RENDERED: October 1, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000302-WC

CONSOL OF KENTUCKY, INC. APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 95-WC-37447 & 94-WC-04738

WILLIAM LINDON;
ROBERT L. WHITTAKER,
ACTING DIRECTOR OF SPECIAL FUND;
HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Consol of Kentucky, Inc. (Consol) appeals from an opinion of the Workers' Compensation Board (the Board) entered January 15, 1999, which affirmed an order of the Administrative Law Judge (ALJ) entered August 3, 1998, finding William Lindon (Lindon) to be totally disabled. We affirm.

Linden sustained an injury to his cervical spine on December 12, 1993 while working for Consol. He underwent an anterior cervical discectomy and fusion at C5-6 and decompression

of the spinal cord in February 1994. Linden has never returned to work.

In August 1994, Lindon filed an application for adjustment of claim alleging not only the cervical spine injury, but also carpal tunnel syndrome (CTS) and hearing loss. Because the medical evidence filed in this case is voluminous and because all parties are familiar with what was filed, we see no need to further add to the record by summarizing it again in its entirety. However, we will develop further facts where necessary to provide a clear understanding of our ruling in this case.

On July 29, 1995, ALJ Thomas Dockter entered the initial opinion and award in this case. ALJ Dockter assigned an occupational disability rating of 50% arising from Lindon's cervical injury only, and found him to be an "excellent candidate" for vocational rehabilitation. The award was apportioned equally between Consol and the Special Fund. ALJ Dockter further found that based on the medical evidence presented, Lindon's CTS was not causally related to his injury.

In an opinion rendered January 26, 1996, the Board affirmed ALJ Dockter's opinion. In regard to Lindon's CTS claim, the Board found that the only issue presented to the ALJ was whether the CTS was related to the 1993 accident as no separate cumulative trauma or disease claim was filed for CTS.

Following denial of Lindon's motion for reconsideration and while Lindon's appeal from ALJ Dockter's opinion was pending before the Board, Lindon filed a new application for adjustment of claim on September 19, 1995. In this application, Lindon

alleged entitlement to benefits for CTS due to repetitive use and constant bending and flexing of his hands and wrists, arousal of a dormant pre-existing condition in his lower back, and depression.

On February 15, 1996, Lindon filed a motion to reopen his previous claim due to (1) mistake in the decision that he does not have CTS; (2) a worsening of his physical and mental condition, which included overall worsening as well as severe depression and bladder/urinary problems. On April 3, 1996, the ALJ entered an order which denied the motion in part, stating:

> the Court finds that the issues regarding the Plaintiff's carpal tunnel syndrome has previously been decided by Judge Dockter by Opinion and award and affirmed by the Worker's Compensation Board[.]

Lindon's other claims were allowed to proceed.

Lindon testified in his deposition that he began having bladder problems immediately after the 1994 surgery. Lindon related that he has difficulty urinating, and that he has to sit in order to urinate. He also has to catheterize himself several times a day. Lindon stated that he informed Consol of his bladder problems in a letter dated September 25, 1995. He testified that he notified Consol about his problem as soon as he started having problems and his doctor told him it was related to his injury. The medical evidence consistently shows that Lindon reported having urinary problems soon after the 1994 surgery. All of his treating physicians stated that the urinary problems were causally related to his injury.

It appears that Lindon's psychiatric complaints first came to light in a medical report prepared by Dr. Pellegrini on July 26, 1995, in conjunction with Lindon's claim for Social Security Disability Benefits. According to the report, Dr. Pellegrini indicated that Lindon was suffering from moderate situational depression and anxiety in conjunction with his cervical injury and CTS. In his deposition, Lindon testified that he first complained of feeling down to Dr. Pellegrini in March or April of 1995. He informed Consol of his diagnosis of depression and anxiety in a letter dated August 7, 1995. The medical evidence regarding Lindon's psychiatric complaints indicates a causal relationship between the injury and his subsequent depression.

