

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 18, 2019

CLAIM NO. 201489885

O'REILLY AUTOMOTIVE STORES, INC.

PETITIONER/  
CROSS-RESPONDENT

VS.

APPEAL FROM HON. STEPHANIE L. KINNEY,  
ADMINISTRATIVE LAW JUDGE

TONY ERNSPIKER;  
AND  
HON. STEPHANIE L. KINNEY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENT/  
CROSS-PETITIONER

RESPONDENT

OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** O'Reilly Automotive Stores, Inc. ("O'Reilly") appeals and Tony Ernspiker cross-appeals from the October 16, 2017 Interlocutory Order, the April 26, 2019 Opinion, Award and Order, and the May 28, 2019 Orders rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ

awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”), benefits, and medical benefits for injuries occurring on September 5, 2013 and September 1, 2015.

## **INTRODUCTION**

A brief overview assists in understanding this appeal. Ernspiker suffered distinct injuries to his left and right shoulders during his employment with O’Reilly. On September 5, 2013, he injured his right shoulder and wrist while attempting to keep a stack of rotors from falling. O’Reilly accepted the injury as compensable, and Ernspiker underwent right rotator cuff repair and right carpal tunnel release procedures. He returned to full-duty work, but began to complain about ulnar nerve pain shortly thereafter. On appeal, O’Reilly contests the work-relatedness of the ulnar nerve condition, which required two additional surgical procedures.

Ernspiker injured his left shoulder on September 1, 2015 while picking up a car battery. O’Reilly accepted the injury as compensable and a rotator cuff repair was performed. Eventually, the left shoulder condition worsened and required a second rotator cuff repair and, later, a total shoulder replacement. On appeal, O’Reilly contests the work-relatedness of these two additional left shoulder procedures.

In addition to its challenge to the sufficiency of the evidence supporting the work-relatedness of the additional right and left shoulder procedures, O’Reilly contests the calculation of PPD benefits and the award of temporary total disability (“TTD”) benefits. In his cross-appeal, Ernspiker challenges the

constitutionality of the retroactive application of the newly amended version of KRS 342.730(4). For the reasons set forth herein, we affirm in part, vacate in part and remand.

### **BACKGROUND**

Regarding the September 5, 2013 incident, Ernspiker testified he injured his right shoulder, arm, elbow and hand while keeping a stack of rotors from falling. Conservative treatment was unsuccessful, and electrodiagnostic studies conducted on January 23, 2014 revealed moderate right carpal tunnel syndrome. Accordingly, Ernspiker underwent a right rotator cuff repair on March 4, 2014 and a right wrist carpal tunnel release on April 24, 2014. Dr. Thomas Gabriel performed the carpal tunnel release and returned Ernspiker to full duty work on July 1, 2014. These procedures were paid for by the workers' compensation carrier.

However, Ernspiker testified he experienced symptoms of ulnar nerve irritation and numbness/tingling in the right ring finger after recovering from the carpal tunnel release. Dr. Gabriel initially expressed uncertainty in his notes as to the etiology of the new cubital tunnel symptoms, as neither the carpal tunnel release nor the rotator cuff surgery would have a direct effect on the ulnar nerve at the elbow. Regardless of etiology, the symptoms persisted and Dr. Gabriel performed a cubital tunnel release surgery on October 9, 2014. A second procedure was required on October 30, 2014 to drain fluid which, according to Dr. Gabriel's notes, may have been required due to an incident when Ernspiker caught himself while falling. Ernspiker was released to full duty work on April 1, 2015, though he reported some continued symptoms at the time.

Ernspiker returned on August 26, 2015 with complaints of continued pain and swelling. On February 25, 2016, Dr. Gabriel stated the ulnar symptoms were likely due to diabetes. Treatment had been delayed for this lengthy period due to unrelated illness and Ernspiker's left shoulder injury. Dr. Gabriel eventually performed a revision of the cubital tunnel release on September 22, 2016. He released Ernspiker from his care on May 9, 2018.

