Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 14, 2014

CLAIM NO. 201301670 & 201301508

BLEDSOE COAL CORP. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

MICHAEL HARRIS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Bledsoe Coal Corporation ("Bledsoe") appeals from the April 21, 2014, Opinion and Order and the June 17, 2014, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the April 21, 2014, Opinion and Order, the ALJ awarded Michael Harris temporary total disability ("TTD") benefits

from August 31, 2013, through February 12, 2014; permanent total disability ("PTD") benefits; and medical benefits.

On appeal, Bledsoe argues the ALJ's finding Harris was temporarily totally disabled from August 31, 2013, to February 12, 2014, is erroneous. Bledsoe also argues the ALJ erred by finding Harris is permanently totally disabled. Finally, Bledsoe asserts the ALJ erred by finding Bledsoe is not entitled to a credit for wages paid to Harris pursuant to the WARN Act.[1]

Harris's Form 101, Claim #2013-01508, alleges he sustained contusions and lacerations to his head, right hand, right leg, right hip, back, neck, and both shoulders on December 1, 2011, when the following incident occurred: "Claimant was picking up cables when a rock fall occurred, causing his injuries." The Form 104 attached to the Form 101 indicates Harris worked as a "beltman" at Bledsoe from

[1] On page eight of Bledsoe's March 24, 2014, position statement to the ALJ, Bledsoe identifies the WARN Act as follows: "In August 1988 Congress passed the Worker Adjustment and Retraining Notification Act (WARN) to provide workers with sufficient time to seek other employment or retraining opportunities before closing their jobs. This law became effective on February 4, 1989, WARN provides that workers' who are laid off or terminated in certain circumstances must receive sixty (60) days advance written notice of their job losses. Under the Worker Adjustment and Retraining Notification Act (WARN), employers with a certain number of employees must give sixty (60) calendar day notice in the case of mass layoffs. If the employer or the employee gets notice, payment in lieu of notice means that the worker doesn't have to work out the notice period, but rather receives payment for it. Under the WARN Act the employer must continue to pay and grant the employee benefits to which they are entitled to through the advance layoff notice period (See Worker Adjustment and Retraining Notification Act)."

March 1995 through August 2013. Before working for Bledsoe, Harris was employed as a truck driver at M&D Construction from 1993 to 1995.

Harris also filed a Form 103, Claim #2013-01670, alleging he sustained work-related hearing loss manifesting on August 30, 2013, due to "[r]epetitve [sic] exposure to loud noise in the work place."

By order dated February 17, 2014, the claims were consolidated.

The March 12, 2014, Benefit Review Conference ("BRC") order lists the following contested issues: work-relatedness/causation; benefits per KRS 342 [".730" has been crossed out]; credit for [handwritten: "WARN pay and unemployment benefits"]; TTD (overpayment/underpayment); and medical benefits. Under "other" is "permanent total disability." The BRC order indicates Harris was born on September 6, 1956, and is a high school graduate.

Harris' January 8, 2014, deposition was introduced. At the time of his deposition, he was 57 years old. He has worked in underground coal mining for approximately 25 years.

Harris described the events of December 1, 2011, as follows:

> I was under it. It was a big rock. Two of them fell and hit me. One almost knocked me down and then the other one hit me and flatten [sic] me out, and they got the rock off of me and got me out of there.

Harris went to the emergency room where he was treated and released. Harris testified that he followed up with Dr. Dahhan, the company doctor, who released him to full duty work.

Harris testified regarding his job duties for six weeks following the December 1, 2011, incident as follows:

> Q: What did you do outside?
>
> A: Nothing. I wasn't able to do nothing.
>
> ...
>
> Q: And for six weeks did they have you look at the computer monitor where the miners were? Did you do some function?
>
> A: I come in just after the mantrip would come and I would leave. I wasn't able to sit out there.
>
> Q: Were you supposed to sit there eight hours?
>
> A: That is what they told me. They let me just come in, when the mantrip goes inside and everybody is gone, I would just leave.
>
> Q: And you were paid for eight hours or ten or what that shift-
>
> A: Eight hours.

