OPINION ENTERED: OCTOBER 19, 2012

CLAIM NO. 200974830

RONDAL LAMBERT — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. JOSEPH JUSTICE, ADMINISTRATIVE LAW JUDGE**

PIKE COUNTY BOARD OF EDUCATION — RESPONDENT/ CROSS-PETITIONER

and

HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING

* * * * * *

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

SMITH, Member. Rondal Neal Lambert ("Lambert") appeals from the March 13, 2012 Opinion, Award and Order rendered by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ"), and the May 16, 2012 order denying his petition for reconsideration. The sole issue Lambert raises on appeal is

whether the ALJ erred in declining to impose a safety penalty pursuant to KRS 342.165. In its cross-appeal, Pike County Board of Education ("Pike County") argues the ALJ erred in denying a credit for sick pay. Pike County also challenges the ALJ's calculation of Lambert's average weekly wage ("AWW") for purposes of awarding temporary total disability ("TTD") benefits. Finally, Pike County argues the ALJ erred in failing to find Dr. Tutt more credible on the issue of the occurrence of a cervical injury and permanent disability.

Lambert filed his Form 101, Application for Resolution of Injury Claim on July 25, 2011 alleging he sustained injury to his head and neck when an air brake canister exploded.

Lambert testified by deposition on October 31, 2011 and at the hearing held January 17, 2012. He has been employed by Pike County as a lead mechanic since 1998. He normally worked at a satellite garage in Phelps. However, if a bus needed more extensive service, he would work out of the Pikeville garage.

Lambert testified he was injured at the main garage in Pikeville on October 1, 2009 when he and three other workers were replacing brake canisters on a bus. While in the course of his duties, he observed that a pin had been

removed from a canister. Lambert testified when he assisted his boss at the Phelps garage, they would always leave the pin in place because it compresses the spring and holds the canister together. He commented to the other workers that the pin should not have been removed. He stated “I seen that move” then Greg Hite hit the canister with a hammer. Lambert stated the next thing he remembered was trying to get up from the floor.

In the days following the accident, Lambert had headaches, neck pain and swelling with pockets of blood under his eyes. On October 9, 2009, he sought treatment with Dr. King who restricted him from work.

Lambert returned to work two months later in December 2009 and continued working until December 2010. He continued to have headaches, neck pain and numbness in his arms and hands. His hands improve when he is not using air guns and torque wrenches. Lambert also stated he now has problems sleeping. He denied any problems prior to the work injury.

At the hearing, Lambert testified he had no training in working with canisters, but had assisted his boss on at least two occasions in the past. He continued performing the same type of work when he returned in December 2009. Because of the headaches, neck pain, dizziness and numbness,

Lambert does not believe he could return to his former job duties.

Lambert testified he does some work around his home. He can use a weed eater for about ten or fifteen minutes but then "I hurt so bad for three days that I couldn't stand it." Lambert acknowledged he saw Dr. Scott in 2007 and was diagnosed with arthritis in his neck. An anti-inflammatory medication was prescribed but he did not receive additional treatment. He missed no work as a result of the arthritis.

Charles Scaggs ("Scaggs"), the day shift maintenance shop supervisor for Pike County, testified at the hearing. Although he was working in the shop at the time of the incident, he did not witness the accident. He stated Lambert, Greg Hite ("Hite"), Richie Foit ("Foit") and Kevin Smith ("Smith"), who were working in the shop on that occasion, were all capable of performing the job with the canister. Scaggs stated he had seen Hite, Foit and Smith put canisters on in the past. He had not personally seen Lambert put a canister on by himself. He noted Hite had done the job approximately 100 times. Scaggs stated that from his examination of the canister after the incident, the safety pin must not have been in place. The canister was still hanging from the bus by a hose. Scaggs stated he put the pin in the canister "in case somebody went back there

messing with it trying to put it together and hurt themselves again."

When asked whether an improper procedure had been used, Scaggs stated "Well it was and it ain't. You've got to loosen it up to turn the canister. You know, I've done it. Every mechanic has done it." He believed the bolts had been loosened too much, causing the canister to come apart.

Smith testified by deposition on December 14, 2011. He did not witness the event, but heard the canister explode. Smith stated he, Foit, Hite and Lambert were all capable of performing the job with the canisters. He indicated he had not seen a canister come apart in the past.

