OPINION ENTERED: AUGUST 20, 2012

CLAIM NO. 201100016

JERRY MCCLURE PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

IRVING MATERIALS, INC
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Jerry McClure ("McClure") seeks review of a March 19, 2012 decision rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits against Irving Materials, Inc. ("Irving"). McClure also

appeals from an April 12, 2012 order denying his petition for reconsideration.

On appeal, McClure argues the ALJ erroneously calculated and awarded PPD benefits. The ALJ determined the 23% impairment rating assessed was appropriate, from which she subtracted 6% due to a prior active condition. McClure takes issue with the ALJ's methodology in calculating his disability rating pursuant to KRS 342.730(1)(b) generated by the injury, as well as any carve out for the impairment rating the ALJ found attributable to a pre-existing active, non-compensable condition. McClure argues the ALJ should have provided credit based upon the dollar amount of the active impairment, rather than reducing the impairment rating. We affirm.

McClure testified by deposition on March 11, 2011, and again at the hearing held January 25, 2012. He is a truck driver from Hodgenville, Kentucky, who was born on March 14, 1968. McClure is a high school graduate, and has a commercial driver's license ("CDL"). He began working for Irving in 2007 driving a cement mixing truck. He explained this job consisted of driving, moving chutes utilized in pouring concrete, lifting bags of steel fiber, climbing and washing the truck.

McClure sustained an injury to his right elbow, shoulder and bicep on December 23, 2009, as he was placing a board while assisting another driver whose truck was stuck in a hole. As he was positioning the board, he experienced a pop in the right upper arm at the elbow. He finished his job, and reported the injury to his immediate supervisor. He then sought treatment at the Urgent Care Center in Elizabethtown. His treatment consisted of surgery to repair the tendon, physical therapy and over-the-counter medications. He continues to treat with his orthopedic surgeon, Dr. Navin Kilambi. McClure explained his right upper extremity including his shoulder, elbow, and arm continue to bother him despite successful surgical repair. He returned to work in June 2010 to the same job at the same or higher rate of pay.

McClure previously sustained an injury to his right wrist in 1996 for which he was assessed a 6% impairment rating.

McClure filed a Form 101 on January 25, 2011 alleging injuries to the right elbow and shoulder stemming from the December 23, 2009 accident. Attached to the Form 101 is Dr. Kilambi's office note dated December 28, 2009. In that note, Dr. Kilambi stated the right elbow popped on December 23, 2009, when McClure was scooting a board. He

further noted an MRI demonstrated a partial tear of the biceps with the remainder of the tendon still near the radial attachment, and the remainder still attached. He noted a previous fusion of the distal ulna.

Irving filed Dr. Kilambi's report dated September 13, 2010, assessing a 2% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Kilambi stated, "He will continue regular duty and follow up in the orthopedic clinic only if needed in the future." In his note dated October 25, 2010, Dr. Kilambi stated McClure has neuralgia in the right lateral forearm, cubital tunnel and right shoulder cuff bursitis and tendonitis due to his work injury.

McClure also submitted the report of Dr. Warren Bilkey who evaluated him on May 4, 2011. Dr. Bilkey noted the injury occurring December 23, 2009, the surgery performed by Dr. Kilambi, and continued complaints of upper extremity pain. He diagnosed McClure with a work-related injury occurring on December 23, 2009, causing a right elbow distal biceps tear and scapular muscle spasm on the right with limitation of right shoulder range of motion. He also stated McClure sustained an injury to the right radial nerve and right ulnar nerve with sensory loss and

muscle weakness. He found McClure to have reached maximum medical improvement ("MMI") for the biceps tear, but not for the shoulder pain and nerve injury. He assessed a 23% impairment rating pursuant to the AMA Guides.

McClure filed a supplemental report from Dr. Bilkey which was also dated May 4, 2011. In that report, he reiterated the 23% impairment rating pursuant to the AMA Guides, noted 0% was due to pre-existing dormant conditions, and 0% was due to pre-existing active conditions. Dr. Bilkey further noted McClure had returned to regular duty work and was not disqualified from performing his previous work.

In another supplemental report dated October 6, 2010, Dr. Bilkey outlined the reasons he disagreed with the opinions expressed by Dr. Richard Dubou, and stated he did not have records indicating a pre-existing active condition with the ulnar nerve.

