Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 28, 2013

CLAIM NO. 201196492

NANA PACIFIC PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

EVELYN HOLLIDAY
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Nana Pacific seeks review of the June 13, 2013, opinion and award of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ") finding Evelyn Holliday ("Holliday") sustained a work-related left shoulder 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. Nana Pacific also appeals from the July 22, 2013, order denying its petition for reconsideration.

Holliday alleged injuries to her left shoulder, left arm, right hip, and left ankle on November 29, 2010, when she was struck from behind by a forklift as she was leaving the company warehouse. Holliday testified the problems with her left ankle ultimately resolved. Pursuant to a February 14, 2012, order, the proceedings were bifurcated to first resolve the issue of the compensability of Holliday's right hip condition. In a September 20, 2012, interlocutory opinion and order, the ALJ determined Holliday's right hip condition was not work-related and dismissed that portion of her claim.

Concerning Holliday's left shoulder injury, in the June 13, 2013, opinion and award, the ALJ concluded as follows:

> **Benefits Per KRS 342.730**
>
> 11. The most credible medical opinion in this matter is that of Dr. Owen in the ALJ's opinion. Dr. Owen examined the Plaintiff most recently of any other doctor in January of 2013. He performed a thorough evaluation and credibly concluded that the Plaintiff has suffered a 12% whole person impairment as a result of the work injury.
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> 12. Dr. Owen concluded that the Plaintiff retained the capacity to

return to work subject to a maximum 20 pound lifting restriction and a prohibition against overhead lifting.

13. The ALJ found that the Plaintiff presented well at the final hearing and was genuine and credible when she testified that she has difficulty dressing herself and doing her hair because of the inability to use her left hand. She likewise credibly testified that she has continuing difficulty at work and that she is only able to use one hand to perform her duties.

14. The ALJ has been convinced by this credible evidence and therefore finds that the Plaintiff has a 12% whole person impairment and that she has returned to work with restrictions at the same or greater wage.

15. When KRS 342.730(1)(c)(1) and KRS 342.730(1)(c)(2) both may be applicable, *Fawbush v. Gwinn*, 107 S.W.3d 5 (2003), and its progeny require an ALJ to make three essential findings of fact, even if not specifically requested to do so by the parties. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than her pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

16. Having established the first two prongs of the Fawbush analysis, the ALJ relies heavily upon the credible testimony of the Plaintiff to determine whether she is likely to continue to

> earn the same or greater wage for the indefinite future.
>
> 17. The Plaintiff testified that she has great difficulty performing her job and that her range of motion is limited. She said that she has to type with one hand and that she is required to lift things with one hand and has to break down files into pieces that she is able to lift due to her restrictions. She also said that despite taking these precautions and observing her restrictions, she experiences pain in doing her job.
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> 18. The ALJ therefore finds that the Plaintiff is not likely to be able to continue to earn the same wages for the indefinite future and thus KRS 342.730(1)(c)(1) is applicable.[1]

Nana Pacific filed a petition for reconsideration making the same argument it does on appeal asserting an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) should not have been conducted as the ALJ erroneously determined Holliday did not retain the physical capacity to return to the job she was performing at the time of the injury. Alternatively, Nana Pacific requested "additional findings of fact and analysis of law" regarding the first two prongs of the Fawbush analysis asserting the ALJ did not provide findings of fact or an analysis explaining why the two and three multipliers were both applicable. As

[1] The ALJ also determined Holliday was not entitled to enhanced benefits pursuant to KRS 342.165.

previously noted, by order dated July 22, 2013, the ALJ denied the petition for reconsideration.

On appeal, Nana Pacific argues the ALJ erred in finding Holliday did not retain the physical capacity to perform the same type of work she performed at the time of the injury. It asserts the overwhelming and uncontroverted evidence shows that not only does Holliday retain the physical capacity to perform this work but she has continued to perform her same job with her same job duties since the accident. It also argues the ALJ failed to provide any analysis regarding the first prong of the Fawbush analysis. It maintains the ALJ merely stated the first two prongs of the Fawbush analysis had been established but made no finding Holliday did not retain the physical capacity to perform the same type of work she performed at the time of the injury. Nana Pacific points out the ALJ noted Holliday's deposition and hearing testimony establish that since the injury she has continued to perform the same job she performed at the time of the injury. In spite of this fact, the ALJ enhanced Holliday's PPD benefits.

Nana Pacific insists the uncontroverted evidence establishes Holliday continues to perform the same job duties she performed at the time of the injury although she

has “modified the way that she works.” Nana Pacific posits the mere modification in the manner in which Holliday performs the same job duties is not sufficient to support a finding she does not retain the physical capacity to perform the type of work she performed at the time of the injury.

Additionally, Nana Pacific argues the medical evidence does not support the ALJ’s determination KRS 342.730(1)(c)1 is applicable. It maintains Dr. James C. Owen, the only physician to directly address this issue, stated Holliday retains the physical capacity to perform the same type of work she performed at the time of the injury. Nana Pacific asserts Dr. Owen’s opinion on this issue is consistent with Holliday’s testimony.

