

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 13, 2020

CLAIM NO. 201761033

BLUE GRASS COMMUNITY ACTION PARTNERSHIP                      PETITIONER

VS.                      **APPEAL FROM HON. JEFF V. LAYSON,  
ADMINISTRATIVE LAW JUDGE**

THOMAS PAPES  
and HON. JEFF V. LAYSON,  
ADMINISTRATIVE LAW JUDGE    RESPONDENTS

**OPINION  
VACATING AND REMANDING**

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

**STIVERS, Member.** Blue Grass Community Action Partnership (“Blue Grass”) seeks review of the October 26, 2019, Opinion, Award, and Order of Hon. Jeff V. Layson, Administrative Law Judge (“ALJ”) finding Thomas Papes (“Papes”) sustained an October 19, 2017, right shoulder injury while in the employ of Blue Grass. The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits enhanced by the three multiplier set forth in KRS 342.730(1)(c)1,

and medical benefits. The ALJ also resolved a medical fee dispute concerning Papes' medical treatment, including right shoulder replacement surgery performed by Dr. Kaveh Sajadi, by finding the treatment work-related. Blue Grass also appeals from ALJ's undated Order ruling on the petition for reconsideration.<sup>1</sup>

On appeal, Blue Grass challenges the ALJ's apportionment of Papes' impairment rating to his pre-existing active right shoulder condition. It maintains the ALJ erroneously relied upon the apportionment of Dr. Anthony McEldowney which is contrary to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") and Kentucky case law. Thus, the matter must be remanded to the ALJ to rely upon the impairment ratings of Drs. Ronald Burgess or Dr. McEldowney in determining the extent of the impairment due to the work injury as well as the pre-existing active condition. Even though Papes did not file a Respondent's brief, we choose to resolve the appeal on its merits. We decline to invoke the sanctions permitted by 803 KAR 25:010(12).

### **BACKGROUND**

Papes' Form 101 alleges he sustained an October 19, 2017, right shoulder injury occurring when he was loading a wheelchair client on the bus and his right arm was caught between the wheelchair and a lift support beam. Medical records were introduced from Papes' family physician, Dr. William Childers, relating to treatment provided before and after the alleged work injury. The records of Dr. John Sanchez, an orthopedic surgeon to whom Papes was initially referred by Dr. Childers,

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<sup>1</sup> The Order was entered in LMS on November 26, 2019.

and Dr. Sajadi were also introduced. Blue Grass submitted three reports from Dr. Burgess, and Papes submitted Dr. McEldowney's report.

Papes testified at an April 15, 2019, deposition and the August 27, 2019, hearing. During his deposition, Papes described the injury which resulted in a "burning tear, and sharp pain in the right shoulder." The pain radiated into the lower base of the neck and down his arm near the elbow. The next day Papes went to his primary physician, Dr. Childers who ordered an x-ray and MRI. Dr. Childers referred Papes to Dr. Sanchez who after a short period of treatment recommended right shoulder replacement surgery, and referred him to Dr. Sajadi. Dr. Sajadi performed the replacement surgery in July 2018.

Papes testified he had been taking Tramadol since 2013 or 2015 for prostate problems. Although Papes denied undergoing any prior right shoulder treatment, he acknowledged previously informing Dr. Childers he had aches and pains in various parts of his body which included the right shoulder. He characterized his pre-injury physical symptoms as aches, pains, and soreness in both shoulders and elsewhere. Dr. Childers did not prescribe medication specifically for a right shoulder condition. Tramadol helped his right shoulder symptoms and he took over-the-counter Ibuprofen for aches and pains which also helped his shoulder symptoms. Papes denied experiencing any prior right shoulder injuries or having any tests performed on his right shoulder prior to the October 17, 2017, injury.

Papes' hearing testimony mirrors much of his deposition testimony. He clarified his right shoulder pain was much worse after the work injury. Papes had experienced pain in his right shoulder and in other parts of his body from 2009 through

2016. Since 2013, he has taken Tramadol daily for pain in his right shoulder and other body parts. Papes had not been placed on work restrictions concerning the use of his right shoulder prior to the subject work injury.

Dr. Sajadi's August 14, 2019, letter reveals his diagnosis was "advanced glenohumeral arthritis which clearly was not caused by the injury," but was "made symptomatic by the injury." Papes denied significant pain prior to the injury, although he admitted a history of stiffness in the right shoulder. Dr. Sajadi's assessment was "the work injury caused the pre-existing arthritis to become symptomatic based on [Papes'] history of lack of significant symptoms prior to the injury." However, Dr. Sajadi also stated he had been provided records from Papes' primary care physician reflecting "consistent complaints of right shoulder pain dating back as far as 2009." Since numerous assessments of right shoulder pain had been documented, he concluded Papes has a long history of right shoulder pain. He concluded with the following:

Unfortunately, there is limited documentation on his physical exam of his shoulder and there is no documentation of diagnostic imaging, which limits full interpretation of his complaints. Based upon the information provided, it does appear Mr. Papes suffered from a pre-existing and active condition to his right shoulder.

