

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 12, 2015

CLAIM NO. 201101057 & 200781764

CHERYL BLAINE

PETITIONER

VS.

APPEAL FROM HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

DOWNTOWN REDEVELOPMENT AUTHORITY, INC.
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Cheryl Blaine ("Blaine") appeals from the March 27, 2014, Opinion, Award, and Order and the May 6, 2014, Order overruling her petition for reconsideration of Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ").¹ In the March 27, 2014, Opinion, Award, and Order,

¹ Hon. J. Landon Overfield has retired and Hon. Robert L. Swisher is now the CALJ.

the CALJ determined Blaine sustained a work injury on June 26, 2007, while in the employ of Downtown Redevelopment Authority, Inc. ("DRA") and awarded temporary total disability ("TTD") benefits from June 27, 2007, through January 27, 2008; permanent partial disability ("PPD") benefits from January 28, 2008, through April 11, 2008; and medical benefits. The CALJ also determined Blaine sustained another work injury on April 11, 2008, and awarded permanent total disability ("PTD") benefits from April 12, 2008, continuing so long as Blaine is disabled; and medical benefits.

On appeal, Blaine asserts the law does not allow an award based on KRS 342.730(1)(b) and KRS 342.730(1)(c)2. Blaine next asserts the CALJ erred in finding she could work at a weekly wage equal to or greater than her pre-injury average weekly wage for the indefinite future. Blaine also argues she did not waive her claim for PTD benefits for the June 26, 2007, injury. Finally, Blaine asserts she was permanently totally disabled as a result of the June 26, 2007, injury.

Blaine filed a Form 101 in Claim No. 2007-81764 alleging work injuries to her low back, bladder, bowel, numbness, tingling, pain, and weakness in her legs on June 26, 2007, while in the employ of DRA in the following

manner: "Picked up a suitcase, had severe immediate back pain and leg pain."

In Claim No. 2011-01057, Blaine alleged an injury to her low back on April 28, 2011, while working for DRA in the following manner: "Bending over, picking up trash of [sic] floor, putting in trash basket."

The claims were consolidated by order dated August 26, 2011.

As the record is voluminous, we will only recount evidence in the record directly relevant to the issues on appeal.

Blaine's April 6, 2010, deposition testimony reveals she was hired by DRA in September 1995. She started as Director but was promoted to Executive Director in 1998 or 1999. Blaine provided the following testimony regarding the physical requirements of her job as Executive Director:

Q: Okay. From a physical standpoint, would you be standing or walking or sitting at a desk or-

A: All of the- all of it.

Q: Okay. All of those?

A: Yes.

Q: And you mentioned lifting. What types of things would you have to lift?

A: It varies. Most of the time- most of the time, you're lifting just, like,

file boxes and things like that, but with events, that's where there would be more lifting. It requires more lifting. Being a non-profit, most non-profits don't have a lot of staff. So you- your duties- even though you may be the executive director, you sort of have to wear many hats.

As Executive Director, Blaine was in charge of organizing and setting up events, such as Concerts in the Park, Christmas events, and other events. She explained what these events entailed:

Q: Okay. And before you got hurt, what types of things would you be doing to help set up for these events?

A: I'd be going and setting out signs before the events and- you know, cones, different things like that, maybe helping people with vendors or different people would come in the park, help them carry their stuff out there. And one time we were selling beverages. I might pick up a case of the beverages and have to take them out, you know, with our volunteers. During an event, I would help sell beverages or walk, you know, around the park making sure everybody was okay. There was a lot of walking and talking and hand shaking. And then after the event, you get your trash receptacle and go around and bend over and pick up trash. So like I said, you do a little bit of everything.

Those are the things I can think of that are primary. You know, there were times when we would take out cars, a freezer on a roller and sell ice cream, just-

Q: Yes. It sounds like there was a pretty big variety?

A: Yes.

After her first work injury on June 26, 2007, she underwent surgery conducted by Dr. Timothy Schoettle. She was also treated by a "bladder doctor," Dr. Mitchell Wiatrak. Concerning her bladder symptoms, she testified as follows:

Q: Okay. And what type of symptoms were you having that caused you to go see Doctor Wiatrak?

A: My bladder quit working totally.

...

Q: Did that happen immediately after June 26th, 2007?

