OPINION ENTERED: November 2, 2012

CLAIM NO. 200901154

LINDA POTTER PETITIONER

VS. **APPEAL FROM HON. CAROLINE PITT CLARK, ADMINISTRATIVE LAW JUDGE**

WAL-MART STORES, INC.
and HON. CAROLINE PITT CLARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Linda Potter ("Potter") seeks review of an opinion rendered April 23, 2012 by Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ") denying income benefits for an alleged psychological injury stemming from neck and low back injuries sustained while employed at Wal-Mart Stores, Inc. ("Wal-Mart"). Potter also appeals from an

Order rendered June 20, 2012, overruling her petition for reconsideration.

On appeal, Potter argues the ALJ's determination she suffered a temporary exacerbation of a psychological condition was clearly erroneous and based upon an invalid expert opinion. Potter also argues the ALJ was clearly erroneous in denying temporary total disability ("TTD") benefits for her psychological condition. We affirm.

Potter filed a Form 101, Application for Resolution of Injury Claim, alleging she injured her low back and neck on July 26, 2009 while gathering shopping carts at Wal-Mart. Potter also alleged she developed secondary psychological overlay due to the accident. Attached to the Form 101 is the August 5, 2009 medical record by Dr. Mansoor Mahmood, her treating physician. Dr. Mahmood diagnosed cervical strain, lumbosacral strain and cervical radiculopathy, and restricted her to lifting no more than twenty pounds.

Potter submitted the November 12, 2009 medical report rendered by Dr. David Muffly, an orthopedic surgeon, who diagnosed acute lumbar and cervical strains due to the July 26, 2009 work accident. He assessed a 6% impairment rating for Potter's cervical spine injury and a 6% impairment rating for her lumbar spine injury pursuant to

the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He then apportioned 6% to the July 26, 2009 injury and the remaining 6% impairment to a prior active condition. He restricted Potter to fifteen pounds maximum lifting, position change every hour, moderate bending and stooping, and no frequent neck turning or overhead reaching.

Potter submitted the psychological report of Eric Johnson, Ph.D., a psychologist who examined him on November 17, 2009. He noted Potter's complaints of trouble with sleeping, unexplained crying, nervousness, loss of interest in activities, memory loss, and pain in the low back, neck and shoulders. He noted Potter began treatment with Mountain Comprehensive Care Center ("MCCC") the day before the examination. Potter denied prior psychological problems or treatment. He also noted Potter was the victim of physical and sexual abuse as a child, and later referenced Potter's "unhappy and frightening" life. Dr. Johnson diagnosed "Major Depression, Single Episode, moderate" and post-traumatic stress disorder ("PTSD"). Dr. Johnson opined Potter's prognosis is fair if she remains in psychological treatment and has success with her medical treatment.

Dr. Johnson stated he could not estimate a permanent impairment due to lack of sufficient psychiatric

treatment and counseling. He opined her depression is the result of pain, loss of income and restricted activities due to her medical conditions caused by the work-related injury. He also opined the PTSD symptoms contribute to the overall impairment, but are not directly related to the injury. Pursuant to the AMA Guides, 5th and 2nd Editions, he later assessed a 26% current impairment rating, carving out 6% due to the aggravation of her pre-existing PTSD, yielding a 20% impairment. Dr. Johnson noted he would expect a significant reduction in her level of impairment with psychiatric treatment. Regarding restrictions based upon her psychological condition, Dr. Johnson opined Potter "will have difficulty working due to effects of major depression."

Wal-Mart submitted Dr. William Lester's report dated December 23, 2009. Dr. Lester diagnosed a lumbar strain and a resolved cervical strain. He opined Potter had reached maximum medical improvement ("MMI") and assigned a 0% impairment rating. Dr. Lester found no need to impose permanent restrictions and recommended Potter return to the same type of work she was performing at the time of injury. Wal-Mart also submitted medical records demonstrating Potter's prior history of low back and neck problems.

