OPINION ENTERED: September 4, 2012

CLAIM NO. 200997597

JAMES RIVER COAL COMPANY PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, ADMINISTRATIVE LAW JUDGE**

DOYLE EDWIN WHITAKER
and HON. OTTO D. WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. James River Coal Company ("James River") seeks review of the March 25, 2012, opinion, order, and award of Hon. Otto D. Wolff, Administrative Law Judge ("ALJ") finding Doyle Edwin Whitaker ("Whitaker") to be totally occupationally disabled and awarding permanent total disability ("PTD") benefits enhanced by 30% pursuant

to KRS 342.165(1) and medical benefits.[1] James River also appeals from that portion of the May 18, 2012, order denying its petition for reconsideration relative to enhancement of the award pursuant to KRS 342.165.

Whitaker's Form 101 alleges on February 2, 2009, he sustained injuries when a rock fell from the roof striking him "on head, shoulders, left index finger, left leg above the knee and left leg." The Form 101 reflects the following injuries: "left leg, amputation of the left index finger with associated anxiety and depression." Whitaker also alleged a violation of a safety regulation pursuant to KRS 342.165.

Whitaker testified by deposition on April 21, 2011, and at the hearing held on January 24, 2012. Whitaker was operating a continuous miner on the date of the injury. He had also worked as a roof bolter. Whitaker described the incident resulting in his injuries as follows:

> A: I was – started the miner up and was loading – had my pan and my conveyor full of coal, and I had my heads to the top waiting on my shuttle car. When the shuttle car pulled in under me, I

[1] The opinion, order, and award of the ALJ was mistakenly dated March 25, 2010, and awarded temporary total disability benefits. In a May 18, 2012, order, ruling on the petitions for reconsideration the ALJ amended the opinion, order, and award to reflect permanent total disability benefits were awarded and the opinion, order, and award was rendered on March 25, 2012.

turned my conveyor on to let it empty, then when I started down pressure down on the heads to force the coal down the conveyor, the top fell in on me, and it fell from the heads of the miner all the way back through the bolt to where I was sitting, and it cut – it hit me in the head and shoulder first and I tried to fight it off me and it landed – come down and landed across my legs, amputated my finger.

Q: Do you know what caused the rock to fall?

A: Draw rock is what it was.

Q: And, what caused the – what caused the rock to fall?

A: The foremans I had at the time on the section wouldn't let me take enough top. Wouldn't let me take the draw rock because of the reject and making a good impression, I'm assuming.

Q: How long had you been advised not to take all the draw rock?

A: They changed section foremans about a month or so before I – before the injury. I'm not sure of the exact time, but they changed foremans and stuff on the section just a short period of time before I got injured. And I was advised by the section foreman to quit taking so much top. Leave it and let the roof bolter – the way it is pin it to the top.

Q: And when you say pin it to the top, what are you talking about it?

A: Let the roof bolters bolt it up.

Q: Oh, okay. Not the miner?

> A: No, no. Not the miner.
>
> Q: Okay. Had you experienced other rock falls while you was [sic] operating the miner after you had been instructed to take less top?
>
> A: Daily. Daily.
>
> Q: Did you ever communicate that to anyone?
>
> A: Oh, yeah. Anytime – anytime you got to tram a miner for half way across a section to clean a whole cut of rock up for the bolt machine, everybody on the section knows it. But, you know – but the miner does – I mean, the foreman – section formans knowed it. I don't know if it ever got outside or anything, but the section foremans knowed it.

Whitaker described his physical injuries:

> A: I had three compound fractures of my leg. Two of my femur right above my knee, and one of my fibula, and it knocked the knuckle out of my finger and they – it was twisted about four times around.
>
> Q: So they had to amputate that part of your finger?
>
> A: Yeah, they said there's nothing they could do to save it.
>
> Q: Okay. What type of treatment have you received to your left leg?
>
> A: I've got a rod from my kneecap to my hip with pins and – and I've had two knee surgeries and they want to do a knee replacement on me.

> Q: Are you talking about your left leg and left knee?
>
> A: Left. On my left leg and my left knee, yeah. They're wanting to do a knee replacement, but I'm holding off on that. They said one is all I can have.

