Circuit Court for St. Mary's County
Case No. C-18-CV-18-000376

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1304

September Term, 2019

B. W. HOVERMILL CO., INC., ET AL.

v.

STEVEN JAMESON

Reed,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Salmon, J.

Filed: October 29, 2020

On January 28, 2016, Steven Jameson, appellee, filed a workers' compensation claim against his employer, B. W. Hovermill Co., Inc. and its insurer, Builders Mutual Insurance Co., appellants (collectively "Hovermill"). Mr. Jameson asserted that he had injured his left shoulder on August 5, 2015 while working as a flooring installer for Hovermill. Mr. Jameson underwent two shoulder surgeries and received temporary total disability compensation for over a year. On April 9, 2018, he filed Issues with the Workers' Compensation Commission ("the Commission") seeking a determination of the nature and extent of his permanent disability because of his shoulder injury, coupled with pre-existing impairments, some of which had worsened after the accident.

On July 2, 2018, the Commission held a hearing at which Mr. Jameson, Hovermill and the Subsequent Injury Fund ("the Fund") participated.[1] On August 14, 2018, the Commission issued an award of compensation[2] finding that Mr. Jameson was permanently totally disabled under "Other Cases," Md. Code Ann., Lab. & Empl. ("LE") § 9-627(k) (1991, 2016 Repl. Vol.), *i.e.*, not involving a statutorily set disability based on the loss of a particular part of the body, because of the combination of his workplace

[1] The Fund is not a party to this appeal.

[2] The Commission initially issued an award of compensation on July 30, 2018, which it subsequently amended by the later award of compensation.

injury (30%), pre-existing conditions (58%), and subsequent worsening of pre-existing conditions (12%); and ordering Hovermill and the Fund to pay benefits.[3]

Mr. Jameson sought *de novo* judicial review of that decision in the Circuit Court for St. Mary's County and asked for a jury trial. Following a two-day trial, the jury returned a verdict affirming in part and reversing in part the decision of the Commission. It affirmed the Commission's decision that Mr. Jameson was permanently totally disabled and that his disability was caused by a combination of his work-related injury, pre-existing conditions, and worsening of those conditions. The jury apportioned the disability as follows: 50% due to his workplace injury; 75% due to unrelated pre-existing conditions; and 25% due to worsening of those unrelated pre-existing conditions after the accidental workplace injury. Hovermill's motion for judgment notwithstanding the verdict ("JNOV") or for a new trial was denied.

[3] Hovermill was ordered to pay $335 per week for 150 weeks. *See* Md. Code Ann., Lab. & Empl. ("LE") § 9-627(k)(2)(3) (1991, 2016 Repl. Vol.) (the Commission shall award compensation under "Other Cases" "in the proportion that the determined loss bears to 500 weeks"); LE § 9-629 (if an employee is awarded compensation for between 75 weeks and 249 weeks, "the employer or its insurer shall pay the covered employee weekly compensation that equals two-thirds of the average weekly wage of the covered employee but does not exceed one-third of the State average weekly wage"). Mr. Jameson's average weekly wage was $1,591.72, which was more than the State average weekly wage in 2015 of $1,005. Thus, Hovermill was liable for one-third of the State wage, which equaled $335 per week. The Fund was ordered to pay $1,005 weekly until it had paid $70,510.

Hovermill appeals asking three questions,[4] which we have condensed and rephrased as two:

> I. Did Mr. Jameson adduce legally sufficient evidence to generate a jury question on the issue of permanent total disability?
>
> II. Was the jury's finding that Mr. Jameson is 150% permanently totally disabled supported by legally sufficient evidence?

We answer both questions in the affirmative and affirm the circuit court judgment.

FACTS AND PROCEEDINGS

On August 5, 2015, Mr. Jameson, then age 52, was working as a floor installer for Hovermill. As he lifted a bucket filled with cement and weighing about 70 pounds, he felt a pop in his left shoulder. He began experiencing pain in his shoulder, which worsened overnight. The next day, he went to St. Mary's Hospital, where he was seen in the emergency department and treated for pain. Mr. Jameson was referred to Lucas Wymore, M.D., an orthopedic surgeon, for follow up. Dr. Wymore diagnosed him with a superior labrum tear, a biceps tear, a rotator cuff tear, and subacromial impingement.

[4] The questions as posed by Hovermill are:

> 1. Whether the circuit court's denial of the appellants' motion for judgment at the close of appellee's case and the close of evidence was in error[?]
>
> 2. Whether the circuit court erred in providing a jury instruction pertaining to permanent total disability, over the objection of counsel for appellants[?]
>
> 3. Was the jury's verdict finding permanent total disability greater than one hundred percent excessive and unsupported by legally sufficient evidence[?]

After physical therapy proved unsuccessful to resolve Mr. Jameson's pain, Dr. Wymore operated on Mr. Jameson's shoulder on December 22, 2015, arthroscopically debriding and decompressing the tissue around the shoulder joint and performing open surgery on a tendon attached to his biceps muscle.

