Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 16, 2014

CLAIM NO. 200879008

KROGER PETITIONER

VS. **APPEAL FROM HON. STEVEN BOLTON, ADMINISTRATIVE LAW JUDGE**

ROBIN PHEGLEY
DR. JOSEPH M. FINIZIO
DR. ROBERT NOLAN
and HON. STEVEN BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Kroger seeks review of the January 30, 2014, opinion, award, and order of Hon. Steven Bolton, Administrative Law Judge ("ALJ") finding Robin Phegley ("Phegley") sustained a work-related back injury and awarding temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Kroger also appeals from the February 21, 2014, order ruling on its petition for reconsideration.

On appeal, Kroger challenges the portion of the ALJ's decision enhancing Phegley's benefits by the three multiplier.

During her August 5, 2009, deposition, Phegley testified that on November 17, 2007, a truck driver was using a walking power jack to unload perishable items from his truck and in the course of pushing the jack he hit her and knocked her backwards. Phegley fell, landing on her buttocks and striking her head against the concrete floor. The manager and an ambulance were called and she was taken to the hospital. Phegley missed one day of work. She continued to work even after she filed her claim on May 14, 2009.

At the time of her injury, Phegley worked as a "DSD receiver." As such, she came in to work at 3:00 a.m. and got off at 11:00 a.m. Her job, in part, entailed receiving products from the vendors. She checked in the vendors at 4:00 a.m. Phegley put away the frozen and dairy products and the driver unloaded the rest of the product. She also straightened up the receiving dock and swept the

floor. After the vendors left, she checked for damaged product. At 9:00 a.m. she locked the back door through which the vendors enter. She then cleaned throughout the store and checked for outdated products.

At the time of her August 5, 2009, deposition, Phegley worked six days a week, working every day except Friday. After the injury, whenever an item fell off the pallet jack, generally she asked one of the male employees to pick it up. Dr. Joseph M. Finizio, her treating physician, placed permanent restrictions of no twisting, bending, or lifting over five to ten pounds. Although she did her best to work within these restrictions, at least once a day she would lift an item weighing more than the restricted weight. Most of the time when she lifted such an item it was to remove a hazard within the store. Phegley experiences pain daily in her low back from below the beltline to her buttocks. Dr. Finizio had recommended epidural injections which she declined. Her current symptoms were numbness and burning in the right leg and sometimes burning in her feet. She experienced severe discomfort when the pain shoots up her leg to the point where the leg meets the buttocks. Her symptoms were constant but worse at night. She was on no medication; however, if her pain became severe enough she obtained a

pain pill from her brother. She estimated she left work early due to pain and discomfort, approximately seven or eight days in the year and a half prior to her deposition.

Pursuant to Phegley's October 28, 2009, motion to bifurcate, on November 18, 2009, Hon. Joseph Justice, Administrative Law Judge ("ALJ Justice") to whom the claim was originally assigned, bifurcated the proceedings to first resolve the issue of entitlement to medical benefits. A hearing was conducted on April 30, 2010, and on June 10, 2010, an interlocutory opinion and order was entered finding Phegley sustained a work-related injury and the epidural steroid injections recommended by Dr. Finizio were reasonable and necessary for the cure and relief of the work injury. Consequently, Kroger was directed to pay for the treatment.

On February 8, 2012, Phegley moved to place the claim in abeyance stating she was scheduled to undergo back surgery to be performed by Dr. Finizio on February 17, 2012. She stated the recommended surgery had been approved by Kroger's carrier. On February 23, 2012, ALJ Justice sustained Phegley's motion, placed the claim in abeyance, and directed the parties to provide status reports on a recurring sixty day basis. On July 10, 2012, ALJ Justice reassigned this claim to the ALJ.

On March 21, 2013, Kroger moved to remove the claim from abeyance citing the March 13, 2013, independent medical evaluation report of Dr. Timothy Kriss in which he opined Phegley had attained maximum medical improvement ("MMI") on September 2, 2012. On April 15, 2013, the ALJ sustained Kroger's motion, ordered the claim removed from abeyance, and set a proof schedule.

On March 2, 2012, Phegley underwent surgery consisting of a two part procedure involving L4-5 decompression and fusion. The fusion was a transforaminal interbody fusion with pedicle screw instrumentation and cage instrumentation using right iliac crest bone graft. The decompressive portion of the procedure was performed by Dr. Finizio and the fusion portion was performed by Dr. Mladen Djurasovic.

