Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 17, 2015

CLAIM NO. 201282921

BLUEGRASS OAKWOOD PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

LORETTA WHITAKER and
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING & REMANDING

* * * * * *

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

ALVEY, Chairman. Bluegrass Oakwood ("Oakwood") appeals from the Opinion and Award rendered December 24, 2014 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") awarding Loretta Whitaker ("Whitaker") permanent total disability ("PTD") benefits and medical benefits for work-related injuries sustained on May 18, 2012 and April 29,

2013. Oakwood also seeks review of the March 17, 2015 Order on Petition for Reconsideration.

On appeal, Oakwood argues the ALJ did not properly consider Whitaker's pre-existing disability in determining she is permanently and totally disabled due to the 2012 and 2013 injuries. We vacate and remand for additional findings of fact.

Whitaker filed a Form 101 alleging she injured her back on two occasions while working as a residential associate for Oakwood. On May 18, 2012, Whitaker alleged she injured her back while assisting a patient suffering from a seizure. Likewise, Whitaker alleged she injured her back on April 29, 2013 while assisting a patient who fell from his bed.

Whitaker testified by deposition on July 1, 2014 and at the final hearing held October 29, 2014. Whitaker was born on March 13, 1966 and resides in Somerset, Kentucky. She completed high school and received training at Oakwood. She has no other specialized or vocational training. Whitaker's employment history includes work at several fast food restaurants, as a nursing aide assisting elderly patients, as a sewing machine operator, in "quality assurance" for a manufacturer of automotive aluminum rims, as a patient care aide assisting the mentally challenged, as

a manager of a gas station, and as a clerk for a tobacco shop.

Whitaker began working as a residential associate for Oakwood, a facility providing care for the mentally challenged, on May 16, 2006. Whitaker was involved in all aspects of patient care. On May 18, 2012, Whitaker testified she was assisting a patient to use the bathroom when he began suffering seizures, causing both of them to fall to the ground. Whitaker testified she felt immediate pain in her lower back. Whitaker was driven to the emergency room at Lake Cumberland Hospital the same morning. She received conservative treatment at Urgent Care, with Dr. Yasser Nadim, and at PT Pros.

Whitaker testified she was restricted from work until October 5, 2012. Her benefits then ceased and the workers' compensation insurer denied additional medical treatment. At the hearing, Whitaker explained Dr. Nadim had released her to return to work. Whitaker returned to a sitting position at Oakwood, earning the same rate of pay, for three or four weeks. Thereafter, she returned to her regular job as a residential associate despite her pain and difficulty with lifting.

Whitaker continued to work until April 29, 2013, when a patient jerked her while she assisted him into his

bed. Whitaker stated she felt immediate pain and a burning sensation in her lower back. Her symptoms were in the same area of her back as the May 2012 incident, but worsened following the April 2013 incident. Whitaker went to the emergency room at Lake Cumberland Hospital. She returned to Urgent Care and Dr. Nadim for treatment, which included physical therapy and injections. Dr. Nadim referred her to pain management, and recommended a series of injections. The workers' compensation insurer approved only one of the injections. Thereafter, Whitaker stopped receiving treatment because it was denied in early October 2013, and she could not afford it on her own. To her knowledge, Dr. Nadim has not released her to work. Whitaker would like to resume treatment for her continuing symptoms, which include low back pain radiating into both legs, and numbness throughout her groin area and left leg. Whitaker stated she did not experience or receive treatment for these symptoms prior to her accidents at Oakwood. Whitaker does not believe she can return to her former job with Oakwood since she has not been released by her physician.

Whitaker acknowledged she injured her "neck and shoulder" in 1998 while working for a manufacturer of aluminum rims, Hayes Lemmerz, and filed a workers' compensation claim. Whitaker treated with Dr. Harold

Rutledge, a pain management physician, and Dr. Rodney Oakes, her family physician. Whitaker stated Dr. Oakes took over her care in the early 2000's, and prescribed Lorcet, Flexeril, and Celebrex for her 1998 injury. Whitaker acknowledged Dr. Rutledge assessed an impairment rating for her 1998 injury, but did not recall the specific percentage. Likewise, she could not recall whether permanent restrictions were assigned by Dr. Rutledge or Mr. David Escobar, MS, PT, the physical therapist who conducted a functional capacity evaluation ("FCE"). Whitaker explained she was eventually terminated from her job at Hayes Lemmerz explaining, "[t]hey give you a timeline that you had to be 100 percent back to capacity of being able to work. And I did not meet their guide - - guideline. . ."