The surgery "helped" but Mr. Jameson still had pain and his shoulder would "catch and then it would pop" during physical therapy. Consequently, on October 21, 2016, Dr. Wymore operated a second time, performing an "open distal clavicle excision." In that surgery, Dr. Wymore used a sagittal saw to remove a portion of Mr. Jameson's clavicle bone. Following the second surgery, the popping largely resolved, but the pain did not.

A little less than six months after the second surgery, on April 7, 2017, Dr. Wymore concluded that Mr. Jameson had reached "maximal medical improvement" and discharged him to "full unrestricted work activities." But Mr. Jameson did not return to his job with Hovermill.

As already mentioned, the Commission found that Mr. Jameson was permanently totally disabled because of his shoulder injury operating in tandem with pre-existing conditions and the worsening of those conditions. Mr. Jameson was dissatisfied with the Commission's apportionment of his disability between his work-related injury and his other impairments and appealed to the circuit court.

The jury trial went forward on July 23 and 24, 2019. In his case, Mr. Jameson testified and played the *de bene esse* depositions of two medical experts: Kevin

McGovern, M.D., an orthopedic surgeon, and Ghazala Kazi, M.D., an occupational medicine specialist.

Dr. McGovern conducted an independent medical examination of Mr. Jameson on January 22, 2018. He reviewed Mr. Jameson's medical records, evaluated radiological studies, interviewed Mr. Jameson, and performed a physical examination of him. Dr. McGovern explained that on August 5, 2015, Mr. Jameson sustained a superior labrum tear and a tear to his subscapularis muscle, which is a part of the left rotator cuff, resulting in impingement syndrome of the left shoulder and an aggravation of pre-existing degenerative changes in his acromioclavicular joint. Initially, Mr. Jameson was treated conservatively with physical therapy and cortisone injections. He later underwent the two surgeries discussed above.

In January 2018, when Dr. McGovern examined Mr. Jameson, he exhibited pain upon moving his left shoulder, tenderness at the shoulder joint, mild tenderness at the acromioclavicular joint, and weakness in the rotator cuff. His left shoulder had decreased motion, but no instability, swelling, or muscle atrophy. In comparison, Mr. Jameson's right shoulder had full motion and no pain or tenderness.

Pursuant to COMAR 14.09.09.01 and 14.09.09.03, Dr. McGovern evaluated Mr. Jameson for permanent impairment to his left shoulder using the *American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th Edition* ("AMA Guide") and the statutory factors set forth at LE § 9-721(b): "(1) atrophy; (2) pain; (3) weakness; and (4) loss of endurance, function, and range of motion." Dr. McGovern

opined to a reasonable degree of medical certainty that Mr. Jameson was 49% impaired in his left upper extremity. He broke down that figure as follows: 7% for loss of motion; 10% for crepitus[5]; 10% for distal clavicle resection; 12% for weakness; and 10% for subjective reports of pain, loss of function, and loss of endurance. Dr. McGovern explained that he was not qualified to opine about a "disability rating," which pertained to whether Mr. Jameson could do his job.

On cross-examination, Dr. McGovern was asked to convert the 49% shoulder impairment to a whole person impairment by means of a conversion chart in the AMA Guide. He opined, based on that conversion chart, that Mr. Jameson was 29% impaired in his whole person because of his shoulder injury.

Dr. Kazi, who as mentioned is an occupational medicine specialist, testified that she conducted an independent medical evaluation of Mr. Jameson on June 20, 2018 to assess his impairment due to his shoulder injury, as well as all his pre-existing conditions and the worsening of those conditions. She listed the following pre-existing conditions: "hypertension, chronic obstructive pulmonary disease or COPD . . . , sleep apnea, gout, gastroesophageal reflux disease, neck pain, . . . gallbladder surgery[,] . . . right hernia surgery and right testicle removal . . ., left knee and right knee." With respect to his pre-existing conditions, Dr. Kazi opined that Mr. Jameson was impaired in his whole person: 5% due to hypertension; 10% due to COPD; 5% due to sleep apnea; 2% due to gout; 5%

[5] Crepitus is the "feeling of things clicking, popping, and snapping when you move a joint."

due to reflux; 6% due to neck pain; 2% due to gallbladder surgery; 20% due to lumbar spine surgeries; 5% due to left knee replacement; and 3% from right knee pain, amounting to a total of 63% whole body impairment arising from injuries and conditions predating the accidental injury. Dr. Kazi opined that Mr. Jameson was 17% impaired in his upper extremity due to his work-related shoulder injury.[6] Since the August 5, 2015 accident, Mr. Jameson had experienced worsening of pre-existing carpal tunnel syndrome in his right wrist, causing a 4% whole person impairment; worsening of pain in his left knee, causing a 32% impairment to his whole person; worsening right knee pain, causing a 12% impairment to his whole person; and hernia surgery with removal of his right testicle, causing an 11% impairment to his whole person.

