

OPINION ENTERED: October 26, 2012

CLAIM NO. 200976342 & 200900773

HANNA ANDERSSON

PETITIONER

VS.

APPEAL FROM HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

BARBARA GAMBRELL
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Although Hanna Andersson's ("Andersson") appeal brief does not specify from which order it is appealing, based on the wording of Andersson's "conclusion," we assume it is appealing from the February 7, 2012, opinion and order on remand.

The Form 101 (Claim No. 2009-00773) filed on July 6, 2009, alleges on October 20, 2007, Barbara Gambrell

("Gambrell") injured her "back with leg pain" while working for Andersson. Gambrell alleges as follows: "I was working and I lifted a tote injuring my back." On August 18, 2009, Andersson filed a Form 111 in which it accepted the claim as compensable but indicated there is a dispute concerning the amount of compensation.

The Form 101 (Claim No. 2009-76342) filed on June 14, 2010, alleges on October 8, 2009, Gambrell injured her "leg (right hip and knee)" while working for Andersson. Gambrell alleges as follows: "I was working and fell injuring my leg." On July 2, 2010, Andersson filed a Form 111 in which it accepted the claim as compensable but indicated there is a dispute concerning the amount of compensation.

In a July 23, 2010, order the ALJ consolidated both claims.

In the April 18, 2011, opinion, award, and order, the ALJ set out the following findings of fact, conclusions of law, and award:

AWW. The first issue to be decided by the ALJ is post-injury AWW. There were two injuries after which Plaintiff returned to work. The first injury occurred on October 20, 2007, and the second on October 8, 2009. The AWW is relevant in that if Plaintiff returned to work "at the same or greater wage," even though she cannot return to her

former type work, and she can continue to earn that wage for the indefinite future, she would only be entitled to the 1 multiplier. The thing is the wage records demonstrate that she did not continue to earn that wage for the indefinite future. The ALJ will take up the injuries separately.

10/20/2007 Injury. Plaintiff was injured on Saturday, October 20, 2007. She was off work the following week, and went back to work in the week ending November 2, and worked 40 hours, earning \$565.20. The ALJ calculated the 13 weeks following her return to work and she averaged \$631.02 during that quarter. Her pre-injury wages were stipulated at \$630.31. The ALJ finds that Plaintiff returned to work at the "same or greater wage," but did not continue to earn that wage for an indefinite period. The next two or three quarters were less. It is not relevant that Defendant's work hours were affected by the recession, or that another employee worked the same number of hours.

10/8/09 Injury. Plaintiff's pre-injury AWW was \$664.47. Her post-injury AWW was never the "same or greater."

There is no disagreement as to Plaintiff's impairment ratings, but whether she is entitled to the 3 multiplier for her injuries.

10/20/07 Injury. Plaintiff was an Order Processor when she was injured in 2007. When she returned to work following the injury, she returned to the job of inventory, "Zero Slot," and labeling, which was lighter work and within her work restrictions. She maintained this job through her second injury in 2009. The ALJ finds that

Plaintiff did not retain the physical capacity to return to the order processing job that she did prior to her injury, and therefore, is entitled to the 3 multiplier. The ALJ finds that Plaintiff has not, and is unlikely to be able to continue earning a wage that equals or exceeds her wage at the time of her injury for the indefinite future. He finds that she sustained 6% WPI as a result of the low back injury.

10/8/09 Injury. Plaintiff sustained 15% WPI as a result of the second injury to her hip. The interesting issue is that Plaintiff was performing the inventory, "Zero Slot," and labeling job at the time of injury. When she returned, she did the inventory and labeling jobs, but did not return to the "Zero Slot" job, and complains that she would not be able to perform the "Zero Slot" job. The only specific restriction from Dr. Ballard was Plaintiff was cautioned against squatting, crossing legs or ankles, or similarly placing hip in position that would dislocate her hip. Dr. Pomeroy released her to work, with restrictions to be placed by the Workers' Comp physician. Although Plaintiff has stated that she cannot do the Zero Slot job, there is nothing other than general commonsense restrictions placed by Dr. Ballard, which the ALJ is persuaded would not prohibit Plaintiff from doing all the duties of her prior job in October 2009. It is obvious that Defendant has accommodated Plaintiff by allowing her to sit to perform much of her job, and they [sic] have placed her in a supervisory position of assisting the Downs Syndrome employees in their work. The ALJ finds that Plaintiff retained the physical capacity to return to her prior type work in the

lighter type employment when she was injured in October 2009.

