

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 5, 2016

CLAIM NO. 201283372

PENNY BERRY

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

CEDAR LAKE PARK PLACE and  
HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Penny Berry ("Berry") appeals from the Amended Opinion and Order on Remand rendered September 4, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for her occupational disease claim for which she alleged a last injurious exposure of April 29,

2012 while working for Cedar Lake Park Place ("Cedar Lake"). Berry also appeals from the October 21, 2015 Opinion and Order on Reconsideration finding she is not permanently totally disabled from the effects of her January 26, 2012 work injury.

On appeal, Berry argues the ALJ erred in denying her motion seeking relief pursuant to CR 60.02. She also alleges the ALJ erred in failing to award an enhancement of benefits pursuant to KRS 342.730(1)(c)2 on remand. We find the ALJ did not err in finding CR 60.02 inapplicable to this proceeding. We also find the ALJ complied with the directives of this Board in our prior decision entered November 13, 2013; the Kentucky Court of Appeals in its decision rendered August 4, 2014; and, the Kentucky Supreme Court in its decision rendered June 11, 2015, and therefore we affirm.

Berry filed a Form 102 on November 26, 2012 alleging she developed pulmonary problems due to sick building syndrome in the course of her employment with Cedar Lake in New Castle, Henry County, Kentucky. She began working for Cedar Lake in September 2010 and developed lung and/or allergic problems within one week of employment. She sought medical treatment with her primary care physician who eventually referred her to an allergist

and a pulmonologist. Berry indicated she returned to work for another employer subsequent to November 26, 2012, but never returned to work for Cedar Lake.

The evidence introduced during the claim was previously summarized in a decision rendered by this Board on November 13, 2013 and will not be reviewed again. In a decision rendered June 27, 2013, the ALJ awarded TTD, PPD enhanced by the multiplier contained in KRS 342.730(1)(c)1, and medical benefits. Cedar Lake filed a petition for reconsideration arguing the ALJ erred in enhancing the award of PPD benefits by the multiplier. The petition for reconsideration was denied in an order issued July 23, 2013.

In the November 13, 2013 opinion rendered by this Board, we found the ALJ's determination regarding the duration of TTD benefits was supported by substantial evidence, and we affirmed. However, regarding the ALJ's analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and application of the multiplier contained in KRS 342.730(1)(c)1, we found as follows:

In its petition for reconsideration, Cedar Lake argued the ALJ could not enhance Berry's PPD benefits by the three multiplier based on his findings in the opinion, order, and award. However, the ALJ reaffirmed his decision regarding the applicability of

the three multiplier in his order overruling Cedar Lake's petition for reconsideration.

Without question an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is only necessary in cases in which the two and three multipliers are both potentially applicable. See Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004). Here, the ALJ specifically found Berry "can return to the type of work which she performed at the time of her occupational disease and injury in accordance with KRS 342.730(1)(c)1." Thus, the three multiplier is not applicable. Additionally, the ALJ determined Berry "has not returned to work as a nurse earning the same or greater average weekly wage than she earned at the time of [sic] occupational disease and injury per KRS 342.730(1)(c)2." Thus, the two multiplier is not applicable. For the ALJ to continue with the Fawbush analysis and resolve the third prong in favor of the three multiplier defies the applicable law. As the ALJ initially found both multipliers were not applicable, the enhancement of Berry's PPD benefits by the three multiplier must be reversed. In the case *sub judice*, the award of PPD benefits cannot be enhanced by a multiplier.

Berry appealed our November 13, 2013 decision to the Kentucky Court of Appeals. In Penny Berry v. Cedar Lake Park Place, 2013-CA-002093-WC, rendered August 1, 2014, the Court of Appeals stated the following:

The sole issue on appeal is whether the Board erred by reversing the ALJ's determination that Berry was entitled to the three multiplier in KRS 342.730(1)(c)1.

The statute provides that the three multiplier is applicable if the claimant is physically unable to resume the type of work performed at the time of the injury. KRS 342.730(1)(c)1. The statute alternatively provides that a claimant who returns to work earning a wage equal to or greater than the pre-injury wage is entitled to an enhanced benefit of a two multiplier for benefits paid during any cessation of that post-injury employment. KRS 342.730(1)(c)2.

. . . .

After careful review, we agree with the Board that the ALJ plainly made factual findings requiring a conclusion that Berry was not eligible for enhanced benefits under either KRS 342.730(1)(c)1 or 2. The Board properly applied the controlling law by reversing the portion of the ALJ's opinion that awarded enhanced PPD benefits and remanding the claim for entry of an amended order awarding benefits without enhancement.

Berry next appealed to the Kentucky Supreme Court. In Penny Berry v. Cedar Lake Park Place, et al., 2014-SC-00476-WC, rendered June 11, 2015, the Court stated as follows:

Berry argues that the Board erred by reversing the application of the three multiplier to her PPD award. Berry

contends that while Dr. Cavallazzi's university evaluation stated she could return to work as a nurse, she could only do so as long as she was not exposed to mold. Effectively Berry argues that she is eligible for the three multiplier because of her inability to work as a nurse at Cedar Lake due to the mold in its facility. We disagree.

