

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 21, 2020

CLAIM NO. 201901222 & 201901220

BROOKDALE RICHMOND PLACE

PETITIONER

VS.

APPEAL FROM HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE

TONYA WEATHERS AND
HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * *

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

ALVEY, Chairman. Brookdale Richmond Place (“Brookdale”) appeals from the April 3, 2020 Opinion, Award, and Order rendered by Hon. Brent E. Dye, Administrative Law Judge (“ALJ”), and from the April 28, 2020 Order denying its Petition for Reconsideration. The ALJ found Tonya Weathers (“Weathers”) sustained permanent cervical and bilateral shoulder injuries due to an October 26,

2017 work accident. The ALJ awarded permanent partial disability (“PPD”) and medical benefits, and enhanced Weathers’ award by the two-multiplier pursuant to KRS 342.730(1)(c)2 beginning on March 2, 2020. The ALJ also found Weathers sustained permanent cervical, lumbar, and left elbow injuries due to a February 17, 2019 work accident, and awarded PPD benefits increased by the three-multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits.

On appeal, Brookdale argues the ALJ erred in finding Weathers sustained permanent work-related injuries on October 26, 2017 and February 17, 2019. Brookdale also argues the ALJ erred in assigning an 8% impairment rating to the February 2019 lumbar injury. Brookdale additionally argues the ALJ erred in determining Weathers is entitled to the two-multiplier for the October 2017 work injury. Finally, Brookdale argues the ALJ erred in finding Weathers does not retain the physical capacity to return to her pre-injury job as a restorative aide due to the February 2019 injury. Brookdale argues Weathers does not meet the standard outlined in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Because substantial evidence supports the ALJ’s determinations that Weathers sustained permanent injuries, the application of the two-multiplier for the 2017 work injury beginning March 2, 2020, the three-multiplier for the 2019 work injury, and the ALJ performed the appropriate Fawbush analysis, we affirm in part. We vacate in part the award of PPD benefits for the 2019 work injury and direct the ALJ to select an impairment rating for that injury supported by the evidence.

Weathers filed a Form 101 alleging she injured her neck, back, and shoulders while lifting a patient on October 26, 2017. Weathers contemporaneously

filed a second Form 101 alleging she injured her back, neck, left elbow, and right hip on February 17, 2019 when she slipped and fell on ice. At the time of both injuries, Weathers worked for Brookdale as a restorative aide/certified nursing assistant (“CNA”). The ALJ consolidated the claims.

Weathers testified by deposition on December 12, 2019, and at the final hearing held March 9, 2020. Weathers has worked as a CNA for approximately twenty years, and began working for Brookdale in October 2011. She initially worked for Brookdale as a CNA before she transitioned to a restorative aide. She returned to work as a restorative aide following both work injuries. As a restorative aide, she assisted patients with range of motion and walking. Weathers transferred and lifted patients weighing up to two hundred pounds with the assistance of a co-worker and the use of a gait belt. Weathers estimated she needed to be able to lift up to one hundred pounds while transferring patients. Weathers also weighed residents monthly stating “we’re holding them up and putting them in the chair. Some can’t even stand.” Weathers assisted residents with ambulation, dressing, and toileting. Weathers disputed the formal job description stating a restorative aide is only required to lift up to twenty-five pounds. Prior to October 26, 2017, Weathers had no problems performing her job duties. Weathers’ activities were not restricted, she received no medical treatment, and had no issues with her back, neck, or shoulders.

Weathers testified that on October 26, 2017, she and a co-worker were transferring a patient with a gait belt when the co-worker let go without warning causing immediate pain in her neck and right shoulder. Weathers treated

conservatively at Concentra and with Dr. Travis Hunt. Weathers soon developed left shoulder symptoms due to overcompensation.

Subsequent to the October 26, 2017 work injury, Weathers returned to work at Brookdale as a restorative aide, working the same hours and earning the same or greater wages. Weathers testified Brookdale accommodated her restrictions. Eventually, Dr. Hunt released Weathers to full duty work with permanent restrictions of no lifting greater than one hundred pounds. Weathers indicated she was able to perform the essential functions of her job within the one hundred pound lifting restriction.

On February 17, 2019, Weathers slipped and fell on ice, landing on her bottom and left elbow causing pain in her left elbow and arm, back, bottom, and neck. Weathers still had pain from the October 2017 injury, which worsened after her fall. Weathers sought treatment with Concentra after the fall. She also treated with Dr. John Vaughan for her cervical condition and Dr. Ronald Burgess for her left elbow condition. Weathers eventually returned to Dr. Hunt in 2019 for treatment of all affected body parts. Dr. Hunt imposed restrictions and recommended injections.

Weathers continued to work for Brookdale as a restorative aide immediately after the second injury earning the same or greater wages. Weathers was off work approximately six days in March 2019, returning to work with restrictions. Later in 2019, Brookdale changed her work hours to three, twelve-hour shifts per week. She had previously worked forty hours a week, Monday through Friday. Weathers acknowledged the reduction in hours was due to a company-wide policy change. Weathers testified she had a lumbar injection in January 2020. She

thereafter developed worsening back pain and Dr. Hunt restricted her from work on January 9, 2020. He released her to return to work with permanent restrictions of no lifting over thirty pounds on February 27, 2020. Weathers returned to work on March 2, 2020. She also worked nine additional hours, for a total of forty-three hours that week. She stated the week was “terrible” with “[t]he walking and the neck pain, and my back pain.” She acknowledged Brookdale accommodated the thirty-pound lifting restriction in the week she returned to work. She currently earns \$15.90 per hour, which is greater than the hourly wage she earned in February 2019, although she earns less than she did on the date of either injury. Considering the thirty-pound permanent restriction, Weathers believes she is unable to perform all aspects of the restorative aide job, specifically the lifting duties.

