# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: September 16, 2016**

CLAIM NO. 201265272

JOANN SOMERVILLE-RICHARDSON PETITIONER

VS. **APPEAL FROM HON. UDELL B. LEVY, ADMINISTRATIVE LAW JUDGE**

INTEGRATED MANUFACTURING & ASSEMBLY LLC
and HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** Joann Somerville-Richardson ("Richardson") seeks review of the February 16, 2016, Opinion, Award, and Order of Hon. Udell B. Levy, Administrative Law Judge ("ALJ"), determining on reopening Richardson sustained a worsening of condition and now has a 7% permanent impairment resulting from an October 17, 2012, injury to her right foot while in the employ of Integrated

Manufacturing & Assembly LLC ("IMA").[1] The ALJ awarded temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits beginning on July 8, 2015, and continuing thereafter through the balance of the 425 week period which began on August 17, 2012. The ALJ also awarded medical benefits. In addition, the award of PPD benefits shall be doubled during any period Richardson ceases to earn a weekly wage equal to or greater than her pre-injury average weekly wage ("AWW"). Richardson also appeals from the ALJ's March 18, 2016, Order sustaining IMA's petition for reconsideration.

On appeal, Richardson attacks the ALJ's decision on two grounds. First, she alleges the ALJ erred in finding she reached maximum medical improvement ("MMI") on September 30, 2015. Next, Richardson asserts the ALJ's analysis regarding the applicability of the three multiplier, as set forth in KRS 342.730(1)(c)1, is erroneous.

The record reveals on May 2, 2013, Richardson filed this claim alleging on October 17, 2012, she injured her right foot when a fifteen pound drill fell on it. The Form 101 notes surgery was performed on March 19, 2013.

[1] The claim was filed in the name Joann Somerville as Richardson married after her claim was decided.

On December 9, 2013, Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman") entered an Opinion and Award finding as follows:

> In this particular case, the defendant argues that only the ganglion cyst is related to the plaintiff's work related traumatic event of October 17, 2012. In doing so, the defendant relies on the opinion testimony of Dr. Best who felt the portion of the surgery relating to degenerative arthritis would not be related to the injury. However, the treating physician, Dr. Klutts, did not draw such a distinction in his notes. Further, Dr. Byrd and Dr. Levine both felt the entirety of the plaintiff's right foot condition was related to the work related event. The plaintiff's testimony indicates she was not having any difficulty immediately prior to the subject injury. After considering the testimony of the plaintiff along with the entirety of the medical evidence in the record, I am convinced the ganglion cyst and 2nd metatarsal osteotomy are both related to the injury sustained in the course and scope of the plaintiff's employment with the defendant on October 17, 2012.

Based on the medical evidence, ALJ Coleman concluded Richardson met the two-part test for TTD benefits during the period from March 19, 2013, through July 11, 2013. Based on the opinions of Drs. Paul Klutts and Robert Levine, ALJ Coleman found Richardson did not have a permanent impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation

of Permanent Impairment ("AMA Guides") and was not entitled to PPD benefits.

On July 8, 2015, Richardson filed a motion to reopen asserting her physical condition has worsened since ALJ Coleman's award, she had undergone a subsequent surgery, and a third surgery had been recommended. Richardson attached her affidavit and the May 26, 2015, Independent Medical Evaluation ("IME") report of Dr. Thomas Loeb performed at the request of IMA's worker's compensation carrier.

By order dated August 7, 2015, Hon. Robert L. Swisher, Chief Administrative Law Judge, determined Richardson had set forth a *prima facie* case for reopening and sustained her motion to the extent the claim would be assigned to an Administrative Law Judge. Subsequently, the claim was assigned to the ALJ.

In the December 9, 2015, Benefit Review Conference Order & Memorandum the parties stipulated to the duration of TTD benefits paid and whether Richardson retains the physical capacity to return to the type of work performed at the time of the injury was a contested issue. Significantly, the parties stipulated Richardson returned to work on August 11, 2015, at a wage equal to or greater than her AWW and currently earns wages equal to or greater

than her AWW. Benefits per KRS 342.730 and KRS 342.125 were listed as a contested issue.

