Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 20, 2016

CLAIM NO. 201402277

BLUEGRASS ORTHOPAEDICS & HAND
CARE P.S.C PETITIONER

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

ANGELA SUMRALL
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART
AND REMANDING
* * * * * *

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

RECHTER, Member. Bluegrass Orthopaedics & Hand Care P.S.C. ("Bluegrass") appeals from the October 20, 2015 Opinion and Order and the December 1, 2015 Order on Petition for Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). Bluegrass argues the ALJ

erred in finding Angela Sumrall ("Sumrall") sustained a work-related cumulative trauma injury, erred in finding notice was properly given, erred in awarding temporary total disability ("TTD") benefits, and erred in enhancing permanent partial disability ("PPD") benefits by the three multiplier. For the reasons set forth herein, we affirm in part, vacate in part and remand.

Sumrall testified by deposition on April 2, 2015 and at the hearing held September 1, 2015. Sumrall holds a Bachelor of Science degree in nursing and a current nursing license. Her employment history includes work as a phlebotomist, research study assistant, medical clinic office manager, and operating room nurse. Sumrall has been employed by Bluegrass since 2010 as an operating room nurse. Her duties include preparing the operating room, pushing stretchers holding patients, positioning patients for surgery, and lifting, positioning, and cleaning equipment and instruments weighing up to sixty pounds. Her work requires frequent repetitive bending, reaching, pulling, lifting, and holding her head in awkward positions.

Sumrall began to have soreness in her neck at the end of her shifts in October, 2012. She initially thought

she had pulled a muscle in her neck. She was treated conservatively by Dr. Dirk Franzen, who owns an interest in Bluegrass. The treatment provided some relief. Sumrall continued to work and began to experience increased pain in her neck and shoulders. Dr. Franzen obtained a cervical MRI in February, 2014 and recommended fusion surgery. Sumrall reported her neck injury and treatment to her supervisor.

Sumrall continued to work full time performing her regular duties until fusion surgery was performed on November 17, 2014. She was off work for two months following surgery, then returned to modified duty completing paperwork. Sumrall received the same pay while working on restricted duty. She began transitioning to regular duties two weeks prior to the hearing. Based upon her most recent evaluation, she had been granted a raise. Raises are based upon performance. She received a raise during each year of her employment at Bluegrass. Sumrall testified she continues to have constant neck pain and is unable to turn her head to the right because the muscle on the left side of her neck is tight. The tightness makes her entire neck sore. Sumrall did not know whether she would be able to continue to do her job.

Sumrall submitted the March 6, 2014 treatment note of Dr. D. Paul Harries. Sumrall complained of left sided neck pain gradually increasing over the last eighteen months. Dr. Harries noted a global reduction in range of motion of the cervical spine and diffuse left cervical facet tenderness to palpation at C4-5, C5-6, and C6-7. A February 18, 2014 MRI revealed degenerative changes and disc bulges at all three levels. Dr. Harries diagnosed chronic pain syndrome and cervical spondylosis without myelopathy.

Dr. Jules Barefoot performed an independent medical examination ("IME") on March 18, 2015. He diagnosed status post multilevel anterior cervical fusion. Using the range of motion model, Dr. Barefoot assigned a 26% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), attributable to her work-related activities. He noted her work frequently required her to position, lift, pull and push patients of considerable weight. Dr. Barefoot indicated these work-related activities proximately caused her cervical pain that ultimately led to her anterior cervical fusion. Although she may have had underlying degenerative disc

disease in her cervical spine, Dr. Barefoot concluded Sumrall's work-related activities brought the condition into its active, symptomatic disabling reality. Dr. Barefoot restricted Sumrall to occasionally lifting or carrying a maximum of forty pounds and frequently lifting or carrying twenty-five pounds. He noted she would have difficulty with any activity that requiring repetitive flexion, extension or rotation of her head.

Bluegrass submitted the report of Dr. Shelley Freimark who conducted a medical records review on May 20, 2014. Dr. Freimark opined Sumrall's neck pain is related to a multilevel degenerative process. Dr. Freimark believed nothing in her job description was repetitive enough to cause any of the findings on her MRI or to cause her symptomatic complaints.

