Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 16, 2013

CLAIM NO. 201079408

ELLIS W. COLEMAN — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

DEPARTMENT OF TRANSPORTATION — RESPONDENT/ CROSS-PETITIONER

AND

HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * * *

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

ALVEY, Chairman. Ellis Coleman ("Coleman") appeals and the Department of Transportation ("DOT") cross-appeals from the from the opinion, order and award rendered October 22, 2012

by Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ"), and from the February 21, 2013 and May 20, 2013 orders ruling on petitions for reconsideration. The ALJ awarded Coleman temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits increased by the three multiplier and medical benefits for a low back injury and resulting psychological condition sustained on July 30, 2010. The ALJ concluded Coleman sustained a 13% impairment rating for his low back injury, of which he carved out 4% due to a pre-existing active condition. In the February 21, 2013 order, the ALJ sustained that part of the DOT's petition for reconsideration finding Coleman is not entitled to an additional period of TTD benefits in addition to those already paid because the issue was not properly preserved for review. The ALJ denied the DOT's second petition in the May 20, 2013 order.

On appeal, Coleman argues the ALJ erred in the February 21, 2013 order by finding he is not entitled to additional TTD benefits as originally determined in the October 22, 2012 opinion. We vacate and remand since Coleman preserved this issue by identifying benefits per KRS 342.730 as a contested issue in the August 7, 2012 benefit review conference ("BRC").

On cross-appeal, the DOT argues substantial evidence does not support a finding of a psychological injury due to the July 30, 2010 work accident. The DOT also asserts the ALJ erred in finding Coleman sustained permanent physical injuries due to the July 30, 2010 event, arguing the entirety of his low back impairment is due to a prior active, symptomatic lower back condition. We disagree and affirm the ALJ's determinations regarding Coleman's physical and psychological disability since they are supported by substantial evidence.

Coleman filed a Form 101 alleging on July 30, 2010 a fifty-five gallon barrel rolled down a hill and struck his left side, causing him to fall backward. As a result, he injured his "back, abdomen, left leg, and developed anxiety & depression." He disclosed he had previously filed a prior workers' compensation claim, number 2002-82498, involving work-related right leg and lower back injuries.

Coleman testified by deposition on June 19, 2012 and at the hearing held August 22, 2012. At the time of the July 2010 work incident, Coleman worked three jobs. He worked over forty hours per week for the DOT as a highway equipment operator. He also held part-time jobs as a fuel attendant and relief bus driver for the Pike County School Board and as a dispatcher/deputy sheriff for the Pike County

Sheriff's Office. In the months preceding the July 2010 incident, Coleman testified he had no problems performing all three jobs, worked without restrictions and took no prescription medication other than for his diabetes. Coleman testified he can no longer perform any of his three jobs because of his work injuries. Coleman currently receives Social Security disability benefits and Kentucky retirement disability benefits.

Coleman testified that on July 30, 2010, while working for the DOT, he was hit in the stomach and left side by a rolling fifty-five gallon barrel causing him to fall over a tire lying behind him. He completed his shift and continued to work for approximately one week. He then sought treatment from Dr. Akers, a chiropractor, for low back and left leg pain, as well as burning and tingling sensations. Dr. Akers restricted Coleman from work on August 10, 2010, and he has not worked since. Dr. Akers provided chiropractic care and referred Coleman to Dr. Sujata Gutti, a neurosurgeon, who administered nerve tests and trigger point injections, which provided no relief. She eventually referred Coleman to her husband, Dr. Sai Gutti ("Dr. Gutti"), for pain management with whom Coleman continues to treat on a monthly basis. Dr. Gutti also referred Coleman to "Mountain Comp" for depression and

anxiety. He also saw Roy Steve Price, a clinical social worker, who he sees on a monthly basis for therapeutic sessions. Dr. Gutti prescribes medication to treat his depression and anxiety, in addition to those prescribed for the physical effects of his injuries.

Coleman testified that on March 28, 2002, he injured his right leg and back while working as a deputy and subsequently received chiropractic treatment from Dr. Akers. An orthopedic surgeon recommended back surgery, which was never approved. Four months later Coleman was released without restrictions and returned to work. Coleman filed a workers' compensation claim for the 2002 incident, which he settled based upon a 13% impairment rating for his back injury. Coleman stated he did not receive any treatment for anxiety or depression following the 2002 incident. Coleman also testified he was involved in a motor vehicle accident in 2003 which resulted in no injuries.

Following the 2002 work incident, Coleman testified he continued to treat with Dr. Akers for occasional episodes of back pain. His last chiropractic visit immediately prior to the July 2010 work accident was in April 2010. Coleman confirmed he has been diabetic since approximately 1996, and became insulin dependent following the July 2010 incident. For this reason, he cannot obtain a

commercial drivers' license, although he denies complications stemming from his diabetes.

Prior to the work injury in question, Coleman testified he only experienced minor back pain not requiring prescription medication. Following the July 2010 work injury, Coleman stated his back pain worsened, he became depressed, and treats with Cymbalta, Zoloft, Gabapentin, Zanaflex, Lortab, Lidoderm patches, and Mobic. He also complains of bilateral leg pain, tingling and burning. Coleman denied receiving treatment or taking medication for depression or anxiety prior to the July 2010 incident.

