

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 15, 2019

CLAIM NO. 201779664

TRACTOR SUPPLY COMPANY

PETITIONER/  
CROSS-RESPONDENT

VS.

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

ROBERT ROBERTS

RESPONDENT/  
CROSS-PETITIONER

and HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENT

**OPINION  
AFFIRMING  
ON APPEAL & CROSS-APPEAL**

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

**STIVERS, Member.** Tractor Supply Company (“Tractor Supply”) appeals and Robert Roberts (“Roberts”) cross-appeals from the June 17, 2019, Opinion, Order, and Award of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). The ALJ found Roberts sustained a neck and right shoulder injury as well as a psychological injury on April

27, 2017, while in the employ of Tractor Supply. Roberts was awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits. Tractor Supply also appeals from the July 16, 2019, Order overruling its petition for reconsideration.

On appeal, Tractor Supply challenges the ALJ’s decision on three grounds. First, it contends the ALJ’s decision is not based upon substantial evidence. Next, it argues the ALJ erred in finding the injuries merit impairment ratings. Finally, it argues the ALJ erred in enhancing Roberts’ benefits by the three multiplier.

On cross-appeal, Roberts argues the version of KRS 342.730(4) which became effective July 14, 2018, does not have retroactive application.

### **BACKGROUND**

The Form 101 alleges Roberts was injured on April 27, 2017, when he was “struck or injured by falling or flying object.” The April 16, 2019, Benefit Review Conference (“BRC”) Order & Memorandum reflects the parties stipulated Roberts sustained a work-related injury on April 27, 2017. The contested issues were: “benefits per KRS 342.730; work-relatedness/causation; average weekly wage; unpaid or contested medical expenses; exclusion for pre-existing disability/impairment; and TTD.” Hand-written under “Other,” is the following: “Proper AMA rating; applicability of HB2/duration of benefit.”

Roberts testified at a July 26, 2018, deposition and at the April 16, 2019, hearing. His deposition testimony reveals Roberts, born August 31, 1955, was 61 years old at the time of his injury. Roberts testified he previously injured his right shoulder resulting in rotator cuff surgery “quite a few years back” in Michigan. In the mid-

1990s, Roberts also underwent rotator cuff surgery to repair the rotator cuff in his left shoulder. Roberts denied undergoing neck treatment prior to April 27, 2017. Roberts testified he was hit by a roll of “heavier gauge wire” which fell off a pallet above him. No one witnessed this event. To his knowledge, the roll of wire struck his head and right shoulder and knocked him to the ground. After he reported the incident to his supervisor, he went to the bathroom and threw up. He then went with his supervisor and spoke by telephone with a company nurse and went home. Because he was in pain that night, he went to the Franklin Hospital emergency room. X-rays were performed and he was given pain medication.

Tractor Supply later sent him to Dr. Patterson in Franklin, Kentucky.<sup>1</sup> Dr. Patterson eventually referred him to Dr. Gregory Lanford for treatment of his neck and Dr. Chaitanya Malempati for treatment of his shoulder. When Roberts saw Dr. Lanford he ordered an MRI and directed him to physical therapy. Dr. Malempati injected the shoulder with Cortisone and recommended physical therapy. The insurance carrier refused the requests of Drs. Lanford and Malempati for Roberts to receive pain management treatment. He has received no medical care since the refusal. Roberts testified he has daily headaches and pain in the right side of his neck. He has weakness in his right arm and his right hand is swollen. When he picks up an item of any weight with his right hand, he experiences pain shooting from his arm into his right shoulder and neck. Within the last three months, the pain has extended into his back.

Roberts provided the following job description:

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<sup>1</sup> Dr. Patterson’s first name was not provided.

Q: Okay. And you were working at a job as a loader?

A: Yes.

Q: And what did that require you to do?

A: That required me to make sure all of the pallets was stacked correctly, all of the – anything that they had at Tractor Supply that was being shipped out and called for in a shipping order was supposed to be on a pallet and secured and then loaded. That's what I did.

Roberts described his limitations resulting from the physical injury.

