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January 22, 2020

David G. Changaris, M.D., P.S.C.
801 Barret Avenue
Suite 103
Louisville, KY 40204

RE: Luzanete deLima

Dr. Changaris,

Enclosed please find a copy of Opinion, Award, & Order from the ALJ in Ms. deLima's claim. Please note that the ALJ found your medical opinion and testing persuasive. While the decision can be appealed, I am comfortable that the well written opinion will withstand future scrutiny. Thank you very much for all of your assistance in this claim. I look forward to working with you again in the near future.

Very truly yours,

SHUMATE, FLAHERTY, EUBANKS
& BAECHTOLD, P.S.C.

BY _____
MICHAEL F. EUBANKS

MFE/clt

Enclosure

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE
CLAIM NO. 2018-87385

LUZANETE F. LIMA **PLAINTIFF**

VS.

RURAL TRANSIT ENTERPRISES CORP **DEFENDANT**

* *

OPINION, AWARD & ORDER

* *

INTRODUCTION

Plaintiff, Luzanete Lima, alleged a work-related head injury to her head on March 27, 2018, in the course of her employment with Defendant, Rural Transit Enterprises Corp. Additionally, Plaintiff alleged a right upper extremity injury incurred as a result of alleged work-related balance deficits. This Administrative Law Judge ("ALJ") conducted a Benefit Review Conference on October 16, 2019, at which time the parties entered into stipulations and identified contested issues. A Final Hearing was held on November 18, 2019. The ALJ reviewed all the evidence of record and the matter is now ripe for decision.

SUMMARY OF EVIDENCE

LUZANETE F. LIMA

Plaintiff testified at a deposition on March 8, 2019 and formal hearing on November 18, 2019. She is 51 years old with a Bachelor's Degree in business administration. Plaintiff's past employment history includes assembly line worker and recreation/special needs aide. She is right-hand dominant and speaks five languages. Plaintiff began working for Defendant in February 2018 as a bus driver. Her job duties included picking/dropping off clients.

Plaintiff did not recall the March 27, 2018 motor vehicle accident. Her only memories were driving the bus off the parking lot and then being at home. After the accident, Plaintiff was taken to Lake Cumberland Regional Hospital. She first

sought treatment with Dr. Rowe, who prescribed medication. In June 2018, Plaintiff began physical therapy at Total Rehab Center. She treated with Drs. Patel and Changaris, who prescribed medication. Beginning in August 2018, Plaintiff treated at Avalon Psychological Center for counseling. In the fall of 2018, she injured her right shoulder/elbow after she became dizzy and fell from a ladder, striking her right elbow on a countertop.

Since the accident, Plaintiff has head/neck pain and memory issues. Plaintiff currently treats with Drs. Changaris and Patel and is prescribed medication. She undergoes counseling at Avalon Psychological Center once a week. Plaintiff's right shoulder/elbow symptoms and dizziness has improved. Her headaches have decreased, occurring only once or twice a month.

Plaintiff did not return to work for Defendant but obtained a full-time position with Pulaski County Schools as a special education aide on September 1, 2019. She cannot recall being told by any medical provider she could not return to work for Defendant. Plaintiff was cleared to drive in the spring of 2019 and performs household duties. Plaintiff denied previous motor vehicle accidents or injuries.

SHEILA STALLSWORTH

Defendant deposed Sheila Stallsworth on April 5, 2019.

Ms. Stallsworth is the EEO Benefits Manager for Defendant. She is the custodian of the records and video of the work accident. Plaintiff was hired on February 21, 2018 as a driver. Ms. Stallsworth advised Plaintiff never disclosed previous workers' compensation claims, dated February 3, 2016, August 18, 2016, and November 14, 2016. She reviewed Defendant's policy handbook and noted if a driver was observed violating the defensive driving rule, they could get into trouble. The buses were equipped with video cameras, done in the regular course of Defendant's business. Ms. Stallsworth reviewed the March 27, 2018 video CD of Plaintiff's work accident.

