Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 23, 2015

CLAIM NO. 200694736

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

KATHY PRICHARD
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Toyota Motor Manufacturing, Kentucky, Inc. ("Toyota") appeals from the May 20, 2015, Opinion and Order and the June 17, 2015, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the May 20, 2015, Opinion and Order, the ALJ determined Kathy Prichard ("Prichard") sustained a worsening of her physical condition since the entry of the

September 30, 2011, Opinion and Award of Hon. Howard E. Frasier, Administrative Law Judge ("ALJ Frasier"). On appeal, Toyota asserts Prichard's reopening is barred by KRS 342.125(3) and Prichard failed to meet her burden on reopening of demonstrating a change of disability.

The Form 101 alleges Prichard injured her neck on May 16, 2005, while in the employ of Toyota in the following manner: "Inspecting connecting rods on a continuous basis."

A November 13, 2007, Form 110 reveals the parties settled for a lump sum payment of $11,068.00.

On April 22, 2009, Prichard filed a Motion to Reopen alleging a change in disability. Under "Explanation" is the following:

> Form 110 was entered on November 13, 2007 awarding Plaintiff benefits based on 8% PPI resulting from work related cervical injury. Plaintiff returned to work and her cervical condition and pain subsequently worsened and she has been medically disabled from work since May 2008. On August 1, 2008 Dr. James Bean performed C4-7 fusion surgery. As reflected by the attached report of Timir Banerjee, MD, who evaluated Plaintiff for the employer on February 20, 2009, Plaintiff has a post-surgical 28% impairment rating. As reflected by Dr. Banerjee's report and the report of Toyota physicians, due to Plaintiff's post surgical condition she now has significant permanent physical restrictions. As a result of her

> restrictions she is not able to return to work.

Toyota filed a Form 112 Medical Fee Dispute on September 8, 2009, characterizing the dispute as follows:

> Respondent suffered injury to her neck March 16, 2005. That the claim settled November 13, 2007 for this neck injury. A copy of the Form 110 is attached. This dispute arises regarding the medical reasonableness and necessity of treatment and surgery related to urinary incontinence and the fact that the medical providers failed to submit for precertification. Dr. Banerjee, who examined Ms. Prichard February 20, 2009 and has reviewed Dr. Fusion medical notes and the Central Baptist August 5, 2009 operative report and is of the opinion that the treatment and surgery for incontinence were not causally related to her cervical condition. A copy of his February 20, 2009 report and September 2, 2009 addendum are attached hereto.

By order dated November 19, 2009, ALJ Frasier consolidated the September 8, 2009, Medical Fee Dispute with the pending reopening.

Toyota filed another Form 112 Medical Fee Dispute on April 12, 2010, stating as follows:

> Respondent suffered injury to her neck March 16, 2005. That the claim settled November 13, 2007 for this neck injury. A copy of the Form 110 is attached. This dispute arises regarding the medical reasonableness and necessity of pain treatment by Donald Douglas, in

> the form of an additional cervical epidural steroid injection. That Dr. Yen Chou Joe Chen, M.D. performed a utilization review regarding the medical necessity and appropriateness of epidural steroid injection requested by Donald Douglas, M.D.

By order dated May 21, 2010, ALJ Frasier consolidated the April 12, 2010, Medical Fee Dispute with the other pending matters.

In a September 30, 2011, Opinion and Award, ALJ Frasier determined Prichard failed to meet her burden of proving she is permanently totally disabled but had met her burden of proving her permanent partial disability ("PPD") has increased since the settlement. ALJ Frasier determined that at the time of the November 13, 2007, settlement, Prichard had an 8% impairment rating for her cervical spine condition and the PPD benefits to which she would have been entitled at the time of settlement. He awarded PPD benefits at the weekly rate of $519.91 for the balance of the 425 week period interrupted by any weeks temporary total disability ("TTD") benefits were paid.

On August 14, 2014, Prichard filed a Motion to Reopen alleging a change of disability as shown by objective medical evidence. Under "explanation" is the following:

Form 110 was entered on November 13, 2007 awarding Plaintiff permanent disability benefits from the date of her injury on March 15, 2005 based on 8% PPI resulting from work related cervical injury. Plaintiff continued working after the entry of the Order but her cervical condition and pain subsequently worsened and she was medically disabled from work in May 2008. On August 1, 2008 Dr. James Bean performed C4-7 fusion surgery after which on April 22, 2009 Plaintiff filed a motion to reopen. The motion was granted and following an evidentiary hearing ALJ Howard Frasier entered a September 30, 2011 Opinion and Award awarding Plaintiff permanent partial disability benefits of $519.91 for the remainder of the 425 PPD period based upon a 28% impairment rating with a 3.2 multiplier, finding that Plaintiff 'will be unlikely to find sedentary employment at a level sufficient to allow her to make the same or greater wages...(and) is not likely to be able to continue earning such a wage for the indefinite future and the two multiplier is not applicable to her claim for worsening.' However, based upon Dr. Bean's January 28, 2010 deposition, in which he stated that he believed that Plaintiff would be able to perform sedentary work, the ALJ denied Plaintiff permanent total disability benefits.