In an October 30, 2018 narrative report, Dr. Gabriel summarized his treatment of Ernspiker's right arm conditions. He noted that, in 2014, he opined the underlying cause of the ulnar nerve symptoms was unclear. However, later in 2014, his opinion apparently shifted and he noted, "the initial injury fully hyperextended the arm (as reported by the patient) at the shoulder ... initial injury and the subsequent surgeries thus far for the upper extremity are felt to be the proximate cause of the symptomatic cubital tunnel syndrome." Dr. Gabriel declined to assign an impairment rating for the right shoulder, but assigned a 12% impairment rating for the ulnar nerve dysfunction. He reiterated that the impairment rating is entirely due to "the work injury and their subsequent treatment and residual effects."

Ernspiker injured his left shoulder and arm on September 1, 2015 when he picked up a battery. Dr. Steven Smith performed a left rotator cuff repair on February 16, 2016, which was deemed compensable by the carrier. Two significant events occurred after this procedure. On March 28, 2016, Ernspiker attended a concert and did not wear his sling because he believed he would be sitting the entire time. At some point, a woman seated near to Ernspiker lost her balance and fell, though it is disputed whether Ernspiker caught the woman from falling or

moved suddenly to avoid her falling onto his left arm. In another incident, Ernsipker testified he felt his left shoulder pop followed by an onset of severe left shoulder pain during physical therapy for his work injury. He was unable to pinpoint exactly when this incident occurred, and could provide no explanation as to why the incident was not documented in his physical therapy records. Ernsipker continued to follow-up with Dr. Smith following these events, both of which were documented in his notes.

Following the incident at the concert, Dr. Smith did not change the course of treatment. However, after the physical therapy incident, he ordered an MRI which revealed a large tear. Dr. Smith opined the large tear most likely occurred during the physical therapy incident when Ernsipker felt a pop in his shoulder. Eventually, a second rotator cuff repair was recommended, which the ALJ deemed compensable in the October 16, 2017 Interlocutory Order. The second rotator cuff repair procedure was performed on September 12, 2017 followed by a reverse shoulder arthroplasty on December 5, 2017.

Dr. Warren Bilkey performed an independent medical evaluation (“IME”) on January 17, 2017. Dr. Bilkey stated the September 5, 2013 work injury included a right shoulder strain, a large rotator cuff tear, a labrum tear, impingement and AC joint inflammation. He diagnosed right carpal tunnel syndrome, flexor tenosynovitis, status post-surgical repair, and residual median neuropathy. Dr. Bilkey also diagnosed right cubital tunnel syndrome, status post-surgery ulnar nerve transposition with complication of right elbow seroma for which Ernsipker underwent surgery, irrigation, and debridement. He assigned impairments related to the 2013 work injury totaling 31% entirely attributable to the work injury.

Dr. Bilkey's impressions concerning the September 1, 2015 injury included a left shoulder strain, a rotator cuff tear, impingement, labral tear, and degenerative joint disease of the left shoulder. Dr. Bilkey noted Ernsipker had undergone surgery and had post-operative recurrent large rotator cuff tear for which further surgery was pending as of the date of his IME. Regarding the 2015 left shoulder injury, if Ernsipker did not have surgery, Dr. Bilkey would assign a 17% impairment, including 3% for pain. Dr. Bilkey indicated he would need to reassess the impairment rating if Ernsipker had further treatment of the left shoulder.

Dr. Ronald Burgess performed IMEs on January 18, 2017, August 3, 2018, and January 10, 2019, at various interludes in Ernsipker's course of treatment. Regarding the right shoulder injury, he opined Ernsipker's ulnar nerve condition is unrelated to the work injury. Dr. Burgess noted the fact Ernsipker's ulnar symptoms did not begin until July 1, 2014, well after the surgical procedure. Further, Dr. Burgess interpreted the January 23, 2014 nerve study as normal. He assigned a 0% impairment rating for the right upper extremity.

Regarding the left shoulder condition, Dr. Burgess explained the initial work-related event produced a small rotator cuff tear unrelated to the later massive tear. He attributed the larger tear to the event at the concert, and the fact Ernsipker was admittedly not wearing his sling as directed. He also emphasized the fact that the physical therapy notes do not document any significant event. Dr. Burgess opined Ernsipker would have been at maximum medical improvement ("MMI") for the work injury on December 5, 2017 and assessed a 2% impairment rating for the left shoulder related to the work injury. Following the January 2019 evaluation, Dr.

