OPINION ENTERED: April 25, 2012

CLAIM NO. 201000107

RIVERSIDE CEMETERY PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

CURTIS JOSLIN
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Riverside Cemetery ("Riverside") seeks review of a decision on remand rendered January 24, 2012, by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding Curtis Joslin ("Joslin") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits.

On appeal, Riverside argues 1) the ALJ's determination an injury occurred on January 7, 2007, is not supported by the record; 2) Joslin does not meet the definition of PTD as defined by KRS 342.730 and applicable case law; 3) the ALJ's findings are inconsistent with the evidence in the case; and 4) on remand, the ALJ "failed to address the contested issue of whether the Statute of Limitations is applicable as Respondent was not entitled to TTD." We affirm.

This is the third appeal to this Board. In the first appeal, we reversed the ALJ's dismissal of the claim due to Joslin's failure to provide due and timely notice pursuant to KRS 342.185. Specifically we ordered:

> We also note as a preliminary matter the ALJ made no finding as to whether a work-related traumatic event in fact occurred. Before a decision can be rendered regarding whether appropriate notice was provided, as a threshold issue, the ALJ must first determine whether a work event, or work-related injury occurred. KRS 342.0011(1) defines "injury" as being a work-related traumatic event "arising out of and in the course of employment" that is the proximate cause producing a harmful change in the human organism. With reference to that definition, it has long been established that "in the course of employment" refers to the time, place, and circumstances of an accident, while "arising out of" refers to the cause or source of the accident. AK Steel Corp. v. Adkins, 253 S.W.3d

59, 63 (Ky. 2008) *citing* Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S.W. 152, 159 (1918).

A claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since the ALJ deemed Joslin unsuccessful in his claim for a work-related injury based upon inadequate notice, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, supra. 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, supra. 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).

Having asserted the claim was barred by failure to provide proper notice, once Joslin testified he informed his "boss" he injured himself at work within three to four days of the alleged accident, the burden shifted to Riverside to prove the elements of the defense. Lizdo v. Gentec Equipment, 74 S.W.3d 703 (Ky. 2002). Since Riverside presented no evidence contradicting Joslin's testimony, it failed in that burden and it was error as a matter of law for the ALJ to rule otherwise. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, supra.

The ALJ found Joslin did not provide due and timely notice of an accident

despite the complete lack of evidence to the contrary. Our appellate courts have explained a fact finder is free to reject even contradicted evidence of record if the fact finder provides a sufficient explanation for the rejection. Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W. 2d 540 (Ky. App. 1991); Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W. 2d 184 (Ky. App. 1981); Collins v. Castleton Farms, 560 S.W. 2d 830 (Ky. App. 1977). We do not believe the ALJ in this instance adequately specified grounds to reject the testimony of both Joslin and his wife regarding whether appropriate notice was provided. Joslin's testimony may have been inconsistent whether notice was provided on the day of the work event, the day after, or up to four days later. However, no evidence exists which would support a dismissal on failure to provide notice. As the Courts have previously held, notice should be liberally construed so as not to unjustly defeat compensation and to effectuate the beneficent purposes of this law. Bates & Rogers Const. Co. v. Allen, 183 Ky. 815, 210 S.W. 467 (Ky. 1919), Hay v. Swiss Oil Co., 249 Ky. 165, 60 S.W.2d 385 (Ky. 1933), Bartley v. Bartley, 274 S.W.2d 48 (Ky. 1954).

The testimony of record not only supports timely notice was provided to Riverside, but also demonstrates Kevin Wolfe, secretary/treasurer for Riverside, advised Joslin to seek medical treatment. Riverside submitted no evidence refuting such allegation which corroborates Joslin's position he provided notice, and the delay, if any, of up to four days had no deleterious effect upon Riverside.

> While there exist issues including but not limited to whether a work event, or injury occurred, and whether the claim was timely filed, which certainly may exist to support dismissal of this claim, those issues are not before us.
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> Accordingly, the decision rendered September 24, 2009, and the order ruling on the petition for reconsideration rendered November 22, 2010, by Hon. Chris Davis, Administrative Law Judge is hereby **REVERSED** and **REMANDED** to the ALJ to address all remaining contested issues.

In his decision on remand, the ALJ stated the following:

> The issues to be decided are extent and duration; application of the multipliers; the value to the Plaintiff's average weekly wage for the lodgings he received; statute of limitations; underpayment of temporary total disability benefits, as to dates; causation/work-relatedness; and "Injury" as defined by the Act.
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> As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).

The Administrative Law Judge has carefully reviewed all of the records, reports, testimony and arguments made in this claim.

