OPINION ENTERED: July 19, 2013

CLAIM NO. 201000459

MODERN PROPERTY MANAGEMENT PETITIONER

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

ESTATE OF JEFFREY ALLEN WILBURN (DECEASED), JULIE A. VANHOOK, ADMINISTRATRIX AND PARENT AND NATURAL GUARDIAN OF AMANDA WILBURN and MAXWELL WILBURN; HEIDIE MARIE CANTER, PARENT AND NATURAL GUARDIAN OF ICY CANTER; and HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Modern Property Management ("Modern") appeals from the October 10, 2011, opinion and order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") finding "that the relationship between

Plaintiff [sic] and Defendant, when Plaintiff [sic] was shot, was that of employee/employer," and determining "Plaintiff [sic] is entitled to receive and Defendant is obligated to pay death benefits as provided in KRS 342.750." Modern also appeals from the November 14, 2011 order overruling its petition for reconsideration. Modern had previously appealed from those decisions, which this Board dismissed as an interlocutory appeal in an opinion entered May 11, 2012. Modern also appeals from the opinion, order and award on remand rendered January 14, 2013, and the order denying its petition for reconsideration rendered March 14, 2013.

We conclude the ALJ's determination Jeffrey Allen Wilburn (deceased) ("Wilburn"), was engaged in the course and scope of his employment at the time he was fatally shot is supported by substantial evidence. We further determine the ALJ did not err in assessing interest upon the unpaid death benefit pursuant to KRS 342.750(6). Accordingly, we affirm.

Wilburn was employed by Modern as the "field operations manager." Tim Scott ("Scott"), president of Modern, testified it is a property management company providing "turn-key management" of properties including among other services "putting together a maintenance plan."

Modern managed the apartment building located at 209 Lakeshore Drive, where Wilburn resided. On March 11, 2009, Wilburn was shot and killed by Latarra Martin, a resident of the same department building who lived across the hall from him. At the time of his death, Wilburn was unmarried and had three dependent children.

On April 12, 2010, Julie VanHook ("VanHook"), as Administratrix of Wilburn's Estate, filed a Form 101 alleging Wilburn was killed on March 11, 2009, as a result of a gunshot wound and attached his death certificate. The Form 101 lists as Wilburn's sole dependents: Amanda Wilburn, daughter; Maxwell Wilburn, son; and Icy Canter, daughter. The Form 101 was signed by VanHook as Administratrix of the Estate. On February 8, 2011, VanHook filed copies of the birth certificates of the three children. On March 9, 2011, VanHook moved to amend the Form 101 requesting as follows:

> …to amend the Form 101 and to have the caption reflect the application and claim for benefits has been brought on behalf of the Estate of Jeffrey Allen Wilburn (Deceased) as well as the surviving minor and dependent children of the deceased, Maxwell Riley Wilburn, Amanda Michelle Wilburn, and Icy Savannah Beth Canter.

On March 22, 2011, the ALJ sustained the motion to amend and ordered as follows:

> [The] Form 101 and style of this case shall be amended to reflect that the claim is brought on behalf of the Estate of Jeffrey Allen Wilburn as well as the surviving minor and dependent children of the deceased, Maxwell Riley Wilburn, Amanda Michelle Wilburn, and Icy Savannah Beth Canter.

The parties introduced proof on the issue of whether Wilburn's death arose out of and in the course of his employment. The transcripts of the witnesses' testimony in Fayette Circuit Court Indictment Number 09-CR-1169, along with the depositions of VanHook and Scott, were filed in evidence.

VanHook testified by deposition on March 29, 2011. VanHook is a resident of Lexington, Kentucky, and was married to Wilburn from 1992 to 2007. She testified she maintained contact with Wilburn, and saw him on a frequent basis. She stated based upon her observation, it was not unusual for tenants to contact Wilburn directly at his apartment with maintenance requests. She specifically testified as follows:

> Q. For all appearances in your experience was he really the contact for Modern Property Management on site there at Lakeshore Apartments?
>
> A. Yes.

