Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 12, 2021

CLAIM NO. 201602539

PERRY COUNTY COAL — PETITIONER

VS. **APPEAL FROM HON. PAUL WHALEN, ADMINISTRATIVE LAW JUDGE**

GREGORY OSBORNE
and HON. PAUL WHALEN,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

* * * * * *

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

STIVERS, Member. Perry County Coal ("Perry County") seeks review of the October 23, 2020, Opinion and Order of Hon. Paul Whalen, Administrative Law Judge ("ALJ Whalen") finding Gregory Osborne ("Osborne") sustained a March 9, 2015, low back injury while in the employ of Perry County. The ALJ awarded permanent partial disability ("PPD") benefits enhanced by the three multiplier

pursuant to KRS 342.730(1)(c)1. Perry County also appeals from the November 23, 2020, Order sustaining in part and denying in part its Petition for Reconsideration.

On appeal, Perry County argues the ALJ erred in finding Osborne did not retain the physical capacity to return to the type of work performed at the time of the March 9, 2015, injury and enhancing his PPD benefits via the three multiplier. Perry County also asserts the ALJ erred in relying upon the opinions of Dr. Arthur Hughes in finding Osborne retains a 6% impairment rating as a result of the subject injury.

BACKGROUND

On May 23, 2016, Osborne filed a Form 103 (Claim No. 2015-01084) alleging he sustained occupational hearing loss as a result of his employment with Perry County. Osborne listed the date of injury as October 1, 2015.

On July 11, 2016, Osborne filed a Form 101 (Claim No. 2016-01535) alleging he sustained cumulative trauma injuries to his shoulders while in the employ of Perry County. Attached to this Form 101 is Dr. Hughes' May 26, 2016, report.

By Order dated November 7, 2016, Hon. Chris Davis, Administrative Law Judge, consolidated the claims.

On November 17, 2016, Osborne filed a Form 101 (Claim No. 2016-02539) alleging an acute low back injury occurring on March 9, 2015, while in the employ of Perry County. Attached to the Form 101 is the October 5, 2016, Form 107 report and addendum of Dr. Jeffrey Fadel.

By Order dated January 3, 2017, Hon. Richard Neal, Administrative Law Judge ("ALJ Neal"), consolidated Claim No. 2016-02539 with the previously consolidated claims.[1]

On June 19, 2017, while the claims were in litigation, Osborne filed a Form 101 (Claim No. 2016-65014) alleging an October 13, 2016, injury to his lower back and left leg while in the employ of Hitachi Automotive Systems ("Hitachi")[2]. Along with the Form 101, Osborne filed the June 1, 2017, narrative report and Form 107 report of Dr. David Muffly. By Order dated August 31, 2017, ALJ Neal consolidated this claim with the claims against Perry County.[3]

Osborne was deposed on September 20, 2016, March 1, 2017, and August 22, 2017, and testified at a December 20, 2017, hearing. At the September 20, 2016, deposition, Osborne explained why he quit working for Perry County.

> A: Well, my back was actually hurting a lot and they were letting me sit outside, you know. I was maintenance foreman and I was on salary. But they cut my pay in half. They cut everybody's, not just mine. They sold out, you know. They cut my pay and put me on hourly. And I was driving two hours each way to work. And I didn't see it hardly coming out, you know. So then I got a job offer from Hitachi, and I thought it would be easier on my back and stuff if I just switched instead of lifting all this big heavy stuff. And it was about the same pay and a lot closer to home. So I left, quit, and went to Hitachi.
>
> Q: So you voluntarily left that job?

[1] All claims were transferred to ALJ Neal.

[2] There was no dispute the injury actually occurred on October 14, 2015.

[3] Osborne quit working for Perry County on October 1, 2015, and began working for Hitachi sometime in the middle of October 2015.

> A: Yeah, they cut my pay so much I just couldn't come out, to be honest with you.

When Osborne left the employ of Perry County, he was under no work restrictions but was still taking medication for low back pain which he continued to experience after the March 2015 injury.[4] Osborne testified the back pain had eased since March 2015. Osborne missed no work due to the injury but performed light duty for a short period. He described his duties with Perry County:

> Q: Okay. And getting back to your job at Perry County Coal, you were a maintenance foreman. Can you tell me what all that job required you to do?
>
> A: Anything that – you know, I was responsible for getting parts to the work area. No matter how you had to do it, I had to get them there some way. I had to go with the inspectors a whole lot when I had one. I had to walk the outside belts. Most of the time, I had to take care of them, you know, and make sure they were ready and do the maintenance on them.
>
> Q: Okay. Was it a physically demanding job?
>
> A: Yeah.
>
> Q: Can you tell me some of the ways it was physically demanding?
>
> A: That was mostly part of it, loading parts. Because it's a slope mine, you have to load parts. You have to load parts from outside on top of the slope into the slope car. Then you ride down to the bottom of the slope, then you have to get parts out and put them in the mantrip. Then when you get to the end of the track, you've got to get them out.
>
> Q So there's two or three times you got to lift the same parts and unload and load them?
>
> A: Yeah, they still do it right now.

[4] At the time of this deposition, Osborne had not filed Claim No. 2016-02539 asserting a March 9, 2015, low back injury.

Q: And how big are the parts?

A: It don't matter. I loaded big parts, I loaded little parts. I've loaded motors. It'd take two or three people to load them.

Q: What would be the heaviest thing you'd have to lift, just on an average day at Perry County Coal? How much would it weigh, 50 pounds, 75, 100?

A: I don't [sic] of nothing over there that would weigh under 100 pounds.

Q: Was there anything heavy you had to lift just by yourself routinely?

A: Not routinely. It may come up and somebody isn't there to help you, but no, usually there was somebody there to help you.

Q: Okay.

A: I mean some of them, you can't lift by yourself. You can roll them all you want to, but you just can't get them lifted.

Q: Okay. So there's just a lot of heavy things that you had to lift?

A: Yeah.

Q: Did you work underground in the mines at all?

A: Oh, yeah. Yeah.

Q: Would you do repairs underground?

A: Yeah.

Q: Okay. And what kind of machines would you work on under there?

A: Head drives, belts, tracks, mantrips, all the face equipment.

Q: Okay. Would you be underground on a daily basis?

A: Every day.

After leaving Perry County, Osborne immediately went to work for Hitachi. At the time of his deposition, he was still working for Hitachi in maintenance. Osborne believed he was physically unable to return to work at Perry County. He occasionally experienced low back pain which extended into his leg. He also experienced pain when he bent over or twisted.

At the March 1, 2017, deposition, Osborne again testified he began working for Hitachi in October 2015 performing maintenance work. At the time of this deposition, Osborne had not filed Claim No. 2016-65014 alleging the October 13, 2016, lower back and left leg injuries. However, he described what occurred on October 13, 2016, as follows:

> Q: Why did that job end?
>
> A: I hurt – my back went out on me while I was at work one day.
>
> Q: What were you doing when it went out on you?
>
> A: I was up in under a piece of equipment cleaning it, and my back went out, my leg went numb. It locked up, my back did, and I had to lay there for a few minutes till [sic] I could crawl out. And then I went to the doctor the next day.
>
> …
>
> Q: Okay. When you say you were under it, were you like on your back, on your knees, what?
>
> A: On my knees. You have to crawl in under it. It's like a little crawlspace, and you have to crawl up in under it and clean it.
>
> Q: Okay. I'm trying to get an understanding of what happened on that day. Are you saying that you kind of like moved in some certain way that caused your back to go out or was there anything else that contributed other than just the way that you were positioned?

A: I really don't know how to explain that, you know. It just – it was a [sic] everyday thing that I was doing; but my back, you know, had been hurting for a while and it just happened to go out that day.

Osborne started working for Perry County in 2002 performing maintenance duties. He served as the maintenance foreman his last nine years with Perry County. He provided the following description of his job at Perry County and elaborated further on why he quit work at Perry County:

Q: Just curious, why would the three hundred pound thing not be lifted by the endloader?

A: That's a good reason; but sometimes your loader man is way away, and he'd be on the other side of the mountain doing something and then your part would be there, and you'd have to load it and go with it.

Q: Okay. So, your work as a maintenance foreman, was that – I understand you're going in and out of the underground mine. Is that correct?

A: That's correct.

