

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 10, 2020

CLAIM NO. 201577829

SALIM MEMIC

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

BROADWAY MANAGEMENT GROUP, LLC;

RESPONDENT/
CROSS-PETITIONER

DR. TUNA OZYUREKOGLU; and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

* * * * *

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

ALVEY, Chairman. Salim Memic (“Memic”) appeals and Broadway Management Group, LLC (“Broadway”) cross-appeals from the May 21, 2018 Opinion, Award

¹ Although 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.

and Order, and the June 14, 2018 Order rendered by Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). The ALJ determined Memic sustained left wrist, upper extremity, and shoulder injuries, but dismissed his claims for neck and low back injuries allegedly resulting from a work-related motor vehicle accident (“MVA”) which occurred on June 25, 2015 while he was working for Broadway.

On appeal, Memic argues the ALJ erred by failing to specifically find there was no pre-existing active condition of the neck and back; in failing to find he sustained neck and back injuries in the accident; in failing to find him permanently totally disabled; and in applying the tier-down provision contained in the pre-1996 version of KRS 342.730. Broadway argues the ALJ erred in finding the left hand/carpal tunnel condition compensable and in awarding vocational rehabilitation. For the reasons set forth herein, we affirm in part, vacate in part, and remand.

Memic filed a Form 101 on September 28, 2016 alleging he sustained injuries to his neck, lower back, left upper extremity/shoulder, and left wrist in a work-related MVA while traveling to a building to perform electrical maintenance on June 25, 2015.

Memic, born on September 6, 1959, in Bosnia, testified he immigrated to the United States in 2000. He worked for Kentucky-Indiana Lumber on an assembly line installing trim on doors until 2003. Memic next worked for Kentucky Trailer until 2006 when he sustained neck and back injuries when he fell from a trailer. He settled his claim for those injuries in 2009. Following the settlement,

Memic worked for ABM Company, a cleaning and janitorial services company, from late 2009 until early 2010.

Memic began working for Broadway in September 2010 performing maintenance on rental properties. Broadway is a property management company overseeing approximately 2,500 apartments and houses in the Louisville area. Memic changed appliances, replaced cabinetry, and installed tiles. His work required crouching, crawling, climbing, working overhead, using his hands repetitively, and lifting 50-75 pounds. While traveling to a building to perform electrical maintenance, his vehicle was struck by another vehicle. He experienced sharp pain from his left elbow down to his wrist. After the MVA, Memic was taken to University of Louisville Hospital for emergency care and underwent imaging studies. Memic stated he was not having any problems with his left hand, wrist, arm, or shoulder, and was working full regular duty, performing all aspects of his maintenance job for Broadway prior to the MVA.

Memic has not returned to work since the June 2015 accident. He testified he is unable to turn his neck and must turn his whole body if he wants to look left or right. He frequently experiences pain radiating from his neck into his left arm. He wears a cervical collar provided by Dr. Ivan Ljubic. If he removes the cervical collar, he experiences a stabbing pain in the neck. He also has constant pain in the front of his left shoulder and into his upper arm, and constant low back pain interfering with his ability to walk. He alternates between sitting and standing every fifteen minutes. He is unable to lift while bending and has difficulty grasping with his left hand. He wakes up throughout the night because of pain. During the day, he

sits on the couch propped up on pillows. He does not perform household or yard chores. His wife helps him bathe and dress. He does not feel capable of working eight hours a day, five days a week on a regular basis because he cannot stand or walk for a long time.

