

**Commonwealth of Kentucky  
Workers' Compensation Board**

**OPINION ENTERED: March 29, 2016**

CLAIM NO. 201401857 & 201399354

TKT TRUCKING

PETITIONER

VS.

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

MICHAEL PERKINS  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

MICHAEL PERKINS

CROSS-PETITIONER

VS.

TKT TRUCKING, LLC  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

CROSS-RESPONDENT

RESPONDENT

**OPINION  
REVERSING IN PART,  
VACATING IN PART, AFFIRMING IN PART,  
AND REMANDING ON APPEAL  
& VACATING IN PART AND REMANDING ON CROSS-APPEAL**

\* \* \* \* \*

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

**STIVERS, Member. STIVERS, Member.** TKT Trucking, LLC ("TKT") appeals and Michael Perkins ("Perkins") cross-appeals from the September 4, 2015, Opinion, Order, and Award of Hon. Chris Davis, Administrative Law Judge ("ALJ") finding Perkins sustained a right shoulder injury and awarding permanent partial disability ("PPD") benefits and future medical benefits. The ALJ also determined Perkins sustained work-related hearing loss, but only awarded medical benefits for cumulative trauma hearing loss. Both parties appeal from the October 12, 2015, Order ruling on the petitions for reconsideration.

On appeal, TKT challenges the finding Perkins sustained an impairment rating as a result of the right shoulder injury, the award of PPD benefits, the finding of the date of maximum medical improvement ("MMI") from the shoulder injury, the ALJ's failure to rely on its doctor's opinions relating to the shoulder injury, and the failure to apportion liability for medical benefits for the hearing loss.

On cross-appeal, Perkins challenges the failure to award income benefits for his work-related hearing loss.

In his Form 101, Perkins alleged a work-related hearing loss due to a traumatic event occurring on October 11, 2012, and a right shoulder injury occurring on December

30, 2012. In his Form 103, Perkins alleged an occupational cumulative trauma hearing loss manifesting on October 11, 2012. By order dated December 24, 2014, the claims were consolidated.

During his January 22, 2015, deposition, Perkins described the event of October 11, 2012, which he alleged caused his hearing loss:

Q: Tell me what happened on that day.

A: Okay. The metal is throughout the building, and, you know, you've got a little order form when you come in. You might X amount what they want cut. And what the number - different metals has got its own number, codes and stuff. So the forklift driver has got to go get it. Well, of course, they've - you've got to remember this place goes through so many unqualified people that don't even know how to run a forklift, number one, you don't - who has no business to be on it to start with. So the little kid goes to get the metal, and these are banded together. These big ol' things are banded together, tons of steel. He gets on, the band breaks on half of a side. So it's already loose on his forklift to start with. So I told him to lower it down real easy and try to bump it together, but, no, what he does is he lifts it up and tilts it forward and the whole darn thing goes over on the table and goes off like a cannon. You know what I mean? When that one strap broke, the whole thing came off of his forklift. He had it way too high. I'm close as from here to that wall away from it. The only -- I know it can't come --

MR. REAVES: Which is how far?

THE WITNESS: Oh, what is that, ten feet?

. . .

THE WITNESS: And but I know it can't come over on me because there's big metal things there, beams, to stop from rolling back on me. You know what I mean? But that's how close it was when it hit that table. You know, it's not a solid table. It's just got beam tables. You know, like a beam here, beam here, beam here and beam here, and it's probably 40 foot long. Then that's where I've got to take the bar and pry them all apart. You know, and get them on to the roller section to be able to check them, mark them, and slide them into the saw. But the loud noise occurred when it came off of the forklift from the boy lifting the forklift too high. You know what I mean? He meant to tilt it backwards, he tilted it forwards.

Q: So it fell and hit this table?

A: From pretty high up.

Q: Right. How high up would you say it fell?

A: I don't know. He had to be a good 12, 13 feet in the air, I'd say, if not higher. I'm - I'm - I'm - no, it was higher than that counting the forklift itself. 15 feet, I'd say. ...

During the deposition, Perkins testified he injured his right shoulder on December 30, 2012, while using a bar to turn a steel beam in order to check for bad spots. Perkins explained when he flipped the bar he felt a

"good jab" in his right shoulder. He sat down and rested and when the pain eased up he resumed his work. He reinjured his arm that same day in the course of flipping one of the beams. Perkins testified he had never experienced that type of pain, as it felt he had been shot in the shoulder. As a result, he immediately went to the ground. He sat down for the rest of his shift and at the end of the shift his son, who also worked that shift, took him to the emergency room at Bellefonte hospital. Bellefonte Hospital referred Perkins to Dr. Joseph Leith, an orthopedic surgeon.

On August 6, 2013, while evaluating Perkins' hearing loss, Dr. Joseph Touma discovered a glomus tumor.<sup>1</sup> Perkins was eventually referred to the University of Kentucky Medical Center, where he was treated for a glomus tumor of the right jugular foramen by Dr. Raleigh Jones and Dr. Mahesh Kudrimoti. Between October 8, 2014, and November 19, 2014, Perkins underwent radiation treatment for the tumor.

The parties submitted numerous medical records and reports from the following: Kings Daughters Urgent Care; The Hearing Center; Ironton Urgent Care Center; Dr.

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<sup>1</sup> Dr. Touma's Form 108 was filed with Perkins' Form 103.

Greg Baker; Dr. Robert Woods; Dr. Joseph Touma; Premier Physical/Occupational Therapy ("Premier"); University of Kentucky Healthcare; Dr. Leith; and Dr. David Jenkinson. The January 5, 2015, university evaluation report of Dr. Barbara Eisenmenger, with the University of Louisville, was also introduced. TKT introduced Dr. Eisenmenger's July 30, 2015, deposition.

Shortly before or at the conclusion of proof taking, the parties learned Brickstreet Mutual Insurance Company ("Brickstreet") provided workers' compensation coverage to TKT on October 11, 2012, the date of the alleged traumatic hearing loss. As a result, Brickstreet was joined as a party and another proof schedule was set. Thereafter, Brickstreet, on behalf of TKT, entered into a settlement agreement with Perkins for the alleged hearing loss due to the October 11, 2012, incident which was approved by the ALJ on May 4, 2015. As part of the settlement, Perkins waived his right to future medical benefits, vocational rehabilitation, and to reopen. There was no buyout of Perkins' right to past medical benefits.

After the introduction of additional proof, the ALJ conducted a final hearing on July 28, 2015. Concerning Perkins' claims for single trauma and cumulative trauma

hearing loss, the ALJ entered the following findings of facts and conclusions of law:

The issues to be decided are entitlement to benefits pursuant to KRS 342.7305; benefits per KRS 342.730; unpaid or uncontested medical expenses; temporary total disability benefits; work-relatedness/causation; average weekly wage; was the assigned impairment rating in conformity with the AMA Guides; and mileage expenses.

. . .

The hearing loss claim in this case contains what I believe everyone can agree is a very unusual fact pattern. Specifically the Plaintiff is alleging both a traumatic work-related hearing loss and a cumulative trauma hearing loss. Both claims are against the same employer but different carriers and both claims are addressed by a single University Evaluation.