Ms. Stallsworth reviewed an undated letter of reprimand sent to Plaintiff which assessed three points, but did not prevent her from continuing to drive for Defendant. Ms. Stallsworth reviewed an October 26, 2018 letter to Plaintiff explaining Defendant received notice from KACO that she could return to full-duty

work with no restrictions. In this letter, Plaintiff was asked to advise of her intentions in returning to work. Plaintiff complained of dizziness to Ms. Stallsworth and a mutual decision was made for Plaintiff to not return as a driver. Ms. Stallsworth did not offer her any type of light-duty position. Plaintiff has not return to work as a driver for Defendant since the accident.

JOHN BLANTON

Defendant conducted the deposition of John Blanton on July 19, 2019.

Mr. Blanton is a private investigator who performed surveillance of Plaintiff on April 23, 2019 and April 24, 2019. He presented summary reports and video that is a true and accurate copy of the surveillance he conducted.

INVESTIGATION SUMMARY REPORTS

On April 23, 2019, Mr. Blanton conducted surveillance from 6:00 a.m. until 2:00 p.m. and observed Plaintiff pressure washing a front sidewalk, driveway and Chevy truck.

On April 24, 2019, Mr. Blanton conducted surveillance from 5:50 a.m. until 12:00 p.m. During that time, Mr. Blanton obtained footage of Plaintiff driving a Chevy Silverado to a physician's office, where she remained for approximately one hour. Plaintiff departed and drove to Kroger, spending almost 50 minutes. Due to Plaintiff's activities upon leaving Kroger, Mr. Blanton thought she recognized his vehicle and discontinued further surveillance.

SURVEILLANCE VIDEO

Defendant submitted surveillance video demonstrating Plaintiff's activities on April 23, 2019 and April 24, 2019, which this ALJ reviewed prior to issuing her decision.

AVALON PSYCHOLOGICAL CENTER

Plaintiff submitted treatment records from Avalon Psychological Center. These records document 11 visits from August 8, 2018 through February 4, 2019. During this time period, Plaintiff received psychological counseling. Additionally, she reported a work accident and complaints of black outs/amnesia, headaches, concentration problems, and dizziness. On September 17, 2018, Plaintiff presented with her left arm in a sling and reported falling after climbing to retrieve something out of a high kitchen cabinet. Plaintiff indicated she fell because she

lost her balance. On December 17, 2018, Plaintiff's counselor indicated she observed no evidence of malingering.

DR. PIYUSH PATEL

Plaintiff submitted Dr. Patel's treatment records.

Plaintiff's September 13, 2018 right elbow x-rays showe no fracture or dislocation.

On January 11, 2019, Plaintiff presented for consultation for seizures. She reported intermittent periods of confusion, status-post motor vehicle accident. Plaintiff thought she had loss of consciousness and amnesia regarding the whole incident. Dr. Patel diagnosed post-concussion syndrome, partial symptomatic epilepsy with complex partial seizures, not intractable, without status epilepticus, PTSD and dizziness. Dr. Patel ordered labs and an EEG.

On January 18, 2019, Plaintiff underwent an EEG, which showed localized sharp wave activity in the left frontal area.

On February 4, 2019, Plaintiff presented to Lake Cumberland Regional Hospital emergency department with suicidal ideation. She reported memory problems since a March 2018 car wreck and having suicidal thoughts for the last two months. Plaintiff was admitted to the Adult Behavioral Health Unit for observation with suicide precautions. Dr. Patel diagnosed major depressive disorder and acute PTSD. He prescribed anti-depressants and ordered group therapy participation. Once Plaintiff was no longer suicidal, she would be discharged with her husband, after a family conference.

On February 6, 2019, Dr. Patel performed an EEG, which showed sharp activity from T3, F2 regions and indicated this activity could be epiloptogenic in nature.

DR. DAVID G. CHANGARIS

Plaintiff submitted Dr. Changaris' initial and supplemental reports and treatment records.

On July 6, 2018, Dr. Changaris performed a video posturography and diagnosed impairment balance, dizziness and right for or history of falls, status-post work-related motor vehicle accident. He recommended balance rehabilitation.

