

OPINION ENTERED: April 5, 2013

CLAIM NO. 201200136

HORIZON BAY

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,  
ADMINISTRATIVE LAW JUDGE

MARY CHAKNINE  
and HON. EDWARD D. HAYS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Horizon Bay appeals from the November 14, 2012, opinion, order, and award and the December 19, 2012, order overruling Horizon Bay's petition for reconsideration of Hon. Edward Hays, Administrative Law Judge ("ALJ"). In the November 14, 2012, opinion, order, and award, the ALJ awarded Mary Chaknine ("Chaknine") permanent partial disability ("PPD") benefits enhanced by the three

multiplier and medical benefits. Horizon Bay filed a petition for reconsideration asserting the ALJ erred in enhancing the PPD benefits by the three multiplier "based on the plaintiff's testimony alone as there is no supporting medical evidence." Horizon Bay also requested specific additional findings. Horizon Bay makes the same argument on appeal.

The Form 101 indicates Chaknine injured her right elbow and neck on February 7, 2011, in the following manner: "I was working and fell on ice while taking trash out and injured my right elbow, back." The Form 101 indicates that at the time of the injury, Chaknine was a "caregiver," and the requirements of the job were "heavy work." Horizon Bay filed a Form 111- Notice of Claim Denial denying the claim.

The September 12, 2012, benefit review conference ("BRC") order lists the following contested issues:

benefits per KRS 342.730 including multipliers, work-relatedness/causation as to neck, notice (as to neck), unpaid or contested medical expenses (neck), injury as defined by the Act (as to neck), and vocational rehabilitation.

The BRC order also indicates the parties stipulated Chaknine continued to work after the accident until July 18, 2011.

In the November 14, 2012, opinion, order, and award, the ALJ made the following findings of fact and conclusions of law regarding the applicability of the multipliers:

One of the remaining issues herein is whether or not plaintiff is entitled to any of the statutory multipliers provided for in KRS 342.730(1)(c). Pursuant to subparagraph (1), the ALJ finds that plaintiff does not retain the physical capacity to return to the type of work that she was performing at the time of her injury. Ms. Chaknine gave consistent and credible testimony as to the severity of her pain and as to the limitations and restrictions which result therefrom. She testified convincingly that she cannot perform the functions of her past work, which consisted mainly of the job of caregiver. She is not capable of lifting patients or controlling patients. She is incapable of doing the amount of lifting, bending, stooping, as is required in the regular performance of her job. A claimant's testimony as to what functions he or she is able to perform following a work-related injury constitutes substantial evidence on which the ALJ may rely. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). In this case, the ALJ finds that Ms. Chaknine testified honestly and consistently.

The Plaintiff was able to return to work for a short period of time at light duty work. However, she was later terminated, allegedly due to tardiness. A finding as to this matter would have relevance only as to the question of whether or not the plaintiff is entitled to the multiplier

of 2 under subparagraph (2) of the cited statute. Where the ALJ finds that both paragraphs (1) and (2) are applicable, the ALJ must find which multiplier is the most appropriate. In the case at hand, the ALJ finds that the 3x multiplier is appropriate. The claimant is physically unable to perform all of the functions of her former work. Accordingly, she does not have the ability to achieve earnings which are equivalent to her former earnings.

Chaknine's March 13, 2012, deposition was introduced which reveals Horizon Bay is a nursing facility, and Chaknine worked in the Alzheimer's unit. In a typical shift, Chaknine was responsible for six to ten patients and she worked from 3 p.m. to 11 p.m. Her shift involved six hours or more of standing and involved lifting. She described the lifting tasks as follows:

There were actually several residents who were total care, which was not really in our job description. So they were- we were lifting them, changing them, transferring them from wheelchair to toilet to toilet to wheelchair.

At the time of the accident, Chaknine worked 37.5 to 40 hours each week at the rate of ten dollars per hour. Chaknine returned to light duty work at Horizon Bay seven days after her injury at the same rate of pay and working the same number of hours. Chaknine was terminated in July

within a week and a half of Dr. Gabriel taking her off light-duty and putting her on full-duty. She was allegedly terminated due to tardiness.

At the time of her deposition, Chaknine was working for Belmont Village, an assisted-living facility. She worked forty hours a week earning nine dollars an hour. She earned less than what she earned while working for Horizon Bay, and her job at Belmont Village did not involve any heavy lifting.

Chaknine believed she is unable to return to her former job at Horizon Bay explaining as follows:

Q: Okay. What is it about the job that you don't think you can perform?

A: I can't lift. I have a lot of swelling in my arm still, a lot of extreme pain, numbness in my hands. I don't have any strength in my hands. I have a hard time doing simple things, like taking gas caps off of my truck; I have my brother's truck, and it has a locked gas cap, and I can't manipulate the key of the thing, the cap.

Chaknine believed she could continue to work at Belmont Village as long as she is not asked to perform more work using her arm. At the time of the deposition, Chaknine was not under the care of a physician for her elbow or neck, not under any work restrictions, and takes over-the-counter medication.

On an average day, Chaknine has pain in her right elbow and swelling in her right arm from the wrist up. Her right arm is weak, and she has difficulty performing everyday tasks such as putting dishes away. Her neck hurts "occasionally."

Chaknine testified at the September 24, 2012, hearing. At the time of the hearing, Chaknine had left her job at Belmont Village because she had been moved to the "memory care" unit which involved more lifting. After leaving Belmont Village, Chaknine worked for an agency named Helping Hands. She stopped working for Helping Hands after her hours were cut and she was sent to places "that were more physical." At the time of the hearing, Chaknine was looking for work.

