OPINION ENTERED: November 2, 2012

CLAIM NOS. 201101207,
201101045, & 201101030

JOHN BARGO & CLARK BARGO, JR. PETITIONER

VS. **APPEAL FROM HON. RICHARD JOINER,**
ADMINISTRATIVE LAW JUDGE

HINKLE CONTRACTING CO., INC.
and HON. RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
AND ORDER DECONSOLIDATING

* * * * * *

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

ALVEY, Chairman. The above appeals have been consolidated since the issues and evidence presented below are essentially identical. On appeal, the petitioners assert Hon. Richard M. Joiner, Administrative Law Judge (ALJ), erred in refusing to recuse from each case and in

dismissing both claims. We affirm on all issues raised in both appeals. We will review the facts pertinent to each claim separately.

CLARK BARGO, JR. V. HINKLE CONTRACTING CO., LLC
CLAIM NO. 2011-01030

Clark Bargo, Jr., ("Clark Bargo"), appeals from the opinion dismissing his claim for injuries he allegedly sustained while working for Hinkle Contracting Co., LLC (Hinkle), rendered by the ALJ on May 25, 2012. Clark Bargo also appeals from the July 6, 2012 order overruling his petition for reconsideration. On appeal, Clark Bargo argues the ALJ erred in refusing to recuse and in determining he did not sustain work-related cumulative trauma injuries.

Clark Bargo filed a Form 101 on July 21, 2011, alleging work-related cumulative trauma injuries to his back, neck, knees, hands, shoulders and legs manifesting on April 8, 2011, the date he last worked for Hinkle, due to his work as a heavy equipment operator beginning in the 1970's.

In support of the Form 101, Clark Bargo filed the report of Dr. Robert Johnson. Dr. Johnson performed an independent medical evaluation ("IME") on June 20, 2011, at

Clark Bargo's request. Dr. Johnson noted there was no specific history of injury. He noted treatment has consisted of Lorcet, occasional injections and chiropractic care. MRIs of the cervical and lumbar spine were performed on May 17, 2011, and demonstrated multi-level degenerative changes.

On physical examination, Clark Bargo complained of pain to the left of midline along the entire lumbar spine. He also reported pain radiating into both shoulder blades. Dr. Johnson opined the work injuries were responsible for the complaints, and were caused by the wear and tear he sustained for over 35 years of working as a heavy equipment operator. Dr. Johnson opined Clark Bargo had reached maximum medical improvement ("MMI"), and assessed a 21% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Johnson further opined Clark Bargo does not retain the physical capacity to return to work as a heavy equipment operator, and should avoid squatting, twisting, climbing, unprotected heights, lifting, pushing, pulling, and carrying over ten pounds. Likewise, he cautioned against stooping, shoveling and walking on uneven surfaces.

Clark Bargo testified by deposition on October 28, 2011, and at the hearing held March 21, 2012. He is a resident of Gray, Kentucky, and was born on August 23, 1953. He completed the eleventh grade, and did not obtain a GED. He has surface mine foreman papers. He began working for Hinkle in 2002 as a heavy equipment operator. He last worked there on April 8, 2011, when he was laid off. He drew unemployment benefits, and has not been employed since that date.

Clark Bargo stated he was generally off work from November through March due to inclement weather while employed by Hinkle. As a heavy equipment operator, he operated bulldozers, articulate trucks, skid steers, backhoes, and ditch-witches on variable terrain. He explained operating the equipment involved extensive use of his arms and legs - - more so the right leg than the left. He also drove a truck which required a commercial driver's license ("CDL"). He renewed his CDL after he last worked in April 2011, which required a physical examination performed by Dr. John Johnson in Corbin on July 12, 2011. His job also required him to manually fill sand bags, then lift and carry them into position to stop erosion, which he indicated was heavy work.

