

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 10, 2019

CLAIM NO. 201700737

FAYETTE COUNTY BOARD OF EDUCATION

PETITIONER

VS.

APPEAL FROM HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

DANIELLE FOWLER
and HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART & REMANDING

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

STIVERS, Member. Fayette County Board of Education (“Fayette County”) appeals from the January 22, 2019, Opinion and Order and the February 12, 2019, Order on Petition for Reconsideration of Hon. Richard E. Neal, Administrative Law Judge (“ALJ”). The ALJ awarded Danielle Fowler (“Fowler”) permanent partial disability (“PPD”) benefits enhanced by the three multiplier and medical benefits for work-related Post-Traumatic Stress Disorder (“PTSD”).

On appeal, Fayette County asserts the ALJ erred in awarding PPD benefits for Fowler's work-related PTSD. Fayette County also asserts the ALJ erred by enhancing Fowler's award of PPD benefits by the three multiplier.

The Form 101 states Fowler sustained work-related injuries on August 26, 2015, in the following manner: "While supervising middle schoolers in the morning while they arrived at school, a student walking with her assigned para-educator jumped me from behind after I turned my back to talk to another supervising teacher." Under "body part injured" is the following: "Face – scratches, mental health, diagnosed with PTSD."

Fowler was deposed on August 2, 2017. At the time of her deposition, Fowler was still employed with Fayette County, and she planned on teaching Spanish at Crawford Middle School during the upcoming school year if her request for certain accommodations was approved. Those accommodations included "supervision stations not in the location of the attack, not transporting students to or from the lunchroom, and avoiding high population areas of groups of students." At the time of her deposition, her accommodations had been denied, and Fayette County had requested clarification.

Fowler and her husband are retailers with LuLaRoe, a clothing line, and their job duties include taking pictures of clothing, posting on Facebook, and interacting with clientele. She testified as follows:

Q: You mentioned earlier that you also sometimes go to people's houses to sell clothing?

A: Out of the fashion boutique.

Q: How often do you do that?

A: In the past – prior to the incident, I would do 10 to 12 pop-ups, but after the incident, the number decreased to four a month at best.

Q: You were doing 10 to 12 a month before?

A: Yes.

Q: Do you still do any pop-up shops or street fairs, things of that nature?

A: Yes, but I include pop-up shops and street fairs together.

...

Q: When you do those type of pop-ups shops, do you interact with people, help them pick out clothing? What types of things do you do? Explain for the judge.

A: I do interact with people. I set up cloth – well, it's set up already in my truck. They come in; they look at the merchandise; they try it on if necessary and then they purchase it. I give advice and if they ask me to find a pairing of an outfit, I will put an outfit together for them, and so I do interact socially with these women that come in the truck.

Q: And I guess by virtue of the fact that you're doing these pop-up shops and things like that, you do have to be around crowds some.

A: You do have to be around crowds some. The crowds are ten people, so it's not necessarily a large crowd. I don't know what the definition of a crowd would be, but normal attendance to a pop-up is around ten people.

At the time of the August 26, 2015, incident, Fowler was teaching Spanish to sixth through eighth graders. Regarding the incident, she testified as follows:

A: There were no students in the hallway. It was the hallway where the entrance – students get off the bus. I was standing close to the gymnasium door, and across

from me was another teacher supervising. Those are our assigned supervision stations. And I looked to my left down the hallway and the student was with her para walking down the hallway from the other entrance. The para did not have her hands on the student.

I turned – as I recall, I said, ‘Good morning,’ to the para. I cannot tell you feet-wise how far she was when I first saw them, but I know it was further than the distance of that picture. I looked at the other teacher and continued our conversation, and then I remember a blur of someone jump – I just remember a blur of panic because somebody was on my back pulling me down and pushing me up against the wall. And I was...

...

Q: Okay. The child that you were talking about, how old was the child?

A: I would guesstimate approximately 13 or 14. She was one year older than all students in her grade because she had been in elementary school one year longer.

Q: Was it a disabled child? She had a disability?

A: Behavior disability. I do not know what her exact diagnosis is, but we were informed she had a behavior disability.

...

Q: Did she grab your hair or did she grab your clothing?

A: I – she grabbed on top of me, because I had a large scrape up over top of my head that I took a picture of right after the incident occurred. So I – it was truly an out of body experience, because I didn’t know what was happening, so I just remember her grabbing and pulling me backwards, and I just knew that my arms were flailing and I couldn’t do anything about it.

