

OPINION ENTERED: DECEMBER 14, 2012

CLAIM NO. 201091018

STANDARD PARKING

PETITIONER

VS.

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

TINA UPTON
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING**

* * * * *

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

SMITH, Member. Standard Parking ("Standard") appeals from the July 12, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Tina Marie Upton ("Upton") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits. Standard also appeals from the August 14, 2012 order denying its petition for reconsideration.

Standard argues the ALJ erred by failing to cite the evidence and testimony of its employer representative, Fleming Jackson ("Jackson"), who testified on behalf of Standard at the July 6, 2012 final hearing. Standard states the ALJ's Opinion and Order issued six days after the final hearing and before the transcript of the hearing was filed, makes no reference whatsoever to Jackson's appearance or testimony, constituting reversible error.

Upton testified by deposition on March 28, 2012 and at the final hearing on July 6, 2012. Upton, now age 49, resides in Florence, Kentucky and has been employed by Standard for over ten years. On January 10, 2012, she filed a Form 101, Application for Resolution of Injury Claim, with an affidavit, alleging on March 26, 2010, she felt a pull in her left shoulder when she attempted to assist with lifting a passenger's luggage.

Upton was referred to Concentra for treatment where she underwent modified work restrictions and physical therapy. An MRI taken April 15, 2010, revealed a full thickness tear of the anterior and mid-portion of the supraspinatus, with mild tendinopathy of the infraspinatus. She ultimately underwent surgery. Following her surgery, Upton began a course of physical therapy and was released to return to

light duty work. However, her pain symptoms continued, necessitating a second surgery.

Upton submitted the medical report of Dr. Steven Wunder, who evaluated her on November 11, 2011. Upton provided a history of a work injury on March 26, 2010, occurring as she was driving her bus at the airport picking up passengers. She felt a pop in her left shoulder as she was throwing luggage. An MRI scan revealed a rotator cuff tear and she underwent surgery in July 2010. When her pain persisted, she was seen by Dr. John Larkin, who performed a subacromial decompression and distal clavicle resection. Dr. Wunder noted Upton was able to return to work in a restricted area where she is not required to lift, push or pull luggage on and off the bus.

After conducting a physical examination and reviewing records from Concentra, Dr. Wunder determined Upton has a 9% permanent impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Standard introduced treatment records and reports from Dr. Larkin, Upton's treating physician. On November 9, 2010, Dr. Larkin performed a repair of the left shoulder rotator cuff tear with subacromial decompression, acromioplasty, left shoulder; distal clavicle resection with

removal of acromioclavicular joint, left upper extremity; and, extensive glenohumeral arthroscopic debridement, left shoulder. He then followed Upton's progress throughout the next year. In his November 23, 2011 report, Dr. Larkin stated Upton had recovered well from the November 2012 surgery and he released her to return to work three months later with no restrictions. He determined Upton was at maximum medical improvement ("MMI") and assessed a 6% whole person impairment rating pursuant to the AMA Guides.

Upton testified at the final hearing conducted July 6, 2012, and reviewed her treatment history which included two surgeries. She testified she had returned to work driving an employee shuttle bus which did not require her to handle or lift passenger luggage. Upton testified she was no longer able to return to job duties requiring handling baggage or lifting luggage. Upton also confirmed she was earning the same or greater wages than on the date of her injury.

Jackson, Upton's supervisor, testified at the final hearing stating Upton was a good employee earning a greater wage than before her injury. He noted Upton continued to work the same hours as before her injury and classified her as an "excellent driver". "I wish I had more like her, yes," he stated. Jackson also stated Upton was not required

to lift baggage although her duties may change in the future.

In his Opinion and Order rendered July 12, 2012, at Section IV-Summary of Witness Evidence, the ALJ stated in part as follows:

The plaintiff testified by deposition on March 28, 2012. She presented the medical records and reports of Concerta, Cincinnati Sports Medicine, Bluegrass PT, Chiropractic Association of Boone County, John Larkin, M.D., and Steven Wunder, M.D. The defendant relies on those records. Medical records are summarized chronologically below the witness testimony.

The ALJ then summarized Upton's testimony and the medical evidence. He issued the following Findings of Fact and Conclusions of Law relating to the issues on appeal:

The plaintiff argues that she has sustained a 9% whole person impairment and cannot return to her pre-injury job. The defendant argues that the plaintiff has sustained at most a 6% whole person impairment and she has returned to work without restrictions.

