

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 13, 2022

CLAIM NO. 202061093 & 201984440

BRITTANY RITCHIE

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

TOYOTA MOTOR MANUFACTURING OF KENTUCKY and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Brittany Ritchie (“Ritchie”) seeks review of the Opinion, Award and Order rendered December 21, 2021, by Hon. M. Christopher Davis, Administrative Law Judge (“ALJ”). The ALJ dismissed Ritchie’s claims for low back, left arm, shoulder, and bicep injuries she allegedly sustained while working for Toyota Motor Manufacturing of Kentucky (“Toyota”). The ALJ determined Ritchie sustained a compensable cervical injury for which she underwent two fusion

surgeries; however, no impairment rating was provided after he determined she reached maximum medical improvement (“MMI”). The ALJ found the surgeries compensable, and he awarded temporary total disability (“TTD”) benefits and medical benefits. The ALJ dismissed Ritchie’s claim for permanent partial disability (“PPD”) benefits because the record contains no impairment rating assessed pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) after she reached MMI. Ritchie also appeals from the January 3, 2022 Order denying her Petition for Reconsideration.

On appeal, Ritchie argues the ALJ erred in addressing Dr. Anthony McEldowney’s application of the AMA Guides since Toyota did not preserve that issue. Ritchie also argues the ALJ’s findings were an unreasonable overreach of authority requiring reversal. Finally, Ritchie argues the ALJ’s determination of her average weekly wage (“AWW”) was erroneous. Because we determine the ALJ properly exercised his discretion, his decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Ritchie filed a Form 101 on April 24, 2020 in claim number 2019-84440, alleging she injured “multiple body parts” while “pushing or pulling” in the course of her employment with Toyota at its Georgetown, Kentucky Plant on April 23, 2019. Ritchie later specified her injuries included her left bicep, neck, and shoulders. The Form 104 filed in support of Ritchie’s claim indicates her employment experience includes working as a cashier at a gas station, as a cashier at

Wal-Mart, as a dishwasher at a restaurant, as a warehouse worker for Amazon, and on the Toyota assembly line.

Ritchie filed a second Form 101 on November 10, 2020, in claim number 2020-61093, again alleging she sustained injuries to “multiple body parts” after continuously pushing and pulling a “30-50 lb. cart off the factory line” in the course of her employment with Toyota on October 13, 2020. She asserted the continuous pulling of the cart resulted in left lower back pain and numbness radiating into her left leg. The claims were consolidated in an Order issued on January 23, 2021.

Ritchie testified by depositions held on June 16, 2020 and December 14, 2020. She also testified at the hearing held October 26, 2021. Ritchie was born on June 19, 1991. She resided in Carlisle, Kentucky in June 2020, but had moved to Ewing, Kentucky by the time of her second deposition. She is a high school graduate, and later received a medical assistant certificate. Prior to being hired by Toyota in 2014, Ritchie underwent carpal tunnel and De Quervain’s releases in her right hand. She also previously injured her right shoulder, for which she underwent rotator cuff repair in 2007. She subsequently had lumbar surgeries in 2018 and 2019, and cervical fusion surgeries in April 2020 and March 2021, all performed by Dr. Travis Hunt with Bluegrass Orthopaedics. She testified the lumbar surgeries improved her left leg pain. She also has a long-standing history of treatment for bipolar disorder, depression, and migraine headaches.

Ritchie was initially hired to work at Toyota through a temporary agency in May 2012. Toyota officially hired her as an employee in December 2014,

and she was employed there continuously until October 2020. She testified she only worked five of the nine years she was employed by either the temporary agency or Toyota, missing significant time from work due to each of her surgeries and the birth of her daughter. She initially worked on the assembly line building four-cylinder Camry engines, working 40 hours per week, and earning \$26 per hour. She was off work from June 2018 until March 2019 due to her initial low back surgery. She returned to work in the “re-intro” area after her initial lumbar surgery. While doing this transitional work, she performed regular work for one-to-two-hour periods. That job involved lifting, twisting, standing, and walking, and she handled parts weighing five to 15 pounds.

Ritchie was pulling a crankcase from a motor in April 2019, when she experienced a pop in the left bicep with pain radiating to her shoulders and neck, primarily localizing in the left shoulder. She also reported symptoms into her left hand. Ritchie reported she had no previous left shoulder pain or pain in the left side of her neck, but she had previously experienced symptoms in the right shoulder and on the right side of her neck. She underwent a cervical fusion at C6-C7 on April 8, 2020. She admitted she first treated for neck problems in 2011, and she had a cervical MRI in 2016.

