Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 31, 2014

CLAIM NO. 200672669

KEVIN REECE PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

INTEGRAL STRUCTURES, INC.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Kevin Reece ("Reece") seeks review of the opinion and order on reopening rendered April 24, 2013 and the opinion and order on remand rendered April 24, 2013 and re-issued on July 22, 2013, by Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the opinion and order on remand, the ALJ determined Reece is not entitled to the

two multiplier pursuant to KRS 342.730(1)(c)2 from October 20, 2006 through October 21, 2009. The ALJ also dismissed Reece's motion to re-open determining he is not entitled to the two multiplier from the time he was terminated on November 21, 2009 through July 2012. Reece also seeks review of the August 26, 2013 order denying his petition for reconsideration of the opinion on remand. Reece did not file a petition for reconsideration of the opinion and order on re-opening.

On appeal, Reece argues the ALJ failed to follow the Board's directions in an opinion remanding the claim on June 28, 2010. Regarding the two multiplier, Reece also argues Integral Structures, Inc. ("Integral") bore the burden of showing his cessation of employment is unrelated to the work injury. Finally, Reece argues the overwhelming evidence of record compels a finding his wages were reduced from August 19, 2007 to November 2012 for reasons related to his work injury. We disagree and affirm.

A review of the unique procedural history is necessary. We will only discuss evidence relevant to the issue pertaining to the application of the two multiplier pursuant to KRS 342.730(1)(c)2.

THE ORIGINAL CLAIM.

On October 17, 2008, Reece filed a Form 101 alleging multiple facial injuries, including his left eye, on October 19, 2006, when a mounting bracket fell across his face while he was removing a garage door for Integral. On the day of the accident, Dr. William Nunery performed a left upper eyelid laceration repair. A second left eye procedure was performed on March 12, 2007 by Dr. Louis Cantor. In the Form 101, Reece stated at the time of his injury he earned $15.50 per hour for his employment as an ironworker. The August 25, 2009 benefit conference review ("BRC") order and memorandum reflects the parties stipulated Reece's average weekly wage ("AWW") was $651.00 and identified the application of multipliers as one of several contested issues.

Reece testified by deposition on April 8, 2009 and at the hearing held August 25, 2009. The majority of his testimony concerned issues related to the application of the three multiplier and will not be summarized further. Reece began working at Integral on July 11, 2005. He was an ironworker, but stated he occasionally performed supervisory duties. On October 19, 2006, a mounting bracket struck his face, nose and left eye while he was removing a garage unit. Reconstructive surgery was performed later that night and a

second surgery was performed on March 12, 2007. Following the October 19, 2006 procedure, Reece was off work for approximately thirty days and then he returned to unrestricted, full duty work. Reece continued to work without formal restrictions until his second surgery. Following the second procedure, Reece missed approximately three months of work before returning to full duty without formal permanent restrictions. On November 25, 2008, Reece's treating physician, Dr. Cantor, provided restrictions as a result of his work-related injury. In the November 25, 2008 letter, Dr. Cantor noted Reece will have difficulty performing tasks requiring good binocular vision and depth perception. He also noted Reece's eye will be more sensitive to environmental irritants such as wind, cold, chemicals, dirt, smoke and other work-related conditions which could cause ocular irritation.

Reece testified he was earning $15.50 per hour at the time of the injury. At the time of his deposition and hearing, Reece stated his earnings had increased to $17.50 per hour. Of the $17.50 hourly wage, $2.00 represented health care reimbursement. Following the conclusion of the hearing, the ALJ noted the claim would stand submitted for decision as of September 25, 2009.

Thomas Eckert ("Eckert"), Integral's president since 1980, testified by deposition on June 19, 2009. Reece was employed by Integral as a field employee. Eckert testified Reece returned to full duty work on November 21, 2006. Following the March 12, 2007 procedure, Reece returned to work on April 14, 2007, again to full duty with no restrictions. In late November 2008, Reece provided a November 25, 2008 letter prepared by Dr. Cantor outlining his restrictions. Eckert testified he had laid off several employees after October 2006 due to the economy, but Reece was still working. Eckert confirmed Reece earned $15.50 per hour and at the time of the accident, and earned $17.50 per hour at the time of the deposition which included $2.00 for health care reimbursement.