> Q: But you didn't stay there for ten hours?
>
> A: No, I didn't.
>
> Q: Or eight hours?
>
> A: No.
>
> Q: But you were paid?
>
> A: I was paid.

After the six weeks, Harris went back underground and worked a different position than he worked at the time of the injury. At the time of the injury, Harris worked on the "low low" where he had to "scatter structure, shovel the low low, rock dust it, stuff like that." When he returned to underground mining, he watched the head drive for about a month. He described his duties for that month as follows: "Well, just go through a man door and sit there all day is what I done [sic]." He explained further:

> Q: You are the only one that has ever watched a head drive that told me that it didn't require any labor?
>
> A: It might have but they didn't require me to do it.

After the month of watching the head drive, Harris returned to his job on the low low. Regarding the difficulties he faced when he returned to his regular job at Bledsoe, he testified:

Q: Did you have any problems doing your job as a low low operator during that period of time?

A: Yes.

Q: What problems did you have?

A: I just couldn't lift like I could before.

Q: What items did you lift before that you couldn't lift then?

A: Well, they [sic] was a lot, like a shovel. I couldn't shovel like I used to. I hurt all the time.

Q: Why is that?

A: Because my back hurt me. My neck.

Q: I mean, we are talking about almost two years or a year-

A: I have got [sic] worse since this happened to me.

Q: I mean, you would have been in that position as a low low operator if we go by the ten weeks, you would have been doing that job for a year and nine months- well, I am sorry. About a year and six months before you were laid off. Does that sound right?

A: I guess. I don't know for sure.

Q: And at that point, did they have extra men in the mines or had they- they were pretty much a skeleton crew; weren't they?

A: No. They wasn't.

Q: Do you think they had extra men then?

A: When they done change my job around is they had belt shovelers that shoveled up at the face, and that stopped, you know, a lot that I had to do. I had two men.

Q: How did that stop-

A: Well, that was a job that I had to do before that.

Q: So they had extra shovelers underground?

A: Yes. They started extra shovelers under the ground on each section at the face.

Q: On each section?

A: Each section.

Q: So it wasn't just to accommodate you?

A: Well, it did accommodate me what I didn't have to do it. Yes.

Harris described his current symptoms as follows:

A: I have [sic] still got [sic] back pain, and my neck pain in there, and my shoulder, and I have [sic] still got [sic] lower back pain.

Q: Let's talk about your low back pain. Is it above, below, or at your belt line?

A: It is right in this area here.

Q: So that is a little above your belt line?

A: Right in this area here.

Q: So that is a little above your belt line?

A: Right in that area.

Q: Area of your belt line?

A: Above it maybe. I don't know exactly where. It is right in this area right in here.

Q: And does the pain just stay in that area?

A: Pretty much there and in my neck and shoulders.

Q: And when we talk about your neck it is just at the base where it goes across your shoulders?

A: Up in my neck some and across.

Q: It goes across to both shoulders?

A: No. My right shoulder most of the time. I have trouble out of my left one, but most of the time it is my right.

Q: Okay. Any other problems that you have that you think are related to this accident?

A: Well, I have got trouble out of both hips.

Q: Okay. When did you start having problems with your hips?

A: Oh, I have had trouble for about, I don't know. A year and a half or a little over that.

Harris also testified at the March 26, 2014, hearing, reiterating much of what was testified to at his deposition.

Harris testified he was laid off from Bledsoe on August 30, 2013, explaining as follows:

> Q: Okay. Was that when they had a big layoff?
>
> A: Yeah. Well, they shut the mines down for a week. They supposed to shut it down for a week through a Labor Day week with no pay. Well, it went on to two weeks. And then it went on to what they called- I don't know- idle. And then about two weeks later, they called and told us they was [sic] laying us off.
>
> Q: Okay. so you found out it was going to be permanent?
>
> A: Yeah.