Q: Okay. Now, since the injury, what have you not been able to do that you could have done beforehand?

A: Washed my hair by myself and – and take my dog for a walk or ride the motorcycle. That's gone. I mean it's just – I can't help clean up around the house. I mean I used to vacuum, clean up; and I was used to doing yard work, which I don't have to do anymore because we're in an apartment; but I – I liked – enjoyed doing that myself. I mean – but there's several things. Like I said, I can't use a can opener. I can't cook.

Roberts lifts with his left hand. He denied receiving treatment for depression prior to the subject work injury.

At the hearing, Roberts testified he worked at Tractor Supply's warehouse in the shipping and receiving department as a Hi-Lo driver. He is basically a lift or forklift driver requiring him to move pallets to load into tractors. Roberts has not worked since the date of the injury. He denied having problems with his right shoulder prior to the work injury. Similarly, he had no right shoulder restrictions and took no medication for a right shoulder condition prior to April 27, 2017. He also denied experiencing neck problems or headaches prior to the subject injury. Roberts was not taking any medication for anxiety or depression before April 27, 2017. He provided a more in depth description of how the injury occurred:

A: I set the pallets in front of the wrapper and backing the forklift up. I got off of it to wrap the pallets; and as the machine – I went to start it – a roll of wire fell from the top pallet and hit me on the right side of the head and my shoulder and knocked me backwards.

Roberts estimated the roll of wire which fell on him was approximately three or four feet high weighing in excess of 50 pounds. The roll fell from a height of ten to twelve feet. At the time of the hearing, he was seeing Dr. Monica Blair and Dr. Gardner in Franklin, Kentucky.<sup>2</sup> His wife's insurance covered this treatment. He testified "[Dr. Blair] got me the medication for the depression and the testosterone and the Cymbalta, and there's some others I can't remember."<sup>3</sup> He also takes Gabapentin. Dr. Gardner prescribed Tizanidine, a muscle relaxer, and recommended he see a psychologist. At the time of the hearing, Roberts was still experiencing daily headaches. He described his current symptoms.

A: ... It hurts through the side of my head over here on the right-hand side into my neck really bad and my right shoulder, and it goes all the way down to my fingertips. And it swells up sometimes, and then it goes back down. And that's about it.

Q: Are you right- or left-handed?

A: I'm right-handed.

Q: If you describe this pain that you have, are you having separate pain that's a headache and separate pain that's shoulder pain and separate pain that's arm pain, or how would you separate that?

A: I mean, I get the headaches and stuff, and it's – sometimes it's just like from if I move a certain way or something.

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<sup>2</sup> Dr. Gardner's first name was not provided.

<sup>3</sup> The record is unclear whether Dr. Blair is a physician, nurse practitioner, or physician's assistant.

And if I move my arm a certain way or try to go up too high with it, my shoulder hurts really bad, I mean, all the way through my back, my chest, and everything.

And my hands, I mean, when I'm picking something up, sometimes I catch a pain through there where I just – I mean, I can't hold what I have in my hand. I have to grab it real quick with the left hand or it will drop.

As Tractor Supply has not raised an issue regarding the ALJ's finding of a psychological injury and contends the finding of an impairment rating is premature, we will not discuss the medical evidence and Roberts' testimony concerning his psychological symptomology.

Roberts testified he is unable to paint or engage in woodwork. He is also unable to ride his motorcycle or walk the family dog. His restrictions prevent him from putting his right hand behind his head and he has problems extending his right arm out to the side and in front of him. He also has difficulty buttoning his shirt. Sitting or standing for prolonged periods of time cause him discomfort. He is unable to lift heavy items with his right arm. Roberts believes he is unable to return to his job at Tractor Supply as he does not believe he can do "the lifting and stuff, and I couldn't be standing on the forklift."

Roberts was unable to remember if Dr. Robert Byrd had asked him if he experienced prior shoulder problems.

