

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 2, 2020

CLAIM NO. 201098764

JAMES GARRISON

PETITIONER/  
CROSS-RESPONDENT

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

M & M CARTAGE CO. INC.

RESPONDENT/  
CROSS-PETITIONER

and HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENT

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

\* \* \* \* \*

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

**STIVERS, Member.** James Garrison (“Garrison”) appeals and M & M Cartage Co., Inc. (“M & M”) cross-appeals from the March 31, 2020, Amended Opinion and Award on Remand and the April 30, 2020, Order of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). In the March 31, 2020, Amended Opinion and

Award, the ALJ terminated Garrison's award of temporary total disability ("TTD") benefits on November 1, 2018. The ALJ also determined that Garrison is not permanently totally disabled.

On appeal, Garrison first asserts he is entitled to TTD benefits from the date of reopening. Garrison acknowledges this argument has already been addressed by the Board and is being preserved only for review by the Court of Appeals. Next, Garrison asserts that an analysis pursuant to Ira A. Watson Dept. Store v. Hamilton, 34 S.W.2d 48 (Ky. 2000) demonstrates he is permanently totally disabled. In a related argument, Garrison asserts the ALJ failed to set forth sufficient findings supporting the conclusion he is not permanently totally disabled.

On cross-appeal, M & M argues the ALJ erred by failing to carve out the portion of the increased impairment rating for the non-work-related C4-5 fusion.

### **BACKGROUND**

As this is the second time this claim has come before us, we adopt the relevant portions of our decision set forth in the January 31, 2020, Opinion as follows:

Garrison sustained a work-related cervical injury on December 29, 2009. No Form 101 was filed. A Form 110-I was approved by Hon. J. Landon Overfield, Administrative Law Judge, on February 9, 2011. The settlement agreement reflects that Garrison was "holding a semi trailer door when it jerked up, injuring his neck." The agreement also reflects Garrison injured his spine at the C5-C6 and C6-C7 levels in the accident. The settlement was based upon a 25% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), assessed by Dr. Marlyn Goldman. In accordance with the agreement, Garrison was to receive \$149.70 per week for 425 weeks. The

agreement also reflects that M&M had paid \$39,082.43 as of the date of settlement. TTD benefits were paid from January 7, 2010 to August 7, 2010, at the rate of \$600.16 per week, for a total of \$18,268.62. On March 21, 2016, Hon. Robert L. Swisher, Chief Administrative Law Judge (“CALJ”), approved a Form 110-I agreement commuting the remainder of Garrison’s payments to a lump sum of \$17,168.47.

On October 10, 2016, Garrison filed a motion to reopen. He noted Dr. Raque had recommended an additional fusion surgery, and he anticipated an increase in his functional impairment rating. Garrison requested the initiation of TTD benefits until he reached maximum medical improvement (“MMI”) from the surgery. Garrison attached an October 5, 2016 note from Dr. Raque indicating he should remain off work until he reached MMI. He also attached Dr. Raque’s September 23, 2016 note indicating he needed a discectomy and fusion surgery at C4-C5 and C5-C6.

In response to the motion to reopen, M&M filed Dr. Russell Travis’ November 16, 2016 consultation review report. Dr. Travis stated the proposed surgery was medically unnecessary, inappropriate, and unrelated to the December 29, 2009 injury.

M&M additionally filed a Form 112 medical dispute challenging the proposed surgery. It also filed a motion to join Dr. Raque as a party to the dispute. M&M filed Dr. Daniel Wolens’ October 13, 2016 report in support of the dispute. Dr. Wolens stated it is difficult to determine what level, or levels are responsible for Garrison’s left-sided neck pain “given the pathology at the C4-5, C5-6, and C7-T1 levels.” Dr. Wolens’ stated that Garrison’s continued smoking and alcohol consumption complicate the potential success of additional fusion surgery. He recommended a second opinion to assess Garrison’s anatomical physiology.

On December 28, 2016, the CALJ entered an order finding Garrison had presented a *prima facie* case, and reopened the claim. The claim was assigned to the ALJ for resolution. Garrison subsequently filed a motion requesting interlocutory relief. The claim was temporarily reassigned to Hon. Stephanie L. Kinney,

Administrative Law Judge, who denied the motion, and the claim was reassigned to the ALJ.

