OPINION ENTERED: December 21, 2012

CLAIM NO. 200900705

CHAD REED — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

JERRY WALLACE D/B/A
WALLACE ROOFING;
HI DRI ROOFING;
THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

AND

UNINSURED EMPLOYERS' FUND — RESPONDENT/ CROSS-PETITIONER

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Chad Reed ("Reed") seeks review of the Opinion and Award rendered June 5, 2012 by Hon. Richard M.

Joiner, Administrative Law Judge ("ALJ Joiner") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits against Jerry Wallace, DBA Wallace Roofing, Hi Dri Roofing ("Wallace") and the Uninsured Employers' Fund ("UEF") for low back and right knee injuries sustained on June 1, 2009. Reed also appeals from the Order denying his petition for reconsideration rendered July 27, 2012 by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ Polites").[1] On appeal, Reed argues the ALJ's finding he retains the physical capacity to return to the type of work performed at the time of injury is not supported by substantial evidence.

The UEF also appeals from the June 5, 2012 Opinion and Award finding it responsible for payment of TTD, PPD and medical benefits and the July 27, 2012 Order denying its petition for reconsideration. On appeal, the UEF argues Reed "suffered a subsequent non employer work related [back] injury, subsuming his original work related injury, which was the direct cause of any PPD." The UEF argues Reed sustained only a soft tissue right knee injury on June 1, 2009, which did not result in permanent impairment. It

[1] This claim was originally assigned to Hon. Edward D. Hays, Administrative Law Judge, on July 20, 2009. The claim was reassigned to ALJ Joiner by Order dated June 21, 2010. The claim was reassigned for a second time to ALJ Polites by Order dated July 12, 2012.

argues Reed failed to prove he is entitled to the average weekly wage ("AWW") found by the ALJ. Finally, the UEF argues Reed must reimburse it for overpayment of TTD benefits and medical benefits.

Reed filed the Form 101 alleging he injured his "right ankle knee" and lower back on June 1, 2009 while working for Wallace when he fell through a roof of a home upon which he was working resulting in his body going through the roof from the waist down. Reed indicated, as a roofer, he earned a weekly wage based upon $10.00 per hour at the time of his injury. The Form 101 indicates Reed was injured on June 1, 2009, the first day of his employment with Wallace.

Reed testified by deposition on October 19, 2009 and at the hearing held March 22, 2012. Reed, a resident of Hardin, Kentucky, was born January 4, 1977 and completed high school. His work history includes work as a welder, laborer pulling automobile parts, maintenance worker and roofer.

Prior to his employment with Wallace, Reed testified he worked as a welder for approximately a year and a half earning $12.00 per hour, but was laid off in January 2009. Reed testified a friend, who also worked for Wallace, told him Wallace was looking for help. He stated the friend

knew he had recently been laid off, needed a job and had experience in roofing. Despite indicating in the form he was injured on his first day of work with Wallace, both at the hearing and his deposition, Reed testified he had been employed there for approximately one week as a roofer prior to the accident. He also explained he talked to Wallace prior to June 1, 2009 about the particular job, but did not start work until then due to rain delays.

Reed testified his job as a roofer required him to constantly bend over and lift shingles weighing around fifty pounds. Reed testified at the deposition a laborer would bring the shingles to him. He also removed shingles and nailed new ones in place using a nail gun. At the hearing, Reed testified he carried the shingles up a ladder.

Reed testified on June 1, 2009, he was working for Wallace installing shingles on a private home. He began working that morning at approximately 7:30 a.m. At the time of injury, three laborers, he and another roofer were present. At approximately 12:30 p.m., he was working on the roof and "was going to get my nails to put in my gun to lay the shingles down, and when I was walking back down, my right side fell through the roof up to my waist." Reed testified he was helped out of the roof and then sat for a few minutes because he could not move his right knee.

Thereafter, a laborer helped him off the roof and he was taken to the Marshal County Hospital by his fiancée.

At the hospital, x-rays were taken and he was prescribed pain medication. He was also provided a knee brace and crutches, and was referred to Dr. Claude Saint-Jacques. Reed testified he experienced "real bad" knee pain, explaining he could not move or put pressure on it. He also stated his knee was swollen and bruised "in the back and the front and sides real bad, black and blue." Reed testified he did not complain of back pain at that time because the pain in his knee and leg was too severe.

After returning home from the hospital, Reed testified he "noticed that night when I was laying in bed, my [lower] back started to hurt real bad." Reed went to Western Baptist Hospital the same night stating he "could barely move my lower back and just tingling down the back of my right leg to the bottom of my foot." More x-rays were taken at Western Baptist Hospital. He was eventually referred to Dr. Rex Arendall, a neurosurgeon, for treatment of his low back complaints.

Reed treated with Dr. Saint-Jacques for primarily his right knee. Dr. Saint-Jacques prescribed physical therapy, which was unsuccessful, and recommended he continue wearing the knee brace.

