Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 24, 2025

CLAIM NO. 202400093

METALSA AUTOMOTIVE USA PETITIONER

VS. **APPEAL FROM HON. SAMUEL BACH, ADMINISTRATIVE LAW JUDGE**

JAMES R. JOHNSON
and HON. SAMUEL BACH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Metalsa Automotive USA ("Metalsa") appeals from the June 9, 2025, Opinion, Award, and Order and the July 1, 2025, Order on Petition for Reconsideration of Hon. Samuel Bach, Administrative Law Judge ("ALJ"). In the June 9, 2025, decision, the ALJ awarded James R. Johnson ("Johnson") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three-multiplier, and medical benefits for a work-related right knee

injury. The ALJ dismissed Johnson's claim for alleged work-related left knee, bilateral hip, and low back injuries.

On appeal, Metalsa asserts three arguments. First, it asserts entitlement to TTD benefits were not properly preserved as an issue for the ALJ to resolve. Next, it argues Dr. John Gilbert's 20% whole person impairment rating is not supported by substantial evidence. Finally, Metalsa argues enhancement of the PPD benefits by the three-multiplier is not supported by substantial evidence.

BACKGROUND

The Form 101 alleges Johnson sustained work-related cumulative trauma injuries to his "Back, Hips, Knees" on October 2, 2021, while in the employ of Metalsa in the maintenance department.

Johnson's October 18, 2024, deposition testimony reveals he began working in maintenance at Metalsa on February 20, 2012. He described a typical day at Metalsa before his injury:

> A: Well, usually go in and have to get on top – well, I'd probably have to get on top of a machine or go down in a pit, they call them, at least once in a day, you know, and that involved climbing up – straight up and down, what you call straight up and down ladders, you know, the ones that's got that little surround around, over them.
>
> Q: Okay.
>
> A: And then the pits, that's where the – part of the machines – about two, three stories of the machine is above ground and there's another story or two down below ground in what they called a pit. You have to go down this ladder to get down in there and it's a – oh, boy, it's a mess down there, oil and nasty, and that's where the scrap goes. When they cut them parts out, it

> punches holes out and stuff in the pieces and it goes down in that pit.
>
> Q: Okay.
>
> A: And there's conveyors down there and motors and pumps and all kinds of stuff you have to go down there and work on from time to time.

Johnson last worked at Metalsa on October 2, 2021. Johnson underwent three right knee surgeries after his last day of employment.

Johnson also testified at the April 17, 2025, hearing. When Johnson left his employment at Metalsa, he underwent right knee replacement surgery. He recounted his physical problems following each surgery:

> A: That first surgery, they replaced my right knee, and then about – I started doing the physical therapy. And then my kneecap kept falling off to the side. So I went back to see the doctor. And that was probably November when he done the third – second surgery to reattach a muscle that he said was causing that problem. Well, it went on for – I done physical therapy again. I had to wear a brace to keep my legs straight for six weeks, and then I started doing physical therapy, and I started having the same problem. So I went back to the doctor again. They started doing some different exercises and different physical therapy. None of it was working. And he finally decided he was just going to have to replace that joint again and re – with a different joint. And he done that in April.
>
> Q: So that one knee, you had three different surgeries?
>
> A: Three surgeries on it, yes.
>
> Q: Okay. Did that solve the problem?
>
> A: Yeah, so far, that seems to have solved the problem. I still have issues with, you know, a little pain and stuff with it, but it's better than it was, yes.

The last right knee surgery took place on April 11, 2022. At the time of the deposition, he had no restrictions concerning the use of his right knee.

Johnson believed he is unable return to his employment at Metalsa explaining: "No, I don't think I could do the job now. I don't think I could even pass the physical because I can't squat down and kneel and all that kind of stuff. My knees just won't let me. My back bothers me a whole lot. I don't think I could do it at all."

Johnson introduced the March 4, 2024, Form 107 Medical Report completed by Dr. Gilbert. After performing a physical examination and a medical records review, Dr. Gilbert diagnosed: "right total knee replacement, reproducible weakness on the left knee, bilateral hip reproducible weakness flexion extension, lumbar radiculopathy secondary to ten years as a maintenance mechanic." Dr. Gilbert attributed the above diagnoses to Johnson's employment at Metalsa and concluded he attained maximum medical improvement ("MMI") on March 4, 2024. He assessed a 46% whole person impairment rating pursuant to the 5TH Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Gilbert opined Johnson does not retain the physical capacity to return to the type of work performed at the time of injury, elucidating as follows: "His right knee replacement, left knee weakness and bilateral hip pain and weakness and lumbar radiculopathy preclude that type of work." He restricted Johnson to "sedentary light duty only."

Johnson also introduced Dr. Gilbert's December 12, 2024, Form 107, containing an updated impairment rating following Johnson's April 15, 2024, total

right hip replacement surgery and July 10, 2024, total left knee replacement surgery. Dr. Gilbert assessed a 36% whole person impairment rating pursuant to the AMA Guides, attributing the entirety to Johnson's employment at Metalsa. He placed Johnson at MMI as of the date of the updated Form 107- December 12, 2024. Dr. Gilbert's restrictions remained the same as set forth in the original Form 107.

