

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 1, 2021

CLAIM NO. 201991508

DEBORAH CHEATHAM

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE

INTEGRITY STAFFING SOLUTIONS and
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS/
CROSS-PETITIONER

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * *

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

BORDERS, Member. Deborah Cheatham (“Cheatham”) appeals from the July 1, 2021 Opinion, Award and Order and the July 20, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge

(“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a February 22, 2019 injury. Cheatham argues the ALJ erred in failing to enhance her PPD benefits by the three-multiplier pursuant to KRS 342.730(1)(c). Integrity Staffing Solutions (“Integrity”) cross-appeals, arguing the ALJ erred in disallowing a credit for unemployment benefits Cheatham received after she ceased working for a subsequent employer. We affirm in part, vacate in part, and remand.

Cheatham testified by deposition on November 5, 2020 and at the hearing held on May 5, 2021. Cheatham is a 57 year-old resident of Lexington, Kentucky. She is a high school graduate and attended some college to study nursing. She has worked in several factory positions. Cheatham testified she injured her back on February 22, 2019 while working for Integrity in a temporary position as a packer at Amazon. She was taking materials off carts and sending them back to the shipper. She bent down to pick up a 50-pound box and felt a “pop” in her low back. Several days later, she filled out paperwork with Integrity and was sent to BaptistWorx in early March. She was seen by a neurosurgeon who wanted to perform injections, but she declined. She received physical therapy and medication from her primary doctor.

Cheatham eventually found lighter duty work at Quad Graphics in May 2019. She sent products through FedEx and UPS in this position. She stated the position was less strenuous but her back continued to hurt. In November 2019, Quad Graphics eliminated her position and moved her to a production line, which was more strenuous and required more bending and lifting. In December 2019, her

back pain worsened. Cheatham tried to obtain treatment at Baptist Health, but was told the workers' compensation insurance carrier refused to pay, so she could not be seen. Cheatham then went to UK Healthcare and was referred to a pain clinic. During this time, she received short-term disability benefits from Quad Graphics until she was terminated on March 20, 2021.

At the time of her deposition, Cheatham was receiving unemployment benefits. She had recently applied for a customer service on-call position. She believed she could perform that job because she would work from home and would be able to change positions as needed. She testified most of her previous jobs were factory work that she is now unable to perform due to her back condition.

At the hearing, Cheatham testified she does not believe she can perform her pre-injury work as she has trouble lifting, walking, bending, and leg numbness. She treats with her family doctor for back pain. She still receives unemployment insurance benefits which began in March 2020 after she exhausted her vacation and sick pay at Quad Graphics. She receives unemployment benefits at a rate of \$667.00 every two weeks. Cheatham testified the unemployment benefits she receives are charged against the account of Quad Graphics – not Integrity. She stated Quad Graphics told her it would let her draw unemployment benefits. She is actively trying to obtain a sedentary job.

Cheatham treated at New Lexington Clinic from January 21, 2020 through May 5, 2020. She reported muscle aches and weakness, arthralgias, and back and knee pain. She was prescribed Gabapentin, Meloxicam, and a topical gel

for pain. A lumbar spine MRI taken on February 13, 2020 showed degenerative changes most conspicuous at L5-S1, where she had a paracentral leftward HNP.

Dr. Gregory Nazar performed an independent medical evaluation (“IME”) on August 28, 2020. Dr. Nazar diagnosed an L5-S1 left paracentral subligamentous disc herniation with S1 radiculopathy symptoms associated with physical activity secondary to the work injury of February 22, 2019. Dr. Nazar placed her at maximum medical improvement (“MMI”) as of the date of the exam. Dr. Nazar assigned restrictions of changing positions frequently, no pushing or pulling greater than twenty pounds, and no lifting or carrying more than fifteen pounds. Dr. Nazar assigned a 12% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”). Dr. Nazar does not believe Cheatham can return to her pre-injury work.

In a March 15, 2021 supplemental report, Dr. Nazar indicated he reviewed MRI studies and Dr. Henry Tutt’s reports. Dr. Nazar believed the MRIs were taken with Cheatham laying down which took the disc pressure off her spine. He stated disc pressure increases when she is standing and physically active, which causes pressure on the S1 nerve root to increase resulting in radicular symptoms. He disagreed with Dr. Tutt and believed that Cheatham has active S1 radiculopathy. Finally, Dr. Nazar believed that a weight bearing lumbar myelogram study would show the radiculopathy, but stated there is enough evidence from her history and MRI to justify his opinions.

Dr. Tutt performed an IME on December 15, 2020. He diagnosed multilevel lumbar degenerative changes of a longstanding nature. He believed the work injury caused a transient myofascial injury such as a lumbar strain/sprain. He did not believe she has shown evidence of lumbar radiculopathy. He opined her left leg pain is circumferential, a non-dermatomal pattern. Dr. Tutt assigned a 0% impairment rating pursuant to the AMA Guides. He felt Cheatham has a 5% pre-existing impairment rating. He believed Cheatham can return to her pre-injury work. After reviewing MRI scans, Dr. Tutt wrote an addendum reaffirming the opinions expressed in his initial report. He did not believe Cheatham showed any evidence of lumbar radiculopathy. Dr. Tutt recommended an EMG and nerve conduction study by a qualified EMG fellowship trained neurologist electromyographer if his opinion was in question.

