

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: September 20, 2024

CLAIM NO. 201765703

TOYOTA MOTOR MANUFACTURING
KENTUCKY, INC.

PETITIONER

VS.

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

WILLIAM FELTS,
PETER HESTER, M.D.,
ANESTHESIA ASSOCIATES, PSC and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Toyota Motor Manufacturing Kentucky, Inc. (“TMMK”) appeals from the April 22, 2024 Opinion, Order and Award and the May 14, 2024 Order overruling its Petition for Reconsideration rendered by Hon. Grant s. Roark, Administrative Law Judge (“ALJ”). The ALJ resolved this re-opening for

consideration of the worsening of condition and medical dispute in William Felts' ("Felts") favor, finding his December 8, 2021 right shoulder surgery was reasonable and necessary. The ALJ awarded increased permanent partial disability ("PPD") benefits based on a 5% increased impairment rating enhanced by the three-multiplier contained in KRS 342.730(1)(c)1, as well as additional temporary total disability ("TTD") benefits from March 22, 2021 through August 2, 2021. The ALJ denied TMMK's Petition for Reconsideration regarding the award of additional TTD benefits. The ALJ granted the Petitions for Reconsideration filed by both parties requesting inclusion of certain specific language, which is not relevant to this appeal.

On appeal, TMMK argues the ALJ erred in awarding additional TTD benefits from March 22, 2021 through August 2, 2021, claiming there is no specific medical opinion stating Felts was *not* at maximum medical improvement ("MMI") during the contested period. TMMK also argues Felts was at MMI on March 22, 2021 as a matter of law since his motion to reopen based on a worsening of condition was sustained. Because we determine the ALJ provided an appropriate analysis explaining the basis for his decision, his determination is supported by substantial evidence, he correctly applied the law, and he properly exercised his discretion, we affirm.

This appeal involves Felts' March 22, 2021 Motion to Reopen and TMMK's subsequent November 12, 2021 Medical Dispute contesting an additional right shoulder surgery. The issues on appeal concern the ALJ's determination related to whether Felts had reached MMI in 2021, and his award of additional TTD benefits prior to the December 8, 2021 surgery. While there are numerous surgical

and other medical records related to Felts' multiple surgeries and continued treatment, this discussion is limited to only MMI, and a determination of the award of TTD benefits.

It is undisputed that Felts sustained a work-related right shoulder injury while working on a machine at TMMK on April 19, 2017. At the time of his injury, Felts had worked on the machine line at TMMK for 24 years. Felts underwent his first right shoulder surgery performed by Dr. Ben Kibler on September 20, 2017. Felts returned to work at TMMK in his same position. Dr. Kibler determined Felts reached MMI on May 1, 2018, for which he assessed a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Felts, *pro se*, and TMMK settled the claim on October 12, 2018, with TMMK paying TTD benefits and PPD benefits with no multipliers based on Dr. Kibler's 5% impairment rating. TMMK also agreed to pay past and future medical treatment.

In August 2019, Felts injured his right middle finger at work which required surgery. That condition resolved and is unrelated to this appeal. However, during the recovery period for that injury, Felts sought treatment with Dr. Kibler for his ongoing right shoulder pain. Dr. Kibler performed a second right shoulder surgery on March 18, 2020. Felts' symptoms continued worsening afterward, and Dr. Kibler subsequently retired. His associate, Dr. Peter Hester, assumed Felts' right shoulder treatment beginning in July 2020. Despite continued physical therapy, his right shoulder pain continued. Dr. Hester performed a third right shoulder surgery on October 7, 2020.

