

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 22, 2020

CLAIM NO. 201201115

NDT CARE SERVICES, LLC D/B/A
HOMEPLACE SUPPORT SERVICES

PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
AND HON. CHRIS DAVIS
ADMINISTRATIVE LAW JUDGES**

ASHLEY CORIO AND
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

BORDERS, Member. NDT Care Services LLC D/B/A Homeplace Support Services (“Homeplace”) appeals from the April 4, 2016 Opinion, Award and Order, the May 25 and June 23, 2016 Orders rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge (“ALJ Wolff”) finding Ashley Corio (“Corio”) permanently totally disabled. Homeplace also appeals from the May 29, 2018

Opinion on Remand and the September 12, 2018 Orders on reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ Davis”).

On appeal, Homeplace argues ALJ Wolff erred in allowing Corio to submit medical reports outside the number previously ordered as acceptable, and failing to exclude her witness from the hearing after the Employer’s request. Homeplace argues the evidence compels a finding that Corio is not permanently totally disabled, and ALJ Wolff’s substitution of his own impression of her, over that of the medical and vocational experts in this claim, is an impermissible overreach and is his attempt to assert a medical opinion. Homeplace further argues ALJ Wolff erred in failing to make factual findings as to the date Corio reached maximum medical improvement (“MMI”), whether the post-injury return to work tolled a period of temporary total disability (“TTD”), and whether her resignation served to terminate her entitlement to TTD benefits. Finally, Homeplace argues ALJ Davis erred by failing to provide an analysis as to whether the medical providers and Corio had a reasonable basis for submitting requests for the payment of medical and out-of-pocket expenses outside the respective timeframes set out in the regulations. We affirm.

Corio testified by deposition on October 25, 2012 and January 28, 2015, and at the hearings held September 16, 2015 and February 1, 2016. Corio has a Master’s degree in clinical psychology. She also completed a one-year program, earning a Behavioral Analyst certificate. Corio began working for Homeplace as a behavioral specialist in July 2011. Her job required her to drive to the homes of patients to assist with their disabilities.

Corio accepted a salaried position as associate executive director in April 2012. Corio was involved in a motor vehicle accident (“MVA”) on July 9, 2012, while driving from one client’s home to another, when a semi-tractor struck her automobile on the driver’s side. After being extracted from the vehicle, she was transported by helicopter to the University of Kentucky Trauma Center. She sustained multiple injuries to her ribs, ankle, left shoulder, left hand and body, and multiple contusions. She briefly returned to part-time work at Homeplace in August 2012. She later attempted to perform some work at home, but indicated she was not capable of performing that work. Corio continues to have difficulties with pain in her left arm and back, and headaches. Corio most significantly suffers from residuals from her closed head injury. She has difficulty concentrating and processing information. She forgets where she is going and has difficulty driving. She also has difficulty managing her finances and balancing her checkbook.

Dr. Maria A. Pavez of the Lexington Neuroscience Center saw Corio on August 23, 2012 for a neurologic consultation. Corio had complaints of dizziness, concentration, word-finding difficulty, lack of attention, and short-term memory impairments. Corio reported a prior history of attention-deficit disorder, for which she treated with Concerta, and additionally had a history of headaches that were exacerbated by the MVA. In a January 25, 2013 report, Dr. Pavez diagnosed post-concussive syndrome with residual headaches, left arm and left leg pain (Piriformis syndrome), post-traumatic stress disorder (“PTSD”), nightmares, neuropathic pain syndrome, and mood swings.

Marquita Bedway, Ph.D., performed a psychological evaluation on November 6, 2001, when Corio was fifteen years old. At that time, Corio complained of almost daily headaches. Dr. Bedway diagnosed attention deficit hyperactivity disorder (“ADHD”), and perhaps a learning disability in mathematics.

Records from the Lexington Clinic reflect Corio was treated on April 15, 2009 for migraine headaches that she reported experiencing since childhood.

Dr. Frank Burke performed an independent medical evaluation (“IME”) on October 3, 2012. Dr. Burke diagnosed post-concussive syndrome, failed left AC joint reconstruction with distal clavicle excision with permanent dysfunctional residuals to the left upper extremity, persistent problems related to the injury, to her back, inclusive of her SI joint and at the greater trochanteric bursa. Dr. Burke assessed a 40% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”).

Dr. Ronald Burgess performed an IME on November 15, 2012. He noted records from the University of Kentucky document fractures of the left sixth through ninth ribs, a grade 5 AC joint separation on the left, and multiple glass lacerations of the left hand. Dr. Burgess diagnosed a laceration of the ulnar digital nerve of the left small finger, for which she has reached MMI, and has 0% impairment. He opined she will reach MMI for the shoulder condition upon completion of physical therapy. Dr. Burgess assessed a 10 % impairment rating for the upper extremity secondary due to distal clavicle resection pursuant to the AMA Guides. From the standpoint of the upper extremity injury, Dr. Burgess felt Corio is

capable of returning to the type of work performed at the time of injury. During his January 22, 2015 IME, he noted instability of Corio's distal clavicle. Dr. Burgess felt Corio was at MMI for the left shoulder condition. He assigned restrictions of no work above shoulder level and no lifting over fifteen pounds. Dr. Burgess assessed a 6% whole person impairment rating for the shoulder condition.

Dr. James C. Owen performed IMEs on September 11, 2013 and May 7, 2015. Dr. Owen diagnosed Corio as status post left shoulder clavicle arthroplasty and AC joint reconstruction; post-concussive syndrome with persistent mental status abnormality; status post-surgery to left hand with full regain of function, fourth and fifth fingers; chronic low back pain, SI, and gluteus pain associated with lateral trochanteric bursitis associated with dysmetria; muscle spasm of the low back; status post rib fractures 6 through 10; and exacerbation of chronic headaches with persistent scapular dyskinesia. Dr. Owen assessed a 19% impairment rating. He recommended restrictions of lifting, handling, and carrying objects less than ten pounds and avoidance of activity that requires prolonged sitting for greater than approximately thirty minutes, or any type of over-shoulder activity with the left shoulder and recurrent bending, squatting, stooping, or prolonged driving. In his 2015 IME, Dr. Owen assessed a 40% impairment rating consisting of 21% for mental status compromise, 11% for the left shoulder injury, 7% for the ulnar nerve injury, 18% for scapular dyskinesia, 5% for the low back, and 3% for her trochanteric bursal problem.

