OPINION ENTERED: AUGUST 24, 2012

CLAIM NO. 200601611

SAPPHIRE COAL COMPANY, INC. PETITIONER

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

DAVID BOGGS,
DR. DAVID RATLIFF
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Sapphire Coal Company ("Sapphire") appeals from March 30, 2012 opinion and award of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), which determined on reopening David Boggs' ("Boggs") condition had worsened to the extent he is now totally occupationally disabled from the work injury originally sustained on August 4, 2006. Sapphire, which also appeals from the ALJ's April 17, 2012 order denying its petition for reconsideration,

arguing the ALJ's opinion and award is not supported by substantial evidence. We affirm.

Originally, Boggs filed a Form 101, Application for Resolution of Injury Claim, on December 19, 2006 stating, "I was knocked on my back on the solid rock bottom of the mine, injuring my low back…" The claim was litigated before Hon. Donna Terry, Administrative Law Judge, ("ALJ Terry"). ALJ Terry, in the opinion rendered November 21, 2007, issued the following findings of fact and conclusions of law:

> The parties have stipulated, and the Administrative Law Judge finds, that Mr. Boggs sustained a work-related back injury during employment by Sapphire on August 4, 2006. On that occasion, Mr. Boggs was knocked onto his back and sustained contusions and a back strain as the result of the belt splicing incident.
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> Mr. Boggs received appropriate conservative medical treatment following the injury, including medication, physical therapy, and an MRI scan, and was released to return to work without restrictions by his treating physician on October 31, 2006. Unfortunately, Mr. Boggs felt unable to return to work as a scoop operator at that point and did not resume work at Sapphire due to continuing complaints of back pain. He testified that he might have been able to perform the job of a ram car driver or other less demanding work, but could not work as a scoop operator or lift heavy bags of rock dust when released.
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> Mr. Boggs has sought other

employment and is not permanently and totally disabled pursuant to KRS 342.0011(1l)(c) and the factors set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W. 3d, 48 (Ky., 2000), as he does retain the ability to perform work on a sustained basis. However, he does continue to have ongoing complaints of low back pain associated with the August 4, 2006 work injury.

Sapphire contends that Mr. Boggs previous low back complaints resulted in [sic] a degree of preexisting active impairment. However, it appears that his previous sporadic complaints of low back pain after performing heavy manual labor resolved and that he did not require ongoing medical treatment or permanent work restrictions for any low back complaints prior to August 4, 2006. There is further no evidence of a previously-assigned permanent impairment rating under the AMA Guides. Therefore, the Administrative Law Judge finds that he had no preexisting active impairment before the August 4, 2006 work injury.

The extent and duration of disability arising from the work injury must be determined. Mr. Boggs appears to be a credible individual who has sustained a strain-type injury superimposed on preexistent dormant thoracic and lumbar changes. His treating physician and nurse practitioner recorded objective findings of spasms and a positive straight leg raising test and have referred him to specialists for further evaluation and treatment. While some evaluating physicians have indicated that Mr. Boggs' subjective complaints outweigh his objective findings, his treating physician and

> nurse practitioner appear convinced of the sincerity of his continuing problems and pain complaints.
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> After careful review of the lay and medical testimony of record, the Administrative Law Judge finds that Mr. Boggs has sustained a degree of permanent partial disability as the result of the work injury and adopts the expert opinion of Dr. Hoskins regarding the permanent impairment rating resulting from the injury and its arousal of preexisting dormant degenerative changes. It is further found that no enhanced benefits are awarded pursuant to KRS 342.730 (1)(c) as Mr. Boggs does retain the physical capacity to return to his prior job based upon the expert opinions of Drs.' McDougal and Bean. Mr. Boggs's weekly benefits shall be calculated as follows:
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> $473.42 x 13% x 1.0 factor= $61.54
>
> Mr. Boggs contends that he is entitled to an additional period of temporary total disability. However, he was released to return to work without restrictions as of October 31, 2007 and could not be considered temporarily totally disabled pursuant to KRS 342.011(11)(a) thereafter. No additional temporary total disability benefits are awarded herein.