Dr. Arendall prescribed medication and also recommended physical therapy, which worsened his knee and back symptoms. Reed testified his condition has worsened explaining he can barely move, and has constant knee and low back pain. He also uses a cane, as recommended by Dr. Saint-Jacques, because his right knee gives way. Reed has not worked since June 1, 2009. Currently, Reed wears a knee brace and is prescribed Lortab and Soma by his family physician, Dr. Tviete.

At his deposition, Reed testified Wallace paid him $10.00 an hour. At the hearing, Reed testified as follows regarding his rate of pay.

> Q: Let me ask you a little bit about your rate of pay there with Mr. Wallace. What was your pay supposed to be?
>
> A: As a laborer, it was ten dollars an hour; but when he found out I could roof, it was supposed to be twelve dollars an hour.
>
> Q: How did they find out you could roof?
>
> A: Because the guy that I was working with, Terry Turner, I told him I could.
>
> Q: And who is Terry Turner?
>
> A: He was the foreman.
>
> Q: Okay.

A: Because me and him was roofing that day and the other ones was[sic] the laborers.

Q: Had you done roofing work before?

A: Yes, sir.

Q: So, you told Mr. Turner you had experience as a roofer?

A: Yes, sir.

Q: And he said what about your rate of pay?

A: He said my rate of pay would go up if I'm a roofer instead of a laborer.

Q: Go up to what?

A: Twelve dollars an hour.

Q: Did he say anything about how much work you could expect like in a week's time?

A: He said as much as I can as long as it don't - - not bad weather.

Q: How many employees did Wallace Roofing Have on that job that day, do you know?

A: Five - - four, four.

Q: And were they all roofers or some roofers and some laborers?

A: Three were laborers, and me and Terry were two roofers.

Q: Okay. Was that the first day of that particular job?

A: Yes, sir.

> Q: Do you know whether or not Wallace Roofing had been working prior to that day?
>
> A: Yes, sir, the week before that. Not the week I started, but the week - - two weeks before, they did.
>
> Q: And what were they doing before that?
>
> A: Roofing. I don't know exactly the location.
>
> Q: Did Mr. Wallace have a job somewhere else other than the place where you were hurt? Was that the only job he had?
>
> A: At the time, yeah.
>
> Q: Okay.
>
> A: But I know he did more jobs after, but I just don't know exactly where.

Reed also testified he could not return to the type of work he was performing at the time he was injured because "I could not bend over or bend my knee or nothing at all or stand on my feet a long period of time at all." Reed stated he can barely lift a gallon of milk, and lifting anything more causes "very bad back pain." He also testified he can only walk a half a block, stand for approximately fifteen to twenty minutes or sit for thirty minutes before beginning to experience right knee and back symptoms. He also has difficulty bending and stooping.

Reed stated he has trouble sleeping and cannot perform any household chores due to his injuries.

At the hearing, Reed also testified regarding Dr. Arendall's January 4, 2010 office note which stated "last week he lifted 80# load of shingles and felt pop in the back and the back went numb and the right leg went out from under him." Reed testified on that particular date, he did not see Dr. Arendall, but saw Kay Duncan ("Ms. Duncan"), FNP for Dr. Arendall. Reed testified Ms. Duncan had misunderstood him and explained he actually was getting off a couch when his back popped and went numb. He denied doing any physical work or lifting any shingles in January 2010, and he testified he was incapable of lifting shingles at that time. He also stated he was not working in January 2010. He further explained he did mention lifting shingles at the January 4, 2010 visit when "they asked me what I did before" and again testified "I was telling her what my job was before."

On cross-examination, Reed testified Dr. Arendall's July 26, 2010 reference to a second injury occurring in January 2010, as well as Dr. Lee's reference of a second injury in January in her independent medical evaluation are erroneous. Reed reiterated there was no

second work-related injury, however, his back popped when he tried to get off the couch in January 2010.

Wallace continued to pay Reed approximately $300.00 per week from July 10, 2009 through the beginning of October 2009 for a total of $4,700.00. At the hearing, counsel confirmed the UEF had paid additional interlocutory benefits through July 8, 2011 for a total of $12,794.93.

Reed submitted the medical records of Dr. Claude E. Saint-Jacques, an orthopedic surgeon, who treated Reed's right knee injury from June 4, 2009 to August 10, 2009. On June 4, 2009, Dr. Saint-Jacques noted Reed fell through a roof on June 1, 2009 while working as a roofer, which has "contused and abraised his right leg and strained his cervical spine and lower back." After noting the treatment history for the June 1, 2009 fall, Dr. Saint-Jacques recommended Reed continue resting and apply ice. Dr. Saint-Jacques also prescribed anti-inflammatory and pain medication, and re-adjusted the knee brace. On June 11, 2009, Dr. Saint-Jacques noted Reed sustained a hematoma and contusion to the medial aspect of the right leg, cervical strain and lumbar strain as a result of the June 1, 2009 work related fall. On July 7, 2009, Dr. Saint-Jacques noted a right knee MRI did not demonstrate any abnormality except for the residual hematoma to the medial aspect of his knee

and minimal residual fluid in the knee. Dr. Saint-Jacques recommended physical therapy and continued to keep Reed off work. On August 10, 2009, Dr. Saint-Jacques noted Reed had made "very good progress." He noted the edema, ecchymosis and swelling had resolved and Reed demonstrated normal range of movement of the knee and ankle. Dr. Saint-Jacques released Reed from his care regarding his right knee and recommended Reed stay off work for another week or two until he saw Dr. Arendall for his back condition.