Harris testified that if he had not been laid off, he would have been unable to continue working in the mines as his problems were getting worse. He described his symptoms as of the date of the hearing:

> A: Well, I got all kinds of trouble with my lower back and my neck and my shoulder here. I can't- you know, I have trouble, I can't- I can't do nothing [sic] like I used to do.
>
> Q: Are you able to- to sit for long periods of time?
>
> A: No, I can't, not no [sic] more.

Q: What kind of problems if you- do you have if you sit for- for a long time?

A: Oh, I get- I hurt. I mean, I can't- I get where I can't move.

Q: Can you sit and watch a one-hour TV show without getting up at all?

A: No, I can't.

Q: What about standing, do you have trouble standing?

A: Yes, I do. Like cement floors or something like that, kills me.

Q: So you have particular problems with cement. What about uneven floors?

A: Uneven? You know, any kind of hard surface kills me, which I can't stand over 30, 40 minutes anyway. And sometimes, I have to get down on my knees and just lean back, you know....

Q: If you go to Wal-Mart and have to stand in line, how long could you stand there before you'd have to tell somebody else to take the buggy and go through there, you're going to have to leave?

A: Twenty-five (25), maybe 30 minutes.

Q: What about walking, do you have any particular problem with walking?

A: Yes, I do.

Q: Is it the same kind of problem you had with standing? You can't do it for very long?

A: Well, I run out of breath, too, and I- and I can't walk for a long time.

> Q: Now, what bothers you, what part of your body is hurting if you walk for a long time?
>
> A: Well, both my hips, my back hurts me all the time. I have trouble out of my back all the time and my neck.

Harris introduced the Form 107 of Dr. Robert C. Hoskins dated February 21, 2014, which contains the following diagnoses:

> 1. Cervical sprain/strain
> 2. Lumbosacral sprain/strain
> 3. Bilateral lumbar radiculitis
> 4. Bilateral knee flexion contractures-right>left
> 5. Hereditary exostoses- familial multiple osteochondromatosis
> 6. Left elbow deformity/flexion contracture

Dr. Hoskins checked "yes" next to the question: "Within reasonable medical probability, was plaintiff's injury the cause of his/her complaints?" Under "explanation of causal relationship," Dr. Hoskins stated as follows:

> Within a reasonable degree of medical probability, Mr. Harris' impairments are secondary to cumulative trauma associated with the physical job demands encountered through his employment in the coal-mining industry superimposed upon pre-existing, dormant, and non-disabling multiple/widespread hereditary exostoses. The event at work on 12-01-11 accelerated/aggravated Mr. Harris' degenerative changes. From that point forward, his spine and extremities

> became gradually more and more symptomatic and disabling.

Dr. Hoskins assessed a 24% whole person impairment rating which consisted of impairment ratings for Harris's cervical spine, lumbar spine, right knee, and left knee. Dr. Hoskins opined Harris does not retain the physical capacity to return to the type of work he performed at the time of the injury and he reached maximum medical improvement ("MMI") on February 12, 2014.

In the April 21, 2014, Opinion and Order, the ALJ provided, in relevant part, the following Findings of Fact and Conclusions of Law:

> . . .
>
> I saw and heard the plaintiff Mr. Harris testify at the Final Hearing. I carefully observed his facial expressions during his testimony. I carefully listened to his voice tones during his testimony. I carefully observed his body language during his testimony. I make the factual determination that he was a credible and convincing. He testified that that while working for the defendant on December 1, 2011 a rock fall occurred and two rocks struck him in his head and back, knocking him to the ground. Thereafter, he sought medical treatment for his injuries. He complained of pain in his neck, back and hips.
>
> This case calls to mind the Opinion of the Kentucky Court of Appeals in Jeffries v. Clark & Ward, 2007 WL

2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

Based upon Mr. Harris' credible and convincing sworn testimony, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hoskins, which is covered in detail above, I make the factual determination that Mr. Harris suffered significant physical injuries as a result of his employment accident on December 1, 2011.

