OPINION ENTERED: February 15, 2013

CLAIM NO. 201200352

W.T. YOUNG STORAGE PETITIONER

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

JOHN MORRISON
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. W.T. Young Storage ("W.T. Young") seeks review of the September 12, 2012, opinion and order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), finding John Morrison ("Morrison") sustained a work-related injury on April 24, 2011, and is totally occupationally disabled yet awarding permanent partial

disability ("PPD") benefits. W.T. Young also appeals from the October 17, 2012, opinion and order on reconsideration.[1]

On appeal, W.T. Young contends substantial evidence does not support a finding Morrison sustained a compensable injury, and the ALJ erred as a matter of law in so finding. Thus, the decision must be reversed and the claim dismissed with prejudice.

Morrison testified by deposition dated May 30, 2012, and at the August 29, 2012, hearing. At his deposition, Morrison testified that on April 24, 2011, when he bent over to "inspect tileage," his back went out and he experienced immediate low back pain. He notified his supervisor, left work early, and sought treatment at Medworks Clinic, a division of St. Joseph Hospital. Morrison acknowledged he sustained a previous work-related lower back injury in October 2009 when he picked up a propane tank and strained his back. He believes he missed approximately a half day of work after the injury and returned to his regular job. He was treated by Dr. Harry Lockstadt and Dr. William J. Lester for the 2009 injury.

[1]Although Morrison filed a notice of cross-appeal, he later filed a motion to dismiss his cross-appeal. By order dated January 16, 2013, Morrison's motion was granted and his cross-appeal was dismissed.

Morrison testified he also sustained a work injury to his lower back while working for Con Robinson Construction in 1995 which led to Dr. Henry Tutt performing surgery that same year.[2] As a result, he filed a workers' compensation claim. He could not recall whether Dr. Tutt imposed any permanent restrictions. After the 1995 surgery, Morrison continued to take pain medication. Morrison testified he did not return to work at Con Robinson but held temporary jobs until he went to work at W.T. Young.

Morrison testified he has also undergone surgery on both shoulders and his right knee. He served in the Army from 1983 to 1986 during which time he injured his knee. In 1988, Dr. Richard Mortara performed surgery on his lower back as a result of a work injury that same year. Morrison testified as a result of that injury he filed a workers' compensation claim but does not believe he received any type of benefits.

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[2]Exhibit C to Morrison's hearing testimony is the December 19, 1995, opinion, order, and award in Claim Nos. 95-03316 and 90-46006 styled John Morrison v. Con Robinson Contracting, Inc. and Special Fund. In that opinion the ALJ determined Morrison sustained a January 16, 1995, low back injury resulting in an L5-S1 herniation. Further, due to his back condition, ALJ Lloyd Edens ("ALJ Edens") determined Morrison had a 28% permanent partial occupational disability. The ALJ determined 7% was due to a pre-existing active condition and the remaining 21% pursuant to the stipulation of the parties was apportioned 50% to the injury and 50% to the arousal at that time of a dormant condition into disabling reality.

Morrison testified he worked for W.T. Young from 1996 to 2011. Aside from the 2009 and 2011 accidents, Morrison experienced no other work accidents while working for W.T. Young. He acknowledged at the time of his April 24, 2011, injury he was taking Lortab 10. Morrison has not returned to work since the April 24, 2011, injury. He testified Dr. Harry Lockstadt has recommended back surgery.

With respect to the symptoms he experienced after the 2009 injury, Morrison testified as follows:

> Q: Following – I've just got a couple more questions for you, and then I'll go ahead and start to wrap this up. Following the 2009 injury to your low back, to the best of your recollection, were you ever completely free of symptoms for your low back condition?
>
> A: No. It depends on what you mean by symptoms though.
>
> Q: Pain or numbness or tingling or discomfort or tightness.
>
> A: Not all that by no means. Some pain.

