OPINION ENTERED: December 5, 2011

CLAIM NO. 201000673

MICHAEL T. PAYNE PETITIONER

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

POWERS CONSTRUCTION COMPANY
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Michael T. Payne ("Payne") seeks review of the opinion, award, and order rendered June 24, 2011, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") finding Payne sustained work-related injuries to his left wrist and lumbar spine and awarding temporary total disability ("TTD") benefits, permanent partial disability

("PPD") benefits, and medical benefits. The ALJ declined to enhance the award by the three or two multiplier pursuant to KRS 342.730(1)(c)1 and (1)(c)2, respectively. The ALJ also declined to enhance Payne's compensation pursuant to KRS 342.165(1). Payne also appeals from the July 25, 2011, order summarily overruling his petition for reconsideration.

On appeal, Payne argues the ALJ erred in not considering whether his benefits should be enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2. Payne maintains in the opinion, award, and order, the ALJ determined the three multiplier set forth in KRS 342.730(1)(c)1 was not applicable, but made no determination regarding the applicability of the two multiplier. Payne asserts his petition for reconsideration requested further findings of fact related to the two multiplier, but the ALJ failed to make additional findings. Payne argues his testimony establishes he briefly returned to work for Powers Construction Company ("Powers Construction") after a period of recuperation. Payne notes the ALJ did not determine whether he had returned to work and earned wages less than his pre-injury wages. Payne argues the ALJ failed to analyze his claim pursuant to

Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Payne argues as follows:

> The Petitioner also requested that the ALJ give his analysis in applying the 2x multiplier conditioned upon the ALJ finding that Mr. Payne was able to return to roofing work and had done so for a period of time. Therefore Petitioner requests that the determinations and facts regarding statutory multipliers be remanded to ALJ in accordance with Kentucky law.

Next, Payne asserts: "The ALJ made an error of fact and an error of law regarding the claimant's safety violation." Payne further asserts as follows: "the ALJ was not clear in his analysis of Petitioner's KRS 342.165 safety violation claim regarding how 'intent' is dealt with under Kentucky law." Payne also argues the ALJ made an incorrect assumption of fact when he determined as follows:

> In addition, the fact that a compliance officer had investigated the scene after the accident and did not recommend the issuance of any citations supports a finding that a safety violation did not occur.

Payne asserts the ALJ incorrectly found Powers did not intend to violate the safety regulations because the ALJ believed Powers Construction was "unaware of his violation." Payne points out Powers Construction presented

no evidence refuting the occurrence of specific safety violations. Further, Payne maintains Powers Construction admitted Payne was not given any safety equipment. Rather, Powers Construction's "entire defense" was Payne was not an employee. Therefore, the ALJ was left with nothing but the "substantial, highly qualified and unrebutted testimony from Randy Gray" ("Gray"), a "retired safety regulation compliance officer in [Kentucky]."

Payne maintains his testimony establishes he fell from the roof of a barn on which he was working while not wearing a safety harness or any other "personal protective gear" designed to prevent the fall. In addition, Gray provided a report and testified by deposition regarding Powers Construction's numerous regulatory safety violations. Payne complains the ALJ did not determine what regulation governed his claims nor did the ALJ determine whether this regulation required Powers Construction to have fall protection in place at the time of his fall. Payne also argues the ALJ did not determine whether the lack of fall protection helped cause his accident. Therefore, there was no "substantial basis for not finding a safety violation."

Payne also maintains the ALJ did not explain how Powers Construction was merely negligent. Payne complains

without explanation or adequate findings of fact, the ALJ summarily stated intent did not exist, and Payne did not prove a violation existed. Citing Chaney v. Dags Branch Coal Company, 244 S.W.3d 95 (Ky. 2008), Payne maintains intent is inferred from Powers Construction's failure to comply with the specific statutes and regulations. Payne asserts there is no evidence in the record a Kentucky OSHA ("KOSHA") compliance officer investigated the accident scene and thereafter concluded there were no violations. Payne maintains KOSHA does not investigate workplace injuries when reported more than six months after the date of injury. Payne maintains he was never contacted by a compliance officer; therefore, the ALJ cannot place any weight on the fact no citations were issued after an inspection. In addition, Payne asserts Kentucky law does not require the issuance of a citation before an award can be enhanced pursuant to KRS 342.165. Accordingly, Payne asserts this matter should be remanded to the ALJ for additional findings regarding whether a safety violation occurred.