July 24, 2018 Report

Dr. Changaris performed a posturography and vestibulonystagmography ("VNG"), which showed Plaintiff more likely than not sustained a traumatic brain injury. He indicated the VNG identified central processing disorders which could be attributed to traumatic injury to the brainstem and frontal lobes. Dr. Changaris requested an automated neuropsychological assessment metric ("ANAM") to identify cognitive dysfunction in the context of traumatic brain injury.

November 26, 2018

Dr. Changaris conducted an independent medical evaluation, at Plaintiff's request, and issued a report, dated November 26, 2018. He noted Plaintiff's work-related motor vehicle accident. Dr. Changaris diagnosed traumatic brain injury, right shoulder and cervical restrictive disease, all due to the work-related motor vehicle accident. Dr. Changaris assessed 59% whole person impairment, per the 5th Ed., *AMA Guides*. He opined Plaintiff's injuries were caused, or brought into disabling reality, by the work-related motor vehicle accident. Dr. Changaris indicated Plaintiff had reached maximum medical improvement and noted further care or treatment was unlikely to improve the pain pattern. He indicated further care and treatment by a pain specialist would be necessary and Plaintiff was likely to progress in loss of neurological function in the absence of further medical intervention.

Dr. Changaris recommended use of anti-depressants and medical pain management that do not contain Acetaminophen or NSAIDs. He assigned permanent restrictions of no driving or walking on uneven surfaces and no climbing. Dr. Changaris identified Plaintiff as a serious risk for a fall and recommended balance training prior to her fall. He noted Plaintiff suffered a right arm contusion resulting in a frozen shoulder, limited elbow range of motion and loss of hand strength.

December 3, 2018

Dr. Changaris reviewed the March 27, 2018 work accident video. He noted Plaintiff was sitting normally facing forward with her head turned 70 degrees off axis to the length of the van and moving forward. In the next frame of the video, Dr. Changaris observed Plaintiff's pony-tail whipped to blurriness with her head

whipped forward. He found it likely she was moving forward at the speed of the car as it was stopping. Dr. Changaris noted her head more likely than not made a left to right and forward angular acceleration. He indicated Plaintiff's face was visible, looking forward, and her hair unchanged. Dr. Changaris observed the measure of the crash impact ranged between 20 and 33.3 milliseconds. Based on the visualized rotation of 70 degrees or 1.2 radians in 20-33 ms, the likely angular acceleration. Dr. Changaris indicated, based on the crash duration, the average angular acceleration calculates to be 1100-3000 R/sec2. This did not include the likely added effect the forward acceleration had no this "whip-like" rotation of the head. Dr. Changaris noted this was within the range generally accepted to produce shear force injury to the brain. Additionally, he indicated Plaintiff did not strike her head in this accident. What Dr. Changaris found clear in the video was her head was turned significantly to the left, approximately 70 degrees, which was forced forward in the collision. Dr. Changaris explained the critical factor in producing demonstrable brain injury was whether there was angular acceleration or twisting. This was considered important in the "shaken baby" syndrome, where there was no direct blow to the child.

Of interest, Dr. Changaris noted Plaintiff could perform complex activity immediately after the impact, severely twisting her head. He observed, immediately after the accident, Plaintiff sat for 4-6 seconds, apparently dazed. Dr. Changaris explained this was not unusual and there were many examples of people receiving blows, i.e., boxing, where a boxer was amnestic for the subsequent records fought. He indicated it was within his personal experience the ability to generate new long term memories took days or weeks to return. Dr. Changaris explained, in the interval, the injured person performed complex tasks.

On posturography and vestibulonystagmogram, Dr. Changaris found severe findings and impaired balance, foundational for Plaintiff's subsequent fall. He indicated Plaintiff was unable to obtain appropriate orthopedic support and physical therapy. This time lapse without therapeutic intervention was sufficient to believe her should would not improve in 12 months, so Dr. Changaris concluded this was a permanent injury attributable to the accident. He found no other potential causes of the posturography and vestibulographic findings and did not

believe Plaintiff could drive a bus with posturography so severely impaired. Dr. Changaris explained the Rhode Island and Colorado Workman's compensation identified posturography and vestibulonystagmography as legitimate tools to diagnose and treat traumatic brain injury.

