

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 30, 2015

CLAIM NO. 201268600

PERRY COUNTY SHERIFF'S DEPARTMENT

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

EVERETT JAMIE TURNER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Perry County Sheriff's Department ("Perry County") appeals from the September 19, 2014, Opinion and Order and the November 3, 2014, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the September 19, 2014, Opinion and Order, the ALJ awarded Everett Jamie Turner ("Turner")

temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits.

Perry County challenges the decision on five grounds. First, Perry County asserts the ALJ erroneously considered an unasserted cervical spine injury in determining Turner is permanently totally disabled. Second, Perry County asserts the ALJ's finding Turner fell is not supported by substantial evidence. Third, Perry County asserts the ALJ's finding that Turner was a credible witness is not supported by substantial evidence. Fourth, Perry County asserts that the medical and lay evidence are conflicting concerning the issue of whether a traumatic fall occurred. Finally, Perry County asserts Turner's medical benefits should not encompass treatment of his neck.

The Form 101 alleges on September 30, 2012, Turner injured his "right upper extremity" in the following manner: "Plaintiff fell while working, causing injury to his right upper extremity."

The July 7, 2014, Benefit Review Conference ("BRC") order lists the following contested issues: work-relatedness/causation; benefits per KRS 342.730; pre-existing active; and medical benefits. Under "other," "permanent total disability" was hand-written.

During Turner's July 14, 2014, deposition, he explained how he was injured on September 30, 2012:

A: Okay. I had made a traffic stop on a vehicle here in Hazard. Upon making contact with the subject,- the reason I pulled him over was it was a high drug trafficking area where I had saw [sic] his truck come from and he had weaved a few times on the road so I made a traffic stop on him. When I did, I noticed some high powered rifle rounds in the backseat and he was dressed in camouflage. He- the guy told me that he was in a hurry because he had just shot an elk and was on his way to recover it and was looking for some people to help him. Should I continue? Do you want me to continue then?

Q: Yeah, continue.

A: Okay. I contacted Bradley Couch, which works for the City of Hazard, which he made contact with a Slone subject that works for Kentucky Fish & Wild Life [sic], and he advised me that elk season wasn't in and that the guy shouldn't, you know, be elk hunting, so he met with me on the traffic stop. At that time, myself along with the Fish and Wildlife office [sic] Slone and this male subject went to the area to where this elk had been supposedly shot. We got there, met up with some guys that were from Georgetown, I think, maybe, Frankfort that had actually shot the elk and that they were with this subject that I had stopped. He was like doing their guide service. So, the decision was made that the Slone from the Fish and Wildlife, along with myself, would go down the mountain to where the elk was supposedly shot dead. It was approximately four hundred yards,

maybe, down in an old hollow field where the- where the elk was. We got down there and took some evidence, he did, and I just assisted by helping move the elk and stuff and we determined after about forty-five minutes, it was time to go. He had got [sic] all the evidence he needed, so we started back out to climb up the hill. I kept getting hot and, you know, I was shedding clothes, took my gun belt off and all that stuff and I- and I just- I remember it getting hot and having to sit down several times along the route. We made it a long way up the hill and I couldn't- I just- I remember it getting hot and having to sit down several times along the route. We made it a long way up the hill and I couldn't- I just got to the point to where I just- I couldn't go hardly. You know, my body was just- I didn't understand, really, what was going on with me and so the Slone, which is the Fish and Wildlife officer, agreed to hike back on the rest of the way up to get some water for me, and, when he left, I felt bad because, you know, I'm the one that actually, you know, started the complaint. I got up and tried to proceed because I didn't want him to have to come all the way back to me where I was down the hill and I remember standing up and tumbling backwards and landed on my right side. I remember my arm folding back on me. I remember just- I remember hitting the ground and then I just laid there. I remember him coming back. I don't- I don't remember much after that. I don't- I just remember- I remember falling- I remember falling and I remember laying there and then I remember- not much. Not a lot after that.

When asked what injuries he sustained in the fall, Turner testified that he has right shoulder issues and a "stiff neck still to this day."

Turner identified the symptoms he experienced:

A: My neck.

Q: How is it bothering you?

A: It's really, really stiff. It's got a lot of pain in it, as far as, you know, sharp pain in my...

Q: Okay.

A: ...neck. My right flank like right here, my shoulder down my arm through my elbow and into my hand. I have no function of my fingers. I can't.....

