OPINION ENTERED: April 19, 2013

CLAIM NO. 200872802

SAMANTHA THOMPSON PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

PARK TERRACE HEALTH CARE
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Samantha Thompson ("Thompson") seeks review of the October 10, 2012, opinion, award, and order rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") in which the ALJ awarded temporary total disability ("TTD") benefits and future medical benefits for shoulder and cervical injuries but dismissed her claim for permanent

partial disability ("PPD") benefits against Park Terrace Health Care ("Park Terrace"). Thompson also appeals from the November 9, 2012, order granting in part and denying in part her petition for reconsideration.

As this claim has previously been before us and the parties are familiar with the facts, we will only discuss those facts relevant to the issues raised on appeal.

Thompson alleged injuries to her left shoulder, arm, neck, and head as a result of an injury occurring on July 20, 2008, when ceiling tiles fell hitting her head, shoulder, and back. At the time of the injury, Thompson was employed in the housekeeping department which involved cleaning the dining room, lobby, offices, nurse's station, bathrooms, and patient rooms. Thompson would regularly dust, mop, sweep, pick up dirty laundry, vacuum, and make beds.

In a January 6, 2011, opinion and order dismissing Thompson's claim, the ALJ made the following findings of facts and conclusions of law:

> 12. The issues to be decided are extent and duration; application of the multipliers;work-relatedness/causation; temporary total disability benefits as to dates and rates; and "Injury" as defined by the Act. As fact finder, the ALJ has the authority to determine the

quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).

The Administrative Law Judge has carefully reviewed the evidence and the parties' arguments.

The undersigned is fully aware of the Plaintiff's complaints regarding ongoing shoulder pain and limitations as well as her neck pain. The undersigned is aware of the fact that some temporary total disability benefits and some medical benefits were paid. The undersigned is aware that, ultimately, Dr. Bilkey, whom the Administrative Law Judge respects, diagnosed a work-related cervical spine condition. The undersigned is aware that Dr. Loeb has stated that the Plaintiff has, or might have, an adhesive capsulitis in the left shoulder. The undersigned is aware that Dr. Ballard extensively treated the Plaintiff. The undersigned is aware that multiple diagnostic imaging tests have verified degenerative changes in the Plaintiff's cervical spine. The undersigned is aware that the ER diagnosed her with a "minor scalp contusion," whatever that specifically means. Finally, the undersigned is aware that various physicians and FCEs have placed restrictions on the Plaintiff.

What the Administrative Law Judge does not accept or believe, and

certainly has not been proven, is that any ceiling tiles ever fell on the Plaintiff. The undersigned concludes, from the evidence presented, that even if any ceiling tiles fell on the Plaintiff they did not cause any injury, temporary or permanent, that necessitated even a single trip to the emergency room, much less years of restrictions, office visits, evaluations, physical therapy and other treatment.

The undersigned notes several obvious problems, even in written transcripts and records, with the Plaintiff's credibility. She has told two distinct stories about what she was doing at the time, was it dusting or vacuuming, it is unlikely she was, as she testified later at the hearing, that she was vacuuming **and** wiping off the tables at the same time. (FH, p. 30). One with each hand as it were. Quite frankly, to the undersigned, that seems more like an attempt to explain away two different, inconsistent versions of what happened after having previously testified to having a good memory of the event. Such testimony and efforts negatively reflect on the Plaintiff.

The undersigned also takes note of Dr. Bilkey's opinion that not only was the shoulder MRI negative but, also, the variability in the range of motion testing is so great that it cannot be used to assign an impairment rating. Dr. Bilkey did not explain what caused the range of motion testing results to be so varied but the fact does not reflect well on the Plaintiff.

Further, while the Administrative Law Judge understands that self reported [sic] symptoms evaluated by a

> trained physician can be considered as objective evidence the record is devoid of any proof of any change of condition, other than degenerative changes, which do not rely upon the Plaintiff [sic] subjective allegations of pain and limitations. The undersigned is not inclined to accept these.
>
> The undersigned is also convinced that the out of court statements made, as testified to by Ms. Umfleet, which are adverse to the Plaintiff, to the effect that the Plaintiff knew about the ceiling tiles falling, and reported them as falling, prior to her "accident" and that later "that fool is lying on the floor," are accurate.

