# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: March 4, 2022**

CLAIM NO. 202001171 & 202001170

AMERICAN PRO STAFFING INC. PETITIONER

VS. **APPEAL FROM HON. TONYA CLEMONS, ADMINISTRATIVE LAW JUDGE**

MARK A. FILBACK
and HON. TONYA CLEMONS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

* * * * * *

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

**STIVERS, Member.** American Pro Staffing Inc. ("American") appeals from the September 24, 2021, Opinion, Award, and Order and the November 1, 2021, Order on Petition for Reconsideration of Hon. Tonya Clemons, Administrative Law Judge ("ALJ"). The ALJ dismissed Mark A. Filback's ("Filback") claim for coal workers' pneumoconiosis ("CWP"). The ALJ awarded permanent partial disability benefits

and medical benefits for a work-related left elbow injury resulting from cumulative trauma. The ALJ dismissed Filback's claims for injuries to the lumbar spine, hands, and arms alleged to have arisen out of cumulative trauma occurring at work.

On appeal, American asserts the ALJ erred by concluding Filback gave timely notice of his work-related left elbow injury. Further, American asserts the ALJ erred by not apportioning liability for the CWP evaluation. Finally, American argues the ALJ erred by determining Filback's left elbow injury is work-related.

## BACKGROUND

Filback filed his Form 102-CWP, Claim No. 2020-01170, on August 28, 2020, alleging he sustained work-related CWP with a date of last exposure of March 16, 2020. The Form 102 asserts notice was given of his alleged CWP on July 10, 2020, by certified mail.

Filback filed his Form 101, Claim No. 2020-01171, on August 28, 2020, alleging he sustained work-related injuries to the back, left elbow, hands and arms due to cumulative trauma on March 16, 2020. The Form 101 claims Filback gave notice of his alleged cumulative trauma injuries on July 10, 2020, by Certified Mail.

Attached to the Form 101 are Dr. James Rushing's May 7, 2020, report, and answers to a Medical Questionnaire. As indicated in the report, after performing an orthopedic examination, Dr. Rushing diagnosed lumbar osteoarthritis, left elbow degenerative joint disease, and bilateral carpal tunnel syndrome. Regarding causation, in the Medical Questionnaire, Dr. Rushing checked

"yes" by the following question: "1. Do you believe that his present medical issues to his back, left elbow, hands and arms are caused, either wholly or in part, by his job activities in the coal industry?"

Also filed in the record is the July 10, 2020, certified letter of notice from Filback to American which states, in full, as follows:

> My client, the above referenced Mark Filback, believes that he suffers from coal workers' pneumoconiosis. Since you were Mr. Filback's last employer, I am hereby providing you with notice that my client and I will be filing a claim for coal workers' pneumoconiosis with the Commonwealth of Kentucky Department of Workers' Claims. We also plan to file a claim for cumulative trauma due to 'wear and tear' and the cumulative physical stress on Mr. Filback's body as a result of performing repetitive medium to heavy manual labor in the mines. You may pass this information along to your workers' compensation insurance carrier for a response.

Filback introduced Dr. John Gilbert's Form 107 dated December 17, 2020. After performing a physical examination and a medical records review, Dr. Gilbert set forth the following diagnoses: "Lumbar radiculopathy left greater than right secondary to cumulative trauma and aggravation of grade 1 spondylolisthesis at L5-S1 which would have been previously asymptomatic with bilateral carpal tunnel syndrome with numbness and weakness on exam, probable osteoarthrosis and reproducible left elbow and shoulder weakness due to cumulative trauma." Dr. Gilbert opined Filback's injuries are attributed to "the work event as described to [him]." Dr. Gilbert assessed a 29% whole person impairment rating pursuant to the 5$^{th}$ Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), apportioned as follows:

a. Lumbar radiculopathy – 13%

> b. Bilateral carpal tunnel syndrome, i.e. median neuropathy and osteoarthrosis – 10%
>
> c. Left elbow weakness – 9%

Filback was deposed on November 11, 2020. The last time he worked in any capacity was for American, and the last place American placed him was at Coleman's Power Plant in Hawesville, Kentucky. He explained why he stopped working at the power plant:

> A: Well, I had – had missed a day, and they wanted to move me somewheres else because I – I took off a day – day of work, and they was aiming to move me to a different job. And then that was about the time all the coronavirus started and the job that they wanted to move me to this out-of-state, and with my health, I wasn't willing to go out-of-state.
>
> …
>
> Q: All right. Help me understand again what happened there at the power plant? They wanted to – or why was it that you stopped working? Can you explain that again?
>
> A: Well, I was – I – I took a day off, and I didn't call in first thing, and they was aiming to send me out-of-state - to a different job, and I didn't – I didn't go out-of-state. I mean, that's – that's the reason – that was my last day worked.
>
> Q: I mean, basically, are you saying that you – felt like you were punished it [sic] for not – for not showing – for the no call, no show and –
>
> A: No. No, sir. No, sir. No. I wasn't – I wasn't punished at all. It's just that on that Hawesville job, there was only three people there. And, you know, they had to make sure that all three people was there all the time. But no. I don't – I don't feel like I was punished by all – by no means.

