

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 17, 2020

CLAIM NO. 201362561

SCH SERVICES PETITIONER/CROSS-RESPONDENT

VS. APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

FRANKIE KEY RESPONDENT/CROSS-PETITIONER
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENT

AND

FRANKIE KEY PETITIONER

VS.

SCH SERVICES, LLC
SCH TERMINAL SERVICES, LLC
CALVERT CITY TERMINAL, LLC
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING ON APPEAL & CROSS-APPEAL

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER¹, Members.

¹Although Board Member Rechter's term expired on January 4, 2020, she is permitted to serve until January 22, 2020 pursuant to KRS 342.213(7)(b), and will participate in decisions rendered by this Board through that date.

STIVERS, Member. SCH Services (“SCH”) appeals and Frankie Key (“Key”) cross-appeals from the September 18, 2019, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ found Key sustained a low back injury on October 22, 2013, which permanently and totally disabled him. The ALJ awarded permanent total disability (“PTD”) benefits, without any carve-out, beginning on July 7, 2014, the date Key last worked for SCH. Both parties appeal from the October 16, 2019, Order overruling their petitions for reconsideration.

On appeal, SCH argues “correct identification of the applicable distinct rules and analyses from the AMA Guidelines, statute, and published decision of Wetherby v. Amazon mandates apportionment and carve-out under the evidence in this case.” It seeks remand for the ALJ to reduce the award by carving out an amount attributable to a previous work-related low back injury Key sustained resulting in two surgical procedures while in the employ of SCH.² In response to SCH’s argument, Key argues SCH waived any argument seeking a carve-out and, if not waived, the argument fails because Dr. Russell Travis used the 4th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Key also asserts SCH failed to prove he had an active impairment/disability prior to the subject work injury. On cross-appeal, Key asserts the award of PTD benefits should commence on the date of the injury October 22, 2013. He also argues the ALJ erred in not enhancing his PTD benefits for a safety violation pursuant to KRS 342.165.

² Although no medical records were introduced concerning this injury, Key testified the injury occurred in 2009.

BACKGROUND

The Form 101 asserts Key was injured on October 22, 2013, when he was “struck or injured by an object handled by others” injuring multiple body parts. The Form 101 reveals Key underwent lumbar fusion on May 12, 2015, and lumbar decompression on July 19, 2016, both of which were performed by Dr. Clint Hill in Paducah, Kentucky. Key also filed a Form SVC alleging pursuant to KRS 342.165, SCH committed a safety violation by violating KRS 338.0311(a) commonly known as the general duty statute. Key alleged KRS 342.165 was applicable because of the following:

Plaintiff’s injuries were the result of the actions of Boyd Cameron (plaintiff’s co-worker). The defendant employer knew or should have known that the actions of Mr. Boyd Cameron were unsafe and likely to cause injury (which they did). Further, the defendant employer knew or should have known (prior to plaintiff’s work injury) that Mr. Boyd Cameron’s continued employment and presence at the work site(s) created an unsafe work place for those working around him.

Key introduced Dr. Hill’s medical records and a questionnaire completed by him on February 7, 2019. Key also introduced the May 10, 2016, medical report of Dr. Charles Barlow, an orthopedic surgeon, generated as a result of an independent medical evaluation (“IME”) conducted that same date.

SCH relied upon the May 14, 2018, report of Dr. Travis and his July 8, 2019, addendum.

Key introduced into evidence the deposition of Chris Jordan (“Jordan”) who authored an April 26, 2019, accident analysis based on his interview with Key.

Key testified at a May 14, 2019, deposition and at the July 24, 2019, hearing. Relevant to the issues on appeal and cross-appeal, Key testified he started with SCH in 2007 as a deck hand. Later, he received a promotion and at one point operated a dozer. He received training to become a supervisor. Key estimated he worked between 40 and 50 hours weekly. He described the October 22, 2013, incident as follows:

Q: Frankie, as I understand this claim, you were injured on 10/22/2013 at the Calvert City Terminal when you were struck with some kind of pipe. I kind of want you to tell me in your own words tell me what happened at that time.

A: I was standing there and a guy drove up and a pipe was back on the J O across the forks and I guess it was bent across the coal pile. When he come by me it came loose and struck me.

Q: This pipe was 180 feet long?

A: No. A 150 feet.

Q: A 150 feet pipe. Was it Steel [sic] or aluminum?