Mr. Jameson, then age 56, testified that he had dropped out of high school, but obtained his GED in 1993. He had worked as a commercial floor installer for 25 years and for Hovermill since 1997. He explained that his job required him to unload and carry in all the materials at the worksite, including items weighing hundreds of pounds. He mixed and carried buckets of concrete to patch surfaces prior to installing the flooring. Installing flooring involved working on his hands and knees, holding a tool in his right hand and supporting himself with his left hand, for between 7 and 8 hours per day. He explained:

[6] Dr. Kazi did not convert this impairment rating to a whole body impairment. Dr. Gordon, who also rated Mr. Jameson as 17% impaired in his upper extremity, did so during his testimony, discussed *infra*, establishing that the conversion results in a 10% whole body impairment.

> It, it's a lot to the shoulders because you've got to be able to hold your body up. When, when you're gluing a floor, I don't know if anybody has ever seen that or not, but you take your right hand, because I'm right-handed, and you take a trowel and you spread the floor. You can spread anywhere from about four feet up to about 10 feet wide and you've got to hold your body up with whichever – with my left arm at the time. And I would crawl across the floor like a baby with that trowel in my hand and it was, it's pretty hard work.

Mr. Jameson testified he had been unable to work as a floorer between 1990 and 1996 due to a work-related injury to his lumbar spine that necessitated two surgeries. During his recovery from that injury, he obtained his GED, participated in vocational rehabilitation, and tried to get a job doing electrical work but was unsuccessful. Eventually, he recovered sufficiently to return to work as a floorer.

With respect to his shoulder, Mr. Jameson testified consistent with the above stated facts regarding the injury and the surgeries. Since he had been discharged by Dr. Wymore, Mr. Jameson still couldn't "work above [his] head" and couldn't support himself with his left arm while kneeling. He testified over objection that he was unable to perform his job as a floorer, explaining that he couldn't "hold [him]self up" because the pain was too great and migrated from his shoulder down into his arm and hand. He estimated that his daily pain level in his shoulder averaged at about 5 to 6 on a scale from 1 to 10.

On cross-examination, Mr. Jameson testified that his COPD caused him significant discomfort; his sleep apnea prevented him from sleeping well; his episodes of gout were "very painful"; that he was prescribed Oxycodone for neck and lumbar back pain; and that he had recently had total left knee replacement and needed a total right

knee replacement. Mr. Jameson was asked whether he would be able to work in a desk job and responded that he was "not educated enough for a desk job."

At the close of Mr. Jameson's case, Hovermill moved for judgment "with respect to the permanent total disability aspect" of the case. Citing *Jewel Tea Company, Inc. v. Blamble*, 227 Md. 1 (1961), it argued that Mr. Jameson was obligated to present expert testimony on the issue of the "degree, extent and duration of disability[.]"[7] Neither Dr. McGovern nor Dr. Kazi offered such an opinion and Hovermill's attorney maintained that Mr. Jameson's lay testimony about his subjective belief that he is unable to work was legally insufficient to generate a jury issue.

Mr. Jameson's counsel responded that he was required to adduce expert medical testimony on impairment, which he did, and that a rational juror could find based upon that testimony, coupled with Mr. Jameson's lay testimony about his education, work experience, and work responsibilities, that he was permanently totally disabled.

The circuit court denied the motion, ruling that "the combination of the testimony of Dr. McGovern and Dr. Kazi, in addition to the testimony of Mr. Jameson, is sufficient to take the case to the jury."

In its case, Hovermill played the *de bene esse* deposition of Stuart Gordon, M.D., an orthopedic surgeon. Dr. Gordon had conducted an independent medical evaluation of Mr. Jameson on June 21, 2018. He testified that he relied heavily upon Dr. Wymore's

[7] The parties noted that Mr. Jameson had attempted to designate a vocational expert to testify at the trial, but that the circuit court precluded that testimony because the designation was untimely.

April 7, 2017 report of his final physical examination of Mr. Jameson, in which he noted that Mr. Jameson exhibited "no apparent distress, full range of motion" in his left shoulder, which was "mildly tender" but had full strength. During Dr. Gordon's physical examination of Mr. Jameson, he found him to have "slight loss of motion in two planes[.]" His overhead motion was limited to 160 degrees, which was 20 degrees less than the full range of motion. His side motion was "slightly decreased." Dr. Gordon noted "a little bit of atrophy in the [left] shoulder" and "a small half grade weakness in the shoulder girdle."

Based upon his review of the medical records and his physical examination of Mr. Jameson, Dr. Gordon opined to a reasonable degree of medical certainty that Mr. Jameson could "work at full duty." Dr. Gordon further opined that Mr. Jameson was 17% impaired in his upper extremity, which he broke down as follows: 2% for loss of motion; 1% for pain; 1% for weakness; 1% for loss of function; 1% for atrophy; 1% for endurance; and 10% because of the distal clavicle resection. That upper extremity impairment converted to a 10% whole person impairment, half of which Dr. Gordon attributed to the August 5, 2015 injury and half to "underlying degenerative disease of the shoulder."

