

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-000007-WC

TRICON GLOBAL RESTAURANT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-76023

JODI JOHNSON; HON. RICHARD M.  
JOINER, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Tricon Global Restaurant has petitioned for review from an opinion of the Workers' Compensation Board entered December 3, 2004, which affirmed the Administrative Law Judge's opinion and award rendered June 28, 2004, on a motion to reopen by Jodi Johnson, and awarded Johnson increased permanent, partial disability benefits. Having concluded that the Board properly affirmed the ALJ's decision as based on substantial evidence, we affirm.

Johnson, who was born on October 29, 1969, is a high school graduate and has completed some college courses. Following her brief college experience, Johnson enlisted in the United States Navy and has since received an honorable discharge. Johnson worked primarily in fast-food restaurants and convenience stores, serving mostly in a management or supervisory capacity, until her work-related injury forced her to discontinue that type of employment.

Johnson's work-related injury occurred on July 11, 2000, while working for Tricon Global at a Taco Bell in Louisville, Kentucky. As Johnson attempted to remove cartons of food from a shelf in a walk-in cooler, the shelf fell onto her, causing several 40 pound boxes of frozen food to fall onto her head and neck. Johnson was transported to the emergency room at Baptist East Hospital by her immediate supervisor. Johnson returned to work four or five weeks after the injury, but due to the pain was only able to work four or five days.

Johnson was examined by Dr. David Changaris, a neurosurgeon, on August 14, 2000. Dr. Changaris reviewed a CT scan from Johnson's previous 1998 injury<sup>1</sup> and reviewed a lumbar MRI scan. Dr. Changaris diagnosed a herniated disc at L3-4 centrally, a herniated disc at L2-3 centrally and slightly

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<sup>1</sup> In 1998 prior to her July 2000 work-related injury, Johnson was injured while working at Speedway SuperAmerica. She had been treated by Dr. Gregory Nazar for the injury to her low back and had undergone surgery at the L3-4 level to correct her back pain in 1998.

paracentral to the right, a diffused disc bulge at L3-4, a disc bulge at L4-5, and a disc bulge at L5-S1. Dr. Changaris assessed a 10% impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.<sup>2</sup> Dr. Changaris recommended that Johnson lift no more than 20 pounds, do only minimal bending, stooping, and climbing, and sit down every one to two hours. He further opined that Johnson could only return to light-duty work.

Johnson was under the care of Dr. Gregory Nazar from August 24, 2000, until March 14, 2001, for ulnar neuropathy and back pain. Records dated August 25, 2000, indicate that while Johnson had full range of motion in her neck, she was continuing to have neck pain. A chart note from Dr. Nazar dated January 18, 2001, diagnosed Johnson with neck pain with associated disc protrusion at C6-7 and to a lesser extent at C5-6. This diagnosis was consistent with an MRI scan of Johnson taken on January 10, 2001, which revealed disc protrusions at C5-6 right of midline and at C6-7 left extending into intervertebral foramen.

A chart note from Dr. Nazar on March 14, 2001, indicates that Johnson had recovered from her ulnar neuropathy, but was still having neck pain, particularly with flexion and extension and from turning her head from side to side. Prior to

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<sup>2</sup> Dr. Changaris attributed the impairment solely to the work-related injury of August 13, 1998.

surgery, Dr. Nazar assessed Johnson with an impairment rating for a DRE Category III and assigned a 15% to 18% impairment to the whole person and related the condition to the July 2000 work-related injury. He placed restrictions on Johnson of minimal lifting (less than 15 pounds), bending, stooping, climbing, crawling, overhead work and no use of vibrating tools. If Johnson returned to work, she would require frequent breaks and would be able to perform only light or sedentary work. Dr. Nazar treated Johnson conservatively, and determined if that treatment failed, surgery would be the next option.

On October 31, 2000, Johnson was examined by Dr. Richard Sheridan, an independent medical evaluator. Dr. Sheridan reviewed reports from Dr. Nazar and Dr. Changaris, and an MRI scan and X-ray report from July 2000. Dr. Sheridan diagnosed Johnson with resolved acute low-back sprain/strain and resolved acute left trapezial and interscapular strain, all related to the July 2000 injury.<sup>3</sup> Dr. Sheridan stated that Johnson had reached maximum medical improvement for the lumbar sprain/strain and that there was no medical necessity to continue treatment.