Clark Bargo treats with his family physician, Dr. Mohammad Jawed, in Corbin, Kentucky. He indicated Dr. Jawed diagnosed a herniated lumbar disk and referred him to Dr. Huff. Dr. Huff diagnosed a rotator cuff problem. Neither Dr. Huff nor Dr. Jawed advised him the problems were work- related. Dr. Chad Morgan, his chiropractor, was the first healthcare provider who advised him his conditions were work-related.

Clark Bargo stated he has problems with his back, legs, arms and neck. He described his neck symptoms as consisting of pain and numbness into both arms. He also complained of low back pain and numbness in his legs, more so on the right than left. He stated his pain and symptoms worsened while working for Hinkle due to greater equipment usage than with previous employers. He admitted receiving cortisone shots for his low back in the past, which were administered by his then family physician, Dr. Wells. After Dr. Wells passed away in the 1990’s, he began treating with Dr. Jawed.

In addition to Dr. Johnson’s report, Clark Bargo submitted the report of Dr. Ronald Dubin, an orthopedic surgeon, who performed an IME at his request on January 23, 2012. Dr. Dubin noted he had developed neck and back pain over a number of years, and quit working on April 11, 2011.

Dr. Dubin diagnosed progressive posttraumatic arthritis to the cervical and lumbar spine secondary to his work. He assessed a 13% impairment rating pursuant to the AMA Guides, of which he attributed 6% to the cervical spine, and 7% to the lumbar spine, all of which he related to the work as a heavy equipment operator. Dr. Dubin also stated he would limit Clark Bargo to sedentary work only.

Clark Bargo also filed the January 19, 2012 report prepared by Dr. Morgan. Dr. Morgan noted complaints of neck, back, bilateral shoulder and knee pain. He also noted complaints of numbness and tingling in both hands. He diagnosed carpal tunnel syndrome, cervical degenerative disk disease, and lumbar degenerative disk disease.

Finally, Clark Bargo filed the vocational report prepared by Mr. William Ellis. Mr. Ellis performed a vocational examination on December 14, 2011. He assessed Clark Bargo to be 100% vocationally disabled.

Clark Bargo was evaluated by Dr. Daniel D. Primm, Jr., an orthopedic surgeon, at Hinkle's request. In his report dated November 1, 2011, Dr. Primm noted Clark Bargo advised he first noticed the onset of low back pain and neck pain over twenty years previously. He also advised his symptoms progressively worsened and did not improve when he was not working. Clark Bargo could recall no

specific back or neck injuries. He also complained of pain in his knees, right greater than left, as well as shoulder pain. Dr. Primm opined Clark Bargo has multiple somatic complaints, probably due to age-related degenerative changes, and he found no evidence of specific work-related conditions. Dr. Primm stated there is no objective evidence of cumulative trauma injuries. Likewise, he found no basis for assessing a functional impairment rating due to any alleged work injury. Dr. Primm stated he saw no need to impose restrictions, and Clark Bargo could return to work at his job with Hinkle. He saw no need for any medical treatment due to the alleged work injuries. Dr. Primm disagreed with Dr. Johnson's findings and assessments.

In a supplemental report dated March 6, 2012, Dr. Primm stated he did not believe Dr. Dubin's assessment was valid. He noted numerous mistakes and misstatements in Dr. Dubin's report.

Dr. Russell Travis, a neurosurgeon, performed a records review at Hinkle's request, and issued a report dated November 30, 2011. Dr. Travis stated, "In my opinion, Mr. Bargo's employment with Hinkle Contracting Company did not and would not be expected to result in the development of a cumulative injury." Dr. Travis noted, at

most, Clark Bargo would qualify for a 5% impairment rating pursuant to the AMA Guides due to the natural aging process, not due to his work. Dr. Travis opined Clark Bargo is not precluded from performing his past work, and he found no basis for any treatment other than home exercise.

In a supplemental report issued March 6, 2012, Dr. Travis also noted numerous erroneous statements by Dr. Dubin. He likewise questioned the validity of Dr. Dubin's report.