Wal-Mart submitted the January 18, 2010 psychiatric report rendered by Dr. Douglas Ruth, a

psychiatrist, who examined Potter on January 13, 2010. Dr. Ruth noted complaints of depression, weeping, irritability, loss of interest in activities, low energy, overeating, suicidal thoughts and anxiety. Potter denied prior psychiatric problems or treatment. Dr. Ruth noted Potter was abused, molested and exposed to frightening experiences during her youth. He further noted medical records demonstrated a history of depression, anxiety, insomnia and treatment with antidepressant medications within the few years prior to the work injury.

Dr. Ruth diagnosed major depression and PTSD. He noted her depression, as well as her neck and back symptoms, had its onset preceding the work incident. Dr. Ruth opined if it is concluded the work incident caused Potter's back and neck problems, then the work incident aggravated, but did not cause, her depressive disorder. He also opined her PTSD preceded and is unrelated to the work incident. Since Potter had not been treated for her psychiatric complaints, Dr. Ruth opined she has not reached MMI and he could not conclude whether she suffered a permanent psychiatric injury. Dr. Ruth noted if Potter reaches MMI for her prior psychiatric symptoms, she would qualify for a permanent impairment rating for those pre-existing complaints. Dr. Ruth opined Potter did not require psychiatric restrictions

and could return to the work she performed at the time of the work incident. He further noted Potter requires psychiatric treatment and, if it is concluded the work incident is the cause of her physical complaints, then her treatment in part would be the result of the work injury. However, Potter would require treatment regardless of the work incident.

Dr. Ruth also testified by deposition on February 18, 2010. He again opined Potter had a significant pre-existing psychiatric history noting her painful experiences as a youth and medical records indicating she had prior psychiatric complaints and treatment in 2007 by Dr. Mann. Dr. Ruth again testified the depressive disorder and PTSD is unrelated, and arose prior to the July 26, 2009 work incident. Dr. Ruth testified Potter provided an inconsistent medical and psychiatric history during the examination. He again opined Potter had not attained MMI for her psychiatric condition and recommended future treatment, which she would need regardless of the work incident. He opined Potter currently has a permanent impairment due to her pre-existing psychiatric condition and declined to recommend psychiatric restrictions. He admitted on cross-examination if Dr. Muffly’s opinion is correct regarding Potter suffering permanent neck and back injuries

due to the work incident, “then conceivably there could be some impact upon her emotional state.”

In an opinion, award and order rendered June 14, 2010, the ALJ determined Potter suffered a resolved, temporary cervical strain on July 26, 2009, which does not warrant permanent impairment, and she dismissed the cervical injury claim. The ALJ determined Potter suffered a low back injury resulting in a 3% impairment rating pursuant to the AMA Guides, preventing her from returning to the type of work she was performing at the time of the incident. The ALJ awarded permanent partial disability (“PPD”) benefits based upon a 3% impairment rating, enhanced by the three multiplier, for her low back injury. The ALJ declined to grant TTD benefits due to her low back or cervical injuries since she did not miss any work due to either work injury. Moreover, after considering Potter’s age of forty years, the fact she has a high school education, her past work experience and her current medical restrictions, the ALJ found Potter is not permanently totally disabled.

The ALJ found as follows regarding Potter’s alleged psychological injury and TTD benefits:

> As to her psychological complaints, Plaintiff relies on the medical opinion of Dr. Johnson to assert she suffers from a 20% whole person psychological impairment due to her work-related

injuries. While Dr. Johnson assigned Plaintiff a 20% impairment, he noted that it was not a final permanent impairment rating because Plaintiff has not reached maximum medical improvement due to her lack of treatment for her psychological condition. Defendant Employer relies on the medical opinion of Dr. Ruth to argue Plaintiff does not suffer from any permanent psychological impairment due to the July 26, 2009 work injury. Dr. Ruth stated that if Plaintiff's physical injuries were entirely resolved and not causing her continued pain and/or disability, then she would not have any permanent psychological impairment as a result of the work injury. However, Dr. Ruth opined that if Plaintiff did suffer continued pain and/or disability due to the work injury, that pain/injury may have aggravated her prior depressive disorder. In that instance, Dr. Ruth opined that Plaintiff is not at maximum medical improvement and will need treatment for her psychological injury. As noted in the paragraphs above, the Administrative Law Judge does believe that Plaintiff continues to suffer pain and disability as a result of the July 26, 2009 work injury. **Therefore, based on the medical testimony of both Dr. Johnson and Dr. Ruth, the undersigned finds that Plaintiff did suffer a psychological injury as a result of her work injuries, because her low back and neck injuries aggravated (did not entirely cause) her depressive disorder.** Likewise, based on the evidence from both psychological evaluators, the Administrative Law Judge finds that Plaintiff has not reached maximum medical improvement from her work-related psychological condition. Therefore, the undersigned cannot assign Plaintiff a permanent psychological impairment rating at this time.