Dr. Hoskins stated that Mr. Harris' work event on December 1, 2011 accelerated and aggravated his degenerative changes into disabling reality. In *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky.2001), the Kentucky Supreme Court stated that where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful

change comes within the definition of an injury. The high court further stated that it was not persuaded that the legislature's decision to abolish Special Fund apportionment with regard to traumatic injury claims had any effect on the longstanding principle that a harmful change to a worker's body which is caused by work is an "injury" for the purposes of the Workers' Compensation Act.

B. Benefits per KRS 342; permanent total disability.

. . .

In this case, I found very credible and convincing the lay testimony of Mr. Harris, which is covered in detail above. In addition, I found very persuasive and compelling the medical evidence from Dr. Hoskins, which is covered in detail above. I make the factual determination that Mr. Harris will sustain under the AMA Guides, Fifth Edition, a permanent whole person impairment of 24% due to his work event of December 1, 2011 accelerating and aggravating his pre-existing degenerative changes into disabling reality. In addition, Dr. Hoskins stated that Mr. Harris does not retain the physical capacity to return to the type of work which he performed at the time of said injuries and that the following restrictions should be placed upon his work activities as a result of his injuries: (1) No lifting > 40 lbs., (2) no lifting > 25 lbs. below waist level, (3) no heavy pushing, pulling or carrying, (4) No continuous sitting > 90 minutes – plaintiff needs 10-15 minutes to stand and walk around after 90 minutes of continuous sitting, (5) no continuous standing or walking > 60 minutes – plaintiff needs 10-15 minutes

to sit after 60 minutes of continuous standing and/or walking, (6) no activities that involve sustained posturing of the lumbosacral spine at extremes of motion or repetitive movements into extremes of lumbosacral motion, (7) no prolonged or repetitive use of equipment that subjects the spinal column to vibration, (8) no prolonged or repetitive stooping or crouching, (9) no prolonged repetitive overhead work, (10) no kneeling, climbing, balancing, crouching or crawling, and (11) no activities that involve sustained posturing of the cervical spine at extremes of motion or repetitive movements into extremes of cervical motion.

Based upon the persuasive and compelling medical evidence from Dr. Eisenmenger, I make the factual determination that Mr. Harris has essentially normal hearing bilaterally and has no significant pattern of noise-induced hearing loss present, and, therefore, a 0% permanent functional impairment under the AMA Guides, Fifth Edition. I, therefore, make the determination that Mr. Harris is not entitled to any workers' compensation benefits for his alleged hearing loss.

"'Permanent total disability' means 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 an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to

find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

Based upon the credible and convincing sworn testimony of Mr. Harris, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hoskins, which is covered in detail above, I make the factual determination that as a result of Mr. Harris' work accident and injuries on December 1, 2011, he sustained very painful and permanent injuries to his neck, low back, both knees and left upper extremity. His low back and neck symptoms have gotten worse and he has difficulty standing and walking. Mr. Harris is now 57 years of age and is, therefore, an older worker with significant limitations for reemployment in the highly competitive job market. I make the factual determination that Mr. Harris has had a

good work history showing a good work ethic, but will not be able to return to any regular gainful employment in the highly competitive job market.

In this case I considered the severity of the plaintiff's physical injuries, which are covered in detail above, his work history, which is covered in detail above, his education, his credible and convincing sworn testimony and the medical evidence from Dr. Hoskins, which is covered in detail above. Based on all of those factors, I make the factual determination that Mr. Harris cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

C. TTD (overpayment/underpayment)

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.

In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App.2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in *Helms*, *supra*, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not

> have improved enough to return to work.
>
> Id. at 580-581.

Based upon the credible and convincing lay testimony of Mr. Harris, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hoskins, which is covered in detail, I make the factual determination that Mr. Harris was entitled to recover temporary total disability benefits in the amount of $721.97 per week, based upon an average weekly wage of $1,120.90, from August 31, 2013 to February 12, 2014, when Dr. Hoskins determined that Mr. Harris reached maximum medical improvement.

D. Medical benefits.

. . .

Based upon the credible and convincing lay testimony of Mr. Harris, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hoskins, which is covered in detail above, I make the determination that Mr. Harris is entitled to recover from the defendant-employer and its workers' compensation insurer for his work-related medical bills and expenses for treatment of his neck, low back, both knees, and left upper extremity, both past and future.