A: Plastic.

Q: And it was on the fork of this fork truck?

A: Yes, sir.

Q: And you said that one end of the pipe struck a pile of coal?

A: Well, I think it fell dragging against the pile of coal. It was so long.

Q: So the other end kicked out?

A: I am not sure because I had my back turned.

Q: Okay.

A: But he drugged [sic] me. He pushed several feet up there that day and we had been moving them all day long and, well, however long it had been there, you know, and we was taking a break. I was taking a drank [sic] of my Mountain Dew.

Q: Are the forks up on this forklift holding the pipe up?

A: Yes.

Q: How high?

A: Well, it seemed like, I don't know the height or anything like that head high.

Q: How far was the fork truck and pipe from you when you were aware it was coming off the forks?

A: I wasn't aware when it was coming off the forks.

Q: It didn't make any noise?

A: No.

Q: Nobody didn't have any time to say look out?

A: Well, Devon screamed it.

Q: Who is Devon?

A: Another Deckhand.

Q: So was one end of this pipe then on or being held up by this coal pile and the other one flying threw [sic] the air coming off the forks?

A: No. We had just bolted from the neck there and we went on up to where we were taking loose from and helping him put it down. It was break time. And we were standing there. And he was half-way down the yard. And he came driving through there with a 150-foot pipe.

Q: Was that fork secured?

A: Well, it bends. Both ends was on the ground. A 150-foot pipe.

Q: Still dragging?

A: Well, at one time. Sure.

Q: Now you said I need to get a picture of this. You indicated this. I don't know where you were on that.

A: Well, it just, they were looking up, you know. They bolted up to each other and each pipe bolts to each pipe.

Q: Well, I am sure that is true with fittings?

A: Yeah.

Q: So the neck was bolted?

A: We got them bolted and moved down.

Q: You had to unbolt them to get them on the fork of this truck?

A: No. He scooped them up with the fork. We unbolted them and he would drive over in a second to get them.

Q: A 150-foot plastic pipe?

A: Well, I wouldn't think so. It wasn't my place to do it.

Q: It was customary to do it whether it was right or wrong?

A: Well, I guess. I didn't do it every day.

Q: The times that you did do it what was being done? Is this the way typically how it was done to move these big pieces of pipe?

A: Sometime. Go up and get them bolted. I would or whoever it was do it. I guess.

Q: Have you seen it done this way before?

A: Well, I mean, I may have. That was probably the way. I don't know. It was the first time that it happened.

Q: Well, are you saying that's how they done it?

A: Move it with a dozer and fork truck and, you know --

Key testified Boyd Cameron (“Cameron”) was the operator and he did not believe Cameron’s actions were intentional explaining:

Q: So, your [sic] not even having any thought process that this was an intentional act?

A: No, sir.

Q: This was an intent.

A: This was an accident; but, Boyd, you got to watch him. He’s an accident prone person.

Q: Why do you think he is an accident prone guy?

A: I’ve seen him in motion.

Q: Have you been in a position to participate in any complaints with the Union over his activities?

A: That don’t matter.

Q: You know, you have the rights to file a Complaint [sic] making an unsafe practice; don’t you?

A: No.

After the incident, Key was taken to the office to determine if he was hurt. Key did not engage in work activities the rest of the day. He did not recall saying it was Cameron’s fault. Key thought a governmental agency had investigated the incident. He worked the next day and continued to work his regular job until he was taken off work by Dr. Bradley Albertson. He has not worked since then. He testified the October 22, 2013, incident injured his low back and right leg. Key had undergone prior low back surgery after injuring his low back in 2009 when he fell out of a boat while working at SCH. Surgery was performed not long after the injury by Dr. Mahdi.³ Key testified a laminectomy was the first surgery performed, and because he was still

³ The Form 105 Medical History lists the doctor’s name as Dr. Bassam Hadi.

having problems, the doctor performed a second surgery. Key characterized the second surgery as successful explaining:

A: Yeah. All I remember is I was in pain and I asked him to fix me and he fixed me.

Q: With a piece of steel or rods that was your understanding that he was going to put them together so they wouldn't move?

A: I just said fix me. He took me in there and when he got done I was ready to go.

Q: Now, ready to go. You knew you didn't have the motion in your lower back that you used to have?

A: I was sore as I could be. I started to work and started decking because I told my doctor I said all I do is sit in a chair. Let me go back to work. Let me go back to work. Like I told you you [sic] do everything and I thought I was going to a chair, you know, and I went to the deck. They did me a favor. It worked the soreness out of me.

