Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2022

CLAIM NO. 202055971

CHRISTOPHER MILLER — PETITIONER

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

OMNI HOTEL AND RESORTS
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

AND

OMNI HOTEL AND RESORTS — CROSS-PETITIONER

VS.

CHRISTOPHER MILLER
IAN GODFREY, ESQ.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE — CROSS-RESPONDENTS

OPINION
AFFIRMING IN PART AND
VACATING IN PART ON APPEAL,
AND VACATING IN PART
AND REMANDING ON CROSS-APPEAL

* * * * * *

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

STIVERS, Member. Christopher Miller ("Miller") appeals and Omni Hotel and Resorts ("Omni") cross-appeals from the January 27, 2022, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ"). Both also appeal from the February 14, 2022, Order ruling on their respective Petitions for Reconsideration. The ALJ found Miller sustained a right shoulder injury while employed by Omni and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. The ALJ also awarded Omni a credit for any unemployment insurance benefits paid to Miller from March 14, 2020, through August 29, 2020.

On appeal, Miller argues Omni is not entitled to a credit for unemployment insurance benefits against its obligation to pay TTD benefits because it did not prove the net after-tax value of the benefits. Miller also argues the ALJ erred by not inserting language in the award directing that enhancement of his PPD benefits by the two-multiplier will occur at any point he ceases earning the same or greater wages. On cross-appeal, Omni argues Miller is not entitled to TTD benefits from March 6, 2020, through October 7, 2020, because he was off work due to the Covid-19 pandemic and not because he was temporarily totally disabled. Omni also asserts the ALJ erred in approving an attorney's fee for Miller's attorney.

BACKGROUND

The Form 101 alleges Miller sustained a January 29, 2020, right shoulder injury while in the employ of Omni. Miller alleged he injured his shoulder moving tables and chairs to set up a banquet room at the hotel.

Miller testified at a June 28, 2021, deposition and at the December 14, 2021, hearing. Miller's deposition establishes that at the time of his deposition he was 52 years old and secured a GED in 1988. Miller acknowledged receiving unemployment insurance benefits from March through August 2020 totaling approximately $5,000.00. About two weeks prior to his deposition, Miller returned to Omni working full time as pool security. At the time he was injured, his job title was "banquet set up guy." He worked five days a week forty hours a week. He described the injury as follows:

> A: No. It was a specific event. I was lifting a chair to stack the chairs like we regularly do. I raised the chair up, I got it about chest high, I felt a stabbing pain in my shoulder; I dropped the chair. I'm saying, you know, a guy that works with me hollered, what's wrong. I said man I felt like somebody just stabbed me in the shoulder. You know, so, you know, we didn't – I didn't pick up anything else, they finished out the room. When we got finished, I went to the office and let the supervisors that were there in the office know that I had hurt my shoulder.

Because he continued to experience shoulder pain, Miller went to the hospital on Monday, February 3, 2020. He continued to work while receiving medical treatment. Since he was the "lead," he engaged in no lifting, and supervised the work. He provided the following description of the treatment he underwent after the injury:

> A: I was back and forth to the doctor. So, I guess, I think it was the end of March or something they set me up for therapy. So in August, I started therapy – still having pain. I'm saying, things like that still going back and forth to the doctor. So they sent [sic] me an appointment for May to have an MRI. So I go and have the MRI in May – in May. They find the tears, scheduled me for surgery in August. Well, when I go to have the surgery

in August, my blood – my potassium level was too low for them to do surgery, so they had to schedule it out further after they get my potassium in order. So from, like I say, from May until I had surgery in October, I was basically back and forth to therapy and – and to the doctor.

Q: Okay. So you had a little bit of delay in being able to have the surgery due to your potassium levels, but then it did happen in October of 2020?

A: Yes – yes.

Q: Okay. And so then, I guess, you went to physical therapy again after the surgery?

A: Yes – yes.

Q: Okay.

A: I went to physical therapy for, I guess, maybe a couple of months – started having some more pain, you know. The doctor didn't know what was causing it said I should be healing fine – sent me for another MRI and found another tear so …

Q: Okay. And did you have another surgery to repair that tear?

A: Yes. I had another surgery in March of this year.

Q: Was it the same doctor?

A: Same doctor.

Q: Okay. And so then, I guess, you had a third round of physical therapy?

A: Yes. Still going now – still going now. I have to go today.

Q: Okay. Well, tell me – tell me a little bit about that. So the physical therapy – what kind of – what kind of exercises are you doing and are you seeing benefit from it?

A: Well, right now they are just trying to work with my range of motion and things because in doing the first

> surgery they had to repair my labrum, my biceps and rotator cuff.
>
> So right now they are still trying to get my range of motion in order before they really start me on any kind of strength therapy, you know. So I – I, you know, I really don't have any strength in my right arm so …
>
> Q: Okay. And as you – as you sit here today, I know you say you don't have a lot of strength in your right arm. Are you starting to see your range of motion come back or …
>
> A: Yes. I'm saying somewhat, I'm saying it's – it's coming back, like I say, it's painful, but you know, I'm trying to work.

Dr. Nyagon Duany performed the October 2020 and March 2021 surgeries. Miller testified he was in a constant pain after the first surgery. Miller explained why he stopped working for Omni on March 6, 2020:

> A: We were furloughed – yeah, we were furloughed on March the 6th.
>
> Q: March the 6th, 2020?
>
> A: Yes.
>
> Q: Okay. And so the Governor shut down the state, people couldn't – couldn't be in public for fear of the Corona virus so they shut her down; is that right?
>
> A: Right.
>
> Q: Okay. And I guess just on the business side, if nobody is traveling, there's nobody staying in a hotel, it doesn't make sense to be paying anybody to be there.
>
> A: Correct.
>
> Q: Okay. And so what did you do – what did you do at that time? Were you able to get unemployment then? Is that what happened?
>
> A: Yes. I didn't have a problem getting on unemployment, but like I say, I – I received

unemployment from – from March until the end of August. I haven't received anything since.

