Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2014

CLAIM NO. 201171250

MARTIN COUNTY FISCAL COURT PETITIONER

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

JOHN SIMPKINS
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

JOHN SIMPKINS CROSS-PETITIONER

VS.

MARTIN COUNTY FISCAL COURT CROSS-RESPONDENT
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENT

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

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

STIVERS, Member. Martin County Fiscal Court ("Martin County") seeks review of the August 21, 2013, Opinion, Order & Award and the November 26, 2013, Order ruling on its petition for reconsideration of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). John Simpkins ("Simpkins") cross-appeals from the August 21, 2013, decision and the May 28, 2014, Order ruling on his petition for reconsideration.[1]

In his August 21, 2013, decision, the ALJ determined Simpkins' claim was not barred by KRS 342.270(1) and he sustained a work-related back injury on October 4, 2011. The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, Martin County argues the ALJ erred in determining Simpkins claim was not barred due to his failure to join this claim with a pending claim as required by KRS 342.270(1). Alternatively, Martin County argues the ALJ's determination when Simpkins attained maximum medical

[1] Martin County filed a Notice of Appeal on December 12, 2013, appealing from the ALJ's initial decision and the Order rendered November 26, 2013. Thereafter, it filed a brief. Simpkins filed a brief asserting the ALJ had not entered an Order ruling on his petition for reconsideration. As a result, this Board placed the appeal in abeyance and remanded the claim for a ruling on Simpkins' petition for reconsideration. On May 28, 2014, the ALJ entered an Order ruling upon Simpkins' petition for reconsideration. This prompted Simpkins to file a Notice of Cross-Appeal on June 27, 2014.

improvement ("MMI") is erroneous and the award of TTD benefits must be vacated and remanded for additional findings.

On cross-appeal, Simpkins argues the ALJ's May 28, 2014, decision contains typographical errors with respect to the amount of TTD benefits and PPD benefits awarded. Alternatively, he argues the ALJ erred in not finding him permanently totally disabled.[2]

On January 2, 2013, Simpkins filed a Form 101 alleging an October 4, 2011, low back injury which occurred when he lifted a bridge board and felt his back pop. Simpkins alleged the injury consisted of the following: "lower back, acute and chronic lumbosacral strain, numbness and tingling into legs." He reserved the right to add an emotional component.

On October 4, 2011, Claim No. 201082363 alleging an injury occurring on July 12, 2010, while working for Martin County was pending. The only documents filed in the record pertaining to that claim are the Form 110 signed only by Simpkins and the attorneys, the Form 110 approved by Hon. Grant Roark, Administrative Law Judge ("ALJ Roark") on October 27, 2011, and the October 10, 2011, hearing

[2] Simpkins states he is also challenging the constitutionality of KRS 342.270(1) which he indicates is moot in light of the ALJ's decision.

order indicating the claim had been settled signed by ALJ Roark and Simpkins' attorney. The October 10, 2011, hearing order signed by ALJ Roark and Simpkins' attorney contains the following statement: "Claim settled for lump sum of $3,000.00 for complete buy-out and dismissal. Form 110 to follow. Defendant to pay court reporter."

The Form 110 in Claim No. 201082363 states Simpkins was injured on July 12, 2010, while cutting weeds. The nature of the injury is: "alleged exposure to chemicals causing skin damage to head, ears, neck, face, and low back." The Form 110 indicates Dr. Lon Lafferty provided an impairment rating of 9% and Dr. Ellen Ballard assessed no impairment. It states TTD benefits were paid from July 22, 2010, through December 12, 2010, at the rate of $296.81 for a total of $6,105.87. The parties agreed that in exchange for a lump sum payment of $3,000.00, there would be a complete dismissal of Simpkins' claim. There was no buy-out of Simpkins' past medical benefits. However, he waived his future medical benefits for $1,000.00, his vocational benefits for $500.00, and his right to reopen for $500.00. The Form 110 dated October 11, 2011, does not provide the date Simpkins, his attorney, and Martin County's attorney signed it.

Both parties introduced the records of Dr. Lafferty, Simpkins' treating physician. With respect to his alleged physical injury, Simpkins relied upon the independent medical evaluation ("IME") reports of Dr. Bruce Guberman and Dr. David Herr. He also submitted the report of Dr. Megan L. Green in support of his alleged psychological injury.[3]

Regarding the physical injury, Martin County relied upon the IME report of Dr. Richard Sheridan. With respect to the alleged psychological injury, it relied upon the IME report of Dr. Robert Granacher.

