

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 1, 2016

CLAIM NO. 201166927

FLOYD COUNTY BOARD OF EDUCATION

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

JENNIFER MARTIN
and
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

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

ALVEY, Chairman. Floyd County Board of Education ("Floyd County") and Jennifer Martin ("Martin") both appeal from the Opinion, Award and Order rendered January 15, 2015 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). Martin was awarded temporary total disability ("TTD")

benefits, permanent partial disability ("PPD") benefits increased by the two multiplier pursuant to KRS 342.730(1)(c)2, and medical benefits for injuries to her right knee and head sustained in a work-related motor vehicle accident ("MVA") on November 17, 2011. The parties also appeal from the February 24, 2016 Order on Petitions for Reconsideration.

On appeal, Floyd County argues the ALJ did not perform a proper analysis pursuant to Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015) in awarding TTD benefits from November 17, 2011 to April 2, 2012 since she returned to the same position without restrictions on November 28, 2011. Floyd County argues the ALJ erred in beginning the application of the two multiplier contained in KRS 342.730(1)(c)2 from the date of injury, rather than from the date of cessation of employment at the same or higher rate of pay. Floyd County also argues the ALJ erred in relying upon the opinions of Dr. Robert Granacher and Dr. David Muffly in assessing a 15.5% impairment rating. Martin argues the ALJ erred in failing to award future medical benefits for her work-related left shoulder injury.

The opinions of Drs. Granacher and Muffly constitute substantial evidence supporting the ALJ's determination Martin sustained work-related injuries to her

right knee and head warranting a 15.5% impairment rating. However, we vacate in part and remand for additional findings and analysis regarding the periods to which Martin may be entitled to TTD benefits; the date Martin ceased earning equal to or greater wages and therefore entitlement to the actual enhancement by the two multiplier or doubling of her PPD benefits; and whether Martin sustained a temporary injury to her left shoulder as a result of the November 17, 2011 MVA warranting temporary and/or future medical benefits.

Martin filed a Form 101 alleging injuries to her left shoulder, right knee, back and head due to the MVA on November 17, 2011. Martin is a registered nurse and began working for Floyd County as a health coordinator/certified school nurse in 1978. The ALJ sustained Martin's motion to amend the Form 101 to include a cervical injury in an order dated August 11, 2015.

Martin testified by deposition on December 20, 2013 and at the hearing held November 16, 2015. Martin is responsible for the health care of all students in the Floyd County school system, the training of health assistants and nurses, and is involved in all health plan meetings. Her job requires her to travel throughout the county. She does not have patients, does not administer

injections, and has never had to perform CPR. At the time of the MVA, Martin worked 205 days a year for which she earned approximately \$62,000.

Following the November 17, 2011 MVA, Martin was off work until November 27, 2011. Martin returned to her job as health coordinator on November 28, 2011, earning the same or greater wages. Other than not driving for the first few days after she returned to work, Martin resumed her normal duties full-time without restrictions, but had continued problems with her right knee, left shoulder and head. Martin continued to work full-time without restrictions until she retired on June 1, 2013. No physician advised her to retire due to her health conditions. Martin was re-hired by Floyd County in early October 2013, and returned to the same position, but worked half the number of hours she did before, earning approximately \$24,000.

On November 17, 2011, Martin was stopped at a red light waiting to turn left. Martin testified she does not remember the events occurring over the next four or five hours, but was told she was rear-ended by another vehicle. Martin has no recollection of being taken to Highlands Regional Medical Center, or treatment rendered at the facility. Martin was transferred to Cabell Huntington

Hospital for further evaluation, and states her first memory is in the ambulance on the way there. Martin was admitted overnight, and was treated for her head injury by a neurologist, Dr. Jeffery Doug Miles. Her left shoulder was treated by Dr. John Jasko. Martin's left upper extremity was placed in a sling and she was prescribed medication. She was diagnosed with a concussion, and restricted from work for two weeks. Martin realized she had problems with her right knee when she attempted to get out of bed and had difficulty walking. She also experienced back, neck and head pain. Subsequent to her hospital visits, Martin followed up with Drs. Miles and Jasko.

