Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 11, 2015

CLAIM NO. 201178299

MORRIS HEATING & COOLING PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JOHN A. DURBIN and
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Morris Heating and Cooling ("Morris") appeals from the Opinion and Order rendered July 8, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding John A. Durbin ("Durbin") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits. Morris also appeals

from the Opinion and Order on Reconsideration issued August 5, 2015.

On appeal, Morris argues the ALJ's award of PTD benefits should be vacated, and the claim remanded for an appropriate determination of entitlement to permanent total or partial disability benefits. Morris also argues the ALJ abused his discretion in allowing Durbin to amend the Form 101 after the decision was rendered. The ALJ failed to make appropriate findings supporting his determinations, including his allowance of the post-award amendment of the Form 101. Therefore, we vacate the decision, order on reconsideration, and order permitting the amendment of the Form 101 in their entirety. We remand for consideration of whether the parties tried the issue of an injury to additional body parts by consent, and, if so, the appropriate award of benefits. On remand, the ALJ shall make any determination necessary supported by the evidence of record.

Durbin filed a Form 101 on January 4, 2012 alleging on July 19, 2011 he injured his ribs, sternum, right elbow and right arm when he fell eight feet onto roof rafters while repairing a smoke alarm for a customer in the scope of his employment with Morris. Durbin was born on December 25, 1965. He is a high school graduate with some

college credits. He also has vocational training in heating and cooling. His work history includes working as an HVAC repairman/technician, electrical construction project manager, and refrigerator technician. He has also worked as a fireman, and briefly as a deputy sheriff.

Durbin, a resident of Milford, Ohio, testified by deposition on March 29, 2012, and again on April 22, 2015. He also testified at the hearing held June 23, 2015. He is right hand dominant. As a service technician for Morris, Durbin called the dispatcher to receive his job assignments. His work included service and repair of heating and cooling systems, both commercial and residential. He estimated he worked alone ninety-five percent of the time. His job involved lifting, climbing ladders, using torches, and carrying tools, tool bags, parts, and tanks of Freon. He has been in the heating and cooling business since 1986.

On July 19, 2011, Durbin was dispatched to the Summit Hills Country Club in Crestview, Kentucky, to change a smoke detector head. He crawled into the attic through an access hatch, and had to walk across beam joists to reach the smoke detector. He fell when one of the boards he stepped on broke. As he fell, a board struck him in the chest, and he momentarily blacked out. He also injured his

right elbow when he fell. He attempted to call his boss to report the injury, but he had no cellular reception in the attic. He completed his job, crawled out of the attic, completed his paperwork, called Morris to report the incident, and drove to Anderson Mercy Hospital ("Mercy"). At the hearing held June 23, 2015, Durbin stated his injuries from the accident included his right elbow, right arm, neck, low back, sternum and ribs.

Chest and right elbow x-rays were taken at the hospital. He also received an injection of pain medication. He subsequently developed swelling in his right elbow, and could not straighten his arm. He also had difficulty breathing due to chest pain. He stated he had never had right elbow or chest problems before. He admitted he had a right elbow x-ray in May 2011 for a work injury, but that problem had resolved prior to July 19, 2011.

Durbin was eventually referred to Dr. Angelo Colosimo, an orthopedic surgeon. Dr. Colosimo administered a cortisone injection, which Durbin stated was "more painful than helpful." Dr. Colosimo also ordered physical therapy which initially provided some relief. Dr. Colosimo eventually released Durbin to return to work, but he was still unable to straighten his right arm, he had difficulty

breathing and his back was hurting. Although his right elbow was pain free when he was released, it recurs daily. He stated his elbow bothers him early in the morning, after work, and with changes in the weather, and the elbow pain awakens him at night. He also has breathing problems due to chest tightness. At his March 29, 2011 deposition, Durbin complained of low back pain limiting his ability to stand, walk, or bend. At the April 22, 2015 deposition, Durbin stated he takes Advil, and experiences ratcheting or catching in the elbow. He stated the right arm would not extend, he has total numbness from the right elbow down, and he is unable to pick up anything. He stated the right elbow is constantly painful, and he has neck pain. He has undergone two surgeries on the right elbow, and his problem has continued to worsen.

When Dr. Colosimo released him, he was offered a light duty job by Morris. He declined this offer because he could not drive to work due to the medication he was taking. He drew some TTD and unemployment benefits, but he could not remember the duration for either. At the time of his first deposition, Durbin had started working for another HVAC company doing lighter duty jobs, working forty hours per week, earning $23.00 per hour. He was eventually

terminated because he could not meet the required quality control standards.