On July 12, 2011, the Plaintiffs filed a “Motion to Submit Case” requesting the ALJ cancel the benefit review conference (“BRC”) scheduled for September 14, 2011, and set a date for submission of the case. The Plaintiffs asserted the sole issue before the ALJ was whether Wilburn’s death arose out of and in the course and scope of his employment with Modern. The Plaintiffs stated the parties had waived the right to a hearing and had submitted evidence including “criminal trial transcripts” to be considered by the ALJ. The Plaintiffs also asserted a hearing was unnecessary and would only further delay the final determination. With the submission of the transcripts of the criminal proceeding, the Plaintiffs maintained the claim was ripe for submission. On August 1, 2011, the ALJ issued a briefing schedule, cancelled the BRC, and directed the claim would stand submitted for a decision as of August 16, 2011.

In the opinion rendered October 10, 2011, the ALJ ordered and adjudged Wilburn’s death “was related to or [sic] arose out of his employment,” and the “Plaintiff [sic] is entitled to receive and Defendant is obligated to pay death benefits as provided in KRS 342.750.” However, the ALJ did not determine the amount and duration of the benefits each of Wilburn’s three minor children would

receive pursuant to KRS 342.750(1)(d) and (e). The ALJ did not award a lump sum benefit to the estate pursuant to KRS 342.750(6). Further, the ALJ did not award medical benefits which may have been incurred for Wilburn's treatment prior to his death, even though VanHook testified she incurred a "huge bill" associated with the initial transporting and care of Wilburn following the shooting.

In our opinion dismissing the previous appeal entered May 11, 2012, this Board determined the ALJ's October 10, 2011 opinion and order was interlocutory and did not represent a final, appealable, and enforceable order. We specifically stated as follows:

> An order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. *See* KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999); Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995); Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1980).
>
> We conclude the October 10, 2011, opinion and order of the ALJ does not meet any of the criteria set out above. In this case, pursuant to KRS 342.750(1)(d)(e), the ALJ must determine Wilburn's average weekly wage and calculate the amount and duration of the income benefits which each of the three minor children shall receive. Pursuant to KRS 342.750(6), the ALJ must award a lump sum benefit to the

> estate and also award medical benefits pursuant to KRS 342.020. The October 10, 2011, opinion and order addresses none of these issues. As it stands now, the parties must compute and agree on the benefits to which the three minor children are entitled and must also agree on the lump sum benefit the estate is to receive. Currently, the parties have no way of resolving any dispute which may arise over the income benefits to which the three minor children are entitled and the lump sum benefit to which the estate is entitled. Likewise, there must be a general award of medical benefits pursuant to KRS 342.020. As a matter of law, the October 10, 2011, opinion and order and the order ruling on the petition for reconsideration must be deemed interlocutory. Clearly, there remain numerous issues which the ALJ must resolve before there can be an enforceable and final opinion, award, and order.

A BRC was held on October 10, 2012. The BRC order and memorandum reflect the parties stipulated Wilburn's average weekly wage was "Max. for 2009." The parties agreed the contested issues include, "benefits per KRS 342.730; outstanding unpaid or contested medical expenses; work-relatedness; and benefits per KRS 342.750 for est. and for 3 minors." On remand, the ALJ rendered a decision on January 14, 2013, finding as follows:

> Subsequent to the issuance of the Opinion of the Workers' Compensation Board, and specifically on October 10, 2012, a telephonic Benefit Review

Conference was held and the parties agreed to the following stipulations: Jurisdiction under the Act; An employment relationship existed between Plaintiff and Defendant at all times herein relevant; Plaintiff sustained an alleged work-related injury on March 11, 2009; Defendant received due and timely notice of Plaintiff's alleged injury and death; TTD benefits have not been paid; Medical expenses have not been paid by Defendant; Plaintiff's date of birth was May 22, 1960; Plaintiff was a high school graduate with some additional educational training.

The parties later submitted additional Joint Stipulations. These Stipulations included the following:

1. Jeffrey Allen Wilburn was born on May 22, 1960 and died on March 11, 2009 as a result of a gunshot wound inflicted by Latarra Martin. Ms. Martin was tried in the Fayette Circuit Court and was found guilty but mentally ill relative to the death of Jeffrey Allen Wilburn and has remained incarcerated and/or in the custody of the Commonwealth of Kentucky since March 11, 2009.

2. Jeffrey Allen Wilburn's average weekly wage at the time of his death was sufficient to qualify his minor children for maximum benefits under KRS 342.750 in the event an Award is entered in this case.

