Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 8, 2016

CLAIM NO. 201378086

TOM PROCTOR RACING STABLE PETITIONER

VS. **APPEAL FROM HON. UDELL B. LEVY, ADMINISTRATIVE LAW JUDGE**

LEIGH SLOAN
and HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Tom Proctor Racing Stable ("TPRS") seeks review of the January 11, 2016, Opinion, Award, and Order of Hon. Udell B. Levy, Administrative Law Judge ("ALJ") finding Leigh Sloan ("Sloan") sustained work-related injuries on July 24, 2012, and awarding permanent partial disability ("PPD") benefits and medical benefits. TPRS

also appeals from the February 22, 2016, Order ruling on its petition for reconsideration.

At the time of her injury, Sloan was employed by TPRS as an assistant trainer. Each morning she was required to check on the health and welfare of the horses before training them. In addition to training the horses between 6:00 a.m. and 10:00 a.m., she managed the employees. Sloan testified that on the date of her injury she noticed a horse in a stall reach out, grab a girl walking a horse, and attempt to drag her into the stall. Sloan dismounted her pony, picked up a pitch fork, and walked to the stall. She recounted what followed:

> A: But to get him to get back instead of coming at me, I shook that at him. I went in to tie him up, because you tie them up in the back of the stall with a bungee-cord type thing. He's still kind of, you know, rambunctious, but he's used to me dealing with him because I had been having to paint his legs. And as I went to snap and hook onto his halter, he flung his head.
>
> I don't remember the initial impact of it. I don't remember if I got him tied up or not, but I did not fall and I did not black out. I just knew something hit me here (indicating). And the last I remember is him slinging his head at me as I'm going to hook. I had enough sense in me to think and I felt and blood was coming out. It knocked my helmet off. I do remember my helmet being knocked off.

> I closed the door, got some paper towels and held them to my head, and I walked 100 yards back around to where my employees were sitting. I sat down, and they saw the blood.
>
> And they said, what happened?
>
> And I said, how bad is it?
>
> And they went immediately to get the ambulance.

Sloan was treated at the University of Louisville Hospital. Thereafter, she underwent treatment by multiple physicians as a result of skull fractures and damage to her left eye, including dry tear ducts.[1] Sloan testified her treating physicians in Kentucky were "Drs. Nunnery, Urda, Newton, Goffman [sic], and LeClear." She was also treated by Dr. Onofrey in Florida. When her tear ducts unplugged, on July 15, 2015, Dr. Catherine Newton recauterized her tear ducts. Dr. Newton prescribed Gabapentin which helps with headaches and facial pain caused by squinting. Since her deposition she has only seen Dr. Newton. She takes Zirgan eye drops for the herpes virus she developed in the left eye. Dr. Newton diagnosed herpes in her eye after the 2013 Kentucky Derby and has aggressively treated the condition through the date of the hearing. Sloan explained

[1] It is apparent from the hearing transcript and the ALJ's opinion that Sloan was deposed on April 18, 2014, but that deposition is not in the record. The ALJ noted the absence of the deposition in his January 2016, Opinion, Award, and Order.

when she has a long strenuous day or does not get the opportunity to close her eye, her vision blurs by 4:00 p.m. However, if she can close the eye and relax it a little bit her problem is not as severe. Whether she experiences headaches depends on how much she is required to squint her left eye due to wind and sun.

Sloan testified she becomes confused very quickly when she is required to deal with more than one individual at the same time. She returned to work performing all aspects of her job. However, because TPRS had no more work for her, she now works sporadically for Airdrie Stud in Lexington. Sloan testified that when she blinks she is unable to close her eye completely:

> Q: Okay. I just have to say, ma'am, I have been watching you, and I have been seeing you blinking it. Are you able to blink it?
>
> A: Does it blink? I mean. I – it doesn't close all the way, I don't know. They just said the nerves – and the one reason I went to Grossman, he thought maybe he could attach this lid, the corner where it is not attached, he thought that he could attach that, and maybe it would help with the dry eye. But the eye doesn't blink closed.
>
> Q: Okay. So it may be more accurate to say you can blink it, but you maybe can't close it all the way as easily as you could before?
>
> A: Yeah. Right.

The July 26, 2012, University of Louisville Hospital emergency department medical record indicates a CT scan of the head revealed the following: multiple facial bone fractures including a depressed fracture of the left frontal sinus, fracture of the roof of the left orbit, fracture of the medial wall of the left orbit, fracture of the lateral wall of the left orbit, fracture of the floor of the left orbit, fracture of the posterior lateral wall of the left maxillary sinus, fracture of the anterior wall of the left maxillary sinus, and fracture of the left zigomatic arch. The "[i]mpression" was:

> 1. Multiple facial bone fractures as detailed above, consistent with a left-sided tripod fracture and a left-sided orbit blowout fracture. There is associated hemosinus and apparent hemorrhage in the left orbit, but both globes remain intact."
>
> 2. Additionally, there is a fracture of the left nasal bone.
>
> 3. There is no definite intracranial extent of this trauma.

