Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 2, 2015

CLAIM NO. 200784763

WHITLEY COUNTY HOME HEALTH PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

COURTNEY TAYLOR
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Whitley County Home Health ("Whitley County") appeals from the September 8, 2014, Opinion, Order, and Award of Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") on reopening finding Courtney Taylor's ("Taylor") occupational disability worsened since the December 11, 2009, Opinion and Award. The ALJ awarded permanent total disability ("PTD") benefits commencing on

November 25, 2013, the date Taylor filed her motion to reopen. Whitley County also appeals from the October 8, 2014, Order ruling on its petition for reconsideration.

The December 11, 2009, Opinion and Award of Hon. Howard E. Frasier, Administrative Law Judge ("ALJ Frasier") determined Taylor sustained a work-related low back injury on June 14, 2007. He noted Taylor subsequently underwent surgery performed by Dr. Amr El-Naggar consisting of an "L5-S1 anterior lumbar diskectomy and interbody fusion using peak AR cage and BMP and placement of anterior titanium ATB plate at L5-S1 for anterior stabilization." Since Taylor had returned to work as a school nurse at the time of the hearing, ALJ Frasier awarded permanent partial disability ("PPD") benefits based on the 22% impairment rating assessed by Drs. Daniel Primm and El-Naggar. Finding Taylor lacked the physical capacity to perform the work she was performing at the time of the injury, ALJ Frasier enhanced the PPD benefits pursuant to KRS 342.730(1)(c)1.

On November 25, 2013, Taylor filed a motion to reopen alleging her condition had substantially worsened since rendition of ALJ Frasier's award on December 11, 2009. Taylor attached her affidavit in which she asserted that due to worsened back pain she stopped working for

Whitley County on September 11, 2012, and has not worked since. She attached Dr. David Muffly's November 14, 2013, report and his completed Form 107 and affidavit. Dr. Muffly's report provides his diagnosis and states Taylor now has a 26% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Muffly stated Taylor is totally disabled and cannot perform sedentary work on a constant basis. He also provided her physical restrictions. In his November 14, 2013, affidavit, Dr. Muffly stated that based upon his records review and physical examination, Taylor's condition has worsened since December 9, 2009, and she is now permanently totally disabled due to the residuals of her June 14, 2007, injury.

In a January 9, 2014, Order, Hon. Robert L. Swisher, Administrative Law Judge, concluded Taylor set forth a *prima facie* case for reopening and sustained the motion to reopen to the extent the claim would be assigned to an Administrative Law Judge. Upon reopening, the parties introduced voluminous medical and vocational evidence.

Taylor introduced her April 8, 2014, deposition and testified at the July 23, 2014, hearing that at the time of ALJ Frasier's December 11, 2009, Opinion and Award,

she was working for Whitley County as a school nurse and worked there until September 11, 2012. She missed work in 2011 due to back problems and stopped working because she was no longer able to work as a school nurse. She denied a subsequent injury caused her condition to worsen. Taylor denied taking narcotic pain medications before going to work as a school nurse. She testified she is now in the same shape she was in prior to the surgery.

In 2012, after Taylor ceased working, she called "Workers' Compensation" and requested a physician be located to treat her pain. As a result, she was sent to Dr. David Weber, who treated her for a year. Dr. Weber administered injections and a trial nerve stimulator, neither of which helped. Because her pain had become unbearable, Taylor again contacted Workers' Compensation and requested another pain management doctor. Thereafter, arrangements were made for Taylor to see Dr. Debora Tallio at Advance Care Centers, whom she saw for a month. When Dr. Tallio left, she saw other doctors at the facility.[1] Dr. Tallio prescribed Neurontin for nerve pain three times a day, Xanaflex, a muscle relaxer, two times a day, Oxycodone four times a day for pain, Oxycontin two times a

[1] Taylor is still treated by the facility which has changed its name to Kentucky Pain Care.

day for pain, and Elavil at bedtime to help her sleep. Taylor denied taking any of these medications prior to December 2009.

Taylor testified she has never been pain free and she only engages in necessary activities. She is no longer able to walk a couple of miles daily. On a scale of one to ten, her pain averages between four and six. When at home she does not sit but gets in a reclined position. She estimated she can sit or stand for fifteen minutes at a time. Taylor can alternate between sitting and standing positions for approximately forty-five minutes and after that must lie down.

