Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 14, 2019

CLAIM NO. 201767168

CANDY CURRENS PETITIONER

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

RJ INSULATION
and HON. JEFF V. LAYSON, III,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING
* * * * * *

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

STIVERS, Member. Candy Currens ("Currens") appeals from the December 20, 2018, Opinion, Award, and Order and the January 22, 2019, Order overruling her petition for reconsideration of Hon. Jeff V. Layson, Administrative Law Judge ("ALJ"). In the December 20, 2018, Opinion, Award, and Order, the ALJ awarded Currens temporary total disability ("TTD") benefits and medical benefits for temporary work-related injuries sustained on August 31, 2017.

On appeal, Currens asserts the ALJ committed reversible error by failing to acknowledge the stipulation Currens sustained a work-related injury on August 31, 2017. Next, in a two-part argument, Currens asserts the ALJ committed error by rejecting Dr. Steven Wunder's medical testimony based upon the holding in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). Currens further asserts the ALJ conducted an analysis not in accordance with Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Lastly, Currens asserts the ALJ began the award of TTD benefits on an incorrect date.

The Form 101 alleges Currens sustained work-related injuries to "multiple body parts" while in the employ of RJ Insulation on August 31, 2017, in the following manner: "Carried two 60-pound tanks of FPAM that had hoses connected from truck into home to basement. She started to go downstairs and tripped on one of the hoses attached to the tank, fell down the stairs with both tanks and injured her head, back, legs, arms."

The October 9, 2018, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: work-relatedness/causation, benefits per KRS 342.730, TTD, vocational rehabilitation, pre-existing active condition, average weekly wage, medical benefits, and temporary vs. permanent injury. The parties stipulated Currens sustained work-related injuries on August 31, 2017. The BRC order indicates TTD benefits were voluntarily paid from September 6, 2017, through December 12, 2017.

Currens was deposed on May 9, 2018. Her job at RJ Insulation was to install insulation, including operating a "blow truck" from which she blew cellulose

insulation into attics. When she fell down the stairs on August 31, 2017, she injured her head, back, legs, and arms, and was rendered unconscious. The first time she received treatment after the fall was at an Urgent Care treatment center on September 6, 2017. She testified as follows:

> Q: Okay. So I'm looking at a note from Urgent Care dated September 6, 2017. Is this the first place that you went for treatment? It would have been about a week later?
>
> A: I went the Wednesday.
>
> Q: Do you know what day of the week your injury occurred on?
>
> A: Thursday.
>
> Q: So the following Wednesday, six days later?
>
> A: Yes.
>
> Q: And did you go to Urgent Care or, it says Cg Medical Associates on Beechmont Avenue?
>
> A: Yes.

The Urgent Care center put Currens on crutches and referred her to Dr. Glen McClung who she saw on September 8, 2017. Dr. McClung ordered a boot for Currens' right foot.

Currens also testified at the October 23, 2018, hearing. She detailed what occurred after she fell down the stairs on August 31, 2017:

> A: And I was like – because I sat there for a minute, and I was like, whoa, this hurts. So I was like, nope. I was like, have to get up. And I got them tanks up on there and kept on going. And then I had to go up and get the third set because it wasn't enough.

> And I got them up, and I finished the job because I always – I called Boone, his father, I said, 'Boone, I got hurt. I'm not coming in. I finished the job, and by the time I get there, you guys aren't going to be there anyway.'
>
> He said, 'Go on home, and we'll see you in the morning.'
>
> Well, I came in the next morning, I showed them my injuries, and, I mean – and they were like, 'Oh, we need these five jobs done. We'll give you a helper.' And they ended up giving me a helper, and we had stayed out 13 hours, I think, that day.
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> Q: When did you finally get some medical treatment?
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> A: Well, that was – so that was Labor Day weekend, so we had a choice of working Monday or not. Well, I was, of course, going to try work Monday, but then I was so – my leg started getting worse. My whole body was black and blue. I just hurt all over.
>
> And I called him and said, 'I'm not coming in today. I'm trying to doctor myself to come back to work. I'll be in tomorrow.' Tuesday came, and I was even hurting worse. Finally, Wednesday, I went to urgent care.

