OPINION ENTERED: APRIL 30, 2012

CLAIM NO. 201093133

BRENT HATTON PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

FAMILY DOLLAR STORES, INC.
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION REVERSING AND REMANDING

* * * * * *

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

SMITH, Member. Brent Hatton ("Hatton") appeals from the December 1, 2011 Opinion, Award and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"), and from the December 19, 2011 order denying Hatton's petition for reconsideration. The sole question on appeal is whether the ALJ erred in declining to enhance permanent partial

disability benefits by the two multiplier pursuant to KRS 342.730(1)(c)2.

Hatton filed a Form 101 Application for Resolution of Injury Claim on March 23, 2011 alleging that on March 12, 2010, he injured his lumbar and cervical spine while lifting empty pallets in the course and scope of his employment with Family Dollar Stores, Inc. ("Family Dollar"). In addition, he alleged a resulting psychological overlay.

Hatton testified by deposition on May 17, 2011 and at the formal hearing held October 27, 2011. Now age 32, Hatton is a resident of Salt Lick, Kentucky where he lives with his parents on the family farm. Hatton began working for Family Dollar in September, 2007, in the warehouse and the bulk department filling orders for individual stores. Hatton's duties required him to place cases of product on pallets, shrink-wrap them and transport them to the loading area. The heaviest cases weighed up to fifty (50) pounds.

On March 12, 2010, as Hatton was squatting to pick up an empty pallet, he felt his back pop four or five times. Hatton dropped the pallet and stood for several minutes trying to recover. Hatton reported the incident to his manager and was taken to the nurse's office where he was treated with Biofreeze and pain medication.

Hatton first sought treatment with Dr. Chapman at Family Health Services. Hatton later saw Dr. William Lester for three office visits. On May 10, 2010, Hatton began treating with Dr. Menke. Dr. Menke allowed Hatton to try a return to full duty beginning in September 2010.

Hatton testified the return to full duty work "like to have killed me." On October 22, 2010, he reported his difficulties to Dr. Menke who determined his condition was worse than when he was initially seen. Dr. Menke then assigned permanent restrictions. Hatton called the employer's office and notified them of his permanent restrictions.

Hatton testified he attempted to return to work again on February 17, 2011, after Dr. Lester had conducted an independent medical examination and released him without restrictions. Hatton stated he "only lasted like an hour doing it." As he was lifting cat litter weighing approximately 30 pounds, his back "cracked and popped". A co-worker heard the cracking and popping. Hatton stated the pain "like killed me." Hatton testified he has had numbness in his legs since that time. Hatton informed "Angel", Family Dollar's human resources representative his pain was "killing him" and was unbearable. Hatton described the conversation as follows:

> But I went in there and I told her, I said, you know – I said, this pain's about to kill me. I said, I can't take it. She said, well, I got a letter here saying that you can do the work. And I said, well – I said, that's great that you've got a letter saying that, you know, I can do the work, I said, I'm telling you something ain't right. My back's killing me. I said, this pain, I can't take it. And she said, well, if you're saying that you can't do the job that this paper says that you can do, then I'll have to take your badge.

Angel then took his badge, had him clock out, walked him to the exit and out of the building.

Hatton's testimony at the hearing was essentially consistent with his deposition testimony. With regard to the attempt to return to work on February 17, 2011, Hatton testified as follows:

> Q. And, what kind of success did you have with that?
>
> A. Sickening to me. I managed, it was around 10:00 o'clock, I think, when I went back out there. You know, I was on average and stuff, I'd throw 4 or 5000 cases a day. I averaged out throwing anywhere 6 to 800 cases an hour. And, I went out there and I made it till dinnertime, till 12:00 o'clock and stuff from 10:00 o'clock. And, in them two hours, I think, it was around 2 to 300 cases I am [sic] may have spent on. And, I mean it – just like when I done the physical thing and stuff, you know, I gave it everything I had, because, you know, I loved my work and I – you know, it just – it really got to me because,

you know, they said, well, this says you can do your job without restrictions and stuff. And, I said, okay, I'll – you know, like I said, unless I try something I don't know if I can do it or not. So, I went out there. And after trying it there for a couple of hours, I come back in and I told the lady in HR, I told her, I said, my back is killing me. I said, something ain't right with it, I don't know what it is, I said, it's about to kill me. And, that was the experience of trying to do the work, you know.

. . . .