Taylor testified she cannot perform any job five days a week, eight hours a day. The medication she currently takes combined with her ability to control her environment provides some relief from the pain. Taylor indicated she has good days and bad days. On a bad day she is nonfunctional. She believes she has more bad days than good. She testified her condition has progressively worsened since she stopped working in September 2012. She seldom goes out to eat and attends church approximately once or twice a month but cannot stay for the entire service. She does not attend both Sunday school and the church service. Because she is unable to engage in certain

household tasks, her family helps with the housework. Taylor has pain radiating into her legs. She believes her leg pain has been more persistent since the trial use of the nerve stimulator.

When Taylor returned to Dr. El-Naggar he ordered an MRI and other diagnostic tests and he did not change her restrictions.[2] She last saw Dr. El-Naggar in 2011. Taylor testified she was unable to return to the staff nurse position which is the job she was performing when injured at work. Had she been able, she would have continued working as a school nurse. She estimated when she stopped working as school nurse in September 2012, her pain level was ten.

In the September 8, 2014, Opinion, Order, and Award, in addressing the medical evidence, the ALJ briefly summarized the report of Dr. Muffly, the results of a functional capacity evaluation ("FCE") performed by Jennifer Wilson, a physical therapist, Dr. Joseph Zerga's report and deposition, and Dr. Henry Tutt's report and deposition. The ALJ's summary of the vocational evidence

[2] The records indicate Dr. El-Naggar saw Taylor on two occasions in 2011. Taylor testified after Dr. El-Naggar received the results of the tests, he refused to see her.

briefly discussed the opinions of Drs. Julian M. Nadolsky and Ralph Crystal.

In determining Taylor made a *prima facie* showing of a worsened condition and Taylor's occupational disability is greater now than at the December 2009 award, the ALJ provided, in relevant part, the following analysis, findings of fact, and conclusions of law:

> Here, the Plaintiff initially submitted the report of Dr. Muffly in which he opined she had suffered an increase in her impairment and was no longer employable on a regular and sustained basis. Dr. Muffly reviewed most of the Plaintiff's medical records and concluded she had been treated for her low back by a series of doctors, including pain management specialists. Based upon this initial report and opinion of Dr. Muffly, the Plaintiff presented a prima facie case.
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> After considering the [sic] all of the medical evidence as outlined above, I find that the Plaintiff has shown a worsening of condition sufficient to support the motion to reopen. Additionally, based upon the testimony of Dr. Muffly as well as the records of Dr. Weber, Dr. Tallio (Advance Pain Center) and Physicians Services PSC. (heretofore erroneously identified as Kentucky Pain Center), I find Plaintiff's testimony concerning her condition is supported by the medical evidence in this claim.
>
> We next turn to whether, with respect occupational disability, her condition has worsened since the Opinion and Award of the underlying

> case. After reviewing all the evidence in this case I find that the Plaintiff has sustained a worsening of her occupational disability. In so finding, I have relied upon the testimony of the Plaintiff, the medical opinion of Dr. Muffly, and the medical records of Dr. Tallio, Dr. Weber and the physicians of Physicians Services, P.S.C. I also find the FCE of Jennifer Wilson persuasive. The summary of the medical evidence in the formation of Dr. Nadolsky's vocational report/deposition is most persuasive to the undersigned. I find that the plaintiff's occupational disability is greater now than at the time of the Opinion and Award of 12/11/2009.

In determining Taylor was totally occupationally disabled, the ALJ provided the following analysis, findings of fact, and conclusions of law:

> Our next determination is the extent and duration of the occupational disability of Plaintiff at the present time. The Plaintiff argues she is permanently and totally disabled as defined by the Act. The Defendant/employer's evidence suggests that Plaintiff's occupational disability is no greater than it was at the time of the original award. After reviewing all of the evidence in this case I find that Plaintiff now suffers from a permanent total occupational disability.
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> . . .
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> "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory

definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store vs. Hamilton, 34 SW2d 48 (Ky. 2000). In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that she can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store vs. Hamilton, supra.