The ALJ's findings relevant to this appeal are as follows, *verbatim*:

Having reviewed the evidence, the ALJ finds the opinions of Dr. Nazar to be the most credible and persuasive. Dr. Nazar documented medical records reviewed as well as the neurological examination and clinical findings. He also documented the findings of his review of two MRI studies taken approximately one year apart that correlated with Plaintiff's symptoms. He went on to apply the appropriate sections of the AMA Guides arriving at 12% impairment. Thus, the ALJ finds that Plaintiff suffered 12% impairment to her lumbar spine due to the February 22, 2019 work event.

With respect to multiplier, when KRS 342.730(1)(c)(1) and (2) both may be applicable, Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny require an ALJ to make three essential findings of fact. First, the ALJ must determine whether an injured claimant can return to the type of work performed at the time of the injury.

Next, the ALJ must determine whether the claimant has returned to work at an average weekly wage (AWW) equal to or greater than his pre-injury AWW. Ball v. Big Elk Creek Coal, Inc., 25 S.W.3d 115 (Ky. 2000). Finally, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

Plaintiff testified that she did not return to work for Defendant after the February 22, 2019 incident for any significant period of time. As indicated in the hearing transcript and BRC Order, Plaintiff returned to work for a subsequent employer on May 16, 2019 in a less physically demanding position. She was able to work in that position until approximately December 2019 when she was moved to a more physically demanding job that she testified she could not perform due to her complaints of back pain. Plaintiff also testified that she was earning the same or greater wage with the subsequent employer. Dr. Nazar did not believe Plaintiff could return to her pre-injury work and recommended restrictions. Plaintiff is not currently working, but testified that she is actively looking for work within her restrictions.

Having reviewed all the evidence, the ALJ finds that Plaintiff does not retain the capacity to return to her pre-injury position. However, Plaintiff returned to work earning the same or greater wages after the injury and can continue to earn that level of wages for the indefinite future. Thus, the award of PPD benefits is calculated as follows:

$$\$555.75 \times 66 \frac{2}{3}\% \times 12\% \times 1.0 \times 1.0 = \$44.46 \text{ per week.}$$

Plaintiff is entitled to the application of the multiplier under KRS 342.730(1)(c)2 for any periods of cessation of employment at the same or greater wage as her pre-injury average weekly wage.

....

Having reviewed the evidence, the ALJ finds that Plaintiff met the definition of temporary total disability from February 22, 2019 through May 15, 2019 and again from December 28, 2019 through May 5, 2020. Thus, Plaintiff is entitled to TTD benefits for these periods at a rate of \$370.50 per week with Defendant

being entitled to a credit for any benefits previously paid and/or overpaid against its liability. Defendant is also entitled to a credit for unemployment benefits received by Plaintiff during any period that TTD benefits were also payable for the February 22, 2019 work incident. See KRS 342.730(5).

Cheatham filed a Petition for Reconsideration requesting the ALJ indicate what factual findings support a determination that she can continue to earn the same or greater wage for the indefinite future. Cheatham also requested additional findings as to whether she suffered a permanent alteration in her ability to earn money as required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). Cheatham timely filed a supplemental Petition for Reconsideration arguing the ALJ erred in granting Integrity a credit for unemployment benefits.

The ALJ's relevant findings on reconsideration are as follows:

With respect to Plaintiff's July 1, 2021 Petition, the ALJ does not find patent error. In the Opinion, the ALJ found Plaintiff was not entitled to application of the three multiplier. The Opinion identifies the applicable statutory and case law with respect to the factors and analysis to be considered by an ALJ in the application of the two versus the three multiplier under KRS 342.730(1)(c).

Consistent with Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and Adkins v. Pike County Bd. Of Educ., 141 S.W.3d 387 (Ky. App. 2004), the Opinion identifies evidence that shows Plaintiff did not return to work for Defendant after the work incident. She did, however, return to work for a subsequent employer, Quad Graphics, in a mail receiving position at same or greater wage. She was able to work for Quad Graphics in that position until it was eliminated. She was then moved to "the line," which she described as a more physically demanding job. She testified that she eventually discontinued the line position due to symptoms she

attributes to the work injury. While she is currently not working, Plaintiff testified that she is actively looking for work within her restrictions.

The Opinion expressly states that Plaintiff does not retain the capacity to return to her prior position at the time of the incident, but she did return to work at the same or greater wage after the injury for a subsequent employer and could continue to earn that level of wages for the indefinite future. In short, the Opinion indicates that a full analysis was performed in consideration of applicable multipliers and the final conclusion was reached that there was no permanent alteration in Plaintiff's ability to earn money. Accordingly, Plaintiff's July 1, 2021 Petition is overruled.

In regard to the July 8, 2021 Petition, the ALJ does find patent error in the determination of Defendant's entitlement to a credit for unemployment benefits. The only evidence of record with respect to unemployment benefits is Plaintiff's testimony.