Foit testified by deposition on December 14, 2011. Foit did not see the incident. Foit believed everyone in the shop was capable of performing the job with the canister. Foit had never seen a canister come apart in the past.

Hite testified by deposition on December 14, 2011. Hite stated Lambert was capable of working on the canisters. Hite was installing a canister on the driver's side at the rear of the bus while Lambert was working on the passenger side. Hite did not see Lambert's canister come apart. Hite denied any conversation with Lambert about the pin being out of the canister.

Stephen Cool ("Cool"), the vehicle maintenance supervisor on the second shift, testified by deposition on January 9, 2011. He stated he had worked with canisters since 1973. Cool was not present at the garage at the time of the accident. Cool stated Pike County had never conducted a training session in the fourteen years he worked there. Cool stated he took the canister off the bus and he and two other workers assembled it and placed it on the bus where it has been in use for two years.

Cool stated "the only thing that was wrong with the brake chamber was incompetence. They didn't know how to put it on." Cool also stated "That day, nobody done anything to intentionally hurt nobody. They just didn't understand how it worked and [Lambert] got hit." Cool read the instructions printed on the canister into the record as follows:

> Warning: spring loaded. To manually release, block wheels, relieve the dust plug, insert and lock release bolt and bolt into position. Tighten nut against washer until bolt extends 3.25 inches.

Thaddeus Brent Blackburn ("Blackburn") testified by deposition on January 9, 2011. He arrived after the incident had occurred but opined the pin was not properly in position to hold back the spring. He acknowledged most of

the information concerning how to install the canister was printed on the canister.

John C. Chaney ("Chaney") testified by deposition on January 9, 2011. Chaney was not present when the accident occurred. Chaney stated he is a certified mechanic with over thirty years of experience. He opined the canister was not pinned or it never would have come apart. Chaney was not aware of any training that had taken place at Pike County, and was unaware of what training other mechanics had since he did not work with them.

Pike County submitted affidavits from Nancy Grubb, Finance Director for Pike County, showing Lambert used sick leave benefits to receive his full salary while off work.

On March 12, 2012, Pike County filed a "Motion to Submit Correct Sick Pay Policy Post Brief" seeking to introduce the policy statement in effect at the time of Lambert's injury which provided as follows:

> Employees qualifying for workers' compensation indemnity payments may choose to take sick leave pay during part or all of the period they are unable to work. However, the amount paid to these employees while on sick leave shall be deducted from their workers' compensation indemnity payments. (Employees shall be responsible for determining any personal tax consequences resulting from their choice to use sick leave pay.)

Dr. Henry Tutt performed an independent medical evaluation ("IME") on April 4, 2011. Dr. Tutt noted that, when a radiologist compared a June 23, 2010 MRI with one performed on September 27, 2007, there was no gross interval change from the prior study. He opined Lambert sustained a forehead laceration and a possible mild concussion as a result of the work injury. Dr. Tutt stated:

> He has multilevel cervical osteoarthritis on which background he likely, also, sustained a transient myofascial injury, a transient exacerbation of symptoms relative to that multilevel degenerative disk disease, longstanding, preexisting, and apparently previously actively symptomatic, based on the fact that he underwent MRI imaging of his cervical spine in 2007. His pain is inconstant [sic] and in the presence of a normal neurological examination with no evidence of myelopathy or radiculopathy, the undersigned would urge conservative management of this individual.

Dr. Tutt also opined Lambert remained as capable of performing his work activities as he had prior to the work event in October 2009. Dr. Tutt stated the work event had not altered the structural integrity of Lambert's cervical spine to the extent it would alter his job status. He stated Lambert's symptoms, with the passage of time, could cause him to have progressive difficulty performing his work activities with multilevel cervical osteoarthritic disease.

However, Dr. Tutt opined the phenomenon would have no relationship to the October 1, 2009 event. Dr. Tutt stated Lambert had reached maximum medical improvement.

