OPINION ENTERED: February 13, 2012

CLAIM NO. 200980906

GSI COMMERCE SOLUTIONS, INC. PETITIONER

VS. **APPEAL FROM HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE**

MICHELE THOMPSON
and HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. GSI Commerce Solutions, Inc. ("GSI") seeks review of a decision rendered August 22, 2011, by Hon. James L. Kerr, Administrative Law Judge ("ALJ") finding Michele Thompson ("Thompson") sustained a work-related injury on August 3, 2009, which the ALJ characterized as a "harmful change in [Thompson] as of that

date pertaining to [Thompson's] cervical condition and left sided symptoms." Concerning the issues on appeal, the ALJ's findings of facts and conclusions of law are as follows:

> The defendant-employer has questioned whether plaintiff sustained an injury as defined by the Act, the work-relatedness/causation of her claim, statute of limitations, notice and pre-existing active condition as issues. As all are intertwined, they shall be addressed together. The defendant-employer points out that plaintiff treated with Barbara Thompson as early as January of 2008 for neck pain after pulling a cart at work. It also points out in its brief that plaintiff related the pain to pulling carts at work. However, the clear evidence is that Ms. Thompson did not tell the plaintiff of the relationship between her employment and her condition until she advised her on July 22, 2009 of that injury. It is not enough that the plaintiff self-diagnosed the relationship between her employment and her condition. See *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (Ky., 2001). Thus, the Administrative Law Judge believes that the statute of limitations of plaintiff's claim only began running as of July 22, 2009. Further, the plaintiff had no duty to give notice of a work-related injury until July 22, 2009. Further, the undersigned notes that plaintiff's symptoms had primarily been on the right side prior to August 3, 2009 when plaintiff's left side became symptomatic. While plaintiff may have had a pre-existing active condition on the right side, the Administrative Law Judge believes that

> [sic] August 3, 2009 incident constitutes the proximate cause of a harmful change in plaintiff as of that date pertaining to plaintiff's cervical condition and left sided symptoms per the credible medical testimony of Dr. Roberts, the university evaluator. His opinions in respect to plaintiff are substantiated by Dr. Changaris. The Administrative Law Judge recognizes that Dr. Loeb has tested [sic] otherwise but KRS 342.315 requires the undersigned to give presumptive weight to the university evaluator. The burden [sic] overcomes [sic] such findings and opinions to [sic] fall [sic] upon the opponent [sic] that evidence [sic]. Herein, the undersigned does not believe that the opinions of Dr. Loeb overcome the findings of Dr. Roberts in respect to plaintiff's compensable condition and the causal connection between her employment and her present impairment rating.

Based on the 22% impairment assessed by the university evaluator, Dr. Craig Roberts, the ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits.

On appeal, GSI asserts the ALJ erred by relying upon the 22% impairment assessed by Dr. Roberts. It asserts his evaluation is flawed for two reasons. First, since Dr. Roberts did not receive an accurate history, his opinion lacks credibility and "does not meet the definition

of substantive evidence per Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004)." Although GSI does not directly identify in its argument what causes the history received by Dr. Roberts to be inaccurate, presumably GSI is referring to the medical records of Barbara Thompson, a nurse practitioner for Dr. R.B. Faulkner, Thompson's family physician. Her records reflect prior to August 3, 2009, Thompson was seen in 2008 and 2009 on five occasions for neck pain. Apparently, GSI's argument is Dr. Roberts was not aware Thompson had a long-standing history of "pre-existing pathology for neck problems" since January 13, 2008.

GSI recites the portion of Table 15-5 of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") which sets forth the criteria for rating an individual in DRE Cervical Category III. Citing to the testimony of Dr. Roberts regarding certain physical findings upon examination, GSI posits Dr. Roberts "confirmed that [Thompson] did not meet the criteria required of DRE Cervical Category III." GSI maintains the testimony of Dr. Thomas Loeb, an orthopedic surgeon who performed an Independent Medical Evaluation ("IME") of Thompson on December 1, 2009, confirms the requisite findings were not

present in order to assess an impairment pursuant to DRE Cervical Category III. GSI sets forth Dr. Loeb's specific testimony in support of its argument.