AWARD AND ORDER

Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND ADJUDGED:**

1. Plaintiff, Barbara Gambrell, shall recover from the Defendant, Hanna Anderson [sic], and/or its insurance carrier, temporary total disability benefits in the sum of \$420.21 from October 21, 2007, through the date she returned to work November 2, 2007; and thereafter permanent partial disability benefits in the sum of \$64.29 per week for 6% WPI, **including the three multiplier** under KRS 342.730(1)(c)1, commencing on November 3, 2007, for the low back injury, and continuing for a period not to exceed 425 weeks together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation, and are subject to the limitations, offsets, and requirements of KRS 730(4), (5), (6), and (7). The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made.

2. Plaintiff, Barbara Gambrell, shall recover from the Defendant, Hanna Anderson [sic], and/or its insurance carrier, temporary total disability benefits in the sum of \$442.97 from October 9, 2009, through December 10, 2009; and thereafter permanent partial disability benefits in the sum of \$66.44 per week for 15% WPI, for the hip injury, commencing on December 11, 2009, and continuing for a period not to exceed 425 weeks together with

interest at the rate of 12% per annum on all due and unpaid installments of such compensation, and are subject to the limitations, offsets, and requirements of KRS 730(4),(5),(6), and (7). The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made.

On April 26, 2011, Gambrell filed a petition for reconsideration asserting the ALJ made certain errors regarding the average weekly wage ("AWW") for the October 8, 2009, injury. By order dated June 2, 2011, the ALJ corrected and amended the April 18, 2011, opinion, award, and order.

On May 2, 2011, Andersson filed a petition for reconsideration alleging the following errors:

The ALJ's failure to evaluate this case under the provisions of *Fawbush v. Gwinn* 103 S.W. 3d 5 (Ky, 2003) was patent error.

Once the ALJ determined that the Plaintiff's post injury earnings decreased, it was patent error not to address whether the decrease was related to the work injury.

The ALJ failed to make specific findings related to the medical evidence of record, and overlooked a portion of Dr. Guarnaschelli's findings.

In a June 2, 2011, order the ALJ acknowledged "he did not discuss his findings sufficiently under the holding of *Fawbush v. Gwinn, supra*," and set out the following additional findings:

It is established that Plaintiff could not return to her former job. The 2009 injury does not factor into the *Fawbush* analysis of the first injury. Even though Plaintiff had a hip injury with a high impairment rating, she does not seem to have been more impaired to do her lighter job that she had following the low back injury in 2007, except for the zero slot job because it required a lot of walking, standing, sitting, bending and squatting. Even with the somewhat lighter job, she is still having problems with her back. She has the same throbbing pain going from her low back into her right hip, into her leg and feet. If she stands for long periods of time it bothers her, some days a couple of hours. She can't sit or walk as long. She can't go for walks without her cane. She doesn't have the strength in her legs. She had most of these symptoms after her first injury.

As the ALJ discussed above, the point of emphasis in the *Fawbush* phrase is whether a claimant is unlikely to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future. The only qualifying part of the whole phrase is the word "able." The important facts here are that we have a long history following the 2007 injury to consider her wages. Other than one quarter, which is the quarter that set her wage for the second injury on October 8, 2009, Plaintiff has never earned the same or greater wage in any quarter

since. Her first injury was October 20, 2007. Her highest quarter following was stipulated to be \$670.93. She never has had a quarter since that time equal to or greater than the 2007 injury AWW. The hearing was February 17, 2011, three years and four months later.

The ALJ found Plaintiff credible. Defendant is in an economic downturn. Some employees have been terminated. Whether Plaintiff is facing an impending layoff is indefinite, but in considering whether Plaintiff's [sic] will be able to maintain her pre-injury wage for the indefinite future, the ALJ is of the opinion that it can be reasonably answered no. The ALJ reaffirms his prior finding.

Andersson appealed to this Board on August 15, 2011, arguing the ALJ "erred as a matter of law in determining that the 3x multiplier was applicable in this case, by failing to reconcile the applicable caselaw [sic], resulting in a financial windfall for the Respondent/Employee." Andersson asserted, in part, as follows:

In this case, if the Respondent/Employee had never suffered an injury and had remained in the order processing department, she would have been impacted by the economy in the same manner as all the other order processors in the facility. Her wages would have been frozen, and her hours would have been cut due to the economic downturn. However, since she suffered an injury, she went to work in a different department at the same hourly

rate. When comparing her hours to those of a similarly situated order processor after her October 20, 2007 injury, the Respondent/Employee has **consistently** worked as many, if not more hours. The data-reviewed covers a three (3) period, and is not just a fluke. The hours (and earnings) are reflected in the data filed of record, and demonstrate that the Respondent/Employee **did not** suffer an economic impact as a result of her injury; she suffered an economic impact as a result of the economy, the same as everyone else at Hanna Andersson.

