Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 12, 2014

CLAIM NO. 201292507

RITCHARD IRACHETA PETITIONER

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

GENE RAY ELECTRIC CO. INC.
HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Ritchard Iracheta ("Iracheta")[1] seeks review of the March 13, 2014, Opinion, Award, and Order of Hon. Edward D. Hays, Administrative Law Judge ("ALJ")

[1] Both parties have spelled the Petitioner's last name "Iracheta" and "Irachetta." We adopt the above spelling based on the Petitioner's signature appearing on the Form 101.

finding he sustained a temporary cervical strain but no permanent impairment as a result of an injury occurring on March 1, 2012, while in the employ of Gene Ray Electric Co. Inc. ("Gene Ray"). The ALJ awarded temporary total disability ("TTD") benefits from March 9, 2012, through September 7, 2012, and medical benefits during the period of temporary injury but no future medical benefits. The ALJ also dismissed the claim for vocational rehabilitation benefits. Iracheta also appeals from the April 7, 2014, Order of Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") denying his petition for reconsideration.[2]

On appeal, Iracheta challenges the ALJ's decision on numerous grounds. First, he argues the ALJ's conclusion he did not suffer a head/brain injury contradicts the stipulations and the reasons provided by the ALJ in support of his findings are not supported by the evidence. Iracheta argues the ALJ failed to make significant findings and his findings are not supported by the evidence. He also contends the overwhelming medical evidence demonstrates he suffered a brain injury. Second, Iracheta argues the ALJ erroneously failed to find he has an

[2] After rendition of the March 13, 2014, Opinion, Award, and Order, the ALJ retired, thus, necessitating the CALJ to rule upon the petition for reconsideration.

impairment rating as a result of the brain injury. Third, Iracheta asserts the ALJ erroneously calculated his average weekly wage ("AWW"). Next, he asserts the ALJ's award of TTD benefits is erroneous. Finally, Iracheta asserts the ALJ erred in failing to award future medical benefits for the head/brain injury.

Iracheta began working for Gene Ray on June 10, 2011, as an apprentice electrician and worked regularly until the March 1, 2012, injury. The parties stipulated Iracheta sustained a work-related injury on March 1, 2012. The injury occurred when Iracheta was attempting to obtain tools from a giant steel toolbox. The latches on the toolbox "kicked out" causing the lid, weighing thirty-five or forty pounds, to fall striking the back of the hardhat he was wearing.

Iracheta testified that after the lid hit him, everything went black and he was in immediate pain. His vision was blurry, his head was throbbing, and he was nauseated and extremely dizzy. He does not remember if he lost consciousness. He could not identify the individual who was also struck by the lid and could only remember the name of one of the other men present when the incident occurred. He performed his duties for the remainder of the day. Iracheta explained he was pressured by "Chase" to

finish his shift. Although he told Bruce he hit his head, he could not remember if he reported his physical symptoms.[3] After his shift ended, he returned to the company shop and told the owner and his son what had happened. They told Iracheta to go home and rest.

Iracheta went to the Hardin Memorial Hospital emergency room that evening. He could not remember whether he returned to work the next day. Iracheta returned to Hardin Memorial Hospital two days later because his headaches had worsened. He has been treated by a number of doctors. Because work restrictions had been imposed by one or more of his doctors, Gene Ray would not allow Iracheta to return to work. As a result, Iracheta returned to Illinois where he lives with his parents. There, he began seeing Dr. Matthew Ross with Mid-West Neurosurgery & Spine Specialists. Iracheta testified he currently experiences headaches and problems with his vision. Because he developed vision problems, he wears glasses at all times. He has reading comprehension, memory, and speech problems. Iracheta acknowledged he was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") as a child.

[3] Iracheta could only remember his first name and identified him as the individual in charge of the job site.

Numerous medical records and reports were introduced by the parties. Iracheta relied primarily on the May 1, 2013, report of Dr. Matthew Cecil, a Ph.D. clinical neuropsychologist, and the report of Dr. Jules Barefoot, a certified independent medical examiner. Gene Ray relied primarily upon the report of Dr. Robert Granacher, board certified in psychiatry and neurology.

