

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 5, 2018

CLAIM NO. 201557362

VICKIE HURLEY

PETITIONER

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

UNITED PARCEL SERVICE
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. Vickie Hurley (“Hurley”) seeks review of the April 30, 2018, Opinion, Order & Award of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”), dismissing her claim for a work-related back injury and awarding a period temporary total disability (“TTD”) benefits and medical benefits for a temporary work-related right wrist injury. Hurley also appeals from the June 18, 2018, Order denying her petition for reconsideration.

On appeal, Hurley asserts the ALJ erred in dismissing her claim for work-related low back injury and in finding she only sustained a temporary right wrist injury. Hurley also takes issue with the award of temporary total disability (“TTD”) benefits and the duration of medical benefits awarded. Hurley asserts the evidence compels a finding that she is entitled to permanent income and medical benefits for her work-related back and wrist injuries and an additional period of TTD benefits.

The Form 101 alleges Hurley was injured on December 23, 2015, while in the employ of UPS and, when in the course of delivering a package to a resident, she slipped and fell on a steep driveway injuring her hips, tailbone, right wrist, and elbow.

Hurley introduced the records pertaining to the treatment of her right wrist which included the records of her treating physician, Dr. Scott Farner with Kleinert Kutz & Associates Hand Care. Regarding the low back injury, Hurley primarily relied upon the medical records and Form 107-I of Dr. Magdy El-Kalliny, a neurosurgeon.

UPS relied primarily upon the medical records of Dr. Henry Tutt in contesting Hurley’s low back injury claim and Dr. Ronald Burgess’ reports for the right wrist injury claim.

BACKGROUND

Hurley testified at the February 28, 2018, Hearing. On the date of the injury, Hurley was driving a U-Haul truck because UPS had pulled her off the normal route and put her on a different route. Hurley testified that, on the date of the injury, she had stopped at a residence and was gingerly ascending a steep driveway. A lady at

the residence saw her coming up the driveway and came out to meet her and receive the delivery. As she was walking down the driveway, Hurley slipped. She provided the following account of the fall:

A: ... And I turned to walk back down the driveway, and I got maybe – I would say, maybe five feet from the back of the truck, and it got extremely steep right there, and I was just taking small steps, trying to make it back to the truck. And my feet went out from under me, and I sat flat on my bottom side with my feet straight in front of me. And I landed on my hands behind me, more weight on my right side than my left side, but both hands hit firm. And my hips hit firm. I felt like – I thought, gosh, I know what a watermelon feels like if you drop it, because this is how I feel like I've just busted myself wide open. And I couldn't get up. And the lady and the little girl started screaming. Her daughter was – it looked like she may have been around six or seven. She started screaming, Mommy, she fell; Mommy, she fell. And the nurse – or she come down there and she said, I'm a nurse so don't move until we figure out if you've hurt yourself. And I was just sitting there, and I hurt so bad I wanted to cry, but I didn't want to cry in front of them. And I said, just give me just a minute and let me get up. And she said, don't move until we, you know, make sure you're okay.

Although she managed to get to her truck, she could not get in because it was too high. She retrieved her phone from inside the truck and called the UPS Center. She spoke with one of her supervisors who sent another supervisor to the scene. That supervisor took Hurley to the emergency room at St. Joseph London where x-rays of her hip and hand were performed. She was released after a couple of hours. Hospital personnel obtained an appointment for her with Dr. Scott Oster, a hand surgeon in London. Dr. Oster ordered x-rays and an MRI and referred her to Kleinert Kutz & Associates Hand Care Center in Louisville where she saw Dr. Farner. Dr. Farner administered steroid injections and referred her to physical therapy.

Hurley was off work until November 16, 2016. When she returned to work her sole job was to drive a truck because UPS had assigned a helper to deliver the packages. Hurley testified she worked through December 24, 2016, and underwent right wrist surgery on December 28, 2016, which was paid by her personal insurance carrier. She underwent elbow surgery in February 2017, and she returned to work on May 9, 2017. Hurley testified she was off work from December 23, 2015, through November 16, 2016, worked from November 17, 2016, through December 24, 2016, and was off work again from December 28, 2016, through May 2017. She received income benefits through August 10, 2016. The elbow surgery performed by Dr. Farner was also paid for by her health insurance carrier.¹ Hurley testified she returned to work at the same position she held at the time of the injury.