Martin County introduced Simpkins' May 31, 2013, deposition testimony. He also testified at the June 26, 2013, hearing. Simpkins testified that before working for Martin County, his only other employment had been for Warfield Shop-Rite where he worked approximately two years. Simpkins testified the injury occurred when he lifted a bridge board and felt his back pop. He indicated he tried to work the next day but could not. He then went to Dr. Lafferty who ordered x-rays and physical therapy performed at Inez Physical Therapy. Dr. Lafferty took Simpkins off work and has yet to release him. Simpkins received TTD

[3] During the proceedings, Simpkins was permitted to amend his claim to include a psychological injury.

benefits from October through December 2011, and has had no income since those benefits stopped. He continues to experience constant back pain. He was not hospitalized as a result of this injury. Simpkins had pre-existing back problems for which he was being treated by Kentucky Pain Physicians, which included regularly prescribing pain medication. He had also taken Zoloft prescribed by Dr. Lafferty for the past decade because he "gets real hateful sometimes." Simpkins indicated that after the subject injury he is easily depressed which necessitated increasing the strength of the Zoloft. He testified Claim No. 201082363 arose due to chemical exposure.

At the hearing, Simpkins was questioned about the October 10, 2011, hearing order signed by ALJ Roark in Claim No. 201082363. Simpkins acknowledged the hearing order reflects he was to receive a lump sum payment of $3,000.00 in exchange for complete buy-out and dismissal of his claim. He testified he appeared in Lexington for the hearing and as a result of negotiations occurring prior to the hearing, the parties agreed to settle the claim pursuant to the terms set forth in the hearing order.

Simpkins testified he signed the Form 110 at his attorney's office in Inez.[4]

Simpkins testified the first report of injury stating Martin County first knew of the injury on October 18, 2011, is incorrect as he reported the injury to Darlene Reed ("Reed"), the secretary for roads and bridges on the day he was hurt. Simpkins returned to work the next day, but he went home after telling the secretary he was unable to work. He testified that on October 10, 2011, the date of the scheduled hearing in Claim No. 201082363, he and the employer were aware he was off work due to the 2011 injury. Simpkins denied being informed he was required to join all claims.

Simpkins testified he still experiences sharp pain just above the belt line and occasionally has numbness in his legs. He can sit for approximately ten minutes without changing position and stand for approximately ten to fifteen minutes without moving. He is able to walk for approximately fifteen minutes. Simpkins estimated the bridge board weighing approximately eighty pounds was the heaviest item he lifted in performing his job. He is

[4] It is apparent from Simpkins' testimony that the attorney representing him in the pending claim is not the same attorney representing him in this claim.

currently treated by Kentucky Pain Physicians who prescribe Lortab and Fiorcet which reduces his pain.

Simpkins testified he has been advised that his job is open if he is able to return. He believes he is unable to carry bridge boards or operate weed eaters. He is also unable to bend over and pick up items. He does not believe he is capable of performing any of his past jobs. Anxiety and depression prevent him from participating in the activities he engaged in previously. He takes Zoloft which helps him avoid grouchy spells. Primarily he stays at home sitting on the couch.

Simpkins acknowledged taking Zoloft for approximately six or seven years. His emotional problems did not affect his ability to work. He denied having any prior back injuries for which he had filed a workers' compensation claim.

The ALJ first determined Simpkins' claim was not barred by KRS 342.270(1) reasoning as follows:

> On the day of this 2011 injury, Plaintiff had pending another workers' compensation claim (Claim No. 2010 – 82363) against Defendant; this claim involved a chemical burn injury sustained on July 12, 2010. This claim was litigated and a joint Benefit Review Conference/Final Hearing was scheduled to be held on October 11, 2011, but on that day, rather than proceeding with the BRC/Final Hearing, the parties entered

into a settlement agreement which was subsequently formalized and an Order Approving Settlement Agreement was rendered by ALJ Grant Roark on October 27, 2011.

Only five (5) or Six (6) days (depending how you count the intervening days) fell between the day of Plaintiff's work-related back injury (October 4, 2011) and the day (October 11, 2011) of Plaintiff's settlement with Defendant of his workers' compensation claim for his burn injury. In the six intervening days, neither party attempted to merge Plaintiff's work-related back injury (no Form 101 had yet been filed) with his then-pending chemical burn claim.

Defendant now contends Plaintiff is precluded from pursuing his back injury claim due to the application of KRS 342.270 (1) which provides, in pertinent part, "When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee."