Thompson appealed and in an opinion entered July 21, 2011, this Board reversed the decision of the ALJ and remanded stating as follows:

> It is clear the statement made by Lynn Hatfield was elicited through Umfleet's testimony at the hearing and was offered into evidence to prove Thompson was lying on the floor of the dining room after the tiles had already fallen. Moreover, it is significant to point out, in recognizing this testimony was adverse to the plaintiff, the ALJ found the statement to be accurate when he found no incident as described by Thompson ever took place. For these reasons, the ALJ erred in relying on this hearsay statement in so finding.
>
> Having excluded this statement on hearsay grounds, it is also clear the remaining evidence compels a finding an injury occurred as defined in KRS

342.0011(1). St. Mary and Elizabeth Hospital records reflect Thompson was seen on the same day of the injury where a diagnosis was made of a minor scalp contusion. Jewish Hospital records dated three days later reflect Thompson was seen in the emergency room for evaluation of a head contusion where it was noted a ceiling tile had fallen on Thompson's head on July 20, 2008. OPS records dated July 30, 2008, seven days after the work event, also reflect a diagnosis of a head and neck contusion.

Although the ALJ finds even if the ceiling tiles did fall on Thompson, the work accident did not cause any temporary or permanent injury which necessitated treatment of any kind. The problem with this conclusion is that the ALJ has not provided an adequate basis for this finding. See Big Sandy Community Action Program vs. Chafins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh and Midway Coal Mining Co., supra.

In Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the Kentucky Court of Appeals noted the difference between a "temporary" and "permanent" injury as follows:

> The arousal of a pre-existing dormant condition into disabling reality may be considered temporary when, upon obtaining maximum medical improvement, the employee post injury fully recovers and reverts to her pre-injury state of health. However, where the trauma or the underlying pre-existing defect exacerbated by the trauma results in a permanent

> impairment rating post injury, even though secondary to surgery or other medical treatment, the totality of the effects of the employee's condition must be judged compensable as a matter of law.
>
> As pointed out, this Board is not a fact finding body. For these reasons, this matter is reversed and remanded to the ALJ to conduct a Finley analysis based on the competent lay and medical evidence existing in the record excluding any hearsay statements.
>
> Accordingly, the opinion and order of January 6, 2011 and the February 25, 2011 order are hereby **REVERSED** and this matter is **REMANDED** to the ALJ for further findings consistent with the views set forth herein.

The Court of Appeals affirmed this Board's decision. On remand, the ALJ entered the following findings of facts and conclusions of law:

> 12. The issues to be decided are extent and duration; application of the multipliers;work-relatedness/causation; temporary total disability benefits as to dates and rates; and "Injury" as defined by the Act. As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence.

Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).

The Administrative Law Judge has carefully reviewed the evidence and the parties' arguments. The hearsay statements, as set forth in the Board's and Court of Appeals' analysis have been excluded. Nothing in that decision, the facts or the law compels me to accept the Plaintiff's testimony and at all relevant points that testimony is rejected. This includes but is not limited to, any physician's opinion which is based in whole or part on the Plaintiff's subjective statements and/or history. However, I also note, I am compelled by the appellate bodies to find that a work-related injury took place. I do so make that finding and the next question is whether or not it was a permanent or temporary injury.

On January 7, 2009 Dr. Ballard assigned the Plaintiff permanent restrictions. She had previously indicated, on December 15, 2008, that when the Plaintiff attended a FCE she would be at MMI. The Plaintiff in fact attended the FCE on December 29, 2008. Therefore, the January 7, 2009 date wherein Dr. Ballard assigned permanent restrictions, and which follows the date of the FCE, is the date the Plaintiff reached maximum medical improvement. Dr. Ballard did not assign an impairment rating.

Dr. Loeb notes that the Plaintiff, under his care, had an entirely normal cervical spine evaluation. He sees no reason to assign an impairment rating. Dr. Loeb shall be relied upon in this matter and the basis for his reasoning, an entirely normal examination, is sufficient to support this conclusion.

> In fact, the Plaintiff's primary support for her cervical spine complaints is her subjective input, which is disregarded, even if recycled through Dr. Bilkey.
>
> Unfortunately that leaves the shoulder, for which no impairment rating has been assigned. Without a rating an award of income benefits cannot be made. However, I do note that Dr. Loeb does believe the Plaintiff has a permanent left shoulder condition. I agree with that and future medical benefits shall be awarded for it. In reliance on Dr. Ballard the shoulder manipulation is non-compensable. It is also reasonable to infer from the evidence that Dr. Ballard believes the Plaintiff has a permanent cervical spine condition, which also warrants an award of future medical expenses.
>
> The undersigned is uncertain as to what actual dates TTD was paid and as to what dates the Plaintiff was actually not at work. However, TTD is awarded, at a rate of $230.37, from July 21, 2008 through January 7, 2009, the date of injury through the date of MMI, and excluding all dates actually worked. Past, present and future medical benefits, for the left shoulder, as work-related and reasonable and necessary, are also awarded, excluding the shoulder manipulation.

Thompson filed a petition for reconsideration asserting the ALJ failed to award future medical expenses for the cervical spine condition. Further, since the ALJ rejected Thompson's testimony, she requested the ALJ to

identify those portions and the basis for rejecting each portion of her testimony.

