# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: March 18, 2016**

CLAIM NO. 201270194

RIDGEWOOD TRUCKING COMPANY PETITIONER

VS. **APPEAL FROM HON. UDELL B. LEVY, ADMINISTRATIVE LAW JUDGE**

ALFRED FRANCIS and
HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING IN PART, REVERSING IN PART,**
**AND REMANDING**

* * * * * *

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

**ALVEY, Chairman.** Ridgewood Trucking Company ("Ridgewood") appeals from the Opinion and Award rendered March 27, 2015 by Hon. Udell B. Levy, Administrative Law Judge ("ALJ"), and the order on reconsideration issued May 11, 2015, awarding permanent partial disability ("PPD") benefits and medical benefits to Alfred Francis ("Francis").

On appeal, Ridgewood argues the ALJ erred in awarding PPD benefits for Francis' alleged cumulative trauma injuries. It argues the only impairment rating of record relates to an acute trauma injury which occurred on September 17, 2012 as a result of a work-related motor vehicle accident ("MVA"). Since the ALJ determined the acute nature of symptoms resulting from the trucking accident subsided, resulting in no permanency, Ridgewood argues it was error to award PPD benefits for the alleged cumulative trauma injury manifesting on June 24, 2014 based upon the impairment rating which had been assessed for the September 2012 acute injury. Because the ALJ concluded Francis' injuries from the September 17, 2012 MVA subsided, resulting in no permanency, we reverse the award of PPD benefits and remand for additional findings regarding whether Francis is entitled to medical benefits for the alleged 2014 cumulative trauma injury.

Francis filed a Form 101 on August 11, 2014 alleging he sustained broken ribs, in addition to right leg, low back, and left shoulder injuries on September 17, 2012 in a MVA which occurred when an approaching coal truck jack-knifed. He also alleged neck, back, right hip and knee injuries due to cumulative trauma sustained due to driving coal trucks from 1976 until June 12, 2014. The

Form 104 filed in support of the claim shows Francis began working for Ridgewood in July 2012.

Emergency room records from the Hazard Appalachian Regional Hospital dated September 17, 2012, filed in support of the Form 101 stated Francis sustained injuries to his face, posterior head, left upper extremity, cervical spine, posterior chest wall, right knee, thoracic spine, and lumbar spine, along with a closed head injury resulting from the MVA. Also filed with the Form 101 is the June 24, 2014 note from Dr. Dale Williams, D.C., who diagnosed Francis as having cervicalgia with moderate degeneration, lumbalgia with moderate degeneration, right hip pain, and bilateral knee pain. Dr. Williams further stated, "He was in a serious accident in 2012 but his condition is degenerative in nature due to the wide spread degeneration. The findings are accumulative in nature. His damage is also consistent with the occupational hazards of the truck industry for an extended period of time."

Francis testified by deposition on January 5, 2015. He was born on November 29, 1957, and is a resident of Bulan, Perry County, Kentucky. Francis graduated from high school in 1975. He began driving coal trucks in 1976, and continued to perform that work for various employers until June 12, 2014. On September 17, 2012, he was injured

in an MVA when the truck he was driving collided with another truck which had jack-knifed. Despite only listing injuries to the left side, left shoulder, rib cage and right hip due to the MVA, the records from the ARH-Hazard emergency room reflect treatment for injuries to his left shoulder, neck, back, hip, front of right leg, and cuts under the eye. He also fractured a left rib from which he continues to have cramps. Although he testified his right hip pain has continued to worsen since the accident, he was released to return to work. Francis had no treatment for any of these conditions until August 2014.

Francis has had some treatment with Dr. Williams since August 2014. In the 1980's, he underwent left knee surgery for a condition which subsequently resolved. He takes no pain medication, but takes over-the-counter Ibuprofen. Francis testified he has not worked since he left Ridgewood in June 2014. He quit his job due to problems with weight bearing on the right hip and shoulder pain. He stated he has problems with bending his arms and sleeping. He also complains of shoulder pain going into his neck. He is currently limited to driving approximately thirty minutes at a time due to his ongoing problems.

