

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 8, 2023

CLAIM NO. 201900793

BELINDA TYGRET

PETITIONER

VS.

APPEAL FROM HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

NORTON HEALTHCARE
and HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Belinda Tygrett (“Tygrett”) appeals from the January 6, 2023, Opinion, Order, and Award and the February 9, 2023, Order on Petition for Reconsideration of Hon. Grant Roark, Administrative Law Judge (“ALJ”). In the January 6, 2023, decision, the ALJ awarded Tygrett temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a March 24, 2019, right hip injury sustained while in the employ of

Norton Healthcare (“Norton”). The January 6, 2023, decision incorporated by reference two interlocutory decisions rendered on March 23, 2020, and October 26, 2020. In the March 23, 2020, Interlocutory Opinion and Order, the ALJ dismissed Tygrett’s low back claim with prejudice, ordered Norton to pay for additional orthopedic treatment of her right hip condition recommended by Dr. Gregory Nazar, and placed the claim in abeyance pending Tygrett reaching maximum medical improvement (“MMI”). In the October 26, 2020, Interlocutory Opinion & Order, the ALJ ordered Norton to approve and pay for Tygrett’s total right hip replacement surgery and to pay TTD benefits from the date of injury. The claim was placed in abeyance pending Tygrett’s recovery from the total right hip replacement surgery.

On appeal, Tygrett asserts the ALJ erred by finding she did not sustain a March 24, 2019, work-related back injury. She further argues the ALJ erred by relying upon the date of MMI assessed by Dr. Lawrence Schaper. Tygrett also claims the ALJ erred by not analyzing whether she sustained a temporary back injury. Finally, Tygrett asserts the ALJ erred in failing to enhance the award of TTD benefits pursuant to KRS 342.730(1)(c)1. (Three-multiplier).

BACKGROUND

The Form 101 alleges Tygrett sustained work-related injuries to multiple body parts on March 24, 2019, in the following manner: “Plaintiff injured her low back and hips/groin in the course and scope of her employment resulting in permanent injury and impairment.”

Tygett was deposed on September 3, 2019. At the time of injury, her official job title was “registered nurse emergency room, weekend option.” She described her job responsibilities as follows:

A: Usually we’re responsible for five to six patients, total patient care. We would hold patients in the emergency room, and that was where my injury happened.

They were in hospital beds, and you usually had to push them upstairs in the beds, and then you’re responsible for direct patient care of heart attack or strokes or splinters in your fingers.

Q: Anything and everything?

A: Yes.

Q: Was there a specific lifting requirement that you had to be able to meet for your job?

A: Yeah, you could have a 300 pound patient who needs to be moved from a stretcher to a bed, and I mean, usually you can get help. And you’re responsible to move the patient to where you need to move them, if they needed CPR, or you know, their blood pressure drops, you need to reverse the bed, just things like that.

Q: I assume you were on your feet most of your shift?

A: Yes.

Q: How long were these shifts that you were working?

A: Twelve hours.

Q: Typically during the day or overnight?

A: Overnight.

Q: Any other physical requirements of the specific position at Norton that we haven’t touched on?

A: You’re saying physical requirements?

Q: As far as any specific things, lifting, climbing stairs, climbing ladders, anything that we haven't touched on?

A: Yeah, we did touch on lifting, right, lifting the patients? Sometimes you have to assist patients to the bathroom, some elderly people or people who are injured who can't, you know, walk or something.

I didn't really go up and down stairs. We used an elevator, but the distance between the emergency room and where the elevators are is far.

Q: Do you have an approximate of how far that would be?

A: It's like you go around [sic] entire unit and then come back on the other side of it. I don't know.

Q: I know you touched on it, but when you were pushing patients in the hospital bed, were you doing that on your own?

A: Usually two nurses did that, and that was another issue I was having with the charge nurse that I felt was bullying me. And I told her I needed help, and she told me there wasn't any help.

And I asked some nurse's aides, and they said they couldn't help. And then I asked her to help me and she told me no, to get the patient upstairs. So I ended up taking her by myself.

Tygett testified that she had not sustained any other work-related injuries before the March 24, 2019, injury. She recounted what occurred on March 24, 2019:

A: I was given an order from my charge nurse, her name is Sherry Baker, to move the patient upstairs. And the patient was in a hospital bed, and she probably weighed about 180 pounds. She was elderly.