Currens filed Dr. Wunder's July 24, 2018, medical report. After conducting a medical records review and physical examination of Currens, Dr. Wunder set forth the following diagnoses and opinions concerning causation:

> I agree with Dr. Goldman that she exacerbated chronic, active problems in her knees and low back. However, she had not had radicular pain in the neck for years. I believe she had a neck sprain with aggravation of pre-existing spondylosis in the cervical region. This led to a radicular component into the left upper extremity.
>
> I believe the work event as described, is the cause of the impairment found. I agree with Dr. Bender, that she did have some pre-existing active impairment. However, the neck radicular symptoms appeared to be quiescent and had not been active since 2010.

Utilizing the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"), Dr. Wunder assessed a 15% DRE category 3 whole person impairment. Opining Currens "had treatment for chronic neck pain in the past and complained of neck pain as late as 2015 and 2016, before this event," Dr. Wunder assessed a 5% impairment rating for a pre-existing active cervical condition. Consequently, the impairment rating for Currens' work-related neck condition is 10%. Dr. Wunder opined Currens reached maximum medical improvement ("MMI") in January 2018 when she returned to work.

Several medical records by Dr. Laura Barczewski, Currens' treating physician, were filed in the record by RJ Insulation. Pertinent to the issues on appeal are the records from Currens' appointments on December 28, 2016, May 4, 2017, and August 22, 2017, during which she was seen for, among other things, cervical radicular pain.

Dr. McClung was deposed on May 30, 2018. Dr. McClung first saw Currens on September 8, 2017, for right lower leg pain, low back pain, and left knee pain. The deposition contains the following relevant testimony:

> Q: Okay. And at that time, she did not have health insurance. Would you agree that it appears that her doctors in 2016 and 2017, prior to this work incident, had recommended physical therapy, medication, and MRIs for her neck and her back?
>
> A: They have.
>
> Q: Okay. Based on that information that wasn't previously available to you, would you agree that it appears that the entirety of the symptoms of which she now complains were pre-existing and active at the time of this work incident?

A: They were.

Q: Would you agree that there's no objective basis in this case to conclude that she's had any kind of permanent harmful change to the human organism?

A: Say that again.

Q: Would you agree that there are no objective medical findings in this case to indicate a permanent harmful change to the human organism?

A: No.

Q: You do not agree?

A: No. I do agree, yeah.

Q: You do agree?

A: Yeah.

Q: Would you agree that it appears she had some temporary bruising, strains that would have resolved within some period of time? How long would you have expected temporary bruising and strains from a fall down the steps to resolve?

A: Even if it was a contusion in the bone or something like that, the longest length of time I would say at least 12 weeks.

Dr. McClung testified he is unable to assign any impairment rating without seeing Currens again.

RJ Insulation also filed Dr. Thomas Bender's June 19, 2018, report. After performing a medical records review and an examination, Dr. Bender opined Currens did not have permanent harmful changes to her cervical spine, lumbar spine, posterior torso, bilateral wrists/hands, or bilateral knees as a result of the August 31, 2017, work incident. Consequently, he assessed a 0% whole person impairment rating

stemming from the fall. Dr. Bender agreed with Dr. McClung that Currens reached MMI within four months of the August 31, 2017, work incident. He assigned a 19% whole person impairment rating to pre-existing active conditions in Currens' cervical spine, lumbar spine, bilateral knees, and right carpal tunnel syndrome.