Dr. Pellegrini, Lindon's primary treating physician, testified that Lindon probably had some CTS prior to the accident which became symptomatic as a result of the injury. Dr. Pellegrini reiterated his earlier testimony that the injury did not cause the CTS, which he believes is better attributed to Lindon's entire work history. In his opinion, the work injury made the CTS "more apparent." Dr. Pellegrini assigned an impairment rating of 10% attributable to CTS. In regards to the decrease of strength in Lindon's hands and arms, Dr. Pellegrini attributed those complaints mostly to the injury. He believes that the fact that the right wrist surgery did not provide relief shows that part of the problem is attributable to the injury.

Dr. Robert Goodman (Dr. Goodman) evaluated Lindon on January 5, 1996. He gave a 10% impairment rating for the cervical injury, apportioning it equally between the injury and pre-existing conditions. Dr. Goodman further noted that Lindon's arm complaints were causally related to the accident only. He does not believe that Lindon has CTS.

On November 26, 1996, the ALJ entered an opinion dismissing Lindon's claim for additional income benefits. Once again, the ALJ reiterated that res judicata precluded any further consideration of occupational disability in regard to Lindon's orthopedic complaints. In regard to whether Lindon had suffered an increase in occupational disability due to his orthopedic complaints, the ALJ found that Lindon had failed to meet his burden of proof, stating that he found Lindon's self-described limitations to be similar to those described in his original complaint.

In regard to Lindon's psychiatric complaints, the ALJ initially found that his depression "was caused, at least in part, by the work injury." However, the ALJ found that Lindon could not use his psychiatric condition to show an increase in his disability because he was aware of his condition at the time of his initial claim was decided. Slone v. Jason Coal Co., Ky., 902 S.W.2d 820 (1995). In so finding, the ALJ stated:

> At the original hearing, the Plaintiff testified to nerve problems including trouble dealing with people and a diminished ability to concentrate. Dr. Pellegrini had diagnosed depression in April and June 1995. The Plaintiff also testified that he began having symptoms of depression and tearfulness following his operations in 1994, although he

> did not report these symptoms to Dr. Pellegrini until 1995. It appears to this Court that the Plaintiff knew or could have known of this condition and should have pursued same in the original claim. Therefore no increase in occupational disability can be shown based upon Plaintiff's psychiatric condition and the language in Slone, supra.

The ALJ further found that Lindon failed to give due and timely notice of his depression based on the fact that Consol was not notified of his condition until August 7, 1995. The ALJ based this decision on his earlier finding that Lindon was aware of his depression at the time the original award was entered.

In regard to Lindon's urinary complaints, the ALJ found that he failed to show a worsening of his condition. In so holding, the ALJ stated:

> Dr. Lotenfoe and Dr. Pellegrini indicated that the Plaintiff's bladder dysfunction was due to the Plaintiff's spinal cord injury. Dr. Lotenfoe assigned a 20% impairment due to the Plaintiff's bladder problems while Dr. Blackburn assigned a 35% impairment. It appears that the only restriction put on the Plaintiff because of this condition is his need to catheterize himself every four to six hours and to work in a clean environment. In the initial Opinion, Order, and Award ALJ Dockter basically found the Plaintiff unable to return to the coal mining industry and ordered vocational retraining so Plaintiff could be trained in another field. There is no indication that the other jobs for which the Plaintiff could be trained outside the coal mining industry would be effected by the Plaintiff's need for self-catherization found above.

The ALJ also found that Lindon failed to give due and timely notice of his urinary problems based on the fact that he was aware of his condition for several months prior to December 1995 and the fact that notice to Consol was not given until September

1996. Following denial of his motion for reconsideration, Lindon once again appealed to the Board.

In an opinion rendered May 16, 1997, the Board reversed the ALJ's opinion and remanded it for further consideration. At the outset of its opinion, the Board states that "[t]he primary issues presented on appeal... are questions of law rather than fact."

