Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 1, 2015

CLAIM NO. 201392232

ALLIANCE COAL, LLC
d/b/a RIVER VIEW COAL, LLC PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

ANGELA WHITLOCK
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Alliance Coal LLC, d/b/a/ River View Coal, LLC ("River View Coal") appeals from the October 20, 2014, Opinion and Order and November 18, 2014, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the October 20, 2014, Opinion and Order, the ALJ awarded Angela Whitlock

(“Whitlock”) temporary total disability ("TTD"), permanent total disability ("PTD") benefits, and medical benefits.

The Form 101 alleges while in the employ River View Coal, Whitlock sustained injuries on February 3, 2012; May 9, 2012; May 18, 2012; December 18, 2012; and March 4, 2013, to her head and neck; pelvis; lumbar; and bilateral upper and lower extremities. The Form 101 also alleges she sustained "depression or other associated mental disorder." Whitlock attached five accident reports to her Form 101 as a means of describing how each injury occurred. Due to their length and intermittent legibility, we will not recount them. The filed accident reports reveal on February 3, 2012, Whitlock injured her left leg; May 9, 2012, her nose; May 18, 2012, her right hip/right leg; December 18, 2012, her nose; and on March 4, 2013, her lower back.

Whitlock was deposed on June 2, 2014. Regarding the alleged injury of February 3, 2012, Whitlock testified as follows:

> A: I was under my canopy because the conditions were low top. I had to be on my knees. And just a piece of gob fell out between the pins and hit my lower right calf, but it wasn't- it wasn't nothing [sic]. I didn't go to a doctor or anything.
>
> Q: It was your lower right calf?
>
> A: I think so.

> Q: I think it said left leg.
>
> A: Well, then left maybe. I don't know. It was my lower leg, bottom part of my leg.[1]
>
> Q: So you didn't treat for it?
>
> A: Didn't treat for it.

Whitlock did not miss any work as a result of the February 3, 2012, event and her leg is no longer symptomatic.

Regarding the May 9, 2012, incident, Whitlock testified as follows:

> Q: Okay. The next one I have was three months later on May 9th, 2012. That involved the gob hitting your nose. Can you tell me-
>
> A: No, it hit the back of my- hit my hard hat and knocked me into the pinner, the equipment.
>
> Q: So the gob hit you that hit your nose into something else?
>
> A: Right.
>
> Q: Hit your [sic] back of your hard hat and it hit you into the pinner?
>
> A: Right.
>
> Q: And what kind of injuries did you have?
>
> A: A bloody nose, skinned knee, just hurt from it.

[1] The Form 101 indicates it was Whitlock's left leg.

Q: Which knee?

A: The right knee.

Q: Anything else besides right skinned knee and bloody nose?

A: Like I said, pain from it, from that kind of jolt to my body. As scary as it was....

Q: So it was pain to your nose and your right knee?

A: Right.

Whitlock missed less than two weeks of work following the May 9, 2012, incident.

The May 18, 2012, incident occurred in the following manner:

Q: Okay. Tell me about what happened on that day.

A: Another rock fall.

Q: And what hit what on your body?

A: This was May-

Q: -18th. I think it hit your right upper leg?

A: Yeah.

Q: And hip?

A: Yeah. That was what caused my fractured hip.

Q: And it was a piece of gob that fell?

A: Yes.

Q: And what did it hit?

A: It hit my right hip.

On December 18, 2012, Whitlock sustained a nose fracture when a cable struck her in the face. She required surgery on her nose.

Finally, on March 4, 2013, Whitlock sustained an injury to her lower back in the following manner: "I was pinning on my regular shift and went to the back of the bolter to get a steel, and a rock fell on me, on my lower back, directly onto it. I was bent over to get the steel out of the bolter." She was eventually taken off work by Dr. Debra Wallace on April 9, 2013, and returned on approximately April 25th. Her last work day at River View Coal was July 11, 2013. She testified as follows:

> Q: I think on July 11th, 2013, Dr. Canlis [sic] gave you an off work slip for light duty. Does that make sense?[2]
>
> A: She gave me a slip for sit-down work only.
>
> Q: And of course the mine couldn't accommodate that?
>
> A: Right.

[2] We have been unable to locate this specific slip from Dr. Judith Canlas. However, there is a slip from Dr. Canlas dated October 8, 2013, attached to Whitlock's Form 101 that restricts Whitlock to sit down work only.

Whitlock had been treating with Dr. Canlas for low back pain.