August 19, 2019

Dr. Changaris reviewed an April 23, 2019 and April 24, 2019 video surveillance of Plaintiff and performed a re-examination on August 7, 2019. Dr. Changaris agreed with Dr. Patel that Plaintiff's mental illness was PTSD, beginning with the initial work-related injury and exacerbated by the inability to obtain medical treatment for her balance disorder. He noted Plaintiff had reached maximum medical improvement on August 7, 2019. Dr. Changaris assessed 33% whole person impairment (17% for right extremity, 10% for headaches, and 10% for dizziness), per the 5th Ed., *AMA Guides*. He assigned restrictions of no lifting overhead, engaging in repetitive right arm/hand activity, use of vibrating/percussive instruments, or rarely lift more than 10 pounds. Dr. Changaris indicated Plaintiff could return to work if given the opportunity to take off as needed to manage her headaches and dizziness. Otherwise, she would need a place to lie down *ad lib*. He explained the underlying brain injury made Plaintiff more likely to be intolerant of criticism and protect herself from workplace abuse.

DR. JOSEPH L. ZERGA

Defendant submitted Dr. Zerga's initial and supplemental reports.

October 15, 2018

Dr. Zerga conducted an independent medical evaluation, at Defendant's request, and issued a report, dated October 15, 2018. Dr. Zerga noted Plaintiff's March 27, 2018 motor vehicle accident. Dr. Zerga found no evidence Plaintiff suffered head, cervical or upper back injuries. Additionally, he found no evidence she had head trauma causing unsteadiness. Therefore, Dr. Zerga opined Plaintiff's right upper extremity injury was not due to the March 27, 2018 event. Dr. Zerga found no evidence she could not return to work. Dr. Zerga concluded Plaintiff did not need ANAM testing, treatment or restrictions.

Dr. Zerga reviewed a video surveillance taken on March 27, 2018. He indicated the video confirmed Plaintiff did not suffer head or blunt trauma or

significant flexion/extension trauma. Dr. Zerga noted Plaintiff was immediately purposeful after the accident and disembarked with no evidence of weakness or unsteadiness.

April 23, 2019

Dr. Zerga had not heard of posturography and vestibulonystagmography used by Dr. Changaris. He does not know of anyone else in the medical community who used these tests. Dr. Zerga explained there were some vestibular tests performed by audiologists but questioned the reliability of tests performed. Dr. Zerga disagreed with Dr. Changaris that Plaintiff suffered a traumatic brain injury. Dr. Zerga found Dr. Patel's EEG findings were non-specific and would not be due to the March 27, 2018 event. The records Dr. Zerga reviewed did not change his opinions.

July 23, 2019

Dr. Zerga reviewed an April 23, 2019 video surveillance of Plaintiff and noted she moved without difficulty with no balance issues. He noted she was able to bend over at a severe degree without difficulty several times. Dr. Zerga indicated Plaintiff stood, walked, and moved without difficulty and demonstrated no manifestations of any injury to her head, neck or upper back.

November 5, 2019

Dr. Zerga indicated he disagreed with Dr. Changaris and opined Plaintiff did not have a work injury and no with work-related impairment .

JOB DESCRIPTION

Defendant submitted the transit driver job description, which included, but was not limited to, push/pull, stoop and bend to assist wheelchair passengers and secure in tie-down, and lift up to 50 pounds.

POLICE REPORT

Defendant submitted a police report, which this ALJ reviewed prior to making her decision.

STIPULATIONS

The parties have stipulated the following:

1. There is jurisdiction under the Act. Yes.

2. An employment relationship existed between the Plaintiff and Defendant-Employer at all relevant times. Yes.
3. Plaintiff sustained a work-related injury or injuries on or about March 27, 2018 (Alleged).
4. Plaintiff provided the Defendant-Employer due and timely notice concerning the alleged injury(ies). Yes
5. The Defendant-Employer paid temporary total disability ("TTD") benefits at a $335.26 weekly rate from March 28, 2018 to October 17, 2018 for a total of $8,549.06.
6. The Defendant-Employer paid $9,514.61 in medical expenses on behalf of the Plaintiff.
7. The Plaintiff's pre-injury average weekly wage was $502.89.
8. Plaintiff retains the physical capacity to return to the type of work performed at the time of the injury. At Issue.
9. Plaintiff did not return to a same or greater wage. Plaintiff currently earns wages Less Than (=/</>) his/her pre-injury AWW.
10. The Plaintiff's date of birth is March 2, 1968.
11. The Plaintiff's education level is: 12th grade and college degree.
12. The Plaintiff's specialized or vocational training: At issue

