

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 8, 2019

CLAIM NO. 201690676

OXMOOR AUTO GROUP

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

STEPHEN MEEKS
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
& REMANDING

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

STIVERS, Member. Oxmoor Auto Group (“Oxmoor”) appeals from the August 27, 2018, Opinion, Award, and Order and the October 19, 2018, Order on Petition for Reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”) awarding Stephen Meeks (“Meeks”) temporary total disability (“TTD”) benefits, permanent total disability (“PTD”) benefits, and medical benefits for a work-related traumatic brain injury.

On appeal, Oxmoor first argues the award of PTD benefits is not supported by substantial evidence. Within this argument is three sub-arguments. It asserts Dr. Robert Byrd's 50% impairment rating can not be considered substantial evidence. Next, Oxmoor asserts the ALJ's finding that Meeks is unable to perform any type of work is not supported by substantial evidence. It also asserts the ALJ failed to determine Meeks' permanent total disability resulted from the work injury. In its second argument, Oxmoor asserts the ALJ erred as a matter of law by awarding both TTD and PTD benefits and starting PTD benefits on the date of the injury. Importantly, we note that Oxmoor never set forth an argument regarding the sufficiency of the ALJ's analysis of Meeks' entitlement to PTD benefits pursuant to McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

The Form 101 alleges Meeks sustained work-related injuries to his head, knees, and back on November 15, 2015, in the following manner: "Slipped and fell in men's bathroom, hit head on urinal." Oxmoor filed a Special Answer asserting the defense of voluntary intoxication pursuant to KRS 342.610(3).

Meeks was deposed on October 19, 2016. Meeks worked for Oxmoor from 2006 through most of 2009 and from the end of 2009 through June 2015. He returned to work at Oxmoor on November 5, 2015, through the day of his accident. After taking time off after his injury, he returned to his regular job at Oxmoor and continued until he was terminated in February 2016. In January 2016, Meeks had a successful month of selling cars at Oxmoor: "I sold six cars and I made \$3,500, which they would keep anybody that sells six cars that makes \$3,500. So, why was I told that

I wasn't working there anymore? If they could find people to sell six cars and make 3,500 they would want to keep every one of them."

Meeks described his current cognitive problems as follows:

My head has so many different sensations I go through every day that are mind-boggling, it can be different every time, it might be three, four in the morning, it might be noon. I don't ever know. My memory, my wife and daughter won't let me cook when they're not there because I've left the stove on and left the house and if my wife didn't come home right behind me it would have burned down.

At the time of his deposition, Meeks was experiencing headaches almost daily. He testified that he cannot return to work anywhere:

Q: Have you gone back to work anywhere else?

A: No. I can't.

Q: Why can you not go back to selling cars? You were doing it until February of this year and then you were terminated due to some dispute with your employer.

A: Yeah, I mean.

Q: Have you looked to go to another employer?

A: My mind ain't [sic] working right, I don't remember stuff right. My wife and daughter didn't want me to go back the first time but I told them I could do it, and it just don't [sic] seem like I could.

At the June 28, 2018, hearing, Meeks testified he returned to his regular work at Oxmoor in December 2015.

Q: So you went back to work at Oxmoor, and what did you go back to? Was it the same job?

A: Yes, yes.

Q: Okay. And how did you do during that – upon your return to work in December of 2015?

A: I mean, I don't really remember. I think I did all right.

Q: The record indicates that you sold, I think, 10 cars, or you had a pretty good month that December when you came back. Can you explain, you know, how would you have sold 10 cars upon your return?

A: Well, mostly everything I caught in December, from what I remember, was in the showroom.

Q: What does that mean, you caught it in the showroom?

A: I just wasn't out running the lot. You know, at this time and age, there's not much coming in on the lot. Most of what you're going to catch is internet, vehicle exchange programs, and a few pass-bys.

Meeks testified regarding the cognitive issues he experienced when he returned to work:

Q: Did you notice any – were you having any problems from a mental standpoint during that December when you came back to work and after that?

A: Well, I did, but I didn't think I did.

Q: What do you mean by that?

A: I didn't really realize how bad a state I was in.

Q: Give us an example of what you mean by that.

A: Just – nothing just felt right. You know, I sort of felt a little out of sorts; but as always, I just kept trying to do the best I could.

Q: When you say nothing felt right, what do you mean by that? In what way?

A: Well, everything just felt a little strange, you know.

Q: You mean mentally?

A: Yeah.

Q: In what way, if you can describe it? If you can't, you can't, but...

A: I can't really describe it.

Q: Well, did you feel slower mentally?

A: Yes. You know, I was forgetting a few things that I was asking other people that I would never forget.

Q: Like what?

A: Like the packages on cars and, you know....

Q: Okay.

Meeks last worked at Oxmoor in February 2016 when he was informed Oxmoor no longer had a spot for him.

