

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 15, 2019

CLAIM NO. 201790702

READY ELECTRIC CO., INC.

PETITIONER

VS.                   **APPEAL FROM HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE**

MONICA CARTER  
and HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

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

\* \* \* \* \*

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

**STIVERS, Member.** Ready Electric Co., Inc. (“Ready Electric”) seeks review of the October 17, 2018, Opinion, Award, and Order of Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”), finding Monica Carter (“Carter”) sustained “a temporary harmful change due to toxic exposure” while in the employ of Ready Electric. The ALJ awarded temporary total disability (“TTD”) benefits enhanced by

30% pursuant to KRS 342.165(1) and medical benefits. Ready Electric also appeals from the November 19, 2018, Order denying its petition for reconsideration.

On appeal, Ready Electric first argues the ALJ erred by mischaracterizing the opinions of the university evaluator, Dr. Fred Rosenblum. Ready Electric contends the ALJ erroneously found Dr. Rosenblum's report supports Carter's claim of a temporary injury and injurious exposure. It further asserts Dr. Rosenblum unambiguously stated Carter did not sustain a harmful exposure, as he marked "No" to the question asking if Carter's disease or condition is causally related to her work environment. It also relies upon Dr. Rosenblum's opinions, contained within the diagnosis section of his report, that there is no meaningful objective data which confirms any significant injury from that exposure. Ready Electric acknowledges Dr. Rosenblum stated Carter had been exposed to mold but notes he ultimately concluded she did not sustain injurious exposure due to the mold.

Ready Electric argues the ALJ's statement in the November 19, 2018, Order overruling its petition for reconsideration that Dr. Rosenblum did not opine there was no injurious exposure is incorrect. Dr. Rosenblum clearly stated she did not sustain injurious exposure and her condition was not causally related to her work environment. Thus, even if Dr. Rosenblum's report supports a finding of injurious exposure, the ALJ's finding is erroneous since he expressed the opinion Carter's condition is not related to her work environment.

In its second argument, Ready Electric contends the ALJ applied the wrong evidentiary standard. Since Dr. Rosenblum is the university evaluator, his opinions shift the burden of proof to Carter to rebut his opinions. Hence, the ALJ erred

in failing to apply the appropriate burden of proof to Carter and in failing to give presumptive weight to Dr. Rosenblum's opinions. Ready Electric contends the ALJ shifted that burden to it by finding it failed to rebut Carter's testimony. It argues the ALJ should have required Carter to prove injurious exposure but instead placed the burden upon it to rebut her subjective complaints.

In Ready Electric's view, the record is replete with medical evidence indicating Carter did not sustain injurious exposure. Further, it argues the medical evidence submitted by Carter is unreliable and does not prove an injurious exposure. Ready Electric argues the reports of Dr. Dennis Hooper, with RealTime Laboratories, Inc., and the opinions of Dr. Rafael Cruz, an emergency room physician, do not rebut the opinions of Dr. Rosenblum. Consequently, the ALJ's reliance upon Drs. Hooper and Cruz and her rejection of Dr. Rosenblum's opinions is erroneous. Similarly, since Dr. Bryan Hartig's opinions depend on the test results of Dr. Hooper's laboratory revealing mycotoxin exposure, his opinions "cannot stand." In essence, Ready Electric's argument is that its medical proof is much stronger than Carter's and the ultimate issue is whether Carter rebutted Dr. Rosenblum's opinions. Since Carter did not successfully rebut Dr. Rosenblum's opinions, Ready Electric requests the Board remand to the ALJ for findings consistent with Dr. Rosenblum's report.

Finally, Ready Electric argues the ALJ committed error by finding a safety violation. It maintains that, in assessing the safety violation, the ALJ relied upon the fact the employees did not wear safety masks when they walked through the area containing mold on Friday, September 23, 2016, as well as the alleged inadequacy of the masks used the following week. It asserts the ALJ mischaracterized Carter's

testimony regarding the instructions she received from Dustin Nance (“Nance”). Ready Electric cites to the following portion of Carter’s July 19, 2017, deposition testimony regarding what she was instructed to do by Nance when they did a walk-through of the facility, including the exposed area, on September 23, 2016:

A: On the 23<sup>rd</sup>. Actually, when we got off the elevator, I stopped everyone and said, hey, you know, this is really bad. Are we supposed to be wearing masks, this is really bad?

You could see it growing around the windows and stuff even outside when we first got off. Just something I had never seen before.

Q: Was anybody from ITS or IES with you on this tour?

A: Yes.

Q: When you stopped and asked these questions on the East Wing, who responded to you?

A: Dustin, my boss, he responded and said that we were supposed to be wearing masks to work in the area, but since we were just doing the walk-through it would be fine because we were just going to be in there for a few minutes.

Ready Electric argues the above testimony demonstrates it planned to provide safety masks for any work performed in the East Wing. This is consistent with Carter’s testimony indicating the team was provided masks recommended by an infectious diseases nurse with St. Mary’s & Elizabeth Hospital (“St. Mary’s”) where the alleged exposure occurred. It notes Carter testified she had limited symptoms after the walk-through on September 23, 2016, and did not seek medical attention that weekend. It also references Carter’s acknowledgment she was provided with a mask when she returned to work the following week. Concerning the ALJ’s statement that it did not provide proper masks, Ready Electric observes the Kentucky Occupational

Safety and Health Administration (“KOSHA”) citation did not find it provided improper masks. Rather, it indicates it did not provide training on how to use the masks. Ready Electric asserts KOSHA issued a written citation but not a fine. Thus, there was not an intentional failure on behalf of Ready Electric as it did everything reasonable and necessary to protect its employees and ensure they had proper masks and protection.