On August 8, 2011, Boggs moved to reopen the original claim pursuant to the provisions of KRS 342.125, alleging a worsening of his condition leading to a change in his disability. Boggs testified by deposition on September 7, 2011 and at the formal hearing conducted February 23, 2012.

He stated he had not been employed at the time of the original opinion and award but continued to look for work. However, he only completed six years of formal education before starting work at age 14 and continuing until his injury on August 4, 2006. The principal reason he has been unable to find work is his limited education and physical restrictions. He was subsequently approved for social security benefits.

Boggs testified his low and mid back pain issues continued and worsened to the extent his legs are numb and his back hurts constantly. He also has been diagnosed with a pulmonary embolism and is taking anti-coagulation medication. He now treats with Dr. Ratliff, a pain specialist.

In support of his motion to reopen Boggs submitted the medical report of Ira Potter, M.D. who examined him on July 21, 2011. Dr. Potter noted Boggs was then 42 years old and claiming a work-related injury originally occurring on August 4, 2006. Dr. Potter reviewed the administrative and medical history, noting Boggs' current complaints were pain and stiffness in the mid and lower back and intermittent pain and paresthesia about the left lower extremity down to the level of the foot-particularly noted about the medial three toes. Boggs told Dr. Potter, "I can’t do nothing now.

It just hurts worser now. I can't sleep. Sometimes it gets so bad, I have to have crutches to walk."

Upon physical examination, Dr. Potter diagnosed thoracolumbar spondylosis; T11-12, T12-L1, L1-2 & L2-3 annular bulging; T11-12, T12-L1, L1-2 & L2-3 degenerative disc disease-moderate to severe; chronic thoracolumbar strain; and left lumbosacral radiculitis. He stated his opinion on causation as follows:

> Mr. Boggs' impairment was caused by the event at work on 08-04-06 as described in section B (Patient History) above. Mr. Boggs' condition has deteriorated relative to his worker's compensation injury and especially since the Opinion & Award of 11-21-07. His pain has increased, his restrictions have increased, and the worsening of his condition has resulted in a greater occupational disability.

Dr. Potter assessed a 15% permanent whole person impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Boggs also submitted the medical report of Robert Hoskins, M.D. who evaluated him on September 21, 2011. Dr. Hoskins first noted he had previously evaluated Boggs four years earlier on May 1, 2007. He noted:

> I assigned Mr. Boggs 13% whole person impairment (8% lumbar combined with 5% thoracic). Subsequent to my evaluation,

> Mr. Boggs had a settlement agreement [sic] in which an Administrative Law Judge awarded him 13% whole person impairment.

Dr. Hoskins noted Boggs continued to complain of mid and lower back pain, stiffness and weakness and "left lower extremity pain with numbness about the left lower extremity down to the level of the foot." He diagnosed:

> 1. Multilevel thoracolumbar annular bulging and degenerative disc disease;
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> 2. Multilevel thoracolumbar degenerative facet disease;
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> 3. Mild anterior compression fractures at T10, T11 and T12;
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> 4. Mild lowering thoracic spondylosis;
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> 5. Thoracic sprain/strain;
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> 6. L1 compression fracture;
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> 7. Lumbar sprain/strain;
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> 8. Left lumbar radiculitis.

Dr. Hoskins opined Boggs' condition had deteriorated relative to his workers' compensation injury and especially since “his settlement agreement” [sic]. His pain had increased, his restrictions had increased and his condition worsened resulting in a greater occupational disability. Dr. Hoskins assigned a 15% whole person impairment pursuant

to the AMA Guides. He also recommended the following restrictions:

1. No lifting greater than 20 pounds;

2. No continuous standing or walking for greater than 30 minutes;

3. No continuous sitting for greater than 30 minutes;

4. No prolonged or repetitive stooping or crouching;

5. No pushing, pulling, or carrying;

6. No prolonged or repetitive use of equipment that subjects the spinal cord to vibration;

7. No prolonged or repetitive overhead work;

8. No activities that involve sustained posturing of the thoracolumbar spine at extremes of motion or repetitive movements into extremes of thoracolumbar motion.