Dr. Gordon criticized Dr. McGovern's 49% impairment rating of the upper extremity, noting that the AMA Guide specifies that a total shoulder replacement amounts to just a 24% impairment of the upper extremity.

At the close of all the evidence, Hovermill renewed its motion for judgment, which was denied.

The trial court instructed the jurors, as pertinent, that if they determined that Mr. Jameson was permanently totally disabled, but that his disability was "due in part to a pre-existing condition or a condition that developed after but is not related to the accidental injury," they should determine the percentage of disability apportioned to each cause. Mr. Jameson's attorney was permitted to argue in closing that the jury could find that Mr. Jameson was more or less than 100% disabled when apportioning disability.

The case was sent to the jury on a special verdict sheet, which first asked: 1) whether the jury found that Mr. Jameson was "Permanently and Totally Disabled" and, if "Yes", 2) whether his "Permanent and Total Disability [was] due to the Accidental Injury alone, even if the Employee has some prior or subsequent unrelated Permanent Disability?" The jurors answered the first question "Yes" and the second question "No."

Based upon those answers, the jurors were directed to answer questions three, four, and five, which asked:

> 3. What percentage, if any, of Employee's Permanent and Total Disability is due to the Accidental Injury that occurred on August 5, 2015?
>
> ___%
>
> 4. What percentage, if any, of Employee's Permanent and Total Disability is due to unrelated Pre-existing conditions (*hypertension, respiratory disease, sleep apnea, back, gout, reflux, abdominal wall, neck, right leg, left leg, and right hand*)?
>
> ____%

> 5. What, if any percentage of Employee's Permanent and Total Disability is due to a worsening of unrelated Pre-existing conditions occurring after August 5, 2015 (*right hand, left knee, right knee*)?
>
> ___%

The jurors found that Mr. Jameson was 50% disabled because of his shoulder injury; 75% disabled because of his unrelated pre-existing conditions; and 25% disabled because of the worsening of unrelated pre-existing conditions after the accidental injury.

Hovermill moved for JNOV or for a new trial, arguing that the evidence was legally insufficient as to permanent total disability because of the lack of expert medical testimony bearing upon Mr. Jameson's disability and that the jury's verdict that Mr. Jameson was 150% impaired was "excessive" and irrational considering the evidence. The circuit court denied the motion by order entered August 20, 2019.

We shall include additional facts as necessary to our resolution of the issues.

STANDARD OF REVIEW

This Court aptly summarized our standard of review of the sufficiency of the evidence following a jury trial on *de novo* appeal from a decision of the Commission in *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 176-78 (2003):

> We review the denial of a motion for judgment and a motion for [JNOV] under the same appellate lens. *Suburban Hosp., Inc. v. Kirson*, 128 Md. App. 533, 542 (1999) (citations omitted), *rev'd on other grounds*, 362 Md. 140 (2000). In order to survive a motion for judgment (and JNOV), a plaintiff has the burden of producing sufficient evidence to send the case to a jury for a resolution of fact. *See American Airlines Corp. v. Stokes*, 120 Md. App. 350, 353 (1998). As this Court explained in *General Motors Corp. v. Bark*, 79 Md. App. 68 (1989):

> If the claimant loses before the Commission and then appeals to the circuit court, the . . . claimant has the burden of producing a *prima facie* case before the trial court, lest he suffer a directed verdict against him, just as he, as the original proponent, had that same burden before the Commission. . . . The claimant has, moreover, the same burden to persuade the trial court by a preponderance of the evidence that his claim is just as he had to persuade the Commission in the first instance.

Id. at 79-80 (quoted with approval in *Stokes, supra*, 120 Md. App. at 353); *see also* Md. Code Ann., Lab. & Empl. § 9-745(b) (Repl. Vol. 1999) ("In each court proceeding under this title: (1) the decision of the Commission is presumed to be prima facie correct; and (2) the party challenging the decision has the burden of proof.").

Given a plaintiff's burden of production, he or she may fend off a motion for judgment by producing legally sufficient evidence to send the case to the jury. In *Jacobs v. Flynn*, 131 Md. App. 342, 353-54 (2000), *cert. denied*, 359 Md. 669 (2000), this Court wrote the following about the standard of review for such motions[:]

> A party is entitled to . . . (JNOV) [and judgment] when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense. *See Bartholomee v. Casey*, 103 Md. App. 34, 51 (1994), *cert. denied*, 338 Md. 557 (1995). In reviewing the denial of a JNOV, we "'must resolve all conflicts in the evidence in favor of the plaintiff and must assume the truth of all evidence and inferences as may naturally and legitimately be deduced therefrom which tend to support the plaintiff's right to recover . . . .'" *Houston v. Safeway Stores, Inc*., 346 Md. 503, 521 (1997) (quoting *Smith v. Bernfeld*, 226 Md. 400, 405 (1961)). If the record discloses any legally relevant and competent evidence, however slight, from which the jury could rationally find as it did, we must affirm the denial of the motion. *See Franklin v. Gupta*, 81 Md. App. 345, 354, *cert. denied*, 319 Md. 303 (1990). If the evidence, however, does not rise above speculation, hypothesis, and conjecture, and does not lead to the jury's conclusion with reasonable certainty, then the denial of the JNOV was error. *See*

> *Bartholomee*, 103 Md. App. at 51. Nevertheless, "[o]nly where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury." *Pickett v. Haislip*, 73 Md. App. 89, 98 (1987), *cert. denied*, 311 Md. 719 (1988).