The "Clinical Impression" was: "[c]losed head injury. Deep laceration to face. Complicated repair. Nasal fracture, zygomatic fracture, blow-out fracture left eye."

The September 18, 2015, Benefit Review Conference ("BRC") Order references the October 8, 2014, BRC Order

identifying the only contested issue as benefits per KRS 342.730.

The October 30, 2015, hearing order reflects Sloan introduced the following medical evidence: medical records/reports of Drs. Jules Barefoot, Ellen Ballard, Kirk LeClear, Douglas Gossman, Newton, and U of L Healthcare. TPRS relied upon the reports of Drs. Michael Best and Peter Timoney. The hearing order also reflects the following handwritten notation: "12/2/14 supplemental report of Dr. Best, C.V. of Dr. Timoney (to be filed within 10 days)" and "Dr. Allen's report must be delivered to Plaintiff's attorney and judge within 10 days."[2]

In his January 2016, decision, the ALJ provided, in relevant part, the following findings of fact and conclusions of law:

> The evidence shows that the left side of Plaintiff's face was crushed as a result of an apparent head butt from a horse she was training in the scope of her employment for Defendant. She sustained multiple facial fractures, including every boundary of her left eye socket. There was also direct trauma to the eye and she has been left with residual scarring not only to her forehead and eyebrow, but to the left eyelid as well. Several doctors have

[2] The curriculum vitae of Dr. Timoney was filed in the report and even though TPRS included a copy of Dr. Best's December 2, 2014, report in the appendix to its brief, that report is not in the Department of Workers' Claims paper file or the Litigation and Management System (electronic filing system).

provided findings from their examinations and various diagnoses for Ms. Sloan's conditions. But only a handful provided opinions regarding permanent impairment she has sustained.

Dr. Allen noted Ms. Sloan had received no treatment for psychiatric complaints and would likely benefit from psychotherapy and antidepressant medication. With that caveat, he determined that she currently has a Class I impairment for Mental Disorders according to criteria from the *AMA Guides*, 2nd Edition, and assigned a 5% whole body impairment. He further opined that Plaintiff has a Class 1 impairment of the Central Nervous System and a 0% impairment due to mental status changes pursuant to Tables 13-5 and 13-6 of the *AMA Guides*, Fifth Edition. However, the range for impairment ratings for a Class 1 impairment pursuant to Table 13-6 is 1% to 14%.

Dr. Best provided an addendum after Dr. Timoney's ophthalmologic evaluation and, notwithstanding his earlier observation that Plaintiff had sustained "a significant injury", relied upon Table 11-5 of the *Guides* to conclude she had a 3% whole person impairment due to her painful scar. He also cited Dr. Timoney's findings that Ms. Sloan had no visual acuity impairment, and concluded that Dr. Barefoot's findings were "clearly…not appropriate under *The Fifth Edition AMA Guides*."

Notwithstanding his conclusion regarding visual acuity, Dr. Timoney provided numerous other diagnoses relating to damage to the structure in and around Plaintiff's left eye. The evidence further shows that the

"painful scar" that Dr. Best referred to actually extends from Ms. Sloan's forehead and across her eyebrow. There is then an "abnormality" (as referred to by Table 11-5 upon which Dr. Best relies) that continues to the orbital structure of her left eye, which Dr. Gossman pointed out is asymmetrical, leading to his diagnosis of left enophthalmos. Several doctors have also documented her droopy eyelid, or ptosis, and the fact that Ms. Sloan is unable to completely close her eyelid. She also has a decrease in her left upper gaze, and therefore limited movement of the eye. It is clear a "painful scar" does not fully describe Plaintiff's facial abnormalities.

Ms. Sloan also has problems with her tear ducts and difficulty moistening her left eye. She is therefore required to wear lenses to protect her cornea from infection. It also bears mentioning, as Dr. LeClear points out, that this risk is enhanced by environmental factors associated with horse training, such as wind, dust and dirt. Finally, Dr. Ballard prescribed polarized lenses to limit problems with bright lights and pain associated with squinting.

Dr. Barefoot clearly provides the most credible evaluation of Plaintiff's whole person impairment due to being struck in the face by a thoroughbred race horse. The 9% rating with regard to Plaintiff's scarring more accurately reflects the deformity that continues past her left eyebrow and encompasses her entire left eye. Furthermore, he correctly notes that the *AMA Guides* expressly state that visual acuity and/or field loss "are not the only factors that can lead to a loss of functional vision." His 20% rating

pursuant to Table 12-10 is entirely appropriate given the multitude of residual problems associated with the structural damage to Plaintiff's left eye. This not only includes glare sensitivity and blurred vision that develops with fatigue but, in addition, the extent that her vision is partially blocked by her drooping eyelid.