> Pursuant to KRS 342.020, Plaintiff is entitled to recover from Defendant Employer all medical expenses that are reasonable and necessary for the treatment and/or relief of her work-related psychological injury. **However, Plaintiff is not entitled to TTD benefits as a result of the psychological injury because no doctor has taken her off of work solely due to her psychological condition, and there is no evidence that Plaintiff's work-related psychological injury causes her to be unable to perform her pre-injury job for Defendant/Employer.** (emphasis added)

The ALJ awarded medical expenses for Potter's low back injury, and for work-related psychological injuries. She also ordered the claim to be placed in abeyance pending Potter achieving MMI, requiring status reports to be filed every sixty days. She indicated the calculation of benefits could change pending Potter's "attaining MMI from her psychological injuries, and whether or not she is assigned any permanent, work-related impairment as a result thereof."

Potter appealed to this Board arguing it was an abuse of discretion for the ALJ to bifurcate her claim with regard to her psychological injury. She also argued the ALJ erred in failing to award TTD benefits for such an injury, since she had not yet reached MMI. In an opinion rendered November 8, 2010, this Board dismissed Potter's appeal, concluding the ALJ's ruling on June 14, 2010 was

interlocutory and did not represent a final and appealable order. The Kentucky Court of Appeals subsequently affirmed the Board's decision on June 24, 2011.

By Order dated August 18, 2011, the ALJ removed the claim from abeyance and established additional proof time on the remaining issues regarding the psychological injury.

Wal-Mart submitted Dr. Ruth's second psychiatric report dated November 4, 2010. Following an examination, Dr. Ruth noted Potter felt her depressive and PTSD symptoms had started to improve in August or July 2010 in response to treatment at MCCC. Potter reported she has dropped out of therapy. Dr. Ruth again diagnosed major depression and PTSD. He opined Potter "suffered a temporary aggravation of her pre-existing depressive disorder as a result of the work injury." He further stated Potter had improved to a state as good or better than that preceding the work incident pertaining to her psychiatric symptoms in response to the psychiatric treatment. Dr. Ruth found Potter markedly minimized her pre-existing psychiatric and medical complaints and exaggerated those following the work injury. He opined Potter attained MMI in August 2010 with respect to her psychiatric complaints because she reported improvement at that time, discontinued her psychotherapy or counseling

sessions and her psychiatric medical treatment has remained unchanged.

Regarding a permanent impairment rating, Dr. Ruth stated as follows:

> She would have qualified for a permanent psychiatric impairment rating prior to the alleged 7/26/09 work injury. None of the current psychiatric impairment is attributable to the effects of the 7/26/09 work injury.
>
> According to the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, Table 14-1 on Page 363 in Chapter 14, Mrs. Potter has a Class 2 psychiatric impairment rating.
>
> According to the Second Edition of the Guides, Table 1 on Page 220 in Chapter 12, she has an eight percent (8%) psychiatric impairment rating.
>
> The class of psychiatric impairment assigned according to the Fifth Edition of the Guides does not necessarily correspond to the class of impairment assigned according to the Second Edition of the Guides. The means of determining the impairment rating differs between these two editions of the Guides, and the class of impairment might or might not be the same. According to the Second Edition of the Guides Mrs. Potter's rating is slightly lower than that of Class 2.
>
> This impairment rating applies solely to the psychiatric functional limitations that Mrs. Potter reports. It does not include allowance for functional limitations directly attributable to her pain as this is accounted for in

> impairment ratings assigned by other chapters of the Guides.
>
> The entirely[sic] of this psychiatric impairment is attributable to Mr. [sic] Potter's pre-existing psychiatric condition.

Dr. Ruth opined Potter does not require any psychiatrically based work restrictions, is psychiatrically capable of returning to the work performed prior to the work injury and requires no additional treatment related to the work injury.

