Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 12, 2016

CLAIM NO. 201301558 & 201301554

SEQUOIA ENERGY PETITIONER

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

FRED ADKISSON,
DR. WILLIAM O'NEILL, and
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

ALVEY, Chairman. Sequoia Energy ("Sequoia") appeals from the Opinion and Order rendered May 14, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Fred Adkisson ("Adkisson") temporary total disability ("TTD") benefits from May 15, 2013 to January 19, 2015, permanent total disability ("PTD") benefits and medical benefits due

to cumulative trauma injuries he sustained to multiple body parts on May 15, 2013 when he was laid off. Sequoia also appeals from the June 15, 2015 order denying its petition for reconsideration.

On appeal, Sequoia argues the ALJ did not provide sufficient findings of fact to support his decision. Sequoia also argues the ALJ's finding it is responsible for the entirety of Adkisson's disability is not supported by substantial evidence. Sequoia next argues the ALJ erred in awarding TTD benefits from May 15, 2013 to December 2, 2013. Finally, Sequoia argues the ALJ failed to perform the necessary analysis in finding Adkisson is permanently totally disabled. We affirm that portion of the ALJ's decision finding Adkisson sustained compensable work related injuries while working for Sequoia, for which it is solely responsible. However, we vacate and remand for additional determinations regarding the award of TTD benefits and PTD benefits.

Adkisson filed a Form 101 on October 15, 2013 alleging he sustained cumulative trauma injuries to his low back, both knees, and neck due to working as a scoop operator. He alleged his last date of employment was May 15, 2013. In the Form 104 employment history form attached to the Form 101, Adkisson stated he had worked as a bolt

machine operator/scoop operator for Sequoia from November 1994 through May 15, 2013. In support of the claim, Adkisson filed the September 10, 2013 report of Dr. Chad Morgan, D.C., who examined him on August 19, 2013 for complaints of pain, stiffness and numbness in the low back, arms and shoulders. Dr. Morgan diagnosed Adkisson with cervical subluxation, lumbar subluxation, sciatica, pain in the upper arm, pain in the hand, and pain in the hip. Dr. Morgan stated all of these conditions were caused by Adkisson's coal mining work, and opined it would be adverse to his health to continue in such employment.

Adkisson testified by deposition on January 23, 2014, and at the hearings held March 25, 2014 and April 29, 2015. Adkisson is a resident of Harlan, Kentucky, and was born on March 14, 1957. Adkisson is a high school graduate.

He had one year of welding courses while in high school. When he last worked, he had an underground mining license. He worked as a scoop operator for Sequoia for two years. He worked on the surface at a coal tipple for six years, and began working underground in 1982. During the course of his career as a coal miner, Adkisson has worked as a laborer, greaser, miner helper, bolt machine operator, roof bolter, cutting machine operator, and shuttle car

operator. He stated he worked for Sequoia for thirteen years, primarily as a shuttle car operator which subjected him to constant jarring. He worked until the mine closed, but stated he does not believe he can return to coal mining work.

As a shuttle car operator, he was required to load supplies weighing up to fifty pounds. He previously sustained a right elbow injury. He takes Aleve and Tylenol PM for joint aches. He testified he sustained no specific traumatic injury while working for Sequoia, but his symptoms developed over a period of time. He reported constant pain in the center of his low back going into his left leg. He also has stiffness in his neck and at night he experiences numbness in his upper extremities to his fingertips. He experiences this same numbness after driving twenty to thirty minutes. He has had knee, low back, neck, and right hip pain for several years. Since the hearing loss claim is not subject of this appeal, that evidence will not be discussed.

Adkisson received unemployment benefits until January 1, 2014, and he was the pastor of a church where he earned one thousand dollars a month. He was later awarded Social Security disability benefits. He has not worked since May 15, 2013, and despite receiving unemployment

benefits for a period time thereafter, is no longer seeking employment.