Plaintiff's cervical condition has continued to deteriorate since the September 30, 2011 Opinion and Order and when Plaintiff saw Dr. Bean on February 15, 2014, he determined that due to the worsening of her cervical condition, Plaintiff is unable to perform sedentary employment.

> This motion to reopen is based upon the worsening of Plaintiff's work related cervical condition and her increased and total occupational disability due to that worsening.

The April 15, 2014, report of Dr. James Bean was introduced in which he opined as follows:

> Kathy Prichard had an anterior cervical discectomy and fusion at 3 levels, C4-C5, C5-C6, and C6-C7, in 2008. She originally had cervical pain with radiation of symptoms to her hands. The arm and hand symptoms resolved. She still has cervical pain.
>
> She had an FCE done in 2011 at Bluegrass PT which confirmed an inability to be employed at a steady, full-day sedentary position because of restrictive neck pain.
>
> At present, she has no extension ability. She can flex only about 25 degrees and gets a stabbing pain in her neck. Rotation is about 25 degrees to the right and about 15 degrees to the left. Thus, she has an essentially immobile neck that would be unable to sustain routine neck movements in an employed position for a full day's work.
>
> I think these changes are permanent and would preclude her from return to long-term, steady employment, even requiring sedentary activity, because of the restriction in neck movement in all directions.

Attached to Dr. Bean's report is an April 15, 2014, "Medical Questionnaire." Dr. Bean checked both "yes"

and "no" to the following question: "Has Ms. Prichard's work-related cervical condition and impairment worsened since your last previous examination?" He further opined as follows: "Yes - unable to perform continuous sedentary duty. No - radiographically unchanged." Dr. Bean put a check by "MRI," "Personal Observation," and "FCE (Including attached May 2011 Bluegrass PT report)" to indicate the evidence he relied upon in support of his opinion of a worsening of condition. Under "findings," Dr. Bean wrote as follows: "2011 FCE precludes sedentary duty." For "current restrictions and/or limitations," Dr. Bean wrote: "No neck rotation, flexion, extension." Dr. Bean checked "yes" by the following question:

> In your January 28, 2010 deposition you stated that Kathy Prichard was capable of sedentary employment. Do you believe that the worsening of her work related cervical condition and impairment since your deposition currently prevents her from engaging in regular and continuous employment, including in a sedentary job.

The April 23, 2015, medical report of Dr. William Childers was introduced in which he stated:

> I am writing in regards to Kathy Pritchitt [sic]. She is a sixty one year old female that I have taken care of since 1999. She has developed significant cervical disk disease and required anterior cervical diskectomy

> and fusion at three levels in 2008. She had cervical radiculopathy at the time and those symptoms have improved, but she has continued to have cervical pain that has limited her ability to function. She has very little range of motion of her neck. She has only 25 to 30 degrees of rotation on the right and much less on the left. She has very little flexion. The movement of her neck is related to lower spine rotation, which limits her mobility and limits her driving. She is unable to lift. This has been an ongoing problem and she is unable to function in the work capacity. Her other history is significant for chronic narcotic use that limits driving or operating any equipment. This has continued to progress and will continue to progress throughout her life time. It is my opinion that she is unable to regularly maintain or perform most basic activities of living to any extent of a meaningful activity. She is unable to engage in employment of any kind, including sedentary employment. I will continue to follow her on a very regular basis for this very debilitating disease in the patient.

Prichard's November 11, 2014, deposition was introduced. She testified she has not worked since September 2011 and spends her days in constant pain. She explained:

> A: Each day is- is pretty painful. I'm in a constant pain now. And pretty much my days are just trying to get through it. I don't really do anything physical. My husband is retired, thank God, and he's- he's pretty much in charge of taking care of me. I don't

> know what I would do if he hadn't retired.