Blue Grass introduced Dr. Burgess' May 3, 2018, Independent Medical Evaluation ("IME") report. After receiving a history from Papes, reviewing the radiographs, and conducting a physical examination, Dr. Burgess diagnosed advanced right glenohumeral osteoarthritis. He concluded the October 19, 2017, event "exacerbated the discomfort in [Papes'] right shoulder, but that it was an active

condition prior to that date.” Thus, Papes “had advanced osteoarthritis of the right shoulder with an exacerbation of his discomfort on [October 19, 2017].” Dr. Burgess opined “the osteoarthritis changes seen on x-ray are longstanding and would be identified with stiffness as well as discomfort.” Papes had attained maximum medical improvement (“MMI”). Dr. Burgess concluded Papes “needs a total shoulder replacement for his underlying osteoarthritic changes, but not for the exacerbation on 10/19/17.” He also concluded Papes was exaggerating his range of motion loss during that visit.

In a report dated January 23, 2019, Dr. Burgess noted Papes had undergone total replacement surgery and physical therapy. Papes had reached MMI. Dr. Burgess opined the replacement surgery was for chronic osteoarthritis of the shoulder. He also opined the subject work injury exacerbated Papes’ shoulder discomfort “but did not cause any objective change.” Prior to the surgery, Papes had an unknown level of stiffness in the shoulder. However, Dr. Burgess was unable to assess a permanent impairment rating for that condition since he did not have documentation of Papes’ pre-existing limitations. Although the surgery was reasonable and necessary treatment of the shoulder arthritis, it was ‘not distinctly for the [October 19, 2017] exacerbation.” Dr. Burgess assessed the following impairment rating:

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> Edition, Mr. Papes has a 24% impairment of the upper extremity secondary to Table 16-27, page 506, for a total shoulder arthroplasty. He also has a 6% impairment of the upper extremity secondary to decreased range of motion, which combine to a 29% impairment of the upper extremity, or 17% of the whole person.

He noted Papes had no evidence of symptom magnification.

In a third report dated August 21, 2019, Dr. Burgess stated he reviewed Dr. Sajadi's medical records including his August 14, 2019, letter. He noted Papes underwent an IME performed by Dr. McEldowney on March 22, 2019. Dr. Burgess agreed with Dr. Sajadi's statement that Papes' symptomatology was pre-existing and active. Dr. Burgess diagnosed osteoarthritis in the right shoulder which was a pre-existing active condition exacerbated by the work injury of October 19, 2017. Although Papes suffered from this pre-existing active condition, Dr. Burgess was unable to assess a permanent impairment rating "since no physical examination is present prior to October 19, 2017." Papes had attained MMI as of January 23, 2019, the date of Dr. Burgess' last examination. Dr. Burgess believed the surgery was reasonable and necessary treatment for the advanced osteoarthritis, but would have been necessary regardless of the exacerbation. Concerning apportionment of the impairment rating, Dr. Burgess stated as follows:

I gave a 17% impairment rating pursuant to the AMA *Guides*, 5<sup>th</sup> Edition, in my Independent Medical Evaluation. I would state that 15% is due to preexisting, advanced osteoarthritis of the shoulder and 2% due to an exacerbation of his underlying, active condition.

He disagreed with Dr. McEldowney's impairment rating providing the following reasoning:

In review of Dr. McEldowney's Independent Medical Evaluation, I do not agree with the 13% impairment rating assigned by him. He uses an unusual method of assigning arthroplasty by combining Tables 16-18 and 16-27 rather than the more common and appropriate method of simply using Table 16-27. Also, biceps tenodesis does not result in loss of supination and I do not agree with his rating for that. I feel, therefore, that his ratings have been

done inappropriately. I also disagree with his apportionment of impairment since Mr. Papes had preexisting, active, advanced osteoarthritis of the shoulder and I do not agree with his attribution of the majority of his problems secondary to the work injury. He also gives a more severe restriction of carrying up to 10 lb, lifting to 16 lb, and no pushing or pulling. The restrictions I delineated are appropriate for a total shoulder arthroplasty and I do not agree with the more severe restrictions recommended by Dr. McEldowney.

