Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 20, 2020

CLAIM NO. 201783787

OWENS & MINOR PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN, ADMINISTRATIVE LAW JUDGE**

DEONDRAY COLE
and HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Owens & Minor appeals from the October 21, 2019, Opinion, Award, and Order of Hon. John H. McCracken, Administrative Law Judge ("ALJ"), which rendered final the November 19, 2018, Interlocutory Order holding Deondray Cole ("Cole") was acting within the course and scope of his employment when he was injured. It also appeals from the November 19, 2019, Order on Petition for Reconsideration. In the October 21, 2019, decision the ALJ awarded Cole temporary

total disability ("TTD") benefits, permanent partial disability benefits, and medical benefits for left arm, wrist, hand/upper extremity injuries.

On appeal, Owens & Minor asserts the ALJ's determination Cole was not engaged in "horseplay" at the time of the accident is not supported by substantial evidence. Alternatively, Owens & Minor maintains that if Cole was engaged in unauthorized training at the time of the accident, his injuries are non-compensable.

The Form 101 alleges Cole sustained work-related injuries to his left lower arm on April 25, 2017, in the following manner: "While training on and operating a dock stocker Plaintiff lost control of the equipment while in reverse. Plaintiff's left arm was crushed between a rack and the dock stocker causing tendon, bone and nerve damage."

On August 25, 2017, Owens & Minor filed a Motion to Bifurcate requesting the ALJ to initially resolve whether Cole's injuries arose out of and in the course of his employment. By order dated October 6, 2017, the ALJ granted Owens & Minor's motion.

On August 1, 2017, Owens & Minor filed a Form SVE, "Safety Violation Alleged by Defendant/Employer" alleging Cole violated its Safety & Quality Orientation Manual, specifically the provision which states as follows:

> 4. Only teammates that have been properly trained and certified by Owens & Minor are allowed to operate the company's motorized vehicles. Teammates must be trained on the specific model of the equipment they will be operating before they are allowed to operate the equipment.

Cole was deposed on August 30, 2017, and testified Owens & Minor ships pharmaceuticals. He was hired in January 2017 as a warehouse coordinator starting in the "international" department. He described his job duties as follows:

> A: Picker and auditor, but mostly picker.
>
> Q: What does it mean, picker? What does that mean?
>
> A: We pick the items that's required, and they ship them out. It was just a little bit of information.
>
> Q: These items that you were picking, were they pharmaceuticals?
>
> A: Yes.
>
> Q: Were they in boxes?
>
> A: Yes.
>
> Q: Would they walk around to pick these items, or would you operate machinery?
>
> A: It depends where the item is located.

Sometimes Cole walked to get the item he was picking; and on other occasions he used a cherry picker. He explained as follows:

> Q: What is a cherry picker?
>
> A: It's a machine that you ride on standing up, and you've got a harness and lanyard on it.
>
> …
>
> Q: Lanyard?
>
> A: Yes.
>
> Q: Does that keep you from falling out?
>
> A: Yes.

Q: Go ahead.

A: And this cherry picker, we put boxes on the back of it, and we put other boxes on top of that, and we go pick our orders. We have labels and have them in box, and we go pick our orders.

Q: So you drove the cherry picker around?

A: Yes.

Q: Were you able to rise up high?

A: Yes.

Q: You'd pick orders and then put the boxes on the cherry picker itself?

A: Yes.

Q: And then when you were finished pulling your order, you would go take it and drop it off in a certain area?

A: Yes.

Q: And then move on and take you next order?

A: Yes.

Cole was required to be certified to operate the cherry picker:

Q: Did you have to be certified to operate this cherry picker?

A: Yes.

Q: How were you certified? How did that work?

A: I got certified by Steve, the safety guy.

Q: What did Steve do to get you certified?

A: He wanted to know if you know how to operate it, and if so, if you – he wanted to know if you basically can operate it and be comfortable with the machine.

Q: Did he watch you operate it?

A: Yes.

Q: Was there hands-on training where he showed you how to operate it?

A: Well, no. If you already know, got any skill by doing it, he just looked to see how far – what you're able to do with it.

Q: Had you ever operated anything similar to a cherry picker before going to work at Owens & Minor?

A: On my last job.

Q: So you had some familiarity with that type of machine?

A: Yes. Yes.

Q: Was there any kind of classroom type of work or watch any kind of videos or anything in additional to the hands-on training?

A: Just videos.

Q: Video?

A: Yes.

Q: You watched a video on how to operate the cherry picker?

A: Yes.

Q: And were you in a warehouse where Steve watched you operate this?

A: Yes.

Q: Then you got certified to operate the cherry picker?

A: Yes.

The cherry picker was not the only piece of machinery Cole needed to use in performing his job. He stated as follows:

> Q: Was the cherry picker the only piece of machinery you needed to do your job in international?
>
> A: International, no. We had another piece of equipment that we also needed. We also needed pallets.
>
> Q: Pallets?
>
> A: Yes.
>
> Q: Just a wood pallet?
>
> A: Yes.
>
> Q: That was a piece of machinery?
>
> A: Yes. That required us using a lift truck, which is a dock stocker also.
>
> Q: A dock stocker is another piece of equipment?
>
> A: Yes.
>
> Q: Were you certified to use the dock stocker while working in international?
>
> A: Well, it's a requirement. If you're on that position, you're supposed to get qualified to work that equipment, too.
>
> Q: And did you get certified?
>
> A: Not at the time. We was asked – we were told we're supposed to – we were required to get – you were supposed to be required to get certified on that equipment.
>
> Q: Okay. So –
>
> A: We needed to get certified on that equipment.

> Q: Okay. Let me make sure I'm clear. While working international, you were certified to operate the cherry picker?
>
> A: Yes.
>
> Q: You were supposed to get certified to operate the dock stocker?
>
> A: Yes.
>
> Q: But you did not?
>
> A: Yes.

When certified on a machine, the employee receives a badge to swipe the machine before it will operate.

Cole eventually moved from the international department to parcels. Regarding the training he received to operate the dock stocker prior to April 25, 2017, Cole testified:

> Q: What benefit to you was it to get trained on the dock stocker?
>
> A: Because sometimes we may have to pick up equipment that we can't reach, or we would be in another area helping out, and people that are certified on that equipment can help them get certain pallets or equipment down.
>
> Q: Do you have to be certified on a piece of equipment in order to operate it?
>
> A: Yes.
>
> Q: And is it fair to say that on April 25, 2017, when this accident occurred, you were not certified on the dock stocker?
>
> A: No, I was being trained on it.
>
> Q: You were being trained on the dock stocker?