Dr. Hoskins noted Boggs' former job included operating ram cars and heavy manual labor in the mines requiring various physical demanding postures and activities such as stooping, lifting more than 75 pounds, pushing, pulling and prolonged replying sitting, Dr. Hoskins concluded Boggs no longer retained the physical capacity to return to the type of work performed at the time of injury.

Sapphire submitted the medical report of Gregory Snider M.D. who examined Boggs on October 13, 2011. Dr. Snider noted Boggs was then age 42 and had worked as a ram car operator for Sapphire from five to six years before his injury of August 4, 2006, when he was struck on the side of his head and knocked to the ground. Since that time, Boggs has seen several physicians including Dr. McDougal, Dr. Bean, and Dr. Krishnaswamy. Also, Boggs had come under the care of Alicia Cook, a nurse practitioner who treated him for several years.

Dr. Snider recorded that Boggs complained of pain in his mid to low back, neck and legs. In addition, Boggs stated the pain, numbness and tingling in his legs is now worse. At the time of Dr. Snyder's examination, Boggs' prescription medication included Opana ER 40 mg bid, Gabapentin 800 mg tid, Zanaflex six mg tid, Nabumetone 750 bid and Trazodone 100 mg qhs. He also noted Boggs had not worked since the injury. After reviewing the records and conducting a physical examination, Dr. Snider stated:

> I do not see any objective evidence of a worsened condition of Mr. Boggs' mid to low back. I agree that he suffered a sprain or strain superimposed on pre-existing degenerative change. There are multiple signs of inconsistency, symptom amplification, and pain-related behavior. One cannot rely on Mr. Boggs'

> subjective presentation for assessment of an anatomic worsening or impairment.

Dr. Snider recommended conservative management and did not see the need for high dose narcotics or regular visits for pain management. In his opinion, Boggs' condition remained unchanged and the 13% impairment was an accurate rating. Dr. Snider stated, "there is no objective basis for increasing this impairment rating."

The Board notes Sapphire filed a medical dispute during the course of this litigation however, as it is not part of this appeal, evidence relating to that dispute will not be summarized.

On March 30, 2012, The ALJ issued the following findings of fact and conclusions of law relevant to the issue on appeal:

> 8. This claim was reopened upon the motion of Mr. Boggs and by Order of ALJ Kerr dated September 15, 2011. The Motion to Reopen alleged that Mr. Boggs suffered a worsening of his condition as shown by objective medical evidence. As such, the burden of proof lies with Mr. Boggs. *Griffith v. Blair*, 430 S.W.2d 337 (Ky. 1968). The ALJ in such matters is to analyze the evidence presented at the time of reopening as well as that filed with the original claim. *W.E. Caldwell Co. v. Borders*, 193 S.W.2d 453 (Ky. 1946). Plaintiff argues that he lacks the physical capacity to return to work or in the alternative, that his permanent partial disability has increased from the 13%

determined by Judge Terry on November 21, 2007 to 15% per the opinion of Dr. Hoskins filed herein.

9. The ALJ found Mr. Boggs to be credible in his description of the continued pain that he has endured and regarding the manner in which it affects his everyday life. After a thorough review of the medical evidence, it is persuasive that Dr. Hoskins, who opined in the original claim regarding Mr. Boggs' 13% whole body impairment, has since determined that Mr. Boggs' whole body impairment is now 15% and that the increase is related to the original work injury. Dr. Hoskins specifically stated in the medical report dated September 22, 2011, "Mr. Boggs' condition has deteriorated relative to his worker's compensation injury and especially since his settlement agreement. His pain has increased, his restrictions have increased, and the worsening of his condition has resulted in a greater occupational disability." In addition, it is noted that Dr. Ira Potter examined Mr. Boggs on July 21, 2011 and concluded also that Mr. Boggs' condition had worsened, assessed additional restrictions and similarly opined that his whole body impairment was now at 15%.