In an opinion dated October 28, 2011, the Board vacated and remanded the claim to the ALJ. The Board's summary of the evidence in the October 28, 2011, opinion is as follows:

Hanna Andersson ("Andersson") appeals from an opinion, award and order rendered by Administrative Law Judge ("ALJ") Joseph W. Justice dated April 18, 2011 determining Barbara Gambrell ("Gambrell") had sustained a low back injury on October 20, 2007 which generated a 6% impairment rating with the imposition of the three multiplier as contained in KRS 342.730 (1)(c)(1). Andersson also appeals from an order dated June 2, 2011, which granted its petition for reconsideration to the extent the ALJ recognized a more complete analysis under the provisions of Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny was mandated but denied the petition for reconsideration to the extent the ALJ reaffirmed his earlier finding the three multiplier was applicable as it pertained to the 2007 injury.

. . .

Gambrell testified in discovery depositions taken on September 10, 2009 and on June 17, 2010 and at the formal hearing held on February 17, 2011. Gambrell was originally hired at Andersson in order processing. Andersson is a distribution center for children's clothes and toys. The order processing job entailed picking merchandise while standing on concrete, and tagging, packing, and putting the items on pallets for shipping. She described this job as being heavy work, requiring her to lift boxes weighing 5 to 30 pounds.

The October 20, 2007 injury occurred when Gambrell felt a pull in her back while working in order processing when she lifted totes containing clothes off the floor. After informing her supervisor of the injury, Gambrell worked the rest of the day but when she went home that evening, she knew something was wrong. She had pain in the right side of her lower back. The next morning she could hardly move. She went to a physician at Baptist Worx for treatment the next day, was taken off work for two weeks, and was prescribed a muscle relaxer and anti-inflammatory medication. After two weeks off work, Gambrell returned to work at Andersson. She then began physical therapy three times a week. She was put on restrictions of no lifting over 10 pounds with walking, sitting, and standing as needed. She returned to work at Andersson in inventory, performing re-labeling and working the "zero slot" job which she described as ensuring the bins were empty and recording that information in a computer. Gambrell stressed neither the re-labeling job, nor the "zero

slot" job were created for her due to her restrictions, but were jobs which "were ongoing" and had to be done no matter what time of year it was. She acknowledged there were times when work was slower than other times depending on the season. She also acknowledged she was presently working full-time. In response to being asked whether there was a period of time she was just working half-days or part-time, Gambrell answered as follows:

This year has been the slowest since I have been at Hanna, because of the economy. We haven't worked but maybe -- some weeks was 28 or 30 hours a week, and, then, I got lucky this year and got jury duty a month.

She noted at the time of her October 2007 injury, she was earning \$14.13 an hour and working 9 ½ hours, 5 days per week and worked eight hours on Saturdays. When asked if the economy affected the number of hours Andersson employees worked, she elaborated by noting as follows:

When it's slow, we're the first ones to go home, no matter if there's work everywhere else. . . What I'm trying to say is O.K., if you were a company and you need to cut hours, I would be the first one, no matter. Like I'm third on the seniority list, O.K. because I'm on light duty and because it's not something that has to be done right at that minute, I would go first.

Gambrell acknowledged her symptoms got worse after the first injury, but before the occurrence of the second injury.

She sustained a second injury at Andersson on October 8, 2009 when she tripped over a tote and landed on her right side, injuring her hip and right knee. She indicated she was not having problems performing her inventory job prior to the October 8, 2009 injury. She was taken by ambulance to St. Mary's Hospital where hip replacement surgery was performed. After the surgery, she underwent physical therapy at her home conducted by home health. She returned to work at Andersson on December 14, 2009, repackaging items customers had returned. Gambrell elaborated by noting prior to the second injury, she was performing the inventory job which involved re-labeling and eventually returned to this same job after the second injury. She stressed, however, there were certain portions of the job she could not perform after the second injury such as "zero slots." In her second discovery deposition, Gambrell testified she earned \$14.70 an hour upon her return to work from the second injury and worked eight hours a day if "we're not slow". Gambrell testified it bothered her to stand, sit and walk, but acknowledged she was okay as long as she had the ability to switch between these positions, which the inventory job allowed her to do. At the formal hearing, Gambrell opined after the October 2007 injury, there was no way she could have returned to her job as a sorter in order processing based on her inability to squat, kneel or bend properly or lift. Gambrell stressed she continued to have back problems, including throbbing low back

pain which radiated into her right hip, leg and into her feet. She identified most of these symptoms originated with her first injury. Due to these symptoms, she indicated she had difficulty sitting or walking for long periods of time. As a result, she uses a cane when she walks. Gambrell testified she continues to perform the re-labeling job in the inventory section with the exception that she is no longer performing the "zero slot" job.

Gambrell estimated she has lost approximately \$12,000.00 in total wages. Gambrell confirmed, there have been changes in the hours worked "across the board" due to the economy since her first injury. She acknowledged the variations in the hours she worked after her injury versus the hours she was working before the injury had somewhat to do with economic circumstances and not with anything she experienced personally.

