Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 24, 2021

CLAIM NO. 202000078, 202000077 & 202000074

WARRIOR COAL PETITIONER

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

BRENT BLADES and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

BORDERS, Member. Warrior Coal ("Warrior") appeals from the May 16, 2021 Opinion, Award, and Order and the June 2, 2021 Order on Petition for Reconsideration, rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ determined Brent Blades ("Blades") suffered a work-related left knee injury on August 1, 2018, and he awarded permanent partial

disability ("PPD") benefits, temporary total disability ("TTD") benefits, and medical benefits. The ALJ dismissed Blades' claim for knee injuries caused by cumulative trauma and limited his award of benefits on the hearing loss claim to medicals benefits as Blades did not reach the 8% threshold entitling him to PPD benefits. The determinations in the hearing loss claim (Claim No. 2020-00077) and the alleged injuries caused by cumulative trauma claim (Claim No. 2020-00078) were not appealed.

On appeal, Warrior argues the ALJ incorrectly applied the law regarding notice, erred in relying on medical opinions for which there is no supporting evidence, erroneously awarded TTD benefits, and erred in refusing to grant credit for short-term disability ("STD") benefits. We affirm, in part, vacate in part, and remand for an additional determination regarding the appropriate period of TTD benefits to which Blades may be entitled.

Blades testified by deposition on May 15, 2020 and at the hearing held March 17, 2021. Blades worked as a coal miner and as an X-ray technician. He worked as a belt man for Warrior from November 2008 through April 2019. He extended the belt line from one to three breaks each night. He went to old belt lines and took them apart, packed everything, stacked the materials on trailers, and took them to the new belt lay's location. After moving the feeder, he packed the framing, stretched the ropes, and ran come-alongs. Blades drilled holes with a hand-held auger to lock the feeder down. The heaviest items he lifted weighed 50-150 pounds. When moving the framing, he used both hands and he frequently bent over and duck walked with the frame to where the ropes were, and then threw it to the other side of

the rope. His job was very hard on his low back, neck, shoulders, elbows, and hands.

Blades alleged he sustained a left knee injury on August 1, 2018. During his deposition, Blades described the occurrence of his injury as follows:

> Q: Any particular way you recall it was the left knee affected in some type of an incident at work?
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> A: Which I told my supervisor, I -- I crawled around down there, knees get cut up, and I didn't fall. I didn't twist it or nothing, but I cut them up all the time crawling around in nasty mud and water. And if I wasn't at work, I was at home in the bed. And that's when it started hurting, when I was underground. And I came out, and I told them I knew I did something. I didn't know what I did, but I did something. And as soon as I come out, the first thing, two or three of them was like, You didn't do it down there, did you? You didn't do it down there, did you? And I know how that works. I had a family, wife, four kids, one in college, and I couldn't afford to lose my job. So I did not file because I knew if I did I'd probably lose my -- I'd probably get fired the way they acted about making sure -- as soon as I walked out, instead of being, Are you okay, it's, You didn't do it down there, did you?
>
> Q: Well, I understand that, and I know you're trying to explain things to me. But my -- my goal right here for what I need to know in this case is what happened. And if you had an accident on the job, I need for you to tell me what it was.
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> A: I didn't fall -- I twisted my knee, but as far as I know from crawling around -- I mean, I did that a lot. But it wasn't no specific that night. I mean, it just -- crawling around I cut my knees up, and it got to hurting one night crawling around underground from rocks getting in your -- your knee guards. It just started hurting one night, and next thing I knew I had an infection in my knee and they was telling me they were going to cut me off at the hip by the time I got – they took me to the hospital.
>
> Q: When did you go to the hospital?

> A: I don't know the exact morning. I come out – it was somewhere around the first of August is when I come out. But I went to the doctor in Madisonville. And for a month straight they put me on antibiotics or -- yeah, and it kept getting worse and worse until finally I collapsed underground one night and they had to bring me out. And that was sometime around September -- September the 7th, I think, they had to bring me out. My dad took me to Evansville then. And when they got me to Evansville, they told my wife that they didn't know if they would be able to save my leg because an abscess had formed.