C. Christopher Allen, Ph.D., examined Corio on August 1, 2013. He stated Corio likely experienced a significant traumatic brain injury secondary to the

MVA. Since that time, she has reportedly experienced significant cognitive, memory related, and emotional difficulties. Dr. Allen stated it is possible Corio manifests permanent neuropsychological deficits. He felt more would be known with regard to her diagnostic and prognostic status after treatment for her significant emotional difficulties.

Dr. Dennis B. Sprague performed a psychological evaluation on January 28, 2014 and February 3, 2014. He diagnosed Corio with a major neurocognitive disorder due to brain injury, behavioral disturbance, PTSD, personality change due to a medical condition, depressed features, anxiety disorder due to a medical condition, post status traumatic brain injury, and unspecified attention deficit disorder. He stated her complaints of short-term and long-term memory problems, difficulties with word finding, poor spelling, difficulties with comprehension, reduced social energy, anxiety, depression, panic related symptoms, and symptoms of PTSD were consistent with head trauma sustained in the MVA. Dr. Sprague assessed a 48% impairment based upon the AMA Guides. He did not believe her pre-accident ADD and headaches played a role in her current difficulties. Dr. Sprague did not feel Corio had the capacity to return to the work she performed at the time of her injury from either an emotional or neuropsychological perspective.

Dr. Douglas D. Ruth performed a psychiatric evaluation and prepared reports dated January 22, 2015 and January 29, 2016. He assessed a 12% psychiatric impairment rating arising from a combination of cognitive deficits and non-cognitive psychiatric symptoms. The cognitive deficits are associated with “axonal shearing” associated with the rapid acceleration/deceleration of the brain in the accident. Dr.

Ruth apportioned one fourth of the impairment to her pre-existing ADHD and three fourths of the impairment to PTSD, and cognitive disorder NOS that arose from the work injury. Dr. Ruth stated Corio likely would not be able to complete work that is highly cognitively demanding, requires a high intensity of cognitive efficiency, or that requires sustained attention and cognitive work for lengthy periods. Dr. Ruth felt Corio was at MMI and noted most of the improvement in cognitive deficits arising from of a traumatic head injury occurs in the first year following the injury.

Dr. Robert P. Granacher performed an IME June 23, 2014. Dr. Granacher did not believe Corio had sustained a permanent traumatic brain injury. At most, he felt she sustained an uncomplicated concussion. Dr. Granacher felt her current mental symptoms are due to over-medication. Dr. Granacher diagnosed a major neurocognitive disorder due to iatrogenic over-medication.

Dr. Timothy C. Kriss performed an IME and opined Corio did not sustain a traumatic brain injury. He noted the initial neurologic presentation and early follow-up neurological presentations were normal. He attributed Corio's results on psychological testing to her lifelong inability to take tests because of test-taking anxiety, stress, and headaches.

Dr. Craig S. Roberts performed an IME regarding the left shoulder and SI joint. He diagnosed left shoulder coracoclavicular joint disruption requiring two ligament reconstructions with residual left shoulder arthofibrosis, rotator cuff dysfunction, scapula-thoracic dyskinesis, left sacroiliac joint injury with residual sacroiliac joint dysfunction, and left sacroiliac posttraumatic arthrosis. Dr. Roberts

assessed a 14% impairment rating for the shoulder injury and a 3% impairment rating for the sacroiliac joint injury for a combined 17% impairment rating.

Dr. David L. Jackson of Cardinal Hill Rehabilitation Hospital oversees and coordinates Corio's care. He first saw Corio in February 2013. Dr. Jackson noted Corio had difficulty with ability to focus, memory, attention, ability to complete tasks, and PTSD. Dr. Jackson opined Corio is unable to return to working as a psychologist. She would be unable to listen to instructions and complete tasks. Dr. Jackson did not think Corio was capable of performing any occupation at the time of his deposition. Dr. Jackson opined Corio suffered a traumatic brain injury with post-concussion syndrome resulting in severe headaches, memory loss, dizziness, mood swings, insomnia, PTSD, anxiety and depression as a direct result of the work-related MVA. She also sustained a left shoulder injury and pain that resulted in two surgeries for ligament reconstruction, left rib fractures, low back and hip pain, left hand injury requiring digital nerve repair, neck pain, and myofascial pain syndrome, as a result of the MVA. She continues to experience impairments in attention/concentration, memory, reasoning, and abstract/critical thinking. She has difficulty filtering distractions in noisy environments, and in that situation she struggles with slow speed processing, quick retention of new information, working memory, decreased writing and spelling, and delayed response time. Dr. Jackson opined these impairments are neurologically based and are due to the traumatic brain injury caused by the MVA.

Dr. Bobby Miller, a neurologist, performed a neuropsychiatric forensic evaluation on May 18, 2015. He diagnosed a mild neurocognitive disorder due to

traumatic brain injury, post-traumatic headaches, and post-traumatic stress disorder. He felt Corio had reached MMI and her condition is unlikely to improve with additional treatment beyond current measures. He assessed a combined 22% impairment rating pursuant to the AMA Guides for Corio's psychiatric/neuropsychiatric condition consisting of 9% for integrative function, 4% for post-traumatic headaches, and 11% for PTSD.

Dr. David Shraberg performed an IME on November 19, 2013. He diagnosed elements of PTSD and phobic anxiety associated with the MVA with the primary symptom being driving anxiety. He noted a prior history of ADHD with elements of anxiety disorder that was ongoing, chronic, and non-disabling. Dr. Shraberg felt she might have received a very mild concussion, but there is no evidence that she should suffer any permanent cognitive impairments.

Records from Diamond Headache Clinic indicate testing revealed moderate to severe impairment in processing speed, attention/concentration, and overall executive functioning. She had moderate deficits in working memory, abstract reasoning, perceptual reasoning, visual-spatial perception and reasoning including spatial visualization, spatial reasoning, nonverbal fluid reasoning, and visuospatial and visual motor abilities.

In an Opinion and Award of April 4, 2016, ALJ Wolff found Corio is permanently totally disabled due to the work-related accident. He overruled Homeplace's Medical Disputes. ALJ Wolff's findings relevant to this appeal are set out *verbatim*:

When a claimant contends she is permanently totally occupationally disabled the ALJ must conduct a five-

step analysis; first, the ALJ must determine if the claimant suffered a work-related injury; next, the ALJ must determine what, if any, impairment rating the claimant has; next the ALJ must determine what permanent disability rating the claimant has; next the ALJ must determine if the claimant is able to perform any type of work; and, next, the ALJ must determine that the total disability is the result of the work injury. *City of Ashland v. Taylor Stumbo*, 461 S.W.3d 392 (Ky. 2015).