After working at River View Coal, Whitlock applied for employment at numerous businesses. She explained as follows:

> Q: Where have you applied?
>
> A: Floyd's Supermarket, Country Mart, Alps, the school system, all kinds of different places. For Jerry Mike Hendrickson. He had a bookkeeping thing going. I've had to keep up with all that for employment.
>
> Q: What would you be doing at Floyd's Supermarket? What did you apply for?
>
> A: Any position. It would be produce, meat, cashier, whatever. I used to work for them [sic] same people years ago.
>
> Q: And is it Alps? Is that what you said?
>
> A: Alps, uh-huh. The same people own that, and same kind of store.
>
> Q: So same sort of position that you would want, anything that they have?
>
> A: Anything I can get.
>
> Q: What about Country Mart? Same deal?
>
> A: No. It's a gas station. Bookkeeping.
>
> Q: Do you have experience with bookkeeping?
>
> A: No, not really.

> Q: And the school system; what kind of positions have you applied for?
>
> A: Any. Mainly instructional assistant, what I was doing prior.
>
> Q: Do you think you'd physically be able to do any of these jobs, or all of them?
>
> A: I don't know. I don't think so.
>
> Q: You don't think so?
>
> A: No.
>
> Q: Why not?
>
> A: Because I hurt really bad, unbelievable pain, after standing for so many hours.
>
> Q: What hurts? What parts hurt you?
>
> A: My lower back and my legs.

Whitlock is certified in early childhood development.

At the time of her deposition, Whitlock was working at a restaurant, Hannah's Place, as a cook and a waitress. She described her job duties as follows:

> Q: When you help out at Hannah's, what kind of shifts do you work?
>
> A: I just work whatever I want or what-three to four hours maybe at a time, but I can sit down anytime I need to.
>
> Q: Have you ever left before?
>
> A: Yeah.

> Q: Do you sit down routinely when you're at Hannah's?
>
> A: Yes.
>
> Q: Have you tried to get on full-time at Hannah's?
>
> A: No. She don't [sic] really need me, and I don't think I could do what she needed me to do. The lifting part of it, there's no way I'm going to do that or anything.
>
> Q: What parts- what things would you have to lift at Hannah's?
>
> A: Stock stuff. Like really heavy boxes of Coca-Cola or Pepsi products and stuff like that.

Whitlock acknowledged: "Yeah, it's not a sit-down only, but that's also why I will not take it full-time, because I can't perform it."

Whitlock recounted an incident of sexual harassment which occurred between April 25, 2013, and July 11, 2013. Concerning how the incident factored into her decision not to return to the mines after July 11, 2013, she elaborated:

> I didn't want to after that. I didn't want to see him. I didn't want to come in contact. Nothing. But more so the fact that I hurt everyday. Everything, my whole lifestyle has changed. I go to bed at night in pain. I sleep on a heating pad and a stupid, big, old wedge pillow and everything else. I don't ever sleep comfortable.

> Yes, that was a big part of- who would want to go back around something like that, especially when my kids even say it made it look like I was the bad person, I did something wrong, when I didn't. I said no, period. And River View's policy is supposed to be, you know, hundred percent you don't do that crap. And I'm trying to be the better, bigger person by not getting him into trouble because of how old he is and how long he's been there and everything else. I'm trying to do the right thing and just walk away.

Whitlock’s current symptoms are:

> A: Headaches, depression, serious low back pain, and numbness and tingling in my legs. My hip, it always hurts.
>
> Q: Your right hip?
>
> A: Yes.

Since her injuries, Whitlock can no longer ride horses or ski. She has difficulty maintaining her house and yard. She hardly cooks and does not exercise since "I have to take a pain pill just to be able to function every day."

Whitlock also testified at the final hearing. At the time of the hearing, she was taking three to four Percocet, 325 mg, for pain on a daily basis. She was also taking Gabapentin which, according to Whitlock, helps with depression. She is also taking Celebrex for arthritis, Prozac for depression, Ativan for anxiety, and Robaxin, a muscle relaxer, for pain.

At the hearing, concerning her current pain, Whitlock testified:

> A: My lower back, the worst pain that keeps me up at night and stuff is in this area. And this leg, in my right leg, it goes down the back and down the side into the knee. Then, my right hip hurts me quite a bit. And it would be on this side if I'm facing you, from my hip on down to right about my knee is my main concern of pain areas (indicating).
>
> Court: Is that the right lower extremity?
>
> A: Yeah, because this is facing, so this is my right hip down to about my knee is where it hurts (indicating).
>
> Q: Down in the front?
>
> A: Yeah, down the front and right down the side (indicating).
>
> Q: Of the right?
>
> A: Yes.
>
> Q: And on the left?
>
> A: The left is in the back to the knee.
>
> Q: All right. But there are times when you feel like-
>
> A: When I feel like it hurts everywhere. It goes all the way down.

Whitlock testified she also has shoulder pain from arthritis. She testified her depression has "skyrocketed" since her injuries because she cannot

physically perform the same tasks she was previously capable of performing.

Whitlock does not believe she could physically or mentally perform the same work she was performing at River View Coal. At the time of the hearing, Whitlock was no longer working at Hannah's Place and had not worked since September 2, 2014. She has applied for flight attendant and retail jobs. She hoped she could work as a flight attendant.