A benefit review conference ("BRC") was held December 9, 2011. At that time, the issues preserved for determination included benefits per KRS 342.730; work-relatedness/causation; notice; and whether Clark Bargo sustained an injury as defined by the Kentucky Worker's Compensation Act. Those issues were confirmed at the hearing held March 21, 2012.

Subsequent to the hearing, both parties filed briefs. On May 11, 2012, Clark Bargo filed a motion for the ALJ to recuse from the case. As grounds for recusal, Clark Bargo stated his counsel was associated with a member of the Workers' Compensation Nominating Commission which did not recommend the ALJ for reappointment, and argued

this would “erase any potential conflict”. Hinkle filed a response and objection to the motion.

In an order issued May 25, 2012, the ALJ stated as follows:

> An administrative law judge is bound to follow the judicial ethics rules promulgated by the Kentucky Supreme court. KRS 342.230(6).
>
> Among other things, these rules require, “A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.” SCR 4.300 Canon 3.B.(1). The burden of proof required to demonstrate that recusal of a trial judge is mandated is an onerous one. It must be shown that trial judge is prejudiced to a degree that he cannot be impartial. *Brand v. Com., 939 S.W.2d 358 (Ky. App. 1997).*
>
> The plaintiff alleges as follows:
>
> 1. That an Associate Attorney in his firm, Roger D. Riggs, Esq., is a member of the Nominating Committee that did not recommend the ALJ for reappointment on Monday, May 7, 2012.
>
> 2. That while counsel has the utmost respect for this ALJ, he feels it is in the best interest of the plaintiff that the [ALJ] recuse himself to erase any potential conflict.
>
> The facts applicable to this claim are as follows:
>
> 1. A hearing was held in this Claim on March 21, 2012. The last brief filed was filed by the plaintiff on April 19, 2012. The administrative law

> judge began work on his decision in his claim after receipt of plaintiff's brief.
>
> 2. The decision had been made prior to May 7, 2012. But for corrections of typographical errors, the decision was prepared and ready to go prior to May 7, 2012.
>
> 3. On May 5, 2012 the administrative law judge left the Commonwealth to attend a medical appointment for his father. On his return to the Commonwealth on May 10, 2012 the decision had been properly edited. Also, at that time a copy of the motion to recuse had been faxed to the office of the administrative law judge. In order to give the opposing party the opportunity to respond to the motion to recuse, the decision was not issued immediately.
>
> 4. Under these circumstances, the action, or inaction of the nominating committee played no part in the decision of the administrative law judge.
>
> 5. There is no valid reason why the administrative law judge should recuse at this stage of the proceedings. The decision will issue forthwith.
>
> The motion to recuse is **OVERRULED**.

On the same date, the ALJ rendered an opinion and order dismissing Clark Bargo's claim. In relevant part, the ALJ found as follows:

> **Was there an injury as defined by the Act?** The threshold issue is whether Clark Bargo, Jr. 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 required him to operate heavy equipment, fill sandbags, load sandbags, and install silt fences. He has supported his claim with reports from Dr. Robert Johnson, Dr. Ronald Dubin, and chiropractor Chad Morgan, D.C. The defendant has presented reports from Dr. Primm and Dr. Travis. Dr. Primm is on the faculty of the UK medical school and Dr. Travis is a well-known evaluator, mostly for defendants I believe. I elect to accept the opinions of Dr. Primm and Dr. Travis to the effect that Mr. Bargo does not suffer from the effects the nature of his work with Hinkle or of any cumulative trauma. Therefore the case must be dismissed.

Was notice timely or excusable? In view of my conclusion above, I need not consider this issue further.

