

OPINION ENTERED: January 25, 2013

CLAIM NO. 200973444

ALTON LIVINGOOD

PETITIONER

VS.

**APPEAL FROM HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE**

TRANSFREIGHT, LLC
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Alton Livingood ("Livingood") seeks review of the August 15, 2012, opinion, award, and order of Hon. Robert L. Swisher, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits as a result of a work-related injury occurring on September 16, 2009. Livingood also appeals from the

September 18, 2012, order overruling his petition for reconsideration.

There was no dispute Livingood sustained a work-related left shoulder injury. Livingood was employed by Transfreight, LLC ("Transfreight") primarily as a forklift operator. He described the injury as follows:

A: I had a label underneath the pallet that I could not scan and it was in the middle of my lanes. And instead of moving with the forklift, I picked up the pallet to get the label out so I could scan it causing the problems to my shoulder.

Livingood was treated by Dr. Travis Hunt, an orthopedic surgeon, who performed two surgeries. On November 4, 2009, he performed a "left shoulder arthroscopy with mini open cuff repair and open acromioplasty." The post-operative diagnosis was acute rotator cuff tear with impingement. Because Livingood developed adhesive capsulitis and was having trouble manipulating his shoulder, on February 10, 2010, Dr. Hunt performed a "left shoulder lysis of adhesions and manipulation under anesthesia."

When Livingood's symptoms persisted, he then went to Dr. Scott D. Mair at the University of Kentucky Department of Orthopaedic Surgery and Sports Medicine. Dr. Mair initially saw Livingood on June 3, 2010, and in

October 2010 performed "post-arthroscopic capsular releases and lysis of adhesions" and a "biceps tenotomy." Livingood was off work and received TTD benefits from November 11, 2009, through March 2, 2010. He returned to work on March 3, 2010, at light duty until the surgery was performed by Dr. Mair. As a result, Livingood was again paid TTD benefits from October 6, 2010, through December 12, 2010.

Livingood returned to work at Transfreight on December 13, 2010, as a forklift operator. On December 13, 2010, approximately four hours into his work day, Livingood hit a pole while operating the forklift which he reported to his supervisor. He worked as a forklift operator until December 23, 2010, when he was terminated because of the December 13, 2010, incident. Livingood did not obtain employment until December 18, 2011, when he began working for Volt Management packing post-it notes.

The June 19, 2012, benefit review conference ("BRC") order reflects the following contested issues: "benefits per KRS 342.730; TTD; KRS 342.165 violation."

Livingood relied upon the impairment rating of Dr. Hunt who assessed a 7% impairment based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Significantly, 5% of the 7% impairment was based on Dr.

Hunt's range of motion calculations and the remaining 2% was assessed for pain. Transfreight relied upon the opinion of Dr. Terry L. Troutt who, pursuant to the AMA Guides, assessed a 1% impairment based on Livingood's loss of range of motion.

In determining Livingood's injury resulted in a 5% impairment, the ALJ entered the following findings of fact and conclusions of law:

Having carefully and thoroughly reviewed the evidence, the ALJ is persuaded that portion of Dr. Hunt's impairment rating attributable to deficits in range of motion is the more persuasive and probative of the two impairment ratings. The ALJ notes that plaintiff's range of motion in the left shoulder was measured by various providers, including the physical therapy provider, Dr. Mair, Dr. Hunt and the defendant's evaluator, Dr. Troutt, at different points of time from January 17, 2011 through July 7, 2011 with results varying over time. It is significant to the ALJ that Dr. Hunt was one of plaintiff's treating orthopedic surgeons and that his evaluation, July 7, 2011, is the most recent. While the defendant argues that Dr. Troutt's rating is more persuasive because it is based on range of motion measurements made two days prior to the courthouse fall, the ALJ notes that Dr. Troutt's actual range of motion measurements made February 10, 2011 are not substantially different than those recorded by the physical therapist on January 17, 2011, i.e., prior to the courthouse fall. Moreover, when Dr. Mair measured

plaintiff's range of motion on May 5, 2011, those ranges which were recorded demonstrate an improvement in flexion (elevation), and are essentially the same with respect to external rotation. At deposition Dr. Hunt explained that some patients will achieve a certain range of motion but when not doing therapy and exercises much will regress and that he believed that is what has happened in the plaintiff's situation. Plaintiff testified that he performs home exercises only on occasion. Further, it appears that only Dr. Hunt measured all of the plaintiff's planes/segments of shoulder motion with Dr. Troutt relying only on Dr. Mair's assessment of three planes of range of motion, flexion, external rotation and internal rotation. The ALJ finds the range of motion assessment of Dr. Hunt, therefore, to be the more current and comprehensive.

