

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 4, 2019

CLAIM NO. 201559661

PEGGY COFFEY

PETITIONER

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

K-MART
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING IN PART, VACATING IN PART
& REMANDING

* * * * *

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

STIVERS, Member. Peggy Coffey (“Coffey”) appeals from the March 6, 2019, Opinion and Order, the April 23, 2019, Order and reissued Opinion and Order, and the May 14, 2019, Order of Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). In the March 6, 2019, Opinion and Order, the ALJ awarded permanent partial disability (“PPD”) benefits and medical benefits based upon a 1.25% impairment rating assessed by Dr. Daniel Primm. In the April 23, 2019, Order, the

ALJ determined that he “erroneously interpreted and consequently misstated the rating issued by Dr. [Daniel] Primm.” The ALJ attached to the order an Opinion and Order dated April 23, 2019, dismissing Coffey’s claim in its entirety. The May 14, 2019, Order, denied Coffey’s petition for reconsideration.

Coffey sets forth six arguments on appeal. First, Coffey asserts the ALJ, in the April 23, 2019, Order, erred in reversing his original award and dismissing her claim. Second, Coffey asserts the ALJ erred in finding Dr. Primm’s opinions to be the most credible. Third, Coffey asserts the ALJ erred in ultimately finding no work-related injury. Fourth, Coffey asserts the ALJ erred in finding no permanent impairment rating. Fifth, Coffey asserts the ALJ erred in awarding no benefits. Finally, Coffey asserts the ALJ erred in failing to enhance the award by the two or three multiplier.

BACKGROUND

The Form 101 alleges Coffey sustained work-related injuries to her neck and bilateral upper extremities while in the employ of K-Mart on November 25, 2015, in the following manner: “Pulling heavy roll racks, 18 gallon totes, and boxes full of merchandise. Repetitive [sic] motions.”¹

Coffey was deposed twice and testified at the January 22, 2019, hearing. We will only summarize the testimony relevant to the issues on appeal.

¹ In her June 16, 2016, deposition, Coffey testified that the incident actually took place on November 24, 2015.

Coffey's first deposition took place on June 16, 2016. At the time of her alleged work-related injury, Coffey was working as a "fashion lead assistant." She testified regarding the nature of her duties as follows:

Q: What did you do, then, in that position?

A: Put out roll racks.

Q: And what are roll racks?

A: They're approximately five foot long, six foot high and there's two bars. They would put clothes on both bars.

Q: So you would hang up clothes on the bars.

A: And then take them off. You would pull the roll rack out to the store and put them up.

Q: So if I understand correctly, you would go to the storeroom, put clothing on one of these roll racks, roll it out to where it's supposed to go and then take the clothing back off and put it on whatever they were hanging –

A: Yes.

Q: - is that correct?

A: Yes. And it was always over your head usually.

After her alleged injury on November 24, 2015, Coffey was taken off work for two weeks by Dr. Sharon Benson. Coffey explained:

Q: Now, I know that Sharon Benson looked at your right hand. Did she also look at that part of your arm you complained of?

A: She done an x-ray.

Q: An x-ray of your hand?

A: My shoulder and arm.

Q: Did she take you off work?

A: Yes.

Q: And took you off work for, you say, two weeks, correct?

A: Yes.

When she returned to Dr. Benson after two weeks, Coffey was not released to return to work.

Q: That's fine. Now, she did allow you to go back to work, then, when you saw her the second time?

A: No.

Q: She did not?

A: No.

Q: But did you go back to work on your own?

A: No. I was either off a month or a month and a half and workmen's comp and K-mart wanted me to come back to work doing light duty. So I went back for two weeks, but I couldn't do it.

Q: So you were actually off work more than two weeks that you told me initially; is that correct?

A: It's in her notes.

Coffey returned to light-duty work at K-Mart. She described her work as follows:

Q: What did your light duty work consist of?

A: Working on the computer with my left hand because I couldn't use my right with the mouse, printing signs.

