

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 5, 2021

CLAIM NO. 201867710

RUAN TRANSPORTATION

PETITIONER

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

DAVID GRIER AND
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Ruan Transportation (“Ruan”) appeals from the October 9, 2020 Opinion, Award and Order and the November 6, 2020 Order on Petition for Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”). The ALJ determined David Grier (“Grier”) sustained a work-related right shoulder injury on July 31, 2018, for which she awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits increased by the

three-multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. On appeal, Ruan argues substantial evidence does not support the ALJ's determinations regarding causation and the application of the three-multiplier. We disagree and affirm.

Grier filed a Form 101 alleging he injured his right shoulder on July 31, 2018 while securing a load on his trailer. The Form 104 indicates Grier began working for Ruan as a truck driver in July 2018. In the "Notice of Filing of Application" issued on March 17, 2020, Ruan was notified it was required to file a Form 111 within forty-five days. Ruan did not file the Form 111 denying the claim until June 10, 2020. Grier filed a motion to deem all allegations contained in the Form 101 admitted by Ruan due to its tardy Form 111. Ruan did not respond to this motion.

Ruan submitted a job description for a "truck driver-driver-assist unload." The job description indicates Grier was required to push/pull up to 125 pounds, lift up to 55 pounds, climb, crouch, bend, kneel, and reach overhead.

Grier testified by deposition on June 16, 2020 and at the hearing held August 17, 2020. Grier testified he has worked as a truck driver for twenty years. He previously sustained two separate work-related low back injuries. Grier asserted the 2013 accident referenced in Dr. Alan Roth's report did not result in a right shoulder injury or treatment. He was also involved in a motor vehicle accident ("MVA") in 2017, resulting in no right shoulder injury. Grier regularly takes medication for asthma and allergies.

Grier testified he had never sustained any injuries to either upper extremity prior to July 31, 2018. Likewise, Grier did not experience right shoulder symptoms nor did he seek medical treatment for his right shoulder prior to his July 31, 2018 accident. Grier also stated he had no restrictions of his work activities prior to July 31, 2018. Grier testified no physician had ever informed him he had vascular necrosis in either or both of his shoulders prior to July 31, 2018.

Grier began working for Ruan a couple of months prior to the work incident as a flatbed truck driver hauling steel coils and materials fabricated out of steel. Grier was required to secure loads with chains, binders, straps, and sometimes tarps depending on what he was hauling. He hauled loads to various customers, and unsecured the materials for unloading. Grier estimated the tarps weighed 80 to 100 pounds and the chains weighed 25 to 50 pounds depending on their length. In securing and unsecuring loads, Grier was required to climb on and off the flatbed. Grier testified he typically secured and unsecured loads ten to twelve times per day.

On July 31, 2018, Grier was preparing to secure a load with chains and binders. He attempted to retrieve a chain out of a side box. The lid on the box was stuck, requiring him to pull with both hands to free the chain. When he did, he experienced a pop and immediate pain in his right shoulder. Grier estimated the chain he was pulling weighed 30 to 40 pounds. Grier completed his normal work activities and notified Ruan of the work incident. Grier continued to perform his normal job duties, but experienced worsening right shoulder pain. Grier again experienced right shoulder pain several weeks later while cranking on dolly legs and

pulling on the fifth wheel pin. Grier initially sought treatment at an immediate care center before seeing Dr. Ryan Krupp for his right shoulder.

Dr. Krupp ultimately performed a total right shoulder replacement on January 14, 2019, and then ordered a course of post-operative physical therapy. Grier was unable to use his right upper extremity afterward for six to eight months, and was unable to return to his job with Ruan. Grier indicated the surgery improved his right shoulder symptoms. While Grier was recuperating from the January 2019 surgery, he began experiencing problems with his left shoulder, which he attributed to overuse compensating for his right shoulder problem. Dr. Krupp eventually performed a total left shoulder replacement, which Grier does not allege to be work-related. Dr. Krupp diagnosed avascular necrosis to both shoulders.

Dr. Krupp released him to return to work on February 17, 2020, with permanent restrictions of no lifting over 30 pounds and limited overhead reaching to no more than two hours per day. Grier continues to have right shoulder pain, which he treats with a topical cream prescribed by Dr. Krupp. He has difficulty lifting heavy objects and reaching up with his right upper extremity. Grier testified he is unable to return to his job with Ruan as a flatbed truck driver because of his limitations and permanent restrictions. Grier now works for Ballard Trucking driving a dry van that is less physically demanding since he is not required to load, unload, or secure loads. Grier works Monday through Friday, earning \$200.00 per day, \$1,000.00 per week. He testified he currently earns less than he did at Ruan.