In a medical record dated May 31, 2011, Dr. Saint-Jacques reviewed Reed's right knee treatment history. He noted he saw Reed on three more occasions following August 10, 2009 for right knee symptoms, which he treated conservatively. Dr. Saint-Jacques diagnosed a strain and contusion of the right knee especially towards the medial aspect, and a lower back injury as a result of the June 1, 2009 work-related fall. He stated he actively treated Reed's right knee injury until August 10, 2009, and "at that point in time, he was not able to return to work as a roofer." He opined Reed was temporarily totally disabled because of his right knee injury from June 1, 2009 through August 10, 2009. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Saint-Jacques

assessed a 4% impairment rating and noted “this right knee injury would give him limited restriction in regard to his physical capacity to work and I have filled out the appropriate questionnaire in that regard.”

Dr. Saint-Jacques also completed a “Physical Residual Functional Capacity Questionnaire” on June 2, 2011, regarding Reed’s right knee injury. He indicated Reed can walk four city blocks without rest or severe pain, can continuously sit and stand at one time for forty-five minutes, and can sit and “stand/walk” for at least five hours total in an eight hour working day. Dr. Saint-Jacques indicated Reed needs a job which permits shifting positions from sitting, standing or walking and will sometimes need to take a one unscheduled fifteen minute break during an eight hour working day. He further indicated Reed must use a knee brace while engaged in occasional standing/walking. Dr. Saint-Jacques indicated Reed can frequently lift and carry less than ten pounds, occasionally ten to twenty pounds, and never fifty pounds. He noted Reed does not have significant limitations in repetitive reaching, handling or fingering. He also indicated Reed cannot stoop and crouch during a working day. When asked, “On average, how often your patient is likely to be absent from work as a result of the impairments or treatment,” he checked “never.”

Several x-rays from Western Baptist Hospital dated June 2, 2009, were also submitted. Lumbar and cervical x-rays revealed no acute abnormality. A right knee x-ray indicated "prominent soft tissue injury to the medial aspect of the right knee. No acute bony pathology."

Two MRIs from Murray Calloway County Hospital dated July 7, 2009 were also submitted into evidence. A lumbar MRI demonstrated multilevel degenerative disk disease and multilevel minimal to mild hypertrophic spondylotic changes within the posterior facets which, along with the degenerative disk disease, results in multilevel spinal stenosis. A right knee MRI demonstrated fluid collection within the peripheral subcutaneous tissues anterior and medial to the anteromedial aspect of the proximal tibia, thought to most likely represent a hematoma; a small, abnormal amount of fluid within the knee joint; a tiny synovial cyst; and no evidence of internal derangement.

Reed and the UEF submitted as evidence Dr. Rex Arendall's medical records. Dr. Arendall began treating Reed for his back complaints on August 17, 2009. On that date, Dr. Arendall noted a two month history of low back pain after falling through a roof at work in June 2009. Reed also complained of pain radiating into his right leg with some numbness and tingling. Dr. Arendall ordered

several diagnostic studies including a lumbar myelogram, CT of the lumbar spine, x-ray of the lumbar spine, and x-ray of the left hip, all of which were negative. On October 16, 2009, Dr. Arendall noted test results revealed weak bulging discs, for which he opined surgery would not be beneficial. He recommended rest, medication, physical therapy, a brace, and non-surgical pain clinic control techniques. He then recommended Reed see a pain control anesthesiologist.

On January 4, 2010, a medical note completed by Ms. Duncan noted Reed presented with back and leg pain. The note stated as follows:

> last week he lifted 80# load of shingles and felt pop in the back and the back went numb and the right leg went out from under him. . . Now he has pain in low back at waistline which occ shoots down the back of the right buttock and thigh and calf to the ankle but not below the ankle. No pain on the left. He has also noticed trembling and shaking in the lower back as well as the right leg.

Dr. Arendall diagnosed lumbar radiculopathy for which he recommended a lumbar MRI. He prescribed physical therapy, Soma and Lortab. Reed continued to treat with Dr. Arendall until July 26, 2011 for low back pain radiating into the right leg and foot with medication and physical therapy. On July 26, 2010, Dr. Arendall noted “his original injury was 6/09 and his second injury was in 1/10- for which he is

still waiting for approval for an MRI." He noted physical therapy had worsened Reed's back condition and he continued to experience low back pain radiating down his right leg and foot. A lumbar MRI performed on December 13, 2010 indicated mild degenerative changes with no central canal or foraminal narrowing.

