OPINION ENTERED: March 15, 2013

CLAIM NO. 201200051 & 201200050

MARTIN COUNTY COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

CLARENCE HANEY
and HON. GRANT S. ROARK
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Martin County Coal Corporation ("Martin County") appeals from the August 27, 2012, opinion, order, and award and the October 10, 2012, order ruling on the parties' petitions for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ determined Clarence Haney ("Haney") sustained a work-related injury on March 10, 2011, and is totally

occupationally disabled due to the combined effects of a 2007 injury and the March 10, 2011, injury. The ALJ also determined each injury resulted in a 50% occupational disability, and since the 2007 injury was a pre-existing active disability and not compensable, awarded permanent total disability ("PTD") benefits based on 50% of the maximum 2011 PTD rate.[1] The ALJ also awarded medical benefits for treatment of the March 10, 2011, injury and Haney's work-related hearing loss.[2]

On appeal, Martin County asserts the ALJ erred in determining Haney sustained a compensable injury as defined by the Act since there were no objective medical findings to support such a finding.

Haney testified by deposition on April 18, 2012, and at the June 27, 2012, hearing. Haney worked in the coal mines for Martin County for thirty-nine and half years. In 1971, he began working as a general laborer and worked his way up to foreman. Haney testified as a foreman he performed manual labor every day. He estimated he worked an average of 75 and 80 hours a week. Haney was

[1] There was no dispute Haney did not file a workers' compensation claim for the September 24, 2007, injury and the claim is barred by the statute of limitations.

[2] Haney filed injury and hearing loss claims. Because the ALJ's decision regarding the hearing loss claim is not at issue it will not be discussed.

injured on March 10, 2011, when in the course of dismounting a forklift he slipped and fell approximately six feet to the ground. He landed on the middle of his back, right leg, and right hip and immediately experienced pain in these areas. Because he believed he would "overcome it," Haney waited approximately four days before going to see his regular physician, Dr. Melissa Fletcher. When his condition continued to worsen, Haney quit work at the end of May or first of June 2011.[3] Haney testified he is now in constant pain and takes prescription and over-the-counter medication daily.

Haney acknowledged he hurt his back approximately fifteen to twenty times while working for Martin County. The parties stipulated Haney "sustained alleged work-related injuries" on December 3, 1985, April 20, 2001, August 17, 2001, March 15, 2002, January 16, 2004, June 4, 2004, August 7, 2004, September 24, 2005, December 13, 2006, January 26, 2007, August 1, 2007, September 24, 2007, and March 10, 2011.

Haney testified that prior to March 10, 2011, he had always been able to work. Except for the September 24, 2007, and March 10, 2011, injuries, he did not miss a

[3] Haney testified he last worked for Martin County on May 30, 2011, but the parties stipulated he worked through June 1, 2011.

significant amount of work due to a work injury. Haney missed approximately five to six months of work after the September 24, 2007, injury, and returned to work in March 2008. Martin County's accident report reflects Haney sustained a lower back injury on September 24, 2007, when his "left foot slipped resulting in a fall on an oil containment wall measuring eight inches wide and about twenty-eight inches high." Haney testified he was taken to Highlands Regional Medical Center and then to the University of Kentucky Medical Center. A CT scan of the lumbar spine revealed Haney sustained "left through L1-L3 transverse process fractures left 12th rib fracture."[4] Haney was treated by Dr. Cassidy at the University of Kentucky Medical Center who placed him in a brace. Haney testified he returned to work in March 2008 when Drs. Fletcher and Cassidy released him to return to work without restrictions. Haney indicated Martin County would not have allowed him to return to work with work restrictions. He testified he still had mild pain when he returned to work in 2008. In spite of the pain, Haney was able to perform all aspects of his work, and except for a day and a half,

[4] Although few medical records were introduced regarding this specific injury, Dr. J. Rick Lyon's summary of the September 24, 2007, CT scan of the lumbar spine provided this information.

missed no work because of back problems until the March 10, 2011, injury.

