Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 22, 2016

CLAIM NO. 201359879

BELLSOUTH TELECOMMUNICATIONS
D/B/A AT&T PETITIONER/CROSS-RESPONDENT

VS. **APPEAL FROM HON. GRANT S ROARK,**
ADMINISTRATIVE LAW JUDGE

THOMAS E. BLACKBURN RESPONDENT/CROSS-PETITIONER
HON. GRANT S ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING IN PART
VACATING IN PART
AND REMANDING
* * * * * *

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

RECHTER, Member. Bellsouth Telecommunications d/b/a AT&T ("AT&T") appeals from the July 6, 2015 Opinion, Award and Order and the September 2, 2015 Order on Petitions for Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ found Thomas E. Blackburn ("Blackburn") permanently totally disabled and

awarded costs and attorney fees for an unreasonable delay in the prosecution of the claim. AT&T argues the ALJ's finding of a permanent total disability is not supported by the evidence, and he erred in ordering it to pay attorney fees and costs. Blackburn cross-appeals, arguing the ALJ erred in carving out 15% of the award as a pre-existing active disability. He further asserts an additional percentage of the attorney fee should be paid by AT&T. For the reasons set forth herein, we affirm in part, reverse in part, vacate in part and remand.

Blackburn testified[1] at the hearing held May 6, 2015. He began working for AT&T in June, 1998 as a service technician, which involved installing residential telephone lines. He wore a tool belt that weighed approximately forty pounds, and was required to climb poles and carry tool pouches and ladders that weighed one hundred pounds. He also worked in attics, basements, and crawl spaces, requiring him to bend, crouch, crawl and kneel. On November 15, 2013, Blackburn was descending a ladder lashed to a pole when his foot slipped and he fell to the ground.

Blackburn acknowledged a prior problem with his left knee that required surgery in 2005. His problem

[1] Blackburn was deposed on April 9, 2015 but the deposition does not appear in the file or electronic record of this case. Although the ALJ indicates the deposition was reviewed, he did not cite any testimony from the deposition in the decision.

resolved, and he did not have additional treatment for his knee until the 2013 work injury. Blackburn sought medical treatment for “just regular back pain” in 2012, but denied any treatment for back pain in the month prior to the work injury. He was under no restrictions for his knee or back, and was working full and regular duty prior to the work injury in 2013. Blackburn had been taking Gabapentin for back pain, but had not taken any pain medication for several months prior to the work injury. Blackburn also underwent a successful cervical surgery in 2008 and he reported no problems with his neck prior to the 2013 work injury.

Following the 2013 work injury, Blackburn has constant burning pain in his back that causes difficulty with sleeping. He has constant numbness and pain in his left leg, can only sit comfortably for about one hour and stand or walk for thirty minutes. Blackburn is unable to perform chores around the home such as yard work. He tries to help his wife with house work but stated “I’ve not been very productive.”

Blackburn indicated he would be unable to perform his past work for AT&T because of his inability to climb or carry tools and ladders. He indicated work as a telephone man “is all I really know” and he did not believe he was

capable of performing any other job for eight hours per day, five days per week. He did not believe any employer would allow him to lie down to rest or relieve his symptoms which he must do on multiple occasions each day.

Blackburn initially treated at Jewish Hospital where he was diagnosed with a left flank contusion and low back and neck pain. He was discharged with instructions to follow up with his primary care physician.

Dr. Ronald Faulkner treated Blackburn on August 30, 2013, for complaints of lower back pain. Dr. Faulkner prescribed Tramadol and Gabapentin. He noted Blackburn's lower back joints were painful. On September 13, 2013, Blackburn complained of continued joint pain, back pain and neck pain, and his prescriptions were refilled. Dr. Faulkner saw Blackburn on November 20, 2013 following the November 15th work injury. Blackburn reported his entire left leg was numb and tingling following the fall at work. Dr. Faulkner ordered an MRI of the lower back, left knee and shoulder.