The first issue to be determined is whether Defendant is correct, and Plaintiff is barred from pursuing his back injury claim under KRS 342.270 (1). Assuming Defendant is not successful with this defense, then the issues of work relatedness/causation of Plaintiff's back condition; whether there was a pre-existing active condition involving Plaintiff's back, and the extent and duration (including any modifiers) of Plaintiff's benefits for his back injury under KRS 342.730 must be determined. There would also be determinations to be

made regarding Plaintiff's allegation of a psychological injury.

REVIEW OF THE EVIDENCE

The following chronology will help understand the first issue to be determined:

1. 1999, Plaintiff commenced working for Defendant as a general laborer.

2. July 12, 2010, Plaintiff sustained a chemical burn-type injury while performing work for Defendant.

3. December 13, 2010, Plaintiff returns to work following his convalescences from his work- related burn injury.

4. March 8, 2011, Plaintiff filed a Form 101 for his burn/injury claim, Claim No. 2010 – 82363.

5. August 30, 2011, pursuant to Defendant's motion a scheduling Order is rendered setting October 10, 2011 for a joint BRC/final hearing.

6. October 4, 2011, Plaintiff sustained work-related injury to low back.

7. October 5, 2011, Plaintiff works several hours but stops working due to low back pain. Sees Dr. Lafferty with complaints of low back pain.

8. October 10, 2011, the day the joint BRC/final Hearing was scheduled, to be held in Claim No. 2010-82363, the claim was settled and no BRC/ Final Hearing was held.

9. October 18, 2011, First Report of Injury filed for Plaintiff's low back injury.

10. October 20, 2011, Plaintiff seeks medical treatment with Dr. Lafferty for October 4, 2011 low back injury.

Diagnosis is chronic lumbar strain, referred to specialist for further treatment.

11. October 7, 2011 ALJ Grant Roark renders Order Approving Settlement Agreement, in claim No. 2010-82363, original Agreement being dated October 11, 2011.

12. January 2, 2013, Form 101 filed for Plaintiff's October 4, 2011 work-related low back injury. Assigned Claim No. 2011-71250.

13. October 27, 2011, Defendant files Special Answer giving notice of its intention to raise the affirmative defense of Plaintiff failing to merge his two claims, thus losing the right to pursue his back injury claim.

14. January 30, 2013, Plaintiff's Motion to Amend his Form 101 so as to include a psychological component was sustained.

15. June 11, 2013, BRC held. Final Hearing scheduled for June 26, 2013.

16. June 26, 2013, final Hearing conducted in back injury claim.

To dismiss Plaintiff's October 4, 2011 low back injury claim because it was not filed within five or six days after the injury and before Plaintiff's then-pending chemical burn claim was settled, would not be appropriate.

In Tanya R. Brooks v. Duro Bag Manufacturing Company, Claim No. 2009 – 00539 (Board Decision rendered December 18, 2009) the Board noted,

> "contrary to Brooks contentions, our courts of justice have held that a cause of action generally accrues when a person becomes aware

that he or she has suffered an injury. (Cites omitted). The Kentucky Court of Appeals, in Pepsi-Cola General Bottlers, Inc. v. Butler, 2006-CA-002401-WC, 2007 WL 196-4526 (Ky. App. 2007), more recently concluded that this general interpretation of the term "accrued" is "in keeping with the language in KRS 342.270 (1) stating a claimant must bring all claims which are known, or should reasonably be known to him. The court in Butler concluded that a cause of action for purposes of KRS 342.270 (1) accrues when a claimant becomes aware that he or she has suffered an injury.

Moreover, the court noted that KRS 342.0011 (1), in pertinent part, defined "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings..." The court reasoned that upon consideration of this language, in conjunction with KRS 342.270 (1), a cause of action, for purposes of KRS Chapter 342, "accrues" when a claimant has suffered a harmful change to the human organism evidenced by objective medical findings, and knows or should know that such harmful change is a

direct result of a work-related traumatic event.

Based upon the above Plaintiff's low back-injury claim would not accrue until he knew, or should have known, his low-back work incident caused a harmful change in his spine as evidenced by objective medical findings. Per the plain language of KRS 342.0011 (33), "objective medical findings" involve information gained through direct observation of an injured worker by a medical provider. In the five or six days following his work incident and settling his chemical burn claim, Plaintiff did see Dr. Lafferty, but that office-visit record does not link Plaintiff back complaints to a work injury, that first occurred on October 4, 2011. The time for Plaintiff to file a claim for his alleged back injury had not "accrued" by the date (October 10, 2011) when Plaintiff's chemical burn claim was settled. Consequently it cannot be said Plaintiff knew, or should have known, he sustained a harmful change evidenced by objective medical evidence as a result of his low-back work incident before he settled his chemical burn claim.