Papes filed Dr. McEldowney's March 22, 2019, IME report. After setting out the records and diagnostic testing reviewed, the employment history, and the results of his physical examination, Dr. McEldowney diagnosed "nonspecific right shoulder sprain/strain/partial rotator cuff tear with exacerbation of previous mild symptomatic right shoulder arthrosis." Although Dr. McEldowney concluded the work event caused the impairment, he also concluded a part of the impairment was due to a cause other than the work event. He explained the apportionment: "right shoulder arthrosis, with whole person impairment attributed 80% to the injury and 20% to pre-existing arthrosis." Dr. McEldowney provided his calculations of the total impairment rating:

Using the fifth edition AMA Guides to the Evaluation of Permanent Impairment, the plaintiff's permanent whole person impairment is 11%, calculated using Figures 16-40 on page 476, 16-43 on page 477, and 16-46 on page 479, which assigns 6% upper extremity impairment for range of motion deficits right shoulder, Tables 16-18 on page 499 and 16-27 on page 506, which assigns 14% upper extremity impairment for right total shoulder arthroplasty, and Table 16-35 on page 510, which assigns 13% upper extremity impairment for strength loss in supination related to biceps tenodesis. Using combined value chart on page 604 and Table 16-3 on page 439, a total 13% whole person impairment is calculated, of which 11% relates to right shoulder injury October 19, 2017 and 2% relates to pre-existing arthrosis.

The ALJ provided the following findings in arriving at the percentage of the impairment rating attributable to the injury:

**IV. Benefits per KRS 342.730, including permanent total disability, multipliers, and exclusion for pre-existing active impairment**

Having determined that Mr. Papes did sustain a work-related injury to his right shoulder on October 19, 2017 and, further, that the shoulder replacement surgery done by Dr. Sajadi constitutes medical treatment for that injury, it is appropriate to assess the Plaintiff's permanent impairment rating in his post-surgical condition. To that end, Dr. McEldowney calculated a 13% AMA rating while Dr. Burgess felt that the correct figure is 17%. Moreover, Dr. Burgess characterized Dr. McEldowney's rating as "unusual" and inappropriate." After reviewing the medical evidence in this case, the Administrative Law Judge finds that the 17% AMA rating given by Dr. Burgess is the most persuasive, credible, and accurate assessment of the Plaintiffs post-surgical permanent impairment in this case.

As mentioned several times previously, the medical evidence in this case indisputably establishes that Mr. Papes had a pre-existing, active, non-work-related arthritic condition affecting his right shoulder for which he received prescription medication from Dr. Childers for several years prior to the work-related injury. Both Dr. McEldowney and Dr. Burgess recognized this fact in that they both apportioned their AMA ratings to reflect the amount of impairment caused to the work injury and the amount attributable to the pre-existing, active condition. Dr. McEldowney felt that 80% of the impairment, or an 11% AMA rating, was the result of the work injury with the remaining 20%, or a 2% AMA rating, being assigned to the pre-existing arthritis. Dr. Burgess, however, limited the work injury to a 2% AMA rating with a 15% AMA rating being the result of the prior, active condition.

As previously discussed, while the medical evidence in this case establishes the existence of a prior, active medical condition, the totality of the facts

indicate that Mr. Papes' right shoulder problems did not become severe, either in terms of medical treatment or disability, until after the work injury. There was no recorded loss of range of motion in the right shoulder prior to October 19, 2017. Likewise, no physician recommended any diagnostic testing, referral to a specialist, injections, or shoulder replacement surgery until after the work-related injury. These facts lead the Administrative Law Judge to conclude that Dr. McEldowney's opinion that the great majority of the impairment in this case is attributable to the work-related injury is more credible than Dr. Burgess's opinion to the contrary.

The apportionment given by Dr. McEldowney was 80% for the work-related injury and 20% for the pre-existing, active condition. Applying these figures to Dr. Burgess's 17% AMA rating results in a work-related impairment of 13.6%.

Blue Grass filed a petition for reconsideration asserting the same arguments put forth on appeal and requesting the ALJ to reconsider his decision and issue a decision supported by the record. Alternatively, it requested additional findings supporting the decision. The ALJ overruled the petition for reconsideration, reasoning in relevant part as follows:

The Administrative Law Judge rejects the Defendant/Employer's reargument of the facts of this case. Specifically, with regard to apportionment, it is Dr. Burgess' opinion which is arbitrary. Conversely, Dr. McEldowney's opinion constitutes substantial evidence and is more consistent with the facts of this case.

The work-related injury in this case occurred on October 19, 2017. The medical evidence indicates that the Plaintiff saw his family physician twelve times between October 30, 2016 through August 25, 2016 with complaints of right shoulder pain and stiffness. The doctor began prescribing Tramadol in 2013. However, the range of motion measurements taken during that time were always within normal limits and there is no indication that the Plaintiff's pre-injury right shoulder complaints were such that Dr. Childers felt it necessary to order

diagnostic tests or to make a referral to a specialist. There was no recommendation for any type of surgery, especially a total shoulder replacement. Also, the doctor did not impose any restrictions or limitations which would affect the Plaintiff's ability to work.