Key received no income benefits due to the 2009 work injury. He clarified that two low back surgeries were performed, a laminectomy and a fusion, before the October 22, 2013, injury.

Following the October 22, 2013, injury, Dr. Hill performed two surgeries. As to whether the surgeries performed by Dr. Hill were beneficial, Key testified:

A: Oh, man, just a little bit. At least now I can sit here and not cry. I've learned how to deal with it a little bit now and I can take it some now than beforehand. Now, I mean, I got to move around every now and then and hold on to something some times. ...

Key last saw Dr. Hill on March 7, 2017. Because of the injury, he has not worked and believes he is unable to work.

At the hearing, Key again recounted how the injury occurred and explained his pain worsened over several months. He finally came under the care of Dr. Hill in 2014. He stopped working for SCH on July 7, 2014, and started receiving temporary total disability (“TTD”) benefits. He has not worked since.

Key reiterated he had undergone back surgery in 2009. He believed he was off work three months following the last back surgery. Key returned to full-duty work at SCH without any limitations or restrictions. He had no problems or treatment of his low back prior to October 22, 2013. He took no medication and had “done wonderful.”

Key does not believe he is now able to perform any of his previous jobs. Following the October 22, 2013, incident, Key did not see a physician prior to July 7, 2014. Key provided the following testimony:

Q: Okay. Well, during that term of time that you were under active treatment, you were – I’m sorry, I meant to go back one point. From the time of the injury on 10/22/13 to the time you first saw the doctor in July of 2014, were you working on a regular, sustained basis?

A: Not really.

Q: Well, you were showing up and getting a paycheck?

A: Yes.

Q: All right. You were on the payroll?

A: Yes sir.

Q: On a full-time basis?

A: Yes sir.

Q: Would you say that you were probably making money equal to your pre-injury wages with that? Did you make as much money as you always had?

A: Oh, yes sir.

Q: Okay. And that includes some overtime didn't it?

A: Yes sir.

Key reiterated he did not make a complaint to the union of a dangerous situation as a result of the October 22, 2013, event.

Jordan's deposition was taken on July 19, 2019, at which time his April 26, 2019, report was introduced concerning the injury. Jordan provided the following summary:

According to Key's statements and the information provided I have determined the following:

1. There was no evidence of prior planning a safety review, or a documented job/activity hazard analysis (JHA/AHA) conducted on this task prior to starting work. (MSHA Regulation 56/57.18002).
2. There was no spotter present to help guide Mr. Cameron safely in-between the workers and a coal pile.
3. The pipe was not safely secured to the forks or rigged to prevent it from detaching. (MSHA Regulation 56.16016) (MSHA Regulation 75.9201).
4. A safe place of employment, free of recognized hazards that are causing or are likely to cause death or serious physical harm (i.e. injury) was not provided. (KRS Chapter 338.031(1)(a)/OSHA General Duty Clause, Section 5(a)(1)).
5. There was an alternative method for moving the pipe which would have provided a higher degree of safety and decreased or eliminated the likelihood of an incident resulting in injury. The pipe could have been rigged so that the loader/excavator/dozer would pull rather than carry the pipe to its next location. This would have

afforded more control over the pipe and could have prevented injury.

6. The Operator at the time of this incident appears to have contributed to an unsafe workplace in that:

a. He was not paying close enough attention to the load or surroundings.

b. A safe distance was not maintained between the employees on the ground and the load. (MSHA regulation 56.16009).

c. His vision was obstructed. He was not aware of what was happening to the pipe on his right side.

d. The route was not made clear and everyone in harm's way was not informed of the potential for a hazard.

The July 10, 2019, Benefit Review Conference (“BRC”) Order and Memorandum reflects the parties stipulated Key sustained a work-related injury on October 22, 2013, SCH had received due and timely notice, and TTD benefits were paid from July 7, 2014, through March 8, 2017. The parties also stipulated the amount of medical expenses paid by SCH. The contested issues were: benefits per KRS 342.730, average weekly wage, TTD, and KRS 342.165.

After summarizing the lay and medical evidence and expert testimony, the ALJ provided the following findings of fact and conclusions of law regarding the disputed issues:

7. As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence, the ALJ must consider the totality of the evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W. 2d 418 (Ky., 1985).

