OPINION ENTERED: June 28, 2013

CLAIM NO. 201000616

KRISTIN REESE PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

DRAYER PHYSICAL THERAPY
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING
AND REMANDING

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BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Kristin Reese ("Reese") seeks review of an opinion, order and award on remand rendered January 22, 2013 by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PPD") benefits and medical benefits for psychological injuries she sustained

while working for Drayer Physical Therapy ("Drayer"). Reese also appeals from an order dated March 18, 2013 denying her petition for reconsideration.

On appeal, Reese generally argues the ALJ erred in failing to enhance her award by the two multiplier pursuant to KRS 342.730(1)(c)2. Because Reese's cessation of employment relates to her work injury, the ALJ erred in failing to award the two multiplier. We therefore reverse that portion of the award, and remand for entry of an award consistent with this opinion.

Reese filed a Form 101 on May 25, 2010, alleging work-related cumulative trauma injuries to her cervical spine with radicular symptoms involving the left scapula, arm, and hand manifesting on November 24, 2008. She later amended her claim to include the allegation of a psychological injury secondary to her physical complaints. In the original opinion, the ALJ determined Draper's physical injury was temporary, and dismissed her psychological claim. Reese appealed to this Board, and in a decision rendered July 19, 2011, we held as follows:

> In addition, the ALJ determined Reese did not sustain a permanent work-related physical injury. That finding is supported by the opinion of Dr. Kriss and, contrary to Reese's assertion, Dr. Kriss's testimony concerning the duration of her physical

injury constituted substantial evidence upon which the ALJ was free to rely. Smyzer v. B.F. Goodrich Chemical Co. 474 S.W.2d 367, 369 (Ky. 1971); Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940). In accordance with Dr. Kriss's opinion, the ALJ further concluded: "if, the Plaintiff had a work related injury, she reached maximum medical improvement on March 31, 2009." To the extent these two conclusions are supported by the record, they must be affirmed. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In contrast, the ALJ failed to address whether Reese suffered a temporary gradual physical injury due to her work activities as a physical therapist at Drayer. While the ALJ did devote some discussion to whether Reese sustained "any work-related trauma," he failed to make a concrete finding with regard to the issue and, as such, we interpret that portion of the ALJ's analysis to be ambiguous. To that extent, the ALJ's decision must be remanded for additional findings of fact and conclusions of law concerning whether Reese, due to her work activities at Drayer between November 2008 and January 2010, suffered a gradual physical injury which was temporary in duration.

In making such a determination, we would point out to the ALJ it is beyond dispute Dr. Kriss diagnosed Reese with a "work-related musculoskeletal strain," which in his opinion resolved by March 24, 2010, but never subjectively improved because of ongoing psychological factors. Dr. McCrary, having only limited medical records for review, appears to have reached a similar conclusion regarding

Reese's diagnosis in relation to her work activities. Finally, Drs. Johnson and Burke were both of the opinion Reese's physical symptoms were causally related to her work activities as a physical therapist. While based on the Board's review of the record, this evidence appears uncontroverted, we are not vested with fact finding authority. *See* KRS 342.285. Accordingly, if on remand the ALJ is persuaded no work-related cumulative trauma producing temporary physical injury transpired, the ALJ shall recite with specificity his reasons for so ruling, and outline the medical evidence relied on in making that determination.

Alternatively, if the ALJ finds a work-related physical injury, was temporary in duration, in fact occurred, we believe as a matter of law a permanent disability award relative to Reese's secondary psychological claim is compelled. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As pointed out by Reese, a secondary psychological condition arising out of a work-related traumatic event or series of events resulting in permanent psychological impairment is compensable, even where the underlying work-related physical injury is only temporary in duration and produces no permanent harmful change. Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001); Richard E. Jacobs Group, Inc. v. White, 202 S.W.3d 24 (Ky. 2006).