> A: Yes.
>
> Q: What type of training had you received on the dock stocker before the beginning of your shift on April 25, 2017?
>
> A: Prior to that, I was asking, because like I said, Hasan [Kzghair] and I was asked – we were supposed to be trained on the dock stocker prior to it. Because in the other areas, you're supposed to also bid it to get trained on the dock stocker, too, because we may need it to pull pallets out.
>
> Also, if we're in another area, even though that we – other areas may need some assistance in the drivers, dock stocker, we can help them put it in.

During orientation, Cole watched videos on how to operate the cherry picker, dock stocker, and other pieces of equipment. He did not have any hands-on training on the dock stocker before the April 25, 2017, accident, although he had discussed with his warehouse supervisor a desire to be trained on it. On the morning of April 25, 2017, his colleague, Kzghair Hasan ("Hasan"), inquired if Cole wanted to be trained on the dock stocker, and Cole said yes. Cole recounted what occurred:

> A: Yes. Basically, before I got on, he said he'll show me the basics.
>
> Q: Hasan did?
>
> A: Yes. And said, go ahead and get on when he get off.
>
> Q: When you said he showed you the basics, what were the basics?
>
> A: Well, this is how you start it. Well, he said he's certified. Like I said, he slides your card in.
>
> Q: Are you talking about Hasan?
>
> A: Yeah, Hasan, because you can't get on there unless the person is certified. You can't get on. So he showed you

how to operate it and what to turn, how to move the lifts and everything, and just the basics of how to drive it.

Q: And Hasan showed you all of that?

A: Yes.

Q: Was he standing on the dock stocker to show you all of that?

A: He stood in the back.

Q: Were you on the dock stocker when he was showing you all of that?

A: Yes.

Q: So he was showing you how to drive it, how to start it, how to stop it, how to go –

A: Yes.

Q: - left, right, forward, backwards?

A: Yes.

Q: But you said you guys had to use Hasan's badge in order to operate it; is that correct?

A: Yes.

Q: Because he was the one that was certified on it?

A: Yes.

Q: Do you know how long Hasan had been certified on that piece of machinery?

A: He told me just a few weeks prior until I got over there, because I was moved over in parcels.

Q: So Hasan had been certified for just a few weeks?

A: Yes.

Q: On the dock stocker?

A: I think so, yes.

Q: So your testimony is that Hasan asked you whether you wanted to get trained on the dock stocker. You said, yes. You got on the dock stocker. Hasan showed you the basics of how to operate it, and then what happened?

A: I got on. I just drove it forward, and I drove it backwards. And someway, somehow, it took off to the left out of control. And in between, because I was trying to fall back, reach back, and my arm got stuck into the racks.

Q: So while operating the dock stocker, there was an accident?

A: Yes.

Q: And you, I guess, crashed into the racks?

A: Yes.

Cole testified that Hasan's job title was warehouse coordinator and he understood Hasan was able to train him in the use of the dock stocker. He explained:

Q: What was your understanding as to who could train you on the dock stocker at the time of the injury?

A: Employees. If an employee is certified to train on equipment, he can train you on equipment also.

Q: How did you come to that understanding?

A: By certain employees you talk to and word of mouth on the floor.

Q: You were told that?

A: Yes.

Q: Who were you told that by?

A: A couple of people, Don, Kim and – and even a couple of supervisors – not supervisor, leads I mean.

Q: Is that team leads?

A: Yes.

Q: What team leads?

A: One named Mohammed.

Q: Mohammed?

A: Yes, on third shift. That's third shift.

…

Q: Based on discussions with him, it was your understanding that coworkers could train other coworkers as long as the coworker that was doing the training was certified on the machine?

A: As long as you get someone to train you on that equipment.

Q: And that person had to be certified, correct?

A: Yes.

Q: Prior to your injury, okay, had you ever seen coworkers train other coworkers on pieces of equipment like the dock stocker?

A: Yes, sir.

Q: How many times?

A: More than ten.

Q: More than ten?

A: Yes.

Q: Prior to your injury?

A: Yes.

Q: Was it a common occurrence for coworkers to train coworkers on the motorized equipment prior to your injury?

> A: Common knowledge.
>
> Q: It was common knowledge?
>
> A: Yes.
>
> Q: You had seen it more than ten times?
>
> A: Yes.
>
> Q: To your knowledge, had any of those ten or more times that you've just mentioned when coworkers were training any other coworkers, did any of those coworkers get in trouble?
>
> A: No.
>
> Q: No? Where did this training take place?
>
> A: In an [sic] clear, open area, when there was nothing around or just an area where no one was around.
>
> Q: Was it open to be seen throughout the warehouse?
>
> A: Yes.
>
> Q: It was, okay. So you could see it in the warehouse?
>
> A: Yes.
>
> Q: Could anybody walking through the warehouse see it?
>
> A: Yes.
>
> Q: Even management?
>
> A: Yes.

After his injury, Cole was not reprimanded or written up for a violation of company policy. He testified further as follows:

> Q: So it was your understanding at the time of the injury that it was Owens & Minor's policy that you were allowed to be trained on the dock stocker by another

> employee as long as that employee was certified; is that correct?
>
> A: Yes.
>
> Q: Did that policy change at some point later on in time in the future?
>
> A: A couple of weeks ago.
>
> Q: It changed a couple of weeks ago?
>
> A: Yeah, a couple or three weeks ago, yeah, a month.
>
> Q: So two or three weeks prior to today –
>
> A: Yes.
>
> Q: - the policy changed?
>
> A: Yes.
>
> Q: How do you know that?
>
> A: Because I went to the meeting.
>
> Q: Tell me what happened at the meeting.
>
> A: It was told to change – just told out loud to everybody that the policy's changed, and employees are no longer able to do that.
>
> Q: Employees are no longer able to train other employees?
>
> A: Yes, plus I was told by a team leader in receiving that you could no longer do that.

Prior to Cole's injury, management was not required to approve training on the use of the equipment. Cole did not believe he was engaged in "horseplay" at the time of his accident:

> Q: Do you feel like you were performing horseplay or fooling around when you got on the dock stocker?

> A: No, sir.
>
> Q: Why did you want to get on the dock stocker?
>
> A: Because we're allowed to get trained on every equipment. I wanted to get trained on the equipment.
>
> Q: And why did you want to get trained on the equipment?
>
> A: It will help my performance on the job.

Cole testified at the September 25, 2018, hearing and again addressed what occurred before he was injured:

> Q: Okay. On the night of your injury, did Hassan [sic] ask you if you still wanted to be trained on the dockstocker?
>
> A: Yes.
>
> Q: How did you respond?
>
> A: Yes.
>
> Q: That you wanted to be trained?
>
> A: Yes, I want to be trained.
>
> Q: Okay. Why did you want to be trained on the dockstocker?
>
> A: More experience and more – I could move around in company with more flexibility. Operate and help out more.

