Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 3, 2014

CLAIM NO. 200400504

TIMOTHY HANNAH PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

CALVIN BAKER
BRIAN TERRY
POPLAR BROOK DEVELOPMENT, LLC
BARBARA NEGROE
UNINSURED EMPLOYERS' FUND
RINKOO AGGARWAL, M.D.
HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

UNINSURED EMPLOYERS' FUND PETITIONER

VS.

TIMOTHY HANNAH
CALVIN BAKER
BRIAN TERRY
POPLAR BROOK DEVELOPMENT, LLC
BARBARA NEGROE
HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

* * * * * *

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

ALVEY, Chairman. Timothy Hannah ("Hannah") seeks review of the decision rendered April 16, 2014, by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ")[1], finding he was employed by Brian Terry ("Terry") on the date of injury, and dismissing claims against Poplar Brook Development, LLC ("Poplar Brook") and Barbara Negroe ("Negroe"). Hannah also appeals from the May 19, 2014 order denying his petition for reconsideration. The Uninsured Employer's Fund ("UEF") also appeals from the CALJ's April 16, 2014 decision finding it liable for the payment of benefits to Hannah, and from the May 19, 2014 order denying its petition for reconsideration.

On appeal, Hannah argues the CALJ erred in 1) not awarding temporary total disability ("TTD") benefits through October 19, 2012; 2) finding he reached maximum medical improvement ("MMI") on February 7, 2005; 3) determining he

[1] Although when the claim was originally assigned, J. Landon Overfield was an Administrative Law Judge, rather than the Chief Administrative Law Judge, he shall be referred to as CALJ at all times in this opinion.

retains the physical capacity to return to the type of work performed at the time of the injury; 4) determining his impairment rating was 5% pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") rather than the 6% rating assessed by Dr. Timothy Kriss; 5) failing to make sufficient findings of fact regarding his psychological condition; 6) awarding credit against benefits awarded from the TTD benefits paid by the UEF; and 7) finding he was not permanently totally disabled.

On appeal, the UEF argues the CALJ erred by finding Poplar Brook was not liable for Terry's undertaking of building Negroe's home. The UEF also argues the CALJ erred in finding Negroe not responsible for payment of benefits.

Regarding the CALJ's award of permanent partial disability ("PPD") benefits based upon a 5% impairment rating, we vacate and remand because he failed to address the additional 1% rating Dr. Kriss assessed due to left meralgia paresthetica. The CALJ also erred in awarding PPD benefits from and after February 25, 2005. Pursuant to Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009), the award of PPD benefits shall commence as of the date of the injury, for a period of 425 weeks. The obligation to

pay PPD benefits is suspended during the period TTD benefits are awarded. Therefore, the CALJ must order the PPD benefits commence with the date of injury, to be suspended during any period TTD benefits are awarded. Regarding all other issues, we affirm.

Hannah filed a Form 101 on March 10, 2014 alleging he sustained a compression fracture of his lumbar spine when he fell from a ladder on February 27, 2004 while working in Hardin County, Kentucky. The Form 101 lists Calvin Baker ("Baker"), Brian D. Terry, Poplar Brook and the UEF as parties. A scheduling order was issued by the Kentucky Office of Workers' Claims on April 26, 2004, assigning the claim to the CALJ. On May 13, 2004, Hannah filed a motion for interlocutory relief. The UEF filed a Form 111 claim denial on May 28, 2004. On June 28, 2004, the CALJ entered an order denying the motion for interlocutory relief.

On July 7, 2004, Hannah filed a motion for extension of time, and motion to bifurcate the claim for the CALJ to determine the relationship of the parties. An order granting the motion to bifurcate was issued on July 26, 2004. A benefit review conference ("BRC") was held on August 12, 2004. The parties agreed the bifurcated issues to be resolved were Hannah's employment status, and the correct calculation of his average weekly wage ("AWW").

Javier Aleman, an EMT with the Hardin County Ambulance Service, testified by deposition on August 2, 2004 to describe the site of the accident and to explain the ambulance report.

Hannah, Baker and Terry testified by deposition on August 5, 2004. A hearing was held regarding the bifurcated issues on August 24, 2004, at which time both Negroe and Hannah testified. Negroe was not a party to the proceedings, but appeared pursuant to subpoena. The parties subsequently submitted briefs solely on the bifurcated issues.