An agreed order was then submitted to the ALJ for a determination regarding compensability of the proposed surgery. On August 3, 2017, the ALJ determined the proposed treatment and surgery for the C4-C5 level was not compensable. However, he determined the proposed treatment and surgery for the C5-C6 level was compensable. The ALJ did not address Garrison's request for TTD benefits. Garrison filed a petition for reconsideration regarding his entitlement to TTD benefits. On September 6, 2017, the ALJ awarded TTD benefits to begin on the date of surgery. Garrison filed a second petition for reconsideration requesting TTD benefits from the date of reopening, and submitted off work slips from Dr. Raque supporting his argument. The ALJ denied the second petition for reconsideration. Garrison appealed the ALJ's determination to this Board, which dismissed the appeal since the claim was not final.

Garrison underwent surgery on October 11, 2017. On October 2, 2018, M&M filed a motion to terminate TTD benefits based upon Dr. Raque's September 19, 2018 letter indicating Garrison had reached MMI. Dr. Raque also assigned restrictions of no lifting in excess of 25 pounds, no pushing or pulling greater than 40 pounds, no prolonged flexion or extension of the neck, and no heavy equipment driving.

Garrison testified by deposition on January 12, 2017, and again on December 17, 2018. He also testified at the hearing held May 1, 2019. Garrison was born on May 23, 1962, and is a resident of Louisville, Kentucky. He is a high school graduate, with two years of vocational training in electronics, however he did not complete the course. He later completed truck driver training. He obtained a CDL in 1994, but testified he does not believe he can pass the physical examination for re-certification due to problems with his neck and low back. He testified he has problems with turning his head when he drives. Garrison receives Social Security disability benefits. The award was retroactive to April 2016, when he filed his claim. When he applied for those benefits, he asserted he was having problems with

high blood pressure, low back pain, neck pain, and deep vein thrombosis.

Garrison's employment history includes selling Medicare supplements, working as an assistant restaurant manager, general contractor, and as a truck driver. He was also employed previously at a state park where he worked as a lifeguard, worked with horses, and assisted with a golf course expansion. As a truck driver, he was primarily a drop and hook driver, meaning he connected/disconnected trailers and drove. He was not required to unload trailers. Garrison testified he broke his ankle while playing high school football. He also had a pulmonary embolism in his left leg while driving for a previous company.

Garrison began having low back problems in 2005 or 2006, and eventually underwent surgery by Dr. Wayne Villanueva. He testified that after the surgery, his low back and leg pain resolved. He started having those problems again in 2009, and he continues to have symptoms in his low back and left leg. Garrison has taken pain medication for his neck since 2009, currently Gabapentin and Percocet, and he takes Synthroid and Lisinopril. He has not treated for his low back since 2015.

On December 29, 2009, Garrison was driving for M&M. When he stopped to make a delivery, the load had shifted. When he opened the door, it swung quickly, knocking him backward to the ground. He developed pain in his neck and left shoulder. On May 19, 2010, he underwent a two level instrumentation and fusion surgery. The surgery helped with the neck and left arm pain, but he continued to experience moderate pain afterward. He returned to work in August or September 2010, with no restrictions, at his request. He stopped working in 2015. Garrison went to a chiropractor for treatment, and was advised he had a broken screw at C5-C6 from the first surgery. He sought medical attention in November 2015 for ongoing problems with his back and neck.

Garrison testified the second cervical surgery did not help. He continues to have pain in the center of his neck and left shoulder. When he was undergoing physical therapy after the second surgery, studies

revealed he had another broken screw, and additional cervical surgery was recommended. Garrison reportedly ceased smoking in October 2017. He stated he does not have any headaches, but has occasional dizziness. He also complained he has constant cervical pain.

Garrison filed multiple records from Dr. Raque. On August 23, 2017, Dr. Raque noted Garrison had a pseudo-arthrosis at C5-C6, and a disc herniation at C4-C5. He recommended exploration of the pseudo-arthrosis and surgical treatment of the disc herniation. Garrison indicated he wanted to undergo the surgery. He reported increased pain with activity, or holding his head in a fixed position for any length of time. On November 21, 2017, Dr. Raque noted Garrison's arm pain had improved with surgery, but he still complained of neck pain. On February 27, 2018, he noted Garrison's pre-operative arm pain had resolved. On April 13, 2018, Garrison complained of neck pain into his left shoulder, arm, and hand.

