

OPINION ENTERED: August 13, 2012

CLAIM NO. 200600568

NANCY MCDONALD

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

COMMONWEALTH OF KENTUCKY/  
HAZELWOOD HOSPITAL  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

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

**STIVERS, Member.** Nancy McDonald ("McDonald") seeks review of the April 9, 2012, opinion and order of Hon. Chris Davis, Administrative Law Judge ("ALJ") finding her occupational disability had increased since July 9, 2007, the date she settled her claim against the Commonwealth of Kentucky ("Commonwealth"). The ALJ awarded permanent

partial disability ("PPD") benefits from August 30, 2010, the date of the motion to reopen, for a period of 425 weeks from July 18, 2004, the date of the work-related injury. The ALJ also resolved a medical fee dispute in favor of McDonald. McDonald also appeals from the May 4, 2012, opinion on reconsideration denying her petition for reconsideration.

McDonald's Form 101 alleges on July 18, 2004, she was injured when she "slipped on wet floor and twisted and fell to the floor injuring [her] right hip and low back."

On July 9, 2007, McDonald settled her claim for a lump sum of \$3,364.19. The Form 110 approved on July 9, 2007, by Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman") reflects an injury date of July 18, 2004, and medical expenses totaling \$15,978.01. The Form 110 reflects Dr. Thomas Loeb assessed a 0% impairment rating on September 19, 2006, and an 8% impairment rating on January 23, 2007. The settlement computation based on a 4% impairment is as follows:  $\$362.08 \times 4\% \times .65 \times 357.3574 = \$3,364.19$ . McDonald did not waive her right to past and future medical benefits, vocational rehabilitation, and to reopen.

On August 31, 2010, McDonald filed a motion to reopen alleging a change of condition and she is "now more

disabled" than at the time of the settlement. She asserted her treating physician believes she needs surgery "which is reasonable and necessary and related to her work injury." McDonald alleged she is temporarily totally disabled and will remain such for a period of time after the surgery. In support of her motion, McDonald attached her affidavit stating she sustained an injury to her right hip and low back on July 18, 2004, and settled her claim based on a 4% impairment "with no factors." She stated Dr. Loeb assessed impairment ratings of 0% and 8%. McDonald maintained she continued to have difficulty with her back and hip. She returned to the care of Dr. David Rouben who she had seen initially for the work-related injury, "and then came under the care of Dr. Thomas Loeb by way of a second opinion." Dr. Rouben has recommended surgery.

McDonald also attached the July 21, 2010, report of Dr. Rouben which indicated she has "discogenic segmental pain at the L4-L5 level." He noted McDonald's pain is accentuated with activities at work and seems to have been precipitated from a prior traumatic event. Dr. Rouben indicated his plan was to "perform minimally invasive transforaminal posterior interbody fusion, right-sided approach, at the L4-L5 level."

The Commonwealth filed a response stating it did not object to the reopening and had approved McDonald's back surgery which was performed on August 31, 2010. The Commonwealth stated temporary total disability ("TTD") benefits are being paid and recommended the motion to reopen be sustained and the matter assigned to an Administrative Law Judge.

On September 30, 2010, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") sustained McDonald's motion to the extent the claim would be assigned to an Administrative Law Judge for further adjudication.

The Commonwealth introduced the independent medical examination ("IME") report of Dr. John J. Guarnaschelli who assessed an impairment rating of 20% to 23% to the body as a whole pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") all of which related to McDonald's work injury. Dr. Guarnaschelli stated McDonald would need ongoing medical treatment and imposed permanent restrictions. He found no signs of symptom magnification.

Dr. Rouben, who performed the back surgery, assessed a 23% impairment based upon the AMA Guides.

At the February 22, 2012, hearing, McDonald testified she was initially injured on July 18, 2004, when she slipped and fell on butter peas while working for the Commonwealth as a "manager 1" at Hazelwood Hospital. She explained she managed over forty employees, and her job involved scheduling and filling in for employees who did not show up. She was also required to lift boxes and crates of dishes, the heaviest of which weighed approximately twenty pounds. McDonald initially treated with Dr. Rouben but then came under the care of Dr. Loeb. She returned to Dr. Rouben sometime in 2009 and he performed lumbar fusion surgery on August 31, 2010.

McDonald returned to work on January 4, 2011.<sup>1</sup> McDonald explained the job to which she returned on January 4, 2011, was not the same job she had in July 2004. In approximately 2007 she "went from being a manager 1 to being an accountant." She has performed that job since she returned to work in January of 2011. McDonald has not missed any work since May 2011. Her current restrictions are no bending, stooping, squatting, and sitting or standing longer than thirty minutes. McDonald testified

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<sup>1</sup> The parties stipulated TTD benefits were paid from August 31, 2010, through January 3, 2011, and from January 25, 2011, through May 2, 2011.

because of her restrictions she cannot return to the work she was performing at the time of her injury in July 2004. At the time of the hearing, McDonald earned \$18.00 per hour. Although McDonald could not remember her rate of pay at the time of the injury she believes she is now making more money. McDonald did not know how much longer she could work as an accountant but hoped to work another year or two. McDonald testified the surgery has partially "fixed" her condition. She testified her lower back was fixed but her leg, hip, and buttocks were "not fixed" because of tissue damage. Currently she takes Hydrocodone for pain.

