

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 6, 2014

CLAIM NO. 201280644 & 201076161

ANGELA WARREN

PETITIONER

VS.

APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

CUMBERLAND VALLEY DISTRICT HEALTH DEPARTMENT
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Angela Warren ("Warren") seeks review of the December 20, 2013, opinion, order, and award of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") determining she sustained a work-related lumbar injury on June 9, 2010, and a cervical injury on June 22, 2012, while in the employ of Cumberland Valley District Health Department

("Cumberland Valley"). The ALJ awarded permanent partial disability ("PPD") benefits and medical benefits for each injury. The ALJ did not enhance either award. Warren also appeals from the January 17, 2014, order sustaining in part and overruling in part her petition for reconsideration.

Warren was in charge of Cumberland Valley's HANDS program which involved assisting young mothers who are determined to be at risk prior to and after delivery. As a result, she was required to make numerous home health visits. Warren was initially injured on June 9, 2010, while carrying a box of magazines out the back door of her building. Warren testified when she attempted to stop, she felt and heard a pop in her back. She reported the injury and filled out an accident report. Approximately three or four days later, she experienced pain radiating into her left leg and low back. She was initially treated by Dr. Shin who referred her to Dr. William Brooks, a neurosurgeon.

Warren worked approximately three months after the injury, until Dr. Brooks took her off work on September 14, 2010. Temporary total disability ("TTD") benefits were paid for this injury from September 15, 2010, to June 28, 2011. Dr. Brooks performed a diskectomy at the L5-S1 level on March 9, 2011. Pursuant to the 5th Edition of the

American Medical Association, Guides to the Evaluation of Permanent Impairment, Dr. Brooks assessed a 10% impairment for the June 9, 2010, injury.

The injury to the cervical spine was caused by a motor vehicle accident that occurred on June 22, 2012. Dr. Brooks did not assess an impairment rating for this injury. However, after performing an orthopedic evaluation on May 13, 2013, Dr. David Muffly assessed a 12% impairment rating for the lumbar spine injury of June 9, 2010, and a 6% impairment rating for the cervical spine injury of the June 22, 2012, injury.

Cumberland Valley introduced the September 24, 2013, report of Dr. Joseph Zerga and his October 2, 2013, deposition.¹ Warren introduced Dr. Zerga's November 5, 2013, deposition taken as if on cross-examination.

Significantly, in the October 9, 2013, Benefit Review Conference Order, the parties stipulated Warren's average weekly wage ("AWW") for the June 9, 2010, injury was \$1,067.67, and her AWW for the June 22, 2012, injury was \$1,227.20.

¹Two depositions of Dr. Zerga were introduced; one indicating Dr. Zerga was deposed on October 2, 2012, and the other indicating he was deposed on October 2, 2013. It appears the transcripts, though somewhat different, are of the same deposition as Dr. Zerga offers the same opinions in both.

Relying upon the opinions of Drs. Brooks, Muffly, and Zerga, the ALJ found Warren sustained a lumbar injury on June 9, 2010. Relying upon Dr. Muffly's opinion, the ALJ determined the injury resulted in a 12% impairment. Based on Dr. Muffly's opinion, the ALJ concluded Warren sustained a cervical spine injury on June 22, 2012, which resulted in a 6% impairment.

In concluding Warren was not entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1 for the June 2010, injury, the ALJ found as follows:

In addition, based upon the testimony of Dr. Brooks and Dr. Zerga, as previously set forth herein, and more specifically Dr. Zerga, who received a history from the Plaintiff of her specific job duties, and yet opined that she could return to work without restrictions, therefore specifically finding that the Plaintiff does retain the physical capacity to return to the job she was performing for the Defendant Employer at the time of her injury and therefore finds the Plaintiff is not entitled to application of the three time statutory multiplier.

Similarly, in concluding Warren was not entitled to any statutory multipliers for the 2012 injury, the ALJ concluded as follows:

In addition, based on the opinions of Dr. Zerga and Dr. Brooks, both whom opined that Plaintiff could return to work without restrictions, the Administrative Law Judge likewise finds

that Plaintiff does retain the physical capacity to return to work and she was performing at the time of the June 22, 2012, work-related accident and therefore is not entitled to application of any statutory multipliers.

As previously noted, the ALJ entered separate awards for each injury. Although the ALJ acknowledged Warren received TTD benefits, there is no award of TTD benefits.

Warren filed a petition for reconsideration arguing the ALJ incorrectly calculated the award for the 2012 injury. She also argued, as she does on appeal, that the finding she could return to work without restrictions, which is based on the opinions of Drs. Brooks and Zerga, is inconsistent with the entire record. She requested specific findings regarding her restrictions due to the 2010 low back injury and for the ALJ to provide the opinions upon which he relied in making these findings. Warren cited to Dr. Muffly's restrictions and her testimony concerning what she endured in order to return to work after the first injury.

