OPINION ENTERED: AUGUST 27, 2012

CLAIM NO. 201001241

O'REILLY AUTOMOTIVE, INC. PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

KIMBERELEY MANN
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. O'Reilly Automotive, Inc. ("O'Reilly") seeks review of the opinion, award and order rendered March 26, 2012 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), awarding Kimbereley Mann ("Mann") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. O'Reilly also

appeals from the order entered May 9, 2012 denying its petition for reconsideration.

On November 5, 2008, Mann, an assistant store manager for O'Reilly in Louisville, was checking in parts, including solvents. As she attempted to catch a case of anti-freeze which had slipped, she twisted her body, and experienced an immediate onset of low back pain. As a result of that accident, she filed a Form 101 alleging injuries to her low back radiating into her left leg. She subsequently amended her claim to include an allegation of psychological conditions stemming from her injuries. Regarding the psychological injury, the ALJ found as follows:

> The ALJ is persuaded by Dr. Snell's findings and opinions that Ms. Mann is suffering severe anxiety and depression due to the injury, her chronic pain, and the psychosocial stressors (pain and stress) which have resulted from the work-related condition and her inability to financially care for her family.

On appeal, O'Reilly first argues the finding of a work-related psychological impairment is erroneous and unsupported by substantial evidence. O'Reilly next argues Dr. Snell incorrectly assessed a psychological impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent

Impairment ("AMA Guides"). Finally, O'Reilly argues the ALJ's selection of Dr. Snell's psychological rating was erroneous and unsupported by substantial evidence. We disagree and affirm.

Mann's original Form 101 filed on October 15, 2010 alleged a low back injury occurring on May 11, 2008. She later filed an amended Form 101 alleging the injury date as November 5, 2008 instead of May 11, 2008, attributing the mistake to scrivener's error. This was approved by order entered August 3, 2011. On August 16, 2011, Mann filed a second amended Form 101 to include an allegation of depression resulting from her work injury.

In support of the Form 101, Mann filed office notes of Dr. John Guarnaschelli, her treating neurosurgeon, dated September 4, 2009; September 22, 2009; and August 31, 2010. On September 4, 2009, Dr. Guarnaschelli stated Mann sustained a work-related injury to her low back on November 5, 2008, with resulting radiculopathy on the left. He recommended lumbar surgery to relieve the radicular symptoms. She was admitted for the surgery on September 22, 2009. On August 31, 2010, Dr. Guarnaschelli noted no evidence of recurrent disk. An MRI performed at his request demonstrated some disk bulging with hypertrophic changes and no evidence of spondylosis. He further noted

the surgery performed in 2009 relieved the radicular pain, but she did not have a complete return of function. He noted she continued to have dysesthesia into the left ankle and foot.

Mann testified by deposition on January 4, 2011, and at the hearing held on January 26, 2012. Mann is a resident of Louisville. She is a high school graduate with no vocational training. She testified she sustained work-related injuries on November 5, 2008 while working for O'Reilly. Mann's previous work experience includes working as a cashier, stocker, hotel housekeeper, fast food cook, counter help, proofreader, and commercial specialist for another auto parts company.

Mann began working for O'Reilly in March 2007 as a counter person and was later promoted to assistant manager. She testified her job required a lot of bending, lifting, and twisting. She had assistance available for heavy lifting. As assistant manager, she supervised two to three other employees. She was terminated on September 2, 2009 due to excessive absenteeism. She then filed for unemployment benefits which were awarded after an appeal. Mann testified she has been unable to find subsequent employment due to her restrictions.

Since the accident, Mann has treated with pain medication, anti-inflammatory medication, physical therapy, epidural steroid injections, surgery, and Cymbalta (an anti-depressant). She continues to treat with pain medication and anti-depressants. She also treats for unrelated hypertension. She has not seen Dr. Guarnaschelli since July 2011. She currently treats with Dr. Snell for high blood pressure and depression, and at the pain center at St. Mary's Hospital for pain management. At the hearing, Mann testified she can stand for only ten to fifteen minutes at a time; she cannot twist or lift more than a gallon of milk; and she cannot sit for over twenty minutes at a time without her left leg going numb. She testified she is unable to perform any of the jobs she held in the past.

Kelley Manning, district manager for O'Reilly, testified at the hearing. He verified Mann had been an assistant manager at one of his stores. He was aware of the November 2008 injury. He terminated Mann due to violation of company absenteeism rules.

The award of benefits based upon Mann's psychological condition is the sole issue on appeal. Therefore, we will only review the medical records pertaining to that condition.

Mann filed multiple office records and reports from Dr. John Snell, her treating internist. These records reflect ongoing treatment for blood pressure and chronic back pain. In a report dated August 8, 2011, Dr. Snell noted he first saw Mann on June 30, 2010 for complaints of low back pain resulting from a November 2008 work injury. He took her off work, and indicated he would defer to Dr. Guarnaschelli regarding her low back condition. Regarding her psychological condition, he stated Mann has severe anxiety and depression due to her injury, chronic pain and medications. He opined she is disabled and unable to work due to her psychological condition. He assessed a 20% impairment rating based upon the AMA Guides. In a note dated January 13, 2012, Dr. Snell stated he had reviewed Dr. Ruth's report, and his opinions remain unchanged.

Dr. Douglas Ruth, a psychiatrist, evaluated Mann on September 21, 2011. He diagnosed depression due to back pain, in remission. He noted her symptoms of depression had improved. Despite diagnosing depression due to back pain, he opined her psychiatric condition was not a direct result of her work injury. He then stated she has no psychiatric condition arising from the November 8, 2011, work injury. He further stated Mann has few psychiatric symptoms and she has the capacity to resume her pre-injury

work from a psychiatric standpoint. He noted Cymbalta has improved her symptoms.

