

OPINION ENTERED: December 14, 2012

CLAIM NO. 201176157

EXPRESS PERSONNEL

PETITIONER

VS.

APPEAL FROM HON. RICHARD JOINER,  
ADMINISTRATIVE LAW JUDGE

JENNIFER JONES  
HON. RICHARD JOINER,  
ADMINISTRATIVE LAW JUDGE  
and HON. THOMAS POLITES  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Express Personnel ("Express") seeks review of the May 25, 2012, opinion and award of Hon. Richard Joiner, Administrative Law Judge ("ALJ") finding Jennifer Jones ("Jones") sustained a work-related thoracic spine injury and awarding permanent partial disability ("PPD") benefits and medical benefits. Express also

appeals from the July 6, 2012, order overruling its petition for reconsideration.

This appeal centers on whether the ALJ could award income and medical benefits for an injury to anything other than Jones' left shoulder and whether various medical bills Jones presented at the hearing are compensable.

Jones' Form 101 alleges on August 26, 2011, while lifting, she injured her shoulder, back, and neck. Jones relied upon the medical records of The Patterson Medical & Diagnostic Center and the undated medical report of Dr. Robert W. Byrd. Jones' October 19, 2011, deposition was introduced, and she testified at the March 20, 2012, hearing. Express introduced the November 10, 2011, medical report of Dr. Martin G. Schiller and Dr. Byrd's January 19, 2012, deposition.

Concerning whether Jones sustained a compensable injury, in the opinion and award, the ALJ determined as follows:

**Was there an injury as defined by the Act?**

The threshold issue is whether Jennifer Jones had an injury as defined in the Workers' Compensation Act. Under the Kentucky Workers' Compensation Act, 'injury' means, in part:

... any work-related traumatic event or series of traumatic

events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment....

Here, the plaintiff's work in the two or three days leading to August 26, 2011 required her to perform tasks that put excessive strain upon her shoulder and thoracic spine. This produced pain in the shoulder and thoracic spine areas. She sought medical attention and was found to have a musculoligamentous injury of the thoracic spine. I find the testimony of Dr. Byrd to be credible and conclude that there has been an injury as defined above.

Regarding Jones' permanent partial disability, the ALJ concluded as follows:

**What is the extent of Permanent Partial Disability?**

Inasmuch as I have not found Jennifer Jones to be 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." Jennifer Jones has an impairment rating. It is either 0% based on the report of Dr. Schiller, or 5, 10, or 15% under the testimony of Dr. Byrd. Dr. Byrd assessed a 10% impairment relating to the shoulder but his methods did not comport with the fifth edition of the AMA Guides. Therefore, I cannot accept that 10% impairment rating for the shoulder. His testimony was clear that he also assessed a DRE category II relating to the thoracic spine. This was supported by his physical examination and was subjected to cross-examination. The thoracic DRE category II produces a 5% impairment. This I can accept.

I find that Jennifer Jones has a 5% whole body impairment as a result of her injury of August 26, 2011 in accordance with the *Guides*.

The ALJ's "Conclusions" are as follows:

1. Jennifer Jones sustained a work-related injury on August 26, 2011. She gave due and timely notice of this injury.
2. As a result of the injury, Jennifer Jones was not temporarily totally disabled.
3. Jennifer Jones has a permanent disability rating of 3.25% which is 5% impairment under the *AMA Guides*

multiplied by 0.65, the factor contained in KRS 342.730.

4. Jennifer Jones has an eighth grade education which allows for an enhancement of benefits by 0.2 under KRS 342.730(1)(c)3, if applicable.

5. On the date of injury Jennifer Jones was 52 years of age which allows for an enhancement of benefits by 0.2 under KRS 342.730(1)(c)3, if applicable.

6. Because Jennifer Jones does retain the physical capacity to perform the type of work performed at the time of the injury, the benefit for permanent partial disability shall not be multiplied by three pursuant to KRS 342.730(1)(c)1 plus the factors identified in KRS 342.730(1)(c)3.

7. Because Jennifer Jones has returned to work at an average weekly wage equal to or greater than the average weekly wage at the time of the injury and has not ceased that employment, the benefit for permanent partial disability shall not be multiplied by two pursuant to KRS 342.730(1)(c)2. She is eligible for an increase in benefits if these circumstances change.

