OPINION ENTERED: December 7, 2012

CLAIM NO. 200977555

SUN HEALTHCARE GROUP, INC. D/B/A
HARBORSIDE HEALTHCARE - OWENSBORO
REHABILITATION & NURSING CENTER PETITIONER

VS. **APPEAL FROM HON. RICHARD M. JOINER,**
ADMINISTRATIVE LAW JUDGE

SUSAN WHITTAKER
and HON. RICHARD M. JOINER
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING & REMANDING

* * * * * *

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

ALVEY, Chairman. Sun Healthcare Group, Inc. D/B/A Harborside Healthcare-Owensboro Rehabilitation and Nursing Center ("Sun Healthcare") seeks review of the opinion and award rendered June 5, 2012 by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") awarding Susan Whittaker

("Whittaker") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits based upon a 7% impairment rating enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2, and medical expenses for work-related wrist and thumb injuries sustained on September 24, 2009. Sun Healthcare also seeks review of the order denying its petition for reconsideration rendered July 6, 2012.

On appeal, Sun Healthcare argues the ALJ erred as a matter of law in failing to follow the mandates of Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010) in his analysis of the applicability of the two multiplier. Sun Healthcare also argues the ALJ erred in placing the "burden of going forward" on the employer to show no relationship between termination of employment and the disabling injury. We agree, and vacate and remand.

It is undisputed Whittaker retains the physical capacity to return to the type of work she performed at the time of her injury. It is also undisputed Whittaker did not work from the date of injury until she returned to light duty work on October 15, 2009 and worked through December 3, 2009 at an average weekly wage equal to or greater than she earned at the time of her injury. She then continued to

work without restriction until she was terminated on January 5, 2010.

Whittaker filed the Form 101 on October 12, 2011 alleging she injured her left thumb, right shoulder and right knee when she slipped and fell on September 24, 2009 while working for Sun Healthcare. Both Whittaker and Sun Healthcare submitted medical records of her treating physician, Dr. S. David Boles. On September 30, 2009, Dr. Boles noted two injuries, a proximal humerus fracture and a left thumb proximal phalanx fracture. He restricted Whittaker from work until October 14, 2009, when he released her to light duty. Dr. Boles indicated he would release Whittaker to return to regular duty work on December 3, 2009. In a note dated November 23, 2011, Dr. Boles assessed a 9% impairment rating for her right shoulder injury and an 8% impairment rating for her left thumb injury, yielding a combined 12% impairment rating for her upper extremity, and a 7% impairment rating of the whole person pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition. He again noted Whittaker had been released to work without restrictions and did not anticipate further treatment. On January 12, 2012, Dr. Boles opined the 2009 fall at work caused the right shoulder and left thumb injury. He also noted a prior left wrist

fracture secondary to a 2008 fall. In a letter dated February 7, 2012, Dr. Boles opined permanent work restrictions are not required with respect to Whittaker's right shoulder and left thumb injuries.

Sun Healthcare submitted various medical records indicating Whittaker received treatment in 2005 for a work-related left foot navicular avulsion fracture and in 2008 for a broken left wrist sustained when she fell at a wedding.

Whittaker submitted the functional capacity evaluation report prepared by Ben Waide on December 13, 2011. Mr. Waide noted a diagnosis of fractured right humerus and a fractured left thumb. He indicated Whittaker performs at a light physical demand level and ultimately concluded she is not able to work.

Sun Healthcare filed a "Witness list, Exhibit List, Stipulations & Contested Issues" on February 21, 2012 indicating Whittaker was employed from September 1, 2009 to January 5, 2010. It noted Whittaker was terminated on January 5, 2010 following an incident at work on January 1, 2010. Sun Healthcare noted the contested issues were whether Whittaker had met her burden of proving a right knee injury; extent and duration of the compensable injuries, and application of the multipliers. It renewed the motion to

strike the functional capacity evaluation report prepared by Mr. Waide.

