Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2020

CLAIM NO. 201477212 & 201467702

OLEN GOOD PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

APEX ENERGY INC.
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING AND REMANDING

* * * * * *

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

STIVERS, Member. Olen Good ("Good") seeks review of the August 20, 2018, Opinion and Award of Hon. John B. Coleman, Administrative Law Judge ("ALJ"), awarding income and medical benefits for a December 31, 2013, left wrist injury and a September 20, 2014, right hand injury. Relying upon the opinions of Dr. Bruce Guberman, the ALJ found Good sustained a left wrist injury resulting in a 16% impairment rating. The ALJ determined the two and three multiplier contained in

KRS 342.730(1)(c)1 and (1)(c)2 were applicable. The ALJ determined that, pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), Good is entitled to enhanced benefits via the two multiplier when his employment earning the same or greater wages ceases "for any reason, with or without cause, except where the reason is the employee's conduct shown to have been an intentional, deliberate action with reckless regard of the consequences either to himself or to another." Relying upon Dr. Guberman's opinions, the ALJ found Good sustained a 2014 right hand injury generating a 4% impairment rating. Since Good had no restrictions due to the injury, the ALJ found the three multiplier did not apply. However, since Good returned to work earning the same or greater wages, the ALJ found the two multiplier is applicable. Significantly, in the order section of the opinion, the ALJ did not direct the benefits would double in the event Good ceased earning the same or greater wages. However, in both awards the ALJ ordered, pursuant to House Bill 2, the income benefits terminated as of April 17, 2021, the date of Good's 70th birthday. Good also appeals from the September 13, 2018, Order ruling on the parties' petitions for reconsideration.

On appeal, Good challenges the ALJ"s decision on three grounds. Good first asserts the ALJ erroneously determined his award terminates on his 70th birthday. He argues that even though House Bill 2 become effective on July 14, 2018, the version of KRS 342.730(4) in effect at the time of his injury was declared unconstitutional. Thus, the version of KRS 342.730(4), effective July 14, 2018, terminating income benefits at the 70th birthday cannot have retroactive application to injuries occurring prior to the effective date of the legislation in question. Next, Good argues the amendment of KRS 342.730(4) is unconstitutional for the same reason as

held by the Kentucky Supreme Court in Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). Finally, Good argues the ALJ erroneously found his post-injury wages are equal to or greater than his pre-injury wages at the time of the injuries. Since he is not capable of performing his same job duties as a result of his injuries and is not being paid as much as he was being paid at the time of the injuries, Good argues entitlement to income benefits enhanced by the three multiplier. Good's argument seems to apply to both awards. We disagree and affirm. However, we remand for entry of an amended award to include in the order portion of the opinion and award that Good is entitled to an award of enhanced benefits in accordance with KRS 342.730(1)(c)2 and the holding in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

BACKGROUND

On July 5, 2016, Good filed two Form 101s. One alleges a December 31, 2013, left wrist injury occurring while in the employ of Apex Energy Inc. ("Apex"), and the other alleges a September 20, 2014, right wrist injury while in the employ of Apex. By Order dated August 19, 2016, the ALJ ordered the claims consolidated.

Good relied upon the report of Dr. Guberman and Apex relied upon the reports of Dr. Ronald Burgess. As previously noted, the ALJ rejected the opinions of Dr. Burgess and accepted the opinions of Dr. Guberman regarding the nature of the injuries and the impairment ratings attributable to both. The ALJ found the 2013 injury resulted in both the two and three multiplier being applicable, and after conducting a Fawbush analysis, determined enhancement of Good's income benefits by the two multiplier was more appropriate. Regarding the 2014 injury, the ALJ

determined the three multiplier was not applicable, but the two multiplier was and Good was entitled to enhanced benefits by the two multiplier.