Q: Did you get some of those sweet federal unemployment castoffs or whatever it was that they were giving?

A: Yeah. I got a couple of them. I'm saying, you know, that there were glitches and hitches with that too. So …

Q: Yeah. You are dealing with bureaucracy, they – paperwork falls off people's desk and things like this, but very good.

Okay. And so – so did you end up like getting your employment terminated from Omni or what happened when things opened back up?

A: They sent out an email at the end of October, not just to me, it had – it was sent to several you know, associates. That because business was as it was as of October the 30th we would all be let go.

Well, I received another email a few days later speaking specifically to me that my status would not change. So, you know, so those – those two emails correlated with each other.

Q: Okay. And so what was your status as opposed to everyone else?

A: I was still furloughed.

Q: Okay.

A: I was still on furlough.

Q: And so were you on furlough up until two-weeks ago?

A: Yes – yes.

At the time of his deposition, Miller was still undergoing physical therapy. He worked under the following restrictions: "No pushing, pulling, lifting,

anything over 10 pounds, no repetitive motion, and nothing really over my head." As a result, Miller could not stack chairs.

Miller took Ibuprofen and Tramadol prescribed by Dr. Duany for pain. Neither of these prescriptions provide much relief. At the time of his deposition, he was working the same number of hours at a higher hourly rate. Consequently, he was earning more money than at the time of the injury. He denied missing any work prior to the furlough.

In January 2021, Dr. Duany first released Miller from his care with restrictions. Because Miller continued to have shoulder pain, he returned to Dr. Duany, who ordered an MRI which revealed another tear. Miller underwent a second right shoulder surgery in March 2021. He continues to experience shoulder pain and does not believe he is capable of returning to the position he was performing on January 29, 2020.

At the hearing, Miller identified the job he performed at the time of the injury as "lead banquet set up." He takes 800 mg of Ibuprofen prescribed by Dr. Duany. His shoulder is stiff and aches constantly. Miller described his work activities after the injury:

> Q: And did you have any trouble doing the job during that time period?
>
> A: Not the job that I was doing. There was no problem doing that.
>
> Q: No, I'm talking about – I'm sorry. I'm talking about right after the injury in January of 2020.
>
> A: Oh, yes, yes, yes, yes, right after the injury. I didn't do a whole lot of lifting or anything after the injury. Like I say, I was the lead, so mostly I had the people up under me, you know what I'm saying, to do the lifting

> and things. I just had to be sure to make sure everything was set correctly.
>
> Regarding his post-injury work, Miller testified as follows:
>
> Q: Okay. Now – and back in early 2020, that's what I'm talking about now, when did you quit working for Omni?
>
> A: I did not quit. We were put on furlough in March of 2020 because of COVID.
>
> Q: Okay. And did you receive unemployment benefits after you were furloughed?
>
> A: Yes. From March until I had my first surgery.
>
> Q: Okay. And was that first surgery in October of 2020?
>
> A: Yes.

Miller reiterated he returned to work for Omni in June 2021 and worked pool security until August 2021 when he quit because of difficulties with his supervisor. He began working for Elwood Staffing, a temporary service, on November 1, 2021. The job he obtained through Elwood Staffing entails lifting steel pans ten hours a day. Although the job is physically difficult for him to perform, Miller works there because he needs the income. He believed he is incapable of performing this job for the foreseeable future. He explained that taking Ibuprofen allows him to perform his current job. Miller believed he is physically unable to perform the job he performed at the time of the January 29, 2020, injury. He rated his post-injury pain 10 on a scale of 1-10 and when taking Ibuprofen his pain is 7. He has been released by Dr. Duany to return to work without restrictions. In addition to problems caused by lifting, he has difficulty pushing and pulling as any task requiring

extension of his arms is difficult to perform. Although he experiences considerable pain, Miller is able to take care of his yard.

Miller introduced the medical records of Dr. Duany, Park Duvalle Community Health Center, and Dr. Richard T. Holt's August 19, 2021, independent medical evaluation report. Miller also introduced the decision of the Office of Unemployment Insurance Appeals Branch concerning his eligibility for unemployment insurance benefits.

Omni submitted KORT Physical Therapy's July 30, 2021, record, Dr. Frank Bonnarens' September 21, 2021, report, and Dr. Duany's January 25, 2021, medical record. It also introduced the records of the Office of Unemployment Insurance setting forth the weeks and amount Miller received unemployment insurance benefits.

The December 14, 2021, Benefit Review Conference Order and Memorandum reflects the contested issues were benefits per KRS 342.730, work-relatedness/causation, notice, unpaid or contested medical expenses, credit for unemployment, and TTD.

The ALJ first determined due and timely notice was provided to Omni. Relying primarily upon Dr. Holt's opinions, the ALJ found Miller sustained a January 29, 2020, right shoulder injury and ordered Omni responsible for all medical benefits relating to the treatment of the right shoulder injury. Regarding Miller's entitlement to TTD benefits, the ALJ offered the following findings of fact and conclusions of law:

> Miller was injured on January 29, 2020 and worked until March 6, 2020. He had his first surgery by Dr.

> Duany on October 8, 2020. Dr. Duany released him to full duty on January 25, 2021, therefore, temporarily at least, his condition had improved to allow a return to work. He is therefore entitled to TTD from March 6, 2020 through January 25, 2021. Dr. Duany did a second surgery on March 4, 2021 and then Miller returned to work, albeit at light duty but full wages on June 10, 2021. He is entitled to TTD from March 4, 2021 through June 10, 2021.
>
> Miller's AWW is $503.91 and his workers' compensation and TTD rate is $335.94.
>
> Miller was paid unemployment benefits in the amount of $210.00 a week from March 14, 2020 through August 29, 2020. Omni is entitled to a credit in that amount against the past due TTD owed.