In addition to the University Evaluation there has been a substantial amount of additional medical evidence provided by Drs. Touma, Baker, Woods and The Hearing Center.

Regardless of the amount of additional evidence provided the rules regarding the rebuttable presumption afforded to the University Evaluator are not discounted and I must still provide a sufficient basis to reject her opinions. KRS 342.315; Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000).

Frankly, given the complexities of this claim I not only cannot see any reason to reject Dr. Eisenmenger's opinions but I welcome them. As an impartial observer there is no reason to even suspect her conclusions are

even unconsciously biased. She took into account the traumatic event, the cumulative trauma, the 'tumor' and the Plaintiff's age. Her opinion has already resulted in a \$25,000.00 settlement and medical benefits for the traumatic hearing loss.

Ultimately it is Dr. Eisenmenger's opinion that the Plaintiff has a compensable cumulative trauma hearing loss. However she cannot say with any degree of certainty what percentage of his impairment rating from that hearing loss is attributable to the cumulative trauma portion and what percentage is attributable to his traumatic hearing loss, his tumor, his age and his nature genetics.

Concerning the alleged right shoulder injury, the ALJ entered the following findings of fact and conclusions of law:

In short the University Evaluator has assigned an overall impairment rating but she is unable to apportion any specific part of it, much less the 8% threshold, to cumulative trauma hearing loss. The Plaintiff bears the burden to prove that his cumulative trauma hearing loss has met the 8% threshold. KRS 342.7305. Having failed to do so he is not entitled to any income benefits for the cumulative trauma hearing loss.

However, there is no impairment rating threshold for the awarding of medical benefits for hearing loss. The University Evaluator has stated that the Plaintiff has sustained a work-related, permanent hearing loss from the cumulative trauma. With or without an impairment rating that is sufficient

to award medical benefits and that is what I will do.

As far as the physical injury I have no reason to doubt the Plaintiff's testimony either about how it happened, his initial symptoms or his current symptoms.

The Plaintiff has testified, and his employer does not dispute, that he used a large bar to move very heavy steel beams. Even if the distance moved was short it is not unreasonable to infer he could have injured himself.

Beyond that the initial diagnostic testing, both by exam and MRI, by Dr. Leith confirmed an injury to the right shoulder. Dr. Jenkinson confirmed that there was, at the least, a temporary injury to the right shoulder. The employer paid TTD and medical benefits. It seems to me the question is not did the Plaintiff sustained a work-related injury to the right shoulder but when did he reach MMI for it and what benefits, if any, is he entitled to for it.

Inasmuch as I find the Plaintiff credible in his ongoing complaints and given the fact that I believe Dr. Leith, who has [sic] multiple opportunities to examine the Plaintiff [sic] more logical course is to select and rely upon the 7% impairment rating assigned for loss of right shoulder range of motion.

Further it seems fairly clear to me that the Plaintiff cannot return to the type of work he was doing on the date of injury. Dr. Leith has never actually released him, permanently, to that work. He continues to have symptoms, including limited range of motion and pain in his right shoulder.

The work involved using a heaving lift bar to lift and move very heavy, large steel beams. The Plaintiff does not believe he can do it. Based on all of the above I find he cannot return to the type of work done on the date of injury.

The Plaintiff worked, on light duty, from January 25, 2013 through February 4, 2013. I do not think this is sufficient to trigger an award under KRS 342.730(1)(c)2. Even if it were this clearly represents a failed return to work attempt and the Plaintiff's actual permanent injury and loss of earning capacity is more accurately reflected under KRS 342.730(1)(c)1.

In awarding TTD benefits, the ALJ provided the following findings of fact and conclusions of law:

As far as dates of TTD the record is somewhat fuzzy, both as to medical evidence and the Plaintiff's own, specific recollections, as to when he was working and when he was not working, following the December 30, 2012 incident, to at least May 13, 2013. The Plaintiff has testified that he was off of work approximately one month, returned to work for a period and then was off work again. TTD was terminated, on May 13, 2013, following the examination of Dr. Jenkinson on May 7, 2013. The period of voluntary TTD, that is between December 30, 2012 and May 13, 2013 shall not be disturbed.

However, it appears as if the Plaintiff, despite Dr. Jenkinson's statement, did not actually reach MMI until August 21, 2014. This is the date he was assigned the accepted and valid impairment rating. Since it is clear that an impairment rating cannot be

assigned until a Plaintiff reaches MMI it is reasonable to infer that he reached MMI on that date. *Martin County Coal Co. v. Goble*, 449 S.W.3d 362 (Ky. 2014).

Since Plaintiff was not working between May 13, 2013 and August 21, 2014 and he was not at MMI he is entitled to TTD during that period.

It is immaterial that Dr. Jenkinson specifically placed him at MMI. Since I am allowed to infer that he was not at MMI until August 21, 2014 then that date, as a matter of law, is reliable and is factually far more accurate.

. . .

The Plaintiff is entitled to temporary total disability benefits at a rate of \$380.00 per week from December 31, 2012 through January 24, 2013 and from February 5, 2013 through August 21, 2014.

Both parties filed petitions for reconsideration making the same arguments raised in this appeal. The October 12, 2015, Order ruling on the petitions for reconsideration, reads as follows:

The Plaintiff's Petition is a re-argument of the merits. The Plaintiff retains the burden of proof and the UME is afforded a rebuttable presumption that was not rebutted. The UME states that apportionment between the traumatic and cumulative trauma hearing loss cannot be made. Therefore the ALJ cannot make a finding that the Plaintiff has the required 8% hearing loss for the cumulative trauma hearing

loss. The Plaintiff's Petition is OVERRULED.

The UME did say that the Plaintiff has work-related cumulative trauma hearing loss. The fact that she did not apportion at least 8% of the overall 20% to the cumulative trauma is no bar to an award of medical benefits. Indeed I am compelled to make such an award. The Defendant's Petition is OVERRULED.

TKT's first argument on appeal has four prongs. First, it argues the ALJ erred in relying upon the impairment rating assessed for the right shoulder injury by Robert J. Hammond ("Hammond"), OTR/L, a physical therapist, at Premier, as the impairment rating was not assessed by Dr. Leith. Therefore, the award of PPD benefits for the shoulder injury was based upon an impairment rating not prepared by a physician as defined by the Act and is in contravention of KRS 342.0011(32).<sup>2</sup> It maintains there is no evidence establishing a physician, specifically Dr. Leith, adopted Hammond's impairment rating and the contents of his report. In support of its argument it cites to KRS 342.0011(32), as well as Sections 2.2 and 2.3 of the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

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<sup>2</sup> KRS 342.0011(32) defines physician.

Since Hammond assessed the impairment rating and a physician did not adopt his impairment rating, TKT argues Perkins did not submit an impairment rating in conformity with Chapter 342, and the ALJ should not have relied upon it in concluding he had an impairment rating due to the right shoulder injury. Thus, the finding the right shoulder injury resulted in the 7% impairment rating must be reversed.

