

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 19, 2021

CLAIM NO. 201098764

M&M CARTAGE CO., INC.

PETITIONER

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

JAMES GARRISON AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. M&M Cartage Company, Inc. ("M&M") appeals from the Second Amended Opinion and Award on Remand rendered on November 25, 2020 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ found James Garrison's ("Garrison") cervical condition has worsened warranting a 3% increased impairment rating, and he is now permanently totally disabled. M&M

also appeals from the December 14, 2020 Order overruling its Petition for Reconsideration.

On appeal, M&M argues the ALJ exceeded his authority by reversing his previous finding that Garrison is not permanently totally disabled. M&M argues the ALJ erred in commencing the award of permanent total disability (“PTD”) benefits from the date of the motion to reopen since that issue is *res judicata*. M&M argues the ALJ erred by “combining the non-work-related impairment with work-related impairment to find Plaintiff totally disabled.” Finally, M&M argues the ALJ failed to carve out 1% of the increased impairment to Garrison’s unrelated C4-5 cervical condition.

We find the ALJ acted within his authority in determining Garrison is now permanently totally disabled since this Board in an Opinion rendered October 2, 2020 vacated his previous determination on this issue. We also determine the ALJ followed the directives of this Board and provided a sufficient and appropriate analysis 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). We additionally find the ALJ did not err in commencing of the permanent total disability benefits award on the date Garrison filed his motion to reopen pursuant to KRS 342.125(4). Finally, we find no evidence supporting M&M’s argument the ALJ combined non-work-related disabilities or impairments with his work-related disability or impairment in determining Garrison is permanently totally disabled. Therefore, because substantial evidence supports the ALJ’s determination that

Garrison sustained a worsening of his work-related cervical condition and is now permanently totally disabled, we affirm.

This is the third time this claim has been appealed to this Board. Garrison sustained a work-related cervical injury on December 29, 2009 while working as a truck driver for M&M. No Form 101 was filed. Hon. J. Landon Overfield, Administrative Law Judge, approved a settlement agreement 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 and underwent a two-level fusion and discectomy in May 2010. The settlement was based upon a 25% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). The agreement reflects Garrison was to receive \$149.70 per week for 425 weeks and M&M had paid medical expenses and temporary total disability (“TTD”) benefits. On March 21, 2016, Hon. Robert L. Swisher, Chief Administrative Law Judge, approved a settlement 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, noting Dr. George Raque had recommended additional fusion surgery, and he anticipated an increase in his functional impairment rating. Garrison requested the initiation of TTD benefits until reaching maximum medical improvement (“MMI”) from the surgery. Garrison attached an October 5, 2016 note from Dr. Raque indicating he should remain off work until reaching MMI. He also attached Dr. Raque’s

September 23, 2016 note stating recent studies indicated he had a solid fusion at C6-7, but a nonunion at C5-6 and a broken screw at C5. Additionally, the myelogram indicated a disc protrusion at the adjacent C4-5 level. Dr. Raque recommended a discectomy and fusion surgery at C4-C5 and C5-C6, and he attributed all aspects of the proposed surgery to the 2009 work injury.

Subsequently, M&M filed a Form 112 medical dispute challenging the proposed surgery. M&M filed Dr. Daniel Wolens' October 13, 2016 report, Dr. Russell Travis' November 16, 2016 consultation review report, and records from Dr. Wayne Villanueva, who performed the May 7, 2010 two level fusion at C5-6 and C6-7. M&M also filed the January 25, 2016 Dr. Michael Doyle's recommendation of a C5 corpectomy and fusion from C4-6. Dr. Doyle opined the surgery at C5-6 is related to the 2009 work injury, but the pathology at C4-5 is not.

An agreed Order was submitted to the ALJ for a determination regarding compensability of the proposed surgery. On August 3, 2017, relying upon Dr. Doyle's opinion, the ALJ determined the proposed treatment and surgery for the C4-5 level was not compensable. However, he determined the proposed treatment and surgery for the C5-6 level was work-related and compensable. In a September 5, 2017 Order addressing Garrison's Petition for Reconsideration, the ALJ awarded TTD benefits to begin on the date of surgery. The ALJ subsequently denied Garrison's second Petition for Reconsideration requesting TTD benefits from the date of reopening.