Garrison also filed Dr. Raque's November 16, 2018 office note. Garrison complained of occipital headaches. Dr. Raque noted the broken screw, but stated there was nothing acute necessitating a rush into surgical repair. Dr. Raque stated, "I do not think the patient can return to work however." He stated the vibration associated with truck driving would increase the chance of plate displacement, or backing out of the screws precipitating emergency surgery. He noted Garrison has a significant loss of neck motion and limitations with his left arm.

On January 20, 2019, Dr. Raque stated Garrison had reached MMI if he did not have additional surgery. He stated Garrison had experienced an increase in his impairment rating, but since he does not assess ratings, he could not state how much. Dr. Raque stated Garrison's restrictions had not changed from those previously assessed. On May 8, 2019, Dr. Raque stated Garrison's condition remained the same, and it was not advisable for him to return to work. He stated Garrison should not lift greater than 15 to 20 pounds, nor should he push or pull greater than 30 pounds. He also cautioned against prolonged neck flexion and extension.

M&M filed records from Dr. Villanueva for office visits on October 29, 2012; October 28, 2015; and February 10, 2016. On October 29, 2012, Dr. Villanueva noted Garrison complained of a two-year gradual onset of left posterior neck pain, worsened by turning his head. He complained of pain in both arms. At that time, Dr. Villanueva diagnosed Garrison with cervical disc degeneration, cervicalgia, limb pain, and a bulging cervical disc with intermittent complaints of numbness. He noted Garrison was taking Percocet, and he prescribed Neurontin. On October 28, 2015, Garrison complained of neck and back pain. Garrison stated the back pain went into his left leg. Dr. Villanueva noted Garrison had a broken screw at the C5 level. He prescribed Mobic for the low back pain. On February 4, 2016, Garrison complained of chronic low back pain with the most recent episode having lasted for over a year. Garrison also complained of chronic neck pain, which Dr. Villanueva attributed to a cervical pseudoarthrosis. He encouraged Garrison to quit smoking, and referred him to pain management.

Dr. Michael Doyle evaluated Garrison at M&M's request on January 25, 2016. He noted the December 2009 work injury. Garrison reported he experienced immediate neck and left shoulder pain after the accident. He subsequently underwent fusion surgery at C5-C6, and C6-C7. Dr. Doyle also noted Garrison previously underwent low back surgery in 2007, by Dr. Villanueva, from which he had a good result. Dr. Doyle recommended a C5 corpectomy and fusion from C4-C6. He stated the surgery at C5-C6 is necessary for the treatment of the 2009 work injury. Regarding surgery at C4-C5, Dr. Doyle stated, "Although pathology at C4-C5 is not a direct result of the 2009 injury, I believe it is medically appropriate to address this pathology at the same time surgery is performed at C5-C6." He also stated Garrison should quit smoking prior to the surgery.

Dr. Sexton evaluated Garrison on October 25, 2018, at M&M's request. Dr. Sexton noted Garrison's history of being knocked down when he opened a trailer door, and developed neck and left shoulder pain afterward. Dr. Sexton noted Garrison had not reached MMI. He stated Garrison had a pseudo-arthrosis at C5-

C6, for which an additional surgery was scheduled. Regarding Garrison's cervical spine, Dr. Sexton diagnosed him as status post ACDF at C5-C6, C6-C7; pseudo-arthrosis at C5-C6 with HNP at C4-C5; non-union at C5-C6; status post corpectomy at C5 with ACDF at C4-C5, C5-C6, and C6-C7; and, a second pseudo-arthrosis at C5-C6. Dr. Sexton also provided diagnoses for Garrison's lumbar complaints, which he determined are not work-related, and we will not discuss. He stated Garrison's cervical complaints are due to the natural aging process. Dr. Sexton assessed a 13% impairment rating for Garrison's cervical condition. He recommend Garrison not drive while taking Percocet, avoid lifting greater than 50 pounds, and avoid wearing a hard hat. He opined the restrictions are not due to a work-related event.