If Defendant's contention was in any way valid, it would force an intolerable situation. For instance, if an injured worker had a claim pending and was only a week away from having a scheduled BRC/Final Hearing or settling that claim, and during that week sustained a work-related cut finger, which at the time appeared to be a very minor injury, but, which, within the next several weeks, and after settling his pending injury claim, he learned his once-thought-to-be insignificant finger cut now required amputation of his finger, could the employer avoid liability based upon Defendant's theory? No.

> Defendant's affirmative defense based upon the application of KRS 342.270 (1), is without merit and is overruled.
>
> Having addressed and disposed of this initial threshold issue, it is appropriate to now address all remaining issues.

In reviewing the evidence regarding Simpkins' claim for a physical and psychological injury, the ALJ noted he was age 49, attended school through the tenth grade, and had not earned a GED. Simpkins did not have specialized education or vocational training and his work history consisted of performing manual labor. Prior to the subject injury, Simpkins had been treated for back pain at Kentucky Pain Physicians and continues to do so. Simpkins took Lorcet before the injury which had been prescribed by Kentucky Pain Physicians for treatment of his low back pain and headaches. Simpkins had also taken Zoloft for approximately ten years prior to his low back injury. In determining Simpkins sustained a work-related physical injury, no psychological injury, and had a pre-existing active impairment, the ALJ provided the following discussion and determination:

> An employee has the burden of proof and the risk of non-persuasion to convince the ALJ of every element of his workers' compensation claim. Snawder v. Stice, 576 SW2d 276 (Ky. App., 1979).

When medical proof is conflicting the question of which evidence to believe and which to disregard is within the exclusive province of the ALJ. Square D Company v. Tipton, 862 S.W.2d 308 (Ky., 1993)

The ALJ has the sole discretion to determine the quality, character and substance of the evidence and to draw all reasonable inferences from such evidence. Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky., 1985)

The ALJ has the sole authority to judge the weight and credibility to be afforded the testimony of a witness. McCloud v. Beth-Elkhorn Corporation, 514 S.W.2d 46 (Ky., 1974)

An injured worker's testimony concerning his condition is competent and has probative value. Caudill v. Maloney's Discount Stores, 560 X.W.2d 1 (Ky., 1977)

The undersigned observed and heard Plaintiff testify at his June 26, 2013 final Hearing. Overall, Plaintiff seemed credible, but at times did seem to be overreaching and attempting to attribute more of his low back symptoms to the October 2011 work incident than may otherwise be indicated. Concern with Plaintiff's testimony increased when the content of Dr. Lafferty's October 5, 2011 office-visit record was reviewed, but, overall Plaintiff seemed credible.

Plaintiff absolutely had an active pre-existing low back condition prior to October 4, 2011. The facts solidly show Plaintiff had been experiencing symptoms of low back problems for several years before October 4, 2011, and was being treated for such. As indicated by Dr. Guberman, Plaintiff, prior to his October 4, 2011 work incident, had an

AMA Guides ratable WPI (5%). Whether one attempts to define an active pre-existing condition in medical terms or legal terms, as defined in Finley v. DBM Technologies, 217 S.W. 3d 261 (Ky. App. 2007), it cannot be seriously disputed Plaintiff had an active pre-existing low back condition immediately prior to October 4, 2011. Plaintiff's Dr. Herr's input is not persuasive when he fails to acknowledge Plaintiff had an obvious active, pre-existing low back condition on October 4, 2011.

The persuasive proof in this claim comes from Plaintiff's Dr. Guberman. In part this is simply true because he is willing to acknowledge and accurately apportion a substantial portion of Plaintiff's low back impairment as attributable to an active pre-existing low back problem. Dr. Guberman's input is also persuasive because it is obvious he had available to him many of Plaintiff's pre-October 2011 medical records, in fact one record going all the way back to when Plaintiff was 11 and fractured his femur.

For the above stated reasons, the persuasive proof provided by Dr. Guberman supports the determination Plaintiff's October 2011 work incident is the cause of 3% of Plaintiff's present WPI.

Having determined Plaintiff has a 3% WPI to his low back, due to his October 2011 work injury, it is next appropriate to ascertain whether Plaintiff is entitled to a multiplier under KRS 342.730. Again, for the above stated reasons, the input of Dr. Guberman is most persuasive. It was his expert medical opinion claimant does not now have the physical capacity to return doing the type of work he was performing at the time of his low back injury. He

suggested Plaintiff avoid heights, bending, stooping, lifting, carrying, pushing and pulling, all tasks Plaintiff was daily required to do as a general laborer working for Defendant. It is determined Plaintiff does not retain the physical capacity to return doing the type work he was doing when injured, and therefore is entitled to the three (3) multiplier provided under KRS 342.730(1)(c)1.

