

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 1, 2021

CLAIM NO. 202000411

TRANE CO.

PETITIONER

VS.

APPEAL FROM HON. TONYA M. CLEMONS,  
ADMINISTRATIVE LAW JUDGE

BRANDON BARNETT  
and HON. TONYA M. CLEMONS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Trane Co. ("Trane") appeals from the May 13, 2021, Opinion, Order, and Award and the June 7, 2021, Order on Petition for Reconsideration of Hon. Tonya M. Clemons, Administrative Law Judge ("ALJ"). The ALJ awarded Brandon Barnett ("Barnett") temporary total disability ("TTD") benefits, permanent partial disability benefits, and medical benefits for work-related cumulative trauma

injuries to the cervical spine, lumbar spine, and knees. The ALJ dismissed Barnett's claim for cumulative trauma injuries to his shoulders for failing to prove work-relatedness. In Claim No. 2020-00412, the ALJ dismissed Barnett's occupational hearing loss claim for failing to prove work-relatedness.

On appeal, Trane asserts the ALJ erred by finding Barnett met his burden of proving he sustained work-related cumulative trauma injuries. Trane also asserts the ALJ committed an abuse of discretion by enhancing the award of income benefits pursuant to KRS 342.730(1)(c)1. Finally, Trane claims it was error for the ALJ to award TTD benefits.

### **BACKGROUND**

The Form 101 in Claim No. 2020-00411 alleges Barnett sustained work-related injuries to his neck, back, shoulders, and knees caused by cumulative trauma on October 25, 2019.

The Form 103 in Claim No. 2020-00412, filed March 23, 2020, alleges Barnett sustained work-related hearing loss on October 25, 2019, from "repetitive exposure to loud noise in the work place." By order dated May 6, 2020, Hon. Monica Rice-Smith, Administrative Law Judge, consolidated the claims.

Trane filed the May 7, 2020, deposition of Barnett. Barnett started working at Trane in 1996, and his first job was a "coil assembler." He worked in this position for four years, and his job duties consisted of the following:

A: Physically you had to maneuver coils up the line. You had to carry your tubes to – your copper tubes to your coil you was working on. You had to swing a hammer all day long and then move the coil to the next – upstream to the next station. That was pretty much the bulk of the job.

Q: Okay. About what was the heaviest thing you had to lift when you were in that position?

A: Well, that's hard to say because some of the units would get stuck on the line and we'd have to get help or try to move it myself, and some of these things weigh, you know, a thousand pounds.

Q: Okay. Was there a lot of overhead work with this position?

A: No, I wouldn't say overhead.

Q: Okay. And were you standing all day doing this position?

A: Yeah, you stand all day on the concrete.

Q: Did you have any type of mats that you were standing on?

A: No.

After leaving the coil assembler position, Barnett worked for five or six years in an area called the "small line, top and bottom cell." He described his job duties as follows:

A: It had several jobs and you started with – on one of the lines you pulled sheet metal out of these racks and loaded them on a – a cart, a rolling table. And after you load your – you know, your first we'll call it module, or your unit haul the metal off the racks onto it, then you would push that cart up to the line and then unload it and then go back and, you know do that two or three times until you got several units of sheet metal. And then you would run the – the shearer, which cut the metal to size. And then you're back and forth, picking up metal back and forth out of the front and the back, you know, because you cut it and – cut your metal. Okay. Then that would be your job for, like I say, day one.

And then day two you'd go the next station which you would run a machine called a strip-it and that's just a big

punching machine. It punches holes in the metal and then it will cut out the shape if you need it. And then you run that for the day.

Then on the following day you would run a – two brakes, which would form metal. So you had [sic] pick the metal up, put it in the brake, form it, put it on the line, push it around the lines to the fourth job, which would be insulation. You insulate it, fiberglass insulation. You cut it. You're constantly handling the panel back and forth so you get your measurements. And you put the insulation in the panel and then you push it down to the end of the line and somebody else takes it from there.

Q: Okay. When you were getting the metal sheets, about how much did they weigh?

A: The rack?

Q: Yeah.

A: It varied, because – you know, just depending what size it was. Some of them were small pieces, you know, a couple inches wide. Some of them were as big as, you know, 36 by 48 inches. Some of them were about – it's bigger than that, because some of them –

Q: Okay. How far would you have to push –

A: - yeah, some of them are – the cart?

Q: Yeah.

A: Twenty feet. About 20 feet. But you were constantly moving it – moving it from one side of the – you know, one side to the other to load. So you may get parts, you know, out of one rack on one side of the line, you know, get what you get, and then you've got to push it across the line to get more metal and then push it to the main line where you actually worked at.

Q: Okay. What would you say the most physically demanding part of this job was?

A: I would say handling that sheet metal. The racks, because some of the racks were, you know, above your head, you had to pull them out of there, or some of them were down on the ground level and you had to pull it, you know, try to slide them out and then try to pick them up pretty much off the ground.