The ALJ entered the following award:

It is hereby **ORDERED AND ADJUDGED** by the Administrative Law Judge as follows:

1. The plaintiff, Jennifer Jones, shall recover of the defendant/employer, Express Personnel & Bendix Foundation, and/or its insurance carrier, permanent partial disability benefits at the rate of \$11.20 per week from August 26, 2011, for 3.25%

permanent disability rating for so long as she is so disabled but for a period not to exceed 425 weeks together with interest at the rate of 12% per annum on all past and unpaid installments of compensation and defendant shall take credit for any compensation heretofore paid.

2. The plaintiff shall further recover of the defendant/employer and/or its insurance carrier for the cure and relief from the effects of the injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.

Express filed a petition for reconsideration pointing out Jones testified at her deposition and at the hearing she was only asserting a claim for a left shoulder injury. It set forth Jones' specific deposition and hearing testimony she was not making a claim for an injury to her back or neck and her only claim was for an injury to her left shoulder. Express also asserted Jones, in her brief to the ALJ, did not argue entitlement to an award for a thoracic spine injury.

Express next argued the issue of unpaid medical bills was not preserved as an issue at the benefit review conference ("BRC"). It cited to a discussion which occurred at the hearing regarding Jones' ability to raise the compensability of certain medical charges as an issue

to be decided by the ALJ. Express maintained the "submitted expenses" were not a "compensable statement of services" as defined by the regulation and the documents had not been timely submitted.

Consequently, Express asked the ALJ to vacate the award for the thoracic spine injury or, in the alternative, make additional findings substantiating his finding in light of Jones' testimony. Express also requested the ALJ enter findings of fact regarding the compensability of the medical charges or, in the alternative, find the unpaid medical bills were not preserved as an issue at the BRC and therefore could not be addressed by the ALJ.

For the first time in these proceedings, in responding to the petition for reconsideration, Jones cited to Dr. Byrd's testimony regarding his diagnosis of a musculoligamentous injury of the thoracic spine and his assessment of a 5% impairment for the injury. Jones argued Dr. Byrd's finding "was supported by a physical examination and was subject to cross-examination." She also noted Dr. Schiller diagnosed thoracic strain.<sup>1</sup> Jones asserted Express' petition for reconsideration was frivolous and the

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<sup>1</sup> Dr. Schiller actually stated he did not "think [Jones] was injured to begin with." He stated "at most, a strain of the thoracic spine could have occurred" and "it should be better now" and "muscle strains do not last permanently." Dr. Schiller assessed no impairment rating.

petition should be overruled. Jones did not address her and her counsel's representations she was only asserting a claim for a left shoulder injury.

Without comment by order dated July 6, 2012, the ALJ summarily overruled the petition for reconsideration.

On appeal, Express again cites to Jones' October 19, 2011, deposition testimony that her neck and back are "fine" and she is only pursuing a claim for a left shoulder injury. Express also cites to Jones' hearing testimony confirming her deposition testimony that she had only left shoulder pain, her back and neck are fine, and her only claim is "for problems with her left shoulder." It also notes Jones' counsel, on the record, acknowledged her only claim was for a left shoulder injury. In the brief to the ALJ, Express points out "both parties confined their arguments to a discussion of compensability of [Jones'] left shoulder." Express asserts the Board should find Jones' deposition and hearing testimony along with the argument in her brief she sustained only a shoulder injury, are "a judicial admission and an abandonment by her of any claim for anything other than her left shoulder."

Next, Express asserts the issue of unpaid medical bills was not preserved as an issue. Express cites to the ALJ's statement in the record concerning the medical bills

which Jones introduced at the hearing. Express asserts the ALJ made no ruling regarding the compensability of these bills and none of the documents reflecting medical charges constitute a statement of service as defined in 803 KAR 25:096(1)(5). In addition, Express asserts the bills were not timely submitted. Express requests the Board remand for a finding the medical charges in question are not compensable.