He testified he continues to experience symptoms as a result of his traumatic brain injury:

Q: What about your headaches? Are you still having those?

A: Yes.

Q: How frequently?

A: Well, it's hard to say. I had it one time for 30 straight days, and then there's times I might go four or five days and not have one. I had one today at 1:02. I was just sitting there watching TV, and I felt it come in [sic]. I just happened to look at the clock because it's right there on the TV as well. And I had one today.

Q: Did that pass, or do you still have it?

A: It passed.

Q: How long do they usually take to pass?

A: They can last up to two to three hours. Sometimes they'll last 15, 20 minutes.

Q: Okay. And then in terms of, like, your memory, that sort of thing, how are you feeling? How are you doing now?

A: I'm doing better, but I left the stove on again. After I thought maybe I've gotten over that, the wife came home – I think it was – I'm pretty sure it was yesterday and told me the stove was on upstairs. So I'm sitting downstairs for like three, four hours with the stove on upstairs.

Q: You mean a burner or the oven?

A: The burner.

Q: Okay.

A: And I was putting a band around my wrist when I cook something because there's [sic] times I go downstairs and forget I've even got something up there cooking. And if I look and see that blue band on my wrist, then I realize I'm cooking, I've got an oven on or stove on or something.

Q: Okay.

A: But I haven't done that in a minute, and then I left the stove on again, I think, yesterday.

Q: Given the way you fell, the way you've just described, you know, the headaches as frequently as you have them, the memory issues you talked about, and then the physical problems you're having, the way you feel right now, do you think you could go back to Oxmoor Hyundai and sell cars?

A: I couldn't.

Q: Is that a no?

A: That's a no.

Q: And why not?

A: My knees and back, the head. The headaches would shut me down for hours sometimes, and no car lot has time for that. And my knees and back are so bad, I just...

Q: Do you feel like you're sharp enough to be able to present a car, put a deal together, that sort of thing?

A: Not anymore, no.

Q: Was that one of your strengths before?

A: Oh, yes, yes.

Prior to his injury at Oxmoor, Meeks was actively treated for depression and anxiety. Concerning his previous termination by Oxmoor, he testified:

Q: Now, you were previously terminated from Oxmoor Auto Group; is that correct?

A: Uh-huh.

Q: Is that –

A: Yes, sir.

Q: - yes? Okay. And I think the reasons given for your termination was [sic] due to a poor attitude?

A: I didn't have a poor attitude.

Regarding his return to work at Oxmoor after the fall, Meeks testified:

Q: And when you [sic] back to work, you didn't have any restrictions; is that correct?

A: Not that I knew of. Nobody gave me any.

Q: Okay. And in December, it looks like that you sold over 18 vehicles.

A: I could have.

Q: That's pretty good for a salesman; is that correct?

A: Yeah. For me, it's nothing. I did that all the time.

Q: Okay. I guess compared to others, that's pretty good for a month?

A: For most people it is.

Q: Okay. And then in January, I think you sold six vehicles.

A: Uh-huh.

Q: And you still think that your sales superseded everybody else's sales?

A: Well, I almost made off them [sic] six what I made off them [sic] 20.

Q: What's that?

A: I almost made as much money off them [sic] six as I did the 20.

Q: You're talking about 20 vehicles versus six vehicles?

A: I almost made as much off the six as I did the 20.

Q: Okay. And do you still agree that you were one of the top salespeople at Oxmoor Hyundai when you went back to work?

A: If I made – was working the floor, I'm pretty good.

Q: Okay. You testified that nobody outsold you.

A: Overall, no, they didn't.

Q: Okay.

A: No time that I've ever been in the business at any dealership did anybody outsell me.

Q: Well, I'm talking about after you went back to work after you fell.

A: Oh, well, I don't know. I don't know what anybody else was doing. I was just trying to do what I could.

Q: And you drove to and from work every day?

A: Yeah, I did.

Q: And to sell a car involves a lot of work, right?

A: It does.

Q: I mean, you have to make the sale?

A: Yes.

Q: You have to do the paperwork?

A: Uh-huh.

Q: You have to do – prepare a purchase statement?

A: Uh-huh.

Q: A due bill?

A: Uh-huh.

...

Q: Do the credit application?

A: We did that online, yeah, on the computer, printed out.

Q: You have the trade appraisal if they had a trade, I assume?

A: Yeah, I put their trade in, and then a manager would appraise that and put a number on it.

Q: And you were – I'm talking about after this fall, I mean, you were doing your job well, and you weren't making any complaints?

A: I always tried. Like I said, I don't – I was in a fog a little bit, and I was doing the best I could.

Q: And you weren't receiving any medical treatment when you were working – when you returned back to work at Oxmoor Hyundai?

A: Not that I can think of.

Around the end of January 2016, Meeks' relationship with Oxmoor began to deteriorate:

Q: Okay. But, again, you were terminated for a poor attitude?