In regard to Lindon's psychiatric condition, the Board found that the ALJ erred in its application of Slone. Although like Slone, Lindon had filed a claim for Social Security, the Board found that his claim was for physical disability only and that there was no indication that it was based wholly or in part on psychological problems. Secondly, the Board found it unreasonable to conclude that Lindon should have known at the time of his original complaint that he had a compensable psychological condition based on his testimony before ALJ Dockter in his original claim that he found himself to be more irritable and less able to cope with family members. The Board noted that during the initial claim, Lindon had no diagnosis of or treatment for a psychiatric condition, and that to hold otherwise "places an unreasonable burden upon an individual to self-diagnosis himself." The Board also disagreed with the ALJ's finding that Lindon failed to give due and timely notice of his psychological condition, holding:

> If the ALJ were correct that Lindon knew or should have known of his psychological condition at the time of his original testimony, then clearly Consol was put on notice at that time since they were represented by counsel and present at the

> testimony. While KRS 342.190 provides for written notice, it has consistently been held that written notice is not required when there is actual knowledge on the part of the employer. KRS 342.190; and KRS 342.200. Also, pursuant to Reliance Diecasting Co. vs. Freeman, Ky.,471 SW2d 311 (1971), knowledge of the accident carries with it notice of all conditions that might reasonably be presumed to flow from that accident. Consol could reasonably anticipate that a substantial cervical injury resulting in a fusion with additional residuals could result in a psychological disorder.

As to Lindon's orthopedic complaints, the Board agreed that ALJ Dockter's findings concerning CTS and its relation to the 1993 operates as res judicata. However, the Board found that the ALJ improperly applied res judicata to bar consideration of ongoing or increased orthopedic problems, especially as related to complaints concerning his arms. The Board noted that although Lindon alleged CTS in both his new claim and motion to reopen, the medical evidence, particularly that of Drs. Goodman and Pellegrini, showed that his upper arm complaints were related to the cervical spine injury as opposed to CTS. The Board noted:

> It was incumbent upon the ALJ, therefore, to consider the orthopedic problems to the extent that they may have worsened or to the extent that the upper extremity problems related to the cervical spine injury rather than carpal tunnel syndrome. While we certainly cannot say that the evidence compelled a conclusion that the orthopedic condition by itself constituted a worsening of occupational disability, the ALJ, having failed to address the problems at all, mandates remand.

Finally the Board addressed Lindon's urinary problems. The Board first held that the ALJ erred in apparently failing to consider the testimony of Michael Marcum (Marcum), a vocational

guidance counselor.[1] The brunt of Marcum's testimony was that due to Lindon's illiteracy, he would be ineligible for all available vocational rehabilitation programs. In regard to this issue the Board found Marcum's testimony to be:

> [a]lso significant to the extent that the ALJ concluded that while claimant's neurogenic bladder was related to the original injury, it created no additional occupational disability. That conclusion by the ALJ was based, in part upon ALJ Dockter's original conclusion that Lindon was prohibited from returning to the dirty work of coal mining. Mr. Marcum's testimony, if believed, could lead one to conclude Lindon was unlikely to be a candidate for finding employment in a clean environment. Certainly the ALJ is not bound by this testimony but it should be considered.

The Board also found that Lindon gave due and timely notice of his urinary complaints based on Reliance.

Consol initially filed a petition for review of the Board's opinion with this Court. On April 14, 1998, this Court dismissed Consol's appeal(as well as Lindon's cross appeal) on the grounds that the Board's order was not final and appealable.

On August 3, 1998, the ALJ entered an order on remand amending the original order to conform with the Board's opinion. In this order, the ALJ found that Lindon's psychiatric condition, together with his physical problems, rendered him totally disabled. The ALJ once again refused to find that Lindon's urological or orthopedic complaints resulted in any additional occupational disability.

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[1]Although Marcum's deposition was filed in the record before the ALJ, the Board presumed that the ALJ did not consider it because he neither refers to or acknowledges it.

Consol filed an appeal from the ALJ's order with the Board. Consol first raised the issues it brought forth in its original appeal. The Board indicated without further elaboration, that it felt its original findings were correct and noted that the issues were preserved for further appeal.

