Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 22, 2016

CLAIM NO. 201494424

NAN BENALLY PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

COMMONWEALTH OF KENTUCKY
ADMINISTRATIVE OFFICE OF THE COURTS
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Nan Benally ("Benally") seeks review of the May 16, 2016, Opinion and Award of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), finding she sustained work-related injuries to her right knee and low back on February 3, 2014, while in the employ of the Administrative Office of the Courts ("AOC"). The ALJ

awarded permanent partial disability ("PPD") benefits and medical benefits. The ALJ denied benefits for Benally's alleged left knee and left ankle injuries. Benally also appeals from the June 20, 2016, Order amending the award of PPD benefits but denying the rest of her petition for reconsideration.

On appeal, Benally challenges the ALJ's decision on four grounds. First, she alleges the ALJ failed to make crucial findings of fact detailing the physical aspect of Benally's work responsibilities and whether she can do those tasks post-injury. Second, Benally asserts the ALJ erred in failing to award the two multiplier pursuant to KRS 342.730(1)(c)2. Third, Benally contends the ALJ erred in finding the three multiplier was not applicable. Fourth, she maintains the ALJ should not have denied benefits for a left knee injury based on the defense of a pre-existing active impairment.

In the Form 101, Benally alleged injuries to both knees, the left ankle, and left back occurring on February 3, 2014, when she fell down the stairwell in the employee parking garage on her way to work.

In the Benefit Review Conference ("BRC") Order & Memorandum, the parties stipulated Benally sustained work-related injuries on February 3, 2014, and the AOC received

due and timely notice. The parties also stipulated Benally returned to work on May 15, 2014, and currently earns the same or greater wages. The parties indicated the contested issues were Benally's physical capacity to return to the type of work performed at the time of the injuries, benefits per KRS 342.730, and unpaid or contested medical expenses.

Benally testified at her July 11, 2014, deposition and at the March 17, 2016, hearing. During her deposition, Benally testified she was currently working as a counselor which is the same job she was performing prior to the injury. However, she was not performing the same job duties. Benally testified she did not believe she could physically continue performing all of the tasks associated with her job at the time of the injury. Benally testified she is no longer involved in any court work or transferring files to and from court. She has very limited contact with her clients except for those who come to her office on the second floor. She no longer goes to the jail, makes home visits, or transfers patients. The modified duties she performed after the injury include completing paperwork and duties other employees were unable to complete. Benally has a Master's Degree in counseling

and amassed fifty-one hours in a Ph.D. program at the University of Wisconsin.

Benally acknowledged she previously underwent surgery in 1980 on her left knee to repair the ACL. She also acknowledged receiving treatment approximately three to six months before her February 3, 2014, injury because she lost flexion and the left knee became painful. Benally was seen by her primary care physician, Dr. Melanie Smallwood, who referred her to physical therapy. She described her symptoms as a regular popping and loss of mobility resulting in modified gait. Benally believed physical therapy had helped. She denied having any prior left ankle, low back, or right knee problems.

After the injury, Dr. Smallwood referred her to Dr. Akbar Nawab, who on June 5, 2014, performed surgery to repair meniscal tears in the right knee. Dr. Nawab eventually referred her to Dr. Kyle Young for treatment of her low back problems. Benally has pain in the lower back which causes numbness and tingling in the buttocks extending down the back of her right leg. Benally estimated she was off work two or three days after the injury and returned to work performing light duty. She was off work in excess of a week due to the June 5, 2014, surgery. At the time of her deposition, she was under

light duty restrictions of no lifting over ten pounds and no kneeling or crawling. She has limited mobility in walking and is only able to drive short distances. Benally testified her job was modified because of her injuries; however, she was unsure if her current restrictions were permanent.