At the hearing, Morrison testified he continues to have low back problems and cannot perform the work he performed at the time of the April 2011 injury. Likewise, he does not believe he can be gainfully employed because of his back problems. Regarding his ability to perform his work duties after the 2009 injury, Morrison explained as follows:

> Q: Then did you resume your full-time duties thereafter?
>
> A: Yes, sir.
>
> Q: And were you doing your full-time duties at the time of the April 24th, 2011 incident?
>
> A: Yes, sir. Well, training. It was part of my duties as well.
>
> Q: You trained people?
>
> A: Yes, sir.
>
> Q: Did you like your work there?
>
> A: Yes, sir. I liked being the best.
>
> Q: What do you mean by that?
>
> A: I just out work everybody and be [sic] the top dog. That was – that's my – what I do.
>
> Q: Do they keep records of your performance?
>
> A: They do.
>
> Q: And how will they do that?
>
> A: It's quarterly bonus pay and they judge you by your speed, accuracy, cleanliness. Those – that's about it. There's one other thing, I think. And I just like to be at the top of the heap when it comes to those issues.

At the hearing, W.T. Young introduced numerous exhibits including St. Joseph Hospital's March 22, 1995, operative note concerning surgery performed by Dr. Tutt on that same date. That note reflects Morrison was diagnosed

with lumbar spinal stenosis at L5-S1 and lumbar disc protrusion at L5-S1. The surgery performed is as follows:

> Reopening of laminotomy, L5-S1; bilateral mesial facetectomy, L5-S1; bilateral radical discectomy, L5-S1; with decompression of S1 nerve roots and caude equine; neurolysis left S1 nerve root.

Also introduced as exhibits at the hearing were the following: Dr. Mortara's May 24, 1988, surgical note reflecting a diagnosis of "herniated disc, L5-S1 left" and a "microdiscectomy, L5-S1 left" was performed; Good Samaritan Hospital's record relating to Morrison's 1988 injury; two handwritten medical records dated April 25, 1991, and October 27, 1992, relating to Morrison's low back symptoms and prior medical history; and a November 22, 2010, St. Joseph Hospital emergency department note indicating Morrison was seen at the emergency room complaining of low back pain which arose while he was moving his motorcycle the day before. In addition, Dr. Lester's March 25, 2011, note was introduced which reflects on that date Morrison was seen by Dr. Lester and complained of the following symptoms:

> Back has worsened. Weakness across lower back. Also c/o numbness in both legs. Rt. Thigh pain with numbness and burning in Rt hip (front) Rt shoulder pain. Sharp pain in Rt hip; shortly. (give out)

A patient update form completed by Morrison on March 25, 2011, was attached to Dr. Lester's note which indicates changes in his health history since his last visit of "worsening of Pain low back, numbness in both legs Right thigh Painful/numb, burning in Right front hip area."

Finally, Dr. Mary Lloyd Ireland's July 4, 2011, note was introduced which reflects Morrison's right leg "is weak because of sciatic nerve problem and he tripped hitting directly on his shoulder" and caught himself with his arm forward flexed. Morrison said his pain then was 10 and now is two. Dr. Ireland noted Morrison works manual labor and has been able to continue to perform "that and work a forklift." Her diagnosis and plan related solely to the shoulder and not to Morrison's leg or back problems.

Morrison introduced the office notes dated October 13, 2011, January 16, 2012, and March 12, 2012, of Dr. Lockstadt with Bluegrass Orthopaedics & Handcare. Morrison also introduced the independent medical evaluation ("IME") report of Dr. Frank Burke.

W.T. Young introduced the July 6, 2011, note of Dr. Franzen generated as a result of an initial evaluation, and both parties introduced Dr. Franzen's August 10, 2011,

office note. W.T. Young also introduced Dr. Burke's July 19, 2012, deposition.

W.T. Young introduced two reports of Dr. J. Rick Lyon, an orthopedic surgeon. In the reports, Dr. Lyon summarized the injury reports of W.T. Young, the reports of various diagnostic tests, and the medical records of Drs. Lester, and other physicians. The reports of Dr. Lester relate to his treatment of Morrison's low back and span the period from 2005 through 2012.

After discussing his review of the medical records and his findings upon examination, Dr. Lyon concluded Morrison's radicular pain complaints pre-existed the alleged April 2011 work injury and were unrelated. It was his opinion Morrison had gradual development of L4-5 disc disease likely as a result of the previous surgical procedures at L5-S1. He noted it was well documented the level above and below an operative disc are at risk for degeneration over time. Dr. Lyon noted if Morrison had been given an impairment rating prior to his alleged injury, he would have been categorized as a DRE Category III according to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He believed Morrison remains a

DRE Category III and his impairment would remain unchanged as a result of the alleged work-related injury.