The November 4, 2013, Benefit Review Conference Order and Memorandum reveals the parties stipulated TTD benefits were paid from February 17, 2012, through December 31, 2012, and Phegley returned to work on January 1, 2013, at a wage less than her average weekly wage ("AWW") at the time of the injury and currently earns wages less than her AWW at the time of the injury.

At the final hearing held on November 19, 2013, the parties stipulated when Phegley initially returned to

work after the injury, she earned wages which were the same or greater than her AWW at the time of the injury. However, upon her return to work after the surgery, she earned wages less than her AWW at the time of the injury.

In the opinion, award, and order, the ALJ noted Dr. Kriss had assessed a 20% impairment and Dr. Bilkey assessed a 22% impairment based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. The ALJ then entered the following analysis regarding the contested issues:

> As to the issues of the Plaintiff suffering an injury as defined by the Act, whether that injury was, within the bounds of reasonable medical probability caused by the work related accident of November 17,2007 and whether the injury was related to the work, the ALJ finds on the record taken as a whole that the testimony of Dr. Warren Bilkey is most persuasive as it comports most closely with the facts of the case.
>
> As to the percentage of whole person impairment, the ALJ finds the testimony of Dr. Warren Bilkey to be persuasive, as he assigns to the Plaintiff a whole person impairment of 22% based upon the *AMA Guidelines to the Evaluation of Permanent Impairment, 5th ed.*
>
> As to the application of statutory enhancement under KRS 342.730 (the "3 multiplier), the ALJ finds the testimony of Dr. Warren Bilkey to be persuasive. The Plaintiff has reached

> MMI and her surgery was by all accounts successful. As Dr. Bilkey and Dr. Guarnaschelli stated, she will likely continue to (and does) suffer some pain. Indeed, that complaint serves as the basis for the ratings of both physicians. Dr. Bilkey recommended the light-duty work restrictions assigned to the Plaintiff by her treating physician, limiting Plaintiff to no lifting greater than 15 pounds, no repetitive bending, lifting, twisting, pushing or pulling. Without question, this 58 year old woman could not return to DSD clerk with those restrictions.
>
> Dr. Bilkey also opined that Plaintiff was precluded from returning to her pre-injury work duties. The Plaintiff has not returned to that job post-surgery.

The ALJ entered findings of fact consistent with the above analysis. The ALJ also found Phegley attained MMI on January 1, 2013. Consequently, the ALJ determined Phegley was temporarily totally disabled from March 2, 2012, the date of the surgery, until she reached MMI on January 1, 2013, and was entitled to TTD benefits during that period. Since Phegley stipulated there had been an overpayment of TTD benefits from February 17, 2012, to March 1, 2012, Kroger was granted a credit for the total overpayment paid for the twelve days. Since the ALJ found Phegley's claim for a separate injury to her head, left arm, and buttocks were unsupported by medical evidence, the

ALJ concluded her claims must be dismissed. Accordingly, the ALJ entered the following award and order:

> 1. Plaintiff, **ROBIN PHEGLEY,** shall recover of the Defendant/Employer, **KROGER**, and/or its insurance carrier, Temporary Total Disability (TTD) benefits at the rate of $388. per week from March 2, 2012 through December 31, 2012 and thereafter, a weekly benefit of $314.34 per week continuing thereafter for so long as Plaintiff is so disabled but not to exceed 425 weeks, together with interest at 12% per annum on all past due and unpaid installments of compensation and, Defendant/Employer shall take credit for any amounts of such compensation heretofore paid. The payment of occupational benefits awarded herein shall terminate pursuant to KRS 342.730 (4) on the date Plaintiff qualifies for normal old-age Social Security retirement benefits.
>
> 2. Plaintiff shall further recover of Defendant/Employer, and/or its insurance carrier, for the cure and relief from the effect of Plaintiff's workers compensation injury, such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably required at the time of Plaintiff's injury and thereafter during disability.
>
> 3. All motions for approval of attorney fees shall be filed with the Department of Workers Claims within thirty (30) days of the finality of this opinion.