A: My bladder started slowly stopping before I had surgery. In between the injury at Lake Barkley and when I had surgery, my bladder started not functioning properly. And then after my surgery, they let me go home on a Sunday and my bladder was working, but within the next day or so, it completely quit. I called Doctor Schoettle's office and I had to go to the store and get a diaper...but diapers, because my bladder had no control, it just quit working. And I was scared.

And they immediately called Home Health and had them come out and found that my bladder was, like- I can't remember exactly, thirteen hundred CC's full or-

I don't know, it was really, really full. and they were instructed by Doctor Schoettle's office to leave the catheter in. And that's when they sent me to Doctor Wiatrak.

Q: Okay. And have your bladder symptoms improved at all since that time?

A: They have improved. I am no longer on a catheter.

Q: Okay. And currently, right now, are you having any type of problems with your bladder?

A: Yes.

Q: Can you- is there any way you can just kind of described those for me?

A: I have leakage now. I have to wear a pad. I cannot wait very long when I have the urge to go, because if I wait very long, then it just- I lose control. There are time when I have- I guess I call them spasms. I don't know if they are spasms, but it's where I have the urge to go every ten or fifteen minutes. And my bladder gets very, very tender to touch.

Blaine also experienced problems with her bowels after the surgery performed by Dr. Schoettle. She recounted those problems:

A: I have no control when I have to go. First of all, I cannot have- I do not have bowel movements on my own. I have to take medication. And when I have bowel movements, they're still not regular with the medication, but when I do have them, they usually come on very quickly and there's no control.

Q: And do you remember when those bowel problems started?

A: After my surgery.

Blaine testified that following the first injury and the surgery, she arrived at work between eight and ten a.m. explaining as follows:

A: It depends on my bowels. If my- when my bowels decide to move, a lot of times they- it takes several different episodes that I have to go through, sort of like people who have a bad case of diarrhea. And when that happens, I basically have to sit with just my robe on in a chair so that when it happens I can run to the bathroom. And sometimes I don't make it. And so I won't go to work when I feel that coming on, because I'd mess myself at work. I won't do that. So I try not to make appointments before then. Or if I have an early morning appointment, I try to get up between four thirty and five and see if- and take my medication the night before a little earlier- or not take my Amitiza at all.

Q: What time do you usually go to work before this last injury in June of 2008?

A: I usually went between- I was there between seven and eight, because I tend to like the early morning. I can get more work done before people came [sic] in.

...

Q: Have you had accidents with your bowel movements?

A: Yes.

Q: Do you sometimes feel like you have to manage your life around your bowel and your bladder?

A: All- yes.

Regarding her back symptoms and pain resulting from the first injury, Blaine testified:

A: I hurt all the time or it's like a numbness down the left side of my left leg and my entire left foot. And there are times when it's like electric shocks run through my leg and down my- into my foot. And it causes involuntary movement. Sometimes it gets so bad after I've been up and going all day, my leg just jerks all over the bed.

I have the mechanical back pain if I try to sweep or vacuum or, you know, just do daily things that cause any bending or twisting or anything like that- and occasionally I'm having it now run down my right leg. My left foot- if I try to move my left foot at all, it's- it's like touching an electric fence. That's the only way I can explain [sic] to you.

And sometimes, like, socks fall off my left foot and I don't realize it, I don't know. Shoes, I have to have straps on it to hold it onto my foot. I can't wear any heels at all- no heel at all. Every time I put a heel on- I have to be very careful when I'm buying shoes, because it causes a lot of back pain. I've had to get rid of- and I never wore heels before, but a lot of shoes before either won't stay on my foot, or the heel, on the left leg [sic].

...

A: Well, right now, I'm having- because I've gotten more active since November, you know, going to the office more and getting out and those types of things, I'm having more pain, because I am more active. For example, when I got home last night, I just ached all over- my legs just ached all over. And so I had to lay on the couch for a while and then I got up and did some other things.

I have muscle spasms in my legs probably, I'm guessing, twice a week. It depends on what I do. If I'm more active, it hurts more.

I went to Nashville last Friday evening. This is a great example. And rode to Nashville, walking about two to three- about three blocks for dinner and held on to someone on their- onto their arm while I walked, and then walked back from dinner and sat and watched a play at T-Pac. And by the time I got home that evening, I was in excruciating pain, did not sleep all night, and spent the entire next day taking muscle relaxers and pain pills. And that's been a while wince I had been in that much pain. so that took me out about twenty-four hours.

