Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 1, 2021

CLAIM NO. 201785945

AXELON — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

KELLY PORTER — RESPONDENT/ CROSS-PETITIONER

DR. JACQUEMIN/ORTHOCINCY and HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION AFFIRMING AND REMANDING AND ORDER

* * * * * *

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

ALVEY, Chairman. Axelon appeals and Kelly Porter ("Porter") cross-appeals from the April 21, 2021 Opinion and Award, the May 13, 2021 Amended Opinion and Award, and the June 2, 2021 Second Amended Opinion and Award rendered by Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"). The ALJ

determined Porter sustained a work-related low back injury on March 27, 2017 and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, Axelon argues the ALJ erred in finding the treatment rendered by Dr. John Jacquemin compensable since Porter failed to designate him as his Form 113 physician. It also argues Dr. Jacquemin failed to seek pre-authorization for the April 2019 lumbar surgery.

On cross-appeal, Porter argues the ALJ should have adopted the 28% impairment rating assessed by Dr. David Sower. Porter argues the ALJ erred in failing to find he is permanently and totally disabled, or in the alternative, in finding he retains to the physical capacity to return to his former job with Axelon. In the event the ALJ did not err in finding the three-multiplier inapplicable, Porter argues he is entitled to the two-multiplier pursuant to KRS 342.730(1)(c)2. Because substantial evidence supports the ALJ's determinations, we affirm. However, we remand the claim to the ALJ for an analysis addressing whether Porter is entitled to the two-multiplier pursuant to KRS 342.730(1)(c)2.

Porter filed a Form 101 alleging he injured his low back on March 27, 2017 as he was using a tool and twisted his body while standing. Subsequently, Axelon filed a medical fee dispute challenging Dr. Jacquemin's request for a lumbar discogram. It attached the December 12, 2018 utilization review denial by Dr. Brett Robin.

Porter began working for Axelon in January 2017, and he was assigned to GE Power working as a production technician/laborer at the time of his

work injury. Axelon filed a job description for a mechanical assembler, which required cleaning components and tanks; operating hand tools, overhead cranes, and forklifts; putting materials away; and performing daily housekeeping tasks. The description was silent as to physical requirements of the job.

Porter testified by deposition on June 22, 2018 and at the hearing held February 23, 2021. Porter was born in January 1959 and is a resident of Fort Mitchell, Kentucky. He is a high school graduate and completed some college courses. Porter's commercial driver's license lapsed in 2017. Porter worked as a truck driver from 1990 to 2015. He stopped truck driving due to several unrelated health conditions, including vertigo, obstructive sleep apnea, chronic kidney disease, and sarcoidosis. Thereafter, he worked as an assembly line worker and as a delivery driver. He began working for Axelon in January 2017. His job duties involved cleaning, washing, and sanding parts. Porter testified he was required to lift up to 50 pounds, and to sit, stand, bend, and stoop.

On March 27, 2017, Porter experienced right-sided low back pain as he was holding a 20 pound vibrating tool and twisting from side to side to clean a large part sitting on the floor. He initially treated at Saint Elizabeth Business Health, and he was then referred to OrthoCincy. There, Porter treated with Dr. Richard Hoblitzell, who provided conservative treatment and placed him on light duty. Dr. Hoblitzell referred Porter to Dr. Steven Wunder. Porter last treated with Dr. Hoblitzell on December 26, 2017, when he was placed at maximum medical improvement ("MMI") and released from his care despite ongoing symptoms and pain. Dr. Hoblitzell did not recommend surgery. Dr. Wunder administered an SI

injection, which did not alleviate his symptoms. Dr. Wunder did not recommend surgical intervention.

Porter worked light duty for Axelon from March 31, 2017 until July 17, 2017, earning the same rate of pay, when he voluntarily quit due to his back pain. Porter received TTD benefits from June 27, 2017 through December 26, 2017, when Dr. Hoblitzell placed him at MMI. Porter testified the worker's compensation insurer paid for his treatment with Drs. Hoblitzell and Wunder. However, he continued to experience symptoms and sought additional treatment on his own, which he submitted to his private insurance.