And I asked for help, but nobody was available to help. I asked the nurse's aides, and they weren't available. And

then I asked Sherry Baker herself, and she said no, she wasn't available.

And I had difficulty getting her out of the room, and once I got out of the room, I hit a long hallway where I went straight, and that was fine. Then I had some trouble again turning that corner to the left, and it was heavy.

And the bed, the wheels were kind of rusted or something, maybe, and they didn't really move. And so there was another long hallway, and I made it there.

Then I had to cut the corner again to the right, and I had trouble there, but was able to do it. And then that's where you go around radiology, which is a long hall. And you cut over to the left, and then you hit a long hall again.

Then you make a sharp left, and that's the elevators. So when I got her there, I tried to [sic] back in the bed, but it wouldn't turn at all. So I knew there was another elevator way down at the other end of the hall.

It was far, and it was a much bigger elevator, and it was for ICU. And I was new there, relatively new. And what I knew was all the elevators go everywhere, but when I got her down here and put her in the elevator, when I pushed the button, it only went to the second floor, and I had to go to the fourth floor.

So I brought her out on the second floor, then went all the way back down to that elevator again and made a wide turn where I knew I could get back in, but coming from this elevator here was carpet, and it was horrible.

I couldn't hardly move the bed. It was like stuck. It was like going through concrete. So I got her to the other elevator, got her in, went up, and what happened when we reached the fourth floor, the threshold of the elevator and the floor were uneven, because we were heavy.

That's how heavy we were. So when I tried to push the bed, it kept hitting the threshold, so I couldn't move. It was a little bit like this room, where this was the bed, but

there was a much smaller area to get around, and I couldn't.

And I was at the head of the bed, and I had to ram the bed, ram the bed, ram the bed to get it [sic] go up; otherwise, we couldn't get out. And then that's not where – I didn't feel any injury then.

I got her up over the threshold and turned. And it was when we turned, that was when I felt a sharp pain in my groin and the side of my hip, and it was bad enough that I yelled out.

And the patient asked me was I okay? And I ended up taking her to her room, and people helped me. We got her off of the bed onto – or no. We just pulled her bed into her room.

We didn't take her off that bed, that I remember.

At the time of her injury, Tygrett experienced right lower back pain.

Tygrett introduced Dr. Nazar's November 12, 2019, Independent Medical Examination ("IME") report. Based upon a physical examination and medical records review, Dr. Nazar diagnosed the following:

1. Right hip pain secondary to acute inflammatory changes involving the right hip with edema superimposed on dormant, asymptomatic degenerative changes of the right hip and right trochanteric bursitis/tendonitis secondary to the work injury of March 24, 2019. (Comment: This patient's pain involving the bursitis and tendonitis is acute secondary to the work injury directly. Also, the pain involving the right hip joint itself is related directly to the work injury of March 24, 2019 as evidenced by the acute changes present in the hip joint itself (edema). It should be noted that she likely had degenerative changes involving the hip prior to the work injury; however, these were completely clinically dormant and asymptomatic prior to the work injury. It is the work injury that brought them into a disabling reality).

Dr. Nazar did not place Tygrett at MMI. However, if no further treatment is undertaken, Tygrett has a 2% whole person impairment rating pursuant to page 537, Table 17-7 of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Dr. Nazar further opined as follows:

Currently, she needs to be on restrictions. They should involve no repetitive bending, lifting, stooping, or twisting with her lower back and to change position as frequently as needed from sitting, standing, and walking. She should not lift or carry greater than 20 pounds and she should not lift overhead. Pushing and pulling should be avoided. Thus, the patient would be able to pass out medications and probably take vital signs within her job as an emergency room nurse, but should not be pushing or pulling patients on beds or in wheelchairs at this time to allow this to settle down and, as indicated as [sic] above, she needs followup with her orthopedic surgeon. It is unclear whether these restrictions would be permanent or not. This would depend on her response to further treatment management with her orthopedic surgeon. The patient, however, currently cannot return back to the full job duties of an emergency room nurse as she was doing prior to the work injury.