Felts filed a Motion to Reopen on March 22, 2021 based on “change of disability shown by objective medical evidence,” claiming his condition had worsened. Felts supported the reopening with the medical report of Dr. James Owen, who examined him on March 9, 2021. Dr. Owen noted Felts had undergone a recent evaluation on February 28, 2021 when he was placed at MMI with a diagnosis of right shoulder pain, rotator cuff syndrome, mild contracture, and voluntary, scapular hand coordination. Dr. Owen noted Felts was in obvious pain during his examination, especially when he moved his right shoulder. He opined Felts was at MMI and he assessed an 8% impairment rating pursuant to the AMA Guides, a 3% increase from the 5% reflected in the October 2018 settlement agreement. Dr. Owen placed additional restrictions on Felts preventing him from returning to full-duty work at TMMK.

Felts began work conditioning in July 2021 and he returned to work in August 2021 after being released by Dr. Hester with permanent lifting restrictions of 10 pounds, no overhead work, and no repetitive work activities. Felts underwent continued treatment, diagnostic examinations, and medical evaluations for continued right shoulder pain. Felts received conflicting medical opinions regarding his treatment options. He returned to Dr. Hester, who recommended a fourth “exploratory” AC Joint surgery, which was originally repaired by Dr. Kibler. This procedure was denied following utilization review (“UR”) and resulted in TMMK filing the November 2021 medical dispute. Despite this denial, Felts underwent the contested fourth shoulder surgery on December 8, 2021. Felts last worked on

December 7, 2021 and he accepted a retirement package through TMMK on March 17, 2022.

Felts testified by deposition on June 18, 2021 and at the final hearing held February 22, 2024. He was 56 years old at the time of the final hearing. He is married and resides with his wife and two adult children in Lexington, Kentucky. He is a high school graduate with no other specialized training or military experience. Felts began working at TMMK in 1993 on the “Paint 1” line, and he transferred to the “Powertrain” line in 1995, where he worked until December 7, 2021. Felts’ job on the Powertrain line involved performing tool changes in the machines and doing quality checks for the machine parts. The machine parts he handled weighed approximately eight pounds, and the tools themselves could weigh up to 20 pounds each. Tool changes were performed either at shoulder level or below.

Felts was performing a tool change on April 19, 2017 when he sustained an injury to his right shoulder as he reached into a machine to grab a pulley and rotated an interior part. When he squeezed his shoulders back together to exit the machine while bringing his arm down from the belt pulley, he felt acute severe pain in his right shoulder that persisted.

Felts recounted the chronology of his four right shoulder procedures. Following the first surgery in 2017, Felts completed physical therapy and work hardening. He returned to work at the same job, despite feeling soreness in his shoulder which flared up and worsened after he returned. In August 2019, he sustained a tendon injury to his right hand while working on a machine. He

underwent surgery for that injury, and he missed an additional period of work. When he returned to work following his hand surgery, “I tried to do the work hardening and my shoulder would just not allow me.” At the time of his deposition in June 2021, he had not returned to work and testified he had not sustained any additional injuries.

During that recovery process, he spoke with his workers’ compensation case worker about ongoing shoulder pain, and she approved him to see Dr. Kibler again. Dr. Kibler advised Felts he “still had some damage in there” and recommended a second surgery which initially was denied. When he was released to work following the hand surgery, he attempted work hardening that he was unable to complete after the first three days due to shoulder pain. He continued treating with Dr. Kibler and the second surgery was finally approved and performed on March 18, 2020. Felts explained he was having “severe pain in different positions” in his right shoulder. He described it as “in the joint, as I keep telling them. It feels like it’s trying to roll out when I raise my arm, and between my shoulder joint and my neck.... It’s popping and it feels like it’s trying to roll out of socket.”

Following the March 2020 surgery, Felts’ right shoulder pain “stayed about the same” but the popping worsened. Dr. Kibler retired and Dr. Hester took over his care. Dr. Hester requested an MRI which showed nothing objectively, so he recommended arthroscopy which was approved in October 2020. The procedure revealed the presence of scar tissue and “the anchor knots Dr. Kibler had used on my bicep muscle had not dissolved the way they were supposed to, so he cut the knots

off of it.” Unfortunately, this surgery did not relieve Felts’ symptoms, which remained “about the same.” He continued with physical therapy at Lexington Orthopedic Clinic, but he plateaued, and progress stalled. He stated his “range of motion still isn’t any good. It just hurts. It feels like a constant toothache.”

