

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 18, 2022

CLAIM NO. 201875505

BRANHAM CORPORATION

PETITIONER

VS.

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

DANIEL DAVIS  
and HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Branham Corporation (“Branham”) seeks review of the September 10, 2021, Opinion, Order, and Award of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”) finding Daniel Davis (“Davis”) sustained work-related left carpal tunnel syndrome (“CTS”) and injuries to his shoulders and cervical region arising from a fall at work on June 25, 2018. The ALJ awarded temporary

total disability (“TTD”) benefits from September 19, 2018, through May 5, 2019, and from July 22, 2019, through October 22, 2019. The ALJ also awarded permanent partial disability (“PPD”) benefits from June 25, 2018, the date of injury, through February 12, 2020, to be suspended during any intervening periods of TTD benefits paid. Davis was awarded permanent total disability (“PTD”) benefits commencing on February 13, 2020.

On appeal, Branham argues the ALJ erroneously awarded PPD benefits. It also argues the ALJ failed to conduct the proper analysis in determining Davis is totally occupationally disabled.

### **BACKGROUND**

Davis’ Form 101 alleges on June 25, 2018, he sustained work-related injuries to his neck and shoulders when he stepped out of a trailer and fell. Davis also alleged he developed left CTS as a natural consequence of the injury.

Davis testified at a December 9, 2019, deposition. Davis was born May 16, 1963, is a high school graduate, and did not attend college. He studied carpentry while in high school. At the time of the deposition, he was working for Branham as a field technician (“field tech”) earning \$29.00 an hour. He was initially placed on light duty after the June 25, 2018, fall, but eventually returned to regular duty. At the time of his deposition, Davis was earning the same hourly rate he was earning at the time of injury, but he was not working the same number of hours. Davis’ regular hours were 7:00 a.m. to 3:30 p.m. Monday through Friday. However, he was sometimes called into work after 3:30 p.m. and on weekends.

Davis began working for Branham in September 2016. He previously worked for other companies as a foreman. He denied experiencing any prior work injuries, cervical problems, and problems with his shoulders, except for a 1984 left shoulder dislocation. He had never been diagnosed with left CTS prior to June 25, 2018.

Although he finished his shift on the day of the injury, Davis experienced immediate pain in his shoulders and between his shoulders and neck. After reporting the injury, he was referred to BaptistWorx. Davis continued to work regular duty and was later referred to Dr. Stacie Grossfeld. After obtaining an MRI, Dr. Grossfeld diagnosed a rotator cuff tear in the right shoulder, and on September 19, 2018, she performed surgery on Davis' right shoulder.<sup>1</sup> Davis testified the surgery provided some relief. After obtaining an MRI of the left shoulder, Dr. Grossfeld performed left shoulder surgery on January 10, 2019.<sup>2</sup>

Davis underwent physical therapy after each surgery. Davis testified he began experiencing left wrist symptoms the day after undergoing left shoulder surgery. He denied experiencing any such symptoms prior to the surgery.

---

<sup>1</sup> Dr. Grossfeld's records reveal she performed surgery on September 19, 2018. Her pre-operative and post-operative diagnoses were right shoulder cuff tear, right impingement syndrome, right glenohumeral joint arthritis, right labral tear, and right biceps tendon repair. She performed a right biceps tenotomy.

<sup>2</sup> The pre-operative and post-operative diagnoses were: 1. Right rotator cuff tear. 2. Right impingement syndrome. 3. Right glenohumeral joint arthritis. 4. Right labral tear. 5. Right biceps tendon tear. The procedures performed were: 1. Right biceps tenotomy. 2. Right rotator cuff tear repair. 3. Right subacromial decompression. 4. Chondroplasty of the shoulder.

Dr. Grossfeld performed surgery on Davis' left hand and upper extremity on July 22, 2019. The operative notes reveal a pre-operative and post-operative diagnosis of left CTS and the procedure performed was left CTS release.

Davis described his current symptoms attributable to the subject injuries:

A: I have shoulder pains that are a little bit to my right above – on top of the shoulder. When I move my arm straight directly out to the right – my side, I have a little pain still on my left when I pick it up straight out from my side. My neck still has pain – shooting pains sometimes from right to left of each shoulder. I still have shooting pains in my – from the surgery on my left hand from my wrist to my fingers.

Davis testified that because of his continuing neck symptoms, Dr. Grossfeld referred him to Norton Leatherman Spine Center (“Norton Leatherman”). The records of Norton Leatherman reflect Davis was first seen by Kelly Stice, APRN (“Stice”), on November 12, 2019. Although Dr. Grossfeld had released him from her care without restrictions, Davis still experienced problems performing his job at Branham.<sup>3</sup> Davis elaborated further regarding his current physical problems:

A: Not feeling comfortable with heights because of my grip of my hands. And with my numbness of my arms, they feel like dead weight. It's hard to use the tools that we use as impacts, drills, wrenches.