It is next appropriate to ascertain whether Plaintiff has sustained a compensable psychological injury as a result of his October 4, 2011 work incident. Plaintiff's Dr. Green, Psy. D., seems somewhat ambivalent in her input. For instance she wrote, "Mr. Simpkins reported a pre-existing condition that appears to have been exacerbated by the injuries that occur in October 2010 (sic). He reported that his symptoms just prior to the injury were mild. Symptoms still appeared to fall in the mild range, but approach the moderate range." She also indicated Plaintiff retained the mental capacity to return doing the work he was doing when injured, even without any psychiatric restrictions.

The most persuasive evidence regarding Plaintiff's claim of a psychiatric injury, comes from Defendant's Board Certified Psychiatrist, Dr. Granacher. A review of his May 13, 2013 psychiatric IME report, which is based on his thorough review of the available facts and records and the results of the numerous standardized tests given to Plaintiff, forces the determination Plaintiff did not incur a psychiatric injury, nor an increase in any psychiatric impairment he may have had prior to his October 2011 work incident; consequently, Plaintiff's

> claim of a psychiatric component to his recent work injury is overruled.
>
> As to TTD benefits, the parties stipulated Plaintiff's average weekly wage was $448.39, two-thirds of which is $298.93. It is appropriate to determine when Plaintiff attained MMI status. Again, for the above-stated reasons, Dr. Guberman's input is most persuasive; on November 20, 2012 he opined Plaintiff obtained MMI status, "one month ago when he was last saw (sic) Dr. Lafferty." A review of the available medical records of Dr. Lafferty reveals Plaintiff saw him, prior to November 20, 2012, on October 20, 2012; consequently, it is determined Plaintiff attained MMI status on October 20, 2012.
>
> Pursuant to KRS 342.020 (1) Plaintiff is entitled to receive from Defendant, all reasonable and necessary medical treatment for the effects of his October 4, 2011 low back work-related injury.
>
> All issues listed in the BRC Order and not discussed and determined herein are, in light of the above-made determinations, moot.

Accordingly, the ALJ awarded TTD benefits in the amount of $283.93 from October 5, 2011, through October 20, 2012, followed by PPD benefits of $17.49 per week for 425 weeks.

Martin County filed a petition for reconsideration requesting reconsideration or additional findings regarding the determination KRS 342.270(1) did not apply and did not

bar Simpkins' claim. Martin County made the same arguments it makes on appeal.

Martin County also requested reconsideration of the ALJ's finding regarding MMI based on Dr. Guberman's reference to Dr. Lafferty's medical records. It asserted Dr. Lafferty placed Simpkins at MMI on January 26, 2012, and again on February 9, 2012. It also requested the ALJ correct certain errors regarding when the special answer was filed and the date ALJ Roark approved the settlement agreement in the other claim. Martin County also requested the ALJ reconsider his reliance upon Dr. Guberman's opinions regarding the impairment rating and Simpkins' capacity to return to work.

Simpkins filed a petition for reconsideration first asserting the opinion contained a typographical error and the TTD benefits awarded should be $298.93. Simpkins also asserted since he had an eleventh grade education with no GED, he was entitled to an additional .2 factor. Therefore, his PPD benefits should be multiplied by 3.2 yielding a weekly benefit of $18.65. Simpkins also contended the ALJ erred in not determining he had a psychological impairment. Alternatively, Simpkins asserted he was at least entitled to medical benefits for the treatment of his psychological condition. Finally, he

maintained his testimony, the medical testimony, his age, education, and ability to return to his former employment entitled him to permanent total disability benefits. Significantly, Simpkins did not seek additional findings regarding the determination there was no psychological injury and he was entitled to PPD benefits.

In his November 26, 2013, Order the ALJ amended the typographical error regarding the dates as requested by Martin County, but concluded it cited to no other patent error appearing on the face of the award. Therefore, the remainder of Martin County's petition for reconsideration was overruled.

In his May 28, 2014, Order ruling on Simpkins' petition for reconsideration, the ALJ stated the first three issues were meritorious and set forth a revised award. However, the ALJ overruled the balance of Simpkins' petition for reconsideration.