At the hearing, Blades testified he came out of the mine and went home. He went to the emergency room due to severe knee pain. The following day, he gave notice of the injury to "Chewy" one of the face bosses. He continued working until September 14, 2018. Blades stated, "a couple guys had to pack me out of the mines" and his father took him to Orthopedic Associates where Dr. Matthew Drake obtained an MRI and performed the first of two surgeries. He received STD benefits in September 2018 after the surgeries. Blades thought there was a deduction from his income to pay for the STD plan. After a second surgery a week later, Blades remained off work for six months. Upon his return, he could no longer duck walk, crawl, or crouch, but he continued to perform his normal duties and earned the same wages during that time. He worked 10 days thereafter, but was unable to continue. He then returned to work for Jennie Stuart Hospital performing X-ray radiography in April 2019. He planned to continue working for the hospital, but did not believe he could return to employment in the mines. Blades testified as follows regarding the measures he takes with his knee:

> Q: Do you have any assistive devices you use for your knee, like braces, wraps, anything of that nature?

A: I've got wraps that I use sometimes.

Q: How -- do you use the wraps when it just flares up or do you use it on a certain time? Would you help the judge understand how you decide to use that or not?

A: If I know I'm going to be going – going somewhere and doing a lot of walking, I'll go ahead and -- I'll go ahead and wrap it. But if I'm just at the house taking it easy, I don't. I don't –

Q: (Interrupting) How about at work?

A: I usually don't do it at work. I don't move a lot. I don't have to move very much.

Blades acknowledged he had low testosterone for which he took injections in his upper arm. He denied having any injections into his thighs. He believed he started on the injections after he ceased working as a coal miner.

Blades filed medical records of Orthopedic Associates. He presented on September 14, 2018 with knee pain into his thigh. MRI results revealed an abscess in the soft tissues overlying the distal aspect of the vastus lateralis muscle. He was diagnosed with a left thigh abscess. Dr. Drake performed surgery. Dr. Isaac W. Fehrenbacher performed a repeat irrigation and debridement of the left thigh and discharged Blades on September 26, 2018. Blades was restricted from crawling, crouching, or carrying more than 20 pounds. Blades returned for a follow-up on January 8, 2019 for the lower left extremity and was restricted from crawling or carrying of more than 40 pounds. Dr. Fehrenbacher determined Blades could return to work on March 17, 2019.

Dr. James Dodds saw Blades on September 11, 2018 for a left knee follow-up. An MRI revealed an oval shaped prepatella fluid collection, prepatellar

bursitis; areas of Grade II chondromalacia lateral articular facet patellar articular hyaline cartilage, lateral subcutaneous soft tissue swelling; heterogeneity and thickening of portions of the lateral collateral ligament complex, secondary to prior injury or degenerative changes; and several small ganglia adjacent to the proximal tibia. It also showed lateral aspect small effusion. Dr. Dodds diagnosed left knee pain, patellar bursitis of the left knee, chondromalacia of the left knee, effusion of the left knee, and chronic pain of the left knee.

Dr. Joseph Zehner performed an independent medical evaluation ("IME") on February 7, 2020. Dr. Zehner assigned a 15% impairment rating for the August 1, 2018 left knee injury pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). Dr. Zehner noted Blades has an abnormal gait supported by multiple pathologic findings of his left knee resulting from crawling in the mines. Dr. Zehner utilized Table 17-5 Lower Extremity Impairment Due to Gait Derangement. He noted Blades has "Mild c" where there is documented arthrosis and use of a cane "for distance walking but not usually at home". Dr. Zehner stated Blades is unable to squat, bend, crawl, use heavy vibrating tools, walk over rough surfaces, or work at unprotected heights. Dr. Zehner concluded Blades does not retain the physical capacity to return to his prior employment. Dr. Zehner stated Blades' knee problems are related to coal mining. Dr. Zehner did not believe Blades has any pre-existing impairment to the knee.