A. Honestly I told her, I said, well, I don't care what your paper says. I said, something ain't right, I said, my back’s about to kill me. I said, I don't know what it is, but it's about to kill me. So, she said, so you're saying you can't do your job? I said no. I'm saying I can't take this pain. I had a few choice words in there and stuff, but, you know, I was in pain, I ain't proud of what I said, but, you know – and she said, well, this paper says you can do your job and I guess since you can't do your job, I don't have to take you back.

Q. Okay. So –

A. Then she asked me if I'd clocked out, ‘cause like I said, it was dinner time. And, I said, no ma'am, I haven’t clocked out. She said, well, I need you to come over here and clock out. And she escorted me to the door and that was it.

Hatton testified he had worked on modified duty for approximately one year prior to the attempt to return to full duty in February 2011.

Hatton submitted medical records and reports of Dr. Thomas Menke, who first saw Hatton on May 10, 2010. Hatton's chief complaint was a work injury occurring on March 12, 2010 involving the low, mid and upper back. Dr. Menke conducted a physical examination that showed Hatton had a normal walking gait and balance. He was tender at the base of the cervical spine and lower spine. He could forward bend with fingertips to the ankles and had a negative straight leg raise bilaterally.

Dr. Menke reviewed an MRI study that showed minimal desiccation and very small posterior bulges at L3-4, L4-5 and L5-S1. Disc hydration was near-normal and there was no neural impingement. A May 7, 2010 cervical MRI showed mild desiccation at C5-6. There was a minimal bulge but no apparent impingement.

Dr. Menke diagnosed a lumbar strain and mild underlying lumbar disk desiccation. He also noted an apparent cervical strain with mild underlying cervical disk desiccation. There was no neural impingement at either level. He recommended Hatton continue exercises for his low back. He also placed Hatton on restrictions of no overhead work, no

lifting over 10 pounds, and directed that Hatton be able to switch from sitting to standing hourly.

In June 2010, Hatton reported physical therapy had helped his low back and he had been trying to increase his activities around the house to see what he could tolerate. He reported feeling a dull ache in his low back with increased activities. Physical therapy had not helped Hatton's neck. He continued to have pain between the shoulder blades. Hatton reported he had been working light duty. Dr. Menke recommended physical therapy and increased activities at home and work. He also restricted Hatton to no overhead work and no lifting over 20 pounds.

On June 25, 2010, Dr. Menke noted Hatton's work-related cervical and lumbar strain was improving but had not resolved. Dr. Menke diagnosed cervicalgia which had not improved with physical therapy. He recommended termination of the physical therapy but continued his restrictions to no overhead work and no lifting over 20 pounds. Dr. Menke also opined Hatton would be at maximum medical improvement ("MMI") four months from the date of injury.

Hatton followed up with Dr. Menke on July 23, 2010, August 13, 2010, September 28, 2010, and October 22, 2010. On July 23, 2010, Hatton reported his pain had "eased off a bit" but had not gone away.

Hatton told Dr. Menke that he was "scared to death". He also stated he was having trouble with his "nerves", and he was feeling stressed. He continued to have low back discomfort consisting of a dull ache.

On physical examination, Hatton was able to walk with a normal gait and conduct toe walk and heel walk. Dr. Menke once again diagnosed work-related cervical and lumbar strain with minimal underlying changes on the MRI. He stated:

> I have nothing further to recommend. He is not able to tolerate the level of work that I had him on last time. I would put him at permanent restrictions: no overhead work. No lifting over 20 pounds. No repetitive bending. [sic] Stoop or twist. I would define repetitive as more than four repetitions per hour. I do think he is at MMI. No follow-up is scheduled.

Dr. Menke saw Hatton again on August 13, 2010. He noted:

> When I saw him on 7-23-10, I put him on permanent restrictions and he comes back now not sure why. I talked with the workers' comp representative. Apparently Family Dollar has a ramp up program where they would want to gradually increase his activity at work. The patient is young. The patient has minimal underlying structural problems with his neck and low back, and they are interested in helping him get back to a more functional level."

Dr. Menke's impression was "patient with work related cervicalgia has improved the most. He is most symptomatic

from work related lumbar strain. Minimal underlying changes on MRI."

Hatton returned to see Dr. Menke on September 28, 2010. Upon examination, Dr. Menke noted:

> When I last saw the patient, I was told that there was this "ramp up" program and that they would start from a set of restrictions and gradually build the patient up. The patient returned to work and they told him no such thing existed and that his restrictions were too vague, but it does sound like they have gradually increased his activities and he is occasionally lifting 50 pounds. He did say that over the last three weeks, there may have been a few occasions where he lifted 50 lbs. but it is certainly not something that he is doing regularly.
>
> The bottom line is the patient was doing quite a bit better for the past 3 weeks because the job that he was doing did not require much bending, stooping or twisting. He says some days he will have a job where he is bent, leaning half over, for the entire 8 hours. He did an activity for the first half of the day this morning. He says his back is a bit sore but not really what he would call painful.