The Administrative Law Judge notes that this matter is on Remand from the Kentucky Workers' Compensation Board, specifically regarding notice. The Board found that the Plaintiff was injured on January 7, 2007 and provided notice of his injury on January 8, 2007 and therefore notice was adequate. This is now the law of the case. Even though the Board only remanded this claim for notice, and specifically found that other defenses may or may not be applicable the factual finding that the Plaintiff's date of injury was January 7, 2007 is now the law of the case.

The undersigned, in his prior opinion, noted the various possible other dates of injury for the Plaintiff because adequate notice is inextricably tied to the date of injury. The Board, in finding that the date of injury is January 7, 2007, as a precursor to finding that notice the next day was adequate, has also made a binding finding that the date of injury is January 7, 2007, for all relevant purposes. All subsequent arguments and findings must be predicated on the legal fact that the Plaintiff's date of injury is January 7, 2007. The undersigned is not persuaded that any other conclusion would be logical.

The undersigned notes, in reaching this conclusion, that I have never doubted that the Plaintiff hurt his back at work, I simply believed that he should either have alleged a cumulative trauma injury and/or that if he had a traumatic injury that it initially

occurred at an earlier, or possibly later date, or, possibly, on January 7, 2007. That date having been selected it is the Plaintiff's date of injury.

The next question the Administrative Law Judge will address is the statute of limitations. Workers' compensation claims must be filed within two years of the date of injury. If temporary total disability benefits are paid to an injured worker then the claim must be filed within two years of the termination of temporary total disability benefits. There exist certain exceptions to the statute of limitations which will toll the running of the limitations. Among those exceptions is if the employer should have paid temporary total disability benefits to an injured and[sic] worker and neither paid those benefits nor notified the Department of Workers' Claims that temporary total disability benefits were being denied.

In this claim the Plaintiff was taken off work by Dr. Skidmore, on July 20, 2007, for a period of four weeks, due to his low back injury and pain. This conclusion is supported by the finding of Dr. Bender that as of August 24, 2007 the Plaintiff was at MMI for any[sic] injury which occurred on January 7, 2007. During this period of time that the Plaintiff was off work his work was done primarily by his wife, with some assistance from his employer. (Hearing Transcript, p. 27-28) The Administrative Law Judge accepts this as fact. Therefore, the employer was aware the Plaintiff was hurt at work, was missing work due to his work injury and never paid TTD or notified the Department that they were not paying TTD. Therefore, regardless of the fact that the Plaintiff received

his regular salary during this time the statute of limitations was tolled.

Finally, because the Plaintiff was entitled to TTD, and the Department was never notified that TTD was not being paid the statute of limitations was effectively tolled until such time at the employer notified the Department that TTD was denied. As a result the Defendant does not have any valid statute of limitations defense herein.

The Administrative Law Judge has already expressed his opinion that the Plaintiff did hurt his back at work. The prior opinion simply found that there were several possible dates of injury. Although the Plaintiff may have had subsequent accidents which did not occur at work it was the work related injury which first necessitated medical treatment and missed time from work. Clearly there is a work-related injury.

It is undisputed that the Plaintiff was provided lodgings[sic] as part of his compensation package for the work he performed. The Plaintiff testified that the value of the lodgings[sic] was $400-$500.00 per month. The Plaintiff's wife testified that the value of the lodgings[sic] was $500.00 per month. Their testimony is uncontradicted. Having had an opportunity to examine both the Plaintiff and his wife I am persuaded that is more likely that his wife is able to accurately judge the value of the lodgings[sic]. The value of the lodgings[sic] will be assessed at $500.00 per month, or, more relevantly, $115.38 per week.

As already noted the Plaintiff was off work, and entitled to temporary total disability benefits, from July 20, 2007

through August 24, 2007. His actual wages were $397.00 per week and the value of his lodgings[sic] was $115.38 per week and thus his total AWW is $512.38 and his workers' compensation TTD rate is $341.89.

The only remaining issue is extent and duration, including application of the multipliers and permanent total disability benefits. The undersigned will adopt the opinion of Dr. Skidmore, over that of Dr. Bender, that the Plaintiff has a 6% work-related impairment rating. The undersigned will further find, in reliance on the Plaintiff's credible testimony, that due to pain he lacks the capacity to return to the type of work done on the date of injury. It should be noted that even absent verifiable, regular radiculopathy, that the Plaintiff's job was heavy manual labor. He dug graves, mowed lawns, painted fences, and moved lumber. All work that he cannot now do due to his back injury.