Since the ALJ relied upon Dr. Thomas Loeb as a basis for his determination Thompson did not have an impairment rating, she requested the ALJ to identify "what determinations had been made to ascertain that Dr. Loeb's conclusions purport with the parameters of the AMA Guides."

Thompson asserted the ALJ erred in failing to assign the 8% permanent impairment assessed by Dr. Warren Bilkey. With respect to this assertion, Thompson makes the same argument she now makes on appeal. Accordingly, she requested the ALJ correct the award to reflect she has an 8% impairment rating as a result of the cervical injury. If the ALJ declined, she requested the ALJ identify the medical evidence he relied upon in determining she did not have an impairment rating.

Thompson also argued it was error for the ALJ to grant Park Terrace a credit against its obligation to pay TTD benefits for all the days she worked during the period TTD benefits were awarded.

In the November 9, 2012, order ruling on the petition for reconsideration, the ALJ amended the opinion, award, and order to include an award of future medical benefits for the cervical spine condition. Concerning the

remainder of Thompson's petition for reconsideration, the ALJ ordered as follows:

> 2. With respect to paragraph 2 of the Petition the Administrative Law Judge apologizes for the use of the ambiguous word "relevant." What I specifically mean, regarding "relevant" is I reject, entirely, the Plaintiff's testimony as to pain, limitations, restrictions, need for medical treatment, benefits from medical treatment, range of motion, recovery, when she recovered and any other matter in dispute or necessary or helpful to resolve any contested issue. I do so because I find she has no credibility. To the extent the Plaintiff sought clarification the Petition is GRANTED.
>
> 3. An entirely normal examination, including, it can be reasonably inferred, a lack of radiculopathy and full range of motion, is more than sufficient to assign a zero impairment rating. To the extent the Plaintiff wished this to be, effectively, restated, the Petition is GRANTED. To the extent they requested further analysis the Petition is DENIED as being unnecessary.
>
> 4. I believe the Plaintiff is misinterpreting *Audi of Lexington v. Elam*, 367 S.W.3d 598 (Ky. 2012) which involved an Administrative Law Judge erroneously interpreting multiple pieces of evidence to conclude what portion of a Plaintiff's impairment rating was pre-existing, active. In this claim the Plaintiff retains the burden of proof and the binding, unambiguous law as applied through *stare decisis* is that the Administrative Law Judge would not be required to accept the rating assigned

> by Dr. Bilkey *even if it were the sole evidence of record*, which it is not. I choose to rely on the opinion of Dr. Loeb. That portion of the Plaintiff's Petition is DENIED.
>
> 5. The undersigned, having further considered the matter and the case law believes that the exclusion of all dates actually worked is not patent error even under the consideration of *Millersburg Military Institute v. Puckett*, 260 S.W.3d 339 (Ky. 2008) as that case stands for the principle that so called wage continuation paid in lieu of TTD when a person would otherwise be entitled to TTD is not listed among the statutory qualifiers for a credit against TTD. Thompson still does not qualify for TTD for those dates actually worked because, clearly, her condition had improved sufficiently to allow a return to work. That portion of the Petition is DENIED.

On appeal, Thompson argues the ALJ exceeded his authority by allowing Park Terrace a credit against its obligation to pay TTD benefits for the dates she actually worked during the period TTD benefits were awarded. Citing Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) and W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), she argues where a claimant has not reached maximum medical improvement ("MMI") TTD benefits are payable until the employee reaches a level of improvement that permits a return to the type of work she was customarily performing at the time of the injury.

Thompson maintains the light duty restrictions imposed after the injury prevented her from performing her customary duties, and Park Terrace created a position which allowed her to perform menial duties. Thompson posits upon her return to work she was not performing her customary job, and she worked a “low number of hours” on the day she returned to work. Thus, the ALJ improperly suspended Park Terrace’s obligation to pay TTD benefits for the dates actually worked.

Next, Thompson argues the ALJ’s determination she did not have a permanent partial impairment rating is inconsistent with the evidence and contrary to the law. Thus, the ALJ had no basis for refusing to assign a permanent impairment and erred in not providing the factual basis which supported his conclusions on this issue. Further, the ALJ erred by not stating which portions of Thompson’s testimony were not credible and why her testimony was not credible. Therefore, the ALJ did not provide any basis for conducting meaningful review.