> **Is the claimant Permanently Totally Disabled?** In view of my conclusion above, I need not consider this issue further.
>
> **What is the extent of Permanent Partial Disability?** In view of my conclusion above, I need not consider this issue further.
>
> **CONCLUSIONS**
>
> 1. Clark Bargo, Jr. did not sustain a work-related injury on April 8, 2011.
>
> **ORDER**
>
> It is hereby **ORDERED AND ADJUDGED** by the Administrative Law Judge as follows:
>
> 1. The claim of plaintiff, Clark Bargo, Jr., against the defendant/ employer, Hinkle Contracting Co., LLC, and/or its insurance carrier is **DISMISSED**.

Clark Bargo subsequently filed a petition for reconsideration arguing, as he does on appeal, the ALJ erred in refusing to recuse himself. He requested the ALJ rescind the opinion and order rendered May 25, 2012, and reassign the claim to a different ALJ for proper adjudication. Clark Bargo also argued the ALJ misconstrued the evidence and misapplied the law, thereby acting in excess of his powers, and the decision was arbitrary and capricious. The petition for reconsideration was overruled by order entered July 6, 2012.

JOHN BARGO V. HINKLE CONTRACTING CO., LLC
CLAIM NO. 2011-01045

John Bargo appeals from the opinion rendered by the ALJ on May 25, 2012, dismissing his claim for injuries he allegedly sustained while working for Hinkle, but awarding medical benefits for the cure and relief of the effects of his work-related hearing loss. John Bargo also appeals from the July 6, 2012 order overruling his petition for reconsideration. On appeal, John Bargo argues the ALJ erred in refusing to recuse and in determining he did not sustain a work-related cumulative trauma injury.

John Bargo filed a Form 101 on July 22, 2011, alleging work-related cumulative trauma injuries to his back, neck, and knees manifesting on April 22, 2011, the date he last worked for Hinkle, due to his work as a heavy equipment operator beginning in the 1970's. In support of the Form 101, John Bargo filed the report of Dr. Robert Johnson who performed an IME on June 20, 2011, at his request. Dr. Johnson noted John Bargo last worked on April 20, 2011. Dr. Johnson noted John Bargo complained of a stiff back, inability to strenuously lift, left arm numbness, intermittent left leg and foot numbness, and a report of sharp low back pain when he hit a hole while

driving a truck. John Bargo stated he had experienced these complaints for over a year, and was sent for MRI's by his chiropractor, Dr. Morgan. Dr. Johnson noted the MRI's of the cervical and lumbar spine performed on May 17, 2011, demonstrated degenerative changes.

Dr. Johnson diagnosed obvious degenerative and post-traumatic changes in the cervical and lumbar spine. Dr. Johnson assessed a 12% impairment rating pursuant to the AMA Guides, consisting of 6% to the lumbar spine, and 6% to the cervical spine. Dr. Johnson opined John Bargo's conditions were due to his work with Hinkle, and he had no active impairment prior to his injuries. Dr. Johnson found John Bargo had reached MMI, does not retain the physical capacity to perform his previous work, and would be limited to sedentary or semi-sedentary activities only.

John Bargo testified by deposition on October 28, 2011, and at the hearing held March 21, 2012. He is a resident of Gray, Kentucky, and was born on April 26, 1955. He is a high school graduate with no specialized vocational training. He began working for Hinkle in 1988 as a heavy equipment operator. He last worked there on April 22, 2011, when he requested a leave of absence from work to be with a sister who was suffering from cancer. He has never returned to work anywhere since that date.

John Bargo stated he was generally off work from November through March due to inclement weather while employed by Hinkle. As a heavy equipment operator, he operated equipment and drove trucks. He was also occasionally required to lift, carry and emplace felt and sandbags which he described as heavy, dirty, nasty work. He renewed his CDL, required for driving trucks, in March 2011, which included a physical examination performed by Dr. Barry Dixon.

John Bargo treats with his family physician, Dr. Jawed, for high blood pressure, high cholesterol, diabetes and sleep apnea. He described his work-related complaints as consisting of neck, low back, left arm and left leg pain. He stated his neck began bothering him in 2010. He stated he first advised Dr. Jawed of the back and neck pain in 2010, but received no treatment for those conditions until he saw Dr. Morgan.