On January 9, 2019, Dr. Sexton stated Garrison's impairment rating for his cervical condition is 29% pursuant to the AMA Guides. He stated Garrison had a 26% impairment rating after his initial surgical surgery. He assessed an additional 2% impairment due to the second surgery, and 1% for the additional level. He stated Garrison should not engage in prolonged overhead work, lifting greater than 40 pounds, nor drive while taking Percocet. He stated Garrison's injury, surgery, and restrictions do not permanently disqualify him from truck driving.

A Benefit Review Conference was held on April 11, 2019. At that time, the issues identified for resolution included work-relatedness/causation of the repeat fusion, corresponding worsening of condition, future medical benefits, TTD benefits, and duration of benefits.

In the Opinion and Award rendered July 22, 2019, the ALJ determined Garrison's treatment for the C5-C7 levels was appropriate and work-related. However, he determined treatment for the C4-C5 level was not work-related. In the findings contained in his decision, the ALJ again noted Garrison was entitled to TTD benefits beginning on the date of surgery; however, he did not address this in the award section of his opinion. The ALJ determined Garrison is not permanently totally disabled. The ALJ awarded an increase in Garrison's PPD benefits in accordance with the 4% impairment rating assessed by Dr. Sexton,

beginning with the date of the motion to reopen, for the remainder of his 425 week compensable period, but he did not address the period of TTD benefits to which Garrison was entitled. The ALJ also awarded 12% interest on past due and owing benefits through June 28, 2017, and 6% on any unpaid benefits thereafter.

Garrison filed a petition for reconsideration, much of which constituted no more than a re-argument of the merits of the claim. He pointed to what he perceived were numerous shortcomings in the ALJ's decision, but did not ask for additional findings of fact. However, Garrison requested the ALJ make a specific award regarding the duration of his entitlement to TTD benefits. M&M filed a petition for reconsideration regarding the increase in the award of PPD benefits. It requested the ALJ to make a determination regarding which portion of the increased 4% impairment was due to Garrison's work injury, and which was related to the surgery for his unrelated condition. M&M specifically requested the ALJ to amend the award of additional PPD benefits based upon only the increased impairment attributable to the C5-C7 levels.

In the September 3, 2019 order on reconsideration, the ALJ stated M&M is only responsible for medical benefits for treatment of the C5-C7 levels, not the C4-C5 levels. The ALJ again stated Garrison is entitled to TTD benefits beginning with the surgery date, but did not provide a termination date for those benefits. He specifically found as follows regarding TTD benefits:

4. An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his worker's compensation claim. *Snawder v. Stice*, 576 SW2d 276 (Ky. App. 1979). The ALJ finds that the issue of temporary total disability has also been previously addressed and again finds that the Plaintiff has not filed evidence sufficient to satisfy his burden to prove entitlement to any temporary total disability benefits that have not already been awarded. The ALJ again finds that the Plaintiff is entitled to TTD benefits following the surgery of October 11, 2017, as previously ordered. The evidence provided by the Plaintiff is insufficient to establish entitlement to TTD benefits related to work-related conditions prior to the date of

surgery and as such, the claim for such benefits beyond what has already been awarded must fail.

Regarding the increase in impairment assessed by Dr. Sexton, the ALJ found as follows:

**Increase in Impairment/Benefits Per KRS 342.730**

5. The ALJ finds per the prior settlement agreement that the Plaintiff sustained a 25% whole person impairment a[sic] determined by Dr. Goldman for the December 29, 2009, incident that resulted in a cervical fusion surgery. Plaintiff has established an increase in impairment of 3% as determined by the opinion of Dr. Sexton as a result of the repeat surgery performed in 2017 by Dr. Raque.

6. Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. *Hill v. Sextet Mining Corporation* , 65 SW3d 503 (KY 2001).

7. "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton* , 34 SW3d 48 (KY 2000).

8. The ALJ finds that the opinion of Dr. Sexton is credible and convincing because his opinion is based upon the objective medical evidence filed herein

and not the subjective complaints of the Plaintiff. Dr. Sexton concluded that the Plaintiff suffered an increased impairment, but observed that he continued working for five years after the first surgery which indicates that he would not be prevented from returning to work as a truck driver. Dr. Sexton issued restrictions including no prolonged overhead work, no lifting of greater than 40 pounds, and no driving while taking Percocet. Dr. Sexton however was unable to relate any of these restrictions to any work-related events. This opinion has convinced the ALJ, and the ALJ thus finds that the Plaintiff has not supplied credible evidence sufficient to establish his entitlement to any multiplier based upon work-related conditions.