In addition to the report from Dr. Morgan, Adkisson filed the December 2, 2013 Form 107-I report completed by Dr. Robert Hoskins. Dr. Hoskins stated Adkisson complained of widespread neuromusculoskeletal complaints attributable to thirty eight years of working in the coal mines. Adkisson specifically complained of low back pain, stiffness and weakness; intermittent pain and paresthesias in the left lower extremity; bilateral shoulder pain and weakness, generally worse on the right; intermittent paresthesia in the upper extremities to the hands; bilateral knee pain, stiffness, weakness and crepitus; pain and stiffness in the right ankle; and multiple intolerances with activities of daily living. He diagnosed Adkisson with numerous conditions including cervical sprain/strain; multilevel cervical degenerative disk disease; bilateral shoulder impingement syndrome/AC joint arthritis; electro physiologically verified bilateral median sensorimotor demyelinative neuropathy across the wrists, moderate to severe on the left and severe on the right; lumbosacral sprain/strain; left lumbar radiculitis; L5-S1 degenerative disk disease; lumbar spondylosis; L4-L5 spondylolisthesis – grade 1; left patellofemoral arthritis;

and, bilateral knee flexion contractures of mild severity. He stated all of these conditions were caused by Adkisson's work.

Dr. Hoskins assessed a 38% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, (AMA Guides"), none of which was active prior to May 15, 2013. He attributed 12% to the right upper extremity, 10% to the left upper extremity, 7% to the cervical spine, 8% to the lumbar spine, 4% to the right lower extremity and 4% to the left lower extremity. Dr. Hoskins recommended restrictions of no lifting greater than forty pounds; no lifting above twenty pounds below waist level; no heavy pushing, pulling or carrying; no continued standing or walking greater than sixty minutes; no continuous sitting greater than ninety minutes; no sustained posturing of the lumbar spine, or repetitive movements at the extremes of lumbosacral motion; no prolonged repetitive use of equipment subjecting the spinal column to vibration; no prolonged or repetitive stooping; no prolonged or repetitive overhead work; no kneeling, climbing, balancing, or crouching; no activities involving sustained posturing of the cervical spine or repetitive movements into the extreme ranges of motion; no forceful and repetitious gripping, handling or pinching;

and no prolonged use of vibratory tools. Dr. Hoskins also opined Adkisson did not retain the capacity to return to the type of work performed at the time of injury.

Dr. Hoskins testified by deposition on March 7, 2014. He stated he had reviewed records of Dr. Morgan for treatment administered on August 19, 2013 and September 10, 2013. He evaluated Adkisson for multiple complaints, but no specific injuries. He stated Adkisson had reached maximum medical improvement ("MMI") for the carpal tunnel syndrome if he did not have the surgery. Dr. Hoskins stated Adkisson's work may not be the sole cause of his problems, but was definitely a contributing factor.

Adkisson filed the October 28, 2014 vocational report of Mr. William W. Ellis. Mr. Ellis opined Adkisson is totally vocationally disabled due to his complaints and restrictions.

Sequoia filed the records of the Daniel Boone Clinic for Adkisson's nineteen office visits from June 3, 1999 through November 4, 2013. Those records reflect Adkisson treated for various complaints including cellulitis, kidney stones, chest pain, bronchitis, hypertension, cholecystitis, upper respiratory infection, numbness in the face and arms, cough, bronchitis, and fatigue. The records also reflect specific complaints of

low back pain and right hip pain on January 25, 2007. An x-ray taken at that time showed mild degenerative joint disease in the right hip. On June 16, 2009, Adkisson complained of back and right side pain. The only treatment record at this facility subsequent to May 15, 2013 is that of November 4, 2013 when he was seen for unrelated hypertension. That note references a work-related hearing loss, but does not address other complaints.

Dr. Joseph Zerga evaluated Adkisson on February 18, 2014 at Sequoia's request. He diagnosed Adkisson with osteoarthritis and carpal tunnel syndrome. He stated the carpal tunnel syndrome was possibly aggravated by operating machinery in the mines. He stated Adkisson has bilateral median neuropathy caused in part by his work. He stated Adkisson needs to be more active and could return to the same type of work he was performing at the time of the injury. He recommended treatment with regular anti-inflammatory medication for the osteoarthritis. He disagreed with the impairment rating assessed by Dr. Hoskins, but stated Adkisson has a 14% impairment based upon the AMA Guides.