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). An 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, 16 (Ky. 1977).

In the present case the ALJ finds more persuasive the opinions of Dr. Wunder. Although Dr. Larkin released the plaintiff to work without restrictions, she continued to have pain. She also returned to work at a less strenuous job. I therefore find Dr. Wunder's opinion more consistent with the evidence of record. I find that the plaintiff sustained a 9% whole person impairment and lacks the capacity to return to her pre-injury employment.

I further find, consistent with *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), that the plaintiff would be entitled to the three factor. *Fawbush* and its progeny require an Administrative Law Judge to make three essential findings of fact. 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 his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

The plaintiff has returned to work in a position with much less lifting. The ALJ has sufficient information about the plaintiff's current earnings to conclude that she earns the same or greater average weekly wage. I do not find sufficient evidence that the plaintiff cannot continue to earn her current wage indefinitely. Based on

her inability to perform her pre-injury job, I find that she is entitled to the three multiplier.

Standard filed a petition for reconsideration on July 26, 2012, arguing the failure of the ALJ to consider the testimony of the employer representative, Fleming Jackson, constituted a patent error. Standard observed the ALJ's Opinion and Order, issued six days after the hearing and before the transcript was filed, made no mention of Jackson's testimony. Standard argued Jackson's testimony was germane since it pertained to the issue of multipliers in accordance with KRS 342.730 and the holdings as set forth by the Supreme Court in Fawbush vs. Gwinn, 103 S.W. 3d 5 (Ky. 2003). Standard argued as follows:

It is respectfully submitted that the Administrative Law Judge's conclusion regarding the Fawbush analysis is in error by failing to consider the testimony not only of the Claimant as she testified at the Final Hearing, but also of Mr. Fleming Jackson. As previously set forth, Mr. Jackson testified at the Final Hearing on behalf of the employer. There is absolutely no reference to Mr. Jackson's testimony in the Opinion and Order. At the Final Hearing, Mr. Jackson testified that he was the Claimant's supervisor. He confirmed that the Claimant continues to earn a wage equal to or greater than that at the time of the March 26, 2010 injury. Mr. Jackson also testified that the Claimant continues to work the same hours now as she was pre-injury. Mr. Jackson further went on to testify that

the Claimant is an "excellent employee" and there is absolutely no indication that the company intends to make any changes in the Claimant's employment.

The ALJ issued his order on reconsideration on August 14, 2012, stating in part as follows:

4. The hearing in this case was conducted in Florence, Kentucky on July 6, 2012, which fact is duly noted on Page 2 of the Opinion and Order dated July 12, 2012. Testifying at the hearing were the plaintiff Upton and Fleming Jackson, an employee of the defendant. The Administrative Law Judge saw and hear [sic] both witnesses testify, gave careful consideration to their testimony and made copious notes regarding their testimony.

5. The Opinion and Order dated July 12, 2012 is, therefore, amended to specifically state that both the plaintiff Upton and Mr. Jackson testified at the final hearing, that the Administrative Law Judge saw and heard both witnesses testify at the hearing, and that the Administrative Law Judge gave careful consideration to their testimony and made copious notes regarding their testimony.

6. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. 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 his pre-injury wage. Third, the ALJ must determine whether the claimant can

continue to earn that level of wages for the indefinite future.

7. Based upon the totality of the evidence, including the hearing testimony on July 6, 2012 by the plaintiff Upton and Fleming Jackson, and the medical evidence cited in the Opinion and Order dated July 12, 2012, specifically including the medical records and reports from Concerta, [sic] Cincinnati Sports Medicine and Orthopaedic Center, Dr. John Larkin and Dr. Steven Wunder, I made the factual determination that the plaintiff has returned to work in a position with much less lifting, that I had sufficient information about the plaintiff's current earnings to conclude that she earns the same or greater average weekly wage, that I did not find objective evidence that she cannot continue to earn her current wage indefinitely, but that based upon her inability to perform her pre-injury job, I found that she was entitled to recover the three multiplier. For all of the above reasons, I made the factual determination and again make the factual determination that the plaintiff cannot return to the type of work which she performed at the time of her work injury and is, therefore, entitled to recover enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.

In light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is, therefore, overruled and denied.

