OPINION ENTERED: JANUARY 11, 2013

CLAIM NO. 201192594

COMMONWEALTH OF KENTUCKY, LEE COUNTY ATC PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

DELORES MONTGOMERY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Commonwealth of Kentucky, Lee County ATC[1] ("Lee County") appeals from the August 10, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Delores Sizemore Montgomery ("Montgomery") permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342,730(1)(c)1 and medical benefits. Lee County also

appeals from the August 31, 2012 Opinion and Order denying its petition for reconsideration. On appeal, Lee County argues the ALJ's finding Montgomery qualifies for the enhancement is not supported by substantial evidence.

Montgomery filed a Form 101, Application for Resolution of Injury Claim, on February 16, 2012, alleging injuries to her neck, shoulders, arms, hands, feet and left leg occurring March 23, 2011, as she was performing her duties as a teacher. She described the accident as follows:

> Two students were fighting on school porch; one was on the ground and the other was standing and lunging forward and punching her repeatedly. I got behind the girl and hooked my arms in hers. I would pull her back, and she would pull me forward. This happened several times before I finally pulled her away and I landed hard on my feet.

Montgomery testified by deposition on April 2, 2012 and at the formal hearing held July 25, 2012. She also relies on the medical records and reports of Drs. Frank Burke, Richard Sheridan, Luther Pettigrew, Martin Favetto and Donald Ambroziak. Lee County also relies on the same records and reports, as well as the medical records from Drs. Henry Tutt and Nicole Everman.

Montgomery was born on November 9, 1967 and is a resident of Clay City, Kentucky. She is college-educated

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[1] Area Training Center.

with a bachelor’s degree in business education and a master’s degree in school administration and secondary leadership. Her detailed description of the incident was as follows:

> Yes. I was sitting in the lobby with another teacher, and the kids was getting off the bus. And a fight broke out on the front porch of the vocational school or the area technology center. So I ran out and the other teacher ran out. And I got behind the girl that was actually punching the girl that was lying on the ground. And when I got behind the girl, I grabbed ahold of her arms, first on the outside. And I couldn't get her to stop or even restrain her in anyway, so I hooked my arms in her upper arms. And so I would, you know, pull her back, and when I would pull her back real hard I’d land hard on the concrete, on my feet. And I'd, of course, shake myself and her as I pulled her back, because she would jerk me forward. And I'd get shaken and jerk forward. And I’d pulled her back again and then and this went on for 10 or 15 times. When she finally -- or when I was finally able to get her completely pulled loose, I landed even harder on the concrete. And I -- my left foot, it felt like that it wanted to, like pop or, I call it krilling (sic), and your ankle but it felt like it was going to pop. So after I got her completely pulled loose and that happened, she was still lunging forward as I had my arms hooked in her arms, so I had to continually still hold her and try to restrain her. So even after that I was still getting shaken back and forth until finally I was able to get her to calm down. (Errors in original)

Montgomery testified she was shaken and felt nervous after the incident, but didn't realize she had been injured. She completed work that day and did not work the next day. She realized she was injured when she was returning to work after the day off. Her arms were weak, she had spasms in her neck, and her hands and feet were burning and tingling. Montgomery's Form 101 describes her initial treatment as follows:

> First went to Clinic on 3/25/11. Said I had inner chest wall muscle strain. When I went back and wasn't better, I felt like I wasn't getting [sic] care I needed, so I went to Sarah Howell at Dr. Ertels & Noss. She ordered [sic] MRI of [sic] brain and neck. I saw Dr. Pettigrew and had a nerve conduction on arms. Saw Dr. Favetto and Herrod.

Montgomery testified her teaching duties required her to stand most of the time and be able to demonstrate and point using her arms and hands. She was required to move around the room working with students in guided or independent practice. In addition to classroom instruction, she was required to remain after class to perform office work including grading papers, preparing lesson plans and routine filing.

Montgomery continues to have numbness, tingling and burning in her hands and feet. Her problems interfere with her ability to type or to hold objects. In addition, the

problems with her hands would interfere with her ability to type and prepare lesson plans. The problems with her arms interfered with her ability to demonstrate points of importance. She stated her ankle pain would prevent her from standing for long periods of time. She noted that teaching from a seated position provides an inadequate experience for the students.