Integral also submitted wage records after the date of the accident through August 15, 2009, reflecting Reece continued to earn $15.50 per hour until approximately January 2008, when he began earning $17.50 per hour. In four of the eleven quarters, May 26, 2007 through August 18, 2007; May 24, 2008 through August 16, 2008; August 23, 2008 through November 15, 2008; and November 22, 2008 through February 14, 2009, Reece's AWW exceeded $651.00.

After the hearing and the submission of the claim to the ALJ on September 25, 2009, Reece filed a motion to

reopen, or in the alternative, a motion to reopen proof to address alleged fraudulent conduct by Integral. The ALJ overruled Reece's motion by order dated October 21, 2009.

In his October 21, 2009 decision, the ALJ awarded permanent partial disability benefits based upon a 14% impairment rating and medical benefits. The ALJ determined the three multiplier did not apply. The ALJ awarded Integral a credit for salary continuation it paid to Reece during the two periods he was off work. Both parties filed petitions for reconsideration. The ALJ granted Integral's petition on November 25, 2009, and corrected clerical errors. On the same date, the ALJ overruled Reece's petition.

Reece appealed the ALJ's decision to this Board. In an opinion entered June 28, 2010, the Board affirmed the majority of ALJ's determinations. However, with regard to the two multiplier, the Board remanded for additional findings of fact, stating as follows:

> With regard to the application of the two multiplier, we note Reece never argued for application of the two multiplier until his brief to this Board. Before the ALJ, Reece continually argued his post-injury wages should not be viewed as equal to or greater than the AWW at the time of his injury. He argued the $2.00 per hour stipend added to his $15.50 per hour rate should be excluded from his post-

> injury wage calculation. He argued only a small percentage of his post-injury wages could even be viewed as being equal to or greater than his AWW at the time of his injury. His arguments concerning post-injury AWW were directed to the issue of the three multiplier and the Fawbush analysis. He argued that even if he returned to work at the same or greater wage, he was not likely to continue to be able to earn the same or greater wage.
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> Even though Reece resisted and argued against a finding of a return to work at the same or greater wage, his petition for reconsideration did request a specific finding from the ALJ on that issue. It is therefore necessary to remand this matter for the ALJ to make additional findings concerning the issue. On remand, the ALJ is to determine whether Reece returned to work at an AWW equal to or greater than the AWW at the time of injury. If the ALJ finds there was a return to work at the same or greater wage, he shall determine, based upon the evidence of record at the time the claim was submitted, whether Reece continues to earn the same or greater wage or whether Reece ceased to earn the same or greater wage. If Reece has had a cessation of an AWW equal to or greater than that earned at the time of the injury, pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 67 (Ky. 2009), the ALJ must determine whether the cessation of that wage was as a result of Reece's disability.

Reece appealed the Board's decision to the Kentucky Court of Appeals, which was ultimately dismissed as untimely filed.

The Kentucky Supreme Court affirmed the Court of Appeals on May 24, 2012.

THE CLAIM ON REMAND

Following the Kentucky Supreme Court's decision, the claim was remanded to the ALJ on August 29, 2012. Less than two weeks later on September 12, 2012, Reece filed a motion to reopen. In the motion, Reece noted the Board had remanded the claim on issues related to the application of the two multiplier based upon the evidence of record at the time the claim was submitted. Reece alleged Integral reduced his hours and eventually terminated him after the claim was submitted. Therefore, he argued he had sustained additional cessations of work and loss of wages. In support of his motion to reopen, Reece attached two affidavits. The ALJ ordered the claim reopened to consider Reece's entitlement to double benefits pursuant to KRS 342.730(1)(c)2, set a proof schedule and scheduled a hearing for February 26, 2013.