Durbin stated although his treatment has primarily concentrated on his right elbow, he continues to have problems with his neck, shoulder and chest. Subsequent to his second surgery, he developed stiffness in his neck, back and both upper extremities. He is unable to dress himself, and has difficulty sleeping. Dr. Colosimo indicated he should follow up with a hand specialist. He saw Dr. Joseph Kutz for an evaluation, but he lives too far away to treat there.

Both Louis G. Morris, the owner of the company, and Larry Schmalz, the service manager, testified by deposition. Their testimony involves whether Durbin was going to be terminated on the date of the injury. Since this is irrelevant to the issues on appeal, their testimony will not be further discussed.

In support of his claim, Durbin filed records from Mercy and its physical therapy department. The July 19, 2011 note states the diagnosis was contusion of the abdominal and chest walls. On August 22, 2011, the diagnoses were the same as above, with the inclusion of a right elbow strain. An MRI taken September 14, 2011 revealed a moderate right elbow effusion with evidence of a

small radial head fracture. The physical therapy note from September 13, 2011 diagnosed a right elbow strain, with rib, chest, and abdominal wall contusions. Durbin was restricted from lifting, pushing, pulling greater than five pounds, kneeling, squatting, overhead work, standing, or driving (due to his medications). The note from October 3, 2012 indicated no significant change, but noted a slight improvement. Morris also filed the July 19, 2011 admission/discharge sheet from the hospital which described the chest injury, but noted Durbin denied a head or neck injury. Additional findings from the physical therapy department indicate Durbin's chest condition continued to improve, but his right elbow condition worsened between August 15, 2011 and October 11, 2011.

Durbin filed the Form 107-I report of Dr. Colosimo dated August 13, 2012. Dr. Colosimo diagnosed a radial head fracture due to falling through the roof. He did not address restrictions, but assessed a 3% impairment rating pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Durbin subsequently filed additional treatment records from Dr. Colosimo. On December 13, 2013, Durbin was excused from work for two weeks. On December 27, 2012,

Durbin reported his right elbow pain and popping had worsened. Dr. Colosimo noted Durbin had less range of motion and constant numbness in the third and fifth digits of the right hand. On January 17, 2013, he was excused from work until he had an EMG. On April 25, 2013, he was excused from work until June 27, 2013. On June 13, 2013, he was excused from work until July 2, 2013. On July 2, 2013, he was to remain off work until he underwent right elbow arthroscopy and ulnar nerve transposition. On August 1, 2013, he was excused from work until he completed physical therapy. Subsequent filings from August 23, 2013 and September 18, 2013 indicate Durbin was to continue to remain off work, and his pain was unchanged after surgery.

Dr. John Wolf, an orthopedic surgeon, evaluated Durbin on April 7, 2015 at his attorney's request. Dr. Wolf noted the July 19, 2011 date of injury. He stated Durbin had received an inadequate and incomplete work-up. He stated Durbin had some right elbow function loss, but his primary problem is neurological. Regarding a diagnosis, Dr. Wolf stated, "It is my impression that the neurologic deficit that Mr. Durbin exhibits is due to a cause above his elbow. He has sustained an injury to either his brachial plexus or to a more proximal structure in his neck involving cervical nerve roots." He assessed a 13%

impairment rating pursuant to the AMA Guides, and recommended Durbin be seen by a neurologist.

In a supplemental report dated April 29, 2015, Dr. Wolf noted his diagnosis was inconclusive. He stated the injury is either to the cervical nerve roots or the brachial plexus, either of which was caused by the work injury. He stated Durbin has limited range of motion in the right upper extremity in addition to significant loss of sensation and grip strength. He again opined Durbin should be seen by a neurologist.

Morris filed the report of Dr. Thomas Loeb, an orthopedic surgeon, who evaluated Durbin at its request on October 9, 2012. Dr. Loeb noted Durbin complained of right elbow pain and stiffness, and had a loss of range of motion of the right arm. He noted physical therapy and Advil provided no relief. In addition to loss of range of motion, tenderness in the right elbow was noted. Dr. Loeb diagnosed right elbow lateral epicondylitis. He stated, "I think this represents an acute-on-chronic type of tissue irritation." He stated the non-displaced radial head fracture had long since healed. He opined Durbin had reached maximum medical improvement ("MMI") three to four months after the accident. He assessed a 5% impairment rating pursuant to the AMA Guides, of which he only

attributed one-fourth to the accident. He stated Durbin required no restrictions. He also stated he would approve a request for a right elbow steroid injection and arthroscopy.