Coleman filed the treatment records of Dr. Gutti, who initially treated him on April 5, 2011. Dr. Gutti noted the work injury and opined Coleman is depressed. He recommended conservative treatment, prescribed medication and advised Coleman to remain off work. The records indicate Dr. Gutti continued to treat Coleman through June 2012. Dr. Gutti administered at least one lumbar epidural steroid injection on May 18, 2011, and prescribed Neurontin, Zanaflex, Cymbalta, Lortab and Mobic. A July 7, 2011 note reflects a diagnosis of reactive depression.

Dr. Gutti also prepared a Form 107-I dated June 15, 2012 outlining the July 2010 work injury and subsequent conservative treatment. He diagnosed intractable low back

pain; lower extremity radiculitis; lumbar degenerative disc disease at L4-5 level, radiculitis, bilateral L5 radiculopathy by electrodiagnostic studies; and neuropathy. He opined Coleman's injuries caused his complaints. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Gutti assessed a 10% impairment rating for lumbar spine and 3% impairment rating for chronic pain, yielding a combined 13% impairment rating. Dr. Gutti indicated Coleman had an active impairment prior to the 2010 work injury. Of the 13% impairment rating, "approximately 30% could be attributed to pre-existing active condition of lumbar degenerative disc disease." Dr. Gutti stated Coleman does not retain the physical capacity to return to the type of work performed at the time of his injury and assigned permanent restrictions.

Coleman also filed Dr. Akers' chiropractic records. Prior to the July 30, 2010 incident, Coleman visited Dr. Akers on April 27, 2010 complaining of mild mid back pain and moderate to severe low back pain. Coleman continued to treat with Dr. Akers following the work accident complaining of low back and lower extremity pain, as well as leg weakness and numbness.

Coleman filed the largely illegible records of Mr. Price, MSW/LCSW, reflecting monthly therapy sessions beginning in March 2011 and continuing through June 2012. Mr. Price diagnosed chronic pain disorder with psychological factors and general medical condition, and depression not otherwise specified, both secondary to the occupational July 30, 2010 injury.

The DOT filed additional records from Dr. Akers reflecting Coleman received periodic chiropractic care from 2005 through 2010. He treated with Dr. Akers at least twice in 2005, once in 2006, fifteen times in 2007, twenty-six times in 2008, and sixteen times in 2009 for a variety of complaints including low back pain. Prior to the July 2010 incident, Coleman received chiropractic care on six occasions in 2010.

The DOT filed the 2002 treatment records of Dr. Larry Coleman. On May 31, 2002, Dr. Coleman noted a lumbar MRI revealed a bulging disc on the right with paracentral herniation entrapping the L5 nerve root, and the patient would like to avoid surgery if possible. On July 10, 2002, Dr. Coleman stated Coleman has a bulging and herniated disc at L4-5 and prescribed Celexa.

The DOT filed three MRI reports. A May 23, 2002 lumbar MRI demonstrated “disc bulging and herniation at

L4/L5 may entrap the right L5 nerve root in the lateral recess." A January 8, 2008 lumbar MRI demonstrated: 1) central disc protrusion at L4-5; 2) mild bulging disc at L5-S1; and 3) minimal T12 wedge deformity, which appears chronic. A September 15, 2010 lumbar MRI demonstrated mild degenerative disc disease at L4-5 and facet arthropathy at L4-5 and L5-S1, with no significant central canal stenosis or neuroforaminal narrowing.

Coleman filed the March 7, 2012 Form 107-I report and letter from Dr. Anbu Nadar, who evaluated him on February 14, 2012. Dr. Nadar diagnosed lumbosacral strain with radiculopathy and mild degenerative disc disease with disc protrusion at L4-5 level. He opined Coleman's injuries caused his complaints. Pursuant to the AMA Guides, Dr. Nadar assessed an 8% impairment rating for the lumbar spine and 3% for chronic pain, yielding a combined 11% impairment rating. Dr. Nadar found Coleman had an active impairment prior to the July 30, 2010 injury, citing to the 2002 back injury. He stated the "DRE Lumbar Category II for which a maximum of 8% is recommended, of which 30% could be attributed to his pre-existing active condition." Dr. Nadar opined Coleman does not have the physical capability to return to the type of work performed at the time of injury

and requires periodic symptomatic care. He also assigned permanent restrictions.

Dr. Nadar testified by deposition on July 25, 2012. Dr. Nadar explained the 8% impairment rating assigned for the lumbar condition is based upon Coleman's radicular complaints, confirmed by the EMG nerve conduction study. Dr. Nadar clarified the 30% he assigned to the pre-existing active condition should be subtracted from the combined 11% impairment rating.

