

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 16, 2022

CLAIM NO. 202091668

COLUMBUS STEEL ERECTORS, INC.

PETITIONER

VS.

APPEAL FROM HON. PETER J. NAAKE,  
ADMINISTRATIVE LAW JUDGE

GEORGE MARSHALL  
and HON. PETER J. NAAKE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Columbus Steel Erectors, Inc. (“Columbus Steel”) appeals from the April 11, 2022, Opinion, Award, and Order and the May 10, 2022, Order overruling its Petition for Reconsideration of Hon. Peter J. Naake, Administrative Law Judge (“ALJ”). The ALJ awarded George Marshall (“Marshall”) temporary total disability benefits, permanent partial disability (“PPD”) benefits, and medical benefits for work-related injuries to his right elbow, right wrist, and low back.

On appeal, Columbus Steel poses three arguments. It first asserts maximum medical improvement (“MMI”) is a prerequisite to a permissible impairment rating, and Dr. Jeffrey Fadel opined Marshall had not yet reached MMI “due to an injection therapy that had not been completed.” Thus, he could not assess an impairment rating at the time he examined Marshall. Secondly, Columbus Steel asserts the cases relied upon by the ALJ do not permit him to rely upon Dr. Fadel since Dr. Fadel ignored his own statement that Marshall had yet to attain MMI following the alleged lumbar spine injury. Finally, Columbus Steel asserts that none of Dr. Fadel’s impairment ratings can be relied upon because the combined impairment rating includes the impairment rating assessed for Marshall’s alleged lumbar spine injury.

### **BACKGROUND**

The Form 101, filed in the record on September 2, 2021, alleges Marshall sustained work-related injuries to “multiple body parts” on February 11, 2020, in the following manner: “Fall, slip or trip on same level.”

Due to the very narrow issue on appeal, we will only summarize the pertinent medical testimony.

Marshall introduced Dr. Fadel’s June 17, 2021, Independent Medical Evaluation report. After performing a physical examination of Marshall and a medical records review, Dr. Fadel set forth the following diagnoses:

1. Posttraumatic lateral epicondylitis and cubital tunnel syndrome right upper extremity, caused from the fall at work on February 11, 2020.
2. Herniated lumbar disc at L1-L2, caused from the injury at work on February 11, 2020.

3. Foraminal stenosis at L4-L5 right side, aroused by the injury at work on February 11, 2020.
4. Right hip pain, etiology unknown, caused from the injury at work on February 11, 2020.
5. Right wrist sprain with residual stiffness, caused from the injury at work on February 11, 2020.

Regarding an impairment rating, Dr. Fadel opined, in totality, as

follows:

Mr. Marshall has a ratable injury according to the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, **if no further treatment is considered.**

The method to calculate his right elbow pathology was to use the Range of Motion Method found in Figure 16-34 on pages 471 and 472. The range of motion values found on examination then result in a 7% upper extremity impairment.

Next, the right wrist which had residual stiffness from its initial injury and immobilization used for the right elbow can also be rated using the Range of Motion Method, Figure 16-35 on Page 473 and Figures 16-29 on Pages 466 through 469 were referenced. Again, taking the values obtained on physical examination, the value then results in an 8% upper extremity impairment.

The lumbar spine pathology found with digital imaging will also be rated at this time, despite the fact that injection therapy has not been completed and therefore, in my view, MMI in its regard has yet to be met. **This is being calculated at this examination assuming that no further treatment is anticipated.** The Diagnostic Related Estimates, which are found on Page 384, were used. Table 15-3 lists the specific categories. Mr. Marshall at this examination would fall within a Category II classification. A 6% whole body impairment was awarded and that figure is based upon the fact that he had no measurable muscle atrophy in the right lower

extremity or is not taking opioid analgesics to rate him at any higher rate.

The right hip region although symptomatic may be a result of referred pain from the back and at this point would not be ratable in my view. Further discussion about this subject will be expanded in the final section of this report.

Combining the right upper extremity values, i.e. the 7% and 8% numbers using the chart on Page 604, then equals a 14% upper extremity total. Conversion to whole person is then done using Table 16-3 on Page 439, which results in an 8% whole person impairment for the right upper extremity.

One then combines the 6% that was found for the lumbar spine and then the 8% calculated for the right upper extremity equaling a 14% whole body permanent partial impairment due to the injuries that Mr. Marshall sustained while he was at work on February 11, 2020. (emphasis added.)