Dr. Richard Dubou evaluated McClure on February 1, 2011. He noted the history of a pop and pain in the right elbow while placing a board, resulting in the surgery performed by Dr. Kilambi. Dr. Dubou stated McClure is status post right elbow distal biceps tear with repair and an excellent objective result. He also noted McClure has cubital tunnel syndrome which he believed to be unrelated,

and due to a previous accident which occurred in 1999. He agreed with the 2% impairment rating assessed by Dr. Kilambi. In a supplemental report dated July 19, 2011, Dr. Dubou indicated the ulnar nerve dysfunction factored into Dr. Bilkey's impairment rating has been present since 1999, not the 2009 injury. In a September 16, 2011 report, he again agreed with the 2% rating assessed by Dr. Kilambi. He relied in part on an EMG/NCV performed by Dr. James E. McKiernan at his request on September 1, 2011. The report generated from that testing was read as normal.

Irving also filed records from Dr. Warren Breidenbach, an orthopedic surgeon with Louisville Hand Surgery. Dr. Breidenbach began treating McClure in September 1997 for ulnar impingement syndrome. He noted McClure underwent a lunotriquetral fusion in the right wrist. He also noted the presence of cubital tunnel problems and recommended a cubital tunnel release. In a note dated September 29, 2000, Dr. Breidenbach assessed a 6% impairment rating.

Finally, Irving filed an EMG/NCV report dated February 5, 1999 from testing performed by Dr. Vaudeva Iyer. Dr. Iyer stated the test demonstrated a "minimal abnormality noted in this study may be considered consistent with mild cubital tunnel syndrome on the right."

In the opinion and award rendered March 19, 2002, the ALJ found as follows:

> Plaintiff suffered a work injury to his right upper extremity, June 19, 1986. He was working for a farmer when he suffered a comminuted, displaced fracture of his right distal radius. The fracture occurred at his dorsal wrist and there was a small avulsion fracture to the ulnar styloid. He was treated by Dr. Amade at Hardin Memorial Hospital. He did not file a workers compensation claim – rather he filed a lawsuit and achieved a settlement.
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> Plaintiff suffered another work injury to his right-[sic]wrist (and multiple injuries to other parts of his body) during the ice storm of January 7, 1996. He was plowing snow in the emergency lane on I-65. He stopped his D.O.T. truck and helped a stranded motorist get his van out of a ditch. Plaintiff, the van's driver and five passengers were standing in the emergency lane – and Plaintiff had opened the passenger-side door of his truck. Seven people were struck down when a tractor-trailer veered into that lane and rear-ended the van, which then "dominoed" the D.O.T.'s snowplow. Plaintiff was rendered unconscious and knocked to the pavement. All were transported via ambulances to Hardin Memorial Hospital. Plaintiff subsequently filed a workers' compensation claim. He was off work from January 8, 1996 through February 18, 1996. No x-rays were made of his right wrist either in the emergency room or during the early course of his treatment for the other injuries suffered in that MVA. He first noticed right wrist-[sic]pain about two months after he returned to work.

Plaintiff's right wrist symptoms did not resolve. Dr. Nash referred him to Dr. Warren Breidenbach of Kleinert, Kutz & Associates. Dr. Breidenbach diagnosed a lunotriquetrel ligament tear, triangular fibrocartilaginous complex tear, and severe wrist pain. Plaintiff's other work-related injuries from the MVA of January 7, 1996 were rated by Dr. Nickerson (August 25, 1998), who reported no impairment was given for the right wrist since the patient was still undergoing treatment.

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On March 26, 1999, Dr. Breidenbach recommended a different surgical option for Plaintiff's right wrist and elbow -- a cubital tunnel release. Humana Freedom, the medical payment obligor for the Commonwealth of Kentucky's Department of Transportation, declined to pay; therefore, no additional surgery was performed. Plaintiff continued working, restricted to light duty. His right wrist pain continued to increase.

. . .

