

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 11, 2016

CLAIM NO. 201500226

RICHARD DAMES

PETITIONER

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

BOONE CO. SCHOOLS
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Richard Dames ("Dames") seeks review of the September 25, 2015, Opinion and Award of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") finding he sustained a work-related hip injury on February 22, 2013, and a work-related lumbar spine injury on May 5, 2013. The ALJ awarded permanent partial disability ("PPD") benefits

and medical benefits for both injuries. However, the ALJ dismissed Dames' claim for an alleged low back injury occurring on February 21, 2015. Both parties filed petitions for reconsideration. In separate orders dated December 1, 2015, the ALJ summarily denied Dames' petition for reconsideration but sustained Boone Co. Schools' ("Boone Co.") petition for reconsideration and amended his award to reflect Dames is not entitled to future medical benefits for the February 22, 2013, and May 5, 2013, injuries.

On appeal, Dames challenges the decision on five grounds. First, Dames asserts he was significantly prejudiced by the medical evidence tendered by Boone Co. at the final hearing. He notes these documents were tendered medical records which were previously stricken by the ALJ. He asserts the tendered medical records exceeded the scope of the evidence to be admitted during the extension of proof time. During the July 14, 2015, Benefit Review Conference ("BRC") the ALJ sustained his previously filed motion to amend his Form 101 to include a claim for a February 21, 2015, work injury. Dames observes that during his July 6, 2015, deposition, Boone Co. cross-examined him about this injury. In sustaining the motion the ALJ ordered proof to remain open for Boone Co. to respond to

this additional injury. Thus, the extension of time was limited only to the introduction of proof relating to the 2015 work injury.

Dames asserts that at the final hearing Boone Co. tendered additional evidence including medical records through six separate motions consisting of "over fifty pages of medical records, personnel files, and job description." Dames lists the contents of the six filings and maintains he objected to the admissibility of any tendered exhibits unrelated to the last injury. The ALJ sustained his objection "to the extent that all late submitted evidence not responsive to the Order dated July 14, 2015 shall be stricken." The ALJ also ordered he would "rule upon the admission of each record along with the Opinion and Award to be issued herein." Dames states the matter stood submitted as of July 28, 2015, and simultaneous briefs were ordered filed within thirty days.

After the hearing, Boone Co. filed a motion to set aside the order and in the alternative to strike the February 21, 2015, injury claim. He asserts after his response was filed, no ruling or order was received from the ALJ in response to this motion.¹ Further, Dames asserts

¹ Contrary to Dames' assertion, the record contains a September 1, 2015, Order in which the ALJ denied the motion.

an order was never received ruling on the admissibility of the six tendered filings previously ordered stricken at the final hearing. Dames' position is only those medical records directly related to his third injury of February 21, 2015, should be admissible.

Dames asserts he offered no testimony regarding the previously stricken medical records and he was not cross-examined regarding these records. Yet, the ALJ's opinion summarized, in detail, all of the stricken records and they were apparently relied upon by the ALJ in formulating his opinion. Dames also notes he did not address this evidence in his post-hearing brief as he understood the records unrelated to the third injury were stricken. Further, there was no subsequent order altering the ALJ's holding that the records were stricken. He argues if the records were admitted into evidence he would have moved for a continuance in order to review the documents to determine if responsive proof was necessary. At a minimum, Dames would have offered testimony regarding the records. Dames also notes Boone Co. did not ask any questions regarding the tendered exhibits. He posits that if the records were not stricken at the final hearing, Boone Co. would not have filed a motion to set aside the

order striking those filings. Dames contends the ALJ's reliance upon these records "ambushed him."

Dames maintains that within the six filings only four pages of the records from St. Elizabeth Business Health and eight pages from St. Elizabeth Physicians addressed his alleged third injury of February 21, 2015. He complains that even though the records support his claim of a work injury on February 21, 2015, the ALJ dismissed the claim.

Dames asserts that pursuant to his July 28, 2015, Order, the ALJ was to rule upon the admissibility of each record offered by Boone Co. at the final hearing and determine whether the proffered evidence had any relevance to the third injury of February 21, 2015. However, the opinion and award provided no ruling regarding the admissibility of this previously stricken evidence. Instead, the decision contains a summary of all six filings. Dames contends he could not respond to medical records apparently admitted into evidence after the final hearing and the filing of his brief.