Weathers continues to experience neck spasms and pain radiating down her spine, primarily in her right arm, as well as numbness into her right arm and hand. She continues to experience pain in both shoulders, left elbow, and right hip. Weathers occasionally experiences low back pain radiating down her right leg. Her low back pain worsens with prolonged sitting and walking. Weathers experiences symptoms after sitting for thirty minutes and after two or three hours of walking. Weathers believes she is able to lift up to thirty pounds from ground level, but cannot lift overhead. Weathers does not believe she is physically capable of continuing to perform even the light duty work at Brookdale due to her pain. On cross-examination, Weathers agreed she is able to perform all material aspects of the restorative aide job within the thirty-pound restriction. On redirect examination, Weathers stated she was required to lift more than thirty pounds at a time prior to

October 2017 while lifting and transferring patients. She testified she does not believe she has the ability to lift and transfer patients.

Becky Stocker (“Stocker”), an administrator for Brookdale since October 2019, testified at the final hearing. Stocker confirmed Weathers is a restorative aide, a position requiring a CNA certification. Stocker agreed restorative aides transfer patients. Stocker stated Brookdale accommodates Weathers’ thirty-pound lifting restriction. Stocker testified either Weathers is not transferring patients, or if she does, it is within the thirty-pound lifting restriction. Stocker testified the job description requires restorative aides to be able to lift up to twenty-five pounds. Stocker testified restorative aides do not lift over twenty-five pounds in transferring patients since they utilize gait belts and mechanical lifts.

Weathers filed as evidence the treatment records from Concentra and Dr. Hunt. Weathers treated at Concentra on several occasions from October 27, 2017 to December 11, 2017 for neck and right shoulder pain radiating down her right arm, and numbness and tingling throughout her right upper extremity. Weathers was diagnosed with a cervical muscle strain and a right shoulder strain, both of which were treated conservatively.

Weathers began treating with Dr. Hunt on January 15, 2018 for neck, right shoulder, and right arm symptoms following the October 2017 accident. Dr. Hunt reviewed a December 15, 2017 cervical MRI that he interpreted as demonstrating a C5-6 disc herniation. On February 19, 2018, Dr. Hunt noted Weathers also complained of left-sided neck and shoulder symptoms, which she suspected was due to overcompensation. Dr. Hunt treated Weathers with physical

therapy, cervical injections, and work restrictions. Dr. Hunt diagnosed C5-6 disc bulge/herniation. He found Weathers attained maximum medical improvement (“MMI”) on October 15, 2018, and permanently restricted Weathers from lifting over one hundred pounds on June 11, 2018.

Weathers treated at Concentra on February 17, 2019 after she slipped on ice and fell at work. She complained of neck, left elbow, left hand, and low back/sacroiliac pain. Weathers was diagnosed with a history of neck pain, cervical strain, left elbow contusion, left hand strain, and sacrum contusion. Concentra ordered physical therapy, imposed restrictions, and ordered a left upper extremity sling. Weathers additionally filed into evidence the work status slips from Dr. Hunt. On December 2, 2019, Dr. Hunt restricted Weathers from lifting over twenty-five pounds. On January 9, 2020, Dr. Hunt restricted Weathers from all work. On February 27, 2020, Dr. Hunt released Weathers to work with permanent restrictions of no lifting over thirty pounds.

Weathers submitted Dr. Bruce Guberman’s September 19, 2019 report and letter. He noted both the October 26, 2017 and the February 17, 2019 work injuries and treatment rendered subsequent to each one. Dr. Guberman diagnosed the following due to the October 26, 2017 lifting incident: chronic post-traumatic cervical strain superimposed on pre-existing but dormant degenerative joint and disc disease; chronic post-traumatic lumbar strain superimposed on pre-existing but dormant degenerative joint and disc disease; and chronic post-traumatic right shoulder strain and chronic post-traumatic left shoulder strain due to overuse as a result and natural consequence of the right shoulder injury. Dr. Guberman noted

imaging studies demonstrated evidence of pre-existing degenerative changes in Weathers' lumbar and cervical spine, which were dormant and asymptomatic prior to October 26, 2017.

Dr. Guberman diagnosed the following due to the February 17, 2019 slip and fall: Chronic post-traumatic cervical strain causing permanent aggravation of prior injury at work occurring on 10/26/17, which itself was superimposed on pre-existing but dormant degenerative joint and disc disease; chronic post-traumatic lumbosacral strain causing permanent aggravation of prior injury at work occurring on 10/26/17, which itself was superimposed on pre-existing but dormant degenerative joint and disc disease; and chronic post-traumatic left elbow strain, most likely due to lateral epicondylitis. He opined Weathers reinjured her cervical and lumbar spine, and permanently aggravated prior pain in those areas due to the slip and fall. She also injured her left elbow.

Dr. Guberman assessed an 8% impairment rating for Weathers' cervical condition pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He apportioned 5% to the October 2017 work injury and 3% to the February 2019 work injury. Dr. Guberman also assessed an 8% impairment rating for Weathers' lumbar condition pursuant to the AMA Guides, of which he apportioned 5% to the October 2017 work injury and 3% to the February 2019 work injury, stating as follows:

In regard to the lumbar spine, from Table 15-3 on page 384 of the Guides the claimant falls under DRE Lumbar Category II. Again, she falls in that category since she does have a clinical history and examination findings compatible with specific injuries occurring at work on 10/26/2017 and 2/17/2019. She also has lumbar

paravertebral muscle spasm as well as radiation of pain into her legs, and those are nonverifiable radicular complaints. In that category, she receives an 8 (eight) percent impairment of the whole person. . . . Again, I recommend that 5 (five) percent impairment of the whole person be apportioned for the 10/26/2017 injury and 3 (three) percent impairment of the whole person be apportioned for the 2/17/2019 injury.

Dr. Guberman assessed a 3% impairment rating for the right shoulder condition and a 4% impairment rating for the left shoulder condition due to the October 26, 2017 work injury. He assessed a 1% impairment rating for the left elbow condition due to the February 17, 2019 work injury. Therefore, Dr. Guberman assessed a 5% impairment rating for the cervical condition, 5% impairment rating for the lumbar condition, 3% for the right shoulder condition and 4% for the left shoulder condition, for a combined 17% impairment rating due to the October 26, 2017 work injury. He assessed a 3% impairment rating for the cervical condition, 3% for the lumbar condition and 1% for the left elbow condition for a combined 7% impairment rating, due to the February 17, 2019 work injury.