Whitlock worked at Riverview Coal for approximately two and a half years and before that for five years for Union County schools as an instructional assistant. During her employment with Union County, she also worked as a janitor during the summer. Before that, she worked for the Shelby County Board of Education for ten years as an educational aide. During the summers, she worked in the cafeteria. She testified that she would be unable to perform any of her previous jobs.

The June 11, 2014, Independent Medical Examination ("IME") report of Dr. Charles Barlow was introduced by Whitlock. After examining Whitlock and performing a medical records review, Dr. Barlow diagnosed the following: "1. Postoperative status open reduction nasal fractures. 2. Right hip pain. 3. Degenerative disc

disease with bulging disc, transitional vertebra at the L5 sacral level, and bilateral radiculopathy." Dr. Barlow provided the following answers to questions posed to him:

> 1. Please give an opinion about these injuries [sic] work-relatedness.
>
> All three injuries to the face, hip and lumbar spine are related to three separate work incidents as noted above in the History of Injury.
>
> 2. Please state whether this client could return to the job description in which the injuries occurred.
>
> Should she return to underground mining, her lumbar and radiating pain would increase.
>
> Please give permanent restrictions if any.
>
> No bending or twisting from the waist; no lifting over 40 pounds; no pushing or pulling greater than 60 pounds.
>
> 3. Please give a maximum medical improvement date.
>
> Maximum medical improvements for the 3 separate injuries are the following:
>
> 1. Nasal injury- MMI was 8 weeks following the December 2012 nasal fracture fixation.
>
> 2. Hip injury- MMI was 10 weeks following the May 9, 2012 incident.
>
> 3. Lumbar spine- MMI was 4 months following her March 4, 2013 injury.
>
> 4. Please give an impairment rating to these conditions if appropriate.

> Impairment for the nasal fracture is 0% impairment consulting Table 11-5; page Chapter 11, as there is no disfigurement, facial disorder or respiratory difficulty.
>
> Table 17-33, page 546 gives 0% impairment for undisplaced, nonarticular healed pelvic fractures. Hip range of motion was normal.
>
> She has nonverifiable radicular complaints with no objective findings producing 6% whole person impairment in Table 15-3, page 384 in the *Guides*.

The August 12, 2014, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: work-relatedness/causation; benefits per KRS 342.730; credit for unemployment; "injury" as defined by the Act; pre-existing active; and permanent total disability [written by "other"].

In the October 20, 2014, Opinion and Order, the ALJ provided the following findings of fact and conclusions of law:

> **A. Injury as defined by the Act; work-relatedness/causation.**
>
> KRS 342.0011(1) defines "injury" to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines

"objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

I saw and heard the plaintiff Ms. Whitlock testify at length at the Final Hearing. I sat a short distance from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony and carefully observed her body language during her testimony. I am the only decision maker who actually saw and heard Ms. Whitlock testify. She was a very stoic individual. I make the factual determination that she was a credible and convincing lay witness and that her testimony rang true.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward,* 2007 WL 2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to <u>life experiences</u>" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "<u>life experiences</u>" in making that determination.

Based upon Ms. Whitlock's credible and convincing lay testimony, which is covered above, and the persuasive and compelling medical evidence from Dr. Barlow, the examining orthopedic surgeon, which is covered above, I make the determination that Ms. Whitlock sustained during her employment by the defendant a work-related nose fracture on December 18, 2012, a work-related hip fracture on May 18, 2012 and work-related injuries to her back on March 4, 2013, at which time a rock fell and struck her back.

B. Pre-existing active.

The correct standard regarding a carve-out for a pre-existing active condition is set forth by the Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App.2007). In *Finley*, *supra*, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic* and *impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. *Finley v. DBM Technologies*, *supra*.

Based upon the credible and convincing lay testimony of the plaintiff, as covered above, and the persuasive and compelling medical evidence from Dr. Barlow, the examining orthopedic surgeon, as covered above, I make the determination that the plaintiff did not have any pre-existing active impairment or occupational disability prior to her above-cited work injuries. I further make the determination that the defendant has not met the burden of proving the existence of pre-existing active

impairment or occupational disability on the part of the plaintiff before the above-cited work injuries.

C. Benefits per KRS 342.730; permanent total disability.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

I again make the factual determination that the lay testimony of Ms. Whitlock, as covered above, was very credible and convincing. I also make the factual determination that the medical evidence from Dr. Barlow, the examining orthopedic surgeon, as covered above, was very persuasive and compelling. I make the factual determination that Ms. Whitlock will sustain as a result of her work-related back injury on March 4, 2013 a permanent impairment of 6% to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 15-3 on Page 384.