Second, Dames argues Boone Co.'s brief to the ALJ should have been stricken. He notes simultaneous briefs were ordered filed and in accordance with the order his brief was filed. Dames' maintains his brief was filed on

August 27, 2015, and the next day Boone Co. filed a motion to file a late brief requesting an extension until September 9, 2015. Without receiving an order permitting the late filing, Boone Co. certified it served its brief on September 10, 2015, which he represents was received by him on September 21, 2015.

Third, Dames asserts the ALJ's decision is arbitrary, capricious or characterized by an abuse of discretion and is erroneous on the basis of reliable, probative, and material evidence. Dames maintains the ALJ relied solely upon the opinions of Boone Co.'s doctor, Dr. Thomas Bender. The ALJ stated Dr. Bender was more credible because he had "more appropriately accounted for [Dames'] prior history of low back pain experienced over a long period of time" which includes an MRI performed in 2004 revealing a central disc herniation at L5-S1 and numerous chiropractic visits which pre-date the alleged work injuries.

Dames maintains the problem with Dr. Bender's reference to chiropractic visits and an alleged 2004 MRI is that the records relating to both were never submitted into evidence or to Dames. Further, none of these records were part of the last minute filings by Boone Co. Dames complains Boone Co. provided these documents to Dr. Bender

without supplying them to him. He observes that he was not cross-examined about the earlier chiropractic care or the 2004 MRI. He contends that if Boone Co. had such records they should have been provided to him and submitted into evidence.

Dames argues these unknown records referred to by Dr. Bender in his report apparently were the controlling factor regarding the credibility of Dr. Bender and in the ALJ's decision regarding Dames' impairment rating and need for future medical treatment. He questions the credibility of Dr. Bender's report as it refers to medical records and treatment unknown to him and not in evidence. Further, the ALJ should have questioned the credibility of Dr. Bender's report for the same reasons.

Fourth, Dames asserts 803 KAR 25:010, Section 8, was completely ignored as many of the medical records in question were only a portion of the medical files. He again contends certain medical records reviewed by Dr. Bender were not introduced in evidence or supplied to him. Dames contends he was never provided certain medical records obtained by Boone Co. until they were tendered at the final hearing. He complains the ALJ relied upon a mere "reference" to medical records by Dr. Bender although the records were never submitted into evidence or provided to

him. Dames again notes he was never cross-examined regarding these medical records or the alleged medical treatment. Consequently, he argues Dr. Bender's report has absolutely no credibility as his opinion rests solely upon unknown medical records.

Finally, Dames argues the ALJ erroneously failed to enhance his benefits by a multiplier. He asserts, at a minimum, he is entitled to income benefits enhanced by the two multiplier and he should have been awarded income benefits enhanced by the three multiplier.

In his Form 101, Dames asserted February 22, 2013, and May 5, 2013, injuries. Dames filed various medical records from St. Elizabeth Business Health. He also submitted the March 23, 2015, report of Dr. Steven Wunder generated after performing an independent medical examination ("IME").

During Dames' July 6, 2015, deposition he was cross-examined concerning the February 21, 2015, injury. In fact, Boone Co. noted in the deposition Dames "may or may not" amend his Form 101. Four days later on July 10, 2015, Dames filed a motion to amend his Form 101 to allege an injury occurring on February 21, 2015. On July 13, 2015, Boone Co. filed the June 26, 2015, IME report of Dr.

Bender which discussed in detail the alleged February 21, 2015, injury.

The July 14, 2015, BRC Order reflects a final hearing was scheduled for July 28, 2015. Under "Other Matters," it noted "proof shall remain open for defendant to respond to plaintiff's amendment to add an additional injury date."

The July 28, 2015, BRC Order signed by both parties identified the contested issues and also granted the motion to amend the Form 101. The hearing order of that same date identified items filed by both parties to be considered as evidence. The listed items filed by Boone Co. included the six separate filings about which Dames complains on appeal. The hearing order also reflects that as of July 28, 2015, the matter would stand submitted and briefs were to be filed simultaneously within thirty days. Finally, the hearing order stated:

Plaintiff's objection to the late evidence is sustained to the extent all late submitted evidence not responsive to the order dated July 14, 2015 shall be stricken. The ALJ will rule upon the admission of each record along with the Opinion and Award to be issued herein.

Two days later on July 30, 2015, Boone Co. filed six notice of filings consisting of the following: medical

records of Dr. Daniel Courtade dated October 24, 2014; Dames' job description; Dames' personnel file; medical records from St. Elizabeth Business Health spanning the period from February 22, 2013, to February 23, 2015; the records of Dr. Grace Terrell spanning the period from September 29, 1995, through August 14, 2013; and the medical records of St. Elizabeth Physicians spanning the period from December 10, 2014, through April 20, 2015.