John Bargo saw Dr. Morgan, a chiropractor, in May 2011. Dr. Morgan ordered MRI's of the cervical and lumbar spine. Dr. Morgan was the first healthcare provider to advise him the problems are work-related. He was provided the same information by Dr. Johnson and Dr. M.C. Acob.

In addition to Dr. Johnson's report, John Bargo submitted the report of Dr. Ronald Dubin, an orthopedic

surgeon, who performed an IME at his request on January 23, 2012. Dr. Dubin noted John Bargo had developed neck and back pain over a number of years, and quit working on April 22, 2011. Dr. Dubin diagnosed post-traumatic arthritis to the cervical and lumbar spine secondary to his work. Dr. Dubin stated John Bargo was at MMI, and assessed a 13% impairment rating pursuant to the AMA Guides, of which he attributed 6% to the cervical spine, and 7% to the lumbar spine. Dr. Dubin stated all of the impairment was due to the work as a heavy equipment operator. Dr. Dubin also stated he would limit John Bargo to sedentary work only.

John Bargo also filed the January 20, 2012 report prepared by Dr. Morgan. Dr. Morgan noted complaints of neck and back pain radiating into the hands. He stated John Bargo had limited range of motion and has cervical and lumbar degenerative changes with disk protrusions. Dr. Morgan stated John Bargo worked in heavy equipment for years, causing severe wear and tear on his body.

Finally, John Bargo filed the vocational report prepared by Mr. William Ellis. Mr. Ellis performed a vocational examination on December 20, 2011. He assessed John Bargo to be 100% vocationally disabled.

John Bargo was evaluated by Dr. Daniel D. Primm, Jr., an orthopedic surgeon, at Hinkle's request. In his

report dated November 1, 2011, Dr. Primm noted John Bargo advised he had worked as a heavy equipment operator for over thirty-five years, with no history of specific work-related accidents or injuries. He complained of aching pain in his neck, back, legs, knees, ankles, and hands - - essentially all joints except his shoulders. Dr. Primm opined John Bargo has multiple somatic complaints and age-related degenerative changes. Dr. Primm stated:

> Based on Mr. Bargo's history, as well as a review of his medical record and his current physical findings, I cannot find any objective evidence that his employment would have resulted in development of his multiple somatic complaints.

Dr. Primm found no evidence of any type of cumulative trauma injury arising from his employment with Hinkle. Dr. Primm found the complaints were not related to the work. Likewise he found no basis for assessing a functional impairment rating due to any alleged work injury. Dr. Primm stated he saw no need to impose restrictions, and Clark Bargo could return to work at his job with Hinkle. He saw no need for any medical treatment due to the alleged work injuries. Dr. Primm disagreed with Dr. Johnson's findings and assessments.

In a supplemental report dated December 1, 2011, Dr. Primm stated he had reviewed the results from the DOT

physical examination performed March 21, 2011. Dr. Primm stated he had no reason to suspect John Bargo sustained cumulative injuries to his cervical and lumbar spine based upon that report. In another supplemental report dated March 6, 2012, Dr. Primm stated he did not believe Dr. Dubin's assessment was valid. Dr. Primm stated there is no such diagnosis as "progressive posttraumatic degenerative arthritis".

Dr. Russell Travis, a neurosurgeon, performed a records review at Hinkle's request, and issued a report dated November 24, 2011. Dr. Travis stated John Bargo's work activity had no relationship to the development of cumulative injury or trauma. Dr. Travis noted John Bargo would qualify for a 0% impairment rating pursuant to the AMA Guides with no objective findings of radiculopathy. He indicated John Bargo may qualify for a 5% impairment due to the degenerative conditions in his cervical spine, but any impairment is due to the natural aging process. Dr. Travis stated with cervical traction therapy and neck exercise, John Bargo should be able to return to his past work. Dr. Travis also stated he would not impose any restrictions for the lumbar spine, but overhead work would be difficult with the C5-6 problems. Dr. Travis indicated no medical

treatment is necessary except for physical therapy and home exercises. He disagreed with Dr. Johnson's opinions.