After summarizing the lay and medical evidence, the ALJ provided the following analysis, findings of fact, and conclusions of law:

> Based on a review of the record of this claim, including the summary and discussion of the evidence as set forth hereinabove, the ALJ does hereby make the following findings of fact and conclusions of law:
>
> First, the stipulations made and entered into by and between the parties at the Benefit Review Conference on December 4, 2013, as set forth hereinabove, are approved and incorporated herein by reference as findings of fact.
>
> 'Injury' as defined under KRS 342.0011(1) as 'any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.' The threshold issue in this claim is whether the Plaintiff sustained an injury as defined under the Act, as a result of the work-

related event that occurred on March 1, 2012.

The work-related incident occurred early in the work shift. The Plaintiff was struck on the back of his hardhat by the metal lid of a large toolbox. The weight was estimated at 50 to 60 pounds. The ALJ finds that the weight of the lid was no more than 60 pounds. Plaintiff's hardhat was not knocked off. The hardhat was not significantly damaged. The Plaintiff was not knocked to the ground. He did not lose consciousness. He continued to work for the remainder of the workday and then he drove himself to the emergency room that evening. All objective medical tests have been negative and/or unremarkable. All neuroimaging has been normal. The Plaintiff did not have a detectable injury at the time of his initial emergency room evaluation. The lid of the toolbox fell a relatively short distance from the point to which it was raised to the point at which it struck Plaintiff's hardhat. This finding is supported by Dr. Granacher's analysis of the incident and his statement that the lid fell no more than a foot from Plaintiff's hardhat level.

The ALJ finds that at worst Mr. Iracheta sustained a cervical strain injury on March 1, 2012. This finding is supported by the report of Dr. Matthew Ross, a neurosurgeon, who examined Plaintiff on November 6, 2012, and opined that Mr. Iracheta likely sustained a mild concussion and post-concussion syndrome. He also likely suffered a cervical strain; however, even Dr. Ross found there was some degree of symptom magnification. Dr. Dennis also opined that Plaintiff's symptoms appear to have been

‘magnified.’ Dr. Granacher fully agreed that Plaintiff’s complaints are far out of proportion to the biomechanics of the work incident.

The ALJ does further find, on the basis of Dr. Granacher’s report, that Plaintiff sustained no permanent impairment whatsoever as a result of the work-related incident. Further, Plaintiff does not require psychiatric restrictions on his job performance. He has the mental capacity to engage in any work he is trained, educated, or experienced to perform.

The Plaintiff has the burden of proof and the risk of non-persuasion as to all essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). The ALJ finds that Plaintiff has simply failed to sustain his burden of proof. At most, the Plaintiff sustained a temporary cervical strain that resulted in no permanent impairment and which has fully resolved. However, based on the opinion of Dr. Granacher, the Plaintiff did not sustain any traumatic brain injury. The medical treatment Plaintiff has already received is sufficient and the Plaintiff is entitled to no further medical treatment relative to the work incident. There has been no showing of any permanent impairment or any showing of reasonableness and necessity of any further medical benefits.

Further, Plaintiff has been paid for any time he was off work and during which he had not attained maximum medical improvement. It is further noted that Plaintiff continued or returned to work for a significant period of time after the date of the work accident.

> Plaintiff's average weekly wage is found to be $574.44, based on the wage records filed herein by the Defendant-Employer. Accordingly, the correct amount of temporary total disability benefits should have been $382.96 per week. Thus, there has been an overpayment of $57.98 per week (TTD benefits paid at the rate of $440.94 per week, less correct calculation of TTD benefits of $382.96).

The ALJ awarded TTD benefits and medical benefits commensurate with his findings.

Iracheta filed a petition for reconsideration making the same arguments he makes on appeal. He requested further analysis and findings of fact as well as a reconsideration of the finding he did not suffer a head or brain injury. Iracheta sought further analysis and findings of fact regarding the appropriate impairment rating arising from that injury and an award of permanent partial disability ("PPD") benefits. Finally, he requested further analysis regarding the correct AWW, additional findings of fact regarding the appropriate TTD benefit rate, and entitlement to medical coverage.[4]

Concluding the petition for reconsideration was a re-argument of the merits of the claim, the CALJ summarily overruled the petition for reconsideration.

---

[4] We will not attempt to summarize Iracheta's argument as they mirror his arguments on appeal.