Before his injury, Cole had seen Hasan train other employees. He offered the following:

> Q: Okay. Now, before your injury, okay, before even the night of the injury –
>
> A: Yes.
>
> Q: - had you ever seen Hassan [sic] train any other employees on the dockstocker?

A: Yes, the week before and the week of.

Q: The week before and the week of?

A: Yes.

Q: Okay. Who had you seen Hassan [sic] train on the dockstocker?

He described the type of training he received from Hasan before the injury:

A: He showed me the basics.

Q: Okay. Well, explain to the Judge. What do you mean by he showed you the basics?

A: Just to know how to work the knobs and which – what goes forward, backwards, moves up and down, what moves this, what goes there, the levers and all that stuff, like, what you're able to pick up, the product – the pallet, the product at the time, and the speed-wise.

Q: And where was all this taking place?

A: At work in the aisles.

Q: Okay.

A: Out in the open.

Q: Out in the open?

A: Yes.

Q: Okay. That's fine. After Hassan [sic] showed you how to use the equipment, the dials and stuff, did you attempt to operate the dockstocker?

A: Yes.

Q: Okay. And then what happened?

A: I got on it and went forward and lost control of it and feel back, and this happened.

Concerning his understanding of who could train him to operate the dock stocker on the day of his injury, Cole testified:

> A: If a person that's certified on a certain equipment, a person can train another person. Common knowledge.
>
> Q: Okay. Common knowledge. If a person was certified on the equipment, they could train another person on the equipment; is that what you just said?
>
> A: Yes.
>
> Q: Because you speak kind of fast. Okay. Was Hassan [sic] certified on the dockstocker?
>
> A: Yes.
>
> Q: How do you know that?
>
> A: Because he told me.
>
> Q: Okay. I don't think that's at issue. And how did you come to the understanding that if a person was trained on a piece of equipment and certified on that equipment that they could train another employee who was not certified on the equipment?
>
> A: It's common knowledge around the building. Open…
>
> Q: It was common knowledge around the building?
>
> A: Yes, amongst employees.
>
> Q: Why do you say that?
>
> A: Because you see people every day training everybody else in different departments. And also, if you want to go – if you're cross-training, like, you should be able to operate certain equipment that's good for you and also for the company itself I you want to learn.
>
> Q: Okay. So you mentioned you'd seen other people doing it?
>
> A: Yes.

Q: Okay. How often did you see – okay. And when you say you've seen other employees doing that, let's talk about who those employees were.

Were the employees that you had seen train other employees on motorized equipment, were they safety directors or safety personnel?

A: No.

Q: Who were they?

A: Warehouse coordinators just like myself.

Q: Okay. So just plain old employees just like you?

A: Yes.

Q: Okay. How often did you see that occur at Owens and Minor prior to your injury?

A: Every day.

Q: Every day?

A: Yes.

Q: Is that why you were saying it was common knowledge?

A: Yes.

Q: To your knowledge, did any of those coworkers who trained other coworkers or warehouse employees who trained other warehouse employees, did they ever get in any trouble from management?

A: No.

Q: Where did this training take place?

A: Out in the open.

Q: Okay. Now, when you say out in the open, what do you mean? In the warehouse itself?

A: Yes, in the work area or in the house in open where – anywhere that's available where you can operate equipment.

Q: Okay. Could anybody that was walking around to the warehouse see this training taking place?

A: Yes.

Q: And is that why – how you were able to witness this training going on?

A: Yes.

Q: Okay. Now, earlier you had mentioned that coworkers were training coworkers, warehouse employees were training other warehouse employees.

Did you ever see any type of safety personnel present during the time that this training was going on?

A: No, sir.

Q: Never saw Steve Linton?

A: No.

Q: Never saw Justin Kerberg?

A: No.

…

Q: Prior to your injury, did management have to give the okay for you to be trained by another coworker?

A: No.

As to whether he was reprimanded post-accident, Cole testified:

Q: Afterwards. Were you reprimanded at all as a result of this accident?

A: No.

Q: Did you get in any trouble at all?

> A: No.
>
> Q: Did anyone in management ever tell you that you weren't supposed to be on the dockstocker before you got hurt?
>
> A: No.

Cole was deposed for the second time on January 14, 2019. Following his injury, Cole returned to work at Owens & Minor on approximately June 19, 2018. This deposition primarily focused on Cole's left arm and hand symptoms.

The October 19, 2017, deposition of Hasan, a warehouse coordinator at Owens & Minor was introduced. He testified Steve Linton ("Linton") trained him to operate the dock stocker:

> Q: What type of training did you have to do for the dockstocker?
>
> A: It's almost like – something like the same, because it's the same lift, like cherry picker or dockstocker or a reach truck, but there's some principal, you know, you need to make sure. Because when you operate it, you know how to lift things, you know, because this one is different than the reach truck.
>
> The reach truck you can reach something inside the aisle, but this one you can take the thing out from the ground and put it somewhere. And this one is not like the other. The other is going more higher and takes more weight. So it's something – it's basically the same, but it's different, you know, use.
>
> Q: They all have some differences to them, the pieces of equipment?
>
> A: Yeah.
>
> Q: And do you have to get separate training for each of those pieces of equipment?
>
> A: Yeah. Yeah, of course.

> Q: Did you have to watch a video for the dockstocker?
>
> A: Yes.
>
> Q: And did you have to take a test on that also?
>
> A: Yeah.
>
> Q: And then who trained you as far as operating the dockstocker?
>
> A: Steve.
>
> …
>
> Q: And how did that work as far as the hands-on training for the dockstocker? Did you all go down to the warehouse, and he had you –
>
> A: Yeah. First, like he – like I said, like we watched some videos. Then after that, answer some questions. Then you go to the ground, you know, in the warehouse to drive it and show you before how to drive it. Then you're driving it.
>
> Q: And was that something where it took a couple of days for him to complete your training for the dock stocker?
>
> A: Yeah. It took like a couple of days, maybe.

Hasan did not know of anybody other than Linton who was allowed to provide training on the operation of the dock stocker. Hasan testified that he is not allowed to train anybody to operate the dock stocker. He explained the process of using your employee badge to operate a particular piece of equipment:

> Q: Now, to be able to operate a dockstocker, you were talking about this earlier, do you have to use your employee badge?
>
> A: Yeah.
>
> Q: How does that work?

A: Yeah, like this badge (indicating).

Q: Okay.

A: Like you scan on the side of the device, on the dockstocker.

Q: Okay.

A: That happen [sic] with all the equipments [sic], you know. Like the cherry picker, the dockstocker, reach truck, all the same. So you scan your badge or you put your badge number, so you'll be authorized to use this.

So it will be shown that user – it's not – if you are not authorized it will say user not authorized. But if you are authorized, it will work directly to turn on the key.

