Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 10, 2015

CLAIM NO. 201295149

DOLLAR TREE STORES, INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

PATTI-ANN DAVIS
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Dollar Tree Stores, Inc. ("Dollar Tree") appeals from the January 14, 2015, Opinion, Award, and Order and the February 18, 2015, Order on Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ awarded Patti-Ann Davis ("Davis") permanent total disability ("PTD") benefits and medical

benefits for work-related Complex Regional Pain Syndrome ("CRPS").

On appeal, Dollar Tree challenges the decision on three grounds. First, it argues Davis' CRPS is not compensable since the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") does not support such a diagnosis. Second, it contends the finding of a 47% impairment rating is an error of law. Finally, Dollar Tree maintains a finding of permanent total disability is not supported by substantial evidence.

The Form 101 alleges on September 23, 2011, Davis injured his right hand and ring finger "after striking a piece of equipment while operating a checkout lane." The Form 101 indicates Davis received the following medical treatment: "surgery (x2), injections, medications; have been diagnosed with CRPS (RSD) after second surgery."

The November 5, 2014, Benefit Review Conference ("BRC") order lists "benefits per KRS 342.730" as a contested issue.

Davis introduced the September 16, 2014, medical record of Dr. David Ciochetty which reflects he diagnosed: "Complex, regional pain syndrome/RSD (upper)."

Davis introduced the September 24, 2014, "Impairment Evaluation Summary" by Steffan Stambaugh (“Stambaugh”), OT/L, CHT, and Nathan Johnson (“Johnson”), MPT, DPT, FAAOMPT with the Bluegrass Outpatient Center which was signed by Dr. Ciochetty. In this report, Stambaugh and Johnson assessed a 47% whole person impairment rating pursuant to the AMA Guides. Concerning maximum medical improvement ("MMI"), Stambaugh and Johnson stated as follows: "Spoke with Dr. David Ciochetty on September 29, 2014. He advised her MMI was conditional on whether or not workers compensation would continue coverage of her pain management."

Dr. Ciochetty’s November 20, 2014, deposition was introduced. He testified that at the time of the deposition, he was Davis' treating physician. After Dr. Ciochetty's first examination of Davis, he diagnosed CRPS of the right hand. As to whether his diagnosis may have changed as he continued her treatment, Dr. Ciochetty testified as follows:

> The overall diagnosis has stayed the same. My concern is we know with longer standing complex regional pain syndrome, it can become bilateral without injury to the contralateral side.

Dr. Chiochetty testified extensively regarding the symptoms which support his diagnosis of CRPS:

> A: Sure. First of all, when she first came here, she had a diminished motion of the knuckle, of the left- I'm sorry, of the right ring finger and a contracture of that finger. She held the entire arm and forearm in a protected fashion. (Witness demonstrates.) I may recall that she was wearing a splint at that time, but that's- I see so many patients with CRPS.
>
> Q: Okay.
>
> A: What also stood out was that she was wearing a short sleeve shirt and she did not want anything touching the hand or the forearm, because of both hyperesthesia as well as allodynia. And hyperesthesia is where a normal painful sensation is felt to be exaggerated by perception.
>
> And then allodynia is where a nonpainful stimulus, such as the wind or a piece of clothing just brushing against the skin, a nonpainful stimulus does feel painful, and she did have allodynia.
>
> ...
>
> A: Sure. And the skin was edematous in contrast to the other fingers. Her grip strength was reduced severely. And not, it is just moderately reduced so she is able to grasp some objects. I would not put anything more than this eight fluid ounce bottle of water in her hand, because of her loss of strength. She is able to perform a lot of functions with her left hand and she has had to resort to the left hand.

Other things also include a decreased temperature. And not just of the finger, but the palm of that right hand as compared to the left. And when I would do the sympathetic blocks, such as the still eight blocks, she would have- we would record increased temperatures of that arm.

Q: Okay.

A: Now, again, these are sympathetic blocks, not sensory blocks. So we were- our object [sic] was not to numb the arm. There were other blocks that I did that I meant to numb the arm. I wanted to see if that would decrease the pain as well.

Q: So just to follow up on that a little bit, over the period of time that you have seen her, you have noticed some edema in the affected finger, the right ring finger?

A: Oh, yes.

...

Q: Have you noticed any deviation in what would be normal skin color of the injured finger when compared to the other fingers?

