Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 20, 2015

CLAIM NO. 201270140

WALTER EVANS PETITIONER

VS. **APPEAL FROM HON. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

KES ACQUISITION COMPANY
DR. JOSEPH LEITH
and HON. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Walter Evans ("Evans") appeals from the July 17, 2014, Opinion, Award, and Order and the September 30, 2014, Order on Petition for Reconsideration of Hon. R. Roland Case, Administrative Law Judge ("ALJ"). In the July 17, 2014, Opinion, Award, and Order, the ALJ awarded temporary total disability ("TTD") benefits in the amount

of $736.19 per week from September 17, 2012, through April 21, 2013; permanent partial disability ("PPD") benefits in the amount of $14.36 per week for 425 weeks; and medical benefits.

On appeal, Evans sets forth three arguments. First, Evans asserts the ALJ failed to resolve the issue of contested medical expenses. Second, Evans asserts the ALJ erred in determining he returned to work at the same or greater average weekly wage ("AWW") after the injury. Finally, Evans asserts the ALJ erred by determining he retained the physical capacity to return to the type of work he was performing at the time of the injury.

The Form 101 alleges Evans injured his left shoulder on September 4, 2012, while in the employ of KES Acquisition Company ("KES") in the following manner: "Putting a head on a dummy bar weighing about 20 or 30 pounds."

The Form 104 attached to Evans' Form 101 indicates Evans was employed at KES from 1989-2002 and from 2009 to the present. Evans was employed at Gallatin Steel from 2003 to 2008.

On March 3, 2014, Evans filed medical expenses and a collection notice from St. Claire Regional Medical Center which was styled "Plaintiff's Notice of Filing

Evidence." Evans indicated that "[t]hese show work injury treatment incurred by the Plaintiff which the Workers' Compensation insurance company has refused to pay." The first attached bill is for 4 milligrams of Methylprednisolone on June 20, 2013. The second bill is for “physical therapy” on May 2, 2013.

The March 26, 2013, Independent Medical Examination ("IME") report of Dr. David Jenkinson was introduced by KES. Dr. Jenkinson attributed Evans' shoulder condition to a pre-existing rotator cuff tear which he concluded is unrelated to Evans’ work. Dr. Jenkinson assessed a 5% impairment rating for this condition. Regarding Evans' ability to return to the type of work he was performing at the time of the injury, Dr. Jenkinson opined as follows:

> It is my opinion that Mr. Evans should be released to return to work in his former occupation or similar employment. There is no reason why he should have any restrictions but he may have some limitations due to residual decreased range of motion of his left shoulder.
>
> It should be apparent that this man had a pre-existing chronic rotator cuff tear with retraction and apparently was functioning satisfactorily at work with that condition. There is therefore, no reason why he should be prohibited from returning to his former occupation.

On April 11, 2014, KES introduced a "Notice of Filing" providing the job description for "Caster Tech." The job description includes "occasional" lifting of up to 25 pounds.

On April 11, 2014, KES filed a Form 112 Medical Fee Dispute which characterized the nature of the dispute to be as follows:

> An Independent Medical Evaluation was performed by Dr. David Jenkinson on March 26, 2013. Dr. Jenkinson determined that Plaintiff's retracted left rotator cuff tear is "NOT" related in any way to the alleged work injury of September 4, 2012. Dr. Jenkinson emphasized Plaintiff treated for left shoulder pain with a subacromial injection a few weeks prior to the alleged injury. Additionally, the MRI of the shoulder indicated a typical description of a chronic retracted rotator cuff tear. The MRI reports retraction and some atrophy of the supraspinatus muscle which are the typical findings of a chronic long-standing rotator cuff tear. Also, in the operative report, Dr. Leith describes chronic retraction as it was not possible to mobilize the cuff back to its original location. That description is again typical of a long-standing chronic rotator cuff tear.
>
> Based in good faith on the expert medical opinion of Dr. Jenkinson, the Movant/Employer hereby contests the compensability of all past and ongoing future medical treatment related to Plaintiff's left shoulder.

