OPINION ENTERED: September 18, 2012

CLAIM NO. 201100042

BOYLE MASONRY CONSTRUCTION, INC. PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

FELIPE MEDELLIN
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Boyle Masonry Construction, Inc. ("Boyle") seeks review of an August 8, 2011, interlocutory opinion and order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") finding Felipe Medellin ("Medellin") sustained a work-related injury as a result of a motor vehicle accident ("MVA") occurring on September 7, 2010. In a subsequent May 8, 2012, opinion, award, and order the ALJ found

Medellin sustained a work-related thoracic spine fracture and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the multipliers contained in KRS 342.730(1)(c)1 and 3, and medical benefits. The notice of appeal does not designate Boyle is appealing from the orders ruling on the petitions for reconsideration filed after the August 8, 2011, and May 8, 2012, opinions.

Medellin's Form 101 alleges a September 7, 2010, injury occurring as follows:

> Plaintiff was a passenger in a company truck with supervisor, Marcus Baxter. Baxter veered off of roadway to the right side of shoulder and passed over other intersecting roadway landing in a ditch and injuring both driver and passenger.

Medellin alleged back, head, neck and shoulder injuries.

At the time of the MVA, Medellin and Marcus Baxter ("Baxter"), Boyle's job superintendent, lived in Liberty, Kentucky, and were working for Boyle at Yates Elementary School in Lexington, Kentucky. Boyle's office was located in the home of its owner, Dwight Boyle ("Dwight"). All of the employees were required to report to Boyle's work site. Because his driver's license had been revoked, Medellin was riding with Baxter to and from Lexington. There is no dispute Medellin and Baxter were on

their way home from work on September 7, 2010, when the MVA occurred in Danville, Kentucky.

After the claim was filed, Boyle filed a motion to bifurcate the proceedings asserting that the going and coming rule barred Medellin's claim and requesting the ALJ resolve the "issues of notice and scope of employment."[1] By order dated April 25, 2011, the ALJ sustained the motion to bifurcate. The parties deposed Medellin, Baxter, and Dwight.

Medellin, age 61 at the time of the injury, testified through the use of an interpreter. Prior to working for Boyle, Medellin had worked six years for Carmichael Masonry carrying blocks and bricks and operating a forklift. His job at Boyle was to help the workers, carry bricks, and operate a forklift. Baxter has been his supervisor the entire time he worked for Boyle. Medellin testified he and Baxter were on their way home from Lexington in a company truck driven by Baxter. The accident occurred in Danville shortly after they stopped at a red light. Medellin described the accident as follows:

> A: We were stopped at this red light. We were waiting for the green light;

[1] Boyle later withdrew notice as a contested issue.

and when the green light came on, the car started and my boss, he came on me. He fell on top of me. And so I tried to take his foot off the gas, and I couldn't. I tried to turn the key off, and I couldn't because of all the weight that was on me. I grabbed the steering wheel and I turned so that we could get out of the way; and then after that because of the weight that was on me, I just let the car go.

Q: You said we were stopped at a stoplight. Who is "we"? You and who else?

A: Just the two of us.

Q: Is that you and –

A: My boss and I.

Q: Is that Marcus?

A: Uh-huh (affirmative).

Q: Where were you stopped at a stoplight?

A: In Danville in the Wal-Mart and Lowe's intersection.

Q: Where were you two going?

A: We were going home.

Q: What time did the accident occur?

A: 5:30 p.m.

Q: So you had clocked out of work, and he was taking you home?

A: Yes. We were going home.

Q: Was Mr. Baxter driving his own vehicle?

> A: He was driving the company car.
>
> Q: What kind of car was it?
>
> A: Like a 2002 Ford. I'm not really sure. It's a 2002 model, I think.
>
> Q: Was it a truck, or was it a car?
>
> A: Truck.
>
> Q: So the workday was over, and you were going home. Why was he taking you home?
>
> A: We used to do that all the time to save on gas money.
>
> Q: Are you able to drive?
>
> A: Yes.

Medellin acknowledged his license had been suspended at the time of the MVA.[2] Medellin testified Danville is approximately thirty minutes from where he lives and it took an hour and a half to travel from his home to the job site. Medellin testified he has to travel long distances from his home to his job sites. Dwight knew he and Baxter were riding together.

