Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 12, 2021

CLAIM NO. 201988426

TRACTOR SUPPLY COMPANY PETITIONER

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

PATRICIA WELLS AND
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

BORDERS, Member. Tractor Supply Company ("Tractor Supply") appeals from the October 20, 2020 Opinion, Award, and Order and the November 13, 2020 Orders on Petitions for Reconsideration rendered by Hon. Stephanie Kinney, Administrative Law Judge ("ALJ"). The ALJ determined Patricia Wells ("Wells") suffered work-related right shoulder and cervical spine injuries due to the August 16,

2018 work incident. The ALJ awarded permanent partial disability ("PPD") benefits based on a 15% impairment rating, enhanced by the 3.2 multiplier, temporary total disability ("TTD") benefits, and medical benefits.

Tractor Supply argues the ALJ erred in determining Wells was entitled to the application of the 3.2 multiplier due to Wells being terminated from her employment for falsifying an accident report. Tractor Supply argues the application of this multiplier is contrary to public policy and the holding in the case of Livingood v. Transport, 467 S.W.3d 249 (Ky. 2015). Wells responded to this appeal, seeking KRS 342.310 sanctions against Tractor Supply for failure to pay the unchallenged portion of the PPD award and for prosecuting a frivolous appeal. For reasons set forth herein, we affirm.

Wells testified by deposition on February 6, 2020 and at the hearing held August 25, 2020. Wells began working for Tractor Supply in the receiving/ sorting department on October 25, 2017. Her job duties required her to lift up to 75-100 pounds, unload trucks, and sort pallets. However, she could ask for assistance to lift items weighing approximately 100 pounds. Wells testified she sustained neck and right shoulder injuries on August 16, 2018 while unloading boxes of trailer hitches that weighed approximately 60 pounds. She later experienced right arm pain with "paralysis" and pinching between her neck and shoulder. The paralysis eventually resolved, but her right arm continued cramping. She reported her injury the following day and then sought treatment. She was placed on light-duty work. Wells then returned to work at the same hourly rate but earned less per week because she worked fewer hours.

Wells testified she was terminated after she reported a subsequent trip and fall. She was told she was terminated because she had lied on company documents. Wells denied falsifying any documents. Wells is not currently working and continues to suffer from neck and shoulder issues. She is unable to turn her head while driving and experiences finger numbness when raising her arm. She cannot look up or down for extended periods of time. She stated she cannot return to work with Tractor Supply because lifting with her right arm causes pain in her arm and shoulder.

Allison McCaffrey ("McCaffrey"), who works in human resources for Tractor Supply, testified by deposition on July 21, 2020. She stated Wells worked as a material handler in the receiving department. She removed products from trailers, sorted them, put them on other pallets and assigned them to the right area. She also picked up store supplies and UPS orders and prepared them for shipment. McCaffrey estimated Wells lifted up to 50 to 75 pounds about 20 percent of the time. Other team members assisted with lifting heavier items. She stated that with restrictions of no overhead lifting of 10 to 20 pounds, Wells would still be able to work at Tractor Supply at a comparable wage. Wells continued working in a light-duty capacity through January 28, 2019. McCaffrey stated Wells was terminated for providing false information in an investigation. She stated that if Wells had not falsified that report, she would still be working at Tractor Supply earning the same wage she earned at the time of her injury, but working fewer hours.

Dr. Abigail DeBusk began treating Wells on August 23, 2018. Wells complained of neck, right shoulder, and right arm pain after lifting boxes at work on

August 16, 2018. She also reported a right elbow injury occurring on May 9, 2018. Dr. DeBusk reviewed cervical X-rays that showed mild straightening of the cervical lordosis and C6-7 anterior spurring. Right shoulder X-rays were negative. Dr. DeBusk diagnosed right elbow/arm pain and trapezius muscle spasm. On September 10, 2018, Dr. DeBusk reviewed a right elbow MRI and suspected elbow or lateral epicondylitis. She noted the EMG results were normal but she planned to obtain a repeat study. She diagnosed right side neck pain, right arm pain, and trapezius muscle spasm. On October 31, 2018, Dr. DeBusk reviewed a repeat EMG, which showed right C7 radiculopathy. The studies seemed to correlate with polyneuropathy involving sensory and motor nerves in the right upper extremity. Dr. DeBusk reviewed a cervical MRI, which showed mild mid-cervical disc desiccation and minimal disc bulges with no focal disc herniation or extrusion. Dr. DeBusk returned Wells to work with restrictions of no overhead lifting and no right arm lifting over 10 pounds.

