OPINION ENTERED: June 26, 2012

CLAIM NO. 201195971 & 201001424

MICHAEL COLEMAN PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

AREA WIDE PROTECTIVE, INC.
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Michael Coleman ("Coleman") appeals the February 10, 2012, opinion, order, and award by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") in which the ALJ dismissed Coleman's claims for lumbar spine and shoulder injuries and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for his cervical spine,

thoracic spine, periiscapular [sic] myofascial pain, and headaches. Coleman filed a petition for reconsideration which was denied by order dated March 6, 2012, from which Coleman also appeals.

Coleman's Form 101 (Claim No. 2010-01424) alleges on August 4, 2009, and March 3, 2010, while working for Area Wide Protective, Inc. ("Area Wide"), he injured his neck, shoulder, back, and suffers from headaches. The Form 101 alleges Coleman was involved in an automobile accident. Coleman's second Form 101 (Claim No. 2011-95971) alleges on February 2, 2011, while working for Area Wide, Coleman injured his low back while setting out traffic cones. By order dated April 12, 2011, the ALJ consolidated Claim No. 2010-01424 and Claim No. 2011-95971.

The December 15, 2011, benefit review conference ("BRC") order indicates the following stipulation: "Plaintiff's average weekly wage (AWW) was $364.65(09) at issue." The following contested issues were listed:

> benefits per KRS 342.730; work-relatedness/causation; average weekly wage; unpaid or contested medical expenses; injury as defined by the ACT; credit for child support lien; TTD

Coleman testified at the December 15, 2011, hearing about the type of work he was performing at Area Wide at the time of his injuries as follows:

Q: Now, this work that you were doing at the time of these injuries, that was basically what kind of work would you call that?

A: A flagger. I was-

Q: Okay, what was your employer doing; what had they been contracted to do, work on the road?

A: No, they flagged for the power company, utility work.

Q: Okay, and you all were I believe over close to Hyman [sic], Kentucky in Knot [sic] County?

A: Yes, I believe so.

Q: And was that true with regard to all these injuries?

A: Right.

Q: And so what was the power company in the process of doing?

A: They was [sic] getting ready to do either a guy line or a power line going across the four lanes. And we was [sic] getting ready to block off four lanes of traffic. And we had set out our cones, was [sic] pulling into the center median area, and a woman rear ended the work vehicle I was a passenger in.

Q: That's in '09?

A: Right.

[text omitted]

Q: The first injury occurred when you got rear ended by a member of the general public?

A: Yes, I was a passenger in the work vehicle.

Q: Okay, and then what happened the second time? I believe it was pertaining to your shoulder.

A: The second one I had got [sic]- I was on restrictive duty, but they moved my weight limit that I could lift to forty pounds, and I was helping picking up the stands, and the stand weighs approximately eighteen to twenty pounds. I put three of them in the truck one at a time, not at the same time, but I was putting- and by the time I put the third one in, my shoulder was- like gave out and was hurting real bad.

Q: Which shoulder?

A: My right shoulder.

[text omitted]

Q: Okay, and then that last incident you were doing something with those cones?

A: I was setting out the taper for a work setting out cones. I was carrying three cones, dropped one, lifted the other two up. And when I lifted them up, it was just like somebody punched me in the back with a stun gun and electricity shot up my back and down the back of my legs.

Q: What part of your back?

A: It felt like my lumbar, but it was my lower back it seemed like.

Q: You said you were tapering?

A: It's-

> Q: Is that where they take the cones and-
>
> A: Basically.
>
> Q: Kind of block off one lane but they do it gradually so people aren't running into each other?
>
> A: Right.
>
> Q: Okay, and are these cones like stacked within each other like a stack of coffee cups?
>
> A: Yes.
>
> Q: So you pull them out of each other?
>
> A: Right. Well, I had ahold of three. They weigh approximately five to seven pounds apiece. I had three. I dropped one but they're three foot tall cones. And I'm not the tallest person so I had to lift them up off the cone I just dropped and then was getting ready to drop another one and I ended up dropping all of them because I was- the pain hit me.

Coleman testified he is unable to perform the kind of work he was performing for Area Wide at the time of his injuries. He stated as follows:

> Q: Michael, considering only the problems that you attribute to those injuries, do you think you could go back and perform the kind of work you were doing for Area Protective?
>
> A: No, I couldn't do the lifting and pulling and stuff to set up the cones or set up the signs because it takes a lot of bending over because the stand

only- it's only like a foot or two off the ground. So you have to lean down to put the sign in the stand. I couldn't do that. Putting the stands in and out of the back of the truck, I couldn't lift them. I couldn't stand there all day either.