The DOT filed the January 11, 2012 report of Dr. G. Christopher Stephens, who evaluated Coleman at its request. Dr. Stephens noted the July 2011 work incident and Coleman's "long history of low back pain." He diagnosed chronic recurring back pain secondary to degenerative disk disease. He found the July 2010 incident "was nothing more than a temporary exacerbation of his chronic back pain," for which he attained maximum medical improvement ("MMI") two months later. Dr. Stephens found no permanent impairment, permanent restrictions or further treatment recommendations attributable to the July 2010 work incident.

Dr. Stephens testified by deposition on June 11, 2012. He stated Coleman's examination was normal with no objective evidence of radiculopathy. He reiterated Coleman had a chronic, active degenerative disc disease temporarily

exacerbated by the July 2010 incident. Dr. Stephens critiqued the opinions of Dr. Nadar regarding causation and assessment of impairment. On cross-examination, Dr. Stephens agreed Coleman was not taking any pain medication, and assumed he was working unrestricted and full time immediately prior to the work accident.

Coleman filed the March 27, 2012 psychological report of Eric Johnson, Ph.D. Dr. Johnson diagnosed depressive disorder, not otherwise specified and pain disorder associated with psychological factors and a medical condition. At the time of the report, Mr. Johnson found Coleman had not reached MMI and recommended he continue outpatient counseling and psychiatric consultation. He estimated Coleman would reach MMI by the end of the year. Pursuant to the 2nd and 5th Editions of the AMA Guides, Dr. Johnson assessed an 8% impairment rating. Coleman also filed the March 27, 2012 Form 107-P prepared by Dr. Johnson. He noted Coleman's psychological complaints are due to the physical work-related injury. He stated the depression and pain disorder are due to Coleman's inability to work and his chronic pain.

The DOT filed Dr. Robert P. Granacher, Jr.'s June 18, 2012 psychiatric report. He concluded Coleman showed no evidence of a mental disorder due to the July 2010 work

injury. He stated Coleman engaged in severe symptom magnification with strong indications of malingering. He also diagnosed severe chronic insulin dependent diabetes. Dr. Granacher assessed a 0% psychiatric impairment due to the July 2010 accident pursuant to the 5th and 2nd Editions of the AMA Guides. Likewise, he found no basis to recommend psychiatric restrictions or future treatment.

Coleman also filed several documents he had also filed in support of his application for Social Security disability benefits. A November 7, 2011 psychological evaluation by Dr. Robert Martin, psychologist, notes the July 2010 work injury and subsequent treatment. Dr. Martin stated Coleman became very depressed due to his chronic pain, loss of physical function capacity and loss of vocational role. He diagnosed major depressive disorder, single episode, severe, without psychotic features; generalized anxiety disorder; and reported medical conditions of pain disorder, type II diabetes. A January 15, 2011 "Department for Disability Determination" report by William Rigby, Ph.D., notes Coleman reported mental health problems due to depression beginning in August 2009. He diagnosed major depression without psychosis, diabetes, and orthopedic problems with his back and shoulder. Coleman also submitted the mostly illegible psychosocial assessment

by Mountain Comprehensive Care Center dated November 15, 2010, as well as the October 13, 2011 mental residual functional capacity assessment by Mr. Price.

Finally, the DOT filed various documents stemming from the 2002 injury. A Form 101 filed in July 2002 indicates Coleman injured his "back and right leg which has been complicated by anxiety and depression" on March 28, 2002, while working for the Pike County Sheriff's Office. In support of that claim, Coleman filed the September 28, 2002 Form 107-I report and letter of Dr. James Templin who assigned an 8 to 13% impairment rating for his lumbar spine pursuant to the AMA Guides. Dr. Templin advised Coleman to minimize activities involving frequent bending, stooping, kneeling, crouching, lifting and carrying; avoid lifting greater than 35 to 40 pounds from waist level and 15 to 20 from floor level; and to avoid activities requiring repetitive use of foot controls with his right foot. He further stated Coleman could return to a full work day in his regular position in four weeks. He opined Coleman would require future chiropractic treatments with Dr. Akers twice a month for an extended period of time. Subsequently, a Form 110 was approved on February 10, 2003 by Hon. Lawrence F. Smith, Administrative Law Judge, indicating the parties settled the back injury claim for $15,784.50 to be paid

weekly for 425 weeks based upon a 13% impairment rating assessed by Dr. Templin.

The August 7, 2012 BRC order reflects the following relevant stipulation: TTD benefits were paid at the maximum rate from August 18, 2010 to January 15, 2012 for a total of $52,525.67. A check mark was denoted next to the following contested issues: Benefits per KRS 342.730; Work-relatedness/causation (psychological only); Injury as defined by the Act (both); and Exclusion for pre-existing disability/impairment as related to Plaintiff's prior 11%[sic] WPI for a work-related back injury. The "other" section identifies the application of the Teledyne[1] doctrine as an issue.