### **BACKGROUND**

On May 4, 2017, Carter filed her claim alleging she was affected by a disease rising out of and in the course of her employment with Ready Electric. She identified the occupational disease as mold exposure. Because Carter was alleging a safety violation, she attached a Form SVC in which she alleged as follows: “In short, Ready Electric did not provide a proper respirator or basic advisory information on respirators to Monica Carter despite having Monica Carter work in an area infested with mold.” Carter attached KOSHA’s citation and Notification of Penalty.

The parties introduced voluminous medical records, the records of KOSHA regarding its investigation of Ready Electric’s work site at St. Mary’s, the reports of Environmental Safety Technologies, Inc.’s Post-Exposure Air Quality reports generated by George W. Young (“Young”), the reports of RealTime Laboratories regarding its testing for mycotoxins in Carter’s frozen urine, stool, and saliva samples, and the report of Leslie Ungers, an environmental industrial hygiene expert.

Carter testified at a July 19, 2017, deposition and at the September 26, 2018, hearing. As noted by the ALJ, Carter provided more than 200 pages of

testimony. At the time of her deposition, Carter was 5'2" and weighed 130 pounds. She smoked cigarettes until September 30, 2016. She has a master's license as an electrician. Prior to her mold exposure at St. Mary's, Carter was in good health and took no medication. Since her exposure, she takes supplements to support her immune system and uses a prescribed rescue inhaler for asthma. One of her physicians, Dr. Hartig, suggested supplements which she has taken since she first saw him in November 2016. Dr. Timothy Killeen, a pulmonologist, prescribed an inhaler in December 2016. Carter denied having any allergies prior to September 2016. Her exposure to molds and fungal growths occurred in the East Wing of St. Mary's.

Carter's immediate supervisor was Nance, the general foreman at this job. Carter testified Nance thought safety was a waste of time. On September 28, 2016, Carter called Jeff Callam ("Callam"), the safety coordinator at Ready Electric and informed him of the type of masks they were wearing. Callam became upset and said they were using dust masks and should have worn full-face respirators. At that time, Carter told Callam she thought the building was making her sick and she had to go to the hospital. She never had any more correspondence with Callam because he went on vacation.

Ready Electric had subcontracted to perform the electrical work at St. Mary's which consisted of adding new panels from a "switch bucket." Carter was the appointed foreman on that site. The project encompassed working in all IT rooms within the hospital. Carter's job was to identify safety hazards. There were four Ready Electric employees on this project. She identified the following problems in the East Wing:

Q: And which area did you ask about?

A: The East Wing.

When we entered into the third floor, we got off the elevator at the first floor, we went to the East Wing.

I immediately smelled just this gross smell, and then Stephan opened the construction door for us to go through, because it was an area that was locked. No signs up or anything, but you couldn't get through there without a key. It was closed off from the hospital. It had water damage and it had all this mold on all of the walls. It was horrible.

When we walked through that door, my eyes started to burn.

Q: On the 23<sup>rd</sup> of September?

A: On the 23<sup>rd</sup>. Actually, when we got off the elevator, I stopped everyone and said, hey, you know, this is really bad. Are we supposed to be wearing masks, this is really bad?

You could already see it growing around the windows and stuff even outside when we first got off. Just something I had never seen before.

Q: Was anybody from ITS or IES with you on this tour?

A: Yes.

Q: When you stopped and asked these questions on the East Wing, who responded to you?

A: Dustin, my boss, he responded and said that we were supposed to be wearing masks to work in the area, but since we were just doing the walk-through it would be fine because we were just going to be in there, quote, for a few minutes.

Carter testified no one was working in the East Wing and molds were visible. Carter testified the smell was so strong it would "take your breath away" and described the smell as "mildew mixed with like poop." The East Wing consisted of

150-foot hallway with 20 rooms on each side of the hallway. The IT room on that floor was located in the bathroom. Carter estimated the walk-through on Friday, September 23, 2016, lasted approximately fifteen minutes. She experienced no symptoms on Friday, but Nance passed out and was hospitalized. The first symptom she experienced was swollen lymph nodes in the right groin on Saturday, September 24, 2016.

Carter returned to St. Mary's on Monday, September 26, 2016, and she and Mel Hart went over the blue prints and prepared a materials list. Nance was still in the hospital. They also met with hospital employees and determined the safety protection to be used. On that same date, a St. Mary's employee showed them the masks the hospital concluded they should wear. When she questioned the adequacy of the mask, Carter was informed an infectious diseases nurse with St. Mary's recommended it. Carter spent all day in the East Wing on September 26, 2016. Because of the smell, she opened the windows, and every half hour she took a 15-minute break. Her eyes burned very badly. Carter estimated they were in the East Wing a minimum of four hours on September 26, 2016. They only wore the masks recommended by St. Mary's when they went above the first floor.

On the evening of September 26, 2016, Carter noticed the swelling in her lymph nodes in her groin had worsened. She also developed a headache and became nauseated. She had observed that all of the St. Mary's employees looked sick. She worked in the East Wing approximately four hours on September 27, 2016, because she became ill. She was dizzy and her eyes were hurting. The lymph nodes in her groin were the size of golf balls. Carter went home, slept for approximately five

hours that afternoon, and went to Clark Memorial Hospital (“Clark Memorial”) in Indiana that evening. Her symptoms improved and she was discharged from Clark Memorial the morning of September 28, 2016.