Finally, Plaintiff was diagnosed with a closed head injury upon discharge from University Hospital. Dr. Allen's testing was suggestive of "some slight indications of cognitive inefficiency or inconsistency" and he acknowledged that she made no attempt to feign memory impairment. Both Dr. Allen and Dr. Barefoot determined that Ms. Sloan meets the criteria for Class 1 impairment under Table 13-6. However, Dr. Barefoot's 10% rating is the only one that falls within the 1%-14% range proscribed by the *AMA Guides*. As a result, I conclude Plaintiff has a 34% impairment rating due to these factors.

I further rely on Dr. Allen to conclude that Plaintiff has sustained a psychiatric injury proximately caused by the 7/24/12 work injury. *Wal-Mart Stores, Inc. v. Smith*, 277 S.W.3d 610 (Ky. App. 2008). An impairment cannot be considered to be permanent until the underlying condition "has reached maximum medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment." *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213 (Ky. 2006). Dr. Allen opines that Plaintiff could benefit from medication and psychotherapy. But the *Guides* also recognize that, even where an injured worker reaches MMI, some change in

their condition can occur over time. Ms. Sloan has gone three and a half years to this point without such treatment and stated on more than one occasion her disdain for medication. Furthermore, Dr. Allen has determined her current level is, at worst, still compatible with most useful functioning. I therefore find that Plaintiff has an additional 5% impairment rating due to her psychiatric injury.

Finally, KRS 342.730(1)(c)1 provides an additional multiplier for calculating permanent partial disability to benefit injured workers who do not retain the physical capacity to return to the type of work performed at the time of an injury and suffered a decrease in their earning capacity. *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003); *Kentucky River Enterprises v. Elkins*, 107 S.W.3d 206 (Ky. 2003). The statute states in relevant part as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection[.]

In *Ford Motor Company v. Forman* 142 S.W.3d 141 (Ky. 2004), the Kentucky Supreme Court construed that "the type of work that the employee performed at the time of injury" as used in the statute means "the actual jobs that the individual performed." Subsequently, the Court further clarified that the term

"refer(s) broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred." *Miller v. Square D. Company*, 254 S.W.3d 810 (Ky. 2008). The guiding principle of both *Forman* and *Miller* is that "the type of work that the employee performed at the time of injury" refers to *all* the jobs and tasks *actually performed* by the claimant for the employer. *Miller*, 254 S.W.3d at 813-14; *Forman*, 142 S.W.3d at 145.

Plaintiff was specifically asked at the Formal Hearing whether she was able to return to all functions of her job as an assistant trainer and responded in the affirmative. She verified this when she testified she was still able to perform all the duties associated with her job after the injury. She had difficulty tasking but developed measures to help her deal with them. Furthermore, it appears that much of her difficulty with performing her job was because the Defendant nearly tripled the number of horses under her training *after she was injured*. While it isn't necessary to delve into their motive for increasing her workload after she sustained facial and head injuries from one of their horses, I must conclude from the evidence that Plaintiff has not met her burden to receive further multipliers pursuant to KRS 342.730(1)(c)1. Therefore, I conclude that the Plaintiff, Leigh Sloan, is entitled to permanent partial disability income benefits calculated as follows:

$552.13 x 37% x 1.70 = $347.29

Both parties filed petitions for reconsideration. In its petition for reconsideration, TPRS requested the ALJ reconsider the finding Sloan had a 5% impairment rating due to a psychological injury, arguing that at the time Dr. Timothy Allen assessed the impairment rating he opined Sloan had not reached maximum medical improvement ("MMI"). It also argued the ALJ did not properly address its argument that Dr. Barefoot's assessment of a 10% impairment rating due to traumatic brain injury is not supported by the weight of the evidence. Significantly, TPRS did not request additional findings of fact but only requested the ALJ modify his January 2016 decision.

