# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: OCTOBER 4, 2013**

CLAIM NO. 201194498

MONICA MILLER PETITIONER

VS. **APPEAL FROM HON. ALLISON E. JONES, ADMINISTRATIVE LAW JUDGE**

PASCHALL TRUCK LINES, INC.
and HON ALLISON E JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION AFFIRMING**
**AND ORDER DENYING MOTION**

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

**RECHTER, Member.** Monica Miller ("Miller") appeals from an Opinion, Order and Award rendered May 6, 2013 by Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ"), awarding permanent partial disability benefits and medical expenses. She challenges the ALJ's determination that she

was not entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1. We disagree and affirm.

Miller was employed by Respondent, Paschall Truck Lines, Inc. ("Paschall"), as a commercial driver. While attempting to operate a crank on her truck, Miller sustained a low back injury. She was initially treated with epidural injections by Dr. Gregory Nazar, who later performed a micro-lumbar discectomy. Despite physical therapy and pain medications, Miller testified her low back remained symptomatic. After Nazar placed Miller at maximum medical improvement, he referred her to Dr. Raghunath Gudibanda for pain management.

Miller later underwent a functional capacity evaluation ("FCE") performed by Mr. Craig Smith. Though concluding Miller suffered from some pain and documented lumbar changes, he noted she demonstrated self-limiting behavior and symptom magnification. Mr. Smith recommended Miller be limited to light physical demand work with the following restrictions: no lifting greater than twenty pounds; no lifting greater than ten pounds (frequently); no lifting greater than five pounds (continuous); no sustained or prolonged bending or twisting; no overhead work; no operating heavy equipment or vibratory tools; and ability

to change positions as needed from standing, walking and sitting.

Ultimately, Dr. Nazar assessed Miller with a 12% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Upon review of the FCE, Dr. Nazar agreed with the physical restrictions recommended by Mr. Smith.

At Paschall's request, Dr. Timothy Kriss performed an independent medical evaluation of Miller, and assessed an 11% impairment rating pursuant to the Guides. Like Mr. Smith, Dr. Kriss found some evidence of symptom magnification and opined the work injury was not responsible for Miller's limited physical capacity. Rather, he attributes it to Miller's "own lack of motivation." Accordingly, he recommended less onerous restrictions of "no lifting/pushing/pulling more than thirty pounds, and the avoidance of unusually frequent bending/twisting." Referencing the requirements of her job description, Dr. Kriss opined Miller would be physically able to perform her pre-injury job.

At the final hearing, Leah Wells, Paschall's safety and risk management director, testified. Ms. Wells explained Paschall would be willing and able to accommodate

the physical restrictions placed on Miller by Dr. Nazar and Mr. Smith. She further acknowledged, albeit briefly and without further elaboration, Miller would have to pass the Department of Transportation ("DOT") physical examination in order to return to work for Paschall. She also theorized the medical examiner would not likely clear a driver who requires frequent use of narcotic pain medications, though she did not state the basis of this knowledge.

In her opinion, the ALJ found Miller sustained a 12% impairment as a result of the March 1, 2011 low back injury. She further found Miller retains the physical capacity to return to her pre-injury job. Miller did not petition the ALJ for reconsideration, but filed a notice of appeal to this Board. In her brief, Miller argues the ALJ erred in determining she was not entitled to benefit enhancement pursuant to KRS 342.730(1)(c)1, despite the fact there was insufficient evidence she could return to her pre-injury employment. More specifically, Miller contends there was no proof she could pass the DOT physical examination, a requirement for Paschall's commercial drivers.

As the claimant, Miller bore the burden of proving each of the essential elements of her cause of

action, including entitlement to enhanced benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Accordingly, it was Miller's burden to establish she "does not retain the physical capacity to return to the type of work that [she] performed at the time of injury." KRS 342.730(1)(c)1. If, as part of her theory of the case, Miller contends she is unable to pass the DOT physical examination, then it was incumbent upon her to present evidence to this effect. She did not and therefore cannot now argue the ALJ erred.

To the extent Miller is otherwise challenging the sufficiency of the evidence, we are not persuaded. When a claimant fails to sustain her burden in establishing entitlement to benefits, this Board will only reverse upon a showing 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).

In determining Miller retains the physical capacity to return to her pre-injury employment within the meaning of KRS 342.730(1)(c)1, the ALJ relied upon Mr. Smith's FCE, Dr. Kriss' restrictions, Paschall's job description and Ms. Well's testimony. The FCE indicated Miller showed some degree of symptom magnification, which the ALJ found credible. Further, the ALJ determined Dr. Kriss' restrictions were "more in line with Miller's true capabilities than Dr. Nazar's restrictions." Finally, the ALJ took into account the physical capacity necessary to operate a truck, and the fact Miller is not required to unload freight.

As the 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an

adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Upon review of the entire record, we cannot conclude the evidence compelled a different result. Rather, the ALJ's decision regarding enhanced benefits was based upon substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

There remains one outstanding issue in this case. Prior to submission of its brief to this Board, Paschall moved to strike Miller's brief and dismiss the notice of appeal due to her failure to petition the ALJ for reconsideration of the May 6, 2013 Opinion, Order and Award. By Order of this Board dated July 17, 2013, a decision on the motion was passed to the merits of the case.

In the absence of a petition for reconsideration, on questions of fact, this Board is limited to a determination of whether there is any substantial evidence contained in the record to support the ALJ's conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). Because Miller's appeal arguably raised questions of law, the motion is hereby **DENIED**. To the extent Miller has challenged the ALJ's factual findings, we have limited our

consideration to a determination of whether substantial evidence supports the ALJ's conclusions.

Accordingly, the decision rendered May 6, 2013 by Hon. Allison Emerson Jones, Administrative Law Judge, is hereby **AFFIRMED**. Further, **IT IS HEREBY ORDERED** Paschall Truck Line's motion to strike Petitioner's brief and dismiss the appeal is **DENIED**.

ALL CONCUR.

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REBEKKAH B. RECHTER, MEMBER
WORKERS' COMPENSATION BOARD

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