In his deposition taken November 14, 2011, Dr. Tutt testified consistently with his report. Dr. Tutt acknowledged he had not personally reviewed the September 27, 2007 MRI. However, he indicated the reports stated there was no change between the 2007 MRI and the MRIs taken following the injury. Dr. Tutt stated Lambert had a normal neurological examination with no findings to indicate the presence of cervical radiculopathy or evidence of a cervical myelopathy. When asked whether Lambert had an impairment, Dr. Tutt stated:

> Well, I've read Dr. Potter's report. Dr. Potter is a family practitioner in Lackey, Kentucky. And in this report he assigns Mr. Lambert an impairment rating relative to his cervical spine correlative with a DRE cervical category II. Now, that category is defined by having a condition -– he has a condition; he has multilevel cervical spondylosis -– and, two, being symptomatic from.
>
> You cannot look at the imaging study of Mr. Lambert and say that he's symptomatic at all. A lot of people have multilevel cervical spondylosis, just like he does, with no symptoms whatsoever. If you're not pinching the spinal cord and you're not pinching a cervical nerve root, they're not generally symptomatic except for an

> intermittent maybe crick in the neck after a long car trip or something. But if this gentleman has been symptomatic and has this condition, then he's a DRE category II. If you want to clarify [sic] him as that, you'd have to say that he had a pre-existing impairment of the same value, because here's a gentleman, for reasons we do not know, had an MRI scan done in 2007 that showed the same changes.

Dr. Tutt noted Lambert was working with cervical spondylosis. He was unable to find any evidence that Lambert's neck condition changed due to the event or he had cervical complaints directly after the event.

Lambert filed medical reports of his treating neurosurgeon, Dr. Norman Mayer, who first saw Lambert on August 12, 2010 on referral from Dr. Samuel J. King. Dr. Mayer noted Lambert developed neck pain after the work accident involving the brake canister in 2009. Lambert reported he had some neck discomfort at the base of the neck and occasionally some hand numbness radiating down to the third, fourth and fifth digits of his right hand after a heavy day at work. Dr. Mayer assessed "Cervical degenerative disease, neck pain, transient, radiculopathy, motor strength intact." He noted Lambert was not interested in surgical management. Dr. Mayer did not believe Lambert required surgery at present but suspected Lambert may require surgical intervention in the future.

Dr. Mayer saw Lambert again on January 13, 2011. He noted Lambert had returned to work recently and his neck and arm pain had worsened. Lambert reported severe pain in his neck radiating to his deltoid the region and numbness and tingling in his left hand. Lambert stated he was now off work and his pain had improved. However, he had severe exacerbation of his neck pain when he performed any significant work. Lambert reported he had physical therapy in the past with no significant improvement.

Dr. Mayer's assessment was cervical degenerative disc disease and C5 and C6 radiculopathy on the left. He ordered an MRI of the cervical spine and placed Lambert off work until the MRI was completed. Dr. Mayer discussed the possibility of a two level anterior cervical discectomy and fusion at C4–5 and C5–6. On January 25, 2011, he sought precertification for the procedure which was denied on February 14, 2011.

Lambert filed the July 6, 2011 report of Dr. Ira B. Potter who performed an IME on June 23, 2011. Lambert complained of neck pain, weakness, headaches, intermittent paresthesia about the upper extremity down to the level of the hand, thumb, index and middle finger, and intermittent episodes of dizziness. On examination, Lambert had muscle guarding with cervical active range of motion. Dr. Potter

diagnosed cervical sprain/strain; C4-5 and C6-7 right paracentral disc protrusions; multilevel degenerative disc disease; left cervical radiculitis; cephalgia; post-concussion syndrome and facial scaring. Dr. Potter determined these diagnoses were causally related to the work injury and explained:

> Mr. Lambert's impairment was caused by the event at work on 10–01–09 as described in section B (Plaintiff History) above superimposed upon preexisting, dormant, & nondisabling degenerative changes about his cervical spine.
>
> I find no evidence in Mr. Lambert's medical records of a condition that I would characterize as chronic. Mr. Lambert did not have an active cervical impairment at the time of the event at work on 10–01–09 nor was he disabled. He did present at Dr. King's office in 2007 with some neck pain, but that episode of neck pain was reportedly short lived. In order to assess impairment, the Guides requires a permanent alteration in a person's ability to perform some activities of daily living, which in turn requires ongoing symptomatology that affects functioning. Mr. Lambert had no ongoing neck symptoms impacting functioning prior to 10–01–09 so he had no preexisting active impairment. His injury on 10–01–09, for the first time, produced a permanent impact on functioning and, hence, impairment.

