Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 20, 2021

CLAIM NO. 201790174

WALSH CONSTRUCTION PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

ROBERT SHEPHERD
WHITTENBERG CONSTRUCTION
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Walsh Construction ("Walsh") appeals from the August 8, 2018, Interlocutory Opinion, the September 6, 2018, Order overruling Walsh's Petition for Reconsideration, the May 4, 2020, Opinion, Award, and Order, the June 3, 2020, Order overruling Walsh's Petition for Reconsideration, the March 4, 2021, Corrected Opinion on Remand, and the March 31, 2021, Order overruling its

Petition for Reconsideration of Hon. R. Roland Case, Administrative Law Judge ("ALJ").

BACKGROUND

As this is the second time this claim has come before us, we incorporate by reference our October 23, 2020, Opinion Vacating and Remanding as if fully set out herein.

The March 4, 2021, Corrected Order on Remand contains the following findings which are set forth *verbatim*:

> **RESPONSIBLE EMPLOYER**
>
> In this case, the Plaintiff worked a short period of time for Whittenberg Construction. However, the evidence indicates that the Plaintiff was having symptoms when he stopped working for Walsh Construction in October of 2016 and in fact, the records indicate his symptoms began in 2015. The evidence from Dr. DuBou indicates there was no responsibility on the part of Whittenberg Construction for the Plaintiff's symptoms. Dr. Gabriel indicated Walsh Construction was the responsible employer.
>
> The Defendant, Walsh Construction, essentially argues they should not be responsible because the Plaintiff did not receive his last injurious exposure while employed by them. However, this is not an occupational disease claim but rather is a cumulative trauma claim. Although, the ALJ has always thought cumulative trauma claims should be treated as occupational disease claims rather than injury claims, the Courts have not adopted that standard. Quite simply, in this case, there is no evidence indicating that the Plaintiff's work for the Whittenberg Construction contributed to his condition. Dr. DuBou was very emphatic in his report and Dr. Gabriel also agreed. In this case, the Defendant-employer Walsh Construction, has failed to show any connection between the Plaintiff's condition and his work for Whittenberg Construction. Therefore, it is found that Walsh Construction is the responsible

employer herein based upon the evidence from Dr. DuBou as well as Dr. Gabriel.

DATE OF MANIFESTATION OF DISABILITY

In this case, the Workers' Compensation Board remanded to the ALJ noting: "thus, the claim must be remanded for the ALJ to set forth a specific date of injury, i.e., when the disability arising from the injury became manifest." The specific remand order indicated: "This claim is REMANDED to the ALJ for a decision determining the date Shepherd sustained a cumulative trauma injury as defined herein, the appropriate award of income and medical benefits, and a resolution of all remaining contested issues."

The parties requested an opportunity to brief the issue on remand and the ALJ has reviewed the respective briefs. Counsel for the Plaintiff argues the correct date is October 1, 2016 as alleged on the Form 101. Although counsel asserts it is clear the most appropriate date of injury for the subject cumulative trauma is October 1, 2016, no reason is given for that date. There simply is no testimony associating October 1, 2016 with this claim. Counsel for Whittenberg Construction also argues the alleged date of the injury on the application is the correct date of injury. Counsel submitted there should simply be a finding the correct date of injury to be October 1, 2016, the date listed on the Form 101 by the Plaintiff. However, again neither counsel gives any basis for selecting the date of October 1, 2016 other than the allegation on the Form 101. The ALJ is unable to find any evidence or testimony concerning October 1, 2016. It appears to be merely a date plucked from thin air.

Counsel for the Defendant, Walsh Construction, essentially argues the date of manifestation for purpose of statute of limitations and notice is December 29, 2016, when the Plaintiff was informed by Dr. DuBou his condition was work-related and same is also the date of manifestation of disability. Walsh argues that the date of manifestation and the date disability and manifestation are the same.

There is no controversy in the record concerning date of manifestation for the purpose of statute of

limitations and notice. There is no argument the claim is barred by either statute of limitations or lack of notice. The issue is the date of "manifestation of disability". As the Board noted in Special Fund vs. Clark, 998 SW2d 487, 490 (KY 1999) the Kentucky Supreme Court defined manifestation in a cumulative trauma injury as follows:

> In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

The language in that decision indicates manifestation of disability refers to disabling symptoms which lead the worker to discover that a work-related injury has been sustained. In this case, Plaintiff began having symptoms late 2015 while working for Walsh Construction. He again started having symptoms in October of 2016 and the symptoms had progressed to the point he called and made an appointment with Dr. DuBou either while he was still working for Walsh Construction or before he began working for Whittenberg Construction. The ALJ is persuaded the manifestation of disability occurred when the symptoms led the Plaintiff to call and make the appointment with Dr. DuBou. At that point they were sufficiently disabling that he sought medical attention. This date was either while he was still working for Walsh Construction or during the period before he went to work for Whittenberg Construction.