Baxter testified he had worked for Boyle for twenty-four years and as its foreman/superintendent for twelve to fourteen years. On the date of the MVA, he was

[2] Although Medellin testified at the hearing he had a driver's license at the time of the MVA, there appears to be no dispute Medellin's driver's license was revoked at that time.

working at Yates Elementary School where Boyle had been working for approximately sixty days. Work started at approximately 7:30 a.m. except for the laborers who started work fifteen minutes early "to get ready for the brick masons." Baxter lives approximately seventy-four miles from the job site. Medellin had worked for Boyle for twelve years. Baxter testified Medellin rode with him because he had lost his license and needed "a ride for a few days." Consequently, Baxter had taken Medellin to and from work for sixty days. Baxter had been driving a company vehicle for approximately ten years which he was only allowed to use for work-related reasons and to get back and forth to work.

Baxter was not hauling materials or running errands on the date of the accident. Baxter testified that on September 7, 2010, after he stopped at a stoplight in Danville, he blacked out resulting in the MVA. At that time, the work day was over. Baxter was off work for three weeks and then returned to his regular employment. Medellin has not returned to work.

Medellin would occasionally ride with Baxter before he lost his license. Other Boyle employees had given Medellin a ride. On those occasions he believed Medellin and the employees were "commuting together."

Baxter testified employees would commute when they had to drive long distances.

Dwight, the owner and CEO of Boyle, testified he has owned the company for thirty-five years. He does on-the-job supervisory work and manual labor. Medellin has worked for Boyle for twelve years as a general laborer, forklift operator, and cement mixer operator. At the time of the MVA, Boyle had been working at Yates Elementary School since June 2010. Medellin had worked at the Yates Elementary School job site the entire time. Because Medellin lost his license due to three DUIs he was riding with Baxter. He believed Medellin had been without a driver's license for approximately a year. Dwight testified as follows:

> Q: How long had he been driving without his license?
>
> A: Just purely guessing, maybe a year.
>
> Q: But almost a year, you think?
>
> A: I think probably, because we had found out he had been driving without a license some and I had told him that was not acceptable practice, to drove [sic] that way.

Dwight gave Baxter permission to use the company truck "24/7." The truck was primarily used for transportation to and from the job site, and to get materials throughout the

day when needed. Dwight testified Medellin lived on the same road as Baxter approximately two or three miles from Baxter's home.

Dwight explained on the day of the accident he received a call from Baxter's wife that Baxter and Medellin had been in an accident south of Danville and had been taken to the hospital. Dwight believed the accident occurred around 5:00 p.m. because they left the job site around 4:00 p.m. Danville is approximately an hour drive from the work site. Both men were on their way home from work and were not performing job duties. They had been off work at least an hour when the MVA occurred. Dwight testified Medellin was terminated because "he left the job site, has not made any contact, has not came back, has not given any indication until a couple of weeks ago that he was even wanting to work again."

Concerning the reason Medellin was riding with Baxter, Dwight explained as follows:

> Q: Ever admitted? Okay. Let's see, that card does with those – and you – based on what you explained to Mr. Clemons, I guess you knew that Felipe and Marcus were riding back and forth to work together every day?
>
> A: I knew that Felipe, due to his condition with the DUI, was riding with Marcus and I had told them that was fine.

> Q: Yeah.
>
> A: But that's the only reason that he was riding with Marcus, because when he had his license he was very independent. He was always—-you know, drive [sic] with himself. He wanted to be on his own.
>
> Q: And why did Marcus have a company vehicle as it – you know—
>
> A: That's part –
>
> Q: --obviously, everybody isn't provided one.
>
> A: No, but he superintends, that's pretty much the industry standard.
>
> Q: Yeah.
>
> A: You provide your superintendent with a vehicle.
>
> Q: With a company vehicle –
>
> A: Yes.

Dwight explained Medellin, Baxter, and the other employees would report to the job site each day. They did not report to the company office or a central location. Rather, the employees travel from their residence directly to the job site. Dwight runs the business out of his house. Dwight testified even though they had different job sites in different cities, Boyle continued to use the same employees. Dwight explained as follows:

> Q: Yeah. And do most – your jobs at different – obviously Yates and Central

> Baptist are both in Lexington, but sometimes are these jobs in different cities –
>
> A: Sure.
>
> Q: -- just around the region, I guess?
>
> A: Just – yes. Uh-huh, (affirmative).
>
> Q: So it is necessary that the employees travel to wherever it is as opposed to the hiring –
>
> A: Right.
>
> Q: -- a new crowd of people in whatever city you happen to be in?
>
> A: Yeah. We work in Richmond quite often, sometimes in Frankfort, Georgetown.
>
> Q: Yeah. And you said Felipe had been with Boyle Masonry for about 12 years, give or take?
>
> A: Yes.
>
> Q: And the – kind of the nature of the employment, it was always the same –
>
> A: Always the same.