Concerning the changes in her physical condition since 2011, Prichard testified:

> A: How it's changed is- can I give you a little bit of a before and after scenario? Before, you know, I could do some things in limited quantity. And now, it's like I deal with a constant pain every day that's pretty intense. And I have a whole lot more bad days versus the good days. And it's very hard for me to get comfortable. Before I could lay down and do the ice therapy, chill out, and it would- it would ease the pain. But now there is [sic] times that that won't even do it. I'm - I'm just constantly trying to find a position to where I'm just not so miserable.
>
> Q: Okay. So is it the frequency of the pain, or is it the intensity of the pain?
>
> A: It- sir, it's both. The frequency is- I really do have more bad days than I had before or after. And intensity, like I said, it had gotten to where I was unable to raise- I might have been getting maybe three hours of sleep a night, and that's not enough for your body to- to heal or to even- you know. That's just not enough for the body.
>
> Q: How many hours of sleep are you getting now?
>
> A: Now, on a good night, I don't know. On a good night I would do maybe ten. But, you know, maybe seven or eight.
>
> ...

> A: Okay. Could I say one more thing, the degree of the pain level, because I don't know if I- I don't feel like I really clarified that. Can I clarify it?
>
> ...
>
> Okay, I would like to paint a picture for you, if you don't mind. The intensity of my pain is likened to having a woman that's in child labor. And when her pain has reached its maximum, I mean, it's really intense and it's extremely tiring to go through that. That pain level is what I feel in this base of my neck. It's like a constant, constant, tightening, burning, sensation in my neck that just- I just have a difficult time getting ease from.
>
> And I want to say also, that I disagree with what Dr. Bean said about me being able to- to - to be able to work because, I mean, I just don't see how- that I could- I have trouble comprehending and- and completing anything now, so- I feel like I'm rambling on and I apologize.

Prichard testified she has lost the motion and comfort in her neck. She explained:

> Q: Do you have any problems sitting up? Does that cause any problems to your neck or your head or anything else, sitting up for a prolonged period of time in a sitting position?
>
> A: That has definitely changed. I have to- I have to have a place to rest my head, to lean it back or to move around or lay down or something when it- it's hurting real bad, yes.

Q: Okay. How long can you sit like in this chair in this conference room; how long can you sit there in an upright position before your neck pain starts becoming uncomfortable and unbearable?

A: Not very long.

Q: Well, like when you eat dinner, how long do you sit at the kitchen table eating dinner or at the dining table?

A: Well, I'm ashamed to say I don't eat at the table. I eat in a high back chair, a wing-back chair, and I lean my head back and eat. So I don't sit up for- straight up for very long. I always- and if I do, I have to make sure that I have something to lean my head on. And then I have to be able to get up and move or lay down to find comfort.

Q: Okay. And does any- do any environmental factors seem to have an effect on your neck pain? And if so, what are they?

A: Absolutely. The cold weather just intensifies it greatly. Any kind of activity will increase the pain level, and if it's a higher activity, it's higher the pain.

Q: Well, you were having these kind of complaints in 2011, too, right? The cold weather-

A: Yes.

Q: -wet weather was affecting it. Has that changed, has it gotten more intense or worse, or has it just stayed the same ever since?

A: No, it's- it's gotten worse. It's intensified.

In the May 20, 2015, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

> **A. Was Motion to Reopen filed timely?**
>
> The defendant argues that the Motion to Reopen filed by the plaintiff on August 12, 2014 was not timely under KRS 342.125. The plaintiff responds by stating that the plaintiff's most recent Motion to Reopen was not time barred. The plaintiff cites in support of her position the decision of the Kentucky Supreme Court in *Hall v. Hospitality Resources, Inc*., 276 S.W.3d 775 (Ky. 2009). I make the determination that that Opinion by the Supreme Court is on point with the case at bar. In that case, as in our case, KRS 342.125(3) provides that the 4-year limitation shall be calculated from the date of the original award or order granting or denying benefits, and that where an order is subsequently entered granting or denying benefits, as was the case there and here, the 4-year statute of limitation is to be calculated from the later date rather than from the earlier date. I, therefore, make the determination that that plaintiff's Motion to Reopen filed on August 12, 2014 is not time barred, since it was filed within 4 years from and after Judge Frasier's September 30, 2011 Opinion and Award.
>
> **B. Any change in plaintiff's condition?**
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> "Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order [for] . . . [c]hange of disability *as shown by*

objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." KRS 342.125(1)(d) (emphasis added).

As the fact finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The ALJ also has the sole authority to judge the weight to be afforded to the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). When conflicting evidence is presented, the ALJ may choose whom or what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977). Furthermore, 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, 96 (Ky. 2000).