As previously noted, the ALJ found KRS 342.730(4) as amended in 2018 applied to Good's claim. Both parties filed petitions for reconsideration. Good's petition for reconsideration primarily made the same argument he makes on appeal. Significantly, Good did not request additional findings or assert the ALJ erred in finding the three multiplier was not applicable to the 2014 injury. Similarly, Good did not question the ALJ's reasoning for finding enhancement of his permanent partial disability ("PPD") benefits by the two multiplier more appropriate to the 2013 injury. In the September 13, 2018, Order, the ALJ sustained Apex's petition for reconsideration and corrected a typographical error regarding the credit for temporary total disability benefits to which Apex was entitled. The ALJ denied Good's petition for reconsideration.

Good appealed and by Order dated January 4, 2019, this Board noted it was faced with one opinion from the Court of Appeals which held the new version of KRS 342.730(4) does not have retroactive application, and a more recent opinion which held the new version of KRS 342.730(4) has retroactive application. Since Holcim v. Swinford, 2018-CA-000414-WC, rendered September 7, 2018, Designated To Be Published, determining the newly enacted KRS 342.730(4) did not have retroactive application was on appeal to the Supreme Court, the appeal was removed from submission and placed in abeyance until a decision in Holcim v. Swinford was final.

On December 18, 2019, the Board ordered the appeal removed from abeyance and granted Good through and until January 17, 2020, to file a supplemental brief. Apex was granted through and including February 17, 2020, to file a supplemental brief. Good was granted through and including February 27, 2020, to file a reply brief, if so desired. The appeal would stand submitted for a decision as of February 27, 2020. Good has not filed a supplemental brief.

An extensive procedural and factual recitation of this litigation is unnecessary due to the limited issues on appeal.

ANALYSIS

The ALJ correctly determined KRS 342.730(4), as amended, which became effective on July 14, 2018, applies to Good's award of PPD benefits for each work injury. Pursuant to House Bill 2, signed by the Governor on March 30, 2018, and effective July 14, 2018, KRS 342.730(4) mandates as follows:

> All income benefits payable pursuant to this chapter 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. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the Supreme Court determined the amended version of KRS 342.730(4) has retroactive applicability and, in doing so, opined as follows:

> Lafarge also asserts that the Court of Appeals erred in addressing the retroactivity of KRS 342.730(4) at all - and, in the alternative, in holding that the statute is not retroactive. For the following reasons, while we hold

the Court of Appeals was correct in addressing the issue, we reverse its holding that the statute is not retroactive.

The ALJ acknowledged this Court's opinion in *Parker v. Webster County Coal, LLC (Dotiki Mine),* 529 S.W.3d 759 (Ky. 2017), in which we found the then-current version of KRS 342.730(4) unconstitutional on equal protection grounds. Since a portion of the statute had been ruled unconstitutional, the ALJ applied an earlier version of the statute which included a tier system. On appeal to the Workers' Compensation Board, Swinford argued he should receive the full 425-week award without the tier system from the previous version of the statute utilized by the ALJ. Lafarge argued the award should state that benefits should be payable to Swinford "for so long as he is eligible to receive them in accordance with KRS 342.730(4)." Lafarge noted that there were legislative efforts underway to re-examine the duration of benefits payable to older claimants under the Workers' Compensation Act.

The Board held that Swinford was entitled to the full 425-week period and Swinford did not pursue further appeal. Lafarge appealed to the Court of Appeals on this issue (along with the previously-discussed issue concerning Swinford's pre-existing condition). Lafarge pointed out that proposed legislation pending before the Kentucky General Assembly may further amend KRS 342.730. While the appeal was pending before the Court of Appeals, the amendment became effective. The amended version of KRS 342.730(4) reads:

> All income benefits payable pursuant to this chapter 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. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In determining which version of the statute to apply, the Court of Appeals discussed whether the statute was retroactive, and held that it was not. Therefore, it applied the statute in force at the time of Swinford's injury after severing the portion this Court had held unconstitutional. Based on that statute, it held that Swinford was entitled to receive benefits for 425 weeks.