In the opinion, award and order rendered March 26, 2012, the ALJ found as follows:

> **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
>
> Based on the evidence contained in the record of this claim, including the summary of the evidence as set forth above, the ALJ makes the following findings of fact and conclusions of law:
>
> . . .
>
> 5. Ms. Mann also began treating with Dr. John Snell, internal medicine, on June 30, 2010. Dr. Snell felt she was unable to work and took her off from work until she could be re-evaluated by Dr. Guarnaschelli. Dr. Snell found Ms. Mann to be suffering from a significant mood disorder. He found her to have severe anxiety and depression due to the injury, chronic pain, and medications.
>
> 6. The Plaintiff had continued to work from the date of the accident up until she was terminated on September 2, 2009 by the employer.
>
> 7. The ALJ finds that Ms. Mann was temporarily totally disabled from September 4, 2009, the date on which she first saw Dr. Guarnaschelli, until she was released to return to work on January 20, 2010. The ALJ finds she was again temporarily totally disabled from June 30, 2010, the date on which she saw Dr. Snell, through August 11, 2010 (Dr. Guarnaschelli took her off

> from work from July 23, 2010 until August 11, 2010).
>
> 8. The ALJ finds that Ms. Mann has a permanent impairment under the AMA Guidelines, Fifth Edition, of 13% to the body as a whole due to the low back condition as opined by her treating surgeon, Dr. Guarnaschelli. The ALJ does further find Ms. Mann to have a 20% psychological impairment based on the opinion of Dr. Snell, her treating physician who specializes in internal medicine. The ALJ is persuaded by Dr. Snell's findings and opinions that Ms. Mann is suffering severe anxiety and depression due to the injury, her chronic pain, and the psychosocial stressors (pain and stress) which have resulted from the work-related condition and her inability to financially care for her family. The ALJ finds that plaintiff has a combined impairment of 30% to the body as a whole.
>
> . . .
>
> 13. Having found plaintiff to have both a physical and a psychological impairment, the plaintiff is entitled to appropriate medical treatment under KRS 342.020 for both her physical complaints and her psychological problems.

In the order entered May 9, 2011, in overruling O'Reilly's petition for reconsideration, the ALJ stated the following:

> This claim is before the Administrative Law Judge on the defendant-employer's Petition for Reconsideration of the Opinion, Award, and Order dated March

> 23, 2012. Having reviewed each of the defendant's arguments, it appearing that each issue raised has been fully considered and dealt with in the original Opinion, Award, and Order, and the ALJ being otherwise sufficiently advised, IT IS HEREBY ORDERED and ADJUDGED that defendant's Petition for Reconsideration be and is OVERRULED and DENIED.

As noted previously, the crux of this appeal is whether the ALJ erred in relying upon Dr. Snell's opinion in awarding benefits for the psychological component of Mann's claim. As the claimant in a workers' compensation proceeding, Mann had the burden of proving each of the essential elements of her cause of action, including the extent and duration of any disability caused by the work-related injury. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Mann was successful in her burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as

to weight and credibility, or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Citing to Armco Steel v. Lyons, 560 S.W.2d 76 (Ky. App. 1978), O'Reilly argues Mann had the burden of proving causation of a work-related injury. The ALJ, based upon the opinions of Dr. Snell, found she satisfied this burden. O'Reilly also argues the ALJ's decision is not supported by substantial evidence, and Dr. Snell's opinions should be disregarded because he is an internist rather than a psychiatrist or psychologist.

The AMA Guides, at page 18 states, "impairment evaluations are performed by a licensed physician." The AMA Guides do not require that impairment ratings may only be assessed by certain specialties of practice. KRS 342.0011(32) states the following:

> "Physician" means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth;

O'Reilly does not argue that Dr. Snell is not a licensed physician. Therefore based upon the AMA Guides,

Dr. Snell was qualified to assess Mann's mental state and any impairment rating stemming from that condition.

O'Reilly next argues Dr. Snell's report does not satisfy the criteria set forth in the AMA Guides for assessing an impairment rating. Again we disagree. In his report, Dr. Snell opined Mann has a mental condition, which he determined was caused by her work injury. He further determined she has an impairment rating due to that condition. Dr. Snell then assigned an impairment rating which he stated was based upon the AMA Guides.

Although O'Reilly has attempted to discredit Dr. Snell's report, he was neither deposed nor subjected to cross-examination. What Dr. Snell did or did not do in arriving at his conclusions is speculative, and certainly does not establish his report does not constitute substantial evidence which could be, and was relied upon by the ALJ.

Contrary to O'Reilly's assertion, this is not a case such as Jones v. Brasch-Barry General Contractor's, 189 S.W.3d 149 (Ky. App. 2006), in which 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. Snell specifically stated the impairment rating he assessed was based upon the AMA Guides. Dr. Snell 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. Although O'Reilly attempted to impeach this determination with Dr. Ruth's report, this amounts to no more than conflicting opinions of two physicians. Therefore, we do not believe the ALJ erred in relying upon Dr. Snell's report in awarding of benefits for Mann's mental condition. We therefore believe the ALJ's award of benefits for Mann's mental condition is supported by substantial evidence, and will not be disturbed.

Accordingly, the decision rendered March 26, 2012, by Hon. Edward D. Hays, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered May 9, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON KIMBERLY K VAN DER HEIDEN
P O BOX 34048
LEXINGTON, KY 40588

COUNSEL FOR RESPONDENT:

HON W CHARLES JOBSON
6008 BROWNSBORO PK BLVD # A
LOUISVILLE, KY 40207

ADMINISTRATIVE LAW JUDGE:

HON EDWARD D HAYS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT KY 40601