On October 21, 2004, the CALJ rendered a decision outlining the facts and his determinations. The CALJ correctly stated the factors set forth in Ratliff v. Redmond, 396 S.W.2d 320 (Ky. 1965), and Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969). The CALJ determined Baker was Terry's employee who had hired Hannah on Terry's behalf. Therefore, he determined Hannah was Terry's employee. The CALJ next determined Hannah's AWW was $400.00 per week. The CALJ determined Terry had no workers' compensation insurance in effect on the date of injury, and therefore he found the UEF responsible for payment of benefits to Hannah pending final resolution of the claim.

On December 21, 2004, the CALJ approved an agreed order executed by the UEF, Hannah, and counsel for Terry and Poplar Brook. The agreement set forth that Terry was in default of payment of TTD and medical benefits. The agreement states as follows:

> Consequently, the plaintiff, Timothy Hannah and the Uninsured Employer's Fund agree that the Uninsured Employers' Fund shall initiate payments based on the average weekly wage of $400 pursuant to KRS 342.730(1)(a). The payment of $266.66 per week by the Uninsured Employers' Fund shall begin on the date of the accident, February 27, 2004, and shall continue until terminated by order of the Administrative Law Judge or an Opinion and Award entered by the Administrative Law Judge finding liability for benefits in some other party other than the Uninsured Employer's Fund. The Uninsured Employer's Fund will also pay any medical expenses necessary for treatment of the work-related injury until plaintiff reaches maximum medical improvement.
>
> …
>
> This Agreed Order does not determine the rights or liabilities of any defendants. No defendant has waived any defense to the action by virtue of the entry of this Agreed Order.
>
> All defendants shall have a dollar for dollar credit for any overpayment of benefits made under this Agreed Order. Additionally, any award of benefits will be made against all primarily liable defendants on a dollar for dollar basis

> for all payments made under this Agreed Order.

Subsequently, the UEF paid TTD benefits at the rate of $266.66 per week for several years thereafter, until the CALJ issued an order on October 19, 2012 removing the claim from abeyance at Negroe's request.

Curiously, on July 31, 2006, while it was paying TTD benefits pursuant to the agreement, the UEF filed the July 25, 2006 report of Dr. David Shraberg, a psychiatrist, who had evaluated Hannah at its request. Despite subsequent introduction of psychiatric/psychological evidence, Hannah neither listed this as a condition in the Form 101, nor was a motion ever subsequently filed to include this as a component of his work-related injury. However, it appears this issue was tried by consent of the parties.

Dr. Shraberg evaluated Hannah on June 28, 2006. He diagnosed Hannah with no evidence of an Axis I diagnoses; borderline intelligence; nicotine dependency; narcotic dependency; status post compression fracture at L1 due to a fall from a ladder, recovered; GAF of 75; and no evidence for further treatment of neuropsychiatric complications from the February 27, 2004 injury.

No motion was made to remove the claim from abeyance, and the UEF continued to pay TTD and medical

benefits. Hannah continued to file status reports noting he was unable to work, and periodically filed notes from Dr. Rinkoo Aggarwal, his pain management physician.

On July 7, 2009, the UEF filed the May 18, 2009 report of Dr. Kriss, a neurosurgeon who evaluated Hannah at its request. Dr. Kriss diagnosed Hannah with a mild healed compression fracture of the L1 due to a fall from a ladder at work on April 27, 2004. Dr. Kriss also noted Hannah had "a classic case of meralgia paresthetica which is entrapment/irritability of the left lateral femoral cutaneous nerve." Dr. Kriss assessed a 5% impairment rating pursuant to the AMA Guides for the compression fracture, and a 1% impairment for the meralgia paresthetica. Dr. Kriss did not address restrictions. Dr. Kriss advised Hannah would reach MMI once he had completed right lumbar facet injections. In the absence of such injections, he stated Hannah had reached MMI as of February 27, 2005. No motion to remove the claim from abeyance was filed.

On July 1, 2011, the UEF filed a motion to join Negroe as a party. Over Negroe's objection, on July 14, 2011, the CALJ issued an order joining her as a party. Negroe later filed a motion to dismiss which was overruled by the CALJ on February 13, 2012. Meanwhile, no motion to

terminate TTD benefits had been filed, and the UEF continued to pay TTD and medical benefits.