Q: Okay.

A: So, yeah, it's like this.

Q: So after you completed the cherry picker training, you could use your badge, and badge on to a cherry picker and use that?

A: Yeah, they will activate the badge number on this machine, and then you will be able to use it.

Q: Okay. And before you completed the dockstocker training, if you tried to use your badge to get on the dockstocker, it wouldn't have authorized you?

A: No, it's not going to work.

Q: Okay. Now, do you remember the reason that you were using a dockstocker back on the date that Mr. Cole's injury occurred?

A: Yeah. I'm using this from time to time to carry some skids. And if I need to go somewhere like to ask about boxes or something, because I've got access for all the equipment.

Q: Okay.

A: Like cherry picker, dockstocker and reach truck.

Q: And the reach truck?

A: Yeah.

Hasan recounted the sequence of events occurring on April 25, 2017:

Q: And what was going on on the date that Mr. Cole's injury occurred? Were you using a dockstocker right before his injury occurred?

A: Yeah, I use the dockstocker, and I used it to go the aisle ten. Then aisle ten was busy, you know, with boxes. They're making boxes over there. So I went to aisle nine, and I get out the dockstocker. Then I tried to talk to the guys over there about some size of the boxes.

Q: Okay. So you were using the dockstocker. You went over to aisle nine?

A: Yes.

Q: And then you got off the dockstocker?

A: Yes.

Q: Was the dockstocker still running?

A: It was running, yeah.

Q: What's the rule as far as a piece of equipment like that running when you're not on it?

A: You're supposed to be not far away from the equipment, like 25 feet, and you need to have sight on the – you can see the picker.

Q: It needs to be visible?

A: It needs to be in your sight all the time.

Q: Within your sight?

A: Yeah.

Q: Now, when you got off the dockstocker in aisle nine, could you still see it?

A: Yes.

Q: And were you within 20 feet, or something like that of it?

A: Less than that.

Q: And you were getting off the dockstocker to discuss something with a couple of –

A: Yes.

Q: - other warehouse workers?

A: Yeah, to discuss about the sizes of the boxes.

…

Q: What happened after you started speaking to them?

A: I was – like I was speaking to them, and then I noticed that Deondray took the dockstocker. He tried to drive it.

Q: Okay.

A: So, yeah. I say, 'Hey, man, you cannot do that because you're not authorized to do it. It's dangerous.' So he say, 'Okay. I'm driving it.' Like he is driving it like it's not a big deal or something. I don't know, so…

Q: Did he tell you why he was getting on the dockstocker?

A: Like we talked before about that. He need to get trained on it, you know, because like when we was working together in international, he's supposed – like we're supposed to be together, you know, to go to get training, but I think that time he moved to another department.

Q: Okay.

A: So, yeah, he didn't get the chance to get trained on it.

> Q: So you talked about the fact that he wanted to get training for the dockstocker in the past?
>
> A: I'm sorry?
>
> Q: Had he told you in the past that he wanted to get training for the dockstocker?
>
> A: Yeah.

Hasan denied training Cole on the operation of the dock stocker:

> Q: Now, Deondray testified that you were training him on the dockstocker. Were you attempting to train him on the dockstocker?
>
> A: No.
>
> Q: Had you ever talked about teaching him how to operate the dockstocker?
>
> A: He asked me to go – how to get trained for the dockstocker. So I told him that you need to go to your supervisor first, then he will send an email. Then after that you will get trained by somebody certified to train you.

Hasan has never trained someone to operate the dock stocker, and not all warehouse coordinators receive training on the use of all equipment. Hasan testified:

> Q: Do all the warehouse coordinators get trained on all of the pieces of equipment?
>
> A: All the warehouse coordinator?
>
> Q: Uh-huh.
>
> A: No, not all of them.
>
> Q: Okay.
>
> A: Yeah, not all of them.

> Q: Have you ever seen a warehouse coordinator train another warehouse coordinator in any piece of equipment at Owens & Minor?
>
> A: No.
>
> Q: Have you ever seen a warehouse coordinator train another warehouse coordinator in any piece of equipment at Owens & Minor?
>
> A: No.

Owens & Minor deposed Adam Garcia ("Garcia"), an operations supervisor and Cole's direct supervisor at the time of his accident. Garcia testified that Linton currently performs dock stocker training.

> Q: And when Steve does training, what are the normal processes for somebody getting trained on the dockstocker?
>
> A: He will get on the equipment himself, and he will display what the controls are. He will show a teammate how to move the equipment, the turning radiuses, and then once he goes through his explanations, he will walk through with the teammate and have them get on the equipment, and he will walk them through driving in a secured area.
>
> Q: And do the team members watch a video for the dockstocker?
>
> A: Yes. They do that before they get on the equipment.

Garcia testified that Hasan is not authorized to train an employee in equipment operation. "He is a Owens & Minor warehouse coordinator. He's not properly equipped to train other employees."

Garcia testified that Cole only had access to a cherry picker, and did not recall Cole requesting he be trained to use the dock stocker. He further testified:

> Q: Did you ever instruct him to operate a dockstocker during a shift?
>
> A: No.
>
> Q: Did you ever have a conversation with anyone else at Owens & Minor who told you that they instructed Mr. Cole to operate a dockstocker?
>
> A: No.
>
> Q: Was Mr. Cole off work for a while after his accident occurred?
>
> A: Yes.

Garcia did not reprimand Cole after the accident. Garcia was unaware of any company policy allowing a warehouse coordinator certified in the operation of a piece of equipment to train another employee on the use of that equipment. Garcia explained how Cole should have proceeded in obtaining training for certification of dock stocker use:

> Q: How is it communicated to warehouse coordinators that they have to go through the channels – so let me asked you this. So what would be the channel for Deondray to get certified on the dockstocker? What should he have done?
>
> A: He would either go to a trainer, and the trainer would contact me and ask for an email request to have him trained, or they would come to me and ask to be – and request to be trained, which then I would forward an email to the trainers requesting that they train him, and then they would set up a time to train them on equipment.
>
> Q: Now, how was that information communicated to your warehouse coordinators at the time or leading up to Deondray's accident?
>
> A: When our teammates come in, they spend time with the trainers, and trainers go over all the safety requirements they have on the floor.

Q: And it should include that procedure?

A: My understanding would – I believe so.

Garcia reiterated that he did not reprimand Cole because of the incident:

> Q: Because I'm like really confused about this case, and I'm going to tell you why. It's my understanding everybody over here likes Deondray, and he's a good worker, and you agree with that?
>
> A: Yes.
>
> Q: But yet it's my understanding that the company is also saying he did something completely against the rules here, correct?
>
> A: Yes.
>
> Q: But yet he's not been written up, he's not been coached about it to my understanding. Have you coached him about it?
>
> A: I've talked to him about the equipment, yes.
>
> Q: Have you talked to him about this incident?
>
> A: Not in any detail.