In the alternative, Nana Pacific asserts the claim should be remanded to the ALJ for additional “findings of fact and analysis of law” as to the first prong of the Fawbush analysis. It argues the ALJ summarily found the first two prongs of the Fawbush analysis had been met, but did not provide findings of fact or an analysis explaining why these first two prongs were met. Accordingly, it seeks reversal of enhancement of the award or, in the alternative, remand for additional findings of

fact and analysis as to the first prong of the Fawbush analysis.[2]

We agree the ALJ did not provide sufficient findings of fact and an analysis regarding whether Holliday retains the physical capacity to return to the type of work she was performing at the time of the injury. Further, the ALJ failed to provide a sufficient basis for his determination it is not likely Holliday would be able to continue to earn the same wages for the indefinite future. Therefore, we vacate that portion of the award enhancing the PPD benefits by the three multiplier pursuant to KRS 342.730(1)(c)1.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the

[2] On appeal, Nana Pacific abandoned its argument contained in the petition for reconsideration that the ALJ did not provide sufficient findings of fact regarding the two multiplier. Further, we believe the ALJ's finding of fact in numerical paragraph 14 on page 9 of the June 13, 2013, opinion and award Holliday "returned to work with restrictions at the same or greater wage" was sufficient to support his conclusion the two multiplier is applicable.

fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). As only the ALJ has fact-finding authority, the ALJ must provide the basis for his determination KRS 342.730(1)(c)1 applies and Holliday did not retain the capacity to perform the job she was performing at the time of the injury as well as the basis for the determination it was unlikely she would be able to continue to earn the same wages for the indefinite future.

In the opinion and award, after noting Dr. Owen's impairment rating and setting forth the restrictions he imposed, the ALJ concluded Holliday's testimony was genuine and credible regarding the physical difficulty she was having in her personal care and at work. The ALJ determined Holliday had a 12% impairment as a result of the injury. After discussing the requisite analysis required by Fawbush, the ALJ made the blanket statement that the first two prongs of the analysis had been established. The ALJ made no finding that Holliday did not retain the

physical capacity to perform the job she was performing at the time of the injury. Similarly, the ALJ did not provide the basis for his conclusion KRS 342.730(1)(c)1 was applicable. Although he referenced certain physical difficulties Holliday was experiencing, the ALJ did not provide the lay and/or medical testimony upon which he relied in determining KRS 342.730(1)(c)1 was applicable.

That said, we disagree with Nana Pacific's argument the uncontroverted evidence establishes Holliday retains the physical capacity to perform the work she performed at the time of the injury.

With respect to the analysis required in determining whether the three multiplier is applicable, in Miller v. Square D Co., 254 S.W.3d 810, 814 (Ky. 2008) the Supreme Court stated as follows:

> Thus, it seems more likely that the legislature intended for the phrase 'the type of work that the employee performed at the time of injury' to refer broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred.

The Supreme Court reaffirmed this principle in Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2004). There the Board had reversed the ALJ's determination the three

multiplier did not apply and remanded explaining the correct standard was whether the claimant lacked the physical capacity to return to the same type of work she performed at the time of the injury. Therefore, her return to the same job classifications might or might not be relevant. Accordingly, the Board directed the ALJ to analyze the evidence concerning the actual jobs the claimant performed at the time of her injury and those she could perform after returning to work. Id. at 144. The Court of Appeals affirmed and in affirming the Court of Appeals, the Supreme Court stated:

> When used in the context of an award that is based upon an objectively determined functional impairment, 'the type of work that the employee performed at the time of injury' was most likely intended by the legislature to refer to the actual jobs that the individual performed.
>
> . . .
>
> For that reason, proof of the claimant's present ability to perform some jobs within the classification does not necessarily indicate that she retains the physical capacity to perform the same type of work that she performed at the time of injury. On remand, the ALJ must analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs.

Id. at 145.

Relative to this issue, Holliday testified on three different occasions regarding the physical problems resulting from the injury.[3] During her November 28, 2011, deposition, Holliday explained her job involved doing office work and sometimes going in the warehouse for inventory, delivering paperwork, and checking on inventory. She estimated eighty percent of her time was spent at her desk doing computer work and answering the telephone. Holliday explained when she conducts inventory she will take an item or a box off the shelf and count the quantity. She described rather significant left shoulder problems and stated she had agreed to undergo left shoulder surgery recommended by Dr. Peter Hester. Holliday testified she was unable to raise her hands above her head and she has problems when she reaches for the telephone. She was unable to lift more than five pounds with her left arm and did not perform any prolonged work reaching overhead with her left arm. Up to that point Nana Pacific had accommodated her restrictions.

[3] Holliday also testified at the July 24, 2012, hearing regarding the compensability of her hip condition but since it is not relevant to our holding we will not discuss that testimony.