Dr. Arthur Hughes examined Francis on August 26, 2014. He noted the September 17, 2012 MVA. Dr. Hughes

noted Francis quit his job on June 12, 2014 due to increasing pain. Dr. Hughes acknowledged Dr. Williams' report dated June 24, 2014 indicated Francis had neck pain, low back pain, diminished cervical and lumbar range of motion, as well as knee and right hip pain.

Dr. Hughes diagnosed neck pain with left radiculopathy, left shoulder pain and limitation of motion, low back pain with right lumbar radiculopathy, right hip pain, and limitation of hip motion. He opined all of Francis' injuries resulted from the September 17, 2012 MVA. Dr. Hughes assessed an 18% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, he attributed 5% to the cervical spine, 5% to the lumbar spine, 5% to the left shoulder and 4% to the right hip. Dr. Hughes stated Francis had reached maximum medical improvement ("MMI") if he had no additional treatment. Dr. Hughes opined Francis does not retain the physical capacity to return to the work performed on the date of the injury. He also imposed restrictions on lifting, climbing, bending and twisting. Dr. Hughes made no mention of repetitive or cumulative trauma.

Dr. Michael Best evaluated Francis at Ridgewood's request on December 21, 2014. Francis advised him of the

September 17, 2012 MVA. Dr. Best acknowledged Dr. Williams' June 24, 2014 report attributing Francis' problems to the cumulative nature of his work as a truck driver. Dr. Best stated Francis had sustained multiple soft tissue contusions in the MVA. He also noted Francis sustained a fracture of the left sixth rib, which had healed by November 30, 2012. He stated Francis' complaints are in excess of the physical findings. He opined Francis had reached MMI, all injuries sustained in the MVA had resolved, and he retains the physical capacity to return to the work performed on the date of the injury. He also disagreed with the 18% impairment rating assessed by Dr. Hughes, and stated Francis has 0% impairment. Dr. Best noted, "The physical examination of Mr. Francis today is plagued by subjective complaints without objective findings."

Dr. Ralph Crystal performed a vocational evaluation at Ridgewood's request on January 29, 2015. Dr. Crystal opined Francis does not have a complete inability to work for remuneration on a regular or sustained basis in a competitive economy. He opined, based upon Dr. Best's report, Francis could return to his job as a truck driver.

A benefit review conference ("BRC") was held on January 14, 2015. The BRC Order and Memorandum reflects

the parties stipulated Francis sustained a work-related injury on September 17, 2012. The 2014 cumulative trauma injury is not mentioned in the BRC order and memorandum. The issues preserved for determination included capacity to return to the type of work performed at the time of the injury, benefits per KRS 342.730, work-relatedness/ causation, notice, average weekly wage, unpaid or contested medical expenses, exclusion for pre-existing active disability or impairment, temporary total disability ("TTD") benefits, vocational rehabilitation benefits, statute of limitations, and apportionment.

The ALJ rendered a decision on March 27, 2015 finding Francis was not entitled to TTD benefits in addition to those previously paid by Ridgewood from September 18, 2012 through September 30, 2012 when he returned to work. The ALJ found the injuries sustained in the September 17, 2012 MVA resolved with no permanency. He awarded PPD benefits based upon a 10% impairment rating for the neck and back due to the cumulative trauma injury manifesting on June 24, 2014. He denied Francis' claim of injuries to his right hip, bilateral knees, left shoulder, right leg and ribs. The ALJ awarded medical benefits for the cervical and lumbar injuries pursuant to KRS 342.020. Specifically, the ALJ found as follows:

> The medical records filed as proof in this case show that Plaintiff had a laceration under his left eye, bruising and red marks around his right knee, and sustained a fractured right rib as a result of the 9/17/12 trucking accident. The records from Hazard ARH further document that Plaintiff also complained of pain or discomfort to his face, posterior scalp, neck, upper back, low back, and right knee. Based on Dr. Best's review of the medical records, however, he only presented for follow-up treatment with Dr. Wicker who noted he was doing better a week after the accident. Plaintiff further testified that Dr. Wicker released him back to work on September 30, 2012. He was subsequently referred to Dr. Sharma but that was only for evaluation of his right knee and right elbow. He didn't begin physical therapy until August, 2014. Essentially, Plaintiff received no further treatment for complaints related to the September 17, 2012.[sic] I conclude from this that the acute nature of symptoms resulting from the trucking accident subsided, resulting in no permanency.
>
> . . .
>
> The claimant in a workers compensation case has the burden of proof and risk of non-persuasion relative to each and every essential element of their claim. *Jefferson County Public Schools v. Stephens*, 208 S.W.3d 862 (Ky. 2006); *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979) Moreover, to qualify for an award of permanent disability benefits, the claimant must establish his condition warrants a permanent impairment rating according to the AMA Guides. KRS 342.0011(35) and KRS 342.730(1)(b). The ALJ has the sole discretion and authority to determine

the substance of the evidence, to judge the weight to be afforded the proof, and to draw all reasonable inferences from the evidence. *McCloud v. Beth-Elkhorn Corporation*, 514 S.W. 2d 46 (Ky. 1974). The ALJ has the discretion 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. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W. 2d 418 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977)

The purpose for the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, is to establish a standardized, objective approach to evaluating medical impairments. "Impairment" is defined in the *Guides* as "a loss, loss of use, or derangement of any body part, organ system, or organ function." But an impairment cannot be considered to be permanent until the underlying condition "has reached maximum medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment." *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213 (Ky. 2006) Dr. Hughes provides the only impairment ratings for Plaintiff's cervical and lumbar injuries that Dr. Williams described. Based on conclusions drawn from his August 26, 2014 examination, I find Plaintiff has a 5% permanent partial whole person impairment due to his cumulative cervical injury and a 5% permanent partial whole person impairment due to his cumulative lumbar injury. Dr. Williams provided inadequate evidence of a cumulative injury to Plaintiff's left shoulder or right hip to consider

Dr. Hughes' recommended ratings for those alleged injuries.

In the context of workers' compensation claims, to be characterized as *active* [rather than dormant], an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the American Medical Association Guidelines immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007) While there is evidence Plaintiff had transient symptoms after the trucking accident, there is no evidence of a pre-existing active condition other than the symptoms caused by the cumulative trauma to his neck and low back.

After dividing cumulative trauma injuries between the percentage attributable to the work and which would probably exist regardless of the work, the *Haycraft* Court apportioned the former to the employer and the latter to be paid by the Special Fund. As a result, the injured worker received compensation for the entire impairment. Although the parties have reserved apportionment as an issue in this claim, there is no medical evidence apportioning Plaintiff's cervical and lumbar impairments between occupational causes and inevitability. Regardless, abolishment of the Special Fund after the 1996 amendments obviated the need for apportionment between occupational causes and the portion of the disability that would probably exist, regardless of the work. *McNutt Construction v. Scott*, supra.

KRS 342.730(1)(c)1 provides, in pertinent part, that:

> "If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments."

Mr. Francis testified he continues to have pain in his neck and low back and that he eventually stopped working because he felt he could no longer operated[sic] a large truck in a safe manner. Functionally, he has problems turning his head in either direction or sitting for extended periods of time. Dr. Hughes and Dr. Best disagree as to whether Plaintiff requires physical restrictions upon returning to work. However, medical *restrictions* only provide a piece of the puzzle. The ultimate determination for applying the 3X multiplier is whether the injured worker has *limitations*, due to their injury, which preclude them from returning to the job they were performing. When a cervical injury results in the limited ability to turn one's head to view the side mirrors in a coal truck, it doesn't take a specific medical restriction to recognize that individual's ability to safely change lanes is severely compromised. Similarly, a truck driver who experiences difficulty operating their foot pedals the longer they've been sitting clearly becomes a danger to others using the roadways later in

the driver’s work shift. Based on the foregoing, I find Plaintiff does not retain the physical capacity to return to the type of work he was performing when his cumulative injury manifested.