Dr. Menke concluded Hatton was six months from the date of injury and it was safe for him to return to regular duty work. Dr. Menke stated; "it is certainly safe for him to try, and he is willing and interested. I gave him a release to full duty. I will re-evaluate him in one month's time."

On October 22, 2010, Hatton followed up with Dr. Menke after trying regular duty work at Family Dollar. Hatton reported lifting 50 pound boxes of bleach over the last several days and ultimately “he had to call in because of the increasing low back pain on Wednesday and Thursday, and he comes to see me now. The pain is across the low back." Dr. Menke diagnosed work-related cervicalgia, mostly resolved, and lumbar strain which evolved into a component of chronic low back pain, worse with increased activity at work. Dr. Menke determined Hatton had reached MMI. Dr. Menke assigned permanent restrictions of no overhead work, no lifting over 20 pounds, and no repetitive bending stooping or twisting. He defined “repetitive” as more than four repetitions per hour.

In a March 25, 2011 report to Hatton's counsel, Dr. Menke stated, within a reasonable degree of medical probability, the work injury on March 12, 2010 was the proximate cause of a harmful change in the human organism and proximate cause of Hatton’s complaints, treatment and need for restrictions. Dr. Menke indicated he understood Hatton was required to do more strenuous work than his restrictions allowed when he returned to work on February 17, 2011, aggravating the initial injury. He did not believe it caused a new injury to Hatton’s spine. Dr. Menke

assigned an 8% whole person impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA "Guides"). He assigned 0% impairment for the cervical condition. Dr. Menke indicated Hatton should remain on the October 22, 2010 restrictions.

Family Dollar submitted the report of Dr. William Lester who examined Hatton January 12, 2011. Hatton provided a history of an injury on March 12, 2010 while lifting cases of water onto a conveyor belt, from which he continued to experience pain in his back.

Dr. Lester noted Hatton continued to work, however, with restrictions of no lifting overhead, no lifting greater than 20 pounds, no repetitive stooping, turning, or bending. Dr. Lester also noted Hatton was not taking medication and was involved in a home exercise program with the use of bands to strengthen his cervical muscles. Dr. Lester had previously treated Hatton on March 24, 2010, April 5, 2010, and May 5, 2010 for his work injury and had diagnosed a lumbar strain.

In response to a series of questions, Dr. Lester determined Hatton's prognosis for recovery was good, based on any objective findings. He noted that Hatton's subjective complaints outweighed any objective findings. He assigned no physical restrictions because Hatton had no

physical limitations objectively. In summary, Dr. Lester concluded Hatton had not been disabled from and had no permanent work injury resulting from the incident of March 12, 2010. Finally, Dr. Lester noted Hatton was continuing to work on restricted duty but, in Dr. Lester's opinion, Hatton could return to regular duty as there were no objective findings to support continuation of restricted duty.

Hatton submitted the report of Dennis B. Sprague, PhD., who conducted an independent psychological evaluation on March 21, 2011. Sprague diagnosed depressive disorder, NOS; anxiety disorder, NOS; and pain disorder associated with psychological factors and general medical condition. He stated, within reasonable medical/psychological probability, Hatton's psychological complaints were related to the work injury. Pursuant to the AMA Guides 2nd ed., he assessed a whole body impairment of 5% for psychological conditions. He noted Hatton did not have an active psychological impairment prior to the injury.

Family Dollar submitted the report of Dr. Douglas D. Ruth, who performed a psychiatric evaluation on August 11, 2011. Dr. Ruth diagnosed anxiety disorder which arose due to his back pain and its subsequent interference with his work and other activities. Dr. Ruth concluded the findings

from the examination and the review of medical records indicate objective findings coalesce with the subjective complaints. He noted Hatton's subjective complaints were in keeping with the objective findings.

Dr. Ruth assigned a 2% psychiatric impairment pursuant to the AMA Guides 2nd ed. He indicated Hatton needed continuing medical treatment for an additional 1 to 2 years and would benefit from psychotherapy. Dr. Ruth would not impose psychiatric based work restrictions. Dr. Ruth did not find evidence of symptom magnification during the evaluation. To the contrary, he indicated Hatton displayed a number of findings compatible with the absence of symptom magnification, including his willingness to admit that a number of his symptoms had substantially improved as well as failing to endorse some symptoms that logically could have been present given his history.