CONTESTED ISSUES

1. Injury as defined by the Act, causation, temporary versus permanent injury
2. Permanent income benefits per KRS 342.730
3. TTD Benefits
4. Ability to return to work
5. Unpaid or contested medical expenses
6. Proper use of the AMA Guides
7. Safety Violation
8. Whether Dr. Changaris' medical opinion conforms to Daubert

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GENERAL AUTHORITY: As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

1. **Injury as defined by the Act, causation, temporary versus permanent injury & whether Dr. Changaris' opinion conforms to Daubert**

It has long been held in Kentucky courts that a worker is entitled to be compensated for all harmful changes that flow from a work-related injury which are not attributable to an independent, intervening cause. Elizabeth Sportswear v. Stice, 720 S.W.2d 732, 734 (Ky. App. 1986). Even having proven the existence of an injury, a Plaintiff is also required to establish causation with regard to each and every element of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). As fact-finder in a workers' compensation claim, it is the function of the ALJ to determine the issue of whether a causal nexus exists between the claimant's injury and his/her work activities. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2005). Whether a causal nexus exists between the work activities and claimant's injury is a factual determination.

However, when a causal relationship between trauma and an injury is not readily apparent to laymen, the question is to be put before the medical experts. Mengel v. Hawaiian-Tropic Ne. & Cent. Distrib., Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proved to a reasonable medical probability with expert testimony... [however] [i]t is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, i.e. to the level necessary to prove a particular medical fact." Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004).

"Objective medical findings" are defined by KRS 342.0011(33) as being information gained through direct observation and testing of a patient, applying objective or standardized methods. In Gibbs v. Premier Scale Co., 50 S.W. 3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if it is based on symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. The Court in Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), concluded though that while objective

medical evidence must support a diagnosis of a harmful change, it is not necessary to prove causation of an injury through objective medical findings.

Plaintiff alleged a traumatic brain injury as a result of the motor vehicle accident on March 27, 2018, relying on treatment records and Dr. Changaris' opinions. Conversely, Defendant argues Plaintiff did not sustain a traumatic brain injury, relying on Dr. Zerga's opinions. After reviewing the conflicting evidence, this ALJ finds Plaintiff sustained a traumatic brain injury as a result of the March 27, 2018, work-related motor vehicle accident. In making this finding, this ALJ relies on Plaintiff's treatment records and Dr. Changaris' opinion.

First, this ALJ notes the motor vehicle accident caused significant/moderate damage to the van/bus Plaintiff was driving. Additionally, there was significant damage to the vehicle that struck Plaintiff's automobile. The extent of this damage is indicative of a severe and forceful impact. After reviewing the police report and video of the accident, this ALJ concluded Dr. Changaris' opinion that the mechanism of injury was sufficient to cause a traumatic brain injury was persuasive.

Secondly, this ALJ notes Defendant's argument that Plaintiff did not exhibit any symptoms of a traumatic brain injury immediately following the motor vehicle accident. However, the police report indicates Plaintiff required treatment immediately following the work accident for a panic attack. Additionally, she was transported by ambulance to the emergency room where physicians diagnosed a concussion. Later, Dr. Rowe diagnosed post-concussive headache. Also, Plaintiff's EEG was abnormal and showed localized sharp wave activity in the left frontal area. Thus, the treatment records immediately following the work accident and thereafter, along with Plaintiff's EEG, support Dr. Changaris' opinion that Plaintiff sustained a traumatic brain injury.

This ALJ noted Dr. Zerga's opinion that the motor vehicle accident was not sufficient to cause a traumatic brain injury. The force of impact and Plaintiff's treatment following the motor vehicle accident do not support Dr. Zerga's opinion on this issue. Additionally, Dr. Changaris (Zerga) was adamant that this was a fictitious incident. However, Plaintiff's counselor, who saw her on numerous occasions, indicated she observed no evidence of malingering.