Unfortunately, the date Plaintiff called to make the appointment is not in the record. This claim was remanded for the ALJ to find the specific date of manifestation. The ALJ finds the specific date is the date he called and made the appointment with Dr. DuBou. Although the ALJ can identify the specific date that manifestation occurred, that specific date is not identified in the record. The record does however reveal that this date was prior to going to work for Whittenberg Construction. Because the Award is commenced from the date of manifestation, the ALJ must adopt some

date. After reviewing the record, it would appear the Plaintiff last worked for Walsh Construction on October 23, 2016 and was terminated on October 24, 2016 for either reusing to take or failing a drug test. The ALJ finds the date of manifestation to be October 23, 2016, the last day Plaintiff worked for Walsh Construction. This may or may not be the actual date he called to make the appointment with Dr. DuBou but it is consistent with Plaintiff's testimony that he made the appointment while he was still working for Walsh Construction or before he went to work for Whittenberg Construction.

The ALJ simply sees no basis to adopt October 1, 2016 as the date of manifestation as urged by Plaintiff and Whittenberg Construction. The ALJ believes the cumulative trauma manifested for purpose of disability prior to Plaintiff's going to work for Whittenberg Construction and believes the date of manifestation for statute of limitations and notice is different than the manifestation of disability. The ALJ finds October 23, 2016 to be the date of manifestation of disability. This is consistent with the Plaintiff's testimony as well as the opinions of Dr. DuBou and Dr. Gabriel.

Although the ALJ is comfortable with finding Walsh Construction the responsible employer, based on the opinions of Dr. DuBou and Dr. Gabriel that the employment with Whittenberg Construction did not contribute to the development of cumulative trauma, the ALJ believes it is very difficult to find an exact date of manifestation of disability when the injury is due to a cumulative injury that develops over years of work. A cumulative trauma injury is an insidious condition and it is near impossible to pinpoint the exact date of its development much less a date of "manifestation of disability" from same. In any event, the ALJ finds the date of manifestation of disability is prior to Mr. Shepherd beginning work for Whittenberg Construction and finds the date of disability is the date he called to make the appointment with Dr. DuBou. The ALJ adopts the last date Mr. Shepherd worked for Walsh Construction as the date of "manifestation of disability" since the evidence indicates the date he called to make the appointment was probably in October of 2016 and

> before he went to work for Whittenberg Construction and the ALJ has to pick some date consistent with same.
>
> In view of the finding of the manifestation of disability being October 23, 2016, the Award will be amended to reflect same with the commencement of the award being from that date. In all other aspects, the ALJ adopts his original Interlocutory Opinion of August 8, 2018 and Opinion of May 4, 2020 on all other issues.

Walsh timely filed a Petition for Reconsideration. The March 31, 2021, Order overruling Walsh's Petition for Reconsideration contains the following additional findings:

> …
>
> Having reviewed the Petition for Reconsideration, it is nothing more than an attempt to reargue the merits of the claim. All the issues raised by Walsh Construction were carefully considered and addressed in the Opinion on Remand.
>
> In the Opinion the ALJ discussed the basis for his finding the date of manifestation was October 23, 2016. The ALJ remains persuaded the date of manifestation is the date the symptoms were sufficient enough to cause Mr. Shepherd to make the appointment with Dr. DuBou. This date was prior to going to work for Whittenberg Construction. Although the specific date of that call is not established in the record, the evidence establishes it was prior to Mr. Shepherd going to work for Whittenberg and the ALJ selected the last date Mr. Shepherd worked for Walsh as the date of manifestation.
>
> The ALJ did not disregard the medical evidence of record but, in fact, the medical evidence of record clearly establishes that Mr. Shepherd's employment at Whittenberg Construction did not contribute to his condition.
>
> Concerning the request for further findings regarding when the Plaintiff knew his condition was work-related, the record is clear this date was in December 2016 when he was told it was work-related by Dr. DuBou.