At his deposition, Whitaker testified to the need for hanging reflectors from the mine roof stating:

> Q: Do you have to hang reflectors?
>
> A: You have – reflectors?
>
> Q: Yes.
>
> A: Reflectors is [sic] hung when – when you get in. If you knock a reflector down, you have to hang it back next to the last row of bolts from the face, from the next to the last row of bolts.
>
> Q: If you knock it down you have to hang it back?
>
> A: Yes. If the miner head knocks it down, you have to hang it back when the cut is done.
>
> Q: Who hangs it up?
>
> A: Me, the whoever. The miner man, if they knock it down they hang it up, but the roof bolter, when they get through bolting a place, they hang it next to the last row of bolts.
>
> Q: Now do they –
>
> A: That's sort of a warning device.
>
> Q: -- go in after you or before?

> A: They go in before I do, then after I do. It's just a continuous cycle.
>
> Q: And do you hang those reflectors so that that will warn people who are walking?
>
> A: It's a warning device, yes.
>
> Q: Those who are walking in the area?
>
> A: Yes.

Regarding the presence of reflectors in the area of the mine where he was injured, at the hearing Whitaker testified as follows:

> Q: There was a citation written that said that you were in by the second row of bolts. Do you know if that – do you have any knowledge where you were when the rock fell on you?
>
> A: I was in – I was in one right when I – when I was covered up. The miner was in one heading.
>
> Q: Is there anything in the mines that would tell you if you were past the second row of bolts?
>
> A: The reflector. Some kind of a warning device.
>
> Q: And, did you – prior to your injury, did you observe any reflectors that you would have gone under prior to the rock fall?
>
> A: No, I wouldn't have crossed under any reflectors.
>
> Q: Do you recall seeing any reflectors in the area where you were operating a miner?

A: No.

Q: I'm reading from the deposition of Ricky Campbell on page 42, and I'm going to ask you to see if this is where you were. There's a citation written because there was the – said that the – says the two reflectors were not being posted in the second row by permanent support in the number one right cross cut. My question to you, then, is that where you were operating the miner?

A: I was in one right, yes.

Q: And, where should those reflectors have been from where you were operating the miner?

A: If there was anything dangerous there or anything that wasn't bolted, they should've been on the second row of bolts back from that.

Q: And, again, why is – why are those there for you?

A: A warning device.

Q: Who puts those – who puts up those reflectors?

A: Roof bolters puts them up. Bosses puts them up. I mean there's several different people underground that puts those reflectors up. Mostly the bolting machine man puts them up, or a miner man puts them up when he gets done cutting.

On cross-examination, Whitaker testified as follows:

Q: First of all, with this testimony that you just gave concerning

> reflectors, do you have any specific recollection as to whether there were or were not reflectors?
>
> A: Yes, honey. If they'd have been reflectors in the one right, I wouldn't have went [sic] by.
>
> . . .
>
> Q: Okay. Where would it have been in relation to any reflectors hanging on the area where you worked?
>
> A: If the reflectors was [sic] in one right, it would've been – the miner would've already been past the reflectors.
>
> Q: If you're operating a miner and you were to knock down a reflector, what would you do?
>
> A: When I get done with a cut, I hang it back.
>
> Q: Okay. And, do you have any knowledge of any reflector being present and knocked down by your operation of the miner?
>
> A: No.
>
> Judge Wolff: Is this on the day of the injury?
>
> Mr. Slone: Yes.
>
> Q: On the day of the injury.
>
> A: No, not – not where I – not in one right, no.

In support of his claim for enhanced benefits pursuant to KRS 342.165, Whitaker relied upon the citations

issued by the Kentucky Office of Mine Safety and Licensing and by the United States Department of Labor Mine Safety and Health Administration ("MSHA").

James River relied upon Whitaker's deposition testimony that the area where he was working when the rock fell on him was supported by roof bolts, and there were no prior warning signs of an imminent rock fall.

James River also relied on the deposition testimony of its mine superintendent, Ricky Campbell ("Campbell"). Campbell testified the area where Whitaker was working was supported with roof bolts and when the rock fell "the unsupported top came through the bolts and contacted him." Campbell stated James River was able to terminate the violation by holding a safety meeting. No other citations were issued. Further, there was no problem with the method used to cut the coal, and James River submitted no change in its mining method. Campbell testified there was no finding the draw rock fell as a result of an intentional failure of James River to comply with the safety regulations. Campbell also testified measures were in place in the area where the accident happened to support the top, and there was nothing James River could have done to prevent the injury.

Significantly, Campbell testified he did not go in the mine with the inspectors after the accident.