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to

work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

Based upon the credible and convincing lay testimony of Ms. Whitlock, as covered above, and the persuasive and compelling medical evidence from Dr. Barlow, the examining orthopedic surgeon, which is covered above, I make the determination that Ms. Whitlock will have a 6% permanent impairment due to her work-related back injury while employed by the defendant on March 4, 2013. Ms. Whitlock is now 43 years of age and is, therefore, a middle-aged worker. Based upon Ms. Whitlock's credible and convincing lay testimony, as covered above, and the persuasive and compelling medical evidence from Dr. Barlow, the examining orthopedic surgeon, as covered above, I make the determination that Ms. Whitlock is not physically able to work at any of her former jobs. In making that determination, I rely upon the decision of the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979). I make the factual determination that Ms. Whitlock had a good work history before her work

injuries on March 4, 2013, showing a good work ethic, but that she will not be able to return to any regular gainful employment in the highly competitive job market. Based upon all of the above factors, I make the determination that Ms. Whitlock cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the determination that she is permanently and totally disabled effective from and after July 4, 2013, when Dr. Barlow determined that she reached maximum medical improvement from her lumbar spine injuries of March 4, 2013.

D. Credit for unemployment and credit for short-term disability.

KRS 342.730(5) mandates that all income benefits payable for temporary total and permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability. I, therefore, make the determination that the defendant is, therefore, entitled to an offset or credit for unemployment insurance benefits, if any, paid for unemployment during the period of the plaintiff's temporary total or permanent total disability.

KRS 342.730(6) provides that all income benefits payable to the plaintiff shall be offset by payments made under an exclusively employer-funded disability plan which extends income benefits for the same disability covered by the Workers' Compensation Act, except where the employer-funded plan contains an internal offset provision for workers' compensation

> benefits, which is inconsistent with said provision.
>
> The record shows that the defendant has filed a complete copy of the plaintiff's short-term disability plan and I make the determination that the defendant is entitled to an offset or credit for payments made by the defendant to the plaintiff under said exclusively employer-funded disability plan as mandated by KRS 342.730(6).

River View filed a petition for reconsideration which was denied by order dated November 18, 2014. In this order, the ALJ stated as follows:

> Defendant has filed a Petition for Reconsideration and this is to rule thereon.
>
> In *Ford Furniture Company v. Claywell*, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. A review of defendant's Petition for Reconsideration shows that defendant is attempting to reargue the case, which is improper. However, out of an abundance of caution, we will again discuss the case.
>
> The record shows that this case was thoroughly litigated by the parties and a substantial record was produced. The Hearing Order dated October 3, 2014 shows that the attorneys for both parties agreed that the plaintiff testified at the Final Hearing and that the plaintiff filed as evidence the following: Report of Dr. Charles

Barlow, unpaid medical bills, 4-21-14 letter and summary report of IWP, and records of Methodist Orthopedic Services, Methodist Family Practice, Dr. Thomas Logan, Dr. Tibbals and Dr. Perkins and all attachments to Form 101. The agreed Hearing Order further states that the defendant filed as evidence the following: Deposition of plaintiff, reports of Dr. Judith Canlas, Dr. Thomas Huhn and Dr. Douglas Ruth and unemployment file. Plaintiff and defendant both stipulate to filing as evidence Dr. Oropilla's records and STD records.

Page 3 of the Opinion and Order states that the following evidence was contained in the record: The plaintiff gave a deposition and also testified at the Final Hearing. The plaintiff also filed the following evidence: Report of Dr. Charles Barlow, unpaid medical bills, 4-21-14 letter and summary report of IWP, and records of Methodist Orthopedic Services, Methodist Family Practice, Dr. Thomas Logan, Dr. Tibbals and Dr. Perkins and all attachments to Form 101. The defendant filed the following evidence: Deposition of plaintiff, reports of Dr. Judith Canlas, Dr. Thomas Huhn and Dr. Douglas Ruth and unemployment file. Plaintiff and defendant both stipulate to filing as evidence Dr. Oropilla's records and STD records.

<u>In addition, Page 4 of the Opinion and Order confirms that the Administrative Law Judge has carefully reviewed and considered all of the above evidence and the complete and entire record in the case file</u>.

The record shows that in the Benefit Review Conference Order the parties agreed the temporary total

disability benefits were paid at the rate of $752.69 per week from April 9, 2013 to April 24, 2013, and further in the amount of $710.74 per week for the period May 10, 2012 to May 13, 2012, and again from June 1, 2012 to July 3, 2012, for the total amount of $5,477.15. In addition, Page 15 of the Opinion and Order states that defendant shall be entitled to a credit for workers' compensation benefits heretofore paid.