In a subsequent note dated March 8, 2013, Dr. Loeb stated he had reviewed additional records, including the February 21, 2013 office note of Dr. Colosimo. He stated Durbin may not have reached MMI, and could need additional surgery. He stated a permanent impairment rating could not be determined. He also indicated there was a question as to the causation of Durbin's ongoing problems.

Dr. Loeb's December 3, 2013 report noted Durbin had a complete circumferential numbness of the right hand, with spotty numbness from the elbow to the wrist. He noted Durbin complained of pain in the same distribution. He stated the surgery does not account for the circumferential numbness. He saw no evidence of reflex sympathetic dystrophy. He stated all findings were directly or indirectly related to the July 19, 2011 accident. He stated Durbin had not reached MMI for the right shoulder or extremity problems. He assessed a 5% impairment rating for the right shoulder pursuant to the AMA Guides, but noted the rating for the right upper extremity issues should be

postponed. He restricted Durbin to one-handed assisting duty only.

Dr. Richard Sheridan examined Durbin on April 21, 2015 at Morris' request. He noted Durbin complained of numbness in the right hand, with right elbow pain and stiffness. He diagnosed a resolved contusion to the ribs and sternum; right ulnar neuritis at the elbow, permanent aggravation of a pre-existing arthritis in the elbow; and fracture of the radial head. He opined Durbin had reached MMI for the right elbow six months after the accident, and assessed a 5% impairment rating pursuant to the AMA Guides. He recommended Durbin refrain from lifting, pushing or pulling 5 to 10 pounds frequently or 10 to 20 pounds infrequently with the right upper extremity. He also recommended Durbin not engage in rapid manual dexterity actions, to avoid climbing ladders or scaffolds, and to avoid exposure to temperature extremes.

Dr. Joseph Kutz, a hand surgeon, examined Durbin on September 18, 2014 by agreement of the parties. Dr. Kutz diagnosed cervical radiculitis at C5-C6 on the right, right elbow pain, peripheral compression with decreased sensation in the right hand, and weakness of the right upper extremity. Dr. Kutz opined all of these diagnoses were causally related to the July 19, 2011 date of injury.

He stated Durbin had not reached MMI, would benefit from additional physical therapy and may need a cervical decompression. He assessed a 7% impairment rating pursuant to the AMA Guides. He stated he was unable to determine what restrictions may be appropriate.

In the decision rendered July 8, 2015, the ALJ awarded TTD benefits from July 19, 2011 through April 21, 2015, and thereafter PTD benefits at the rate of $635.18 per week. The ALJ stated as follows regarding Dr. Wolf's report:

> I was particularly impressed with the medical evidence from Dr. Wolf, a very reputable orthopedic surgeon. I make the determination that the medical evidence from Dr. Wolf is very up-to-date and current. Dr. Wolf stated that Mr. Durbin would sustain under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, a 22.5% impairment to his upper extremity, which translates into a 13% impairment to the whole person. Dr. Wolf strongly recommended that Mr. Durbin be evaluated by a neurologist. I make the determination that the medical evidence from Dr. Wolf is very persuasive, compelling and reliable.

The ALJ then stated as follows:

> Dr. Sheridan, the defendant's most recent examiner, stated that Mr. Durbin will sustain a 5% permanent impairment to the body as a whole directly related to his fall at work on July 19, 2011. Dr. Sheridan placed the following

permanent restriction on the plaintiff's physical activities as a result of that work injury: (1) Lift/push/pull 5 lbs. to 10 lbs. frequently and 10 lbs. to 20 lb. [sic] infrequently with the right upper extremity. (2) No rapid manual dexterity with the right upper extremity, including the use of vibratory tools and air guns. (3) No climbing ladders or scaffolds. (4) No exposure to temperature extremes with the right upper extremity.

In his April 21, 2015 report, Dr. Sheridan stated that the plaintiff has reached maximum medical improvement for the injuries caused by his July 29, 2011 fall.

The parties agree that the plaintiff last worked back on July 19, 2011, which is almost 4 years ago. Based upon Dr. Sheridan's evidence, I make the determination that the plaintiff is entitled to recover from the defendant weekly temporary total disability benefits from and after July 19, 2011 until Dr. Sheridan stated that the plaintiff reached maximum medical improvement in his April 21, 2015 medical report.