On August 10, 2015, Boone Co. filed a "Motion to Set Aside Order or in the Alternative, to Strike Plaintiff's Claim for the Injury of February 21, 2015." It requested the ALJ set aside his order of July 28, 2015, sustaining the objection to its evidence. In the alternative, it requested the ALJ set aside the order of July 28, 2015, granting Dames' motion to amend the Form 101. Dames filed a response to the motion. Contrary to Dames' assertion on September 1, 2015, the ALJ overruled Boone Co.'s motion. Dames filed his brief to the ALJ on August 31, 2015. Boone Co. did not timely file its brief but rather on September 8, 2015, it filed a motion for leave to file a late brief. It sought through September 9, 2015, in which to file its brief. Even though no order was entered, Boone Co.'s brief was filed on September 18, 2015.

On September 25, 2015, the ALJ entered the opinion and award. Concerning the alleged injury of February 21, 2015, the ALJ entered the following findings of fact and conclusions of law:

12. An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his worker's compensation claim. *Snawder v. Stice*, 576 SW2d 276 (Ky. App. 1979).

13. The Plaintiff alleges that he fell on ice and injured himself on February 21, 2015. He reported to Dr. Wunder that he experienced right-sided low back pain for the first time following this incident. The records of Dr. Mullen however reveal that the Plaintiff had been treating for low back pain for some time and that he received lumbar spine injections and physical therapy in the months prior to the alleged injury.

14. The records from St. Elizabeth Business Health indicate the presence of a contusion to the right side of the low back and a headache. The independent medical evaluation of Dr. Bender assessed a 0% whole person impairment as a result of the February 21, 2015, injury and stated that there was no residual. The ALJ finds that the opinion of Dr. Bender is the most credible in this matter because he has more appropriately accounted for the Plaintiff's prior history of low back pain experienced over a long period of time which includes an MRI taken in 2004 that revealed a central disc herniation at L5-S1 and numerous chiropractic visits that pre-date any work injury at issue herein. Dr.

Bender's opinion is therefore the most credible evidence regarding this incident as well.

15. The ALJ therefore finds that the incident occurring on February 21, 2015, did not cause a harmful change to the human organism and therefore does not constitute an injury as that term is defined in the Act. Any claim for the incident occurring on February 21, 2015, is hereby **DISMISSED**.

Concerning the 2013 work injuries, the ALJ entered the following findings of fact and conclusions of law:

16. The ALJ finds, as stated above that the medical opinion of Dr. Bender is the most credible and convincing in this matter. As such, the ALJ is persuaded by the opinion of Dr. Bender that this Plaintiff has a 3% whole person impairment for the left hip as a result of the February 22, 2013, injury and a 3% whole person impairment to the lumbar spine as it pertains to the May 5, 2013, work injury. The ALJ further finds in accordance with the opinion of Dr. Bender that the Plaintiff retains the ability to return to the same type of work.

17. The ALJ further finds in accordance with the opinion of Dr. Bender that the Plaintiff will not need future medical treatment for the work injuries suffered and that any active impairment of the Plaintiff is rather the result of the intervening event identified by Dr. Bender in October of 2014, and to ongoing pre-existing issues.

On October 13, 2015, Boone Co. filed a petition for reconsideration requesting the award be amended in accordance with the opinions of Dr. Bender that Dames is not entitled to future medical treatment for his work injuries.

On October 14, 2015, Dames filed a petition for reconsideration raising the same issues he now raises on appeal.

As previously noted, by separate orders both dated December 1, 2015, the ALJ overruled Dames' petition for reconsideration and sustained Boone Co.'s petition for reconsideration and amended the award to reflect Dames is not entitled to future medical benefits for the alleged injuries occurring in February and May 2013 and February 2015.

Concerning Dames' first argument we note the transcript of the hearing does not reveal the ALJ entered a ruling at the time of the hearing regarding six proffered filings. The only exchange which took place regarding the late evidence filed by Boone Co. is as follows:

JUDGE WEATHERBY: On behalf of the defendant, there are the medical records from Dr. Bender, the plaintiff's deposition, records from St. Elizabeth Business Health as well, plaintiff's job description and

personnel file, and the records from Dr. Courtade and Dr. Terrell.

I note that there is an objection to the late filing of the records from Drs. Terrell and Courtade, and that a ruling on that will be reserved and will be made in accordance with the opinions rendered in this matter.