Sun Healthcare attached several exhibits to the February 21, 2012 filing regarding the events leading to Whittaker's termination over an alleged claim of verbal abuse, including three witness statements. In an "Event Investigation Interview Record" dated January 4, 2010, employee Christa McMichael ("McMichael") reported on January 1, 2010, a patient was "hollering about being in a flood" and was cursing, swinging his arms and trying to get out of bed. The patient was put in his wheelchair and taken to the nurse's station where he could be supervised. Employees noticed an old skin tear had re-opened, but the patient resisted when they attempted to dress it. McMichael stated Whittaker, the registered nurse, kept telling the patient to be quiet and calm down. The patient was given a cookie, but he continued to talk and ramble. McMichael reported Whittaker told the patient to "shut up (or shut the hell up) or she wasn't going to do a damn thing for [him]." Subsequently, the unit manager and administrator were notified of the incident and Whittaker was sent home pending an investigation.

In an "Event Investigation Interview Record" dated January 5, 2010, employee Robin Knight ("Knight") also

described the incident and similarly discussed an unruly and loud patient who was taken to the lobby to be supervised on January 1, 2010. After attempting to dress the skin tear and offering him a cookie, the patient continued to be loud and agitated. Knight stated she heard Whittaker state "If you don't shut the hell up, I'm not going to do a damn thing." Knight reported McMichael also witnessed the incident and stated Whittaker was subsequently sent home.

In a January 5, 2010 "Event Investigation Interview Record", Whittaker was also interviewed concerning the events of January 1, 2010. Whittaker reported she was at the nurse's station when a resident was brought out. She and a certified nurse's assistant noticed some blood on his shirt. They left the patient alone after he began to scream when they approached him to address the cut. After the resident started complaining he was going to bleed to death, Whittaker reported the follow events:

> [Whittaker] stated 'your [sic] not bleeding to death, when you shut up + calm down, I'll put a bandage on it.' He got agitated again + kept saying get over here + do the dressing change. [Whittaker] stated 'to shut up + calm down or she wasn't going to do the dressing change.' She states she may have said 'damn dressing change,' she is not sure. She stated she told him that they were afraid of him when he acts like that.

Sun Healthcare also attached an undated letter by Michelle Glover, Interim Administrator, who provided a final report of the allegation of verbal abuse by Whittaker. After summarizing the events and subsequent staff interviews, Ms. Glover noted Whittaker was educated to its Abuse Policy and Code of Conduct on two separate occasions. She also concluded the interview with Whittaker was consistent with the employee witness statements. Ms. Glover then noted the allegations had been substantiated and she terminated Whittaker's employment. Sun Healthcare also attached a "Facility Complaint Form" completed by Ms. Glover and sent to the Kentucky Board of Nursing ("the Nursing Board") to notify it of Whittaker's conduct. In a letter dated February 23, 2010, the Nursing Board informed Ms. Glover it had investigated the matter and "While the Panel members found some evidence of a violation of the Kentucky Nursing Laws, they determined that the Board will initiate no formal disciplinary action against the nurse's license."

Whittaker testified by deposition on December 13, 2011 and at the final hearing held on April 27, 2012. Whittaker is a resident of Owensboro, Kentucky and was born November 13, 1950. She earned an Associate's degree in Applied Sciences and Nursing and is a registered nurse. Whittaker's work history includes work as a hair dresser/

beautician, a certified medical technician, a circulating nurse, a home health nurse, registered nurse and substitute teacher. She also has performed odd jobs such as housecleaning, babysitting, and cooking. Whittaker confirmed she had a prior work-related left foot injury and non-work-related left wrist injury.

Whittaker testified she began working for Sun Healthcare, a rehabilitation nursing home, on September 1, 2009 as a unit nurse. Whittaker stated her job required passing medicines, administering treatments, drawing blood, administering IVs, and performing charting and medical sheet changeovers. She also lifted and moved patients when an aide was not available or needed assistance.