Q: What else did you do?

A: I was a door greeter.

Q: Anything else?

A: I would pull carts out and give them to the customers as they came in when I greeted them.

Q: And you did that for two weeks?

A: Yes.

Q: And then what happened after the two-week period?

A: It was worse, got a lot worse.

Q: When you say it got worse, in what way did it get worse?

A: I couldn't hold a pencil. I couldn't write.

Q: And that would be with your right –

A: Yes.

Q: You're right-handed, right?

A: Yes. I was dropping things, couldn't tell I was gripping them.

Q: So were you taken off work at that point –

A: Yes.

Q: - by Ms. Benson?

A: Yes.

Coffey underwent neck surgery on March 14, 2016.

At the time of her first deposition, Coffey had not returned to work at K-Mart. She testified she did not believe she was able to perform the job she was performing at the time of her alleged injury, explaining:

Q: Have you requested you be returned to work at this point?

A: I don't think I can do my job.

Q: Your job at K-mart?

A: Right. It would be too much on my hand. It's still numb.

Q: So you're waiting for all of that to resolve?

A: Yes.

Q: Do you plan to go back to work, ma'am?

A: I can't with that job.

Q: I'm sorry?

A: I can't with that one particular job, I can't.

Q: You cannot do that job is what you're saying?

A: No.

Coffey was deposed again on December 28, 2017. She testified that she was released to return to work in October 2016 with lifting restrictions imposed by Dr. Phillip Tibbs. She recounted her current duties as follows:

Q: So you're still employed by K-Mart?

A: Yes.

Q: When you went back to work in October of 2016, what was your position that you went back to?

A: Soft line lead.

Q: And that's what you were before, correct?

A: Yes.

Q: Only this time you had a 25-pound maximum lift?

A: Yes.

Q: Did they and do they accommodate that?

A: Yes.

Q: What has changed in the nature of your work; what are you not doing now that you were doing before?

A: Well, if I'm lifting something really heavy, I either ask for help or have one of the other girls help me.

Q: So anything in excess of 25 pounds?

A: Yes.

Q: So you either get help or have somebody else do it?

A: Yes.

Q: How often does that happen on a daily basis, just roughly?

A: Maybe once.

Q: Once?

A: Yes.

Coffey returned to work earning the same wages she earned at the time of her alleged injury and working the same number of hours.

Coffey testified at the January 22, 2019, hearing that she was no longer employed by K-Mart because the store closed. She testified in further detail regarding the 25-pound lifting restriction she was under while working at K-Mart:

Q: So when you went back to work, were you under restrictions?

A: Yes.

Q: Okay. Would you tell us what?

A: I'm not allowed to lift over 100 – I mean, over 25 pounds and I'm still taking medicine. I just – anything that I thought I couldn't do, I just didn't do.

Q: So were you able to lift heavy totes –

A: (interrupting) No.

Q: - overhead?

A: No.

Q: You don't do any overhead work?

A: No.

Q: And you don't lift anything as heavy. What – how do you know what not to lift?

A: You just sort of pull it over and look and see what's inside of it. You know, if – except for the ones on top, you can't do them. You would – I would just have somebody get them down from the top usually.

Q: So Kmart works with you?

A: Yes, they did.

Q: Or they did work with you?

A: Yes.

Q: Let's go on the record now by saying, you're no longer employed at Kmart, right?

A: Right.

Q: And – because of the shutting of the store?

A: Yes.

K-Mart introduced Dr. Primm's March 31, 2017, orthopedic examination report. After receiving a history from Coffey, conducting a medical records review, and a physical examination, Dr. Primm diagnosed the following:

1) Chronic multi-level degenerative disk disease, cervical spine; 2) medical records showing evidence of chronic preexisting neck pain requiring treatment prior to the

11/25/15 work incident; 3) status post two-level cervical discectomies, decompressions, and anterior fusions with excellent clinical result.