On October 1, 2012, Negroe filed Dr. Kriss' report dated September 23, 2012. Dr. Kriss stated Hannah had been improperly diagnosed with a traumatic brain injury. He diagnosed a small endplate fracture, which he estimated was a 10-15% wedge compression. He stated Hannah's symptoms were out of proportion to his findings. Again, as he had done in 2009, Dr. Kriss assessed a 5% impairment rating pursuant to the AMA Guides for the compression fracture, and a 1% impairment rating due to the meralgia paresthetica. He opined Hannah had reached MMI as of February 27, 2005, and would have temporary restrictions for three weeks, after which time he could work full duty. Dr. Kriss further opined Hannah should be weaned from narcotics.

The UEF filed the July 22, 2013 supplemental report of Dr. Kriss which stated narcotics are not reasonable or medically necessary to treat the February 27, 2004 work injury.

Negroe moved to remove the claim from abeyance, and terminate TTD benefits on October 5, 2012. The CALJ issued an order on October 19, 2012 removing the claim from abeyance, and setting a proof schedule.

Hannah testified by deposition on August 5, 2004. He also testified at the hearing held August 24, 2004; his deposition on November 5, 2013; and at the final hearing held January 9, 2014. His employment history consists of working as a parts inspector, meter reader for a water utility, as a stone mason, and as a hod carrier. Prior to working on Negroe's house, Hannah had previously assisted Baker and Terry with constructing the stone entrance to the subdivision for which he was paid in cash. Hannah had met Baker earlier, and in fact rented a room to him. Baker had previously inquired about Hannah assisting him with building houses. Hannah eventually agreed to work for Baker and Terry in framing Negroe's house. Baker hired him to work at the rate of ten dollars per hour. No taxes were withheld, and no workers' compensation waiver was signed. Hannah had never framed a house before, and he worked strictly as a laborer. Hannah provided his own hammer, nail bag and measuring tape, but all other tools were provided by Baker and Terry. He stated Baker paid him in cash with money provided by Terry. He never met or saw the home owner, Negroe, until the first hearing.

On the date of the accident, Hannah was using a ladder while working on a deck. He fell from the ladder into a hole. He experienced a pop and pain in the middle of

his back to his tail bone. He later experienced pain in his right ankle due to blood clots. No surgery was ever performed for the injuries he received in the fall. He has continued complaints of pain in his left leg and the right side of his back. He also complained of pain in the front side of his left leg, near his pocket, and occasional toe numbness.

Despite his complaints, Hannah had obtained hunting and fishing licenses since 2004, as evidenced by documents filed by the UEF from the Kentucky Department of Fish and Wildlife. Hannah admitted to hunting and fishing after the accident, but only on a limited basis. He testified he did not believe he could perform any of his previous work.

Negroe testified at the August 24, 2004 hearing, at her deposition taken on December 21, 2012, and at the January 9, 2014 hearing. Negroe, Robert Tobiason and Terry were all engineers at General Electric. Terry approached Negroe and Tobiason about purchasing some land to develop a subdivision, and sell lots to future home owners. Negroe and Tobiason agreed, and the three of them formed Poplar Brook, which is a Limited Liability Company ("LLC") organized pursuant to Kentucky Law. The land was purchased, and steps were taken to develop it so lots could be sold.

While Negroe was on assignment for General Electric in Mexico, she purchased a lot in her own name from Poplar Brook. She stated Poplar Brook had no role in the construction of her house. She then contracted with Terry to serve as the project manager. Terry hired workers, and coordinated all work. She had never built a house, and knew nothing of what was required. She obtained a construction loan from which Terry was to be paid in three increments based upon the progress of construction. Terry oversaw and supervised the construction. She did not hire either Baker or Hannah. When she returned from Mexico in the summer of 2004, she became more involved because Terry did not finish the job, so she had to hire another contractor. She stated she did not learn of Hannah's accident until months after it occurred. She stated Terry is no longer a member of the LLC.

Terry testified by deposition on August 5, 2004. He stated Poplar Brook is a landholding company organized to develop Oak Forest Estates, where Hannah was injured. Poplar Brook developed the land by having it surveyed and designed with roads built and utilities installed. Negroe contracted with him to serve as the project manager for construction of her house. She transferred funds to his personal account which he disbursed. Poplar Brook was not

involved in any of those transactions. He hired Baker who he paid with funds received from Negroe. He did not require subcontractors to carry workers' compensation insurance. Poplar Brook was never involved in building houses.

