OPINION ENTERED: July 10, 2012

CLAIM NO. 201001574

RYAN EAGLIN PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

COMAIR
and HON. OTTO DANIEL, WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Ryan Charles Eaglin ("Eaglin") appeals from the February 13, 2012, opinion, order, and award of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, medical benefits, and vocational rehabilitation benefits. Eaglin filed a petition for reconsideration that was

overruled by order dated March 21, 2012, from which Eaglin also appeals.

The Form 101 alleges on December 26, 2008, Eaglin injured his neck, shoulder, back, and suffered a psychological injury while working for Comair. The Form 101 alleges the injuries happened as follows: "Continuous loading of heavy luggage into cargo bin."

The August 12, 2011, benefit review conference ("BRC") order lists the following contested issues: work-relatedness/causation; unpaid or contested medical expenses; credit for STD; exclusion for pre-existing disability/impairment; TTD; and vocational rehabilitation. Also listed are the following: extent and duration; PPD; PTD, sanctions for failure to attend an IME; failure to timely file a Form 111.

On appeal, Eaglin asserts the ALJ erred by determining Comair, Inc. ("Comair") established good cause for failing to timely file a Form 111. Eaglin also asserts that because Comair failed to timely file its Form 111, the ALJ should have given "greater deference" to Dr. Robert Noelker's impairment rating; thus, Eaglin is entitled to past and future medical benefits for his alleged psychological injury. Eaglin also asserts the ALJ erred by

relying on Dr. John Larkin's testimony because "it was not based on the AMA Guides."

Regarding Comair's Form 111, Eaglin argues as follows:

> ....
>
> In the case at issue here, Respondent filed its Form 111 approximately 20 days beyond [sic] the requisite time period ended, and as its 'good cause' explanation, stated that the delay was an oversight due to a 'transition in claims personnel.' A.L.J. Opinion at 17. In his Opinion, the A.L.J. stated that, 'though Defendant's explanation lacks detail, it is deemed to constitute a 'good cause' explanation for Defendant's delay.' Id. However, Kentucky courts would not find Respondent's explanation adequate because it is based merely on an oversight by Respondent and Respondent's attorney, and does not fall within the bounds delineated by Kentucky's well established case law.

The record reveals Eaglin's Form 101 was filed on December 27, 2010. By scheduling order dated January 18, 2011, Comair was given forty-five (45) days to file a Form 111. Comair's Form 111 was filed on March 25, 2011. Eaglin did not file an objection or motion regarding the filing of the Form 111. As noted, failure to timely file a Form 111 was made a contested issue at the August 12, 2011, BRC. On December 16, 2011, Eaglin filed a "Motion to Have

Allegations of Form 101 Deemed Admitted" asserting as follows:

> Mr. Eaglin filed a Form 101 on December 27, 2010. A Scheduling Order was entered on January 18, 2011 giving the defendant until March 4, 2011 to file its Special Answers and/or Form 111. The Form 111 was not filed until March 24 [sic], 2011 denying all the allegations in the claim. The Form 111 was filed more than twenty days allowable by the Scheduling Order.
>
> At the Benefit Review Conference held on August 12, 2011, the defendant/employer still contested the work-relatedness/causation of the injury, unpaid or contested medical expenses, credit for STD, exclusion for pre-existing disability/impairment, TTD, and vocational rehabilitation, all despite the fact of having filed a Form 111 and/or Special Answer in a non-timely manner.
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> 803 KAR 25:010 Section 5(2)(a) states that the Form 111 shall be filed within 45 days after the Notice of Scheduling Order or within 45 days filing an order sustaining a motion to re-open a claim. The regulation goes on further to state that if the Form 111 is not filed **'all allegations on the application shall be deemed admitted.'** 803 KAR 25:010 Section 5(2)(b).
>
> Moreover, a defendant may incorporate special defenses that shall be timely raised in the Form 111. Id. at (2)(d). In this case, Defendant had ample time to file a Special Answer but failed to do so. In this case, the only Special Answer raised was statute of limitations, and because there was no

> timely filing of [sic] Form 111 or a Special Answer, that defense is waived.
>
> In the present case, because the Form 111 and Special Answer were not timely filed, the only issue that Defendant/Employer may maintain is extent and duration. KRS 342.270(2) also states that within 45 days of the issuance of the notice of the filing of a claim, the defendant/employer shall set forth all matters accepted or denied and the basis for each denial. Due to the fact that the defendant/employer failed to timely file its Form 111, the Form 111 must be deemed admitted. (Gray v. Trim Masters, 173 SW 3d 236 KY. 205) [sic].