The plaintiff, **Angela Whitlock**, testified that she worked for the defendant as a coal miner. She stated that while employed by the defendant she sustained work injuries, including a nose fracture on December 18, 2012, a hip fracture on May 18, 2012, and a back injury on March 4, 2013, at which time a rock fell on her back requiring her to go to the hospital. She stated that after her back injury her substitute supervisor came to her and that she reported her injury. She stated that her back is still hurting and that Dr. Oropilla is treating her. She has been referred to Dr. Warren for an electromyogram. She testified that she takes prescription medication for her back and leg pain. She stated that pain runs down her right leg. She testified that she has mental symptoms, consisting of depression and anxiety. The plaintiff testified that she cannot return to work as a coal miner. She also stated that she cannot return to work at the jobs contained in her work history, which included employment as an educational aide for the Union County Board of Education, the Shelby County Board of Education and as an educational aide for Audubon Head Start. The plaintiff admitted that she has worked part-time at the restaurant operated by her sister.

The plaintiff filed the medical report of **Dr. Charles Barlow**, who evaluated the plaintiff on June 11, 2014. Ms. Whitlock gave a medical history of a work injury on December 18, 2012 when a cable hit her in the face and fractured her nose and of other work injuries on May 9 and 18, 2012, when she sustained an injury to her right hip. She also stated that on March 4, 2013 a rock fell on her back, causing low back pain. She related her subsequent symptoms. Dr. Barlow reviewed comprehensive medical records dealing with Ms. Whitlock and performed a thorough physical examination. His diagnoses were as follows: Postoperative status open reduction nasal fractures, right hip pain and degenerative disc disease with bulging disc, transitional vertebra at the L5 sacral level and bilateral radiculopathy. Dr. Barlow stated that should the plaintiff return to underground coal mining, her lumbar and radiating pain would increase. Dr. Barlow placed permanent physical restrictions on the plaintiff as follows:

No bending or twisting from the waist; no lifting over 40 pounds; no pushing or pulling greater than 60 pounds. Dr. Barlow stated that the plaintiff reached maximum medical improvement from her nasal injury 8 weeks following the injury, maximum medical improvement from the hip injury 10 weeks following her injury and maximum medical improvement for her lumbar spine injury 4 months following said injury. Dr. Barlow stated that the plaintiff will not sustain any permanent impairment as a result of her nasal fracture or her hip injury, but that she will sustain a 6% whole person impairment as a result of her back

injury under the AMA Guides, Table 15-3 on Page 384.

I saw and heard the plaintiff Ms. Whitlock testify at length at the Final Hearing. I sat a short distance from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony and carefully observed her body language during her testimony. I am the only decision maker who actually saw and heard Ms. Whitlock testify. She was a very stoic individual. I make the factual determination that she was a credible and convincing lay witness and that her testimony rang true.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward,* 2007 WL 2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

I made and again make the determination that the medical evidence

produced by Dr. Barlow, the examining orthopedic surgeon, was persuasive and compelling.

As stated in *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 774 (Ky.2009), “physicians must use clinical judgment when assigning impairment ratings, and that ‘clinical judgment, combining both the “art” and “science” of medicine, constitutes the essence of medical practice.’ ”The applicable law affords Dr. Barlow certain discretion and professional judgment when interpreting the Guides and assigning an appropriate impairment rating. The great orthopedic surgeon, Dr. David Gaw, repeatedly emphasized in his lectures that the AMA Guides were not a cookbook but were guides to assist the physician in reaching medical opinions.

I am very familiar with Dr. Barlow, the examining orthopedic surgeon, and have read numerous medical reports and depositions produced by Dr. Barlow. I have found him to be a thoroughly qualified orthopedic surgeon and have found that his opinions are worthy of reliance upon them.

In making the determination that Ms. Whitlock is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what

impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

The plaintiff Ms. Whitlock worked for the defendant as a coal miner. She sustained documented work-related injuries to her nose, hip and back. She testified that her back is still hurting and that Dr. Oropilla is still treating her. She has been referred to Dr. Warren for an electromyogram. She takes prescription medication for her back and leg pain and stated that the pain runs down her right leg. She testified that she is not physically able to return to work as a coal miner and that she cannot return to work at the other jobs contained in her work history, including employment as an educational aide for a number of school systems and programs. In making the determination that Ms. Whitlock is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

Ms. Whitlock is now 43 years of age and is, therefore, a middle-aged worker in the highly competitive job market. Based upon her credible and convincing lay testimony, as covered above, and the persuasive and compelling medical evidence from Dr. Barlow, the examining orthopedic surgeon, as covered above, I make the determination that Ms. Whitlock is not physically able to work at any of her former jobs. In making that determination, I rely upon the decision of the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979). I make the further determination that Ms. Whitlock had a good work history before her work injuries while employed by the defendant, showing a good work ethic, but that she will not be able to return to any regular gainful employment in the highly competitive job market. It is uncontradicted that Ms. Whitlock last worked on approximately May 7, 2013, which is approximately 1½ years ago.

