

OPINION ENTERED: January 25, 2013

CLAIM NO. 201190258

MARIA PRESTON

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

MARCO INDUSTRIAL TIRE CO.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Maria Preston ("Preston") seeks review of an opinion rendered August 24, 2012 by Hon. Grant Roark, Administrative Law Judge ("ALJ") finding compensable a left knee injury she sustained while employed at Marco Industrial Tire Co. ("Marco"), and finding she sustained a

temporary lumbar injury. Preston also appeals from an Order entered October 23, 2012, denying her petition for reconsideration, and finding Marco is not responsible for future medical benefits for her temporary lumbar injury.

On appeal, Preston argues the ALJ's determination her lumbar injury was temporary and had returned to baseline was erroneous and not supported by substantial evidence. Preston also argues the ALJ failed to properly consider the holding in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) in determining whether she had an impairment resulting from her lumbar spine injury. We affirm in part, vacate in part, and remand.

Preston filed a Form 101, Application for Resolution of Injury Claim on January 3, 2012, alleging she sustained injuries while working for Marco on May 3, 2010; November 1, 2010; and April 22, 2011. Preston alleged she slipped and fell on wet stairs on May 3, 2010 injuring her right shoulder, wrist, hips and lower back. She alleged she slipped and fell down stairs on November 1, 2010, injuring her left shoulder, left knee, neck and chin. She alleged she tripped and fell over a forklift on April 22, 2011, injuring her right knee and lower back.

Preston testified by deposition on February 15, 2011, and at the hearing held June 25, 2012. She was born

on November 10, 1958, and is a resident of Drift, Kentucky. Preston is a high school graduate, and completed one semester of college. Preston's previous work experience includes employment as a corrections officer, inspector, customer service representative, and assembly line worker. She continues to work as Marco's office manager, the same position she held on all three injury dates. As office manager, Preston does the billing for the company, as well as bookkeeping, filing, payroll and bank deposits. On May 3, 2010, she earned \$10.00 per hour; on November 1, 2010, she earned \$10.25 per hour; and she currently earns \$11.00 per hour.

On May 10, 2010, Preston testified she was descending steps to get mail. A leaky roof caused the stairs to be wet and slick. She fell, and reported the incident to her employer. She indicated she may have had x-rays taken, but continued to work and had no additional treatment.

On November 1, 2010, Preston testified she again fell down some stairs. She attempted to catch the railing, but missed. She turned and landed on her left knee and rolled down the stairs. She went to the emergency room. She missed a few days of work due to the accident then returned to light duty. She eventually returned to regular

duty, and continued to take over-the-counter Tylenol for low back and knee pain. She stated this was her worst injury of the three alleged, and she never fully recovered from it. She described the April 22, 2011 event as an exacerbation of her condition.

Physical therapy, injections, and medication did not improve her condition, and she was eventually referred to Dr. Kevin Pugh, an orthopedic surgeon. Dr. Pugh eventually performed surgery on her left knee. She subsequently returned to work as Marco's office manager. She stated she last experienced low back pain prior to her work injuries in 2003 or 2004.

Preston testified she was involved in a motor vehicle accident in August 17, 2005, from which she had complaints of neck, low back, and left shoulder pain. A nerve conduction study for her low back was performed, but she stated she had no treatment afterward.

Preston testified she has occasional stiffness in her left shoulder, and occasionally experiences catches in her low back. She also stated ongoing left knee and low back complaints vary with her activity level. She uses a TENS unit prescribed by Dr. Duane Densler, a neurosurgeon, and takes Naproxyn.

Preston filed numerous medical records in support of the Form 101 including records from ARH-McDowell, Dr. Pugh, Dr. Densler, and MRI reports. Dr. Pugh's August 26, 2011 note indicates complaints of left knee pain. He acknowledged injections administered six weeks prior to the office visit provided three weeks of relief. An MRI of the lumbar spine taken at ARH-McDowell on June 16, 2011 demonstrated a left-sided herniation at L4-L5, and degenerative disk disease at L4-L5 and L5-S1. An MRI of the left knee dated June 16, 2011 demonstrated meniscal tears, osteoarthritis and joint fluid.

Preston later filed additional records from ARH-McDowell from April 1, 2011 through August 26, 2011 indicating ongoing treatment for her left knee and low back symptoms. Preston completed a review of symptoms questionnaire on July 12 2011, noting she was either having problems with, or had previously experienced problems with balance, sinus, leg pain while walking, asthma, shortness of breath, indigestion, arm or leg weakness, back pain, arm or leg pain, joint pain or swelling, arthritis, fainting or blacking out, memory problems, inability to concentrate, double or blurred vision and food allergies.