3. Minor children, Maxwell Wiley Wilburn and Amanda Michelle Wilburn, were dependent upon and receiving support from Jeffrey Allen Wilburn at the time of his death. They are appropriate beneficiaries should benefits be awarded under KRS 342.750. Julie A. VanHook is their parent and guardian and shall be named as a party

in this capacity and in accordance with this fact.

4. Icy Savannah Beth Canter was dependent upon and receiving support from Jeffrey Allen Wilburn at the time of his death. She is an appropriate beneficiary should benefits be awarded under KRS 342.750. Heidi Marie Canter is her parent and guardian and shall be named as a party in this capacity to this action in accordance with this fact.

5. There are outstanding medical expenses arising from this incident as attached to the Application for benefits.

6. Should the Administrative Law Judge award benefits under the Act in this matter, the parties agree that the lump sum death benefit owed to the estate for 2009 is $68,198.54.

7. If the Administrative Law Judge awards benefits in this matter pursuant to KRS 342.750, the minor children would be eligible for benefits under KRS 342.750 (1)(d).

8. Amanda Wilburn’s date of birth is November 1, 1994. She will reach age eighteen on November 1, 2012 and age twenty-two on November 1, 2016.

9. Maxwell Wilburn’s date of birth is April 14, 1997. He will reach age eighteen on April 14, 2015 and age twenty-two on April 14, 2019.

10. Icy Canter’s date of birth is June 18, 2007. She will reach age eighteen on June 18, 2025 and age twenty-two on June 18, 2029.

11. Any benefits awarded under KRS 342.750 to the children in this matter shall not exceed the weekly maximum for 2009 of $520.72 while paid to two or more children and shall not be less than $347.16 when paid to only one child.

Having reviewed this matter, and in compliance with the Order of the Workers' Compensation Board,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

The undersigned Administrative Law Judge has reviewed the evidence of record and his previous Findings and Conclusions and incorporates by reference the original determinations set forth in the original Opinion and Order dated October 10, 2011, including the determination that the death of Jeffrey Wilburn arose out of and was related to his employment with Modern Property Management for the reasons set forth therein.

For his further findings on remand, the ALJ states:

KRS 342.750 provides income benefits, when an injury causes death, specifically providing, "If the injury causes death, income benefits shall be payable in the amount and to or for the benefit of the persons following, subject to the maximum limits specified in subsections (3) and (4) of this section". Paragraph (1)(d) provides "to the children, if there is no widow or widower, 50 percent of such wage for one (1) child, and 15 percent for each additional child, divided among such children, share and share alike." The maximum weekly income benefits payable for all beneficiaries in case of death shall not exceed 75 percent of the

average weekly wage of the deceased as calculated under KRS 342.140.

Jeffrey Wilburn's wages were sufficient for maximum benefits for a 2009 date of death from a work-related injury. The maximum benefit payment for 2009 is five-hundred-twenty dollars and seventy-two cents ($520.72).

Julie A. VanHook, Administratrix of the estate of Jeffrey Wilburn, is also the parent and natural guardian for minor children Amanda Wilburn and Maxwell Wilburn who are the natural children of Jeffrey Allen Wilburn and were dependent upon him for support at the time of his death. Julie A. Vanhook[sic] is a party to this matter in her capacity as Administratrix of the Estate and as the parent and natural guardian of these two children.

Heidi Marie Canter is the parent and natural guardian of the minor child, Icy Canter, who was the natural child of Jeffrey Allen Wilburn and dependent upon him at the time of his death. Heidi Marie Canter is a party to this matter in this capacity.

Amanda Wilburn, Maxwell Wilburn, and Icy Canter, the three minor children of Jeffrey Wilburn, are entitled to benefits in accordance with the findings of this Administrative Law Judge and the provisions of the Kentucky Workers' Compensation Act, KRS 342.750 (1)(d).

The Estate of Jeffrey Wilburn is entitled to a lump sum payment of $68,198.54 in accordance with KRS 342.750(6) as the death in March, 2009 was a direct result of a work-related injury.

The medical treatment rendered to Jeffrey Wilburn as a result of this accident is compensable.