In accordance with Dr. Holt's opinions, the ALJ found the injury generated a 5% permanent impairment rating. Although the ALJ determined the three-multiplier contained in KRS 342.730(1)(c)1 is not applicable, concerning the applicability of KRS 342.730(1)(c)2, the ALJ stated:

> Given that he only takes over the counter medicine and is not in active treatment with a doctor I feel it is possible he may continue to do the work. If he does not that is subject of a Motion to Re-Open. He is earning more than on his date of injury. KRS 342.730(1)(c)2 does not currently apply.

PPD benefits were awarded for 425 weeks from January 29, 2020, suspended during any periods Miller received TTD benefits. The ALJ also awarded medical benefits. The award of TTD benefits reads as follows:

> The Plaintiff shall recover permanent partial disability benefits from the Defendant, and/or its insurance carrier, in the amount of $10.92 a week, for 425 weeks, from January 29, 2020, and excluding any periods of TTD, with 6% interest on any past due portions and with the Defendant taking a credit for any benefits paid.

Both parties filed Petitions for Reconsideration. In his Petition for Reconsideration, Miller contended, as he does on appeal, that the ALJ erred in granting Omni a credit against its obligation to pay TTD benefits for the full amount of unemployment insurance benefits he received. Rather, the credit should be the net amount after deduction for taxes. Miller also argued the ALJ should have provided language in the award enhancing his PPD benefits by the two-multiplier when his employment at the same or greater wages ceases.

In its Petition for Reconsideration, Omni argued the ALJ erred in awarding TTD benefits from March 6, 2020, until October 8, 2020, when Miller underwent surgery. It argued Miller did not miss work because of the alleged work injury but because of a furlough due to the Covid-19 pandemic.

The ALJ overruled both Petitions for Reconsideration. His reasoning is set forth *verbatim*:

> This matter comes before me on both parties' Petitions for Reconsideration and both parties Responses. As for the issue of whether or not the Defendant is entitled to a credit in the amount of $210.00 a week against past due TTD benefits, from unemployment benefits the Plaintiff received I accept that the Defendant is only entitled to a credit for the net amount received. The Defendant argues that the $210.00 is the net amount and the Plaintiff had the burden to prove if it was not. As to who has the burden of proof to prove what the net amount was in unemployment benefits I believe, having attempted to research it, that this is a novel question. If it is not, or until the appellate courts wish to elaborate I have no specific guidance. That being said, until such a specific rule is made or brought to my attention I believe I should err on the side of caution and adopt the general rule that the Plaintiff always has the burden of proof and persuasion unless there is a specific rule otherwise. As such I will not amend the amount of the credit. The Plaintiff's Petition is OVERRULED in that regard. The

> Defendant's argument that the Plaintiff is not entitled to TTD during any periods he was not at MMI and not at work for a non-work-related reason is inaccurate. The Defendant's Petition is OVERRULED. **As to the whether or not an Opinion must state that a Plaintiff may, in the future, be entitled to have KRS 342.730(1)(c)2 applied to his PPD award I can only say that I do not think such language is necessary. That being said, if, in the future, KRS 342.730(1)(c)2 applies the Plaintiff is entitled to it. I make no findings or Orders has to if it does apply or who would have the burden of proving if it did, or did not, when it would start or end or of any other pleadings or arguments that would be needed.** (emphasis added).

Miller's attorney subsequently filed a Motion for Attorney Fees based upon the following calculation:

> Pursuant to a contract of representation entered on April 14,2021, the Plaintiff agreed to a fee in accordance with KRS 342.320 of 20% of the first $25,000.00, 15% of the next $25,000.00, and 10% of the remainder of a settlement or award.
>
> .2 x $21,580.64 : $4,316.00 (rounded down to nearest whole dollar) Total: = $4,316.00

His attorney represented that Miller planned to appeal, raising the issue of Omni's credit for unemployment insurance benefits which would "only affect an additional underpayment and not the currently awarded benefits." By Order dated February 23, 2022, the ALJ awarded the attorney's fee requested.

Omni filed a Petition for Reconsideration asserting the ALJ prematurely awarded an attorney's fee based on an award of income benefits which is not final and which Miller is disputing. Omni requested the Order approving the attorney's fee be stricken. The ALJ overruled the Petition for Reconsideration concluding as follows:

> This matter comes before the Defendant's Petition for Reconsideration and the Plaintiff's Response. I have never seen an attorney file a fee motion on a claim they intended to appeal. I assumed no appeal was to follow. However, I can find no reason or rule that says such a motion can't be filed. As the Plaintiff points out the outcome of any appeal can only raise or maintain the amount of his fee. Accordingly, the Petition is OVERRULED.

On appeal, Miller asserts Omni failed to prove a credit for unemployment insurance benefits because it did not prove the net after-tax value of those benefits. Miller cites to American Standard v. Boyd, 873 S.W.2d 822, 824 (Ky. 1994) and Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008) holding the employer bears the burden of establishing a credit. He also references the Kentucky Supreme Court's decision in Mercer County Fiscal Court v. Arnold, Claim No. 2011-SC-00706-WC, rendered December 20, 2012, Designated Not To Be Published, and the Kentucky Court of Appeals decision in Wal-Mart v. Mandeel, Claim No. 2011-CA-001470-WC, rendered January 20, 2012, Designated Not To Be Published.

Miller observes Omni introduced a payment ledger showing the amount of unemployment insurance benefits paid but offered no evidence of the after-tax value. Miller notes that in its Response to his Petition for Reconsideration, Omni conceded there is no evidence of the after-tax value of the unemployment insurance benefits and argued he has the burden to prove the net benefit after he filed his taxes. He requests the credit granted Omni for unemployment insurance benefits against its obligation to pay TTD benefits be reversed.

