Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 25, 2022

CLAIM NOS. 202000191, 202000190,
202000189 & 201871446

MURRAY ENERGY CORPORATION PETITIONER

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

MARK SMITH;
MUHLENBERG COUNTY COAL and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
AND ORDER

* * * * * *

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

ALVEY, Chairman. Murray Energy Corporation ("Murray Energy") appeals from the September 3, 2021 Opinion, Award and Order rendered by Hon. Jonathan R, Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded Mark Smith ("Smith") permanent partial disability ("PPD") benefits for an acute right knee injury

he sustained on June 27, 2018. The ALJ also awarded PPD benefits for injuries to Smith's left knee, left shoulder, and neck caused by cumulative trauma, commencing on March 2, 2019. No party filed a petition for reconsideration from the September 3, 2021 Opinion.

On appeal, Murray Energy argues the ALJ awarded benefits against the incorrect party in violation of a valid stipulation. Murray asserts the stipulation that Smith sustained injuries caused by cumulative trauma on December 27, 2019 establishes that as the date of manifestation. Therefore, according to Murray Energy, the ALJ erred in finding it liable, since Smith's employer on that date was Muhlenberg County Coal ("Muhlenberg"). Murray Energy argues the Opinion is analogous to apportionment, which is forbidden in claims concerning injuries caused by cumulative trauma. Murray Energy also argues the ALJ failed to terminate the award of PPD benefits upon the attainment of age seventy or four years after Smith's injury or exposure, whichever occurs last, in accordance with KRS 342.730(4). We find substantial evidence supports the ALJ's determinations and no petition for reconsideration was filed. We also determine the word manifestation for the date marking an injury caused by cumulative trauma is not synonymous with manifestation for purpose of providing notice. Therefore, we affirm.

Smith filed a Form 101 (Claim Number 2018-71446) on February 10, 2020 alleging an acute right knee injury on June 27, 2018 when he slipped while walking the beltline and twisted his right knee. Smith identified Murray Energy as his employer.

On February 11, 2020, Smith filed another Form 101 (Claim Number 2020-00189) alleging injuries to his left knee, low back, shoulders, and neck caused by cumulative trauma. He listed Murray Energy as his employer, and identified December 27, 2019 as the injury date, which also is the day he was laid off from his employment. In support of the Form 101, Smith filed the questionnaire and treatment record of Dr. James Rushing, D.C. On the same date, Smith also filed a Form 103 alleging occupational hearing loss (Claim Number 2020-00190) and a Form 102 alleging coal workers' pneumoconiosis ("CWP") (Claim Number 2020-00191).

The four claims were consolidated by the ALJ on February 20, 2020. We will not discuss the evidence pertaining to the hearing loss and CWP claims since they are not subject to this appeal.

Initially, counsel for Murray Energy only litigated and defended the acute right knee injury claim while counsel for Muhlenberg litigated and defended the hearing loss, CWP, and claims for injury caused by cumulative trauma. Counsel for Murray Energy withdrew as counsel for all claims against it except for the acute injury claim. Counsel for Muhlenberg filed notices of representation for the hearing loss, CWP, and injuries caused by cumulative trauma. Counsel for Muhlenberg also filed a "Notice of Correct Employer and Motion to Substitute Employer Name" for the hearing loss, CWP, and injuries caused by cumulative trauma claims. The Notice stated the appropriate Employer is Muhlenberg, as insured by Zurich, and not Murray Energy. It moved to substitute the Employer's name from Murray Energy to Muhlenberg. The ALJ sustained this motion on April 9, 2020.

Smith testified by deposition on April 20, 2020 and March 9, 2021, and at the final hearing held September 30, 2020. Smith was born in 1953 and resides in Madisonville, Kentucky. Smith testified Ken America is a subsidiary of Murray Energy. He began working for Ken America/Murray Energy on September 11, 2006. He initially worked as a shuttle car driver for approximately three years and then in mine maintenance constructing ventilation systems for two years. He then worked as a belt examiner for approximately eight years. He was required to walk and examine the belt line while carrying his tools, repair or remove defective rollers weighing up to seventy pounds, and clear debris and rock. He regularly worked in tight low spaces, in awkward positions, and on rough terrain. Smith attributed his shoulder, low back, neck, and knee conditions mainly to his work activities as a belt examiner.