In the February 16, 2016, Opinion, Award, and Order, the ALJ set forth the stipulations which include the amount and duration of Richardson's TTD benefit payments and her AWW. The ALJ determined Richardson now has a 7% impairment rating due to the second surgery on August 19, 2014, performed by Dr. Klutts, which is an increase in her disability since ALJ Coleman's decision of December 9, 2013, reasoning as follows:

> In this instance, Judge Coleman determined on December 9, 2013 that Plaintiff had sustained a permanent injury but did not have a ratable impairment per the AMA Guides. She was still awarded medical benefits to treat the effects of her injury, pursuant to *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). It has been shown by the evidence that Ms. Sommerville-Richardson [sic] returned to see Dr. Klutts in February, 2014 due to ongoing symptoms in her foot. Conservative treatment was pursued for several months but, when that proved unsuccessful, a second procedure was performed on August 19, 2014.
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> Dr. Loeb recognizes that Plaintiff has complications after the second procedure which was performed, in part, to remove hardware from her second metatarsal. He maintains, however, that the second metatarsal osteotomy was not related to the work injury. Nevertheless, it was previously determined by Judge Coleman that the

ganglion cyst *and* the second metatarsal osteotomy were both related. That decision is res judicata as between these parties.

Dr. Loeb noted Plaintiff developed a second neuroma in the webspace between the second and third toes, has pain radiating into the second and third toes and back to her midfoot, and that she walks with an antalgic gait secondary to this pain in her forefoot. He also noted ankylosis of the second toe and concluded the painful neuroma in the second and third webspace of the right foot were caused by surgical manipulation in the area of the second metatarsal osteotomy. Contrary to Dr. Loeb's medical conclusion, Ms. Sommerville-Richardson [sic] has a hammertoe deformity caused by the work injury as a matter of law. *Elizabethtown Sportswear v. Stice*, 720 S.W.2d 732 (Ky. App. 1986) [sic]

The evidence further shows Plaintiff reached MMI after her second surgery on September 10, 2015, per Dr. Byrd. Dr. Byrd also provides the most credible evidence of Plaintiff's impairment, having closely examined her entire forefoot and determined Ms. Sommerville-Richardson [sic] has ankylosis in all five toes in extension. It isn't clear Dr. Loeb actually examined Plaintiff's toes, other than the second toe, although he did conclude she maintained a mild antalgic gait. Dr. Klutts suggests she has a 3% whole person impairment but provides no explanation how he arrived at that estimate. Therefore, I conclude Plaintiff has developed a 7% permanent partial impairment from the second surgery, which represents an increase in her disability since the

> original decision was rendered on December 9, 2013.

Regarding the applicability of the multipliers, the ALJ determined as follows:

> KRS 342.730(1)(c) states as follows:
>
> > 1. 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, but this provision shall not be construed so as to extend the duration of payments; or
> >
> > 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained.
>
> These provisions require that the ALJ first consider subsection (1). Even if it is determined that, due to her injury, Ms. Sommerville-Richardson [sic] does not retain the physical capacity to return to the type of work she performed at the time of injury, it is necessary to consider whether she has returned to work at the same or

greater wages than her pre-injury AWW. *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) [sic]

. . .

Dr. Byrd has stated that Plaintiff should never lift or carry more than 25 pounds, cannot engage in any lifting in a competitive work situation, but that she can stand and walk 4-8 hours per day. However, Dr. Loeb opined that, without additional surgery to address problems with her forefoot [footnote omitted], Plaintiff cannot return to anything other than sedentary duty. Dr. Klutts advised Defendant that Ms. Sommerville-Richardson [sic] should have no restrictions and retains the physical capacity to continue to work at her regular job as an assembly line worker. Yet, Dr. Klutts provided Plaintiff with Work Releases on August 10, 2015 where he initially stated she needed to work light duty and rest for ten minutes every three hours. The second Release prepared that day stating Plaintiff had no restrictions was prepared at her request so she could try to work again. Moreover, it isn't evident Dr. Klutts even knows what Plaintiff's job functions entail.