Q: Okay. Well, I guess what I'm getting at here, you know, but for taking the – you referenced a couple of times taking that day off. I guess what I'm wondering is: Conceptually if that hadn't happened, I mean, would you still be, you know, running the heavy equipment at the power plant? Does that make sense?

A: Yeah. That makes sense, but I mean, I don't know. I mean, I really don't.

Q: At the time – at the time that you stopped working at the power plant though, were you – were you still able to do the job when this other – were you physically able to do the job that you were doing when this other job opened up out-of-state that you couldn't take?

A: Yes. I mean – I mean, I done it. I mean, I didn't have much of a choice.

Q: All right. That is to say that you stopped physically working at the power plant because they wanted to assign you to another spot in another state. Does that make sense? Is that right? Like, you weren't at the power plant for two months complaining about your ability to do the work?

A: No.

Q: You were at the power plant for a couple of months and you have this condition. But you were working the entire time and then they needed to move you. And that's when the breakdown happened between, well, in terms of your ongoing work activity?

A: No. I don't – I don't think that's right.

Q: So is it your testimony that you were complaining about the ability to do your job leading up to the circum [sic] –

A: No. No. No. I was not complaining.

Q: Okay. So I mean, basically what I'm getting at is so is it fair to say then that you stopped working at the power plant for reasons unrelated to the claim. You might have a claim but you weren't having – you didn't stop

working there due to the claim? Does that make sense? You know, I depose a lot of folks, right? And, you know, the said claimant and he had a bad fall, okay? And so he testifies to me that, you know, he had to stop working due to the fall, right?

A: Right.

…

Q: Yeah. Did the power plant actually close?

A: Yes. The – the power plant was – the Coleman Power Plant was shut down, and we was – like, I said, we was excavating the gypsum.

Q: Okay. And it was shut down due to the COVID?

A: No. It was shut down to – who knows what. I have – I have no idea why they shut down, but they – they quit producing energy well before we ever started there. I have no idea why they shut down.

Regarding his left elbow pain, Filback testified as follows:

Q: What is – what's your – what is the – so what do you – how was the left elbow injured? What's – what happened there?

A: I have no idea. It just – I don't ever remember hitting it. It just starts shooting pains up and down my arm. And if I, you know, move my arm very much, my elbow, it would just shoot pains throughout my – throughout my arm and go up my shoulders.

Q: When did, you know, when did this start going on? The shooting pain on your left arm?

A: I would say some – I'm thinking sometimes last year. I mean, I – I ain't 100 percent sure on the date.

Filback also testified at the July 28, 2021, hearing. Concerning his last day at work for American, he testified:

> Q: Okay. Alright. When you last worked on March the 16th, 2020, were you fired, laid off, or were you transferred someplace that you elected not to go?
>
> A: I was supposedly aiming to get transferred.
>
> Q: Was that within the state or out of state?
>
> A: One job was out of state, and then one job was right at the border. It was up there on the other side of Louisville.
>
> Q: Did you elect not to take those jobs?
>
> A: Yes, sir, I did.
>
> Q: Now, I believe you had missed a day before your last date of work. Were you going to a doctor or something another the day before?
>
> A: I just woke up sick and…and hurting, and I just didn't go in.
>
> Q: Okay. Did that lead to you being transferred someplace else by American Pro Staffing, in your opinion?
>
> A: Yes, sir, it did.

By Order dated November 13, 2020, the ALJ consolidated both claims.

The July 13, 2021, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: "Work related/causation as to both, Notice, Permanent income benefits per KRS 342.730 & 342.732, Average Weekly Wage, TTD Benefits - both claims, Ability to return to work, Exclusion for unrelated impairment, Credit for: unemployment benefits, Unpaid or contested medical expenses, and Proper use of the AMA Guides." Under "Other contested

issues" is the following: "1) Entitlement to medical benefits as to both claims; 2) Injury, as defined by the Act as to both claims; 3) Costs for breathing studies."