Ritchie again returned to transitional re-entry work in August 2020, with no restrictions subsequent to her first cervical fusion. She injured her low back on October 13, 2020 while pushing and pulling a cart on an assembly line. She testified the cart became stuck. When she pulled on the cart, she experienced pain from her low back to her neck. She also experienced low back pain down the left leg,

more severe than her previous left leg pain. She testified she first experienced low back problems in 2018 when she threw a softball while coaching a team. She underwent surgery for that injury in December 2018. She later experienced some low back pain while picking up a folding chair. She reported her left sciatic nerve began bothering her in November 2019. She has had no additional lumbar surgery since the October 13, 2020 incident. Ritchie also testified she was fired by Toyota after the October 13, 2020 incident because her short-term and long-term disability benefits had expired. Ritchie began working as a medical assistant in January 2021, and she subsequently had an additional cervical fusion surgery in March 2021, returning to part-time work for her new employer after convalescing for a month.

Ritchie testified she did well after her two lumbar surgeries. She does not believe she can return to work at Toyota because the twisting and lifting is too difficult for her neck and low back.

Ritchie filed Dr. Ryan Patrick Donegan's May 29, 2019 office note in support of the Form 101 she filed on April 24, 2020. Dr. Donegan's notes reflect her complaints of left shoulder pain. Ritchie reported physical therapy worsened her symptoms. Dr. Donegan noted Ritchie's history of previous right shoulder injury, right wrist surgery, and low back surgery. He diagnosed a proximal left bicep tendon injury. Dr. Donegan saw her again on June 19, 2019 and July 10, 2019 for her continued complaints.

Ritchie filed the October 13, 2020 records from the Georgetown Community Hospital where she saw multiple nurses and APRNs, in support of the Form 101 filed on November 10, 2020. Those records indicate Ritchie complained

of pain into her left leg, and noted she previously underwent a lumbar fusion in November 2019. She previously had been seen at that facility on September 3, 2020 for similar complaints of left lower back pain. Ritchie advised her low back and left leg pain was aggravated by walking, standing, sitting, and range of motion activities. Lumbar x-rays were taken on both the September 2020 and October 2020 visits.

Ritchie filed multiple office notes for treatment she received from Dr. Hunt on over 20 occasions between May 29, 2019 and June 21, 2021. The first note reflects Dr. Hunt saw Ritchie for complaints of left shoulder pain. He advised her to avoid lifting more than one to two pounds, and avoid any repetitive lifting, or any lifting over waist level. Ritchie reported left shoulder injections worsened her pain. On September 24, 2019, Dr. Hunt noted Ritchie's continued left shoulder complaints, and additionally noted low back and bilateral leg pain. He diagnosed degenerative lumbar disc disease with bulging, left greater than right, and radiculopathy. On November 15, 2019, Dr. Hunt performed lumbar fusion surgery from the L4 to S1 levels, and a revision decompression at L4-L5.

On March 26, 2020, Dr. Hunt saw Ritchie for a follow-up of her low back pain. He also noted her complaints of pain in the left side of the neck, into the shoulder, and down to the left hand. He noted Ritchie's desire to have an anterior cervical discectomy and fusion at C6-C7. That procedure was performed on April 8, 2020. Dr. Hunt released Ritchie to return to work on June 18, 2020, and he recommended she lift no more than five pounds. He also advised against pulling and twisting. Ritchie continued to complain of dull aching and throbbing neck pain

afterward. A July 17, 2020 MRI demonstrated the C6-C7 fusion. It also showed a C5-C6 kyphosis with mild spinal cord compression.

On December 17, 2020, Dr. Hunt noted Ritchie's history of low back pain, joint pain localized in the left wrist and shoulder, neck pain, and radicular pain. His diagnoses included a lumbar fusion at L4-L5 performed in November 2019, and chronic low back pain. Dr. Hunt again noted Ritchie's complaints of low back pain on February 15, 2021, which she indicated bothered her from the shoulder down. A cervical MRI showed stenosis at C5-C6 pressing upon the spinal cord. Dr. Hunt performed an anterior discectomy and fusion at C5-C6 on March 17, 2021, but she continued have complaints of neck pain after the surgery. By April 8, 2021, Ritchie still complained of neck pain, but she had returned to part-time work. On May 24, 2021, Ritchie's neck and arms had improved, but she had continued low back pain with left leg numbness. On June 21, 2021, Dr. Hunt noted he was still treating Ritchie for the C5-C6 herniated disc that he determined is work-related. He did not impose any restrictions. He noted he performed cervical fusions on April 8, 2020 and March 17, 2021. He additionally indicated Ritchie is probably unable to return to her previous employment at Toyota.