In applying the factors set out in Ira Watson, supra, it is apparent that Plaintiff's vocational factors infer her total and permanent disability. Those factors I have considered are: her age - 38 years old; her educational level – bachelor of science nursing degree. Her work experience has been the full gamut of nursing duties, from the medium to heavy duty of a floor nurse in a skilled nursing setting to the more sedentary work of a school nurse. To the Plaintiff and Defendant's credit, Plaintiff returned to work after her initial award of benefits and was able to continue working in a more sedentary/light duty job for two and a half years. She was able to perform the duties of a school nurse even with restrictions until her pain began increasing. Because of the severity of the pain, she is unable to perform even sedentary work for an eight hour workday. This fact is evidenced not only by the medical and vocational evidence, but by the persuasive testimony of the Plaintiff. She "officially" worked for over three

> years with the restrictions of her neurosurgeon. She struggled to continue working even when her pain kept her from performing those lighter duties. I believe that if the Plaintiff could work, she would be working. However, I find that her vocational and medical factors all add up to a permanent and total occupational disability.

Whitley County filed a petition for reconsideration noting the ALJ incorrectly stated Taylor had filed the records of Dr. El-Naggar. Since it had filed those records, Whitley County questioned whether the ALJ considered the records. Since the ALJ failed to consider Dr. El-Naggar's 2011 record and his opinions regarding Taylor's condition, it requested "a specific finding of fact in this regard." Whitley County asserted the ALJ stated the record contains objective medical evidence sufficient to constitute a *prima facie* case but referenced no objective medical evidence.[3] It argued the ALJ relied upon Dr. Muffly in concluding a *prima facie* case had been presented, but argued Dr. Muffly saw no objective changes.

Whitley County contended Dr. Muffly's impairment rating of 22% for the fusion is identical to the award of ALJ Frasier and the additional 3% he assessed for pain

[3] There is no statement or finding by the ALJ in the Opinion, Order, and Award regarding the presence of objective medical evidence.

pursuant to the AMA Guides should not have been considered as Dr. Zerga indicated an assessment for pain is not in accordance with the AMA Guides.[4] It requested a finding as to whether the 3% impairment rating was in accordance with the AMA Guides.

Whitley County asserted Dr. Muffly's reliance upon post-award degenerative changes at L4-5 was inappropriate. It also argued Dr. Muffly relied significantly upon Taylor's self-reporting complaints of increased pain. Consequently, it requested the ALJ identify what she considered to be objective medical evidence, as this was an essential element of the claim.

Further, since the ALJ also indicated she relied upon the records of Drs. Weber, Tallio, and Physician's Services PSC in support of her decision, Whitley County asserted additional findings were necessary. Whitley County requested findings identifying the objective medical evidence in these records and the physicians' opinions she relied upon in support of her finding of a worsened condition. The ALJ was also requested to cite the medical opinion which relates to Taylor's alleged increase in pain due to her work injury.

[4] The medical evidence from Dr. Muffly reflects he assessed a 23% impairment rating.

Whitley County took issue with the ALJ's reliance upon Dr. Nadolsky's opinions observing he had opined Taylor was totally occupationally disabled prior to ALJ Frasier's award.

Whitley County contended the ALJ erred by not finding Taylor failed to establish any type of anatomical change post-award. Consequently, it requested a finding the medical records show a solid fusion, no neurological abnormalities, and the structural integrity of the adjacent level to the fusion site. Once this finding was made, Whitley County requested an explanation for rejection of this evidence.

Whitley County requested the ALJ identify in a finding of fact the specific objective medical evidence relied upon by Dr. Muffly. Similarly, it requested a finding of fact concerning the presence of any objective medical evidence which confirms Taylor's alleged increase in pain is attributable to her work injury.

Whitley County took issue with the analysis conducted by the ALJ in finding Taylor is totally occupationally disabled. It argued the ALJ should state how Taylor's age, education, and transferrable skills factored into her decision.