Carter called Callam on the morning of September 28, 2016, and informed him she had received a doctor’s note taking her off work the rest of the week and she believed the building was making her sick. Carter was off work from Wednesday, September 28, 2016, through Friday, September 30, 2016. After taking three doses of antibiotics, Carter developed breathing problems. When she awoke on Friday morning, September 30, 2016, she could not breathe and returned to the emergency room at Clark Memorial. She was still fatigued even though she had done nothing for three days. Carter testified she stopped smoking on September 30, 2016. She had smoked approximately seven to ten cigarettes per day since she was 30 years old. She denied having any previous shortness of breath or experiencing any of these symptoms prior to September 30, 2016. She experienced a burning sensation in the left side of her chest and neck as well as knots in her neck. She began vomiting on September 30, 2016. When she told personnel at Clark Memorial’s emergency room she had been exposed to molds and believed this had led to her sickness, the antibiotics she had been taking were discontinued. She was released to go home on September 30, 2016.

On Saturday, October 1, 2016, she began vomiting and was unable to eat or drink. She described her symptoms as flu-like. She returned to work on October 3, 2016, because she was the only one who knew what was to take place at St. Mary’s. She had the same symptoms except the swelling in the leg had decreased. Carter

provided the following description of what she encountered at St. Mary's when she returned to work on October 3, 2016.

Q: When did you go back to work the next time?

A: The 3<sup>rd</sup> of October.

Q: Were they still open then?

A: No. Mel had shut some of them.

Q: Were some of them open?

A: I think some of them were open. He told me he couldn't get some of them shut, like they had swelled or something after I had opened them and he couldn't get them shut.

Then when I went to work on the 3<sup>rd</sup>, they were all opened up again, and there were HEPA filters everywhere and some of the bigger portions that were growing out of the ceiling, like the big, snotty looking globs had already been removed. They had abatement – Louisville Abatement was the sticker that was on the machines that were lying in the floors.

I went up there to get material and noticed that the windows were open, and I was like I thought Mel said he shut these windows. But they were all open again.

They had these HEPA filters going. They had the doors open. You know, they had the construction doors shut before and locked. Not this time. They were wide open.

They had HEPA filters through the hallway plugged in and fans flowing on the wet spots. HVAC systems from the fourth floor were leaking on the third floor, and the ones on the third floor were leaking on the second floor. So underneath each window was an HVAC unit that was leaking. I would probably say 30 percent of them were leaking.

So when you would go downstairs and would look up – like say if you were on the third floor, you would look up and in the ceiling there would be this massive

moldy glob growing – it almost looked like a cave stalactite or something – and it would just be like all gross, but it would be growing out and it would be dripping. It would be the unit above and it would be growing this mass of mold and it was just – yeah.

But they had all been removed. So they came in and removed them, and, then, they put garbage cans wherever they were leaking to catch the water that was leaking, and, then, they had put all these fans out and HEPA filters and opened the windows. They were trying to clean the air out is what they were trying to do.

Q: Well, here's my question. When did you say the abatement team came in; do you know?

A: I'm not sure, because I wasn't there. See, I wasn't there from the 27<sup>th</sup> until the 3<sup>rd</sup>, or the 28<sup>th</sup> was the first day I wasn't there, all the way to the 3<sup>rd</sup>. When I got there on the 3<sup>rd</sup>, it was real bad. That whole building was bad, even when I –

Q: Let me ask the question. On 9/27 when you left work, there was no abatement team there. Correct?

A: Correct.

Q: When you returned on October 3<sup>rd</sup>, there was an abatement team there. Correct?

A: Correct. Their equipment was there and these big bags of rags, but they weren't there. I saw suits, like Tyvek suits. I saw things piled up in the little washroom area, and they had some garbage cans out. And, then, they had the machines with their sticker on there. That was how I knew that they were abatement, because I saw the machines with the sticker on there. Then I noticed the big globs were missing. They had come in and removed them off, and, then, they were cleaning the air.

Q: So sometime between 9/27 at noon and when you went back to work on October 3<sup>rd</sup>, an abatement team had come in and started to abate the problem. Is that correct?

A: Correct.

Q: There were some air samples done on 9/30/16.

A: Correct.

Q: Do you know if those were done before or after the abatement team came in; do you have any knowledge?

A: I can't say. I don't know. I don't have anyone that I could have asked about that.

Q: That's fine. You don't know.

A: And I remembered that guy's name, the guy from Jewish who called off the job. His name is Charlie Lyninger.

When he walked in on Wednesday, the 6<sup>th</sup> of October – this was right after I had sent Dustin a text and I told him I'm too sick; I'm done; I'm done with this project now; I'm getting sicker and sicker by the day. He said, well, Charlie walked in this morning and smelled mold.

I have got all these text messages on another phone. I am probably going to have to get that information eventually. I know they can get it off of there.

He called the job off. He said – because when he walked in and went to the IT room, he smelled mold. And I'm assuming this is from where they were abating it and all the doors opening and closing, them dragging the garbage bags down the steps, it just stirs that stuff up even worse.

Charlie said he felt sick to his stomach that morning and he called off the job. He said from now on no one is to go above the first floor of this building and this job is completely shut down. They didn't even finish the other project. They pulled out altogether of doing the project.

On that date, Carter stayed approximately two hours and went home.

Carter testified she returned to work on October 4, 2016, for two hours in order to take pictures of the area in question.<sup>1</sup> She testified that when she took the pictures she was

---

<sup>1</sup> Those pictures were introduced during her deposition.

in full protective dress wear. The pictures depicted the mold and the equipment and filters being used by the removal crew.

She testified she lost 33 pounds during the period she was sick, and at her lowest point, weighed 97 pounds. Because of the vomiting, she did not experience bowel movements for a week and a half. Carter began to improve when she saw Dr. Hartig who started her on nutrient-based treatments. She recounted the symptoms she continued to experience and the treatment she received during October 2016.

Carter provided RealTime Laboratories with urine, saliva, and stool samples which she had frozen. RealTime Laboratories later confirmed the samples were good/sterile samples. Dr. Hartig informed her he thought this had been a good idea. He also took stool samples.