> Concerning the request for further findings on the application of Hale vs. CDR Operations, Inc., 474 SW3d 129 (Ky. 2015), the ALJ has reviewed that decision on numerous occasions. That case merely held there was no apportionment in cumulative trauma claims. It specifically does not indicate cumulative trauma claims are to be treated as occupational disease claims. As the ALJ indicated in his original Opinion and the Opinion on Remand, he has always believed cumulative trauma claims should be treated as occupational disease claims, but that has never been adopted by the courts. There is nothing in the Hale case which indicates cumulative trauma claims are treated similar to occupational disease claims. The Hale case merely held there was no apportionment in cumulative trauma claims.
>
> Having considered the issues raised by the Defendant Walsh Construction, the ALJ is persuaded they are without merit and merely an attempt to reargue the merits of the claim. For the above reasons, the Petition for Reconsideration by Walsh Construction is overruled.

ANALYSIS

Walsh first asserts the ALJ erroneously found it the employer liable for all benefits based upon the determination Shepherd's cumulative trauma injury occurred on October 23, 2016. On this issue, we affirm.

As an initial matter, we note Walsh's first argument intermittently confuses the date Shepherd's disability arising from the cumulative trauma injury presented or manifested with the "date of manifestation" as defined in Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). This confusion is revealed within the following language:

> - The Board previously instructed the ALJ to determine the date Mr. Shepherd's injury became manifest. **As the Board noted, an injury caused by cumulative trauma manifests when 'a workers' [sic] discovers that a**

> **physically disabling injury has been sustained [and] knows it is caused by work.'**
>
> - Despite choosing this date, **Mr. Shepherd repeatedly testified that he did not know what was causing his symptoms**. **Mr. Shepherd noted that he had 'no idea' what caused his condition and he did not report it to his supervisors at Walsh because he 'didn't know what was causing it.'**
>
> - Mr. Shepherd repeatedly testified that he had no idea what was causing his symptoms until he treated with Dr. DuBou, while working for Whittenburg [sic]. **He had no knowledge or belief that he had a work-related injury until Dr. DuBou informed him of that fact, while he was working for Whittenburg [sic].** The injury manifested during the second appointment with Dr. DuBou on December 29, 2016.
>
> - In the alternative, Walsh submits that either November 17, 2016 or December 8, 2016 is the date the injury became manifest. November 17, 2016 is the date that Mr. Shepherd first sought treatment with Dr. DuBou and told Dr. DuBou what he does for a living. **This is the first date in which any evidence exists to support a finding that Mr. Shepherd was symptomatic and knew his symptoms were caused by work.** (Emphasis added).

Walsh fails to grasp an understanding of the distinction between the date Shepherd's cumulative trauma injury manifested (i.e. became symptomatic) and the date of manifestation as defined in Alcan Foil Products v. Huff, supra. However, we will address whether substantial evidence supports the ALJ's determination Shepherd's cumulative trauma injury manifested on October 23, 2016.

In our October 23, 2020, decision the ALJ was directed to determine the date Shepherd's cumulative trauma injury manifested and state the "specific medical and lay evidence" supporting his finding. The March 4, 2021, Corrected

Opinion on Remand firmly demonstrates the ALJ relied upon the opinions of Drs. Richard DuBou and Thomas Gabriel in conjunction with Shepherd's testimony in complying with our instructions. The ALJ referenced the opinions of Drs. DuBou and Gabriel that Shepherd's work at Whittenberg Construction ("Whittenberg") did not contribute to his cumulative trauma injury. A review of Dr. DuBou's April 27, 2017, letter reveals the following opinions:

> 1. Did Mr. Shepherd have an active physical impairment before beginning work with Whittenberg Construction on November 7, 2016? YES
>
> 2. Do you believe Mr. Shepherd's work with Whittenberg Construction over the 10 days prior to your November 17, 2016 examination lead to any harmful change to his physical condition as presented on that initial visit? NO
>
> 3. Do you believe Mr. Shepherd's work with Whittenberg Construction over the 10 days prior to your examination lead to the results found in the EMG testing? NO
>
> 4. Did Mr. Shepherd's condition worsen at all from the time of your initial examination until the January 20, 2017 surgery? NO
>
> 5. Do you believe that Mr. Shepherd was a surgical candidate prior to the beginning of his employment with Whittenberg Construction on November 7, 2016? YES
>
> 6. Do you believe that Mr. Shepherd's work with Whittenberg Construction from November 7, 2016 until the surgery on January 20, 2017 made him any more of a surgical candidate than he was prior to his employment with Whittenberg? NO