In a medical note dated July 28, 2011, Dr. Arendall assessed an 8% impairment rating pursuant to the AMA Guides due to the 2009 work injury. He concluded Reed aggravated his degenerative disc disease and the condition is permanent. He restricted Reed from pushing, pulling or lifting over twenty-five pounds on a repetitive basis. Dr. Arendall opined Reed had obtained medical maximum improvement ("MMI") and restricted Reed from work beginning January 4, 2010 until July 26, 2010.

Reed submitted medicals records from his family physician, Dr. Tveite. On September 22, 2009, Dr. Tveite noted Reed complained of low back pain since falling through a roof on June 1, 2009. He diagnosed spinal stenosis and low back pain. On October 23, 2009 and November 19, 2011, Dr. Tveite noted low back pain complaints and prescribed medication.

The UEF submitted the June 7, 2011 medical report of Dr. Jeana J. Lee, an orthopedic surgeon. Dr. Lee

discussed the June 1, 2009 fall and subsequent treatment. She noted:

> When asked about an incident where he was trying to load shingles in December of 2009, Mr. Reed states that he "tried" to return to work but was unable to do so, as he immediately felt a pop in his back when he tried to lift a heavy load. His financee states that she had to actually come and pick Mr. Reed up from work on that date.

Dr. Lee noted Reed is obese and out of shape, and documented the physical exam regarding his back and right knee was essentially normal. Dr. Lee diagnosed a contusion and hematoma of the right lower extremity, which had completely resolved. Dr. Lee declined to place any specific limitations or restrictions as a result of the injury. She also opined a permanent impairment rating is not applicable. When asked if Reed could return to the type of work he was performing at the time of his injury, she stated:

> At this time, Mr. Reed is unable to do so. He is significantly deconditioned and frankly, out of shape. He has led a sedentary life for the past two years. Because of this, he is easily susceptible to muscle spasms in his lumbar spine. He also has weakness in his lower extremities contributing to persistent aching. Because of his generalized deconditioning, I do not feel that he is able to return to a job that requires heavy manual labor.

Dr. Lee opined Reed reached MMI regarding his knee on August 10, 2009. With regard to his back, Dr. Lee opined Reed reached MMI in December 2009, since he felt well enough to try to return to roofing, as evidenced by his attempt to lift shingles.

In the June 5, 2012 opinion and award, ALJ Joiner found Reed suffered an injury as defined by the Kentucky Worker's Compensation Act and concluded he was entitled to TTD benefits from the date of injury until July 26, 2010. The ALJ stated as follows regarding PPD benefits, causation, AWW and the application of the three multiplier:

> **What is the extent of Permanent Partial Disability?** Inasmuch as Chad Reed is not permanently totally disabled, I must consider whether there is a permanent partial disability. Permanent partial disability is the condition of an employee who due to an injury has a permanent disability rating but retains the ability to work. A permanent disability rating is the permanent impairment rating selected by an Administrative Law Judge times the factor set forth in the table that appears at KRS 342.730 (1)(b) and a permanent impairment rating means the percentage of whole body impairment caused by the injury or the occupational disease as determined by "Guides to the Evaluation of Permanent Impairment, American Medical Association." Chad Reed has an impairment rating. With respect to the knee it is either 4% based on the report of Dr. Saint-Jacques, or 0% under the report of Dr. Lee. With

respect to the back the impairment is either 8% under the report of Dr. Arendall or 0% under the report of Dr. Lee.

I find the report of Dr. Saint-Jacques dated May 31, 2011 to be a credible assessment of the plaintiff's knee injury. Therefore I find that there is a residual 4% impairment relating to his knee due to the injury of June 1, 2009.

I find the report of Dr. Arendall dated July 28, 2011 to be a credible assessment of the plaintiff's back injury. Therefore I find that there is a residual 8% impairment relating to his back due to the injury of June 1, 2009.

Combined, the two impairments produce a 12% impairment pursuant to the AMA *Guides*, 5th edition.

Is the disability or impairment proximately caused by the injury? In order to be compensable, an impairment must be caused by the injury. In this instance, there is no doubt about the knee injury being caused by the incident of June 1, 2009. There are questions however concerning the low back injury. At issue is the history recorded by someone in Dr. Arendall's office as to an incident occurring the week before an examination on January 4, 2010. This note makes reference to Mr. Reed lifting an 80 pound load of shingles the previous week and feeling a pop in his back with numbness in the right leg. At that time, Mr. Reed had already been under the care of Dr. Arendall and already had symptoms of radiation of pain into his left leg from falling through the roof in June 2009. There was already sufficient

evidence for Dr. Arendall to assess his impairment of 8%. I find that the impairment both to the knee and the low back were proximately caused by the incident of June 1, 2009.

What is the average weekly wage? The average weekly wage is controlled by KRS 342.140. This statute provides, in pertinent part:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> > (a) The wages were fixed by the week, the amount so fixed shall be the average weekly wage;
> >
> > ***
> >
> > (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury.

(e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

(f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees.

(2) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury.

. . .