Dr. Raque performed a fusion at C4-6, as well as a C5 corpectomy on October 11, 2017. Garrison submitted additional records of Dr. Raque from August

2017 through May 2019, which indicate a second nonunion. M&M submitted Dr. Robert Sexton's November 1, 2018 report and January 9, 2019 supplement report. Garrison testified by deposition on January 12, 2017 and December 17, 2018, and at the final hearing held on May 21, 2019.

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

The ALJ rendered an Opinion and Award on July 22, 2019, finding Garrison's cervical condition is compensable at the C5-C7 levels, but the condition at the C4-5 level is not causally work-related. The ALJ again found 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 based upon Dr. Sexton's restrictions, noting there was insufficient proof establishing the restrictions are work-related. The ALJ awarded an increase in Garrison's PPD benefits based on the 4% impairment rating increase assessed by Dr. Sexton, beginning with the date of the motion to reopen, for the remainder of his 425-week compensable period. Both parties filed Petitions for Reconsideration.

In the September 3, 2019 Order on reconsideration, the ALJ reiterated M&M is only responsible for medical benefits for treatment of the C5-C7 levels. The ALJ again stated Garrison is entitled to TTD benefits commencing on the surgery date, but did not provide a termination date for those benefits. Regarding the

increase in impairment assessed by Dr. Sexton, the ALJ first found Garrison sustained a 25% impairment rating due to the December 29, 2009 work injury resulting in cervical fusion surgery. The ALJ then determined Garrison sustained a 3% increase in impairment due to the repeat surgery performed in 2017 by Dr. Raque, based upon Dr. Sexton's opinion. The ALJ reiterated his finding that Garrison is not permanently totally disabled.

The ALJ concluded Garrison now has a 29% impairment rating for his cervical condition based upon Dr. Sexton's supplemental report, consisting of 26% impairment based upon the two-level arthrodesis, an additional 2% for the second operation and another 1% for the additional level pursuant to the AMA Guides. The ALJ calculated Garrison's weekly PPD benefits increased \$203.86 from the prior \$149.70 weekly benefit rate. The ALJ awarded Garrison the additional weekly sum of \$54.16 commencing on the date of the filing of the motion to reopen, October 20, 2016, and continuing for the remainder of the 425-week period established in the March 21, 2016 settlement agreement. The ALJ awarded medical expenses related to the C5-C7 cervical condition.

Both parties appealed to the Board. The Board rendered an Opinion on January 31, 2020 affirming in part, vacating in part, and remanding. The Board determined the ALJ failed to perform the requisite analysis in determining Garrison is not permanently totally disabled pursuant to City of Ashland v. Taylor Stumbo, supra and Ira A. Watson Department Store v. Hamilton, supra. On remand, the Board directed the ALJ to perform the appropriate analysis. The Board noted that if the ALJ determines Garrison is not permanently totally disabled, he must make a

determination regarding the termination date of TTD benefits and must review his determination regarding the increased impairment rating. This Board directed that any impairment for the C4-5 condition could not be included in any increased award of PPD benefits. That opinion was not appealed.

The ALJ rendered an Amended Opinion and Award on Remand on March 31, 2020, determining Garrison was entitled to TTD benefits for the second surgery from October 11, 2017 through November 1, 2018, per Dr. Sexton's January 9, 2019 report. The ALJ found Garrison sustained an increase of 4% impairment rating "as determined by the opinion of Dr. Sexton as a result of the surgery performed in 2017 by Dr. Raque at the C4-5 level which has been determined to be compensable." The ALJ again determined Garrison is not permanently totally disabled, making the following additional findings of fact:

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. 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 based upon the work injury of the increase in impairment found herein.

Both parties filed Petitions for Reconsideration, which the ALJ summarily overruled on April 30, 2020. Both parties then appealed from the March 31, 2020 Opinion on Remand and the April 30, 2020 Order. On appeal, Garrison argued he is entitled to TTD benefits from the date of reopening. Garrison also

argued the ALJ failed to set forth sufficient findings supporting the conclusion he is not permanently totally disabled, and a proper analysis pursuant to Ira A. Watson Dept. Store v. Hamilton, *supra*, demonstrated otherwise. On appeal, M&M argued the ALJ erred by failing to carve out the portion of the increased impairment rating for the non-work-related C4-5 fusion.