Potter also submitted Dr. Johnson's second psychological report dated December 13, 2011. Following a second examination, Dr. Johnson noted Potter's complaints of depression due to medical problems, which were exacerbated by a motor vehicle accident in 2010. Potter reported her neck and back have worsened since the accident. Dr. Johnson noted Potter is no longer receiving psychiatric care and counseling from MCCC and is not taking psychotropic medications. Potter reported her PTSD symptoms have improved, but she is still depressed because of pain. Dr. Johnson diagnosed "Major Depressive Episode, possibly recurrent, Mild" and "R/O Borderline Intellectual Functioning." Dr. Johnson noted he did not have treatment records from MCCC for his review. Regarding a permanent impairment rating, Dr. Johnson stated as follows:

> Permanent impairment cannot be determined. Current impairment due to effects of the work-related injury is tentatively estimated to be 15%, assuming that she didn't receive much psychiatric care or make much progress at MCCC after the previous accident.

Wal-Mart submitted a treatment record dated March 31, 2010 from MCCC, which diagnosed depressive disorder, NOS, anxiety disorder, physical abuse of a child (victim), sexual abuse of child (victim). MCCC recommended she continue her counseling and medication of Zoloft and Amitriptyline.

Both parties also submitted medical and chiropractic records following the intervening 2010 motor vehicle accident.

Potter testified by deposition on December 8, 2009 and on September 15, 2011. She also testified at two formal hearings held on April 15, 2010 and February 23, 2012. Potter, a resident of Galveston, Kentucky, was born January 3, 1970 and is a high school graduate. Her prior work experience includes work as an assistant manager, part owner of a cleaning business and a cashier. Potter began working for Wal-Mart in October 2000 and was an overnight stocker at the time of the work incident on July 26, 2009. Potter testified that on July 26, 2009, she was in the Wal-Mart parking lot gathering carts. As she attempted to line up

the carts, she felt pain in her low back and neck stating "it just was like a real sharp pain in my neck, and then on my low back. And by the time I got home, I couldn't get out of the vehicle." Thereafter, Potter went on vacation and then returned to light-duty work at Wal-Mart until November 2009, when she quit due to her pain. Potter testified she has not returned to any employment since leaving Wal-Mart. Potter received conservative medical treatment for her physical injuries from the Highlands emergency room, Mud Creek Clinic and Dr. Mahmood.

Potter testified she suffers from constant low back pain and occasional right leg and neck pain, constantly weeps, has trouble sleeping, cannot be around large groups of people, suffers from memory loss and lack of concentration and cannot participate in activities due to pain. Potter testified her symptoms appeared following the work incident and denies prior psychological problems or treatment for depression or anxiety. Potter testified she does not recall seeing Dr. Mann in 2007 for complaints of depression, nervousness, excessive worrying and trouble sleeping nor receiving a prescription for Cymbalta. Potter emphasized she loved working at Wal-Mart and being around her friends, but since the work incident, she can do neither.

Potter testified she began treatment at MCCC for her psychological complaints in November or December 2009 where she received therapy and was prescribed Zoloft. Potter felt the therapy helped her symptoms. At her deposition on September 15, 2011, Potter testified she is no longer receiving treatment or medication for her psychological complaints. However, she still has psychological symptoms. When asked if she could return to work, Potter testified as follows:

> A: No.
>
> Q: So you just can't do it because of your pain?
>
> A: Yes.
>
> Q: What about your emotional problems? That contributes, too?
>
> A: Well, yes. I'd say it would some, yes.
>
> Q: Okay. So you're just not able to go back to work?
>
> A: I ain't able.