The ALJ's findings and conclusions in the August 8, 2011, interlocutory opinion and order are as follows:

Findings and Conclusions

> The Defendant argues that because Medellin's accident occurred as he was travelling home after his work day was complete his claim is not compensable under the "going and coming rule." That rule was stated in *Receveur*

Construction, Co. v. Rogers, *958 S.W.2d 18, 20 (Ky. 1997)*, as follows:

> The general rule is that injuries sustained by workers when they are going to or returning from the place where they regularly perform the duties connected with their employment are not deemed to arise out of and in the course of the employment as the hazards ordinarily encountered in such journeys are not incident to the employer's business.

See also Haney v. Butler, 990 S.W.2d 611 (Ky. 1999); Olsten-Kimberly Quality Care v. Parr, 965 S.W.2d 155, 157 (Ky. 1998); Baskin v. Community Towel Service, 466 S.W.2d 456 (Ky. 1971); Kaycee Coal Co. v. Short, 450 S.W.2d 262 (Ky. 1970).

Exceptions exist to the going and coming rule. One of those exceptions involves an injury sustained in a vehicle furnished by the employer. As stated by Professor Larson in his treatise:

> If the trip to and from work is made in a truck, bus, car, or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment. The justification for this holding is that the employer has himself expanded the range of the employment and the attendant risks…The reason for the rule in this section depends upon the extension of risks under the employer's control.

Larson's Workmen's Compensation, Section 15.10 (2006).

Kentucky has not gone so far as the majority of state jurisdictions that have adopted the rule in *Larson's* that the very occurrence of an injury in a company vehicle while travelling to or from work is a work related event. In *Receveur*, *surpa [sic]*, our Supreme Court said:

> While not prepared to totally adopt the reasoning in those cases, we do agree that where there is evidence that the use of the company owned vehicle is of some benefit to the employer, an exception to the going-and-coming rule is created.

Receveur at 19.

The benefit to the Employer in the present case is admitted by company owner Dwight Boyle. He plainly said that Baxter's use of the truck served a business purpose: "Throughout the day if he needed to go get materials or something, he uses the truck." Boyle noted that a vehicle allowance to a key employee like Baxter was industry standard. Boyle Concrete had no company offices, so Baxter and all employees travelled wherever the job site happened to be. At the time of Medellin's injury, the job site was 74 miles away. The availability of a company vehicle at a distant construction work site is essential, and such was supplied by Boyle to Baxter. (There is no contention here that Baxter and Medellin had departed or deviated from the scope of their employment for a personal errand while returning home from work.)

The rule of law in Kentucky law [sic], then, is that the operator of a company furnished vehicle involved in a "going and coming" accident is engaged in work related activity if he is providing "some benefit" to the employer at the time of the accident. Based on the facts set forth above, Baxter was engaged in work related activity at the time of his accident. The question in this case is whether there is any distinction in the circumstance of an injury to a passenger in a vehicle whose operator is engaged in work related activity.

The facts of Medellin's case are similar to those in *J.D. Dutton v. Industrial Commission, 584 P.2d (Ariz. 1978).* The claimant construction foreman in that case lived 45 miles from a job site, and rode to work each day in a company vehicle assigned to his supervisor. While driving home from work one afternoon both men were injured in an accident. The supervisor's claim was accepted on the basis that his injury occurred in a company furnished vehicle. The foreman's claim was initially denied, but the Court reinstated it on appeal. The Court held that the foreman's injury was also covered under the exception to the going and coming rule related to company furnished transportation. It held that because the supervisor was authorized to take co-employees to and from work, the supervisor's work expanded the range of risks assumed by the employer, and there was an implied or tacit agreement between the foreman and the employer to furnish the foreman's transportation. The Court further held that the time spent going to and from work benefited the employer because the jobsite was remote. By authorizing the supervisor

to furnish rides for his employees, the employer recognized that transportation was a concern on the remote job.

The ALJ recognizes that the full rationale for extending the exception to the going and coming rule to the passenger in the *Dutton* case was not adopted in *Receveur*. *Id.* at 21. The *Receveur* Court noted that it did not proceed to address those justifications for the exception identified by Professor Larson because the exception had already been established by showing that there was "some benefit to the employer" in providing the transportation. Just as Boyle Masonry benefitted from the provision of a vehicle to Baxter, the ALJ finds that it benefitted from allowing an employee to ride to a work site 74 miles away in that vehicle. Medellin had lost his license because of a DUI. Boyle knew this, and told Medellin it was "not acceptable practice" to drive without a license. He knew that Medellin and Baxter lived near each other, and knew that Baxter had begun regularly driving Medellin to the job site in a company vehicle. He knew that Medellin would not get to a remote job site without a ride from a coworker. Boyle had employed Medellin for 12 years, and he benefitted from having Baxter drive a long-time employee to the job site.