The plaintiff suggests an average weekly wage of $480. This is based on a $12 per hour rate regularly working 40 hours per week. I do not believe that Mr. Reed worked that regularly or would have worked that regularly if he

had been employed for 13 weeks prior to his injury. The Uninsured Employers' Fund suggests an average weekly wage of $30.77. This is based on total earnings of $400 for 13 weeks assuming that he had worked a full week prior to the injury. I believe that his wage would be greater than that had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked when work was available to other employees in a similar occupation. The problem is that there is very little evidence as to where the wage should be placed between the two extremes. I note that Mr. Reed's work with Mr. Wallace was delayed by approximately a week because of rain. He would not have worked 40 hours for the full 13 weeks prior to the injury. I believe that there would be likely to have been some rain to occur in the weeks before that sufficient to keep him from working full time during that 13 week period. I believe that $360 is a good approximation of what Mr. Reed would be likely to have earned had he been employed during the full 13 week period. I find the average weekly wage to be $360.00, producing a TTD rate of $240.00

Does the claimant have the physical capacity to return to the type of work performed at the time of the injury? There are two factors which must be determined in order to properly calculate the benefit for permanent partial disability. The first factor is whether or not the claimant retains the physical capacity to perform the type of work done at the time of the injury. On this point, I accept the report of Dr. Saint-Jacques with respect to the knee. The functional capacity evaluation signed by Dr.

> Saint-Jacques on June 2, 2011 does not indicate sufficient restrictions to prohibit him from performing roofing work. With respect to the spine, I accept the ability assessment from Dr. Lee. Mr. Reed is significantly deconditioned and out of shape. This is not a permanent condition and is not a direct result of the injury. Therefore, I conclude that from the results of the injury of June 1, 2009, Mr. Reed does retain the physical capacity to perform the type of work he was doing at the time of his injury.

The ALJ awarded Reed TTD benefits at the rate of $240.00 per week from June 1, 2009 through July 26, 2010 and thereafter PPD benefits at a rate of $28.80 per week for a period not to exceed 425 weeks, as well as medical expenses.

Both parties filed petitions for reconsideration. The UEF argued Reed's AWW should be determined pursuant to KRS 342.140(1)(e) since he had not worked a full thirteen weeks. It argued there was no evidence as to "when work was available to other employees in a similar situation" or that Reed "was available to work in the prior thirteen weeks 'when work was available,'" both requirements under KRS 242.140(1)(e). The UEF requested the ALJ make specific findings of fact as to the evidence used to support the following statements:

> (1) "I believe that his wage would be greater than that had he been so employed by the employer the full

> thirteen (13) calendar weeks immediately preceding the injury and had worked when work was available to other employees in a similar occupation" . . . and
>
> (2) "I believe that $360 is a good approximation of what Mr. Reed would be likely to have earned had he been employed during the full 13 week period."

The UEF did not raise arguments regarding causation, injury or permanent impairment in its petition for reconsideration.

Reed filed a petition for reconsideration requesting the ALJ reconsider his findings and conclusions regarding whether he retains the physical capacity to return to the type of work he performed at the time of injury. Reed argued his testimony, when read in conjunction with the June 2, 2010 Physical Residual Functional Capacity Questionnaire and the May 31, 2011 medical note by Dr. Saint Jacques, establishes he cannot return to his past work as a roofer. Reed also requested the ALJ correct the amount of TTD benefits previously paid by the UEF. Reed alleged the UEF paid TTD benefits for approximately 83 weeks at $138.86 per week, which amounts to $11,585.00, not $12,794.93 as it stated at the hearing.

ALJ Polites summarily denied the petitions by both Reed and the UEF by Order dated July 27, 2010, finding both parties sought to reargue the merits of the claim.

On appeal, Reed essentially makes the same argument stating the ALJ's finding he retains the physical capacity to return to roofing is not supported by substantial evidence in light of Dr. Saint-Jacques' and his own testimony. In the alternative, he argues "the ALJ's finding on this issue is inadequate in that it is impossible to tell the specific basis for the ALJ's conclusion that under the restrictions and limitations of Dr. Saint-Jacques, the Petitioner can return to his past work as a roofer."

The UEF argues Reed "suffered a subsequent non employer work related injury, subsuming his original work related injury, which was the direct cause of any PPD." It essentially argues Reed did not receive a compensable back injury on June 1, 2009 since diagnostic testing demonstrated a soft tissue injury and he sustained a subsequent second injury while lifting an 80 pound bundle of shingles on another job. The UEF argues any impairment for his back is a result of the second December 2009 injury and not compensable. The UEF also asserts Dr. Arendall's opinion is less persuasive since he did not reference the second back injury in assessing an impairment rating.

Pointing to Dr. Lee's opinion, the UEF also argues Reed did not suffer a permanent impairment from his right knee injury. The UEF notes Reed's subjective complaints of

impairment are not sufficient, nor are the diagnoses of physicians relying on the claimant's complaints, to prove a right knee injury.