Under “Conclusions and Recommendations,” Dr. Fadel further opined, in relevant part, as follows:

**Mr. Marshall has reached maximum medical improvement as of this examination, again if no further treatment is anticipated.**

...

I would agree with his treating physician that an interventional pain management physician is necessary for both diagnostic and therapeutic purposes specifically in this case, since he is a difficult gentleman to diagnose with overlapping symptoms. **In my view, corticosteroid injection therapy at the foramina at the L4-L5 area also with an epidural steroid injection at the L2 disc space and possibly injection therapy into the right hip would all be helpful in isolating the pain generators affecting Mr. Marshall’s right lower extremity and groin.**

Despite the fact that the MR arthrogram of the right hip did not reveal a labral tear, it might be some benefit to consider arthroscopic evaluation if injection therapy does not completely isolate the pain generators involved in this specific case. (emphasis added.)

The January 18, 2022, Benefit Review Conference Order and Memorandum lists the following contested issues: “benefits per KRS 342.730 including multipliers; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses; injury as defined by the Act; credit for unemployment; exclusion for pre-existing disability/impairment; TTD rate and duration; KRS 342.165 violation; and use of the AMA Guides.” Under “other” is the following: “Safety Violation raised against the employer.”

The April 11, 2022, Opinion, Award, and Order contains the following findings of fact and conclusions of law regarding Marshall’s entitlement to PPD benefits which are set forth *verbatim*:

## **PERMANENT PARTIAL DISABILITY**

### **A. Right Elbow Impairment**

The impairment ratings offered for Marshall’s right elbow injury were a 0% from Dr. Ballard, and an 8% impairment from Dr. Fadel. Dr. Ballard’s report states that at the time of her examination on March 24, 2021, Marshall required further treatment of his right elbow, but that after an additional four weeks of therapy he would be at maximum medical improvement. Dr. Ballard’s report does not record her range of motion measurements for the wrist and elbow, but states that they are normal.

Marshall has undergone a significant surgery to his right elbow which included an ulnar nerve transposition. Dr. Fadel assessed impairment for the right elbow after Marshall reached MMI for that condition in June 2021.

Dr. Fadel recorded his range of motion measurements and concluded that these calculated to a 7% upper extremity impairment for the elbow and an 8% upper extremity impairment for the wrist.

Upon review of Dr. Fadel's report, Dr. Ballard disputed his impairment for the lumbar spine, but did not dispute the rating which Dr Fadel assessed for Marshall's right elbow.

Because Dr. Fadel's impairment rating is supported by his range of motion measurements and was performed after Marshall reached MMI, and also because Marshall's complaints of continuing symptoms in his right elbow and wrist are better represented by Dr. Fadel's impairment than Dr. Ballard's, the Administrative Law Judge finds that Dr. Fadel's assessment of impairment for the right elbow and wrist injury is more persuasive.

The parties have preserved the issue of whether the impairment ratings offered comply with the A.M.A. Guides to the Evaluation of Permanent Impairment, 5th Ed. The proper interpretation of the A.M.A. Guides is a medical question solely within the province of the medical experts. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003); *Lanter v. Ky. State Police*, 171 S.W.3d 45, 52 (Ky. 2005). Regarding the impairment assigned for Marshall's right elbow and wrist injury, there was no medical testimony which would prove that Dr. Fadel's impairment was not based on the A.M.A. Guides. In *Plumley v. Kroger, Inc.*, 557 S.W.3d 905, 912 (Ky. 2018), the Supreme Court held that in order to constitute substantial evidence, a physician's assessment of permanent impairment must be grounded in the A.M.A. Guides, but that the law does not require strict conformity with the A.M.A. Guides. The Administrative Law Judge finds that Dr. Fadel's impairment rating is grounded in the A.M.A. Guides.

Where opinions from medical experts conflict regarding the appropriate percentage of impairment to be assessed for an injury, it is the ALJ's function as fact-finder to weigh the evidence and select the rating upon which permanent disability benefits, if any, will be awarded. *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002). The Administrative Law Judge finds that

Marshall has an 8% impairment to the body as a whole as a result of his right hand and elbow injury.