. . .

Mr. Durbin is now 49 years of age, meaning that he is now in late middle age. It is uncontradicted that he has not worked at any job since his fall on July 19, 2011, which is almost 4 years ago. I make the determination that Mr. Durbin is a credible and convincing lay witness and that his testimony rang true. He worked in the residential heating and air conditioning business for 15 years. That work required regular strenuous manual labor,

including the use of tools and ladders and repetitive lifting and carrying. Mr. Durbin is right-handed and his work injuries are to his right upper extremity. He testified that he is not physically capable of returning to heating and air conditioning work. He also worked as a firefighter, which is a strenuous physical labor job requiring heavy lifting and carrying. The plaintiff testified that he is not physically capable of returning to work as a fireman. He also formerly worked as a deputy sheriff, which is a demanding physical labor job. The plaintiff testified that he is not physically capable of returning to work as a deputy sheriff. I make the determination that the plaintiff is not physically able to work at any job. I make the determination that if he could work he would work. I note that he had a solid work history showing a good work ethic before his severe injuries on July 19, 2011. Mr. Durbin stated his physical condition is getting worse and that his right arm numbness and tingling is getting worse. He cannot dress himself, his hygiene is limited and he suffers from insomnia. He testified that his prescription pain medication has not helped him. He stated that he continues to have pain in his right arm and elbow and also in his neck, back and hips.

As noted above, I found the medical evidence from Dr. Wolf, a reputable orthopedic surgeon, to be very persuasive, compelling and reliable. Dr. Wolf stated that the plaintiff will sustain under the AMA Guides, Fifth Edition, a 22.5% impairment to his right upper extremity, which translates into a 13% whole person impairment. In his supplemental report, Dr. Wolf stated that the plaintiff’s diagnoses

are clearly due to his work-related injuries and that his physical limitations are substantial. Not only does the plaintiff have a limited range of motion involving both his elbow and his ability to supinate and pronate his forearm, but he also has a significant loss of sensation in his right upper extremity. His grip strength on his right or dominant side is less than 50% of his grip strength on his left or subservient side. Dr. Wolf noted that this is a more significant loss than might otherwise be apparent because the plaintiff is right-hand dominant. Dr. Wolf stated that the plaintiff is physically unable to do most things which require fine coordination with his right hand. Dr. Wolf stated that the plaintiff is unable to perform tasks which require physical strength or repetitive motions. Dr. Wolf stated that the plaintiff needs to be evaluated by a neurologist.

I make the determination that the plaintiff is now an older worker in the highly competitive job market. I make the determination that if Mr. Durbin went out into the highly competitive job market and sought regular employment, he would have an extremely difficult, if not impossible, time in finding a regular job. He is basically a one-handed worker. I make the determination that if he would work he would be working. Based upon the credible and convincing lay testimony of Mr. Durbin, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Wolf, as covered in detail above, I make the determination that as a result of the plaintiff’s work-related injuries on July 19, 2011, the plaintiff cannot find work consistently under regular work circumstances and work dependably.

> Based upon all of the above factors, I reach the legal conclusion that Mr. Durbin is permanently totally disabled from and after April 21, 2015, when Dr. Sheridan stated that he reached maximum medical improvement.
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> . . .
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> Based upon the plaintiff's credible and convincing lay testimony, as covered above, and the persuasive and compelling medical evidence from Dr. Wolf, as covered in detail above, I make the determination that Mr. Durbin is entitled to recover from the defendant and its workers' compensation insurer for his work-related medical bills and expenses, both past and future, for treatment of the work-related injuries to his right upper extremity, neck, chest and ribs, as well as his back, specifically including the evaluation by a neurologist, as recommended by Dr. Wolf.

The ALJ additionally provided Morris an offset credit for any unemployment benefits paid to Durbin during the period of the award against total disability benefits, temporary or permanent.

Morris filed a petition for reconsideration requesting additional findings supporting the award of PTD benefits. Morris argued the Form 101 asserted Durbin's injuries were to his ribs, right elbow and right arm. It points out Durbin at no time made any attempt to amend the claim to include the neck or back as compensable injuries.

Morris argued it was patent error for the ALJ to award medical benefits for the neck or back.