Dr. Guberman opined Weathers reached MMI on September 19, 2019. He opined Weathers retains the physical capacity to return to work. Dr. Guberman restricted Weathers from lifting, carrying, pushing, or pulling more than twenty-five to thirty pounds occasionally or more than ten pounds frequently. He advised Weathers should avoid using her arms overhead or for repeated activities, and to avoid standing in one position for more than thirty minutes at a time or more than five to six hours in an eight-hour day.

Brookdale filed the February 4, 2019 and January 15, 2020 reports by Dr. Russell Travis. In the February 4, 2019 report, Dr. Travis addressed the October

26, 2017 lifting incident. Dr. Travis diagnosed a cervical strain/sprain with some irritation of the right C6 nerve root, which resolved without sequelae, due to the October 2017 lifting incident. Dr. Travis noted Weathers' symptoms of paresthesias in the right upper extremity and numbness and tingling in the C-6 nerve root distribution of the right hand had resolved with conservative treatment. He noted the cervical MRIs of December 15, 2017 and August 20, 2018 do not show any evidence of residual compromise to the neural foramina. Dr. Travis opined Weathers was at MMI and required no further treatment. He assessed a 0% impairment rating for Weathers' cervical condition pursuant to the AMA Guides. He opined Weathers is physically capable of returning to her normal job without restrictions.

In the January 15, 2020 report, Dr. Travis noted the February 17, 2019 slip and fall, which resulted in left elbow, neck, back, low back, right buttock, and right hip pain. Dr. Travis re-examined Weathers and summarized the treatment records since the second injury. Dr. Travis noted his previous cervical diagnosis due to the October 2017 work incident. Dr. Travis found, at most, Weathers had sustained a cervical sprain/strain superimposed on an old cervical spine injury, which had resolved as he had noted in his previous report. Dr. Travis similarly diagnosed a lumbar sprain/strain, but found no evidence of any permanent lumbar injury. He also determined Weathers' left elbow complaints have resolved without any permanent injury. Dr. Travis opined Weathers had reached MMI and required no further treatment. He also found Weathers did not have any pre-existing, active cervical conditions. He assessed a 0% impairment rating for her lumbar and cervical

conditions, and found no basis for assessing impairment for her left elbow pursuant to the AMA Guides. Dr. Travis agreed with the one hundred pound lifting restriction imposed by Dr. Hunt, and determined Weathers is physically capable of returning to fully duty work.

Brookdale filed the job description of a restorative specialist. The description indicates a restorative specialist is required to stand, walk, sit, reach with hands and arms, climb/balance, stoop, kneel, crouch or crawl, and lift up to twenty-five pounds.

A benefit review conference was held on February 12, 2020. The parties stipulated Weathers sustained injuries on October 26, 2017 and February 17, 2019, which Brookdale asserts were only temporary. The parties stipulated to a pre-injury average weekly wage (“AWW”) of \$1,161.93 for both injuries. The parties also stipulated Weathers did not miss any work following the October 2017 injury and earned equal or greater wages. The parties stipulated Weathers returned to work following the February 2019 injury. She was off work for two periods, March 13, 2019 to March 19, 2019 and from January 9, 2020 to March 2, 2020. At the hearing, the parties further stipulated Weathers returned to work after the February 2019 injury and earned a wage equal to or greater than her pre-injury AWW for a period of time. The following were identified as contested issues: Weathers’ physical ability to return to the type of work performed at the time of injury, AWW, KRS 342.730 benefits, KRS 342.7305 benefits, pre-existing disability and/or impairment exclusion, and proper use of the AMA Guides.

The ALJ first addressed whether Weathers' injuries were permanent or temporary, noting the parties had stipulated she had, at minimum, sustained temporary injuries due to the work events. The ALJ determined the October 26, 2017 work incident caused a permanent neck injury, specifically a neck strain/sprain and the arousal of an underlying pre-existing dormant, asymptomatic, and non-disabling cervical condition into an active, symptomatic, and disabling state. The ALJ also determined the October 26, 2017 work incident caused a permanent right shoulder injury and indirectly caused a permanent left shoulder injury. The ALJ primarily relied upon Dr. Guberman's opinions, Weathers' testimony, and the lack of evidence demonstrating previous neck or bilateral shoulder symptoms, treatment or restrictions. The ALJ determined the October 26, 2017 work incident did not cause a permanent low back injury, noting the lack of low back complaints in the treatment records subsequent to the lifting incident. Due to the parties' stipulations, the ALJ determined Weathers sustained a temporary low back injury from which she obtained MMI on June 11, 2018.

The ALJ determined the February 17, 2019 work event caused permanent neck, low back, and left elbow injuries. The ALJ relied upon diagnostic studies, Dr. Guberman's opinion, and Weathers' testimony. The ALJ also noted the lack of evidence demonstrating low back or left elbow issues, treatment, restrictions or limitations immediately prior to the work event. Based upon the parties' stipulations, the ALJ determined the February 17, 2019 incident caused temporary pelvic and right hip injuries from which she obtained MMI on September 19, 2019.

The ALJ also adopted Dr. Guberman's assessment of impairment for the October 26, 2017 neck and bilateral shoulder injuries. The ALJ adopted the 5% impairment rating for the cervical spine, 4% impairment rating for the left shoulder, and 3% impairment rating for the right shoulder, for a combined 12% impairment rating pursuant to the AMA Guides. The ALJ found Weathers retained the physical capacity to perform her pre-injury job as a restorative aide following the October 26, 2017 work injury.

The ALJ adopted Dr. Guberman's assessment of impairment for the February 17, 2019 low back, neck, and left shoulder injuries. The ALJ adopted the 8% impairment rating for the low back, 3% impairment rating for the neck, and 1% impairment rating for the left elbow, for a combined 12% impairment rating pursuant to the AMA Guides. The ALJ determined the entire 8% impairment rating for the low back condition is attributable to the February 17, 2019 work trauma, stating *verbatim* as follows:

Dr. Guberman determined that Weathers currently has an 8% low back permanent impairment rating. He found Weathers had spasms, and reduced motion. Dr. Guberman stated that he used the highest DRE II rating, because "...she does have significant interference with activities of daily living due to the lumbar spine despite being at maximum medical improvement."