Janine Refsnider ("Refsnider") testified she worked for Andersson as a human resource business partner since May 2008. Her job was to handle issues involving labor relations, human resources and operating functions. Refsnider acknowledged when she began her employment, Andersson experienced a down-turn in third and fourth quarter sales in 2008 due to the bad economy and, by the spring of 2009, Andersson's sales volume was much lower. However, beginning with the 2010 holiday season, Refsnider started seeing an upswing in business. As a result, she acknowledged work hours and employee headcount started trending lower in 2008, due to the bad economy, compared to 2007. She identified the spring of 2009 as the roughest quarter for

Andersson and also acknowledged there was a layoff in February 2009. Refsnider noted Gambrell last received a pay raise in February 2008. She pointed out Gambrell previously made \$14.13 per hour, but after receiving a 4% increase in wage in 2008, Gambrell's current rate of pay is \$14.70 per hour. Refsnider confirmed there had been no hourly wage increases in 2009 or 2010. She acknowledged, however, Andersson paid out a 5% bonus to employees in late April of 2010. Refsnider testified she saw no reason why Gambrell would not be able to continue working the inventory job at Andersson for the indefinite future.

Refsnider also testified at the formal hearing to supplement her previous testimony. Refsnider acknowledged compiling wage information comparing hours worked of similarly situated workers at Andersson in order processing versus hours worked by Gambrell. From her review of the records, Refsnider confirmed Gambrell continued to work the same or even greater hours than she would have if she had continued to work in the order processing department. She further acknowledged the job Gambrell was presently performing was not a special job created just for her, but was a job regularly performed as part of the business at Andersson. Based on the restrictions imposed on Gambrell, Refsnider saw no reason Gambrell would not be able to continue to perform that job. Refsnider testified she had no problems or issues with Gambrell's work or her job performance. She also stressed Gambrell had been a great employee and confirmed Gambrell had a fairly high seniority at Andersson.

Michael Lam ("Lam"), Distribution Manager at Andersson, testified he oversees the operations at Andersson which includes everything from receipts through the door to all packages leaving the building. He acknowledged Gambrell was working in order processing prior to the first injury sustained on October 22, 2007. He also verified Gambrell worked in the inventory department re-labeling and the "zero slot" job after returning to work at Andersson following the first injury. Lam noted Gambrell returned to work after the second injury, performing the re-labeling job in the inventory department. He also verified the re-labeling job was not created for Gambrell, but was a regular job function. Lam further testified he has worked at Andersson for 10 years, during which time, the re-labeling job has always existed. He could not think of any reason Gambrell would not be able to continue working at the re-labeling job. He noted he has not heard Gambrell voice any difficulty or problems performing the job. Lam stressed Gambrell was very high on the seniority list. He also pointed out Gambrell was a very conscientious employee and was a very hard worker.

Lam noted work hours at Andersson changed drastically at the end of 2007 and into the beginning of 2008 due to the economic turndown. As a result, he acknowledged having to cut 28 employees in February 2008, including two managers. He also stressed it has taken approximately two years to build the business back up to levels seen in 2007.

[text omitted]

We summarized Andersson's position in the previous appeal as follows:

On appeal, Andersson contends the ALJ erred as a matter of law in determining the three multiplier as contained in KRS 342.730(1)(c)(1) applied so as to enhance benefits by failing to reconcile applicable case law resulting in a financial windfall for Gambrell. Andersson first cites to Gambrell's own testimony where she noted the year 2009 had been the slowest year since she had worked for Andersson due to the effects of a bad economy and as a result, some weeks Andersson employees only worked 20 to 30 hours per week. Andersson next cited to Janine Refsnifer's testimony who compared hours worked of similarly situated employees who remained in order processing after Gambrell's October 20, 2007 injury with the hours Gambrell worked and concluding Gambrell worked as many hours and usually more than a similarly situated employee. Andersson also cited the testimony elicited from Michael Lam who acknowledged Andersson initiated an "across-the-board" freeze on raises beginning February of 2008 and the hours changed drastically for Andersson employees at the end of 2007 going into the beginning of 2008. Andersson also cited Lam's testimony wherein he noted, had Gambrell remained in order processing or even if she had been a salaried employee, she would not have received a pay increase nor would she have worked the hours comparable to those who worked prior to October 20, 2007.

