Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 26, 2016

CLAIM NO. 201386565

MIDDLETOWN HEATING AND AIR PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

MICHAEL K. KLIMKO
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Middletown Heating and Air ("Middletown") appeals from the March 21, 2016, Opinion and Order and the May 4, 2016, Order on Reconsideration of Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability ("PPD") benefits enhanced by the two multiplier and medical benefits.

On appeal, Middletown asserts the first award of income benefits enhanced by the two multiplier is erroneous. Middletown also asserts the ALJ erred by failing to find Klimko's conduct precluded a subsequent application of the two multiplier pursuant to Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

In the Form 101, Michael Klimko ("Klimko") alleged on April 16, 2013, he sustained an injury to his low back with right leg pain in the following manner: "I was working and coming down [sic] ladder and injured my low back with right leg pain." At the time of his injury, Klimko was working as an HVAC technician for Middletown.

The January 13, 2016, Benefit Review Conference Order listed the following contested issues: benefits per KRS 342.730 [handwritten: "multipliers"] and temporary total disability ("TTD") benefits. Under stipulations, Klimko's average weekly wage ("AWW") is listed as $1,019.79.

Klimko's November 19, 2015, deposition was introduced. He testified that after his injury, he returned to his same job at Middletown, albeit light-duty, earning the same wages and working the same hours. He explained why he left Middletown in June 2014 and began working for Airstream Technologies ("Airstream"):

> Q: And why did you switch jobs?
>
> A: I didn't feel like I was being treated the same.
>
> Q: Was there- how is that?
>
> A: Just the things that I was asked to do that I'd never been asked to do before with customers and change of policy and things I didn't understand.
>
> Q: Okay. For, like, example, what kind of policy changes?
>
> A: Well, like the job that I left them on was- I diagnosed a leaking evaporator coil, and the- for the whole time that I've worked there we never required any type of down payment, and I was asked to get a down payment for the work, and I asked why, and was told that it was none of my business, and I just wanted to know why there was a policy change.
>
> I'd already explained to the customer that I could order the coil. It was going to cost her X amount of dollars, we would collect on completion, and that isn't what Heather decided.
>
> Q: Okay. So you decided to quit and go someplace else?
>
> A: Didn't want to put up with all the drama.

Klimko testified at the January 25, 2016, hearing and addressed the circumstances resulting in him leaving Middletown in June 2014:

A: Well, I was frustrated, number one, when I was dispatched, and when I got to the call I had found that it was low on refrigerant. I asked the customer if I could perform a leak check, which cost $140, which I did, and I did find the equipment leaking. At that point, you call your manager and you get a recommendation, and I was told at that point- now, I've worked there for three years or something, I was told at that point I had to get half of what it costs to put the coil in.

Q: That's what you said in your deposition?

A: Which that had never, ever been- we were selling $20,000 systems on a handshake and a signature, and all of a sudden she changed policy, and I think she did it to make me look bad, or to upset me in front of this customer.

Q: Did you get upset?

A: Yes, I did.

Q: Did you then resign?

A: Yes, I did- on the job, which was probably not the best thing to do, but I had had enough.

Q: She said that you took your truck to your house, turned it off, and said you guys can come and get it.

A: Yes, I did. I had to get my personal tools off the truck.

Q: She also said that you found another piece of equipment later on and gave it to her, and she was happy about?

A: Oh, yeah, I didn't want to be arrested for stealing something from

> Middletown- which I've seen them do stuff to employees before. I'm a man of my word. When I tell you I'm going to do something, I do it.
>
> Q: There was a letter that came in- again, you've not seen these documents?
>
> A: First time this morning.
>
> Q: Do you feel that this lady could have thought that you were rude to her?
>
> A: Yes.

The January 21, 2016, deposition of Heather Wheeler ("Wheeler"), general manager of Middletown, was introduced. Wheeler testified that Klimko was making $25.00 an hour in 2013, and in 2014 his hourly rate increased to $26.00. She testified concerning what occurred on June 19, 2014:

> Q: Just briefly describe for the Judge what your experience was on June 19th, 2014.
>
> A: I received a call from Mr. Klimko regarding a coil. I told him I would call him back. I also received a call from the homeowner. She was having a problem.
>
> Q: I don't want to hear what the homeowner said, but what was your understanding of the situation from the conversation that you had with Mr. Klimko?
>
> A: He had reported that the coil was leaking and that it needed to be replaced.