Garcia had never seen Cole "goofing off" while using equipment or at work in general.

Gerald Rivera ("Rivera"), operation supervisor at Owens & Minor, was deposed on October 19, 2017. He is trained in the operation of every piece of equipment. His training was comprised of watching videos, taking tests, and hands-on training. Linton and Justin Kerberg ("Kerberg") are the current trainers, and are the only individuals permitted to train an employee on the dock stocker operation. Warehouse coordinators cannot train other warehouse coordinators to operate

equipment. He testified that badge access is one way to keep unauthorized people from using the equipment. Regarding the process he goes through in order to get someone on his team trained to operate a specific piece of motorized equipment, he declared:

> A: We request the training through email, or face-to-face conversation, and then they schedule you. You know, they send you a link for videos and stuff they have to watch, and it goes from there. I like to have everything on record, so pretty much I always request training through emails.
>
> Q: And do you send an email to either Justin or Steve?
>
> A: Correct.

Rivera testified "Teammates are not supposed to train other teammates."

Rivera recounted what occurred when he visited with Cole and Hasan after the accident:

> A: Yes. When I went to the location he was, I asked him a couple of questions. You know, I asked him what happened, and he said he was being trained by Hasan driving the equipment, and he had problem – he went forward and no issue. When he was backing up, that's when he lose control and he hit the rack.
>
> And I told him no other teammate was supposed to be training him. And then I remember Hasan was around, and then he walk away, and then he came back. And he told me that he wasn't training him. And I was like okay, and I just keep continue taking care of him.
>
> Q: But it immediately struck you that he shouldn't have been on the equipment with another warehouse coordinator training him?
>
> A: That's why I told him, yeah. I told him no warehouse coordinator was supposed to be training other warehouse coordinators.

> Q: And then you did speak to Hasan about that?
>
> A: Hasan was right there, and he heard me speaking to Deondray. And then, like I said, he walk away. And then he came back, and he told me that he wasn't training him. I was like, 'Okay, no problem. We are going to do an investigation, and then we will go from there.'

Exhibit 1 to Rivera's deposition is an "Incident Investigation Report" completed by Rivera. The following testimony transpired regarding the report:

> Q: Would the initial part of this incident – you have described the incident, 'Deondray was being trained by Hasan on the dockstocker RC7.' RC7 is the name of this particular dockstocker?
>
> A: Yeah.
>
> Q: Him being trained by Hasan, that's what Deondray told you?
>
> A: Uh-huh.
>
> Q: Is that a yes?
>
> A: Yeah, that's what Hasan told me.
>
> Q: That's what Deondray told you, or Hasan told you?
>
> A: The guy, Deondray Cole, he said he was being trained by Hasan.
>
> Q: Did you talk to anybody else who confirmed what Deondray said, and told you that Deondray was being trained by Hasan?
>
> A: Not really. Because Hasan was walking away, and then he came back and he said he wasn't training him. But, you know, being on the floor, he wasn't, like, in shock, so I don't think he would say something that is not true.

Rivera believed Cole was being truthful but Hasan was not telling him the truth. He elaborated:

Q: So if I understand your testimony correctly, when you spoke to Deondray, and as you sit here today, you feel Deondray was telling the truth that he was getting trained by Hasan?

…

A: Yes.

…

Q: …Do you feel like Hasan was not telling you the truth?

A: Yeah, because he walked away from me, and when – and like a couple locations down, talk to more people, the same people that are around me, the area when he got hurt, and then he came back and say he wasn't training him. Why he didn't say that to me when Deondray told me he was training him. Why did he walk away when Deondray told me he was being trained by Hasan.

Q: I see. So the scenario that happened is, Hasan – you are right there dealing with Deondray, and Hasan is right there with you?

A: Yes.

Q: You say, 'Deondray, what happened'?

A: Uh-huh.

Q: And he says, 'I was being trained on the dockstocker by Hasan, and I lost control of it and got hurt,' or something like that?

A: While back up, yeah.

Q: 'I was backing up and I got hurt.' Hasan at that point doesn't dispute what Deondray is saying?

A: Correct.

Q: He walks off, goes talks to the other witnesses, then comes back to you –

A: Saying that he wasn't training him.

Q: Saying, 'No, I wasn't training him'?

A: Correct.

Q: Basically, you feel like Hasan was covering his on [sic] butt not to get in trouble?

A: More than likely, yes.

Rivera was questioned further about the accident report he authored:

Q: Let me go over a little bit of that. So you fill out part 2 of it anyway, so that's the meat of it, it looks like.

Oh here it says, 'Describe any unsafe acts or procedural violations that contributed to the incident.' And what you put down was just that the teammate was training and still familiarizing himself with the equipment. And you can actually read along.

To refresh, under the area Section 5, Gerald, it says, 'Describe unsafe acts or procedural violations that contributed to the incident,' And you put, 'Teammate was training and getting familiar with the equipment,' right?

A: Uh-huh.

Q: Did you feel like there was some sort of procedural violation that contributed to the incident?

A: Can you repeat that again?

Q: Okay. Under No. 5 – see, that's where you are supposed to describe if you feel like there was an unsafe act or procedural violation that contributed or caused the accident, right?

A: Uh-huh.

Q: And then you put that the teammate who – I guess that you meant Deondray, right?

A: Uh-huh.

Q: 'Was training and still getting familiarizing himself with equipment.'

Did you feel like Deondray committed any type of unsafe act or procedural operation at the time of this incident?

A: Well, if he was driving equipment that wasn't in his name, that's a violation right there, because he was driving under somebody's name.

Q: Okay.

A: Yeah.

Q: Why didn't you put that down there at the time?

A: It has been a long time. It's been a long time.

Q: So you're just not sure, or don't know, or don't recall?

A: I can't remember why I didn't put that in there.

Q: Let's look at that third page, Root Cause Worksheet. Did you fill that out?

A: I think that's what this is, right.

Q: It's the Root Cause Analysis or Cause Analysis, and this is the Root Cause Worksheet. I'm assuming you filled this out, right?

A: Yeah.

Q: So under Level 1: What was the physical cause of the incident? You basically put that I guess his arm got caught between the equipment. And the recommendation was requires administrative control. What does that mean to, like, me who doesn't normally see these Root Cause Analysis?

A: I think I put that there- because I believe when you fill this out it's like a drop down box and you select. I think that was the best that will describe that one.

Q: What's that mean, though?