As stated above, to be eligible for the three multiplier, the claimant must not retain the physical capacity to perform the type of work she performed at the time of her occupational disease and injury. KRS 342.730(1)(c)1. The three multiplier can be awarded if the claimant cannot physically complete all the individual tasks required as a part of the job performed when the work-related occupational disease and injury occurred. *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2003). But a claimant is not eligible to receive the three multiplier just because she cannot return to work at a particular employer due to a work-related injury. In this matter, Dr. Cavallazzi clearly stated in his university evaluation that Berry retained the capacity to work as a nurse. The ALJ adopted the doctor's opinion in his original decision and declined to amend his findings on a petition for reconsideration. His finding that Berry can return to work as a nurse is supported not only by Dr. Cavallazzi's opinion, but also by her own testimony. Thus, Berry is not eligible to have her PPD benefits enhanced by the three multiplier and the Board did not err by reversing that portion the ALJ's opinion, order and award.

Berry alternatively argues that that Board erred by failing to remand this

matter for the ALJ to determine the applicability of the two multiplier. But to receive the two multiplier the claimant must return to work at a weekly wage equal to or greater than her average weekly wage at the time of the occupational disease and injury. KRS 342.730(1)(c)2. The ALJ found that Berry was not earning an equal to or greater average weekly wage, and based on that finding she is ineligible to receive the two multiplier. This factual finding was not challenged in her petition for reconsideration and is the law of the case. Berry is not eligible for her PPD benefits to be enhanced by a multiplier as provided by KRS 342.730 (1)(c)1 or 2.

On remand, the ALJ found as follows:

In its Opinion, the Supreme Court noted that I had determined that the plaintiff could return to work as a nurse as per her testimony and the medical evidence from Dr. Cavallazzi, the university evaluator. The Supreme Court then stated that the plaintiff is not eligible to have her permanent partial disability benefits enhanced by the 3 multiplier and that the Workers' Compensation Board did not err by reversing that determination in my original Opinion, Order and Award. The Supreme Court further noted that the plaintiff alternatively argues that the Board erred in failing to remand this case to me to determine whether the 2 multiplier was applicable. The Supreme Court stated that since I found that the plaintiff was not earning a wage equal to or greater than her average weekly wage, she is, therefore, ineligible to receive the 2 multiplier. The Supreme Court noted that that determination was not challenged in the

plaintiff's Petition for Reconsideration and is, therefore, the law of the case.

Based upon the relevant evidence and the ruling case law, I make the determination under KRS 342.730(1)(b) that the plaintiff is entitled to recover permanent partial disability benefits based upon Dr. Cavallazzi's permanent impairment rating of 25% to the body as a whole under the AMA Guides, Fifth Edition, subject to the 1 multiplier.

Both attorneys did a very good job in this case and both attorneys wrote erudite briefs on the issue of whether CR 60.02 applies to this case.

The defendant cites the decision of the Kentucky Supreme Court in *Burroughs v. Martco*, 339 S.W.3d 461 (Ky. 2011), where the high court stated that an Administrative Law Judge did not err in refusing to consider the plaintiff's Motion under CR 60.02. The high court stated that CR 60.02 has not been adopted in the Workers' Compensation Regulations and therefore the Judge is not even permitted to consider a CR 60.02 Motion filed by the plaintiff. I make the determination that the defendant's argument on this point is valid.

The defendant also argues that the plaintiff did not raise in her Petition for Reconsideration addressed to the original Opinion and Order the issues now raised in her CR 60.02 Motion and, thereby, waived same. I note that the Supreme Court in the case at bar stated that the plaintiff did not file a Petition for Reconsideration in regard to the 2 multiplier and that that is the law of the case. I, therefore,

make the determination that the plaintiff waived said argument. Plaintiff's Motion is denied.

On remand, the ALJ rendered an amended decision in accordance with the direction of this Board, the Kentucky Court of Appeals, and the Kentucky Supreme Court. Therefore, we affirm the finding Berry is entitled to no enhancement of her award of PPD benefits by the multipliers contained in either KRS 342.730(1)(c) 1 or 2.

Likewise, we determine the ALJ did not err in denying Berry's motion requesting relief pursuant to CR 60.02. As noted by Cedar Lake, the request pursuant to CR 60.02 is improper. The Kentucky Supreme Court held in Burroughs by Martco, 339 S.W.3d 461 (Ky. 2011), relief pursuant to such motion is not provided for in Kentucky workers' compensation claims. In that case, the Court stated as follows:

The ALJ did not err by refusing to consider the claimant's motion to reopen based on CR 60.01 and CR 60.02. The Kentucky Rules of Civil Procedure "govern procedure and practice in all actions of a civil nature in the Court of Justice" [6] but apply to proceedings before an administrative agency only to the extent provided by statute or regulation. Although the regulations that govern workers' compensation proceedings have adopted several of the Rules of Civil Procedure, they have not adopted CR

60.01 or CR 60.02. KRS 342.125(1) states the only grounds for reopening a final workers' compensation award. The court acknowledged as much in *Wheatley v. Bryant Auto Service* when noting that KRS 342.125 provided a statutory remedy to correct the ALJ's mistake of law, "just as could have been done under CR 60.02 had it been a civil proceeding." Id. at 465.

Therefore the ALJ did not err in denying Berry's motion and we affirm.

Accordingly, the September 4, 2015 Amended Opinion and Order on Remand, and the October 21, 2015 Opinion and Order on Reconsideration issued by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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