In response, Jones again cites to Dr. Byrd's testimony establishing she sustained injuries to her left shoulder and thoracic spine. Therefore, Jones posits Express was "put on notice from the beginning" she was making a claim for injuries to her left shoulder and thoracic spine and the two problems "were physically and diagnostically connected." Jones argues for Express to suggest otherwise is misleading. With respect to Express' argument regarding medical bills, Jones asserts as follows:

Regarding petitioners [sic] second argument that work related medical bills were never paid because they were never submitted to the employer for treatment, said argument is categorically false based upon sworn testimony of Jennifer Jones in her deposition of 10-19-11 (P 51-52) and her live testimony at the hearing (P 13-15).

Jones testified at her October 19, 2011, deposition that two or three days before August 26, 2011, she had begun working on a special order Express would "need out by a certain time." Jones described the onset of her physical problems as follows:

Q: Now what is this thing that they needed exactly?

A: One of them was the biggest one that they let the women do is a 384 and then they have one that is infused that is heavier than that one. They needed them all that week because nobody - they didn't have any in backup because nobody would do them. No women would only do them but I would so they would bring - they brought them to me. They said we need these and as quick as I could get them done they would pick them up so I did it all that week, and then that day that I came when I was doing the heavy ones my shoulder started. It was sting and I just took some Tylenol because I'm 52 and I'm like take Tylenol. So I'm 52, I take Tylenol. So I took a couple of Tylenol and I kept on working. They was just coming for me. It's like we need these.

Q: Now where were you having pain?

A: In my shoulder right under my shoulder blade.

Q: You are indicating your left shoulder?

A: Yes.

Q: Okay.

A: And it started stinging and I was thinking well, it's just because I'm old. So, I just kept on working and they would come for the brakes and we got to have them, we got to have them, so I kept going and going and going and I took - about a couple hours later I took two more Tylenol because it was hurting and I - they brought them to - I was doing them and then I picked up one and I put it on and I made it and it was on the top and it was five - it was a little bit taller than me. The last row that I was putting on and after I finished the brake, I put it on the top and when I put it on the top, I felt something like water run down in my shoulder blade. It felt like water running in my shoulder blade and it just started hurting. And, so, I'm like I'm going to keep on going. I need the - you know, so I went back and I was going to make another one and I - when I went to put it up, I couldn't. I got it up and then I couldn't lift it any further, it was just pain. So, my co-worker said, what is the matter? I said, my shoulder is hurting, and she said - I said - well, I don't know if I kept going or what but I think I kept on trying to work and somehow she said, your shoulder is swollen, because it had started hurting when I had - you know, earlier. It had started hurting and she said, I believe your shoulder is swollen, and I said, really and she said, yeah. So, she said - I said, let's go to the bathroom and you take a look at it. And, so, we got to the bathroom and I took my shirt off and the spot that I said was hurting she said, it's swollen. I said, is it, she said your shoulder is swollen too because I pulled my top down and, so, she said - I went back to my station and she said, Jennifer, you better go and tell - you had better go and tell

the supervisor. If you don't they'll fire you. I said, they will, won't they? And, so, she said, yeah. So I went up and said, Tyler - he's our lead and I said, Tyler. He said, yeah. I said, I believe my shoulder is swollen and it's hurting and he said - I pulled my shirt down. I said, look and he said, that's not good, and he said, I'm going to get you some ice. So he went and got some ice and - one of those dry ice packets and he brought it back and he gave it - he crushed it up a little bit and we read it and my co-worker said, how are you going to hold it on? and I said, I don't know. She said, well, I'll do it. So she held it on and, so, I - they didn't send me home. I wanted to stay because I was in overtime and I just labeled. They didn't say anything. They just let me label.

Jones testified she experienced pain in the shoulder and not in the shoulder blade. The following exchange then took place between Jones, her counsel, and counsel for Express:

Q: All right. So, basically, what you have suffered in this whatever happened to you on August 26, 2011, or thereabouts while you were working at Bendix, is that you began having this pain in your shoulder blade and in your left shoulder?

Mr. Rudloff: Well, objection. She didn't say shoulder blade. She said shoulder.

A: No.

Mr. Harding: Well, she said shoulder blade is where she is feeling pain.

Mr. Rudloff: No,

JONES: My shoulder.

Mr. Rudloff: --she said shoulder.

Mr. Harding: I heard what she said.

Mr. Rudloff: --she said shoulder.