Concerning TPRS's petition for reconsideration, the ALJ stated, in relevant part, as follows:

> As pointed out in the Opinion Award and Order, Plaintiff has not had any psychotherapy over the three and a half years since her injury and has further indicated her desire to avoid taking medication. I would further add that, while Dr. Allen examined Ms. Sloan to provide opinions relative to this claim, none of her treating physicians have referred her for psychotherapy or psychotropic medication. She is still functioning at a high level psychologically and, therefore, has reached maximum medical improvement.
>
> It further appears the Defendant is rearguing the merits regarding the determination that Plaintiff has 10% whole person impairment due to a

> traumatic brain injury. Both Dr. Allen and Dr. Barefoot determined Plaintiff Class 1 impairment related to mental status pursuant to Tables 13-5 and 13-6 of the AMA Guides. However, Dr. Barefoot was the only physician to provide a rating within the range established for a Class 1 impairment. Further relief pursuant to Defendant's petition is prohibited by the statute since the parties have been sufficiently apprised of the basis for determining Plaintiff has this impairment for mental status and the separate psychological impairment as described in the January 11, 2016 Opinion. *Kentland Elkhorn Coal Corp. v. Yates*, 743 S.W.2d 47 (Ky. App. 1998); *Cook v. Paducah Recapping Services*, 694 S.W.2d 684, 689 (Ky. 1985); *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982).

On appeal, TPRS challenges the ALJ's decision on three grounds. First, it asserts the ALJ's reliance upon Dr. Barefoot's 10% impairment rating for traumatic brain injury is unreasonable and not supported by substantial evidence. It relies upon the opinion of Dr. Allen who concluded Sloan did not have a traumatic brain injury, since the neuropsychological testing did not reveal cognitive impairment. TPRS asserts Dr. Barefoot did not list any testing or provide documentation explaining the diagnosis of a traumatic brain injury. It cites to Table 13-25 of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") which

documents a battery of neurological tests and criteria to be reviewed in determining whether impairment of the central nervous system is present. It asserts Dr. Barefoot did not employ this testing or criteria to support his finding of traumatic brain injury. On the other hand, Dr. Allen subjected Sloan to a battery of psychological testing over a two day period. Based on this testing, Dr. Allen concluded there was no evidence of even a mild traumatic brain injury. It maintains Dr. Allen's assessment is verified by the fact Sloan continued to perform her job duties for the three year period between her injury and the end of her employment with TPRS. It contends there is no evidence that Sloan suffered a traumatic brain injury other than Dr. Barefoot's conclusory statement. It notes Dr. Barefoot is an occupational medical specialist and unlike Dr. Allen has no specialized training in assessing a neurological psychological impairment. It complains although these arguments were raised regarding Dr. Barefoot's opinion, the ALJ did not address them. Thus, the ALJ failed to set forth sufficient facts to support his conclusion.

Next, TPRS argues the ALJ erred in finding Sloan was at MMI and in relying upon Dr. Allen's 5% impairment rating for the psychological impairment. It notes Dr. Allen diagnosed adjustment disorder with mixed anxiety and

depression as well as alcohol use disorder in sustained remission. However, Dr. Allen concluded Sloan was not at MMI and noted the AMA Guides do not permit the assessment of an impairment rating prior to achieving MMI. If a percentage was necessary, Dr. Allen concluded Sloan currently has a Class 1 impairment for mental disorders and based on the 2nd Edition of the AMA Guides, a 5% impairment rating due to the work-related injury. However, if Sloan were to engage in treatment, Dr. Allen believed there would be no impairment rating. TPRS argues since the AMA Guides prohibited Dr. Allen from assessing an impairment rating, Sloan has no impairment rating for a psychological injury. TPRS argues the ALJ erred in disregarding Dr. Allen's uncontradicted statement Sloan was not at MMI and in determining she had a 5% impairment rating for a psychological injury.

Finally, TPRS argues the ALJ erred in relying upon Dr. Barefoot's assessment of a 9% impairment rating for facial scaring and a 20% impairment rating for photophobia as both are unreasonable and not supported by substantial evidence. TPRS argues Dr. Best found Sloan's cranial nerve function revealed normal visual fields and pupillary response bilaterally. Her extraocular movements were smooth and she had coordinated eye movement in all directions. In

addition, Sloan demonstrated normal corneal reflex on the left, no photophobia to light upon testing, and 20/20 visual acuity. Dr. Best indicated Sloan had multiple left facial fractures and no long-lasting nerve or eye injury. Because Sloan had a well-healed scar resulting in little or no disfigurement, Dr. Best assessed a 2% to 3% impairment rating.

TPRS notes Dr. Timoney's finding Sloan had no visual acuity impairment which translated to a visual acuity impairment rating of 0%. It acknowledges Dr. Timoney diagnosed status post-facial fracture repair, left lasophthalmos, left superficial punctate erosions, left upper punctual stemosts, left lower punctual plug, and left lateral canthal dystopia. However, Sloan did not report an impaired ability to perform her activities of daily living. Thus, it contends these findings direct that Sloan falls within column 1 of Table 12-10 of the AMA Guides which is a Class 1 impairment. As such, only Dr. Timoney's 0% impairment rating falls within that class. It argues the ALJ failed to account for this discrepancy. Thus, the inconsistent evaluation constitutes an abuse of discretion and causes the ALJ's decision to be arbitrary, unreasonable, unfair, and unsupported by sound legal principles. It argues in light of Dr. Timoney's report, Dr. Barefoot's

report is inappropriate and not in accordance with the AMA Guides.