Bluegrass submitted the June 5, 2015 report of Dr. Franzen. He began treating Sumrall on October 16, 2012. Dr. Franzen diagnosed cervical spondylosis and myofascial pain. He indicated Sumrall's condition was not related to her work, and attributed the condition to normal degenerative aging of the cervical spine. Dr. Franzen was critical of Dr. Barefoot's report, noting there was no substantive discussion or support to explain how her

condition was caused by her job. Dr. Franzen further noted Dr. Barefoot is board certified in emergency medicine and has no particular training or expertise in evaluating and managing degenerative problems of the spine.

Bluegrass submitted the report of Dr. John Vaughan who performed an IME on May 20, 2015. Sumrall complained of left-sided pain and torticollis of the neck. She gave a history of painful symptoms beginning in October 2012. Dr. Vaughan diagnosed a cervical disc herniation at C4-C5, C5-C6, and C6-C7, status post anterior cervical discectomy and fusion. He opined the cervical condition was caused by genetic predisposition, 44 years of aging, and environmental stressors throughout her life. Dr. Vaughan placed Sumrall in DRE Category IV and assigned a 26% impairment rating pursuant to the AMA Guides. He restricted her to lifting no more than 30 pounds. Sumrall reached MMI on April 15, 2015 when Dr. Franzen released her.

After reviewing the evidence, the ALJ found Sumrall's work duties were repetitive in nature and aggravated her pre-existing dormant cervical degenerative disc disease into symptomatic and disabling reality. The ALJ determined Sumrall gave due and timely notice, noting

she was not informed by a physician that her cervical condition was due to work-related cumulative trauma until Dr. Barefoot issued his report following his evaluation on March 18, 2015. Regarding TTD benefits, the ALJ explained:

> Plaintiff underwent a cervical fusion on November 17, 2014. Plaintiff returned to light duty work on January 19, 2015 and performed paperwork tasks. These paperwork tasks are a significant departure from Plaintiff's customary job duties as an operating nurse. Plaintiff was released to ease into her regular job duties on August 18, 2015. Dr. Vaughan indicated Plaintiff reached maximum medical improvement at the time she was released by Dr. Franzen on April 15, 2015. Plaintiff is awarded TTD benefits from November 17, 2014 through April 15, 2015 at the rate of $769.06/week.

The ALJ found Sumrall has a 26% impairment rating and considered the appropriate multiplier:

> Next this ALJ must address what, if any, multiplier enhancement Plaintiff is entitled to. Plaintiff has returned to her pre-injury position. She is currently undergoing pain management treatment, consisting of injective therapy and narcotic medication. Plaintiff continues to have cervical symptoms which impede her ability to drive. Plaintiff requires assistance at work with heavier tasks but she does not feel she will be able to continue to perform her job in the future in light of her cervical symptoms. Dr. Barefoot recommended restrictions including avoiding heavy lifting, carry and repetitive flexion,

> extension, and rotation of the head. In light of Plaintiff's testimony and Dr. Barefoot's restrictions, this ALJ finds Plaintiff is entitled to the 3 multiplier.

Bluegrass filed a petition for reconsideration raising the same arguments it now makes on appeal. By order dated December 1, 2015, the ALJ made no additional findings and summarily overruled the petition for reconsideration.

On appeal, Bluegrass first argues the ALJ erred in finding Sumrall sustained a work-related cumulative trauma injury. It contends the ALJ did not adequately explain how Sumrall's work caused the cervical condition or necessitated surgery. According to Bluegrass, Dr. Barefoot's opinion does not establish causation within a reasonable degree of medical probability because it lacked any specific explanation.

However, the ALJ did not rely on Dr. Barefoot's opinion to establish Sumrall's work-related activities caused her condition. Rather, Dr. Barefoot opined her work brought a dormant, degenerative condition into disabling reality. The employer is responsible for that portion of an injury attributable to the arousal of a pre-existing dormant condition into disabling reality by a work injury.

McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). No proof was submitted to establish this degenerative condition was active or symptomatic prior to Sumrall's employment at Bluegrass.

Bluegrass' arguments are directed to the weight to be afforded the evidence, a matter solely within the purview of the ALJ. The Board 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. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). There being substantial evidence to support the ALJ's finding on this issue, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Bluegrass next argues the ALJ's findings regarding notice are improper. KRS 342.185(1) requires notice of an accident to be given to the employer "as soon as practicable" after the accident. Implicit in the finding of a gradual injury is a finding no single instance of workplace trauma caused an injury of appreciable proportion. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001). For that reason, in cumulative trauma claims, the date triggering the obligation to give notice is the "manifestation of disability," which is the date a worker

first learns he has sustained a gradual injury and knows it is due to his work. Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999).