The undersigned does not believe that the Plaintiff has a work-related psychological injury. However, both Dr. Noelker and Dr. Roebker found the Plaintiff's academic functioning level to be at the 1st grade level or lower. The undersigned believes that this is a sincere presentation and that, on his best day, the Plaintiff has the ability to academically function much as a six year old would. It is highly improbable, as close to impossible as anything can be, that the Plaintiff would ever be retrained into a different occupation, one not requiring brute strength and a strong back. Further, all of his past work has been manual labor.

> It is my finding that the Plaintiff lacks the capacity to return to any of his prior work, due to the effects of the work injury, and lacks the capacity to be re-trained into any meaningful employment. Under the definition of the Kentucky Workers' Compensation Act he is permanently, totally disabled. In making this determination I am aware that he worked for the employer until he had a dispute with them and I am aware of the dearth of restrictions from a physician. The Plaintiff's testimony on this matter is probative and can be relied upon.
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> The Plaintiff was injured on January 7, 2007 but continued to work until July 20, 2007 and was then off work until August 24, 2007. He is entitled to income benefits at a rate of $341.89 for that period. The Plaintiff returned to work and worked until the end of May. He then worked two more months for a different employer. Because the Plaintiff bears the burden of proof those dates must be construed most adverse to him. Therefore, he worked, for the purposes of this Opinion, for the Defendant until May 31, 2008 and for a different employer until July 31, 2008. Therefore, beginning on August 1, 2008 he is entitled to total income benefits until such time as he qualifies for normal social security old age retirement.
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> The Plaintiff is also entitled to all past, present and future medical expenses, as work-related and reasonable and necessary, for the work related injury at L5.

On the second appeal, we vacated the ALJ's opinion, award and order rendered June 27, 2011 based upon

his references to “findings” by this Board, and the law of the case doctrine. We specifically held as follows:

> Jurisprudence has long recognized pursuant to the “law of the case” doctrine, an appeal settles all errors that were or might have been relied upon by a reviewing court or administrative appellate tribunal. Under the “law of the case” doctrine, if an appellate body passes on a legal question and then remands the cause to the fact-finder for further proceedings, all outstanding legal questions that formerly might have been appealed in the original decision but were not perfected cannot, as a matter of law, be raised later following remand. Whittaker v. Morgan, 52 S.W.3d 567 569-570 (Ky. 2001). Moreover, the legal questions thus determined by the appellate body, once final, whether decided correctly or incorrectly, cannot be decided differently on subsequent appeal in the same case. Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982). Rather, all prior rulings by that appellate body become law for the limited purposes of that particular case. *Id.*
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> The “law of the case” doctrine is founded upon the policy of ending litigation and cases may not be presented piecemeal. It is an iron rule universally recognized that a decision of an appellate court or administrative appellate tribunal once final and not subjected to further appellate review becomes the “law of the case” for purposes of a subsequent determination on appeal, however erroneous the initial appellate decision may be. Williamson v. Com., 767 S.W.2d 323, 325 (Ky. 1989); Union Light, Heat & Power Co. v. Blackwell’s Adm’r, 291 S.W.2d

539 (Ky. 1956); Sowders v. Coleman, 4 S.W.2d 731 (Ky. App. 1928).

The "law of the case doctrine" is inapplicable to the case *sub judice* except as it pertains to the notice issue previously decided by this Board. As pointed out by Riverside, the ALJ's statement the Board determined Joslin sustained an injury on January 7, 2007 is erroneous. We made no such finding as we are not a fact-finding body. As noted previously, this Board previously reversed the ALJ's determination Joslin failed to provide due and timely notice, and set forth the reasons for making that determination. Nothing else was decided. We specifically stated we were making no determination regarding any other issues, including whether a work-related injury actually occurred. We simply do not have authority to do so. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

KRS 342.285 designates the ALJ, not the Board, as the fact-finder. In that role, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may draw reasonable inferences from the evidence, 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such evidence 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 weight and credibility, or by noting reasonable inferences that otherwise could have been drawn from the evidence. 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).
>
> Therefore, we are compelled to vacate and remand this matter to the ALJ to determine whether Joslin sustained a work-related injury on January 7, 2007, and if so, the benefits to which he is entitled. It is the responsibility of the ALJ, not this Board, to make such determination.
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> Accordingly, the decision rendered June 27, 2011, and the order ruling on the petition for reconsideration rendered August 8, 2011, by Hon. Chris Davis, Administrative Law Judge are hereby **VACATED** and **REMANDED** to the ALJ to address all remaining contested issues.