On August 3, 2001, Johnson was again examined by Dr. Changaris. He reviewed the cervical MRI dated January 10, 2001. He diagnosed Johnson with cervical radiculopathy, disc

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<sup>3</sup> He also diagnosed Johnson with possible left ulnar neuropathy, but stated that it was not related to the work injury.

herniation at C6-7, and mild depression, and stated that this diagnosis was concurrent with her work-related injury of July 11, 2000. He assigned her a 21-24% impairment rating based on the AMA Guides, Fifth Edition. Dr. Changaris recommended that Johnson lift less than 20 pounds, perform minimal bending, stooping, climbing, overhead work, and that she use no vibrating tools. He specified that she required a job tailored to her specific needs that would allow her to take breaks every one to two hours, and would have to be of a light-duty or sedentary nature.

On February 6, 2002, Johnson and Tricon Global entered into a settlement agreement, which was approved by the Administrative Law Judge.<sup>4</sup> The agreement only provided for compensation for Johnson's claim of cervical injury, and also provided payment of permanent, partial disability based on a 15% impairment rating. Johnson received a lump-sum payment of \$15,985.60 in accordance with the settlement. The settlement agreement specifically provided:

This is a compromise settlement of a disputed claim wherein the Defendant-Employer and Plaintiff have reached a compromise agreement. The Plaintiff has alleged several injuries against Taco Bell, all stemming from the alleged incident of

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<sup>4</sup> At this time, Johnson's symptoms included sharp pain in her neck, radiating down both arms, especially her left arm. She was unable to turn her head very far without pain, and had numbness and tingling in her hands and arms, mostly on her left side. To be comfortable, she had to change positions almost every hour.

July 11, 2000. The Plaintiff has agreed that the ulnar neuropathy is a pre-existing active condition not related to her alleged work injury with Taco Bell and [that claim] shall therefore be dismissed with prejudice. Defendant-Employer shall be responsible for no medical benefits for the ulnar neuropathy, nor shall the Defendant-Employer be responsible for any benefits under KRS 342.730 or KRS 342 as a whole. The Plaintiff further has alleged carpal tunnel as being related to the July 11, 2000 injury. The Plaintiff shall dismiss with prejudice her alleged bi-lateral carpal tunnel claim. The Plaintiff acknowledges that the condition is not work-related. The Defendant-Employer shall be responsible for no medicals or any other benefits under KRS 342 for the alleged carpal tunnel syndrome. The Plaintiff further acknowledges that the low back sprain/strain actually relates to a prior injury. Therefore, it is pre-existing and active, and not the responsibility of Taco Bell. The Plaintiff shall dismiss her low-back claim with prejudice. The Plaintiff acknowledges that this is not related to her work at Taco Bell, and Taco Bell shall be responsible for no medical indemnity or any other benefits under KRS 342. The Plaintiff's low back claim is dismissed with prejudice. The Plaintiff's left trapezial sprain shall be dismissed with prejudice. The Defendant-Employer shall be responsible for no medical, no indemnity benefits or any other benefits under KRS 342. The left trapezial sprain claim is dismissed with prejudice. The Plaintiff agrees that she shall waive her right to reopen any and all of those dismissed claims. As consideration for this waiver, Plaintiff acknowledges receiving the settlement on her neck lump sum is sufficient consideration for waiver of her right to reopen any of the alleged dismissed claims. Plaintiff further acknowledges that all the dismissed claims are dismissed with prejudice and that they are not related to