On December 30, 2011, Comair filed a response to Eaglin's motion stating, in part, as follows:

> ....
>
> The twenty day delay was an administrative oversight due to a transition in claims personnel. Nevertheless, the Plaintiff fails to assert the belated filing caused any prejudicial effect whatsoever. Given the administrative oversight, paired with an absence of any prejudicial effect, the ALJ should exercise his discretion and excuse the late Form 111.
>
> The Plaintiff filed its Form 101 on December 27, 2010 but failed to file this Motion until December 15, 2011. As this is about four (4) months after the August 12, 2011 Benefit Review Conference, as well as about one (1) year after the Form 101 was filed, The [sic] ALJ should overrule Plaintiff's

> Motion as untimely and failing to show prejudice or that Plaintiff's needs haven't been adequately protected during this case. Plaintiff just states 'due to the fact that the defendant/employer failed to timely file its Form 111, the Form 111 must be deemed admitted. (Gray v. Trim Masters, 173 SW 3d 236 Ky. 205) [sic].' As Plaintiff fails to show any prejudicial effect or desire for an expeditious resolution of this claim, the ALJ should exercise his discretion and excuse the delayed filing on behalf of Comair.

Concerning the late filing of Comair's Form 111, the ALJ determined as follows:

> At the BRC the parties indicated numerous contested issues to be determined by the ALJ. As above noted, one specific listed issue was whether the allegations of Plaintiff's Form 101 must be deemed admitted, because a Form 111 was not filed by Defendant within forty-five days from the date of the Commissioner's assignment order. Herein, the Commissioner's assignment order was dated January 18, 2011 and Defendant filed its Form 111 on March 25, 2011, approximately 20 days beyond the allotted time period.
>
> An employer's obligation to timely file a Form 111 is mandatory as set forth in the Commissioner's assignment orders, KRS 342.270(2) and 803 KAR 25:010 Sec. 5(2)(a) and (b). If the Form 111 is not timely filed, the allegations in a Plaintiff's Form 101 must be deemed admitted.
>
> The Defendant contends its delay should be excused because 'good cause' can be

> shown for the delay. Defendant's 'good cause' explanation was, 'The 20 day delay was an administrative oversight due to a transition in claims personnel.'
>
> There is a 'good cause' exception to the mandatory operation of the rule. Clark Regional Medical Center v. Lovings, No. 2006-SC-0027-WC, 2006 Ky Unpub. LEXIS 29 (Oct. 19, 2006). Though Defendant's explanation lacks detail, it is deemed to constitute a 'good cause' explanation for Defendant's delay and therefore, Plaintiff's Motion is overruled.
>
> It is noted that, ultimately, whether or not Defendant timely filed its Form 101 [sic] is not important, for the ALJ would have reached the same conclusions even if Plaintiff's motion was sustained.

In the case of Neace v. Asplundh Tree Expert Co., Inc., Not Reported in S.W.3d, 2008 WL 1850622 (Ky. 2008), the Kentucky Supreme Court held that "[n]either KRS 342.270(2), nor 803 KAR 25:010, § 5(2), nor Gray v. Trimmaster, supra, deprives an ALJ of discretion to permit a tardy Form 111 to be filed upon a showing of good cause." Slip Op. at 1. The Court stated further as follows:

> In the present case, the employer tendered a tardy Form 111 and asserted that good cause existed for the delay. The Board determined that KRS 342.270(2) and 803 KAR 25:010, § 5 did not require strict compliance with the 45-day period despite their mandatory language. It concluded that a party may

obtain relief from the 45-day requirement upon a showing of good cause in the same manner that a party may obtain relief from a default judgment in a civil action.

KRS 342.270(2) requires an employer to respond within 45 days of the scheduling order and admit or deny the allegations contained in the worker's application for benefits. It does not address the effect of a delay in doing so or a failure to do so. 803 KAR 25:010, § 5 operates as the equivalent of a default judgment provision. Its purpose is to facilitate the prompt and orderly resolution of claims.

In a civil action, CR 8.02, CR 8.04, and CR 12.01 operate to admit an averment in a pleading if the opposing party fails to answer and deny it within 20 days of service of the summons and complaint. CR 55.01 provides for the entry of a default judgment if a party fails to defend a cause of action and lists but a few exceptions. *Ryan v. Collins,* 481 S.W.2d 85 (Ky. 1972), notes, however, that the courts disfavor such judgments and that CR 55.02 permits the trial court to set aside a default judgment upon a showing of good cause in accordance with CR 60.02. *Liberty National Bank & Trust Co. v. Kummert,* 305 Ky. 769, 205 S.W.2d 342 (Ky. 1947), and *Howard v. Fountain,* 749 S.W.2d 690, 692 (Ky. App. 1988), direct the trial court to apply a liberal standard when judging whether good cause exists and state that the exercise of discretion will not be disturbed absent abuse. Likewise, *Moffitt v. Asher,* 302 S.W.2d 102 (Ky. 1975), applies an abuse of discretion standard to a decision granting or denying a request under CR 6.02 to plead after the time allowed in CR 12.01 has expired.

