# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: February 5, 2016**

CLAIM NO. 201301012

COMMONWEALTH OF KENTUCKY
UNINSURED EMPLOYERS' FUND PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

MORGAN CRAYNE
PIPER LOGGING
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** The Commonwealth of Kentucky, Uninsured Employers' Fund ("UEF") appeals from the July 20, 2015, Opinion, Order, and Award and the September 15, 2015, Order on Petition for Reconsideration of Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ awarded Morgan Crayne ("Crayne") temporary total disability ("TTD")

benefits, permanent partial disability ("PPD") benefits, and medical benefits.

The UEF challenges the decision on several grounds. First, it asserts Crayne did not prove a work-related injury. Second, it contends Crayne did not prove the average weekly wage ("AWW") calculated by the ALJ. Third, it maintains it is entitled to reimbursement for Crayne's failure to attend an Independent Medical Examination ("IME"). Fourth, it contends Crayne failed to prove notice. Finally, the UEF argues that if an injury occurred, it was due to an act of God.

The Form 101, filed July 1, 2013, alleges on April 17, 2013, Crayne injured his low back while in the employ of Piper Logging in the following manner:

> After stepping on a snake, I jumped and felt immediate pain in my low back. The same day, I was driving a logging truck. The driver's seat was broken. As I descended down a hill the seat lunged forward jarring me in between the seat and steering wheel.

The Form 101 alleges as follows regarding notice: "On both occasions I immediately told Frankie Piper, the owner." Within the Form 101 and his attached Affidavit, Crayne avows his wage at the time of the injury was $100 per day.

Attached to the Form 101 is a medical record dated June 3, 2013, from Baptistworx indicating Crayne's injury occurred as follows: "Stepped on snake jumped hurt back." On that date, Crayne underwent an x-ray, was restricted to no lifting greater than ten pounds, and was taken off work for three days.

On December 12, 2013, Crayne filed a “Motion to Amend Form 101” to include Edward F. Piper (“Piper”) individually as a defendant/employer. By order dated January 6, 2014, Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ Swisher") sustained Crayne's motion.

The May 14, 2015, Benefit Review Conference ("BRC") lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses; injury as defined by the ACT; exclusion for pre-existing disability/impairment; TTD; and vocational rehabilitation. Under "other" is the following: "Reimbursement for IME with Dr. Lee (2) Admissibility of deposition testimony of Loyd Baucum."

Crayne’s June 10, 2014, deposition was introduced. Crayne testified that when he first started working for Piper Logging, he agreed to a salary of $100 a

day. He provided the description of the event causing his injury:

> Q: Okay. And what happened?
>
> A: First load- actually it was the very- it was our first day on the job. We were- Frankie had some scattered logs over the property from where he had worked there the year before, before I came to work for him. It was the first day it was dry enough to get in- to get semis in. Frankie was in a hurry. Everybody was in a hurry. The logs was [sic] already cut, so he wasn't in the woods cutting timber. He run [sic] the knuckle boom. He loaded the first load of logs.
>
> As soon as the last load touched the top of the truck, I either- it was either while I was taking a chainsaw to- it was while I was taking a chainsaw to trim the limbs off before I took off, I stepped around the passenger side of the truck and I felt something under my foot and instantly knew it was a snake because I've done it before. And I looked down and I was on the tail of that large copperhead, and I jumped and I screamed and I- I moved like I had never moved in my life. There was roughly a 40-inch copperhead and I was standing on its tail.
>
> Q: Did he strike?
>
> A: It was- no. It was too cold.
>
> Q: Okay. You screamed and jumped, and what happened?
>
> A: I fell backwards. I didn't let go of whatever I had in my hand, the saw. And everyone was within, you know, a few

> feet from me. We was [sic] all standing within 10 feet of each other. I got up. I got a cheater pipe which we used to tighten the cables down on the truck, I killed the snake. Told- we talked about it a minute. No big deal really at the time. Got in the truck- tightened the cables down and proceeded to go to the road.
>
> We was [sic] roughly 3 miles off the road, which meant- and it was muddy, and the log skidder had to assist the truck out pretty much the whole way, had to push me the whole way. I was going out across this very soft, spongy bean field. And Matt McCaslin was on the skidder and he was in high gear trying to keep up with me to match the blade to the back of the truck. And the truck bogged down, it come [sic] to a slow stop and Matt hit me real hard. And I knew right then that something was wrong.
>
> And all the way- from that point all the way to the sawmill, I could not sit in the seat, I was stretching and moving. And I thought I'd pulled a muscle in my back. And I continued to haul I think two more loads of logs that day to Cadiz and went home that night with a load. I didn't unload that night. Matt met me at the sawmill, give [sic] me a ride to the house, helped me up to the house, had a lot of steps to get up.

Crayne also testified at the June 1, 2015, final hearing. He first started working for Piper Logging in late 2012, cutting timber. Regarding his wage, Crayne testified as follows:

Q: How much did Mr. Piper pay you when you worked for him?