Concerning his current symptoms, at the August 28, 2014, final hearing, Turner testified:

Q: You just tell us, tell us about what kind of sensations and feelings and lack of feelings that you might have?

A: It's like I can try to tell my arm to do something but it really won't. It don't [sic] work.

Q: All right.

A: Like I have a lot of pain in my neck and my shoulder, a lot of nerve pain.

Q: Does it cause problems with turning your head?

A: Yeah.

Q: Tell us about that.

A: Yeah. I can't hardly turn my head a lot. I can turn it to the left a little bit but not much to the right.

Q: Now, the pain that you are having in your arm, from your point of view, do you feel like that's derived from whatever is happening in your shoulder, or are you actually having physical pain in the muscles and other parts of your arm itself, or do you know?

A: I'm not sure.

Q: Okay.

A: I'm not sure.

Q: Do you have pain all the time?

A: Yes.

Q: Does the pain medication make the pain go away?

A: Not really.

Q: Does it-

A: No, not really.

Q: Now, what actual use do you have of your arm? For instance, can you reach into a refrigerator and take a gallon of milk-

A: No.

Q: - out of the refrigerator?

A: No.

Q: Can you drink a soft drink-

A: No.

Q: -with your right hand?

A: No.

Q: Are you right-handed?

A: Yes, sir.

Q: Do you essentially have to do everything left-handed now?

A: Yes.

Q: Did you hurt any other part of your body?

A: Just the soreness in my neck was all.

The Perry County Ambulance report dated September 30, 2012, was introduced. In the report under the heading "Cause of Injury," "fall or jump" was not checked.

Similarly, the September 30, 2012, "Emergency Department Chart" from Hazard Appalachian Regional Hospital indicates there is no history of falling, immediate or within three months.

Tony Eversole ("Eversole"), Chief Deputy with the Perry County Sheriff's Department and Turner's supervisor testified at the hearing. Eversole responded to the incident and immediately started performing first aid for heat exhaustion. Eversole testified as follows:

Q: And again, when you saw Mr. Turner, did you see any signs that he had fallen and rolled down the hill?

A: No, sir.

Q: Now, did Mr. Turner ever tell you that he had fallen and hurt his shoulder?

A: No, sir. He sat down and was hot and I remember, like I said, wiping his face with a cold- a cold rag and he laid back on the bench that we were on.

Q: Now, he says in his application that he had fallen and he also stated that he gave verbal notice to Chief Deputy Tony Eversole immediately after the injury occurred. Is that a true statement?

A: No, sir.

The May 9, 2013, "Progress Notes" of Dr. Ushma Patel were introduced and under the heading "History of Present Illness," Dr. Patel noted as follows:

After his injury he started complaining of neck pain which increases with extension, flexion and lateral rotation. He he [sic] typically complains of generalized posterior neck and suboccipital pain. He has localized tenderness over the posterior lateral aspect of his neck. Pain is provoked with cervical extension and axial rotation. He denies any associated bowel or bladder dysfunction.

Dr. Patel stated Turner's neck pain started the day after the work injury and he would consider an MRI of the cervical spine in the future.

The March 26, 2014, Independent Medical Examination ("IME") of Dr. Arthur Hughes was introduced. In providing a history, Dr. Hughes noted Turner is "now unable to move the neck or the right arm." Dr. Hughes diagnosed the following:

1. Right shoulder pain and diminished range of motion.
2. Status post right shoulder surgery including distal clavicular resection repair of rotator cuff tear and subacromial decompression.
3. Complex regional pain syndrome, right upper extremity.

Dr. Hughes marked "Yes" by the question, "Within reasonable medical probability, was plaintiff's injury the causes of his/her complaints?" He opined as follows:

Mr. Turner sustained a fall on his right arm. He sustained a rotator cuff tear and underwent surgery for this including a distal clavicular resection, repair of the rotator cuff, and a subacromial decompression. Unfortunately, a few days after that, he developed pain down the entire right arm, which worsened and was associated with color changes, swelling, extreme hypersensitivity and loss of motion of multiple joints of the right upper extremity compatible with reflex sympathetic dystrophy (complex regional pain syndrome), which has persisted. He has had a stellate ganglion block, which was 50% helpful for some days. He has not yet had a trial of a spinal cord stimulator. The right arm is now functionless and has severely

restricted his behavior in addition to causing personal hardship in terms of his family, his ability to do even the most basic activities of daily life, and he has had emotional consequences because of this.