On April 13, 2021, Felts consulted with Dr. Scott Mair to obtain a second opinion at Dr. Hester’s suggestion and an updated MRI of his shoulder was obtained. Dr. Mair opined “there was nothing physically another surgery could repair” so Felts attempted physical therapy with UK Healthcare but was told there was nothing they could do for him without a working diagnosis. He only saw Dr. Mair for the initial evaluation, then followed up again with Dr. Hester who released him and assigned permanent restrictions. With respect to his shoulder, Felts testified he “just feel[s] like it never got better.” He takes no prescription medication for shoulder pain, only an occasional Tylenol. No ointments or rubs have been effective.

Felts returned to light-duty work at TMMK from August 2, 2021 until his December 8, 2021 surgery. He had “very little” improvement in his shoulder symptoms following the final surgery. He still experiences clicking. He saw Dr. Hester in October 2023 for an updated impairment rating but has not seen him since. Felts testified he cannot return to either the paint or powertrain jobs he previously performed due to his pain and stated he cannot perform any type of work with his shoulder condition. “There’s not a day goes by” without pain. He tried to perform some simple activities with his left hand around the house, and he is very limited in his ability to lift even a gallon of milk into the refrigerator with his right hand. He continues to get sharp pains and uses the heating pad constantly. He cannot put his

right hand on the steering wheel for long periods and he had to purchase a self-propelled lawn mower and electric weed eater to perform yard work.

Dr. Hester also testified by deposition on October 11, 2023. He is a surgeon specializing in orthopedic surgery, sports medicine, in particular shoulder and knee surgery. He noted Dr. Kibler had performed two prior surgeries on Felts' right shoulder. He initially planned to continue physical therapy, advance to work conditioning, and keep the work restrictions in place. He did not feel Felts was at MMI and noted Dr. Kibler's last treatment note dated May 22, 2020 indicated he was to continue working on mobilization and physical therapy with a goal to work toward overhead positioning with stretching and strengthening. Dr. Hester stated, "So as far as MMI at that juncture, I don't think that that was – as I inherited him, he was still not optimized."

Regarding his perceived success after the March 2020 surgery, Dr. Hester stated Felts still had pain specifically in the AC joint when he performed Hawkins and Speed's tests. He noted Felts still had significant complaints of pain on his August 25, 2020 office note with limited motion, weakness, and tenderness, so he ordered an MRI. At the September 15, 2020 visit, they discussed another arthroscopic intervention because Felts was not at MMI. Dr. Hester performed a third surgery on October 7, 2020, focusing on the glenohumeral joint and did not alter the AC joint during that procedure. Instead, he hoped cleaning out the permanent suture knots and the bursa inside the glenohumeral joint would help alleviate Felts' pain. He stated during the procedure "once we're arthroscopically inside the glenohumeral joint, we can't see the AC joint. Once we commit to

cleaning out the AC joint. . . one has to make a separate incision, and then you're committed to taking that down." On the November 17, 2020 follow-up visit, Felts still had clicking and popping sensations in his right shoulder. Dr. Hester testified it typically takes four to six months to recover from a shoulder surgery.

Dr. Hester noted Felts underwent an evaluation by Dr. Michael Moskal who declared him at MMI on February 23, 2021. Dr. Hester then referred Felts to Dr. Mair for a consultation. Dr. Mair did not recommend additional surgery. In June 2021, Dr. Hester modified Felts' restrictions from 25 pounds down to 10 pounds, indicating "he was not doing very well with the heavier load; right. And that's also you see there where we made it permanent restrictions."