Finally, the UEF argues the following regarding the ALJ's error in assessing Reed's AWW:

> Plaintiff has produced no checks, stubs, deposit slips, income tax returns or other indicia of pay from any employer other than payments after the injury. He has produced no testimony as to pay nor has he produced any evidence as to prevailing wages or available work in the area for the type of work he claimed to be performing in accordance with KRS 342.140(1)(f). He has provided no evidence of what he would have earned but for this injury. Plaintiff has provided no evidence or information as to prior wages and the ONLY information provided by plaintiff was that he was to be paid $10 an hour. He worked no more than one week by his own admission, therefore his total pay would be $400 total for the previous 13 weeks, assuming he had worked a full week prior to the injury. Under KRE 342.140(1)(e) the $400 must be divided by 13 weeks for an AWW of $30.77 per week. C & D Bulldozing Co. v. Brock, 820 S.W.2d 482, (Ky., 1991). 803 KAR 25:010 Section 5(1)(d)(3)(e) further requires the following documents to be provided by the plaintiff: "Documentation establishing the plaintiffs preinjury and postinjury wages', this he has failed to do . . . .
>
> By the very nature of the job, roofing work is going to be sporadic due to weather as well as availability of work, "The claimant's Form 110 alleged 40 hours of work per week, but he admitted

that roofing is not performed in rainy weather. Moreover, Jones testified in June 2009 that his own employment as a roofer was almost nonexistent during the previous winter. Such evidence precluded a reasonable finding that there would have been 40 hours' work available to a roofer during each of the 13 weeks immediately preceding February 27, 2009. Having failed to offer evidence of all the required elements under KRS 342.140(1)(e), the claimant failed to meet his burden of proving average weekly wage", Com., Uninsured Employers' Fund v. Rogers, 2011-SC-000335-WC, 2012 WL 1453611 (Ky. Apr. 26, 2012, not final)

There is no evidence in the record as to what plaintiff "would have earned had he been so employed by the employer the full thirteen weeks", KRS 342.140(1)(e). See Wright v. Fardo, 587 S.W.2d 269, (Ky. App. 1979). Subsection(e) also requires plaintiff establish by proof "when work was available to others in a similar occupation", this has (sic) also failed to do. The plaintiff's attempt to establish work available in his testimony during the hearing insufficient, the statutes require proof, not mere conjecture by one who stands to gain by his testimony. The plaintiff has the burden of proof. Not only that, the Board must find by substantial evidence, that the plaintiff has proved his claim . . . .

Ignoring the law, plaintiff can still only argue an AWW of $300 based on payments by the defendant after plaintiff's injury. Although pay after injury cannot be used to establish AWW: "Initially, we hold that the Board erred by considering weeks of employment outside the 13-week period immediately

preceding the last injurious exposure", C & D Bulldozing Co. v. Brock, 820 S.W.2d 482, (Ky., 1991). Plaintiff never alleges that he was to work full time nor that he was under the impression that defendant would keep him on for future work, much less any guarantee of future employment. Therefore if the ALJ finds that plaintiff earned $400 for the one week's work (for which no evidence exists), then his average weekly wage is $400 divided by 13 or $30.77 per week, "Claimant's average weekly wage is $127.35 as calculated by dividing by 13 the total he earned during the 7 weeks he worked throughout the 13 calendar weeks immediately preceding his last injurious exposure. We believe this does in fact represent an average weekly wage based upon his future capacity to earn income under the normal and customary practices of hire in his employment with C & D in that irregular working time was a normal part of the job . . .", Brock, (emphasis added)(citation omitted). On the other hand, if the ALJ finds that he was paid $300 a week based on the salary continuation checks, then his AWW would be $23.08 per week.

CONCLUSION

As plaintiff suffered only a soft tissue injury and there was no [PPD], the AWW is relevant only to TTD and since his AWW is less than the minimum, the minimum rate as established by the DWC is the TTD rate to be paid (the rate paid by the UEF in interlocutory payments) $138.86, (KRS 342, Appendix, Schedule of Workers' Compensation Benefits). Furthermore, since Dr. Saint-Jacques stated that plaintiff reached MMI by 10 August 2009, then TTD would be paid from 2 June 2009 to 10

> August 2009 for a total of $1368.77. As the UEF actually paid $12,794.93 and the employer paid $4200, then plaintiff owes $15,626.16 to the EUF[sic] in overpaid benefits. As the back injury was not related to his employment by the defendant nor the June 2009 injury, then the medical fees previously paid by the UEF for any treatment to his back must be repaid to the UEF. There is certainly no need for continued medical benefits since there is no permanent disability and no future medical care has been recommended.
>
> This claim should be remanded to the ALJ to find an AEE[sic] in accordance with [sic] above and to find that there is no permanent impairment from the June 1, 2009 injury, and that plaintiff must repay overpaid TTD and medical benefits to the UEF.

As the claimant in a workers' compensation proceeding, Reed had the burden of proving each of the essential elements of his cause of action including injury, entitlement to multipliers pursuant to KRS 342.730(1)(c)1, causation, permanent impairment and AWW. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002).