Grier filed the August 23, 2018 Norton Occupational Medicine treatment note. Grier presented with right shoulder pain of three weeks duration,

and he related the July 31, 2018 incident. A right shoulder X-ray demonstrated a “subcondylar fracture of the right humeral head may represent avascular necrosis following prior trauma.”

Dr. Krupp began treating Grier’s right shoulder on August 29, 2018. Dr. Krupp noted the initial July 31, 2018 work incident and the second work incident occurring on August 21, 2018. Dr. Krupp ordered an MRI and restricted Grier from work. The September 20, 2018 right shoulder MRI demonstrated severe chronic osteonecrosis causing cortical flattening and irregularity along the articular surface and a cortical step-off along the superolateral femoral head; rotator cuff tendinosis; moderate AC arthrosis; GH joint effusion with synovitis; and patch bone edema in the inferomedial humeral head.

On October 1, 2018, after reviewing the MRI and performing an examination, Dr. Krupp diagnosed Grier with right shoulder severe avascular necrosis of the proximal head with fragmentation and cortical step-off. Dr. Krupp ultimately recommended a right shoulder total arthroplasty and assigned restrictions. Dr. Krupp stated as follows regarding causation:

We discussed at length that it is unlikely his acute injury caused the avascular necrosis but based on his history it did cause his symptoms to become a symptomatic reality and exacerbate his underlying condition including possibly worsening the overall condition of the shoulder.

Dr. Krupp noted it was unlikely Grier would return to his full duty job and recommended a truck driving position requiring less manual labor. Dr. Krupp performed a right shoulder total arthroplasty on January 14, 2019. Grier underwent a course of post-operative physical therapy and gradually improved. Dr. Krupp

performed a total left shoulder arthroplasty in July 2019, which temporarily postponed Grier's work conditioning for the right shoulder. On February 17, 2020, Dr. Krupp diagnosed "13 months s/p total right shoulder arthroplasty – doing well." He opined Grier had reached maximum medical improvement ("MMI") and assessed a 17% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He assigned the following permanent restrictions to Grier's right upper extremity: lifting up to 25 to 30 pounds, push/pull up to 25 to 30 pounds, push/pull repetitive occasional (4 hours per day), and work at or above shoulder level (overhead) occasional (2 hours per day).

Grier filed Dr. Richard Holt's October 3, 2019 report. Dr. Holt noted the July 31, 2018 injury and subsequent treatment rendered by Dr. Krupp. Dr. Holt diagnosed Grier as status-post right total shoulder with loss of motion. He opined the July 31, 2018 work event caused Grier's impairment. He noted Grier "had avascular necrosis in his shoulder. However, it was dormant and was asymptomatic prior to the on the job event." Dr. Holt assessed a 27% impairment rating pursuant to the AMA Guides. Dr. Holt found Grier had reached MMI as of the date of his examination. Dr. Holt opined Grier does not retain the physical capacity to return to the type of work performed at the time of the work injury due to the lifting limitations recommended by Dr. Krupp. Dr. Holt permanently restricted Grier from repetitive reaching overhead or lifting more than 5 pounds overhead; lifting over 25 pounds from knee to chest height; and no lifting from the floor. Dr. Holt later

revised his assessment of impairment to an 18% impairment rating for the right shoulder pursuant to the AMA Guides.

Ruan filed Dr. Michael Best's October 29, 2018 report. He noted the July 31, 2018 and August 21, 2018 work incidents, reviewed the medical records, and performed an examination. Dr. Best noted Grier had normal function of his left upper extremity but significantly reduced function of his right upper extremity. Dr. Best stated as follows regarding causation:

Q3: What is the degree of disability due solely to the work injury of the specified date?

A3: Even though the patient injured his right shoulder in 2013 he has required no care or treatment from 2013 to 2018. The x-rays clearly demonstrate humeral head collapse and flattening consistent with avascular necrosis. It should, however, be noted that within reasonable medical probability the work injury of July 31, 2018, aggravated preexisting avascular necrosis – Early stage, that is most likely related to his chronic use of albuterol.

Q4: Are there preexisting conditions contributing to the present disability? If so, can you please give us a statement of apportionment?