E. Credit for WARN pay and unemployment benefits.

KRS 342.730(5) provides that all income benefits for temporary total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total disability.

> I, therefore, make the determination that the defendant and its workers' compensation insurer are entitled to a credit or offset against temporary total disability benefits for unemployment insurance benefits paid for unemployment during the period of the plaintiff's temporary total disability.
>
> The defendant states that under the Worker Adjustment and Retraining Notification Act the defendant-employer paid the plaintiff 60 days of WARN pay, at the end of which he reapplied for unemployment benefits.
>
> However, neither the defendant nor the plaintiff has cited any statutory provision or case law which states that the defendant is entitled to a credit for WARN benefits paid to the plaintiff. I, therefore, make the determination that no such credit is appropriate.

In its petition for reconsideration, Bledsoe requested additional findings which included a request to provide the basis for the ALJ's determinations Harris is disabled due to cumulative trauma and Harris became disabled on the last day he worked before his layoff. Bledsoe also requested additional findings which explained the finding Dr. Hoskins' report was credible when he assessed impairment ratings to different body parts than were alleged in the Form 101. Finally, it requested

findings addressing the award of TTD benefits from August 31, 2013, through February 12, 2014.

The June 17, 2014, Opinion and Order on Reconsideration reads, in relevant part, as follows:

> . . .
>
> In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. A review of defendant's Petition for Reconsideration shows that defendant is attempting to reargue the case, which is improper. However, out of an abundance of caution, we will discuss defendant's arguments.
>
> This case was thoroughly litigated by the parties and a voluminous record was produced. I carefully reviewed all of the record before rendering the original Opinion and Order.
>
> The plaintiff, Michael Harris, testified that he is now 57 years of age. He worked for Bledsoe Coal Corp. for 18 ½ years. His job was a manual labor job. He testified that on December 1, 2011, while working for the defendant, a rock fall occurred and two rocks struck him in his head and back. After returning to work, he could not shovel. He had pain in his neck, back and hips. He last worked for the defendant on August 30, 2013. He stated that his lower back and neck condition has gotten worse. He now has difficulty standing and walking. He has been treated by Dr. Hoskins and a family

nurse practitioner. He has been awarded Social Security disability benefits.

The plaintiff Mr. Harris was the only live witness at the Final Hearing. The defendant did not produce any live witnesses at the Final Hearing. I sat a few feet from Mr. Harris and carefully observed during his testimony his facial expressions, carefully listened to his voice tones and carefully observed his body language. I am the only decision maker who actually saw and heard the plaintiff testify. He was a very stoic gentleman. I made and again make the factual determination that he was a very credible and convincing lay witness and his testimony rang true.

The plaintiff filed the medical report of Dr. Robert Hoskins. Dr. Hoskins took a medical history from the plaintiff regarding Mr. Harris' work injuries on December 1, 2011, at which time two rocks fell on him, knocking him down. He was immediately taken by ambulance to the hospital emergency room for treatment. Dr. Hoskins performed a comprehensive physical examination of the plaintiff and reviewed pertinent medical records, including the plaintiff's diagnostic test results. Dr. Hoskins stated that within reasonable medical probability Mr. Harris' injuries on December 1, 2011 were the cause of his complaints and further that his job accident on that date accelerated and aggravated degenerative changes in his spine and extremities. Dr. Hoskins stated that using the AMA Guides, Fifth Edition, Mr. Harris will sustain a permanent whole person impairment of 24% and further that the plaintiff did not have an active impairment prior to his work injuries. Dr. Hoskins stated that Mr.

Harris reached maximum medical improvement on February 12, 2014. Dr. Hoskins stated that the plaintiff does not retain the physical capacity to return to the type of work which he performed at the time of his injuries and imposed upon the plaintiff very stringent physical restrictions. I made and again make the factual determination that the medical evidence from Dr. Hoskins was very persuasive and compelling.