Next, Miller asserts the ALJ erred in stating the two-multiplier set forth in KRS 342.730(1)(c)2 did not currently apply because he continued to earn the same or greater wages. He notes the ALJ added that if Miller returned to work at the same or greater wages then he would be entitled to the two-multiplier if that employment at the same or greater wages ceases. Miller maintains that since the ALJ found he returned to work at the same or greater wages, future application of KRS 342.730(1)(c)2 is required. Miller notes the language of the statute is mandatory. Contrary to the ALJ's suggestion in the Order on Reconsideration, Miller maintains there is no mechanism within KRS 342.125 to reopen a claim for application of the two-multiplier. Significantly, he notes Omni has no objection to amending the award to include the language in the statute.

On cross-appeal, Omni argues the ALJ erroneously awarded TTD benefits from March 6, 2020, through October 8, 2020, the date of Miller's first surgery. Omni argues Miller did not miss work during the period in question due to the effects of the injury but because he was furloughed due to the Covid-19 pandemic. It only contests the award of TTD benefits during this period. According to Omni, Miller cannot meet the statutory requirement set forth in KRS 342.011(1), as there is no evidence demonstrating Miller was disabled and not at maximum medical improvement during the period in question. Consequently, Miller is only entitled to TTD benefits from October 8, 2020, the date of his first surgery, through January 25, 2021, when he returned to light duty, and from March 4, 2021, the date of the second surgery, until June 20, 2021, when he returned to full duty work.

Omni also contends the ALJ erred by prematurely awarding an attorney's fee based in part upon the award of TTD benefits. It cites the following portion of KRS 342.320(4) which reads as follows: "The motion for approval of attorney's fee shall be submitted within thirty (30) days following finality of the claim." It asserts the language plainly states that an attorney's fee can only be approved after the claim has been finally adjudicated. Omni requests the Board reverse the Order since the award of TTD benefits to Miller affects the amount of the attorney's fee.

ANALYSIS

KRS 342.730(5) reads as follows:

> All income benefits pursuant to this chapter otherwise payable for temporary total and permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability.

The above-cited statute does not require Omni to prove the net after-tax value of unemployment benefits before it can receive an offset for the unemployment insurance benefits paid to Miller during a period he received TTD benefits. Therefore, we affirm the ALJ's decision on this issue.

Without question, American Standard v. Boyd, supra, Millersburg Military Institute v. Puckett, supra, and Dravo Lime v. Eakins, 156 S.W.3d 283 (Ky. 2005) place the burden upon Omni to establish its entitlement to an offset for unemployment insurance benefits paid during the same period TTD benefits were awarded to Miller. In Dravo Lime v. Eakins, supra, the Kentucky Supreme Court unequivocally held as follows:

> The employer asserted that KRS 342.730(6) permitted it to credit the short-term disability benefits the claimant received against its liability for his workers' compensation award. Hence, it was the employer's burden to establish its entitlement.

Id. at 290.

Omni met that burden by filing the summary of unemployment insurance benefit payments to Miller spanning the period from March 14, 2020, through August 29, 2020.[1] Pursuant to KRS 342.730(5) in order to meet its burden Omni was only required to establish the amount of the unemployment insurance benefits paid during a period TTD benefits or PPD benefits were awarded. Miller's reliance upon Mercer County Fiscal Court v. Arnold, Claim No. 2011-SC-000706-WC, rendered December 20, 2012, Designated Not To Be Published, is misplaced. As found by the ALJ "Mercer County 'totally failed' in its proof because there was no evidence in the record of specifics, dates, duration, or amounts of unemployment benefits paid to Arnold." Slip Op. at 1. Thus, it was impossible for the ALJ to award a credit. This Board affirmed the ALJ's decision as did the Kentucky Court of Appeals and Supreme Court. In affirming, the Supreme Court explained:

> As this Court has previously said, even though an employer may be entitled to a credit, "it is that party's responsibility to present evidence to support that position. A motion to reopen is not the proper avenue." *American Standard v. Boyd,* 873 S.W.2d 822, 824 (Ky. 1994). Additionally, 803 KAR 25:010 Section 13(14) states in regard to a BRC, "[o]nly contested issues shall be subject to further proceedings."

[1] The records reveal the first check for unemployment insurance benefits for the weeks of March 14 and March 21 was issued on March 27, 2020, and the last check for benefits for the week of August 29, 2020, was issued on September 8, 2020.

> In this matter, Mercer County admits that it did not request a credit for the unemployment benefits Arnold received until its petition for reconsideration. Mercer County apparently did not request the credit because it believed Arnold was not totally disabled. But the hearing before the ALJ was to determine if Arnold was *permanently and totally* disabled. As such, Mercer County should have raised the issue of receiving an unemployment benefit credit at the ALJ hearing, if for no other reason but to preserve its right to request the credit if Arnold was adjudged totally disabled. Further, there is no requirement that the ALJ should have *sua sponte* awarded a credit to Mercer County just because Arnold testified he received unemployment benefits.
>
> Mercer County also implies in its brief that KRS 342.730(5) placed an affirmative duty on Arnold to disclose information about his unemployment benefits to the ALJ since he was the party seeking a total disability benefit. We disagree. KRS 342.730(5) places no responsibility or burden on an injured worker to raise the issue of the unemployment benefits credit.

Slip Op. at 2-3.