1. Based upon the above determinations it is clear Plaintiff suffered both psychological and physical injuries as a result of her July 9, 2012 work-related MVA injury.

2. Based upon the above it is clear Plaintiff has an impairment rating of 10% for her work-related psychiatric injury and a 17% for the physical injury component of work injury, when these impairment ratings are combined Plaintiff has a 25% WPI.

3. Using the above determined impairment rating it is determined Plaintiff has a 28.75% permanent disability rating.

4. So as to determine whether Plaintiff is unable to perform any type of work it is appropriate to undertake an *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000) analysis. In a *Watson* analysis the following factors are considered:

AGE: At the time of her injury Plaintiff was 26 years old. Plaintiff's age does not suggest she is permanently totally disabled.

EDUCATION: Plaintiff has a substantial amount of formal education. The extent of Plaintiff's education does not suggest she is permanently totally disabled.

VOCATIONAL SKILLS: Prior to her MVA Plaintiff had utilizable vocational skills. Obviously prior to her MVA Plaintiff had the skill required for being a clinical psychologist, with a supervisor monitoring her work. Assuming this is a skill, prior to her MVA Plaintiff had the unfettered skill of driving an automobile. Plaintiff

had the skill of working with patients having physical and/or mental developmental disabilities. Plaintiff had the skill of being able to create and maintain records regarding the patients she visited. At the time of her MVA Plaintiff was transitioning to an Associate Executive Director position, in this position she would spend part of her work time at a desk, be required to attend administrative staff meetings, and perhaps deal with personnel matters.

Plaintiff's vocational skills do not suggest she is permanently totally disabled.

POST-MVA RESTRICTIONS AND LIMITATIONS:
As a result of her MVA Plaintiff has many restrictions and limitations. Symptoms associated with Plaintiff's psychiatric injuries substantially compromise her capacity to utilize her vocational skills. Since her MVA Plaintiff has difficulty concentrating, major problems with her short-term memory, physical pain, word-finding, processing information, remembering where she is driving to, managing her checking account, sorting out conversation when she is speaking with more than one person, remembering what she was supposed to do during the day, compromised coping skills, disabling severe headaches, remembering when to take medication and what to take, etc.

Plaintiff has physical restrictions and limitations. Dr. Coy provided restrictions of no lifting greater than 5 pounds and working only six hours a day. Dr. Riley restricted Plaintiff to lifting no more than 25 pounds with her left hand. Dr. Corbett set permanent physical restrictions of no work above shoulder level and no lifting over 15 pounds. Dr. Lockstadt's restrictions included to minimize repetitive bending and twisting through the spine, alternate between sitting, standing, and walking with frequent changes in posture, and minimize her use of stairs, and never climb a ladder.

Plaintiff's restrictions and limitations, at this time, strongly suggest she is permanently totally disabled.

Before concluding whether Plaintiff is now permanently totally occupationally disabled it is to be noted D. Jackson, the physician most familiar with her status,

testified, “You know, the difficulties with Ms. Corio, one is her chronic headaches and ability to listen to someone give her instructions and complete those. So I think being able to perform an occupation at his time, I don’t think she could do it, no.”

It is also noted that the parties have filed several vocational evaluations. Plaintiff filed a vocational consultation by Ralph M. Crystal, Ph.D. Dr. Crystal conducted a vocational evaluation, and, so as to qualify to render expert opinions, reviewed over 50 records and documents, interviewed Plaintiff, and administered several standard vocational tests. Having taken these preparatory steps Dr. Crystal concluded Plaintiff suffered a loss of vocational opportunities.

Dr. Crystal opined, “Based on the medical records and reports reviewed on 02/27/15 Ms. Corio is currently unable to work and will likely be limited to the sedentary to light range of work in the future.”

Defendant filed an April 24, 2015 vocational report by Dana Ward, MRC, CRC, CCM, CLCP, CBIS, Vocational Rehabilitation Counselor. So as to qualify to render expert vocational opinions, Dr. Ward reviewed records, took into consideration Plaintiff permanent physical restrictions, considered Plaintiff’s work history, administered several standard occupational evaluation tests, and considered the labor market.

Having taken these preparatory steps Dr. Ward opined Plaintiff was not permanently and totally disabled. Dr. Ward indicated Plaintiff could now work as a Clinical Behavioral/Mental Health Practitioner, Therapist (PRN), Resource Coordinator, Clinician and Licensed Professional Clinical Counselor.

Having observed and heard Plaintiff testify it is hard to believe she would now be able to do any of these jobs on a regular and sustained basis.

LIKELIHOOD OF RESUMING SOME TYPE OF “WORK”: Taking into consideration the Watson factors, most importantly the factor concerning Plaintiff’s physical and mental limitations and restrictions, and considering them together, it is

unlikely, at this time, Plaintiff can resume some type of “work” under normal employment conditions. Plaintiff was observed and heard at both sessions of her final hearing and it was obvious she was struggling to understand questions, to pull together answers, remember questions, all of which generated an agonizing situation and observable frustration.

Taking into consideration several hours of observing Plaintiff as a witness it is inconceivable and unreasonable to conclude she now has the capacity to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy.

Based upon the above it is determined Plaintiff is now unable to perform any type of work.

5. The ALJ must determine whether the total disability is the result of the work injury. For there to be any carved out of a PTD award an injured worker must have a pre-existing disability. *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003). Plaintiff did not suffer from a pre-existing disability immediately before her work-related MVA.

At the time of her MVA Plaintiff was consistently working very long work-day without restriction or limitation. At the time of her MVA she was transitioning into an Executive Administrator position, which can probably be considered a promotion. Prior to her MVA Plaintiff was able to do all physical and mental tasks her job required.

Hopefully, for both Plaintiff and Defendant, she will improve to a level where she can work providing services to another in return for remuneration on a regular and sustained basis, but that is not her present status.

Homeplace filed a petition for reconsideration alleging multiple errors.