On appeal, Standard argues the ALJ abused his discretion by failing to consider uncontroverted material

evidence presented at the final hearing. Standard states the ALJ, in his Opinion and Order, failed to make any reference to or consideration of Jackson's uncontroverted testimony. It notes the Opinion and Order was rendered on July 16, 2012 and the final hearing transcript was not entered until July 20, 2012. Therefore, Standard argues, it was error and abuse of discretion to issue a decision without considering relevant, germane, material evidence presented at the final hearing.

Standard is correct in observing the ALJ's Opinion and Order made no reference to Jackson's testimony. However, the ALJ unequivocally stated in his order on reconsideration he considered Jackson's testimony and had made copious notes regarding his testimony. The mere fact the hearing transcript had not been filed in the record at the time the ALJ rendered his Opinion and Order is not proof he failed to consider the hearing testimony in arriving at his decision. We note nothing in 803 KAR 25:010 Section 18 requires the ALJ to wait until the transcript has been filed before rendering a decision. It states:

(2) At the conclusion of the hearing, the claim shall be taken under submission immediately or briefs may be ordered.

...

(4) The administrative law judge may announce his decision at the conclusion of the hearing or shall defer decision until rendering a written opinion.

We conclude the ALJ was within his authority in issuing his Opinion and Order before the filing of the hearing transcript. The ALJ made it clear in his order on reconsideration he considered Jackson's testimony and made notes to assist him in the decision process. Accordingly, we find no error on this issue.

Standard also argues the ALJ erred in finding Upton qualified for the three multiplier pursuant to KRS 342.730. Standard notes Upton's treating physician, Dr. Larkin, released her to full-time duty on February 9, 2011, stating "I think Tina has reached a point she can go back to work full duty." Standard also notes, following Dr. Larson's release, Upton returned to full duty work, making the same or greater wages, and without any assistance or accommodation. Standard also argues the ALJ's Fawbush analysis was in error, especially in light of Jackson's testimony.

Pursuant to Fawbush v. Gwinn, *supra*, when both the two and three multiplier are applicable, an ALJ must determine which multiplier under KRS 342.730(1)(c) is "more appropriate on the facts" when awarding permanent partial

disability benefits. Fawbush at 12. KRS 342.730(1)(c)1 states, in relevant part, as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection. . .; or

KRS 342.730(1)(c)2 provides:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

Where a claimant meets the criteria of both (1)(c)1 and (1)(c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue

earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn, *supra*. In other words, is the injured worker faced with a "permanent alteration in the ...ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury for the indefinite future, the three multiplier under KRS 342.730(1)(c)1 applies.

The Fawbush Court articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work he or she performed at the time of injury, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and whether the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Fawbush at 12.

In his order denying Standard's petition for reconsideration, the ALJ indicated he based his decision

regarding the multiplier on the totality of the evidence including the medical opinions of Drs. Larkin and Wunder, as well as the testimony of Upton and Jackson. Upton's testimony establishes she cannot assist with luggage handling and is not able to perform the work she performed at the time of her injury and thus the three multiplier could apply in her case. At the benefit review conference, the parties stipulated Upton had continued to work for Standard at the same wage following the injury. Thus, the two multiplier could also apply. The ALJ explicitly stated in both the original decision and on reconsideration that he did not find objective evidence that Upton cannot continue to earn her current wage indefinitely. However, the ALJ applied the three multiplier.

The ALJ's findings are unclear. The ALJ either mistakenly used a double negative, intending to find Upton was not likely to continue earning the same or greater wage for the indefinite future, or the ALJ meant to say what he said but still decided to award the three multiplier. If the ALJ in fact intended to find there was no evidence Upton would not be able to earn the same or greater wage for the indefinite future, he was compelled, as a matter of law, to find (1)(c)2 applicable rather than (1)(c)1. We note it was Upton's burden to prove she is not likely to be able to earn

the same or greater wage into the foreseeable future. The ALJ seems to have shifted the burden to the employer. It is therefore necessary to vacate the ALJ's finding regarding application of the appropriate multiplier and direct the ALJ to make more specific findings on the issue.

Accordingly, the July 12, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge and the ALJ's August 14, 2012 Opinion and Order on Reconsideration are **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for additional findings and entry of an amended award in conformity with the views expressed herein.

ALL CONCUR.

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