The affidavits in support of the motion to reopen dated October 7, 2009 and September 11, 2012 outlined events allegedly occurring after the original claim was submitted to the ALJ on September 25, 2009. Reece testified by deposition on November 28, 2012 and at the hearing held February 26, 2013. Reece stated he called into work on

Monday, September 28, 2009 and Tuesday, September 29, 2009, and was told on both occasions by Travis Varble ("Varble"), a project manager, to stay home due to lack of work. Reece was assigned to a new residential job site on Wednesday, September 30, 2009 to set up metal beams. On October 1, 2009, Reece was assigned to a training session to learn how to climb scaffolding located 220 feet off the ground. The training was later canceled, and Reece was sent back to the job site where he had worked the prior day. Reece alleges he and Varble had a disagreement over his claim and restrictions. On Friday, October 2, 2009, Reece continued to work at the residential job site.

On Monday, October 5, 2009, Reece was again told to stay home due to lack of work. On Tuesday, October 6, 2009 Reece attended a two hour training session and then reported to the Lyndon job site. He was asked to climb a twenty foot scaffold in the rain and disassemble it. Reece told his supervisor he could not perform the task due to his eye condition and work restrictions, and he was told to go home. Reece was again sent home the following day after he stated he could not perform the assigned work duties at the Lyndon job site due to his restrictions. Reece was told there was no work available and to stay home on Thursday, October 8, 2009 and Friday, October 9, 2009. From

approximately Monday, October 12, 2009 through November 15, 2009, Reece was assigned to work at Integral's shop where he cleaned, pulled weeds, organized and inventoried supplies. From November 16, 2009 to November 20, 2009, Reece was assigned to the Healing Place job site. On November 20, 2009, the job foreman informed Reece he had been terminated from Integral.

Reece testified during this time frame, he was the only Integral employee told to stay home due to lack of work and assigned to work at the Integral's shop. Reece neither knew why he was being terminated nor if others had been laid off. Reece remained unemployed until February 2011. He worked part-time at a hotel earning no more than $12.00 per hour from February 2011 through February 2012. He then worked at a hospital earning $12.50 per hour in January 2012. He was promoted in July 2012, and earned $19.64 per hour as a finish carpenter. Reece stipulated he began earning more than his pre-injury AWW in July 2012.

Eckert testified by deposition on January 31, 2013, and confirmed Reece was laid off on November 20, 2009. He stated although Reece was sent home due to lack of work on several occasions, he was still paid for the day. He acknowledged on the days Reece was told to stay home, other Integral employees were assigned to various job sites.

Eckert stated Reece was sent home while other worked because Integral had no outstanding jobs within the restrictions. Eckert confirmed Reece was mostly assigned to work at the Integral shop from October 12, 2009 through November 11, 2009, where he organized and sorted supplies, and performed yard maintenance. He was then assigned to the Healing Place job site before being laid off on November 20, 2009.

Eckert testified at least three other employees were laid off at approximately the same time as Reece. He insisted Reece was not laid off due to his work injury or restrictions, but because Integral "had no further work." He also indicated work was slowing down during the latter part of 2009, and Integral only had two working projects. Eckert denied he assigned Reece to the shop in October and November 2009 out of retaliation, but did it to accommodate his restrictions. He also stated all employees have been detailed in this fashion periodically in the past. He stated the only other option would have been to place Reece on unemployment since no other work was available. Eckert stated Integral laid off other field employees subsequent to November 2009 and at one point was down to just two or three working employees. Integral also laid off at least three office employees during that time. The remaining office and field staff accepted pay reductions. Eckert testified

Integral employees, including Reece, were laid off due to lack of work. Business began picking back up since November 2012 and Integral called back several employees in late 2011 and 2012, and currently employs ten field employees. Reece was not called back because others were willing to work at a cheaper rate.

Eckert attached two business records as exhibits to his deposition. One exhibit demonstrated Integral's annual man hours steadily decreased from 2008 through 2010. The hours gradually started to increase in 2011 and 2012 but never back to the levels reached in 2008. Likewise, Eckert introduced a document reflecting annual wages for field and office employees from 2008 through 2012. In general, the record indicates annual wages for both field and office employees decreased from 2008 through 2010, but began to increase in 2011 and 2012.