Porter treated with a pain management specialist, Dr. Pragya Gupta, from January 2018 through January 2019. Dr. Gupta administered lumbar transforaminal injections, prescribed Gabapentin, and recommended physical therapy. He submitted bills for his treatment with Dr. Gupta to Medicaid. He did not submit his bills to the workers' compensation insurer because he had previously been released. Porter then sought treatment with Dr. Jacquemin. Based upon the results of a discogram, Dr. Jacquemin performed a lumbar fusion on April 16, 2019. Porter last treated with Dr. Jacquemin in September 2019, when he was placed at MMI and released from treatment. Porter believed the surgery was successful, stating it resolved most of his pain. He continues to experience occasional back pain, and is unable to sit or stand for long periods of time.

Porter has not returned to any work since July 17, 2017. Porter testified he is unable to return to his job with Axelon based upon Dr. Gregory Nazar's restrictions. At the deposition, Porter testified he is unable to return to any

of his previous jobs due to his back condition and other unrelated heath conditions. At the hearing, Porter testified he does not believe he is physically capable of returning to any of his previous jobs considering only his back condition.

On cross-examination, Porter acknowledged he had first designated Dr. Hoblitzell and then Dr. Wunder as his Form 113 physician. Porter also acknowledged he did not seek pre-authorization for treatment with Dr. Gupta, nor did he complete another Form 113.

Tamara Wilson ("Wilson") testified at the hearing. Wilson is a claims adjuster for The Hartford and she was assigned to Porter's claim in January 2018. Wilson testified Porter completed a Form 113 designating Dr. Hoblitzell as his physician, and a second Form 113 designating Dr. Wunder as his physician. Wilson testified Dr. Hoblitzell referred Porter to Dr. Wunder for a second opinion, not for additional treatment. Wilson acknowledged Porter continued to have low back issues despite being released from Dr. Hoblitzell. Wilson did not receive documentation from Dr. Wunder referring Porter to another provider. She did not receive another Form 113 designating either Dr. Gupta or Dr. Jacquemin as Porter's physician. Likewise, Wilson did not receive a request for pre-authorization for the fusion surgery.

The parties filed the records of Dr. Hoblitzell, who treated Porter from May 23, 2017 through December 26, 2017. He interpreted a lumbar MRI as showing some degenerative changes and a small disc bulge at L4-5 with mild foraminal narrowing on the right. A June 29, 2017 EMG/NCV was normal. Dr. Hoblitzell diagnosed Porter with a lumbar strain and a disc bulge at L4-5. He treated

Porter conservatively with physical therapy, work conditioning, light duty restrictions, and medication. On July 5, 2017, Dr. Hoblitzell referred Porter for a second opinion at the Mayfield Clinic. Porter saw Dr. Wunder at the Mayfield Clinic on August 9, 2017. Dr. Wunder recommended a CT scan of the SI joint and a SI injection. Dr. Wunder diagnosed Porter with SI joint dysfunction and a lumbar sprain.

On December 26, 2017, Dr. Hoblitzell noted Porter completed work conditioning with no real progress and the injections from the Mayfield Clinic did not provide long term relief. His examination continued to show pain of the right iliolumbar region, and Porter continued to complain of tingling down his right L5 dermatome. Dr. Hoblitzell diagnosed a lumbar strain with a disc bulge at L4-5, and an apparent SI strain. Dr. Hoblitzell stated Porter is not a surgical candidate and felt he had attained MMI. He permanently restricted Porter from lifting over 10 pounds, pushing and pulling over 20 pounds, and walking or standing more than four hours a shift. He released Porter from his care and advised him to return on an as-needed basis. In a letter dated January 8, 2018, Dr. Hoblitzell opined Porter's diagnoses were due to the March 27, 2017 work injury. He assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). In a November 26, 2019 letter, Dr. Hoblitzell opined Porter's back problems are causally related to the work injury.

Porter returned to Dr. Wunder on February 28, 2018. He noted the CT scan was normal and Porter's symptoms returned following the previous SI

injection. Dr. Wunder diagnosed SI joint dysfunction and a lumbar sprain. He opined Porter is not a surgical candidate but ordered a repeat MRI.