Dr. El-Kalliny treated her low back problems with injections and physical therapy and returned her to work on March 30, 2016, with work restrictions. She has no surgery scheduled as a result of the back injury but underwent pain management for which she paid. She is scheduled to receive an injection from her pain management physician and will later see Dr. El-Kalliny. She denied having any prior treatment of her right wrist or elbow, lower back, and hips prior to December 23, 2015. Hurley testified that approximately 19 years ago, she hurt her back and saw Dr. El-Kalliny. She believed his treatment consisted only of taking x-rays. She missed no work. During the 19 years prior to December 23, 2015, Hurley had no issues with her back except muscles spasms. Prior to December 23, 2015, she did not experience pain that kept her from working. She acknowledged settling a prior worker's compensation

¹ Dr. Farner's record reflects elbow surgery was performed on February 22, 2017.

claim for a January 30, 2006, cervical and thoracic injury. She believed this claim was settled in November 2008. Dr. El-Kalliny treated her for the surgical and thoracic problems associated with this injury.

In dismissing Hurley's low back injury claim and finding she sustained only a temporary right wrist injury, the ALJ provided the following findings of fact and conclusions of law:

**Benefits Per KRS 342.730/Injury as Defined by the Act
Work-Relatedness and Causation**

14. The Plaintiff seeks benefits as a result of an alleged injury to the upper extremities and low back as a result of a fall that took place on December 23, 2015, and has presented the medical opinions of Drs. El-Kalliny and Farner to support the alleged harmful changes to the human organism that resulted.

15. The ALJ finds that the opinions expressed by Drs. Tutt and Burgess are more credible as they are based upon the objective medical evidence available rather than the subjective complaints of the Plaintiff.

16. Dr. Tutt was convincing in his opinion that the Plaintiff suffered a sacral contusion which resolved. He credibly explained the presence of longstanding mild degenerative changes at L5-S1 and found that her low back pain was related to those longstanding degenerative changes. He found no evidence that the Plaintiff sustained a permanent harmful change to her back due to the event of December 23, 2015, and that opinion has convinced the ALJ. The ALJ therefore finds that the Plaintiff's claim for benefits due to a low back injury is hereby **DISMISSED**.

17. With respect to the upper extremity injuries claimed, the ALJ is most persuaded by the opinion of Dr. Burgess who has opined that the Plaintiff has had paresthesias into both hands without diagnosis since 2008. He also pointed out that she had a normal nerve conduction study.

18. Dr. Burgess found that the Plaintiff had pre-existing subjective complaints of numbness without objective correlation and that there was no significant pathology at the time of the arthroscopy. Dr. Burgess concluded that the injury resolved without any harmful change to the human organism as shown by objective findings. This opinion has convinced the ALJ and the ALJ finds that the claim for permanent income benefits as a result of an upper extremity injury is hereby **DISMISSED**.

The ALJ awarded temporary TTD benefits from the date of injury through February 23, 2016, based on the following findings of fact and conclusions of law:

Temporary Total Disability

19. 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).

20. Dr. Burgess has opined that the Plaintiff reached maximum medical improvement eight weeks after the incident or on February 23, 2016.

21. The ALJ therefore finds that the Plaintiff is entitled to temporary total disability benefits from the date of injury through February 23, 2016.

With respect to the unpaid or contested medical expenses, the ALJ provided the following findings of fact and conclusions of law:

Unpaid or Contested Medical Expenses

22. The ALJ has relied upon the opinion of Dr. Burgess for the finding that the Plaintiff reached maximum medical improvement within eight weeks of the date of injury. Dr. Burgess has likewise opined convincingly that the Plaintiff's surgery was neither reasonable or medically necessary for the cure and relief of the work injury.

23. The ALJ finds that all reasonable and necessary medical benefits have thus been paid and that the surgery dated December 28, 2016, is non-compensable.

The ALJ awarded TTD benefits from December 23, 2015, through February 23, 2016. However, the ALJ did not award any period of medical benefits.

Hurley filed a petition for reconsideration taking issue with the ALJ's award of temporary TTD benefits and making many of the same arguments she asserts on appeal. Hurley requested reconsideration of the ALJ's decision or in the alternative "a more definite statement" regarding the adoption of the opinions of Drs. Burgess and Tutt. Significantly, Hurley did not request additional findings of fact.

In the June 18, 2018, Order, the ALJ provided the following:

This matter is before the ALJ upon the Petition for Reconsideration filed by the Plaintiff seeking a redetermination of the calculation of temporary total disability ("TTD") benefits awarded herein, a redetermination of the finding regarding the Plaintiff's alleged back injury, and further explanation of the reliance upon the findings of Drs. Tutt and Burgess. Accordingly, the following additional findings are hereby made:

1. The ALJ finds that the reliance of Dr. Tutt on the X-rays taken of the Plaintiff to identify the presence of longstanding mild degenerative changes at L5-S1 was convincing and persuasive. Dr. Tutt convincingly found that the Plaintiff's low back pain was related to these longstanding degenerative changes and not the work incident. Dr. Tutt found no evidence that the Plaintiff sustained a permanent harmful change to her back due to the event of December 23, 2015. This credible opinion negates any argument for additional TTD related to the low back as the condition was not causally work-related.
2. Likewise, Dr. Burgess based his decision that there was no objective evidence of abnormality of the right wrist following the work incident in question upon the June 8, 2016, EMG/NCV study performed pursuant to a referral from Dr. Farner. He opined that this study was normal

and that the Plaintiff had no neurological changes to the right upper extremity as a result of the December 23, 2015, work incident. Dr. Burgess concluded that the Plaintiff had preexisting subjective complaints of numbness without objective correlation and that there was no significant pathology at the time of the arthroscopy. Dr. Burgess therefore concluded that the injury resolved without any harmful change to the human organism as shown by objective findings. This reliance upon objective medical evidence was also persuasive and convincing. Dr. Burgess credibly placed the Plaintiff at maximum medical improvement for the right upper extremity eight weeks post injury [sic] and added that it resolved without a harmful change to the human organism.

3. The ALJ finds that the combination [sic] of the credible opinions of Drs. Tutt and Burgess have outweighed those of Drs. Farmer and El-Kalliny. The ALJ therefore declines to disturb the result reached herein.

On appeal, Hurley first observes she did not receive any medical treatment for her lower back or right wrist prior to December 23, 2015. She was under no medical restrictions and was able to perform her job without any limitation. Thus, Hurley contends Dr. Tutt's assessment of a 5% impairment rating for a pre-existing active low back condition is not supported by the evidence, as there are no employment or medical records demonstrating this problem. Hurley contends, as a matter of law, absent a showing of a pre-existing active impairment, her condition is a pre-existing dormant condition aroused into disabling reality for which Dr. El-Kalliny assessed a 13% impairment rating attributable to the December 23, 2015, fall. Hurley cites to the findings of the May 18, 2016, and January 3, 2017, MRIs which show severe collapse of the L5-S1 disc and contends this is objective evidence documenting an acute injury resulting from her work-related fall. Hurley maintains Dr. Tutt did not offer an opinion concerning whether the pre-existing condition was active at the time of the work

injury. Since there is no objective medical evidence she had a pre-existing active condition with regard to her low back and legs prior to the injury, and the MRI provides objective medical evidence of an injury, Hurley asserts the ALJ's decision is erroneous.

Regarding her alleged right wrist injury, Hurley first asserts that, based upon Dr. Burgess' findings, "there is no objective medical evidence to establish a pre-existing active condition prior to December 23, 2015." Hurley further asserts Dr. Burgess' opinions, upon which the ALJ relied to dismiss her claim for permanent income benefits, "ran counter to the objective medical evidence." Specifically, Hurley cites the June 8, 2016, nerve conduction study conducted by Dr. Taylor which "showed decreased conduction velocity from the wrist to the 3rd digit." Hurley argues the evidence supports the injury to her right wrist is a permanent one. Next, Hurley argues she is entitled to an award of medical expenses encompassing the two surgeries performed by Dr. Farner. Lastly, Hurley also argues she is entitled to an additional period of TTD benefits from December 28, 2016, through May 9, 2017, the date Dr. Farner placed her at MMI.

STANDARD OF REVIEW

As the claimant in a workers' compensation proceeding, Hurley 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). Since Hurley was unsuccessful in that burden with respect to the low back injury and the finding of only a temporary right wrist injury, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence"

is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

ANALYSIS – LOW BACK INJURY

Dr. Tutt's May 31, 2016, Independent Medical Evaluation ("IME") report reveals Hurley was seen by him in 2008 for an IME and had presented with complaints of neck pain, interscapular pain, numbness, drawing in both hands, and a dull achy pain in the right shoulder extending to her right third, fourth, and fifth fingers. Hurley alleged a January 30, 2006, injury. Dr. Tutt set forth the records he reviewed and his findings concerning the alleged injury to Hurley's cervical and thoracic region. Dr. Tutt also set forth the history Hurley provided regarding the December 23, 2015, injury. He noted that in March 2016, Dr. El-Kalliny had arranged for a lumbar MRI which had not taken place. Hurley related she only had minimal improvement and recited her right wrist complaints. He noted a major complaint of "pain in the region of the coccyx" which extends bilaterally to both buttocks and is associated with frequent spasms and diarrhea. The pain was made worse by sitting but did not radiate to the lower extremities. Under the heading "Past Medical History," he noted Hurley stated that after the birth of her 17-year-old son, she suffered period of severe low back for which she was treated. Although she got over this episode, she told Dr. Tutt of "experiencing intermittent low back pain since."

Dr. Tutt noted the December 23, 2015, x-rays taken by St. Joseph London revealed marked narrowing of the L5-S1 disc space with some vacuum disc changes secondary to advanced desiccation. Due to the loss of disc space height, some osseous foraminal stenosis was noted at L5-S1 in association with short pedicles and mild facet arthropathy. There was no fracture shown.