We first address Reed's argument the ALJ erred in finding he retains the physical capacity to perform the type of work he was doing at the time of his injury and therefore the three multiplier does not apply. Since Reed was unsuccessful before the ALJ in this regard, the question on appeal is whether the evidence compels a different

conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Although a party may note evidence supporting a different outcome than 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 ALJ's 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 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 which otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

That said, the record provides substantial evidence to support the ALJ's conclusion Reed retained the physical capacity to return to the type of work he performed at the time of injury, and does not compel a finding the three multiplier applies. Reed relies upon the opinions of Dr. Saint-Jacques and his own testimony in arguing his knee condition has rendered him unable to return to roofing. However, Dr. Saint-Jacques' opinions are equivocal at best. In the May 31, 2011 medical note, Dr. Saint-Jacques stated "this right knee injury would give him limited restriction in regard to his physical capacity to work and I have filled out the appropriate questionnaire in that regard." The questionnaire dated June 2, 2011

indicated, in part, the following restrictions: 1) Reed can walk four city blocks without rest or severe pain; 2) Reed can continuously sit and stand at one time for forty-five minutes; 3) Reed can sit and “stand/walk” for at least five hours total in an eight hour working day; 4) Reed can frequently lift and carry less than ten pounds, occasionally ten to twenty pounds, and never fifty pounds; 5) Reed does not have significant limitations in doing repetitive reaching, handling or fingering; and 6) Reed cannot stoop and crouch during a working day. Also when asked, “On average, how often your patient is likely to be absent from work as a result of the impairments or treatment,” Dr. Saint-Jacques checked “never.”

Dr. Saint-Jacques did not specifically opine Reed did not retain the physical capacity to return to work. Dr. Saint-Jacques was not questioned further or deposed on issues relating to whether Reed maintained the physical capacity to return to roofing. We note Reed’s testimony was inconsistent as to whether he carried the shingles up the ladder or whether the shingles were brought to him by a co-worker. We find it was reasonable for the ALJ to find the questionnaire signed by Dr. Saint-Jacques did not indicate sufficient restrictions to prohibit him from performing roofing work due to his knee condition.

However, Reed argues his testimony regarding the physical requirements of the roofing job establishes he cannot return to the job under the restrictions imposed by Dr. Saint-Jacques. It is well established the claimant's own testimony is competent evidence as to whether the claimant retains the physical capacity to return to the type of work performed at the time of injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). Conversely, it is also within the discretion of the ALJ to dismiss a claimant's testimony and rely, instead, on medical testimony in the record. Reed is essentially requesting the Board to provide its own appraisal as to the weight and credibility of the testimony provided by him and Dr. Saint-Jacques, and find a more favorable conclusion, a task of which we are forbidden to do. Thus, the evidence does not compel a finding Reed does not maintain the physical capacity to return to the type of work he performed at the time of injury and therefore the three multiplier is not applicable.

We next address the UEF's argument regarding causation of Reed's back condition. Since Reed was successful before the ALJ regarding the issue of causation, the question on appeal is whether there is substantial evidence of record to support the ALJ's decision. Wolf

Creek Collieries v. Crum, supra. "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).

The UEF argues we must find any impairment for Reed's back condition to be solely the result of a second, non-work-related December 2009 injury and therefore not compensable. We disagree. As noted by the ALJ, Reed began treating with Dr. Arendall for his back condition on August 17, 2009, well before the alleged second injury occurred in December 2009. There, Dr. Arendall noted a two month history of low back pain radiating into the right leg after falling through a roof at work in June 2009. On October 16, 2009, Dr. Arendall noted test results demonstrated weak bulging discs, but he opined surgery would not be beneficial. Despite noting on at least two occasions of a second back injury in his medical records dated January 4, 2010 and July 26, 2010, Dr. Arendall assessed an 8% impairment rating due to the June 2009 work injury and he did not attribute any impairment to the alleged injury of December 2009. We also note Reed testified he went to the emergency room a second time the night of June 1, 2009 complaining of back pain. This was confirmed in Dr. Saint-

Jacques' June 4, 2009 medical record. His records also indicate Reed constantly complained of low back symptoms prior to the second injury of December 2009. Therefore, we find substantial evidence exists in the record to support the ALJ's conclusion the impairment to the low back was proximately caused by the June 1, 2009 incident.

Likewise, we note substantial evidence exists in the record to support a finding Reed's knee injury caused permanent impairment. The ALJ acted within his discretion in adopting the opinion of Dr. Saint-Jacques, Reed's treating physician, over that of Dr. Lee in assessing a 4% impairment rating pursuant to the AMA Guides.