Metalsa introduced Dr. Timothy Kriss' July 5, 2024, Independent Medical Examination ("IME") report. After performing a physical examination of Johnson and a medical records review, Dr. Kriss concluded none of Johnson's alleged cumulative injuries are work-related. Concerning the existence of a work-related impairment, he opined as follows:

> In the absence of any work-related injury, in the absence of any work-related permanent harmful change, there is no objective medical basis for assigning Mr. Johnson any work-related permanent impairment as a result of his job duties at Metalsa.

However, Dr. Kriss assigned a 15% impairment for the total right knee replacement surgery and a 15% impairment for the right hip replacement surgery. He concluded as follows:

> Utilizing the combined values chart on page 605, the above impairments of 15% and 15% combine to yield an overall whole person impairment of 28%. I would assign all 28% whole person impairment to non-traumatic, non-work-related factors such as Mr. Johnson's osteoarthritis, smoking, morbid obesity, and genetics. I would not assign any portion of this impairment to work activity.

After reviewing Dr. Gilbert's March 4, 2024, report, Dr. Kriss opined Dr. Gilbert's impairment ratings do not meet the AMA Guides' causation

methodology requirements as he failed to include a detailed analysis. He explained, in relevant part, as follows:

> In his March 4, 2024 report, Dr. Gilbert provides no detailed analysis of why the October 2, 2021 work incident is responsible for
>
> 20% right knee impairment
> 10% lumbar impairment
> 9% left hip impairment
> 9% right hip impairment
> 10% left knee impairment
> permanent restrictions of sedentary work only
>
> Indeed, Dr. Gilbert provides no supporting analysis whatsoever for any of the work-related diagnoses, work-related impairments or work-related restrictions he assigns to Mr. Johnson,
>
> much less the required "DETAILED" analysis.
>
> …

Dr. Kriss also opined Dr. Gilbert's methodology for calculating an impairment rating is incorrect because he failed to provide "scientific evidence for the work related causation of 5 different impairments in 5 different body regions in the same patient at the same time." (emphasis in original). He also opined Dr. Gilbert failed to provide a:

> 1) Comparison of the medical findings with the impairment criteria listed in the guides.
>
> 2) Discussion how specific findings relate to and compare with the Guides' criteria.
>
> 3) Explanation of each impairment value.

Consequently, he believed "none of the impairment assigned to Mr. Johnson by Dr. Gilbert is valid or consistent with Fifth Edition AMA Guidelines

based on the most basic, explicit methodological AMA requirements alone." He then provided the following "summary of inconsistencies with AMA Guidelines:"

> Dr. Gilbert did not provide an appropriate EXPLANATION OF MEDICAL BASIS for the five different organ system impairments and diagnoses he assigns to Mr. Johnson, as required by 5th Edition AMA Guidelines.
>
> Dr. Gilbert did not provide the necessary Fifth Edition AMA Guidelines mandated 'DETAILED ANALYSIS' to determine causation, diagnosis and impairment he assigns to Mr. Johnson.
>
> Dr. Gilbert cited no 'SCIENTIFIC MEDICAL EVIDENCE' mandated by Fifth Edition AMA Guidelines to support the five different organ impairments and diagnoses he assigns to Mr. Johnson.
>
> Dr. Gilbert did not perform the Fifth Edition AMA Guideline mandated minimum NEUROLOGICAL EXAMINATION of the patient required to determine any spinal impairment in any human (motor exam, sensory exam, deep tendon reflexes, atrophy, gait exam).
>
> Dr. Gilbert did not perform the necessary CLINICAL CONFIRMATION of any diagnosis of radiculopathy as mandated by Fifth Edition AMA Guidelines for any radiculopathy-based impairment (radicular muscle testing, radicular sensory testing, radicular tendon reflexes testing).
>
> Dr. Gilbert did not explicitly **compare** his medical findings in Mr. Johnson with the impairment criteria as required by Fifth Edition AMA Guidelines. (emphasis in original).
>
> Dr. Gilbert did not explicitly **discuss** how specific findings in Mr. Johnson relate to the impairment criteria as required by Fifth Edition AMA Guidelines. (emphasis in original).

> Dr. Gilbert did not **explain** each impairment value, as required by Fifth Edition AMA Guidelines. (emphasis in original).
>
> Dr. Gilbert recommended extremely limiting permanent restrictions (sedentary work only) for Mr. Johnson, but did not provide a proper explanation for those restrictions, as required by Fifth Edition AMA Guidelines. Simply restating a diagnosis which typically does not mandate permanent restrictions is not an explanation for severe permanent restrictions.
>
> Dr. Gilbert has assigned lumbar spinal impairment without performing the Fifth Edition AMA Guideline mandated minimum lower extremity neurological examination.
>
> Dr. Gilbert assigned knee and hip impairment to Mr. Johnson on the basis of decreased strength, but this loss of strength is based on a single examination on a single occasion by a single examiner, and therefore invalid according to Fifth Edition AMA Guidelines.

Dr. Kriss's March 5, 2024, Supplemental Report pertains only to Johnson's left knee condition following his left knee replacement surgery, which has no bearing on the issues raised on appeal.

Metalsa filed its March 28, 2024, Notice of Disclosure which lists the following contested issues: "work relatedness/causation; injury as defined by the Act; employment relationship; notice; statute of limitations; credit for unemployment, and short and long-term disability; correct assessment of AMA Guides; medical benefits; **TTD benefits**; benefits owed pursuant to KRS 342.730, if any."

