OPINION ENTERED: April 12, 2012

CLAIM NO. 200893074

R.R. DONNELLY & SONS CO. PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

CASSANDRA HAYS
and HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. R.R. Donnelly & Sons Co. ("Donnelly") appeals the November 7, 2011, order on remand by Lawrence F. Smith, Administrative Law Judge ("ALJ"). A brief procedural history is necessary.

The Form 101 for Claim No. 2008-74358, filed February 17, 2010, alleges on August 26, 2008, Cassandra Hays ("Hays") injured her right hip, low back, and

sustained a psychological injury, while working for Donnelly, in the following manner: "Plaintiff was trying to prevent material from falling off a pallet & pushed her right hip into the material." By order dated April 30, 2010, Claim No. 2008-74358 was consolidated with Claim No. 2008-93074 and both were identified collectively as 2008-93074.[1] By order dated April 19, 2010, the ALJ placed in abeyance Claim No. 2008-93074 against Care Givers by Linda, LLC, ("Care Givers").

The October 4, 2010, benefit review conference ("BRC") order lists the following contested issues for the claim against Donnelly: "Extent and duration; Causation/work relatedness; Multipliers pursuant to KRS 342.730(1)(c); underpayment of TTD; Failure to pay medical expenses; Vocational rehabilitation; apportionment." Stipulations include Hays' average weekly wage ("AWW") of $391.56. The BRC order also indicates "[p]laintiff has now returned to work at a different job," and nothing is written next to "wages currently earned."

[1] The Form 101 associated with Claim No. 2008-93074 alleges on March 5, 2008, Hays injured her low back while working for Care Givers by Linda, LLC, in the following manner: "Plaintiff was catching a patient who was beginning to fall when she injured her low back."

At the April 26, 2010, deposition, regarding her wages at Wal-Mart, the job at which she currently works, Hays testified as follows:

> Q: What is your pay at Walmart presently?
>
> A: $9.70 an hour.
>
> Q: Are you working full time?
>
> A: Yes.

At the October 19, 2010, final hearing, the following exchange took place between the ALJ, counsel, and Hays regarding post-injury wages:

> ALJ: Okay. The plaintiff has now returned to work at a different job. What about post-injury wages; do I have any indication about post-injury wages?
>
> Mr. Watts [counsel for Hays]: I think we can stipulate they are less than before. That's what her testimony-- I would offer too.
>
> ALJ: Let me put down a number. Is there a number I can arrive at?
>
> Mr. Watts: I would ask my client, your weekly wage now or hourly wage, what do you make?
>
> Hays: $9.70.
>
> Mr. Watts: How many hours a week?
>
> Hays: 40.
>
> Mr. Watts: $9.70 times 40. I'm a little slow, but I can...I get $398 (sic).

> ALJ: Anybody disagree with $398 a week?
>
> Ms. Wood [counsel for Care Givers]: I don't have any objection.
>
> Mr. Watts: That doesn't seem right though. I don't think it's right. It could be.

In the December 20, 2010, opinion and order, among the listed stipulations, is the following:

> 7. That the plaintiff's average weekly wage (AWW) at the time of her August injury was $391.56;
>
> 8. That the plaintiff has returned to work at a different job earning $398.00 per week;

Regarding extent and duration of the August 26, 2008, injury, in the December 20, 2010, opinion and order the ALJ stated as follows:

> The plaintiff argues that she sustained an injury on August 26, 2008 caused by her work for defendant Donnelley [sic] that resulted in a permanent impairment. She relies on the records of Dr. Ritterbusch, and the opinions of her treating orthopedic physician, Dr. Vaughan, and of Dr. Owen.
>
> From my review of the evidence, the exact origin of the plaintiff's symptoms resulting from the August 26, 2008 work injury incident proves difficult to ascertain. However, it is clear from the plaintiff's history and treatment that the plaintiff was injured. Although there are differing opinions among the physicians, I am more persuaded by those of Dr. Vaughan

> and Dr. Owen. Dr. Owen believed that the plaintiff had an injury of the lumbar spine and assigned an 11% whole person impairment based on DRE Category III.
>
> Having been persuaded by the opinions of Dr. Vaughan and Dr. Owen that the plaintiff retained a work-related injury resulting from the August 26, 2008 work injury event, I note that those physicians assigned lifting restrictions of not greater than 20 or 40 pounds. The plaintiff has, however, returned to work in a different state for a different employer. She is earning greater wages and appears to be doing well. However, she still has significant permanent lifting restrictions from at least three physicians who examined her. Accordingly, pursuant to the opinions [sic] authority granted by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), I find that the evidence is unclear as to whether she can continue this work for the foreseeable future. Therefore, I find she qualifies for the enhancement provisions of KRS 342.730(1)(c)1.