her work at Taco Bell and, therefore, are not compensable under KRS 342. The Plaintiff has also alleged psychological/depression. The Plaintiff acknowledges that this is not a work-related condition and dismisses any allegation/claim for psychological/psychiatric/depression, medicals, indemnity or any other benefits under KRS 342, although not formally brought, with prejudice. As a compromise of this claim, the Defendant-Employer shall accept as compensable the Plaintiff's cervical claim. The Plaintiff has agreed to waive any past-due temporary total disability claim she may have for the cervical condition. The Defendant-Employer has disputed the compensability of the cervical condition from the start. The Plaintiff understands that she will receive no claimed past-due temporary total disability for the cervical condition. The Defendant-Employer will, however, pay a 15% permanent partial disability for the neck condition. This is a compromise permanent partial disability based on the disputed nature of the claim. The 15% shall be calculated as above for a lump sum payment of \$15,985.60. The Plaintiff understands and accepts a 15% permanent partial disability paid at \$15,985.60 as sufficient consideration for buyout and waiver of any right to indemnity benefits she may have under KRS 342.730, be that permanent partial, permanent total or past-due temporary total disability benefits. Should the Plaintiff have surgery, the Defendant-Employer will pay temporary total disability benefits per the statute. The Plaintiff's medicals for the cervical condition shall be covered per KRS 342.020 and the Kentucky Fee Schedule. The Plaintiff enters into this agreement freely, knowingly, intelligently and with advice of competent counsel. The Plaintiff acknowledges that she is not entitled to any 1.5 enhancer and any claim for such is waived in this agreement. [emphases added].

After approval of the settlement agreement, Johnson underwent an anterior cervical discectomy and fusion at C6-7 level, by Dr. Nazar, on November 4, 2002. She was examined in April 2003 by Dr. Warren Bilkey, an independent medical examiner, who reviewed Dr. Nazar's records and concluded that although Johnson had a good surgical outcome, the surgery had not improved her condition and he recommended light-duty work restrictions.<sup>5</sup> Dr. Bilkey reviewed an MRI of Johnson's neck, performed on March 31, 2003, and stated that it demonstrated anterior fusion C6-7 with anatomic alignment. He also noted disc bulge at C5-6 and C6-7 causing mild canal stenosis. He diagnosed her with cervical strain with disc herniation.

On May 9, 2003, Dr. Bilkey reported that Johnson had complained of upper-back pain, neck pain and shoulder pain with pain radiation into the right upper limb and a sense of numbness in the left upper limb. On July 21, 2003, Dr. Bilkey again examined Johnson and reported that she complained of neck pain that radiated into the right upper limb and numbness of the left upper limb. He stated that she had reached maximum medical improvement and based on the AMA Guides, Fifth Edition, assigned her a 25% impairment rating to the body as a whole for a DRE

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<sup>5</sup> Dr. Bilkey stated that there was residual myofascial pain involving shoulder and neck musculature related to tightness and weakness. This pain might explain Johnson's residual symptoms, and if addressed, offered her a chance for significant improvement.

cervical category IV impairment.<sup>6</sup> He opined that she should lift a maximum of ten pounds and perform no overhead and repetitive upper extremity work.<sup>7</sup>

On October 10, 2003, Johnson filed a motion to reopen her claim. She offered as evidence the medical reports of Dr. Bilkey<sup>8</sup> which stated that her impairment rating had increased since surgery and since the time the settlement agreement was signed by the parties. Tricon Global filed its objection to the motion to reopen stating that "in consideration of the receipt by her of the compromised amount, [Johnson] gave up any opportunity to receive additional benefits." On December 1, 2003, the ALJ granted Johnson's motion to reopen.

Johnson was deposed on January 28, 2004. She stated that she is better in some ways and worse in others. She can sit longer without hurting, and while her range of motion, looking up and down and from side to side, is less, the movement hurts less. However, she still suffers pain in her neck and shoulder blade area. She testified that she does not sleep well since her surgery because she has to change positions several times during the night. She also has to change positions when

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<sup>6</sup> This rating is due to the fact that Johnson had a one-level, anterior-cervical discectomy and fusion.

<sup>7</sup> Johnson was urged to continue with home exercises and to advance to push-ups for shoulder protractor strengthening.

<sup>8</sup> Dr. Bilkey's testimony and medical records are the only medical evidence in the record subsequent to Johnson's surgery.

sitting and watching TV. She further testified that her stiffness makes driving difficult. She has weakness in her left arm, which has occurred since her injury. Johnson further testified that she has pain when she wears a bra because it pulls at her neck. She did not have this problem at the time of settlement.

While Johnson testified that she had looked for work, she had not returned to work because her restrictions would not allow her to perform the type of work she was doing at the time of her injury and she has no other job skills. Johnson testified that she was attempting to go back to school and learn a trade. However, she has not been able to get student loans because she has bad credit due to outstanding medical bills relating to her injury that have not been paid by Tricon Global.