Burgess assigned a 22% impairment for decreased range of motion and the implant arthroplasty of the left shoulder.

Dr. Jeffrey Fadel conducted an IME on July 9, 2019. Dr. Fadel examined Ernspeker following the final two left surgical procedures, and noted significant limitations in the use of his left arm. He placed restrictions against lifting, working overhead, and pulling, which would prevent a return to his prior employment. He diagnosed a 22% impairment rating for the left shoulder injury.

Concerning Ernspeker's right shoulder injury, the ALJ made the following findings:

This ALJ notes Dr. Gabriel treated Plaintiff for his right upper extremity carpal tunnel and cubital tunnel syndromes. Defendant [accepted] compensability for Plaintiff's right carpal tunnel release. However, Defendant contests the causation/work relatedness of Plaintiff's ulnar nerve condition/symptoms. On this issue, Dr. Gabriel completed a fairly comprehensive report addressing his treatment and opinions regarding causation of Plaintiff's ulnar nerve symptoms.

Plaintiff reported ulnar nerve irritation with numbness/tingling in the right ring finger on July 1, 2014. An EMG was conducted on August 18, 2014, which was consistent with significant right cubital tunnel syndrome. However, Plaintiff's prior January 23, 2014 EMG showed bilateral velocity delays of Plaintiff's ulnar sensory nerves, which was possibly consistent with early peripheral polyneuropathic changes. Dr. Gabriel concluded there was definite evidence of progressive and severe ulnar nerve compression at the elbow during the perioperative period following Plaintiff's right shoulder rotator cuff repair on March 4, 2014, and right carpal tunnel release on April 24, 2014. Dr. Gabriel opined Plaintiff's initial injury and subsequent surgeries for the right upper extremity were the proximate cause of Plaintiff's symptomatic cubital tunnel syndrome. Dr. Gabriel explained the initial injury on September 5, 2013 fully hyperextended Plaintiff's right arm at the shoulder,

elbow and wrist. This ALJ is impressed with Dr. Gabriel's narrative report and notes Dr. Gabriel is in the best position to address causation on the issue of Plaintiff's ulnar nerve condition due to his position as Plaintiff's treating physician from 2014 through 2016. As such, this ALJ adopts Dr. Gabriel's causation opinion regarding Plaintiff's ulnar nerve condition.

Regarding the left shoulder, the ALJ found as follows:

This ALJ previously addressed the etiology of Plaintiff's left shoulder symptoms in her interlocutory opinion. At that juncture, the ALJ addressed whether Dr. Smith's pending surgical recommendation, consisting of left rotator cuff repair, was related to the September 1, 2015 work injury or an intervening injury. This ALJ reviewed the evidence relating to the incident at the concert as well as the incident during physical therapy. Previously, this ALJ noted Plaintiff's treatment protocol was not drastically altered following the concert incident. However, this was not the case after Plaintiff reported a pop during physical therapy. It was only after the incident at physical therapy that Dr. Smith recommended an updated left shoulder MRI. Ultimately, Dr. Smith opined Plaintiff's recurrent left shoulder rotator cuff tear occurred during the physical therapy incident. Again, this ALJ finds Dr. Smith is in the best position to address the etiology of Plaintiff's left shoulder symptoms following incidents at the concert and during physical therapy. Dr. Smith was afforded the opportunity to examine Plaintiff and obtained a history at numerous office visits. Again, after reviewing the evidence, and considering the matter thoroughly, this ALJ continues to find Dr. Smith's opinion on this issue to be the most persuasive evidence addressing the etiology of Plaintiff's recurrent left shoulder rotator cuff tear.

The ALJ determined Ernspeker is entitled to a 6% whole person impairment rating as a result of the September 5, 2013 injury. The ALJ found Dr. Gabriel provided the most accurate assessment of the whole person impairment

regarding the right carpal tunnel and cubital tunnel syndrome because he performed the right carpal tunnel release and cubital tunnel releases. Thus, the ALJ found a 12% whole person impairment as a result of the 2013 injury which resulted in the right cubital tunnel syndrome. The ALJ found Ernspeker does not retain any permanent impairment for right carpal tunnel syndrome. The ALJ further found Ernspeker retains a 22% whole person impairment for the left shoulder condition following the reverse left shoulder arthroplasty and decreased range of motion. In making this finding, the ALJ relied on the opinions of Drs. Fadel and Burgess. The ALJ determined Ernspeker is not permanently totally disabled, but does not retain the physical capacity to perform his job duties on the time of the September 5, 2013 work injury.