> As explained in *J.B. Blanton Co. v. Lowe,* 415 S.W.2d 376 (Ky. 1967), the courts afford an administrative agency's construction of its own regulation great weight when determining the regulation's meaning. Although 803 KAR 25:010, § 5 does not indicate that the time for filing a Form 111 may be enlarged after it expires, the claimant points to no statute or regulation that prohibits it from being enlarged despite a showing of good cause. The Board's construction of 803 KAR 25:010, § 5 is reasonable. It considers a worker's interest in the prompt resolution of a claim but also ensures that an employer who shows good cause for tendering a tardy Form 111 will receive a day in court. We conclude, therefore, that 803 KAR 25:010, § 5 permits an employer to file a Form 111 outside the 45-day period if the ALJ finds that it has shown good cause for the delay.

Slip Op. at 2-3.

Here, it is undisputed Comair filed an untimely Form 111. The scheduling order was issued January 18, 2011, and Comair filed its Form 111 on March 25, 2011. We note Comair failed to file a motion requesting leave to file a late Form 111. Significantly, Eaglin failed to file a motion to strike or objection to Comair's tardy Form 111 until after the BRC on August 12, 2011. The record reveals Comair provided an explanation in its December 30, 2011, response to Eaglin's "Motion to Have Allegations of Form 101 Deemed Admitted" explaining why its Form 111 was

delayed. In the February 13, 2012, opinion, order, and award, the ALJ determined Comair's explanation- i.e. "administrative oversight due to a transition in claims personnel"- comprised "good cause." See Neace v. Asplundh Tree Expert Co., Inc., supra. Clearly, the better practice would have been for Comair to formally request leave to file a late Form 111 and provide adequate explanation for its failure to file a Form 111 before its December 30, 2011, response to Eaglin's "Motion to Have Allegations of Form 101 Deemed Admitted." The ALJ's determination that Comair established good cause for its failure to timely file a Form 111 is well within the discretion afforded to him under the law, and it will not be disturbed.

Relying in part on his first argument, Eaglin next argues the ALJ should have accepted Dr. Noelker's opinions rather than Dr. Cooley's opinions concerning Eaglin's alleged psychological impairment. Eaglin argues as follows:

> The correct standard of reviewing these issues is a mix of both the 'de novo' standard, and the 'abuse of discretion' standards. Because it is a question of law, the correct standard for reviewing whether Respondent is in default for failing to timely file its Form 111 is 'de novo.' Conversely, because it is a question of fact, the correct standard for reviewing whether Dr,[sic] Noelker's whole person impairment

rating should be given greater deference than Dr. Cooley's is 'abuse of discretion.' Discretion is abused when an A.L.J.'s decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. Ct. App. 2009).

Dr. Noelker's assessment of 25% whole person impairment should be given deference over Dr. Cooley's 0% whole person impairment rating. Dr. Noelker provided a detailed assessment of Mr. Eaglin's mental status, based on the Million Clinical Multiaxial Inventory-III, which objectively measured his emotional and personality features. Letter from Dr. Noelker to Social Security Disability Reviewer at 1. Dr. Noelker noticed a significant elevation on that scale, indicating the presence of clinical anxiety. Id.

Further, Dr. Noelker objectively determined that Plaintiff 'is disabled from competitive gainful employment' and 'continues to battle chronic pain, clinical depression, and anxiety.' This substantial evidence supports the finding that Plaintiff suffered a severe and ongoing psychiatric injury as a result of his work related injury.

Conversely, Dr. Cooley simply assessed Mr. Eaglin's mental status based on his current medications, and past psychiatric history. A.L.J. Opinion at 13. Further, Dr. Cooley diagnosed Mr. Eaglin with pre-existing and dormant Generalized Anxiety Disorder even though Mr. Eaglin takes medication to treat his anxiety due to the fact that it is not dormant at all.

Dr. Noelker's assessment of Mr. Eaglin's mental status was far more

detailed and informed than that of Dr. Cooley because it was based on the Million Clinical Multiaxial Inventory-III, and an in-depth measure of Mr. Eaglin's mental and emotional state. Therefore, his assessment of 25% whole person impairment for Mr. Eaglin's psychological injury should be given greater weight than Dr. Cooley's, who only considered a few superficial components of Mr. Eaglin's mental health.