> This Form 112 is being filed in part as a protective measure pursuant to Dyer v. M.W. Manufacturers, Claim No. 04-85372 (Workers' Compensation Board Opinion rendered May 14, 2007) to preserve Movant's ability to contest future medical expenses in the event they arise. In Dyer, Administrative Law Judge Manno concluded that because the employer had failed to file a Form 112, medical expenses incurred by the Plaintiff could not be challenged.

Medical records of Dr. Joseph Leith indicate that on November 26, 2012, Evans underwent surgery to repair a left rotator cuff tear. Dr. Leith's April 27, 2013, medical records contain the following notation:

> S/P left rotator cuff repair. On exam he has forward flexion about 170 degrees. He can return to work with weight lifting restriction. He said the therapist said he will need a 50 pound weight restriction. I told him to get documentation from therapist and take [sic] to his work physician to get restriction okayed for work. F/U 2 months.

In a June 20, 2013, medical record, Dr. Leith noted as follows:

> He is s/p left rotator cuff repair. He said with the last steroid injection he had improvement and was able to complete therapy and work but he said the shoulder has become increasingly painful again. The patient said he got denied by BWC for PT. I will request a steroid injection. I give him a script for Medrol dosepak for the pain until we can get steroid injection approved.

> I told him to stop anti-inflammatory while on dosepak and then resume. F/U 2 weeks for injection if approved.

In an April 26, 2013, letter, Dr. Leith stated Evans “may not return to work at this time. He may return to work on 4/27/13.”

Evans’ April 22, 2014, deposition was introduced. Evans testified he was initially hired by KES as a "laborer." Thereafter, he bid and obtained a position as a "utility man." He then successfully bid to work in the metal shop working as pit man. Later, Evans moved to casting operator and then pit operator. He was a pit operator at the time KES’ plant shut down.

When he returned to work for KES in 2009, his job title was "laborer." Evans described the nature of this job as follows:

> Q: Okay. As a laborer, were you doing the same stuff as you did back in 1989, the cleaning and the light maintenance?
>
> A: Uh-huh.
>
> Q: Okay.
>
> A: Yes, sort of.
>
> Q: Okay. What was different?
>
> A: It was- well, the- the labor was a little more intensive this time when I came back, if that makes any sense.

> Q: Well, can you describe what that means?
>
> A: Well, working and cleaning around the furnaces we did a lot of shoveling heavy slag. Our job when- if- if I wasn't stepped up, you know like a vacation or something, then I would come in on daytime and the crew I was with, we would first thing that we would do we would clean the furnace up from the night before where they- where they case, where they boarded the steel. And one of the by-products of melting steel is slag, and it's- it's- it's really heavy. And we- we had to clean up and clean the furnace up, get everything ready for the next crew when they came in at night-

After his September 4, 2012, injury, Evans returned to work in April 2013 as a laborer and then moved to shipping. Regarding his work restrictions, Evans testified as follows:

> Q: Are you operating under any type of restrictions, work restrictions?
>
> A: No, ma'am. I told Dr. Leith, when I went back to work, I wanted to go back- see, our- our- our highest weight restriction is 50 pounds. I told him I wanted to try it, and if something happened, then- and our lowest weight restriction's 25. So I went back under 50, and so far, that's where I'm at. I'm still there.

At the final hearing, regarding the duties he performed at the time of the injury, Evans testified as follows:

> Q: You told us also in your deposition that before the work injury, the work you did could include several different jobs because you were working as a laborer; is that correct?
>
> A: That's correct.
>
> Q: Explain to the judge why that was, that the laborer wasn't one specific job.
>
> A: We would fill in, fill vacations for other departments when people were on vacation or- or absent for the day.
> Q: Well, when you were injured, what was the heaviest weight you had to lift on those various jobs you would be doing prior to the injury as a laborer or filling in?
>
> A: Approximately 60 pounds would be the heaviest I would have to lift.