Broadway submitted the evaluation reports of Dr. Gregory Gleis conducted on July 3, 2007 and January 7, 2008 for Memic's prior work injury to his neck and low back he sustained while working for Kentucky Trailer. On July 3, 2007, Dr. Gleis indicated Memic demonstrated increased pain response with the cervical, thoracic, and lumbar range of motion testing. His low back and left leg symptoms were his worst complaints, but his examination was not diagnostic for radiculopathy. Cervical and lumbar MRIs demonstrated pre-existing degenerative spine conditions. Based on the cervical MRI, Dr. Gleis felt Memic could be having left C7-C8 radicular complaints. In the January 7, 2008 report, Dr. Gleis stated Memic reported no improvement of his symptoms. Memic had a July 18, 2007 emergency room visit for a flare-up of neck pain without a new injury. Dr. Gleis diagnosed a cervical strain, without radiculopathy, as well as low back and bilateral leg pain. His examination was consistent with a lumbar strain without radiculopathy. He causally related the cervical and lumbar strains to the December 15, 2006 work-related fall. Dr. Gleis stated Memic had reached maximum medical improvement ("MMI") and he assessed a 10% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), assigning 5% for the cervical and 5% for the lumbar condition.

Memic settled his claim for the September 11, 2006 and December 15, 2006 injuries to his left hand, back, and upper extremity by agreement approved on February 20, 2009. The agreement noted diagnoses of cervical and lumbar strains and laceration of the left hand.

Memic began treating with Dr. Ljubic on July 6, 2015. Dr. Ljubic diagnosed a neck whiplash injury, paraspinal muscle spasms, bilateral cervical spine radiculopathy, and bilateral upper extremity. He referred Memic for cervical and lumbar MRIs. A cervical MRI on October 6, 2015 showed increased cervical lordosis with multilevel spondylotic disc displacement most pronounced at C5-6 and abutment of the bilateral C6 and left C7 nerve roots. Dr. Ljubic also obtained a lumbar MRI which showed disc displacement from L2-3 through L4-5. He noted the L4-5 displacement and facet arthropathy mildly to moderately narrows the proximal neural foramina and barely abuts the left L4 nerve root.

On December 9, 2015, Memic presented to Dr. Tuna Ozyurekoglu who diagnosed him with left carpal tunnel syndrome/pronator teres syndrome/cubital tunnel syndrome, left shoulder biceps tendinitis, left elbow biceps tendinitis, and a TFCC tear. Dr. Ozyurekoglu injected Memic's left carpal tunnel, prescribed a left elbow splint and left wristlet, and referred Memic for a left wrist MRI. On July 20, 2016, Dr. Ozyurekoglu recommended left wrist arthroscopy, repair versus excision of the TFCC tear, lunotriquetral tear, ganglion cyst, and left carpal tunnel release. On October 26, 2016, he diagnosed left carpal tunnel syndrome and left wrist TFCC tear caused by the June 25, 2015 motor vehicle accident. Dr. Ozyurekoglu recommended Memic undergo left wrist arthroscopy repair versus

excision of the TFCC tear, lunotriquetral tear, ganglion cyst, and carpal tunnel release. Dr. Ozyurekoglu stated the surgery was reasonable for the cure/relief of Memic's June 25, 2015 work injury.

Dr. Michael J. Doyle evaluated Memic for neck and back pain on December 9, 2015. On February 17, 2016, he noted physical therapy made the neck and arm pain worse. Dr. Doyle referred Memic for physical therapy and pain management for his low back, and for consideration of surgery for his neck on March 4, 2016.

Dr. Scott Kuiper saw Memic on May 16, 2016. He obtained a shoulder MRI, and diagnosed adhesive capsulitis and a rotator cuff tear of the left shoulder. Dr. Kuiper eventually performed left shoulder arthroscopic surgery consisting of a manipulation, lysis of adhesions, acromioplasty with coracoacromial release, and rotator cuff repair.

Dr. Robert Sexton performed an IME on February 10, 2016. He diagnosed myofibrous sprain/strain of the cervical and lumbar spine without additional radiculopathy, discopathy, neuropathy, or myelopathy, superimposed on antecedent mild lumbar and mild to moderate cervical spondylosis. Dr. Sexton stated there was no objective medical evidence validating a permanent change in Memic's condition due to the June 25, 2015 work accident. Therefore, he determined Memic does not have a ratable impairment pursuant to the AMA Guides. Dr. Sexton noted Memic has mild to moderate pre-existing cervical spondylosis and mild lumbar spondylosis both of which are appropriate and do not constitute an active partial impairment. He did not believe Memic had any objective

evidence of a left wrist injury to warrant the use of a brace. He opined Memic suffered from a pre-existing active condition, and has reached MMI.