JONES: It's my shoulder.

Mr. Harding: Barbara, do you - can you recall back and -

Mr. Rudloff: She said left shoulder on numerous occasions.

Mr. Harding: Well, she said shoulder blade -

Mr. Rudloff: No.

Mr. Harding: --because that is why I brought out the fact that she had a prior injured shoulder blade.

A: If you look at all my doctors' statements they are all shoulder.

Q: No, but today you said that you were having pain in your shoulder blade.

Mr. Rudloff: No.

Q: Well, you said and then it went out into your shoulder and around your left side.

A: Well, regardless, it is my shoulder. If they would have let me go to Western Kentucky Orthopedics, I don't feel we would even have to went. They would have probably told you exactly what it was, whether it was related to it or not. They should have let me go to Western Kentucky Orthopedics.

Jones testified she is only being treated for a shoulder problem and denied having any neck or back problems, stating as follows:

Q: What else is he treating you for in his office?

A: Shoulder.

Q: Just the shoulder?

A: Yes.

Q: So, in your application here, you say that you hurt your back and neck. You just hurt your shoulder, your left shoulder, is that what you are saying?

A: That is what is hurting. That day that I went in it may have been hurting. I just don't want to lie to you. It may have been hurting but today and ever since it - and some days I have trouble because my back hurts.

Q: Like you always had trouble?

A: No, no.

Q: No, I'm saying that you have always had trouble with your neck and your shoulder?

A: No.

Q: I mean your neck and your back?

A: No, not - not - not lately. Not since Dr. Ghayoumi I haven't had any trouble.

Q: All right. Well, what I am trying to figure out here, do you just have pain in your left shoulder now?

A: Yes.

Q: Okay. Your neck and your back are okay now?

A: Fine.

Q: They are fine. So your claim today is only for problems with your left shoulder, correct?

A: Yes, sir.

Q: Okay.

Mr. Harding: Dan, you are nodding affirmatively that's correct?

Mr. Rudloff: Yes, sir.

Later in the deposition, Jones testified as follows:

Q: And then your problem, like yesterday and today, you are saying is basically just your left shoulder?

A: Yes.

On direct examination, the following exchange took place:

Q: Ms. Jones, Mr. Harding has asked you a lot of questions about other body parts that you have injured over time. Have you ever injured your left shoulder prior to this work injury?

A: No.

Q: The claim that we are making against Express Personnel is not for a neck, is it?

A: No.

Q: Is it for a back?

A: No.

Q: It's just for a left shoulder?

A: Yes.

Q: Now, your pain that he asked you about, is it pain in your left shoulder blade or is it primarily located in your left shoulder region?

A: Left shoulder region.

. . .

Q: Given your current physical limitations and your incumbent pain, are you able to do the job you had at Express at the time of this injury?

A: No.

Q: Any why is that?

A: Because of shoulder pain?

Q: And when you say 'shoulder,' are you talking about your left shoulder?

A: Yes.

Q: Regarding your present physical condition, what hurts?

A: My left shoulder.

Jones testified all of the medical bills and out-of-pocket expenses attached to her deposition relate solely to her left shoulder injury.

On January 4, 2012, Jones introduced the undated medical report of Dr. Byrd, with Rehab Associates of Bowling Green, generated as a result of an examination

conducted on December 6, 2011. That document is styled "impairment rating" and assessed the following impairment:

According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, shoulder extension to 45 degrees results in a 1% impairment. Shoulder flexion to 90 degrees results in a 6% impairment. Using Table 16-43 shoulder abduction to 90 degrees results in a 4% impairment. Shoulder abduction to 40 degrees results in a 0% impairment of the upper extremity. Using Figure 16-46, shoulder external rotation to 45 degrees results in a 1% impairment. Shoulder internal rotation to 45 degrees results in a 4% impairment.  $1 + 6 + 4 + 0 + 1 + 4$  results in a 16% impairment of the upper extremity. Using Table 16-3, a 16% impairment of the upper extremity results in a 10% impairment of the whole person.