Barnett then moved to the “CV department” for four years where he built custom products. He described the job tasks associated with this position:

A: We built air conditioning – air handling units from the ground up and they’re just custom built. Customer would give us dimensions what they – what they wanted and we built the unit from the floor up, you know.

Q: Okay. What was the most physically demanding –

A: A lot of heavy lifting. Handling the panels, handling what were called nested U-channels. And then of course you’re bending down on the ground, crawling sometimes. There’s just a lot of heavy – heavy parts you had to maneuver.

Q: Okay. Were you doing this lifting throughout the day? Did you ever have any breaks where you weren’t like lifting and moving parts?

A: Well, you, I mean, did it all day long, but you got, you know, three breaks out of the day, you got two tens and a 15-minute lunch break. But, yeah, it’s all day long, you know, you put one part on and then you have to go back and put the next part. It’s just, you know, nonstop.

Q: What is about the heaviest item you think you had to lift when you were in that position?

A: I would say probably the big panel, wall panels, trying to pick those up and maneuver them, you know, because you had to manipulate them to a certain area and then get the screws to line up. Some of those probably weighed 50, 60 pounds, maybe even more than that.

Barnett then transferred to the “foam cell” position which he held from 2010 through 2019. This was his last position at Trane. He recounted the job requirements:

A: In this particular cell, I had several different jobs. Mostly, I guess, you would get the metal out of a rack, it was formed metal. It was – and you’d pull it out of a rack, put it on the line. Put patches and stuff in it to cover any holes that were in the metal and keep the foam from coming out. And then you take it and load it up into a huge press, and then you would operate a machine that – that injected foam into this panel you just built. And then when it – after you got done injecting the foam and have to cure it for like ten minutes and then you would get the panel out and carry it to another rack, put it on another rack. That was one job.

And then another job, we had to work with what was called perforated panels. It’s a big panel with a bunch of holes in it. It’s for soundproofing features. And we had to take it out of a rack and strip off a – some kind of adhesive they had on it, some kind of plastic adhesive stuff. You had to peel that stuff off and then cut fiberglass insulation to whatever dimension it was and then load that onto another rack, pick it up and carry it to another rack and put it in there.

And then I built what was – after that – you know, I did that for a day or whatever and then the next day, or different job, I built what was called doors. And it’s the same principle, you take panels out of a rack, put it on the line, do the same thing, cover any holes with some kind of patching product. And then I had to pick it back up, put – after I built it and put it back in the rack it came from and then take that rack over to another area and then let this area take care of it. And this was, you know, a lot of pushing and pulling on this rack.

...

A: And then another job that I had there was building things called doorjambes and it’s, you know, you’re just feeding – getting fed one after another. We had to build

those. It's kind of the same principle, you just change the size of metal.

Q: Okay. What were the most physically demanding aspects of those jobs?

A: I would say having to pull a – pull the panels, which were pretty good size, out of the racks. I got – I got panels just piled into this metal rack, it's on wheels, and they're – they're vertical, you know, and they're formed metal. So I've got to – I've got to grab one, each one individually out of a vertical rack and lay it horizontally by myself and then do what I've got to do to it and then I've got to put it right back in the same rack I just got it out of. And then, you know, of course you've got to drag that rack – you know, I'm going to have to drag it to – push it, you know, a hundred feet to the next – to the next person, who's across – you know, across the way.

And then another aspect was picking these panels up and putting them in this foam press. That was a – that was a lot of work because you had to pick them up and – of course, you know, this press has got different shells in it, so you've got to put them in there and then you've got to take them back out, constantly handling them, then picking – picking them back up, putting them back in another rack when you got done. A lot of twisting and turning and pulling and tugging.

Q: Okay. How much do you think those panels weighed?

A: Oh, Lord, most – you know, the small ones weighed anywhere, you know, a couple pounds. The big ones, they probably weigh, you know, 30 pounds, 40 pounds.

Q: Okay. Did you have any difficulties doing this position?

A: Yeah, I mean, I'm constantly handling this metal all the time. You know, this is – it would load me down, I guess.

Q: Did you ever have any –

A: Constantly struggled – I'm sorry, say it again.

Q: Did you ever have any specific injuries in this position?

A: No, none that I reported.

Q: Okay.

A: I mean, I've had – I've had problems like – and I'll tell the – tell my supervisor, you know, is there any way we could – you know, especially these vertical racks that we had metal in, could we check – put in – in horizontal racks, it would be a lot easier to pull out? And they actually – I actually got one and then they took it away from me, said it took up too much space. They wanted to go back to the vertical racks.