Blaine testified: "Doctor Schoettle had told me not to lift anything over twenty pounds and not to go up hazardous steps, but I don't have anything in writing or anything like that."

Following the June 26, 2007, injury, Blaine was off work for six months. After that, Dr. Schoettle gave her

permission to work part-time for several months, which she did from home. During her part-time work from home, she performed "managerial things using [her] computer." Blaine was unable to work at her regular office because it was "on the second floor of an old building that had hazardous steps." Once the office moved, she was able to return to work. She described how her job duties changed since returning:

A: I am no longer able to do a lot of the event preparation management. I don't- for example, before my back surgery, I might have jail supervised crew out picking up trash and I would be out there helping them pick up trash out in the park, those types of things. I no longer am able to do those types of things, which are, you know, part of the promoting downtown, part of the description.

...

A: One of the things during the events- you know, I told you we have to walk around and do a lot of that stuff. And now, I can't do that. I drive a cart that I have to borrow from someone back and forth or I get a lawn chair when I'm having to sit and I don't get to get out and socialize and talk with people. I'm not able to do that like I was. And that's one of our requirements. For example, attending civic type events and things like that, I haven't been doing that. And that's one of the requirements of my job. In fact, that's something the mayor told me last week she wants to see me out more.

...

Q: Now, earlier you said that one of your duties was to represent the D.R.A. and attend events and civic functions and this kind of thing, the conversation with the mayor. You know, we all go to these things where you talk and walk around and graze or whatever. How do you- do you have those as part of your job, too?

A: It is, but that's something that I haven't done. And I think that was the comment from the mayor last week was why. Because I have not- I have- since this injury, it's really affected me, I think, mentally. Because it's harder for me to get out around people. I'm embarrassed because I limp. I can't do things like I used to be able to do. And to go to those functions, I can't stand up for a long time. You know, it's something that you take for granted until it happens. So I haven't been going. I've primarily let those parts of my job- I either have my assistant, when she was there, to go. And that's one thing the mayor made a point of saying is that I'm the face of D.R.A., not my assistants and she wants to see me there.

At the time of her deposition, Blaine was taking Lisinopril, Hydrochlorothiazide, Amitiza, Zaniflex, Soma, Hydrocodone, and potassium.

Blaine had difficulty walking through the grocery store and climbing stairs. She can stand for about ten to fifteen minutes before experiencing pain.

At the final hearing, Blaine again testified that after the first injury she started performing part-time work for DRA in January 2008. She testified as follows:

Q: Okay. What- what did you do? Why- why couldn't you go to the office, so to speak?

A: We had- we're a non-profit and we had moved to a building, an historic building that was up- our offices had moved to an historic building that was up steep stairs. And, at the time- well, Dr. Schoettle had told me he didn't want me to do steep stairs very often. And I don't even know, I may have still been on a walker at that point. I don't remember when I got off the walker and on a cane. So I couldn't navigate the steps or sit very long. So my Board was very gracious and allowed me to work from home.

Blaine testified concerning the trouble she experienced while working at home during this time period.

A: I was having trouble- I mean, I had to sort of choose my own hours when I had things done so I could lay down a lot.

Q: This was at home that you would lay down?

A: Uh-huh.

Q: Tell the Judge what kind of problems you were having overall at that time, or even after this first injury and surgery.

A: I was having bladder and bowel issues. I was having some incontinence

and I had to wear a pad. I started becoming where I couldn't go have a bowel movement without medication. And at that time we sort of had it where I could go mornings when I did, but it would take a while and when I did I didn't have a lot of control, so I would have to stay close to the bathroom.

DRA's move to a one-story building in November 2009 allowed her to return to work, but with certain difficulties. She explained:

Q: Okay. In your job as representative- as the exec of the DRA you said you to solicit funding and attend fundraisers. Were you expected and required to attend meetings in the community where you would meet people and do things?

A: Yes, and I was on boards, too.

Q: Did you- were you able to continue those parts of your job after your first injury?

A: No, I sent my staff.

Q: Did you- would you- did you receive any criticism from the board about that?

A: Yes.

Q: What was said?

