OPINION ENTERED: June 6, 2013

CLAIM NO. 201101390

TAMARA DANIEL PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

FORD MOTOR COMPANY
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Tamara Daniel ("Daniel") seeks review of the decision rendered December 17, 2012 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for neck and right upper extremity injuries sustained on October 30,

2009, while working for Ford Motor Company ("Ford"). Daniel also appeals from the order entered February 22, 2013, denying her petition for reconsideration, motion to set aside the opinion, and motion to reopen.

On appeal, Daniel argues the ALJ erred in failing to analyze her entitlement to the three-multiplier pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Daniel also argues the ALJ erred by failing to set aside the opinion and order to consider new evidence. Because we determine the ALJ appropriately performed the analysis required by Fawbush, supra, and further did not err in not setting aside his December 17, 2012 decision or by denying the motion to reopen, we affirm.

Daniel filed a Form 101 on June 29, 2011 alleging injuries to her neck, right shoulder, and right upper extremity on October 30, 2009 when a turntable of parts she was pushing stopped abruptly. She also alleged right upper extremity injuries occurring on November 8, 2010 when a truck door slipped, and she attempted to push it away with her right hand to prevent being struck in the face. She later filed a Form 101 on October 24, 2011 alleging a right knee injury occurring February 25, 2011 when she struck her right lower extremity on a bracket. The claims were consolidated by order issued November 23, 2011.

Daniel testified by deposition on September 12, 2011, and at the hearing held October 17, 2012. Daniel is a resident of Clarksville, Indiana, and was born on February 3, 1966. She is a high school graduate. She completed some vocational courses in business while in high school. Her employment history consists of working as a waitress, cashier, assembler and press operator for a plastic injection molding facility. She began working for Ford in April 1998, initially in the body shop where she assembled parts.

In 2009, Daniel worked in the fender build department which consisted of loading fenders onto fixtures, and inspecting them for imperfections. On October 30, 2009, she was pushing a turntable of parts when it caught and stopped abruptly causing her to experience a burning sensation in her neck, shoulders and right arm. She continued to perform her regular job until she underwent surgery consisting of a right pronator teres release on June 25, 2010. She was off work from the date of the surgery until September 30, 2010, when she returned to working on truck doors.

On November 8, 2010, a door she was working on slipped. She used her right hand to block it from hitting her in the face, and developed increased pain and symptoms

in her neck and right upper extremity. She continued to work, and on February 25, 2011, she struck her right knee on a bracket while attempting to place a door on a fixture. She also experienced an increase in neck pain on November 17, 2011 when picking up a part. She sought treatment with Dr. Gregory Nazar, a neurosurgeon, who referred her to Dr. Rodney Chou, a physiatrist. She was restricted from working from January 20, 2012 until June 13, 2012.

Daniel testified Ford did not pay TTD benefits while she was off work, and her medical treatment, including the surgery performed by Dr. Luis Scheker, remains unpaid. She stated although she had experienced upper extremity aches and pains prior to October 30, 2009, they always resolved. The problems she experienced on that date were different, and her symptoms have persisted. She stated her current job is much lighter, and she is unable to perform all of her previous work at Ford which caused her 2009 injury.

In support of her claims, Daniel filed records from the medical department at Ford for treatment dates of October 30, 2009 through November 12, 2010 reflecting treatment for complaints of pain and burning in the upper back, neck, right arm, bilateral upper trapezius and right shoulder. The records also note palpable crepitus in the

neck. The records also document the accidents of October 30, 2009 and November 8, 2010. Daniel also filed with the first Form 101, records from Kleinert and Kutz reflecting treatment administered by Dr. Scheker, including the pronator teres surgery performed in June 2010, and increased pain from the November 8, 2010 accident involving the truck door. In support of the second Form 101, Daniel filed treatment notes from Dr. Raymond Shea, an orthopedic surgeon in Louisville, who noted a contusion to the right knee, and chondromalacia on MRI.