10. Mr. Boggs related during his trial testimony that he attended the seventh grade but did not complete it and that he cannot read or understand a newspaper. He also stated that his mathematical ability is limited to being able to count money but that he was not very good at that either. Mr. Boggs indicated that he has applied for jobs but that his inability to read and write has prevented any success. The ALJ finds this testimony to be

> believable and again found Mr. Boggs to be credible on this point.
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> 11. The ALJ finds that Mr. Boggs' work-related condition has worsened, creating additional pain and disability as well as resulting in greater work restrictions. Mr. Boggs is found to have a 15% functional impairment to the body as a whole for the physical impairment caused by the subject injury. Mr. Boggs' increased disability, work restrictions and inability to read and write prevent him from retaining the ability to return to any type of work. Mr. Boggs has a complete and permanent inability to perform any kind of vocational activities in order to provide services to another on a regular and sustained basis in a competitive economy. Mr. Boggs is therefore totally disabled pursuant to KRS 342.0011(11)(c) and is entitled to permanent total occupational disability benefits paid at the maximum rate of $631.22 per week beginning August 8, 2011 and continuing for so long as he is so disabled but which shall terminate pursuant to K.R.S. 342.730(4) when he qualifies for normal old-age social security retirement benefits.

On April 17, 2012, the ALJ overruled Sapphire's petition for reconsideration filed April 10, 2012.

Boggs, as the claimant in a workers' compensation claim, had the burden of proving each of the essential elements of his claim, including whether there has been a change of disability as shown by objective medical evidence of worsening of impairment due to a condition caused by the

injury since the date of the award or order. *See* KRS 342.125(1)(d); Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Boggs was successful in that burden, the question on appeal is whether the ALJ's decision is supported by substantial evidence. 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 people. 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 quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Moreover, it is within the ALJ's discretion alone to judge the weight to be accorded and any inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ, as fact-finder, 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); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence

contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Pursuant to KRS 342.0011(11)(c), "permanent total disability" is defined in pertinent part as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. . ." "Work" is defined in KRS 342.0011(34) as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy".

The determination of a total disability award remains within the broad authority of the ALJ. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The factors which the ALJ may consider in making this determination include the worker's post injury physical, emotional, intellectual and vocational status and how these factors interact. Id at 51. "It also includes a consideration of the likelihood that the particular worker would be able to find work under normal employment conditions." Id. In making his or her assessment, the ALJ

may rely on both the medical testimony and a worker's own assessment of his or her ability to labor. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). See also Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

It is apparent that, consistent with the holding in Ira A. Watson Department Store v. Hamilton, supra, sufficient evidence exists to support the ALJ's finding there has been a change in disability as shown by objective medical evidence of worsening of impairment due to a condition caused by the injury since the date of the award to the extent Boggs is now 100% occupationally disabled. The evidence reflects that, subsequent to the November 21, 2007 Opinion and Award, Boggs had a worsening of his condition.

As the ALJ noted, Boggs' impairment increased from 13% at the time of the original award to 15% on reopening. The ALJ considered the factors enunciated in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968) and noted Boggs had only attended the seventh grade and had difficulty reading and writing. The ALJ considered the restrictions imposed by Dr. Hoskins, whose opinions he found credible. The ALJ also found significant and credible Boggs' testimony regarding his increased pain and its effect on his ability to function. In determining whether a claimant is incapable of regular employment in the labor market, the ALJ may rely on the

medical testimony as well as the worker's own self-assessment of his ability to labor. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

Dr. Hoskins and Dr. Potter opined Boggs had an increase in pain, restrictions and impairment rating. Both doctors conducted a physical examination and reviewed medical reports and numerous diagnostic tests. Their findings qualify as objective medical findings. "Objective medical findings" is defined by KRS 342.0011(33) as information gained through direct observation and testing of the patient, applying objective or standardized methods. In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if it is based upon symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. The ALJ concluded Boggs was unable to work on a regular and sustained basis in a competitive economy. The ALJ therefore found Boggs was permanently totally disabled. Substantial evidence supports this finding which cannot be disturbed on appeal.

Accordingly, the March 30, 2012 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law

Judge and the April 17, 2012 order denying Sapphire's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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