Much of Benally's hearing testimony mirrors her deposition testimony. At the hearing, Benally described her job duties as follows:

> Q: And can you tell the Judge what your responsibilities were as a counselor.
>
> A: My duties were to administer therapeutic services to clients that were referred to us through the judicial system. So doing group work, group therapy, individual therapy, case assessment, court appearances, taking clients to and from detox centers or to incarceration, going in and out of house, jail assessments, documentation of all case management and the over seeing [sic] of the case manager that was assigned to it.

After the injury, Benally did not perform some of the basic duties associated with her job. She indicated she was no longer meeting with clients in group sessions, attending court sessions, and carrying charts. Benally testified that after the injury, her wages remained the same. Her last day of work at the AOC was on April 16, 2014. Benally testified she resigned in order to return to

the University of Wisconsin to pursue a Ph.D. She acknowledged that prior to the injury she had already initiated the process of returning to the University of Wisconsin. Since resigning, Benally has not earned the same wages she earned while employed with the AOC. She left the University of Wisconsin and returned to Kentucky to help her daughter because her daughter had "some medical concerns."

Benally provided the following testimony regarding the tasks she was physically unable to perform post-injury:

> Q: As you sit here today are you able to go back to work as a counselor at AOC?
>
> A: With the specific duties that I was performing there only if they were modified as they had been before would I be able to do them.
>
> Q: Tell us what is it that you couldn't do the work that you did before you got hurt.
>
> A: The modified duties include the light duty work, so carrying heavy loads of charts or walking long distances like we had to do. Our offices were on Market Street and to go across to the Judicial Center is a block and a half, so walking back and forth. Also being able to ambulate freely, without hesitation and I was working with crisis clients, so being able to respond quickly in emergency situations would be challenging for me.

> Q: Is that the same thing as crisis intervention?
>
> A: Yes, it is.
>
> Q: What does that really entail?
>
> A: That relates to sometimes we have clients that are messed up detoxing, so they can become unstable both physically or mentally. And sometimes they can lash out or they can have physical problems, any number of things that can happen with them, so we are always on guard as to how to manage those kinds of things even with themselves or amongst each other.
>
> Q: Well, physically what does that mean?
>
> A: Physically that means that I should intervene – sometimes I have to intervene physically. Restraining somebody, helping them to – if they have a seizure helping them onto the floor and making them safe until a medical help arrives. Being able to react to any type of situation, sometimes clients can become combative not only verbally but sometimes physically. So maintaining safety not only for myself but for others that I am responsible for.

Benally estimated her left knee was treated approximately six months before February 3, 2014, when she underwent physical therapy. Benally acknowledged that after the injury she was off work for three days and returned to the same position earning the same salary. She missed two weeks of work following her surgery in June 2014.

Numerous medical records were introduced. In a letter dated June 18, 2014, attached to a partially completed and unsigned Form 107, Dr. Nawab stated Benally suffered a work-related injury consisting of bilateral patella fracture, ankle strain, lumbar strain, and meniscal tear. As a result, Benally underwent an arthroscopy of the right knee. The operative note was attached to his filings. The June 5, 2014, operative note reveals the following procedure was performed: "arthroscopy of the right knee with chondroplasty patella, partial medical meniscectomy, partial lateral meniscectomy, chondroplasty, lateral femoral condyle." Dr. Nawab indicated Benally suffered a 4% impairment rating based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") due to impairment of meniscal tear.

The December 16, 2015, Independent Medical Evaluation ("IME") report of Dr. Jules Barefoot was introduced. Dr. Barefoot assessed the following:

> 1) History of a left knee nondisplaced patella fracture.
>
> 2) History of a right knee nondisplaced patella fracture.
>
> 3) Injury to the medial and lateral menisci of the right knee requiring arthroscopy surgery with a partial

medial and lateral meniscectomy June 5, 2014.

4) Avulsion fracture left ankle talar head.

5) Osteoarthritis of the left ankle.

6) Progressive severe osteoarthritis of the right knee.

7) Progressive severe osteoarthritis of the left knee.

8) L3-L4 and L4-L5 posterior disc protrusions with radicular complaints.