Q: When did you start experiencing numbness in your right arm?

A: Right after the accident.

Q: Okay. But the – the left arm didn't start until the day after you had the left shoulder surgery?

---

<sup>3</sup> Davis worked for Branham during the time he was treated by Norton Leatherman until he underwent neck surgery on February 12, 2020.

A: It's – it's not a numbness; it's a dead weight numbness. I don't know. It's hard to explain. It's a dead weight in both of them. But not numbness as a – numbness as a dead feeling. No, sir.

Q: Does your arm feel like it's asleep?

A: No. It feels like it's extra weight.

Q: Okay.

A: It's heavy in weight, and no strength. That's the best I can ex – explain that.

Davis was off work three months following the July 22, 2019, CTS surgery. Thereafter, he returned to work full-time performing his regular duties. Davis testified that even though he was undergoing cervical spine treatment, he likes his job and intends to continue working for Branham as long as he is able.

On January 22, 2020, Davis moved to bifurcate the proceedings requesting the ALJ to resolve his entitlement to cervical surgery and TTD benefits. By Order dated May 18, 2020, the ALJ sustained the motion and stated a reasonable proof schedule would be discussed during a telephonic status conference.

The September 23, 2020, Benefit Review Conference Order and Memorandum (“BRC Order”) reveals the parties stipulated Davis sustained a work-related injury and Branham received due and timely notice. The parties stipulated TTD benefits were paid from September 19, 2018, through May 15, 2019, the amount of medical expenses paid, and Davis' average weekly wage (“AWW”). The contested issues were: “work-relatedness/causation – neck, unpaid or contested medical expenses, injury as defined by the Act – neck, and TTD.” Under the heading “Other Matters,” is the following: “Hearing on bifurcated issues of compensability of cervical injury and surgery and TTD.”

The ALJ conducted a hearing on that same date during which only Davis testified. Davis testified Branham installs heavy duty conveyor belts and expansion joints in power plants and coal mines. He provided the following description of his field tech job:

A: My job was I could weld, I fabricated, I installed heavy duty conveyor belts, I sit there and have to pick up 200 pounds of press that we use for putting the belts together, I have to be able to pick up 40 pounds, both arms, to carry it up and down inclines on the conveyors and as well as stairs, and climb with straight ladders, I sit there and be able to pick up over my head 60 to 80 pounds with chain falls and come-alongs to be able to work the belts in place.

In the course of performing his job, Davis used many hand tools such as wrenches, grinders, and rotary tools. Davis testified that prior to June 25, 2018, he had no medical restrictions and was capable of performing all job tasks. He furnished the following description of the June 25, 2018, injury:

A: Well, I was preparing for a job, I had an armful of tools in my hand, and I was proceeding out of one of the tool trailers, and at the bottom of the tool trailer where they made a step out of a railroad tie, it rolled out from underneath my feet, and I fell on my back across the last two stairs of it and landed on my elbows and jarred my neck and shoulders, which consisted of all the injuries I've had to date.

After falling, Davis experienced consistent pain in his elbows, shoulders, and neck. He went to BaptistWorx the day of his fall and upon his supervisor's recommendation, eventually saw Dr. Grossfeld. He continued to work but was restricted "to 50 pounds and no walking up stairs or ladders or climbing ladders." On September 19, 2018, he underwent right shoulder surgery to repair the labrum and bicep. He believed Dr. Grossfeld was unable to repair the bicep because

“it was completely tore off.” He was off work approximately three months.<sup>4</sup> He underwent left shoulder surgery on January 10, 2019. After this surgery, he immediately experienced left-hand numbness and sharp pain from his neck to his shoulder. Once she obtained the results of an EMG, Dr. Grossfeld performed surgery on July 22, 2019, for left CTS.<sup>5</sup> After this surgery, Davis continued to experience neck symptoms and numbness in the lower three digits of his left hand. Because of continued cervical problems, Dr. Grossfeld referred him to a neurosurgeon.

Davis returned to work on October 23, 2019, because Branham was shorthanded. He began treatment of the cervical region with Norton Leatherman on November 12, 2019. After an MRI was performed, Dr. Jeffrey Gum recommended neck surgery. Davis worked through February 11, 2020, the day before he underwent neck surgery. He has not worked since. He was fired on September 10, 2020. Davis described his post-surgery cervical symptoms:

A: It relieved some of it but not all of the pain. I still have pain in my neck, like, a ball of pain that averages up to probably maybe a four to five in pain, but it could go up to seven. It all depends on what I do and turn my head at.

