OPINION ENTERED: June 28, 2013

CLAIM NO. 201200401

NORTH AMERICAN STAINLESS PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

KELLI M. BAKER
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. North American Stainless ("NAS") appeals from the January 11, 2013 opinion, award and order rendered by Hon. Stephen G. Bolton, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits to Kelli M. Baker

("Baker"). The ALJ also ordered Baker undergo a vocational rehabilitation evaluation. NAS also appeals from the February 18, 2013 order denying its petition for reconsideration.

On appeal, NAS argues the ALJ erred in basing the award of PPD benefits upon a functional impairment rating assessed prior to Baker reaching maximum medical improvement ("MMI"). NAS also argues the ALJ, "erred by failing to rely upon the medical opinions regarding Baker's pre-existing and active back condition rather than utilizing the opinions of the medical experts to make his decision." NAS also argues the ALJ erred in enhancing the award of PPD benefits with the three multiplier pursuant to KRS 342.730(1)(c)1. Finally, NAS argues the ALJ erred in awarding vocational rehabilitation benefits. Because the ALJ's determinations are supported by substantial evidence, and are in conformity with the law, we affirm.

This claim was initiated by NAS filing a Form 112 medical dispute on March 29, 2012. The dispute was filed to challenge lumbar surgery proposed by Dr. Kimathi Doss for treatment of Baker's low back injury sustained on April 24, 2011. In support of the medical dispute, NAS filed the utilization review ("UR") report prepared by Dr. Robin Simon, an orthopedic surgeon, dated January 4, 2012. Dr.

Simon opined the surgery proposed by Dr. Doss consisting of a laminotomy, hemi-laminectomy with decompression of nerve roots, including a partial facetectomy, foraminotomy and/or excision of a herniated intervertebral disc, was not medically necessary.

Dr. Doss again submitted a request for surgery on February 23, 2012. In his UR report dated February 28, 2012, Dr. Kenneth Kopacz opined, "the left lumbar L4-5 discectomy is medically necessary." He further stated, "Given the claimant's continued symptoms and imaging findings the surgery is indicated for the radicular symptoms and nerve compression."

An order was issued by Hon. J. Landon Overfield, Chief Administrative Law Judge, on April 18, 2012, joining Dr. Doss, and the Norton Brownsboro Hospital as parties to the medical dispute, and giving all respondents twenty days to respond to the order.

On April 19, 2012, Baker filed treatment records of Drs. Doss and Sherrell Nunnelley. Treatment records from April 28, 2011 through January 14, 2011, including reports from radiographic and imaging studies, documenting ongoing treatment for low back pain, were included. Dr. Doss initially saw Baker on July 5, 2011 upon referral from Dr. Nunnelley. He noted the history of a sudden onset of

low back pain, left lower extremity pain and burning in the medical aspect to the knee. He also noted numbness and tingling on the anterior surface of the distal lower extremity. A disc herniation at L4-5 was confirmed by MRI, and he recommended low back surgery. The November 14, 2011 record noted continued low back pain, and Dr. Doss again recommended surgery.

On May 16, 2012, a scheduling order was issued by the Kentucky Department of Worker's Claims, setting a Benefit Review Conference ("BRC") for September 4, 2012. The order further noted the ALJ to whom the claim would be assigned remained to be determined.

On July 16, 2012, Baker filed a Form 101, alleging she injured her low back on April 24, 2011 as she attempted to roll a fifty-five gallon drum of hydraulic fluid onto a skid. The Form 104, Employment History, filed with the claim noted her employment history included working as a material hander and on a production line.

Baker testified by deposition on June 27, 2012, and at the hearing held September 20, 2012. At the time of her deposition, Baker was a resident of Hanover, Indiana, but by the hearing date she had moved to Texas. Baker was born on November 22, 1978, and is a high school graduate. She completed a cosmetology course while in high school,

and at one time was a licensed cosmetologist in Indiana. She worked as a cosmetologist for a year and a half. Baker's employment history consists of working as a cashier at a fast food restaurant, small parts assembler, press operator, machine operator, technical support specialist, trainer, material handler, and forklift operator. At NAS, she drove a forklift, unloaded trucks, stored supplies, inventoried supplies, scanned products and performed some computer work. She stated her job required lifting up to seventy-five pounds. She stated she cannot perform many of her previous job duties due to the twenty-five pound lifting restriction imposed by Dr. Timir Banerjee who performed an examination in order to provide a second opinion regarding the proposed surgery.