In analyzing this claim, the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

I. Introduction

The Plaintiff is permanently, totally disabled solely as a result of his work injury. No safety violation on the part of the Defendant has been proven.

II. Benefits per KRS 342.730

Even though I am finding the Plaintiff permanently, totally disabled I am required to select an impairment rating. In this case, both Dr. Hill and Dr. Travis states the Plaintiff has a 31% impairment rating. Dr. Hill states the entirety of it is related to the October 22, 2013 accident. Dr. Travis says only 6% of it is related to the October 22, 2013 incident, the remainder is from Key's accident while working as a barge hand.

Frankly, I have never been able to fully grasp how a previously "permanent" impairment rating, especially one from a surgery, can disappear once a certain period of time has elapsed. Nonetheless, some hold that it can. I do not agree with that and do not agree with it in this claim. Since the Plaintiff did have a prior lumbar surgery and because Dr. Travis' reasoning and analysis on this matter are sound, I will rely on him to find that the Plaintiff has a 6% impairment rating from the October 22, 2013 injury.

Far more important here are the facts supporting an award of total disability. The restrictions from Dr. Travis include no lifting of more than 10-15 pounds and the ability to change positions from sitting, standing and walking as needed. One does not need a vocational expert to tell us that those are severe restrictions for anyone. Clearly they not only preclude a return to work for the Defendant, as all medical experts say, but they also preclude a return to work as a barge worker, commercial painter, fry cook, farm laborer or heavy equipment operator, all of the Plaintiff's prior jobs.

I must also take into account Mr. Key's age. It is true that at 42 years of age he is not considered an older

worker. However, most likely, and having listened to Mr. Key and heard him out we probably, at least in his case, have a good idea of his academic potential and the fact that he has reached it. That might not be true for every 42 year old but I do believe and so find that it is true for him.

That academic potential is, I find, more or less accurately reflected in his 10th grade education. In short, I believe he has very little potential for retraining into any job that would limit his lifting to 10-15 pounds and allow him to sit, stand or walk as needed. I don't really imagine, other than some forms of self-employment or some very light or sedentary jobs, that there are that many jobs that would accommodate those restrictions, at all.

Mr. Key cannot return to any of his past work. He lacks the ability to be retrained into any job that would or could accommodate his restrictions. As such, he is permanently and totally disabled as a result of the October 22, 2013 work accident.

I do not find any reason to make a carve out due to the prior accident. Impairment rating and occupational disability are distinct and there are distinct rules and analyses that are conducted to determine if there is a carve out. In this case, Mr. Key continued to work his job for this Defendant. There is no evidence or indication that he moved from barge work to heavy equipment operator because of the prior surgery. There are no known restrictions prior to October 22, 2013. There is simply no basis to find any pre-existing occupational disability. There is no carve out.

Because the Plaintiff worked until July 7, 2014, his award will start on that date. There is no difference in the award whether it is characterized as temporary total or permanent total.

III. Temporary Total Disability Benefits

The parties having stipulated to an AWW of \$1113.50 the correct rate of TTD is \$742.33. The Order and Award will reflect that. The parties were clear that the dates of TTD do not need to be changed from those already paid.

IV. KRS 342.165, Safety Violation by the Defendant

The Plaintiff argues that the report and testimony of Mr. Jordan is uncontradicted in this matter and should therefore be deemed persuasive. However, even if uncontradicted the Plaintiff still bears the burden of proof on this matter and the ALJ is allowed to disregard even uncontradicted proof.

It is worth noting that in this claim there is no OSHA citation or any specific statute or regulation governing this type of incident. The regulation cited by Mr. Jordan is general and for whatever reason OSHA did not issue a citation that it had been violated. Therefore, the Plaintiff relies on the general duty clause. *Apex Mining v. Blankenship*, 918 S.W.2d 225 (Ky. 1996).

Mr. Jordan's report, even when supported by the testimony and input from Mr. Key, does not induce me to find a safety violation. Mr. Jordan did not include any actual information from the work site or any other person or employee, other than Mr. Key. He relied on Mr. Key's subjective and biased input and his research of general regulations and concepts.

I am simply not persuaded and the Plaintiff has the burden of proof. The safety violation is Dismissed.

PTD benefits were awarded from July 7, 2014, until Key attains the age of 70. SCH was given a credit for any previous income benefits paid.