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

follows:

At this point in time, I feel Ms. Coffey has experienced a very good clinical result following her two-level cervical discectomies, decompressions, and anterior fusions. The medical records I reviewed, as well as her diagnostic testing, clearly reveal that this patient had longstanding chronic, multilevel, degenerative disk disease involving her cervical spine. In my opinion, her records also seem to indicate she did have active symptomatology prior to her 11/25/15 event. In fact, her chiropractic records reflect that she was treated for primary complaints of neck pain in 2014 and, again, in 2015, when she presented on 11/9/15 complaining of moderate to severe right lower neck symptoms. This was only 16 days prior to her work event. Also, those chiropractic notes show that she continued to treat with her chiropractor only four days prior to the work-reported event. That last note from 11/21/15 indicates, although her neck pain was decreased, it was not resolved.

In terms of an impairment rating, I feel she falls under DRE Category III, Table 15-5, page 392 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. I feel her impairment rating is 25%. In terms of apportionment, I do feel that this lady did have an active preexisting condition prior to the 11/25/15 event. I feel approximately half of the 25% rating is based on an active preexisting rating. Of the remaining 12.5%, I feel that only a very small amount, no more [sic] one-tenth of the 12.5%, is related to the 11/25/15 work event, and that is only on the basis of a further aggravation of her chronic well-established moderate to severe multi-level degenerative changes involving her cervical spine. I point out that her MRI scan did not show any signs of acute injuries following the 11/25/15 event.

Within a reasonable degree of medical probability, the surgical procedure performed by Dr. Tibbs, consisting of an anterior discectomy and fusion at C3-4 and C4-5, was

not attributable to the alleged incident of either 11/24 or 11/25/15.

Finally, I feel that she should be able to continue her regular work, and I agree with the light lifting restrictions with that right arm.

K-Mart also introduced Dr. Henry Tutt's February 26, 2016, medical records review report. Dr. Tutt diagnosed "multilevel cervical spondylosis creating severe spinal stenosis at at least C3-4 and C4-5, warranting cervical surgical decompression." He opined Coffey's condition "has no relationship" with the alleged work-related event, nor was it aggravated, exacerbated, or accelerated by the work-related event.

The January 7, 2019, Benefit Review Conference Order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, exclusion for pre-existing disability/impairment, temporary total disability ("TTD") benefits, application of multipliers, and "IMEs in conformity with the Guides."

In the March 6, 2019, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

14. The ALJ is unable to escape the conclusion that the Plaintiff may have misrepresented her condition when being evaluated in this matter. The Plaintiff specifically denied any prior neck pain or injuries to Dr. Primm and appears to have failed to mention said issues to Drs. Fadel and Roberts also.

15. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.2007), provides that the Defendant has the burden of proof as to the existence and the rating of a pre-existing active condition and that in order for an impairment to be "active" it must be both symptomatic and impairment ratable immediately prior to the work injury.

16. The ALJ finds that the evidence of the Plaintiff's neck symptoms and treatment that predate the work injury are well-established but the records and opinions fall short of the determination that the Plaintiff's condition was also impairment ratable prior to the work injury. The ALJ also finds that the Plaintiff was working without restrictions on the date of the incident and notes that Dr. Primm stopped short of stating that the injury was impairment ratable immediately prior to the work injury.

17. The ALJ further finds however that Dr. Primm had the clearest picture of the Plaintiff's overall condition as he considered the chiropractic records of the Plaintiff in order to reach his initial determination. It is upon this basis, that the ALJ finds that the Impairment rating assessed by Dr. Primm, as related to the work incident, is the most credible in this matter.

18. The ALJ therefore finds that the Plaintiff has sustained a 1.25% whole person impairment as a result of the work injury and that she retains the ability to return to the same type of work, per Dr. Primm. The ALJ further finds that the IME of Dr. Primm was issued in accordance with the Fifth Edition of the AMA Guides.