Donnelly appealed and in an opinion entered August 23, 2011, this Board remanded the case to the ALJ, instructing as follows:

> We agree with Donnelly to the extent the ALJ's findings of fact in performing the Fawbush analysis was deficient to provide meaningful appellate review. The Court of Appeals in Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982) held that an ALJ is required to make sufficient findings of fact so as to apprise the parties of the basis

of his decision in order to permit meaningful review on appeal.

...

Here, the ALJ made no finding Hays could not return to the type of work she performed at the time of the injury. Although it is presumed the ALJ attempted to make such a finding inasmuch as he attempted to conduct a Fawbush analysis, the ALJ has failed to make this finding and also has failed to specify a basis for such a finding. For these reasons, the ALJ's opinion is vacated and this matter is remanded to the ALJ to make further findings as to whether Hays retains the physical ability to return to the type of work performed at the time of the injury.

Although not raised by the parties, it is not clear substantial evidence exists in the record to support the second prong required in making a Fawbush analysis. The ALJ noted on Page 3, Section II- Stipulations, of his opinion the parties stipulated Hays returned to work at a different job earning $398.00 per week. The problem with this statement is that the parties made no such stipulation. Hays testified in her discovery deposition she earned $9.70 an hour at Wal-Mart and worked full-time. At the BRC, the parties left open Item 9 of the stipulations which asks 'Wages Currently Earned.' During the colloquy which occurred prior to Hay's testimony elicited at the formal hearing, the following exchange took place:

> Judge Smith: Okay. The plaintiff has now returned to work at a different job. What about post-injury wages;

> Do I have any indication about post-injury wages?
>
> Mr. Watts: I think we can stipulate they are less than before. That's what her testimony-- I would offer too.
>
> Judge Smith: Let me put down a number. Is there a number I can arrive at?
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> Mr. Watts: I would ask my client, your weekly wage now or hourly wage, what do you make?
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> Ms. Hays: $9.70.
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> Judge Smith: Anybody disagree with $398 a week?
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> Ms. Wood: I don't have any objection.
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> Mr. Watts: That doesn't seem right though. I don't think it's right. It could be.

As the court reporter recognized in the transcription of the formal hearing transcript, $9.70 an hour x 40 hours a week does not equate to $398.00 per week. [Footnote 5 of the Board's opinion reads as follows: In reality, $9.70 per hour x 40 hours per week equates to an AWW of $388.00 per week

which is less than $391.56 which represents the stipulated AWW at Donnelly.] Moreover, from the conversation, it is also clear the parties never stipulated on the record $398.00 per week was Hays' post-injury wages.

...

An analysis of his findings of fact made in his original opinion and award demonstrates the ALJ was under the misconception the test was whether Hays could continue to work in her present position at Wal-Mart for the foreseeable future rather than whether it is likely Hays could continue to earn a wage equal to or greater than her pre-injury wage for the indefinite future. Although the ALJ attempts to correct this error in his order on reconsideration by pointing out he was persuaded by the evidence Hays may not be able to maintain her position <u>and her earnings capacity</u>, he fails to give reasons to support this finding. (Emphasis added).

For these reasons, we vacate and remand this matter for the ALJ to first make sufficient findings to address whether Hays can return to the type of work she performed at the time of the injury. If the answer to this question is 'no', the ALJ is directed to so specify and then make sufficient findings. If the ALJ determines from the record KRS 342.730(1)(c)(1) applies, he is then directed to determine if Hays has returned to work at a post-injury wage equal to or greater than the wage earned at Donnelly. If the answer to this question is 'no', then the application of <u>Fawbush</u> ceases and the ALJ is directed to impose the three multiplier as contained in KRS

> 342.730(1)(c)1. If the ALJ determines, however, Hays has returned to post-injury wages equal to or greater than her wage at Donnelly, he is directed to complete the Fawbush analysis by determining with specificity, whether it is unlikely Hays could continue to earn that level of income into the indefinite future.

In the November 7, 2011, order on remand, the ALJ determined as follows:

> This matter comes before the ALJ on remand from the Kentucky Board of Workers' Claims (the Board). The defendant appealed the December 20, 2010 decision of the ALJ arguing patent error in applying the *Fawbush* analysis to the plaintiff. The Board vacated the opinion and remanded for further findings of fact.
>
> First the Board instructs that the ALJ make a specific finding of fact whether the plaintiff retains the capacity to return to her pre-injury job. As stated in the opinion the plaintiff's job required lifting 50-70 pounds. Dr. Vaughan assigned permanent lifting restrictions of 40 pounds. Dr. Owen opined that the plaintiff no longer retained the ability to perform her pre-injury employment, recommending that she lift no more than 20 pounds and avoid bending, squatting and stooping. The ALJ found these opinions more persuasive than the opinions presented by the defendant. I therefore find that the plaintiff did not retain the capacity to return to her pre-injury job.
>
> Next, the Board instructed the ALJ to determine whether the plaintiff returned to work at the same or greater

> wages. The opinion noted that the parties stipulated that the plaintiff's average weekly wage (AWW) at the time of her August injury was $391.56. The opinion incorrectly stated that the parties stipulated to a return-to-work wage of $398.00. In fact the record reflects that the parties agreed that the plaintiff returned to work earning $9.70 per hour, 40 hours per week. This totals $388.00 per week. I therefore find that the plaintiff did not return to work at the same or greater wages. The *Fawbush* analysis is therefore unnecessary. I find the plaintiff entitled to the enhancement provision of KRS 342.730(1)(c).