...

Q: Did you get hit up against anything or make contact with anything?

A: With the wall.

Q: What part of your body hit the wall?

A: So she came at this angle, from the back left, my back left, and so the wall was this side, so it'd be like this. It would be my right side that made contact with...as I recall.

Fowler saw Dr. Stephen Cox on September 3, 2015, and at that appointment, he increased her dosage of Xanax and started her on Propranolol. She described her current symptoms:

A: Flashbacks, nightmares, fight or flight feeling when I see an individual that resembles that student on the street or anywhere, anxiety to leave my house sometimes. I was at the school on Monday and I struggled to go back in that hallway where it happened. I did do it because I needed to get to my room, but it – heart palpitations, dizziness, my body aches, my limbs ache. I feel out of control. I cry a lot. I would say almost daily.

Fowler missed between 25 to 30 days of school following the incident.

She testified as follows:

A: I could not be – I was nervous to be out in the hallway. I was nervous to walk the loop around the gym. My 4th period class I took to lunch and we would take the back loop because it was less populated, but after the accident occurred, there was a threshold – there was a threshold that you would pass through and the FMD classroom would be on your left immediately. I had to pass through that threshold to walk those students to the cafeteria. I rerouted so I would not have to pass through that threshold by their door.

So I rerouted to go around the longer way with my students because I – for the first – for the first six months after the accident couldn't – I couldn't do it. I would always take the longest way around. Even if the classroom that I had to go to was just right down, I had to walk. And even still, I'm looking in the mirror bubbles to make sure that I'm safe.

Fowler testified regarding the requested accommodations which Fayette

County refused to provide:

Q: Did you have any interactions with this student at all after you returned to work?

A: I was – they were wanting me to get a handwritten letter from her. They wanted her to come and hand it to me personally and apologize, and I said no way. They put it in my chair. She had a handwritten letter in English that apologized for attacking me.

So I avoided her at all costs, but I did see her on a regular basis, and we shared a wall so I would hear her outbursts on a weekly basis of throwing chairs across the room, screaming, and the teachers yelling at her. Though I requested to – with downtown to have accommodations to be moved, I was not accommodated.

Q: Okay, are there any other, I guess, issues or accommodations that you asked for during that school year when you continued working after the attack?

A: Support. I spoke to Tracy Dennis downtown about the incident and support and just being afraid, talking to my principal a couple of times on the phone about being afraid, and he said that she was going to have her meeting – I'm drawing a blank what it's called when special education people meet to discuss accommodations for students –

Q: An IEP meeting?

A: It was bigger than an IEP. IEP 504 or something.

Q: Okay.

A: And that, you know, they would see what happened then. And nothing would happen. So I sought the help of a KAPE paralegal, which is the union, and I would talk to her about the incident. And I would call downtown. I filed a police report; he said they would not press charges because she was a special education student. When I handed that paperwork to my principal, all he said to me

was, 'Did you put that I came and checked on you?' And that was all I got.

So I also talked to the counselors – Ms. McVey in particular, one of our counselors – about the situation and how I could have accommodations, and talked to special education individuals through her with her, and it did not go anywhere. I know that she personally went around to see about what would happen – what classroom changes could happen to where I could be moved, but none of those accommodations were made.

And I didn't even know that she had done that, but I found out later that she and another individual that I would like to remain nameless worked very hard, and that did not take place that that move was allowed.

Fowler took FMLA leave in September 2016 because of her symptoms:

I informed my principal before the school year started that I was anxious about that student and that I was starting to get very panicky and that prior to that summer I was relieved when the school year ended and that prior to that summer – that things were well. As time got closer to actually needing to go back, I got very nervous, fight or flight feelings on a regular basis and I was crying a lot because I didn't know if I could do it again and face her again and be in that same situation.

He was concerned because the yearbook was not finished, and I did not finish the yearbook because I struggled to do anything related to that job because it was a reminder, and I was doing the yearbook on my own, with no assistance. Yes, I was receiving a stipend. His concern in that phone call was why I didn't have a yearbook and why it was a week before school started and that he was not going to have a Spanish teacher.

And he did two personas: friend Mike versus boss Mike understands that you're afraid, but boss Mike needs a Spanish teacher. And he said it was three days before school, but I contacted him the week prior via text to set up a meeting. He texted me directly back to call him in two days. I called him in two days; he did not answer. And then he called me three or four days later, as I recall,

to discuss what I had wanted to discuss with him a week prior, and I voiced my concern.