Dr. Jasko treated Martin's right knee and left shoulder conservatively which helped but did not resolve those complaints. Dr. Jasko ordered an MRI of Martin's right knee in 2012 and her left shoulder in April 2015. Dr. Jasko also administered two injections, ordered a TENS unit, and prescribed a compound cream. Martin is restricted from lifting over twenty-five pounds. Martin stated she followed up with Dr. Miles for her head complaints. Dr. Miles restricted her from driving for a year, but Martin advised she was unable to follow the restriction due to her job duties. At the hearing, Martin

indicated she sought osteopathic treatment for her neck and low back pain in August 2015.

Martin was involved in a previous MVA in February 2011 when she was rear-ended by a FedEx truck, from which she testified she sustained a "stinger" and was taken to the hospital. Martin was released the same day and did not receive any subsequent treatment. Martin denies any prior symptoms or treatment to her left shoulder, back, neck or head. Martin recalled one incident of previous right knee pain after she walked a long distance.

Martin filed the emergency department records from Highlands Regional Medical Center dated November 17, 2011, which reflect she was involved in a MVA, with possible loss of consciousness. Martin could not remember the accident, but complained of a headache, back pain and left shoulder pain. The records reflect Martin was diagnosed with a head injury, contusion to the chest wall and a shoulder sprain. Martin was transferred to Cabell Huntington Hospital for further evaluation by Dr. Miles. He diagnosed a concussion and possible left shoulder contusion versus rotator cuff pathology, and admitted her overnight. Upon discharge, Martin's left arm was placed in a sling. She was advised to follow up with Dr. Miles and

an orthopedist. Martin was restricted from work until November 28, 2011.

The records indicate Martin followed up with Dr. Miles on one occasion on December 16, 2011. Although Dr. Miles noted Martin was doing well, he also noted she reported a long-lasting headache, dizziness, and an episode of forgetfulness. Dr. Miles diagnosed Martin as status-post concussion, loss of consciousness, improving. He advised Martin to return as needed.

Martin treated with Dr. Jasko on several occasions from December 2011 through February 2012, and again from October 2014 through April 2015, for primarily left shoulder and right knee pain. Dr. Jasko's records reflect he initially diagnosed a shoulder contusion/pain and right knee sprain versus medial meniscal tear. A February 7, 2012 right knee MRI demonstrated meniscal tears. Dr. Jasko treated both conditions conservatively with physical therapy and prescription Ibuprofen. When Martin returned in October 2014, Dr. Jasko ordered additional physical therapy for her right knee and left shoulder, and administered injections to the shoulder. An April 21, 2015 left shoulder MRI demonstrated anterior capsular stripping with deficiency of the anterior inferior aspect of the cartilaginous labrum attributed to labral

tear. In the last note of record dated April 28, 2015, Dr. Jasko diagnosed shoulder pain in the deltoid insertion and restricted Martin from working overhead, and lifting or carrying over twenty-five pounds. He released Martin to return on an as-needed basis.

Floyd County filed the treatment records of Dr. Sujatha Reddy and Dr. Jaya Pampati. Martin complained of right knee and right hip problems in 2004, 2005 and 2009. On February 9, 2011, Martin was taken to Highlands Regional Medical Center following a MVA, and was diagnosed with a cervical sprain and head injury.

Floyd County filed the February 24, 2014 report of Dr. David Muffly, who also testified by deposition on March 19, 2014. Dr. Muffly diagnosed a right knee strain with medial meniscus tear; left shoulder strain without sign of rotator cuff injury; and resolved lumbar pain. He noted Martin had pre-existing right knee and right hip arthritis, as well as pre-existing low back pain. Dr. Muffly opined the left shoulder strain is related to the MVA, and the meniscus tear is partially related to the MVA. Dr. Muffly assessed a 1% impairment rating for the meniscus tear pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He attributed half of the

impairment rating to the MVA and half to pre-existing, active degenerative changes. Dr. Muffly provided the following regarding the left shoulder and low back conditions:

3. Did the work incident of 11/17/2011 cause a permanent injury in your opinion or a temporary injury that resolved?

The right knee medial meniscus tear is a permanent injury. The low back pain from the [MVA] did resolve. The left shoulder did not cause a permanent injury.