Durbin filed a motion on July 27, 2015 to amend the Form 101 to include the multiple body injuries, neck, back, unknown neurological sources of injury, and brachial and cervical plexus, to which Morris objected.

On August 5, 2015 the ALJ entered an order denying Morris' petition for reconsideration, restating in large part what he had previously stated in the decision. The ALJ specifically stated:

> The plaintiff alleged in his Form 101 that due to his fall on January 19, 2011, he sustained injuries to his ribs, sternum, right elbow and right arm. Dr. Wolf's medical reports were persuasive, compelling and reliable. He stated that Mr. Durbin's primary complaints were chest pain, abdominal pain and right upper extremity pain. Dr. Wolf further stated that the plaintiff sustained an injury to either his brachial plexus or to a more proximal structure in his neck involving the cervical nerve roots. Dr. Kutz diagnoses were that the plaintiff sustained cervical radiculitis primarily at C5-C6 on the right side, right elbow pain, peripheral nerve compression with decreased sensation in the right hand and weakness in the right upper extremity, all causally related to Mr. Durbin's fall on July 19, 2011.
>
> Based upon the plaintiff's credible and convincing lay testimony and the persuasive, compelling and reliable

medical evidence from both Dr. Wolf and Dr. Kutz, I make the determination that Mr. Durbin is entitled to recover from the defendant and its workers' compensation insurer for his work-related medical bills and expenses, both past and future, for the parts of his body specified by Dr. Wolf and Dr. Kutz hereinabove, including an evaluation by a neurologist, as recommended by Dr. Wolf.

The very recent decision of the Kentucky Supreme Court in *City of Ashland v. Stumbo*, ___ S.W.3d ___, 2015 WL 2340403 (Ky.), requires me to undertake a five-step analysis in order to determine whether the plaintiff Mr. Durbin is totally disabled.

(1) Based upon the medical evidence from Dr. Kutz, as covered above, I make the determination that as a result of the plaintiff's fall on July 19, 2011, he has sustained cervical radiculitis primarily at C5-C6 on the right side, right elbow pain, peripheral nerve compression with decreased sensation in the right hand and weakness of the right upper extremity. Pursuant to the medical evidence from Dr. Wolf, as covered above, I make the determination that the plaintiff complained of numbness, pain, tingling and upper sensitivity in his right arm, as well as neck pain, and also Dr. Wolf's diagnoses that the plaintiff sustained an injury to his brachial plexus or to a more proximal structure in his neck involving the cervical nerve roots.

(2) I next make the determination pursuant to Dr. Wolf's compelling, persuasive and reliable medical evidence that Mr. Durbin will under the AMA Guides, Fifth Edition, have a 22.5% permanent impairment of his upper

extremity, which translates into a 13% permanent impairment to the body as a whole.

(3) I next make the determination based upon Dr. Wolf's persuasive, compelling and reliable medical evidence that Mr. Durbin should be evaluated by a neurologist and that the cause of his diagnoses were clearly due to his work-related injuries on July 19, 2011, and further that the plaintiff's physical limitations are substantial, including a limited range of motion involving both his elbow and his ability to supinate and pronate his forearm, as well as a significant loss of sensation in his right upper extremity. In addition, Dr. Wolf stated that Mr. Durbin's grip strength on his right is less than 50% of his grip strength on his left. Dr. Wolf further stated that this is a more significant loss than might otherwise be because the plaintiff is right hand dominant. Finally, Dr. Wolf stated that Mr. Durbin is physically unable to do most things which require fine coordination with his right hand and that he is unable to perform tasks which require physical strength or repetitive motions.

(4) I next make the determination that Mr. Durbin is unable to perform any type of work. It is uncontradicted that the plaintiff last worked back on July 19, 2011, which is 4 years ago. Mr. Durbin is now 49 years of age, meaning that he is now in late middle age. He was a credible and convincing lay witness and his testimony rang true. His work history was in residential heating and air conditioning for 15 years. That work required regular strenuous manual labor, including the use of tools and

> ladders and repetitive lifting and carrying. Mr. Durbin is right-handed and his work injuries are to his right upper extremity. He testified that he is not physically capable of returning to heating and air conditioning work. He also worked as a firefighter, which is a strenuous physical labor job requiring heavy lifting and carrying. Mr. Durbin testified that he is not physically capable of returning to work as a fireman. He also formerly worked as a deputy sheriff, which is a dangerous and demanding physical labor job. Mr. Durbin testified that he is not physically capable of returning to work as a deputy sheriff. I make the determination that if Mr. Durbin could work he would be working. He had a solid work history showing a good work ethic before his severe injuries on July 19, 2011. He testified that his physical condition is getting worse and that his right arm numbness and tingling is getting worse. He testified that he cannot dress himself, his hygiene is limited and that he suffers from insomnia. He testified that his prescription pain medication has not helped him.
>
> (5) I next determine that Mr. Durbin's permanent total disability, as described above, is the result of his severe work injuries on July 19, 2011.
>
> In reaching the above legal conclusion, I rely upon all of the above factors.