On appeal to this Court, Lafarge argues that the Court of Appeals overstepped its bounds by addressing whether the newly-amended version of KRS 342.730(4) was retroactive. It argues that "the award in place in favor of Swinford indicated that permanent partial disability benefits would be payable for a period of 425 weeks, without limitation. The only issue regarding that award was whether the 425[-]week duration was correct." However, we fail to see how the Court of Appeals could have analyzed the duration of benefits without first ascertaining which version of the statute applied. Lafarge made the duration of benefits an issue. It cannot now complain that the Court of Appeals resolved this issue by determining whether a newly-amended statute impacting the duration of those benefits was applicable.

Lafarge asserts that even if the statute's retroactivity was properly before the Court of Appeals, that court erred in holding that KRS 342.730(4) was not retroactive. This difficult issue was created by the failure to codify subsection (3) of Section 20 of 2018 Ky. Acts ch. 40 as part of the Kentucky Revised Statutes (KRS). Codification means "[t]he process of compiling, arranging, and systematizing the laws of a given jurisdiction...." CODIFICATION, Black's Law Dictionary (11th ed. 2019). "The Legislative Research Commission shall formulate, supervise, and execute plans and methods for ... codification[ ] and arrangement of the official version of the Kentucky Revised Statutes." KRS 7.120(1). Subsection (2) of KRS 7.120 requires that "[t]he Commission shall prepare and submit to the General Assembly such consolidation, revision, and other matters relating to the statutes as can be completed from time to time."

After the legislature has passed an act and it is signed into law, then the official version of the Kentucky Revised Statutes shall be maintained by the Legislative Research Commission. KRS 7.131(1) ("[t]he Legislative

Research Commission shall maintain the official version of the Kentucky Revised Statutes....”). Furthermore, “[t]he official version of the Kentucky Revised Statutes shall contain all permanent laws of a general nature that are in force in the Commonwealth of Kentucky.” KRS 7.131(2). The General Assembly has mandated that courts shall rely on that official version. KRS 7.138(2)(a) states, “[i]n any judicial or administrative proceeding, the text of any codified Kentucky statute which is submitted or cited by a party or *upon which the court … relies shall be that text contained in the official version of the Kentucky Revised Statutes*....” (Emphasis added.)

The maintenance of the Kentucky Revised Statutes is vital for research and understanding the laws under which we must live, function and plan future actions. Anyone who is seeking to know the law researches the Kentucky Revised Statutes. It would be impractical and extremely difficult if people had to search all the acts of every legislative session in order to advise clients or know what law to follow. It is essential that the official version of the Kentucky Revised Statutes be accurate and up to date.

The reviser of statutes “shall be appointed by the [Legislative Research] Commission upon recommendation of the director.” KRS 7.140(1). The reviser of statutes has the duty to execute the functions set forth in KRS 7.120, 7.131, 7.132, 7.134, 7.136, 7.138, and 7.140 for the Legislative Research Commission. KRS 7.140(1). This includes the duty to “formulate, supervise, and execute plans and methods for ... codification[ ] and arrangement of the official version of the Kentucky Revised Statutes.” KRS 7.120(1). The reviser of statutes has the duty to prepare and submit to the General Assembly such revisions of the statutes as can be completed from time to time. KRS 7.120(2). The reviser of statutes also has the duty to execute the Legislative Research Commission’s function of maintaining the official version of the Kentucky Revised Statutes. KRS 7.131.

The dilemma facing the Court in this case is that portions of the Act passed by the General Assembly were completely omitted from the official version of the Kentucky Revised Statutes. A Legislative Research

Commission note appears below the official version of KRS 342.730(4) stating:

> This statute was amended in Section 13 of 2018 Ky. Acts ch. 40..... Subsection (3) of Section 20 of that Act reads, "Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims: (a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and (b) That have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act."

However, it failed to include it in the official version of KRS 342.730. KRS 7.134(1)(c) requires that certified versions of the Kentucky Revised Statutes shall contain "[t]he text of laws contained in the applicable version of the Kentucky Revised Statutes...." Subsection (1)(f) provides that the Legislative Research Commission and the reviser of statutes may include "[a]ny annotations, historical notes, and other information that the Commission deems appropriate to include." These two subsections make it clear that the text of laws in the official version of the Kentucky Revised Statutes and the Legislative Research Commission notes are separate and distinct.