The decision in this case is consistent with the results in *Turner Day & Woolworth handle Co. v. Pennington, 63 S.W.2d 490 (Ky. 1933); Port v. Kern, 187 S.W.3d 329 (Ky.App.2006); and Barry v. US Airways, No. 2008-CA-001811, Claim No. 2007-01293*. The *Turner* case was favorably cited in *Receveur.* In *Turner*¸ the going and coming defense was rejected in the claim of a worker who was

> injured in a motor vehicle accident while returning from a timber site to his home for the weekend, primarily based on the fact that the employer paid for the gasoline for the worker's travel; the worker often brought messages back to the employer, but had not been carrying any such message on this particular trip home.
>
> **Interlocutory Order**
>
> 1. Plaintiff Felipe Medellin's September 7, 2010 injury occurred in the course and scope of his employment. The motor vehicle accident from which he alleges injury is not barred by the "going and coming rule." Medellin is entitled to the benefits afforded by KRS Chapter 342, including medical benefits pursuant to KRS 342.020.
>
> . . .

Boyle filed a petition for reconsideration asserting the ALJ erroneously relied, in part, upon J.D. Dutton v. Industrial Commission, 584 P.2d 1190 (Ariz. 1978) which is not binding authority in Kentucky. Boyle argued Medellin's injuries occurred on his way home from work, miles from the job site, and he was not performing activities within the course and scope of his employment. Consequently, there was no work injury.

By order dated August 30, 2011, the ALJ overruled Boyle's petition for reconsideration.

On May 8, 2012, the ALJ entered an opinion, award, and order awarding Medellin income and medical

benefits. Since Boyle's petition for reconsideration filed after the opinion, award, and order do not relate to the issue on appeal, we will not discuss its petition for reconsideration or the ALJ's order overruling the petition for reconsideration.

On appeal, Boyle asserts in affirming the ALJ's opinion this Board would be creating a new rule of law "that showing up for work is a 'service to the employer' within the meaning of the exception to the 'going and coming' rule." Boyle maintains the general rule in this jurisdiction is that "injuries sustained by workers when they are going to or returning from the place where they regularly perform the duties connected with their employment are not deemed to arise out of and in the course of their employment." Boyle argues the exception to the going and coming rule "service to the employer" is not present in this case. Boyle posits as follows:

> Accordingly, in this jurisdiction, work-related travel has come to mean travel that is for the convenience of the employer, as opposed to travel for the convenience of the employee. Id. at p. 20.

Boyle asserts there is no evidence Medellin's return trip home from his place of work on the date of injury was for the convenience or benefit of Boyle. It

argues the mere fact Medellin was in a company vehicle driven by his supervisor at the time of the accident is not sufficient to impose liability for workers' compensation benefits. It posits Medellin's testimony establishes he was not providing any service to Boyle and Medellin's activities were clearly transitory. Further, there was no agreement between Boyle and Medellin that it would furnish his transportation. Likewise, Baxter did not typically provide transportation to Medellin or other employees because Baxter would often need to stay at the job site later than the other employees or run business-related errands before returning home. Boyle argues transportation of Medellin to and from the job was a detriment not a benefit to it. Boyle asserts the accident occurred forty miles from the job site an hour and half after work ended. Boyle notes the ALJ relied heavily on Fortney v. Airtran Airways, Inc., 319 S.W.3d 325 (Ky. 2010). It argues in Fortney, supra, the employer's involvement in the deceased employee's transportation arrangements was far more extensive than the present case. Unlike Fortney, there was no prior arrangement or promise to Medellin of transportation to and from Boyle's remote job site as an "inducement to employment."

Boyle posits in hindsight the better practice would have been to terminate Medellin if he was unable to secure transportation to and from work. Boyle asserts it chose a compassionate solution by allowing Baxter to transport Medellin to and from work for the temporary period he was unable to drive because his license was suspended. Boyle maintains "carpooling alone is not enough to impose liability, even where there are multiple, distant job sites and the employer enjoys the benefit of maintaining the same employees by their carpooling from a central location." Moreover, riding in a company truck does not in and of itself constitute a service to the employer. Such action is "not evidence of some putative benefit beyond conveyance to and from work." Accordingly, Boyle requests the decision of the ALJ be reversed and remanded for dismissal.