In his June 17, 2019, decision, after summarizing the lay and medical evidence, the ALJ provided the following findings of fact and conclusions of law:

#### **Causation/Work-Relatedness**

As a threshold issue, the defendant employer disputes plaintiff suffered any work-related injuries to his neck, right shoulder or any psychological injury as a

result of the April 27, 2017 work incident. In support of its position, it relies on the opinions of its experts, Dr. Moskal and Dr. Trivette. Dr. Moskal did not believe plaintiff suffered any permanent injury to his shoulder or neck beyond a pre-existing shoulder condition for which plaintiff underwent surgery approximately 10 years ago. Defendant argues Dr. Trivette did not believe plaintiff suffered any compensable psychological injury. It also argues Dr. Byrd's opinions on causation do not constitute substantial evidence because he did not indicate in his report that he was aware plaintiff had previously undergone shoulder surgery. It also argues Dr. Byrd did not document sufficient objective evidence of any permanent shoulder or neck injuries. He therefore argues Dr. Moskal's opinions are most persuasive and that plaintiff's claim for any permanent benefits should be dismissed.

Having reviewed the evidence of record, the Administrative Law Judge is ultimately most persuaded by Dr. Byrd's opinions in this matter. Although he did not list in his report that he was aware plaintiff had undergone shoulder surgery previously or that he had reviewed treatment records from Dr. Lanford for Dr. Malempati, he testified in his deposition that, just because he did not list them did not mean he did not review them. Moreover, the ALJ is persuaded that, even if Dr. Byrd did not actually review these treatment records, if he had done so they would have further supported his opinions rather than contradicted them. For example, plaintiff presented to Dr. Malempati with right shoulder complaints in June, 2017, only about six weeks after the work injury. At that time, he was complaining of persistent right shoulder pain which he diagnosed as right acromioclavicular joint strain. After additional conservative treatment including physical therapy and injection, which provided no relief, he ordered an MRI, which showed a partial rotator cuff tear which remained his diagnosis as of February, 2018. However, by that point the carrier had denied any additional treatment based on the opinions of its evaluating physician, Dr. Moskal.

In addition, it is determined the fact that Dr. Byrd may not have been aware of plaintiff's prior shoulder history is not so significant in this instance as to render Dr. Byrd's opinions unpersuasive. Plaintiff testified his

previous surgery was approximately 10 years prior, and that he had no problems with his shoulder since that time. Nothing in the record refutes this and nothing refutes his testimony that he was working without problems or restrictions up until April 27, 2017, the date of his injury. Moreover, nothing in the record establishes plaintiff was having any right shoulder pain or had any other evidence of a partially torn rotator cuff immediately prior to April 27, 2017. These factors all leave the ALJ to conclude plaintiff suffered a new injury to his right shoulder and support Dr. Byrd's conclusions. Dr. Moskal's opinions to the contrary are simply not found credible in this instance. It is therefore determined plaintiff's right shoulder condition is causally related to the April 27, 2017 work incident is compensable.

With respect to plaintiff's alleged neck injury, the ALJ is again persuaded by Dr. Byrd's opinions. Again, nothing in the record indicates plaintiff was having any neck problems prior to April 27, 2017. Dr. Lanford's treatment records establish plaintiff immediately began reporting neck pain following the work incident. His diagnostic testing review concluded plaintiff had multilevel cervical degenerative disc disease which was dormant but brought into symptomatic reality by the work injury. Although Dr. Moskal maintains plaintiff had no evidence of any cervical injury to support Dr. Byrd's conclusions, the ALJ is persuaded by plaintiff's testimony that he has ongoing neck pain and stiffness and limited range of motion, consistent with Dr. Byrd's conclusions. Moreover, Dr. Byrd testified credibly that he observed both cervical muscle guarding and radicular complaints into the posterior shoulder. He explained that pain in the posterior shoulder is not normally associated with a rotator cuff pathology and, therefore, represented symptoms more attributable to the cervical injury. Based on Dr. Byrd's opinions and plaintiff's treatment records and credible testimony, it is determined plaintiff's cervical condition is work-related and compensable as well.

Finally, with respect to plaintiff's alleged psychological condition, the ALJ is more persuaded by Dr. Sprague's conclusions. His diagnosis of depression causally related to the effects of his work injury is consistent with plaintiff's testimony. Moreover, even the defendant's expert, Dr. Trivette, did not contradict Dr.