Kroger filed a petition for reconsideration primarily arguing an analysis pursuant to Fawbush v. Gwinn,

103 S.W.3d 5 (Ky. 2003) was necessary. Significantly, Kroger did not dispute the ALJ's determination, based on Dr. Bilkey's opinion, that Phegley did not retain the physical capacity to return to her prior employment. However, it argued the post-injury wage records establish Phegley had returned to work earning the same or greater wages and the parties had stipulated to such. Therefore, the second prong of Fawbush was met and the ALJ must address the third prong of Fawbush. Kroger made the same argument it now makes on appeal asserting the ALJ erred in enhancing the award by the three multiplier. Alternatively, should the ALJ fail to reverse his decision, it requested additional findings of fact as to whether Phegley returned to work earning the same or greater wages and whether she has the capacity to earn the same or greater wages for the indefinite future.

The February 21, 2014, order ruling on Kroger's petition for reconsideration reads as follows:

> This matter having come before the undersigned upon the defendant/employer's Petition for Reconsideration filed with regard to the Administrative Law Judge's Opinion, Order & Award rendered on January 30, 2014; and the undersigned having reviewed said pleadings and being otherwise sufficiently advised;
>
> **IT IS HEREBY ORDERED** that the

defendant/employer's Petition for Reconsideration is **SUSTAINED**. The ALJ's Opinion, Order & Award rendered on January 30, 2014 shall be amended as follows:

1. (Page 35): "Dr. Bilkey also opined that Plaintiff was precluded from returning to her pre-injury work duties. The Plaintiff has not returned to that job post-surgery. As such, I find the plaintiff does not retain the physical capacity to return to her prior employment.

2. Next, the ALJ finds that a Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003) analysis is necessary in this claim. Pursuant to Fawbush, an ALJ must make three essential findings. First, the ALJ must determine if the plaintiff cannot return to the type of work performed at the time of the injury in accordance with KRS 342.70(1)(c)(1); second, the plaintiff has returned to work at an average weekly wage equal to or greater than her pre-injury average weekly wage; and, third, whether the plaintiff can continue to earn that level of wages into the indefinite future.

Based upon the opinions set forth by Dr. Bilkey, I make the finding that the plaintiff does not retain the physical capacity to return to her prior employment. Next, pursuant to the post-injury wage records filed by the defendant/employer and the stipulation of the parties, I find that plaintiff did return, post-injury, to her employment earning same/greater wages.

Ultimately, the decision on this issues [sic] all comes down to the remaining prong of the analysis set forth in Fawbush v. Gwinn, Ky. 103 S.W.

3d 5 (2003), which is whether it is likely plaintiff will be able to continue to earn the same or greater wage for the indefinite future.

Having considered the evidence available on this issue, the Administrative Law Jude [sic] is ultimately persuaded that the plaintiff likely will not continue to earn the same/greater wages for the indefinite future and, thus, is entitled to the enhancement factor of the "3 multiplier" as authorized by KRS 342.730 (1) (c) 1.

To make this finding the ALJ notes that the plaintiff continues to work five days a weeks, eight hours a day without issue. However, Ms. Phegley testified at the formal hearing that when she returned to work in January, 2013 she was assigned to the U-scanner, where customers substantially check themselves out. She was the attendant and assisted people who were self-checking. She works the small U-scan because it is less physical. It is open from 8 AM to 4:30 PM, 4 days a week, then one day from 10 AM to 6:30 PM.

She works 6 days per week, but not more than 40 hours because of her back. Because of her seniority she does get time and a half on Sundays that she works.

She testified that since her accident, her life has changed. She is now good for only about 6 hours of work, after which her back begins to bother her. She has to do household chores differently because her back is fused. She cannot use a vacuum cleaner

Weather changes affect her back, as do awkward movements. When she has back pain, her only relief is to lay [sic] on the floor and bring her knees

up to where her back is. She does not take medicine other than OTC Tylenol and BackAid Max.

On a normal day, she has some sort of pain. On different days [sic] is at different levels. Weather changes affect her, especially when it is turning cold or rainy. Cold-weather causes her pain more than hot.

Since her surgery, she has trouble sleeping, although the surgery has helped with her symptoms, especially the numbness and sharpness in her legs. She does have trouble standing for her whole shift however. She does not believe that she could go back to the DSD clerk position that she held prior to her injury because of the physical requirements of the job. She did return to that job immediately after the injury but she did not perform all the aspects of the job because she had physical limitations. She had to rely on others to help her.