At the time of her deposition, Carter was able to keep down the food she ate. However, there were certain foods which she was unable to eat. She uses a ventolin inhaler when around any type of fumes such as diesel fuel fumes or fumes from chemicals and paint. She does not possess the same energy she had pre-injury. She is on oxygen when sleeping, and she performs nasal rinses daily to combat the possible growth of mycotoxins in her nasal cavity. She temporarily experienced significant blurred vision which finally subsided in January or February 2017. She testified Dr. Candace Olund, an ophthalmologist, diagnosed chemical burns on the surface of her eyes. She was given steroids, eye drops, and Tea Tree wipes. Carter was not provided with any eye protection when she worked in the East Wing. She developed a metallic taste especially when she eats something which had been in a can.

Dr. Hartig took her off work for three months. She stopped working for Ready Electric on March 3, 2017.

At the hearing, Carter testified her last injurious exposure occurred on October 4, 2016. She denied providing a history of asthma to Dr. Rosenblum. However, she told Dr. Rosenblum her child had an asthma history. Ready Electric provided her with an extra-large M95 dust mask which did not fit and did not provide good protection. She wore the mask the entire time she was at St. Mary's except for the September 23, 2016, walk-through. Carter provided the following explanation for her failure to wear the mask during the walk-through:

Q: And did you wear the mast at all times that you were on [sic] second and third floor in the contaminated areas of the Saint Mary's and Elizabeth Hospital except for the first day when you came through on the walk-through?

A: Yes. I wore the mask the whole time I was there.

Q: But not on the walk-through, right?

A: Not on the walk-through.

Q: And why not?

A: They told me I didn't need one. Dustin told me I didn't need one.

Q: And then after that, you wore it the rest of the time?

A: I did.

Q: Did you even know you were going to be going into those areas that were unoccupied during the walk-through?

A: No. I was unaware that area existed.

Q: And then when did you become aware that that area existed?

A: The day that we went on the walk-through, September 23<sup>rd</sup>.

Q: As you entered the area?

A: Yes.

Carter told the people with whom she worked the mask did not fit properly, but there was no immediate supervisor present to inform of that fact since Nance, her superior, had been hospitalized on September 23, 2016, and Callam was on vacation. She was the head person at the project since Nance was in the hospital.

In concluding Carter sustained a temporary harmful change due to her exposure to molds and fungal material, the ALJ provided the following findings of fact and conclusions of law:

After careful consideration of the evidence and the well argued positions of the parties, it is determined that Plaintiff has met her burden of proving a temporary harmful change due to the toxic exposure at work. Carter presented as a strong, credible witness. Not only is her testimony of the exposures, her illness and follow up treatment completely believable, it is essentially, un rebutted. No one has come forth to say the occurrences did not happen. The investigations and testing along with all the remedial efforts of the hospital are persuasive that there was a toxic situation. The project was even stopped because of the danger to the workers. Again, this is all un rebutted. The opinion of Leslie Ungers is not persuasive and is contradictory to the more persuasive opinion of George Young who found significantly elevated levels of Aspergillus/Penicillium like spores on all of the indoor air samples collected. He even noted visual damage and called it significant. It is also important in this determination to consider that Carter is a hard working, educated and skilled worker who was in good health until her exposure. This is her un rebutted testimony. Her onset of conditions was sudden and dramatic. She was ill for months and when she was well, she returned to work and got on with her life. Her treatment and symptoms upon presentations to the hospital and various providers are well documented.

The initial exposure occurred when there was no protection and, according to OSHA, the masks subsequently provided were not adequate. The area of danger had been closed off for years and had significant water damage. Environmental Safety Technologies recommended remediation even if the area was to remain unoccupied.

The university evaluator opinion is supportive of Plaintiff's claim of temporary illness. Carter is not claiming permanent impairment, only temporary. Dr. Rosenblum found Carter was exposed to mold (including *Aspergillus* and *Penicillium* – per the OSHA report) and may have developed reactive airway disease as a result of the exposure. He stated that Carter certainly could have developed bronchospasm after the exposure but that she had no permanent injury. Again, she does not claim permanent impairment. It has been pointed out the error in his report where he stated Carter had a history of asthma as a child. Still, this did not keep Dr. Rosenblum from determining a temporary onset of symptoms due to her exposure.

Defendant Employer has focused on a theory that Carter essentially made up her symptoms and treated with substandard facilities and providers. From the outset, she was essentially left to her own abilities to find adequate methods of testing and treatment. Defendant Employer's argument that her providers were not competent or credible is rejected. In fact, because Defendant Employer did not take action early on, its attempt to develop a defense of the claim began too late. All the evidence taken in close proximity to the alleged exposure supports the finding that Plaintiff suffered a temporary harmful change due to her exposure to mold.

The ALJ awarded TTD benefits from October 5, 2016, through March 3, 2017, and determined all treatment prescribed by Dr. Hartig and treatment from other hospitals and providers through March 3, 2017, is compensable.

In finding Ready Electric had committed a safety violation meriting enhanced income benefits by 30%, the ALJ provided the following findings of fact and conclusions of law:

The goal of KRS 342.165(1) is to promote workplace safety by encouraging workers and employers to follow safety rules and regulations. *Apex Mining v. Blankenship*, 918 S.W.2d 225, 228 (Ky. 1996). The relevant portion of the statute provides:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

Application of the safety penalty requires the claimant to prove two elements: (1) evidence of the existence of a violation of a specific safety provision, whether state or federal; and (2) evidence of “intent” to violate a specific safety provision. *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834 (Ky. 1997). Intent to violate a regulation, however, can be inferred from an employer’s failure to comply because employers are presumed to know what state and federal regulations require. See *Chaney v. Dags Branch Coal Co.*, 244 S.W.3d 95, 101 (Ky. 2008).