Andersson also argues on appeal the application of the three multiplier is clearly different from the

underlying indemnity award. Andersson contends "the multiplier is used to enhance the benefits of a Respondent/Employee who has suffered an impairment to her earning capacity as a result of the work injury, and attempts to return that person to their [sic] preinjury earning status, to the extent that such a thing is possible." However, Andersson maintains the statute is not intended to give an injured employee economic superiority over uninjured coworkers. Andersson points out if Gambrell had never suffered an injury and had remained in the order processing department, she would have been impacted by the economy in the same manner as all other order processors in the facility inasmuch as her wages would have been frozen and her hours would have been cut due to the economic downturn. Andersson notes since Gambrell suffered an injury, she went to work in a different department at the same hourly rate and, when comparing the hours she worked to those of a similarly situated order processor after her October 20, 2007 injury, Gambrell has consistently worked as many, if not more hours. Andersson maintains the hours and earnings which are reflected in the data filed into evidence demonstrate Gambrell did not suffer an impact as a result of her injury, but suffered an impact as a result of the economy, the same as everyone else at Andersson.

In support of its argument, Andersson cites to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009), and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). It concludes the reason Gambrell has earned less than her pre-injury AWW since October 20, 2007 has nothing to do with her injury, but has

everything to do with the economy. It maintains the holding in Hogston and Chrysalis House make it clear Gambrell is not entitled to the enhancement of benefits due to economic fluctuations or any other reason not related to the work injury. It argues Gambrell suffered the same economic impact as her co-workers and the same impact she would have suffered had she not been injured. It concludes Gambrell's earning capacity was in no way impacted by the work injury and no evidence has been entered into the record to suggest otherwise.

The Board remanded the case to the ALJ with the following instructions:

As it applies to the 2007 injury, the ALJ determined Gambrell did not retain the physical capacity to return to the order processing job she was performing prior to the injury. In so finding, the ALJ recognized the potential application of KRS 342.730(1)(c)1. In addition, the ALJ determined Gambrell returned to work at the same or greater wage than she was earning at the time of the 2007 injury therefore recognizing the potential application of KRS 342.730 (1)(c)2. As both KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 were potentially applicable, the ALJ therefore was obligated to conduct a Fawbush analysis and determine whether Gambrell was able to continue, for the indefinite future, to perform work in which she earned a wage comparable to or greater than the wage earned at the time of the 2007 injury. Adams v. NHC Healthcare, 199 S.W.3d 163, 169 (Ky. 2006). After conducting such an analysis, if the ALJ determines Gambrell is unlikely to earn

an equal or greater wage for the indefinite future, application of the three multiplier is appropriate. If, however, the ALJ determines Gambrell is able to earn a wage equal to or greater than the pre-injury wage for the indefinite future, then at any point when this employment ceases for reasons associated with work-related injury at issue, enhancement via the two multiplier is applicable. See Chrysalis House v. Tackett, supra; Hogston v. BellSouth Telecommunications, supra.

The ALJ correctly recognized the application of Fawbush in this case when he found Gambrell "has not and is unlikely to be able to continue earning a wage that equals or exceeds her wage at the time of her injury for the indefinite future." In reaffirming the imposition of the three multiplier, the ALJ attempted to substantiate this finding in his order denying Andersson's petition for reconsideration by pointing out Gambrell never earned the same or greater wage in any quarter since, other than the one quarter which established Gambrell's AWW for the second injury. The ALJ specifically indicated in his original opinion, however, it was not relevant Andersson's work hours were affected by the recession. Moreover it is significant to point out in his order on reconsideration the ALJ recognized Andersson was in an economic down turn and some employees had been terminated. However, it is not clear the ALJ took this factor into consideration in determining why Gambrell ceased earning wages equal to or greater than the average weekly wage at the time of the 2007 injury upon her return to work.
[text omitted]

In his order on reconsideration, the ALJ found significant that post-injury, Gambrell did not exceed her pre-injury wage with the exception of one quarter. The ALJ further found significant Gambrell never earned the same or greater wage for a period of three years since this one quarter. This would seem to be a good indication Gambrell is not likely to earn the same or greater wage for the indefinite future at her job at Andersson. However, the ALJ made no determination as to whether the reason Gambrell failed to earn the same or greater wage had any relationship to the effects of her work injuries or whether it was the result of unrelated factors including the recession and bad economy.

We are also concerned the ALJ placed undue emphasis on Gambrell's ability to continue earning the same or greater wages in her specific job at Andersson. The determination of one's ability to earn the same or greater wages is not limited to one job or one employer but represents just one factor for the ALJ's consideration. See Adkins v. Pike County Board of Education, supra. Although we are remanding this matter for additional findings, as it pertains to making a proper Fawbush analysis, we are not compelling any particular result.

The ALJ's February 7, 2012, "Opinion and Order on Remand From Board," states, in part, as follows:

The Board's opinion stated that it was not clear the ALJ took into consideration the factor of an economic downturn in determining that Plaintiff was not able to continue earning a wage

equal to or greater than the 2007 pre-injury wage for the indefinite future. The Board then said *Chrysalis House* applied to this situation, and that her inability to earn the same wage had to relate to her disabling injury. So, in the *Fawbush* analysis, if Plaintiff's inability to earn the same or greater wage related to the economic downturn rather than the disabling effects of the injury, Plaintiff would not be entitled to the three multiplier under (1)(c) 1.