A: Sure. The skin would look a bit more blanched. But as compared to the left hand, the right hand was distinctly more blanched than the left hand. The right hand was definitely cooler than the left hand.

...

A: She now is able to wear long sleeved shirts on her right arm and she no longer carries her right arm close to her.

Q: I see.

A: So she is a little bit more interactive, a little bit more social with her dominant hand.
Q: Okay. And I believe you may have touched on this but I wanted to be sure. In your observation, is the skin texture on the injured right ring finger different from the skin texture on the other uninjured fingers?

A: Typically, we see wrinkles, especially around the knuckles of the fingers. And she doesn't have any wrinkles at all. She does have stretching of the skin and she does have contracture. And that makes her left [sic] ring finger immobile.

...

Q: And would you, when comparing her right ring finger to her left ring finger, would you feel comfortable using the word atrophy to apply to the right ring finger?

A: Well, you have to understand that there is [sic] no muscles in the fingers and muscles are in the forearm. And there is [sic] tendons that traverse over and below the metacarpals and go in the fingers themselves. So the fingers have a lot of tendons, so it's very difficult to denote atrophy of the fingers themselves. You have to look at the thenar and hypothenar eminence as well as the muscles of- and the tendons thereof of the forearm.

Q: And these things we have just talked about, in particular the difference in skin color, skin temperature, the edema, the texture of the skin on the finger, are those things that you would

> look at and consider in making the diagnosis of CRPS?
>
> A: Yes.
>
> Q: And in your opinion, again, are the presence of those things in Ms. Davis, do they support, in your opinion, your diagnosis of CRPS?
>
> A: That is correct.
>
> Q: And once again, these things have been present from the first time you saw her in 2012 until today or until October?
>
> A: That is correct, to some degree during those times, yes.

Regarding the impairment rating initially assessed by Bluegrass Outpatient Center, Dr. Ciochetty testified as follows:

> Q: And is it your understanding that these folks at Bluegrass Outpatient Center are specifically trained in making these measurements?
>
> A: They are specifically trained.
>
> Q: And-
>
> A: And they perform their measurements in a very standardized fashion. Rather than have individual physicians doing it their way, they have standardized evaluation-
>
> Q: And this referral was by you, not me or Ms. Davis or anything like that. This is somewhere where you sent her as her treating physician, correct?

A: This referral to them was by me.

Q: And you have faith in the accuracy and validity of the measurements?

A: I have extreme faith in Dr. Johnson.

Q: And do you agree to the extent he calculated impairment ratings in his report, do you agree with those?

A: I- I agree with the impairment ratings, yes.

Q: And you have reviewed this report?

A: Yes, sir.

Q: And have you-

A: And I have signed off on it.

Q: Well, that was my next question. Although the measurements were done by a physical therapist, you signed off also at the bottom, in addition to Stefan Stambaugh?

A: Yes.

Q: Does that indicate your agreement with these measurements and calculations-

A: Yes.

Q: - contained therein?

As to whether Davis has reached MMI, Dr. Chiochetty testified as follows:

A: There is a chance that she could improve but not dramatically. What I don't want to happen is for her to lose further function. That's the reason why

> she needs to continue, again, aggressive at first, and then maybe every three to four months thereafter, a follow-up with a physical therapist.
>
> Q: Well, let me ask my question another way then. The impairment rating which has been assessed and which you have testified that you agree to, are you of the opinion that that's not likely to change one way or the other in the next 12 months?
>
> A: No, that's not my opinion at all.
>
> Q: Okay.
>
> A: That's the minimal impairment rating right now. I do not expect that to improve more than 10 to 20 percent, but I expect it to worsen over the next 15 to 20 years.
>
> Q: Well, then again, just let me cut to the chase. Do you believe that right now, she is at maximum medical improvement?
>
> A: I would have to say no, because she has not been able to pursue further physical therapy and occupational therapy.

The May 12, 2014, record of Dr. Rodrigo Moreno was introduced. In the "summary" section of this report, Dr. Moreno opined as follows:

> Regarding the questions of WC. Yes I think this patient has a diagnosis of Complex regional pain syndrome. In july [sic] 2012 she had vasomotor changes, increase sweat, blorchy [sic] discoloration associated with stiffness and severe pain. Today she has pain and fixed pip j stiffness. I thinsk [sic]

> she is at MMI and don't think she is a candidate for any surgical procedure to improive [sic] her function of her RRF.