At his October 4, 2021 follow-up, Felts was having more trouble, feeling a pinch in the right shoulder with heavy popping and very limited range of motion. Dr. Hester ordered an x-ray and Felts underwent an MRI on October 12, 2021. With Felts showing no improvement, Dr. Hester evaluated the AC joint. On physical exam, Felts pointedly experienced AC joint pain: "And that's when we started to localize and feel like it was the AC joint that had previously been repaired." Dr. Hester agreed the MRI indicated the glenohumeral ligaments appeared intact; however, he qualified that by stating, based on a static image the shoulder seemed stable, but "based upon a dynamic exam, no." In fact, when he performed the fourth surgery on December 8, 2021, Dr. Hester discovered an existing shoulder instability within the AC joint which did not appear on the MRI.

Dr. Hester indicated he never believed Felts was "imagining" the pain or clicking and stated it is difficult to identify what the true cause is. "Is it scapula

crepitance, is it AC joint, is it bursa, is it labrum.... All we can do is try and stabilize and identify each one of those things and give it our best effort.” Following Felts’ final appointment on March 2, 2023, Dr. Hester believed he had done everything he could to help Felts with the various images and procedures. He stated, “It’s difficult. The shoulder’s a tough joint, lot of mobility, and we do the best we can to try and make it right for him.” He expected Felts to be at MMI following the December 8, 2021 surgery on June 8, 2022, six months post-surgery. He recommended a continuation of the restrictions.

Felts filed Dr. Hester’s February 23, 2021 office note. Dr. Hester performed range of motion and motor testing, and he assessed an 11% impairment rating pursuant to the AMA Guides. Additionally, Felts tested positive on the right horizontal adduction test and the right “empty can” test. Under “Plan”, Dr. Hester stated *verbatim*, “he had an outside agency provide ime and was declared at mmi hence we have no choice but to follow that and deem him at mmi.” Dr. Hester assigned permanent work restrictions of modified duty, no at or above shoulder level work, and 25 pounds left/carry/push/pull.

TMMK introduced Dr. Mair’s April 13, 2021 office note. Dr. Mair noted Felts’ multiple shoulder surgeries as well as his report of never feeling better after any of his previous surgeries. Dr. Mair reviewed an MRI dated April 8, 2021 which demonstrated “postsurgical changes of the rotator cuff with no evidence of tear. Labrum appears intact with no signs of tear. Degenerative changes appreciated. Overall articular cartilage appears stable and intact.” Dr. Mair explained to Felts the MRI did not demonstrate any structural abnormalities

warranting any additional surgery, but he noted Felts' continued pain and loss of motion. He recommended follow-up with physical therapy for other non-operative treatment measures. Dr. Mair did not expressly provide an opinion regarding MMI.

Dr. Hester's June 1, 2021 note indicated Felts was at MMI, but he increased the restrictions. Dr. Hester's accompanying June 10, 2021 report reflects Felts' complaints of right shoulder pain, catching, and "rolling out" as well as Dr. Mair's opinions. Dr. Hester indicated the new restrictions were permanent and noted Felts tested positive on palpation for right "AC joint, biceps, greater tuberosity, pec minor, and upper trap" as well as the horizontal adduction, Hawkins, and Empty Can (anterior) tests. He noted Felts' prior September 20, 2017 right shoulder arthroscopy and labral repair of the rotator cuff and biceps tenodesis, March 18, 2020 AC joint debridement and repair, and October 7, 2020 diagnostic arthroscopy and removal of foreign suture material and subacromial bursectomy.

Dr. Moskal evaluated Felts multiple times at TMMK's request. On February 7, 2021, he noted Felts' report of right shoulder pain and diagnosed rotator cuff syndrome, mild contracture, and voluntary scapular incoordination. He recommended no further treatment. He noted Felts reported right shoulder pain with motions and manual muscle testing. Felts tested negative for nerve impingement sign and Hawkins test with no bilateral painful arc, coracohumeral impingement or subacromial/subdeltoid crepitus. He believed Felts was at MMI stating, "assuming Dr. Hester's findings documented were accurate" then "no further surgical or nonsurgical treatment... would make a meaningful clinical improvement."