At a January 22, 2020, hearing, Tygrett identified her current symptoms as follows:

I have a lot of swelling in the right side of my back that comes around to the right lateral hip since the beginning, and the right groin since the beginning. None of that has ever gone away. I feel like my hip is unstable, like it moves sometimes. And there’s a lot of pain. Sometimes my leg almost gives out. It’s sharp.

The January 8, 2020, Benefit Review Conference Order and Memorandum lists the following contested issues: work-relatedness/causation (both hip and back), unpaid or contested medical expenses, injury as defined by the ACT

(hip and back), RTW wages, MMI, and reasonableness/necessity of continued treatment. Under other matters is the following: “Claim bifurcated to determine all issues other than permanent benefits.”

In the March 23, 2020, Interlocutory Opinion and Order, the ALJ dismissed Tygrett’s low back injury claim, determined Tygrett sustained a work-related right hip injury, and ordered Norton to pay for additional orthopedic treatment of the hip condition. The ALJ’s findings of fact and conclusions of law are set forth *verbatim* as follows:

Causation/Work Relatedness/Injury under the Act

As indicated above, this matter has been bifurcated to first decide the threshold issues of whether plaintiff suffered compensable injuries to her right hip and lower back as she alleges. The defendant does not dispute the occurrence of an accident on March 24, 2019, but maintains it caused only a temporary right hip strain, which has resolved and requires no further treatment. It further points out there is no evidence that plaintiff’s lower back complaints are causally related to the work event on March 24, 2019. For her part, plaintiff relies on her expert, Dr. Nazar, who indicated plaintiff suffered a right hip strain or bursitis superimposed on pre-existing, dormant degenerative changes of the right hip, for which she is not yet at maximum medical improvement. Plaintiff therefore maintains she is entitled to additional medical treatment and temporary, total disability benefits until she reaches MMI.

Having reviewed the evidence of record, the Administrative Law Judge first notes that there is no evidence of record that plaintiff’s lumbar complaints are work-related. The claimant in a workers’ compensation claim bears 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). When the causal relationship between the trauma and the injury is not readily apparent to a layman, the question is one properly within the province of the medical experts.

Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981); *Elizabethtown Sportswear v. Stice*, Ky. App., 720 S.W.2d 732 (1986). In order to rise to the level of substantial evidence, the opinion of a medical expert must be based upon reasonable medical probability or certainty. *Young v. Davidson*, Ky., 463 S.W.2d 924 (1971). Accordingly, without any such medical evidence establishing causation, plaintiff has not carried her burden of proof with regard to her lower back condition and that portion of her claim must be dismissed.

However, with respect to plaintiff's right hip condition, the ALJ is ultimately most persuaded by Dr. Nazar's opinion that plaintiff has a work-related, symptomatic right hip condition that requires additional treatment. Contrary to Dr. Magone's opinions, Dr. Nazar explained that plaintiff had no right hip problems prior to the work injury and that her diagnostic studies reveal acute inflammation superimposed on her pre-existing right hip degenerative arthritis. His explanation in this regard is simply found most persuasive. He further explained that plaintiff requires additional orthopedic follow-up treatment, perhaps including a steroid injection into the right hip. Plaintiff has not yet received this kind of treatment since her previous orthopedic examination. Based on Dr. Nazar's credible explanation and opinions, it is determined plaintiff has a work-related or right hip condition, the permanency of which cannot yet be determined, and which requires some degree of additional treatment. Therefore, until at least plaintiff reaches maximum medical improvement for her right hip condition, her right hip condition is compensable and she is entitled to reasonable and necessary medical expenses for treatment of her right hip condition.

MMI/TTD Benefits

Based on the foregoing findings, it is determined plaintiff is not yet maximum medical improvement for her right hip condition. However, she has returned to work, in some capacity in a childcare environment, although the exact hours and average weekly wage have not yet been determined. Moreover, plaintiff testified as to her childcare work at the time of her final hearing,

before the coronavirus pandemic which has closed many childcare facilities as of time of this Opinion, of which the ALJ take judicial notice. Based on these unknown factors, the ALJ cannot conclude whether plaintiff is currently entitled to temporary, total disability benefits and that issue will be preserved for final determination on the merits.

Reasonableness/Necessity of Continued Treatment

As indicated above, the ALJ is persuaded by Dr. Nazar's opinions that plaintiff requires at least some additional treatment for her right hip condition before she is at maximum medical improvement. Accordingly, additional orthopedic follow-up treatment shall be approved and paid, so long as it is reasonable and necessary and at least until maximum medical improvement, at which time he can be determined whether plaintiff has a permanent right hip injury.