Additionally, because Respondent is in default, all of Mr. Eaglin's claims are now deemed admitted, including Mr. Eaglin's claims for past and future medical benefits, as well as an award of permanent partial disability. The Kentucky Court of Appeals in *Neace v. Asplundh Tree Expert Co.* affirmed a decision in which the A.L.J. concluded that failure to timely file [sic] Form 111 resulted in the admission of all allegations. No. 2006-CA-001328-WC, 2007 Ky. App. Unpub. LEXIS 254. There, the appellee/employer failed to file its Form 111 within the forty-five day time limit as provided in KRS 342.270(2), and 803 KAE 25:010 5(2). *Id*. at *1-*2. The appellant/employee objected to the late filing of the Form 111, and the A.L.J. ultimately concluded that the failure to timely file [sic] Form 111 resulted in the admission of all allegations contained in the application. *Id*. at *2.

The law is clear. The employer has 45 days following notice of the employee's claim to file its Form 111. KRS 342.270(2). When a party fails to timely file its Form 111, and fails to show good cause for the delay, that party is in default and all of the allegations in the application are deemed admitted. 803 KAR 25:010 5(2).

> Here, Respondent is in default due to 'personnel changes' that allegedly made it impossible for Respondent to timely file its Form 111. 'Personnel changes' are not good cause explanations for this delay because Respondent was presumably aware of these changes and failed to take the necessary steps to ensure that those changes did not interfere with this claim, or any others. Therefore, all of Mr. Eaglin's claims, including those relating to his psychological injury and for future medical benefits, are deemed admitted. Consequently, Mr. Eaglin is entitled to past and future medical benefits, and an award of permanent partial disability.

To the extent Eaglin rehashes the arguments regarding Comair's untimely filing of its Form 111, we have already dispensed with this argument and will not address it further. To the extent Eaglin is advocating one medical witness should be relied upon over another, this too can be dispensed with swiftly.

In the February 13, 2012, opinion, order, and award, the ALJ summarized the proof submitted regarding Eaglin's alleged psychological injury as follows:

> Plaintiff claims a psychological component to his work injury. Plaintiff testified that on a normal day he feels, 'Just about worthless really.' He attributes this to his limitations and restrictions he has as a result of the work injury. Physically he feels awful and has problems functioning. He presently takes Cymbalta and Alprazolam

for his 'nerves'. Plaintiff testified that prior to his 2008 injury he did not treat with a psychiatrist or psychologist, but did receive medications for emotional problems from his family physician. Dr. McCarren's records indicate Plaintiff received medications for psychological problems since 1998.

....

Also attached to Plaintiff's Form 101 are records by Dr. Noelker Ph. D. and two typed letters dated October 5, and October 21, 2010. Dr. Noelker's handwritten records are illegible. In his October 5, 2010 letter to Mr. Mike Arnold, Plaintiff's Social Security attorney, Dr. Noelker wrote, in pertinent part, 'Given Ryan's history as well as above test data and current mental status, we believe he is disabled from competitive gainful employment, and is not released to returned [sic] to work at this time. He continues to battle chronic pain, clinical depression and anxiety. His diagnosis is: Anxiety Disorder, NOS, 300. 00 (DSM –IV–TR), which incorporates clinical anxiety, panic attacks, as well as clinical depression.' In his October 21, 2010 letter to the Social Security Disability Reviewer, Dr. Noelker noted Plaintiff had no formal history of mental health care/treatment. Dr. Noelker described Plaintiff as showing indecisiveness, restlessness and tension. He did not set forth an opinion that Plaintiff's psychological problems were work-related. Plaintiff filed a February 23, 2011 supplemental report by Dr. Noelker. In that supplement Dr. Noelker assessed Plaintiff a 25% WPI rating for his psychological problems.

....

Defendant next filed an IME report by Dr. Andrew Cooley, forensic psychiatrist, dated July 7, 2011. So as to be prepared to render expert psychiatric medical opinions, Dr. Cooley obtained from Plaintiff a history of the accident and how the accident affected him mentally, conducted a face-to-face mental status exam, administered standardized mental test instruments, reviewed eight sets of medical records and read Plaintiff's deposition transcript.