I saw and heard the plaintiff Mrs. Prichard testify at the Final Hearing. I sat a few feet from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony, and carefully observed her body language during her testimony. I am the only decision maker who actually saw and heard her testify in this reopening proceeding. She was a stoic and open lady. I make the determination that she was a credible and convincing lay witness and that her testimony rang true.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward,* 2007 WL 2343805 (Ky. App. 2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement.

. . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

I make the determination that the medical evidence from the plaintiff's treating neurosurgeon, Dr. Bean, was persuasive, compelling and reliable. I am very familiar with Dr. Bean, who is an excellent neurosurgeon who is conservative by nature. Dr. Bean performed Mrs. Prichard's 3-level neck surgery in 2008. He reviewed her functional capacity evaluation done in 2011. He examined her again on April 15, 2014. He noted that she has no extension ability in her neck and can flex her neck only about 25 degrees, at which time she gets a stabbing pain in her neck. He found that rotation of her neck is about 25 degrees to the right and about 15 degrees to the left. Dr. Bean emphasized that this lady has

essentially an immobile neck and that she would be unable to sustain routine neck movements in an employed position for a full day's work. Dr. Bean stated that those changes in her neck are permanent and will preclude her from returning to long-term steady employment, even sedentary activity, because of the restriction in her neck movement in all directions. Dr. Bean stated that Mrs. Prichard's work-related cervical condition and impairment has worsened since his last examination. He noted that in his January 28, 2010 deposition he stated that Mrs. Prichard was capable of sedentary employment and that her work-related cervical condition and impairment has worsened since his deposition currently preventing her from engaging in regular and continuous employment, including a sedentary job.

I read with interest the 2015 medical report of Dr. Childers, Mrs. Prichard's long-term treating physician. Dr. Childers noted Mrs. Prichard's cervical disc disease and neck surgery at 3 levels in 2008. He stated that she now has very little range of motion in her neck with only 25-30 degrees of rotation on the right and much less on the left. He noted that she has very little flexion in her neck. He noted that she is unable to lift. He emphasized that she is unable to function in a work capacity. He noted that she has chronic narcotic use which limits driving or operating any equipment. Dr. Childers stated that Mrs. Prichard is unable to regularly maintain or perform most basic activities of living to any extent of a meaningful activity. Dr. Childers emphasized that she is unable to engage in any employment of any kind, including sedentary employment.

I make the determination that the medical evidence from Dr. Childers is persuasive, compelling and reliable.

In *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979), the Kentucky Supreme Court stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 341.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury

physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the workers' medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. a [sic] worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

Mrs. Prichard is now 61 years of age, meaning that she is an older worker in the highly competitive job market. Her work history shows that from 1976-2005 she had a very good work history showing a very good work ethic. She had a serious work-related neck injury while employed by the defendant on March 16, 2005. In 2008 Dr. Bean performed upon her an anterior cervical discectomy and fusion at 3 levels. In his Opinion and Award dated September 30, 2011, Judge Frasier determined that the plaintiff had a 28% permanent impairment to the body as a whole and awarded her enhanced permanent partial disability benefits. Based upon the plaintiff's credible and convincing lay testimony, as covered in detail above, and the persuasive, compelling and reliable medical evidence from Dr. Bean, the plaintiff's treating neurosurgeon, which is covered in

detail above, as well as the persuasive, compelling and reliable medical evidence from Dr. Childers, the plaintiff's long-term treating physician, I make the determination that if Mrs. Prichard goes out into the highly competitive job market, she will have no realistic expectation of finding any regular gainful employment. I make the determination that she will not be able to return to any regular gainful employment in the highly competitive job market.

Considering the severity of Mrs. Prichard's work-related neck injuries, her work history, her educational level, her credible and convincing lay testimony, as covered above, the persuasive, compelling and reliable medical evidence from Dr. Bean, her treating neurosurgeon, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Childers, her long-term treating physician, as covered above, I make the determination that Mrs. Prichard cannot find work consistently under regular work circumstances and work dependably. I make the determination that her physical condition has worsened greatly since Judge Frasier's Opinion and Award on September 30, 2011 and that her disability has changed greatly for the worse as shown by objective medical evidence of worsening of impairment due to the condition caused by her work injury in 2005 since the date of Judge Frasier's Opinion and Award dated September 30, 2011. Based upon all of the above factors, I reach the legal conclusion that Mrs. Prichard's physical condition has greatly worsened and that she is now permanently and totally disabled. I reach the legal conclusion that her permanent and total disability began on August 12, 2014,

> the date she filed her current Motion to Reopen.

