Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 4, 2013

CLAIM NO. 200883605

LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

JENNIFER STAFFORD
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Lexington-Fayette County Health Department ("LFCHD") appeals from the March 19, 2013, opinion and award and the May 17, 2013, order on reconsideration of Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"). In the March 19, 2013, opinion and award, the ALJ awarded Jennifer Stafford ("Stafford") temporary total disability ("TTD") benefits, permanent partial disability ("PPD")

benefits enhanced by the three multiplier, and medical benefits.

On appeal, LFCHD asserts the ALJ erred by enhancing the income benefits by the three multiplier as of the date of the injury. Instead, LFCHD argues the ALJ should have enhanced the income benefits from the date Stafford’s employment ceased. In the alternative, LFCHD asserts Stafford is entitled to the two multiplier instead of the three.

The Form 101 asserts Stafford injured her left knee on June 26, 2008, in the following manner: "Plaintiff went to get chairs from a warehouse and as she was going to turn on [sic] light switch she tripped over a pallet injuring her left knee."

On November 2, 2011, Stafford filed a "Motion to Amend 101" to add psychological impairment. On November 29, 2011, Stafford filed a "Renewed Motion to Amend 101" in which she attached supportive medical records. By order dated December 15, 2011, Hon. Richard Joiner, Administrative Law Judge ("ALJ Joiner") sustained Stafford's motion to amend her Form 101 to add a psychological impairment.

By order dated July 6, 2012, the claim was reassigned to ALJ Polites.

The January 11, 2013, benefit review conference ("BRC") order lists the following contested issues: “benefits per KRS 342.730, unpaid or contested medical expenses- Pysch meds, KRS 342.165 violation, and vocational rehabilitation.”

Regarding the three multiplier, the ALJ determined as follows in the March 19, 2013, opinion and award:

> As to whether plaintiff’s permanent partial disability benefits should be enhanced by application of the factors contained in KRS 342.730(1)(c)1, plaintiff argues that she does not retain the physical capacity to return to the type of work that she performed at the time of her injury and she should be entitled to application of the three factor based upon her testimony that she could not return to the performance of all aspects of her job post injury as well as the testimony of Dr. Bilkey who felt that she did not retain the physical capacity to return to her job. The employer argues conversely that the fact the plaintiff did in fact return to her position for the defendant employer is evidence that she retains the physical capacity to perform the job and hence no enhancement should be given.
>
> Having reviewed and considered the entirety of the lay and medical testimony on this issue, the ALJ is persuaded by the testimony of the plaintiff and Dr. Bilkey that she does not retain the physical capacity to return to all aspects of the type of

work she performed at the time of her injury and as such she is entitled to enhancement of her benefits by application of the three factor.

Plaintiff testified in both her deposition and her hearing that while she was able to perform some aspects of her job, there were numerous activities she could no longer perform given the restrictions placed on her by Dr. Burandt which were to avoid bending, squatting, kneeling, climbing stairs or ladders and no lifting greater than 20 pounds. Dr. Bilkey stated that he agreed with Dr. Burandt's restrictions and the restrictions precluded plaintiff from doing the full scope of her usual work duties successfully carried out prior to the June 26, 2008 work injury. In her deposition plaintiff testified that her job title for the employer was as a health equity outreach specialist and she described her job as "going into the community, take information, giveaways, go do home visits for families, try to get people enrolled in KCHIP" which was a children's health insurance program. In her current condition she could not perform the activities required to go out in the community and she had to have somebody go with her to take the materials to distribute, as well as the tables and chairs for the display. She could not go to some of the out-of-town events that she was supposed to do because the people that helped her were not authorized for out-of-town travel. She also testified that she has 3 to 4/10 pain on a daily basis and she takes meloxicam and Lortab on a daily basis to address her pain.