The evidence shows Plaintiff has returned to work and performs her job with difficulty. More likely than not, she is able to perform her job as an assembler because her duties she is required to perform as union president allow her occasional opportunities to sit with her foot propped up. This is not consistent with an individual able to return to pre-injury employment status notwithstanding the effects of their injury. I therefore conclude the provisions of KRS 342.730(1)(c)1 are applicable in this case.

> Nevertheless, Plaintiff has returned to work at equal or greater weekly wages than her pre-injury average weekly wage. Therefore, the provisions set out in KRS 342.730(1)(c)2 are also applicable. Based on the testimony of both Plaintiff and Ms. Walker (who I also found to be very credible), there is every reason to believe Plaintiff will continue earning greater wages for the foreseeable future. Pursuant to *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), Plaintiff will not be entitled to any further multipliers, except during any period of cessation of that employment, during which time payment of PPD shall be two (2) times the following amount:
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> **$622.56 x 2/3 = $415.04 x 7% x .85 = $24.69 per week**

Concerning Richardson's entitlement to TTD benefits, the ALJ found as follows:

> The evidence in this case shows Plaintiff returned to work on August 9, 2015 but did not reach MMI after her second surgery until Dr. Byrd evaluated her on September 10, 2015. Although she last saw Dr. Klutts on August 3, 2015, he did not release her back to work until an effective date of August 10, 2015. Even then, it appears Ms. Sommerville-Richardson [sic] had to return to his office to have him lift restrictions altogether. Moreover, while the return date was projected as August 10, she actually returned to work one day earlier. Therefore, Plaintiff is entitled to TTD benefits through August 8, 2015 at the rate of $415.04 per week.

Richardson did not file a petition for reconsideration. However, IMA filed a petition for reconsideration asserting that at the final hearing, the parties stipulated to the rate, period, and total amount of TTD benefits paid as noted on page twelve of the ALJ's decision. IMA asserted the parties failed to acknowledge ALJ Coleman previously awarded a different rate and period of TTD benefits. IMA pointed out the ALJ had accurately noted ALJ Coleman awarded TTD benefits of $415.04 per week from March 19, 2013, through July 11, 2013. It requested the ALJ amend his decision to reflect TTD benefits were paid at the rate of $415.04 per week from March 19, 2013, through July 11, 2013, and at the rate of $428.96 per week from August 19, 2014, through August 3, 2015. IMA also requested the ALJ correct an error on page thirteen of his decision that Richardson returned to work on August 11, 2015, since the parties agreed she returned to work on August 9, 2015. It noted this is consistent with the ALJ's finding on page twenty of his decision wherein he noted Richardson was entitled to TTD benefits through August 8, 2015.

Notably, Richardson filed a response to the petition for reconsideration stating only as follows: "[i]f the ALJ concurs, the Plaintiff believes the identified

typographical errors need to be corrected by the assigned ALJ."

The ALJ entered an Order on March 18, 2016, sustaining the petition for reconsideration and ordering as follows:

> The ALJ's Opinion and Award rendered on February 16, 2016 shall be amended to reflect the following:
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> 1. Stipulation 5 on page 12 should be amended to reflect that TTD benefits were paid in the amount of $415.04 per week from March 19, 2013 through July 11, 2013 (totaling $6,818.51), and at the rate of $428.96 per week from August 19, 2014 through August 3, 2015 (totaling $21,448.00), for a total amount of $28,266.51.
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> 2. Stipulation 9 on page 13 should be amended to reflect that Plaintiff returned to work on August 9, 2015 at a wage equal to or greater than her AWW. Plaintiff currently earns wages equal to or greater than her AWW.
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> 3. On page 20, paragraph 1 of the Order should be amended to reflect that, "Plaintiff shall recover temporary total disability income benefits from the Defendant and/or their carrier at the rate of $415.04 per week from 3/19/13 through 7/11/13 and 8/19/14 through 8/9/15, together with interest at 12% per annum on all past due amounts. The employer shall be entitled to a credit for all amounts overpaid in TTD during this period against any past due benefits, pursuant to *Triangle Insulation and Sheet Metal Co., v. Stratemeyer,* 782 S.W2d 628 (Ky. 1990).