Baker testified she experienced a back strain in 2007, and began treating with a chiropractor in January 2008. She had no pain in her extremities. She stated the back pain improved after a short period of time, but she continued to see the chiropractor for several months for follow-up care. She had no surgery for the 2007 strain, had no pain or symptoms in her lower extremities, missed no time from work, and continued to perform her regular job until April 24, 2011.

On April 24, 2011, Baker was called upon to deliver a fifty-five gallon drum of hydraulic oil which weighed between four and five hundred pounds. This required her to lean the drum, and roll it onto a skid so it could be moved with a forklift. When she attempted to pull the drum backward, she experienced a pinch in her back and left side. She was unable to complete the task. She completed her shift and went home. She awoke during the night with low back and leg pain. She was not scheduled to return to work until April 27, 2011. She treated with a chiropractor for three days, which provided no relief. She called NAS and reported the injury, and was referred to Dr. Nunnelley who recommended light duty, pain medication, and muscle relaxers. When her condition did not improve, Dr. Nunnelley referred her to Dr. Doss who recommended surgery. She continued to work light duty until September 21, 2011, when she was terminated because NAS could not accommodate the twenty-five pound lifting restriction imposed by Dr. Banerjee.

Baker did not undergo surgery, and is unsure if she desires to have any performed. She testified she experiences daily back pain, numbness in her left lower extremity, difficulty sleeping, pain with lifting or twisting, and cannot sit for over half an hour. She is

unable to play golf or work out. She takes Ibuprofen, attempts to stretch, and takes hot baths to relieve her pain. She is not working, but since her termination, she has sought employment within her restrictions.

NAS filed records from Dr. Eric Berseth, D.C., at Clifty Falls Chiropractic, indicating Baker's last treatment prior to April 24, 2011, was September 8, 2008. She began treating there on January 11, 2008 for back pain. The records reflect her treatment with the chiropractor in 2008 included twelve times in January, eight times in February, six times in March, three times in April, twice in May, once in June, once in July, and once in September. At the hearing, counsel for NAS stated the chiropractic records were filed because, "I wanted to make sure we had some records about the pre-existing inactive condition."

In support of the Form 101, Baker filed the August 26, 2011 report of Dr. Banerjee, a neurosurgeon, who provided a second opinion at NAS's request. Dr. Banerjee noted the history of injury occurring April 24, 2011. Dr. Banerjee stated Baker has multi-level disk degeneration and protrusions. He noted an extruded disk at L4-5 with extruded disk material central and para-central to the left. He noted osteophytes at three levels. He opined surgery is unnecessary. He further stated if no surgery is

performed, Baker has reached MMI. If she elects surgery, she would reach MMI six months post-surgery. Dr. Banerjee assessed a 13% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), which he stated would be applicable regardless of whether or not she undergoes surgery. Dr. Banerjee stated he would restrict Baker from lifting no more than twenty-five pounds, avoid twisting, exercise, lose weight, and quit smoking.

NAS filed the June 20, 2012 report prepared by Dr. Henry Tutt, who evaluated Baker at its request. Dr. Tutt noted the history of injury and complaints. He stated she had previously treated in 2006 and 2008 for low back pain. Dr. Tutt diagnosed pre-existing, active, symptomatic lumbar degenerative arthritis, disk and joint disease involving the L3-4 and L4-5 segments. He stated relative to the April 24, 2011 work event, Baker sustained a left L4-5 superior disk extrusion, which was transiently associated with a left L4 radiculopathy, and subsequently resolved with conservative treatment. He stated she reached MMI between November 1, 2011, and December 1, 2011. Regarding her impairment, based upon the AMA Guides, Dr. Tutt stated Baker had a 5% pre-existing impairment rating. Her impairment progressed to 13%, then reverted to 8%, of

which only 3% is due to the April 24, 2011 work injury. He disagreed with the 13% impairment rating assessed by Dr. Banerjee. Dr. Tutt recommended the use of proper body mechanics when lifting.