Dr. Michael Best performed an IME on May 18, 2020. Dr. Best found no injury to either knee. He stated Blades had a lateral thigh infection that spread to

the knee joint. He opined Blades developed an abscess due to self-injecting testosterone. In a June 15, 2020 report, Dr. Best reiterated that Blades sustained a lateral thigh abscess, precipitated by multiple injections of testosterone, within the lateral thigh. Dr. Best found minimal evidence of injury caused by cumulative trauma, including plain X-rays revealing pathology greater than what would be expected from the natural aging process. Dr. Best noted Blades' complaints were subjective and found no objective evidence to support a diagnosis of injury caused by cumulative trauma. He also found Blades was at maximum medical improvement ("MMI") and there was no evidence of pre-existing active medical conditions, except in the left knee. Dr. Best disagreed with Dr. Zehner regarding the cause and effect relationship between the thigh abscess and the knee condition. Dr. Best assigned a 0% impairment rating pursuant to the AMA Guides.

Medical records of Baptist Health indicate Blades presented to the emergency room on August 1, 2018. The treatment note initially states under the subjective heading that Blades presented for right knee pain. In the history provided by the patient, the note lists the location as the left knee. A diagram is marked for left knee swelling on examination and left knee is noted. The left knee was X-rayed and aspirated. Blades was released to return to work on August 3, 2018. He was seen on August 27, 2018 for a follow up examination of the left knee. The examination of the right knee was normal. A second arthrocentesis of the left knee was performed. On September 5, 2018, an MRI of the left knee revealed an oval shaped prepatellar fluid collection and prepatellar bursitis. There were areas of grade II chondromalacia, lateral articular facet patellar articular hyaline cartilage. Lateral

subcutaneous soft tissue swelling, and heterogeneity and thickening of portions of the lateral collateral ligament complex, secondary to prior injury or degenerative changes, were noted. There were several small ganglia adjacent to the proximal tibia lateral aspect and small effusion.

Warrior filed the STD plan that states, "Currently you don't have to pay a premium for disability coverage." Additionally, the plan states:

> If you have a qualifying disability after six months of employment, Short-Term Disability coverage replaces a portion of your pay for up to 26 weeks. Your benefit depends upon your length of service. For example, in the calendar year after you complete one year of service, the benefit is two weeks at full base pay and four weeks at half pay. The following calendar year, the benefit increases to three weeks at full base pay and six weeks at half base pay. Different amounts apply in the case of work-related injuries.
> . . . .
>
> If you become disabled because of an occupational illness or injury that results in your total disability, you will be entitled to short-term disability benefits under this Plan in addition to the income replacement you may be entitled to under the workers' compensation law. Under the Plan you will receive your base rate of pay until the date you are eligible for workers' compensation under state law. After that date you will receive short-term disability benefits under the Plan equal to your base rate of pay *less* the amount of any income replacement you receive under a workers' compensation law during the 26-week short-term disability period in which you received your full base rate of pay under the Plan, you will be required to reimburse your employer for any workers' compensation replacement income overpayment. If you do not do this, your future benefits under the Plan may be reduced by the amount of the overpayment.

The ALJ's findings relevant to this appeal are as follows, *verbatim*:

Notice for the Left Knee

19. KRS 342.185 provides:

> Except as provided in subsections (2) and (3) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof…

20. The Plaintiff initially listed the right knee for the specific injury on the Form 101 but later moved to amend the application to reflect a left knee injury. The Plaintiff confirmed that he gave verbal notice on the date following the injury.

21. The ALJ notes that the records from Baptist Health Madisonville filed along with that Form 101 indicate that the Plaintiff actually treated for the left knee on August 1, 2018.

22. The ALJ finds that while there may have been an initial misstatement regarding the actual knee that was injured, the corresponding medical records, which contain a diagram, are clear that the left knee was the subject of the August 1, 2018, injury.

23. The ALJ therefore finds that while the Plaintiff may have made an inadvertent misstatement initially, he corrected the initial mistake, amended the application, and thus gave notice as soon as practicable in accordance with the dictates of KRS 342.185.

24. Since the inception of the Act, the courts have determined that where the claim for an occupational injury is meritorious and the employer is not prejudiced by a delay in receiving notice, the claim should not be dismissed easily. *See* Bates & Rogers Construction Co. v. Allen, 183 Ky. 815, 210 S.W. 467, 472-74 (1919).