Both parties filed petitions for reconsideration. SCH contended the ALJ erred in finding Key was permanently totally disabled solely as a result of the October 13, 2013, work injury. SCH's argument mirrors its argument on appeal. SCH maintained the failure to apportion or carve-out needed to be corrected. Key's petition for reconsideration asserted the award of income benefits should begin on the date of the injury. Key also asserted he had established SCH violated one more safety rule and therefore enhancement was necessary.

The October 16, 2019, Order overruling both petitions for reconsideration reads as follows:

This matter comes before the undersigned on both parties' Petitions for Reconsideration and both parties' Responses thereto. As to the Defendant's Petition the Plaintiff was doing heavy manual labor, without restrictions, at the time of his accident. Regardless of his prior injury as a barge hand, or its possible impairment rating, he had no pre-existing occupational disability. There should be no carve out of the total disability award. As to the Plaintiff's Petition it is incumbent on him to prove the safety violation. He attempted to do so under the general duty clause and cited to no specific statute, regulation or citation regarding the accident to prove his case. He only presented a non-persuasive witness and the Plaintiff. Both Petitions are OVERRULED.

In arguing the ALJ erred in his analysis, SCH relies upon the Kentucky Supreme Court's holding in Wetherby v. Amazon.com, 580 S.W.3d 521 (Ky. 2019), contending it is identical to the case *sub judice*. SCH asserts Key's condition resulting from the 2009 injury was ratable at 25% per Dr. Travis and when subtracted from Dr. Travis' current rating, the impairment rating attributable to the subject injury is 6%.⁴ SCH argues since the ALJ relied upon Dr. Travis' impairment rating, he cannot ignore his apportionment of the impairment rating. SCH contends identification and compliance with the distinct rules contained in the statute, AMA Guides, and Wetherby must be followed in apportioning the permanent impairment causally related to the October 22, 2013, injury. Further, the ALJ must exclude the permanent impairment rating not related to the subject injury. SCH asserts Wetherby sets forth a clear example of the distinct rules of the AMA Guides and their application. Thus, pursuant to the statute, the AMA Guides, and Wetherby, an apportionment to exclude the 25% impairment rating as not causally related to the subject injury is necessary.

⁴ Dr. Travis assessed a combined 31% impairment rating; 25% for the 2009 injury and 6% for the October 22, 2013, injury.

Consequently, the ALJ's decision is erroneous in light of Dr. Travis' testimony because the award is not in conformity with the Act, the AMA Guides, and Wetherby.

We disagree and affirm on SCH's appeal.

ANALYSIS

First, we note Wetherby dealt with whether there should be a carve-out of permanent partial disability ("PPD") benefits not permanent total disability ("PTD") benefits. Significantly, in Wetherby, the Supreme Court observed:

After considering all the medical evidence, the ALJ determined that Wetherby retained a 25% pre-existing cervical impairment due to his previous injuries, and a 6% impairment stemming from the 2012 work injury for a total whole person impairment of 31%. It appears that the ALJ relied on both Dr. Kriss and Dr. Stephens, adopting Dr. Stephens's impairment rating from the 1980 injury of 25%, and Dr. Kriss's overall impairment rating of 31%, resulting in a 6% impairment attributable to the 2012 work injury.

Id. at 525.

In holding a carve-out was not necessary, the Supreme Court ultimately agreed with the Court of Appeals' holding that the ALJ did not need to apply Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) "because the ALJ found the 1980 injury to be stable and that it had no disabling effect or connection to the subject injury based upon the medical evidence presented." Id. at 527-528. As that is not the case in the case *sub judice*, we believe Finley and Roberts Brothers Coal Company v. Robinson, 113 S.W.3d 181 (Ky. 2003) are dispositive of this issue. In Finley, the Court of Appeals held as follows:

It is well-established that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. *McNutt Constr. / First Gen. Servs. v. Scott*, 40

S.W.3d 854 (Ky. 2001). In its opinion, the Board correctly and succinctly set forth the law upon compensability of a pre-existing dormant condition:

What then is necessary to sustain a determination that a pre-existing condition is dormant or active, or that the arousal of an underlying pre-existing disease or condition is temporary or permanent? To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the *AMA Guidelines* immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

Id. at 265.