A BRC was held on September 4, 2012. The BRC order and memorandum reflects the parties stipulated to a work injury occurring on April 24, 2011. The contested issues consisted of benefits per KRS 342.730, work relatedness/causation, unpaid/contested medical bills, credit for unemployment benefits, exclusion for pre-existing active disability, temporary total disability benefits, vocational rehabilitation, multipliers, extent and duration, and whether Baker retains the physical capacity to return to the work performed prior to the date of injury. At the hearing held September 20, 2012, the parties stipulated Baker's average weekly wage was $910.36.

In the Opinion, Order and Award rendered January 11, 2013, the ALJ found as follows:

ANALYSIS

> One of the most important functions in reviewing evidence and making evidentiary findings in worker's compensation cases is determining the credibility of the Plaintiff. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977). In the instant case,

the candidness of the Plaintiff as well as her realistic assessment of her own state of health is[sic] a good indication that her testimony is truthful and can be relied upon.

This matter really was initiated because the Plaintiff was reluctant to have the back surgery recommended by Dr. Doss. She wanted a second opinion which she obtained from Dr. Banarjee [sic]. As noted by Dr. Tutt and Dr. Banarjee [sic], the passage of time seemed to confirm that the Plaintiff was able to work through some of her problems, although there is consensus that she does have a permanent partial disability as the direct and proximate result of her work related injury superimposed on a pre-existing degenerative condition in her lower back. The real issue is the extent and duration of her disability and whether the pre-existing degenerative disease condition was dormant and wholly aroused into disabling reality by the work related injury or constituted a pre-existing active condition. Dr. Moss's opinion as to the need for surgery seems to have been overtaken by subsequent developments and even the Plaintiff does not seem keen on the idea at the present time.

To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the *AMA Guidelines* immediately prior to the occurrence of the work related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App., 2007). So, when work related trauma causes a dormant degenerative condition to become disabling and to result in a

functional impairment, the trauma is the proximate cause of the harmful change. Hence, the harmful change comes within the definition of injury. *McNutt Construction v. Scott*, 40 S.W.3d 854 (Ky., 2001).

Here, it is true that the Plaintiff had some back problems in 2008. The records from Clifty Falls Chiropractic are voluminous and instructive. They disclose that the Plaintiff sought treatment for low back pain commencing January 11, 2008, when she presented to her chiropractor. She complained of back weakness and moderate pain. Her history was that she had suffered this pain since about the middle of 2006. By history, she suffered sharp, stabbing pain at all levels of her spine while lifting, walking, bending or working.

She also suffered from some pain radiating into her leg, but as testified to by Plaintiff and reflected in the records, it was her right leg.

An x-ray report of January 28, 2008 showed moderate degenerative disk disease at L-4/L-5 and early at L-3/L-4. Otherwise, the results were essentially normal. By February 8, 2008 she was reporting that she was almost asymptomatic in her lower back, but continued to have some problem with her right leg. By September of 2008 she was reporting only minor problems, and as she testified, her treatment notes stop on September 8, 2008, some two and one-half years prior to her work related injury of April 24, 2011. There is no doubt that during that 2 ½ year period she was performing occasional heavy labor with no restriction or complaint.

Taking into account the medical evidence as a whole in the record as well as the Plaintiff's history as testified to by her and given to both examining and treating physicians, it seems to the undersigned that the opinion of Dr. Banarjee [sic] is the most persuasive and consistent with all of the underlying facts.

Dr. Tutt assigns the same percentage of wpi as Dr. Banarjee [sic] during the time of her active lumbar radiculopathy, but opines that this rating reverted to 8% upon the clearing of the active left L-4 nerve root compression. He then goes on to assign a 5% pre-existing active impairment, thus leaving only 3% wpi as being compensable. However, this does not seem to be consistent with the evidence in the record as a whole, especially as he found the Plaintiff to have reached maximum medical improvement between 11/1/2011 and 12/1/2011, just three months after Dr. Banarjee [sic] found her to have the same 13% wpi. I find Dr. Banarjee [sic] to be more persuasive.

As to the statutory enhancement, Dr. Banarjee [sic] imposed a permanent 25lb. lifting restriction on the Plaintiff which resulted in her termination from the Defendant's employment because the Defendant could not accommodate those restrictions. Thus, it seems clear that the Plaintiff cannot return to the type of work performed on the date of the injury, in spite of her assertion that she might be able to. At the time of her injury, she was lifting 75 lbs or more, driving a fork-lift loading and unloading supplies. She testified that as of the date of the hearing, she remains

unemployed in part because of her lifting restriction.

