OPINION ENTERED: April 27, 2012

CLAIM NO. 201088594

LORETTA BARNETT PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

ADECCO FOR KDMK
and HON. ALLISON EMERSON JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Loretta Barnett ("Barnett") seeks review of an opinion and order rendered November 21, 2011, by Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ") dismissing her claim for permanent partial disability ("PPD") benefits and future medical benefits against ADECCO for KDMK ("ADECCO"). Barnett also appeals from the

December 19, 2011, order ruling on the petitions for reconsideration filed by both parties.

In her Form 101, Barnett alleges a May 17, 2010, work-related injury occurred as follows:

> Was manipulating parts while working as an inspector on an assembling line and noticed increased pain into the left upper extremity and neck – during week leading up to May 17, 2010 I was working 2 lines all week and could not continue as my hand was swollen and throbbing then.

Barnett alleged injuries to her "left upper extremity, nodule and trigger finger/thumb, and pain in LUE and neck/cervical spine."

Barnett testified at a July 20, 2011, deposition and at the September 21, 2011, hearing. Between 1987 and November 1991, Barnett performed assembly line work for three different employers. In 1987, she worked for six months for Quality Manufacturing ("Quality"), and in 1988 she worked for six months for Continental Metal Supply ("Continental"). For approximately three years, until November 1991, she worked for Powell Manufacturing ("Powell") assembling shirts. In November 1991, because Barnett began experiencing numbness, tingling, and throbbing in her left arm, she stopped working at Powell and never returned. As a result of that injury, Barnett

was treated by Dr. Mark Einbecker and later by Dr. James Templin.

Barnett filed a workers' compensation claim resulting in a May 9, 1995, opinion, order, and award by Hon. W. Bruce Cowden, Administrative Law Judge ("ALJ Cowden"). ALJ Cowden determined Barnett sustained a "repetitive motion injury which culminated in disability on November 1, 1991." In the opinion, order, and award, ALJ Cowden summarized the records of Drs. Einbecker and Templin who treated Barnett for this injury. Concerning the extent of Barnett's occupational disability, ALJ Cowden concluded as follows:

> The Plaintiff asks for 100% occupational disability inasmuch as she cannot even perform sedentary work and has no transferrable skills. The defendant employer, on the other hand, asks for a moderate degree of occupational disability in the range of 40% to 50%. The ALJ will take a middle ground. The ALJ, after considering the plaintiff's age, education, and prior work experience and taking into account the medical and lay testimony as I am required to do pursuant to Osborne vs. Johnson Ky. 432 SW2d 800 (1988), the [sic] ALJ [sic] is of the opinion that the plaintiff is currently suffering an occupational disability of 70% and the ALJ so finds. Clearly, the plaintiff will not have the ability to perform any repetitive type of work activity that she has performed in the past. Although as pointed out, there has been a question of whether or not the

plaintiff worked at a fast food restaurant. Inasmuch as her From 104 does not reveal such work activity, it is clear that the majority of the plaintiff's work activity has been in the manufacturing area performing repetitive work activity not only for the defendant employer but for other manufacturing companies. Clearly, the plaintiff will not have the ability to return to any type of repetitive work activity that she has performed in the past. However, the ALJ is of the opinion, that the plaintiff is fairly young and does have an eleventh grade education. The ALJ feels that at the present time the plaintiff is not totally occupationally disabled inasmuch as the plaintiff has the ability to perform certain jobs in the area in which she lives commensurate with the work restrictions imposed although these jobs will be few in number. The ALJ will attribute the 70% occupational disability not only from a physical standpoint but also from a psychiatric standpoint taken collectively. The ALJ feels that the plaintiff is able to perform light or sedentary work per the recommendations of Dr. Einbecker as long as the plaintiff avoids repetitive or overhead activity. It should also be pointed out that in the medical assessment attached to the Form 107, Dr. Ludwig characterized the plaintiff's ability to perform work related functions to be good or fair with respect to each identified activity which would preclude a total occupational award. Because, however, the ALJ makes an additional finding that the plaintiff would not be able to perform her usual and customary work activity, that of working as a seamstress in a factory setting, the ALJ finds that the plaintiff would be a suitable candidate

> for rehabilitation with emphasis on pain management. For this reason, the ALJ recommends that the plaintiff be evaluated for same.

On April 29, 1997, a settlement agreement was approved reflecting Barnett settled her claim for a lump sum and waived her rights to future medical benefits and to reopen the claim.

Barnett testified Dr. Einbecker performed three surgeries on her left arm and hand which she described as "radial nerve release, a median nerve release and a carpal tunnel."[1] She denied Dr. Einbecker ever told her she should not perform a particular type of work, although she acknowledged Dr. Einbecker may have provided her with a weight-lifting limitation. Barnett testified she received a copy of her medical records from Dr. Einbecker. Barnett testified she did not work outside the home for eighteen years and worked as a housewife taking care of her two children. She denied any flare-ups or injuries to her left arm from 1991 until she went to work for ADECCO. During her deposition, Barnett explained why she returned to work in November 2009 stating as follows:

[1] Dr. Einbecker's records reflect on June 15, 1992, he performed surgery on the left hand of a "release of radial sensory nerve." On October 22, 1993, Dr. Einbecker performed surgery on the left hand of "carpal tunnel release with release of the median nerve proximally."