On January 19, 2012, Express took Dr. Byrd's deposition.<sup>2</sup> Dr. Byrd testified he had examined Jones' "thoracic back and her left shoulder blade." Concerning the thoracic condition, he testified Jones experienced pain from the mid to lower thoracic spine out to her posterior shoulder. Dr. Byrd felt Jones' problem was predominantly related to her thoracic facet pain. He acknowledged if Jones had a resolution of her symptoms and "as long as she

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<sup>2</sup>During his January 19, 2012, deposition, Dr. Byrd testified he prepared two reports- one providing an impairment for the left shoulder condition and the other providing an impairment for the thoracic spine condition. Jones introduced only Dr. Byrd's report relating to the left shoulder impairment.

did not have any other further restrictions in terms of range of motion or anything along those lines," her impairment rating for the thoracic spine would be zero. However, when Dr. Byrd conducted the examination, he found evidence that would indicate Jones fit within DRE thoracic category II. Consequently, Dr. Byrd assessed a 5% impairment. Consistent with his report, Dr. Byrd testified pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides") he assessed a 10% impairment for the left shoulder based on Jones' range of motion.

At the hearing, regarding the documents pertaining to the various medical charges in question, the following exchanges took place between counsel and the ALJ prior to the introduction of any testimony:

Mr. Rudloff: Was unpaid medical bills mentioned, Your Honor?

Mr. Harding: No.

THE COURT: No.

Mr. Rudloff: We reserve that specifically as an issue.

Mr. Harding: Judge, we would just object to it because there are no specific medical bills that have been submitted here today that we can even respond to.

THE COURT: Until you're presented with a bill that meets the definition of a bill in the Regulations, you're not obligated to respond to anything.

Mr. Harding: Okay.

Mr. Rudloff: Did we specifically reserve unpaid medical bills in our compliance and, I don't know, maybe that was lumped under Benefits under KRS 342.730. I don't know. That's an issue we specifically reserved.

THE COURT: Which came in after the Benefit Review Conference?

Mr. Rudloff: That's possible.

THE COURT: It had to be. It was received in my office on March 8<sup>th</sup> and the Benefit Review Conference was held on March 5. It was filed in Frankfort on March 5 and I frankly don't remember whether it was discussed at the Benefit Review Conference.

Mr. Rudloff: We would like to reserve that as an issue.

THE COURT: Do you have any bills that meet the definition of bills in the regulations?

Mr. Rudloff: She has - she's prepared to testify that all these bills were submitted to the defendant/employer.

THE COURT: Okay.

Mr. Rudloff: And they were denied.

THE COURT: Well, are you prepared to go forward on those issues -

Mr. Rudloff: Yes, sir.

THE COURT: --as I related them?

Mr. Rudloff: Yes, sir.

THE COURT: Mr. Harding, are you prepared to go forward on those issues?

. . .

By Mr. Rudloff:

Q: Please continue. Did she -

A: Each time that I took the medical bills to her, she said she couldn't authorize them to be paid. That's why I began to pay them, because I needed treatment.

Q: I presented you with a grouping of medical bills. Please take some time to look through them.

A: Okay. (Witness reviews bills.)

Q: Have you had sufficient time to review them?

A: Yes.

Q: Were all these medical bills that were presented to Express or their representative for payment relating to your work injury?

A: Yes.

Q: Did they pay any of them?

A: No.

Mr. Rudloff: We would move for entry of those into evidence.

Mr. Harding: Objection, Your Honor. I mean, a proper foundation hasn't been laid for these. Here's one from

Springfield Radiology for a C.T. of her abdomen. I mean, that doesn't have anything to do with this injury.

Mr. Rudloff: That was the E.R. at the Medical Center.

Mr. Harding: In Clarksville, Tennessee?

Mr. Rudloff: That was the E.R. from the Medical Center?

JONES: And some of -

Mr. Harding: I mean, none of these have any description on them. They could be related to heart surgery, you know. We don't know.

Mr. Rudloff: They've had ample opportunity to investigate this claim now.

Mr. Harding: No, we just got these today. We've had no opportunity-

Mr. Rudloff: You've had ample opportunity to investigate this claim.

Mr. Harding: Well, we have investigated the claim but we did not receive any bills.

Mr. Rudloff: You knew that when you took the deposition in October, you hadn't paid any medical bills.

Mr. Harding: Right.