Second, Consol argued that the ALJ failed to set forth proper findings of fact in support of his conclusion that Lindon is now totally disabled as a result of the combination of his physical and psychological problems. The Board found:

> In rendering a decision, it is not incumbent upon the fact finder to set forth either a detailed recitation of the facts or the law nor to discuss the minute detail of his reasoning. In the instant action, we believe it is particulary significant that the ALJ when he rendered his initial decision on November 26, 1996, offered a detailed summary of the evidence and specifically a detailed summary of the evidence relating to the psychological condition. He noted that both Drs. Dietrich and Vandivier believed that the prognosis from a psychological standpoint was poor. It was acknowledged that Lindon was learning disabled, depressed and anxious. He appeared to be functioning at a low average level and even Dr. Cooley, who performed an extensive psychiatric examination, diagnosed chronic dysthymia and mild mental retardation. The ALJ in his Order on Remand did not again summarize this evidence. He did, however, conclude:
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>> Plaintiff's psychiatric condition is severe as indicated by the testimony given by Dr. Dietrich and Dr. Vandivier. Even Dr. Cooley indicates that the Plaintiff's [sic] needs psychiatric treatment... Although Plaintiff may have had some of these problems dating back to 1994, they apparently were not of the degree to cause any occupational disability at that time. At the present, however, Plaintiff's

> psychiatric condition does limit
> his ability to function properly.

> This finding on the part of the ALJ satisfies the requirement set out in Shields [vs. Pittsburgh and Midway Coal Mining Co., Ky. App., 634 S.W.2d 440 (1982)]. It would have served no realistic nor reasonable purpose, particulary when considering the amount of paper that already exists in this file for the ALJ to again offer a detailed summarization of the psychological testimony. The parties as well as this Board can review this Order and have a reasonable understanding of the basis for ALJ's decision.

This appeal followed.

Prior to addressing the merits of Consol's appeal, there are several procedural arguments which need to be addressed. First, Consol argues that Lindon's reply brief should be stricken in its entirety on the ground that it was untimely filed and thus not in accordance with CR 76.25(6). This argument is moot due to the fact that Lindon was given permission to file his brief out of time by order of this Court entered April 14, 1999.

Consol also asks that a portion of Lindon's reply brief be stricken. In the closing paragraph of his reply brief, counsel for Lindon alleges that his complaints have not been taken seriously because he is African-American and that Consol has done everything possible to avoid paying benefits. Lindon also asked that Consol be sanctioned. Counsel for Consol was given leave to file a response brief in regard to Lindon's allegations. Consol asked that the allegations be stricken and Lindon's motion for sanctions denied.

Having reviewed the entire 18 volume record of evidence presented in this matter, we find the last paragraph of Lindon's brief to be totally inappropriate and therefore order it stricken. It appears that up until this point, Lindon has never alleged racial discrimination in the handling of his claim and there is no evidence in the record to support this unfortunate and unnecessary claim. Furthermore, there is nothing in the evidence which would indicate that Consol has in any way attempted to abuse the appellate process or somehow prolong this claim. Lindon's allegations are not well taken and his motion for sanctions is denied.

Lindon alleges that Consol's failure to file a petition for reconsideration pursuant to KRS 342.281 bars an appeal of all factual findings and errors related thereto. Having reviewed the record herein and the issues raised by Consol on appeal, we believe that Lindon's allegation on this issue applies only to Consol's argument that the ALJ's order on remand was not adequately supported by findings of fact. Specifically, Consol alleges that the ALJ's order regarding Lindon's psychiatric condition contained "no findings of fact to support his conclusion and failed to provide any rationale demonstrating the method by which he weighed the evidence."

