. You run a business of your

own on your route, your set territory. You take payment for the product, you make deposits, you do it all.

Q: And tell us the kind of things that you would do on a typical day?

A: You go in, get your handheld computer. The last ten years you'd punch a clock for DOT purposes. You go out, you pretrip your truck, make sure everything is safe to drive. Until the last three or four years, you would count your truck, verify everything was on it that was supposed to be. And they had changed it. They call it a gateless system. You would leave- you have a roster of accounts per day, you know. Some accounts you work five times a week, some once every week, two weeks, but you'd go out- I'd go out and service my customers. And I'd go in and take an order for today, fill coolers, rotate product, sell, you know, interact with the customers. When I say customer, I mean store owners, the managers, you know. The consumers are the customers that buy the product.

Q: Right.

A: You sell the product and merchandise it, you make it presentable.

...

Q: All right. How long did you do that job as a customer representative?

A: 15 years, approximately.

Q: Okay. What were you doing as of 2010?

A: 2010, I was a CR, customer representative, the same thing.

After the November 1, 2010, neck injury and subsequent surgery, Justice was returned to work at his previous role of customer representative on July 1, 2011. On that date, Justice injured his low back. Dr. Menke released Justice to return to work on August 2, 2011, at which time Justice returned to his job as customer representative until the January 13, 2012, injury.

At the time of his deposition, Justice testified his current problem is his "Neck, shoulders, knee, back" hurt all over. He was taking Lipitor for cholesterol; Flexeril for muscle pain; Paxil for nerves; Bystolic for blood pressure; Ambien for sleeping; and Mobic for inflammation.

At the November 14, 2014, hearing, Justice described the events of November 1, 2010:

> A: Me and a vending tech removed frozen product from a pop machine, vending machine.
>
> As I was placing it on the truck in a shell, where it's loose you put it in a shell. As I set it down, a can exploded and I jerked back from it.
>
> At the time I didn't think nothing [sic] of it. It was funny. We laughed. You know, I didn't think nothing [sic] of it.
>
> Q: All right. Now, where were you in Pike County?

A: That injury?

Q: Yes, November 2010.

A: Mouth Card Market.

Q: How far is the drive from Mouth Card back to the plant?

A: Mileage?

Q: No, not mileage. We don't do anything in mileage, just time, how long?

A: According to the time of day in a tractor trailer, 55 minutes is about the best you're going to do.

Q: Any discomfort or any problems on the the [sic] drive back?

A: God, yes. Driving up the road my right shoulder just started aching more and more and more, just shoulder and arm. It felt like post-surgery. I thought my rotator cuff had torn.

...

Q: Now, according to Dr. Sajadi's records, you went back to him fairly quickly. Just about eight days later you were in his office in Lexington, November the 9th.

A: Yes, the day it happened, I called and got an appointment. I thought my rotator cuff had torn.

Q: Okay. According to the notes he says you had possible radiculopathy from your neck. This was not a shoulder problem. Is that what Dr. Sajadi told you?

> A: I don't know what radiculopathy is. I'm not a doctor.
>
> ...
>
> Q: December 20th, 2010 you saw Dr. Menke the surgeon who obviously did the surgery on your neck?
>
> A: Yes.
>
> Q: What did you tell him? Did you tell him what happened?
>
> A: Yes.

Justice underwent physical therapy on his neck and surgery was performed in February 2011. He returned to work in July of 2011.

Justice testified he has undergone a total of seven surgeries for work-related injuries sustained at Pepsi.

Regarding his ability to perform any type of work, Justice testified:

> Q: Could you be dependable to show up for a job, any job, five days a week, 40 hours a week?
>
> A: No.
>
> Q: Now I want to know why.
>
> A: Pain. If you look back at my work record, I didn't miss work. You make a commitment to somebody when you have a job, there's a job to do, you do it. If you don't, it puts a burden on somebody else.

That's how I was raised. You do your job. If you tell a man you are going to do something, you do it.

In order to work, you have to be dependable. I'm not dependable even to me let alone a company. I don't know, you know, how bad I'm going to feel tomorrow or what I do today how it determines what I'll be able to do tomorrow.

You have to be dependable to hold a job to work.

Q: Why aren't you dependable to leave the house every morning and go somewhere?

A: If you don't sleep any at night, you're not likely going to go anywhere. You wake. You feel bad. You lay around the house.

I mean, what am I going to do if I do go out? I'm going to get up, get dressed. I force myself to go visit my dad at least twice a week, like it [sic] not, and he comes up and visits me.

It's sad. We've got a friend that said my dad is going to be pushing me around in a wheelchair. He's 76. That's bad.

But, I mean, other than that, it's just according to if I get any rest or, you know, just- you won't believe how the weather effects [sic] your body. It does. When you start getting injuries, you'll see. The old people they are right.