Evans also testified as follows regarding the medical bills filed in the record:

> Q: We've also filed collection notices and medical expenses from St. Claire Medical Center. After Dr. Leith released you to return to work in April of 2013, did you receive more treatment from him?
>
> A: Yes, sir. I returned to see him again.
>
> Q: Did that treatment involve the physical therapy expenses that are in

> the May and June 2013 bills and collection notices that we filed from St. Claire?
>
> A: Yes.
>
> Q: And after you returned to work, but were still under the treatment of Dr. Leith, what sort of treatment, did he recommend or do besides the physical therapy?
>
> A: He did an injection, Cortisone, to try to alleviate some of the irritation and pain I was having.
>
> Q: And his office records show that in June when that was performed that you had come back to see him, because when you returned to work, you were having so much pain in the injured shoulder; is that correct?
>
> A: That's correct.

The May 6, 2014, Benefit Review Conference Order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; AWW; unpaid or contested medical expenses; exclusion for pre-existing disability/impairment; and TTD (underpayment).

In the July 17, 2014, Opinion, Award, and Order, the ALJ provided the following analysis and conclusions:

> **1. All factors involved in benefits under KRS 342.730 including exclusion for pre-existing active impairment or disability and including work-relatedness causation and injury as defined by the Act?**

The issue of benefits under KRS 342.730 involves the determination of whether the plaintiff has a permanent disability and if so whether it is total or partial in nature. In this case, the plaintiff obviously is not totally disabled. The plaintiff's disability must be considered partial in nature. This begins with a determination of the appropriate impairment rating under the *AMA Guides. Jones v. Brash-Barry General Contractors,* 189 SW3d 149 (Ky. App. 2006). The Administrative Law Judge is convinced from a review of the evidence that Dr. Guberman and Dr. Jenkinson correctly indicated the plaintiff would have an impairment under the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* of 5%. Of this, Dr. Jenkinson felt all was due to a pre-existing active impairment while Dr. Guberman attributed a 1% to a pre-existing active impairment. The Administrative Law Judge finds the testimony of the plaintiff to be very credible that he would have been unable to perform his job with the rotator cuff tear and the Administrative Law Judge therefore finds the plaintiff did sustain an injury as defined by the Act including a harmful change to his body that necessitated surgery. However, he had sought prior treatment and the Administrative Law Judge therefore finds that a portion of the plaintiff's impairment is pre-existing active. The Administrative Law Judge chooses to accept the apportionment of Dr. Guberman of 1% prior active and 4% due to the injury. Under *KRS 342.370(1)(b),* a *4%* impairment carries a multiplication factor of .65 for a 2.6% permanent partial disability. However, the analysis does not end there as the Administrative Law Judge must also determine whether the provisions of *KRS 342.730(1)(c) 1 or 2* apply.

Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages, a determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. If employment is found to be not likely, then the 3 multiplier would apply. See *Fawbush v. Gwynn,* 103 S.W. 3d 5 (Ky., 2003), *Kentucky River Enterprises, Inc. v. Elkins,* 107 S.W.3d 206 (Ky. App. 2003) *and Adkins v. Pike County Board of Education,* 141 S.W.3d 387 (Ky. App. 2004). Subparagraph 2 applies only in the limited instance where the plaintiff returns to work earning same or greater wages, but then ceases to do so by reason of a work injury. *Chrysalis House, Inc. v. Tackett,* 283 S.W.3d 671 (Ky. 2009) and *Hogston v. Bellsouth Telecommunications,* 325 S.W.3d 314 (Ky. 2010).

In this particular case, the Administrative Law Judge finds the plaintiff has returned to work and is earning the same or greater wages and he will be able to continue doing so for the indefinite future. Additionally, the Administrative Law Judge finds the plaintiff has the physical capacity to return to the type of work he was performing at the time of the injury. If the plaintiff ceases his employment because of the work injury, he would then be entitled to the 2 factor pursuant to *Chrysalis House, Inc. v. Tackett, supra.*
While the plaintiff has sustained a significant injury and the Administrative Law Judge finds his testimony to be credible, he has returned to work and is earning

essentially the same wages as before the injury. Additionally, the plaintiff's treating physician, Dr. Joseph Leith, released the plaintiff to return to work on April 27, 2013 with no restrictions noted on the release. For those reasons, the Administrative Law Judge finds the plaintiff is not entitled to any enhancement factors unless he ceases his employment because of the work injury.