Dr. Marcis Craig diagnosed left medial meniscus tear and performed surgery on December 18, 2013. On January 2, 2014 and January 23, 2014, Dr. Craig noted increased pain in the left knee. On April 15, 2014, Dr. Craig noted Blackburn did not benefit from the knee scope

and had continued pain associated with this injury. On April 25, 2014, Dr. Craig noted no relief from pain after trials of physical therapy and steroid injections. On May 8, 2014 Dr. Craig noted Blackburn had continued knee pain since surgery with unsatisfactory result.

Dr. Thad Jackson performed a neurosurgical evaluation on January 3, 2014 for ongoing low back pain and left leg numbness to the knee. Dr. Jackson diagnosed lumbago, low back pain, and lumbar disc herniation with left annular tear. He recommended physical therapy.

Dr. John Guarnaschelli treated Blackburn before and after the work injury. Blackburn presented on September 23, 2010 with recurrence of back and atypical leg pain. An MRI obtained on September 7, 2010 showed some degenerative changes. Dr. Guarnaschelli saw Blackburn on February 6, 2014 for a neurosurgical consultation. He noted an MRI scan in November 2013 showed evidence of a left L2-L3 disc herniation. Blackburn had complained of back pain in 2012, and an MRI at that time showed a bulging disc at L2-L3. Dr. Guarnaschelli compared the MRIs and found there was a worsening of the condition of the L2-L3 disc and Blackburn now had an annular tear. Dr. Guarnaschelli performed a left L2-3 laminectomy and discectomy on May 13, 2014. On October 8, 2014, he noted

the surgery had relieved the radicular pain in Blackburn's legs, but he had chronic back pain. Dr. Guarnaschelli recommended supervised physical therapy and a work hardening program.

Dr. Michael Best performed an independent medical examination ("IME") on August 6, 2014 at AT&T's request. Dr. Best diagnosed a slip/fall from a ladder with left flank contusion and sprain. He noted a left knee posterior horn medial meniscus tear and left sided disc herniation at L2-3, both of which were status post-surgical intervention. He opined Blackburn did not require narcotic analgesics and should be weaned from them. Dr. Best indicated Blackburn would be restricted from climbing telephone poles and lifting greater than fifty or sixty pounds. Dr. Best opined Blackburn was capable of returning to work, which would be therapeutic and help in restoration of left lower extremity strength. If Blackburn diligently performed rehabilitation activities, he could return to his previous work activities without restriction in three to four months. Referencing the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Best assigned a 10% impairment rating to the low back and 1% to the left knee.

Dr. Jules Barefoot performed an IME on November 19, 2014. Blackburn complained of ongoing severe pain and swelling in his left knee with marked loss of mobility. He also complained of ongoing low back pain radiating down the left leg. He also noted his left leg “gives out” while walking. He had marked difficulty with climbing and descending stairs and could only walk for approximately fifteen minutes on a flat level surface. His knee and back pain were worse with exposure to rain or cold weather. Dr. Barefoot diagnosed status post left knee arthroscopy with a partial medial meniscectomy on December 18, 2013; status post left L2-3 laminectomy and discectomy on May 13, 2014; status post left knee arthroscopy with a partial medial meniscectomy on March 25, 2005; and status post anterior cervical fusion C5-C6-C7 in 2008. He opined the work injury caused the need for the December 2013 and May 2014 surgeries. Dr. Barefoot stated Blackburn did have a history of transient back pain, but the condition was dormant and asymptomatic at the time of the work injury. Dr. Barefoot indicated Blackburn had recovered completely from the prior knee condition. He reinjured his left knee in the work injury which then required further surgery. Dr. Barefoot assigned a 13% impairment rating to the lumbar spine and an 8% impairment rating for the left knee

resulting in a 20% combined rating attributable to the work injury. Dr. Barefoot opined Blackburn would not be able to return to his prior position. He would have marked difficulty lifting and carrying more than light loads and is not able to squat, kneel, crouch or crawl. He would have difficulty with flexion at his waist and is not able to work safely on ladders or scaffolding. He would have difficulty operating machinery with foot controls and would need to frequently change positions and/or rest for relief of pain and discomfort.