And another problem that I had that I talked to my supervisor about is we had these – where I worked in the building doorjamb and stuff, we had these floor mats you stand on, rubber mats. But they were constantly tripping over them. And air lines, we had air lines to run our tools, you know, you're constantly getting tangled in them. It was pretty much told that's the best we could do, you know, just make do with that. And then –

Q: Did you –

A: - I had problems – I had problems – me and a couple other people had problems pulling this – whatever this film was that's on these perforated panels off, because there was just – you just couldn't peel them off. And sometimes they would get two or three layers on them and you're like, man, this – this stuff won't come off. And they were like, well, this is the process, this is the best we can do. Just, you know, try your best.

When his employment terminated, Barnett was not on any work restrictions. He was asked the following:

Q: Okay. And if the plant hadn't closed, would you have continued to work for Trane?



A: No, I was actually trying to find a way out. I just couldn't do this work no more. It's – it's breaking me down, which is why I went ahead and got my – a degree, I was trying to find another way to make a living.

At the time of his deposition, Barnett was experiencing pain at the back of his neck at the shoulder blades, shooting pain in his knees, and lower back pain which sometimes radiated into his legs. Barnett believed that constantly looking down at the conveyor lines caused his neck condition and working on concrete floors at Trane for twenty-four years caused his knee problems. He also believed going up and down steps and getting down on his hands and knees caused his pain. He experiences back pain when he tries to bend over, pick up something, or just walk.

Barnett also testified at the March 17, 2021, hearing. Barnett explained why he stopped working at Trane: “Not when I got laid off, no. It was like a volunteer layoff. There was work shortages and I got laid off.” He was under no work restrictions at the time he was laid off. He explained further:

A: Yeah, they gave me a severance because they were shutting down.

Q: What were your – at that time, you know, did you plan on continuing to work at Trane for the foreseeable future, or did you have any plans on leaving Trane? What was going on in your mind at that time?

A: No, I was actually looking for ways to actually leave Trane. I took all the punishment I could take there.

Q: What do you mean by that?

A: I was trying to find a different job in kind of the same field. I had been going to school and ended up getting a degree.

...

Q: Okay. All right. The \$15,000 I believe is what you testified that you received as a severance from Trane. Is that what is was?

A: It was something like that, yeah.

Q: That was because the Trane plant was leaving. You didn't – you weren't – I mean, you didn't have any choice. The Trane plant was moving to South Carolina, so you didn't have a job there anymore?

A: Yeah, they were shutting down, yeah. I didn't have a job.

He discussed why he can no longer work at Trane:

A: No. No, I don't – I can't do what I used to do on a continuous basis, no.

Q: What would prevent you from going back to Trane?

A: The pain in my back and my neck. And then of course my knees. I couldn't go back to doing what I was doing, pulling that metal around and the physical demand that that job required is – I don't have it in me anymore.

Barnett testified that he is unable to stand in one spot for very long.

Barnett filed Dr. Bruce Guberman's July 15, 2020, Form 107 Medical Report. After performing a medical records review and a physical examination, Dr. Guberman diagnosed the following:

1. Chronic posttraumatic strain and degenerative joint and disc disease of the lumbosacral spine due to cumulative trauma of work
2. Chronic posttraumatic strain and degenerative joint and disc disease of the cervical spine due to cumulative trauma of work
3. Chronic posttraumatic strain of both knees due to cumulative trauma of work.

Dr. Guberman opined Barnett's work at Trane caused his injuries. He also opined Barnett attained maximum medical improvement ("MMI") on July 15, 2020, and assessed separate 8% impairment ratings for Barnett's cervical spine and lumbar spine conditions utilizing Chapter 15, Tables 15-5 and 15-3, of the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment for a combined 15% impairment rating. Dr. Guberman opined Barnett is unable to return to the type of work he was performing at the time of his injury, and imposed the following restrictions:

In my opinion, he is unable to stand and/or walk combined for a total of more than 30 minutes at a time or more than 4 or 5 hours in an 8-hour day. In my opinion, he is unable to sit for more than 30 minutes at a time or more than 4 or 5 hours in an 8-hour day. In my opinion, he should avoid kneeling, crawling and squatting. Furthermore, in my opinion, he is unable to lift, carry, push or pull objects weighing more than 25 pounds occasionally or more than 5 pounds frequently. He is not able to climb up and down ladders or should avoid stairs and inclines.

Attached to the Form 101 is the March 2, 2020, report and Medical Questionnaire of Dr. Julie Ann Martin, Chiropractor. After obtaining a history and performing a physical examination, Dr. Martin diagnosed hand pain, knee pain, lumbar facet syndrome, cervical segmental dysfunction, thoracic segmental dysfunction, shoulder pain, lumbar segmental dysfunction, and cervical myofascitis. Responding to the Medical Questionnaire, Dr. Martin answered "yes" to the following questions:

1. Do you believe that his present medical issues to his [handwritten: "neck, back, shoulder, knees] is caused, either wholly or in part, by his job activities?