The ALJ found as follows regarding TTD:

Defendant's argument of an overpayment of temporary total disability benefits is closely intertwined with Defendant's argument that Dr. Smith's left reverse shoulder arthroplasty, performed on December 5, 2017, was not work-related. As set forth below, this ALJ finds the left shoulder arthroplasty was work-related. This ALJ reviewed Dr. Smith's treatment records and notes Plaintiff was restricted from working through May 10, 2018. This ALJ examined the record to determine when Plaintiff reached maximum medical improvement. This ALJ notes Dr. Fadel indicated Plaintiff reached maximum medical improvement in June 2018. Dr. Smith tendered a report, dated May 21, 2018, indicating Plaintiff had not yet reached maximum medical improvement. Thus, based upon the combined reports of Drs. Smith and Fadel, this ALJ finds Plaintiff reached maximum medical improvement as of June 1, 2018. Accordingly, Plaintiff is awarded temporary total disability benefits at the rate of \$243.70/week from February 16, 2016 through June 1, 2018. Defendant is entitled to a credit for temporary total disability benefits previously paid.

O'Reilly's filed a petition for reconsideration raising the same arguments it raises on appeal. Ernspiker filed a petition for reconsideration arguing the ALJ erred in applying the provisions of KRS 342.730(4) in effect as of July 14, 2018. The ALJ issued separate orders on May 28, 2019 ruling on the petitions for reconsideration. She summarily overruled Ernspiker's petition. Regarding O'Reilly's petition, the ALJ provided the following analysis:

This matter comes before this Administrative Law Judge ("ALJ") upon Defendant's petition for reconsideration. Defendant argues this ALJ committed several errors. Essentially, Defendant's petition re-argues the merits of the claim, which is impermissible. However, this ALJ will address each item raised in Defendant's petition.

**1. Causation/work-relatedness of cubital tunnel syndrome, subsequent surgeries and medical benefits**

Defendant asserts this "ALJ incorrectly interpreted (or did not consider) the medicals [sic] records of the treating surgeon, Dr. Gabriel with regard to causation/work-relatedness of the cubital tunnel syndrome and subsequent surgeries related thereto, whereby making a patent error in awarding benefits for the right upper extremity." Defendant cites Dr. Gabriel's July 1, 2014 treatment note, and asserts this is the first allegation of an ulnar nerve issue. Defendant also noted a post-surgical fall at home. This ALJ previously considered Defendant's arguments on this issue, as noted on page 12 of her opinion.

This ALJ reviewed all of the evidence in this claim prior to issuing her decision on April 26, 2019, including Dr. Gabriel's treatment notes. This ALJ also reviewed Dr. Gabriel's October 30, 2018 comprehensive narrative report. At the conclusion of Dr. Gabriel's treatment, he drafted a report addressing the causation of Plaintiff's cubital tunnel syndrome. This ALJ found Dr. Gabriel's report to be persuasive for several reasons. First, as Defendant notes, Dr. Gabriel treated Plaintiff for a

prolonged period. Thus, this ALJ felt Dr. Gabriel's opinions had a sound foundation because he was well aware of Plaintiff's treatment and symptoms. Secondly, Dr. Gabriel is an upper extremity specialist and is well trained to offer opinions on this issue. Lastly, Dr. Gabriel was afforded an opportunity to review his medical records at the conclusion of his treatment prior to issuing his narrative report.