The ALJ made the following findings regarding the extent of Blackburn's disability and the issue of pre-existing active disability:

> Having reviewed the evidence of record, the Administrative Law Judge is ultimately persuaded plaintiff has carried his burden of proving he is totally disabled. Several factors lead to this conclusion. First, plaintiff suffered significant left knee and lower back injuries which required surgical intervention. Yet the surgeries performed have not been successful in relieving plaintiff's complaints, even by acknowledgement of the treating physicians. Dr. Best's opinions to the contrary are simply not found credible in this instance. Moreover, plaintiff testified credibly that he has continued pain and limited functional ability due to both his back problem and his knee injury. He continues to take pain medication. It is noted that plaintiff worked in a

high wage position and even an award of permanent and total disability does not cover what he has lost and will continue to lose in wages and future wage earning capacity. Quite simply, the Administrative Law Judge believes plaintiff would currently be working if [he] were so able. Finally, it is noted that the restrictions of Dr. Barefoot are consistent with plaintiff's own continued complaints and would necessarily impose significant hurdles in plaintiff's ability to return to the workforce. This is also true given that most of plaintiff's work history has been with the defendant employer in a job that is physically demanding.

For these reasons, it is determined the combination of plaintiff's injury and restrictions, considered within the context of his age, education and work history, render plaintiff permanently and totally disabled.

However, with respect to the issue of prior active condition, because plaintiff has been found permanently and totally disabled, the analysis is whether he had any prior, active occupational disability rather than any permanent impairment rating. On this issue, there is no dispute plaintiff underwent a previous left knee injury in 2005 and a cervical injury requiring fusion in 2008, and that he had been actively symptomatic in his lower back for several years and was even receiving treatment and medication in the months and weeks preceding this work injury. Given Plaintiff's history of prior injuries and his medications he was taking for same up to the date of the work injury, the Administrative Law Judge is persuaded plaintiff had a

> 15% occupational disability immediately before this work injury.

The ALJ determined Blackburn unreasonably failed to attend or enroll in physical therapy as recommended by his treating physicians. Conversely, AT&T failed to establish the degree, if any, to which his condition was aggravated or made worse by his failure to attend physical therapy. Thus, the ALJ concluded the record did not support any quantifiable reduction in the award.

The ALJ noted a settlement demand was made on January 6, 2015 and that AT&T had not responded or made a counter offer. In a response to the motion for sanctions, AT&T indicated it had determined it was necessary to take Blackburn's deposition, which ultimately took place on April 9, 2015. The ALJ acknowledged a delay in responding though the date of the deposition may have been justified. However, he likewise determined it had been three months since the taking of the deposition and AT&T had still not responded to the settlement demand, nor had it made a counter offer. The ALJ noted this was an accepted, compensable claim and held any delay following the deposition was not justified. Therefore, he ordered AT&T to pay Blackburn's costs and attorney fees incurred after April 9, 2015.

AT&T filed a petition for reconsideration making essentially the same arguments it raises on appeal. Blackburn filed a petition for reconsideration requesting additional findings regarding impairment ratings for his back and knee arising from the work-related injury, and further analysis and findings of fact regarding the carve out for pre-existing active occupational disability.

In the September 2, 2015 order on petitions for reconsideration, the ALJ found Blackburn sustained a 13% impairment rating for the low back and an 8% impairment rating for the left knee based upon the opinion of Dr. Barefoot. The ALJ then explained:

> As to plaintiff's argument that there was no basis for carving out part of his award as prior active disability, it is determined this argument is not persuasive. Although plaintiff argues he had not complained of knee pain for years prior to the work injury of November 15, 2013, the fact remains he did have a previous left knee surgery. Moreover, it was already pointed out that plaintiff was, in fact, actively symptomatic in his lower back and was receiving treatment and medication for it in the weeks and months leading up to this injury. Although plaintiff may not have been under any formal restrictions at the time of the injury, such does not preclude a finding of some degree of occupational disability. In the days when all awards – permanent partial or total – of workers' compensation benefits were based on occupational

disability, a finding of 15% occupational disability based on the history of injuries and treatment plaintiff had prior to November 15, 2013 would have been very reasonable. In any event, the Administrative Law Judge remains persuaded that plaintiff's award of benefits should be reduced by 15% for prior active disability and the plaintiff's Petition for Reconsideration on this point is therefore **denied**.