2. Average weekly wage?

The administrative Law Judge has carefully reviewed the calculations of the plaintiff and of the defendant-employer. The main difference would appear to be the week ending June 2, 2012. If the vacation pay is not included then the employer's calculations would be correct. If the vacation pay is included, this would add $1,289.60 to the second quarter and result in an average weekly wage of $1,134.05. Either calculation would be sufficient for the maximum permanent partial rate but would affect the temporary total rate. The vacation pay would appear to be earned paid vacation and apparently can be received even during a period when the employee worked and would therefore appear to be in the nature of a bonus which is to be included in the calculation of average weekly wage. The Administrative Law Judge will therefore find an average weekly wage of $1,134.05.

3. Appropriate temporary total disability?

Temporary total disability is defined in *KRS342.0011(11)(a)* as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of

improvement which would permit a return to employment. The Courts have noted that in order for temporary total disability benefits to be payable the plaintiff must not have reached maximum medical improvement and must not have reached a level of improvement that would permit a return to employment. *Magallan Health v. Helms, 140 SW2d 579* (Ky. App. 2004).

Dr. Leith released the plaintiff on April 27, 2013 and it appears the plaintiff actually had returned to work prior thereto since the wage records indicated he had worked forty (40) hours the week ending April 27, 2013. The Administrative Law Judge finds the appropriate period of temporary total [sic] to be as paid by the employer of September 17, 2012 through April 21, 2013 and this would be consistent with the wage records indicating the plaintiff worked the week ending September 15, 2012 and the week ending April 27, 2013. Based on the average weekly wage of $1,134.05 the plaintiff would be entitled to the maximum temporary total rate of $736.19.

4. Unpaid or contested medical expenses?

The plaintiff testified there was an unpaid medical bill and the defendant has filed a medical dispute as to past and ongoing future medical treatment. As indicated above, the Administrative Law Judge finds the plaintiff sustained a work-related injury to his shoulder and will make the appropriate award of medical expenses pursuant to *KRS 342.020.* Any outstanding or future medical bills should be submitted to the employer for payment with the employer to make the determination as to compensability and to file the appropriate specific medical dispute as

> to any bill contested. The plaintiff will be awarded the reasonable and necessary medical expenses for the treatment of his injury. Any outstanding bills can be submitted by the plaintiff to the employer under this award and the employer will make the determination of whether to pay same or file a medical fee dispute as to any issue as to compensability of any disputed bill.

Evans filed a petition for reconsideration asserting several errors and requesting additional findings on three issues. Evans requested a finding of fact that he has not returned to work earning the same or greater wages. Evans also requested a finding of fact that he lacks the physical capacity to return to the type of work he was performing at the time of the injury. Finally, Evans asserted the ALJ failed to decide the contested issue of unpaid medical expenses and requested a decision on this issue.

In the September 30, 2014, Order on Petition for Reconsideration, the ALJ denied all three requests.

Concerning Evan’s contention the ALJ failed to determine the issue of unpaid or contested medical expenses, he argues as follows:

> Both parties presented evidence and arguments concerning the issue set out in the Benefit Review Conference of "unpaid or contested medical expenses."

> The Plaintiff submitted a Notice of Filing in February 2014 with medical expenses and collection notices from St. Claire Regional Medical Center. The Respondent KES additionally served a Medical Dispute on April 7, 2014 challenging their responsibility for "the compensability of all past and ongoing future medical treatment related to Plaintiff's left shoulder."
>
> Despite both parties briefing the issue the Judge did not resolve either issue. This was a clear error of the Administrative Law Judge because he merely sidestepped the issues preserved for decision by him. His failure to decide these issues will cause further delay in determination of what medical expenses for treatment of the work injury of the Plaintiff were payable. It is clear the Administrative Law Judge cannot determine the compensability of unknown future medical expenses but he should have ruled on the actual contested medical expenses filed by Mr. Evans and testified to in the Final Hearing. (T, page 16-17). Similarly, the Judge should have ruled that the Defendant's Medical Fee Dispute was overruled as to whether any past work injury treatment expense were payable.