In a supplemental report issued March 6, 2012, Dr. Travis noted numerous erroneous statements by Dr. Dubin. He likewise questioned the credibility of Dr. Dubin's report.

Hinkle filed the November 4, 2010 record of Dr. Pam Combs with Cardiovascular and Sleep Consulting Services in Paris, Kentucky. Dr. Combs specifically noted John Bargo was negative for limb pain, myalgias and arthralgias.

Hinkle also filed reports from the cervical and lumbar MRI's performed on May 17, 2011. Both studies demonstrated multi-level degenerative changes.

Hinkle filed records from Bluegrass Medical Center, LLC (Dr. Jawed), for various treatment dates from April 4, 2007 through August 22, 2011. The first complaint of arthralgia and arthritis was made on April 4, 2007.

Hinkle also filed the "Medical Examination Report for Commercial Driver Fitness Determination", prepared by Dr. Dixon on March 2, 2011. Dr. Dixon noted John Bargo had no spinal injury or disease, and had no chronic low back pain or muscular disease.

A BRC was held December 9, 2011. At that time, the issues preserved for determination included benefits

per KRS 342.730; work-relatedness/causation; notice; and whether John Bargo sustained an injury as defined by the Kentucky Worker's Compensation Act. Those issues were confirmed at the hearing held March 21, 2012.

Subsequent to the hearing, both parties filed briefs. On May 11, 2012, John Bargo filed a motion for the ALJ to recuse from the case. As grounds for recusal, John Bargo stated his counsel was associated with a member of the Workers' Compensation Nominating Commission which did not recommend the ALJ for reappointment and argued this would "erase any potential conflict". Hinkle filed a response and objection to the motion.

In an order issued May 25, 2012, the ALJ stated as follows:

> An administrative law judge is bound to follow the judicial ethics rules promulgated by the Kentucky Supreme court. KRS 342.230(6).
>
> Among other things, these rules require, "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required." SCR 4.300 Canon 3.B.(1). The burden of proof required to demonstrate that recusal of a trial judge is mandated is an onerous one. It must be shown that trial judge is prejudiced to a degree that he cannot be impartial. *Brand v. Com., 939 S.W.2d 358 (Ky. App. 1997)*.

The plaintiff alleges as follows:

1. That an Associate Attorney in his firm, Roger D. Riggs, Esq., is a member of the Nominating Committee that did not recommend the ALJ for reappointment on Monday, May 7, 2012.

2. That while counsel has the utmost respect for this ALJ, he feels it is in the best interest of the plaintiff that the [ALJ] recuse himself to erase any potential conflict.

The facts applicable to this claim are as follows:

1. A hearing was held in this Claim on March 21, 2012. The last brief filed was filed by the plaintiff on April 19, 2012. The administrative law judge began work on his decision in his claim after receipt of plaintiff's brief.

2. The decision had been made prior to May 7, 2012. But for corrections of typographical errors, the decision was prepared and ready to go prior to May 7, 2012.

3. On May 5, 2012 the administrative law judge left the Commonwealth to attend a medical appointment for his father. On his return to the Commonwealth on May 10, 2012 the decision had been properly edited. Also, at that time a copy of the motion to recuse had been faxed to the office of the administrative law judge. In order to give the opposing party the opportunity to respond to the motion to recuse, the decision was not issued immediately.

4. Under these circumstances, the action, or inaction of the nominating committee played no part in the

> decision of the administrative law judge.
>
> 5. There is no valid reason why the administrative law judge should recuse at this stage of the proceedings. The decision will issue forthwith.
>
> The motion to recuse is **OVERRULED**.