The ALJ is not persuaded, however, that plaintiff is entitled to an additional 2% impairment rating by virtue of pain as assigned by Dr. Hunt. In so finding, the ALJ relies upon the opinion of Dr. Troutt that the additional attribution to "pain" is inappropriate considering plaintiff only takes over-the-counter medication for pain control. The ALJ further notes in this regard that the plaintiff has been released to full regular duties without restrictions by all of his treating physicians. When he takes pain relievers his pain level is only 3 out of 10. While he testified to ongoing symptoms and limitations in the shoulder, the ALJ is simply not persuaded that the medical and lay testimony provided supports Dr. Hunt's additional assignment of 2% pursuant to the Pain Chapter of the AMA Guides. Accordingly, the ALJ finds and

concludes that the plaintiff's left shoulder injury of September 16, 2009 has resulted in a 5% permanent impairment rating under the 5th Edition of the AMA Guides based on the report of Dr. Hunt. Plaintiff has a disability rating, therefore, of 3.25%.

In determining Livingood did not qualify for enhancement of his benefits by the three multiplier pursuant to KRS 342.730(1)(c)1, the ALJ entered the following findings of fact and conclusions of law:

...KRS 342.730(1)(c)(1) provides that if an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be three times the amount otherwise determined under (b) of KRS 342.730. Although the plaintiff testified that he does not believe he is physically capable of performing regular duties as a forklift operator in light of ongoing symptoms in his left shoulder, the ALJ is more persuaded by the totality of the medical evidence including the opinions of plaintiff's treating physicians, Drs. Mair and Hunt, as well as the defendant's evaluating physician, Dr. Troutt, that the plaintiff does not require formal work restrictions and is capable of performing his job as a forklift operator. In addition, the job description filed by the defendant does not describe physical requirements which are outside of even the plaintiff's subjective self-imposed limitations. Finally, the ALJ notes that the plaintiff did, in fact, return to his full regular duties as a forklift operator and performed those

duties until the time of his termination shortly after his return to work. While the operation of the forklift no doubt required the use of plaintiff's left upper extremity to some extent during the course of the work day, the undersigned is not persuaded by the plaintiff's testimony that he is physically precluded from performing his job as a forklift operator in spite of his residual left shoulder symptoms. The ALJ finds and concludes, therefore, that the plaintiff retains the physical capacity to return to the type of work performed at the time of injury and that the triple multiplier of KRS 342.730(1)(c)(1) is not applicable.

Concerning Livingood's entitlement to enhanced benefits by the two multiplier pursuant to KRS 342.730(1)(c)2, the ALJ entered the following findings of facts and conclusions of law:

With respect to the application of the double multiplier of KRS 342.730(1)(c)(2), the ALJ likewise finds that plaintiff has not established entitlement to that statutory enhancement. While it is clear that the plaintiff was terminated in December of 2010 because he was involved in what the company considered an avoidable accident, the ALJ is not persuaded that the reason for that accident was related to his disabling shoulder injury. Plaintiff testified that he was taking Lortab when he returned to work and that because he was, it affected his ability to operate his forklift thus resulting in the accident. At deposition he testified he was under the influence of Lortab "but not bad." The more convincing

testimony, however, was to the effect that the plaintiff was assigned to an area of the facility with which he was unfamiliar and that that was the reason he accidentally bumped into a concrete post. Further, the testimony of Stephanie Baldwin establishes that plaintiff was already on a "final warning" status at the time of the event in light of prior transgressions. In other words, but for the prior transgressions the pole bumping incident would not have resulted in plaintiff's termination. The ALJ is not persuaded, therefore, that the plaintiff's termination by the defendant is attributable to the disabling left shoulder injury and plaintiff is not, therefore, entitled to the application of the double multiplier of KRS 342.730(1)(c)(2).

Plaintiff is, therefore, entitled to an award of permanent partial disability benefits calculated as follows: $\$550.43 \times \frac{2}{3} \times 5\% \times .65 = \11.93 per week.