A4: The chronic use of albuterol/corticosteroids in all likelihood is responsible for the avascular necrosis. The work injury caused an aggravation of the preexisting condition, bringing it to disabling reality and requiring the surgical procedure-Total shoulder replacement.
(Original emphasis)

Dr. Best determined Grier had not reached MMI and agreed with the recommended right total shoulder replacement. Dr. Best re-evaluated Grier on December 16, 2019. He noted that since his previous evaluation on October 29, 2018, Grier underwent right total shoulder arthroplasty by Dr. Krupp on January 14,

2019. The post-operative notes indicate Grier developed progressively severe pain in the opposite left shoulder. Dr. Krupp diagnosed avascular necrosis of the humeral head and performed a left total shoulder arthroplasty on July 16, 2019. Dr. Best stated as follows regarding causation:

Clearly the presence of ***bilateral*** avascular necrosis of the **right and left** shoulder would be definitive proof that would substantiate, within reasonable medical probability, that indeed the cause of the bilateral avascular necrosis of the right and left shoulders was that of corticosteroid usage and was **not** a work-related condition. Clearly there was **no** work injury to the left shoulder, nevertheless, it too developed avascular necrosis - - requiring a total shoulder replacement.

....

As I noted above, the patient developed avascular necrosis of the right and left shoulders. The bilaterality of the pain produced by the avascular necrosis required the total shoulder replacement on the right side and subsequently on the left side. The patient's work injury was that of a "pop" in the right shoulder when he was "pulling additional chains from a box." The symptoms were only about the right shoulder. For this complaint this patient underwent a right total shoulder replacement on January 14, 2019. During his convalescence he complained of increased pain about the opposite, left shoulder (the shoulder receiving absolutely no trauma from the reported work event). This shoulder also had developed avascular necrosis and a left total shoulder replacement was required on July 16, 2019.

Therefore, within reasonable medical probability, causation was not the work-related event described as occurring on July 31, 2018. Because of this patient's bilateral shoulder avascular necrosis, corticosteroid use, and not a work-related condition, caused the right and left humeral avascular necrosis. (Original emphasis)

Regardless of causation, Dr. Best determined Grier had reached MMI for his right shoulder. Dr. Best found no permanent impairment rating directly and causally related to the July 31, 2018 work event.

Ruan also filed Dr. Roth's June 8, 2017 report. He evaluated Grier for alleged injuries to his cervical, thoracic, and lumbar spine due to an April 11, 2017 MVA. Dr. Roth noted Grier sustained a work injury in 2013, injuring his low back and right shoulder. He noted Grier was off work for approximately nine months. He underwent physical therapy, had a lumbar MRI, and was evaluated by a neurosurgeon who did not recommend surgical intervention. Dr. Roth noted Grier returned to work and had no problems with his back until April 2017.

A Benefit Review Conference was held on July 9, 2020. The parties stipulated Grier sustained a work-related injury on July 31, 2018. The parties stipulated Ruan paid TTD benefits at a \$664.87 weekly rate from July 31, 2018 to February 17, 2020, and medical expenses totaling \$51,764.00. The issues preserved for determination included causation/work-relatedness, permanent income benefits per KRS 342.730, average weekly wage ("AWW"), TTD benefits, wages upon return to work, current wages, ability to return to pre-injury work, exclusion for pre-existing impairment, credit for unemployment, sickness or accident benefits, unpaid or contested medical expenses, proper use of the AMA Guides, and consequences of the late Form 111. The parties later stipulated to a pre-injury AWW of \$1,200.00. Grier also filed his post-injury wages with Ballard Trucking. Grier submitted his weekly pay stubs for March 15, 2020 to April 4, 2020, and from April 26, 2020 to May 30, 2020.

The ALJ rendered her Opinion on October 9, 2020. The ALJ first addressed the effect of Ruan's tardy Form 111. After reviewing Gray v. Trimmer, 173 S.W.3d 236 (Ky. 2005), the ALJ noted Ruan did not file a timely Form 111 and failed to present reasonable grounds for excusing the delay. Therefore, the ALJ determined Ruan had admitted Grier sustained a work-related right shoulder injury. However, she noted Grier retained the burden of proving the extent of Ruan's liability.