Smith continued to work as a belt examiner for Murray Energy until he injured his right knee on June 27, 2018 when he slipped on the muddy ground and twisted his right knee. Thereafter, he continued to work regular duty for several weeks before he sought treatment with Dr. David Bealle, who surgically repaired a torn meniscus. Smith received temporary total disability ("TTD") benefits from July 26, 2018 through September 25, 2018. Smith returned to work for Murray Energy in September 2018 and was immediately placed in a different position with the safety department where he programmed dust pumps worn by miners and sent collected information from the pumps to MSHA until March 2, 2019.

On March 3, 2019, Smith began working for Muhlenberg, also a subsidiary of Murray Energy. He moved to a different location but performed the

same job in the safety department until he was laid off on December 27, 2019. Smith testified he is able to perform the safety job; however, due to ongoing right knee problems, he does not believe he is able to return to his mining job at Murray Energy.

Smith ultimately underwent a left knee replacement in March 2020 and a right knee replacement in June 2020. He has not sought treatment for his neck or shoulders. Smith acknowledged he sought treatment for his low back with a chiropractor in 2013 or 2014. Smith testified the chiropractor informed him his low back condition was caused by his work activities as a belt examiner. Smith received unemployment benefits and currently draws regular Social Security benefits.

In support of his claim, Smith filed records from Dr. Bealle, the July 16, 2020 report of Dr. John Gilbert, and the April 6, 2021 report by Dr. Larry Oteham. In a letter dated February 27, 2020, Dr. Bealle noted Smith sustained a right knee complex/displaced medial meniscus tear caused by the June 27, 2018 work injury and he underwent a surgical repair. Dr. Bealle opined Smith attained maximum medical improvement ("MMI") on August 21, 2018 and assessed a 3% impairment rating pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Bealle opined Smith retains the physical capacity to return to work and imposed no restrictions for the June 2018 injury.

On March 9, 2020, Dr. Bealle performed a left total knee arthroplasty. He noted a post-operative diagnosis of advanced primary osteoarthritis of the left knee with varus alignment. On June 1, 2020, Dr. Bealle performed a total right knee

arthroplasty. He noted a post-operative diagnosis of advanced primary osteoarthritis of the right knee with varus alignment.

Dr. Gilbert examined Smith on July 16, 2020. He noted Smith worked as a belt examiner, shuttle car operator, and pinner in the coal mining industry for the past sixteen years. After performing an examination and reviewing the medical records, Dr. Gilbert diagnosed bilateral total knee replacements secondary to cumulative trauma; left shoulder degenerative joint disease; pain and weakness; and cervical and lumbar radiculopathy and degenerative joint disease. Dr. Gilbert opined the above diagnoses are "all due to cumulative trauma as well as injuries." Dr. Gilbert assessed a 15% impairment rating for the right knee, 15% impairment rating for the left knee, 15% impairment rating for the cervical radiculopathy, 15% impairment rating for lumbar radiculopathy, and 5% impairment rating for the left shoulder, pursuant to the AMA Guides. Dr. Gilbert opined Smith had no active impairment prior to the injury and attained MMI on July 16, 2020. Dr. Gilbert opined Smith does not have the physical capacity to return to former work as a coal miner and is totally disabled. In a September 3, 2020 supplemental report, Dr. Gilbert clarified the 15% impairment rating he assessed for the right knee is related to the acute injury sustained on June 27, 2018.

Dr. Oteham examined Smith's knees on April 6, 2021. He noted Smith has a sixteen-year history in the coal mining industry, fifteen of which were underground and required frequent kneeling, squatting, crawling, and lifting. He noted Smith worked light duty at Muhlenberg until 2019. He noted Smith underwent a right knee arthroplasty in June 2018, a total left knee replacement in

March 2020, and a total right knee replacement in June 2020. Dr. Oteham opined there is a causal relationship between Smith's complaints and the reported injury as well as the cumulative exposure he sustained during his activity as an underground coal miner. He opined cumulative trauma caused by Smith's underground activity for his many years of service contributed to no less than 50% of the degenerative changes that required the total knee arthroplasties in both knees. He opined Smith had attained MMI and assessed a 15% impairment rating for each knee pursuant to the AMA Guides.