KRS 338.031(1)(a), commonly known as Kentucky’s “general duty” provision, requires every employer to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Even a general duty violation that results in a worker’s accident and injury may be sufficient to fall under KRS 342.165(1). See *Apex Mining v. Blankenship*, *supra*.

Traditionally, the 30% penalty per statute has been difficult to apply because of the element of intent required. Oddly, in this case, Carter’s claims of failure to provide a safe work place are unrebutted. Simply being cited for violations is not enough to invoke the safety penalty. Intent must be shown. Carter has testified that the conditions were so bad, she asked if they should have

safety equipment and Dustin Nance stated it was not a big deal. She also stated she found him to have somewhat of a careless disregard for safety rules. This is unrebutted. The employer violated the general duty of employers to provide a place of employment free from recognized hazards that were likely to cause death or serious physical harm. Pursuant to *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598, 599 (Ky. App. 2000), in order to establish a safety violation under the “general duty” provision, the Plaintiff must establish that:

- (1) a condition or activity in the workplace presented a hazard to employees;
- (2) the cited employer or employer's industry recognized the hazard;
- (3) the hazard was likely to cause death or serious physical harm; and
- (4) a feasible means existed to eliminate or materially reduce the hazard.

The experts and KOSHA have established the existence of mold created a dangerous and hazardous condition which was recognized as a hazard in the industry. That being exposed to toxic mold is likely to cause serious physical harm is implied in the remediation measures. Once the mold was discovered, the section was shut down and all entering the area were required to have full body protection. The feasible means to eliminate or reduce the hazard would have (and eventually was) full body protection until the mold could be eliminated. This did not occur in a timely fashion. Even proper masks would have shown an effort to provide safety from mold exposure. Ready Electric did not provide proper masks.

Again, Carter’s testimony that Ready Electric displayed a disregard for safety is unrebutted. Carter’s benefits are increased by 30% per KRS 342.165.

Ready Electric filed a petition for reconsideration asserting the same arguments put forth on appeal. Ready Electric did not request additional findings of fact except in arguing the ALJ applied an incorrect evidentiary standard. With respect

to the safety violation, Ready Electric only requested the ALJ to reconsider her opinion.

In denying the petition for reconsideration, the ALJ provided the following:

Dr. Rosenblum specifically found that Carter was exposed to mold. His report never states that Carter did not become ill from or suffer an injury from the mold exposure. He found there was no permanent impairment as a result of the exposure. Dr. Rosenblum's report, supports the same conclusion as Dr. Cruz - that after Carter was exposed to the mold she was ill for months and when she was well, she returned to work and got on with her life. That Carter had no permanent impairment, does not preclude her from recovering for her time off work due to the injurious exposure or from recouping her medical expenses that were denied. Dr. Rosenblum did not opine that there was no injurious exposure. Instead, he found she could have developed bronchospasm and recommended she avoid further exposure to mold, dust or fumes. Additionally, the opinion relies on other evidence of record including the testimony of Dr. Cruz and Dr. Hooper, as well as Ms. Carter's testimony and Dr. Hartig's diagnoses of injurious exposure.

Defendant Employer argues as in its brief that there was no safety violation. The Opinion, Award and Order covers this issue thoroughly and the conclusion will not be changed.

### **ANALYSIS**

We find no merit in Ready Electric's first argument the ALJ mischaracterized Dr. Rosenblum's opinions, as his diagnosis supports the finding Carter sustained a temporary occupational disease as a result of exposure to mold including Aspergillus and Penicillium.

KRS 342.0011 (2) and (3) provide the definition of an occupational disease as follows:

(2) “Occupational disease” means a disease arising out of and in the course of the employment;

(3) An occupational disease as defined in this chapter shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The occupational disease shall be incidental to the character of the business and not independent of the relationship of employer and employee. An occupational disease need not have been foreseen or expected but, after its contraction, it must appear to be related to a risk connected with the employment and to have flowed from that source as a rational consequence.

KRS 342.0011(4) defines injurious exposure as follows:

“Injurious exposure” shall mean that exposure to occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made.

Dr. Rosenblum’s September 27, 2017, Form 108-OD reveals a history of Carter working as a foreman on an electrical job at St. Mary’s in September 2016. He noted the area had previous water damage and Carter was “apparently exposed to mold.” She developed dizziness, blurred vision, a flu-like illness, chest burning, and felt tired. Carter also had inguinal adenopathy. Based on his examination, Dr. Rosenblum provided the following diagnosis:

Ms. Carter was exposed to mold including *Aspergillus* and *Penicillium* (per OSHA report) on the dates above while working for Ready Electric at St. Mary’s and Elizabeth Hospital; however, there is no meaningful objective data that confirms any significant injury from that exposure. She may have developed some **reactive airway disease** but even that is unclear. In addition, she

has a history of asthma as a child as well is a smoking history and certainly **could have developed some bronchospasm after this exposure**. Regardless, there is again no objective data of any significant injury or residual impairment. The mycotoxins reported in her urine are a test result which is not from a reputable lab and should not be considered a meaningful test in regards to diagnosing disease from a mold exposure in this situation. In summary, there is 0% impairment. (emphasis added).

The above language permitted the ALJ to conclude Dr. Rosenblum believed Carter sustained an occupational disease, albeit temporary in nature. Dr. Rosenblum's diagnosis does not exclude a finding of a temporary injury; rather, it supports a finding of a temporary injury. We are aware that under the heading of "Causation," Dr. Rosenblum answered "No" as to whether Carter's disease or condition was causally related to her work environment. Preferably, the ALJ should have stated she rejected that portion of Dr. Rosenblum's opinion as it is inconsistent with his diagnosis which indicates Carter sustained a temporary disease or illness as a result of exposure to mold at St. Mary's. We note Dr. Rosenblum believed Carter did not have a prior active impairment. The ALJ was free to rely upon Dr. Rosenblum's diagnosis while simultaneously rejecting his answer that the disease was not causally related to Carter's work environment. The ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Further, 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky.

