Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 23, 2013

CLAIM NO. 201179693

JEFFERSON COUNTY PUBLIC SCHOOLS PETITIONER

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

SHERRI FRECH
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

SHERRI FRECH CROSS-PETITIONER

VS.

JEFFERSON COUNTY PUBLIC SCHOOLS
and HON. WILLIAM J. RUDLOFF, CROSS-RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Jefferson County Public Schools ("Jefferson County") appeals from the May 2, 2013, opinion

and award and the June 10, 2013, order overruling Jefferson County's petition for reconsideration of William J. Rudloff, Administrative Law Judge ("ALJ"). Sherri Frech ("Frech") cross-appeals from the May 2, 2013, opinion and order and the June 10, 2013, order overruling, in part, her petition for reconsideration. In the May 2, 2013, opinion and award, the ALJ awarded Frech temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for injuries to her right knee, neck, lumbar spine and hip, and myofascial pain.

On appeal, Jefferson County puts forth four arguments. First, Jefferson County asserts the ALJ's application of the three multiplier is contrary to the statutory language and the criteria set forth in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Second, it asserts the ALJ's determination Frech's right knee, low back and neck conditions, and myofascial pain are related to the May 26, 2011, injury is erroneous. Third, Jefferson County asserts the ALJ's findings of fact are incomplete. Finally, Jefferson County asserts the impairment rating relied upon by the ALJ for Frech's low back condition is not based on objective findings.

On cross-appeal, Frech requests the claim be remanded for clarification regarding the award of TTD benefits.

The Form 101 indicates on May 26, 2011, Frech was injured in the following manner:

> Plaintiff was working in the kitchen in the course of her employment when a steel rack approximately 6 feet high and 3 feet wide, loaded with trays of food fell on Plaintiff injuring her Left Shoulder. Left Knee (Right Knee compensatory), Left Ankle, Hips and Neck/Back. Plaintiff suffered work-related injury causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides.

The December 21, 2012, benefit review conference ("BRC") order lists the following contested issues: "benefits per KRS 342.730, work-relatedness/causation [handwritten: R. Knee), unpaid or contested medical expenses, injury as defined by the ACT (handwritten: R. Knee), TTD." Under "other" is written the following: "L. Knee [illegible] Condition At Issue & Medical Dispute."

Jefferson County's first argument on appeal is the ALJ's application of the three multiplier is in direct contradiction to his finding Frech is able to return to the type of work she performed at the time of the injury. Jefferson County asserts as follows: "Since Judge Rudloff

determined that Ms. Frech did retain the ability to return to the type of work which she performed at the time of her injury, the Fawbush analysis is not applicable."

Regarding the three multiplier, the ALJ determined as follows in the May 2, 2013, opinion and award:

> This is a situation where both the 3 multiplier and the 2 multiplier could potentially apply under the given facts of this claim within the principles enunciated in *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky.2003). The *Fawbush* case requires the Judge to make three essential findings of fact. First, the Judge must determine, based on substantial evidence, that the plaintiff cannot return to the type of work performed at the time of the plaintiff's injuries in accordance with KRS 342.730(1)(c)1; and second, the plaintiff has returned to work at an average weekly wage equal to or greater than the plaintiff's pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and third, whether the plaintiff can continue to earn that level of wages into the indefinite future. In this case, I find the sworn testimony of the plaintiff to be credible and convincing and I also find the medical evidence from Dr. Bilkey to be very persuasive. I, therefore, make the factual determination that the plaintiff can return to the type of work which she performed at the time of her injuries. Based on the sworn testimony of the plaintiff and the convincing medical evidence from Dr. Bilkey, I make the factual determination that although Ms. Frech has returned to work at an average

weekly wage equal to or greater than her pre-injury average weekly wage, the 2 multiplier does not apply. In addition, it is important to remember that under the holding of the Court of Appeals of Kentucky in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform the plaintiff's current job. Under the *Adkins* case, the standard for the decision is whether the injuries have permanently altered the worker's ability to earn an income and the application of KRS 342.730(1)(c)1 is appropriate, if the individual returns to work at the same or greater wage, but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. I note that Ms. Frech stated to Dr. Bilkey that her pain is a daily phenomenon and that her pain intensity is from 4-8 on a 0-10 pain scale. Ms. Frech related to Dr. Bilkey that her sleep is dysfunctional due to her pain. Dr. Bilkey stated that in his medical opinion Ms. Frech sustained injuries to her left knee, right knee, neck, low back, hip area and myofascial pain as a result of her work accident on May 26, 2011. Based upon that evidence from Ms. Frech and Dr. Bilkey, I make the factual determination that the third prong of the *Fawbush* analysis applies here, and that Ms. Frech's injuries have permanently altered 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. I, therefore, make the factual determination that the third prong of the *Fawbush* analysis applies here and that under that application the

> plaintiff is entitled to the 3 multiplier.