On the same date, the ALJ rendered an opinion and order dismissing John Bargo's claim. In relevant part, he found as follows:

> **Was there an injury as defined by the Act?** The threshold issue is whether John Bargo 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 required him to work generally from March through November of each year when working for the defendant. His work was predominately as a heavy equipment operator. Mr. Bargo stopped working on

April 22, 2011 telling his employer that he wanted a leave of absence to attend to his sister who had a serious medical condition. There is no medical record to that point of any complaints with the neck or back. He has supported his claim with reports from two physicians and a chiropractor. These reports come from Dr. Morgan, Dr. Johnson, and Dr. Dubin. These reports are conclusory in nature. They are not persuasive. On the other hand the defendant has presented evidence from two physicians one of whom is on the faculty of the University of Kentucky medical school. Both Dr. Travis and Dr. Primm attribute the changes of the spine to the natural aging process. The definition of injury specifically excludes the natural aging process as being an injury. I am persuaded by the reports of Dr. Travis and Dr. Primm to the effect that any problems that Mr. Bargo may have are attributable to the natural aging process. Therefore, I conclude that Mr. Bargo has not sustained an injury to the spine, cervical, or lumbar. This conclusion will require me to dismiss the claim for injury.

Was notice timely or excusable? K.R.S. 342.185 (1) provides in part, "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..." In this case, a written report of the injury was prepared. It was prepared within a reasonable period of time following the communication of the diagnosis of cumulative trauma to the plaintiff. Notice of the accident was therefore timely given.

> **Is the claimant Permanently Totally Disabled?** In view of my conclusion above, I need not consider this issue further.
>
> **What is the extent of Permanent Partial Disability?** In view of my conclusion above I need not consider this issue further.
>
> . . .
>
> **CONCLUSIONS**
>
> 1. John Bargo did not sustain a work-related injury on April 22, 2011 to his spine.
>
> 2. John Bargo sustained a work-related injury on April 24, 2011 in the nature of hearing loss. He gave due and timely notice of this injury.
>
> 3. As a result of the hearing loss Mr. Bargo has a 4% impairment. This does not qualify for income benefits but will entitle him to an award of medical benefits for hearing loss.
>
> **ORDER AND AWARD**
>
> It is hereby **ORDERED AND ADJUDGED** by the Administrative Law Judge as follows:
>
> 1. The claim of plaintiff, John Bargo, against the defendant/employer, Hinkle Contracting Co., LLC, and/or its insurance carrier, for cumulative trauma to the spine with an injury date of April 22, 2011 is **DISMISSED**.

John Bargo subsequently filed a petition for reconsideration arguing, as he does on appeal, the ALJ

erred in refusing to recuse himself. He requested the ALJ rescind the opinion and order rendered May 25, 2012, and reassign the claim to a different ALJ for proper adjudication. John Bargo also argued the ALJ misconstrued the evidence and misapplied the law, thereby acting in excess of his powers, and the decision was arbitrary and capricious. The petition for reconsideration was overruled by order entered July 6, 2012.

I.

DID THE ALJ ERR IN REFUSING TO RECUSE?

We must first determine whether the ALJ erred by refusing to recuse himself from deciding these claims. We conclude he did not. The Bargos allege the ALJ's decisions were biased due to the fact he was not reappointed as a judge, and an associate of their counsel served upon the Workers' Compensation Nominating Commission which did not recommend his reappointment. No evidence was introduced to support this contention, and the motions to recuse were based upon speculation and conjecture. The ALJ, in his orders entered May 25, 2012, outlined the timelines for his decision of the claims. In addition to the timelines, the ALJ provided detailed analyses as to why he did not recuse in either case. Likewise, in the decisions rendered in both claims on the same date, the ALJ provided cogent,

well-reasoned bases for his determinations. None of the ALJ's actions illustrate bias on his part.