I told him I did not want to be in the same position supervision-wise, which was right by the door of the FMD classroom. And they accommodated a change to the main hallway – well, one of the main pods. I say, not the main hallway. We had another student join us, who was two-on-one, a para and a teacher, at all times because of behavior issues, severe behavior issues, and I would see her in that 8th grade hallway where I was supervising every morning and I was very nervous about that child.

I later found out that she was taken out of Crawford because she beat up the principal with a fire extinguisher so she was taken to a different facility. I was nervous to go back because I knew that the first incident did not have to occur nor – and I was worried that I was not going to be safe, but he said I need to just get my foot in the door and everything will be okay. So I put my foot in the door. I just couldn't do it. I was tired of being afraid.

Dr. Cox informed her that, after the incident, she should have not returned to teaching at Crawford. He recommended at the time Fowler went on FMLA leave that she discontinue teaching so she could heal. According to Fowler, taking FMLA leave has helped. As to whether she believed her continued symptoms are from working at Crawford or with children in general, Fowler testified:

A: My children go to Maxwell and I have been there a number of times. I have been on edge a couple of times when I've gone in there to where I was feeling anxious and nervous and fearful. But I have since been there, have probably went to multiple programs for my children and I did not have – and I have to step inside that building every day to actually pick up my kids from the ESP program, and I was capable of doing that.

But I asked for the accommodation of switching schools, and they said they would deny me if I asked to switch schools because I was afraid of FMD students; that that would not get approved. That's coming from Jennifer Dyar and Tracy Dennis.

So I do not know what it would be like to teach at a different school. We are an FMD school at Crawford and not every school is an FMD school.

Fowler testified at the November 27, 2018, final hearing regarding her symptoms:

A: I don't leave my house. My house is like the safe zone, I don't get out of my pajamas, I don't take a bath for a couple, a week, two weeks, I don't notice. Time runs in, I don't, I have no concept of time or the day. I spend most of my time in bed with the TV on in the background.

I don't take my kids to school anymore, I don't pick them up, and sometimes if I have to pick them up I can make myself do that, but there have been times when I'm supposed to pick them up and I have to call my husband, who works a half an hour away, and tell him I can't do it today, you're going to have to do it for me. (witness crying)

If I am in a public place for whatever reason, grocery store and somebody is behind me that fight or flight just comes on real quick she jumped me from behind. And I can't control those thoughts.

Q: But Danielle, the employer has provided us with all these pictures showing how happy you are and you've seen these and counsel provided these. I want you to see these Judge, she's smiling.

A: You want me to smile now for you because I can do it because that is what happens. It's pretty easy to put on a smile when no one knows what's really going on behind the scenes.

After the work injury, Fowler worked the entire school year. It was not until the following school year that Fowler went on leave because she "started having panic attacks about going back into the exact same situation."

Concerning her LuLaRoe business, she testified:

Q: It looks like you're for the year 2016 that would have been your first full year at selling LULAROE, is that right?

A: That is correct.

Q: And this would have been post-accident, correct?

A: Correct.

Q: That your net income from that year was close to \$100,000, \$97,874, is that correct?

A: Yes, that is correct with the help of my husband who also was no longer working a full-time job for half the year and the employment of four other employees.

Fowler's husband is currently working at a restaurant called "Mezzo" in Midway, Kentucky.

Attached to Fowler's Form 101 is a February 9, 2017, Form 107 completed by Dr. Cox. After performing an examination and psychological testing, Dr. Cox set forth the following diagnoses: "PTSD, chronic, severe," "major depression, severe," and "panic disorder." He assessed a 30% whole person impairment rating.¹ Instead of listing the chapters, tables, and pages of the AMA Guides he utilized in deriving his impairment rating, Dr. Cox wrote as follows: "You will have to send me a simple explanation of this or consult with a forensic physician. Regular doctors are not taught this in medical school." Dr. Cox attributed Fowler's PTSD and depression to the attack at school and opined Fowler should not return to any teaching for six to twelve months.

¹ It is unclear which edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") Dr. Cox used in his calculation.

Fowler filed Dr. Cox's May 24, 2017, supplemental report in which he states that, based upon Chapter 12 of the AMA Guides, Second Edition ("AMA Guides, 2nd Ed."), Fowler's impairment rating due to the effects of her August 26, 2015, work injury is 63%.