9. The ALJ further finds that the credible proof supplied herein is not sufficient to establish that the Plaintiff's restrictions are causally work-related. The ALJ is therefore unable to conclude that the Plaintiff would be unable to provide services to another in return for remuneration on a sustained basis in a competitive economy. The ALJ thus finds that the Plaintiff is not permanently and totally disabled.

10. The ALJ has based the finding of an increase in impairment on the supplemental report of Dr. Sexton. Dr. Sexton concluded that the Plaintiff had a 26% impairment based upon the two-level arthrodesis with an additional 2% for the second operation and another 1% for the additional level per Table 15-7 page 404 of the Guides to the Evaluation of Permanent Impairment. Dr. Sexton therefore concluded that the Plaintiff's current impairment is 29%. The ALJ finds that this conclusion is credible and convincing.

11. The ALJ therefore finds based upon the credible supplemental report of Dr. Sexton that the Plaintiff's whole person impairment has increased to 29%.

### CALCULATION

12. The Plaintiff's increased permanent partial disability benefits shall therefore be calculated as follows:  $\$520.72 \times 29\% \times 1.35 = \$203.86$ . This calculation results in an increase of \$54.16 from the prior weekly amount of \$149.70.

...

In affirming in part and vacating in part, we held:

As noted above, Garrison argues he is entitled to TTD benefits from the date he filed the motion to reopen. He also argues the ALJ failed to perform an appropriate analysis regarding whether he is permanently totally disabled in accordance with Ira Watson Dept. Store v. Hamilton, *supra*. He next argues Dr. Sexton's opinions do not constitute substantial evidence based upon the holding in Cepero v. Fabricated Metals Corp., *supra*. Garrison asserts the evidence compels a contrary result. Finally, Garrison argues the ALJ did not adequately set forth the basic facts supporting his ultimate conclusion, did not demonstrate that he properly reviewed all of the evidence, and did not properly articulate the basis for his decision. M&M argues the ALJ erred in failing to set forth which portion of the increase of 4% impairment is due to Garrison's work injury, and what percentage, if any, is due to his surgery at C4-C5, which the ALJ determined was not work-related.

As the claimant in a workers' compensation proceeding, Garrison had the burden of proving the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Garrison was unsuccessful in his burden of establishing he is permanently totally disabled, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.

1984). “Compelling evidence” is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ’s decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, *supra*.

We first note Garrison’s reliance on Cepero v. Fabricated Metals Corp., *supra*, is misplaced. This case is distinguishable from Cepero, which was an unusual case involving not only a complete failure to disclose, but also affirmative efforts by the employee to cover up a significant injury to the left knee two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero’s left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. In Cepero, the Supreme Court found a medical opinion erroneously premised on the claimant’s egregious omission of directly relevant past medical history was sufficient to mandate reversal based on an insufficient history received by the medical expert. The Court held a “medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable.” *Id.*

After reviewing the evidence and the ALJ’s decision, we cannot conclude Dr. Sexton was provided a history so inaccurate or incomplete as to render his opinion lacking in probative value. Garrison clearly reported the 2009 injury to Dr. Sexton. We also note Dr. Sexton indicated he had reviewed multiple records regarding Garrison’s previous treatment. He also indicated he had reviewed the reports from Drs. Travis and Doyle. We likewise note Dr. Sexton was not cross-examined, so there is no record, other than the

information set forth in his reports, regarding what he specifically relied upon in assessing Garrison's claim. Garrison's objections to Dr. Sexton's opinion go to the weight of the evidence, and are not an adequate basis to reverse on appeal.

We next note that as fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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

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, supra. 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., supra; and 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).

That said, permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining whether an injured worker is entitled to a finding of permanent total disability, the ALJ is required to perform an analysis pursuant to the direction provided in Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra.

In this instance, the ALJ failed to perform the requisite analysis in determining Garrison is not permanently totally disabled. He merely stated that he found Dr. Sexton's opinions are credible and found Garrison is not permanently totally disabled, without any analysis. On remand, the ALJ is directed to perform the correct analysis in accordance with City of Ashland v. Taylor Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra. We make no determination regarding whether Garrison is permanently totally disabled, and the ALJ is free to make any determination based upon the evidence.