Sprague's findings. Rather, she also diagnosed depression and anxiety which could be improved with treatment. She did not specifically conclude plaintiff's psychological testing results, either hers or Dr. Sprague's, were invalid. Rather, she only indicated her testing included some indicators that plaintiff perhaps gave less than complete effort. Dr. Sprague did not make his test data available to Dr. Trivette for her review, so she could only point out that his report did not indicate he performed any validity testing. Given that both experts diagnosed some degree of depression and anxiety and that there is no evidence plaintiff had such problems prior to April 27, 2017, the ALJ is ultimately persuaded by Dr. Sprague's conclusions. It is therefore determined plaintiff's psychological condition is compensable as well.

After concluding Roberts was not permanently totally disabled, the ALJ awarded PPD benefits enhanced by the three multiplier reasoning as follows:

Instead, the ALJ is persuaded by Dr. Byrd's 20% combined whole person impairment rating. Again, his rating is simply found more consistent with plaintiff's current partially torn rotator cuff and cervical limited range of motion than Dr. Moskal's 1% impairment rating for pain with no real identifiable injury. In addition, it is determined plaintiff also has a 10% psychological impairment rating as assigned by Dr. Sprague. Again, Dr. Sprague's reading is consistent with his diagnosis and is supported by his test results and by plaintiff's presentation at the final hearing. It is therefore determined plaintiff has a total combined impairment rating of 30%.

Although the parties listed appropriate AMA rating as a contested issue, the ALJ is persuaded by Dr. Byrd's report and his deposition explanation that his examination findings supported his application of the AMA Guides to plaintiff's neck and shoulder injuries. He documented the significant diminished shoulder range of motion and cervical muscle guarding along with cervical diminished range of motion and radicular symptoms. For these reasons, it is determined Dr. Byrd's impairment rating is appropriate under the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

With respect to multipliers, the ALJ is persuaded from Dr. Byrd's opinion that plaintiff's shoulder

condition prevents him from lifting anything over 50 pounds occasionally or 10 pounds repetitively, which plaintiff testified being consistent with the full array of his job duties he held at the [sic] of his injury. As such, plaintiff is entitled to application of the 3x multiplier and KRS 342.730(1)(c)(1).

The ALJ also concluded Roberts did not have a prior active condition, was entitled to TTD benefits, and House Bill 2, effective July 14, 2018, applied to Roberts' claims. Thus, his PPD benefits ceased when he attained the age of 70. Roberts was awarded PPD benefits of \$376.29 per week commencing on the date of the injury for 425 weeks or until August 31, 2025.

Tractor Supply filed a petition for reconsideration arguing Roberts' PPD benefits should not exceed 99% of his TTD benefit rate and requesting a correction in the amount of PPD benefits awarded. Tractor Supply also requested further findings of fact as to why Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004) is inapplicable. In doing so, it asserted that Dr. Byrd did not receive a past medical history regarding Roberts' previous rotator cuff tears. It also contended Dr. Byrd did not review or remember receiving the medical records of Roberts' treating physicians. It requested additional findings as to why this lack of information was not germane and sought a recitation of the reasons for the ALJ's decision.

Tractor Supply also took issue with the following statement by the ALJ:

Having reviewed the evidence of record, the Administrative Law Judge is ultimately most persuaded by Dr. Byrd's opinions in this matter. Although he did not list in his report that he was aware plaintiff had undergone shoulder surgery previously or that he had reviewed treatment records from Dr. Lanford for Dr. Malempati, he testified in his deposition that, just because he did not list them did not mean he did not review them. Moreover, the ALJ is persuaded that, even if Dr. Byrd did not

actually review these treatment records, if he had done so they would have further supported his opinions rather than contradicted them.

Tractor Supply asserted this finding was inexplicable. It argued this language suggests the ALJ did not read the evidence but simply imagined the evidence relied upon. It represented that, the kindest interpretation is that the ALJ wrongfully inserted himself into the medical decision making process. It also requested additional findings regarding the ALJ's conclusion Dr. Byrd's findings and impairment rating were credible. Finally, it requested additional findings regarding the applicability of the three multiplier since Drs. Michael Moskal, Amy J. Trivette, and Byrd recommended Roberts return to work.