Relying upon the opinions of Dr. Rouben, the ALJ determined McDonald has a 23% impairment. The ALJ also determined she does not retain the capacity to return to the type of work performed on the date of injury. Since McDonald "is currently earning wages equal or greater than on her date of injury," the ALJ determined McDonald can continue to work as an accountant "for some time to come and, thus, continue to earn equal or greater than on her date of injury." Consequently, the ALJ stated McDonald's benefits would not be enhanced by a multiplier. The ALJ calculated McDonald's benefits upon reopening as follows:

The Plaintiff's permanent partial disability award shall be \$543.09 (AWW) x 2/3 (workers' compensation rate) x .23 (impairment rating) x 1.15 (grid factor) = \$95.76 per week, from August 30, 2010, for a period to expire 425 weeks from July 18, 2004, and excluding all periods of TTD, and with the Defendant to receive a credit for all benefits already paid for the time period August 30, 2010 through 425 weeks from July 18, 2004.

The ALJ entered an award of PPD benefits consistent with the above finding.

McDonald filed a petition for reconsideration arguing the ALJ erred by not enhancing her benefits by the three multiplier and "in beginning [her] initial award period on July 18, 2004, the date of her injury." The petition for reconsideration was denied.

On appeal, McDonald asserts "the ALJ erred in not beginning the claimant's 425 week award period after 9/19/06 and before 1/23/07." Citing Sweasy v. Wal-Mart Stores, Inc., 295 S.W. 3d 835 (Ky. 2009), McDonald argues as follows:

The Claimant's impairment could not have begun on the date of injury because she had no impairment on either July 18, 2004 or any date that preceded September 19, 2006, when Dr. Loeb assessed a zero impairment. Impairment had to have begun sometime after September 19, 2006, and/or before or on January 23, 2007 when Dr. Loeb assessed an 8% impairment. The ALJ was

requested to find a date to begin the award in that period and he did not. The ALJ erred in so doing and this matter should be reversed and remanded with instructions to begin the initial award on some date between those two periods.

The outcome in the case *sub judice* is controlled by Sweasy v. Wal-Mart Stores, Inc., *supra*. Sweasy injured her back on November 28, 2005, while working as a cashier for Wal-Mart. She was off work three days and returned to work at light duty in accordance with her work restrictions. On March 1, 2007, Wal-Mart refused to honor Sweasy's restrictions and terminated her employment. The ALJ determined Sweasy sustained a work-related injury and awarded TTD benefits from March 1, 2007, through August 24, 2007. The ALJ ordered the payment of PPD benefits to begin on August 25, 2007. Sweasy appealed asserting the ALJ should have begun the award of TTD benefits from the date of injury rather than the date Wal-Mart terminated her employment. This Board determined the evidence did not compel an award of TTD benefits during the period before Sweasy's termination on March 1, 2007. The Board *sua sponte* determined the ALJ committed palpable error by failing to award PPD benefits from the date of the injury through March 1, 2007, because Sweasy's permanent

disability began at the time of the injury and remanded for entry of a corrected award.

Wal-Mart appealed to the Court of Appeals questioning the Board's authority to *sua sponte* raise a legal issue and its decision concerning the commencement of PPD benefits. The Court of Appeals affirmed with respect to the first issue but reversed regarding commencement of PPD benefits. The Supreme Court reversed the Court of Appeals holding as follows:

This appeal concerns KRS 342.730 (1)(d), which provides compensable periods of 425 weeks for disability ratings of 50% or less and of 520 weeks for disability ratings that exceed 50%. KRS 342.730(1)(d)'s failure to specify when the period of a 425-week award begins may be read to imply legislative intent to permit such an award to begin on a date other than when the permanent impairment or disability of 50% or less arises. Yet, mindful of policy and purpose for which KRS 342.370(1)(b)-(e) were enacted, we conclude that the legislature intended no such absurdity.[footnote omitted] Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits. [Footnote omitted]

A condition "arises" when it comes into being, begins, or originates. [Footnote omitted] Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* consider the amount of impairment that *remains* at MMI to be "permanent." The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration. [Footnote omitted]

The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.

The decision of the Court of Appeals is reversed and this claim is remanded to the ALJ for the entry of a proper award.

Id. at 839-840.

As in Sweasy v. Wal-Mart Stores, Inc., supra, the record establishes McDonald's condition arose on the date

of injury. Thus, the ALJ did not err in ordering the award of PPD benefits to begin on the date of injury. The medical records generated after McDonald's injury clearly establish the physical effects of the injury manifested immediately after she slipped and fell at work. The February 8, 2005, letter from Dr. Michael Baker reflects he saw McDonald on July 19, 2004, for evaluation and treatment of an injury sustained in a work-related accident the day before. Dr. Michael Baker noted McDonald slipped and fell and "as a result of the accident she reported experiencing neck pain, lower back pain, gluteal pain, and upper back pain." The October 25, 2004, record of Dr. Rouben reflects McDonald was seen by Dr. Baker on July 19, 2004, "for neck symptoms precipitated as a result of a fall that was incurred while on the job." Her secondary complaint was of "low back pain precipitated at the time of the same fall." Dr. Rouben stated: "Her notes extend through October 8, 2004 and essentially she was being treated with spinal mobilization techniques." He noted McDonald stated she experienced "posterior interscapular and right anterior right parasternal pain in addition to right sided low back pain, which was precipitated July 18, 2004, as a result of having slipped and fallen in some food that was on the floor."