Regarding the alleged underpayment of TTD benefits, the ALJ entered the following findings of fact and conclusions of law:

3. Underpayment of temporary total disability benefits as to duration.

Plaintiff contends that temporary total disability benefits have been underpaid as to duration. The parties stipulated that temporary total disability benefits were paid at the rate of \$380.14 from November 11, 2009 through March 2, 2010 and from October 6, 2010 through December 12, 2010. Plaintiff contends that he did not reach maximum medical improvement until

January 19, 2011 when placed in that status by Dr. Mair and that TTD is, therefore, payable through January 18, 2011 absent a showing that plaintiff returned to performing the type of work he was performing at the time of injury.

He further argues that the work he was performing was "minimal work" and was not the type of work that was "customary or that he was performing at the time of his injury" citing *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000). Plaintiff requests additional TTD benefits from March 3, 2010 through October 5, 2010 and from December 23, 2010 through January 18, 2011. The defendant, for its part, contends that the plaintiff is not entitled to any additional temporary total disability benefits in that he was released to full regular duty as of December 13, 2010 and that he, in fact, returned to that work at that time.

"Temporary total disability" is defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement which would permit a return to employment." Entitlement to TTD is a question of fact. *Hall's Hardwood Floor Company v. Stapleton*, 16 S.W.3d 327 (Ky.App. 2000). Kentucky courts have confirmed the two-pronged test for establishing entitlement to TTD under KRS 342.0011(11)(a). TTD are [sic] payable so long as "(1) maximum medical improvement has not been reached and (2) the injury has not reached a level of improvement that would permit a return to employment." *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App. 2004).

With respect to plaintiff's request for benefits from March 3, 2010 to October 5, 2010, the ALJ notes that the plaintiff was employed during that period at his regular rate of pay although he was performing modified/light duty for that period of time. He testified that during that time frame he spent half of his time changing batteries in forklifts, an activity that he had performed on a full time basis for a five month period a couple of months before the date of injury, spent 25% of his time tracking down misplaced freight, an activity that he performed daily while working as a forklift operator, and spent 25% of his time as a bathroom monitor, something that he never did prior to the date of injury. Plaintiff acknowledged at the Formal Hearing that those functions were required in the operation of the defendant's business and that he was not given a "make-work" project. In other words, if he had not performed those duties someone else would have had to have done it. Having carefully considered the evidence the ALJ is not persuaded that the plaintiff is entitled to an additional period of temporary total disability benefits from March 3, 2010 through October 5, 2010. During that time frame the majority of plaintiff's time was spent performing employment activities that he had performed for the defendant on a sustained basis in the past (i.e., changing batteries and tracking down misplaced freight). The only activity that the plaintiff had not performed in the past was working as a bathroom monitor, but the ALJ is not persuaded that those activities were either the result of a "make-work" project or otherwise would not have been performed by another employee. In other words, for the most part, the plaintiff was

performing work for which he had prior training and experience and which he actually performed for the defendant/employer.

Livingood filed a petition for reconsideration making the same arguments he makes on appeal. In the September 18, 2012, order overruling Livingood's petition for reconsideration, the ALJ determined as follows concerning the impairment rating attributable to the work injury:

. . .

The plaintiff first contends that the ALJ erred in carving out the 2% impairment rating for pain assigned by Dr. Hunt from Dr. Hunt's overall 7% AMA rating. Plaintiff argues that although the ALJ has broad discretion regarding medical evidence, in rejecting a portion of Dr. Hunt's impairment rating the ALJ has, in essence, independently interpreted the AMA Guides. The essence of the plaintiff's argument is that it's "all or nothing" with respect to the physician's impairment rating. The ALJ relied, however, on the expert medical opinion of Dr. Troutt in finding that Dr. Hunt's assessment of a 2% impairment rating under the AMA Pain Chapter was inappropriate under the facts and circumstances of this claim. The ALJ did not, therefore, independently interpret the AMA Guides and dismiss a portion of the impairment rating assigned by Dr. Hunt. This aspect of the petition for reconsideration is, therefore, **OVERRULED.**

Since the ALJ concluded Livingood was impermissibly requesting him to reweigh the evidence with respect to the other issues raised in the petition for reconsideration, he overruled the remaining portion of the petition for reconsideration.