The facts in the case *sub judice* can be distinguished from those in Mercer County Fiscal Court v. Arnold, supra, as Omni introduced evidence regarding the duration and amount of unemployment insurance benefits paid to Miller. Significantly, Miller does not dispute the authenticity or accuracy of the summary. The summary reveals the unemployment insurance benefits were paid during a time period Miller was awarded TTD benefits. Thus, Omni was entitled to a credit against its obligation to pay TTD benefits during a period he also received unemployment insurance benefits.[2]

[2] In this opinion we have vacated the award of TTD benefits spanning the period from March 6, 2020, through October 7, 2020, which encompasses the period Miller received unemployment insurance benefits. Thus, on remand the issue of Miller's entitlement to TTD benefits must again be addressed. Specifically, whether Miller is entitled to TTD benefits during the timeframe he received unemployment insurance benefits.

Miller's reliance upon Wal-Mart Stores, Inc. v. Mandeel, supra, is also misplaced. In Mandeel, the Board found the ALJ erred when Wal-Mart was not granted a credit for unemployment insurance benefits paid to Mandeel. The Board concluded Wal-Mart should have received a credit or offset for unemployment insurance benefits paid to Mandeel from October 17, 2009, through April 10, 2010, since the records relating to unemployment benefits paid to Mandeel established he received $415.00 a week from October 17, 2009, through April 10, 2010. Mandeel testified he also received $830.00 or $840.00 every two weeks before taxes and $748.00 after taxes during another period but no records were introduced establishing this period of payments. Wal-Mart requested time to obtain additional unemployment records but was unsuccessful. Thus, the records from the state of Kentucky relating to the payment of unemployment insurance benefits to Mandeel only spanned the period from October 17, 2009, through April 10, 2010. The Board concluded Wal-Mart was not entitled to a credit for unemployment insurance benefits paid beyond April 10, 2020, since there was no documentation of unemployment insurance benefit payments after April 10, 2020. The Court of Appeals reversed finding as follows:

> KRS 342.730(5) states that "[a]ll income benefits pursuant to this chapter otherwise payable for temporary total and permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability." KRS 342.730(5) uses the mandatory "shall" language. Wal–Mart is entitled to a credit if it can produce substantial evidence as to the amount and duration of unemployment benefits Mandeel received. Mandeel's only argument is that the $415.00 per week amount was not proven to be a before

> or after taxes amount; [footnote omitted] therefore, Wal–Mart failed in its burden of proof.
>
> We find that Wal–Mart was entitled to receive credit for unemployment benefits paid to Mandeel up until August 8, 2010. Wal–Mart filed records from the unemployment office showing Mandeel received benefits in the amount of $415.00 every week from October 17, 2009, through April 10, 2010. This is supported by Mandeel's testimony that he received $830.00 or $840.00 every two weeks before taxes until December 15, 2010. Mandeel also testified during his deposition and at the final hearing that he received $748.00 after taxes. Mandeel never disputed these amounts and has consistently testified as to how much he received. Even in his written arguments to this Court, Mandeel does not dispute the amounts. We therefore reverse and remand this case to the Board for further proceedings consistent with this opinion.

Slip Op. 3-4.

In a footnote, the Court of Appeals provided the following, "The unemployment benefit credit only applies to amounts received after taxes." In light of the Mandeel opinion and the plain reading of the statute, we conclude the ALJ properly allowed a credit for all unemployment insurance benefits paid to Miller. The footnote is non-binding and constitutes unavailing *dicta* set forth in an unpublished opinion. KRS 342.730(5) contains no provision that the employer is only entitled to a credit or offset for the net after-tax value of the unemployment insurance benefits paid to the claimant. The footnote contained in Mandeel is *dicta* as there is no provision in KRS 342.730(5) directing the allowable offset applies to amounts received after taxes.

Our holding is supported by the wording in KRS 342.730(7) which reads as follows:

> Income benefits otherwise payable pursuant to this chapter for temporary total disability during the period the employee has returned to a light-duty or other alternative job position shall be offset by an amount equal to the employee's gross income minus applicable taxes during the period of light-duty work or work in an alternative job position.

KRS 742.730(7), enacted in 2018, which became effective on July 14, 2018, clearly states the employer is entitled to an offset against the obligation to pay TTD benefits by an amount equal to the employee's gross income minus applicable taxes during the period the employee was gainfully employed either in light-duty or in an alternative job position. KRS 342.730(5) was already in place at the time KRS 342.730(7) was enacted. In enacting KRS 342.730(7), the legislature did not amend KRS 342.730(5) to provide that the employer was only entitled to the after-tax value of the unemployment insurance benefits paid thereby lending credence to the Court of Appeals' footnote in Mandeel. Consequently, we glean the legislature's intent was that the employer is entitled to an offset for all unemployment insurance benefits paid during a period TTD benefits were or are also to be paid.

The Supreme Court in Active Care Chiropractic, Inc. v. Rudd, 556 S.W.3d 561, 564 (Ky. 2018) stated as follows:

> KRS 446.080(1) directs that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[.]" This Court's goal, in construing statutes, "is to give effect to the intent of the [legislature]. We derive that intent ... from the language the [legislature] chose, either as defined by the [legislature] or as generally understood in the context of the matter under consideration." *Livingood,* 467 S.W.3d at 256 (internal quotations and citations omitted). "General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to

> the provisions of the whole statute and its object and policy." *Cty. of Harlan v. Appalachian Reg'l Healthcare, Inc.,* 85 S.W.3d 607, 611 (Ky. 2002). However, when construing provisions to match objectives of whole statutes, "[w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Livingood,* 467 S.W.3d at 257-58 (internal citations and quotations omitted). Moreover, "'it is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there.'" *Wilson v. SKW Alloys, Inc.,* 893 S.W.2d 800, 802 (Ky. App. 1995) (quoting *Gateway Constr. Co. v. Wallbaum,* 356 S.W.2d 247, 248-49 (Ky. 1962)).