Id. at 353-54.

DISCUSSION

I.

Sufficiency of the Evidence on Permanent Disability

Hovermill contends that Mr. Jameson failed to adduce legally sufficient evidence to generate a jury issue on permanent total disability and, as a consequence, the trial court should have granted its motions for judgment at the close of Mr. Jameson's case and/or at the close of all the evidence, or that it should have granted its motion for JNOV. More precisely, Hovermill argues that "the opinion regarding permanent total disability, relied upon by [Mr. Jameson], and allegedly offered by Dr. McGovern and Dr. Kazi, was legally insufficient." It emphasizes that neither physician opined about Mr. Jameson's education, employment history, or the labor market for an employee with his impairments. In contrast, Hovermill maintains that Dr. Gordon's opinion that Mr. Jameson could return to work was consistent with Dr. Wymore's April 7, 2017 report, that said that Mr. Jameson could return to full duty and that this was the only evidence on disability. Thus, according to Hovermill, the only evidence regarding disability supported its position that Mr. Jameson was *not* permanently totally disabled.

Mr. Jameson responds that he adduced expert medical testimony to explain the nature of his shoulder injury; the surgeries to treat the injury; and the remaining impairment in his shoulder, as well as pre-existing impairments caused by other injuries and conditions and by the post-accident worsening of those conditions. Having established those impairments, he maintains that expert testimony was not required on the issue of disability because Mr. Jameson's lay testimony as to his education, work experience, prior attempts at vocational rehabilitation, and his work limitations because of his impairments was sufficient to generate a jury question regarding permanent total disability. We agree.

Permanent total disability "in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial." *Weather Tight Constr. Co. v. Buckler*, 129 Md. App. 681, 684 (2000) (quoting *Babcock & Wilcox, Inc. v. Steiner*, 258 Md. 468, 473-74 (1970), in turn quoting Larson, Arthur, 2 *Workmen's Compensation Law* § 57.51). "'An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled.'" *Montgomery Cnty. v. Buckman*, 333 Md. 516, 528 (1994) (quoting *Babcock*, 258 Md. at 474).

In the context of permanent partial and permanent total disability, it is the role of the factfinder to assess the quantum of "disability" resulting from an accidental workplace injury, not the impairment or injury to the worker. *See Gly Constr. Co. v. Davis*, 60 Md. App. 602, 606-07 (1984) ("'It has been stated repeatedly that the distinctive feature of the compensation system . . . is that its awards (apart from medical benefits) . . . are made not for physical injury as such, but for 'disability' produced for such injury.'") (quoting 2 A. Larson, *Larson's Workmen's Compensation Law* § 57.11 (1983 ed.) (footnotes omitted)); Gilbert, Richard P., *et al.*, 1 *Maryland Workers' Compensation Handbook* § 7.03 (2019) (hereinafter "*Gilbert*") ("compensation benefits are payable for disability which results from an injury; they are not payment for the injury itself").

Decisions of this Court and the Court of Appeals make clear that though expert medical testimony is required, in most cases, to establish the cause and the extent of a claimant's injury or impairment, it ordinarily is not required to establish his or her disability. In *Gly Construction*, 60 Md. App. at 606, this Court affirmed the circuit court judgment, in which it upheld the decision of the Commission that a claimant was 100% disabled in the use of his left hand. Two medical experts testified before the Commission, one who opined that the claimant suffered a 50% permanent impairment to his hand, and the other to a 90% permanent impairment. *Id*. at 605-06. This Court emphasized that it was the role of the circuit court, on review of the Commission's decision, to assess disability and that it was not "compelled to find an amount of

disability that is no greater than the highest medical evaluation and no less than the lowest medical evaluation" because that "would impermissibly shift the legal determination of 'disability' to physicians . . . in clear contravention of the legislative intent and traditional role of the Commission or court." *Id.* at 607. It was improper to "equate anatomical loss with loss of use." *Id*. at 606. Rather, in assessing loss of use, "the Commission and the trial court on appeal could and patently did consider [the claimant]'s testimony as to the manner, degree, and extent that he could and could not use his hand." *Id*. at 607. Because the medical opinions on impairment, coupled with the lay testimony, supported the Commission's decision, we held that the circuit court had not erred by upholding it. *Id*. at 608.