2. Do you believe that continuation in his job duties will continue to have adverse health consequences?

3. Do you believe that the job as performed by the patient at his most recent employment arouses into disabling reality the cumulative trauma which had been ongoing for a number of years?

4. Have all of your opinions been rendered within the realm of reasonable medical probability?

Trane filed Dr. Stacie Grossfeld's June 15, 2020, Independent Medical Examination report generated after performing a medical records review and a physical examination.

The March 17, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: "Work relatedness/causation," "Statute of limitations/statute of repose," "Permanent income benefits per KRS 342.730 and 342.7305; PTD," "TTD Benefits," "Ability to return to work," and "MMI." Under "Other contested issues" is the following: "1) Entitlement to medical expenses; 2) Injury, as defined by Act; 3) Manifestation Date."

The ALJ's findings of fact and conclusions of law are set forth, in relevant part, *verbatim*:

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B. Injury as Defined by Act and Work-relatedness/  
Causation

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The parties dispute whether Plaintiff suffered cumulative trauma as a result of his work activities. There is conflicting medical opinion in this matter as to the cause of Plaintiff's alleged cumulative trauma injuries. As the issue of causation is one left to the medical experts, the ALJ will look to the medical records, medical reports,

and/or medical testimony to decide the issue of whether Plaintiff suffered compensable cumulative trauma injuries.

There is no evidence that contradicts Plaintiff's testimony that he experiences symptoms in his neck, back, bilateral knees, and bilateral shoulders. The treatment records of Martin Chiropractic indicate Plaintiff complained of intermittent neck and upper back, right shoulder pain, right & left thenar eminence, low back pain, right knee pain, and left knee pain. His work with Defendant since 1996 was documented along with his job duties and prior workers' compensation injuries to his back and right shoulder. Diagnostic studies of Plaintiff's cervical, thoracic, and lumbar spine taken at the time of the exam showed osteoarthritic changes.

Dr. Martin ultimately diagnosed hand, knee, and shoulder pain; lumbar facet syndrome; cervical, thoracic, and lumbar segmental dysfunction; and cervical myofascitis. She related all medical conditions to Plaintiff's job activities. Further, she indicated that she believed Plaintiff most recent job aroused the cumulative trauma into a disabling reality.

Dr. Guberman, with respect to medical causation, stated that Plaintiff had a long history of low back and neck pain without specific injury or trauma with diagnostic studies that revealed degenerative change. He documented Mr. Barnett's complaints of pain and tenderness along with range-of-motion abnormalities in the cervical and lumbar spine at examination along with his bilateral knees that he attributed to cumulative trauma.

Moreover, he documented range-of-motion abnormalities and crepitation with tenderness of both knees on examination. Thus, based upon his examination, Dr. Guberman concluded that Plaintiff had more severe symptoms, range-of-motion abnormalities, interference with activities of daily living, and functional limitations associated with his cervical spine, lumbar spine, and bilateral knees than would be expected for a man of his age, which he attributed to cumulative trauma from Mr. Barnett's work.

Dr. Grossfeld found no cumulative trauma injuries due to Plaintiff's work with Defendant to his lumbar spine, cervical spine, or bilateral knees. She explained that Mr. Barnett had no physical signs consistent with a disc herniation, although he did have a history of disc protrusions at the L4 through S1 that had resolved. She also found he had a normal examination of the lumbar spine, cervical spine, and bilateral knees.

Thus, she found that Plaintiff had no harmful change. Dr. Grossfeld went on to explain that she could not explain Mr. Barnett's subjective complaints of pain as she stated she found no anatomical reasons to match his pain complaints.

Having reviewed all evidence in regard to causation with respect to Plaintiff's alleged cumulative trauma injuries to his cervical spine, lumbar spine, and bilateral knees, the ALJ finds the medical testimony of Dr. Guberman to be the most credible and persuasive. Dr. Guberman provides detailed documentation of his examination of Mr. Barnett and explanation of his findings with respect to the medical cause of Plaintiff's complaints. Accordingly, the ALJ relies upon Dr. Guberman's testimony in finding that Mr. Barnett sustained work-related cumulative trauma injuries to his cervical spine, lumbar spine, and bilateral knees with a manifestation date of October 25, 2019.

In regard to Plaintiff's allegation of cumulative trauma injuries to his bilateral shoulders, Dr. Martin attributed Plaintiff's bilateral shoulder condition to his work duties even though she documented a prior workers' compensation injury to the right shoulder. Dr. Guberman stated that Plaintiff reported right shoulder pain that appeared to have begun with an injury at work in 2003 or 2004 and not cumulative trauma.

Dr. Guberman also noted Plaintiff's mild and intermittent left shoulder complaints along with minimal range-of-motion abnormalities upon examination. Accordingly, he concluded that Mr. Barnett did not have cumulative trauma injuries to his bilateral shoulders.