Dr. Tutt also reviewed the medical records of Dr. Dennis Ulrich. He noted that on January 11, 2016, Hurley reported she was in no acute distress and Dr. Ulrich defined no abnormal findings. His assessment was low back pain.

In assessing Hurley's alleged injury, Dr. Tutt noted the x-rays of the lumbar spine, pelvis, left hip, and wrist were all unremarkable except for showing some longstanding L5-S1 lumbar degenerative changes and some irregularity of the dorsal cortical margin of the triquetrum. He opined Hurley had no lumbar tenderness, a full range of lumbar motion, demonstrated a sitting straight leg raising of 90 degrees plus, and had a normal neurological examination. Dr. Tutt stated as follows:

In the opinion of the undersigned, there is no evidence, from a clinical standpoint, to indicate that Ms. Hurley has sustained **any injury beyond transient myofascial injuries, i.e., buttock contusions and wrist sprains, which, based on standard treatment guidelines, should have reached maximum medical improvement and an endpoint to treatment by this stage, over 3 months later.** To the undersigned, the complaints proffered by Ms. Hurley are completely inexplicable and ungrounded in any anatomic or physiologic principles. The undersigned is of the opinion that she shows no evidence to indicate a lumbar injury and she has no indication for lumbar MRI imaging. (emphasis ours).

Dr. Tutt opined Hurley sustained "buttock contusions and wrist strains/sprains," and found MMI had been reached regarding her coccygeal buttocks complaints. He concluded Hurley had a normal musculoskeletal and neurological examination. He also concluded Hurley had prior complaints of intermittent low back pain since the birth of her 17-year-old son and prior complaints of intermittent neck pain. The imaging studies of that area show only minor degenerative changes consistent with the natural process of aging/living. Dr. Tutt opined recent lumbar

spine x-rays show longstanding degenerative changes involving the L5-S1 joint, severe desiccation changes, and thinning of the disk space. Hurley was capable of returning to her usual duties without restrictions.

UPS subsequently introduced a May 31, 2017, report of Dr. Tutt based on an examination performed that same day. Dr. Tutt reiterated the opinions he previously provided and emphasized Hurley's continuing complaints were considered inexplicable and ungrounded in any anatomic or physiologic principles. Dr. Tutt also noted that since he had seen her, Hurley had undergone treatment by Dr. Farner and two surgeries. Dr. Tutt noted a May 18, 2016, lumbar MRI performed after his first evaluation was said to show some discogenic disease at L4-5 and L5-S1 with no evidence of nerve root compression and no spinal stenosis. A January 3, 2017, MRI scan of the lumbar spine showed the same findings. An EMG and nerve conduction study of June 18, 2016, revealed no abnormality except for the electrophysiologic evidence of mild sensory median neuropathy of the right wrist. He also reviewed the operative notes of Dr. Farner dated December 28, 2016, and February 22, 2017. In addition, Dr. Tutt provided a review of Dr. Burgess' IME dated July 15, 2016. Dr. Tutt stated his re-evaluation of Hurley did not alter his opinion previously expressed in either the IME report dated March 31, 2016, or the April 20, 2016, addendum to that report.² Dr. Tutt stated as follows:

In the opinion of the undersigned, relative to the work event described as occurring on 12/23/2015, Ms. Hurley sustained wrist strains and a sacral contusion, entities for which maximum medical improvement and an endpoint to treatment were achieved within a few weeks to a couple of months, at least, following the work event of

² The April 20, 2016, Addendum report was not introduced by UPS.

record. Subsequent imaging studies, including MRIs of the wrist and of the lumbar spine and an EMG and nerve conduction study of the upper extremities excluded any evidence of any permanent structural alteration occurring subsequent to that work event of record. The undersigned is of the opinion that maximum medical improvement and an endpoint to treatment was long ago achieved and that the right upper extremity surgeries performed on Ms. Hurley were inappropriate and unnecessary and completely unrelated to the work event of record. The undersigned is unable to define any condition sustained by Ms. Hurley relative to the work event of 12/23/2015 which would impose any impairment of disability, and she is considered fully capable of performing her usual job duties without restrictions and, in the opinion of the undersigned, has been capable of performing her usual job duties, without restrictions, since on or about 02/01/2016.

In a subsequent Addendum dated June 20, 2017, Dr. Tutt stated Hurley is considered to have sustained a sacral contusion which had resolved. Hurley had longstanding mild degenerative changes at L5-S1 level for which she had been previously actively symptomatic resulting in some low back pain as a teenager and she suffered intermittent low back pain since that time. There was no evidence Hurley sustained any permanent harmful change to her back due to the December 23, 2015, injury. Further, the mild degenerative changes involving her lower lumbar spine have no relationship to the December 23, 2015, injury. He believed “MMI was long ago achieved.”