Lafarge points out that "not all legislation passed by our Legislature becomes codified." Lafarge's argument is based on the example of the budget of the Commonwealth of Kentucky which has the force of law but is not embodied in any statute. KRS 7.131(2) requires that "[t]he official version of the Kentucky Revised Statutes shall contain all permanent laws of a general nature that are in force in the Commonwealth of Kentucky." Subsection (3) of that statute specifically provides that "the Commission may omit all laws of a private, local, or temporary nature, including laws for the appropriation of money...." The statute requires that all permanent laws of a general nature shall be included in the official version of the Kentucky Revised Statutes, but the Commission may omit laws for the appropriation of money (i.e., the budget).

While the Act in the present case is not an appropriations bill, those are not the only laws exempt from codification. KRS 7.131(3) states that the Legislative Research Commission "may omit all laws of a private, local, or temporary nature." Here, the language in the Act regarding retroactivity is temporary. It applies to those cases which "have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal as not lapsed, as of the effective date of this Act." For any new injuries and claims, the retroactivity of the Act will not be an issue. Therefore, the language is only relevant to a particular time frame and once cases arising during that time frame are fully adjudicated, it will be unnecessary. Therefore, due to the temporary nature of the language regarding retroactivity in the Act, codification was not required.

Lafarge cites *Baker v. Fletcher,* 204 S.W.3d 589 (Ky. 2006), a case concerning a budget act. Therein, we stated, "[t]hough it is clear that the General Assembly must expressly manifest its desire that a statute apply retroactively, magic words are not required." *Id.* at 597. In that case, we looked to language contained in the Act in question in order to determine that the legislature intended that it apply retroactively. As noted, budgets are exempt from codification requirements—as are temporary laws. Therefore, in both that case and the case at bar this Court may go to the language of the Act to determine retroactivity.

This Court has great respect for the language the General Assembly included in the official Kentucky Revised Statutes. The General Assembly made a clear pronouncement regarding retroactivity in KRS 446.080(3): "[n]o statute shall be construed to be retroactive, unless expressly so declared." With no mention of retroactivity or any language from which retroactivity may be inferred, the express language of KRS 342.730(4) does not make the statute retroactive. However, the Legislative Research Commission note following the statute references the Act from which the statute was enacted and, as discussed, is exempt from the codification requirements, as it is temporary in nature. Thus, the legislature has made a declaration concerning retroactivity in this case.

> Since the newly-enacted amendment applies retroactively, it must be used to determine the duration of Swinford's benefits. We remand this matter to the ALJ to apply the time limits set out in the 2018 amendment to KRS 342.730(4).
>
> While Swinford attempted to belatedly challenge the constitutionality of the amendments to KRS 342.730(4), it did so only after the Court of Appeals had rendered its opinion. The Court of Appeals denied that issue as moot. Swinford did not file a cross-appeal to this Court to address that issue. Therefore, the constitutionality of the statute is not at issue before us in this case. Furthermore, the Attorney General was not timely notified of a constitutional challenge pursuant to KRS 418.075.

Id. at 43-44.

Whether the amended version of KRS 342.730(4) has retroactive effect has been decided by our state's highest court. The record in this litigation reveals Good's date of birth is April 17, 1951. Accordingly, the ALJ's determination to limit Good's awards of PPD benefits by the version of KRS 342.730(4) as amended in 2018 by House Bill 2 is affirmed.

Good also asserts retroactive applicability of the amended version of KRS 342.730(4) violates both the United States and Kentucky Constitutions. The Board, as an administrative tribunal, has no jurisdiction to rule on the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Consequently, we are without authority to render a decision upon Good's second argument. Thus, we must affirm on this issue.

Finally, we find no merit in Good's third argument the ALJ erred in finding he returned to work after each injury earning the same or greater wages. Good references the fact he was allowed to withdraw the stipulation contained in the June

13, 2018, Benefit Review Conference ("BRC") Order that he currently earns greater wages than before.[1] Good contends the ALJ misunderstood his testimony regarding his wages subsequent to the injuries in concluding the two multiplier was applicable. We disagree.

