OPINION ENTERED: SEPTEMBER 28, 2012

CLAIM NO. 200901334

BILL HUNTSMAN d/b/a
HUNTSMAN & SONS PAINTING PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

JOE MANNING,
UNINSURED EMPLOYER'S FUND,
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Bill Huntsman d/b/a Huntsman & Sons Painting ("Huntsman") seeks review of the decision rendered May 9, 2012, by Hon. Chris Davis, Administrative Law Judge ("ALJ") finding Joe Manning ("Manning") permanently and totally disabled due to his work injury of June 10, 2009,

and finding valid and enforceable the settlement agreement entered into by Manning and the Uninsured Employer's Fund ("UEF"). Huntsman also appeals from the June 12, 2012 order denying its petition for reconsideration, in addition to orders entered May 9, 2012, May 17, 2012, and June 4, 2012, and the previous decision entered August 12, 2011.

Due to the complex procedural history of this claim, a chronological summary is necessary. Joe Manning ("Manning") filed a Form 101 on November 23, 2009, alleging a work-related injury to his right foot, occurring June 10, 2009, when he fell approximately ten feet. The Department of Workers' Claims issued a scheduling order on December 5, 2009, setting a benefit review conference ("BRC") for 4:00 p.m. on April 13, 2010, at the Louisville hearing site. On December 15, 2009, a scheduling order was sent to all relevant parties, including Huntsman. Huntsman testified at the June 15, 2011 final hearing he received this scheduling order indicating when the BRC was scheduled. Huntsman testified at his November 10, 2010 deposition he appeared at the Louisville hearing site as directed by the scheduling order. Prior to the BRC, Manning reached a settlement with the UEF, and a Form 110-I settlement agreement was approved by the ALJ on April 28, 2010.

On June 14, 2010, Huntsman filed a motion to reopen and set aside the settlement arguing it was procured by fraud. On July 6, 2010, the ALJ set aside the settlement, determining Huntsman had made a *prima facie* allegation of fraud sufficient to allow proof to be taken on that issue. The ALJ deferred ruling on whether fraud had actually been perpetrated by stating, "A final resolution of Defendant's Motion is PASSED to the merits." In the same order, the ALJ set a proofing schedule on a "60-30-15 basis".

After numerous motions and extensions of time, Huntsman moved to bifurcate and/or dismiss the claim in a motion filed November 17, 2010. On December 6, 2010, the ALJ entered an order denying the motion to bifurcate. On February 22, 2011, the ALJ entered an order scheduling a benefit review conference/hearing for June 15, 2011. Huntsman filed a motion for clarification/reconsideration of the order on March 14, 2011. The ALJ entered an order denying the motion on March 23, 2011. Huntsman then filed an appeal to this Board on April 22, 2011. This Board dismissed the appeal because it was impermissibly taken from an interlocutory order.

On August 12, 2011, the ALJ entered an opinion, order and award, finding the motion to reopen based upon an

allegation of fraud was timely filed; however, he concluded Manning had not perpetrated any fraud. The ALJ then found Huntsman's defense of subject matter jurisdiction (employment relationship) was not timely raised. Additionally, the ALJ found the settlement agreement of April 28, 2010 was valid and enforceable.

Since it has a significant bearing on the issues raised by Huntsman on appeal, we recite the following findings by the ALJ from the August 12, 2011 opinion.

> The issues to be decided are whether or not the plaintiff committed fraud in this claim and that the specific reason for that fraud was lack of subject matter jurisdiction under the Act. The Administrative Law Judge will also rule on the various motions for sanctions.
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> As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky., 1985).
>
> In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative

Law Judge has also reviewed the parties' briefs and arguments.

The first thing the Administrative Law Judge will note is that the parties have all knowingly offered inaccurate and misleading testimony and/or sworn statement in this matter. The Administrative Law Judge will not belabor the point. It is clear, especially with Mr. Huntsman[sic] testimony that he was never contacted by the UEF or Plaintiff's attorney and that the Administrative Law Judge told him, essentially, that he had no rights, that he had no rights, that inaccurate testimony was offered. As a result, and after due deliberation, the testimony of the parties, and Billy Joe Huntsman, will be interpreted, construed and considered to the degree least favorable to their positions.

This shall include that the Plaintiff was not engaged in painting or water sealing at the time of his injury but that he was involved in clearing brush on June 10, 2009.