Because of the issues raised, we will only summarize the evidence relating to the two issues raised on appeal.

Payne's Form 101 alleges on June 17, 2008, he sustained work-related injuries while working for Powers Construction when he fell approximately eighteen to twenty feet off a barn roof resulting in a lumbar spine fracture and broken left wrist.

Alan K. Powers ("Powers") was deposed on November 10, 2010, and January 20, 2011. Powers did not testify at the hearing. Powers' testimony at both depositions reveal Powers Construction's business operations can best be characterized as shady. Powers maintained Payne was not an employee of Powers Construction at the time of the injury, and, if anything, was an independent contractor. Powers testified Payne had previously worked for Powers Construction and was fired in 2002. Powers and his wife were the only employees of Powers Construction. Powers admitted all individuals with whom Powers Construction contracted to perform work were paid in cash. The testimony from Powers and others who performed independent contracting jobs for Powers Construction reflects it obtained jobs roofing or re-roofing barns, commercial buildings, and apartment buildings. Powers Construction also contracted with individuals to put on siding, hang drywall, and remodel the inside of buildings. In all

instances, Powers Construction considered these individuals independent contractors and it always paid them in cash.

Powers acknowledged Payne had performed contract work for Powers Construction in the past. On June 17, 2008, when Payne was injured, Powers maintained Powers Construction had contracted with Robert Dunn ("Dunn") and Chris Galbraith ("Galbraith") to take a metal roof off a barn and put on a new one. Powers testified after he left the job site, Payne showed up to work on the barn roof and was not supposed to be working at the time he fell.

Dunn testified when Payne showed up, Dunn got off the roof and called Powers informing him Payne was there and asked if Payne was supposed to be on the job. Powers informed Dunn Payne was not to perform any work on this job, and Powers was returning to the job site. Powers and Dunn testified upon Powers' return, Payne was told to come down because he was not working on this job.

Payne's August 12, 2010, deposition was introduced and he testified at the April 25, 2011, hearing. Payne maintained he was hired by Powers Construction to re-roof the barn from which he fell. Payne insisted he was a full-time employee of Powers Construction. Payne testified he was injured when he fell off a roof while putting on a

metal roof. He described the events leading to his fall as follows:

> A: Okay, it happened because the roof –- we was putting on a metal roof. It was starting to get a little sideways, so we had to take the roof back up to get it straightened back out. Well, I was down at the bottom. I was taking screws out across the bottom edge. That was our first and foremost thing right there we was doing because the roof needed to be shifted. One of his employees was mad because he was in charge of –- while Allen was gone, he was in charge, you know, and let's make sure we get this straight and it was all on him whether or not this roof turned out right. And he got mad when Allen said take it back up, take the roof back off, so he started unscrewing screws left and right, left and right. I'm on the bottom hinge unscrewing screws and the piece of metal I'm standing on, I fall off. I fall back, the metal comes down on top of me, that whole sheet of metal, which was probably twenty foot long and that's how it happened and I fell off.

Payne indicated he was taken to the hospital by Powers. Payne testified he had not worked since he worked at Powers Construction and had not attempted to do any work. At the hearing, Payne testified he returned to work for Powers Construction in 2009 performing less than half a dozen jobs. He acknowledged he was never able to work an entire day and worked a maximum of "maybe four hours" in one day. No other proof was introduced regarding whether

Payne had returned to work at a weekly wage equal to or greater than his average weekly wage ("AWW") at the time of his injury. Since Powers Construction always paid Payne in cash, no records were introduced regarding Payne's wages. Significantly, in the November 2, 2010, Benefit Review Conference ("BRC") order, the parties stipulated Payne had not returned to work and was currently earning no wages.

Regarding the applicability of KRS 342.165(1), relevant testimony is contained in Powers' November 10, 2010, and January 20, 2011, depositions. In his November 10, 2010, deposition, Powers testified he only saw "half of [Payne's fall]." Powers explained as follows:

> A: After the yell, so I would say pretty much when he was just coming right off. I didn't see how the action happened. All I know is I seen him in mid-fall and metal coming off.
>
> Q: How high would you estimate that –
>
> A: Sixteen feet.
>
> Q: - roof was?
>
> A: Sixteen feet fall.
>
> Q: And what did he land on?
>
> A: Ground, dirt.

Powers' January 20, 2011, deposition revealed the following:

> Q: How often do you work on roofs?