Thompson asserts the ALJ’s conclusions regarding Dr. Loeb’s opinion contain several erroneous statements. Thompson asserts she was never under his care, and Dr. Loeb’s use of the term “essentially normal” in describing the results of his examination is different from the ALJ’s

statement the results of Dr. Loeb's examination were entirely normal. Thompson maintains Dr. Loeb's findings of guarding and asymmetric loss of range of motion are not only abnormal "but are factors that qualify under the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for a DRE Cervical Category II" which results in a 5-8% impairment rating. Thompson contends Dr. Loeb did not state he saw no reason to assign an impairment rating, rather Dr. Loeb initially noted he could not assess an impairment because Thompson was not at MMI and needed further evaluation. Further, while in a subsequent report Dr. Loeb stated he disagreed with Dr. Bilkey's assessment of an 8% impairment rating, he did not state Thompson had no impairment. Thompson contends as noted by the Board and Court of Appeals, Dr. Loeb based his conclusion in part on his opinion there was no documented cervical spine injury "from the work injury." Thompson contends this issue is now moot. Thompson cites to the Board's statement that Dr. Loeb "pointed out he did not rate Thompson's condition in the absence of a work injury." Thompson argues the ALJ misinterpreted and misapplied this statement since he found she sustained a permanent cervical condition due to the

work injury and then inaccurately suggested Dr. Loeb saw no reason to assign an impairment rating.

Thompson also argues in addition to misunderstanding Dr. Loeb's opinion, the ALJ refused to ensure Dr. Loeb's findings were consistent with the AMA Guides.

Thompson argues in addition to incorrectly characterizing Dr. Loeb's examination as entirely normal, the ALJ, in the order ruling on the petition for reconsideration, "made matters worse by claiming 'a lack of radiculopathy and full range of motion is more than sufficient to assign a zero impairment rating.'" Thompson argues the ALJ's conclusion Dr. Loeb found full range of motion is not supported by the evidence and radiculopathy is not required in order for a permanent impairment to be present pursuant to the AMA Guides.

Citing Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81 (Ky. 2005), Thompson argues the ALJ cannot give credence to an opinion of a physician who assigns an impairment rating which is not based on the AMA Guides, therefore the opinion cannot constitute substantial evidence. Thompson asserts the evidence does not support the ALJ's conclusion her cervical range of motion was normal when examined by Dr. Loeb. Thompson argues Dr. Loeb

made no such statement and his findings upon examination were not normal pursuant to the AMA Guides.

Thompson maintains Dr. Bilkey's impairment rating was the only impairment assigned based on her achieving MMI. Further, even though Dr. Loeb stated he disagreed with Dr. Bilkey's impairment rating, he never offered an alternative rating.

Accordingly, Thompson requests the Board vacate the opinion, award, and order and remand for an award of TTD benefits without a credit for the days she worked and an award of income benefits based on the 8% impairment assessed by Dr. Bilkey with enhancement by the three multiplier pursuant to KRS 342.730(1)(c)1.

Because we agree the ALJ improperly granted Park Terrace a credit against its obligation to pay TTD benefits, we vacate the ALJ's award of TTD benefits to the extent it grants Park Terrace a credit against its obligation to pay TTD benefits during the applicable period.

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 Const. Co., Inc. v. Baker, supra; Central Kentucky Steel v. Wise, supra. Generally the duration of an award of TTD may be ordered only through the earlier of those two dates. Thus, an award of TTD benefits means the employee has not reached MMI and has not attained a level of improvement which would permit the employee to return to the type of work that is customary or that she was performing at the time of the injury.

Here, the ALJ made the determination, which is not disputed by Park Terrace, that Thompson was temporarily totally disabled from July 21, 2008, through January 7, 2009. The benefit review conference ("BRC") order reflects the parties stipulated TTD benefits were paid from October 15, 2008, through December 2, 2008. Thompson's testimony and the payroll records introduced by Park Terrace reveal she worked very few hours during the time she returned to work after July 20, 2008, the date of her injury. The wage records introduced by Park Terrace reflect from the time Thompson returned to work until October 15, 2008, she worked 3.5 hours, 8 hours, 16.7 hours, 27.5 hours, 8 hours, 7.5 hours, 25.67 hours, 19 hours, 24.83 hours, 19.33 hours,

and 17.5 hours. When she returned to work in December, Thompson worked 18.83 hours and 2.33 hours before she was terminated.[1]

Thompson's testimony is consistent with her post-injury wage records introduced by Park Terrace. Thompson returned to work at light duty filing and putting labels on patient supplies. She testified because Park Terrace could not accommodate her light duty restrictions, this job was created for her. Thompson's unrebutted testimony establishes she did not work a full day and the hours she worked were significantly reduced after the injury. Her testimony was buttressed by Cathy Umfleet's ("Umfleet") deposition testimony.[2] Umfleet testified Thompson's post-injury job was filing and putting labels on medical products. Further, Umfleet testified although Thompson was supposed to work a full day, she only worked three to four hours a day.