1999). The ALJ's failure to expressly reject Dr. Rosenblum's opinion set forth in the "Causation" section is, at most, harmless error.

Implicit within the ALJ's acceptance of Dr. Rosenblum's diagnosis is her rejection of Dr. Rosenblum's statement under the causation section of his report. Moreover, had the ALJ accepted Dr. Rosenblum's statement that Carter's condition was not related to her work environment, she would have been required to explain why she rejected his diagnosis which amply supports a finding of a work-related temporary disease resulting from the exposure to mold at the work site. Thus, we find no error in the ALJ's interpretation of Dr. Rosenblum's report.

We reject Ready Electric's second argument that the ALJ applied an incorrect evidentiary standard. The ALJ did not shift the burden of proof to Ready Electric by stating Carter's testimony is un rebutted. In determining Carter sustained a temporary occupational disease, the ALJ found Carter to be a strong and credible witness, and her testimony regarding "the exposures, her illness, and follow-up treatment was completely believable" and essentially un rebutted. That is not a finding as to causation. The ALJ merely found Carter's testimony regarding her exposure to mold and the resulting symptoms to be credible. Important to the ALJ was the testing conducted by Environment Safety Technologies (Young) and the KOSHA investigation as well as St. Mary's action in shutting down the project. From this, the ALJ reasonably inferred Carter was exposed to a "toxic situation." Young's report reflects he conducted a fungal air sampling on various dates including September 30, 2016. An October 3, 2016, letter, authored by Young concerning the fungal air sampling performed on September 30, 2016, reads, in part, as follows:

The laboratory results of this analysis completed on October 3, 2016, finding significantly elevated levels of Aspergillus/Penicillium like spores on the [sic] all of the indoor air samples collected. Furthermore, the surface sample collected on the third floor confirmed that the visible damage was significant and could be contributing to these airborne readings. Based on these laboratory results, it is recommended that the spaces continue to be unoccupied and be isolated from the rest of the facility in order to prevent the contamination to other areas of the facility. It would be prudent to proceed with a remediation of these areas even if they are not to be occupied in the near future. All porous materials should be removed from these areas and all visible fungal contamination remediated.

After providing her finding concerning Carter's testimony and her acceptance of Young's test results, the ALJ addressed the fact Carter was initially exposed to the molds without any protection and, according to KOSHA, was provided inadequate masks. The ALJ concluded that, based on Dr. Rosenblum's opinion, Carter sustained a temporary illness. She noted Carter was only claiming she sustained a temporary injury which she believed was consistent with Dr. Rosenblum's finding Carter was exposed to Aspergillus/Penicillim per the KOSHA report and may have developed reactive airway disease as a result of the exposure. The ALJ also noted Dr. Rosenblum believed Carter may have developed some bronchospasm after the exposure but did not experience a permanent injury. Without question, in resolving the issue of causation, the ALJ relied upon Dr. Rosenblum's opinions contained in the Diagnosis section of his report. She also rejected Ready Electric's contention Carter's "providers" were not competent and credible.

We disagree with the assertion the evidence submitted by Carter does not prove an injury, as the reports of RealTime Laboratories and Drs. Cruz and Hartig

constitute substantial evidence also supporting the ALJ's opinion. The report of RealTime Laboratories establishes its testing revealed Carter had detectable amounts of mycotoxins. The ALJ was free to accept RealTime Laboratories' test results and reject Dr. Rosenblum's opinions regarding its reputation. In stating the test results establishing mycotoxins in Carter's urine "are not from a reputable lab and should not be considered a meaningful test in regards to diagnosing disease from mold exposure," Dr. Rosenblum exceeded the scope of his statutory task. His task was to provide a medical opinion as to whether Carter suffered a temporary or permanent work-related occupational disease. Dr. Rosenblum's unsolicited opinions regarding the reputation of a laboratory exceed his statutorily designated task. Thus, the ALJ was free to ignore these gratuitous comments and to accept Dr. Hooper's response to Dr. Rosenblum's criticisms. The report of Environmental Safety Technologies and the KOSHA investigation firmly demonstrate Carter was exposed to significant amounts of mold during the time she worked at St. Mary's.

The KOSHA citation introduced in the record reads as follows:

For the (3) Electricians of Ready Electric Company Inc, located at 3300 Gilmore Industrial Blvd Louisville, Kentucky 40213, the employer did not provided [sic] advisory information on respirators as presented in Appendix D. CSHO noted on 08/31/16 the employer provided the employees with a 3M N95 sanding Respirator that are used voluntarily for comfort, while working in the East Wing of St. Mary's and Elizabeth Hospital which contained mold.

We note KOSHA's investigative report cites to Environmental Safety Technologies' test results set forth herein.

In his report, Dr. Cruz set forth the results of the testing from RealTime Laboratories. He also addressed Dr. Hartig's report in which he stated there was "a confirmed case of mold toxicity, sensitivity and subsequent chronic inflammatory response syndrome." Dr. Cruz also reviewed the KOSHA records and the report from Environmental Safety Technologies dated October 3, 2016. He concluded the findings of the Environmental Safety Technologies revealed multiple dates of a "substantially larger spore mold count inside the abandoned hospital." Based on the information he reviewed, Dr. Cruz concluded Carter's "shortness of breath, dyspnea, weakness and anxiety can confidently be attributed to [her] mold exposure." He noted Carter had never had asthma symptoms until after her exposure to mold. Consequently, it was "abundantly clear there was a workplace exposure to mold and dampness from a building that had been abandoned due to flooding." Dr. Cruz concluded as follows:

So, we are presented with a very physically fit and healthy individual who rarely was ill and who AFTER exposure to a moldy environment develops Reactive Airway Disease/Asthma, Night time Oxygen dependence and who finds herself with repeated episodes of shortness of breath and wheezing severe enough to prompt 8 visits to the emergency department which as we all know is very expensive, stressful and unpleasant.