In an opinion rendered April 23, 2012, the ALJ determined Potter did not sustain a permanent psychological impairment as a result of the July 26, 2009 work injury by stating as follows:

> Under KRS 342.0011(35) and (36), an Administrative Law Judge is authorized to select a permanent impairment rating

rendered pursuant to the most recent edition of the AMA *Guides to the Evaluation of Permanent Impairment* for a compensable condition. *Knott County Nursing Home v. Wallen*, 74 SW3d 706 (Ky. 2002). The courts have held the proper interpretation of the AMA *Guides* and the appropriate assessment of an impairment rating are medical determinations which may only be made by physicians. *Kentucky River Enterprises, Inc. v. Elkins*, 107 SW3d 206 (Ky. 2003); *Newberg v. Garrett*, 858 SW2d 181 (Ky. 1993). In cases involving conflicting testimony by medical experts, the discretion to choose between conflicting expert opinions rests exclusively with the Administrative Law Judge. *Staples, Inc. v. Konvelski*, 56 SW3d 412 (Ky. 2001); *Square D. Company v. Tipton*, 862 SW2d 308 (Ky. 1993).

In this case, Plaintiff relies on the medical opinion of Dr. Johnson, to assert she suffers from a 15% whole person impairment due to her work-related psychological injury. Pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, 2nd and 5th Editions, Dr. Johnson assigned a 15% permanent psychological impairment, "assuming that she didn't receive much psychiatric care or make much progress at MCCC after the previous accident." Dr. Johnson opined that Plaintiff's depression was due to the work-related injury of July 26, 2009.

Defendant Employer relies on the medical opinion of Dr. Ruth to argue Plaintiff does not suffer from any permanent impairment due to the July 26, 2009 work injury. Dr. Ruth diagnosed non work-related, posttraumatic stress disorder and depression, and opined Plaintiff suffered a temporary aggravation of her pre-existing

> depressive disorder as a result of the July 2009 work injury. Dr. Ruth noted that Plaintiff underwent specialized psychiatric treatment after the work injury and original Opinion and Award, and improved to the point that she is now as good, if not better, psychologically as she was prior to July 26, 2009. He indicated that Plaintiff did not sustain a permanent psychiatric injury or resulting permanent psychological impairment as a result of the work injury, and opined that she reached MMI from her aggravation/ exacerbation in August of 2010.
>
> After careful consideration of the conflicting medical evidence presented herein, I finds[sic] that Dr. Ruth has rendered the most accurate and authoritative assessment of Plaintiff's psychological condition and of a permanent impairment rating under the AMA *Guides*, and I adopt his expert opinions on these issues. **It is therefore determined that Plaintiff's July 26, 2009 work injury caused a temporary aggravation/exacerbation of her pre-existing psychological condition, which has now returned to baseline. The temporary aggravation of Plaintiff's psychological problems did not result in any permanent psychiatric injury or impairment. Plaintiff's award of income benefits shall therefore remain the same as outlined in the original June 14, 2010 Opinion and Award.**
> **(**Emphasis added).

Potter filed a petition for reconsideration arguing the ALJ patently erred in adopting Dr. Ruth's opinion since it is not in conformity with the AMA Guides and is inconsistent with the medical evidence and the June

14, 2010 opinion. Potter argued Dr. Ruth's opinion does not conform to the AMA Guides because the 2nd Edition does not provide for an 8% psychiatric impairment rating for a Class I or Class II, mild impairment. Potter argued Dr. Ruth's opinion is patently erroneous in "subscribing [Potter's] psychological condition associated with the work injury to pre-existing back trouble." Potter also argued Dr. Ruth's second opinion contradicted his first opinion. Potter's petition was overruled by Order dated June 20, 2012.

On appeal, Potter again argues the ALJ erred in adopting Dr. Ruth's opinion and states as follows:

> As detailed above, Dr. Ruth assigned an 8% WPI to pre-existing physical and psychological conditions. Primarily, such opinion is invalid as the law of the case prohibits the consideration of a pre-existing lumbar condition. The ALJ found [Potter] suffered a 3% lumbar WPI from the work injury which precludes an assignment of [Potter's] psychological condition to a pre-existing physical injury.
>
> . . . .
>
> Dr. Ruth's opinion of an eight percent (8%) impairment is not in conformity with the 5th and 2nd Edition of the Guides and the ALJ is prohibited from giving credence to an invalid opinion. The opinion of Dr. Ruth does not comply with the Guides and therefore cannot be substantial evidence
>
> . . .

> Dr. Johnson's opinion is the only impairment rating compliant with the Guides, and as such is the only substantial evidence upon which a determination of permanent psychological impairment can be made.

Potter also argues the ALJ's ruling regarding her entitlement to TTD benefits was clearly erroneous based upon the evidence in the record.