Dr. Moskal performed a second evaluation on July 22, 2021 and issued a report dated August 1, 2021 indicating he had reviewed additional medical records. He noted Felts had reported “syncope (loss of consciousness)” and “multiple falls.” His report noted Felts stated he “had issues” when he was bent over and on two occasions “fell over, passed out, and described it in maybe seconds or milliseconds.” Dr. Moskal was unable to assign an impairment rating at this time but assessed no restrictions for Felts’ shoulder injury and indicated no additional medical treatment.

Dr. Moskal issued a third supplemental report on September 5, 2021 following review of Dr. Kibler’s operative records. He noted Felts’ impairment rating of 5% in October 2018 and opined it had not changed. He further opined none of the prior surgeries were related to the original work injury and, compatible with the MRI, Felts “does not have a loss of range of motion of the glenohumeral (shoulder joint) and lack of volitional (active) movement is not due to anatomy. Further, lack of full effort or full motor function is not due to anatomy.” Finally, he criticized the impairment ratings assessed by Drs. Hester and Owen, stating they did not conform to the AMA Guides. He again assessed no restrictions, and he recommended no additional medical treatment.

TMMK submitted x-ray reports of the right shoulder dated October 4, 2021 with findings of normal alignment and no evidence of fracture. The impression was mild degenerative changes in the right shoulder. TMMK also submitted the October 12, 2021 MRI report of the right shoulder without contrast which was compared to the MRI dated September 4, 2020. Views were taken of the rotator cuff, glenohumeral joint, and extra-articular joint. The MRI revealed a narrowing of

the subacromial space, but no discrete tear of the supraspinatus tendon; post bicipital tenodesis; a prior labral repair; increased signal along the posterior-inferior aspect of the glenoid labrum possibly representing postsurgical changes, not specifically evidencing a recurrent tear; and mild degenerative changes.

Dr. Hester's October 4, 2021 office note stated Felts could return to work on modified duty with restrictions of no pushing, pulling, or lifting over 10 pounds, and "no at or above shoulder level" work. The plan of care was listed as PT and MRI. Under MMI, it states "yes." Dr. Hester followed up with another return-to-work note dated October 12, 2021 indicating the same restrictions. However, it noted Felts was not at MMI and the plan of care was surgery. No projected MMI date was given.

Dr. Hester's request for surgery was denied following UR by Dr. Laura Bruse, based on the absence of appropriate diagnostic testing and objective evidence, stating surgeons "can usually determine correct diagnoses through physical examination and imaging studies alone," noting "diagnostic arthroscopy should be limited to situations where imaging is inconclusive and significant pain or functional limitation continues despite conservative care." Nonetheless, Dr. Hester performed the surgery on December 8, 2021. Dr. Hester's operative note indicated Felts' postoperative diagnoses included a right shoulder labral debridement, and a right shoulder acromioclavicular joint anterior-posterior instability, arthrosis. The note indicated "exam under anesthesia demonstrated an instability from front to back of the acromion around the clavicle that had yet to be appreciated to that degree." He performed a semi tendinosis allograft reconstruction with cadaver tissue.

Physical therapy records from therapist Robin Cromwell dated January 6, 2022 indicate Felts underwent right shoulder labral debridement and right AC joint reconstruction with cadaver tissue. It stated, “All the ligaments at the right AC joint demonstrated full-thickness rupture. In surgery no stability was appreciated at the right AC joint due to the disruption of the ligamentous structures.” The report indicated Felts was well-known to this therapist due to his previous shoulder surgeries.

A Benefit Review Conference was held September 7, 2021 listing the following contested issues: Permanent income benefits per KRS 342.730/multipliers; TTD benefits; Wages upon return to work; Unpaid or contested medical expenses. Under “Other contested issues” it listed “worsening on reopening.” The hearing was set for September 23, 2021. However, the ALJ entered an Order dated September 23, 2021 stating the matter was originally scheduled for a final hearing that day; however, Felts was “now experiencing additional shoulder complaints and has another medical appointment in October.” The ALJ cancelled the hearing and placed the claim in abeyance “pending plaintiff reaching MMI.” TMMK subsequently filed the Medical Dispute on November 12, 2021. The ALJ denied TMMK’s motion to remove the claim from abeyance on July 18, 2022, and the claim remained in abeyance until December 2033.