On March 29, 2024, Johnson filed a Notice of Disclosure which listed the following contested issues: "PTD, PPD, Medical Benefits, and **TTD**."

The April 17, 2025, Benefit Review Conference ("BRC") Order and Memorandum sets forth the following contested issues: "permanent total disability; work-related injury/causation; injury as defined by the Act; notice; permanent income benefits per KRS 342.730, including multipliers; proper use of the AMA Guides; past and future medical benefits; and date of injury/manifestation."

In the June 9, 2025, Opinion, Award, and Order, the ALJ entered the following findings of fact and conclusions of law which are provided *verbatim*:

> …
>
> **1. Did Johnson sustain a work-related injury?**
>
> Johnson testified to the development of pain and symptoms involving the bilateral knees, right hip, and low back he believes to be the result of his employment activities. He explained his work as requiring frequent climbing of ladders – he described as being similar to a fire escape -- and other stairs to gain access to the pit area. During this process, he would carry equipment or other items to complete tasks. He further described the use of a tool bag weighing approximately 40 pounds.
>
> Most of his work involved very large machines which he would enter to service. He would be required to service sensors and gears within the machines which often required being on his knees. Or, he would be required to replace bearings, which would require he get into awkward positions.
>
> Johnson testified to surgeries and continuing problems with the right knee. He acknowledged the final total knee replacement has helped the symptoms but testified to continuing "pain and stuff with it". (Hearing Transcript, pp. 18-19). I found Johnson's testimony with respect to the physical activities performed and complaints he experienced to be credible.
>
> In support of his claim, he offered the medical reports of Dr. James Rushing, Dr. John Gilbert and medical records from various treating professionals and medical

facilities. Metalsa similarly submitted reports from its examining physician, Dr. Timothy Kriss, as well as from treating physicians and medical facilities. The filings from the parties overlap as to providers and dates of treatment.

Dr. Rushing evaluated Johnson on November 8, 2023. He endorsed Johnson's contentions regarding injuries to the knees, back, and hips, and stated these conditions were caused, in whole or in part, by his job activities. Attached to Dr. Rushing's report was a history and intake form. Johnson reported having undergone 2 right knee surgeries (in 2021 and 2022), but experiences pain in both knees, right hip, and lower back.

Dr. Gilbert evaluated Johnson on March 4, 2024, and noted Johnson's complaints of back pain with spasm, stiffness, tenderness, and lumbar radiculopathy in a dermatomal or myotomal fashion. He further noted bilateral knee problems, with continuing trouble squatting and arising. He noted grinding, popping, and weakness in the left knee and two right TKRs. Dr. Gilbert advised he would require right hip and left knee surgery due to his symptoms and complaints.

Dr. Gilbert noted Johnson's complaints and problems arose from his employment with Metalsa. His understanding was Johnson performed maintenance and repair on large stamping presses; was required to trouble shoot and replace parts; and perform continuing maintenance including oil, lube, testing, and repairs. These tasks required climbing on and under machines, entering into a pit area to perform maintenance, and climbing in and through machines to service and replace parts. Further he noted the problems associated with the conditions began during his last five years of work.

Dr. Gilbert noted since the cessation of his employment, Johnson has undergone a right knee replacement (October 6, 2021), right knee retinaculum repair (November 30, 2021), and a revision to the right total knee (April 11, 2022). He diagnosed Johnson as status-post right total knee replacement, reproducible left knee weakness, bilateral hip weakness on flexion/extension [footnote omitted], and lumbar

radiculopathy all secondary to 10 years as a maintenance mechanic. Again, he believed the work activities as described to him by Johnson to be the cause for the diagnoses offered and the ultimate impairment he determined.

The records of NP Parrish reflect treatment January 22, 2019. Johnson complained of knee and acute shoulder pain. On August 9, 2019. Johnson complained of knee pain for which she prescribed Mobic. These records also reflect treatment on November 26, 2019, following a non-work-related MVA and complaints of coccyx pain. X-rays of the lumbar spine performed that day revealed a normal sacrum and coccyx but degenerative disc disease at L4-5 and L5-S1.

The records of St. Thomas Hospital Midtown reflect treatment for complaints of right knee pain prior to the performance of a total knee replacement. Johnson reported years of bilateral knee pain, right greater than left. The records reflect a valgus deformity involving the left knee. The right knee replacement was performed October 6, 2021. Following the TKR and during PT, it was discovered Johnson experienced intermittent lateral displacement of the patella of the right knee. Therapy was discontinued and additional treatment was recommended. Johnson underwent additional surgery performed by Dr. Raab on November 20, 2021. Without relief and with treatment records reflecting continued patellar instability, Johnson ultimately underwent a revision of the TKR on April 11, 2022.

Records of Monroe Family Medical Center – Dr. Timothy Hume and Dr. William Witt – reflect treatment beginning in October 2022 for complaints of bilateral knee pain. Reference was made to diagnostic studies of both knees reflecting arthritis. He returned with complaints of low back pain on October 27, 2023. X-rays studies performed at the time revealed moderate to severe degenerative disc disease at L5-S1 and scoliosis. Johnson also made complaints of right hip pain and x-ray studies performed revealed degenerative changes of the right hip.

