Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 21, 2015

CLAIM NO. 201396907

HERITAGE HEALTHCARE/MIDDLESBORO
NURSING & REHAB PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF,**
ADMINISTRATIVE LAW JUDGE

MELISSA DANIELS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Heritage Healthcare/Middlesboro Nursing & Rehab ("Heritage") appeals from the April 1, 2015, Opinion and Order and the May 4, 2015, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ awarded Melissa Daniels ("Daniels") temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, Heritage raises two arguments. First, Heritage asserts the ALJ erred by enhancing the PPD benefits by the three multiplier. Next, Heritage argues the ALJ committed an error of law in finding Daniels has a 3% whole person impairment rating.

The Form 101 alleges Daniels sustained an injury to her right ankle on January 25, 2013, while in the employ of Heritage and in the following manner: "Plaintiff slipped on ice in the parking lot at her work and fell."

The February 12, 2015, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730 and medical benefits. Under "other" is the following: "Defendant offers judgment under CR 68."

Daniels' January 22, 2015, deposition was introduced. She is a high school graduate and obtained a Physical Therapy degree from Southeast Community College.

Heritage is a nursing home and rehabilitation facility. When she was first hired by Heritage, Daniels' position was "physical therapy assistant." She was earning $30.00 an hour working between thirty-two to forty hours a

week. She offered the following testimony regarding her daily activities as a physical therapy assistant:

> A: We work on balance with our patients, strengthening- I feel like I've been put on the spot- ambulating, which those things are some of our main things that we work with. Those all require me to stand, pull, stoop, squat, sit in [sic] the floor. I mean I climb up on the bed. I climb off the bed. I mean-
>
> Q: Are these elderly patients?
>
> A: Yes, most. We do have some rehab patients that come in, but usually-
>
> Q: Residents of the place?
>
> A: No, we actually get...well, they come in as residents, but they don't stay. They're not permanent residents.
>
> Q: So they come after an accident or whatever you-
>
> A: Yes, like maybe after a knee replacement or something and we keep them maybe for two to three months and they go back home.
>
> Q: Any lifting involved?
>
> A: Yes.
>
> Q: What are some things you're lifting? Are you assisting the patients up and down?
>
> A: I'm lifting patients up and down. I lift wheelchairs. I lift equipment in the gym, which I refer to as weights or moving furniture in the gym to get something else, tables.

> Q: What would you say the most physically demanding aspect of your job is?
>
> A: Lifting patients probably depending on the weight of the patient.

At the time of her deposition, Daniels was earning $28.50 an hour which is less than what she earned at the time of the work injury. Daniels testified that everyone at the company received a five percent pay cut sometime after her work injury.

Daniels was off from work for four and a half months following the work injury, and underwent two different surgeries. When she returned to work, she was under a restriction of no squatting. She testified regarding the problems she experienced upon her return to work.

> Q: So when you returned to modified, you were doing everything except squatting essentially that you were doing prior to the injury?
>
> A: No.
>
> Q: What else were you unable to do?
>
> A: My balance wasn't that good at first, so I mean I wasn't like handling patients that I would normally handle or, you know, like gait or walk or lift somebody and pull them towards me because I would lose my balance, so I had to have help or assistance with anything like that, and I did not work,

> like I said, I could work up to thirty two for forty hours. I was working like the minimum time.

Daniels was taken off all restrictions approximately one month after returning to work, and she has continued to work without restrictions.

At the time of her deposition, she was still experiencing difficulties working. She testified as follows:

> A: I still sometimes have, if it's a heavier patient and we're ambulating them or something, I don't feel confident because if their weight is like a lot more than mine, it will pull me and it knocks me off balance a lot easier than what it used to. My ankle hurts. After about six or eight hours in I usually have to sit down more. I prop my foot up more.
>
> ...
>
> Q: What current problems are you having, if any, right now? Let's start with pain. Do you have any pain in your right ankle?
>
> A: Yes.
>
> Q: What would you rate that on a scale of zero to ten, ten being the worst, on an average?
>
> A: On an average, probably about I'm going to say a seven.
>
> Q: Does that ever improve?

A: If I take Ibuprofen, if I ice it, if I prop it up, yes.

Q: How often will you have to ice your right ankle?

A: Probably two to three times a week.

Q: Is that after work?

A: Yes.

Q: When it improves, can you estimate what that might go down to?