At the final hearing, plaintiff testified again that she could not perform her job without a helper

because the job required bending, kneeling, carrying items over 20 pounds and that she was supposed to perform community events on the average of three a week. Following her last surgery she was not able to do as many community events and had assistance when she did. She testified that the table she had to take with her weighed more than 20 pounds and the outreach materials from the health department she was to distribute came in boxes weighing up to 50 pounds. She also was unable to spend as much time on her feet, from five hours a day to two hours a day and that her employer made accommodations for her to enable her to continue in her job. In addition, Dr. Timothy Allen obtained a history from plaintiff that 60% of her job duties were spent answering phone calls for the KCHIP program and 40% doing outreach activities. As such, the ALJ feels it is significant that plaintiff needed assistance in performing 40% of her pre-injury job. The fact the plaintiff needed assistance in performing her job duties upon her return to work following her last surgery and that she was unable to perform the entirety of her pre-injury job duties was not disputed by the employer. In addition, Dr. Bilkey's testimony supports the proposition that plaintiff does not retain the physical capacity to perform all aspects of her pre-injury job.

In summary, it is clear that plaintiff has suffered a serious injury to her right knee that has necessitated three different surgical procedures and may require further surgery in the future. Her injury still causes her pain on a daily basis for which she takes pain medicine and she has been placed on substantial functional limitations by

> Dr. Burandt that significantly limit the type of physical activity she can engage in including work activities. While she was able to return to some aspects of her job, the ALJ is persuaded that she does not retain the physical capacity to return to all aspects of the type of work she performed at the time of her injury and her permanent partial disability benefits shall be enhanced by the application of the three factor contained in KRS 342.730(1)(c)1.

Both Stafford and LFCHD filed petitions for reconsideration. LFCHD's petition for reconsideration requested the ALJ amend the March 19, 2013, opinion and award to reflect PPD benefits are not enhanced by the three multiplier. In the alternative, LFCHD requested that the ALJ apply no multiplier.

Stafford filed a petition for reconsideration asking the ALJ to make a more specific finding that her injury "permanently altered her ability to earn an income and that she is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage in light of her work restrictions and impairment."

The thorough and well-reasoned May 17, 2013, order ruling on the petitions for reconsideration set forth the following additional findings:

> The employer has requested reconsideration of the enhancement of

plaintiff's permanent partial disability benefits by the three factor contained in KRS 342.730(1)(c)1. Plaintiff has requested additional findings of fact in regard to the enhancement of the PPD award. Implicit in both petitions in a request for an analysis of the facts of the claim pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and to the extent that both parties request a Fawbush analysis the petitions are SUSTAINED.

In Fawbush the Kentucky Supreme Court concluded that 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. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court further held that 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 as 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 (c)2 is more appropriate on the facts. Id. at 211.

As applied to the instant claim, the initial determination is whether plaintiff retains the physical capacity to return to the type of work that she performed at the time of the injury. In the Opinion and Award the ALJ found that plaintiff did not retain the physical capacity to return to her job for the employer. The evidence was unrebutted that plaintiff returned to work post injury for the employer in her original position as a health outreach worker, but that she needed

significant accommodation from her employer in order to perform the full scope of her usual work duties. The medical testimony was unrebutted that the plaintiff must abide by physical limitations as [sic] result of her injury which limited her ability to lift greater than 20 pounds, stand, bend or squat and plaintiff testified that she was given an assistant to go with her to perform the physical aspects of her job. Dr. Bilkey testified that the restrictions due to her work injury precluded plaintiff from performing the full scope of her usual work duties that she carried out prior to her injury and his testimony was unrebutted. Given the above, the ALJ found in the Opinion and Award that plaintiff did not retain the physical capacity to return to the type of work that she performed at the time of her injury. The ALJ believes that this finding was proper notwithstanding the fact that plaintiff did return to work for the employer in essentially a light-duty or accommodated position for a period of time following her injury and that this employment ended when plaintiff was laid off by the employer due to a lack of funding for her program. To the extent the employer requests that the ALJ reconsider this finding, the petition is OVERRULED.