Dr. Cooley documented Plaintiff's current medications to include Cymbalta, Hydrocodone, Clonopin, and Xanax. Each of these medications Plaintiff described as being extremely effective. Dr. Cooley then obtained a past psychiatric history from Plaintiff. Plaintiff acknowledged he had, prior to his injury, problems with nervousness, depression, and his emotions. Plaintiff had incidents of anxiety prior to his injury and took Xanax for these incidents. Plaintiff told Dr. Cooley that when Defendant advised him to not turn in an injury claim with workers' compensation, but to use short-term disability, he became nervous and emotional and felt they [sic] wanted me to be dishonest.

In Dr. Cooley's medical status examination, he basically found Plaintiff to be normal. Dr. Cooley's standardized mental assessment found Plaintiff's results to be valid. Plaintiff's profile indicated chronic pain problems, no malingering, an IQ of 119, good memory and a threshold rating for obsessive-compulsive personality traits.

> Dr. Cooley's diagnosis included, Generalized Anxiety Disorder, pre-existing and now dormant; cannabis abuse in reported remission; Obsessive-Compulsive Personality Traits; and, status post three back surgeries with chronic pain. He assessed Plaintiff a 0% WPI rating impairment, secondary to the accident in question. It was his opinion that Plaintiff's psychiatric diagnoses were not the result of the alleged work injury.
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> Dr. Cooley next answered specific written questions propounded to him by Defendant's attorney. Dr. Cooley indicated Plaintiff had attained MMI status [sic] that any psychiatric condition Plaintiff may now have was not caused by a work injury but, was pre-existing and active; and, Plaintiff was a good candidate for returning to school and learning new employment skills. Dr. Cooley concluded his input writing, 'I would impose no restrictions on this bright, pleasant young man from a psychiatric standpoint. As I noted above, he clearly has no symptom burden and is intact.'

Regarding the compensability of Eaglin's alleged psychological injury, the ALJ determined as follows:

> Plaintiff claims a psychological component to his work injury, but Plaintiff has not presented persuasive proof of such. In making this determination the ALJ is persuaded by Plaintiff's pre-injury medical records and the input of Dr. Cooley, a Board Certified Forensic Psychiatrist. Plaintiff's pre-injury medical records confirm a long history of psychological difficulties - anxiety, nervousness, and depression. Also, Dr. Cooley

> indicated Plaintiff's alleged psychological conditions predated his work injury. Dr. Cooley, being a forensic psychiatrist, is better qualified to give expert psychiatric and psychological opinions than is Plaintiff's Dr. Noelker, Ph.D. It is determined Plaintiff does not have a psychological component to his work injury.

Eaglin's argument regarding the preference the ALJ should give Dr. Noelker's testimony lacks merit. The ALJ's summary of the medical evidence regarding Eaglin's alleged psychological injury is comprehensive. The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, and substance of the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). 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 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). If "the physicians in a case

genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). 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). Thus, this Board cannot instruct the ALJ to rely on Dr. Noelker's opinions instead of Dr. Cooley's opinions.

Eaglin also asserts the following regarding why the ALJ should have relied upon Dr. Noelker's opinions instead of Dr. Cooley's opinions:

> Dr. Noelker's assessment of Mr. Eaglin's mental status was far more detailed and informed than that of Dr. Cooley because it was based on the Million Clinical Mutiaxial Inventory-III, and an in-depth measure of Mr. Eaglin's mental and emotional state.

This argument goes to the *weight* the ALJ chooses to give to Dr. Cooley's opinions. The ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from

the evidence. *See* Square D Company v. Tipton, supra; Miller v. East Kentucky Beverage/Pepsico, Inc., supra. This Board cannot and will not interfere with the ALJ's exercise of the discretion afforded him under the law, and the ALJ's reliance upon Dr. Cooley will remain undisturbed.

Eaglin's final argument on appeal is the ALJ erred by relying on Dr. Larkin's testimony. Eaglin asserts as follows:

> In evaluating the existence of a pre-existing condition, and apportioning causation among factors that caused the injury and impairment, a physician must base his opinion on the AMA Guides. Under the Kentucky Workers' Compensation Act, the AMA Guides are an integral tool for assessing an employee's disability rating and monetary award. [citation omitted]. To be useful for the fact finder, a physician's rating must be grounded in the AMA Guides, and any assessment that disregards the expressed terms of the AMA Guides cannot constitute substantial evidence in support of an award of Workers' Compensation benefits. *Id*. Significantly, the Commissioner of the Department of Workers' Claims has adopted the AMA Guides, 5th Edition as the most recent version under KRS 342.0011(37).
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> ....
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> Here, the impairment rating that Dr. Larkin assigned to Mr. Eaglin does not comply with the AMA Guides because he failed to follow all of the steps required by the Guides for an accurate assessment. Specifically, Dr. Larkin

> failed to include a rating in his IME report regarding Mr. Eaglin's alleged pre-existing active condition, and only gave a vague approximation during his testimony, not a specific impairment as directed by the Guides. This does [sic] is not in compliance with the AMA Guides and should, therefore, be disregarded by the Board.