Daniel filed additional treatment records from the Ford medical department for treatment from February 25, 2011 through June 29, 2012. Those records document the February 25, 2011 right knee injury from striking the bracket, and outline the subsequent follow up treatment. The records also document ongoing complaints of right elbow, right forearm, right shoulder, upper back, and neck pain. Daniel later filed additional records from the Ford medical department beginning in 1999.

Daniel filed multiple reports prepared by Dr. Warren Bilkey. In his first report dated October 24, 2011, Dr. Bilkey stated he had evaluated Daniel's neck, right upper extremity and right knee. He stated she had developed a work-related cervical strain, with strains to

the right shoulder and right elbow. He stated she later developed epicondylitis and posterior interosseous nerve compression. On November 8, 2010, she experienced an aggravation of symptoms stemming from the October 30, 2009 work injury. He further noted she sustained a contusion of the right knee with a bone bruise on February 25, 2011. Dr. Bilkey opined the injuries sustained on November 8, 2010 and February 25, 2011 had resolved, however those sustained on October 30, 2009 had not. He assessed a 7% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

In an addendum dated March 1, 2012, Dr. Bilkey changed his assessment of impairment after reviewing the records of Drs. Chou and Nazar. He stated based upon input from those physicians, Daniel has an 11% impairment rating based upon the AMA Guides. In a report dated October 17, 2012, Dr. Bilkey stated Dr. Chou's treatment was reasonable and stated Daniel had reached maximum medical improvement ("MMI") on June 15, 2012.

Daniel filed records from Dr. Nazar's January 6, 2012, and January 20, 2012 office visits. Also included were reports from a bone scan performed January 9, 2012, and x-rays taken January 9, 2012. Dr. Nazar noted complaints of

right sided neck and shoulder pain with onset in October 2009 and subsequent re-injury. He noted degenerative changes in the cervical spine on the right. He opined Daniel's complaints of pain were due to a soft tissue injury, and saw no need for surgery. He further stated her neck pain was a chronic issue. He restricted her from lifting greater than fifteen pounds, no repetitive movement, and to avoid cervical strain.

Daniel also filed records from Dr. Rodney Chou who first saw her on February 1, 2012. Dr. Chou diagnosed pain in her limbs, and myofascial pain. He stated her issues were most likely due to deconditioning after her initial injury. He ordered physical therapy at Frazier Rehabilitation whose records were also filed. On April 11, 2012, Dr. Chou noted Daniel complained of pain in her limb, myofascial pain and displacement of a cervical intervertebral disc without myelopathy.

Dr. Chou testified by deposition on July 26, 2012. He first saw Daniel on February 1, 2012 for complaints of neck pain, and pain going down her right arm. He noted Daniel had some mild paraspinal tenderness in her neck, but the remainder of her examination was within normal limits. He detected no muscle spasm. Although he restricted her from work, he noted she had initially been taken off work by

Dr. Nazar. He further stated he would have released Daniel to full duty on the first office visit if she had requested it. He stated Daniel had reached MMI by June 13, 2012. He did not order a functional capacity evaluation, but stated she should not lift over ten pounds. He stated she would qualify for a 0% impairment rating based upon the AMA Guides.

Daniel filed the report of the MRI taken at Jewish Hospital in Louisville on December 15, 2011, which reflects multi-level cervical degenerative changes. The report further states foraminal compromise is most prominent at C4-5 with a bone marrow signal intensity abnormality involving the C4 vertebral body.

Daniel filed the report of Dr. Valerie Waters, a physiatrist with Advanced Rehabilitation Specialists, dated May 29, 2012. Dr. Waters diagnosed myofascial pain and degenerative disc disease of the cervical spine. She stated Daniel is unable to lift over forty pounds or perform work over the shoulder level. She then stated Daniel can work with lifting no greater than twenty pounds.

Dr. Waters testified by deposition on August 27, 2012. She noted the October 2009 injury, but stated Daniel had done well until October 2011. On examination, Daniel exhibited muscle spasm in her shoulder, but not her neck.