Likewise, in *Getson v. WM Bancorp*, 346 Md. 48, 50-51 (1997), the Court of Appeals affirmed a decision of the Commission finding that a claimant was 30% permanently partially disabled in her whole body because of an injury to her right shoulder. The Court reasoned that the Commission correctly determined that the impairment to the claimant's right shoulder was an unscheduled "Other cases" impairment of her upper extremity, not a scheduled impairment of her right arm. *Id*. at 60. It further held that the Commission was obligated to "convert upper extremity impairment ratings to the equivalent impairment of the body as a whole [based on the conversion chart in the AMA Guide]," but that it was not required to find disability equivalent to either of those converted impairment ratings or an average of the ratings. *Id*. at 60-61. Citing *Gly*, the Court emphasized that the "determination of disability was

never intended to be the one-to-one equivalent of the medical evaluations of the claimant's impairment." *Id.* at 61. The AMA Guide itself stated that "'impairment' means an alteration of an individual's health status that is *assessed by medical means*, 'disability,' which is *assessed by nonmedical means*, means an alteration of an individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements.'" *Id.* at 62 (quoting AMA Guide at § 1.1 (emphasis in AMA Guide)). Thus, the Commission was not to "merely adopt medical evaluations of anatomical impairment," but rather to "assess the extent of the loss of use by considering how the injury has affected the employee's ability to do his or her job." *Id.* In sum, though an "evaluating physician [could] provide[] the Commission with an assessment of medical impairment; the finder of fact . . . must determine the degree of disability." *Id.*

We return to the case at bar. Mr. Jameson called two medical experts who testified about the injuries to his shoulder and the resulting medical impairment.[8] Dr. McGovern assigned a 49% impairment in the left upper extremity, which amounted to a

[8] In its brief, Hovermill contests the factual basis for and reliability of Drs. McGovern and Kazi's "opinions of permanent total disability." As discussed, however, neither physician offered an opinion on permanent total disability. Each offered an opinion on the impairment to Mr. Jameson's left shoulder and Dr. Kazi also offered opinions about medical impairments to other parts of his body occasioned by pre-existing conditions and worsening of those conditions after the accidental injury.

Even if they had offered opinions on disability, which for the reasons discussed, is not within the ambit of a medical evaluation, we would hold that Hovermill failed to preserve any challenge to those opinions given that the *de bene esse* depositions of both medical experts were admitted at trial without objection.

29% whole body impairment. Dr. Kazi assigned a 17% impairment to Mr. Jameson's left upper extremity, which converted to a 10% whole body impairment. Hovermill's expert also assessed a 17% impairment to Mr. Jameson's shoulder, which he converted to a 10% whole body impairment, but he attributed only 5% to the accidental injury. Dr. Kazi further opined that, cumulatively, Mr. Jameson's pre-existing impairments amounted to a 63% whole body impairment and that the worsening of those conditions, cumulatively, contributed an additional 59% whole body impairment. Thus, there was evidence from which a reasonable juror could find based on the medical testimony alone that Mr. Jameson was permanently totally disabled.

Mr. Jameson's testimony established that he had worked as a floor installer his entire adult life and that on one prior occasion when he suffered a work-related injury to his back, he undertook vocational rehabilitation but was unable to find other work. He further testified that his shoulder injury made it painful and difficult for him to do his job because he had to support his upper body with his left arm and shoulder while he used his right arm to spread concrete, glue, and to perform other work-related tasks. Mr. Jameson further testified that several of his pre-existing conditions caused him significant pain, kept him awake at night, and made it difficult for him to work on his hands and knees in the only job he had performed for 25 years. This was evidence from which a reasonable juror could infer that Mr. Jameson's shoulder injury was a significant contributor to his disability, *i.e.*, the loss of earning power, even if it was not the most significant medical impairment he faced. *See Giant Food, Inc. v. Coffey*, 52 Md. App. 572, 578 (1982) (loss

of industrial use means "loss of earning capacity, *i.e.*, the employee's ability to earn wages after the accident").

This case is unlike *Blamble*, 227 Md. at 1, which Hovermill relies upon. There, the claimant's medical impairment was a heart condition and the medical experts *called by the claimant* sharply disputed the nature of the medical impairment and whether it was an impairment at all. Viewed in a light most favorable to the claimant, the evidence showed that she could perform sedentary work and she did not adduce any evidence as to why she could not find employment that was sedentary. On that evidence, the jury found that the claimant was 100% disabled and that her disablement was entirely caused by her accidental injury. *Id*. at 3.

The Court of Appeals reversed, holding that the evidence was legally insufficient to establish permanent total disability. *Id*. at 4. In so holding, the Court emphasized that the claimant's disability was of the type that "to the inexperienced and inexpert witness must remain purely subjective in nature." *Id*. at 6. In contrast, the Court cited to its decision in *Cluster v. Upton*, 165 Md. 566, 569 (1933), a case where the claimant suffered a fractured finger, in which it opined:

> Prediction from present conditions of the conditions which will exist in the future may in some instances be made by a jury without the aid of opinions of experts in such matters. Common knowledge would tell them that a lost member is permanently lost and there may be conditions which, while less obviously permanent in their nature, may still, according to common knowledge, be probably so, with such a degree of probability that an adjudication of permanency as a fact may be permissible without expert opinions. There must, however, be a reliable basis for the adjudication of it as a fact, something beyond mere conjecture, or possibility; and the burden is upon the plaintiff to establish the fact by evidence sufficient to support

> the finding, if he intends to include permanent injury as an item in the ground of his recovery.