In response, the ALJ amended the award of PPD benefits as requested and terminated the PPD benefits when Roberts reached the age of 70. The ALJ overruled the remainder of the petition for reconsideration finding it to be a re-argument of the merits.

Tractor Supply first contends Dr. Byrd admitted he did not obtain a past medical history and could not remember if he received the treating physician's records. Consequently, pursuant to Cepero, Dr. Byrd's opinions cannot comprise substantial evidence. Since Dr. Byrd was not aware Roberts had prior rotator cuff surgeries and was not aware of the location of the work injury, Tractor Supply maintains the ALJ substituted his medical opinion which is insufficient and impermissible. It takes issue with the ALJ's statement:

Although he did not list in his report that he was aware plaintiff had undergone shoulder surgery previously or that he had reviewed treatment records from Dr. Lanford for Dr. Malempati, he testified in his deposition that, just

because he did not list them did not mean he did not review them.

It asserts the following testimony from Dr. Byrd contradicts the ALJ's statement:

Q: Well, let me ask you this: Did you have an opportunity to review any medical records of September 26, 2017, or the records of Dr. Lanford, for example, or Malempati?

A: I don't have the – I don't recall exactly what was brought to me for that examination or not. I don't know.

Q: Okay.

A: Because I didn't list it in my report, so I do not recall if those records were actually available.

Tractor Supply also takes issue with the ALJ's statement that, even if Dr. Byrd did not actually review the treatment records of Drs. Lanford and Malempati, the records would have further supported his opinions rather than contradicted them if he had indeed reviewed them. It maintains Dr. Byrd disagreed with the ALJ's "interpretation" citing to the following testimony:

Q: In that situation would that suggest that any problems that you observed him having at the time of your examination in June probably occurred after or would have probably had to have occurred after October 3 of 2017?

A: I would say if he was not having any shoulder pain and he had full range of motion that –

Q: No. He had shoulder pain, but he had a full range of motion, no atrophy, and no adhesive capsulitis.

A: Yes, that would affect my concerns about him having adhesive – reaching a diagnosis of adhesive capsulitis secondary to his original injury.

Tractor Supply further takes issue with the ALJ's finding that even though Dr. Byrd was unaware of Roberts' prior shoulder history, that lack of information is not so significant as to render Dr. Byrd's opinions unpersuasive. It observes Dr. Byrd found this omission to be significant citing to the following testimony:

Q: Now, when I read your report you don't have any record that he ever had any prior surgeries; is that correct?

A: Not on his neck or his shoulders, what I was focusing on.

Q: And I would imagine that you asked him if he had had any prior surgeries to his shoulder, didn't you?

A: Typically I would.

Q: Okay. So, if you don't have it listed here, it would look like that he perhaps purposefully left that information out of his past medical history; isn't that correct?

A: It's hard for me to say that. Maybe I didn't ask, but typically I would.

Q: Okay. I mean, that's – if you're looking at somebody's shoulder, whether or not they had a past injury or surgery to that shoulder, it's an important piece of information, isn't it?

A: Yes.

Q: And if you were not given that information by the plaintiff, then that's a red flag to you as a physician, isn't it?

A: I'm not sure why he wouldn't have give [sic] me that piece of information, but –

Q: That concerns you, though, doesn't it?

A: Yes, it's concerning, and it, quite frankly, is concerning that it was not part of my report.

Tractor Supply argues since Dr. Byrd thought this was an important omission, the ALJ's decision to the contrary is impermissible and an invasion of the physician's role.

Next, Tractor Supply argues the ALJ erred "in finding an impairment rating." It notes Roberts refused to allow Dr. Moskal to obtain range of motion measurements. In Tractor Supply's view, this is significant because Roberts' evinced a normal range of motion when seen by his treating physician weeks earlier. It argues Dr. Byrd's lack of confidence in his own findings is indicative of a second injury. As an after-thought, Tractor Supply puts forth the following argument regarding the psychological injury: "From a psychiatric standpoint, it appears that Mr. Roberts is not yet ready for a rating per Dr. Trivette. He is still on medication. A rating in this regard is not appropriate."