Thus, this ALJ found cause to reject Dr. Zerga's causation opinion.

This ALJ notes Defendant's argument that Dr. Changaris' causation opinion is deficient. The factors an ALJ may consider, when determining an expert's reliability and credibility, and ultimately whether the expert's opinions are admissible, include:

> (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique, and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular field. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); City of Owensboro v. Adams, 136 S.W.3d 446 (Ky. 2004).

To be clear, this ALJ's finding that Plaintiff sustained a traumatic brain injury is not completely based on Dr. Changaris' opinions alone. Rather, this ALJ felt the treatment records also supported Plaintiff's allegation of a traumatic brain injury considering the diagnosis rendered following the motor vehicle accident. However, this ALJ will provide a Daubert analysis in order to provide the parties findings on this issue for appellate purposes.

Dr. Changaris utilized posturography and vestibulonystagmography in order to assess whether Plaintiff sustained a traumatic brain injury. Dr. Changaris felt Plaintiff's test results indicated she sustained a traumatic brain injury. Dr. Zerga questioned these tests and indicated he had never heard of posturography and vestibulonystagmography. Of course, Dr. Zerga's unfamiliarity with these tests does not equate to a finding in Defendant's favor. Dr. Changaris explained these tests have been utilized by Worker's Compensation courts in other jurisdictions and the military and have been tested. Dr. Changaris indicated posturography is a generally accepted well-established test useful in monitoring neurologic recovery. Thus, Dr. Changaris provided an opinion addressing whether the testing he performed is generally accepted in this particular field. After conducting an analysis in accordance with Daubert, this ALJ finds Dr. Changaris' opinion, to the limited extent he relied on posturography and vestibulonystagmography, is

reliable and credible. However, this ALJ feels compelled to note Dr. Changaris' causation opinion was also based on his clinical examination findings and review of Plaintiff's treatment records.

Plaintiff alleges she sustained a right upper extremity injury as a result of falling due to balance issues, which she attributes to the work injury. In July 2018, Dr. Changaris felt Plaintiff exhibited a significant balance disorder and he characterized her as a fall risk. On August 8, 2018, Plaintiff presented for psychological counseling and reported sudden head movements make her feel dizzy. Additionally, she reported balance problems and several falls. Plaintiff testified she sustained a right upper extremity injury as a result of losing her balance while trying to retrieve something in a high kitchen cabinet. Considering Plaintiff's balance problems were documented on numerous occasions in her treatment records, this ALJ finds Plaintiff's fall wherein she sustained a right upper extremity injury is work-related because it was a direct and natural consequence of the symptoms/limitations of the work related traumatic brain injury in accordance with Addington Res., Inc. v. Perkins, 947 S.W.2d 421 (Ky.App. 1997). In making this finding, the ALJ relies on Dr. Changaris' and treatment notes, which evidence balance issues and dizziness.

2. Temporary total disability benefits

KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. When a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event. This test was reinforced in the recent holding by the Kentucky Supreme Court in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015). The holding in Livingood, supra, was further explained in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), where the Court stated:

> [i]t is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because

> the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. *Id.* (Emphasis Added.)

Defendant paid temporary total disability benefits at the rate of $335.26/week from March 28, 2018 through October 17, 2018. The parties stipulated to an average weekly wage of $502.89, which produces a weekly temporary total disability rate of $335.26. Thus, temporary total disability benefits were paid at the appropriate rate.

Plaintiff argues she is entitled to additional temporary total disability benefits because she was not at maximum medical improvement at that time temporary total disability benefits ceased. The primary issue at this juncture is when Plaintiff reached maximum medical improvement following the March 27, 2018, work injury. On that issue, Dr. Zerga was quite adamant Plaintiff did not sustain an injury and maximum medical improvement was not relevant because, as he opined, she was never not at maximum medical improvement.