Whitaker acknowledged she signed an Oakwood written job description for a residential associate in May 2012, which outlines the requirement of lifting twenty to fifty pounds frequently and over fifty pounds occasionally. Whitaker insisted she was unaware of any permanent restrictions assigned by Dr. Rutledge or by Dr. Escobar at the time she was hired by Oakwood in 2006, and further stated Oakwood did not require a physical examination upon her hire. However, Whitaker acknowledged she was actively

taking prescription medication for her 1998 injury at the time she was hired by Oakwood in 2006.

The parties filed the records of Dr. Nadim from May 29, 2012 through June 28, 2013. Whitaker treated with Dr. Nadim beginning May 29, 2012 for lumbar pain radiating into her legs following the May 18, 2012 incident. Dr. Nadim diagnosed lumbago. He ordered diagnostic studies, recommended physical therapy, and administered three injections to the right sacroiliac joint. The August 9, 2012 lumbar MRI revealed degenerative disc changes in L2-3 and L5-S1. Whitaker returned to Dr. Nadim on May 13, 2013, complaining of recurrent lumbar pain radiating down both legs following the April 29, 2013 accident. Dr. Nadim diagnosed back pain and disc disease. He administered a trigger point injection and ordered a new lumbar MRI. The April 28, 2013 MRI showed mild discogenic degenerative changes most notable at L2-3, non-acute wedging of multiple vertebral bodies and kyphosis consistent with Scheuermann's disease.

Oakwood filed the September 19, 2012 and October 16, 2013 reports from Dr. Richard Sheridan. The September 19, 2012 report addresses the lumbar complaints due to the May 2012 incident only. Dr. Sheridan concluded Whitaker had reached maximum medical improvement ("MMI") and assigned no

permanent restrictions. He likewise assessed a 0% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Dr. Sheridan re-evaluated Whitaker on October 16, 2013. In his report he reviewed both alleged injuries to her lumbar spine, as well as a previous neck/shoulder injury in 1998 and 2010. Dr. Sheridan concluded Whitaker had reached MMI regarding her low back complaints. He again declined to assign permanent restrictions and assessed a 0% impairment rating pursuant to the AMA Guides.

Oakwood filed the July 22, 2014 report of Dr. John Vaughan, who addressed both alleged work injuries. He also noted Whitaker reported prior neck injuries occurring in 1998 and 2010. Dr. Vaughan diagnosed Whitaker with thoracolumbar Scheuermann's disease based upon the diagnostic studies, a pre-existing, active condition. Dr. Vaughan assessed a 5% impairment rating for the pre-existing active condition pursuant to the AMA Guides, and no additional impairment attributable to her alleged 2012 or 2013 injuries.

Dr. Vaughan stated Whitaker had pre-existing functional limitations based upon his review of a 1999 FCE, which included no lifting greater than thirty pounds. Dr.

Vaughan stated her restrictions have not changed since the alleged 2012 and 2013 work injuries. He opined Whitaker's alleged work injuries would not prevent her from returning to her former job at Oakwood. Any need for ongoing treatment to Whitaker's back is for the pre-existing active condition.

In a September 9, 2014 supplemental report, Dr. Vaughan stated the two MRI findings on August 8, 2012 and June 28, 2013 are consistent with chronic Scheuermann's disease, which existed prior to her work injuries. He further disagreed with the opinions of Dr. James Owen, including his use of the range of motion method in assessing Whitaker's impairment rating. He reiterated Whitaker had a 5% impairment rating both before and after her May 2012 work injury. He stated Whitaker's back pain was a pre-existing active condition based on her extensive treatment with Dr. Oakes.