Relying upon Morrison's testimony, the medical records of Dr. Lockstadt, and the IME report and deposition of Dr. Burke, the ALJ determined Morrison sustained a work-related injury on April 25, 2011. Based on this same lay and medical evidence, the ALJ found Morrison's work-related trauma of April 24, 2011, caused:

> A dormant degenerative condition of his lumbar spine to become disabling and to result in a functional impairment so that the trauma was the proximate cause of the harmful change.

In determining Morrison was permanently totally occupationally disabled, the ALJ entered the following findings of facts and conclusions of law:

> 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). In the present case the ALJ finds most persuasive the opinion of Dr. Burke. I therefore find that the plaintiff sustained a 37% whole person impairment.
>
> "'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 the present case, I considered the severity of the plaintiff's injuries, his age, his work history, his sworn testimony and the specific opinions of Dr. Lockstadt and Dr. Burke that he is disabled for gainful employment. Based on all of those factors, I make the factual determination that Mr. Morrison cannot find work consistently under regular circumstances and work dependably. I, therefore, find that he is permanently and totally disabled.

Concerning the existence of a pre-existing active disability and the award of income benefits, the ALJ entered the following findings of fact and conclusions of law:

> As noted above, the plaintiff filed a previous workers' compensation claim for a January 16, 1995 work-related back injury. In Claim Nos. 1995-03316 and 1990-46006, John Morrison v. Con Robinson Contracting, Inc. and Special Fund, Judge Edens rendered an Opinion, Order and Award on December 19, 1995 in which he found that the plaintiff suffered a 28% permanent partial occupational disability as a result of his back condition and awarded Mr. Morrison compensation benefits.
>
> In light of the plaintiff's 1995 award deciding that he had a 28% permanent partial disability, I make the determination that said 28% pre-existing active occupational disability must be subtracted from his permanent total disability award, thereby reducing plaintiff's occupational disability award to 72%. *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky.2003) and *Tudor v. Industrial Mold & Machine*, 2012 WL 3632450 (Ky.2012).
>
> KRS 342.730(1)(d) states that if a permanent disability rating is greater than 50%, the compensable permanent partial disability period shall be 520 weeks from the date the disability exceeding 50% arises, which in this case was April 24, 2011.

W.T. Young filed a petition for reconsideration making many of the same arguments it now makes on appeal.

Morrison filed a petition for reconsideration asserting since the ALJ found he was permanently totally disabled, there should not have been a carve out and the award of benefits should run until his normal retirement date. Thus, he asserted the award should be corrected and he should be paid permanent total disability benefits based on 72% beginning April 24, 2011, until Morrison's regular retirement date.

In overruling both petitions for reconsideration, the ALJ reaffirmed his opinion and order stating he had previously comprehensively reviewed the evidence and ruled upon the issues raised by the parties.

On appeal, W.T. Young maintains a finding of a compensable injury is not supported by substantial evidence, and the ALJ erroneously relied upon the testimony of Dr. Burke, Dr. Lockstadt, and Morrison. It argues Dr. Burke did not have an adequate medical history and contradicted himself. It contends Dr. Burke admitted he did not review any of the MRI films or medical imagery and the Veteran's Administration ("VA") records and he was not aware Morrison had surgery at the L4-5 level. Further, Morrison did not give Dr. Burke a history of the April 25,

2011, low back injury, and Dr. Burke did not have any records of Morrison's bilateral shoulder condition. It also notes Morrison's original injury in 2009 did not resolve. W.T. Young maintains Dr. Burke testified his impairment rating was based upon a range of motion model but he did not have any range of motion studies prior to the alleged 2011 injury. It maintains Dr. Burke admitted that without the prior range of motion studies, it was impossible "to apportion any sort of loss of range of motion to the 2011 and pre-2011 events." Therefore, it argues Dr. Burke's report and testimony are not credible and cannot be considered substantial evidence pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004).

Likewise, W.T. Young argues Dr. Lockstadt never issued a causation opinion, and there is nothing in his records evidencing he was aware of an April 25, 2011, injury as his treatment records following that injury do not reference or mention the April 25, 2011, injury. Further, Dr. Lockstadt's records do not indicate he was aware of any of Morrison's prior low back surgeries or treatment. It maintains Morrison suffered his first back injury in the Army in 1986 and received an award based upon a 28% impairment rating for a 1990 injury. Further,

Morrison underwent two previous spinal surgeries "at the same level in which the current injury is alleged to have occurred." Therefore, W.T. Young argues there is nothing to indicate Dr. Lockstadt had "any substantive information regarding the injuries, events, surgeries, or prior treatment" and pursuant to Cepero, supra, his opinions cannot constitute substantial evidence on the issue of causation.