Q: How often do you experience the pain at the level of four to five?

A: I experience that all day long.

Q: That’s constant?

A: That’s constant.

Q: How often is it spiking up to the seven?

---

<sup>4</sup> The parties’ stipulation concerning TTD benefits paid establishes Davis was off work more than three months as he received TTD benefits from September 19, 2018, through May 15, 2019.

<sup>5</sup> Apparently, Davis worked on May 16, 2019, and worked until July 21, 2019.

A: It depends on what I do for that day. If I have to reach above my head or turn real quick for some reason, I have spiking pain.

Q: Is there anything you can do to try to help with the symptoms?

A: Just some hot showers mostly what I do to try to help besides having to move around. Right now as I'm sitting here trying to sustain composure, I hurt as well.

Q: Is the pain just in the neck, or does it still go out into one of the arms?

A: I still have some every great once in a while shoots down into my left side, and I quote it, my hands are still numb on the first two digits.

Q: How is the motion of your neck currently?

A: I have probably a 60 percent look upper and maybe a 60 percent look down as well as right to left before I have pain.

Q: Which of those directions do you feel is most limited?

A: When I look up.

Q: What about lifting; how much would you say you could lift comfortable from ground to waist level?

A: Comfortably from ground to waist is probably approximately 35.

Q: What about from waist level to chin level?

A: Waist level to chin level, maybe 20.

Q: Can you lift comfortably overhead?

A: No, I cannot. That gives me a lot of trouble. I couldn't hold a ball above my head without crying.

Davis testified he sleeps approximately six hours a night. However, he wakes up every two to three hours to change positions. As a result, he is groggy and



tired during the day. He believed he is incapable of performing the field tech job, explaining as follows:

A: I definitely couldn't climb any ladders, I couldn't hold any type of weight for any length of time or nothing above my head, especially 200 pounds of press that we have to use.

Davis returned to work at Branham in October 2019 after Dr. Grossfeld released him and imposed no restrictions on the use of his shoulders and neck. Although he worked until the day before the neck surgery, Davis "did not perform his job completely." He explained he remained on the ground instead of "going up in the air." His supervisor instructed him to do the best he could until he learned "what was going on with [my] neck." He believed the surgery was successful because the previous numbness in the first four digits of his left hand was reduced to numbness in the last two fingers. Although he was released to return to work by Dr. Gum, he did not believe he could return to work because of the pain. Davis explained, "I am a little better, but not to my full potential where I was." Davis believed he could not perform all the tasks associated with his job. He has not applied for work anywhere else.

Davis submitted three reports from Dr. Jules Barefoot. Both parties introduced the records of Dr. Gum with Norton Leatherman and Dr. Grossfeld's medical records and reports. Branham submitted two reports from Dr. Gregory Snider.

In a November 23, 2020, Interlocutory Opinion and Order, the ALJ provided, in relevant part, the following findings of fact and conclusions of law:

Having reviewed the evidence of record, the Administrative Law Judge is persuaded plaintiff has carried his burden of proving his cervical condition is causally related to his June 25, 2018 work injury. In reaching this conclusion, the ALJ fully acknowledges the contrary opinions from plaintiff's treating physician, Dr. Grossfeld, and that of a well-respected evaluating physician, Dr. Snider. However, their opinions are simply not found especially persuasive in this instance. Dr. Grossfeld seems to suggest that plaintiff's cervical complaints were due to a pre-existing, active cervical condition, yet there are no records to indicate plaintiff was ever having neck problems prior to June 25, 2018. Moreover, plaintiff specifically complained of neck pain when he first began treating with Dr. Grossfeld just one week after the work injury on July 3, 2018. In addition, the treatment records from Norton Leatherman Spine Center indicate plaintiff's neck problems were due to the arousal of significant cervical degenerative changes including cervical spondylosis from C5-7 and retrolisthesis at C5. As such, the treatment records and plaintiff's history of no prior cervical problems and the fact that he reported neck problems almost immediately after the work injury all lead the ALJ to find Dr. Barefoot's opinions most persuasive in this case. Dr. Barefoot examined plaintiff and also reviewed his treatment records and opined his cervical condition and need for cervical surgery were caused by pre-existing degenerative changes which were dormant and aroused into symptomatic reality by the work injury of June 25, 2018. Given the totality of evidence available, Dr. Barefoot's opinions on causation are simply found most persuasive. Accordingly, it is determined plaintiff's cervical condition is work-related and compensable.

The ALJ ordered Branham responsible for all cervical treatment to date and all reasonable and necessary future medical expenses. TTD benefits were awarded from February 12, 2020, through May 12, 2020.