Since the 2011 injury, Haney estimates he takes approximately three times as much medication as he did prior to the injury. He testified he has been unable to work since he stopped working for Martin County. Haney was sixty-two years old when he stopped working.[5]

Haney relied upon the December 13, 2011, Form 107 and the December 13, 2011, independent medical examination ("IME") report of Dr. Anbu Nadar, an orthopedic surgeon. Haney also introduced the February 27, 2008, IME report of Dr. David Jenkinson pertaining to a December 13, 2006, work-related injury. Martin County relied upon the April 24, 2012, IME report of Dr. Lyon. Both parties submitted the records of Dr. Fletcher. Included within Dr. Fletcher's records are reports pertaining to MRIs performed in 2007, 2008, and 2011 as well an x-ray taken in 2011.

In determining Haney sustained a work-related injury on March 10, 2011, the ALJ entered the following findings of fact and conclusions of law:

> **Causation/Work-Relatedness**
>
> The primary issue in this claim as presented is whether plaintiff suffered any new compensable low back injury on

[5] Haney's birthdate is October 18, 1948.

March 10, 2011 to entitle him to an award of permanent benefits. The defendant argues plaintiff suffered three previous lower back injuries, which are not compensable, prior to March, 2011. In fact, plaintiff suffered a non-compensable lower back injury in 2007 for which plaintiff underwent surgery and was off work for almost 6 months. The defendant points out that no physician of record found any new pathology or objective findings in plaintiff's lower back after the March, 2011 fall at work beyond those changes which pre-existed the fall. Accordingly, the defendant maintains plaintiff did not suffer any new "injury" within the meaning of KRS 342.0011(1). Instead, it argues plaintiff's prior lower back injuries caused very significant occupational disability such that plaintiff was not sure he could continue working throughout the period from 2008 up to the March, 2011 accident. The defendant therefore maintains the significant occupational disability plaintiff now has is due solely to the prior, non-compensable injuries.

For his part, plaintiff argues he was able to return to work following all his prior injuries and was not working with any restrictions up to the March, 2011 fall. He adds that although he was able to keep working following the prior injuries, the March, 2011 incident has rendered him unable to return to work.

The defendant's point as to the lack of an identifiable change in plaintiff's lower back due to the March 10, 2011 accident is not lost. However, in this instance, plaintiff clearly had chronic lumbar pathology which, while not dormant, was clearly

made more symptomatically severe, according to Dr. Lyon, by the March, 2011 work accident. The genuine increase in symptomology noted in Dr. Fletcher's and Dr. Lyon's clinical examinations is considered sufficient evidence of a new injury to satisfy the statutory requirement in KRS 342.0011(1) and (33). In Gibbs v. Premier Scale Co., Ky., 50 S.W.3d 754 (2001), the Supreme Court of Kentucky first considered the definition of "objective medical findings" as required by KRS 342.0011(1) and defined in KRS 342.0011(33). The court, in Gibbs, explained:

> KRS 342.0011(33) limits 'objective medical findings' to information gained by direct observation and testing applying objective or standardized methods. Thus, the plain language of KRS 342.0011(33) supports the view that a diagnosis is not an objective medical finding but rather that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. The fact that a particular diagnosis is made in the standard manner will not render it an 'objective medical finding.' We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purpose of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a

> harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33). Therefore, we must conclude that a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an 'injury' for the purposes of Chapter 342.

Id. at 761-762. The court then went on to say that for an injury to qualify as a harmful change, it does not necessarily require documentation by means of diagnostic testing such as x-ray, CT scan, EMG or MRI to be compensable. The court stated, ***"[w]e know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrate the existence of symptoms of such a change."*** Id. at 762. The court also recognized that to be compensable, a diagnosis may be derived from symptoms that were confirmed by direct observation and/or testing applying objective or standardized methods in order to comply with the requirements of KRS 342.0011(1).

As applied to the present case, the increase in severity of symptoms

> following a specific traumatic injury at work, leads the Administrative Law Judge to conclude plaintiff suffered a new injury.