Toyota filed a petition for reconsideration on June 2, 2015, asserting Prichard's August 12, 2014, Motion to Reopen violates the statute of limitations set forth in KRS 342.125(3). Toyota also asserted the motion to reopen did not demonstrate any objective change in impairment as required by KRS 342.125(1)(d).

The June 17, 2015, Opinion and Order on Reconsideration, overruling the petition for reconsideration reads as follows:

> Defendant has filed a Petition for Reconsideration and plaintiff has responded thereto.
>
> In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky. 1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. A review of defendant's Petition for Reconsideration shows that defendant is attempting to reargue the case, which is improper. However, out of an abundance of caution, we will again discuss the case.
>
> Page 3 of the original Opinion and Order dated May 20, 2015 specifically states that I have carefully reviewed and considered all of the evidence filed by the parties in the case and the complete and entire record in the case file, including the plaintiff's

testimony and the medical evidence from Dr. Bean, Dr. Childers and Dr. Banerjee.

The defendant reargues that the Motion to Reopen filed by the plaintiff on August 12, 2014 was not timely under KRS 342.125. The plaintiff responds by stating that the plaintiff's most recent Motion to Reopen was not time barred. The plaintiff cites in support of her position the decision of the Kentucky Supreme Court in *Hall v. Hospitality Resources, Inc*., 276 S.W.3d 775 (Ky. 2009). I make the determination that that Opinion by the Supreme Court is on point with the case at bar. In that case, as in our case, KRS 342.125(3) provides that the 4-year limitation shall be calculated from the date of the original award or order granting or denying benefits, and that where an order is subsequently entered granting or denying benefits, as was the case there and here, the 4-year statute of limitation is to be calculated from the later date rather than from the earlier date. I, therefore, make the determination that that plaintiff's Motion to Reopen filed on August 12, 2014 is not time barred, since it was filed within 4 years from and after Judge Frasier's September 30, 2011 Opinion and Award.

The plaintiff, **Kathy Prichard,** testified that there has been a change and a worsening in her neck since Judge Frasier's Opinion in 2011. She stated that her neck pain has increased and that her cervical range of motion is restricted. She stated that her pain interferes with her sleep. She testified that her activities of daily living have been reduced and that her ability to do housework and drive a vehicle is negatively affected. She

stated that her treating physician, Dr. Childers, has increased her prescription pain medication and that this has helped. She stated that she last worked back in 2008.

I saw and heard the plaintiff Mrs. Prichard testify at the Final Hearing. I sat a few feet from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony, and carefully observed her body language during her testimony. I am the only decision maker who actually saw and heard her testify in this reopening proceeding. She was a stoic and open lady. I make the determination that she was a credible and convincing lay witness and that her testimony rang true.

Filed in the record was the medical report of **Dr. James Bean**, the plaintiff's treating neurosurgeon. In his medical report dated April 15, 2014, Dr. Bean stated that the plaintiff's chief complaint was neck pain. He noted that she had an anterior cervical discectomy and fusion at three levels, C4-C5, C5-C6 and C6-C7 in 2008. Dr. Bean reported that the plaintiff originally had cervical pain with radiation of symptoms to her hands, that her arm and hand symptoms have resolved, but that she still had cervical pain. Dr. Bean reported that a functional capacity evaluation was done in 2011, which confirmed an inability to be employed at a steady, full-day sedentary position because of restrictive neck pain. Dr. Bean stated that Mrs. Prichard has no extension ability, that she can flex only about 25 degrees and gets a stabbing pain in her neck. The plaintiff's rotation is about 25 degrees to the right and about

15 degrees to the left. Dr. Bean stated that she has an essentially immobile neck that would be unable to sustain routine neck movements in an employed position for a full day's work. Dr. Bean stated that those changes are permanent and would preclude Mrs. Prichard from returning to long-term steady employment even requiring sedentary activity because of the restriction of her neck movement in all directions. Dr. Bean stated that Mrs. Prichard is unable to perform continuous sedentary duty. Dr. Bean stated that in his January 28, 2010 deposition he stated that Mrs. Prichard was capable of sedentary employment and it is now his opinion that the worsening of her work-related cervical condition and impairment since his deposition currently prevents her from engaging in regular and continuous employment, including a sedentary job.