Although the ALJ found Ruan had admitted Grier sustained a work-related right shoulder injury because it had failed to timely file a Form 111 claim denial, she determined the evidence, especially the opinions from Drs. Krupp and Holt, established he sustained a work-related right shoulder. The ALJ noted Grier did not seek treatment for his right shoulder complaints in the months or years prior to July 31, 2018, consistent with the opinions of Dr. Krupp and Dr. Holt, who both opined the right shoulder avascular necrosis was aggravated by the work injury into symptomatic and disabling reality. The ALJ also noted this is consistent with Dr. Best's initial causation opinion. Finally, the ALJ acknowledged Grier developed left shoulder symptoms while convalescing from his right shoulder replacement. However, the ALJ found this did not diminish Grier's claim, noting he experienced an acute work event on July 31, 2018 and had persistent right shoulder symptoms afterward. The initial August 23, 2018 treatment note documented right shoulder pain for three weeks, which the ALJ also found supported Dr. Holt's and Dr. Krupp's causation opinion. Therefore, the ALJ determined Grier's right shoulder condition is related to the July 31, 2018 work injury.

The ALJ then determined Grier reached MMI on February 17, 2020, based upon Dr. Krupp's treatment note. The ALJ awarded TTD benefits from August 1, 2018 through February 17, 2020. The ALJ found Ruan entitled to a credit for TTD benefits previously paid, but determined there was an underpayment as to rate based upon the stipulated AWW of \$1,200.00.

The ALJ determined Grier's work-related right shoulder injury warrants a 17% impairment rating based upon Dr. Krupp's opinion. The ALJ next determined Grier does not retain the capacity to perform his pre-injury work based solely on his right shoulder condition, relying upon his testimony and the opinions of Dr. Krupp and Dr. Holt. The ALJ stated as follows:

After reviewing the evidence, this ALJ finds Grier does not have the capacity to perform his pre-injury work based solely upon his right shoulder condition. This finding is supported by Grier's testimony and Drs. Krupp and Holt's opinion.

Grier worked for Ruan as a flatbed truck driver. This required him to lift over 35 pounds. Per, Dr. Krupp's permanent work restrictions, Grier cannot lift over 30 pounds. Also, Grier is right-hand dominate, and is left with significant restrictions/limitations to his dominate upper extremity. These limitations affect his ability to push/pull and perform overhead work. Thus, this ALJ finds Grier does not have the capacity to perform his pre-injury work.

Most recently, Grier obtained a job as a box truck driver, and his restrictions are being accommodated. He earns \$200/day, which produced a weekly wage of \$1000. This is less than his pre-injury average weekly wage. More importantly, his current earnings are not the same and do not exceed his pre-injury average weekly wage. This, there is no indication for a two multiplier analysis.

Ruan filed a Petition for Reconsideration requesting the ALJ to “set out findings of facts as to how she found this claim work-related and found the Plaintiff entitled to the three (3) multiplier ...” The ALJ provided the following *verbatim* additional findings of fact in the November 6, 2020 Order:

On October 9, 2020, this ALJ issued an opinion, award, and order. She found Plaintiff’s right shoulder condition was work-related and her analysis for this finding was noted on page 6 of her opinion. Essentially, the ALJ relied on the causation opinions of Drs. Holt and Krupp. Furthermore, this ALJ set out her reasoning for why she felt Dr. Krupp’s causation opinion was more persuasive when compared to Dr. Best’s most recent causation opinion. Thus, this ALJ provided findings and conclusions and cited the evidence she relied on. As such, no additional findings or conclusions will be provided upon on petition.

This ALJ also found Plaintiff does not have the capacity to perform his pre-injury work. This ALJ reviewed the evidence, as noted on page 8 of her opinion. She noted Plaintiff was required to lift over 30 pounds and he was no longer able to do so. She further noted that this finding was supported by Drs. Krupp and Holt’s opinions. Dr. Krupp implemented permanent work restrictions of no lifting or pushing over 30 pounds. Furthermore, Dr. Krupp limited Plaintiff to pushing or pulling to four hours/day and only two hours of work at or above shoulder level. This ALJ notes Dr. Krupp was Plaintiff’s treating physician and surgeon and is therefore in the best position to address Plaintiff’s work capacity. Furthermore, this ALJ concludes Dr. Krupp’s permanent work restrictions preclude Plaintiff from performing his pre-injury work because his pre-injury work required lifting which exceeded Dr. Krupp’s recommended restrictions. Plaintiff worked as a flat-bed truck driver hauling steel coils and materials fabricated out of steel. He lifted anywhere from between 35-100 pounds depending on the customer.