Q: Is that something that would typically be done in one of these service calls?

A: Well, he actually wouldn't replace it, because the coil, that's the entire thing above the actual furnace. It's somewhat large, and that's not something you would have on your service truck.

So that would have to be something that was ordered specific to the size and type that was there, width, height, and tonnage. And normally, an installer would come back and perform that job if it needed to be done.

Q: How did that conversation go with Mr. Klimko? What was the conversation that you had with regarding this coil repair or replacement?

A: I never even gave him a price as is shown on that ticket. He said he found it leaking. He ended up leaving that job.

Q: As far as leaving the job, did he finish the job?

A: No.

Q: The ticket that you're talking about, is this a ticket that you have copied out of Mr. Klimko's personnel file that you have in your-

A: Yes, and the customer's.

Q: I guess I do want you to walk me through this ticket, if you could. Is this the ticket that you're referring to dated-

A: That's his ticket, uh-huh.

Q: What is your understanding or your interpretation of his ticket?

A: Okay. He has on here that there is a diagnostic.

...

A: From this, he goes to do a diagnostic. That's N.C. He would abbreviate. That stands for no cool at the top, reason for the call on the left-hand side.

Down at the bottom, it's a $69.00 diagnostic, because that's what we charge in order to find the problem. His diagnosis is that he found the wet switch in the pan open, and he reset it.

And he says he found water in the blower housing. Then he finds the R22 charge. That 63 over 200 is a little bit low, and he puts see leak check, find indoor coil leaking and check outdoor.

That's what that stands for, that O.D., that check O.D., no leaks, and he puts that it needs to be cleaned. And then on the task, you can see where he performed the electronic leak check and the rates.

Then under option one, he has unit low on charge and then the 14 and a half inch wide coil. And when I called him back and I gave him the three ton coil price, this option three with the amount, and he left soon after this.

And then someone went behind him and found none of this to be correct.

...

Q: As far as the conversation that you had with Mr. Klimko about this service call?

A: Uh-huh.

Q: Is that a yes? I'm sorry. Be careful on your uh-huhs and uh-uhs. Was any of this suggested maintenance that Mr. Klimko described to you done on this residence at that point?

A: No, not to this date.

Q: Why did he leave this call? What was the reason given to you why he left the call on this date?

A: Given to me? He was asked to leave based on the customer wanting him to leave.

Q: That was something that you instructed him to do?

A: Yes.

Q: What did he convey to you on this June 19th date about his employment status with Middletown Heating & Air?

A: I asked him to leave, because he was being very loud and the customer called in and wanted him to, because he was being rude, and of course, she wrote that small letter.

In addition, I asked him to come back and talk to me and calm down. He told me, no, and if I wanted my truck, I could come get it.

Q: Did he voluntarily terminate his employment-

A: Yes.

Q: - on this date? Did you terminate him or fire him on this date?

A: No, I asked him to come in and talk to me.

Q: Did you have to physically go and pick up the company truck at that point?

A: Yes, at his residence later in the day after we took care of Mrs. Mulgrew.

...

Q: Was there any discipline as a result of this June 19th incident?

A: He went home and quit. He actually left this residence. And because it was left with all of the stuff off the coil and nothing functioning at the time, Mr. DeZern, the service manager, went directly there.

After he got done there, we both went to Mr. Klimko's residence and picked up the vehicle after we were done taking care of the customer first.

...

Q: So as far as this 6/19/2014 date, it is your understanding as the general manager of Middletown Heating & Air that Mr. Klimko voluntarily quit that day, correct?

A: That is correct.

Q: He was not terminated because of any physical problems performing his work?

A: No.

Wheeler was asked about any policy changes within Middletown that might have occurred between the time Klimko was injured and June 2014:

> Q: As far as the time period between Mr. Klimko's April 2013 work injury and when he stopped working for Middletown in June 2014, did you have any specific policy changes about calls, about receiving money, anything like that in Middletown's policies?
>
> A: On any part that's nonreturnable, you are supposed to get at least 50 percent down upfront. That's any nonreturnable part. Normally, that can be anything from a warranty part or something that's not a carrier part.
>
> And of course, you can't put any part on and take it off and ever take it back. You're not allowed to do that.
>
> Q: Was that a policy change that was new in June 2014?
>
> A: No, that's been our policy since probably 2000.