In this instance, Dr. Sprague and Dr. Granacher were the only medical experts to address causation, as well as extent and duration of Reese's psychological condition. As set out above, both experts assessed Reese as having a 10% whole person psychological

> impairment pursuant to the AMA Guides secondary to her work-related physical injury at Drayer. Hence, should the ALJ on remand determine Reese suffered a temporary physical injury as a result of her work activities at Drayer, as a matter law he shall grant her an award of TTD benefits through March 24, 2010, to be followed by an award of permanent disability based on her psychological condition in line with the unrebutted opinions of Drs. Sprague and Granacher. *See* KRS 342.730(1).

The Board's decision was affirmed by the Kentucky Court of Appeals in an opinion rendered November 2, 2012. On remand, the ALJ determined as follows:

> As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W. 2d 418 (Ky., 1985).
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> As the Board correctly states, and the record reflects, the evidence appears uncontroverted that the Plaintiff sustained a temporary work-related strain. However, the Board has already affirmed the Administrative Law Judge's finding that even if the Plaintiff sustained such an injury she reached maximum medical improvement no later than March 31, 2009. Inasmuch as the Plaintiff did not miss any work from the date of injury, November 24,

2008, through the date of MMI, March 31, 2009, she is not entitled to any temporary total disability benefits. She also was not denied any medical treatment for the injury during that time frame and is not claiming any additional medical treatment during that time frame. Therefore no matters in controversy exist or are before the Administrative Law Judge regarding the temporary physical injury.

The Administrative Law Judge understands that the date of MMI is prior to the date Dr. Johnson examined the Plaintiff, and at her urging and based entirely on her self-examinations, determined the condition was work-related. However, the law is clear that in cumulative trauma claims the date of onset for purposes of notice and statute of limitations can be, and frequently is, different, than the dates for income benefits and medical treatment.

The Plaintiff is entitled, based on the findings and conclusions of Dr. Granacher, to a finding of a 10% impairment rating. Pursuant to the specific finding of Dr. Granacher she is not entitled to any restrictions and therefore no multipliers.

Further, as noted by Dr. Granacher the Plaintiff is clearly magnifying her psychological symptoms. This comports entirely with the undersigned’s own estimation of the reliability of the Plaintiff’s self-reporting. Dr. Sprague also declined to assign specific restrictions and noted that the Plaintiff had many causes for her psychological condition, only some of which are work-related.

The Plaintiff's only permanent work-related condition is psychological and she has no restrictions for that. She is not entitled to any enhancement pursuant to KRS 342.730(1)(c)1. Although the Defendant terminated the Plaintiff when they [sic] were unable to meet the restrictions she presented to them she is likewise not entitled to any enhancements pursuant to KRS 342.730(1)(c)2.

Those restrictions are not accurate and are not adopted by the undersigned. They were produced as a result of the Plaintiff's symptom magnification and belief, honestly held or not, that she cannot perform tasks and duties which she can, objectively do. That a Plaintiff arbitrarily demands unnecessary accommodations and makes factually inaccurate claims does not, within the meaning of *Chrysalis House v. Tackett*, 283 S.W.3d 671 (Ky. 2009), arise to the level that the fact that she is earning less wages than on the date of injury is due to the injury. Rather the fact that she is earning less wages is due to her and her mistakes, or more.

The Plaintiff is still vested with the right to file a Motion to Re-Open and, in the future, prove an entitlement to benefits pursuant to KRS 342.730(1)(c)2.

The Plaintiff's permanent partial disability award shall be 1339.23 (AWW) x 2/3 (workers' compensation rate subject to statutory maximum) x .10 (impairment rating) x.85 (grid factor) = $42.71, from November 24, 2010, for 425 weeks. She is also entitled to all reasonable and necessary, and work-related, medical expenses for the psychological condition.

Reese filed a petition for reconsideration on February 5, 2013 arguing the ALJ erred in failing to enhance her award of PPD benefits by the two multiplier pursuant to KRS 342.730(1)(c)2 to which she is entitled because she is no longer working due to the disabling injury. The petition for reconsideration was denied by order dated March 18, 2003.

The following facts are pertinent to this appeal. Reese was first seen by Dr. Charles Johnson, D.O., on January 8, 2010, who diagnosed her with cervical radiculopathy radiating into the left shoulder and arm and restricted her from work. Reese testified she was terminated by Drayer on May 27, 2010 due to medical restrictions imposed by Dr. Johnson.