Based on the AMA Guides, Dr. Barefoot assessed a 9% impairment rating for the right knee injury, an 8% impairment rating for the left knee injury, a 5% impairment rating for the left ankle injury, and a 13% impairment rating for the low back injury. Based on the combined values chart, Benally had a 31% whole person impairment rating all of which was attributable to the work-related injury as Benally had no pre-existing impairment.

The AOC introduced the October 7, 2015, report and October 29, 2015, addendum of Dr. Michael Best as well as his January 7, 2016, deposition. In his October 7, 2015, report, Dr. Best noted Benally had undergone ACL repair of the left knee approximately thirty years ago. He also noted that in June 2012 and in July and September 2013, Benally had been seen by Dr. Smallwood for left knee pain. Dr. Best performed range of motion tests on both

knees, the left ankle, and low back. Because x-rays of both knees and the left ankle were necessary, Dr. Best stated he was unable to complete the IME.

In his addendum, Dr. Best noted x-rays of the left foot and both knees had been performed on October 21, 2015. Dr. Best assessed no impairment for the left ankle and left knee condition. He assessed a 4% impairment rating for a work-related injury to the right knee. He also assessed a 5% impairment rating for the low back condition as Benally had radiographic criteria for a lumbosacral DRE Category II impairment. However, he believed this impairment rating pre-existed the slip and fall, as there was no objective evidence the slip and fall produced a permanent harmful change in the human organism. Dr. Best believed the left knee was a long-standing condition dating back to the sequela of the ACL tear and reconstruction in 1980 and there was no objective evidence of a new permanent harmful change in the human organism related to the February 2014 slip and fall. At most, the slip and fall resulted in a left knee contusion.

Dr. Best noted Benally had described the physical requirements of her usual and customary work. He opined "the patient has described her work as a counselor, a desk job, and she is fully capable of returning to these duties

without restrictions." Thus, he believed Benally retained the physical capacity to return to the type of work performed at the time of the injury.

As to the nature and extent of Benally's work-related injuries, the ALJ provided the following Findings of Fact and Conclusions of Law:

> 16. In addition to the myriad of medical evidence in this matter, the ALJ is presented with impairment ratings from Drs. Best, Nawab, and Barefoot. The ALJ is most persuaded by the opinions of Drs. Best and Nawab as they are consistent and provide a consensus of opinion that the Plaintiff has suffered a 4% whole person impairment as a result of the injury to her right knee. The outlying opinions of Dr. Barefoot are outweighed by this consensus however the opinion of Dr. Barefoot that the Plaintiff's back injury is causally work-related is convincing.
>
> 17. The ALJ is persuaded by the explanation provided by Dr. Best regarding the Plaintiff's left knee, and left ankle conditions. Specifically, the ALJ is persuaded that the Plaintiff's left knee condition is degenerative and pre-existing and that the left ankle condition has resolved.
>
> 18. Dr. Best also opined that the there was no cause and effect relationship established to support the work-relatedness of the Plaintiff's back injury and resulting 5% impairment. The ALJ is more persuaded however by the opinion of Dr. Barefoot that the Plaintiff's lumbar spine condition was asymptomatic, dormant,

> and non-disabling but due to the workplace injury was activated into her current symptomatic disabling reality. While the ALJ finds that the impairment rating provided by Dr. Best is more reasonable, the opinion regarding causation provided by Dr. Barefoot is to be relied upon herein.
>
> 19. The ALJ therefore finds based upon the opinions of Drs. Best and Nawab that the Plaintiff has sustained a 4% whole person impairment to the right knee. The ALJ is persuaded that the Plaintiff has sustained a 5% whole person impairment to the low back as determined by Dr. Best but finds that this impairment is causally work-related in accordance with the opinion of Dr. Barefoot. The ALJ relies upon Dr. Best however to conclude that the Plaintiff retains the ability to return to the same type of work. Based upon the foregoing, the ALJ finds that the Plaintiff has sustained a 4% whole person impairment and a 5% whole person impairment, to the right knee and low back respectively. The Plaintiff therefore has sustained a 9% whole person impairment as a result of the work injury but retains the ability to perform the same type of work.