The October 22, 2012 opinion recited the above stipulations and issues identified in the BRC order, except it stated TTD benefits were paid from September 9, 2010 to January 15, 2012. The ALJ found as follows regarding Coleman's alleged psychological claim:

> The initial determination to be made is whether Plaintiff stained[sic] a psychological injury as a result of his July 30, 2010 work incident.
>
> In an effort to ascertain the true cause of Plaintiff's anxiety and depression, Plaintiff's counsel sent him

[1] Presumably Teledyne-Wirz v. Willhite, 710 S.W.2d 858 (Ky. App., 1986).

to be examined by Dr. Eric Johnson, Ph.D. Dr. Johnson provided a March 27, 2012 psychological report and as to causation Dr. Johnson indicated Plaintiff did not have psychological problems prior to his 2010 work injury. He also indicated Plaintiff's present psychological complaints were the direct result of his recent physical work-related injuries. Dr. Johnson assessed an 8% psychological impairment rating.

In Plaintiff's January 15, 2011 evaluation for the Kentucky Division of Disability Determinations, it was documented he stated, when describing his chief complaint, "says he has mental health problems because of depression. He has had this since August 2009." It is true Plaintiff does have "health problems because of depression but, it is unclear why it was noted." He has had this since August, 2009." There does not appear to be any indication in the many available records what the significance of August 2009 is to Plaintiff.

On November 7, 2011 Psychologist Robert Martin, Fellow American College of Forensic Examiners, conducted a psychological evaluation of Plaintiff. This was done to address why Plaintiff initially denied Social Security Disability Benefits, Psychologist Martin conducted a very thorough exam of Plaintiff. Pursuant to his evaluation of Plaintiff he wrote, "Mr. Coleman's depression and anxiety are the results of his chronic pain, loss of physical functional capacity and progressively worsening diabetes."

In an effort to thwart Plaintiff's claim of a psychological component to his work injury, Defendant obtained a July 9, 2012 psychiatric evaluation

> report by Dr. Robert Granacher, an often-retained psychiatric expert witness for employers. In Dr. Granacher's evaluation, he characterized Plaintiff as exhibiting "severe symptom magnification with a strong indication of malingering." As previously noted, the undersigned characterized Plaintiff as being credible and forthright.
>
> It is also noteworthy that the results of the standardized tests administered by Dr. Granacher appear to be in conflict with the results attained by others who have administered such standardized tests. After conducting an evaluation of Plaintiff, Dr. Granacher answered specific written questions propounded to him by Defendant's counsel. In his answers he indicated Plaintiff's psychiatric diagnosis was not related to the July 30, 2010 alleged accident. He assessed a 0% psychiatric WPI rating. He indicated, from a psychiatric standpoint, Plaintiff retained the mental capacity to return to doing the work he was doing when injured.
>
> Based upon the reliable input from Dr. Eric Johnson, Ph.D. and Dr. Robert Martin, Ph.D. it is determined Plaintiff does have a psychological component to his July 30, 2010 work injury. Since the only WPI rating issued for a psychological injury is 8%, that is determined to be Plaintiff's WPI rating.

The ALJ found as follows regarding Coleman's physical injuries:

> In regard to Plaintiff's physical impairment sustained in his 2010 work injury, Dr. Sai Gutti's, Pain Management, input is persuasive. Dr. Gutti, Plaintiff's treating physician,

has had an opportunity to see, touch and evaluate Plaintiff on numerous occasions since August 18, 2010. Having the opportunity to monitor Plaintiff's status, he proposed a logical, step-by-step course of treatment for Plaintiff. Dr. Gutti set a specific goal to alleviate Plaintiff's pain to a degree Plaintiff could more fully participate in day-to-day activities. He expressed his intention to give constant review to the diagnosis and treatment plan. He proposed first trying conservative treatment than[sic] injected[sic] therapy and, if necessary, more invasive treatment. He reviewed Plaintiff's MRI's from September 15, 2010 and May 23, 2012 and the EMG studies of August 2010. Plaintiff has a pain problem and Dr. Gutti is a pain doctor, if Plaintiff had a bone problem then it is likely a bone doctor's input would be persuasive. Based upon his arsenal of pertinent information, his opportunity to see [sic] treat Plaintiff over a protracted period of time, and his particular medical expertise, his input is most persuasive. **It is determined Plaintiff has a 13% WPI at this time**.

Dr. Gutti including [sic] also correctly opined Plaintiff was unable to return doing the work (three jobs) he was doing when injured. Dr. Gutti also noted Plaintiff was able to work without restrictions prior to his July 2010 work injury. He imposed restrictions including no lifting over 10 pounds from floor level; no lifting over 20 pounds from waist level; alternative sitting and standing to reduce low back pain; no walking/standing for more than two hours in a regular work day; no sitting more than three hours in a usual work day; avoid continuous bending, stooping, and climbing, and do not operate heavy machinery.

> **Dr. Gutti acknowledged Plaintiff had a pre-existing active condition of his lumbar spine. It was his opinion that approximately 30% of Plaintiff's 13% was due to a pre-existing active condition. Based upon Dr. Gutti's persuasive input it is determined Plaintiff's WPI rating for his recent work-related injury is 9% (13% x 30% = 9.1 rounded to 9%).** (emphasis added).