As the claimant in a workers' compensation proceeding, Potter had the burden of proving each of the essential elements of her cause of action, including psychological impairment and entitlement to TTD benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where the claimant is unsuccessful with regard to 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 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). 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). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker

v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Pursuant to the law of the case doctrine, we find no merit in Potter's argument Dr. Ruth's opinion is invalid. The ALJ previously found Potter sustained a work-related lumbar injury and awarded PPD benefits based upon a 3% impairment rating in her June 14, 2010 opinion. In her brief to the Board, Potter states, "Dr. Ruth assigned an 8% WPI to pre-existing physical and psychological conditions." Therefore, Potter argues his opinion is invalid since the law of the case doctrine prohibits an assignment of Potter's psychological condition to a pre-existing physical injury.

After careful review of the record, we note Potter misstates Dr. Ruth's opinion by asserting he "assigned an 8% WPI to pre-existing physical and psychological conditions." Dr. Ruth opined Potter suffered a temporary aggravation of her pre-existing depressive disorder as a result of the work injury. Dr. Ruth's assessment of an 8% permanent psychological impairment rating was based upon her condition prior to the work incident and he found none of the impairment attributable to the effects of the work incident.

Dr. Ruth stated as follows regarding the 8% impairment rating in his November 4, 2010 psychiatric report:

> **This impairment rating applies solely to the psychiatric functional limitations that Mrs. Potter reports. It does not include allowance for functional limitations directly attributable to her pain** as this is accounted for in impairment ratings assigned by other chapters of the Guides.
>
> The entirely[sic] of this psychiatric impairment is attributable to Mr. [sic] Potter's **pre-existing psychiatric condition.**
> (Emphasis added).

Dr. Ruth specifically stated the 8% impairment rating applies solely to Potter's pre-existing psychiatric condition and does not include any allowance for pain. The 8% impairment rating is not partly based on the pre-existing physical condition as alleged by Potter.

Notwithstanding, the law of the case doctrine is inapplicable. The case most commonly cited as to what constitutes the law of the case is Inman v. Inman, 648 S.W. 2d 847 (Ky. 1982). The Supreme Court instructed as follows:

> The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions and law and not questions of fact. "As the term 'law of the case' is most commonly used, and as

> used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." 5 Am. Jur.2d, Appeal and Error, Sec. 744.

Id. at 849.

Under "the law of the case doctrine", when an appellate body passes on a legal question and remands the case to the fact-finder below for further proceedings, the legal question determined by the appellate body cannot be decided differently on subsequent appeal in the same case. Whittaker v. Morgan, 52 S.W.3d 567 (Ky. 2001); Inman, supra. Moreover, the legal questions thus determined by the appellate body, once final, whether decided correctly or incorrectly, cannot be decided differently on subsequent appeal in the same case. Inman, at 849. Rather, all prior

rulings by that appellate body become law for the limited purposes of that particular case. Id.

In the case *sub judice,* the ALJ awarded PPD benefits and medical expenses for Potter's low back injury, placed her psychological claim in abeyance pending attainment of MMI and declined to award TTD benefits for her psychological injury in an opinion rendered June 14, 2010. In an opinion rendered November 8, 2010, this Board dismissed Potter's appeal, concluding the June 14, 2010 opinion was interlocutory and did not represent a final and appealable order. The Kentucky Court of Appeals subsequently affirmed this Board's conclusion and held:

> ALJ's order of June 14, 2010, did not adjudicate finally any of the rights of the partiers in this case. Interlocutory orders and judgments determining issues which are not specifically disposed of in a final judgment are deemed to be readjudicated as of the date of the final order. Therefore, Potter will have full opportunity to appeal this disputed order when the ALJ makes a final disposition of all the issues.
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> Potter v. Wal-Mart Stores, Inc., No. 2010-CA-002217-WC (rendered June 24, 2011)(Not to be published)

Therefore, the "law of the case" doctrine is inapplicable since the June 14, 2010 order was interlocutory and did not represent a final and appealable order as

previously decided by this Board, and affirmed by the Kentucky Court of Appeals. Also, this Board and the Kentucky Court of Appeals did not pass on the issues of pre-existing conditions or work-related permanent injuries. The ALJ's finding in her June 14, 2010 interlocutory opinion regarding Potter's low back injury is not the "law of the case."