Wheeler testified that after Klimko resigned, he came in with his new employer to return Middletown’s drill. She testified as follows: "I saw him get out of the truck. He jogged around the truck, gave me the drill back and said, sorry, I must have had this with my other tools. And I told him, thank you."

Attached to Wheeler's deposition is the June 19, 2014, letter from [illegible first name] Mulgrew which states as follows:

> One of your service guys Mike came to check my air conditioner this morning and he was very rude and unpleasant to talk to [sic] he left me with no explanation [sic] I wish to never have him in my home again.

Also attached is a "Reprimand" dated June 19, 2014, pertaining to Klimko's activities on that date. Under "reason for discipline," the following is checked: "unsatisfactory work performance," "violation of company rules," and "personal conduct." Under "Describe Violation in Detail" is the following:

> Service call on 6-19-14 [sic] rude to customer from time he arrived on call. Customer call [sic] after Mike left {sic] wanted to know what was happening with Tech [sic] explained he had been let go; she told me how he was rude both times he came there this year.

Under "Action to be Taken" is the following: "Employee quit & walked off job before finished work - told customer needed to replace her indoor coil when refrigerant was not the problem per Bill [illegible], service manager."

Wage records introduced by Middletown indicate Klimko was paid hourly. His AWW from September 20, 2013,

through December 13, 2103, is $957.88, from December 20, 2013, through March 14, 2014, is $932.94; from March 21, 2014, through June 13, 2014, $1,042.21; and from June 20, 2014, through September 12, 2014, $1,061.19.[1]

Regarding the two multiplier, the ALJ determined as follows:

> KRS 342.730 (1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or another. Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).
>
> In January, 2015 Plaintiff received a $1 raise per hour, making his hourly rate of pay $26/hour. Plaintiff earned $13,548.73 in the 13 week period from March 21, 2014 through June 13, 2014, which produces a post-[sic] AWW of $1,042.21, $22.42 more than Plaintiff's pre-injury AWW. Based upon Plaintiff's post-injury wage records with the Defendant, he earned wages less than his pre-injury AWW from September 10, 2013 through March 20, 2014. Based upon KRS 342.730 (1)(c)2 and Livingood Plaintiff is entitled to the 2 multiplier during this period. Plaintiff earned a same or greater wage from March 21, 2014 through June 19, 2014, and is not entitled to any

[1] September 20, 2013, is an incorrect date as the ALJ found Klimko returned to work September 10, 2013.

> additional multiplier during this period.
>
> The ALJ does not view Plaintiff's resignation as an intentional, deliberate action with reckless disregard of the consequences to himself or another. In this case, substantial evidence does not establish Plaintiff's conduct was of that nature. Plaintiff resigned his position with the Defendant on June 19, 2014. Plaintiff resigned out of frustration on June 19, 2014. He voluntarily quit and returned the Defendant's equipment [sic] Because Plaintiff stopped earning a same or greater wage, he is entitled to the 2 multiplier during this period.

Both parties filed petitions for reconsideration. Middletown first argued Klimko was not entitled to the two multiplier during the period from September 10, 2013, through March 20, 2014. It argued as follows:

> The Administrative Law Judge found that during the period March 21, 2014 through June 13, 2014 claimant earned an average weekly wage greater than his pre-injury average weekly wage. Based on this finding, this Administrative Law Judge found claimant was entitled to the 2.0 multiplier for the prior quarter.
>
> ...
>
> The Statute does not allow for the retroactive enhancement of permanent partial disability benefits through the 2.0 multiplier when there is a quarter of greater wages followed by a quarter of lesser wages. This would obviously lead to absurd results.

Middletown also pointed to a typographical error in the Order regarding the date of injury. Next, Middletown requested the ALJ reconsider her application of the two multiplier after June 19, 2014.