Dr. Potter placed Lambert in DRE cervical category II and assigned an 8% impairment rating pursuant to the

American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"). He indicated Lambert did not have an active impairment prior to the injury. Dr. Potter also assigned a 2% impairment rating for Lambert's persistent dizziness and a 1% rating for Lambert's facial scaring.

In the Opinion, Award and Order dated March 13, 2012, the ALJ made the following findings regarding the extent and duration of Lambert's disability:

> The ALJ has not been persuaded by the report of Dr. Tutt. Dr. Tutt said there was no evidence by MRI that Plaintiff has sustained recent change to the degenerative disc disease Plaintiff had in his cervical spine. He said Plaintiff had a "transient exacerbation of symptoms relative to that multilevel degenerative disc disease, long-standing, pre-existing, and apparently previously actively symptomatic, based on the fact that he underwent MRI imaging of his cervical spine in 2007." He said "previously" active, and the ALJ agrees that Plaintiff apparently has some neck pain at one time, but this was a one-time incident, [he] was not receiving treatment, and the condition was not disabling at the time of Plaintiff's injury. He had no ratable impairment at the time of the injury. The ALJ rejects his statement that the MRI did not show evidence of recent change. There was no evidence that Plaintiff was suffering from radiculopathy prior to the injury, but the treating neurosurgeon found radiculopathy and recommended fusion surgery. The ALJ was persuaded by his

findings and the impairment rating of Dr. Potter for the cervical spine. The ALJ finds that Plaintiff sustained [sic] 8% WPI to his cervical spine as a result of the injury.

The ALJ was not persuaded by Dr. Potter's assignment of impairment for dizziness or post–concussion syndrome. Dr. Mayer did not diagnose this condition, nor did he make and [sic] specific findings that Plaintiff had symptoms that would lead to this conclusion. The ALJ finds that Plaintiff has not proven an impairment ratable post–concussion syndrome.

The ALJ was not persuaded by the 1% impairment rating for the forehead scar. The example that Dr. Potter gave from the AMA Guides was for a displaced bone, and there was no evidence that Plaintiff had anything more than a forehead laceration that was sutured without any permanent impairment.

The ALJ finds that Dr. Potter's restrictions are the only ones in the record. The restrictions would not support a claim of permanent total disability as claimed by Plaintiff. He continued to work for a year after he came back to work in December following his recuperation. From the record it is obvious that he wanted to continue working, but was unable to do the physical requirements of that job. Plaintiff was 52 years of age at the time of injury. He is a skilled mechanic. He qualified for the DRE Category II impairment on the basis of Dr. Mayer finding radiculopathy. Plaintiff can do lighter mechanical work with the restriction of 40 pounds lifting. Plaintiff has not proven that he is permanently totally disabled.

> Plaintiff is entitled to the three multiplier enhancement.
>
> Plaintiff is entitled to 8% WPI PPD benefits with the three multiplier enhancement.

With regard to the safety violation issue, the ALJ observed that the problem with Lambert's theory was that his witnesses were speculating as to what happened without concrete evidence. The ALJ noted Chaney was not present and had no actual knowledge of the event. The ALJ also noted conflicts in the opinions of Blackburn, Cool, Hite, Smith and Scaggs as to precisely what happened. The ALJ then cited extensively to the Board's decision in Barnes v. Bass Hotels & Resorts, Inc., Claim No. 06-97307 rendered August 6, 2009, which states in part:

> As referenced above, application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Secondly, evidence of "intent" to violate a specific safety provision must also be present. Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. See Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2000). Intent is not inferred as a matter of law but is a question of fact which must be addressed by the ALJ.

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may be grounds for assessment of the safety penalty in the absence of a specific regulation or statute addressing the matter. Apex Mining v. Blankenship, supra; Brusman v. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). KRS 338.031(1)(a) requires the employer "to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. Two cases wherein the court discussed the violation of KRS 338.031(1)(a) for the purposes of KRS 342.165(1) are discussed below.