Dr. Grossfeld also found that Plaintiff had a normal physical examination of his right and left shoulders with

only subjective complaints of pain. She went on to explain with respect to all alleged body parts, including the bilateral shoulders, that she could not find any anatomical reason to match Plaintiff's subjective pain complaints.

Based upon the facts and the evidence, this ALJ finds the medical the opinions of Dr. Guberman and, to a lesser degree, Dr. Grossfeld to be the most credible and persuasive with respect to Plaintiff's alleged cumulative trauma injuries to his bilateral shoulders. Consequently, the ALJ finds that Plaintiff has not met his burden to prove any work-related cumulative trauma injuries affecting his bilateral shoulders. Therefore, Plaintiff's claim for income and medical benefits for his alleged cumulative trauma injuries to this bilateral shoulders is dismissed.

C. Permanent income benefits per KRS 342.730; Permanent Total Disability; and Ability to return to work

Plaintiff has been found to have sustained compensable work-related cumulative trauma injuries to his cervical spine, lumbar spine, and bilateral knees. The ALJ must now determine what, if any, income benefits stem from the injuries.

As noted, Dr. Guberman diagnosed Plaintiff with chronic posttraumatic strain and degenerative joint disease of the lumbosacral spine and cervical spine as well as chronic posttraumatic strain of both knees, all due to cumulative trauma of work. Under the AMA Guides, 5th Edition, he went on to assess Plaintiff with 8% whole person impairment attributable to his cervical spine in the DRE Cervical Category II. Further, he placed Mr. Barnett in the DRE Lumbar Category II for cumulative trauma to his low back with an associated 8% whole person impairment.

Finally, with respect to Plaintiff's bilateral knees, Dr. Guberman explained that Plaintiff's range-of-motion abnormalities fell in the less than mild category under the Table for assessment in the Guides. Therefore, he found that Plaintiff would not receive any impairment from that table. Moreover, he stated that Mr. Barnett did not fall under any specific diagnostic category for his

bilateral knees. As a result, Dr. Guberman assessed 0% whole person impairment for Plaintiff's cumulative trauma injuries to his knees. Accordingly, under the Guide's Combined Values Chart, he assessed a combined 15% whole person impairment rating attributable to Plaintiff's work-related cumulative trauma injuries to his lumbar spine, cervical spine, and bilateral knees.

Dr. Grossfeld did not find that Plaintiff suffered any harmful change due to cumulative trauma injuries to any body part attributable to his work with Defendant. Thus, she went on to find that Plaintiff retained 0% whole person impairment rating related to any alleged body parts listed.

Plaintiff testified that with respect to his neck that he continues to experience daily sharp and dull pain. Further, he testified to daily sharp lower back pain that makes walking difficult due to sharp pain down his leg. He described the lower back pain as worse than his neck pain.

Having reviewed all the evidence on this issue, the ALJ finds the opinions of Dr. Guberman to be persuasive. Pursuant to Plaintiff's testimony, the more persistent symptoms stem from Plaintiff's cervical spine and lumbar spine. The symptoms described are more compatible and consistent with Dr. Guberman's assessment of combined whole person impairment. Accordingly, the ALJ finds that Plaintiff suffers from 15% whole person impairment for the combined effects of the work-related cervical and lumbar cumulative trauma injuries.

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As the ALJ has already determined that Plaintiff suffered work-related cumulative trauma injuries to his cervical spine, lumbar spine, and bilateral resulting in a 15% AMA impairment rating that translates to a 15.00% permanent disability rating, the only factors left to consider are whether Plaintiff is unable to perform any type of work and whether the disability is the result of the work injury.



In this matter, Plaintiff is a 45-year-old male, which is more than twenty years away from retirement age, with a high school education, and an Associate's Degree that he received in 2017. Plaintiff testified to employment prior to work with Defendant for a temporary agency. Moreover, he testified that prior to discontinuation of his employment with Defendant, he had been attempting to obtain a different job in the same field and had obtained his degree. Plaintiff also testified that he was not under any work restrictions at the time he was laid off work.

No physician or expert of record finds that Plaintiff is completely incapable of performing any type of work due to his work-related cumulative trauma injuries. Dr. Grossfeld found no permanent restrictions were required. Dr. Guberman opined that Plaintiff did not retain the physical capacity to return to the type of work he performed at the time of the injury. He does not state, however, that Plaintiff is unable to perform any type of work.

Having reviewed all the evidence, the ALJ finds that Plaintiff is not permanently and totally occupationally disabled due to his work-related cumulative trauma injuries. This finding is based upon opinions of Dr. Guberman and, to a lesser degree, the opinions of Dr. Grossfeld along with Plaintiff's testimony.

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The ALJ has found that Plaintiff suffered work-related cumulative trauma injuries resulting in an impairment rating and permanent disability rating. Thus, the next issue is what, if any, statutory multiplier is applicable under KRS 342.730(1)(c).