Turning next to the defendant's Petition, it is also determined that it is not persuasive. No additional findings are necessary and the evidence of record supports the finding of total disability. Plaintiff's occupational situation and work history, in addition to his age, and education, are considered within the context of plaintiff's injury, restrictions and current complaints of pain and ongoing limitations. Accordingly, the defendant's Petition for Reconsideration on this point is **denied.**

To the extent additional explanation may be required for rejecting Dr. Best's opinions, the ALJ concedes the Opinion may not have clearly explained that the ALJ was persuaded by the records of plaintiff's treating physicians that his surgeries had not been altogether successful and that plaintiff still had ongoing problems. To the extent Dr. Best's opinions contradict the treating physician in this regard, the ALJ is more persuaded by the physicians who more closely followed plaintiff's condition and who were charged with his care and well-being. As Dr. Best's opinions were contrary to those of the treating physician as to whether

> plaintiff had any ongoing problems, Dr. Best's opinions were not found credible in this instance.

Regarding the attorney fee issue, the ALJ noted liability was never truly contested in this claim. He further noted KRS 342.267 specifically references KRS 304.12-230, which states it is an unfair claims settlement practice to "not attempt[] in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear". The ALJ concluded AT&T and its carrier acted unreasonably by failing to comply with the statute which requires it to attempt a good faith, prompt and fair settlement of the claim. Accordingly AT&T's petition was denied as to this issue.

The ALJ issued an order on September 10, 2015 granting Blackburn's request for an attorney a fee of $12,000.00 with $4,212.13 to be paid by AT&T for services rendered from April 9, 2015 through July 6, 2015, and the remaining $7,787.87 be deducted from the weekly benefits.

On appeal, AT&T argues there is insufficient evidence to support a finding of permanent total disability. AT&T concedes Blackburn sustained serious injuries as a result of his fall. However, it argues Blackburn is capable of returning to work in some capacity. AT&T notes that while Dr. Barefoot set forth restrictions,

he did not assess Blackburn as permanently unemployable. Similarly, Dr. Guarnaschelli did not indicate Blackburn would be unable to return to work at any point. Rather, he kept Blackburn off work until he was seen by an addiction specialist at a pain management facility for ongoing excessive use of opioid medication. AT&T further contends the ALJ did not provide a sufficient discussion, weighing and analysis of the factors enunciated in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) for the determination of a total disability.

Permanent total disability is the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of the injury. KRS 342.0011(11)(c). In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers' age, educational level, vocational skills, medical restrictions, and the likelihood he can resume some type of work under normal employment conditions. Ira A. Watson, id. The ALJ enjoys wide ranging discretion in making granting or denying an award of permanent total disability benefits. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.

1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006).

An ALJ's decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973); New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). In this instance, we conclude the ALJ did not adequately address the appropriate factors established in Ira A. Watson, nor did he provide a sufficient analysis to demonstrate he considered the totality of the evidence. Certainly, Blackburn's testimony and the medical opinion of Dr. Barefoot constitute some evidence to support the ALJ's decision. Dr. Barefoot assigned significant restrictions, including limiting Blackburn to lifting or carrying only light loads and no squatting, kneeling, crouching or crawling, and no work on ladders or scaffolding. He noted Blackburn would have difficulty with foot controls and would require frequent changes of position and/or rest for relief of pain and discomfort.

Additionally, a claimant's own testimony as to his condition has some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d

48 (Ky. 1979). Blackburn testified to significant limitations of his ability to sit, stand, or walk and indicated a need to frequently change positions, including the need to recline to relieve his pain. He also testified his pain interfered with his ability to sleep, causing him to be fatigued "all the time." Blackburn can no longer perform his past work that he performed for AT&T since 1998. He testified that is the only type of work he knows how to perform.