Dr. Tutt disagreed with Dr. El-Kalliny’s diagnosis of bilateral sacroiliac joint pain related to the work injury. Dr. Tutt indicated there is no evidence of sacroiliac joint dysfunction and no basis for continuing complaints of sacral pain extending into both buttocks, a symptom which would not be associated with sacroiliac joint dysfunction. Dr. Tutt pointed out the imaging studies showed “no

evidence of recent structural alteration of some minor longstanding L5-S1 degenerative changes and shows no findings associated with nerve root compression.” He also disagreed with Dr. El-Kalliny’s statement regarding work-relatedness of Hurley’s complaints, as there is no evidence, either relative to her examination or imaging studies, of any recent structural alteration of the lumbar spine. He also disagreed with Dr. El-Kalliny’s impairment rating as he assessed a 13% impairment rating, the highest rating permissible for a DRE Category III. Dr. Tutt noted Hurley had a pre-existing complaint of intermittent low back pain correlating her with a lumbar DRE Category II and has “never shown any evidence of a lumbar radiculopathy to equate her with a lumbar DRE Category III, either relative to the work event of record or before the work event of record.”

The Kentucky Supreme Court held in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), that it is possible for a claimant to submit evidence of a temporary injury for which temporary income and medical benefits may be awarded, yet fail in the burden to prove a permanent harmful change to the human organism for which permanent benefits are appropriate. The claimant, in Robertson, failed to prove more than a temporary harmful change as a result of the work injury. Thus, the Court ruled the claimant was not entitled to income benefits or future medical expenses, but was limited to being compensated for only those medical expenses incurred in treating the temporary symptoms that resulted from the work-related incident.

Contrary to Hurley’s assertions, the opinions of Dr. Tutt expressed in three medical reports constitute substantial evidence upon which the ALJ was free to

rely in determining she did not sustain a permanent low back injury. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939)).

Moreover, in line with Robertson, we believe the ALJ could reasonably conclude from that evidence the injury of December 23, 2015, produced only temporary harmful changes involving Hurley's low back which were transient in duration and that fully resolved by the time Dr. Tutt saw her, resulting in no permanent impairment or disability or the need for future medical treatment. Although Hurley testified she experienced no prior back problems, the history she provided to Dr. Tutt reveals she continued to experience intermittent back problems since the birth of her son. Thus, Dr. Tutt concluded there was evidence of longstanding mild degenerative changes without evidence of recent structural alteration. Because of that and her complaints of intermittent back pain, Dr. Tutt concluded Hurley had a pre-existing active 5% impairment rating. That is consistent with the history provided by Hurley and the diagnostic testing. The opinion expressed by Dr. Tutt is certainly within the realm of his expertise. More importantly, the opinions expressed by Dr. Tutt do not establish Hurley had a pre-existing dormant condition which was activated by the December 23, 2015, injury. Dr. Tutt was very specific that Hurley's lumbar problems were symptomatic and pre-existed this work injury.

While Hurley is correct the contrary opinions espoused by Dr. El-Kalliny could have been relied on by the ALJ to support a different outcome in her favor, in light of the remaining record, the views articulated by him represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers,

127 S.W. 3d 554 (Ky. 2003). As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Because the outcome selected by the ALJ is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, *supra*.

We note that the ALJ could not rely upon Dr. El-Kalliny's impairment rating without a specific finding MMI was attained prior to January 3, 2017. In his Form 107-I dated January 3, 2017, Dr. El-Kalliny assessed a 13% impairment rating pursuant to the AMA Guides. In answering the question as to the date MMI was achieved, Dr. El-Kalliny stated, "not yet." The assessment of an impairment rating by Dr. El-Kalliny at that time was in contravention of the AMA Guides, which mandate an impairment rating should not be considered permanent until MMI is obtained. Specifically, Section 2.4 of Chapter 2 reads as follows:

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximal medical improvement ("MMI"). It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living.

Based on the above, Dr. El-Kalliny's impairment rating was not in accordance with the AMA Guides and the statute. Thus, the ALJ could not rely upon

that impairment rating without simultaneously relying upon a different physician's MMI date that pre-dates January 3, 2017, the date of Dr. El-Kalliny's report, as the report in and of itself establishes it was premature.

That said, we vacate the complete dismissal of Hurley's low back injury claim and remand. On more than one occasion, Dr. Tutt emphasized Hurley sustained a sacral contusion which he characterized as a transient myofascial injury. Thus, the ALJ's complete dismissal of Hurley's low back claim was error. On remand, the ALJ must determine the extent and duration of the low back injury and the period during which Hurley is entitled to medical benefits and income benefits, if any.

RIGHT WRIST INJURY

Regarding Hurley's alleged right wrist injury, numerous medical records and medical reports were filed in the record by both parties. Only the most pertinent will be discussed.