19. The ALJ finds that the determination that the Plaintiff does not retain the ability to return is additionally supported by her deposition testimony that she returned to the exact same duties including putting out roll racks, stocking shelves, operating the register, completing inventory, and attending to customers. The Plaintiff also confirmed that Dr. Tibbs allowed her to return to that work within the lifting restrictions assessed.

Unpaid or Contested Medical Expenses

20. 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.

21. The ALJ finds that the Defendant Employer shall be responsible for the reasonable and necessary medical treatment rendered as a result of the work-related injury found herein but specifically finds based upon the report

of Dr. Primm that the anterior discectomy and fusion at C3-4 and C4-5, was not attributable to the work injury. This conclusion is supported by the imaging study findings referenced by Dr. Primm indicating a lack of and significant objective evidence of an acute injury occurring on November 24, 2015.

Average Weekly Wage/Temporary Total Disability

22. Based upon the un-contradicted records filed herein, the ALJ finds that the Plaintiff's pre-injury average weekly wage was \$372.81.

23. 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)

24. The ALJ finds that the Plaintiff has not established the entitlement to temporary total disability benefits based upon the credible objective medical evidence filed herein. The Defendant Employer shall therefore be entitled to a credit for the temporary total disability benefits already paid.

25. The ALJ reiterates the reliance upon the opinion of Dr. Primm who has opined that the Plaintiff sustained a 1.25% whole person impairment and retained the ability to return to the same type of work. The ALJ also finds that the Plaintiff has not established any inability to return to work that resulted from a work injury. The ALJ therefore finds that the entitlement to temporary total disability benefits has therefore not been credibly established.

Calculation

26. The Plaintiff's permanent partial disability benefits shall therefore be calculated as follows: $\$372.81 \times 66\frac{2}{3} \times 1.25\% \times .65 = \2.01 .

Coffey was awarded PPD benefits of \$2.01 for 425 weeks and medical benefits.

Both parties filed petitions for reconsideration. Coffey asserted several errors, one being Dr. Primm's impairment rating is not in accordance with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Coffey requested "additional findings regarding any tables, figures, or provisions in the AMA Guides which Dr. Primm used to support a pre-existing active impairment of 12.5%."

K-Mart asserted the ALJ erred by finding Coffey did not have a pre-existing active impairment, as Dr. Primm assessed a 12.5% impairment rating for an "active impairment" prior to the alleged work injury.

In the April 23, 2019, Order, the ALJ held as follows:

1. The ALJ points out that the Defendant is correct in its Petition in that the ALJ erroneously interpreted and consequently misstated the rating issued by Dr. Primm. The ALJ reiterates the reliance upon Dr. Primm due to his more comprehensive grasp of the Plaintiff's medical history. The ALJ finds that the condition identified by Dr. Primm was specifically impairment ratable and he characterized the work related portion of the impairment as an aggravation of her chronic well-established moderate to severe multi-level degenerative changes in the cervical spine. Dr. Primm assessed an impairment rating that he attributed to a pre-existing condition and only assigned a small percentage of that existing impairment to the work-related aggravation. As such, the ALJ continues to find that the opinion of Dr. Primm was the most comprehensive and convincing.

The ALJ, in light of the errors made in the initial Opinion and Award and pointed out in both Petitions, hereby reissues the Opinion in full as attached hereto.

The attached April 23, 2019, Opinion and Order contains the following amended findings of fact and conclusions of law regarding "injury" as defined by the Act and a pre-existing active condition:

14. The ALJ is unable to escape the conclusion that the Plaintiff may have misrepresented her condition when being evaluated in this matter. The Plaintiff specifically denied any prior neck pain or injuries to Dr. Primm.

15. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. 2007), provides that the Defendant has the burden of proof as to the existence and the rating of a pre-existing active condition and that in order for an impairment to be “active” it must be both symptomatic and impairment ratable immediately prior to the work injury.

16. The ALJ finds that the evidence of the Plaintiff’s neck symptoms and treatment that predate the work injury are well-established and that she treated with a chiropractor a mere four days prior to the alleged work injury.