However, while the ALJ cited to Ira A. Watson Department Store v. Hamilton, id., he did not engage in the appropriate analysis of all of the factors. Blackburn's testimony was not discussed in the ALJ's summary of the evidence, nor did he identify which portions of Blackburn's testimony upon which he relied. Furthermore, he did not discuss Blackburn's education level or his prior work history as a factor in his future employability. The mere statement he relied upon Blackburn's testimony and the medical evidence from Dr. Barefoot and the listing of the factors of age education and work history is insufficient. As noted by the Supreme Court in Ira A. Watson, the ALJ must make specific findings regarding Blackburn's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. The ALJ failed to

adequately discuss those factors, and therefore we remand for further findings of fact.

AT&T next argues an award of attorney fees and costs is inappropriate because its actions have not been so unreasonable as to warrant this harsh penalty. AT&T asserts it preserved viable, reasonable defenses to recovery in its presentation of the case, including the implications of pre-existing conditions as well as a complete bar to recovery for failure to adhere to medical advice. AT&T asserts it was not in a position to evaluate the claim until the deposition was taken, nearly three months after the initial demand was submitted. It further notes Blackburn applied for Social Security Disability after the hearing, which by law requires the consideration of a Medicare-Set Aside account.

The assessment of sanctions pursuant to KRS 342.310 is discretionary. KRS 342.310(1) provides:

> If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions,

> attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them.

Blackburn filed a motion for an award of attorney's fees citing KRS 342.267, which incorporates the Unfair Claims Settlement Practices Act into the Workers' Compensation Act, and KRS 342.310. KRS 342.267 provides:

> If an insurance carrier, self-insured group, or self-insured employer providing workers' compensation coverage engages in claims settlement practices in violation of this chapter, or the provisions of KRS 304.12-230, the commissioner of the Department of Workers' Claims shall fine the insurance company, self-insured group, or self-insured employer the sum of one thousand dollars ($1,000) to five thousand dollars ($5,000) for each violation and if they have a pattern of violations, the commissioner may revoke the certificate of self-insurance or request the commissioner of insurance to revoke the certificate of authority of the insurance carrier or the self-insured group.

In the Opinion, Award and Order, the ALJ determined AT&T's refusal "to attempt a settlement in the circumstances is simply not reasonable." The ALJ cited KRS 342.310 later in the Opinion, presumably as the basis for the award of attorney's fees. He did not specifically reference KRS 342.267. However, in the Order on Petitions for Reconsideration, the ALJ cited KRS 342.267 and concluded

AT&T "acted unreasonably by failing to comply with the statute that requires it to attempt a good faith, prompt and fair settlement of the claim."

The Kentucky Supreme Court has described the proceedings which result from a violation of KRS 342.267 thusly:

> A workers' compensation claim and an unfair claims settlement practices complaint trigger two entirely separate actions. Although an action under KRS 342.267 concerns an insurance carrier's conduct with regard to a workers' compensation claim or claims, a violation of KRS 342.267 does not provide an additional recovery to the worker and does not create a private cause of action. A proceeding under KRS 342.267 is an action by the state to assure that the law is enforced. Although a worker may initiate a proceeding by filing a complaint, the Commonwealth is the real party in interest and the recipient of any fine. The Office of Workers' Claims investigates a complaint and, if appropriate, the Executive Director orders a show-cause hearing. The purpose of the proceeding is to determine whether the carrier complied with the law or engaged in conduct that warrants a fine.
> Mitchell v. TFE Group, 276 S.W.3d 814, 816 (Ky. 2009).

Whether a carrier's actions constitute an unfair claims settlement practice pursuant to KRS 342.267 is a determination left exclusively to the Commissioner of the Department of Workers' Claims. There is no statutory

provision by which an ALJ may sanction an employer pursuant to KRS 342.267. As a logical extension, we do not believe the ALJ may sanction the employer pursuant to KRS 342.310 for a violation of KRS 342.267, thereby implicitly making a determination which the General Assembly has left to the Commissioner.