Q: Was most of your work shift underground or was there a good portion of it where you were working in a shop or somewhere else?

A: Both. I worked in the shop some. I had to walk, check the belt some. I had to go with inspectors a lot. And then I had to do some paperwork, too, yeah.

Q: As a maintenance foreman were you salaried?

A: Yeah. Yes, I was.

Q: And do you recall what your last salary was?

A: A regular week was approximately two thousand. And if I worked on Saturday, I mostly did, was twenty-four something, approximately twenty-four hundred and something.

Q: Alright. So, why did your job at Perry County Coal end?

A: Well, that's a good question. I hurt my back. I was going with a [sic] inspector, and I hurt my back. The mantrip jumped off the track. And I hurt my back, and I went to the doctor, which was the incident you're talking about, March the 9th. And I was a maintenance foreman. I could do about what I wanted to do. And I filled a [sic] accident report out, because that's – that's protocol. So, I went to the doctor that night when I got home. It was late in the evening anyway when it happened. And he just give me a light-duty slip and some pills to get over the pain, you know. And I sort of took it easy, because I knowed [sic] they was going to sell out, and I needed a job. My girl was going to school. So, I was supposed to kept [sic] my job. And I guess where I had a [sic] accident report, they took me off salary when they sold out. So, I couldn't make it on twenty-five dollars a [sic] hour driving four hours a day; so, I had to find me another job closer to home. So, that's the reason I went to Hitachi, because I was making almost the same money about thirty minutes away. And I was driving two hours each way. It wasn't like that I didn't want to work.

Q: Oh, I understand. I couldn't do that myself, but – so, when your job --- when your salary was changed to twenty-five dollars an hour, were you still going to be the maintenance foreman or not?

A: Well, it would have been called a maintenance foreman, but you'd just been making twenty-five dollars a hour with a lot more work to do, you know, and ….

Q: Now, what would be the additional work to do? What would be the difference in the job?

A: Well, you just pick up more work. There'd be less men when they sold out, you know.

Q: So, the same work, but there's less men.

Osborne described the March 9, 2015, event resulting in the low back injury at Perry County:

Q: Let me ask you this. First of all, going back to March 9th, 2015, for a second, describe to me again, if you don't mind, how you were injured on that date.

A: The guy driving the mantrip was driving me and a [sic] inspector in to do a mine check. And while we was – while we was coming back out, he run over like a block of wood is what I'm saying. It was on top of the track. And when he did, it throwed [sic] the mantrip up in the air and it come back down real hard. And that was – that was when it – that was when I really felt the pain.

Regarding the work he performed at Perry County following the March 9, 2015, injury, he testified:

Q: And you said after that incident happened – or correct me if I'm wrong. Are you saying that your job changed as far as you didn't do as much physically after that?

A: No, I could – you know, when I was maintenance foreman, I could do a lot. I could about watch myself is what I'm saying. And after I hurt my back, you know, I sort of watched myself and tried to take care of myself, because I was trying to – I was trying to keep the job if you …

Q: I understand. Could you explain to me in a little bit more detail what you would not do after that injury and what you would continue to do?

A: I would – after that happened I wouldn't load parts, you know, by myself. And I would wait for the loader to come. And most of the time somebody else would already be there to load them.

Q: Okay. And the parts that you would still do that you had always done before would be what?

A: Like loading tires. We loaded tires in there. We loaded motors, electrical motors.

Q: And you're doing this after your injury, also.

A: No. No, I quit.

Q: What did you still do after the injury? Between March and October, 2015, what did you spend your days doing at Perry County Coal?

A: I would work out in the shop when I could. That way I could just watch my back. I would go with the inspectors. They would – you know, I'd just tell them I would go with them, which would take about all day, and that would sort of take care of the back situation.

Q: Okay. When you were underground at that mine, was the height or whatever so that you could stand up if you were down there?

A: Not always.

Q: So, it varied?

A: It varied.

Q: And when you were saying after your job – they took you off salary. I guess the buyout happened.

A: Yeah.

Q: Could you give me a little bit more detail on if your job would have changed from what you had been doing after the injury, after the buyout? What were you going to have to do differently after that happened?

A: It would have mostly been the same. It was just – it was just a money deal, you know, the reason I had to get a new job, you know.

Q: Okay. Were you going to still be able to kind of pick and choose what you did physically under the new ownership or that would have been out the window?

A: I would doubt it. I would doubt if I could do what I wanted to do.

After work on March 9, 2015, Osborne saw Dr. David Reilly who restricted his duty for a week and then released him to full duty. Osborne did not request Perry County to pay for Dr. Reilly's treatment. He explained Perry County never denied treatment for his injury because he did not submit a claim. Osborne discussed his back symptoms following the March 9, 2015, injury and until the October 14, 2016, injury at Hitachi:

> Q: So, tell me in your words between the March, 2015, mantrip incident and when your back went out on you in October, 2015, during that time period had your back pain gotten better, did it kind of come and go? What would you say?
>
> A: My back has been hurting ever since I got in that mantrip wreck. And I tried to bear with it, because I thought, you know, I was keeping my job. And then when it come [sic] down to it, I couldn't do it. Then I had to go find another job. But yeah, my back had been hurting ever since then. But if you – if you're in a coal mines [sic] and your back's hurting and you've got a [sic] accident report, they'll get rid of you, you know. So, you try to – you try to work it out the best you can. And it got to where, you know, my leg went numb that day. And my leg never did go numb, but it hurt. And then about the last two or three months before it went out, my back went out, it started doing the same thing again at Hitachi.
>
> Q: Okay. So, when you were under that piece of equipment cleaning it that day, that was the first day that your leg ever went numb?
>
> A: No, it wasn't the first day it ever went numb; but it was the first day – it was the first time that I was ever under a piece of – like working on something and my back went out with my leg. I couldn't – my leg had went out two or three times while I was working, walking, and I'd have to stop and lean up on something. But that was the first time I'd ever got under – you know, cleaning something out and my back and my leg went out, yes, since – since it – since that mantrip wreck, you know.

At the August 22, 2017, deposition, Osborne again described the events of March 9, 2015. On that date, he was in a mantrip with a mine inspector when the following occurred:

> Q: Okay. So the way I picture it, and this is just my interpretation of it, you can tell me if it's right or not, it's a cart – basically it's a car that gets you from point A to point B?

A: Right.

Q: And there was a rock or something on the rails –

A: Yeah.

Q: -- that the guy didn't see and it hit it and it threw your –

A: No. It run over top of it and it went – then it flipped – you know, flipped the back end of it, just like a car would do if you was in a car.

Q: Yeah.

A: And it come back down on the track real hard.

Q: So it was a …

A: Yeah. Slammed it down on the track.

Q: Up and then down –

A: Right.

An accident report was filled out, and that evening after work Dr. Reilly prescribed Flexeril and placed Osborne on light duty until he saw his family physician, Dr. Jeffrey Golden. He denied leaving Perry County in October 2015 due to physical problems:

Q: Did Dr. Golden ever remove that restriction:

A: On June the – I worked – I kept telling him that my back was hurting, and he asked me, you know, do you have – can you work with it, and I just – I just took care of myself. I got a $120,000 job. If they find out my back's hurt, you know what's going to happen to me, and I got a kid going to college. I done the best I could do and I was doing good with it. I was taking care of myself, you know. And it come up I guess in October there, they sold out, and then they dropped my pay to $25 a [sic] hour.

Q: A big difference, huh?

> A: And I'm driving – I'm driving four hours. I couldn't even pay my gas bill with that. I had to get something else closer to home, you know, and I – I was working good, you know. Everybody's got back pain. Anybody – everybody's got back pain. And I was dealing with it. I was doing good. I could work. I could work – I worked with a lot of people. And I just went to Hitachi and it was – I was doing good at Hitachi. I never missed a day's work.