Q: Did you also flag?

A: Yes, I flagged also.

Q: How do you do that? Do you actually use a flagger or one of those slow stop signs?

A: Slow stop signs.

Q: And you turn it?

A: Right.

Q: But that requires standing there on asphalt for long periods of time?

A: Yes, I've done it for up to eighteen hours at one time.

Q: Like in one day you mean?

A: One shift.

Q: Yeah, could you do that from [sic] these injuries?

A: No, I can't even sit for- I couldn't even sit right now for over an hour without having to get up and walk around. I can't walk very far without having to sit down because of the pain. And it just took over from working all the time and to enjoy [sic] working and then come [sic] up and can't do nothing [sic]. It's driving me nuts. I'm going stir crazy.

Concerning Coleman's alleged injuries and their compensability, in the February 10, 2012, opinion, order, and award, the ALJ determined as follows:

> In the specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds persuasive and relies upon the opinions of Dr. Potter and Dr. Travis and finds that Mr. Coleman has met his burden of proving he suffered an injury as defined by the Act and [sic] to his thoracic spine, cervical spine, and that his headaches which resulted from his cervical condition are causally related to the work-related injuries that he suffered. The ALJ finds the Plaintiff has not proven he suffered a work-related injury to his lumbar spine or shoulder condition [sic].
>
> The Administrative Law Judge bases this finding on the opinion of Dr. Jenkinson, and Dr. Kriss as well as Dr. Potter who all found that Mr. Coleman suffered an injury to his cervical spine. In addition the Administrative Law Judge relies upon the opinion [sic] of Dr. Travis and Dr. Potter who felt that Mr. Coleman suffered an injury to his thoracic spine as a result of the work injuries described by him. Further, the headaches that Mr. Coleman is being treated for according to Dr. Potter arise from the cervical spine injury that he suffered and are therefore are [sic] causally related to the same.
>
> [text omitted]
>
> Dr. Kriss and Dr. Jenkinson have assessed Mr. Coleman but [sic] 5% functional impairment rating pursuant to the Fifth Edition of the AMA Guides

> for his cervical spine condition. Dr. Potter assesses Mr. Coleman a 16% functional impairment rating, 7% for his cervical spine condition, 2% for his headaches and periscapular myofascial pain, and 8% for his thoracic spine condition.
>
> In this specific instance, the Administrative Law Judge finds persuasive and relies upon the opinion of Dr. Potter who accurately assessed Mr. Coleman's three areas of injury resulting from his work-related injuries and finds Mr. Coleman retains a 16% functional impairment rating as a result of his cervical spine condition, his thoracic spine condition, his headaches and periscapular myofascial pain caused by his work-related injuries. Pursuant to care [sic] S34 2.730[sic](1)(b) the functional impairment rating is multiplied by a factor of one yielding a 16% permanent partial disability.

Coleman's first argument concerns the ALJ's March 6, 2012, order ruling on his petition for reconsideration. Coleman asserts the ALJ exceeded his authority under KRS 342.281 by revisiting the merits of the claim in the order ruling on his petition for reconsideration. Coleman maintains as follows:

> In refusing to apply the 3 multiplier in awarding benefits, the ALJ found only that the claimant could return to his job of a flagger even though he had been restricted to medium work. Inasmuch as the record shows that his job at the time of his injuries exceeded medium work, the ALJ declined to apply the 3 multiplier since he

> could be a flagger. Opinion, Order and Award, p.26.
>
> In a timely fashion, the employer [sic] challenged this finding by the ALJ as a 'patent' error appearing upon the face of the Opinion, Order and Award pursuant to KRS 342.281, which section limits the ALJ to correction of errors patently appearing thereon.
>
> However, the ALJ, rather than 'correcting' this patent error, issued an Order overruling the claimant's Petition for Reconsideration in which he actually re-visited the merits of the claim and, in essence, found that the claimant could do job duties beyond that of a mere flagger. In so doing, the ALJ exceeded his authority under KRS 342.281 which was limited to correcting a patent error.

Concerning Coleman's job duties at Area Wide, in the February 10, 2012, opinion, order, and award, the ALJ stated as follows:

> He eventually became a crew chief. He testified he would set up the zone and the read signs and would drive a truck. He set out most of the traffic cones and directed traffic. He testified the stand holding the signs could weigh up to 20 pounds.

