Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **June 1, 2018**

CLAIM NOS. 201364482 & 200568114

FRANCES DUNBAR PETITIONER

VS.

APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

PENNYROYAL HOSPICE INC.,
JENNIE STUART MEDICAL CENTER,
DR. JOHN LACH,
and HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

JENNIE STUART MEDICAL CENTER PETITIONER

VS.

FRANCES DUNBAR,
PENNYROYAL HOSPICE INC.,
DR. JOHN LACH,
HON. THOMAS POLITES (ALJ),
and HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Frances Dunbar ("Dunbar") appeals from the November 27, 2017 Opinion, Award and Order and the January 3, 2018 Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD"), permanent partial disability ("PPD"), and medical benefits. In addition to those orders, Jennie Stuart Medical Center ("JSMC") appeals from the Interlocutory Opinion and Order rendered by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ Polites") on October 26, 2015. Dunbar argues the ALJ erred in applying the tier-down provision of the 1994 version of KRS 342.730(4) to her claim, and in failing to enhance her benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. JSMC argues Dunbar's low back surgery was not compensable, and that portion of the interlocutory order should be vacated and reversed with instructions that all benefits are related to a 2005 accident. We affirm.

BACKGROUND

This claim arises from two work-related accidents. Dunbar injured her low back on July 14, 2005 while working for Pennyroyal Hospice, Inc. She filed a claim for benefits, which the parties settled. Dunbar received treatment for her low back until 2013. On October 10, 2013, Dunbar alleged she injured her low back, left hip and leg following a fall. At that time, she was working as a floor nurse for JSMC.

The current claim was bifurcated on the issues of the compensability of a proposed surgery, maximum medical improvement, and TTD. ALJ Polites rendered an interlocutory decision on October 26, 2015, finding a low back surgery recommended by Dr. David McCord reasonable, necessary, and causally related to the 2013 work injury. ALJ Polites considered Dunbar's 2005 injury, and concluded the 2013 injury caused a permanent aggravation or exacerbation of her pre-existing active low back condition. He ordered JSMC to initiate payment of TTD and to bear responsibility for the surgery recommended by Dr. McCord. In 2017, the claim was re-assigned to the ALJ.

Proof Submitted Prior To the Interlocutory Order

Dunbar was deposed on July 15, 2014 and explained she fell at work on October 10, 2013 when she went to sit

down in a chair that had been moved. She fell to a concrete floor. Dunbar acknowledged the 2005 injury caused intermittent flare-ups of low back pain, but she characterized the 2013 injury as more severe and continuous pain. She explained that she was unable to perform every duty of a floor nurse after the 2005 injury, but continued to work with some modifications.

Extensive medical evidence was submitted in this claim, including records from the 2005 injury claim and voluminous records documenting ongoing treatment between 2005 and 2013. The proof generally indicates Dunbar treated for the effects of the 2005 injury regularly until the 2013 injury. From 2007 through 2011, she treated with Dr. John Lach for lumbar pain complaints and numbness in her legs and feet. Dunbar also treated with Dr. Eric Putty, chiropractor, from 2003 through 2010, for low back and left leg pain. Following the 2013 injury, Dunbar treated with Dr. Frederick Robbe and, later, with Dr. McCord. Dr. McCord eventually recommended lumbar fusion, which was performed on February 1, 2016. Below, we summarize in detail the proof that directly relates to the issues on appeal.

During the litigation of the 2005 injury claim, Dr. Lach conducted an independent medical evaluation ("IME") on

September 7, 2007. He assessed an 8% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Lach attributed the impairment rating to Dunbar's 2005 work-related low back injury. He recommended restrictions against heavy lifting, and treatment as needed for pain management, including epidural injections. Dr. Lach acknowledged the possibility Dunbar would need surgery at some point in the future.

Dr. Paresh Sheth first treated Dunbar on June 21, 2013, prior to the October 10, 2013 work accident. Dunbar complained primarily of neck pain, but noted her low back injury in 2005. Dunbar returned on October 8, 2013, just two days before her second work accident, and reported intensified low back pain. Dr. Sheth's office notes document an inability to perform all of her work duties because of the flare-up in low back pain. He recommended an MRI and referral to a neurosurgeon.