Dr. Ronal Fadel evaluated Memic on January 3, 2017 at Broadway's request. He diagnosed a contusion/sprain injury of the cervical spine and head, as well as a contusion of the left shoulder, with secondary adhesive capsulitis arising from guarding and the immobilization, and a lumbar strain injury, all of which he related to the MVA. He noted the diagnoses of axial spondylosis/ degenerative facet and disc disease as well as a TFCC tear pre-dated the accident. He did not believe Memic had reached MMI. Dr. Fadel stated there is no objective data supporting an acute new injury to the cervical or lumbar spine. With respect to Memic's left wrist condition, Dr. Fadel noted TFCC tears from an injury are usually caused by falling on a hyperextended and pronated wrist, operating a drill that binds and rotates the wrist, and distal radial fractures. He further noted acute TFCC tears due to an injury are immediately noticeable and would not surface for the first time five months later as did Memic's complaints. He explained TFCC joint degeneration is part of the aging process beginning around age thirty and no one has a normal TFCC by the fifth decade of life. He therefore concluded Memic's TFCC tear was degenerative in nature and not due to the work accident. Dr. Fadel stated Memic's current profile regarding the cervical condition is the same as it was in 2006 for which he had already been assessed a cervical DRE Category II rating of 5% pursuant to the AMA Guides. Dr. Fadel did not anticipate any permanent restrictions would be necessary.

Memic's claim was bifurcated to determine the compensability of the left wrist and proposed left wrist surgery, as well as entitlement to additional TTD

benefits, and the correct average weekly wage. In an Interlocutory Opinion, Order and Award rendered on May 30, 2017, the ALJ stated he was not persuaded Memic carried his burden of proving his left wrist condition was caused by the work-related MVA. The ALJ was persuaded by Dr. Fadel's explanation that the mechanism of injury and the fact that no left wrist symptoms developed until approximately five months later are inconsistent with an acute injury induced TFCC tear. The ALJ further noted Dr. Ozyurekoglu did not explain how the MVA caused the TFCC tear, nor did he explain how it did not become noticeable until months after the accident. Therefore, the ALJ found the proposed TFCC surgery is not compensable. The ALJ was not persuaded Memic has left carpal tunnel syndrome noting the EMG/NCV study of the left upper extremity did not support that diagnosis. Dr. Sexton considered that EMG study in determining Memic had no objective evidence of an injury. Because Memic's objective testing did not support the diagnosis, the ALJ determined Memic does not have left-sided carpal tunnel syndrome. The claim was placed in abeyance pending recovery from Memic's October 2016 shoulder surgery.

The claim was removed from abeyance on October 11, 2017, and additional evidence was submitted, including the report of Dr. Warren Bilkey who performed an IME on April 20, 2016. Dr. Bilkey diagnosed cervical, lumbar and left wrist strains related to the work accident. Dr. Bilkey explained Memic had a previous history of injury, with similar pain behavior, as well as a history of apparent full recovery with time and inadequate treatment response. He concluded Memic had reached MMI. Dr. Bilkey noted Memic had 5% impairment ratings for the

cervical and lumbar conditions prior to the work injury. He assessed an additional 9% whole person impairment rating attributable to the June 25, 2015 MVA.