Two days after the hearing, Boone Co. filed six separate notices of filing to which no objection was filed. Consistent with the July 28, 2015, hearing order, within the opinion and award, the ALJ should have ruled on the admissibility of each item of evidence to which Dames objected. The opinion and award contain no such ruling. However, the July 28, 2015, order states Dames' objection to the admission of late evidence was sustained to the extent that all late submitted evidence not responsive to the July 14, 2015, order shall be stricken. Unfortunately, an order was not entered stating what evidence, if any, was stricken.

The transcript reveals the ALJ recited the evidence which had been filed on behalf of Boone Co. He then noted the only objections were to the late filings of Drs. Terrell and Courtade's records. Even though Boone Co. filed a motion requesting the ALJ set aside the July 28, 2015, Order sustaining Dames' objection to its evidence, it did not cite the evidence to which it was referring. The

record is silent regarding Dames' objection to any other evidence Boone Co. sought to introduce at that late date.

We are unable to determine from the record what evidence the July 28, 2015, hearing order excluded. However, based on the findings of fact and conclusions of law, Dames' inability to review these records and offer testimony concerning the records is harmless error as we do not believe the ALJ attributed any significance to the records about which Dames complains. Consistent with his July 28, 2015, hearing order and his representation at the hearing, the ALJ should have ruled on the admissibility of Drs. Terrell and Courtade's records. Similarly, in the opinion and award the ALJ should have determined "the admission of each record" by determining what was and was not responsive "to the order dated, July 14, 2015." Based on his findings of fact and conclusions of law, the fact the ALJ did not resolve this evidentiary issue constitutes harmless error as the findings of fact and conclusions of law establish the ALJ relied almost exclusively upon the opinions of Dr. Bender in reaching his decision as to the compensability of the three alleged work injuries. Further, there is no citation in the findings of fact and conclusions of law to any of the six records proffered by

Boone Co. two days after the hearing. Thus, we decline to disturb the ALJ's decision based on Dames' first argument.

Moreover, assuming the six filings were tendered at the hearing and the hearing order refers to those filings, it is apparent Dames was content to allow the ALJ to rule on their admissibility in his decision. Dames permitted the claim to be submitted for a decision regardless of the ALJ's ruling on his objection to the evidence. At the hearing, Dames did not seek an extension of the proof time, in the event all or a portion of the documents were admitted into evidence. Further, Dames did not seek to continue the hearing in order to further review the documents and address them at a subsequent hearing.

We find no merit in Dames' second argument. Clearly, Boone Co.'s brief before the ALJ was not timely filed. Further, Dames is correct the ALJ did not permit Boone Co. to file a late brief. However, Dames did not file an objection to the motion or to the late brief filed by Boone Co. Since Dames did not raise this issue until after the decision was rendered he waived his right to complain about the late filing of the brief.

Significantly, Dames' petition for reconsideration was not timely filed. The ALJ issued his opinion on Friday, September 25, 2015. Pursuant 803 KAR

25:010, Section 1 (4)(a)(1), the opinion and award was deemed filed on Monday, September 28, 2015, three days after the date set forth on the opinion and award. Thus, pursuant to KRS 342.280(1), a petition for reconsideration must have been filed within fourteen days of September 28, 2015. Since Monday, October 12, 2015, the last day to file a petition for reconsideration was Columbus Day, a federal holiday, the last day for filing a petition for reconsideration was October 13, 2015. Boone Co.'s petition for reconsideration was filed on October 13, 2015, and Dames' petition for reconsideration was filed one day late on October 14, 2015. Therefore, the ALJ had no choice but to summarily overrule Dames' petition for reconsideration. This is important as Dames first raised the issue regarding the late filing of the brief in his petition for reconsideration which was untimely filed.

Dames' argument the ALJ's decision is arbitrary, capricious or characterized by an abuse of discretion, and is erroneous on the basis of reliable probative material evidence, has no merit. In his June 26, 2015, report, Dr. Bender set out the records he reviewed and the results of his examination. He concluded as a result of the February 22, 2013, fall, Dames sustained a left hand contusion, left hip contusion, and subsequent trochanteric bursitis of the

left hip. As a result of the May 5, 2013, injury, Dames sustained a right knee sprain/strain and lumbar sprain/strain. As a result of the February 21, 2015, fall, Dr. Bender stated Dames sustained a pelvic contusion. With respect to the first injury, Dr. Bender concluded Dames has residual trochanteric bursitis of the left hip. With respect to the second injury, he believed the low back spine symptoms that became evident in 2013 continued through 2014. Dames appeared to be symptomatic from pre-existing degenerative disease.