In the September 24, 2021, Opinion, Award, and Order, the ALJ provided the following Findings of Fact and Conclusions of Law relating to the CWP claim which are set forth *verbatim*:

> **I. Claim No.: 2020-01170**
>
> **A. Injury, as defined by the Act; work-relatedness/causation; benefits per KRS 342.732; unpaid or contested medical expenses; entitlement to medical benefits; notice; and costs of breathing studies.**
>
> Having reviewed and considered all the evidence, the ALJ finds the university evaluation report of Dr. Westerfield to be the most persuasive. In reaching this finding, the ALJ finds sufficient evidence has not been adduced to overcome the presumptive weight afforded the university evaluation (UE). Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000).
>
> Dr. Westerfield was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Further, Dr. Westerfield meets the criteria set forth in KRS 342.315 and KRS 342.316 as he is not only a B- reader, but also a board certified pulmonologist.
>
> In his report, Dr. Westerfield pointed out the lack of x-ray evidence for CWP. He found Plaintiff suffered from COPD due to his cigarette smoking.
>
> Consistent with the finding of the UE, Dr. Rosenberg found Plaintiff did not have CWP. Dr. Rosenberg stated Plaintiff had normal total lung capacity.
>
> The ALJ does not find the evidence from Dr. Crum submitted on behalf of Plaintiff to be sufficiently persuasive to overcome the presumptive weight afforded to the opinions of the UE. Accordingly, based upon the opinions of Dr. Westerfield, the ALJ finds Plaintiff has failed to meet his burden of establishing the presence of

> x-ray evidence of coal workers' pneumoconiosis or any other occupationally acquired disease related to the exposure to coal dust. As such, Plaintiff's claim for medical and income benefits for coal workers' pneumoconiosis must be dismissed.
>
> While Defendant preserved the issue of costs associated with breathing studies, it provides no evidence that the statutory requirement under KRS 342.316(3)(b)4h has been met to compel 50% of the costs be borne by Plaintiff. Accordingly, Defendant's request for costs of breathing studies is dismissed.

The ALJ found notice of the alleged injuries was due and timely. The ALJ provided, in relevant part, the following Findings of Fact and Conclusions of Law concerning the alleged work injuries which are set forth *verbatim*:

> After careful consideration of the evidence, the ALJ finds Plaintiff has met his burden to prove a work-related cumulative trauma injury to his left elbow was caused by his work with Defendant. In reaching this finding, the ALJ relies on the opinions of Dr. Gilbert. Dr. Gilbert's opinions are the most persuasive as they are line with Plaintiff's credible testimony as to his continued left elbow symptoms. Dr. Gilbert diagnosed the mechanism of injury of cumulative trauma involving the left elbow and stated findings of reproducible left elbow weakness. Thus, the ALJ finds Plaintiff sustained a left elbow injury due to work-related cumulative trauma.
>
> With respect to the allegations associated with his lumbar spine and bilateral wrists and/or arms, the ALJ finds Plaintiff has failed to meet his burden to prove work-related cumulative trauma injuries. In reaching this finding, the ALJ relies on the opinions of Dr. Lyon. Following a 9 review of Plaintiff's medical records from 2016 through 2020, Dr. Lyon explained that Plaintiff had no accelerated or advanced degenerative changes based upon a review of diagnostic films from March, 2018 and his examination in January, 2021. He stated there were no objective findings of radiculopathy. Finally, he felt Plaintiff's placement in the DRE Lumbar Category 3 was due to the non-work-related lumbar fracture and not any work-related cumulative trauma.

With respect to Plaintiff's bilateral hands and/or arms complaints, the ALJ again finds the opinions of Dr. Lyon to be the most credible and persuasive. Dr. Lyon explained Plaintiff's symptoms did not reflect classic carpal tunnel syndrome due to a lack of reporting of paresthesias into the fingers and negative digital compression, as well as Phalen's, on evaluation. As the physical examination showed no atrophy and no alteration of sensation, he did not believe carpal tunnel could be objectively diagnosed.

Based upon the foregoing, the ALJ finds Plaintiff has not met his burden to prove cumulative trauma injuries to his lumbar spine or bilateral hands and/or arms. Therefore, his claim as to cumulative trauma injuries to his lumbar spine and bilateral hands and arms is dismissed.

