OPINION ENTERED: NOVEMBER 9, 2012

CLAIM NO. 201083457

JACKIE KITCHEN PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

TROVER FOUNDATION REGIONAL MEDICAL CENTER
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Jackie Kitchen ("Kitchen") appeals from the April 25, 2012 Opinion, Award and Order rendered by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ") and the June 29, 2012 order on her petition for reconsideration. Kitchen argues the ALJ failed to award a sufficient period of temporary total disability ("TTD") benefits. We disagree and affirm.

Kitchen testified by deposition on October 20, 2011 and at the hearing conducted February 28, 2012. She began working for Trover Foundation/Regional Medical Center ("Trover") on November 9, 2009 as a certified nursing assistant ("CNA"). On July 13, 2010, she was lifting a patient when she experienced a burning sensation across her chest and in the back of her left arm and shoulder. She went to the emergency room on the morning of July 14, 2010 and later treated with Dr. Richard B. Lee on July 15, 2010.

Kitchen underwent physical therapy at Trover Sports Medicine and Rehab from July 22, 2010 through August 10, 2010. A cervical MRI and left shoulder MRI were performed on August 6, 2010. Dr. Lee released her to return to work on August 16, 2010. She returned to Trover and worked two 12-hour shifts between August 16, 2010 and August 25, 2010. Kitchen stated no other doctor placed her on restrictions after August 2010.

Kitchen testified she had been involved in a motor vehicle accident in 1996 and sustained a fractured right kneecap, a head wound and a whiplash injury. She underwent chiropractic treatment for approximately one month. She was off work for approximately eight weeks due to the injury and later terminated from her job because she was unable to work.

Kitchen also testified she sustained a right shoulder rotator cuff tear on May 8, 2006, while employed with Calvert City Convalescent Center. She filed a worker's compensation claim as a result of that injury which was settled on November 2, 2007, for a 5% permanent disability.

At the hearing, Kitchen testified she injured the right side of her neck on July 13, 2010, while working with another nurse attempting to move a patient. Kitchen stated she noticed a large knot at the base of her neck on the right side. She then began having tingling in her right hand and right shoulder pain. Kitchen's supervisor sent her to the emergency room and she was then referred to Dr. Lee.

Kitchen later left Trover and was employed as a CNA with Signature Healthcare for approximately three months between January and April 2011. Her duties were similar to those at Trover. Next, she began working as a CNA with Creekwood on April 9, 2011. She stated her job duties included feeding, bathing, and clothing residents and transporting them to therapy in wheelchairs. She had help from male CNA's with lifting the patients.

Kitchen acknowledged she did not report for work on August 24, 2010 and August 25, 2010, because she informed Trover she was getting married. Kitchen did not recall

telling Trover she was moving. No one at Trover told her she was fired and could not return to work.

Vickie Pritchett, Coordinator of Employee Health Services at Trover, testified at the hearing. She confirmed that Kitchen did not report for work on August 24, 2010 and called on August 25, 2010 to report she was quitting.

The parties stipulated TTD benefits were paid at the weekly rate of $241.05 from July 15, 2010 through August 15, 2010.

Trover filed the July 14, 2010 medical record of Trover Health System Sports Medicine. Kitchen presented on July 14, 2010 with normal range of motion in her extremities. Dr. Lee indicated there was no decreased range of motion of the neck. The cervical spine was non-tender with no vertebral tenderness. His impression at that time was muscle strain of the right shoulder and sprained neck. Kitchen was released to return to work the following day. The cervical spine and left shoulder x-rays on that date were normal.

Trover filed the August 6, 2010 MRI report from South Regional Open MRI. Dr. Brooks A. Horsley noted there were small central disc protrusions at C4–5, C5–6 and C6–7 that were not associated with nerve root compression and would be

incidental findings. There was no foraminal narrowing or spinal stenosis. His impression was negative MRI of the cervical spine. He stated there was no source of left radicular complaint seen on the MRI.

Kitchen submitted the July 15, 2010 and August 10, 2010 treatment notes of Dr. Lee. On July 15, 2010, Kitchen presented for a re-check of injuries to her neck and left shoulder. Kitchen reported that she had been injured in a work-related accident on July 13, 2010, while pulling a patient up in bed. Dr. Lee noted Kitchen developed pain in her neck and left shoulder and had worsening pain and stiffness since the onset. He noted x-rays of the cervical spine and left shoulder revealed no acute abnormalities. Kitchen reported her symptoms had worsened since the day before and she had a pain level of 8/10. On examination, Kitchen had tenderness to palpation along the left side cervical paraspinal muscles and left trapezius muscle extending into the left scapular area. Range of motion in her neck was moderately restricted in all planes. Kitchen had no edema or joint effusion in her shoulder. She had tenderness to palpation anteriorly over the biceps tendon and superiorly over the subacromial joint. Active range of motion was restricted in flexion and abduction. Dr. Lee's assessment was neck and left shoulder sprain, unimproved.

Kitchen was to continue her current medications of Naproxen and Cyclobenzaprine. She was also directed to continue home exercises and remain off work pending reevaluation.

On August 10, 2010, Kitchen reported persistent pain and stiffness in her neck and shoulder since the work injury. Kitchen rated her pain level as 7/10. She indicated her pain continued to radiate down her left arm to her hand. She also reported increased discomfort when attempting to lift her arm above shoulder elevation. Dr. Lee's assessment was neck and left shoulder sprains, improving slowly. He stated cervical and left shoulder MRI studies revealed no surgical pathology and indicated Kitchen should continue her current medications as needed, along with the home exercise program. He would allow Kitchen to resume her regular duties on August 16, 2010. He discharged her in good condition and indicated she was to return to OccuCare as needed.