Noting Haney had worked in the coal mines for Martin County for almost forty years, and based on his age, education, work history, and physical condition, the ALJ was "easily persuaded" Haney is permanently totally disabled. However, citing primarily to Dr. Fletcher's records, the ALJ concluded Haney "had a significant occupational disability prior to March, 2011." The ALJ concluded Haney was not totally occupationally disabled prior to March 10, 2011, finding as follows:

> However, the Administrative Law Judge is not persuaded plaintiff was totally disabled prior to March, 2011. Again, despite his well-documented ongoing pain, plaintiff was able to continue working from the time he returned to work in 2008, after the 2007 injury, up to March, 2011. Although plaintiff was having difficulty and was working in apparent pain, he was able to deal with the pain and continue working.

As a result of the March 10, 2011, accident, the ALJ also determined Haney sustained a permanent partial disability finding as follows:

> The problem for plaintiff is that KRS 342.730(1)(a) specifically states that non-work-related impairment cannot be considered for purposes of total

> disability, and the significant occupational disability the [sic] pre-existed the March, 2011 accident was not compensable.
>
> With that in mind, the Administrative Law Judge is not persuaded plaintiff's March, 2011 work injury alone would render him totally disabled. Indeed, as indicated elsewhere herein, the March 10, 2011 incident caused no new pathologies which could be seen on diagnostic studies. His symptoms increased after the accident but he was already experiencing chronic significant lower back symptoms prior to the accident. For these reasons, it is determined the March 10, 2011 accident alone would not render plaintiff totally disabled. It is therefore determined the subject work injury alone has produced only a partial disability. Permanent, partial disability is purely a function of impairment ratings instead of occupational disability.

Based upon the opinions of Dr. Nadar, Haney was found to have an 8% pre-existing impairment and a current impairment of 15% resulting in a 7% impairment "due solely to the effects of the [March 10, 2011] injury." The ALJ concluded Haney was not capable of returning to work and enhanced his permanent partial disability ("PPD") benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ's calculation of Haney's PPD benefits is as follows: $1,980 x 2/3 = $1,320 → $541.47 (maximum 2011 PPD rate) x .07 x .85 x 3.6 = $115.98 per week.

The ALJ rejected Haney's "allegation of a cumulative trauma claim." In addition, the ALJ concluded Haney sustained a 2007 lower back work injury which the parties agree "contributes to [Haney's] current lumbar impairment." However, since no claim was filed within the statutory period, the claim was dismissed as barred by the statute of limitations. The ALJ also rejected Martin County's defense Haney suffered a compensable injury because he failed to follow the reasonable medical advice of Dr. Fletcher.

Concerning Haney's hearing loss claim, because the 8% impairment threshold required by KRS 342.730(5) had not been met, the ALJ only awarded medical benefits. Accordingly, Haney was awarded PPD benefits until he qualified for normal old age Social Security retirement.

Both parties filed petitions for reconsideration. As it does on appeal, relying on Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), Martin County asserted there were no objective medical findings to support the ALJ's conclusion Haney sustained a March 10, 2011, work injury. Martin County stated it would stipulate Haney's pain complaints increased following the March 10, 2011, injury, but that fact is not enough for a finding of compensability as Haney's complaints of pain did not meet

the definition of a compensable injury pursuant to the statute and Gibbs v. Premier Scale Co., supra. Rather, Martin County contended the law requires a claimant's complaints of symptoms be supported by objective medical findings, and there were no such findings in this claim. It requested the finding the clinical examinations of Drs. Fletcher and Lyon demonstrated objective medical evidence sufficient to satisfy the requirements of KRS 342.0011(1) and (33) be set aside and Haney's claim be dismissed with prejudice.

In his petition for reconsideration, Haney took issue with the award of PPD benefits. Haney argued since the ALJ found him totally occupationally disabled, the ALJ was required to calculate his benefits based on the total disability rate. Haney contended although the 2007 work injury is non-compensable, the ALJ was not prevented from considering the effects of this injury. Haney insisted since he was found to be totally disabled and he did not have a "non-work-related pre-existing disability," it was error for the ALJ "to use KRS 342.730(1)(a) to convert his total disability to a permanent partial disability" and the award should be corrected.

Haney also contended even though he had a pre-existing active impairment, there was no evidence he had a

pre-existing disability preventing him from working. He requested the ALJ correct the opinion, order, and award "so as to not exclude [his] prior work-related impairment from his Award; to calculate his benefits at the Total Disability Rate; and, find that there was no pre-existing active 'disability' in this case."