In the October 8, 2014, Order ruling on the petition for reconsideration, with respect to the assertion the medical records of Dr. El-Naggar were submitted by Whitley County and highly relied upon in defending this claim, the ALJ noted Dr. El-Naggar's deposition was not taken, however his medical records, introduced by Taylor, were noted and discussed.[5] Further, Dr. El-Naggar's surgery was discussed in Dr. Tutt's testimony and Dr. El-Naggar's restrictions and limitations were discussed when the ALJ addressed the vocational evidence she relied upon. The ALJ stated she had considered and incorporated Dr. El-Naggar's chart notes into the opinion and award. Concerning the remainder of the petition for reconsideration, the ALJ stated as follows:

> The undersigned found Dr. Muffly's expert opinion to be the most persuasive for reasons outlined in the Opinion and Award. First, Dr. Muffly noted that the plaintiff had chronic radiculopathy, failed back syndrome, failed pain management and chronic pain. (Opinion and Award page 4) Dr. Muffly's opinion, as to the impairment rating, was persuasive to the undersigned. His opinion was based not only on his own clinical findings but also on a review of the plaintiff's medical records. Secondly, while not required, the undersigned did find the plaintiff had sustained an increase in

[5] The ALJ also referenced the Hearing Order which reveals Taylor filed Dr. El-Naggar's records.

> her impairment rating from the findings of ALJ Frasier.
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> Lastly, the vocational evidence along with the plaintiff's credible testimony persuaded the undersigned that Ms. Taylor was now permanently totally disabled. This vocational evidence included the medical restrictions and limitations of not only Dr. Muffly, but also Dr. El-Naggar. Those restrictions and limitations were specifically discussed and considered by the undersigned in the Opinion and Award – and therefore need no explanation or reiteration here.

On appeal, Whitley County identifies the issue as:

> Does the evidence of record contain 'objective' medical evidence of a worsening of condition or did the ALJ rely on Respondent's subjective complaints of pain in finding a worsening of condition pursuant to KRS 342.125(1)(d)?

Whitley County notes in its petition for reconsideration it requested additional findings of fact regarding the basis for the ALJ's decision that Taylor established through objective medical evidence a *prima facie* case of a worsening impairment. Whitley County notes it requested specific findings of fact identifying the objective medical evidence relied upon by Dr. Muffly, Dr. Weber, Dr. Tallio, and Physician's Services that establishes Taylor's condition had worsened since the

initial award. It asserts the ALJ failed to provide any such findings.

Whitley County also notes it requested a specific finding of fact as to the presence of any medical opinion which related to the alleged increase in pain due to the work injuries. It observes it requested additional findings of fact regarding the ALJ's reliance upon Dr. Nadolsky's opinions since he had opined Taylor was totally occupationally disabled prior to ALJ Frasier's award. It contends the ALJ's reliance upon Dr. Nadolsky is misplaced.

Whitley County contends there is no objective medical evidence which establishes a worsening of impairment since the date of the award due to a condition caused by the injury. It contends Dr. Muffly conceded he relied significantly upon Taylor's self-reported complaints of increased pain in formulating his opinion. It argues Dr. Muffly's 3% impairment rating for pain was inappropriate and not in accordance with the AMA Guides.

Whitley County cites to the specific testimony of Dr. Muffly which indicates he relied upon the February 21, 2013, MRI scan of LifeScan Imaging which he testified was "the only objective thing [he] could find." Whitley County also cites Dr. Muffly's testimony he felt sorry for Taylor when he examined her and his statement that the bulk of the

basis for his statement Taylor was unable to perform sedentary work is due to her severe complaints of pain. Whitley County maintains it demonstrated to the ALJ why Dr. Muffly's reliance upon the degeneration at L4-L5 was misplaced, by making her aware of pre-award diagnostic studies showing degenerative changes at L5-S1 and L4-L5 as early as 2008. It notes this is evidenced by Dr. Tutt's statement in his report identifying an August 14, 2008, CT scan of the lumbar spine which described discogenic degenerative changes at L4-L5. Consequently, it contends Dr. Muffly's opinions with regard to the worsened condition are based solely upon Taylor's history of chronic pain which does not rise to the level of objective medical evidence.

Whitley County contends the records of Drs. Weber and Tallio are devoid of any objective medical evidence supporting a worsening of condition. Further, the FCE report is based upon subjective complaints of pain as well as subjective tests and does not contain objective findings.