The fact Thompson was performing minimal work, but not the type of work which was customary or the work she was performing at the time of the injury does not

[1] A wage record indicates for the period ending 11/8/2008, Thompson worked 40 hours. However, this was during the period the parties stipulated TTD benefits were paid and nothing established why Thompson worked during this period and was paid for this week.

[2] Umfleet testified although she was not Thompson's supervisor upon Thompson's return to work, she directed Thompson's work activities and checked on her daily.

permit the ALJ to grant Park Terrace a credit for the days Thompson actually worked against its obligation to pay TTD benefits during the period TTD benefits were awarded. In Central Kentucky Steel v. Wise, supra, the Supreme Court stated:

> CKS would interpret the statute so as to require a termination of TTD benefits as soon as the worker is released to perform any type of work. We cannot agree with that interpretation. It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury. Dr. Gardner stated that Wise did not reach maximum medical improvement until October 28, 1997. Moreover, Wise did not return to work until the end of September. Consequently, the award by the ALJ of TTD benefits through September 30, 1997, was supported by substantial evidence.

Id. at 659.

As Thompson performed minimal work during the period TTD benefits were awarded, the ALJ erred in granting Park Terrace a credit for the days she worked. In the order overruling Thompson's petition for reconsideration, the ALJ stated Thompson did not qualify for TTD benefits on the days she actually worked because her condition had sufficiently improved to allow her to return to work. However, the ALJ never made a finding Thompson reached MMI

or had been released to perform the type of work that is customary or that she was performing when injured at any point between July 21, 2008, through January 7, 2009. The fact Thompson was able to return to work performing any type of work did not permit the ALJ to grant Park Terrace a credit against its obligation to pay TTD benefits for the days she actually worked. Therefore, on remand the ALJ must award TTD benefits from July 21, 2008, through January 7, 2009, without Park Terrace receiving a credit for the days Thompson actually worked during that period.

Concerning Thompson's second argument, in our July 21, 2011, opinion remanding we determined the evidence compelled a finding an injury occurred as defined by KRS 342.0011(1). We also determined the ALJ did not provide an adequate basis for the finding, even if the ceiling tiles fell on Thompson, the work accident did not cause any temporary or permanent injury which necessitated treatment. Therefore, we reversed and remanded for the ALJ to conduct an analysis pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) as to whether Thompson sustained a temporary or permanent injury based on the competent lay and medical evidence existing in the record.

While this Board concluded the evidence overwhelmingly established there was a work injury, and

remanded the claim to the ALJ for a determination of whether Thompson sustained a temporary or permanent injury, the Board did not attempt to define the nature of Thompson's injury or injuries as that is the ALJ's function.

On remand, the ALJ determined Thompson sustained neck and shoulder injuries which justified the award of future medical benefits. However, the ALJ determined neither injury merited a permanent impairment rating. There is no issue regarding the award for the shoulder injury since none of the physicians assessed an impairment rating. With respect to the neck injury, Dr. Bilkey concluded Thompson had a Cervical DRE Category II impairment and assessed an 8% impairment. However, the ALJ rejected Dr. Bilkey's assessment and relied upon Dr. Loeb in determining Thompson had no permanent impairment of the cervical spine.

Dr. Loeb conducted an independent medical evaluation ("IME") on February 17, 2012, at the request of Park Terrace. Dr. Loeb's letter of the same date sets out the results of his physical examination with respect to the cervical spine:

> Examination of her cervical spine shows left and right gaze 30 degrees each, 20 degrees upward gaze and 5 degrees

> downward gaze. Head tilt to the left and right 20 degrees each. She has diffuse tenderness and guarding over the left lateral neck and entire shoulder with no specific trigger point. She has no numbness or weakness in either upper extremity. Long tract signs are negative in both upper extremities. Negative Hoffmann's test bilaterally. Skin temperature, tone, and pulses are normal in both upper extremities. There is no tenderness to palpation over the anterior cervical spine either on the left or right. She appears to have magnification of symptoms to some degree however deep tendon reflexes are 2+ and equal biceps, triceps, and brachioradialis bilaterally. There is no evidence of muscle atrophy in any group of both upper extremities. Range of motion of the right shoulder is normal.

Dr. Loeb's impression was pre-existing cervical spondylosis. He also believed Thompson had possible adhesive capsulitis of the left shoulder based on her limited range of motion. Dr. Loeb declined to assess an impairment rating, impose work restrictions, and assess Thompson's ability to return to work because she was not at MMI and needed further evaluation of her left shoulder which he believed included an "examination under anesthesia of her left shoulder" to determine whether she had adhesions. Dr. Loeb believed MMI would not occur until approximately three to four weeks after the shoulder manipulation.