The plaintiff filed the medical report of her treating physician, **Dr. William Childers**, dated April 23, 2015. Dr. Childers stated that he had been treating Mrs. Prichard since 1999 and that she had developed significant cervical disc disease and required an anterior cervical discectomy and fusion at three levels in 2008. He stated that her cervical radiculopathy had improved, but that she continued to have cervical pain that limits her ability to function. Dr. Childers stated that the plaintiff has very little range of motion in her neck, having only 25-30 degrees rotation on the right and much less on the left. Mrs. Prichard has very little flexion. She is unable to lift. She is unable to function in a work capacity. She has chronic narcotic use which limits driving or operating any equipment. Dr. Childers stated that in his opinion

the plaintiff is unable to regularly maintain or perform the most basic activities of living to any extent of a meaningful activity. Dr. Childers stated that the plaintiff is unable to engage in employment of any kind, including sedentary employment. Dr. Childers stated that he will continue to follow Mrs. Prichard on a very regular basis for her debilitating condition.

The defendant attempts to reargue the application of KRS 342.125(1)(d), which provides for a change of disability as shown by objective medical evidence of worsening of impairment due to a condition caused by the injury since the date of the award or order. In the most recent Opinion and Order making the determination that Mrs. Prichard's physical condition has greatly worsened and that she is now permanently and totally disabled is solidly based upon the persuasive, compelling and reliable objective medical evidence from the plaintiff's neurosurgeon, Dr. Bean, and her long-term treating physician, Dr. Childers, as covered in great detail above, which clearly shows a worsening of Mrs. Prichard's impairment and condition due to her neck injury which she sustained in 2005 and a change of disability showing a worsening of her condition since the date of Judge Frasier's Opinion and Award on September 30, 2011.

The defendant attempts to reargue the significance of the Functional Capacity Evaluation in 2011 referred to by Dr. Bean. Dr. Bean's April 15, 2014 medical report carefully documents the medical facts of the plaintiff's worsened condition and impairment as compared and contrasted to the 2011

Functional Capacity Evaluation. In making my determination of the plaintiff's worsened condition, I did not rely upon the 2011 Functional Capacity Evaluation.

The defendant attempts to reargue the plaintiff's testimony as found by Judge Frasier. I carefully read and contrasted the plaintiff's testimony leading up to Judge Frasier's 2011 decision and made the determination that the plaintiff specifically stated that there has been a change and worsening in her neck since Judge Frasier's 2011 Opinion, that her neck pain has increased and that her cervical range of motion is restricted, that her neck pain interferes with her sleep, that her activities of daily living have been reduced and that her ability to do housework and drive a motor vehicle is negatively affected. She also testified that Dr. Childers has increased her prescription pain medication. I relied upon all of that sworn testimony in making my recent decision.

The defendant attempts to reargue that Dr. Childers stated that the plaintiff's ongoing neck problem began in 2008. The proof is that Dr. Childers has been the plaintiff's treating physician since 1999 and his medical report dated April 23, 2015 objectively documents the severe worsening of the plaintiff's neck condition and her resultant occupational disability. As Dr. Childers stated, Mrs. Prichard is unable to regularly maintain or perform the most basic activities of living to any extent of meaningful activity and that she is unable to engage in employment of any kind, including sedentary employment. Dr. Childers' persuasive, compelling and

reliable medical evidence completely destroys the rearguments contained in the defendant's Petition for Reconsideration.

The defendant attempts to reargue that the objective medical evidence as shown in Dr. Bean's medical report dated April 15, 2014 and Dr. Childers' medical report dated April 23, 2015 does not support a determination of worsening of the plaintiff's physical condition and occupational disability so as to support a determination of permanent total disability. On the contrary, the objective medical evidence from both of the plaintiff's treating physicians completely destroys the plaintiff's reargument.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward,* 2007 WL 2343805 (Ky. App. 2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement

. . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to <u>life experiences</u>" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "<u>life experiences</u>" in making that determination.

In *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979), the Kentucky Supreme Court stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

"'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to

rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

In its Petition for Reconsideration, defendant attempts to reargue the plaintiff's occupational disability. The defendant argues that the 1996 amendments to the Workers' Compensation Act overrule the definition of occupational disability set forth in *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968). In *Osborne*, the Supreme Court stated that the change of condition which KRS 342.125 contemplates is a change of the workers' physical condition. This argument was rebutted by the Kentucky Supreme Court in *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky. 2001), where the court stated that the principles set forth in *Osborne* remain viable in determining whether a worker's occupational disability is partial or total.