The Board rendered an Opinion on October 2, 2020 affirming in part, vacating in part, and remanding. Regarding the issue of permanent total disability, we stated as follows:

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

....

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).

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.

The Board vacated the termination of Garrison's TTD benefits on November 1, 2018, and remanded for additional findings. The Board noted Garrison did not return to work following the second fusion surgery in October 2017. The Board noted the ALJ relied upon Dr. Sexton's January 9, 2019 supplemental report in determining Garrison's TTD benefits terminated on November 1, 2018. However, Dr. Sexton did not refer to MMI in that report. In fact, Dr. Sexton opined Garrison had not reached MMI in the November 1, 2018, report. Therefore, the Board determined there was no support in the record for a November 1, 2018 termination date of TTD benefits. On remand, the Board directed the ALJ to re-examine the medical evidence to determine an appropriate termination date and set forth the basis of his determination.

The Board next addressed M&M's argument that 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. The Board affirmed on this issue, but vacated the ALJ's determination that Garrison's impairment increased by 4%, and remanded for entry

of an amended opinion and order finding the increase to be 3%. The Board stated as follows:

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 5th 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.”(footnote omitted)(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. (original emphasis)

Neither party appealed the October 2, 2020 opinion.

The ALJ rendered a Second Amended Opinion and Award on Remand on November 25, 2020. As directed by the Board, the ALJ determined Garrison’s impairment rating increased by 3% pursuant to Dr. Sexton’s opinion. After reviewing the statutory definitions of “permanent total disability” and “work” contained in KRS 342.0011(11)(c) and (34) and the case of Ira A. Watson

Department Store v. Hamilton, *supra*, the ALJ found Garrison is now permanently and totally disabled, stating as follows *verbatim*:

6. The ALJ finds that the opinion of Dr. Sexton is credible and convincing with respect to impairment 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.

7. With regard to restrictions, the ALJ relies upon the credible opinion of Dr. Raque who found that the Plaintiff had an increased impairment following the second fusion surgery and that he was permanently restricted to no lifting of over 30 pounds, no pushing or pulling of over 40 pounds, no overhead work, and no operating heavy equipment. Dr. Raque indicated that the Plaintiff continued to have neck pain, which precluded him from physical activity including the operation of heavy equipment and that the Plaintiff was taking significant narcotic pain medication and that it would be unsafe for him to operate heavy equipment or to work in over the road trucking. Dr. Raque therefore found that the Plaintiff was unable to return to work.

8. The Plaintiff testified that his employment history has included construction work and commercial driving but that he could no longer pass a Department of Transportation physical. The ALJ finds that the Plaintiff's reliance on prescription pain medication as noted by Drs. Sexton and Raque, along with the restrictions issued against driving or operating heavy equipment, render him unable to return to the same type of work.

....

11. In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. *Id.*

12. The ALJ finds in accordance with the credible restrictions issued by opinions of Drs. Sexton and Raque that the Plaintiff would be unable to perform any of the jobs that he has performed for the majority of his working life which include primarily commercial driving and construction positions.

13. There is also no convincing evidence that this Plaintiff would now be able to return to the work force in a sedentary or office capacity as a return to this type of work would likely also be adversely affected by the Plaintiff's use of pain medication.

14. The ALJ finds that the Plaintiff's advanced age, blue collar work history, extensive restrictions, and reliance upon prescription pain medication, render him incapable of returning to any type of sustained work. The ALJ is therefore unable to conclude that the Plaintiff would be able to provide services to another in return for remuneration on a sustained basis in a competitive economy based upon the increased impairment and additional restrictions found herein. The ALJ thus finds that the Plaintiff is permanently and totally disabled.

15. The issue of Temporary Total Disability has been rendered **MOOT** by the foregoing.

The ALJ awarded PTD benefits commencing on the date Garrison filed the motion to reopen, October 20, 2016, subject to KRS 342.730(4). He also awarded medical benefits related to the C5-C7 cervical condition.