If the ALJ determines, after performing the appropriate analysis, that Garrison is not permanently totally disabled, he must revisit the award of TTD benefits. While the ALJ, on multiple occasions, determined Garrison is entitled to TTD benefits commencing on the date he had his second surgery, at no time did he provide a termination date for those benefits. If in fact, the ALJ determines Garrison is entitled to a period of TTD benefits, he must provide a date those benefits terminated and the basis for his determination. Again, we direct no particular result.

Finally, as noted by M&M, the ALJ determined a portion of the surgery performed by Dr. Raque was for treatment of Garrison's work-related injury, and a portion was not. However, the ALJ found the entire increased impairment rating assessed by Dr. Sexton was due to the work-injury. We note Dr. Sexton indicated that a portion of the increased impairment was due to the additional level operated on. This appears to be a reference to the unrelated C4-C5 surgery. If the ALJ determines Garrison is not permanently totally disabled, we direct him to review his determination regarding the increased impairment. Since the C4-C5 condition was determined not work-related, any impairment for that condition cannot be included in the award of increased PPD benefits. Again, we do not direct any particular result, and the ALJ may make any determination based upon the evidence.

The Board remanded the claim to the ALJ to provide the following:

- Perform a correct analysis of Garrison's entitlement to PTD benefits pursuant to City of Ashland v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015) and Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).
- If the ALJ once again determines Garrison is not permanently totally disabled, he must provide a termination date for Garrison's award of TTD benefits and the basis for his determination.
- Further, if the ALJ once again determines Garrison is not permanently totally disabled, he must review his determination regarding the increased impairment since the ALJ determined the C4-5 condition and resultant fusion surgery are not work-related.

The March 31, 2020, Amended Opinion and Award on Remand sets forth the following additional findings:

- Paragraph 7: "Temporary total disability benefits shall therefore terminate as of November 1, 2018, per Dr. Sexton's report dated January 9, 2019."

- Paragraph 11: “...or by extension to permanent total disability due to work related injuries.”
- Paragraph 13: “The ALJ finds in accordance with the credible opinion of Dr. Sexton, that these additional restrictions are not causally related to the work injury, and as such the restrictions cannot therefore provide the basis for permanent total disability. The Plaintiff therefore retains the same abilities with respect to the work injury to provide services to another in return to remuneration that he did prior which would specifically include the ability to drive a truck.

Both parties filed petitions for reconsideration which were overruled by Order dated April 30, 2020.

### **ANALYSIS**

We vacate the ALJ’s determination Garrison is not permanently totally disabled and remand for additional findings.

First, we note that Garrison’s first argument claiming he is entitled to TTD benefits from the date of reopening has, as acknowledged by Garrison, already been addressed by this Board and has been asserted only for purposes of preserving the issue for the Court of Appeals. If that issue was before this Board, since no appeal was taken from our previous decision, our determination is now the law of the case.

Concerning Garrison’s second argument, pursuant to KRS 342.0011(11)(c), “permanent total disability” is defined in pertinent part as “the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. . .” The determination of a total disability award, as articulated by the Supreme Court of Kentucky in Ira A. Watson Department Store v. Hamilton, supra, requires a weighing of the evidence concerning whether the worker "will be able to

earn an income by providing services on a regular and sustained basis in a competitive economy." Ira A. Watson Department Store at 51. The Supreme Court articulated the factors an ALJ shall consider in making this determination stating as follows:

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. (Emphasis added).

The ALJ enjoys wide ranging discretion in granting or denying an award of permanent total disability benefits. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006). That said, all parties, including this Board, are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). While this Board is cognizant of the fact an ALJ is not required

to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result, the ALJ must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

In the March 31, 2020, Amended Opinion and Award, the ALJ failed to set forth adequate findings informing this Board of the basis for his determination Garrison is not permanently totally disabled. The ALJ concluded Dr. Robert Sexton's restrictions cannot form the basis for a finding of permanent total disability because he failed to relate them to the work-related injury. This finding cannot form the entire basis for the ALJ's finding Garrison is not permanently totally disabled, because it is insufficient as well as inaccurate.