We specifically directed the ALJ to decide all issues. In the opinion, award and order issued subsequent to the second remand from this Board, the ALJ revisited issues of whether Joslin sustained a work-related injury and whether notice was timely provided. The ALJ did not specifically address the issue of whether the claim should be dismissed for not being timely filed; however, such

finding was tacitly made. In the opinion, award and order rendered January 24, 2012, the ALJ stated the following:

> The Administrative Law Judge has never doubted that the Plaintiff injured his back at work. I have always felt and found that he did injure his back at work and that as a result of the work-related back injury he is permanently and totally disabled. I am not "result" oriented.
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> I found that notice was inadequate and that due to the lack of notice and the very physical nature of his work that the lack of notice prejudiced the employer from investigating the claim or mitigating the injury to the Plaintiff. As a result I dismissed the claim for lack of notice. As a matter of law notice was adequate.
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> I also find whether or not I am required to as a matter of law that he injured his back on January 7, 2007. As I have written, he did injure his back at work and he did provide adequate notice of a work-related injury occurring on January 7, 2007. In the undersigned's weighting and analysis of the evidence it would be an illogical non-sequiter [sic] to find that he had a work-related injury in the winter of 2006-07 and that he provided prompt and adequate notice of that injury allegedly occurring on January 7, 2007 but to find that he had no work-related injury on or about January 7, 2007.
>
> While no doubt we all engage in numerous inconsistencies on a regular basis without realizing it I will not intentionally engage in inconsistencies to achieve a certain result. Especially in light of the fact, as

> already noted, that I truly believe and find, as is allowed by the evidence, that the Plaintiff sustained a work-related injury to his back in the winter of 2006-7 and, as a matter of law, he gave adequate notice of that fact. If the exact date of that injury is lost in the haze due to an inadequate response by the employer to what was adequate notice and the Plaintiff's lack of sophistication, there is evidence he is mentally retarded, the Plaintiff should not be punished for that.
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> In fact, I believe and find that his injury occurred, taken from the probative evidence of his testimony, that that injury occurred on January 7, 2007.
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> The Opinion, Award and Order of June 27, 2011 remains in effect and applicable herein.

(Emphasis added)

Since Joslin was successful before the ALJ, the question on appeal is whether there was substantial evidence to support the ALJ's decision, including that pertaining to the statute of limitations. 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).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976).

So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

As stated above, we believe the ALJ addressed all issues before him, and his determinations were supported by substantial evidence. In his most recent decision, he adopted his findings from the opinion rendered June 27, 2011 outlining the basis of his determination the claim was timely filed. The ALJ specifically found Riverside failed to comply with statutory notification requirements.

The failure of employers to satisfy the statutory notification requirement tolls the statute of limitations by estopping the employer from prevailing on that defense. *See* KRS 342.038(1), KRS 342.040(1), and H.E. Neumann Co. v. Lee, 975 S.W.2d 917 (Ky. 1998).

KRS 342.040(1) places an affirmative mandatory duty on the commissioner to apprise, in writing, an injured worker of the right to prosecute a claim when TTD benefits are terminated. Additionally, the statute of limitations is tolled when an employer is deficient in its obligation to notify the Office of Workers' Claims of the termination or denial of benefits, whether innocent or intentional. *See* Lizdo v. Gentec Equipment, 74 S.W.3d 703 (Ky. 2002); Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992); Ingersoll-

Rand Co. v. Whittaker, 883 S.W.2d 514 (Ky. 1994); City of Frankfort v. Rogers, 765 S.W.2d 579 (Ky. App. 1988).

The purpose of requiring an employer to report both an injury and termination of TTD benefits is to enable the Office of Workers' Claims to comply with its obligation pursuant to KRS 342.040(1) to notify the worker of the need to timely file a potential claim. Effective reporting by an employer and the concurrent responsibility of the Office of Workers' Claims prevents employers from utilizing statutory or regulatory non-compliance as a foundation for a limitations defense. The tolling of the statute of limitations in any given case is fact intensive and relief is equitable in nature. *See* Newberg v. Hudson, *supra*. Unquestionably, Riverside, as the party asserting the affirmative defense of statute of limitations, bore the burden of proof.

In this instance, the ALJ clearly reviewed and addressed all issues. In his decision rendered June 27, 2011, the ALJ determined the statute of limitations was tolled. Although this finding was vacated by this Board on November 29, 2011, the ALJ subsequently reinstated his previous findings, while addressing the issues on remand. Therefore, we find no error.

For these reasons, the opinion, award and order rendered by Hon. Chris Davis on January 24, 2012 is hereby **AFFIRMED**.

ALL CONCUR.

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