OPINION ENTERED: July 27, 2012

CLAIM NO. 200779819

JENNIFER BRIDGES DAUGHERTY PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

ROSEDALE MANOR
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

ALVEY, Chairman. Jennifer Bridges, now Daugherty[1], ("Daugherty") seeks review of the opinion, award and order rendered April 30, 2012, by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") awarding her permanent partial disability ("PPD") benefits and medical benefits

[1] At the time the claim was filed petitioner was named Jennifer Bridges, she subsequently changed her name to Jennifer Bridges Daugherty.

for a right knee injury sustained in a work-related accident occurring on July 26, 2007, while working for Rosedale Manor ("Rosedale"). No petition for reconsideration was filed by either party.

On appeal, Daugherty argues the ALJ erred in adopting the 1% permanent impairment rating assessed by Dr. John Larkin, her treating orthopedic surgeon, and requests the Board adopt the 13% impairment rating assessed by Dan Buchanan, a chiropractor she saw on one occasion for the purpose of assessing an impairment rating. Daugherty argues Dr. Larkin's opinion is not credible because it was formed without conducting a physical examination or without taking a post-surgery history. We affirm.

This claim originated on March 25, 2008, when Daugherty filed a medical fee dispute after the denial of a right knee arthroscopy and patellar re-alignment following utilization review. The dispute was subsequently dismissed by the ALJ as moot on April 9, 2009, and the merits of the underlying dispute was not addressed. On June 16, 2009 Rosedale filed a medical fee dispute after Dr. Larkin recommended a right knee MRI as a prelude to the right knee procedure. Thereafter, Daugherty filed the Form 101 on August 4, 2009, claiming she injured her right knee on July 26, 2007, while working for Rosedale as a certified nurse's

assistant ("CNA"). In an Interlocutory opinion, award and order rendered February 19, 2010, the ALJ ruled in Daugherty's favor regarding the medical fee dispute, finding the proposed right knee patellar re-alignment/VMO stabilization procedure work-related, reasonable and necessary by stating as follows:

> a. Occurrence of "injury."
>
> The Employer's defense that Daugherty did not sustain an "injury" as defined by KRS 342.0011(1) did not appear to come into focus until receipt of Dr. Bender's IME report. Its' Form 111 responding to Plaintiff's Form 112 acknowledged a compensable claim with a dispute over compensability of surgery. Its' Response to the MFD acknowledged the work relatedness of the patella realignment surgery that had been recommended. The UR physicians did not question work relatedness as to the patella realignment procedure.
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> Daugherty's complaints were substantiated in the initial treatment records, as noted by the defense IME, Dr. Bender, who observed that St. Elizabeth physical therapy records had confirmed popping in the knee and further "suggest even the likelihood of some patellofemoral instability." The ALJ also observed, for example, that on August 4, 2007 the physical therapy records document complaints of aching, throbbing, and swelling; objective findings in the therapy and other St. Elizabeth records substantiate those complaints.
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> Dr. Bender's opinion that Daugherty's "patellofemoral subluxation was

peculiar to the body habitus of the claimant rather than any incident that occurred at work on 7/26/7″ was not persuasive. Daugherty did not have the symptoms that currently require surgical intervention on the right knee until after the work injury, and therefore her weight prior to that time had not produced any such symptoms. Dr. Bender did not discuss the mechanism of injury in stating his opinion on causation.

Dr. Bender's opinion that the work injury had caused only a temporary exacerbation of a patellofemoral condition was also not persuasive. Even though instances of dislocations have significantly decreased, they and the other symptoms continue two-and-a-half years after the injury, and therefore can hardly be called "temporary." Dr. Bender's opinions were not voiced by the UR physicians, Drs. Goldman and Loeb.

The suggestion that Daugherty's history of a chronic problem with the left knee inferred a non-work related condition in the right knee was not persuasive to the ALJ.

The ALJ found Daugherty's description of her injury to be credible. She was working alongside another employee when it occurred, and sought medical attention immediately afterward. The Defendant did not submit evidence suggesting that Daugherty's injury did not occur as she claimed. Daugherty was in a kneeling position because she was assisting a resident. She was clearly placed in a position to have been injured by this work activity, and therefore the argument of an idilopathic [sic] fall is misplaced.

b. Relatedness/reasonableness and necessity of surgery.