On appeal, Ruan argues substantial evidence and case law do not support the ALJ's determinations. Specifically, Ruan asserts "the ALJ erred in assuming that the evidence indicated work relatedness." Ruan asserts Grier's work activities were inconsequential and did not cause a harmful change in the human organism. Ruan points to the fact Grier developed the same problem in his left shoulder several months later with no discernable injury and there was no medical evidence establishing any difference between his shoulders prior to his surgeries. Ruan asserts there was no medical evidence of any acute physical injury or any harmful change due to his employment, and the medical evidence established his steroid use for his pulmonary condition most likely caused the avascular necrosis.

Ruan argues Dr. Holt did not sufficiently explain his opinion regarding causation. It further cites to Cepero v. Fabricated Metal Corp., 132 S.W.3d 839 (Ky. 2004), alleging Grier falsely advised Dr. Holt that he had been experiencing continuous unrelenting pain following the July 31, 2018 work incident, which is different than what he reported to Dr. Krupp and Dr. Best. Ruan asserts Dr. Krupp's opinion does not amount to medical probability, since he noted the left shoulder was not work-related and he could not differentiate between the right and left shoulder. Finally, Ruan asserts Grier's situation is analogous to experiencing angina while working. He argues the case law regarding angina is instructive, citing to American Bakeries v. Hatzell, 771 S.W.2d 333 (Ky. 1989) and McDaniels v. Cowin, WCB 2004-00450, rendered June 24, 2005.

Ruan next argues the ALJ erred in finding the three-multiplier is applicable pursuant to KRS 342.730(1)(c)1. Ruan argues the ALJ did not consider a

“broad range of factors” as set forth in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003); Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004); and Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). Ruan asserts Grier’s wage records from his current employer reflect he is earning “almost” the same wages as he was earning at the time of his work incident. Ruan asserts it is not realistic to compare wages at this time due to COVID, and a “slight decrease” in wages upon working a new job does not support entitlement to the application of the three-multiplier. According to Ruan, truck driving is a job that historically continues to increase in wages. It asserts Grier will “certainly” be able to earn higher wages at his current job in the near future. Finally, Ruan points out that Grier continues to work as a truck driver.

As the claimant in a workers’ compensation proceeding, Grier had the burden of proving each of the essential elements of his cause of action, including causation and entitlement to the three-multiplier pursuant KRS 342.730(1)(c)1. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Grier was successful in his burden, the question on appeal is whether there was substantial evidence of record to support the ALJ’s decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence.

Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We determine substantial evidence supports the ALJ's determination that the July 31, 2018 work injury aroused Grier's right shoulder avascular necrosis into a symptomatic and disabling reality. It is well established that, "Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful

change; hence, the harmful change comes within the definition of an injury.” McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001). Grier’s treating physician, Dr. Krupp, diagnosed severe right shoulder avascular necrosis of the proximal head with fragmentation and cortical step-off on October 1, 2018. Dr. Krupp noted that although it was unlikely Grier’s acute injury caused the avascular necrosis, “based on his history it did cause his symptoms to become a symptomatic reality and exacerbate his underlying condition including possibly worsening the overall condition of the shoulder.”

Similarly, Dr. Holt opined the July 31, 2018 work event caused Grier’s impairment. He noted Grier “had avascular necrosis in his shoulder. However, it was dormant and was asymptomatic prior to the on the job event.” We note even Dr. Best, in his initial October 29, 2018 report, provided a similar causation opinion. Dr. Best noted that although Grier’s chronic use of corticosteroids likely caused the avascular necrosis, the “work injury caused an aggravation of the preexisting condition, bringing it to disabling reality and requiring the surgical procedure-Total shoulder replacement.”

The ALJ noted Grier did not seek treatment for his right shoulder in the years prior to July 31, 2018. The ALJ also noted Grier’s development of left shoulder symptoms subsequent to the right shoulder replacement. The ALJ determined the left shoulder problems did not diminish his right shoulder claim noting he experienced an acute event on July 31, 2018, consistent with the treatment records.

Cepero v. Fabricated Metals Corp., *supra*, is inapplicable in this case. Cepero was an unusual case involving not only a complete failure to disclose but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing in this instance akin to Cepero, *supra*. Dr. Holt identified the records he reviewed, and was fully aware Grier underwent right then left total shoulder replacements. There is no evidence supporting Ruan's position that neither Dr. Holt nor Dr. Krupp had a complete misunderstanding of Grier's shoulder condition. Further, the brevity of Dr. Holt's causation opinion does not render it unsubstantial. Rather, this is a factor that merely goes to the weight to be afforded his testimony.