> A: It was just some things that come [sic] up and we just – I just wanted my own money and I just went and applied. And they asked me, did I have any qualifications about [sic] inspecting and I told her, yes, I had done some prior to – not recently, but I had done some. And she said, well, what about coming in at 5:30, and that was it.
>
> Q: And this was at ADECCO?
>
> A: Yes.
>
> Q: And when you say she, who is she?
>
> A: Jessica was her first name. I don't know her…
>
> Q: Is that at the ADECCO office?
>
> A: Yes.

Later in her deposition, Barnett further explained as follows:

> Q: I have to ask: When you wanted to go back to work after 18 years of not being in the formal work force, why did you go back to the same type of job that caused you problems to start with?
>
> A: Well, I didn't have any problems for 18 years. But I hadn't been in that kind of environment either, but I didn't think that it would be – that it would even come back up – would be something that would flare back up.
>
> Q: So are you saying you hadn't had any problems with it since 1991?
>
> A: Right.
>
> Q: So once you stopped doing that kind of assembly line work, it cleared up?

> A: It got better.
>
> Q: Your symptoms, I mean.
>
> A: It got better.
>
> Q: It didn't occur to you that if you started doing that same kind of work again that it might happen again?
>
> A: Not after 18 years.

Barnett testified because "very little" of her jobs at Quality and Continental involved inspection she felt she could do the job at ADECCO. Barnett described her job as follows:

> Q: Can you describe for me the actual pump that you were inspecting; how big was it; what did it look like?
>
> A: Well, it all considered [sic] what line you was [sic] on. Some of them were bigger; some of them were like this; some of them –
>
> Q: Okay. Let me – when you say like this, you're showing what, about a foot and a half tall —- long?
>
> A: Maybe longer than that, some of them was [sic].
>
> Q: What was the smallest?
>
> A: The smallest one was probably about a foot tall. And we would take them out – they would come through on the line after they made them in these totes and we'd pull the tote down to us and take out one – there was [sic] four in a tote at a time and we would take them out, hold them in our left hand and take – we had a marker, like a

green marker. After we checked whatever part we checked, we had certain marks that we had to put on it to show that it had been checked. And you turn some of them upside down and looked at the bottom of them and made sure the inscription on the bottom of the plastic was [sic] the right numbers on it, and you put them back in and go on and do the next one until you got all four of them done. And then after that, you'd close your tote up and then you'd put it on a big cart until you got that cart completely full. Then you'd pull the cart over – push it over to another place and get another cart and bring them – start all the way back over. Load your totes back on the line and they'd just start going back again and they'd fill them up and you do it all again.

Q: And you have – I'm sorry – four fuel pumps per tote?

A: Yes.

Q: So you were holding and inspecting with you left arm and you were marking on it with your right hand.

A: Right.

Q: Are you right-handed when you write?

A: Yes.

Q: Now, you've told us the dimensions of the smallest and the largest pumps that you would handle. How much did those weigh; do you know?

A: A small one would probably weigh maybe – maybe two pound [sic]. The larger one would probably weigh four or five pound [sic].

> Q: Did you have a certain number that you were supposed to inspect per shift?
>
> A: Yes.
>
> Q: And how many was that?
>
> A: On the smaller parts, most of the time it was – there's two different lines. The smaller ones was 1400 parts per night and some of the larger parts – some of the – it was like 2200 parts per night.

Barnett's work shift consisted of working ten hours plus breaks totaling fifty minutes.

At the hearing, Barnett testified when she decided she wanted to go back to work, she went to ADECCO and put in an application to work for KDMK because having a GED was not a prerequisite to employment. Barnett testified Adecco did not ask her any questions regarding her previous employment, previous work injuries, and work restrictions. Barnett testified she worked on various assembly lines without any problems until approximately April 2010. Barnett had no real problems performing any work until about a week before May 17, 2010. Barnett indicated in mid-April she had some slight pain in her left forearm which did not affect her work. However, during the last week she worked she was put on the "Toyota line" which required the highest production. She explained on that line she had to hold the parts out with her left hand which

caused her trigger thumb. Barnett's pain continued to worsen that last week as she continued to perform this work. It was during this period she developed a "little ball" at the base of her thumb. During her last week of work her "upper neck" and shoulder felt like "somebody was twisting her arm off." As an inspector on the assembly line, she was required to hold the part with her left hand and put an inspection mark on the part with her right hand. Barnett testified she went to work on Friday, May 14, 2010, and by 2:00 a.m. that morning her arm was in pain. Barnett worked through the pain until her shift ended. Barnett explained her pain began at her thumb and went into her forearm, shoulder, and the left side of her neck. By Sunday, her hand was badly swollen. Barnett reported the injury to Jessica at ADECCO on Monday, May 17, 2010. ADECCO immediately referred her to Dr. McLaughlin. Later, she was treated by Dr. Heilig, an orthopedic surgeon, who ordered an EMG and MRI. Dr. Heilig's records reflect he performed surgery consisting of left carpal tunnel release and left trigger thumb release. As a result of the surgery, Barnett received relief from her trigger thumb but not from the carpal tunnel condition.