The ALJ found Coleman entitled to the application of a three multiplier pursuant to KRS 342.730(1)(c)1, based upon his testimony and the opinions Drs. Nadar and Gutti. The ALJ found Coleman attained MMI on "June 15, 2010" since Dr. Gutti completed the Form 107 on June 15, 2012. Finally, the ALJ declined to find Coleman permanently and totally disabled. The ALJ awarded TTD benefits from July 31, 2010 through June 15, 2012, PPD benefits based upon a 16% impairment rating commencing on June 16, 2012 and medical benefits for the "work-related injuries to his right knee and ankle." The ALJ found the DOT was entitled to a credit for any payment of compensation benefits already paid.

Coleman filed a petition for reconsideration on November 7, 2012 requesting the ALJ correct the MMI date to June 15, 2012. Coleman requested the ALJ specifically find he utilized the combined chart in the AMA Guides to arrive at the 16% impairment rating in calculating his PPD

benefits. Coleman also requested the ALJ correct the award of medical expenses to reflect "work-related injuries to the Plaintiff's back, and his anxiety and depression."

The DOT filed a petition for reconsideration on November 7, 2012, arguing the ALJ improperly awarded additional TTD benefits in addition to those already paid as reflected in the BRC's stipulations since Coleman neither requested nor listed as a contested issue entitlement to additional TTD benefits at the BRC. The DOT requested the ALJ amend his opinion to reflect the correct period of TTD benefits as those already paid as stipulated in the BRC, to August 18, 2010 through January 15, 2012.

The DOT argued the ALJ erred in failing to "properly address and carve out [Coleman's] preexisting active disability." It asserted Dr. Gutti's assessment of impairment does not constitute substantial evidence, stating as follows:

> The [ALJ] notes the Plaintiff had a previous 2002 injury claim which he settled for a 13% whole person impairment for a low back claim. The [ALJ] then proceeded to amazingly adopt the opinion of Dr. Gutti who assessed a 13% rating (the exact same rating the Plaintiff settled for back in 2002] and only carved out a 30% preexisting active impairment. This equals to a 4% carve out. Under the [AMA Guides] it is absolutely impossible to have a 4% low back impairment rating under the DRE at

> the time of a work incident. If the [ALJ] reviewed the [AMA Guides], he would note the DRE places rating in the range of 5-8% and 10-13% and nowhere is it possible to have a 4% pre-existing active low back impairment rating.

The DOT also challenged several findings and statements made by the ALJ regarding Coleman's psychological condition.

In the February 21, 2013 order ruling on the DOT's petition for reconsideration, the ALJ stated as follows regarding TTD benefits:

> 1. The first issue for which Defendant seeks reconsideration is that the undersigned addressed and determined the issue of Plaintiff's entitlement to TTD benefits when that issue was not listed on the BRC Order as an issue for determination. A review of the August 7, 2012 BRC Order confirms the issue of Plaintiff's entitlement to TTD was not listed as an issue for determination by the ALJ. In light of the fact the ALJ did consider the issue of TTD and then render an award of TTD benefits in the Opinion, when that issue was not preserved for determination by the ALJ, does constitute an error patently appearing on the face of the Opinion, therefore Defendant's Petition for Reconsideration on this point is sustained. Since Plaintiff's entitlement to TTD benefits was not an issue to be addressed, it is determined Plaintiff was only entitled to receive TTD benefits as paid by Defendant.
>
> Petitioner also correctly points out that the time period Defendant did pay TTD benefits is incorrectly set forth in the Opinion. Defendant paid TTD benefits to Plaintiff from August

> 18, 2010 through January 15, 2012. Pursuant to the Stipulations of the parties, this is the only period of time Plaintiff was paid TTD benefits and since additional TTD benefits cannot be awarded, Plaintiff is only entitled to receive TTD benefits as paid.
>
> The Opinion is revised so as to delete any portion of the Opinion that addresses the issue of Plaintiff's entitlement to TTD benefits or awards Plaintiff TTD benefits.
>
> The Order section of the Opinion is revised so as to delete an award of TTD benefits in excess of the benefits already paid Plaintiff from August 18, 2010 through January 15, 2012.

The ALJ stated as follows regarding the carve-out for Coleman's pre-existing condition:

> 2. The second point on which Plaintiff seeks reconsideration is that the carve-out of Plaintiff's impairment rating for a preexisting active condition was not done correctly. In the Opinion, a 4% carve-out was taken from Plaintiff's 13% WPI. Defendant contends the carve-out cannot possibly be correct because the 5th Edition of the AMA Guides do not provide for a 4% lumbar impairment rating. Based upon this assumption, Defendant contends Dr. Gutti's input (the physician who gave the 13% WPI rating and then carved-out the 4% to give a 9% WPI rating) does not constitute substantial evidence that can be relied upon to determine Plaintiff's impairment rating.
>
> A review of Dr. Gutti's Form 107 reveals his 13% impairment rating is soundly based on the AMA Guides. He indicated he utilized the Guides to make

his rating. He wrote, "Patients (sic) impairment comes from DRE model 15-4 patient falls under Category III."