As mandated by Finley, in order to establish the existence of an active low back condition prior to October 22, 2013, SCH was required to demonstrate the pre-existing condition merited an impairment rating pursuant to the *AMA Guides* and that the condition was symptomatic. SCH met the first prong of the test by establishing through Dr. Travis that Key had a 25% impairment rating as a result of his previous low back surgeries. However, SCH failed in its burden of establishing the pre-existing condition was symptomatic. Key's un rebutted testimony established that although he had undergone previous surgeries, he did not have a symptomatic low back condition. That testimony, if believed by the ALJ, qualifies as substantial evidence supporting his finding that SCH did not meet its burden as required by Finley. Moreover, the opinions of Drs. Hill and Barlow constitute substantial evidence supporting the ALJ's finding there is no basis for finding a pre-existing occupational disability. In his questionnaire dated February 27, 2019, Dr. Hill agreed with Dr. Travis' 31% impairment rating. However, as to whether Key was symptomatic prior to the injury, Dr. Hill opined as follows:

Mr. Key was asymptomatic prior to his work injury. He worked at a labor intensive job with limitations. He had no pre-existing impairment or restrictions before the injury. The current impairment is fair based on ROM measurements which are attributable entirely in my opinion to the 10/22/13 work injury.

5. Dr. Travis has apportioned his 31% rating as follows:

6% to the work injury of October 22, 2013

25% to the prior impairment

Do you agree with Dr. Travis? No.

Why/why not: See above. He was fully functional prior to injury on 10/22/13 without limitations.

Similarly, Dr. Barlow opined Key was “asymptomatic until the work incident on the above date which caused an aggravation of an underlying degenerative condition.”

In Roberts Brothers Coal Company, the Supreme Court determined the ALJ was not required to reduce an award of PTD benefits due solely to an impairment rating assessed for a previous injury. The Supreme Court noted that, based upon the lay and medical evidence, the ALJ determined the claimant was totally disabled. The ALJ further determined he had no pre-existing active disability despite having back problems, as he was working without restrictions when injured. The Supreme Court explained as follows:

Thus, awards under KRS 342.730(1)(a) continue to be based upon a finding of disability. In contrast, an award of permanent partial disability under KRS 342.730(1)(b) is based solely on a finding that the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude,

therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

Id. at 183.

The mere presence of the impairment rating for a pre-existing condition is insufficient to support a carve-out of an award of PTD benefits under KRS 342.730. Thus, a finding of total disability without a carve-out is appropriate when there is no evidence the claimant possessed a pre-existing disability. Stated another way, since none of the claimant's disability was active at the time of his injury, no exclusion for prior active disability was required. In Dr. Travis' July 8, 2019, report he noted the fact Key was working at the time of the injury without limitations does not preclude an impairment rating. As he noted on page five of his report, "[w]ork is not included in clinical judgment for impairment percentages' and impairment ratings are not intended for use as direction determination of work disability." Dr. Travis understood the existence of an impairment rating does not equate to disability. The ALJ found that although Key had a prior impairment rating as a result of prior low back surgeries he did not have a prior disability. Since Key's testimony and all the doctor's statements establish Key was not symptomatic prior to the injury, we find no error in the ALJ's finding a carve-out in the award of PTD benefits was not appropriate.

Although Key's arguments in response to the appeal are now moot, we choose to address his arguments that SCH waived any argument for a carve-out and

Dr. Travis' impairment rating is based on the wrong edition of the AMA Guides. Specifically, we note even though it was not identified as an issue at the BRC, evidence was introduced during the proceedings, without objection by Key, in support of SCH's position for a carve-out. In the same vein, SCH's brief to the ALJ argued for a carve-out. Thus, we believe the issue was tried by consent. The Court of Appeals in Hodge v. Ford Motor Co., 124 S.W.3d 460, 462-463 (Ky. 2003) stated as follows:

Pursuant to CR 15.02, “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” [footnote omitted] In *Nucor Corp. v. General Electric Co.*, [footnote omitted] our Supreme Court discussed the purpose of CR 15.02, and explained how the rule should be interpreted by Kentucky courts:

Bertelsman Philipps explains “[o]ne of the reasons” for the rule “is to take cognizance of the issues that were actually tried.”

“The Rule goes further than authorizing amendments to conform to the evidence. It provides that if issues not raised by the pleadings are tried by express or implied consent, they shall be treated as if they had been so raised [citation omitted].

....

The decision whether an issue has been tried by express or implied consent is within the trial courts discretion and will not be reversed except on a showing of clear abuse.

....