Dr. Bilkey testified by deposition on March 26, 2004, why in his opinion Johnson's impairment rating was not correct based on the Fifth Edition of the AMA Guides.<sup>9</sup> Dr. Bilkey

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<sup>9</sup> Dr. Bilkey stated that a change occurred in the impairment ratings for radiculopathy (cervical fusions) when the AMA Guides, Fourth Edition was replaced. According to the Fourth Edition of the AMA Guides, if a claimant had a disc herniation with a pinched nerve and had undergone surgery, the claimant was assigned a DRE Category III impairment. A separate impairment rating was assigned if instability of the spine required a fusion operation. Dr. Bilkey stated that the surgery to correct disc herniations in the neck had been altered, and now included operating from the front of the spine to the back. By cutting through from front to back and removing the entire disc, any posterior protrusions of the disc that might be compressing nerve roots were eliminated. The disc is replaced with bone wedge and the spine is bound together at that point. The Fifth Edition of the AMA Guides states that for a fusion instability operation, a DRE Category IV impairment rating is assigned and the pinched nerve is no longer rated. Essentially, this

testified that as a licensed independent medical examiner he had been told by the Board of Independent Medical Examiners that the authors of the Fifth Edition of the AMA Guides, which included some members of the IME Board, did not intend to substantially change the impairment ratings. He claimed the intention was that there was to be no more than a 3% difference in the amount of impairment as stated in the Guides. Based on this information, Dr. Bilkey testified that Johnson should be rated as a DRE Category III, with a 15% permanent impairment. However, because his opinion was based on the most current edition of the AMA Guides, Dr. Bilkey stated that Johnson's impairment rating based on the July 2000 work-related injury is 25%. He recommended that she lift no more than ten pounds, perform no overhead work, no repetitive upper extremity work, and not use ladders.

A final hearing was held before the ALJ on May 4, 2004. Johnson offered into evidence the medical reports of Dr. Bilkey dated May 23, 2003, May 9, 2003, and July 21, 2003; Dr. Nazar dated August 24, 2000, through March 14, 2001; Dr. Changaris dated August 3, 2001; and Dr. Sheridan dated October 31, 2000; and a notice of filing parol evidence.<sup>10</sup> Tricon Global

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edition of the Guides directed that any fusion operation resulted in a DRE Category IV impairment.

<sup>10</sup> On April 19, 2004, Johnson filed parol evidence in the form of a letter dated December 10, 2001, sent from her attorney to the attorney for Tricon Global. The letter set forth that Johnson had read through Tricon Global's

filed the depositions of Johnson and Dr. Bilkey as evidence.<sup>11</sup> Johnson was the only live witness, and her testimony was similar to the testimony given in her deposition. Since no one appeared for Tricon Global at the final hearing, the ALJ allowed the parties to file briefs before entering his opinion and award.

In his opinion and award entered on June 30, 2004, the ALJ found that Johnson's disability rating had increased since settlement and awarded her permanent, partial disability based on a 25% impairment rating, as well as payment of medical expenses. On July 21, 2004, Tricon Global filed its appeal to the Board. The Board entered an opinion on July 3, 2004, affirming the ALJ's award. This appeal followed.<sup>12</sup>

Upon review, this Court will reverse the Board's decision only when it has "overlooked or misconstrued controlling law or committed an error in assessing the evidence

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proposed settlement agreement and would not agree to settle her claim unless she could retain her right to reopen the claim. Apparently, following this letter the agreement was modified because there is no mention in the agreement of the fact that Johnson did not have a right to make a motion to reopen her claim.

<sup>11</sup> Tricon Global filed a motion to supplement the record with medical reports from Dr. Nazar from 1998-July 5, 2000, and Dr. Changaris dated August 14, 2000. There was no objection by Johnson. However, there is no order of record allowing these records into evidence.