She stated Daniel's range of motion was within normal limits. She also stated the motor examination was normal, and so were her reflexes. She stated Daniel qualifies for a 0% impairment rating pursuant to the AMA Guides. She reiterated Daniel could not lift greater than twenty pounds, or work above shoulder height. She stated these restrictions were temporary, and would be lifted after four weeks.

Daniel also filed an off-work slip signed by Dr. Cassandra Bittenbender, her family physician. The note states Daniel was unable to work from June 7, 2004 through June 11, 2004, and is unrelated to the injuries alleged in either Form 101.

Finally, Daniel filed a letter from Dana Ballinger, with Ford's workers' compensation dated January 25, 2012. The letter states, "Ford Motor Company Workers' Compensation will not be covering any additional treatment pertaining to your cervical spine."

Ford filed the records review report of Dr. Robert Sexton, a neurosurgeon, dated June 10, 2011. He noted complaints of neck and shoulder problems. He stated, "There is, in the records provided, no objective evidence of injury provided. On professional medical grounds, I would recommend denial of surgery for insufficient documentation."

Dr. Bart Goldman examined Daniel at Ford's request on September 15, 2011. In his report, he noted the work injuries of October 30, 2009 and November 8, 2010, and the surgery performed June 25, 2010. He opined Daniel has a 0% impairment rating based upon the AMA Guides. He stated she had full range of motion and a normal neurologic examination, and found nothing which would preclude a return to regular work.

In a subsequent report dated April 5, 2012, Dr. Goldman stated Daniel complained of aching pain in her neck, as well as pins and needles sensations between her shoulder blades. He stated the results of her neck examination were relatively normal. She complained of pain upon full neck flexion. He stated she had reached MMI for any injury to her neck, shoulders, right upper extremity, or right knee. He stated she would qualify for a 0% impairment rating pursuant to the AMA Guides for any of her injuries.

Dr. Michael Best examined Daniel on September 21, 2011. He diagnosed chronic spondylosis-preexisting; bilateral carpal tunnel syndrome-preexisting; bilateral cubital tunnel syndrome-preexisting; a work injury of October 30, 2009, with a posterior interosseous nerve compression, right lateral epicondylitis, status post posterior interosseous nerve decompression and release of

the right lateral epicondyle on June 25, 2010. Dr. Best opined she had reached MMI. He stated she would qualify for a 6% impairment rating pursuant to the AMA Guides, none of which was active prior to her work injury. He stated he would not assess any restrictions upon her activities.

A benefit review conference ("BRC") was held on March 8, 2012. In the BRC order and memorandum, the contested issues were listed as benefits per KRS 342.730; work relatedness/causation; average weekly wage; unpaid or contested medical expenses; injury as defined by the Act; credit for short term disability benefits; exclusion of pre-existing disability impairment; and TTD benefits.

In the decision rendered December 17, 2012, the ALJ found as follows:

> **Causation/Work-Relatedness/Injury Under the Act**
>
> As a threshold issue, the employer argues plaintiff has not met her burden of proving her alleged injuries were caused by her work activities or the incidents alleged. However, having reviewed the evidence of record, the Administrative Law Judge is persuaded by the opinions of Dr. Bilkey and Dr. Best that plaintiff's neck and upper extremity injuries were caused by the October 30, 2009 work injury. It is further determined the other alleged injury dates in 2010 and 2011 did not cause any permanent injuries beyond those caused by the October 30, 2009 date. Specifically, it is determined

plaintiff suffered only a temporary knee injury in 2011 which caused no permanent injury.

Prior Active Condition

The employer also disputes plaintiff has no injury to her upper extremity beyond that which pre-existed the 2009 alleged date and which was active going back to 2004 and 2005. However, as indicated above, the Administrative Law Judge is persuaded by the totality of evidence that plaintiff's upper right arm injury and impairment are due entirely to the October, 2009 work injury.