It was only after the injury on October 19, 2017 that, for the first time, the Plaintiff was sent for an MRI which revealed abnormalities in the right shoulder. Moreover, it was not until after the injury on October 19, 2017 that the Plaintiff saw a specialist who recommended a shoulder replacement surgery. This surgical procedure, which had not been contemplated before the injury on October 19, 2017, was performed on July 16, 2018.

The facts of this case support a finding that the Plaintiff had a preexisting, active condition affecting his right shoulder. They do not, however, support a finding that the great majority of his current impairment is attributable to that pre-existing, active condition. Specifically, these facts do not support Dr. Burgess' opinion that 15% of the current 17% impairment was pre-existing and active, with only 2% arising after the injury.

At the time Dr. Burgess assessed his 17% AMA rating on January 23, 2019, he wrote in his report:

"Prior to the 10/19/17 incident, Mr. Papes had an unknown level of stiffness in the shoulder. I am unable to give a permanent impairment rating for that condition since I do not have documentation of his preexisting limitations."

Then, in his final report written on August 21, 2019, Dr. Burgess stated that the condition which he had previously characterized as "an unknown level of stiffness in the shoulder" would merit a 15% AMA rating. He did not cite any "documentation of his preexisting limitations" or explain how he could assess a 15% impairment in August of 2019 after stating that he was "unable to give a [preexisting] permanent impairment rating" at the time he actually examined the Plaintiff in January of 2019. It is further noted that the most important factor in Dr. Burgess' calculation of an impairment rating is the fact that the Plaintiff has undergone a total shoulder arthroplasty on July 16, 2018. That procedure had not been done prior to the injury. Indeed, there is no evidence

that this procedure was necessary or even contemplated prior to the work-related injury. There is simply no way that a 15% impairment rating which is the direct result of a surgical procedure performed on July 16, 2018 can be said to have existed on October 19, 2017—approximately nine months before the surgery was done.

Dr. McEldowney, on the other hand, concluded that only 20% of the Plaintiff's current impairment was pre-existing and active with the remaining 80% being caused by the work-related injury. This apportionment is much more consistent with the facts of this case in that it acknowledges that there was a pre-existing condition, but one which did not require a surgery, or even an MRI or referral to a specialist. Those things became necessary only after the work-related event. As Dr. Burgess acknowledges, the great majority of the Plaintiff's current impairment rating is the result of the right shoulder replacement surgery. Since the Plaintiff's medical history shows that the surgery was precipitated by the work-related injury, it follows that the impairment attributed to the procedure is causally related to that injury.

The Defendant/Employer also argues that Dr. McEldowney's assessment of apportionment is "contrary to the requirements of the *AMA Guides*." The proper methods and procedures for addressing apportionment issues are set forth in Section 1.6b on pages 11-12 of the Guides. A review of that section reveals that Dr. McEldowney's opinion is much more in line with the requirements of the Guides than that of Dr. Burgess who, again, unequivocally stated that there was no basis for calculating any pre-existing active impairment rating in his original report.

In its Petition, the Defendant/Employer states that the Guides "requires the impairments to be calculated separately and requires the preinjury impairment to be subtracted from the post-injury impairment." However, in calculating his pre-injury impairment, Dr. Burgess, cites Table 16-27 on page 506 of the Guides, which gives a 24% upper extremity impairment for a total shoulder arthroplasty. This rating is directly the result of the fact that a specific procedure was performed. Since the Plaintiff's right shoulder replacement surgery was not performed until nine months after the injury, it simply cannot be the case that the impairment rating directly

resulting from that surgery existed prior to the injury. Therefore, it is Dr. Burgess' assessment of pre-injury impairment which is "contrary to the requirements of the *Guides*."

...

In this case, the Administrative Law Judge determined that Dr. Burgess' overall AMA rating was credible, but that his findings regarding apportionment were not consistent with the facts of this case. Conversely, Dr. McEldowney's conclusion that 80% of the Plaintiff's current impairment was the result of the work-related injury was more in line with the Plaintiff's documented medical history. This, in turn, led the Administrative Law Judge to "accept a portion of one witness's testimony while rejecting other portions of the same witness's testimony." The application of Dr. McEldowney's 80/20 apportionment to Dr. Burgess' 17% AMA rating, results in a pre-existing impairment of 3.4%. Finally, it is noted that, had the ALJ opted to adopt Dr. McEldowney's specific pre-existing impairment figure of 2%, the carve-out and reduction in weekly benefit would have been even less.