Whitley County argues Drs. Muffly, Tallio, and Weber, as well as Jennifer Wilson did not compare Taylor's functional capacity at the time of the award to her functional capacity after December 11, 2009. Therefore, it

contends the only evidence that supports the ALJ's conclusion Taylor has lost the ability to return to work is her subjective complaints of pain.

Citing to Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006) and KRS 342.125(1)(a), Whitley County asserts Taylor must prove by objective medical evidence she sustained a worsening of impairment from the injuries which is permanent and this change causes her to be permanently disabled. It contends Dr. El-Naggar's opinions do not support a worsening of condition as there is no structural change at or above the fusion level. Whitley County contends Taylor's testimony, the medical evidence relied upon by the ALJ, and the FCE do not identify any objective medical evidence establishing a worsening of Taylor's condition.

Whitley County concludes by arguing as follows:

> The petitioner, in its petition for reconsideration, asked for a specific reference to the objective medical evidence which supports the ALJ's finding that a worsening of condition was established by objective medical evidence. This request was denied. The opinions of Dr. Muffly, who candidly indicated that he relied upon the respondent's subjective complaints of pain and felt sorry for respondent and who was unable to refer to any objective medical evidence, which developed post award, does not rise to

> the standards set forth in KRS 342.125(1)(d).
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> CONCLUSION
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> The petitioner states that the ALJ's finding that the respondent met her burden of proof under KRS 342.125(1)(d) is based upon respondent's subjective complaints of pain and not based on objective medical evidence. Consequently, this matter should be remanded to the ALJ and should be reversed on the basis of the respondent's failure to show a change of disability.

Even though Whitley County's brief contains a number of sub-arguments, its brief only identifies one issue. In the last paragraph of its brief and in the conclusion, it reaffirms the sole issue on appeal is whether Taylor met her burden of proof, as required by KRS 342.125(d), of establishing a change in impairment and occupational disability based on objective medical evidence. Thus, we will only address that issue.

In a motion to reopen, "the party seeking to increase an award has the burden of proving that there has been a change of condition resulting from the original compensable injury." Griffith v. Blair, 430 S.W.2d 337, 338 (Ky.1968)(citing KRS 342.125; Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). Since Taylor was successful in that burden, the question on appeal is whether there was substantial 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 making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

That said, the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are

entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. However, the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). The holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004) is instructive. There, the Supreme Court remanded the claim "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

In the case *sub judice*, the ALJ did not provide sufficient findings of fact or conclusions of law which allow for meaningful review of her determination Taylor sustained a worsening of her occupational disability which is greater now than at the time of the December 11, 2009, Opinion and Award. The ALJ stated based upon the testimony

of Dr. Muffly and the records of Drs. Weber, Tallio, and Physician Services she concluded Taylor had shown a worsening of condition sufficient to support her motion to reopen. The ALJ further stated she relied upon that same medical evidence as well as the FCE of Jennifer Wilson and the vocational report of Dr. Nadolsky in finding Taylor's occupational disability is greater now than at the time of ALJ Frasier's Opinion and Award.

Whitley County correctly observes the ALJ did not identify the objective medical evidence relied upon by Dr. Muffly in support of his opinion Taylor had a worsening of impairment and occupational disability. As Dr. Muffly is the only physician to express the opinion Taylor's impairment rating increased and she had a change of disability due to a worsening of impairment, it was incumbent upon the ALJ to ensure Dr. Muffly's opinion was based upon objective medical evidence. The records of Drs. Weber, Tallio, and Physician's Services do not contain an opinion by a physician that there had been a change of disability or worsening of impairment. Consequently, Dr. Muffly's opinion is the only opinion which could be relied upon by the ALJ in finding there had been a change of disability as shown by objective medical evidence of a worsening of impairment. Although the ALJ stated she

relied upon Dr. Muffly's opinion she did not reference the objective medical evidence which supports his opinion Taylor had a worsening of impairment since ALJ Frasier's award in December 2009. This was necessary since in its petition for reconsideration Whitley County requested the ALJ identify the objective medical evidence relied upon by Dr. Muffly. Thus, the decision of the ALJ finding Taylor's occupational disability is greater than at the time of the December 11, 2009, award must be vacated and this matter remanded for additional findings on this issue. Similarly, the award of PTD benefits must be vacated.