KRS 342.0011(11)(c) defines "permanent total disability” as “the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury.” Determining whether a particular worker has sustained a partial or total occupational disability, as defined by KRS 342.0011(11), clearly requires weighing the evidence concerning the workers[sic] ability to earn an income by providing services on a regular and sustained basis in a competitive economy. This determination necessarily includes considering the interaction of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions.

No one has indicated Plaintiff is unable to work a normal 8 hour day or a 40 hour work week. There is no evidence he became undependable or unable to show up for work every day until he quit. In fact, he was able to work and earn more wages in 2014 than he was earning when he was first injured in 2012. As Dr. Crystal pointed out, Mr. Francis is not precluded from returning to work within several employment sectors, even when considering the most restrictive limitations, based on his retained physical capacity and intellect.

Therefore, while Plaintiff should no longer be hauling coal on a full time basis, nothing precludes him from employment driving smaller trucks or seeking employment in other sectors where he has transferrable skills, experience, or the ability to gain on the job training.

Based on the foregoing, Mr. Francis is entitled to permanent partial disability income benefits calculated as follows:
**$844.92 x 2/3 = $563.28 x 10% x .85 = $47.88 x 3.4 = $162.79 per week**

. . .

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Plaintiff shall recover from the Defendant and/or their insurance carrier all reasonable and necessary medical expenses for the cure or relief of the effects of his cervical and lumbar injuries in accordance with KRS 342.020, the accompanying Regulations, and the findings herein.

2. Plaintiff shall recover permanent partial disability income benefits from the defendant and/or their insurance carrier at the rate of $162.79 per week beginning June 24, 2014, and continuing for 425 weeks thereafter together with interest at 12% per annum on all past due amounts.

3. Plaintiff’s claim for permanent partial disability income benefits for his right hip, bilateral knees, left shoulder, right leg and ribs is DENIED.

4. Counsel shall move for approval of attorney fees within 30 days.

Ridgewood filed a petition for reconsideration on April 10, 2015 arguing, as it does on appeal, the ALJ erred in awarding PPD benefits for the June 2014 cumulative trauma. It argued the only impairment rating assessed was for the September 17, 2012 injuries, which the ALJ determined had resolved with no permanency. In the alternative, Ridgewood argued it could only be held liable for its proportionate share of any award pursuant to Southern Ky. Concrete Contractors, Inc., v. Campbell, 662 S.W.2d 222 (Ky. Ct. App. 1983).

The petition for reconsideration was denied by order dated May 11, 2015. In that order, the ALJ stated as follows:

> This matter comes before the Administrative Law Judge on Defendant's Petition for Reconsideration of the Opinion Award and Order rendered on March 27, 2015. Pursuant to KRS 342.281, the Administrative Law Judge is limited in this review to correction of errors patently appearing upon the face of the award, order, or decision. The substance of Defendant's Petition is primarily re-argument of the undersigned's findings regarding the compensability of Plaintiff's cervical and lumbar injuries. This is not subject to review, pursuant to *Frances vs. Glenmore Distilleries*, 718 SW2d 953 (Ky. App. 1986).
>
> Dr. Hughes properly assessed Plaintiff's cervical and lumbar impairments each as DRE Category II