Consistent with Dr. DuBou's opinions, Dr. Gabriel's August 14, 2017, Independent Medical Examination ("IME") report contains the following pertinent language:

> Within a reasonable degree of medical probability, it would be my opinion that Mr. Shepherd's complaints of bilateral upper extremity peripheral nerve compression neuropathy is primarily related to his occupational activities over the years, and more specifically, related to his employment history with Walsh Construction. It is fairly well supported in the medical literature that vibratory tools, jackhammers, air guns, and impact tools can lead to symptoms of peripheral nerve compression.
>
> It would be my impression that Mr. Shepherd's bilateral upper extremity peripheral nerve compression neuropathies are due to the trauma arising from the patient's daily work activities in bridge construction, which reached a level of disabling reality and active symptomatology during his employment with Walsh Construction from 2012 to 2016.

The ALJ was also convinced by Shepherd's May 23, 2017, deposition testimony that his symptoms actually began in 2015, he made an appointment with Dr. DuBou while still employed by Walsh, and he did not experience a worsening of his symptoms while working for Whittenberg. The pertinent deposition testimony is as follows:

> Q: Where were you working when the symptoms started in late 2015?
>
> A: For Walsh Construction.
>
> …
>
> Q: And am I correct in understanding that during your time at Whittenberg Construction, those symptoms progressed or worsened to the point that you sought medical attention?
>
> A: No.
>
> …
>
> A: They didn't get worse. They were the same.

Q: And when you say they were the same, what do you mean by that?

A: They still hurt just as bad as they did working for Walsh.

…

Q: How long did you have to wait to get into Dr. DuBou's office?

A: A couple – maybe a couple of weeks.

Q: No more than two weeks?

A: No more than two weeks.

Q: All right. So you would have called about two weeks in advance of your November 17, 2016 –

A: Yes. Nine days, I was off –

Q: Hold on a second. Let me finish.

A: I'm sorry. I thought you were.

Q: You're fine. So you would have called approximately two weeks before your November 17, 2016 appointment with Dr. DuBou?

A: Yes.

Q: And that would have put us around the November 1st to 3rd time range, correct?

A: Somewhere around there, yes.

Importantly, the record reveals Shepherd began working for Whittenberg on November 7, 2016.

The evidence discussed herein comprises substantial evidence supporting the finding that the date of injury or manifestation of Shepherd's cumulative trauma injury is October 23, 2016, his last day of employment with

Walsh. "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Faced with no definitive date in the record relating to when Shepherd called Dr. DuBou to schedule his appointment, within his discretion the ALJ was free to infer a date, based upon the evidence. Shepherd's deposition testimony indicates he called to make the appointment approximately two weeks before the November 17, 2016, appointment, placing the date of the phone call during the first week of November. However, the ALJ's choice of October 23, 2016, which is only one week prior, is harmless error. Because the finding of October 23, 2016, as the date Shepherd's symptomatology began is consistent with the medical opinions of Drs. DuBou and Gabriel specifying Shepherd's cumulative trauma injury became symptomatic *before* he started working for Whittenberg, we may not disturb the finding.

Walsh also asserts cumulative trauma injuries should be treated as occupational injury claims pursuant to Hale v. CDR Operations, Inc., 474 S.W.3d 129 (Ky. 2015). Thus, in Walsh's view, because Shepherd's last injurious exposure to the offending vibratory tools occurred while working for Whittenberg, it is the liable employer. We are unconvinced by Walsh's argument on this issue.

Hale v. CDR Operations, Inc., supra, stands for the proposition that in cumulative trauma injury claims, the employer on the date of manifestation of impairment and disability is solely liable for the effects of the claimant's injury despite the fact his/her prior employment may have contributed somewhat or substantially to the injury. In other words, as correctly noted by the ALJ in the

March 31, 2021, Order, the Hale Court held there is no apportionment in cumulative trauma claims. However, Hale did hold that cumulative trauma claims should be treated as occupational disease claims resulting in the employer on the date of last injurious exposure bearing all liability.