Dr. McEldowney evaluated Ritchie at her attorney's request on April 21, 2020. He noted the history of Ritchie sustaining neck and arm injuries while pulling on a crankcase at work on April 23, 2019. Dr. McEldowney did not review an MRI, but indicated Ritchie advised she had a herniated disc at C6-C7. Ritchie complained of neck and left upper extremity pain and tingling into her left hand. He noted Dr. Hunt performed a cervical fusion on April 8, 2020. The surgery reportedly

improved her left arm and neck pain, but she still had some pain into her left shoulder. Dr. McEldowney diagnosed Ritchie with a “Patient described C6-C7 herniated disc.” He stated a pulling injury could likely cause neck and left arm pain. Dr. McEldowney assessed a 25-28% impairment rating pursuant to the AMA Guides, although he stated she would not reach MMI until July 8, 2020.

Dr. McEldowney re-evaluated Ritchie at her attorney’s request on January 8, 2021. He noted she sustained a work-related lumbar injury on October 13, 2020 from lifting a 50-pound cart at work, causing her to experience pain from the buttocks into the left foot. He also noted she had returned to work after a successful cervical fusion in September 2020, but she was terminated from her job at Toyota after the October 2020 incident.

Dr. McEldowney noted Ritchie’s long history of migraine headaches, and her condition had improved significantly after the April 2020 cervical fusion. She also reported continued mild neck pain. He additionally noted she had worked on and off since her low back pain started in 2018. Dr. McEldowney diagnosed Ritchie with a lumbar strain. He assessed a 20% impairment rating due to Ritchie’s low back surgeries, including a fusion from L4-S1, unrelated to the October 13, 2020 low back strain. He assessed no impairment rating for the October 13, 2020 low back strain and stated she had not undergone surgery for that incident. However, he noted she has an unresolved soft tissue lumbar injury with a previous fusion. He stated Ritchie does not have the physical capacity to return to the type of work she performed at Toyota. He recommended her to avoid using ladders or step stools, engage in prolonged standing or walking, and take frequent sit-down breaks every 20 to 30

minutes. He also advised her to avoid climbing stairs and walking on uneven ground, to lift no more than 20 pounds, carry no more than 12 pounds, or push and pull no more than 50 pounds. Dr. McEldowney assessed a 26% impairment rating for the cervical spine on January 8, 2021, but he did not mention a date when she reached MMI, nor did he mention her upcoming cervical surgery.

Toyota filed three reports from Dr. Robert Sexton. In his report dated September 11, 2019, Dr. Sexton diagnosed Ritchie with major depression, bipolar disorder, factitious disorder, possible biceps tendinosis, and malingering all due to her complex psychiatric condition. He found no clinical evidence of a cervical injury, and she had reached MMI by April 13, 2019. He stated Ritchie could return to work without restrictions. He also found the proposed lumbar fusion surgery unnecessary, and likewise he found a cervical fusion unnecessary. He recommended a referral to a pain management specialist.

In his October 8, 2020 report, Dr. Sexton focused on Ritchie's complaints of the migration of neck pain from the left shoulder to the cervical spine. He also noted her recurrent complaints of lumbar pain. Dr. Sexton noted Ritchie had undergone a two-level lumbar fusion in November 2020 and a cervical fusion in April 2020. Ritchie complained of continued left shoulder and arm pain despite Dr. Hunt's release permitting her to resume full work duties on August 19, 2020. Ritchie also reported recurrent leg pain after bending over a chair.

As a result of the April 23, 2019 injury, Dr. Sexton diagnosed a psycho-physiological musculoskeletal condition without radiculopathy, myelopathy, or neuropathy; mild age-appropriate cervical spondylosis; mild bicipital myositis,

resolved; no shoulder injury found on arthrogram or MRI; no herniated cervical disc identified on cervical MRI; no neurological deficit or neuropathic myelopathy found on EMG/NCV; no clinical abnormalities after the alleged April 23, 2019 work-related injury. He opined all of her “conditions” were caused by hypochondriasis, and there was no evidence of a herniated disc on any of the imaging studies. He also found no evidence of instability, mass lesion, or any objective clinical abnormalities. He stated neither the cervical nor lumbar conditions met the ODG criteria for performing fusion surgery.

Dr. Sexton found the April 8, 2020 cervical fusion was not causally related to the April 23, 2019 work injury, for which he found Ritchie reached MMI on June 23, 2019. He assessed a 5% impairment rating for a pre-existing active condition. He found no basis for recommending restrictions, and he found Ritchie capable of returning to her pre-injury work. He opined additional treatment is unnecessary.