Second, TKT asserts since the ALJ adopted an invalid impairment rating he erred in awarding PPD benefits based on the 7% impairment rating. It asserts no other physician assessed an impairment rating upon which to base an award of PPD benefits. Since Hammond's impairment rating is not in conformity with the AMA Guides and Kentucky law, TKT maintains the award of PPD benefits based on the 7% impairment rating is error and the award must also be reversed.

Third, TKT argues the ALJ erred in relying upon the date of Hammond's evaluation as the basis for his determination of the date of MMI. Since Hammond's impairment rating cannot be substantial evidence, TKT maintains the ALJ cannot base his determination as to when Perkins attained MMI upon the date Hammond assessed the

impairment rating. Therefore, the ALJ's decision as to the date of MMI must be reversed.

Fourth, TKT contends the ALJ erred in not relying upon the impairment rating and the opinions of Dr. David Jenkinson expressed in his report. It notes Dr. Jenkinson, a board certified surgeon, opined Perkins did not have an impairment rating. Since Perkins failed to introduce an impairment rating from a physician, TKT contends the ALJ was required to rely upon Dr. Jenkinson's impairment rating for the right shoulder injury as his opinion is the only valid impairment rating. On remand, it requests the ALJ be instructed to adopt the opinions of Dr. Jenkinson regarding entitlement to PPD benefits, the date of MMI, and entitlement to future medical benefits for the right shoulder injury.

The second argument asserted by TKT, as insured by KESA, hereinafter referred to as ("KESA"), is the ALJ erred in failing to apportion medical benefits for Perkins' hearing loss among the two insurance carriers. KESA maintains it was the insurance carrier for only six weeks of the entire time Perkins worked for TKT. KESA posits Dr. Eisenmenger could not determine, within reasonable medical probability, the portions of Perkins' hearing loss attributable to cumulative trauma, direct trauma, his

tumor, his age, or genetics. It asserts even though Perkins settled his claim against Brickstreet, the carrier for the traumatic hearing loss bears responsibility for some portion of Perkins' future medical expenses. It concludes by arguing as follows:

In the same manner upon which the ALJ relied on the University Evaluator's opinion concerning the inability to apportion functional impairment, the same issue exists with respect to the apportionment of medical benefits. It is important to note that the University Evaluator was unable to state beyond reasonable medical probability what portion each of the potential causes of Plaintiff's hearing loss contributed to his total hearing loss. She was also unable to do so with respect to his need for future medical benefits. In fact, the Defendant submits that there is no substantial evidence in the record upon which the ALJ may rely in an effort to address the question of future medical apportionment. The logical conclusion that follows is that if Plaintiff failed to satisfy his burden of proof with respect to apportionment of impairment, then on the same basis he also failed to do so with respect to the apportionment of future medical benefits. To hold otherwise would be to place a treating physician in the untenable position of having to determine whether the treatment he/she is recommending is for traumatic hearing loss, cumulative hearing loss, age related hearing loss, genetic related hearing loss, or hearing loss related to Plaintiff's tumor.

Because we agree the ALJ improperly relied upon Hammond's impairment rating and report, we reverse the finding of a 7% impairment rating and the award of PPD benefits for the right shoulder injury. However, we vacate the award of future medical benefits, the finding of the date of MMI, and the award of TTD benefits.

Attached to Perkins' Form 101 alleging work-related hearing loss due to a single trauma and a right shoulder injury, is an August 21, 2014, letter concerning a disability impairment rating from Premier addressed to Dr. Leith authored by Hammond, the evaluator. There is no disagreement that, at the time of his evaluation, Hammond was not a physician as defined in Chapter 342. In the letter, Hammond notes Perkins was referred to the clinic for a functional evaluation on August 21, 2014. The letter states at Dr. Leith's request a disability rating based on the AMA Guides was included in the letter. After setting forth a brief history, Hammond noted Dr. Leith had diagnosed impingement with bursitis. He also provided Perkins' subjective complaints and the objective data he obtained consisting of range of motion measurements for Perkins' right shoulder. At the conclusion, Hammond provided the following:

Using directions from Chapter 16, tables 16-40, 43, and 46 from *The American Medical Association-Guides to the Evaluation of Permanent Impairment, 5<sup>h</sup> Ed.*, **Mr. Perkins** has a **12% impairment rating for the right upper extremity**. The **whole person impairment total is 7%**. The solution was derived from pg. 439, table 16-3.

We are unable to locate in the record a report or note from Dr. Leith generated after August 21, 2014, the date Hammond provided his assessment. The only document from Dr. Leith relating to an impairment rating is his note of July 2, 2014, which contains a diagnosis of "shoulder impingement, acute."<sup>3</sup> Dr. Leith noted paresthesias of the right arm. In his assessment plan, Dr. Leith stated:

Because of continued numbness, tingling, and weakness in the right upper extremity, I will refer to neurologist for further evaluation. Script also given for him to be evaluated by Premiere [sic] for impairment rating. Follow up 1-2 months.

This July 2014 note is the most recent record of Dr. Leith contained in the record. As noted by TKT, no other physician offered an opinion regarding an impairment rating except Dr. Jenkinson, who concluded, pursuant to the

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<sup>3</sup> In his report of January 11, 2013, Dr. Leith diagnosed impingement with bursitis - tendonitis 726.10 acute.

AMA Guides, Perkins did not have an impairment rating as a result of the right shoulder injury.

KRS 342.0011(11)(b) defines permanent partial disability as follows: "'Permanent partial disability' means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work."

KRS 342.0011(35) defines permanent impairment rating as: "'[p]ermanent impairment rating' means percentage of whole body impairment caused by the injury or occupational disease as determined by the 'Guides to the Evaluation of Permanent Impairment.'"

Sections 2.1 and 2.2 of the AMA Guides mandate as follows:

### **2.1 Defining Impairment Evaluations**

An **impairment evaluation** is a medical evaluation performed by a physician, using a standard method as outlined in the *Guides* to determine permanent impairment associated with a medical condition. An impairment evaluation may include a numerical impairment percentage or rating, as defined in the *Guides*. An impairment evaluation is not the same as an **independent medical evaluation** (IME), which is performed by an independent medical examiner who evaluates but does not provide care for the individual. Impairment evaluations may be less comprehensive than IMEs and may be performed by a treating physician or a nontreating physician,

depending upon the state's requirements and the preferences of the individual, physician, and requesting party. Examples of an impairment evaluation and components of a comprehensive IME will be discussed later in this chapter.

## **2.2 Who Performs Impairment Evaluations?**

Impairment evaluations are performed by a licensed physician. The physician may use information from other sources, such as hearing results obtained from audiometry by a certified technician. However, the physician is responsible for performing a medical evaluation that addresses medical impairment in the body or organ system and related systems. A state may restrict the type of practitioner allowed to perform an impairment evaluation, and some require additional state certification and other criteria, such as minimum number of hours of practice, before the physician is approved as an impairment evaluator. The physician is encouraged to check with the local workers' compensation agency, industrial accident board, or industrial commission concerning their prerequisites.