Whittaker testified on September 24, 2009, she slipped and fell on spit as she was leaving a patient's room, landing on her right shoulder, and hitting her thumb and left arm. She also stated her knee was sore, was bruised all over and could not move her right shoulder or left arm due to "major pain." At the hearing, Whittaker clarified she was seeking benefits for her alleged right shoulder and thumb injuries only.

Whittaker initially treated at a clinic and then with Dr. Boles, who provided a splint for her left hand, a sling for her right shoulder and also immobilized her.

Whittaker did not work from September 24, 2009 thru October 14, 2009. Dr. Boles then released Whittaker to light-duty work on October 14, 2009, primarily answering telephones and assisting in feeding patients. Whittaker testified she was unaware of any complaints made regarding her job performance during this time. Dr. Boles subsequently released her to work without restrictions in early December. Again, Whittaker testified she was unaware of any complaints made concerning her job performance for the month of December.

Whittaker testified she had been working full-duty for approximately two weeks when her employment was terminated. Following her termination, Whittaker worked at a security job, as an assembly line worker and for the census bureau as a numerator. She currently is not working and receives Social Security disability benefits. Whittaker testified she last treated with Dr. Boles in February 2010, and was released from his care. Whittaker testified Dr. Boles did not place any restrictions on either her thumb or shoulder injury. Whittaker testified she occasionally receives pain injections in her left shoulder at the McCauley Clinic. The clinic has not placed any formal restrictions on Whittaker due to her injuries.

At the deposition, when asked why Sun Healthcare let her go, Whittaker testified as follows:

A: They said that I wasn’t able to do the nursing duties properly . . . . And there was a patient who was not mine, and they went to get him out of bed because he was hollering, he wanted up, and they skinned his elbow in trying to get him up and made a skin tear.

And he was sitting out there screaming at the top of his lungs. Of course, everybody’s trying to sleep; not us, but the patients. And so I told him if he would shut up and be quiet, I would come and put a dressing on him. He got combative. He wouldn’t let anybody near him. His nurse couldn’t get near him, no one. And she went off the floor, and so I gave him a cookie; and I gave him something to drink; and got him calmed down; then I did his dressing change. And somebody - - I don’t know who, doesn’t matter - - said that it was abusive for me to have told him to shut up and be quiet.

It wasn’t done in that way. It was really to get him - - his attention, to get him calmed down. And so then I got a call from the person who was over the facility telling me to clock out and go home and she would contact me. And then a few days later, they contacted me and told me I wasn’t doing their nursing standards.

Q: Okay.

A: And it was reported to the state, and I wrote them what happened and they reported what happened, and I wasn’t - - there wasn’t anything done as far as, you know, the state was made aware of it and - -

Q: Okay. The state nursing board or - -

> A: Yes. Anytime there's some type of abuse - - or what's called abuse - - is reported to the nursing board. And they evaluated their statement and my statement and - -
>
> Q: Your nursing license is still in good standing?
>
> A: Well, I retired after that because I was having so much trouble. You know, I couldn't do CEUs and re-get them. I just - - I retired. I retired last year.
>
> Q: Okay. In 2010?
>
> A: Yes.
>
> Q: Okay. And you said that was because you were having trouble getting CEUs?
>
> A: No, I was afraid I couldn't do it.
>
> Q: Okay.
>
> A: I hurt in my shoulder and my wrist and my thumb. Hurts all the time, but sometimes much worse than other times. And so I thought if I changed what I was doing, you know, I'd find something I could do that wasn't stressful because when you're in pain, you're snippier, and I don't like being that way.