Fowler also filed Dr. Cox's June 18, 2017, supplemental report. In this report, Dr. Fowler assessed a 65% whole person impairment rating explaining as follows:

The 65% whole person impairment is calculated using the 2nd Edition of the Guides to Evaluation of Permanent Impairment. She is vocationally unemployable and will remain so. She is not competitively employable. A prospective employer, knowing her likelihood of being absent and being unpredictably prone to lose emotional composure with coworkers, employers, and customers (students), would not employ her as a selection among 10 other equally, otherwise qualified employment applicants.

Psychiatrically, she is 'moderately/severely impaired, a 4 on a 5 point scale with 5 being severe.' The degree of impairment varies from time to time, depending upon the amount of stress to which she is subjected and upon whether she takes prescribed medication regularly and receives necessary psychotherapy.

Under "rehabilitation or treatment potential," Dr. Cox opined as follows: "It is accepted among experienced clinicians that PTSD, after 6 months of duration, the prognosis for post-traumatic stress disorder ever resolving is poor. It isn't going to get worse; but, it's not going to get better in reasonable medical probability." Dr. Cox did not believe Fowler could return to teaching with Fayette County stating, in part, as follows:

She mourns losing her teaching career due to her PTSD related fear of harmful students. There is a part of her that

really wants to return to teaching. But there is a much stronger part of her that is terrified of being seriously hurt by students and the feeling that she cannot count on the administration of the Fayette County Schools to protect her from such harm risk.

Dr. Cox addressed Dr. Douglas Ruth's² conclusions which were based upon Fowler's social media presence stating, in part, as follows:

I was startled to see that such strong conclusions were drawn merely from the facial expression of photographs of Ms. Fowler and from words attributed to her on this Facebook thing. I don't know much about Facebook. And, I must say, this is the first time I have ever seen random undated snapshots and uncertified, undated attributed comments in a medical diagnostic evaluation. You see, PTSD is diagnosed by having a certain number of psychiatric symptoms and signs necessary for meeting the diagnostic criteria. Such quickie, 'gotcha' Facebook pictures and comments are not any part of that diagnostic criteria.

Dr. Cox detailed the notion of "defense mechanisms" and "reaction formation" in the context of Fowler's social media activities.

Attached to the June 18, 2017, supplemental report is a "Mini International Neuropsychiatric Interview" indicating, among other things, Fowler meets the criteria for PTSD.

In his November 9, 2018, progress note under "assessment," Dr. Cox wrote "post traumatic stress disorder, chronic" and the following:

There's a tremendous amount of serious, and severe phobic avoidance here, so characteristic of posttraumatic stress disorder. Her avoidance behavior is severe. Her depression which stems from her posttraumatic stress disorder is also very severe. She still has a grip on life; and is not apt to harm herself at the moment. However, self-destruction, out of despair and anxiety does cross her

² Dr. Ruth evaluated Fowler at Fayette County's request.

mind. The family is losing everything financially; and this hurts her to [sic] devastating to [sic] agree [sic] because of her children's needs and her husband having to work so hard because she can't.

She is clearly unable to work due to PTSD disabilities. It is not expected for this to change.

Dr. Cox's August 1, 2018, deposition was introduced. He testified that despite treatment, Fowler continues to have the same condition that she had after the attack. He explained:

Q: And as far as the post-traumatic stress disorder, has she reached a plateau as far as that treatment?

A: Yes. I was educated that if your panic – post-traumatic stress disorder isn't resolved in six months, the prognosis for it ever improving is poor, and so we're way, way past that in Danielle.

Dr. Cox did not believe Fowler could return to the Fayette County school system but could possibly return to a "very low stress, low risk school environment possibly in the future."

Concerning the PTSD symptoms, Dr. Cox testified as follows:

A: The key symptom – the key symptom is avoidance behavior. People with PTSD, they want to avoid the traumatic event, the place where the traumatic event occurred, people who are like the persons who traumatized them. Anything that reminds them of that, they want to avoid that.

If they don't have strong avoidance behavior, they probably don't have post-traumatic stress disorder. It's probably – if there's a necessary symptoms, that's probably it.

They have a lot of nervousness about anything in their daily life that reminds them of the traumatic experience. Even television shows of like a crime, if that's their problem where they were attacked by a criminal,

television shows or movies that, you know, depict that, they want [sic] turn to [sic] it off or go to the other room. They have flashbacks reliving the experience and they have a numbness of their emotions to loved ones and they can have a lot of problems with depression and anxiety.