GSI also cites to the recent decision of this Board in Justice v. Mountain Express, Claim No. 201000253, rendered November 7, 2011, for the proposition "it was unreasonable for a physician to assign an impairment rating not supported by the Guides."

Thompson's May 13, 2010, deposition testimony indicates on August 3, 2009, she was pulling a cart when her neck started aching. Thompson testified when she continued to pull the cart her left fingers starting going numb, and the pain felt like hot, sharp knives in her neck. The pain ran down her left shoulder and into the middle two fingers. Thompson reported this to her supervisor and was sent to the doctor. Thompson admitted having prior neck problems while working for GSI in Shepherdsville and later, while working for GSI in Louisville. Although she experienced previous neck pain, Thompson explained her prior neck pain was not as severe as the pain she experienced on August 3, 2009, and she experienced no previous left shoulder pain or problems with numbness in her fingers. Thompson explained the pain she experienced on those previous occasions would come and go.

In accordance with an order directing a university evaluation pursuant to KRS 342.315, Dr. Roberts' October 26, 2010, Form 107-I was filed in the record. Dr. Roberts reviewed the records of Hardin Professional Services, LLC (Dr. Thad Jackson), Hardin Memorial Hospital, and Lincoln Trail Diagnostics, as well as the reports of Dr. Thomas Loeb and Dr. David Changaris. After conducting a physical examination, Dr. Roberts diagnosed "cervical spine broad-based disc osteophyte complexes C4-5, C5-6, C6-7 with left-sided cervical radiculopathy mainly C-7" and "left shoulder post traumatic arthrofibrosis." Dr. Roberts concluded Thompson's injury was the cause of her complaints. Based on the AMA Guides, he assessed a 22% impairment, none of which was due to an active pre-existing condition. However, Dr. Roberts believed Thompson's condition is "due in part to arousal of a pre-existing dormant nondisabling condition or congenital abnormality." He explained Thompson "likely had cervical spine disc disease at C5-6 and likely C4-5 and C6-7 which was dormant and non-disabling brought into disabling reality by her work-related injury."

GSI deposed Dr. Roberts on January 20, 2011. In determining causation, Dr. Roberts explained he, in part, relies upon the history the individual provides at the time

the examination is performed. Dr. Roberts acknowledged his report reflects Thompson stated she had no prior neck or left shoulder problems until the work-related injury of August 3, 2009. Significantly, the following exchange took place between GSI's counsel and Dr. Roberts:

> Q: Is that what she related to you, that she had –-
>
> A: Pretty much. And I sometimes for fill-in reasons, it's generally my custom to say no prior, major whatever it might be. That's just –- for some reason, I don't see the words "or significant." Because a lot of times the individual might have had little bit of neck or back pain, but it was not anything unusual or abnormal.
>
> So generally, it's the –- according to what the patient recalls and oftentimes –- and I think, which is the case with Ms. Thompson, I think she did have some prior problem with these areas. And I think that came up and was part of my opinion as well.
>
> Q: And when you talk about "major prior problems" and so forth, what would you consider to be major versus, I guess, minor?
>
> A: Well, there's no set hard criteria, but oftentimes, I'll define that for the patient and say, By the way, have you ever seen a doctor for this before? Have you had surgery for this before? Were you off work? Were there any sports injuries, car accidents, work injuries that involve this area," to sort of put in some context. Generally, those I think of more in the major side. A day of back pain

> unrelated to some activity or injury, to me, might be on the minor of not significant side. But it's a little bit of judgment involved.
> Q: Sure. I understand. So if, like all of us, if you wake up and you feel some stiffness in your back, you wouldn't consider that to be a major back problem?
>
> A: Usually not.
>
> Q: But if you are –- I think, if I follow you right, if it's something of a condition where you seek medical care, maybe medications or other treatment, that would be more in the category of a major incident; is that correct?
>
> A: Usually. That's correct.
>
> Q: Okay. And then of course what she provided, told you –- with that context, she told you she had no prior neck or left shoulder symptoms or problems until June 2009; is that correct?

Concerning his impairment rating, the following exchange took place between GSI's counsel and Dr. Roberts:

> Q: On the cervical spine, you have DRE Category II, 16 [sic] whole body impairment.
>
> Doctor –- and I'm just going to ask you: Did you mean category II, 6 percent, or DRE Category II, 16 percent?
>
> If you need to look at the –-
>
> A: Right. Right. That's a very good question. I'm looking at that and,

generally, category II would not be 16 percent.