The ALJ, in the February 13, 2012, opinion, order, and award, provided the following summary regarding Dr. Larkin's medical testimony:

> Defendant's next piece of medical evidence consists of an IME report by Dr. John Larkin, orthopedic surgeon, dated June 8, 2011 and Dr. Larkin's deposition transcript dated July 29, 2011. (Plaintiff's counsel was not present at Dr. Larkin's deposition). In his IME report Dr. Larkin said [sic] forth the steps he took to [sic] qualify [sic] to render expert medical opinions. Dr. Larkin obtained a medical history from Plaintiff and conducted a physical examination. His physical examination included specific attention to Plaintiff back, right hip and left hip. In his examination of Plaintiff's back, he noted there was no evidence of paraspinous muscle spasm and straight leg raising tests were negative. He was unable to detect any focal area of tenderness over either the S1 joint [sic].
>
> Having taken these preparatory steps, Dr. Larkin then gave his opinions. His diagnosis was, "An underlying spondylolisthesis of Grade II in nature at L4–5 with secondary facet arthropathy and nerve root compression, primarily on the right side at L4–5."

He continued, “In regard to proximate cause of the condition, there is no doubt that the spondylolisthesis could either be traumatic secondary to a pars defect or could be congenital.” Dr. Larkin opined Plaintiff did not retain the capability to return back to doing the work he was doing when injured, but was able to work. He gave Plaintiff an MMI date of December 8, 2011, one year from Plaintiff’s last surgery.

In his deposition Dr. Larkin testified in accord [sic] with his IME report, but did embellish numerous points. Dr. Larkin testified Plaintiff’s pre-2008 medical records made it clear Plaintiff had a pre-existing condition. He specifically testified about Plaintiff’s 2005 records from Progressive Rehab., which confirmed Plaintiff had complaints of low back and neck pain. He also acknowledged a January 13, 2006 record, which documented Plaintiff was assigned lumbar restrictions including no lifting greater than 20 pounds, lifting to waist height, pulling no greater than 20 pounds, and no lifting above shoulder.

Dr. Larkin assessed Plaintiff a 25% WPI rating with 75% of that being pre-existing and active. Dr. Larkin concluded his deposition testimony by opining Plaintiff could not return to the work he was doing when injured, but Plaintiff was absolutely not totally disabled.

The ALJ then concluded as follows:

As to the issue of the extent of Plaintiff's physical impairment, this ALJ is persuaded that a combination of input from Plaintiff's Dr. Kelly and

Defendant's Dr. Larkin allows the most accurate assessment of Plaintiff's status. Dr. Kelly presented the most thought-out assessment of Plaintiff's present total impairment. Dr. Kelly clearly explained his assessment and why, in this particular situation, it was not appropriate to utilize the Fifth Edition of the AMA Guides' Range of Motion methodology to assess Plaintiff's impairment. Having initially evaluated Plaintiff under the ROM methodology, Dr. Kelly determined that, "This is a situation where the range of motion method produced an artificially low (14%) impairment rating." Dr. Kelly reasoned the DRE Method, which takes into account the severity of Plaintiff's residual pain and subsequent functional restrictions, was the best way to evaluate Plaintiff. Using the DRE method, Dr. Kelly assessed Plaintiff a 23% WPI rating without apportionment. Based upon Dr. Kelly's well-thought-out assessment, it is determined Plaintiff has a 23% WPI rating.

Having ascertained Plaintiff has a WPI rating for his low-back, it is next appropriate to determine whether Plaintiff had a pre-existing active low back condition, which must be carved out of his 23% rating. What constitutes a pre-existing active condition is defined in Finley v. DBM Technologies, 217 S.W. 261, 265 (Ky. App. 2007). To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury.

The burden of proving the existence of an active pre-existing condition falls upon the employer. Defendant has proven

Plaintiff had an active pre-existing condition. Plaintiff's pre-existing condition was AMA Guides ratable immediately prior to December, 2008. This is confirmed by noting the input of Drs. Banerjee and Larkin who were able to rate, in terms of the AMA Guides, the extent of Plaintiff's pre-existing condition prior to December, 2008.