A: I don’t know. I say it’s probably about 40 percent.

Q: As a general contractor, what considerations do you look at as far as safety requirements for heights, working at heights?

A: Certain pitches, we have belts, harnesses and equipment; and that is pretty much it, you know.

Q: Do you know how far off the ground your subcontracted people have to be?

A: At this appropriate time, I’m not for sure, but I keep a little book.

Q: You keep a book about it?

A: Yeah.

Q: That a record book?

A: It’s an OSHA book.

Q: Would you mind producing that for us?

[text omitted]

Q: What reporting requirements do you feel obligated to undertake with OSHA-related matters? Do you ever notify them of injuries?

A: No.

Q: Never? Never have?

A: No.

Q: What safety equipment was used on the barn job?

A: Obviously, I don’t know.

> Q: Obviously, you don't know.
>
> A: I don't know. I know all the trucks carry harnesss [sic], and I don't know if they were being used. Well, obviously, they wasn't if Mike fell off the roof. Wasn't supposed to be up there in the first place. But they are all provided, so I don't know if they chose to, you know -– and that was subcontracted to an individual, and they had the access to my equipment so.
>
> Q: Do you inform them that you had equipment there for them to use?
>
> A: They know it.
>
> Q: So were Rob and Chris wearing the appropriate equipment?
>
> A: Don't recall. When I got there is when the accident happened and I was not too worried about looking at other people. Rob was on the ground and I was on the ground.

Payne relied upon Gray's report and March 24, 2011, deposition testimony. Gray testified he is a consultant in the health and safety profession. He graduated in 1993 from Murray State University with an OSHA degree. He then worked for twenty-five years for the Kentucky Occupational Safety and Health Administration ("KOSHA") as a compliance officer. Gray also earned a "Master's Degree in OSHA" approximately ten years after he began working for KOSHA. Gray retired as a compliance officer with the state of Kentucky.

Gray explained the vast majority of his job with KOSHA involved safety inspections. He also conducted accident investigations. In either case, if he determined "the employer met the criteria for a citation," he would write a report and "issue the recommendation for citations to be issued by the Frankfort office." Gray also testified at KOSHA hearings.

The first thing Gray does when investigating an accident is interview the person who was hurt and go to the site to take pictures and measurements. Gray explained he would look at all the information gathered and "compare to the standard members and all potential violations that may have existed at the time." Concerning Payne's accident, Gray learned Payne was working on the roof of a barn which pursuant to OSHA regulations was considered a commercial unit rather than a residential unit. Gray explained there are different standards for different types of facilities and buildings. The barn had two different pitches. He testified Payne explained the workers were tearing off an old metal roof and installing a new metal roof. Gray explained Payne's fall was "covered by the OSHA standards which would be covered under the 29 CFR 1926 regulations for construction." He explained these federal regulations were relevant because all of the federal regulations were

adopted by the state of Kentucky. Gray stated as a compliance officer, he had investigated this type of work injury many times. He pointed out when employers are required to do a one or two day job, as in this case, the employer must assess the job "from the standpoint of the roof pitch system to see what kind of protective measures they [sic] need to take for their employees." Gray explained as follows:

> If it's a steep pitch roof only with no combination of roofs, they can go strictly with fall protection. Which would be a body harness, lanyards, anchor points, ball restrain systems and things of that nature.
>
> If it's a low pitch roof or a flat roof, then they've got other options. They can use guard rails, perimeter markings and different things. An actual human warning system. There's a lot of things they can do for a low pitch roof as well.
>
> Then whenever there's a combination, then the employer has to ensure that whenever they're on a steep roof that they're wearing their fall protection. But then whenever they're done with the steep roof portion of the work, then they go to the low portion, they can change that protection level and use a different type of means to protect the employees.
>
> Regardless, they still have to provide a means any time they're six feet or more off the ground.

Gray testified Powers Construction complied with none of these regulations.