Family Dollar submitted a functional capacity evaluation report by Mr. Rick Pounds of Associates in Rehabilitation. Mr. Pounds noted Hatton was pleasant and cooperative throughout the evaluation. On assessment, he met or exceeded all maximum requirements for work at the medium physical demand level with most of his performance into the heavy and very heavy PDL.

In his December 1, 2011 Opinion, Award and Order, the ALJ first acknowledged the parties stipulated Hatton had "a return to work at same/greater wages but no current wages". He determined Hatton's cervical injury was temporary, entitling him to medical benefits until the condition resolved. The ALJ relied upon Hatton's testimony and Dr. Menke's reports to find Hatton suffered a permanent injury to the low back for which he had an 8% impairment. The ALJ also found Hatton had a compensable psychological condition resulting in a 5% impairment. The ALJ's finding regarding multipliers was as follows:

> While the ALJ found Hatton's testimony to credibly support certain parts of his claim, he was unwilling to give Hatton the benefit of the doubt on his testimony concerning his ability to return to his prior job. The ALJ finds that the insufficiency of objective findings on physical exam, the inference in Dr. Menke's notes of an expectation to return to unrestricted work, the results of the FCE, and the opinion of Dr. Lester support the finding that Hatton retains the physical capacity to return to his preinjury work.

Accordingly, the ALJ awarded permanent partial disability benefits without the application of any multiplier.

Hatton filed a petition for reconsideration noting the ALJ made no findings of fact relative to enhancement pursuant to KRS 342.730(1)(c)2. Hatton pointed out the

parties stipulated to and the evidence supported findings he returned to work earning a wage equal to or greater than his pre-injury wage and was no longer earning a wage at all. Thus, Hatton argued he was entitled to application of the two multiplier.

In his December 19, 2011 order ruling on the petition for reconsideration, the ALJ found as follows:

> In this case, the defendant's response accurately states that the ALJ relied on Dr. Lester "to find that the Plaintiff should have been able to work unrestricted at his job at Family Dollar," which "in essence (is) a finding that the plaintiff resigned for personal reasons, not because he was unable to return to unrestricted to work." If the ALJ had been persuaded by Plaintiff's testimony concerning his pain upon return to work, he would have awarded the 3.0 multiplier. Having not been so persuaded, the 2.0 multiplier is also not applicable in this case.
>
> Plaintiff's petition is sustained to the extent that he correctly points out that the ALJ should have undertaken an analysis of the applicability of the 2.0 factor, but having now done so, the ALJ finds that the 2.0 multiplier does not apply to the award in this case.

On appeal, Hatton argues the ALJ erred in failing to enhance benefits by the two multiplier contained in KRS 342.730 (1)(c)2. Hatton acknowledges the ALJ, as fact-finder, has broad discretion. However, Hatton argues the ALJ misconstrued the law by failing to enhance the award by

the two multiplier. Hatton notes the ALJ reasoned that, because he felt Hatton retained the physical capacity to perform his previous job duties, it followed that his resignation and cessation of earnings was not related to his disability.

Hatton first notes the ALJ's reasoning would essentially nullify the application of KRS 342.730(1)(c)2 since a claimant who does not qualify for the three multiplier would never qualify for the two multiplier if he at any time ceased earning an equal or greater wage because he felt he could not perform regular duty work. The two multiplier would then only retain applicability in a Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) scenario.

Next, Hatton argues the ALJ's determination that Hatton’s resignation was for personal reasons not related to his disability is an incorrect recitation and interpretation of the facts and ignores the uncontroverted testimony. Hatton argues he did not resign for any reason, personal or otherwise because he did not resign. Hatton asserts his testimony was unrebutted that, when he voiced his complaints to Angel, she took his badge, forced him to clock out, and escorted him from the building. Hatton contends he had no say in the matter and, further, his termination was directly related to his injury and its effects. While the ALJ felt

there was no reason Hatton could not perform at regular duty, under KRS 342.730(1)(c)2 and Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009), such would not forestall application of KRS 342.730(1)(c)2 as the reason (with or without cause) was related to the work-related disability.