> under the *AMA Guides*. While these were determined to be Plaintiff's ultimate permanent impairment ratings, Dr. Williams' assessment of causation (i.e., that both were due to cumulative trauma related to his work rather than the serious accident in 2012) was accepted over that of Dr. Hughes. In addition, the undersigned specifically discussed the evidence relating to apportionment including, but not limited to, the lack of evidence showing he had a pre-existing active condition before he had to quit working for Ridgewood Trucking Co., pursuant to *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007), other than Plaintiff's transient symptoms after the 2012 trucking accident (which was also during his employment with Defendant).
>
> Therefore, the undersigned having reviewed the record, the arguments of counsel and being otherwise sufficiently advised;
>
> **IT IS HEREBY ORDERED** the Defendant's Petition for Reconsideration is **DENIED**.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984)). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince

reasonable people, in support of each element. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We acknowledge an ALJ has wide range discretion in reaching his determination. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact, and he is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). When the question of causation involves a medical relationship not apparent to a lay person, the issue is properly within the province of medical experts and an ALJ is not justified in

disregarding the medical evidence. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

We note the ALJ's discretion is not without limitation. In this instance, the ALJ specifically found on page 19 of his decision the 2012 injury had resolved, "resulting in no permanency". Regarding the ALJ's denial of the September 17, 2012 claim, we affirm. Likewise, we affirm the ALJ's determination Francis is not permanently totally disabled, and is not entitled to any additional period of TTD benefits.

However, we note the only impairment rating assessed in this claim was that provided by Dr. Hughes which was specifically assessed due to the September 17, 2012 accident, not the alleged June 2014 cumulative trauma injury. The only physician who specifically found Francis' complaints resulted from the cumulative nature of his work as a truck driver was Dr. Williams. Both Drs. Hughes and Best acknowledged they had reviewed the June 24, 2014

report of Dr. Williams, yet neither assessed an impairment rating for that condition, nor found Francis had sustained cumulative trauma injuries.

While an ALJ may be able to pick, choose, reject, believe, or disbelieve various parts of the evidence, as noted above, his determination must be supported by the evidence of record. As noted in Miller v. Go Hire Empl. Dev., Inc., 473 S.W.3d 621, 634 (Ky. App. 2015):

> When multiple work-related injuries are alleged, it is imperative that an ALJ's opinion distinguish the condition to which factual findings pertain. An ALJ's discretion to pick and choose from the evidence does not authorize conflicting findings of fact. A witness may be inconsistent, but an ALJ may not, and on review an appellate court must search for consistency in interpreting an ALJ's findings.

Here, the ALJ specifically determined the 2012 MVA resulted in no permanent injuries. The 2012 and 2014 injuries are not interchangeable. Specifically, one was due to an acute traumatic event, and the other was allegedly due to repetitive cumulative activity. Due to the separate dates, as well as the distinct causes of injury, the impairment rating assessed specifically for the September 2012 injury cannot be transferred to the June 2014 injury. Once the ALJ determined the September 2012

injury had resolved with no permanency, he was not permitted to utilize that impairment rating for the alleged June 2014 cumulative trauma injury. We note Dr. Hughes specifically opined all of Francis' impairment stemmed from the September 17, 2012 MVA, from which the ALJ determined he had fully recovered. Since there is no impairment rating in the record relating to the alleged June 2014 injury, the ALJ's award of PPD benefits must be reversed.

That said, we note it is well established an ALJ can award future medical benefits for a work-related injury, although a claimant has reached maximum medical improvement and no permanent impairment rating was assessed. The Kentucky Supreme Court has concluded "disability exists for the purposes of KRS 342.020(1) for so long as the work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits." FEI Installation, Inc. v. Williams, 214 S.W.3d at 318-319.

Therefore, we remand the claim for the ALJ to provide a determination of entitlement of medical benefits pursuant to KRS 342.020 for the June 2014 injury, and to provide an analysis consistent with FEI Installation, Inc. v. Williams, supra. In reaching his determination, the ALJ

must also provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Accordingly, the ALJ's decision rendered March 25, 2015 and the May 11, 2015 order on reconsideration by Hon. Udell B. Levy, Administrative Law Judge, are **AFFIRMED IN PART and REVERSED IN PART**. This claim is **REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON JEFFREY R SOUKUP
PO BOX 2150
LEXINGTON, KY 40588

**COUNSEL FOR RESPONDENT:**

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

**ADMINISTRATIVE LAW JUDGE:**

HON UDELL B LEVY
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601