Dr. Fadel again evaluated Memic on September 13, 2017. Memic complained of pain in his left lower back, into to his left leg and heel. He also described pain between his shoulder blades, the left side of his neck, and a burning sensation in his left elbow and wrist. Dr. Fadel found the rotator cuff tear was Memic's singular pathology related to the accident. Dr. Fadel stated the historical and objective facts fail to support any new acute injury to Memic's axial skeleton beyond the transient soft tissue injury he sustained in the MVA. His opinions from the first IME remained unchanged. Dr. Fadel added Memic has a profound somatoform disorder with considerable elements of symptom exaggeration and misrepresentation. Dr. Fadel reported Memic has poor insight on his current condition, contributing to his current compromised functional status, noting the self-limiting immobility likely caused the development of adhesive capsulitis in his shoulder. Dr. Fadel assessed an 11% whole impairment rating. Dr. Fadel stated Memic is unable to perform any physically demanding occupation. He stated this is not due to the rotator cuff injury, but rather the somatoform disorder. Dr. Fadel opined Memic could return to work without restrictions with the repair and proper self-motivation. Dr. Fadel reported Memic reached MMI following his visit with Dr. Kuiper on February 6, 2017.

In a September 19, 2017 report, Dr. Ozyurekoglul indicated he saw Memic on six occasions between December 9, 2015 and July 20, 2016. Dr. Ozyurekoglul diagnosed left carpal tunnel syndrome, left suprascapular tendon tear,

as well as left lateral epicondylitis, left TFCC tear, and lunotriquetral tears. He recommended Memic undergo a left wrist arthroscopy repair versus excision of the TFCC tear, lunotriquetral tear, ganglion cyst, and left carpal tunnel release. Dr. Ozyurekoglul explained Memic sustained his injuries in the work-related motor vehicle accident. He was holding the steering wheel when he was struck on the side of his vehicle, delivering the kind of force and impact necessary to cause the TFCC tear and subsequent significant complaints of radial nerve pain from the elbow to the wrist. Dr. Ozyurekoglul opined that within reasonable medical probability, the wrist injury and the TFCC injury were directly related to the MVA.

Dr. Jules Barefoot evaluated Memic on October 11, 2017. He reviewed records from Dr. Ozyurekoglul, Dr. Ljubic, and Dr. Kuiper. Dr. Barefoot also reviewed Dr. Robert Sexton's report, records from Dr. Doyle, an IME report from Dr. Bilkey, and an IME report from Dr. Fadel. Dr. Barefoot diagnosed Memic with lumbar disc displacement at L4-5, left L4 nerve root abutment, and cervical disc displacement with severe left foraminal narrowing with abutment of the C-6 nerve root. Dr. Barefoot additionally found Memic suffered from the left rotator cuff tear and AC joint arthritis, a complete avulsion of the TFCC at the radial attachment with a tear of the dorsal radioulnar ligament, and a tear of the lunotriquetral interosseous ligament. Dr. Barefoot diagnosed Memic as status-post left shoulder manipulation under anesthesia, status post left shoulder arthroscopy for lysis of adhesions of acromioplasty, and rotator cuff repair. He also diagnosed Memic with persistent tendinopathy and bursitis of the left shoulder, depression/anxiety, and pre-existing cervical and lumbar disc disease. Dr. Barefoot stated the MVA caused

Memic's diagnoses. He acknowledged Memic had a pre-existing impairment in his cervical and lumbar spines with 5% ratings for each spinal level. He opined Memic had no active ratable conditions present in the left shoulder or left upper extremity prior to the MVA. Dr. Barefoot assessed an additional 15% impairment for the lumbar spine and an additional 18% for the cervical spine related to the work injury. Dr. Barefoot assessed ratings of 20% for the shoulder, 7% for the wrist, and 4% for the elbow, and an additional 3% for pain, resulting in a combined total of a 45% whole person impairment rating for the conditions related to the MVA. He indicated Memic had reached MMI if no additional treatment was available. He stated Memic's diagnosis of depression is a manifestation of his continuing social isolation and chronic pain, and therefore it resulted from the June 25, 2015 work injury. Given the severity of the conditions, Dr. Barefoot concluded Memic is permanently totally occupationally disabled.