This ALJ reviewed Dr. Gabriel's narrative report and, again, concludes it is the most persuasive piece of evidence addressing causation of Plaintiff's right cubital tunnel syndrome. Thus, this ALJ concludes Plaintiff's right cubital tunnel syndrome is work-related, relying on Dr. Gabriel's report. This ALJ feels compelled to note her conclusion is not based upon a mere inference. On page 2 of Dr. Gabriel's report, he clearly opines Plaintiff's initial injury fully hyperextended Plaintiff's right arm at the shoulder, elbow and wrist. Dr. Gabriel went on to conclude the initial injury and subsequent surgeries for Plaintiff's upper extremity were the proximate cause for Plaintiff's cubital tunnel syndrome. On page 3 of narrative report, Dr. Gabriel assessed impairment for Plaintiff's right ulnar nerve (i.e. right cubital tunnel syndrome) and attributed the impairment to Plaintiff's work injuries, subsequent treatment and residual effects.

## **2. Causation of second left rotator cuff repair and left shoulder replacement, intervening event at concert and unreasonable failure to follow medical advice**

Defendant maintains Plaintiff's left shoulder symptoms are not due to the work injury, but rather a precipitating event that caused a "new" injury. This argument was considered previously. On October 16, 2017, this ALJ issued an interlocutory opinion addressing the causative role of Plaintiff's intervening incident at a concert. This ALJ concluded Dr. Smith, Plaintiff's shoulder surgeon, provided the most persuasive opinion. This ALJ noted Dr. Smith rendered treatment throughout the period wherein the incidents at the concert and physical therapy occurred. Importantly, this ALJ noted Plaintiff's postoperative care was not drastically altered following the incident at the concert. Dr. Smith did not recommend additional diagnostics until after

documenting the physical therapy incident twice. This was a situation wherein conflicting evidence was present. Ultimately, this ALJ relied on Dr. Smith's opinions, which is within her purview.

The issue of whether Plaintiff unreasonably failed to follow medical advice was also previously addressed in this ALJ's interlocutory decision on pages 10-11. This ALJ reviewed Dr. Smith's treatment records and noted there was no clear indication Plaintiff was advised to wear his sling continuously and without interruption prior to March 28, 2016. Thus, this ALJ was not convinced Plaintiff unreasonably failed to follow medical advice. This conclusion was not based entirely upon Plaintiff's "self-serving" testimony. Rather, this ALJ turned to the treatment notes to locate Dr. Smith's clear directive that Plaintiff should wear a sling continuously. Dr. Smith's treatment notes did not contain a clear directive, which was detrimental to Defendant's argument.

### **3. Award of permanent income benefits**

Defendant argues this ALJ erred in adopting Dr. Gabriel's 12% assessment of impairment. Defendant maintains Plaintiff's right cubital tunnel syndrome is not work-related. This ALJ has addressed this argument at length and set forth her reasoning for concluding Plaintiff's right cubital tunnel syndrome is work-related in reliance on Dr. Gabriel's opinions.

Defendant argues Plaintiff's alleged right shoulder injury on September 5, 2013 should be dismissed. This ALJ reviewed the evidence and concluded it did not support a dismissal of Plaintiff's September 5, 2013 right shoulder injury. Additionally, this ALJ concluded Plaintiff's September 5, 2013 right shoulder injury warranted 6% permanent impairment as a result of the distal clavicle resection. This finding was supported by Dr. Bilkey, and Defendant's own expert, Dr. Burgess.

Lastly, Defendant argues Plaintiff retained 2% impairment for the September 1, 2015 work injury. However, this argument requires a conclusion that Dr. Smith's recommended second rotator cuff surgery and the eventual left shoulder replacement were not work-

related. As such, Defendant's argument on this issue must fail.

#### **4. Plaintiff's capacity to return to prior work**

Defendant argues Dr. Gabriel released Plaintiff to return to full duty work. However, this release occurred on July 1, 2014 and before Plaintiff's October 9, 2014 right cubital tunnel release and September 22, 2016 revision surgery. On October 30, 2018, Dr. Gabriel offered his final opinion addressing restrictions. Dr. Gabriel recommended five to ten pounds maximum right arm lifting and no repetitive use of the right upper extremity. This ALJ was not convinced, based upon Dr. Gabriel's restrictions, that Plaintiff retained the capacity to maneuver and/or lift parts in order to perform his pre-injury job duties.

#### **5. Calculation of benefits**

Defendant asserts this ALJ erred in calculating benefits. However, this argument is predicated upon Defendant's assertion that Plaintiff's right cubital tunnel syndrome is not work-related, which is not consistent with this ALJ's conclusions.