The multiplier analysis under KRS 342.730(1)(c) is a multi-step process. The first step is to determine whether the claimant has "the physical capacity to return to the type of work" he was performing at the time of the injury. The Act provides, "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the

amount otherwise determined under paragraph (b) of this subsection . . . .” See KRS 342.730(1)(c)1.

A workers’ post injury physical capacity and ability to perform the same type of work as at the time of injury are matters of fact to be determined by the ALJ. Ford Motor Company v. Forman, 142 S.W.3d 141, 144 (Ky. 2004). An ALJ may rely upon the claimant’s own testimony regarding capabilities and limitations in determining the extent of his disability as to whether or not an injured worker has the physical capacity to return to work. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

As applied to this matter, Plaintiff testified to the various jobs duties that he fulfilled over the course of his more than twenty years in Defendant’s employment. This evidence indicates that the various positions required standing and/or sitting for significant periods of time, climbing ladders and/or stairs, bending, stretching, pushing, pulling, lifting, and twisting. This type of work is beyond the physical restrictions recommended by Dr. Guberman as well as Plaintiff’s own credible testimony as to his post-injury physical abilities.

Thus, having reviewed all the evidence on this issue, the ALJ finds Plaintiff’s testimony as to his physical capabilities and limitations to be credible, persuasive, and consistent with Dr. Guberman’s recommended restrictions and opinions. Accordingly, the ALJ finds that Plaintiff does not retain the capacity to return to his pre-injury employment with Defendant. Consequently, Plaintiff qualifies for application of the three multiplier contained in KRS 342.730(1)(c)1. Thus, the award of PPD benefits is calculated as follows:

$\$799.35 \times 66 \frac{2}{3}\% \times 15\% \times 1.0 \times 3.0 = \$239.80$  per week.

#### D. TTD Benefits and MMI

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The parties stipulated that no TTD benefits were paid in connection with this matter. Plaintiff was placed at MMI as of July 15, 2020 by Dr. Guberman. Dr. Grossfeld found no permanent harmful change due to Plaintiff’s work and no MMI date appears to be

provided. Plaintiff testified that he was part of a layoff from Defendant as the plant was leaving the area. According to Dr. Grossfeld's report, however, Defendant's plant did not relocate to another state, so the factory was still up and running although Plaintiff was no longer working there. Plaintiff testified that he has not returned to employment since his layoff from work with Defendant on October 25, 2019 because of his symptomatology.

The ALJ finds that based upon the evidence, Plaintiff reached MMI on July 15, 2020. Thus, he met the statutory requirement of temporary total disability benefits from October 25, 2019 through July 15, 2020. Accordingly, he is entitled to TTD benefits for this period at a rate of \$532.90 per week.

Both parties filed Petitions for Reconsideration. Barnett asserted the ALJ erred by failing to award medical expenses for the injuries to the cervical spine, lumbar spine, and knees. Trane made the same arguments raised on appeal. The ALJ sustained Barnett's Petition for Reconsideration, overruled Trane's, and furnished the following additional findings:

With respect to the issue raised by Defendant regarding TTD benefits, the ALJ does not believe that Defendant points to patent error. The Opinion identified the statutory definition and applicable case law with respect to the definition of temporary total disability and entitlement to TTD benefits. The Opinion indicates that all of the evidence was fully considered in determining that Plaintiff was entitled to TTD benefits.

The Opinion reflects that Plaintiff was part of a voluntary layoff in anticipation of a facility shutdown. The evidence also reflects that Plaintiff testified at the Hearing that at the time of the layoff, he did not plan to continue to work for Defendant into the foreseeable future and was, in fact, looking for ways to leave employment with Defendant, was trying to find a different job in the same field, and had been going to school to obtain a degree.

The evidence also reflects that Plaintiff stated in his deposition that he had difficulties performing his job duties prior to the layoff because of the constant handling of metal all the time. Plaintiff went on to testify that on occasion he had asked his supervisor for accommodations such as changing of vertical racks to make the position easier and/or assistance with pulling of perforated film from panels. Plaintiff also testified at the Hearing that he sought medical treatment when the pain became so bad that he could not deal with it. Otherwise, he dealt with his back symptoms over the years by using remedies such as over-the-counter Tylenol.

Based upon the evidence, the ALJ declines to disturb the finding of the award of TTD benefits. Defendant's Petition is a re-argument of the merits on this issue. Accordingly, Defendant's Petition is **OVERRULED** on this issue.

In regard to second argument raised in Defendant's Petition with respect to application of the statutory three multiplier, the ALJ does not believe that Defendant identifies patent error. The Opinion identifies the statutory definitions and applicable case law with respect to the application of statutory multipliers.

Consistent with applicable law, the Opinion identifies the evidence relied upon in finding that Plaintiff does not retain the physical capacity to return to the type of work he was performing at the time of the injury. As indicated in the Opinion, Plaintiff testified to his various job duties with Defendant over his more than twenty year career in Defendant's employment as well as his current physical abilities. As further noted in the Opinion, Dr. Guberman assessed permanent restrictions that were outside the job duties of Plaintiff's pre-injury employment as described by Plaintiff.