The ALJ's reference to Taylor's testimony, Dr. Muffly's opinions, and other medical records does not sufficiently advise this Board or the parties of the objective medical evidence which support Dr. Muffly's opinions. A general reference to the opinions of Dr. Muffly, various medical records, the FCE report, and Dr. Nadolsky's opinions is insufficient. The ALJ's statements in the October 8, 2014, Order are also insufficient as the ALJ did not identify the objective medical evidence which establishes a worsening of impairment and change of disability since ALJ Frasier's award. Whitley County requested such a finding and the ALJ failed to comply with its request.

In the same vein, the ALJ must also address Dr. Muffly's 3% impairment rating assessed separately for Taylor's pain. In the opinion, order, and award, the ALJ provided no findings concerning whether Dr. Muffly's assessment of a 3% impairment rating for pain was in conformity with the AMA Guides. This issue was raised by Whitley County during the proceedings, as Dr. Zerga testified the assessment of a 3% impairment rating for pain was not permitted by the AMA Guides.[6] In its petition for reconsideration, Whitley County also raised the ALJ's failure to address whether Dr. Muffly's 3% impairment rating for pain was in conformity with the AMA Guides. It requested a specific finding as to whether Dr. Muffly's 3% impairment rating for pain was in accordance with the AMA Guides. In the October 8, 2014, Order ruling on the petition for reconsideration, the ALJ did not address this issue. The only statement referencing an impairment rating contained within the order is the ALJ's statement she found Taylor "had sustained an increase in her impairment rating from the findings of ALJ Frasier." We note ALJ Frasier found Taylor had a 22% impairment rating as a result of the work injury. Dr. Muffly assessed a 23% impairment rating

[6] Dr. Zerga relied upon the second paragraph on page 570 of the AMA Guides.

and added a 3% impairment rating for pain resulting in a total impairment rating of 26%. The ALJ did not address whether she relied upon Dr. Muffly's 23% impairment rating or the total impairment rating of 26%. Such a finding is necessary in light of the Supreme Court's holding in Colwell v. Dresser Instrument Div., supra, wherein it noted "a greater impairment rating is objective medical evidence of a worsening of impairment." Id. at 218. Consequently, on remand the ALJ must decide whether Dr. Muffly's 3% impairment rating for pain is in conformity with the AMA Guides.

We decline to hold there is no medical evidence in the record which would constitute objective medical evidence indicative of a worsening of impairment since the December 11, 2009, award. Clearly, the opinions of Drs. Zerga and Tutt may be relied upon in finding there is no objective medical evidence of a worsening of impairment since the date of the award. On the other hand, in his report and deposition, Dr. Muffly identified objective medical evidence which supports his opinion and a finding Taylor has sustained a worsening of impairment due to a condition caused by the injury since the date of the award.

In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Supreme Court held as follows:

> KRS 342.0011(1) makes it clear that not all work-related harmful changes are compensable. Therefore, we are constrained to conclude that although a worker may experience symptoms and although a physician may have diagnosed a work-related harmful change, the harmful change must be evidenced by objective medical findings as that term is defined by KRS 342.0011(33). Otherwise, it is not compensable as an "injury." KRS 342.0011(1).
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> KRS 342.0011(33) limits "objective medical findings" to information gained by direct observation and testing applying objective or standardized methods. Thus, the plain language of KRS 342.0011(33) supports the view that a diagnosis is not an objective medical finding but rather that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. The fact that a particular diagnosis is made in the standard manner will not render it an "objective medical finding." We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purposes of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class

> of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33). Therefore, we must conclude that a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an "injury" for the purposes of Chapter 342.
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> In view of the evidence which was presented in this particular case, a question has arisen concerning whether a harmful change must be, or is capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Contrary to what some have asserted we are not persuaded that it must. Furthermore, at least to some extent, we view that question as being off the mark. Likewise, we are not persuaded that a harmful change must be both directly observed and apparent on testing in order to be compensable as an injury.
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> . . .
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> We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

Id. at 761-762

In the case *sub judice*, Dr. Muffly's report establishes upon physical examination, he observed Taylor had stiffness in the lumbar spine and was limping as she got out of her chair. This is significant as Dr. Zerga also noted that at the time of his examination, Taylor's gait was different than when he examined her prior to the December 2009 award.[7] Dr. Muffly observed the straight leg raise test revealed Taylor experienced pain at forty-five degrees. Dr. Muffly also noted the lumbar spine was tender in the lumbosacral area and lumbar spasms were present. Clearly, the presence of lumbar spasms is an objective medical finding. In conformity with the directive of Gibbs v. Premier Scale Co./Indiana Scale Co., supra, the above constitutes information gained by direct observation.