In an April 6, 2020, Petition for Reconsideration, Tygrett asserted the ALJ committed patent error in dismissing her back injury claim. By Order dated April 24, 2020, the ALJ overruled Tygrett's Petition for Reconsideration without providing additional findings.

Tygrett testified at the August 27, 2020, hearing that Dr. Schaper recommended right hip replacement surgery which she is willing to undergo. She discussed her current symptoms and ability to work as a nurse:

Q: Okay. Now, it's been awhile since you testified in front of the judge. Can you tell us a little bit – symptoms you're experiencing? Are they – well, what are they as compared to what you did – you testified before? How is your problem? Has it gotten worse?

A: Yes. I don't know if it's because of so much inactivity, but it's a lot worse. I have a lot of pain in my right hip on the outside of it and all the way down to my – middle of my shin and in my groin. And it's just a lot worse. And there's a lot of muscle atrophy. I walk with a pretty bad limp. My right leg is shorter now.

Q: All right. Now, let me –

A: (Interrupting) It's worse.

Q: - ask you this – just a couple things. Does it cause you problems sleeping in the evening?

A: Yes.

Q: And has it caused you problems being able to do anymore nursing work?

A: Yes, if I have to – I've been trying to work, find a job to work at home, you know, where I can get up or sit down when I need to or even lay down.

...

Q: But I haven't been successful.

Q: Could you go back to doing any of the work that you did for Career Staffing –

A: (Interrupting) No.

Q: - or the –

A: (Interrupting) No way. No.

Q: --Valhalla, or the Valhalla Nursing Home?

A: No.

Q: Okay. And tell the judge why.

A: It's just too much. It's – I mean, sometimes I feel like my heart skips beats the pain is so bad.

In the October 26, 2020, Interlocutory Opinion and Order, the ALJ concluded the right total hip replacement surgery proposed by Dr. Schaper is work-related and compensable. No additional findings were made pertinent to the low back claim and a Petition for Reconsideration was not filed by either party.

Subsequently, Tygrett introduced Dr. Jules Barefoot's April 19, 2022, IME report. After performing a physical examination and medical records review, Dr. Barefoot diagnosed the following:

1. March 24, 2019: Workplace injury to the lumbar spine and right hip.
2. August 10, 2021: Right total hip arthroplasty.
3. January 8, 2022: MRI of the lumbar spine demonstrated at L3-L4, a left disc extrusion with contact with the left L4 nerve root and at L4-L5, a disc bulge with severe foraminal stenosis with disc contacting the left L4 nerve root.

Dr. Barefoot assessed a 37% whole person impairment pursuant to the AMA Guides, attributable to the March 24, 2019, work injury. He opined, in part, as follows: "Likewise, in regard to her lumbar spine, she may have had degenerative disc disease present in her lumbar spine, but there is no evidence she had an activate symptomatic impairment ratable condition present in her lumbar spine prior to the above-noted workplace incident." Dr. Barefoot opined Tygrett is unable to return to her prior position as an active-duty registered nurse.

A second deposition of Tygrett was conducted on June 28, 2022. Tygrett testified that the pain in her thighs is more intense than it was, with the left side being worse than the right, and she was still experiencing numbness in her feet. She elaborated further regarding her symptoms and limitations:

Q: Have any of your low back symptoms or lower extremity symptoms improved at all since the injury?

A: No, right after surgery, I was sitting in a chair, and I bent over, and I guess two of those discs burst open in my back after surgery when he realigned me, I guess.

Q: About how long after surgery did that happen?

A: It was more than a month. I mean, it wasn't much longer after that. I'm not positive.

...

Q: Did you improve after this chair incident at all, or has it stayed the same since then?

A: No, that is gone now, but I mean, I was standing straight up. I mean, I'm not still acutely injured from that injury. I mean, I feel it when I bend over and stuff, but I can't really bend over far.

Q: Any other issues or symptoms with your low back that we haven't mentioned already today?

A: The decrease in mobility, you know.

Q: I guess then any different issues that you're having still with the right hip, problems, symptoms, pain, anything like that?