Kentucky law mandates an impairment rating must be assessed by a licensed physician. Physician is defined by KRS 342.0011(32) as follows: "'Physician' means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic

practitioners acting within the scope of their license issued by the Commonwealth.”

By statute, Hammond is not a physician. Therefore, since Perkins did not introduce a document in the form of a report, note, or letter from Dr. Leith in which he adopted Hammond’s evaluation and impairment rating, the ALJ could not rely upon the impairment rating assessed by Hammond as the impairment rating of Dr. Leith. Consequently, the ALJ erred in finding Perkins has a 7% impairment rating resulting from the right shoulder injury.

Perkins argues TKT failed to timely object to Hammond’s letter/report providing the impairment rating or present a medical opinion discrediting the report. He notes this issue was not raised in the Form 111, or notice of claim denial, and a motion to strike the report was not filed at any time thereafter. Perkins relies upon the Supreme Court’s holding in Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). Perkins references Dr. Leith’s July 2, 2014, note in which he indicated he would send Perkins to Premier for an impairment rating, and argues there was no attempt to discredit the impairment rating generated at the request of Dr. Leith. He asserts identifying a contested issue to be whether the impairment rating is in accordance with the AMA Guides in the Benefit Review Conference

("BRC") order was not a timely objection. Perkins maintains TKT did not timely object to Hammond's report as it waited until proof time was closed and it did not specify in the BRC order what was being contested.

Alternatively, Perkins contends if TKT's argument has validity, the claim should be remanded to allow TKT to present proof that Dr. Leith did not request the impairment rating, he disavowed the impairment rating, or the impairment rating was not properly assessed pursuant to the AMA Guides. Further, Perkins notes TKT never presented any medical evidence demonstrating the impairment rating was not properly calculated pursuant to the AMA Guides. Perkins also maintains KRS 342.730(1)(b) does not state an impairment rating must be calculated by a physician.

We find no merit in this counter-argument as the statute directs the impairment rating must be in accordance with the AMA Guides. The AMA Guides dictate an impairment evaluation must be performed by a licensed physician. Pursuant to KRS 342.0011(32), Hammond is not a physician. Therefore, since the record does not establish Hammond's impairment rating and evaluation was reviewed and adopted by Dr. Leith or any other physician, the ALJ erroneously relied upon the 7% impairment rating assessed by Hammond.

Perkins had ample opportunity to introduce a report or letter from Dr. Leith verifying the report and accepting the findings and impairment rating of Hammond as his own. As previously noted, a report or record from Dr. Leith generated after August 21, 2014, the date of Hammond's assessment, was not introduced as evidence.

The March 10, 2015, BRC Order sets forth the contested issues and additionally notes under the heading of "Other," the following: "[e]ntitlement to benefits per KRS 342.7305; is impairment rating in accordance with the AMA Guides." In an agreed order dated March 11, 2015, joining Brickstreet as a party, the ALJ noted the parties agreed Brickstreet provided coverage to TKT on October 11, 2012. Two days earlier, on March 9, 2015, TKT as insured by KESA, had filed a motion to reset proof taking stating the ALJ should afford Brickstreet the opportunity to submit proof. To deal with the added complexities presented by TKT having different insurance coverage for the alleged injuries, it requested proof taking be reset for all parties. Pursuant to this motion, in a March 30, 2015, Order, Perkins was granted an additional thirty days to submit proof and thereafter Brickstreet and KESA had thirty days to submit proof. Perkins had fifteen days for rebuttal.

On June 8, 2015, Perkins filed a motion to reset the final hearing noting Brickstreet had reached a settlement agreement with him and TKT's proof-time had expired. In his amended witness list filed June 15, 2015, Perkins stated as follows: "Additionally, attached to the Form 101 was Dr. Leith's confirmation of the Plaintiff's impairment rating from his left [sic] shoulder work injury." We are unable to locate any such document attached to the Form 101 in which Dr. Leith confirmed the impairment rating. Significantly, this sentence confirms Perkins recognized the need for Dr. Leith to confirm the impairment rating assessed by Hammond.

Perkins' assertion TKT waited until proof time was closed before it objected to the impairment rating is misleading as the record demonstrates this issue was first raised by Perkins at the March 10, 2015, BRC. On March 30, 2015, Perkins was granted an additional thirty days to submit proof and an additional fifteen days to submit rebuttal proof. Perkins did not attempt to rehabilitate Hammond's impairment rating which was statutorily deficient.

Further, we believe Copar, Inc. v. Rogers, supra, is inapplicable to the facts in the case *sub judice*. In Copar, supra, the employer failed to object to the

admission of hospital records relied upon by Rogers to establish the existence and cause of his psychiatric condition. In concluding Copar had waived its objection to these medical records, the Supreme Court stated as follows:

KRE 103 provides that an allegation of error may not be based on a ruling that admits evidence unless a substantial right of the party is affected and unless the party makes a timely objection or motion to strike. It was not until after the claim was taken under submission, in its tardy brief to the ALJ, that the employer first objected to the use of opinions contained in the claimant's hospital records to prove the existence and cause of her psychiatric condition. The employer maintains, however, that the regulation concerning medical reports is more specific than the regulation concerning the Rules of Evidence and, therefore, that hospital records must meet the requirements of the medical report regulation in order for the opinions they contain to be considered as evidence. It requires that medical reports must be signed or authenticated and accompanied by a statement of the qualifications of the individual making the report. Seeking to excuse its failure to object earlier, the employer maintains that if the claimant intended to rely on opinions from the hospital records to prove a psychiatric injury, it was her burden to give notice of their intended use.

Contrary to the employer's assertion, we are persuaded that nothing in 803 KAR 25:010E, § 9 or 12 abrogates KRE 103. The time for taking proof with respect to this claim closed well before the hearing was held. At the

hearing, the ALJ specifically noted that the hospital records were the only evidence concerning the psychiatric condition. It was apparent, therefore, that the claimant intended to rely upon them to prove the condition's existence and cause. Yet, when questioned by the ALJ, the employer failed to object to such use of any medical opinions they contained and indicated only that it intended to introduce no psychiatric evidence. Furthermore, the employer signed, without objection, the hearing order that listed the hospital records as evidence for the claimant.

803 KAR 25:010E, § 12(2) is a specific regulation that addresses the admission of hospital records into evidence. It clearly anticipates that medical opinions contained in such records will sometimes be considered by an ALJ. Although the regulation specifies that opinions contained in such records shall not be considered in violation of KRS 342.033, it does not require that they be signed by the author or that the qualifications of the author be attached. Therefore, it is open to debate whether 803 KAR 25:010E, § 9 applies to opinions that are found in hospital records. In any event, we are persuaded that the employer's failure to raise a timely objection to such use of the claimant's hospital records was fatal to its present assertion of error.

Id. at 560-561.

In the case *sub judice*, Hammond's August 21, 2015, letter was attached to the Form 101. At that time the document may or may not have been admissible depending on whether Perkins introduced medical proof from a

physician adopting Hammond's evaluation and impairment rating as his or her opinion and impairment rating. As noted herein, Perkins failed to introduce any such letter from Dr. Leith. Unlike in Copar, Inc. v. Rogers, supra, the employer timely raised an objection to the impairment rating assessed by Hammond as it was raised at the March 10, 2015, and July 28, 2015, BRCs. We believe the record establishes Perkins was aware that a document from Dr. Leith should have been introduced adopting the evaluation and impairment rating of Hammond at some point during the proceedings.