M&M filed a Petition for Reconsideration, essentially raising the same arguments it now makes on appeal. In an Order rendered December 14, 2020, the ALJ overruled M&M's Petition, stating as follows *verbatim*:

IT IS HEREBY ORDERED, that the Petition is **OVERRULED** as an impermissible re-argument of the merits of the claim. The Kentucky Workers' Compensation Board determined that the ALJ's prior failure to find the restrictions issued by Dr. Sexton to be sufficiently work-related was erroneous and as such that said restrictions were the result of the work injury. Those work-related restrictions, along with the requirement that the Plaintiff take prescription pain medication, provided a substantial portion of the underlying basis for the finding of permanent total disability.

On appeal, M&M argues the ALJ had no authority to reverse his previous dispositive factual findings on the merits in a subsequent opinion, absent a showing of new evidence, fraud or mistake, citing to Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). Therefore, M&M argues the ALJ's finding that Garrison is now permanently and totally disabled is arbitrary and unreasonable, and must be reversed.

M&M argues the ALJ erred in awarding PTD benefits from the date of the motion to reopen since this issue is *res judicata*. M&M notes the ALJ had previously determined Garrison was not entitled to TTD benefits prior to his October 2017 surgery, and that Garrison is not permanently totally disabled. M&M argues Garrison is not entitled to either TTD or PTD benefits for his work-related condition prior to the date of the second surgery. M&M also points out this Board, in the January 31, 2020 Opinion, remanded the claim to the ALJ for a determination of a

date of termination of TTD benefits, not commencement. It further notes the January 31, 2020 Opinion was not appealed. Therefore, according to M&M, the issue of whether Garrison is totally disabled due to work-related conditions prior to the second surgery is *res judicata* and it requests the Board to reverse the ALJ's award of PTD benefits beginning from the date of reopening.

M&M argues, "It is clear that the ALJ combined the non-work-related impairment resulting from the unrelated fusion at C4-5 with work-related impairment and disability to arrive at a [PTD] award." M&M asserts the ALJ must perform additional analysis addressing what percentage of disability is associated with each condition and make the appropriate carve-outs. M&M asserts no physician has opined Garrison is totally disabled, and he continued working for five years after his work injury while taking Percocet. M&M argues the ALJ arbitrarily and without explanation abandoned his previous reliance upon Dr. Sexton, who did not relate the restrictions to the work-related events. M&M asserts Garrison is unable to work not only due to his neck condition, but also due to his low back condition since his job required him to sit for long periods.

Finally, M&M argues the ALJ failed to carve out a portion of the increased 3% impairment rating due to the non-work-related fusion at C4-5, without acknowledging this Board's October 2, 2020 Opinion affirming on this issue. M&M asserts Dr. Sexton apportioned 1% to the non-compensable C4-5 level, and that therefore, Garrison has a 2% increased impairment rating. "Based on the 2% increase to the previously adjudicated 25%, the plaintiff would now have a total 27% as a result of the work injury."

We first reject M&M's argument the ALJ exceeded his authority in determining Garrison is now permanently totally disabled, contrary to his previous finding in the July 22, 2019 Opinion and March 31, 2020 Amended Opinion. In the October 2, 2020 Opinion, this Board vacated the ALJ's determination Garrison is not permanently totally disabled and remanded for additional findings. When a decision is vacated, it is as if the initial determination never existed. This was addressed in Hampton v. Flav-O-Rich, 489 S.W.3d 230 (Ky. 2016), and in Commonwealth of Kentucky v. Werner, 2014-CA-001154-WC, 2015 WL 2226274 (Ky. Ct. App., April 10, 2015)(designated Not to be Published). The holding in both cases establishes that when an ALJ's decision is vacated, it is effectively canceled, annulled, or revoked. Thereafter, the judgement or opinion is no longer binding or conclusive.

As noted in Hampton, 489 S.W.3d at 234-235, the Kentucky Supreme Court stated as follows:

Because the Board vacated the ALJ's award, he is required to write a new opinion on remand; he cannot, as the Court of Appeals indicated, simply supplement his existing opinion with additional findings of fact. In the process of writing that new opinion, there is nothing to prevent the ALJ from entering a different award, nor is there anything to compel the ALJ to enter the same award. By vacating the ALJ's opinion and requiring him to make additional findings, the Board has implicitly authorized him to enter a different award . . .