KRS 26A.015(2) states, in relevant part, as follows:

> (2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
>
> (a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;

A mere statement of bias or prejudice without specific supporting documentation and information is insufficient for a reviewing body to impute bias or prejudice on the part of a decision maker. Foster v. Commonwealth, 348 S.W.2d 759 (Ky. 1961); Roberts v. Sturgill, 77 S.W.2d 789 (Ky. 1935).

The law presumes a judge is unbiased and unprejudiced in the matters over which he or she presides and any alleged bias or prejudice must be strong enough to overcome the presumption of this integrity. Bias or prejudice based upon mere conclusory allegations, and subjective conclusions or opinions of bias or appearance of impropriety are insufficient to require a judge's disqualification. It is actual existence of prejudice on

the part of a judge, not mere apprehension of it by a party, which disqualifies. Howerton v. Price, 449 S.W.2d 746 (Ky. 1970). Furthermore, bias or prejudice should be of a substantial nature and of a character calculated to prevent or impede a judge's impartiality and to sway his or her judgment. Mere belief the ALJ will not afford a fair and impartial trial is insufficient grounds for recusal. Webb v. Commonwealth, 904 S.W.2d 226 (Ky. 1995). Where bias and prejudice are not of such character, a judge is not disqualified and may deny a recusal motion.

Here the ALJ explained the timeframe utilized in arriving at his decisions. Likewise, he determined no valid reason had been presented to convince himself he should recuse from the proceedings. No proof or evidence of actual bias was provided, and the ALJ refused to recuse based upon speculation and conjecture. We agree no compelling reason existed for recusal, and that determination rested solely with the ALJ which we will not disturb.

II

DID THE ALJ ERR IN DETERMINING THE BARGOS DID NOT SUSTAIN WORK-RELATED INJURIES AND DISMISSING THEIR CLAIMS?

It is well established a claimant in a workers' compensation claim bears the burden of proving each of the

essential elements of his causes of action before the ALJ, including whether he sustained work-related injuries. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where a claimant is unsuccessful with regard to that burden, the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. In rendering a decision, KRS 342.275 and KRS 342.285 grant the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The evidence in both claims was nearly identical. In both decisions, the ALJ relied upon the opinions of Drs. Primm and Travis, rather than the opinions of Drs. Johnson, Morgan and Dubin. He provided a detailed, cogent analysis explaining his reasons for dismissing each claim. Substantial evidence exists to support the ALJ's dismissal of both claims, and contrary results are not compelled. We cannot say the outcomes arrived at by the ALJ are so

unreasonable based upon the evidence the decisions must be reversed as a matter of law.

Despite the argument to the contrary, as noted above, substantial evidence exists to support the ALJ's dismissals of both claims. Therefore, we are without authority to disturb her decision on appeal. *See* KRS 342.285 Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As the Court held in Ira A. Watson Department Store v. Hamilton, supra, one of the functions of the ALJ, as fact-finder, is to translate the lay and medical evidence when determining the extent of an employee's occupational disability at a particular point in time.

The ALJ determined in both decisions the opinions of Drs. Primm and Travis were more credible, and he outlined why he relied upon them in dismissing the claims. Again, the ALJ could reasonably make such decisions based upon the evidence, and his determinations will not be disturbed.

Accordingly, the decision rendered May 25, 2012 and the order on reconsideration rendered on July 6, 2012, by Hon. Richard M. Joiner, Administrative Law Judge, in the claim of Clark Bargo v. Hinkle Contracting Co., LLC, Claim No. 2011-01030; and the decision rendered May 25, 2012 and the order on reconsideration rendered on July 6, 2012, by

Hon. Richard M. Joiner, Administrative Law Judge, in the claim of John Bargo v. Hinkle Contracting Co., LLC, Claim No. 2011-01045 are hereby **AFFIRMED.**

Since the appeal is now final, **IT IS HEREBY ORDERED** the claims which have been consolidated only for purposes of appeal by order entered by the Board on August 29, 2012, are hereby **DECONSOLIDATED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS COMPENSATION BOARD

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