Pursuant to KRS 342.281, any "errors patently appearing upon the face of the award, order or decision" are to be brought to the attention of the ALJ by a petition for reconsideration in order to give him a chance to correct the error. Although the pre-1996 amendment version of KRS 342.281 provided that failure

to file a petition for reconsideration would not preclude appeal on a contested issue, that language is absent from the current version of KRS 342.281. Under KRS 342.0015, "procedural provisions of [the 1996 amendments] shall apply to all claims irrespective of the date of injury[.]" Therefore, because Consol failed to ask the ALJ for further factual findings in regard to the order on remand, this argument is precluded from further review.[2]

Finally we believe that several of the issues raised by Consol on appeal are now moot by virtue of the Board's affirmation of the ALJ's order on remand. Specifically, Consol argues that (1) the ALJ properly dismissed Lindon's urological complaints due to lack of timely notice; and (2) the ALJ properly found that Lindon failed to prove an increase in occupational disability due to his urological complaints. As our review of the ALJ's order on remand shows, the increase in Lindon's occupational disability rating was based solely on his psychiatric condition, and the ALJ specifically found after further review that "this Court still does not believe that the Plaintiff's urinary condition would result in any additional occupational disability." As the Board affirmed the ALJ's order on remand, we believe that it is no longer necessary to review these particular issues as they had no bearing on the ALJ's determination on remand.

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[2]Even if we are mistaken in regard to this ruling, we agree with the Board's handing of this issue as set forth earlier in this opinion and adopt the position of the Board's ruling as our own.

We will now address the merits of the appeal. We note at the outset that:

> [t]he function of further review of [the Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board overlooked or misconstrues controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

Consol first contends that the Board erred in reversing the ALJ's findings that Lindon's orthopedic complaints were barred by the doctrine of res judicata. We agree with Consol that the doctrine of res judicata bars a litigant from retrying a workers compensation issue that has been fully litigated and decided. Uninsured Employers' Fund v. Fox, Ky. App., 862 S.W.2d 902, 904 (1993). If the claims Lindon filed after the issuance of ALJ Dockter's original opinion attempted to obtain benefits for CTS arising out of his 1993 injury, then we would agree with Consol's argument. However a review of the record shows that this is not the case.

In regard to Lindon's claim for CTS, the only ruling ALJ Dockter made was that it was not casually related to his injury of December 1993. The Board affirmed, noting that Lindon had not filed a cumulative trauma claim or a disease claim for CTS and that the sole issue before ALJ Dockter was "whether CTS was related to the December 12, 1993 injury which he answered in the negative based not only on the report of Dr. Kasdan, but upon the report of Dr. Pellegrini." A review of Lindon's second

application for adjustment as well as his motion to reopen clearly shows that he was not attempting to relitigate the ALJ's finding that there was no casual connection between his allegation of CTS and the 1993 injury. In his application for adjustment, Lindon alleged entitlement for benefits due to repetitive use and constant bending and flexing of his wrists. The medical evidence filed in support of Lindon's CTS claim, particularly that of Dr. Pellegrini, supported the idea that Lindon developed CTS as a result of his entire work history as opposed to his injury alone. Secondly, in his motion to reopen, Lindon alleged mistake in ALJ Dockter's earlier opinion that he did not have CTS. We agree with the Board that "although the motion to reopen was couched in terms of mistake, that by itself does not bar reopening based on change of occupational disability." Based on the various summaries of the medical evidence contained in the record as well as our own review thereof, we do not believe the Board erred in remanding the matter for further consideration as to whether Lindon's orthopedic complaints had resulted in an increase in occupational disability.

Consol next argues that the Board erred in finding that Lindon gave due and timely notice of his psychological complaints. Consol argues that Lindon knew of his psychiatric condition long before he submitted the letter of notice.

Pursuant to KRS 342.185, notice of a compensable injury must be given to an employer "as soon as practicable after the happening thereof." KRS 342.185 is somewhat tempered by KRS

342.200, which provides in part that "delay in giving notice shall not be a bar to proceedings under this chapter if it is shown...that the delay or failure to give notice was occasioned by mistake or other reasonable cause." "Whether notice has been give as 'soon as practicable' depends upon all the circumstances of the particular case." Marc Blackburn Brick Co. v. Yates, Ky., 424 S.W.2d 814, 816 (1968). The nature of the injury is also important when addressing issues of notice "insofar as it relates to the knowledge of the injured person of the extent of his injury." Yates, 424 S.W.2d at 816.