As to the specific components of his 13%, Dr. Gutti plainly set forth 10% was for Plaintiff's lumbar spine impairment per Chapter No. 15, Table No. 15-3, which yielded a 10% WPI rating for Plaintiff's lumbar spine. He went on to explain he assessed, per the Guides, a 3% impairment rating for Plaintiff's chronic pain. He wrote that this 3% was based upon Chapter No. 18, Section 18.30 of the Guides. When 3 and 10 are combined per the Guide's Combined Values Chart, the result is a 13% WPI rating.

Dr. Gutti went on to write, "As listed above patient has an active impairment based on the DRE model of 13%. Approximately 30% could be attributed to pre-existing active condition of lumbar degenerative disc disease." 70% of 13 is 9.1, and when rounded down, yields a 9% WPI rating. (emphasis added)

Nurse Staffing v. Roberta Rogers, Claim No. 09-94579, (Board Opinion March 30, 2010, affirmed by the Court of Appeals on October 22, 2010, in an unpublished Opinion), provides relevant input on this question.

At page 10 of the Board's Opinion it was written, "What is more, the AMA Guides authors also make it clear within the confines of that treatise that its purpose is to provide objective standards for the "estimating" of permanent impairment ratings by physicians. While it is true an assessment by a physician of a workers' physical impairment which wholly disregards the express terms of the AMA Guides cannot constitute substantial

evidence to support an award of benefits, the Court of Appeals of Kentucky has instructed that so long as a physician's opinion concerning impairment is "grounded in the AMA Guides", the rating assessed may be relied on by the fact finder for purposes of determining PPD. Jones v. Brasch-Berry General Contractors, 189 S.W.3d 149, 154 (Ky, App. 2006). For that reason, this Board has routinely held that except under compelling circumstances, where it is obvious even to lay person that a gross misapplication of the AMA Guides has occurred, the issue of whether a physician's AMA rating is properly assessed and, therefore, credible is a matter of discretion for the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App., 1985).

Dr. Gutti's 13% is well "grounded in the AMA Guides".

Dr. Gutti's subsequent determination that 30% of the 13% was due to a pre-existing condition was an appropriate determination. The Guides do not dictate what percentage or portion of a Guides-based, WPI rating is to be cut out due to a pre-existing active condition. If Defendant's contention on this point was accepted, it would be an example of the tail wagging the dog.

Furthermore, under Ludka v. M.G. Construction, 2005 WL 3334705, 2005-CA-000769, a 2005 unpublished opinion, the proper way for a party to challenge a doctor's impairment rating is to present medical testimony concerning the impropriety of the rating or to cross-examine the doctor. A review of this claim file indicates Defendant neither presented testimony concerning the

> alleged impropriety of Dr. Gutti's WPI rating nor did Defendant cross-examine Dr. Gutti.
>
> Based upon the above, Defendant's Petition on this point is overruled.

The ALJ stated as follows regarding Coleman's psychological injury:

> 3. As to Defendant's third point for which it seeks reconsideration Defendant correctly points out that the Opinion incorrectly indicates that the only WPI rating for Plaintiff's psychological injury was the 8% given by Dr. Johnson, but this is not correct. Defendant's Dr. Granacher also gave an impairment rating, that being a 0%.
>
> Since what was written in the Opinion was not correct, it constitutes an error which appears on the face of the Opinion, and therefore Defendant's Petition is sustained on this point. Accordingly, the last sentence in paragraph 2, on page 20 of the Opinion, is deleted and replaced with "Since there are only two (2) WPI ratings for Plaintiff's psychological injury – Plaintiff's Dr. Johnson's 8% and Defendant's Dr. Granacher's 0% - it must be determined which WPI rate most accurately reflects Plaintiff's psychological impairment. The most reliable and persuasive evidence comes from Dr. Johnson. It is determined, based upon Dr. Johnson's input, Plaintiff has an 8% whole person psychological impairment as a result of his July 30, 2010 work injury."
>
> 4. Defendant next contends Dr. Granacher's qualifications and/or character as set forth in the Opinion are inaccurate.

In its Petition Defendant wrote, “Dr. Granacher is “an often retained psychiatric expert witness for Employers.” Dr. Granacher has testified in numerous civil and workers’ compensation claims and has repeatedly noted that he has close to 50/50 for both Plaintiff and Defendants as far as performing IMEs. Incorrect characterization by the ALJ obviously shows a bias towards Dr. Granacher’s Opinion.” A review of the record in this claim does not reveal any testimony or other input regarding Dr. Granacher’s 50/50 split as to which party he conducts IMEs.

The undersigned was not biased towards Dr. Granacher’s opinions, but was persuaded Dr. Granacher’s input merited little weight. Dr. Granacher’s input was afforded little weight for several reasons, including, but not limited to, his standard test results appeared invalid (as clearly indicated by Dr. Johnson), and his final opinions were based upon his concluding Plaintiff was a symptom magnifier bordering on malingering, a key issue on which the undersigned does not agree with Dr. Granacher.