As to the recommended stabilization procedure, the ALJ is persuaded by the evidence from Dr. Larkin as to its work relatedness, and reasonableness and necessity. Dr. Goldman concurred with the need for surgery in his 2009 UR report, after Daugherty failed in the conservative treatment measures he had recommended when denying surgery in 2007. Dr. Loeb issued a similar UR report in 2007, saying that conservative treatment ought to be exhausted before surgery. Since Dr. Goldman subsequently acknowledged the failure of conservative treatment, presumably Dr. Loeb would be of like mind on the present need for surgery.

Dr. Bender said that there was "only a minimum indication for surgery at present." The ALJ believes that the respect that Dr. Larkin paid to Dr. Bender would be reciprocated if Dr. Bender had the opportunity. They are both well regarded physicians. Dr. Bender acknowledges at least some indication for surgery. Dr. Larkin is the treating physician, and believes there is greater indication for surgery; thus, the ALJ defers to his opinion on the reasonableness and necessity of surgery, an opinion the ALJ again notes is shared by a UR physician, Dr. Goldman. The Defendant suggests that surgery is further not reasonable or necessary because the symptoms prompting the recommendation for surgery are not pronounced, i.e., Daugherty is able to go about her daily activities despite her condition. The ALJ does not find that notion persuasive. Daugherty does work full time, but that does not mean she does not require surgery. She has continual

> symptoms, still has instances of the knee popping out of place, and wears a brace to work every day and at home every night. Those are indications for surgery according to Dr. Larkin, Dr. Goldman, and, to a certain extent, Dr. Bender.
>
> Dr. Larkin said in April and July 2009 that his surgical recommendation was the stabilization procedure. The ALJ finds that Plaintiff did not submit evidence to counter the opinions from Dr. Loeb and Dr. Goldman that a chondroplasty would not be work related. While that procedure does not appear to be a part of Dr. Larkin's present surgical plan, if it is, the Defendant is not liable for it.

The ALJ also found Daugherty entitled to temporary total disability ("TTD") benefits from the date of surgery until she reached maximum medical improvement ("MMI"). The ALJ placed Daugherty's claim in abeyance pending MMI. Rosedale's petition for reconsideration from the February 19, 2010, Interlocutory Opinion, Award and Order was denied on March 24, 2010. Subsequently, Daugherty reached MMI and the claim was removed from abeyance. Daugherty and Rosedale submitted further proof on the issue of extent and duration, and entitlement to temporary and permanent benefits.

Voluminous medical records were subsequently filed by both parties. Daugherty submitted records from

Dr. Kunkler of St. Elizabeth Business Health Care indicating she began treatment on July 26, 2007 for her right knee injury, consisting of conservative care in the form of pain medication, a knee brace, icing and physical therapy. On September 4, 2007, Dr. Kunkler interpreted the right knee MRI as demonstrating medial meniscal degeneration without tear, mild chondromalacia, and a cyst on the posterior medial aspect. He diagnosed a right knee strain, with medial meniscal abnormality. Dr. Kunkler noted Daugherty was not improving with conservative treatment and referred her to Dr. Larkin.

Records from St. Elizabeth Business Health Care indicate Daugherty attended physical therapy approximately one to two times per week from August 9, 2007 through November 15, 2007, when she was discharged due to lack of improvement and continued patellar-femoral complaints. The August 29, 2007 right knee MRI report stated:

> Mild chondromalacia medial femoral condyle. Increased internal signal medial meniscus, consistent with meniscal degeneration, without tear. Small joint effusion. 12 mm septated extra-synovial cyst located posterior and cephalad to the medial femoral condyle.

Dr. Larkin's records were submitted by both Daugherty and Rosedale, indicating she began treatment on

September 7, 2007. He reviewed the MRI and noted complaints of right knee popping out of place and pain. Dr. Larkin diagnosed patella subluxation and recommended a patella taping program, knee bracing, anti-inflammatories and physical therapy. On September 20, 2007, Dr. Larkin noted no improvement and stated if Daugherty suffered in excess of five more subluxation episodes, he would consider a VMO repair procedure. On October 25, 2007, Dr. Larkin again noted no right knee improvement with conservative treatment and stated his request for surgical intervention had been denied by workers' compensation. Dr. Larkin recommended Daugherty continue physical therapy during the interim while the request for surgery was being resolved. On November 26, 2007, Dr. Larkin recommended returning Daugherty to physical therapy.