Although not raised by Perkins, we must address TKT's failure to file a brief arguing this issue to the ALJ. TKT filed a motion for additional time to file a brief but no brief was filed. However, TKT's failure to file a brief did not waive its objection to the impairment rating assessed by Hammond. More importantly, the impairment rating assessed by Hammond is not in accordance with the AMA Guides. Because TKT timely raised the validity of Hammond's impairment rating as a contested issue, and the AMA Guides and, by extension, the statute do not permit an impairment rating to be assessed by anyone other than a physician, the ALJ could not rely upon the impairment rating assessed by Hammond.

The March 10, 2015, and July 28, 2015, BRC Orders signed by the parties indicates "[e]ntitlement to benefits per KRS 342.7305; is impairment rating in accordance with the AMA Guides; mileage" were contested issues. This sufficiently preserved the issue of whether Perkins introduced evidence pursuant to the AMA Guides of an impairment rating for the right shoulder injury. The failure to object to Hammond's letter attached to the Form 101 was not a waiver of TKT's right to object to any impairment rating offered for the shoulder injury. The administrative regulations require the parties identify the contested issues at the BRC. On all appropriate occasions, TKT raised the issue of whether Perkins had introduced an impairment rating for the right shoulder which was in accordance with the AMA Guides. Thus, the issue was properly before the ALJ and should have been resolved in favor of TKT.

We also agree the ALJ erred in awarding PPD benefits based upon the 7% impairment rating assessed by Hammond. Since the record contains no other impairment rating assessed by a physician supporting an award of PPD benefits, the award of PPD benefits must be reversed. This is consistent with KRS 342.0011(11)(b) which requires evidence of a permanent disability rating as a precursor to

an award of PPD benefits. Since the record does not contain a permanent disability rating in accordance with the statute, the ALJ was precluded from finding Perkins is permanently partially disabled and awarding PPD benefits.

We also agree the ALJ erred in determining Perkins reached MMI on August 21, 2014, the date Hammond assessed his impairment rating. The ALJ stated he accepted August 21, 2014, as the date of MMI since this was the date Perkins "was assigned the accepted and valid impairment rating." The ALJ's reliance solely upon Hammond's report in determining the date of MMI was error. Therefore, the ALJ's determination of MMI must also be vacated.

We find no merit in TKT's argument the ALJ erred by not relying upon the impairment rating of Dr. Jenkinson. In refusing to award PPD benefits, the ALJ merely had to determine Perkins had not met his burden of proof by submitting evidence establishing he had a permanent impairment rating justifying a finding of permanent partial disability and an award of PPD benefits. The ALJ was not required to accept the impairment rating of another physician. In other words, in declining to award PPD benefits the ALJ only had to find Perkins had not met his burden of establishing he sustained a permanent impairment rating as a result of the December 30, 2012, injury.

Similarly, the assertion this claim should be remanded with instructions to the ALJ to adopt the opinions of Dr. Jenkinson regarding the date of MMI and Perkins' entitlement to TTD benefits has no merit. Within his discretion, the ALJ specifically rejected Dr. Jenkinson's opinion as to when Perkins attained MMI. The ALJ may rely upon other medical evidence in the record, other than Dr. Jenkinson's report, in determining the date of MMI. The ALJ is not required to rely upon a physician's opinion as to MMI, if other medical evidence sufficiently establishes Perkins attained MMI on a different date. Stated another way, if the ALJ concludes other medical evidence in the record demonstrates Perkins was not at MMI on the date Dr. Jenkinson believed he reached MMI, the ALJ is free to reject Dr. Jenkinson's opinion in determining a different date of MMI. The ALJ must provide his reasons for rejecting Dr. Jenkinson's opinion. Upon determining an MMI date, the ALJ must then determine the period to which Perkins is entitled to TTD benefits.

Concerning the assertion the ALJ was required to adopt the opinions of Dr. Jenkinson regarding Perkins' entitlement to future medical benefits, in FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS 342.020(1) does not

require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Therefore, the absence of an impairment rating does not preclude the ALJ, on remand, from awarding future medical benefits. Consequently, we decline to remand the claim with instructions to find Perkins is not entitled to future medical benefits based on the opinion of Dr. Jenkinson. The ALJ determines, based on the medical evidence, whether Perkins is entitled to future medical benefits for his right shoulder injury.

We find no merit in the assertion of KESA that liability for Perkins' medical benefits for the work-related hearing loss should have been apportioned between KESA and Brickstreet.

First and foremost, KESA did not raise this as a contested issue at any of the BRCs. Thus, it waived its right to raise this issue for the first time in a petition for reconsideration. As previously noted, after the final hearing, TKT did not file a brief arguing this issue before the ALJ.

That said, the Court of Appeals' holding in CR & R Trucking Co., Inc., as insured by Liberty Mutual Insurance Company v. Newcomb, et al, 2009-CA-000191-WC,

rendered August 7, 2009, Designated Not To Be Published, is dispositive of this issue. Newcomb sustained two work-related back injuries while employed by CR & R Trucking. When Newcomb first injured his back in 1981, CR & R Trucking was insured by Old Republic Insurance. Newcomb again injured his back while working for CR & R Trucking in 1987 when Liberty Mutual was the insurance carrier for CR & R Trucking. In January 1990, the ALJ rendered an opinion and award deciding both issues and finding Newcomb totally disabled attributing 70% of the disability to the 1981 injury and 30% to the 1987 injury.

In 2007, Newcomb's treating physician requested an MRI for which Liberty Mutual refused to pay. Newcomb filed a motion to reopen and a Form 112 medical fee dispute. The ALJ rendered an opinion and order finding the MRI reasonable and necessary and Old Republic Insurance responsible for the medical expenses because the 1981 injury was more significant than the 1987 injury. Old Republic Insurance appealed. This Board disagreed with the ALJ's analysis, concluding Liberty Mutual was wholly liable for Newcomb's medical expenses, and reversed that portion of the ALJ's decision. Liberty Mutual appealed. The Court of Appeals in affirming the Board stated:

Furthermore, in Derr Construction Co. v. Bennett, 873 S.W.2d 824, 828 (Ky. 1994), the Kentucky Supreme Court held:

Because KRS 342.020 does not exempt an employer from liability for any portion of a worker's medical expenses in those instances where the work-related injury constitutes a progression or worsening of a prior, active work-related condition, we hold that the employer is responsible for the medical expenses necessary for the cure and relief of the [condition].

The original opinion in this case awarded future medical expenses to Newcomb, but it did not apportion future medical expenses between the two insurance companies. On reopening, the ALJ concluded:

It is clear from Judge McDermott's opinion that he considered the 1981 date of injury the more significant one. It is also clear from the record that the 1981 injury necessitated a surgery in December, 1986 (prior to the second date of injury). It is from this surgery, and its aftermath, that the Plaintiff's problems flow. The responsible party shall be that party on the risk for the 1981 date of injury.