Defendant introduced two witnesses that testified that beginning in the latter part of 2007 and the spring of 2008, Defendant started to experience a downturn in business that affected the hours that employees worked. Defendant introduced a chart comparison of hours worked by Plaintiff with another employee, supposedly similarly employed in the same job that Plaintiff was performing during the time of the economic downturn. The hours comparison chart did not show great disparity in the two. Defendant's witnesses took great pains to point out that Plaintiff was not likely to lose her job because of her restrictions. Plaintiff has a job that she has to do, basically, in a sitting position. Plaintiff did not contest the fact that Defendant had terminated certain employees in the economic situation that Defendant was experiencing.

Plaintiff, as a result of the two injuries resulting in a 6% WPI for the 2007 injury, and the 15% WPI for the hip injury, resulting in a hip replacement, as previously stated, was limited to primarily a sitting job in the Inventory Department. Prior to her first injury, Plaintiff was in the order processing department and the

shipping department. After the 2007 injury, she then went to inventory labeling to accommodate her restrictions. Although Plaintiff was not very articulate in explaining why her disabling injuries were the factors in her not being able to continue her prior wage, she stated that with the release of a number of employees, the employees in production, of which her pre-injury order processing and shipping jobs would be an integral part, were given the overtime hours, while inventory labeling, which was not as critical to the production going out the plant as order processing or shipping. Therefore, she did not get as much overtime in her department as employees in order processing did. Defendant's witnesses said they thought (without concrete documentation) the overtime hours for the two departments would even out over a period of time. When things were slow, her area was the first to go home, and she would not get overtime, because she was on light duty and is was not as essential to getting the orders out. (Dep., Sept. 10 2009, pp.46-48; Dep., June 16, 2010, pp. 26-28).

The ALJ found Plaintiff credible. It was obvious that her inarticulate explanation of reduction in hours, and overtime, was not contrived or rehearsed as there was no indication that she knew or even appreciated the intricacies of KRS 342.730 (1)(c) 1 and 2. The ALJ is convinced that neither was her attorney aware that Defendant would make the argument that its business made a downturn and *Chrysalis House* was applicable to this situation. Plaintiff did not touch on such argument in her brief which was filed concurrently with Defendant's.

The ALJ did not find that Defendant's witnesses' testimony credible relating to the downturn in business as the sole reason Plaintiff's wages fell below her pre-injury wage. The testimony of witnesses Refsnider and Lam were general in nature, without specific facts other than the chart of comparison hours of one unknown co-employee. Ms. Refsnider testified Plaintiff received a wage raise on February 15, 2008, although the record shows that it was not until April that the wage raise was on her wage record. As stated above, Mr. Lam, without specific facts, stated that he thought the wages in labeling and production would even out over time. If Defendant were to raise this affirmative defense and make this argument, the burden was on it to have produced records to statistically prove their [sic] contention, rather than [sic] vague and non-specific testimony. It was incumbent on Defendant to prove its affirmative defense that the job in which she worked pre-injury was affected by the downturn. Plaintiff testified that if she had been in production or order processing (as she was prior to her injury), she would have received more overtime. Plaintiff was in the inventory department, which earned less over [sic] than the production department, because of her disability, she was not able to earn the same or greater wage for the indefinite future.

The Board's opinion stated, "[w]e are also concerned that the ALJ placed undue emphasis on Gambrell's ability to continue earning the same or greater wages in her specific job at Andersson. The determination of one's ability to earn the same or greater wages is not limited to one job or one employer but

represents just one factor for the ALJ's consideration. See Adkins v. Pike County Board of Education." As stated hereinabove, Plaintiff has a severe impairment, and was relegated to basically sedentary work in a manufacturing environment. It would be extremely difficult for her to find a job that would pay her pre-injury wages if the job at Defendant should terminate. The ALJ finds these factors alone makes it unlikely that Plaintiff will be able to continue to earn a wage equal to or greater than her pre-injury wage.

The ALJ has conducted a *Fawbush* analysis, and has considered the directive of the Board that if the factors that caused Plaintiff's wages to fall below her pre-injury AWW was solely because of the economic downturn of Defendant's business and not related to her disability as dictated by *Chrysalis House*, Plaintiff is not entitled to the three multiplier under (1) (c) 1. The ALJ finds that it is not likely that Plaintiff will be able to continue earning her pre-injury wages into the indefinite future and this is related to her disability.

The Board also remanded to the ALJ the required suspension of PPD benefits payable for the October 2007 injury during the period of TTD benefits awarded for the October 2009 injury. The ALJ has thought this was mandated by .730 (1) (b) and did not require an order by the ALJ.