Blue Grass contends the ALJ's apportionment of Papes' permanent impairment rating between the pre-existing active condition and the work injury was improper, relying upon the holding in Leaseway Motor Co. Transport v. Cline, 2006-SC-0551-WC, rendered March 22, 2007, Designated Not To Be Published. Pursuant to the Kentucky Supreme Court's holding in Cline, Blue Grass argues the impairment rating for the active condition must be calculated separately. Thus, Dr. Burgess' assessment of a pre-injury and post-injury impairment must be relied upon. It contends Dr. McEldowney apportionment of the impairment rating is arbitrary at best. It argues without providing any analysis or support, Dr. McEldowney attributed 80% of Papes' impairment rating to the injury and 20% to pre-existing arthrosis. In doing so, Dr. McEldowney failed to provide his analysis or calculations for determining a specific

pre-injury impairment rating nor did he subtract a pre-injury impairment rating from the total impairment rating. Rather, he chose an unsupported and arbitrary percentage of apportionment without providing any justification or explanation. Consequently, Blue Grass insists Dr. McEldowney's impairment ratings cannot be relied upon since both are not in accordance with the AMA Guides or Kentucky law.

Blue Grass adds that Dr. McEldowney's division of the impairment is not in accordance with his own conclusion, as 80% of a 13% permanent impairment rating is 10.4% not 11%. Conversely, it argues even though Dr. Burgess did not initially determine the impairment rating attributable to Papes' pre-existing active condition, he was able to after reviewing Papes' pre-injury records. Dr. Burgess apportioned his 17% impairment rating, with 15% due to pre-existing advanced osteoarthritis of the shoulder, and 2% due to an exacerbation of his underlying active condition. In Blue Grass's view, Dr. Burgess' opinion is far more credible than that of Dr. McEldowney. It notes both doctors agreed Papes had a pre-existing active condition warranting an impairment rating. However, the ALJ erred in relying upon Dr. Burgess' impairment rating and Dr. McEldowney's apportionment in determining the impairment rating attributable to the injury. It requests the ALJ's finding of the impairment rating attributable to the injury be vacated with instructions for the ALJ to choose between Dr. Burgess' or Dr. McEldowney's assessment of the impairment ratings attributable to the pre-existing condition and the work injury.

### **ANALYSIS**

KRS 342.0011(35) mandates that all impairment ratings be determined according to the AMA Guides. Thus, the ALJ must select an impairment rating which

is in accordance with the AMA Guides. The impairment rating the ALJ found attributable to Papes' injury was not calculated in accordance with the AMA Guides. Moreover, the impairment ratings assessed by both doctors for the pre-existing active condition were not in accordance with the AMA Guides.

Dr. McEldowney set forth his calculations pursuant to the AMA Guides in arriving at a 13% impairment rating of which 11% relates to the October 19, 2017, right shoulder injury. He identified the non-work-related event as right shoulder arthrosis and indicated the impairment rating attributable to the arthrosis is 20% of his total 13% impairment rating. Dr. McEldowney did not provide an impairment rating for the pre-existing arthrosis in accordance with the AMA Guides, as there is no calculation of the impairment rating for the pre-existing arthrosis utilizing the AMA Guides.

Dr. Burgess' attempt to calculate an impairment rating attributable to a pre-existing active condition is equally problematic. In his second report of January 23, 2019, Dr. Burgess stated that, prior to the work injury, Papes had an unknown level of stiffness in the shoulder. He acknowledged an inability to provide an impairment rating for that condition since he did not have documentation of Papes' pre-existing limitations. In his third and final report dated August 21, 2019, Dr. Burgess again stated he was unable to give an impairment rating since no physical examination was present prior to the work injury. However, he stated later in the report that he previously assessed a 17% impairment rating pursuant to the AMA Guides. Without explanation, he then apportioned 15% to pre-existing advanced osteoarthritis of the shoulder and 2% to an exacerbation of the underlying active

condition. Similar to Dr. McEldowney's attempt to assess an impairment rating for the pre-existing active arthrosis, Dr. Burgess did not provide his calculations pursuant to the AMA Guides in arriving at the 15% impairment rating for the pre-existing advanced osteoarthritis. Before the ALJ can accept an impairment rating, establishment that the impairment rating has been assessed pursuant to the AMA Guides is required. The AMA Guides sets out how an impairment rating for a pre-existing condition must be determined. Section 2.5h Changes in Impairment from Prior Ratings reads, in relevant part, as follows:

If apportionment is needed, the analysis must consider the nature of the impairment and its relationship to each alleged causative factor, providing an explanation of the medical basis for all conclusions and opinions. ...