In Werner, the ALJ originally determined the Claimant was not entitled to workers' compensation benefits. This Board vacated and remanded, directing the ALJ to review the evidence and determine whether the Claimant sustained a work-related knee injury with appropriate findings of fact. In the

Opinion on Remand, the ALJ entered an award in favor of the Claimant contrary to his previous determination. On appeal, the UEF argued the ALJ had no authority to enter an award in favor of the Claimant since the ALJ had already determined that he was not in fact entitled to an award citing to Bowerman v. Black Equipment Co., supra. Like the UEF, M&M also cites to Bowerman v. Black Equipment Co., supra. The Court of Appeals in Werner stated as follows:

This argument misses the mark, however, because the ALJ did not reverse himself. Rather, the Board vacated the ALJ's decision and directed the ALJ to reconsider this matter pursuant to its authority under KRS 342.285(3). When any court or tribunal orders that a judgment, opinion, or order be set aside or vacated, that decision effectively cancels, annuls, or revokes the judgment, order, or opinion. See BLACK'S LAW DICTIONARY 1546 (7th ed. 1999)(defining "vacate" as "to nullify or cancel; make void; invalidate"). Thereafter, the judgment, order or opinion is no longer binding or conclusive. *First State Bank v. Asher*, 273 Ky. 54, 117 S.W.2d 581, 583 (1938). This means the vacated judgment no longer binds any litigant and, by logical extension, no longer binds the ALJ who rendered the vacated judgment. Thus, upon remand, the ALJ was free to consider the evidence, and in doing so, reevaluate the merits of Werner's claims. See, e.g., *ABS Global, Inc. v. Draper*, No. 2013-SC-000051-WC, 2014 WL1514991 (Ky. April 17, 2014)(holding, in a situation where the Board's order vacated the ALJ's original opinion and order, "It is clear that the Board wanted the ALJ to fully review the evidence and either make findings to support his original opinion or reach a different conclusion on remand.)

We find this reasoning is directly applicable to the case before us. Neither party appealed from this Board's October 2, 2020 Opinion. Therefore, on remand, the ALJ was required to conduct a thorough analysis of Garrison's entitlement to PTD benefits pursuant to relevant statutory and case law. The ALJ

was required to consider factors discussed in Ira A. Watson Department Store v. Hamilton, supra, provide an analysis as required by City of Ashland v. Taylor Stumbo, supra, consider Dr. Sexton's work-related restrictions contained in his January 9, 2019 report, and set forth adequate findings supporting his determination.

That said, as the claimant in a workers' compensation proceeding, Garrison had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Garrison was successful in his burden, the question on appeal is whether substantial evidence 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). 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.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky.

2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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

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 because 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 Garrison is permanently totally disabled, the ALJ was directed to perform an analysis pursuant to City of Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra. The Board also directed the ALJ to consider Dr. Sexton's work-related restrictions contained within the January 9, 2019 report. We additionally note an injured worker's testimony may be considered, and relied upon, when assessing total disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

Although the ALJ did not specifically outline the five-step analysis outlined in City of Ashland v. Stumbo, *supra*, we determine he followed the directive of this Board and provided a sufficient and appropriate analysis pursuant to those factors, and Ira A. Watson Department Store v. Hamilton, *supra*, in determining Garrison is now permanently and totally disabled. The ALJ found Garrison sustained compensable work-related injuries at the C5-C7 levels and that his impairment had worsened, warranting a 3% increase in impairment based upon Dr. Sexton's opinion. The ALJ could reasonably infer this as a basis for assessing Garrison's disability.

The ALJ next determined Garrison is incapable of returning to any type of sustained work. He relied upon the restrictions imposed by Dr. Sexton and Dr. Raque, the use of pain medication, Garrison's age, and his work history. Dr. Raque's most recent treatment notes indicate Garrison continued to complain of severe neck pain and left arm pain. In an April 10, 2018 note, Dr. Raque noted a recent cervical CT scan shows a "healing fusion at C6-7 but there is still fusion at C4-5 or C5-6." On November 6, 2018, Dr. Raque noted the cervical CT scan showed:

He has pseudoarthrosis at both top and bottom of the strut graft in the C5 vertebrectomy channel. The upper screws are broken. The +4 (sic) has been no displacement of the plate and screws have not backed out however. He has developed severe foraminal stenosis bilaterally at C5-6 County (sic) for the left arm pain due to subsidence of the graft into the C6 vertebral body.