> 4. All other provisions of the Opinion Award and Order not inconsistent with these amendments shall remain unaffected.

In support of her first argument, Richardson notes Dr. Klutts, who performed the two surgeries, has recommended a third surgery. However, Dr. Loeb was critical of the first two surgeries and recommended a different surgery to be performed by an orthopedic surgeon. She asserts the carrier for IMA has agreed to pay for the surgery recommended by Dr. Loeb but not the surgery recommended by Dr. Klutts. Richardson represents she is concerned about undergoing a third surgery given the results of the treatment already afforded her and the differences in the medical opinions.

Richardson concedes Dr. Robert Byrd opined MMI was attained on September 10, 2015, the date of his evaluation. However, she maintains the overwhelming medical and lay evidence demonstrates she has undergone continued treatment and is in need of a third surgery. Thus, Richardson argues the ALJ erred in finding she was at MMI on September 10, 2015.

Richardson agrees the ALJ accurately found she returned to work on August 9, 2015, but notes her restrictions were only removed after she requested such.

She contends she has continually been treated by Dr. Klutts and testified she has not ruled out the need for a third surgery. Richardson cites to a myriad of symptoms as outlined in her testimony. She maintains if the ALJ's finding of MMI is left undisturbed she will be forced to seek another reopening of her claim in the event she seeks further medical treatment or her condition changes subsequent to obtaining the necessary recommended medical treatment.

Richardson argues the ALJ committed reversible error by finding she reached MMI on September 10, 2015. Consequently, the ALJ's decision should be reversed and the claim remanded to the ALJ for appropriate findings concerning MMI.

Concerning her second argument, Richardson puts forth the following statement which directly contradicts her argument: "The ALJ found that both KRS 342.730(1)(c) 1 and 2 are applicable. The Petitioner does not contest those findings and holdings." Richardson then asserts the ALJ erred in performing the analysis regarding applicability of the three multiplier and the analysis he performed pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) was very limited. She argues the ALJ's findings were based upon her job duties at the time of the reopening in July 2015 rather

than her job duties prior to the October 2012 work injury. Richardson asserts the Fawbush analysis requires findings she is medically disqualified from returning to her pre-injury work duties or any of the jobs which require her to stand or walk for prolonged periods of time. Richardson contends the ALJ failed to render any findings as to her physical capabilities prior to the work injury. She concludes by arguing as follows:

> In this case, the ALJ failed to render any findings as to the Petitioner's physical capabilities prior to the work injury. With or without restrictions and breaks for union matters or being allowed to work a sit down job, there is no question that the Petitioner is medically disqualified from returning to her per-injury [sic] 'capacities' to work or walk on her feet for prolonged periods.
>
> The ALJ erroneously rendered findings and holdings based upon the Petitioner's physical capabilities prior to reopening not prior to her work injury. As such, it is respectfully submitted that the ALJ committed reversible error as a matter of law. The Board is requested to vacate and remand this case to the ALJ for appropriate findings and a proper analysis per Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

As the claimant in a workers' compensation proceeding, Richardson had the burden of proving each of the essential elements of her cause of action. Snawder v.

Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Richardson seeks to overturn the ALJ's decision, the question on appeal is whether the evidence compels the result she seeks. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox,

19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We begin by noting Richardson did not file a petition for reconsideration. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the

ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Pursuant to KRS 342.285, an award or order of the ALJ as provided in KRS 342.275 shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed as provided for in KRS 342.281. KRS 342.281 provides for the filing of a petition for reconsideration "[w]ithin fourteen (14) days from the date of the award, order, or decision" of the ALJ. Thus, because Richardson did not file a petition for reconsideration as provided for in KRS 342.281, the ALJ's decision is conclusive and binding as to all questions of fact. Our only task on appeal is to determine whether the ALJ's decision is supported by substantial evidence.