Hatton argues the evidence does not establish any reason for his inability to continue working at an equal or greater wage other than the disabling injury and it does not establish Hatton resigned from his employment with Family Dollar for reasons unrelated to his disability. Hatton notes he was injured at work, returned to work earning an equal or greater wage, and attempted on at least two occasions to return to regular duty. When he advised his employer he could not continue working at regular duty, he was fired. Thus, he no longer earns a wage equal to or greater than his pre-injury wage. Hatton argues, as a matter of law, he is entitled to application of the two multiplier.

In a workers' compensation case, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his claim. See Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). In order to sustain that burden, a claimant must produce substantial evidence in support of each element, including application of the

statutory multipliers. Id. Kentucky law holds if the party with the burden of proof before the ALJ was unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. In Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984) the Court of Appeals stated:

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the Board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Compelling evidence is defined as evidence so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The Supreme Court in Special Fund v. Francis, *supra*, stated:

> If the fact-finder finds against the person with the burden of proof, his

> burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

KRS 342.730(1)(c)2, pertaining to application of the two multiplier, states as follows:

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

In Chrysalis House, Inc. v. Tackett, supra, the Supreme Court narrowed the applicability of KRS 342.730(1)(c)2, holding as follows:

> KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage 'for any reason, with or without cause.' It is, however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for 'disability' that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' provided that the reason relates to the disabling injury.

Here, Hatton's account of the attempted return to work on February 17, 2011 and the cessation of his employment on that date is uncontroverted. Hatton was performing work in excess of the permanent restrictions assessed by his treating physician. He testified he was unable to perform full duty work on that date because of his pain. As Hatton acknowledged, the ALJ was well within his discretion in choosing to rely on Dr. Lester's opinion in determining Hatton's retained physical capacity and deny application of the three multiplier. Although Dr. Lester had examined Hatton on January 12, 2011, his opinion, at the time of the

incident, was merely conflicting evidence. There is nothing in the record to suggest Hatton's cessation of employment involved anything other than the dispute as to his physical capacity. The evidence only indicates the employment ceased because Hatton would not accede to continue working in excess of his doctor's restrictions and after he perceived he was unable to work as a result of his pain. Based upon the record, as a matter of law, the dispute must be viewed as a reason related to Hatton's disabling injury and application of the two multiplier is compelled. We therefore reverse.

The holding in Chrysalis House, *supra,* requiring the reason for the cessation of employment to be related to the disabling injury does not negate the phrase "with or without cause" in KRS 342.730(1)(c)2. In addition, we may not interpret a statute at variance with its stated language. Commonwealth v. Allen, 980 S.W.2d 278, 280 (Ky. 1998). We may not add to nor subtract from the given language of the statute. Commonwealth v. Reynolds, 136 S.W.3d 442, 445 (Ky. 2004). Our ultimate goal is to implement the intent of the legislature. Wesley v. Nicholas County Bd. of Educ., 403 S.W.2d 28, 29 (Ky. 1966).

Dr. Lester's opinion may be evidence concerning whether there was "cause" for Hatton to believe he could not

continue working at full duty. However, it is uncontroverted the employer forced Hatton to “clock out” and leave the premises as a result of the disagreement over his ability to perform full duty work at a time when no judicial determination had been made concerning his physical capacity.

Accordingly, the decision of Hon. Douglas W. Gott, Administrative Law Judge, is **REVERSED** and this matter is **REMANDED** back to the ALJ for entry of an award enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2.

STIVERS, MEMBER, CONCURS AND FILES A SEPARATE OPINION.

STIVERS, MEMBER. Because I believe the opinion, award, and order in the case *sub judice* must contain an award of the two multiplier in accordance with Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010), I write separately.

I agree with the majority's opinion to remand the case to the ALJ for entry of an award enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2. The very fact Hatton returned to employment during the pendency of his claim at a weekly wage equal to or greater than the average weekly wage earned at the time of his work-related injury requires enhancement of the award by the two multiplier

subject to the requirements of Chrysalis House, Inc., supra, and Hogston, supra. The ALJ must state as much in his award.

Since the parties stipulated Hatton returned to work at a weekly wage greater than the average weekly wage at the time of the injury, the ALJ's failure to award the two multiplier in the original opinion, order, and award is error. At some point during the 425 weeks that Hatton receives income benefits, Hatton may return to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury and may still be entitled to the two multiplier should that employment cease due to reasons which relate to the disabling injury or a previous work-related injury. At that time, Hatton would be entitled to have his income benefits enhanced by the two multiplier. KRS 342.730(1)(c)4. which reads as follows:

> Notwithstanding the provisions of KRS 342.125, a claim may be re-opened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of subparagraph 2. of this paragraph.