In making the determination that Ms. Whitlock is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

The record shows that in the Benefit Review Conference Order the defendant did not raise as a contested issue medical benefits. On Page 15 of the Opinion and Order, I provided that the plaintiff shall recover from the defendant and/or its workers' compensation insurer for the cure and relief of any effects of her work injuries, medical, surgical, hospital treatment, including nursing, medical or surgical supplies and appliances as may reasonably be required at the time of her injury and thereafter during

disability. The medical coverage applies to all of the plaintiff's work-related injuries, including her nose, hip and back injuries.

Based upon the plaintiff's credible and convincing lay testimony and the persuasive and compelling medical evidence from Dr. Barlow, I make the determination that under the decision of the Kentucky Supreme Court in *FEI Installation, Inc. v. Williams,* 214 S.W.3d 313 (Ky. 2007), the plaintiff is entitled to an award of both past and future medical benefits for the aforesaid injuries, and I so rule. I find that in *Mullins v. Mike Catron Construction/Catron Interior Systems, Inc.*, 237 S.W.3d 561 (Ky. App. 2007), the Kentucky Court of Appeals noted that the Judge is entitled to exercise his or her discretion in making a determination regarding future medical benefits and the original Opinion and Order is amended to award the plaintiff medical benefits for future treatment of the above-specified work injuries.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). 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, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such

> evidence is not an adequate basis to reverse on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). 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 reasonable inferences that otherwise could have been drawn from the evidence. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213 (Ky. 2006); *Seventh Street Road Tobacco Warehouse v. Stillwell*, 550 S.W.2d 469 (Ky. 1976).
>
> WHEREFORE, in light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied, with the specific amendment recited hereinabove.

River View Coal first argues the ALJ's finding of permanent total disability is not supported by substantial evidence. This argument is broken down into two sub-arguments; 1) the evidence does not support a finding of permanent total disability, and 2) the ALJ did not properly weigh the factors set forth in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Concerning the determination of whether a worker is totally occupationally disabled, in Ira A. Watson

Department Store v. Hamilton, supra, the Supreme Court instructed:

> However, determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. For that reason, we conclude that some of the principles set forth in *Osborne v. Johnson*, *supra*, remain viable when determining whether a worker's occupational disability is partial or total.
>
> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson*, *supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally

> disabled. *See, Osborne v. Johnson, supra,* at 803.

Id. at 51.

The determination of whether a claimant is totally disabled remains within the broad discretion and authority of the ALJ. *See* Ira A. Watson Department Store v. Hamilton, supra. In making his or her assessment, the ALJ may rely on both the medical testimony and a worker's own assessment of his or her ability to labor. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

Substantial evidence supports the ALJ's determination Whitlock is permanently totally disabled. It is clear from the language in both the October 20, 2014, Opinion and Order and November 18, 2014, Opinion and Order on Reconsideration that the ALJ relied on Whitlock's "credible and convincing lay testimony" as well as Dr. Barlow's opinion in determining Whitlock is permanently totally disabled. Both Dr. Barlow's report and Whitlock's testimony constitute substantial evidence upon which the ALJ can rely in determining Whitlock is permanently totally disabled. Dr. Barlow assigned a 6% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Dr. Barlow also imposed permanent restrictions

of no bending or twisting from the waist, no lifting over 40 pounds, and no pushing or pulling greater than 60 pounds. Even more significant is Whitlock's testimony regarding her inability to work in the coal mines and at any of the jobs she held prior to working in the coal mines. Additionally, Whitlock expressed reservations about her capacity to perform the jobs for which she was seeking employment at the time of the hearing. Whitlock also testified extensively to her current level of pain and her personal and professional limitations due to that pain. This evidence comprises substantial evidence in support of the ALJ's determination Whitlock is unable to find work consistently under normal employment conditions and to work dependably and is, consequently, permanently totally disabled. *See* Ira A. Watson Dept. Store v. Hamilton, supra.

We find no merit in River View Coal’s argument the ALJ failed to properly weigh the factors set forth in Ira A. Watson Dept. Store v. Hamilton, supra. While the ALJ provided inadequate findings of fact in the October 20, 2014, Opinion and Order, he rehabilitated these inadequate findings of fact with the following additional findings in the November 18, 2014, Opinion and Order on Reconsideration.