The ALJ issued the Opinion, Order and Award on April 14, 2024 finding Felts’ December 8, 2021 surgery was reasonable and necessary. He found Felts’ condition had worsened since the approval of the parties’ October 12, 2018 settlement agreement, finding a 5% increase in his impairment rating. He dismissed

Felts' claim for permanent total disability benefits, but he awarded the three-multiplier outlined in KRS 342.730(1)(c)1. He found Felts was entitled to additional TTD benefits from March 22, 2021 through August 2, 2021, but not from August 2, 2021 to December 8, 2021. The ALJ found Dr. Hester's opinions the most persuasive since he was Felts' treating surgeon and the one most familiar with his shoulder condition and the etiology of his complaints. The ALJ additionally found Dr. Hester's explanation that his examination findings justified the December 8, 2021 exploratory surgery leading him to find the instability which was not evident on the imaging studies was more persuasive than Dr. Moskal's opinions.

The ALJ found Felts was not at MMI and he was unable to return to his regular and customary employment until August 2, 2021. He was persuaded by Dr. Hester's testimony that Felts would not have reached MMI until approximately six months following his December 8, 2021 surgery. He denied Felts' claim for additional TTD benefits between August 2, 2021 and December 8, 2021 because Felts was performing *bona fide* light duty work during that time within his permanent restrictions.

In its Petition for Reconsideration specific to this appeal, TMMK requested additional findings of fact regarding the ALJ's award of TTD benefits from March 22, 2021 through August 2, 2021, asking the ALJ to point to a specific medical opinion he relied upon in finding that Felts was not at MMI during the contested period. TMMK argued when Felts filed his Motion to Reopen on March 22, 2021 it was for a change of disability as shown by objective medical evidence, not for additional TTD benefits. TMMK argued the caselaw is clear that a claimant who

is not at MMI cannot make the showing required in a motion to reopen that the change in impairment is permanent and exists at the time of filing, citing to Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008). TMMK further argued the uncontested evidence established Felts was at MMI as of March 22, 2021, which continued during 2021. It observed Dr. Hester opined he was at MMI as of June 1, 2021. Even as of October 4, 2021, Dr. Hester noted Felts' MMI date of February 23, 2021. TMMK argued if Felts was not at MMI as of March 22, 2021, then sustaining the motion to reopen was in error and no increased benefits should be awarded.

Felts responded, noting the parties entered into stipulations and TMMK filed no objection to Felts' motion to reopen. He argued the ALJ specifically noted Felts had not reached MMI after March 22, 2021, until his return to work on August 2, 2021. He submitted Dr. Hester initially believed Felts had reached MMI, but it was abundantly clear from a review of the medical records and Felts' testimony that his condition worsened to the point of needing additional surgery, thus indicating he could not be at MMI.

Felts stated, "the parties agreed that Mr. Felts had not reached MMI and the ALJ entered an order dated September 23, 2021 to hold the claim in abeyance based upon" that fact. There was conflicting evidence of record. Felts posited he was placed at MMI initially, but it was apparent soon thereafter he had not actually reached MMI as noted by the medical records from Dr. Hester, Dr. Mair, the MRI study, Dr. Hester's request for surgery, and the actual surgery performed. He argued the ALJ had the discretion to review all the evidence, not just that relied upon by TMMK.

The ALJ issued an Order on May 14, 2024 overruling TMMK's Petition for Reconsideration. He indicated his finding with respect to Felts' not being at MMI between the contested dates "was made based on a reasonable inference gleaned from the evidence as a whole." Although physicians initially placed Felts at MMI as early as February 2021, his testimony regarding continued complaints, requests for diagnostic studies and the October 2021 recommendation for a fourth surgery (which was performed in December 2021) "led the ALJ to infer that [Felts] was not actually at MMI at any point in 2021. This inference is supported by the totality of the record."