It seems clear that at the trial stage the only way a party may raise the objection of deficient pleading is by objecting to the introduction of evidence on an unpleaded issue. Otherwise he will be held to have

impliedly consented to the trial of such issue.”

Furthermore, the Supreme Court has noted that “[t]here is a need for uniformity and stability in our approach to the application of the civil rules to Workers' Compensation matters.” [footnote omitted] The uniformity principle was followed in *Divita v. Hoppie Plastics*, [footnote omitted] where this Court held that since the defendant employer's misrepresentation defense “was tried before the ALJ,” the defense was properly considered by the ALJ even though the employer had failed to raise the issue in the pre-hearing conference order. [footnote omitted] This Court went on to state that CR 15.02 applied to workers' compensation proceedings, explaining that “we would not apply a more stringent rule [than CR 15.02] to an administrative hearing.” [footnote omitted]

In addition, we find no merit in Key's assertion that Dr. Travis' impairment rating was based on the 4th Edition of the AMA Guides. Initially, we note this issue was not identified as a contested issue in the BRC Order. Further, Dr. Travis' July 8, 2019, report firmly demonstrates he relied upon the 5th Edition of the AMA Guides in assessing his impairment rating. Dr. Travis specifically noted:

In regard to the question of impairment and Dr. Hill disagreeing with question five about apportionment of the 31%; 6% to the work injury of 10/22/2013, and 25% to prior impairment, again, this smacks of a lack of familiarity of the *American Medical Association Guides to Evaluation for Permanent Impairment, Fifth Edition*.

...

For Dr. Hill to review the MRI scans and note a solid fusion at L4-5 and L5-S1, from a previous operative procedure, and not consider that as a loss of motion segment integrity indicates a lack of knowledge regarding the *American Medical Association Guides to Evaluation for Permanent Impairment, Fifth Edition*.

Our review of Dr. Travis' citation to various portions of the AMA Guides reveal he cited to pages in the 5th Edition of the AMA Guides in formulating his impairment rating.

Key takes the position on cross-appeal that, pursuant to Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009) and Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008), an award of PTD benefits should be treated no differently than an award of PPD benefits. We disagree. Sweasy dealt with an award of PPD benefits. In Sweasy, the Supreme Court concluded, "the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of maximum medical improvement, the worker's disability rating, or the compensable period's duration." Id. at 839-840. In Millersburg, the Supreme Court held "wages are paid for performing labor; income benefits are paid for work-related disability." The claimant's wages are *bona fide* because they were paid ostensibly for labor and because the evidence did not prevent a reasonable finding that the employer intended to pay them in lieu of workers' compensation benefits. Here, the facts are different as the ALJ determined permanent total disability did not begin on the date of injury which is supported by Key's testimony. Key testified he worked until July 7, 2014. During that time, he worked his regular hours including overtime. This issue was previously addressed by this Board in Underwood v. Pella Windows DEPE PLLC, Claim No. 2011-00713, rendered August 26, 2016, in which we held Underwood was not entitled to PTD benefits during the period he worked at full wages. In Underwood v. Pella Windows DEPE PLLC, Claim No. 2016-CA-001424-

WC, rendered March 31, 2017, Designated Not To Be Published, the Court of Appeals affirmed stating:

The award of PPD benefits concerns only Underwood's June, 2009 work accident and, therefore, his cervical injury. The ALJ's analysis does not explain why due to the effects of the June, 2009 injury alone, Underwood was unable to continue to return to the type of work he performed at the time of the injury. In light of the unique circumstances of this case—specifically, that Underwood continued to work without accommodation during this period—further analysis is required.

... He first contends that the Board erred in reversing the start date of the PTD award. Underwood draws our attention to *Roby v. Trim Masters, Inc.*, 2015–CA–000923–WC, 2016 WL 3962602 (Ky. App. July 22, 2016). *Roby* is distinguishable on its facts. Underwood is not challenging the ALJ's conclusion that he is permanently, totally disabled. The issue is simply **when** his PTD award should begin.

Underwood also argues that the principles in *Gunderson v. City of Ashland*, 701 S.W.2d 135 (Ky. 1985), still apply. We agree with Pella that this is not a *Gunderson* case. In *Gunderson*, a police officer who was paralyzed and confined to a wheelchair after having been shot in the line of duty returned to work as a dispatcher after modifications were made to the unit. Our Supreme Court agreed with the old board that Gunderson was totally occupationally disabled. “[E]xcept for the compassionate treatment of his employer, Gunderson is entirely precluded from successful competition for employment in the job market.” *Id.* at 137. As the Board explained here, the ALJ did not conclude that Pella was a “sympathetic employer.”