During the examination of June 14, 2000, Dr. Breidenbach modified/reduced the restrictions on Plaintiff's work activities to light duty work with maximum lifting of 20 pounds; wear a brace on right upper extremity, prn; he noted Plaintiff could return to work driving a tractor-trailer within those restrictions. Dr. Breidenbach reiterated his request for pre-authorization to perform the right cubital tunnel release and anterior transposition. He noted workers' compensation had sent Plaintiff for an IME by its expert, which physician had

recommended denial of surgery. The surgery was tentatively scheduled for November 20, 2000. Dr. Breidenbach noted he examined Plaintiff on September 29, 2000; Plaintiff's lawyer had asked him to rate the Plaintiff's impairment. He noted he had assessed 6% to the whole person, which included some of the tingling and numbness in the right hand. He noted Tinel's was positive, EMG and nerve conduction study showed cubital tunnel symptoms. He discussed with Plaintiff that the CTR was the simpler of the two operations, but with a higher failure rate. He noted he would proceed to schedule the surgery. Dr. Breidenbach's staff scheduled Plaintiff to come in for his pre-operative examination on November 15, 2000. But, the employer's workers' compensation insuror again refused pre-authorization. Apparently, after ALJ Smith's decision that found Dr. Breidenbach's treatment compensable, the employer was responsible for the recommended treatment of Dr. Breidenbach, but Plaintiff never returned.

Pursuant to Kentucky Rules of Evidence, KRE 201, I take judicial notice of the Opinion and Award rendered January 12, 2001 by the Hon. Donald G. Smith in Claim 1996-81050, Jerry McClure vs. Kentucky Department of Transportation and Special Fund.

Despite the rather extensive record of treatment for the wrist, the Plaintiff stated he had no problems with his wrist after his initial wrist surgery until this accident. (Plaintiff's depo. p. 9). He just continued working and never underwent the right cubital tunnel release by any subsequent treating physician. He

obtained other employment after the D.O.T. fired him in 2002.

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ANALYSIS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The contested issues will be discussed in the order most reasonable to the undersigned.

1. The facts as stipulated by the parties.

2. Anything that is not right-biceps tear – asserting prior active, causation.

. . .

A more difficult question is whether the Plaintiff has a pre-existing active impairment of his right upper extremity immediately before this injury. The employer has the burden of proof on the affirmative defense of pre-existing active condition. Finley vs. DBM Technologies, 217 SW3d 261 (Ky. App. 2007). Pursuant to Finley, a pre-existing condition is deemed active and therefore not compensable, if it is "symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury."

There is no question that Plaintiff suffered from a prior nerve injury to his right upper extremity that had produced an impairment rating. In 2000 Dr. Breidenbach had opined Plaintiff had a 6% impairment to his right upper extremity due to a right ulnar nerve condition. ALJ Smith's Opinion and Award in 2001 accepted that impairment rating and awarded Plaintiff

permanent partial disability benefits based (in part) on that impairment rating.

Accordingly, I find that Plaintiff suffered from a 6% impairment prior to his current work injury. However, the test requires a determination as to whether Plaintiff suffered from a "symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury."

In this case, there is no medical evidence that Plaintiff's right upper extremity was symptomatic immediately prior to his work injury. His testimony was that he had no problems with his right upper extremity following his treatment for same by Dr. Breidenbach. However, Dr. Breidenbach's medical records paint a slightly different scenario. The last records indicate an active condition with ongoing pain in the ulnar nerve distribution for which surgery was recommended in 2000. There was no evidence he was being treated for his right UE immediately before this current work injury. There was no evidence he was under permanent restrictions on his UE and there was no evidence he was taking medications for his UE at the time of his current work injury. Apparently nine years had passed since Plaintiff's last right UE medical treatment. Significantly, Dr. Dubou's reliance on the EMG studies by Dr. McKerin showed no nerve damage and Dr. Dubou states: "the results of that EMG/nerve conduction study were entirely normal." Dr. Dubou thereafter defers to Dr. Kalambi's impairment rating of 2% based on "objective weakness and sensory changes that would be consistent with the injury and his recovery".

Although Dr. Bilkey opines a 23% whole body impairment, all related to his current injury, it is apparent that Dr. Bilkey did not have information or medical records relating to Plaintiff's previous right UE injury. Thus, he did not accurately consider the Plaintiff's previous upper extremity injury in his assessment of the plaintiff's current impairment.

Based upon the totality of the evidence in this case, I find that Plaintiff had a pre-existing active impairment to his right upper extremity. In making this finding I rely upon the medical records and opinion of Dr. Breidenbach. Since 1996, the proper calculation of permanent partial disability under KRS Chapter 342 has been a mathematical function of impairment ratings determined in accordance with the AMA Guides. See KRS 342.0011(11)(b)(35) and (36); KRS 342.730(1)(b). Permanent partial disability is awarded on the basis of the impairment caused by an injury, and any pre-existing active impairment preceding the injury must be excluded when determining the impairment that is compensable. Roberts Brothers Coal Co. vs. Robinson, 113 SW3d 181 (Ky. 2003). When a work-related injury is superimposed upon a pre-existing active condition that is impairment ratable under the AMA Guides affecting the same body part, the claimant's permanent partial disability is determined by subtracting the pre-existing impairment rating from the overall impairment rating following the injury.