A: $100.00 a day.

Q: And how were you paid?

A: I was paid by cash and check.

Q: I'll hand you some copies of checks, certified copy that you heard us speaking about before, and you've looked at those, I believe, prior to this hearing. Do those accurately depict the checks that he paid you?

A: Yes.

Q: During the spring of 2013?

A: Yes.

[Checks were marked as Exhibit A.]

Q: Did Mr. Piper in addition to those checks also pay you cash?

A: Yes.

Q: Can you describe that to the judge?

A: The schedule for hauling logs is the cutoff date of Thursday. Any log hauled to the sawmill before 12 o'clock on Thursday, he gets a check for on Friday. And he had not been back in the logging business that long, and there was some weeks that he didn't have enough money in the checking accounts to cover all of what he owes. And another fact, we live, to plainly put it, out in the middle of nowhere. It was a long way to travel to a bank. Most of the time on Friday's [sic], it was late in the afternoon, and I had a newborn baby, and he would pay me some in cash because I wouldn't be able to

go cash a check before Monday. I'd have to drive all the way to Sturgis from where we live, over 20 miles, I don't know [sic] exact amount, and that's why it was that way.

Q: And I believe we've established that the rate was $100.00 a day. Is that correct?

A: Yes.

Q: And that he paid you cash in addition to the checks. Was cash payments made to you sporadic or every week? Can you describe how often they were?

A: They were every week. Every Friday, I got a check. If for some reason during the week, if I need- there was a couple of times I asked him on a Monday or Tuesday because we- we had been through some- you know, it was a - when I first started working for him, I was driving 50, right at 50 miles a day. I drove a Jeep Grand Cherokee that got about nine miles to the gallon, and for the first month that I worked for him, it cost me money to work for him. I made nothing. I went in the hole, but I done it trying- he had a great big job that he had begged me for five months to come work for him. And there was times I had to have money or I wouldn't get back to work. There was times that I wouldn't get home, but that's what I've done to go help him on this job to do what I loved.

Q: So we've established the rate and how you were paid. Tell the judge how many days in a week would you typically work?

A: At least, six. When I first started, he had lots of trouble with the truck.

> There was times that he would go in getting parts. He would go to- I he [sic] think went to Illinois, once. I would go with him to do different things, and he would pay me for that day. We might not have been in the woods logging that day, but we was working to prepare for the day when we would get there. And he knew I had to work every day, every day I could, and there was a time or two that we worked seven days a week and that's not uncommon, especially that time of year. You work when you can.
>
> ...
>
> Q: Mr. Piper had previously testified that he believed you guys worked about three days a week. What you're saying is you believe it was more than that?
>
> A: It was more than that.

Exhibit A to the hearing is comprised of checks made out to Crayne from Piper Logging ranging in amounts from $100.00 to $400.00.

Regarding notice of the injury, Crayne testified as follows:

> Q: When you got back from Cadiz, did you tell anybody that your back was hurting then?
>
> A: Yes.
>
> Q: Who did you tell?
>
> A: Everyone that was there. Frankie knew. Matt knew. I know- I remember specifically Matt because Frankie was probably either in the woods- Matt was

the one that I would see more often because he was in and out of the woods with the skidder to where I would park the truck and load the logs. So I know Matt was the first one I told.

Bobby who had just started was bucking logs. I'm pretty sure that's what he was doing that day. So it would have Matt and Bobby knew then when I got back. Frankie knew sometime throughout the day that that had happened. I can't tell you exactly when, but I know Matt give [sic] me a ride home that night, and he had to- I had 22 steps to get to my apartment. He had to help me up them steps.

Q: Just so we're clear, before you went home that day, did you tell Frankie Piper that you hurt your back?

A: Oh, yeah. At some point in time he knew that I hurt my back.

Q: And you mentioned you continued to work the rest of the day. Is that correct?

A: Yes.

Q: What happened the next day?

A: I could not get out of bed. I couldn't raise [sic] up on my own. I don't believe I went to work the next day, maybe for a couple of days. He knew that I wasn't coming. I would call him early in the mornings. Where he lived at, he didn't have nothing [sic] but a cell phone. There is very little cell service, and if he didn't answer when I called him, I would leave him a message, or I believe [sic] the time a lot of the messages went through Stacy. She was leaving- I don't- she would leave earlier for work. A lot of times

> when I couldn't get a hold of him, Stacy was the next person I called. So they both knew that I was hurt and couldn't come to work.