Dr. Cruz responded to questions submitted to him as follows:

Was Monica Carter exposed to mold?

**Unequivocally YES. The sample outside reporting agencies such as Environmental Technology Services Inc. confirm very high levels of Indoor fungal spores when compared to outdoor which when remediated [cleaned/removed] and retested showed significant reductions in indoor mold findings.**

Are Mrs. Carter's symptoms of asthma, wheezing, chemical hypersensitivity, fatigue, poor stamina need for night-time oxygen attributable to her exposure?

**Unequivocally YES. There is ample medical literature that demonstrates mold inhalation can be very toxic and have lasting effects long after the initial exposure which is what happened in this case. Prior to this mold exposure Mrs. Carter was extremely fit and athletic. She was rarely if ever ill and had no history of asthma, night time need for oxygen, chemical hypersensitivity or repeated episodes of shortness of breath.**

**Per AMA Guides to the Evaluation of permanent Impairment 5th Edition, Mrs. Carter does NOT qualify for an Impairment rating; however, she is impaired, and her quality of life as a result of this mold induced asthma and chemical hypersensitivity limits her ability to work in a dusty or fume filled environment which is often the case for electrician work. Her ability to work as an electrician has been severely limited or compromised by this exposure. Her ability to enjoy the outdoors and sports have been significantly compromised since her stamina is very reduced. She could easily walk 8 miles at work, but now since her mold exposure, she reports feeling fatigued and winded if she walks even 2 miles. This is from an individual who routinely exercised three times a week for 1-3 hours and could comfortably ski on black diamond slopes. Her health status has certainly been damaged by the mold exposure and even her future earning capacity.**

Within reasonable medical probability, is Mrs. Carter's condition causally related to her work environment?

**YES. Prior to this exposure, Mrs. Carter was very healthy and athletic with a strong capacity to work. Since her exposure, she has developed asthma, wheezing, chemical hypersensitivity, fatigue, poor stamina need for night-time oxygen attributable to her exposure. Nothing else explains such an abrupt and profound change in [sic] state of health.**

Within reasonable medical probability, is any pulmonary impairment caused in part by factors in her work environment?

**YES, Mold Exposure.**

Contrary to Ready Electric's protestations, the reports of Dr. Cruz and RealTime Laboratories constitute substantial evidence upon which the ALJ may also rely in resolving the issue of causation. The ALJ also relied upon Dr. Hartig's report which is not inconsistent with Dr. Rosenblum's diagnosis and, thus, constitutes substantial evidence supporting the ALJ's decision. In a December 5, 2016, letter, Dr. Hartig requested that Ready Electric grant Carter a medical leave of absence from her work "due to a confirmed case of mold toxicity, sensitivity, and subsequent chronic inflammatory response syndrome." He recommended at least three months off from work.

In summary, the ALJ did not shift the burden to Ready Electric to rebut Carter's testimony; she determined whether Carter had met her burden of proving work-related disease. The ALJ was not required, as urged by Ready Electric, to issue findings as to whether Carter had rebutted Dr. Rosenblum's opinions as she had relied upon his opinions in finding Carter had sustained a temporary occupational disease. There was nothing for Carter to rebut. While the ALJ is required to provide the reasons for her rejection of Dr. Rosenblum's findings and opinion as to causation, she is not required to set forth her reason, if she does so, for rejecting his opinion regarding what is and is not a reputable laboratory. Dr. Rosenblum and this Board have no authority to assess the credibility of and the weight to be afforded the evidence. Similarly, as urged by Ready Electric, this Board has no authority to direct a finding that the medical evidence submitted by Carter is unreliable.

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Since Dr. Rosenblum's diagnosis as set out herein along with the testing from RealTime Laboratories and the opinions of Drs. Cruz and Hartig constitute substantial evidence, this Board has no authority to set aside the ALJ's finding that Carter sustained a temporary occupational disease meriting an award of TTD benefits and medical benefits.

Finally, because we are unable to determine the evidence upon which the ALJ relied in finding a safety violation occurred pursuant to KRS 342.165(1), we vacate the 30% enhancement of the TTD benefits. In the ALJ's analysis of this issue, she noted KOSHA had cited Ready Electric. She also noted Carter testified the conditions were so bad she asked if they should have safety equipment and Nance stated it was not a big deal. She referenced Carter's testimony that she had found Nance to have a somewhat careless disregard for safety rules. The ALJ then

determined Ready Electric violated KRS 338.031(1)(a), the general duty statute, by failing to provide a workplace free of recognized hazards likely to cause death or serious physical harm since Carter satisfied the four prong test established in Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000). The ALJ found the first two prongs were satisfied since the “experts and KOSHA” established mold was the condition which presented a hazard to the employee which was recognized as a hazard in the industry. The ALJ also concluded the third prong was met since exposure to toxic mold is likely to cause serious physical harm was implied by the remediation measures. The ALJ concluded the fourth prong was established since a feasible means to eliminate or materially reduce the existing hazard was the use of full body protection until the mold could be eliminated. According to the ALJ, this did not occur in a timely fashion. Even though the ALJ stated “even proper masks would have shown an effort to provide safety from mold exposure,” she did not find the use of proper masks was a feasible means to eliminate or materially reduce the hazard.