17. The ALJ finds that Dr. Primm had the clearest picture of the Plaintiff’s overall condition as he considered the chiropractic records of the Plaintiff in order to reach his determination despite the Plaintiff’s denial of prior pain or treatment. It is upon this basis, that the ALJ finds that the impairment rating assessed by Dr. Primm, as related to the work incident, is the most credible in this matter. The findings made herein are therefore based thereupon.

18. The ALJ finds that the Defendant has satisfied its burden in the form of the convincing opinion of Dr. Primm, that the Plaintiff had [sic] pre-existing, symptomatic, and impairment ratable condition to her cervical spine on the date of the alleged injury. Dr. Primm assessed the impairment rating in accordance with the AMA Guides and cited Table 15-5 on page 392 in support thereof. [footnote omitted]

19. Dr. Primm assessed a 25% whole person impairment and added that while half was pre-existing, that only a small fraction was causally work-related. Dr. Primm characterized the work-related portion as an aggravation of the pre-existing moderate to severe degenerative changes in her cervical spine. Since Dr. Primm assessed a rating and noted the presence of very recent symptoms, including treatment received four days prior to the date of injury, the ALJ finds that the Defendant Employer has satisfied its burden to establish the presence of a symptomatic and impairment ratable condition existing at the time of the work incident.

Unpaid or Contested Medical Expenses

20. 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.

21. The ALJ finds that the Defendant Employer has successfully demonstrated the presence of a pre-existing and active condition and has not established entitlement to medical treatment in this matter. The ALJ finds that the portion of the injury identified by Dr. Primm that was attributable to the work injury consists of a slight aggravation of the preexisting degenerative changes that already existed. The ALJ therefore finds that there has been no credible evidence presented upon which the ALJ could base an award of medical benefits and specifically finds based upon the report of Dr. Primm that the anterior discectomy and fusion at C3-4 and C4-5, was not attributable to the work injury. This conclusion is supported by the imaging study findings referenced by Dr. Primm indicating a lack of and significant objective evidence of an acute injury occurring on November 24, 2015.

Average Weekly Wage/Temporary Total Disability

22. Based upon the un-contradicted records filed herein, the ALJ finds that the Plaintiff's pre-injury average weekly wage was \$372.81.

23. 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)

24. The ALJ finds that the Plaintiff has not established the entitlement to temporary total disability benefits based upon the credible objective medical evidence filed herein. The Defendant Employer shall therefore be entitled to a credit for the temporary total disability benefits already paid.

25. The ALJ reiterates the reliance upon the opinion of Dr. Primm who has opined that the Plaintiff experienced an aggravation of a pre-existing condition. The credible evidence herein has not established any entitlement to temporary total disability benefits because there has been no credible showing that any of the Plaintiff's lost time was due to a work-related injury.

The ALJ dismissed Coffey's claim.

Coffey filed a petition for reconsideration requesting additional findings detailing why she is not entitled to an award of income and medical benefits based upon Dr. Primm's 12.5% whole person impairment rating or at least an award of TTD benefits.

The May 14, 2019, Order denying Coffey's petition for reconsideration reads as follows:

This matter is before the ALJ upon the Petition for Reconsideration filed by the Plaintiff seeking an award of temporary total disability benefits herein. Accordingly, the following additional findings are hereby entered:

1. The ALJ reiterates the finding that Dr. Primm was credible in his determination that of the 12.5% whole person impairment, only 1,25 % is causally work related.
2. An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his worker's compensation claim. *Snawder v. Stice*, 576 SW2d 276 (Ky. App. 1979).
3. 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).
4. The ALJ finds that the Plaintiff has failed to establish that by virtue of the 1.25% workrelated impairment he was disabled from work for any period of time. The ALJ is therefore unable to establish any entitlement to

temporary total disability benefits. The Petition is therefore hereby **DENIED**.

Coffey first asserts the ALJ erred by reversing the original opinion and order and dismissing her claim entirely.