In the October 10, 2012, order the ALJ overruled Martin County's petition for reconsideration. However, the ALJ sustained Haney's petition for reconsideration in part, amending the opinion, order, and award as follows:

> Turning to plaintiff's petition, the Administrative Law Judge is persuaded that the analysis and conclusions set forth in the Opinion on the issue of whether to consider plaintiff's prior work-related but unclaimed condition were based on an erroneous interpretation of applicable law. Specifically, the reasoning set forth by the Board in Kellogg's Company v. Shirley Ward, et al, WCB No. 2009-01079 (Rendered November 10, 2010) and by the Kentucky Supreme Court in an unpublished decision in Leaseway Motor Transport v. David Stump, 2004-SC-0042-WC (2004), when considered along with Roberts Brothers Coal Co. v. Robinson, Ky., 113 S.W.3d 181 (2003), lead the Administrative Law Judge to conclude that Kentucky law holds that prior work-related injuries are taken into consideration when determining whether a claimant is totally disabled, even if the prior injury did not yield a formal claim or settlement.

As applied to this case, the Administrative Law Judge previously determined that the effects of both the 2007 and 2011 injuries render plaintiff totally disabled. Based on the application of what is interpreted as the correct state of Kentucky law, plaintiff's prior 2007 low back injury is taken into account. The Administrative Law Judge remains persuaded the effects of the two work injuries render plaintiff totally disabled.

Having concluded plaintiff is presently totally disabled, it must also be determined how much of plaintiff's current disability (as opposed to impairment) was caused by the prior, non-compensable 2007 injury. Any such pre-existing occupational disability determined using the old factors set forth in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968) must then be carved out from 100% and the balance is that to which plaintiff is entitled. Roberts Brothers Coal Co. v. Robinson, Ky., 113 S.W.3d 181 (2003).

The significance of plaintiff's prior low back problems was set forth in some detail in the Opinion and those same conclusions remain and are adopted here by reference. As pointed out, however, plaintiff was able to return to work following the 2007 so he was not totally disabled after [sic] that injury alone. Ultimately, the Administrative Law Judge is persuaded plaintiff had a 50% occupational disability due to the 2007 incident. Given the significant problems he was having performing his job in pain after that injury, and considered within the context of his age and limited education and work experience, it is determined plaintiff would have had 50%

> occupational disability due to that injury. Accordingly, plaintiff has a 50% occupational disability due to the 2011 work injury. His award of benefits is therefore calculated as follows:
>
> $1,980 x 2/3 = $1,320 → $721.97 (maximum 2011 PTD rate) x 50% = $360.99 per week.

The ALJ awarded PTD benefits commencing on March 10, 2011, and continuing until Haney qualifies for normal old age Social Security retirement.

On appeal, citing Gibbs v. Premier Scale Co., supra, Martin County asserts "there are no objective medical findings showing a harmful change to support the ALJ's award for a compensable injury." It contends the ALJ erroneously relied upon the conclusions of Drs. Lyon and Fletcher to support his finding of a compensable injury. Martin County asserts the ALJ's finding that the reports and conclusions of Drs. Lyon and Fletcher indicate a general increase in symptomology is a factual error as the record shows the increase in Haney's "complaints of symptoms" were not corroborated by objective medical findings. Martin County posits Drs. Lyon and Fletcher admitted "they were unable to demonstrate with direct observation that a new, harmful, physical change had taken place as a result of the alleged 2011 injury event."

Although Dr. Lyon observed Haney's complaints of pain increased as a result of the 2011 injury, Martin County maintains there were not any objective medical findings on clinical examination or in the diagnostic studies to corroborate an actual permanent harmful change resulting from the 2011 event. Martin County asserts both physicians concluded there was no objective medical evidence of a harmful change, rather there was only a change in Haney's complaints of increased symptoms. Thus, it insists although the 2011 incident may have caused Haney pain, without objective medical evidence, "the pain cannot be found to be a compensable injury." Martin County argues the ALJ's finding of a compensable 2011 injury must be set aside and the claim ordered dismissed.