As set forth above, this ALJ found Plaintiff sustained a work-related traumatic brain injury and right upper extremity injury. After reviewing the evidence, this ALJ finds Plaintiff reached maximum medical improvement on August 7, 2019, relying on Dr. Changaris. This ALJ notes Plaintiff continued to undergo treatment following cessation of temporary total disability benefits in October 2018, and her condition continued to improve through Dr. Changaris' proposed date of maximum medical improvement. Following October 2018, Plaintiff continued to seek treatment with Avalon Psychological Center, Dr. Patel, and Dr. Fakhoury. Importantly, it was not until after Plaintiff sought treatment with Dr. Fakhoury that her condition improved and plateaued. As such, this ALJ awards temporary total disability benefits at the rate of $335.26/week from March 28, 2018 through August 7, 2019. Defendant is entitled to credit for temporary total disability benefits previously paid.

3. Specialized or vocational training

The parties were unable to reach a stipulation regarding Plaintiff's specialized or vocational training. Defendant maintained Plaintiff spoke five languages. This ALJ reviewed Plaintiff's deposition, and her testimony supports Defendant's assertion. Thus, this ALJ finds Plaintiff retains specialized or vocational training to the extent that she speaks five different languages

4. Permanent income benefits per KRS 342.730, ability to return to work, and proper use of AMA Guides

This ALJ found Plaintiff sustained a mild traumatic brain injury and right upper extremity injury as a result of the March 27, 2018, work accident. This ALJ is now vested with the responsibility of determining what permanent impairment, if any, Plaintiff retains as a result of this injury. Dr. Zerga opined Plaintiff does not retain any permanent partial disability because he concluded she did not sustain a work-related injury. Conversely, Dr. Changaris, in his most recent report assessed 10% permanent impairment for headaches, 10% permanent impairment for dizziness and 17% permanent impairment for decreased right upper extremity range of motion. After reviewing the evidence, this ALJ finds Plaintiff retains a 10% permanent impairment rating for dizziness and ongoing headaches. Plaintiff continues to complain of ongoing headaches and intermittent dizziness. She is undergoing treatment with Dr. Fakhoury. Thus, Plaintiff's ongoing headaches and dizziness do not support Dr. Zerga's opinion that she does not retain any permanent impairment. As such, this ALJ finds Plaintiff retains a combined 19% permanent impairment rating as a result of the work-related injury. In making this finding, this ALJ relies on Dr. Changaris.

This ALJ found Plaintiff sustained a right upper extremity injury, but she is not convinced Plaintiff retains any permanent impairment as a result of this injury. This ALJ notes Dr. Changaris' assessed impairment for decreased range of motion. However, this ALJ did not find that assessment of impairment to be persuasive after reviewing surveillance footage of Plaintiff utilizing a pressure washer and using her right upper extremity. Thus, this ALJ finds Plaintiff is not entitled to any

permanent partial disability benefits for her right upper extremity injury, but as set forth below is entitled to an award of past and future medical benefits.

The parties preserved capacity to perform preinjury work as a contested issue in this claim. This ALJ notes Plaintiff did not return to work for Defendant following the work injury. Additionally, she was intermittently restricted from driving. Considering Plaintiff's traumatic brain injury requires ongoing treatment, this ALJ is not convinced that this condition does not require any restrictions as opined by Dr. Zerga. This ALJ further concludes it would be ill-advised for an individual with Plaintiff's ongoing headaches and dizziness symptoms to return to work as a driver. Thus, this ALJ finds Plaintiff does not retain the capacity to return to pre-injury work as a driver, relying on her testimony and Dr. Changaris' restrictions. As such, Plaintiff is awarded permanent partial disability benefits in the amount of $203.84/week for 425 weeks.

5. Unpaid or contested medicals expenses

KRS 342.020(1) provides that "[i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability." In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Instead, liability for medical expenses exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits."

This ALJ concluded Plaintiff sustained an traumatic brain injury and right upper extremity injury. As such, Plaintiff is entitled to reasonable and necessary treatment for the cure and relief of her traumatic brain injury and right upper extremity work injury.