Porter treated with Dr. Gupta at the Advanced Pain Treatment Center from March 2018 through August 2018. His diagnoses included a bulging lumbar disc, lumbar foraminal stenosis, lumbar radicular pain, and lumbosacral spondylosis without myelopathy. He prescribed Tramadol and Cymbalta, and administered several injections. He also ordered a repeat lumbar MRI, performed on May 25, 2018, which demonstrated broad based discogenic changes with right foraminal prominence without central canal stenosis; moderate right foraminal narrowing due to disc protrusion; and mild discogenic changes at L4-5.

Dr. Gupta prepared a Form 107 on March 6, 2019. He noted a discogram performed in January 2019 identified an intervertebral disc disruption at L4-5, for which Dr. Jacquemin recommended lumbar surgery. Dr. Gupta diagnosed Porter with an annular disc tear at L4-5, lumbar radicular pain, and lumbar discogenic pain syndrome due to the March 27, 2017 work event. He opined Porter had not attained MMI but assessed a 10% impairment pursuant to the 6th Edition of the AMA Guides. He assigned permanent restrictions and opined Porter does not have the physical capacity to return to his previous work.

Porter filed Dr. Jacquemin's records. The April 16, 2019 operative report reflects Dr. Jacquemin performed a L4-5 complete and radical discectomy with partial takedown of posterior longitudinal ligament and a L4-5 fusion. In a June 26, 2019 letter, Dr. Jacquemin noted Porter did well after the L4-5 fusion surgery. Dr. Jacquemin opined the work injury either caused the disc problem,

significantly aggravated it, or exacerbated it to the point he required the surgery. Therefore, he opined the surgery was causally related to the work injury. In a February 3, 2021 letter, Dr. Jacquemin opined the fusion surgery was reasonable and necessary. He further noted when he last saw Porter in September 2019, he reported a decrease of pain to a level 2 and was not taking any pain medication.

Axelon filed Dr. Thomas Bender's August 20, 2018 report. Dr. Bender examined Porter on August 15, 2018. He noted Porter is symptomatic from spinal arthritis involving the lumbar facets and sacroiliac joints. He opined Porter does not have symptomatic lumbar discopathy or neurological involvement to the right leg related to the March 27, 2017 work event. Dr. Bender agreed with Dr. Hoblitzell's diagnosis of a lumbar sprain/strain due to the March 27, 2017 work event from which he attained MMI in January 2018. Dr. Bender assessed a 0% impairment rating pursuant to the AMA Guides. He opined Porter does not require permanent restrictions, and he is physically capable of returning to his pre-injury work position.

Axelon filed Dr. Timothy Kriss' February 27, 2019 report. Dr. Kriss diagnosed inflammation of the right sacroiliac joint, and to a lesser degree the right L4/L5/S1 facet joints. He noted the SI and facet joints are closely located and can be clinically difficult to distinguish when they are chronically inflamed. He opined Porter's symptoms stem more from the right sacroiliac joint. He noted chronic inflammation of the right SI and lower lumbar facet joints is consistent with the March 27, 2017 mechanism of injury. Dr. Kriss assessed a 5% impairment rating pursuant to AMA Guides due to the work injury. He opined Porter reached MMI

on December 26, 2017. Dr. Kriss found no objective basis for assigning permanent restrictions. He noted Porter is physically capable of returning to work, including his previous job with Axelon. Dr. Kriss disagreed with Dr. Jacquemin's recommendation of a discography and proposed fusion surgery.

Porter filed Dr. Sower's January 24, 2020 report. Dr. Sower opined Porter sustained a work-related injury on March 27, 2017, which resulted in a disc herniation at L4-5 causing a significant right lower extremity radiculopathy and prevented Porter from returning to work. Dr. Sower assessed a 28% impairment rating pursuant to the AMA Guides. He opined Porter had reached MMI and is not unable to return to work in his prior capacity.