Q: You mentioned earlier about lying down during the day.

A: Yes, sir.

Q: Is that every day?

A: Yes, sir.

Q: On a good day, one of your better days, how many times would you lay down not to get sleep or to rest but for pain relief?

A: Two to three times a day anyway at least.

...

Q: Okay. I notice your face lights up when you talk about sales. You'd like to get back into some sales, wouldn't you?

A: At Pepsi I was somebody. You know, I'm just a high school graduate. I was really good at my job. I enjoyed my job and it paid me a lot of money. It worked out really good [sic]. I just really enjoyed my job. I still would love to do it, you know.

Q: But there's probably don't you think some similar jobs you think you could do?

A: Every job that I know of that is in sales requires some kind of-- if you're selling a product, you have to handle that product. If you're a car salesman, you've got to walk the car lot.

Q: You could work in a hardware store. You could handle light items, couldn't you?

A: How could I lie down to try to get some relief for my back and-

Q: If you had some flexible time.

A: Yeah, I mean, if that was available.

At the time of the hearing, Justice was still taking Flexeril, Ambien, Mobic, Lipitor, and Paxil.

The October 9, 2014, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation [handwritten: "neck knee surgery"]; notice [handwritten: "neck"]; average weekly wage; unpaid or contested medical expenses; credit for [handwritten: "LTD/STD"]; exclusion for pre-existing disability/impairment; TTD. The BRC order indicates $139,081.44 in medical expenses were paid by the employer. The parties failed to check "injury as defined by the ACT" as a contested issue.

In the BRC order, the parties stipulated injuries occurred on October 25, 2010; November 1, 2010; July 1, 2011; and January 13, 2012. The fact "alleged" was handwritten by this stipulation is meaningless, particularly in light of the fact that "injury as defined by the ACT" was not checked under "contested issues."

At the November 14, 2014, hearing counsel for Pepsi represented temporary total disability ("TTD") benefits were paid as follows:

> Counsel: Let's see 11/9/2010 to 6/5/2011 and 7/11 to 8/21/2011 at the rate of $711.79 for the 2010 injury in the total amount of $25,644.44.

> . . .
>
> Counsel: TTD was paid from 1/16/2012 to 2/16/2014 at the rate of $736.19 for the 2012 injury in the total amount of $80.244.71.

Concerning the issue of extent and duration, the ALJ set forth the following findings of fact and conclusions of law:

> The primary issue is the extent of plaintiff's impairment/disability. Plaintiff maintains he is totally disabled as a result of the combined effects of all of his work injuries. Conversely, the employer maintains plaintiff is capable of returning to many medium to sedentary duty jobs based on his relatively young age, intelligence, education and ability to work as a salesman.
>
> In this claim, plaintiff suffered injuries to his left knee, left shoulder and neck. Dr. Muffly has assigned fairly significant restrictions and has noted limitations in plaintiff's use of his neck, his upper extremity and his lower extremity. In fact, Dr. Muffly agreed with the recommendation for a total knee replacement given plaintiff's current symptoms, the condition of his left knee and the failure of other conservative treatment. Considering the evidence of record, including the opinions of Drs. Moskal, Schiller and Best, the Administrative Law Judge is persuaded that the physical limitations assigned by Dr. Muffly are most persuasive. Considering such limitations, even against the vocational evaluation of Luca Conte, the Administrative Law Judge is

> persuaded the combined effects of these current work injuries render plaintiff permanently and totally disabled. In reaching this conclusion, it is noted that virtually all of plaintiff's work history to this point has been with Pepsi and his injuries now prevent him from returning to such work. Although plaintiff has a high school education and appeared very intelligent at the final hearing, the fact remains he has significant limitations from his neck down to his leg; he has undergone 7 surgeries to date; his treating physician recommends a total knee replacement; and he has no real experience in light or sedentary work. Given these factors, it is determined it is unlikely plaintiff would be able to obtain and maintain regular, gainful employment in a competitive economy. Moreover, the Administrative Law Judge is persuaded by plaintiff's attempts at returning to work, even after neck fusion surgery, that plaintiff would have returned to work by now if he were able. As such, considering the effects of plaintiff's injuries within the context of his age, education, and work history, the Administrative Law Judge is persuaded plaintiff is permanently and totally disabled. His award of benefits is based on his AWW for his January 13, 2012 injuries as the effects of that injury, together with his 2010 and 2011 injuries, combined to produce the total disability. His award of benefits is therefore calculated as follows:
>
> $1,353.35 x 2/3 = $902.23 → $736.19 (maximum 2012 PTD rate) per week

In its petition for reconsideration, Pepsi requested additional findings of fact supporting the

compensability of the cervical injury, the prospective knee replacement surgery, and the finding Justice is permanently totally disabled. Pepsi's request for additional findings was denied by order dated February 23, 2015.