ANALYSIS

We reverse the ALJ's dismissal of Coffey's claim for failure to prove a work-related injury as set forth in the April 23, 2019, Opinion and Order. Further, we reverse the April 23, 2019, Order responding to both parties' petitions for reconsideration and the May 14, 2019, Order responding to Coffey's petition for reconsideration. We vacate the ALJ's determinations the three multiplier is not applicable, the finding regarding Coffey's entitlement to TTD benefits, and the finding the anterior discectomy and fusion surgery is not work-related, as set forth in the March 6, 2019, Opinion and Order and the reissued Opinion and Order of April 23, 2019, and remand for additional findings.

In the initial March 6, 2019, Opinion and Order, the ALJ relied upon Dr. Primm's opinion, as set forth in his March 31, 2017, report, that "one-tenth of...12.5% is related to the 11/25/15 work event." The ALJ determined Coffey met her burden of proving a work-related injury occurring on November 24, 2015. In relying upon Dr. Primm, the ALJ held "Dr. Primm had the clearest picture of the Plaintiff's overall condition," and found Dr. Primm to be the "most credible" medical opinion in the record. The ALJ further determined that, with respect to a pre-existing active condition, Coffey "was working without restrictions on the date of the incident" and "Dr. Primm stopped short of stating that the injury was impairment ratable immediately prior to the work injury." The ALJ concluded Coffey was not suffering

from a pre-existing active neck condition at the time of the work-related incident, and awarded PPD benefits and medical benefits based upon Dr. Primm's 1.25% impairment rating. The ALJ opined Coffey failed to establish "any inability to return to work that resulted from a work injury" and did not award TTD benefits. The ALJ also found the three multiplier inapplicable, holding Coffey retained the ability to return to her pre-injury work. The ALJ stated the wage records reveal Coffey's "pre-injury average weekly wage was \$372.81 and her post-injury weekly wage was \$374.65," but he failed to award the two multiplier. Finally, the ALJ determined the anterior discectomy and fusion surgery performed by Dr. Tibbs is not work-related.

However, in the reissued April 23, 2019, Opinion and Order, despite still relying on Dr. Primm and characterizing his opinions as "the most credible in this matter," the ALJ dismissed Coffey's claim. In both the April 23, 2019, Order and reissued Opinion and Order, the ALJ determined Coffey's pre-existing active neck condition was impairment ratable based on Dr. Primm's opinions. However, despite acknowledging Dr. Primm's opinion that a small portion of Coffey's impairment rating is due to a *work-related aggravation*, the ALJ dismissed Coffey's claim.

The ALJ's dismissal of Coffey's claim in an order ruling on the petition for reconsideration is erroneous. The Kentucky Supreme Court, in Garrett Mining Company v. Nye, 122 S.W.3d 513, 520 (Ky. 2008), addressed the function of a petition for reconsideration:

KRS 342.281 provides that in considering a petition for reconsideration, "[t]he administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision" This language precludes an ALJ (or, formerly, the "old" Board) from reconsidering the case on the merits

and/or changing the findings of fact. *Wells v. Beth–Elkhorn Coal Corp.*, Ky. App., 708 S.W.2d 104, 106 (1985); *see also*, *Ford Furniture Co. v. Claywell*, Ky., 473 S.W.2d 821, 823 (1971) (where record considered by “old” Board supported its decision, KRS 342.281 could not be used to reconsider case on the merits); *Beth–Elkhorn Corp. v. Nash*, Ky., 470 S.W.2d 329, 330 (1971) (after dismissing employee's claim, “old” Board exceeded its authority by awarding benefits on petition for reconsideration). Thus, ALJ King exceeded his authority by making additional findings and increasing the award in response to a petition for reconsideration.