Barnett testified she injured her left hand while working at Powell. The symptoms she experienced then are

similar to the symptoms she currently experiences. Barnett testified she received over four years of treatment for the 1991 injury. At the time of the 1995 hearing, she was still in pain due to the injury. She testified her problems resided approximately two years after the 1995 hearing.

During the eighteen and a half years she was off work, Barnett testified she worked inside and outside her house without "a bit of problem." Barnett testified no one explained to her she had permanent restrictions and that she was precluded from doing similar types of work in the future. Barnett testified Dr. Einbecker told her that her problems in 1991 with her left hand were due to "repetitive work" she performed at Powell. Barnett did not feel she was precluded from performing "similar types of employment or any other employment in the future." Concerning whether Barnett was advised that she should avoid repetitive work in the future, Barnett testified as follows:

> Q: Okay. But then Dr. Einbecker never suggested to you that maybe repetitive work is something you shouldn't be doing any longer?
>
> A: No. Well, what it was too, after – I figured after 18 and-a-half years I would think that what I did do – I mean, not hardly a man was doing what I had done, but I just kind of figured that after 18 and-a-half years and I

> didn't have no problem whatsoever that I would be able to hold down a job again and just have my own money again.

Sheila Collins ("Collins"), office manager for ADECCO, was deposed on September 7, 2011. Collins testified Barnett was assigned to work on the assembly line. Collins testified she provided Barnett with the job description and asked if Barnett had any restrictions which would preclude her from performing the job. Barnett told Collins she was physically able to do the job and had no prior restrictions. When Barnett reported the injury she denied having prior injuries to her left arm. Collins later found out from the adjuster that information was incorrect.

The contested issues listed in the September 7, 2011, benefit review conference ("BRC") order are "Capacity to return to former work; Causation/work relatedness; Extent and duration; Failure to pay medical expenses; Injury as defined by the Act; Multipliers pursuant to KRS 342.730(1)(c); Pre-existing active disability; underpayment of TTD; Vocational rehabilitation, and failure to follow medical advise [sic]." In dismissing the claim, the ALJ entered the following findings of facts and conclusions of law:

Did the plaintiff failed [sic] to follow reasonable medical advice thereby contributing to the plaintiff [sic] work injury of May 17, 2010? KRS 342.035(3) states in part as follows:

> 'No compensation shall be payable for the… disability of an employee if his … Disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.'

The plaintiff has had a long history of medical problems with her left upper extremity. In his report dated October 12, 2010 Dr. Best catalogued the plaintiff's medical history between February, 1992 and May, 1994. She underwent several surgical procedures and her physician specifically stated that she would be relegated to light or sedentary type work with no assembly line type activities due to her inability to do repetitive type work. The plaintiff applied for and received a workers compensation award due to her disability.

As directed, for the next 17 or 18 years, the plaintiff avoided the type of work that had originally contributed to her injuries. However, in 2009, without the benefit of an [sic] updated medical advice, the plaintiff resumed working in a factory type setting. It is clear to this administrative law judge that the plaintiff was aware of her medical situation.

Now the plaintiff is enduring what appears to be even greater disability with the same body parts after she has

> returned to the same type of work. Given this history, I am persuaded by the opinions of Dr. Best on this issue. He states that the plaintiff's failure to follow Dr. Einbecker's require [sic] restriction to work activities in 1995 clearly resulted in the necessity of additional care and treatment. Accordingly, as relates to the plaintiff's upper left extremity, I find that the plaintiff violated her physician's medical instructions. Given the seriousness of this plaintiff's medical condition I find that [sic] the violation to be unreasonable. I also find that the activity aggravated her condition to the extent that it required much more medical treatment. Finding her actions in violation of KRS 342.035 I find that the [sic] plaintiff's medical condition of her upper left extremity medical [sic] condition [sic] is not compensable.
>
> As relates to the plaintiff [sic] neck condition, while persuaded that the plaintiff [sic] neck condition is work-related I am more convinced by the opinion of Dr. Best that any impairment has resolved to the extent that the plaintiff now has a 0% impairment.
>
> The plaintiff underwent a trigger finger injury which Dr. Heilig repaired on September 16, 2010. Although Dr. Best indicates that this injury warrants a 1% whole person impairment, neither Dr. Burgess nor Dr. Heilig would rate it that high. I am more persuaded by their opinions on this issue. Accordingly, I find that the plaintiff's trigger thumb injury has a 0% impairment.

The ALJ ordered as follows:

> 1. The plaintiff's injury claim for her upper extremity is hereby DISMISSED with prejudice.
>
> 2. The plaintiff has a 0% impairment with respect to her trigger thumb injury and her neck injury.