25. The ALJ similarly finds that a misstated reference to the right knee accompanied by medical records that clearly detail treatment of the left, does not serve to prejudice the interests of the Defendant Employer. Accordingly, the ALJ finds that notice was given in accordance with KRS 342.185.

Benefits Per KRS 342.730/Work-Relatedness and Causation
Injury as Defined by the Act

26. As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

27. The Plaintiff has provided, and relies upon, the medical opinion of Dr. Zehner in this matter with respect to all injuries claimed other than hearing loss. The ALJ has been persuaded by the credible testimony of the Plaintiff, along with his contemporaneous presentation for medical treatment, that he sustained a work-related left knee injury on August 1, 2018.

28. The ALJ therefore finds that the opinion of Dr. Zehner regarding the Plaintiff's left knee injury is credible and convincing because it is supported by the credible testimony and corresponding medical treatment records of the Plaintiff.

29. The ALJ finds that Dr. Zehner's reference to the Plaintiff's extensive left knee treatment while noting that the right knee examination was normal, lends credibility to the finding of a specific injury.

30. The ALJ therefore finds per the credible opinion of Dr. Zehner, that the Plaintiff sustained a 15% whole person impairment based appropriately upon Table 17-2, on page 526, of the AMA Guides.

31. The ALJ finds that Dr. Zehner was also convincing in his documentation of the Plaintiff's gait derangement as a result of the left knee injury. Dr. Zehner

> convincingly stated that the Plaintiff remained capable of medium duty work but could not return to walking on uneven surfaces, climbing, or working at unprotested heights. The ALJ finds based upon these gait-related restrictions, that the Plaintiff does not retain the physical capacity to return to the same type of work. His benefits shall therefore be enhanced by the "three multiplier" per KRS 342.730(1)(c)1.
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> 36. The ALJ finds that Dr. Zehner credible determined that the Plaintiff reached maximum medical improvement on September 11, 2018. The ALJ finds based thereupon that the Plaintiff is entitled to temporary total disability benefits in the weekly amount of $795.79 per week from the date of injury, August 1, 2018, through September 11, 2018. The duration of the award of temporary total disability benefits has rendered the issue of credit for short-term disability plan payments inapplicable.

Warrior filed a Petition for Reconsideration making the same arguments it raises on appeal. The ALJ overruled the Petition for Reconsideration, finding it failed to cite any patent error and it was merely an impermissible re-argument of the merits of the case.

As the claimant in a workers' compensation proceeding, Blades had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Blades was successful in his burden regarding this claim, we must determine whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence 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).

On appeal, Warrior argues the ALJ incorrectly applied the law regarding due and timely notice. Warrior asserts it was prejudiced by the delay in giving notice. Warrior asserts that by accepting STD benefits and having his medical

expenses paid through health insurance, Blades deprived Warrior of any opportunity to question the work-relatedness of the condition and to have the treatment reviewed by utilization review or peer review.

Warrior equates failure to file an incident report to failing to give notice. Blades' deposition testimony indicates he gave notice to his supervisor upon exiting the mine on August 1, 2018. He testified the injury was not filed because he was afraid he would lose his job. He indicated the supervisor essentially instructed him not to file the injury report. This does not negate the fact that he orally reported the injury to the supervisor. While Blades' Form 101 initially listed the right knee in the specific injury claim, he later moved to amend the application to reflect a left knee injury. The medical report filed with the Form 101, while initially stating Blades had a right knee injury, clearly indicates the complaints at that time were for the left knee, and treatment on that date and on subsequent visits was directed to the left knee. A cursory review of the initial medical report make it apparent that the reference to the right knee was in error. Based upon the totality of the evidence, the ALJ determined proper notice was given. We cannot say this finding was not supported by substantial evidence and therefore affirm on this issue.