On appeal, Livingood challenges the ALJ's decision on four grounds. First, Livingood asserts he was entitled to additional TTD benefits during the periods he returned to work performing light duty work. He asserts the work he was performing was modified light duty which was not his customary pre-injury work. Therefore, since this work was not his customary work, pursuant to Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), he was entitled to TTD benefits during this period. Livingood asserts although his testimony reflects he had previously performed some of the jobs he was assigned when he returned to work performing light duty, the bathroom monitor job was a "made up" job that no one performed before or after the time he performed that job. Curiously, Livingood asserts it is "an un rebutted fact" he did not earn the same weekly wage when he returned to work at modified or light duty. He maintains although he was paid the same hourly rate, the wage records submitted by Transfreight at the hearing establish "he did not receive any overtime during that

period." Livingood maintains the fact he earned substantial overtime prior to the work injury "solidifies the fact" he did not return to his customary employment as a forklift operator.

Second, Livingood argues his benefits must be enhanced by the two multiplier since the reason for his termination related to the work injury. Livingood maintains since this event occurred on the first day he returned to work as a forklift operator at an unfamiliar location and he was under the influence of medication, the effects of the work injury resulted in his termination. He asserts the ALJ committed error by not finding the reason Livingood bumped the pole with his forklift was due to being placed in an "unfamiliar position" while still "under the influence of narcotic medication."

Third, Livingood asserts the ALJ improperly engaged in an independent interpretation of the AMA Guides when he carved out 2% of Dr. Hunt's impairment rating. Citing to Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005), he asserts interpretation of the AMA Guides and assessment of an impairment are medical questions reserved only for medical witnesses.

Fourth, Livingood asserts he lacked the physical capacity to return to his job as a forklift operator.¹ Thus, the ALJ erred in not enhancing his benefits by the three multiplier. He asserts in determining whether KRS 342.730(1)(c)1 applied, the ALJ misunderstood his testimony regarding his physical capabilities and failed to take into consideration the range of motion restrictions found by Dr. Hunt.

As the claimant in a workers' compensation proceeding, Livingood had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Livingood was unsuccessful in that burden regarding entitlement to additional TTD benefits, the impairment rating attributable to the work injury and enhancement of his income benefits, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is

¹ Since Livingood does not argue Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is applicable, we assume this is an alternative argument.

limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn

from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We find no merit in Livingood's contention he is entitled to additional TTD benefits. KRS 342.0011(11)(a) reads as follows:

'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment;

Entitlement to TTD benefits requires a showing the claimant has not reached maximum medical improvement ("MMI") and has not reached a level of improvement which permits a return to employment. As noted by Livingood, in Central Kentucky Steel v. Wise, supra, the Supreme Court held it is not reasonable to terminate TTD benefits of an employee who has returned to work performing minimal work but not the type of work which is customary or that he was performing at the time of the injury. In such cases the claimant has not reached a level of improvement that would permit a return to employment.

The facts in this case are different. At the hearing, Livingood testified that between March 3, 2010, and October 5, 2010, 50% of his work involved changing batteries, 25% of his work involved ensuring items were in the right spot, and 25% of his work involved monitoring the bathrooms. He testified that prior to his injury he had worked five months changing batteries. In addition, prior to his injury, at the end of each work day, Livingood was required to ensure there was no misplaced freight. Although Livingood testified monitoring bathrooms was something he had not done before and believed it was a made up job, he also testified during the period between March 3, 2010, and October 5, 2010, he earned his regular rate of pay.

The fact Livingood spent half his time changing batteries and spent 25% of his time tracking down freight supports the ALJ's determination he was not given a "make-work" project. Thus, the evidence establishes Livingood did not return to work performing minimal work. Rather, he performed work which he had regularly and customarily performed prior to his injury. Therefore, the second prong of KRS 342.0011(11)(a) was not satisfied in that Livingood had reached a level of improvement which permitted a return to employment. Stated another way, the fact Livingood

returned to work earning his same rate of pay and was performing jobs he performed on a full time or part time basis prior to the injury constitutes substantial evidence which supports the ALJ's decision he is not entitled to additional TTD benefits between March 3, 2010, and October 5, 2010.

Further, we are unconvinced by Livingood's assertion that his lack of overtime during the period in question supports the argument that he did not return to his customary employment. The record does not establish a connection between Livingood's lack of overtime and the injury.

Similarly, we find no merit in Livingood's contention the ALJ erred in not enhancing his benefits by the two multiplier. We emphasize that in the opinion, award, and order and in the order overruling the petition for reconsideration, the ALJ did not make a finding Livingood returned to work at a weekly wage equal to or greater than his average weekly wage ("AWW") at the time of his injury. That finding must be made before enhancement by the two multiplier can be considered. Although it appears the ALJ and the parties assumed Livingood returned to employment at a weekly wage equal to or greater than his AWW at the time of the injury, there is no finding to that

effect and there was no testimony to that effect. Livingood's testimony only established he returned to work at the same rate of pay.