Preston also submitted records from Dr. Pugh, including the operative report dated October 13, 2011. Dr.

Pugh diagnosed left knee medial and lateral meniscus tears; left knee grade 4 chondromalacia of the medial femoral condyle and medial tibia, and grade 3 chondromalacia of the lateral compartment; and grade 3 chondromalacia of the patellofemoral joint. For those conditions, he performed a partial medial and lateral meniscectomy. On November 22, 2011, Dr. Pugh noted her left knee had improved, although she complained of occasional soreness. She also reported occasional pain in the right knee. In a note dated March 11, 2012, Dr. Pugh opined Preston sustained left knee medial and lateral meniscal tears due to the work incident, and assessed a 4% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He also stated she retains the capacity to return to the same work she performed at the time of the injury.

Preston filed a Form 107-I medical report prepared by Dr. Ira Potter who evaluated her on March 1, 2012. Dr. Potter noted Preston was Marco's office manager, and provided a history of the three work accidents listed in the Form 101. Dr. Potter noted the October 13, 2011 knee surgery, and further noted she had returned to work shortly after Thanksgiving in 2011. Dr. Potter diagnosed cervicalgia, lumbar sprain/strain, left lumbar radiculitis,

left L4-L5 and L5-S1 disc protrusions/herniations, L4-L5 and L5-S1 degenerative disc disease, and status post left knee arthroscopy with partial medial and lateral laminectomies. Dr. Potter opined the lumbar injury was caused by the May 3, 2010 fall at work, aggravated by the fall on April 22, 2011. He further opined the left knee injury was caused by the fall on November 1, 2010, aggravated by the fall occurring on April 22, 2011. Dr. Potter assessed an 11% impairment rating pursuant to the AMA Guides, of which he attributed 7% to the lumbar condition and 4% to the left lower extremity. Dr. Potter suggested numerous restrictions, but opined she retains the physical capacity to perform her previous work.

Both Preston and Marco submitted the July 12, 2011 report prepared by Dr. Densler. Dr. Densler noted the history of work injuries and complaints of low back and left leg pain. He noted physical therapy helped, as did treatment with a TENS unit. Dr. Densler stated based upon the MRI, she has degenerative disk disease at L4-L5 and L5-S1, "none of which needs any surgical intervention at this time".

Marco filed records from Dr. Sujata R. Gutti, a neurologist, reflecting treatment from September 26, 2005 through July 19, 2006 for cervicalgia, left shoulder, left arm radiculitis and lumbago with disc bulging at L4-L5.

Marco also filed the report of Dr. David Muffly, an orthopedic surgeon, who evaluated Preston on March 26, 2012. Dr. Muffly outlined the work accidents, as well as a previous right knee injury in 2002 and the 2005 motor vehicle accident. Preston complained of left knee pain with stiffness of the medial and lateral knee. She also complained of daily low back pain with radiation into her left hip. He noted she complained of occasional aching in her cervical spine. Dr. Muffly noted full range of motion in both knees but observed some grinding. He stated she had no sign of disc herniation or nerve root impingement on MRI. He opined Preston sustained left knee medial and lateral meniscus tears due to her work injuries, and had no injury to her right knee. He further stated she sustained a temporary lumbar strain due to the April 22, 2011 injury. Dr. Muffly assessed a 4% impairment rating pursuant to the AMA Guides for the left knee injury. He stated she may have some impairment due to pre-existing active cervical and lumbar problems. Dr. Muffly also stated she requires no additional medical treatment, and may continue with her normal job without restrictions.

In the Opinion, Order and Award rendered August 24, 2012, the ALJ found as follows:

**Causation/Work-Relatedness/
Injury Under the Act**

As a threshold issue, the employer disputes plaintiff suffered any permanent injury other than that to her left knee. It argues that plaintiff's alleged neck and lower back complaints were due to degenerative changes that were already active prior to any of the work injuries alleged. It also argues plaintiff did not suffer any permanent injuries to her left shoulder, right wrist, hip shin or right knee.

For her part, plaintiff argues that although she had lumbar complaints prior to the work injuries, she did not have a ratable lumbar impairment before the work injuries and, as such, the entirety of her lumbar condition is compensable along with the undisputed left knee impairment. In support of her position the plaintiff relies on the opinion of her IME physician, Dr. Potter.