Montgomery attempted to return to work in April 2011, working two days one week and three days the next week. However, her pain increased and she eventually resigned on July 31, 2011.

Dr. Frank Burke evaluated Montgomery on March 23, 2011[2]. He received a history of the March 23, 2011 incident, reviewed medical records, and performed a physical examination. Dr. Burke concluded Montgomery sustained a complex injury pattern in the incident at work, including a cervical spine sprain with development of non-verifiable radicular symptoms into the left upper extremity and the acute development of sprains in her wrists with bilateral mild carpal tunnel syndrome. Dr. Burke noted Montgomery was diagnosed with sprained subtalar joints with developing tarsal tunnel syndrome's bilaterally. He noted the injury

[2] Dr. Burke's report lists the date of injury as 3/2/11 and the date of the office visit as 2/23/11. The report was filed on March 21, 2012. The Board determines there are typographical errors.

to her subtalar joint on the left foot continued to be symptomatic with persistent physical findings for which she was being followed by a podiatrist. Finally, he noted she had developed nonspecific burning of both feet.

Based upon the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Burke placed Montgomery in DRE cervical category II and assigned a 7% whole person impairment. He assigned a 2% whole person impairment for Montgomery's left ankle and subtalar joint injury and a 1% impairment for a mild peripheral neuropathy involving her feet. Finally, he assigned a 6% whole person impairment for bilateral mild median nerve compression below the mid-forearm. Dr. Burke concluded Montgomery had a combined 15% whole person impairment rating related to her injuries, pursuant to the AMA Guides. He stated:

> This patient is not going to be able to return to the level of activities and physical requirements of a teacher at a vocational school, particularly uncertain nature of the student population. She probably would benefit by an intensive physical therapy program, as well as further imaging and diagnostic studies. I would not recommend that she crawl, climb, or walk on uneven ground. Bracing of the left ankle and subtalar joint would probably be a benefit.

Montgomery introduced reports from Dr. Donald Ambroziak, who examined her on July 20, 2011. In a report dated September 26, 2011, Dr. Ambroziak noted Montgomery had a previous diagnosis of tarsal tunnel syndrome in both feet and post-traumatic left ankle bursitis. He stated:

> As far as future disability goes, at the present time she is physically unable to perform her job activities as a teacher effectively. However I cannot state that she will not improve until she finishes her physical therapy and receives her evaluation and treatment from the second neurologist.

Lee County introduced records from Dr. Luther Creed Pettigrew, who treated Montgomery beginning in January 2011. Dr. Pettigrew concluded the injuries Montgomery sustained in the work-related incident represented an exacerbation of pre-existing left median neuropathy and cervical nerve root strain. He believed Montgomery was attempting to magnify the severity of her impairment, and found her injuries would not prevent her from returning to her type of employment in the future.

Dr. Martin Favetto treated Montgomery in July 2011. He found signs of carpal tunnel syndrome, but did not relate the condition to her work. He concluded the condition was most likely idiopathic.

Dr. Nicole Everman treated Montgomery on November 3, 2011, and obtained nerve conduction tests of her lower extremities. Dr. Everman found no evidence of radiculopathy or focal neuropathy. She recommended continued treatment with a podiatrist for foot pain.

Dr. Richard Sheridan evaluated Montgomery on May 1, 2012, diagnosing resolved acute cervical strain, resolved bilateral shoulder strains, wrist strains, and ankle and subtalar joint strains. He assessed a 5% impairment rating for the cervical strain pursuant to the AMA Guides. Dr. Sheridan indicated Montgomery reached maximum medical improvement ("MMI") six months following the incident and required no restrictions or further medical treatment.

Dr. Henry Tutt evaluated Montgomery on June 14, 2011, and diagnosed muscle strains and sprains, resolved. He felt Montgomery would have reached MMI within two to four weeks following the incident. He stated there was no relationship between Montgomery's current complaints and the work incident. In his opinion, Montgomery could return to her duties without restrictions.