Dr. Hughes assessed a 49% whole person impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th edition ("AMA Guides"). Dr. Hughes' impairment rating does not include an impairment rating for Turner's neck injury. However, Dr. Hughes did not believe Turner was at maximum medical improvement ("MMI") at the time of his examination. He stated "[Turner] requires the implantation of a spinal cord stimulating device for treatment of RSD."

Perry County introduced Dr. Henry Tutt's June 25, 2014, IME report, August 1, 2014, "Addendum to Independent Medical Examination" report, and his August 27, 2014, deposition.

The September 19, 2014, Opinion and Order, contains the following relevant findings of fact and conclusions of law:

A. Work-relatedness/causation.

KRS 342.0011(1) defines "injury" to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment

which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

I sat a few feet from the plaintiff Mr. Turner at the Final Hearing and carefully observed his facial expressions during his testimony, carefully listened to his voice tones during his testimony, and carefully observed his body language during his testimony. I am the only decision maker who actually has seen and heard the plaintiff testify. He was a stoic witness. I make the factual determination that he was a credible and convincing lay witness and that his testimony rang true.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward*, 2007 WL 2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not

credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

Based upon Mr. Turner's credible and convincing lay testimony, which is covered above, and the persuasive and compelling medical evidence from Dr. Patel, which is covered above, as well as the persuasive and compelling medical evidence from Dr. Hughes, which is covered above, I make the factual determination that Mr. Turner suffered significant physical injuries to his right upper extremity and neck as a result of his work-related fall on September 30, 2012.

. . .

C. Benefits per KRS 342.730; permanent total disability.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

I again make the factual determination that the lay testimony of Mr. Turner, as covered above, was very credible and convincing and that his testimony rang true. In addition, I found very persuasive and compelling the medical evidence from the plaintiff's treating physician, Dr. Patel, which is covered above. Dr. Patel saw the plaintiff for his right upper extremity pain and his neck pain. Dr. Patel took a medical history from Mr. Turner and performed a thorough physical examination of the plaintiff. Physical examination of Mr. Turner's cervical spine showed that his range of motion was decreased and painful on

extension, and that he had mild tenderness to palpation. Examination of the right forearm and hand showed edema. Sensation was decreased to pinprick, involving the entire right hand and forearm. The plaintiff's right arm showed edema in the dorsal as well as the volar aspects. Gentle palpation of the right upper extremity caused exquisite pain. The plaintiff had stiffness involving the entire right upper extremity. Dr. Patel's diagnoses were complex regional pain syndrome and neck pain. Dr. Patel's treatment recommendations included a bone scan, an electromyogram and nerve conduction study, MRI of the cervical spine and prescription medications, as well as a stellate ganglion block for the upper limb reflex sympathetic dystrophy, as well as physical therapy. I also make the factual determination that the medical evidence from Dr. Hughes was very persuasive and compelling. Dr. Hughes' diagnoses were that the plaintiff has right shoulder pain and diminished range of motion, and status post right shoulder surgery, including distal clavicular resection repair of the rotator cuff tear and subacromial decompression, and also complex regional pain syndrome of the plaintiff's right upper extremity. Dr. Hughes stated that using the AMA Guides, Fifth Edition, the plaintiff will sustain a 49% permanent impairment to the body as a whole. He has a functionless right arm due to the effects of right reflex sympathetic dystrophy, and he is unable to use his right hand, arm or shoulder for virtually any task because of severe pain affecting the entirety of his right arm, shoulder, fingers and limitation of motion. Based upon the medical evidence from Dr. Tutt, I make the factual determination that the

plaintiff Mr. Turner has reached maximum medical improvement.

In *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979), the Kentucky Supreme Court stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

"'Permanent total disability' means 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 . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

Based upon the credible and convincing lay testimony of Mr. Turner, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Patel, his treating physician, which is covered in detail above, as well as the persuasive and compelling medical evidence from Dr. Hughes, which is covered in detail above, I make the factual determination that Mr. Turner sustained and will sustain a severe permanent impairment to his right upper extremity as a result of his work-related fall on September 30, 2012, resulting in a functionless right arm, and that Mr. Turner is unable to use his right upper extremity for virtually any task because of his severe pain and limitation of motion. I make the factual determination that Mr. Turner has constant pain in his right arm and right shoulder as well as in his neck. His right upper extremity is his dominant extremity. Mr. Turner is now 40 years of age, meaning that he is a middle-aged worker in the highly competitive job market. I make the factual determination that Mr. Turner has had a good work history showing a good work ethic, but that due to the severe injuries to his right upper

extremity he has significant limitations for reemployment and will not be able to return to any regular gainful employment in the highly competitive job market. Based upon all of the above factors, I make the factual determination that Mr. Turner cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the determination that he is permanently and totally disabled.