The ALJ determines that Weathers did not have a pre-existing, active, symptomatic, and impairment ratable low back condition immediately before the February 17, 2019 injury. There is not any credible evidence Weathers had a symptomatic low back condition immediately before the February 17, 2019 trauma. Although Dr. Guberman opined the October 26, 2017 trauma produced a 5% low back permanent impairment rating, the ALJ did not find this credible. The ALJ determines the February 17, 2019 trauma caused

Weathers' entire 8% low back permanent impairment rating.

For the February 17, 2019 work injury, the ALJ determined Weathers does not retain the physical capacity to perform her pre-injury job. Weathers' testimony persuaded the ALJ that she was required to lift patients weighing up to two hundred pounds and she can no longer perform those activities. The ALJ also found persuasive the thirty-pound lifting restriction imposed by Dr. Hunt and Dr. Guberman, which precludes Weathers from lifting and transferring patients. The ALJ also noted Weathers returned to work and earned an AWW equal to or greater than her pre-injury AWW. The ALJ next determined Weathers does not have the ability to earn equal or greater wages for the indefinite future, and the February 17, 2019 injury permanently altered her income earning ability pursuant to Fawbush v. Gwinn, supra. The ALJ found Weathers credible, noting she had performed CNA work for over twenty years, and had worked for Brookdale for over eight years. The ALJ reviewed Weathers' testimony addressing her symptoms and limitations and her belief she cannot continue performing even her light duty job. Therefore, the ALJ determined she is entitled to the three-multiplier for the February 17, 2019 work injury.

The ALJ separately calculated the award of PPD benefits for each injury. He stated as follows, *verbatim*, regarding calculations and the application of two-multiplier:

The PPD calculation for the first injury is: **\$626.29 x .12 x 1.00 x 1.0 = \$75.15**. The ALJ finds Plaintiff is entitled to \$75.15 a week, for 425 weeks, commencing October 26, 2017. The amount is doubled, if she stops earning an Aww that equals or exceeds her pre-injury

one “[f]or any reason, with or without cause, except where the employees conduct is shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another.” Livingood v. Transfreight, 467 S.W.3d 249 (Ky. 2015).

Weathers was not working when the February 12, 2020 BRC occurred. This is why the parties stipulated that Weathers was earning less wages for both injuries. In fact, she was not earning any wages. The ALJ finds Weathers returned to work on March 2, 2020. Weathers’ testified she recently worked 43 hours per week, and earned \$15.90 an hour. This equates to \$683.70 a week, and is significantly less than the stipulated \$1,161.93 pre-injury Aww.

The ALJ finds that Weathers did not stop earning equal or greater wages for any reasons that the Livingood case expresses. Therefore, commencing March 2, 2020, Weathers benefits are doubled, and she is entitled to \$150.31 until she resumes earning an Aww that equals or exceeds \$1,161.93.

The PPD calculation for the second injury is: **\$774.62 x .11 x 1.00 x 3.0 = \$257.94**. The ALJ finds Plaintiff is entitled to \$257.94 a week, for 425 weeks, commencing February 17, 2019.

The ALJ awarded PPD benefits as follows:

(1) Brookdale and/or its insurance carrier or its third-party administrator, \$75.15 in weekly PPD benefits, commencing 10/26/17 and continuing through 3/1/20. From 3/2/20 until she resumes earning an Aww equal to or greater than \$1,161.93, Weathers is entitled to \$150.31 in weekly payments.

When/if Weathers resumes earning an Aww equal to or greater than \$1,161.93, her weekly PPD benefits return to \$75.15. Then, if Weathers again ceases earning an Aww equal to or greater than \$1,161.93, for reasons not attributable to her conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to

another, her weekly benefits shall return to \$150.31 per week and the cycle continues.

The PPD benefits shall not exceed 425 weeks and are subject to KRS 342.730(4)'s current version. Any intervening TTD period shall suspend the PPD payment period. Brookdale shall take a credit for any payment of such compensation it has already made. 6% per annum interest on all due and unpaid amounts.

(2) For the 2/17/19 injury, Weathers shall recover from Brookdale and/or its insurance carrier or its third-party administrator, \$257.94 a week in PPD benefits, commencing 2/17/19. The PPD benefits shall not exceed 425 weeks and are subject to KRS 342.730(4)'s current version. Any intervening TTD period shall suspend the PPD payment period. Brookdale shall take a credit for any payment of such compensation it has already made. 6% per annum interest on all due and unpaid amounts.

Brookdale filed a Petition for Reconsideration, essentially raising the same arguments it now raises on appeal. In the Order denying the petition, the ALJ corrected two typographical errors.

The ALJ determined his analysis contained in the Opinion regarding whether Weathers' sustained permanent injuries due to the work events was sufficient and noted he addressed each alleged injured body part. Therefore, he declined to render additional findings of fact on the issue of permanent injuries. The ALJ stated as follows, *verbatim*, regarding Brookdale's assertion that he erred in finding Weathers' February 2019 lumbar injury produced an 8% impairment rating:

Secondly, the Defendant asserts the ALJ patently erred, because he found the Plaintiff's February 17, 2019 injury produced an 8% low back permanent impairment rating. The ALJ respectfully disagrees.

Dr. Bruce Guberman opined the Plaintiff currently has an 8% low back permanent impairment rating. Dr. Guberman assigned this rating, because he found the Plaintiff had reduced motion, spasms, and non-verifiable radicular complaints. Measuring reduced motion and observing spasms are objective findings.

Dr. Guberman apportioned the 8% permanent impairment rating between the October 26, 2017 and February 17, 2019 injuries. He concluded the October 26, 2017 injury produced a 5% low back impairment rating, and the February 17, 2019 injury produced a 3% rating.

The ALJ determined that the October 26, 2017 injury did not produce a permanent low back impairment rating. This, however, does not mean that the February 17, 2019 injury only produced a 3% low back permanent impairment rating. Again, Dr. Guberman determined the Plaintiff currently has an 8% permanent impairment rating.