Plaintiff's testimony reflects that she discontinued work for Defendant in February 2019. She then worked for Quad Graphics from May 2019 until December 2019. She received short-term disability until March 2020 when Quad Graphics allowed her to receive unemployment benefits. The evidence does not indicate that any unemployment benefits received by Plaintiff were charged against the account of Defendant.

Thus, the Opinion contains patent error on its face in determining Defendant is entitled to a credit for unemployment benefits as evidence does not exist reflecting a proper legal basis for the credit for unemployment benefits pursuant to KRS 342.730(5). Accordingly, Plaintiff's July 8, 2021 Petition is sustained. The July 1, 2021 Opinion, Award and Order is corrected on page 9 as follows:

"Defendant is not entitled to a credit for unemployment benefits received by Plaintiff during any period that TTD benefits were also payable for the February 22, 2019 work incident. See KRS 342.730(5)."

On appeal, Cheatham argues the ALJ erred in failing to award the three-multiplier. Cheatham argues that neither the facts nor the ALJ's analysis support a conclusion there was no permanent alteration in her ability to earn money. Cheatham testified she can no longer perform any of her past jobs. She is no longer able to perform any kind of work offered at Amazon. She stated she can no longer perform her work duties at Quad Graphics, even though for a time she made the same or greater wage. She initially worked on a line at Quad Graphics that was not physically demanding. However, she testified the heavier work on a different line at Quad Graphics was part of the same job for which she was hired.

The Kentucky Supreme Court in Fawbush, supra, articulated several factors an ALJ must consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. Those factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is performed out of necessity, whether the post-injury work is performed outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. at 12. The Court in Adkins, supra, directed that the ALJ "must consider a broad range of factors, only one of which is the ability to perform the current job" in determining whether a claimant can continue to earn an equal or greater wage. Id. at 390. Fawbush does not contain an exhaustive list of factors an ALJ is to consider in making the determination of whether a worker is likely to continue earning the same or greater wage. Rather, the ALJ's determination is fact-specific and individualized.

We agree with Cheatham that the ALJ did not carry out the precise analysis required by Fawbush, supra, and as explained in Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). Here, the ALJ's analysis appears to be limited to Cheatham's ability to perform the less physically demanding portion of the job at Quad Graphics and the fact that she was actively seeking work. Cheatham points out the position at Quad Graphics included more physical work than she was able to perform.

The proper determination of the ability to earn the same or greater wage is not confined to the ability to perform any one job for an employer. The ALJ did not directly address the question of whether the lighter work at Quad Graphics constitutes work that would be readily available with other employers, thereby establishing an ability to continue to earn the same or greater wage for the indefinite future. As noted by Cheatham, she has been seeking work since leaving Quad Graphics, a period of approximately 18 months at the time of the ALJ's decision. The inability to secure work for an extended period of time, though not determinative, may constitute some evidence of the inability to continue to earn the same or greater wage. The ALJ did not discuss other relevant factors and how they impact Chatham's ability to earn money. The ALJ's findings regarding the question were conclusory, both in the initial determination and on reconsideration.

An ALJ is required to provide a sufficient basis to support their determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47

(Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact that an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his or her reasoning in reaching a particular result. However, the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Because the ALJ's analysis insufficiently demonstrated the relevant factors were considered and properly weighed, we vacate the award of income benefits and remand the claim for a determination based on a correct analysis as required by Fawbush and Adams. We express no opinion as to the outcome.

Integrity argues the Order denying a credit for unemployment benefits is an unwarranted and mistaken exercise of the discretion by the ALJ. Integrity asserts the clear language of KRS 342.730(5) does not require the unemployment compensation be drawn from the account of the defendant/employer. While the ALJ noted the employer must prove "a proper legal basis for the request" for a credit, Integrity contends the proper legal basis here is simply compliance with the terms of the statute.

KRS 342.730(5) provides:

All income benefits pursuant to this chapter otherwise payable for temporary total and permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability.

As noted in Cheatham's responsive brief, the statute refers to benefits **paid**, rather than benefits **received** by the employee. We believe the reference to unemployment benefits paid, rather than benefits received, indicates the credit applies only to unemployment benefits for which the subject employer is responsible. Had the legislature intended the credit to apply to benefits received from the accounts of other employers, we believe it would have couched the statutory provision in terms that grant the credit for unemployment benefits received by the employee. There is no evidence Integrity's account was charged for the unemployment benefits. Rather, evidence indicates the subsequent employer's account was charged for the unemployment benefits paid to Cheatham. Quad Graphics was not a party to the workers' compensation claim and had no way of seeking reimbursement through the workers' compensation claim. The result of granting a credit to Integrity for the unemployment benefits charged to Quad Graphics' account would be an unjust enrichment to Integrity. Because Integrity paid no unemployment benefits to Cheatham, the ALJ properly denied the credit.

Accordingly, the July 1, 2021 Opinion, Award and Order and the July 20, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge, are hereby **VACATED IN PART** and **AFFIRMED IN PART**. This matter is **REMANDED** to the ALJ for additional findings concerning Cheatham's entitlement to the three-multiplier in accordance with the views set forth herein.

ALL CONCUR.

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