A: About a two.

Q: Are you ever pain free?

A: No.

Q: Is there any reason you don't think you would be able to continue doing your job for the indefinite future?

A: Yes.

Q: Explain that for me.

A: I have random pain that shoots through my foot, which I would hate to catch me off guard, especially when I'm ambulating a patient, lifting a patient, you know. I have trouble determining if I'm stepping over something. I catch it constantly on things and about trip.

Q: Have you ever tripped-

A: I think that may have to be due to nerve. I'm not sure, but you can ask them at work. I trip more than I ever have in my whole entire life.

Q: Have you ever fell [sic]?

A: I've actually sort of always caught myself so far.

Q: When did the pain begin in the right foot, or has that always been the case?

A: I've had pain ever since I've had it done.

...

Q: Other than the pain do you have any numbness in your ankle?

A: Yes.

Q: Is that constantly?

A: Actually it's not in my ankle. It's on the top of my foot and the three middle toes, and yes, it is constantly.

Q: What about any swelling in the ankle?

A: Yes, I have swelling all of the time.

Q: Is that constantly or is it after work or-

A: After I've been on it so long.

Q: Do you wear any special sort of shoes?

A: I wear Air Max because I think it takes off some of the shock and impact.

Q: Do you have a brace?

A: I wear a brace.

Q: Who is prescribing that brace, or is it just something you got at Walmart?

> A: I've had the brace ever since...actually I got it from PT Pros, and if it's hurting bad enough I'll put that on and wear it the rest of the day at work or I may wear it that morning if it's hurting really bad.

Daniels testified that her foot is getting "worse as time goes by." When she assists patients, she fears injuring herself and injuring the patient. She testified as follows:

> A: I'm afraid I'll lose my balance and actually injure the patient, you know, and hurt myself, too, probably in the process.
>
> Q: Do the patients that you have to help themselves have limitations so that they can't assist you? They can't just jump right up and say do this or take care of me?
>
> A: Yes.
>
> Q: Are some of them to the point where you have to help pull them up?
>
> A: Some of them are to the point where they need max assist totally.
>
> Q: Does that cause you problems?
>
> A: Yes.
>
> Q: Do you have to get other help to do that now?
>
> A: Yes, I do.
>
> Q: Are there patients actually that you can't even treat or help now because of

> the problems with your foot, or can you get assistance to help?
>
> A: I can get assistance. We have very good CNAs. I have to say that.
>
> Q: Do you actually rely on them to help you now?
>
> A: Yes, I do.
>
> Q: Do they help you?
>
> A: Yes.
>
> Q: Did they have to do that before?
>
> A: No.

At the time of her deposition, she was working five days a week and seven to eight hours a day. She takes Ibuprofen.

Daniels also testified at the February 25, 2015, hearing. Concerning her current limitations, she testified:

> A: I do lifting, stooping, squatting, pulling, pushing. I'm trying to think. That's the main ones I can think of.
>
> Walking patients which requires me having balance. And since I hurt my ankle, I have more trouble balancing and I have trouble squatting.
>
> Q: Anything that-
>
> A: I have more pain and swelling than I had originally, too.
>
> Q: That was my next question. Any of the job duties that you have that you actually attempt to do that causes you

any problems with your ability to do your job?

A: Lifting. I have to ask for help on patients that I wouldn't used to have asked for help, and ambulating sometimes with patients I have to ask for help now because I'm worried that I'm going to lose my balance and cause that resident to fall and me myself fall and get injured.

Q: Any problems with your ankle itself?

A: Swelling, pain.

Q: Okay. Now, I want [sic] to physical therapy for about four years after a car wreck, and they had some steps in there that they assisted patients walking up and down. Do you all have those at your job?

A: Yes.

Q: Are you required as part of your job to hold onto a patient to attend therapy to go up and down those steps?

A: Yes.

Q: Do you actually have to train them how to do steps again or is part of their therapy steps?

A: Yes, it is.

Q: Does that put you in any way of fear of danger or cause you any problems?

A: It depends on the patient, the weight of the patient and how long I've been working that day if my ankle is stiff.

...

Q: All right. Any other problems you're having? Do you have to take any pain medicine for this that you didn't take when you were working, I mean, before you injured your ankle?

A: Yes, I take Ibuprofen on a regular basis probably anywhere from two to four times a week.