ORDER

Pursuant to the Board's orders on remand,

IT IS HEREBY ORDERED that Paragraph 1 of the Order and Award in the Opinion, Award and Order rendered on April 18, 2011, be amended to read as follows:

1. Plaintiff, Barbara Gambrell, shall recover from the Defendant, Hanna Andersson, and/or its insurance carrier, permanent partial disability benefits, for her low back injury, in the sum of \$64.29 per week for 6% WPI, including the three multiplier under KRS 342.730 (1)(c) 1, commencing on October 30, 2007, and continuing for a period not to exceed 425 weeks, but interrupted by the period of TTD benefits from October 9, 2009 through December 10, 2009, for the October 9, 2009 injury, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation, and are subject to the limitations, offsets, and requirements of KRS 730 (4), (5), (6), and (7). The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made.

Gambrell filed a petition for reconsideration asserting the ALJ erred by awarding PPD benefits at the rate of \$64.29 and the actual amount is \$68.57. By order dated March 26, 2012, the ALJ corrected this error.

Andersson filed a petition for reconsideration on February 14, 2012, asserting three errors. First, Andersson asserted the "ALJ's refusal to follow the unrebutted

evidence comparing the Plaintiff's post-injury hours with those of a similarly situated worker in her pre-injury job was patent error." Next, Andersson asserted the "ALJ failed to follow the prevailing law in rendering his decision, ignoring the Supreme Court's finding in Chrysalis House and Hogston." Finally, Andersson asserted the ALJ committed patent error by "failing to distinguish between the limitations caused by the first injury and the second injury on remand."

In a March 22, 2012, order the ALJ determined as follows:

Defendant has filed a Petition for Reconsideration of the Order on Remand rendered by the ALJ on February 7, 2012. Defendant has made its allegation of errors in three numbered sections. The ALJ will not address the first two sections as he considers them a re-argument of those points made in its brief on remand.

The ALJ wants to address some of the points raised in the third section. The testimony of Plaintiff as to her loss of overtime and making less wages was given in such an inarticulate manner that it was clear to the ALJ that she and her attorney had not discussed nor prepared her testimony to meet Defendant's argument of the applicability of *Chrysalis House*. This is why the ALJ found her testimony in this regard credible. If she had come to the hearing with her testimony well-rehearsed on such a complicated matter to meet Defendant's position, the ALJ

would not have found her testimony credible. The fact that she made her point, although inarticulate, confirmed in the ALJ's mind that her attorney had not discussed this nor rehearsed a response to Defendant's legal position as to the reason for her earning less wages. Her testimony was a spontaneous explanation that because she was on light duty she was the first to be sent home, and the people in production got the bulk of overtime. Other than a comparison of one person's wages, Defendant attempted to support its position with vague testimony of management witnesses rather than business records.

IT IS HEREBY ORDERED that Defendant's Petition for Reconsideration is **DENIED**.

On appeal, Andersson makes the same arguments contained in its February 14, 2012, petition for reconsideration with the addition of a fourth argument—"The ALJ erred as a matter of law by altering the benefit calculation after this portion of his decision became final."

First, Andersson argues the ALJ should have relied upon its evidence "comparing the hours worked by an Order Processor (Respondent/Employee's pre-injury job) and the Respondent/Employee's post-injury hours." Andersson further states as follows: "Regardless of how credible the ALJ believes the Respondent/Employee to be, she is not

merely 'inarticulate' in her explanation of reduction of hours- she is **wrong**."

The ALJ, as fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Thus, the ALJ has discretion under the law to pick and choose from the evidence.

Here, the ALJ relied upon Gambrell's testimony regarding her post-injury hours. Andersson alleges the ALJ has rendered a "decision that **ignores** the evidence submitted." What Andersson is really arguing is that the ALJ has chosen to ignore the evidence it submitted on the issue of Gambrell's post-injury hours. The ALJ can choose to disregard Andersson's proof on this issue, and this choice is within the discretion afforded to him under the law and this Board has no authority to usurp the ALJ's authority.

Next, Andersson asserts the ALJ failed to follow the law as set forth in Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). Andersson asserts as follows:

If the Respondent/Employer has not continued to earn the same or greater wages, the ALJ must then address why the earnings have decreased. Essentially, the ALJ found it was irrelevant that the Respondent/Employee's work hours were affected by the recession, or that another employee worked the same number of hours because he found the Respondent/Employee to be a credible witness.

At some point, this line of argument must end as it has been perpetuated *ad infinitum* throughout this litigation. In his February 7, 2012, order on remand, the ALJ *fully addressed* the issue he was directed to address on remand. In the opinion, the Board stated as follows:

Moreover it is significant to point out in his order on reconsideration the ALJ recognized Andersson was in an economic down turn and some employees had been terminated. However, it is not clear the ALJ took this factor into consideration in determining why Gambrell ceased earning wages equal to or greater than the average weekly wage at the time of the 2007 injury upon her return to work.