W.T. Young also asserts Morrison did not mention his injury in the Army or his prior surgery during his deposition. It also maintains he could not recall the work injury he had in 1988 and was unable to recall whether he received medical benefits following the 1995 award.

Next, W.T. Young argues the ALJ's finding of a compensable injury is an error of law. W.T. Young repeats many of the same arguments in its previous argument. It asserts that under pressure from Morrison's attorney, Dr. Burke "finally ascribed 50% of the impairment to conditions existing before the alleged April 25, 2011, injury" and later reduced the impairment rating to 23% ascribing half of that to the alleged April 25, 2011, injury.

W.T. Young contends the ALJ erred by finding Morrison sustained a 37% whole person impairment because Dr. Burke assigned the 37% impairment rating to the 2009

injury and assigned either an 18.5% or 12.5% impairment rating to the alleged April 25, 2011, injury. Thus, the highest possible rating the ALJ "could have used for a finding of PPD benefits was 18.5%." It argues the award of income benefits based on a 28% whole person impairment rating in 1995 is *res judicata*. W.T. Young asserts subtracting Morrison's prior impairment rating of 28% from his highest possible post-April 25, 2011, impairment rating results in a negative value. Consequently, it posits Morrison is not entitled to additional compensation. It also argues Morrison cannot be found to be permanently totally disabled from an injury which did not increase his impairment. Therefore, reversal and dismissal is required.

Morrison, as the claimant in a workers' compensation proceeding, 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 Morrison was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of

substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find no merit in W.T. Young's assertion the ALJ erroneously relied upon Morrison's testimony, Dr. Burke's report and testimony, and Dr. Lockstadt's records.

While Dr. Burke admitted he did not have the records of Dr. Tutt, Dr. Mortara, Dr. Lester, and the VA, we believe he had sufficient information regarding Morrison's medical history to form an opinion Morrison sustained a work-related injury on April 24, 2011. Contrary to W.T. Young's assertion, the record does not conclusively establish Morrison underwent surgery at the L4-5 level. Rather, the medical records introduced at the

hearing by W.T. Young establish the previous surgeries were performed at the L5-S1 level. This is consistent with Dr. Burke's history.

Dr. Burke testified he reviewed the records of Drs. Lockstadt and Franzen which provided him with Morrison's range of motion and mobility after the 2009 injury through 2012.

Although the VA records reflect Morrison experienced lower back problems in 1988, and not 1986, there is little discussion regarding the severity and permanence of his lower back problems. Thus, the failure of Drs. Lockstadt and Burke to obtain the records is not as significant as W.T. Young contends. Further, we find no significance in the fact Dr. Burke did not have records pertaining to Morrison's bilateral shoulder condition as all the medical opinions were confined to the nature and cause of Morrison's lower back condition and its disabling effects.

The fact Dr. Burke did not reference the April 24, 2011, injury in his report does not vitiate the value of his opinions. Although Dr. Burke testified Morrison did not provide him with a history of an April 24, 2011, injury, he also testified he was aware of the incident where Morrison "was bending over and picking up something."

Dr. Burke's handwritten notes introduced by W.T. Young contain a notation of "bending over inspecting a pallet acute worsening of back pain" the day before his shoulder surgery was planned in April 2011. He also noted Morrison had not been able to return to work since. Further, Dr. Burke's report references the two previous surgeries at L5-S1 and states on each occasion Morrison had subsequently returned to work. He noted Morrison developed back pain "for which he was followed" by Dr. Lester and discussed Dr. Lester's diagnosis and recommended treatment.

Similarly, Dr. Burke testified he knew Morrison had been treated for low back problems since the 1980s. He testified to the significance of the MRI reports of 2008, 2009, and 2011. Dr. Burke also discussed the nature and significance of the 2009 injury. As noted by Dr. Burke, there is no dispute Morrison returned to work after the 2009 injury without restrictions and missed no work. Like Dr. Lockstadt, Dr. Burke agreed a comparison of the 2009 and 2011 MRIs revealed "a distinct increase of almost 100% of as far as the abnormalities seen on the MRI." Dr. Burke apportioned the 37% impairment he assessed to the injury at the L5-S1 level, the 2009 injury, and the 2011 injury.