In the December 20, 2018, Opinion, Award, and Order, the ALJ set forth the following analysis on the issue of "injury" as defined by the Act, causation, and pre-existing, active disability:

> 'Injury' is defined by KRS 342.0011(1) as a 'work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which proximately causes a harmful change in the human organism evidenced by objective medical findings.' The term 'objective medical findings' means 'information gained through direct observation and testing of the patient applying objective or standardized methods.' When the causal relationship between an injury and a medical condition is not apparent to a lay person, the issue of causation is solely within the province of a medical expert. *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. 1981). An injury may be temporary, requiring the payment of TTD benefits and temporary medical benefits, while not resulting in a permanent change to the human organism that qualifies for permanent disability benefits or medical benefits. *Robertson v. UPS*, 64 S.W.3d 284 (Ky. 2001).
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> In this case, there is no disagreement that Ms. Currens was involved in a work-related traumatic event when she fell down some stairs on August 31, 2017. The main question is the degree to which any physical conditions from which she currently suffers are causally related to that incident. The Plaintiff argues that her pre-injury work history and activity lead to a conclusion that the majority of her current problems are the result of the work injury. The Defendant/Employer, on the other hand, argues that the medical evidence demonstrates that the entirety of the Plaintiff's current condition was pre-existing and active at the time of the injury.

As mentioned above, the Plaintiff bears the burden of proof with regard to establishing that she has a condition or injury which is causally related to the incident at work. To that end, she has submitted a medical report from Dr. Wunder, who agrees that the alleged injuries to the Plaintiff's knees and low back are pre-existing, active conditions. He does not assign an AMA rating for these conditions. Dr. Wunder does assign an AMA rating for the Plaintiff's current cervical radicular complaints which he believes are causally related to the work injury. In support of this particular finding, he states that 'she had not had radicular pain in the neck for years' and 'the neck radicular symptoms appeared to be quiescent and had not been active since 2010.'

These statements by Dr. Wunder are simply not true. The records from the Plaintiff's family physician, Dr. Barczewski, establish that Ms. Currens reported cervical radicular symptoms on a consistent basis in 2016 and 2017, with the most recent office note documenting such complaints being dated August 22, 2017 – just nine days before the work-related injury. Medical opinions that are based upon inaccurate information or incomplete information do not constitute substantial evidence to support a finding of work-related causation. *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004). Because Dr. Wunder cited an incorrect medical history as the basis for his opinion that the Plaintiff sustained a work-related cervical injury, the Administrative Law Judge finds that his medical opinions in this case lack credibility and do not constitute substantial evidence.

Having rejected Dr. Wunder's medical testimony, the Administrative Law Judge finds no other competent, substantial medical evidence in the record which establishes that Ms. Currens has sustained any type of permanent work-related injuries as a result of the event on August 31, 2017. The Administrative Law Judge does find credible the opinions from Dr. Bender, who stated in his report that the Plaintiff reached MMI within four months after the work injury on August 31, 2017 and that he did not believe that there was any evidence of a permanent, harmful change to the human organism affecting any body part. This opinion from Dr. Bender is consistent with the testimony of Ms. Currens' treatment

> orthopaedic surgeon, Dr. McClung, who, when made aware of the Plaintiff's pre-injury medical history, agreed that there were no objective findings which indicated a permanent injury.
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> Based on the foregoing, the Administrative Law Judge finds that Ms. Currens sustained a temporary injury when she fell down some stairs on August 31, 2017 and that she reached MMI four months later on December 31, 2017. There is no substantial evidence of any permanent injury, impairment or disability affecting any body part after December 31, 2017. She is entitled to receive TTD benefits in the amount of $442.12 for [sic] period she was off from work from September 6, 2017 through December 31, 2017. Likewise, the Administrative Law Judge finds that Ms. Currens does not require any additional medical treatment for any work-related injuries after the date of MMI on December 31, 2017.
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> Having determined that the Plaintiff's has not sustained a permanent impairment or disability arising from the alleged work injuries, it is further found that she is not entitled to an award of vocational rehabilitation benefits.