Crayne testified his job duties changed when he returned to work:

> Q: So you missed a few days of work?
>
> A: Yes.
>
> Q: Did you eventually go back?
>
> A: I had to, yes.
>
> Q: Did anything change when you went back as far as your job duties?
>
> A: Oh, yeah. The day I went back, we met at Frankie's house and Bobby got in a new truck he had bought.
>
> Q: And you're referring to Bobby Blackburn, another employee?
>
> A: Yes. Had no knowledge that- I was actually getting ready to get into the truck when Frankie pulled the keys out of his pocket and handed them to Bobby Blackburn. And I believe what we done then is I rode with Frankie, me and Matt, to the job site where the truck I was driving was at to take the log bunks off of it and put on this new truck. And then they got in the old truck and drove it to the scrap yard, and that's where it disappeared. I don't think we worked that day. The next day, I was given either a 372 or a 394 Husqvarna chainsaw and said, You [sic] can buck logs and load truck because Bobby's going to drive.

> Q: How much longer did you work for Mr. Piper before your employment ceased there?
>
> A: At least a week. No longer than two.
>
> Q: What was the reason that you stopped working for him?
>
> A: After about four or five days of bending over with that chainsaw, I had to- I knew I was hurt. My wife had called Stacy, had brought it up to her that I was going to have to go to the doctor. When I got a phone call from Frankie, and his exact words was-
>
> Q: You can't say what he said.
>
> A: Okay.

Piper’s April 2, 2014, deposition was introduced. He testified that he is also referred to as "Frank" and "Frankie." Piper testified Crayne worked an average of two to three days a week between January and April 2013.

> Q: Okay. From 1 April until the date that Morgan claims he was injured, the 17th - so, from the 1st through the 17th, do you know how many days you worked then?
>
> A: I want to say it was about like it was before, just when the weather would let us, two to three. I don't think we worked during that time- I may be wrong and probably am. I don't think we worked but just a couple of full weeks two or three times- you know, a couple of, you know, full weeks just two or three, maybe four times because of the weather.

> Q: Okay. You've said twice now 2 to 3 days a week. Don't let me put words in your mouth. But would it be fair to say that you worked roughly 2 and a half days a week from January through the 17th of April?
>
> A: It'd be- it's [sic] be pretty close. I'd say 3 days a week, you know. I'd go with 3 days a week, probably.
>
> Q: Okay. And that's January through 17 April?
>
> A: Yes.
>
> Q: Okay. And Morgan worked for you that entire period of time?
>
> A: Yes.

Regarding the payment of wages, Piper testified as follows:

> Q: Okay. How was Morgan paid?
>
> A: Check some. Cash some.
>
> Q: Okay. And what was his pay based on?
>
> A: A hundred.
>
> Q: A hundred a day?
>
> A: Yes.
>
> Q: So, if they worked 3 days a week, Matt and Morgan both averaged about $300 a week?
>
> A: Right.

As to when he received notice of Crayne's injury, Piper testified:

> Q: When did you first find out that he was claiming an injury?
>
> A: Shoot. I don't really remember. Well, we got the first papers through the mail here, whenever it's dated.
>
> Q: Are you talking about the claim that he filed?
>
> A: Yeah, I guess that would be what it is. Yeah, that might be- I mean, that might be exactly right.
>
> Q: Were you aware that- did he tell you that he had been injured any time before-
>
> A: No. Not until-
>
> Q: -he filed this claim?
>
> A: When we got- when we got our first paper in the mail, that's when he told me that he'd stepped on a snake or jumped over- jumped on one or stepped on one or jumped off of one or whatever it was.

Piper testified it is not unusual to see snakes while logging. He testified as follows:

> Q: And that's probably not an unusual thing logging, to see snakes?
>
> A: No, not really. We don't see as many as what you would think we would, you know. I mean, we have seen them. But it's not an everyday thing. When you see them, you don't care nothing [sic] about seeing them again, or I don't.

The May 14, 2014, deposition of Matthew McCaslin ("McCaslin") was introduced. McCaslin began working for

Piper Logging in March 2013. Regarding the incident of April 17, 2013, he testified as follows:

> Q: Okay. The day of April 17th, which was a Wednesday of last year, 2013, do you recall any incident with a snake when you-all were working over in Christian County?
>
> A: I remember he come [sic] running around the truck and grabbed a bar, and he went back around the truck. And when he came back, he had a snake.

The October 21, 2013, medical report of Dr. Theodore Davies states, in relevant part, as follows:

> I have followed Mr. Morgan Crayne since July 30. He has suffered a lumbar disc displacement with lumbar radiculopathy. This was the result of an injury that he described to me at work on April 17, 2013, carrying a chainsaw when he stepped on a copperhead snake and jumped and twisted while holding the chainsaw and injuring his back. He also commented that riding in a truck on a rough road within an hour of that caused further pain. Then, he was hit by a piece of equipment that slipped forward hitting him in the back. According to the history that he gave me, this work-related event would be the causation of his lumbar disc displacement.
>
> He would be placed in a DRE Category III which gives 10% whole person impairment for lumbar radiculopathy which has resulted. Currently, he is off work. He was awaiting surgical intervention. The patient does have lumbar disc degeneration, which according to his history was dormant and non disabling [sic] prior to the

> work-related event described above. The patient has been off work since he was injured in April through the present and continues to be off work into the foreseeable future. Again, he has been scheduled for surgical intervention of the lumbar disc displacement.