The ALJ found as follows:

Addressing plaintiff's left wrist condition first, the Administrative Law Judge notes it was previously found not work-related in the Interlocutory decision rendered on May 30, 2017 based on the evidence at that time. The defendant argues nothing in the evidence filed since then would support a contrary result at this time. However, in this instance, the ALJ is persuaded otherwise. In his report, Dr. Tuna explains that plaintiff had his hands on the steering wheel when his vehicle was struck on the left side in the motor vehicle accident, producing the kind of force consistent with plaintiff's triangular fibrocartilage tear injury. He pointed out plaintiff's MRI established this injury as well. Dr. Tuna's review of the medical records shows plaintiff complained of pain into his left arm/wrist area immediately following the motor vehicle accident and not for the first time five months later as Dr. Fadel indicated previously, which was a significant factor in the previous determination that

plaintiff's left wrist condition was not due to the motor vehicle accident. As a hand specialist and the treating physician, the ALJ finds Dr. Tuna's explanations especially persuasive in this instance. Conversely, in his most recent report, Dr. Fadel did not offer anything to rebut or contradict Dr. Tuna's explanations. For these reasons, it is now determined plaintiff's left wrist condition is work-related and compensable.

With respect to plaintiff's neck and lower back conditions, the ALJ is again persuaded by Dr. Fadel's conclusions. Although Dr. Barefoot diagnosed new and distinct neck and lower back injuries due to the MVA and made findings to support his conclusions, Dr. Fadel, Dr. Sexton and even Dr. Kuiper and Dr. Bilkey all either noted outright symptom magnification or found it difficult to conduct a meaningful examination due to extreme pain behavior preventing manipulation or even touching. Dr. Fadel and Dr. Sexton further explained they found no objective evidence of any new, permanent lumbar or cervical injuries. Plaintiff argues he fully recovered from his 2005 neck and back injuries and that he is unable to work now due, in part, to the new injuries he suffered to those areas in the MVA. The ALJ is not persuaded in this regard. As the defendant points out, in his testimony in the prior claim, plaintiff had extreme difficulty with most activities of daily living and had pain radiating into his extremities. The ALJ simply does not believe plaintiff was not nearly as incapacitated at that time as he suggested; nor does the ALJ believe plaintiff is as injured now as he claims. The significant symptom magnification noted by the evaluators supports this determination. For these reasons, the ALJ is persuaded by Dr. Fadel's conclusion that plaintiff did not suffer any new, permanent lumbar or cervical injuries in the work-related MVA. As such, these portions of his claim must be dismissed.

The ALJ noted Memic speaks little English, and his shoulder and arm injuries only limit his activities in one arm. The ALJ stated he simply was not persuaded there are no jobs to which Memic can return within his restrictions, compatible with his age and academic skills. For those reasons, the ALJ determined

Memic is not permanently and totally disabled. The ALJ was persuaded by Dr. Barefoot's 12% shoulder impairment rating and 7% left upper extremity impairment, noting the similar shoulder ratings assessed by Drs. Bilkey and Fadel. The ALJ found Dr. Barefoot's rating more consistent with Memic's injury, surgery, and ongoing symptoms. The ALJ additionally noted Dr. Barefoot provided the only impairment rating for the left upper extremity and it is consistent with Dr. Ozyurekoglu's diagnosis. Accordingly, the ALJ determined Memic has a combined 18% impairment rating. The ALJ was persuaded Memic is a suitable candidate for vocational retraining evaluation. Because Memic does not retain the physical ability to return to the job performed at the time of his injury, and his ability to return to work commensurate with his previous earnings would be enhanced by basic additional education, the ALJ indicated the Kentucky Department of Workers' Claims would refer Memic for a vocational evaluation by a subsequent order.