Richardson's first argument lacks merit. Further, we take issue with Richardson's assertion that she has been considering whether to undergo surgery, as Richardson repeatedly stated during her deposition and at the hearing that she was not currently interested in undergoing a third surgery. Thus, it was reasonable for the ALJ to assume her condition had plateaued.

In his report generated as a result of an examination performed on September 10, 2015, Dr. Byrd

assessed a 7% impairment rating due to antalgic gait. In a Medical Questionnaire dated September 30, 2015, attached to his report, Dr. Byrd affirmatively stated Richardson had attained MMI. Significant to this appeal is the fact that in assessing an impairment rating, the AMA Guides require MMI to be attained before an impairment rating can be assessed. *See* 2.4 of the AMA Guides. In assessing the 7% impairment rating, Dr. Byrd obviously concluded Richardson was at MMI. He confirmed this in the Medical Questionnaire in which he indicated Richardson was at MMI and had a 7% impairment rating, none of which he attributed to a pre-existing active condition. Thus, the medical evidence filed by Richardson establishes she was at MMI, and we find Richardson's assertion she is not at MMI to be incongruous with this evidence.

In his decision, the ALJ relied upon Dr. Byrd in concluding Richardson had reached MMI on September 10, 2015. We also note that on November 17, 2015, Dr. Loeb assessed a 1% impairment rating and on November 30, 2015, Dr. Klutts assessed a 3% impairment rating. Since both doctors stated their impairment ratings were assessed pursuant to the AMA Guides, it was reasonable for the ALJ to conclude they believed Richardson had reached MMI. The opinion of Dr. Byrd constitutes substantial evidence supporting the ALJ's

finding that Richardson attained MMI on September 10, 2015. Significantly, Richardson did not file a petition for reconsideration taking issue with the ALJ's finding of the date of MMI; consequently, this Board has no authority to disturb that finding.

Similarly, we find no merit in Richardson's second argument the ALJ erred in his analysis regarding applicability of the three multiplier. We also find this argument to be disingenuous since Richardson did not in any way question the ALJ's finding regarding the applicability of the three multiplier and, instead, represented in her appeal brief that she did not contest "the findings and holdings" that both KRS 342.730(1)(c)1 and 2 are applicable.

Nothing in the ALJ's decision indicates his analysis regarding the three multiplier was based on Richardson's physical capability to perform the job she was performing at the time of reopening. In conducting the analysis regarding the applicability of the three multiplier, the ALJ makes no mention of Richardson's physical capabilities immediately prior to July 8, 2015, the date of reopening. Rather, the ALJ's summary of the stipulations signals his understanding the issue was whether Richardson retained the physical capacity to return to the type of work performed at the time of her injury on October

17, 2012. The ALJ noted it was more likely than not Richardson was able to perform her job as an assembler because the duties she is required to perform allowed her the occasional opportunity to sit with her foot propped up. The ALJ specifically noted this fact was not consistent with Richardson being able to return to her "pre-injury employment status." The ALJ set forth sufficient facts in support of his determination Richardson did not possess the capacity to return to the work she was performing at the time of her October 17, 2012, injury.

During her testimony, Richardson recounted what she had to do in order to perform her job after the injury. During her November 24, 2015, deposition, Richardson identified her job as an assembler and indicated at the time of her deposition she still worked at that job. In finding the three multiplier applicable, the ALJ solely discussed Richardson's ability to perform her job as an assembler, the job she was performing at the time of her October 17, 2012, injury. Since Richardson did not contest this finding by filing a petition for reconsideration, she has waived her right to complain about it on appeal.

We find no merit in the assertion the ALJ's analysis regarding the three multiplier was based on Richardson's physical capabilities at the time of reopening

in July 2015 rather than her physical capabilities at the time of the October 17, 2012, work injury.

Accordingly, the February 16, 2016, Opinion, Award, and Order and the March 18, 2016, Order amending the February 16, 2016, Opinion, Award, and Order are **AFFIRMED**.

ALL CONCUR.

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