In his August 12, 2014, report, Dr. Davies opined:

> Mr. Morgan Crayne's diagnosis was that of lumbar disc displacement with lumbar radiculopathy. This was related to a work injury that he described while carrying a chainsaw weighing 40-50 pounds. He stepped on a poisonous snake and jerked, injuring his back. The injury that he described appears to be specifically related to the onset of his symptoms. He has an impairment rating of 10% whole person impairment as a result of his symptoms. He would be placed in a DRE category III, which imparts 10% impairment, page 384, table 15-3, under section 15.4 DRE lumbar spine of the Fifth Edition of *The Guides to Evaluation of Permanent Impairment*.
>
> The patient has restrictions. He is advised to avoid heavy lifting, repetitive bending or twisting of his lower back, prolonged sitting or standing. He should not lift heavy weights. He should avoid heavy vibrating equipment and avoid working in extremes of cold and dampness.
>
> He necessarily has had lumbar disc degeneration that pre-existed the specific injury that was necessarily dormant and nondisabling according to the history that he related to me prior to the injury. The patient was off work

> from the time that he was first seen in my office July 30, 2013, through the present. He has not been able to resume work activities and has been referred to a pain management clinic setting. I expect that the patient will require some continuation of pain management into the foreseeable future. He does not have a condition at this point in time that would require further operative intervention.

The December 10, 2014, IME report of Dr. Michael Best was introduced. Dr. Best set forth the following diagnoses:

> 1. Work injury April 17, 2013, with:
> a. L5-S1 disc herniation.
> 2. Status-post lumbar hemilaminotomy, discectomy at L5-S1 bilaterally November 8, 2013.
> 3. Chronic low back pain/radicular pain.

Under the heading of "discussion," Dr. Best noted:

> On April 17, 2013, the patient states he exited a truck while logging. He stepped on a 'copperhead' snake and jumped back. He noted pain in his low back. He killed the snake. He performed logging activities and drove the logging truck to and from the mill, only worsening the pain.

With respect to causation, Dr. Best opined as follows: "Clearly, the injury was caused by the work event as described." Dr. Best opined Crayne reached MMI and

assigned a 13% whole body impairment rating "due to [Crayne's] persistent back pain, radicular symptoms and positive findings on physical examination." He further opined that Crayne suffered from no pre-existing active condition prior to April 17, 2013. The following question and answer is contained in the report:

> Q8: Plaintiff claims to have stepped on a snake, causing him to jump and twist, causing a broken back. Testimony reveals plaintiff ran back around the truck to get a bar to kill the snake with and then ran back around the truck to kill the snake. In your medical opinion, to a reasonable medical probability, is it possible to receive this injury in this manner and then run for a weapon? Is there any physical evidence of an injury as defined by the act that took place on the alleged date of injury. Can you state with any reasonable medical certainty that an injury as so defined took place?
>
> A8: Clearly, it is possible. The possibility is completely dependent upon the patient's 'fear' of snakes. By stepping on a copperhead, he has an adrenalin surge, a 'fight or flight' condition. This would allow him to run to the rear of the truck and kill the snake. Clearly, I believe this to be a work-related injury.

In the July 20, 2015, Opinion, Order, and Award, the ALJ provided, in relevant part, the following Findings of Fact and Conclusions of Law:

> . . .

**B. WORK-RELATEDNESS/CAUSATION & INJURY AS DEFINED BY THE ACT**

It has long been held in Kentucky courts that a worker is entitled to be compensated for all the harmful changes that flow from a work-related injury that are not attributable to an independent, intervening cause. Elizabeth Sportswear v. Stice, 720 S.W. 2d (Ky. App. 1986).

"Injury is statutorily defined in KRS 342.0011 (1):

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of an in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

"Objective medical findings" is defined by KRS 342.0011 (33) as information gained through direct observation and testing of the patient, applying objective or standardized methods. In Gibbs v. Premier Scale Co., 50 S.W. 3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011 (1) and (33) if it is based upon symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), in which the Court held that while objective medical evidence must support a harmful change diagnosis, it is unnecessary to prove causation of any injury through objective medical findings.

> Medical causation must be proved to a reasonable medical probability with expert testimony… [however] [i]t is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, i.e. to the level necessary to prove a particular medical fact." Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004).

The Employer and UEF contend that the occurrence of Plaintiff's alleged injury never happened, and further contest whether Plaintiff sustained an injury as defined by the Act. The ALJ has reviewed all the deposition transcripts, and is convinced that Plaintiff did, in fact, step on a copperhead snake on April 17, 2013, which caused him to wrench his back while attempting to get away from the snake. Blackburn heard Plaintiff and McCaslin discuss the incident. McCaslin discussed the incident with Plaintiff and saw the carcass after Plaintiff killed the snake. The ALJ notes Plaintiff's testimony that a skidder hit the logging truck in the rear which exacerbated his back pain. However, Plaintiff's testimony is clear that he felt his back condition was resultant from wrenching his back while trying to get away from a poisonous snake.