…

**D. Benefits under KRS 342.730; ability to return to work; proper use of the Guides; unpaid or contested medical benefits; and entitlement to medical benefits.**

Plaintiff suffered a work-related cumulative trauma injury to his left elbow. Thus, the ALJ must decide the appropriate impairment, if any, attributable to the injury.

In this matter, Plaintiff testified that he has pain in his left elbow. He denied current formal medical treatment for his left elbow, but testified to use of over-the-counter treatments such as Ibuprofen and icy hot. Plaintiff also testified to use of a TENs unit purchased by his wife although he did not specify if the device was used on his left elbow. Dr. Gilbert assessed 9% impairment attributable to Plaintiff's left elbow. He documented Plaintiff's reported symptoms and stated there were exam findings of reproducible weakness. Dr. Lyon felt 0% impairment existed for the left elbow injury regardless of causation.

After reviewing the evidence, the ALJ finds Dr. Gilbert has provided the most accurate assessment of whole person impairment. Thus, the ALJ finds Plaintiff retains a 9% impairment rating under the AMA Guides as a

> direct result of his work-related cumulative trauma to his left elbow

American asserted several arguments in its Petition for Reconsideration, including requesting additional findings on the issue of an injury as defined by the Act and notice. American did not raise as an issue the financial responsibility for the CWP evaluation.

The November 1, 2021, Order overruling the Petition for Reconsideration contains the following additional findings:

> This matter is before the Administrative Law Judge on an October 7, 2021 Petition of Reconsideration by Defendant asserting patent error on the face of the September 24, 2021 Opinion, Award, and Order with respect to the finding that Filback sustained cumulative trauma injury to his left elbow. Defendant also raises issues with respect to notice, causation, and compensability of medical expenses associated with the cumulative trauma injury to the left elbow. Filback has responded to the Petition.
>
> KRS 342.281 provides that an ALJ is limited on review of petition for reconsideration to correction of errors patently appearing on the face of the award, order, or decision. Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).
>
> First, Defendant argues patent error with respect to findings on notice. The ALJ does not believe Defendant points to patent error. In the Opinion, it was found Filback provided due and timely notice of the alleged injury. In reaching this finding, the Opinion reflects that all evidence was fully considered. The evidence including, but not limited to, Filback's credible testimony as to the onset of symptoms in the elbow beginning within the year prior to his November, 2020 deposition; the May, 2020 records from Dr. Rushing providing a causation statement; and a July, 2020 notice letter provided to Defendant reflect due and timely notice consistent with relevant and applicable law.

Defendant also asserts patent error in finding that Filback met his burden to prove cumulative trauma to his left elbow, entitling him to reasonable and necessary medical treatment. While Defendant asserts inconsistency in the Opinion rising to the level of patent error, the ALJ again does not believe Defendant points to patent error.

The Application for Resolution of Injury filed on behalf of Filback asserts cumulative trauma injuries to his back, left elbow, hands, and arms individually. Each party submitted medical evidence proffering opinions as to the nature and/or medical cause associated with each alleged body part.

The Opinion indicates all evidence was fully considered in determining Filback met his burden to prove cumulative trauma injury to his left elbow based upon the opinions of Dr. Gilbert. The evidence including Filback's credible testimony as to his job duties with Defendant as well as his continued symptoms in his left elbow and difficulty lifting items. Further, the records of Dr. Rushing diagnose left elbow degenerative joint disease due to Filback's work activities, which are consistent with Dr. Gilbert's opinions.

Dr. Gilbert's report reflects a medical history was taken from Filback as well as an examination and review of records including the records of Dr. Rushing. Ultimately, he diagnosed probable osteoarthrosis and reproducible left elbow weakness due to cumulative trauma. Dr. Gilbert's opinions were found to be the most credible and persuasive with respect to the left elbow injury as his opinions are most consistent with the other evidence of record. Further, reasonable and necessary medical expenses attributable to the work-related left elbow cumulative trauma injury were also found compensable consistent with relevant and applicable case law.

Defendant's Petition is a re-argument of the merits of the claim on these issues. Accordingly, Defendant's Petition is overruled.

## ANALYSIS

American first asserts the ALJ erred in finding Filback provided timely notice of his cumulative trauma left elbow injury. It asserts Filback provided notice of his claims for CWP and cumulative trauma injuries by certified letter on July 10, 2020. However, American notes the first medical opinion supporting Filback's claim for injuries due to cumulative trauma is expressed in Dr. Gilbert's December 17, 2020, Independent Medical Evaluation; consequently, the notice requirement is not triggered until that date. On this issue, we affirm.