4. If it is your opinion that the work incident of 11/17/2011 caused a temporary injury that resolved, please state the date, within the realm of reasonable probability and/or certainty upon which that temporary injury resolved?

The low back pain and left shoulder pain improved after completion of her physical therapy in April 2012.

Dr. Muffly opined Martin is at maximum medication improvement ("MMI"), and can continue her current job duties without permanent restrictions. Dr. Muffly stated Martin could require a right knee arthroscopic procedure in the future. Dr. Muffly prepared two addendums dated February 28, 2014 and July 23, 2015 in which his opinions remained unchanged.

Dr. Muffly's deposition testimony is consistent with his report. He noted Martin did not complain of back or neck pain during his examination. He again assessed a 1% impairment rating for the right knee meniscus tear, attributing half to the MVA and the other half to the pre-existing degenerative changes. Upon questioning of his assessment of impairment on cross-examination, Dr. Muffly stated as follows:

Q: Is there anything in the AMA Guidelines that gives more impairment if you have more than one tear?

A: There's in the Guidelines if you have surgery to remove both meniscus, it gives more impairment. And actually, technically she never had surgery, so technically she doesn't have the 1% impairment to the knee, but I think it was something that I assigned without surgery.

Q: And if she had surgery what would your impairment be?

A: One percent.

. . . .

Q: And Dr. Muffly, your impairment rating that you assigned, that would be based upon Ms. Martin having surgery?

A: Yes.

Q: Okay. So if there is no surgery, would she have any impairment?

A: Technically no impairment according to the Guidelines.

Q: And is that based on the 5th Edition of the AMA Guidelines?

A: Yes.

Dr. Muffly testified Martin sustained a temporary left shoulder strain due to the November 17, 2011 MVA which did not result in permanent impairment pursuant to the AMA Guides. He further testified Martin did not sustain any permanent impairment to her low back or cervical spine. Dr. Muffly stated Martin reached MMI at the conclusion of her physical therapy in April 2012.

Martin filed the February 27, 2014 report of Dr. Anbu Nadar. He diagnosed a head injury with concussion; cervical and lumbosacral strain with degenerative disc disease; left shoulder strain with rotator cuff tendonitis; and right knee contusion and strain, chondromalacia patella, all caused by her accident. He assessed a 5% impairment rating to the cervical spine, 5% to the lumbar spine, and 12% to the "right knee; concussion/memory loss," for a combined 22% impairment rating pursuant to the AMA Guides. He later clarified he assessed a 2% impairment rating for the right knee and a 10% impairment rating for the "head injury and concussion and memory loss." Dr. Nadar assigned permanent restrictions, and opined Martin is unable to return to work. Dr. Nadar stated Martin is at

MMI, and recommended periodic symptomatic care. Dr. Nadar was unable to assess any permanent impairment for her left shoulder utilizing the AMA Guides.

Floyd County filed the February 15, 2014 report of Dr. David Shraberg, a board certified psychiatrist and neurologist, who also testified by deposition on April 2, 2014. His deposition testimony is consistent with his report. Dr. Shraberg performed a neurological and neuropsychiatric examination. He also reviewed the medical records. Dr. Shraberg testified Martin's mental status, neurological examinations, and her cognitive functioning were all within normal limits.

At Dr. Schraberg's request, a battery of neuropsychological tests was administered by Dr. Paul Ebben. He concluded any test scores falling below expectations should not be interpreted because there was a response bias toward exaggerating problems as it pertains to memory and visual-constructional skills. In this instance, Dr. Ebben stated there was no clear evidence of outright malingering. Nonetheless, he stated the scores which fall below expectations are suspect and need to be interpreted cautiously. Therefore, Dr. Shraberg interpreted the psychological testing results as showing no evidence of memory or cognitive impairment from the MVA.

Dr. Shraberg diagnosed Axis I pre-accident history of hypothyroidism, mild concussion, Grade III concussion with post-concussion syndrome, recovered with possibly 3-4 hours of antegrade amnesia with no intracranial focal signs; Axis III MVA with soft tissue contusion and injury to left shoulder and right knee, with ongoing complaints of mild left shoulder and right knee pain and concussion with transient post-concussive symptoms including headaches and initial difficulties and transient problems with memory and concentration, recovered. Dr. Shraberg opined Martin has recovered from her mild concussion, and warrants a 0% impairment rating pursuant to the AMA Guides. Dr. Shraberg stated permanent restrictions and stated additional neuropsychiatric treatment is unwarranted. He opined Martin has the capacity to continue performing her job duties as a health coordinator.