Benally filed a petition for reconsideration asserting the ALJ should provide specific findings of fact regarding the physical requirements of her job and whether she can now and into the foreseeable future physically restrain one of her participants. She pointed to her testimony that restraining participants was one of her job duties which she can no longer perform. Benally noted Dr.

Best opined she could restrain participants who weigh approximately one hundred pounds.

Next, Benally requested the ALJ address her entitlement to the two multiplier pursuant to KRS 342.730(1)(c)2 since the uncontradicted testimony established she returned to work earning the same wages. Therefore, pursuant to Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015), she argued she was entitled to enhanced PPD benefits during any cessation of employment regardless of whether it is related to her injury.

Finally, Benally requested the ALJ "to void and redo" those portions of his opinion wherein the ALJ stated he believed the testimony and report of Dr. Best that Benally had pre-existing conditions of the left knee and low back since causation and pre-existing impairment were not issues in the claim. Benally asserted the only contested issues pursuant to the BRC Order were benefits per KRS 342.730, unpaid and contested medical expenses, and reimbursement for mileage. Benally also contended Dr. Best's opinion concerning a pre-existing active impairment did not meet the requirements of Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007), as there was no evidence she had a condition which was symptomatic immediately before she fell. Benally also asserted the ALJ

improperly calculated the award of PPD benefits.

In the June 20, 2016, Order, the ALJ sustained only that portion of the petition for reconsideration regarding his miscalculation of the PPD benefits and amended the award to reflect Benally is entitled to $32.17 per week instead of $10.93 per week for 425 weeks. Concluding all other portions of the petition for reconsideration were a re-argument of the merits, the ALJ declined to further disturb his opinion.

In her first argument on appeal, Benally asserts the ALJ failed to make crucial findings of fact so that meaningful review can be conducted. Specifically, she asserts that in response to the petition for reconsideration the ALJ failed to outline the physical demands of her work and whether she is capable of performing those tasks after the injury. Benally specifically notes she cannot restrain the participants in the program anymore and seeks remand for additional findings of fact.

In her second argument, Benally contends she is entitled to the two multiplier starting from August 16, 2014, which is last date she earned the same or higher wages. Pursuant to Livingood v. Transfreight, LLC, supra, she posits she is no longer required to establish the

reason for the cessation of her employment is related to the disabling injury. Benally notes the ALJ focused on the fact she planned to resume her education at the University of Wisconsin; thus, the cessation for her employment was unrelated to the work injury.

In her third argument, Benally asserts she is entitled to the three multiplier because she cannot return to the type of work she was performing at the time of the injury. Benally points to her testimony outlining those aspects of her job she can no longer physically perform. She continues to emphasize she is no longer capable of restraining her clients. Therefore, Benally argues since the three multiplier is applicable, the ALJ should have also performed an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Benally asserts the standard is whether she can perform the actual work she was performing at the time of the injury.

Benally's fourth argument is that there were only three contested issues- benefits per KRS 342.730, unpaid or contested medical expenses, and reimbursement for mileage. She notes the ALJ was persuaded her left knee condition was degenerative and pre-existing, and she objected to this rationale as the basis for his decision on this issue as the defense of a pre-existing active impairment was

withdrawn by the AOC. Further, Benally asserts Dr. Best's opinion she had a pre-existing active impairment of the left knee is not based on the evidence as there was no showing per Finley v. DBM Technologies, supra, her left knee was symptomatic immediately before the fall. She also contends her left knee impairment is only ratable because she had an ACL repair in 1980.

As the claimant in a workers' compensation proceeding, Benally had the burden of establishing her entitlement to the multipliers contained KRS 342.730(1)(c)1 and that she sustained a work-related injury to the left knee. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Benally was unsuccessful in that burden, 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 (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).