Dr. Kriss prepared a June 12, 2020 supplemental report after reviewing additional medical records. Dr. Kriss noted that after his previous evaluation, Porter underwent a L4-5 fusion and reported dramatic improvement in his low back and right leg symptoms. Despite the successful surgery, Porter had not returned to any work. Dr. Kriss stated that despite the successful fusion surgery, he still did not believe it was reasonable or necessary. Similarly, Dr. Kriss found the surgery was unrelated to the March 27, 2017 work event. Regardless, Dr. Kriss opined Porter attained MMI from the surgery on September 6, 2019. He assessed a 20% impairment rating pursuant to the AMA Guides, attributing 5% to the work injury and 15% to the non-work-related surgery. Dr. Kriss restricted Porter from lifting more than 30 pounds and advised he should avoid repetitive bending and twisting. Dr. Kriss opined Porter is unable to return to his former job duties with Axelon, but he can return to truck driving.

Porter filed Dr. Nazar's August 21, 2020 report. He noted the fusion surgery was successful in that Porter's right leg pain resolved, his low back pain was reduced, and he has some residual numbness and tingling his right foot. Dr. Nazar noted Porter decided not to return to work primarily due to his associated medical comorbidities, which include chronic kidney disease and sarcoidosis.

Dr. Nazar diagnosed a March 27, 2017 work-related injury resulting in L4-5 right-sided disc protrusion/herniation, producing lower back and right leg pain. This required surgical intervention, performed on April 17, 2019, and resulted in relief of Porter's symptomatology except for some residual numbness involving the dorsum of his foot. He opined the disc herniation/protrusion at L4-5 requiring surgery is related to the March 27, 2017 work event. Dr. Nazar explained Porter's low back injury was not easily identifiable on a simple MRI since it was done in the supine position. In this position, the disc pressure is low. However, Porter's symptoms primarily occurred when he was upright and active. Thus, foraminal disc protrusions of this type are difficult to identify as symptom producers.

Dr. Nazar assessed a 20% impairment rating pursuant to the AMA Guides, attributable to the work injury. He opined Porter attained MMI on April 17, 2020. Dr. Nazar opined the surgery is work-related, reasonable, and necessary. Dr. Nazar assigned permanent restrictions related to Porter's surgery and low back. He restricted Porter from repetitive bending, lifting, stooping or twisting of his back, from lifting over 20 pounds, and from pushing or pulling over 35 pounds. Dr. Nazar stated as follows regarding ability to return to his former job:

> The patient could return back to work as a production technician; however, his notable medical comorbidities

> prevent him from returning back to work at this time. The patient states, though, that he could go back to the type of work that he was doing if he did not have those associated medical comorbidities as being present.
> . . .
>
> Mr. Porter does have restrictions pertaining to his spinal fusion that are indicated above in the report. . . . I believe, though, that he could return to his pre-injury work according to his description. His medical comorbidities prevent him from doing such.

Axelon filed Dr. Ralph Crystal's July 24, 2018 vocational report. Dr. Crystal opined Porter is not disabled from employment and does not have a complete and permanent inability to perform any type of work due to injury.

Axelon filed two Form 113s. In the first, Dr. Hoblitzell was designated as Porter's physician on July 11, 2017. In the second, Dr. Wunder was designated as Porter's physician on February 23, 2018.

A Benefit Review Conference ("BRC") was held on February 9, 2021. The parties stipulated Porter allegedly sustained a work injury on March 27, 2017. Axelon paid TTD benefits from March 28, 2017 through March 30, 2017, and from June 27, 2017 through December 26, 2017. Axelon also paid medical expenses in the amount of $10,520.19. The parties identified the following contested issues: average weekly wage ("AWW"), ability to return to the type of work performed at the time of injury, benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, and TTD. The parties also identified, "constitutionality of KRS 342.730(4); MFD lumbar discogram, compensability outside treatment, compensability of medicals without preauthorization, permanency" as additional contested issues.