A: Yeah, I have a lot of pain in that hip. It's like right behind the bone on the – it's the same place as it's been since the beginning.

It feels like – sometimes it feels like it's tearing inside, sharp and burning. And the leg has atrophied a lot, and the muscles are pulling away from it.

My groin still hurts. And there's a big – probably about half the size of a tennis ball hole in my groin like a divot that you can feel the hip prosthesis sticking out.

I mean, I weigh over 250 pounds, and I can feel the ball of the prosthesis sticking out when I put my hand on it. I can rest my thumb on the top of it.

And then when I – if I'm standing straight up and I put my finger on the top of that prosthesis, when I turn my foot outward, that prosthesis disappears, and then when I put it back forward, the prosthesis comes back.

So I don't know – understand how the weight of your body maybe influences how that prosthesis – because the only x-ray they take is if you're laying on your back or on your side.

So of course it's going to look like it's right, but when you're standing up, it's totally different. And sometimes it feels like it's just going to pop out or break like in my mid thigh. I don't know.

I can hardly go up a step without holding on to something to pull my weight. I can't put weight – I mean, it's like – I don't know. It's not right. I don't know.

Norton submitted Dr. Thomas Loeb's August 2, 2022, IME report. Concerning Tygrett's low back condition, based on his physical examination and a medical records review, Dr. Loeb concluded she has multilevel degenerative disc disease. Regarding causation, Dr. Loeb opined as follows:

Overall, it is my opinion that there was no permanent injury incurred as a result of her work injury of 03/24/2019 and, in addition, there does not appear to be any structural alteration or any permanent injury from her episode at home a couple of weeks after that initial injury date. I believe that her current findings are totally based on her longstanding, pre-existing, progressive, degenerative arthritic changes following a natural course, and I would use the DRE methodology, which is found on Page 384, and she would be ranked under the category II at 8% impairment to the whole person, even though a specific persistent injury pattern is not discernible. She basically has nonverifiable radicular complaints 'defined as complaints of radicular pain without objective findings; no alteration of the structural integrity and no significant radiculopathy.' Combining the hip and spine PPI ratings using the Combined Values Chart on Page 604, 20+8 would be 26% to the whole person. Again, I do not believe the hip replacement was related to the original injury, nor do I believe the degenerative changes of the lumbar spine were related to the original work injury of 03/24/2019.

Tygrett testified at the November 7, 2022, final hearing she believes she needs treatment of her lower back condition and is forced to work in order to pay her bills. She explained as follows:

Q: Now, even though you've not been released by the doctors to go to work activities, are you currently working?

A: I'm forced to work. Yes.

Q: Okay. What do you mean 'forced to work'?

A: I have no other income other than to work. I have to pay my rent and buy food and pay my bills.

Tygrett found employment through a nursing agency. She works the nightshift in order to have more sit-down time. She testified as follows:

Q: So this is – is this – patient sitting is what you're talking about as the nurse?

A: Mostly sitting.

Q: That's what I mean. But you are sitting with patients. You're not really treating them like you would if you were a floor nurse at Norton's?

A: No, you don't treat them. No. You just pass the medication.

Tygrett discussed her current physical symptoms:

A: Okay. With my hip, there is still a lot of pain exactly where it started around my hip and my buttock. Around the side. And then since surgery there's been like a tearing sensation down the middle of my thigh. It feels like my muscles are tearing apart. I have a hard time bending over. If I sit in a chair and bend over, my disks go out in my back. I feel pain now on my left side. I've felt pain in my pelvis, like a sharp pain when I walk intermittently. Like I can feel that I am unable. If a nurse's aide or somebody asked me to help them, I do everything I can do to not help them because I can't

really lift people anymore. I can't get down and look under the bed for anything. If I drop something, I kick it to the side because I can't bend down anymore. It's horrible. It's horrible. I'm just – I don't know.

Q: So how would you describe the pain?

A: Really bad. Like on a scale from one to ten, it would be like eight, nine and ten.

Q: Where is the pain located?

A: In my right hip and my lower back now and down both my legs.