In the May 4, 2016, Order on Reconsideration, the ALJ stated as follows:

> This matter comes before the Administrative Law Judge upon Defendant's Petition for Reconsideration and Plaintiff's response to said petition.
>
> The Defendant argues Plaintiff is not entitled to 2 multiplier during the period from September 10, 2013 through March 20, 2014. The Defendant argues KRS 342.730 (1)(c) does not allow for retroactive enhancement of permanent partial disability benefits through the 2 multiplier when there is a quarter of greater wages followed by a quarter of less wages. This ALJ addressed Plaintiff's permanent partial disability in her March 21, 2016 Opinion, Award and Order as follows:
>
>> In January, 2015 Plaintiff received a $1 raise per hour, making his hourly rate of pay $26/hour. Plaintiff earned $13,548.73 in the 13 week period from March 21, 2014 through June 13, 2014, which produces a post-AWW of $1,042.21, $22.42 more than Plaintiff's pre-injury AWW. Based upon Plaintiff's post-injury wage records with the Defendant, he earned wages less than his pre-injury AWW from September 10, 2013

> through March 20, 2014. Based upon KRS 342.730 (1)(c)2 and Livingood Plaintiff is entitled to the 2 multiplier during this period. Plaintiff earned a same or greater wage from March 21, 2014 through June 19, 2014, and is not entitled to any additional multiplier during this period.

Consistent with the purpose of the benefit and with KRS 342.710(1)'s goal of encouraging a return to work, KRS 342.730 (1)(c) focuses on post-injury wages. Although KRS 342.710(1) expresses a preference for a return to the same employment, KRS 342.730(1)(c)2 requires only that the injured worker "returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury." Thus, it applies without regard to whether the worker returns to the employment in which the injury occurred or to other employment. Toy v. Coca Cola Enterprises, 274 S.W.3d 433 (Ky. 2008).

KRS 342.730 (1)(c)2 permits a double income benefit during any period that employment at the same or a greater wages ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences of either to himself or another. Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

Case law does not support the Defendant's argument that there is no basis for retroactive enhancement of permanent partial disability benefits through the 2 multiplier. Rather, the ALJ was compelled to review Plaintiff's

post-work-injury average weekly wages and award the 2 multiplier during any period that employment at the same or greater wages ceases based upon applicable case law. As such, Defendant's Petition is DENIED, in part.

The Defendant correctly notes a typographical error on page 9 of the Opinion, Award and Order, wherein an incorrect date of injury is noted. Defendant's Petition on this issue is GRANTED. Numerical paragraph 1 under the Order section of the ALJ's March 21, 2016 Opinion is amended as follows:

> 1. Plaintiff, Michael K. Klimko, is awarded permanent partial disability benefits for the April 16, 2013 back injury based upon 11% permanent impairment. Plaintiff is awarded permanent partial disability benefits at the rate of $124.20/week from September 20 [sic], 2013 [sic] through March 20, 2014. Plaintiff is awarded permanent partial disability benefits from March 21, 2014 through June 19, 2014 at the rate of $62.10/week. Plaintiff is awarded permanent partial disability benefits at the rate of $124.20/week beginning on June 20, 2014. Plaintiff is only entitled to receive permanent partial disability benefits for 425 weeks which is suspended during any period of TTD benefits.

KRS 342.281 sets out the procedure for which an agreed party can petition an

> ALJ to correct his or her findings with regard to patent errors. Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104, 106 (Ky. App. 1985). Consequently, an ALJ has the authority to both correct errors in the original decision that are plainly apparent, and to address omissions of fact or evidence overlooked at the time the decision was rendedered [sic]., Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Francis v. Glenmore Distilleries, 718 S.W.2d 953 (Ky. App. 1986). The ALJ has authority to correct patent errors on petitions for reconsideration, including clerical, factual, or legal errors. Commonwealth Dept. of Mental Health v. Robertson, 447 S.W.2d 857, 859 (Ky. 1986). In short, simply rearguing the merits of this case is not the proper subject for a petition for reconsideration. The Defendant's last argument requests this ALJ to reconsider her application of the 2 multiplier. This equates to rearguing the merits for which a Petition for Reconsideration is not proper.

On appeal, Middletown asserts the same arguments contained in its petition for reconsideration.

We agree with Middletown's first argument the ALJ erred in enhancing the PPD benefits by the two multiplier during the period from September 10, 2013, through March 20, 2014, and reverse that portion of the award enhancing his benefits by the two multiplier during this time period.