## **B. Low Back Impairment**

The Administrative Law Judge has previously found that Marshall suffered a work related injury to his low back in the accident. This was apparent from the evidence, including an MRI, treating orthopedic surgeons' opinions, and Marshall's testimony. It is now two years after the accident, and Columbus Steel has refused to provide treatment for Marshall's low back injury. In such a situation it is appropriate to assume that Marshall is at MMI for his low back condition, given that appropriate treatment has been consistently refused. In *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621 (Ky. App. 2015) the Court of Appeals faced the same circumstances and stated: "The need for additional treatment does not preclude a finding that a worker is at MMI." *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 776 (Ky. 2009). Dr. Fadel opined that Marshall was at maximum medical improvement if no additional treatment is provided. That fact can be inferred from Columbus Steel's refusal to authorize treatment for Marshall's low back condition. Dr. Fadel used Lumbar Category II DRE to estimate an impairment rating, relying on non-verifiable radicular complaints.

The Defendant argues that non-verifiable radicular complaints cannot be the basis for an impairment rating because these do not establish the objective medical evidence which KRS 342.0011(1) requires. However, the MRI performed in August 2020 shows a herniated disc at L1-L2, and this study constitutes objective medical evidence of a harmful change in the body sufficient to satisfy KRS 342.0011(1). Dr. Fadel's rating was based on intermittent complaints of radiculopathy. Marshall's testimony, which is corroborated by the medical records of his treatment, shows that he has intermittent pain into his thigh and groin. While the ALJ is not authorized to independently interpret the A.M.A. Guides, "...An ALJ may consult the Guides when considering the medical evidence and deciding which expert to rely upon." *Pella Corp. v. Bernstein*, 336 S.W.3d 451, 453 (Ky. 2011). Dr. Fadel's finding that Marshall's fall caused a herniated

disc at L1-L2 is supported by the fact that Marshall did not have these symptoms before his injury, and the A.M.A. Guides' description of a dermatome for L1-L2 disc herniations which includes the groin and thigh area. (See, A.M.A. Guides, Figure 15-1, p. 377). A reasonable interpretation of Dr. Fadel's medical opinion is that the radiculopathy from this disc is intermittent, and therefore non-verifiable. In addition, Marshall strained his low back in the fall which would cause low back pain. Therefore, the Administrative Law Judge is persuaded by Dr. Fadel's opinion and finds that Marshall has a 6% impairment to the body as a whole as a result of his low back injury which occurred in the fall.

Dr. Ballard's opinion ignores the fact that Marshall has a herniated disc at L1-L2, as well as other complaints of lumbar spine symptoms. Her opinion that these were pre-existing is not supported by the medical records in evidence, and therefore her opinion that Marshall suffers no impairment as a result of his fall is not persuasive.

### **C. Neck impairment**

Pursuant to *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001), an injured worker may establish a temporary injury for which temporary total disability and/or temporary medical benefits may be paid, yet fail in the burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. An injured worker is entitled to an appropriate award of the related TTD and medical benefits until such time as he or she reaches his pre-injury base line.

The records of Marshall's treatment indicate that Marshall's symptoms of cervical pain and radiculopathy resolved after the fall. It is not disputed that Marshall had a pre-existing cervical fusion surgery which had been performed in 2003. However, an active pre-existing condition may be exacerbated by a work-related injury rendering the employer liable for medical treatment related to the injury. *Derr Construction Co. v. Bennett*, Ky., 873 S.W. 2d 824 (1994). The Administrative Law Judge finds that Marshall suffered a temporary injury to his cervical spine which resolved and returned to its pre-injury baseline condition by the date Marshall reached MMI according to Dr. Fadel on June 17, 2021.



Applying the combined values chart of the A.M.A. Guides, and relying on the testimony of Dr. Fadel, the Administrative Law Judge finds that Marshall has a 14% impairment to the body as whole as a result of his right elbow and low back injuries.

In its Petition for Reconsideration, Columbus Steel asserted similar arguments to those made on appeal. In the May 10, 2022, Order, the ALJ provided the following additional findings:

...

The Defendant's Petition points out two errors in the assessment of evidence; first, the Defendant argues that Dr. Fadel's impairment rating for Marshall's right elbow injury was not based on the A.M.A. Guides, and second, that Dr. Fadel's assessment of permanent impairment for a lumbar spine injury is invalid because the Plaintiff is not at MMI for that injury. The Plaintiff has responded, arguing that the Defendant requests a reweighing of the evidence which is beyond the scope of a decision on petition for reconsideration.