Oakwood also filed the report of Dr. Christopher Brigham. He reviewed and critiqued the 23% impairment rating assessed by Dr. Owen, arguing the range of motion method should not have been used in Whitaker's case. Rather, he opined the diagnosis-related estimate is the most appropriate method, which would result in a 6-8% impairment rating pursuant to the AMA Guides.

Whitaker filed Dr. Owen's May 9, 2014 Form 107-I report. He reviewed the May 2012 injury, the April 2013 injury, and noted a June 2013 MRI showed two bulging discs and annular tear. He also discussed her prior neck injuries in 1998 and 2010. Dr. Owen diagnosed the following:

> Chronic pain felt to be associated with both discogenic pain from level of L2-L3 as well as L5-S1, but also associated with multiple vertebral body endplate irregularity wedging between T11-T12, T12-L1, and L1-L2. So, three levels of wedging associated with persistent non-verifiable radiculopathy symptomatology and clearly positive straight leg raise.

Dr. Owen opined Whitaker's injury caused her complaints. He noted the MRI demonstrates there was a significant injury on the second accident causing wedging, and the L2-L3 and L5-S1 problems were there from the initial injury. Dr. Owen found Whitaker had a pre-existing condition. Dr. Owen assessed a 23% impairment rating using the range of motion method pursuant to the AMA Guides, attributing 5% to a pre-existing, active condition. Therefore, the "total whole person impairment attributable to two work-related accidents in April 2013 and May 2012 would be 18%" pursuant to the AMA Guides. Dr. Owen opined Whitaker is not at MMI, stating she needs pain management and recommended review by a neurosurgeon. Dr. Owen stated Whitaker does not retain the physical capacity to return to

the type of work performed at the time of injury. He restricted her from lifting, handling, or carrying objects weighing over twenty pounds and to avoid recurrent bending, squatting or stooping.

Oakwood filed the medical records from Drs. Rutledge and Oakes generated as a result of the April 1998 injury. Whitaker treated with Dr. Rutledge on nearly ten occasions from November 16, 1998 through October 22, 1999 for neck and right shoulder pain due to a work injury. Dr. Rutledge prescribed medication, administered a cervical epidural injection and at least two trigger point injections. He also recommended an FCE and restricted Whitaker from lifting over twenty pounds in February 1999, but did not indicate whether the restriction was permanent or temporary. On October 22, 1999, Dr. Rutledge diagnosed Whitaker with chronic cervical myofascial pain syndrome, chronic lower right thoracic myofascial pain syndrome appearing to be subscapular, an affective component with anxiety and sleep disturbance secondary to chronic pain. He stated Whitaker had reached MMI and is unable to return to her former job at Hayes Lemmerz, which required lifting thirty to forty pound wheels. Dr. Rutledge assessed a 23% impairment rating, with 15% for chronic pain, 5% for the affective condition and 3% for sleep disturbance using the

4th Edition of the AMA Guides. Dr. Rutledge stated the FCE "was a valid representation of her present physical conditions . . . . It was the opinion of the FCE that she could not perform her previous physically requiring duties. This has been my subjective opinion all along."

Dr. Oakes took over Whitaker's care with regard to the 1998 injury in 2001. Dr. Oakes treated Whitaker approximately every four months until her May 2012 work injury. He consistently diagnosed chronic cervical and right lower thoracic myofascial pain syndrome, and prescribed Lorcet, Flexeril and Celebrex. The prescription of Cymbalta was added in June 2011. Following the 2012 and 2013 work accidents, Dr. Oakes continued to prescribe Lorcet, Flexeril, Celebrex and Cymbalta through March 2013 for her previous injuries on the condition that she would not accept opioid pain medication though her other treating physicians.

Finally, Oakwood filed the July 28, 1999 FCE prepared by David Escobar, MS, PT. He found Whitaker could occasionally lift no more than 17 pounds above the shoulders, 25.8 pounds desk to chair, and 32.4 pounds chair to floor due to limitations in her right shoulder.