Persuasive to this Board is the fact that in 2018, the legislature enacted KRS 342.730(7) which allows the employer an offset against its obligation to pay TTD benefits during the applicable period for the amount of the employee's gross income *minus applicable taxes*. Notably, the legislature did not amend KRS 342.730(5) to allow the employer that same credit for the after-tax value of the unemployment insurance benefits paid. That portion of the ALJ's decision awarding Omni a dollar-for-dollar offset for the unemployment insurance benefits will be affirmed.

We agree the ALJ erred by not inserting language in the award that Miller is entitled to PPD benefits enhanced by the two-multiplier at any time after his employment at the same or greater wages ceases so long as the prohibition set forth in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015) is not present.[3] We have consistently held that the only avenue for Miller to obtain those enhanced benefits is for the ALJ to include in the award language indicating the claimant's

[3] In Livingood v. Transfreight, LLC, supra, the Supreme Court held "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." Id. at 259.

benefits will be doubled at any time his employment at the same or greater wages ceases in accordance with the directives of Livingood v. Transfreight, LLC, supra. On remand, the ALJ shall insert that language in the award so that Miller is able to obtain the enhanced PPD benefits during any period his employment at the same or greater wages ceases. We point out the facts in this case establish Miller may be entitled to double benefits during the time he stopped working for Omni in August 2021 until November 1, 2021, when he began working for Elwood Staffing.[4] Thus, the claim will be remanded for a finding Miller returned to work earning the same or greater wages and an amendment of the award directing Miller is entitled to enhanced PPD benefits by the two-multiplier at any point his employment at the same or greater wages ceases, in accordance with the directive of Livingood v. Transfreight, LLC, supra.

Concerning Omni's first argument on cross-appeal, KRS 342.0011(11)(a) defines temporary total disability as follows:

> 'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc.

[4] The relevant portion of the statute reads: 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.

v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work she was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he/she remains disabled from his/her customary work or the work he/she was performing at the time of the injury. The Court in Magellan Behavioral Health v. Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> . . .

> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court further elaborated with regard to the standard for awarding TTD as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employ-ment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
>
> . . .
>
> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In Livingood v. Transfreight, LLC, supra, the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury stating as follows:

> As the Court explained in *Advance Auto Parts v. Mathis,* No. 2004–SC0146–WC, 2005 WL 119750, at (Ky. Jan. 20, 2005), and we reiterate today, *Wise* does not "stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD."

Two months after rendering Livingood v. Transfreight, LLC, supra, the Supreme Court rendered Zappos.com v. Mull, supra, specifically rejecting the Court of Appeals' interpretation of "a return to employment" as set forth in KRS 342.0011(11)(a).[5] There, the ALJ awarded TTD benefits during a period Mull had not returned to her regular employment but worked light duty. TTD benefits were awarded during the period Mull had not attained MMI and had not reached a level of improvement which would permit her to return to her regular customary employment. Zappos.com appealed to this Board and we reversed the award of TTD benefits. The Court of Appeals reversed the Board and reinstated the award of TTD benefits. In reversing the Court of Appeals, the Supreme Court stated as follows:

The Board held:

> Here, Zappos accommodated Mull's restrictions with a scanning position, which she testified was a normal part of her employment prior to the injury. Zappos correctly notes Mull acknowledges she was capable of continuing to perform the light duty work but ceased her employment with Zappos for personal reasons completely unrelated

[5] A determination of the existence of "a return to employment" necessarily requires a finding of whether the employee was performing customary work.

> to the work injury. Nothing in the record establishes the light duty work constituted 'minimal' work and she worked regular shifts while under restrictions. She was also capable of performing, and continued to perform for more than one year post-injury, her primary fulltime employment with Travelex. Given Mull was capable of performing work for which she had training and experience, and voluntarily ceased her employment for reasons unrelated to her injury or the job duties, substantial evidence does not support the award of TTD benefits and we therefore reverse.

Mull subsequently appealed to the Court of Appeals, which reversed the Board and reinstated the award of TTD benefits. The Court of Appeals held that the phrase "return to employment," as found in KRS 342.0011(11)(a), "was only achieved if the employee can perform the entirety of her pre-injury employment duties within the confines of the post-injury medical restrictions." Thus, since Mull no longer retained the physical ability to perform any activities requiring gripping and grabbing with her right hand, and her pre-injury employment required such tasks, the Court of Appeals held she was entitled to TTD benefits. We disagree, and reverse the Court of Appeals.

The Board's review in this matter was limited to determining whether the evidence is sufficient to support the ALJ's findings, or if the evidence compels a different result. *W. Baptist Hosp. v. Kelly,* 827 S.W.2d 685, 687 (Ky. 1992). Further, the function of the Court of Appeals is to "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Id.* at 687–88. Finally, review by this Court "is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Id.* The ALJ, as fact-finder, has the sole discretion to judge the credibility of

testimony and weight of evidence. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985).

As stated above, pursuant to KRS 342.0011(11)(a), in order for a claimant to be entitled to TTD benefits, she must satisfy a two-prong test: (1) she must not have reached MMI; and (2) she must not have reached a level of improvement that would permit her return to employment. *Double L Constr., Inc. v. Mitchell,* 182 S.W.3d 509, 513 (Ky. 2005). *Wise* stands for the proposition that TTD benefits for a claimant should not be terminated just because she is released to perform minimal work if it is not the type of work that was customary or that she was performing at the time of his injury. 19 S.W.3d at 657. However, "*Wise* does not 'stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.'" *Livingood v. Transfreight, LLC,* 467 S.W.3d 249 (Ky. 2015). Accordingly, the ALJ must analyze the evidence in the record and determine whether the light duty work assigned to the claimant is not minimal and is work that she would have performed before the work-related injury.