Davis' September 4, 2014, deposition was introduced. At that time, she was still employed by Dollar Tree but not working. She described her September 23, 2011, injury as follows:

> A: I was bagging items for the customers, I was putting items through the register. And I went to put my hand down and the bag- and it hit the metal piece, the bag holder.
>
> Q: So are the bags kind of arranged in like a circle?
>
> A: No.
>
> Q: Can you like turn the bag holder? Describe the bag holder to me.
>
> A: It's actually in a spot about this big. (Witness demonstrates.)
>
> Q: Okay.
>
> A: And it has a metal bar going all the way around-
>
> Q: Okay.
>
> A: - with a tab on the top, a metal- to put the bags and then arms to put the sides of the bags.
>
> Q: I see.
>
> A: And my finger hit the metal tab.

Davis also testified at the November 19, 2014, hearing. She testified that all of the jobs she has performed in the past required her to use both hands. She testified as follows:

> Q: Do you know of any of those jobs that you can do in your current condition with your limits on your right hand?
>
> A: No.

We find no merit in Dollar Tree's first argument the ALJ erred by relying upon the opinions of Dr. Ciochetty and Dr. Moreno in finding Davis' CRPS work-related because "[n]either Dr. Moreno's nor Dr. Ciochetty's findings meet the Guides' criteria for a CRPS diagnosis." Accordingly, we affirm the ALJ's reliance upon Dr. Ciochetty's and Dr. Moreno's *diagnosis* of CRPS.

In Tokico v. Kelly, 281 S.W.3d 771 (Ky. 2009), the Kentucky Supreme Court held Chapter 342 does not require a doctor to conform his diagnosis to the criteria set forth in the AMA Guides stating:

> KRS 342.730(*l*)(b) bases partial disability benefits on a permanent impairment rating, which KRS 342.0011(35) defines as being the "percentage of whole-body impairment" that an injury causes "as determined by" the latest edition of the *Guides.* Neither statute refers to a physician's diagnosis. Chapter 1 of the Fifth Edition discusses the *Guides'*

> philosophy, purpose, and appropriate use. Page 11 acknowledges that "some medical syndromes are poorly understood," that 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." Diagnosing what causes impairment and assigning an impairment rating are different matters. Diagnostic criteria stated in the *Guides* clearly have relevance when judging the credibility of a diagnosis, but Chapter 342 does not require a diagnosis to conform to criteria listed in the *Guides*.
>
> The employer relies on *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149 (Ky. App. 2006), which concerned an ALJ's authority to rely on a physician who conceded that a worker's back condition fell within a particular impairment category but disagreed with the percentages called for in the *Guides. Jones* is instructive though distinguishable. The present case concerns an ALJ's authority to choose among the opinions of physicians who diagnose a condition differently and who interpret the *Guides* differently when rating impairment for the condition.

Thus, the ALJ could consider the diagnostic criteria contained in the AMA Guides in "judging the credibility of a diagnosis," but was not required to abide by the criteria.

16.5e of Chapter 16 of the AMA Guides entitled "Complex Regional Pain Syndromes (CRPS), Reflex Sympathetic

Dystrophy (CRPS I), and Causalgia (CRPS II)" provides the objective criteria to be utilized in making a diagnosis of CRPS. The AMA Guides direct that at least eight of the listed findings "must be present concurrently for a diagnosis of CRPS." However, as set forth herein, the Kentucky Supreme Court has directed that a physician's diagnosis need not strictly conform to the criteria listed in the AMA Guides. Therefore, Dollar Tree's argument Dr. Ciochetty's and Dr. Moreno's diagnoses of CRPS are not supported by objective medical findings, since Dr. Moreno found four of the criteria and Dr. Ciochetty found six, is rejected. The ALJ's reliance upon their diagnoses will not be disturbed.

Dollar Tree's second argument on appeal is that the ALJ's finding of a 47% impairment rating was an error of law as Dr. Ciochetty did not find Davis to be at MMI at the time of the rating and because the 47% impairment rating was assessed by physical therapists. We disagree and affirm the finding of the 47% impairment rating.