The ALJ rendered an opinion on April 21, 2021. He found Dr. Nazar's opinion most persuasive. He noted Dr. Nazar most adequately explained Porter had no pre-existing active or dormant condition, and he sustained a disc protrusion at L4-5 due to the work injury, which encroached into the neural foramen. The ALJ noted Dr. Nazar explained the supine positioning of a patient during an MRI can obscure the protrusion that causes pain when the patient is standing and moving around, but that the discogram revealed the protrusion more succinctly. The ALJ noted Dr. Nazar opined the fusion surgery directly resulted from the work-related disc protrusion, and he determined the lumbar discogram and fusion were reasonable, necessary, and compensable. Relying upon Dr. Nazar, the ALJ found Porter has a 20% impairment rating due to the March 27, 2017 work injury. The ALJ relied upon Dr. Nazar in concluding Porter "retains the ability to return to the same type of work. Specifically, Dr. Nazar concluded that Porter's restrictions would not prevent him from returning to the same type of work." The ALJ determined Porter's pre-injury AWW to be $580.80. The ALJ determined Axelon's arguments concerning pre-authorization inapplicable since 803 KRS 25:096 §11 applies post-award only and because medical expenses are not compensable until an award is entered. The ALJ found Porter reached MMI on September 6, 2019, and he is entitled to TTD benefits from March 27, 2017 through September 6, 2019. The ALJ awarded TTD benefits, PPD benefits, and medical benefits for Porter's low back injury.

Both parties filed Petitions for Reconsideration. Axelon requested additional findings of fact regarding Porter's failure to properly designate Dr.

Jacquemin as his 113 physician, and the compensability of the treatment rendered. Axelon also requested additional findings relating to the award of PPD benefits in the event the ALJ found the fusion surgery non-compensable due to Porter's failure to designate Dr. Jacquemin as his 113 physician. It also requested the ALJ to reconsider the award of TTD benefits. Porter argued the evidence compels a finding of permanent total disability, or in the alternative, that he is entitled to the three-multiplier. In the alternative, Porter argues he is entitled to the two-multiplier. Porter also argued the ALJ should have awarded PPD benefits based upon Dr. Sower's 28% impairment rating.

The ALJ entered an Amended Opinion and Award on May 13, 2021. This opinion is essentially identical to the April 21, 2021 opinion. However, he stated as follows, *verbatim*, regarding the three-multiplier and permanent total disability:

> The credible findings of Dr. Nazar also indicate that the Plaintiff retains the ability to return to the same type of work. Specifically, Dr. Nazar concluded that the Plaintiff's restrictions of no lifting over 20 pounds and no pulling or pushing over 30 pounds would not prevent him from returning to the same type of work and that any of the comorbidities that would prevent a return to work were no due to the work injury. The ALJ finds that per these credible findings, the issue of permanent total disability has been rendered **MOOT**.

Axelon filed a Petition for Reconsideration again requesting additional findings of fact pertaining to the effect of Porter's failure to properly designate Dr. Jacquemin as his 113 physician, pursuant to 803 KAR 25:096 §3, on the compensability of the treatment he rendered. Axelon also argued, "Should the fusion surgery be found non-compensable due to the Plaintiff's failure to properly

designate Dr. Jacquemin as a designated physician, the [Axelon] respectfully requests additional findings of fact and that the award of additional TTD benefits and PPD benefits based upon the 20% impairment rating be reconsidered." Porter filed a Petition for Reconsideration, incorporating the alleged errors by the ALJ contained in his first Petition for Reconsideration.

The ALJ rendered a second amended decision on June 2, 2021. The opinion is essentially identical to the April and May 2021 opinions, but containing the following additional findings of fact, *verbatim*, regarding the "Effect of Failure to Designate 113 Physician on the Compensability of Fusion Surgery."

> 27. 803 KAR 25:096, Section 3(1) provides in relevant part:
>
> > Except for emergency care, treatment for a work-related injury or occupational disease shall be rendered under the coordination of a single physician selected by the employee. The employee shall give notice to the medical payment obligor of the identity of the designated physician by tendering the completed Form 113, including a written acceptance by the designated physician, within ten (10) days after treatment is commenced by that physician.
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> 28. Per 803 KAR 25:096, Section 3(5), "The unreasonable failure of an employee to comply with the requirements of this section may suspend all benefits payable under KRS Chapter 342 until compliance by the employee and receipt of the Form 113 by the medical payment obligor has occurred."
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> 29. This Regulation clearly indicates that an unreasonable failure to submit a Form 113 "may suspend" benefits. The ALJ therefore retains discretion to determine whether a suspension would be