Both parties filed petitions for reconsideration. In its petition for reconsideration, ADECCO asserted the ALJ found the injuries to the neck and left thumb resulted in no impairment but "did not clearly state" whether the injuries were temporary or permanent. Further, it asserted the ALJ made no findings of fact regarding Barnett's entitlement to future medical benefits for her "recognized injuries." ADECCO requested the appropriate findings of facts.

Barnett's petition for reconsideration asserted the ALJ should order ADECCO is liable for the surgery performed by Dr. Heilig since the ALJ determined the trigger finger is work-related. Barnett also asserted she is entitled to future medical expenses for her neck and trigger finger injuries.

In the December 19, 2011, order ruling on the petitions for reconsideration, the ALJ ordered ADECCO is responsible for the medical expenses due to the trigger finger surgery but is not liable for future medical care for the trigger finger injury and neck injury.

On appeal, Barnett asserts the ALJ erred in determining her left upper extremity injury is not compensable because she failed to follow reasonable medical advice in violation of KRS 342.035(3). Barnett asserts KRS 342.035(3) is not applicable since there is no evidence she failed to follow proper medical advice after the injury at KDMK. Citing Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995), Allen v. Glenn Baker Trucking, Inc., 875 S.W.2d 92 (Ky. 1994), and White's Lodging Services v. Shields, 2010-CA-001135-WC, rendered April 22, 2011, Designated Not To Be Published, and Kroger v. James, 2007-SC-000247-WC, rendered March 20, 2008, Designated Not To Be Published, Barnett argues as follows:

> The case law on this defense deals in using it when it is alleged that an employee has unreasonably refused to follow medical advice concerning the injury in the pending claim, not to avoid liability on a pending claim based upon an employee's alleged failure to follow medical advice regarding a prior injury.

Barnett asserts that as in White's Lodging Services v. Shields, supra, and Kroger v. James, supra, Barnett testified she "did not understand that the permanent restrictions would remain with her in subsequent employments." Further, Barnett references her testimony she was unaware Drs. Einbecker or Templin placed any work

restrictions on her which were meant to be "life-long in nature." Barnett cites to her testimony that "neither physician sat down with her and explained she must never attempt certain activities again in the future." Barnett maintains she was never advised she is precluded from attempting a similar factory position in the future simply because she was adjudicated not to have the capacity to perform that job. Barnett cites to her testimony that eighteen years had passed since her injury, and during thirteen of those years she was asymptomatic and very physically active. Therefore, it never occurred to her the carpal tunnel condition would reoccur. Barnett argues it is unreasonable to require an unsophisticated laborer to seek a release of restrictions from a condition which resolved eighteen years earlier. Barnett posits the situation would have been different had Dr. Heilig, post-surgery, given her restrictions and her failure to adhere to those restrictions caused further complications.

Alternatively, Barnett asserts should KRS 342.035(3) apply, ADECCO has not met its burden as required by Luttrell v. Cardinal Aluminum Co., supra. Barnett argues the restrictions placed upon her by the physicians are medical opinions "meant to quantify the impact of an injury on a worker in the future," and "is not medical

advice as contemplated under KRS 342.035(3)." In addition, Barnett argues it was not unreasonable for her to seek employment eighteen years after her prior injury since she was asymptomatic for at least thirteen years. In light of her circumstances, Barnett argues her actions were not unreasonable.

Next, Barnett asserts the ALJ's determination she did not have a permanent impairment due to her neck injury and is not entitled to future medical treatment for her neck injury is not supported by substantial evidence. Barnett cites to the test results and opinions of Dr. Heilig in arguing Dr. Best's opinion that she suffered a simple neck strain is not based on substantial evidence. Barnett points out the ALJ rejected Dr. Best's opinion she had a 1% impairment due to the left trigger thumb but accepted his opinion she had no impairment due to a neck strain. Barnett asserts this "arbitrary analysis of the record" demonstrates the ALJ's decision regarding the neck injury is not supported by substantial evidence.

As the claimant in a workers' compensation proceeding, Barnett had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Barnett was unsuccessful in that burden regarding her neck injury, 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 they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Further, Adecco had the burden of proving the affirmative defense contained in KRS 342.035(3). Since ADECCO was successful in that burden, the question on appeal is whether there is substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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 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). Although a party may note evidence that would have supported 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). 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 342.035(3) reads, in relevant part, as follows:

> No compensation shall be payable for the death or disability of an employee if his death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

After reviewing the statute and the case law, we conclude KRS 342.035(3) is not solely applicable to the claimant's unreasonable failure to follow medical advice given after the occurrence of the subject work injury. We conclude KRS 342.035(3) also applies when medical advice is given prior to the occurrence of a work injury and the subsequent unreasonable failure to follow the medical advice causes a work injury or further aggravation of a work injury.