Gray read from his March 21, 2011, report which reflected the following violations by Powers Construction:

> 29 CFR 1926.20(b)(2): A competent person did not conduct regular inspections of the jobsite, materials, and equipment:
>
> 29 CFR 29 CFR 1926.21(a): The employer did not establish and supervise programs for the education and training of employers and employees in the recognition, avoidance and prevention of unsafe conditions in employments covered by the act:
>
> 28 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury:
>
> 29 CFR 1926.32(f): A competent person, who was capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who had authorization, did not take prompt corrective measures to eliminate them:
>
> 29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-slope roof’s, with unprotected sides and edges 6 feet (1.8m) or more above lower levels was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system,

> warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roof's 50-feet (15.25m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted:
>
> 29 CFR 1926.501(b)(11): Each employee in a steep roof with unprotected sides and edges 6 feet (1.8m) or more above lower levels was not protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems:
>
> 29 CFR 1926.503(a)(2)(i): The employer did not assure that each employee was trained, as necessary by a competent person qualified in the nature of fall hazards in the work area:
>
> 803 KAR 2:180 Section 3(4): The employer did not orally report to the Kentucky Department of Labor, Office of Occupational Safety and Health, Division of Compliance, at (502)564-3070, any work-related incident which resulted in the hospitalization of fewer than two employees within seventy-two hours following the incident:

Gray testified not only must the employer have safety equipment available, but the employer must "enforce its usage." Gray explained as follows:

> A: Well, we have this thing in OSHA, and it was a ruling in OSHA back several years ago. It's called the Employers Affirmative Defenses. That ruling said that there's four things

that an employer could do in order to defend themselves against an OSHA citation.

First thing is the employer has to have all their written programs that they're required to have for their job. No matter what their task is, the OSHA guidelines in the manufacturing, in the general industry manufacturing, the construction, all the different regs, they have requirements for written programs. The employer has to know what written programs out of those standards they're required to have.

So therefore, number one, they have to have all the written programs.

Secondly, they have to ensure all of their employes [sic] are fully trained on the programs of what their responsibilities and obligations are.

Thirdly, the employer has to be able to demonstrate and prove that they have gone out and actually done on-site audits to check to make sure the employees are not being exposed to hazards. If they are, that they removed them from the hazards. These things need to be documented. They have to prove that they're being proactive and going out and seeking and looking at the work that the employees are involved in.

Fourthly, the employer has to have a written documented employee disciplinary procedure. The disciplinary procedure is for health and safety violations only. OSHA does not care that they came to work late. The health and safety, the disciplinary procedure for health and safety rules has to be demonstrated that it's been used in the past whenever the employee

> did not follow their instructions and their training.
>
> Now, whenever an employer achieves all four of those elements, then the employer then can seek an adequate or the beginning of a defense for OSHA not to issue a citation. But if the employer is missing one of those, not all four but only one of those, then they're not eligible for that defense. They have to have them all.

Gray testified Powers Construction should have reported the accident, and if the fall had been reported and investigated, he anticipated Powers Construction would have been cited and penalized. Gray was not aware someone from KOSHA had come to the site and talked with Powers Construction and viewed the site.[1] The following exchange then took place between Gray and Powers Construction's counsel:

> Q: In the instance where the report of a compliance officer yields no citation being issued, that would mean that either the compliance officer found no potential violations for which a citation could be issued or his recommendation was rejected at the next level; is that correct?
>
> A: Well, there's probably some other reasons as well, but those would be the two primary.

[1] There appears to be no dispute Powers never reported Payne's fall and Payne's attorney reported the incident to KOSHA "a couple of months" before Gray's March 24, 2011, deposition.

Regarding the fact no citations were issued to Powers Construction by OSHA, Gray testified as follows[2]:

> Q: Mr. Gray, this injury happened –- what date do you have for the injury?
>
> A: I think I have June 17th of 2008, if I remember right.
>
> [text omitted]
>
> Q: If I did not notify OSHA about this until a couple of months ago, would OSHA have investigated the actual accident?
>
> A: No. This is the thing. OSHA only had six months from the date of occurrence to issue a citation. So it wouldn't matter if they didn't find anything or they find a wealth of things. They couldn't do anything about it after six months. If they don't get the citation to the employer's hand and issued to them within that time frame, it doesn't matter any more [sic].
>
> Now, OSHA can still issue a citation for failure to report beyond the six months whenever they learned something wasn't reported, but they can't go back and issue a citation for the actual violations they may have occurred because that six month period has expired.
>
> Q: There was no opportunity in this situation since they weren't notified until I notified them. There was no opportunity for a citation to be made in the first six months?

[2] Although the testimony references OSHA, it appears the parties were referring to KOSHA.

A: They couldn't have done it. They could not have done it.

Q: I had asked Mr. Powers in his second deposition what the height requirement was for when regulations started to require safety equipment. He did not know, but he did say that he had an OSHA book that apparently he went by. That's been provided.[3]

Let me have this marked as Exhibit 2.