Tygett explained why she is unable to work the same number of hours she previously worked at Norton:

A: Well, when I first started out, I was forced to work as hard and as fast as I could because we were about to be evicted because Norton stopped payment again unexpectedly. So when I worked that time, I thought I was just going to tear apart. It was so bad. I hadn't had any physical therapy. So as I worked, I felt myself getting stronger. And that's fine because I was weak. Now that I've worked, I feel it's turning around and it is becoming bad again. It's eating me up again. And I can tell because the same feelings that I had in my right hip when I was forced to work and it ate up my cartilage in a matter of months I'm still feeling something like that happening in the left now. My whole pelvis is involved. So every day it gets worse and worse.

As previously noted, the January 6, 2023, Opinion, Order, and Award, incorporated by reference the March 23, 2020, and October 26, 2020, Interlocutory Orders. PPD benefits, TTD benefits, and medical benefits for Tygett's work-related right hip injury were awarded. In dismissing Tygett's low back injury claim, the ALJ provided the following additional findings which are set forth *verbatim*:

Causation/Work-Relatedness/Injury under the Act

As a threshold issue, the defendant continues to dispute that plaintiff's alleged lower back condition is causally related to the March 24, 2019 work injury date. It points out the lower back condition was previously dismissed in a prior interlocutory decision, and nothing filed since then is so persuasive as to warrant overturning that decision. For her part, plaintiff points out her expert, Dr. Barefoot, reviewed the evidence of record, including her January, 2022, lumbar MRI and concluded plaintiff has an extruded lumbar disc with foraminal stenosis, accounting for her radicular symptoms. Plaintiff argues Dr. Barefoot's conclusions should be found most persuasive.

In the March 23, 2020, interlocutory decision, it was determined no evidence existed at that time that plaintiff's alleged lower back condition was causally related to the March 24, 2019 incident. Now, plaintiff has presented evidence from her evaluating physician that her alleged lumbar condition is work-related which, if accepted as most persuasive, would support a finding that the lumbar condition is work-related. However, the ALJ remains persuaded that plaintiff has not carried her burden of proving her alleged lumbar condition is work-related and, in this regard, finds Dr. Loeb's opinions most persuasive. In reaching this conclusion, it is noted that none of plaintiff has treated with several different physicians before her various complaints since March, 2019, and none of the treating physicians have indicated her lumbar complaints are related to the work injury. Moreover, even though Dr. Barefoot concluded the lumbar condition was work-related, he offered no real analysis other than to say there was no medical record of lumbar complaints prior to the work injury and she has lumbar complaints now and, as such, the two must be related. His opinions in this regard are simply not found persuasive because he does not explain away or otherwise account for the fact that low back pain was not mentioned in the initial treatment records following March 24, 2019 and, in fact, plaintiff specifically denied low back pain. Moreover, plaintiff's treating surgeon, Dr. Schaper, pointed out that the lumbar MRI from 2019 did not demonstrate significant findings. Certainly, plaintiff's 2022 lumbar MRI showed much more significant findings, including an extruded disc and advanced foraminal stenosis, but the fact that these

findings did not exist in 2019 supports Dr. Loeb's conclusions. For these reasons, it is, again, determined that plaintiff's lumbar condition is not work-related and that portion of her claim must be dismissed.

In declining to enhance the income benefits by the statutory multipliers, the ALJ provided the following:

Benefits per KRS 342.730/Multipliers

The next issue to be determined is the extent of plaintiff's impairment. First, it is noted that both Dr. Barefoot and Dr. Loeb each concluded plaintiff's right hip condition warrants a 20% impairment rating, and the ALJ so finds. The next question becomes whether plaintiff's compensable right hip condition, alone, prevents her from returning to the registered nurse job she held at the time of her injury. The ALJ is persuaded by plaintiff's testimony at the final hearing that she has physical limitations which prevent her from performing the standing and pushing and lifting required of the registered nurse position she held with the defendant. However, the ALJ is also persuaded by the opinions of plaintiff's treating surgeon, Dr. Schaper, that such limitations are not the result of her compensable right hip injury but, instead, her due to issues involving her lower back, diabetes, or other unrelated conditions. Indeed, the ALJ is persuaded by Dr. Schaper's opinion that plaintiff has no restrictions as a result of her right hip condition only. Accordingly, it is determined plaintiff retains the physical ability to return to the registered nurse position she held with the defendant and, as such, is not entitled to application of the 3x multiplier and KRS 342.730(1)(c)(1). Her award of benefits is, therefore, calculated as follows:

$\$1957.76 \times 2/3 = \$1305.17 \rightarrow \$716.49$ (maximum 2019 PPD rate) $\times .20 \times 1 = \$143.30$ per week.