In *Livingood,* the claimant, a forklift driver, could not drive a forklift due to his light duty work restrictions. Instead, while on light duty restrictions he changed forklift batteries, monitored bathrooms for vandalism, and checked to make sure freight was correctly placed around the facility. The ALJ determined that since Livingood had performed those tasks before, and the work was not a make-work project, he had returned to employment and was not entitled to TTD benefits. *Id*. at ____. The ALJ's findings were affirmed by this Court.

In this matter, Mull satisfied the first prong of the TTD benefit test because she had not reached MMI. But, the ALJ did not perform an in depth analysis of the second requirement, whether the light duty work Mull performed was a return to her regular and customary employment. However, despite the lack of an in depth analysis the facts of this matter are relatively clear, and we must agree with the Board that substantial evidence does not support the ALJ's award of TTD.

Prior to her injury, Mull's job tasks included retrieving a product, scanning it, and placing it in a

> shipping box. Mull was trained in all of these tasks. After the injury, Mull was restricted to scanning items. Mull testified that scanning was a normal part of her pre-injury employment. The light duty work is not a significant diversion from her original employment and there is no indication the work was minimal. Mull also received the same hourly wage. Mull returned to her regular and customary employment at Zappos and she does not satisfy the second requirement to receive TTD benefits.

In Trane Commercial Systems v. Tipton, 481 S.W.3d 800, 806 (Ky. 2016), the Supreme Court reinforced its decision in Zappos.com v. Mull, Claim No. 2014-SC-000462-WC, rendered October 29, 2015, Designated Not To Be Published, and again rejected the Court of Appeals' definition of "a return to employment" stating as follows:

> The Court of Appeals in this case held that Tipton was entitled to TTD while she was working full-time for Trane and earning the same hourly rate. This holding by the Court of Appeals was based on a misunderstanding of *Bowerman* and an understandable misinterpretation of what "return to employment" means.

Id. at 806.

The Supreme Court provided the following clarification regarding the standard to be applied in determining when an employee has not reached a level of improvement that would permit "a return to employment":

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee

> reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.
>
> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise,* 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALA must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

Based on this standard, the Supreme Court determined the ALJ and this Board had correctly decided Tipton was not entitled to additional TTD benefits, reasoning as follows:

> Applying the preceding to this case, we must agree with the ALA that Tipton was not entitled to TTD during the period in question. Tipton's physician released her to perform light and sedentary work, which Trane provided for her. Additionally, although Tipton had not previously assembled circuit boards, she had

> assembled the air conditioning units and had tested them. Furthermore, she did not produce any evidence that assembling circuit boards required significant additional training or that it was beyond her intellectual abilities. In fact, it appears that Tipton was certainly capable of and wanted to perform the circuit board assembly job because she bid on and was awarded the job after her release to full-duty work. Thus, there was ample evidence of substance to support the ALJ's denial of Tipton's request for additional TTD benefits, and we reverse the Court of Appeals.

Id. at 807.

We decline to reverse the award of TTD benefits and remand with directions to find Miller is not entitled to TTD benefits during the period in question. However, we agree the ALJ's analysis on this issue is deficient as it does not comport with the law regarding entitlement to TTD benefits. We emphasize Omni is only contesting the award of TTD benefits from March 6, 2020, when Miller was furloughed, through October 7, 2020, the day before he underwent back surgery. Miller's testimony establishes he did not stop working because of the work injury but because he was furloughed due to the Covid-19 pandemic. In awarding TTD benefits, the ALJ noted Miller worked until March 6, 2020, and underwent surgery on October 8, 2020. He was released to full-duty on January 25, 2021. The ALJ concluded that Miller's condition had improved enough for him to return to work. Therefore, Miller was entitled to TTD benefits from March 6, 2020, through January 25, 2021. In its Petition for Reconsideration, Omni raised the fact Miller stopped working due to a furlough solely caused by the Covid-19 pandemic. The award of TTD benefits between the date of furlough and the day before Miller underwent surgery on October 8, 2020, is not supported by the appropriate analysis. In his

February 14, 2022, Order, the ALJ stated "the defendant's argument that plaintiff is not entitled to TTD during the periods he was not MMI and not at work for a non-work reason is inaccurate." In his decision and the Order ruling on Omni's Petition for Reconsideration, the ALJ failed to engage in the two-pronged analysis which must be performed in order to award TTD benefits. Consequently, the award of TTD benefits from March 6, 2020, through October 7, 2020, must be vacated and the claim remanded for additional findings and a determination of whether Miller is entitled to TTD benefits between March 6, 2020, and October 7, 2020, in accordance with the directives of KRS 342.0011(1) and the relevant case law.

Finally, the ALJ erred in prematurely entering an Order awarding an attorney's fee. KRS 342.320(4) reads as follows:

> No attorney's fee in any case involving benefits under this chapter shall be paid until the fee is approved by the administrative law judge, and any contract for the payment of attorney's fees otherwise than as provided in this section shall be void. The motion for approval of an attorney's fee **shall be submitted within thirty (30) days following finality of the claim**. … (emphasis added).

The above-cited language is mandatory. Thus, the Motion for Attorney's Fee was premature since the claim is far from final. The ALJ erred in awarding an attorney fee. We point out that since we have vacated the award of TTD benefits from March 6, 2020, through October 7, 2020, the ALJ will be required to revisit the award of an attorney's fee based on his subsequent ruling. Further, if Miller is entitled to enhanced PPD benefits between the time his employment with Omni ceased and he began working for Elwood Staffing, the amount of the attorney's fee will be affected.

Accordingly, those portions of the January 27, 2022, Opinion, Award, and Order and the February 14, 2022, Order granting Omni a potential offset or credit against its obligation to pay TTD benefits for unemployment insurance benefits received by Miller is **AFFIRMED**. However, those portions of the award and subsequent Order regarding Miller's entitlement to enhanced PPD benefits via the two-multiplier are **VACATED**. The claim is **REMANDED** with directions to the ALJ to find the two-multiplier is applicable and direct that Miller is entitled to double benefits at any point his employment at the same or greater wages ceases in accordance with the directives of Livingood.