Next, Warrior argues the ALJ erred in relying on medical opinions for which there is no supporting evidence. Warrior argues Dr. Zehner's opinion that Blades has a 15% impairment rating cannot be relied upon as it is not based on any evidence in the record regarding moderate or advanced arthritis in the left knee and the use of a cane for distance walking as required by table 17-5, section 17.2c of the AMA Guides. Warrior notes Dr. Zehner refered to the existence of documented

arthrosis, but he made no reference to the severity of the condition. He made findings of effusion, but no findings as to degeneration. Further, there is no evidence that Blade used a cane. In support of its argument, Warrior cites Blades' testimony at the hearing where he was asked about assistive devices. Blades only stated he used wraps when "going somewhere and doing a lot of walking" but he made no reference to the use of a cane.

Regarding the accuracy of the impairment rating assessed by Dr. Zehner, we note that he was not cross-examined. We likewise note the impairment rating he assessed was not challenged by the other medical experts of record. Our courts have consistently stated that the proper method for impeaching a physician's methodology under the AMA Guides is through cross-examination regarding that opinion or through another medical expert. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81 (Ky. 2005). That did not occur in this case. Because we determine Dr. Zehner's permanent impairment rating was plainly grounded in the AMA Guides, we cannot say the ALJ's reliance on that rating was beyond the scope of his discretion as fact-finder or unreasonable as a matter of law. Speedway/Super America v. Elias, 285 S.W.3d 722, 730 (Ky. 2009); Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). Therefore, it was permissible to rely upon that rating as a basis for the award of PPD benefits. The ALJ clearly explained why he relied upon the rating. We will not disturb the ALJ's determination based upon Dr. Zehner's assessment of impairment, which constitutes substantial evidence. We likewise affirm the ALJ in this regard.

Warrior now argues the ALJ erroneously awarded TTD benefits from August 1, 2018 through September 11, 2018. Blades testified at the hearing that he returned to work following the August 1, 2018 injury and continued to work through September 11, 2018 earning his normal wages.

We do not believe the ALJ properly analyzed and considered the issue of entitlement to TTD benefits as the record indicated Blades had returned to work at his normal job. TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement permitting a return to employment[.]" In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. Blades testified he continued to work following the injury at his regular employment until September 11, 2018. Therefore, we vacate this portion of the ALJ's opinion and remand for additional findings regarding the appropriate duration of TTD benefits to which Blades may be entitled during this period, if any. We do not direct any particular outcome

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits as long as he or she is unable to perform the work performed at the time of the injury. The Court stated, "... we reiterate today, Wise does not 'stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.'" Id. at 254. In Trane Commercial Systems v.

Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.
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> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based

> reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.
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> Id. at 807

Finally, Warrior argues the ALJ erroneously refused to grant it credit for STD benefits Blades received. Warrior notes the plan is exclusively employer-funded and Blades testified he has not repaid the amounts he received during the period. Benefits were paid at a rate of $251.66 per week from September 23, 2018 through the pay period ending March 17, 2019. Warrior contends Blades will be unjustly enriched if it is not granted a credit.

Warrior had the burden of establishing entitlement to a credit for the STD payments. Dravo Lime Co. Inc., v. Eakins, 166 S.W.3d 283 (Ky. 2005). KRS 342.730(6) provides:

> All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

KRS 342.730(6) requires a three-part analysis before it applies to a particular benefit, in this case, STD benefits. The plan must be exclusively employer-funded, it must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits. While Blades testified he was not sure whether he would have to repay the STD benefits, he did not have the burden of proof on the issue of the credit, and his testimony is not substantial evidence establishing there was no

offset. It was Warrior's burden to establish the STD plan did not contain an offset. There was substantial evidence that the STD policy did contain an internal offset provision from a plain reading of the plan itself. The plan provided for repayment of benefits, clearly this is at least a partial offset for workers' compensation benefits. We note that reimbursement of the STD plan falls outside of KRS 342.010 *et. seq*., and therefore outside the purview of the ALJ. Warrior's relief on this issue lies elsewhere. Therefore, we believe the ALJ's determination is supported by substantial evidence and this portion of the ALJ's opinion shall be affirmed.

Accordingly, the May 16, 2021 Opinion, Award, and Order and the June 2, 2021 Order rendered by Hon. Jonathan Weatherby, Administrative Law Judge, are hereby **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** to the ALJ for entry of an amended decision in conformity with this opinion.

ALL CONCUR.

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