Muhlenberg filed Dr. Thomas O'Brien's May 18, 2020 report. He noted Smith's work as an underground coal miner/belt examiner with Ken America from 2006 to March 2019 and his brief employment at Muhlenberg in an office job. Dr. O'Brien diagnosed advanced bilateral degenerative arthritis of the knees unrelated to his work activities as a coal miner or his brief period performing office work for Muhlenberg. Dr. O'Brien opined Dr. Bealle's treatment is unrelated to Smith's work as a coal miner and is the result of the progressive natural history of degenerative arthritis (bilateral) in an elderly man with genu varus deformity of the knees. He found the March 2020 surgery appropriate but unrelated to his work activities as a coal miner. Similarly, Dr. O'Brien opined Smith's subjective complaints regarding his low back, shoulders, and neck are unrelated to his work activities with Murray Energy or Muhlenberg. Regardless of causation, Dr. O'Brien assessed a 0% impairment rating for the low back, neck, and shoulders, a 15% impairment rating for the left knee surgery and a 1% impairment rating for the 2018 right knee procedure pursuant to the AMA Guides. He noted Smith is a candidate

for total right knee arthroplasty, though it is unrelated to his work activities. Dr. O'Brien declined to assign restrictions and opined Smith can return to both his work activities with Muhlenberg and Murray Energy.

The ALJ rendered an Opinion in December 2020. However, based upon Petitions for Reconsiderations filed by Murray Energy and Muhlenberg, the ALJ struck the Opinion from the record by Order dated December 17, 2020, and it has been deleted from LMS. He joined Muhlenberg and Murray Energy to Claim Numbers 2020-00189, 2020-00190, 2020-00191, and 2018-71446, and provided additional time for the submission of proof in defense of all claims.

Smith subsequently filed a motion to show both Murray Energy, d/b/a Ken American and Murray Energy d/b/a Muhlenberg as parties. The ALJ granted Smith's motion on March 12, 2021 and extended time to submit proof. Smith also submitted the April 6, 2021 report by Dr. Oteham.

A Benefit Review Conference ("BRC") was held on September 30, 2020. The parties stipulated, "Plaintiff sustained a work-related injury or injuries on: 12/27/19 (CT, CWP, HL); 6/27/2018 (Rt. Knee only)." The parties also stipulated TTD benefits were paid for the right knee injury only from July 26, 2018 through September 25, 2018. The following were identified as contested issues: benefits per KRS 342.730; work-relatedness/causation, unpaid or contested medical expenses; injury as defined by Act; credit for unemployment benefits; exclusion for pre-existing disability/impairment; proper use of the AMA Guides, benefits per KRS 342.732; statute of limitations/repose; **manifestation date**; and benefits per KRS 342.730. (Emphasis added)

At the final hearing, the ALJ reviewed the stipulations and contested issues contained in the BRC Order. The ALJ noted the parties stipulated, "that the plaintiff sustained a right knee injury on June 27th of 2018, and that his last day of employment for the cumulative trauma, [CWP] and hearing loss claims is December 27th of 2019 . . ." The ALJ also confirmed the contested issues for determination included manifestation date.

The ALJ rendered an Opinion on September 3, 2021. He first determined Smith was last employed for a minimum of one year for Murray Energy d/b/a Ken America and he is entitled to medical expenses related to his occupational hearing loss pursuant to KRS 342.7305. The ALJ next determined Smith failed to establish the presence of CWP or any other occupationally acquired disease related to the exposure of coal dust, and dismissed that claim. The ALJ also dismissed Smith's low back injury claim allegedly caused by cumulative trauma. He noted Smith testified his chiropractor advised him his low back problems were caused by his work activities no later than 2013. Therefore, the ALJ found Smith's low back condition manifested in 2013 and his claim for benefits related to that condition is barred by the two-year statute of limitations contained in KRS 342.185(3).

The ALJ next determined Smith sustained an acute right knee injury on June 27, 2018. He relied upon Dr. Bealle's opinions and found Smith sustained a 3% impairment rating due to the June 27, 2018 work injury.