ORDER

Based upon the above-mentioned stipulations, findings, conclusions and applicable law as set forth in the Act, it is HEREBY ORDERED AND ADJUDGED as follows:

1. Pursuant to KRS 342.750 (6), the Estate of Jeffrey Allen Wilburn shall recover from the defendant/employer, Modern Property Management, and/or its insurance carrier a lump-sum death benefit of sixty-eight thousand, one-hundred and ninety-eight dollars and fifty-four cents ($68,198.54), from which the cost of burial and transportation of the body shall be paid **together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation.** (emphasis added).

2. The employer and/or its insurance carrier shall pay all reasonable and necessary medical expenses for the injury to Jeffrey Wilburn pursuant to KRS 342.020.

3. Pursuant to KRS 342.750 (1)(d), Julie A. Vanhook[sic], as parent and natural guardian of the minor child Amanda Michelle Wilburn shall recover from the defendant/employer, Modern Property Management, and/or its insurance carrier, on behalf of said minor child a weekly benefit of one-hundred and seventy-three dollars and fifty-seven cents ($173.57) from March 12, 2009 until age eighteen (November 1, 2012), unless Amanda Michelle Wilburn is enrolled full-time in an accredited educational institution on November 1,

2012, then benefits shall continue until she ceases to be so enrolled, reaches age twenty-two (November 1, 2016) or until she marries or ceases to be actually dependent, whichever shall occur first. Said weekly benefits shall increase to two-hundred sixty dollars and thirty six cents ($260.36) during any period for which benefits to either Maxwell Riley Wilburn or Icy Canter cease. In the event that benefits cease for both Maxwell Riley Wilburn and Icy Canter, said weekly benefit to Amanda Michelle Wilburn shall increase to three-hundred forty seven dollars and sixteen cents ($347.16) for the remainder of the compensable weeks under KRS 342.7501(d). Said benefits are awarded together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation.

4. Pursuant to KRS 342.750 (1)(d), Julie A. Vanhook[sic], as parent and natural guardian of the minor child Maxwell Wiley Wilburn shall recover from the defendant/employer, Modern Property Management, and/or its insurance carrier, a weekly benefit of one-hundred and seventy-three dollars and fifty-seven cents ($173.57) from March 12, 2009 until age eighteen April 14, 2015), unless Maxwell Riley Wilburn is enrolled full-time in an accredited educational institution on April 14, 2015, then benefits shall continue until he ceases to be so enrolled, reaches age twenty-two (April 14, 2019) or until he marries or ceases to be actually dependent, whichever shall occur first. Said weekly benefits shall increase to two-hundred sixty dollars and thirty six cents ($260.36) during any period for which benefits to either Amanda Michelle Wilburn or Icy Canter cease. In the event that benefits cease for both

Amanda Michelle Wilburn and Icy Canter, said weekly benefit to Maxwell Riley Wilburn shall increase to three-hundred forty seven dollars and sixteen cents ($347.16) for the remainder of the compensable weeks under KRS 342.7501(d)[sic]. Said benefits are awarded together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation.

7.[sic] Pursuant to KRS 342.750 (1)(d), Heidi Marie Canter, as parent and natural guardian of the minor child Icy Savannah Beth Canter shall recover from the defendant/employer, Modern Property Management, and/or its insurance carrier, on behalf of said minor child a weekly benefit of one-hundred and seventy-three dollars and fifty-seven cents ($173.57) from March 12, 2009 until age eighteen (June 18, 2025), unless Icy Canter is enrolled full-time in an accredited educational institution on June 18, 2025, then benefits shall continue until she ceases to be so enrolled, reaches age twenty-two (June 18, 2029) or until she marries or ceases to be actually dependent, whichever shall occur first. Said weekly benefits shall increase to two-hundred sixty dollars and thirty six cents ($260.36) during any period for which benefits to either Amanda Michelle Wilburn or Maxwell Riley Wilburn cease. In the event that benefits cease for both Amanda Michelle Wilburn and Maxwell Riley Wilburn, said weekly benefits to Icy Savannah Beth Canter shall increase to three-hundred forty seven dollars and sixteen cents ($347.16) for the remainder of the compensable weeks under KRS 342.7501(d)[sic]. Said benefits are awarded together with interest at the rate of 12% per annum on all due and

> unpaid installments of such compensation.