Currens filed a petition for reconsideration making the same arguments put forth in this appeal. In the January 22, 2019, Order, the ALJ provided the following additional findings:

> . . .
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> 1. The Plaintiff first argues that it was error for the Administrative Law Judge to reject the medical testimony from Dr. Wunder on the grounds that it was based on inaccurate or incomplete information. Specifically, the Plaintiff maintains that the holding in *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004), does not apply because the doctor rendering the medical opinion in that case had not been provided relevant medical records pertinent to the Plaintiff's medical history, whereas, in this case, all of the Plaintiff's pre-injury medical records were made available to Dr. Wunder.

In his report, Dr. Wunder wrote:

"I agree with Dr. Goldman that she exacerbated chronic, active problems in her knees and low back. However, ***she had not had radicular pain in the neck for years.*** I believe she had a neck sprain with aggravation of pre-existing spondylosis in the cervical region. This led to a radicular component into the left upper extremity."

and

"I believe the work event as described, is the cause of the impairment found. I agree with Dr. Bender, that she did have some pre-existing active impairment. However, ***the neck radicular symptoms appear to be quiescent and had not been active since 2010***. (Emphasis added)."

Clearly, Dr. Wunder bases his opinion regarding causation of the Plaintiff's cervical condition on a belief that the Plaintiff "had not had radicular pain in the neck for years" and "the neck radicular symptoms appear to be quiescent and had not been active since 2010." As pointed out in the Opinion, Award and Order, these statements are simply not true. The medical records of the Plaintiff's family physician, Dr. Barczewski, confirm that Ms. Currens was diagnosed with "cervical radicular pain" on December 28, 2016, May 4, 2017 and August 22, 2017. The last of these dates is a little more than a week before the work injury.

Dr. Barczewski's medical records were submitted into evidence in this case. Regardless of whether these records were provided to Dr. Wunder, it is clear that they directly contradict his statements that the Plaintiff had not had any cervical radicular symptoms since 2010. Therefore, even if *Cepero* does not mandate that Dr. Wunder's testimony be disregarded, the Administrative Law Judge finds that his opinions regarding causation and permanent impairment lack credibility because they are based on an incorrect description of the Plaintiff's pre-injury medical history.

2. The Plaintiff's second argument is that there was "patent error in that the ALJ has formed and substituted his medical diagnosis incorrectly for that of the medical professionals. Specifically, the Plaintiff takes

issue with the statement that the "records from Dr. Barczewski established that Ms. Currens reported 'cervical radicular symptoms on a consistent basis in 2016 and 2017.'"

The contention that the Administrative Law Judge "substituted his medical diagnosis incorrectly for that of the medical professionals" is without any basis whatsoever. During the three visits with Dr. Barczewski immediately preceding the work event on August 31, 2017 (on December 28, 2016, May 4, 2017 and August 22, 2017), the doctor includes "cervical radicular pain" under the heading "Diagnosis and all orders for this visit." The term "cervical radicular pain" is found in these office notes. It is not something that the Administrative Law Judge conjured up.

3. The third issue raised by the Plaintiff in her Petition is that the Administrative Law Judge did not properly analyze this case pursuant to the dictates of *Finley v. DBM Technologies* , 217 S.W.3d 261 (Ky. App. 2007).

In this case, the Administrative Law Judge's finding that the Plaintiff did not sustain any permanent impairment or disability is tantamount to a finding that any impairment she had prior to the injury was pre-existing and active. The holding in *Finley* requires that a pre-existing condition must be both impairment ratable and symptomatic in order to be deemed to be preexisting and active. The first prong of this test is satisfied by the testimony of Dr. Bender and Dr. Wunder, both of whom assigned AMA ratings for the Plaintiff's pre-injury cervical condition. The fact that the pre-existing condition was symptomatic is confirmed by the medical records from Dr. Barczewski, who diagnosed "cervical radicular pain" on December 28, 2016, May 4, 2017 and August 22, 2017. As set forth both in the original Opinion and previously in this Order, Dr. Wunder's erroneous opinion that the Plaintiff had not been treated for cervical radiculopathy since 2010 render his opinion regarding the work-relatedness of any permanent condition affecting Ms. Currens' cervical spine to be without credibility. The Administrative Law Judge did, on the other hand, find Dr. Bender's testimony to be credible. Since Dr. Bender apportioned all of the Plaintiff's current impairment to the pre-existing, active condition, the Administrative