Hurley filed a September 28, 2016, letter of Dr. Farner in which he diagnosed Hurley with right wrist pain. He further stated as follows:

- a) Her diagnosis is right wrist pain. Her prognosis is guarded. She is scheduled for a right wrist diagnostic arthroscopy on 12/28/16, but she may have a prolonged recovery, dependent on the findings of her diagnostic arthroscopy.
- b) I feel that her right wrist pain is a direct result of the work related injury of 12/23/15, as she was asymptomatic prior to the fall.
- c) It is difficult to assess the likelihood of future complications associated with the patient's injuries. We will have a more clear cut picture postoperatively.
- d) Ms. Hurley is scheduled for a right wrist diagnostic arthroscopy on 12/28/16 and there will be physical

therapy to follow. It is difficult to give an estimate of the surgical cost due to the fact that the surgical treatment is dependent upon the findings during surgery. There will be surgeon's fees as well as anesthesia fees and facility fees.

e) Ms. Hurley has not reached MMI at this time.

Additional medical records of Dr. Farner indicate Hurley underwent a right wrist arthroscopic debridement of a central triangular fibrocartilage complex tear and radiocarpal and mid carpal joint synovitis on December 28, 2016, and a right cubital tunnel release on February 22, 2017. Hurley was released by Dr. Farner to regular duty work with no restrictions on May 9, 2017.

Dr. Farner's October 19, 2017, record reflects Hurley was complaining of "intermittent numbness and tingling of her small finger after using her hand with exertional activities such as repetitive use of her hand, opening a jar, writing, and repetitive lifting of boxes." Dr. Farner assessed a 2% whole person impairment rating pursuant to the AMA Guides.

UPS filed the July 15, 2016, IME report of Dr. Ronald C. Burgess at Commonwealth Orthopaedic Surgeons. After performing an examination and medical records review, Dr. Burgess set forth the following assessment and impairment rating:

Ms. Hurley's mechanism of fall on an arm behind her would be a consistent mechanism for a lunotriquetral ligament sprain. This would be reported by the history of a questionable fragment off the dorsum of the triquetrum and soft tissue swelling at the time of the original x-ray. Lunotriquetral sprains normally resolve over a period of six to eight weeks and it is felt that she would have been at maximum medical improvement eight weeks from the time of the fall. On today's examination, there is no objective evidence of any residual with full range of

motion and a negative physical examination. She has a higher level of grip strength at level 4 than at level 2, which would be consistent with self-limiting behavior. I feel that no further medical treatment is required and feel that she could return to her previous job duties without restrictions.

Using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, Ms. Hurley is felt to have a 0% permanent impairment with normal range of motion and objective findings. She does not require work restrictions and can work without limitations on lifting.

UPS filed the February 2, 2017, IME report of Dr. Burgess. After performing an examination and medical records review, Dr. Burgess opined that, with respect to the right wrist, Hurley sustained a dorsal triquetral fracture of her right wrist that “was secondary to the fall on December 23, 2015.” He further opined the injury of December 23, 2015, resolved without any permanent change to the human organism, and the surgery performed by Kleinert, Kutz, & Associates was neither reasonable nor necessary nor related to the December 23, 2015, incident, and he had no additional treatment recommendations.

A February 9, 2017, letter by Dr. Burgess states as follows:

Medical records from Kleinert, Kutz & Associates are reviewed, including the operative record from December 28, 2016. At the time of surgery, Ms. Hurley was found to have a central triangular fibrocartilage tear, which was debrided, with otherwise normal findings. The final note was from January 10, 2017, at which time Ms. Hurley was on one-handed duty.

Central tears of the triangular fibrocartilage are degenerative tears rather than traumatic tears. The arthroscopy, therefore, showed no objective evidence of any abnormality to the wrist following the incident on December 23, 2015. The recommendations stated in my February 2, 2017, Independent Medical Evaluation are unchanged in that I feel that Ms. Hurley would be able to

return to regular duty at a time four weeks following that evaluation and has a 0% permanent impairment.

Dr. Tutt, in the aforementioned March 31, 2016, IME, diagnosed a right wrist “strain/sprain.” He had no explanation for her persistent complaints. He further opined as follows:

She has been directed to see an upper extremity orthopedic specialist and the undersigned is not in disagreement with that recommendation, but it is doubtful that any specific treatable entity will be uncovered. She is specifically not considered to have any evidence to indicate a right ulnar neuropathy at the basis of her complaint of right 5th finger numbness. In the absence of any neurological findings or a positive Tinel’s, she would not even appear to show an indication for an EMG and nerve conduction study.

Dr. Tutt opined Hurley has reached MMI with respect to her right wrist injury and can return to her normal job activities without restrictions.