Modern filed a petition for reconsideration on January 25, 2013 arguing the ALJ made insufficient findings to apprise the parties of the basis for his conclusions, and requested more specific findings of fact to support his determination of whether Wilburn was killed in the course and scope of his employment. Modern also argued the ALJ erred in awarding interest on benefits awarded pursuant to KRS 342.750(6). The ALJ denied the petition for reconsideration by Order entered March 15, 2013.

On appeal, Modern argues the ALJ erred in determining Wilburn was in an employee/employer relationship with Modern at time of his death. Modern also argues the ALJ erred in awarding interest on the benefit provided by KRS 342.750(4).

Modern argues the ALJ's determination of compensability is not supported by substantial evidence. Wilburn's estate had the burden of proving each of the essential elements of the cause of action, including whether the occurrence was work-related. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

KRS 342.285 designates the ALJ as the finder of fact. He has the sole discretion to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole discretion to determine the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. In order to reverse the decision of the ALJ, there must be no substantial evidence to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal.

Modern argues the ALJ failed to make sufficient findings of fact to support his conclusions. The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful

review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). We are cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusions were drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004), to be instructive. There the Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review." Id. at 358.

In this instance, the ALJ acknowledged he had reviewed all of the evidence, including the trial transcripts from the criminal trial stemming from Wilburn's murder. Specifically, in the opinion rendered October 10, 2011, the ALJ enumerated he relied upon the trial testimony introduced by Modern, including the testimony from George Corman, who testified, "And he said something, okay or I'll

handle it or some – something like that …" The ALJ also relied upon trial testimony from the investigating police officers, introduced by both Modern and Wilburn's estate. He also relied upon the testimony of Dr. Gregory Perri, Ph.D., introduced by Modern. Based upon a review of the evidence, the ALJ could reasonably conclude Wilburn was engaged in employment activities at the time he was shot, and his decision will not be disturbed.

Modern next argues the ALJ erred in awarding interest upon benefits awarded pursuant to KRS 342.750(4). This is believed to be a misstatement. In its petition for reconsideration, Modern argued the ALJ erred in awarding interest upon the death benefit awarded pursuant to KRS 342.750(6). Regardless of whether the argument relates to either statutory provision, we find the ALJ did not err in his determination. This issue has already been decided by the Supreme Court in Realty Improvement Co., Inc. v. Raley, 194 S.W.3d 818 (Ky. 2006). Therein, addressing the death benefit payable under KRS 342.750(6), the Court stated:

> The lump sum authorized by KRS 342.750(6) is paid 'in addition to other benefits,' indicating that it, too, is a benefit. Although KRS 342.750(6) directs payment of the benefit to the deceased worker's estate, it is a subsection of KRS 342.750, which expressly authorizes 'income benefits' that are payable to

> specified ‘persons’ when an injury results in death. This implies that a deceased worker’s estate is a ‘person’ for the purposes of the statute and also that ***benefits authorized under subsection (6), like those under subsection (1), are income benefits***. (Emphasis added.)
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> Id. At 822.

KRS 342.040(1) provides “[a]ll income benefits *shall* be payable . . . with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid.” In Bradley v. Commonwealth of Kentucky, 301 S.W.3d 27, 30 (Ky. 2009), the Kentucky Supreme Court held as follows:

> The court determined in *Realty Improvement Co., Inc. v. Raley* that a deceased worker's estate is a " person" for the purposes of KRS 342.750(6) and that the lump-sum benefit is a form of income benefit that is subject to enhancement under KRS 342.165(1). The court reasoned that KRS 342.750 refers explicitly to "income benefits," that the benefit is based on the state's average weekly wage, and that the "goals of KRS 342.165(1) are to encourage workplace safety as well as to compensate those who are victims of intentional safety violations." Although *Realty Improvement* did not address interest because it was not at issue, we conclude that interest accrues on a lump-sum death benefit under KRS 342.040(1) just as it does on other past-due income benefits awarded under Chapter 342.

Because the Kentucky Supreme Court has defined the lump sum death benefit authorized under KRS 342.750(6) as an income benefit, KRS 342.040(1) mandates interest be paid on the amount of such installment when past due. Therefore, the ALJ did not err in assessing interest on unpaid benefits due the estate pursuant to KRS 342.750(6).

Accordingly, the decisions rendered October 10, 2011 and January 14, 2013, and the orders on reconsideration issued November 14, 2011 and March 14, 2013, by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, NOT SITTING.

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