Finally, Tractor Supply contends there is no evidence supporting the finding Roberts is unable to do his regular job or any job which he has done in the past. Thus, enhancement by the three multiplier pursuant to KRS 342.730(1)(c)1 is error. Tractor Supply notes Drs. Moskal, Byrd, and Trivette recommended Roberts return to work. Further, the doctors did not impose restrictions prohibiting Roberts from performing his regular work.

Tractor Supply concludes with the assertion that when it is demonstrated the fact-finder may have held an erroneous understanding of the relevant evidence in reaching a decision, remand is authorized for further findings. It requests the decision be vacated and the claim remanded for further findings.

## ANALYSIS

Roberts, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Roberts was successful in that burden, the question on appeal is whether substantial evidence of record supports 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). 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 are unconvinced by Tractor Supply's first argument claiming substantial evidence does not support the ALJ's decision. The main thrust of Tractor Supply's argument is Dr. Byrd was not aware of the prior rotator cuff surgeries and was not sure if he had received the treating physician's records. Tractor Supply also relies upon Dr. Byrd's purported admission during his deposition that he was concerned Dr. Moskal and the treating physicians could not find evidence of Roberts' problems six months after the injury.

As an initial matter, the fact Dr. Byrd may not have been aware of the rotator cuff surgeries does not render his opinions less than substantial. Rather, such information goes to the weight to be assigned his opinions which is a question solely to be decided by the ALJ in his role as fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Moreover, the record establishes the prior injuries and resulting surgeries did not limit Roberts from performing his job duties and none

of the doctors assessed an impairment rating as a result of the prior injuries. Thus, we perceive no error in the ALJ's conclusion that Dr. Byrd's lack of knowledge of these rotator cuff injuries and surgeries is insignificant.

Secondly, Dr. Byrd's deposition testimony reveals he was provided the records of Drs. Lanford and Malempati as well as the records of Dr. Dennis Sprague, the psychologist, and may have reviewed them. His testimony is as follows:

Q: Okay. Let me represent to you it was not listed in your report the medical records that you reviewed, but I checked back with my office to check the cover letter that – when we asked you to do this evaluation, and it said that we had sent you the reports of the treating orthopedic surgeon, Dr. Malempati, also the reports of and records of Dr. Lanford, the treating neurosurgeon, also records from the medical center at Bowling Green, and further records of Dr. Dennis Sprague, who is a psychologist who did an evaluation for us, and would those typically be the types of records that you would need in order to do an informed and educated independent medical evaluation?

A: Yes. So, I guess I misspoke earlier. When I said maybe I did not have those records, I guess those records were available. I just did not list them in my report that I had reviewed those.

...

A: The MRI scan being specifically – excuse me. The physical therapy being specifically in Portland, Tennessee, and also the impairment rating provided by Dr. Sprague, those all suggest his records were available, but, again, I think when I spoke earlier it was based on the fact that I did not list the records that were reviewed.

Q: Okay. So, the records aren't listed, but that doesn't mean you didn't review them.

A: That is correct.

Dr. Byrd also addressed Tractor Supply's assertion that Dr. Moskal and the treating physicians could not find evidence of these conditions six months after the injury, testifying as follows:

Q: Okay. What about in terms of the shoulder?

A: I do have significant concerns that he had full range of motion of his shoulder six months after this injury and did not have it – and did have limitations on his – on his examination with me, and I do have concerns if six months after his injury if it was completely normal that I'm not sure how that could be attributed to his injury.

Q: Let me represent or ask you, then, was that based upon representations of counsel?

A: That was based on --- that was based on the information provided to me by him, yes, that he had full range of motion of his shoulder six months after an injury. I don't have those records. I did not have those – that rec – let me back up. I am not sure I had that particular record at the time of my examination.