A benefit review conference ("BRC") was held on September 9, 2014. The BRC order reflects the parties

stipulated Whitaker allegedly sustained injuries to her low back on May 18, 2012 and April 29, 2013. The parties stipulated Oakwood paid Whitaker temporary total disability ("TTD") benefits from May 19, 2012 to September 25, 2012 and again from April 30, 2013 through August 9, 2013. The parties stipulated Whitaker's average weekly wage was $532.40. The parties listed benefits per KRS 342.730, unpaid or contested medical expenses, exclusion for pre-existing disability/impairment and TTD as contested issues.

In the December 24, 2014 opinion, the ALJ summarized the medical and lay evidence, including the records pertaining to Whitaker's 1998 injury. The ALJ found Oakwood had waived its right to contest the impairment rating assessed by Dr. Owen and failed to plead the affirmative defense of unreasonable failure to follow medical advice in a special answer. The ALJ then provided the following findings of facts and conclusions of law:

WHOLE PERSON IMPAIRMENT

> It is appropriate to ascertain Plaintiff's WPI rating. Two ratings are available – Plaintiff's Dr. Owen's 18% and Defendant's Dr. Vaughan's 5%. Dr. Vaughan indicated he would have assessed a 5% WPI before Plaintiff's work incidents and 5% following her work incidents, consequently, he attributes no WPI to Plaintiff's two work incidents. Based upon Plaintiff's credible testimony, and the input of Dr.

Owen, it is clear Plaintiff experienced an increase in her WPI as a result of her May 2012 and April 2013 work incidents. Consequently, Dr. Owen's 18% WPI most accurately reflects the consequences of Plaintiff's two work incidents. It is determined Plaintiff sustained an 18% WPI as a result of her two work incidents.

PERMANENT TOTAL DISABILITY

Plaintiff claims to be permanently totally occupationally disabled as a result of her two work incidents.

KRS 342.0011 (11) (C) "permanent total disability" is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. There is no question Plaintiff has a permanent disability rating.

As used in the above definition, "work" is statutorily defined as meaning, providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011 (34).

So as to determine if an injured worker's occupational status fits within the above definitions, an assessment must be made based upon the factors set forth in *Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky., 2000)*. These factors include the worker's age, education level, vocational skills, post—injury medical restrictions, and the likelihood he could resume some type of "work" under normal employment conditions. The following analysis is made.

AGE: At the time of her work incidents Plaintiff was approximately 47 years old. This age is on the cusp of whether it is a minus factor in determining whether she is permanently totally occupationally disabled. Plaintiff's age has little significance when determining whether Plaintiff is Permanently Totally Disabled.

EDUCATION: At the time of her work injuries the extent of Plaintiff's formal education was high school graduate. This formal education was some time ago completed. The extent of Plaintiff's education suggests she is permanently totally occupationally disabled.

VOCATIONAL SKILLS: Plaintiff has worked as an aide and/or assistant in residential care facilities. She has also worked as a server at a Frisch's restaurant, a production worker in the T-shirt department of Fruit of the Loom, a biscuit maker and order taker at Hardee's restaurant, and, performing quality checks on tire rims. To perform these particular jobs the needed skill is manual labor. It appears Plaintiff does not have any transferable vocational skills. It also appears that as a result of her work injuries she does not retain the skill of providing manual labor. The very limited extent of Plaintiff's vocational skills strongly suggest she is permanently totally occupationally disabled.

POST-INJURY MEDICAL RESTRICTIONS: Based upon Plaintiff's credible testimony she is substantially limited in what tasks she can do. Dr. Owen, after being told the physical requirements of the type of work she was performing when injured, opined Plaintiff did not retain the physical capacity to return doing the

type of work she was doing when injured. He suggested the following restrictions, "lifting, handling, carrying objects less than 20 pounds and avoidance of activity that required recurrent bending, squatting, or stooping." When Plaintiff's credibly-described limitations are coupled with Dr. Owen's restrictions, it is apparent Plaintiff's post-injury restrictions substantially limit her employment potential.

LIKELIHOOD OF RESUMING SOME TYPE OF WORK: When attempting to ascertain Plaintiff's current occupational status, using the above criteria as set forth in *Watson*, it becomes apparent it is unlikely Plaintiff could resume doing some type of "work" on a regular and sustained basis in a competitive economy. She lacks a quality education, totally lacks transferable occupational skills, is substantially restricted and limited in what tasks she can physically perform; consequently, it is determined Plaintiff is permanently totally occupationally disabled.