> appropriate. There is no language regarding a forfeiture of benefits.
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> 30. The Court of Appeals addressed this matter in Hitachi Automotive Systems Americas Inc. v. Coots, 2018 WL 5115663, finding that the Kentucky Workers' Compensation Board ("Board") appropriately found that the ALJ properly exercised his discretion to order a temporary suspension of benefits. A finding of non-compensability is therefore not contemplated in the Regulation and as such is impermissible.
>
> 31. The ALJ therefore finds that the remedy sought by the Defendant Employer, namely to find the fusion surgery non-compensable, is inappropriate and inapplicable. The ALJ further finds that medical benefits had been discontinued by the Defendant Employer as as such his failure to follow the letter of the applicable regulations may be excused. The Plaintiff shall therefore provide the required designation and the Defendant Employer shall thereafter resume benefits including payment for the disputed fusion surgery.

Neither party filed a petition for reconsideration from the second amended opinion.

On appeal, Axelon argues the ALJ erred in finding Dr. Jacquemin's treatment compensable since Porter did not designate him as his Form 113 physician. Axelon points out Porter only designated Drs. Hoblitzell and Wunder as his Form 113 physicians. Axelon argues Porter never obtained written consent from the insurer or the ALJ to select a third designated physician, nor did he make any effort to designate Dr. Jacquemin as his 113 physician. Therefore, pursuant to 803 KAR 25:096 §3(1) and (5) and §4, none of the treatment rendered by Dr. Jacquemin, including the discogram and lumbar fusion, is compensable. Axelon argues Porter's continued failure to comply with the regulation either permanently bars

compensability or suspends compensability until Porter complies with the regulation, or until he requests and receives written approval to select a third designated physician and submits a completed Form 113. Axelon asserts that assuming the ALJ's award constitutes "written consent of the [ALJ]" pursuant to 803 KAR 25:096 §4, then once Porter submits a new Form 113, "that treatment going forward would be compensable. . . However, any and all treatment undertaken by providers other than Dr. Hoblitzell or Dr. Wunder through the date of the ALJ's opinion and award is not compensable. . . ." Axelon also argues the ALJ erred in finding the treatment rendered by Dr. Jacquemin compensable since he never requested pre-authorization for the surgery. Finally, Axelon argues the ALJ erred in awarding medical benefits for treatment rendered by a non-designated physician who failed to seek pre-authorization for the surgery, and all TTD and PPD benefits flowing from this impermissible award of medical benefits must be reversed.

On cross-appeal, Porter argues the ALJ in failing to undergo the five-step analysis to determine whether he is permanently and totally disabled pursuant to City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). In the alternative, Porter argues the evidence compels the application of the three-multiplier based upon Dr. Nazar's restrictions and his testimony regarding the job requirements. In the alternative, Porter asserts the evidence compels the application of the two-multiplier since he returned to light duty between March 31, 2017 and July 11, 2017 at the same rate of pay but was unable "to even maintain this light duty work." Porter argues the ALJ erred in failing to adopt the 28% impairment rating assessed by Dr. Sower, since the clinical findings require a rating from DRE category V.

As the claimant in a workers' compensation proceeding, Porter had the burden of proving each of the essential elements of his claim, including entitlement to the three- multiplier pursuant to KRS 342.730(1)(c)1. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Porter was unsuccessful in his burden regarding the three-multiplier, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence

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

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

We find substantial evidence supports the ALJ's determination Porter retains the ability to return to the same type of work, and a contrary result is not compelled. KRS 342.730(1)(c)1 states as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

Dr. Nazar's opinion alone constitutes substantial evidence supporting the ALJ's determination. Dr. Nazar imposed restrictions of no lifting over 20 pounds and no pushing or pulling over 30 pounds due to the work-related back injury. However, Dr. Nazar specifically found Porter:

> …could return back to work as a production technician; however, his notable medical comorbidities prevent him from returning back to work at this time. The patient states, though, that he could go back to the type of work that he was doing if he did not have those associated medical comorbidities as being present.