On cross-appeal, those portions of the January 27, 2022, Opinion, Award, and Order and the February 14, 2022, Order awarding TTD benefits from March 6, 2020, through October 7, 2020, are **VACATED**. On **REMAND** the ALJ shall provide additional findings and a determination whether Miller is entitled to TTD benefits between March 6, 2020, and October 7, 2020. Further, the March 12, 2020, Order awarding Miller's attorney an attorney's fee is **VACATED**.

ALVEY, CHAIRMAN, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

ALVEY, Chairman. Although I agree with the result reached by the majority, I disagree with the reasoning. Therefore, I concur in the result only. KRS 342.730(1)(a) establishes the basis for the determination of an award of temporary total disability ("TTD") benefits. That provision specifically states as follows:

> For temporary or permanent total disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred ten percent (110%) of the state average weekly wage and not

> less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability. Nonwork-related impairment and conditions compensable under KRS 342.732 and hearing loss covered in KRS 342.7305 shall not be considered in determining whether the employee is totally disabled for purposes of this subsection.

KRS 342.730 Sections (b) through (e) discuss methods of calculation and enhancements for permanent partial disability awards. KRS 342.730(5) provides an offset credit for unemployment benefits. That section indicates the credit for unemployment benefits is only applicable during any "period of temporary total or permanent total disability". That provision has existed without modification since 1996. This Board has previously held the credit is only applicable for benefits actually received, or the "net" proceeds from unemployment benefits. Maker's Mark v. Courtney Clark, WCB 2012-77538 (April 10, 2015) (cited here for guidance, not authority).

KRS 342.730(7) was added in 2018. That provision provides a credit for net earnings an injured worker may have during any period of work while they may be entitled to TTD benefits. KRS 342.730(5) was not modified or amended at that time. The majority believes the failure to include the "net" earnings language in Section 5 allows a credit for the gross unemployment benefits paid. Such application would deprive an injured worker of benefits to which he or she may be entitled due to the fact a credit would be allowed for any taxes deducted from such benefits. This would prevent a full realization of benefits the injured worker has been awarded. Nothing in this statute establishes an injured worker should ever receive less than the amount awarded. TTD benefits already take into consideration a reduction of the

average weekly wage by one-third, replicating a deduction of taxes. To further reduce the amount owed by additional taxes paid from any unemployment benefits is wrong and would constitute a double reduction. Therefore, I disagree with any attempt by the majority to reverse course on our previous determination, and in so doing diminish benefits to which an injured worker is rightfully entitled. Sections (5) and (7) are completely separate provisions, drafted at different times, and simply have no bearing on each other. Because Section (5) has never been modified since its inception in 1996, nor has it been interpreted by the courts, I do not see any reason to modify our previous decision.

That said, Omni introduced evidence establishing the unemployment benefits paid to Miller. It is presumed this establishes the gross amount paid. However, Miller failed to file any evidence establishing the net amount of unemployment benefits received. Once Omni filed those records, Miller bore the burden of rebutting the evidence and establishing a lesser credit amount. He failed to do so. Absent the filing of evidence establishing the net amount paid, the unrebutted records Omni filed constitute substantial evidence supporting the ALJ's determination regarding credit for the unemployment benefits. While I believe KRS 342.730(5) only provides a credit for unemployment benefits actually received, Miller was compelled to file evidence establishing the net amount since Omni had filed the records supporting the amount purportedly paid on its behalf paid. Since Miller failed to file any evidence supporting an alternative for the unemployment benefits credit, I agree with affirming the ALJ on this issue. However, I believe the majority has overreached in its analysis regarding the gross or net unemployment benefits.

MILLER, MEMBER, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

MILLER, Member. I agree with the decision of the majority in all respects except for its holding regarding the employer credit for unemployment benefits contained in KRS 342.730(5). On this issue, I concur in the result only. I agree with the ALJ's finding awarding a credit to the employer, as Omni met its burden in producing evidence of unemployment benefits paid to Miller.

As the party requesting the credit, Omni had the burden to produce evidence showing entitlement to the credit. American Standard v. Boyd, 873 S.W.2d 822 (Ky. 1994); Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008). Omni met its burden by filing records from the Kentucky Department of Labor, Office of Unemployment Insurance showing amounts paid to Miller on Omni's account. The time frame of receipt of unemployment benefits, March through August 2020, and the time frame in which Miller received TTD benefits, overlapped and that has not been contested.

Miller's evidence on this issue consisted of his testimony at his deposition and at the final hearing. There is no other testimony in the record. Miller testified he received unemployment benefits and it was "about $5,000.00." The credit claimed by Omni and the unemployment benefits Miller received are virtually the same.

Specifically, the issue raised by Miller to this Board is as follows: "Omni failed to prove a credit for unemployment benefits because it did not prove the net after-tax value of those benefits." In this matter, there has been no evidence

of record of the net after-tax value of the unemployment benefits, assuming any taxes were taken out. KRS 341.190(4), the statute regarding confidentiality of employment records, appears to limit what information an employer can receive, so it remains unclear whether an employer can even obtain amounts other than what has been charged to the employer account by the Office of Unemployment Benefits. Here, Omni obtained and filed the records relating to its charges for unemployment benefits paid to Miller. This filing constitutes substantial evidence to support the award by the ALJ.

Since there was no other contrary evidence, the issue of whether an employer would receive a credit for the gross or net unemployment benefits, which overlapped with a period of TTD benefits, is not before this Board at this time and should not be decided. Because there was substantial evidence to support the ALJ's finding regarding the employer credit, I believe our analysis on this claim ends here.

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