It shall also include a finding that Bill Huntsman, as the employer, was fully aware of the pending nature of this claim, and had received numerous communications from the Plaintiff's attorney and the UEF prior to the settlement agreement and that he was never, at any time, refused his right to be heard nor was he discouraged or effectively silenced in his pursuit of his right to be heard. Rather, Bill Huntsman, willfully or through his own neglect did not seek to become an effective party to this claim and have the settlement agreement set aside until he became aware that he might not be able to avoid some liability for this claim.

The undersigned also notes the contentious nature of this claim and the fact that the parties could not even agree as to the contested issues. The Plaintiff wished to frame the issue as to whether or not fraud was committed, under a strict definition of that fraud and whether or not the Defendant asserted any defenses to this claim in a timely manner. They did not even want to allow the opposing party to argue or list their own contested issues.

The Defendant has argued that the contested issue is whether or not this claim falls under the jurisdiction of the Act and whether or not fraud was committed, under a strict definition, is irrelevant as the Act[sic] never had jurisdiction. They argue that subject matter jurisdiction can be raised at any time, by any party, even by a court or appellate court, during the pendency of a claim. They make this argument despite the fact that their original Motion to Re-Open was based on an allegation of fraud. The undersigned having determined that they made a *prima facie* case for fraud the claim was re-opened.

The undersigned finds, strictly for procedural purposes, that the Defendant being a party to this claim he has a right to contest the settlement agreement until the claim is final. Although atypical a settlement agreement is just like an Opinion for purposes of determining finality. KRS 342.265. Further, a Motion to Re-Open for fraud was timely in this case. Thus this matter is properly before the Administrative Law Judge.

It is also noted that even the Defendant, Bill Huntsman, acknowledges receipt of the Scheduling Order in this claim, dated December 15, 2009. This Order indicates that the time for the Defendant to assert defenses in this matter expired on January 29, 2010.

Although it may seem incongruous, a party may file a Motion to Re-Open as was done in this claim that does not mean that a party may assert any and all defenses, *de novo*, as was done in this claim.

By operation of the above the time for the Defendant to assert defenses to this claim expired on January 29, 2010. KRS 342.270(2)[sic] Any and all defense[sic] asserted after that date are, by law, deemed waived. The Defendant, however, as noted above, argues that the time to assert the defense of subject matter jurisdiction is never waived.

The Administrative Law Judge notes that the defenses of independent contractor and employment relationship, i.e. did the injured party work for the alleged employer, are very common defenses in a workers' compensation claim. They are far more common in claims involving uninsured employers than insured employers. Both of these common place defenses are questions of subject matter jurisdiction.

The Administrative Law Judge is aware of no prior argument ever made, either before this Judge or in a citable appellate decision, that the defenses of independent contractor and employment relationship can be raised more than forty-five days after the date of the scheduling order. The Administrative Law Judge believes that

by creating such a rule, under the rubric of subject matter jurisdiction would be to usurp the power of the legislature and the appellate courts in this matter.

Further, the undersigned believes that the relief sought by the Defendant, to be allowed to assert subject matter jurisdiction after January 29, 2010 is barred by the applicable case law and rules. The statute and the Kentucky Supreme Court hold that any and all defenses, other than benefits under KRS 342.730, must be raised within forty-five days of the scheduling order. The only exception that can be made to this rule is for good cause. *Gray v. Trimmaster*, 173 S.W.3d 236 (Ky. 2005)[sic] That the Defendant does not believe that a forty-five day rule[sic] is not good cause. Further, as already noted, the undersigned does not believe that the Defendant was ever deprived of an opportunity to assert defenses in this matter.

To find that the above rule does not apply would be to find that at the time the legislature and Supreme Court found that any and all defenses were waived they did contemplate the existence of subject matter jurisdiction as a defense. This is highly improbable.

The final rule that applies to find that the time for asserting subject matter jurisdiction as defense has passed is that the defense of subject matter jurisdiction as it applies to the entire practice of law is far more broad that[sic] the rule for the timeliness of asserting defenses to the workers' compensation

claim. The more specific rule prevails of[sic] the more general rule.

Further the Administrative Law Judge does not believe that the Plaintiff has committed fraud within the definition of how it applies to this claim and the Act. In fact, one of the few things that the parties agree upon is that at the time of his injury the Plaintiff was working for the Defendant and that, generally, if not on this date, he was employed for the Defendant within the regular course and scope of the Defendant's business.