Liberty Mutual relies on Phoenix Mfg. Co. v. Johnson, 69 S.W.3d 64 (Ky. 2001), where the Kentucky Supreme Court approved equal apportionment of medical expenses between two insurance

carriers. *Id.* at 69. Based upon our review, however, we believe Liberty Mutual has overlooked an important difference. In *Phoenix*, the ALT approved a settlement agreement between two insurance carriers to split equally all future medical expenses. *Id.* at 66. The Court clearly emphasized this fact in concluding that apportionment was proper. *Id.* at 68-69. Consequently, we believe *Phoenix* is factually distinguishable.

Liberty Mutual also relies on *Sears Roebuck & Co. v. Dennis*, 131 S.W.3d 351 (Ky. App. 2004), where a panel of this Court approved the apportionment of medical expenses between two different insurers, "when the circumstances so warrant." *Id.* at 356. *Sears* addressed a claimant who suffered a back injury with one employer and a psychological injury with a subsequent employer. *Id.* at 353. In affirming, this Court noted that there were distinct, separate injuries and expert testimony specifically supported apportionment of medical expenses. *Id.* at 356.

Liberty Mutual asserts that *Sears* supports apportionment of all medical expenses to Old Republic because the original ALJ found Newcomb's 1981 injury was more severe, and Newcomb underwent back surgery prior to his second injury. We disagree.

The facts show that Newcomb sustained an injury to the same body part, his lower back, during both the 1981 and 1987 incidents. Although the original ALJ assigned 70 percent disability for the 1981 injury, we are not persuaded that this translates to an apportionment of future medical expenses. Furthermore, the record on

reopening contains no evidence to support the ALJ's conclusion that Old Republic was liable for future medical expenses. While the medical evidence provided opinions as to the necessity of the MRI, neither physician offered an opinion regarding whether one injury or the other was the cause of Newcomb's complaints. Although Liberty Mutual contends the circumstances of this case rendered Old Republic liable for future medical expenses, we conclude that, unlike in *Sears*, the record was devoid of evidence to support such an apportionment.

Finally, the Board, in addition to analyzing *Derr*, *Phoenix*, and *Sears*, quoted an unpublished decision of this Court, *Res-Care, Inc. v. Fritz*, 2004-CA-002167-WC (March 11, 2005). *Fritz* addressed facts very similar to the case at bar, and a panel of this Court concluded:

While it is clear that the *Phoenix* and *Sears*, *Roebuck* cases set out exceptions to the general rule put forth in *Derr*, we find them to be factually distinguishable from this case. While the result may seem harsh as stated in *Derr*, that is the law and the legislature has not seen a reason to address this situation since *Derr* was rendered. We are bound by *Derr* and fail to see any basis for reversing the Board. The Board's opinion did not overlook or misconstrue controlling statutes or precedent nor did it commit an error in assessing the evidence so flagrant as to cause gross

injustice. *Western Baptist Hospital*, 827 S.W.2d at 687-88.

*Fritz*, slip op. at 13. Although *Fritz* is not binding authority, we agree with the Court's analysis and resolution. [footnote omitted] Based upon our review of the statutes and cases relied upon by the parties, we conclude the Board neither erred in reversing the ALJ nor exceeded the scope of its review.

Slip Op. at 3-6.

Based on the above rationale, KESA bears the responsibility for all medical benefits related to Perkins' work-related hearing loss.

On cross-appeal, Perkins maintains the ALJ correctly relied upon the opinions of Dr. Eisenmenger in finding he had a cumulative trauma hearing loss. Perkins notes KRS 342.7305(1) clearly states work-related hearing loss can be due to either a single trauma or repetitive exposure to hazardous noise. He relies upon Dr. Eisenmenger's statement in the Form 108 that the work-related hearing loss resulting in a 20% impairment rating was not caused by a single trauma. Thus, the ALJ erroneously determined he failed in his burden of proving a cumulative trauma hearing loss because he had not met the 8% threshold. Perkins submits the ALJ erroneously rejected his claim for income benefits for the hearing loss because

he believed Dr. Eisenmenger could not apportion the 20% impairment rating between the cumulative trauma and single trauma hearing loss. Perkins argues since Dr. Eisenmenger concluded his hearing loss, meriting a 20% impairment rating, is due to either repetitive exposure or one traumatic exposure to hazardous noise at work, the ALJ erred by failing to award income benefits as the impairment rating exceeds the 8% statutory threshold. We agree and vacate the ALJ's determination Perkins is not entitled to income benefits for his work-related hearing loss.

Fundamental to the issue on cross-appeal is the understanding that the law in Kentucky directs the last employer with whom the worker was injuriously exposed to hazardous noise shall bear the entire liability for the hearing loss. In Greg's Const. v. Keeton, 385 S.W.3d 420, 425 (Ky. 2012), the Supreme Court held:

The ALJ did not err by determining that the claimant sustained an injurious exposure to hazardous noise in his employment with Greg's. Workers' Compensation is a statutory creation. KRS 342.0011(4) defines an injurious exposure as being "that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made." Although Chapter 342 considers noise-induced hearing loss to be a gradual injury for the purposes of notice and limitations, [footnote omitted] KRS

342.7305(4) treats the condition much like KRS 342.316(1)(a) and KRS 342.316(10) treat an occupational disease for the purpose of imposing liability. Mindful that none of these statutes makes an employer's liability contingent on a minimum period of exposure and that Chapter 342 contains but one definition of injurious exposure, we conclude that KRS 342.0011(4) defines the term not only with respect to a disease but also for the purpose of KRS 342.7305(4). Contrary to what Greg's would have us conclude, the final clause of KRS 342.7305(4) does not require a worker to prove that the last employment caused a measurable hearing loss. It refers to the type of exposure to hazardous noise that would result in a hearing loss if continued indefinitely. [footnote omitted]

Consistent with the practical reality that workers change jobs, sometimes frequently, as well as the medical realities that noise-induced hearing loss develops gradually and that audiometric testing is based to some degree on the worker's subjective responses, KRS 342.7305(4) imposes liability on the last employer with whom the worker was injuriously exposed to hazardous noise. Like KRS 342.316(1)(a) and KRS 342.316(10), KRS 342.7305(4) bases liability solely on the fact that the employment involved a type of exposure known to be injurious, *i.e.*, a repetitive exposure to hazardous noise.

Thus, TKT is solely liable for Perkins' hearing loss due to repeated injurious exposure to hazardous noise.

The Form 108 prepared by Dr. Eisenmenger reflects the following diagnoses:

Mr. Perkins has greater hearing loss than would be expected for an individual of 51 years of age. Objective and behavioral measures are consistent and show a high frequency pattern typical of that seen with long term noise exposure. The conductive component in the right ear is likely the result of the glomus tumor. Without hearing test results prior to the acoustic trauma event, it is difficult to separate the contribution of the noise exposures. Based on the reported history of noise exposure, the report of an acoustic trauma ta [sic] work the apparent absence of other factors associated with hearing loss, and the results of the hearing evaluation, the primary cause of this hearing loss is long term noise exposure with a secondary cause of the conductive component from the glomus tumor.