Dr. Rasesh Desai reviewed Wells' cervical MRI and EMG results on November 13, 2018. He felt her symptoms were caused by the C3-4 right-sided disc protrusion. Dr. Desai noted Wells failed physical therapy. He recommended a trial of cervical steroid injections. Dr. Desai diagnosed mild right shoulder impingement and administered a steroid injection. He allowed Wells to return to work with restrictions of no overhead lifting and no lifting over 10 pounds with the right arm. On January 4, 2019, after no reported improvement, Dr. Desai ordered a right shoulder MRI and continued the work restrictions for an additional six weeks.

On February 14, 2019, Dr. Desai reviewed the right shoulder MRI, noting it was suggestive of full-thickness partial width tear of the proximal and mid-aspect of the supraspinatus with mild subdeltoid bursitis and inferior osteophytes formation of the distal clavicle, resulting in mild impingement. On March 1, 2019, Dr. Desai performed an open right rotator cuff repair, distal clavicle excision with subacromial decompression, and acromioplasty with corocoacromial ligament release. On September 12, 2019, Wells reported her right shoulder pain and range of motion had improved, but her neck symptoms persisted. She could not lift over five pounds due to shoulder, arm, and hand pain and numbness. Wells reported no relief following a cervical epidural injection performed four weeks previously. Dr. Desai ordered cervical physical therapy and prescribed medication. He opined Wells was unable to return to work and she had reached maximum medical improvement ("MMI").

Dr. Michael J. Moskal performed an evaluation on January 17, 2019. Wells reported an onset of entire right arm pain and paralysis after going to sleep on August 15, 2018. She awoke without problems on August 16, 2018, then experienced onset of shoulder pain with work activity that day. Dr. Moskal declined to provide opinions concerning the shoulder and elbow until he could review an MRI. In an April 8, 2019 report, Dr. Moskal stated Wells does not have a diagnosis of an injury to the right shoulder girdle. She has the expected age-related diffuse intermediate signal change present in tendons of the rotator cuff. He opined the work event did not the cause her symptom complex. He further stated Wells does not have an elbow diagnosis or condition related to the work event.

Dr. James R. Farrage performed an evaluation on January 23, 2020. He noted a history of a May 9, 2018 right forearm injury after repetitively handling material that resolved without treatment, and work-related neck and shoulder injuries on August 16, 2018 while lifting boxes. Dr. Farrage diagnosed Wells as status-post open right rotator cuff repair acromioplasty with coracoacromial ligament release and distal clavicle excision with subacromial decompression. He noted Wells continues to have issues with pain, restricted range of motion, decreased strength, and impaired functional capacity. Additionally, Dr. Farrage diagnosed cervical degenerative disc disease with right C7 radicular pain. He indicated Wells was at MMI. Dr. Farrage assigned a 12% impairment rating for Wells' right shoulder and a 5% impairment rating for her cervical spine, for a combined 16% impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). Dr. Farrage assigned restrictions of lifting no more than 20 pounds occasionally, 10 pounds frequently, and 5 pounds continuously. He also felt Wells could push/pull 50 pounds occasionally, but should avoid extreme cervical motion and above-shoulder level activity. Dr. Farrage opined Wells does not retain the physical capacity to return to her previous job. Dr. Farrage stated there is no apportionment for pre-existing conditions.

In a March 5, 2020 report, Dr. Moskal indicated he reviewed Dr. Farrage's report. Dr. Moskal disagreed with Dr. Farrage's January opinions. Dr. Moskal opined Wells does not have cervical radiculopathy and impairment related to work at Tractor Supply. Dr. Moskal noted Dr. Farrage's January 23, 2020 document

is internally inconsistent because it inadequately rendered an impairment rating according to the AMA Guides. Dr. Moskal concluded Wells did not sustain a cervical or right shoulder injury. He indicated right shoulder surgery was not reasonable and necessary.

Dr. Ellen M. Ballard performed an evaluation on June 3, 2020. Dr. Ballard diagnosed Wells as status-post rotator cuff surgery, distal clavicular excision, acromioplasty, and coracoacromial ligament release. Dr. Ballard also diagnosed neck pain and a possible cervical strain. Dr. Ballard indicated the problems were due to the August 16, 2018 work injury. Dr. Ballard felt Wells had reached MMI and does not require further medical treatment or diagnostic tests. Dr. Ballard assigned a 10% impairment rating for the right shoulder and a 5% impairment rating for the cervical condition pursuant to the AMA Guides. Dr. Ballard noted Wells likely had pre-existing degenerative conditions in her shoulder. Dr. Ballard assigned restrictions of no overhead work or right arm lifting of more than 10 pounds.