With respect to the issue on appeal under the heading of "Discussion and Determination," the ALJ concluded as follows:

> Plaintiff contends his work accident was caused in some degree by the intentional failure of the employer to comply with specific safety statutes or administrative safety regulations relative to the maintenance of safety in an underground coal mine. Consequently, he claimed enhanced benefits pursuant to KRS 342.165; it is the employee's burden to prove that the employer's violation of a specific safety statute or regulation contributed to his injury. Cabinet for Workforce Div. v. Cummins, 950 S.W.2d 834, (Ky. 1997).
>
> KRS 342.165 does not require one to demonstrate that an employer intentionally meant to harm an employee or that the employer's conduct was egregious or malicious. An employer's intent is inferred from the employer's failure to comply with a specific statute or regulation. If the violation 'in any degree' causes work-related to, [sic] KRS 342.165(1) applies. Chaney v. Dags Branch Coal Company, 244 S.W.3d 95 (Ky. Sup. Ct. 2008).
>
> As a result [sic] Plaintiff's accident Defendant received one Federal Citation for violating Title 30 CFR 75.202(a), and two State Notices of Non-Compliance/Closure Orders, one addressing Defendant's failure to have two reflectors posted in the second row

of permanent roof support; and the other addressing Defendant's failure to comply with its own roof control plan. These citations were issued by mining officials who regularly investigate underground mining accidents.

Having determined there were Federal and State Safety Regulations that Defendant failed to be in compliance with at the time of Plaintiff's accident, the only thing that remains to be determined, for Plaintiff to receive additional benefits under KRS 342.165, is whether Plaintiff's injuries were caused in any degree by Defendant's violation of the applicable regulations.

On the two State Citations the inspector was specifically asked, 'Did any injury or fatality occur as a result of Non-Compliance?' and on both citations the inspector answered 'yes.' In the Federal Citation the inspector wrote, 'The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of rock, face or ribs and coal or rock bursts was not complied with . . . where the continuous miner operator was injured by falling rock that measured 22 inches wide, 50 inches long and 2 inches thick to approximately 10 inches thick causing crushing injuries.' The reports of these trained inspectors seem to preclude making a finding other than that Plaintiff's injuries were caused to some degree by Defendant's violation of the applicable safety regulations.

Defendant contends its violation of the safety regulations cannot be connected to Plaintiff's injuries and therefore, he should not be awarded

increased benefits pursuant to KRS 342.165. Defendant's position is mainly grounded on the testimony of Rickey Campbell, Defendant's superintendent of the mine in which Plaintiff was injured. Campbell has worked for Defendant since 1994. Campbell explained that each mine has its own roof control plan, which consists of what is determined to be a suitable means of maintaining the roof so as to keep accidents from happening. Campbell described 'draw rock' as any rock that has fallen from the roof to the roof anchorage. Anchorage refers to the bolt that has been put in-place to hold the roof up. There is no anchorage installed until after a cut has been made by the continuous miner, then the roof bolters step in and install the anchorage in the form of roof bolts. Campbell indicated that, in his opinion, there was no problem with draw rock in the vicinity of Plaintiff's accident. He acknowledges he never saw the rock that fell nor did he know where Plaintiff was located at the time of the rock fall.

Defendant contends the Federal Citation was strictly issued on the occurrence of a rock falling from the roof. But the language of the Federal Citation does not appear so simple, for the Federal Citation specifically noted that the rock that fell from the roof, fell from a place where Defendant failed to comply with the regulations. 'The 012 MMU side of the super section with the continuous miner operator was injured by falling rock…' Defendant contends that nobody knows exactly where Plaintiff was located at the time of his injury and therefore, it is impossible to connect the safety violations with his injury, but the fallacy with this reasoning is that it

is known that Plaintiff was located under the falling rock and that area of the ceiling, from which the rock fell, was not in compliance with Defendant's roof control plan (Kentucky Notice of Non-Compliance No. 09306003) nor was it in compliance with Federal Mine State Safety Regulations (Title 30 CFR 75.202(a)).

Plaintiff did testify that at the time of the roof fall he was not located within the 'red zone.' He defined the 'red zone' as the area around any part of the continuous miner. Not being in the 'red zone' does not mean he was under protected roof. Plaintiff's exact location at the time of the roof fall is elusive, but, based upon the mine safety experts' conclusions, it can be said Plaintiff was positioned under the rock that fell from the roof and the rock fell from an area of the roof that was found to be in violation of at least two specific safety regulations.