The evidence including Plaintiff's credible and persuasive testimony which was most consistent with the detailed permanent restrictions assessed by Dr. Guberman led to the finding that Plaintiff does not retain the physical capacity to return to his pre-injury position. Defendant's Petition on this issue is a re-argument of the merits of the claim. Accordingly, Defendant's Petition is **OVERRULED** on this issue.

Finally, the ALJ does not believe that Defendant points to patent error with respect to the finding of causation in this matter. Again, the Opinion identified applicable statutory and/or case law on this issue. Further, the Opinion indicates that all of the evidence was fully considered in determining that Plaintiff met his burden of proof as to causation. The evidence including Dr. Martin's records and Dr. Guberman's opinions led to the finding of medical causation.

By way of clarification, the ALJ finds that Dr. Grossfeld did provide testimony through her report that she felt Plaintiff exhibited symptom magnification based upon her examination. Thus, there was evidence that contradicts Plaintiff's testimony as to symptoms in his neck, back, and bilateral knees. The ALJ finds, however, that the testimony of Dr. Guberman was detailed, credible, persuasive, and consistent with Plaintiff's testimony as to his symptoms. Therefore, the ALJ declines to disturb the finding that Plaintiff met his burden to prove that he suffered cumulative trauma injuries. Defendant's Petition on this issue is a re-argument of the merits of the claim. Accordingly, Defendant's Petition is OVERRULED.

With respect to Plaintiff's Petition that the Opinion, Award, and Order contains a patent error in that it identifies a work-related right wrist injury, the ALJ agrees that a patent error appears on the face of the Award and Order. Thus, Plaintiff's Petition is SUSTAINED on this issue. Accordingly, the Award and Order is clarified and corrected to reflect that the award of compensable medical expenses is associated with Plaintiff's compensable cumulative trauma injuries to his cervical spine, lumbar spine, and bilateral knees.

### **ANALYSIS**

Trane first asserts the ALJ erroneously relied upon the opinions of Drs. Guberman and Martin. Trane claims "Dr. Guberman's report offers little to no value in the causation analysis." Trane also maintains Dr. Martin's report fails to provide any analysis explaining how Barnett's job caused his injuries. Trane contends Dr. Grossfeld's opinions relating to causation are more persuasive and

requests the Board reverse the ALJ's finding of work-related cumulative trauma injuries. On this issue, we affirm.

As the claimant, Barnett bore the burden of proving each of the essential elements of his cause of action, including causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Barnett was successful in that burden, the question on appeal is whether there is substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

The ALJ relied upon Drs. Guberman and Martin in determining Barnett sustained work-related cumulative trauma injuries to the cervical spine, lumbar spine, and knees. Despite Trane's arguments to the contrary, the opinions of Drs. Guberman and Martin constitute substantial evidence upon which the ALJ can rely. Its primary objections with respect to both doctors' opinions concern the sufficiency of their causation analysis.

The July 15, 2020, report of Dr. Guberman detailed the results of his physical examination and his diagnoses. He opined that Barnett "has more severe symptoms, range of motion abnormalities, interference with activities of daily living, and functional limitations in regard to his cervical spine, lumbar spine and both knees than would be expected for a man of his age, and that is due to the cumulative trauma of his work." Further, Dr. Guberman answered "yes" to the following question: "Do you believe the work event as described to you is the cause of the

impairment found.” In her March 2, 2020, report, Dr. Martin provided the results of her physical examination and her diagnoses, and in the attached Medical Questionnaire she answered “yes” to the following question: “Do you believe that his present medical issues to his [handwritten “neck, back, shoulder, knees”] is caused, either wholly or in part, by his job activities?”

The fact Drs. Guberman and Martin did not provide a more detailed explanation concerning causation merely goes to the credibility of their opinions and not the admissibility of their opinions. Matters of credibility are to be decided exclusively by the ALJ. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ’s decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, *supra*. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

While Dr. Grossfeld expressed contrary opinions on causation, such opinions represented nothing more than conflicting evidence compelling no particular outcome. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Regarding the physicians upon whom the ALJ relied, the ALJ is vested with the authority to weigh the medical evidence, and if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Consequently, the Board may not second-guess the ALJ and the reasons she relied upon the opinions of certain physicians while rejecting the opinions of another. This discretion lies exclusively within the province of the ALJ and the Board will not invade her discretion.



Trane next asserts the ALJ erred by enhancing Barnett's benefits by the three multiplier pursuant to KRS 342.730(1)(c)(1). It contends the ALJ relied upon Dr. Guberman's restrictions in finding the three multiplier applicable; however, the record reveals Barnett stopped working at Trane only because the plant was closing and moving to South Carolina. As Trane asserts, "[t]here is no evidence that he was unable to physically do the job at the time he left."