> Law Judge finds that the entirety of the Plaintiff's impairment and/or disability affecting her cervical spine was preexisting and active and is not attributable to the work-related event on August 31, 2017.
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> 4. The Plaintiff's fourth argument in her Petition is that it was error for the Administrative Law Judge to determine that the Plaintiff did not sustain a permanent impairment as a result of the work-related incident. As set forth in the Opinion, Award and Order, this finding was based on the medical testimony from Dr. Bender and Dr. McClung, both of whom testified that the Plaintiff did not have any permanent impairment caused by the August 31, 2017 trip and fall at work.
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> 5. The fifth, and final, point raised by the Plaintiff in the Petition is that it was error for the ALJ to begin the period for payment of TTD benefits on September 6, 2017. According to the Plaintiff, the correct date is September 2, 2017, when she stopped working for the Defendant/Employer.
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> In order to qualify for TTD benefits, the Plaintiff must prove: 1) that she has not reached MMI, and; 2) she is not able to perform her pre-injury job. There is no medical evidence in this case which indicates that the Plaintiff was unable to work until she went to Urgentcare on September 6, 2017. Consequently, the Administrative Law Judge found that the Plaintiff met the second prong of the definition of TTD beginning on September 6, 2017.
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> Based on the foregoing, the Plaintiff's Petition for Reconsideration is overruled in its entirety.

Currens first asserts the ALJ erred by incorrectly including the issue of "injury" under the Act and causation in his analysis, as the parties stipulated at the BRC, Currens sustained a work-related injury on August 31, 2017. Currens contends, as a matter of law, the ALJ was required to start his analysis with a finding she sustained a work-related injury.

This Board acknowledges the October 9, 2018, BRC Order contains the stipulation Currens sustained a work-related injury. We also note that, despite the ALJ

acknowledging the stipulation in the December 20, 2018, Opinion, Award, and Order, he briefly revisited the issue of an "injury" under the Act in his analysis.[1] However, we find this superfluous analysis to be harmless error, as the ALJ ultimately acknowledged "there is no disagreement that Ms. Currens was involved in a work-related traumatic event when she fell down some stairs on August 31, 2017." The ALJ then proceeded to analyze whether Currens sustained a permanent or temporary injury. This was an appropriate analysis in light of "temporary vs. permanent injury" having been listed as a contested issue on the BRC order. *Stipulating to the occurrence of a work-related injury is not equivalent to stipulating Currens sustained a permanent work-related injury.* The ALJ ultimately determined Currens sustained a temporary work-related injury occurring on August 31, 2017. Therefore, the impact of any extraneous discussion on behalf of the ALJ regarding "injury" under the Act is nil. On this issue, we affirm.

In her multi-pronged second argument, Currens first asserts the ALJ erred by rejecting Dr. Wunder's medical testimony relying on the principles articulated in Cepero, supra.

When an ALJ believes a medical opinion is based upon an inaccurate history or an inaccurate understanding of the medical record, he or she is free to reject the opinion. Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). As we so often note, it is within the ALJ's discretion as fact-finder to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d

[1] In the "Stipulations and Contested Issues" section of the December 20, 2018, Opinion, Award, and Order, the ALJ noted as follows: "The parties have agreed to the following stipulations…3) the Plaintiff sustained a work-related injury on August 31, 2017."

308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the sole authority to judge the weight of the evidence and inferences to be drawn from that evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997).