Dr. Cox opined that Fowler's condition is static; i.e. it is not going to get worse; and it is not going to get better.

Dr. Cox testified extensively regarding Fowler's social medical presence and labeled it "irrelevant." He also provided the factors he considered when calculating his impairment rating.

Concerning Fowler's business with LuLaRoe, Dr. Cox provided the following:

Q: Do you recall her promoting her business on her Facebook profile?

A: In the sense I think some of her clothing or probably things, items she sells in her business.

Q: And so you are aware that she has a business that she owns with her husband. Correct?

A: Yes.

Q: She sells clothing?

A: Right.

Q: To your knowledge, is she still active in that business?

A: Yes.

Q: I want to talk just briefly about your findings in your report regarding her employability because I think it's a little different from what your testimony was today. In the report that was the most recent report where you assessed a 65 impairment rating, you indicate that she is 'vocationally unemployable.'

A: Yes.

Q: Now, I think that – well, first of all, we’ve acknowledged that she does own a business and operate a business. Correct?

A: Yes.

Q: So she’s self-employable in that sense you would agree?

A: As I understand, her business has gone downhill quite a bit and since her husband’s involved in it, I don’t know how much she does and how much he does.

Q: But she does still work in the business as far as you know?

A: Yeah.

He acknowledged he has calculated an impairment rating only five times in the past, and he has no training in this area.

Q: Okay. So do you acknowledge that you’ve not had any formal training in how to apply or use the AMA guidelines?

A: Correct.

Q: And you acknowledge that that is something that some people in your profession have done and do?

A: Yes.

Several reports from Dr. Ruth, a forensic psychiatrist, were filed in the record by Fayette County.

The August 13, 2018, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: work-related injury, permanent income benefits per KRS 342.730; average weekly wage; unpaid or contested medical

expenses; and proper use of the AMA Guides. Under “other contested issues” is “permancency (injury under the Act).”

In the January 22, 2019, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law regarding injury under the act and causation:

...

Drs. Cox and Ruth agree that the Plaintiff suffered from PTSD as a direct result of the August 26, 2015, work injury. However, the opinions of the psychiatrists differ in that Dr. Cox has opined that the Plaintiff’s PTSD continues to be symptomatic, whereas Dr. Ruth found that the Plaintiff’s PTSD is in total remission. The ALJ finds Dr. Cox’s opinion to be most persuasive given the totality of the circumstances.

Dr. Ruth clearly believed that the Plaintiff had significant work-related PTSD symptoms at the time of his initial evaluation. In fact, at that time, Dr. Ruth stated that the Plaintiff was not presently capable of returning to work at the school where the work injury occurred. Further, Dr. Ruth noted that the Plaintiff would not be capable of working in other schools where it was likely that she would be exposed to students who are agitated, unruly, threatening, or violent. In sum, Dr. Ruth stated that the Plaintiff, at the time of his initial evaluation, lacked the mental capacity to resume employment in the school where the work injury occurred.

Dr. Ruth’s opinion was altered at the time of his second evaluation of the Plaintiff, and he now found that the Plaintiff’s PTSD had completely resolved. Dr. Ruth’s stated rationale for the change of opinion appears to be based primarily on two factors - the pictures and statements on the Plaintiff’s Facebook page, and the result of a second psychological test that purportedly showed that the Plaintiff exaggerated her symptoms. The ALJ finds both of these reasons to be unpersuasive.

First, the ALJ [sic] unconvinced, as a general proposition, that the image a person attempts to paint of themselves on Facebook is a reliable reflection of what

that person is truly going through in real life. This is particularly true in the Plaintiff's case, and the ALJ finds that the pictures and statements on her Facebook account are not a reliable depiction of her mental and emotional state. This is especially true when considering that the Plaintiff's Facebook account was used, in part, to promote her business. A posted selfie of the Plaintiff crying, unhygienic, or anxious would not have been a very effective marketing strategy for selling her clothing products.

Secondly, while a psychological test performed by Dr. Ruth detected symptom exaggeration, it does not logically follow that this result somehow shows that the Plaintiff is now completely symptom free, and that her PTSD has resolved. While it is certainly possible that the Plaintiff had at least some level of symptom exaggeration or magnification on testing, the ALJ, after listening to her testimony, finds that she does continue to experience significant PTSD symptoms, as opined by Dr. Cox.