Finally, we address the UEF's argument regarding Reed's AWW. It is undisputed Reed worked less than thirteen weeks for Wallace. There was no proof submitted by Reed to establish, pursuant to KRS 342.140(1)(f), a usual wage for similar services. Therefore, the calculation of Reed's AWW is governed by KRS 342.140(1)(e) which states as follows:

> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> . . .
>
> (e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding

> the injury, his average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

In Huff v. Smith Trucking, 6 S.W.3d 819, 821-822 (Ky. 1999), the Kentucky Supreme Court pointed out:

> KRS 342.140(1)(e) applies to injuries sustained after fewer than 13 weeks' employment. It utilizes the averaging method set forth in KRS 342.140(1)(d) and attempts to estimate what the worker's average weekly wage would have been over a typical 13-week period in the employment by referring to the actual wages of workers performing similar work when work was available. As was recognized in Brock, the goal of KRS 342.140(1)(d) and (e) is to obtain a realistic estimation of what the injured worker would be expected to earn in a normal period of employment. In the instant case, the logging business had not yet operated for 13 weeks; therefore there was no 13-week period from which to estimate an average weekly wage for employment.
>
> . . .
>
> Although KRS 342.140(1)(e) may be less than artfully drafted with regard to a casual labor situation, it is clear that casual laborers are not exempted from workers' compensation coverage under the Act and that no special provision has been enacted for

> computing their average weekly wage. The same holds true for workers employed by newly established businesses which have been in operation for less than 13 weeks when a work injury occurs. KRS 342.140(1)(e) relies upon the earnings of employees in a similar occupation during the 13-week period immediately preceding the injury when determining what the injured worker would have earned for the full 13-week period had he been so employed.

The purpose of the various methods for calculating AWW under KRS 342.140 is to obtain a realistic reflection of the claimant's earning capacity at the time of his injury. Huff v. Smith Trucking, supra; *See also* C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991). The computation must take into consideration the unique facts and circumstances of each individual case. Id. The ultimate objective is to ensure the claimant's benefit rate is based upon "a realistic estimation of what the worker would have expected to earn had the injury not occurred." Desa International, Inc. v. Barlow, 59 S.W.3d 872, 875 (Ky. 2001).

Abel Verdon Construction v. Rivera, 348 S.W.3d 749 (Ky. 2011) is instructive in the case *sub judice*. In Rivera, the claimant testified he worked for two weeks before he was injured; three days the first week and four days the second. He also testified he was paid $50.00 a

day and earned a total of $250.00. A foreman testified the claimant was paid $7.00 to $8.00 per hour and received his wages in cash. The Court noted the employer submitted no contrary evidence. The ALJ awarded an AWW of $150.00, which was affirmed by this Board and the Court of Appeals. In affirming the Court of Appeals, the Kentucky Supreme Court stated as follows:

> Chapter 342 requires the findings of fact that support an award to be based upon substantial evidence. It does not require documentary proof of a worker's average weekly wage in a case where nothing refutes testimony by the worker and his foreman that the employer paid its employees in cash. As stated previously, KRS 342.285(1) permits an ALJ to pick and choose from the witnesses' testimony and to draw reasonable inferences from the evidence. The ALJ relied on the testimonies of the claimant and Martinez to find an average weekly wage of $150.00. The Court of Appeals did not err by affirming the finding because it constituted a reasonable estimate of what the claimant probably would have earned had he worked for the full 13–week period immediately preceding his injury when work was available. (citations omitted)

Id. at 757

The evidence available to the ALJ in the case *sub judice* regarding the AWW issue is admittedly scant. We note neither Wallace nor the UEF complied with 803 KAR 25:010 §13(9)(a) which states "the defendant shall provide a

completed Form AWW-1, Average Weekly Wage Certification" at the benefit review conference. Nor did Wallace provide relevant evidence regarding the wages of its other employees. The Form 101 indicates Reed began working for Wallace on June 1, 2009 and earned a weekly wage of $10.00 per hour in cash at the time of his injury. It also indicates Reed had not worked the six months prior since he was laid off from his previous employer.

Reed testified he had been employed by Wallace for approximately one week as a roofer when he was injured. However, the particular job where he was working when he was injured did not start until a week later due to rainy weather. Reed testified Wallace paid him $10.00 per hour. Reed testified he had worked approximately five hours prior to the accident. At the time of the injury, three laborers, he and another roofer were present. Reed also testified the foreman told he was supposed to be paid $12.00 per hour as a roofer, rather than $10.00 per hour as a laborer. When asked about how much work he could expect in a week's time, Reed testified his foreman told him "as much as I can as long as it don't - - not bad weather." Reed testified Wallace had been roofing two weeks prior to June 1, 2009 at another location and had more roofing jobs after completion of the project where the accident occurred.

Neither Wallace nor the UEF provided evidence which refuted Reed's testimony he was earning $10.00 per hour in cash at the time he was injured. Likewise, nothing in the record refutes Reed's testimony regarding his earnings. As noted earlier, KRS 342.285(1) permits an ALJ to pick and choose from the witnesses' testimony and to draw reasonable inferences from the evidence. The ALJ relied on Reed's testimony in finding an AWW of $360.00, and it was well within his discretion to do so. We also note the ALJ provided a reasonable estimation of potential hours Reed's work would have been hindered due to inclement weather. The ALJ's conclusion of $360.00 per week fairly approximates what Reed likely would have earned had he been employed during the full thirteen week period. There is substantial evidence in the record to support the ALJ's determination of AWW pursuant to KRS 342.140(1)(e).

Accordingly, the Opinion and Award rendered June 5, 2012 by Hon. Richard M. Joiner, Administrative Law Judge, and the Order on reconsideration rendered July 27, 2012 by Hon. Thomas G. Polites, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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