In a supplemental report dated March 17, 2014, Dr. Zerga stated Adkisson had reached MMI, and no surgery was needed for the carpal tunnel syndrome. He stated

Adkisson had no impairment for the cervical or lumbar complaints.

Dr. Gregory Snider evaluated Adkisson at Sequoia's request on March 5, 2014. He noted Adkisson was laid off from work on May 15, 2013. He diagnosed multiple myalgias and arthralgias. He also diagnosed bilateral shoulder bursitis, right ankle sprain, hearing loss, and bilateral median neuropathy. Dr. Snider recommended weight loss and treatment with anti-inflammatory medication. He opined Adkisson had not reached MMI, and therefore he could not assess an impairment rating. In a supplemental note dated March 17, 2014, Dr. Snider stated he disagreed with the 38% impairment rating assessed by Dr. Hoskins, and additionally stated he would not impose any restrictions due to Adkisson's cumulative injuries.

A benefit review conference ("BRC") was held on March 11, 2014. The contested issues identified were whether Adkisson retains the capacity to return to the work performed on the date of injury; benefits per KRS 342.730; credit for unemployment benefits; injury as defined by the Act; pre-existing active; medical benefits; and whether Adkisson is permanently totally disabled.

Subsequent to the BRC, the ALJ awarded interlocutory relief in a decision dated April 21, 2014.

He found Adkisson had not reached MMI. He awarded TTD benefits until MMI was reached. The ALJ specifically found as follows:

> I make the factual determination that the medical evidence from Dr. Hoskins, as covered in detail above, was persuasive and compelling. I also make the factual determination that the medical evidence from Dr. Jones and Dr. Shinn-Pettyjohn, as covered in detail above, was persuasive and compelling. I, therefore, make the factual determination that Mr. Adkisson did sustain serious work-related injuries to his neck, low back and both wrists as a result of repetitive motion injuries or cumulative trauma which he sustained during the 13-year period from 2000-2013 while he was employed by the defendant.
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> . . .
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> KRS 342.730(1) provides that income benefits for temporary total disability are payable under said statutory section.
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> KRS 342.0011(11)(a) defines "temporary total disability" to mean that condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.
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> In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was

> performing at the time of the injury. The Court in *Helms, supra*, stated:
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> > In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
> > Id. at 580-581
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> Based upon the credible and convincing lay testimony of Mr. Adkisson, as covered in detail above, and the persuasive and compelling medical evidence from Dr. Hoskins, as covered in detail above, as well as the persuasive and compelling medical evidences[sic] from Drs. Jones and Shinn-Pettyjohn, as covered in detail above, I make the factual determination that Mr. Adkisson has not reached maximum medical improvement from his work-related injuries and has not reached a level of improvement that would permit a return to employment, and I make the factual determination that Mr. Adkisson is entitled to recover from the defendant-employer and its workers' compensation insurer weekly temporary total disability benefits, beginning on May 15, 2013 and continuing so long as Mr. Adkisson remains disabled from his customary work or the work he was performing at the time of his injuries and until he has reached maximum medical improvement from his work injuries.

It is noted Drs. Raleigh Jones, and Jennifer Shinn-Pettyjohn, referenced by the ALJ, evaluated Adkisson for his hearing loss claim which is not subject of this

appeal. Those physicians noted Adkisson had a degree of hearing loss, and should use hearing protection.