That's what Mr. Powers provided me as the text that he referenced for.

A: These are not OSHA standards.

Q: What is that?

A: This is what I would use or any other compliance officer would use at the close of an inspection. We actually call it the PIG, but it's called Post Inspection Guide. We just acronym them as PIG.

What this does is it tells the employer their rights under the OSHA law once the OSHA inspection ends. How to have the informal conference. Tells them how to contest. It tells them about penalties. It explains the process to them. It's just a booklet that the compliance officer leaves at the job site whenever they leave, but it's not a set of regulations.

Q: That's all I have.

RECROSS EXAMINATION BY MR. LEE:

[3] In his January 26, 2011, deposition, Powers testified he carried this book with him.

> Q: A compliance officer who came and investigate [sic] an accident more than six months after the accident had occurred, while he would not, according to you he could not issue a citation for any safety violations if it was more than six months after the accident, occur, correct?
>
> A: After that occurrence.
>
> Q: But that it could certainly issue a citation to an employer if the employer had failed to give notice of that accident?
>
> A: To report it.
>
> Q: To report it. Are you aware in this case that after this officer came and discussed the matter with Powers Construction, that no such citation was issued for failing to report?
>
> A: I can't speak to why it was or wasn't. I just know that they can.
>
> Q: Would have been grounds to do it if you had been a compliance officer, wouldn't it?
>
> A: If I had been compliance officer, I would have wrote him a citation.
>
> Q: It is entirely likely that whoever came to look at this one made a determination that there may not have been an employer/employee relationship between Powers and Payne, correct?
>
> A: I don't know. I can't speak for what the compliance officer did.

The ALJ concluded at the time of his injury, Payne was an employee of Powers Construction. Based on

Payne's testimony he was paid $10.00 per hour and typically worked forty hours a week, the ALJ determined Payne's AWW was $400.00. Relying upon the opinion of Dr. Thomas J. O'Brien, the ALJ found Payne had a 7% functional impairment as a result of his injuries; 2% attributable to the left wrist injury and 5% attributable to the low back injury. Based on the opinion of Dr. O'Brien, the ALJ found Payne retained the physical capacity to return to the type of work he was performing at the time of the injury and KRS 342.730(1)(c)1 was not applicable. As pointed out by Payne, the ALJ did not discuss the applicability of the two multiplier even though the November 2, 2010, BRC order reflects "extent and duration of disability with application of multipliers" was a contested issue. Concerning enhancement of Payne's benefits pursuant to KRS 342.165(1), the ALJ found as follows:

> The last issue for determination is whether or not the Defendant Employer violated KRS 342.165(1) which states in part, "if an accident is caused the degree by the intentional failure of the Employer to comply with a specific statute, law, of Administrative regulation made thereunder, communicated to the Employer and relative to installation or maintenance of safety appliances and methods, the compensation for which the Employer would otherwise have been liable under this chapter shall be

increased 30% in the amount of each payment."

The Plaintiff argues that his injury occurred based upon two safety violations. The first that he was not supplied the proper safety harnesses that would have prevented him from falling off the building and second that a coworker had improperly removed the screws from the metal roof causing the same to slide off leading to the Plaintiff's injuries. In support of their position, the Plaintiff submitted testimony from Mr. Gray, who is an expert in occupational safety and health.

Mr. Gray testified that the actions of the Defendant Employer in regards [sic] to the job site the Plaintiff or [sic] working at violated several federal OSHA regulations. He testified that while the Defendant Employer was not cited by OSHA for any violations that they nonetheless existed. He testified that at least the Defendant Employer violated their [sic] duty to report an accident which would have triggered the investigation in question.

The Defendant Employers' [sic] argue [sic] that Mr. Gray is a retired OSHA compliance officer and admitted that he does not make determinations of whether or not a safety violation occurred and makes recommendations to the powers that be for said determination. He also was unaware that an OSHA compliance officer had come to the actual site of the Plaintiff's injury, interviewed witnesses, and examined the scene and no citations were issued therefrom.

> In this specific instance, after careful review [sic] the evidence, the Administrative Law Judge is not persuaded that the Plaintiff has met his burden of proving that the Defendant Employer intentionally violated any known safety statutes or administrative regulations.
>
> While the actions of the Defendant Employer were negligent and could have been prevented, the Administrative Law Judge is simply not convinced that the Defendant Employer intentionally violated any known statutes or regulations.
>
> It is readily apparent from the testimony of Mr. Powers that he was unaware that he was violating safety regulations if in fact, he was. In addition, the fact that a compliance officer had investigated the scene after the accident and did not recommend the issuance of any citations supports a finding that a safety violation did not occur.