For example, in apportioning a spine impairment, first the current spine impairment rating is calculated, and then an impairment rating from any preexisting spine problem is calculated. The value for the preexisting impairment rating can be subtracted from the present impairment rating to account for the effects of the intervening injury or disease. Using this approach to apportionment requires accurate information and data to determine both impairment ratings. If different editions of the *Guides* are used, the physician needs to assess their similarity. If the basis of the ratings is similar, a subtraction is appropriate. If they differ markedly, the physician needs to evaluate the circumstances and determine if conversion to the earlier or latest edition of the *Guides* for both ratings is possible.

Thus, in accordance with the AMA Guides, the doctors must first calculate the impairment rating attributable to the pre-existing condition relying upon specific provisions within the AMA Guides. Neither doctor complied with the AMA Guides in attempting to arrive at an impairment rating attributable to the pre-existing condition. Since Dr. Burgess' 15% impairment rating and Dr. McEldowney's 2%

impairment rating were not calculated pursuant to the AMA Guides, the ALJ was not authorized to accept either as an appropriate impairment rating attributable to Papes' pre-existing condition.

We find support for our holding in Corbett v. Makers Mark Distillery, 2013-CA-001102-WC, rendered March 13, 2015, Designated Not To Be Published. There, the Board had vacated the ALJ's reliance upon Dr. Jerry Morris' assessment of a 10% impairment rating due to the work injury. The Court of Appeals affirmed this Board, stating as follows:

Further, Dr. Morris failed to cite the chapter, table, or page in the *AMA Guides* providing a basis for any assigned impairment rating. The lack of any such citation, together with Dr. Morris's opinion Corbett had not reached MMI and did not qualify for assignment of any permanent impairment rating under the *AMA Guides*, is further evidence Dr. Morris never intended his "10%" response to Question 4(a) to be characterized as a "procedural" impairment rating.

...

Thus, even if the *AMA Guides* authorized "procedural" impairment ratings, and even if the ALJ's adoption of Dr. Best's prior MMI opinion could allow an otherwise impermissible "procedural" impairment rating purportedly assigned by Dr. Morris, logic and a literal reading of Corbett's Question 4(a) demand that Dr. Morris's "10%" response be interpreted as an apportionment percentage, and not an impairment rating. We, therefore, hold the record establishes Dr. Morris assigned no permanent impairment rating. The Board, the ALJ, and both parties erred in treating Dr. Morris's statement of a "10%" apportionment percentage as an impairment rating. In the absence of any other impairment rating being offered by the remaining physicians, the Board correctly vacated the ALJ's award of PTD benefits.

Had we characterized Dr. Morris's answer as a "procedural" impairment rating, the Board correctly held

the ALJ would nevertheless be prohibited from utilizing it to award PTD benefits. The most compelling reason offered by the Board was that Dr. Morris provided no basis for such an impairment rating by specifying a chapter, page, section, provision, or table in the *AMA Guides*.

Under Kentucky law, the *AMA Guides* are an integral tool for assessing a claimant's disability rating and monetary award. *Jones v. Brasch–Barry General Contractors*, 189 S.W.3d 149, 154 (Ky. 2006). A physician's impairment rating is but one piece of the total evidence the ALJ must evaluate for quality, character, and substance, and, in the exercise of discretion, either accept or reject. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002). There is no requirement that an ALJ, as fact-finder, must necessarily accept an assessed impairment rating as true. *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky. App. 2007).

A permanent impairment rating resulting from an injury must be determined by utilization of the *AMA Guides*. KRS 342.730(1). The proper interpretation of the *AMA Guides* and the proper assessment of impairment are medical questions solely within the province of medical experts for the purposes of assessing a claimant's disability. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003); *Lanter v. Ky. State Police*, 171 S.W.3d 45, 52 (Ky. 2005). To be useful for the fact-finder as competent, substantial evidence, a physician's opinion must be grounded in the *AMA Guides*, and an ALJ may not give credence to an opinion of a physician assigning a permanent impairment rating that is not based upon the *AMA Guides*. *Jones* at 154. In order to utilize an impairment rating in the assessment of a claimant's disability rating and monetary award, an ALJ is required to determine whether the impairment rating was based upon the *AMA Guides*, and is authorized—though not compelled—to consult the *AMA Guides* when determining the weight and credibility to be assigned to the evidence. *Caldwell Tanks v. Roark*, 104 S.W.3d 753, 756–757 (Ky. 2003).

It stands to reason, therefore, citation by the medical expert to particular criteria set forth in the *AMA Guides* utilized to assign an impairment rating is a prerequisite

for an ALJ's determination of the weight and credibility assignable to the impairment rating. Without such a foundation or basis, any impairment rating is dubious, unverifiable, and unreliable, and cannot constitute probative, substantial evidence to support an award of disability benefits.

Slip Op at 7-8.

Here, the ALJ rejected Dr. McEldowney's total impairment rating and accepted Dr. Burgess' impairment rating. However, he then relied upon Dr. McEldowney's opinion that 20% of Papes' impairment rating was attributable to a pre-existing arthrosis, a finding not in accordance with the AMA Guides.