After reviewing Dr. Moskal's findings, Dr. Byrd later in the deposition testified as follows:

Q: Doctor, may I show you, in fact, the part that talks about range of motion here in Dr. Moskal's report?

A: Okay. I'm looking at this. So, he has right shoulder flexion to 20 degrees at this examination, which is – I'm assuming you want me to compare the reports. Is that what you're trying to get me to do here?

Q: Yes, sir. If you're going to say he had normal range of motion six months after the injury, does that report actually say it's normal range of motion six months --

...

A: This report is actually more limited than my report.

Q: So, in other words, Doctor, do you stand by your opinions – well, how is it more limited? That might be a better question for the judge.

A: His ability to flex, have shoulder flexion, which is bringing the arm forward like – bringing the arm forward was 20 degrees for him, 40 degrees for me. He could not even hardly move his arm out to the side. He rated that at zero – excuse me. He rated that 30 degrees. I rated it at 40 degrees. So, just about every range of motion of his right shoulder was less.

His left shoulder examination and I were fairly consistent, but this – the right shoulder examination is much more limited than his left shoulder examination. So, based on this report that is available to me, I would make the same conclusions for his shoulder examination --

...

Q: So, in other words, you stand by your report.

A: Thank you. Those are – those would be the words I'm looking for. Yes, I would – based on the – these records I would stand by my opinion, yes.

Dr. Byrd's testimony demonstrates he possessed the treating physician's records, and Dr. Moskal's examination and range of motion measurements reveal more severe limitations of motion than when he examined Roberts. Thus, we find Tractor Supply's assertion that Dr. Byrd did not have the treating physician's records and Dr. Moskal did not find any evidence of the alleged conditions caused by the injury six months after the surgery to be meritless.

Dr. Byrd's June 14, 2018, report reflects he obtained a history of the present illness and conducted a physical examination. His assessment is as follows: "1) right shoulder injury, 2) probable rotator cuff tendinitis, 3) right shoulder adhesive capsulitis, 4) cervical pain, 5) cervical facet disease, and 6) cervical degenerative

disease.” Dr. Byrd found Roberts’ condition to be directly attributable to the April 27, 2017, injury. He assessed a 15% impairment rating for the shoulder injury and a 6% impairment rating for the cervical spine injury and provided the sections of the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) utilized in formulating the impairment ratings.

Tractor Supply’s assertion notwithstanding, Dr. Byrd’s report and testimony as set out herein qualifies as substantial evidence sufficient to support the ALJ’s conclusion that Roberts sustained a work-related shoulder and neck injury on April 27, 2017, and as a result has a 20% combined impairment rating as a result of the work injury.

After an examination of the record, this Board believes Cepero is inapplicable in the case *sub judice*. 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 akin to Cepero in the case *sub judice*.

Further, the ALJ provided sufficient findings of fact to apprise the parties and this Board of the basis for his decision. The fact-finder is not required to

set out the minute details of his reasoning in reaching his conclusion. Big Sandy Community Action Program & Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Simply put, the ALJ does not have to set forth detailed reasoning or his thought processes in weighing each piece of evidence.

Similarly, we find no merit in Tractor Supply's second argument asserting the ALJ erred in finding Roberts sustained an impairment rating for physical and psychological injuries. The ALJ was free to reject Dr. Moskal's interpretation of what the medical records he reviewed revealed. Significantly, Tractor Supply does not contend Dr. Byrd's findings upon examination, if accurate, do not substantiate the impairment ratings he assessed pursuant to the AMA Guides. That being the case, the opinions of Drs. Byrd and Moskal constitute conflicting opinions as to the impairment rating and the proper application of the AMA Guides. Where there are conflicting opinions from medical experts as to the appropriate rating, it is the ALJ's function as fact-finder to weigh the evidence and select the rating upon which permanent disability benefits will be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002). Although assigning a permanent impairment rating is a matter for medical experts, determining the weight and character of medical testimony and drawing reasonable inferences therefrom are matters for the ALJ. Knott County Nursing Home, Id.