Ultimately, the ALJ finds Dr. Cox's opinion to be most persuasive. Dr. Cox, as the Plaintiff's treating physician, has had the opportunity to evaluate the Plaintiff on numerous occasions over the course of several years. He has further had opportunity to evaluate the Plaintiff both before and after her work injury. Dr. Cox believes that the Plaintiff continues to have significant active PTSD symptoms. The ALJ finds Dr. Cox's opinion to be most reliable on the issue of the Plaintiff's current symptoms and diagnosis, and further finds that the Plaintiff has met her burden of proof of active PTSD that is work-related.

Regarding application of the three multiplier, the ALJ concluded as

follows:

Concerning the multipliers, KRS 342.730(1)(c)1 provides, "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection" A worker's post-injury physical capacity and ability to perform the same type of work as at the time of injury are matters of

fact to be determined by the ALJ. *Ford Motor Company v. Forman*, 142 S.W.3d 141, 144 (Ky. 2004). The Kentucky Supreme Court has construed, “the type of work that the employee performed at the time of injury” to mean the actual jobs that the individual performed. *Id.* at 145. The phrase also has been construed to refer broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred. *Miller v. Square D. Company*, 254 S.W.3d 810, 814 (Ky. 2008).

As Dr. Ruth stated after his initial evaluation of the Plaintiff, the Plaintiff has described aggravation of her anxiety symptoms when she is reminded of the work injury, which is usual in patients with PTSD. Dr. Ruth noted that, in individuals with PTSD, stimuli in the environment where the causative event occurs can trigger increased anxiety that potentially can be incapacitating. Dr. Ruth further noted that even seemingly benign stimuli including sights, sounds, and smells at the site where the trauma occurred, can cause similar reactions. Dr. Ruth noted that, in the Plaintiff’s case, the environment of the school in which her injury occurred causes recollection of the incident and aggravates her symptoms. For those reasons, after the initial evaluation, Dr. Ruth stated that the Plaintiff would not be capable of returning to the school in which the work injury occurred. Further, he noted that the Plaintiff would not be capable of working in other schools in which it is likely that she would be exposed to students who are agitated, unruly, threatening, or violent. Dr. Ruth’s opinion only changed after he later concluded that the Plaintiff’s symptoms have completely resolved - a proposition rejected by this ALJ.

Dr. Cox’s current opinion regarding the Plaintiff’s return to her prior employment is similar to the opinion Dr. Ruth had after his initial evaluation of the Plaintiff. Dr. Cox has opined that the Plaintiff lacked the mental capacity to return to her prior job. The ALJ finds that Dr. Cox’s opinion, coupled with the Plaintiff’s testimony, to be most persuasive. The ALJ specifically finds that the Plaintiff lacks the physical capacity to return to the job that she performed at the time of her work injury. Further, it is undisputed that the Plaintiff currently earns less than

she earned at the time of her work injury. As such, the Plaintiff is entitled to have her benefits enhanced by the three multiplier. The Plaintiff's PPD benefits therefore calculate as follows:

$$\begin{aligned} & \$614.97 \times 65\% \times 1.7 \text{ (grid)} \times 3 \text{ (multiplier)} = \$608.82 \\ & \text{(capped at maximum amount for 2015) per week.} \end{aligned}$$

The ALJ notes that the Defendant has argued that the three multiplier issue and issue of total disability have been waived because of the stipulations made at the BRC. However, a closer review of the BRC form show that it was stipulated that the Plaintiff retained the "physical capacity" to return to the type of work performed at the time of the injury, not the mental capacity. Further, the medical reports filed and depositions taken make it clear that the issue concerning whether the Plaintiff retains the capacity to return to the job that she performed at the time of her injury was a heavily contested issue between the parties. The issue was therefore also tied [sic] by consent.

In its petition for reconsideration, Fayette County asserted two errors.

It contended the ALJ made contradictory findings regarding the three multiplier in the January 22, 2019, Opinion and Order. It also took issue with the finding regarding Fowler's impairment rating and requested a specific finding of fact as to whether Dr. Cox's impairment rating conforms to the AMA Guides.