(Citations omitted.) There, "the misshapen condition of the finger was sufficient objective evidence to allow a jury to infer a permanent injury." *Blamble*, 227 Md. at 7. Because the nature of the claimant's impairment in *Blamble* was a "complicated" "medical question" that involved "fact-finding which properly f[ell] within the province of medical experts[,]" the Court held "that reliance on lay testimony alone" to establish her inability to work with that impairment was legally insufficient. *Id.*

The facts in the instant case are more like *Cluster* than *Blamble*. The medical experts testified that Mr. Jameson had atrophy, weakness, loss of motion, and pain in left shoulder, coupled with lumbar back pain, numerous other ailments, and pain in both of his knees. As *Gly* and *Getson* make clear, the determination of quantum of disability arising from these significant medical impairments was a quintessential question of fact for the jury. He testified in concrete terms about how his shoulder injury and pre-existing conditions directly impacted his ability to perform tasks required of him as a floor installer. On this evidence, the jury determined that Mr. Jameson's medical impairments resulted in a total loss of the industrial use of his body. This finding was amply supported by the expert medical testimony and Mr. Jameson's lay testimony. The circuit court did not err by denying Hovermill's motions for judgment or its JNOV motion or by instructing the jury on permanent total disability.

II.

Apportionment of Permanent Total Disability

An employee may be permanently totally disabled solely by reason of an accidental injury; by reason of an accidental injury and unrelated pre-existing conditions operating in tandem; or by reason of an accidental injury, unrelated pre-existing conditions, and post-accident worsening of the unrelated pre-existing conditions. *See Potter v. S. Md. Elec. Cooperative, Inc*., 84 Md. App. 453, 455 (1990) (claimant permanently totally disabled because of accidental injury to foot; pre-existing skin cancer; and worsening of skin cancer after the accidental injury). Consequently, "a subsequent injury on the heels of a prior partial disability sometimes creates the arithmetic anomaly of the whole being greater than the sum of its parts." *Darden v. Mass Transit Admin.*, 162 Md. App. 231, 233 (2005).

An employer or insurer only is liable to compensate an employee for the percentage of disability that flows from the accidental injury. LE § 9-902(a); *see also Subsequent Injury Fund v. Thomas*, 275 Md. 628, 633 (1975) ("The employer is responsible for compensating the employee for the disability attributable to the occupational injury.") Compensation for disablement resulting from conditions or injuries that predate the accidental workplace injury may be borne by the Fund if certain criteria are met. *See Thomas*, 275 Md. at 633 ("The Fund is liable for the disability attributable to the impairment existing before the injury."); LE § 9-802(b) (setting out criteria for liability of the Fund); *Gilbert* at § 11.02(3) ("The Fund is liable for the

payment of any award to a previously impaired claimant that is in excess of the amount directly attributable to the subsequent injury."). Post-accident worsening of pre-existing conditions is not compensable. *Thomas*, 275 Md. at 633.

In this case, both the Commission and the jury found that Mr. Jameson was permanently totally disabled, but apportioned the disability differently between the pre-existing conditions, accidental injury, and worsening of pre-existing conditions. The Commission found that 58% was caused by pre-existing conditions; 30% caused by the subsequent accidental injury to the left shoulder; and 12% due to post-accident worsening of the pre-existing conditions, for a total of 100%. The jury found that Mr. Jameson was 50% disabled because of his accidental injury; 75% disabled by reason of his pre-existing conditions; and 25% disabled by reason of the worsening of those conditions, for a total disablement of 150%.[9]

[9] The practical effect of those findings for Hovermill would be to increase the duration and the amount of compensation it owed. By our calculations, Hovermill would be liable for $754 per week for 332 weeks. Pursuant to LE § 9-627(k)(3), the duration of compensation for an "Other cases" disability is computed by multiplying the "proportion [of] the determined loss" against 500 weeks, making the based duration of compensation here 250 weeks. Pursuant to LE § 9-630(a)(1)(i), however, if compensation would be payable for 250 weeks or more under LE § 9-627, then the duration of compensation is extended by an additional one third the number of weeks, or 83 weeks, for a total of 332 weeks. LE § 9-630(a)(1)(ii) states that the amount of compensation is two-thirds of the employee's average weekly wage, but not to exceed 75% of the State average weekly wage. Because two-thirds of Mr. Jameson's average weekly wage would exceed the 2015 State average weekly wage, Hovermill would be liable for 75% of $1,005, which is $754. Consequently, under the jury verdict, Hovermill was liable for just over $200,000 more in disability benefits than under the Commission's award.

Hovermill contends that the jury's finding that Mr. Jameson was more than 100% disabled was unreasonable and excessive and is inconsistent with those cases permitting such a finding only upon a reopening of a prior claim. He suggests that it was improper for the court to permit Mr. Jameson's counsel to argue that the jury could find more than 100% disablement and that the jury's findings in that regard cannot be reconciled with the evidence.