Pursuant to the above section, at any time during the award, Hatton may seek to reopen when his employment at a weekly wage equal to or greater than his average weekly

wage at the time the injury ceases due to reasons which relate to the disabling injury or a previous work injury. However, if the award does not contain the language contained in KRS 342.730(1)(c)2, Hatton may be barred pursuant to KRS 342.730(1)(c)4 from ever reopening the claim in order to seek enhanced benefits consistent with the requirements of Chrysalis House, Inc., supra, and Hogston, supra.

Even assuming, *arguendo*, the ALJ was correct in this case and Hatton is not entitled to double benefits at the time the ALJ rendered his initial award, he is not prevented from seeking double benefits at any other point in time during his 425 week award so long as he is able to make the requisite showing pursuant to Chrysalis House, Inc., supra, or Hogston, supra. KRS 342.730(1)(c)4 permits Hatton, at any time during the period PTD benefits, are paid to reopen in order to seek enhancement of his benefits by the two multiplier. However, in order to obtain enhancement of his benefits by the two multiplier at any point during the 425 week period, the award must find KRS 342.730(1)(c)(2) is applicable and provide for enhancement pursuant to the statute and applicable case law. In such a scenario, the ALJ's failure to award the two multiplier in the original award may forever act as a bar, upon future

reopenings, to enhancement of Hatton's award of income benefits by the two multiplier should Hatton once again become employed, at any point during the 425-week period of benefits, at a wage equal to or greater than his wage at the time of the work-related injury and that employment ceases for reasons that "relate to" said injury or previous work injury. Chrysalis House Inc., supra, and Hogston, supra.

Further, I submit the ALJ was required to make a finding as to whether Hatton's cessation of employment at a weekly wage equal to or greater than his wage at the time of the work-related injury "relates to" the work-related injury, pursuant to Chrysalis House, Inc., supra, and Hogston, supra. The fact Dr. Lester believed Hatton should have been able to work unrestricted is irrelevant to the subject inquiry. Rather, the proper inquiry is whether Hatton’s employment ceased for reasons which relate to the subject inquiry. Here, the evidence establishes the dispute between Family Dollar and Hatton was over whether Hatton could perform the work assigned by Family Dollar. Therefore, Hatton’s reason for no longer working at Family Dollar relates to the disabling work injury. It was error for the ALJ, as stated in the December 19, 2011, order ruling on the petition for reconsideration, to rely

exclusively on Dr. Lester's pronouncement as to why Hatton resigned from his employment at Family Dollar. Further, the proper analysis *the ALJ* must undertake is set forth in Chrysalis House, Inc., supra.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I respectfully dissent from the majority decision. As pointed out above, Hatton was unsuccessful in his burden of establishing entitlement to an enhancement of his benefits pursuant to KRS 342.730(1)(c)2. The question on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as that which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As noted by the majority, the ALJ, as fact-finder, has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion 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 10 (Ky. 1979). The

ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). To that end, an ALJ may even reject unrebutted medical testimony, so long as he adequately sets forth his rationale for doing so. *See* Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The ALJ has the sole discretion and authority to determine the substance of the evidence and to judge the weight to be afforded the proof and to draw all reasonable inferences from the evidence. Paramount Foods, Inc. v. Burkhardt 695 S.W.2d 418 (Ky. 1985), McCloud v. Beth-Elkhorn Corp., *supra*.

In this instance, Hatton requested the Board to engage in unauthorized fact-finding, to which the majority

acquiesced. It is clear from the record the ALJ determined Hatton had returned to work at his regular job. The ALJ also chose to rely upon Dr. Lester's assessment of restrictions. It was within his prerogative to do so. On remand, the ALJ provided an analysis of his basis for refusing to enhance the award of benefits pursuant to KRS 342.730(1)(c)2. While evidence existed upon which the ALJ could have relied to make such an award, he did not. Evidence supported the ALJ's decision and a contrary result was not compelled.

The majority discussed the holding of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009), in which the Kentucky Supreme Court provided an explanation regarding the applicability of KRS 342.730(1)(c)2 which served to limit the application of the multiplier contained therein. Based upon that holding, the cessation of employment must be related to the work injury. In this instance, the ALJ engaged in the appropriate analysis and determined the cessation of employment was not related to the injury. Based upon the restriction, the ALJ determined Hatton could have continued to perform his regular employment. The ALJ determined Hatton was terminated because he refused to perform the work tasks assigned to him.

Again, I believe the majority has engaged in unauthorized finding of fact, and I would affirm the decision of the ALJ.

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