With regard to reimbursement of UI benefits, the Plaintiff has waived any claim to TTD in her brief. Thus, the Defendant is not entitled to credit for unemployment benefits received by the Plaintiff.

As to vocational rehabilitation, it would appear that given Plaintiff's work history and vocational background she is an excellent candidate. Her testimony was that in her prior employment she had worked with suppliers, waited on customers, scanned supplies, conducted inventories and worked on computers. She is clearly a candidate for transition into a more sedentary field of employment.

FINDINGS OF FACT, AND CONCLUSIONS OF LAW

1. Facts as stipulated by the parties and set out herein above.

2. As to the issue of work-relatedness, causation or injury as defined by the Act, the Plaintiff's own testimony supported by all of the medical testimony in the record supports the fact that the Plaintiff sustained a work-related injury on April 24, 2011. The ALJ finds that the Claimant suffered a work-related injury on April 24, 2011 while in the employ of the Defendant/ Employer.

3. As to the issue of exclusion for pre-existing disability/impairment, the ALJ finds, based upon the record as a whole that there was no active pre-existing disability/ impairment as to this Plaintiff at

the time of her work-related injury of April 24, 2011.

4. As a result of her April 24, 2011 work-related injury, the Plaintiff has a whole person impairment rating of 13% according to the *AMA Guides, 5th ed.* [sic] In making this finding, I have relied upon the opinion of Dr. Timir Banarjee [sic], M.D., which, concerning Plaintiff's functional impairment rating as a result of the subject injury, I find to be the most credible and convincing evidence in the record.

5. As opined by Dr. Banarjee [sic], the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. Further, it is undisputed that the Plaintiff is not currently working and therefore is earning less than she earned at the time of her work injury. The Plaintiff is therefore entitled to the statutory enhancement of a 3.0 multiplier pursuant to KRS 342.730 (1) (c) 1.

6. Plaintiff is thus entitled to a weekly benefit calculated at $541.47 x 13% x 1 x 3.0 (multiplier) = $211.17 per week.

7. As discussed herein above, based upon the record taken as a whole, I find that the Plaintiff reached her level of maximum medical improvement (MMI) on November 1, 2011.

8. As the Plaintiff has waived her claim for temporary total disability payments between the date of her injury on April 24,

2011 and the date upon which she reached MMI (November 1, 2011), the Defendant/Employer is not entitled to a credit for unemployment benefits paid to the Plaintiff.

9. There are no current unpaid or contested medical expenses other than the expense of the proposed microdiskectomy by Dr. Kimathi Doss and North Brownsboro Hospital, which the ALJ hereby finds to be medically unnecessary. However, if such expenses exist, they shall be submitted on a timely basis to the Defendant/ Employer or its insurance carrier.

10. The Plaintiff is eligible for, and will likely benefit from vocational rehabilitation services and shall be referred for evaluation pursuant to KRS 342.710 (3).

11. As to future medical expenses, the Plaintiff shall be entitled to the cost of reasonable and necessary treatment for the cure and relief of her work related injury.

NAS filed a petition for reconsideration on January 24, 2013, arguing, as it does on appeal, the ALJ erred in relying upon the 13% impairment rating assessed by Dr. Banerjee, because Baker had not reached MMI. NAS also argued the ALJ erred in finding Baker's condition was dormant prior to the date of injury. Finally, Baker argued the ALJ erred in ordering a vocational rehabilitation

evaluation. The petition for reconsideration was denied by order entered February 18, 2013.

NAS argues on appeal the ALJ erred in basing the award of PPD benefits upon a functional impairment rating assessed prior to Baker reaching MMI; "erred by failing to rely upon the medical opinions regarding Baker's pre-existing and active back condition rather than utilizing the opinions of the medical experts to make his decision."; erred in enhancing the award of PPD benefits with the three multiplier pursuant to KRS 342.730(1)(c)1; and, erred in awarding vocational rehabilitation benefits.