A: Oh, I was never told why I was terminated.

Q: Okay.

A: I think I was told I wasn't happy.

Jessica Slaughter ("Jessica"), Meeks' daughter, also testified at the hearing. She testified regarding her father's behavioral changes immediately following his fall at work:

A: He was forgetful. He was having trouble concentrating on things. He would call me to tell me about his day, and then like an hour later, we would talk about it again. And I started realizing that he wasn't realizing that we had already had this conversation. So he was confused, and then I – at first I was telling him, 'Hey, we already talked about this.' And then I realized it was kind of hurting his feelings when I would tell him things like that; so I kind of would just let him talk and go through it at that point.

...

Q: Okay. Did you discuss with him at some point him leaving Oxmoor?

A: I did. I had a conversation with him in January.

Q: How did that come up?

A: One day – the one thing that stuck out the most was he told me he – I asked him how traffic was on his way home from work because Shelbyville Road is busy. And, you know, I knew he was still kind of in a fog and suffering from his concussion, and I was getting more nervous about his behavior.

And I said, 'How was your drive home from work?'

And he was like, 'I don't really know.'

I was like, 'What do you mean?'

He said, 'I don't' – he basically indicated he didn't remember without flat out saying that.

He said, 'I don't really know. I don't really' – and he kind of changed the subject. So he did not remember his drive home from work; so I was concerned that he was putting himself and others at danger at that point.

Jessica provided the following testimony concerning her father's behavior after he was terminated by Oxmoor:

A: Yes. My husband and I both alternate working from home; so we got to the point where – well, he had left the stove on at home twice. My mom would come home from work. The stove was one where he had tried to cook himself something. They have a gas stove. Obviously, that's very unsafe. She was concerned for his safety at that point and so was I. So we started having her bring him to my house – because we only live about 10 minutes apart – on her way to work so that we could keep an eye on him through the day.

They also have stairs in their home. They have a bi-level. And my house, the main floor is one level – because he had tripped on the stairs a couple of times.

Q: Had there ever been incidents where he had left the house and left it unlocked and open?

A: Yes, several times. My mom would come home, and he would be going to the store or something, and the front door is wide open.

Q: Did you ever have to help him pay bills and that type of thing?

A: Yes. His account became overdrawn, and bill people were calling; so at that point, I went to the bank and we got a power of attorney drawn up, and I became his power of attorney for his medical and financial affairs.

Q: Okay. And was that something he had problems with before, keeping up with money and paying bills?

A: Absolutely not. It was quite the opposite. He was very meticulous about those kinds of things.

Q: Okay. Is there anything else you can think of as far as after the incident after he had stopped work that was a change from how he was before the accident?

A: He's had trouble over the past couple of years managing frustration at some point – points in time. We no longer go to restaurants like when they are crowded because he gets very confused if there's a lot of noise and it's a crowded restaurant. Like Texas Roadhouse, for example, that's very acoustic in there. It makes him very anxious, and he's not enjoying it. He's ready to go home at that point. It seems like he almost gets sidetracked with everything going on very easily, and it's not enjoyable for him; so we don't frequent those kind of places.

Jessica testified her father has gotten lost driving to familiar places. She has noticed some improvements in her father's memory and energy in the past six to nine months. He no longer requires daily supervision.

Clayton Curry ("Curry"), the general manager at Oxmoor at the time of Meeks' injury, was deposed on September 6, 2017. The first record of a sale made by Meeks following his November 15, 2015, injury is dated December 3, 2015. Curry testified Meeks returned to his regular job following the injury, and Meeks had a good December.

A: It would be the December. So, I mean, he had 18 ½ units sold in December, so that was a good month.

Q: Is that better than like a typical salesman?

A: Yeah, yeah. Typically you are looking at an average of somewhere around 10 to 12.

Curry explained why Meeks was terminated in February 2016:

A: Because of two things. I mean, it was pretty much back to the old, you know, reason why I was hesitant before, because of attitude and performance, you know, and he was very verbal in one of the meetings, where he started cursing in one of the meetings, where he started cursing in front of the managers and the salespeople and stormed out of the meeting.

And then when I came in I talked to him about it and he just – you know, he had shut down. He was just – didn't really want to talk about it and started pointing blame anywhere other than himself. Like I told him, I said, your reputation precedes you, Steve. And, you know, like I said, I like Steve, but, you know, some things you can't change and you can't change attitude sometimes.