KRS 342.185(3), as enacted by House Bill 2, effective July 14, 2018, states as follows:

> The right to compensation under this chapter resulting from work-related exposure to cumulative trauma injury shall be barred unless notice of the cumulative trauma injury is given within two (2) years from the **date the employee is told by a physician that the cumulative trauma injury is work-related.** An application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years **after the employee is told by a physician that the cumulative trauma injury is work-related.** However, the right to compensation for any cumulative trauma injury shall be forever barred, unless an application for adjustment of claim is filed with the commissioner within five (5) years after the last injurious exposure to the cumulative trauma. (Emphasis added).

In Anderson v. Mountain Comprehensive Health Corporation, 628 S.W.3d 10 (Ky. 2021), the Kentucky Supreme Court held that the newly enacted version of KRS 342.185(3) contains no requirement to provide notice "as soon as practicable" in cumulative trauma injury cases. The Court held, in relevant part, as follows:

> **Clearly, on its face, KRS 342.185(3) provides a bright-line two-year limitation period from the date the plaintiff is told her cumulative trauma is work-related. Additionally, it establishes a firm five-year repose period from the date of last exposure. Neither limitation includes a further provision that notice to the employer be provided "as soon as practicable.** (emphasis added).

Id. at 15.

Consequently, pursuant to the recently enacted version of KRS 342.185(3), a cumulative trauma injury claim need only be filed within the two-year statute of limitations set forth in KRS 342.185(3). Further, the Supreme Court determined the changes in KRS 342.185(3) are retroactive and "apply to 'all claims irrespective of the date of injury or last exposure.'"

Significantly, an employee is not prohibited from giving notice of a gradual injury at an earlier date if he/she suspect the associated symptoms are the product of work activities. American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). As held by the Supreme Court in American Printing House, supra, "nothing prohibits a worker who thinks she has sustained a work-related gradual injury from reporting it to her employer before the law requires her to do so, and nothing prevents her from reporting an injury that she thinks is work-related before a physician confirms her suspicion." Id. at 149.

The ALJ determined Filback was first diagnosed with work-related cumulative trauma injuries by Dr. Rushing on May 7, 2020. Our review of Dr. Rushing's May 7, 2020, report and Medical Questionnaire reveals the ALJ's determination is supported by substantial evidence. As set forth previously herein, Dr. Rushing diagnosed lumbar osteoarthritis, left elbow joint disease, and bilateral

carpal tunnel syndrome, and in the Medical Questionnaire, Dr. Rushing checked "yes" by the following question: "1. Do you believe that his present medical issues to his back, left elbow, hands and arms are caused, either wholly or in part, by his job activities in the coal industry?" The record further shows that on July 10, 2020, only two months after being informed by Dr. Rushing that his injuries are work-related, Filback provided notice of his injuries to American via certified letter.

American's assertions to the contrary, Filback's testimony regarding why he stopped working for American in March 2020 has no bearing on the issue of notice. Further, assuming, *arguendo*, Dr. Gilbert was the first physician to inform Filback of his work-related cumulative trauma injuries, this does not render Filback's notice of July 10, 2020, suspect or invalid. In other words, the fact that Dr. Gilbert, on December 17, 2020, also diagnosed work-related cumulative trauma injuries did not prevent Filback from providing notice earlier, particularly since the ALJ has concluded, as is within her discretion, that Dr. Rushing diagnosed work-related injuries on May 7, 2020. Since Filback filed his claim for work-related cumulative trauma injuries, which includes his left shoulder injury, within the two years mandated by KRS 342.185(3), the ALJ's determination regarding notice is affirmed.

American next asserts the ALJ erred by not apportioning medical expenses for the CWP evaluation, as she concluded Filback does not suffer from work-related CWP. We vacate the ALJ's finding regarding the financial responsibility for the CWP evaluation and remand for additional findings.

The statute implicated by the second issue on appeal is KRS 342.316(3)(b)4.h. which reads as follows:

> Within thirty (30) days of the receipt of the statement for the evaluation, the employer, insurer, or payment obligor shall pay the cost of the examination. Upon notice from the commissioner that an evaluation has been scheduled, the employer, insurer, or payment obligor shall forward the expenses of travel necessary to attend the evaluation at the state employee reimbursement rates to the employee within seven (7) days. **However, if the employee has alleged a pulmonary dysfunction but has not filed spirometric evidence as required by paragraph (a) of this subsection at the time the evaluation is scheduled by the commissioner, the employee will be responsible for fifty percent (50%) of the cost of the evaluation.** (emphasis added).