There is not any credible evidence that the Plaintiff had a pre-existing, active low back permanent impairment rating. The ALJ logically and reasonably inferred that the February 17, 2019 injury produced the entire 8% rating. As the ALJ found:

There is not any evidence that immediately before the October 26, 2017¹ work-related trauma, Weathers actively: (1) experienced any severe low back problems or symptoms; (2) received low back medical treatment; (3) took medications for any low back issues; (4) was under any physical restrictions/limitations for her low back; (5) was having any difficulty performing her job duties {qualitative and quantitative}; (6) was missing time from work due to low back issues; or (7) had a low back impairment/

¹ The ALJ amended this sentence to reflect the correct date of injury as February 17, 2019.

disability. This all changed after the work-related trauma.

....

An ALJ may apportion an impairment rating, between multiple body parts, under certain circumstances. See Pella Corp. v. Bernstein, 336 S.W.3d 451 (Ky. 2011). In Bernstein, a physician assigned a bilateral shoulder impairment rating, but did not apportion it between each shoulder. The Supreme Court determined the ALJ could review the relevant medical evidence and select a reasonable left shoulder impairment rating. Id.

Although the Bernstein case involved apportioning an impairment rating between body parts, which is not the current case's issue, the general rule and principle is that an ALJ has the ability to apportion an impairment rating under certain circumstances. The rule extends to apportioning an impairment rating between alleged injury dates. This is exactly what the ALJ did in the present case.

The credible medical expert opined the Plaintiff currently has an 8% permanent low back impairment rating. There was not any credible evidence that the Plaintiff's October 26, 2017 injury produced a permanent low back impairment rating. There also is not any credible evidence that the Plaintiff had a preexisting, active low back condition that warranted a permanent impairment rating. Therefore, based on logical and reasonable inferences, the ALJ concluded that the February 17, 2019 injury produced the entire 8% low back permanent impairment rating.

This was a finding within the ALJ's abilities and discretion. The case law also establishes that the ALJ has this ability. The ALJ respectfully asserts he did not commit any legal or patent errors concerning this issue.

The ALJ reiterated his determination Weathers does not retain the physical capacity to perform her pre-injury work. The ALJ noted he analyzed the evidence addressing this issue, and weighed and compared Weathers' pre-injury job duties to her current physical capabilities. The ALJ noted it is within his discretion to rely on the claimant's self-assessment, concerning his/her physical abilities, when determining whether the claimant retains the physical capacity to perform his/her pre-injury work. The ALJ stated he "appropriately relied on the Plaintiff's credible testimony and Dr. Guberman's credible opinion to find that the Plaintiff did not retain the physical capacity to perform her pre-injury job." The fact Weathers used a gait belt while moving and lifting the patients did not alter his determination.

The ALJ also reiterated his determination that Weathers is entitled to an enhancement of her PPD benefits by the two-multiplier beginning on March 2, 2020 for the October 2017 work injury since she ceased earning an AWW that equals or exceeds her pre-injury AWW. The ALJ found KRS 342.730(1)(c)2 does not require Weathers' employment to cease. KRS 342.730(1)(c)2 only requires Weathers to cease earning an AWW equal to or greater than her pre-injury one. The ALJ noted the parties stipulated Weathers' pre-injury AWW for the October 2017 injury was \$1,161.93 and that she subsequently earned an equal or greater AWW. The ALJ also noted the fact that Weathers is currently earning a higher hourly wage does not establish she is currently earning an equal or greater AWW. Instead, he must compare Weathers' pre and post-injury AWW. The ALJ then quoted his findings contained in the opinion supporting his determination that Weathers' most recent AWW is less than her pre-injury one based upon her hearing testimony.

The ALJ next addressed Brookdale's assertion he inappropriately conducted an analysis pursuant to Fawbush v. Gwinn. The ALJ noted the parties stipulated that Weathers' AWW for the February 2019 injury was \$1,161.93 and that she earned an equal or greater AWW following this injury. The ALJ again determined Weathers currently earned less than her February 2019 pre-injury AWW. Her most current weekly wage was only \$683.70. The ALJ reviewed Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), and reiterated the Fawbush analysis he had provided in the Opinion. The ALJ acknowledged Brookdale currently accommodates Weathers' restrictions, and she is currently performing her job. However, he found Weathers could not perform her job without the significant accommodations and relied upon her testimony regarding her limitations and abilities. The ALJ concluded it is unlikely Weathers will ever return to her pre-injury wage level, let alone have the ability to continue earning it into the indefinite future.

On appeal, Brookdale argues Weathers did not suffer permanent injuries due to the October 26, 2017 and February 17, 2019 work events. Brookdale argues the ALJ erred in assigning an 8% impairment rating to the 2019 lumbar injury. It points out that no medical expert assigned an 8% impairment rating to Weathers' lumbar condition due solely to the February 2019 work event. It argues the ALJ did not have the authority to attribute the entire 8% impairment rating to the February 2019 lumbar injury since Dr. Guberman had apportioned 5% to the October 2017 work injury and 3% to the February 2019 work injury.

Brookdale additionally argues Weathers is not entitled to the three-multiplier for the February 17, 2019 work injury. It asserts Weathers returned to

work to the same restorative aide position and testified she now earns a higher hourly wage than at the time of both injury dates. Brookdale insists Weathers returned to her normal pre-injury job, relying on Stocker's testimony. Brookdale points out Weathers testified she returned to the same job title and same type of work. Weathers also testified she is able to lift up to thirty pounds and agreed she is able to perform the material aspects of her job within her restrictions. Brookdale also argues the underlying facts in Fawbush v. Gwinn, supra, are distinguishable from the facts in this instance, and bar the application of the three-multiplier.

Brookdale also argues Weathers is not entitled to the two-multiplier for the October 2017 work injury. It asserts Weathers earns a greater hourly wage than prior to her injury. It also asserts the two-multiplier does not apply since Weathers is still employed by Brookdale.

As the claimant in a workers' compensation proceeding, Weathers had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Weathers was successful in her burden, we must determine whether substantial evidence of record supports 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). Although a party may note evidence supporting a different outcome than 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 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).