D. Medical benefits.

KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational disease, the medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

Based upon the credible and convincing lay testimony of Mr. Turner, which is covered above, and the persuasive and compelling medical evidence from both Dr. Patel and Dr. Hughes, which is covered in detail above, I make the determination that Mr. Turner is entitled to recover from the defendant and its workers' compensation insurer for his work-related medical bills and expenses for treatment of his right upper extremity and neck, both past and future.

Perry County filed a petition for reconsideration asserting several errors and requesting additional findings. Perry County argued the ALJ's opinion and order

did not contain adequate findings of fact and conclusions of law concerning the issue of permanent total disability. Perry County asserted the ALJ's finding of a work-related fall is not supported by substantial evidence. Perry County requested the ALJ reconsider and reverse the award of PTD benefits and medical benefits because the award was, in part, based upon a non-compensable neck injury. Perry County also argued the ALJ's reliance upon the opinions of Dr. Tutt constitutes error. Perry County requested the ALJ state whether certain inconsistencies in Turner's testimony were considered in determining his credibility. Finally, Perry County requested a specific finding as to whether Turner could engage in his prior employment.

In the November 3, 2014, Opinion and Order on Reconsideration, the ALJ stated as follows:

Defendant has filed a Petition for Reconsideration and this is to rule thereon.

In *Ford Furniture Company v. Claywell*, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. A review of defendant's Petition for Reconsideration shows that defendant is attempting to reargue the case, which is improper. However, out of an abundance of caution, we will again discuss the case.

The record shows that the parties have thoroughly litigated this case and a substantial record was produced. Page 3 of the original Opinion and Order dated September 19, 2014 states the evidence which the parties agreed to in the Hearing Order and further states that the Administrative Law Judge has carefully reviewed and considered all of said evidence and the complete and entire record in the case file.

The plaintiff, **Everett Turner**, testified that he is right handed. His work history has included employment as a police officer, a deputy sheriff and as a construction worker. While working for the defendant on September 30, 2012, he was hiking up a mountain, got overheated and dizzy and passed out, falling backwards. He experienced pain in his right shoulder and neck. He was taken by ambulance to the hospital in Hazard. He stated that he did not remember any prior right arm complaints. He came under the treatment of Dr. Smith, who had him undergo an MRI of his right shoulder, and then referred him to Dr. Hall, who performed right shoulder surgery. Thereafter, he underwent physical therapy. He was then referred to pain management. He had a nerve block and was prescribed pain medication as well as a sling for his right arm. He stated that he has constant pain in his right arm, right shoulder pain and neck pain. He also experiences dizziness. The plaintiff testified that in 2001 he had a right knee injury. In 2010, he had a left ankle injury and also spinal fractures. In 2012, he fell off a ladder and had a head injury.

The plaintiff filed the medical report of **Dr. Ushma Patel** dated May 9, 2013. Mr. Turner complained of right upper extremity pain. He stated that he was working as a deputy for the Perry County Sheriff when he was injured on September 30, 2012. He reported that he had a heat stroke and fell off an embankment and had his right arm pinned under him. He was diagnosed with rotator cuff tear and underwent arthroscopic surgery on February 15, 2013 by Dr. Keith Hall. He also complained of neck pain. Dr. Patel conducted a thorough physical examination of the plaintiff. Dr. Patel's diagnoses were complex regional pain syndrome of the right upper extremity, right RCT and neck pain. Dr. Patel recommended a bone scan and electromyogram and nerve conduction study, as well as consideration of an MRI of the cervical spine in the future. Dr. Patel considered prescribing anti-depressants for neurogenic pain, as well as other prescription medications. Dr. Patel considered a stellate ganglion block for the plaintiff's upper limb RSD. Dr. Patel considered physical therapy.