Dr. Hoskins stated that Mr. Harris' work event on December 1, 2011 accelerated and aggravated his degenerative changes into disabling reality. In *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky.2001), the Kentucky Supreme Court stated that where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. The high court further stated that it was not persuaded that the legislature's decision to abolish Special Fund apportionment with regard to traumatic injury claims had any effect on the longstanding principle that a harmful change to a worker's body which is caused by work is an "injury" for the purposes of the Workers' Compensation Act.

Based upon Mr. Harris' credible and convincing lay testimony, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hoskins, which is covered in detail above, I made and again make the factual determination that Mr. Harris suffered significant physical injuries as a result of his

employment accident on December 1, 2011. I did not and do not make the factual determination that the plaintiff's injuries were the result of cumulative trauma.

In Hush v. Abrams, 584 S.W.2d 48 (Ky.1979), the Kentucky Supreme Court stated that where the medical evidence clearly and unequivocally shows the plaintiff's actual bodily condition, his lay testimony is competent on the question of the extent of disability which has resulted from his bodily condition, and that where there is medical testimony from which the decision maker could conclude that the plaintiff did suffer trauma, the decision maker could then use lay testimony to determine the extent of the plaintiff's occupational disability.

The great orthopedic surgeon, Dr. David Gaw, stated on numerous occasions in his lectures that the AMA Guides are not a cookbook, but are Guides to be used by physicians. Dr. Hoskins is a licensed physician and is definitely qualified to give medical opinions based on the AMA Guides, Fifth Edition. Unfortunately, the defense attorney is not a licensed physician and is not competent or qualified to give her interpretation of the meaning of the AMA Guides, Fifth Edition. Likewise, the defense attorney is not competent or qualified to criticize the medical evidence from Dr. Hoskins or his opinions as to medical causation, since he is a licensed physician.

Based upon the credible and convincing sworn testimony of Mr. Harris, which is covered in detail above, and the persuasive and compelling medical evidence from Dr.

Hoskins, which is covered in detail above, I make the factual determination that as a result of Mr. Harris' work accident and injuries on December 1, 2011, he sustained very painful and permanent injuries to his neck, low back, both knees and left upper extremity. His low back and neck symptoms have gotten worse and he has difficulty standing and walking. Mr. Harris is now 57 years of age and is, therefore, an older worker with significant limitations for reemployment in the highly competitive job market. I make the factual determination that Mr. Harris has had a good work history showing a good work ethic, but will not be able to return to any regular gainful employment in the highly competitive job market.

In this case I considered the severity of the plaintiff's physical injuries, which are covered in detail above, his work history, which is covered in detail above, his education, his credible and convincing sworn testimony and the medical evidence from Dr. Hoskins, which is covered in detail above. Based on all of those factors, I make the factual determination that Mr. Harris cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

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.

In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App.2004),

the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in *Helms*, *supra*, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> Id. at 580-581.

Based upon the credible and convincing lay testimony of Mr. Harris, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hoskins, which is covered in detail, I make the factual determination that Mr. Harris was entitled to recover temporary total disability benefits in the amount of $721.97 per week, based upon an average weekly wage of $1,120.90, from August 31, 2013 to February 12, 2014, when Dr. Hoskins determined that Mr. Harris reached maximum medical improvement.

KRS 342.730(5) provides that all income benefits for temporary total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total disability.

I, therefore, make the determination that the defendant and its workers' compensation insurer are entitled to a credit or offset against temporary total disability benefits for unemployment insurance benefits paid

for unemployment during the period of the plaintiff's temporary total disability.

The defendant states that under the Worker Adjustment and Retraining Notification Act the defendant-employer paid the plaintiff 60 days of WARN pay, at the end of which he reapplied for unemployment benefits.

However, neither the defendant nor the plaintiff has cited any statutory provision or case law which states that the defendant is entitled to a credit for WARN benefits paid to the plaintiff. I, therefore, make the determination that no such credit is appropriate.