In its first argument concerning the compensability of the neck condition, Pepsi asserts the ALJ's reliance upon Dr. Muffly's opinions is flawed since he evaluated Justice nearly two years after the alleged neck injury.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky., 2008). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id.

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 supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on 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).

In determining Justice's cervical injury is work-related, the ALJ relied upon the opinions of Dr. Muffly. Dr. Muffly's examination revealed mild tenderness of the cervical muscles. He provided the cervical range of motion

measurements. Dr. Muffly noted a review of Dr. Menke's records revealed:

> Dr. Menke – 13 treatments between 12-20-2010 and 2-5-2012. He was treated for neck pain and was referred by Dr. Sajadi who had performed cervical MRI diagnosing disc herniation and cervical radiculopathy. I have reviewed the operative report dated 2-24-2011 for ACDF at C5-6. Post-operatively he had some residual neck pain. There was noted to be re-injury on the office visit dated 7-8-2011 and repeat cervical MRI was done. He had x-rays of his lumbar spine indicating moderate degenerative disc disease.

Dr. Muffly's assessment was: "Cervical disc herniation related to the 11-1-2010 work accident resulting in fusion of the cervical spine - he has mild residual cervical stiffness and pain." Dr. Muffly assessed a 25% impairment rating for the cervical spine condition. Dr. Muffly's opinions comprise substantial evidence in support of the ALJ's finding Justice's November 1, 2010, cervical injury is work-related and compensable; thus, the ALJ's determination will not be disturbed.

The discrepancy in the histories provided by Justice to Dr. Sajadi and Drs. Menke and Muffly, does not rise to the level of the factual situation in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). Cepero is a case involving affirmative efforts by the employee to

cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee which left the claimant confined to a wheelchair for more than a month. The physician upon whom the administrative law judge relied was not informed of this prior history by the employee, and every physician who was adequately informed of this prior history opined that Cepero's left knee impairment was not work-related but was instead attributable to the non-work-related injury two and a half years previous.

In the case *sub judice*, Justice's hearing testimony regarding what occurred on November 1, 2010, is consistent with the histories contained in Dr. Menke's December 20, 2010, medical record and Dr. Muffly's May 15, 2014, report. The significance of the discrepancy between the history in Dr. Sajadi's November 9, 2010, record and Justice's testimony and the histories set forth in Dr. Menke's December 20, 2010, record and Dr. Muffly's report, is to be determined by the ALJ. As fact-finder, the ALJ determines the significance and credibility of the evidence. *See* Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). In relying upon Dr. Muffly's opinions, the ALJ concluded the history Justice provided to both Drs. Menke and Muffly regarding the events of November 1, 2010, was

credible. This history is consistent with Justice's hearing testimony relative to the events causing his cervical injury. This Board cannot second-guess the ALJ's determination regarding the credibility of the witnesses. Further, the ALJ is not required to provide a detailed analysis explaining the basis for his resolution of any discrepancy in the histories contained in the records of the medical providers. An ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching 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). Since the ALJ sufficiently explained the basis for his decision on this issue, his determination Justice's cervical spine injury is compensable will not be disturbed.

Concerning Pepsi's second argument, we affirm the ALJ's finding of permanent total disability, but vacate the award of PTD benefits.

The Workers' Compensation Act defines permanent total disability as “the condition of an employee who, due to an injury, has a permanent disability rating and has a

complete and permanent inability to perform any type of work as a result of an injury." KRS 342.0011(11)(c). The factors that an ALJ must consider in determining whether an individual claimant is permanently and totally occupationally disabled are set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). They include the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact; a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions; whether the individual will be able to work dependably; and whether the worker's physical restrictions will interfere with vocational capabilities. Id. "An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury." McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001).

On appeal, Pepsi has merely cited to reasons the ALJ *could have* determined Justice is not permanently totally disabled. However, mere evidence contrary to the ALJ's decision is an insufficient basis for reversal on appeal. Id. In order to reverse the decision of the ALJ, it must

be shown substantial evidence of probative value does not support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In the January 13, 2015, decision, the ALJ amply discussed the evidence which persuaded him Justice is permanently totally disabled, including Dr. Muffly's restrictions and the fact that Justice "has no real experience in light or sedentary work." The ALJ was also persuaded by the fact that "virtually all of plaintiff's work history to this point has been with Pepsi," and, as concluded by the ALJ, his injuries prevent him from returning to such work. Justice testified extensively to his duties throughout his nearly twenty-year career with Pepsi. Justice also testified he knows of no position within Pepsi that does not involve lifting. Apparently, the ALJ found Justice to be a credible witness, as he was “persuaded by [Justice’s] attempts at returning to work, even after neck fusion surgery that [Justice] would have returned to work by now if he were able.”