ALJ Wolff issued an Order on May 25, 2016 (originally bearing the date June 25, 2016 but corrected by Order dated June 23, 2016) providing as follows:

Defendant seeks reconsideration on the following points:

1. A point upon which Defendant seeks reconsideration is, as written by Defendant in its Petition (numerical paragraph 4 page 2), “Employer respectfully request that the Administrative Law Judge reconsider the determination that the inclusion of the testimony of Katrina Corio after having failed to exclude her pursuant to KRE 615 was not prejudicial to Employer.” Defendant got exactly what it asked for. No consideration of Katrina Coriolis testimony was done by the undersigned. Katrina Coriolis input was not considered, in any way. Her testimony was not read by the undersigned. Katrina Coriolis is not mentioned in the 51-page Opinion.
2. Because Defendant got exactly what it asked for, Defendant’s Petition for Reconsideration on this issue is overruled.
3. On page 4 of its Brief Defendant wrote, in pertinent part, “Accordingly, the Administrative Law Judge failed to observe his duty in complying with the mandatory rule requiring the sequestration of witnesses. That being the case, Employer objects to the consideration of any testimony provided by Katrina Corio.”
4. Defendant correctly points out a conflict in the Opinion, on page 43 of the Opinion Plaintiff’s Whole Person Impairment (WPI) rating was indicated to be 10% for the psychiatric component of her work injury, but then on page 36 Plaintiff’s WPI rating was indicated to be 9% for the psychiatric component of her work injury. The correct WPI number for the psychiatric component of Plaintiff’s work injury is 9%, and the Opinion shall be appropriately revised.
5. Defendant contends (numerical paragraph 8, page 3) the undersigned failed to address its argument regarding an Agreed Order entered in the civil litigation of Plaintiff’s circuit court action against the tortfeasor, apparently the Circuit Order instructed Defendant to provide payment to Plaintiff’s PIP insurer, KESA. KESA is not a party in Plaintiff’s workers’ compensation claim. The undersigned is without

jurisdiction to address the issue of one insurer's obligation to another insurer. Plaintiff remains fully obligated to provide Plaintiff with all reasonable, necessary and work related medical treatment.

6. Defendant's Petition for Reconsideration of this issue is overruled.

7. Furthermore, herein the determination was made Defendant, and/or its worker's compensation insurance carrier, must pay all reasonable, necessary and work-injury related medical expenses, the undersigned has no authority to pass that obligation on to another entity, particularly to an entity that is not a party in this claim.

8. Furthermore, as described by Defendant, the issue it seeks to have considered appears to be a dispute between one insurer, KESA, and another insurer, Plaintiff's PIP insurer, in such a situation jurisdiction does not lie with an ALJ. In Custard Insurance Adjuster v. Aldridge, 57 S.W.3d 284 (Ky. 2001), the supreme court, citing Wolfe v. Fidelity Casualty Insurance Co., of New York, 979 S.W.2d 118 (Ky. 1998) and Larson's Worker's Compensation Law Sec. 150.04 (1)-(2) (2001), held, that in a dispute between two insurance carriers which does not effect the rights of an employee in a pending claim, the ALJ does not have jurisdiction to address and decide the issue.

9. Defendant seeks reconsideration of the undersigned's determination Plaintiff is permanently totally occupationally disabled (numerical paragraph 2). Even if this issue was to be reconsidered, it would remain the steadfast opinion of the undersigned that Plaintiff is permanently totally occupationally disabled.

10. Defendants request for reconsideration of the undersigned's determination Plaintiff is permanently totally occupationally disabled is an attempt by Defendant to have the proof re-evaluated, re-weighted, and reconsidered, but such is not appropriate pursuant to a Petition for Reconsideration, and, accordingly, Defendant's Petition for Reconsideration on this point is overruled.

11. Defendant indicates the undersigned failed to address its argument regarding Plaintiff's voluntary resignation from her employment, with Defendant and whether it told TTD benefits payable to Plaintiff. (numerical paragraph 6, page 3). It is written on page 6 of the Opinion, "Plaintiff testified she resigned from Homeplace Support Services on August 30, 2012 she explained, "I was told my position did not exist and I was demoted to a behavioral specialist position, which I was not able to do." (October 25, 2012 deposition page 73)." Plaintiff also indicated she was unable to return doing any of the usual and customary work she was able to do prior to her work incident. (FH – 38).Plaintiff's uncontradicted testimony allows the inference she could not return to work for Defendant due to the effects of the injuries she sustained in her work-related MVA. It appears Plaintiff did not voluntarily resign from her employment with Defendant. Plaintiff testified she tried to do this for a little over a month, and during this month of work what she tried to do would take her like six hours whereas, before her work injury she was able to do this type work in an hour. Plaintiff credibly testified she really wanted to work and tried hard to do so, but she could not add the test-result numbers, she made mistakes and did not feel confident with her work product. Her husband had to check her arithmetic. The word "work", as used in the definition of "permanent total disability", is statutorily defined as meaning "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011 (34).Plaintiff was not awarded TTD benefits. Based upon the above cited statutory definitions Plaintiff has been totally occupationally disabled since the day of her injury and continues to be so disabled.

12. Plaintiff's unrefuted testimony, being what it is on this point, causes Defendant's Petition for Reconsideration on this point to be overruled.

13. Based upon Plaintiff's testimony, it is clear she has not been able to provide services to another on a regular and sustained basis since her MVA.

14. Permanent total disability means the condition of an employee who, due to a work injury, has a permanent

disability rating and has a complete and permanent inability to perform any type of work as a result of a work injury. KRS 342.0011 (11) (c).

15. Defendant seems to contend its obligation to pay TTD benefits to Plaintiff should be suspended during that brief period of time she attempted to work at home for a Pikeville psychologist. This work consisted of her getting the psychologist's test results and attempting to integrate and word process that the information into a final work product.

16. A review of the proof reveals Defendant did not present any proof contradicting Plaintiff's testimony on Plaintiff's explanation of why she stopped working for Defendant.

17. Plaintiff testified she was unable, due to the effects of her work injury, to return to work for Defendant following her MVA. (FH2 – 39).

18. Defendant contends the undersigned did not consider its argument regarding the compensability of certain medical bills allegedly not properly presented to it or its insurer pursuant to the applicable statute and regulations. There is merit to Defendant's Petition on this point. Pursuant to KRS 342.020, and the regulations set forth in 803 KAR 25:096, medical providers are required to submit to a medical payment obligor (Defendant or its worker's compensation insurer) a complete statement of the medical services provided within 45 days of the date the medical treatment was provided, and, if the provider fails to follow these mandatory procedures, the obligor is not obligated to pay the bill. Defendant is correct it is not obligated to pay any medical provider's statement (bill) that has not been presented to it, or its insurer, within 45 days of the medical treatment being provided and/or is not presented in the fashion dictated by the statute and regulations; furthermore, Plaintiff is not required to pay such statements or bills and the medical provider, or any one acting on its behalf, is precluded from taking or initiating any collection action against Plaintiff. It will be up to the parties jointly to determine which bills are compensable by Defendant and /or its workers' compensation insurance carrier.