Regarding the Defendant's first argument, in *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court explained that the extent of a worker's impairment at particular points in time and the proper interpretation of the A.M.A. Guides are medical questions solely within the province of medical experts. While counsel for the Defendant explains in detail, with reference to tables in the A.M.A. Guides why he believes Dr. Fadel's impairment rating is incorrect, no medical evidence was introduced to support that argument. Dr. Fadel's impairment rating was based on the A.M.A. Guides, but whether calculations for impairment based on loss of range of motion are accurate is a matter which requires medical expertise.

The Defendant's second argument is that the Plaintiff has not reached maximum medical improvement for his lumbar injury. It is now more than two years after the accident, and Marshall has undergone some physical therapy but epidural steroid injections were not performed. The defendant has denied coverage for the

low back injury and it is reasonable to assume that significant medical intervention such as surgery or steroid injections is unlikely to occur, and Marshall's low back condition is unlikely to change significantly. The need for additional medical treatment does not preclude a finding that a worker is at MMI, and Dr. Fadel's conditional finding of maximum medical improvement can be relied upon as substantial evidence. *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 776 (Ky.2009); *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621 (Ky. App. 2015).

The findings that Marshall has a 7% impairment to the body as a whole as a result of his left elbow injury and that he was at maximum medical improvement for his low back injury when he was examined by Dr. Fadel are findings of fact, supported by Dr. Fadel's testimony. The scope of review on a petition for reconsideration is to examine the opinion or order for patent errors and the ALJ may not reweigh the evidence on a factual issue decided in the initial opinion. *Wells v. Ford*, 714 S.W.2d 481 (Ky. 1986). The ALJ does not have the authority to reconsider the merits of the claim and change the findings of facts on petition for reconsideration. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 520 (Ky. 2003). Therefore, the Defendant's Petition for Reconsideration is overruled.

### ANALYSIS

Columbus Steel first contends Dr. Fadel opined Marshall had not reached MMI following his alleged lumbar spine injury "due to an injection therapy that had not been completed." Consequently, Columbus Steel maintains the ALJ is unable to rely upon Dr. Fadel's impairment rating for Marshall's lumbar spine condition. On this first issue, we affirm.

The definition of permanent partial disability, as set forth in KRS 342.011(11)(b) requires, in part, a permanent disability rating. The 5<sup>th</sup> Edition of the

American Medical Association, Guides to the Evaluation to Permanent Impairment, (“AMA Guides”) defines permanent impairment as follows:

An impairment is considered permanent when it has reached maximum medical improvement (“MMI”), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.

“MMI,” as defined by the Kentucky Supreme Court, “refers to the time at which a worker’s condition stabilizes so that any impairment may reasonably be viewed as being permanent.” Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771, 775-776 (Ky. 2009).

In the June 17, 2021, report, Dr. Fadel assigned a 6% whole person impairment rating arising out of Marshall’s lumbar spine injury. We acknowledge Dr. Fadel opined as follows regarding MMI from the alleged lumbar spine injury: “The lumbar spine pathology found with digital imaging will also be rated at this time, despite the fact that injection therapy has not been completed and therefore, in my view, MMI in its regard has yet to be met.” However, it is very clear from the following statements that Dr. Fadel’s statement regarding MMI is conditional:

- “Mr. Marshall has a ratable injury according to the American Medical Association’s Guide to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, **if no further treatment is considered.**” (emphasis added.)
- “Mr. Marshall has reached maximum medical improvement as of this examination, **again if no further treatment is anticipated.**” (emphasis added.)

As noted by the ALJ in the April 11, 2022, Opinion, Award, and Order and the May 10, 2022, Order, the Court of Appeals addressed a similar issue

in Miller v. Go Hire Employment Development, Inc., 473 S.W.3d 621, 632-635 (Ky.

App. 2015) holding as follows:

Here, Miller was examined by Dr. Hughes on April 23, 2013. Dr. Hughes noted his medical opinions in a Form 107. Dr. Hughes indicated he would assess a 6% whole person impairment rating pursuant to the AMA *Guides* specifically for Miller's right CTS. As to causation, he noted "the symptoms of right CTS accompanied by physical findings of such were not present prior" to the work-related MVA on July 3, 2012, "and had been present since."

**Most importantly, in regard to MMI relating to Miller's CTS condition, Dr. Hughes *specifically* opined that she:**

**had not yet reached maximum medical improvement as she has had no treatment for the right carpal tunnel syndrome, though this is mild. *If no further treatment for this is approved, then she is at maximum medical improvement as of this date.***

...