KRS 342.730(1)(c)1 states as follows:

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

In Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), the Kentucky Supreme Court stated that, in making a determination regarding the applicability of KRS 342.730(1)(c)1, the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the time of injury" and "determine from the lay and medical evidence whether he retains the physical capacity to return to those jobs."

The ALJ relied upon Barnett's extensive deposition and hearing testimony regarding the types of tasks he performed during his tenure at Trane and determined that, pursuant to Dr. Guberman's opinions and restrictions, Barnett is unable to return to the type of work he performed at the time of his injury. Dr. Guberman opined Barnett is incapable of returning to his previous work at Trane and set forth several restrictions incompatible with performing Barnett's described

work tasks. Dr. Guberman restricted Barnett from lifting, carrying, pushing, or pulling objects weighing more than 25 pounds occasionally or more than five pounds frequently. However, Barnett testified that his pre-injury job at Trane required lifting of 30 to 40 pounds, and his penultimate position within Trane required lifting up to 50 and 60 pounds. Further, Dr. Guberman restricted Barnett from standing for more than thirty minutes at a time or more than four to five hours in an eight-hour day. Barnett testified his first job at Trane required him to stand a full shift on hard concrete. These restrictions compromise substantial evidence supporting enhancement of Barnett's income benefits.

At the hearing, Barnett testified that he could not return to work at Trane due to the pain in his back, neck, and knees, and within her discretion, the ALJ relied upon this testimony. 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 within the ALJ's province is the authority to rely on a claimant's self-assessment of his/her ability to labor based on his/her 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 in part on Parson's testimony that he did not have the capacity to return to the type of work performed at the time of injury. His testimony is sufficient to support the ALJ's decision; therefore, it may be not set aside on appeal. *Special Fund v. Francis, supra*. Consequently, medical evidence and lay

evidence support the ALJ's determination Parson did not possess the capacity to return to the work he performed at the time of the injury. On this issue, we affirm.

Finally, Trane argues the award of TTD benefits is erroneous because there is no evidence indicating Barnett stopped working or was unable to work because of his injuries. Trane asserts Dr. Guberman's opinion regarding Barnett's MMI status is erroneous, as the evidence in the record indicates there was never a time when Barnett was not at MMI. We vacate the award of TTD benefits and remand for additional findings.

Temporary total disability is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement permitting a return to employment[.]" In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court explained, "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits as long as he

or she is unable to perform the work performed at the time of the injury. The Court stated, "... we reiterate today, Wise does not 'stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.'" Id. at 254. In Trane Commercial Systems v. Tipton, supra, the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

We take this opportunity to further delineate our holding in *Livingood*, and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.*, 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise*, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not

attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

As noted in the March 17, 2021, BRC Order, Trane did not pay TTD benefits.

We conclude the ALJ did not provide an adequate analysis concerning entitlement to TTD benefits. Under the applicable statutory and case law, a complete analysis of Barnett's entitlement to TTD benefits entails a two-prong inquiry which includes an analysis of MMI and whether the claimant has reached a level of improvement permitting a return to employment as defined by all applicable statutory and case law including Trane and its predecessors.

In the May 13, 2021, Opinion, Order, and Award, the ALJ set forth minimal findings on the issue of Bartlett's entitlement to TTD benefits, emphasizing Dr. Guberman's opinion regarding MMI and the fact that Barnett has not returned to employment since he was laid off at Trane on October 25, 2019. While the ALJ furnished additional findings on the issue of entitlement to TTD benefits in the June 7, 2021, Order, her analysis focused exclusively on Barnett's ability to return to work at Trane. However, the ALJ failed to analyze, pursuant to Trane and its predecessors, whether Barnett is able to perform customary work. This is particularly important because, as acknowledged by the ALJ in the June 7, 2021, Order, Barnett "was trying to find a different job in the same field."

While this Board recognizes this is an unusual case involving a claimant who was laid off from his employment at Trane and has not yet had a “return to employment,” the ALJ must still make a determination as to whether Barnett is capable of returning to customary work before entering an award of TTD benefits. Stated differently, the ALJ cannot base an award of TTD benefits exclusively on an analysis of MMI. Her decision must encompass the second prong of the TTD analysis, specifically whether Barnett is capable of returning to customary work. On remand, the ALJ must carry out this analysis and enter an amended order and, if appropriate, an award of TTD benefits.

Accordingly, with respect to the ALJ’s determination of causation and the enhancement of income benefits by the three multiplier, the May 13, 2021, Opinion, Order, and Award and the June 7, 2021, Order are **AFFIRMED**. The ALJ’s award of TTD benefits is **VACATED** and the claim is **REMANDED** for additional findings and entry of an amended order, and, if appropriate, an award of TTD benefits.

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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