The ALJ entered the following Findings of Facts and Conclusions of Law relevant to this appeal, concerning Wells' average weekly wage pre and post injury, *verbatim*:

> **Average weekly wage and wages upon return to work**
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> The parties were unable to reach a stipulation regarding Wells' preinjury average weekly wage. This ALJ review the limited wage records submitted. Strangely, TCS did not submit a full 52 weeks of wage records prior to Wells' work injury. However, this ALJ reviewed the limited records and calculated Wells' pre-injury average weekly wage. This ALJ reviewed Well's earnings from May 6, 2018 through August 11, 2018, and finds Wells' pre-injury average weekly wage is $606.03.

> Next, the ALJ must determine whether Wells returned to a same or greater wage to determine whether the two multiplier is applicable. To that end, this ALJ reviewed Wells' post-injury earnings from August 18, 2018 through December 1, 2018. These records produced a post-injury average weekly wage of $582.33/week. As such, the two multiplier will not be applicable in this claim because Wells did not return to a same or greater wage.

Regarding the issue of permanent income benefits per KRS 342.730 and the ability of Wells to return to work, the ALJ made the following findings, *verbatim*:

> **Permanent income benefits under KRS 342.730 and ability to return to pre-injury work**
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> This ALJ found Wells sustained a right shoulder and cervical injury and is vested with the responsibility of demining what permanent impairment Wells retains as a result of each injury. After reviewing the evidence, this ALJ finds Wells retains 15% permanent impairment, relying on Dr. Ballard.
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> This ALJ notes Drs. Ballard and Farrage issued similar impairment ratings. They both issued 5% permanent impairment for Wells' cervical injury. However, their ratings differed slightly regarding Wells' right shoulder permanent impairment. This ALJ found Dr. Ballard's rating was most persuasive because she had the benefit of examining Wells' most recently.
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> Next, the ALJ must determine what multiplier Wells is entitled to. Tractor Supply adamantly argues Wells is not entitled to the three multiplier because she was terminated for misconduct or wrong doing. Tractor Supply cited a multitude of scenarios wherein an injured worker's benefits are decreased or barred due to wrong doing. However, none of the cited scenarios are applicable in this claim. Rather, the three multiplier standard is whether Wells retains the physical capacity to perform her pre-injury work. After, reviewing the evidence, this ALJ concludes Wells does not have the

> capacity to perform her pre-injury work. In making this finding, the ALJ relies on Plaintiff's testimony and Drs. Farrage and Ballard's opinions.
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> This ALJ notes Wells' pre-injury work required frequent lifting. Wells testimony establishes she is unable to perform lifting activities that her pre-injury work required. Furthermore, her testimony is supported by Drs. Farrage and Ballard's recommended restrictions. Lastly, Dr. Desai, Wells' treating physician, concluded she was unable to work. As a result, Wells is awarded permanent partial disability benefits at the rate of $193.93/week, beginning on August 16, 2018 and continuing for 425 weeks, suspended during any period of temporary total disability benefits.

Tractor Supply filed a Petition for Reconsideration requesting the ALJ to make additional findings concerning the applicability of the three-multiplier in light of the holding in Livingood v. Transport, supra. In response to Tractor Supply's Petition, the ALJ entered the following findings:

> Defendant requests additional findings regarding the three multiplier under Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015). Livingood held:
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> "Under workers' compensation statute authorizing award of double benefits when a claimant's employment ends after returning to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, reason for cessation of work at the same or greater wage does not need to be related to the disabling injury"
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> The holding in Livingood addressed a claimant's entitlement to the two multiplier when he or she ceased earning a same or greater wage. The holding did not extend to the three multiplier. As a result, no additional findings are warranted.

As the claimant in a workers' compensation proceeding, Wells had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576

S.W.2d 276 (Ky. App. 1979). Since Wells was successful in her burden regarding this claim, we must determine whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise

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

On appeal, Tractor Supply argues the ALJ erred in enhancing the PPD award by the 3.2 multiplier. It argues the Supreme Court held that KRS Chapter 342 evinces a legislative intent that an employee should not benefit from her own wrongdoing and that but for that wrongdoing, Wells would have returned to work at equal or greater wages and the 3.2 multiplier would not be applicable. Tractor Supply argues the holding of the Supreme Court in Livingood, supra, should be extended to cases where the three-multiplier is sought to prevent a worker from benefiting for their own wrongdoing. It argues to do otherwise would violate public policy. We disagree.