19. Defendant's Petition on this point is sustained as pertains to medical statements (bills) filed herein.

20. Furthermore, 803 KAR 25:096 Sec. 10 (3) prohibits a medical provider from initiating collection services or actions against the patient if the bills are deemed noncompensable pursuant to the medical provider's failure to comply with the mandatory provisions.

21. Perhaps hundreds of medical bills have been filed in this claim and it would be very overbearing to go through and check each individual bill and make a determination whether it was or was not properly submitted to Defendant and/or its insurer.

22. Defendant wrote, "Employer submits that the medical bills complained of, and filed into the record by, Plaintiff, do not comply with the requirements set out in the regulations. The vast majority of these bills have not been submitted to the insurer, or, in the event the bill, itself, was filed, have not be submitted with the accompanying documentation to meet the standard of a "statement for services." (Defendant's brief page 44). Defendant continued, "Until such time as Plaintiff does comply with those requirements, Employer and insurer have no obligation to pay or challenge the treatment." (Defendant's brief page 45).

23. Defendant contends no determination was made as to the date Plaintiff attained MMI status. Defendant correctly points out the determination of when Plaintiff attained MMI status was reserved as an issue. Defendant correctly points out that no determination was set forth in the opinion regarding when Plaintiff attained MMI status.

A determination of when, if ever, Plaintiff attained MMI status does not seem relevant. The dollar figure of Plaintiff's weekly indemnity benefit is the same (\$736.19) whether Plaintiff is at temporary total disability or permanent total disability status. Plaintiff has been permanently totally occupationally disabled since the day of her work-related MVA.

Defendant may be contending Plaintiff could not be entitled to TTD benefits during that five or six week period she worked for a Pikeville psychologist. A review of Plaintiff's testimony indicates she was unable to return doing the type of work she was doing for Defendant when injured, was unable to do the work she tried to do during the brief period of time she attempted to work for the Pikeville psychologist, and she had to stop working for the Pikeville psychologist due to the effects of her work-related MVA.

For the above stated reasons Defendant's Petition on this point is overruled.

8. Defendant wishes the undersigned to make a determination Plaintiff violated an evidentiary order and that such alleged violation caused it to be prejudiced by giving Plaintiff an evidentiary advantage. (numerical paragraph 5, page 2).

Defendant wrote, "Dr. Jackson is one of the "global opinion" submitted in violation of the June evidentiary order."

As noted in the Opinion, each party has been allowed to file an extensive amount of proof, Defendant fails to point out, with specificity, how it prejudiced by it, and Plaintiff, was allowed to submit for consideration all the proof they wished to file.

Defendant was provided multiple extra opportunities to file whatever proof it wished to file, and was granted additional specific time periods to review and consider any and all proof submitted by Plaintiff and file proof in response.

On June 29, 2015 an Order was rendered reading, in pertinent part, "This claim contains a multitude of medical records filed by each party. In the interest of judicial efficiency, employer's motion is GRANTED. Each party must identify no more than two physicians to be relied upon for each body part and physical and psychiatric restrictions in advance of the August 4, 2015 Benefit Review Conference. Other medical reports and treatment records in evidence can be used to corroborate

a side's chosen positions, or to address the positions of the other party.”

The August 4, 2015 BRC order does not indicate Defendant made any objection to the evidence filed by Plaintiff or of Plaintiff's alleged failure to abide by the June 29, 2015 Order, in fact, Defendant was specifically given an additional 14 days to review Plaintiff's proof and to raise objections as deemed necessary. Defendant did not raise any type of objection during this 14 days of additional time it was given to review and consider Plaintiff's proof nor did it mention alleged Plaintiff violation on the June 29, 2015 Order.

On September 16, 2015 the first phase of Plaintiff's final hearing was commenced and Defendant made no objection to Plaintiff's filed proof and/or Plaintiff's alleged violation of the June 16, 2015 Order. Defendant was again given additional time following this part of Plaintiff's final hearing to respond to Plaintiff's proof filing. During this additional time period, Defendant did not file an objection as to Plaintiff's violation of the 6/29/15 order.

A review of the content of the September 16, 2015 hearing transcript does not reveal Defendant ever making any objection to Plaintiff's filed proof and/or Plaintiff's alleged violation of the June 16, 2015 Order.

The second phase of Plaintiff's final hearing occurred on February 1, 2016.

At no time during the 4 ½ months between the initial part of Plaintiff's final hearing and the final part of Plaintiff's final hearing did Defendant make any objection to Plaintiff's alleged violation of the June 16, 2015 Order.

A review of the February 1, 2016 transcript of the second phase of Plaintiff's final hearing, including the discussions between this ALJ and the parties' attorneys, fails to reveal Defendant raising any objection regarding Plaintiff's alleged violation of the June 16, 2015 Order.

It was not until February 25, 2016, some nine months after the Order was rendered, and several weeks and

after the final hearing that Defendant first raised question regarding Plaintiff's alleged violation of the June 16, 2015 Order.

In its February 25, 2016 objection Defendant wrote, in pertinent part, "At the final hearing (the initial component of Plaintiff's final hearing conducted on September 16, 2015) Plaintiff presented a three ring binder containing voluminous medical information. That three ring binder contained "Global" physicians, in addition to physicians addressing specific body parts. It also identified three "psychological" physicians... Plaintiff's position prejudices Employer by not complying with Administrative Law Judge's order, Plaintiff has gained an evidentiary advantage through the number of opinions addressing each body part. Further, employer is burdened in its preparation of its brief... Employer respectfully requests that the Administrative Law Judge conference with the parties to limit Plaintiff's physician opinions in accordance with the evidentiary Order." In its objection, Plaintiff declines to recall and mention it was given specific periods of additional time to review the three-ring binder and to raise any objection it may have to the content of the binder and / or Plaintiff's alleged violation of the June 16, 2015, order.

Towards the conclusion of Plaintiff's initial final hearing the undersigned said, several times, something like "...but, I think it puts you (Defendant) in a tight and, perhaps, unfair spot today. I mean, you can't even object to this hardly, because you haven't - - read it. (FH 1 pages 35 - 36) and "...that will give the Defendant some time to look at it and see what they want to - - how they want to address this." (FH 1 page 45).