Dr. Nazar noted Porter suffers from several unrelated health conditions, including vertigo, obstructive sleep apnea, chronic kidney disease, and sarcoidosis. The above constitutes substantial evidence upon which the ALJ could rely, and a contrary result is not compelled. The ALJ was not required to undergo an analysis regarding permanent total disability. Therefore, we affirm on this issue.

However, this Board remands the claim to the ALJ to address whether Porter is entitled to the two-multiplier pursuant to KRS 342.730(1)(c)2 and, if necessary, to amend the award of benefits accordingly. The ALJ did not address this issue in either of the opinions despite Porter arguing in his Petitions for Reconsideration the two-multiplier was compelled in the event the ALJ found the three-multiplier not applicable. KRS 342.730 (1)(c)2 states the following:

> 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

Pursuant to KRS 342.730(1)(c)2, in order to qualify for the two-multiplier, an employee must "return to work" at equal or greater wages than the pre-injury AWW and that work must cease in accordance with the standards set forth in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015). The ALJ determined Porter's pre-injury AWW was $580.80, a finding not challenged on

appeal. On remand, the ALJ is directed to determine whether the two-multiplier is applicable. Specifically, the ALJ is directed to determine whether there was a "return" to work and whether Porter returned to work at a weekly wage equal to or greater than the pre-injury AWW. We direct no particular result, and the ALJ may make any determination based upon the evidence.

Next, we find the 20% impairment rating assessed by Dr. Nazar, and relied upon by the ALJ, constitutes substantial evidence. The proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). However, the ALJ has discretion to choose the rating used as the basis for an award of permanent partial disability benefits. Pella Corp. v. Bernstein, 336 S.W.3d 451, 453 (Ky. 2011). Where opinions from medical experts conflict regarding the appropriate percentage, the ALJ, as fact-finder, must weigh the evidence and select the rating upon which permanent disability benefits, if any, will be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002).

Here, the ALJ was confronted with several opinions regarding the appropriate impairment rating. Dr. Sower assessed a 28% impairment rating, while Drs. Nazar and Kriss assessed 20% impairment ratings. Dr. Nazar determined Porter qualified for the DRE category IV and assessed a 20% impairment rating pursuant to the 5th Edition of the AMA Guides. No other physician of record opined Dr. Nazar's assessment of impairment was not assessed in conformity with the AMA Guides. Dr. Nazar's opinion constitutes substantial evidence supporting the ALJ's determination of Porter's impairment rating. Therefore, we affirm on this issue.

Next, we find the ALJ did not err in finding Dr. Jacquemin's treatment compensable despite the fact Porter did not designate him as the Form 113 physician. We first note it is unclear whether Axelon properly identified the failure to designate Dr. Jacquemin as a Form 113 physician as a contested issue at the BRC. "Only contested issues shall be the subject of further proceedings." 803 KAR 25:010 §(12). The parties identified multiple issues at the BRC, but not specifically Porter's failure to designate a Form 113 physician. Rather, they identified "compensability outside treatment" as one of the contested issues. Regardless and assuming "compensability of outside treatment" refers to treatment rendered by a non-designated Form 113 physician, we determine the ALJ did not err in finding the treatment rendered by Dr. Jacquemin is compensable. In relevant part, 803 KAR 25:096 § 3 provides:

> (1) Except for emergency care, treatment for a work-related injury or occupational disease shall be rendered under the coordination of a single physician selected by the employee. The employee shall give notice to the medical payment obligor of the identity of the designated physician by tendering the completed Form 113, including a written acceptance by the designated physician, within ten (10) days after treatment is commenced by that physician.
> ...
> (5) The unreasonable failure of an employee to comply with the requirements of this section may suspend all benefits payable under KRS Chapter 342 until compliance by the employee and receipt of the Form 113 by the medical payment obligor has occurred.