Sequoia filed a petition for reconsideration from the interlocutory order arguing Adkisson was not entitled to TTD benefits until he saw Dr. Hoskins on December 2, 2013. Sequoia specifically requested additional findings of fact regarding the determination Adkisson had not reached MMI. Sequoia specifically argued as follows:

> In addition, the defendant submits that the ALJ erred in finding that the plaintiff's TTD benefits should begin on May 15, 2013. There is no dispute that the plaintiff was laid off on May 15, 2013 and that he has not returned to work since that time. That being said, there is no basis for an award of TTD benefits on May 15, 2013. In this regard, there is no evidence in the record that establishes that the plaintiff was temporarily totally disabled on May 15, 2013. The plaintiff was not seeking medical treatment for any of the alleged injuries in this claim at the time in which he was laid off on May 15, 2013. In addition, he was not under any work restriction or taking any medication for any of the alleged injuries in this case on May 15, 2013. Since the plaintiff was working regular duty and not under any medical treatment for the alleged injuries in this case on May 15, 2013, the defendant submits that he was not entitled to TTD benefits following the layoff on May 15, 2013, there is still no basis for TTD benefits as he was not restricted in any manner.

> The defendant submits that to the extent that the plaintiff is entitled to TTD benefits, the benefits should not begin until December 2, 2013 when he was evaluated by Dr. Robert Hoskins. Indeed, Dr. Hoskins was the first physician to examine the plaintiff for the alleged injuries to the neck, back and bilateral wrists in the case. Therefore the defendant respectfully request additional findings of fact regarding the appropriate starting date for TTD benefits.

The petition for reconsideration was denied. The ALJ reiterated his conclusions from the interlocutory decision without addressing Sequoia's request for additional findings, and without providing an analysis. Citing to AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008), the ALJ stated he had the sole discretion to reach a decision.

Sequoia filed a motion to remove the claim from abeyance on September 12, 2014. In support of the motion, Sequoia filed the September 3, 2014 neurosurgical consult report of Dr. James Bean. Dr. Bean opined Adkisson had reached MMI, had a 10% impairment rating pursuant to the AMA Guides, and did not recommend surgery. Adkisson later filed Dr. Bean's August 5, 2014 note which diagnosed low back pain with left sciatica, rule out left lumbar lateral recess stenosis, and bilateral carpal tunnel syndrome.

Dr. Bean testified by deposition on January 22, 2015. He first saw Adkisson on August 5, 2014 to assess complaints of left hip pain and hand numbness. Adkisson described his history of cumulative trauma and complained of pain in his back, left hip and leg, neck, and hands. He stated he experienced these problems for over ten years, during which time his symptoms continued to worsen. Dr. Bean's initial impression was low back pain and left sciatica because of the left leg complaints. Dr. Bean stated there were no objective findings of sciatica. An MRI showed a slight spondylolisthesis which he found insignificant. He found no acute herniation, and determined Adkisson needed no additional treatment, including surgery. He diagnosed arthritis in the lumbar spine with moderate stenosis at L4-L5. He opined Adkisson had sustained, "some sort of cumulative trauma injury consistent with coal mining" for which he assessed a 10% impairment rating. He did not diagnose Adkisson with a cervical condition. Dr. Bean stated Adkisson's degenerative changes are due to age, chronic wear and tear, usage and some genetics. He additionally stated the jarring from operating a shuttle car could activate underlying degenerative conditions into disabling reality.

On September 29, 2014, the ALJ entered an order removing the claim from abeyance. On October 20, 2014, he entered an order terminating TTD benefits. On November 5, 2014, the ALJ entered an order allowing Adkisson to amend the claim to include injuries to the right and left upper extremities.

Adkisson filed the January 19, 2015 supplemental report of Dr. Hoskins. Dr. Hoskins made the same diagnoses he had previously outlined in his December 2, 2013 report. He again stated all of Adkisson's complaints and conditions were caused by work. He stated Adkisson had reached MMI on January 19, 2015, and he changed the impairment rating to 37% pursuant to the AMA Guides. He again stated Adkisson does not retain the capacity to perform the work performed at the time of the injury, and reiterated the restrictions he had assessed previously.

Dr. Hoskins testified by deposition on March 27, 2015. He examined Adkisson on November 25, 2013 and again on January 19, 2015 for complaints of pain in multiple parts of the body. Dr. Hoskins stated Adkisson no longer had any impairment attributable to knee complaints, because the range of motion was normal. He stated Adkisson had reached MMI for the carpal tunnel syndrome. Dr. Hoskins stated all of the impairment he assessed was due to

Adkisson's work at Sequoia. Later in his deposition he stated 10% of Adkisson's impairment was due to his employment prior to Sequoia.