Attached to the Form 101 is a report concerning Dr. Steven Simon's May 19, 2016, Psychological Assessment. Dr. Simon conducted a medical records review, a daily activities assessment, and made behavioral observations. Regarding Meeks' daily activities assessment, Dr. Simon reported as follows:

Mr. Meeks displayed significant difficulty explaining his daily activities. When asked about his day-to-day functioning, he replied, 'I really don't know. I don't really remember.' Mr. Meeks stated, 'I have trouble staying asleep. I don't really know how long I sleep. Everything is harder. It's harder to do everything.' Mr. Meeks reported that he typically watches television all day. When asked if he had friends, Mr. Meeks responded 'not really.' He could not remember if he had friends prior to the injury. Mr. Meeks stated that he cannot cook for himself because 'I forget and leave the stove on, so I just microwave or make a sandwich.' He also reported, 'I can't concentrate on nothing [sic].' Finally, Mr. Meeks reported that he used to play basketball 'with the guys,' but reported that he no longer does. 'Now I shoot by myself. I can't run no [sic] more because of my knee and my head hurts. If I took a shot to the head, it wouldn't be good, so I don't go out there.'

Mr. Meeks reported that the injury has left him with troubling sequelae. He reported, 'My head hurts all the time. I can't remember things. I couldn't remember how

to get to Poplar Level Road and I've lived here all my life. I've left the stove on and walked away from my house and left it unlocked. I left my cat in the backyard. My energy level used to be real high, now I'm just tired. I twisted my left knee when I fell and it's just slowed me down to where I just can't do nothing [sic] like I used to. My balance is off.'

The report further indicates the following assessments were conducted:

Clinical Interview.

Rey Memorization of 15 Items Test.

Wechsler Adult Intelligence Scale – IV (WAIS-IV)

Wechsler Memory Scale- IV (WMS-IV)

WMS-IV Brief Cognitive Status Examination (BCSE)

Wechsler Test of Adult Reading (WTAR)

Repeatable Battery for the Assessment of Neuropsychological Status (RBANS)

Trail Making Test (Parts A & B)

Bender Visual Motor Gestalt Test

Cantor Background Interference Procedure

Beck Depression Inventory-2 (BDI-2)

Beck Anxiety Inventory (BAI)

Dr. Simon set forth the following diagnoses:

331.83 (G31.84) Mild neurocognitive disorder due to traumatic brain injury

300.00 (F41.9) Unspecified Anxiety Disorder

311 (F32.9) Unspecified Depressive Disorder

The above diagnosis is supported by the history that Mr. Meeks has experienced a head trauma with loss of consciousness and subsequent seizure. There is strong, convergent neuropsychological assessment data to support persisting generalized cognitive decline in the aftermath of this head injury which includes memory impairment, information processing problems, psychomotor slowing, focus and attentional problems along with sequelae of depression at this time.

Regarding an impairment rating and causation, Dr. Simon opined as

follows:

Mr. Steve Meeks is a married 58 year old male with a 9th grade education who had worked successfully as an automobile salesperson prior to sustaining a head injury when he reportedly slipped on a wet floor, hit his head against the urinal, lost consciousness and was found on the floor 'in a pile of blood', according to his wife. Mr. Meeks experienced a seizure that evening and was then readmitted to the hospital. In March, 2015, several months after the TBI, he was diagnosed with concussive syndrome and memory impairment per Norton Hospital records.

On a premorbid basis, Mr. Meeks indicated that he was doing fairly well and was one of the highest auto sales producers at his company. He attempted to go back to work after the head injury but was ultimately fired. He reported no prior history of formal psychiatric treatment through he does acknowledge a history of anxiety for which he was treated with and became dependent upon Xanax [sic], indeed, experiencing a Xanax [sic] withdrawal seizure once.

Medical records also indicate the presence of an MRI findings consistent with a remote infarct in the right upper cerebellum. The etiology of this remains unclear but I would not think that this would account for the dramatic cognitive decline and personality change issues which followed, in my opinion, directly from the TBI of 11/15/2015. In the aftermath of this, Mr. Meeks has displayed significant memory impairment, diffuse cognitive decline and dysfunction, emotional blunting, hyperirritability, decreased spontaneity or abulia, all consistent with a post-concussion syndrome.

Though Mr. Meeks had difficulty on the Rey-15 Item Memory Test, this was felt to be more likely due to attentional problems/anxiety as opposed to purposeful dissimulation. Effort otherwise seems good and this evaluator did not form the opinion that Mr. Meeks was feigning or disingenuous regarding his symptom reporting or performance during this evaluation.

As such, it is this evaluator's opinion that Mr. Meeks has a ratable impairment which followed directly from the accident and it's [sic] aftermath which included

significant memory impairment, cognitive decline and personality change.

Within a reasonable degree of psychological certainty, it is this evaluator's opinion, based upon the above findings and information, that Mr. Meeks is experiencing a moderate to severe range neurocognitive disorder at this time with clinically significant anxiety and depression as part of the clinical picture. There appears to be prior history of anxiety, including treatment with Xanax [sic], though the head injury likely exacerbated whatever degree of anxiety existed pre-morbidly.

