OPINION ENTERED: July 12, 2013

CLAIM NO. 201287411

LAKE CUMBERLAND REGIONAL HOSPITAL PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

REGINA FORTENBERRY
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Lake Cumberland Regional Hospital ("LCRH") seeks review of the opinion, order and award rendered February 14, 2013, by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits to Regina

Fortenberry ("Fortenberry") for a cervical injury she sustained on March 24, 2012 when she was attacked by a psychiatric patient. LCRH also appeals from the order entered March 7, 2013 denying its petition for reconsideration.

On appeal, LCRH argues the ALJ's enhancement of the award of PPD benefits by the three multiplier pursuant to KRS 342.730 (1)(c)1 was erroneous. Because we determine the ALJ provided the appropriate analysis in application of the three multiplier, we affirm.

Fortenberry filed a Form 101 on January 23, 2012 alleging a cervical injury due to an attack by a psychiatric patient. At the time of the injury, she was employed by LCRH as a licensed practical nurse ("LPN"), in the Behavioral Health Unit. Fortenberry was born on April 23, 1973, and resides in Nancy, Kentucky.

Fortenberry testified by deposition on December 6, 2012, and at the hearing held December 20, 2012. She is a high school graduate, and is an LPN. She previously held certifications as a medical technician, and certified nursing aide ("CNA"). Fortenberry's work history includes work primarily in the healthcare field. She has worked as a CNA and as an LPN, in direct patient care in a hospital

setting, as a home health nurse, as a charge nurse, and in a physician practice.

On March 24, 2012, Fortenberry was assisting with bathing a psychiatric patient. The patient struck her twice in the back of the head. She developed a headache, and completed an incident report. Fortenberry was then treated in the emergency room, and was eventually referred to Dr. O. Amr El-Naggar, a neurosurgeon. Dr. El-Naggar eventually performed surgery on May 9, 2012. Fortenberry returned to work in August 2012, when Dr. El-Naggar imposed restrictions preventing her return as an LPN in the Behavioral Health Unit. Fortenberry returned to work as an LPN, assisting a bariatric surgeon, which has few, if any, physical demands.

Fortenberry testified some of her symptoms eventually returned requiring her to miss time from work in late 2012. She currently takes Robaxin, Diclofenac and Neurontin for treatment of her ongoing complaints. While she was off work in late 2012, Fortenberry underwent epidural steroid injections which provided some relief.

Although she has required no assistance, or accommodation in performing her current job, Fortenberry expressed concern regarding her ability to continue to perform her work into the indefinite future. This is based

upon her current physical ability, recurrence of symptoms, and whether the contract of the physician for whom she works will be renewed. She testified she would be unable to return to her previous jobs in the healthcare field due to the lifting requirements.

In support of the Form 101, Fortenberry submitted the July 16, 2012 report of Dr. El-Naggar. She also attached Dr. El-Naggar's operative report from the surgery performed May 9, 2012, and the report of a cervical MRI performed April 26, 2012.

The MRI report indicates severe canal stenosis at C4-C5 due to moderate size disc osteophyte extrusions, and multilevel degenerative disc disease. The operative report describes the surgery included fusions at C4-C5 and C6-C7.

In his report, Dr. El-Naggar noted Fortenberry complains of occasional numbness in both hands, and dropping things frequently, and occasional pain and numbness in both extremities. He noted she has residual neck pain, but not as bad as it was prior to her surgery. Dr. El-Naggar assessed a 26% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated she should not lift, push or pull greater than ten

pounds. He also noted she should avoid activities requiring repetitive bending or twisting of the neck.

Fortenberry also filed Dr. El-Naggar's office note dated November 29, 2012. Dr. El-Nagger stated he had taken Fortenberry off work due to her cervical herniated nucleus pulposus, neck pain, cervical radiculitis, paresthesias, and headaches. He stated she could return to work on December 14, 2012 with the same restrictions he had previously imposed.

James Hughes ("Hughes"), director of human resources for LCRH, testified by deposition on December 16, 2012. Hughes testified Fortenberry worked as an LPN in the behavioral health unit in April 2012, and now works in a physician's office. He stated her current duties entail escorting patients to examination rooms, taking vital signs, and administering shots when requested. He stated her current job is neither temporary, nor a special accommodation, and she earns the same pay rate she was earning at the time of her injury. He stated her current job is not physically demanding, and he is unaware of any complaints regarding her inability to work. He stated the restrictions imposed by Dr. El-Naggar preclude a return to her pre-injury job.

A benefit review conference ("BRC") was held December 5, 2012. In the BRC order and memorandum, the only issue preserved for resolution was benefits per KRS 342.730. The parties stipulated to an injury occurring on March 24, 2012, and an average weekly wage of $684.50 per week.