The next medical record from Dr. Larkin is dated April 16, 2009, wherein he noted Daugherty was last seen in November 2007 for a work-related knee injury and had received unsuccessful conservative treatment. Dr. Larkin noted Daugherty continued to complain of knee pain, catching and popping. He opined Daugherty suffered from a chondral defect of the right knee and had been symptomatic for nearly two years. Dr. Larkin recommended an MRI with the possibility of a scope and stabilization procedure.

On March 17, 2010, following the Interlocutory Opinion, Award and Order, Dr. Larkin noted Daugherty returned wanting to proceed with the knee scope. Dr. Larkin recommended an MR Arthrogram. This was performed on September 17, 2009, and demonstrated 1) grade 2 osteochondral abnormality about the patella apex and 2) central position of the medial facet and mucoid degeneration of the posterior horn of medial meniscus. Dr. Larkin diagnosed patellofemoral chondromalacia which he treated with cortisone injections.

On October 22, 2010, Dr. Larkin performed the right knee surgery. In a note dated October 25, 2010, Dr. Larkin observed Daugherty was doing well post-operatively and ordered physical therapy. Rosedale submitted physical therapy records from Commonwealth Orthopaedic Centers dated November 1, 2010, November 24, 2010, November 29, 2010 and December 6, 2010.

Daugherty submitted the chiropractic report of Dr. Buchanan dated September 20, 2011. Dr. Buchanan noted Daugherty injured her right knee on July 26, 2007, while assisting a resident, which eventually required surgery. Dr. Buchanan noted continued moderate to intense right knee symptoms, with Daugherty rating her knee pain seven out of ten. After performing an examination, Dr. Buchanan

assessed a 13% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA" Guides).

Rosedale submitted Dr. Larkin's office record dated November 16, 2011. In that record, Dr. Larkin noted Daugherty's treatment history for her right knee injury, including extensive conservative treatment, MRI, Arthrogram, and eventual surgery. He noted Daugherty had recovered and returned her to work on the last day of assessment occurring on January 6, 2011, with no restrictions. Pursuant to the AMA Guides, Dr. Larkin assessed a 1% impairment rating and opined she could return to all activities with no restrictions.

Daugherty testified by deposition on July 1, 2009, and at hearings held January 27, 2010 and March 22, 2012. Daugherty was born October 20, 1982, and resides in Cincinnati, Ohio. She completed high school and attended two years of college, without earning a degree. Daugherty, in addition to being a CNA, also has a certification in medical records. Daugherty's work history includes work as a cashier, cook, assistant manager and CNA. Daugherty testified she began working for Rosedale in June 2006. Approximately one week following the July 26, 2007, accident, Daugherty returned to Rosedale as a desk clerk

due to light duty restrictions imposed by her physicians. She then quit her job at Rosedale in July 2008 and began working as a scheduler at a retirement community from July 2008 to December 2008. In December 2008, Daugherty began her current employment with Humana, where she works full-time as a customer care representative. She earns more in her job with Human than she did while employed by Rosedale. Daugherty testified she had no previous right knee injuries or symptoms before the July 26, 2007, accident.

Daugherty testified on July 26, 2007, she and a hall partner were assisting a resident. As Daugherty bent down next to the bed, she experienced a pop in her right knee causing her to fall. Her knee cap did not pop out of place at that time. She testified it first popped out of place a couple of weeks later, and her husband popped it back into place for her.

Daugherty immediately sought treatment at St. Elizabeth Hospital, where she was prescribed pain medication, provided a knee brace, and an order was placed for physical therapy. She began treatment with Dr. Larkin in September 2007, who treated her conservatively with a knee brace, pain medication and physical therapy and restricted her to light-duty work. Daugherty testified she did not treat with Dr. Larkin at all from November 2007

until April 2009, when he again recommended right knee surgery. She also stated the conservative measures did not alleviate her symptoms. Daugherty underwent right knee surgery on October 22, 2010. Subsequently, she attended regular physical therapy and doctor appointments. Daugherty testified she continues to experience right knee pain, reduced range of motion, and difficulty with stairs, walking, and bending her knee.

Regarding the number of times she actually saw Dr. Larkin following the knee surgery, Daugherty testified as follows:

> A: I didn't see Dr. Larkin after the surgery at all that I recall. I do recall seeing Dr. Avery. I guess that's his PA.
>
> Q: Well, actually, it's not Dr. Avery.
>
> A: Oh.
>
> Q: It's the physician's assistant?
>
> A: Yeah, the Physician's Assistant Avery, and as well as there was another PA that took out my - - the sutures, but that was - - those are the only people that I recall seeing at the doctor's office.
>
> . . . .
>
> Q: And you had also - - how many times do you recall seeing Avery?
>
> A: I saw Avery - -

> Q: (Interrupting) After - - the surgery. I'm sorry.
>
> A: After the surgery. I saw him - - after the surgery, I saw him for about once a week for about three weeks, three to four weeks. I don't remember exactly. And then I saw him once every other week.