Integral and Reece also filed voluminous business records into evidence including an accounting of Integral's monthly deposit documents from January 2009 through December 2012, records from the Division of Unemployment Insurance, daily job reports tracking employee hours and assignments from August 2009 through November 20, 2009, and Reece's daily time sheets from August 2009 through November 20, 2009.

THE OPINIONS SUBJECT TO THIS APPEAL

The ALJ issued two opinions. In the opinion and order on remand rendered April 24, 2013, the ALJ summarized Reece's testimony and Eckert's deposition testimony from 2009 and 2013, and noted the business records showing man hours had decreased in 2010 and 2011. In the "Findings of Fact and Conclusions of Law," the ALJ stated as follows:

> In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments. The Administrative Law Judge has considered the requirements of *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003); and *Chrysalis House v. Tackett*, 283 S.W.3d 671 (Ky. 2009).
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> The evidence from the claim as a whole, including the original litigation and the evidence filed since then, demonstrate that following his injury on October 19, 2006 the Plaintiff did return to work at a wage equal or greater than on his date of injury. This is true because the Plaintiff's hourly rate prior to his date of injury was $15.50. After his date of injury, at least by the time he returned to work, his hourly rate was either $15.50 or $17.50. At some point $2.00 per hour was paid to him due to his waiver of certain health benefits. Regardless of[sic] if his hourly rate was $17.50 per hour or $15.50 per hour the requirement of a return to work at equal or greater wages has been met.

Further, at the time of the original Opinion the parties had **stipulated** to an average weekly wage, for the date of injury, of $651.00. Following his date of injury, from May 26, 2007 through August 18, 2007, the Plaintiff had an average weekly wage of $668.83, if his hourly rate was $15.50, or $755.13, if his hourly rate was $17.50. Frankly, for many reasons, I am dubious that his hourly rate for workers' compensation purposes, would be considered $17.50. Therefore, regardless of which hourly rate is chosen his post injury average weekly wage equaled or exceeded his pre injury average weekly wage, from May 26, 2007 through August 18, 2007, meeting that requirement of KRS 342.730(1)(c)2.

The only real question then, put to us by *Chrysalis House*, is: Is the reason he earned less than on his date of injury from date of return to work through the date of submission of original claim, casually related to the work injury. In deciding this question I note the *res judicata* finding that, objectively, the Plaintiff does and did retain the capacity to return to the type of work done on the date of injury. I also note that as far as the Plaintiff's credibility I believe he has always been forthright and honest. Nonetheless, not unexpectedly, he has viewed all of the relevant events through a personal prism not always confirmed by the objective facts.

Specifically, I have no doubt, since the Plaintiff has told me so, that his interactions and relationships with some of his supervisors were not always cordial when he refused to perform certain tasks. Regardless, the business records of the Defendant are clear and convincing that during the timeframe in

> question the Defendant's total level of business was in decline. Certainly the Plaintiff's hours and total wages were not the only one whose were reduced.
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> The Plaintiff has made subjective, if honestly made, arguments and allegations that his level of skill and experience were such that no other reasonable explanation can be given for why his hours were reduced. I reject that theory. Of course the Plaintiff retains the burden of proof on this issue.
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> For the aforementioned reasons and including the fact that the Plaintiff has failed to offer any proof beyond his own opinion of his skills and his own subjective interpretation of events, which do not persuade me, I find that he is not entitled to any additional multipliers.
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> . . . .
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> ORDER
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> 1. The issue of whether nor the Plaintiff is entitled to a multiplier pursuant to KRS 342.730(1)(c)2., from October 20, 2006 through October 21, 2009, is dismissed resolved in entirely in favor of the Defendant.
> (Emphasis added)

The ALJ issued a simultaneous opinion and order on reopening on April 24, 2013. There, the ALJ again summarized the testimony of Reece and Eckert, and the business records indicating a reduction of man hours. He ultimately dismissed Reece's motion to reopen. In his findings of fact and conclusions of law, the ALJ stated as follows:

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments. The Administrative Law Judge has considered the requirements of *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003); and *Chrysalis House v. Tackett*, 283 S.W.3d 671 (Ky. 2009).