Walsh also argues the ALJ erred in finding the surgery performed by Dr. Amitava Gupta to be compensable. We disagree. On March 26, 2018, Walsh filed a Form 112 Medical Fee Dispute contesting the reasonableness and necessity of the following proposed surgery by Dr. Gupta: "Left Cubital Tunnel Release, Anterior Subcutaneous Transposition of Ulnar Nerve, Re-release of Left Carpal Tunnel and Fat Pad Flap Coverage."[1] *Significantly, Walsh did not contest the work-relatedness of the proposed surgery.* Attached to the Form 112 is the March 22, 2018, Utilization Review report of Dr. Lisa Reznick who denied the request for surgery because conservative therapy such as corticosteroid injections had not been attempted. Dr. Reznick observed, in relevant part, as follows: "objective findings in the most recent medical report were limited to justify the need for surgery. Furthermore, exhaustion of lower levels of care was not established. There was no prior postoperative therapy from his 05/19/17 surgery. Guidelines also recommend corticosteroid injection trial prior to surgery." However, as noted by the ALJ in the August 8, 2018, Interlocutory Opinion, Dr. Gupta tried injections. His medical records of March 29, 2018, indicate Dr. Gupta "[i]njected both carpal tunnels." In this same medical record, Dr. Gupta reiterated the need for the proposed surgery stating as follows: "Patient will require surgery but his surgery was denied by his

[1] The record shows the surgery was ultimately performed by Dr. Gupta on February 20, 2019.

workers compensation. The workers compensation wants the patient to receive carpal tunnel injections."

In conjunction with Dr. Gupta's opinions, the ALJ also relied upon Shepherd's April 25, 2018, hearing testimony, elicited approximately one month after the injections, that his condition was not much better than before his original two surgeries. The pertinent testimony is as follows:

> Q: All right. You're still seeing Dr. Gupta?
>
> A: Yes, sir.
>
> Q: When did you last see him, do you recall?
>
> A: I believe it was last month sometimes.
>
> Q: All right. We have filed records to show March 28th; does that sound about right?
>
> A: That makes sense.
>
> Q: And what did Dr. Gupta do for you at that time?
>
> A: He gave me injections.
>
> Q: Tell Judge Case what is the current condition of each of your upper extremities, your right and your left arms and hands.
>
> A: They're not much better than they were before the first surgeries.
>
> Q: And, again, what are the symptoms that you're experiencing?
>
> A: They're numb. I can't hold anything. I have zero grip. No offense, I have the grip of a girl and I'm a construction worker and I don't know how to deal with that. I mean, I have done this half my life – over half my life.

Q: Have you and Dr. Gupta discussed any other treatment besides these injections?

A: Surgery.

Q: Do you want to undergo surgery?

A: Yes, I do.

Q: Why?

A: I would like to get fixed so I can go back to work. That's what I do.

Q: How old are you again?

A: 47. I'm not ready to be done.

In the August 8, 2018, Interlocutory decision, the ALJ indicated he relied upon Dr. Gupta's opinions and Shepherd's April 25, 2018, Interlocutory Hearing testimony in finding the surgery reasonable and necessary. This evidence comprises substantial evidence supporting the ALJ's determination regarding the surgery in question. We also note Dr. Reznick's denial was contingent upon a failure to attempt more conservative treatment such as corticosteroid injections. However, Dr. Gupta injected both carpal tunnels on March 29, 2018, essentially eradicating the rationale behind Dr. Reznick's denial. Shepherd's April 25, 2018, hearing testimony that he was still experiencing a level of pain one month after the injections comparable to the pain he felt before his original two surgeries performed by Dr. DuBou further erodes Dr. Reznick's opinions. As substantial evidence supports the determination the surgery performed by Dr. Gupta on Shepherd's left wrist and elbow is reasonable and necessary treatment of his work-related cumulative trauma injury, we must affirm.

Walsh further asserts the ALJ erred by awarding benefits based upon the 12% impairment rating assessed by Dr. Ronald C. Burgess. We disagree.