We determine the ALJ acted well within her authority as fact-finder in determining Grier's right shoulder condition is causally related to the July 31, 2018 work injury. Likewise, we note the ALJ determined Ruan admitted Grier sustained a work-related right shoulder injury when it failed to timely file a Form 111. Even absent that admission, the opinions rendered by Drs. Krupp and Holt constitute substantial evidence supporting her determination, and therefore we affirm on this issue.

We further determine substantial evidence supports the ALJ's determination Grier does not have the physical capacity to perform his pre-injury work based solely on his right shoulder condition, thus entitling him to the three-multiplier applicable pursuant to KRS 342.730(1)(c)1. This statute states as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

In Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), the Kentucky Supreme Court held, “[w]hen used in the context of an award that is based upon an objectively determined functional impairment, ‘the type of work that the employee performed at the time of injury’ was most likely intended by the legislature to refer to the actual jobs that the individual performed.”

In her Opinion and Order on Reconsideration, the ALJ relied upon Dr. Krupp, Dr. Holt, and Grier's own testimony in analyzing the applicability of the three-multiplier. Grier testified he worked for Ruan as a flatbed truck driver requiring him to secure loads with chains or tarps. He estimated the tarps weighed up to 100 pounds while the chains weighed up to 50 pounds. Grier testified he typically secured and unsecured loads ten to twelve times per day. He testified he is unable to return to his former job with Ruan in light of his restrictions and limitations. An ALJ enjoys the authority to give substantial weight to a claimant's testimony regarding his retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). A claimant's post-injury testimony is also

competent evidence regarding whether he or she retains the physical capacity to return to the type of work performed at the time of injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

On February 17, 2020, Dr. Krupp, imposed the following permanent restrictions to Grier's right upper extremity: no lifting, pushing or pulling over 25-30 pounds, occasional repetitive pushing or pulling (4 hours per day), and occasional work at or above shoulder level (2 hours per day). Dr. Holt opined Grier does not retain the physical capacity to return to the type of work performed at the time of the work injury due to the lifting restrictions imposed by Dr. Krupp. Dr. Holt permanently restricted Grier from repetitive reaching overhead or lifting anything more than five pounds overhead; lifting over twenty-five pounds from knee to chest height; and no lifting from the floor. We further note the job description indicates he was required to push/pull up to 125 pounds, lift up to 55 pounds, climb, crouch, bend, kneel, and reach up. The ALJ primarily relied upon the permanent restrictions imposed by Dr. Krupp in finding Grier is unable to perform his pre-injury work, requiring lifting in excess of thirty pounds. Dr. Krupp's and Dr. Holt's opinions, as well as Grier's testimony, constitute substantial evidence supporting the ALJ's determination Grier does not retain the ability to perform his per-injury work, and therefore we affirm on this issue.

The ALJ was not required to perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (2003) as suggested by Ruan. In Fawbush v. Gwinn, the Kentucky Supreme Court directed when the two-multiplier and the three-multiplier are found to be applicable to a claim, the ALJ "is authorized to determine which

provision is more appropriate on the facts.” 102 S.W.3d at 12. The Supreme Court further instructed if the evidence indicates “a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future application of paragraph (c)1 is appropriate.” *Id.* In Adams v. NHC Healthcare, *supra*, the Supreme Kentucky Court directed the Fawbush analysis includes a broad range of factors, only one of which is the ability to perform the current job.

The Fawbush analysis is only required when both the two-multiplier and the three-multiplier are applicable. In this instance, the parties stipulated to a pre-injury AWW of \$1,200.00. The ALJ determined Grier’s post-injury AWW is \$1,000.00, less than his pre-injury AWW. Grier filed his post-injury weekly wages, supporting the ALJ’s post-injury AWW determination. Grier testified he currently works Monday through Friday, earning \$200.00 per day, \$1,000.00 per week. Since Grier never returned to work at equal or greater wages subsequent to his work injury, the two-multiplier is not currently applicable, and the ALJ was not required to perform a Fawbush analysis. The true issue is whether the ALJ’s determination that Grier does not retain the physical capacity to perform the type of work he was performing at the time of his injury is supported by substantial evidence, which we have already resolved.

Accordingly, the October 9, 2020 Opinion, Award and Order and the November 6, 2020 Order on Petition for Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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