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

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

As the ALJ determined Klimko retains the capacity to perform his pre-injury work, she was not required to engage in an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

Pursuant to 342.730(1)(c)2, in order to qualify for the two multiplier, an employee must return to work at equal or greater wages than the AWW at the time of the injury and then that work must cease in accordance with the standards set forth in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015). The record indicates the parties stipulated to a pre-injury AWW of $1,019.79. As noted by the ALJ in the March 21, 2016, Opinion and Order, "[b]ased upon Plaintiff's post-injury wage records with the Defendant, he earned wages less than his pre-injury AWW

from September 10, 2013 through March 20, 2014."[2] Our review of the wage records submitted by Middletown on January 26, 2016, is consistent with the ALJ's summation. The wage records further indicate that from March 21, 2014, through September 12, 2014, Klimko's AWW was greater than his pre-injury AWW. The ALJ determined Klimko's post-injury AWW was $1,042.21, an AWW greater than his pre-injury AWW. However, only when Klimko quit his job with Middletown on June 19, 2014, and accepted a job with AirStream at an AWW allegedly less than $1,042.21 does the two multiplier become potentially applicable, as the two multiplier cannot be applicable before a claimant returns to work and earns a wage equal or greater than his pre-injury AWW. Here, Klimko only earned a weekly wage equal to or greater than his AWW at the time of injury during the period from March 21, 2014, through June 19, 2014. Thus, pursuant to the statute, Klimko was only eligible for enhanced benefits following the period his post-injury AWW equaled or exceeded his AWW at the time of injury. Stated another way, returning to work at an equal to or greater post-injury AWW is a condition precedent to be entitled to the two multiplier.

[2] We note that the week ending on September 20, 2013, through the week ending on March 14, 2014, encompasses two 13-week periods as per the AWW-1 Wage Certification filed by Middletown on January 26, 2016.

Under these facts, it was impossible for Klimko to be entitled to enhancement of his benefits by the two multiplier prior to the time he returned to work earning a weekly wage equal to or greater than his AWW. Consequently, the ALJ's award of the two multiplier from September 10, 2013, through March 20, 2014, is reversed.[3]

We find no merit in Middletown's second argument that the ALJ erred by failing to find Klimko's conduct precluded application of the two multiplier pursuant to Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

In the case of Livingood, supra, the Supreme Court of Kentucky held as follows regarding application of the two multiplier:

> Livingood also contends that he should have been awarded the two multiplier pursuant to KRS 342.730(1)(c)2 which provides:
>
> > 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

[3] We note the award commences PPD benefits on September 20, 2013, through March 20, 2014. We assume that is a typographical error, and the ALJ meant September 10, 2013.

> cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

The Board observed that it would appear "this statute provides for a doubled benefit anytime a cessation of employment at the same or greater wage occurs," but that as construed in *Chrysalis House,* KRS 342.730(1)(c)2 only permits a double income benefit when the reason relates to the disabling injury.

In *Chrysalis House,* the claimant worked at a residential substance abuse treatment center. He was discharged for stealing a money order belonging to one of the residents. The ALJ determined that the claimant stole the money order, endorsed and cashed it, but that it was irrelevant for purposes of KRS 342.730(1)(c)2. On appeal, the employer argued that the legislature did not intend for the words "with or without cause" to supersede Kentucky's longstanding policy preventing individuals from profiting from their illegal acts; further, that to construe the statute in a way that encourages illegal conduct would be contrary to public policy. The Board and the Court of Appeals affirmed the ALJ's decision based on the unambiguous language of KRS 342.730(1)(c)2. This Court reversed:

> We presume when interpreting a statute that the legislature intended for it to mean exactly what it says. Although ambiguous language must be interpreted based on legislative purpose and intent, unambiguous language requires no interpretation. Yet, nothing requires a statute's subsection to be read in a vacuum rather than in the context of the entire statute.
>
> KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage "for any reason, with or without cause." It is, however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for "disability" that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," provided that the reason relates to the disabling injury.
>
> *Id.* at 674 (footnotes omitted).

Here, the ALJ was not persuaded that the reason for Livingood's termination related to his disabling injury. We cannot say that the evidence compels a

contrary finding in that regard. Nevertheless, the circumstances in the present case are very different from those in *Chrysalis House* and lead us to reconsider our construction of KRS 342.730(1)(c)2.

. . .

"It has long been established that the purpose of awarding income benefits to injured workers is to provide an ongoing stream of income to enable them to meet their essential needs and those of their dependents." *Ball v. Big Elk Creek Coal Co.,* 25 S.W.3d 115, 117 (Ky. 2000).

KRS 342.730(1) provides income benefits to replace some of the wages that workers lose due to the occupational effects of work-related injuries.