<sup>12</sup> Johnson argues to this Court that Tricon Global's petition should be dismissed because of its failure to name her attorney as a party to the appeal. Johnson claims that her attorney was awarded attorney's fees by an order entered July 19, 2004, and is, thus, an indispensable party to the appeal. We fail to see how the attorney is indispensable to the issues raised in this petition.

so flagrant as to cause gross injustice" [citations omitted].<sup>13</sup> To properly review the Board's decision, this Court of course must review the ALJ's underlying decision. Where the ALJ has found in favor of the party with the burden of proof, this Court must determine whether the ALJ's findings were supported by substantial evidence.<sup>14</sup> The Supreme Court of Kentucky has defined substantial evidence as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people]" [citations omitted].<sup>15</sup> In other words, such evidence "would permit a fact-finder to reasonably find as it did."<sup>16</sup> As the fact-finder, the ALJ, not this Court and not the Board, "has the sole discretion to determine the quality, character, and substance of evidence."<sup>17</sup> Not only does the ALJ weigh the evidence, but the ALJ may also choose to believe or disbelieve any part of the evidence, regardless of its source.<sup>18</sup>

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<sup>13</sup> Daniel v. Armco Steel Co., 913 S.W.2d 797, 798 (Ky.App. 1995).

<sup>14</sup> Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). See also Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

<sup>15</sup> Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971).

<sup>16</sup> Special Fund, 708 S.W.2d at 643.

<sup>17</sup> Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999) (citing Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985)).

<sup>18</sup> Id. (citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977)). See also Snawder v. Stice, 576 S.W.2d 276, 280 (Ky.App. 1979).

Tricon Global argues that the settlement agreement signed between the parties precluded an award of additional benefits for permanent, partial disability. It argues that because the settlement agreement stated that Johnson agreed to \$15,985.60 as sufficient consideration for buyout and waiver of any right to indemnity benefits she may have under KRS 342.730, that she waived her right to reopen her claim. In the alternative, Tricon Global argues that the ALJ's decision was not based on a correct use of the AMA Guides or substantial evidence. We disagree.

After reviewing the parties' arguments and the record below, we conclude the Board's well-written opinion by Member Gardner is persuasive, and we adopt it, in pertinent part, as our own:

The ALJ reviewed the lay and medical testimony in considerable detail. On the issue of whether a reopening was barred by the terms of the February 6, 2002 settlement agreement, the ALJ concluded:

There are six separate body parts identified in this settlement agreement. Claims relating to five of those body parts are dismissed with prejudice. One claim, the claim with respect to the cervical spine, is accepted as compensable. The waiver of the right to reopen is only identified as applying to the dismissed claims.

The agreement contemplates additional income benefits to be paid for temporary total disability automatically in the event of surgery. The terms of the agreement do not restrict the right to reopen the cervical spine claim. When one considers the parol evidence, it becomes even more clear that the right to reopen continues to exist with respect to the cervical spine claim. Reopening is not barred by the terms of the settlement agreement.

The ALJ next determined whether Johnson experienced a change to warrant reopening under KRS 342.125 stating:

KRS 342.125 permits a claim to be reopened with a showing of change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order. Here, Ms. Johnson has established that she had a 15%-18% impairment relating to the cervical spine prior to the settlement. She has since undergone surgery and now has demonstrated a 25% impairment relating to the cervical spine. This change is sufficient to warrant reopening.

Finally, the ALJ determined extent and duration of Johnson's permanent partial disability concluding as follows:

Inasmuch as Jodi Johnson does not claim to be totally disabled, I must consider whether there is a permanent partial disability. Permanent partial disability is

the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. A permanent disability rating is the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b) and a permanent impairment rating means the percentage of whole body impairment caused by the injury or the occupational disease as determined by 'Guides to the Evaluation of Permanent Impairment, American Medical Association, latest available edition.' It is 25% based on the report of Dr. Bilkey. The employer suggests that this impairment rating should not be accepted because Dr. Bilkey had a conversation with 'the principals in the American Board of Independent Medical Examiners' who held the opinion that the 25% rating is not consistent with the original intent of the writers of the AMA guidelines. The Legislature has delegated to the authors of the AMA [G]uides to [E]valuation of [P]ermanent [I]mpairment the determination of impairment pursuant to the [G]uides as written. It is difficult to understand how such delegation can be legal in view of Legislative Research Commission v. Brown, Ky., 664 S.W.2d 907 (1984). However, it is my obligation to apply the statute as written. An Administrative Law Judge has no authority to pass a law in the legality of legislative delegations. The AMA [G]uides prove that a cervical fusion warrants a 25% rating. This is an

increase in impairment over what Ms. Johnson had before the surgery.

I conclude that Jodi Johnson has a 25% whole body impairment in accordance with the Guides.