At the hearing, Whittaker again described the events occurring on January 1, 2010 which led to her termination:

> . . . And we - - the hallway - - there's a nurse on one end and I'm the nurse on the other end, and one of the other nurse's patient was hollering [sic] top of his lungs and they got him up because he said he wanted to get up. And, in

> doing so, the aides when they put him in his chair he got a skin tear, some type. They grazed //[sic] his arm or his elbow and he was screaming and hollering and carrying on awful and the other residents, of course, were trying to sleep and his nurse left the floor for something. I don't know where she was. So, I told him, I said if you shut up and quit screaming I will come help you. Well, the other aides tried to do things. He wouldn't let anybody near him without being very combative. So, I went and got some cookies and a drink and I said if you will be quite [sic] I will give you some cookies, so he quieted right down. He took the drink. I said now do you want me to put something on your arm? He said yes, so then I put the dressing and he was fine the rest of while I was there. But, I did raise my voice to him but it was more to get his focus, not to be abusive to him and - - because he wasn't hearing anybody. He was just like out of control screaming. I didn't see that what I did was wrong, to be honest, but - -

Whittaker was subsequently terminated on January 5, 2010 after meeting with the Director of Nursing and the Director of Human Resources. Whittaker denied cursing at the patient, but admitted she raised her voice when she told the patient to "shut up." Whittaker testified Sun Healthcare filed a complaint with the Nursing Board, but no action was taken against her nursing license. Upon cross-examination, Whittaker admitted the Nursing Board indicated it had found some evidence of a violation of the Kentucky

Nursing Laws, but opted not to take any formal disciplinary action. Whittaker also stated she worked with no problems or complaints following her return to full duty until the events leading to her termination. Whittaker also testified she has been a nurse since 1993. No complaints concerning her nursing practices had been made to the Nursing Board between 1993 and the termination incident in 2010.

In an opinion and award rendered June 5, 2012, the ALJ awarded TTD benefits from September 24, 2009 until October 15, 2009, PPD benefits based upon the 7% impairment rating assessed by Dr. Boles, and medical expenses. The ALJ noted Whittaker agrees she retains the physical capacity to do the job she was performing at the time she was injured. The ALJ stated as follows regarding the application of the two multiplier:

> **Has the plaintiff returned to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury?** The second factor is whether the claimant is earning a wage which is equal to or greater than the wage earned at the time of the injury. Ms. Whitaker did return to work at the same wage following her injury. Since Susan Whitaker has ceased that employment on January 5, 2010, she has not had and she does not now have wages that are greater than or equal to the wage at the time of injury.

But for the Kentucky Supreme Court decision in *Chrysalis House v. Tackett,* Ky., 283 S.W.3d 671 (2009) the inquiry regarding the application of the "2" multiplier would end there. However, that decision requires the administrative law judge to function, more or less, as an unemployment compensation referee to determine the cause of the termination. The employer asserts that the termination was for violation of its policies. The matter surrounding the termination of Ms. Whitaker was brought before the Kentucky Board of Nursing which reported that some panel members found some evidence of a violation of Kentucky nursing laws, the Board determined that no formal disciplinary action. No action has been taken against Ms. Whitaker's nursing license. The stated reason for the termination was, "This is considered verbal abuse and a class I violation under company policy and procedures in the Employee Handbook." The employee handbook has not been introduced as evidence.

Under *Chrysalis, supra*, the administrative law judge is to make a determination as to whether the termination bears some relationship to the injury. There is no evidence here that Ms. Whitaker violated any laws or regulations. Without the employee handbook, it is impossible for the administrative law judge independently to determine whether there was a violation of the rules in that handbook. The administrative law judge is aware that sometimes the occurrence of an injury with a resulting workers compensation claim tends to taint the employer-employee relationship.

Once the claimant establishes the basic facts of an injury followed by a

> return to work at the same or greater wage followed by a termination of employment at that wage, **I believe that it is appropriate to shift the burden of going forward to require the employer to establish that there is no relationship between the termination of employment and the fact of an injury or claim if the employer wishes to avoid the application of the "2" multiplier. The claimant has established those basic facts and the employer has failed to persuade effectively that the reason for the termination was wholly independent of the injury.** (Emphasis Added)
>
> Therefore, the "2" multiplier will be applied.
>
> **CONCLUSIONS OF LAW**
>
> . . . .
>
> 7. Because Susan Whitaker has returned to work at an average weekly wage equal to or greater than the average weekly wage at the time of the injury and has ceased that employment, the benefit for permanent partial disability shall be multiplied by two pursuant to KRS 342.730(1)(c)2.