In its March 19, 2019, petition for reconsideration, K-Mart alleged certain patent errors, including the ALJ’s finding that Dr. Primm did not assess an impairment rating for Coffey’s pre-existing active neck condition. *Importantly, neither party alleged patent errors with respect to the ALJ’s finding of a permanent work-related injury, Coffey’s entitlement to an award of PPD benefits and medical benefits, or the ALJ’s statement that Coffey’s post-injury wages exceeded her pre-injury wages.*² Consequently, even though the ALJ was able to correct his misunderstanding regarding Dr. Primm’s 12.5% impairment rating for Coffey’s pre-existing active neck condition in his order on reconsideration, he was not authorized to reverse his findings of fact regarding Dr. Primm’s medical opinions being the most credible, the existence of a work-related injury, and Coffey’s entitlement to an award of PPD benefits and medical benefits. However, Dr. Primm’s impairment rating attributable to the injury is not without problems, as it is not consistent with the AMA Guides.

² Coffey did request additional findings, however, on all of these issues and more.

In his March 31, 2017, report, Dr. Primm opined Coffey has a 25% impairment rating pursuant to Table 15-5, page 392, of the AMA Guides.³ Dr. Primm opined half (12.5%) of the 25% impairment rating “is based on an active preexisting condition.” Contrary to Coffey’s arguments on appeal, Dr. Primm’s apportionment of one-half of the 25% impairment rating to a pre-existing active condition is within his discretion and consistent with the AMA Guides.⁴ However, Dr. Primm’s assessment of “no more [sic] one-tenth” of the remaining 25% impairment rating is erroneous since Dr. Primm failed to cite to any section, table, or page in the AMA Guides supporting the impairment rating. Consequently, his opinion of a 1.25% impairment rating cannot constitute substantial evidence. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Dr. Primm’s arbitrary “one-tenth” carve-out without any citation to the AMA Guides falls short of this standard. *See Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971). “[A] physician’s latitude in the field of workers’ compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides.” *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006). The only inference that can be made regarding Dr. Primm’s remaining 12.5% impairment rating is that it comprises, *in its entirety*, a work-related aggravation

³ As noted by the ALJ in the reissued Opinion and Order attached to the April 23, 2019, Order, while Dr. Primm referenced a DRE Category III, it is clear that he meant to refer to a DRE Category IV.

⁴ The AMA Guides defines permanent impairment as follows: “An impairment is considered permanent when it has reached maximum medical improvement (“MMI”), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.”

of Coffey's pre-existing active condition. A work-related aggravation of a pre-existing active condition is compensable.

Hence, the ALJ's dismissal of Coffey's claim for failure to prove a work-related injury as set forth in the reissued Opinion and Order of April 23, 2019, must be reversed. On remand, the ALJ must award PPD benefits based upon the 12.5% impairment rating assessed by Dr. Primm which is not due to a pre-existing active cervical condition. As the ALJ relied upon Dr. Primm in the March 6, 2019, Opinion and Order and *all subsequent orders*, he must now rely upon Dr. Primm's 12.5% impairment rating. On remand, the ALJ must also reinstate Coffey's award of medical benefits for the cure and relief of her work-related neck injury.

The ALJ is also held to his original statement, as set forth in paragraph thirteen in the March 6, 2019, Opinion and Order, that Coffey's "pre-injury average weekly wage was \$372.81 and her post-injury average weekly wage was \$374.65." Coffey was no longer working at K-Mart at the time of the hearing because Coffey's particular store had closed. Therefore, on remand, at the very least, Coffey is entitled to application the two multiplier under the tenets articulated in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

We also vacate the ALJ's determination Coffey is not entitled to application of the three multiplier as set forth in the March 6, 2019, Opinion and Order. We note Coffey requested additional findings on this issue in her March 18, 2019, petition for reconsideration which the ALJ did not provide. The record indicates Coffey, in October of 2016, returned to work at K-Mart in the same position she was working at the time of her alleged injury. However, Coffey was working under lifting

restrictions imposed by Dr. Tibbs and adopted by Dr. Primm. Coffey's testimony reflects she asked for help with lifting at least once a day and was unable to perform certain aspects of her job. On remand, the ALJ must set forth additional findings concerning Coffey's entitlement to the three multiplier. Should the ALJ determine the three multiplier is also applicable, he must conduct an analysis pursuant to Fawbush v. Gwinn, 102 S.W.3d 5 (Ky. 2003).