The plaintiff also filed the medical report of **Dr. Arthur Hughes** dated March 26, 2014. Mr. Turner gave a history of his accident on September 30, 2012 and his right shoulder injury. The plaintiff also related his subsequent medical treatment, including right shoulder surgery on February 14, 2013. He also related his painful symptoms. Dr. Hughes reviewed comprehensive medical records dealing with the plaintiff. Dr. Hughes conducted a comprehensive physical examination of the plaintiff and reviewed Mr. Turner's diagnostic test results. Dr. Hughes' diagnoses were as

follows: (1) Right shoulder pain and diminished range of motion. (2) Status post right shoulder surgery including distal clavicular resection repair or rotator cuff tear and subacromial decompression. (3) Complex regional pain syndrome, right upper extremity. Dr. Hughes stated that within reasonable medical probability the plaintiff's injury was the cause of his complaints. Dr. Hughes stated that Mr. Turner had a fall involving his right arm and sustained a rotator cuff tear, for which he underwent a distal clavicular resection repair of the rotator cuff and subacromial decompression. He then developed pain down the entire right arm compatible with reflex sympathetic dystrophy, which has persisted. Dr. Hughes stated that using the AMA Guides, Fifth Edition, Mr. Turner will sustain a 49% permanent impairment to the body as a whole because of the plaintiff's injuries to his right shoulder, right elbow, right wrist, right little finger, right fourth finger, right third finger, right index finger and right thumb, and also pain. Dr. Hughes stated that the plaintiff did not have an active impairment prior to his injury. According to Dr. Hughes, the plaintiff has not reached maximum medical improvement and requires the implantation of a spinal cord stimulating device for treatment of his RSD. Dr. Hughes stated that the plaintiff is very substantially physically limited because of his ongoing RSD, which has completely incapacitated his right shoulder arm and hand. Dr. Hughes stated that the plaintiff does not retain the physical capacity to return to the type of work which he performed at the time of his injury, since he has a functionless right arm at this time due to the

effects of RSD. Dr. Hughes placed restrictions on the plaintiff's work activities as a result of his injury: "Mr. Turner is unable to use the right hand, arm or shoulder for virtually any task because of severe pain affecting the entirety of his right arm, shoulder to fingers, and limitation of motion."

I made and again make the factual determination that the comprehensive medical evidence from Dr. Hughes was very persuasive and compelling. As stated in *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 774 (Ky.2009), "physicians must use clinical judgment when assigning impairment ratings, and that 'clinical judgment, combining both the "art" and "science" of medicine, constitutes the essence of medical practice.'" The applicable law affords Dr. Hughes certain discretion and professional judgment when interpreting the Guides and assigning an appropriate impairment rating.

I sat a few feet from the plaintiff Mr. Turner at the Final Hearing and carefully observed his facial expressions during his testimony, carefully listened to his voice tones during his testimony, and carefully observed his body language during his testimony. I am the only decision maker who actually has seen and heard the plaintiff testify. He was a stoic witness. I make the factual determination that he was a credible and convincing lay witness and that his testimony rang true.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward*, 2007 WL 2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case,

in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

Based upon Mr. Turner's credible and convincing lay testimony, which is covered above, and the persuasive and compelling medical evidence from Dr. Patel, which is covered above, as well as the persuasive and compelling medical evidence from Dr. Hughes, which is covered above, I make the factual determination that Mr. Turner suffered significant physical injuries to his right upper extremity and neck as a result of his work-related fall on September 30, 2012.

I again make the factual determination that the lay testimony of Mr. Turner, as covered above, was very credible and convincing and that his testimony rang true. In addition, I found very persuasive and compelling the medical evidence from the plaintiff's treating physician, Dr. Patel, which is covered above. Dr. Patel saw the plaintiff for his right upper extremity pain and his neck pain. Dr. Patel took a medical history from Mr. Turner and performed a thorough

physical examination of the plaintiff. Physical examination of Mr. Turner's cervical spine showed that his range of motion was decreased and painful on extension, and that he had mild tenderness to palpation. Examination of the right forearm and hand showed edema. Sensation was decreased to pinprick, involving the entire right hand and forearm. The plaintiff's right arm showed edema in the dorsal as well as the volar aspects. Gentle palpation of the right upper extremity caused exquisite pain. The plaintiff had stiffness involving the entire right upper extremity. Dr. Patel's diagnoses were complex regional pain syndrome and neck pain. Dr. Patel's treatment recommendations included a bone scan, an electromyogram and nerve conduction study, MRI of the cervical spine and prescription medications, as well as a stellate ganglion block for the upper limb reflex sympathetic dystrophy, as well as physical therapy. I also make the factual determination that the medical evidence from Dr. Hughes was very persuasive and compelling. Dr. Hughes' diagnoses were that the plaintiff has right shoulder pain and diminished range of motion, and status post right shoulder surgery, including distal clavicular resection repair of the rotator cuff tear and subacromial decompression, and also complex regional pain syndrome of the plaintiff's right upper extremity. Dr. Hughes stated that using the AMA Guides, Fifth Edition, the plaintiff will sustain a 49% permanent impairment to the body as a whole. He has a functionless right arm due to the effects of right reflex sympathetic dystrophy, and he is unable to use his right hand, arm or shoulder for virtually any task because of severe pain affecting the entirety of his

right arm, shoulder, fingers and limitation of motion. Based upon the medical evidence from Dr. Tutt, I make the factual determination that the plaintiff Mr. Turner has reached maximum medical improvement.