> A: Well, you know, like if it was training – more control, I would say like telling them, you know, that they are not supposed to be trained by other warehouse coordinators. Yeah, like more control of the situation.
>
> Q: Okay. And then under Level 2 it says, 'What actions of people led to or contributed to the physical cause of the accident?' You put failing to train. And then your recommendation was retrain employee.
>
> Who are you meaning? Deondray? Hasan? Both, or somebody else?
>
> A: I would say –
>
> Q: A supervisor over top of them?
>
> A: Retrain employee, I would say Deondray. And Hasan, he had to be pretty much retrained too and tell him that he is not supposed to train others.

Linton, the training and safety coordinator, was deposed on October 19, 2017, and described his normal job duties as follows:

> Training all the new employees, as far as MAG goes; and with out Smart Solve and Owens & Minor University, those are computer-based trainings that I facilitate; handling all the – well, not all. Safety inspections for things like the fire pump, and all the risers around the building; general safety inspections with all the racking; retraining and evaluation of all the drivers' MHE.

Linton trains a new employee on equipment via videos and hands-on training which takes a total of two to four hours. All new team members are first trained on the cherry picker. Linton confirmed that not all warehouse coordinators receive training in the operation of the dock stockers. Linton explained the process of requesting training of an employee on the dock stocker:

> A: The supervisor will typically request it, and we just get to them when we can. It just depends on work flow.

Q: So a supervisor will contact you. Call you, send you an email, or something like that?

A: Correct. Or verbal. They may just ask me.

Q: And just let you know that Joe needs to be trained on the dockstocker when you have got time for it?

A: Yes.

Q: Okay.

A: Yes. Not extremely formal.

Linton described the training process as follows:

A: Review the video, and see if they have watched the video. And then I go over all the – before they even get on the machine, I take them around the machine, show them how to do the pretrip inspection, which all the safety devices is part of that, so we do that pretrip. After the video, we go through all of that, and it's, like I said, a two- to four-hour process.

Q: When they are first at orientation, do they watch a video on dockstockers?

A: That's about their third or fourth day. They are specific to each style of equipment we have. There's actually four. One is a general overall safety video, and then there is three more that is model specific.

Q: So instead of rewatch the same video or similar video when they go for the dockstocker training?

A: It's very similar to others. But, yes, they watch another video that's more specific to the dockstocker itself.

Q: Do they take a test after that?

A: Yes, with all of them.

Q: Is that administered on a computer?

A: Yes.

> Q: And then you do a hands-on, where they are on the ground working on the machine after they do the test?
>
> A: Correct. Well, I take them through everything. I take them up in the air, and all of that good stuff.

Once the individual is certified, he or she have access to the specific piece of equipment through a badge.

Linton testified Hasan is not allowed to train other workers to operate the dock stocker. He continued as follows:

> Q: Can any warehouse coordinators train other warehouse coordinators?
>
> A: No. We are in the process of getting our certifications where we can train someone to train drivers, so we are getting train-the-trainer certifications.
>
> Q: And at that point we can train the supervisors?
>
> A: Yes.
>
> Q: But up to this point in time, warehouse coordinators cannot train other warehouse coordinators?
>
> A: It did happen at one point where we were using one girl to train people, but she was just staying with them; the actual certification still came through me. So she would say, 'I have worked with this person,' then I would come and I would evaluate them, basically take them through the whole gamut of what they do on a dockstocker. And then once I was satisfied, then I would give them the certification.
>
> Q: When was that program in place?
>
> A: Early last year.
>
> Q: In 2016?
>
> A: No, this year. I'm sorry.
>
> Q: Okay.

A: Earlier in the year.

Q: Who was that employee who was –

A: Betsy Parks.

Q: And what's her position?

A: She is a warehouse coordinator.

Q: Why was she allowed to let other people be on the dockstocker?

A: Because she had lots of experience, and because we were, quite frankly, just very, very busy.

Q: But she had specific authority from you to allow other warehouse coordinators under certain circumstances to operate dockstockers?

A: And the GM approved it.

Q: I'm sorry?

A: The GM approved it. I didn't just tell her to start doing it. I checked, and he said it was okay.

Q: So you got authority from the GM to allow this warehouse coordinator –

A: Only her, yeah.

Q: And was she kind of in a –

A: And not for anybody. We would say, 'Hey, Betsy, take care of this person. Don't just go and train everybody you want.' We had specific people that we would set her up with.

Linton never trained Cole, and he never asked Betsy Parks ("Parks") to train him. In Linton's experience, warehouse coordinators never operate equipment without receiving training. "No, sir. That was the first time anybody had. These are dangerous lifts, and I try to make it very clear that safety comes first. That definitely

would be a safety violation to be operating something you haven't been certified on or trained on."

Linton set forth the safety changes implemented after Cole's accident:

> A: Change any policies? We made it a tough love rule now that you have to have certification before you can operate – tough love rule, they had one that came out 17 years ago because someone was killed.
>
> Now we have a tough love rule that says you have to wear your harness and lanyard any time you are on a stock picker. If you're caught operating without your harness and lanyard, it is an automatic final written warning, and second time is termination. So they added operating an order picker or MAG without certification as a tough love rule.
>
> Q: So before this accident, was it a rule?
>
> A: It was definitely a rule, it just wasn't a tough love rule.

Cameron Bethard ("Bethard") a packer at the time of Cole's accident, was deposed. He addressed the pre-injury training custom within the plant:

> Q: All right. Prior to Deondray's injury and leading up to Deondray's injury, were Owens & Minor employees allowed to train other employees on the motorized equipment?
>
> A: No, they weren't allowed to.
>
> Q: They weren't.
>
> A: They were doing it, though.
>
> Q: Okay. Well, explain that.
>
> A: Before Andre got hurt, there was other employees training other employees on the equipment. But after he got hurt, that's when they enforced the rule that no employees should train other employees.
>
> Q: Okay.

A: I believe it was a rule but they just didn't enforce it, and nobody really knew about it.

Q: All right.

A: I believe if it was enforced, people have did it, I really believe that, but it wasn't enforced.

Q: Okay. Well, let's take that bit by bit. Prior to Deondray getting hurt, did you ever see Owens & Minor employees, co-workers training other employees on motorized equipment?

A: Yes, I did.

Q: Okay. The employees that were doing the training, were they certified trainers?

A: Were they certified?

Q: Strike that. Were they certified on the equipment?

A: They were certified on the equipment, but they weren't certified trainers.

Q: Okay. That's what I was trying to find out. Okay. If they weren't certified trainers but they were certified on the equipment, were they supposed to be training other employees on the equipment?

A: No, they weren't.

Q: Okay. Why was –

A: Like me, I was certified to operate the equipment, but I didn't have training experience to train other employees.

Q: Okay.

A: That was a management job.

Q: Okay. But yet you're telling me that even – as long as people were certified on the equipment, even though they were not certified trainers, they were training other employees that were not certified on the equipment; is that accurate?