In addition, Dr. Muffly's November 14, 2013, report indicates the February 14, 2011, MRI of the lumbar spine without contrast "shows the fusion at L5-S1 with mild degenerative changes at L4-L5," and the February 12, 2013, MRI of the spine shows "fusion at L4-L5 with facet hypertrophy with neuroforaminal stenosis with normal appearing disc." Based on the scans he reviewed, Dr. Muffly testified Taylor was developing degenerative changes

[7] See pages 37 and 46 of Dr. Zerga's June 2, 2014, deposition.

at L4-L5 level, the level adjacent to her fusion. He explained "the next level is beginning to degenerate and has been confirmed on her tests."[8] Dr. Muffly explained the finding from the May 12, 2013, MRI is "an objective finding which confirms what otherwise is considered a subjective symptom." During his July 9, 2014, deposition, Dr. Muffly explained further:

> Q: Did these changes, Dr. Muffly, do those changes explain or can those changes explain why the person has more pain?
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> A: Yes, that is a known complication of fusion surgery, degeneration like that is painful, and I think it is an objective finding that would confirm what otherwise is considered a subjective symptom.
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> . . .
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> Q: And do you see anything in your examination or in the reports that shows any kind of anatomical change subsequent to December 11, 2009?
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> A: Just degeneration at the L4-5 level.
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> Q: Was that present anywhere before?
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> A: I didn't see it on the 2007 lumbar MRI, but it is present on the 2013 lumbar MRI.
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> . . .
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> Q: The one that you're saying shows the change.

[8] See page 10 of Dr. Muffly's July 9, 2014, deposition.

> A: Okay. Life Scan Imaging, February 21, 2013.
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> Q: So are you attributing her increase in symptoms and reports of pain to that disc degeneration?
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> A: I think that is contributing, yes.
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> Q: What else is contributing?
>
> A: Those are the only objective things that I can find.

Thus, Dr. Muffly sufficiently identified objective medical evidence which supports his opinion Taylor had a worsening of impairment and disability since December 11, 2009.[9] Although Drs. Tutt and Zerga attributed no significance to the 2011 and 2013 MRIs, it is clear Dr. Muffly had a different opinion.

Significantly, even Dr. Zerga during his June 2, 2014, deposition noted the MRI revealed abnormalities. Dr. Zerga testified the diagnostic studies did not reveal any objective findings subsequent to December 11, 2009, showing any worsening of Taylor's condition.[10] However, just before offering that opinion Dr. Zerga stated, "and then she had another MRI scan performed at Lifescan Imaging February 21, 2013, which would be a little over one year ago, and that

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[9] We note Dr. El-Naggar last saw Taylor on February 14, 2011. Thus, there is no opinion from Dr. El-Naggar as to the significance of findings in the February 21, 2013, MRI report.

[10] See page 30 of Dr. Zerga's June 2, 2014, deposition.

did not show any significant abnormalities…" Thus, Dr. Zerga concluded the MRI revealed some abnormalities, albeit insignificant.

The record contains conflicting evidence which would support a finding either way concerning the existence or lack thereof of objective medical evidence supporting a finding of a worsening of impairment and occupational disability. On remand, the ALJ is free to choose the medical evidence upon which she will rely. In resolving this issue, the ALJ is free to rely upon the opinions of Drs. Tutt and Zerga or, in the alternative, Dr. Muffly. We express no opinion as to the outcome.

On remand, the ALJ must also determine Taylor's current impairment rating. This determination includes a resolution of whether the additional 3% impairment rating assessed by Dr. Muffly for pain is in accordance with the AMA Guides. We are cognizant of the Supreme Court's holding in Central Baptist Hospital v. Hayes, 2012-SC-00752-WC, rendered August 29, 2013, Designated Not To Be Published, in which it held that once the ALJ is presented with overwhelming evidence the impairment rating calculated by the medical expert is in contravention of the AMA Guides, the ALJ has the responsibility to assign a different rating.