Medellin, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including that his injuries occurred during the course and scope of his employment. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Medellin was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's

decision. 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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 (Ky. 1977). An 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have

supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In Port v. Kern, 187 S.W.3d 329, 330 (Ky. App. 2006) the Court of Appeals explained the Supreme Court's reasoning in Receveur Const. Company/Realm, Inc. v. Rogers, 958 S.W.2d 18 (Ky. 1997), stating as follows:

> The Supreme Court's reasoning in *Receveur* clearly rests not on the remoteness of the job site but on the reason Rogers was driving a company vehicle, as the use of the company

> vehicle enabled Rogers to avoid a stop at the company office in Louisville before proceeding to a job site, thus saving time and allowing him to begin working earlier in the day. Though Rogers' use of the company vehicle was a convenience to him, it was primarily provided for the benefit of the employer.

The Court of Appeals affirmed the ALJ's award based on the fact Kern's "use of the company vehicle allowed him to travel directly to a job site instead of stopping at the port itself to get tools." Id. at 330. It noted Kern stored his tools in the company vehicle and, as in Receveur, supra, his use of the company vehicle "allowed him to travel directly to a job site instead of stopping at the port itself to get his tools." Id.

In Fortney, supra, the Supreme Court noted as follows:

> The Larson treatise notes that transportation is normally "singled out for special consideration" when it "involves a considerable distance, and therefore qualifies under the rule ... that employment should be deemed to include travel when the travel itself is a substantial part of the service performed." [Footnote omitted] . . .

Id. at 329.

Although this quote references the employer's use of transportation or transportation expenses as an inducement to accept or continue employment, the above language

espouses the premise the considerations are different when an employee is provided transportation, however limited.

In the case *sub judice*, we believe substantial evidence supports the ALJ's conclusion that a benefit was conferred upon Boyle by having Medellin ride with Baxter to remote construction sites. Significantly, Boyle stopped Medellin from driving to the job site because he did not have a license. Although Boyle asserts in hindsight the better practice would have been for it to terminate Medellin since he could not obtain his own transportation to and from work, the fact remains it did not terminate Medellin and instead chose to transport him to and from work. Thus, the ALJ was free to infer from the fact Boyle stopped Medellin from driving and permitted its foreman to transport Medellin that Boyle did not want to lose Medellin's services. The testimony permitted the ALJ to conclude that after insisting Medellin not drive, Boyle made transportation available to Medellin in order to continue his employment. Although the ALJ did not specifically state Medellin was a good worker, his finding Boyle "benefitted from having Baxter drive a long time employee to a remote job site" clearly supports such a conclusion.

Dwight's testimony establishes Boyle moved from city to city and kept the same employees when it moved to a different city. His testimony establishes Boyle received a benefit by keeping its same employees and not having to hire new employees as its job sites changed from city to city. Although J.D. Dutton, Inc., supra, is not controlling precedent, we find the holding to be insightful. The facts in J.D. Dutton, Inc., supra, are somewhat similar to the facts in this case. Specifically, we note the Court of Appeals of Arizona, in part, relied upon the fact that transporting the employee to and from work conferred a benefit upon the employer. The Arizona Court of Appeals' decision is based, in part, on whether the employer received a benefit by providing transportation to its employee.

In the case *sub judice*, Medellin, a twelve year employee, was regularly required to drive long distances to his employment. Boyle was benefitted by keeping a long time employee and by not having to hire a new employee to replace Medellin. When Boyle realized Medellin did not have a driver's license and was driving to work, it directed Medellin to stop driving. Boyle's directive resulted in Medellin riding approximately 150 miles each day with Baxter. Boyle knew of and consented to this

arrangement. Therefore, the ALJ could reasonably infer that Boyle benefitted by having Medellin continue in its employ and to that end directed its foreman to transport Medellin to the job site.

In Howard D. Sturgill & Sons v. Fairchild, 647 S.W.2d 796, 798 (Ky. 1983) the Court of Appeals instructed as follows:

> The Board's determination that Fairchild's action was not of benefit or service to his employer is a finding of fact, not a conclusion of law. It is well settled that findings of fact will not be disturbed on appeal if they are supported by evidence of probative value. The reviewing court must not substitute its judgment for that of the finder of fact.

The above language mandates, regardless of the outcome, when the ALJ's determination is supported by evidence of probative value as in the case *sub judice*, we may not substitute our judgment for that of the ALJ.

Accordingly, the August 8, 2011, interlocutory opinion and order incorporated into the May 8, 2012, opinion, award, and order, and the August 30, 2011, order overruling Boyle's petition for reconsideration relative to the August 8, 2011, interlocutory opinion and order are **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON KAMP PURDY
300 E MAIN ST STE 400
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON AARON D REEDY
127 W MAIN ST
LEXINGTON KY 40507

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W GOTT
400 E MAIN ST STE 300
BOWLING GREEN KY 42101