On remand, the ALJ clearly detailed that portion of Gambrell's testimony he relied upon in determining she would not earn wages equal to or greater than her AWW at the time of the 2007 injury for the indefinite future. Based on Gambrell's testimony, the ALJ concluded, because of the job to which she was relegated due to the effects of the first injury, Gambrell would be unable to earn wages equal to or greater than the wages she earned at the time of the injury for the indefinite future. This conclusion is supported by substantial evidence and complies with the Board's directive. The ALJ is entitled to rely upon Gambrell's testimony. The ALJ's determination shall not be disturbed.

Andersson also argues the ALJ erred by "failing to distinguish between the limitations caused by the first and second injury on remand." However, this argument is not developed, as Andersson drifts from making this assertion to arguing a completely different point. Andersson states as follows:

The ALJ noted that the **combination** of the Respondent/Employee's injuries limited her to what was 'primarily' a sitting job following her second injury and hip replacement. (Opinion and Order on Remand, 2/7/2010, p.2) However, the only limitations relevant to the present decision are those that resulted from the **first** injury-

specifically, the low back sprain, not the hip fracture. Here again, the ALJ is free to ignore the unrebutted evidence of record in favor of the Respondent/Employee's disjointed testimony, which was rebutted by documentation.

In addition, the ALJ's statement that he was 'convinced' that neither the Respondent/Employee, nor her attorney, was aware that the Defendant would make an argument under Chrysalis House is both incorrect and irrelevant. The only issue of substance throughout the majority of the case, (and in fact the only real impediment to settlement) was the difference in interpretation of the law applicable to multipliers. This was clear to everyone, and certainly shouldn't have been a surprise to Respondent/Employee's counsel. As far as the Respondent/Employee's awareness of what argument might be made, the Respondent/Employee would not be expected to have such knowledge, and this is why she retained counsel.

Lest there be any question as to whether Respondent/Employee's counsel was 'surprised' by this argument, the undersigned refers the ALJ to the letter sent to Respondent/Employee's counsel on March 7, 2011 setting forth this argument in advance as part of the discussion of potential settlement. Why Respondent/Employee's counsel chose not to address this prevalent issue in his concurrent brief is a question that only he can answer. Regardless, the ALJ cannot make the argument **for** him, and cannot substitute an argument that was not presented.

We disagree the ALJ failed to distinguish between the limitations caused by the October 20, 2007, injury and the October 8, 2009, injury. It is clear in both the April 18, 2011, opinion, award, and order and the February 7, 2012, order on remand the ALJ was very aware only the limitations following the October 20, 2007, injury were relevant to the analysis to be conducted on remand. The ALJ's order on remand is replete with references to accommodation of Gambrell's restrictions following the 2007 injury. We do not question the ALJ's cognizance of the fact that the issue of the applicability of the three multiplier pertains only to the 2007 injury.

Andersson's final argument on appeal is that the ALJ, on remand, erroneously corrected an error that was made in the original April 18, 2011, opinion, order, and award. Andersson asserts as follows:

Respondent/Employee's counsel indicated in his Petition for Reconsideration that the ALJ's Order on Remand contained a **typographical error**. In fact, the ALJ's Order on Remand used exactly the same rate to calculate benefits that was contained in the original Opinion and Award. Instead of a typographical error, what Respondent/Employee complains of is that the multiplier in question was not enhanced by a .2 add on for the Respondent/Employee's age. This issue was not appropriately raised on Petition for Reconsideration of the

ALJ's original Opinion and Award as would have been appropriate, and was never mentioned on appeal to the Workers' Compensation Board. Having failed to raise an issue of drafting error, fact or law pertinent to the issue of whether the Respondent/Employee was entitled to have the multiplier increased due to the Respondent/Employee's age, the Respondent/Employee is precluded from raising this issue **for the first time** in a Petition for Reconsideration of the ALJ's Opinion and Order on Remand.

The ALJ has the authority to correct a mistake made in calculating an award at any point *sua sponte*, regardless of whether the error was raised by a party. Wheatley v. Bryant Auto Service, 860 S.W.2d 767 (Ky. 1993). Failure to apply the statutory income benefit multiplier pursuant to KRS 342.730(1)(c)(3) is such a mistake that can be corrected *sua sponte*. Although mindful of the general rules of law preserving the sanctity of compensation awards and orders as final judgments, we are also mindful of the underlying policy that every injured worker should be granted that which he or she is justly due. As quoted by the Court in Wheatley, supra:

Bearing in mind that compensation laws are fundamentally for the benefit of the injured work[er], a just claim must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos.

Wheatley, supra, at 769.

Additionally, if the ALJ had not corrected this error, the Board would have pursuant to KRS 342.285

Accordingly, the February 7, 2012, opinion and order on remand and the March 22, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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