Mr. Rudloff: And you've had-

Mr. Harding: And we didn't receive - we weren't -

Mr. Rudloff: And you should have investigated at that time.

Mr. Harding: And Dan, we weren't told that there were any outstanding bills.

Mr. Rudloff: That is untrue. That's absolute testimony. We can look at the testimony on that. We move for entry of those into evidence.

Mr. Harding: Objection, Your Honor.

THE COURT: I will admit the documents as an exhibit but the issue is still whether or not those constitute medical bills under the Act.

Mr. Harding: All right.

THE COURT: I will admit the documents but they're not necessarily bills until I say they're bills.

Mr. Harding: Thank you, Judge.

Jones testified all the medical charges evidenced by the documents introduced at the hearing relate to the treatment of her shoulder.

At the hearing, Jones was asked by her counsel, "Now regarding your present physical condition, what hurts?" Jones responded, "my shoulder," and then clarified it was her left shoulder.

On cross-examination, the following exchange took place:

Q: You gave testimony at your deposition?

A: Yes.

Q: And that was under oath?

A: Yes.

Q: And were all of your statements true and correct to the best of your knowledge and do you still agree with all the statements you made at that time?

A: I don't agree with all of them because that day, I had asked my attorney - I was in a lot of pain and I couldn't take a pain pill and I was in a lot of pain. So really, when I get under pain, I say things and do things, so that's all I can tell you. It may be correct and it may not.

Q: Can you think of anything off the top -

A: Not now.

Q: --of your head that was incorrect?

A: I don't remember.

. . .

By Mr. Harding:

Q: I asked you, 'You just have pain in your left shoulder now.' And you responded, 'Yes.' And then I asked, 'Okay. Your neck and your back are okay now,' and you answered 'Fine.' And then I asked, 'They are fine, so your claim today is only for problems with your left shoulder, correct?' And you answered, 'Yes, sir.' And then your counsel nodded in the affirmative that that was correct and then stated that that was correct. Is that true?

A: Yes, that's true.

Significantly, the "Applicable Law & Discussion"

section of Jones' brief to the ALJ reads as follows:

KRS 342.0011(1) defines an 'injury' to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

The most credible evidence in this case is that Jennifer sustained a serious work related injury to her left shoulder while employed by the defendant/employer on or about 08-26-2011.

Dr. Byrd is the treating rehabilitation specialist and his diagnosis of [sic] was that Jennifer sustained a work related left shoulder injury that would result in a 10% permanent impairment rating to the body as a whole as a result of decreased shoulder movement which directly affects her job and employability. The defendant/employer employed by Dr. Schiller to examine Jennifer and it is clear that he is a biased witness. His opinions are refuted by the testimony and records of the treating rehabilitation specialist, Dr. Robert Byrd. The overwhelming weight of the credible medical evidence is that Jennifer sustained a significant left shoulder injury while working for Express Personnel on 8-26-11 and that it continues to cause her problems.

We submit that Jennifer should be awarded permanent partial disability benefits under KRS §342.730(1)(c)(1) and the holding of the Supreme Court in

Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

We first observe the ALJ made no finding regarding the alleged shoulder injury other than to state he rejected Dr. Byrd's impairment rating for the shoulder injury. Similarly, in summarizing Jones' testimony the ALJ made no reference to her testimony that she had no neck or back problems and her only claim was of a left shoulder injury. A review of the May 25, 2012, opinion and award compels the conclusion the ALJ determined Jones sustained only a musculoligamentous injury of the thoracic spine. The ALJ did not make a specific finding Jones had an injury to her left shoulder. Further, in determining Jones' permanent partial disability, the ALJ rejected Dr. Byrd's 10% impairment rating for the alleged shoulder injury because his impairment rating did not comport with the AMA Guides. The ALJ determined Jones had a 5% impairment as a result of her August 26, 2011, injury which he defined as a "musculoligamentous injury of the thoracic spine." As noted in his findings, that 5% impairment was assessed by Dr. Byrd for a thoracic spine injury based on DRE category II of the AMA Guides. Unfortunately, the ALJ made no determination as to the compensability of any medical bills which had been introduced during the proceedings.