The medical records of Dr. Gregory Raab were submitted. These records document the performance of

3 surgeries of the right knee, culminating with a total right knee revision performed on April 11, 2022. As of July 8, 2022, Johnson was progressing and doing well. He was participating in a home exercise program but indicated a desire for increased motion of the knee. Johnson further stated his left knee had been problematic recently. As of the date of the evaluation, the left knee was feeling quite well with no significant issues. Moreover, Dr. Raab noted physical examination of the left knee was within normal limits as to stability, range of motion, and strength. Palpation of the left knee revealed no tenderness, no effusion and no crepitus.

Johnson was seen by Dr. Kirk Fee for continuing complaints of right hip pain. On April 15, 2024, a total right hip replacement was performed for complaints of right hip pain and evidence of degenerative arthritis.

Dr. Kriss evaluated Johnson on July 5, 2024. He identified no specific injury as causing his complaints, but that Johnson's symptoms arose very gradually and incrementally over many years. He diagnosed Johnson as experiencing osteoarthritis, which he further described as merely being arthritis of the joints. He attributed the onset of Johnson's arthritis primarily to his body habitus and obesity.

Dr. Kriss stated it would be impossible for Johnson's knee conditions to have resulted from employment activities. He cited to medical literature supporting this contention and further to a conclusion Johnson's knee conditions were the direct result of obesity.

Dr. Kriss further opined Johnson's hip conditions were not the result of his employment activities with Metalsa. Johnson's complaints of bilateral hip pain arose long after his employment activities with Metalsa ceased. He noted Johnson now voices no complaints of left hip pain.

Finally, Dr. Kriss opined Johnson's lumbar condition was not the result of his employment activities at Metalsa. In his review of pertinent medical records, he found no evidence suggesting Johnson communicated history of onset of symptoms resulting from his employment activities, and no evidence from any

treating physician related any such complaints to his employment.

In a supplemental report, Dr. Kriss addressed impairment to the left knee following a total knee replacement. He again noted his diagnoses of bilateral knee replacements performed due to polyarthritis in the knees. He explained the cause for the arthritis as Johnson's obesity and a 40-pack-year history of cigarette smoking.

I find Dr. Gilbert had an adequate and full understanding of the job and work activities performed by Johnson during his employment at Metalsa. I find his testimony credible as to Johnson's bilateral knee, right hip, and lower back being the result of his employment activities with Metalsa. Similarly, I find Dr. Kriss had an adequate and full understanding of the job and work activities performed by Johnson during his employment. His testimony was also credible as to the cause for Johnson's complaints.

While I have found the medical testimony presented by both parties to be credible, I am persuaded by Dr. Kriss' opinions regarding Johnson's hip complaints. While there is evidence suggesting degenerative changes in the hips during his employment, Dr. Kriss stated there is no medical evidence of an onset of complaints for the hip conditions until long after his employment with Metalsa ended. This finding was primarily the basis for his conclusion Johnson's hip conditions were not the result of his employment activities. I rely on the opinions of Dr. Kriss and find Johnson's bilateral hip conditions are not the result of his employment activities with Metalsa.

I further rely upon the opinions of Dr. Kriss to find Johnson's left knee condition is not work-related. He noted the condition of the left knee was related to Johnson's obesity and history of gout within the extremity. There is also evidence of the valgus deformity in the left knee. Given his examination and findings, Dr. Kriss testified it would be impossible to relate the knee conditions (and particularly the left knee) to Johnson's employment activities.

I further rely on the opinions of Dr. Kriss to find Johnson's low back condition is not work-related. He specifically noted two instances of acute back pain in 2009 and 2015 followed by treatment for osteoarthritis pain in 2020. He noted there were no instances of complaints of low back pain between these appointments. Dr. Kriss stated by medical definition a cumulative injury must accumulate and that while Johnson was working, there was no accumulation of low back pain. Therefore, he opined there was no cumulative trauma to the low back.

I rely upon Dr. Gilbert in finding Johnson's right knee is work-related. As Dr. Gilbert noted, there is evidence of degenerative changes within the left knee. He noted the arthritis in the right knee was severe. I infer that by stating the level of arthritis to be severe, Dr. Gilbert intended to state the arthritis is more severe than what he would expect to see in a person of Johnson's age.
I find Johnson sustained a work-related injury to the right knee due to his employment activities with Metalsa. I find he did not sustain injuries to the left knee, hips, and low back. The claims for benefits for injuries to the left knee, hips, and low back are dismissed.

2. What are the appropriate benefits under KRS 342.730?

a. Entitlement to TTD:

…

The issue of entitlement to TTD benefits was not expressly preserved in the BRC Order. However, the medical testimony universally establishes Johnson underwent a right TKR which I have found to be a compensable work injury. Further, the parties listed benefits under KRS 342.730 as a contested issue, and that statute addresses the extent and duration of a claimant's disability. I am required to make a finding as to when or if a claimant reached MMI as part of an analysis of the extent and duration of disability. I believe I have discretion under KRS 342.730 to decide if and when Johnson reached MMI.