We find no merit in Benally's first argument asserting the ALJ should have provided additional findings of fact regarding the physical aspects of her job and erred in overruling her petition for consideration. In his opinion, the ALJ summarized Benally's testimony regarding her job duties. He also indicated "[t]he Plaintiff's job description of Substance Abuse Counselor was introduced into evidence on behalf of the Plaintiff. This information was reviewed and considered into evidence." After considering this information and Dr. Best's opinion, the ALJ concluded Benally retained the capacity to return to the same type of work. That was clearly within the ALJ's authority. The ALJ was not required to sift through the testimony, outline the demands of her job, and then make specific findings that Benally could perform each one of the physical tasks associated with her job at the time of the injury.

An ALJ is not required to set out the minute details of his reasoning in reaching his conclusion. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The only requirement

is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, supra.

Dr. Best indicated in his report that he was fully aware of Benally's job description and believed she was capable of fully performing that job after the injury. Based on the ALJ's statements in his opinion regarding Benally's job tasks and Dr. Best's statements indicating he was aware of the physical requirements of Benally's job, the ALJ was not required to provide more in depth findings.

Regarding Benally's second argument, we agree with Benally the two multiplier is applicable in this claim. Therefore, the award of PPD benefits must be reversed. In the March 17, 2016, BRC Order, the parties stipulated Benally returned to work on May 5, 2014, and she currently earns the same or greater wage. That stipulation causes the two multiplier to be applicable, and the ALJ erred in not so finding.

In Livingood v. Transfreight, LLC, supra, the Kentucky Supreme Court concluded as follows:

> Given our analysis, we conclude that *Chrysalis House* was incorrect in holding that the reason for cessation of work at the same or greater wage under KRS 342.730(1)(c)2 must relate to

> the disabling injury. To that extent, *Chrysalis House* is overruled. Nevertheless, a literal construction of KRS 342.730(1)(c)2 would lead to an unreasonable result if an employee like the one in *Chrysalis House* is allowed to benefit from his own wrongdoing.

Id. at 257.

The Kentucky Supreme Court held as follows:

> We hold that KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another. In the instant case, the substantial evidence of record does not establish that Livingood's conduct was of that nature. Rather, the ALJ concluded that "but for the prior transgressions the pole bumping incident would not have resulted in [Livingood's] termination."

Id. at 259.

Thus, Benally is entitled to double income benefits during any period her employment at the same or greater wages ceases for any reason without or without cause, except where her conduct was shown to have been an intentional deliberate action with reckless disregard of the consequences either to her or another.

Here, there is no question Benally ceased her employment with the AOC in order to attend the University

of Wisconsin for a Ph.D. In light of Benally's unrebutted testimony, there is no need to remand the claim for additional fact finding since Benally ceased her employment with AOC in an attempt to obtain her Ph.D. at the University of Wisconsin, and her conduct was not an intentional deliberate action with reckless disregard of the consequences either to her or another.

On remand, the ALJ shall enter an award directing Benally is entitled to the two multiplier from August 16, 2014, and continuing throughout the period her weekly wage is less than her AWW at the time of the injury. We emphasize that pursuant to 803 KAR 25:010 Section 16, the AOC did not seek to be relieved of the stipulation prior to the date of the hearing. Thus, the parties are bound by the stipulation.

We find no merit in Benally's third argument asserting she is entitled to the three multiplier. In his October 29, 2015, addendum report, under work capacity/restrictions, Dr. Best stated as follows:

> The patient has described the physical requirements of his/her usual and customary work activities.
>
> Should restrictions be placed upon patient's work activities due to the injury or its residuals? **No.**

> Does patient retain the physical capacity to return to the type of work performed at the time of injury? **Yes.**
>
> The patient has described her work as a 'counselor', a desk job. She is fully capable of return to these duties without restriction.