A: Yes. Correct. It was accurate in there, yes.

Q: Okay. How often did that happen?

A: It happened nearly daily.

Q: Daily?

A: Daily, yes.

Q: Okay. And what setting – how would that happen?

A: Like we would go into an aisle and like – let's say if you wanted me to train you on the equipment, we go in an aisle where we ain't around nobody and I let you drive around the aisle, I let you drive around the equipment and let you get comfortable with it, and then start from there.

Q: Okay. And did you ever see employees do that with the dockstocker?

A: Yes.

Q: Okay. How many times prior to Deondray's injury?

A: I believe three or four times. I didn't see it that much, but I have seen it happen.

Q: Okay. During the times that employees would train their co-workers on the equipment. Even though those employees weren't certified trainers, did anybody ever get in any trouble, to your knowledge?

A: Not that I know of.

Q: Okay. Do you know if management was aware that employees were training other employees on equipment?

A: I mean, we were pretty open about it, so I believe they knew about it. I mean, this wasn't behind closed doors, you know. This was out in the open.

Bethard was unaware of a policy prohibiting employees training other employees before Cole's injury:

A: I didn't know that policy at all.

Q: Okay. And you had seen other people –

A: I had seen other employees doing it, you know.

Q: - other than Steve Linton?

A: Other than Steve Linton, yes.

During a meeting held right after Cole was injured, Bethard learned employees were not supposed to be training other employees:

Igor Dizdaredic ("Dizdaredic") an HR representative at Owens & Minor who participated in the accident investigation was also deposed. The investigation revealed Cole "got on the dockstocker and operated the dockstocker without anybody's permission, without proper training, which ultimately caused an injury to himself." He explained why Cole was not reprimanded:

> A: We wanted to make sure that we go through all of the proper procedures, and to make sure that he is back from work, and that he is retrained.
>
> At that particular point, we were advised to hold off issuing any particular disciplinary actions related to this incident.
>
> Q: By whom?
>
> A: By the leadership team here in Louisville.

Dizdaredic testified that Parks provided some training:

> A: Betsy Parks, she provided some basic hands-on training on the equipment during a shorter period of time, but she was not allowed to do any certifications or to make any updates in the system called InfoLink, which authorizes you to use the equipment.
>
> Q: But yet she still trained them?

> A: She filled in last year maybe for a couple of weeks, or a couple of months, but nothing officially. She had no authority to determine who is to be certified on any type of equipment, or anything like that. All the work was done by Steve and Justin.

During his deposition, Kerberg, the safety and training coordinator, testified that not everyone receives training to operate the dock stocker. Only he and Linton may train employees on the operation of equipment such as the dock stocker. He testified that Hasan is not permitted to train other warehouse coordinators to use equipment. Cole, at the time of his accident, was "still in his initial 30-day period of being trained on the stock picker."

In the November 19, 2018, Interlocutory Order, the ALJ found Cole was acting in the course and scope of his employment at the time of his injury setting forth the following findings of fact and conclusions of law:

> The sole issue for decision at this time is whether Mr. Cole's injury occurred while he was working in the course and scope of his employment with Owen's and Minor. For the reasons explained below, the ALJ finds that he was working in the course and scope of his employment with Owens and Minor when he was injured on April 25, 2017.
>
> Mr. Cole presented himself well at the hearing. He was a credible witness. He testified that, prior to his injury, he saw other employees who were certified to operate equipment, train other employees on that equipment. Mr. Bethard stated that co-employee training was very commonplace before Mr. Cole became injured. Mr. Linton admitted that Betsy Parks, a warehouse coordinator, was allowed to train, but not certify co-employees on equipment. However, there is no proof that management told the employees that Mr. Parks had permission to train. It is apparent that co-employee training took place in the open for anyone to see. The ALJ understands that Owen and Minor had a policy in effect that prohibited employees from training one another on

moving equipment. This appears to be a sound policy. However, the ALJ relies on the testimony of Mr. Cole and Mr. Bethard to find that the policy was not enforced until after Mr. Cole sustained his injuries.

The ALJ does not believe Mr. Hasan Kzhgair's testimony or statement. The ALJ believes that Mr. Rivera is correct that Hasan was trying to protect himself from discipline when he told Mr. Rivera that he was not training Mr. Cole. Mr. Rivera's testimony makes clear that he thought Hasan was not being truthful. He believed Mr. Cole's statement that Hasan was training him to operate the dockstocker. The ALJ relies on the testimony of Mr. Cole and Mr. Rivera to find that Hasan Kzhgair was attempting to train Mr. Cole on the operation of the dockstocker when the accident occurred injuring Mr. Cole.

The ALJ relies on Mr. Cole and Mr. Bethard to find that he was acting in the interests of the company when he stepped onto the dockstocker to be trained by Hasan. Mr. Cole stated that the more equipment he was certified to use, the more value he could add to the company. The ALJ agrees and finds that Mr. Cole was acting in a reasonable manner to serve the interests of the company when he began operating the dockstocker, even though he was not certified. Mr. Cole knew that Hasan was certified to operate the dockstocker and believed that he could give him hands-on training to ultimately obtain certification from Mr. Linton. The ALJ believes this in part due to Mr. Cole's testimony that Mr. Linton never gave him hands-on training to become certified on the cherry picker. He simply observed him operate it after Mr. Cole watched videos on its use and safety. Mr. Linton then certified him to use the cherry picker. It is a logical step for Mr. Cole to believe that Hasan could show him how to use the dockstocker and then he would have Mr. Linton observe him operate it after viewing the video and obtain certification. Of significance is the fact that Mr. Cole was never disciplined for operating the dockstocker and that meetings occurred following this injury to enforce a policy that was already in existence. If the policy was actively enforced prior to the accident, then why wasn't Mr. Cole disciplined?

The ALJ relies on the testimony of Mr. Cole to find that he sustained a left arm and hand injury on April

> 25, 2017, while working in the course and scope of his employment for Owens and Minor. The ALJ finds that Mr. Cole's injury was work-related.

The August 27, 2019, Benefit Review Conference Order lists the following contested issues: work-related injury/causation, permanent income benefits per KRS 342.730, TTD benefits, ability to return to work, unpaid or contested medical expenses, and KRS 342.165 violation.

In the October 21, 2019, decision the ALJ left undisturbed his findings as set forth in the November 19, 2018, Interlocutory Order that Cole was acting within the course and scope of his employment when injured.

Owens & Minor filed a petition for reconsideration requesting the ALJ to reconsider his finding that Cole acted within the course and scope of his employment at the time of his injury, as the "overwhelming evidence supports that claimant was outside the course and scope of his employment at the time of the accident as he was taking a dock stocker on a 'joy ride'." Further, it asserted that, "[b]ecause the claimant was operating machinery he was not certified or allowed to use, the claimant violated KRS 342.165 when taking a 'joy ride' and his award should be reduced by 15%."