In Apex Mining v. Blankenship, supra, the injured worker was required to operate a grossly defective piece of heavy equipment which had its throttle wired open, the brakes did not work, and it had caused prior accidents. The court found the egregious behavior of the employer justified imposition of the safety penalty in the absence of a specific statute or regulation.

However, in Cabinet for Workforce Development v. Cummins, supra, the court stated not every violation of KRS 338.031(1)(a) required the imposition of a penalty for the purposes of KRS 342.165. The claimant's work site as a teacher of refrigeration, air conditioning, and heating at an adult vocational school was not properly ventilated. The court agreed with the Board that the employer's action was not an obvious and egregious violation of basic safety concepts such as would overcome the general language of KRS 338.031. The court distinguished the facts from Apex Mining, noting the potentially dangerous condition of the

piece of heavy equipment and the fact the employer had taken no steps to correct it.

We believe the facts in Apex Mining illustrate one end of a continuum of employer conduct that ranges from egregious to the other end of the continuum illustrated in Cummins where the employer's conduct is innocuous. The question here is whether the hazard to which Barnes was exposed is one the employer had actual or imputed knowledge so as to justify awarding an increase in compensation.

Here, Barnes did not allege violation of a specific statute or administrative regulation and his argument was premised entirely upon an alleged violation of KRS 338.031(1), the "general duty" clause. Violation based upon KRS 338.031 still requires an element of intent. Here, the ALJ clearly found Barnes had not satisfied the intent element of KRS 342.165. He found the defendant/employer merely asked Barnes to watch the young men. The ALJ stated the defendant/employer did not ask Barnes to run off the boys or chase the boys or to confront them. The ALJ specifically found the employer could not foresee Barnes would go beyond the scope of his instructions and choose to pursue and confront the boys.

The facts in this claim may reasonably be viewed as placing this matter in the category of claims controlled by the holding in Cummins, supra, where, even if there were a violation of KRS 338.031(1), the employer's action was not so obvious and egregious a violation of basic safety concepts that would warrant imposition of the 30% enhancement

> pursuant to KRS 342.165(1). We cannot say the ALJ's conclusion was so wholly unreasonable that it must be reversed as a matter of law. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

The ALJ then made the following findings:

> In the claim *sub judice* the ALJ is convinced that Plaintiff has not shown that Defendant violated the "general duty" clause set out in KRS 338.031(1)(a). Plaintiff cited *Apex Mining v. Blankenship* as supporting his position. The ALJ does not believe the case supports his position as pointed out by Judge Gardner. First, there cannot be inferred any intent on the part of Defendant. These men had many years experience in working on school buses, and, particularly, Plaintiff had 14 years experience there. A common repair was installing air brake canisters on school buses. After years of experience and this being a common repair, who would Defendant retain to instruct on safety that would know more than these men working on these vehicles. The employer's failure to instruct experienced mechanics in the dangers of these canisters was "not so obvious and egregious a violation of basic safety concepts that would warrant imposition of the 30% enhancement pursuant to KRS 342.165(1)." The ALJ finds that Plaintiff has not proven a safety violation that would warrant imposition of enhancement under KRS 342.165(1).
>
> **Credit for Sick Pay.** Defendant is seeking a credit for salary continuation in the form of sick pay received by Plaintiff during a part of the time that he was off work following his injury.

> Plaintiff has attached to his brief a copy of an opinion of the Board styled *Pike County Board of Education v. Jane Branham*, Claim Number 05-75254, entered July 11, 2007. There a similar situation arose in which the school board had not introduced evidence of what the school board plan provided, and had not filed a copy of the plan. In the claim *sub judice*, the ALJ found only affidavits of Nancy Grubb setting out information as to wages and what number of days Plaintiff had been paid and the rate, etc. He was unable to find any plan that had been filed into evidence setting out what the plan provided. Even if an affidavit had been filed, the ALJ is not convinced that an affidavit is admissible to prove what it purports to. Defendant did not offer any testimony or evidence regarding the terms of the sickness plan or whether the plan contained an offset provision.
>
> The ALJ finds that Defendant is not entitled to a credit for the salary continuation for sick pay paid by Defendant.

Lambert filed a petition for reconsideration arguing the ALJ's decision pertaining to the safety penalty contained misstatements of the law and faulty reasoning.