Underwood acknowledges that workers' compensation is a creature of statute. *Williams v. Eastern Coal Corp.*, 952 S.W.2d 696, 698 (Ky. 1997). The statute defines permanent total disability as “the condition of an employee who, due to an injury, has a permanent

disability rating and has a complete and permanent inability to perform any type of work as a result of an injury....” KRS 342.0011(11)(c). The statute affords us no latitude. We are compelled to agree with the Board that “as a matter of law, a worker cannot be considered totally permanently disabled during a period he continues to work at his regular job, with no accommodations, at full wages.”

Slip Op. at 2-3.

Based on the above, we find the ALJ did not err in starting the award on the date Key last worked.

Finally, Key asserts Jordan’s testimony and report are uncontradicted, therefore enhanced income benefits pursuant to KRS 342.165 is required. We disagree. Within his discretion, the ALJ determined there was no safety violation. In doing so, the ALJ noted there was no OSHA citation and no specific statute or regulation governing this type of incident. Noting Key asserted SCH had violated KRS 338.0311(a), the ALJ concluded Jordan’s report, although supported by Key’s testimony and input, did not convince him to find a safety violation. He noted Jordan did not include any actual information from the work site or interview any other person or employee other than Key. Rather, he relied upon Key’s subjective and biased input and his research of general regulations and concepts. Jordan’s testimony is consistent with the ALJ’s conclusion as he acknowledged his report is based solely upon an hour and a half to two hour interview with Key approximately five and half years after the event. Further, Jordan did not review the First Report of Injury. Additionally, he agreed one of the regulations he cited (MSHA Regulation 56/57.18002) became effective in 2018 approximately five years after the incident. The last regulation to which he cited (MSHA regulation 56.16009) in his report merely

requires a person to stay clear of suspended loads. There is nothing in that regulation placing an affirmative duty on SCH. As to the other regulation relied upon (MSHA 56.16016), the ALJ enjoys the discretion to determine whether that regulation applied given that Key's testimony is the only basis for Jordan's conclusion that this regulation applied.

To be clear, Jordan's report reveals it was not based on an investigation contemporaneous with or shortly after the accident. In fact, we find nothing in his report revealing he visited the accident site or inspected the equipment and materials involved. We believe the language of the Supreme Court in Groce v. VanMeter Contracting, Inc., 539 S.W.3d 677, 683 (Ky. 2018) is persuasive. There, the Supreme Court stated:

Finally, although KOSHA's citations and investigative report, and the terms of the settlement agreement may be considered as some evidence of the alleged regulatory violations, it remains for the ALJ in the workers' compensation action to determine whether, as a matter of fact, the violations occurred and, if so, whether they were intentional and a contributing cause of the injury-producing accident. "The fact that the employer settled the KOSHA citation without admitting a violation is immaterial. In the context of a workers' compensation claim, it is the responsibility of the ALJ to determine whether a violation of a statute or administrative regulation has occurred." *Brusman v. Newport Steel Corp.*, 17 S.W.3d 514, 520 (Ky. 2000).

In the case *sub judice*, there was no investigation and no citation for a violation. However, even if there had been a citation, the ALJ was free to disregard it and draw his own conclusions as to whether there had been a violation of the statute or administrative regulation. The following language in Groce, given the facts of this case demonstrates this Board does not have the ability to substitute our judgment for

that of the ALJ's, and alter the finding there was no violation of a statute or regulation.

In Groce, the Supreme Court explained:

It is fundamental that the Board “shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact.” KRS 342.285(2). The ALJ “has the sole discretion to determine the quality, character, and substance of the evidence, and may reject any testimony and believe or disbelieve various parts of the evidence” *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329 (Ky. App. 2000) (internal edits and quotations removed) (citations omitted).

Id. at 684.

We are also persuaded by Jordan's answer to the following question during his deposition testimony:

Q: Okay. And you did that because you thought that those were applicable to this very incident, I'm sure?

A: That they could be applied.

The above response demonstrates Jordan did not definitively state the sections he cited were applicable to the facts in this case. Rather, he stated they could be applied.

Accordingly, on cross-appeal and appeal, the decision of the ALJ is

AFFIRMED.

ALL CONCUR.

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