Here, the ALJ concluded Dr. Wunder had an inaccurate understanding of Currens' history of cervical radicular symptoms; therefore, his opinions cannot constitute substantial evidence. The ALJ noted in both the December 20, 2018, Opinion, Award, and Order and the January 22, 2019, Order, Dr. Wunder stated in his July 24, 2018, report that Currens' "neck radicular symptoms appeared to be quiescent and had not been active since 2010." However, the ALJ determined Dr. Wunder's statement was contradicted by the medical records of Dr. Barczewski which note Currens was seen for cervical radicular symptoms on December 28, 2016, May 4, 2017, and August 22, 2017, the last appointment occurring just nine days before the work-related event. As the ALJ noted in the January 22, 2019, Order, even if he was not mandated to reject Dr. Wunder's medical opinions pursuant to Cepero, he certainly had the discretion to reject his opinions based upon credibility issues alone because of his understanding of Currens' pre-injury medical history. Indeed, the language utilized by the ALJ in the December 20, 2018, Opinion, Award, and Order certainly suggests a lack of credibility, versus a rejection under Cepero, was the primary reason the ALJ rejected the medical opinions of Dr. Wunder. This Board will not invade ALJ's discretion.[2] On this issue, we affirm.

[2] As the ALJ stated in the December 20, 2018, Opinion, Award, and Order, "Because Dr. Wunder cited an incorrect medical history as the basis for his opinion that the Plaintiff sustained a work-related cervical injury, the Administrative Law Judge finds that his medical opinions in this case lack credibility and do not constitute substantial evidence."

The other portion of Currens' second argument is the ALJ erroneously applied the analysis under Finley, as he failed to shift the burden of proof to RJ Insulation. Currens contends RJ Insulation failed to introduce evidence showing her pre-existing "conditions were causing any type of disabling reality during the entire time she worked" at RJ Insulation before the subject injury. Currens also asserts the ALJ was "compelled to assign Currens a post-injury impairment rating of either 19% per Bender or 15% per Wunder." On the entirety of these issues, we affirm.

The arguments on appeal regarding the alleged erroneous analysis under Finley can be summarily dispensed with, as Finley has no relevance to the ultimate outcome in the case *sub judice*. This is not a case where the ALJ carved-out an impairment rating from a greater impairment rating for a pre-existing active condition pursuant to Finley. In such a case, the ALJ would have been required to conduct a full analysis under Finley and determine whether Currens' pre-existing active condition was both symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. Here, the ALJ determined Currens sustained only a temporary work-related injury, and substantial evidence in the form of Dr. Bender's medical testimony supports this determination. Thus, the ALJ was not required to apply a Finley analysis. We acknowledge the language in the January 22, 2019, Order indicating that the finding Currens sustained a temporary injury "is tantamount to a finding that any impairment she had prior to the injury was pre-existing and active." However, we emphasize that a finding of a temporary work-related injury is not equivalent to a finding of a pre-existing active condition and does not necessitate an analysis under Finley. Therefore, Currens'

arguments regarding the ALJ's alleged failure to shift the burden of proof to RJ Insulation and to consider Currens' ability to perform her job before the August 31, 2017, fall are meritless.

We reject Currens' argument the ALJ was compelled to assign a permanent impairment rating of either 19% or 15%, because it is not supported by the record. Dr. Bender's 19% impairment rating, as set forth in his June 19, 2018, report, was assessed for pre-existing, active conditions in Currens' cervical spine, lumbar spine, bilateral knees, and right carpal tunnel. Dr. Bender assigned a 0% whole person impairment rating for the August 31, 2017, work incident. While it is true Dr. Wunder assigned a 15% whole person impairment rating, he assigned a 5% whole person impairment to a pre-existing active neck condition. Therefore, only 10% of the 15% impairment rating stems from the August 31, 2017, work incident. Nevertheless, the ALJ decided to rely upon Dr. Bender's opinions and impairment rating. When "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ was not compelled to find Currens had a post-injury impairment rating of either 19% or 15%.