803 KAR 25:096 § 4(2) and (3) permits an employee to change a designated physician to a second designated physician. However, if an employee's two choices of designated physician have been exhausted, "he shall not, except as

required by medical emergency, make an additional selection of a physician without the written consent of the employer, its medical payment obligor, arbitrator, or the administrative law judge. This consent shall not be unreasonably withheld." 803 KAR 25:096 § 4(5). In Hitachi Automotive Systems Americas, Inc. v. Coots, 2018 WL 5115663 (Ky. App. October 19, 2018) (*unpublished*), the Court of Appeals stated as follows:

> Like the Board, we note that 803 KAR 25:096 § 3(5) provides only for a "suspension" of benefits "until compliance by the employee and receipt of the Form 113." Unlike KRS 342.205(3), the Regulation does not suggest that benefits are "not payable" during the period of noncompliance. To the contrary, the Regulation indicates that the suspension lasts only "until" the employee complies by submitting his Form 113. Moreover, the suspension is not mandatory. The Regulation provides that an unreasonable failure to submit a Form 113 "*may* suspend" benefits. This language suggests that the ALJ retains discretion to determine whether suspension is warranted. The Board determined that the ALJ appropriately exercised his discretion to order a suspension of benefits until such time as Coots filed a proper Form 113, and that according to the language of the Regulation, the suspension is temporary. We agree with the Board's interpretation of the Regulation.
>
> Slip Op. at 4.

The ALJ determined the remedy sought by Axelon, i.e., that the treatment rendered by Dr. Jacquemin during the time he had not been properly designated as the Form 113 physician be deemed non-compensable, is not available pursuant to the regulations and the holding in Hitachi Automotive Systems Americas, Inc. v. Coots, supra. The Court in Hitachi specifically rejected Axelon's argument for permanent suspension, noting the regulations do not suggest that the

benefits are not payable during the period of noncompliance. We agree with the ALJ and find the holding in Hitachi is persuasive. The regulations do not suggest benefits are permanently suspended or are not payable during a period of noncompliance. Furthermore, the ALJ further found Porter's failure to designate Dr. Jacquemin as his Form 113 physician was excused since his medical benefits had been discontinued. We find the ALJ appropriately considered the circumstances and determined the failure of Porter to designate Dr. Jacquemin as his Form 113 physician was excused. Porter testified that by the time he began treating with Dr. Gupta he believed he had been "released from Workers' Comp. That's the reason why I didn't submit it." He believed Axelon stopped paying TTD benefits and medical benefits in late 2017 or early 2018 even though he continued to experience pain and symptoms. Therefore, Porter testified he sought treatment on his own with Dr. Gupta, and then with Dr. Jacquemin. We find the ALJ did not err or abuse his discretion in determining Porter's treatment with Dr. Jacquemin is compensable.

In its responsive brief to Porter's cross-appeal, Axelon requested that "any/all allegations of ALJ error in Mr. Porter's brief be STRICKEN." It asserts Porter filed its Notice of Cross-Appeal incorrectly via the Kentucky Department of Workers' Claim Litigation Management System ("LMS"). It asserts Porter filed the document as a "Notice of Filing" in LMS rather than a "Notice of Cross-Appeal to the Board." It asserts Porter's filing in LMS is procedurally deficient and did not effectively transfer jurisdiction to this Board. Axelon cites to no authority for this argument. 803 KAR 25:010 §3 only requires all pleadings, notices, orders and other documents to be filed using LMS. Having reviewed the record, we conclude Porter

timely filed his Notice of Cross Appeal utilizing LMS. We additionally note Axelon never filed a motion requesting the relief sought, and therefore, Porter did not have the opportunity to respond. That said, **IT IS HEREBY ORDERED AND ADJUDGED** the request to strike Porter's cross-appeal is **DENIED**.

Accordingly, the April 21, 2021 Opinion and Award, the May 13, 2021 Amended Opinion and Award, and the June 2, 2021 Second Amended Opinion and Award by Hon. Jonathan Weatherby, Administrative Law Judge, are hereby **AFFIRMED**. The claim is **REMANDED** for an analysis of Porter's entitlement to the two-multiplier and entry of an amended opinion and, if appropriate, an amended order and award.

ALL CONCUR.

/s/ Michael W. Alvey
MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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