Concerning the applicability of the three multiplier, the ALJ made the following findings:

> Mr. Coleman argues that as a result of his injuries, he is permanently and totally occupationally disabled or in the alternative is entitled to application of the three time statutory multiplier....

KRS 342.730(1)(c)(1) states in pertinent part 'that if, due to an injury and [sic] employee does not retain the physical capacity to return the type of work the employee performing at the time of their injury, the benefits for permanent partial disability shall be multiplied by three times the amount otherwise determined under paragraph B of this subsection.'

[text omitted]

Mr. Coleman argues he is permanently and totally occupationally disabled as a result of the injuries he suffered to his cervical spine, thoracic spine, and his periscapular myofascial pain syndrome and headaches. He testified that he does not feel capable of returning to his job as a flagger for the Area Wide Protective based upon the listing [sic] requirements and the requirement that he be on his feet for several hours a day.

Area Wide Protective has submitted medical proof from Dr. Jenkinson, Dr. Kriss, Dr. Manning and the results of two functional capacity evaluations all the [sic] which reflect the [sic] Mr. Coleman retains the physical capacity not only to work, but to return to work at his prior occupation as a flagger for Area Wide Protective, Inc.

In this specific instance, the Administrative Law Judge finds that based on the functional capacity evaluations performed, and Mr. Coleman's testimony describing his job duties as a flagger for the Defendant Employer, that not only is Mr. Coleman not permanently and totally occupationally disabled, but in fact he retains the physical capacity to return to his former job as a flagger for the

> Defendant Employer, should he be so motivated. Mr. Coleman has been restricted to medium work and the job of flagger, according to the functional capacity evaluations, clearly fits within that category.

Coleman's petition for reconsideration presented the following argument:

> Comes the plaintiff, pursuant to KRS 342.281, and petitions for reconsideration of the Opinion, Order, and Award rendered herein February 10, 2012, and in support hereof says that there are patent errors appearing upon the fact of the Opinion, Order and Award, in that the Administrative Law Judge states that the type of work the claimant was doing at the time of the injury was flagging, whereas, the last injury and the one that really was the damaging injury, on February 2, 2011, occurred while he was lifting and setting out traffic cones in the course of his employment. In fact, the Administrative Law Judge makes multiple references throughout the Opinion, Order and Award to the fact that the claimant was lifting and setting out traffic cones yet in determining whether or not he can return to the type of work done at the time of the injury, (thereby entitling him to a 3 multiplier), the Administrative Law Judge only found that he could return to his job as a 'flagger.'
>
> This is an error appearing on the face of the Opinion, Order and Award and the Administrative Law Judge should correct same by finding that the claimant is not able to return to [the] type of work that he was doing at the time of his injury and award the 3 multiplier accordingly.

The ALJ's March 6, 2012, order ruling on the petitioner for reconsideration states as follows:

> This matter is before the Administrative Law Judge on Defendant's Response to Plaintiff's Petition for Reconsideration. Having reviewed the record and being otherwise sufficiently advised,
>
> IT IS HEREBY ORDERED as follows:
>
> 1. The ALJ thoroughly reviewed and described Plaintiff's job duties and went beyond more than the mere flagger description. As a result, Plaintiff's petition for reconsideration is DENIED.

Coleman's argument on appeal regarding the ALJ's findings in the March 6, 2012, order ruling on Coleman's petition for reconsideration is without merit, as the ALJ, in the order directly addresses and disposes of the issue Coleman raised in his petition for reconsideration. The record reveals Coleman testified extensively to his job duties at Area Wide surrounding his injuries both in his deposition and at the hearing. A review of the language in the February 10, 2012, opinion, order, and award reveals the ALJ had a thorough understanding of Coleman's job duties with Area Wide. In his petition for reconsideration, Coleman argued the ALJ characterized Coleman's job at the time of the February 2, 2011, injury

as that of a "flagger" and ultimately determined Coleman could return only to that job.

We disagree with Coleman's assertion the ALJ "re-visited the merits of the claim and, in essence, found that the claimant could do job duties beyond that of a mere flagger." In the March 6, 2012, order on petition for reconsideration, the ALJ merely clarified that he "thoroughly reviewed and described Plaintiff's job duties and went beyond more than the mere flagger description" in the February 10, 2012, opinion, order, and award. In other words, we believe the ALJ was acknowledging he understood Coleman's job duties went beyond that of a flagger at the time of his injuries and considered this fact when ruling on the applicability of the three multiplier. A fair reading of the ALJ’s order ruling on Coleman’s petition for reconsideration is the ALJ believed Coleman could perform his previous job which encompassed more than working as a flagger. In the order ruling on Coleman’s petition for reconsideration, the ALJ did not change or reverse his decision on the merits with respect to this issue; rather, he provided an explanation. No error was committed.