KRS 342.310 permits sanctions when an action has been "brought, prosecuted, or defended without reasonable grounds." Here, the ALJ made no specific finding AT&T defended the claim without reasonable grounds. In fact, AT&T was successful in convincing the ALJ Blackburn suffered from a pre-existing active disability. *Cf.* KACG Self-Insurance Fund v. Tri State Crane Rental, Inc., 240 S.W.3d 644 (Ky. App. 2007)(where employer raised legitimate question as to whether employee had worked enough days to qualify for coverage of an out-of-state injury, it cannot be said claim was defended without reasonable grounds). While the ALJ enjoys broad discretion to impose sanctions, and will only be reversed upon an abuse of that discretion, the award must nonetheless conform to the requirements of KRS 342.310. Because the ALJ determined only that AT&T had violated KRS 342.267, and entered no finding that it had defended the claim without reasonable grounds, we must reverse the award of attorney's fees.

On cross-appeal, Blackburn argues the ALJ abused his discretion and erred in carving out 15% of the permanent total disability award for pre-existing active disability, contending the finding is not supported by substantial evidence or controlling precedent. Blackburn notes Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003) establishes the proper analysis for determining whether there is an exclusion for pre-existing active disability. The Court explained an exclusion from a total disability award must be based upon a finding of disability rather than impairment. Blackburn contends the prior impairment rating for his knee does not equate to a finding that he had a pre-existing active disability, and a pre-existing impairment rating does not compel a finding of pre-existing occupational disability. Blackburn asserts it is uncontradicted that he was working full and regular duty and capable of performing all aspects of his physically demanding job prior to November 15, 2013. Dr. Barefoot observed that Blackburn had recovered completely from the prior knee condition and that the back condition was dormant and asymptomatic prior to the work injury. Dr. Best assessed a 10% rating for the current back condition and did not apportion any of the rating to a pre-existing condition. Blackburn asserts AT&T failed to meet its

burden of proving any pre-existing condition was impairment ratable and symptomatic immediately prior to the work injury.

The ALJ was clearly aware any exclusion for pre-existing disability from an award of permanent total disability is based upon occupational disability rather than the existence of an impairment rating alone. Dr. Guarnaschelli treated Blackburn for a recurrence of back and leg pain on September 23, 2010. Blackburn had an MRI of his back approximately one year prior to the work injury that revealed the disc at L2-L3 was bulging. This is the same disc later shown to be herniated in an MRI taken following the 2013 work injury. As noted by the ALJ, Blackburn treated with Dr. Faulkner for back complaints on August 30 and September 13, 2013, shortly before the work injury. Blackburn was taking Gabapentin for his back condition at the time of the subject work injury.

Nonetheless, we do not believe the ALJ's analysis is sufficient in light of the uncontradicted testimony that Blackburn was under no medical restrictions and was capable of, and did perform, his full duty work activities prior to the injury. Given this circumstance, it was incumbent upon the ALJ to acknowledge and discuss this fact. We therefore vacate the finding regarding pre-existing disability. We

do not direct any particular finding on remand as to whether Blackburn's pre-existing conditions produced some degree of pre-existing active occupational disability.

Blackburn requests an additional $1,684.85 of the awarded attorney fee be paid by AT&T for twelve hours of work performed following the ALJ's award.

The ALJ awarded attorney fees and costs for the limited period from the date of the Blackburn's deposition through the date of the decision. Blackburn did not file a petition for reconsideration of the September 10, 2015 order pertaining to the attorney fee awarded as a sanction. Thus, the question of entitlement to any additional fee was not presented to the ALJ and therefore the Board has no authority to pass on the question.

Accordingly, the July 6, 2015 Opinion, Order and Award and the September 2, 2015 order ruling on the parties' petitions for reconsideration are hereby **AFFIRMED IN PART, REVERSED IN PART, AND VACATED IN PART** and this matter is **REMANDED** for additional findings and entry of an amended decision consistent with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER/CROSS-RESPONDENT:

HON ALLISON HELSINGER
2333 ALEXANDRIA DR
LEXINGTON, KY 40504

COUNSEL FOR RESPONDENT/CROSS-PETITIONER:

HON CHRISTOPHER P EVENSEN
6011 BROWNSBORO PK BLVD #A
LOUISVILLE, KY 40207

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601