The ALJ made the following findings regarding Smith's alleged injuries to his left knee, neck, and shoulders caused by cumulative trauma, *verbatim:*

> 32. The ALJ finds that the Plaintiff testified credibly about the duties that he performed during his coalmining career and about the physical toll that these duties exacted upon his body. The ALJ finds that this credible testimony of the Plaintiff supports the findings of Dr. Gilbert in this matter who diagnosed impairments to the cervical spine, the left knee, and to the left shoulder.
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> 33. The ALJ specifically finds that Dr. Gilbert's impairment ratings and restrictions are consistent with the Plaintiff's credible description of years of duck walking in low coal and repeatedly hitting his head on the roof while working for Murray Energy d/b/a Ken America.
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> 34. The ALJ finds based upon the testimony of the Plaintiff that his safety position with Muhlenberg County Coal did not contribute to his cumulative trauma injuries because his duties were sedentary and consisted of office work. The Plaintiff specifically testified that he did not go underground or perform any of the physically demanding duties that he described performing for Murray Energy d/b/a Ken America while at Muhlenberg County Coal. The ALJ therefore finds that the last employer for the purposes of the Plaintiff's cumulative trauma injuries was Murray Energy d/b/a Ken America.
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> 35. Dr. Gilbert credibly assessed a 15% whole person impairment to the left knee, 15% for cervical radiculopathy, and 5% for the left shoulder, with the mechanism of injury being cumulative trauma. This opinion has convinced the ALJ and the ALJ finds based upon the credible determinations of Dr. Gilbert and the application of the combined values chart that the Plaintiff has sustained a 24% whole person impairment attributable to work-related cumulative trauma suffered during the Plaintiff's employment for Murray Energy d/b/a Ken America which ended as of March 2, 2019.

Regarding Smith's injuries allegedly caused by cumulative trauma, the ALJ determined Smith does not retain the physical capacity to return to his former job as a belt examiner. However, since Smith returned to work in the safety position

earning the same or greater wages until he was laid off, the ALJ performed a Fawbush analysis. The ALJ ultimately determined enhancement by the three-multiplier pursuant to KRS 342.730(1)(c)1 is appropriate. The ALJ determined Smith is not permanently totally disabled.

The ALJ awarded Smith PPD benefits against Murray Energy d/b/a Ken America and/or its insurer the sum of $12.41 per week commencing on June 27, 2018 and continuing for a period not to exceed 425 weeks. The ALJ also awarded Smith PPD benefits against Murray Energy d/b/a Ken America, and/or its insurer the sum of $825.40 per week commencing on March 2, 2019 and continuing for a period not to exceed 425 weeks. The ALJ noted, "All benefits shall terminate four years after the date of the injury or on the Plaintiff's seventieth birthday whichever last occurs." The ALJ awarded medical expenses for the acute right knee injury and the left knee, neck, and shoulder injuries caused by cumulative trauma. No petition for reconsideration was filed from the September 3, 2021 Opinion.

On appeal, Murray Energy argues benefits were awarded against the incorrect party in violation of a valid stipulation. Murray Energy asserts the ALJ disregarded the stipulation that Smith sustained injuries caused by trauma injuries on December 27, 2019 when the ALJ found Murray Energy d/b/a Ken America was his last employer regarding his injuries caused by cumulative trauma. Murray Energy notes the parties stipulated at the BRC that Smith sustained work-related injuries on December 27, 2019 regarding Smith's hearing loss, CWP, and injuries caused by cumulative trauma. It further noted that at the final hearing, the ALJ stated the parties stipulated that Smith's last day of employment for the alleged

injuries caused by cumulative trauma, CWP, and hearing loss claims was December 27, 2019. Murray Energy argues the parties are bound to this stipulation and noted no party moved to be relieved from it. Murray Energy asserts, "The date of manifestation was clearly stipulated as December 27, 2019 in the [BRC Order]. As such, the ALJ erred in awarding Respondent Smith cumulative trauma benefits against Petitioner. Respondent Smith's employment with Petitioner ended in March 2019 and the stipulation renders the award a legal impossibility."

Murray Energy also argues the Worker's Compensation Act does not allow for apportionment of benefits in claims for injuries caused by cumulative trauma. Murray Energy asserts that while the September 3, 2021 opinion "does not expressly state Respondent Smith's benefits were apportioned, the effect of the decision is analogous to apportionment" since the ALJ ignored the stipulated manifestation date and determined Smith's claim should have accrued against it.

Finally, Murray Energy argues that any award of PPD benefits should be limited in duration pursuant to KRS 342.730(4). Murray Energy requests correction of the error in awarding Smith PPD benefits for a period not to exceed 425 weeks, to reflect the award "shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs." KRS 342.730(4).