Based on [sic] Best and Bilkey, [sic] find 5% [sic] neck and 6% [sic] upper extremity with no 3x because [sic] not persuaded plaintiff is not likely to be able to continue earning the same or greater wage for the indefinite future.

Extent & Duration

On this issue, the Administrative Law Judge is persuaded by the opinions of Dr. Dr. Bilkey that plaintiff warrants a 5% cervical impairment and a 6% upper extremity impairment for a total of 11%.

With respect to multipliers, it is noted that plaintiff has returned to work for the employer at a position not as physically demanding as that held at the time of the October, 2009 injury, at the same or greater average weekly wage. It is also determined the totality of evidence is not persuasive that it is unlikely that plaintiff will be able to continue earning such a wage for the indefinite future. As such, she is not entitled to application of

> the 3x multiplier in KRS 342.730(1)(c)1. Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003). Her award of benefits is therefore calculated as follows:
>
> $1,084.32 x 2/3 = $722.88 → $520.72 (maximum 2009 PPD rate) x .11 x 1 = $57.23 per week.
>
> **TTD Benefits**
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> Plaintiff also seeks TTD benefits for the periods she was off work. The employer argues plaintiff was not temporarily totally disabled and, as such, is not entitled to TTD benefits.
>
> Having reviewed the evidence of record, the Administrative Law Judge is persuaded from the evidence of plaintiff's treating physicians that she was taken off work with restrictions Ford could not accommodate for the periods from June 25, 2010 through September 30, 2010 and from January 25, 2012 through September 23, 2012 at the rate of $694.30 per week.
>
> **Medical Expenses**
>
> Based on the foregoing findings, it is determined plaintiff is entitled to payment of all outstanding medical expenses for treatment of her neck, upper extremity and her right knee. She is entitled to future medical expenses for her neck and upper extremity only.

Both Daniel and Ford filed petitions for reconsideration. Daniel argued, as she does on appeal, the ALJ erred by failing to perform a proper analysis pursuant

to Fawbush, supra. Daniel also filed a motion to set aside the opinion, reinstate TTD benefits, and reopen the claim. Ford requested findings of fact to support the award of TTD benefits from June 25, 2010 through September 30, 2010, and from January 20, 2012 through September 23, 2012. Ford also requested the ALJ enter a finding concerning the MMI date for the October 30, 2009 injury. Finally, Ford requested the ALJ find Daniel is precluded from future benefits for the temporary knee injury.

In an order dated February 22, 2013, the ALJ stated as follows:

> This matter comes before the Administrative Law Judge pursuant to Petitions for Reconsideration filed by the plaintiff and the defendant of the Opinion, Order & Award rendered December 17, 2012, and upon plaintiff's Motion to Set Aside Opinion and Order and to Reopen for Temporary Total Disability Benefits, together with the parties' respective responses thereto.
>
> As an initial matter, the defendant's Motion to Strike plaintiff's pleadings is DENIED.
>
> In her Petition, plaintiff maintains it was error to conclude that plaintiff had not carried her burden of proving she is not likely to be able to continue to earn the same or greater wages for the indefinite future. This argument is merely an attempt to have the Administrative Law Judge re-weigh the evidence of record, which is not a proper matter for a Petition for

Reconsideration. Plaintiff's petition on this issue otherwise points to no patent errors to justify the remedy she seeks. Accordingly, plaintiff's Petition for Reconsideration is DENIED.

For its Petition, the defendant argues it was error to award temporary, total disability benefits through September 23, 2012. In support of its position, the defendant argues there is no evidence in the file that plaintiff had not reached maximum medical improvement until September 23, 2012. Having reviewed the defendant's Petition and the plaintiff's response thereto, and having reviewed the evidence of record again, it is determined the defendant is correct that there is no evidence that plaintiff reached MMI on September 23, 2012. Indeed, a further review of the file makes clear a determination of MMI on September 23, 2012 was a patent error as there is no evidence to support such a finding. Instead, it is determined plaintiff reached maximum medical improvement as of June 13, 2012, as determined by Dr. Chou on that date. Up to June 13, 2012, plaintiff had been taken off work by Dr. Nazar and Dr. Chou such that TTD benefits are appropriate up to that date.