Regarding whether Dr. Larkin performed an examination before November 16, 2011, Daugherty testified as follows:

> Q: Did Dr. Larkin complete an examination before November 16th, 2011 on you?
>
> A: No.
>
> Q: At any point in time, did Dr. Larkin meet with you and test your range of motion, test your strength, anything like that?
>
> A: No. Avery did.
>
> Q: Okay. Did Dr. Larkin ever - - and when was the last time you saw Dr. - - or Physician's Assistant Avery?
>
> A: It was my very last visit. I believe it was in January of 2011.
>
> Q: Okay. And did Dr. Larkin or the physician's assistant ever have you do a Functional Capacity Evaluation?
>
> A: Not that I recall.

On cross-examination, Daugherty admitted Dr. Larkin's office had all her information, including her

physical therapy records, when she returned after the surgery. Daugherty testified as far as she knew, her physical therapist forwarded her records to Dr. Larkin's office, allowing him to track her range of motion, evaluations, assessments and other testing information gathered at physical therapy. Daugherty testified when she visited Dr. Larkin's office following surgery, the physician's assistant performed periodic assessments including one during her last visit.

In the opinion, award and order rendered April 30, 2012, the ALJ awarded no additional TTD benefits, but he did award medical benefits and PPD benefits based upon a 1% impairment rating, stating as follows:

> 3. Plaintiff filed evidence from Dr. Dan Buchanan, a chiropractor in Cincinnati who evaluated Daugherty at her attorney's request on September 20, 2011. He assigned 13% impairment for reduced range of motion and reduced strength on flexion and extension. He made no reference to work restrictions.
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> 4. Both parties filed evidence from Dr. John Larkin, who performed an arthroscopic medial meniscectomy with subchondral drilling of the patellofemoral joint on October 22, 2010. Following surgery, Dr. Larkin released Daugherty to return to work on November 1, 2010. He ultimately released her with no restrictions, and assigned 1% impairment.

5. The ALJ observed Daugherty's testimony at the Hearing. He again found her to be a good witness for herself. The ALJ has again reviewed the evidence filed prior to the Interlocutory Opinion, and has reviewed the parties' Briefs.

6. The calculation of Daugherty's permanent partial disability benefits under KRS 342.730 first requires the ALJ to determine her impairment. She argues for the 13% rating assigned by Dr. Buchanan. The Defendant argues for the 1% rating assigned by Dr. Larkin.

Under KRS 342.0011(35) and (36), an Administrative Law Judge is authorized to select a permanent impairment rating from the evidence. Knott County Nursing *Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002). The courts have held that the proper interpretation of the AMA Guides and the appropriate assessment of an impairment rating are medical determinations which may be made only by physicians. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003). In claims like this case involving conflicting testimony by medical experts, the discretion to choose between conflicting expert opinions rests exclusively with the Administrative Law Judge. *Staples v. Konvelski*, 56 S.W.3d 412 (Ky. 2001). After careful consideration of the conflicting medical evidence, the ALJ finds that Dr. Larkin has rendered the most authoritative and persuasive opinion on impairment at 1%. At Daugherty's urging when threshold issues were initially presented, the ALJ adopted Dr. Larkin's testimony on the occurrence of a work related injury and the need for surgery in an Interlocutory Opinion; now she unpersuasively asks the ALJ to find Dr.

> Larkin, the treating orthopedic surgeon, less credible on the issue of impairment than an evaluating chiropractor.
>
> 7. The ALJ further relies on the evidence from Dr. Larkin and Dr. Buchanan to find that Daugherty has no restrictions on activities. She therefore retains the physical capacity to return to her pre-injury employment and is not entitled to the 3.0 multiplier of KRS 342.730(1)(c)1. (No argument was presented in favor of the 3.0 multiplier.)
>
> 8. Daugherty is presently working for Humana in a call center as a customer care representative. She is making more money than she did while working for Rosedale Manor. If the ALJ had determined that Daugherty did not retain the physical capacity to return to her prior job, that fact combined with her current wages would have required an analysis under *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). The outcome, however, would be the same because Daugherty testified that she is able to perform her current job without any problems, and since it is likely she will continue to earn wages greater than her pre-injury AWW for the foreseeable future, a Fawbush analysis would still result in a PPD calculation pursuant to KRS 342.730(1)(c)2. (HT p. 16).