Concerning the first issue raised by Martin County, it notes there is no dispute Simpkins was injured on October 4, 2011, and thereafter he signed the settlement agreement pertaining to Claim No. 201082363 sometime between October 11, 2011, and October 27, 2011. Consequently, the Form 110 regarding the 2010 work injury confirms Simpkins settled a claim with his employer without joining all causes

against Martin County. Martin County cites to Ridge v. VMV Enterprises, Inc., 114 S.W.3d 845, 847 (Ky. 2003) in support of its argument this claim is barred. It contends the ALJ's conclusion the injury claim had not accrued since Dr. Lafferty had not confirmed a work-related injury is erroneous as Simpkins was aware he had an injury on October 4, 2011. Martin County cites to the fact Simpkins sought medical treatment the next day even though he did not provide Dr. Lafferty with a history of a work injury on that date. It posits the fact Simpkins did not provide an accurate history to Dr. Lafferty on October 5, 2011, should not change his legal obligation to file and join his new claim with the pending claim.

Martin County observes the case law defining when a cause of action accrues with respect to KRS 342.270(1) is sparse. However, it cites to Pepsi Cola General Bottlers, Inc. v. Butler, 2006-CA-002401-WC, rendered by the Court of Appeals, Designated Not To Be Published. There, the Court of Appeals concluded the cause of action for purposes of KRS 342.270(1) accrues when the claimant has suffered a harmful change to the human organism evidenced by objective medical findings and knows or should know the harmful change is a direct result of a work-related traumatic event. Thus, Martin County maintains the injury accrued either on the

date of injury or the next day when Dr. Lafferty confirmed a lumbar strain. In addition, since Simpkins missed work and began treatment for back pain, his claim accrued at least five days before the scheduled hearing for the 2010 injury. It posits the ALJ could have reopened the proof time in Claim No. 201082363 for "as long as was necessary for the parties to introduce proof regarding the 2011 injury or place the claim in abeyance pending MMI." Given these facts, it argues Simpkins' claim is barred pursuant to KRS 342.270.

Alternatively, Martin County argues the ALJ could not rely upon Dr. Guberman's assessment of MMI since he indicated Simpkins attained MMI on his last visit to Dr. Lafferty. It observes Dr. Lafferty had already placed Simpkins at MMI on January 26, 2012, and noted that fact again on February 9, 2012. Further, Dr. Lafferty's note of October 20, 2012, the date Simpkins' was last seen by him before Dr. Guberman's evaluation, reveals Simpkins was treated for other conditions unrelated to his work injury. Therefore, Dr. Guberman could not rely upon Dr. Lafferty's treatment as the basis for determining MMI status. That being the case, the ALJ's conclusion regarding the date of MMI is not supported by substantial evidence and must be vacated for reconsideration.

On cross-appeal, Simpkins argues the ALJ's May 28, 2014, Order contains a typographical error. Even though the ALJ noted the first three points in his petition for reconsideration were meritorious, he asserts the amended award set forth in the May 28, 2014, Order is erroneous. Simpkins maintains his TTD benefits should be $298.93 and his PPD benefits $18.63 per week. He asserts the ALJ failed to add a .2 multiplier contained in KRS 342.730(1)(c)3 in computing his PPD benefits.

Alternatively, Simpkins argues the ALJ erred in not finding he was permanently totally disabled. He cites to his age, education, inability to return to his former employment, and inability to be retrained for gainful employment. He also cites to his testimony he is unable to work, Dr. Lafferty's statement he would be unlikely to return to his former level of employment, and the restrictions imposed by Drs. Guberman and Herr. Simpkins asserts the ALJ failed to rely upon all of the evidence in making his determination and thus his finding should be reversed.

In Ridge v. VMV Enterprises, Inc., supra, the claimant, Ridge, sustained a work-related knee injury in 1998 and a work-related back injury in 1999. Ridge filed an application for benefits with respect to his knee injury on

April 19, 2000. In August 2000, the parties agreed to settle the claim and the ALJ approved the settlement. The agreement made no reference to the back injury. On February 26, 2001, Ridge filed an application with respect to the back injury. The employer denied the claim and filed a special answer asserting the claim was barred by KRS 342.270(1). The ALJ agreed and dismissed the claim. In affirming the ALJ, the Supreme Court stated as follows:

> The language of KRS 342.270(1) is clear, unequivocal, and mandatory, both with respect to a worker's obligation to join "all causes of action" against the employer during the pendency of a claim and with respect to the penalty for failing to do so. Under KRS 342.270(1), it is immaterial that the claimant's knee and back injuries arose at different times, involved separate claims, and were treated by the parties as separate matters. Once he filed a claim for the knee injury, KRS 342.270(1) required him to file and join the claim for the back injury before the knee injury claim was settled.