Q: Yeah. That's what –- because it saves a lot of questions if you take –-

A: That's the rub here, I think, from what I can tell. Yeah. That's very interesting. I believe that is a typo, a typographical error. I think that is DRE Cervical Category II, 6 percent based on the diagnoses there that are consistent with the findings and that, therefore, is 6 percent. That changes some of the arithmetic here.

MS. BLAND: I just want you to be sure, Doctor, of this because it means a big difference in this case.

I represent the patient.

THE WITNESS: Yes, sir.

MS. BLAND: And I want you to be as -– check this out and make sure.

THE WITNESS: Let me spend more time on this. I understand.

Q: In fact, Doctor, if you like, I have no problems if you need to go back – I'm not going to ask you to try to recalculate everything here right now. If it is a 6 percent versus a 16 percent and you need to do recalculations, I would be agreeable, and JoAnne as well, to allow the doctor to do that by supplemental report or -– again, after rechecking the figures just to make sure the doctor is on the same page with the findings and so forth on this.

A: Yeah. I'd probably be more comfortable doing it that way if that's okay. Because looking at this my first

> watch is to say it's probably an error, but I would like to spend some time going back through everything here because it doesn't happen that often.

Accordingly, the parties agreed Dr. Roberts would be permitted to review his report, and if any changes were necessary he would notify the parties. The deposition was continued and adjourned with the understanding the parties would return if needed. Thereafter, Dr. Roberts' January 30, 2011, supplemental report was filed in the record which reads as follows:

> This is a supplemental report to my IME of October 26, 2010, regarding Ms. Michelle L. Thompson. I have been asked specifically to review her impairment rating on [sic] Form 107. After further review, I have determined that the overall whole person impairment I have determined of 22% is correct. However, under Letter I, under the table, there is a typographical error on the cervical spine line of this table. DRE Cervical Category should be "III" and not "II" as it was indicated on the table. The 16% whole person [sic] as also indicated in this line of the table is correct as it stands as [sic] is the overall aggregate whole person impairment.

Dr. Roberts was not deposed after filing this report.

After reviewing the record, this Board believes Cepero, supra, is inapplicable in the case *sub judice*. Cepero, supra, was an unusual case involving not only a

complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous.

We find nothing akin to Cepero in the case *sub judice*. Dr. Roberts' testimony establishes he was aware Thompson had prior neck problems at the time of his examination. Dr. Roberts reviewed Dr. Loeb's IME report which stated, in part, as follows:

> [Thompson] has had prior pain in her cervical spine since at least June 20, 2009 but it should be noted Ms. Thompson gave a totally inconsistent initial history originally stating her pain did not begin until August 3, 2009 until I pointed out there was a note in the record that she had prior work up for two months before her alleged injury date for the same symptoms. She also failed to tell me she was in a motor vehicle accident in May 2009. She completely avoided telling me her

> history of symptoms in May and June of 2009 until I pointed out to her the records had clearly delineated these events.

If nothing else, the contents of Dr. Loeb's report establish Dr. Roberts was well informed of Thompson's prior neck problems.

The testimony of Thompson and Barbara Thompson casts doubt on the significance of Thompson's previous neck problems. At the June 21, 2011, hearing, Thompson testified she had prior problems but she did not experience pain every day. However, she explained after pulling a cart all day, it was not uncommon for her to feel sore at the end of a work day. Thompson went on to point out she currently has no problems in the right side of her neck, right shoulder, or hands. Barbara Thompson's May 6, 2011, deposition testimony establishes up until the time she saw Thompson on July 22, 2009, she was not sure "we had actually been treating it as work comp injury." Barbara Thompson acknowledged all of Thompson's previous problems were in the right side of her neck and her right shoulder. Regarding the history Thompson provided as to whether she had active ongoing problems, Barbara Thompson testified as follows:

> Q: Based upon your records, is it fair to say this is an active ongoing condition you're treating since January 13, 2008 in the neck?

> A: She described it as intermittent initially. My note of 6-19-09 she said that it flares up intermittently.