As a result of the February 2013 hip injury, Dr. Bender concluded Dames sustained an injury of structural permanency in the left hip. There was no structural permanency in the left hand or right knee.² However, Dames also appeared to have experienced an ongoing active condition of the lumbar spine on an intermittent-to-frequent basis since at least 2011 if not as remote as 2009. For the left hip injury, based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Bender assessed a 3% whole person impairment rating. The right knee injury did not merit an impairment rating. Dames' lumbar spine

² Dames also alleged a February 22, 2013, left hand injury and a May 5, 2013, right knee injury.

condition merited a 8% whole person impairment rating based on the AMA Guides. It was Dr. Bender's opinion that at least 5% of the impairment was active before the 2013 injury. Thus, the lumbar spine symptoms manifesting in 2013 represented an additional 3% whole person impairment rating. Using the combined tables, Dames had a 5% impairment rating due to the two injuries he sustained while in the employ of Boone Co. Dr. Bender opined the alleged injury of February 21, 2015, consisting of a pelvic contusion had no residual effect and merited no impairment rating.

Dr. Bender believed Dames possessed the ability to continue in his job capacity as Director of Facilities of Boone Co. Schools. In addition, future medical management did not appear to be necessary for any of the injuries. Dr. Bender concluded by stating future medical management is not warranted in terms of the injuries sustained on February 22, 2013, May 5, 2013, or February 21, 2015.

We understand Dames' frustration over the fact Dr. Bender reviewed medical records which were not supplied to him or introduced in evidence. However, the fact remains Dr. Bender's report was filed on July 13, 2015, without objection. Dames voiced no objection to the

contents of the report or the fact that Dr. Bender may have reviewed records of which he was not aware. Thus, Dames waived any right to complain about the admissibility of Dr. Bender's report and the records to which he had access and upon which he, in part, based his opinion.

As the claimant in a workers' compensation proceeding, Dames had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Although Dames prevailed, in part, but was unsuccessful in persuading the ALJ to rely upon the report of Dr. Wunder, 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). Stated another way, Dames has the burden on appeal of establishing the evidence compels the result he seeks on appeal. "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). Therefore, the function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be

disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The opinions of Dr. Bender constitute substantial evidence upon which the ALJ could rely. Dames did not assert the impairment ratings Dr. Bender assessed for the February 2013 and May 2013 injuries were not in accordance with the AMA Guides. Similarly, Dames does not take issue with the accuracy of Dr. Bender's report. Rather, his complaint concerns the records which Dr. Bender had available for his consideration. Since no objection was filed to Dr. Bender's report and the evidence he considered in formulating his opinions, Dames waived any objection to the ALJ's reliance on his report. Dr. Bender's report constitutes substantial evidence supporting the ALJ's decision as to the compensability of each alleged injury; thus, the ALJ's decision must be affirmed.

For the reasons previously stated, we find no merit in Dames' fourth argument. Dames argues he was never aware of the medical records tendered at the final hearing. As previously noted, the ALJ's decision reflects he did not attribute any significance to those records. Thus, the ALJ's consideration of the records without entering a ruling as to their admissibility as he indicated in the July 14, 2015, Order and at the hearing, constitutes

harmless error. Further, the fact Dames was not supplied with some of the medical records upon which Dr. Bender relied in formulating his opinions does not constitute grounds for reversal. Since Dr. Bender's report was introduced without objection, the ALJ was free to consider it. Further, all of the records Dr. Bender reviewed were not required to be introduced into evidence before the ALJ could consider his report.

803 KAR 25:010, Section 8 (3)4)(a) and (b) reads as follows:

(3) During the pendency of a claim, any party obtaining or possessing a medical or vocational report or records shall serve a copy of the report or records upon all other parties within ten (10) days following receipt of those reports or records or within ten (10) days of receipt of notice if assigned to an administrative law judge.

(4) All medical reports filed with Forms 101, 102-0D, or 103 shall be admitted into evidence without further order if:

(a) An objection is not filed prior to or with the filing of the Form 111; and

(b) The medical reports comply with Section 10 of this administrative regulation.

Since Dr. Bender's report was introduced without objection and there is no allegation the medical report does not comply with Section 10, the ALJ was free to

consider Dr. Bender's report and determine its weight and credibility. As previously noted, Dr. Bender's report constitutes substantial evidence upon which the ALJ was free to rely in reaching his decision.