At first blush, it appears the ALJ made a typographical error in the May 2, 2013, opinion and order when he determined as follows: "I, therefore, make the factual determination that the plaintiff can return to the type of work which she performed at the time of her injuries." However, in Jefferson County's May 15, 2013, petition for reconsideration, it brought to the ALJ's attention the contradiction between the ALJ's determination that Frech retained the physical capacity to return to her customary employment and the ALJ engaging in a Fawbush analysis. In the June 10, 2013, opinion and order ruling on the petitions for reconsideration, the ALJ failed to modify his determination that Frech was able to return to the type of work which she performed at the time of her injuries. Indeed, Jefferson County's petition for reconsideration was overruled. Thus, we must conclude the ALJ did not make a typographical error.

The Fawbush analysis applies only in cases in which the three and two multiplier are both potentially applicable. *See* Adkins v. Pike County Board of Education, supra. Here, the ALJ specifically found KRS 342.730(1)(c)1 is not applicable. Having made the factual determination

Frech "can return to the type of work which she performed at the time of her injuries," it was unnecessary for the ALJ to engage in a Fawbush analysis. After determining the three multiplier was not applicable, the ALJ should have analyzed the applicability of the two multiplier and stopped there. For the ALJ to continue with the Fawbush analysis and resolve the third prong in favor of application of the three multiplier is error, and there is no supportive precedent in the applicable law. The ALJ's award of the three multiplier is reversed. Based on the ALJ’s finding Frech returned to work at an average weekly wage equal to or greater than her pre-injury average weekly wage, remand is necessary for enhancement of the income benefits pursuant to KRS 342.730(1)(c)2 and the guidelines set forth in Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671.

In its second argument, Jefferson County asserts the ALJ's determination Frech's right knee, low back, neck, and myofascial conditions are related to the May 26, 2011, injury is erroneous. Jefferson County argues the ALJ should have relied upon the opinions of the treating orthopedic surgeon, Dr. Thomas Loeb, over the opinions of Dr. Warren Bilkey, a non-orthopedic surgeon.

In an independent medical examination ("IME") report dated January 14, 2013, Dr. Bilkey diagnosed the following:

> 1. 5/26/11 work injury, left knee contusion/strain injury with medial meniscus tear. Ms. Frech underwent surgical menisectomy. She was subsequently diagnosed with symptomatic plica and underwent a second arthroscopic surgical procedure for further meniscus debridement and for removal of plica.
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> 2. Right knee strain, medial meniscus tear, symptomatic plica. Ms. Frech underwent surgical menisectomy with removal of plica.
>
> 3. Cervical strain with chronic neck pain.
>
> 4. Lumbar strain, bilateral hip pain.
>
> 5. Myofascial pain.

Dr. Bilkey further opined as follows:

> In my opinion, the above diagnoses are due to the 5/26/11 work injury. The evaluation and treatment procedures that have been carried out appear to have been reasonable, medically necessary and work injury related. It does not appear that Ms. Frech had an active impairment affecting any of these injury sites prior to 5/26/11.

Regarding an impairment rating, Dr. Bilkey determined as follows:

> Ms. Frech has acquired a permanent partial impairment caused by the 5/26/11 work injury. According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, for the knee injuries and surgeries, Table 17-33 is referred to. This is the diagnosis based evaluation Table for lower limb impairments. For the partial menisectormy procedures to both knees, there is 1% whole person impairment, 2% lower limb impairment. No impairment maybe [sic] calculated here with respect to loss of range of motion or other measures. It is noted that this individual is very flexible and I think this makes an impairment related to loss of motion one that requires a relatively greater physical injury than somebody who starts out being relatively tight. With respect to the cervical strain injury, this is a Cervical DRE Category II impairment according to Table 15-5. There is 5% whole person impairment. With respect to the lumbar strain, with ongoing hip pain concern, there is 3% whole person impairment primarily for the hip pain problem. This is referenced on Fig. 18.1 in the Chapter on Chronic Pain. She does not qualify for a DRE related impairment to the lumbar spine based on examination findings. Furthermore, impairment with respect to loss of hip motion may not be issued either. Combining these impairments yields a total 10% whole person impairment which is solely attributable to the 5/26/11 work injury.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion with regard to every element of the claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). As Frech was the party

with the burden of proof and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as evidence of substance and relevant consequence and having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

As fact-finder, the ALJ 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 Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He 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).

The opinions of Dr. Bilkey comprise substantial evidence in support of the ALJ's determination that Frech's

right knee condition, low back and neck condition, and myofascial symptoms are related to her May 26, 2011, injury. The argument the ALJ should have relied upon a physician's opinion because of his or her credentials, is without merit. The ALJ, as fact-finder, has full discretion to determine the physician or physicians upon which he relies. We acknowledge the differing medical opinions in the record; however, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The ALJ's decision to rely upon Dr. Bilkey will not be disturbed.

Jefferson County's third argument is that the ALJ's findings of fact on work-relatedness are inadequate and incomplete. Jefferson County asserts as follows:

> Given the multiple medical opinions that contended that Ms. Frech's right knee, neck and back conditions were not work-related, the Petitioner asserts that the ALJ's Findings of Fact are inadequate under the circumstances.

In the May 2, 2013, opinion and award, the ALJ made the following findings of fact on the issue of work-relatedness:

> I saw and heard the plaintiff Ms. Frech testify at the Final Hearing and make the factual determination that she was a credible, persuasive and convincing witness. Based upon the totality of the evidence and specifically upon the plaintiff's sworn testimony and the comprehensive medical report from Dr. Bilkey, I make the factual determination that as a result of Ms. Frech's work accident on May 26, 2011 she sustained physical injuries to both her left knee and her right knee, injuries to her neck, injuries to her lumbar spine and hip and myofascial painful symptoms. I found Dr. Bilkey's comprehensive medical report to be very persuasive.

While this Board acknowledges the ALJ's findings of fact are lacking in detail, this is not a case in which the Board and the parties must struggle to identify the substantial evidence which served as the basis for the ALJ's findings. The May 2, 2013, opinion and award clearly notes the ALJ relied upon both Frech's testimony at the final hearing and Dr. Bilkey's report. As noted herein, Dr. Bilkey's opinions constitute substantial evidence in support of the ALJ's finding of work-relatedness. Simply put, the ALJ has provided sufficient findings to apprise the parties and this Board of the basis for his decision, and the basis for his decision constitutes substantial evidence. *See* Big Sandy Community Action Program v.

Chafins, 502 S.W.2d 526 (Ky. 1973). Thus, additional findings in this case are unnecessary.

Finally, in a three-sentence paragraph, Jefferson County argues Dr. Bilkey's 3% impairment rating for Frech's low back condition is not based on objective findings; therefore, "[a]t least 3% of the 10% award should be found to be non-compensable."

Dr. Bilkey's January 14, 2013, IME report is based upon a physical examination of Frech which includes, but is not limited to, height and weight measurement, side bends, back bends, spine compression, shoulder rotation, hip flexion, knee examination and palpation, sit-ups, etc. Dr. Bilkey's physical examination is extensively described within the report. The report also indicates Dr. Bilkey performed a thorough medical records review, which included the medical records of Dr. Loeb concerning Frech's low back condition.

KRS 342.0011(33) defines “objective medical findings” as “information gained through direct observation and testing of the patient applying objective or standardized methods.” In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court, in addressing this definition, recognized in addition to objective diagnostic tools such

as x-ray, CT scan, EMG/NCV or MRI, there is a wide array of standardized laboratory tests and tests of physical and mental function available to the medical practitioner. The Court further emphasized as follows:

> We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrate the existence of symptoms of such a change.

Id. at 762.

Dr. Bilkey's impairment rating regarding Frech's low back injury is based on objective medical findings, and the ALJ's reliance upon this impairment rating will remain undisturbed.