In his Opinion and Order dated August 10, 2012, the ALJ relied on the opinions of Drs. Burke and Ambroziak, and determined Montgomery sustained an injury as defined by the

Act. The ALJ then made the following findings regarding the extent of Montgomery's permanent impairment:

> The plaintiff argues that she has sustained a 15% whole person impairment and lacks the capacity to return to work. The defendant argues that the plaintiff sustained only a 5% impairment and retains the capacity to return to her pre-injury work.
>
> In the present case the ALJ finds most persuasive the opinion of Dr. Burke. His opinion most closely reflects the plaintiff's condition as the ALJ encountered her. I therefore find that she sustained a 15% whole person impairment. Further in keeping with Dr. Burke's opinion, I find that the plaintiff no longer retains the capacity to return to her pre-injury job. She is therefore entitled to the KRS 342.730(c)(1)1. [sic] enhancement provision.

Lee County filed a petition for reconsideration on August 22, 2012, requesting additional findings regarding Montgomery's physical capacity. Lee County noted the ALJ relied upon Dr. Burke's opinion, who only assigned restrictions against crawling, climbing or walking on uneven ground. Lee County asserted the ALJ had not explained how those restrictions prevented Montgomery from returning to her job as a teacher.

On August 31, 2012, the ALJ denied Lee County's petition for reconsideration, explaining as follows:

> The plaintiff testified that her teaching duties required her to be on her feet all day and that she had the responsibility for attempting to maintain student discipline. Dr. Burke stated in his medical report that Ms. Montgomery is not going to be able to return to the level of activities and physical requirements of a teacher at a vocational school, particularly the uncertain nature of the student population. Based on the plaintiff's credible and convincing testimony and Dr. Burke's opinions, I made the factual determination that the plaintiff no longer retains the physical capacity to return to her pre-injury job and that she is, therefore, entitled to enhanced permanent partial disability benefits under KRS 342.730(c)(1)1 [sic].

On appeal, Lee County argues the ALJ's finding that Montgomery does not retain the physical capacity to return to her job as a teacher is not supported by substantial evidence. Lee County notes the ALJ relied on Dr. Burke's testimony. Lee County asserts the only restrictions outlined by Dr. Burke were no climbing, crawling, or walking on uneven ground, which would not prevent Montgomery from teaching business courses. Lee County states the ALJ failed to explain the connection between these restrictions and Montgomery's inability to perform her job duties as a teacher. Lee County notes Drs. Tutt, Sheridan and Pettigrew all felt Montgomery could return to work with no restrictions. Thus, Lee County argues the Board should

reverse the ALJ's finding regarding Montgomery's retained physical capacity and remand this matter to the ALJ for entry of an award consistent with the evidence.

Montgomery, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including entitlement to the three multiplier pursuant to KRS 342.730(1)(c)1. KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Montgomery was successful in her burden, the question on appeal is whether the ALJ's finding is supported by substantial evidence. 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson

v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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 decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). 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).

Lee County narrowly focuses on Dr. Burke's statement regarding restrictions in arguing his opinion is not substantial evidence supporting application of the three multiplier. However, Lee County is silent about Dr. Burke's explicit statement that Montgomery "is not going to be able to return to the level of activities and physical requirements of a teacher at a vocational school." The ALJ stated he relied on Dr. Burke's opinion, not his restrictions. The ALJ was well within his role as fact-

finder in accepting Dr. Burke's opinion that Montgomery's condition would not permit her to perform the work she was performing at the time of her injury and was thus entitled to enhancement of her benefits pursuant to KRS 342,730(1)(c)1. On September 26, 2011, Dr. Ambroziak also opined Montgomery's ankle and foot pain prevented her from performing her duties as a teacher. Further, Montgomery's testimony regarding her retained physical capacity is substantial evidence supporting the ALJ's application of the three multiplier. It is well-settled that a claimant's own testimony as to capabilities and limitations may be relied upon by the fact-finder in determining the physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Company v. Curling, 451 S.W.2d 610 (Ky. 1970). There being substantial evidence to support the ALJ's conclusion, we may not reverse.

Accordingly, the August 10, 2012 Opinion and Order rendered by Hon William J. Rudloff, Administrative Law Judge, and the August 31, 2012, Opinion and Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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