Pike County also filed a petition for reconsideration arguing affidavits of Ms. Grubb were sufficient to establish its entitlement to a credit for sick pay against TTD benefits. Pike County also argued Lambert's wages from concurrent employment with Pike County as a bus driver

should not have been used in calculating his AWW for TTD benefits.

The ALJ issued separate orders on May 16, 2012 denying the petitions. In the order denying Pike County's petition, the ALJ noted no plan was submitted during proof time.

On appeal, Lambert argues Pike County's failure to train mechanics in the proper installation of air brake canisters was a safety violation pursuant to KRS 342.165. Lambert states the uncontroverted evidence establishes there has been no training for the mechanics conducted by the employer since 1973. Lambert argues the facts in his claim are more similar to the issues presented in Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996) than those presented in Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997) which the ALJ relied upon in his decision. Lambert argues the employees obviously did not know what they were doing, and, if they had been properly trained, the incident would not have occurred.

On cross-appeal, Pike County again argues the information contained in the affidavits of Ms. Grubb was sufficient to establish Pike County's entitlement to a credit for sick pay against TTD benefits. It notes, as it did before the ALJ, Lambert voluntarily elected to receive his full salary. Pike County submits that to allow Lambert

to receive both his full salary and TTD benefits results in double recovery.

Pike County argues, pursuant to Double L Construction, Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005), Lambert's concurrent wages earned for driving buses for Pike County should not be used in calculating his TTD benefits. Pike County contends there is no evidence Lambert was incapable of performing his duties as a substitute bus driver.

Finally, Pike County argues the overwhelming weight of the evidence indicates the ALJ should have found the opinions of Dr. Tutt more reliable and concluded there was no permanent injury due to the work accident.

Pike County argues that the Dr. Tutt's opinions are overwhelmingly more reliable and the ALJ should have found no permanent injury as a result of the work incident. Pike County contends the evidence as a whole supports a finding of no compensable injury to Lambert's cervical spine. Pike County also contends any cervical impairment was pre-existing. It notes Dr. Tutt stated the only injury was a possible cervical strain. Pike County further contends there was no change shown in post-injury MRIs.

Finally, Pike County argues, in the alternative, if the Board finds Lambert has an impairment rating with respect to the incident, he is not entitled to the three multiplier.

Pike County notes Lambert worked for one year after the accident performing the same job duties. Pike County also contends there is nothing from an objective standpoint to indicate there is any type of abnormality in the cervical spine that would prevent Lambert from returning to his job duties.

A claimant in a workers' compensation case bears the burden of proving each essential element of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Lambert, the party with the burden of proof, was unsuccessful before the ALJ in proving a safety violation per KRS 342.165, the issue on appeal is whether the evidence compels a contrary conclusion. *See* 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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). It is not enough for Lambert to merely show some evidence supports his position. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As long as the ALJ's opinion is supported by evidence of substance, the Board may not

reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.165(1) provides in pertinent part as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

We continue to hold that, in cases alleging unsafe workplaces, Apex Mining v. Blankenship, *supra*, and Cabinet for Workforce Development v. Cummins, *supra*, represent two ends of a continuum. The ALJ was convinced the facts of the case *sub judice* were more akin to those in Cummins than to Blankenship. The ALJ noted the mechanics were experienced, and replacing the canisters was a common repair. We note the instructions concerning the safety pin and the procedures involved in installing the canister were printed on the canister. The ALJ concluded any lack of instruction was not so obvious and/or egregious as to warrant a safety violation enhancement pursuant to KRS

342.165(1). We cannot say the ALJ's determination was clearly erroneous.

Concerning sick leave payments made to Lambert, the question is whether Pike County, as a matter of law, is entitled to a credit. As the party seeking credit pursuant to KRS 342.730(6), Pike County had the burden to establish its entitlement. Dravo Lime Co. Inc., v. Eakins, 166 S.W. 3d 283 (Ky. 2005). Our analysis begins with KRS 342.730(6) which provides:

> All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

It follows that Pike County is only entitled to receive a credit for payments made in lieu of workers' compensation benefits if its plan or policy complies with the statute. It also follows that if the policy or plan is not introduced as evidence, a fact-finder or reviewing body has little or no opportunity to determine whether the terms of the plan or policy comply with the mandates of KRS 342.730(6).