Memic filed a petition for reconsideration seeking clarification that the impairment ratings referred to in the opinion are whole person ratings. Memic requested additional analysis and findings regarding the neck and back conditions and permanent total disability. Finally, Memic argued the tier-down provision of the pre-1996 version of KRS 342.730 should not be applied to reduce his award. Broadway also filed a petition for reconsideration arguing the ALJ erred in reversing the finding of the interlocutory opinion that the left wrist is not compensable. Broadway also argued the ALJ failed to perform an adequate analysis regarding vocational rehabilitation benefits.

The ALJ provided the following additional findings regarding Memić's petition in the order on reconsideration:

Considering this evidence which was previously not discussed in addition to plaintiff's argument that the ALJ did not perform the appropriate analysis for prior active condition for plaintiff's neck or lower back, the ALJ is not persuaded plaintiff points out in years [sic] to justify changing the findings. In particular, even considering all of Dr. Ljubic's and Dr. Barefoot's findings, the Administrative Law Judge remains persuaded by Dr. Fadel's[sic] suffered no new, permanent lumbar or cervical injuries due to the work-related motor vehicle accident. Again, plaintiff simply did not present as a very credible witness and the symptom magnification noted by Dr. Fadel, Dr. Sexton, Dr. Kuiper, and Dr. Bilkey all make it difficult to accept medical opinions based in large part on plaintiff's presentation of pain. Although Dr. Ljubic[sic] and Dr. Barefoot's records could support a finding of new lumbar and cervical injuries, their opinions are not found as persuasive as Dr. Fadel's in this particular instance. It is therefore determined, again, that plaintiff has not carried his burden of proving he suffered neck or lower back injuries as a result of the work-related motor vehicle accident.

Moreover, plaintiff's insistence that a proper analysis of a prior active condition is not conducted is misplaced. That kind of analysis is required when a compensable injury is determined and the ALJ has to determine how much, if any, of the condition was pre-existing and active immediately before the work injury. However, in this case, it was determined plaintiff did not carried [sic] his burden of proving he suffered any permanent neck or lower back injuries as a result of the motor vehicle accident. His neck and lower back claims were therefore dismissed based on causation and work relatedness and Injury Under the Act rather than due to any pre-existing condition. In this regard, plaintiff's petition for reconsideration is overruled.

The ALJ acknowledged the finding of a compensable left wrist condition was contrary to the previous determination in the interlocutory decision.

He based the reversal on new evidence from Dr. Ozyurekoglu explaining the inconsistency relied upon in previously dismissing Memic's left wrist condition. As to Broadway's argument that the ALJ did not analyze the entire employment history in awarding vocational rehabilitation benefits, the ALJ stated he was not persuaded there was any patent error. The ALJ overruled Broadway's petition indicating Memic cannot return to his former job and his shoulder problems make any of his former manual labor jobs difficult.

On appeal, Memic argues the ALJ erred in failing to make a specific finding that he had no pre-existing active condition of his neck and back. Memic asserts the uncontradicted evidence demonstrates that following the release to return to full duty work in 2011 until the June 25, 2015 work-related accident, he sought no treatment for his neck or back, took no medication for his neck or back, and was fully capable of performing all the physical aspects of his job. Dr. Sexton opined Memic did not have a pre-existing active impairment, and Dr. Barefoot noted Memic did not seek treatment for the neck or back during the four years preceding the work injury. While Dr. Fadel believed the diagnoses of spondylosis and degenerative disc disease pre-dated the work accident, he did not opine the conditions were active immediately prior to the accident. Citing Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), Memic argues Broadway failed to meet its burden of showing the pre-existing conditions of the neck and back were both symptomatic and impairment ratable immediately prior to the work injury.