With respect to Dr. Barefoot's 9% impairment rating for the facial scar, TPRS argues Dr. Barefoot did not describe the shape, color, evidence of ulceration, depression, or elevation. Further, he did not note whether the scar was atrophic or hypertrophic, soft, pliable, hard, thick, smooth, or rough. It cites to Dr. Best's statement in his December 2, 2014, report that the AMA Guides state these factors should be considered in the evaluation process. It notes Dr. Barefoot also provided no explanation or reasoning to support an impairment rating at the high end of the scale. TPRS argues since Sloan continued to perform her full work duties and the scar was well-healed resulting in little or no disfigurement, an impairment rating at the highest range was inappropriate.

Sloan, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Sloan was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

"Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find no merit in TPRS's first argument Dr. Barefoot's assessment of a 10% impairment rating for a traumatic brain injury is unreasonable and not supported by substantial evidence. In his report, Dr. Barefoot correctly noted the University of Louisville Hospital's July 24, 2012, record contains a diagnostic impression on discharge of closed head injury, deep laceration to the face with a complicated wound repair, nasal fracture, and blowout fracture of the left eye. Based on a medical records review and his examination, Dr. Barefoot diagnosed the following:

> 1. Status post treatment for a depressed fracture of the left frontal sinus, fracture of the left orbit,

> fracture of the medial wall of the left orbit, fracture of the lateral wall of the left orbit, fracture of the floor of the left orbit, fracture of the posterolateral wall of the left maxillary sinus, fracture of the left anterior wall of the left maxillary sinus, and fracture of the left zygomatic arch.
>
> 2. Left nasal bone with deviation of the nasal septum.
>
> 3. Lagophthalmos left upper lid.
>
> 4. Orbicularis oculi palsy.
>
> 5. Facial scarring with the left orbital fat atrophy.
>
> 6. Closed head injury with traumatic brain injury.
>
> 7. Left enophthalmos.

Concerning Sloan's closed head injury, Dr. Barefoot stated:

> In regards to her closed head injury/traumatic brain injury that she received, refer to page 320, table 13-5, Clinical Dementia Rating. She falls into the questionable category and would be assigned a 0.5 score.

TPRS does not contend Dr. Barefoot referenced the wrong section and table of the AMA Guides in arriving at the 10% impairment rating. Nor does TPRS contend Sloan overstated her symptoms resulting from her head injury. Rather, it argues Dr. Barefoot's impairment rating is not supported by any clinical testing, and Dr. Allen's testing

revealed no traumatic brain injury. The portions of Dr. Barefoot's report dealing with the traumatic brain injury, though succinct, qualify as substantial evidence sufficient to support the ALJ's finding Sloan sustained a work-related traumatic brain injury.

Concerning the existence of a traumatic injury, even though Dr. Allen concluded neurological testing did not reveal cognitive impairment, he opined as follows:

> She has a Class I impairment of the Central Nervous System. According to the AMA Guides, 5th edition Chapter 13, tables 13-5 and 13-6, she has a 0% impairment due to mental status changes related to the work injury of July 24, 2012.

A review of Tables 13-6 of the AMA Guides cited by Dr. Allen indicates a Class 1 impairment merits an impairment rating from 1% to 14%. Yet, Dr. Allen assessed a 0% impairment rating in contravention of the very table he cited. Since Dr. Allen found Sloan fell within Class 1 of Table 13-6, Dr. Barefoot's 10% impairment rating is within the range permitted by Table 13-6. Consequently, Dr. Barefoot's impairment rating is supported by the medical records of the University of Louisville Hospital, his evaluation, and Dr. Allen's assessment of a Class 1 impairment rating. Substantial evidence supports the ALJ's

determination of a traumatic brain injury and the 10% impairment rating he assessed for that injury.

While the contrary opinion of Dr. Allen that neurological testing did not reveal a cognitive impairment rating and Sloan had no impairment rating may have been articulated in greater detail, such testimony represented nothing more than conflicting evidence compelling no particular outcome. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Similarly, any perceived lack of specificity by Dr. Barefoot in explaining his opinion regarding the existence of a traumatic brain injury merely went to the weight and credibility to be afforded his opinion, which was a matter to be decided exclusively within the ALJ's province as fact-finder. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Hence, we find no error in the ALJ's determination Sloan sustained a traumatic brain injury resulting in a 10% impairment rating.