On June 26, 2016, Dr. Golden ordered an MRI. On June 29, 2016, Dr. Golden administered Toradol and Kenalog shots and prescribed Mobic for back pain. Following Osborne's October 14, 2016, injury, Dr. Golden referred him to Dr. Amir El-Naggar. He provided the following concerning his job at Hitachi:

> Q: Take me through the time you clock in till [sic] the time you clock out what a typical day would be like and describe in detail, if you can, the physical requirements of the job. Did you have to bend a lot, did you have to lift a lot, did you have to crawl, stoop, twist, all that good stuff?
>
> A: There wasn't a lot of manual like – like weight. There wasn't a lot of manual, but there was a lot of twisting in tight spots. As far as lifting something heavy, probably 40 pounds is the heaviest I ever lifted there. Mostly hand tools, changing lights, cables out. And then the worst part was getting under that powder coat machine.
>
> Q: The what?
>
> A: It's called a powder coat machine. That's a --
>
> Q: Powder coat?
>
> A: Powder coat, yeah. That's actually where I got hurt at. And it was like – it was about as long – you had to crawl about the length of this table and I would crawl under that, from me to him, and then I'd have to reach around this corner, like getting in that weather (phonetic) –
>
> Q: Okay. Hold on.

A: -- and get these coils out.

Q: So how many feet do you think this table is?

A: It's like – a power coat's just – it had a lid, like a door here you take out, and you crawl under it. It was about – about the height of this table, you've got to crawl under it.

Q: And how high is the table?

A: Somewhere in this area right here. (Gesturing)

Q Well, how many feet?

A: I'd say three and a half feet, somewhere in there.

Q: Okay. So there's a –

A: Entrance door there. You take our –

Q: So the machine is – the door is kind of on the ground, you take the door off …

A: Yeah, and you crawl back – you like crawl like from here to – you know, here to the end of this table.

Q: And how many feet is that do you think?

A: It's probably ten.

Q: So you crawl ten feet under the machine?

A: Yeah. And then you have to – you have to bend around, like around behind his chair, and this chain runs around these parts that powder coats.

Q: So like an L you would bend?

A: It's sort of like a horseshoe. Yeah. But I had to bend like – like a L.

Q: Okay.

A: And these coils falls off at the door, they get hung up, and that's part of my job, to clean all of them up.

Q: What fell off?

> A: The coils. They're like a little old copper coil, like a horseshoe.
>
> Q: Oh, okay. I was thinking –
>
> A: Yeah.
>
> Q: -- coal and I'm like …
>
> A: No. They're like a – they're like a horseshoe and they powder coat part of them, and it's on a chain. And then there's a door that opens and the part goes through and it gets hot, you know, heats it up. And I actually have to crawl up under it – and it's about the length of this table – and I had to reach right under it, you know, ever since I been there. It was just this one time.

Osborne testified that bending and twisting were the most physical aspects of his Hitachi job. He believed that before the October 2016 injury, he was capable of performing all duties associated with the Hitachi job. He did not return to work after the injury.

The December 12, 2017, Benefit Review or Status Conference Order and Memorandum reflects the contested issues were as follows: "work-related injury, TTD benefits paid, medical expenses unpaid or contested, physical capacity to return to the type of work performed at time of injury, exclusion for pre-existing impairment, and permanent income benefits per KRS 342.730 including multipliers." Other contested matters were "failure to follow medical advise [sic], false representation of physical or medical condition, apportionment, and maximum medical improvement." Prior to the hearing, Osborne and Perry County agreed to settle the claims for occupational hearing loss (Claim No. 2016-01084) and injuries to his shoulders (Claim No. 2016-01535).[5]

[5] On January 22, 2018, ALJ Neal approved both Settlement Agreements.

Pertaining to the March 9, 2015, low back injury, Perry County introduced Dr. Michael Best's February 21, 2017, report and his December 26, 2017, supplement. It also introduced the medical records of Dr. Jonathan Moore, Dr. Harold Rutledge, and Lake Cumberland Medical Associates.

Hitachi introduced Dr. Timothy Kriss' September 20, 2017, report and his October 4, 2017, deposition. It also submitted the records of Dr. Golden spanning the period from March 9, 2015, through October 14, 2016.

Osborne introduced the June 1, 2017, report of Dr. Muffly as evidence in support of his March 9, 2015, and October 13, 2016, injury claims.

At the December 20, 2017, hearing, Osborne provided a description of his injury at Perry County. The evening of the injury, Dr. Reilly imposed restrictions for two or three days. Osborne missed no work after the March 9, 2015, injury performing all his duties at Perry County until he quit on October 1, 2015. He testified neither Dr. Fadel nor Dr. Hughes informed him of work restrictions. Thus, he was unaware of a medical condition which prevented him from performing his duties at Hitachi. Further, he did not miss any work while employed by Hitachi. Osborne provided the following regarding his work capabilities following the March 9, 2015, injury:

> Q: … You know how you just testified a minute ago that after that injury you went to the After Hours Clinic and saw Dr. Riley, correct?
>
> A: Yes.
>
> Q: Did you go back at all to any doctor after that until the next year – in 2016?
>
> A: Not for my back, no. I went for – I went for my foot – neuropathy (sic) but not for my back, no.

Q: And when you did go back to seek medical treatment it was with your family physician Dr. Goldman. Is that right?

A: That is correct.

Q: And that would be after you started working at Hitachi, correct?

A: That is correct.

Q: Now you testified a minute ago that after your injury at Perry County Coal in March of 2015 your job really didn't change as a Maintenance Foreman. Is that right?

A: Are you talking about from Perry County to Hitachi?

Q: No, from before your injury at Perry County to after your injury at Hitachi.

A: No – no, they were the same. No.

Q: So would it be correct to say then that you never really worked light duty?

A: No, it was the same. He – Dr. Riley didn't actually give me light duty. Like I said I've got the report. It says restricted for two to three days – two or three days, that's what the doctor said in his report.

Q: So after the injury you were still doing most of the – all the requirements of your job as a Maintenance Foreman?

A: Yeah – yes.

Q: Okay. Now I believe you said earlier and I'm not sure if you said it specifically but when you were talking about the evaluation by Dr. Fadel and Dr. Hughes did you ever – were you ever given those reports to even know what they said?

A: No.

Q: Okay. When you left Perry County Coal was it correct that some of the factors that influenced your decision to stop working there was because of the buy-

> out by CAM (sic), the pay being cut and the long drive to work?
>
> A: That is correct.

On February 19, 2018, ALJ Neal entered an interlocutory Opinion, Order, and Award finding as follows:

> 2016-02539 (MARCH 19, 2015)
>
> There is no evidence the Plaintiff had any low back pain in the months leading up to March 19, 2015. The Plaintiff testified, and the medical records show, he had the immediate onset of axial low back pain at the time of the March 19, 2015, work incident, and has continued to have low back pain since that time. Dr. Fadel diagnosed the Plaintiff with degenerative lumbar disc disease aroused by the March 19, 2015, injury at work. Similarly, Dr. Kriss diagnosed the Plaintiff with chronic low back pain of multi-fractural etiology. Dr. Kriss explained the medical records confirmed the Plaintiff did not have any low back pain prior to March 19, 2015, when he was involved in a mantrip accident, and he has had continued low back pain since that time. Dr. Kriss further noted the mechanism of injury on March 19, 2015, was certainly capable of causing persistent back pain. Dr. Snider also agreed there was evidence that some of the Plaintiff's back complaints were related to the acute event involving the mantrip. The ALJ finds Dr. Fadel and Dr. Kriss' opinions most persuasive and consistent with the medial records as it relates to the March 19, 2015, injury. As such, the ALJ finds the Plaintiff has met his burden of proof as to a March 19, 2015, work-related low back injury.
>
> 2016-65014 (OCTOBER 14, 2016)
>
> While the Plaintiff did have low back pain during the time leading up to the October 14, 2016, work incident, he did not have any radiculopathy. The Plaintiff was able to work full-duty as a maintenance person for Hitachi up until October 14, 2016, when he had the immediate onset of left leg radiculopathy while working under a machine at Hitachi. Specifically, his back locked-up on him and his left leg went completely numb. Dr. Best noted that in July of 2016 (just before

> the October 14, 24 2016, work injury), the Plaintiff had only an MRI that showed an L5-S1 disc bulge without disc extrusion. Three months later, just after the October 14, 2016, work injury, the Plaintiff had a second MRI that showed a disc extrusion at L5-S1 with nerve root impingement. Dr. Best concluded the second injury caused a harmful change, and the harmful change was documented by the MRI findings. He noted the numbness described by the Plaintiff was consistent with a disc extrusion at L5-S1. Dr. Best later specifically diagnosed the Plaintiff with a work-related injury on October 14, 2016, involving an L5-S1 disc extrusion. Similarly, Dr. Kriss stated the Plaintiff had no radicular pain down either leg prior to October 14, 2016, and that only after October 14, 2016, injury did the Plaintiff consistently complained of radicular pain and numbness radiating down the back of the left thigh and calf. Dr. Kriss concluded there was a degree of permanent harmful change due to the twisting event of October 14, 2016. The ALJ finds the opinion of Dr. Best and Dr. Kriss most persuasive as to the issue of whether the October 14, 2016, work event constituted an injury under the Act. As such, the ALJ finds the Plaintiff has met his burden of proof of showing he sustained a work-related low back injury on October 14, 2016.