Warren also asserted it was clear she returned to work at a greater wage following the 2010 low back injury and urged an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) was required. Although she asserted entitlement to enhancement by the three multiplier; she also

noted there was no discussion by the ALJ regarding the application of the two multiplier. Warren contended, based on the stipulations, there is no dispute she returned to work at equal or greater wages after the 2010 injury

In overruling in part Warren's petition for reconsideration, the ALJ stated as follows:

That the Plaintiff's Petition for Reconsideration arguing that the Plaintiff is entitled to an application of the three or two time multiplier as a result of her 2010 lumbar spine injury shall be and the same is hereby **OVERRULED**. In finding that the Plaintiff retained the physical capacity to return to the type of work she was performing at the time of the injury the Administrative Law Judge relied upon the opinions of Dr. Zerga and Dr. Brooks both whom opined that the Plaintiff did retain the physical capacity to return to work without restrictions, and further based on the fact that the Plaintiff did in fact return to work subsequent to the September 9, 2010, accident on June 29, 2011, and worked until her second injury of June 22, 2012, performing her normal job duties until the occurrence of her June 22, 2012, work accident.²

On appeal, Warren argues the ALJ erred in not finding she is entitled to the three multiplier pursuant to KRS 342.730(1)(c)1. She concedes there is no question Dr. Brooks released her to return to work without restrictions.

² The ALJ sustained Warren's petition for reconsideration to the extent he amended the award for the 2012 award.

However, she argues there is no question she was not allowed to return to work with restrictions and, at her instigation, Dr. Brooks released her to return to work without restrictions. Warren notes Dr. Brooks acquiesced to her request while at the same time expressing doubt she would be able to continue working. Warren contends Dr. Brooks' October 7, 2013, letter sets out the restrictions applicable to the lumbar spine injury. Warren also contends although Dr. Zerga stated she could return to work without restrictions, he agreed in substance with the restrictions placed by Dr. Brooks.

Warren argues as follows: "[t]here is something inherently unfair in allowing an employer to insist that an employee be returned to work without restrictions, and at the same time argue that she has been allowed to return to work without restrictions." She notes that in her petition for reconsideration, she requested specific findings regarding her restrictions for the low back injury and recitation of the opinions on which the ALJ relied in making these findings. Warren complains that in ruling on her petition for reconsideration, the ALJ merely stated he relied upon the opinions of Drs. Brooks and Zerga that she could return to work without restrictions. Warren maintains this was not the final opinion of either doctor. Therefore,

Warren requests the claim be remanded to the ALJ with directions to reconsider his opinion regarding application of the three multiplier for the 2010 low back injury.

As the claimant in a workers' compensation proceeding, Warren had the burden of proving each of the essential elements of her cause of action, including entitlement to enhanced benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Warren was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine

all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The evidence relating to this issue consists of Warren's deposition and hearing testimony, the records and

October 7, 2013, letter of Dr. Brooks, and the report and depositions of Dr. Zerga.

During her August 26, 2013, deposition, Warren acknowledged Dr. Brooks released her to return to work without restrictions because Cumberland Valley would not allow her to return to work with restrictions. Warren testified Dr. Brooks wanted to impose restrictions but when she checked with her supervisor she was told she would not be allowed to return with restrictions. She returned to work June 29, 2011 and worked until the motor vehicle accident of June 22, 2012. She testified that prior to the motor vehicle accident, she received a letter from Cumberland Valley stating that she was being laid off and her last day of work would be June 22, 2012.

At the October 23, 2013, hearing, Warren testified she was only able to return to work after her back surgery with the aid of disposable heating pads and a back brace. She also took NSAIDS medication. Dr. Brooks provided her with work restrictions but her supervisor told her she could not return with restrictions. Warren testified that at her instruction, Dr. Brooks released her to return to work without restrictions following the 2011 surgery and after the June 22, 2012, motor vehicle accident. On both occasions when she was released to return to work, Warren

indicated she was still having low back pain and numbness and tingling in the left leg.

In a June 16, 2011, note, Dr. Brooks stated as follows: "I have given her a note to return to work without restrictions on 6/20/11. I have released her from my care and will see her on an as needed basis." Dr. Brooks' records also contain a document concerning "work status" dated June 16, 2011, which reflects Warren could return to regular work on June 27, 2011. In addition, Dr. Brooks' September 27, 2012, note reveals the following: "I would anticipate she would be able to return to work without limitations November 1st given her improvement thus far."