Here, the factual situation is completely different than in Ridge. Clearly, Simpkins had pre-existing back problems meriting constant treatment well before the October 4, 2011, injury. Although Simpkins experienced immediate back pain, as noted by the ALJ and Martin County, on October 5, 2011, Simpkins did not provide a history of receiving a work-related injury the previous

day. The fact Simpkins may have experienced significant pain and discomfort on October 4, 2011, did not require him to immediately seek to continue the hearing scheduled for October 10, 2012, in Claim No. 201082363. Dr. Lafferty's October 5, 2011, note does not indicate the severity of the injury. Thus, at that time it was extremely difficult to determine whether Simpkins had a meritorious claim for a work-related injury occurring on October 4, 2011. In fact, Dr. Lafferty's note reveals "lower back pain radiating down into [left] groin region. Onset 4 days ago." He went on to note the pain was worse with any movement sitting, and was eased by standing. In addition, he noted Simpkins had done a lot of lifting. Significantly, Dr. Lafferty noted "denied trauma/injuries." His diagnosis was L/5 strain/spine and muscle spasm. It appears Dr. Lafferty next saw Simpkins on October 12, 2011, two days after the hearing order was entered indicating Claim No. 201082363 was settled.[5] Thus, Simpkins was not required to seek to continue the hearing scheduled in Claim No. 201082363 based upon the event which occurred on October 4, 2011. Martin County would have us hold based on the events of October 4,

[5] On the record in question, the date at the bottom of the note is only partially visible. It appears Dr. Lafferty did not see Simpkins on October 10, 2011, the date of the hearing in Lexington.

2011, and October 5, 2011, that Simpkins was required to file a motion to continue the hearing in order to assert a claim and join it with a pending claim when the severity and cause of his lumbar condition was then unknown. At that time, Simpkins was required to assume he sustained a compensable injury. Given Simpkins' prior back problems, such an assumption would be highly speculative. In fact, Dr. Guberman assessed a greater impairment for his pre-existing problems than for the condition arising from the October 4, 2011, injury. Significantly, Dr. Guberman's assessment was provided on November 20, 2012, over one year after the October 4, 2011, injury.

Following Martin County's logic, Simpkins had a five day statute of limitations. Within that period, Simpkins would have been required to move to continue the hearing, hold the claim in abeyance, reopen the proof time, and not settle the claim. Between October 4, 2011, and October 10, 2011, there was no diagnosis of a work injury, no impairment rating, and no indication of the extent of any injury. Even though Dr. Lafferty diagnosed a back strain on October 5, 2011, the question of whether Simpkins aggravated his existing condition or sustained a new injury had not been resolved. We also note the time for

submitting medical evidence in Claim No. 201082363 had expired.

We attribute no significance to the fact ALJ Roark approved the agreement on October 27, 2011. The Form 110 reveals the settlement agreement was prepared on October 11, 2011. We believe the hearing order signed by ALJ Roark and Simpkins' attorney establishes an agreement was reached which subsequently could be enforced should either party attempt to withdraw. Thus, for all intents and purposes, the claim was settled on October 10, six days after the purported injury. More importantly, Claim No. 201082363 was dismissed. Simpkins received $3,000.00 for dismissal of the claim. Thus, there would have been no pending claim with which to consolidate the above-styled claim after October 10, 2011.

Further support for our position is found in Saint Joseph Hosp. v. Frye, 415 S.W.3d 631 (Ky. 2013). Frye sustained a 2009 work injury. She sustained another injury at work in 2010 after the final hearing but before the case was taken under submission and an opinion rendered. The Supreme Court held Frye's failure to join both claims did not defeat her second claim as it was no longer pending during the time between the final hearing and the ALJ's opinion.

Here, the proof time had expired but the hearing had not been held. For reasons previously stated, Simpkins' claim had not accrued at the time of the October 10, 2011, hearing. Further, after the October 10, 2011, order was entered by ALJ Roark indicating the claim was settled in exchange for a complete dismissal, Simpkins' claim was no longer pending. All that remained was for the parties to execute the settlement agreement and forward it to the ALJ for his signature. Therefore, when Simpkins' claim subsequently accrued the previous claim was not pending, obviating the need for joinder.

Moreover, since a settlement was reached, a motion to continue or hold this claim in abeyance would constitute an attempt to vitiate the settlement reached on October 10, 2011. The law does not favor such a course of action, as settlement is statutorily encouraged. Given the facts of this case, we believe the ALJ's conclusion KRS 342.270(1) is inapplicable is correct.

That said, we agree with Martin County the award of TTD benefits must be vacated. It is clear from the ALJ's opinion he awarded benefits solely by determining the date Simpkins attained MMI. KRS 342.0011(11)(a) defines TTD as follows:

> ‘Temporary total disability’ means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court further explained that “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant’s level of improvement permits a

return to the type of work she was customarily performing at the time of the traumatic event.