Dr. Best opined Benally was fully capable of returning to her job duties as a counselor at the time of the injury. Dr. Best reinforced this opinion at his deposition, testifying as follows:

> Q: Do you believe she is capable of performing her job duties as a drug court counselor that she was performing prior to this slip and fall?
>
> A: I do. As she described it to me, the majority of the activities required in her job were pretty sedentary, and so consequently I believe that indeed she can return to those.
>
> . . .
>
> Q: Okay. Do you know she is a drug counselor at the courts?
>
> A: Yes, sir.
>
> Q: And as you can imagine, these are highly tense people, and a lot of times she has to – well, not a lot of times. It is part of her work, as she described in her deposition, that sometimes she has to intervene physically. Is she able to do that now?
>
> A: Sure.
>
> Q: She can hold down a person?

A: Well, it depends on – I mean, you didn’t describe – I mean, is the person 100 pounds? Is the person 400 pounds? If the patient’s 400 pounds, neither you nor I can restrain that individual. If the patient’s 100 pounds, then probably both you and she can restrain that patient.

Q: So you wouldn’t have a problem letting her do that if you were her doctor?

A: No. And I’ll tell you another reason why, because return to work is so terribly necessary in life. In all of our lives, having a job is a very meaningful position. Bringing home a paycheck is very meaningful. If you look at the studies, you’ll find out that the incident of depression is about six times greater in individuals who are unemployed. The incidence of hypertension goes up; the incidence of diabetes goes up; the incidence of a sudden cardiac death goes up. So consequently, I am very judicious when I take people from work. There has to be a real solid reason. Okay? If you look at her from her waist up, okay, she’s normal. Okay? There’s no reason why, from the waist up, she couldn’t help restrain individuals. From the waist down, she’s got a – she’s got two bad knees. Okay? Her ankle is fine, and I don’t find anything significantly bad about her back. So in that circumstance, I would rather err on allowing her to return to her work than to keep her off work. I just don’t think that’s fair to either she or her family.

Q: You wouldn’t agree that’s sort of an iffy point there, whether she can restrain someone or not?

> A: Well, again, it depends on who she has to restrain. Okay? And, you know, the whole point is that should I tell you, you shouldn't drive a car home tonight because you may get hit by a Greyhound bus? Well, you may get hit by a Greyhound bus on the way home, but the chances aren't great that that's going to happen, so I wouldn't tell you not to drive home. And it's the same thing with her job. I think that her risk of injury is so low that she ought to be able to return to that job because she also said that typically she never lifts greater than 25 to 30 pounds.
>
> Q: Is that when she was talking about carrying the cases to the court? Is that what she was talking about?
>
> A: Yeah, carrying records, she said.
>
> Q: Okay. Now, what about – can she traverse stairs, go up and down stairs?
>
> A: Again, it depends on how many stairs we're talking about. Could she go up 50 stairs? Probably not. Could she up ten stairs? Probably she could. And, again, going up and down stairs is all in conditioning. So consequently, if she had to climb 10 or 12 stairs, if she got into an aerobics program, for instance, like a swimming program that would help strengthen her lower extremities, then indeed she might well be able to do that. It's just – you have to give me a few more statistics about what she's got to do.

The testimony of Dr. Best as set forth above and his opinions expressed in the October 29, 2015, addendum qualify as substantial evidence supporting the ALJ's decision the three multiplier is not applicable. Since the

evidence does not compel a contrary result, this Board is without authority to disturb the ALJ's decision on this issue.

Likewise, Benally's fourth argument asserting the ALJ should not have denied benefits for the left knee condition based on a finding of pre-existing active impairment is without merit. The March 17, 2016, BRC Order lists three contested issues. Work-relatedness/causation and injury as defined by the Act were not listed as contested issues for any of the alleged work-related injuries. Further, exclusion for disability/impairment was also not listed as an issue.