In Kentucky River Enterprises, Inc. vs. Elkins, 107 SW3d 206 (Ky. 2003), the Supreme Court instructed assigning a permanent impairment rating

under the AMA Guides is a medical determination to be made only by a medical expert. Elkins stands for the principle that not only the existence and cause of a permanent impairment, but also the date for assigning a permanent impairment rating, the proper method for doing so, and the proper amount of the rating are medical questions. An impairment rating can only be established through medical testimony sufficient on its face to support a reasonable inference by the ALJ that the AMA Guides were probably drawn on. Knott County Nursing Home vs. Wallen, 74 SW3d 706 (Ky. 2002). So long as there is sufficient information contained within a medical expert's testimony from which an ALJ can reasonably infer the impairment rating assessed is based upon the AMA Guides, the ALJ, as fact finder, is free to adopt the expert's rating for purposes of calculating an injured worker's permanent disability pursuant to KRS 342.730(1)(b) or for purposes of determining and excluding pre-existing impairment from the amount of the claimant's permanent partial disability produced by an injury. Transportation Cabinet, Department of Highways vs. Poe, 69 SW3d 60 (Ky. 2002) and Roberts Brothers Coal Co. vs. Robinson, supra. As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company vs. Tipton, 862 SW2d 308 (Ky. 1993). The ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller vs. East Kentucky Beverage/Pepsico, Inc., 951 SW2d 329 (Ky. 1997). In this case, there is not only medical evidence of Plaintiff’s pre-existing active impairment of 6% - but there is a previous adjudication (and compensation) for that permanent

partial disability. I find Dr. Bilkey's opinion of Plaintiff's present permanent partial impairment is persuasive – however, I do not believe Dr. Bilkey was aware of Dr. Breidenbach's previous treatment and impairment rating for the right upper extremity and the nerve damage. An 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. vs. Fox, 19 SW3d 88 (Ky. 2000). Where expert testimony is conflicting, the ALJ has some discretion to pick and choose from the evidence, and to reach reasonable inferences based on the evidence. Here, I rely on the evidence from Dr. Breidenbach to establish the presence of nerve damage prior to the work injury. I further rely upon the opinion of Dr. Warren Bilkey that the Plaintiff suffered a 23% permanent partial impairment according to the AMA Guides, 5th Edition.

3. Benefits per KRS 342.730.

Having found that Plaintiff suffered a work injury and having adopted and relied upon Dr. Bilkey's impairment rating of 23%, I find that 6% of the 23% impairment was pre-existing active impairment and should be subtracted from the 23% overall impairment rating. Therefore, I find that Plaintiff shall be awarded 17% permanent partial disability benefits (23 minus 6 = 17) based upon a 17% impairment rating. In making this finding I have relied upon Dr. Bilkey and Dr. Breidenbach's medical opinions.

McClure filed a petition for reconsideration arguing, as he does on appeal, the ALJ erred in her calculation of PPD benefits by incorrectly excluding the pre-existing active impairment rating. He argues the ALJ should have subtracted the actual dollars, rather than the impairment rating, in calculating the reduction for pre-existing active disability. The petition for reconsideration was denied by order entered on April 12, 2012.

On appeal, McClure adopts the unsuccessful argument advanced in Tudor v. Industrial Mold & Machine Co., 2011-CA-000580-WC, (rendered September 2, 2011), currently on appeal to the Kentucky Supreme Court. McClure asserts the ALJ erred by calculating his award based upon a 17% impairment rating rather than the total impairment rating of 23% assessed by Dr. Bilkey which included a 6% impairment for a pre-existing active non-work-related condition. We find no merit in this argument. The Kentucky Court of Appeals in Tudor, supra, expressly rejected the formula McClure argues should have been utilized in the case *sub judice*.