In support of his argument on appeal, Iracheta asserts the ALJ's conclusion contradicts the stipulation he sustained an injury or injuries. He notes his Form 101 alleges an injury consisting of "head (brain injury), neck, and headaches," and the stipulations were included and incorporated by the ALJ as findings of fact. Iracheta argues since the parties stipulated he sustained a work-related injury, the ALJ erred in dismissing his claim. He notes the records of Hardin Memorial Hospital listed a contusion to the scalp and the records from Workwell contained a diagnosis of post-concussion syndrome neither of which the ALJ recited in the opinion. Iracheta also contends the ALJ's finding he did not have a detectable injury at the time of the initial emergency room evaluation is erroneous as the records from Hardin Memorial Hospital contain a diagnosis of concussion, scalp contusion, and cervical strain. Iracheta also takes issue with the ALJ's finding all objective medical tests were negative or unremarkable as the testing of Dr. Brandon Frazier and Dr. Cecil are consistent with a traumatic brain injury. He also contends the ALJ erred in finding Iracheta returned to work for a significant period of time after the date of the accident, as the evidence revealed he returned to light duty sweeping at the shop for seven days.

Iracheta argues the overwhelming medical evidence establishes he suffered a head/brain injury. He cites to the diagnoses of various doctors relating his symptoms to the March 1, 2012, work injury and argues only Dr. Granacher, hired by Gene Ray, concluded he did not sustain a work injury.

Iracheta maintains that in light of the overwhelming medical evidence, the ALJ erred in failing to find he had an impairment rating as a result of his injury. Utilizing the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Cecil assessed an 18% impairment based upon a neurological impairment, and Dr. Barefoot assessed a 14% impairment for a closed head injury. Iracheta argues the evidence compels a finding of an impairment for a brain injury based on either of the doctor's impairment ratings. As a sub-part to this argument, he also notes the ALJ failed to make a finding of fact regarding his entitlement to a 3% whole person impairment for headaches/chronic pain assessed by Dr. Barefoot pursuant to the AMA Guides. Consequently, Iracheta submits the ALJ failed to set forth the basic facts and provide an analysis regarding the issue of his

impairment rating so as to reasonably apprise the Board of the basis for his decision.

Next, Iracheta argues the ALJ erred in arriving at an AWW of $574.44. He notes the amount of his AWW was a contested issue and his evidence establishes a much higher AWW. He complains the ALJ performed no analysis of the issue. The ALJ merely stated the amount of the AWW and that it was based on the wage records filed by the employer. Iracheta argues the ALJ failed to set forth the facts on which his finding of the AWW was based. Consequently, the parties were not apprised of the basis of his decision. He notes Exhibit 2 to his hearing testimony provided documentation of his AWW of $779.79. Further, Iracheta testified the calculation of the AWW contained within the exhibit is a true and accurate reflection of his earnings. He asserts the ALJ's finding regarding his AWW should be vacated with instructions to find his AWW is $779.79.

Similarly, Iracheta asserts the award of TTD benefits is erroneous as the ALJ utilized the wrong AWW figure in calculating TTD benefits. He argues the ALJ did not analyze entitlement to TTD benefits based on the two prong test established by case law. He contends since he was restricted to medium level work and did not reach

maximum medical improvement ("MMI") until his evaluation by Dr. Barefoot or Dr. Cecil on May 1, 2013, he is entitled to additional TTD benefits from September 8, 2012, through May 1, 2013.

Finally, Iracheta asserts if the ALJ's finding he did not suffer a head injury is reversed he is entitled to an award of permanent medical benefits for the injury.

As the claimant in a workers' compensation proceeding, Iracheta had the burden of proving each of the essential elements of his cause of action, including entitlement to permanent income and medical benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Iracheta was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is 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 by the ALJ 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be

disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We find no merit in the assertion the ALJ's conclusions he did not suffer a head or brain injury is contradicted by the stipulations. As defined in KRS 342.0011(1), an "injury" does not require a *permanent* "harmful change in the human organism." "Injury" is defined as follows:

> [A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.
> KRS 342.0011(1)

Temporary disabling conditions, as defined in KRS 342.0011(11)(a), are still injuries pursuant to KRS 342.0011(1). Thus, the ALJ's finding of a temporary injury is not inconsistent with the parties' stipulation as the parties did not stipulate to the nature and extent of the injury. Further, the ALJ's failure to mention the Hardin Memorial Hospital record contained a diagnosis of contusion to the scalp and his failure to note the diagnosis from Workwell of concussion syndrome are of no significance. Based on his summary of the evidence and his findings of fact, we conclude the ALJ reviewed the medical evidence and

was aware of the nature of Iracheta's alleged injuries as revealed by the medical records in evidence. His failure to set out those diagnoses in his opinion does not in any fashion affect his decision.