Dr. Guberman's opinion constitutes substantial evidence supporting the ALJ's determination Weathers' sustained permanent cervical and bilateral shoulder injuries due to the October 2017 work event and permanent cervical, lumbar, and left elbow injuries due to the February 2019 work event. In Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754, 762 (Ky. 2001),

the Kentucky Supreme Court specifically addressed what constitutes objective medical evidence as set forth in KRS 342.0011(33) explaining as follows:

We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

Dr. Guberman performed an examination and reviewed multiple diagnostic studies, including four cervical MRIs, a left elbow MRI, and a lumbar MRI. His examination demonstrated complaints of pain, tenderness, spasms, and abnormal range of motion in both the cervical and lumbar spine. Dr. Guberman noted the diagnostic studies evidenced pre-existing lumbar and cervical degenerative changes, and opined they were dormant, asymptomatic, and not ratable prior to October 26, 2017. His examination demonstrated tenderness and abnormal range of motion in her shoulders. His examination of the left elbow demonstrated tenderness and mild range of motion abnormalities. Dr. Guberman's review of diagnostic studies and findings upon examination comprise objective medical evidence supporting his determination the October 2017 work event produced permanent injuries to Weathers' cervical spine and bilateral shoulder and the February 2019 work event produced permanent injuries to her cervical spine, lumbar spine, and left elbow.

The ALJ additionally noted the lack of symptoms or treatment prior to her work injuries. Dr. Travis' opinions represent nothing more than conflicting

evidence compelling no particular outcome. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Therefore, we affirm the ALJ's determination Weathers sustained permanent cervical and bilateral shoulder injuries due to the October 2017 work event and permanent cervical, lumbar, and left elbow injuries due to the February 2019 work event.

We next conclude the ALJ did not err in increasing Weathers' PPD benefits for the October 2017 injury by the two-multiplier beginning March 2, 2020. KRS 342.730(1)(c)2 states:

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 for 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....

As noted by the ALJ, the parties stipulated Weathers returned to work at an AWW greater than her pre-injury AWW, thereby satisfying the first condition of KRS 342.730(1)(c)2. We disagree with Brookdale's argument there was no "cessation of that employment" since Weathers' continues to be employed by the company. The first prong of the statute requires only that the claimant return to "work at a weekly wage equal to or greater than the average weekly wage at the time of injury." The second prong of the statute, which triggers the award of enhanced benefits, is satisfied "during any period of cessation of that employment." "That employment" is clearly defined in the prior sentence as "work at a weekly wage

equal to or greater than the average weekly wage at the time of injury.” There is no requirement Weathers employment with Brookdale cease.

We next find no merit in Brookdale’s assertion the two-multiplier is inapplicable since Weathers currently earns a higher hourly wage, now \$15.90 per hour. Rather, “KRS 342.730(1)(c)2 requires a comparison of the pre-injury and post-injury AWW calculated in accordance with KRS 342.140.” Livingood v. Transfreight, LLC, 467 S.W.3d 249, 259 (Ky. 2015). *See also* Ball v. Big Elk Creek Coal, Inc. 25 S.W.3d 115, 118 (Ky. 2000). We acknowledge that Weathers testified she now earns a greater hourly wage than at the time of her work injuries. However, Weathers also testified that her hours had been reduced due to a company policy change sometime in 2019. Weathers indicated she used to work Monday thru Friday, forty hours a week with overtime opportunity. Under the new policy, Weathers now works three twelve-hour shifts per week. The parties stipulated Weathers returned to work on March 2, 2020. As noted by the ALJ, Weathers testified she most recently worked 43 hours at her increased hourly wage of \$15.90 per hour. The ALJ determined, “this equates to \$683.70 a week, and is significantly less than the stipulated \$1,161.93 pre-injury AWW.” In the Order on Petition for Reconsideration, the ALJ noted he found Weathers ceased earning an equal or greater AWW on March 2, 2020 and that this trend will likely continue. “The Plaintiff currently works three, 12 hour shifts each week. This only equates to a \$572.40 (\$15.90 x 36) week average. To equal her \$1,161.93 pre-injury [AWW], the Plaintiff, at the \$15.90 hourly rate, will have to work over 73 hours a week This is more than double her current weekly schedule.” Based upon the above, we find

the ALJ did not err by increasing the award of PPD benefits by the two-multiplier beginning March 2, 2020.

Brookdale erroneously asserts that even if Weathers' AWW is less, "this is a result an institutional change in Plaintiff's hours This shift in hours was in no way related to Plaintiff's previous injuries." The Kentucky Supreme Court held KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." Livingood v. Transfreight, LLC, 467 S.W.3d at 259. In the instant case, there is no allegation or evidence of record establishing Weathers' conduct was of this nature. Therefore, substantial evidence supports the ALJ's determination the requirements of KRS 342.730(1)(c)2 have been satisfied.

We next determine substantial evidence supports the ALJ's determination Weathers does not retain the physical capacity to perform her pre-injury job after the February 2019 work injury. In Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), the Kentucky Supreme Court stated that in making a determination regarding the applicability of KRS 342.730(1)(c)1, the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether he retains the physical capacity to return to those jobs." We note Weathers' testimony regarding the maximum lifting requirements directly conflicts with the job description and Stocker's testimony. Weathers testified she transferred patients, some of whom

weighed up to two hundred pounds. Weathers testified a co-worker would help and she used a gait belt in transferring patients. Weathers estimated she needed to be able to lift up to one hundred pounds while transferring patients. In contrast, the job description indicates restorative aides are required to lift no more than twenty-five pounds. Stocker also testified Weathers was required to lift no more than twenty-five pounds. We determine the ALJ considered the evidence and properly exercised his discretion as fact-finder in finding Weathers' testimony more credible regarding the lifting requirements of her job as a restorative aide.