#### **6. Temporary total disability benefits**

Defendant argues this ALJ erred in awarding benefits [for] Plaintiff's September 1, 2015 injury. This argument is intertwined with Defendant's argument that Dr. Smith's second left rotator cuff surgery and left shoulder replacement was not work-related. As set forth in this ALJ's April 26, 2019 opinion and this order on reconsideration, this ALJ finds Plaintiff's left shoulder condition is related to the September 1, 2015 injury, relying on Dr. Smith. Thus, this ALJ finds Plaintiff is entitled to temporary total disability benefits from February 16, 2016 and continuing until Plaintiff reached maximum medical improvement on June 1, 2018. Defendant is entitled to a credit for temporary total disability benefits previously paid.

#### **7. Medical dispute contesting left shoulder replacement**

Defendant argues the left shoulder replacement performed by Dr. Smith on December 5, 2017 is not work-related. This ALJ considered Defendant's argument prior to issuing her most recent opinion. Additionally, this ALJ considered the etiology of Plaintiff's persistent left shoulder symptoms before issuing her interlocutory opinion. The ALJ reviewed the conflicting evidence and found Plaintiff's ongoing left shoulder symptoms were due to the effects of the September 1, 2015 work injury, relying on Dr. Smith's opinions. This ALJ is not convinced this finding resulted in a patent error.

### ANALYSIS

On appeal, O'Reilly first challenges the work-relatedness of Ernspeker's subsequent left and right shoulder surgeries. Regarding the left shoulder, O'Reilly contends the only reliable evidence clearly demonstrates the subsequent injury was due to Ernspeker's attempt to catch a falling woman at a concert, after which his condition began to deteriorate. It notes the physical therapy records do not document the occurrence of a pop or re-injury during his sessions. Concerning the right shoulder, O'Reilly argues no substantial evidence supports a causal relationship between the work injury and the cubital tunnel syndrome. O'Reilly stresses that Dr. Gabriel's July 1, 2014 note says nothing about the condition being work-related, and he stated the etiology of new cubital tunnel symptoms is unclear. At that time, he opined the ulnar symptoms were likely related to diabetes.

The claimant has the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Ernspeker was successful in proving the cubital tunnel condition, and the need for a second left rotator cuff repair and shoulder replacement resulted from the work injuries. Thus,

O'Reilly's burden on appeal is to show there was no substantial evidence to support the ALJ's determination. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). 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).

As the fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ has the sole authority to determine the weight to be accorded and the inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). 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). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

O'Reilly's arguments on appeal are essentially an attempt to re-argue the merits of the claim. While O'Reilly is able to identify evidence that could support a finding in its favor, there is substantial evidence to support the ALJ's findings on these issues. As noted by the ALJ, O'Reilly's relies primarily on Dr. Gabriel's early records in making its argument that the right cubital tunnel condition is not related to the work injury. However, the ALJ found Dr. Gabriel's comprehensive narrative of October 30, 2018 most persuasive. After reviewing all of his treatment notes, Dr. Gabriel concluded the initial injury fully hyperextended the

right arm at the shoulder, elbow and wrist. He ultimately concluded the initial injury and subsequent upper extremity complications were the proximate cause for Ernsipiker's cubital tunnel syndrome. Regarding the second left rotator cuff repair and subsequent shoulder replacement, the ALJ found Dr. Smith provided the most persuasive opinion. The ALJ noted Dr. Smith rendered treatment throughout the period wherein the incidents at the concert and physical therapy occurred, and the postoperative care was not drastically altered following the incident at the concert. Dr. Smith did not recommend additional diagnostics until after documenting the physical therapy incident. The ALJ found Dr. Smith was in the best position to address the etiology of the left shoulder symptoms following incidents at the concert and during physical therapy. Dr. Smith ultimately concluded the recurrent left shoulder rotator cuff tear occurred during the physical therapy incident. The ALJ was well within her role as fact-finder in finding the opinions of Drs. Gabriel and Smith more persuasive. Given the conflicting nature of the evidence on the issue of work-relatedness, this Board cannot conclude that the evidence compelled a particular result.