Utilizing the AMA Guides for the Evaluation of [sic] Impairment (1984, Table One, page 220), it is opined that Mr. Meeks has an upper range Class 3 psychiatric impairment in the areas of affect, thinking and general cognitive functioning ('intelligence'). I would rate this collectively as a 50% degree of impairment with 10% as pre-existing in the form of a pre-existing anxiety disorder. Thus, I would rate Mr. Meeks as having a 40% degree of impairment in these areas as directly attributable to the November, 2015 traumatic brain injury.

Meeks filed the September 10, 2016, Independent Medical Examination ("IME") of Dr. Robert W. Byrd. He performed a physical examination, a mental status examination, and a medical records review. As a result of the mental status exam, Dr. Byrd noted the following:

Mental status exam reveals he is able to recall that it is September. He is oriented to it being Saturday. When asked about the date being 09/10 and if anything happened on 09/11 he is not able to recall any events that occurred on 09/11. He is able to recall the name of the president being Obama. He also knows that Donald Trump and Hillary Clinton are running for president. He is able to perform serial 7's. He is able to spell the word "world" forward but cannot spell it backwards. In terms of his immediate memory, it is within normal limits as he is able to repeat the phrase, "No and, ifs, or buts." However, he cannot recall this phrase after five minutes. Cranial nerves II-XII are grossly intact but he does

demonstrate problems associated with tracking and has nystagmus.

Dr. Byrd diagnosed the following: “1) Left knee injury 2) Injury to the lumbar spine with radicular complaints 3) Traumatic brain injury 4) Post concussive headaches.” Dr. Byrd opined Meeks was not at maximum medical improvement (“MMI”) with respect to his knee or lumbar spine injury. Regarding an impairment rating for Meeks’ brain injury, Dr. Byrd opined:

In terms of his brain injury, he is at MMI for his brain injury. According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 14-1, this individual falls into a Class IV with a marked impairment of his social function and concentration. He is able to perform his activities of daily living but demonstrates significant safety concerns in terms of cooking and leaving the stove on. He cannot be left for longer than short periods of time. He has significant loss of short term memory. The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, do not allow for a specific impairment rating to be given on cognitive deficits but he is not able to maintain employment and has significant safety awareness issues. Overall, I would rate this individual at 50% impairment due to the injury that he has of his brain. His other injuries to his knee and back warrant further workup.

Dr. Byrd’s addendum dated October 19, 2016, contains the following question and answer:

1. Is the presence of that type of injury (meniscus or ACL injury/tear) more consistent with a twisting type injury from a slip and fall versus a fall which resulted from a sudden loss of consciousness?

Answer: Yes. An injury to a meniscus or ACL is more likely due to a slip and fall in which the knee is twisted as opposed to a fall from a loss of consciousness in which the individual would fall forward.

The June 12, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice (left knee and low back), unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, and TTD. Under “Other” is the following: “Idiopathic fall.”

In the August 27, 2018, Opinion, Award, and Order, the ALJ set forth the following findings of fact and conclusions of law:

Notice (Left Knee and Low Back)

19. No proceeding for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof...KRS 342.185

20. It is well-documented that the Plaintiff fell in the restroom of the Defendant on November 15, 2015. The Plaintiff was taken to the hospital in view of witnesses and had obviously sustained an injury. The ALJ finds that due to the nature of the injury and the associated memory and cognitive issues, that the Plaintiff provided notice a [sic] soon as practicable and that the Defendant could not have been prejudiced by any delay in specifying the body parts that were included.

Work-Relatedness and Causation/Idiopathic Fall

21. The ALJ finds that the most plausible and credible medical opinion with respect to the work-relatedness of the Plaintiff's injury is the opinion of Dr. Byrd who credible [sic] reasoned that an injury to the meniscus or ACL was more likely due to a slip and fall wherein the knee is twisted instead of a fall from a loss of consciousness in which a person would tend to fall forward. The ALJ finds that this same theory would rule out an idiopathic fall because of the slip and twist finding.

22. This opinion is based in logic and is essentially unrefuted. The ALJ does not find it credible that the Plaintiff lost consciousness from Xanax withdrawal as there is no evidence that he stopped taking it or from

marijuana use as there is also no evidence that he has ever had such an incident before despite admitted and documented prior use.

23. The ALJ therefore finds that the fall in the bathroom of the Defendant was a slip and fall and was causally work-related.

**Benefits Per KRS 342.730/Injury as Defined by the Act
Pre-existing Active Disability/Unpaid or Contested
Medical Expenses**

24. The ALJ finds that due to the nature of the injury of the Plaintiff, that the testimony of his daughter regarding his condition prior to the injury as compared to afterward was particularly helpful and credible. Ms. Slaughter credibly testified that the Plaintiff began having significant memory issues, hygiene issues, had problems paying his bills and would get lost, all of which was new to him and occurred after the work injury. The ALJ further finds that Ms. Slaughter's testimony lends credibility to the opinions of Drs. Burton and Byrd in this matter.