On November 26, 2014, Sequoia filed a Form 112 medical dispute challenging the compensability of surgery for carpal tunnel syndrome recommended by Dr. William O'Neill based upon a report of Dr. Daniel Wolens who stated such treatment was not recommended. No motion to join Dr. O'Neill was filed, there is no additional reference to the medical dispute, and Dr. O'Neill was never joined as a party to the claim.

Sequoia filed the December 10, 2014 report of Dr. John Vaughn. He diagnosed Adkisson with multiple musculoskeletal arthralgias. Dr. Vaughn stated Adkisson has no impairment for cervicalagia or a lumbar condition.

Sequoia next filed the April 22, 2015 report of Dr. David Jenkinson. He noted Adkisson had multiple complaints including low back, neck, both knees, right hip, right ankle, both shoulders and bilateral carpal tunnel syndrome, all of which he attributed to work. Dr. Jenkinson found no objective abnormality which for any diagnosis other than carpal tunnel syndrome. Dr. Jenkinson found no evidence of cumulative trauma injuries in any body

part, and saw no basis to impose any restrictions. He stated Adkisson could return to work.

Sequoia also filed Dr. Ralph Crystal's December 18, 2014 vocational report. Dr. Crystal opined, "Mr. Adkisson does not have a complete and permanent inability to perform any type of work because of this injury. With or without training there are jobs that Mr. Adkisson is qualified to perform and he is not disabled from employment."

A second BRC was held on February 11, 2015. The issues preserved were work-relatedness, injury as defined, pre-existing active, benefits per KRS 342.730, TTD, medical benefits, credit for unemployment, permanent total disability, and capacity to return to work.

In the May 14, 2015 decision, the ALJ reiterated his determination Adkisson is entitled to TTD benefits beginning May 15, 2013, without providing any analysis. The ALJ awarded TTD benefits through January 19, 2015, when Dr. Hoskins stated he had reached MMI. The ALJ then determined Adkisson is entitled to PTD benefits without providing a sufficient analysis supporting his determination. The ALJ stated as follows:

> In this case, I considered the serious nature of the plaintiff's work-related injuries, as documented by Dr. Hoskins,

> his high school education many years ago, and his credible and convincing lay testimony, as covered in his hearing testimony. Based upon all of the above factors, I reach the legal conclusion that Mr. Adkisson is permanently and totally disabled, beginning on January 19, 2015, when he reached maximum medical improvement as per Dr. Hoskins' persuasive, compelling and reliable medical evidence.

Sequoia filed a petition for reconsideration arguing there was no basis for awarding TTD benefits commencing on May 15, 2013. Sequoia also argued the ALJ erred in finding a work injury on May 15, 2013. Sequoia argued the ALJ erred in awarding PTD benefits. Sequoia requested additional findings on each of these issues. Sequoia argued the ALJ failed to perform an analysis pursuant to Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) in determining Adkisson is totally disabled. Finally, Sequoia also requested the ALJ make additional findings of why he found it solely liable for any award of benefits.

The ALJ issued a decision on June 15, 2015 denying Sequoia's petition for reconsideration. The ALJ reiterated much of what he had previously stated in his opinion and the prior interlocutory opinion, underlining

some passages from those decisions. Regarding the award of TTD benefits, the ALJ stated as follows:

> The defendant attempts to reargue the award to the plaintiff for temporary total disability benefits and requests additional findings of fact regarding said award. It is uncontradicted that the defendant and its workers' compensation insurer paid the plaintiff temporary total disability benefits at the rate of $653.76 per week from May 15, 2013 to October 23, 2014 in the total amount of $43,121.89, and the parties so stipulated. **I make the determination that the defendant is estopped to reargue the award of temporary total disability benefits and has waived its argument, in that it voluntarily paid to the plaintiff very substantial temporary total disability benefits beginning on May 15, 2013, the date he last worked.** (Emphasis added).