In his third report, dated December 15, 2020, Dr. Sexton determined Ritchie did not sustain a new injury in October 2020. He noted her history of lumbar decompression surgery in 2018, and the lumbar fusion from L4-S1 in 2019. He also noted Ritchie’s C6-C7 cervical fusion, her previous rotator cuff surgery, bilateral median nerve decompression, De Quervain’s release, bipolar disorder, and somatic symptom disorder (malingering). He again found Ritchie’s complaints were caused by her psycho-physiological disorder associated with long-standing bipolar dysthymic disorder. He found no objective evidence of work injuries sustained at Toyota. He also found the cervical fusion was not supported by the ODG. He

found she reached MMI for her lumbar strain by November 24, 2020. Dr. Sexton stated Ritchie needs appropriate psychiatric treatment before returning to work, but no physical restrictions are reasonable or necessary. He noted Ritchie complained of pain from her left buttock into her left leg, with numbness on December 7, 2020. He found she did not sustain a work injury in October 2020.

Toyota also filed records from Ritchie's treatment at the plant medical facility on April 24, 2019, May 14, 2019, and September 4, 2020. Those records reflect Ritchie complained of left shoulder and neck pain into the left shoulder blade after pulling a crankcase out of a module. The September 4, 2020 note indicates Dr. Hunt released Ritchie to work on August 20, 2020, and she resumed full duty on September 4, 2020, but she could not do so due to a personal injury she experienced at home.

Toyota additionally filed records from Ritchie's family physicians for treatment she received on July 11, 2019, October 3, 2019, and October 22, 2019. Those records indicate Ritchie was off work due to a left bicep tear and a major depressive disorder. She also complained of acute low back pain with sciatica and a cervical disc bulge with left arm numbness.

Dr. Henry Tutt, a neurosurgeon, evaluated Ritchie at Toyota's request on September 20, 2021. Dr. Tutt noted the history of a bicep sprain or strain in April 2019. He stated Ritchie demonstrated no evidence of radiculopathy until October 2019 when she experienced a flare-up of symptoms from a cervical arthritic problem dating back to 2016 or 2017. He stated the April 8, 2020 surgery had no relationship to the April 23, 2019 work event. He found the March 17, 2021 surgery was

performed due to minimally demonstrated degenerative changes. He found Ritchie had long ago reached MMI. He noted Ritchie has been intermittently symptomatic since 2016 for her cervical osteoarthritis. He stated her cervical problems and surgeries are not causally work-related to the April 23, 2019 work event. He also found Ritchie reached MMI three months after each surgery. He recommended no additional treatment, and he stated Ritchie's activities should not be restricted.

Toyota additionally filed records from Dr. Stephen Moses, Ritchie's family physician, for office visits from November 2016 to January 2017. Dr. Moses noted right shoulder and neck pain. He diagnosed cervical nerve impingement and suspected C6 nerve involvement. An MRI revealed minimal bulging at C5-C6. He also diagnosed cervical paraspinous muscle spasm and rhomboid muscle pain.

A Benefit Review Conference was held on October 26, 2021. The parties noted Toyota disputed both the April 23, 2019 and October 13, 2020 alleged injury dates. Toyota also disputed whether Ritchie retains the capacity to return to the type of work performed on the date of injury. The contested issues included benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid or contested medical expenses, injury as defined by the Act, credit for unemployment and wages earned, TTD benefits, permanency, and unpaid medical benefits including the C5-C6 and C6-C7 fusions.

On November 9, 2021, Ritchie filed wage records from a similarly situated employee in the amount of \$1,620.00 per week. She argued the ALJ should rely upon this calculation since her work was so sporadic during the year prior to the accident it could not be relied upon in assessing her AWW. Toyota objected,

arguing KRS 342.140(1)(e) is inapplicable. It argued Ritchie worked for Toyota for more than 13 weeks prior to each injury, having been hired in 2014. The ALJ overruled the objection in an Order entered on November 30, 2021.

Toyota had previously filed wage records reflecting Ritchie's earnings for the 52 weeks prior to her cervical injury. Those records reflect she did not work a full 13 weeks for any of the quarters in the year prior to her cervical injury. Her best 13-week period was for the pay periods ending May 13, 2018 to August 5 2018, and two of those periods reflect she had no earnings. Toyota's records reflect her AWW was \$713.16.