During his September 28, 2016, deposition, Good testified as follows:

> Q: Okay. Have you missed any work at all for either hands since your right hand injury?
>
> A: No, ma'am.
>
> Q: Okay. Are you earning the same amount at Apex as you were at the time of your first injury?
>
> A: Yes, ma'am.
>
> Q: And that is what?
>
> A: 16.98 per hour.
>
> Q: And you're working the same hours as you were back before your injury? The same amount of hours.
>
> A: Yes ma'am.
>
> Q: Same benefits as pre-injury?
>
> A: Yes, ma'am. Hang on a second.
>
> …

[1] A July 10, 2018, Order reads as follows:

> This matter is before the ALJ on the motion to amend the stipulation regarding the plaintiff's post injury average weekly wage. The plaintiff stipulated at the BRC to earning same or greater wages. However, at the final hearing, the plaintiff's testimony made it clear that this stipulation was incorrect. Both parties adequately addressed the issue at the final hearing. Therefore, with good cause shown, the plaintiff is relieved of the stipulation regarding the plaintiff's post injury average weekly wage.

Q: I think that off the record you had mentioned you wanted to clarify something about your hours. Have the amount of hours changed?

A: Yes, ma'am.

Q: Okay. Explain that to me.

A: We work between 85 and 90 hours a week.

Q: You work between 85 and 90 hours a week?

A: Yes, ma'am.

Q: Wow.

A: Six days a week.

Q: And before 12/31/13, how many hours were you working?

A: We were working approximately 65 to 70 hours a week.

Q: Okay. And how long have you been working 85 to 90?

A: Since December of last year.

Q: Do you get overtime?

A: Yes, ma'am.

Q: Time and a half?

A: Yes, ma'am.

Q: But still the same benefits as pre-injury?

A: Yes, ma'am.

Good described his job as follows:

A: Purchase – I'm purchasing agent, load and unload freight as it comes in, I pull freight off the shelf to ship it out, and we make hydraulic hoses.

…

Q: Yeah, just – I want to know if primarily you're at a computer, what you do physically, up and down. You don't have to walk me through hour by hour. Just an overview.

A: I'm probably 80 percent computer and telephone.

Q: Okay. And what's the other 20 percent?

A: Other 20 percent would be loading and unloading trucks with a forklift, pulling parts off the shelves for equipment.

Q: Okay.

A: And making hydraulic hoses.

Good later clarified his previous testimony concerning his earnings.

Q: I assume your hourly wage has gradually increased or increased at some point?

A: No, ma'am. We took some reductions in our wages –

…

Q: You're probably -- with your 85 to 90, is it safe to assume you're making as much as maybe you've ever made there?

A: No.

Q: Okay. Not true?

A: Not true.

Q: How much were you paid on your high end while you were at Apex?

A: Eighteen dollars – in the neighborhood of $18 per hour.

Q: And you got 85 to 90 hours a week?

A: Not at that time. We were getting about 70.

At the hearing, Good reiterated his deposition testimony and provided an in depth description of his job. He testified that prior to his first injury he was

working 80 hours a week. Good testified he underwent four surgeries as a result of the 2013 left wrist injury. Concerning his post-injury wages, he testified as follows:

> Q: All right. And after each one – when you returned after the first one did you go back to working eighty hours?
>
> A: Yes, I did.
>
> Q: All right. Were you making the same amount of money when you returned the first time?
>
> A: Yes, sir.
>
> Q: All right. Same hourly wages?
>
> A: Yes, sir.

However, Good testified when he returned to work after the first injury he was not performing the same job duties because he went to light duty. He explained as follows:

> A: When I went back I went back on light duty. They brought a guy from the night shift to day shift and he stayed with me up until May 5th of last year when he left for a better job.

Good described the change in his work duties following the 2013 injury:

> Q: All right. Have you ever returned to anything other than light duty work?
>
> A: No, I have not.
>
> Q: And do you still have a helper?
>
> A: Yes, I do.
>
> Q: All right. And what does the helper do for you now?
>
> A: He basically makes all the hydraulic hoses, does all the heavy lifting. I basically do the negotiating of the contracts, computer work and telephone work.
>
> Q: Okay. So if you could just so the Administrative Law Judge understands has your work detail or duty changed

drastically in a physical nature after the injury and surgeries than before?