Dr. Tutt offered additional opinions regarding Hurley’s right wrist injury in his May 31, 2017, IME report. In the May 31, 2017, report, Dr. Tutt opined the surgeries performed on Hurley’s right wrist were inappropriate and unnecessary and “completely unrelated to the work event of record.” He further opined:

The undersigned is unable to define any condition sustained by Ms. Hurley relative to the work event of 12/23/2015 which would impose any impairment or disability, and she is considered fully capable of performing her usual job duties without restrictions, since on or about 02/01/2016.

UPS filed the June 8, 2016, EMG/NCV report of Dr. Robert F. Taylor of Taylor Physical Medicine & Rehabilitation, PLLC, which sets forth the following findings:

NCV Findings:

1. Evaluation of the Right median motor nerve showed normal distal onset latency, normal amplitude, and normal conduction velocity (Elbow-Wrist).
2. The Right ulnar motor nerve showed normal distal onset latency, normal amplitude, and normal conduction velocity (B Elbow-Wrist).
3. The Right median sensory nerve showed normal distal peak latency (Palm), normal distal peak latency (Wrist), normal amplitude (Wrist), and **decreased conduction velocity** (Wrist-3rd Digit).
4. The Right ulnar sensory nerve showed normal distal peak latency and normal amplitude and normal conduction velocities.

EMG Findings:

1. All examined muscles showed no evidence of electrical instability.

Impression:

- 1) Electrodiagnostic evidence of mild sensory median neuropathy at the R wrist.
- 2) Given the exam, surprisingly no compelling evidence was seen regarding ulnar neuropathy at the elbow, cubital tunnel or Guyon's canal. The exam was normal.

(emphasis in original)

In her first argument on appeal, Hurley asserts that, based upon Dr. Burgess' medical opinions, "there is no objective medical evidence to establish a pre-existing active condition prior to December 23, 2015." While we agree Dr. Burgess' medical opinions do not establish Hurley, at the time of her December 23, 2015, fall, was suffering from a pre-existing active condition in her right wrist as defined in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), this argument is irrelevant in light of the ALJ's ultimate conclusion. In the April 30, 2018, Opinion, Order &

Award, the ALJ dismissed Hurley's claim for *permanent* income benefits for her right wrist injury. The only factual scenario in which a pre-existing active right wrist condition would have any relevance is one in which the ALJ determined Hurley sustained a permanent right wrist injury on December 23, 2015, *and* a pre-existing active right wrist condition at the time she sustained the injury. Then, before the ALJ could carve out of the permanent impairment rating the percentage of impairment attributable to the pre-existing active condition, the ALJ would first have to find Hurley's right wrist condition was both symptomatic and impairment ratable at the time of the December 23, 2015, fall pursuant to Finley, supra. However, as the ALJ dismissed Hurley's claim for permanent income benefits for failing to prove she sustained a permanent wrist injury on December 23, 2015, this argument is immaterial.

Hurley further asserts Dr. Burgess' opinions, upon which the ALJ relied to dismiss her claim for permanent income benefits, "ran counter to the objective medical evidence." Specifically, Hurley cites the June 8, 2016, nerve conduction study conducted by Dr. Taylor which "showed decreased conduction velocity from the wrist to the 3rd digit." Hurley argues the objective medical evidence supports her claim the injury to her right wrist is permanent.

While objective medical evidence is not required to prove causation, it is required to support the finding of a harmful change in the human organism. "Objective medical findings" is defined by KRS 342.0011(33) as information gained through direct observation and testing of the patient, applying objective or standardized methods. In Gibbs v. Premier Scale Company/Indiana Scale Company,

50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court discussed what may constitute objective medical evidence as defined by KRS 342.0011(33) stating:

In view of the evidence which was presented in this particular case, a question has arisen concerning whether a harmful change must be, or is capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Contrary to what some have asserted we are not persuaded that it must. Furthermore, at least to some extent, we view that question as being off the mark. Likewise, we are not persuaded that a harmful change must be both directly observed and apparent on testing in order to be compensable as an injury.

...

We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

Id. at 762.

In his first IME report, dated July 15, 2016, Dr. Burgess conducted a physical examination which included a battery of testing:

Examination today shows full range of motion of the right wrist. Ms. Hurley states the wrist 'pulls' with full flexion at 60°. There is no visible edema present at the wrist. With palpation, there is no reproducible area that is tender to palpation. There is no tenderness at the subpisiform area or the hook of the hamate or over the lunotriquetral joint. Lunotriquetral stress and ballottement is negative. TFCC stress is negative. The distal radioulnar joint is stable in all positions. Scaphoid rocking is negative. Thumb grind, adduction stress, and Pinkelstein's tests are all negative.

Dr. Burgess also took grip strength measurements and a series of x-rays that were “within normal limits.”