In addendums dated May 17, 2014 and July 29, 2015, Dr. Shraberg disagreed with the opinions of Dr. Granacher. Dr. Shraberg noted Dr. Granacher is neither a neurologist nor neuropsychologist. He asserts Dr. Granacher bypassed his own neuropsychologist's conclusions, and interpreted neuropsychological testing he is neither board-certified nor qualified to interpret on a first level basis.

Martin filed the February 10, 2014 report of Dr. Granacher, who evaluated her on February 4 and 5, 2014. He also testified by deposition on September 2, 2014. Dr. Granacher's deposition testimony is consistent with his report. He is board-certified in general psychiatry, geriatric psychiatry, forensic psychiatry, neuropsychiatry, and sleep medicine. He reviewed Martin's history, along with her medical records, and performed a mental status examination. A brain MRI was performed on February 5, 2014, which demonstrated intact midline structures, no convincing evidence of a Chiari malformation, and a homogeneous brain parenchyma. Dr. Amy Frazier administered a battery of neuropsychological testing.

Dr. Granacher noted atypical results on the Conner's Continuous Performance test consistent with an attention deficient disorder. Two additional tests indicated mild impairment. Overall, Dr. Granacher opined Martin shows impairment of sustained attention, dominant fine motor speed, non-dominant fine motor speed, naming ability, and executive functions tasks of trial-by-trial feedback to form, maintain, and shift cognitive sets. Dr. Granacher testified the tests are consistent with the biomechanics of Martin's injury and her reported memory problem. He further explained only Martin's prospective

memory has been affected. He diagnosed a mild neurocognitive disorder as a result of the November 17, 2011 MVA. Pursuant to the 2nd and 5th Editions of the AMA Guides, Dr. Granacher assessed a 15% impairment rating. He testified Martin has plateaued in her recovery.

Dr. Granacher restricted Martin from employment which requires sustained attention, fine motor speed of the dominant hand, fine motor speed of the non-dominant hand, and quick decisional capacity. Dr. Granacher stated Martin retains the ability to perform her job duties on a full time basis, but he restricted her from giving injections, situations requiring rapid nursing decisions on behalf of a physically impaired youngster, or where she might be required to perform CPR. Dr. Granacher testified he was not aware of Martin's specific job duties as a health coordinator, and he did not review her deposition testimony. He recommended a trial of cognitive enhancers and frontal brain stimulants.

A Benefit Review Conference ("BRC") was held on December 1, 2014. The parties stipulated: Floyd County paid a total of \$309.42 in TTD benefits, as well as medical expenses; to an average weekly wage ("AWW") of \$1,272.71; she returned to work on November 28, 2011 earning equal or greater wages; and, she retired on June 1, 2013, returning

later on a part-time basis. The parties identified the following as contested issues: benefits per KRS 342.730 including extent and duration with multipliers, work-relatedness/causation, credit for sick leave/subrogation, exclusion for pre-existing disability/impairment, and TTD. Subsequent to the BRC, liability for present and future medical benefits was added as a contested issue in an order dated January 7, 2015. Unpaid or contested medical expenses were additionally listed as a contested issue in the November 16, 2015 hearing order. The ALJ noted the issue of subrogation for any award against a third party tortfeasor has been bifurcated and held in abeyance pending resolution of Martin's third party claim.

In the January 15, 2016 opinion, the ALJ provided a detailed summary of the evidence. The ALJ found Dr. Nadar's opinions unpersuasive. He then stated Dr. Muffly's opinion is the most compelling "as to [Martin's] claim of permanent injury to her left shoulder, right knee, back and cervical spine" Based upon the opinion of Dr. Muffly, the ALJ found Martin sustained a right knee strain with a medial meniscus tear resulting in a 1% impairment rating, 50% of which is attributable to pre-existing, active degenerative changes. The ALJ found the low back strain and left shoulder strain had resolved, and

determined she does not have any permanent injury to her cervical spine as a result of the MVA. The ALJ found Martin reached MMI at the conclusion of her physical therapy in April 2012, has no work restrictions, and can continue her current job duties.