Baker testified he had known Terry for a long time. Baker is a resident of Georgia who came to Kentucky at Terry's request to assist in developing a subdivision, and later in building houses. Terry hired Baker to build Negroe's house and paid him in cash. Hannah began working with Baker after the basement of the house had been poured. Baker requested the materials needed to build the house, and Terry paid the bills. Baker stated he provided the tools and direction for Hannah's work. He stated on the date of the accident he had told Hannah not to use the ladder, but to go through the house as the other workers were doing. He did not see the fall, but helped Hannah out of a thirty-six inch deep hole where he had fallen.

Subsequent to the October 19, 2012 scheduling order, Hannah filed records from Dr. Aggarwal for treatment rendered from February 22, 2005 through October 29, 2012. Dr. Aggarwal treated Hannah for low back pain along with left leg pain and paresthesias. She prescribed various medications and testing to include x-rays and a brain MRI. At various intervals she prescribed medications including

Duragesic patches, Neurontin, Coumadin, Vicodin, Zoloft, Amitriptyline, Tramadol, Topamax, MS-Contin and other medications. On October 29, 2012, Dr. Aggarwal stated Hannah has an 8% impairment rating pursuant to the AMA Guides. Hannah subsequently filed additional notes from Dr. Aggarwal dated November 24, 2012; February 13, 2013; March 22, 2013 indicating he should remain off work; May 8, 2013 prescribing Oxycontin; and October 30, 2013 stating Hannah should remain off work. In the March 22, 2013 note, Dr. Aggarwal diagnosed Hannah with lumbago, lumbar spinal stenosis, a lumbar strain, and a lumbar compression fracture. She stated he does not retain the physical capacity to return to the type of work performed on the date of the work injury. She restricted him from lifting over twenty pounds; bending, twisting or stooping; prolonged standing or walking for more than forty-five minutes; and, climbing or crawling.

Hannah filed the report of Dr. Catherine Frantom, Ph.D., who opined he had symptoms suggestive of an axonal brain injury.

Hannah filed the April 16, 2013 report of Dr. C. Christopher Allen, Ph.D., a psychologist from Lexington, Kentucky who diagnosed a cognitive disorder NOS; borderline

intellectual functioning; status post traumatic brain injury, mild to moderate; and a GAF of 61.

Hannah also filed the September 13, 2013 report of Dr. Stephen Schnacke, a vocational expert from Bowling Green, Kentucky. Dr. Schnacke evaluated Hannah on March 19, 2013, and stated he is incapable of gainful participation in the workforce.

The UEF filed the July 11, 2013 report of Dr. Timothy J. Allen, a psychiatrist from Morehead, Kentucky, who evaluated Hannah on May 31, 2013. Dr. Allen diagnosed a malingered cognitive disorder, mild mental retardation, chronic back pain, moderate occupational and medical problems. Dr. Allen opined Hannah exaggerated his cognitive impairment and stated his problems did not result from the work injury. He stated Hannah had reached MMI on February 17, 2005. He assessed a 3% impairment rating pursuant to the AMA Guides for conditions not caused by Hannah's work injury.

Negroe filed the August 15, 2013 vocational report of Dr. Ralph Crystal who evaluated Hannah at her request. Dr. Crystal opined Hannah is not disabled from employment and has the ability to perform a wide range of jobs.

A telephonic status conference was held on November 8, 2013. The CALJ subsequently entered an order setting the hearing for January 9, 2014.

At the hearing, the parties identified the contested issues. Hannah listed benefits pursuant to KRS 342.730, vocational rehabilitation benefits, and sanctions for failure to initiate TTD benefits. The UEF listed the issues as extent and duration, whether Hannah sustained a work-related brain injury, future medical expenses, credit for overpayment of TTD benefits, Hannah's ability to return to work, Negroe's liability (either individually or as an up-the-ladder contractor, joint venturer, or partner), liability of Poplar Brook (either individually, as a general contractor, joint venturer, up-the-ladder contractor, or partnership), and Hannah's employment status. Poplar Brook listed the contested issues as whether Negroe was either Hannah's or Terry's employer, whether Negroe is an up-the-ladder contractor pursuant to KRS 342.610(2), collateral estoppel, *res judicata*, failure to timely join pursuant to 803 KAR 25:010 §2(3), failure to mitigate damages, laches, and credit for overpayment of TTD benefits as to duration. Additional issues were listed regarding the psychological component, injury as defined by the Act, causation/work-relatedness, disability/impairment rating, and liability for

contested or disputed medical bills for both the physical and psychological components of the claim. Finally it was noted a medical dispute had been filed regarding the reasonableness, necessity and work-relatedness of pain management and treatment with narcotic pain medication.