On August 5, 2015, the ALJ also entered an order amending the Form 101, pursuant to CR 15.02. He stated as follows:

> This amendment simply allows the original Application for Benefits to conform to the evidence which at no time did the Defendant object to during the litigations. It is clear that these issues were preserved not only by implied consent but also by actual consent. The Defendant had every opportunity to present a defense to these diagnosis[sic] during the litigation and are not in any way prejudiced by this amendment.

We note the ALJ, as fact-finder, 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 sole authority to judge 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); 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. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his

decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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, supra. 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, supra.

However, such discretion is not unfettered. In reaching his determination, the ALJ must also provide findings sufficient to inform the parties of the basis for his 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The ALJ's determination is deficient. Although he awarded medical benefits for injuries to multiple body parts not alleged in the Form 101, his opinion does not reflect a determination Durbin sustained work-related injuries due to those conditions. Specifically, the ALJ

failed to point to any evidence supporting the award of medical benefits for the back. Although the record contains some testimony regarding the "neck" and brachial plexus, this is speculative since the medical providers making this observation all reference the need for a neurological work-up which apparently has never been undertaken.

The ALJ has provided primarily conclusory pronouncements rather than findings. Merely making conclusory statements without citation to supporting substantial evidence amounts to an abuse of discretion. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007).

We also find the ALJ's order of August 5, 2015 is an abuse of discretion. The fundamental requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *See* U.S.C.A. Const. Amends. 5, 14; Const. § 2. In Kentucky Alcoholic

Beverage Control Board v. Jacobs, 269 S.W.2d 189 (Ky. 1954), the Court held the requirements of procedural due process included a hearing, the taking and weighing of evidence, findings of facts based upon consideration of the evidence, the making of an order supported by substantial evidence, and, where the parties' constitutional rights are involved, judicial review of administrative action. *See also* Utility Regulatory Commission v. Kentucky Water Service Co., Inc., 642 S.W.2d 591 (Ky. 1982).

Once an application for benefits is filed by an injured worker, KRS 342.270(1) places the burden upon the worker to join all accrued and known causes of action that may exist against the same employer during the pendency of the claim. Civil Rule ("CR") 15.02 permits a motion to amend the pleadings in order to conform to the evidence to be made by "any party at any time, even after judgment." *See* CR 15.02; Kroger Co. v. Jones, 125 S.W.3d 241 (Ky. 2004); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). CR 15.02 states, in relevant part, as follows:

> Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect

> the result of the trial of these issues.

However, an ALJ may consider and decide an issue or claim tried by consent of the parties, even when the issue or claim is never formally incorporated into an injured worker's application for benefits. *See Id.*, Kroger Co., supra; Collins, supra.

That said, in his decision, the ALJ failed to address whether the inclusion of the non-alleged body parts was tried by consent. Although the post-award order allowing Durbin to amend the Form 101 could conceivably be permissible, if clearly supported by substantial evidence, in this instance, the ALJ failed to make appropriate determinations, as noted above which would allow for such action.

Because the ALJ's decision is deficient, and does not set forth determinations which are supported by substantial evidence, we vacate and remand. On remand, the ALJ must make a decision supported by substantial evidence. The ALJ is permitted to make a determination of whether the additional alleged injuries were appropriately tried by consent. In arriving at this decision, we are not engaging in fact-finding. The ALJ is permitted to make any appropriate award based upon the evidence. However, he

must provide an analysis which will allow for meaningful review. Therefore, for the foregoing reasons, the opinion rendered by Hon. William J. Rudloff, Administrative Law Judge, on July 27, 2015; the order on reconsideration issued August 5, 2015; and the order permitting the Form 101 to be amended also issued on August 5, 2015, are hereby **VACATED**. This claim is **REMANDED** to the ALJ for appropriate determinations as set forth above.

ALL CONCUR.

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