Whittaker filed a petition for reconsideration to correct a typographical error regarding the time period she is entitled to TTD benefits.

Sun Healthcare also filed a petition for reconsideration arguing it is a patent error to find Whittaker retains the physical capacity to return to her pre-injury job, but then proceed to increase her benefits by

the two multiplier. It also argued Whittaker only made vague allegations regarding the reason for her termination, and did not produce any proof on the issue. In contrast, Sun Healthcare submitted the letter by the Nursing Board acknowledging Whittaker's behavior constituted some evidence of violation of Kentucky nursing laws and several witness statements. Sun Healthcare also argued "there is no authority whatsoever" to shift the burden of going forward to an employer to establish no relationship between termination of employment and a work-related injury in order to avoid the application of the two multiplier, as the ALJ did in the case *sub judice*.

The ALJ granted Whittaker's petition and amended the award to correctly reflect the time period for TTD benefits on July 6, 2012. In the same order, the ALJ summarily denied Sun Healthcare's petition for reconsideration. This claim was subsequently reassigned to Hon. Thomas G. Polites, Administrative Law Judge ("ALJ Polites"), on July 16, 2012.

On appeal, Sun Healthcare argues the ALJ erred as a matter of law in failing to apply controlling precedent in enhancing Whittaker's income benefits by the two multiplier, namely KRS 342.730(c)2, Chrysalis House v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra. Sun

Healthcare points to statements made by Whittaker's counsel during oral arguments at the hearing indicating he did not care for Chrysalis House and urged the ALJ to disregard its ruling, as the plaintiff in Chrysalis House was charged with a criminal act, while Whittaker was not. Sun Healthcare notes Hogston, supra, held KRS 342.730(c)2 permits a double benefit during any period that employment at the same or greater wages ceases for any reason, with or without cause, provided that the reason relates to the disabling injury. Sun Healthcare argues Whittaker's suggestion she was terminated under questionable circumstances and as a cost saving measure is entirely baseless and unsubstantiated.

Sun Healthcare also argues the ALJ erred in placing the "burden of going forward" on the employer to establish no relationship between the termination of the employment and the disabling injury if it wishes to avoid the application of the two multiplier. Nonetheless, Sun Healthcare argues the ALJ erred as a matter of law by "ignoring the evidentiary record and awarding a multiplier based on the unsubstantiated allegations of Whittaker's counsel." Sun Healthcare also argues the ALJ misinterpreted controlling case law by stating he believes Chrysalis House places him in the position of acting as an unemployment

compensation referee in order to determine the cause of termination.

We first address Sun Healthcare's argument the ALJ erred in placing the burden of going forward on the employer in establishing no relationship between the termination of employment and the injury so as to avoid the application of the two multiplier pursuant to KRS 342.730(1)(c)2. It is well established a claimant in a workers' compensation proceeding bears the burden of proving each of the essential elements of her cause of action, including the application of statutory multipliers. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979. Therefore, the ALJ erred in placing the burden of proof on the employer, Sun Healthcare, in demonstrating the two multiplier did not apply.

Regardless, we find the ALJ erred in applying the two multiplier pursuant to KRS 342.730(1)(c)2 since Whittaker's cessation of employment was not related to her disabling injury. KRS 342.730(1)(c)2 states:

> 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, 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.

In Chrysalis House, 283 S.W.3d at 674, the Supreme Court held the reason for cessation of employment must be related to the disabling injury in order for the double income benefit to apply. There, the ALJ had authorized double benefits to a claimant who returned to work at the same or greater wage, but was subsequently terminated due to his involvement in criminal activity. The Workers' Compensation Board and the Kentucky Court of Appeals affirmed. In reversing the Court of Appeals, the Supreme Court stated:

> KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage 'for any reason, with or without cause.' It is however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for 'disability' that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' **provided that the reason relates to the disabling injury.**

(emphasis added)

Id.