PRE-EXISTING IMPAIRMENT

Defendant raises the question of whether there should be a carve-out from Plaintiff's WPI rating for a pre-existing active condition. The burden of proving the existence of a pre-existing active condition falls upon the employer.

As set forth in *Roberts' Brothers Coal Company v. Robinson, 113 S.W.3d 181 (Ky., 2003)* there is a distinction between "impairment" and "disability". For there to be an active pre-existing condition, such must be impairment ratable pursuant to the AMA Guides and symptomatic immediately before Plaintiff's work incidents. In light of

> the fact Plaintiff was working full time, without limitation, and on a regular basis, it cannot be said she had an active impairment immediately before her work incidents. Consequently, it is not appropriate to find a pre-existing active condition.
>
> MEDICAL BENEFITS
>
> In addition to her entitlement to indemnity benefits, Plaintiff is entitled to receive from Defendant all reasonable and necessary medical treatment needed for the cure and/or relief from the effects of her work-related low back injuries.

The ALJ awarded Whitaker PTD benefits commencing on April 30, 2013, with Oakwood entitled to a credit for TTD benefits already made, and medical benefits.

Whitaker filed a petition for reconsideration arguing she is entitled to permanent partial disability benefits for her May 18, 2012 injury, in addition to PTD benefits beginning on April 29, 2013 as awarded by the ALJ.

Oakwood also filed a petition for reconsideration raising several arguments. Relevant to this appeal, Oakwood also argued, "It was patent error for the 'Pre-Existing Impairment' analysis to use an incorrect standard." It argued the ALJ's analysis suggests the mere fact one is working regularly precludes a finding of pre-existing impairment, and rendered the medical and lay evidence to the contrary irrelevant. Oakwood requested more specific

findings as to pre-existing impairment and/or disability to enable meaningful appellate review. Specifically, it requested the ALJ "analyze the weight and credibility of the evidence mentioned in paragraph iii.,[1] and specifically weigh the impact which Dr. Rutledge's pre-existing restrictions have upon the Plaintiff's ability to perform manual labor both before the dates of injury."

In the March 17, 2015 Order on Petition for Reconsideration, the ALJ overruled in part and sustained in part Oakwood's petition. The ALJ first determined he erred in finding Oakwood had waived its right to challenge Dr. Owen's assessment of impairment, and clarified his summary of Dr. Brigham's opinion. After noting the proper interpretation of the AMA Guides is a medical question, but the selection of a rating is a factual determination solely within the ALJ's role, and reviewing applicable case law, the ALJ stated as follows:

> It is clear, whether the ROM or DRE method is utilized. Plaintiff has a WPI as a result of her May 18, 2012 and/or her April 29, 2013 work incidents. Therefore, whether one chooses to utilize Dr. Owens' 18% or Dr. Brighham's 6 – 8%, it is clear Plaintiff has a permanent impairment rating which is to

[1] Paragraph iii identified as evidence Dr. Oakes' treatment records, the finding of pre-existing, active impairment by both Drs. Vaughan and Owen, Dr. Rutledge's prior work restrictions and impairment rating assessed in October 1999, the prior FCE and the fact her previous employer, Hayes Lemmerz, could not accommodate her restrictions.

> be used to ascertain whether Plaintiff is totally permanently occupationally disabled.
>
> Because Plaintiff does have a permanent disability rating as a result of either her 2012 work incident and/or her 2013 work incident, the first requirement of determining whether Plaintiff is permanently totally occupationally disabled is satisfied. (KRS 342.0011 (11) (c), (35) and (36)).
>
> Having a permanent disability rating one may proceed to address whether Plaintiff is permanently totally occupationally disabled. In Pages 11 through 14 of the Opinion this issue was addressed, the determination Plaintiff is Permanently Totally Disabled will not be revised.