Under the heading of "Causation," Dr. Eisenmenger answered questions 1, 2, and 3 as follows:

1. Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. **Yes**

2. Within reasonable medical probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment. **Yes**

3. Within reasonable medical probability, is plaintiff's hearing loss due to a single incident of trauma? **No**

Dr. Eisenmenger opined Perkins had a 20% impairment rating pursuant to the AMA Guides; none of which was active prior to acquiring the work-related condition.

In her deposition of July 30, 2015, introduced by TKT, Dr. Eisenmenger testified whether a single event generating loud noise can cause hearing loss depended on the loudness and how close the event was to the individual. She noted Perkins had been exposed to noise at work and was close to a very loud sound. Dr. Eisenmenger testified many people do not realize they have hearing loss until it reaches a certain degree, then suddenly it becomes noticeable. Therefore, a traumatic event may have added to his hearing loss and made Perkins aware of it.

Dr. Eisenmenger testified she sees many individuals who indicate they have no hearing loss but in fact do, and do not realize it. Dr. Eisenmenger had no data as to Perkins' hearing capabilities before the event on October 11, 2012. Dr. Eisenmenger explained:

A: Well, the audiogram just gives you information about how that person's hearing is at the moment in time when that test was done. And what caused the hearing loss can sometimes be more problematic when there are multiple factors and how much.

Significantly, Dr. Eisenmenger concluded the conductive hearing loss "was most likely due to the tumor,"

since during her examination "we were able to at least remove the conductive component that was there that is not going to be caused by noise exposure." Accordingly, her impairment rating did not take into consideration Perkins' conductive hearing loss due to the tumor.

With respect to causation, Dr. Eisenmenger explained it was hard for her to state how much of the loss was due to regular day-to-day exposure to noise versus the one traumatic event. Her uncertainty was due to the inability to ascertain the loudness of the noise generated by the event of October 11, 2012. However, Dr. Eisenmenger noted Perkins did not notice tinnitus until after the event which indicates the noise generated by the falling steel was probably "good and loud." She explained it was significantly loud enough to cause tinnitus.

As to the length of exposure to hazardous noise necessary to develop Perkins' hearing loss, Dr. Eisenmenger explained:

Q: To develop that level of permanent hearing loss that this guy has, is it something that he's exposed for a week? Does it take a month?

A: It takes longer.

Q: Does it take a year? Two years? I mean, what typically - if there is a typically, typically how long would you

expect to see someone exposed to noise with those results?

A: I have to go back again and say, 'Well, how loud was the noise,' because the louder the noise, the sooner you're going to see it.

Q: Okay.

A: And I don't know how loud the noise exposure is for him on a day to day basis or was for him on a day to day basis at work. I have no information on that to be able to say.

Q: Okay.

A: But, you know, it's going to take several years, anyway. It's not going to happen overnight. It's not going to, you know - you're not going to walk into some place, and six months after you start working there, have a hearing loss this bad. You might be starting one, and it might continue to progress, but it won't be this bad.

There are no set standards, rules, anything, that can tell you exactly how fast somebody's hearing loss is going to progress unless you have really good noise data.

Concerning the significance of the October 11, 2012, incident, Dr. Eisenmenger testified:

A: And tinnitus is very - it goes along - you know, it kind of hangs around with hearing loss, and usually the worse the tinnitus, usually the worse the hearing loss.

So if he had a hearing loss up to the moment that this happened, it obviously was not causing him the ringing, the noises in his head that

followed the event and then continued after the event.

So I do believe that there was some sort of significant change in his hearing, but I don't know where it started. I don't know - I don't know what the start time is. I don't know where we were at the time that happened.

So that would be handy, you know. If he had his hearing test the day before and it happens, then we can say, 'Oh, we have this much more hearing loss because of this event.' But we don't have that. We don't have - at least I don't have - this one was 8/16/13 - 8/6, I can't read.

. . .

Q: At least from his account and from his statement and testimony, the tinnitus didn't begin until after that traumatic event when the steel dropped in front of him.

A: I think that's why he focuses in on that being the - you know, the big event because it was significant change in this hearing.

And I say 'significant.' It may not have been that much of a change in his hearing, but the tinnitus suddenly appears and has remained. So, yeah.

Concerning her opinion expressed in the Form 108,

Dr. Eisenmenger testified:

Q: And according to your Form 108, was it your opinion that the primary cause of the high frequency pattern loss you found was long-term noise exposure?

A: By the shape of the high frequency hearing loss and the fact that he had been around noise for a significant period of time, that's where that statement came from.

So I believe that the high frequency portion of the hearing loss more likely than not was influenced by the noise around which he worked without the use of ear protection.

As to whether the hearing loss was due to long-term noise exposure as opposed to the traumatic event, Dr. Eisenmenger testified:

A: Again, you know, that is my - how do I want to phrase this?

I think that perhaps he - I think it's probably a combination of both actually. I mean, it's not just the long - I don't think it's necessarily all long-term noise exposure. Part of it, I believe, likely occurred during that loud traumatic incident.

But I think based on some of the other things, the fact that he had noise exposure in addition at work to just this noise event, like it's a combination of both.

Q: And it was your testimony earlier that the greater the level of noise he's exposed to at work, the shorter the period of time to develop hearing loss; is that correct?

A: I'm trying to - ask me that again.

Q: Was it your testimony earlier that the greater the level of noise exposure at work, the shorter the period of time to develop hearing loss?

A: Certainly the level of the noise is going to have an affect [sic] on how quickly that hearing loss develops, and I think it's pretty evident by the OSHA guidelines that say, you know, if the noise gets too loud, you can only be in that noise environment unprotected maybe for two hours.

So certainly the intensity of the noise is going to have - play some role in how long it takes for that hearing loss to develop. But, you know, again, in this case, we have perhaps two totally different types of events going on, long-term exposure and then a sudden event that occurred at the same - or at some point in time.

Q: Okay. Now, I'm sure the administrative law judge is going to try to determine this question: How would you apportion his hearing loss percentage of impairment between the long-term exposure and the sudden traumatic loss event?

A: As I was stating earlier, without previous test results prior to the traumatic event, that would be almost impossible for me to determine. I would not feel comfortable trying to say, oh, I think about this percentage is from long-term noise exposure; this percentage is from the traumatic event reported by the patient. They add together, and I don't have a - we do not have a good way of being able to separate those out.

Q: So would you agree at this point that you're relying upon the results of your form 108 evaluation?

A: Yeah. And that represents what his hearing was like that day regardless of what caused it.

Dr. Eisenmenger's opinions firmly establish the 20% impairment rating was assessed for hearing loss caused solely by exposure to hazardous noise at work. The hearing loss was occasioned by one traumatic event or repeated exposure to hazardous noise at work, or both. Thus, Perkins met the 8% threshold and is entitled to income benefits. That being the case, the ALJ was required to determine what portion of the 20% impairment rating, if any, is attributable to the single event of October 11, 2012. That portion, if any, of the impairment rating attributable to that one event is not compensable as Perkins settled his claim for income benefits with Brickstreet, the insurance carrier at risk on October 11, 2012. The remaining percentage is compensable and an award of PPD benefits is mandated.