The application of the two multiplier was again addressed in Hogston v. Bell South Telecommunications, supra. In Hogston, the ALJ declined to award a claimant double benefits when he found no connection between the cessation of employment and the work-related injury pursuant to Chrysalis House. The Supreme Court rejected the claimant's argument Chrysalis House should be limited to those instances where an employee would otherwise profit from an illegal act and affirmed KRS 342.730(1)(c)2 permits a double income benefit during any period of employment at the same or a greater wage ceases for any reason, with or without cause, provided that the reason relates to the disabling injury. Id. at 317. The Court further held KRS 343.730(1)(c)2 includes a cessation of employment due to the disabling effects of previous work-related injuries as well as the injury being compensated. Id.

After careful review of the record, we find the ALJ's determination of the applicability of KRS 342.730(1)(c)2 is not supported by any evidence, substantial or otherwise. We note the record contains extensive evidence regarding the events surrounding Whittaker's termination. Two witness statements were

submitted by Sun Healthcare in which employees reported Whittaker told a patient to “shut up (or shut the hell up) or she wasn’t going to do a damn thing for [him]” and “If you don’t shut the hell up, I’m not going to do a damn thing.” Whittaker also provided her account of the events and reported she stated to shut up and calm down, or she was not going to do the dressing change. Sun Healthcare also submitted the final report of the allegation of verbal abuse, which noted the allegations had been substantiated resulting in Whittaker’s termination. Subsequently, the Nursing Board found some evidence of a violation of the Kentucky Nursing Laws, but declined to initiate formal disciplinary action against Whittaker’s license.

Whittaker testified by deposition and at the hearing regarding the circumstances surrounding her termination. Whittaker testified she attempted to calm a patient who she described as being aggressive and loud. In doing so, Whittaker testified she told him to “shut up and be quiet” and “if you shut up and quit screaming I will come help you.” Whittaker stated shortly thereafter she was told to clock out and go home. “And then a few days later, they contacted me and told me I wasn’t doing their nursing standards.” Whittaker testified the incident was reported to the Nursing Board who did not take any action against her

license. Whittaker denied cursing at the patient, but admitted she raised her voice when she told the patient to “shut up.” Whittaker testified she worked with no problems or complaints following her return to full duty and until the events leading to her termination. Whittaker also testified she has been a nurse since 1993. No complaints concerning her nursing practices had been made to the Board between 1993 and the termination incident in 2010.

Upon review, we find no evidence indicating the reason for Whittaker’s cessation of employment was in any way related to her disabling injury. The ALJ did not cite to any evidence in the opinion and award indicating Whittaker’s cessation of employment was related to her disabling work-related injuries. Rather, the evidence and opinion focused entirely on whether Whittaker verbally abused a patient. In finding the two multiplier applied, the ALJ noted the Nursing Board found some evidence of a violation of Kentucky Nursing Laws, but took no action against Whittaker’s license. He noted the stated reason for termination was "This is considered verbal abuse and a class I violation under company policy and procedures in the Employee Handbook." He also observed the employee handbook has not been introduced as evidence. The ALJ then found Sun Healthcare had failed to persuade him the reason for the

termination was wholly independent of the injury and enhanced Whittaker's income benefits by the two multiplier.

Accordingly, those portions of the June 5, 2012 opinion and award and July 6, 2012 Order on reconsideration relating to the enhancement of the PPD benefits by the two multiplier are hereby **VACATED** and this matter is **REMANDED** to ALJ Polites for entry of an opinion consistent with the analysis required in the application of the two multiplier pursuant to Chrysalis House v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra, and identifying the claimant as bearing the burden of proving each of the essential elements of her cause of action, including the application of statutory multipliers.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, DISSENTS WITHOUT FURNISHING A SEPARATE OPINION.

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