Despite having more than ample time and opportunities to raise objections, Defendant declined to do so until several weeks after completion of the last component of Plaintiff's final hearing on February 1, 2016.

The undersigned is unaware of how Defendant has been prejudiced by the proof-taking course this claim has followed. Defendant has failed to present any specific example of how it has been prejudiced by Plaintiff's alleged violation of the June 16, 2015 Order.

Though afforded much time and numerous opportunities to raise such objection Defendant did not timely do so.

For the above reasons Defendant's effort to have the Opinion reconsidered on this issue is overruled.

ORDER

Pursuant to the above, (numerical paragraph 2 on page 43) of the Opinion is revised to read; Based upon the above, it is clear Plaintiff has an impairment rating of 9% for her work-related psychiatric injury and a 17% for the physical injury component of (her) work injury, when these impairment ratings are combined. Plaintiff has a 24% WPI.

In the Order and Award section of the Opinion (page 50) an additional paragraph is added reading; Any and all medical statements (bills) not presented to Defendant, and/or it's worker's compensation insurer, by Plaintiff, or her medical providers in conformity with the mandatory provisions of KRS 342.020 and the accompanying regulations are deemed non-compensable. The parties shall determine which statement (bill) is to be deemed non-compensable as between Plaintiff, Defendant, and or its insurer.

Plaintiff shall not be subject to any collection effort and/or action by a medical provider and /or person and/or entity attempting to collect any statement (bill) deemed non-compensable as between Plaintiff and Defendant, and/or its insurer.

All content of the Opinion not in conformity with the above is stricken, all remaining content shall remain in effect.

In response to a motion by Corio, ALJ Wolff issued a June 23, 2016

Order providing as follows:

Plaintiff seeks clarification of the May 25, 2016 Order (“Order”) regarding Defendant’s Petition for Reconsideration.

Plaintiff contends the Order affirmed the determination contained in the 51-page April 4, 2016 Opinion, Order and Award (“Opinion”) Defendant was obligated to pay for all reasonable, necessary and work-injury related medical expenses, but then the Order goes on to indicate certain medical bills were untimely presented to Defendant and therefore non-compensable, the content of the Order could be interpreted as presenting a conflict regarding Defendant’s obligation to pay Plaintiff’s medical bills, thus clarification is appropriate.

In the Order it was written, “It will be up to the parties jointly to determine which bills are compensable by defendant and/or its workers’ compensation insurance carrier.” (Order, numerical paragraph 18).

There are many, many medical bills in this claim. The undersigned did not make a determination which medical bills were compensable and/or which bills were untimely presented, if any, to defendant and not compensable. Plaintiff represents Defendant denied this claim from the start and denied the compensability of medical bills presented to it. On the other hand, Defendant represented, during the last phase of Plaintiff’s final hearing, conducted on February 1, 2016, “Our position here is that we’ve been paying for about two and a half years of the three years, we’ve been paying medical bills that are sent to us.” (FH-2 page 8). Obviously there is confusion as to the parties understanding whether or not medical bills have been presented and/or paid.

In an effort to facilitate resolution of Defendant’s obligation to pay medical bills, it is noted KRS 342.020 (1) instructs medical providers to submit their bills for medical services rendered within 45-days of the service being rendered.

It appears Plaintiff, and/or her medical providers, timely submitted certain medical bills to Defendant which were paid but Defendant declined to pay numerous submitted bills. As a result of Defendant’s denial Plaintiff had no

choice but to submit her medical bills to her private health care insurer and/or the tortfeasor's automobile liability insurer and/or the PIP insurer.

Plaintiff now contends, due to Defendant's denial of certain tendered medical bills, it had no obligation thereafter to continue tendering medical bills to Defendant. Plaintiff argues, because she did not submit medical bills to Defendant after Defendant denied the compensability of Plaintiff's medical bills, Defendant cannot now raise an objection to its obligation to pay the medical bills because the bills were not timely presented.

Kentucky case law supports Plaintiff's position. In *Wolford & Wethington Lumber v. Derringer*, 2010 WL 3377731, the Kentucky Supreme Court wrote,

"The claimant directed medical providers to bill his health insurance carrier because his employer asserted from the onset that his back condition and herniated disc were not work-related.

"Like the 30-day issues in *Haddix v. R. J. Corman Railroad Construction*, 864 S.W. 2d (Ky. 1993), the current 45-day rule is unambiguous and stated in mandatory language. Nonetheless, 803 KAR 25:096, excuses a failure to submit a statement for services within the 45-days upon a showing of reasonable grounds for failing to do so. Knowledge of an employer's assertion that the condition being treated is non work-related constitutes reasonable grounds for failing to direct a provider to submit a bill for treating the condition to the employer or for failure to seek reimbursement for bills personally paid."

Furthermore, in *Rankin Law v. Sutton*, 2013 WL 3481232 it was written:

"Regulation 802 KAR 25.096 section 6 excuses the failure to submit a statement for services within 45-days upon a showing of reasonable grounds. An employee has reasonable grounds for failing to submit statements for services or to seek reimbursement when the employer has denied the claim as being non-work-related."

It is impossible for the undersigned to ascertain which bills have been sent to and paid by Defendant, and it is impossible to know which bills have been denied thus cancelling Plaintiff's obligation to continue to present bills within a 45-day time period. The May 26, 2016 Order is clarified so is to make it clear the parties are to jointly determine which bills are compensable by Defendant and/or its workers' compensation insurance carrier, and, included in that determination the parties must consider which statements or bills were not presented to Defendant because Plaintiff was aware Defendant denied Plaintiff's claim and/or denied the compensability of medical bills.

In the event the parties are unable to make such determination the specific bills in question, as well as other proof, will need to be presented to the fact finder for the determination of compensability.

On November 29, 2016, then Chief Administrative Law Judge Robert Swisher sustained a third petition for reconsideration to the extent that he agreed ALJ Wolff failed to make any findings of fact or conclusions of law respecting the compensability of unpaid medical expenses. The claim was re-assigned to ALJ Davis. ALJ Davis, after an extensive review of the evidence, made the following findings:

II. SUBSTANTIVE MEDICAL DISPUTE REGARDING REASONABLENESS AND NECESSITY OF TREATMENT FROM KENTUCKY HAND AND PHYSICAL THERAPY

I do believe that Judge Wolff discussed this when he noted that Dr. Wolens stated that additional therapy was unlikely to benefit the Plaintiff. Plaintiff should be well versed by now in home exercises. He recommended against it.