When Dr. Hughes assessed the 6% whole person impairment rating pursuant to the AMA *Guides*, he documented, based on the medical history provided by Miller, that she had received no treatment for the right CTS condition.

Dr. Hughes clearly conditioned his assessment of the 6% impairment rating on Go Hire's continued denial of recommended treatment for Miller's CTS, without which he concluded Miller should be considered at MMI as of the date of her April 23, 2013, examination. Go Hire has continuously, consistently, and vigorously denied liability for payment of medical or other benefits associated with the contested condition, having submitted Dr. Jenkinson's medical opinion denying even its existence.

Dr. Jenkinson examined Miller on July 31, 2013. Dr. Travis examined Miller on August 20, 2013. Both asserted Miller's medical history contained no suggestion of the contested right CTS condition until she was examined by Dr. Hughes on April 23, 2013. Neither referenced any medical treatment for CTS having been provided prior to their respective examinations of Miller, and neither of their respective resulting medical opinions could reasonably be expected to cause Go Hire to approve such treatment for what they considered to be a non-existent or non-work-related condition.

Thus, when Dr. Hughes' Form 107 is read in context, it appears he simply opined treatment might benefit Miller's CTS—which, importantly, he characterized as being “mild”—but barring provision of such treatment, he considered her to have reached MMI. Stated alternatively—and to borrow terminology from the *AMA Guides*—without treatment, Dr. Hughes opined Miller's contested condition was more likely than not to remain static and stabilized with no further anticipated recovery or deterioration.

Dr. Hughes could not be expected to gaze into a crystal ball to discern whether Go Hire would capitulate and acquiesce to providing recommended treatment it had vigorously denied. However, the record establishes Miller *had not* received treatment at the time Dr. Hughes diagnosed right CTS, and—given the strong contrary opinions expressed by Go Hire's medical examiners—it was unreasonable to expect she would ever be approved for such treatment. Therefore, the ALJ could reasonably interpret Dr. Hughes' conditional opinion to mean Miller *had* reached MMI as of April 23, 2013, when Dr. Hughes conducted his examination—especially since Dr. Hughes characterized Miller's CTS as being merely “mild” and because the need for treatment does not preclude a finding of MMI. *Tokico*, 281 S.W.3d at 776.

Such an inference regarding Dr. Hughes' provisional MMI opinion would be entirely consistent with his assignment of an impairment rating under the *AMA Guides*. Dr. Hughes' *direct action* of assigning a 6% whole person impairment rating could reasonably be understood to confirm the meaning intended for the *indirect words* expressed in his provisional MMI opinion. **A reasonable inference arising from Dr.**

**Hughes' assignment of an impairment rating for Miller's CTS would be that the physician knew no treatment had been provided, none would be forthcoming, and without treatment Miller's contested condition would remain unchanged. Without the recommended treatment, Dr. Hughes clearly opined Miller had reached MMI for the contested condition "as of this date"—April 23, 2013—being the very date he proceeded to assign the 6% whole person impairment rating under the AMA *Guides*.**

With this understanding, Dr. Hughes' assignment of the 6% whole person impairment rating was in accordance with the AMA *Guides*—having arisen from his opinion that Miller had reached MMI regarding her diagnosed right CTS, and could represent substantial evidence to support an award of PPD income benefits relating to this contested condition. Therefore, if the ALJ on remand provides specific findings supporting a determination that any right CTS is work-related and compensable, the ALJ should not be precluded from determining whether Miller is entitled to an award of appropriate PPD income benefits in addition to an award of medical benefits.

The same reasoning holds true in the case *sub judice*, as the language used by Dr. Hughes is nearly identical to that used by Dr. Fadel. Here, as in Miller, the ALJ could logically infer that Marshall was indeed at MMI as of the date of Dr. Fadel's examination since he never received the steroid injections upon which Dr. Fadel's opinion regarding MMI was contingent. As noted by the ALJ in both the April 11, 2022, Opinion, Award, and Order and the May 10, 2022, Order, Columbus Steel denied coverage for Marshall's alleged lumbar spine injury for two years before the final order and award. In the May 10, 2022, Order, the ALJ proficiently stated as follows:

It is now more than two years after the accident, and Marshall has undergone some physical therapy but epidural steroid injections were not performed. The

defendant has denied coverage for the low back injury and it is reasonable to assume that significant medical intervention such as surgery or steroid injections is unlikely to occur, and Marshall's low back condition is unlikely to change significantly. The need for additional medical treatment does not preclude a finding that a worker is at MMI, and Dr. Fadel's conditional finding of maximum medical improvement can be relied upon as substantial evidence.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The Court of Appeals has fully addressed this issue and the ALJ has provided adequate rationale for his conclusion, Dr. Fadel's impairment rating is compliant with the mandates set forth in the AMA Guides. Therefore, the ALJ's reliance upon the impairment rating assessed by Dr. Fadel for Marshall's alleged lumbar spine injury will not be disturbed.