We agree that the ALJ should have resolved the issue of the compensability of the medical bills filed in the record by Evans on March 3, 2014. There is testimony by Evans at the final hearing, as set forth herein, regarding the physical therapy bills which were filed in the record. Additionally, Dr. Leith's medical record dated June 20,

2013, indicates he ordered a steroid injection on that same date. This date matches the date of the injection as indicated on the bill filed in the record. Additionally, "unpaid or contested medical expenses" was identified as a contested issue at the BRC, and Evans argued this issue in his brief to the ALJ. Therefore, the claim must be remanded for a determination of the compensability of the medical bills filed by Evans on March 3, 2014, as this issue was properly before him during the pendency of this claim. *See* R.J. Corman R.R. Const. v. Haddix, 864 S.W.2d 915 (Ky. 1993).

Concerning Evan's argument the ALJ erroneously determined he returned to work at equal or greater wages, Evans notes the ALJ determined his pre-injury AWW was $1,134.05 and post-injury AWW was $1,125.47. However, he argues the ALJ failed to make a determination Evans' post-injury AWW was not equal to or greater than his pre-injury AWW. Evans maintains as follows:

> In the Order on Reconsideration the Judge theorized that although he included Mr. Evans' vacation pay in the 13 week quarter that produced the average weekly wage of $1,134.05, that theoretically if the Petitioner had an equivalent amount of vacation pay in a post injury quarter, his average weekly wage would be greater. This was clearly an error as it disregarded the evidence and findings made by the Judge. The

> Judge stated in his Order on the Petition for Reconsideration "On an hourly basis or on a projected quarter that included vacation pay the Plaintiff would have equal or greater wages.
>
> This ignores the statutory law and case law for calculation of an average weekly wage, whether prior to the injury or after returning to work following the injury. It would never be accurate to disregard the actual wages received by the party after the injury on the theory that he might earn more (or less) as he did prior to the 13 week quarter used to determine the average weekly wage.

We vacate the ALJ's determination Evans' post-injury wages were greater than his AWW at the time of the injury.

Regarding pre and post-injury AWW, the July 17, 2014, Opinion, Award, and Order contains the following findings of fact:

> 21. Wage records for the 52 weeks immediately preceding the date of injury were filed into evidence. The highest quarter reflected in the records begin on March 10, 2012 through June 2, 2012, wherein the plaintiff earned $13,453.12. The total amount then divided by 13 provides an average weekly wage of $1,034.86.
>
> 22. Additional wage records for the weeks following the date of injury were also filed into evidence. Post injury records reflect the plaintiff worked only 2 weeks in the quarter

> lasting from September 8, 2012 through December 1, 2012, and only 1 week for the quarter lasting from December 8, 2012 through March 2, 2013. On June 8, 2013 the plaintiff began working regularly with his highest quarter occurring from December 7, 2013 through March 1, 2014, wherein the plaintiff earned $14,631.09. This total divided by 13 provides an average weekly wage of $1,125.47.

The ALJ then set out the following analysis and conclusions regarding pre-injury AWW:

> The administrative Law Judge has carefully reviewed the calculations of the plaintiff and of the defendant-employer. The main difference would appear to be the week ending June 2, 2012. If the vacation pay is not included then the employer's calculations would be correct. If the vacation pay is included, this would add $1,289.60 to the second quarter and result in an average weekly wage of $1,134.05. Either calculation would be sufficient for the maximum permanent partial rate but would affect the temporary total rate. The vacation pay would appear to be earned paid vacation and apparently can be received even during a period when the employee worked and would therefore appear to be in the nature of a bonus which is to be included in the calculation of average weekly wage. The Administrative Law Judge will therefore find an average weekly wage of $1,134.05.