Conversely, Dr. Jackson has opined that the Plaintiff could need therapy for years to come. It has also been well documented by several physicians that the Plaintiff continues to have residual symptoms for her physical

injuries. This includes Drs. Kibler, Owen and Roberts. The records from Kentucky Hand and PT state the Plaintiff improved with therapy but still has symptoms.

If the Plaintiff has a work-related left shoulder injury, and if her treating doctor says she needs PT, and if she says the PT helps, and if the provider documents the PT helps, then the PT is reasonable and necessary.

III. DOES THE FAILURE TO TIMELY SUBMIT BILLS, AFTER MAY 6, 2014, ACT AS BAR TO THEIR COMPENSABILITY

A. LEGAL STANDARD

The law does allow exceptions for medical bills to be filed with the MPO more than 45 days from the date of service. While it is undisputed that the regulation is unambiguous the fact remains that the rule has never been, and is not, considered ironclad.

The Defendant points to a six-year-old, four at the time of their original brief, Court of Appeals case that requires no deviation from the statute when the law is clear. However, that case did not concern this issue. Of more relevance is the unpublished Kentucky Supreme Court Case cited by the Plaintiff. *Wolford & Wethington Lumber v. Derringer*, 2010 WL 3577731. That case clearly states that exceptions can be made to the 45-day rule. The ALJ is to conduct an analysis to determine if an exception should be made. Even unpublished cases can be used as guidance if no published authority exists on an issue. Further, the rationale that the 45-day rule is not, always, an ironclad rule is in keeping with commonsense and the general method whereby law is practiced in this Commonwealth, at least with respect to workers' compensation.

In this matter, I am persuaded that the 45-day rule does not apply to any medical expenses that I will find compensable. First, all of the medical expenses that I will find compensable are from providers wherein the billing started prior to the May 6, 2014 letter from Mr. Kamenish. Further, the Defendant continued to deny much of the claim and medical treatment. It is unreasonable for providers who have, for several years,

been billing a different source, to suddenly start billing a new MPO. Especially with little reasonable expectation of prompt payment.

The 45 day rule is no bar herein.

Corio filed a petition for reconsideration noting ALJ Davis inadvertently failed to address mileage expenses. By order dated September 12, 2018, ALJ Davis set forth the mileage expenses he found compensable.

On appeal, Homeplace first argues ALJ Wolff erred in allowing Corio to violate the June 2015 order limiting the number of physicians' reports each party was to present. Homeplace contends it has been prejudiced by the "caprice" of ALJ Wolff. The June 2015 order provided the framework for the development of evidence in this claim. Homeplace argues by allowing Corio to submit evidence outside of that established framework, ALJ Wolff provided Corio with a manifest advantage. It argues ALJ Wolff should have limited Corio to two physician opinions on impairment for each body part or injury, and two opinions addressing either the physical or psychiatric restrictions, per ALJ Wolff's original order.

Next, Homeplace argues ALJ Wolff erred in allowing Katrina Corio ("Katrina") to testify without sequestering her from Corio's testimony. KRE 615 mandates the exclusion of witnesses. It provides, in pertinent part, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses...." This is the mandatory duty of a court, with no discretion provided, and is directly applicable to the Administrative Law Judge through application of 803 KAR 25:010 Section 14, which provides that the Kentucky Rules of Evidence shall apply in all proceedings before an Administrative

Law Judge. Homeplace asserts ALJ Wolff failed to observe his duty in complying with the mandatory rule requiring the sequestration of witnesses. This resulted in prejudice to Employer. In the Order of May 26, 2016, ALJ Wolff indicated he had disregarded Katrina's testimony. However, when rendering his award of permanent total disability ("PTD") benefits, ALJ Wolff also pointed to having observed and heard Plaintiff testify and his opinion was based on: "Taking into consideration several hours of observing Plaintiff as a witness..." Homeplace contends it is impossible to determine the extent that Katrina's improper testimony affected his conclusion. However, given the importance ALJ Wolff placed on the hearing, Homeplace maintains it is unlikely, despite the ALJ's assurances, that it played no role. Accordingly, Homeplace asks the Board to vacate the orders of the ALJs involved in this claim from the present through April 4, 2016, set aside the hearing testimony, and order a new hearing to take place, leading to a new decision and order.

The ALJ as fact-finder enjoys broad discretion in controlling the presentation of evidence in a worker's compensation proceeding. New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). Thus, as a general proposition, any purported error by the fact-finder must be reviewed under the abuse of discretion standard. Abuse of discretion by definition "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945).

ALJ Wolff allowed both parties to exceed the two-physician limit. The claim involved a psychological injury and numerous physical injuries requiring treatment from numerous providers. Both parties were given ample opportunity to develop their evidence and rebut the opposing party's medical evidence. We see no abuse of discretion on the part of ALJ Wolff in allowing the parties to exceed the two doctor rule in this case.

It is apparent ALJ Wolff felt Katrina's presence during Corio's testimony would be helpful in the presentation of her testimony. KRE 615 provides an exception to the sequestration for a person whose presence is shown by a party to be "essential to the presentation of the party's claim". Separation is discretionary, and the ALJ can allow a person to stay in a courtroom if it benefits the presentation of the case and the progress of the testimony. Here, Karina testified after Corio. Her presence was allowed to reduce anxiety on Corio's part. She did not influence the content of Corio's testimony. ALJ Wolff did not consider testimony from Katrina in reaching the decision. Homeplace's speculation that it could have influenced ALJ Wolff is an insufficient basis to order a new hearing and we decline to do so.

Homeplace argues ALJ Wolff erred in finding Corio permanently totally disabled. Homeplace argues ALJ Wolff erred in weighing the evidence. He provided no explanation as to why he did not rely on the physical and mental restrictions set forth by Drs. Roberts and Ruth in reaching his conclusion. It also argues ALJ Wolff never explained which restrictions he was applying, or why he declined to follow the absence of restrictions set out by Drs. Roberts and Ruth, who were otherwise so compelling. Likewise, ALJ Wolff did not address whether he

found Dr. Crystal or Dr. Ward credible, where both found that Corio retained at least some level of existing work life. Homeplace asserts ALJ Wolff disregarded the opinions of the two physicians that he found the most credible, disregarded the opinions of the vocational experts, did not make any findings as to what restrictions are accepted as credible, and instead, based his opinion on his personal observations over the course of the claim. Homeplace argues this was an impermissible overstep, not supported by the evidence which compels a finding that Corio retains an ability to work at some level, and permanent partial disability benefits are appropriate, rather than PTD benefits. At a minimum, it argues this decision should be vacated so the evidence may be reweighed exempting ALJ Wolff's subjective feelings regarding Corio.