Further, the ALJ's statement Iracheta did not have a detectable injury at the time of his initial emergency room evaluation is almost a verbatim quote of Dr. Granacher's conclusion which reads: "He did not have any injury detectable at his emergency department evaluation." Even though the hospital note of March 1, 2012, reveals a diagnosis of concussion without loss of consciousness, a contusion, and cervical strain, Dr. Granacher obviously interpreted the record as revealing no detectable injury and the ALJ was entitled to rely upon his interpretation. Significantly, the ALJ ultimately determined, based on the opinion of Dr. Ross, that Iracheta sustained a temporary cervical strain. We also note Dr. Ross diagnosed a mild concussion and post-concussion syndrome. The ALJ was aware Iracheta had sustained a concussion, but concluded based on Dr. Granacher's opinion his condition did not constitute an injury as defined by the Act.

We disagree with the assertion the ALJ's finding that all objective medical tests had been negative or unremarkable is contradicted by objective testing performed

by Drs. Cecil and Frazier as it appears the ALJ was referring to notations in multiple reports including those of Dr. Cecil which reflect the May, 14, 2012, MRI and the March 21, 2012, EEG were normal. Thus, the evidence supports the finding that all objective medical tests were negative or unremarkable. Further, the neuropsychological testing performed by Drs. Frazier and Cecil were clearly subject to different interpretations as evidenced by the other conflicting medical opinions contained in the record.

The finding Iracheta continued to return to work for a significant period of time after the accident is incorrect, since he did not return to his regular job after March 1, 2012, but worked approximately a week sweeping in the shop. That finding is harmless error since Dr. Granacher noted in his report that Iracheta was not employed and had not been employed for well over a year. It appears Dr. Granacher and the other physicians relied upon by the ALJ were aware of Iracheta's post-injury employment. Thus, we find the erroneous finding concerning Iracheta's post-injury work activities to be harmless.

We disagree with the assertion the medical evidence overwhelmingly supports the conclusion that Iracheta suffered a compensable head/brain work injury. Hardin Memorial Hospital, Workwell, Dr. Reioj, Dr. Sowell,

Dr. Kaelin, and Dr. Ross all diagnosed a concussion and post-concussion syndrome. However, only Dr. Sowell diagnosed chronic post-traumatic headaches. Significantly, in his November 6, 2012, note, Dr. Ross indicated it was likely Iracheta had a mild concussion and post-concussion syndrome and a cervical strain injury. Dr. Ross concluded there may be a component of situational depression as well. He also noted there may be some degree of symptom magnification. The January 3, 2013, note indicates Iracheta was recovering well from his injury and a component of his pain may be due to inflammation of the muscle attachments to the left suboccipital or an occipital neuralgia. He indicated the physical therapist recommended an additional three weeks of work conditioning. Dr. Ross felt this was reasonable given the progress Iracheta had made and noted he would be returning for a follow-up after completion of his therapy. In his February 5, 2013, record, Dr. Ross noted Iracheta was better but not fully recovered from the injury and was now capable of working at medium physical demand level. Dr. Ross again recommended resumption of the work conditioning. His last note dated April 4, 2013, indicates Iracheta is doing reasonably well and is capable of working at medium physical demand level. He recommended resumption of work conditioning. More

significantly, we note in his initial off-work slip dated November 6, 2012, Dr. Ross stated Iracheta should be off work from November 6, 2012, through December 11, 2012. His diagnosis is post-concussion syndrome and cervical strain. However, in the off-work note dated January 3, 2013, Dr. Ross indicated Iracheta should remain off work until February 5, 2013, and the sole diagnosis provided is cervical strain.