That aside, contrary to Express' assertion, judicial admissions play no role in Kentucky's Workers' Compensation administrative proceedings. See General Elec. Co. v. Turpen, 245 S.W.3d 781, 784 (Ky. App. 2006). Although effective June 15, 1995, the Commissioner of the Department of Workers' Claims in promulgating regulations governing administrative proceedings before ALJs adopted certain of the Kentucky Rules of Civil Procedure, Rule 36 entitled "Request for Admission" is specifically excluded. See 803 KAR 25:010 § 17(1); Wadlington v. Sextet Mining Co., 878 S.W.2d 814 (Ky. App. 1994). Instead, when facts are undisputed, the parties in workers' compensation actions before the ALJ are required to enter agreed stipulations. See 803 KAR 25:010 § 16. Therefore, Jones' statements cannot and do not constitute judicial admission.

However, we find the doctrine of judicial estoppel to be applicable in the case *sub judice*. In Weddle Enterprises, Inc. v. Jasper, 2009-CA-001812-WC, rendered May 14, 2010, Designated Not To Be Published, the Court of Appeals defined the doctrine of judicial estoppel as follows:

However, we need not reach a discussion of issue preclusion in this case because we find the doctrine of judicial estoppel to be applicable. The principle acts to estop Weddle's claim

on appeal as Weddle now takes a position contrary to the position it took earlier in the administrative proceeding. *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422 (Ky. App. 2008). See also, T. Scott Belden, Annotation, *Judicial Estoppel in Civil Action Arising from Representation or Conduct in Prior Administrative Proceeding*, 99 A.L.R. 5<sup>th</sup> 65 (2002). Judicial estoppel is a quasi-estoppel principle that may 'be applied to prohibit a party from taking inconsistent positions in judicial [or quasi-judicial] proceedings.' *Hisle*, 258 S.W.3d at 434; *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759 (Ky. App. 2001). The formula often applied for this principle asks whether (1) the party is taking a position clearly inconsistent with an earlier position, (2) the party succeeded in persuading a court to accept the earlier position, and (3) the party would derive an unfair advantage if not estopped. *Id.*

In the present case, after Jasper filed his notice of appeal from ALJ Manno's interlocutory opinion, award, and order, Weddle filed a motion to dismiss on the ground that the interlocutory opinion was not final and appealable, but subject to change or modification. The Board agreed with Weddle and dismissed Jasper's claim. Thus, Weddle succeeded in persuading the Board to accept its position. Now Weddle attempts to argue that the issues in the order were finally decided and that ALJ Hays was precluded from revisiting the issues therein. Thus, according to Weddle, it would appear that Jasper should have had no recourse at all. This would be an unfair advantage to Weddle and detriment to Jasper. Thus, we find that

Weddle is barred from advancing this argument on appeal. See, *Hisle, supra*.

Slip Op. at 6.

Throughout these proceedings Jones repeatedly stated she was not pursuing a claim for her neck and back injury. Yet, after the ALJ awarded income and medical benefits for a thoracic injury and did not award income and medical benefits for the shoulder injury, in responding to the petition for reconsideration, Jones, for the first time, cited Dr. Byrd's deposition testimony regarding a thoracic injury which resulted in a 5% impairment. Jones also emphasized Express had deposed Dr. Byrd and questioned him regarding the thoracic injury and his impairment rating. Likewise, on appeal, Jones makes the same argument. However, Jones' deposition and hearing testimony, as well as the argument in her brief to the ALJ completely negated a claim for a neck or back injury. Jones' position post-award is "clearly inconsistent with an earlier position." Slip Op. at 6.

Throughout the proceedings, Jones asserted she sustained a shoulder injury and nothing more. In her deposition and at the hearing, Jones affirmatively stated her neck and back were fine and had not been injured. In responding to the petition for reconsideration and in her

appeal brief, Jones took a position inconsistent with her earlier position. In spite of the fact Jones did not assert a thoracic injury claim, the ALJ awarded benefits for such an injury. Even though Jones did not succeed in persuading the ALJ to accept her earlier position she had sustained a work-related shoulder injury, we believe Jones would derive a patently unfair advantage if allowed to recover income and medical benefits for an unclaimed injury and, more importantly, an injury she and her counsel expressly stated, on more than one occasion, was not being asserted. Therefore, Jones is estopped from asserting in her response to the petition for reconsideration and on appeal she sustained a compensable thoracic injury and the ALJ's determination of such an injury is supported by substantial evidence.