As to the second prong of the Fawbush analysis, the parties stipulated that plaintiff had returned to work at a wage that was equal to or greater than her average weekly wage at the time of her injury. As such, there is no question that KRS 342.730(1)(c)2 applies.

Given the above, it is clear that both KRS 342.730(1)(c)1 and (1)(c)2 apply in this claim, and therefore

Fawbush requires the ALJ to further determine whether plaintiff is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (1)(c)1 or (1)(c)2 is more appropriate on the fact. Id. at 12.

Having reviewed the entirety of the evidence in this claim, the ALJ concludes that plaintiff is not likely to be able to continue earning the same or greater wage for the indefinite future and as such, it is appropriate to enhance plaintiff's benefits by the application of KRS 342.730(1)(c)1. Of course it is relevant to this consideration that while plaintiff returned to work for the employer at the same job and at the same or greater wage, as of the time of her testimony at the formal hearing her job had been terminated and she was no longer employed. Hence her employment at the same or greater wage has not continued for the indefinite future. Further, given the significant restrictions that have been placed on plaintiff as a result of her work injury, including no lifting greater than 20 pounds, no squatting or kneeling, and avoidance of stairs and ladders, she is precluded from competing for employment for a wide range of occupations that require significant physical activity and is relegated to the performance of light or sedentary work. In addition, plaintiff testified at her hearing that she has been searching for work within her restrictions and in the pay range that she enjoyed with the employer but has been unsuccessful, probably, in her opinion, due to her restrictions. It should also be noted that plaintiff's employment at the same or greater wage ceased for reasons that were not related to her disabling injury and

> hence pursuant to Chrysalis House v. Tackett, 282 S.W.3d 671 (Ky. 2009), plaintiff would not be entitled to enhancement of her benefits by the two factor contained in KRS 342.730(1)(c)(2).
>
> In summary, the ALJ believes that the plaintiff is not likely to be able to continue earning such a wage for the indefinite future as demonstrated by her current unemployment, and as such, the ALJ believes the enhancement of plaintiff's permanent partial disability benefits by application of 342.730(1)(c)2.
>
> As to the employer's request that plaintiff's PPD benefits should be enhanced by the three multiplier only after the date of her termination from her job, the ALJ agrees that such an award might be more appropriate given the facts of the instant claim. However, the ALJ is without authority to make such an award and as such, the employer's request for same is OVERRULED.

LFCHD's first argument on appeal is the ALJ erred by applying the three multiplier as of June 26, 2008, the date of Stafford's injury. LFCHD asserts it is "inequitable to force an employer who retained Ms. Stafford in her job for four years after the date of her injury to have to pay benefits enhanced by a multiplier of 3 during the period of her employment." This argument can be dispensed with in short order, as the three multiplier can only be applied starting from the date of injury, as that is the date upon

which PPD benefits must commence. Pursuant to Sweasy v. Wal-Mart Stores, Inc. #1269, 295 S.W.3d 835 (Ky. 2009), and KRS 342.730(1)(d), PPD benefits are to be paid from the date the impairment rises, which is when the work-related injury produces a harmful change in the human organism. Therefore, any enhancement by the three multiplier must also be applied from the date of injury.

In an alternative argument, LFCHD asserts that if the three multiplier cannot commence as of the date of the cessation of Stafford's employment, then the two multiplier must apply.

In the May 17, 2013, order on petition for reconsideration, the ALJ, found both the two multiplier and three multiplier were applicable and conducted a complete analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and specifically determined that Stafford is "not likely to be able to continue earning the same or greater wage for the indefinite future" and, therefore, the three multiplier is applicable. The function of the Board is not to second-guess the ALJ's ruling. Our review of an ALJ’s decision is limited to determining whether the findings are so unreasonable under the evidence 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). Since substantial evidence supports the ALJ's award of the three multiplier, we affirm.