Courts have liberally interpreted what constitutes reserving an issue under 803 KAR 25:010 §13(12). *See UPS, Inc. v. Stoudemire*, 251 S.W.3d 331 (Ky. App. 2008); *Sidney Coal Co. v. Shuffman*, 233 S.W.3d 710 (Ky. 2007). In *Stoudemire* it was held that the term "disability" as used in KRS 342.730 included both temporary total disability benefits and permanent partial disability benefits. Here, like in *Stoudemire*, the issue of benefits under KRS 342.730 was preserved as contested. Therefore, Johnson's entitlement to TTD benefits is properly before the ALJ.

Johnson testified he worked for Metalsa until October 2, 2021. Further, within a few days, he underwent surgery on his right knee. The evidence establishes he underwent a right TKR on October 6, 2021, a reticulum repair and washout on November 30, 2021, and a revision to the right total knee on April 11, 2022. He never returned to work.
Dr. Gilbert testified Johnson reached MMI on the date of his evaluation, March 4, 2024.

Dr. Kriss testified Johnson reached MMI for the right knee on July 8, 2022, which he noted to be 3 months following the revision of the right TKR.

I find Johnson was not at MMI and unable to work due to the right knee condition from the date of his cessation of employment until July 8, 2022. Based on the testimony of Dr. Kriss, I find Johnson reached MMI on July 8, 2022.

Johnson is entitled to a period of TTD benefits from October 3, 2021, through July 8, 2022. The parties stipulated to an average weekly wage of $1,706.02. The maximum TTD rate for a 2021 injury ($1,009.56) is applicable.

b. The appropriate impairment rating:

Having determined Johnson sustained work-related injury to his right knee resulting from his employment activities with Metalsa, I must determine the appropriate impairment rating, if any, attributable to this injury.

Johnson testified he worked until the performance of the initial right knee surgery. He then was off work for the initial and resulting surgeries and was not able to return to work thereafter. He testified to the multiple surgeries performed for the knee and to his continuing difficulties associated with the right knee. Johnson further testified to aching and other symptoms within the right knee resulting from performance of household chores or even walking through the grocery store.

Dr. Gilbert assessed impairment for the right knee. He noted Johnson received a good result from the TKR, with good range of motion and good stability, with no contracture or alignment issues relative to the arthrodesis. He assessed impairment for the right knee of 20% to the whole body, but did not delineate the manner in which the impairment rating was calculated. I infer his statements regarding the knee condition to refer to the category of impairments under the AMA Guides regarding performance of a total knee replacement. In such instances, the examining physician determines – on a point system – the category of recovery received following the performance of the TKR. Here, Dr. Gilbert has noted an impairment rating which would correspond with a "fair" result.

To the contrary, Dr. Kriss assessed impairment of 15% for the right knee, however, he found the condition and impairment were not the result of Johnson's work activities. While Dr. Kriss testified Johnson is asymptomatic with respect to his right knee, Johnson testified to continuing complaints of pain and related issues with respect to the right knee.

The impairment for the right knee condition is based upon a point system under the Guides, for which at least half of the points are assessed due to an assessment of continuing complaints of pain. I presume Dr. Gilbert found a reduced number of points, and therefore a higher impairment rating, due to Johnson's continuing complaints. Dr. Kriss noted Johnson is asymptomatic with respect to his right knee. This statement is not consistent with Johnson's testimony in this claim.

> Based upon the discretion afforded to me, I find Johnson retains impairment of 20% to the right knee based on the testimony of Dr. Gilbert.

After finding Johson is not permanently totally disabled, the ALJ provided the following concerning the entitlement to enhanced PPD benefits:

> **c. Total disability, multipliers, and the duration of benefits:**
>
> Johnson argues for a finding of permanent total disability.
>
> …
>
> Essentially in assessing entitlement to permanent total disability, the Kentucky Supreme Court laid out a five (5) step analysis in *City of Ashland v. Stumbo*, 461 S.W.3d 392 (KY 2015). The ALJ must determine:
>
> • if the claimant suffered a work related injury;
>
> • if the claimant has experienced a permanent impairment;
>
> • if the claimant has experienced a permanent disability rating; • whether the claimant is unable to perform any type of work;
>
> • and if the total disability is the result of the work injury
>
> In determining whether the claimant is unable to perform any type of work, the ALJ must state with specificity the factors that were utilized in making the determination. In so doing, the ALJ must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (KY 2000). Pursuant to *Osborne v. Johnson*, 432 S.W.2d 800 (KY 1968), the ALJ must evaluate the post-injury physical, emotional, intellectual, and vocational status when determining entitlement to PTD.

I have found Johnson sustained a work-related injury to his right knee. I have also found he retains 20% whole person impairment which equals 20% (20% x 1) disability rating. I must now determine whether Johnson can perform any type of work.

Dr. Gilbert stated Johnson would be restricted to sedentary light duty only, and further stated he would not be able to return to the type of work he performed at Metalsa. In contrast, Dr. Kriss did not believe Johnson would be restricted in his activities. I believe that while the restrictions assessed by Dr. Gilbert would be limiting, they would not preclude Johnson from returning to some kind of work. I have also considered his advanced age as he is now 70 years of age. However, he has a high school education and has attended college. Moreover, Dr. Kriss testified he could return to work without restrictions. I believe he would still be able to return to some type of employment. I find Johnson is not permanently totally disabled.