Consistent with the statute, on remand the ALJ must address Dr. Eisenmenger's opinions expressed in the Form 108 attributing the entire impairment rating to the cumulative trauma hearing loss and not to the single incident occurring on October 11, 2012. In the findings of fact and conclusions of law, the ALJ did not address Dr. Eisenmenger's opinions set forth in the Form 108. During her deposition, Dr. Eisenmenger retreated somewhat from that position. However, at the conclusion of cross-

examination she acknowledged her findings contained in the Form 108, regardless of causation, accurately represented Perkins' hearing on the date of her examination. Significantly, the ALJ did not resolve whether any or all of Perkins' hearing loss is attributable to the October 11, 2012, event. Given Dr. Eisenmenger assessed a 20% impairment rating entirely due to work-related hearing loss, it was incumbent upon the ALJ to determine the compensable portion of Perkins' work-related hearing loss.

The issue is whether any portion of the work-related hearing loss is attributable to the event of October 11, 2012. On remand, in the event the ALJ finds a portion of the 20% impairment rating was caused by the October 11, 2012, event, the impairment rating attributable to that event must be subtracted from the 20% impairment rating in calculating the award of PPD benefits. Since Perkins settled his claim for the hearing loss occasioned by the October 11, 2012, event, he has already been compensated for this hearing loss. The impairment rating attributable to the repetitive exposure to hazardous workplace noise then serves as the basis for the award of PPD benefits. Thus, the claim must be remanded to the ALJ for a determination of the extent of the hearing loss attributable to the event occurring on October 11, 2012.

As pointed out earlier, KESA, as the carrier at risk at the time of last exposure to the hazardous noise in the workplace bears the entire liability for all medical benefits for Perkins' work-related hearing loss.

Accordingly, those portions of the September 4, 2015, Opinion, Order, and Award and the October 12, 2015, Order ruling on the petitions for reconsideration finding Perkins has a 7% impairment rating as a result of the right shoulder injury occurring on December 30, 2012, and the award of PPD benefits are **REVERSED**. Those portions of the September 4, 2015, Opinion, Order, and Award and the October 12, 2015, Order determining Perkins attained MMI on August 21, 2014, awarding TTD benefits and future medical benefits are **VACATED**. This claim is **REMANDED** to the Administrative Law Judge for a determination of the date Perkins attained MMI, an award of TTD benefits, and a determination of the extent to which he is entitled to medical benefits for his right shoulder injury in accordance with the views expressed herein. The ALJ shall order Perkins is not entitled to permanent income benefits for the right shoulder injury.

Those portions of the September 4, 2015, Opinion, Order, and Award and the October 12, 2015, Order ruling on the petitions for reconsideration determining Perkins is

not entitled to income benefits for his work-related hearing loss are **VACATED**. The claim is **REMANDED** for entry of an amended opinion and award determining the impairment rating attributable to Perkins' repetitive exposure to hazardous noise in the workplace and an award of income benefits in conformity with the views expressed herein. The ALJ shall order KESA is liable for future medical expenses necessary for the cure and relief of the work-related hearing loss.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

**RECHTER, MEMBER.** I agree with the majority's ultimate conclusion that the impairment rating submitted by Premier Therapy was never formally adopted by Dr. Leith and, therefore, does not comport with the AMA Guides or applicable Kentucky regulations. However, I am compelled to state my disagreement that TKT properly preserved this objection.

It is not uncommon for a physician to request that an impairment rating be assessed by other health care professionals, which the physician then later reviews and adopts. Perkins' counsel stated, in his amended witness list filed June 15, 2015: "attached to the Form 101 was Dr.

Leith's confirmation of the Plaintiff's impairment rating from his left shoulder work injury." In fact, the confirmation letter was not attached to the Form 101. Perkins' counsel is responsible for this oversight.

However, there is no indication in the record TKT ever made a specific objection to the admission of Dr. Leith's report or filed a motion to strike. Further, because it never filed a brief to the ALJ, TKT did not raise its objection in any pleading prior to final adjudication. Rather, it first raised the issue in its petition for reconsideration. Whether defense counsel also overlooked Dr. Leith's missing confirmation letter, or simply declined to enter a more specific objection which would likely have resulted in a swift admission of the missing letter, we cannot know.

On appeal, TKT argues the issue is properly preserved by inclusion, in the BRC order, of the following contested issue: "is the impairment rating in conformity with the AMA Guides." This same issue was listed in a second BRC order after a prior conference was cancelled. It is true that only issues identified as contested at the BRC may be the subject of further proceedings. However, this regulation does not serve to relieve a party of entering more specific objections. The mere identification of

"conformity with the AMA Guides" in no way serves as a substitution for a specific objection based on exact grounds for exclusion. I cannot agree TKT entered a timely objection to the admission of the impairment rating assessed at Dr. Leith's request.

Nonetheless, because the impairment rating does not satisfy the statutory requirements, as a matter of law, we are compelled to reverse the award.

I also disagree with the majority that this matter should be remanded for further findings of fact regarding the cumulative hearing loss claim. In his Opinion, the ALJ summarized Dr. Eisenmenger's Form 108 and noted her finding Perkins' "hearing loss is related to repetitive exposure to hazardous noise over an extended period of employment." He then summarized her deposition testimony in which, as the majority notes, retreats somewhat from the Form 108. At the deposition, Dr. Eisenmenger reaffirmed Perkins' overall level of hearing loss, but explained why she could not definitively apportion this overall hearing loss between the traumatic event and cumulative exposure: "How much of that was a day to day exposure over a long period of time versus any additional change in his hearing caused by this very loud noise event caused by the steel being dropped, we can't separate. So, you know, I can't say one versus the other

caused it." She repeated this sentiment throughout her deposition testimony. It is clear from the ALJ's summary of the evidence that he considered both the deposition testimony as well as the Form 108 statements.

Acting within his discretion as fact-finder, the ALJ chose to rely upon Dr. Eisenmenger's deposition testimony. He concluded Dr. Eisenmenger could not "say with any degree of certainty what percentage of his impairment rating from that hearing loss is attributable to the cumulative portion." This factual conclusion is well supported by the record.

The majority has asked the ALJ to determine, on remand, whether any portion of the hearing loss is attributable to the traumatic event, and to subtract that amount from the overall 20% hearing loss. The ALJ has already done so, and he concluded Dr. Eisenmenger did not provide a sufficiently reliable opinion on that point. As the claimant, it was Perkins' burden to establish the requisite 8% hearing loss due to cumulative trauma. He failed in this burden. The fact his overall hearing level exceeds the 8% threshold is immaterial. Perkins suffered a traumatic hearing loss event for which he was compensated through a settlement agreement with Brickstreet. Unfortunately, in his separate claim against TKT's insurer

at the end of his employment, he is unable to provide sufficient proof his cumulative hearing loss independently exceeds the threshold.

For these reasons, I concur in part and dissent in part.

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