Dr. Raque opined surgical repair would be required at some point. Dr. Raque opined, "I do not think the patient can return to work however. The vibration of over the road truck driving would exacerbate his neck and arm pain and

would result in significant risk of displacement of the plate or backing out of the screws precipitating emergency surgery . . .” In the most recent treatment note dated May 8, 2019, Dr. Raque prescribed Garrison Percocet, 7.5-325 MG, every six hours.

Dr. Raque stated as follows:

This study social history (sic) probably not fused with a pseudoarthrosis both the top and bottom of the cage. There is no further subsidence of the cage however and the screws have not backed out. The plate is not displaced. He continues to complain of activity related neck pain which precludes any type of significant physical activity including operation of heavy equipment. He is also requiring significant narcotic pain medication and carotid (sic) do not think it is going to be safe from him to be driving bulldozers and the like. Additionally any type of over the road driving is ill advised.

. . . . I still do not think it’s feasible for him to go back to work due to the pseudoarthrosis and continued neck pain requiring narcotics. This makes heavy equipment or operating business vehicles on the road ill advised. Additionally he cannot lift much over about 15 or 20 pounds and cannot engage in activities that require prolonged extension or flexion of his neck. Pushing or pulling over 30 pounds his (sic) not possible. Additionally a desk job is not feasible due to his requirement for the narcotics. . . .

In a letter dated January 20, 2019, Dr. Raque stated Garrison had attained MMI if he did not wish to undergo a third surgical procedure. He further opined Garrison has a greater impairment rating following the second surgery than he had following the first surgery. Dr. Raque permanently restricted Garrison from lifting over 30 pounds and pushing or pulling over 40 pounds. He restricted Garrison from operating heavy equipment or from overhead work.

Dr. Sexton diagnosed Garrison as status-post ACDF C5-6, C6-7; pseudoarthrosis C5-6 with HNP C4-5; nonunion at C5-6; status-post corpectomy C5 with ACDF C5-6, C6-7 and C4-5; second pseudoarthrosis at C5-6. Regarding the lumbar spine, he also found Garrison is status-post lumbar laminectomy, and has congenital short pedicles with spinal stenosis, and central multi-level degenerative disc disease. In the January 9, 2019 report, Dr. Sexton noted the ALJ determined a portion of Garrison's cervical condition, C5-6 and C6-7, was work-related and compensable, while C4-5 was non-work-related. Dr. Sexton assessed a 26% impairment rating for the May 7, 2010 ACDF at C5-6 and C6-7 pursuant to the AMA Guides. He assessed a 2% impairment rating for the repeat C5-6 and C6-7 ACDF and a 1% "for each additional level" pursuant to the AMA Guides. Therefore, Garrison had a combined 29% impairment rating for his cervical spine. Dr. Sexton imposed the following restrictions for the 2010 C5-6 and C6-7 ACDF, and the repeat ACDF at C5-6 and C6-7 in 2017: no prolonged overhead work, no lifting greater than forty pounds and no driving while taking Percocet. As directed by the Board, the ALJ noted Dr. Sexton's restrictions are work-related since they applied to the C5-6 and C6-7 conditions. Dr. Sexton opined Garrison is not permanently totally disabled due to his cervical condition since he continued to work for five years after the 2010 surgery.

Garrison testified he was born in May 1962. He completed high school and served two years in the Army Reserves. He attended some vocational schooling for IT training, but never completed the program nor worked in that field. Garrison testified he did not attend the DOT physical examination in 2016 due to his

ongoing problems. Garrison has worked as an over-the-road truck driver since 1994. Prior to that, Garrison worked for himself as a general contractor performing home improvement tasks for six years. He also briefly worked as a lifeguard, ran a ditch witch, sold insurance for Humana, and worked as an assistant manager for Bob Evans. Garrison last worked as a truck driver in October 2015 and has not returned to any work since. Garrison does not believe he can perform any of his past work. Garrison stated Dr. Raque has restricted him from driving.