As we held in Tudor, supra, Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky. 2003) addresses the appropriate methodology for excluding pre-existing

active conditions from awards of PPD, in contrast to awards of permanent total disability. The Kentucky Supreme Court instructed:

> Thus, awards under KRS 342.730(1)(a) continue to be based upon a finding of disability. In contrast, an award of permanent partial disability under KRS 342.730(1)(b) is based solely on a finding that the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment.

In Tudor, supra, the ALJ, relying upon the opinion of Dr. Travis, found Tudor had a pre-existing, active impairment of 9%, and an additional 9% impairment due to a work injury. The ALJ determined the total benefits payable for an 18% impairment and then excluded the monetary amount attributable to the pre-existing 9% impairment. The ALJ's calculations are as follows:

> $509.50 (sixty-six and two-thirds of Tudor's average weekly wage) x 18% (the total combined impairment) x 1 (the factor set out in KRS 342.730(1)(b)) =

> $91.71. The ALJ then calculated the value of Tudor's 9% pre-existing impairment as follows: $509.50 x 9% x .85 (the factor set out in KRS 342.730(1)(b)) = $38.98. The ALJ then subtracted the value of the pre-existing impairment from $91.71 and arrived at PPD benefits of $52.73 per week.

This Board reversed and remanded for entry of an award based solely on the 9% impairment attributable to the work injury. The Court of Appeals affirmed holding as follows:

> Having accepted the ALJ's findings regarding Tudor's impairments, and after reviewing the record and relevant law, we agree with the Board that the ALJ incorrectly calculated Tudor's benefit rate. The calculation of benefit rate depends, in pertinent part, on several factors. First, the ALJ must determine, as he did herein, that the claimant suffered a work-related injury. KRS 342.0011(1).
>
> Next, the ALJ must determine if the claimant has any permanent impairment rating, which is defined as the "percentage of whole body impairment caused by the injury ... as determined by the 'Guides to Evaluation of Permanent Impairment' ..." KRS 342 .0011(35) (emphasis added). Based on this statutory definition, "permanent impairment rating" differs from "impairment" because a "permanent impairment rating" must be the result of a work injury.
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> Once the ALJ has determined that a claimant has a permanent impairment rating, he must calculate the

claimant's "permanent disability rating." A permanent disability rating is calculated by multiplying the permanent impairment rating by the appropriate factor from KRS 342.730(1)(b). KRS 342.0011(36). Thus, a permanent disability rating must be based on a permanent impairment rating, which must be a percentage of impairment caused by the injury. It is when he analyzed these two factors that the ALJ went astray.

The ALJ found that Tudor "has a permanent disability rating of 18%, which is 18% impairment under the AMA Guides multiplied by 1.0, the factor contained in KRS 342.730." That finding is unsupported by the record and inconsistent with the ALJ's finding that half of Tudor's 18% impairment preexisted the injury. Once the ALJ determined that 9% of Tudor's impairment preexisted the work injury, that percentage of impairment could not be included in calculating Tudor's permanent impairment rating or permanent disability rating. Since only 9% of Tudor's impairment was caused by the work injury, the ALJ could only use that 9% impairment in calculating Tudor's permanent impairment rating and his permanent disability rating.

The ALJ also erred when he found that "[i]mmediately prior to the injury of August 31, 2009, Roger W. Tudor had a permanent disability rating of 7.65% which is 9% impairment under the AMA Guides multiplied by 0.85, the factor contained in KRS 342.730." The 9% impairment Tudor had prior to the work injury was not caused by the work injury; therefore, it cannot be the basis for a permanent impairment rating and it cannot be used to calculate a permanent disability rating.

Slip op. at 2-3.

McClure seeks to use the 23% impairment because the factor, set forth in KRS 342.730(1)(b), is 1.15. According to KRS 342.730(1)(b), an impairment assessed pursuant to the AMA Guides ranging from 16% to 20% shall be multiplied by 1. However, impairments of 21% to 25% shall be multiplied by a factor of 1.15. Since the ALJ used the 17% impairment rating attributable to the injury in calculating his PPD benefits, the factor utilized in this case is 1. As pointed out in Tudor, supra, a proper calculation of McClure's PPD benefits requires the use of the 17% impairment rating. The ALJ is required to use the actual impairment rating attributable to McClure's work-related injuries in computing his benefits. The ALJ did not err in the award of PPD benefits, and the award must be affirmed.

Accordingly, the decision rendered March 19, 2012 by Hon. Jeanie Owen Miller, Administrative Law Judge, and the order denying the petition for reconsideration issued April 12, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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