Although both parties cite to the deposition of Dr. Fletcher, we are unable to locate that deposition in the file. Further, we note in the opinion, order, and award, the ALJ does not refer to Dr. Fletcher's deposition and merely summarizes the contents of her medical records. Thus, we will not consider any argument made by the parties based on Dr. Fletcher's deposition testimony.

Haney, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See*

KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Haney was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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).

In addition to the language in Gibbs v. Premier Scale Co., supra, cited by the ALJ in his August 27, 2012, opinion, the Supreme Court also stated:

> In view of the evidence which was presented in this particular case, a question has arisen concerning whether a harmful change must be, or is capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Contrary to what some have asserted we are not persuaded that it must. Furthermore, at least to some extent, we view that question as being off the mark. Likewise, we are not persuaded that a harmful change must be both directly observed and apparent on testing in order to be compensable as an injury.
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> . . .
>
> We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

Id. at 762.

In the case *sub judice*, we believe a work-related harmful change was established by objective medical findings as defined in KRS 342.0011(33) and clarified by the Supreme Court in Gibbs v. Premier Scale Co., supra. The October 11, 2011, report concerning the MRI of the

lumbar spine performed without contrast on October 10, 2011, reflects the following impression:

> 1. Degenerative disc and facet disease in the lumbar spine and lower thoracic spine remain stable.
>
> 2. Chronic pars fractures at L5 remain stable with Grade-I anterolisthesis.
>
> 3. Signal abnormalities in the right kidney are nonspecific, differential includes renal cysts.
>
> 4. No focal pathological marrow replacement.
>
> 5. Chronic compression deformity of T12 with Schmorl's node remain unchanged.

The March 15, 2011, x-ray report reveals the following impression:

> 1. Abnormal L5-S1 level as above.
>
> 2. Osteopenia and degenerative disc disease.
>
> 3. Right nephrolithiasis, lower pole.

These tests clearly establish abnormalities within the lower thoracic and lumbar spine. Without regard to what the previous MRIs revealed, these tests clearly reveal Haney had harmful changes within the lumbar and thoracic spine.

Further, among Dr. Fletcher's records is the March 15, 2011, office "Progress Note" reflecting upon physical examination Haney "is tender on the right side of

his back." In this notation, Dr. Fletcher noted that her physical examination of Haney, four days after the work injury, revealed verified symptoms in the right side of his back. Significantly, none of Dr. Fletcher's progress notes generated after the August 24, 2007, injury contain a notation that her physical examination revealed any physical symptoms. Thus, we believe that finding by Dr. Fletcher, standing alone, constitutes symptoms which were directly observed by Dr. Fletcher upon physical examination of Haney, and her physical examination constituted "testing of the patient applying objective and standardized methods." KRS 342.0011(33).

Furthermore, in his voluminous report, Dr. Lyon summarizes various medical records relating to the treatment of Haney's long standing back problems. Within his report is a summary of Dr. Fletcher's March 15, 2011, note which reads as follows:

> [Haney] was seen by Dr. Fletcher because he fell on March 10, 2011, re-injuring an old chronic injury that we have treated him for before in his back. On exam he is tender on the right side of his back.

Dr. Lyon also summarized the August 3, 2011, office note of Dr. Lester who saw Haney for lower and

middle back pain and right leg pain. Dr. Lyon noted Dr. Lester's examination revealed the following:

> Tenderness at the right greater trochanter, L2 to L5 spinous processes, L4-L5 paraspinal muscles in the right, right S1, right gluteus and piriformis, right iliac crest. Waddell signs are negative. He has increased pain with flexion of the lumbar spine. Reflexes were 2+. He is able to heel and toe gait and squat.