This claim has been vigorously prosecuted, and defended. To that end, there has been a great deal of mud throwing in an attempt to cast the parties in the most negative light possible. Piper claims he caught Plaintiff smoking marijuana and refused to allow him to continue driving the log truck. However, Blackburn testified that he and Plaintiff were taking turns

driving the hauling truck in April, 2013. On the other hand, Plaintiff claims the hauling truck he was required to drive was not properly maintained, and had a defective seat. The ALJ was not impressed with this testimony.

Plaintiff's work accident occurred on April 17, 2013, and Plaintiff has explained the reason for a delay in obtaining medical treatment. Plaintiff believed the condition was a simple muscle strain that would resolve on its own. The ALJ has considered that testimony and believes it. On June 3, 2013, Plaintiff sought treatment at Baptistworx, and was ultimately referred to a neurosurgeon, Dr. Davies. Plaintiff first saw Dr. Davies on July 30, 2013. Approximately six (6) weeks after the work accident, and after it was apparent to Plaintiff that his low back condition would not resolve on its own, he sought treatment at Baptistworx. Both Baptistworx and Dr. Davies note the history that Plaintiff injured his low back on April 17, 2013 after stepping on the tail of a copperhead snake. The medical providers do not list any intervening injury that would explain Plaintiff's continued low back symptoms. The medical providers do not note any type of intervening injury that would explain Plaintiff's L5-S1 disc herniation.

The ALJ must now determine if Plaintiff's run-in with a copperhead snake on April 17, 2013 caused an injury as defined by the Act. Case law is clear that causation of an injury is within the realm of a medical expert. To that end, Dr. Best and Davies have both indicated the work event on April 17, 2013 is what caused Plaintiff's back condition that eventually required

surgery. Dr. Best clearly felt Plaintiff's mechanism of injury (i.e. wrenching his back after stepping on a copperhead snake) resulted in the herniations depicted on Plaintiff's June 26, 2013 lumbar MRI. The Employer and the UEF have gone to great lengths to impeach Plaintiff's credibility. But, the Defendants' own expert, Dr. Best, believed Plaintiff, and so does this ALJ. The ALJ has reviewed Dr. Lee's report, and does not find it to be probative because she indicated she had inadequate medical records.

This ALJ concludes Plaintiff sustained an injury to his low back, relying on the medical opinions of Dr. Davies, and the Defendant's own medical expert, Dr. Best.

*ACT OF GOD*

In this sense, the "act of God" defense is not a defense in and of itself but merely descriptive of a hazard presented in a positional risk claim. The presence of a copperhead snake at Plaintiff's work site on April 17, 2014 [sic] may have been an act of God, but it was Plaintiff's employment that was the reason for his presence at what turned out to be the place of danger. The fact that the mechanism of injury may have been related to an act of God is not, in and of itself, dispositive of liability. The fact that a copperhead was sent forth by God and His divine power to Plaintiff's work site does not relieve the employer from the liability for injury sustained by Plaintiff. This issue is, therefore, resolved in favor of the Plaintiff. No. 2010-01351 Shelby Industries v. Estate of Brian Larsh & Sandra Larsh, Kiera Larsh and Breann Larsh.

**C. EXCLUSION FOR PRE-EXISTING ACTIVE IMPAIRMENT**

When determining whether a pre-existing condition is compensable, a physician's opinion that the condition was dormant or active before the work injury is not the deciding factor. A pre-existing condition is "active" under the Kentucky Workers' Compensation Act only to the extent that the condition is symptomatic and warrants a permanent impairment rating. McNutt Const./ First Gen. Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

In Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the Court dealt with the situation wherein an individual's pre-existing scoliosis made her more likely to surer [sic] injury. The Court noted the Administrative Law Judge must determine whether the pre-existing condition was permanently or temporarily aroused by the work injury and further noted that to be characterized as an active condition, an underlying pre-existing condition must be symptomatic and have impairment pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. The employer bears the burden of proving the existence of a pre-existing, active disability.

The ALJ concludes the Employer did not meet its burden of proving Plaintiff had a pre-existing, active disability. Dr. Best evaluated Plaintiff at the request of the Employer, and indicated Plaintiff did not have a pre-existing, active back condition. There is no evidence Plaintiff has any impairment for his low back immediately prior to April 17, 2013. There was a notation regarding back symptoms at the L1-L2

level, but Plaintiff underwent surgery at the L5-S1 level. Furthermore, in 2006 and 2007 Plaintiff sought treatment at Crittendon [sic] County Hospital. In 2007, Plaintiff reported back pain in conjunction with kidney stones. Only months prior to the work accident, on December 27, 2012, Plaintiff was at the emergency room, but there were no complaints of back symptoms. Plaintiff worked for Piper for several months before the April 17, 2013 work injury. There is nothing in the record that suggests Plaintiff was unable to perform this work due to low back pain and/or symptoms.