25. Dr. Byrd diagnosed a left knee injury, an injury to the lumbar spine with radicular complaints, a traumatic brain injury, and post-concussive headaches. Dr. Byrd also determined that the Plaintiff would be unable to maintain employment and had significant safety awareness issues. Dr. Byrd assessed a 50% impairment due to the work-related brain injury.

26. Dr. Burton opined that the Plaintiff sustained a concussion with loss of consciousness and developed selected neurocognitive issues. He also found that the Plaintiff continued to have areas of neurocognitive deficit consistent with a traumatic brain injury and recommended that the Plaintiff engage the services of a "life planner" to enhance his overall level of functioning.

27. The ALJ finds that the Plaintiff has failed to satisfy his burden to establish a compensable injury to the knee or low back and consequently the claims for benefits as a result of these injuries is [sic] hereby **DISMISSED**.

28. Permanent total disability is defined in KRS 342.0011(11)(c) as 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 an injury. *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (KY 2001).

29. “Work” is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton*, 34 SW3d 48 (KY 2000).

30. The ALJ is convinced by the findings of Drs. Byrd and Burton and finds that due to the work-related traumatic brain injury suffered by the Plaintiff, that he is unlikely to be able to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy. The ALJ therefore finds that the Plaintiff is permanently and totally disabled.

31. It is the employer’s responsibility to pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may reasonably be required at the time of injury and thereafter during disability...KRS 342.020.

32. The ALJ finds that based upon the foregoing, the Defendant Employer shall be responsible for the reasonable and necessary medical expenses incurred as a result of the work-related traumatic brain injury found herein.

Temporary Total Disability

33. Temporary total disability means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment...KRS 342.0011(11)(a)

34. The ALJ finds in accordance with the opinion of Dr. Byrd that the Plaintiff attained maximum medical improvement as of September 10, 2016, and that he is

entitled therefore to temporary total disability benefits from the date of his termination from the employment of the Defendant, February 2, 2016, through September 10, 2016.

Credit for Unemployment Benefits Received

35. The ALJ finds in accordance with the foregoing that the Defendant Employer shall be entitled to a credit against the benefits awarded herein for any corresponding unemployment benefits received by the Plaintiff.

In its petition for reconsideration, Oxmoor asserted the same arguments it now makes on appeal. It also asserted the ALJ failed to undertake the five-step analysis required by City of Ashland v. Stumbo, 461 S.W. 3d 392 (Ky. 2015).

In the October 19, 2018, Order on Petition for Reconsideration, the ALJ set forth the following additional findings:

1. The ALJ reiterates the reliance upon the credible and convincing opinion of Dr. Byrd who opined that the Plaintiff would be unable to maintain employment and had significant safety awareness issues. Dr. Byrd also assessed a 50% impairment due to the work-related brain injury.

2. The ALJ further finds that the opinion of Dr. Byrd is supported by the testimony of Ms. Slaughter who testified that following her father's fall at work, he became forgetful, confused, and had trouble concentrating. She said that he left the gas stove on several times, was forgetting to lock the door, and could no longer keep up with his checking account. She explained that previously, he had been very meticulous about such things.

3. The ALJ further finds that the Plaintiff suffered a work-related injury but continued to work thereafter. Mr. Curry's deposition indicated that the Plaintiff's volatility came out of nowhere in a meeting and caused his ultimate termination. He said that the Plaintiff was cursing and disrespectful to management. The ALJ finds that the erratic behavior that eventually caused the Plaintiff's termination constitutes additional evidence that supports

the occurrence of a work-related injury occurring on November 15, 2015.

4. The ALJ finds based upon the foregoing, that the Plaintiff's forgetfulness, inability to concentrate, safety awareness issues, and volatility, that the Plaintiff lacks the ability to earn wages on an ongoing basis.

Oxmoor first contends Dr. Byrd's 50% impairment rating cannot be considered substantial evidence since he did not perform an independent assessment of Meeks' cognitive ability. Oxmoor also contends Dr. Byrd erred by not providing an impairment rating pursuant to Chapter 12 of the 2nd Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). We affirm on this issue.