What the Defendant would have the ALJ accept is that the Plaintiff was aware of the difference in his status as painter/water sealer v. brush remover. That the Plaintiff knew of the legal and statutory definitions of who was covered by the Workers' Compensation Act. The Administrative Law Judge does not believe that the Plaintiff was aware of this distinction. Without knowledge of these potential distinctions there is no reason for the Plaintiff to commit the alleged fraud. As the Plaintiff has testified he simply knew he was working for Bill Huntsman. In the lay sense of this phrase he is entirely correct and therefore no fraud was committed.

In summary the Administrative Law Judge believe that KRS 342.125(1)(a) gave the Defendant an absolute right to re-open this claim to determine if fraud had been committed. Given the nature of the dispute raised by the Motion it was appropriate to re-open proof and for the Administrative Law Judge to retain jurisdiction. Notwithstanding that the Defendant was given an opportunity to be heard the

> time for raising the defense of employment relationship/subject matter jurisdiction, expired on January 29, 2010. There is not fraud. As such this matter is resolved entirely in favor of the plaintiff.

Huntsman filed no petition for reconsideration from that decision, but again filed an appeal to this Board. In an opinion entered December 28, 2011, this Board stated the following:

> The ALJ's August 12, 2011, opinion, order, and award is not a final and appealable order because it only "dismissed" Huntsman's May 11, 2010, Motion/Petition for Reconsideration and found the settlement agreement to be valid and enforceable. The ALJ has yet to resolve Manning's claim against Huntsman.
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> On June 8, 2011, we dismissed Huntsman's prior appeal to this Board. There is nothing in the record which changes the status of Manning's claim against Huntsman since entry of that opinion. On June 8, 2011, the settlement agreement had been approved and the ALJ had not resolved Manning's claim against Huntsman. Further, the settlement agreement could not grant the UEF the right to proceed against Huntsman.
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> In resolving Manning's claim against Huntsman, the ALJ is not bound by the settlement agreement entered into between the UEF and Manning. KRS 342.125(7) states, in relevant part, as follows:

> . . . no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party.
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> Clearly, the settlement agreement entered into between Manning and the UEF and approved by the ALJ on April 28, 2010, reflects Huntsman was not a party to the settlement agreement. Therefore, the ALJ must enter a separate opinion ruling on the merits of Manning's claim against Huntsman. If the ALJ enters an award in favor of Manning against Huntsman, the ALJ must also grant the UEF a right of recovery to the extent of its payment of the income and medical benefits awarded by the ALJ.
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> Since there has not been a final award, order, or decision as defined by 803 KAR 25:010 Section 21 (2)(b), the claim must be remanded to the ALJ for entry of a final decision resolving Manning's and the UEF's claim against Huntsman.

In compliance with the opinion entered by this Board, on May 9, 2012, the ALJ rendered his final opinion, order and award, finding as follows:

> This matter is on Remand from the Kentucky Workers' Compensation Board to decide all remaining issues between the Plaintiff and the Employer. Finding the Opinion of August 12, 2011 Interlocutory the Board did not address any issues contained therein.

However, in the original Opinion the undersigned found that no fraud had occurred and that the Form 111 was not timely filed. As the Form 111 was not timely filed the only possible remaining issue is extent and duration. Therefore the only issue to be decided is that of extent and duration.

It is also noted that the Plaintiff and the UEF have entered a settlement agreement which the Board has agreed is valid and enforceable. Since the employer may file additional appeals beyond the Board payment has been withheld by the UEF but the UEF's liability in this matter, as the Plaintiff is permanently and totally disabled as a result of his work injury, cannot increase.

As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

On the issue of extent and duration it must be noted that during the pendency of this claim the

Employer, Bill Huntsman, had scheduled the Plaintiff to be seen by Dr. Gregory Gleis. The Plaintiff moved to quash that IME, a telephonic status conference was held and it was determined that, in fact, the Plaintiff had already attended the IME. At no time did the Administrative Law Judge deny the Defendant the right to file the report from this IME. The Defendant did not, and has not, in fact, filed that report. This is confirmed by the Administrative Law Judge's hard copy of the file, the Department of Workers' Claims' electronic filing and the undisputed list of evidence on the Formal Hearing Order of June 15, 2011.