The evidence from the claim as a whole, including the original litigation and the evidence filed on re-opening, demonstrate that following his injury on October 19, 2006 the Plaintiff did return to work at a wage equal or greater than on his date of injury. This is true because the Plaintiff's hourly rate prior to his date of injury was $15.50. After his date of injury, at least by the time he returned to work, his hourly rate was either $15.50 or $17.50. At some point $2.00 per hour was paid to him due to his waiver of certain health benefits. Regardless of if his hourly rate was $17.50 per hour or $15.50 per hour the requirement of a return to work at equal or greater wages has been met.

Further, at the time of the original Opinion the parties had **stipulated** to an average weekly wage, for the date of injury, of $651.00. Following his date of injury, from May 26, 2007 through August 18, 2007, the Plaintiff had an average weekly wage of $668.83, if his hourly rate was $15.50, or $755.13, if his hourly rate was $17.50. Frankly, for many reasons, I am dubious that his hourly rate for workers' compensation purposes, would be considered $17.50. Therefore, regardless of which hourly rate is chosen his post injury average weekly

wage equaled or exceeded his pre injury average weekly wage, from May 26, 2007 through August 18, 2007, meeting that requirement of KRS 342.730(1)(c)2.

Likewise the Plaintiff has admitted that in July, 2012 he returned to work earning more than on his date of injury. Thus he would not be entitled to any enhancement of his benefits until such time as he ceases to earn a wage greater than on his date of injury.

The only real question then, put to us by *Chrysalis House*, is: Is the reason he earned less than on his date of injury from late November, 2009 through July 1, 2012 casually related to the work injury. In deciding this question I note the *res judicata* finding that, objectively, the Plaintiff does and did retain the capacity to return to the type of work done on the date of injury. I also note that as far as the Plaintiff's credibility I believe he has always been forthright and honest. Nonetheless, not unexpectedly, he has viewed all of the relevant events through a personal prism not always confirmed by the objective facts.

Specifically, I have no doubt, since the Plaintiff has told me so, that his interactions and relationships with some of his supervisors were not always cordial when he refused to perform certain tasks. Regardless, the business records of the Defendant are clear and convincing that at the time the Plaintiff was laid off that much of the workforce of the Defendant was either laid off or required to accept a pay cut. Later, as in several months, the workforce returned to a level close to, but not exceeding that at the time the

Plaintiff was laid off. However, the pay rate of these employees is typically less than the pay rate of the same employees prior to the Plaintiff's lay off.

In short, the Plaintiff was laid off from his job due to economic reasons and not for reasons due to his work injury. While I understand that the timing of events, his lay off took place very close in time to the original decision being issued, and his arguments with his direct supervisors, concern him these are subjective, not objective concerns. Many other employees were laid off at the same time, not just him and he was not being singled out. There is no evidence his direct supervisors had a role in laying him off and in fact the evidence suggests the contrary in that assertion that the individual, Mr. Eckert, who provided this testimony was not the man with whom the Plaintiff has on site disputes with. Nor was Mr. Travis Varble, the man the Plaintiff says actually told him to stay home.

There is also no evidence, accepted by the undersigned that prior to his actual lay off that his gradual decrease in hours worked was due to the work injury. It is the Plaintiff's burden to prove that any reduction in his average weekly wage was due to the work injury. Given that I have already rejected the theory that he was being retaliated against and accepted the theory that the Defendant was suffering a wholesale, on-going loss in business there is no remaining compelling evidence to find his reduction in wages was due to the work injury.