Moreover, the ALJ enjoys the discretion to choose whom and what to believe. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001). A fact-finder does have the authority to consult the AMA Guides when determining the weight to be assigned

the evidence, though he is not necessarily compelled to do so. Caldwell Tanks v. Roark, 104 S.W.3d 752 (Ky. 2003). Here, the ALJ apparently concluded Dr. Byrd's impairment ratings were in concert with the AMA Guides.

We reject Tractor Supply's argument that Roberts is not yet ready for a rating for his psychological condition. The ALJ has the discretion to determine the medical evidence upon which he will rely. Dr. Sprague's report reflects the following diagnostic impression:

Axis I: Disruptive mood dysregulation disorder with anxiety and depressed features.

Generalized anxiety disorder

Mild cognitive disorder due to head trauma with behavioral disturbance.

Axis II: Deferred

Axis III: Medical sequelae as medically diagnosed.

Axis IV: Psychological stressors: Unemployment, physical health problems, emotional factors, present life circumstances.

Axis V: 50 highest global adaptive functioning past year.

Dr. Sprague assessed a 10% impairment rating. Significantly, Tractor Supply does not assert Dr. Sprague's opinion does not constitute substantial evidence. Rather, it urges Dr. Trivette's testimony should be given more weight. As previously noted, the ALJ determines the medical evidence upon which he will rely and we will not disturb his determination that Roberts has a psychological injury meriting a 10% impairment rating pursuant to the AMA Guides.

We reject Tractor Supply's final argument the ALJ erred in enhancing Roberts' benefits by the three multiplier. Although Dr. Byrd recommended a return to

work, he unequivocally opined Roberts “is not capable of maintaining his previous employment.” Moreover, Roberts’ testimony as recited herein establishes he is unable to return to the job he was performing at the time of the injury. When the issue is the claimant’s ability to labor and the application of the three multiplier, it is within the province of the ALJ to rely on the claimant’s self-assessment of his ability to perform his prior work. *See* Ira A. Watson Department Store v. Hamilton, *supra*; Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We have consistently held that it remains the ALJ’s province to rely on a claimant’s self-assessment of his ability to labor based on his physical condition. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The ALJ’s decision to apply the three multiplier pursuant to KRS 342.730(1)(c)1 is based on a determination that Roberts did not have the capacity to return to the type of work performed at the time of injury and is supported by substantial evidence in the record in the form of Dr. Byrd’s opinion and Roberts’ testimony. Therefore, it may not be set aside on appeal. Special Fund v. Francis, *supra*.

On cross-appeal, Roberts argues as follows: “[T]he provision of KRS 342.730(4) terminating benefits at age 70 does not have a retroactive application.” Roberts states since the issue has not been resolved by the Kentucky Supreme Court, he “wishes to preserve the applicability of House B2 to his claim.” In his reply brief, Roberts acknowledges Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019) addressed the retroactivity of House Bill 2, but “did not address the constitutionality of the HB2 version of KRS 342.730(4).”

In Holcim v. Swinford, *supra*, the Supreme Court held:

This Court has great respect for the language the General Assembly included in the official Kentucky Revised

Statutes. The General Assembly made a clear pronouncement regarding retroactivity in KRS 446.080(3): “[n]o statute shall be construed to be retroactive, unless expressly so declared.” With no mention of retroactivity or any language from which retroactivity may be inferred, the express language of KRS 342.730(4) does not make the statute retroactive. However, the Legislative Research Commission note following the statute references the Act from which the statute was enacted and, as discussed, is exempt from the codification requirements, as it is temporary in nature. Thus, the legislature has made a declaration concerning retroactivity in this case.

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

Id. at 44.

In light of the Supreme Court’s holding, we affirm that portion of the decision limiting the award of PPD benefits pursuant to the version of KRS 342.730(4) which became effective July 14, 2018. Finally, to the extent Roberts’ cross-appeal poses a constitutional challenge to the recently enacted KRS 342.730(4), as an administrative tribunal, this Board lacks jurisdiction to resolve this issue and must affirm. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945).

Accordingly, on appeal and cross-appeal the June 17, 2019, Opinion, Order and Award and the July 16, 2019, Order are **AFFIRMED**.

ALL CONCUR.

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