Columbus Steel next asserts the cases relied upon by the ALJ – specifically Miller v. Go Hire Employment Development, Inc., supra, and Tokico (USA), Inc. v. Kelly, supra - do not permit Dr. Fadel to ignore his conclusion Marshall had yet to attain MMI from the lumbar spine injury. If MMI had not been reached, it argues all impairment ratings are invalid.

Regarding Miller and Kelly, the crux of Columbus Steel's argument is that the case *sub judice* can be distinguished because of the alleged "certainty" of Dr. Fadel's statement that Marshall's lumbar spine condition is not at MMI. However,

as previously illustrated herein, Dr. Fadel's statement regarding MMI is fully contingent upon Marshall receiving steroid injection therapy which he ultimately did not. Consequently, Columbus Steel's argument about the alleged "certainty" of Dr. Fadel's statement regarding MMI for Marshall's lumbar spine injury lacks merit.

Further, the cases of Miller and Kelly fully bolster the ALJ's reliance upon Dr. Fadel's impairment rating for Marshall's lumbar spine injury. As previously noted, the facts in Miller are strikingly similar to those in the case *sub judice*, as Dr. Hughes opined as follows regarding Miller: "Miller 'had not yet reached maximum medical improvement as she has had no treatment for the right carpal tunnel syndrome, though this is mild. *If no further treatment for this is approved, then she is at maximum medical improvement as of this date.*" Miller at 632 (emphasis added). The Court in Miller held that it would be reasonable for the ALJ to infer that Dr. Hughes' assessment of an impairment rating indicated that he "knew no treatment had been provided, none would be forthcoming, and without treatment Miller's contested condition would remain unchanged." Id. at 633. This same inference is appropriate in the case *sub judice*.

In Kelly, the claimant received additional treatment after Dr. Sprague, the physician upon whom the ALJ relied regarding Kelly's psychological impairment, assessed his impairment rating. The Court held that the ALJ did not err by relying upon Dr. Sprague's impairment rating, as the "need for additional treatment does not preclude a finding that a worker is at MMI." Kelly at 776. This holding bolsters the ALJ's reliance upon Dr. Fadel's impairment rating for



Marshall's lumbar spine injury, as the need for additional treatment, he ultimately did not receive, does not necessarily preclude a finding of MMI.

Regarding the case of W.L. Harper Construction Co., Inc. v. Baker, 858 S.W.2d 202 (Ky. App. 1993), the ALJ did not directly rely upon this case in either the April 11, 2022, Opinion, Award, and Order and the May 10, 2022, Order. Rather, it was cited by the court in Miller.

Both Miller and Kelly fully support the ALJ's reliance upon Dr. Fadel's impairment rating for Marshall's lumbar spine injury. Accordingly, on this second issue on appeal, we affirm.

Columbus Steel concludes by asserting Dr. Fadel's combined impairment rating is not valid, because it includes the allegedly faulty impairment rating assessed for Marshall's alleged lumbar spine injury. It argues that "unless the 'whole person' has reached MMI for a given instance of injury, then a whole person impairment rating cannot be assigned." Due to our resolution of the first issue on appeal regarding the ALJ's reliance upon Dr. Fadel's impairment rating assessed for Marshall's lumbar spine injury, this third argument on appeal has been rendered moot.

Finally, as noted by the ALJ in the April 11, 2022, Opinion, Award, and Order, Marshall alleged a work-related right hip injury. However, the ALJ failed to resolve this aspect of Marshall's claim. Therefore, we remand the claim to the ALJ for entry of an amended decision resolving this aspect of Marshall's claim.

Accordingly, on all issues raised on appeal, the April 11, 2022, Opinion, Award, and Order and the May 10, 2022, Order are **AFFIRMED**. This

claim is **REMANDED** for entry of a decision resolving Marshall's claim for a work-related right hip injury.

ALL CONCUR.

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