In addition, Dr. Lyon noted in his report that upon examination Haney was "tender on the paraspinal muscles in the lower lumbar spine to the right, non-tender over the spine or in the left paraspinal muscles." Twice in his report Dr. Lyon noted Haney had right calf atrophy of 1.5 cm. Concerning the significance of that finding Dr. Lyon stated as follows:

> After examination of and discussion with Mr. Haney, in addition to review of the records, it is clear that Mr. Haney had a pre-existing impairment prior to his March of 2011 back injury. This injury was significant enough that he considered discontinuing his job and this idea was supported by Dr. Fletcher. Furthermore, just nine months prior to his injury, he was diagnosed and treated for radiculopathy by Dr. Briggs. Based on that exam, it is apparent that on 06/23/2010, he would have had an impairment rating per the AMA Guidelines Fifth Edition page 392, table 15-5. Although there are no calf measurements performed, he was noted to have weakness on exam, straight leg raising was positive bilaterally with

> pain on the right and deep tendon reflexes were diminished at the right Achilles. This, therefore, results in a DRE Category III with a 15-18% impairment. As per examination today, he is noted to have calf atrophy of 1.5 cm. Therefore, he would also be considered a DRE Category III with a 15-18% impairment.

There is no reference to right calf atrophy of any degree in any of the medical records other than that contained in Dr. Lyon's April 26, 2012, report. Based upon the calf atrophy, Dr. Lyon's assessed a 15-18% impairment. Therefore, we conclude the findings of Dr. Lester on August 3, 2011, as summarized by Dr. Lyon and Dr. Lyon's finding upon examination which included a 1.5 cm calf circumference differential, also constitute objective medical findings evidencing a work-related harmful change occurring on March 11, 2011. This harmful change was established "through information gained by direct observation or testing applying objective standardized methods that demonstrated existence of symptoms of such a change." Gibbs v. Premier Scale Co., supra at 762. Consequently, the ALJ did not err in determining "the genuine increase in symptomology noted" by Drs. Lyon and Fletcher upon "clinical examinations" was "sufficient evidence of a new injury" and satisfied the requirements of KRS 342.0011(1) and (33).

Moreover, although the ALJ did not state he specifically relied upon Dr. Nadar in determining Haney sustained a work-related injury, we conclude he did. The ALJ's reliance upon Dr. Nadar's impairment ratings in determining Haney's pre-existing 8% impairment and his present impairment of 15% firmly establishes he relied upon Dr. Nadar in determining Haney sustained a work-related injury. In his December 13, 2011, report, Dr. Nadar set out the results of his clinical examination:

> He has tenderness over the dorsal and lumbar spine, more so over the lumbosacral area on the right side. His range of motion was measured using bubble inclinometer. He has a forward flexion of 30 degrees, extension of 10 degrees, lateral flexion of 25 degrees on either side. Sitting straight-leg raising is 0 to 90 degrees; supine straight-leg raising is 0 to 45 degrees on the left side and 0 to 40 degrees on the right side and elicits back and leg pain. His reflexes are intact. Sensory examination fails to reveal any focal deficit.

Those same findings are contained in the Form 107 completed by Dr. Nadar.[6] Thus, we believe Dr. Nadar's findings of a harmful change in the human organism constitute objective medical findings, as this was information gained through direct observation and/or testing applying objective and

[6] Likewise, in his deposition Dr. Nadar did not indicate any changes in his findings upon examination.

standardized methods that demonstrated the existence of symptoms of such a change. Gibbs v. Premier Scale Co., supra at 762. Consequently, Dr. Nadar's diagnosis of lumbosacral strain with radiculopathy was supported by "objective medical findings" as defined by KRS 342.0011(33) and Gibbs v. Premier Scale Co., supra. Therefore, the ALJ's determination Haney sustained a work-related injury on March 10, 2011, as defined by the statute is supported by substantial evidence. Consequently, because the ALJ's decision Haney sustained a work-related injury is supported by substantial evidence, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Because the ALJ found Haney to be permanently totally disabled, determined the 2007 work-related injury resulted in an 8% impairment, but reduced the PTD award by fifty percent, we *sua sponte* vacate the ALJ's award of PTD benefits. Although neither party raised this issue on appeal, KRS 342.285 clearly grants the Board the authority to decide questions of law regardless of whether they are raised on appeal. Within the Board's

province on appeal is to assure orders and awards of an ALJ are in conformity with Chapter 342. In this case, the ALJ's award is not in conformity with the law.