As the claimant in a workers' compensation proceeding, Smith had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Smith was successful in that burden, the question on appeal is whether there was substantial

evidence of record to support 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). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof 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).

Importantly, Murray Energy did not file a petition for reconsideration from the September 3, 2021 Opinion. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, on appeal, we must determine whether substantial evidence supports the ALJ's decision.

We first reject Murray Energy's argument that income benefits were awarded against the incorrect party in violation of a valid stipulation. Murray Energy is correct that 803 KAR 25:010 §13(12) states that only contested issues shall be subject of further proceedings. The purpose of a BRC is to expedite the processing of a claim and avoid the need for a hearing, if possible. Issues that are not listed as contested at a BRC cannot be the subject of further proceedings. 803 KAR 25:010 §16(2) allows a party to be relieved of a stipulation, upon cause shown, if a motion is filed at least ten days prior to the hearing.

The BRC Order reflects the parties did not stipulate December 27, 2019 as the manifestation date, as alleged by Murray Energy. In the "Other" section, "Benefits per KRS 342.732; Statute of Limitations/Repose; **Manifestation**

Date; Benefits per KRS 342.7305" were listed as additional contested issues. (emphasis added). At the final hearing, the ALJ also confirmed the contested issues, which included manifestation date. Therefore, we determine the date of manifestation of Smith's injuries caused by cumulative trauma was a contested issue and not stipulated by the parties.

We also note manifestation is a separate issue from when the injury occurred. Significantly, a manifestation date is only necessary for providing notice and determining whether a claim is timely filed. KRS 342.185(1) requires providing notice of an injury "as soon as practicable". Any claim for benefits to a resulting injury must be filed within two years "after the date of accident" or following the suspension of payment of income benefits, whichever is later. The Kentucky Court of Appeals, in Randall Co. v. Pendland, 770 S.W.2d 687 (Ky. App. 1989), adopted a rule of discovery regarding injuries caused by cumulative trauma, holding the date of injury is when the disabling reality of the injuries becomes manifest. Therefore, in injury claims caused by cumulative trauma, the date for giving notice and for clocking the statute of limitations is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999).

In Ford Motor Company v. Duckworth, 615 S.W.3d 26 (Ky. 2021), the Kentucky Supreme Court noted manifestation can have dual meanings in cumulative trauma claims. The date symptoms or disability arises may be the start date for liability. This differs from the manifestation date for providing notice which arises when, "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101

(Ky. 1999). Consequently, "for cumulative trauma injuries, the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised by a physician that he has a work-related condition." Consol of Kentucky, Inc. v. Goodgame, 479 S.W.3d 78, 82 (Ky. 2015). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. *See* American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and advise it is work-related. We additionally note that date of injury and date of manifestation are not necessarily synonymous.

Therefore, we determine the manifestation date for Smith's alleged injuries caused by cumulative trauma was properly preserved as a contested issue in the BRC Order and the ALJ acted within his discretion in finding "the last employer for the purposes of the Plaintiff's cumulative trauma injuries was Murray Energy d/b/a Ken America." In light of the above finding, we also reject Murray Energy's argument the ALJ's opinion effectively amounted to apportionment. The ALJ determined Smith's brief employment with Muhlenberg from March 3, 2019 to December 27, 2019 did not contribute to his cumulative trauma injuries because his duties were sedentary and consisted of office work. The ALJ determined Smith's injuries caused by cumulative trauma solely resulted from his work activities with Murray Energy, a finding which was not appealed by either party.

Finally, we find no merit in Murray Energy's last argument. In the "Order" section of the opinion, the ALJ specifically stated, "All benefits shall terminate four years after the date of the injury or on the Plaintiff's seventieth

birthday whichever last occurs." We determine this language is sufficient to trigger the application of KRS 342.730(4) to the award of PPD benefits.

Respondent, Muhlenberg County Coal requested an oral argument be held. After having reviewed the record, **IT IS HEREBY ORDERED AND ADJUDGED** an oral argument is unnecessary in arriving at a decision, and therefore the request is **DENIED**.

Accordingly, the September 3, 2021 Opinion, Award and Order rendered by Hon. Jonathan R, Weatherby, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

/s/ Michael W. Alvey
MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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