Importantly, the BRC order lists only "neck" and "knee surgery" as the specific contested condition relative to causation. Additionally, the parties stipulated injuries occurred on October 25, 2010; November 1, 2010; July 1, 2011, and January 13, 2012. The fact that "alleged" was

handwritten near this stipulation is meaningless, especially since "injury as defined by the ACT" was not checked as a contested issue. Consequently, the parties undeniably stipulated injuries occurred on the above-cited dates. Thus, the ALJ was not obligated to set forth an analysis regarding the issue of "injury" as defined by the Act since it was stipulated injuries occurred on the alleged dates. Similarly, as to the causation issue, the ALJ was only obligated to provide findings of fact regarding Justice's alleged neck and left knee injuries and the need for left knee replacement surgery requested by Dr. Pugh.

That said, even though substantial evidence supports the determination of permanent total disability, we vacate the ALJ's award of PTD benefits and remand for the ALJ to enter separate awards for each injury.

Justice alleged various physical injuries occurring on four separate dates. Justice also amended his Form 101 to add a psychological injury. The ALJ erred by not entering separate awards for each separate and distinct injury. In Garrett v. Miller Pipeline, Claim No. 200401458, rendered February 9, 2007, we instructed as follows:

> Where various injuries producing different whole body impairment ratings occur as a result of successive and

> distinct work-related traumatic events, the disability ratings pursuant to KRS 342.730(1)(b) for those injuries must be calculated separately. See Moore v. Pontiki Coal Corp., 2001-SC-0089-WC (rendered October 25, 2001 and designated not to be published). Moore involved successive injuries, first to the claimant's left knee and second to his low back, sustained with a single employer insured by the same carrier for both incidents.

On remand, the ALJ must enter separate awards for each injury. We agree substantial evidence supports a determination of permanent total disability; however, the ALJ has failed to specify which injury resulted in Justice becoming permanently totally disabled. The ALJ must specify the nature of the injury sustained on each date and enter the appropriate award of income and medical benefits. In the amended Order and Award, the ALJ must adhere to the relevant law pertaining to awards for overlapping and excess disability. *See* Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Fleming v. Winchy, 953 S.W.2d 604 (Ky. 1997); Whittaker v. Fleming, 25 S.W.3d 460 (Ky. 2000).

Finally, Pepsi asserts the opinions of Dr. Kevin Pugh and Dr. Muffly cannot support a finding the knee replacement surgery is compensable. We vacate the determination the left knee replacement surgery is compensable and remand for additional findings.

In the January 13, 2015, decision, the ALJ opined the left knee replacement surgery is reasonable, necessary, and causally related to the effects of the work injury based upon the opinions of Drs. Pugh and Muffly. First, we note that pursuant to the October 9, 2014, BRC order, only causation was contested relative to left knee replacement surgery. However, in making the determination the left knee replacement surgery is related to the effects of the work injury, the ALJ failed to cite the *specific* medical opinions which support his finding concerning causation and, therefore, compensability. In Pepsi's January 27, 2015, petition for reconsideration, it requested additional findings on this issue, and the ALJ denied this request.

On remand, the ALJ must resolve the issue of causation with respect to the left knee replacement surgery by citing the evidence upon which he relied in reaching his decision. This is particularly important since we have been unable to locate a definitive statement in Dr. Pugh’s records establishing a causal link between the left knee replacement surgery and Justice's work injuries.

Even though Dr. Muffly opined Justice needs left total knee replacement surgery, the ALJ must identify Dr. Muffly’s findings which support his opinion. This is particularly necessary in light of Dr. Muffly attributing a

portion of the impairment rating he assessed for Justice's left knee condition to a past femur fracture. We emphasize we take no position as to the existence of such evidence because the ALJ is free to draw any reasonable inference from the medical evidence. Should the ALJ once again determine the left knee replacement surgery is compensable, he must support his determination by citing the medical evidence upon which he relied.

Finally, *sua sponte*, we vacate the award of medical expenses. On remand, the ALJ must delineate the specific injuries for which medical benefits are awarded. In paragraph two in the January 13, 2015, Order and Award, the ALJ awards medical expenses "for the cure or relief of the effects of his injuries." This is insufficient as a matter of law.

Accordingly, those portions of the January 13, 2015, Opinion, Order, and Award and the February 23, 2015, Order on Petition for Reconsideration, determining Justice's cervical spine injury is compensable and Justice is permanently totally disabled are **AFFIRMED**. The ALJ's finding the left knee replacement surgery is compensable, and the award of permanent total disability benefits and medical benefits are **VACATED**. This claim is **REMANDED** for

additional findings and an amended decision in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON WALTER HARDING
400 W MARKET ST STE 2300
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON MICHAEL FLEET JOHNSON
P O BOX 1529
PIKEVILLE KY 41502

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
410 WEST CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE KY 40202