Davis filed a Petition for Reconsideration asserting the award of TTD benefits should have extended through June 23, 2020, based on Dr. Gum's statement that he could not be kept off work more than four months. Davis pointed out that

four months from the date of surgery is June 23, 2020. By Order dated December 21, 2020, the ALJ sustained the Petition for Reconsideration ordering Branham to pay TTD benefits through June 23, 2020.

Following the September 23, 2020, hearing, Davis submitted the records of Dr. Gum and a supplemental report from Dr. Barefoot. Branham introduced reports from Drs. Snider and Grossfeld.

The June 10, 2021, BRC Order reflects the parties again stipulated Davis sustained an injury and gave due and timely notice, the total medical expenses paid to date, and Davis' AWW. The parties agreed to read into the record at the hearing the periods of TTD benefits paid. The contested issues were: "work-related injury/causation, permanent income benefits per KRS 342.730/PTD, TTD benefits, ability to return to work, credit for: post-injury wages, unpaid or contested medical expenses, and proper use of the AMA Guides." Under the heading "Other contested issues," is "RTW Dates; End date for income benefits; Injury Under the Act."

During the July 12, 2021, hearing, the parties stipulated TTD benefits were paid from September 19, 2018, through May 15, 2019, and again from February 12, 2020, through June 23, 2020. Only Davis testified at the hearing. He again set forth the medical treatment he underwent following the injury.

Following the shoulder surgeries, he returned to work on May 16, 2019. In July 2019, he underwent carpal tunnel release on the left upper extremity. He did not receive TTD benefits following this surgery. Because Dr. Grossfeld allowed him to return to work, Davis returned to work on or near October 23, 2019,

and worked through February 11, 2020. He did not return to work after the February 12, 2020, neck surgery. He recounted his current neck symptoms:

A: Right now at this time, it feels like somebody's got an ice pick or, like, a screwdriver sticking in the back of my spine. And I've got pains shooting to my left shoulder.

Davis testified his symptoms are constant and worsen as the day progresses. Although he rated his neck pain as four or five, Davis explained the pain could easily go to 10. The pain spikes when he looks up or to either side. In order to relieve the pain, he relaxes in a lounge chair, takes a hot shower, or takes Aleve. He estimated having approximately 35% motion in his neck.

Davis experiences throbbing pain in his right shoulder. The pain develops when he attempts to pick something up or reach to his shoulder. His pain ranges from three to seven. The pain increases when he is carrying, lifting, or moving items. He believed he has 45% to 50% of his normal right shoulder motion. Davis has approximately half of his normal right arm strength.

Davis rated his left shoulder pain at five to six. However, the pain can spike to 10. He described his left shoulder symptoms as follows:

A: ... The left shoulder is very painful. I have --- for some reason, it's never gotten better. It shoots pain up into my neck when I move it. I can't hardly get that one even close to go above my head. I can't reach behind me. And I'm in pain all the time with that one.

Q: So it's constant?

A That's constant.

Davis believed he has 30% of his normal left shoulder strength. He testified he can sit for 30 to 45 minutes and stand for 30 minutes without experiencing pain. He is able to comfortably lift 20 pounds. However, he can only lift

five to ten pounds from his waist to his chin. He cannot lift comfortably above his head.

Davis is unable to mow his lawn or perform mechanic work on his vehicle. He is also unable to use a vacuum cleaner. Because he was unable to maintain his home located on 13 acres, he sold it and moved to a much smaller home. He is no longer able to play golf or ride his bike, and his fishing activities are limited. He has some trouble dressing and grooming. Davis believes he is unable to return to his field tech job because he cannot use and carry equipment, climb, or go through small chutes. All of his previous jobs as an ironworker, carpenter, millwright, and boilermaker entailed "hands on heavy work." He does not believe he can perform any type of work for which he has training and experience. This belief is based on his inability to stand or sit for any length of time and walk very far before having to sit down. If the work is too strenuous, Davis has to take breaks. Sometimes he has to rest for a day or two without performing any work.

Davis acknowledged he worked for Branham until the first shoulder surgery on September 19, 2018. He returned to work on limited duty sometime after the January 10, 2019, left shoulder surgery and worked until he underwent carpal tunnel surgery on July 22, 2019. Dr. Grossfeld later returned him to regular duty work. He worked regular duty at Branham from October 23, 2019, until he underwent cervical fusion surgery on February 12, 2020. The work he performed until he underwent the fusion surgery entailed no climbing or performing any activity which would harm his shoulders. He was able to sit and stand as needed. Davis explained he had "good workers." He denied receiving complaints about his work

performance. He testified he does not believe he is getting any better and has not applied for work. He takes Aleve and Advil for pain.