Regarding TPRS's second argument, we agree the ALJ erred in finding Sloan was at MMI and in relying upon Dr. Allen's assessment of a 5% impairment rating for a psychological injury. Only Dr. Allen offered an opinion as to whether Sloan had an impairment rating due to the psychological injury. The ALJ understood Dr. Allen

concluded Sloan was not at MMI at the time he saw her. However, the ALJ's reasons for attributing no significance to Dr. Allen's opinion regarding the date of MMI were Sloan had not undergone psychotherapy in the three and a half years since her injury and she expressed the desire to avoid taking medication. In the February 2016 order, the ALJ also noted none of Sloan's treating physicians referred her to psychotherapy or psychotropic medication. Since Sloan was functioning at a high level psychologically, he concluded she had reached MMI. That finding by the ALJ is erroneous.

Important to resolving this issue is the fact Dr. Allen did not see Sloan until October 14 and 15, 2015. The fact Sloan may not have received any prior treatment is irrelevant. The hearing in this matter was conducted on October 30, 2015, fifteen days after Sloan was seen by Dr. Allen. The ALJ's statement that Sloan had not had any psychotherapy in over three and a half years since her injury is irrelevant. More importantly, a date of MMI must be based on medical evidence. Dr. Allen conclusively stated that as of the date he saw Sloan, she was not at MMI. In his report, Dr. Allen did not in any manner qualify his opinion Sloan was not at MMI at the time he saw her. In that regard, he did not opine if she received no

further treatment Sloan was at MMI. Notably, Dr. Allen stated although it was difficult to predict the amount of benefits she may receive from treatment, he would expect a resolution of her impairment resulting in 0% permanent impairment. Consequently, the ALJ erred in relying upon Dr. Allen's impairment rating of 5% as it was assessed in contravention of the AMA Guides.

The AMA Guides direct as follows:

> 2.4 When Are Impairment Ratings Performed?
>
> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living.

KRS 342.0011(11)(b) and (35) reads as follows:

> (b) "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; and

> . . .
>
> (35) "Permanent 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";

The above-cited provision of the AMA Guides and KRS 342.0011(11)(b) and (35) precluded the ALJ from relying upon Dr. Allen's 5% impairment rating for a psychological injury as it was not in concert with the AMA Guides, and by extension the statute. The ALJ's determination Sloan sustained a 5% impairment rating as a result of a July 24, 2012, psychological work injury shall be reversed.

Concerning TPRS's third argument, we find no error in the ALJ's reliance upon Dr. Barefoot's 9% impairment rating for the facial scar and 20% impairment rating for the left eye injury. The May 20, 2014, letter of Dr. Newton, an ophthalmologist, reflects she diagnosed "exposure keratopathy in the left eye" and "dry eye" resulting from the work injury. Sloan's visual acuity unaided was 20/25+. Sloan had evidence of dry eye, "with diffuse punctate staining of the left cornea." The punctual plugs which had been previously inserted were missing. Dr. Newton replaced the plugs and recommended

Sloan continue using the gel at night and taking Zirgan once a day to prevent recurrence of Herpes simplex virus.

In a July 11, 2014, note Dr. Newton concluded Sloan attained MMI and would "need upper and lower lid punctual occlusion to maintain adequate tear film. She may require topical non-steroidal anti-inflammatory drop for intermittent ocular pain." Pursuant to the AMA Guides, Dr. Newton assessed an impairment rating for the left eye of 99% which equated to a whole person impairment of 83.2%.

The June 7, 2013, letter of Dr. LeClear reveals Sloan had extensive injuries to her face, orbit, and eye. He noted Dr. Gossman referred Sloan to him for a determination of whether a contact lens could be designed to provide relief from the dryness of the eye due to "exposure secondary to damage to the eyelid OS." Dr. Gossman had suggested "further eyelid surgery may be considered but protection of the cornea from infection and even permanent scarring was the first priority." Dr. LeClear noted Sloan had an "inability to close her left eyelid and Grade 3+ staining of the anterior ocular surface – the cornea and the bulbar conjunctiva." Her uncorrected vision was "20/60 OS and 20/20-1 OD." Sloan's "best corrected vision with a large astigmatism spectacle RX was

20/30 OS and 20/20 OD." Dr. LeClear provided the particular options available to deal with these problems.

Concerning an impairment rating for the damage to Sloan's eye, in his July 27, 2015, letter, Dr. Best relied upon Dr. Timoney's finding that there was no visual acuity impairment. Therefore, Dr. Best opined Sloan's acuity related impairment rating equals 0%. Based on this, Dr. Best stated the Individual Medical Evaluation performed by Dr. Barefoot was inappropriate pursuant to the AMA Guides.