The ALJ further noted that while TMMK's position regarding Felts' motion to reopen for PPD precluding a claim was novel, it was "not actually supported by any legal authority and ultimately not persuasive." He found there is no legal authority indicating a motion to reopen for an increase in PPD benefits precludes a claim for TTD simply because one must be at MMI to be assigned a permanent rating, which is a prerequisite for a reopening for an increase in PPD benefits. Even assuming *arguendo*, it was true, it would not apply here since at the time Felts moved to reopen the claim in March 2021 medical experts (mistakenly) believed he was at MMI and as such it was a good faith action based upon current knowledge. It was only after the claim was reopened that Felts began receiving additional treatment which ultimately led to the contested shoulder surgery.

This appeal followed.

As the claimant in a workers' compensation proceeding, Felts bore the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576

S.W.2d 276 (Ky. App. 1979). Because Felts was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Where there is conflicting medical evidence, the question of which evidence to believe is the exclusive province of the ALJ. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977); Square D Co. v. Tipton, *supra*. Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal,

may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

TMMK asserts the ALJ erred in finding Felts was not at MMI during the contested period of March 22, 2021 to August 2, 2021. It submits the “uncontroverted medical opinion” states otherwise. We disagree and affirm.

TTD is statutorily defined in KRS 342.0011(11)(a) as “the condition of an employee who has not reached maximum medical improvement (“MMI”) from an injury and has not reached a level of improvement that would permit a return to employment[.]” In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he/she remains disabled from his/her customary work or the work he/she was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky 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, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so 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, 481 S.W.3d 800 (Ky. 2016), the Kentucky 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

The AMA Guides define MMI as follows:

A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however further recovery or deterioration is not anticipated.

p. 601.

The AMA Guides additionally states at p. 19, as follows:

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of the **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change.

In Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754 (Ky. 2001), the Supreme Court engaged in an extensive discussion of what constitutes objective medical findings defined in KRS 342.0011(33). There, the Supreme Court explained:

KRS 342.0011(33) limits “objective medical findings” to information gained by direct observation and testing applying objective or standardized methods. Thus, the plain language of KRS 342.0011(33) supports the view that a diagnosis is not an objective medical finding but rather that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. The fact that a particular diagnosis is made in the standard manner will not render it an “objective medical finding.” We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purposes of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33). Therefore, we must conclude that a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an “injury” for the purposes of Chapter 342.

In view of the evidence which was presented in this particular case, a question has arisen concerning whether a harmful change must be, or is capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Contrary to what some have asserted we are not persuaded that it must. Furthermore, at least to some extent, we view that question as being off the mark. Likewise, we are not persuaded that a harmful change must be both directly observed and apparent on testing in order to be compensable as an injury.

...

We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods

that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

Id. at 761-762. (Emphasis added).

This case presents a mix of conflicting medical and testimonial evidence regarding Felts' MMI status. Felts maintained throughout his treatment with Dr. Hester that he continued experiencing shoulder pain, popping, clicking, and other symptoms. While Felts' testimony regarding his symptoms does not qualify as objective evidence, Dr. Hester clearly opined in both his medical notes and his deposition testimony that, despite the absence of instability in the MRI images, Felts showed positive signs of pain and limited range of motion during his physical "dynamic exam" on multiple office visits. This was demonstrated during administration of the right horizontal adduction test, Hawkins test, and the empty can test, as well as during palpation of the AC joint, biceps and pectorals dating back to February 2021, despite the fact Dr. Moskal had already deemed Felts at MMI. Dr. Hester reiterated in his February 23, 2021 office note he "had no choice but to follow" Dr. Moskal's findings, further indicating he questioned whether Felts had reached MMI but he felt constrained to make such an indication on the medical record.