After declining to reconsider his conclusions regarding the extent of Whitaker's education and vocational skills, the ALJ made the following additional findings of fact regarding pre-existing disability:

> Defendant next seeks reconsideration of whether Plaintiff had a pre-existing impairment and/or disability. When considering whether one is permanently totally occupationally disabled, the workers' prior "disability", not "impairment" is the controlling factor. As noted in *Robert Bros. Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003) an exclusion from a PTD award must be based upon pre-existing "disability", while an exclusion from a PPD award must be based upon pre-existing "impairment."
>
> In *Roberts Brothers Coal Co*., supra it was indicated: If the worker, immediately prior to the work injury, was able to fully perform her job, then she did not suffer from a pre-existing

> disability. Herein Plaintiff testified she returned to full-duty and unrestricted work following her 2012 work incident. She returned to "the floor and my job." (FH p. 13). In the Defendant's discovery deposition Plaintiff testified that following her 2012 work incident, she returned to her pre-2012 full-duty work. (Depo. p. 28). Based upon this testimony it was determined Plaintiff did not have a disability prior to her 2013 work-incident.
>
> A review of the section of the Opinion titled PRE-EXISTING IMPAIRMENT (page 14) reveals an erroneous mixing of the words "impairment" and "disability", therefore, where the word "impairment" is written, it is now replaced with the word "disability".

The ALJ then made the additional finding Whitaker attained MMI from the May 2012 injury on September 19, 2012, based upon the September 19, 2012 report of Dr. Sheridan, and is therefore entitled to TTD benefits during this time period. Therefore, the ALJ substituted the word "impairment" with the word "disability" in the section of the opinion titled 'Whole Person Impairment" and determined Whitaker attained MMI following the May 2012 injury on September 9, 2012.

In overruling Whitaker's petition for reconsideration, the ALJ noted the following:

> A review of the available pertinent medical proof indicates Dr. Brigham only focused on Dr. Owens' May 2014 Form 107. In Section 8, titled CAUSATION, Dr. Owen

> indicated, "If the MRI image is correct then there was a significant injury on the second accident causing the wedging." Then, under the "IMPAIRMENT" section, he found (whether correctly or not) an 18% WPI rating, and wrote, "Therefore, total whole person impairment attributable to the two work-related accidents in April 2013 and May 2012 would be 18%." Dr. Owen never apportioned the degree of impairment due to Plaintiff's 2012 injury and her 2013 injury.
>
> Based upon the available proof, the extent, if any, of Plaintiff's WPI impairment resulting from her 2012 work incident cannot be determined; consequently, Plaintiff's petition is overruled. Plaintiff is not entitled to a PPD award for her 2012 injury, she is entitled to only TTD benefits as above set forth. Plaintiff's petition on this point is overruled.

The ALJ amended the award to reflect Whitaker was entitled to TTD benefits from May 19, 2012 through September 19, 2012 only as a result of the 2012 injury. With regard to the 2013 injury, the ALJ awarded Whitaker PTD benefits commencing on April 29, 2013 for the April 29, 2013 injury, with Oakwood entitled to a credit for payments of TTD benefits already made.

On appeal, Oakwood argues the ALJ did not give enough weight to the evidence regarding Whitaker's previous injury, resulting restrictions and impairment rating, in determining she did not have a pre-existing disability prior to her 2013 work-incident. Oakwood alleges "the ALJ also

erroneously put dispositive weight into the view that [Whitaker] was working in her job 'fully,' and on that basis ignoring compelling evidence that [Whitaker] had a pre-existing disability." Oakwood distinguishes Roberts Bros. Coal v. Robinson, 113 S.W.3d 181 (Ky. 2003) to the claim *sub judice*, pointing out Robinson was working without restriction at the time the work-related injury was sustained while Whitaker was working under restrictions at the time of the 2012 and 2013 work accidents. Oakwood emphasizes an analysis regarding total disability necessarily includes the factor whether the worker's physical restrictions will interfere with vocational capabilities. Oakwood argues evidence, i.e., the fact that Whitaker had previously been assigned a permanent impairment rating and restrictions in 1999, compels a finding of a pre-existing disability. In the alternative, Oakwood argues the ALJ misinterpreted Robinson as holding if a worker, immediately prior to the work injury, was able to fully perform her job, then she did not suffer from a pre-existing disability.