In short, the evidence leads the undersigned to determine that the

> reason he lost his job, and thus his earning capacity from November, 2009 through July, 2012 was in no way connected to his injury. Pursuant to *Chrysalis House, supra,* he is not entitled to any enhancement of his benefits pursuant to KRS 342.730(1)(c)2.

In both opinions, the ALJ included the following language following his findings of fact and conclusions of law:

> Finally, the Administrative Law Judge would like to clarify a procedural question and issue. As the parties have noted the date of this Motion to Re-Open and the date of the Remand of the original claim were less than two weeks apart, the Order Remanding being issued on August 29, 2012 and the Motion to Re-Open being filed on September 11, 2012. The parties have also argued that the issue on re-opening and the issue on remand are the same. The undersigned disagrees with that procedurally and, to an extent, factually.
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> The Board specifically stated that the undersigned was correct in overruling the Plaintiff's post-submission motion in the original claim to remove the claim from submission and submit additional proof. The instructions to the Administrative Law Judge were to determine if, following his injury, the Plaintiff returned to work at an equal or greater wage, if so then if he ever ceased to earn an equal or greater wage and, if so, if the reason he earned less was due to the work injury. All of these findings were to be restricted to a timeframe prior to the date of submission of the original claim. Conversely, the Re-Opening concerns a time frame from November, 2009, after

> the date of submission, through July, 2012.
>
> The undersigned attempts to explain this situation, to the best of my understanding and ability. In addition, a separate Remand [or Re-Opening] opinion shall be issued. Necessarily that Opinion will be very similar to this Opinion, both in factual summary and analysis. This is a reality in this, hopefully, unique claim.

On July 22, 2013, the ALJ ordered the opinion and order on remand re-entered and re-issued. He further ordered "the time to Petition for Reconsideration and/or appeal Opinion and Order on Remand shall run from the date of this order. The parties shall have the same time provided by statue, regulation or rule from today's date, below, to file appropriate post-decision Motions and/or take an Appeal to the Workers Compensation Board."

Thereafter, Reece filed a petition for reconsideration of the July 22, 2013 opinion and order on remand. He argued the ALJ inappropriately considered business records since they are not admissible to show why his wage decreased before August 25, 2009 after he had returned to his pre-injury AWW. He argued factors such as poor economic conditions, high unemployment or a failing business are not appropriate reasons to deny the multiplier. He also made the same arguments he now raises on appeal.

Reece requested the ALJ enter findings as to why he ceased making the same or greater wages after he returned to work based solely on the proof of record at the time the case was submitted after the August 25, 2009 hearing. Reece did not file a petition for reconsideration regarding the April 24, 2013 opinion and order on reopening.

In the August 26, 2013 order on reconsideration, the ALJ stated as follows:

> 1. To clarify, there were issued, simultaneously, an Order on Remand as to whether or not the Plaintiff was entitled to an enhancement to his benefits pursuant to KRS 342.730(1)(c)2. at the time of the Original Opinion and an Order on Re-Opening as to whether or not the Plaintiff was entitled to an enhancement to his benefits pursuant to KRS 342.730(1)(c)2. since the Original Opinion. The Department does not place either appeals or motions to re-open in abeyance even if they co-exist. This Order, and the Petitions, concern only the Order on Remand.
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> 2. The Administrative Law Judge has already made a factual findings[sic] that for purposes of a workers' compensation average weekly wage calculation the Plaintiff, at the time of the Original Award, had returned to work at equal or greater wages and had generally and consistently, at the time of the Award, maintained those wages. Single days, or even isolated weeks, that run contrary to the overall and general conclusion are not sufficient to overcome the burden placed on the

> Plaintiff to qualify for benefits under KRS 342.730(1)(c)2.
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> *Randall v. C.W. Johnson Xpress*, 2009-CA-001698 applies to KRS 342.730(1)(c)1. and it would be irrational, in light of *Chrysalis House v. Tackett*, 283 S.W.3d 67 (Ky. 2009) to apply it to KRS 342.[sic](1)(c)2.