The plaintiff Ms. Whitlock worked for the defendant as a coal miner. She sustained documented work-related injuries to her nose, hip and back. She testified that her back is still hurting and that Dr. Oropilla is still treating her. She has been referred to Dr. Warren for an electromyogram. She takes prescription medication for her back and leg pain and stated that the pain runs down her right leg. She testified that she is not physically able to return to work as a coal miner and that she cannot return to work at the other jobs contained in her work history, including employment as an educational aide for a number of school systems and programs. In making the determination that Ms. Whitlock is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

Ms. Whitlock is now 43 years of age and is, therefore, a middle-aged worker in the highly competitive job market. Based upon her credible and convincing lay testimony, as covered above, and the persuasive and compelling medical evidence from Dr. Barlow, the examining orthopedic surgeon, as covered above, I make the determination that Ms. Whitlock is not physically able to work at any of her former jobs. In making that determination, I rely upon the decision of the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979). I make the further determination that Ms. Whitlock had a good work history before her work injuries while employed by the defendant, showing a good work ethic, but that she will not be able to return to any regular gainful employment in the highly competitive job market. It is uncontradicted that Ms. Whitlock last worked on

> approximately May 7, 2013, which is approximately 1½ years ago.
>
> In making the determination that Ms. Whitlock is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

The ALJ specifically discussed Whitlock's age, her continuing symptoms of pain, and her testimony regarding her inability to work in the coal mines and, importantly, as an educational aide. As stated by the ALJ November 18, 2014, Opinion and Order on Reconsideration,

> She testified that she is not physically able to return to work as a coal miner and that she cannot return to work at the other jobs contained in her work history, including employment as an educational aide for a number of school systems and programs.

Even though the ALJ failed to discuss Whitlock's certification in early childhood development and Dr. Barlow's specific medical restrictions, an ALJ is not required to set forth the minute details of his reasoning in reaching a particular result. The ALJ's findings of fact and analysis set forth in the November 18, 2014, Opinion and Order on Reconsideration fully apprise the Board and the parties of the basis for his determination Whitlock is

permanently totally disabled. This determination will not be disturbed.

As part of its argument concerning the deficiency of the ALJ's findings on the issue of permanent and total disability, River View Coal asserts several off-topic arguments. One such argument is that Dr. Thomas Huhn's medical opinions are more persuasive than Dr. Barlow's. This argument clearly does not address the sufficiency of the ALJ's findings of fact pertaining to the issue of permanent total disability. 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. *See* 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. *See* Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority in deciding questions involving causation. *See* Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an

ALJ, such proof is not an adequate basis to reverse on appeal. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). In other words, the ALJ is vested with the authority to find one medical opinion more persuasive than others in the record. Such extraneous arguments by River View Coal are rejected.

River View Coal's second argument on appeal is the ALJ erred by not considering other potential reasons Whitlock has not returned to the coal mines after July 11, 2013, specifically the alleged sexual harassment incident that occurred between April 25, 2013, and July 11, 2013. We disagree.

Even though Whitlock's deposition testimony reveals the sexual harassment incident played a role in keeping her from working in the coal mines after July 11, 2013, her testimony also establishes that an even greater factor in her refusal to work in the coal mines is her daily pain. Whitlock explained in her deposition, that it was "more so the fact that I hurt everyday. Everything, my whole lifestyle has changed. I go to bed at night in pain. I sleep on a heating pad and a stupid, big, old wedge pillow and everything else. I don't ever sleep comfortable." Whitlock also testified at both her deposition and the hearing that she is unable to return to

the work she performed both at the mines and as an educational aide because of her pain. The ALJ, as the fact-finder, has the discretion to pick and choose amongst the testimony, including that presented by a single witness. *See* Jackson v. General Refractories Co., supra; Caudill v. Maloney's Discount Stores, supra. The ALJ's determination Whitlock is unable to return to her work in the coal mines because of the pain she continues to experience from her injuries will not be disturbed.

Finally, River View Coal takes issue with the language in the ALJ's November 18, 2014, Opinion and Order on Reconsideration in which the ALJ, in an attempt to clarify his award of medical benefits, stated as follows: "The medical coverage applies to all of the plaintiff's injuries, including her nose, hip and back injuries." The open-ended language in the November 18, 2014, Opinion and Order on Reconsideration does not clarify the specific injuries for which River View Coal must provide medical benefits. In the October 20, 2014, Opinion and Order, the ALJ ordered River View Coal to be responsible for medical benefits for Whitlock's "work injuries." This caused River View Coal to seek further clarification concerning its liability for medical benefits in its petition for reconsideration.

We vacate the ALJ's award of medical benefits and remand for the ALJ to specifically set forth the work injuries for which he is awarding medical benefits. On remand, the ALJ shall not use the same language contained in the November 18, 2014, Opinion and Order on Reconsideration. The ALJ's original award and "clarification" essentially comprise an award of medical benefits for all of Whitlock's work-related injuries, an award which is impermissively vague. On remand, the ALJ shall set forth the specific work-related injuries for which medical benefits were awarded and provide the necessary findings of fact in support of the award. Because the ALJ relied upon Dr. Barlow's opinions and 6% impairment rating for non-verifiable radicular complaints which have been attributed to her low back injury, Whitlock is entitled to medical benefits for her low back condition.