A: The mayor said something to me first about I needed to be more visible. And then every time she would see me- because she was a big supporter of mine, she had been on my board for many years, actually back from when I had created that organization and had gone

from a \$20,000 budget to almost a \$200,000 budget. So she, every time she would see me she would mention that it was- people were saying things to her because they weren't seeing me out in the public. And then sometime in 2010 and 2011 my executive board started saying things to me about I really needed to be more visible. Because they don't want your staff- and by then I didn't have much of a staff- they want you.

Q: And why was it you didn't attend those events?

A: I couldn't stand or walk very far. It was a lot of standing. And I didn't feel like- my personality changed. I just don't have the motivation I used to have. I don't feel good any more. I've always been a very outgoing person and got my energy from being around other people. Now it's rare.

Blaine underwent surgeries on July 12, 2007, May 20, 2011, and February 28, 2012.

In his October 27, 2010, Form 107-I, Dr. Schoettle diagnosed *cauda equina* syndrome secondary to intradural herniation at L4-L5 following the June 26, 2007, injury. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), he assigned a 31% whole person impairment rating apportioned in the following manner: 19% for bowels and bladder, 13% for lumbar radiculopathy, and 2% for the lumbar spine. His medical restrictions included

"limited stairs," no lifting greater than 10-15 pounds, and no repetitive bending or stooping.

The December 3, 2013, telephonic Benefit Review Conference ("BRC") order lists, in relevant part, the following stipulations:

7. Plaintiff's average weekly wage on June 26, 2007 was \$1,202.80 and on April 28, 2011 was \$1,287.50.

8. Plaintiff returned to work after the June 26, 2007 work-related injury on January 28, 2008 at a wage equal to or greater than her average weekly wage and worked through April 28, 2011. Plaintiff has not worked since April 28, 2011.

The BRC Order lists the following contested issues:

1) benefits per KRS 342.730 (including the application of multipliers); 2) overpayment of temporary total disability benefits; 3) work-relatedness/causation of Plaintiff's alleged psychological condition; 4) unpaid or contested medical expenses; 5) exclusion for pre-existing active disability or impairment; 6) Plaintiff's entitlement to sanctions for Defendant Employer's non-payment of TTD benefits; and 7) Plaintiff's entitlement to sanctions for Defendant Employer's non-payment of PPD benefits at a rate based on the functional impairment rating assigned by Defendant Employer's evaluating physicians.

Concerning Blaine's June 26, 2007, injury, the CALJ provided the following findings of fact and conclusions of law in the March 27, 2014, Opinion, Award, and Order:

The contested issues will be discussed in a chronological manner rather than in the order in which they are listed in the benefit review conference order and memorandum. The discussion will first relate to the benefits to which Plaintiff is entitled pursuant to KRS 342.730 and subsections, the exclusion of pre-existing active disability or impairment, and whether or not there was overpayment of TTD benefits.

Following Plaintiff's June 26, 2007 work-related injury Defendant Employer voluntarily paid TTD benefits at the rate of \$646.47 per week from the day after the injury through January 20, 2008. According to the stipulated average weekly wage, the weekly amount paid was correct. The parties stipulated Plaintiff returned to work on January 28, 2008. Plaintiff testified she first returned to work working part-time approximately six months after the June 26, 2007 injury. Her return to work preceded her having attained maximum medical improvement according to both Dr. Schoettle and Dr. Brigham. The CALJ finds Plaintiff, as [sic] result of her June 26, 2007 work-related injury, was temporarily totally occupationally disabled from June 27, 2007 through January 27, 2008 and entitled to TTD benefits during that time.

Plaintiff admittedly had pre-existing low back problems and had

undergone medical treatment for those problems shortly prior to June 26, 2007. "To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." Finley v. DBM Technologies, Ky. App., 217 S.W.3d 261 (2007). Based on Plaintiff's admission that she had a symptomatic condition shortly prior to her first work-related injury and the opinion of Drs. Uejo and Brigham, the CALJ finds Plaintiff did have a pre-existing active impairment at the time of her June 26, 2007 work-related injury. However, the CALJ finds Plaintiff had no pre-existing occupation disability prior to June 26, 2007.