Next it must be determined whether Plaintiff's pre-existing condition was symptomatic immediately prior to December 2008. Plaintiff's pre-injury medical records contain numerous references to low-back problems dating back to 2005. In the course of performing his independent medical evaluation, Dr. Banerjee reviewed Plaintiff's medical records that predated Plaintiff's work injury. Dr. Banerjee noted when Plaintiff saw chiropractor Leake on August 5, 2008, Plaintiff advised him he had been having low back symptoms for the past six months. Records from Progressive Rehabilitation confirm that in December 23, 2005, Plaintiff complained of low back symptoms. Though Plaintiff was able to continue working, it cannot be denied Plaintiff had symptoms immediately prior to December 26, 2008.

Based upon the criteria set forth in Finley, it is determined Plaintiff had a pre-existing active condition immediately prior to December 26, 2008. Dr. Larkin who had access to many of Plaintiff's pre-work injury medical records, apportioned 75% of Plaintiff's total impairment to an active, pre-existing condition. Because he had access to so many pre-injury medical records, Dr. Larkin's apportionment is most persuasive; therefore, it is determined that 75% of Plaintiff's 23%

> WPI rating is attributable to a non-compensable, pre-existing, active condition. As a direct result of his working for Defendant, Plaintiff incurred a 5.75 (75% of 23%) WPI rating.

In his June 8, 2011, independent medical examination ("IME") report, Dr. Larkin opines as follows:

> In regard to whether or not the patient had an active condition prior to these progressive changes, the answer to that would be yes. There is documentation that prior to the injury, in reviewing Dr. Leake's notes, that he did have complaints of pain involving the lumbar back at least dating back to 9/11/08.
>
> In regard to impairment, as you know these are done based upon the AMA Fifth Edition Guidelines to Evaluation of Permanent Impairment. Using table 15-3, page 384 of the Guides, he would fall into a DRE Category V rating secondary to his fusion. Essentially, he has evidence of loss of motion segment at L4-5 secondary to surgical arthrodesis specifically. The patient, however, does not have ongoing sensory abnormalities or radicular complaints, nor has he ever had bowel or bladder symptoms. This still places him into a Category V rating.

Concerning maximum medical improvement ("MMI"), Dr. Larkin stated "MMI would be projected as of 12/8/11, one year from his last surgical intervention."

Dr. Larkin was also deposed on July 29, 2011. Regarding an impairment rating, Dr. Larkin testified as follows:

> Q: Doctor, you indicated in your report of June 8, 2011 that you would project an MMI date, I believe in December of 2011, is that correct?
>
> A: Yes, and that is based upon his surgical intervention.
>
> Q: And that was one year from his last surgical intervention?
>
> A: Correct, which consists of a lumbar fusion.
>
> Q: And Doctor you also indicate that based upon your review of the AMA Guides that this patient with the fusion would fall into a DRE Category V rating?
>
> A: Yes sir, and that actually is, you could actually place him into a Category IV, because, as you know very well, utilizing Guides to Evaluation of Impairment there is a little bit of discretion there, but currently in the Fifth Edition Guidelines on Table 15-3, Page 384, he would have an impairment because of the lumbar arthrodesis and he could actually be considered in Category IV rating of 23%, but because he was still complaining of some associated pain and had had an arthrodesis done I thought a Category V rating of 25% was appropriate, and that is actually a little generous.
>
> Q: Okay, and I noticed you put the DRE Category V rating, page, table, etcetera, so you actually did an impairment rating when you did your

avowal, you just didn't put the numerical percentage or number in there, is that correct?

A: I thought I put the percentage in there too, but maybe I did not, no sir, I stand corrected, let me see just briefly here, that is correct, I didn't actually, I stated that he fell into a Category V rating based upon that report, but we did not discuss percentages.

Q: Okay, so it was your intent then to do an impairment rating and you put all the tables and page numbers and category and everything in there an all you did not do was put the percentage in?

A: Yes, and as you know in the Guides to Evaluation of Impairment there is a range that it always gives in terms of, and especially if it is considered a rating based upon a DRE category of related basis so he had a lumbar arthrodesis done, which automatically puts you into the Category IV, but he was still complaining of associated symptoms, so I could put him into a Category V, so the rating there would be 23%, the upper margin of Category IV or the lower margin of Category V which would be 25%, yes sir.

Dr. Larkin testified further as follows:

Q: Doctor in regard to your 25% rating, that opinion is rendered within the realm of reasonable medical probability?

A: Yes sir.

> Q: Based on your experience and training and your exam [sic] of this patient?
>
> A: Yes.
>
> Q: And use of the Guides?
>
> A: Yes.
>
> Q: Which you are very familiar with?
>
> A: Yes.
>
> Q: You used those a lot?
>
> A: I do.