Mrs. Prichard is now 61 years of age, meaning that she is an older worker in the highly competitive job market. Her work history shows that from 1976-2005 she had a very good work history showing a very good work ethic. She had a serious work-related neck injury while employed by the defendant on March 16, 2005. In 2008 Dr. Bean performed upon her an anterior cervical discectomy and fusion at 3 levels. In his Opinion and Award dated September

30, 2011, Judge Frasier determined that the plaintiff had a 28% permanent impairment to the body as a whole and awarded her enhanced permanent partial disability benefits. Based upon the plaintiff's credible and convincing lay testimony, as covered in detail above, and the persuasive, compelling and reliable medical evidence from Dr. Bean, the plaintiff's treating neurosurgeon, which is covered in detail above, as well as the persuasive, compelling and reliable medical evidence from Dr. Childers, the plaintiff's long-term treating physician, I make the determination that if Mrs. Prichard goes out into the highly competitive job market, she will have no realistic expectation of finding any regular gainful employment. I make the determination that she will not be able to return to any regular gainful employment in the highly competitive job market.

Considering the severity of Mrs. Prichard's work-related neck injuries, her work history, her educational level, her credible and convincing lay testimony, as covered above, the persuasive, compelling and reliable medical evidence from Dr. Bean, her treating neurosurgeon, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Childers, her long-term treating physician, as covered above, I make the determination that Mrs. Prichard cannot find work consistently under regular work circumstances and work dependably. I make the determination that her physical condition has worsened greatly since Judge Frasier's Opinion and Award on September 30, 2011 and that her occupational disability has changed greatly for the worse as shown by objective medical evidence of worsening

of impairment due to the condition caused by her work injury in 2005 since the date of Judge Frasier's Opinion and Award dated September 30, 2011. Based upon all of the above factors, I reach the legal conclusion that Mrs. Prichard's physical condition has greatly worsened and that she is now permanently and totally disabled. I reach the legal conclusion that her permanent and total disability began on August 12, 2014, the date she filed her current Motion to Reopen.

In making the above determinations, I rely upon the unanimous Opinion of the Supreme Court of Kentucky in *Wilder v. Enterprise Mining,* 2014 WL 7239812 (Ky.2014). There, the Supreme Court ruled that (1) the ALJ has the sole authority to determine the weight, credibility, substance and inference to be drawn from the evidence; (2) where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination; (3) although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal; (4) the ALJ is free to interpret the expert evidence and reach conclusions; (5) while evidence has been presented to counter the ALJ's conclusion, the mere fact that contrary evidence could lead to a different result does not provide grounds to reverse the ALJ.

Toyota's first argument on appeal is that Prichard's motion to reopen is barred by KRS 342.125(3). We disagree.

KRS 342.125(3) states as follows:

> Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

In Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 785 (Ky. 2009), the Supreme Court of Kentucky stated as follows:

> Given our further analysis, the conclusion that an "order granting or denying benefits" was tended to encompass an order granting benefits *different* than an original award or settlement is compelling. ***Thus, the reference in KRS 342.125(3) to the "the original award or order granting or denying benefits," must necessarily refer not only to the original award, but to any subsequent order granting or denying benefits.*** Any contrary interpretation leads to absurd results, as well as a violation of the clear spirit of the Kentucky Workers'

> Compensation Act. *Plummer v. Sharondale Coal Corp.,* 834 S.W.2d 708, 711 (Ky. App. 1992) ("We refuse to afford an interpretation to the statute that would create irrational distinctions yielding absurd results that would serve to undermine the purpose of the Workers' Compensation Act."). "We have often said that statutes will not be given [such a] reading where to do so would lead to an absurd or unreasonable conclusion." *Wesley v. Board of Ed. of Nicholas County,* 403 S.W.2d 28, 30 (Ky.1966); *see also Commonwealth of Ky., Dept. of Highways v. Wilkins,* 320 S.W.2d 125, 126 (Ky. 1959).

(emphasis added).

As indicated by the record, Prichard's original claim for benefits was settled on November 13, 2007. On April 22, 2009, Prichard filed a Motion to Reopen alleging a change in disability, and in the September 30, 2011, Opinion and Award, ALJ Frasier determined Prichard met her burden of proving an increase in permanent partial disability. ALJ Frasier determined Prichard would have been entitled to PPD benefits of $30.97 per week at the time of the settlement agreement and increased that amount to $519.91 per week. The September 30, 2011, Opinion and Award is clearly a subsequent order granting benefits consistent with the holding in Hall, supra. Therefore, Prichard's August 12, 2014, Motion to Reopen was timely filed within

four years of ALJ Frasier's September 30, 2011, Opinion and Award.

Toyota’s second argument is Prichard failed to meet her burden of demonstrating a worsening of condition as shown by objective medical evidence, and the ALJ failed to cite to the objective medical evidence which supports his finding of a worsening of impairment.