ALJ Neal concluded the affirmative defenses raised by Hitachi were without merit. He found Osborne was not at maximum medical improvement ("MMI") reasoning as follows:

> The medical evidence in this claim is conflicting as to whether the Plaintiff is at MMI. The Plaintiff's IME physician, Dr. Muffly placed him at MMI on June 1, 2017. Conversely, both Dr. Best and Dr. Kriss do not believe the Plaintiff has reached maximum medical improvement. Dr. Best has opined the Plaintiff has a S1 disc herniation to the left that is related to the October 14, 2016, work injury, and will require surgery. Similarly, Dr. Kriss strongly suspects the Plaintiff will need surgical intervention due to the October 14, 2016, work event, but felt additional diagnostics including a lumbar myelogram were needed first. He did not believe the Plaintiff would be considered at MMI until such diagnostics were performed. The ALJ finds the opinion

> of Dr. Kriss and Dr. Best to be most persuasive, and finds the Plaintiff has not yet reached MMI for his work related injury. As such, the claim is placed in abeyance pending MMI.

Temporary total disability ("TTD") benefits were awarded to be paid by Hitachi:

> After the March 9, 2015, injury, with the exception of three days, the Plaintiff continued to work for Perry without any formal restrictions through October of 2015. He then began working full-duty for Hitachi, and continued to work full-duty for Hitachi for almost a year until his October 14, 2016, work-related injury. He has yet to return to work after the October 14, 2016, injury. The ALJ finds the Plaintiff is not entitled to any TTD as it relates to the March 9, 2015, injury. He was clearly capable of his customary work until the intervening injury, and had been doing so for over 1.5 years.
>
> Concerning the October 14, 2016, injury, the ALJ finds it was this injury, with the resultant radiculopathy, that caused the Plaintiff to be taken off work. The medical records coupled with the Plaintiff's testimony show the Plaintiff has not yet reached a level of improvement that would permit a return to his customary work or the work he was performing at the time of injury. In fact, he has not been able to return to any work. Further, as noted above, the Plaintiff has yet to reach MMI. Accordingly, the Plaintiff is entitled to TTD from October 14, 2016, until which time he is either placed at MMI, returns to his customary work, or the Hitachi is otherwise released from payment by order. Again, as noted above, Hitachi is responsible of payment for this period of TTD because he remains off work due to the Hitachi work injury.

Hitachi also bore the liability for all future medical benefits:

> Further, there is no indication the Plaintiff was a surgical candidate prior to the October 14, 2016, injury. The second work injury on October 14, 2016, was a significant event and also involved the lumbar spine. The second injury was more than a temporary

> exacerbation; instead, it was the injury that caused the onset of severe radicular symptoms that were so debilitating that the Plaintiff was unable to return to work. The ALJ finds there is simply no clear line of demarcation that would substantiate an apportionment of responsibility for the payment of medical benefits between the first and second employer. As such, under the dictates of Derr, the ALJ finds that any reasonable and necessary medical treatment for the Plaintiff's work related low back condition starting October 14, 2016, is the responsibility of the second employer – Hitachi.

Perry County was responsible for all medical benefits for the work-related lumbar spine injury through October 13, 2016. Thereafter, Hitachi was financially responsible for all medical benefits incurred for the treatment of Osborne's lumbar spine injuries. Payment of TTD benefits commenced on October 14, 2016, to continue thereafter until Osborne reached MMI. The claim was placed in abeyance pending Osborne attaining MMI.

In response to Osborne's Motion to Schedule a BRC because TTD benefits were terminated, on December 12, 2018, ALJ Neal ordered the claim removed from abeyance, and set a proof schedule.

Osborne supplemented the record with the medical records of Lake Cumberland Neurosurgical Associates, which included those of Dr. El-Naggar and Sara Todd Godbey, a Physician's Assistant, the June 5, 2018, MRI report, Dr. Muffly's January 17, 2019, report, and Dr. Amanda Merchant's psychological evaluation report.

Hitachi introduced the January 14, 2019, report of Dr. J. Rick Lyon and his February 4, 2019, supplement.

Hitachi also filed a medical fee dispute contesting Dr. El-Naggar's recommendation for implantation of a spinal cord stimulator as well as a motion to join Dr. El-Naggar as a party.[6] In support of its medical fee dispute, Hitachi filed the Utilization Review reports of Dr. Daniel Gutierrez. Hitachi also introduced Dr. Best's February 27, 2019, and April 10, 2019, supplemental reports.

Osborne was deposed on January 21, 2019, and reiterated that on the night of March 9, 2015, he went to Dr. Reilly who restricted his job duties for two or three days. Although his back remained sore, he missed no work. He recounted why he stopped working for Perry County and obtained employment with Hitachi in mid-October 2015. Osborne testified that since the October 14, 2016, injury, his pain is worse and extends down his left leg. He has not worked since October 14, 2016, and believed he is unable to perform any of his prior jobs as well as sedentary jobs. He last saw Dr. El-Naggar on January 5, 2017.

At the April 22, 2019, hearing, ALJ Neal identified the contested issues as the reasonableness and necessity of the proposed medical treatment including implantation of the spinal cord stimulator, whether Osborne had attained MMI, and his entitlement to additional TTD benefits.

Significantly, none of the evidence introduced after the February 19, 2018, interlocutory decision addressed Osborne's ability to perform his job duties following the March 9, 2015, low back injury. In the May 23, 2019, Interlocutory Opinion, and Order, ALJ Neal resolved the medical fee dispute in favor of Osborne,

[6] Dr. El-Naggar was joined as a party by Order dated March 13, 2019.

found he had not attained MMI, and ordered the resumption of TTD benefits. His decision is, in relevant part, set forth *verbatim*:

> Ultimately, the ALJ finds that the Plaintiff's treatment providers, in conjunction with the Plaintiff's input, are in the best position to determine whether the Plaintiff should proceed with the surgery the SCS. Further, Dr. Muffly has opined that the SCS is reasonable and necessary treatment. The ALJ finds Dr. Muffly to be most persuasive, finds that the SCS is reasonable and necessary treatment for the work injury, and finds that Defendant Hitachi is the responsible party for payment of the procedure.
>
> **MAXIMUM MEDICAL IMPROVEMENT**
>
> MMI is defined by the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment as follows:
>
> > An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximal medical improvement (MMI). It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The Guides attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living.
>
> As noted above, the ALJ has found that the SCS is reasonable and necessary treatment for the Plaintiff's work injury. He has not yet had the stimulator. Dr. Muffly, who agreed that the SCS was reasonable and necessary, has opined that the Plaintiff is not at maximum medical improvement. The ALJ finds Dr.

> Muffly to be most persuasive, and finds that the Plaintiff is not at maximum medical improvement.
>
> …
>
> The ALJ finds that the Plaintiff currently continues to have significant low back pain with radiculopathy. He has not worked since his TTD was terminated in November 2018. The Plaintiff testified that he has not applied for employment, nor does he feel capable of working currently. The medical records coupled with the Plaintiff's testimony show the Plaintiff has not yet reached a level of improvement that would permit a return to his customary work or the work he was performing at the time of injury. In fact, he has not been able to return to any work. Further, as noted above, the Plaintiff has yet to reach MMI. Accordingly, the Plaintiff is entitled to TTD from November 13, 2018, until which time he is either placed at MMI after his SCS, returns to his customary work, or the Defendant Hitachi is otherwise released from payment by order. Again, as noted above, Defendant Hitachi is responsible of payment for this period of TTD.