With regard to Martin's concussion and memory loss, the ALJ found the opinions of Drs. Nadar and Muffly unpersuasive. The ALJ provided a five page summary of the opinions of Drs. Granacher and Shraberg. He then provided the following analysis in ultimately finding the opinion of Dr. Granacher most persuasive:

Both of these eminent physicians are persuasive. Dr. Shraberg argues that his diagnosis is more accurate because he has assessed Ms. Martin from a neuropsychological perspective rather than a neuropsychiatric perspective as did Dr. Granacher. He also argues that his assessment of Ms. Martin's neuropsychiatric impairment is confirmed by her work history post-accident wherein she returned to full employment on November 28, 2011 and worked without restriction until she took regular retirement effective June 1, 2013, then came back working unrestricted half-time in the same position where presumably she continues to work without restriction. He opines in his Addendum #1 to his medical report that there is nothing clinically (Ms. Martin's performance and career after the accident) on neuropsychological testing when factored and reconciled with the usual Scatter and other tests that contradict reliance on

mildly abnormal tests, that suggests that either Ms. Martin has an impairment, should be restricted in her present duties as a nurse in the school system nor requires dangerous stimulants, amphetamines or cognitive enhancers.

Dr. Shraberg challenges Dr. Granacher's qualifications to make an assessment of Ms. Martin from a neuropsychiatric standpoint as opposed to Dr. Shraberg's neuropsychological evaluation. However, I am convinced by the opinion of Dr. Granacher because of the testing. Dr. Granacher had his own testing performed, to which he testified. However, he also noted (correctly in my opinion), that the testing by Dr. Ebben seemed to confirm that Ms. Martin has cognitive deficiencies arising from the MVA.

As Dr. Granacher pointed out, in the 7 page report of testing results appended to Dr. Shraberg's IME, Dr. Ebben noted test results that showed on the Repeated Battery for the Assessment of Neuropsychological Status (RBANS), Ms. Martin tested "Below expectations" in 3 of 5 categories and on the test as a whole. She also performed "Below expectations" on the finger tapping test and the grip strength test. On the Personality Assessment Inventory (PAI), she showed Elevated subscales demonstrating Thought Disorder (problems with confusion, distractibility, communicating and concentrating). Her consistency between observations, test results, and subjectively expressed symptoms was "Variable, guarded to poor regarding memory and visual-constructional skills." As Dr. Granacher pointed out, Dr. Ebben was not aware of Plaintiff's clinical situation. His job was to

administer and report on the results of various standardized neuropsychological testing, which he did. It would appear that despite Dr. Shraberg's assertions to the contrary, his results are at least in part supportive of Dr. Granacher's diagnoses of this Plaintiff.

For the foregoing reasons, I find the medical opinion of Dr. Granacher to be the most complete and compelling medical evidence in the record as it relates to the nature, scope and effect of Plaintiff's head injuries.

I therefore find that on November 17, 2011, Jennifer Martin, the Plaintiff herein, suffered a work related traumatic event in the form of a motor vehicle accident arising out of and in the course of her employment with the Defendant, Floyd County Board of Education, which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

The ALJ found the three multiplier contained in KRS 342.730(1)(c)1 is not applicable. However, he found Martin met the criteria for the two multiplier contained in KRS 342.730(1)(c)2 since she returned to work on November 28, 2011 earning the same or greater wages. She voluntarily retired on May 31, 2013, and returned to Floyd County within three months earning half the wages she made at the time she retired. The ALJ found Livingood v. Transfreight, 467 S.W.3d 249 (Ky. 2015), mandates the application of the two multiplier to the award of benefits.

Thus, the ALJ calculated the award of PPD benefits as follows: $\$1,272.71 \text{ AWW} \times \frac{2}{3} = \848.47 (Max. Wage $\$541.47$) $\times 15.5\% = 83.93 \times 2$ (statutory multiplier) = $\$167.86$ per week.

After providing the statutory definition of TTD, the ALJ made the following findings regarding Martin's entitlement: "[Martin] was temporarily, totally disabled from November 17, 2011 until April 2, 2012 when she had returned to unrestricted work and was found to be at MMI by Dr. Muffly . . ." The ALJ also found Martin "is entitled ongoing (sic) to have the employer pay for the cure and relief from the effects of her work-related injuries."

