

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 1, 2022

CLAIM NO. 202098273

DELTA GLOBAL SERVICES

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

WAJEEHAH ANDREWS and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Delta Global Services (“Delta”) appeals from the November 9, 2021 Opinion, Order, and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ awarded Wajeehah Andrews (“Andrews”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits enhanced by the multipliers contained in KRS 342.730(1)(c)1, and medical benefits for work-related cervical and lumbar injuries.

Delta also appeals from the November 29, 2021 Order denying its Petition for Reconsideration.

Delta argues the ALJ abused his discretion in awarding PPD benefits to Andrews. It argues Andrews' subjective complaints are not supported by objective evidence. Delta additionally argues the enhancement of the award of PPD benefits is not supported by substantial evidence. The ALJ performed the appropriate analysis in determining Andrews is entitled to an award of PPD benefits based upon the 10% impairment rating assessed by Dr. Gregory Nazar, enhanced by the three-multiplier contained in KRS 342.730(1)(c)1, and we therefore affirm.

Andrews, currently a resident of Newark, New Jersey, filed a Form 101 on April 21, 2021, alleging she sustained work-related injuries to her left leg, back, left knee, left arm, and neck on October 28, 2019, as she was exiting a plane and the steps collapsed causing her to fall and lose consciousness. Andrews is a high school graduate, and she had worked for Delta for over four years at the time of the accident. In addition to her work as a cabin service manager for Delta, Andrews' work history includes working as an aviation officer for the New Jersey Port Authority, and in healthcare billing and coding at a medical facility.

Andrews testified by deposition on July 28, 2021, and at the hearing held September 16, 2021. Andrews worked for Delta at the airport in Hebron, Kentucky at the time of the accident, and resided in Cincinnati, Ohio. Prior to that, she resided near Atlanta, Georgia. After the accident, she returned to the Atlanta area to stay with family members, and eventually moved to Newark to live with her mother due to her lack of income.

Andrews' license in medical billing and coding has now expired. She testified her job with Delta involved training and screening for flight attendants. She also worked as part of a "fly team" assisting at various airports around the country. She managed up to twelve people as part of her team. The team ensured the cleaning of planes after flights and checking for explosive devices. This included crawling with a flashlight to check under seats, checking overhead bins, pulling the bottoms from seats for inspection, and ensuring the lavatories were cleaned. The job required pushing, pulling, and lifting up to fifty pounds. She earned \$17.50 per hour, and always worked more than forty hours per week.

She and her team were exiting a plane on the date of the accident after completing the cleaning and inspection tasks. She was required to climb down external stairs to exit the plane, and as a supervisor, she was the last to leave. The stairs collapsed as she was attempting to climb down, causing her to fall. She lost consciousness and did not recall the entire fall. She next remembered coming to, and "hopping around" due to left knee pain. She was taken to the hospital by ambulance.

She treated with physical therapy and medication, and continued to work for Delta, performing office work only, until December 4, 2019, when Delta was no longer able to accommodate her limitations. She received TTD benefits from January 8, 2020 through June 7, 2020, although she did not work again until she returned to Delta in August 2020, when she attempted to perform light duty tasks. Her last day of work with Delta was December 15, 2020, because continuing to perform desk work was "not feasible". She had difficulty working due to her pain,

and the effects of her medication. Andrews cannot perform her job due to her inability to climb steps, and problems with bending and muscle spasms. She testified she had no problems prior to the accident, but she has experienced pain from her neck into her left shoulder, and back pain into her left hip and knee since that date.

Andrews testified she currently treats with Dr. Humira Ashras, an orthopedic/spine specialist in Newark. Dr. Ashras administered injections which provided temporary relief, and a second series of injections is pending.

Dr. Nazar's Form 107 medical report was filed in support of Andrews' claim. He evaluated her on December 15, 2020. Dr. Nazar noted Andrews was working as a cabin service manager for Delta when she fell from a tarmac hydraulic step on October 28, 2019. He noted she did not remember the event. Andrews complained of neck, low back, and left knee pain. Dr. Nazar diagnosed Andrews with lumbar and cervical strain injuries, with some non-verifiable symptoms caused by the October 29, 2019 work accident. He determined she reached maximum medical improvement ("MMI") on October 29, 2020. He additionally stated she retains the physical capacity to return to the type of work performed at the time of the injury. However, he recommended restrictions of no lifting, carrying, pushing, or pulling over twenty pounds, and he would limit her overhead lifting. He also recommended she change position frequently as needed from sitting, standing, and walking, and avoid repetitive bending. Dr. Nazar assessed a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), of this rating he attributed 5% to the neck and 5% to the low back.

Andrews also filed records from Peachtree Orthopaedic Clinic in Alpharetta, Georgia, and St. Elizabeth-Edgewood. Those records reflect treatment from October 28, 2019 to November 5, 2020. On October 28, 2019, Dr. Donald Langenbeck noted the history of the work accident. He diagnosed cervical and lumbar facet joint pain. Dr. Michael Elleman also noted the work accident, and Andrews' complaints of back pain radiating down her left leg to the ankle. He diagnosed an acute cervical strain.

Dr. Michael Best evaluated Andrews on April 21, 2020 at Delta's request. He noted the history of the steps collapsing, and Andrews falling to the tarmac. He additionally noted her complaints of left-sided neck, low back, left leg, and left knee pain. He noted her job required continuous bending, stooping, squatting, crawling, overhead reaching, crouching, pushing, pulling, and kneeling. Dr. Best diagnosed Andrews with soft tissue trapezius, cervical, thoracic, and lumbar strains, which have resolved. He also noted she had a left knee strain/sprain/contusion that had resolved. He found she had reached MMI and needed no additional treatment or testing. He did not believe she needed any restrictions, and found she has a 0% impairment based upon the AMA Guides. In a supplemental note dated August 26, 2021, Dr. Best stated he disagreed with Dr. Nazar's impairment rating, and he reiterated the 0% rating he had previously assessed.