Significantly, Jones never introduced any proof regarding a thoracic spine injury. A potential thoracic injury was discussed during a lengthy rambling discourse between Dr. Byrd and Express' counsel concerning Dr. Byrd's findings and impairment rating for the thoracic injury. Oddly enough, this discussion between Dr. Byrd and Express' counsel related to Dr. Byrd's medical report which was not introduced by Jones.

Moreover, we conclude the award for a thoracic injury is not supported by substantial evidence. Dr. Byrd testified if Jones' symptoms resolved and she had no further restrictions in terms of range of motion she would have no impairment. Jones conceded at her deposition and at the hearing her back was fine and she had no pain. Therefore, Jones had no impairment and Dr. Byrd's testimony cannot constitute substantial evidence supporting the ALJ's award.

In summary, Jones' sole claim was for a left shoulder injury. In a vaguely worded opinion and award, the ALJ found Jones sustained only a musculoligamentous injury of the thoracic spine and, pursuant to thoracic DRE category II of the AMA Guides, she has a 5% impairment. For an unknown reason, the ALJ refrained from discussing Jones' testimony she had no neck and back symptoms and her only injury was to her left shoulder. The ALJ specifically rejected Dr. Byrd's impairment for the shoulder injury and implicitly determined Jones did not sustain a compensable shoulder injury. Therefore, Jones is barred from receiving an award for a thoracic injury when she did not assert a claim for a thoracic injury and specifically stated she was not asserting a claim for a thoracic injury throughout the proceedings. Similarly, given Jones' testimony,

substantial evidence does not support an award of income and medical benefits for a thoracic spine injury. Accordingly, the ALJ's award for a thoracic injury must be reversed.

Concerning Express' second argument, we agree the ALJ did not address the documents introduced by Jones at the hearing which she alleged were medical charges for treatment of her work-related shoulder injury. Significantly, the parties did not identify unpaid or contested medical expenses as one of the contested issue in the March 5, 2012, benefit review conference ("BRC") order.

803 KAR 25:010(13) and (14) read as follows:

(13) If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:

(a) Prepare a summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge; and

(b) Schedule a final hearing.

(14) Only contested issues shall be the subject of further proceedings.

Since the compensability of the unpaid medical expenses was not listed as contested issues at the BRC,

Jones waived her right to claim she is entitled to payment of the medical bills introduced at the hearing.

Further, at the hearing, the ALJ never determined whether the compensability of the alleged medical bills was a contested issue. Since the ALJ did not address the compensability of the medical bills in the BRC order, the opinion and award, or in the order ruling on the petition for reconsideration, we conclude the ALJ did not believe the compensability of the medical bills was a contested issue. Thus, Jones is not entitled to payment of those medical charges evidenced by the documents introduced at the hearing.

We point out that in her brief to the ALJ after summarizing the "Relevant Evidence," in the section of her brief styled "Applicable Law and Discussion," Jones made no argument regarding the compensability of those medical bills. In her conclusion, Jones merely states she is entitled to income benefits and payment of her medical bills and expenses as a result of her work-related left shoulder injury.

Finally, since Jones testified all the medical expenses in question were for treatment of and related to her shoulder injury and the ALJ did not award income and medical benefits for the shoulder injury, the medical

expenses introduced by Jones at the hearing are not compensable. Without question Jones testified all of the medical expenses relate solely to treatment of the left shoulder injury. Thus, since the ALJ found Jones did not sustain a shoulder injury, Express is not liable for the medical bills which Jones introduced at the hearing.

Accordingly, the May 25, 2012, opinion and award, and the July 6, 2012, order ruling on the petition for reconsideration are **REVERSED** and this matter is **REMANDED** to Hon. Thomas G. Polites, Administrative Law Judge ("ALJ Polites") for entry of an opinion and order in conformity with the views expressed herein dismissing Jones' claim for income and medical benefits in its entirety.<sup>3</sup>

ALL CONCUR.

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<sup>3</sup>By order dated July 6, 2012, this claim was reassigned to ALJ Polites.

**ADMINISTRATIVE LAW JUDGE:**

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