In making this determination, I also relied upon the decision of the Kentucky Court of Appeals in 2013-CA-002063-WC, Quad/Graphics, Inc. v. Mario Holguin, et al, decided on June 6, 2014, where the employer argued that it was entitled to an offset for light duty wages paid to the plaintiff during a period for which the plaintiff was also awarded temporary total disability benefits. The Court of Appeals noted that KRS 342.730 provides for two circumstances in which an employer can receive a credit against its TTD benefits obligation. Subsection (5) permits an offset for unemployment insurance benefits paid during any period of TTD or permanent total disability, and subsection (6) requires an offset for payments made under a qualifying employer-funded disability or sickness and accident plan, but there is no provision in said statute for an offset for light duty wages.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder

> the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky.2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence 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). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky.2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.1976).
>
> WHEREFORE, in light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied.

We will first address Bledsoe's second argument, that the finding of permanent total disability is erroneous

in light of the evidence in the record. Because the ALJ’s decision Harris is totally permanently disabled is not in conformity with the evidence, we vacate the award of PTD benefits and remand for additional findings.

In both the April 21, 2014, Opinion and Order and the June 17, 2014, Opinion and Order on Reconsideration, the ALJ opined, based on Harris' testimony and the opinions of Dr. Hoskins, the events of December 1, 2011, "accelerated and aggravated his degenerative changes into disabling reality," causing "painful and permanent injuries to his **neck, low back, both knees and left upper extremity.**" (emphasis added). However, a review of the Form 101, Dr. Hoskins' opinions, and the ALJ's findings reveal several inconsistencies and omissions.

In the Form 101, Harris alleged injuries to his **head, right hand, right leg, right hip, back, neck, and both shoulders**. Dr. Hoskins, upon whom the ALJ relied in finding Harris is permanently totally disabled, assigned impairment ratings for Harris' cervical spine, lumbar spine, right knee, and left knee. Even though the ALJ found Harris sustained "painful and permanent injuries" to both knees and Dr. Hoskins assigned an impairment rating for Harris' left knee, Harris did not allege an injury to his left knee. With respect to Dr. Hoskins’ assessment of an

impairment rating for Harris' right knee condition, we believe the Form 101 sufficiently identified problems with the right leg so as to advise Bledsoe that Harris had sustained an injury to the right leg which may well have included an injury to the right knee. Significantly, we note Bledsoe does not specifically complain about Dr. Hoskins' assessment of an impairment rating for a right knee condition. Further, while the ALJ found Harris sustained "painful and permanent injuries" to his left upper extremity, Dr. Hoskins did not assign an impairment rating for Harris' left upper extremity. Finally, not all of the injuries alleged in the Form 101 were addressed by Dr. Hoskins or the ALJ.

We are compelled to note Dr. Hoskins' Form 107 reflects he characterized the injury as a cumulative trauma. However, we believe the statements of Dr. Hoskins contained under the heading "Explanation of Causal Relationship" which has been previously recounted herein permitted the ALJ to find Harris sustained a compensable work injury on December 1, 2011, as the work injury aroused previously dormant non-disabling conditions into disabling reality.

On remand, and based on the evidence in the record, the ALJ must specifically identify each injury he

believes Harris sustained and the nature of the impairment attributable to each injury. Should the ALJ determine Harris sustained only some of the injuries alleged in the Form 101, the ALJ must nonetheless fully address all other injuries alleged in the Form 101. In doing so, the ALJ cannot step outside of the injuries pled in Harris' Form 101 or include injuries to body parts to which Dr. Hoskins did not assign impairment ratings. The ALJ erroneously included in his analysis of permanent total disability injuries to Harris' left knee and left upper extremity when an injury to the left knee was not pled by Harris and Dr. Hoskins did not assign an impairment rating for a left upper extremity injury.

If, on remand, the ALJ determines Harris is permanently totally disabled, Bledsoe's first argument on appeal, i.e. the ALJ's award of TTD benefits from August 31, 2013, through February 12, 2014, is erroneous in light of the evidence, is rendered moot. In the event that the ALJ finds Harris is permanently totally disabled, the ALJ must determine the appropriate start date for the award of PTD benefits.