Furthermore, Sumrall is not required to self-diagnose the cause of her condition. Hill, 65 S.W.3d at 505. Until informed of the diagnosis by Dr. Barefoot, Sumrall did not have an obligation to notify Bluegrass of a gradual work-related injury. Although she began experiencing symptoms in 2012, Sumrall testified she was not advised by a doctor that she had a gradual work-related injury prior to the evaluation by Dr. Barefoot. Likewise, the medical records do not reflect a diagnosis of a gradual work-related injury or that Sumrall was ever advised she had sustained a gradual work-related injury prior to the time he was seen by Dr. Barefoot. Her testimony, in conjunction with the lack of medical proof establishing a prior date of knowledge, constitutes substantial evidence supporting the ALJ's determination Sumrall was first advised she had a gradual work-related injury by Dr. Barefoot. Furthermore, the ALJ could reasonably conclude notice given following Dr. Barefoot's evaluation was timely. Because the ALJ's finding concerning the issue of whether Sumrall gave due and timely notice is supported by

substantial evidence, we are without authority to disturb her decision on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Next, Bluegrass challenges the award of TTD benefits. The ALJ relied on Dr. Vaughn's opinion regarding the date Sumrall reached MMI. However, according to Bluegrass, she offered no explanation as to why she did not rely on the opinion of Dr. Barefoot concerning MMI. Bluegrass further argues Sumrall was not entitled to TTD benefits during the period of light duty work because paperwork was a part of Sumrall's pre-injury job duties. Alternatively, Bluegrass argues the award of TTD benefits should terminate on March 18, 2015, when Dr. Franzen placed her at MMI.

The evidence concerning the date Sumrall reached MMI was conflicting. Thus, the ALJ was permitted to choose the date Sumrall reached MMI from the opinion of any of the physicians. The fact the ALJ relied on the opinion of Dr. Barefoot regarding most issues does not mandate reliance on his opinion regarding the date Sumrall reached MMI. The ALJ was well within her authority in relying on the opinion of Dr. Vaughan, who agreed with Dr. Franzen, the treating surgeon.

We do find it necessary to vacate the ALJ's decision regarding the issue of the period of TTD benefits. 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 remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky 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. To be entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury.

In Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court recently clarified when TTD is appropriate in cases where the employee returns to modified duty. The Court stated:

> 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 ALJ 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.

The ALJ determined Sumrall's light duty tasks constituted a "significant departure" from her pre-injury work. While this statement is supported by the record, the Court's recent explanation in Tipton requires a different analysis to justify an award of TTD benefits during a period of modified duty. We therefore must vacate the award of TTD benefits. On remand, the ALJ is requested to

determine whether Sumrall's light duty work is "customary"; that is, "work within her physical restrictions and for which she has the experience, training, and education."

Finally, Bluegrass argues the ALJ's application of the three multiplier is not supported by the evidence. Bluegrass notes Sumrall has returned to work at a greater wage, is under no specific restrictions from a physician, and was released to return to work full duty. Bluegrass further contends the ALJ inaccurately summarized Sumrall's testimony when she indicated she "does not feel she will be able to continue to perform her job in the future in light of her cervical symptoms." Her actual testimony was "I don't know if I'm going to be able to continue my job." Bluegrass notes there is no evidence Sumrall exceeds medical restrictions or takes excessive narcotic medication in order to perform her work.

We must vacate that portion of the award enhancing Sumrall's PPD benefits by the three multiplier. KRS 342.730(1)(c)1 permits application of the three multiplier when the employee lacks the physical capacity to return to her pre-injury work. The ALJ awarded the three multiplier, citing Sumrall's continuing cervical symptoms, physical restrictions, and her need for assistance in

performing heavier tasks. However, Sumrall also acknowledged that she has returned to work at a greater wage. Thus, the evidence could support application of either the two or the three multiplier pursuant to KRS 342.730(1)(c). It was therefore incumbent upon the ALJ to perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) to determine the appropriate multiplier.

Accordingly, the October 20, 2015 Opinion and Order and the December 1, 2015 Order on Petition for Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge are hereby **AFFIRMED IN PART, AND VACATED IN PART**. This matter is **REMANDED** for additional findings consistent with the views expressed herein.

ALL CONCUR.

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