On appeal, Reece argues the ALJ erred by failing to follow the Board's instructions on remand since he did not limit his decision to the evidence of record at the time the claim was submitted in August 2009. Reece asserts the ALJ only considered business records from 2010 through 2012, after the claim was originally submitted, in determining he was not entitled to the two multiplier during the time period prior to the hearing. "Absent [Integral's] business records, there is no other basis for the ALJ's conclusion that [Reece's] reduction in wages from August 19, 2007 through August 25, 2009- and, in fact, continuing until July, 2012, was not related to his injury." Second, Reece argues once it has been shown there has been a cessation of employment after a claimant returned to work at a weekly wage equal to or greater than the AWW at the time of injury, the burden should be shifted to the employer to prove the cessation was not due to the work-related injury. Finally, Reece argues "the overwhelming evidence when the claim was

submitted compels a finding that petitioner's wages were reduced from August 19, 2007 to November, 2012 because of his work injury."

Integral argues Reece's appeal from the April 24, 2012 opinion on reopening is not timely and should be dismissed. Integral states Reece filed a notice of appeal on September 24, 2013 for both the April 24, 2013 opinion on reopening and the July 22, 2013 opinion on remand. However, the opinion on reopening "became final when no petition for reconsideration or notice of appeal was filed within thirty days. Accordingly, the notice of appeal with regards to the opinion and order on reopening should be dismissed."

Reece's second argument on appeal can be disposed of in short order. As the claimant in a workers' compensation proceeding, Reece had the burden of proving each of the essential elements of his cause of action, including enhancement of his benefits pursuant to KRS 342.730(1)(c)1 or 2. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). There is simply no statutory or case law supporting Reece's argument the employer should bear the burden of proving a cessation of employment is not related to a claimant's work injury once he or she has returned to work at a weekly wage equal to or greater than the AWW at the time of injury. Reece is

correct in noting an employer bears the burden of proof in affirmative defenses. However, entitlement to the statutory multipliers is not an affirmative defense, but rather one of several elements of his cause of action. Therefore, the burden rests upon Reece as the claimant to prove any cessation pursuant to KRS 342.730(1)(c)2 is related to his work injury.

Since Reece was unsuccessful in his burden in proving he is entitled to the two multiplier both prior to and following the submission of his original claim, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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 discretion to determine 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). 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.730(1)(c)2 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.

In Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009), the Kentucky Supreme Court narrowed the applicability of KRS 342.730(1)(c)2, holding the section permits double benefit during a period of cessation of employment at the same or greater wage "'for any reason, with or without cause,' provided that the reason relates to the disabling injury." *See also* Hogston v. Bell South Telecommunication, 325 S.W.3d 314 (Ky. 2010). Further, in Ball v. Big Elk Creek Coal Co. Inc., 25 S.W.3d 115, 117-118 (Ky. 2000), the Kentucky Supreme Court held for purposes of KRS 342.730(1)(c)2, an employee's post-injury earnings are subject to calculation under KRS 342.140(1), the same calculation method used to determine a claimant's pre-injury wages. Rather than focusing upon a particular week, KRS 342.140 requires the computation of an average of the employee's earnings over a period of 13 consecutive

calendar weeks. “We read KRS 342.730(1)(c)2 as providing that the pre- and post- injury [AWWs] should be compared . . . .” Id. at 118. As a result, the two multiplier may be applied to income benefits so long as: 1) a claimant continues to work post-injury for a period of time; 2) the claimant subsequently ceases work due to the disabling effects of his injury; 3) a post-injury AWW can be determined, inferred or projected by the ALJ from the evidence using one of the statutorily established methods laid down under KRS 342.140(1); *and,* 4) the post-injury AWW as determined by the ALJ is equal to or greater than the claimant's AWW at the time of the injury.

Due to the procedural uniqueness of this claim, there are several overlapping issues in the opinion on remand and the opinion on reopening. As noted by the ALJ in both opinions, the parties stipulated at the August 25, 2009 BRC Reece’s pre-injury AWW was $651.00. It is also undisputed Reece returned to work for Integral following his injury, except for the two periods of recovery following his surgeries, until his termination in November 2009. It is also undisputed Reece returned to an equal or greater AWW in July 2012 after securing new employment.