Nonetheless, we conclude the issue of whether Benally sustained a work-related left knee injury was tried by consent. In his October 29, 2015, addendum, Dr. Best provided the following opinion regarding an impairment rating for the left knee:

> Clearly, the left knee degenerative changes secondary to the ACL reconstruction/tear in 1980 is a chronic active medical condition. It is fully expected that the left knee would have developed degenerative changes following the injury and subsequent reconstructive surgery. This is the natural outcome of this condition.

Dr. Best also alluded to treatment in 2012 and 2013 for left knee problems. In fact, Benally testified

she had been to the doctor between three and six months prior to the injury for left knee problems. During his deposition and without objection, Dr. Best provided the following testimony explaining why he did not believe Benally sustained a compensable injury to the left knee:

> Q: So do you feel like she has any permanent impairment rating under the Fifth Edition of the AMA Guides for the left knee?
>
> A: Well, absolutely she has a permanent impairment rating. The problem is what of that permanent impairment rating is related to the contusion, and typically a soft tissue contusion results in no permanent impairment rating. If you look at my report, she has a very significantly reduced range of motion of that left knee. She also radiographically has very significant osteoarthritis of that left knee. She, again, had the ACL reconstruction in 1980, and if you look into her past history, she's had chronic complaints of left knee pain. So the real problem here is, yes, she has a ratable impairment under the fifth edition AMA Guides. I just do not feel that that impairment, however, is objectively determined to be causally related to the slip and fall injury.
>
> . . .
>
> Q: Now, did you find a permanent injury caused by the fall of February 3rd, 2014, for the left knee?
>
> A: For the left knee. Okay. Let's define "permanent injury." Are we using a permanent harmful change to the human organism?

Q: Yes.

A: Is that the definition we're using?

Q: Yes.

A: Okay. Under that definition, I did not find objective evidence of a worsening of her pre-existing degenerative arthritis of the left knee.

Q: Okay. Did you find that she had a patella fracture from the fall to the left knee?

A: I did not, and there was some question as to whether that was actually a patellar fracture because if you look at that report, on one – in one place calls it a nondisplaced left patellar fracture; on another place it calls it as a vertical fracture of the tibia. So I'm not sure exactly what the radiologist meant by that, but I did not see it. And subsequent radiographic studies did not show that there was any arthritic component secondary to it as you would expect with a nondisplaced fracture.

Q: So is your opinion today, then, that what she has sustained from February 3rd, 2014, to her left knee is a temporary condition?

A: I do believe that she had, at the very most, she had a nondisplaced fracture. Nondisplaced fractures heal without sequelae. Okay? Hence, why it's nondisplaced. It's anatomic. Okay? So consequently, I do not believe that this resulted in a permanent harmful change.

Q: Because the fracture healed?

A: Because it had healed in anatomic position.

Q: Okay. But can we agree that there was a fracture for the left knee?

A: Again, I can't – I can quote what the radiologist said by that MRI. I was not provided that MRI.

Q: Okay. Can we say that there are physicians who have examined her radiographs and determined that she had a fracture to the left knee?

A: I think the only person that looked at that was the radiologist because Dr. Nawab did not comment on that being a fracture and did not alter his care. Obviously, she was not given a knee brace for that. She was not put in a cast. She did not receive any surgical procedure. So I did not see where Dr. Nawab found that to be a treatable entity.

Q: Doctor, if I show you Dr. Nawab's note that he said that she sustained a bilateral patellar fracture, would you change your opinion on that then?

A: Yeah, because there's nothing that would indicate that she had bilateral patellar fractures. The MRI of the right knee did not show a patellar fracture, so I think he probably misspoke if he said bilateral patellar fracture.

[text omitted]

Q: Doctor, do you see Dr. Nawab's narrative report where he says diagnosis is bilateral patellar fracture?

A: I do.