On the issue of multipliers, I find Johnson has not returned to work since October 2, 2021. Therefore, he is not entitled to benefits under KRS 342.370(1)(c)2.

I further find the restrictions of both Dr. Gilbert together with Johnson's testimony, credible. Dr. Gilbert specifically determined he would not be able to return to the type of work he performed at the time of the injury he sustained and should engage in light sedentary employment.

Finally, Johnson testified he did not believe he could return to work at Metalsa stating, "I don't think I could even pass the physical because I can't squat down and kneel and all that kind of stuff. My knees won't let me." (HT, p. 23). Since Johnson had previously testified to continuing complaints of pain and symptoms within the right knee, I believe his statement regarding his inability to return to work at Metalsa, while stated to be with respect to the knees, plural, would also be applicable to exclusively to the surgically corrected right knee. As the parties are aware, a claimant's own testimony as to his condition has some probative value and is appropriate for consideration by the ALJ. *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

> The assessed limitations would prevent Johnson from returning to the type of work he performed for Metalsa. Further, I believe his testimony indicates he does not believe he could return to work for Metalsa based upon his right knee condition. He is entitled to enhanced benefits under KRS 342.370(1)(c)1.
>
> Finally, I find the provisions of KRS 342.730(4) are applicable to this claim. At the time of his injury, Johnson was then 66 years of age, with a date of birth of April 8, 1955. Under the above referenced provision, any awarded income benefits shall terminate as of the date a claimant reaches age 70, or 4 years after the date of injury, whichever last occurs. He reached age 70 on April 8, 2025. 4 years from the date of injury is October 2, 2025. I find the income benefits awarded to Johnson shall terminate as of October 2, 2025.

Metalsa's Petition for Reconsideration set forth the same arguments it asserts on appeal.

The July 1, 2025, Order overruling the Petition for Reconsideration contains the following additional findings:

> …
>
> First Defendant contends it was patent error to award TTD benefits. It contends the issue of entitlement to TTD benefits was not specifically preserved as contested and therefore it had no opportunity to respond to the argument in its brief. However, not only was the issue presented by Plaintiff by way of its Notice of Disclosures filed in this claim, but the issue was litigated as seen by the evidence presented by the parties.
>
> As Defendant notes, the issue was preserved as "Permanent income benefits under KRS 342.730, including multipliers". I relied upon this document, the prior filings of evidence from the parties, and case law stating the preservation of benefits under KRS 342.730 is sufficient to apprise the parties and allows an award of TTD benefits. I again rely upon the Contested Issues, Plaintiff's Notice of Disclosures, and cited case law to support the award of TTD benefits in this claim.

Defendant further argues the failure to specifically address "Entitlement to TTD" prevented an argument on the issue. However, Defendant does not address how such a failure, even if against prevailing law, would have affected the outcome of the claim. Defendant cites to no evidence upon which it could have relied to avoid the finding of a compensable period of TTD benefits following the surgery performed on Johnson's right knee. In fact, I relied upon the evaluator retained by Defendant, Dr. Kriss, in determining the date of MMI. I state this not as some type of suggestion that the opinion of Dr. Kriss regarding MMI was somehow a "lesser of two evils" for the Defendant, but to point out the fact its own evaluating physician recognized Johnson was not at MMI for the right knee condition until July 8, 2022.

Defendant's second alleged error concerns the impairment rating for the right knee condition, and the finding Johnson's current knee condition is ratable at 20% to the body as a whole. Defendant argues the medical evidence establishes Johnson achieved a "good" result from surgery and thus the rating selected should have been 15% to the whole body. I acknowledge the AMA Guides provides for a rating of 15% to the whole body in instances of a "good" result and for a rating of 20% in instances of a "fair" result, and that Dr. Gilbert made a statement in his report regarding a good range of motion within the surgically corrected knee.

However, at no point did Dr. Gilbert indicate or suggest his use of the word "good" in describing either Johnson's symptoms or the results of various examinations was intended to refer to the type of result achieved through surgery for the purposes of assessing impairment. Simply stated, Dr. Gilbert's opinion was Johnson retained impairment of 20% for the result achieved. As I stated in the Opinion, Plaintiff credibly testified to continuing problems with the knee. He testified these problems prevented him from squatting and kneeling. Further he did not believe he could pass a physical examination due to his knees. Finally, he testified to three surgeries performed on the right knee, and that he continues to have some issues with the right knee. Even following the total knee revision, Plaintiff stated the right knee causes pain, "…and stuff like that…" He acknowledged the knee is now better than it

> was. However, he did not testify the right knee was asymptomatic. I rejected the impairment from Dr. Kriss, in part, because he suggested the right knee is now asymptomatic. I simply did not believe Johnson's right knee is now asymptomatic.
>
> And while Dr. Gilbert did not delineate the precise number of points he determined to support the assessment of 20% impairment, I note that, similarly, Dr. Kriss did not delineate the precise number of points he determined to support the assessment of 15% impairment. Regardless, I find there was ample evidence to support the opinions of Dr. Gilbert and the assessment of 20% impairment for the right knee condition.
>
> Similarly, as to Defendant's third argument regarding application of the 3.6 multiplier, I believe the collective testimony of Plaintiff and Dr. Gilbert supports the finding he is not able to return to work at Metalsa. In addition to the continuing problems with the right knee to which Plaintiff testified as referenced above, he testified he could not return to the job he performed due to problems with his knees. While he referenced "knees" in the plural, because he further testified to continuing pain in the right knee, I believe his testimony is equally attributable to the right knee condition. I find Plaintiff's testimony that he could not return to work at Metalsa or even pass a pre-employment examination because of his "knees" would be equally applicable solely to the right knee because he testified to continuing pain and problems with the right knee.