Consistent with the purpose of the benefit and with KRS 342.710(1)'s goal of encouraging a return to work, KRS 342.730(1)(c)2 focuses on post-injury wages ...

The purpose of KRS 342.730(1)(c) 2 is to keep partially disabled workers in the habit of working and earning as much as they are able. It creates an incentive for them to return to work at which they will earn the same or a greater average weekly wage by permitting them to receive a basic benefit in addition to their wage but assuring them of a double benefit if the attempt proves to be unsuccessful.

Toy v. Coca Cola Enterprises, 274 S.W.3d 433, 434–35 (Ky.2008). The statute also "discourages an employer from continuing to employ an injured worker at the same or a greater wage for the sole purpose of securing a

finding of partial rather than total disability or a finding under KRS 342.730(1)(c) 2 rather than [a triple benefit under] KRS 342.730(1)(c) 1." *Chrysalis House* at 675.

In *Kentucky Mountain Coal Co. v. Witt,* 358 S.W.2d 517 (Ky.1962), the Court construed the former KRS 342.120(5) [footnote omitted], which provided for awards to be paid from the Subsequent Claim Fund ("SCF") where a claimant was employed by the same employer after an injury at the same or greater wage. At issue was whether the SCF remained liable for payment of the award after the claimant's employment was terminated. There, the award commenced on September 12, 1960. The claimant was reemployed at wages equal to or exceeding his former wages. The SCF proceeded to pay the award until June 1961, when it discovered that the reemployment had ended on March 2, 1961. The then Board relieved the SCF from payment and imposed liability upon the employer for future payments during such time as the claimant was not employed at the same or greater wage. The employer appealed. The Court affirmed.

> The obvious purpose of the statute is to encourage reemployment of injured workmen at adequate wages by relieving the employer of the requirement of paying disability compensation in addition to full wages ... But the inducement or encouragement the legislature has extended is clearly for *continued* reemployment. It is not conceivable that the legislature intended to relieve an employer

> completely of liability for compensation payments if he should reemploy the workman for only one day.
>
> In construing a statute the courts will consider the purpose which the statute is intended to accomplish.

Id. at 518.

We conclude that the construction of KRS 342.730(1)(c)2 in *Chrysalis House* does not effectuate the legislative intent. Requiring that the cessation of employment at the same or greater wage must relate to the disabling injury does not promote the statute's obvious purpose of encouraging continued employment. Instead, it limits the statute's application. Moreover, such a construction does little to discourage employers from taking workers back after an injury just long enough to avoid liability for a greater award.

Re-examining the statute in context reinforces our conclusion. The preceding subsection, KRS 342.730(1)(c)1 governs application of the three multiplier and provides: "If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three...." By contrast, KRS 342.730(1)(c)2, governing application of the two multiplier, does not include the language, "if due to an injury." "[W]here the legislation includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that the legislature acted intentionally and purposefully in

the disparate inclusion or exclusion." *Turner v. Nelson,* 342 S.W.3d 866, 873 (Ky.2011) (*citing Palmer v. Commonwealth,* 3 S.W.3d 763 (Ky. App. 1999)).

Given our analysis, we conclude that *Chrysalis House* was incorrect in holding that the reason for cessation of work at the same or greater wage under KRS 342.730(1)(c)2 must relate to the disabling injury. To that extent, *Chrysalis House* is overruled. Nevertheless, a literal construction of KRS 342.730(1)(c)2 would lead to an unreasonable result if an employee like the one in *Chrysalis House* is allowed to benefit from his own wrongdoing.

. . .

KRS Chapter 342 evinces a legislative intent that an employee should not benefit from his own wrongdoing. KRS 342.165(2) [footnote omitted] bars compensation where an employee knowingly and willfully makes a false representation regarding his or her physical condition or medical history in writing at the time of entering employment. KRS 342.610(3) provides that "[l]iability for compensation shall not apply where injury, occupational disease, or death to the employee was proximately caused primarily by voluntary intoxication as defined in KRS 501.010, or by his or her willful intention to injure or kill himself, herself, or another." In *Advance Aluminum Co. v. Leslie,* 869 S.W.2d 39, 40 (Ky.1994), the Court explained that "KRS 342.610(3) encompasses situations including horseplay, intoxication, or other employee conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences

either to himself or to another." [footnote omitted]

An employee's conduct after an injury may also result in the termination or reduction of income benefits. KRS 342.035(3) provides that "[n]o compensation shall be payable for the ... disability of an employee ... 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." Where an employee refuses to submit to or obstructs an independent medical exam, KRS 342.205(3) provides that "his or her right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues." KRS 342.710(5) provides that "[r]efusal to accept [vocational] rehabilitation pursuant to an order of an administrative law judge shall result in a fifty percent (50%) loss of compensation for each week of the period of refusal."