Next, this Board must *sua sponte* address errors not raised on appeal. *See* KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

First, in the October 20, 2014, Opinion and Order the ALJ specifically determined as follows:

> Ms. Whitlock sustained during her employment by the defendant a work-related nose fracture on December 18,

> 2012, a work-related hip fracture on May 18, 2012 and work-related injuries to her back on March 4, 2013, at which time a rock fell and struck her back.

However, at no point in the October 20, 2014, Opinion and Order and November 18, 2014, Opinion and Order on Reconsideration did the ALJ address Whitlock's alleged psychological injury. On remand, the ALJ must address Whitlock's allegation of a psychological injury and either accept it as a work-related or dismiss the claim. The ALJ must cite the evidence in the record supportive of his determination on this portion of Whitlock’s claim. Similarly, the ALJ must also address Whitlock's entitlement to future medicals for the alleged psychological injury.

We also vacate the ALJ's award of TTD benefits from April 9, 2013, to July 4, 2013, and remand for additional findings consistent with the record and the applicable law. The record indicates Whitlock returned to work in the coal mines on April 24, 2013, and continued to work until July 11, 2013. On remand, the ALJ must set forth findings of fact and conclusions of law providing the basis for an award of TTD benefits during a time when Whitlock had returned to work at the coal mines. In other words, if the ALJ believes Whitlock did not "return to employment" as that term of art is set forth in KRS 342.0011(11)(a) and

defined in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) and Bowerman v. Black Equipment Co., 297 S.W.3d 858, 874 (Ky. App. 2009), he must provide findings of fact supportive of this conclusion.[3] Should the ALJ determine Whitlock indeed returned to "customary employment" or the work she "was performing at the time of [her] injury" from April 24, 2013, through July 4, 2013, an award of TTD benefits for this period is inappropriate. Central Kentucky Steel at 659.

We note that voluntary TTD benefits were paid by River View Coal from April 9, 2013, the date Dr. Wallace took Whitlock off work, through April 24, 2013, the date upon which Dr. Wallace returned her to work.

If the ALJ determines Whitlock did not return to "customary employment" or the work she "was performing at the time of [her] injury" from April 24, 2013, through July 4, 2013, which is supported by sufficient findings of fact, the ALJ may award TTD benefits from April 24, 2013, through July 4, 2013, the date of termination being the date upon which Dr. Barlow opined Whitlock had reached maximum

[3] As stated by the Court in Central Kentucky Steel v. Wise, supra, "[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 that is **customary or that he was performing at the time of his injury.** (emphasis added). Central Kentucky Steel at 659.

medical improvement ("MMI") for her lumbar spine injuries sustained on March 4, 2013.

This claim represents an unusual hybrid situation in which both TTD benefits and PTD benefits have been awarded. Should the ALJ determine Whitlock is not entitled to TTD benefits from April 24, 2013, through July 4, 2013, the award of PTD benefits must begin on the date of the injury which generated a permanent impairment rating. As the record indicates Dr. Barlow assigned a 6% whole person impairment rating for non-verifiable radicular complaints associated with her lumbar back condition, and Whitlock sustained the lumbar back injury on March 4, 2013, PTD benefits should begin on that date.

Finally, we note that the ALJ, in the October 20, 2014, Opinion and Order and the November 18, 2014, Opinion and Order on Reconsideration, failed to give River View Coal credit for TTD benefits already paid. In the October 20, 2014, Opinion and Order, the ALJ awarded TTD benefits from May 10, 2012, to May 13, 2012; June 1, 2012, to July 3, 2012; and April 9, 2013, to July 4, 2013. However, the August 12, 2014, BRC order stipulates River View Coal voluntarily paid TTD benefits from May 10, 2012, to May 13, 2012; June 1, 2012, to July 3, 2012; and April 9, 2013, to April 24, 2013. Therefore, the ALJ, in an amended opinion

and order, must clearly state River View Coal shall receive credit for TTD benefits paid.

Accordingly, concerning the issue of whether substantial evidence and adequate findings of fact support the ALJ's determination Whitlock is permanently totally disabled, the October 20, 2014, Opinion and Order and November 18, 2014, Opinion and Order on Reconsideration are **AFFIRMED**. Concerning the issue of the ALJ’s failure to consider other reasons why Whitlock did not return to the coal mines after July 11, 2013, the October 20, 2014, Opinion and Order and November 18, 2014, Opinion and Order on Reconsideration are **AFFIRMED**. The ALJ's award of medical benefits and the award of TTD benefits from April 9, 2013, to July 4, 2013, are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended award and additional findings consistent with the views expressed herein which shall include a decision resolving Whitlock's psychological injury claim.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BRANDY HASSMAN
333 W VINE ST STE 300
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON LUCIUS HAWES
P O BOX 655
HOPKINSVILLE KY 42241

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J RUDLOFF
400 E MAIN ST STE 300
BOWLING GREEN KY 42101