Regarding the denial of Sequoia's request for reconsideration of the award of PTD benefits, the ALJ stated as follows:

> The defendant also attempts to reargue the award to the plaintiff for permanent total disability and requests additional findings of fact supporting said award. In making the determination that Mr. Adkisson is permanently and totally disabled, I relied upon the fact that he is now 58 years of age, which means that he is definitely an older worker in the highly competitive job market. I noted that his work history from 1994 to 2013, a period of approximately 20 years, was as a coal mine employee, which is clearly very demanding punishing physical labor. I relied upon the fact that Mr. Adkisson

has a very good work history showing a very good work ethic. I relied upon the fact that Mr. Adkisson had to stop working in the coal mines on May 15, 2013, over 2 years ago, and the parties so stipulated. I made and make the determination that if Mr. Adkisson could return to work at his customary coal mining job he would do so. I made and again make the determination that if Mr. Adkisson went out into the highly competitive job market he would have an extremely difficult, if not impossible, time finding any regular or customary work. He does have minimal part-time employment as a minister at a small church, and it is commendable that he is doing so. **In my life experiences as an attorney practicing workers' compensation law for both employees and employers and again as a workers' compensation judge, I made and make the determination that Mr. Adkisson is an honest and God-fearing individual, and that he told the truth as he saw it.**

"'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).

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.

As noted in the original Opinion and Order, it is uncontradicted that Mr. Adkisson works part-time as a pastor for a small rural church, for which he earns $100.00 [sic] per month. In *Gunderson v. Ashland*, 701 S.W.2d 135 (Ky. 1985), the Kentucky Supreme Court was confronted with a case where the plaintiff was awarded total disability benefits even though he returned to

work for the police department as a dispatcher. It was clear that Mr. Gunderson could not return to full-time duty as a police officer. Relying upon *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968), another landmark decision, the Supreme Court emphasized that the essence of the test is the probable dependability with which the plaintiff can sell his services in a competitive labor market, undistorted by such factors as sympathy of a particular employer. The Supreme Court reinstated the award to the plaintiff for total occupational disability. I make the determination that the *Gunderson* case is definitely pertinent in reaching the decision of permanent total disability in the Adkisson case, even though Mr. Adkisson is working part-time as a minister and earning very minimal compensation.

The defendant also attempts to reargue the basis for the award to the plaintiff for permanent total disability and requests additional findings of fact. Mr. Adkisson stated that he worked for the defendant for 13 years and that he experienced back and neck pain over the last 8 or 10 years on the job with the defendant. He testified that he also experienced wrist problems while working for the defendant. At the most recent Hearing, Mr. Adkisson stated that his present symptoms include painful carpal tunnel symptoms, low back pain, pain in both knees, pain in his right shoulder, pain in his right ankle, and pain in his neck. In his most recent report on January 19, 2015, Dr. Hoskins assessed the plaintiff has[sic] having a 37% permanent impairment to the body as a whole under the AMA Guides, Fifth Edition, of which 13% permanent impairment was for his right upper

extremity injuries, of which 10% permanent impairment was for his left upper extremity injuries, of which 10% permanent impairment was for his lumbar spine injuries, of which 7% permanent impairment was for his cervical spine injuries and of which 2% permanent impairment was for his knee injuries. The permanent total award to Mr. Adkisson is for a combination of all of the above-stated cumulative trauma injuries.

The defendant also attempts to reargue the evidence from Dr. Vaughan and Dr. Crystal. As noted hereinabove, I carefully reviewed and considered the report from Dr. Vaughan and the report from Dr. Crystal and compared and contrasted their evidence with that from Dr. Hoskins. Dr. Vaughan evaluated Mr. Adkisson and stated that the plaintiff had normal findings on physical examination of his neck and low back and also full strength in both his upper and lower extremities. Dr. Vaughan stated that the plaintiff would have a 0% impairment to his cervical spine and a 0% impairment to the lumbar spine. Dr. Vaughan opined that the plaintiff did not sustain any injuries to his low back or neck due to his work for the defendant. I carefully compared and contrasted the evidence from Dr. Vaughan with that from Dr. Hoskins. I found Dr. Hoskins to be more persuasive, compelling and reliable in his presentation of medical evidence. Dr. Crystal performed a vocational evaluation of the plaintiff. Dr. Crystal stated that the plaintiff is not totally disabled. Dr. Crystal concluded that the plaintiff has the physical capacity to perform a wide range of jobs in the competitive labor market. I made and again make the determination that the evidence from