With regard to both opinions, we find substantial evidence in the record supports the ALJ’s determination

Reece returned to work following his injury at a wage equal or greater than his AWW at the time of injury. The testimonies of both Reece and Eckert, as well as the wage records submitted by Integral during the original litigation, establish Reece continuously earned either $15.50 or $17.50 per hour following his work injury. Either wage is equal or greater than Reece's pre-injury hourly wage of $15.50. In addition, the ALJ relied upon the wage records filed by Integral during the pendency of the original claim. The wage records reflect Reece's earnings immediately following his October 19, 2006 accident through August 15, 2009 at either $15.50 per hour or $17.50 per hour. The records indicate after Reece returned to work, he earned a post-injury AWW greater than $651.00 for at least one quarter: he earned an AWW of $668.88 from May 26, 2007 through August 18, 2007 at an hourly rate of $15.50 per hour. Therefore, the testimony of Reece and Eckert and the wage records provide the requisite substantial evidence supporting the finding Reece returned to work at an AWW equal to or greater than his pre-injury AWW, and no contrary result is compelled.

Since the ALJ determined Reece returned to work at the same or greater AWW, he may be entitled to the two multiplier for any subsequent period he ceased earning such

wage, so long as the cessation relates to his disabling injury pursuant to Chrysalis House, Inc. v. Tackett, supra. In both the opinion on remand and opinion on reopening, it is reasonable to infer the ALJ found Reece subsequently ceased earning the same or greater AWW in light of the fact he engaged in an analysis pursuant to Chrysalis House, Inc. v. Tackett, supra, and the wage records reflect several subsequent quarters where Reece earned a lesser AWW due to a fluxing hours worked.

Regarding the opinion on remand only, we find substantial evidence supports the ALJ's determination Reece is not entitled to the two multiplier for periods of time in which he ceased earning the same or greater AWW from the date of his injury through the original submission of his claim since any reduction of hours was unrelated to his work injury, and no contrary result is compelled. The ALJ primarily found Reece's testimony unpersuasive. He specifically rejected Reece's theory there is no other explanation for why his hours were reduced and noted his personal opinions were not always confirmed by the objective facts.

The ALJ acted within his discretion in assessing the weight and credibility of Reece's testimony, Square D Co. v. Tipton, supra. The ALJ also relied upon business

records submitted by Integral demonstrating Integral's total level of business was in decline during the time frame in question, i.e., from approximately October 19, 2006 through the submission of the original claim to the ALJ. Although Reece is able to point to conflicting evidence and different inferences supporting an outcome in his favor, such is not an adequate basis for reversal on appeal. We find no merit to Reece's argument the ALJ inappropriately considered evidence outside the time period in question in the opinion on remand. The wage records, testimony of Eckert and Reece, as well as the business records constitute the requisite substantial evidence supporting the ALJ's determination Reece failed in his burden of proving any reduction of hours was unrelated to his work injury during the time frame in question, and no contrary result is compelled.

Regarding the opinion on reopening only, we likewise find substantial evidence supports the ALJ's determination Reece's reduction of hours occurring after the claim's submission and his eventual termination on November 21, 2009 is unrelated to his work injury and therefore he is not entitled to the two multiplier, and again no contrary result is compelled. The ALJ primarily relied upon Eckert's testimony and Integral's business records in finding other employees had been laid off around the same time or had

accepted a pay reduction in support of his determination Reece was laid off due to economic reasons. The ALJ also rejected Reece's testimony and theory of retaliation. Again, the ALJ acted within his discretion in assessing the credibility of Eckert's and Reece's testimony, and ultimately in finding Integral's witness more persuasive.

Accordingly, the April 24, 2013 opinion and order on reopening, the opinion and order on remand rendered April 24, 2013 and re-issued on July 22, 2013, and the August 26, 2013 order denying Reece's petition for reconsideration by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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