Since her return on January 1, 2013 she has been able to work through her full shift at the U-scan, although she had to leave early a couple of days. She has only worked three Sundays since she came back to work. When she works Sundays, she does not work her five normal shifts. She has had no shifts where she has worked six days in one week.

She is doing the U-scan and anticipates being able to continue to do that job for the foreseeable future. However, despite her expressed optimism,

I note the testimony of Ms. Sue Hasken to the effect that the plaintiff could work an additional eight (8) hour shift, should she choose to do so. If

the plaintiff worked the hours available to her, she would have a post-injury average weekly wage of $669.60 per week ($13.95 x 48 hours). However, Ms. Hasken also testified that if Ms. Phegley has to work past about 6:30 PM, she says her back bothers her. She says that she does not have any interest in working on Sundays because it bothers her back, even though she would be paid time and a half if she did work on Sundays.

Thus, contrary to the position argued by the Defendant/Employer, it is not just that Ms. Phegley doesn't want to work extended hours, it hurts her back to do so. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977).

IT IS THEREFORE ORDERED that the Defendant/Employers [sic] Petition for Reconsideration is partially **SUSTAINED** and partially **DENIED.**

Finding of Fact and Conclusion of Law No. 5 at page 36 of the Opinion, Award and Order of January 30, 2014 is hereby modified and supplemented as follows:

5. As opined by Dr. Bilkey, the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. Dr. Bilkey recommended light-duty work restrictions, limiting the Plaintiff to no lifting greater than 15 pounds, no repetitive bending, lifting, twisting, pushing or pulling. Further, based upon her own testimony, her education, work background and her physical restrictions, I find that the work related injury suffered by the

> Plaintiff has permanently altered her ability to earn an income. Further, that although she returned to work for a relatively brief period of time at a wage equal to that which she had earned before the injury (which included regular overtime), she has now transferred to another position commensurate with her physical restrictions. It seems highly unlikely that she will be able to continue for the indefinite future to do work from which to earn such a wage. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). In making that finding, I rely on the medical opinion of Dr. Warren Bilkey, which I find to be the most compelling and persuasive evidence in the record as to that issue.
>
> Consequently, I conclude that Ms. Ramey [sic] is entitled to the 3 multiplier pursuant to KRS 342.730 (1) (c) 1.
>
> In all other respects, the Opinion, Award and Order of January 30, 2014 shall remain unchanged and is hereby ratified, republished and rendered as amended.

On appeal, Kroger concedes the first two prongs of the Fawbush analysis were satisfied. However, it argues there is no question Phegley can continue working in her current position for the indefinite future; therefore, enhancement by the three multiplier was not appropriate. It contends Phegley decided not to work the additional hours offered to her on Sunday which would result in her working forty-eight hours a week. Kroger posits if Phegley worked forty-eight hours a week she would then earn more

per week than her AWW at the time of the injury. It argues the undisputed evidence reveals Phegley can work forty-eight hours each week pursuant to “the labor contract” but she decided not to work on Sundays. Kroger acknowledges since Phegley only works forty hours a week, her AWW is below that of her AWW at the time of injury. However, there is no medical evidence that would restrict her from working more than forty hours a week. Kroger maintains Phegley’s assertion she would experience increased back pain if she works additional hours is not credible as she has not attempted to work more than forty hours a week. In addition, Phegley has never reported experiencing any pain during her regular eight hour shift.

Finally, Kroger makes a public policy argument that an employer does not have an incentive to permanently accommodate an employee’s restrictions when an employee such as Phegley chooses not to work all available hours and draws a salary near her pre-injury wage and also receives workers’ compensation benefits. It urges the decision be reversed and the claim remanded with instructions Phegley is not entitled to any enhancement factor.

Phegley, as the claimant in a workers’ compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including

entitlement to enhanced PPD benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Phegley was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). 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).

Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

At the November 19, 2013, hearing held after Phegley underwent surgery and returned to work, Phegley testified she currently works as a U-scanner. She explained a U-scanner is stationed at the point where the customer checks out unassisted. Her job is to walk around and make sure the customers are purchasing the items in their cart and to walk the customer through the line as he or she checks out. Phegley works 8:00 a.m. to 4:30 p.m. four days a week and one day from 10:00 p.m. to 6:30 a.m. Because she has seniority, Phegley is able to earn time and

a half on Sunday which is not considered part of her work week. During the thirty-two years she has been employed with Kroger, she always worked Sunday and her other five days. Since she returned to work after the surgery, Phegley's back gives out and she can no longer handle working more than forty hours a week. She explained it was not because she did not want to work but because she was unable to work due to her back problems. Since she returned to work after surgery, there have been times when the head checker, who fills out her schedule, has asked her to work on Sunday because Kroger was short-handed. In those cases, the head checker and management know, when Phegley works on Sunday, she has to have an extra day off the next week.