In the September 10, 2021, decision, the ALJ first addressed the compensability of the left CTS and found, based upon Dr. Grossfeld's opinion, it was caused by the left shoulder surgery and therefore work-related. The ALJ next addressed the impairment ratings attributable to the injuries. Relying upon Dr. Snider's opinion, the ALJ found Davis retains a 28% impairment rating for the cervical condition. Relying upon Dr. Grossfeld's opinion, the ALJ found Davis retains a 3% impairment rating due to the left shoulder injury, a 4% impairment rating due to the right shoulder injury, and a 3% impairment rating due to the CTS. In finding Davis is permanently totally disabled, the ALJ provided the following findings of fact and conclusions of law which are set forth *verbatim*:

As applied to the present case, the preceding findings establish plaintiff suffered work-related injuries for which he has an impairment rating, which then translates to a disability rating using the grid factors set forth in KRS 342.730. As to plaintiff's work related disability, the ALJ notes that plaintiff is currently 58 years of age and has a high school diploma, and his entire employment history consists of heavy manual labor jobs in industries such as ironwork, carpentry, and as a millwright. He has no specialized training or experience compatible with more sedentary types of employment. Moreover, plaintiff testified credibly at the final hearing that is continued pain from his neck and his inability to sit or stand for prolonged periods of time prevent him from performing many activities of daily living and tasks around his home. For these reasons, the ALJ is persuaded plaintiff has carried his burden of proving he is unlikely to be able to obtain and maintain gainful employment in a competitive economy on a regular and sustained basis. As such, it is determined plaintiff is permanently and totally disabled. His award

of benefits is, therefore, calculated as follows: \$848.41 per week beginning February 13, 2020.

Concerning Davis' combined impairment rating and entitlement to TTD benefits and PPD benefits, the ALJ provided the following:

From the records available, it appears plaintiff returned to work with accommodations from May 6, 2019 through July 21, 2019 and from October 23, 2019 through February 12, 2020. Accordingly, he is entitled to permanent partial disability based on Dr. Grossfeld's combined 37% impairment rating with a 3.4 multiplier from June 25, 2018 through February 12, 2020, with such PPD benefits suspended during any intervening periods of temporary, total disability. Plaintiff's award of PPD benefits is calculated as follows:  $\$1529.94 \times 2/3 = \$1019.96 \rightarrow \$636.32$  (maximum June, 2018 PPD rate)  $\times .37 \times 1.7 \times 3.4 = \$1360.83 \rightarrow \$839.93$  (99% of TTD rate) per week from June 25, 2018 through February 12, 2020, with interest at 6% on all past due amounts. Plaintiff is entitled to TTD benefits at the rate of \$848.41 per week from September 19, 2018 through May 5, 2019, and from July 22, 2019 through October 22, 2019, with the defendant to take a credit for all amounts paid in TTD to date, and with interest at 6% on all past due amounts.

Branham filed a Petition for Reconsideration essentially making the same arguments it raises on appeal. It also asserted the ALJ's decision contained an error as the combined impairment rating should be 35% based on the combined values chart of the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, rather than 37%. The October 13, 2021, Order denied the Petition for Reconsideration except for amending the combined impairment rating from 37% to 35%. The ALJ noted the correction did not affect any of the amounts awarded.

On appeal, Branham first argues the ALJ should not have awarded PPD benefits beginning on June 25, 2018, the injury date and continuing through February 12, 2020, the date Davis underwent cervical surgery. Relying upon Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009), it asserts the compensable period for partial disability begins on the date that impairment and disability arise. It complains the ALJ awarded PPD benefits despite the fact Davis continued to work regular duty until February 12, 2020. It also complains the award of PPD benefits was partially based upon the permanent impairment rating for the cervical spine assigned only after Davis underwent the February 12, 2020, cervical fusion. According to Branham, Davis' cervical impairment had not arisen prior to the cervical surgery. It notes that in Sweasy, supra, the Supreme Court recognized an injury sometimes occurs after a latency period. Branham observes the Board has previously upheld the ALJ's refusal to award PPD benefits prior to the date of permanent total disability. It requests the PPD award be vacated.

Next, Branham argues the ALJ's analysis addressing the issue of permanent total disability is deficient. It asserts the ALJ failed to offer any discussion regarding the medical evidence relating to Davis' capabilities. It notes Dr. Grossfeld did not impose restrictions because of the shoulder injuries and CTS. Rather, Dr. Grossfeld returned Davis to regular duty. Branham complains that in stating Davis had no specialized training or experience compatible with more sedentary types of employment, the ALJ did not offer any analysis explaining how he reached that conclusion. Consequently, Branham argues the ALJ's failure to discuss the medical evidence relating to Davis' physical abilities does not comply with the analysis



required by City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). Since the findings were insufficient pursuant to Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982), it requests the Board vacate the award of PTD benefits and remand the claim for additional findings.

