Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 11, 2014

CLAIM NO. 201069601

MARIA GARCIA PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

CENTRAL KENTUCKY PROCESSING, INC.
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART,
VACATING IN PART, REMANDING
AND DENYING ORAL ARGUMENT

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

RECHTER, Member. Maria Garcia ("Garcia") appeals from the February 6, 2014 Opinion, Award and Order and the March 10, 2014 Order on Petition for Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). The ALJ determined Garcia returned to work earning wages equal

to those earned at the time of injury, and she is not presently entitled to enhancement of her award by any multiplier. On appeal, Garcia challenges both findings. We reverse in part, vacate in part and remand for additional findings.

Garcia injured her left wrist and right shoulder when she slipped and fell in a bathroom at Central Kentucky Processing, Inc. The injury occurred on December 16, 2010. She remained off work until April 2, 2012 and was paid temporary total disability benefits during this period.

The parties stipulated she did not retain the physical capacity to return to the type of work performed at the time of injury. Her testimony concerning her ability to perform that work was not rebutted. They also stipulated Garcia's average weekly wage ("AWW") at the time of her injury was $474.28.

However, the parties contested Garcia's post-injury AWW. Post-injury wage records were submitted, covering pay dates from April 11, 2012 through March 27, 2013. Garcia earned an AWW of $458.05, $477.92, $445.68, and $431.49 in the first four quarters following her return to work. Therefore, Garcia's AWW in the second quarter exceeded the AWW at the time of injury. Additional weekly earnings from April 10, 2013 through June 19, 2013 were

also submitted. This most recent period produces an AWW greater than her pre-injury AWW, though this eleven-week period does not constitute a full quarter of earnings. No wage records were submitted covering the time period between June 20, 2013 and the December 19, 2013, the date of the final hearing.

Garcia's final hearing testimony concerning her rate of pay and hours worked post-injury is as follows:

> Q. How much are you earning an hour now?
>
> A. They are paying me now $10.25.
>
> Q. Is it more or less than before the injury?
>
> A. It's a little bit more.
>
> Q. Are you still working 40 hours a week?
>
> A. Yes.
>
> Q. Do you work overtime when it is offered?
>
> A. Sometimes.

Garcia testified she missed some work for medical appointments. She noted the employer accommodates her restrictions by allowing her to work in a lighter duty position.

Kaye Chrisman, human resource manager for Central Kentucky Processing, confirmed Garcia is earning $10.25 per

hour and is scheduled to work four ten-hour shifts per week. Garcia is permitted to work overtime. Chrisman indicated Garcia has nearly perfect attendance, is a good worker, and her restrictions can be accommodated indefinitely.

The ALJ rendered her Opinion and Order on February 6, 2014, noting the parties stipulated Garcia did not retain the physical capacity to return to the type of work performed at the time of injury. The ALJ next determined, based on Garcia's testimony, she "returned to work earning the same or greater wages as she was earning at the time of injury." Citing the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ then considered whether Garcia is likely to be able to continue earning a same or greater wage for the "foreseeable" future. She reasoned:

> The employer testified Garcia is an excellent worker with a good attendance record. There is no evidence the job is a bogus position to minimize the claim. The employer also testified Garcia would have no reason to believe her job would be in jeopardy. Garcia likes her job and the employer likes Garcia.
> …
> Regarding the multiplier, Plaintiff has not been able to return to her same job but currently earns a wage equal to or greater than the wage she was earning at the time of injury and is likely to

> do so for the foreseeable future, as discussed above.

Garcia filed a petition for reconsideration raising two arguments, both based on the ALJ's findings concerning her post-injury earnings. According to Garcia, the post-injury wage records demonstrate she met or exceeded her pre-injury AWW in only one of the four quarters. Thus, she claimed it was patent error for the ALJ to conclude there had been a return to work at a weekly wage equal to or greater than the AWW at the time of injury, pursuant to KRS 342.730(1)(c)2. If so, then an analysis pursuant to Fawbush v. Gwinn was unnecessary. Alternatively, even if the one quarter of wages exceeding her pre-injury AWW can be considered a return to work at an equal or greater AWW, Garcia challenged the ALJ's consideration of the third prong of the Fawbush analysis. According to Garcia, the fact she only exceeded her pre-injury AWW in one quarter should be a clear indication she is unlikely to continue to earn her present wage into the indefinite future.