**D. NOTICE**

KRS 342.185(1) reads, in relevant part, as follows:

Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof. . .

KRS 342.200 reads, in relevant part, as follows:

The notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause.

Case law firmly supports the premise an employee is not required to report every "minor accident" to his or her employer. Turner, Day and Woolworth Handle Co. v. Morris, 101 S.W.2d 921, 924 (Ky. App. 1937). When a condition produced by an accident is a "latent one" and the effects of the accident are not immediately serious, an employee's duty to provide notice to his or her employer pursuant to KRS 342.185 is not yet triggered. Id. Only when it becomes "reasonably apparent that a compensable injury has been sustained" is the duty to provide notice triggered. Id.

Medical records note Plaintiff reported a work accident on April 17, 2013 involving a copperhead snake. Plaintiff reported the same accident to Baptistworx. Also, Plaintiff reported the work accident to William Lee, a subsequent employer. McCaslin acknowledge [sic] the incident with the snake, and Blackburn heard Plaintiff and McCaslin discuss this accident. Clearly, there was talk of the snake incident on the job site on April 17, 2013, and Piper was present at the job site on that day. This ALJ does not believe that Piper was not aware of this incident and Plaintiff’s low back symptoms.

Plaintiff testified that he advised Piper of his back symptoms on April 17, 2013. Plaintiff was adamant that he notified Piper sometime on April 17, 2013. Plaintiff did not return to work for a few weeks after April 17, 2013, but eventually returned to work out of necessity to provide for his family. This ALJ finds Plaintiff provided due and timely notice, and relies on

Plaintiff's testimony in making this finding.

**E. AVERAGE WEEKLY WAGE**

KRS 342.140 (d) sets forth how a claimant's average weekly wage should be calculated when the claimant's wages are fixed by the day. The statute requires the most favorable to the employee earned during the first, second, third, or fourth period of thirteen (13) calendar weeks. This claim is problematic because the Employer did not keep records of what Plaintiff was paid. Both Plaintiff and Piper testified that Plaintiff was paid by check, and also received cash payments. Another employee, McCaslin, also testified that he was paid by check and cash. Evidence has been produced regarding the checks Plaintiff's [sic] received, but the only evidence the ALJ has regarding cash payments comes through Piper and Plaintiff's testimony. It is clear Plaintiff was paid $100/day, and that is uncontroverted. The ALJ must decide how many days Plaintiff averaged during the course of his employment with Piper.

In Plaintiff's Form 101, he alleged an average weekly wage of $100/day. Plaintiff testified he worked up to six (6) days a week. Piper testified that he believes Plaintiff worked approximately three (3) days/week because work had been slow. McCaslin believes he worked approximately three (3) days/week in April, 2013. In reviewing the check submitted into evidence, there are several weeks Plaintiff made over $300. The Employer did not provide a completed AWW-1, as required by 803 KAR 25:010 § 13.

The ALJ finds Plaintiff, on average, worked three (3) to four (4) days/week in the thirteen week quarters preceding the work accident, and finds an average weekly wage of $350.00/week.

. . .

**G. BENEFITS PER KRS 342.730**

The ALJ has two impairment ratings in this claim this [sic] claim [sic]. Dr. Davies, Plaintiff's treating neurologist assessed 10% impairment, pursuant to DRE Category III, 5th Ed. AMA Guides. Alternatively, Dr. Best assessed impairment using the DRE Category III, but assessed impairment in the higher range. Ultimately, Dr. Best assessed 13% impairment due to Plaintiff's significant scar tissue and post-operative MRI findings. The ALJ believes Dr. Best has, indeed, rendered the best and most accurate assessment of Plaintiff's impairment. This ALJ finds that Plaintiff has a 13% permanent impairment rating, pursuant to the 5th Ed. AMA Guides, relying on Dr. Best.

The ALJ must now address what multiplier, if any Plaintiff is entitled to. Plaintiff claims he is physically unable to return to work as a logger. Plaintiff has made a few attempts to return to work as a logger, but claims this work aggravates his low back. Dr. Davies did not issue any permanent restrictions. Likewise, Dr. Best did not issue any permanent work restrictions. Moreover, Dr. Best's functional capacity evaluation confirmed Plaintiff was capable of lifting in the heavy to very heavy duty work category. Based upon the medical opinions of Drs. Best and Davies, this ALJ concludes that Plaintiff does

> retain the physical capacity to perform his pre-injury work, and is not entitled to any multiplier enhancement. Plaintiff's permanent partial disability benefits are calculated as follows:
>
> $350 x 66&2/3 x 13% x 1 (state factor) x 1 (multiplier) = $30.33/week
>
> Accordingly, Plaintiff is awarded permanent partial disability benefits at the rate of $30.33/week for 425 weeks.
>
> . . .
>
> **J. REIMBURSEMENT FOR IME WITH DR. LEE**
>
> The UEF seeks reimbursement for an IME with Dr. Lee, that Plaintiff attended, but left before Dr. Lee could complete her evaluation. KRS 342.205 (3) sets forth the employer's remedy in situations where an employee fails to appear for a scheduled evaluation. The only remedy allowed by the applicable statute is to suspend the employee's right to prosecute the claim. There is no provision in statute, regulations, or case law that supports ordering Plaintiff to bear the cost of a no-show fee. The ALJ does not have the authority to order Plaintiff to reimburse the UEF for Dr. Lee's no show fee.