A Benefit Review Conference was held September 16, 2021. The issues preserved for determination included whether Andrews has the physical capacity to return to the type of work performed at the time of the injury; benefits per KRS 342.730; average weekly wage; TTD; and the proper use of the AMA Guides.

In the Opinion and Order issued November 9, 2021, the ALJ determined Andrews sustained work-related injuries to her neck and back on October 28, 2019. He determined her average weekly wage was \$794.34, yielding a TTD rate of \$529.56. The ALJ found Dr. Nazar's opinions, coupled with Andrews' testimony, more credible than those expressed by Dr. Best, and explained the basis for that determination.

The ALJ also performed an analysis pursuant to Fawbush v. Gwinn, 201 S.W.3d 5 (Ky. 2003), and found the three-multiplier contained in KRS 342.730(1)(c)1 applicable. The ALJ also determined, pursuant to the holding in Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004), Andrews is not capable of performing the actual jobs she performed prior to her injury. The ALJ also awarded TTD benefits from January 8, 2020 to October 29, 2020 based upon Dr. Nazar's determination of the MMI date.

Delta filed a Petition for Reconsideration arguing the ALJ erred in relying upon Dr. Nazar's opinion. It argued his impairment rating assessment is not in accordance with the AMA Guides. It also argued Dr. Nazar's opinions were based upon subjective, not objective, criteria. It additionally argued the ALJ erred in enhancing the award of PPD benefits by the three-multiplier contained in KRS 342.730(1)(c)1. Finally, Delta argued the ALJ erred regarding the duration of the award of PPD benefits.

In an Order entered November 29, 2021, the ALJ denied Delta's Petition for Reconsideration, except for amending the period of TTD benefits to January 8, 2020 to August 1, 2020.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, supra.

In reaching a determination, the ALJ must also provide findings sufficient to inform the parties of the basis for his 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The ALJ relied upon the impairment rating assessed by Dr. Nazar, who diagnosed cervical and lumbar sprain and strain injuries. He noted Dr. Nazar commented regarding Andrews' complaints and her non-verifiable radiculopathy. Relying upon Dr. Nazar, the ALJ awarded PPD benefits based upon a 10% impairment rating. Delta argues, based upon the holding in Gibbs v. Premier Scale Co./Ind. Scale Co., 50 S.W.3d 754 (Ky. 2001), no objective findings support Dr. Nazar's impairment assessment, therefore his opinion cannot constitute substantial evidence supporting the ALJ's decision.

We disagree. The holding in Gibbs, supra, and the definition contained in KRS 342.0011(1), reflect an injury is "any work-related traumatic event . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." The term "objective medical findings" means clinical findings, **observations** and other standardized testing performed as part of a physical examination. The Supreme Court in Gibbs, supra, noted the term "testing" does not require the use of sophisticated diagnostic tools. Dr. Nazar's observations sufficiently support his determination Andrews sustained work-related injuries for which she is entitled to an impairment assessment. We additionally note Category II of table 15-3 of the AMA Guides specifically references guarding and non-verifiable radicular complaints supporting Dr. Nazar's assessment of a 5% impairment for the lumbar condition. Likewise, we note Category II of table 15-5 of the AMA Guides reference guarding and non-verifiable radicular complaints, also supporting Dr. Nazar's assessment of a 5% impairment rating for Andrew's cervical condition.

Although Dr. Best disagreed with Dr. Nazar's assessment, his opinion is nothing more than a contrary opinion upon which the ALJ chose not to rely. (Emphasis added).

The next issue is whether the ALJ performed the appropriate analysis in applying the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ determined the application of the three-multiplier is appropriate since although Andrews returned to work for Delta, she could not perform all her job duties, and eventually left work because as she testified it was not "feasible" to continue.

Because Andrew returned to work at apparently the same or greater wage, the ALJ was required to perform an analysis pursuant to Fawbush v. Gwinn, supra, requiring a determination of which multiplier contained in KRS 342.730(1)(c) is "more appropriate on the facts" when awarding permanent partial disability benefits. Id. 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.

KRS 342.730(1)(c)2 further 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.

When a claimant satisfies the criteria of both (c)1 and (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, the three-multiplier pursuant to KRS 342.730(1)(c)1 is applicable.

Fawbush v. Gwinn, supra, 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. Those factors include the claimant's lack of physical capacity to return to the type of work he or she performed, whether the post-injury work is done 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. As the Court in Adkins v. Pike County Bd. of Educ., supra, stated, it is not enough to determine whether an injured employee is able to continue in his or her current job. The Court stated:

Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider

a broad range of factors, only one of which is the ability to perform the current job.
Id. at 30.

We find the ALJ appropriately performed the analysis pursuant to Fawbush v. Gwinn, supra, and determined the application of the three-multiplier most appropriate under the circumstances, and he explained his reasons for this determination. He specifically noted the restrictions Dr. Nazar assessed, and Andrews' own assessment of her abilities. We find the ALJ did not err in determining she is unable to continue earning the same or higher pay into the indefinite or foreseeable future.

Accordingly, we **AFFIRM** the November 9, 2021 Opinion and Order, and the November 29, 2021 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON WALTER E HARDING
400 WEST MARKET ST, SUITE 2300
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

LMS

HON WARD BALLERSTEDT
2451 CRITTENDEN DR
LOUISVILLE, KY 40217

ADMINISTRATIVE LAW JUDGE:

LMS

HON JONATHAN R WEATHERBY
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601