It is without question that, as a result of the June 26, 2007 work-related incident, Plaintiff had a serious low back injury which resulted in the need for lumbar spine surgery, resulted in a permanent functional impairment rating under the *Guides* and the need for permanent restrictions on her physical activities. The CALJ finds the most credible and convincing medical evidence in the record concerning Plaintiff's functional impairment rating from the first injury is that of Dr. Brigham, a 26% functional impairment to the body as a whole for the combined impairment for the lumbar spine, bladder dysfunction, bowel dysfunction and sexual dysfunction.

Plaintiff does not argue entitlement to permanent total occupational disability benefits as [sic] result of the June 26, 2007 work-related injury. However, she does argue entitlement to enhancement of her

permanent partial disability benefits pursuant KRS 342.730 (1)(c)1. The record is clear and it is stipulated that, following the first injury, Plaintiff returned to work at a wage equal to or greater than her average weekly wage at the time of the injury. The record is also clear her return to work was to a job in which the physical requirements were modified. However, she worked in her same job title at a wage equal to or greater than her average weekly wage at the time of the injury until her unfortunate second injury of April 11, 2008. Plaintiff argues she would not have been able to retain that employment and that wage for the indefinite future. The CALJ is of the opinion an analysis such as that first announced by the Supreme Court's decision in Fawbush v. Guinn, 103 S.W.3d 5 (Ky., 2003) is necessary.

Based on Plaintiff's testimony and the restrictions placed on her by Dr. Schoettle, it is clear Plaintiff did not retain the physical capacity to return to work performing EXACTLY the same physical job duties she performed prior to June 26, 2007. On the other hand, Plaintiff did return to work at a wage equal to or greater than her pre-injury wage and performed those job duties through April 11, 2008. According to Plaintiff's testimony Defendant Employer made a significant number of concessions relating to Plaintiff's job duties in order to retain her in its employ. There is nothing in the record to indicate that attitude on behalf of Defendant Employer would change. Plaintiff testified she had a fervent desire to continue in her employment for Defendant Employer and she was performing the modified job duties on a regular basis until the second injury.

The restrictions placed on Plaintiff by Dr. Schoettle would allow Plaintiff to continue working for an indefinite period barring significant change in her physical condition. Plaintiff's work ethic and the employment practices of Defendant Employer also indicate Plaintiff would have been able to continue working for the indefinite future barring an unforeseen change in her physical condition. Based on those factors, the CALJ finds that, although Plaintiff did not retain the physical capacity to return to EXACTLY the same physical job duties she performed prior to June 26, 2007, she did in fact return to work at a wage equal to her pre-injury wage, and would have been able to continue in that employment for the indefinite future had her second injury not occurred. Based on that finding the CALJ concludes Plaintiff is not entitled to enhancement of her permanent partial disability benefits pursuant to KRS 342.730 (1)(c)1.

Pursuant to KRS 342.730 (1)(b) Plaintiff is entitled to benefits based on her functional impairment rating resulting from her work-related injury of June 26, 2007 multiplied by the applicable factor. The CALJ finds the most credible and convincing opinion concerning Plaintiff's functional impairment rating resulting from the first injury to be that of Dr. Brigham, 26% functional impairment to the body as a whole. That functional impairment rating becomes a permanent partial disability rating of 35.16%. Plaintiff is therefore entitled to permanent partial disability benefits paid at the rate of \$166.17 per week beginning January 28, 2008 and continuing thereafter for a period of 425 weeks.

(26% x 1.15 = 35.1%; \$443.42 x 35.1% = \$166.17.)

Blaine's first argument on appeal is confusing. Blaine's subheading for this section- "The law does not allow an award based on KRS 342.730(1)(b) and KRS 342.730(1)(c)2"- is vague. We are unsure whether Blaine is contending Kentucky Workers' Compensation Law in general does not allow for an award based on KRS 342.730(1)(b) and KRS 342.730(1)(c)2 or that Kentucky law does not allow for an award based on KRS 342.730(1)(b) and KRS 342.730(1)(c)2 in this specific case. Blaine's argument in this section of her brief leaves our questions unanswered.

Nonetheless, Blaine appears to argue in this section of her brief that the ALJ misinterpreted KRS 342.730(1)(c)2 by failing to interpret the statutory provision in the following manner:

It directs that the job the injured employee is performing be at a wage equal to or greater than at the time of the injury for the indefinite future, be one in which the injured employee could compete for on the same basis as any other employee notwithstanding the injured employee's impairments and limitations.