We also find support for our decision in Armstrong Coal Company, Inc. v. Piper, Claim No. 2014-58536, rendered May 4, 2018, which is somewhat similar to the facts in the case *sub judice*. There, Piper had introduced the March 16, 2016, medical record of Dr. Benjamin Burkett in which he stated there was an "80% exacerbation of pre-existing condition." In a subsequent July 7, 2016, letter, Dr. Burkett assessed an impairment rating pursuant to the AMA Guides of 10-13%. Dr. Michael Best assessed an impairment rating on behalf of Armstrong Coal Company in which he opined there appeared to be a pre-existing active medical condition at L2-3 and L4-5. He acknowledged having the entire record of the treatment in 2013 by Piper's primary care physician as well as any treatment records from Dr. Burkett prior to the date of injury would be beneficial. Dr. Best also acknowledged the treatment provided by another physician prior to the work event would also help to definitely determine the status of the pre-existing condition. However, Dr. Best went on to assess a 20% impairment rating minus a 13% impairment rating for the pre-existing condition. The ALJ found Piper had a total impairment rating of 20%, and in

accordance with Dr. Burkett's statement found that 80% of the 20%, was the impairment rating attributable to the work injury. Thus, based on the opinion of Dr. Burkett, the ALJ found Piper had a 16% impairment rating as a result of the work injury.

The ALJ specified her reasoning for rejecting Dr. Best's opinion, noting Dr. Best stated the 2013 treatment records would help definitely determine the status of the pre-existing condition and also determine whether there was a pre-existing active medical condition. The ALJ found it puzzling how Dr. Best "can make any apportionment to the work injury or pre-existing when he clearly implies he needed more information." This Board vacated the ALJ's determination Piper had a 16% impairment rating, holding as follows:

On appeal, Armstrong asserts the ALJ's decision to assign a 16% impairment rating to Piper's May 1, 2014, injury is erroneous, arguing, in part, as follows:

The ALJ was required to pick from one of the three impairment ratings in the record: the 7% WPI rating issued by Dr. Best, the 10-13% impairment rating issued by Dr. Burkett, or the 20% WPI rating issues by Dr. Butler. The ALJ erred by independently calculating a 16% WPI rating.

We vacate the ALJ's award of PPD benefits and remand for additional findings.

In Dr. Burkett's March 16, 2015, medical record, he states, "80% exacerbation of preexisting condition." Not only does this language fail to specify if he is referring to a preexisting *active* condition, but it is too vague, as a matter of law, to serve as the basis for the ALJ to calculate her own impairment rating even if he *had* specified pre-existing *active* condition. As it stands, however, Dr. Burkett offered no opinion that the impairment rating stemming from the May 1, 2014, injury was 80% of a pre-

existing *active* impairment rating, and this is confirmed by the fact that he assessed a 10-13% impairment rating without attributing any of it to a pre-existing active condition.

Significantly, we note that, in the November 27, 2017, Opinion, Award, and Order, the ALJ arrived at her 16% impairment rating by merely calculating 80% of 20%. However, this calculation of impairment is not only incompatible with the 5<sup>th</sup> Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, but, as much as we can glean from Dr. Burkett's ambiguous language, this calculation does not represent an "80% exacerbation of [a] pre-existing condition." Therefore, it is abundantly clear that even the ALJ did not fully understand the meaning behind Dr. Burkett's ambiguous language.

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, and Dr. Burkett's opinion regarding an "80% exacerbation of preexisting condition" falls short of this standard. See Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). On remand, the ALJ shall not rely on Dr. Burkett's vague language in determining an impairment rating for the May 1, 2014, injury and shall, instead, rely upon one of the three impairment ratings in the record.

Piper appealed our decision. The Court of Appeals affirmed in Piper v. Armstrong Coal Company, 2018-CA-000817-WC, rendered December 21, 2018, Designated Not To Be Published, holding as follows:

We agree with the Board that the ALJ erred in relying on Dr. Burkett's statement "80% exacerbation of preexisting condition" to calculate the final impairment rating because there is no evidence Dr. Burkett calculated this percentage in accordance with the AMA Guides as required by statute and by our case law.

"Permanent impairment rating" is defined as the "percentage of whole body impairment caused by the injury or occupational disease as determined by the 'Guides to the Evaluation of Permanent Impairment.' "

KRS 342.0011(35). “The proper interpretation of the *Guides* and the proper assessment of impairment are medical questions.” *Lanter v. Kentucky State Police*, 171 S.W.3d 45, 52 (Ky. 2005). “A claimant found to have a compensable, permanent partial disability receives workers' compensation benefits based on the percentage of the employee's disability assessed by the ALJ in accordance with the AMA Guides.” *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006) (citing KRS 342.730(1); KRS 342.0011(35) ).