After conducting a physical and mental status examination of Meeks, Dr. Byrd adequately set forth his rationale for assessing a 50% impairment rating pursuant to the 5th Edition of the AMA Guides. Dr. Byrd's report reveals Meeks had reached MMI for his brain injury, and "falls into a Class IV with a marked impairment of his social function and concentration." He believed Meeks is "able to perform his activities of daily living but demonstrates significant safety concerns in terms of cooking and leaving the stove on." The ALJ is not required to confirm Dr. Byrd's impairment rating by consulting the AMA Guides, second-guessing his examination methodology, and re-calculating an impairment rating based upon his or her own judgment. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Instead, the ALJ is entitled to rely upon a physician's unique expertise. As long as sufficient information is contained within a medical expert's testimony from which an ALJ can determine how the expert derived the impairment rating, the ALJ is free to

adopt that physician's impairment rating. Similarly, any alleged deficiencies by Dr. Byrd in assessing Meeks' cognitive abilities merely goes to the weight and credibility to be afforded his opinion, which was a matter to be decided exclusively within the ALJ's province as fact-finder. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Regarding Oxmoor's argument that Dr. Byrd erred by utilizing the 5th Edition of the AMA Guides in calculating Meeks' impairment rating, the ALJ is entitled to rely upon Dr. Byrd's ability to properly utilize the correct edition of the AMA Guides when calculating an impairment rating for a traumatic brain injury. It is clear from his report that Dr. Byrd consulted Table 14-1 of the 5th Edition of the AMA Guides which pertains to "Classes of Impairment Due to Mental and Behavioral Disorders." As there is no corresponding impairment rating in Table 14-1, the ALJ could reasonably infer Dr. Byrd consulted the 2nd Edition of the AMA Guides in order to derive his 50% impairment rating. The ALJ's reliance upon Dr. Byrd's impairment rating will not be disturbed.

In its second sub-argument, Oxmoor asserts the ALJ's finding Meeks is unable to perform any type of work is not supported by substantial evidence, and the ALJ failed to state with specificity the evidence supporting this finding. We affirm on this issue.

In the August 27, 2018, decision and the October 19, 2018, Order on Petition for Reconsideration, the ALJ stated he relied upon the opinions of Dr. Byrd and Jessica's testimony to conclude Meeks is unable to maintain any form of employment. In the August 27, 2018, Opinion, Award, and Order, the ALJ failed to

specify the precise testimony that was persuasive in his determination Meeks is unable to return to any form of employment. However, the ALJ rendered additional findings in the October 19, 2018, Order delineating the testimony upon which he relied. In Dr. Byrd's September 10, 2016, IME report, he opined Meeks "is not able to maintain employment and has significant safety awareness issues." Dr. Byrd's opinion, standing alone, comprises substantial evidence in support of the ALJ's determination Meeks is unable to maintain any form of employment. However, further bolstering the ALJ's determination Meeks is unable to maintain any form of employment is Jessica's hearing testimony. At the hearing and as outlined above herein, Jessica testified extensively concerning her father's behavioral and memory problems. As the ALJ noted in the October 19, 2018, Order, Jessica testified that, following the work injury, Meeks "became forgetful, confused, and had trouble concentrating." From this testimony, the ALJ could logically conclude Meeks is unable to sustain employment. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979).

The ALJ also stated he relied upon the opinions of Dr. Bradley Burton to determine Meeks is unable to maintain any employment. A review of an undated report by Dr. Burton, generated as a result of his most recent examinations of Meeks conducted on March 19 and March 22, 2018, and as noted by the ALJ in his decision, reveals Meeks "continues to demonstrate areas of neurocognitive deficit" and would benefit from the services of a "life planner" to enhance his level of functioning. We also note that, in his November 30, 2017, deposition, Dr. Burton described Meeks as

being “very dysfunctional.” From this, the ALJ could also discern Meeks is unable to maintain employment.

While the ALJ did not claim to rely upon Meeks’ own assessment of his ability to return to work, his deposition testimony lends further support of the conclusion Meeks is unable to return to any form of employment, as he testified he cannot return to work because his mind is not working right. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

The opinions of Drs. Byrd and Burton, the hearing testimony of Meeks’ daughter, Meeks’ own assessment of his ability to labor, and, as the ALJ stated in the October 19, 2018, Order, his “forgetfulness, inability to concentrate, safety awareness issues, and volatility,” all constitute substantial evidence supporting the ALJ’s determination Meeks is unable to maintain employment. Consequently, we must affirm on this issue.

Oxmoor’s third sub-argument is the ALJ failed to definitively determine Meeks’ total disability resulted from his work injury as required by City of Ashland v. Stumbo, supra. It further argues Dr. Burton never opined Meeks’ symptoms were the result of a traumatic brain injury. We affirm on this issue.

In his decision, the ALJ opined he “is convinced by the findings of Drs. Byrd and Burton and finds that due to the work-related traumatic brain injury suffered by the Plaintiff, that he is unlikely to be able to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy.” This finding is harmonious with Dr. Byrd’s diagnoses of **traumatic brain injury** and **post concussive headaches**, his 50% impairment rating “**due to the injury that he has of**

his brain,” and his opinion that Meeks is unable to maintain employment. (emphasis added). Significantly, Dr. Byrd attributed none of the 50% impairment rating to any other cause.