At a subsequent November 8, 2012, deposition, Holliday indicated surgery performed by Dr. Hester was helpful and she was in less pain and had more use of her left arm. She still does paperwork, filing, inventory control, and follows up on shipping. Although, Holliday testified she is unable to check inventory and receive paperwork because she cannot wear shoes with a steel toe, it appears this was tied to her hip problem. She went on to explain there is a difference in how she now performs her duties. Holliday explained because of the problems with her arm someone else has to lift for her. Her relevant testimony is as follows:

> Q: Okay, I understand. And I don't want to put words in your mouth, but it sounds like not going to the warehouse and doing work in the warehouse is the main difference in your job duties before October 2010.
>
> A: With my duties. Uh-huh, (affirmative).
>
> Q: Now, do you have restrictions that prevent you from doing anything else?
>
> A: Yes. I'm very careful with – with filing. I can't bear weight on my left side very much. I think the doctor limited me at 10 pounds and I have trouble with a milk carton, you know, a milk – a gallon jug. So, filing, moving files, archiving – checking archives of files, all sometimes would entail lifting and, of course, I have to get somebody to help —- help me do that.

Holliday has trouble extending her arm and putting on her coat if her arm is extended straight out or behind her. She is unable to hold items of any weight if the arm is extended in front of her and as a result she has to use both hands. Holliday experiences problems with filing items and has to stop after a period of time. She also has problems reaching for the telephone and doing "everyday things."

At the April 17, 2013, hearing, Holliday acknowledged she was performing the same job but with restrictions and modifications. She explained she has limited motion. Holliday acknowledged when she returned to work she was earning the same wages she earned at the time of the injury. In fact, she noted she received a raise of twenty-five cents an hour and worked the same hours. Holliday explained she does everything right-handed such as filing, reaching, and typing. She continues to have problems raising her arm to the shoulder level and could not reach behind her. Although she can reach straight out in front of her, she cannot raise her arm above chest level. As noted by Nana Pacific, Holliday testified as follows:

> Q: Okay. And if I understand it from your prior deposition testimony and then your deposition testimony today, and

> correct me if I'm wrong, please, you're doing the same job duties you did before you were hit by the forklift, it's just you've learned to do them a little differently?
>
> A: Correct.
>
> Q: Okay. You've had to make some modifications based on your shoulder injury?
>
> A: Correct.

The evidence as summarized herein constitutes substantial evidence in support of a determination to either enhance or refuse to enhance the 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, 34 S.W.3d 48 (Ky. 2000); Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We have consistently held that it remains the ALJ's province to rely on a claimant's self-assessment of her ability to labor based on her physical condition. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

Further, although Dr. Owen concluded Holliday would be able to return to the type of work performed at the time of injury, he imposed rather stringent physical

limitations regarding the use of Holliday's left arm. As noted by Holliday in her brief, although Dr. Thomas Loeb did not believe his impairment rating and the restrictions he imposed were related to the work injury, he imposed significant restrictions of no lifting greater than five pounds above the left shoulder or repetitively no more than one to two pounds above the left shoulder. Thus, we conclude the medical evidence standing alone or in concert with Holliday's testimony would support a finding by the ALJ that she did not retain the capacity to perform the type of work she was performing at the time of the injury.

Additionally, upon remand, should the ALJ determine KRS 342.730(1)(c)1 is applicable pursuant to Fawbush, he must revisit the issue of whether Holliday is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future. In doing so, the ALJ must provide more analysis than was provided in the June 13, 2013, opinion and award. After finding the first two prongs of the Fawbush analysis had been established, the ALJ discussed the difficulty Holliday had performing her job and noted her range of motion was limited. The ALJ went on to recount a portion of Holliday's testimony regarding the physical problems she experiences in performing her jobs

and the pain she experiences even when she complies with the physical restrictions imposed. However, the ALJ did not provide the basis for his conclusion that Holliday was not likely to be able to continue earning the same wages for the indefinite future, which he must do on remand if he determines Holliday does not retain the physical capacity to perform the job she was performing at the time of the injury.

Accordingly, that portion of the June 13, 2013, opinion and award enhancing Holliday's PPD benefits by the three multiplier is **VACATED**. This matter is **REMANDED** for entry of an amended opinion and award containing additional findings of fact as to whether Holliday retains the capacity to perform the type of work she was performing at the time of the injury. Further, if the ALJ determines Holliday does not retain the physical capacity to perform the type of work she was performing at the time of the injury, the ALJ shall also make additional findings of fact as to whether it is unlikely Holliday will be able to continue earning the same or greater wages for the indefinite future as required by Fawbush v. Gwinn, supra.

Finally, as the September 20, 2012, opinion and order was interlocutory, in the amended opinion and order on remand the ALJ shall also adopt his findings of fact and

order regarding Holliday's alleged right hip condition and order her claim for the alleged right hip injury is dismissed.

ALL CONCUR.

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