While Dr. Ciochetty unequivocally testified during his deposition that he did not believe Davis had reached MMI, the record reveals Dr. Moreno opined Davis reached MMI on May 12, 2014, and the ALJ ultimately relied upon Dr. Moreno's MMI date. The record further reveals

Stambaugh and Johnson assessed the 47% impairment rating on September 24, 2014, four months after Dr. Moreno's May 12, 2014, MMI date. Dr. Ciochetty signed off on Stambaugh's and Johnson's impairment rating on September 24, 2014. Under "MMI," Stambaugh's and Johnson's September 24, 2014, report indicates as follows: "Spoke with Dr. David Ciochetty on September 29, 2014. He advised her MMI was conditional on whether or not workers compensation would continue coverage of her pain management." The ALJ, as fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Consequently, the ALJ is free to rely upon the MMI date of Dr. Moreno while simultaneously relying upon the impairment rating assessed by Stambaugh and Johnson which was subsequently adopted by Dr. Ciochetty.

We reject Dollar Tree's objection to the 47% impairment rating based on the fact the impairment rating

was assessed by physical therapists and not Dr. Ciochetty. It is clear from the September 24, 2014, report of Stambaugh and Johnson that the impairment rating was assessed pursuant to the AMA Guides. Further, it is clear from Dr. Ciochetty's deposition testimony, cited herein, that Dr. Ciochetty reviewed the report of Stambaugh and Johnson, agreed with their measurements and calculations, and ultimately agreed with the 47% impairment rating adopting it as his own. The ALJ's reliance upon the impairment rating initially calculated by Stambaugh and Johnson and subsequently adopted by Dr. Ciochetty and his finding Davis has a 47% impairment rating will not be disturbed.

Dollar Tree's final argument on appeal is the ALJ did not support his finding of permanent total disability with substantial evidence. We agree and remand for additional findings.

In the January 14, 2015, Opinion, Award, and Order, the ALJ set forth seven sentences ostensibly in support of Davis being permanently and totally disabled:

- Frankly, I doubt she has any serious employment opportunities.

- While Davis did attend college she did not finish it.

> • She has never held a "professional" position.
>
> • Even most, if not all, so called "white-collar" jobs would be inaccessible to her with her current restrictions.
>
> • It is unlikely that she has any job opportunities.
> • I understand she is only forty-six and has attended college.
>
> • Nonetheless I think she is permanently and totally disabled as a result of the work injury.

The above-cited sentences reveal statements that are both conclusory in nature and devoid of analysis consistent with the criteria enumerated by the Supreme Court in Kentucky in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001):

> 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 dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual 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.

The ALJ is required to apprise the parties of the basis of his determination that Davis is permanently and totally disabled, and he has not done so here. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). On remand, the ALJ must analyze the issue of permanent total disability utilizing the factors enunciated in McNutt Construction/First General Services v. Scott, supra. If the ALJ is unable to offer any further analysis and support in determining whether Davis is permanently totally disabled, then a finding of permanent partial disability is appropriate. In that event, the ALJ must determine the proper duration of temporary total disability ("TTD") benefits.[1]

Even though its January 27, 2015, petition for reconsideration did not specifically request additional

[1] The record reveals voluntary TTD benefits have been paid at the rate of $105.61 per week from January 25, 2012, to July 6, 2012.

findings on the issue of permanent total disability, Dollar Tree took issue with the ALJ's award of PTD benefits on the basis "of a simple listing of activity restrictions and lack of professional experience." This sufficiently raised as an issue the lack of a proper analysis in determining Davis is permanently totally disabled. Thus, the finding of permanent total disability and the award of PTD benefits must be vacated and the claim remanded for additional analysis and findings of fact.

Accordingly, the January 14, 2015, and the February 18, 2015, Order on Petition for Reconsideration are **AFFIRMED** to the extent the ALJ determined Drs. Ciochetty's and Moreno's diagnoses of CRPS is supported by substantial evidence and Davis has a 47% impairment rating. The ALJ's finding of permanent total disability and the award of PTD benefits are **VACATED**. This claim is **REMANDED** for additional findings and entry of an amended decision in conformity with the views expressed herein.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I concur with the majority in affirming the ALJ’s reliance upon the 47% impairment rating. However, I respectfully dissent from that portion of the

majority opinion vacating the ALJ's decision, and remanding for additional findings pursuant to McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2011). I believe the ALJ provided a sufficient basis for his decision, and I would affirm.

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