Oxmoor’s representation that Dr. Burton never opined Meeks’ symptoms were the result of a traumatic brain injury is misleading. Dr. Burton diagnosed Meeks with “concussion w/LOC,” “abnormal neuroimaging,” and “Symbolic Dysfunction” and opined, in relevant part, as follows:

Mr. Meeks continues to demonstrate areas of neurocognitive deficit as detailed above and such a pattern can be consistent with the impact of a traumatic brain injury. He has also demonstrated an appreciable degree of neurocognitive recovery compared to his most recent assessment consistent with what one would expect to see in the presence of a partially resolving TBI. The neurocognitive recovery that he has demonstrated would seem to rule out a dementing disorder that would typically be defined as deteriorative in nature.

Despite Oxmoor’s representations to the contrary, Dr. Burton reiterated this opinion in his November 30, 2017, deposition in which he opined as follows:

A: Well, if he improved from the earlier evaluation, which, as I said in my report, as you probably know, that to the extent that those two reports were comparable, and that was Dr. Simon’s eval, he did seem to demonstrate improvement. Then that would argue for an effect of a neurological insult. And if the improvement, you know, is – comes from after the brain injury or after the concussion, however you want to term it, then that would be more consistent with having had a concussion and having some effects of that.

Q: As opposed to dementia, which, I guess, you would expect to see decline?

A: Correct.

While Dr. Burton, in his deposition, opined Meeks' psychiatric symptoms of depression, anxiety, anger, and frustration are significant clinical problems, he further opined the label "psychiatric problems" does not mean "that those can't develop as a product of having had, you know, brain injury."

The ALJ is free to utilize Dr. Burton's opinions, in conjunction with Dr. Byrd's opinions, as support for his finding that, due to Meeks' traumatic brain injury he is totally disabled. Long acknowledged is the ALJ's right to pick and choose the medical evidence upon which he wishes to rely and draw all reasonable inferences. The ALJ's determination Meeks' total disability is the result of his traumatic brain work injury is supported by substantial evidence and will not be disturbed.

Oxmoor's final argument on appeal is the ALJ erred by awarding both TTD benefits and PTD benefits and starting the award of PTD benefits on November 15, 2015, the date of injury, since Meeks returned to his regular job with no restrictions until he was terminated on February 2, 2016. Oxmoor asserts the award of PTD benefits should commence September 10, 2016, the date upon which the ALJ determined Meeks reached MMI. We vacate the ALJ's award of TTD and PTD benefits and remand for additional findings.

The ALJ awarded TTD benefits from February 2, 2016, the date Meeks was terminated from Oxmoor, through September 10, 2016, the date upon which Dr. Byrd opined Meeks reached MMI. The ALJ awarded PTD benefits beginning on the date of injury to be interrupted by any intervening periods of TTD benefits.

An award of TTD benefits in the context of an award of PTD benefits is often a distinction without a difference. Here, the ALJ awarded TTD benefits from

the date Meeks was terminated from Oxmoor through the date Dr. Byrd opined Meeks reached MMI. *Under this specific set of facts*, Meeks would not be entitled to TTD benefits during this time period. We vacate the ALJ's award of TTD benefits from the date Meeks was terminated from Oxmoor to September 10, 2016.

That said, on remand, the ALJ is requested to determine if Meeks is entitled to TTD benefits from date of injury through the date of his return to Oxmoor, as the record indicates Meeks was off from work following his fall. In doing so, the ALJ must engage in an analysis pursuant to KRS 342.0011(11)(a) and the line of cases beginning with W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993) and spanning to the Supreme Court of Kentucky's most recent guidance in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016).

Also on remand, the ALJ must determine the appropriate date upon which to begin Meeks' award of PTD benefits. The record reflects Meeks returned to his regular job at Oxmoor following his injury. Both Meeks and Curry testified extensively about Meeks' performance at Oxmoor when he returned to work following his fall. While a return to work does not conclusively establish a claimant is not permanently totally disabled, before the ALJ can award PTD benefits commencing on the date of injury in the wake of Meeks returning to work, he must first make a determination Meeks was working at Oxmoor following his injury because of the compassion of his employer. Gunderson v. City of Ashland, 701 S.W.2d 135 (Ky. 1985). In other words, the ALJ must determine that, "in the absence of compassionate treatment by his employer, the claimant was entirely precluded from successful competition for employment in the job market," during the time period in which

Meeks worked for Oxmoor following his injury. *Id.* at 137. If the ALJ cannot make this finding, the award of PTD benefits cannot commence on the date of Meeks' injury. Rather, the award of PTD benefits must commence sometime after his termination by Oxmoor.

Accordingly, to the extent the ALJ found Meeks to be permanently totally disabled, the August 27, 2018, Opinion, Award, and Order and the October 19, 2018, Order are **AFFIRMED**. The award of TTD and PTD benefits is **VACATED**, and this claim is **REMANDED** to the ALJ for additional findings consistent with the views set forth herein and entry of an amended award of TTD and PTD benefits.

ALL CONCUR.

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