The ALJ issued the Opinion, Award and Order on December 21, 2021, dismissing Ritchie's claims for left arm, left bicep, shoulder, and low back injuries. He found no evidence any of those alleged injuries were permanent. The ALJ found Ritchie sustained a work-related cervical injury for which he awarded TTD and medical benefits. The ALJ noted Ritchie did not reach MMI until June 17, 2021, and the only impairment rating for her cervical condition was assessed by Dr. McEldowney on January 8, 2021, prior to her second cervical fusion. The ALJ acknowledged an injured worker can be at MMI and still require medical treatment. Tokico (USA) v. Kelly, 281 S.W.3d 771 (Ky. 2009). Here, however, the ALJ found Ritchie's condition had not stabilized and she had not reached MMI when she saw Dr. McEldowney in January 2021. The ALJ specifically found as follows:

However, the AMA Guides define MMI as a person's condition has stabilized to the extent that any impairment rating would be considered permanent. In this case Ritchie's condition had far from stabilized as of January 8, 2021. To the contrary, not only did she have another cervical fusion three months later, but it was to

an entirely different level than her first fusion and she had never been entirely asymptomatic. Clearly, she was not at MMI on January 8, 2021 and her condition had not stabilized so that her impairment rating would be considered permanent. As such the impairment rating cannot be used.

The rating from Dr. McEldowney was the only rating in the record. Without an impairment rating no permanent partial disability award can be made.

As a lay person I am not allowed to independently review the Guides in a circumstance like this. It may well be that Ritchie must have an impairment rating, it may also well be that it is different than 26% or 25-28% and maybe another rating entirely.

The ALJ agreed with Toyota that Ritchie's AWW should be calculated pursuant to KRS 342.140(1)(d). He found her AWW was \$733.16. He awarded TTD benefits at the rate of \$488.77 per week from April 26, 2019 through September 12, 2019, and again from March 17, 2021 through April 17, 2021, with 6% interest. He additionally found the C5-C6 and C6-C7 surgeries compensable, and he found Ritchie is entitled to future medical benefits for her cervical injury/surgeries pursuant to the requirements of KRS 342.20.

Ritchie filed a Petition for Reconsideration arguing the ALJ erred in finding she did not reach MMI until July 2021. She cited to both Dr. Sexton and Dr. Tutt finding she reached MMI in 2019, then 2020. She also cited to Dr. Hunt's release to return to work in August 2020. She further argued she had reached MMI by January 2021 when she saw Dr. McEldowney, and her cervical conditions subsequently worsened requiring additional surgery. Ritchie additionally argued the ALJ erred in calculating her AWW. She also argued her work was sporadic requiring a different calculation. She finally argued the ALJ should have relied upon

the wages of a similar employee since her work was too sporadic to make an accurate determination.

The ALJ denied the Petition for Reconsideration in an Order issued January 3, 2022. He found Ritchie had not reached MMI at the time she was evaluated by Dr. McEldowney. The ALJ specifically found, “There can be no more clear evidence that a person is not at MMI if they still require surgery.” The ALJ found the impairment rating Dr. McEldowney assessed was not probative. Likewise, the ALJ found his determination of Ritchie’s AWW is supported by substantial evidence.

As noted above, Ritchie argues the ALJ erred in addressing Dr. McEldowney’s application of the AMA Guides. She additionally argues the ALJ overreached his authority, and his findings are so unreasonable they must be reversed as a matter of law. Ritchie finally argues the ALJ erred in his determination of her AWW without proper consideration of the controlling caselaw.

Ritchie, as the claimant in this workers’ compensation proceeding, had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ’s decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under

the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In rendering a decision, Kentucky's workers' compensation Act grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. See KRS 342.275; KRS 342.285; AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting an outcome other than that reached by the ALJ, this is not adequate to support a reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

After reviewing the evidence, we find the ALJ did not err in his determinations, and he acted within the discretion afforded to him. The ALJ appropriately determined Ritchie's AWW. Ritchie argues because she worked so sporadically due to various injuries, surgeries, and conditions, her AWW could only

be calculated based upon the wage records of a similarly situated worker pursuant to KRS 342.140(1)(e), rather than pursuant to KRS 342.140(1)(d).

It is undisputed Ritchie was employed by Toyota from December 2014 until her termination in October 2020. Although she missed work for several periods during that time span, she remained an employee with no breaks in service; thus, she clearly was employed by Toyota for greater than 13 calendar weeks immediately preceding her injury date. KRS 342.140 (1)(d) &(e) state as follows:

342.140 Computation of employee's average weekly wage.

The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:

(1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:

(d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;

(e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation;

The facts here similar to those in Belcher v. Manpower of Indiana, 492 S.W.3d 156 (Ky. App. 2016). There, the Kentucky Court of Appeals held that since Mr. Belcher was employed by Manpower of Indiana for greater than 13 weeks, the AWW must be calculated pursuant to KRS 342.140(1)(d), since despite his missing several weeks of work, he was still employed during that period.