The CALJ rendered a 61 page opinion on April 16, 2014 addressing the issues raised by the parties. The CALJ adopted and cited heavily from his previous opinion on bifurcated issues, entered on October 21, 2004. The CALJ determined Hannah was Terry's employee, and provided a detailed explanation for his decision. The CALJ determined that while Terry and Negroe were members of Poplar Brook, the transactions concerning the construction of her house had nothing to do with that LLC. Negroe purchased a lot from Poplar Brook, and contracted with Terry directly, not as a member of the LLC, to construct her house. The CALJ determined neither Poplar Brook nor Negroe was Hannah's employer, either directly or statutorily.

The CALJ found Hannah sustained a work-related physical injury on February 27, 2004 while working for Terry, who had no workers' compensation insurance. He found Hannah reached MMI on February 27, 2005, and awarded PPD benefits based upon the 5% impairment rating Dr. Kriss assessed for the compression fracture, with no enhancing

multipliers pursuant to KRS 342.730(1)(c)1. The CALJ did not address the 1% impairment rating Dr. Kriss assessed for the meralgia paresthetica. He determined Hannah did not sustain a work-related psychological condition, and needed no treatment for such condition. The CALJ concluded Hannah was not entitled to an enhancement of the TTD benefits awarded from the date of injury through February 27, 2005 pursuant to KRS 342.040 because initially there was a significant factual and legal question as to who was responsible for payment of benefits. The CALJ determined the UEF is entitled to a dollar for dollar credit for past due benefits for TTD benefits paid through the date such benefits were terminated. The CALJ pointed specifically to the language in the agreement to pay TTD benefits entered into by Hannah and the UEF on December 21, 2004. The CALJ further determined pain management treatment, including narcotic pain medication and patches, is unreasonable and unnecessary. He ordered a weaning period from such treatment. The CALJ found Hannah entitled to other reasonable and necessary medical treatment for the compensable work injuries pursuant to KRS 342.020.

The UEF filed a petition for reconsideration requesting additional findings as to why Poplar Brook and its members were not jointly and severally liable as up-the-

ladder employers. In support of its position, the UEF, as it does on appeal, cited to an internet article from website "biztaxlaw.about.com."

Hannah also filed a petition for reconsideration arguing the CALJ failed to address the additional 1% impairment for meralgia paresthetica; erred in relying upon Dr. Kriss' opinions, and in finding he did not suffer from a work-related psychological condition; erred in finding he had reached MMI by February 27, 2005; erred in finding he could return to regular work; erred in finding he should be weaned from narcotics; erred in awarding credit for the overpayment of TTD benefits against past due benefits; erred in failing to award attorney fees for TTD benefits obtained by filing the interlocutory motion; erred by not considering Hannah's pre-exiting and post-injury cognitive difficulties; erred in finding PPD benefits to begin on February 28, 2005; and it was error for the CALJ to make additional findings of fact.

On May 19, 2014, the CALJ entered an order denying both petitions for reconsideration.

As noted above, except for a determination regarding the meralgia paresthetica, and the commencement date for the award of PPD benefits, the CALJ's opinion is affirmed in its entirety. First, the CALJ's determination

Terry was Hannah's employer is supported by substantial evidence. Clearly, although Negroe and Terry were members of an LLC established to develop a subdivision, the evidence supports the determination a separate agreement was reached regarding the construction of the house where Hannah was injured. Negroe contracted with Terry to build a residence on a lot she purchased individually from Poplar Brook. The evidence supports the CALJ's determination Poplar Brook, as a separate entity, was not involved in the construction of the house. Likewise, the CALJ's conclusion Negroe, individually, contracted with Terry, individually, to construct a house on property she had purchased from Poplar Brook, is supported by the evidence. Poplar Brook had no involvement except for its intended purpose, to develop the subdivision and sell lots. The extent of Poplar Brook's involvement was to sell a lot to Negroe. Likewise, the CALJ's determination Terry, not Negroe, was Hannah's employer is supported by the evidence.

The UEF points to an internet article to support its position. It is noted the article was never introduced into evidence, has no binding effect, and certainly is not authoritative for Kentucky law regarding LLC's. The UEF is directed to KRS 275.001 *et. seq*., specifically KRS 275.005, KRS 275.010, KRS 275.015, and KRS 275.150 regarding the

operation, requirements, and purpose of an LLC, and personal liability of its members. Notwithstanding the CALJ's references to Poplar Brook as a corporation, clearly it is an LLC. The CALJ did not err in determining Terry was Hannah's employer, and neither Poplar Brook nor Negroe is liable for payment of Hannah's benefits.