In light of these findings, we have carefully reviewed the KOSHA records and Carter’s testimony to determine the basis of the finding concerning the fourth prong; the use of full body protection. The KOSHA records do not establish full body protection was necessary and/or required to eliminate or materially reduce the hazard created by the exposure to mold. Rather, the KOSHA records indicate Ready Electric had provided exposed employees with “respiratory protection, but were not trained on the use and how to properly don and use the respiratory protection provided by the employer.” This was the basis for the KOSHA citation. KOSHA documented

Ready Electric had taken steps to ensure its employees were not exposed to specific conditions noting personal protective equipment had been provided in the form of a 3M N95 respirator model 8511 masks. There was no mention by KOSHA that the donning of full body protection was needed in order to eliminate or fully remove the hazard.

Significantly, Carter's testimony does not support the ALJ's finding regarding the use of full body protection. Carter testified Callam told her that, rather than use dust masks, they should have been supplied with full-face respirators. Carter also testified St. Mary's dictated the safety equipment to be worn and the masks Ready Electric provided were based upon the recommendation of St. Mary's infectious disease nurse. Carter testified when she went in to take the pictures, introduced as an exhibit to her deposition, she was completely dressed explaining as follows:

A: Number 1 – and also for the record, too, I [sic] completely dressed. I went and got the clothes I needed for mold removal. So I had on a full face respirator with a completely covered Tyvek suit, chemical gloves, chemical boots, the whole nine yards. And, then, I bagged that stuff when I came out of the area. Just so you know I didn't go in there without protection and make myself sicker.

The above testimony establishes Carter put on attire used for mold removal. She did not testify the items she put on to take the pictures were needed by her in order to safely complete Ready Electric's job at St. Mary's. There is no testimony by Carter that the outfit she wore to take the pictures was necessary for her to be protected from the hazards created by exposure to molds while working on the project.

Moreover, in the ALJ's decision, there is no reference to any evidence addressing the need for Ready Electric's employees to wear full protective gear in

completing the project. The only reference to full protective gear within the ALJ's summary of Carter's testimony is set forth in the following paragraph:

Jeff Callum [sic], safety director, told Carter Ready Electric should have provided the workers on the East Wing with full respirators and dust masks. When Carter returned to work on October 3, 2016, remediation for the mold was underway and those in the area were fully outfitted with protective gear. The hospital called off the electrical project because of the mold hazard.

Likewise, in the ALJ's summary of the KOSHA reports there is no reference to KOSHA determining Carter should have been provided full body protective gear. Rather, in her summary of the KOSHA reports, the ALJ noted KOSHA's investigator determined N95 dust masks purchased by Ready Electric were worn by Carter and Mel Hart on September 26, 2016. The investigator also determined that, while the N95 dust mask could help reduce exposure to certain air borne particles, it could not eliminate the risk of contracting illness or disease. She also noted the investigator further found Ready Electric provided no training regarding the use of the masks. In the final paragraph pertaining to the summary of KOSHA's investigation the ALJ noted KOSHA had cited Ready Electric for not providing training to the employees who were wearing 3M N95 Model 8511 respiratory protection which was a violation of 29 CFR 19:10.134(k)(6). Thus, the ALJ's summary of the evidence does not provide any guidance to us or the parties as to the evidence upon which she based her determination the feasible means to eliminate or reduce the hazard was the use of full body protection.

Notably, in her Form SVC, Carter alleged a safety violation was due to Ready Electric's failure to "provide a proper respirator or basic advisory information

on respirators to [her] despite having [her] work in an area infested with mold.” Carter asserted the failure to provide advisory information on respirators violated Appendix D of 29 CFR 1910.134. Thus, Carter was relying on a violation of a specific safety regulation in the workplace rather than a violation of the employer’s “general duty” set forth in KRS 331.0311(a).

All parties to a workers’ compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990). The parties are entitled to an accurate and complete basis upon which the ALJ made her decision. Because we are unable to determine the evidence upon which the ALJ relied in determining Carter satisfied the fourth and final prong set forth in Offutt, the finding that Ready Electric committed a safety violation must be vacated and the claim remanded for additional findings.

That said, we decline to remand the claim for a finding that Ready Electric did not commit a safety violation meriting a 30% enhancement of the TTD benefits. We note the first day Carter went on the walk-through, her supervisor told her masks were not needed. Consequently, she was exposed to mold prevalent throughout the East Wing for at least fifteen minutes without protection. Also, Ready Electric does not dispute it did not provide the appropriate advisory information and training regarding the use of the respirators. This is borne out by the KOSHA citation

in which Ready Electric admitted its employees had not received training on how to correctly wear the 3M N95 Model 8511 respirator. We also point out Carter's testimony reveals St. Mary's dictated the safety equipment to be worn, not Ready Electric. Thus, in her analysis on remand, the ALJ must bear in mind Carter acknowledged St. Mary's dictated the safety equipment to be used by Ready Electric employees in performing their job. We express no opinion as to the outcome on remand.

Accordingly, the ALJ's determination Carter sustained a temporary occupational disease and the duration of the award of TTD benefits is **AFFIRMED**. The finding that KRS 342.165(1) is applicable and the award of TTD benefits enhanced by 30% is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings and a determination of whether KRS 342.165(1) is applicable and entry of an award of TTD benefits in accordance with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

**Rechter, Member.** I would affirm the ALJ's opinion. I believe sufficient evidence exists in the record to support her conclusion that a feasible means existed to eliminate or materially reduce the hazard of mold exposure.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON MARK R BUSH **LMS**  
HON CLARKE D COTTON **LMS**  
250 GRANDVIEW DR STE 550  
FT MITCHELL KY 41017

**COUNSEL FOR RESPONDENT:**

HON DEREK P O'BRYAN **LMS**  
600 W MAIN ST STE 500  
LOUISVILLE KY 40202

**ADMINISTRATIVE LAW JUDGE:**

HON JANE RICE WILLIAMS **LMS**  
657 CHAMBERLIN AVE  
FRANKFORT KY 40601