The ALJ's determination Coffey is not entitled to TTD benefits as set forth in the March 6, 2019, Opinion and Order must also be vacated. The record reflects voluntary TTD benefits were paid totaling \$13,247.62. The record also indicates Coffey missed a *minimum* of two weeks of work following her injury and worked light-duty as a door greeter at K-Mart for a certain length of time. Further, when Coffey returned to her pre-injury position at K-Mart in October 2016, she returned with lifting restrictions. In his original March 6, 2019, Opinion and Order, the ALJ determined that, "based upon the credible objective medical evidence filed herein," Coffey is not entitled to TTD benefits and determined K-Mart was entitled to a credit for all TTD benefits voluntarily paid. Should the ALJ, on remand, rely upon Dr. Primm or the other medical opinions in the record, he must set forth a comprehensive analysis of Coffey's entitlement to TTD benefits pursuant to all relevant statutory and case law, including Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016) and all cases preceding Trane. The ALJ cannot provide a cursory conclusory statement regarding Coffey's lack of entitlement to TTD benefits as set forth in the March 6, 2019, Opinion and Order. All parties are entitled to findings

of fact sufficient to apprise them of the basis of the ALJ's decision regarding TTD benefits.

The ALJ's determination the anterior discectomy and fusion surgery is not work-related as set forth in the March 6, 2019, Opinion and Order and the reissued Opinion and Order of April 23, 2019, must also be vacated. While Dr. Primm opined the anterior discectomy and fusion performed by Dr. Tibbs is not attributable to the work incident of November 24, 2015, Dr. Primm's errors with respect to his assessment of a 1.25% impairment rating was not assessed in accordance with the AMA Guides. Further, his characterization of Coffey's work injury as "alleged" and his own opinions regarding a work-related aggravation are contradictory necessitating the ALJ revisiting this issue. If, as described by Dr. Primm, "the further aggravation of Coffey's chronic well established moderate to severe multi-level degenerative changes involving her cervical spine," contributed in any degree to the need for the fusion surgery, the surgery is compensable. *See Derr Construction Co. v. Bennett*, 873 S.W.3d 824 (Ky. 1994). In that respect, Dr. Tibbs' medical records are germane.

Based upon our resolution of Coffey's first argument on appeal, all other arguments on appeal have either been resolved or rendered moot.

Accordingly, the ALJ's dismissal of Coffey's claim for failure to prove a work-related injury as set forth in the reissued Opinion and Order of April 23, 2019, is **REVERSED**. In an amended opinion and order, the ALJ shall award PPD benefits and medical benefits based upon Dr. Primm's 12.5% impairment rating. We **VACATE** the ALJ's determination Coffey is not entitled to the three multiplier, the finding regarding her entitlement to TTD benefits, and the finding that the anterior

discectomy and fusion surgery is not work-related as set forth in the March 6, 2019, Opinion and Order and the reissued Opinion and Order of April 23, 2019. We **REMAND** for additional findings on all issues in accordance with the views set forth herein. Further, the ALJ shall find the two multiplier is applicable to the award of PPD benefits. On remand, should the ALJ determine the three multiplier is also applicable, he must conduct an analysis pursuant to Fawbush v. Gwinn, supra. The April 23, 2019, Order responding to both parties' petitions for reconsideration and the May 14, 2019, Order responding to Coffey's petition for reconsideration are **REVERSED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON JAMES D HOWES **LMS**
5438 NEW CUT RD STE 201
LOUISVILLE KY 40214

COUNSEL FOR RESPONDENT:

HON GUILLERMO A CARLOS **LMS**
444 W SECOND ST
LEXINGTON KY 40507

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY **LMS**
657 CHAMBERLIN AVE
FRANKFORT KY 40601