Here, based upon the meager evidence contained in the record, we conclude the proof is insufficient to support a finding that the ALJ acted arbitrarily or capriciously or abused his discretion. Scearcy v. Three Point Coal Co., 380 Ky. 683, 134 S.W.2d 228 (Ky. App. 1939). Ms. Grubb's affidavits and the attachments were insufficient to establish all of the elements required by KRS 342.730(6). The evidence merely indicated Lambert received his full salary when he elected to use accumulated sick leave. No plan was introduced during proof time. Further, the policy statement Pike County attempted to introduce outside of proof time following briefing would likewise be insufficient. Lambert's testimony that he chose to use his accumulated sick leave during his period of TTD does not compel a finding that Pike County is entitled to an offset against the TTD benefits.

Since Lambert was successful proving a compensable cervical injury, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence has been defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky.

1971). Although a party may note evidence that would have supported a contrary conclusion, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As fact-finder, the ALJ determines the quality, character and substance of the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Additionally, when faced with conflicting medical opinions, the ALJ has discretion to choose which physician's opinion to believe. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

The ALJ acted well within his role as fact-finder in choosing to rely on the opinions of Dr. Potter in finding Lambert sustained a cervical injury that produced an 8% functional impairment rating. Dr. Potter opined Lambert did not have a prior active impairment despite having an instance of cervical complaints in 2007. He also found Lambert continued to have radiculopathy as a result of the work injury. Lambert testified he missed no work as a

result of the 2007 episode. The mere fact that an individual experienced some complaint in the past does not establish the problem persisted. Here, Lambert denied any ongoing treatment following his complaint in 2007 and there is no medical evidence indicating he was symptomatic immediately prior to the 2009 work-related injury. Dr. Potter's opinions constitute substantial evidence supporting the ALJ's conclusions. Thus, we may not reverse.

At first blush, Pike County's argument concerning AWW for purposes of calculating TTD benefits might appear to have some merit. A review of Double L Construction, *supra*, reveals the Supreme Court in dicta indicated as follows:

> Having considered the relevant statutes, we conclude that a worker is entitled to TTD benefits if a work-related injury results in a temporary inability to perform the job in which it occurred. If the injury also causes an inability to perform a concurrent job of which the employer has knowledge, income benefits are based on the wages from both employments by operation of KRS 342.140(5). *If the injury does not cause an inability to perform a concurrent job, KRS 342.140(5) is inapplicable and income benefits are based solely on the wages from the job in which the injury occurred.* In contrast, if a work-related injury does not prevent the worker from performing the job in which it occurred, the worker is not entitled

> to TTD despite an inability to perform a concurrent job.

Double L. Construction at 515. (Emphasis added).

However, we conclude Pike County's arguments concerning the AWW issue with regard to TTD benefits are misplaced. Lambert's work as a bus driver was with Pike County and not another employer. His bus driving is an additional duty for the same employer and is not concurrent employment. KRS 342.140(5), the provision addressing the inclusion of wages from concurrent employment, provides:

> When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his wages from all the employers shall be considered as if earned from the employer liable for compensation. (Emphasis added).

Pike County cites no authority holding different positions or tasks for the same employer are to be considered separate, concurrent employment. The ALJ correctly considered all the wages earned as a mechanic and substitute bus driver in calculating Lambert's AWW.

Finally, we find no error in the ALJ's application of the three multiplier with regard to Lambert's cervical injury. It is well-established that the claimant's own testimony as to his condition and functional limitations has

some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Lambert testified to his ongoing difficulties and the resulting impact on his activities of daily living. He gave an example of the effect of simply using a weed eater for ten or fifteen minutes as producing intolerable pain. Lambert testified concerning the effect of using air guns and torque wrenches on his hands. Further, Lambert testified to the difficulty he had during his return to employment and the worsening of his condition during that time. The ALJ could reasonably conclude Lambert's testimony regarding lifting required in the job, combined with restrictions assessed by Dr. Potter would preclude Lambert from performing his work as a mechanic.

Accordingly, the March 13, 2012 Opinion, Award and Order rendered by Hon. Joseph W. Justice, Administrative Law Judge, and the May 16, 2012 orders ruling on the petitions for reconsideration are **AFFIRMED**.

ALL CONCUR.

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