Similarly, we believe the report of Dr. Brandon C. Dennis, a neuropsychologist at the Frazier Rehab and Neuroscience Center, who saw Iracheta on a referral from Dr. Kaelin, is supportive of the ALJ's decision. Dr. Dennis' report reveals the reason for the referral was to assess for "presence, extent, and nature of neurocognitive impairment." After conducting an interview, reviewing medical history, and performing a battery of tests, Dr. Dennis concluded Iracheta's symptoms were consistent with post-concussive effects of a mild traumatic brain injury. However, the absence of a skull fracture, intracranial injury, significant loss of consciousness, or post-traumatic amnesia suggests the cognitive effects of the injury "should have resolved within six months of spontaneous recovery that had elapsed." Dr. Dennis concluded the ongoing physical complaints are more

extensive than would be expected following such an injury. He also noted performance on measures sensitive to effort and motivation was variable. Iracheta did well on some tasks and others were at or just below the cut-offs for questionable effort. He noted on a self-report measure of symptoms, Iracheta endorsed many somatic and cognitive symptoms which "are infrequently endorsed even by patients with known neurologic and physical illnesses." While Iracheta may not have deliberately underperformed during the present examination, he believed there was "sufficient evidence that his symptoms have been magnified." Dr. Dennis suspected this was due to a "neuropsychiatric sequelae that can accompany mild traumatic brain injury such as depression, changes in vegetative pattern, and social and situational factors." His report does not establish Iracheta sustained a significant head/brain injury.

Dr. Daniel Garst's October 15, 2012, report indicates he conducted an independent medical evaluation of Iracheta on that same date. Dr. Garst's impression was Iracheta was suffering from post-concussive syndrome and he was slowly recovering. He had no superimposed psychiatric diagnosis other than the attention deficient disorder ("ADD") which he has had for years. Dr. Garst did not

recommend any additional treatment other than that taking place at the direction of Iracheta's neurologist. From a psychiatric standpoint, he believed Iracheta seems to have reached MMI concerning his head injury. Successful treatment for ADD might improve his performance on psychological testing. From a psychiatric perspective alone, Dr. Garst believed Iracheta was able to return to his former occupation. Based on the AMA Guides, he categorized Iracheta's condition as Class One and assessed no impairment rating. In a July 25, 2013, letter generated after reviewing records from Drs. Ross, Dennis, and Cecil, Dr. Garst concluded the information reviewed lead him to believe Iracheta "is on course to have no permanent impairment."

More significantly, the September 18, 2013, report of Dr. Granacher reveals he conducted an in depth interview, reviewed numerous medical records, and administered a number of tests. As a result, Dr. Granacher concluded as follows:

> Mr. Iracheta's claims are not believable, nor are the examinations of the two neuropsychologists. The biomechanics do not allow for him to have sustained any significant injury to his brain, or even a concussion. He was not knocked down. He drove himself 55 miles home the day of the accident,

> and he drove himself to a hospital. His neuroimaging is all normal.
>
> . . .
>
> Now I ask the reader to jump ahead to his frontal lobe and executive function testing. The *Wisconsin Card Sorting Test* scores at the top of page 19 are in the superior to very superior range. They are well above average and are at the 91st and greater than 99th percentile, respectively. The importance of this is, had he sustained an injury to his brain by a posterior blow from a blunt force injury, his frontal lobes would have been markedly damaged. They have not been damaged. Moreover, he is showing discrepancies in effort on testing. As the reader can also note on page 19, he made a higher score on *Trailmaking Test B* than *Trailmaking Test A*. *Trailmaking Test B* is two to three times more difficult than *Trailmaking Test A*.

Accordingly, Dr. Granacher's diagnosis was as follows: "[n]o evidence of a psychiatric or neuropsychiatric disorder as a result of a blow to his hardhat, March 1, 2012." He believed Iracheta had a 10% neuropsychiatric impairment based on the AMA Guides prior to March 1, 2012. Further, based on the AMA Guides Iracheta had no impairment due to the March 1, 2012, work injury. It was his opinion Iracheta did not require psychiatric restrictions and possessed the capacity to engage in any work he is trained, educated, or experienced to perform. He further concluded Iracheta had reached MMI.

As previously noted, Dr. Granacher concluded Iracheta did not have a detectable injury at his initial emergency room evaluation and neuroimaging was normal.

Our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision Iracheta did not sustain a brain injury and is not entitled to an award of income and medical benefits. The opinions of Dr. Granacher as well as the opinions of Drs. Ross, Dennis, and Garst constitute substantial evidence supporting the ALJ's determination Iracheta did not sustain a compensable head/brain injury due to the March 1, 2012, work accident. Since substantial evidence supports the conclusion Iracheta did not sustain a compensable head/brain injury, the ALJ's determination regarding this issue will be affirmed.