In *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979), the Kentucky Supreme Court stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

"'Permanent total disability' means 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 . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . [and] to work dependably[.]" *Ira A. Watson Dept.*

Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

Based upon the credible and convincing lay testimony of Mr. Turner, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Patel, his treating physician, which is covered in detail above, as well as the persuasive and compelling medical evidence from Dr. Hughes, which is covered in detail above, I make the factual determination that Mr. Turner sustained and will sustain a severe permanent impairment to his right upper extremity as a result of his work-related fall on September 30, 2012, resulting in a functionless right arm, and that Mr. Turner is unable to use his right upper extremity for virtually any task because of his severe pain and limitation of motion. I make the factual determination that Mr. Turner has constant pain in his right arm and right shoulder as well as in his neck. His right upper extremity is his dominant extremity. Mr. Turner is now 40 years of age, meaning that he is a middle-aged worker in the highly

competitive job market. The parties agreed that Mr. Turner last worked back on September 30, 2012, which is over 2 years ago. I make the factual determination that Mr. Turner has had a good work history showing a good work ethic, but that due to the severe injuries to his right upper extremity he has significant limitations for reemployment and will not be able to return to any regular gainful employment in the highly competitive job market. Based upon all of the above factors, I make the factual determination that Mr. Turner cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the determination that he is permanently and totally disabled.

KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational disease, the medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

I make the factual determination that the plaintiff has not met the burden of proving any permanent impairment under the AMA Guides, Fifth Edition, as a result of his work-related neck injuries. However, based upon the persuasive and compelling medical evidence from Dr. Patel, as covered above, and the decision of the Supreme Court of Kentucky in *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky.2007), the plaintiff is still entitled to an award of future

medical benefits for his neck injuries, and I so rule.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky.2008). An ALJ may draw reasonable inferences from the evidence, 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. *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky.1979); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky.1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky.1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213 (Ky.2006); *Seventh Street Road Tobacco Warehouse v. Stillwell*, 550 S.W.2d 469 (Ky. 1976).

Perry County's first argument is the ALJ erred by considering the effects of a neck injury in determining Turner is permanently totally disabled. It requests the

finding of permanent total disability and the award of PTD benefits be vacated.

In the September 19, 2014, Opinion and Order, the ALJ awarded past and future medical benefits for Turner's right upper extremity and neck. In the November 3, 2014, Opinion and Order on Reconsideration, the ALJ provided additional findings, previously summarized, concerning Turner's entitlement to medical benefits for his neck condition.

KRS 342.270(1) reads as follows:

If the parties fail to reach an agreement in regard to compensation under this chapter either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

Once an application for benefits is filed by an injured worker, KRS 342.270(1) places the burden upon the worker to join all accrued and known causes of action that

may exist against the same employer during the pendency of the claim. Civil Rule ("CR") 15.02 permits a motion to amend the pleadings in order to conform to the evidence to be made by "any party at any time, even after judgment." See CR 15.02; Kroger Co. v. Jones, 125 S.W.3d 241 (Ky. 2004); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). CR 15.02 states, in relevant part, as follows:

Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

However, an ALJ may consider and decide an issue or claim tried by consent of the parties, even when the issue or claim is never formally incorporated into an injured worker's application for benefits. See Id., Kroger Co., supra, Collins, supra.

In the case *sub judice*, the injury alleged on Turner's Form 101 is "right upper extremity." A "neck" condition or injury was not alleged as a specific injury. However, Turner introduced medical evidence addressing his neck pain which started immediately after the injury without objection by Perry County. Additionally, in both

his deposition and at the final hearing, Turner testified, without objection, he experienced constant neck pain. Finally, Turner's failure to amend his Form 101 to include a neck injury was not listed as a contested issue at the BRC by Perry County. 803 KAR 25:010, Section 13(14) provides as follows regarding BRCs: "Only contested issues shall be the subject of further proceedings." Consequently, we find the issue of Turner's alleged neck injury was tried by consent, and the ALJ properly considered the effects of Turner's neck pain in determining the extent of his occupational disability.