Regarding its first argument Crayne did not prove a work-related injury, the UEF argues, in part, as follows:

> ALL the evidence in this case clearly shows that plaintiff was not injured when he alleged he stepped on a snake. He continued to work and all the actual witnesses dispute his allegations. He

> told no one he was injured, complained of no back pain and even when in argument with Piper over the garnishment, never mentioned an injury. The fact that he waited over 6 weeks to see a physician is revealing.

As the claimant in a workers' compensation proceeding, Crayne had the burden of proving each of the essential elements of his cause of action, including proving an "injury" as defined by the Act. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Crayne was successful in his burden, the question on appeal is whether substantial evidence exists in the record supporting 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ's determination Crayne sustained his burden of proving an "injury" as defined by the Act is supported by substantial evidence. The above-cited medical opinions of Drs. Davies and Best unequivocally establish Crayne sustained a work-related injury. In his December 10, 2014, IME report, Dr. Best opined the incident on April 17, 2013, as described by Crayne, is the cause of Crayne's injuries. In his August 12, 2014, report, Dr. Davies states Crayne's diagnoses is "related to a work injury that he described while carrying a chainsaw weighing 40-50 pounds. He stepped on a poisonous snake and jerked, injuring his back." Since this evidence constitutes substantial evidence in support the ALJ's determination Crayne sustained an

"injury" as defined by the Act, the ALJ’s determination cannot be disturbed.

We find no merit in the UEF's second argument that Crayne did not prove the AWW calculated by the ALJ. Thus, we affirm the calculation of Crayne’s AWW.

As correctly noted by the ALJ, KRS 342.140(d) is applicable as the record fully supports Crayne was paid $100.00 a day prior to and at the time of his injury. As noted by the ALJ, this fact is uncontroverted. The record establishes Crayne was paid both by cash and check as several checks were attached as Exhibit A to the hearing transcript. Significantly, Piper failed to provide a completed Form AWW-I as required by 803 KAR 25:010 § 13(9)(a). Therefore, the ALJ was left to calculate the AWW based on the testimony concerning the number of days Crayne worked weekly prior to his injury, the amount Crayne was paid per day, and the checks attached to the hearing as Exhibit A. "KRS 342.285(1) permits an ALJ to pick and choose from the witnesses' testimony and to draw reasonable inferences from the evidence." Abel Verdon Construction and Acuity Insurance, Appellants, v. Migual A. Rivera, 348 S.W.3d 749 (Ky. 2011). We believe the above-styled case supports the manner in which the ALJ calculated AWW; thus, the ALJ's calculation will not be disturbed.

The UEF argues it is entitled to reimbursement for expenses incurred due to Crayne's failure to complete his IME with Dr. Jeana Lee. It contends "[i]f, against all the evidence there is any award in this claim, the UEF must be reimbursed the amount of money spent on the IME with Dr. Lee that plaintiff walked out on." We disagree.

As correctly noted by the ALJ in the July 20, 2015, Opinion, Order, and Award, pursuant to KRS 342.205(3), the only sanction for Crayne's failure to complete the IME with Dr. Lee is to suspend his rights to prosecute his claim. There is no statutory provision which grants the ALJ the authority to order Crayne to reimburse the UEF for the fees associated with Dr. Lee’s evaluation.

As the record regarding this issue is convoluted at best, we will recount the relevant facts. On August 6, 2014, the UEF filed a "Notice of Filing Report of Dr. Jeana J. Lee, MD and Motion to Place Claim in Abeyance" requesting the ALJ to place the claim in abeyance for Crayne's failure to submit to an examination by Dr. Lee. The UEF's motion asserts as follows: "As Dr. Lee does not want to see plaintiff again, once we are assured plaintiff will cooperate, we will have to find a substitute examiner, until then this claim should remain in abeyance."

On October 2, 2014, the UEF filed a "Renewed Motion to Place Claim in Abeyance" asserting as follows:

> 1. Defendant made a previous motion to place claim in abeyance because plaintiff did not cooperate in his IME. Said motion was held pending plaintiff cooperating in a rescheduled IME. Defendants did make an offer to settle pending the IME, at the request of plaintiff's counsel, but plaintiff rejected the offer.
>
> 2. Plaintiff had an IME scheduled for 1 October, 2014 in Louisville with Dr. Best and funds for transportation were sent to his attorney. Plaintiff did not show for the IME and the UEF will not have to pay a no show fee. As verified with plaintiff's counsel, plaintiff was arrested for DVO/EPO violation and was in jail as of 30 September, 2014. (Plaintiff has an extensive history of DVO/EPO violations so chances of making bail are unknown).
>
> 3. We renew our motion to place the claim in abeyance as required under KRS 342.205 and further move for costs against plaintiff of $2,450.00 for the IME's and $264.84 for travel for the two failed IMEs.