Q: What do you do to get relief from the problem with your ankle from swelling and pain?

A: Prop it up, ice it and usually Ibuprofen.

...

I also wear a brace at times. I'm sorry.

Q: Okay. Well, tell the Judge about that brace. I think that's already in the record. I should have asked you. Do [sic] still wear that?

A: Actually I have it on today but it's sort of more a precaution today because there's ice and snow outside, and this is how I fell.

Q: What does the brace do for you?

A: It braces my ankle. It's got hard plastic on the sides, and it sort of stabilizes it.

Q: And how far up your foot does it go?

A: About 8 inches up (indicating).

Q: Okay. It keeps it in a straight position so it won't flex?

> A: Well, it can flex some but not a lot. It has plastic strips around on the sides that sort of braces my ankle.
>
> Q: You can raise it up but you can't twist it sideways?
>
> A: It doesn't do inversion and eversion.

Regarding the assistance she receives from other employees, Daniels testified:

> Q: Have you had to have assistance from other employees in your job duties?
>
> A: Yes.
>
> Q: Tell the Judge some of those that you have to ask for now.
>
> A: Like I said, I have to ask for help from the other physical therapy assistant there. Sometimes I ask the occupational therapist for assistance. We also have a tech, a physical therapy technician, ad [sic] I also ask the CNAs for assistance.
>
> Q: And why-
>
> A: That's lifting patients, transferring patients, ambulating patients.
>
> Q: And why do you do that?
>
> A: Because I'm worried that I'm going to injure a patient if I try to get by myself because I'm afraid I'm going to get off balance and cause an injury.
>
> Q: Is getting off balance one of the problems with this ankle?

A: Yes.

Attached to the Form 101 is the October 10, 2013, report of Dr. David E. Muffly which states, in part, as follows:

> Assessment: Healed right ankle trimalleolar fracture with residual numbness of her right foot which is likely related to injury of the superficial peroneal nerve associated with her work accident. She has chronic right ankle pain. She has [sic] slight loss of range of motion of the right ankle. She has mild right calf atrophy.
>
> Impairment is 3% to the whole person. She has 1% impairment related to chronic right ankle pain. 2% impairment is from injury to the superficial peroneal nerve using Table 17-37. The 5th Edition AMA Guidelines.
>
> She is at risk for post-traumatic osteoarthritis of her right ankle. She can continue her current employment without restriction.

Also attached to the Form 101 is the October 10, 2013, Form 107-I completed by Dr. Muffly, who offered the following “diagnosis”:

> Healed right ankle trimalleular fracture
>
> Injury right superficial permeal nerve
>
> Chronic right ankle pain

Regarding causation, Dr. Muffly opined Daniels' injury is the cause of her complaints, and assessed a 3% whole person impairment rating. He stated Daniels reached maximum medical improvement ("MMI") on October 10, 2013.

In a February 6, 2015, report Dr. Muffly confirmed his assessment of a 3% impairment rating.

In the April 1, 2015, Opinion and Order, the ALJ provided, in relevant part, the following findings of fact and conclusions of law:

> **A. Benefits per KRS 342.730.**
>
> I saw and heard the plaintiff Mrs. Daniels testify at the Final Hearing. She was examined by both attorneys. I sat a few feet from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony and carefully observed her body language during her testimony. She was a very open and stoic lady. I make the determination that she was a very credible and convincing lay witness and that her testimony rang true.
>
> . . .
>
> I am very familiar with Dr. Muffly, who is a very reputable orthopedic surgeon. He examines injured persons for both the defendant and the plaintiff. I have reviewed in detail both of Dr. Muffly's medical reports hereinabove and make the determination that the medical evidence from Dr. Muffly is very persuasive, compelling and reliable. In his February 6, 2015 medical report, Dr. Muffly's diagnoses

were that the plaintiff had a healed right trimalleolar ankle fracture with residual numbness of her right foot consistent with injury to the superficial peroneal nerve caused by her ankle fracture and that she has chronic ankle pain with painful internal fixation device. Dr. Muffly noted that overall Mrs. Daniels' impairment was unchanged, but her pain has increased. He predicted that future treatment would include surgery for removal of the internal fixation of the right ankle and that Mrs. Daniels is at risk for post-traumatic osteoarthritis.

. . .