Tractor Supply sets forth several examples of specific instances where the Legislature and/or the Supreme Court have determined a claimant's acts may either limit or bar an award. However, none of the cases or statutes specifically apply to a case where the claimant is seeking application of the three-multiplier. In fact, the situations listed by Tractor Supply are very specific and clearly indicate a Legislative intent to address the concerns caused by the acts that the Legislature or Supreme Court felt needed to be addressed in the realm of public policy. No such concerns are addressed by the Legislature or Supreme Court regarding the application of the three-multiplier anywhere in KRS Chapter 342. This leads one to believe if the application of the three-multiplier, in an instance such as we are confronted with in this case, were a matter of public concern, the Legislature or Supreme Court would have addressed it, but they have not.

KRS 342.730 (1)(c)1 and 2 states the following: (c)

1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or

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

As can be seen from a plain reading of the statute, a claimant is entitled to enhancement of benefits by the three-multiplier, pursuant to KRS 342.730(1)(c)1, by proving they "do not retain the physical capacity to return to the type of work the employee performed at the time of the injury".

KRS 342.730 (1)(c)2 applies when an employee returns to work at an equal or greater wage and the employment ceases during the duration of the PPD award. In the situation where the claimant does not retain the physical capacity to return to work but does so, earning equal or greater wages, thereby invoking application of either KRS 342.730(1)(c)1 or 2, the ALJ must then perform an analysis per Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) to determine if the claimant will be able to perform the job at equal or greater wages into the indefinite future.

The ALJ determined Wells never returned to work for Tractor Supply at equal or greater wages, therefore she did not qualify for the application of the two-multiplier contained in KRS 342.730(1)(c)2. She determined the pre-injury average weekly wage was $606.03 and her post-injury average weekly wage was $582.33. This determination was not appealed by Tractor Supply. Therefore, the ALJ properly determined the only issue was whether Wells was entitled to enhancement of her PPD benefits by the three-multiplier pursuant to KRS 342.730(1)(c)1.

In Livingood v. Transfreight, et al., supra, the Supreme Court addressed the issues of entitlement to TTD benefits and entitlement to the two-multiplier. In Livingood, the Court stated as follows:

> The preceding subsection, KRS 342.730(1)(c)1 governs application of the three multiplier and provides: "If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three. By contrast, KRS 342.730(1)(c)2, governing application of the two multiplier, does not include the language, "if due to an injury." "Where the legislation includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that the legislature acted intentionally and purposefully in the disparate inclusion or exclusion." Turner v. Nelson, 342 S.W.3d 866, 873 (Ky. 2011) (citing Palmer v. Commonwealth, 3 S.W.3d 763 (Ky.App. 1999)).
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> In addition, the Court in Livingood held as follows:
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> We conclude that the legislature did not intend to reward an employee's wrongdoing with a double benefit. We hold that KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional,

> deliberate action with a reckless disregard of the consequences either to himself or to another. In the instant case, the substantial evidence of record does not establish that Livingood's conduct was of that nature. Rather, the ALJ concluded that "but for the prior transgressions the pole bumping incident would not have resulted in [Livingood's] termination.

In Livingood, the Court placed significance on the fact KRS 342.730(1)(c)1 included the language "if due to an injury". In the Court's opinion, the use of this language by the Legislature presumes they acted intentionally and purposefully in the inclusion of this language in KRS 342.730(1)(c)1 as compared to the intentional and purposeful exclusion of the same language in KRS 342.730(1)(c)2. This clearly evidences a decision by the Legislature not to include the language in KRS 324.730(1)(c)2. It is clear to this Board that the holding in Livingood concerning the application of the two-multiplier is not inclusive of a situation where the claimant has proven they do not retain the physical capacity to return to work at the job they were performing at the time of the accident as a result of the injury. Therefore, the argument set forth by Tractor Supply fails. This Board is not aware of any statutory authority or case law extending Livingood to KRS 342.730(1)(c)1 and declines to extend the holding based on the facts of this case.

Lastly, Wells has moved for sanctions against Tractor Supply pursuant to KRS 342.310. Wells argues Tractor Supply failed to pay the PPD award without application of the 3.2 multiplier, which it was not challenging, and for bringing a frivolous appeal. This Board ordered Tractor Supply to pay the uncontested PPD benefits and passed the remainder of the Motion to the merits of the appeal. Tractor Supply filed a notice indicating it paid the past due benefits. In addition, this Board

determines that while Tractor Supply was not successful in this appeal, its argument for an extension of the holding in Livingood to include the three-multiplier was prosecuted in good faith, seeking an extension of current case law, which this Board finds does not violate KRS 342.310. Therefore, Wells' request for sanctions is denied.

Accordingly, the October 20, 2020 Opinion, Award, and Order and the November 13, 2020 Orders on Petitions for Reconsideration rendered by Hon. Stephanie Kinney, Administrative Law Judge are **AFFIRMED.** Wells' motion for sanctions is **OVERRULED**.

ALL CONCUR

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