Since Haney's prior lumbar low back injuries were work-related, the non-work-related exclusion articulated in KRS 342.730(1)(a) is not applicable. Consequently, the ALJ was permitted to determine the March 10, 2011, injury along with previous work-related injuries resulted in Haney being permanently totally disabled. Further, we note neither party takes issue with the ALJ's determination Haney is permanently totally disabled.

In the August 27, 2012, opinion, order, and award, the ALJ determined Haney had a pre-existing impairment of 8% as a result of the 2007 incident. Although the ALJ did not specifically identify the injury to which the 8% impairment was attributable, it is clear from his discussion in the opinion, award, and order he deemed the 8% impairment to be attributable to the September 24, 2007, injury. This injury resulted in Haney being transported to the University of Kentucky Medical Center for treatment and being off work for almost six months. We are buttressed in our conclusion by the ALJ's statement in his October 10, 2012, order that Haney was able to return to work following the 2007 incident and "was

not totally disabled due to that injury alone," but had a 50% occupational disability due to the 2007 incident. Since neither party has contested the ALJ's finding Haney had a pre-existing impairment of 8% as a result of the September 24, 2007, injury, the ALJ's determination Haney had a 50% occupational disability due to the 2007 incident is an error of law. Likewise, the ALJ's October 10, 2012, order amending the opinion, order, and award and awarding PTD benefits based on 50% is also an error of law. We believe this case is governed by the concept of excess disability, albeit in a hybrid form.

The ALJ determined the September 24, 2007, injury resulted in an 8% impairment and Haney had a permanent partial disability as a result of the 2007 injury. Therefore, Haney could not have a 50% pre-existing occupational disability due to the 2007 injury, as an award for the 2007 injury must be based on the 8% impairment. Since the ALJ determined the combined effects of the 2007 injury and the March 10, 2011, injury rendered Haney totally disabled, the concept of excess disability is applicable as there were potentially overlapping awards.

Although Haney's claim for the 2007 injury is barred by the statute of limitations, the only amount which can be deducted from the award for the March 10, 2011,

injury is the weekly amount of PPD benefits awarded for the September 24, 2007, injury. The award for the 2007 injury must be based on an 8% impairment. As Haney's claim for the 2007 injury is barred by the statute of limitations, the award as discussed herein is entirely fictional.

We believe this case is controlled by Fleming v. Winchy, 953 S.W.2d 604 (Ky. 1997) and the subsequent decision on appeal styled Whittaker v. Fleming, 25 S.W.3d 460 (Ky. 2000).[7] Fleming, the claimant, was rendered totally occupationally disabled by partially disabling back injuries which occurred in 1990 and 1991. Although the two injuries in that case were sustained while working for different employers, and this case involves two injuries within the same employment, the principle is the same. The ALJ awarded lifetime benefits to Fleming after excluding the non-compensable prior active disability.[8] The ALJ equally apportioned the responsibility for payment of the PTD benefits between the two employers. The Kentucky Supreme Court agreed Fleming was entitled to total disability benefits arising from the combined effects of the two work injuries. However, it held the worker is not

[7] *See also* Spurlin v. Brooks, 952 S.W.2d 687 (Ky. 1997).
[8] This non-compensable prior active disability was due to two previous work injuries for which Fleming had been fully compensated. Id. at 461.

entitled to benefits for total disability until such time as he became totally disabled. Therefore, benefits were to be awarded on a permanent partial disability basis for the first injury, the 1990 injury, at the rate of 66 2/3% of the worker's disability multiplied by the percentage of occupational disability limited to 75% of the state average weekly wage. PTD benefits were to be paid as a result of the second (1991) injury based on the statutory formula.

In Whittaker v. Fleming, supra, the Supreme Court held that the subsequent employer at risk for the 1991 award was entitled to a credit for the benefits paid pursuant to the partial disability award for the 1990 injury rendered against the first employer to the extent the PPD benefits for the 1990 injury overlapped the period of total disability.

In this case, the ALJ should have formulated an award for the 2007 injury even though Haney failed to assert a claim. This is necessary in order to prevent Haney from receiving an unjust benefit. The ALJ can formulate an award for the 2007 injury since it appears Haney's average weekly wage well exceeded the 2007 state average weekly wage and the award for the 2007 injury would be based on the statutory maximum. Haney's PPD award for the 2007 injury would be based on an 8% impairment, would

begin as of the date of the injury and extend for 425 weeks, and would be interrupted by any period temporary total disability ("TTD") benefits were paid. It appears Haney received TTD benefits until March 2008.