### **ANALYSIS**

As an initial matter, we note that on appeal Branham does not contest the ALJ's finding of work-related CTS and a cervical injury. Further, it does not take issue with the ALJ's findings concerning the impairment rating attributable to each work-related condition.

Davis, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Davis 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). 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).

In asserting the ALJ erred in awarding PPD benefits from June 25, 2018, until Davis underwent neck surgery on February 12, 2020, Branham suggests this is a hybrid situation as discussed in Sweasy, supra, and a latency period existed before the impairment arose. We find no merit in this argument. Davis' testimony and the medical evidence firmly demonstrate that after the June 25, 2018, injury,

Davis immediately experienced shoulder and neck symptoms. Significantly, during the period in dispute, Davis underwent surgery on each shoulder and the left upper extremity for CTS.

Consistent with Davis' testimony, when Dr. Grossfeld saw him on July 3, 2018, Davis complained of bilateral shoulder pain. She noted that as a result of the fall, Davis experienced an acute onset of sharp pain ranging from 4 to 8 on a scale of 1 to 10. Davis could not raise his right arm above his head and had been complaining of numbness and tingling involving his second, third, and fourth fingers and left elbow pain. The numbness was in the left upper extremity. She diagnosed: 1. Right traumatic rotator cuff tendonitis. 2. Cervical strain resulting in a possible disc protrusion. 3. Left elbow pain secondary to bone bruise, left olecranon.

Dr. Grossfeld's July 18, 2018, note reveals that after falling, Davis complained of acute onset of pain in his right shoulder and cervical spine. Unquestionably, the unrebutted medical evidence establishes harmful changes to the shoulders, neck, and even the left upper extremity immediately manifested after the fall and there was no latency period before the impairments arose.

Although Branham asserts Davis continued to work regular duty after the June 25, 2018, injury until he underwent neck surgery on February 12, 2020, Davis' testimony does not support that assertion. Davis' testimony reveals that although he returned to work earning the same hourly rate after the injury, he was placed on light duty. He eventually returned to regular duty but did not work the same number of hours he had worked prior to the fall. Davis' deposition testimony and September 23, 2020, hearing testimony recounted consistent symptoms in his

shoulders and neck. Davis testified that prior to undergoing neck surgery, he performed his job while remaining on the ground. Further, upon returning to work on October 23, 2019, until he underwent neck surgery, he did not perform any tasks which would harm his shoulders. Davis was able to stand and sit as needed. He explained he had “good workers.”

Dr. Grossfeld’s records and Davis’ testimony establish both shoulders were immediately symptomatic following the injury. Similarly, the records of Norton Leatherman establish Davis immediately developed cervical symptoms following the subject injury. The initial report of Stice with Norton Leatherman reflects Davis presented with pain radiating “into the left arm down to the hand with mild numbness/tingling, and subjective weakness in both arms.” Stice concluded the “AP and Lat upright C-spine film,” revealed “cervical spondylosis and degenerative changes from C5-7. Retrolisthesis at C5.” Davis had reported chronic neck pain which radiated mostly into the left arm along with mild numbness/tingling and subjective weakness. Thus, the conditions in all the affected areas including the left arm arose at the time of injury.

The records of Dr. Grossfeld and Norton Leatherman constitute substantial evidence supporting the award of PPD benefits since the conditions arising from the injuries to Davis’ shoulder, cervical spine, and left upper extremity came into being or originated immediately after the June 25, 2018, injury. Consequently, pursuant to Sweasy, supra, the ALJ correctly awarded PPD benefits from the date of the injury until Davis underwent surgery on February 12, 2020. Stated another way, the record establishes there was no latency period.

We are unconvinced by Branham's assertion that because Davis returned to work on two different periods between the date of injury and the February 12, 2020, neck surgery, he is not entitled to PPD benefits during the period in question. The ALJ was not precluded from awarding PPD benefits because Davis periodically returned to work as Davis' testimony demonstrates he was only permanently partially disabled until February 12, 2020.

Similarly, the ALJ was not precluded from awarding PPD benefits based in part upon a cervical impairment rating assessed after the February 12, 2020, surgery. The important factor in determining whether Davis was entitled to an award of PPD benefits is whether the symptoms in the shoulders and neck began immediately after the work injury, thereby partially disabling Davis. Again, the records of Dr. Grossfeld and Norton Leatherman establish the shoulders and neck were immediately symptomatic following the injury producing immediate permanent impairment and disability. Consequently, an award of PPD benefits based upon an impairment rating for the shoulders, neck, and the CTS of the left extremity surfacing after the left shoulder surgery was justified.