Shepherd introduced the October 8, 2019, IME report of Dr. Theodore Gerstle. After performing a physical examination and a medical records review, Dr. Gerstle diagnosed the following: "1. Bilateral carpal tunnel syndrome caused from cumulative trauma while employed at Walsh Construction. 2. Cubital tunnel syndrome on the left caused from the cumulative trauma while employed at Walsh Construction." Dr. Gerstle opined Shepherd achieved maximum medical improvement ("MMI") on August 8, 2019. Dr. Gerstle's calculations of an impairment rating is as follows:

> Mr. Shepherd does have a ratable injury in regards to both upper extremities according to the AMA *Guides to the Evaluation of Permanent Impairment*, 5th Edition. First, in reference to Mr. Shepherd's right upper extremity, he would qualify for 5% upper extremity impairment according to 495 under Carpal Tunnel heading, one needs to reference the second criteria for the impairment. His exam is consistent with residual carpal tunnel syndrome and 5% upper extremity impairment.
>
> In regards to the left upper extremity, on Page 495 under Carpal Tunnel section, 5% of individuals that have carpal tunnel syndrome may have a normal nerve study although the patient has clinical findings consistent with recurrence of his left carpal tunnel syndrome as well.
>
> Mr. Shepherd has abnormal two-point discrimination with dysesthesia over the median nerve distribution of the left hand after surgical intervention. This qualifies, in my opinion again, as 5% upper extremity impairment.
>
> In calculating sensory impairment involving the ulnar nerve, one must refer to Table 16-15 on Page 492. The sensory deficit at 7% can be found in this table and that would be an impairment of no portion of ulnar nerve functioning from its sensory standpoint. This was then multiplied by 40% found under Table 16-10 on Page

> 482; a grade-3 classification is then awarded. The end value would be 3% whole body impairment.
>
> Next, calculating any motor deficit would be completed using Table 16-15 on Page 492 and when doing so obtain a 46% under the ulnar nerve column. Table 16-11 on Page 484 lists different grades; Mr. Shepherd would then be classified under grade-4. A 20% value is then multiplied by 46, giving a 9% whole body permanent partial impairment.
>
> One would initially combine the two upper extremity impairments using the Combined Values Chart on Page 604. This then would equal 10% upper extremity impairment. One then converts whole person using Table 16-3 on Page 439, this equals a whole body permanent partial impairment of 6%.
>
> One then combines the values that were calculated using the Combined Values Chart on Page 604. Therefore, the total whole body permanent partial impairment would equal 17% due to the cumulative trauma sustained by Mr. Shepherd while working at Walsh Construction.

On April 6, 2020, after reviewing Dr. Gerstle's October 8, 2019, IME report, Dr. Burgess set forth the following opinions:

> I reviewed an Independent Medical Evaluation by Dr. Gerstle dated 10/08/19. On physical examination, under neurologic and impression, he has normal sensation in the median nerve bilaterally with no evidence of atrophy. In the ulnar nerve distribution, he states there is no hypothenar atrophy bilaterally and 6-mm two-point discrimination in the left ulnar nerve distribution. His grip strength testing simply says that the interossei are 4/5 on the left vs. 5/5 on the right.
>
> He subsequently gives a 5% impairment to both upper extremities for following carpal tunnel release. He then gives a grade 3 sensory loss in the ulnar nerve distribution, and when he multiplies the 7% of the upper extremity possible by 40% he gives a 3% impairment of the whole person. For the motor impairment, based apparently on the limited interossei of 4/5, he gives a 20% grade 4 loss, which of the 46% he states is a 9% whole-body impairment.

> Dr. Gerstle's sensory examination within the ulnar nerve distribution on the left side is actually normal with 6-mm two-point discrimination and no light touch measurements done. He does the limited evaluation that the interossei are 4/5. He also states that grip strength is 4/5, but apparently did not do a Jamar dynamometer. In examination of his AMA evaluations for the ulnar nerve of the left upper extremity, he gave a 3% whole-body impairment for sensory loss on the left side when it should be a 3% upper extremity impairment. He did the same with the motor loss of the ulnar nerve on the left side, giving a 9% whole-body permanent impairment rather than an upper extremity impairment. If he had used the AMA *Guides* appropriately, his findings would be equal to a 12% impairment of the whole person.
>
> He subsequently states that he feels that repetitive use was appropriate cause for all of the patient's symptomatology. As I stated in my Independent Medical Evaluation, the type of activities that this patient was involved in would be considered a causative factor for carpal tunnel syndrome, but are not currently considered a causative factor for ulnar nerve compression at the elbow.
>
> All of my answers and opinions have been based on a reasonable degree of medical probability.

In the May 4, 2020, decision, the ALJ furnished his rationale for relying upon Dr. Burgess' recalculation of Dr. Gerstle's impairment rating. The ALJ was "persuaded there was a calculation error in Dr. Gerstle's report using whole body impairment rather than impairment to the extremity." Utilizing Dr. Gerstle's findings, upon examination, Dr. Burgess recalculated the impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") and arrived at a 12% impairment rating.