The October 7, 2013, letter of Dr. Brooks to Warren's counsel contains the following:

Although I discussed with her restrictions, her employer would not allow her to return with any limitation. She wishes to do so and I acquiesced to that, although, I told her that she needed to be careful with bending, twisting, lifting, etc. I also told her that I was not sure that she would be able to continue. Yet, she wished to do so.

Subsequent to her motor vehicle accident, she had exacerbation of her neck and back. Unfortunately, there is little else to offer her as she did not have a surgically correctable abnormality.

Once again, she wished to return to work. I told her to continue to do so and gave her a return to work slip on 11/01/2012.

Her restrictions that I had mentioned to her were no lifting above 15 lbs., no repetitive bending, lifting, twisting, stooping, and limited stair climbing and driving.

The latter are restrictions that I placed in reference to her lumbar spine.

The September 24, 2013, report of Dr. Zerga merely contains the statement Warren was able to return to work after the June 2010 injury. During his October 2, 2013, deposition, Dr. Zerga testified Dr. Brooks released Warren to return to work without restrictions after the June 9, 2010, injury and following the June 22, 2012, motor vehicle accident. Dr. Zerga testified he believed Warren was able to return to her usual and customary work without restrictions. However, during his November deposition, Dr. Zerga was shown Dr. Brooks' October 7, 2013, letter. The following exchange then took place:

A: I certainly would agree with the no repetitive bending, lifting, twisting, stooping. And limited stair climbing.

Although I do think she could climb stairs. And to put a number on it, maybe once an hour she could climb a flight of stairs.

Driving, in the context of what Dr. Brooks is saying, I don't think he's

saying she can't drive. I think that follows the adjective limited. I think she should be able to stop and stretch every hour, okay, if she could drive.

Q: So you agree with that, in terms of driving being limited, in that respect?

A: I would agree with that; yes, sir. I wouldn't - I think I - I think she could lift a little more than 15 pounds. I think that's a pretty restrictive - pretty high restriction. I - if I was giving her a lifting restriction, I would give her 25 pounds. Okay?

On redirect, the following exchange took place:

Q: Okay. Now, you were asked about a letter that was authored by Dr. Brooks. And it's dated October 7th, 2013. And there in that letter you were read some restrictions that he said he had suggested or would suggest.

My question to you is: Are the records clear from Dr. Brooks that he released her to return to work without restrictions not only after the first injury, but also after the second injury?

A: Certainly there's no documentation that he placed restrictions on her after the first injury. I'm not so sure after the second. If anybody wants to show me -

Q: Okay. Well, these - these records -

A: -- anything to the contrary. I would say that, as far as I know, he didn't state any specific restrictions until that letter that he wrote.

Q: Okay.

A: But he does state restrictions in that letter.

Q: So the -

A: But he states those are due to her back, not due to her neck.

Q: Okay. Here's a date of service, June the 16th, 2011. Angela was seen in follow up and is markedly better. Cymbalta has helped her considerably. I have given her a note to return to work without restriction on June 20th, 2011. I have released her from my care and will see her on an as-needed basis.

Is that clear and unequivocally releasing her to return to work?

A: It is; yes, sir.

Q: And then, as we know, and as the record shows, she did, in fact, return to work and was involved in this second episode.

On the second episode, she was treated - this was for the alleged neck and cervical problems. And this is a date of service, September 27th, 2012. This is about three months after the second.

As was in follow up today, her neck has shown steady improvement. I would anticipate that she would be able to return to work without limitations November 1st, given her improvement thus far. He makes a diagnostic compression of cervical strain resolving. She should be able to return to work first of November.

Is that, again, an unequivocal release to return to work without restrictions?

A: As that letter reads, it is; yes, sir. And as I - and as an emphasis of

what I've previously said, what - what that - as that letter reads, Dr. Brooks indicates he felt any cervical issues are resolving.

Q: Okay.

A: And I don't know of any place in Dr. Brooks' records that he gives her any impairment for her cervical spine.

Q: Now, I asked - I asked you when I took your deposition - I said: With regard to the first injury, that is the back injury of June 9th, 2010, did he release her to return to work without restrictions on June the 20th, 2011?

And you indicated that he had.

And I also asked you if he released her following the automobile accident.

And you indicated that he had.

I asked you: Do you believe that Ms. Warren is able to return to usual and customary work responsibilities without restrictions?

You answered: Yes.

Do you still believe that to be the correct answer?

A: I believe - I believe she could do her job within the restrictions that have been placed. I do believe that she can't do a lot of heavy lifting.

Q: Okay.