More recently, in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as she remains disabled from her customary work or the work she was performing at the time of the injury. The court in Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> . . . .
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court further

elaborated with regard to the standard for awarding TTD as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky.App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
>
> . . . .
>
> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

Thus, the date Simpkins attained MMI is not the sole factor to be considered in an award of TTD benefits. To be entitled to TTD benefits, Simpkins must not have reached MMI or a level of improvement that would prevent a return to employment as defined by the case law. Since the

ALJ did not discuss the second prong of the analysis, i.e. whether Simpkins reached a level of improvement that would permit a return to employment as defined herein, the claim must be remanded to the ALJ for an analysis of his entitlement to TTD benefits based on the applicable law. In addition to considering the date Simpkins reached MMI, the ALJ must also determine when he reached a level of improvement that would permit a return to his customary employment.

We also agree with Martin County that Dr. Guberman's assessment of MMI as the date Simpkins was last seen by Dr. Lafferty prior to Dr. Guberman's examination is not supported by substantial evidence. Dr. Guberman stated Simpkins was at MMI as of the date he was last seen by Dr. Lafferty. As pointed out by Martin County, that date appears to be October 20, 2012. A review of Dr. Lafferty's October 20, 2012, record reveals on that date he did not treat Simpkins' low back problems. Thus, we do not believe there is any support for Dr. Guberman's assessment of MMI based upon the date Simpkins was last seen by Dr. Lafferty especially since Dr. Lafferty assessed MMI on January 26, 2012, which he confirmed on February 9, 2012.

With respect to Simpkins' cross-appeal, we note in its reply brief, Martin County concedes the TTD benefit

rate and PPD benefit rate are incorrect and Simpkins is correct the TTD benefit rate is $298.93 and the PPD benefit rate is $18.63. Thus, the ALJ's award of income benefits must be vacated.

Finally, we find no merit in Simpkins' argument the ALJ erred in not determining him to be totally occupationally disabled. Significantly, in his petition for reconsideration, Simpkins sought no additional findings of fact regarding the determination he was permanently partially disabled. That portion of Simpkins' petition for reconsideration relating to his entitlement to an award of permanent total disability merely reargues the evidence. He did not take issue with the sufficiency or depth of the ALJ's analysis in determining Simpkins is entitled to PPD benefits.

We believe the ALJ correctly considered all factors as required by McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). More importantly, Simpkins does not take issue with the ALJ's determination he had a pre-existing impairment for which he had been treated for years. In fact, his own physician, Dr. Guberman, attributed a greater impairment to the pre-existing condition than he did to the October 4, 2011, injury. The opinions of Dr. Guberman clearly establish

Simpkins had physical problems which pre-existed the subject injury. We note Dr. Green indicated from a psychological standpoint Simpkins was likely capable of returning to work. In addition, as noted by Simpkins, in his report of February 9, 2012, Dr. Lafferty stated Simpkins was unable to return to his former level of employment. Dr. Lafferty did not state Simpkins was incapable of performing all types of employment. Since Simpkins did not seek additional findings as to the ALJ's determination Simpkins is only partially disabled and the ALJ's analysis and determination he is not totally disabled is supported by substantial evidence, the decision of the ALJ finding Simpkins to be permanently partially disabled must be affirmed.

Accordingly, that portion of the August 21, 2013, Opinion, Order & Award finding Simpkins' claim is not barred by KRS 342.270(1) and the portion of the November 26, 2013, Order reaffirming that determination are **AFFIRMED**. Those portions of the August 21, 2013, Opinion, Order, and Award and the November 26, 2013, Order relating to the award of TTD benefits are **VACATED**. On remand, the ALJ shall enter an amended opinion, award, and order determining the appropriate period to which Simpkins is entitled to TTD benefits in conformity with the views

expressed herein. Further, any award of TTD benefits shall be at the rate of $298.93 per week. In addition, those portions of the August 21, 2013, Opinion, Order & Award and the May 28, 2014, Order relating to the award of PPD benefits are **VACATED**. Based on the agreement of the parties, the amended opinion, award, and order shall award PPD benefits of $18.63.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SARAH K MCGUIRE
P O BOX 351
PIKEVILLE KY 41502

COUNSEL FOR RESPONDENT:

HON JOHN EARL HUNT
P O BOX 960
ALLEN KY 41601

ADMINISTRATIVE LAW JUDGE:

HON OTTO D WOLFF IV
8120 DREAM ST
FLORENCE KY 41042