Under *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky.2003), I am required to make an analysis under KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2. Step 1 is to determine whether KRS 342.730(1)(c)1 is applicable? In other words, does the plaintiff have the physical capacity to return to the type of work she was performing at the time of her injury? Under *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979), I may rely upon Mrs. Daniels' testimony regarding her ability to labor. She testified that her job with the defendant requires walking, lifting, stooping, squatting, pushing and pulling and that she continues to have pain and swelling in her right ankle. She has to get assistance from co-workers with lifting and ambulating patients. She takes over-the-counter pain medication for her painful symptoms. She has to wear an ankle brace. I make the determination that Mrs. Daniels' continuing painful symptoms are completely consistent with Dr. Muffly's objective medical findings and his prognosis for Mrs. Daniels, and that she does not really have the physical

capacity to return to the type of work she was performing at the time of her injury.

Step 2 is to determine whether KRS 342.730(1)(c)2 is applicable? In other words, has Mrs. Daniels returned to work at equal or greater wages than at the time of her work injury? The parties agreed that Mrs. Daniels is still working for the defendant, but that she currently earns wages less than her average weekly wage at the time of her work injury. I make the determination that KRS 342.730(1)(c)2 does not apply.

Out of an abundance of caution, I will move on to step 3 and resolve the following question: Is Mrs. Daniels unlikely to be able to continue earning a wage that equals or exceeds her wage at the time of her work injuries for the indefinite future in any employment? Out of an abundance of caution, I will determine whether Mrs. Daniels is likely to be able to continue earning the same or greater wage for the indefinite future. I rely upon the Opinion of the Kentucky Court of Appeals in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004), where the Court stated that the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform her current job. Under the *Adkins* case, the standard for the decision is whether the plaintiff's injuries have permanently altered her ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. Based upon the plaintiff's sworn testimony, as covered above, and the very persuasive, compelling and reliable medical evidence of Dr. Muffly, as covered in detail above, I

> make the determination that it is unlikely that Mrs. Daniels will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon the above-cited evidence, I make the determination that the third prong of the *Fawbush* analysis applies here, and that the plaintiff's January 25, 2013 work injuries and resultant surgery will permanently alter her ability to earn an income and that she is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage, and that she is, therefore, entitled to the 3 multiplier under KRS 342.730(1)(c)1. In making that determination, I also rely upon the Opinion of the Kentucky Supreme Court in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006).
>
> The plaintiff's enhanced permanent partial disability benefits shall be based upon Dr. Muffly's 3% whole person permanent partial impairment under the AMA Guides, Fifth Edition.

Heritage filed a petition for reconsideration making the same arguments it makes on appeal. In the May 4, 2015, Opinion and Order on Reconsideration, the ALJ offered the following findings:

> In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. A review of defendant's Petition for Reconsideration shows that defendant is attempting to reargue the case, which is improper. However, out

of an abundance of caution, we will again discuss the case.

Page 3 of the original Opinion and Order dated April 1, 2015 specifically states that I have carefully reviewed and considered all of the evidence, including the Hearing Transcript, and the complete and entire record in the case file. The complete and entire record in the case file includes the report of Dr. David Burandt dated November 26, 2013. Dr. Burandt's report consists of three sentences, in which he states that Mrs. Daniels has reached maximum medical improvement and needs no further treatment, that she has no permanent impairment under the AMA Guides, Fifth Edition, and that he does not recommend any specific restrictions and would not expect any further treatment, unless symptoms should recur.

The plaintiff filed two medical reports from **Dr. David Muffly**. In his October 10, 2013 report, Dr. Muffly obtained a medical history from Mrs. Daniels to the effect that she slipped and fell on ice in the defendant's parking lot on January 23, 2013 and had a trimalleolar right ankle fracture. She denied any prior injuries to her right ankle. She related her subsequent medical treatment, including internal fixation surgery on February 6, 2013 by Dr. Burandt. She returned to work on June 5, 2013 and continues at her previous job. Mrs. Daniels stated that her current complaints included right ankle pain on a daily basis with stiffness in the morning and pain when she first gets up from a chair. She feels a catch in her foot at times and has a fear of falling. She limps at the end of the day and complains of mild swelling. She complains of numbness at