Finally, we agree in part with Dames' fifth argument. We disagree with that portion of Dames' argument that his benefits should have been enhanced by the three multiplier. As previously noted, Dr. Bender's opinion that Dames "maintains the ability to continue in the job capacity" constitutes substantial evidence supporting the determination not to enhance Dames' benefits by the three multiplier.

That said, the parties' stipulation in the July 28, 2015, BRC Order reveals Dames' average weekly wage ("AWW") at the time of the February 2013 injury was \$1,730.77 and his AWW at the time of the May 5, 2013, injury was the same. Thus, Dames returned to work after the initial injury at the same or greater wages. Based on that stipulation, Dames was entitled to enhancement of his PPD benefits by the two multiplier for the February 22, 2013, injury in accordance with the Supreme Court's recent ruling in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015). Similarly, the parties stipulated that as of the time of Dames' February 21, 2015, injury his AWW was

\$1,815.38. Thus, Dames returned to work after the May 5, 2013, injury earning a greater AWW. He is also entitled to enhancement of his PPD benefits by the two multiplier for the May 5, 2013, injury in accordance with Livingood v. Transfreight, LLC, supra.

The parties reserved as an issue benefits per KRS 342.730 which we deem to include entitlement to multipliers. Even though in his brief to the ALJ, Dames did not argue entitlement to enhancement of his income benefits via the two multiplier, based on the stipulations, we believe Dames is entitled to enhanced benefits pursuant to KRS 342.730(1)(c)2.³

Although not raised by Dames, as the Board is charged, pursuant to KRS 342.285, with ensuring all awards are in accordance with the provisions of Chapter 342, we vacate that portion of the finding contained in numerical paragraph seventeen of the September 25, 2015, decision that "Dames will not need future medical treatment for the work injuries suffered" and the ALJ's December 1, 2015, Order amending the award to reflect Dames is not entitled to future medical benefits for the February 22, 2013, and May 5, 2013, injuries.

³ We note in his brief to the ALJ, Dames argued entitlement to enhanced PPD benefits by three multiplier.

Since the ALJ determined the February and May 2013 work injuries merited an award of PPD benefits, as a matter of law, Dames is entitled to an award of medical benefits for each injury. In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Here, however, it is undisputed Dames has a permanent functional impairment rating as a result of two injuries. We emphasize this Board has consistently held that a worker who has established a work-related permanent impairment rating has also established a disability for purposes of KRS 342.020 and is entitled to future medical benefits. We interpret the court's holding in FEI Installation, Inc. v. Williams, supra, to mean that where there is evidence of a permanent impairment rating in accordance with the AMA Guides, as a matter of law, it is error for an ALJ to rule broad-spectrum and prospectively that future medical care is unreasonable and unnecessary, notwithstanding nonspecific expert medical testimony to the contrary. In such circumstances, pursuant to KRS 342.020(1), a general award

of future medical benefits is mandated, and as noted by the Court:

[u]nder 803 KAR 25:012; Mitee Enterprises v. Yates, 864 S.W.2d 654 (Ky. 1993) and National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991), an employer is free to move to reopen an award to contest the reasonableness or necessity of any medical treatment and also whether the need for treatment is due to the effects of the injury." FEI Installation v. Williams at 319.

Since the ALJ found Dames sustained two work injuries each meriting an impairment rating, Dames, by statute is entitled to an award of medical benefits for each injury. As noted above, Boone Co. is free to contest any proposed future medical treatment.

Accordingly, the decision of the ALJ finding Dames sustained work-related injuries on February 22, 2013, and May 5, 2013, each meriting a 3% impairment rating is **AFFIRMED**. Similarly, the ALJ's decision dismissing Dames' February 21, 2015, low back injury claim is also **AFFIRMED**. However, the award of income benefits for the February 22, 2013, and May 5, 2013, injuries is **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended award finding Dames is entitled to enhancement of his PPD benefits in each award pursuant to KRS 342.730(1)(c)2 (the two multiplier) under the terms and conditions set forth in

Livingood v. Transfreight, LLC, supra. Finally, the portions of the September 25, 2015, Opinion and Award and the December 1, 2015, Order denying future medical benefits for the February 22, 2013, and May 5, 2013, injuries are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award enhancing Dames' PPD benefits in both awards by the two multiplier under the terms and conditions set out in Livingood v. Transfreight, LLC, supra. Further, the ALJ shall enter a general award of medical benefits for the February 22, 2013, left hip injury and May 5, 2013, lower back injury.

ALL CONCUR.

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