Daugherty did not file a petition for reconsideration from the opinion, award and order rendered April 30, 2012.

On appeal, Daugherty argues the ALJ erred in relying upon the opinion of Dr. Larkin in assessing a 1% impairment rating. Daugherty asserts "over a year after surgery, despite no examination or consultation with the patient, the doctor forwarded a letter to the Defendant's Attorney suggesting a 1% permanent partial impairment rating." Daugherty argues the AMA Guides does not allow for a doctor to complete a Form 107 form without performing a physical examination. Since Dr. Larkin had not seen Daugherty since the surgery, there was no clinical status, review of symptoms or physical examination as required by the AMA Guides, Subsections 2.5 and 2.6. Daugherty specifically cites to the AMA Guides, Section 2.6a.3, which states "Assess current clinical status, including current symptoms, review of symptoms, physical examination, and a list of contemplated treatment, rehabilitation, and any anticipated reevaluation." Therefore, Daugherty requests the "Board adopt the report of Dr. Buchanan and award a finding of 13% impairment rating along with all other appropriate benefits."

As the claimant in a workers' compensation proceeding, Daugherty had the burden of proving each of the essential elements of her cause of action including extent and duration of disability. Burton v. Foster Wheeler

Corp., 72 S.W.3d 925 (Ky. 2002). Since Daugherty was unsuccessful before the ALJ, 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 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 the case *sub judice*, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 200). 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

That said, we do not find the evidence compels a finding of the 13% impairment rating assessed by Dr. Buchanan. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), the Kentucky Supreme Court explained the assessment of impairment ratings and the proper interpretation of the AMA Guides are medical questions solely within the province of medical experts.

See also KRS 342.0011(11)(a), (35) and (36); and KRS 342.730(1)(b). For that reason, an ALJ is not authorized to arrive at an impairment rating by independently interpreting the AMA Guides. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Rather, the improper interpretation of the AMA Guides and assessment of an impairment rating pursuant to the AMA Guides are medical questions reserved only to medical witnesses. Kentucky River Enterprises v. Elkins, *supra*. Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005). Therefore, 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. George Humfleet, *supra*. Moreover, authority to select an impairment rating assigned by an expert medical witness rests with the ALJ. See KRS 342.0011 (35) and (36); Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001). The Board has previously explained:

> An impairment rating, therefore, can only be established through expert medical testimony sufficient on its face to support a reasonable inference by the ALJ that the AMA Guides were probably drawn on. So long as there is sufficient information contained within a medical expert's testimony from which an ALJ can reasonably infer the impairment assessed is based upon the 5th Edition of the AMA Guides, the ALJ

> as fact finder is free to adopt that expert's rating for purposes of calculating an injured worker's permanent disability pursuant to KRS 342.730(1)(b). Frisch's Big Boy of London, Inc. v. Ethel Pearl Richardson, Claim No. 201083863, July 21, 2011.

We find no error in the ALJ's reliance upon Dr. Larkin's assessment of 1% impairment for Daugherty's right knee injury. Dr. Larkin served as Daugherty's treating orthopedic physician since September 2007 and eventually performed her knee surgery in October 2010. Daugherty testified she did not see Dr. Larkin after her surgery, but only saw his physician's assistant, Mr. Avery. However, she also testified, after the surgery Mr. Avery performed periodic assessments and tests. Daugherty attended physical therapy, and the records were forwarded to Dr. Larkin's office. After attaining MMI, Dr. Larkin assessed a 1% impairment rating for Daugherty's right knee injury. Daugherty submitted a conflicting report prepared by Dr. Buchanan, D.C., an evaluating chiropractor, after completing one examination. He assessed a 13% impairment rating. We note, as did the ALJ, Daugherty urged the ALJ in the prior medical fee dispute to adopt Dr. Larkin's opinion concerning the occurrence of a work-related injury and the need for surgery, but now asks the same doctor be

found less credible on the issue of permanent impairment than an evaluating chiropractor. We believe substantial evidence exists to support the ALJ's decision, and the record does not compel a contrary result.

Accordingly, the opinion, award and order rendered April 30, 2012, by Hon. Douglas W. Gott, ALJ, is hereby AFFIRMED.

ALL CONCUR.

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