the top of her foot, which radiates into three toes and is not resolved. Symptoms are increased by stair climbing and walking long distance. She gets relief from use of a brace or Ibuprofen. Dr. Muffly performed an appropriate physical examination of the plaintiff and reviewed a multitude of medical records regarding her. Dr. Muffly's diagnoses were as follows: Healed right ankle trimalleolar fracture with residual numbness of her right foot which is likely related to injury of the superficial peroneal nerve associated with her work accident. She has chronic right ankle pain. She has slight loss of range of motion of the right ankle. She has mild right calf atrophy. Dr. Muffly stated that under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, the plaintiff will sustain a 3% permanent impairment to the whole person due to chronic right ankle pain and injury to the superficial peroneal nerve. Dr. Muffly stated that the plaintiff can continue her current employment without restriction, but is at risk for post-traumatic osteoarthritis of her right ankle. In his February 6, 2015 report, Dr. Muffly again recited the plaintiff's history of injury on January 25, 2013 and her subsequent medical treatment. Mrs. Daniels gave her current complaints: She continues to have daily right ankle pain described as stiffness when first getting up and especially in the morning. She has medial ankle pain and some medial heel pain when standing and walking at work and says that after 7 hours she has a lot of limping. She notices tenderness on the lateral ankle over the plate and says cold weather increases her lateral ankle pain. She continues to have numbness of the toes

of her right dorsal foot. She described medial ankle pain "like a spike." She complains of swelling of her right ankle at the end of the day. She gets some relief to use ice or to use Ibuprofen and occasionally she uses a brace. Symptoms are increased with prolonged standing or walking or when walking on uneven ground. She denies any re-injury to her right ankle. Dr. Muffly then performed an appropriate physical examination of the plaintiff and reviewed appropriate medical records and diagnostic test results. Dr. Muffly's diagnoses were as follows: Healed right trimalleolar ankle fracture. She has residual numbness of her right foot consistent with injury to the superficial peroneal nerve caused by her ankle fracture. She has chronic ankle pain with painful internal fixation device. Future treatment would include surgery for removal of internal fixation of the right ankle. She's at risk for post-traumatic osteoarthritis. Dr. Muffly stated that under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Mrs. Daniels will sustain a 3% permanent whole person impairment due to her chronic ankle pain and injury from the superficial peroneal nerve. Dr. Muffly noted that overall Mrs. Daniels' impairment is unchanged, but her pain has increased.

The plaintiff, **Melissa Daniels**, testified that her job with the defendant required walking, lifting, stooping, squatting, pushing and pulling. She stated that she continues to have pain and swelling in her right ankle. She has to get assistance from co-workers with lifting and ambulating patients. She takes over-the-counter pain medication. She wears an ankle

brace. She stated that she has no work restrictions.

I saw and heard the plaintiff Mrs. Daniels testify at the Final Hearing. She was examined by both attorneys. I sat a few feet from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony and carefully observed her body language during her testimony. I am the only decision maker who actually saw and heard Mrs. Daniels testify. She was a very open and stoic lady. I make the determination that she was a very credible and convincing lay witness and that her testimony rang true.

. . .

I am very familiar with Dr. Muffly, who is a very reputable orthopedic surgeon. He examines injured persons for both the defendant and the plaintiff. I have reviewed in detail both of Dr. Muffly's medical reports hereinabove and make the determination that the medical evidence from Dr. Muffly is very persuasive, compelling and reliable. In his February 6, 2015 medical report, Dr. Muffly's diagnoses were that the plaintiff had a healed right trimalleolar ankle fracture with residual numbness of her right foot consistent with injury to the superficial peroneal nerve caused by her ankle fracture and that she has chronic ankle pain with painful internal fixation device. Dr. Muffly noted that overall Mrs. Daniels' impairment was unchanged, but her pain has increased. He predicted that future treatment would include surgery for removal of the internal fixation of the right ankle and that Mrs. Daniels is at risk for post-traumatic osteoarthritis.

The defendant objects to Dr. Muffly's second report, which was dated February 6, 2015. I make the determination that that report was rebuttal evidence under *Estill County Farm & Home Supply Company v. Palmer*, 416 S.W.2d 752 (Ky.1967) and *Ajax Coal Co. v. Collins*, 269 Ky. 222, 106 S.W.2d 617 (1937). I make the determination that the defendant failed to file a Motion for additional proof time to cross-examine Dr. Muffly about his rebuttal report.