In his subsequent letter of July 7, 2010, regarding a cervical impairment, Dr. Loeb stated as follows:

> In response to your letter of June 21, 2010 and our phone call of July 7, 2010, I have reviewed my IME on Samantha Thompson and also reviewed the report of Dr. Ellen Ballard dated May 24, 2010 and May 10, 2010. I also have a faxed report of an Independent Medical Evaluation performed by Dr. Warren Bilkey on March 22, 2010. None of these reports change my original opinion given in my IME of February 17, 2010. In regards to the cervical spine, I reiterate that when seen at Jewish Hospital on July 23, 2008 there was no recorded evidence of any injury to her neck or shoulder. X-rays that were performed of the cervical spine on that date show a preexisting spondylosis or arthritis at C4/5 and C5/6 but no acute findings. There is no objective evidence in the chart that explains why she developed progressive pain in the left shoulder with numbness into the left upper extremity. Dr. Bilkey has opined that the patient has a permanent partial impairment rating due to the neck injury and he rated this at 8%. I completely disagree respectfully with is rating and its relationship to the work injury as there was no documented injury to the cervical spine from this work injury. I would not even rate her condition in the absence of a work injury. I cannot rate her at 8% as she had an essentially normal evaluation of her neck at the time of my exam.

The July 23, 2008, records of Jewish Hospital, alluded to by Dr. Loeb, reflect Thompson was seen on Sunday

complaining of “headache, nausea, and neck stiffness, and pain persist.” The physical examination of her neck revealed a normal range of motion but tenderness was present in the paraspinal muscle. A CT of the head and various diagnostic tests were ordered. The nursing assessment with respect to the neck reveals the following:

> Patient has full range of motion to neck, Trachea midline, No lymphadenopathy noted to neck, No jugular venous distention noted, No obvious signs of trauma to neck, Patient complains of pain to left neck, Pain described as aching, On a scale 0-10 patient rates pain as 7, Patient complains of neck pain on passive range of motion, Patient complains of lateral tenderness.

The records reveal Thompson was instructed as follows regarding the cervical strain:

> You have a neck strain. This is an injury to the muscles and ligaments in the neck. There is no evidence of a fracture of the neck bones. Also, no injury to the spinal cord or nerve roots was detected.
>
> Usually, stiffness and pain INCREASE for the first 24-48 hours after the injury. The pain will gradually resolve and the neck will become more mobile. Most patients are back at work or school within a few days. Typically, complete healing takes about two or three weeks.

The July 20, 2008, records of Jewish Hospital and St. Mary’s Healthcare reflect Thompson was seen in the

emergency room on the date of the injury. The chief complaint was a head injury. In the summary report under the heading “comments,” the following is noted: “ceiling fell on head no loc pain in head and right side of neck.” It also states Thompson had a head injury. The “Emergency Physician Record” indicates Thompson had a head injury and under chief complaint “head” was circled and “neck” was not circled. Under “ROS” “headaches” was circled and “neck pain” was not circled. Under “neck” “non-tender,” “painless range of motion,” and “trachea mid-line” were all checked. At the hearing, regarding her neck symptoms, Thompson testified as follows:

> Q: Ms. Thompson testified to what body parts were injured. Did you ever have any pain or numbness in your right upper extremity following the 7/20/08 incident?
>
> A: No, sir.
>
> Q: Okay; and, I’ll show you some medical records from your E.R. trip at St. Mary and Elizabeth Hospital on 7/20/08, and it indicates – comment, ceiling fell on head, no loss of consciousness, pain in head and right side of neck. Did you ever have any pain in the right side of your neck after the injury?
>
> A: No, sir.
>
> [text omitted]

> Q: Defense exhibit three – I'm looking at Jewish Hospital E.R. sheet from July 23, 2008, with a report of a CT of your brain with contrast. And the history – fell, numbness right upper extremity and headache. Never had numbness in your right upper extremity following this 7/20/08 injury?
>
> A: No, sir.
>
> Q: Okay; the same thing for the CT of – I'm sorry, this is an x-ray with a history of 7/23/08 from Jewish Hospital saying tingling of right upper extremity, no tingling in right upper extremity…
>
> Mr. Levy: Can I see that?
>
> Q: Following 7/20 …
>
> Mr. Davis: Yes, here it is.
>
> Q: No tingling of the right upper extremity following your July 20, '08 incident?
>
> A: No, sir.

The above medical records and testimony support Dr. Loeb's statement Thompson had no injury to her neck or shoulder.

Dr. Loeb's statements that he disagreed with Dr. Bilkey's impairment "rating and its relationship to the work injury" and there was "no record evidence" of a neck injury constitute substantial evidence supporting the ALJ's determination Thompson did not sustain an injury sufficient to justify the award of income benefits. Although, Dr. Loeb went on to state he would not rate Thompson's

condition in the absence of a work injury, his statement he could not rate her at 8% because she had an "essentially normal evaluation" permits the ALJ to infer, based on his examination, Dr. Loeb would not assess an impairment rating for the cervical injury. We believe the tenor of Dr. Loeb's statements in the July 7, 2010, letter regarding the alleged cervical injury permits the ALJ to determine Dr. Loeb believed Thompson did not have an impairment rating as a result of the July 20, 2008, injury.