Having reviewed the evidence of record, the Administrative Law Judge is not persuaded plaintiff has carried her burden of proof with respect to her lumbar claim. In reaching this conclusion, the Administrative Law Judge is fully aware of Dr. Potter's conclusions; however, as the defendant points out, Dr. Potter was not provided accurate information about plaintiff's lumbar complaints following her motor vehicle accident in 2005. A review of Dr. Gutti's records, as well as Dr. Muffly's review of the 2006 MRI compared to the 2011 MRI, and the history obtained by Dr. Muffly all lead the Administrative Law Judge to agree that Dr. Potter was not provided an accurate history. In his report, there is no indication Dr. Potter had been provided all of Dr. Gutti's treatment records or

the 2006 MRI report, and it appears plaintiff did not accurately report her prior symptoms as Dr. Potter indicated "her orthopedic medical history with respect to her lower back and lower extremities is unremarkable for any non-occupational injuries." This is not an accurate statement since Dr. Gutti's records clearly show plaintiff complained in 2006 of constant lower back pain with pain into her leg following the August, 2005 motor vehicle accident. For these reasons, the Administrative Law Judge cannot credit Dr. Potter's opinions in this instance.

Instead, Dr. Muffly's assessment is considered most accurate and most in keeping with plaintiff's prior history and diagnostic study results. He concluded plaintiff may have suffered temporary lumbar and cervical strains following the work injuries alleged, but that those conditions returned to baseline and that plaintiff did not therefore suffer any permanent injury other than to her left knee. Based on Dr. Muffly's opinions, it is determined plaintiff's only compensable permanent injury is to her left knee as a result of the work injuries. Moreover, based on the fact that plaintiff continued to work following the first two injuries and did not require knee surgery until after the last one, it is determined the April 22, 2011 injury was the proximate cause of plaintiff's permanent left knee injury.

Extent & Duration

Having concluded only plaintiff's left knee injury is compensable, it is further determined plaintiff has a 4% impairment rating as a result of that injury. In this regard, the opinions of Dr. Potter and Dr. Muffly are in

agreement and the Administrative Law Judge accepts those opinions. Moreover, based on the lack of restrictions from Dr. Pugh and the fact that plaintiff has returned to her same job performing the same duties at the same or greater wages as before her injury, it is determined plaintiff retains the physical ability to return to the job she held at the time of her injury. Accordingly, no additional multipliers are appropriate. Plaintiff's award of benefits is calculated as follows:

$$\begin{aligned} & \$417.69 \times 2/3 = \$278.46 \times .04 \times .65 \\ & = \$7.24 \text{ per week.} \end{aligned}$$

In her petition for reconsideration filed August 31, 2012, Preston argued, as she does in her appeal, the ALJ failed to properly perform an analysis pursuant to Finley, supra, and argued her testimony, along with the medical evidence, establish she was not symptomatic immediately prior to the May 3, 2010 work injury. Preston filed a supplemental petition for reconsideration on September 4, 2012, arguing the ALJ failed to award medical benefits for the lumbar injury. Marco also filed a petition for reconsideration on September 5, 2012, requesting the ALJ make additional findings relieving it of payment for future medical benefits for any condition other than the left knee.

In an order issued October 23, 2012, the ALJ denied both Preston's petition for reconsideration and

supplemental petition. Regarding Marco's petition for reconsideration, the ALJ found as follows:

Moreover, because it was determined plaintiff suffered only a temporary lumbar injury which returned to baseline, she is not entitled to future medical treatment after her evaluation with Dr. Muffly on March 26 2012. Therefore, plaintiff is only entitled to future, ongoing medical treatment for her left knee. In this regard, plaintiff's Supplemental Petition is denied and the defendant's Petition is granted. In all other respects, the August 24, 2012 Opinion, Order & Award remains unchanged.

On appeal, Preston argues she did not have a pre-existing, active impairment at the time of the work incident pursuant to Finley, supra. She argues she had no ratable active condition prior to her work injury, therefore the ALJ erred in finding only a temporary lumbar injury.

As the claimant in a workers' compensation proceeding, Preston had the burden of proving each of the essential elements of her cause of action including the occurrence of a work-related injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Preston was unsuccessful before the ALJ regarding her alleged lumbar injury, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence

is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

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). The 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 supporting a different outcome than 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

We cannot say the ALJ's determination Preston sustained only a temporary injury to her low back is so unreasonable based upon the evidence that it must be reversed as a matter of law. We note Dr. Muffly's report supports the ALJ's conclusion. Preston's arguments on appeal essentially point to conflicting evidence in the record supporting a more favorable outcome. This is not an adequate basis to reverse, and we find the evidence does not compel a finding of a work-related injury occurring on June 22, 2011.