In addition, Dr. Loeb's February 22, 2005, note states as follows:

Nancy is a 46-year-old female who presents today for an evaluation regarding her low back and hip pain. She was working in food services on July 18, 2004 at the Hazelwood Center and slipped on a wet floor coming down on her right hip and her right leg. She states she felt a sharp pain that went from her right hip across her mid spine. She states her hip actually popped. At the time of the incident, she was unable to feel her legs for approximately ten minutes and had to be helped by her co-workers to her office. She has undergone fairly extensive workups including physical therapy, x-rays, MRI, and chiropractic manipulation. She has also been prescribed multiple braces and is here for a second opinion regarding the use of the brace as well as for pre-oblation therapy. The patient rates the pain as 8 to 9/10 on the pain scale. The pain is described as sharp and stabbing with certain motions as well as throbbing and dull. The pain persists throughout the day. Ms. Donald states that with any bending, kneeling, stooping, or laying down the pain on the right side will persist. She states that the pain initially was radiating down her lower extremities however this seems to have improved. Primarily the right side was affected. She states now the pain is fairly well located at the superior portion of her right buttock. She has taken Celebrex as well as Ultram and Valium for pain relief. She has also been given work restrictions. The patient has been through two different courses of physical therapy. An MRI was obtained in November of 2004. The patient

states she has continued to work despite her injury. She was fitted for a rigid Conti brace however workman's comp is not willing to pay for this as the patient does not have to previous neoprene style lumbar supports.

The record contains other medical notes/reports generated by Dr. Rouben in 2004 and 2005 reflecting McDonald had immediate physical problems on the date she was injured and thereafter. The medical records uniformly establish the work-related trauma on July 18, 2004, produced an immediate harmful change in the human organism and there was no latency period. As pointed out in Sweasy v. Wal-Mart Stores, Inc., supra, the fact Dr. Loeb may have assessed an impairment rating at a later date does not alter the fact the permanent impairment being measured actually originated with the harmful change. Id. at 839. As the medical evidence supports a finding McDonald's injury produced a permanent impairment and disability on the date of the injury, the ALJ's determination the initial award period begins on July 18, 2004, must be affirmed. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

That said, since the parties do not contest the ALJ's finding McDonald is currently earning wages equal to or greater than on the date of her injury, McDonald is entitled to enhancement of her benefits by the two

multiplier should her employment at the same or greater wage cease for a reason which relates to the disabling injury or due to the disabling effects of previous work-related injuries.<sup>2</sup> See Chrysalis House, Inc. v. Tackett, 583 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d (Ky. 2010). Therefore, we vacate that portion of the opinion and order determining "no multipliers will be given at this time." Since McDonald returned to work at the same weekly wage she was earning at the time of the injury, KRS 342.730(1)(c)(2) is applicable subject to the conditions set forth in Chrysalis House, Inc., supra, and Hogston, supra. Therefore, the ALJ's failure to provide for enhancement of the award by the two multiplier in the April 9, 2012, opinion and order subject to the conditions set forth in Chrysalis House, Inc., supra and Hogston, supra, is error. At some point during the remaining period McDonald receives income benefits, her employment may cease due to reasons which relate to the disabling injury or a previous work-related

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<sup>2</sup> In accordance with the 2007 settlement agreement, the parties stipulated McDonald's impairment at the time of the initial injury was 4%. Since McDonald returned to work after her injury in 2004 performing the same job, there is no issue regarding her entitlement to the three multiplier at that time. When she settled, McDonald did not seek enhancement of her benefits by the two multiplier and continued to work after the injury. Therefore, the ALJ was not required to determine whether any multipliers were applicable at the time of settlement.

injury. See Chrysalis House, Inc., supra and Hogston, supra. If McDonald's employment ceases due to reasons which relate to the disabling injury or a previous work-related injury, she is entitled to have her income benefits enhanced by the two multiplier upon a properly filed motion to reopen. See Chrysalis House, Inc., supra and Hogston, 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. On remand, the ALJ must include this language regarding the two multiplier in the amended opinion and order. While neither party has raised this issue on appeal, this Board may raise it *sua sponte*.

Accordingly, the April 9, 2012, opinion and order and the May 4, 2012, opinion on reconsideration regarding the commencement date for the award of PPD benefits are **AFFIRMED**. That portion of the opinion and order determining "no multipliers will be given at this time" is **VACATED** and this matter is **REMANDED** to the ALJ for entry of an amended opinion and order awarding the two multiplier subject to the conditions set forth in Chrysalis House, Inc., supra and Hogston, supra.

ALL CONCUR.

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