The ALJ was free to rely upon Dr. Burgess' recalculation of the impairment rating pursuant to the AMA Guides. While an ALJ is not free to recalculate the impairment rating, he is not obligated to accept every impairment

rating assessed by a physician as probative. *See* Greene v. Paschall Truck Lines, 239 S.W.3d 94 (Ky. App. 2007). "We ascribe no magical conclusiveness to the assessment of an impairment rating vis-a-vis the overriding weight of the remaining evidence. An impairment rating is but one piece of the total evidence that the ALJ, as fact-finder, must evaluate for "quality, character, and substance" and, in the exercise of his discretion, either accept or reject. [citation omitted]" Id. at 109. When the medical evidence is conflicting, within his exclusive province the ALJ determines which evidence to believe. *See* Square D. Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Further, an ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

The ALJ exercised the discretion afforded to him under the applicable case law in accepting Dr. Gerstle's examination findings, and in rejecting his impairment rating as being inconsistent with the AMA Guides pursuant to Dr. Burgess' opinions. That being the case, he was not precluded from relying upon Dr. Burgess' recalculation of the impairment rating in accordance with the AMA Guides.

Finally, Walsh asserts the ALJ erred by failing to award a credit for an alleged "overpayment" of temporary total disability ("TTD") benefits. While its argument is not entirely clear, Walsh appears to argue the ALJ should have relied upon Dr. Burgess' determination Shepherd reached MMI on February 20, 2019,

after which "no more major medical treatment was performed," rather than rely upon Dr. Gerstle's opinion Shepherd reached MMI on August 8, 2019, the date Dr. Gupta opined no further treatment could be provided to Shepherd. As Walsh points out in its brief to this Board, "Dr. Gerstle places Mr. Shepherd at MMI on August 8, 2019, when Dr. Gupta opined that no further treatment could be provided. Dr. Burgess, on the other hand, placed Mr. Shepherd at MMI after his second procedure on February 20, 2019."

Notably, the commencement date of the award of TTD benefits is not being contested. The record indicates Walsh paid TTD benefits from January 20, 2017, through August 8, 2019.

Dr. Gerstle opined as follows regarding the date Shepherd achieved MMI: "Mr. Shepherd has reached maximum medical improvement for his right and left upper extremities after two iterations of ulnar and median nerve decompressions with a date of maximum medical improvement of August 8, 2019, when Dr. Gupta told Mr. Shepherd that there was nothing further that could be done." This is consistent with Shepherd's March 4, 2020, hearing testimony:

> Q: Okay. All right. Now let's come to you – you were – stopping receiving workers' comp. Were you ever advised why they stopped paying you workers' comp?
>
> A: As far as I knew it was because I was done with treatment.
>
> Q: Okay. And that –
>
> A: The last visit I had with Dr. Gupta and it stopped.
>
> Q: All right. So that was August 8th of 2019?
>
> A: Yes, sir.

Dr. Burgess' opinion Shepherd attained MMI on February 20, 2019, represents nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). As fact-finder, the ALJ is vested with the authority to weigh the medical evidence, and if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). This same rationale applies to differing opinions regarding the date Shepherd achieved MMI. As substantial evidence supports the ALJ's award of TTD benefits through August 8, 2019, there is no overpayment of TTD benefits. On this issue, we affirm.

Accordingly, on all issues raised on appeal, the August 8, 2018, Interlocutory Opinion, the September 6, 2018, Order overruling Walsh's Petition for Reconsideration, the May 4, 2020, Opinion, Award, and Order; the June 3, 2020, Order overruling Walsh's Petition for Reconsideration the March 4, 2021, Corrected Opinion on Remand, and the March 31, 2021, Order overruling Walsh's Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON MARK BUSH **LMS**
250 GRANDVIEW DR STE 550
FORT MITCHELL KY 41017

COUNSEL FOR RESPONDENT:

HON CHED JENNINGS **LMS**
401 W MAIN ST STE 1910
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON ROBERT FERRERI **LMS**
2410 FRANKFORT AVE
LOUISVILLE KY 40206

RESPONDENT:

DR AMITAVA GUPTA **USPS**
315 E BROADWAY
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON R ROLAND CASE **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601