Garrison explained Dr. Raque performed the second cervical procedure on October 11, 2017. Subsequently, a cervical CT scan revealed another nonunion and broken screw, which he believes is at the C5-6 level. Garrison testified he currently is prescribed Percocet and Gabapentin. He continues to experience neck pain radiating into his left shoulder and arm, and has difficulty sleeping. Garrison testified the medication helps, but does not resolve his pain, which increases with activity. Garrison testified he had been prescribed Percocet 10/325, but that this dosage made him feel “fuzzy-headed or dizzy.” He now takes Percocet 7.5/325, and stated his pain is worse but he is not as dizzy or sleepy. Garrison has difficulty concentrating due to his medication. Garrison believes his cervical condition is worse now than it was following the first surgery.

We believe the above comprises of substantial evidence supporting the ALJ’s determination that Garrison is now permanently totally disabled due to his work-related cervical condition. Therefore, since the ALJ followed the directives of this Board, provided a sufficient and appropriate analysis pursuant to City of Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra,

and that substantial evidence supports his determination, his decision will not be disturbed.

We also find the ALJ did not err in commencing the award of PTD benefits on the date Garrison filed the motion to reopen, October 20, 2016. KRS 342.125 (1) (d), and (4) state as follows:

(1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

(d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

...

(4) Reopening and review under this section shall be had upon notice to the parties and in the same manner as provided for an initial proceeding under this chapter. Upon reopening, the administrative law judge may end, diminish, or increase compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke a previous order. The administrative law judge shall immediately send all parties a copy of the subsequent order or award. **Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen.** No employer shall suspend benefits during pendency of any reopening procedures except upon order of the administrative law judge.
(Emphasis added)

Although it is not directly on point, we find the holding in Sweasy v. Wal-Mart, 295 S.W.3d 835 (Ky. 2009) analogous and instructive. There, the Kentucky Supreme Court determined Sweasy's entitlement to benefits vested at the

time of the injury. In this instance, Garrison's entitlement to enhanced benefits for the worsening of his condition vested on the date he filed the motion to reopen. The increase in impairment was a product of the underlying cervical condition requiring surgery, not necessarily the surgery itself. The ALJ did not determine Garrison is entitled to PTD benefits commencing on the date of the motion to reopen until the second opinion on remand rendered on November 25, 2020. Therefore, the issue was not *res judicata*. Accordingly, we affirm the ALJ's award of increased benefits commencing on the date the motion to reopen was filed.

Next, this Board has already addressed and rejected M&M's argument the ALJ was required to carve out a portion of Garrison's increased impairment for the unrelated C4-5 condition. In its October 2, 2020 opinion, this Board specifically affirmed 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, since there was "no support for the suggestion that Dr. Sexton offered any impairment rating for that portion of the second surgery implicating C4-5." This Board ultimately concluded that since Dr. Sexton fully acknowledged 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. Since the Board affirmed this determination, and M&M did not appeal from the October 2, 2020 opinion, the determination is the law of the case. Therefore, we find no error by the ALJ in attributing the entire 3% increase in impairment to the work-related cervical condition.

Similarly, we find no support for M&M's assertion, "it is clear that the ALJ combined the non-work-related impairment resulting from the unrelated fusion at C4-5 with work-related impairment and disability to arrive at the [PTD] award." As noted above, the ALJ did not err in attributing the entire increase in impairment to the work-related C5-C7 cervical condition. The ALJ, on multiple occasions throughout the litigation of this claim, has reiterated his finding the C4-5 condition is not causally work-related, and did not refer to this unrelated condition or Garrison's low back condition in his PTD analysis. In his January 2019 report, Dr. Sexton recognized Garrison's cervical condition at the C4-5 level had not been deemed compensable by the ALJ, and assessed an impairment rating and restrictions based upon the C5-C7 levels only. In assessing his own physical ability to return to work, Garrison discussed his worsening cervical condition since the second surgery in 2017 and the repeat nonunion at C5-6. M&M points to no specific evidence demonstrating the ALJ considered or combined non-work-related conditions in his PTD analysis.

Accordingly, the November 25, 2020 Second Amended Opinion and Award on Remand and the December 14, 2020 Order on Petition for Reconsideration by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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