In both the July 22, 2019, Opinion and Award and the March 31, 2020, Amended Opinion and Award on Remand, the ALJ found, in relevant part, as follows in paragraph 11: "Dr. Sexton issues restrictions including no prolonged overhead work, no lifting of greater than 40 pounds, and no driving while taking Percocet. Dr. Sexton however was unable to relate any of these restrictions to any work-related events." However, a review of Dr. Sexton's January 9, 2019, report reveals he attributed all three restrictions to the original C5-6 and C6-7 surgery and the October 11, 2017, repeat surgery, and the ALJ unequivocally determined Garrison's C5-6 and C6-7 condition and the surgeries were work-related. Consequently, the ALJ's conclusion that Dr. Sexton was unable to relate any of the restrictions to any work-related events is erroneous.

On remand, and as instructed in our January 31, 2020, Opinion, the ALJ must conduct a thorough analysis of Garrison’s entitlement to permanent total disability benefits pursuant to the relevant statutory and case law. While we direct no particular result, the ALJ must consider factors “such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact” as stated in Ira A. Watson Department Store, supra, provide the analysis required by the City of Ashland v. Stumbo, supra, and consider Dr. Sexton’s work-related restrictions enumerated in his January 9, 2019, report and set forth adequate findings supporting his determination. Id. at 51.<sup>1</sup>

We also vacate the termination of Garrison’s TTD benefits on November 1, 2018, and remand for additional findings.

KRS 342.0011(11)(a) defines temporary total disability as follows:

‘Temporary total disability’ means the condition of an employee who has not reached maximum medical improvement [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Kentucky Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of

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<sup>1</sup> Dr. Sexton’s restrictions are a) ACDF C5-6, C6-7, 2010 No prolonged overhead work. No lifting greater than 40#. Should not have been driving while taking Percocet 10 mg qid. b) ACDF C5-6, C6-7 10-11-2017 (as above, same restrictions).

returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

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

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

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

. . .

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the

statutory phrase ‘return to employment’ was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD benefits, the Supreme Court elaborated as follows:

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. See Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an ‘all or nothing’ argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform ‘any type of work.’ See KRS 342.0011(11)(c).

...

Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than ‘the type that is customary or that he was performing at the time of his injury’ does not constitute ‘a level of improvement that would permit a return to employment’ for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

More recently, in Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The Court stated, “... we reiterate today, Wise does not ‘stand for the

principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.” Id. at 254.

Finally, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Supreme Court instructed as follows:

As we have previously held, “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury.” Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TDD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TDD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TDD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TDD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

The record reveals Garrison did not return to work following the second fusion surgery in October 2017. Therefore, the termination date for Garrison’s award of TTD benefits *must* be based upon a date of MMI. In the March

31, 2020, Amended Opinion and Award on Remand, the ALJ relied upon Dr. Sexton's January 9, 2019, supplemental report in determining Garrison's TTD benefits terminated on November 1, 2018. However, the January 9, 2019, report contains no reference to MMI which would support a finding Garrison achieved MMI on November 1, 2018. In fact, in Dr. Sexton's November 1, 2018, report, he specifically opined Garrison had not yet reached MMI. Consequently, there is no support in the record for a November 1, 2018, termination date of TTD benefits. On remand, the ALJ must re-examine the medical evidence in the record in determining an appropriate termination date and set forth the basis of his determination. While we direct no particular result, the ALJ's ultimate decision must be based upon an accurate understanding of the record.

All other issues raised on appeal by Garrison have been rendered moot by the above determinations including the start date of the award of TTD benefits which Garrison has raised only in order to preserve the issue in a subsequent appeal.

On cross-appeal, M & M asserts the ALJ erred by failing to carve out a portion of the increase in the impairment rating for the non-work-related C4-5 repair. While we affirm on the issue raised on cross-appeal, we vacate the ALJ's determination that the increase in Garrison's impairment is 4% and remand for entry of an amended opinion and order finding the increase to be 3%.

In the March 31, 2020, Amended Opinion and Order on Remand, based on Dr. Sexton's report, the ALJ erroneously stated there had been a 4% increase in the impairment rating. However, that finding is not in accordance with Dr. Sexton's January 9, 2019, report as Dr. Sexton concluded Garrison had a 26%

impairment rating as a result of the initial work injury and a 3% increase in that impairment rating due to the second surgery. His report reads, in relevant part, as follows:

The C5-6, C6-7 repeat ACDF was a result of a failed fusion of C5-6, C6-7. Therefore this would add an additional 2% by table 15-7, page 404, paragraph IIE = add 2% for second operation

AND

Table 15-7, page 404 – paragraph IE = add 1% for each additional level.