Likewise, we also note the holding of the Kentucky Court of Appeals in Carrie Reed v. Toyota Manufacturing, Kentucky, Inc., No. 2014-CA-001135-WC (July 17, 2015) (designated not to be published). In that case, Reed worked only 10 weeks of the previous 52 weeks due to treatment of unrelated medical conditions. Reed argued that based upon her “unique circumstances” her AWW should be determined pursuant to KRS 342.140(1)(e). It was undisputed Reed was employed for more than 52 weeks, and her job was available to her during the entire period. The Court of Appeals determined that since Reed was admittedly employed by Toyota for more than 52 weeks at the time of the injury, it would be improper to calculate her AWW pursuant to KRS 342.140(1)(e). The Court of Appeals’ decision specifically stated as follows:

While we are sympathetic to Reed’s situation and understand the compassionate reasoning behind the ALJ’s decision and attempt to minimize the impact of Reed’s nonwork-related illness on her AWW, kindness and concern simply cannot change the language espoused by the General Assembly. The statute is clear, unambiguous, and must be followed. Further, Reed’s impassioned plea to treat her as an employee subject to sporadic work rings hollow under the facts adduced below. The mere fact she had not actively worked a full thirteen week period during the fifty-two weeks prior to her injury—during which time it was conceded TMMK consider her an employee and would have permitted her

return at any point—does not somehow transform her status to that of a seasonal or sporadic worker.

Ritchie’s situation is similar to Reed’s. She missed work unrelated to her work injury despite her continued employment with Toyota. Therefore, applying the rationale of Reed, supra, we affirm the ALJ’s determination regarding Ritchie’s AWW in accordance with KRS 342.140(1)(d).

Ritchie also argues the ALJ erred in awarding only TTD benefits for her cervical injury. She argues addressing Dr. McEldowney’s application of the AMA Guides was not preserved as an issue, and the ALJ’s findings were an unreasonable overreach of authority requiring reversal. We disagree. The parties clearly preserved the issue of income benefits pursuant to KRS 342.730, which encompasses both TTD benefits and the correct calculation of PPD benefits that must be based upon an impairment rating assessed in accordance with the AMA Guides.

In Miller v. Go Hire Employment Development, Inc., 473 S.W.3d 621 (Ky. App. 2015), the Kentucky Court of Appeals noted MMI is critical in the context of assessing a “whole person impairment” rating. The Court of Appeals noted the AMA Guides prohibit physicians from assessing an impairment rating for a medical condition unless the patient has achieved MMI. AMA Guides, p. 9. The Court of Appeals noted that without a whole person impairment rating—properly assigned pursuant to the AMA Guides—an award of PPD benefits is prohibited. KRS 342.730(1)(b); KRS 342.0011(35). In contrast to an award of PPD benefits, an award of medical benefits does not require assignment of a permanent impairment pursuant to the AMA Guides.

The ALJ found the impairment rating Dr. McEldowney assessed was premature since Ritchie had not yet reached MMI. We note Dr. McEldowney did not address MMI in his January 2021 report. In fact, that portion of the report was left blank. The ALJ specifically noted Ritchie underwent an additional fusion surgery at an adjacent level merely two months after she was last seen by Dr. McEldowney. The evidentiary record fails to establish what Ritchie's impairment may have been at the time the ALJ determined she eventually reached MMI from her last surgery performed in March 2021. The ALJ noted Dr. McEldowney's impairment rating was assessed five months prior to his determination she had reached MMI on June 17, 2021. The ALJ acknowledged that additional treatment does not necessarily mean an individual could not have reached MMI. Tokico (USA) v. Kelly, supra. However, he determined Ritchie's condition had not yet stabilized since she remained symptomatic when Dr. McEldowney assessed the impairment rating. He also noted she underwent additional cervical fusion surgery shortly after that rating was assessed. The ALJ found that because Ritchie had not yet reached MMI when the impairment rating was assessed, it could not be relied upon in determining an award of PPD benefits.

We note the ALJ awarded Ritchie TTD and medical benefits, and specifically found her cervical fusion surgeries compensable. However, because he determined she had not reached MMI when Dr. McEldowney assessed the impairment rating, and since no additional impairment rating was provided after he determined she reached MMI, there was no basis to award PPD benefits.