As a result the uncontradicted, probative evidence on the Plaintiff's impairment rating, restrictions, limitations, pain and abilities is provided by Dr. Bilkey and the Plaintiff's testimony. None of the lay testimony can address these issues. Even if they were able to address these issues I find that Bill Huntsman and Bill Huntsman Jr. have extensively and intentionally perjured themselves in this matter. They have accused the otherwise impartial UEF investigator, UEF attorneys and the Administrative Law Judge with making false and prejudicial statements. It is true that some of these statements were made at the Benefit Review Conference and at various telephonic conferences but they were nonetheless made. They would have the undersigned and potential appellate bodies believe that they, and only they, have ever told anything resembling the truth and that they were not provided notice of the claim nor given a chance to defend against it until it was too late. This position can only be maintained if the UEF

> investigator, the UEF attorneys and the ALJ are liars. I believe they have done all of this not only with a pre-meditated eye toward to[sic] defeating this claim but, more importantly, with a pre-meditated eye to extending this claim so as to position themselves to avoid any direct liability for it.
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> I find the Plaintiff to be permanently and totally disabled. The Plaintiff was fifty-three years old on the date of injury. He is currently fifty-five years of age. Although he has earned a GED he only attended school through the 10th grade. All of his work has been as an unskilled laborer. His restrictions not only preclude returning to this work but also make it likely that in the future his options will be even more limited.
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> He testified to an average weekly wage of $640.00 per week. His PTD rate shall be $426.67 a week, from June 10, 2009, until such time as he qualifies for normal social security retirement. He is also entitled to all past, present and future medical expenses, for the right ankle, as may be work-related and reasonable and necessary. The entirety of the award herein is solely against Bill Huntsman, the UEF discharging its entire liability by the payment of the Settlement Agreement.

On May 17, 2012, the ALJ *sua sponte* issued an order correcting a clerical error appearing in the decision. In all other respects his decision remained unchanged.

On May 22, 2012, Huntsman filed a petition for reconsideration asserting the ALJ had miscalculated Manning's average weekly wage and therefore erred in arriving at an appropriate temporary total disability ("TTD") rate. Huntsman also took offense with the ALJ's statement that both Bill Huntsman and Bill Huntsman, Jr., had engaged in perjury. On June 4, 2012, the ALJ entered an order denying Huntsman's petition for reconsideration. Manning also filed a petition for reconsideration requesting correction of clerical errors appearing in the opinion, order and award which the ALJ proceeded to correct.

On appeal, Huntsman, through counsel, argues in an acerbic and acrimonious manner that the ALJ erred in both his interpretation of the facts and the applicable law. Specifically, Huntsman raises the following issues on appeal: 1) it was exempt under KRS 342.650 as a matter of law; 2) the ALJ failed to set forth any findings or basis for denying the exception when all jurisdictional facts were undisputed, compelling and of such weight and competency that it violated the clear and convincing, the reasonable man and the "entirety of the record" standards necessary to support the conclusion he reached; the facts compelled the party's exemption from the Act per KRS

342.650, and consequently the ALJ lacked jurisdiction *ab initio* to hear and approve any "agreement"; 3) the facts being compelling, by proceeding the ALJ erred by impermissibly allowing waiver of jurisdiction (i.e., assumption of jurisdiction) when the law is that jurisdiction cannot be waived; 4) due process was denied to the petitioner; 5) the ALJ erred by denying Petitioner due process in approving an "Agreement" in the absence of the Petitioner and subsequently limiting the defense of the claim to that of fraud then later extent and duration; 6) the ALJ erred in ruling that the only issue was of extent and duration while failing to make any finding and conclusion of law on KRS 342.650; 7) the UEF is estopped from collecting monies from the Petitioner under an "agreement" the UEF admits was induced by material misrepresentations made by the Respondent, but for which an "agreement" would not have been reached, and such is violative of Huntsman's due process rights; 8) the negligence of the UEF in failing to establish the requisite jurisdictional facts and who later admits that jurisdiction was lacking is estopped from enforcing or collecting on either its "agreement" with Manning or under the Order an Award of the ALJ as against Huntsman. We disagree.

On appeal the initial inquiry is whether the ALJ's findings are supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). 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). 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 supporting a different outcome than reached by the ALJ, that 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 weight and credibility or by noting reasonable inferences that

otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Huntsman's assertions that the ALJ somehow misconstrued both the law and the facts presented are simply untrue. The ALJ found Manning committed no fraud, as was his prerogative, and believed Manning's version of the facts provided was more accurate than the version presented by the Huntsmans. Determinations related to the facts of a case are solely within the purview of the ALJ. On those issues, this Board is not permitted to substitute its judgment for that of the ALJ. In this instance, substantial evidence exists to support the ALJ's determination Manning did not engage in fraudulent activity

That said, we believe substantial evidence exists to support the ALJ's finding Huntsman was fully apprised of the filing of the workers' compensation claim *ab initio*. As such, and without a finding of fraud, at no time during the claim did Huntsman file an entry of appearance, a Form 111 claim denial, raise an issue regarding lack of jurisdiction, or in any manner attempt to defend the claim filed by Manning until after the approval of the settlement agreement. Absent a finding of fraud, the failure to take affirmative steps to defend the claim is not excused.