In the decision rendered February 14, 2013, the ALJ found as follows:

> **1. The facts as stipulated by the parties.**
>
> **2. Benefits per KRS 342.730: Extent and duration with multipliers.**
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> The Plaintiff argues that she is partially permanently disabled as a result of her work injury and is entitled to the 3 multiplier. The Defendant/employer argues that Plaintiff is not entitled to the 3 multiplier. After considering the totality of the evidence, I find that Plaintiff is permanently partially disabled and is entitled to the 3 multiplier pursuant to KRS 342.730(1)(c)(1).
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> Since 1996, permanent partial disability has been measured by reference to a permanent impairment rating rendered pursuant to the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment and the factors and multiplier set forth in KRS 342.730. After considering Plaintiff's credible testimony and the medical evidence in this case, including the opinion of Dr. El-Naggar, I find that as a result of the March

24, 2012 work-related injury Plaintiff suffered a functional impairment to her cervical spine of 26% pursuant to the AMA Guides, 5th edition. In making this finding I rely on the opinion of Dr. El-Naggar. Accordingly, this 26% functional impairment rating, pursuant to KRS 342.730(1)(b), is converted to a 35.10% permanent partial disability.

In determining whether the Plaintiff, as a result of the March 24, 2012 work-related injury, is entitled to any statutory enhancement per KRS 342.730(1)(c), also commonly known as the "multipliers", the following analysis was made. Under KRS 342.730(1)(c)(1), an injured employee who lacks the physical capacity to return to the work performed on the date of the injury may receive a triple income benefit, while KRS 342.730(1)(c)(2) encourages those who retain the physical capacity to return to the same type of work and earn the same or greater wage to receive a double income benefit during any period of time that employment at that wage level ceases. If both sections of KRS 342.732(1)(c) are applicable, an Administrative Law Judge is required to make a further determination.

Subsequent to the work-related injury and surgical procedure, the parties stipulated that Plaintiff returned to a job on July 20, 2012 making the same or a greater wage. The job she returned to was significantly different than her job at the time of the injury. Plaintiff is restricted from lifting or pushing more than ten pounds and should avoid activities requiring repetitive bending, twisting of the neck and she cannot go back to her original work requiring repetitive bending, twisting and lifting.

Subsequent to the injury and surgery, the Plaintiff is doing "office LPN" work. It is not contested that Plaintiff's restrictions would not allow her to return to same type of work she was performing at the time of the injury. The Defendant/employer argues however that there are ample jobs at the same or greater wage available to the Plaintiff and she has not been gratuitously been "given" a job within her restrictions. Mr. Hughes testified Plaintiff is not precluded by her injury from returning to numerous "office LPN" jobs – one of which she now performs. The Defendant/employer argues that even if Plaintiff's current job ends, there are other similar jobs she could perform. Thus, the Defendant/employer argues that her employment would continue into the "indefinite future".

In Ford Motor Co. vs. Forman, 142 SW3d 141 (Ky. 2003), the Kentucky Supreme Court held that "the type of work that the employee performed at the time of injury" refers to the actual jobs that the employee performed as that phrase is used in workers' compensation statute providing an enhanced permanent partial disability benefit for those who lack the physical capacity to return to the type of work performed at the time of injury.

In the case at bar, it is stipulated that Plaintiff returned to work at a weekly wage equal to or greater than the average weekly wage at the time of her injury. Thus, in the event of a cessation of work due to a reason related to the claimant's disabling injury [see Chrysalis House, Inc. vs. Tackett, Ky., 283 SW3d 671 (2009)], Plaintiff would be entitled to

the 2x multiplier provided for in KRS 342.730(1)(c)2.

Having determined that both sections 1 and 2 are applicable, the undersigned must next determine which of the multipliers is the most appropriate under the facts of the case. Fawbush vs. Gwinn, 103 SW3d 5 (2003). The undersigned must determine if the claimant is likely to be able to continue earning the same or greater wage for the foreseeable future. If the ALJ determines that it is unlikely the plaintiff will be able to continue earning the same or greater wage for the foreseeable future, then the 3x multiplier is applicable.

In performing this analysis various factors must be considered, including, but not limited to: whether the Plaintiff's current job is within her medical restrictions, whether she is on medications and the level of such medications, her own testimony as to her ability to perform the job duties, the level of accommodation provided by the current employer, and whether or not the Plaintiff's current position is a bona fide job or not.

Although the Plaintiff is certainly fortunate she has been able to continue working at the same compensation level - she is certainly at a distinct disadvantage if she were to lose this job for any reason whatsoever. While there may exist other jobs similar to her current job, one issue is the likelihood of whether or not this current job will extend into the indefinite future. If the contract of the doctor she currently works for is not extended, she is out looking for another LPN job with restrictions that severely limit the work she can do.

The Kentucky Supreme Court held in Adams vs. NHC Healthcare, 199 SW3d 163, 168-169 (Ky. 2006):

> The court explained subsequently in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), that the *Fawbush* analysis includes a broad range of factors, **only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income.** The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.
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> Id. at 168, 169 (emphasis ours)

Accordingly, in applying the Fawbush analysis, I find the following:

(1) Plaintiff cannot return to the type of work performed at the time of the injury. In making this finding, I rely on the uncontested evidence that she has medical restrictions that completely exclude performing work as a floor nurse.