Hitachi bore the liability for implantation of the spinal cord stimulator and all other reasonable and necessary medical expenses. ALJ Neal ordered Hitachi to pay TTD benefits from November 13, 2018, continuing until Osborne attained MMI or returned to employment. The claim was again placed in abeyance pending Osborne attaining MMI.

Thereafter, Hitachi filed the records of Lake Cumberland Neurosurgical Associates including a form completed by Sara Todd Godbey, PA, concerning Osborne's ability to perform work-related activities and Dr. El-Naggar's records and a questionnaire he completed. Hitachi also filed the supplemental reports of Drs. Kriss, Best, and Lyon. Perry County introduced Dr. Best's May 21, 2019, deposition.

On March 17, 2020, Hitachi filed a motion to remove the claim from abeyance representing that Dr. William J. Lester, Osborne's treating physician, placed Osborne at MMI as of December 1, 2019. Hitachi attached Dr. Lester's report revealing he assessed a 10% impairment rating and imposed physical restrictions.

By Order dated March 30, 2020, ALJ Neal sustained the motion and set a proof schedule.

On May 5, 2020, Osborne was again deposed. He testified a trial implantation occurred on August 17, 2019, with the implantation occurring on August 1, 2019. Osborne reiterated much of his previous deposition testimonies. Relevant to this appeal, Osborne testified once more that when he sought treatment on the evening of March 9, 2015, Dr. Reilly restricted his duties for the next two or three days. He testified he left Perry County because it had been purchased and his earnings were reduced. Osborne described his pain following the March 9, 2015, injury:

> Q: So I understand you have a baseline pain level. Following this accident did that pain increase?
>
> A: No, it didn't. After about a week it settled down. I mean, it was normal, like it was, you know.

Regarding his ability to work between March 9, 2015, and October 14, 2016, Osborne testified as follows:

> Q: … So you would agree that before working at Hitachi you did have some pain from your work in the coal mines?
>
> A: Yes, I had some. Yeah. But I worked fine. I worked fine every day in the coal mines, and I worked fine at Hitachi up to that day. …

Osborne introduced Dr. Lester's records, the records of Lake Cumberland Neurological Associates, and the May 21, 2020, Independent Medical Evaluation report of Dr. Bruce Guberman. Dr. Guberman opined Osborne reached MMI on May 21, 2020, and did not retain the physical capacity to return to the type of work performed at the time of the injury. However, Dr. Guberman did not identify the injury which prevented Osborne from returning to the type of work performed at the time of that injury. Dr. Guberman also assessed a 13% impairment rating for this injury, but he did not identify the injury which generated the 13% impairment rating, nor did he attempt to apportion the impairment rating between the two injuries.

The claim was subsequently reassigned to ALJ Whalen.

At the August 24, 2020, hearing, Osborne testified he had worked in the coal mines for 26 years and described the type of work he performed. Osborne testified he still experienced back pain after using the medication prescribed by Dr. Reilly on the evening of March 9, 2015. Regarding his pain following this injury, Osborne testified:

> A: And, you know, they just give me some muscle relaxers is all they actually said, you know, just give me muscle relaxer. Said, you know, if anything else happened, you know, come back but that was it. And I just, I just went back to work and just, I mean, it stung but it wasn't near as bad as it was after it happened that day, you know, you just, all coal miners has got pretty bad backs anyway.

After Perry County sold out, Osborne found a job closer to home and "if it wasn't for that I'd still been working, you know." He described his work at Hitachi as bending and twisting in tight places. He explained his back was numb and

hurt following the March 9, 2015, injury at Perry County; however, the injury at Hitachi caused pain radiating down his leg. Osborne also discussed the success of the spinal cord stimulator. Regarding his prior deposition testimony, the following exchange took place:

> Q: … You were asked, in your application you indicate you didn't have any back pain, this is your application with Hitachi and your answer was, that's right, I didn't have any issues with my back pain at that time; is that correct?
>
> A: Yeah.
>
> Q: You also said in that deposition, talking about your injury with Perry County Coal, that after about a week it settled down, it was normal; is that correct?
>
> A: Yeah, that's correct, yeah. The real, the stinger part, yeah, it went down, yeah.

On August 26, 2020, Perry County and Osborne tendered an Agreed Order which listed the following contested issues:

> 1. Benefits per KRS 342.730 including entitlement to multipliers;
>
> 2. Physical capacity to return to work on 3/9/2015 injury;
>
> 3. Apportionment for liability of indemnity and medical benefits between Hitachi and Perry County Coal;
>
> 4. Medical expenses – reasonableness/necessity.
>
> 5. The parties preserve for appellate reasons any issues previously decided by the ALJ's Interlocutory Opinion, Order and Award of February 19, 2018 and May 23, 2019.

On September 8, 2020, ALJ Whalen entered the following Order:

> The parties having filed a Notice for an Agreed Order on Contested Issues, and the ALJ being otherwise fully and sufficiently advised;
>
> It is hereby Ordered that the Agreed Order is Granted.

On September 20, 2020, an Order was entered in LMS stating the "attached Form 110 Agreement as to Compensation and the Addendum concerning lump sum payment is approved." Attached to the Order is an agreement between Osborne and Hitachi in which Osborne agreed to settle his claim against Hitachi for TTD benefits of $134,115.64 and a lump sum settlement of $97,210.89. The settlement was broken down as follows:

> Waiver or buyout of all past, present and future income benefits
> Yes $37,210.89
>
> Waiver or buyout of future medical benefits
> Yes $50,000.00
>
> Waiver of vocational rehabilitation
> Yes $5,000.00
>
> Waiver or right to reopen
> Yes $5,000.00
>
> Under "Other Information" is the following:
>
> In exchange for the payment of $97,210.89, the Plaintiff hereby agrees to dismiss with prejudice any and all claims for additional income, medical expenses, and vocational rehabilitation benefits with regard to the October 14, 2016 injury, whether past, present or future, as well as all statutory rights pursuant to K.R.S. 342.125, the reopening statute.
>
> …
>
> The Plaintiff understands that he has received specific consideration for a waiver of any and all claims to additional income benefits and fully understands that he

> cannot claim additional income benefits as a consequence of the October 14, 2016 injury at Hitachi.

In the October 23, 2020, Opinion and Order, ALJ Whalen provided the following analysis and findings which is set forth *verbatim*:

> "Injury" is defined by KRS 342.0011(1) as a "work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which proximately causes a harmful change in the human organism as evidenced by objective medical findings." The term "objective medical findings" means "information gained through direct observation and testing of the patient applying objective or standardized methods." In this matter, there is no dispute whether this is a work-related injury. The parties stipulated that the injury of March 9, 2015, is work-related.
>
> The determination in this claim is whether Plaintiff suffered a compensable injury under the Kentucky Workers' Compensation Act entitling him to income and medical benefits for the low back pain caused by the injury of March 9, 2015. Plaintiff argues that 12 the fact of his injury is clear and that the most credible medical testimony, that of Dr. Best supports an award of permanent partial disability benefits based upon the impairment with the three times multiplier given his inability to return to the type of work he performed at the time of the injury. The Defendant argues to the contrary that Plaintiff's current symptoms are the result of his subsequent injury while working at Defendant Hitachi.
>
> In respect to Plaintiff's March 9, 2015, injury, he was able to drive from Perry County to Lake Cumberland After Hours Clinic in Somerset, Kentucky, after the injury. He saw Dr. Reilly, where he normally sees Dr. Golden. Plaintiff's complaint was low back pain associated with the accident in the mantrip. He was prescribed Flexural and prescribed to light duty outside of the mine. Plaintiff went back to work on March 10, 2015, and continued working until he quit in October 2015 and went to work for Hitachi. Plaintiff's medical records after March 9, 2019, reflect that he was treated primarily for peripheral neuropathy. Dr. Kriss opined

that the peripheral neuropathy was not related to Plaintiff's work injuries of March 9, 2015, with Plaintiff or October 13, 2016, with Hitachi. Plaintiff had a second low back injury on October 14, 2016, when he was under a piece of machinery cleaning it and his back went out and his leg went numb after crawling under it, bending and twisting to pick up coils at Defendant Hitachi.

Derr Construction v. Bennett, 873 S.W. 2d 824 (Ky. 1994) is the controlling case where there are successive injuries to the same body part, absent the ability to determine a clear demarcation or apportionment between the treatment required as a result of successive injuries, the last employer and its carrier are at risk for the last injury is responsible for all the medical benefits for both injuries.