A: Yes, it has.

Q: And now you're pretty much at a computer?

A: I'm pretty much. Eighty (80%) percent of my day is computer work, again negotiating on the telephone and price shopping …

Regarding his hours worked and wage rate, Good testified as follows:

Q: Are you working the same amount of hours?

A: Yes, sir, I am.

Q: All right. Are you making exactly the same amount of money now as what you did before?

A: No, I – we got a raise in January but that did not put me to what I was before.

Q: Can you explain what you mean by that?

A: Before I was at $18.50 an hour.

Q: Uh-huh.

A: Then we put a price cut and I'm now at $18.00 an hour after we got our money back.

Q: What did you get a price cut to?

A: What did I get it to?

Q: Yeah, it went from $18.50. What did it go down to?

A: It went down – it went from $18.50 to $16.75.

Q: All right. And for how long were you drawing the $16.75?

A: Approximately three or three and a half years.

Q: All right. Was this after the injury?

A: No.

Q: All right. So at the time of the injury you were making what at the time of the injury?

A: At the time – let's see – at the time of the injury I was – I can't remember the exact money but December – this past December three years ago is when we took our pay – our cut because we had a big layoff.

…

A: And then we got our money back. I can't remember what I was making at the time. I know – but they cut me back to $16.75.

Q: All right. So now what do you make?

A: $18.00 an hour.

Q: $18.00 an hour. All right. So before the injury you were making $18.50?

A: Uh-huh (yes).

Q: Is that a yes?

A: Yes. I'm sorry. Yes.

…

Q: On the date if [sic] injury what were you making then?

A: $18.50 an hour . . .

Q: Okay.

A: On the date of injury.

…

Q: On the first date of injury what were you making?

A: $18.50 . . .

Q: All right.

A: The best that I can remember.

Q: All right – and then the second injury?

A: The second injury I was at $18.50.

Q: All right. And now you're making what?

A: $18.00.

Good testified he never missed any work after the 2014 right hand injury. He acknowledged the injury to his right hand did not require physical therapy or surgery. Significantly, at the end of the hearing, the following exchange took place between Good and the ALJ:

> Judge Coleman: I've got to ask him a question. At the time of both your injuries you said you were making $18.50 an hour. When did you get reduced to sixteen-something per hour?
>
> A: I believe it would be December – this coming December will be three years.
>
> Judge Coleman: So December of 2015?
>
> A: Uh-huh (yes), because we ….
>
> Judge Coleman: And you hadn't got back to the point of $18.50?
>
> A: That's correct.
>
> Judge Coleman: So that leaves you still making less money or ….
>
> A: Less money.

As the claimant in a workers' compensation proceeding, Good had the burden of proving each of the essential elements of his cause of action including his entitlement to enhanced benefits via the three multiplier for each injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Good was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is

defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

As an initial matter, we note that although Good obtained relief from his stipulation set forth in numerical paragraph 13 of the June 13, 2018, BRC Order stating he currently earns wages greater than before, he did not obtain relief from the stipulation that his average weekly wage ("AWW") at the time of each injury was the same- $1,276.50. Consequently, the stipulation that Good's AWW did not change from the time of the first injury to the second injury dooms his argument that he did not return to work earning the <u>same</u> or greater AWW.

KRS 342.730(2) reads as follows:

> If an employee returns to work at a weekly wage **equal to** or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments. (emphasis added).

The stipulation concerning Good's AWW in paragraph 11 of the BRC Order firmly establishes that following his first injury on December 31, 2013, Good returned to work with an AWW equal to his AWW at the time of the 2013 injury. Undeniably, Good stipulated that at the time of his September 20, 2014, right hand injury he was earning the same AWW as he did at the time of the first injury.

Further, the ALJ did not misunderstand Good's deposition and hearing testimony recited herein, as Good testified that after his first injury and at the time of the second injury he was earning the same amount he was at the time of his first injury.