Dr. Burgess’ February 2, 2017, IME report reflects he performed *a second physical examination* and a *second series of x-rays* which were within normal limits. Significantly, Dr. Burgess had the benefit of reviewing Dr. Taylor’s NCV/EMG report at the February 2, 2017, IME.

Dr. Burgess’ two physical examinations, including the host of testing and x-rays, constitute “objective medical evidence” as defined in Gibbs, supra, and this objective medical evidence fully supports Dr. Burgess’ ultimate finding of a dorsal triquetral fracture of the right wrist *that resolved without any permanent harmful change to the human organism*. The ALJ has the discretion to pick and choose amongst the medical evidence in the record. He was certainly not obliged to rely upon Dr. Taylor’s NCV/EMG report, nor does Dr. Taylor’s report constitute the only objective medical evidence in the record. Here, the ALJ choose to rely upon the medical opinions of Dr. Burgess. Dr. Burgess’ opinions regarding the non-permanent nature of Hurley’s injury are fully supported by objective medical evidence and constitute substantial evidence in support of the ALJ’s dismissal of Hurley’s claim for permanent income benefits. As the record does not compel a different result, we must affirm on this issue.³

Next, Hurley argues she is entitled to an award of medical expenses encompassing the two surgeries performed by Dr. Farner.

³ It is important to note here that, while Dr. Burgess was not asked to render additional opinions following the February 22, 2017, cubital tunnel release surgery performed by Dr. Farner, Hurley failed to raise any objections to the admissibility of Dr. Burgess’ opinions pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004).

As set forth in detail herein, Dr. Burgess' opinions, upon which the ALJ relied, constitute substantial evidence in support of his ultimate determination the December 28, 2016, surgery is non-compensable and "all reasonable and necessary medical benefits have thus been paid." In the February 2, 2017, IME report, Dr. Burgess stated "I do not feel that Ms. Hurley's right wrist surgery by Kleinert, Kutz & Associates is directly related to her previous incident, since she had no objective findings of abnormality prior to the arthroscopic procedure and no pathology found during the surgery." Dr. Burgess reiterated this opinion in the February 9, 2017, supplemental letter after reviewing the surgical report. As Dr. Burgess' opinions with respect to the December 28, 2016, surgery constitute substantial evidence in support of the ALJ's determination regarding this surgery, we must affirm.

That said, we note the ALJ, in the April 30, 2018, Opinion, Order & Award, only addressed the compensability of the December 28, 2016, surgery and not the February 22, 2017, cubital tunnel release. However, an inference can be drawn from the ALJ's language that he also deemed the second surgery to be non-compensable, as Dr. Burgess opined Hurley had reached MMI on February 23, 2016, or eight weeks after the December 23, 2015, fall. The ALJ relied upon Dr. Burgess' MMI date. The ALJ also concluded "all reasonable and necessary medical benefits have thus been paid" and his award of TTD benefits terminates on February 23, 2016. However, out of an abundance of caution, we remand the claim to the ALJ for a specific finding regarding the non-compensability of the second surgery.

Finally, Hurley asserts she is entitled to an additional period of TTD benefits from December 24, 2015, through May 9, 2017, the date she was placed at MMI by Dr. Farner following her second wrist surgery.

In light of the fact we are remanding the claim for a determination of the income and medical benefits to which Hurley may be entitled, if any, for the temporary low back injury, we vacate the award of TTD benefits. Any award of TTD benefits must take into consideration the fact that the medical evidence undisputedly establishes Hurley sustained temporary low back and right wrist injuries. Thus, the ALJ must take into consideration the fact that Hurley sustained two temporary injuries in resolving the extent and duration of any income benefits to which Hurley is entitled. Further, since the ALJ's award does not contain a specific award of medical benefits, an award setting out the period of medical benefits to which Hurley is entitled for each injury is required.

Accordingly, those portions of the April 30, 2018, Opinion, Order & Award and the June 18, 2018, Order relating to the determination Hurley did not sustain permanent low back and right wrist injuries are **AFFIRMED**. However, the ALJ's complete dismissal of the low back injury and the award of TTD benefits are **VACATED**. On remand, the ALJ shall enter an amended opinion and order finding Hurley sustained a temporary low back injury, and determining the extent and duration of the injury. The ALJ shall also determine the extent to which Hurley is entitled to TTD benefits and medical benefits. As previously noted, in formulating an award of TTD benefits, the ALJ shall take into consideration the effect of the wrist and low back injuries.

ALL CONCUR.

DISTRIBUTION:

METHOD

COUNSEL FOR PETITIONER:

HON BRUCE R BENTLEY
P O BOX 1926
LONDON KY 40743

LMS

COUNSEL FOR RESPONDENT:

HON CHRISTOPHER G NEWELL
1700 UPS DR STE 103
LOUISVILLE KY 40223

LMS

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
657 CHAMBERLIN AVE
FRANKFORT KY 40601

LMS