Mr. Jameson responds that Maryland law is clear that a claimant can suffer more than 100% disability and that there is no legitimate rationale offered by Hovermill for why that result was excessive here.

As a threshold matter, Hovermill has not preserved any challenge to the closing argument made by Mr. Jameson's attorney regarding the percentage of disability. At the jury trial, Mr. Jameson's attorney requested a non-pattern instruction that, in apportioning permanent total disability, the jury could find that Mr. Jameson was disabled more (or less) than 100%. Hovermill opposed the giving of that instruction, arguing that the pattern instruction on apportionment did not cap the percentage of disability and that it would mislead the jurors for the court to explicitly instruct them that they could find more than 100% disability. The court ruled that it would not give the non-pattern instruction but would permit Mr. Jameson's counsel to argue that the jury could find more than 100% disability. Hovermill's counsel explicitly agreed to proceed in that manner, stating that the court would not "hear an objection from [him]" if such an argument was made. In keeping with this statement, Hovermill did not object when Mr.

Jameson's counsel argued to the jury that in apportioning permanent disability, they could "do more or less than 100 percent." Having acquiesced in permitting this argument to be made, any appellate contention that it was improper is waived. *See Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) ("Waiver is conduct from which it may be inferred reasonably an express or implied intentional relinquishment of a known right." (quotation marks and citation omitted)).

The jury's finding that Mr. Jameson was 150% disabled also was consistent with the law in Maryland and was supported by legally sufficient evidence. As the Court of Appeals explained in *Anchor Motor Freight, Inc. v. Subsequent Injury Fund*, 278 Md. 320, 328-29 (1976), if a claimant has pre-existing impairments, suffers a subsequent accidental injury, and experiences post-accident worsening of the pre-existing conditions, each of those impairments might create permanent disability, *i.e.* industrial loss of use of the body, in whole or in part, making it "not illogical" for a claimant to be more than 100% disabled. The example cited in *Anchor Motor*, which was drawn from this Court's underlying decision in the same appeal, was as follows: "One is 50% permanently and partially disabled because of a back injury. In a subsequent accident he loses both legs" resulting in an additional 100% disablement. *Id.* at 329 (quoting *Subsequent Injury Fund v. Compton*, 28 Md. App. 526, 532 (1975)). In that example, the employee is 150% disabled. *See also Potter*, 84 Md. App. at 456 ("It is like . . . being more than 100% disabled, which, though defying ordinary logic, is possible under Workers' Compensation law.")

This Court's decision in *Coffey*, 52 Md. App. at 572, also is instructive. There, a 62-year-old claimant who had worked as a grocery store clerk for 20 years was injured when a steel plate fell on his right foot, fracturing it. *Id*. at 575. He filed a claim for permanent disability benefits and the Commission found that he was 25% permanently partially disabled in his right foot. *Id*. at 573. He appealed to the circuit court and prayed a jury trial. *Id*. At the trial, the evidence showed that the claimant had suffered from a pre-existing demyelinating neurological disease for forty years, but it had not caused him to lose time from work. *Id*. at 574-76. Complications from the workplace injury required surgery on his right and left legs and, in the opinion of his treating physician, the claimant's inability to exercise for a long period of time caused his neurological symptoms to progress. *Id*. at 576. Another physician testified, however, that the sole cause of the claimant's permanent disability was the pre-existing neurological disease, which he believed to be multiple sclerosis. *Id*. at 576-77.

The jury found on this evidence that the claimant was 30% disabled by reason of his pre-existing neurological disease and 100% disabled by reason of his accidental workplace injury. *Id*. at 573-74. On appeal from that judgment, the employer argued that the evidence was legally insufficient to warrant the submission of permanent total disability to the jury. *Id*. at 577. This Court affirmed, reasoning that there was legally sufficient evidence adduced to generate a jury issue on permanent total disability. *Id*. at 578. It also addressed the jury's apportionment of disability, noting that there was "nothing illogical or illegal" in its finding that the claimant's "total disability . . .

amounted to more than 100%" given that the evidence showed that "the accidental injury caused [the claimant], who had not lost any time from work over a ten year period, to become totally disabled from performing any gainful work whatsoever as a direct consequence of the treatment required by the accidental injury." *Id*. at 579.

In the instant case, there was nothing illogical or illegal in the jury's finding that Mr. Jameson was permanently totally disabled because of his pre-existing conditions (75%), coupled with the post-accident worsening of those conditions (25%), but also would be 50% disabled by reason of his accidental injury standing alone. Mr. Jameson's pre-existing conditions are the "historic backdrop on which the subsequent injury work[ed] its impact," *Darden*, 162 Md. App. at 245, and, here, the impact of his accidental injury coupled with the pre-existing multitude of impairments rendered him permanently totally disabled in the view of the jury (and the Commission before it). The jury's findings to that effect was not excessive considering the evidence about the extent that his many medical impairments impacted Mr. Jameson's ability to perform his job and the evidence that he was not "educated enough for a desk job."

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.