We agree that Lindon gave notice of his psychiatric problem as soon as practicable. Under Reliance Diecasting Co. v. Freeman, Ky., 471 S.W.2d 311 (1971), an employer's notice that an accident involving an employee has occurred "carries with it notice of all those things which reasonably may be anticipated to result from it[.]" Reliance, 471 S.W.2d at 313. There has never been any dispute that Consol had immediate notice of Lindon's mishap in the mine. Given the severity of his injury and his resulting inability to return to work, we are not willing to say that depression is not reasonably anticipated to flow from his injury.

Even if Reliance does not apply in regard to Lindon's notice concerning his depression, we believe that it was still timely given. The first medical diagnosis of depression appears in Dr. Pellegrini's record of July 26, 1995 following an office visit on July 19, 1995. Although Lindon testified in his original claim to having problems getting along with people and

being around people and crying over little things in the summer of 1995 and feeling down in March or April of 1995, we do not feel that these episodes would have been sufficient to inform Lindon, a man of limited intellectual capacity, that he was suffering from a work-related, compensable condition. The notice requirement of the worker's compensation statutes "does not demand the impossible of the employee", and we agree with the Board that to find otherwise places an unreasonable burden on Lindon to self-diagnose his depression. Newburg v. Slone, Ky., 846 S.W.2d 694, 700 (1992). Based on the foregoing, Lindon's written notice to Consol on August 7, 1995 is sufficient to satisfy the requirements of KRS 342.185.

Consol next contends that the ALJ properly dismissed Lindon's psychological complaints under the rationale of Slone. We agree with the Board that, although somewhat similar to the case at hand, Slone is easily distinguishable.

Slone, who suffered a work-related back injury, filed for both workers' compensation and Social Security benefits in July 1987. While Slone included a claim for psychiatric complaints in his social security claim, there was no such claim made in conjunction with his workers' compensation claim. In 1992, Slone sought to reopen his workers' compensation claim alleging a change in occupational disability due to psychiatric problems. In holding that Slone could not reopen his claim, the Kentucky Supreme Court held:

> The testimony in the record from the physician expert used by the claimant indicates that the mental condition was sufficiently known to be the subject of a

> proceeding for Federal social security benefits. For some unknown reason, the claimant did not choose to pursue a similar complaint in the State workers' compensation proceeding. Accordingly, the present appeal which attempts to raise these issues by means of the reopening procedure cannot really be distinguished from the prohibition against piecemeal litigation stated in Wagner Coal & Coke Co. v. Gray, 208 Ky. 152, 270 S.W. 721 (1925). The failure of the claimant to present any evidence regarding his mental condition in the original workers' compensation claim cannot be cured by a motion to reopen more than two years later.
>
> KRS 342.125 provides that an award may be reopened upon a showing of "change of occupational disability, mistake or fraud or newly discovered evidence." A motion to reopen cannot be based on a condition known to the claimant during the pendency of his original action, but which for some reason, he did not choose to litigate.
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> ....
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> The mental condition could not be considered "newly discovered evidence" because Sloan knew of this condition in 1987. His claim that the record does not show that counsel in the original proceeding understood that he had a psychiatric condition which was work related is unconvincing. Obviously counsel knew of the condition because it was presented in the social security claim process. His failure to determine whether the psychiatric condition was work related is simply a lack of due diligence. It is not "newly discovered evidence" that can be used to support a motion to reopen.

Slone, 902 S.W.2d at 821-822.

While Slone is factually similar, there are several differences which warrant a different outcome in this case. Unlike Slone, there was no evidence that Lindon knew he was suffering from depression at the time his original claim was filed, let alone that it was related to his injury and thus

compensable. As the Board stated, "[i]f the filing [of] a Federal black lung claim cannot be used to establish a distinct manifestation of a disease, certainly irritability cannot be reasonably presumed to indicate a compensable psychological disorder."

Having considered the parties' argument on appeal, the decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Natalie D. Brown
Lexington, KY

BRIEF FOR APPELLEE, WILLIAM LINDON:

Phyllis L. Robinson
London, KY

Roland Case
Pikeville, KY

BRIEF FOR APPELLEE, SPECIAL FUND:

Joel D. Zakem
Louisville, KY