Although Dr. Burke's testimony is somewhat confusing regarding the impairment ratings attributable to

the various work-related injuries, we believe his testimony is sufficiently supported by Morrison's medical history and the medical records. Thus, his testimony and report constitute substantial evidence supporting the ALJ's determination Morrison sustained an April 24, 2011, work injury.

In the same vein, although Dr. Lockstadt does not specifically mention an April 24, 2011, injury, a fair interpretation of his January 16, 2012, office note is that Dr. Lockstadt was aware Morrison sustained a work-related injury in 2011. Dr. Lockstadt's reference to the MRI studies performed in 2009 and 2011 and the difference in what the two revealed permitted the ALJ to conclude Dr. Lockstadt was aware of the April 24, 2011, work injury. Dr. Burke's report reveals the 2011 MRI was performed on August 8, 2011, well after the alleged injury in April. Dr. Lockstadt observed the 2011 MRI reflects a 2 mm increase in the herniation at the L4-5 level. In his January 16, 2012, office note, Dr. Lockstadt observed that in 2009 the herniated disc was very small, but in 2011 the MRI revealed a progression of the L4-5 herniation with the disc pressing against the nerve root irritating the L5 nerve root. Consequently, the ALJ could infer from the January 2012 note that Dr. Lockstadt was highlighting the

additional damage to the disc caused by the 2011 injury. Therefore, the failure of Dr. Lockstadt to specifically mention the April 24, 2011, injury does not disqualify his records as not credible or substantial.

Dr. Lockstadt's records also establish he had a clear understanding of Morrison's back problems. Dr. Lockstadt's reports noted Morrison had seen Dr. Lester and undergone two back surgeries. He noted there was a new herniation at L4-5 and an old injury at L5-S1. He opined Morrison had an additional impairment as a result of the new injury at L4-5.

The fact that Drs. Burke and Lockstadt did not review certain medical records does not render their opinions less than substantial. Rather, this fact goes to the weight to be assigned to their opinions and testimony which is a question solely to be decided by the ALJ in his role as fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Here, relying upon the medical evidence from two physicians and Morrison's testimony, the ALJ determined he sustained an April 24, 2011, work injury.

We also conclude Cepero, supra, is inapplicable in the case *sub judice*. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but

affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice.*

Although not mentioned by W.T. Young, Dr. Franzen's July 6, 2011, report references the 2011 injury. Dr. Franzen stated Morrison "strained [his back] again lifting." He also noted the pain after this injury was similar to that reported in 2009 and early 2010. Dr. Franzen specifically noted that after the 2009 incident and before the event in 2011, Morrison finally got his back to his previous baseline. The July 6, 2011, report reflects Dr. Franzen's impression was that Morrison "was with chronic back pain status two previous operations," had a previous lifting injury, and "now a more recent one with a

further flare up of back pain." He stated this was a flare up of Morrison's chronic problem with a new injury. Dr. Franzen's records firmly establish the existence of a new injury in April 2011.

W.T. Young's assertion Morrison did not mention anything about his injury in the Army or his prior surgery during his deposition is inaccurate. Our review of Morrison's deposition testimony reflects he testified concerning the surgery performed by Dr. Mortara in 1988 and the surgery performed by Dr. Tutt in 1995. Morrison acknowledged he had sustained an injury in the Army, albeit to his left knee. There is no dispute Morrison worked for W.T. Young for fifteen years missing little or no work. Our review of his deposition and hearing testimony does not establish Morrison provided a substantially inaccurate or incomplete medical history. Thus, the ALJ was also permitted to rely upon Morrison's testimony in determining he sustained a work-related injury on April 24, 2011.

Since substantial evidence supports the ALJ's decision Morrison sustained a work-related injury we are not authorized to disturb his decision. Special Fund v. Francis, supra.

Finally, we find no merit in W.T. Young's assertion that since the impairment rating assessed by Dr.