In Proven Products Sales and Service v. Crutcher, 464 S.W.2d 800, 802 (Ky. 1971) the Kentucky Court of Appeals, predecessor to the current Kentucky Supreme Court, seems to give credence to Barnett's argument stating as follows:

> As concerns the claim of failure to follow medical advice, we agree with the conclusion of the circuit court that the statute contemplates specific advice as distinguished from a general admonition, as in the instant case, to lose weight. Furthermore, we think the statute contemplates advice concerning the treatment of the injury or disease which is the immediate cause of the disability.

The last line of the above quote is not contained in any subsequent decisions dealing with the applicability of KRS 342.035(3). In Allen v. Glenn Baker Trucking, Inc., supra, Allen, while operating a bulldozer, stirred a nest of yellow jackets and was stung multiple times. As a result, he suffered a severe allergic reaction and was taken to a clinic by a co-worker. Allen was given a shot containing Benadryl and steroids. The physician advised Allen orally and in writing not to drive for the remainder of the day. Both Allen and a co-worker testified the co-worker offered to take Allen home but Allen rejected the offer believing he was capable of driving. Allen was almost home when he became unconscious and had an accident resulting in head, neck, and back injuries. The ALJ concluded Allen's injuries were work-related, but his occupational disability resulting from the accident was non-compensable because he failed to follow reasonable medical advice. Accordingly, Allen was barred by KRS 342.035(3) from receiving income and medical benefits. This Board and the Court of Appeals affirmed. The Supreme Court adopted the opinion of the Court of Appeals affirming the dismissal of Allen's case which reads, in part, as follows:

> Finally, Allen argues that the advice given to him by the doctor not to drive a vehicle is not the 'medical advice'

> contemplated by KRS 342.035(2). Relying on *Proven Products Sales & Service v. Crutcher*, Ky., 464 S.W.2d 800 (1971), Allen insists that the 'advice' as used in the statute 'must be advice that goes toward the treatment of a disease or injury, not general advice....' The advice in *Crutcher* that was held not conforming to the statute was a 'general admonition' to lose weight. The court held that the statute contemplates 'advice concerning the treatment of the injury or disease which is the immediate cause of the disability.' *Id*. at 802. While the statute more frequently comes into play concerning failure to follow advice concerning treatment of an injury or disease incurred in the course of one's employment, the statute also addresses disabilities that are 'caused' or 'aggravated' by failure to follow specific medical advice. There is no question that all of Allen's permanent disability is the result of the one-vehicle accident which would not have occurred had Allen followed the specific advice not to drive that day. The ALJ and the board found this advice to be clear and specific.
>
> The statute evinces a purpose to relieve employers from liability for disability benefits when the disability could have been avoided by claimant's compliance with his doctor's advice. The statute requires the claimant to mitigate his damages, not just in the treatment of his injury, but in preventing further injury or disability. In our opinion the advice given to Allen not to drive is clearly the type of advice the statute intended to embrace.

Id. at 94.

In Luttrell v. Cardinal Aluminum Co., supra, the Court of Appeals discussed the elements necessary to establish the affirmative defense contained in KRS 342.035(3), instructing as follows:

> In *Teague v. South Central Bell*, Ky.App., 585 S.W.2d 425 (1979), this Court set forth the two elements necessary to establish an affirmative defense pursuant to KRS 342.035(2): 1) failure to follow medical advice and 2) the failure must be unreasonable. A third factor is whether the unreasonable failure caused disability. *Elmendorf Farms v. Goins*, Ky.App., 593 S.W.2d 81 (1979). The determination of whether the failure to follow medical advice is unreasonable is a question of fact for the ALJ. *Fordson Coal Co. v. Palko*, 282 Ky. 397, 138 S.W.2d 456 (1940).

Id. at 336.

We believe White's Lodging Services v. Shields, supra, only offers marginal support for Barnett's position. In White's Lodging Services v. Shields, supra, the Court of Appeals affirmed the ALJ's determination KRS 342.035(3) was not applicable. However, with respect to White's argument on appeal, in footnote 3 the Court of Appeals stated:

> Interestingly, the ALJ also noted that the defense of 'unreasonable failure to follow medical advice' has never been used in the way White's Lodging seeks to use it. Namely, the statute has typically been used to reduce

> or eliminate an award where the employee has unreasonably refused to follow medical advice concerning *the injury in the pending claim.* White's Lodging seeks to apply this logic to the failure to follow medical advice concerning a previous injury, not the injury which is the subject of the pending claim. It is easy to see the problems that this type of application of the statute might cause. However, we do not need to decide this issue today as this reasoning appears to be dicta and we affirm on the ALJ's other stated grounds.

Slip op. at 5.

In White's Lodging Services v. Shields, supra, the Court of Appeals declined to address the issue of whether KRS 342.035(3) applies in situations where the claimant's failure to follow medical advice given prior to an injury results in a subsequent work injury.