In Frech's cross-appeal, she asserts the case should be remanded for the ALJ to clarify the award of TTD benefits. Frech asserts as follows:

> The Employer disputed work-relatedness and causation of Ms. Frech's right knee injury. (12/21/12 Benefit Review Conference Order) Thus, when Ms. Frech was off work after undergoing right knee surgery performed by Dr. Loeb on January 6, 2012, Ms. Frech was not paid Temporary Total Disability (TTD) benefits. (Transcript p. 14)
>
> Further, although the Employer reinstated TTD benefits from March 29, 2012 through May 15, 2012, Ms. Frech underwent additional left knee surgery

on March 19, 2012 and was not released to return to work until May 28, 2012. (See Loeb records attached to Form 101)

In the April 18, 2013 Opinion & Order ALJ Rudloff awarded TTD benefits as originally paid by the Employer, July 25, 2011 through October 14, 2011 and from March 29, 2012 through May 15, 2012. (Opinion p.7)

Ms. Frech filed a Petition for Reconsideration requesting additional findings of fact regarding the periods of TTD benefits. Ms. Frech further requested an award of TTD benefits from July 25, 2011 through October 14, 2011; from January 6, 2012 through March 5, 2012, and from March 19, 2012 through May 28, 2012 with the Employer receiving a credit for benefits previously paid.

In the June 10, 2013 Order on Petition for Reconsideration ALJ Rudloff reaffirmed his rulings in the original Opinion with the exception of the amendment to TTD benefits. ALJ Rudloff amended the Opinion to reflect an award of TTD benefits from January 6, 2012 through March 5, 2012 and from March 19, 2012 through May 28, 2012.

Although it is assumed the original award of TTD benefits from July 25, 2011 through October 14, 2011 remained unchanged by the Order on Petition for Reconsideration, Ms. Frech requests the claim be remanded for an Order clarifying the periods of Temporary Total Disability benefits awarded are July 25, 2011 through October 14, 2011; January 6, 2012 through March 5, 2012; and March 19, 2012 through May 28, 2012 with the Employer receiving a credit for benefits previously paid.

In the May 2, 2013, opinion and award, the ALJ determined the following regarding TTD benefits:

> KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.
>
> Based on the sworn testimony of the plaintiff, which was credible and convincing, and the totality of the medical evidence in the record, specifically including the medical report from Dr. Bilkey, I find that the plaintiff is entitled to recover from the defendant and its workers' compensation insurance carrier temporary total disability benefits for the periods July 25, 2011 to October 14, 2011 and again from March 29, 2012 to May 15, 2012.

In Frech's May 16, 2013, petition for reconsideration, she requested an award of additional periods of TTD benefits from January 6, 2012, through March 5, 2012,[1] and from March 19, 2012, through May 28, 2012, with Jefferson County receiving credit for benefits already paid.

In the June 10, 2013, order the ALJ determined as follows:

[1] Later in her petition for reconsideration, Frech requested an award of TTD benefits from January 6, 2012, through May 5, 2012.

> Plaintiff's Petition for Reconsideration regarding temporary total disability benefits allegedly due and owing to the plaintiff is well taken. The Opinion and Order in this case dated May 2, 2013 is, therefore, amended so as to state that plaintiff is entitled to recover from defendant and its workers' compensation insurer temporary total disability benefits in the amount of $188.13 per week for the period from January 6, 2012 through March 5, 2012, and again from March 19, 2012 until May 28, 2012. In reaching that decision, I rely on the evidence cited by the plaintiff in her Petition for Reconsideration and also the decision of the Supreme Court of Kentucky in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky.2000).

The Board agrees that the wording of the ALJ's June 10, 2013, order is unclear. Significantly, the order does not state the two periods of TTD benefits awarded in the order are in addition to the TTD benefits awarded in the May 2, 2013, opinion and award. While the logical assumption is that the additional two periods of TTD benefits are supplemental to those awarded in the May 2, 2013, opinion and award, neither party nor this Board should be left to guess. Therefore, the claim is remanded to the ALJ for clarification on the precise periods of TTD benefits awarded.

Accordingly, the May 2, 2013, opinion and award and the June 10, 2013, order on reconsideration are hereby

AFFIRMED in part, **REVERSED** in part, and **REMANDED** for entry of an amended opinion and award in conformity with the views set forth in this opinion.

ALL CONCUR.

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