I make the determination that I exercised my discretion in allowing the admission of Dr. Muffly's rebuttal report under the Opinion of the Workers' Compensation Board in Claim No. 2013-87986, Voith Industrial Services, Inc. v. Michael Chapman, decided on May 16, 2014.

I note that Dr. Burandt's report was dated November 26, 2013, that Dr. Muffly's initial report was dated October 10, 2013, and his rebuttal report was dated February 6, 2015. I compared and contrasted said reports. I note that Dr. Burandt's report was three sentences in length, whereas Dr. Muffly's reports were very comprehensive, well-reasoned and up-to-date.

As stated in *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 774 (Ky.2009), "physicians must use clinical judgment when assigning impairment ratings, and that 'clinical judgment, combining both the "art" and "science" of medicine, constitutes the essence of medical practice.'" The applicable law affords Dr. Muffly certain discretion and professional judgment when interpreting the Guides and assigning an appropriate impairment rating. The great orthopedic

surgeon, Dr. David Gaw, repeatedly emphasized in his lectures that the AMA Guides were not a cookbook but were guides to assist the physician in reaching medical opinions.

The defendant's attorney criticizes Dr. Muffly's medical evidence. However, Dr. Muffly is a well-qualified orthopedic surgeon, whereas the defendant's attorney is not competent or qualified to give a medical opinion.

In addition, I note that Dr. Muffly's February 6, 2015 report was filed as rebuttal to Dr. Burandt's November 26, 2013 report. The record shows that the Benefit Review Conference was held on February 12, 2015 and the second report from Dr. Muffly was filed before the Final Hearing on February 25, 2015. I make the determination that the second report from Dr. Muffly was filed in a timely manner as rebuttal evidence.

Under *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky.2003), I am required to make an analysis under KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2. Step 1 is to determine whether KRS 342.730(1)(c)1 is applicable? In other words, does the plaintiff have the physical capacity to return to the type of work she was performing at the time of her injury? Under *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979), I may rely upon Mrs. Daniels' testimony regarding her ability to labor. She testified that her job with the defendant requires walking, lifting, stooping, squatting, pushing and pulling and that she continues to have pain and swelling in her right ankle. She has to get assistance from co-workers with lifting and ambulating patients. She takes

over-the-counter pain medication for her painful symptoms. She has to wear an ankle brace. I make the determination that Mrs. Daniels' continuing painful symptoms are completely consistent with Dr. Muffly's objective medical findings and his prognosis for Mrs. Daniels, and that she does not really have the physical capacity to return to the type of work she was performing at the time of her injury.

Step 2 is to determine whether KRS 342.730(1)(c)2 is applicable? In other words, has Mrs. Daniels returned to work at equal or greater wages than at the time of her work injury? The parties agreed that Mrs. Daniels is still working for the defendant, but that she currently earns wages less than her average weekly wage at the time of her work injury. I make the determination that KRS 342.730(1)(c)2 does not apply.

Out of an abundance of caution, I will move on to step 3 and resolve the following question: Is Mrs. Daniels unlikely to be able to continue earning a wage that equals or exceeds her wage at the time of her work injuries for the indefinite future in any employment? Out of an abundance of caution, I will determine whether Mrs. Daniels is likely to be able to continue earning the same or greater wage for the indefinite future. I rely upon the Opinion of the Kentucky Court of Appeals in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), where the Court stated that the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform her current job. Under the *Adkins* case, the standard for the

decision is whether the plaintiff's injuries have permanently altered her ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. Based upon the plaintiff's sworn testimony, as covered above, and the very persuasive, compelling and reliable medical evidence of Dr. Muffly, as covered in detail above, I make the determination that it is unlikely that Mrs. Daniels will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon the above-cited evidence, I make the determination that the third prong of the *Fawbush* analysis applies here, and that the plaintiff's January 25, 2013 work injuries and resultant surgery will permanently alter her ability to earn an income and that she is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage, and that she is, therefore, entitled to the 3 multiplier under KRS 342.730(1)(c)1. In making that determination, I also rely upon the Opinion of the Kentucky Supreme Court in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky.2006).

The plaintiff's enhanced permanent partial disability benefits shall be based upon Dr. Muffly's 3% whole person permanent partial impairment under the AMA Guides, Fifth Edition.

. . .

WHEREFORE, in light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied.