The March 19, 2013, opinion and award and the May 17, 2013, order reveal the ALJ relied upon both Stafford's and Dr. Bilkey's testimony to determine Stafford could not return to her pre-injury job performance.

At the time of her May 3, 2012, deposition, Stafford was still employed with LFCHD as a health equity outreach specialist. Stafford had a total of three operations on her knee following the June 26, 2008, injury. After the first surgery was performed to repair her broken kneecap, Stafford returned to work in September, 2008. She was restricted to working only a half a day, and she could not squat, bend or kneel, climb stairs or ladders, and lift. When asked if she was physically able to perform her job after returning following the first surgery, Stafford testified as follows:

Q: Tell me what you couldn't do.

> A: I still can't. I can't climb stairs or ladders. You have to be- sometimes you- there's things that you have to bend to get to or kneel or squat if you're trying to put information out, and there's things that we carry out to community events that are over like- they're like 50 pounds that I can't do that either.
>
> Q: Does someone do that for you now or do you have some assistance?
>
> A: Yes.
>
> Q: So people at work have sort of pitched in to help you out; is that correct?
>
> A: Yes.
>
> Q: Accommodate you; is that right?
>
> A: Yes.

Stafford testified she had a second surgery in January or February 2009 for removal of hardware. Stafford testified regarding her condition when she returned to work:

> A: I was on crutches, I remember that, and I had to have something under my desk to prop my leg up on so it wouldn't hang because I still had on the knee immobilizer and my knee was straight.
>
> Q: When you returned did you have restrictions like the first time working-
>
> A: Yes.

> Q: -part-time or half day or something of that nature?
>
> A: No, I worked full-time then, but I still had the other restrictions.
>
> Q: As far as the lifting and climbing and those restrictions, correct?
>
> A: Yes.
>
> Q: When you returned to work were you performing the same job?
>
> A: Yes.

Stafford had a third surgery on her knee for removal of bone spurs. Stafford testified as follows regarding her limitations when she returned to work:

> Q: When you returned, were you returned with limited activity?
>
> A: Yes.
>
> Q: Tell me about that.
>
> A: It's the same restrictions and I had- I was in the knee immobilizer and the crutches again.
>
> Q: So you had to go through all that procedure again, recovery procedure?
>
> A: Um-hum. (Affirmative)
>
> Q: Did you return working full-time or were you working part-time?
>
> A: Full-time.
>
> Q: After a period of time were you able to work without a knee immobilizer and without crutches?

A: Yes.

Stafford was asked to describe how her knee affects her current ability to work, and she testified as follows:

> A: Like I said, there's [sic] some things that I cannot do, as getting stuff ready to go out in the community. I can't do that anymore. I have to have that done for me. Somebody actually has to go with me to take the things in and then bring them out.
>
> A: When you're talking about taking things in and going out and bringing them back out, when you go out in the community are you going to events? Is that what you're doing?
>
> A: Events, um-hum. (Affirmative)
>
> Q: To publicize the KCHIP program?
>
> A: Yes.
>
> Q: And you take- what, set up tables and have brochures and that the [sic] sort of thing?
>
> A: Tables, yes, chairs, whatever we need to-

Stafford testified that she still has knee pain, and daily takes Meloxicam and Lortab in addition to medication for depression and anxiety.

At the January 18, 2013, hearing, Stafford testified to her limitations at LFCHD after she returned

following her third knee surgery until July 16, 2012, when she stopped working for LFCHD:

> Q: Okay. From the time you returned after your last or third surgery, until July 16th of last year, were there limitations on your activities at work because of your knee?
>
> A: Yes.
>
> Q: Tell the- tell the Judge about things that you did at work before you got injured that you weren't able to do during that period of time.
>
> A: Okay. I couldn't do the community events without somebody helping me do it because you have to bend and kneel and carry things over twenty pounds. And-
>
> Q: Now, was that a part of your regular job-
>
> A: That-
>
> Q: -before?
>
> A: -was. Yes.
>
> Q: How many- how often did you do community events?
>
> A: I would say, at least, an average of three a week.
>
> Q: Before your injury.
>
> A: Uh-huh. (Yes)
>
> Q: Okay. And, tell the- explain why that is. What the physical requirements were.