Burke for the April 24, 2011, injury does not exceed the occupational disability determined by ALJ Edens, Morrison is not entitled to additional compensation. W.T. Young's argument on this issue completely misses the point. Prior to December 12, 1996, the determination of an occupational disability was not tied to an impairment rating. Rather, based on the medical evidence, the ALJ was permitted to determine the extent of a claimant's occupational disability without regard to an impairment rating. Significantly, ALJ Edens did not determine the 1995 injury resulted in a 28% whole person impairment; rather, he determined Morrison had a 28% occupational disability. Impairment and disability are not synonymous. Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky. 2003).

Without question, any claim for additional PPD benefits as a result of an injury occurring after December 12, 1996, is driven by the existence of an impairment rating pursuant to the AMA Guides. However, a claim of permanent total disability for an injury after December 12, 1996, is governed by the criteria contained in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Thus, in this case, a claim for additional PPD benefits resulting from a post-1996 injury did not require an impairment rating in excess of 28%. Rather, such a

claim would be based on the impairment rating attributable to a new injury. Similarly, a claim for permanent total disability ("PTD") benefits did not require the impairment rating for the subject injury to exceed 28%. Here, the only limiting factor in Morrison's claim for PTD benefits is ALJ Edens' previous determination of a 28% occupational disability. Since Morrison asserted he is totally occupationally disabled as required by Roberts Bros. Coal Co., supra, the ALJ was required to determine whether Morrison had a pre-existing occupational disability. We note the parties do not contest the ALJ's reliance on ALJ Edens' decision and his determination Morrison has a 28% pre-existing occupational disability.

That said, this Board is 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). Because the ALJ found Morrison to be permanently totally disabled but awarded PPD benefits, we, *sua sponte*, vacate the ALJ's award of income benefits. Although neither party raises an issue on appeal, KRS 342.285 clearly grants the Board the authority to decide questions of law regardless of whether either party raises the issue on appeal. It is the Board's province on appeal to assure orders and awards of an ALJ are in conformity

with Chapter 342. In this case, the ALJ's award is not in conformity with the law.

Since Morrison's prior lumbar low back injuries were work-related, the non-work-related exclusion articulated in KRS 342.730(1)(a) is not applicable in this case. Consequently, the ALJ was permitted to determine the April 24, 2011, injury along with previous work-related injuries resulted in Morrison being permanently totally disabled. Our review of W.T. Young's brief reveals it does not take issue with the determination Morrison is permanently totally disabled. Rather, both of W.T. Young's arguments are couched in terms of substantial evidence not supporting the ALJ's determination Morrison sustained a compensable injury on April 24, 2011. W.T. Young's only argument pertaining to permanent total disability is that Morrison cannot be found to be permanently totally disabled due to an injury resulting in an impairment rating less than 28%.

Drs. Burke and Lockstadt agree Morrison's back condition prohibits him from gainful employment. In addition, Morrison testified he could not perform gainful employment. As the ALJ relied upon the physician's opinions and Morrison's testimony, substantial evidence supports the ALJ's determination Morrison is permanently

occupationally disabled. Therefore, on remand the ALJ must award PTD benefits.

We note W.T. Young did not raise the issue of whether the 2009 injury resulted in a pre-existing occupational disability, in spite of the fact part of Dr. Burke's 37% impairment rating was apportioned to the 2009 injury. Although Morrison's claim for the 2009 injury is barred by the statute of limitations, that fact did not prohibit W.T. Young from asserting Morrison had a pre-existing occupational disability as a result of the 2009 injury for which there must be an exclusion in the award. However, since W.T. Young did not raise this issue, we decline to address it.

As it has not sought an exclusion or a carve out for the October 2009 injury, W.T. Young is liable for the percentage of Morrison's permanent total occupational disability attributable to the latest injury which is 72%.

Finally, although we have vacated the ALJ's award of PPD benefits, we also find the weekly amount awarded to be in error. The parties stipulated Morrison's average weekly wage at the time of the injury was $595.50. Sixty-six and two thirds of that amount is $397.00. Further, 72% of $397.00 is $285.84. Thus, Morrison should have been awarded $285.84 per week beginning on April 24, 2011, for

so long as he is totally permanently disabled subject to the provisions of KRS 342.730(4).

Accordingly, the decision of the ALJ determining Morrison sustained a work-related injury on April 24, 2011, and is permanently totally disabled is **AFFIRMED**. The ALJ's award of permanent partial disability benefits is **VACATED** and this matter is **REMANDED** for entry of an award of permanent total disability benefits in conformity with the views expressed herein.

ALL CONCUR.

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