The ALJ awarded PPD benefits in the amount of $\$167.86$ per week commencing November 17, 2011, TTD benefits from November 17, 2011 through April 2, 2012, and medical benefits.

Floyd County filed a petition for reconsideration raising several arguments, including those now raised on appeal. Martin also filed a petition for reconsideration requesting the ALJ correct the rate of TTD benefits. In the February 24, 2016 order on petitions for reconsideration, the ALJ made the follow relevant findings:

Defendant's second argument requests that I set aside the Opinion, Award and Order of January 15, 2016 based on

defendant's disagreement with my interpretation of Dr. Muffly's 1% whole person impairment rating. While Dr. Muffly did state that technically speaking Martin was not entitled to an impairment rating because she had not had surgery, he went on to note that she had refused surgery. He went on to find that within the realm of reasonable medical probability, she had a 1% impairment. Dr. Muffly was the defendant's IME physician. I chose to rely on his opinion because I found it to be both informed and persuasive.

The same is true of Defendant Employer's allegation of error concerning my reliance on the medical opinion of Dr. Granacher over that of Dr. Shraberg. I articulated at length the basis for that reliance, upon which I will not expand.

Thus, as to defendant's argument of error patently appearing on the face of the Opinion, Award & Order with regard to my reliance on some medical evidence over other medical evidence, it is a disagreement with my interpretation of the medical evidence in the record, which is not within the scope of my review under the provisions of KRS 342.281. Francis v. Glenmore Distilleries, 718 S.W.2d 953 (Ky.App. 1986). Defendant's allegations of error patently appearing on the face of the Opinion, Award and Order of January 15, 2016 is therefore DENIED.

. . . .

Lastly, the Defendant wants findings as to which body parts the Plaintiff is entitled to have future medical services rendered at the expense of the employer. I have already articulated and awarded benefits for the right knee

and head (mild neurocognitive disorder) which were the only body parts ultimately at issue regarding a permanent disability rating. The Defendant/Employer apparently recognized a period of temporary total disability from 11/17/2011 through 4/2/2012, and I am unaware of any evidence in the record from the Defendant/Employer distinguishing TTD benefits as between the complained of left shoulder, right knee, back and head.

As permanent partial disability benefits were awarded for the right knee and head only, no substantial evidence was presented concerning a permanent rating for the left shoulder and back, and no argument was made by the Plaintiff for future medical benefits for those body parts, the award of future medical benefits under KRS 342.020 would not apply to the left shoulder and back. Therefore, additional findings of fact would be superfluous. I find no error patently appearing on the face of the Opinion, Award and Order of January 15, 2016 as to this issue and defendant's request for further findings is DENIED.

The ALJ also corrected the TTD benefit rate. Regarding multipliers, the ALJ found Martin entitled to the enhancement by the two multiplier, and found no patent error appearing on the face of the January 15, 2015 opinion.

On appeal, Floyd County challenges the ALJ's reliance on the opinions of Drs. Muffly and Granacher in determining Martin's right knee and head injuries warrant a

15.5% impairment rating. With regard to Martin's right knee condition, Floyd County argues Dr. Muffly's 1% impairment rating is not in conformity with the AMA Guides since he testified she technically did not qualify for any impairment due to the fact she did not undergo surgery. Floyd County also argues the ALJ disregarded Dr. Shraberg's opinions. It also points to Dr. Granacher's testimony regarding his lack of knowledge of Martin's specific job duties, the fact he did not perform a neurological examination, and his incorrect identification of Martin's initial hospital visit being longer than one day. Floyd County also challenges the ALJ's TTD analysis during the time period Martin had not reached MMI, but had returned to work without restriction beginning on November 28, 2011. Although it agrees the two multiplier is applicable, Floyd County contends the ALJ erred in beginning the double award from the date of injury rather than the date of cessation. Martin argues the ALJ erred in failing to award future medical benefits for her left shoulder injury.