Kitchen submitted the report of Dr. Anthony McEldowney, who evaluated her on October 20, 2011. Dr. McEldowney took a history of the work incident and subsequent treatment. On examination, Dr. McEldowney noted Kitchen had persistent swelling in the left side of her neck without bony deformity present. She had weakness around the left shoulder and had difficulty with active motion overhead. Dr. McEldowney was

able to passively move Kitchen's left shoulder without significant mechanical symptoms. Kitchen had tenderness bilaterally in the musculature along the neck on the right also there was notable muscle contusion present.

Dr. McEldowney diagnosed a work-related cervical sprain/strain. He stated within a reasonable medical probability, Kitchen's injury was the cause of her complaints. Using the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. McEldowney assigned a 6% whole person impairment rating. He placed Kitchen at maximum medical improvement ("MMI") as of October 20, 2011. Dr. McEldowney opined Kitchen retained the physical capacity to return to the type of work she performed at the time of her injury.

Dr. McEldowney issued a rebuttal report on December 29, 2011, indicating he had reviewed the independent medical evaluation ("IME") report of Dr. Gregory Gleis. Dr. McEldowney disagreed with Dr. Gleis regarding causation of Kitchen's current condition. Dr. McEldowney reiterated his belief the strain on July 13, 2010 produced Kitchen's 6% impairment rating.

Dr. Gleis evaluated Kitchen on November 14, 2011 and conducted a medical records review. He diagnosed a work-related strain, similar to the May 2006 cervical strain, and

a work-related left shoulder strain, however, he found no evidence of a permanent work-related injury. He opined there was no objective evidence of a new injury to the cervical spine and Kitchen's neck pain was consistent with cervical degenerative disc disease. He stated this was no different than the 2006 reported neck pain. Dr. Gleis found no evidence of a permanent left shoulder injury and stated the decreased range of motion in the left shoulder should improve with a home exercise program. Using the AMA Guides, Dr. Gleis placed Kitchen in DRE cervical category I with a 0% impairment rating. He found no need for restrictions and indicated Kitchen retained the physical capacity to perform her regular job duties.

Relying on the opinion of Dr. McEldowney, the ALJ in an opinion rendered April 25, 2012, determined Kitchen had a 6% permanent impairment as a result of the July 13, 2010 injury. The ALJ found Kitchen reached MMI on August 16, 2010, the date Dr. Lee released her to return to work, and therefore was not entitled to additional TTD benefits.

Kitchen filed a petition for reconsideration, arguing Dr. Lee did not state she was at MMI at the time he released her to return to work, and Dr. McEldowney was the only physician to directly address the date she reached MMI. Further, Kitchen pointed to her own testimony as

establishing she ceased working for Trover because she was unable to continue her job duties. Kitchen raises the same arguments on appeal.

By order dated June 29, 2012, the ALJ overruled the petition for reconsideration, as an attempt to re-argue the merits of the claim.

As the claimant in a workers' compensation claim, Kitchen had the burden of proving each of the essential elements of her cause of action including the duration of her entitlement to temporary total disability ("TTD") benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Kitchen was unsuccessful in that burden, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence which is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). In rendering a decision, KRS 342.285 gives an ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve

various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as an ALJ's ruling with regard to an issue is reasonable under the evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.0011(11)(a) defines temporary total disability 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." A two part analysis must be applied before TTD benefits are awarded, including determination of

whether 1) maximum medical improvement has not been reached; and 2) the employee has not reached a level of improvement that permits a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004).

As to the first prong, Kentucky courts have noted MMI is reached when medical evidence establishes that the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition is over. *See* Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

As to the second prong, the Kentucky Supreme Court provided clarification in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), stating:

> "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work and not the type that is customary or that he was performing at the time of the injury."

Moreover, entitlement to TTD benefits, including the duration for which such benefits are awarded, is a question of fact to be decided by the ALJ. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327, 329 (Ky. App. 2000).

The evidence pertaining to Kitchen's entitlement to TTD benefits does not compel a contrary finding. Here, Dr.

Lee released Kitchen to return to work without restrictions on August 16, 2010. Kitchen returned to her normal duties as a CNA at Trover for two shifts and worked for two other employers as a CNA after leaving her employment with Trover. There is no evidence any physician placed restrictions on Kitchen after Dr. Lee's release, and Kitchen acknowledged she had no restrictions after the release. The ALJ could reasonably infer Dr. Lee considered Kitchen to be at MMI at the time he granted the release without restrictions.

Even if Kitchen had not reached MMI at the time of Dr. Lee's release, the evidence supports a finding Kitchen had reached a level of improvement that permitted a return to her usual or customary employment at that time. Thus, pursuant to the holding in Magellan Behavioral Health v. Helms, *supra*, Kitchen did not satisfy both prongs of the test to determine eligibility for TTD benefits. The parties stipulated TTD was paid from July 15, 2010 through August 15, 2010. The evidence simply does not compel a finding of any greater period of TTD benefits.

Accordingly, the April 25, 2012 Opinion, Award and Order and the June 29, 2012 Order overruling Kitchen's petition for reconsideration rendered by Hon. Joseph W. Justice, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JAMES D HOWES
5438 NEW CUT RD #201
LOUISVILLE, KY 40214

COUNSEL FOR RESPONDENT:

HON DENISE KIRK ASH
PO BOX 34125
LEXINGTON, KY 40588

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G. BOLTON
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601