(2) The Plaintiff has returned to work at an average weekly wage equal to or greater than her pre-injury wage. This was stipulated by the parties.

(3) I find that it is unlikely Plaintiff can continue to earn that level of wages into the indefinite future. In making this finding I rely on the non-contested evidence that indicates Plaintiff has medical

restrictions which prohibit her from performing many of the duties required of, not only her previously LPN job with the Defendant/employer but numerous other jobs which she previously performed. Essentially, other than sedentary office work, Plaintiff would not be able to perform any nursing jobs. This significantly restricts her job opportunities. Plaintiff testified the medical restrictions were the reason for changing her job. She also testified that the current job pays as much as her former job with the Defendant/employer and was within her medical restrictions. However, she was beginning to have difficulty performing this current job – and had been off from work for two weeks immediately before the hearing, all due to her injury. She also testified she had applied for another position with a different employer and was denied that job due to her medical restrictions. I find that Plaintiff has permanent restrictions which substantially limit the number of jobs that were available to her pre-injury. I further find that the residuals of this work injury have permanently altered her ability to earn an income and therefore she is unlikely to continue to earn this level of wages into the indefinite future. Plaintiff is therefore entitled to the statutory multiplier, KRS 342.370(1)(c)(1) also known as the 3 multiplier. For this finding I rely on the credible testimony of Plaintiff and the medical opinion of Dr. El-Naggar. The permanent impairment rating of 26% is converted into a Permanent Disability Rating of 35.10% with the application of 1.35 grid factor pursuant to KRS 342.730(1).

LCRH filed a petition for reconsideration arguing the ALJ erred in assessing a three multiplier pursuant to KRS 342.730(1)(c)1, based upon the holding by the Supreme Court in Fawbush vs. Gwinn, 103 S.W.3d 5 (Ky. 2003). LCRH argued such award is not supported by the evidence. In the order entered March 7, 2013, denying the petition for reconsideration, the ALJ found as follows:

> The defendant, Lake Cumberland Regional Hospital, petitions for the undersigned ALJ to reconsider the Opinion and Award of February 14, 2013. The defendant avers error in the undersigned's application of the 3 multiplier pursuant to KRS 342. 0730(1)(c)(1). The defendant argues the undersigned's analysis "focuses primarily on claimant's inability to go back and do the job she was doing prior to her injury, or to do similar jobs.". The defendant avers "claimant's current employment is as secure and "permanent" as is the employment of any other employee at Lake Cumberland Regional Hospital. It is in no sense a temporary job, nor is it one which was created to accommodate the claimant."
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> The argument set forth by the defendant in its Petition for Reconsideration is essentially the same argument made on the merits of the case. While it is true that both the 2 and the 3 multiplier could apply in this case, the undersigned carefully considered the findings of the Kentucky courts when deciding which multiplier was most appropriate in the case at bar. The argument by the defendant that the application of the 3 multiplier is a "windfall" to the plaintiff, because she

is working presently at the same or greater wage, belies the application of Fawbush and its progeny.

The court explained 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 ability to perform the current job. In Adkins, at page 390, the Kentucky Court of Appeals makes the following observation:

> If every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus in determining whether claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.

The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c) 1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

> I considered many factors in determining which multiplier was most appropriate. These factors are outlined in the 18 page Opinion and Award.
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> . . .
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> The issue is not whether the current employment of the plaintiff is "permanent" or gratuitous as argued by the defendant. The issue is whether the plaintiff's ability to earn the same wage has been permanently altered and in determining that it had been, I relied on plaintiff's credible testimony and the uncontroverted medical evidence. Finding no error in the Opinion and Award of February 14, 2013, the Defendant's Petition for Reconsideration is hereby and same is **DENIED**.

Since Fortenberry was successful before the ALJ, the question on appeal is whether her determination is supported by substantial evidence. 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 the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

LCRH argues the ALJ erred in enhancing Fortenberry's award of PPD benefits by the three multiplier

pursuant to KRS 342.730(1)(c)1. Here, Fortenberry returned to work for LCRH in a physician practice with the same job title, earning the same or higher rate of pay, but unquestionably to a less physically demanding position.

In Fawbush, supra, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. Id. at 12. In Fawbush, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury, however, he had returned to work at a lighter job earning an average weekly wage equal to or exceeding his average weekly wage at the time of the injury.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court remanded a claim for a determination of the claimant's average weekly wage following his return to work. The Court instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury:

> The ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, supra, to determine from the evidence whether he is likely to be able to continue earning such a wage for the

> indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts. *Id*. at 211.

In Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), the Court held the Fawbush analysis includes a "broad range of factors", only one of which is the ability of the injured worker to perform his pre-injury job.

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

In this instance, the ALJ made the appropriate Fawbush analysis. Based upon the evidence of record, she determined Fortenberry will be unable to perform her

current job into the indefinite future. Because the ALJ performed the appropriate analyses, her decision will not be disturbed.

Accordingly, the opinion, order and award rendered February 14, 2013, and the order denying the petition for reconsideration rendered March 7, 2013, by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

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