Coleman's second argument is that the ALJ erred in determining his AWW at the time of the first injury. He argues as follows:

> It is understandable that the ALJ would have been confused on the issue of AWW, given the fact that it was not the same at the time of each injury. The ALJ erroneously interpreted the evidence submitted by the employer to be $305.48 at all relevant times. Opinion, Order and Award, p.22.
>
> In fact the wage records submitted by the employer showed a different AWW for each injury.
>
> The employer filed an AWW-1 spreadsheet on March 24, 2011, clearly showing the pre-injury AWW to be $364.65 for the injury of August 5 [sic], 2009.
>
> Inasmuch as $246.42 was paid for TTD as to the first injury, which the ALJ found to have caused [sic] 16% functional impairment rating, the ALJ erred in his PPD award on page 27 of the Opinion, Order and Award.
>
> Hence, the Board should remand this case with directions to correct the TTD rate in the award on page 27 from $203.66 to $246.42 and correct the PPD amount as follows: $246.42 x 16% = $39.42 per week.

In light of the record, we find Coleman's argument to be without merit. The record reveals on March 28, 2011, Area Wide filed an AWW-1 spreadsheet indicating an AWW of $364.65 for the August 4, 2009, injury. On December 21, 2011, Area Wide filed a second AWW-1 spreadsheet indicating an AWW of $305.48 for the February 2, 2011, injury. On January 6, 2012, Area Wide filed a

third AWW-1 spreadsheet indicating an AWW of $305.48 for the March 3, 2010, injury and reaffirming the AWW for the February 2, 2011, injury. We note that the December 15, 2011, BRC order specifies the following stipulation: "Plaintiff's average weekly wage (AWW) was $364.65(09) **at issue**." (emphasis added). The language of this "stipulation" indicates AWW for the August 4, 2009, injury was a contested issue. Coleman's brief to the ALJ indicates this as well by stating as follows: "The plaintiff's average weekly wage was $364.65 in 2009, but this is at issue." We also point out “average weekly wage” was listed as a contested issue in the BRC order. Significantly, however, in Coleman's brief to the ALJ, he concedes to an AWW of $305.48 "at all pertinent times" by stating as follows:

> **The employer has filed wage records indicating an average weekly wage at all pertinent times herein of $305.48**. Utilizing the 14% [sic] functional impairment rating assigned by Dr. Potter, an award based upon that 14% [sic] would be calculated as follows: $305.48 x 66 2/3% = $203.65 x 14% [sic] = $28.51 x 3 multiplier= $85.53 per week for a period of 425 weeks.

(emphasis added).

Consequently, in the February 10, 2012, opinion, order, and award, the ALJ relied upon an AWW of $305.48, as set forth

in the December 21, 2011, and February 2, 2011, spreadsheets filed by Area Wide and as set forth by Coleman in his brief to the ALJ. The ALJ concluded as follows:

> The next issue for determination is the appropriate average weekly wage. The Defendant Employer has submitted wage records that reflect Mr. Coleman had an average weekly wage of $305.48 and **the Plaintiff in his brief concurs with this finding.** Therefore, the Administrative Law Judge finds Mr. Coleman's average weekly wage was $305.48. This entitles him to TTD benefits payable at a rate of $203.66.

(emphasis added).

Within his discretion, the ALJ was entitled to rely upon an AWW of $305.48. While we acknowledge Area Wide's March 28, 2011, AWW-1 spreadsheet indicates a pre-injury AWW of $364.65 for the August 4, 2009, injury, the ALJ was not obligated to rely on this figure. Instead, the ALJ was entitled to rely upon representations made by Coleman in his brief and the subsequent AWW-1 spreadsheet filed by Area Wide. As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence,

regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Significantly, in his petition for reconsideration, Coleman did not take issue with the AWW figure utilized by the ALJ. Thus, the ALJ was not given the opportunity to correct the alleged error. In the absence of Coleman addressing this issue in a petition for reconsideration, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ’s conclusion, as this is a question of fact. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). As there is substantial evidence in the record in support of the ALJ's determination of an AWW of $305.48, as acknowledged in Coleman's brief to the ALJ, this determination, along with the ALJ's calculation of TTD and PPD benefits based on an AWW of $305.48, will not be disturbed.

Accordingly, the February 10, 2012, opinion, order, and award and the March 6, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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