Finally, we believe Kroger v. James, supra, supports the premise KRS 342.035(3) bars recovery where the claimant's unreasonable failure to follow competent pre-injury medical advice results in a work-related injury. In Kroger v. James, supra, James had been involved in an automobile accident in 1989 in which he sustained a broken wrist, cracked sternum, ten broken ribs, and a T5

compression fracture. Later that same year, James injured her back while lifting boxes at Dillard's. She experienced pain in her low back and lower portion of her mid-back. After undergoing surgery, she returned to work with restrictions against lifting more than twenty pounds, repetitive twisting or turning, and excessive walking. James testified that because Dillard's failed to honor her restrictions, she re-injured her back and underwent a second surgery. James further testified in an attempt to get Dillard's to offer her lighter work, Dr. Hodes made the restrictions permanent. That attempt was not successful because Dillard's placed her on medical leave. Dr. Hodes' records indicated he performed surgery for a compression fracture at L1 and later for compression fractures at T6 and T9. Dr. Hodes related the fractures to James' work at Dillard's. Dr. Hodes diagnosed osteoporosis and lumbar strain and noted surgery had provided excellent resolution of her discomfort from the fractures. Dr. Hodes also imposed permanent restrictions against lifting more than twenty pounds and against repetitive bending and twisting. The claim for thoracic and lumbar strains was settled for a period of temporary total disability ("TTD") benefits and a lump sum based on a 12% disability.

James testified she did not understand the permanent restrictions were to remain with her in subsequent employments. She also testified she worked outside the restrictions when unloading trucks and filling coolers in her subsequent job at Family Dollar Store. James left that job due to a non-work-related medical condition and in 2003 began working for Kroger as a cashier. Her job at Kroger involved scanning items, operating a cash register, and performing general cleaning duties such as mopping and cleaning restrooms. James testified she lifted cases of soft drinks and water frequently and the heaviest items she lifted were fifty-pound bags of dog food. James stated that except for an occasional backache, she was able to perform all of her duties with no problems. James asserted a claim for benefits, alleging on February 19, 2005, she lifted some cases of soft drinks and water after which she felt something snap between her shoulder blades and a burning pain. She continued to work on light duty for approximately a month before being placed on medical leave. James acknowledged her pain was similar to what she experienced in 1999 but more severe. The application James completed in November 22, 2003, for the position as a

cashier/bagger contained a section entitled “ESSENTIAL JOB FUNCTIONS” stated as follows:

> The work for which you are applying may involve one or more of the following job requirements: lifting, pushing, pulling or extending above the head items weighing 25 lbs. or more; lifting, bending, and turning at the waist simultaneously; standing or walking at least two hours at a time; operating mechanical equipment; exposure to temperature extremes. (If you do not know, please inquire about whether any of these are essential functions of the position for which you are applying.)
>
> Can you perform the essential job functions of the position for which you are applying with or without reasonable accommodation?
>
> Yes _____ No _____

James checked “Yes” on the application. The application provided no specific place to report previous injuries, but James indicated Dillard’s laid her off after placing her on medical leave for a limited period of time which had expired. Kroger’s office manager, responsible for hiring new employees and conducting job orientation, testified James failed to report the previous injuries or any restrictions concerning her back at the interview. James

only reported she left her last employment due to a medical problem. The office manager stated she was not aware of a previous injury and would not have hired James had she known of her restrictions. The office manager testified cases of cola weighed 20.89 pounds and cases of water weighed 27.5 pounds. On cross-examination, Kroger's office manager acknowledged she did not specifically ask about previous injuries or permanent restrictions, and James was able to perform all of her duties until she was injured.

One of the two defenses Kroger raised was James' claim must be dismissed under KRS 342.035(3) because the present injury resulted from James' unreasonable failure to comply with the restrictions imposed after the 1999 injuries. In resolving the claim, the ALJ concluded KRS 342.035 did not apply and cited the absence of any evidence James failed to follow medical advice after the injury at Kroger or of any evidence the previous compression fractures worsened due to her failure to comply with the work restrictions. Further, the ALJ found credible James' testimony indicating she thought the restrictions applied only to her attempt to obtain light-duty work at Dillard's.

The Kentucky Supreme Court affirmed the decisions of this Board and the Court of Appeals reversing the ALJ's decision on the basis that KRS 342.035(3) cannot be so

narrowly interpreted as to only apply in situations where the claimant fails to follow medical advice given after the subject injury, stating as follows:

> Kroger asserted on appeal that the ALJ interpreted KRS 342.035(3) too narrowly. It argued that the restrictions assigned after the claimant's previous back injury continued to apply to her employment at Kroger. The Board agreed. It found the statute to be unambiguous and considered *Allen v. Glenn Baker Trucking, Inc.*, 875 S.W.2d 92, 94 (Ky.1994), to be authority for the principle that a worker's unreasonable failure to follow competent medical advice after a previous injury may be a proper basis to deny compensation in the claim for a subsequent injury. The Board concluded that the ALJ committed a legal error by failing to analyze the evidence under *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995). On that basis, it vacated the decision regarding KRS 342.035 and remanded the claim for further analysis.

Slip op. at 3.