Hannah argues the CALJ erred in awarding PPD benefits, rather than a permanent total disability award. He additionally argues the CALJ erred in finding he was not entitled to TTD benefits through October 19, 2012, when an order was entered removing the claim from abeyance and terminating TTD benefits. Hannah also argues the CALJ erred in determining he retains the physical capacity to perform his pre-injury work. Hannah next argues his award of PPD benefits should start no earlier than September 23, 2013. Finally, Hannah argues the CALJ failed to make sufficient findings regarding his psychological condition.

As the claimant in a workers' compensation proceeding, Hannah had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was unsuccessful in his 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 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 determining whether the ALJ's findings are so unreasonable under the evidence 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 Company 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 supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 which otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's ruling is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, the ALJ relied upon Dr. Kriss who evaluated Hannah on two occasions. Dr. Kriss' opinions constitute substantial evidence supporting the CALJ's determination of Hannah's physical injury and impairment. Regarding Hannah's alleged psychological condition, it is noted this issue was tried by consent since no allegation regarding this condition was alleged in the Form 101, nor did any party move to join this as an issue. However, that said, based upon the evidence, the CALJ determined Hannah did not suffer from a work-related psychological condition. The CALJ outlined the evidence from Drs. Timothy Allen, Shraberg and Kriss regarding the alleged psychological/traumatic brain injury allegation. He outlined who he found credible, and his analysis was sufficient to justify his determination. Because a contrary result is not compelled on any of these issues, the CALJ's determinations will not be disturbed.

Hannah also argues the CALJ erred in granting credit for the TTD benefits the UEF paid against past due and owing benefits. We disagree. As we noted above, the CALJ's determination of Hannah's disability, and MMI date of February 27, 2005 are supported by Dr. Kriss' opinions. The 425 week payout period terminated long before the CALJ rendered his determination. The CALJ only awarded credit against past due and owing benefits which he is clearly authorized to do. An employer may be afforded a dollar-for-dollar credit for any voluntary payment of past-due income benefits, so long as the claimant's future benefits are not affected. Triangle Insulation & Sheet Metal Co., Div. of Triangle Enter., Inc. v. Stratemeyer, 782 S.W. 2d 628 (Ky. 1990).

Hannah argues the UEF was under obligation to pay TTD benefits until the CALJ allowed such payments to be terminated. While this is a true statement, that does not determine the actual period for which Hannah was entitled to such benefits. The December 2004 agreed order approved by the CALJ, and signed by the parties provided for a credit for any overpayment of benefits pursuant to that order. It is noted the UEF paid far in excess of the amount actually due by failing to move to have the claim removed from abeyance, or as Negroe pointed out, by failing

to mitigate its damages. It can never hope to recover all it overpaid. We find no error in the CALJ's determination regarding credit against past due and owing benefits for the sums paid by the UEF.

That said, Hannah argues the CALJ erred in basing the award of PPD benefits on a 5% impairment rating rather than the 6% rating determined by Dr. Kriss. The CALJ discussed the 5% impairment rating assessed by Dr. Kriss for the compression fracture, and the 1% assessed for the meralgia paresthetica which he failed to address in the award. On remand, the CALJ is directed to address the meralgia paresthetica, and to make a determination of whether Hannah is entitled to an award of PPD benefits and medical benefits for that condition. If he determines this is a compensable condition, the CALJ is directed to amend his award of benefits accordingly. We do not direct any particular result.

Finally, on remand, pursuant to Sweasy, supra, the CALJ is directed to award PPD benefits commencing from the date of injury for a period of 425 weeks, with the obligation to pay such PPD benefits suspended during any period for which TTD benefits are awarded.

Hannah requested an oral argument be held. After having reviewed the record, **IT IS HEREBY ORDERED AND**

ADJUDGED an oral argument is unnecessary in arriving at a decision, and therefore the request is **DENIED**.

Accordingly, the opinion rendered April 16, 2014, and the order denying the petitions for reconsideration issued May 19, 2014, by Hon. J. Landon Overfield, Chief Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART**, and **REMANDED** for entry of an amended decision in conformity with the views expressed herein.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
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