> Dr. Crystal did not match the credibility shown in the plaintiff's sworn lay testimony and the persuasive, compelling and reliable vocational evidence from Mr. Ellis, who opined 100% disability.
> (Emphasis added)

On appeal, Adkisson challenges the ALJ's determination regarding the appropriate period of TTD benefits, the analysis in awarding PTD benefits, and apportionment. We first note, as the claimant in a workers' compensation proceeding, Adkisson had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Adkisson was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Sequoia argues the ALJ erred in finding it solely liable for the payment of income and medical benefits. This issue was recently addressed by the Kentucky Supreme

Court in Hale v. CDR Operations, Inc., 474 S.W.3d 129 (Ky. 2015). There, the Court found the employer responsible for the entirety of the award, stating as follows:

> Since the 1996 amendments, what was once the Special Fund's liability has shifted back to the employer. "[T]he legislature's decision to abolish Special Fund apportionment with regard to traumatic injury claims had no effect on the longstanding principle that a harmful change to a worker's body that is caused by work is an "injury" for the purposes of Chapter 342." *Com., Transp. Cabinet v. Guffey,* 42 S.W.3d 618, 621 (Ky.2001). "[D]isability which results from the arousal of a prior, dormant condition by a work-related injury remains compensable under the 1996 Act...." *McNutt Constr./First Gen. Servs. v. Scott,* 40 S.W.3d 854, 859 (Ky.2001). "Long ago, we determined that to the extent that a dormant degenerative condition, itself, is proximately caused by work, the condition is an injury. *See Haycraft v. Corhart Refractories,* Ky., 544 S.W.2d 222, 225 (1976). That principle remains viable under the 1996 amendments." *Hill v. Sextet Min. Corp.,* 65 S.W.3d 503, 508 (Ky. 2001).
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> Resurrecting the apportionment scheme of *Southern Kentucky Concrete* would in essence create a "lesser" class of claimants. In hearing loss and occupational disease claims—which are quite similar in nature to cumulative trauma because they occur gradually over time—the employer at the time of the last injurious or hazardous exposure is liable. The employee is entitled to the same amount of compensation whether he worked for one

> employer or many. An employee who sustains a harmful change in his human organism due to cumulative trauma over many years working for the same employer is entitled to compensation to the full extent of his resultant disability. But, someone like Hale would not be fully compensated, simply because he worked for multiple employers. We can discern no basis for such a distinction. "Although both the employee and the employer have rights under the [Workers' Compensation] Act, the primary purpose of the law is to aid injured ... workers." *Zurich Am. Ins. Co. v. Brierly,* 936 S.W.2d 561, 563 (Ky. 1996). Nothing in KRS Chapter 342 limits the liability of the employer, in whose employ the date of manifestation occurred, to the percentage of the claimant's work-life spent there. *Southern Kentucky Concrete* has no application under the current statutory scheme.

Id. at 137-138.

Based upon this holding, the ALJ did not err in apportioning all liability to Sequoia, Adkisson's last employer where he worked for over thirteen years. Likewise, based upon the line of cases beginning with Haycraft v. Corhart Refractories, 544 S.W.2d 222, 225 (Ky. 1976), we find the ALJ did not err in determining Adkisson sustained cumulative trauma injuries to multiple parts of his body while working for Sequoia for which it is solely responsible. The finding of injury is supported by the reports and deposition of Dr. Hoskins, as well as the

findings by Drs. Zerga, Snider and Bean. Therefore, the ALJ's determination Adkisson sustained work-related cumulative trauma injuries will not be disturbed.

An ALJ is afforded significant latitude in reaching a determination. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact, and he is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

However, such discretion is not unfettered. In reaching a determination, the ALJ must properly apply the law, provide findings sufficient to support his finding, and inform the parties of the basis for the decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v.

Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Here, the ALJ failed to perform the appropriate analysis, supported by the evidence, in determining the period of TTD benefits from May 15, 2013 through December 2, 2013. TTD is defined as, "the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment". KRS 342.0011(11)(a). This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise,

19 S.W.3d 657, 659 (Ky. 2000), the Court further explained, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court stated as follows:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement **and** not have improved enough to return to work.
>
> . . . .
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment'

> was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured. (Emphasis added)

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment.
>
> . . . .
>
> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

The ALJ's determination Adkisson was entitled to TTD benefits from May 15, 2013 to December 2, 2013, is deficient. The ALJ failed to provide any analysis, or cite to any evidence supporting the award of TTD benefits during this period. The only significance afforded to May 15, 2013 is that was the date Adkisson was laid off. Adkisson

continued to work every day until he was laid off, and there is no documentation which appears to support his inability to work thereafter until he was evaluated by Dr. Hoskins. It is noted Adkisson first sought treatment for his work injuries in August 2013 when he saw Dr. Morgan, the chiropractor. The record does not appear to contain any documentation from Dr. Morgan supporting a period of TTD benefits. The first physician to address restrictions relating to the work injuries was Dr. Hoskins' December 2, 2013 report.

Despite the ALJ's statement in the June 15, 2015 order on reconsideration, we note Sequoia is not estopped or precluded from arguing the correct period of entitlement to TTD benefits. The ALJ incorrectly stated Sequoia voluntarily paid TTD benefits. Those benefits were actually paid pursuant to the interlocutory decision. Even if paid voluntarily, Sequoia is not precluded from raising the argument which was properly preserved. Such estoppel or preclusion would only serve to discourage an employer from voluntarily paying benefits which would be in contravention of the Kentucky Workers' Compensation Act.

We therefore vacate the ALJ's award of TTD benefits, and remand for a determination based upon the

evidence, which is supported by sufficient findings of fact.

We also vacate the ALJ's award of PTD benefits. Permanent total disability is defined 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). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Department Store v. Hamilton, supra, in determining whether a claimant is permanently and totally disabled:

> 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. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work

> dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

Here, the ALJ did not engage in the appropriate analysis of the factors set forth in Ira A. Watson Department Store v. Hamilton, supra. In finding Adkisson permanently totally disabled, the ALJ merely stated as follows:

> In this case, I considered the serious nature of the plaintiff's work-related injuries, as documented by Dr. Hoskins, his high school education many years ago, and his credible and convincing lay testimony, as covered in his hearing testimony. Based upon all of the above factors, I reach the legal conclusion that Mr. Adkisson is permanently and totally disabled, beginning on January 19, 2015 when he reached maximum medical improvement as per Dr. Hoskins' persuasive, compelling and reliable medical evidence.

This conclusory statement falls well short of the analysis required in Ira A. Watson Department Store v. Hamilton, supra, or the factors set forth in City of Ashalnd v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015). The ALJ is required to make specific findings regarding Adkisson's post-injury physical, emotional, intellectual,

and vocational status and how those factors interact. The ALJ failed to appropriately discuss and make findings pursuant to those factors, and therefore, his determination is deficient.

On remand, the ALJ is directed to make a determination of entitlement to any permanent disability benefits based upon the evidence. The ALJ must set forth an appropriate analysis and discussion of the evidence supporting his determination. The ALJ is not precluded from awarding permanent partial disability benefits, or PTD benefits which he deems appropriate based upon the evidence. In reaching his decision, the ALJ is not constrained from consideration of any particular portion of the evidence, and may consider the entire record. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra. However, any determination must be supported by the appropriate analysis and findings.

Accordingly, the May 14, 2015 and the June 15, 2015 and March 3, 2015 orders on petitions for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for additional

determinations and a decision in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

RECHTER, Member. I concur in the majority opinion, but dissent from the portion of the opinion determining the ALJ's analysis of permanent total disability is insufficient. I believe the ALJ's analysis is sufficient and adequately apprises the parties of the basis of his decision.

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