The above language directs the ALJ must consider whether the failure of a claimant to follow medical advice received prior to the subject work-related injury caused the work-related injury. Allen v. Glenn Baker Trucking, Inc., supra, stands for the same proposition. Allen received a previous injury, multiple bee stings, and his failure, albeit on the same day, to comply with the medical advice

given as a result of that injury caused a subsequent work-related injury. Because Allen failed to follow the medical advice given to him after his bee stings, he was not entitled to income and medical benefits as a result of an injury which was clearly work-related.

We recognize the former Court of Appeals' holding in Proven Products Sales and Service v. Crutcher, supra, and the language contained in the footnote in White's Lodging Services v. Shields, supra, support Barnett's position on appeal. However, the fact remains our review of the applicable case law reflects the most recent pronouncement from the Kentucky Supreme Court on this issue, although unpublished, is that the unreasonable failure to follow competent medical advice provided prior to a subject work-related injury which causes a subsequent injury serves as a bar to the claimant's entitlement to compensation in a claim asserted for that subsequent injury. Further, this Board's interpretation of KRS 342.035(3) herein remains consistent with the Board's interpretation of the statute in previous opinions. Accordingly, we feel compelled to follow the holding in Kroger v. James, supra.

Therefore, the sole issue is whether the evidence establishes Barnett failed to adhere to medical advice of

Drs. Einbecker and Templin, i.e. the work restrictions imposed, and her failure to adhere to the restrictions was unreasonable and caused the disability resulting from her injury while working for ADECCO.

In an August 1, 2011, letter, after stating he felt Barnett had "exceeded the permanent work restrictions placed by the ALJ," Dr. Best responded to the questions set out below as follows:

> **Q2: Do you believe this failure to follow the advice of Dr. Einbecker was unreasonable?**
>
> A2: From a lay standpoint, it certainly appears that the patient essentially had a contract. For her to receive her workers' compensation disability payments in the amount assessed, she was not to return to repetitive manufacturing work. She completed the contract and accepted the monetary benefit. Dr. Einbecker, experienced orthopaedic/hand surgeon, assessed these permanent restrictions to be medically reasonable and <u>necessary</u>. Therefore, in violating these restrictions, there was a significant chance of reinjury. Ms. Barnett indicates the reinjury occurred on or about May 17, 2010. The reinjury occurred while performing highly repetitious activities, violating her restrictions.
>
> **Q3: Did Ms. Barnett's unreasonable failure to follow this medical advice result in the need for medical treatment that would not otherwise have been required?**

> A3: Dr. Einbecker stated that within reasonable medical probability, the patient required restriction to [sic] work activities in 1995. Therefore, clearly the unreasonable failure to follow the medical advice resulted in the necessity of additional care or treatment. Had the patient complied with the restrictions she had previously agreed to (and accepted monetary compensation for), within reasonable medical probability there would have been no reinjury.

The opinions of Dr. Best set forth in his August 1, 2011, letter constitute substantial evidence which supports the ALJ's finding Barnett failed to follow the advice of Drs. Einbecker and Templin, and her failure to follow the medical advice was unreasonable and caused the carpal tunnel syndrome she developed while working at ADECCO. In the medical records, Drs. Einbecker and Templin imposed permanent work restrictions as a result of the 1991 work injury Barnett sustained while working for Powell. Dr. Einbecker's May 12, 1994, record reflects he assessed an impairment rating and imposed the following restrictions:

> Based on the patient's symptoms and her grip strength, she would be relegated to a light or sedentary type work with no assembly line type activities due to her inability to do repetitive type work. She should avoid over-head work and any work that she would do she should do with arms at her side. Using the AMA guidelines for impairment, she

> would have a 6% disability rating in each upper extremity secondary to loss of pain. She would also have a 3% disability rating to the left upper extremity secondary to loss of sensation. This would have a total of a 15% total body impairment rating. I would recommend at some point in the future since therapy has not helped her and she is still quite symptomatic with her TOC that she be evaluated by Dr. Greenlee who deals with a lot of TOC patients from a surgical standpoint which she may ultimately need.

Likewise, in his January 19, 1993, report regarding Barnett's restrictions, Dr. Templin stated as follows:

> Ms. Barnett would like to return to work but is very concerned over her condition. Unfortunately, I do not see Ms. Barnett returning to any type of work activities for which she has training or experience. I would therefore strongly recommend she begin working on obtaining her GED. At the end of this time, I would recommend she obtain vocational testing and then placed in a position of vocational training or additional education in another area where the functional job duties are more consistent and compatible with her current medical condition. Unfortunately any work position must primarily involve functional job duties where Ms. Barnett is able to avoid work activities requiring repetitive use of the arms for pushing, pulling, lifting, twisting or turning.

Significantly, Dr. Heilig provided the following testimony which we believe supports the ALJ's decision:

Q: Well, she had previous release in 1992 or 1993, whatever it was. I had always thought that once you had a release, it was released and you wouldn't – there wouldn't be a need to release it aqain.

A: Oh yes, you can. It's not uncommon for a carpal tunnel syndrome to recur, particularly in patients that go back to the same type of activity that aggravated it to begin with. I have patients that work in say factories, where they're using their hands all day long, they'll get a carpal tunnel release. And then it will be good, they will go back to the same job, come back, you know, five or six years later, and it's coming back on them.