As noted by the ALJ, Dr. Hunt imposed a permanent restriction of no lifting over thirty pounds in February 2020. Dr. Guberman likewise imposed restrictions of no lifting, carrying, pushing or pulling objects more than twenty-five to thirty pounds occasionally or more than ten pounds frequently. Weathers worked forty-three hours during the week prior to the hearing. Although Brookdale accommodated her lifting restrictions, Weathers testified the week was "terrible" due to her neck and back pain. Considering the thirty-pound permanent restriction, Weathers believes she is unable to perform all aspects of the restorative aide job, specifically the lifting duties. Weathers' testimony and the restrictions imposed by Dr. Hunt and Dr. Guberman constitute substantial evidence supporting the ALJ's determination she does not retain the physical capacity to return to her former job as a restorative aide. An ALJ may give weight to a claimant's own testimony regarding her retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). A claimant's testimony is competent evidence as to whether he or she retains the physical capacity to return to the type of work performed at the

time of injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

The parties also stipulated Weathers returned to work following the February 2019 work injury earning the same or greater AWW. Therefore, an analysis pursuant to Fawbush v. Gwinn, *supra*, was required by the ALJ. Fawbush directs that when a claimant meets the criteria of both KRS 342.730(1)(c)1 and (c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush, 103 S.W.3d at 12. In other words, is the injured worker faced with a "permanent alteration in the ...ability to earn money due to his injury." *Id.* "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage equaling or exceeding his or her wage at the time of the injury, the three-multiplier pursuant to KRS 342.730(1)(c)1 is applicable.

The Fawbush Court articulated several factors an ALJ may consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. Those factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is performed out of necessity, whether the post-injury work is performed outside of medical restrictions, and if the post-injury

work is possible only when the injured worker takes more narcotic pain medication than prescribed. Fawbush, 103 S.W.3d at 12. The Court in Adkins, *supra*, directed that the ALJ “must consider a broad range of factors, only one of which is the ability to perform the current job” in determining whether a claimant can continue to earn an equal or greater wage. Id. at 390. Fawbush does not contain an exhaustive list of factors an ALJ may consider in making the determination of whether a worker is likely to continue earning the same or greater wage. Rather, the ALJ’s determination is fact-specific and individualized.

We determine the ALJ performed an appropriate Fawbush analysis. In determining Weathers does not have the ability to earn equal or greater wages for the indefinite future, the ALJ considered the fact she has worked as a CNA for over twenty years and over eight years for Brookdale. The ALJ considered Weathers’ continued symptoms in her neck, shoulder, back, and left elbow which hinder her lifting abilities and her ability to sit and walk. He noted Weathers testified her symptoms have adversely affected her sleep and her belief she does not feel she can continue to work light duty. The ALJ considered the fact that Weathers struggles to perform her current job duties, which have been accommodated by Brookdale. In the Order on reconsideration, the ALJ noted Weathers now earns less than her February 2019 pre-injury AWW. The ALJ acknowledged Brookdale currently accommodates Weathers’ restrictions and she is performing her job within those restrictions. However, the ALJ also noted Weathers could not perform her job without significant restrictions. The ALJ considered Weathers’ testimony regarding the physical toll continuing to work causes and her condition. Based upon the

above, the ALJ determined it was unlikely Weathers will ever return to her pre-injury wage level, let alone have the ability to continue earning it into the indefinite future. Substantial evidence exists supporting the determination Weathers has a permanent alteration in the ability to earn money due to her February 2019 injury.

Although Brookdale has identified substantial evidence regarding factors supporting its position, it is not the function of this Board to re-weigh the proof. The ALJ conducted the required Fawbush analysis, and substantial evidence supports the conclusion that the three-multiplier is appropriate in this instance.

Finally, Brookdale argues the ALJ erred in assigning an 8% impairment rating to Weathers' February 2019 lumbar injury. Dr. Guberman opined Weathers sustained lumbar injuries due to both the October 2017 and February 2019 work events. He determined Weathers retains an 8% impairment rating for her lumbar condition pursuant to the AMA Guides, and apportioned 5% to the October 2017 injury and 3% to the February 2019 injury. However, the ALJ determined Weathers did not sustain a permanent lumbar injury due to the October 2017 work event, a finding that has not been appealed. The ALJ determined Weathers sustained a permanent lumbar injury due to the February 2019 work event only, and apportioned the entire 8% impairment rating to the February 2019 lumbar injury. Brookdale asserts the ALJ exceeded his authority since no medical expert assessed an 8% impairment rating for Weathers' lumbar condition due solely to the February 2019 work injury. We agree.

Chapter 342 requires a permanent impairment rating produced by a work-related injury to be determined pursuant to the AMA Guides. 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); *See also* Lanter v. Ky. State Police, 171 S.W.3d 45, 52 (Ky. 2005) (“The proper interpretation of the *Guides* and the proper assessment of impairment are medical questions.”) 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, it is the ALJ’s function as fact-finder to 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). In George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004), the Court further held that, while an ALJ is not authorized to independently interpret the AMA Guides, as fact-finder he or she may consult them in the process of assigning weight and credibility to evidence.

The ALJ has some discretion in selecting the impairment rating upon which to base a PPD award. In Caldwell Tanks v. Roark, 104 S.W.3d 753, 757 (Ky. 2003), the Court found an ALJ may rely on the conversion tables used to combine whole person impairment ratings or to convert a binaural hearing impairment to a whole-person impairment since the reading of these tables required no medical expertise. In Knott Co. Nursing Home v. Wallen, *supra*, the Kentucky Supreme Court concluded that when a mental injury is at issue, an ALJ is authorized to translate a Class 1 through 5 AMA impairment into a percentage impairment for the

purpose of determining the worker's disability rating and calculating the income benefit.

We conclude the ALJ exceeded his discretion in arriving at a distinct and separate impairment rating for the 2019 lumbar injury from that offered by a physician. Brookdale and Weathers provided the ALJ with impairment ratings assessed by Dr. Guberman and Dr. Travis for each date of injury and each alleged body part injured. Under these circumstances, we do not believe that an ALJ may make an independent determination regarding an impairment rating where such ratings have been provided by medical witnesses. Dr. Guberman assessed a 3% impairment rating for the 2019 lumbar injury while Dr. Travis assessed a 0%.