In determining Thompson had a "permanent cervical spine condition," the ALJ relied upon Dr. Ballard's records not Dr. Loeb's opinions. Significantly, Dr. Ballard did not offer an opinion as to whether Thompson had an impairment rating for the cervical spine condition. Admittedly, Dr. Bilkey assessed the only impairment rating for the cervical spine condition. However, the ALJ is not bound by the opinions of Dr. Bilkey, as he believed the "primary support for [Thompson's] cervical spine complaints is her subjective input" and he did not find Thompson to be credible.[3]

Assuming, *arguendo*, Thompson is correct in her assertion that Dr. Bilkey's testimony regarding an

[3] See Page 11 of the October 10, 2012, opinion, award, and order.

impairment rating is uncontradicted, the ALJ may reject uncontradicted medical testimony. It is well settled depending on the circumstances involved even where medical evidence is uncontradicted, an ALJ is vested with the authority to reject such evidence so long as a sufficient explanation for that rejection is provided. Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985). Furthermore, if the history relied upon by a physician is sufficiently impeached by other evidence contained in the record the ALJ may reject that physician's opinion, though he is not necessarily required to do so. Osborne v. Pepsi-Cola Co., 816 S.W.2d 643 (Ky. 1991).

Here, the ALJ rejected Dr. Bilkey's opinions because he believed it was based primarily upon the history Thompson provided. Thus, the ALJ provided a sufficient explanation for his rejection of Dr. Bilkey's impairment rating as he clearly believed Thompson's testimony was "recycled through Dr. Bilkey." In the November 9, 2012, order on reconsideration, the ALJ firmly reiterated his belief Thompson was not credible in her testimony as to pain, limitations, restrictions, need for medical treatment, benefits from medical treatment, range of motion, recovery, when she recovered, and any other matter in dispute which would help resolve any contested issue.

The ALJ again reiterated Thompson had no credibility. Thus, we believe the ALJ provided sufficient basis for his decision Thompson had no impairment as a result of the injury and the basis for his rejection of Dr. Bilkey's testimony.

As the claimant in a workers' compensation proceeding, Thompson had the burden of proving each of the essential elements of her cause of action, including that her work-related injury resulted in a permanent impairment. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Thompson 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).

Thompson relies heavily upon Dr. Loeb's findings as a result of his examination of the cervical spine, particularly his range of motion measurements. Thompson cites to the AMA Guides in support of the proposition that the findings of Dr. Loeb regarding her loss of motion are abnormal findings and qualify her for a DRE Cervical Category II 5-8% impairment. Thompson also maintains the ALJ's statement Dr. Loeb's cervical spine examination was entirely normal is erroneous. Thompson posits Dr. Loeb did not opine she had no impairment of the cervical spine. We agree with Thompson that the ALJ's characterization of Dr. Loeb's evaluation being entirely normal is not correct as Dr. Loeb used the phrase "essentially normal evaluation." That said, Thompson's assertion the cervical range of motion found by Dr. Loeb justifies an impairment rating pursuant to the AMA Guides is a lawyer's assessment of an impairment pursuant to the AMA Guides and not a physician's. Similarly, even though Thompson asserts Dr. Loeb's finding of "guarding and an asymmetric loss of range of motion" are abnormal findings and justify a Cervical Category II impairment rating, that assertion is also a lawyer's assessment of the physical findings and interpretation of the AMA Guides and is not an assessment by a physician. Because Dr. Loeb is a licensed medical

physician it was appropriate for the ALJ to assume his expertise in utilizing the AMA Guides was comparable or superior to any other medical witness of record. Additionally, the ALJ, as fact-finder, has no responsibility to meticulously sift through the AMA Guides to determine whether Dr. Loeb's refusal to rate Thompson's condition harmonizes with that treatise's underlying criteria.

In this case, the ALJ was permitted to rely upon Dr. Loeb's statement Thompson had an essentially normal evaluation of her neck at the time he saw her, in spite of Thompson's assertion Dr. Loeb's findings regarding her range of motion of the cervical spine merited an impairment rating. An impairment rating or lack thereof pursuant to the AMA Guides is a medical determination, which may only be made by medical experts. *See* Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). Consequently, Thompson's analysis of the AMA Guides and its requirements concerning an impairment rating represents an independent review of the AMA Guides by an attorney at law, not a physician. This Board has consistently stated that the proper method for impeaching a physician's methodology under the AMA Guides is through cross-examination or the opinion of another medical expert.