Further, for the reasons previously stated, we find no error in the ALJ's failure to assess an impairment rating as a result of Iracheta's injury. We note Dr. Cecil assessed an 18% neuropsychological impairment due to a significant brain injury and Dr. Barefoot assessed a 14% impairment rating for a closed head injury. However, Dr. Granacher and Dr. Garst concluded Iracheta did not have an impairment rating as a result of a head/brain injury. As is his prerogative, the ALJ chose to rely upon Dr. Granacher's opinions. The ALJ is entitled to rely upon the

medical opinions of a qualified physician regardless of the number of physicians who express a contrary opinion. There is no question Dr. Granacher is qualified to express an opinion as to whether Iracheta sustained a work-related head or brain injury of any proportion. As Drs. Ross, Dennis, and Garst also support the ALJ's findings, we find no error in the ALJ's determination Iracheta did not have a permanent impairment as a result of the subject work injury.

While Iracheta is correct the contrary opinions espoused by Drs. Cecil and Barefoot could have been relied on by the ALJ to support a different outcome in his favor, in light of the remaining record, the views articulated by those physicians represent nothing more that conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Similarly, we find no merit in Iracheta's argument the ALJ erred in not providing findings of fact regarding entitlement to a 3% impairment rating for

headaches. A review of Dr. Barefoot's report indicates he assessed the 3% impairment pursuant to Section 18.5 of the AMA Guides. The ALJ relied upon the opinions of Dr. Granacher who concluded there was no impairment. Thus, the ALJ was not required to address the fact Dr. Barefoot had assessed an additional 3% for pain. Table 18.5 of the AMA Guides reads as follows:

> 5. The final impairment rating should include the following:
>
> a. The percentage impairment rating based on the dysfunction in the organ or body part being rated (see step A in Section 18.3d).
>
> b. Additional impairment of up to 3% may be given if an individual has pain-related impairment that increases the burden of illness slightly (see step C in Section 18.33).

A reading of that section indicates a 3% impairment rating may be added to the final impairment rating if the individual has pain related impairment that slightly increases the illness. Here, since the ALJ relied upon Dr. Granacher's opinion that there was no impairment rating, the additional 3% would not be applicable as there was not an impairment rating to which to add the 3% rating assessed for pain.

That said, we agree in part with Iracheta's assertion the ALJ erred in the calculation of the AWW.

Gene Ray submitted an AWW-1 which provided Iracheta's earnings for three quarters. The first quarter immediately prior to the work injury purports to be his wages from December 8, 2011, through March 1, 2012.[5] The second quarter purports to contain his wages from September 8, 2011, through December 1, 2011. The third quarter purports to contain his wages from June 23, 2011, through September 1, 2011. The last quarter contains only eleven weeks of wages due to Iracheta's date of hire. Iracheta relied upon a printout of a summary of his wages, apparently supplied by Gene Ray, covering the pay periods spanning the period from June 16, 2011, through March 8, 2012.

There are discrepancies in both parties' calculations. In calculating Iracheta's AWW, Gene Ray categorized the three thirteen-week periods based upon the date the check was issued. It did not include the wages actually earned for each of the thirteen weeks. Rather, the wages listed for each week are actually weekly wages earned during the previous week. The printout from Gene Ray introduced as part of Exhibit 2 to Iracheta's hearing testimony, reveals the checks for Iracheta's weekly wages were issued a week later. Gene Ray listed Iracheta's

[5] It appears Iracheta worked a full week for the week which ended on March 1 as he worked 40 hours plus 10.5 hours of overtime that week.

weekly wages based on the date of the check and not wages actually earned that particular week. Thus, Gene Ray did not include the wages actually earned for each week within the thirteen week period.

However, in calculating the AWW for the three periods, Iracheta included within the last thirteen week period the earnings for the week ending March 8, 2012, which were post-injury earnings. Those wages are not to be included in determining an AWW. That fact means Iracheta's calculation of his AWW was not based solely on his earnings immediately preceding his injury. Consequently, both figures submitted for the calculation of AWW are erroneous.