Barbara Thompson testified she had never taken Thompson off work prior to the August 3, 2009, injury and the first time she imposed physical restrictions on Thompson's physical activities was after the August 3, 2009, injury.

Finally, we point out the December 1, 2009, IME report of Dr. Loeb is not completely credible. In his report, Dr. Loeb stated as follows: "She also failed to tell me she was in a motor vehicle accident in May 2009." In answering the question, "[C]an any of [Thompson's] symptoms be apportioned to the MVA in May 2009? If so, what percentage?", Dr. Loeb stated as follows:

> It is clear from the medical record, she had ongoing symptoms prior to her alleged work injury on August 3, 2009 probably exacerbated by a MVA in May 2009 but no acute injury appeared to have been caused from that injury nor was there any acute new injury from the August 3, 2009 incident in my opinion as well.

In his May 23, 2011, deposition, Dr. Loeb admitted he could not and did not verify Thompson was in a motor vehicle accident. He testified that information came from Hartford Insurance Company, the entity paying for his evaluation. When shown the accident report, Dr. Loeb admitted the records reflect Thompson's son was involved in the motor

vehicle accident, and Thompson was mentioned in the accident report because she was the owner of the vehicle. Thompson testified to this fact at the June 21, 2011, hearing. It appears GSI does not dispute the information provided to Dr. Loeb was erroneous.

Likewise, we find no merit in GSI's argument the ALJ erred in relying upon the impairment assessed by Dr. Roberts. Even though Dr. Loeb criticized the impairment rating assessed by Dr. Roberts, this Board has repeatedly held such information would not necessarily be legally determinative or in any way binding as to the ALJ's authority, as fact-finder, to pick and choose whom and what to believe. The AMA Guides make it clear its purpose is to provide objective standards for the "estimating" of permanent impairment ratings by physicians. Because Dr. Roberts is a licensed medical doctor, it was appropriate for the ALJ to assume his expertise in utilizing the AMA Guides was comparable or superior to any other expert medical witnesses of record. Indeed, the ALJ, as fact-finder, has no responsibility to look beneath an impairment rating or meticulously sift through the AMA Guides to determine whether an impairment assessment harmonizes with that treatise's underlying criteria. Except under compelling circumstances where it is obvious even to a lay person a

gross misapplication of the AMA Guides has occurred, the issue of which physician's AMA rating is most credible is a matter of discretion for the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

An impairment rating pursuant to the AMA Guides is a medical determination which may only be made by medical experts. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). Contrary to GSI's assertion that Dr. Roberts admitted Thompson "did not meet the criteria necessary under DRE Category to have a 16% rating," we find no such statement to that effect in Dr. Roberts' reports and testimony. Rather, Dr. Roberts' January 30, 2011, letter confirms his opinion Thompson had a 22% impairment based on the AMA Guides as set forth in his October 26, 2010, Form 107-I. After receiving Dr. Roberts' January 30, 2011, supplemental report, GSI did not depose Dr. Roberts. As pointed out by the ALJ, Dr. Roberts' testimony and opinions are substantiated by Dr. Changaris.

As a physician appointed pursuant to KRS 342.315, Dr. Roberts' clinical findings and opinions must be afforded presumptive weight, and GSI has the burden to overcome such findings and opinions. Based on the evidence in the record, we believe the ALJ's determination Dr. Loeb's opinions do not "overcome the findings of Dr. Roberts" is amply

supported by the evidence. In light of the record, the views articulated by Dr. Loeb represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). Where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Consequently, we find no error. Because the outcome selected by the ALJ is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

Further, our opinion in Justice v. Mountain Enterprises, Claim No. 201000253, rendered November 7, 2011, has no application to the case *sub judice*. In Justice v. Mountain Enterprises, supra, Dr. Ruth utilized the correct edition of the AMA Guides but his 6% impairment rating had no connection with the Class II psychiatric impairment set forth in the 2nd Edition of the AMA Guides. Rather, the impairment rating for a Class II psychiatric impairment ranged from ten to twenty percent. We have no such allegation in the case *sub judice*. GSI does not assert Dr. Roberts' 16% cervical impairment rating does not fall within DRE Cervical Category III.

Accordingly, the August 22, 2011, opinion and award and the September 21, 2011, order overruling GSI's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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