Phegley testified that prior to the injury she was able to work an eight hour shift and then come home and do household chores. Now, she struggles during the last two hours of the work day because of her back. Because her back is fused, whenever she does laundry at home her shoulders and hips have to stay parallel. She always has to be conscious of the way she turns her back. A little turn can make her "back go out." Phegley refuses to take pain medication except Tylenol. She experiences different levels of pain every day. Phegley also has problems

sleeping and there are nights she does not get any sleep due to her back problems. She acknowledged fusion surgery helped with the numbness and sharp pain in her legs. Now she has very little pain in her legs. The only time she experiences leg problems is when her back gives out. On occasions she experiences back pain at the end of her shift which forces her to hold onto the counter.

Since returning to work on January 1, 2013, she has continued to work at the U-scan position working only five days a week. She acknowledged she can continue working at the U-scan position. However, on a couple of occasions she left work six hours into her shift because of back pain. On one occasion, she left work after only working three hours. When she works on Sunday, the next week she does not work her normal five days. Since returning to work after the surgery, she has never worked six days in a week. Since her return to work on January 1, 2013, she has worked on Sunday on only three occasions.

Phegley's testimony, if believed, establishes the situation is not that she does not want to work extended hours, rather she cannot work extended hours because of her back. In his February 21, 2014, order, the ALJ found it was unlikely Phegley would be able to continue for the indefinite future to work at a wage that equals or exceeds

her AWW. In so finding, the ALJ relied upon Phegley's testimony regarding her ability to work and the hours she could work each week. It is within the province of the ALJ to rely upon the claimant's self-assessment of her ability to perform her prior work. *See* Ira A. Watson Department Store v. Hamilton, supra; Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). In the February 21, 2014, order, the ALJ accurately summarized Phegley's November 19, 2013, hearing testimony. Phegley's testimony constitutes substantial evidence and provides a sufficient basis for the ALJ to determine she would not be able to return to regular employment at the same or greater wages than she earned at the time of the injury. Therefore, an award pursuant to KRS 342.730(1)(c)1 was appropriate.

The ALJ's decision to apply the three multiplier based on a determination Phegley did not have the capacity to continue earning the same or greater wages than she earned at the time of the injury, is supported by substantial evidence; therefore, it may not be set aside on appeal. Special Fund v. Francis, supra. Accordingly, the ALJ's decision to enhance Phegley's benefits by the three multiplier is affirmed.

That said, we vacate the ALJ's award of PPD benefits. This claim shall be remanded to the ALJ for

entry of an amended award reflecting the award of PPD benefits shall commence as of the date of the injury, November 17, 2007, and shall run for 425 weeks. *See* Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009). The obligation to pay PPD benefits shall be suspended during the period TTD benefits were awarded from March 2, 2012, through December 31, 2012. The payment of PPD benefits shall resume on January 1, 2013, for the remainder of the 425 week award. Further, the ALJ found the claim for alleged injuries to Phegley's head, both arms, and buttocks was unsupported by medical evidence and must be dismissed. Since the ALJ did not order the claims dismissed, on remand the ALJ shall order them dismissed.

Accordingly, the decision of the ALJ to enhance the PPD benefits by the three multiplier is **AFFIRMED**. However, the award of PPD benefits is **VACATED** and the claim is **REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JOEL W AUBREY
300 N HURSTBOURN PARKWAY #110
LOUISVILLE KY 40222

COUNSEL FOR RESPONDENT:

HON STEPHANIE WOLFINBARGER
429 W MUHAMMAD ALI BLVD STE 1102
LOUISVILLE KY 40202

RESPONDENTS:

DR JOSEPH M FINIZIO
210 E GRAY ST #1105
LOUISVILLE KY 40202

DR ROBERT NOLAN
4119 BROWNS LN #1
LOUISVILLE KY 40220

ADMINISTRATIVE LAW JUDGE:

HON STEVEN BOLTON
657 CHAMBERLIN AVE
FRANKFORT KY 40601