As the claimant in a workers' compensation proceeding, Whitaker had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). However, Oakwood had

the burden of proving Whitaker had a pre-existing active disability which should be carved out of the award of PTD benefits. Since Oakwood was unsuccessful on this issue before the ALJ, 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). That said, because we vacate the ALJ's decision in its entirety, the ALJ is directed to determine as directed below.

This Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). We note in order to properly address the argument regarding the pre-existing active disability we must review the entirety of the ALJ's decision. The ALJ did not make specific findings regarding each of the alleged injury dates.

We vacate and remand for additional findings of fact regarding each of the alleged injury dates. In the Form 101, and as stipulated by the parties in the BRC order, Whitaker has alleged two separate and distinct injuries to

her low back. The first occurred on May 18, 2012, and the second on April 29, 2013. However, the ALJ failed to separately address each of her "work injuries" in the opinion and order on reconsideration. Therefore, on remand, the ALJ is directed to address each alleged injury to determine whether Whitaker sustained an injury. If he so determines Whitaker sustained an injury on either or both dates, he must then determine whether the injury was temporary or permanent, and the duration of entitlement to income benefits, if any. Likewise, the ALJ must determine the average weekly wage applicable on each injury date in order to properly base his decision. We do not direct any particular result, and the ALJ may make any determination supported by the evidence. The ALJ is directed to provide a basis for his decision which would permit meaningful review.

In the event the ALJ determines one or both of her alleged work injuries resulted in partial disability, the ALJ must determine whether Whitaker had a symptomatic and impairment ratable pre-existing condition immediately prior to the occurrence of the work-related injury pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In the event the ALJ affirms his finding of total disability as a result of one of her work injuries, the ALJ is directed to make additional findings of fact addressing

whether Whitaker had a pre-existing active disability, particularly in light of Oakwood's request in its petition for reconsideration.

In Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, (Ky. 2003), the Kentucky Supreme Court distinguished between pre-existing impairment and pre-existing disability. The Court held a finding a claimant had a pre-existing impairment was not synonymous with a finding of a pre-existing disability. Id. at 183. The Court explained there should not be a carve out from a total disability award for pre-existing impairment if there was no pre-existing disability. Id.

> . . . .[A]wards under KRS 342.730(1)(a) continue to be based upon a finding of disability. In contrast, an award of permanent partial disability under KRS 342.730(1)(b) is based solely on a finding that the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding

> of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a). Id.

We agree with Oakwood the ALJ misstated the holding of Roberts when he stated the Court indicated, "If the worker, immediately prior to the work injury, was able to fully perform her job, then she did not suffer from a pre-existing disability." Rather the Court stated a finding of pre-existing disability is not compelled when an individual, who has a pre-existing impairment, is working *without restrictions* at the time a work-related injury is sustained. Id. In this instance, the ALJ failed to address or discuss the impact of the prior medical records and FCE from the 1998 injury, which indicate permanent restrictions and an impairment rating were assigned, in his determination of no pre-existing disability, despite Oakwood's request to do so in its petition for reconsideration. This is especially true because Whitaker continued to treat for ongoing conditions at the time of the 2012 injury. Therefore, on remand, if the ALJ determines Whitaker is totally disabled, his analysis of pre-existing disability must include a discussion of the medical records pertaining to the prior 1998 injury, ongoing medical treatment, any prior permanent restrictions and impairment, and their

impact on his ultimate determination. Again, we do not direct any particular result, and the ALJ may make any determination supported by the evidence.

Therefore, the December 24, 2014, Opinion and Award and the March 17, 2015 Order on Petition for Reconsideration by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby **VACATED,** and **REMANDED** to the ALJ for entry of an amended opinion and award containing additional findings of fact as to each alleged injury, including whether Whitaker sustained an injury, temporary or permanent, on each alleged date. If the ALJ determines Whitaker sustained an injury on either date, he must determine entitlement to any income benefits, temporary or permanent, and medical benefits to which she may be entitled. The ALJ must also determine whether Whitaker had a pre-existing condition, which is dependent on whether she is partially or totally disabled.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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