Dr. Hester's ongoing 2021 medical records indicate his physical exam findings, which suffice as objective evidence, did not change prior to the December 8, 2021 surgery. In June 2021, Dr. Hester increased Felts' work restrictions, further

reducing the amount of weight he could handle from 25 pounds to 10 pounds, which he made restrictions permanent. When Dr. Hester exhausted other conservative options/evaluations and determined it was in Felts' best interest to explore the AC joint, he changed the MMI status on his October 12, 2021 office note. While arguably the surgical recommendation alone is indicative of Felts' not being at MMI, it is certainly bolstered by the other objective evidence. Finally, the discovery of the instability in Felts' AC joint during the December 8, 2021 surgery confirmed he had not reached MMI as previously claimed by Dr. Moskal.

This Board has previously held determinations related to when a claimant attains MMI are solely within the purview of the ALJ. Martin County Coal Co v. Goble, 449 S.W.3d 362 (Ky. 2014). TMMK argues the ALJ is constrained by the “uncontroverted” MMI status indicated in the medical records in making his determination of MMI; however, we disagree. The office notes do not comprise the entirety of the evidence available for the ALJ’s review, and Dr. Hester’s testimony and dynamic physical examinations and observations of Felts provided substantial evidence supporting a finding that Felts was not at MMI from March 22, 2021 through August 2, 2021, the date he returned to light-duty work. TMMK’s argument is meritless as the ALJ may pick and choose from the evidence in determining an MMI date. An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party’s total proof. Jackson v. General Refractories Co., supra. Here, the MMI date was reasonably inferred from the treating physician’s testimony, notations upon physical

examinations, and the ultimate discovery of instability during the December 8, 2021 surgery, all of which constitute objective medical findings.

The above-cited factors constitute substantial evidence ultimately convincing the ALJ to find Felts had not reached MMI as originally assessed by Dr. Moskal, a determination that falls well within the ALJ's discretion. As the ALJ's reliance upon Dr. Hester's opinions is firmly supported by medical evidence, we affirm the ALJ's determination regarding when Felts reached MMI as well as the award of TTD benefits from March 22, 2021 through August 2, 2021.

With respect to TMMK's additional argument that Felts was at MMI on March 22, 2021 as a matter of law based on his motion to reopen being sustained, we are not persuaded. TMMK cites to Hall v. Hospitality Resources, Inc., supra to support this claim; however, we believe this reliance is misplaced. In Hall, a case addressing the statute of limitations in bringing a Motion to Reopen, the claimant was still receiving TTD benefits under an order granted after the original award and had not reached MMI when the statute of limitations ran to file her claim. The Supreme Court, in reversing the Court of Appeals, held the four-year statute of limitations must be calculated from the later date, as opposed to the date of the original award, where an order is subsequently entered granting or denying benefits. While the Supreme Court in Hall, supra stated that a claimant in a motion to reopen must prove she sustained a post-settlement worsening of impairment from the injury and that the change is permanent, the facts of this case are distinguishable in that Felts was initially - albeit mistakenly - declared to be at MMI whereas the claimant in Hall, supra was not. We disagree that Hall, supra stands for the proposition

championed by TMMK that Felts is somehow precluded from an award of TTD *because* it was ultimately proven he was not at MMI at the time of filing.

We agree with the ALJ's rationale that Felts' motion to reopen was made in good faith based on available information at the time of filing. The ALJ was free to consider the totality of the evidence presented during the pendency of the claim and to make reasonable inferences therefrom, including a mistaken MMI date. Additionally, the record clearly shows the ALJ entered an Order on September 23, 2021 placing the claim in abeyance, acknowledging Felts was not at MMI, to which TMMK did not object. The ALJ properly exercised his discretion in denying TMMK's argument, and we affirm.

Accordingly, the April 22, 2024 Opinion, Order and Award and May 14, 2024 Order on Petition for Reconsideration by Hon. Grant Roark, ALJ, are hereby **AFFIRMED**.

ALL CONCUR.

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