Accordingly, the defendant's Petition for Reconsideration is GRANTED to the extent that it is determined plaintiff reached maximum medical improvement as of June 13, 2012, and that plaintiff's second period of temporary, total disability benefits should run from January 25, 2012 through June 12, 2012.

In all other respects, it is determined defendant raises no other patent errors to justify further

altering the findings set forth in the December 17, 2012 Opinion and Order.

Accordingly, the Order & Award section on page 19 of the December 17, 2012 Opinion and Order is HEREBY AMENDED to read as follows:

ORDER & AWARD

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. For temporary, total disability, plaintiff shall receive from the defendant employer $694.30 per week from June 25, 2010 through September 30, 2010 and from January 25, 2012 through June 12, 2012, together with interest at 12% on all past due amounts.

2. For permanent, partial disability, plaintiff shall receive from the defendant the sum of $57.23 per week beginning October 30, 2009 and continuing for 425 weeks thereafter, except that such weekly PPD benefits shall be suspending during any intervening weeks of TTD awarded herein, together with interest at 12% on all past due amounts.

3. Plaintiff shall further recover from the defendant all reasonable and necessary medical expenses for the cure or relief of the effects of her injuries in accordance with KRS 342.020, the accompanying Regulations, and the findings herein.

4. Counsel shall move for approval of attorney fees within 30 days.

Finally, with respect to plaintiff's Motion to Reopen and to Set

> Aside the Opinion and Order, the Administrative Law Judge notes that plaintiff has not indicated that her condition has deteriorated such that she is no longer at maximum medical improvement. Therefore, she cannot be now entitled to temporary, total disability benefits. KRS 342.0011(11). Moreover, the Administrative Law Judge rendered the decision in this matter based on the evidence as it existed at the time of the final hearing on October 17, 2012. After the hearing and before the Opinion rendered in this matter, no motions were made to supplement the record or otherwise reopen proof. Therefore, the determinations and findings made in the December 17, 2012 Opinion and Order cannot now be set aside, especially where, as here, such findings are supported by the evidence of record at the time this matter was submitted for decision. Plaintiff's Motion to Set Aside the opinion is therefore DENIED.
>
> In addition, where the award is rendered in a claim without application of the 3x multiplier in KRS 342.730(1)(c)1, that claim may not be reopened simply to request application of the 3x multiplier -- even if based on new evidence -- unless there is also evidence of an increased impairment rating. Accordingly, plaintiff's Motion to Reopen is also DENIED.

It is well established the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his or her cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where the claimant is unsuccessful with regard to that

burden, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. In rendering a decision, KRS 342.275 and KRS 342.285 grant 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). 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).

That said, regarding the Daniel's first issue on appeal, in Fawbush, supra, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. Id. at 12. In Fawbush, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury. However, he had returned to work at a lighter job earning an average weekly wage equal to or exceeding his average weekly wage at the time of the injury.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court remanded a claim for a determination of the claimant's average weekly wage following his return to work. The Court instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury:

> The ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, supra, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts. *Id.* at 211.

In Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), the Court held the Fawbush analysis includes a "broad range of factors", only one of which is the ability of the injured worker to perform his pre-injury job.

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS

342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

Step one of the Fawbush analysis requires the ALJ to determine whether the injured worker retains the physical capacity to perform the job she was performing at the time of the injury. We determine the ALJ implicitly concluded Daniel does not retain the physical capacity to return to the work she performed at the time of her injury. The ALJ next determined Daniel had returned to work earning an average weekly wage equal to or exceeding her wage at the time of the injury. The ALJ then determined Daniel could continue to earn that level of wages into the foreseeable future, which is the third prong of the Fawbush analysis. The ALJ appropriately considered all steps of the Fawbush analysis, and declined to enhance the award of PPD benefits by the three-multiplier. It was within his discretion to do so, and a contrary result is not compelled, therefore the ALJ's determination shall not be disturbed.