Further, we do not find this to be a situation as in Brasch-Berry General Contractors v. Jones, supra, wherein the ALJ relied on a physician who placed the worker in a DRE lumbar Category IV and assigned a 26% impairment rating, even though he repeatedly testified that if the AMA Guides were strictly followed, the worker would only qualify for a Category III impairment. Two other physicians in that claim placed the injured worker in a lumbar Category III that called for an impairment of 10-16%. The Court affirmed the Board's reversal of the ALJ's decision since the medical opinion which persuaded the ALJ was not in accordance with the AMA Guides and, for that reason, did not qualify as substantial evidence. Here, Dr. Loeb did not give any such qualifying testimony concerning his opinion as to the results of his physical examination of Thompson. Dr. Loeb's statements do not in any manner indicate his assessment was not in accordance with the AMA Guides. Dr. Loeb noted the x-rays, although revealing pre-existing spondylosis or arthritis at C4-5 and C5-6, revealed no acute findings. Dr. Loeb concluded there was no documented injury to the cervical spine due to the work injury and therefore he would not rate Thompson's condition in the absence of a work injury. The hospital records, Thompson's testimony, and Dr. Loeb's opinions constitute

substantial evidence supporting the ALJ's determination Thompson did not have a permanent impairment as a result of her work-related permanent cervical spine condition.

We understand Thompson's argument that Dr. Loeb's refusal to rate her condition was based solely upon his belief there was no work injury, and in spite of his opinion the ALJ relied upon Dr. Ballard's statements in determining Thompson has a work-related permanent cervical condition. Therefore, Thompson posits since the ALJ has determined Thompson sustained a permanent cervical spine condition, Dr. Loeb's opinion cannot be relied upon because it is premised solely upon the fact she did not sustain a work injury. Consequently, Thompson argues since Dr. Loeb's opinions are based on that assumption and although he stated he could not rate Thompson at 8%, he did not state she had no impairment.

Contrary to Thompson's argument, we believe the ALJ was permitted to consider the fact Dr. Loeb believed the x-rays revealed no acute findings, there was no documented injury to the cervical spine, and Thompson had an "essentially normal evaluation of her neck" in concluding she did not have a permanent impairment as a result of what the ALJ found to be a permanent cervical spine condition.

Although the ALJ incorrectly stated Thompson was under Dr. Loeb's care and Dr. Loeb's examination was entirely normal, we believe it is clear from Dr. Loeb's July 7, 2010, letter that he did not believe Thompson had a permanent impairment as a result of a cervical spine injury.

Similarly, we are unconvinced by Thompson's argument regarding the ALJ's statement in the November 9, 2012, order ruling on the petition for reconsideration that Dr. Loeb's examination was entirely normal, and "it can be reasonably inferred, a lack of radiculopathy and full range of motion, is more than sufficient to assign a zero impairment." Thompson's argument that even with a lack of radiculopathy the AMA Guides permit the assessment of an impairment is again a lawyer's assessment of the AMA Guides and not supported by any medical testimony. Although the ALJ did not accurately quote from Dr. Loeb's letter, nonetheless we believe the opinions expressed by Dr. Loeb in the July 7, 2010, letter constitute substantial evidence supporting the ALJ's determination Thompson does not have a permanent impairment as a result of a cervical injury.

Even though Dr. Loeb found no documented evidence of an injury to the cervical spine as a result of the work injury, the ALJ relied upon Dr. Ballard's records and

restrictions in determining Thompson had a permanent spine condition as a result of the injury. That is the ALJ's prerogative. Likewise, the ALJ was permitted to rely on Dr. Loeb's opinions in determining Thompson had no cervical impairment. Further, we note Dr. Loeb's July 7, 2010, letter expressing his opinions regarding the lack of an impairment was expressed after the ALJ determined Thompson attained MMI.

Thompson also complains the ALJ erred in not explaining why he found her testimony not to be credible. Although the ALJ is required to provide the basis for his decision, he is not required to explain in minute detail why he did or did not find a witness to be credible. As previously noted, the ALJ determines the credibility of the witnesses, and he is not required to explain his reasons regarding the credibility of a witness.

Accordingly, those portions of the October 10, 2012, opinion, award, and order and the November 9, 2012, order ruling on the petition for reconsideration relating to Park Terrace's entitlement to a credit against its obligation to pay TTD benefits are **REVERSED**. Those portions of the October 10, 2012, opinion, award, and order and the November 9, 2012, order ruling on the petition for reconsideration determining Thompson did not have a

permanent impairment as a result of a work-related cervical spine injury are **AFFIRMED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion, award, and order awarding TTD benefits from July 21, 2008, through January 7, 2009, and directing Park Terrace shall not be entitled to any credit against its obligation to pay TTD benefits.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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