Concerning its first argument that Daniels does not qualify for the three multiplier, Heritage contends as follows:

> In this claim, there was no evidence propounded that Daniels cannot or has not returned to her pre-injury job, or is working in some accommodated fashion. To the contrary, all evidence establishes she continues to work her exact same job that she was doing pre-injury. She is not under any work restrictions, not treating and not taking any prescription medication. [footnote omitted] *Fawbush v. Gwinn* clearly does not apply to the current case. In light of the evidentiary record, it was an abuse of discretion to rely on that claim. Even under a *Fawbush v. Gwinn* analysis, a 3x is not a possible outcome. Consequently, for the foregoing reasons, Heritage requests that the ALJ's Award of the 3x be reversed.

We first note that the ALJ unnecessarily engaged in an analysis pursuant to Fawbush v. Gwinn, supra, as the facts establish the two multiplier is not applicable. Thus, our scrutiny of the ALJ's analysis will only focus on the three multiplier and its applicability. Our review hinges on whether substantial evidence supports this determination. We conclude it does.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his or her claim. Durham v.

Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984)). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Kentucky Utilities Co. v. Hammons, 145 S.W. 2d 67, 71 (Ky. 1940).

Because Daniels, the party with the burden of proof concerning enhancement by the three multiplier, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show there was some evidence which would

support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, supra.

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. . .;

Substantial evidence in the form of Daniels' testimony regarding her limitations at work supports the ALJ's determination. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). While Daniels has indeed returned to her pre-injury job, she testified extensively about the physical limitations she faces performing her job. In his decision, the ALJ provided the aspects of her testimony which persuaded him:

> She testified that her job with the defendant requires walking, lifting, stooping, squatting, pushing and pulling and that she continues to have pain and swelling in her right ankle. She has to get assistance from co-workers with lifting and ambulating

> patients. She takes over-the-counter pain medication for her painful symptoms. She has to wear an ankle brace. I make the determination that Mrs. Daniels' continuing painful symptoms are completely consistent with Dr. Muffly's objective medical findings and his prognosis for Mrs. Daniels, and that she does not really have the physical capacity to return to the type of work she was performing at the time of her injury.

Additionally, in the May 4, 2015, Opinion and Order on Reconsideration, the ALJ repeated the above findings.

The fact that Daniels returned to her pre-injury job does not preclude enhancement by the three multiplier. In other words, while Daniels has returned to her pre-injury job, her ability to perform her same job *tasks* has, according to Daniels' testimony, been disrupted by her work injury. *See* Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004). This is evidenced by the fact that she now is required to ask for assistance from her co-workers when lifting and ambulating patients, as noted by the ALJ. She also requires over-the-counter pain medication and an ankle brace. Daniels' deposition and hearing testimony constitute substantial evidence in support of enhancement by the three multiplier, the ALJ's decision on this issue will not be disturbed.

Regarding its second argument that the ALJ abused his discretion by finding Daniels has a 3% whole person impairment rating, Heritage argues as follows:

> Dr. Muffly found, and the ALJ agreed, that Daniel is entitled to a 3% impairment rating. This was a combination of 1% for pain and 2% for a superficial peroneal nerve deficit. As to the 1% assigned for pain, Dr. Muffly provides absolutely no justification in support.

While an ALJ may elect to consult the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") in assessing the weight and credibility to be afforded a physician's impairment rating, as finder of fact he or she is never required to do so. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). So long as sufficient information is contained within a medical expert's testimony from which an ALJ can reasonably infer the assessed impairment rating is based upon the AMA Guides, the ALJ, as fact-finder, is free to adopt that physician's impairment rating. Here, Dr. Muffly adequately set forth his rationale for assessing a 1% impairment rating for pain, indicating in his February 6, 2015, report that Daniels has "chronic ankle pain with painful internal fixation device." Dr. Muffly based the 1% impairment rating

for chronic ankle pain on Chapter 18 of the AMA Guides. The ALJ is not required to second-guess Dr. Muffly's impairment rating by reviewing the medical records and testimony, consulting the AMA Guides, and re-assessing an impairment rating based upon his or her own judgment. Indeed, the ALJ has the discretion to rely upon Dr. Muffly's opinions and impairment rating. The ALJ's discretion will not be disturbed.

Accordingly, the April 1, 2015, Opinion and Order and the May 4, 2015, Opinion and Order on Reconsideration are **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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