Chaknine reiterated she can no longer perform the job she was performing at the time of the injury testifying as follows:

Q: In your discovery deposition you said that you did not think that you could do the job you had [sic] Horizon Bay, as it relates to your current physical condition, is that still the same?

A: Yes.

Q: What is it about the job there that [sic] would find difficult?

A: The lifting is very difficult because with a lot of dementia Alzheimers [sic] clients you have to do quite a bit of lifting. They don't- they get to a point where they don't understand what it is you want them to do. Bathing is an issue- trying to get them undressed and bathed because they don't do their own bathing. The house cleaning is an issue.

At the time of the hearing, Chaknine was neither taking prescription medication nor under any medical restrictions for her neck and elbow condition.

Horizon Bay introduced a "Medical Questionnaire" dated May 8, 2012, completed by Dr. Thomas Gabriel. In the questionnaire, Dr. Gabriel opined Chaknine retained the physical capacity to return to work at her regular job as a caregiver at Horizon Bay. Dr. Gabriel imposed no restrictions due to the February 7, 2011, work incident and assessed a 1% impairment rating for the right upper extremity pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Chaknine introduced Dr. Warren Bilkey's May 15, 2012, independent medical examination ("IME") report. Dr. Bilkey imposed no work restrictions and stated "Ms. Chaknine has resumed regular duty work." Pursuant to the AMA Guides, Dr. Bilkey assessed a 4%

impairment rating attributable to the February 7, 2011, work injury.

On February 11, 2011, Dr. David Tate placed Chaknine on lifting restrictions for the right upper extremity of no more than two pounds until a re-evaluation on March 1, 2011.

Dr. Frank Bonnarens' May 27, 2011, report contains a recommendation Chaknine resume her "activities of daily living and return to work regular duty."

It is well-settled the claimant's own testimony as to her capabilities and limitations may be relied upon by the fact-finder in determining the physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Company v. Curling, 451 S.W.2d 610 (Ky. 1970). Chaknine's testimony is certainly consistent with the fact she is no longer able to return to the type of duties she was performing as a caregiver with Horizon Bay at the time of her injury. Chaknine's testimony, standing alone, constitutes substantial evidence which supports the ALJ's decision the three multiplier pursuant to KRS 342.730(1)(c)(1) is applicable. Contrary to Horizon Bay's argument on appeal, the ALJ may rely exclusively on the claimant's testimony in making a determination as to the applicability of the three

multiplier. However, the record is not devoid of medical evidence supportive of the ALJ's determination. On February 11, 2011, Dr. David Tate restricted Chaknine to lifting no more than two pounds with the right upper extremity. This lifting restriction, in light of Chaknine's description of her pre-injury duties with Horizon Bay, prohibits a return to her former work. Thus, the ALJ's determination the three multiplier is applicable is supported by substantial evidence in the form of Chaknine's testimony and Dr. Tate's restrictions.

That said, we vacate the ALJ's award of the three multiplier and remand for an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). In Fawbush v. Gwinn, supra, the Supreme Court held that in cases where KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 both apply, the ALJ must conduct an additional analysis, directing as follows:

We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that 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, the application of paragraph (c)1 is appropriate.

Id. at 12.

The Supreme Court reaffirmed this holding in Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), stating as follows:

The court explained subsequently in Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky.App.2004), that the *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

Id. at 168-169.

In the case *sub judice*, the ALJ determined the three multiplier is applicable. Additionally, the ALJ determined KRS 342.730(1)(c)(2), the statutory provision relating to the two multiplier, is also applicable by stating as follows in the November 14, 2012, opinion, order, and award:

The Plaintiff was able to return to work for a short period of time at light duty work. However, she was later terminated, allegedly due to tardiness. A finding as to this matter would have relevance only as to the question of whether or not the plaintiff is entitled to the multiplier of 2 under subparagraph (2) of the

cited statute. Where the ALJ finds that both paragraphs (1) and (2) are applicable, the ALJ must find which multiplier is the most appropriate.

The September 12, 2012, BRC order indicates Chaknine continued to work at Horizon Bay until July 18, 2011. Further, Chaknine's deposition testimony establishes she returned to light duty work at Horizon Bay seven days after her injury at the same rate of pay and working the same number of hours. Therefore, it is clear KRS 342.730(1)(c)(2) is also applicable.

Pursuant to Fawbush v. Gwinn, supra, and Adams v. NHC Healthcare, supra, after determining the provisions of KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 are applicable, the ALJ is required to determine whether Chaknine is "able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn at 12. However, both the November 14, 2012, opinion, order, and award and the December 19, 2012, order overruling Horizon Bay's petition for reconsideration are silent as to whether Chaknine is unlikely to be able to continue earning a wage that equaled or exceeded her wage at the time of the injury for the indefinite future as required by Fawbush v. Gwinn, supra. On remand, the ALJ must conduct this analysis. If the ALJ determines based

upon the evidence Chaknine is unable to earn this wage into the indefinite future, enhancement by the three multiplier is appropriate.

We realize the alleged reason for Chaknine's termination from Horizon Bay, post-injury, is tardiness. Thus, Chaknine, under an analysis pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010) would not be entitled to the two multiplier for the period of "cessation" of her employment at Horizon Bay. Nonetheless, the two multiplier was *triggered* due to the fact Chaknine returned to work at Horizon Bay following the injury at the same wages she earned before the injury. Since both the two and three multiplier are applicable, as determined by the ALJ, a full analysis pursuant to Fawbush v. Gwinn, supra, and Adams v. NHC Healthcare, supra, is required.

Accordingly, those portions of the November 14, 2012, opinion, order, and award and the December 19, 2012, order on reconsideration enhancing the award of PPD benefits by the three multiplier are **VACATED**. This claim is **REMANDED** for entry of an amended opinion, order, and award in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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