In arguing entitlement to additional TTD benefits during the period between March 3, 2010, through October 5, 2010, Livingood makes an assertion of fact which vitiates his entitlement to enhancement of his PPD benefits by the two multiplier. Specifically, Livingood asserts when he returned to work at the same rate of pay he did not earn any overtime, and prior to his work injury he earned substantial overtime. Although the actual overtime pay is not to be calculated in determining AWW, the number of hours of overtime worked is to be used in calculating an employee's AWW. R.C. Durr Co. v. Chapman, 563 S.W.2d 743 (Ky. App. 1978). Consequently, since Livingood did not work overtime when he returned to work at light duty but had regularly worked overtime prior to his injury, the initial eligibility requirement for enhancement of his PPD benefits set forth in KRS 342.730(1)(c)2 was not met.

That said, we believe substantial evidence supports the ALJ's finding Livingood's termination did not relate to his injury. The ALJ chose not to believe Livingood's testimony that the effect of the medication he was taking affected his operation of the forklift. The ALJ

found the more convincing testimony established Livingood's unfamiliarity with the area to which he was assigned within the facility was the reason he accidentally bumped into a concrete post which resulted in his termination. Stephanie Baldwin ("Baldwin") a human resources business partner with Transfreight, testified Transfreight has an aggressive disciplinary policy. Baldwin explained that pursuant to the policy, Livingood was on a full and final warning. In Livingood's case, Baldwin testified the incident of December 13, 2010, was his third incident, and as this was deemed a preventable accident Livingood was subject to discipline. Consequently, since Livingood had been on a full and final warning, the next step was termination. Because of his previous violations, Transfreight's disciplinary policy mandated Livingood's dismissal upon the occurrence of the December 13, 2010, event. Since the ALJ's determination not to enhance Livingood's PPD benefits by the two multiplier is supported by substantial evidence, we are without authority to alter his decision.

Likewise, Livingood's third argument the ALJ independently interpreted the AMA Guides in carving out the 2% impairment has no merit. The ALJ's determination to carve out the 2% impairment was based solely upon Dr. Troutt's opinion contained in his December 19, 2011,

independent medical examination ("IME") addendum in which he discussed Dr. Hunt's impairment rating. In that report, when asked whether he agreed with Dr. Hunt's impairment rating, Dr. Troutt stated, in relevant part, as follows:

I questioned the severity of perceived level of pain and attributing the 2% impairment rating associated with his level of pain secondary to fact that Mr. Livingood only takes Excedrin over-the-counter for pain.

Without question, the determination to deduct the 2% impairment rating Dr. Hunt assessed for pain was not based upon the ALJ's independent assessment of the AMA Guides, but on Dr. Troutt's opinion. The ALJ relied upon Dr. Hunt's 5% impairment rating based upon his range of motion calculations but chose not to rely upon Dr. Hunt's assessment of the 2% impairment rating for pain. As previously stated, the ALJ may rely in part on one witnesses' testimony and disregard another portion of that same witnesses' testimony in reaching a decision on a particular issue. Here, the ALJ's decision regarding the impairment rating attributable to Livingood's work injury was based solely upon the medical evidence and therefore is supported by substantial evidence.

Finally, we find no merit in Livingood's assertion the ALJ erred in finding he retained the physical

capacity to return to his job as a forklift operator. Livingood fails to reference Dr. Mair's December 7, 2010, office note indicating Livingood could return to work in a week without restrictions. In addition, Dr. Troutt, in his December 19, 2011, addendum stated Livingood was capable of returning to his job as a forklift operator. Likewise, Dr. Hunt's June 15, 2011, note, in which he assessed the 7% impairment, also reflects Livingood had no permanent restrictions. During his May 18, 2012, deposition, Dr. Hunt confirmed he released Livingood on July 15, 2011, with no work restrictions. Additionally, Dr. Hunt testified that as of the date of his deposition, Livingood had no work restrictions. Finally, Livingood testified he was able to operate the forklift when he returned to work on December 13, 2010. Therefore, we believe the medical evidence and Livingood's testimony constitute substantial evidence supporting the ALJ's determination the three multiplier was not applicable.

Accordingly, since substantial evidence supports the decision of the ALJ and the evidence does not compel a different result, the August 15, 2012, opinion, award, and order and the September 18, 2012, order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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