TOTAL cervical WPI therefore = 26% + 2% + 1% = 29% WPI – as a result of his cervical spine condition.

Significantly, in his September 3, 2019, Order ruling on the Petitions for Reconsideration the ALJ correctly stated in paragraphs 10 and 11 as follows:

10. The ALJ has based the finding of an increase in impairment on the supplemental report of Dr. Sexton. Dr. Sexton concluded that the Plaintiff had a 26% impairment based upon the two-level arthrodesis with an additional 2% for the second operation and another 1% for the additional level per Table 15-7 page 404 of the Guides to the Evaluation of Permanent Impairment. Dr. Sexton therefore concluded that the Plaintiff's current impairment is 29%. The ALJ finds that this conclusion is credible and convincing.

11. The ALJ therefore finds based upon the credible supplemental report of Dr. Sexton that the Plaintiff's whole person impairment has increased to 29%.

It is important to note that neither party contested the ALJ's determination that the increase in impairment rating is 3%.

Based upon the evidence in the record, the ALJ cannot rely upon Dr. Sexton's opinions while simultaneously concluding Garrison had a 4% increase in

impairment, as the July 22, 2019, Opinion and Order, the September 3, 2019, Order and the March 31, 2020, Amended Opinion and Order on Remand firmly establish the ALJ relied upon Dr. Sexton's opinions. Consequently, the ALJ must find the increase in impairment rating is 3% and not 4%. We vacate the ALJ's finding Garrison has a 4% increase in his impairment rating on reopening and direct the ALJ to find, in accordance with the September 3, 2019, Order and the opinions of Dr. Sexton, the impairment rating increased by 3%.

However, we affirm that portion of the March 31, 2020, Amended Opinion and Order on Remand declining to apportion any of the increased impairment rating to the non-work-related C4-5 repair. Our reasons follow. There is no support for the suggestion that Dr. Sexton offered any impairment rating for that portion of the second surgery implicating C4-5. At the beginning of his January 9, 2019, letter, Dr. Sexton specifically noted the fact that the ALJ deemed that portion of the second surgery encompassing C4-5 to be non-work-related. As stated, “[a] **PORTION**, not the entirety, of his cervical condition has been deemed compensable and work related by the ALJ, C5-6, and C6-7 were deemed to be work related; the extension of the fusion construct to C4-5 was deemed to be non-compensable, non-work related.” (Emphasis in original.) *Therefore, a reasonable inference is that Dr. Sexton would not include this level in his calculations of the increased impairment rating.* A review of Table 15-7 on page 404 of the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, further bolsters this inference. Table 15-7 indicates that a second surgery warrants an automatic impairment rating increase of 2%. Further, Dr. Sexton, in his January 9, 2019, letter, interpreted Table

15-7 to stand for the proposition that 1% is added for “each *additional* level.”<sup>2</sup> (Emphasis added). Since Dr. Sexton fully acknowledged at the beginning of his letter that the ALJ deemed the C4-5 repair to be non-work-related, a reasonable inference is that the 1% is for the “additional” level of C6-7 and not C4-5. Consequently, the ALJ was not required to apportion any of the increase in the impairment rating to the non-work-related C4-5 repair. Therefore, concerning the issue raised on cross-appeal by M & M, we affirm.

Accordingly, to the extent the ALJ determined Garrison is not permanently totally disabled and terminated the award of TTD benefits on November 1, 2018, the March 31, 2020, Amended Opinion and Order on Remand and the April 30, 2020, Order are **VACATED**. This claim is **REMANDED** for additional findings consistent with the views set forth herein. Our resolution of these issues renders moot the other issues raised on appeal by Garrison. To the extent that the ALJ determined the increase in impairment following the second surgery, as per Dr. Sexton’s opinions, is 4%, we **VACATE** and **REMAND** for entry of an amended opinion and order finding the increased impairment rating is 3%. Concerning the cross-appeal, we **AFFIRM** the ALJ’s determination that no portion of the increased impairment rating is attributable to the non-work-related C4-5 repair.

ALL CONCUR.

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<sup>2</sup> For the sake of accuracy, we point out that Table 15-7 does not state “each additional level” but, rather, “1% per level.”

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