In the February 12, 2019, Order, the ALJ set forth the following additional analysis:

Concerning Dr. Cox's impairment rating and whether it conforms to the AMA Guides, it is clear that an ALJ can only find permanent impairment ratings that physicians calculate pursuant to, and based on, the AMA Guides. See KRS 342.262; Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002); and Jones v. Brasch Berry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). However, in a recent case where the Defendant made comparable technical arguments as the Defendant in the instant case, the Kentucky Supreme Court clarified and found, "[t]o be grounded in the Guides is not to require strict adherence to the Guides, but rather a general

conformity with them.” The Supreme Court further noted that the Court of Appeals in Brasch-Barry did not require strict adherence to the Guides when they stated, “[a]n ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides.” The Supreme Court noted, “[a]n opinion that is based upon the Guides is different from one that strictly adheres to the Guides.” Plumley v. Kroger, Inc., 557 S.W.3d. 905 (Ky. 2018)

As applied to the instant case, Dr. Cox has utilized the appropriate sections of the Guides and based his impairment rating opinion on the Plaintiff’s continued active PTSD symptoms, and how those active symptoms affect her thinking, perception, judgment, affect, behavior, and activities of daily living. During his deposition, Dr. Cox meticulously went through the Guides and credibly gave his rationale for his assigned impairment ratings. The ALJ finds that Dr. Cox’s opinion is based upon, grounded in, and in conformity with the Guides. Further, his opinion was persuasive and is adopted by the ALJ. Lastly, the ALJ finds that the specific issues raised by the Defendant does not change the overall validity of Dr. Cox’s opinion as to impairment.

Concerning the multipliers, the Plaintiff correctly points out a typographical error in the Opinion. This was a case that involved a physical assault; however, there was no permanent physical injury from the assault. The ALJ stated throughout the Opinion that the Plaintiff retained the “physical capacity” to return to her prior employment, and that the Plaintiff had no “physical” disabilities or impairments. These findings entered into the calculus in not only a determination of the application of the three multiplier, but also in a determination on the Plaintiff’s argument that she was totally disabled. The sentence on page 20 of the Opinion that states, “[t]he ALJ specifically finds that the Plaintiff lacks the physical capacity to return to the job that she performed at the time of her work injury” is a typographical error, and the word “physical” should be removed and replaced with “mental / psychological”. The Plaintiff’s lack of capacity to return to her former job stems from her psychological overlay, not any physical injury. As such, page 20 of the Opinion

is amended to remove the word “physical” and replace it with “mental / psychological.”

Fayette County first asserts Dr. Cox’s opinions and impairment rating do not constitute substantial evidence since he admitted to “complete unfamiliarity with assignment of an impairment rating under the AMA Guides.” It cites to Dr. Ruth’s objections to Dr. Cox’s interpretation of the AMA Guides and impairment rating. Fayette County also asserts Dr. Cox “significantly downplays” Fowler’s employment as a LuLaRoe retailer and her presence on social media. We affirm on this issue.

We acknowledge Dr. Cox’s deposition testimony that he has not received any formal training in the AMA Guides. However, Dr. Cox’s familiarity, or lack thereof, with the AMA Guides goes to the weight and credibility of his opinions and not their admissibility. The ALJ, as fact-finder and gatekeeper of the record, is the sole judge of credibility. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). That said, this Board has carefully reviewed Dr. Cox’s “Psychiatric Impairment Profile” contained within his June 18, 2018, report and compared it to the “Example of Psychiatric Impairment Profile” on page 221 of the AMA Guides, 2nd Ed. Dr. Cox’s Impairment Profile is summarized as follows:

Intelligence	Impairment Class: 1
Thinking	Impairment Class: 4
Perception	Impairment Class: 4
Judgment	Impairment Class: 4
Affect	Impairment Class: 5

Behavior	Impairment Class: 5
Activities of Daily Living	Impairment Class: 3
Potential	Impairment Class: 4
Collective Impairment	Moderately Severe (4)
65% whole person impairment	

In comparison, the Impairment Profile example contained within the AMA Guides, 2nd Ed., is as follows:

Intelligence	Impairment Class: 1
Thinking	Impairment Class: 4
Perception	Impairment Class: 2
Judgment	Impairment Class: 4
Affect	Impairment Class: 4
Behavior	Impairment Class: 4
Activities of Daily Living	Impairment Class: 1
Potential	Impairment Class: 3
Collective Impairment	Moderate to severe (4)
55% to 75% whole person impairment	