Payne filed a petition for reconsideration arguing he was entitled to the three multiplier. Alternatively, Payne asserted if the ALJ concluded he was able to return to work then the ALJ should still consider applying the two multiplier since he attempted to return to work. Significantly, Payne made no request for additional findings of facts regarding his entitlement to the two multiplier.

Concerning the alleged safety violation, Payne argued Gray's compelling and unrebutted testimony

established the violation of numerous regulations. Payne argued the ALJ's denial of the application of the safety violation because he "could not find intent" was unexplained given the evidence. Accordingly, Payne requested "findings appropriate to the facts and testimony regarding Powers Construction's intentional violation of several state and federal safety regulations applicable to the injury and make an appropriate award of enhanced benefits." Without explanation the ALJ summarily overruled Payne's petition for reconsideration.

As the claimant in a workers' compensation proceeding, Payne had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Payne was unsuccessful in establishing entitlement to enhanced income benefits pursuant to KRS 342.730(1)(c)2 and KRS 342.165(1), the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by

the ALJ 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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). 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481

(Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Although the BRC order reflects the applicability of multipliers was an issue, and the ALJ never specifically dealt with the applicability of the two multiplier in his opinion, award, and order or the order ruling on Payne's petition for reconsideration, we find no error in the ALJ's failure to enhance Payne's benefits by the two multiplier.

The BRC order reflects the parties stipulated Payne had not returned to work since the injury. 803 KAR 25:010 Section 16 reads, in relevant part, as follows:

> (2) Upon cause shown, a party may be relieved of a stipulation if the motion for relief is filed at least ten (10) days prior to the date of the hearing, or as soon as practicable after discovery that the stipulation was erroneous.

Since Payne did not seek to be relieved of the stipulation which established he did not qualify for enhanced benefits by the two multiplier, the ALJ did not err in failing to address this issue in either the opinion, award, and order or the order ruling on the petition for reconsideration. Further, Payne introduced no evidence establishing he returned to work earning a wage equal to or greater than

his AWW at the time of the injury. In fact, the hearing testimony reflects Payne never worked a full day upon his return to work at Powers Construction after the injury. Since Payne failed in his burden of establishing entitlement to enhanced benefits pursuant to KRS 342.730(1)(c)2, we find Payne's argument of entitlement to enhanced benefits by the two multiplier to be totally without merit.

Although the heading of Payne's first argument asserts the ALJ failed to analyze whether the two multiplier should be applied in his case, given Payne's statement "the determination and facts regarding statutory multipliers be remanded to the ALJ in accordance with Kentucky law," we feel compelled to address Payne's entitlement to the three multiplier. That issue is very quickly dispensed with, as the ALJ relied upon the opinions of Dr. O'Brien in determining Payne retained the physical capacity to return to the type of work he performed at the time of the injury. Dr. O'Brien placed no restrictions on Payne's work activities and opined Payne could return to work as a roofer. Dr. O'Brien's opinions constitute substantial evidence which supports the ALJ's determination not to enhance Payne's benefits by the three multiplier. Accordingly, we affirm the ALJ's determination Payne was

not entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1 or 2.

That said, we believe the record compels a finding Payne's injuries were the direct result of Powers Construction's failure to comply with various safety regulations. KRS 342.165(1) reads, in part, as follows:

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

In Chaney v. Dags Branch Coal Company, supra, the Supreme Court defined what must be established in order for KRS 342.165(1) to apply stating as follows:

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

Id. at 101.

Powers acknowledged he was not aware of the safety equipment used on the “barn job” which resulted in Payne’s injury. He also acknowledged he knew Payne and others were not using the “harnesses and equipment” which were in the truck. Gray pointed out Payne’s failure to use whatever safety equipment was supplied by Powers Construction is not a defense to Powers Construction’s failure to require Payne to wear the required safety equipment given the fact Powers Construction was aware Payne was not using the equipment it allegedly had available. Powers admitted he said nothing to Payne about wearing the safety equipment. Powers also admitted he has never notified OSHA of any work injuries. In addition, Powers Construction did not have in place other fall and safety protection, mandated by state and federal regulations, as outlined in Gray’s report. Gray’s testimony and report establishes numerous violations of Kentucky safety regulations.