Mr. Jeffery Wills ("Wills") testified by deposition on October 5, 2010. He became the center manager at Drayer in April 2005. Wills confirmed Reese worked as a physical therapist for Drayer in 2008. Wills testified he did not learn of Reese's alleged work-related injury until December 2009. Wills acknowledged Reese underwent informal physical therapy at the clinic between November 2008 and December 2009, including occasions when he administered therapy to her upper and mid-back. Wills

further acknowledged he was Reese's direct supervisor. Wills confirmed Reese's employment at Drayer was terminated because of her physical restrictions.

Reese began treating with Dr. Jonathan Cole, Ph.D., a licensed clinical psychologist, on May 27, 2010. Dr. Cole referred her for a psychiatric evaluation at Beaumont Behavioral Health, PSC, where she was diagnosed with adjustment disorder, depression and anxiety. Reese subsequently was treated with medication and psychotherapy.

Dr. Dennis B. Sprague, Ph.D., a licensed clinical psychologist, examined Reese on November 9, 2010. Dr. Sprague diagnosed a "Mood Disorder NOS" and "Pain Disorder with Psychological Factors and General Medical Condition." Dr. Sprague assessed a 10% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), due to her psychological condition. Dr. Sprague stated he saw no evidence of psychological impairment which pre-existed Reese's injury at Drayer.

Dr. Robert P. Granacher, Jr., a forensic psychiatrist, evaluated Reese on December 1, 2010. Dr. Granacher diagnosed Reese with "mood disorder (major depression), mostly in remission at the present time." Pursuant to the AMA Guides, Dr. Granacher assessed "a 10%

whole body psychiatric impairment due to a work injury November 24, 2008." Dr. Granacher likewise found no evidence of any pre-existing psychological condition prior to the November 2008 work injury. Dr. Granacher recommended continued psychological treatment using an anti-depressant medication.

As she did in her petition for reconsideration, Reese argues on appeal the ALJ erred in failing to enhance her award of PPD benefits by the two multiplier pursuant to KRS 342.730(1)(c)2. KRS 342.730(1)(c)2 states as follows:

> 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. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

In Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009), the Kentucky Supreme Court narrowed the applicability of KRS 342.730(1)(c)2, holding as follows:

> KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage 'for any reason, with or without cause.' It is, however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for 'disability' that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' provided that the reason relates to the disabling injury.

Later, in Hogston v. Bell South Telecommunication, 325 S.W.3d 314 (Ky. 2010), the Court revisited the application of the two multiplier. The Court held KRS 343.730(1)(c)2 includes a cessation of employment due to the disabling effects of previous work-related injuries as well as the injury being compensated. Id.

It is undisputed Reese sustained a temporary physical injury. Likewise, it is undisputed she sustained a 10% impairment due to her psychological condition stemming from her physical injury. Here, both Reese and Wills testified she continued to perform her job until the restrictions imposed by Dr. Johnson were presented to Drayer. She was then terminated because Drayer could not accommodate her restrictions. Therefore, clearly she is no

longer working due to restrictions resulting from her disabling injury. Because the impairment rating stems from a psychological impairment assessed due to her physical injury, it is part and parcel of her injury. We deem the two multiplier pursuant to KRS 342.730(1)(c)2 applicable to the case *sub judice*, and is compelled as a matter of law. The ALJ's determination the two multiplier is inapplicable is therefore reversed. On remand, the ALJ shall enhance the PPD benefits by the two multiplier pursuant to KRS 342.730(1)(c)2 after the date she was terminated at Drayer because the reason for the termination of her employment at the same or greater wage relates to the work injury.

Accordingly, the opinion, order and award on remand rendered January 22, 2013 by Hon. Chris Davis, Administrative Law Judge, and the order issued March 18, 2013 denying the petition for reconsideration, are hereby **REVERSED** and **REMANDED** for entry of an opinion consistent with the views expressed herein.

STIVERS, MEMBER, CONCURS.

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