That said, for reasons not raised by Perry County, the ALJ's finding of permanent total disability and the award of TTD benefits and PTD benefits are vacated. It is clear from the language in the September 19, 2014, Opinion and Order that the ALJ relied upon Dr. Hughes' 49% whole person impairment rating. However, a finding of permanent total disability requires a *permanent impairment rating*. KRS 342.0011(1)(11)(c). While Dr. Hughes assessed a 49% whole person impairment rating in his March 26, 2014, IME report, he also opined Turner had not yet reached MMI. Pursuant to the AMA Guides, Chapter 1.2, "A medical impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning it is well

stabilized and unlikely to change substantially in the next year with or without medical treatment." (emphasis in original). Therefore, Dr. Hughes' whole person impairment rating was not permanent at the time of his IME report. Significantly, the record does not contain a supplemental report by Dr. Hughes.

In the September 19, 2014, Opinion and Order, the ALJ opined that "[b]ased upon the medical evidence from Dr. Tutt, I make the factual determination that the plaintiff Mr. Turner has reached maximum medical improvement." In addition, the ALJ awarded TTD benefits from October 1, 2012, through June 25, 2014, "when Dr. Tutt stated that Mr. Turner reached maximum medical improvement." In order for the ALJ to rely upon Dr. Hughes' 49% impairment rating, he must simultaneously rely upon a physician who determined MMI had been attained on or before the date Dr. Hughes assessed his 49% impairment rating, March 26, 2014.

The ALJ believed Dr. Tutt's testimony supports an MMI date of June 25, 2014, the date of his IME report. However, we are unable to locate a clear articulation of MMI by Dr. Tutt in his June 25, 2014, IME report, his August 1, 2014, supplemental report, or his August 27,

2014, deposition.¹ Notably, in its petition for reconsideration, Perry County argued the record does not contain an opinion from Dr. Tutt regarding MMI. We note the following testimony in Dr. Tutt's August 27, 2014, deposition:

Q: And Doctor, in your opinion, did Mr. Turner sustain, in your opinion, any type of permanent injury as a result of the September 30, 2012 incident?

A: No, sir.

Q: And based upon what he did describe, which basically I think was light-headedness and-

A: Syncope.

Q: Yes. How soon would that have- should that have resolved?

A: Within hours.

On remand, the ALJ must provide additional findings regarding his determination of June 25, 2014, as the date of MMI in reliance upon Dr. Tutt's testimony. If the ALJ again finds June 25, 2014, is the date of MMI, Dr. Hughes' impairment rating must be rejected, as it was assessed prior to Turner reaching MMI. Our holding is fully supported by Robert Corbett v. Makers Mark Distillery, No.

¹While this Board is not ruling out a statement of MMI in Dr. Tutt's 15-page IME report, 6-page supplemental report, or his deposition, this Board, in its review, has been unable to locate one.

2013-CA-001102-WC, Designated Not To Be Published (March 13, 2015), in which the Court of Appeals held as follows:

Because Dr. Morris opined Corbett had not reached MMI, the AMA *Guides* prohibited him from assigning any impairment rating for any of Corbett's conditions.

. . . .

A permanent impairment rating resulting from an injury must be determined by utilization of the AMA *Guides*. KRS 342.730(1). The proper interpretation of the AMA *Guides* and the proper assessment of impairment are medical questions solely within the province of medical experts for the purposes of assessing a claimant's disability. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003); *Lanter v. Ky. State Police*, 171 S.W.3d 45, 52 (Ky. 2005). To be useful for the fact-finder as competent, substantial evidence, a physician's opinion must be grounded in the AMA *Guides*, and an ALJ may not give credence to an opinion of a physician assigning a permanent impairment rating that is not based upon the AMA *Guides*. *Jones* at 154. In order to utilize an impairment rating in the assessment of a claimant's disability rating and monetary award, an ALJ is required to determine whether the impairment rating was based upon the AMA *Guides*, and is authorized—though not compelled—to consult the AMA *Guides* when determining the weight and credibility to be assigned to the evidence. *Caldwell Tanks v. Roark*, 104 S.W.3d 753, 756-757 (Ky. 2003).

Slip Op. at 18, 22-23.