ANALYSIS

Metalsa first asserts entitlement to TTD benefits was not preserved as an issue to be decided by the ALJ, as it was not specifically delineated as an issue in the BRC Order nor did Johnson address entitlement to TTD benefits in his brief to the ALJ. Metalsa takes issue with the ALJ's reliance upon UPS, Inc. v. Stoudemire, 251 S.W.3d 331 (Ky. App. 2008) and Sidney Coal Co., Inc./Clean Energy Mining Company v. Huffman, 233 S.W.3d 710 (Ky. 2007). On this first issue, we affirm.

We acknowledge entitlement to TTD benefits is not expressly preserved as a contested issue on the BRC Order. We also acknowledge that the actual contested issue relied upon by the ALJ is "**permanent** income benefits per KRS 342.730, including multipliers" and not "benefits under KRS 342.730." However, as correctly noted by the ALJ in the July 1, 2025, Order on Petition for Reconsideration, the issue was presented in Johnson's March 29, 2024, Notice of Disclosures and fully litigated by the parties. Further, despite Metalsa's protestations, Sidney Coal Co., Inc./Clean Energy Mining Company v. Huffman, supra, and UPS, Inc. v. Stoudemire, supra, are on point, as they acknowledge the principle outlined in the June 9, 2025, Opinion, Award, and Order: i.e., courts liberally interpret what constitutes reserving a contested issue.

In Sidney Coal Co., Inc. v. Huffman, the Board remanded the claim to the ALJ for additional findings of fact and conclusions of law on impairment, TTD benefits, and medical expenses. Sidney Coal Co. appealed, asserting the issue of entitlement to TTD benefits was not made a contested issue, as the only contested issues were "extent and duration" and "overpayment of TTD." Consequently, as it argues, remand on the issue of entitlement to TTD benefits is inappropriate. The Court of Appeals affirmed the Board, and the Supreme Court of Kentucky, in affirming, held as follows:

> 803 KAR 25:01 OP, Section 13, requires the parties to prepare "a summary stipulation of all contested and uncontested issues" and states that "[o]nly contested issues shall be the subject of further proceedings." The employer notes that the parties listed the contested issues as being: "Extent and duration" and "Overpayment of TTD." It asserts that the claim should not be remanded for additional findings regarding TTD because the

> claimant failed to list his entitlement to TTD beyond what the employer paid voluntarily, i.e., underpayment of TTD. This argument ignores the Board's statement that it has interpreted the regulation consistently and has held that "questions regarding the appropriateness and duration of TTD are encompassed within the question of extent and duration." We are convinced that the Board's interpretation is reasonable. **Mindful that the courts give great deference to an administrative agency's interpretation of its own regulations, we find no error in that regard.** *See J.B. Blanton Co. v. Lowe*, 415 S.W.2d 376 (Ky.1967).

Id. at 713-714. (emphasis added).

In UPS, Inc. v. Stoudemire, supra, UPS maintained Stoudemire failed to properly preserve the issue of entitlement to TTD benefits, as it was neither raised at the hearing nor designated as a contested issue at the BRC. The Court of Appeals rejected this argument holding, in relevant part, as follows:

> Although the issue of additional TTD benefits was not raised at the initial benefit review conference, the extent and duration of disability was specifically designated as a contested issue in the parties' stipulations. **UPS's preservation argument ignores that the term "disability" as used in KRS 342.730, encompasses both temporary total disability benefits and permanent partial disability benefits.** Moreover, the Supreme Court of Kentucky has recently rejected the argument now poised by UPS.

Id. at 333. (emphasis added).

The Court cited Sidney Coal Co. in support of its conclusion.

In the case *sub judice*, as the ALJ correctly noted in the June 9, 2025, Opinion, Award, and Order, "[i]n *Stoudemire* it was held that the term 'disability' as used in KRS 342.730 included both temporary total disability benefits and permanent partial disability benefits." Even more important is the Supreme Court's

pronouncement in Sidney Coal Co. that "great deference" is given to an administrative agency's own regulations. Id. at 714.