Owens & Minor's petition for reconsideration was denied by order dated November 19, 2019.

In its first argument on appeal, Owens & Minor asserts the ALJ erred in concluding Cole was not engaged in "horseplay" at the time of his accident. It asserts Hasan was not training Cole on the dock stocker at the time of the accident; rather, Cole was taking the dock stocker for a "joy ride." We affirm on this issue.

The Kentucky Court of Appeals in Hayes Freight Lines, Inc. v. Burns, 290 S.W.2d 836, 838 (Ky. App. 1956), held as follows regarding entitlement to compensation when an injury results from "horseplay":

> It seems to be the general rule that compensation is not recoverable under workmen's compensation acts for injuries sustained through horseplay, done independently of and unconnected with the work of employment, for the reason that such injuries could not be said to have been brought about while performing services growing out of and incidental to employment. 58 Am. Jur., Workmen's Compensation, sec. 268; 13 A.L.R. 540, Annotation.

The Court elucidated two exceptions to this general rule: "(1) non-participation of an injured employee in the horseplay, and (2) where horseplay was known to the employer who permitted it to continue without interference. [citations omitted]." Id. Whether the facts in a specific case show a claimant was engaged in horseplay at the time of an accident is an issue of law. Hall Contracting of Kentucky v. Huff, 481 S.W.3d 811, 814 (Ky. App. 2015).

Here, the ALJ relied upon the testimonies of Cole, Bethard, Linton, and Garcia in concluding Cole was in the process of being trained by Hasan to operate the dock stocker at the time of his April 25, 2017, injury and was not engaging in horseplay. Our review of the record reveals substantial evidence supports this conclusion. As noted by the ALJ in the November 19, 2018, Interlocutory Order and rendered final by the October 21, 2019, decision, Cole testified that, prior to his injury, he requested his warehouse supervisor train him to operate the dock stocker. Cole testified that, learning how to operate the dock stocker would help with his job performance and would allow him greater flexibility to move around within the company. Also, according to Cole, it was common practice for employees who were

certified to operate pieces of equipment like the dock stocker to train other employees. Corroborating Cole's testimony regarding co-employee training is Bethard's testimony that employee training on motorized equipment by certified employees was commonplace before Cole's accident. Linton and Dizdaredic also corroborated this testimony acknowledging that Parks, *a warehouse coordinator like Cole and Hasan*, provided training to other employees on the operation of motorized equipment.

Cole testified that, on the day of his accident, Hasan inquired if he still wanted to be trained to use the dock stocker. Cole replied yes and the training ensued, resulting in the injury. The ALJ, within the discretion afforded to him under the law, chose not to believe Hasan's testimony he was not training Cole at the time of the accident. Instead, the ALJ relied upon Cole's testimony and Rivera's testimony that he believed Hasan was untruthful in order to avoid being disciplined and Cole was truthful. Significantly, Garcia, Cole's direct supervisor, testified that he had never seen Cole "goofing off" on equipment or at work in general before his accident.

We are acutely aware of the contradictory testimony in the record. We have reviewed it and summarized it in detail. However, 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

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 above-cited testimony comprises substantial evidence supporting the ALJ's conclusion Cole was undergoing training by Hasan at the time he was injured and not engaging in horseplay. "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). For this Board to second-guess or undermine the ALJ's factual findings and legal conclusions when there is substantial evidence in the record supporting the ALJ's findings and conclusions would be overstepping our legislative mandate. When reviewing a decision on appeal, the function of the Board is limited to a determination of whether the findings 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).

The second argument appears to be an alternative argument, as Owens & Minor asserts even if the ALJ correctly concluded Cole was engaged in training at the time of his accident, the accident did not occur within the course and scope of his employment because the training was unauthorized. We affirm on this issue.

The ALJ determined Cole was being trained on the dock stocker by Hasan at the time of his injury. The ALJ also concluded this type of "co-employee training took place in the open for anyone to see." This conclusion is supported by Cole and Bethard who both testified co-employee training took place on a regular basis out in the open. Linton's testimony also supports this conclusion, as he testified Parks, *a warehouse coordinator*, trained other employees to use the equipment in 2017, the same year Cole was injured. As the ALJ noted which the lay testimony supports, Cole knew Hasan was certified to operate the dock stocker. Cole testified he believed Hasan could provide him with hands-on training in the operation of the dock stocker and Linton would then officially certify him in a manner similar to how Cole was certified in the operation of the cherry picker. Linton did not provide Cole with hands-on training on the cherry picker; rather, he just observed Cole operating the machine and then certified him. The testimony of Cole, Bethard, and Linton ultimately persuaded the ALJ that "[i]t is a logical step for Mr. Cole to believe that Hasan could show him how to use the dock stocker and then he would have Mr. Linton observe him operate it after viewing the video and obtain certification." *Stated another way, it was logical for Cole to believe he was engaging in sanctioned co-employee training wholly consistent with other co-employee training that had occurred within the company.* Further bolstering this premise is Cole's testimony relied upon by the ALJ that learning how to operate the dock stocker would have provided a <u>direct benefit</u> to Owens & Minor because it allowed Cole to reach items not normally reachable, ultimately allowing him to better assist the company.

Most persuasive to the ALJ, however, is the fact that Cole was not reprimanded or punished in any manner following his injury, which was confirmed by Cole, Garcia, and Dizdaredic. Equally persuasive was the safety meeting held directly after Cole was injured in order to formally implement a "tough love" rule regarding operating the motorized machinery. As the ALJ stated, "[o]f significance is the fact that Mr. Cole was never disciplined for operating the dockstocker and that meetings occurred following this injury to enforce a policy that was already in existence." We note that, while there was a written policy in Owens & Minor's Safety & Quality Orientation Manual pertaining to the need for employees to be "properly trained and certified" before operating the company's motorized equipment, the policy fails to address who may or may not provide training to employees in the operation of the motorized equipment. At a minimum, there was co-employee training from Parks, as testified to by Linton and Dizdaredic. However, Cole and Bethard testified co-employee training was much more extensive. Therefore, substantial evidence supports the inference that Cole's training in the operation of a dock stocker by Hasan was "authorized" since co-employee training had occurred in the past. Thus, Owens & Minor's second argument fails.

Accordingly, on all issues raised on appeal, the October 21, 2019, Opinion, Award, and Order, which rendered final the November 19, 2018, Interlocutory Order holding Cole was acting within the course and scope of his employment when he was injured, and the November 19, 2019, Order are **AFFIRMED**.

ALL CONCUR.

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