We likewise find no merit in Potter's argument Dr. Ruth's opinion is invalid because it does not conform to the AMA Guides. 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 proper 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).

In the case *sub judice*, Dr. Ruth opined Potter suffered a temporary aggravation of her pre-existing depressive disorder as a result of the work injury and she has since returned to baseline. Dr. Ruth assigned an 8% impairment rating, entirely attributable to her pre-existing depressive disorder. Dr. Ruth opined Potter has a Class 2 psychiatric impairment pursuant to the 5nd Edition of the AMA Guides and an 8% impairment rating pursuant to the 2nd Edition of the AMA Guides. He further explained the classes of psychiatric impairment assigned pursuant to the 5th Edition does not necessarily correspond to those assigned pursuant to the 2nd Edition and the means of determining the impairment rating differs between the editions.

We disagree with Potter's reliance upon Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). In Jones, a physician during cross-examination admitted the claimant's injury fell within the parameters

of one category of impairment but placed him in a higher category, explaining the AMA Guides were flawed and served no more than guidelines. In his report, Dr. Ruth specifically stated the impairment rating he assessed was based upon the AMA Guides. Dr. Ruth also explained the differences between the two editions used in reaching an impairment rating for psychiatric conditions. In his report and during his deposition, Dr. Ruth did not state he disregarded the AMA Guides in assessing an impairment rating as did the physician in Jones v. Brash-Barry General Contractor's, supra. We also note Dr. Ruth's use of the AMA Guides was not impeached by Dr. Johnson or any other medical witness. Rather, Dr. Johnson's report amounts to a conflicting opinion upon which the ALJ declined to rely. Moreover, in both the November 17, 2009 and December 13, 2011 psychological report, Dr. Johnson assigned a *current* impairment rating rather than a *permanent* impairment rating.

Therefore, we do not believe the ALJ erred in relying upon Dr. Ruth's opinion in determining Potter's work-related injury caused a temporary aggravation/ exacerbation of her pre-existing psychological condition, which has now returned to baseline, and therefore did not result in any permanent psychiatric injury or impairment.

The evidence does not compel a finding of a 15% permanent psychological impairment rating based upon the opinion of Dr. Johnson.

Likewise, the evidence does not compel an award of TTD benefits as argued by Potter. KRS 342.0011(11)(a) defines TTD as follows:

> [t]he 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 Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as she remains disabled from her customary work or the work she was performing at the time of the injury. The Court in Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work. Id. at 580-581.

In the case *sub judice*, the ALJ did not award TTD benefits due to her low back or cervical injuries since she did not miss any work as a result of either injury. Potter does not argue this finding is in error. Nonetheless, this

finding is supported by substantial evidence based upon Potter's own testimony she returned to light duty work after returning from vacation and the December 23, 2009 medical opinion of Dr. Lester who found no need for permanent restrictions and recommended Potter return to the same type of work she was performing at the time of injury.

The evidence also does not compel an award of TTD benefits due to Potter's alleged psychological injury. The ALJ declined to award TTD benefits based upon Potter's psychological injury in the June 14, 2010 opinion, since no physician took her off work solely due to that condition and there was no evidence establishing she was unable to perform her pre-injury job for Wal-Mart. We note Dr. Ruth opined in both of his psychiatric reports that Potter does not require any psychiatrically based work restrictions and is psychiatrically capable of returning to the work performed prior to the work injury. Potter's own expert psychologist, Dr. Johnson, only noted she "will have difficulty working due to effects of major depression" without outlining any specific restrictions. Later in his December 13, 2011 psychological report, Dr. Johnson declined to recommend *any* psychologically based restrictions. Finally, Potter testified her emotional problems only contributed "some" to her opinion she could not return to job at Wal-Mart.

Therefore the evidence does not compel a contrary result, and substantial evidence supports the denial of TTD benefits.

Accordingly, the April 23, 2012 Opinion rendered by ALJ Caroline Pitt Clark, and the June 20, 2012 Order overruling the petition for reconsideration are hereby **AFFIRMED.**

ALL CONCUR.

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