As Prichard was the party with the burden of demonstrating a worsening of condition as shown by objective medical evidence and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

It is abundantly clear from both the May 20, 2015, Opinion and Order and the June 17, 2015, Opinion and Order on Reconsideration the ALJ relied upon the opinions

of Drs. Childers and Bean, and both opinions constitute substantial evidence in support of the ALJ's finding of permanent total disability. Dr. Childers, in his April 23, 2015, report opined Prichard "is unable to engage in employment of any kind, including sedentary activity." In his April 15, 2014, report, Dr. Bean opined Prichard’s restriction in neck movement "preclude her from return to long-term, steady employment, even requiring sedentary activity." Dr. Bean further acknowledged in the April 15, 2014, "Medical Questionnaire" that while he once believed, as testified to in his January 28, 2010, deposition, Prichard was capable of sedentary employment, he now believes Prichard's worsening condition prevents her from engaging in regular and continuous employment. The opinions of both doctors establish a worsening of Prichard’s physical condition and disability. Therefore, Prichard has demonstrated a worsening of condition since the decision of ALJ Frasier as shown by objective medical evidence. The opinions of Drs. Childers and Bean comprise substantial evidence in support of the ALJ’s determination Prichard is permanently totally disabled, thus, this determination cannot be disturbed.

We find Toyota's argument that it is "unaware of the objective medical evidence the ALJ relied upon to make

a determination of change in impairment" to be somewhat disingenuous. Both the May 20, 2015, Opinion and Order and the June 17, 2015, Opinion and Order on Reconsideration cite to the opinions of Drs. Childers and Bean as the basis for the ALJ finding a worsening of impairment. In the May 20, 2015, Opinion and Order, the ALJ not only summarized the reports of Drs. Childers and Bean but also set forth an analysis of said reports on pages nine through eleven of the Opinion and Order which details what he found compelling and persuasive. The ALJ reiterated his analysis in his June 17, 2015, Opinion and Order on Reconsideration. To request the ALJ to provide additional explanation of the medical evidence upon which he relied would be unreasonable and unnecessary and beyond what the law requires. The ALJ's determination of permanent total disability will not be disturbed.

Accordingly, the May 20, 2015, Opinion and Order and the June 17, 2015, Opinion and Order on Reconsideration are **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

ALVEY, Chairman. I respectfully dissent. The Kentucky Supreme Court was very divided in its decision in Hall v.

Hospitality Resources, Inc., 226 S.W.3d (Ky. 2008). As pointed out in Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000) and Robertson v. United Parcel Service, 64 S.W.3d 284, 287 (Ky. 2001), workers' compensation is a creature of statute. It is well established where a statute is unambiguous, it must be applied as written according to its plain meaning. Hall v. Hospitality Resources, Inc., supra; Griffin v. City of Bowling Green, 458 S.W.2d 456, 457 (Ky. 1970).

KRS 342.730(3) states as follows:

> Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

Although acknowledging the holding in Hall, supra, such application to the facts in the case *sub judice* produces an absurd result contrary to the clear statutory language, and I submit the intent of KRS 342.125(3). The overriding intent of the statutory changes implemented by the legislature in 1996 was to limit, rather than expand

benefits. The dissent in Hall, supra sets out the legislative intent and history which will not be recited here.

Contrary to the limitation contained in KRS 342.125(3), the majority would construe Hall, supra to allow for reopenings for increase in PPD benefits, or permanent total disability benefits in perpetuity. The statutory language clearly limits reopenings for an increase in benefits to be filed within four year time period. A reasonable interpretation may be that a reopening for TTD benefits filed within the four year window, with a subsequent finding of permanent worsening is appropriate. However, nothing contained in the statute would allow for such a finding in a claim reopened more than four years after the approval of a settlement agreement or the entry of an award. The four year timeframe serves as a statute of limitations to restrict rather than expand such action. The majority's decision ignores the clear statutory language, and holds for naught the restrictive language contained in KRS 342.125(3).

The majority in Hall, supra, infers approved settlement agreements do not equate to opinions or orders. This is contrary to KRS 342.265(1). Likewise this is contrary to Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952), as

reiterated in Richey v. Perry Arnold, Inc., 391 S.W.3d 705 (Ky. 2012) where the Kentucky Supreme Court clearly stated a settlement carries the effect of an order or award.

While KRS 343.125(3) allows for reopenings for additional TTD benefits, such does not revive the four year statute of limitations contained in that provision. In this case, clearly Pritchard could move for additional TTD benefits, but is precluded from establishing a worsening of condition for either PPD benefits, or a finding of permanent total disability. I would reverse the ALJ's decision as precluded by KRS 342.125(3). I would further note that based upon the holding in Hall, supra, the ALJ made an appropriate determination; however, I submit the holding in that case is contrary to the specific limitations set forth in the statute.

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