A: Oh, you have to get down on your knees and set up materials, tables, incentives. I couldn't lift over twenty pounds.

Q: So, that's what your doctor said.

A: Uh-huh. (Yes)

Q: Okay. Well, how much did the table weigh?

A: Oh, it was more than twenty pounds.

Q: Okay. What else did you lift that was heavy?

A: The materials for the Health Department. All of their outreach materials for WIC, any department that needed outreach we did that.

Q: Okay. And, what were the materials and how-what range would they weigh?

A: Up to fifty pounds. And, it's like a- just brochures, incentives.

Q: Would they be in boxes-

A: Yes.

Q: -large boxes-

A: Yes.

Q: -and things? Okay. Before your injury did you have to do a lot of stairs-

A: Yes.

Q: -at work?

A: Uh-huh. (Yes)

Q: Did they change-

A: Every day.

Q: -after your last surgery and you returned to work?

A: Yes. It did.

Q: What happened about you and stairs?

A: I had to get a handicap sticker to park around front so I could go in where the- there's no stairs and I could get on the first floor into the elevator and go.

Q: And, that's at the Health Department-

A: Yes.

Q: -where you worked.

A: 'Cause in the employee parking lot, you either have to walk that- walk up a flight of steps to get in or walk down a big flight of steps to go around to the front of the building.

Q: Okay. Before your injury what part of the day were you on your feet?

A: Probably about five hours a day.

Q: And, after your last surgery how much were you on your feet?

A: Two- about two. Two hours a day.

Q: Okay. And, that change and the other changes you've talked about, were those accommodations that were made by your employer for you?

A: Yes.

> Q: It was agreed by your supervisors that you could modify your activities in those ways?
>
> A: My supervisor. Yes. My supervisor is the one who did that.
>
> Q: I think I skipped ladders. Did you have to do ladders occasionally before your injury?
>
> A: Occasionally. Yes.
>
> Q: In light of the condition of your knee, would you be able to return to the full duties of the job you had with the Health Department before your injury?
>
> A: No.

Stafford was ultimately laid off from LFCHD on June 26, 2012, as part of a general workforce layoff. Despite submitting applications, Stafford has been unable to find employment. She explained:

> A: I've put in applications, bunches of applications. I've got- went on line to the job search websites. I go to state-Kentucky- the state website and I actually have applied for jobs for there to.
>
> Q: Have you been offered any work?
>
> A: No. Whenever they find out what my restrictions are, it's like, no.
>
> Q: Do you believe that you will be able to find any work that is in the pay range that you enjoyed with the Health Department?

> A: No.
>
> Q: Why not?
>
> A: Because I can't do it. There's a lot of employers that are- that's- you know, they won't accommodate that, because if they're hiring you for this job, this is what- they say this is your job description, this is what you need to do.

Stafford's deposition and hearing testimony constitute substantial evidence in support of enhancement of her PPD benefits by the three multiplier. When the issue is the claimant's ability to labor and the application of the three multiplier, it is within the province of the ALJ to rely on the claimant's self-assessment of his ability to perform his prior work. *See* Ira A. Watson Department Store v. Hamilton, supra; Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). Stafford testified she did not believe she could return to her pre-injury duties at LFCHD, and this testimony comprises substantial evidence in support of the ALJ's decision the three multiplier is applicable. Further, this evidence fully supports the ALJ's determination Stafford is unlikely to be able to continue earning the same or greater wage for the indefinite future. The ALJ's determination will remain undisturbed.

Accordingly, the March 19, 2013, opinion and award and the May 17, 2013, order ruling on the petition for reconsideration of Hon. Thomas G. Polites, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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