A: I do believe she might need to have some relief from sitting. I don't see any indication that she has any restrictions recording [sic] her cervical spine or her upper extremities.

Q: So when Dr. Brooks released her to return to work on each of these occasions, would you have agreed with him at that time?

A: I would have done the same thing Dr. Brooks did.

Q: Okay.

A: Yes.

Q: All right. And the fact of the matter is, she did return to work following the back surgery. She worked a year. And according to the record, she worked - did her usual job. And would that be consistent with him having released her to return to work?

A: Yes.

Q: All right. Irrespective of - of what motivates physicians to give opinions on return to work or not to return to work, can it be assumed that most physicians would not jeopardize the health of their client - of their patient?

A: I think that would be a fair assumption. I think that, you know, we don't live in a [sic] absolute world. But I think if Dr. Brooks was - had significant concern that return to work was going to harm her, I don't think he would have done it.

Q: And have the opinions you've expressed been based on reasonable medical probability or certainty?

A: Yes, sir; they have.

We understand Warren's frustration with the ALJ's findings in both the December 2013 opinion, order, and award and the January 2014 order that Drs. Brooks and Zerga

opined Warren retained the physical capacity to return to work without restrictions. However, the finding by the ALJ in both the December 20, 2013, opinion, order, and award and the January 17, 2014, order are supported by substantial evidence. Warren testified she was released to return to work by Dr. Brooks without restrictions, albeit at her request. Dr. Brooks' records reflect he returned her to work without restrictions on June 20, 2011. Although Dr. Brooks' letter establishes he acquiesced to Warren's request, nevertheless he returned her to work without restrictions. Even though Dr. Brooks provided the restrictions for the lumbar injury, this does not negate the fact that he returned Warren to work without restrictions.

Further, during his October 2, 2013, deposition, Dr. Zerga testified Dr. Brooks stated Warren could return to work without restrictions, and he agreed with Dr. Brooks' assessment. Although Dr. Zerga appears to have retreated from that position at one point during his November 5, 2013, deposition, later in that deposition he again stated Warren could return to work without restrictions. Dr. Zerga also indicated he would have released her to return to work without restrictions and believed, if Dr. Brooks thought returning her to work would

harm her, he would not have done so. Clearly, Dr. Brooks' letter and Dr. Zerga's November 2013 deposition testimony indicate they would impose physical restrictions upon Warren's work activities due to the lumbar injury. However, it is also clear Dr. Brooks' records and portions of Dr. Zerga's testimony reveal Warren could return to work without restrictions.

We emphasize the ALJ may reject any evidence 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. Magic Coal Co. v. Fox, supra; Whittaker v. Rowland, supra; Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Here, the earlier records of Dr. Brooks and Dr. Zerga's testimony in both depositions constitute substantial evidence which supports the ALJ's finding that Warren was returned to work by both physicians without restrictions. The fact that both physicians may have changed their mind on this issue is of no consequence when the prior opinions of Drs. Brooks and Zerga provide substantial evidence to support the ALJ's findings. Since the evidence does not compel a contrary result, the ALJ's determination Warren is not entitled to enhanced benefits by the three multiplier must be affirmed.

That said, the parties' stipulation and Warren's testimony firmly establish she returned to work at equal or greater wages after the June 2010 injury, thus triggering the provisions of KRS 342.730(1)(c)2. Consequently, even though Warren may not currently be working at the same or greater wages, at some point during the 425 week period if her employment at weekly wages equal to or greater than the AWW at the time the 2010 injury ceases due to reasons which relate to the 2010 injury, she is entitled to have her income benefits enhanced by the two multiplier upon a properly filed motion to reopen. Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009); Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). Therefore, the award for the 2010 injury must be vacated and the claim remanded for entry of an amended award requiring enhancement by the two multiplier should Warren qualify for such during the 425 week award. Further, since the parties stipulated Warren received TTD benefits due to the 2010 injury and she underwent surgery during the period TTD benefits were paid, this matter is remanded to the ALJ for the appropriate award of TTD benefits for the June 9, 2010, injury.

Accordingly, those portions of the December 20, 2013, opinion, order, and award and the January 17, 2014,

order ruling on the petition for reconsideration determining Warren is not entitled to enhanced benefits by the three multiplier as a result of the June 9, 2010, injury are **AFFIRMED**. However, the award of income benefits for the 2010 injury is **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award concerning the 2010 injury to the effect Warren is entitled to enhanced benefits pursuant to KRS 342.730(1)(c)2 in conformity with the mandates of Chrysalis House v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra. The ALJ shall also enter an award of TTD benefits for the June 9, 2010, injury.

ALL CONCUR.

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