So it is possible for it to recur, and you can release it again. The ligament heals back together. It will tend to heal with more room, but you can still get scar tissue or swelling in the area that can cause the carpal tunnel symptoms again.

. . .

Q: After Ms. Barnett had her surgeries back in the early 1990s, her physician put a restriction on her of no repetitive motion, much like the restriction you gave, and no returning to work in an assembly type situation. And she didn't do that for many years. I think it was – I'm trying to remember from her testimony, I believe it was about 18 years that she didn't work. And then she returned to a similar work situation at KDMK through Adecco.

Based on those facts, do you think that her returning to that type of work aggravated her prior left hand and wrist symptoms?

A: It may have.

Q: Okay. Sort of brought them up to the forefront again?

A: It could.

The evidence shows after eighteen years, Barnett ignored the medical restrictions imposed by both Drs. Einbecker and Templin and intentionally sought, through ADECCO, the type of work which caused the 1991 work injury to her left hand. Given ALJ Cowden's finding regarding Barnett's permanent work restrictions and that the 1991 injury resulted in 70% occupational disability, we believe the ALJ was justified in finding Barnett's failure to adhere to those restrictions was unreasonable, and her unreasonable failure to follow the previous medical advice of two physicians caused the disability for which compensation was sought. Although Barnett testified she was unaware she had permanent restrictions and she worked thirteen years without problems, there is no testimony indicating that during the thirteen years she performed any aspect of the assembly line work she performed at Powell. At the July 20, 2011, deposition, when asked why she returned to the same job which caused her problems to start with, Barnett responded as follows:

A: Well, I didn't have any problems for 18 years. But I hadn't been in that

> kind of environment either, but I didn't think that it would be – that it would even come back up – would be something that would flare back up.

The above language strongly indicates Barnett was aware of the cause of her previous problems yet she intentionally returned to the same type of work which Drs. Einbecker and Templin expressly stated she should never perform.

We believe the record reflects Barnett was aware of her permanent work restrictions. She testified Dr. Einbecker informed her that her problems were due to the repetitive work she performed at Powell. Barnett also testified she has copies of Dr. Einbecker's medical records. Those medical records place Barnett on notice of the restrictions Dr. Einbecker imposed when he last saw her on May 12, 1994. Further, ALJ Cowden's opinion and award placed Barnett on notice of her physician's imposed permanent work restrictions. Thus, the ALJ could reasonably conclude substantial evidence supports a finding Barnett failed to follow competent medical advice and her failure to follow that medical advice was unreasonable and resulted in the upper extremity injury of carpal tunnel syndrome on May 17, 2010.

We feel compelled to address the equivocal language used by the ALJ on page 10 of his opinion and

order wherein he found “the activity aggravated [Barnett’s] condition to the extent that it required much more medical treatment.” The ALJ did not specifically state he found Barnett’s unreasonable violation of the medical restrictions caused the carpal tunnel syndrome. However, we believe by virtue of the fact the ALJ found the injury non-compensable, he implicitly found Barnett’s carpal tunnel syndrome was caused by her unreasonable failure to comply with competent medical advice. Further, we note Barnett does not assert the ALJ failed to determine whether Barnett’s unreasonable failure to comply with competent medical advice *caused* her carpal tunnel syndrome.

Likewise, we find no merit in Barnett’s assertion the ALJ erred in relying upon the medical opinions of Dr. Best in determining Barnett’s neck injury, although work-related, was merely a soft tissue strain which resolved and resulted in no impairment. Further, the ALJ did not err in relying on Dr. Best’s opinion that no further medical treatment is warranted for the neck injury. As previously pointed out, the ALJ has the right to choose which physician’s opinions he finds most credible. In this case, the ALJ was not required to accept the opinions of Dr. Heilig regarding Barnett’s alleged neck injury. The fact the ALJ did not rely upon Dr. Best’s opinion that Barnett’s

trigger thumb resulted in a 1% impairment has no bearing on his decision to accept Dr. Best's opinions regarding Barnett's neck injury. Therefore, the opinion of Dr. Best that Barnett merely sustained a neck strain which has resolved resulting in no impairment and no need for additional medical treatment constitutes substantial evidence supporting the ALJ's decision to dismiss Barnett's claim for income and future medical benefits for her neck injury.

Since substantial evidence supports the ALJ's finding KRS 342.035(3) is applicable and bars Barnett's claim for an upper extremity injury in the form of carpal tunnel syndrome, the ALJ's decision dismissing Barnett's claim for an upper extremity injury must be affirmed. Further, the evidence does not compel a finding Barnett sustained a neck injury justifying an award of income benefits and medical benefits since substantial evidence supports the ALJ's determination Barnett merely sustained a neck strain which resolved and does not merit an award of income benefits and future medical benefits. Therefore that portion of the ALJ's decision regarding Barnett's claim for a neck injury must also be affirmed.

Accordingly, the November 21, 2011, opinion and order and the December 19, 2011, order ruling on the petitions for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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