In Plaintiff's situation, the March 9, 2015, work injury at his employment with the Defendant, Perry County Coal and the subsequent injury on October 14, 2016, involved the lumbar spine. While the Plaintiff did have continued low back pain after the instant March 9, 2015, injury the low back pain was axial and did not radiate down his legs, and he continued to work full duty up and until the time of the October 14, 2016, work injury at Defendant Hitachi. Further, there is no indication the Plaintiff was a surgical candidate prior to the October 14, 2016, injury. This ALJ finds Plaintiff missed no work as a result of his March 9, 2015, injury for the remaining six months he worked for Defendant, Perry County Coal and started working for Defendant, Hitachi. The second work injury on October 14, 2016, was a significant event and also involved the lumbar spine. The second injury was more than a temporary exacerbation, instead, it was so debilitating that the Plaintiff was unable to return to work. This ALJ, like the previous ALJ, finds there is simply no clear line to divide the apportionment of responsibility of medical benefits between the first and second employer. In reviewing the medical evidence, Dr. Fadel assessed a 7% impairment and Dr. Hughes and Dr. Muffly assessed a 6% impairment.

However, the previous ALJ has decided apportionment in respect to responsibility for medical benefits. In following Derr, Judge Neal has already

found in the Interlocutory Relief Award of February 19, 2018, that the second employer, Defendant, Hitachi responsible for Plaintiff's medicals, including the spinal cord stimulator, and TTD.

Absent introduction of new evidence, fraud, or mistake an ALJ would exceed his authority to reverse dispositive findings in an Interlocutory Opinion. Bowerman v. Black Equipment, Co., 297 S.W. 3d 858, 867 (Ky. App. 2009). In this case, the ALJ has not found new evidence, fraud or mistake which would mandate a reversal of the findings in the February 19, 2018, Interlocutory Relief Award. The ALJ finds Plaintiff is unable to provide an apportionment of his injuries to his lower back and spine between Defendants, Perry County Coal and Hitachi. The ALJ has found that Defendant, Perry County Coal is not responsible for any past or present medical care of the Plaintiff. The previous ALJ had found that Plaintiff does not have the physical capacity to return to work. (Emphasis added).

Derr does not preclude an award of income benefits in this situation. The ALJ finds the opinions of Dr. Hughes and Dr. Muffly assessment of a 6% impairment most persuasive. The Plaintiff's permanent partial disability benefit is $580.21 (AWW) x 2/3 (workers' compensation rate) x .06 (impairment rating) x 1.00 (grid factor) = $29.59, from October 14, 2016, enhanced by a multiplier of three=$88.77 and excluding any periods of TTD, for a period of 425 weeks. The ALJ finds Plaintiff is entitled to the three multiplier as he does not retain the physical capacity to return the type of work he performed on March 9, 2015. (KRS 342.730 (1)(c). Interlocutory Opinions and Awards of February 19, 2018, and May 23, 2019, are preserved for appellate purposes only.

This generated a Petition for Reconsideration from Perry County pointing out ALJ Whalen determined no new evidence justified reversal of ALJ Neal's prior interlocutory factual findings. Thus, enhancement by the three multiplier

for the March 2015 injury was error. Regarding its stipulation concerning the contested issues, Perry County asserted as follows:

> While it is true that Judge Neal found plaintiff lacked the physical capacity to return to work after the 2016 Hitachi injury, he clearly also determined that plaintiff retained the physical capacity to return to work after the 2015 Perry County Coal injury. And as this ALJ has already determined there is no new evidence that would justify reversal of the prior ALJ's interlocutory factual findings, the award of the 3 multiplier in this 2015 injury claim is in error.
>
> While it is true that plaintiff's physical capacity to return to work after the Perry County Coal injury was a contested issue for this judge to determine, that issue was actually listed in error by counsel for the employer as this previous factual finding by Judge Neal had been overlooked due to the passage of 2 years of time since the first Interlocutory Award. Listing of the issue as contested, however, does not negate the prior ALJ's dispositive interlocutory finding.

Perry County also asserted ALJ Whalen improperly relied upon Dr. Hughes in finding the March 9, 2015, injury caused a 6% impairment rating since Dr. Hughes assessed no impairment rating for a lumbar condition. It also cited Dr. Best's opinion that Osborne had no impairment as a result of the March 9, 2015, injury. Alternatively, it noted the grid factor for a 6% impairment rating is .85 and the award should be corrected accordingly. Perry County also noted the award stated Osborne was awarded permanent total disability benefits which should be corrected.

In his November 23, 2020, Order, ALJ Whalen sustained a portion of Perry County's Petition for Reconsideration and amended the award to reflect PPD benefits were awarded based on a .85 grid factor. However, ALJ Whalen overruled the remainder of the Petition for Reconsideration ordering as follows:

> Derr does not preclude an award of income benefits in this situation. The ALJ finds the opinions of Dr. Hughes and Dr. Muffly assessment of a 6% impairment most persuasive. The Plaintiff's permanent partial disability benefit is $580.21 (AWW) x 2/3 (workers' compensation rate) x .06 (impairment rating) x 0.85 (grid factor) = $19.74, from October 14, 2016, enhanced by a multiplier of three=$78.95, and excluding any periods of TTD, for a period of 425 weeks. Relying on the opinion of Dr. Guberman, the ALJ finds Plaintiff does not have the physical capacity to return to the type of work he was performing at the time of his injury. The ALJ finds Plaintiff is entitled to the three multiplier as he does not retain the physical capacity to return the type of work he performed on March 9, 2015. (KRS 342.730 (1)(c).

On appeal, Perry County cites Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009) for the proposition that reversal of prior dispositive factual findings by an ALJ in an interlocutory opinion, absent new evidence, fraud, or mistake, is arbitrary, unreasonable, unfair, and unsupported by sound legal principles. Since ALJ Whalen found no new evidence, fraud, or mistake mandating reversal of ALJ Neal's findings set forth in the February 19, 2018, interlocutory award, Perry County maintains he erred by enhancing the PPD benefits via the three multiplier. Similarly, it also maintains he erred in stating ALJ Neal found Osborne lacked the physical capacity to return to work since ALJ Neal actually found Osborne lacked the capacity to return to work because of the subsequent back injury while employed by Hitachi in 2016 and not due to the March 9, 2015, injury. Consequently, based on ALJ Whalen's finding that there had been no new evidence, fraud, or mistake mandating a reversal of ALJ Neal's finding, Perry County argues enhancement by the three multiplier must be reversed.

In a companion argument, Perry County contends Osborne's testimony speaks for itself. It observes Osborne consistently testified throughout that he did not return for medical treatment after being seen by a physician on the night of the March 9, 2015, injury. It notes Osborne testified he returned to work the next day and performed the same job for seven months until Perry County was purchased and his earnings reduced. Osborne then went to work at Hitachi for approximately one year until he sustained an injury there. Perry County notes Dr. Fadel's opinion that Osborne lacked the physical capacity to work was rendered at the time Osborne had not reached MMI. Further, Osborne testified at the final hearing before ALJ Whalen that he would still be working at Perry County if the company had not been sold. Therefore, Osborne did not qualify for enhancement via the three multiplier.

Finally, Perry County argues ALJ Whalen improperly relied upon Dr. Hughes' opinion in finding the March 2015 injury generated a 6% impairment rating since Dr. Hughes assessed a 0% lumbar impairment rating. Thus, reliance upon Dr. Hughes in finding Osborne retains a 6% impairment rating as a result of his March 9, 2015, injury is error. Perry County seeks reversal of this finding and further consideration.

ANALYSIS

We reverse ALJ Whalen's finding Osborne does not possess the capacity to perform the jobs he was performing at the time of the March 9, 2015, injury and the enhancement of Osborne's PPD benefits by the three multiplier. We also reverse the ALJ's reliance upon Dr. Hughes in finding the March 9, 2015, injury generated a 6% impairment rating. We vacate ALJ Whalen's finding the March 9,

2015, low back injury generated a 6% impairment rating based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") and remand for additional findings regarding the impairment rating attributable to the March 9, 2015, injury. Our rationale follows.