> Q: Upon reading that, do you change your mind at all on whether Ms. Benally suffered permanent harm as a result of the fall of February 3rd, 2014?
>
> A: Well, now are you asking me about the right knee?
>
> Q: Left knee.
>
> A: Because we're talking about bilateral fractures; we're talking about left and right.
>
> Q: That's right. I'm going to stay on the left for now because I'm not worried about the right.
>
> A: I need a scorecard here.
>
> Q: She had a lot of different parts.
>
> A: Again, I would not agree with what Dr. Nawab said. I think he misspoke in that or it's a typographical error because there is no place in the record that indicates that this patient had bilateral patellar fractures.

Benally filed no objection to any portion of Dr. Best's reports nor did she object to his deposition testimony concerning the left knee condition. In fact, Benally engaged in a lengthy cross-examination regarding Dr. Best's reasoning for concluding Benally did not sustain a left knee injury. Similarly, Benally did not object to that portion of AOC's brief, under the heading "extent and duration," arguing Benally did not sustain a compensable left knee injury.

Pursuant to CR 15.02, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (Ky. 1991), our Supreme Court discussed the purpose of CR 15.02, and explained how the rule should be interpreted by Kentucky courts:

> Bertelsman Philipps explains "[o]ne of the reasons" for the rule "is to take cognizance of the issues that were actually tried."
>
> "The Rule goes further than authorizing amendments to conform to the evidence. It provides that if issues not raised by the pleadings are tried by express or implied consent, they shall be treated as if they had been so raised [citation omitted].
>
> ....
>
> The decision whether an issue has been tried by express or implied consent is within the trial courts discretion and will not be reversed except on a showing of clear abuse.
>
> ....
>
> It seems clear that at the trial stage the only way a party may raise the objection of deficient pleading is by objecting to the introduction of evidence on an unpleaded issue. Otherwise he will be held to have impliedly consented to the trial of such issue."

Furthermore, the Supreme Court has noted that "[t]here is a need for uniformity and stability in our approach to the application of the civil rules to Workers' Compensation matters." The uniformity principle was followed in Divita v. Hopple Plastics, 858 S.W.2d 214 (Ky. App. 1993), where this Court held that since the defendant employer's misrepresentation defense "was tried before the ALJ," the defense was properly considered by the ALJ even though the employer had failed to raise the issue in the pre-hearing conference order. This Court went on to state that CR 15.02 also applied to workers' compensation proceedings, explaining that "we would not apply a more stringent rule [than CR 15.02] to an administrative hearing." Thus, the issue of whether Benally sustained a work-related left knee injury was tried by consent.

Further, Benally's reliance upon Finley v. DBM Technologies, supra, is misplaced. In the case *sub judice*, the issue was not whether a portion of an impairment rating for the left knee should be carved out for a pre-existing active condition pursuant to Finley v. DBM Technologies, supra. Rather, the issue was whether Benally sustained a work-related injury to the left knee. Dr. Best concluded Benally did not sustain a work-related left knee injury and all of her left knee problems were symptomatic and pre-

existed her February 3, 2014, injury. In order for Finley v. DBM Technologies, supra, to be applicable, there must have been a work-related injury meriting an impairment rating. In that case the question then becomes whether a portion of the impairment rating should be carved out for a pre-existing active condition as defined by Finley v. DBM Technologies, supra. Here, Dr. Best concluded there was no work-related injury; thus, Finley v. DBM Technologies, supra, is inapplicable. We also emphasize Dr. Nawab, Benally's treating physician, only assessed an impairment rating for the right knee injury. In his report of June 8, 2014, Dr. Nawab did not assess an impairment rating for any other condition.

Accordingly, the May 16, 2016, Opinion and Award is **AFFIRMED** on all issues raised by Benally on appeal except for the ALJ's failure to enhance her income benefits by the two multiplier. Therefore, the award of PPD benefits is **REVERSED** and this matter is **REMANDED** to the ALJ for entry of an award directing Benally is entitled to benefits enhanced by the two multiplier from August 16, 2014, until such time as she earns wages which are equal to or greater than the wages she earned at the time of the injury.

ALL CONCUR.

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