More importantly, the ALJ did not provide the basis for his determination of Iracheta's AWW. He merely stated he based his findings upon the wage records filed by Gene Ray. An explanation was necessary as Iracheta requested such additional findings of fact in his petition for reconsideration and none were provided. We have no choice but to conclude the ALJ did not compare the competing figures relating to the AWW and determine whether either calculation was an accurate summary of the wages for the three thirteen week periods immediately preceding the injury. Consequently, the ALJ's determination of Iracheta's AWW must be vacated and the matter remanded for

a correct calculation of his AWW. Although the Supreme Court has declared the parties are not entitled to a "second bite of the apple" in determining AWW, we believe the ALJ, as designated by the CALJ, is permitted to request from the parties what each deems to be an accurate calculation of Iracheta's AWW based on the wage records filed in the record.[6] As previously noted, the ALJ must provide the basis for his determination of Iracheta's AWW.

Concerning Iracheta's argument, the award of TTD benefits is not in concert with the law, we note TTD means the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011. TTD is a factual finding in which the ALJ is called upon to analyze the evidence presented and determine the date the injured employee either 1) reaches MMI, or 2) attains a level of improvement such that he is capable of returning to gainful employment. KRS 342.0011(11); W.L. Harper Construction Co. v. Baker, 658 S.W.2d 202 (Ky. App. 1993); Central Kentucky Steel v. Wise, 19 S.W.3 657 (Ky. 2000). Generally, the duration of an award of TTD may be ordered only through the earlier of those two dates.

[6] Nesco v. Haddix, 339 S.W.3d 465 (Ky. 2011).

Here, the ALJ did not provide any analysis regarding the period during which Iracheta was temporarily totally disabled. In his decision, the ALJ determined Iracheta's AWW, noted an overpayment, and awarded TTD from March 9, 2012, through September 7, 2012, the period during which TTD benefits had already been paid. The ALJ did not determine when Iracheta attained MMI and the point at which he attained a level of improvement such that he was capable of returning to gainful employment. A number of doctors have offered opinions regarding MMI. Further, a number of doctors have also discussed Iracheta's capability to return to gainful employment. Specifically, the ALJ must determine the date Iracheta attained MMI and also attained a level of improvement which allowed him to return to gainful employment. During the period Iracheta achieved neither he is entitled to an award of TTD benefits. Therefore, the matter must be remanded for a correct analysis regarding the period Iracheta is entitled to TTD benefits.

We find no merit in Iracheta's assertion that should this Board reverse the finding that he did not suffer a head/brain injury and determine he suffered a compensable head injury, he is entitled to an award of continued medical treatment. For reasons set out herein,

we have affirmed the ALJ's determination Iracheta did not sustain a head/brain injury. Further, this Board does not have fact-finding capabilities and therefore could not make that determination.

That said, since the ALJ relied upon Dr. Granacher's opinion that there was no evidence of a psychiatric or neuropsychiatric disorder as a result of the blow to the head, Iracheta did not require psychiatric restrictions relating to his job performance and had the mental capacity to engage in the work he was trained, educated, and experienced to perform, we find the determination not to award medical benefits for a head/brain injury is supported by substantial evidence. The ALJ's refusal to award medical benefits for a head and brain injury shall be affirmed.

Accordingly, those portions of the March 13, 2014, Opinion, Award, and Order as affirmed in the April 7, 2014, Order finding Iracheta did not sustain a permanent impairment as a result of the work-related incident and dismissing his claim for permanent income and medical benefits are **AFFIRMED**. Those portions of the March 13, 2014, Opinion, Award, and Order relating to the ALJ's determination of Iracheta's AWW and the period Iracheta is entitled to TTD benefits and the April 7, 2014, Order

reaffirming these determinations are **VACATED**. This matter is **REMANDED** to the ALJ, as designated by the CALJ, for a determination of Iracheta's AWW and the appropriate award of TTD benefits in accordance with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON CHRISTOPHER P EVENSEN
6011 BROWNSBORO PK BLVD #A
LOUISVILLE KY 40207

COUNSEL FOR RESPONDENT:

HON RODNEY J MAYER
600 E MAIN ST STE 100
LOUISVILLE KY 40202

CHIEF ADMINISTRATIVE LAW JUDGE:

HON J LANDON OVERFIELD
657 CHAMBERLIN AVE
FRANKFORT KY 40601