In his February 19, 2018, interlocutory decision, ALJ Neal found that following the March 9, 2015, injury, with the exception of three days, Osborne continued to work for Perry County without any restrictions through the end of his employment in October 2015. He also found Osborne worked for Hitachi performing full duty work for almost a year until the October 14, 2016, work injury. ALJ Neal concluded Osborne was not entitled to TTD benefits as a result of the March 2015 injury since Osborne "was clearly capable of his customary work until the intervening injury, and had been doing so for over 1.5 years."

In his decision, ALJ Whalen noted, as did ALJ Neal, that Osborne missed no work as a result of the March 9, 2015, injury for the remaining period he worked for Perry County and then started working for Hitachi. ALJ Whalen found there was no clear line to divide the apportionment or responsibility of the medical benefits between the first and second employer. Therefore, Hitachi remained responsible for Osborne's medical benefits. Of great significance is ALJ Whalen's finding there was no new evidence, fraud, or mistake which would mandate a reversal of ALJ Neal's February 19, 2018, interlocutory award. Thus, based on that finding, ALJ Whalen could not alter any portion of ALJ Neal's February 19, 2018, interlocutory decision as this finding established no proof was introduced following ALJ Neal's February 19, 2018, interlocutory decision which supported a finding

Osborne did not retain the capacity to perform the work he was performing at the time of his March 9, 2015, injury. Consequently, ALJ Whalen's finding Osborne did not retain the capacity to perform the type of work he was performing on March 9, 2015, is clearly erroneous. Further, ALJ Whalen erroneously stated, "the previous ALJ had found that Plaintiff does not have the physical capacity to return to work." That finding is contradictory to his previous finding that there was no new evidence, fraud, or mistake which would mandate reversal of ALJ Neal's findings in the February 19, 2018, decision. ALJ Neal unequivocally stated that following the March 9, 2015, injury, Osborne was clearly capable of his customary work until the October 14, 2016, injury at Hitachi. Significant to ALJ Neal was Osborne's continued work for over a year and a half following the March 9, 2015, injury without any restrictions. What ALJ Whalen failed to grasp was that ALJ Neal found Osborne did not retain the physical capacity to return to the work he performed due to the October 14, 2016, injury.

In Bowerman v. Black Equipment Company, 297 S.W.3d 858, 867 (Ky. 2009), the Kentucky Court of Appeals held:

> Though this appears to be a matter of first impression, our review of relevant legal authority leads us to conclude the reversal of prior dispositive factual findings rendered by an ALJ in an interlocutory opinion, absent introduction of new evidence, fraud, or mistake, is arbitrary, unreasonable, unfair, and unsupported by sound legal principles. In such instances, the ALJ exceeds the exercise of reasonable discretion, operates outside the bounds of statutory authority, and must be reversed.

The Court of Appeals further held the ALJ's reversal of previously adjudicated factual findings represented an abuse of discretion by the fact-finder

because she acted in excess of her statutory authority. In such cases, reversal is mandated. The Court of Appeals explained as follows:

> Thus, absent newly discovered evidence, fraud, or mistake, parties have a reasonable expectation that they may rely on factual findings that have been fully and fairly adjudicated by an ALJ, even when rendered in an interlocutory decision. *See Garrett Mining Co. v. Nye,* 122 S.W.3d 513, 522 (Ky. 2003).

Id. at 868.

As in Bowerman, since ALJ Whalen found there was no new evidence, fraud, or mistake which would mandate reversal of ALJ Neal's February 19, 2018, interlocutory decision, Perry County had a reasonable expectation it may rely upon factual findings fully and fairly adjudicated by an ALJ even when rendered in an interlocutory decision. The Court of Appeals held:

> Unlike *Vendome,* the ALJ in Bowerman's claim rendered a final opinion with factual findings inconsistent with those previously adjudicated in her interlocutory opinion regarding the same factual questions and based on the same evidence. To do so was arbitrary, unreasonable, unfair, and unsupported by sound legal principles, and was an abuse of the ALJ's discretion.

Id. at 870.

Bowerman is applicable in the case *sub judice*. ALJ Whalen found there was no reason to alter the findings of ALJ Neal contained in the February 19, 2018, interlocutory opinion. Therefore, his finding Osborne was incapable of performing the jobs he was performing at the time of the March 9, 2015, injury and is entitled to PPD benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 is arbitrary, unreasonable, unfair, and unsupported by sound legal principles, and was an abuse of discretion. Id. at 870. As explained by Bowerman:

> Reason, logic, and sound principles of justice dictate that findings regarding questions of fact, once fully litigated by the parties and properly adjudicated by the fact-finder, should not be subject to change absent new evidence, fraud, or mistake, regardless of whether rendered in an interlocutory order or a final decision. *See Garrett Mining,* 122 S.W.3d at 522.

Id. at 871.

Controlling in the case *sub judice* is the following conclusion:

> In the instant appeal, the ALJ appropriately exercised her discretion to enter factual findings in the interlocutory proceeding, but then erred when she applied the wrong statutory standard to those facts. When her error became evident, the ALJ did not merely correct her misapplication of the law, but abused her discretion by conducting an unauthorized second review of Bowerman's claim and reversing her original factual findings. As a result, Bowerman's assertion that the ALJ's action bears the appearance of being result-oriented is understandable.
>
> The unexplained reversal of the ALJ's longstanding interlocutory factual findings was inconsistent, erratic and unpredictable, and therefore arbitrary and capricious. The ALJ's entry of opposite dispositive factual findings in her final opinion went beyond merely correcting an error patently appearing upon the face of her interlocutory opinion. Instead, the ALJ's action represented an unauthorized second review of the merits of Bowerman's claim, and was an abuse of her discretion as fact-finder.
>
> While the Court's reference to the principle of *res judicata* in *Garrett Mining* applied to dispositive factual findings rendered in final decisions *vis-à-vis* motions to reopen, its logic extends to factual determinations which have been fully and fairly litigated and properly adjudicated by an administrative fact-finder in interlocutory orders. Factual findings have legal consequences. They are a foundation for the proper application of law. Parties rely upon adjudicated factual findings in shaping their decisions, conduct, and arguments. Adjudicated factual findings must remain constant and immutable so their legal impact may be

> predictable. A fact, once adjudged, must be taken for truth; and no fact, once adjudged, should be subject to re-examination or revision.
>
> This principle of finality is logically applicable to all factual findings, whether rendered in interlocutory orders or final decisions, and certainly applies to the circumstances in Bowerman's appeal. The clear import of the foregoing analogous legal authority is that an ALJ, properly acting within her discretion as fact-finder, is authorized to reverse a misapplication of law in a subsequent decision, but is *not* authorized to conduct a second review of the merits in a subsequent opinion by reversing previously litigated and adjudicated questions of fact.

Id. at 873-874.

We are compelled to point out that, although Osborne testified at the August 24, 2020, hearing that he could not return to his job at Perry County and Hitachi, his testimony was presented after the second injury. The medical evidence unanimously demonstrates the second injury was more severe than the first as it resulted in a herniated disc. Further, Osborne's hearing testimony did not alter his previous testimony that, following the March 9, 2015, injury, he could perform his job duties at Perry County and was able to work at Hitachi performing all tasks until the October 14, 2016, injury.

Also significant is Osborne's hearing testimony acknowledging his previous testimony that he was not working under any restrictions following the March 9, 2015, injury and he did not submit to Perry County the bill for Dr. Reilly's treatment that night. He also acknowledged that at the time he completed his application with Hitachi, he did not have any issues with back pain. Osborne testified that within a week following the March 9, 2015, injury his back was normal and the stinger part had gone down. Thus, ALJ Whalen's finding concerning the

applicability of the three multiplier to the March 9, 2015, injury and enhancement of Osborne's PPD benefits are error and must be reversed.

We also point out Osborne's testimony indicating he could not return to work at Perry County given prior to ALJ Neal's February 19, 2018, interlocutory decision, could not be relied upon by ALJ Whalen as ALJ Neal did not find this testimony probative. ALJ Neal concluded Osborne was capable of performing the customary work he performed for Perry County at the time of his March 9, 2015, injury since he continued to do so for a year and a half after that injury. In order to alter ALJ Neal's finding relative to Osborne's capacity to perform the work he was performing at the time of the March 9, 2015, injury, ALJ Whalen would have had to rely upon evidence introduced after the February 19, 2018, interlocutory decision. Since ALJ Whalen stated he found no new evidence, fraud, or mistake mandating reversal of ALJ Neal's findings in the February 19, 2018, decision, he could not find the three multiplier applicable.