We find the ALJ did not err in finding Ritchie is entitled only to TTD and medical benefits. He determined she did not reach MMI until June 2021, after her last fusion surgery, and long after the impairment rating was assessed by Dr. McEldowney. Dr. McEldowney did not determine in his report when Ritchie reached MMI. Likewise, the impairment rating was assessed prior to her last fusion surgery. The ALJ properly exercised his discretion in determining Ritchie did not reach MMI until June 2021, and there is no evidence of what impairment rating she may have had at that time based upon the AMA Guides. Because we determine the ALJ properly exercised his discretion and a contrary result is not compelled, we affirm.

Accordingly, the December 21, 2021 Opinion, Award and Order, and the January 3, 2022 Order denying Ritchie's Petition for Reconsideration rendered by Hon. M. Christopher Davis, Administrative Law Judge, are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

MILLER, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

MILLER, Member. This claim offers a unique set of facts. Ritchie was injured at work on April 23, 2019, while pulling a crankcase from a motor. As a result of the injury, Dr. Travis Hunt performed a cervical fusion at C6-C7 on April 8, 2020. The ALJ found the injury and the cervical fusion surgery compensable.

Dr. McEldowney evaluated Ritchie on April 21, 2020 at the request of her counsel. He opined Ritchie would not be at maximum medical improvement ("MMI") until three months post-surgery, July 8, 2020. Using the DRE Cervical

Category IV, he assessed a 25-28% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Impairment Rating (“AMA Guides”).

Dr. Hunt, the treating surgeon, released Ritchie to full-duty work on August 19, 2020. Ritchie returned to work at Toyota. On October 13, 2020, Ritchie experienced a second injury at Toyota, mainly to her lower back. This injury occurred while pushing and pulling a cart. On October 20, 2020, Ritchie was examined for low back pain related to the October 13th work event. On November 9, 2020, Dr. Hunt reviewed an MRI of the low back. She saw Dr. Hunt’s office again on December 17, 2020 for the injury. She filed a Form 101 for the October 13th lumbar injury that was later consolidated with her original cervical injury claim. It is noted that Ritchie had two prior surgeries for the low back performed by Dr. Hunt that were not work-related.

The first mention of cervical symptoms arose during a February 4, 2021 visit when Ritchie reported she had recently noticed worsening of balance and felt heaviness and weakness from the shoulders to her low back and legs. This led to an MRI of the cervical spine on February 12, 2021. Dr. Hunt performed a second cervical fusion on March 17, 2021 involving the C5-6 level and removed the plate at C6-7 from the previous surgery.

Dr. Henry Tutt examined Ritchie on September 20, 2021 at the request of Toyota’s counsel and opined she reached MMI on June 17, 2021. The ALJ determined this is the date MMI was achieved.

Ritchie had previously returned to Dr. McEldowney for a second independent medical evaluation (“IME”) on January 8, 2021. The exam concerned her low back injury, but Dr. McEldowney reported:

Patient denies any injury to her neck and was started back to work September 2020 after successful cervical spinal fusion. The October 13, 2020 injury occurred while pulling and lifting a cart that weighed about 50 pounds. The doctor noted post cervical surgery the patient states resolution of arm numbness and tingling after surgery. Patient states she is 90% improved following cervical spine fusion.

The report also stated *verbatim*:

Patient states arriving to work On October 13, 2020 without restrictions performing full work activities usual and customary for her job description. Patient states that she was able to pass work conditioning and work hardening following her neck surgery in September 2020 to allow her to return to work without restrictions.

While the bulk of the report related to the lumbar region, it did discuss the previous cervical injury and fusion. Dr. McEldowney assessed a 26% impairment rating utilizing Table 15-5 of DRE Cervical Category IV. At this point in time, the cervical condition, which led to the second fusion, was not on the radar and Ritchie’s treatment concerned the lumbar region.

Ultimately, the ALJ found both cervical surgeries compensable. He awarded no permanent partial disability (“PPD”) benefits as he found the June 17, 2021 date controlling for maximum medical improvement (“MMI”). Since no impairment rating was assessed after that date, the ALJ stated: “Without an impairment rating no permanent partial disability award can be made.”

Dr. McEldowney's 26% rating is grounded in the DRE category, and this rating is the same whether the first fusion was successful or unsuccessful. It is clear Ritchie had a work injury, followed by a surgery, a return to work, and an impairment rating utilizing the DRE method contained in the Guides. While the Guides provide that impairment ratings should not be assessed until MMI is reached, the factual finding by the ALJ of a later date for MMI should not deprive Ritchie of compensation.