Memic argues the ALJ erred in failing to find compensable neck and back injuries. Memic contends the ALJ failed to summarize significant evidence

proving Memic sustained compensable injuries to his neck and back, and failed to compare and contrast that with the evidence the ALJ listed in the opinion. He also argues the ALJ failed to explain why Dr. Fadel's opinion carried more weight than objective medical findings including the MRI reports showing cervical and lumbar pathology/injury, and the diagnoses of the treating physician, Dr. Ljubic. Memic notes the opinion failed to discuss Dr. Ljubic's records. Memic further argues the ALJ erred in failing to find him permanently totally disabled. With the inclusion of the neck and back condition, Memic argues he has been rendered permanently totally disabled. Even if no new neck and back injury is found, he contends the ALJ erred in failing to consider the effect of the prior work-related injuries in his analysis of permanent total disability as required by Teledyne-Wirz v. Willhite, 710 S.W.2d 858 (Ky. App. 1986). Memic notes the left wrist surgery has been found work-related and the ALJ did not consider the yet to be determined restrictions related to that condition.

Memic had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in proving work-related injuries to his neck and low back and in proving a permanent total disability, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001). While

consideration of a total disability award depends on many factors, it remains within the ALJ's discretion to translate an impairment rating into either partial or total disability. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The factors which the ALJ may consider in making the determination include the worker's post-injury physical, emotional, intellectual and vocational status and how those factors interact. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

Pre-existing active condition/impairment is a defense addressed after a finding that a work event was the proximate cause producing a harmful change in the human organism. Here, the ALJ was not convinced Memic carried his burden of proving a work-related harmful change to his neck or low back. Dr. Fadel unequivocally stated there is no objective data supporting an acute new injury. Likewise, Dr. Sexton stated there is no objective evidence of a harmful change in Memic's condition. The opinions of Drs. Fadel and Sexton constitute substantial evidence supporting the ALJ's finding of that he did not sustain new injuries to his neck and low back.

The ALJ acted with the discretion afforded to him in translating the impairment rating into an award of permanent partial disability benefits rather than permanent total disability benefits. Based on the record, we conclude the evidence is not so overwhelming as to compel a finding in Memic's favor. Likewise, the evidence does not compel a finding Memic sustained neck and low back injuries. Again, we note Dr. Fadel stated there is no objective data supporting a new acute injury to the cervical or lumbar spine. Dr. Fadel indicated Memic has the same DRE

category II profile as he had following the 2006 injury. The ALJ noted Memic's cervical and lumbar conditions did not prevent him from performing his work for approximately four and a half years prior to the MVA. The ALJ was not convinced Memic has a complete inability to return to some form of work given his restrictions, age, and academic skills. An ALJ may give weight to a claimant's own testimony regarding his retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Here, however, the ALJ found Memic was not credible concerning his limitations, a finding supported by the opinions of Drs. Fadel, Sexton, Kuiper, and Bilkey, all of whom noted symptom magnification. The ALJ was not convinced the restrictions concerning the left wrist and shoulder assigned by the treating shoulder surgeon are so severe as to prevent any kind of return to work within Memic's other abilities or aptitude.

While Memic has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As reviewed above, because this Board has no fact-finding authority, and the ALJ made sufficient findings supported by substantial evidence in the record, we are without authority to direct a different result. Special Fund v. Francis, *supra*, and KRS 342.185. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said his conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). If Memic requires surgery in the future, he can reopen if the surgery produces a change in his impairment/disability within the limitations set forth in KRS 342.125.

Memic argues the ALJ erred in applying the tier-down provision set forth in the 1994 version of KRS 342.730 to this claim. Memic notes House Bill 2 went into effect on July 14, 2018, and it applies to all pending claims, terminating permanent partial disability benefits at age 70 or four years from the date of injury.

House Bill 2, signed by the Governor on March 30, 2018, became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4). That statute now states as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached as seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

Section 20(2) & (3) of House Bill 2 state as follows:

(2) Sections 2, 4, 5 and subsection (7) of Section 13 of this Act are remedial and shall apply to claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

(3) Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims:

(a) (a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and

(a) (b) That have not been fully and finally adjudicated, or are in the appellate process, or for

which time to file an appeal has not lapsed, as of the effective date of this Act.