Good's testimony also establishes his hours increased following the December 31, 2013, injury and he received overtime. Although Good testified at his deposition that he received a reduction in his hourly rate, his hearing testimony demonstrates the reduction from $18.50 to $16.75 did not occur until after both injuries occurred and he had already returned to work. As noted by the ALJ, the reduction occurred in 2015. Good's testimony at the June 28, 2018, hearing reveals the reduction occurred "this past December three years ago is when we took our cut." Thus, the reduction Good refers to in his argument occurred two years after the first injury and almost a year and a half after the second injury. Consequently, we find the ALJ did not err in finding, based on Good's testimony, he returned to work after both injuries earning the same or greater wages.

Neither party takes issue with the ALJ's determination that enhancement by the three multiplier is applicable to the January 31, 2013, injury. Further, at no time has Good questioned the ALJ's reasoning for finding enhancement by the two multiplier appropriate for the 2013 injury. In his petition for reconsideration, Good did not request additional findings regarding his determination the three multiplier was not applicable to the September 20, 2014, injury. Moreover, Good did not testify his job duties or tasks changed in any manner after the 2014 injury. Good unequivocally testified he did not undergo any surgery or physical therapy and has continued to perform the job he was performing at the time of his September 2014 injury without missing work.

Significantly, Dr. Guberman opined the December 2013 injury prevented Good from returning to all activities he was performing at the time of injury.

He offered no such opinion regarding the 2014 work injury. Similarly, Good did not offer testimony which demonstrated the three multiplier was applicable to the 2014 injury. Good did not request additional findings of fact or a more explicit ruling in his petition for reconsideration, as required by KRS 342.281 and KRS 342.285 as to the applicability of the three multiplier in relation to the September 20, 2014, injury. As such, the issue is not properly preserved for review by this Board. *See* Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007)(failure to make statutorily-required findings of fact is a patent error which must be requested in a petition for reconsideration in order to preserve further judicial review).

With respect to the September 20, 2014, injury, since the factual finding concerning the inapplicability of the three multiplier was not challenged in a petition for reconsideration it is the law of the case. Thus, Good was not eligible for his PPD benefits to be enhanced by the multiplier as provided by KRS 342.730(1)(c)1. As noted by the Court of Appeals in Coleman v. Area Wide Protective, Inc., 2012-CA-001252-WC, rendered March 22, 2013, Designated Not To Be Published:

> A factual issue in a workers' compensation case which has not been raised in the brief to the ALJ or in a motion for reconsideration is waived. *Shelby Motor Co. Inc. v. Quire,* 246 S .W.3d 443, 446–447 (Ky. 2007); *Halls Hardwood Floor Co. v. Stapleton,* 16 S.W.3d 327, 330 (Ky. App. 2000). An ALJ's order or award on workers' compensation benefits is conclusive and binding as to all questions of fact if a petition for reconsideration is not filed. KRS 342.285(1).

Id. at 2.

Good did not request additional findings in his petition for reconsideration regarding the ALJ's determination the three multiplier was not

applicable to the September 2014 injury. Thus, on appeal, Good has waived his right to claim the ALJ erroneously found the three multiplier is inapplicable to the September 20, 2014, right hand injury. Since the ALJ's determination to enhance Good's PPD benefits by the two multiplier for the December 31, 2013, injury and his finding the three multiplier is not applicable to the September 20, 2014, injury are supported by substantial evidence and the record does not compel a contrary result, this Board has no authority to disturb his decision on appeal. Special Fund v. Francis, supra.

That said, since the order in the opinion and award makes no provision for enhancement of the award via the two multiplier in accordance with the statute and Livingood v. Transfreight, LLC, supra, we remand for entry of an amended award for inclusion of the appropriate language regarding Good's entitlement to enhancement by the two multiplier.

Accordingly, as to all issues raised on appeal, the August 20, 2018, Opinion and Award and the September 13, 2018, Order are **AFFIRMED**. This claim is **REMANDED** for entry of an amended opinion in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

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