By order dated October 17, 2014, CALJ Swisher placed the claim in abeyance.

On November 5, 2014, Crayne filed a "Motion to Remove Claim From Abeyance" in which he asserted as follows:

> Comes the Plaintiff, Morgan Crayne, by and through counsel and hereby moves

> the ALJ to enter an order removing this claim from abeyance. As grounds for this motion, Plaintiff states that no IME is expected to be scheduled by the defendants. This claim was originally put into abeyance so the plaintiff could attend an IME. Unfortunately, the plaintiff was unable to appear at the latest scheduled IME because he was incarcerated. Plaintiff informed the undersigned immediately upon his arrest which was the day before his scheduled IME. The undersigned informed counsel for the UEF about this development. It is assumed by the undersigned that the UEF has incurred a 'no show' fee.
>
> The UEF has expressed to the Plaintiff that they will not reschedule this IME until the Plaintiff reimburses the UEF for costs incurred due to the missed IME. While the Plaintiff understands the frustration of the UEF, the only penalty discussed by the act for a 'refusal' to attend an IME is a cessation of benefits, which the Plaintiff is not receiving. (KRS 342.205(3)). The plaintiff did not refuse to attend the scheduled IME, he simply could not attend it. Furthermore, any costs incurred by the UEF could only be taken out of the Plaintiff's award or settlement. At this point, the claim is in limbo and needs to come to a conclusion. Based on the foregoing reasons, the Plaintiff moves the ALJ to take the claim out of abeyance and schedule a BRC.

By order dated November 19, 2014, CALJ Swisher overruled Crayne's motion leaving the claim in abeyance "until such time as plaintiff submits to an independent medical examination."

On December 10, 2014, Crayne submitted to an IME by Dr. Michael Best, and by order dated February 6, 2015, the claim was removed from abeyance.[1]

The record demonstrates both CALJ Swisher and the ALJ proceeded as authorized by statute when Crayne failed to comply with a scheduled IME. There is absolutely no authority via statute or regulation for the ALJ to assess costs against Crayne for his failure to complete his evaluation with Dr. Lee.

The UEF's fourth argument that Crayne failed to provide due and timely notice of his injury to Piper likewise has no merit.

The ALJ has the discretion in making the determination of whether notice was given “as soon as practicable” based on the specific circumstances of the case. Newberg v. Slone, 846 S.W.2d 694 (Ky. 1992). Here, after weighing the testimony of both Crayne and Piper, the ALJ determined due and timely notice of the April 17, 2013, injury was given. As stated by the ALJ, Crayne "was adamant that he notified Piper sometime on April 17, 2013." Additionally, both Crayne and Piper testified that Crayne did not return to work for a few weeks after the April 17,

[1] By order dated January 5, 2015, this claim was reassigned to ALJ Kinney.

2013, incident. Crayne testified that he not only let Piper know why he was not able to return to work, but Piper visited him in his home during the time he was unable to return to work. The ALJ has the discretion to pick and choose from the evidence and determine Crayne provided due and timely notice of the April 17, 2013, injury to Piper. As Crayne's testimony constitutes substantial evidence in support of this determination, the ALJ's determination cannot be disturbed.

Finally, the UEF’s argument that if an injury did occur, it was an "act of god and not within the control of Piper in any manner whatsoever" has no merit.

As noted by the ALJ, the "act of God" defense is not a defense recognized in Kentucky. However, this defense is related to the positional risk or increased risk doctrine. Larson’s Workers’ Compensation Law, Section 5.01. Here, the ALJ determined Crayne's job as a logger placed him in a zone of increased risk. As stated by the ALJ, while the presence of the copperhead snake on April 17, 2013, may have been an act of God, "it was Plaintiff's employment that was the reason for his presence at what turned out to be the place of danger." Piper testified it is not unusual to see snakes when logging. Thus, under either the positional risk or increased risk doctrine,

substantial evidence supports the finding Crayne's injury occurred during the course of his employment with Piper Logging.

Accordingly, on all issues raised on appeal, the July 20, 2015, Opinion, Order, and Award and the September 15, 2015, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON C D BASTON
UNINSURED EMPLOYERS' FUND
1024 CAPITAL CENTER DR STE 200
FRANKFORT KY 40601

**COUNSEL FOR RESPONDENT:**

HON DAVID TROUTMAN
P O BOX 1837
PADUCAH KY 42002

**COUNSEL FOR RESPONDENT:**

HON ROBERT FRAZER
P O BOX 361
MARION KY 42064

**ADMINISTRATIVE LAW JUDGE:**

HON STEPHANIE L KINNEY
410 W CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE KY 40202