We disagree with what appears to be Blaine's interpretation of KRS 342.730(1)(c)2. The record indicates

and there is no dispute that Blaine returned to work after the June 26, 2007, work-related injury on January 28, 2008, at a wage equal to or greater than her average weekly wage at the time of the injury. This was stipulated during the December 3, 2013, telephonic BRC. In his analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the CALJ noted KRS 342.730(1)(c)2 is applicable because Blaine worked "at a wage equal to or greater than her average weekly wage at the time of the injury until her unfortunate second injury of April 11, 2008." The CALJ demonstrated an accurate understanding of this statutory provision. There is no error in the ALJ's interpretation of KRS 342.730(1)(c)2.

Blaine next argues the CALJ erred by finding she could work at a wage equal to or greater than her average weekly wage at the time of the injury- the third prong of the Fawbush v. Gwinn, supra, analysis- for the indefinite future.

Pursuant to Fawbush v. Gwinn, supra, an ALJ must determine which multiplier contained in KRS 342.730(1)(c) is "more appropriate on the facts" when awarding PPD benefits. Fawbush at 12. KRS 342.730(1)(c)1 states, in relevant part, as follows:

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. . . ; or

KRS 342.730(1)(c)2 further provides:

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 for 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.

When a claimant meets the criteria of both (c)1 and (c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky., 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn,

supra. In other words, is the injured worker faced with a "permanent alteration in the ...ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). When the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury for the indefinite future, enhancement by the three multiplier under KRS 342.730(1)(c)1 is appropriate.

The Fawbush Court articulated several factors an ALJ should consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Fawbush at 12. As the Court of Appeals in Adkins, supra, stated, it is not enough to determine whether an injured employee is able to continue in his or her current job. The Court explained:

Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.

Id.

The CALJ's analysis of whether Blaine would have continued working at an equal or greater wage for the indefinite future following the June 26, 2007, injury is deficient as a matter of law. While the CALJ stated the "restrictions placed on Plaintiff by Dr. Schoettle would allow Plaintiff to continue working for an indefinite period barring significant change in her physical condition," the CALJ failed to discuss and analyze these restrictions with any amount of specificity in his "Discussion and Analysis" section.² The CALJ's comment on Blaine's "work ethic" and DRA's "employment practices" in the March 27, 2014, Opinion, Award, and Order, speaks more to Blaine's ability to continue in her current job, only one of many factors the CALJ should have considered. See Fawbush; Adkins. The CALJ should have also discussed such

² The ALJ did note Dr. Schoettle's restrictions following the June 26, 2007, incident in the "Summary of the Evidence" section of the March 27, 2014, Opinion, Award, and Order by stating as follows: "He gave Plaintiff permanent restrictions of performing desk work, limiting the use of stairs, no repetitive bending or stooping, and no lifting over 15 pounds. He released Plaintiff back to part-time work, then gradually transitioned to full-time work, and finally from the home to the office."

factors as whether the post-injury work is done out of necessity and is possible only when the injured worker takes more narcotic pain medication than prescribed. Fawbush at 12. As required by Adkins, the CALJ should have focused on Blaine's capacity to earn the same or greater wages beyond her employment at DRA.

The CALJ's award of PPD benefits must be vacated and the claim remanded for a determination of whether it was likely Blaine could have continued earning equal or greater wages following the June 26, 2007, into the indefinite future if the second injury of April 28, 2011, had not occurred.

Blaine's third argument on appeal is that she did not waive her claim for permanent total disability ("PTD") benefits following the June 26, 2007, injury. We agree. The December 3, 2013, BRC Order lists "benefits per KRS 342.730 (including the application of multipliers)" as a contested issue. This issue would include Blaine's entitlement to PTD benefits following both injuries. Further, in her brief to the ALJ, Blaine asserts entitlement to PTD benefits following the June 26, 2007, injury. Additionally, in her April 10, 2014, petition for reconsideration, Blaine requested the CALJ determine whether she was rendered permanently totally disabled

following the June 26, 2007, injury. Blaine did not waive her claim for PTD benefits as a result of the June 26, 2007, injury. Thus, the CALJ's conclusion in the March 27, 2014, Opinion, Award, and Order stating that Blaine "does not argue entitlement to permanent total occupational disability benefits as [sic] result of the June 26, 2007 work-related injury" is erroneous.