We believe the outcome selected by the ALJ is supported by substantial evidence and in conformity with the Act. As the claimant in a workers' compensation proceeding, Baker had the burden of proving each of the essential elements of her cause of action including the appropriate impairment rating, entitlement to statutory multipliers pursuant to KRS 342.730(1)(c)1, and vocational rehabilitation. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since she was successful before the ALJ, the question on appeal is whether substantial evidence of record supports the decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence

having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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 supporting a different outcome than 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). In

order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The parties stipulated Baker sustained a work-related low back injury on April 24, 2011. This is supported not only by Baker's testimony and Dr. Banerjee's report, but also by Dr. Tutt. NAS's argument the ALJ improperly relied upon the impairment rating assessed by Dr. Banerjee is disingenuous. NAS argues the impairment rating assessed by Dr. Banerjee is inappropriate because she has not reached MMI. This is simply not true. On page five of his report, Dr. Banerjee stated as follows:

> I would think she has a fixed deficit if she does not undergo an operation. Since she does not have any leg pain now chances are that after operation and foraminal enlargement there can develop nerve damage and she may end up with leg pain. If it is decided against operation she can be considered at MMI according to the 5th edition page 601. If she undergoes an operation she won't be at MMI for six months and will have the same impairment.

Based upon the foregoing, since Baker has not undergone surgery, and appears not to desire surgery, it was reasonable for the ALJ to rely upon the impairment rating assessed by Dr. Banerjee in awarding PPD benefits.

Likewise, the ALJ did not err in enhancing the award of PPD benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. Although Baker continued to work after the accident until September 21, 2011, she performed only limited or light duty. She was terminated because of the lifting restriction imposed by Dr. Banerjee. It is well settled a claimant's own testimony as to her capabilities and limitations may be relied upon by the fact-finder in determining the physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Co. v. Curling, 457 S.W.2d 610 (Ky. 1970). Because Baker cannot return to her former job due to her inability to lift up to seventy-five pounds as required, and because Baker testified she is unable to perform many, if not most of the jobs she performed in the past, the ALJ did not err in awarding the three multiplier.

NAS next argues Baker's condition was pre-existing, and therefore a portion of her impairment should have been found non-compensable. There is no evidence her previous low back condition remained active subsequent to her last visit with the chiropractor in September 2008. Baker continued to perform her work, and the injury in question did not occur until approximately two and a half years later. Likewise, although NAS argued an impairment

rating could have been imposed in 2008, there is no evidence such rating was in fact assessed. Even if Baker had a ratable condition prior to April 24, 2011, there is no evidence her condition was active or symptomatic for at least two and a half years prior to that date.

Kentucky law holds the arousal of a pre-existing dormant condition into disabling reality by a work injury is compensable, and an employer is not responsible only for a pre-existing active condition present at the time of the alleged work-related event. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). The correct standard regarding a carve-out for a pre-existing active condition is set forth in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). There the Kentucky Court of Appeals instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic and impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. Finley v. DBM Technologies, supra. In the case *sub judice*, while NAS introduced evidence of previous treatment for low back pain, it failed to establish Baker suffered from a symptomatic low back condition immediately prior to the

April 24, 2011 work-related injury. Therefore, the ALJ did not err in finding Baker's impairment was not due to a pre-existing active condition.

Regarding the award of vocational rehabilitation benefits, KRS 342.710, states as follows:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . .
>
> (3) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

In Wilson v. SKW Alloys, 893 S.W.2d 800 (Ky. App. 1995), the Kentucky Court of Appeals noted a purpose of this statute is to expeditiously restore the injured worker as near as possible to a condition of self-support as an able bodied worker, and further held "work for which an employee has previous training or experience" must be suitable employment. Wilson defined "suitable employment" as:

> work which bears a reasonable relationship to an individual's

> experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement.
> Id. at 802.

In Haddock vs. Hopkinsville Coating, Inc., 62 S.W.3d 387 (Ky. 2001), the Court noted, restoring a worker to "suitable employment" means "attempting to achieve a reasonable relationship between the worker's pre and post-injury earning capacity." The determination of whether a claimant has returned to suitable employment is a factual determination solely within the role of the ALJ as fact-finder.

It is undisputed Baker cannot return to the work performed at NAS. She was terminated from her employment because she could not perform the requirements of her job due to the restrictions imposed by Dr. Banerjee. Likewise, the ALJ's determination is supported by Baker's own testimony she is unable to perform many of her previous work activities, and has been unable to secure employment. The ALJ's determination regarding a referral for a vocational

evaluation is appropriate, and is supported by substantial evidence.

Accordingly, the opinion, order and award rendered by Hon. Steven G. Bolton, Administrative Law Judge, on January 11, 2013, as well as the order on reconsideration dated February 18, 2013 are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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