We find the following language in Sweasy, supra, is on point:

Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits.

A condition “arises” when it comes into being, begins, or originates. [footnote omitted] Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* consider the amount of impairment that *remains* at MMI to be “permanent.” The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.

The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.

Id. at 839-840.

Moreover, in T-Rad North America v. Brown, Claim No. 2017-85772, rendered April 9, 2021, we affirmed an award of PPD benefits followed by an award of PTD benefits stating as follows:

We likewise find the ALJ did not err in determining Brown is entitled to PPD benefits from the date of injury until September 27, 2019. This is similar to the situation in Dolt & Dew, Inc. v. Smith, 493 S.W.2d 711 (Ky. 1973). Smith was injured while working for Dolt & Dew, Inc. He returned to light duty work afterward, and continued in that employment until the company went out of business. Smith was awarded PPD benefits for the period he returned to work, and PTD benefits afterward. The Kentucky Court of

Appeals, predecessor of the Kentucky Supreme Court, noted:

In summary, we conclude that the Board was justified in determining that Smith's disability, the effects of which were not fully realized, permanent and partial so long as he was afforded work by his employer that he was able to do, proved to be total and permanent when his employer went out of business ...

Id. at 713.

In this instance, Brown made multiple attempts to return to work after her injury, but was physically unable to do so. As in Smith, Brown's disability was not "fully realized" until she was unable to perform her last job. Based upon this reasoning, we find the ALJ did not err in awarding PPD benefits, TTD benefits, and PTD benefits, and we affirm.

In summary, the condition in Davis' shoulders and neck originated on the date of injury. Per Sweasy, supra, Davis' impairments arose when the work-related trauma produced harmful changes in various human organisms. The records of Dr. Grossfeld and Norton Leatherman and Davis' testimony establish the harmful changes in the shoulders and neck occurred immediately after the fall. The fact an impairment rating could not be assessed for the neck, shoulders, and CTS until after Davis reached maximum medical improvement is of no import in determining the extent of the harmful changes and the origination. We emphasize surgery constitutes treatment of the effects of the injury. The medical evidence and Davis' testimony demonstrate symptoms in his shoulders and neck originated or began just after the June 25, 2018, injury. Dr. Gum ultimately determined neck surgery constituted reasonable and necessary treatment of the cervical symptoms present since the June

25, 2018, injury. That being the case, the ALJ appropriately awarded PPD benefits from the date of the injury until Davis underwent surgery on February 12, 2020. Because the medical and lay evidence recited herein constitute substantial evidence supporting the ALJ's award of PPD benefits, we are without authority to disturb the ALJ's decision on this issue. Special Fund v. Francis, supra.

We agree the ALJ failed to conduct a complete analysis in determining Davis is totally occupationally disabled as required by City of Ashland v. Stumbo, supra. The Supreme Court directed the following five-step analysis is to be conducted by an ALJ in determining whether a claimant is totally disabled:

Thus, an ALJ is required to undertake a five-step analysis in order to determine whether a claimant is totally disabled. Initially, the ALJ must determine if the claimant suffered a work-related injury. Here, the parties stipulated that Stumbo suffered a work-related injury; therefore, the ALJ was not required to make that finding. Next, the ALJ must determine what, if any, impairment rating the claimant has. Here, the ALJ listed the various impairment ratings assigned to Stumbo by the physicians. However, the ALJ never found which impairment rating Stumbo actually has. Having failed to determine what impairment rating Stumbo has, the ALJ could not then determine what permanent disability rating Stumbo has. Thus, the ALJ failed to satisfy the second and third steps of the analysis. Next, an ALJ is required to determine that the claimant is unable to perform any type of work. Here, the ALJ attempted to undertake this analysis, but, as noted by the Board and the Court of Appeals, he fell short. An ALJ cannot simply state that he or she has reviewed the evidence and concluded that a claimant lacks the capacity to perform any type of work. The ALJ must set forth, with some specificity, what factors he or she considered and how those factors led to the conclusion that the claimant is totally and permanently disabled. Such findings are particularly crucial in a case such as this where: part of Stumbo's condition and arguably some of his restrictions are related to his pre-existing antiphospholipid



syndrome; Stumbo testified he could perform sedentary work with accommodations; no physician imposed any restrictions that would foreclose Stumbo from performing sedentary work; Stumbo has performed a wide-range of work activity; and Stumbo has obtained 90 hours of college credits. Finally, an ALJ must determine that the total disability is the result of the work injury. Here, again, the ALJ fell short because he failed to delineate which, if any, of Stumbo's restrictions are related to the knee injury and which are related to the pre-existing antiphospholipid syndrome.