Finally, we agree with Blaine's assertion the CALJ should have entered findings of fact regarding her claim of permanent total disability due to the June 26, 2007, injury. As stated above, the issue of Blaine's entitlement to PTD benefits following the June 26, 2007, injury was not waived. Despite Blaine's assertion of entitlement to PTD benefits in her brief to the CALJ and in the petition for reconsideration for additional findings on this issue, the CALJ failed to enter any findings on this issue in the March 27, 2014, Opinion, Award, and Order and the May 6, 2014, Order overruling Blaine's petition for reconsideration.

In the March 27, 2014, Opinion, Award, and Order, the CALJ stated Blaine "does not argue entitlement to permanent total occupational disability benefits as [sic] result of the June 26, 2007 work-related injury." However,

in Blaine's January 27, 2014, brief to the CALJ, she argued as follows:

In this case, Plaintiff sustained two work-related injuries. She was off work for more than six months. After the first injury, she worked part-time from home from January 2008 until November 2009, at which time she started working at the office. She worked at home because she could not climb stairs. She was able to perform only a few of the requirements of her current position. Even though she returned to work after the first injury, that was a 'made work' position. Under no set of circumstances could she meet the definition of work in the statute. Working for another would not allow her to take unscheduled breaks; rest as needed; not carry out the most important components of her job, concerts in the park; and being the 'face of the DRA' by attending meetings and events in the community. She simply could not meet the requirements of that position on a regular and sustained basis in a competitive economy. Before she was injured the second time, she knew as did her Board and the Mayor, that she was not doing the job and could not continue in it on an indefinite basis. Even in the absence of the second injury, Plaintiff would likely have been found totally disabled.

Again, Blaine asserted entitlement to findings regarding permanent total disability in the April 10, 2014, petition for reconsideration. Yet, in the May 6, 2014, Order overruling Blaine's petition for reconsideration, the

CALJ merely stated that he is of the opinion the March 27, 2014, Opinion, Award, and Order contains "adequate findings of fact and an adequate explanation (including a *Fawbush* analysis) to support the decision Plaintiff was not permanently totally occupationally disabled."

The March 27, 2014, Opinion, Award, and Order fails to render findings of fact and conclusions of law regarding Blaine's entitlement to PTD benefits following the June 26, 2007, work-related injury. As cited above, the CALJ inaccurately stated Blaine "does not argue entitlement to permanent total occupational disability benefits as [sic] result of the June 26, 2007 work-related injury." In light of the fact Blaine requested findings on the issue of permanent total disability following the June 26, 2007, injury, this statement by the CALJ is clearly erroneous.

Blaine returned to work on January 28, 2008, following the June 26, 2007, injury. However, "[t]he fact that a worker may be willing and able to work at some occupation does not necessarily preclude his being totally disabled for purposes of workers' compensation." Wells v. Jones, 662 S.W.2d 849, 850 (Ky. App. 1983). Thus, on remand, an analysis regarding Blaine's entitlement to PTD benefits following the June 26, 2007, injury pursuant to applicable law is necessary. See Ira A. Watson Dept. Store

v. Hamilton, 34 S.W.3d 48 (Ky. 2000) and Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968). This is particularly true in light of Blaine's deposition and hearing testimony regarding the severity of her symptoms following the June 26, 2007, injury and her modified job duties upon her return work.

Accordingly, the CALJ's analysis of the applicability of the two multiplier as set out in the March 27, 2014, Opinion, Award, and Order and as reaffirmed in the May 6, 2014, Order overruling Blaine's petition for reconsideration is **AFFIRMED**. As the CALJ's statement in the March 27, 2014, Opinion, Award, and Order that Blaine "does not argue entitlement to permanent total occupational disability benefits as [sic] result of the June 26, 2007 work-related injury" and the CALJ's analysis concerning the third prong of the Fawbush analysis are erroneous, the award of PPD benefits is **VACATED**. This claim is **REMANDED** for entry of an amended opinion and award determining Blaine's entitlement to PTD benefits due to the June 26, 2007, injury. Should the CALJ or Administrative Law Judge ("ALJ") as designated by the CALJ determine Blaine is not entitled to PTD benefits as a result of the June 26, 2007, injury, the CALJ or ALJ must then conduct an appropriate

analysis of the third prong of the Fawbush analysis in conformity with the views expressed herein.

ALL CONCUR.

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