Consequently, should the ALJ find Turner reached MMI on June 25, 2014, as this Board is unable to locate another impairment rating in the record, there can be no award of PTD benefits or permanent partial disability ("PPD") benefits. At that point, the ALJ must determine if Turner, based upon the medical evidence in the record, sustained a temporary injury, and if appropriate, the extent to which he is entitled to TTD benefits and medical benefits for any and all injuries. Should the ALJ determine Turner did not sustain a temporary injury, Turner's claim must be dismissed.

However, should the ALJ not find evidentiary support for an MMI date of June 25, 2014, the ALJ must examine the record to determine a different MMI date and also determine whether it predates March 26, 2014, the date Dr. Hughes assessed his impairment rating.

Even though Perry County did not raise this issue, we are permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Perry County's second argument on appeal is the ALJ's finding of a work-related fall is not supported by substantial evidence. Perry County contends the ALJ's

alleged "failure to consider the fact that Turner told the ER personnel that he had not fallen compels a review of the ALJ's decision and compels further findings of fact." We disagree.

The ALJ, as both gatekeeper of the evidence and fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence as well as issues of credibility. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Here, the ALJ chose to believe Turner's deposition and hearing testimony that he fell on September 30, 2012. Stated differently, the ALJ found Turner's testimony regarding his September 30, 2012, fall to be credible. We have no authority to disturb the ALJ's discretion.

We acknowledge the ALJ failed to discuss the Perry County Ambulance report or the emergency records of Hazard Appalachian Regional Hospital in great detail in both the September 19, 2014, Opinion and Order and the

November 3, 2014, Opinion and Order on Reconsideration. However, the ALJ was fully aware there is conflicting evidence in the record regarding whether Turner fell on September 30, 2012. This is clearly reflected in the ALJ's summary of Eversole's testimony.

While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Thus, the ALJ was not required to discuss every shred of evidence which factored into his determination Turner fell on September 30, 2012. The ALJ's determination Turner fell on September 30, 2012, will not be disturbed.

Perry County's third argument is the finding that Turner is a credible witness is not supported by substantial evidence. As stated, the ALJ, as fact-finder, has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, supra. The ALJ is the sole judge of the credibility to be

afforded to a witnesses' testimony. Here, the ALJ determined Turner was a credible witness. The ALJ went to great length in both the September 19, 2014, Opinion and Order and the November 3, 2014, Opinion and Order on Reconsideration to explain his finding regarding Turner's credibility. As we have no authority to interfere with the ALJ's finding regarding witness credibility, that finding cannot be altered.

Perry County's fourth argument is a restatement of its second argument on appeal regarding the ALJ's determination Turner fell on September 30, 2012. Perry County asserts as follows:

The unbiased and objective medical evidence, consisting of the ambulance run sheet and the records of the Hazard ARH, not only prove that Turner reported no history of falling; but that he in fact denied a fall immediate or within three months.

Perry County asserts it requested additional findings in its petition for reconsideration regarding the conflict between Turner's testimony and the ambulance run sheet and the "Emergency Department Chart" from Hazard Appalachian Regional Hospital records. Yet, the ALJ failed to provide additional findings.

As stated, the ALJ has the discretion to rely on Turner's testimony regarding the events of September 30, 2012. In the September 19, 2014, Opinion and Order and the November 3, 2014, Opinion and Order on Reconsideration the ALJ clearly explained the basis for his finding Turner was a credible witness. The ALJ was not required to specifically address why he rejected the contradictory evidence in the record. Shields v. Pittsburgh and Midway Coal Min. Co., supra; Big Sandy Cmty. Action Program v. Chaffins, supra. Additional findings concerning Turner's testimony of his fall and his credibility are unnecessary.

Finally, Perry County, in a reiteration of its first argument on appeal, asserts Turner is not entitled to medical benefits for his neck because it was not an injury alleged in the Form 101. This argument has been addressed.

Those portions of the September 19, 2014, Opinion and Order and the November 3, 2014, Opinion and Order on Reconsideration finding Turner sustained a work-related fall and a neck injury are **AFFIRMED**. However, the finding Turner has a 49% impairment rating and is totally disabled and the award of TTD benefits, PTD benefits, and medical benefits are **VACATED**. Also, the ALJ's finding that Turner reached MMI on June 25, 2014, is **VACATED**. The claim is

REMANDED for additional findings and entry of a decision in conformity with the views expressed herein.

ALL CONCUR.

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