As the claimant in a workers' compensation proceeding, Martin had the burden of proving each of the essential elements of her cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was successful in that burden, with

exception for her left shoulder injury, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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 10 (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). Although a party may note evidence supporting a different outcome than 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). The Board, as an appellate tribunal, may not usurp

the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The opinions of Drs. Granacher and Muffly constitute substantial evidence supporting the ALJ's determination Martin sustained work-related injuries to her right knee and head warranting a 15.5% impairment rating. The ALJ demonstrated a clear understanding of the evidence before him, and properly weighed the conflicting opinions in reaching his ultimate determination.

In his February 24, 2014 report, Dr. Muffly, who the ALJ noted evaluated Martin at Floyd County's request, diagnosed a right knee strain with medial meniscus tear and found a history of pre-existing right knee and right hip arthritis. Dr. Muffly stated the meniscus tear is partially related to the MVA. He assessed a 1% impairment rating for the right knee medial meniscus tear, apportioning half to the MVA and half to pre-existing degenerative changes. Dr. Muffly stated his assessment was

pursuant to "[t]able 17-33 of the 5th Edition AMA Guidelines. . ." On direct examination, Dr. Muffly confirmed his assessment of impairment pursuant to the AMA Guides. However, on cross-examination, Dr. Muffly stated since Martin did not have surgery, she technically does not have a 1% impairment rating. The ALJ addressed this inconsistency in the order on petition for reconsideration stating as follows:

While Dr. Muffly did state that technically speaking Martin was not entitled to an impairment rating because she had not had surgery, he went on to note that she had refused surgery. He went on to find that within the realm of reasonable medical probability, she had a 1% impairment.

Dr. Muffly's assessment of impairment found in the report, and confirmed by his deposition testimony, constitutes substantial evidence upon which the ALJ could rely in assigning a .5% impairment rating for Martin's right knee. We acknowledge Dr. Muffly provided equivocal testimony regarding his assessment upon cross-examination. However, the ALJ appropriately exercised his discretion in accepting the opinions contained in Dr. Muffly's report and rejecting the equivocal testimony on cross-examination. Magic Coal Co. v. Fox, supra. Dr. Muffly indicated in his report his assessment was made pursuant to the AMA Guides,

which he confirmed during direct examination. Therefore, Dr. Muffly's opinion constitutes substantial evidence and we will not disturb the ALJ's determination on this issue.

We likewise find Dr. Granacher's opinion regarding Martin's cognitive condition constitutes substantial evidence upon which the ALJ could rely. The attacks by Floyd County go to the weight to be afforded the evidence. It is not within this Board's province to re-weigh the evidence. The ALJ provided detailed summaries of Drs. Granacher's and Shraberg's opinions, appropriately considered each, and adequately explained why he ultimately found Dr. Granacher's opinion most persuasive. The ALJ alone has the authority to determine the quality, character, and substance of the evidence, and to judge 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). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

We agree with Floyd County the ALJ did not perform a proper analysis regarding Martin's entitlement to TTD benefits during the time period she returned to work without restriction prior to attaining MMI. The finding

Martin attained MMI on April 2, 2012 appears to be undisputed. The ALJ found Martin entitled to TTD benefits from "November 17, 2011 until April 2, 2012 when she had returned to unrestricted work and was found to be at MMI by Dr. Muffly."

TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a). To be entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury.

In Livingood v. Transfreight, LLC, supra, the Kentucky Supreme Court addressed the ALJ's denial of Livingood's request for additional TTD benefits during the

period he had returned to light duty work by stating, "Except for bathroom monitoring, Livingood had performed the other activities before the injury; further they were not a make-work project." Id. at 253. The Court specifically stated as follows:

As the Court explained in *Advance Auto Parts v. Mathis*, No. 2004-SC-0146-WC, 2005 WL 119750, at (Ky. Jan. 20, 2005), and we reiterate today, Wise does not "stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD." Livingood had the burden of proof on the issue. Where the ALJ finds against the party with the burden of proof, the standard of review on appeal is whether the evidence compelled a contrary finding. *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). The Board and the Court of Appeals were not convinced that it did. Nor are we. "The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Western Baptist v. Kelly*, 827 S.W.2d 685, 688, 39 4 Ky. L. Summary 54 (Ky. 1992). Id. at 254-255.