The ALJ awarded benefits based on the 25% impairment rating.<sup>19</sup>

On appeal, Tricon frames the issue as:

[W]hether or not the original settlement precludes the claimant from any further receipt of permanent partial disability benefits; and, if that could be found to be the case, whether or not the ALJ's reliance upon the finding of Dr. Bilkey was reasonable, given his testimony and demur in his deposition.

Tricon contends Johnson agreed to waive future entitlement to indemnity benefits, including permanent partial benefits pursuant to KRS 342.730 and only agreed she was entitled to future temporary total disability benefits if she underwent the surgery. Tricon admits that while Dr. Bilkey assessed a 25% impairment rating in his report, his deposition testimony was dispositive.

First considering the issue of whether Johnson waived her right to reopen, we agree with the ALJ that she did not. In Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704 (2000), the court stated that consideration

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<sup>19</sup> Various other issues were raised by Tricon Global, but were quickly dismissed by the ALJ, including: (1) could the claims be reopened as pleaded in Form 101, (2) is the claim barred by KRS 342.270; (3) is any exclusion proper because of pre-existing active disability or impairment; (4) causation; and (5) liability for certain medical expenses.

for a waiver must be contained on the face of the settlement and "may not simply be implied from some other activity. The waiver of any right under the Kentucky Workers' Compensation Act in a settlement document must meet this standard." Id. at 706.

While the settlement agreement between Tricon and Johnson specifically provided for waiver of the right to reopen the dismissed claims, there was no specific waiver for the cervical claim. Furthermore, the December 10, 2001 letter submitted by Johnson and relied upon by the ALJ supports a finding that Johnson did not agree to a waiver of the right to reopen. Accordingly, the ALJ did not err in his determination that Johnson did not waive her right to reopen her cervical injury claim.

The burden was on Johnson to show she sustained a change in occupational disability since the time of the original settlement due to the effects of the injury. Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991). In Beale v. Faultless Hardware, Ky., 837 S.W.2d 893 (1992), the court recognized that reopening awards pursuant to approved settlement are treated differently from reopening awards made pursuant to fully litigated claims, and determined the percentage of occupational disability contained in the settlement agreement is not conclusive of actual disability on the settlement date. Here, the ALJ made the required specific findings as to the extent of occupational disability that existed at the time of settlement. He determined Johnson established she had a 15%-18% impairment rating relating to her cervical spine prior to settlement.

The ALJ as fact finder has the sole authority to initially judge the weight, credibility, substance and inferences to be drawn from the evidence, which is now

challenged on appeal. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). When the evidence is in conflict, the ALJ is at liberty to choose to believe parts of the evidence and disbelieve other parts of the evidence, whether the evidence comes from the same witness or the same party's total proof. Brockway v. Rockwell International, Ky. App., 907 S.W.2d 166 (1995). The determinative question to be answered is whether the ALJ's finding is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. KRS 342.285 and Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000).

Since this is a post 1996 claim, the issue is whether Dr. Bilkey's 25% impairment rating constitutes substantial evidence upon which an increased award could be based. In his report, Dr. Bilkey assessed the 25% rating. However, at his deposition, he retreated from that position and explained why a 15% impairment under the Fifth Edition of the Guides was appropriate. Dr. Bilkey explained that pursuant to conversations with members of the American Board of Independent Medical Examiners he was told it was not the original intent of the authors of the Guides, Fifth Edition, to substantially alter the impairment ratings found in the Guides, Fourth Edition. The ALJ, in deciding Johnson had a 25% impairment rating, specifically stated he relied on Dr. Bilkey's 25% impairment rating because "[t]he AMA [G]uides provide that a cervical fusion warrants a 25% rating." The sum and substance of Dr. Bilkey's testimony was that the Guides, Fifth Edition, if applied literally, authorize a 25% impairment, but if one looks behind the literal language to the intent of the drafters - 15% impairment is authorized.

In the face of conflicting impairment ratings, this Board has determined that the ALJ is free to consult the Guides to assess

the appropriate weight and credibility to be assigned to conflicting evidence. Dr. Bilkey's testimony was both equivocal and contradictory in nature, yet the ALJ concluded that part of his testimony was entitled to credence. Our only concern on appeal is whether this finding is so unreasonable that it must be disregarded as a matter of law. It is not.

Accordingly, the decision of the Administrative Law Judge is hereby AFFIRMED [emphasis original].

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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