Despite having found that Evans' pre-injury AWW was $1,134.05 and post-injury AWW was $1,125.47, the ALJ inserted the following language in his award regarding

potential applicability of the two multiplier: "Should the Plaintiff experience a cessation of employment due to the disability arising from the work injuries, the Plaintiff's weekly benefits shall be doubled to $28.72 per week during the period of cessation." After Evans noted this discrepancy in his petition for reconsideration, the ALJ made the following additional finding in the September 30, 2014, Order on Petition for Reconsideration:

> The Administrative Law Judge found the plaintiff returned to work earning equal or greater wages. At the time of the injury he was earning $18.01 an hour and he has returned to work initially at $18.76 and now at $19.14 per hour. The pre-injury average weekly wage was based on a 13 week quarter which included vacation pay of $1,289.60. In order to compare oranges to oranges assuming the plaintiff has a post injury quarter that included vacation pay this would increase the average weekly wage by $1,289.60 divided by 13 weeks or $99.20. Hence, on an hourly basis or on a projected quarter that included vacation pay the plaintiff would have equal or greater wages. In passing, the Administrative Law Judge would note this finding actually benefits the plaintiff since it would make him eligible for the 2 factor if he ceases employment relative to the injury. Based on the above, the Petition for Reconsideration regarding the return to work at equal or greater wages is also **DENIED**.

In the September 30, 2014, Order on Petition for Reconsideration, the ALJ utilized information not in the record in calculating the post-injury AWW. The ALJ stated that in order to "compare oranges to oranges," he assumed Evans had a post injury quarter that included vacation pay comparable to the $1,289.60 that was added into his pre-injury AWW calculations. However, a review of wage records filed in the record do not definitively indicate what, if any, Evans received post-injury for vacation pay. Thus, while the record may support the addition of the vacation pay for pre-injury AWW calculations, it does not support the addition of vacation pay in calculating Evans' post-injury AWW. On remand, the ALJ must determine the post-injury AWW in a manner consistent with the evidence in the record and then determine the applicability of the two multiplier.

Finally, Evans asserts the ALJ erred by determining he had the physical capacity to return to the type of work he was performing at the time of the injury. Evans argument is twofold. Evans asserts the ALJ misunderstood Dr. Leith's April 26, 2013, return to work slip as releasing him with "no restrictions." Evans also asserts the job description filed in the record by KES does

not describe the type of work he was performing at the time of the injury.

It is clear from the language in both the July 17, 2014, Opinion, Award, and Order and the September 30, 2014, Order on Petition for Reconsideration that the ALJ was swayed by the job description filed by KES and the lack of restrictions imposed by Drs. Jenkinson and Leith in finding Evans is able to return to the type of work he was performing at the time of the injury. Thus, he was not entitled to enhancement of his income benefits by the three multiplier.

Kentucky law mandates when the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Evans had the burden of proof on the issue of applicability of the three multiplier.

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the

> entire record, as to have compelled a finding in his favor.

Wolf Creek Collieries, supra, at 735.

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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome.

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Special Fund, supra, at 643.

We are unable to conclude the evidence compels a different result than what was reached by the ALJ regarding the three multiplier, as Dr. Jenkinson's March 26, 2013, report firmly supports the conclusion Evans is able to return to his pre-injury work.

Regarding the ALJ's determination that Dr. Leith returned Evans to work without restrictions, in the September 30, 2014, Order on Petition for Reconsideration the ALJ noted Dr. Leith did not address work restrictions within his return to work release. The record is consistent with this determination. The ALJ also noted the "restriction of no lifting more than 50 pounds was only the recommendation of the therapist." This is also consistent with the evidence in the record.

Finally, regarding the work description filed in the record, while we acknowledge the discrepancy between the work description filed by KES and Evans' hearing testimony regarding his job title and the lifting requirements at the time of the injury, the ALJ chose to rely upon KES’ filing instead of Evans' testimony. Concerning this contradictory evidence, the ALJ has the discretion to choose the evidence upon which he will rely. Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and

substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). The ALJ's determination the three multiplier is not applicable cannot be disturbed.

Accordingly, the portion of the July 17, 2014, Opinion, Award, and Order and the September 30, 2014, Order on Petition for Reconsideration determining the three multiplier is inapplicable is **AFFIRMED**. Those portions of the July 17, 2014, Opinion, Award, and Order and the September 30, 2014, Order finding Evans' post-injury AWW is greater than his AWW at the time of the injury and declining to rule upon the compensability of the medical bills filed in the record on March 3, 2014, are **VACATED**. This claim is **REMANDED** for entry of an amended opinion, award, and order determining Evans' post-injury AWW and the applicability of the two multiplier and the compensability of the medical bills filed in the record on March 3, 2014.

ALL CONCUR.

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