Defendant also wrote “if the Administrative Law Judge took time to review the actual qualifications of Dr. Robert Granacher as compared to those of either Dr. Eric Johnson or Dr. Martin (neither of which are any more than psychologist) the Administrative Law Judge would likely have reached a different opinion.” The undersigned, though already familiar with Dr. Granacher’s credentials, again reviewed his qualifications and again (several times) reviewed the proof, and, having

> done so, remains unaware of any reason to reach another opinion.
>
> L.K.M. and W.R.M v. Department for Human Resources, Commonwealth of Kentucky, et. al., 621 S.W.2d 38 (Ky. 1980) provided, "We also find no merit in appellant's contention that one of the witnesses did not have the proper college degree."
>
> The issues contained in Numerical paragraphs two (2) and three (3) of Section III of Defendant's Petition are Overruled, the issues therein are mere reargument.

The DOT filed a second petition for reconsideration arguing the ALJ's statement it had not presented testimony concerning the alleged impropriety of Dr. Gutti's impairment rating was incorrect. It also requested further findings of fact explaining why Dr. Granacher's report had little weight "as opposed to a psychologist such as Eric Johnson." The ALJ overruled the DOT's second petition in its entirety on May 20, 2013, stating as follows:

> In an effort to fairly address and determine the merits of Defendant's Second Petition, the undersigned reread several times Dr. Stephens' January 11, 2012 IME report, Dr. Stephens' Addendum to his initial IME report, and the entire transcript of Dr. Stephens' July 11, 2012 deposition.
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> A rereading of Dr. Stephens' July 11, 2012 deposition transcript does not reveal where Dr. Gutti's involvement in

this matter was discussed, and, since Dr. Gutti was not deposed, it cannot be said he was ever subject to cross examination. These facts are dispositive when determining the weight to be afforded Dr. Gutti's WPI assessment. The ALJ's previous determinations regarding which WPI rating to accept remain unchanged.

Despite this determination, it cannot be denied that defendant did file proof, especially in the form of Dr. Stephens' Addendum to his initial IME report, calling into question what restrictions should be placed on plaintiff and how any impairment rating assessed plaintiff should be apportioned between a pre-existing impairment and the impairment caused only by the work injury. Defendant did present proof challenging Dr. Gutti's input, but it cannot be denied Dr. Gutti was not subject to deposition or cross examination nor did Dr. Stephens give testimony addressing the alleged improprieties of Dr. Gutti's WPI rating.

Based upon the black-and-white facts of this claim, Defendant's petition on this point is overruled.

The second point upon which Defendant seeks reconsideration, is a request to reconsider the weight given the input of its expert psychiatric physician, Dr. Granacher. Defendant requests the ALJ "to make further findings as to why Dr. Granacher's report was given less weight afforded Plaintiff's expert witness, psychologist Barry Johnson." Defendant's petition seeking reconsideration of this point is an attempt to have the undersigned again review the proof, re-evaluate the proof, and re-weigh the evidence; this is not a valid reason to sustain a petition for

> reconsideration; and therefore, Defendant's petition for reconsideration of this point is overruled.

On appeal, Coleman argues the ALJ erred in the February 21, 2013 order regarding the award of TTD benefits. Coleman argues he is entitled to additional TTD benefits from January 15, 2012 to June 15, 2012 as originally found in the October 22, 2012 opinion. Coleman asserts he did not stipulate he was not entitled to additional TTD benefits. He further asserts the issue was properly preserved by arguing he was entitled to permanent total disability benefits under the Teledyne doctrine. He also argues TTD benefits are included in the umbrella stipulation as part of the contested issue of benefits pursuant to KRS 342.730.

On cross-appeal, the DOT argues substantial evidence does not support a finding of a psychological injury due to the July 30, 2010 work accident. The DOT also argues the ALJ erred in finding Coleman sustained permanent physical injuries as a result of the July 30, 2010 event. Relying upon Finely v. DBM Technologies, Inc., 217 S.W.3d 261 (2007), it argues Coleman had an active, symptomatic lower back condition immediately prior to the work accident. It asserted Coleman was assigned a 13% impairment rating for a previous 2002 back injury and he continuously treated with

Dr. Akers until three months prior to the work injury. It argues the opinions of Dr. Stephens are most persuasive regarding a pre-existing active condition. It states Dr. Gutti's assessment of impairment is incorrect, raising the same argument made in its first petition for reconsideration, and points to the opinions of Drs. Nadar and Stephens.

We first address Coleman's argument he is entitled to additional TTD benefits despite the DOT's assertion the issue was not properly preserved at the BRC. We agree with Coleman and find the issue of additional TTD benefits outside of those voluntarily paid by the DOT was in fact properly preserved. In United Parcel Service, Inc. v. Stoudemire, 251 S.W.3d 331, 333-334 (Ky. App. 2008), the Court held a claimant properly preserved the issue of additional TTD benefits, even though the employer contended this issue was not raised at the BRC, when the extent and duration of disability issue was specifically designated as a contested issue to the ALJ. Likewise, the Kentucky Supreme Court in Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman, 233 S.W.3d 710, 713 (Ky. 2007), held questions regarding the appropriateness and duration of TTD are encompassed within the question of extent and duration.