If this case had ended in January 2021, the 26% rating would clearly stand. Dr. McEldowney had already assessed MMI in July 2020. Then, Ritchie's neck complaints worsened, leading to a second fusion at the disc level above the prior fusion and the removal of the plate at C6-7. Several months later, Ritchie was assessed at MMI, but no impairment rating occurred thereafter.

It is not the role of the Board to fact-find or reappraise the evidence in a different manner than found by the ALJ. Miller v. Go Hire Emp. Dev., Inc., 473 S.W.3d 621, 629 (Ky. App. 2015). The ALJ's finding that Ritchie reached MMI after the second surgery should not, however, automatically preclude PPD benefits from being awarded.

MMI is defined in the Guides as the date in which clinical findings indicate that the medical condition is static and well stabilized. It refers to a date from which further recovery or deterioration is not anticipated, although it is understood that an individual's condition is dynamic and there may be some expected changes over time. AMA Guides, 5th Ed., p. 19. Accordingly, an impairment should not be considered permanent until the clinical findings indicate

that the medical condition is static and well stabilized. Id. Some impairment ratings are based on loss of Range of Motion while another category measures the impairment based on specific conditions and/or treatment.

DRE Cervical Category IV states in pertinent part: “Individual may have loss of motion of a motion segment due to a developmental fusion or **successful or unsuccessful attempt at surgical arthrodesis.**” Id. at 392 (emphasis added). Because Ritchie underwent a cervical fusion, Dr. McEldowney correctly utilized this category when he assigned his impairment rating after the first surgery. He utilized the same category when determining the 26% impairment rating in January 2021.

The date in which Ritchie reached MMI was for the ALJ to determine. That said, in this claim, the ALJ failed to appreciate there are two potential MMI dates. This scenario is somewhat akin to when a person has surgery and receives temporary total disability (“TTD”) benefits followed by a gap in TTD benefits and a return to work before TTD is reinstated due to a second surgery. A worker can reach MMI while still having additional treatment. Tokico (USA) v. Kelly, 281 S.W. 3d 771 (Ky. 2009).

Alternatively, assuming the later MMI date is the only one that can be used, these particular facts still allow for PPD benefits to be awarded. Crump v. United Mechanical, Inc., No. 2016-CA-001457-WC, 2018 WL 6600237 (Ky. App. Dec. 14, 2018), though unpublished and not cited as authority, is analogous and instructive. While an AMA rating was assessed pre-MMI by Dr. Bilkey, the Court of Appeals allowed it to be used to determine benefits, as the rating would not change post-MMI since it was grounded in the DRE. Id. at *3. This situation is quite similar

to Ritchie's case. If it is distinguishable, an MMI date *had* been assigned by Dr. McEldowney prior to the second AMA rating. Both ratings came from DRE Category IV (25-28%).

The Court of Appeals stated in Crump: "Most importantly, his opinion was based on the methods set forth in the Guides. As such, the Chief ALJ could have given credence to Dr. Bilkey's opinion." Id. (citing Plumley v. Kroger, Inc., 557 S.W.3d 905, 912-913 (Ky. 2018), reh'g denied (Nov. 1, 2018)) (holding that an ALJ is entitled to give credence to an opinion that is based upon the Guides even if the opinion does not strictly adhere to them). Like the claimant in Crump, Dr. McEldowney's rating was grounded in the Guides and the surgical procedure itself provided a minimum impairment rating.

While the Board cannot usurp the role of the ALJ in determining the MMI date, it can correct the harsh result in this unique set of facts. This action would prevent an unwarranted result stemming from an unintended abuse of discretion, that the finding was unreasonable under the evidence. Abel Verdon Const. v. Rivera, 348 S.W. 3d 749, 754 (Ky. 2011).

Workers' Compensation is a system of wage-loss protection, the purpose of which is to be certain that income is available to provide the necessities of life for those affected by physical disability. Williams v. Eastern Coal Corp., 952 S.W.2d 696 (1997). The fundamental purpose of the Workers' Compensation law in Kentucky is to seek compensation for injured workers for economic loss sustained due to a worker's injury in the course and scope of employment. Newberg v. Weaver, 866 S.W. 2d 435 (Ky. 1983).

Kentucky court have recognized a “manifest injustice” standard in the Workers’ Compensation system. Durham v. Copley, Jr., 818 S.W.2d 610 (Ky. 1991). A manifest injustice would occur in this claim if Ritchie is denied PPD benefits. Wherefore, I believe the Opinion should be vacated and remanded to the ALJ to either assess the 26% AMA rating or order any of the other potential directives available in KRS 342.275(2).

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