ALJ Whalen also erred in relying upon Dr. Hughes' opinions in finding Osborne retained a 6% impairment rating as a result of the March 9, 2015, injury. In his May 26, 2016, report, Dr. Hughes did not impose an impairment rating for a low back condition due to the March 9, 2015, injury. Rather, he assessed a 5% impairment rating for each shoulder injury for a total impairment rating of 10%. Thus, reliance upon Dr. Hughes in finding Osborne retains a 6% impairment rating as a result of the March 5, 2015, injury is error.

Although not raised by Perry County, we vacate the determination Osborne has a 6% impairment rating due to the subject injury and remand for a

determination of the impairment rating attributable to the March 9, 2015, injury for the following reasons. ALJ Whalen relied upon the opinions of Drs. Hughes and Muffly in finding Osborne retained a 6% impairment rating as a result of the March 9, 2015, injury. In his February 19, 2018, decision, ALJ Neal concluded Osborne had not attained MMI. Similarly, in the May 23, 2019, interlocutory decision resolving the medical fee dispute concerning Osborne's entitlement to implantation of a spinal cord stimulator and additional TTD benefits, ALJ Neal found Osborne had not attained MMI and awarded TTD benefits from November 13, 2018, until such time as he was either placed at MMI after the spinal cord stimulator was implanted, or returned to his customary work, or Hitachi was otherwise relieved of payment. We are unable to locate in the record where Dr. Muffly assessed an impairment rating after the May 23, 2019, interlocutory decision resolving the medical fee dispute and awarding additional TTD benefits. Moreover, in the October 23, 2020, decision, ALJ Whalen did not determine a date of MMI. Thus, ALJ Whalen can only rely upon an impairment rating assessed after he determines the point at which Osborne attained MMI. Stated another way, any impairment rating assessed prior to the date of MMI is not in accordance with the AMA Guides and the statute.

KRS 342.0011(35) reads as follows:

> "Permanent impairment rating" means percentage of whole body impairment caused by the injury or occupational disease as determined by the "Guides to the Evaluation of Permanent Impairment."

Thus, any impairment rating assessed must be based upon the AMA Guides. Section 2.4 of the AMA Guides reads as follows:

> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living. (Emphasis in original).

Based on the above, any impairment rating rendered prior to the employee attaining MMI is not in accordance with the AMA Guides and by extension is violative of KRS 342. There is no question that, under Kentucky law, MMI is a prerequisite for the evaluation for permanent impairment. Hall v. Hospitality Res., Inc., 276 S.W.3d 775, 781 (Ky. 2008); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 217 (Ky. 2006). Therefore, on remand, ALJ Whalen must determine the date of MMI. After determining MMI, he is only permitted to utilize an impairment rating assessed on the date Osborne reached MMI or any point thereafter.

We note that without explanation, in his November 23, 2020, Order, ALJ Whalen relied upon Dr. Guberman in determining Osborne did not retain the physical capacity to return to the type of work he was performing at the time of his injury. In his report, under diagnosis, Dr. Guberman stated:

> He did not miss work at that time and did receive a short period of conservative treatment. The low back pain improved significantly, although he did have a flare-up

on 6/29/2016 at which time he also was given medication.

The low back pain became much more severe on 10/5/2016 when he suffered a twisting-type injury while working in an awkward position at work. He has had severe low back pain since then which did not improve with conservative measures, including an attempt at physical therapy, epidural injections, medication, and alteration of activities. He therefore underwent spinal cord stimulator placement with only mild partial improvement. He continues to have constant pain in the lumbar region of his spine with radicular symptoms on the left side. The claimant currently has an antalgic gait and mild atrophy of the left leg compared to the right leg, a decrease in his Achilles tendon reflexes, and a slight decrease in his left patellar reflex.

In assessing an impairment rating, he provided the following:

From Table 15-3 on page 384 of the Guides to the Evaluation of Permanent Impairment, Fifth Edition, by the American Medical Association, the claimant falls under DRE Lumbar Category III. In that category, the claimant receives a 13 (thirteen) percent impairment of the whole person. The claimant falls in that category since he does have dermatomal pain, sensory loss, reflex abnormalities, and atrophy of the left leg compared to the right leg. It is noted that from Box 15-1 on page 381 of the AMA Guides, it is stated "Atrophy is measured with a tape measure at identical levels on both limbs. For reasons of reproducibility, the difference in circumference should be 2 cm or greater in the thigh and 1 cm or greater in the arm, forearm, or leg." The claimant does have 1 cm atrophy of his left lower leg compared to the right lower leg (at the calf level). I have taken into consideration the claimant has a diagnosis of peripheral neuropathy, but records from Dr. Golden before this injury in regard to the peripheral neuropathy indicate that he did not have motor weakness or atrophy. Atrophy was not noted by Dr. Moore, in his note of July 14, 2015 when he evaluated the claimant's peripheral neuropathy. The Independent Medical Evaluation of Dr. Hughes on 5/26/2016 notes that "An epidural nerve fiber density analysis, 7/14/2015, indicates absence of fibers indicative of advanced small

> fiber neuropathy." Furthermore, Dr. Hughes' note indicates he did not have radiation of pain into his legs, and he also quotes notes from Dr. Golden of 3/9/2015 indicating "Lower back pain. There was no radiation to the legs." Dr. Hughes' exam on that date does not indicate muscle weakness or atrophy. Therefore, in my opinion, to a reasonable degree of medical probability, the claimant's physical examination and neurological examination of his lower extremities is consistent with left-sided lumbar radiculopathy superimposed on small fiber peripheral neuropathy involving the feet and legs below the knees. Therefore, in my opinion, the claimant falls under DRE Lumbar Category III. He is placed in the upper end of the category since he does have significant interference with activities of daily living despite being at maximum medical improvement, and that is consistent with the text in the second paragraph of the first column on page 381 of the Guides which states "If residual symptoms or objective findings impact the ability to perform ADL despite treatment, the higher percentage in each range should be assigned." Therefore, the claimant receives a 13 (thirteen) percent impairment of the whole person for this injury.

Dr. Guberman determined MMI was reached on May 21, 2020, and Osborne did not retain the physical capacity to return to the type of work he was performing at the time of the injury. Throughout his report, Dr. Guberman does not identify the specific injury to which he is referring. Thus, we are unable to determine whether the 13% impairment rating was assessed for one injury or both injuries. Dr. Guberman did not state Osborne lacked the capacity to perform the job he was performing at the time of his March 9, 2015, injury. In fact, his report strongly indicates his reference to the injury implicates the October 14, 2016, injury at Hitachi. Moreover, ALJ Whalen cannot rely upon Dr. Guberman's opinions in finding Osborne did not retain the physical capacity to return to the job he was performing on March 9, 2015, and by extension enhancing his benefits by the three

multiplier. This is due to ALJ Whalen's finding of no new evidence, fraud, or mistake which would mandate a reversal of ALJ Neal's February 19, 2018, interlocutory decision.

Accordingly, that portion of the October 23, 2020, Opinion and Order and the November 23, 2020, Order finding Osborne retains a 6% impairment rating as a result of the March 9, 2015, injury and the award of income benefits for the injury are **VACATED**. This claim is **REMANDED** for a determination of the impairment rating attributable to that injury, if any, in accordance with the views expressed herein. Those portions of the October 23, 2020, Opinion and Order and the November 23, 2020, Order finding the March 9, 2015, injury prohibited Osborne from performing the type of work he was performing at the time of the injury and the enhancement of the award by the three multiplier pursuant to KRS 342.730(1)(c)(3) are **REVERSED**. Finally, ALJ Whalen's reliance upon Dr. Hughes in finding the March 9, 2015, injury generated a 6% impairment rating is **REVERSED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON JEFFREY DAMRON **LMS**
P O BOX 351
PIKEVILLE KY 41502

COUNSEL FOR RESPONDENT:

HON JOHN HUNT MORGAN **LMS**
P O DRAWER 750
HARLAN KY 40831

ADMINISTRATIVE LAW JUDGE:

HON PAUL WHALEN **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601