In her March 10, 2014 Order on Reconsideration, the ALJ reaffirmed her finding Garcia returned to work at the same or greater wage. She cited Garcia's hearing

testimony as set forth above, and the fact Garcia's best post-injury quarter exceeded her stipulated pre-injury AWW.

On appeal, Garcia again challenges the ALJ's finding she returned to work at an AWW equal to or greater than her pre-injury AWW. Alternatively, she argues the ALJ erred because she only earned the same or greater wage for one quarter post-injury, showing she is not likely to consistently earn such a wage for the indefinite future. Finally, Garcia maintains the ALJ was required to hold that, upon cessation of earning the same or greater wages, she would be entitled to payments enhanced by the three multiplier.

We turn first to the ALJ's calculation of Garcia's post-injury wages. In reaching the conclusion she had returned to work earning the same or greater wages as she was earning at the time of the injury, the ALJ initially stated her reliance on Garcia's testimony. At both the deposition and the final hearing, Garcia testified only that she earned a higher hourly rate of $10.25 post-injury, as opposed to her pre-injury hourly wage of $10.05. However, in the Order on Reconsideration, the ALJ noted Garcia's "best" post-injury quarter exceeded her pre-injury AWW.

In Ball v. Big Elk Creek Coal Co., Inc., 25 S.W.3d 115, 117-118 (Ky. 2000), the Kentucky Supreme Court explained, for purposes of KRS 342.730(1)(c)2, an employee's post-injury AWW is subject to calculation under KRS 342.140, using the same method employed to determine a claimant's pre-injury AWW. Stated otherwise, the analysis must focus on the worker's AWW, not simply her hourly pay rate. Id. at 117 (reaffirming the prior holding in Whittaker v. Robinson, 981 S.W.2d 118 (Ky. 1998), in which the Court "rejected the argument that the worker's pre- and post-injury hourly pay rate should be compared and concluded that the legislature intended for a comparison of the pre- and post-injury average weekly wage.").

Thus, for an employee who is paid hourly, as Garcia, her post-injury average weekly wage must be calculated pursuant to KRS 342.140(1)(d) to determine whether there has been a return to work at a higher wage. This calculation requires an analysis of Garcia's earnings over a fifty-two week period, and identification of her "best" quarter. While the ALJ seemed to particularly emphasize Garcia's increased hourly rate, she also acknowledged "during the best quarter, the wage was $477.92, higher than the pre-injury wage of $474.28." For this reason, we are satisfied the ALJ conducted the

analysis required by Ball and reached a result supported by substantial evidence.

We next turn to the ALJ's consideration of the third prong of the Fawbush analysis; that is, whether Garcia is likely to be able to continue earning the same or greater wage for the indefinite future. As stated above, the ALJ considered the fact Garcia is an excellent worker whose restrictions are accommodated by Central Kentucky Processing. However, the Kentucky Supreme Court, in Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), explained that this third prong of the Fawbush analysis requires more than a consideration of whether the worker is able to continue in her present employment. Rather, "the standard for the decision is whether the injury has permanently altered the worker's ability to earn an income." Id. at 168.

For this reason, we must remand the matter for additional fact-finding as to whether Garcia's injury has permanently impacted her ability to earn an income not only at Central Kentucky Processing, but should that employment cease. The ALJ is requested to take into consideration the extent and nature of the injury, as well as the fact Garcia has had lengthy periods of earnings less than the stipulated AWW. On remand, should the ALJ determine KRS

342.730(1)(c)2 is more appropriate to this claim, she must determine, pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009), whether Garcia is presently entitled to enhancement by the two multiplier.

Finally, Garcia requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED** the request is **DENIED**.

Accordingly, the February 6, 2014 Opinion and Order and the March 10, 2014 Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **REVERSED IN PART, VACATED IN PART AND REMANDED** for additional findings and entry of an amended opinion consistent with the views expressed herein.

ALL CONCUR.

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REBEKKAH B. RECHTER, MEMBER
WORKERS' COMPENSATION BOARD

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