...

Tygett's Petition for Reconsideration made the same arguments she now makes on appeal.

In the February 9, 2023, Order, the ALJ provided the following additional findings which are set forth *verbatim*:

This matter comes before the Administrative Law Judge pursuant to the plaintiff's petition for reconsideration of the Opinion, Order & Award rendered in this matter on January 6, 2023. In her petition, plaintiff alleges errors for failing to find her alleged lower back condition work-related and for failing to award additional TTD benefits back to April 6, 2019; for not continuing TTD until placed at MMI by Dr. Barefoot in 2022; for awarding the defendant a week for week credit against unemployment benefits; and for not discussing the date of maximum medical improvement.

Plaintiff's petition for reconsideration with respect to the compensability of her alleged lower back condition is largely a reargument of the merits, which have already been decided. However, in her petition, plaintiff claims the January 6, 2023 Opinion did not address evidence that "*Dr. Nazar's records reflect an acute injury to her back. Dr. Schaper checked a box that Plaintiff has sustained a work-related injury to the right lumbar/hip. Dr. Bercovici also identifies the work injury to the lower back/right hip.*" However, after pouring over the voluminous evidence again on LMS in considering this petition, the ALJ cannot find any evidence that any of these three physicians ever concluded plaintiff had a work-related lower back condition. This explains why such opinions were not discussed in the January 6, 2023 Opinion; because they are not present in the record. Moreover, although plaintiff has argued throughout that she had lower back pain from the very beginning of her work injury, her exhibit at the hearing, (already filed into evidence but also attached to the transcript and copied and pasted below) from April 6, 2019 mentions at least twice that plaintiff denies any lower back pain.

ANALYSIS

Tygrett first asserts the ALJ erred by dismissing her low back claim.

On this issue, we affirm.

Tygrett, as the claimant in a workers' compensation proceeding, had the burden of proving the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in her burden regarding her alleged work-related low back 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 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 are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The record does not compel a different result. In the March 23, 2000, Interlocutory Opinion and Order, the ALJ dismissed Tygrett's lumbar spine injury claim noting there is no evidence indicating her lumbar complaints are work-related. Indeed, a review of the voluminous medical evidence reveals that prior to the March 23, 2020, Interlocutory Opinion and Order, a physician had not provided a causal connection between the alleged low back injury and the March 24, 2019, work incident. Further, Tygrett's March 4, 2020, brief to the ALJ, failed to reference any medical evidence supporting her allegation of a work-related low back injury. Notably, in his November 12, 2019, IME report, Tygrett's IME physician, Dr. Nazar, diagnosed only a work-related right hip injury. While we acknowledge Tygrett reported low back pain to some of her medical providers and testified

extensively to experiencing lumbar spine pain, medical causation must be proven by expert medical testimony. Mengel v. Hawaiian - Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184, 186-187 (Ky. App. 1981). Medical causation must be proven by medical opinion within “reasonable medical probability.” Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

Even though Tygrett asserts the ALJ failed to consider “additional medical evidence” filed after the March 23, 2020, Interlocutory Opinion and Order, she fails to identify the specific “additional medical evidence” to which she is referring. That said, we acknowledge Dr. Barefoot’s opinions set forth in his April 19, 2022, IME report that Tygrett sustained a March 24, 2019, work-related lumbar spine injury. The ALJ considered Dr. Barefoot’s opinions as evidenced by his summary of the report and a full page of additional findings in the January 6, 2023, decision. The ALJ was not required to rely upon Dr. Barefoot’s opinions, as his opinions merely represent conflicting medical evidence. When physicians 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, so long as the opinion is based on the AMA Guides. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Where there is conflicting medical evidence, the question of which evidence to believe is the exclusive province of the ALJ. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977); Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The ALJ's analysis of Dr. Barefoot's opinions as well as his additional findings regarding the alleged low back injury set forth in the January 6, 2023, Opinion, Order, and Award are thorough. Thus, the ALJ was not required to further engage in a detailed analysis under the AMA Guides nor was he required to engage in a detailed explanation of the minutiae of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

Within this first argument, Tygrett also claims as follows: "Dr. Nazar's records reflect an acute injury to the Petitioner's back. Dr. Schaper checked a box that Petitioner has sustained a work-related injury to the right lumbar/hip. Dr. [David] Bercovici also identifies the work injury to the lower back/right hip." However, we concur with the ALJ's finding as set forth in his February 9, 2023, Order: "However, after pouring over the voluminous evidence again on LMS in considering this petition, the ALJ cannot find any evidence that any of these three physicians ever conclude plaintiff had a work-related lower back condition."