Despite the impairment classes in Dr. Cox's Impairment Profile either matching or exceeding those in the example presented in the AMA Guides, 2nd Ed., both profiles have a collective impairment class of four, moderate to severe, which

equates to a 55% to 75% whole person impairment rating range. Dr. Cox ultimately assigned a 65% whole person impairment rating which lies in the middle of this range.³

The Board is aware of Dr. Ruth's criticisms of Dr. Cox's interpretation of the AMA Guides and impairment rating. In sum, Dr. Ruth concluded in the July 5, 2018, supplemental report as follows:

My conclusions differ from those impressions expressed by Dr. Cox in many respects, including: (1) his application of the AMA Guides to the Evaluation of Permanent Impairment is incorrect, and he acknowledges that he is unfamiliar with its use; (2) the impairment rating he assigned is vastly exaggerated; (3) he erroneously presumed that a treating physician was in a better position to provide a forensic opinion than a forensic psychiatrist who performs an independent examination, and (4) his conclusions regarding the use of assessment instruments in examination are faulty.

Dr. Ruth assessed a 0% whole person impairment rating stemming from the August 25, 2016, work incident. However, 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). The mere presence of contrary evidence in the record is not an adequate basis for reversal. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Further, Dr. Cox made it abundantly clear he was aware of Fowler's activities as a LuLaRoe retailer and her activities on social media. In his June 18, 2018, report, he addressed at length the misleading nature of social media pictures and posts

³ Regarding whether Fowler has reached maximum medical improvement, it is clear from the language in both Dr. Cox's June 18, 2018, report and his deposition that he believes Fowler's PTSD reached a plateau six months after the August 25, 2016, work incident and will not get better or worse.

in the context of assessing one's wellbeing. Dr. Cox stated: "[w]hen people pose for snapshots, ever since the Kodak camera was invented, they tend to smile with a broad smile, regardless of how they feel." Dr. Cox continued this discussion during his deposition testimony. Thus, we find no merit in Fayette County's claim Dr. Cox "completely disregarded" the inconsistencies between Fowler's reported symptoms and her social medial posts.

Dr. Cox also addressed the fact Fowler was continuing to work in her business selling clothing. Fayette County's arguments to the contrary, we fail to see why Dr. Cox should factor into his analysis the precise dollar amount Fowler and her husband earned at LuLaRoe in 2016 and 2017.

"Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). As Dr. Cox's opinions and impairment rating comprise substantial evidence, we affirm on this issue.

Fayette County's second argument is the ALJ erred by applying the three multiplier to Fowler's award of PPD, as the three multiplier is only applicable when a claimant does not retain the "physical" capacity to return to the type of work performed at the time of the injury. We reverse.

KRS 342.730(1)(c)1 states, in relevant part, as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection. . . (emphasis added.)

In the case *sub judice*, the parties stipulated at the BRC that Fowler retains the physical capacity to return to the type of work she was performing at the time of her injury, and the ALJ reiterated this in both the January 22, 2019, Opinion and Order and the February 12, 2019, Order. Even though the ALJ determined Fowler does not retain the mental capacity to return to the type of work she was performing at the time of the injury and awarded the three multiplier for this reason, we believe the parties are bound by the stipulation in the August 13, 2018, BRC Order indicating the three multiplier is not applicable. We note Fowler offered no qualifying language to the stipulation in which “physical capacity” was distinguished from “mental capacity.” Further, Fowler never sought, pursuant to 803 KAR 25:010 §16(2), to be relieved of this stipulation. Thus, the stipulation prevented the ALJ from amending his decision in the February 12, 2019, Order to reflect “the ALJ specifically finds that the Plaintiff lacks the mental/psychological capacity to return to the job that she performed at the time of her work injury” in finding the three multiplier applicable.

We disagree with the ALJ’s finding the issue of the applicability of the three multiplier was tried by consent. As noted by the ALJ, Fayette County argued in its brief that the stipulation in the BRC Order caused the “three multiplier issue” to have been waived. Nothing in the record reflects Fayette County retreated from this position at any time during the litigation of the claim. Therefore, we reverse the ALJ’s award of the three multiplier and remand for entry of an amended order and award.

Accordingly, with respect to Fayette County’s first issue on appeal, the January 22, 2019, Opinion and Order and the February 12, 2019, Order on Petition for Reconsideration are **AFFIRMED**. In response to the second issue on appeal, we

REVERSE the ALJ's application of the three multiplier and **REMAND** for entry of an amended order and award.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, DISSENTS WITHOUT SEPARATE
OPINION.

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