As the claimant in a workers' compensation proceeding, Corio had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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).

KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the

evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Permanent total disability is the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of the injury. KRS 342.0011(11)(c). In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers' age, educational level, vocational skills, medical restrictions, and the likelihood she can resume some type of work under normal employment conditions. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); City of Ashland v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015). In determining the level of occupational disability, no single factor is controlling. Further, it can rarely be said the evidence compels a finding of a greater or lesser degree of occupational disability. Millers Lane Concrete Co., Inc. v. Dennis, 599 S.W.2d 464, 465 (Ky. App. 1980). The ALJ enjoys wide ranging discretion in granting or denying an award of permanent total disability benefits. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006).

Homeplace essentially requests this Board to re-weigh the evidence and direct a finding in its favor, which we are not permitted to do. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). ALJ Wolff devoted thirty pages of his opinion to a discussion of the evidence in this claim. We are convinced ALJ Wolff properly understood and considered the evidence in reaching his decision. ALJ Wolff identified the appropriate factors, weighed the evidence, and reached a determination supported by substantial evidence. ALJ Wolff specifically articulated how he considered Corio's age, education level, and work history in conducting his analysis.

The record contained ample substantial evidence supporting ALJ Wolff's findings. ALJ Wolff was persuaded Corio sustained both psychological and physical injuries. She sustained significant back and shoulder injuries and a traumatic brain injury, as well as a psychological injury resulting in permanent impairment. Based upon the medical evidence and restrictions contained therein, as well as Corio's testimony, ALJ Wolff could reasonably conclude she was not capable of performing work on a regular and sustained basis in a competitive economy. KRS 342.0011(11)(c). Corio testified to ongoing difficulties resulting from both the physical and psychological injuries. A claimant's own testimony as to his condition has some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

While Homeplace has identified evidence supporting a different conclusion, substantial evidence was presented to the contrary. As such, ALJ Wolff acted within his discretion in determining which evidence to rely upon, and it cannot

be said his conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, *supra*.

Homeplace argues ALJ Wolff erred in failing to find a date of MMI. Homeplace contends that because Corio is not entitled to an award of PTD benefits, and the date of MMI is relevant to the extent that her PPD benefits would be a different amount than the TTD benefits. Further, it suggests the date of MMI was necessary for ALJ Wolff's analysis of disability, as the physical restrictions assessed by physicians prior to that date would have less probative value than restrictions assessed afterward. It notes there is a significant variance in the restrictions provided in the record.

Because ALJ Wolff's determination of PTD is affirmed, Homeplace's argument regarding the date of MMI is rendered moot. Any period of entitlement to TTD benefits merges with her entitlement to PTD benefits.

Homeplace argues ALJ Davis erred by failing to provide an analysis as to why the medical bills and mileage expenses should be allowed to be submitted late. Homeplace argues the only avenue for ALJ Davis to order payment of a delinquent statement for services is to find "reasonable grounds" for the late submission. ALJ Davis' analysis does not address whether there were reasonable grounds, which is distinct from whether the treatment was work-related.

This Board has held on a number of occasions the forty-five-rule for submission of statements for services in KRS 342.020(1) has no pre-award application. In R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993), the Kentucky Supreme Court pointed out the requirement in KRS

342.020(1) for the payment of bills within 30 days of receipt of the statement for services “applies to medical statements received by an employer after an ALJ has determined that said bills are owed by the employer.” In other words, it does not apply pre-award.

In Brown Pallet v. David Jones, Claim No. 2003-69633, (entered September 20, 2007), we held the reasoning of the Supreme Court in R.J. Corman Railroad Construction, supra, concerning the thirty-day provision for payment of medical benefits should also apply to the forty-five-day rule for submission of medical bills.

The court in R.J. Corman stated, “[U]ntil an award has been rendered, the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable.” By extension, we find the sixty-day requirement contained in 803 KAR 25:096 §11 is likewise not applicable until an award has been entered finding the claim is compensable. Pursuant to Garno v. Selectron USA, 329 S.W.3d 3001 (Ky. 2010), the sixty-day rule found at 803 KAR 25:096 §11 applies only after an interlocutory decision or final award has been entered. Since an interlocutory award was not entered, the sixty-day rule was not applicable until after ALJ Wolff rendered his decision.

Homeplace argues ALJ Wolff erred in finding Corio’s brief return to employment at Homeplace and her work from home did not toll the period of TTD benefits. Homeplace contends Corio was not entitled to TTD benefits following her voluntary resignation.

The only evidence concerning Corio's post-injury work is her testimony. Corio was released for part-time work and returned to Homeplace from August 26, 2012 through August 30, 2012. She acknowledged she received her regular salary for those days. Thus, she would not be entitled to TTD or PTD benefits for the period from August 26, 2012 through August 30, 2012 absent extraordinary circumstances. However, the Opinion and Award rendered by ALJ Wolff states in pertinent part as follows, "Defendant shall take credit for any payment of such compensation heretofore made." This order, by operation of law, allows Homeplace to take credit for the four days of salary Corio received from August 26, 2012 through August 30, 2012 against any TTD benefits owed Corio for this same time period. Therefore, we affirm the ALJ in this regard.

We do not believe Corio's voluntary resignation precludes the award of TTD or PTD benefits following August 30, 2012. Corio performed some work from home for a different employer after that time. We note post-injury wage records were not filed in this claim. It does not appear from her testimony this employment constitutes anything more than minimal employment. Corio's testimony does not establish the amount of work she performed or the wages paid for that work. There is no substantial evidence upon which to conclude Corio earned substantial or comparable wages in post-injury employment. She testified she did not perform all of the tasks of her pre-injury job. She testified she had difficulty performing the work, taking six hours to perform what would have taken one hour prior to the injury. Further, what work she performed required assistance from her husband. She did not feel capable of performing the post-injury work on a

continuing basis. A worker's testimony is competent evidence of her physical condition and ability to perform various activities both before and after being injured. Hush v. Abrams, supra. The brief employment in conjunction with Corio's testimony concerning her ability to perform that work does not mandate a finding TTD benefits should be tolled because of her voluntary cessation of that employment.

Accordingly, the April 4, 2016 Opinion, Award and Order, the May 25, and June 23, 2016 Orders rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, and the May 29, 2018 and September 12, 2018 Orders rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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