Therefore, although it is within an ALJ's discretion to “believe or disbelieve various parts of the evidence,” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000), “an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides.” *Jones*, 189 S.W.3d at 153.

There is no evidence that Dr. Burkett consulted the Guides or had the Guides in mind when he stated “80% exacerbation of a pre-existing condition.” Dr. Burkett made no mention of a preexisting condition in his letter of July 7, 2016, in which he assigned a total impairment of 10-13%. Thus, the Board correctly held that the ALJ erred as a matter of law in relying on Dr. Burkett's statement because it did not conform to the statutory requirements and therefore did not constitute adequate evidence to support the impairment finding.

Slip Op. at 3.

The present situation is analogous to the situation in Piper. The ALJ cannot apply Dr. McEldowney's 20% apportionment to Dr. Burgess' 17% impairment rating. In any event, the ALJ could not rely upon either impairment rating assessed for the pre-existing condition, as neither Dr. McEldowney nor Dr. Burgess were able to assess an impairment rating for a pre-existing condition based on the AMA Guides.

As noted in Corbett, neither doctor provided a basis for the impairment rating by specifying a chapter, page, section, provision, or table in the AMA Guides.

We add that, when a decision is vacated it is as if the initial determination never existed. This was addressed in Hampton v. Flav-O-Rich, 489 S.W.3d 230 (Ky. 2016), and in Commonwealth of Kentucky v. Werner, 2014-CA-001154-WC, rendered April 10, 2015, Designated Not to be Published. The holding in both cases establishes when an ALJ's decision is vacated, it is effectively canceled, annulled, or revoked. Thereafter, the judgement or opinion is no longer binding or conclusive.

As noted in Hampton, 489 S.W.3d at 234-235, the Kentucky Supreme Court stated as follows:

Because the Board vacated the ALJ's award, he is required to write a new opinion on remand; he cannot, as the Court of Appeals indicated, simply supplement his existing opinion with additional findings of fact. In the process of writing that new opinion, there is nothing to prevent the ALJ from entering a different award, nor is there anything to compel the ALJ to enter the same award. By vacating the ALJ's opinion and requiring him to make additional findings, the Board has implicitly authorized him to enter a different award . . .

In Werner, the ALJ had originally determined the Claimant was not entitled to workers' compensation benefits. This Board vacated and remanded, directing the ALJ on remand to review the evidence and determine whether the Claimant sustained a work-related knee injury with appropriate findings of fact. In the opinion on remand, the ALJ entered an award in favor of the claimant and contrary to what was previously found. On appeal, the UEF argued the ALJ had no authority to enter an award in favor of the claimant since the ALJ had already determined that

he was not in fact entitled to an award of benefits and cited to Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). The Court of Appeals stated as follows:

This argument misses the mark, however, because the ALJ did not reverse himself. Rather, the Board vacated the ALJ's decision and directed the ALJ to reconsider this matter pursuant to its authority under KRS 342.285(3). When any court or tribunal orders that a judgment, opinion, or order be set aside or vacated, that decision effectively cancels, annuls, or revokes the judgment, order, or opinion. *See* BLACK'S LAW DICTIONARY 1546 (7<sup>th</sup> ed. 1999)( defining "vacate" as "to nullify or cancel; make void; invalidate"). Thereafter, the judgment, order or opinion is no longer binding or conclusive. *First State Bank v. Asher*, 273 Ky. 54, 117 S.W.2d 581, 583 (1938). This means the vacated judgment no longer binds any litigant and, by logical extension, no longer binds the ALJ who rendered the vacated judgment. Thus, upon remand, the ALJ was free to consider the evidence, and in doing so, reevaluate the merits of Werner's claims. *See, e.g., ABS Global, Inc. v. Draper*, No. 2013-SC-000051-WC, 2014 WL1514991 (Ky. April 17, 2014)(holding, in a situation where the Board's order vacated the ALJ's original opinion and order, "It is clear that the Board wanted the ALJ to fully review the evidence and either make findings to support his original opinion or reach a different conclusion on remand.)

Slip Op. at 1.

Accordingly, those portions of the ALJ's decision finding Papes has a 13.6% impairment rating as a result of his work injury and awarding PPD benefits based on that impairment rating are **VACATED**. As neither party has appealed the ALJ's finding that Papes sustained a work-related injury meriting an impairment rating, this claim is **REMANDED** to the ALJ for a determination of the impairment rating attributable to Papes' work injury in accordance with the views expressed

herein. Upon determining the impairment rating attributable to the work injury, the ALJ shall then enter the appropriate award of PPD benefits. We express no opinion as to the ALJ's decision on remand.

ALL CONCUR.

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