Next, we determine the ALJ did not err in refusing to reopen the claim, or to set aside the opinion rendered December 17, 2012. KRS 342.275(2) states as follows:

> The administrative law judge may grant continuances or grant or deny any benefits afforded under this chapter, including interlocutory relief, according to criteria established in administrative regulations promulgated by the commissioner. The administrative law judge shall render the award, order, or decision within sixty (60) days following the final hearing unless extension is mutually agreed to by all parties. The award, order, or decision, together with a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue shall be filed with the record of proceedings, and a copy of the award, order, or decision shall immediately be sent to the parties in dispute.

While the statute is silent regarding a situation where new, previously undiscoverable evidence is indeed discovered, the situation is addressed in the Kentucky Civil Rules. CR 59 is the appropriate vehicle for alerting the lower court to procedural defects which may be corrected by a new trial, such as an allegation a new trial should have been granted. Hamlin Const. Co., Inc. v. Wilson 688 S.W.2d 341 (Ky. App. 1985).

CR 59.01 states:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:
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> . . .
>
> (c) (c) Accident or surprise which ordinary prudence could not have guarded against.
>
> . . .
>
> (g) Newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

In the claim ***sub judice***, Daniel argues at the time of the hearing she was working for Ford. In the motion to set aside the opinion, her attorney asserted Daniel last worked on December 14, 2012, and the opinion was issued on December 17, 2012. Daniel asserts pursuant to KRS 342.125(1)(b), the fact she ceased working after December 14, 2012 constitutes newly discovered evidence which would allow her to reopen her claim. It is significant Daniel did not attach any medical documentation or her affidavit to the motion.

The granting of a new trial, or in this instance a new hearing, rests upon the sound discretion of the trier of fact, or in this case the ALJ. Carr v. Brownfield, 255

S.W.2d 623 (Ky. 1953); Walker v. Farmer, 428 S.W.2d. 26 (Ky. 1968); Glidewell v. Glidewell, 859 S.W.2d 675 (Ky. App. 1993). The granting of a new trial, or hearing, should not be granted unless it can be demonstrated substantial justice has not been done. The burden to demonstrate harmful error rests with the party seeking the new trial or hearing. Smith v. McMillan, 841 S.W.2d 172 (Ky. 1992).

The general rule used to determine whether a limited retrial should be ordered is whether a distinct and severable issue is to be decided, and the trial on the severable issue will not result in injustice. Smith, supra.

In order to obtain a new trial on the ground of newly discovered evidence, a litigant must allege and prove such evidence has been discovered since the trial, or in this case the hearing, which could not have been discovered prior to the trial by the exercise of due diligence. Cobb v. Keith, 178 S.W.2d 872 (Ky. 1939).

In the alternative, KRS 342.125, which was cited by Daniel, sets forth the steps necessary to reopen or review an award.

> **342.125 Reopening and review of award or order -- Grounds -- Procedures -- Time limitations -- Credit for previously-awarded retraining incentive benefits or income benefits awarded for coal-related pneumoconiosis.**

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge ***may*** reopen and review any award or order on any of the following grounds:
>
> (a) Fraud;
>
> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
>
> (c) Mistake; and
>
> (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

(Emphasis added).

The decision to reopen a claim, or to set aside an opinion based upon newly discovered evidence, rests within the sound discretion of the ALJ. When seeking to reopen, or to set aside a decision, it is imperative the "newly discovered evidence" be tendered for review. Daniel failed to do so. Here, the ALJ denied the motion to set aside the opinion, and further declined to reopen the claim. He adequately explained his reasoning for doing so, and again a contrary result is not compelled.

Based upon the foregoing, we find the ALJ committed no error. The ALJ appropriately decided the

issues which were properly preserved, and a contrary result is not compelled.

Accordingly, the decision by Hon. Grant S. Roark, Administrative Law Judge, rendered December 17, 2012, and the order issued February 22, 2013 are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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