Dr. Timoney's handwritten Form 107 report is mostly illegible. However, we note in its brief TPRS acknowledges the multiple diagnoses of injuries which are largely illegible. Significantly, Dr. Timoney merely stated Sloan's visual acuity impairment rating equaled 0%. He did not indicate Sloan did not have an impairment rating for an injury to the left eye. Relative to the impairment rating for the left eye, Dr. Barefoot's report contains the following:

> A report from Plastic Surgery at University Hospital on October 9, 2012, notes an evaluation on that date. She was noted to have 2 mm of enophthalmost and loss of attachment in the lateral portion of the upper eyelid. She was evaluated on that date by Dr. Florman.
>
> A CT scan done of the facial bones in Hollywood, Florida, on January 22, 2013, notes evidence of surgery in the

> orbital floor on the left side, with a surgical plate and screws, with thickening of the orbital floor. There was a surgical screw present in the left zygoma. A small air bubble was seen in the soft tissues of the anterior-superior orbit. There was complete opacification of the right maxillary sinus probably due to sinusitis. There was severe right-sided deviation of the nasal septum.

The records of the various physicians recited herein along with Dr. Barefoot's report in our view constitutes substantial evidence in support of the ALJ's determination Sloan has a 20% impairment rating as a result of the injury to her left eye. In his report, Dr. Barefoot stated:

> A report by Dr. Catherine Newton, M.D., on May 6, 2013, notes an evaluation done on that date. There was noted to be pain in the left eye, with swelling and bruising. The pain was made worse with bright lights.
>
> An evaluation done by Dr. Douglas Gossman on May 28, 2013, notes pain and dry eye, with incomplete closure of the left eyelid. Her brow area had nerve sensitivity to touch.
>
> She also complained of left eye diplopia on outward gaze. His examination revealed asymmetric lid excursion in the left upper eyelid with left superior orbital fat atrophy. He noted that the orbits were asymmetrical, with left enophthalmos. There was noted to be reduced tear meniscus on the left with mucus stranding. His impression was for

lagophthalmos of the left upper eyelid with lagophthalmic keratitis of the left eye and left orbicularis oculi palsy. He did note that a tarsorrhaphy could be of benefit. (Note: This is a procedure where the eyelids are partially sewn together.)

A report by Dr. DeClear dated June 7, 2013, notes a referral from Dr. Gossman for evaluation of dry eye on the left. Dr. DeClear states that a scleral lens would be the best choice for Ms. Sloan.

Further followup [sic] visits with Dr. Newton were reviewed. This included visits on June 25, 2013; July 26, 2013; August 1, 2013; August 6, 2013; August 15, 2013; August 20, 2013; and August 29, 2013.

An evaluation done by Dr. Ellen Ballard dated September 24, 2013, notes, “It hurts to squint, and bright lights bother her.”

Dr. Ballard did note left lid lag and a scar present above her left eye. She was noted to have slightly decreased upper gaze on the left. She was noted to have painful palpation to her left eyebrow. Dr. Ballard’s impression was for a history of left orbital fracture, reported herpes simplex infection with negative lab, reported chronic headache pain.

Further evaluations by Dr. Newton dated May 19, 2014; June 2, 2014; and July 11, 2014 were reviewed.

A report by Dr. Newton on July 11, 2014 places Ms. Sloan at MMI.

. . .

DISCUSSION:

> Using the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, I would rate Ms. Leigh Sloan's impairment as follows:
>
> From page 297 of the Guides, 12.4B, Individual Adjustments, Ms. Sloan was noted to have glare sensitivity, photophobia, and reduced dark adaptations. For this, she receives an adjustment of 15 points in the Function Vision Score.
>
> Then referring to page 298, table 12-10, she would be placed in a Class 2 impairment and would be assigned a 20% whole person impairment.

Dr. Barefoot cited the applicable sections and tables of the AMA Guides upon which he relied in assessing the 20% impairment rating. The reports of Drs. Ballard, LeClear, Gossman, Newton, and Barefoot constitute substantial evidence supporting the ALJ's determination Sloan has a 20% impairment rating as a result of the injury to her left eye.

Just as significant, Dr. Timoney's June 11, 2015, report does not in any way attack the impairment rating assessed by Dr. Barefoot in his August 27, 2014, report. Thus, we find no merit in TPRS's argument the 20% impairment rating assessed by Dr. Barefoot and adopted by the ALJ was in error based on the report of Dr. Timoney. Although Dr. Best offers a blanket opinion that the

impairment rating by Dr. Barefoot is inappropriate, he does not cite any reason for that statement. It appears Dr. Best's opinion is based solely upon the finding of Dr. Timoney that there is no visual acuity impairment. Within his discretion, the ALJ chose to attribute no evidentiary weight to Dr. Timoney's Form 107 report and Dr. Best's opinion set forth in his July 27, 2015, letter.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed that the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Consequently, while an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be accorded an expert's impairment assessment, as the trier of fact the ALJ is never required to do so. Thus, we find no error in the ALJ's reliance upon Dr. Barefoot's 20% impairment rating for the injury to Sloan's left eye.