6. KRS 342.165 violation

Defendant argues Plaintiff committed a safety violation, and Plaintiff's indemnity benefits should be reduced by 15%. Defendant asserts Plaintiff committed a safety violation by pulling the vehicle she was driving in front of an oncoming vehicle that had the right-of-way. Plaintiff argues she did not intentionally fail to obey any lawful and reasonable order or regulation.

KRS 342.165 states if a work accident is caused, in any degree, by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation then compensation shall be decreased by 15%.

The first element that must be addressed is the "intentional failure" by the employee. Intentional failure must be more than simple negligence. The state of mind of the party violating the safety regulation or policy at the time the accident occurs, and against whom the penalty is sought to be imposed, constitutes an essential finding to be made in such instances. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985).

Specifically with regard to KRS 342.165(1), our courts have held that its application requires proof of two elements. Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996). First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal or, as in the instant claim, a specific safety policy or order of an employer. Secondly, evidence of "intent" to violate the specific safety provision must also be present. This does not mean that the party must be intent on purposely causing an injury or producing an accident. Rather, there must be evidence within the record from which this ALJ can conclude or infer that there was some degree of conscious indifference to the consequences of the act.

Inadvertent negligence by the employee is not enough. There must be a level of awareness by the party not merely with regard to the existence of a safety regulation or policy, but an immediate cognizance that the conduct causing the injury is in contravention to the policy or regulation. Barmet of Kentucky v. Sallee, Ky. App., 605 S.W.2d 29 (1980). In other words, the injury must be the result of conscious wrongdoing. The act causing the injury must be desired by the doer, and

the consequences reasonably foreseeable. The violation must be advertent and rise to the level of at least reckless disregard or willful misconduct. See, Larson's Workers' Compensation, § 31. Only then, if the accident caused by the employee is attributable "in any degree" to his failure to use any safety appliance furnished by his employer, or his failure to obey any lawful and reasonable order or administrative regulation of the Commissioner or his employer for the safety of employees or the public, shall the compensation for which his employer is liable be decreased by 15% in the amount of each payment.

In this case, this ALJ concludes Plaintiff inadvertently turned and failed to yield to another vehicle, which had the right of way. This ALJ does not view this act as a reckless disregard or willful misconduct. Rather, this seems to be an incident of simple negligence. Simply put, this ALJ is not convinced the intentional element has been established or Plaintiff exhibited conscious indifference, reckless disregard, or willful misconduct by failing to yield the right-of-way.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED AND ADJUDGED**:

1. Plaintiff, Luzanete DeLima, shall recover from the Defendant, Rural Transit Enterprises Corp., and/or its insurance carrier temporary total disability benefits at the rate of $335.26/week from March 28, 2018 through August 7, 2019. Defendant is entitled to a credit under Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990) for temporary total disability benefits previously paid.

2. Plaintiff, Luzanete DeLima, shall recover from the Defendant, Rural Transit Enterprises Corp., and/or its insurance carrier permanent partial disability benefits in the sum of $203.84/week for a 19% permanent partial disability commencing on March 27, 2018 and continuing for a period not to exceed 425 weeks.

3. Defendant's alleged safety violation is dismissed, with prejudice.

4. All unpaid installments of compensation awarded herein shall carry interest at the rate of 12% per annum on all due and unpaid installments of such compensation as of June 28, 2017 and 6% thereafter. The benefits are subject to

the limitations set forth in KRS 342.730 (5), (6), and (7) and KRS 342.730(4) newly amended version, which became effective July 14, 2018.

5. Plaintiff shall recover medical expenses from the Defendant/Employer, including but not limited to provider's fees, hospital treatment, surgical care, nursing, supplies, appliances, prescriptions, and mileage reimbursements as may be reasonably required under KRS 342.020 for the cure and relief from the effects of the traumatic brain and right upper extremity injury. The Defendant's obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.

6. Any motion for approval of attorney's fees shall be filed within thirty (30) days after the final disposition of this award. Any such motion must include an itemization of services together with either the actual times or a reasonable accurate estimate of the time expended on each of the itemized services listed.

Rendered and copies deposited in the United States Mail or delivered via LMS to the parties noted below on this the 17th day of January, 2020

Stephanie L. Kinney

STEPHANIE L. KINNEY
ADMINISTRATIVE LAW JUDGE

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