Donnelly did not file a petition for reconsideration.

In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, even on an order on remand, inadequate, incomplete, or even inaccurate fact finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

On appeal, Donnelly asserts as follows:

> The crux of the issue in this case is the pre-hearing colloquy conducted by the ALJ in this case. The ALJ made an error by essentially making a finding that Hays earned $398/week in her post injury work. (See page 16 and 17 of the Board Opinion). The Board stated in its Opinion that it is not clear from the record whether substantial evidence exists in the record to support the second prong of the Fawbush analysis. (See p.16 of the Board Opinion).
>
> The ALJ in his initial Opinion and at the hearing entered an erroneous stipulation as to the post injury wages of Hays. The defendant in the case relied upon this stipulation and therefore did not explore the question of her wages during the hearing. This error is easily corrected. The ALJ should conduct an evidentiary hearing on the sole issue of Hay's post injury wage.
>
> The ALJ's Order on Remand is clearly in error when it states that the parties agreed to the post injury wage. His finding is based on a stipulation that did not exist. Fairness requires that an evidentiary hearing be conducted on the important issue of Hays' post injury wage. If, after the hearing, the ALJ concludes that her post injury wages equal or are greater than her pre-injury wages, then the ALJ must conduct the third prong of the Fawbush test.

Significantly, neither party objected to the sufficiency of the ALJ's analysis regarding the three multiplier.

In the November 2, 2011, order on remand, the ALJ acknowledged the mathematical error made during the hearing

which was memorialized in the December 20, 2010, opinion and order by stating as follows: "The opinion incorrectly stated that the parties stipulated to a return-to-work wage of $398.00." The ALJ further stated as follows in the November 2, 2011, order on remand: "In fact the record reflects that the parties agreed that the plaintiff returned to work earning $9.70 per hour, 40 hours per week. This totals $388.00 per week." Regardless of the statement in the November 2, 2011, order on remand regarding an alleged agreement concerning Hays' post-injury wages, the ALJ is still entitled to rely upon Hays' deposition testimony and hearing testimony in determining Hays' post-injury wages. The ALJ, as fact-finder and first-hand observer of the testimony at issue, is the sole judge of the weight, credibility and inferences to be drawn from the record. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, including that presented by the claimant. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). The ALJ's ability to rely upon Hays' deposition and hearing testimony regarding her post-injury wages is not contingent upon whether an agreement has been reached between the parties.

Donnelly appears to argue on appeal that because it "relied upon" the ALJ's erroneous statement at the hearing regarding Hays' post-injury wages, it "did not explore the question of [Hays'] wages" and is entitled to an evidentiary hearing on this issue. The Board finds no merit in this argument. Donnelly had ample opportunity during the course of the litigation to explore the issue of Hays' post-injury wages. At the hearing, Donnelly was not bound by opposing counsel's erroneous calculation of Hays' weekly wages. Donnelly's assertion its reliance upon an erroneous mathematical calculation at the hearing entitles it to an evidentiary hearing on the issue of Hays' post-injury wages has no merit. Donnelly is responsible for its failure to pursue proof on the issue of Hays' post-injury wages in a timely manner during the course of the litigation, not Hays or the ALJ. Donnelly was capable of calculating Hays' post-injury wages based on Hays' statements concerning her hourly rate and hours worked. Regardless of the faulty mathematics at the final hearing which was memorialized in the December 20, 2010, opinion, order, and award and the ALJ's statements in the November 7, 2011, order on remand pertaining to an "agreement" reached on Hays' post-injury wages, the ALJ is still entitled to rely upon Hays' deposition and hearing

testimony regarding her post-injury wages. An evidentiary hearing relative to Hays' post-injury wages is unnecessary.

As the ALJ determined the three multiplier is applicable and the two multiplier is not, he was not required to complete an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). The ALJ's November 7, 2011, order on remand will not be disturbed.

Finally, since Donnelly failed to file a petition for reconsideration asserting patent error was committed by the ALJ in the November 7, 2011, order on remand by stating an agreement had been reached regarding post-injury wages, Donnelly cannot now be heard to contest this language on appeal. We deem the ALJ’s statement to be a harmless factual error.

Accordingly, the November 7, 2011, order on remand, is **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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