Id. at 396-397.

In Ira A. Watson Dept. Store v. Hamilton, *supra*, the Supreme Court outlined the factors to be considered in determining whether a claimant is totally occupationally disabled as defined by KRS 342.0011(11).

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. *See, Osborne v. Johnson*, *supra*, at 803.

Id. at 51.

The ALJ was only required to determine whether Davis sustained a work-related neck injury and developed CTS due to treatment of his work injury. Since the parties stipulated Davis sustained work-related shoulder injuries, the ALJ

was not required to determine Davis sustained work-related injuries to his shoulders. In conducting his analysis, the ALJ satisfied step one by determining Davis sustained work-related injuries to his shoulder, neck, and CTS. He satisfied step two by determining the impairment rating attributable to each injured body part. He also addressed step three of the analysis by determining the total permanent disability rating.<sup>6</sup>

The ALJ failed to satisfy step four of the analysis. The ALJ noted Davis was 58 years old, had a high school education, and his entire work history consisted of heavy manual labor working in ironwork, carpentry, and as a millwright. He also recognized Davis did not have any special training or experience compatible with working sedentary jobs. However, the ALJ did not make a finding Davis is unable to perform any of his previous jobs and lacked the capacity to perform sedentary jobs. Rather, he found Davis credibly testified at the hearing that he had continued neck pain and was unable to sit or stand for long periods of time which prevented him from performing any activities of his daily living and tasks around his home. “For these reasons,” the ALJ was persuaded Davis had satisfied his burden of establishing he was unlikely to be able to obtain and maintain gainful employment in a competitive economy. Step four of the Stumbo analysis requires the ALJ to determine Davis is unable to perform any type of work. The ALJ made no such finding. His analysis fell short of completing step four of the analysis.

---

<sup>6</sup> The ALJ amended the combined impairment rating in his October 13, 2021, Order ruling on the Petition for Reconsideration reducing it to 35%.

The ALJ may rely upon Davis' final hearing testimony regarding his neck pain and inability to sit or stand for long periods of time and perform any activities around his home in reaching a decision as to his occupational disability. Branham submits that compliance with the Stumbo analysis requires the ALJ to discuss the medical evidence regarding Davis' physical abilities. We disagree. In the Opinion and Order, the ALJ summarized the medical evidence but did not discuss it in the Findings of Fact and Conclusions of Law. That is the ALJ's prerogative. Within his discretion, the ALJ chose to rely upon Davis' testimony in resolving the issue of permanent total disability. As the Supreme Court decreed in Ira A. Watson Dept. Store v. Hamilton, supra, "a worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after his injury. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979)." Id. at 52. That said, the ALJ must find Davis lacks the capacity to perform any type of work before finding him totally occupationally disabled.

Finally, the ALJ failed to satisfy the fifth step of the analysis by determining the total disability is a result of the work injury. The ALJ did not satisfy steps four and five of the analysis by determining Davis was unable to perform his previous jobs and sedentary type employment, i.e., any type of work. The ALJ also did not provide a finding that Davis' total disability is a result of his work injuries. Consequently, the finding Davis is totally occupationally disabled must be vacated.

On remand, consistent with the requirements of Ira A. Watson Dept. Store v. Hamilton, supra, the ALJ must resolve the question of what type of work Davis is and is not capable of performing upon recovering from the work injury.

That determination includes a consideration of factors including Davis' post-injury physical, emotional, intellectual, and vocational status and how those factors interact. Id. at 52. Further, the ALJ must consider the likelihood that Davis would be able to find work consistent under normal employment conditions.

Accordingly, the award of PPD benefits contained in the September 10, 2021, Opinion, Order, and Award and reaffirmed in the October 13, 2021, Order is **AFFIRMED**. However, the finding Davis is totally occupationally disabled and the award of PPD benefits are **VACATED**. This claim is **REMANDED** to the ALJ for a determination of Davis' occupational disability in accordance with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

MILLER, MEMBER, NOT SITTING.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON SHANE BRANHAM  
2452 SIR BARTON WAY STE 200  
LEXINGTON KY 40509

**LMS**

**COUNSEL FOR RESPONDENT:**

HON CHRISTOPHER P EVENSEN  
6011 BROWNSBORO PARK BLVD STE A  
LOUISVILLE KY 40207

**LMS**

**ADMINISTRATIVE LAW JUDGE:**

HON GRANT S ROARK  
MAYO-UNDERWOOD BUILDING  
500 MERO ST 3<sup>RD</sup> FLOOR  
FRANKFORT KY 40601

**LMS**