Huntsman argued he received no notification of the claim until after the entry of the agreement. Based upon the fact that both Bill Huntsman and Bill Huntsman, Jr. appeared at the Louisville hearing site on April 13, 2010, at the time set forth in the scheduling order issued by the Kentucky Department of Workers' Claims on December 15, 2009, this argument rings hollow. As found by the ALJ, Huntsman did not enter an appearance, nor did it in any way defend the claim filed against it until after the Huntsmans appeared at the Louisville hearing site for the BRC set by the scheduling order. Huntsman, as found by the ALJ, failed to timely file a Form 111 claim denial as required by both KRS 342.270(2), and 803 KAR 25:010 §5(2), and failed to timely raise any defenses to Manning's claim.

KRS 342.270(2) states in pertinent part as follows:

> Within forty-five (45) days of the date of issuance of the notice required by this section, the employer or carrier shall file notice of claim denial or acceptance, setting forth specifically those material matters which are admitted, those which are denied, and the basis of any denial of the claim.

803 KAR 25:010 § 5 states, in pertinent part, as follows:

> (2)(a) The defendant shall file a Notice of Claim Denial or Acceptance on a Form 111-Injury and Hearing Loss within forty-five (45) days after the notice of the scheduling order or within forty-five (45) days following an order sustaining a motion to reopen a claim.
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> (b) If a Form 111 is not filed, all allegations of the application shall be deemed admitted.

Huntsman made no attempt to file a Form 111 until August 4, 2010, long after the time provided by statute, regulation, and scheduling order. Since the ALJ determined the settlement was not procured by fraud, we find no error in refusing to allow Huntsman to raise defenses, including lack of jurisdiction, which could have been timely raised but were not. On appeal, Huntsman argues it was deprived of due process. Since it failed to avail itself to the procedures set forth above, we find Huntsman was deprived of neither substantive nor procedural due process.

Citing Gray v. Trimmaster, 173 S.W.3d 236 (Ky. 2005), the ALJ ruled Huntsman failed to timely file a Form 111, and at no time demonstrated any valid reason for not doing so. The ALJ thereby determined Huntsman had waived any issues except those related to extent and duration of disability. The ALJ then found Manning to be permanently totally disabled.

Huntsman argues the ALJ impermissibly exercised jurisdiction over this claim, and it can raise such issue at any time. Manning filed a Form 101 alleging a work-related injury, and this filing brings the claim under the purview of the Department of Workers' Clams and confers jurisdiction upon the ALJ to decide all matters. Huntsman could have timely raised issues of work-relatedness, jurisdiction, and KRS 342.650 before the ALJ, but failed to do so. Even then, a mere allegation or assertion of a defense does not equate to a finding. The ALJ found Manning was employed by Huntsman, was injured in the course and scope of his employment, and was awarded benefits based upon that injury. These findings are supported by the evidence and will not be disturbed.

Huntsman's arguments pertaining to the UEF's settlement of the claim are groundless and without merit. We do not believe the ALJ erred in his decisions rendered in August 2011, May 2012, or in the myriad other orders appealed by Huntsman. Therefore, we affirm.

Next, we would be remiss in failing to point out that most troubling to this Board is the conduct of counsel throughout the course of litigation. Noteworthy here is the obvious lack of respect of counsel to each other and to the ALJ. Counsel are admonished that such behavior is neither

appropriate nor condoned. Any further such activity by either counsel will be subject to any sanction this Board, or at our direction, the ALJ may be allowed to levy.

Finally, Huntsman has requested oral arguments be held in this appeal. After having reviewed the record, it is determined an oral argument is unnecessary in arriving at a decision in this appeal, and therefore the request is **DENIED**.

Accordingly, the decisions by Hon. Chris Davis, Administrative Law Judge, rendered May 9, 2012, and August 12, 2011, as well as the orders entered May 17, 2012, June 4, 2012, and June 12, 2012, are hereby **AFFIRMED**.

SMITH, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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MICHAEL W. ALVEY, CHAIRMAN
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