We disagree with the ALJ that Pella Corporation v. Joyce Bernstein, supra, permits an ALJ to apportion an impairment rating between alleged injury dates. In Bernstein, the evaluating physician diagnosed adhesive capsulitis of the shoulders greater on the left than the right and assessed a 10% impairment rating for both shoulders. The ALJ determined the claimant sustained a permanent left shoulder injury, but not a permanent right shoulder injury. The ALJ declined to award benefits for the left shoulder injury since the evaluating physician had failed to separate the 10% impairment rating that he assigned to the shoulders. The Kentucky Supreme Court disagreed, stating the evaluating physician clearly thought that the left shoulder injury warranted a permanent impairment rating. The Court found the ALJ was permitted to reasonably infer from the treatment notes and the Form 107 that the evaluating physician attributed more than half of the rating to the left shoulder. The Court stated the ALJ was free under the circumstances to consider the

relevant medical evidence and select a reasonable impairment rating to be used to calculate income benefits. Id. at 454.

Unlike Bernstein, this case involves two different dates of injuries and the same injured body part. Unlike in Bernstein where the evaluating physician failed to apportion the bilateral shoulder impairment to each shoulder, Dr. Guberman specifically assessed a 5% impairment rating to the 2017 lumbar injury and 3% to the 2019 lumbar injury. We decline to broadly interpret Bernstein as permitting an ALJ to apportion an impairment rating between multiple alleged injury dates for the same body part when medical experts of record have expressly addressed apportionment. Therefore, we vacate the ALJ's award of PPD benefits for the 2019 work injury, and remand for a determination of PPD benefits based upon the evidence of record.

Accordingly, the April 3, 2020 Opinion, Award, and Order and the April 28, 2020 Order on Petition for Reconsideration rendered by Hon. Brent E. Dye, Administrative Law Judge, are hereby **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** for entry of an amended opinion consistent with the views expressed herein.

BORDERS, MEMBER, CONCURS.

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

STIVERS, Member. Respectfully, I dissent from that portion of the opinion vacating the ALJ's finding that Weathers retains an 8% impairment rating for his work-related lumbar condition. Dr. Guberman's report contains the following

opinions concerning the presence of a lumbar spine impairment due to the October 2017 and February 2019 work-related injuries:

In regard to the lumbar spine, from Table 15-3 on page 384 of the Guides the claimant falls under DRE Lumbar Category II. Again, she falls in that category since she does have a clinical history and examination findings compatible with specific injuries occurring at work on 10/26/2017 and 2/17/2019. She also has lumbar paravertebral muscle spasm as well as radiation of pain into her legs, and those are nonverifiable radicular complaints. In that category, she receives an 8 (eight) percent impairment of the whole person. Again, she is placed in the upper end of the category since she does have significant interference with activities of daily living due to the lumbar spine despite being at maximum medical improvement. Again, I recommend that five (five) percent impairment of the whole person be apportioned for the 10/26/2017 injury and 3 (three) percent impairment of the whole person be apportioned for the 2/17/2019 injury.

Notably, Dr. Guberman's examination occurred after both injuries. He did not assess a separate impairment rating for the October 2017 injury based on a records review and examination. His examination was conducted on September 19, 2019, and his impairment rating was based upon the condition of the lumbar spine affected by both injuries. Thus, the 8% impairment rating was based upon the permanent condition of the affected area in the lumbar region following the February 2019 injury. Since Dr. Guberman assessed an impairment rating based on the AMA Guides after performing his examination, this is a question of the propriety of the apportionment and not the calculation of an impairment rating.

Utilizing the medical evidence in the record, the ALJ chose to disregard Dr. Guberman's assessment of a 5% impairment rating for the October 2017 injury finding Weathers sustained only a temporary injury. However, relying

upon Dr. Guberman's report and the medical records, the ALJ concluded the 8% impairment rating assessed by Dr. Guberman resulted from the February 2019 injury. Brookdale does not take issue with Dr. Guberman's calculation of the 8% impairment rating pursuant to the AMA Guides. Further, Brookdale does not take issue with the ALJ's finding of an October 2017 temporary work injury. However, it rather disingenuously asserts that if there is a permanent injury, it is not due to the latter injury but to the October 2017 injury which the ALJ found to be a temporary injury.

Pella Corp. v. Bernstein, 336 S.W.3d 451, 453 (Ky. 2011) permits the ALJ to accept Dr. Guberman's impairment rating but reject his apportionment. In Bernstein, Dr. Jackson diagnosed adhesive capsulitis of the shoulders greater on the left than the right and assigned a 10% impairment rating for both shoulders. He did not assign a specific impairment rating to either shoulder condition. The ALJ concluded that, absent a specific assignment of an impairment rating, he was not authorized to find the left shoulder injury generated an impairment rating since Dr. Jackson did not attribute a specific rating to the left shoulder injury. This Board reversed concluding Dr. Jackson's medical records permitted the ALJ to attribute an impairment rating greater than 5% to the left shoulder condition.

Here, an impairment rating was apportioned between two injuries by Dr. Guberman. The ALJ rejected the doctor's apportionment of an impairment rating to the earlier injury and concluded the total impairment rating calculated pursuant to the AMA Guides was generated as a result of the February 2019 injury. Bernstein permits the ALJ, in the absence of an assigned specific impairment rating,

to assign a portion of a general impairment rating to a specific body part. Therefore, reason dictates the ALJ can accept an impairment rating calculated for a particular body part but reject the apportionment of the impairment rating between two injuries.

In Bernstein, the ALJ was given greater latitude than in the case *sub judice*, as he selected an impairment rating for the left shoulder condition even though one had not been specifically assigned to it. Here, Dr. Guberman assigned a specific impairment rating for the affected lumbar area. Brookdale asserts Bernstein does not grant the ALJ the authority to generate his own impairment rating which has not been assigned by a medical professional. However, this is not what occurred. Dr. Guberman, a medical professional, assigned an impairment rating for Weathers' lumbar spine condition. The ALJ concluded that, based on the medical records, Dr. Guberman's impairment rating was not erroneous; rather, his apportionment of the impairment rating was erroneous. Consequently, the ALJ was permitted to accept Dr. Guberman's 8% impairment rating for the February 2019 lumbar injury assessed approximately seven months after the February 2019 injury.

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