The ALJ must award PTD benefits for the March 10, 2011, injury based on the statutory formula. The ALJ must then grant Martin County a credit for the weekly amount of PPD benefits payable for the 2007 injury during the period the awards overlap. As a result of the March 10, 2011, injury, Haney is entitled to an award of TTD benefits in the amount of $721.97 per week. That computation is as follows: $1,980 (Haney's AWW) x 2/3 = $1,320 reduced to $721.97 per the maximum PTD rate for the 2011 injuries. From that, Martin County would receive a credit for the weekly amount attributable to the award for the September 24, 2007, injury during the period both awards would overlap.

We have carefully reviewed Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003) and conclude it is not applicable in this case. Although Roberts Bros., supra, held an exclusion from a total disability award must be based on pre-existing disability while an exclusion from a partial disability award must be based on a pre-existing impairment, this case falls exclusively under the concept

of excess disability since there are overlapping awards. We are persuaded Roberts Bros., supra, does not apply because the ALJ's determination the 2007 injury caused a 50% disability would result in an illogical and unjust result in this case. Significantly, had Haney timely asserted a claim for the 2007 injury, at most, he would have been entitled to an award of PPD benefits based on an 8% impairment. Under no circumstances could Haney have been awarded benefits based on an occupational disability of 50% due to the 2007 injury. Even though the ALJ believed Haney may have had an occupational disability of 50%, the award for the 2007 injury could only be based upon an 8% impairment further reduced by the factor of .85. Consequently, the ALJ's award as set forth in the October 10, 2012, order unjustly penalizes Haney and grants Martin County a windfall because of Haney's failure to timely file a claim for the 2007 injury. Thus, the concept of excess disability as enunciated in Whittaker v. Fleming, supra, and Spurlin v. Brooks, supra, must govern the award in this case.

We emphasize that from the commencement of the award for the 2007 injury up until the time Haney stopped working, Martin County would receive no credit since Haney was working and the awards would not overlap.

As Haney missed little or no work after the March 11, 2011, injury, he was not permanently totally disabled until he stopped working on June 1, 2011, as stipulated by the parties. Thus, the award of PTD benefits would begin on June 2, 2011, as the parties are bound by the stipulation Haney worked through June 1, 2011. The award of PPD benefits for the 2007 injury and the award of PTD benefits for the 2011 injury would begin to overlap on the date Haney ceased working, June 2, 2011. Liability for Haney's award of PTD benefits falls on Martin County with a dollar for dollar credit permitted for any prior overlapping permanent partial disability award, and the extent and duration of that total award is determined as of the date the last work-related injury became totally occupationally disabling. Again, we acknowledge we are requiring the ALJ to calculate a fictional award for the September 24, 2007, injury. However, we believe such is required by the applicable case law pertaining to excess disability.

The total disability award shall be based on the applicable rate at the time of the March 10, 2011, injury. The fact that a prior active disability contributes to Haney's total disability does not alter this analysis. In a normal situation, after the expiration of the overlapping

period of permanent partial disability, the original overlapping dollar amount becomes excess disability and becomes the liability of Martin County, the employer responsible for the final injury for so long as Haney is disabled.

In this case, due to Haney's date of birth, the awards for the 2007 and 2011 injuries will terminate on the same date pursuant to the provisions of KRS 342.730(4). Therefore, Martin County shall continue to receive a credit for the 2007 injury award during the entire period of the award of PTD benefits for the 2011 injury.

Accordingly, the August 27, 2012, opinion, order, and award, and the October 10, 2012, order as they relate to the ALJ's determination Haney sustained a March 10, 2011, work-related injury are **AFFIRMED**. That portion of the October 10, 2012, order ruling on the petition for reconsideration awarding Haney PTD benefits at the rate of $360.99 per week is **VACATED**. This matter is **REMANDED** to the ALJ for entry of an award of PTD benefits in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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