Tygrett next asserts the ALJ committed error by finding November 4, 2021, to be the date of MMI as opined by Dr. Schaper. According to Tygrett, Dr.

Schaper's opinion regarding MMI only pertains to her hip injury and not the alleged lumbar work injury. On this issue, we affirm.

A review of Dr. Schaper's opinions reveals he does not believe the low back condition is work-related. In his November 4, 2021, record, Dr. Schaper opined Tygrett's low back symptoms are due to degenerative disc issues in her lumbar spine and lumbar nerve root impingement. He offers no opinions linking this condition to the March 24, 2019, work incident. Since the dismissal of Tygrett's claim for a lumbar spine injury is supported by substantial evidence, Dr. Schaper's failure to assign a date of MMI for Tygrett's low back condition – a condition both he and the ALJ deemed to be non-work-related – was unnecessary.

Determinations pertaining to when a claimant attains MMI are solely within the purview of the ALJ. The ALJ has the discretion to pick and choose which medical opinion upon which to rely regarding the date of MMI, and he ultimately relied upon opinions of Dr. Schaper. Jones v. Brasch-Berry General Contractors, supra. Since Dr. Schaper's opinions constitute substantial evidence, we must affirm.

Tygrett's third argument the ALJ erred by not analyzing whether she sustained a *temporary/lumbar spine* injury on March 24, 2019, is also without merit. In the February 9, 2023, Order, the ALJ emphasized he did not analyze whether Tygrett sustained a temporary lumbar spine injury because he determined the lumbar spine condition is not work-related. This determination is supported by substantial evidence. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) recognized an injured worker may establish the occurrence of a temporary injury for which temporary benefits may be paid but fail to prove a permanent harmful change

to the human organism for which permanent benefits are payable. *However, there first must be a determination that Tygrett sustained a work-related lumbar spine injury before the tenets of Robertson, supra, are triggered.* Absent a finding Tygrett sustained a work-related lumbar spine injury on March 24, 2019, the ALJ had no reason to carry out an analysis to determine whether the injury is temporary. In fact, such an analysis would not only be unnecessary but erroneous. Therefore, we affirm on this issue.

Finally, Tygrett asserts the ALJ erred by failing to enhance her PPD benefits via the three-multiplier. On this issue, we affirm. In the February 9, 2023, Order, the ALJ stated he relied upon Dr. Schaper's opinions set forth in the November 4, 2021, medical record in determining not to enhance the income benefits by the three-multiplier. Concerning Tygrett's ability to return to her regular work, Dr. Schaper drew a clear distinction between not releasing her to work "because of her other issues," and not restricting her from work "due to the hip replacement." The ALJ, as is within his discretion, relied upon Dr. Schaper's opinions in deciding not to award PPD benefits enhanced by the three-multiplier. KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, supra. 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so

unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, *supra*. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In accordance with the discretion afforded him, the ALJ chose to rely on Dr. Schaper's opinion in resolving this issue. Even though the record contains evidence favorable to Tygrett on this issue, including Tygrett's testimony regarding her current symptoms and ability to work and Dr. Barefoot's opinions as set forth in his April 19, 2022, IME report, this is not a sufficient basis for reversal of the ALJ's decision. Where there is conflicting medical evidence, the question of which evidence to believe is within the exclusive province of the ALJ. Pruitt v. Bugg Bros., *supra*; Square D Co. v. Tipton, *supra*. Because Dr. Schaper's testimony constitutes substantial evidence supporting the ALJ's ultimate conclusion regarding the applicability of the three-multiplier, we are without authority to disturb his conclusion.

Accordingly, on all issues raised on appeal, the January 6, 2023, Opinion, Order, Award, incorporating by the reference the two interlocutory decisions rendered on March 23, 2020, and October 26, 2020, and the February 9, 2023, Order ruling on the Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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