See also, Johnson Floyd Coal Company v. Eric Osborne, Claim No. 2007-77104 (WCB, Rendered November 29, 2010).

KRS 342.0011(11)(a) defines TTD as a condition of an employee who has not reached maximum medical improvement ("MMI") from an injury and has not reached a level of improvement that would permit a return to employment. This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court further explained:

> [i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she was performing at the time of his injury.

In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event. In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> Id. at 580-581.

Therefore, we vacate and remand to the ALJ to determine whether Coleman is entitled to additional TTD benefits. On remand, the ALJ shall find Coleman properly preserved this issue in light of United Parcel Service, Inc. v. Stoudemire, supra, Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman, supra, and Johnson Floyd Coal Company v. Eric Osborne, supra. The ALJ shall then conduct an appropriate analysis as outlined above and determine

whether Coleman is entitled to additional TTD benefits, if any, in addition to those voluntarily paid by the DOT.

We next address the DOT's arguments the ALJ erred in determining Coleman sustained both permanent physical and psychological injures due to the July 30, 2010 work accident. As the claimant in a workers' compensation proceeding, Coleman had the burden of proving each of the essential elements of his cause of action including extent and duration of his alleged disabilities. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since he was successful before the ALJ, the question on appeal is whether substantial evidence supports the decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581

S.W.2d (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

We find the ALJ acted well within his discretion in relying upon the opinions of Coleman's treating physician, Dr. Gutti, in determining he sustained a permanent low back injury due to the July 30, 2010 event. In the June 15, 2012 Form 107-I, Dr. Gutti assessed a 13% impairment rating for Coleman's low back condition pursuant to the AMA Guides. He then carved out 4% due to a pre-existing active condition. Relying on the above opinion, the ALJ determined Coleman sustained a low back injury due to the July 30, 2010 event and assessed a 9% impairment rating. Although the DOT is able to point to evidence in the record supporting a more favorable outcome, such is not

an adequate basis for to reverse on appeal. McCloud v. Beth-Elkhorn Corp., supra.

We find no merit in the DOT's argument Coleman did not sustain any permanent impairment due to the July 2010 event since he previously settled a claim involving the same body part in 2003 based upon a 13% impairment rating and continued to treat with Dr. Akers up until three months prior to the work injury. We first note in the case *sub judice*, Coleman is not alleging a worsening of a condition subsequent to the 2003 settlement. Rather, he is alleging a new, separate injury. Therefore, the ALJ is not required to determine Coleman's actual occupational disability at the time of settlement in order to determine whether there has been an increase in impairment. *See* Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992). We also acknowledge Coleman continued to receive chiropractic treatment for various complaints including low back symptoms. However, as noted by Dr. Gutti, Coleman was working full time without restriction at the time of the work incident. In fact, the ALJ agreed with the DOT in part in finding Coleman had a pre-existing active condition at the time of the work injury, but was un-persuaded such condition accounted for the entirety of Coleman's current impairment rating. The ALJ committed no

error in finding more persuasive the opinions of Dr. Gutti. Magic Coal Co. v. Fox, supra.

We likewise reject the DOT's argument Dr. Gutti's assessment of impairment cannot constitute substantial evidence since it is impossible to arrive at a 4% low back impairment rating pursuant to the AMA Guides. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Hence, an ALJ is not authorized to arrive at an impairment by independently interpreting the AMA Guides. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Additionally, while an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be accorded an expert's impairment assessment, as finder of fact he is never required to do so. Id. An ALJ may adopt an expert's opinion regarding an impairment rating so long as sufficient information is contained from which he can reasonably infer it is based upon the AMA Guides.

In reviewing Dr. Gutti's June 15, 2012 report, he clearly indicates his assessment of impairment is pursuant to the AMA Guides. Contrary to the DOT's assertion, Dr. Gutti did not assess a 4% impairment rating for Coleman's

low back condition. In his report, Dr. Gutti clearly assessed a 10% impairment rating for the lumbar spine and 3% for chronic pain, yielding a combined total of 13% pursuant to the AMA Guides. He then apportioned 30% of the 13% rating to a pre-existing active condition. On the other hand, Dr. Stephens assessed no permanent impairment rating due to the July 30, 2010 event. Under such circumstances, the opposing impairment rating assessed by Dr. Stephens merely represented conflicting evidence which the ALJ in his role as fact-finder was free to reject.

Finally, we find no error in the ALJ's determination Coleman sustained psychological injuries as a result of the July 30, 2010 work injury. The opinions of Drs. Johnson and Martin constitute substantial evidence upon which the ALJ can rely. Although Dr. Granacher rendered a differing opinion on the issue, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Accordingly, the October 22, 2012 opinion, order and award, and the February 21, 2013 and May 20, 2013 orders on reconsideration by Hon. Otto D. Wolff, IV, Administrative Law Judge, are **AFFIRMED IN PART, VACATED IN PART**, and **REMANDED** for entry of an amended award consistent with the views expressed herein.

ALL CONCUR.

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