O'Reilly's next arguments are necessarily intertwined with its prior challenge to the work-relatedness of Ernsipiker's cubital tunnel condition and final two left shoulder surgeries, and are essentially rendered moot. It claims the impairment ratings should be assessed for the right shoulder without consideration of the ulnar nerve condition, and for the left shoulder condition following the first left rotator cuff repair. Because we have determined the ALJ did not abuse her

discretion in concluding the conditions are work-related, we find no error in the ALJ's determination of Ernspiker's impairment rating.

O'Reilly also argues the ALJ erred in awarding TTD benefits for the 2015 injury from February 16, 2016 through June 1, 2018. O'Reilly notes Dr. Burgess placed Ernspiker at MMI from the September 12, 2017 rotator cuff surgery on December 5, 2017. Again, O'Reilly's argument is predicated on its position that only the first rotator cuff surgery is related to the work injury. Because the ALJ found the second left rotator cuff surgery and left shoulder replacement are related to the September 1, 2015 injury, the ALJ could find Ernspiker is entitled to TTD benefits until he reached MMI on June 1, 2018.

While O'Reilly's has identified evidence supporting a different conclusion on the above issues, there was substantial evidence presented to the contrary. As such, the ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Finally, O'Reilly argues the ALJ erred in the calculation of the amount of the PPD benefits. O'Reilly's notes the parties stipulated to a pre-injury average weekly wage of \$318.44 for the 2013 injury, and \$363.55 for the 2015 injury. Thus, the awards of \$243.70 and \$209.64 per week should have been at the rates of \$242.37 and \$208.48 per week respectively. Ernspiker concedes the ALJ erred in her calculation of PPD benefits, and the calculations contained in O'Reilly's brief are correct and mirror those that the parties agreed on prior to the appeal being filed.

Accordingly, we vacate the ALJ's decision as to the calculation of the amount of the weekly PPD benefit. On remand the ALJ shall enter an amended award reflecting the corrected amount of PPD benefits.

On cross-appeal, Ernspiker argues the ALJ erred in finding all benefits terminated in accordance with House Bill 2 effective July 14, 2018. Ernspiker relies upon the Kentucky Court of Appeals decision in Holcim v Swinford, 2018-CA-000414-WC, 2018 WL 4261757 holding the amendment could not be retroactively applied. He further argues the retroactive application of the newly amended version of KRS 342.730(4) would violate the contracts clause of the United States and Kentucky Constitutions and is an exercise of arbitrary power in contravention of section 2 of the Kentucky Constitution. Ernspiker argues benefits under the Act at the time of the injury were part of the bargain when he elected to be covered, rather than reject the coverage. Because the Act permits rejection at any time, even during an ongoing employment relationship, the contractual nature of acceptance of the Act is fixed as of the date of an employee's injury.

The Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), reversed the Court of Appeals, holding the amended version of KRS 342.730(4) retroactively applies to pending claims. The Court held:

This Court has great respect for the language the General Assembly included in the official Kentucky Revised Statutes. The General Assembly made a clear pronouncement regarding retroactivity in KRS 446.080(3): “[n]o statute shall be construed to be retroactive, unless expressly so declared.” With no mention of retroactivity or any language from which retroactivity may be inferred, the express language of KRS 342.730(4) does not make the statute retroactive. However, the Legislative Research Commission note

following the statute references the Act from which the statute was enacted and, as discussed, is exempt from the codification requirements, as it is temporary in nature. Thus, the legislature has made a declaration concerning retroactivity in this case.

Since the newly-enacted amendment applies retroactively, it must be used to determine the duration of Swinford's benefits. We remand this matter to the ALJ to apply the time limits set out in the 2018 amendment to KRS 342.730(4).

Id. at 44.

Thus, we must affirm the ALJ's limitation of the award of PPD benefits. Ernsipker's challenge based upon violation of the contracts clause was not addressed in Holcim. As an administrative tribunal, this Board lacks jurisdiction to resolve this issue and must affirm. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945).

Accordingly, the April 26, 2019 Opinion, Award and Order and the May 28, 2019 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** for entry of an amended award reflecting the correct PPD rates.

Finally, O'Reilly requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED** the request is **DENIED**.

ALL CONCUR.

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REBEKKAH B. RECHTER, MEMBER  
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