That said, this Board is unable to determine the precise nature of the temporary injury or injuries the ALJ believes Currens sustained on August 31, 2017, and we remand for additional findings. The Form 101 alleges injuries to Currens' head, back, legs, arms. Dr. Bender, the physician upon whom the ALJ relied for his determination Currens sustained only a temporary injury, opined the only evidence of an injury Currens sustained on August 31, 2017, "is the minimal cutaneous scar residual to the proximal lateral tibial metaphysis of the right lower leg." Even though the ALJ limited his award of medical benefits from August 31, 2017, through December 31, 2017, all parties are entitled to know which injury or injuries the ALJ deems covered by his award. On page 14 of his December 20, 2018, decision, the ALJ merely found Currens sustained a temporary injury when she fell on August 31, 2017. The ALJ did not define the specific body part or parts which were injured. Thus, a finding of an injury to a specific body part is necessary. Any remaining claim for an injury or injuries Currens alleged sustaining on August 31, 2017, the ALJ does not deem compensable must be formally dismissed in an amended order and award.

Finally, Currens asserts the ALJ erred by not starting her award of TTD benefits on September 2, 2017, instead of September 6, 2017. We vacate the ALJ's award of TTD benefits and remand for additional findings.

KRS 342.0011(11)(a) defines temporary total disability as follows:

> 'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Kentucky Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he or she was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he or she remains disabled from his or her customary work or the work he or she was performing at the time of the injury. The Court in Magellan, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum

> medical improvement and not have improved enough to return to work.
>
> . . .
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD benefits, the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
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> . . .
>
> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

More recently, in Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The Court stated, "... we reiterate today, Wise does not 'stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.'" Id. at 254.

Finally, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Supreme Court instructed as follows:

> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TDD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TDD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TDD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TDD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

Here, the ALJ's analysis regarding the start date of TTD benefits fails to demonstrate an accurate understanding of the evidence. Currens testified at the hearing that she returned to work the day after her fall and was unable to return thereafter. She sought medical treatment for the first time following her fall at the Urgent Care center on September 6, 2017. In her brief to the ALJ, Currens asserted entitlement to additional TTD benefits from September 2, 2017, through September 5, 2017.[3] In the December 20, 2018, Opinion, Award, and Order, in his summary of Currens' testimony, the ALJ stated at the Urgent Care center Currens "was taken off from work." However, Currens did not testify to this, and the records from the Urgent Care center where Currens treated on September 6, 2016, were not entered into the record. In her petition for reconsideration, Currens once again asserted her entitlement to TTD benefits beginning on September 2, 2017. In the January 22, 2019, Order overruling Currens' petition for reconsideration, the ALJ stated there is no medical evidence in the record indicating Currens was unable to work until the day she went to Urgent Care on September 6, 2017. However, there is no medical evidence in the record establishing exactly when Currens was first taken off of work. The only evidence in the record addressing when Currens stopped work after her August 31, 2017, fall consists of Currens' hearing testimony indicating she was unable to return to work beginning on September 2, 2017, and the ALJ has not explicitly rejected this testimony. There is also deposition testimony in the record from Dr. McClung indicating it would have been "reasonable" for him to take her off of work on

[3] Voluntary TTD benefits were paid from September 6, 2017, through December 12, 2017.

September 8, 2017, but he does not remember, and no records from the September 8, 2017, appointment were entered into the record.

This Board cannot engage in fact-finding. Therefore, on remand, the ALJ must revisit the issue of when to begin Currens' TTD benefits with a proper understanding of the evidence in the record. Should the ALJ again chose September 6, 2017, as the date upon which to begin Currens' award of TTD benefits, he must provide findings regarding why he believes her visit to the Urgent Care center on September 6, 2017, marks the beginning of Currens' inability to work.

Accordingly, regarding Currens' first two arguments on appeal, the December 20, 2018, Opinion, Award, and Order and the January 22, 2019, Order are **AFFIRMED**. We **VACATE** the award of TTD benefits and **REMAND** for additional findings consistent with the views set forth herein. Also, in an amended order and award, the ALJ shall specify the exact nature of the temporary work-related injury or injuries Currens sustained on August 31, 2017, and formally dispense with all remaining injury claims alleged in the Form 101.

ALL CONCUR.

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