As an initial matter, we point out the ALJ must, after reviewing the record, determine whether Filback alleged a pulmonary dysfunction. The latter half of the above-cited statute is only applicable in the event Filback alleged a pulmonary dysfunction.[1] The ALJ has not made this determination. Should the ALJ determine Filback alleged a pulmonary dysfunction, she must then determine if Filback filed spirometric evidence "at the time the evaluation is scheduled by the commissioner." Since apportionment of cost for the University Evaluator was listed as a contested issue in the July 13, 2021, BRC Order, the ALJ is required to set forth the basic facts upon which her ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). Further, American asserted this argument in its brief to the ALJ.

[1] We point out that nowhere in his brief to this Board does Filback claim he did not allege a pulmonary dysfunction.

However, should the ALJ conclude Filback did not allege a pulmonary dysfunction, the latter part of KRS KRS 342.316(3)(b)4.h. is not applicable. Consequently, the ALJ need not determine if Filback filed spirometric evidence "at the time the evaluation is scheduled by the commissioner," as apportionment would not be appropriate. We acknowledge American did not raise this issue in its Petition for Reconsideration; however, as a mixed issue of law and fact, the Board's standard of review is *de novo,* and we are able to request additional findings even though American did not. *See* Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991).

We are compelled to point out that in resolving this issue, the ALJ set forth a one-sentence conclusory statement indicating American provided "no evidence that the statutory requirement under KRS 342.316(3)(b)4h has been met to compel 50% of the costs be borne by Plaintiff." However, this conclusory statement inappropriately shifted the burden of proof onto American to prove Filback did not file spirometric evidence when this is not suggested by the statute. On remand, if the ALJ determines a pulmonary dysfunction was alleged, she is required to resolve whether the statute has been satisfied based upon an examination of the evidence in the record. In other words, the ALJ is required to determine if Filback filed spirometric evidence "at the time the evaluation is scheduled by the Commissioner."

Finally, American asserts the ALJ erroneously concluded Filback's alleged cumulative trauma left elbow injury is work-related since it was, as argued, "medically inextricable from other claimed injuries that were dismissed (hands, back, arms)." On this issue, we affirm the ALJ.

Filback bore the burden of proving each of the essential elements of his cause of action, including causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Filback was successful in his burden, the question on appeal is whether substantial evidence of record supports the ALJ's decision. 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 an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department

Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In finding Filback sustained a work-related left elbow injury, the ALJ relied upon Dr. Gilbert's opinions. In the December 17, 2020, Form 107, previously set forth herein, Dr. Gilbert diagnosed "[l]umbar radiculopathy left greater than right secondary to cumulative trauma and aggravation of grade 1 spondylolisthesis at L5-S1 which would have been previously asymptomatic with bilateral carpal tunnel syndrome with numbness and weakness on exam, probable osteoarthrosis and reproducible left elbow and shoulder weakness due to cumulative trauma." Dr. Gilbert opined that Filback's injuries are attributed to "the work event as described to [him]" and he assessed a 29% whole person impairment rating pursuant to the AMA Guides apportioned as follows:

a. Lumbar radiculopathy – 13%

b. Bilateral carpal tunnel syndrome, i.e. median neuropathy and osteoarthrosis – 10%

c. Left elbow weakness – 9%

*Nothing* within Dr. Gilbert's report suggests Filback's alleged injuries are inseparable. Dr. Gilbert diagnosed *separate* injuries to *different* body parts and assessed *separate* and *distinct* impairment ratings for each one. As Dr. Gilbert's report

constitutes substantial evidence supporting the ALJ's determination Filback sustained a work-related left elbow injury, we affirm.

Accordingly, the ALJ's determinations in the September 24, 2021, Opinion, Award, and Order and the November 1, 2021, Order that Filback provided due and timely notice and sustained a left elbow injury are **AFFIRMED**. The ALJ's decision with respect to the party or parties responsible for the CWP evaluation is **VACATED**. This claim is **REMANDED** for additional findings of fact, including whether Filback alleged a pulmonary dysfunction, and a decision in accordance with the views expressed herein.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON JAMES B COMPTON **LMS**
2452 SIR BARTON WAY STE 300
LEXINGTON KY 40509

**COUNSEL FOR RESPONDENT:**

HON MCKINNLEY MORGAN **LMS**
HON DAN SCOTT **LMS**
921 S MAIN ST
LONDON KY 40741

**ADMINISTRATIVE LAW JUDGE:**

HON TONYA CLEMONS **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601