Two different Mine Safety Inspectors specifically indicated Plaintiff's injuries were at least in part caused by Defendant's violation of certain safety regulations. This documented evidence is more persuasive than that of the mine's superintendent who has not seen the rock that fell and who has worked for Defendant for nearly 20 years and who never saw the fallen rock.

Based upon the fact Plaintiff was under the rock when it fell from the roof and the area of the roof from which it fell was deemed to be in violation of safety regulations addressing how the roof of a mine is to be safety maintained, it can only be concluded that Plaintiff's injuries

> were caused in some degree by Defendant's failure to comply with several specific safety regulations. Consequently, Plaintiff is entitled to a 30% increase in his compensation as provided by KRS 342.165.

Both parties filed petitions for reconsideration. As Whitaker's petition for reconsideration does not relate to the issue on appeal, we will not discuss it. Concerning the ALJ's finding KRS 342.165 is applicable, James River asserted the ALJ was required to make additional findings and requested additional findings regarding each citation. James River posited since the ALJ's reasoning was erroneous, he must address each citation and review the evidence relative to each. James River also requested corrections be made "to several findings relative to the evidence submitted relevant to KRS 342.165." James River asserted much of the same argument it now makes on appeal.

In the May 18, 2012, order ruling on James River's petition for reconsideration, the ALJ stated, in relevant part, as follows:

> Next, Defendant contends the Opinion needs additional findings in regard to whether the ALJ could infer, from the available evidence, the determination that Defendant's violation of a specific safety statute or regulation contributed, in any degree, to cause Plaintiff's injuries.

Though Defendant goes into a line by line review of the ALJ's determination regarding whether a safety violation occurred and whether any such violation contributed in any degree to cause Plaintiff's injuries, this is merely another attempt by Defendant to reargue the case. The inferences drawn from the evidence by the ALJ and the logic employed by the ALJ in reaching the conclusion on this point was well explained in the Opinion.

In its Petition for Reconsideration of this particular determination, Defendant again argues, as it did in its Brief, that because the parties and witness could not [sic] where Plaintiff was when the rock fell, there cannot be a determination that a safety violation contributed, in any degree, to cause Plaintiff’s injuries. It is again noted that this argument is without merit, it is known where Plaintiff was when the rock fell – he was under the rock. The rock fell from a spot in the roof that was found to exist in violation of specific regulations of the Federal and State governments. It was specifically found by the U.S. Dept. of Labor, Mine Safety and Health Administration’s inspector that this particular spot in the roof, "was not complied with on the 012 MMU side of the super section where the continuous miner operator was injured by falling rock." A similar finding was made by the inspector for the Kentucky Office of Mine Safety and Licensing. This State inspector determined this spot in the roof was not in compliance with Defendant's approved Roof Control Plan. On this issue there was substantial evidence from which the ALJ could infer Plaintiff’s crush injuries were, to a degree, caused by Defendant’s violation of Federal and State safety regulations.

> Defendant's petition seeking to have the ALJ reconsider the determination that Defendant's safety violations did, to some degree, contribute to cause Plaintiff's injuries, is another attempt by Defendant to reargue the issue; therefore, Plaintiff's Petition on this point is OVERRULED.
>
> Defendant's Petition for Reconsideration is sustained on a point concerning the ALJ's incorrect reference to the specific numbers of the two (2) Notice of Non-Compliance/Closure Order. Citation No. 09306002 addresses Defendant's failure to comply with the Roof Control Plan. Notice of Non-Compliance/Closure Order No. 09306003 addresses Defendant's alleged wrong doings regarding its placement of two (2) reflectors in the vicinity of Plaintiff's work accident.
>
> With this clarification in mind, the reference to No. 09306003 on page twenty-eight (28) of the Opinion is replaced with No. 09306002. A review of the Opinion and Defendant's Petition, does not immediately reveal any other incorrect reference, but, in the event such incorrect reference exists, the Opinion should be considered revised as above set forth.

On appeal, James River again asserts the ALJ erroneously concluded:

> Doyle Whitaker was not under protected top at the time of his accident and that he was under the rock that fell from the roof, in violation of 'at least two specific safety regulations' and found the employer liable for payments under KRS 342.165.