Consistent with the foregoing, we conclude that the legislature did not intend to reward an employee's wrongdoing with a double benefit. We hold that KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another. In the instant case, the substantial evidence of record does not establish that

> Livingood's conduct was of that nature. Rather, the ALJ concluded that "but for the prior transgressions the pole bumping incident would not have resulted in [Livingood's] termination."

Livingood at 255-259.

The ALJ determined Klimko's behavior on June 19, 2014, the day he resigned from Middletown, did not rise to the standard articulated in Livingood, supra - i.e. "employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." Id. at 259.

Klimko, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including entitlement to any multipliers. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Klimko was successful in that burden, the question on appeal is whether there was 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or

reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

There is substantial evidence in the record in support of the ALJ's determination that Klimko's behavior on June 19, 2014, does not comprise an "intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." Livingood at 259. It is important to note the standard articulated in Livingood stems from the Supreme Court of Kentucky's analysis of KRS 342.730(1)(c)2 in the context of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) in which the claimant, who worked at a substance abuse treatment center, was terminated for stealing money belonging to one of the residents.

In the case *sub judice*, Klimko resigned; he was not terminated. In fact, testimony by Wheeler indicates she asked him to come in, calm down, and talk to her. Further, even though the record indicates Klimko drove his work truck home and told his supervisor she would have to come and retrieve it, Wheeler successfully retrieved the truck. Wheeler's testimony also indicates Klimko returned a drill to her after he resigned. While the record supports the notion that Klimko's behavior on June 19, 2014, was

reprehensible, it is not within this Board's authority to usurp the ALJ's discretion to find Klimko's action do not rise to the standard articulated in Livingood, thus prohibiting application of the two multiplier.

That said, using the final week of wages Klimko earned at Middletown from June 14, 2014, through June 19, 2014, filed in the record by Middletown ($1,061.19) and the ample wage records from Airstream filed in the record by Klimko, the ALJ must calculate his post-injury AWW at Airstream utilizing the same methodology as was utilized to calculate Klimko's pre-injury AWW. KRS 342.140(1)(d); *See* Toyota Motor Manufacturing v. Jason Tudor, 2014-CA-001752-WC, rendered June 16, 2016, To Be Published. Should the ALJ determine Klimko's AWW during this period is indeed less than his post-injury AWW of $1,042.21 at Middletown, Klimko's PPD benefits may be enhanced by the two multiplier commencing on June 20, 2014.

Finally, the award of PPD benefits must begin on April 16, 2013, the date of the injury, to be interrupted by any periods TTD benefits are paid. *See* Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009). In the March 21, 2016, Opinion and Order, the ALJ seemingly began the award of PPD benefits the day after voluntarily-paid TTD

benefits ended on September 9, 2013.[4] This is error. The ALJ must begin the award of PPD benefits on the date of injury, to be suspended during any period or periods TTD benefits are paid. Additionally, on remand, the ALJ must enter an award of TTD benefits. This Board is permitted to *sua sponte* reach issues even if unpreserved and not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Accordingly, that portion of the award enhancing Klimko's PPD benefits from September 10, 2013, through March 20, 2014, is **REVERSED**. The award of PPD benefits enhanced by the two multiplier beginning on June 20, 2014, is **VACATED**. This claim is **REMANDED** to the ALJ to determine Klimko's AWW at AirStream utilizing the wage records of Middletown and AirStream filed in the record. Should the ALJ determine Klimko's AWW at AirStream is less than his post-injury AWW of $1,042.21, while still at Middletown, she shall enhance the PPD benefits by the two multiplier beginning on June 20, 2014. Finally, on remand, the ALJ must amend the award of PPD benefits and award TTD benefits in accordance with the views expressed herein.

[4] Again, the Order states PPD benefits were to commence on September 20, 2013, which we assume is a typographical error.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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