In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), we reverse the ALJ's application of the tier down provision. In Holcim v. Swinford, *supra*, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy is retroactive to all pending claims. Because Memic's claim was pending on the effective date of the amended statute, his award is governed by the limitations set forth in the amended statute.

Broadway argues the ALJ erred in reversing his finding regarding the compensability of the left wrist/hand condition. In the interlocutory decision, the ALJ found Memic did not suffer an injury to his wrist/hand as a result of the June 26, 2015 accident. Broadway notes that, in general, an ALJ is precluded from revising his prior findings of fact. Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). While Memic submitted a new report from Dr. Ozyurekoglu, Broadway contends it contains no different conclusions. Instead, Dr. Ozyurekoglu simply arrived at the same conclusions while writing a lengthier report to address Broadway's previous arguments and the ALJ's previous findings. Dr. Fadel previously reviewed the medical records cited by Dr. Ozyurekoglu. The records documented complaints of upper extremity pain at the time of the accident and the ALJ considered that evidence at the time of his decision. Furthermore, Broadway contends Dr. Ozyurekoglu was apparently not aware of Memic's prior complaints of left wrist and hand pain from the elbow down to the fingers as far back as 2007. Since he did not appear to review such information, Broadway argues his

conclusions remain based on an incomplete set of records. Citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Broadway contends the ALJ should not have relied on the opinions of Dr. Ozyurekoglu, and the left wrist/hand/elbow injury should be dismissed.

We find no error in the ALJ's reversal of the finding regarding the compensability of the wrist condition. In Bowerman v. Black Equipment Co., *supra*, the Court of Appeals held 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. The case *sub judice* is distinguishable from Bowerman. As stated by the ALJ in the May 21, 2018 Opinion, Order and Award, there were several pieces of evidence introduced after the interlocutory order, including Dr. Ozyurekoglu's report explaining how the mechanism of the injury produced the kind of force consistent with the TFCC injury. Dr. Ozyurekoglu also reviewed the medical records showing Memic complained of pain in the arm/wrist area immediately following the MVA. Thus, the new evidence established Dr. Fadel mistakenly believed the symptoms arose five months after the accident. Mistake is also a basis for reversal of an interlocutory determination. The new evidence from three physicians filed subsequent to the Interlocutory Opinion constitute substantial evidence confirming Memic suffered a compensable left arm injury.

Broadway notes KRS 342.710(3) provides that an award of vocational rehabilitation benefits is appropriate when, due to a work injury, a claimant lacks the ability to perform any type of work for which he has prior training or experience.

Broadway contends the ALJ did not conduct an adequate analysis in his Opinion or in the Order on Reconsideration. Broadway asserts the ALJ found Memic lacks the ability to return to the job he performed at the time of his injury, but he did not address all of Memic's prior jobs. Instead, the ALJ merely stated Memic would benefit from vocational rehabilitation.

KRS 342.710 states as follows:

(1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . .

(3) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

In Haddock vs. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001), the Court noted, restoring a worker to "suitable employment" means "attempting to achieve a reasonable relationship between the worker's pre and post-injury earning capacity." In his opinion, award, and order, the ALJ found Memic, a 59-year-old, non-fluent English speaker who has performed only manual labor jobs since coming to America, cannot return to his pre-injury job and would have difficulty returning to any of his previous manual labor work. That finding is supported by substantial evidence and, therefore, the determination that Memic is entitled to a vocational rehabilitation evaluation will not be disturbed. Additional education or training might enable Memic to secure suitable employment in the future. This is precisely the purpose of the vocational evaluation. Moreover, no

final decision has been made regarding entitlement to rehabilitation benefits. Broadway has an opportunity to respond to the evaluation prior to the ultimate determination of whether an award of vocational rehabilitation benefits is deemed appropriate.

Accordingly, the May 21, 2018 Opinion, Award and Order, and the June 14, 2018 Order rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED IN PART, and REVERSED IN PART**. This claim is **REMANDED** for entry of an amended opinion in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, NOT SITTING.

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