Regarding a pre-existing and active condition prior to the alleged work injury of December 26, 2008, Dr. Larkin testified as follows:

> Q: Doctor, based on the nature, extent and chronicity of this patient's pre-existing back and related symptomatology, which you have documented in your report that goes back to at least 2005 up to and including documentation and treatment on December 4th, of '08, about three weeks before the injury, so based on the documented treatment and symptoms, at least from '05 up to three weeks before the injury in '08 and based on the history given you in your exam, would you have an opinion as to whether or not this patient had a pre-existing active condition in his lumbar spine pre-existing the December 26th, 2008 injury?
>
> A: Yes sir, I would.

> Q: Okay, and Doctor, again based on your experience and training, your exam and review of the records, do you have an opinion within reasonable medical probability as to what percentage of this patient's 25% impairment rating would be apportioned to a pre-existing active condition?
>
> A: Well let me finish the answer to the first question you asked, do I have an opinion, and the answer is yes, and that opinion would be that he did have an active ongoing condition based upon review of the medical records prior to the incident of 12-26-08 and with regard to that his ongoing complaints of symptoms were insidious in nature and therefore did not relate to the specific work related injury, but more ongoing symptoms which he stated really actually dated back to the early spring of 2008, and in reviewing his radiographs along with MRIs his findings there were consistent with a degenerative disc disease with a spondylolisthesis at L5 and basically facet arthropathy, which is a degenerative change. What is interesting is that, of course, he is a young man, and so in my opinion I think he had ongoing symptoms, and probably, based upon review of the medical records, and the documented radiographic findings, will-- probably 75% of that was pre-existing and active.

Eaglin's argument that Dr. Larkin's impairment rating "is not based upon the AMA Guides" has no basis in fact. As an initial matter, we take issue with Eaglin's assertions of error regarding Dr. Larkin's deposition

testimony. We note Eaglin's counsel did not attend Dr. Larkin's deposition or file any objections to his testimony. Likewise, Eaglin did not make specific objections to Dr. Larkin's testimony at the August 12, 2011, BRC. 803 KAR 25:010, Section 13(14) provides as follows regarding contested issues at the BRC: "Only contested issues shall be the subject of further proceedings."

Significantly, a review of Dr. Larkin's testimony, as set out in his report and his deposition, reveals a thorough understanding of and adherence to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Eaglin asserts as follows- "Specifically, [Dr. Larkin] failed to calculate a current impairment, a pre-existing impairment, and did not subtract any pre-existing impairment from the current impairment." However, this argument rings hollow. First, the record reveals Dr. Larkin assessed a 25% impairment rating in his July 29, 2011, deposition. Next, Dr. Larkin opined as to what percentage of the impairment rating- i.e. 75%- is apportioned to pre-existing and active disability, in accordance with the mandates of Finley v. DMB Technologies, 217 S.W.3d 261 (Ky. App. 2007). Nothing in Kentucky law

supports Eaglin's argument that the assignment of a percentage to pre-existing and active disability is error. Dr. Larkin was free to assess an impairment rating and then state what *percentage* of the impairment rating is attributable to pre-existing and active disability. "[P]roper interpretation of the Guides and the proper assessment of an impairment rating are medical questions." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). However, the ALJ still has the discretion to "consult the Guides when considering the medical evidence and deciding which expert to rely upon." Pella Corp. v. Bernstein, 336 S.W.3d 451 (Ky. 2011). Thus, the ALJ, when presented with the issue of what percentage of an impairment rating, if any, is to be apportioned to a pre-existing and active disability, has the discretion to carry out the simple mathematics necessary to obtain the appropriate impairment rating attributable to the work-related injury in calculating Eaglin’s income benefits. We note the ALJ ultimately relied upon Dr. John Kelly's impairment rating of 23% while simultaneously relying upon Dr. Larkin's opinion that 75% of Eaglin's impairment was attributable to a pre-existing and active condition. The ALJ is free to pick and choose from the evidence in this manner. *See* Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky.

2003). No error was committed by Dr. Larkin or the ALJ by relying on any part of Dr. Larkin's opinions.

Accordingly, the February 13, 2012, opinion, order, and award and the March 21, 2012, order overruling Eaglin's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MARK BUSH
250 GRANDVIEW DR STE 550
FT MITCHELL KY 41017

COUSNEL FOR RESPONDENT:

HON H DOUGLAS JONES
P O BOX 0095
FLORENCE KY 41022

ADMINISTRATIVE LAW JUDGE:

HON OTTO D WOLFF IV
8120 DREAM ST
FLORENCE KY 41042