That said, we also note the ALJ did not misapply the law regarding pre-existing conditions and find Finley v. DBM Technologies, supra, and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), are not applicable. In Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829, 833 (Ky. 2008), the Supreme Court noted as follows:

Finally, the ALJ did not misapply the law regarding pre-existing conditions. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001), stands for the principle that "[w]here work-related trauma causes a dormant degenerative

condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury." [footnote omitted] It is inapplicable in the present situation because the ALJ relied on medical evidence that work-related trauma caused no permanent harm and because no overwhelming medical evidence compelled otherwise.

In Blankenship v. Wal-Mart Stores, Inc., 2011-SC-000131-WC, rendered September 22, 2011, Designated Not To Be Published, the Supreme Court stated:

The court determined ultimately that the dispute over whether the injury caused a dormant pre-existing condition to become disabling was inapplicable because the ALJ found the critical issue to be whether a work-related injury actually occurred. Noting that the ALJ found the claimant to be untruthful, the court found no error in the decision to reject his evidence of causation because the physicians testifying on his behalf based their opinions on a false history.

[text omitted]

Finley and *McNutt* were inapplicable because the ALJ found the claimant not to be credible and, as a consequence, rejected medical opinions based on a history that the ALJ concluded was false.

Slip Op. at 5.

We believe the above language to be applicable in the case *sub judice*. This claim does not involve a

situation where the claimant sustained a work-related injury resulting in a permanent impairment. While Dr. Muffly indicated she may qualify for an impairment rating based upon both cervical and lumbar conditions, he specifically found she sustained only a temporary injury to her lumbar spine due to the April 22, 2011 accident. Medical evidence exists supporting the ALJ's determination of no permanent lumbar injury, and a contrary result is not compelled. Since the ALJ determined there was no permanent harm, there was no reason to conduct an analysis pursuant to Finley v. DBM Technologies, supra, and McNutt Construction, supra.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail in the burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms.

The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis.

The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Id. at 286.

In this instance, the ALJ specifically found Preston sustained only a temporary lumbar injury, and provided his reasoning for doing so, based upon the evidence. We find no error in the ALJ's award of temporary medical benefits for the lumbar injury consistent with Robertson, supra, and FEI Installation Inc. vs. Williams, 214 S.W.3d 313 (Ky. 2007).

Even though we have affirmed the ALJ's decision regarding Preston's lumbar injury, we vacate the award of income benefits to the extent the ALJ must include language regarding the applicability of KRS 342.730(1)(c)2. Because the ALJ determined Preston "returned to her same job performing the same duties at the same or greater wages as

before her injury," the two multiplier is applicable. However, enhancement of Preston's benefits by the two multiplier is subject to the conditions set forth in Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010).

While we acknowledge Preston has yet to meet the requirements as set forth in Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra, at some point during the 425 weeks she receives income benefits, she may cease working due to reasons which relate to the disabling injury or a previous work-related injury. At that point, she would be entitled to have her income benefits enhanced by the two multiplier upon a properly filed motion to reopen. Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra. This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2," i.e., the two multiplier.

As Preston has already met the requirements of KRS 342.730(1)(c)2 before the entry of the final award, the two multiplier language must be included in the amended

award indicating this is contingent upon her meeting the requirements as set forth in Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra. The failure to include such language in the amended award would constitute an error of law.

Accordingly, concerning the issue raised on appeal, the August 24, 2012 opinion and the October 23, 2012 order ruling on the petitions for reconsideration are **AFFIRMED**. However, the award of income benefits is **VACATED** and this claim is **REMANDED** to the ALJ for entry of an amended award consistent with the view expressed herein.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

MEMBER SMITH. I dissent for the reason that I think it is overreach to acknowledge that Preston has not yet met the requirements that would trigger the analysis required in Chrysalis House Inc., supra, and yet require the ALJ to issue a decision on something that may never happen. The ALJ addresses issues brought before him or her in which both parties have had a chance to litigate the issues. Furthermore, the statute is very clear as to when the two multiplier would be triggered. The majority correctly

points out that at some point during the 425 weeks Preston receives income benefits, she may cease working due to reasons which relate to the disabling injury or a previous work-related injury. However, she may not. Our responsibility is not to speculate. For this reason, I would dissent from that portion of the decision remanding.

COUNSEL FOR PETITIONER:

HON THOMAS W MOAK
P O BOX 510
PRESTONSBURG, KY 41653

COUNSEL FOR RESPONDENT:

HON BENITA J RILEY
P O BOX 1350
PRESTONSBURG, KY 41653

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
410 WEST CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE, KY 40202