However, the ALJ, as fact-finder, has no responsibility to look behind an impairment rating or meticulously shift 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 impairment rating is most credible is a matter of discretion for the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

We have reviewed the second paragraph on page 570 of the AMA Guides cited by Dr. Zerga in his deposition in support of his assertion the 3% impairment rating for pain was inappropriate. That paragraph reads as follows:

> Finally, at a practical level, a chapter of the *Guides* devoted to pain-related impairment should not be redundant of or inconsistent with principles of impairment rating described in other chapters. The *Guides'* impairment ratings currently include allowances for the pain that individuals typically experience when they suffer from various injuries or diseases, as articulated in Chapter I of the *Guides*: "Physicians recognize the local and distant pain that commonly accompanies many disorders. Impairment ratings in the *Guides* already have accounted for pain. For example, when a cervical spine disorder produces radiating pain down the arm, the arm pain, which is commonly seen,

has been accounted for in the cervical spine impairment rating." (p. 10). Thus, if an examining physician determines that an individual has pain-related impairment, he or she will have the additional task of deciding whether or not that impairment has already been adequately incorporated into the rating the person has received on the basis of other chapters of the *Guides*.

However, page 570 also contains the following:

18.3 When This Chapter Should Be Used to Evaluate Pain-Related Impairment

Organ and body system ratings of impairment should be used whenever they adequately chapter the actual ADL deficits that individuals experience. However, the organ and body system impairment rating does not adequately address impairment in several situations, discussed below.

When There is Excess Pain in the Context of Verifiable Medical Conditions That Cause Pain

Individuals in this group have pain associated with medical conditions that are verifiable by objective means. An example is an individual with a persistent lumbar radiculopathy following a lumbar diskectomy. Such an individual will usually have objective findings, including atrophy of the affected leg, muscle weakness, and MRI evidence of epidural scarring. An individual with these findings would receive an impairment rating of 10% on the basis of the DRE spine impairment rating system described in Chapter 15. Although the DRE rating is usually appropriate, some individuals with persistent lumbar radiculopathies report "excess" pain. That is, they report that their pain causes severe

> ADL deficits, suggesting a level of impairment greater than 10%. Procedures in this chapter can be used to assess this additional impairment and to classify it as mild, moderate, moderately severe, or severe.

The above paragraphs establish the assessment of an additional impairment for pain is within the discretion of the physician and is to be determined on a case by case basis. Since the propriety of Dr. Muffly's 3% impairment rating for pain was raised as an issue throughout the litigation and Whitley County requested a specific finding as to whether the 3% impairment rating for pain is in conformity with the AMA Guides, the ALJ must address it on remand. The ALJ may rely upon the opinion of Dr. Zerga in determining the 3% impairment rating for pain is not in conformity with the AMA Guides. However, the ALJ may accept Dr. Muffly's impairment as she has not been presented with overwhelming evidence the 3% impairment rating for pain by Dr. Muffly is in contravention of the AMA Guides. Should the ALJ determine the 3% impairment rating for pain is in conformity with the AMA Guides, then that impairment rating constitutes objective medical evidence of a worsening of impairment.

Finally, on remand, should the ALJ determine Taylor has met her burden of proof as set forth in KRS

342.125(1)(d), she must determine whether Taylor is totally occupationally disabled. Since Whitley County has referenced certain deficiencies in the ALJ's analysis, we emphasize the ALJ's analysis concerning whether Taylor is totally occupationally disabled must be in conformity with the guidelines set forth in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, for the reasons stated herein, the ALJ's finding Taylor sustained a worsening of her occupational disability greater than at the time of the December 11, 2009, Opinion and Award and the award of PTD benefits as set forth in the September 8, 2014, Opinion, Order, and Award and the October 8, 2014, Order ruling on the petition for reconsideration are **VACATED**. This claim is **REMANDED** to the ALJ for rendition of a decision in conformity with the views expressed herein.

ALL CONCUR.

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