With respect to TPRS's assertion the ALJ erred in relying upon the 9% impairment rating assessed by Dr. Barefoot for Sloan's scar, there is no dispute Dr. Barefoot's impairment rating is within the range of impairment permitted by the AMA Guides for the scarring. Further, TPRS did not request additional findings regarding

the ALJ's determination Sloan had a 9% impairment rating as a result of the scarring.

Consequently, for two reasons we do not believe TPRS's argument concerning the ALJ's finding Sloan had a 9% impairment rating is valid. First, as noted TPRS did not request the ALJ to address Dr. Barefoot's failure to describe the nature and appearance of the scar. Notably, in support of this argument TPRS relies upon Dr. Best's December 2, 2014, report which is not in the record. Although it was contained in the appendix of TPRS's brief, it is not in evidence and will not be considered in support of TPRS's argument. Since the ALJ was not given the opportunity to address this perceived deficiency via the petition for reconsideration, our review in this case is limited. Our review of the record leads us to conclude there is identifiable evidence that supports the ALJ's finding Sloan had a 9% impairment rating which Dr. Best characterized as a painful scar. The AMA Guides permitted Dr. Barefoot to assess a 9% impairment rating and the fact Dr. Best may have disagreed with that determination bears no weight.

Second, even if Dr. Best's December 2, 2014, report was in the record, this Board has repeatedly held that criticism of Dr. Barefoot's impairment rating for the

scar is not necessarily legally determinative or in any way binding as to the ALJ's authority as fact-finder to pick and choose whom and what to believe. The AMA Guides make it clear that its purpose is to provide objective standards for the "estimating" of permanent impairment ratings by physicians. Because Dr. Barefoot is a licensed medical doctor, the ALJ could appropriately assume his expertise in utilizing the AMA Guides was comparable or superior to any other expert medical witnesses of record. What is more, the ALJ, as fact-finder, has no responsibility to look beneath an impairment rating or meticulously sift through the AMA Guides to determine whether an impairment assessment harmonizes with that treatise's underlying criteria. Except under compelling circumstances where it is obvious even to a lay person that a gross misapplication of the AMA Guides has occurred, the issue of which physician's AMA rating is most credible is a matter of discretion for the ALJ. REO Mechanical v. Barnes, 691 S.W. 2d 224 (Ky. App. 1985).

In this case, the ALJ concluded Dr. Barefoot's use of the AMA Guides in determining that there was a 9% impairment rating due to the scarring was not erroneous. We are unable to ascertain why the ALJ concluded Dr. Barefoot's impairment rating was more accurate because the

petition for reconsideration did not raise this issue. Relying upon Dr. Best's opinion, TPRS maintains Dr. Barefoot's impairment rating was erroneous. However, the ALJ had the right to reject that opinion even if Dr. Best's December 2, 2014, report had been in the record.

We also note that in its petition for reconsideration, TPRS did not challenge Dr. Barefoot's 20% impairment rating for the injury to Sloan's left eye. There was no request for additional findings regarding the ALJ's determination Sloan had a 20% impairment rating for injury to her left eye. Thus, any complaint by TPRS on appeal regarding insufficient fact-finding or the ALJ's failure to adequately explain his reasoning for accepting Dr. Barefoot's 20% impairment rating for the injury to the left eye and the 9% impairment rating for the scar is without merit as it was not preserved as an issue on appeal. As Dr. Barefoot's 9% impairment rating for the scar is within the acceptable impairment rating permitted by the AMA Guides, we find no error in the ALJ's reliance upon it.

Accordingly, those portions of the January 11, 2016, Opinion, Award, and Order and the February 22, 2016, Order on Reconsideration finding Sloan sustained a traumatic brain injury meriting a 10% impairment rating, a

work-related scar meriting a 9% impairment rating, and a work-related injury to her left eye meriting a 20% impairment rating are **AFFIRMED**. Those portions of the January 11, 2016, Opinion, Award, and Order and the February 22, 2016, Order on Reconsideration finding Sloan has a 5% whole person impairment as a result of a psychological injury is **REVERSED**. The award of income and medical benefits is **VACATED**. This claim is **REMANDED** to an Administrative Law Judge as designated by the Chief Administrative Law Judge for entry of an amended award based on a 10% impairment rating for a psychological injury, a 9% impairment rating for the facial scar, and a 20% impairment rating for the left eye. On remand, in light of the fact TPRS does not contest Dr. Allen's findings concerning her work-related psychological problems, the ALJ shall also determine whether Sloan is entitled to future medical benefits for this condition.

ALL CONCUR.

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