The ALJ’s statement that “while the actions of [Powers Construction] were negligent and could have been prevented, the Administrative Law Judge is simply not convinced that [Powers Construction] intentionally violated any known statutes or regulations” is misguided and a complete misstatement of the law regarding Powers

Construction's failure to comply with a specific statute or lawful administration regulation. The fact Powers Construction was unaware it was violating safety regulations is irrelevant, as intent is inferred from its failure to comply with the regulation. The ALJ's finding Powers Construction was negligent is meaningless without any explanation as to what conduct the ALJ deemed negligent. Clearly, negligent conduct has no bearing in the case *sub judice*. What the ALJ meant when stating Powers Construction's action "could have been prevented" is unknown. Certainly, the finding of negligence which could have been prevented leads to the inference the ALJ believed Powers Construction had failed to comply with certain safety regulations but any attempt on our part to interpret the meaning of that statement without any further explanation by the ALJ would be pure speculation.

We believe the fact a compliance officer may have conducted an investigation over two and one half years after the accident and did not recommend the issuance of a citation for a safety violation has no bearing on whether Powers Construction failed to comply with an administrative regulation concerning workplace safety. As Gray's unrebutted testimony revealed, KOSHA would not have conducted an investigation and issued citations for

workplace safety violations beyond six months from the "date of occurrence." Certainly Powers Construction did not report the accident. It appears a compliance officer visited the scene and spoke with Powers Construction only after Payne's attorney reported the accident to KOSHA. At that time a citation for a violation of a safety regulation could not have been issued.

As pointed out in Chaney v. Dags Branch Coal Company, supra: "If the violation 'in any degree' causes a work-related accident, KRS 342.165(1) applies." Clearly, the testimony of Powers and Gray establish there were numerous and obvious violations of state administrative safety regulations concerning workplace safety which caused Payne's fall and injuries.

Chaney v. Dags Branch Coal Company, supra, stands for the proposition Payne was not required to show Powers Construction intentionally violated a statute or regulation concerning workplace safety. Upon the establishment of a violation of an administrative regulation concerning workplace safety, Powers Construction's intent to violate the regulation is inferred. We conclude the record compels a finding that had Powers Construction complied with the safety regulations outlined in Gray's report, Payne's fall would not have occurred. Stated another way, but for

Powers Construction's failure to comply with the numerous workplace safety regulations cited by Gray, Payne's fall and injuries would not have occurred.

Further, there is absolutely no basis for the ALJ's finding "it is readily apparent from the testimony of Mr. Powers that he was unaware that he was violating safety regulations if in fact, he was," since Powers Construction's awareness or lack thereof of workplace safety regulations is irrelevant and the record clearly indicates Powers Construction violated numerous safety regulations. Chaney v. Dags Branch Coal Company, supra, is clear, absent unusual circumstances, an employer is presumed to know what specific state and federal regulations concerning workplace safety require. Id. at 101. Powers' testimony reflects a rather flippant attitude toward complying with workplace safety regulations. Therefore, given Powers' deposition testimony recited herein and Gray's testimony and report, we conclude the record compels a finding Payne's accident was caused "in any degree" by the intentional failure of Powers Construction to comply with numerous administrative regulations concerning workplace safety, and Payne's income benefits should be enhanced by thirty percent.

Given the evidence in the record and the fact Powers Construction did not report the violation, the ALJ was clearly erroneous in finding Powers did not violate a safety regulation and in giving any weight to the fact a compliance officer may have investigated the accident two and one half years after it occurred and did not recommend issuance of any citations. To hold otherwise would allow Powers Construction to benefit from its unlawful and most likely intentional act of failing to report the accident and avoid any consequences for its egregious violations.

Accordingly, that portion of the June 24, 2011, opinion, award, and order and the July 25, 2011, order determining Payne was not entitled to enhancement of his benefits pursuant to KRS 342.730(1)(c)1 or (1)(c)2 is **AFFIRMED**. That portion of the ALJ's June 24, 2011, opinion, award, and order determining Payne was not entitled to enhancement of his permanent partial disability benefits pursuant to KRS 342.165(1) and that portion of the July 25, 2011, order relating to Payne's entitlement to enhanced benefits pursuant to KRS 342.165(1) are **REVERSED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion, award, and order enhancing Payne's benefits by 30%.

ALL CONCUR.

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