If, on remand, the ALJ determines Harris is permanently partially disabled, Bledsoe's first argument on appeal regarding the award of TTD benefits has merit.

Consequently, we address Bledsoe's argument regarding the award of TTD benefits.

Bledsoe's argument on appeal is that the ALJ's award of TTD benefits from August 31, 2013, through February 12, 2014, is erroneous in light of the evidence in the record.

KRS 342.0011(11)(a) defines temporary total disability 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.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. In other words, where a claimant has not reached maximum medical improvement ("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.

More recently, in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The court in Magellan Behavioral Health v. Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> . . . .

> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD, the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky.App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
>
> . . . .

> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In the case *sub judice*, it is clear that the ALJ terminated TTD benefits on February 2, 2014, based on Dr. Hoskins' assessment of MMI on that date. What is not clear, however, is why the ALJ initiated his award of TTD benefits on August 31, 2013, which, according to the evidence in the record, is the day after Harris was laid off from Bledsoe. The ALJ outlined the law pertaining to entitlement to TTD benefits in detail in both the April 21, 2014, Opinion and Order and the June 17, 2014, Opinion and Order on Reconsideration, and plainly stated he relied upon evidence from Dr. Hoskins and the testimony of Harris as the basis for his award of TTD benefits. However, he failed to explain why he chose to initiate the award of TTD benefits on August 31, 2013. The ALJ must provide adequate findings of fact based on the evidence in order to advise the parties and this Board of the basis for his decision. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v.

Chaffins, 502 S.W.2d 526 (Ky. 1973). It is not the role of this Board to speculate on the ALJ's rationale and to render an opinion based on that speculation.

On remand, if appropriate, the ALJ must engage in the two prong analysis outlined herein in determining any period during which Harris is entitled to TTD benefits. To base an award of TTD benefits on the date Harris attained MMI is insufficient. On remand, should the ALJ determine Harris is only entitled to permanent partial disability ("PPD") benefits, the ALJ must fully set forth his rationale for initiating an award of TTD benefits. The ALJ must also determine the appropriate start date for the payment of PPD benefits.

Finally, we find no merit in Bledsoe's third argument it should receive credit for wages it paid Harris under the WARN Act. Consequently, we affirm the ALJ's decision on this issue.

The issue of credits against income benefits is dictated exclusively by statute. Specifically, KRS 342.730(5) and (6) are implicated here. The relevant statutory provisions read as follows:

> KRS 342.730(5): All income benefits pursuant to this chapter otherwise payable for temporary total and permanent total disability shall be offset by unemployment insurance

> benefits paid for unemployment during the period of temporary total or permanent total disability.
>
> KRS 342.730(6): "All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability of sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

As salary continuation under the WARN Act is not covered under these statutory provisions, Bledsoe is not entitled to a credit. The language of KRS 342.730(5) and (6) is clear and unambiguous. When a statute is unambiguous on its face, it should be applied without resort to outside aids and it is not open to construction. Coursey v. Westvaco Corp., 790 S.W.2d 229 (Ky. 1990); Overnight Transp. Co. v. Gaddis, 793 S.W.2d 129 (Ky. App. 1990). When the plain language and meaning of the statute is without ambiguity, the intent of the legislature is discerned from what the General Assembly said, not what it might have said, and further interpretation is unwarranted as a matter of law. Clark v. Clark, 601 S.W.2d 614 (Ky. App. 1980); Lane v. Newberg, 841 S.W.2d 181 (Ky. 1992). Consequently, Bledsoe is not entitled to a credit against its obligation to pay

TTD benefits or PTD benefits for payments made to Harris pursuant to the WARN Act.

Accordingly, the ALJ's award of TTD benefits and PTD benefits as set forth in the April 21, 2014, Opinion and Order and the June 17, 2014, Opinion and Order on Reconsideration is **VACATED**. Those portions of the April 21, 2014, Opinion and Order and the June 17, 2014, Opinion and Order on Reconsideration denying Bledsoe a credit for payments made pursuant to the WARN Act are **AFFIRMED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion containing additional findings in conformity with the views expressed herein.

ALL CONCUR.

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