More recently in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD is appropriate in cases where the employee returns to modified duty. The Court stated:

We take this opportunity to further delineate our holding in Livingood, and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." Double L Const., Inc., 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has

actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

That said, the award of TTD benefits is hereby vacated. Although Martin testified she struggled with her left shoulder, right knee and head, the evidence establishes Martin returned to her usual work as a health coordinator on November 28, 2011 until her retirement on June 1, 2013. On remand, the ALJ must determine, based upon the evidence, if Martin is entitled to TTD benefits during the period she worked prior to reaching MMI, bearing in mind the direction of the Kentucky Supreme Court in Livingood v. Transfreight, LLC, supra, and Trane Commercial Systems v. Delena Tipton, supra. This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). However, any determination must be supported by the appropriate analysis and findings.

Although it agrees Martin is entitled to the two multiplier pursuant to KRS 342.730(1)(c)2, Floyd County argues the date of injury, for application of the enhancement, or doubling of benefits is incorrect. We agree the two multiplier applies, but only became effective during the period Martin ceased earning an AWW equal to or greater than her pre-injury AWW. At the BRC, the parties stipulated: 1) Martin's AWW was \$1,272.71; 2) Martin returned to work on November 28, 2011 earning an equal or greater wage; 3) Martin currently earns less than her AWW; and, 4) Martin retired on June 1, 2013 and returned on a part-time basis.

KRS 342.730(1)(c)2 states as follows:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

Recently, the Kentucky Supreme Court held KRS 342.730(1)(c)2 permits a double income benefit "during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." Livingood v. Transfreight, LLC, 467 S.W.3d at 259.

There appears to be no dispute Martin returned to work on November 28, 2011 at an AWW equal to or greater than \$1,272.71, and she currently earns a lesser AWW. In light of Livingood v. Transfreight, LLC, supra, and the stipulations entered into by the parties, the ALJ must first make a specific finding as to the date Martin ceased earning the same or greater AWW. Both parties appear to agree her date of retirement would be the day she ceased earning the same or greater wages. Martin's weekly benefits may only be doubled during that period of such cessation except where it results from Martin's conduct resulting from her own intentional, deliberate act with reckless disregard of the consequences either to herself or another.

Finally, Martin argues the ALJ failed to consider whether she is entitled to future medical expenses for her

left shoulder injury. In the opinion, the ALJ relied on the opinions of Dr. Muffly, with exception for the head injury, and found Martin's left shoulder strain had resolved. The ALJ found Martin entitled medical benefits of her "work related injuries," and entitled to future medical expenses pursuant to KRS 342.020. In its petition for reconsideration, Floyd County requested the ALJ specify for what injuries it is responsible for paying medical expenses. In her reply to Floyd County's petition, Martin argued at a minimum she is entitled to future medical expenses for her head, right knee and left shoulder.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson

suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.
Id. at 286.

It is well established an ALJ may award future medical benefits for a work-related injury, although a claimant has reached maximum medical improvement and did not have a permanent impairment rating resulting from the injury. See FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007).

In his report, Dr. Muffly, upon whom the ALJ relied, clearly diagnosed Martin with left shoulder strain without signs of a rotator cuff injury due to the MVA. He stated, "[t]he left shoulder did not cause a permanent injury" and improved after the completion of her physical therapy in April 2012. Likewise, Dr. Muffly testified Martin sustained a temporary left shoulder strain as a result of the MVA which did not result in permanent impairment pursuant to the AMA Guides. Martin also

testified she believed she injured her left shoulder in the MVA, and received treatment for this condition. The medical records also indicate Martin was primarily treated for her left shoulder complaints by Dr. Jasko.

In light of the contested issues listed at the BRC and the request for clarification in the petition for reconsideration, we vacate and remand for the ALJ to perform an analysis pursuant to Robertson v. United Parcel Service, supra; and FEI Installation, Inc. v. Williams, supra, to determine whether Martin sustained a temporary injury to her left shoulder, if any, as a result of the November 17, 2011 MVA warranting temporary and/or future medical benefits.

Accordingly, the January 15, 2015 Opinion, Award and Order and the February 24, 2016 Order on Reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** to the Administrative Law Judge for additional findings of fact and entry of an amended opinion in conformity with the views expressed herein.

ALL CONCUR.

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