James River maintains that at the time of the accident, it had in place a roof control plan and was adhering to its provisions as the area where Whitaker was working was supported by the means called for in the plan. James River contends Campbell and Whitaker testified it used reflectors, and the miner operator and the roof bolter are two primary operators responsible for placement of those reflectors. James River argues Whitaker "provided no testimony that he was in an area he should not have been due to lack of placement of a reflector nor that his accident was in any way caused by lack of proper placement of reflectors." James River contends the federal inspectors did not write citations for "red zone and reflectors violations and their drawings do not show a positioning of Whitaker in the same area drawn by the state inspector." It maintains as follows:

> Contrary to the finding of the ALJ, Whitaker's own testimonial evidence consistently places him under protected top and there is no violation of 30 CFR 75.202(a) resulting from the intentional failure of the employer to comply with installation or maintenance of safety appliances or methods.

Consequently, James River argues the case *sub judice* is completely distinguishable from the facts in Chaney v. Dags Branch Coal Company, 244 S.W.3d 95 (Ky. 2008). James

River argues the ALJ did not state how it allegedly violated the regulation/statute and how "the determined violation caused the accident." It asserts the ALJ's finding "'trained inspectors seem to preclude making a finding other than that Plaintiff's injuries were caused to some degree by Defendant's violation of the applicable safety regulations'" is insufficient and erroneous. Further, the ALJ's failure to respond to its request to correct erroneous factual findings leaves the record muddled as to what actually occurred. James River posits the ALJ's decision to enhance Whitaker's benefits pursuant to KRS 342.165 should be reversed or remanded for further review of the citations and a determination of how its alleged non-compliance relates to the accident.

Whitaker, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including entitlement to enhanced benefits pursuant to KRS 342.165(1). *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Whitaker was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision regarding the applicability of KRS 342.165(1). Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.

1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal.

McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

KRS 342.165(1) reads as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employee to

> use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

In Chaney v. Dags Branch Coal Company, supra, the Supreme Court instructed as follows:

> Absent unusual circumstances such as those found in Gibbs Automatic Moulding Co. v. Bullock, 438 S.W.2d 793 (Ky. 1969), an employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require. Thus, its intent is inferred from the failure to comply with a specific statute of regulation. If the violation "in any degree" causes a work-related accident, KRS 342.165(1) applies.

Id. at 101.

On the day Whitaker was injured, MSHA issued citation/order number 7504776. Under the heading "Condition or Practice" the citation reads as follows:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of roof, face or ribs and coal or rock bursts was not complied with on the 012 MMU side of the super section where the continuous miner operator was injured by falling rock that measured 22" wide, 50" long and 2" thick to

> approximately 10" thick causing injuries.
>
> Termination time is due to giving the operator enough time to hold safety talks with all three shifts.

The citation reflects James River violated Title 30 CFR 75.202(a) which was as safety violation. Under the heading of "Gravity" the citation reflects: "significant and substantial." Negligence listed was "moderate."

The record also contains copies of what appears to be a sixteen page inspection report styled "Daily Cover Sheet" which was attached to the MSHA citation. Page 14 of that report reflects as follows:

> Date: 2-2-09
> Citation Number 7504776
> What is the Violation: Fall of Roof; Draw rock hit coal miner operator. broke left leg
> left index finger
> Where is the Violation Located or Observed: 012 MMU #1 Heading
> Who Knew the Violation Existed: foreman should have
> How long has the Violation existed: 10 min
> Number Affected: 1
> If an Accident should Occur, How Serious Would it be: Lost work day restricted duty
> What is the Likelihood of this type of Accident: Occurred
> Why: Broken bones

Page 15 of the report reflects the inspector traveled to the surface where he and two state inspectors

had a “Daily close out Conference” with Campbell and “Kelly Cochran, Safety Department.” The federal inspector made the following handwritten notation: “issued my paper, advised him of his conference rights and left mine property.”

Page 16 of the report reflects the following handwritten notation: “Roof adequately supported except where cited.”

The record reflects on the date of the injury the Commonwealth of Kentucky Office of Mining Safety and Licensing (“Commonwealth”) issued to James River a “Notice of Non-Compliance/Closure Order,” number 09306002, State File No.: 11305-53. The notice reflects the type of issuance was “Non-Compliance.” The notice contains the following:

> Did an injury or fatality occur as a result of Non-Compliance? Yes.
>
> Description of Non-Compliance/Closure Order, Condition or Practice: Non Compliance with: KRS 352.201-1. 12/14 supersection.
>
> The approved roof control plan was not being complied with when the accident with Whitaker occurred in the #1 heading, 1 (one) break spad 4634. The miner operator was in by the 2nd row of permanent roof support.
>
> ABATEMENT

> Remedial Measures Taken: Conducted meeting with mine management on red zone and approved roof control plan. Company will conduct meeting with employees.