The ALJ also relied upon the fact Johnson listed TTD as a contested issue in its March 29, 2024, Notice of Disclosure. "TTD" was also reiterated as a contested issue in Johnson's April 16, 2024, Amended Notice of Disclosure. Further, we note Metalsa, in its Notice of Disclosure dated March 20, 2024, listed "TTD benefits" as a contested issue. In further support of the award of TTD benefits, the ALJ, in both the June 9, 2025, Opinion, Award, and Order and the July 1, 2025, Order on Petition for Reconsideration, cited to the medical evidence revealing Johnson underwent a total right knee replacement on October 6, 2021, which the ALJ determined is a result of a compensable work injury. *Importantly, this issue was fully litigated by both parties.* In the July 1, 2025, Order, the ALJ delineates the futility of Metalsa's argument in light of Johnson's total right knee replacement surgery:

> **However, Defendant does not address how such a failure, even if against prevailing law, would have affected the outcome of the claim.** Defendant cites to no evidence upon which it could have relied to avoid the finding of a compensable period of TTD benefits following the surgery performed on Johnson's right knee. In fact, I relied upon the evaluator retained by Defendant, Dr. Kriss, in determining the date of MMI. I state this not as some type of suggestion that the opinion of Dr. Kriss regarding MMI was somehow a 'lesser of two evils' for the Defendant, but to point out the fact its own evaluating physician recognized Johnson was not at MMI for the right knee condition until July 8, 2022.

Moreover, the addition of the word "permanent" in the boilerplate language on the BRC Order – i.e., "permanent income benefits per KRS 342.730, including multipliers" – is a distinction without a difference and the ALJ's

interpretation of this language as including TTD benefits as an issue deserves deference. This is particularly true in light of the applicable case law and the fact that the compensability of Johnson's total right knee replacement surgery was fully litigated.

Metalsa next argues Dr. Gilbert failed to delineate the manner by which the 20% impairment rating for Johnson's right knee was calculated pursuant to Tables 17-33 and 17-35 of the AMA Guides. According to Metalsa, Johnson had an "excellent" result from the October 6, 2021, total right knee replacement surgery and, for that reason, is entitled to only a 15% impairment rating.

We initially take issue with Metalsa's characterization of Johnson's total right knee replacement surgery as bringing about an "excellent" result since the assertion is unsupported by the record. As correctly cited by the ALJ in both the June 9, 2025, Opinion, Award, and Order and the July 1, 2025, Order on Petition for Reconsideration, Johnson underwent two corrective surgeries after the total right knee replacement surgery. Further, Johnson testified he continued to experience right knee problems. In the July 1, 2025, Order, the ALJ noted Johnson "credibly testified to continuing problems with the knee. He testified these problems prevented him from squatting and kneeling. Further, he did not believe he could pass a physical examination due to his knees."

The ALJ acknowledged Dr. Gilbert's failure to detail the manner in which he calculated the 20% impairment rating. However, this fact went to the weight and credibility of Dr. Gilbert's opinions and not their admissibility. The ALJ, as fact-finder, has the sole authority to determine the weight of the evidence and

the credibility of testimony in the record. *See* Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). We recognize the extensive criticism of Dr. Gilbert's methodology set forth in Dr. Kriss's July 5, 2024, IME report, some of which has been set forth herein *verbatim*. However, the ALJ has the discretion to choose the medical opinions upon which he will rely. 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). Thus, we affirm.

Finally, Metalsa asserts Dr. Gilbert's opinions and Johnson's testimony cannot constitute substantial evidence supporting enhancement of his PPD benefits via the three-multiplier. In its view, Dr. Gilbert did not specifically address restrictions for the right knee and Johnson's hearing testimony was that he could not return to the same job at Metalsa because of his back condition. On this issue, we affirm.

KRS 342.730(1)(c)1, as well as relevant case law, requires the ALJ to analyze the actual tasks the employee performed prior to the injury and then assess the limitations and restrictions to their physical capacity which resulted from the work-related injury. Voith Industrial Services, Inc. v. Gray, 516 S.W.3d 817 (Ky. App. 2017). Miller v. Square D Co., supra, stands for the proposition that a worker who can no longer perform all his required job tasks lacks the ability to return to the "type of work" performed at the time of injury. Additionally, in Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), the Kentucky Supreme Court held, "[w]hen used in the context of an award that is based upon an objectively

determined functional impairment, 'the type of work that the employee performed at the time of injury' was most likely intended by the legislature to refer to the actual jobs that the individual performed."

Johnson's testimony regarding his ongoing knee symptoms and limitations is competent evidence to support enhancement by the three-multiplier. Transportation Cabinet of Highways v. Poe, 69 S.W.3d 60, 64 (Ky. 2002). As the ALJ referenced in both the June 9, 2025, Opinion, Award, and Order and the July 1, 2025, Order on Petition for Reconsideration, Johnson testified that his right knee still causes pain. Particularly persuasive to the ALJ is Johnson's hearing testimony, on page 23, in which he testified that he could not pass the Metalsa physical because his knees would not permit him, *not* just his back condition as urged by Metalsa.

Also persuasive to the ALJ is Dr. Gilbert's opinion contained in the March 4, 2024, Form 107, that Johnson is unable to return to his job at Metalsa. While we acknowledge there are conflicting medical opinions as to whether Johnson can return to his pre-injury job at Metalsa, the ALJ as fact-finder has wide discretion to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, this is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., supra. The decision as to whom and what to believe and the inferences to be drawn from the evidence is solely within the discretion of the ALJ when there is conflicting evidence. Dr. Gilbert's opinion, along with Johnson's testimony regarding his abilities and his belief that he cannot return

to his previous work, support the determination Johnson is entitled to application of the three-multiplier. Since the basis for this finding is adequately explained by the ALJ, we will not disturb the ALJ's finding on this issue.

Accordingly, on all issues raised on appeal, the June 9, 2025, Opinion, Award, and Order and the July 1, 2025, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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