A second Notice of Non-Compliance/Closure Order, number 09306003 provides the same information and that an injury occurred due to non-compliance and identified the non-compliance. Under "Remedial Measures Taken" is the following:

> Discussed with mine superintendent Rick Campbell over approved roof control plan page 21 (placing 2 reflectors on the 2nd row of permanent roof support to warn employees not to go inby).

Further, in the following exchange during Campbell's deposition, Campbell acknowledged James River may have violated a safety regulation:

> Q: Is there anything in these documents that you've seen or read that any one person knew or saw where my client was at the time the rock fell?
>
> A: No.
>
> Q: Okay. When you look at the citation that was discussed with you regarding the roof control plan, and it's the citation 09306003, regarding placing the reflectors on the second row of permanent roof support to warn employees not go to inby.
>
> A: Okay.
>
> Q: Are they saying that there was no reflector or warning on the second row

of bolts from where he would have been standing or the last row of bolts leading to the face? I guess my question is, and I'll try to make it easier, which row of bolts did not have a reflector?

A: The way this ticket was written it's hard to interpret what they're talking about. The way that reflector would have been hung would have been on the second row in #1 heading, is where it would have been hung. And for them not to be here there, it could have been two things. It could have been forgot by the bolt machine man or it could have been got by the miner when he started cutting. The miner could have got it. So that's the best I can answer your question.

Q: So what we're talking about is the second row of bolts that's from the face?

A: Yes, sir, second row of bolts from the face.

Q: That would have been the final warning to the miner operator, isn't that correct, to make sure he was not supposed to go inby the second row of bolts?

A: Yes.

Q: And if there was no reflector on that row of bolts, then the miner operator would not have had any warning where he was positioning when he was operating that miner as relations to being in that danger zone?

A: That's true. That's their protection.

Q: That's right.

> A: But he's also an experienced coal miner that knows where he's at and he's depending on a little six inch reflector or two little six inch reflectors an inch wide that's there. If it's low and he's got his head bent over, it's hard to see that stuff. Again, that could have been gone when he pulled that miner up, the reflector. What this is saying, this ticket is, is that the reflector was not present when the inspectors got there. I mean he had already cut probably ten or fifteen feet and he could have cut the reflectors down. That's the way I interpret that, okay.
>
> Q: But in any event, for some reason it wasn't there?
>
> A: Again, too, the reflector in that one heading where Doyle would have positioned himself, he would have been away from that reflector. That reflector is straight ahead and Doyle would have been – the reflector would have been in 1 heading and Doyle would have positioned himself either in the 1 right cut when he started. So technically when Doyle started his cut he would have solid face and he wouldn't have had unsupported top to walk into. He would have solid face. So, if that helps.

Campbell testified it was the foreman's responsibility to make sure the stickers or flags were on the bolts. In this case, the Commonwealth determined the foreman was responsible for the warning not being on the row of bolts.

The record reflects James River received citations for violation of state and federal mine safety

regulations. Those violations state Whitaker's injury was caused by James River's failure to comply with specific state and federal administrative regulations. The state and federal citations constitute substantial evidence supporting the ALJ's decision on this issue.

Admittedly, during his deposition, Whitaker testified he was under a top which was bolted; however, at the hearing he testified differently. As recited herein, at the hearing Whitaker testified he did not recall seeing any reflectors in the area where he was operating the miner. He re-emphasized this point on cross-examination. Therefore, we find no merit in James River's assertion Whitaker's testimony consistently places him under a protected top and there is no violation of 30 CFR 75.202(a). As previously pointed out, the ALJ is free to rely on one portion of Whitaker's testimony and give no weight to another portion.

Because the ALJ's determination James River's failure to comply with specific state and federal regulations caused Whitaker's work-related injuries is supported by substantial evidence, the decision of the ALJ must be affirmed. Special Fund v. Francis, supra.

Accordingly, the March 25, 2012, opinion, order, and award, and the May 18, 2012, order ruling on the

petition for reconsideration as they relate to the ALJ's determination to enhance Whitaker's benefits pursuant to KRS 342.165 are **AFFIRMED**.

ALL CONCUR.

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