Dr. Robbe treated Dunbar on October 14, 2013, four days after the work accident. He diagnosed a displaced fracture of the proximal femur and recommended conservative treatment. Dr. Robbe later reviewed Dr. Sheth's treatment

notes pre-dating the 2013 injury, and agreed Dunbar suffered a pre-existing, active low back condition.

Dr. Lach re-evaluated Dunbar after the 2013 work injury. On May 24, 2014, he concluded she had experienced an increase and change in her symptoms attributable to the 2013 injury. To reach this conclusion, he compared MRIs of the low back conducted in 2007 and 2013, and found a change in the facet arthropathy. Dr. Lach assessed a 3% impairment for trochanteric bursitis pursuant to the AMA Guides.

Dr. Lach supplemented his report on April 13, 2015, after a weight bearing MRI had been performed. Dr. Lach determined the recent MRI revealed a herniated disc at L4-5. He assessed an 11% whole person impairment, with 8% attributable to the 2005 low back injury.

Dr. Lach was deposed and questioned specifically about Dunbar's low back treatment immediately prior to the 2013 injury. Dr. Lach acknowledged her low back condition was active, but emphasized she continued to work and function even with on-going pain. He also noted her symptoms from the 2005 injury were intermittent with flare-ups, and not continually debilitating. When asked about the 3% impairment attributed to Dunbar's hip condition, Dr. Lach explained the rating was due to her on-going pain. He found no evidence of

a hip fracture, but theorized she likely has arthritis due to her age and weight.

Dr. Thomas O'Brien conducted an IME on September 30, 2014. Dr. O'Brien examined Dunbar and reviewed medical records concerning both the 2005 and 2013 injuries. He concluded Dunbar did not sustain an orthopedic injury as a result of either work injury, and instead attributed her current low back and hip conditions to degenerative changes exacerbated by her body habitus and comorbid conditions. To reach this conclusion, Dr. O'Brien noted Dunbar's subjective complaints have not changed since the 2005 injury.

Dr. McCord, Dunbar's treating neurosurgeon, was deposed on January 25, 2015. He explained Dunbar's lumbar injury had been significantly exacerbated by the 2013 accident. Dr. McCord determined Dunbar suffered a pre-existing active condition as a result of the 2005 accident, with a 5% permanent impairment rating. However, he concluded the L4-5 and L5-S1 discs had slipped as a result of the 2013 accident, and also caused a central herniation at L3-4. To support this conclusion, he compared MRIs taken prior to the 2013 injury, and also relied upon Dunbar's history of pain complaints. While acknowledging Dunbar was actively treating with Dr. Sheth at the time of the 2013 accident, he emphasized

Dunbar's pain had increased significantly. He further emphasized that surgery had been previously recommended to Dunbar, but that she was not motivated to pursue this option until after the 2013 injury.

October 26, 2015 Interlocutory Opinion

ALJ Polites bifurcated the claim to first consider whether Dunbar suffered a work-related injury in 2013, and the compensability of the surgery. He concluded the 2013 accident caused a permanent exacerbation and aggravation of the pre-existing active condition caused by the 2005 accident. ALJ Polites relied on the fact Dunbar continued to work until the 2013 injury, albeit with pain and modified duties. He acknowledged Dunbar continued to treat with Dr. Lach for low back pain, but noted she controlled her symptoms well with conservative treatment. ALJ Polites was equally persuaded by Dr. McCord's opinion that Dunbar had suffered a very significant and debilitating increase in her symptoms after the 2013 fall. Finally, ALJ Polites noted Drs. Robbe, Lach and McCord were all of the opinion Dunbar's symptoms had increased significantly following the 2013 accident. This proof, when considered in its totality, convinced ALJ Polites that Dunbar suffered ongoing and active pain from the 2005

accident, but the 2013 fall injured her to the point she could no longer work.

Proof Submitted After the Interlocutory Order

The claim was abated for a period of time and Dunbar underwent surgery performed by Dr. McCord. Thereafter, proof was reopened and the claim proceeded to a final hearing.

Additional office notes from Dr. Robbe were submitted. By February 8, 2017, Dr. Robbe indicated Dunbar's hip exam was normal. He recommended restrictions against lifting more than 10 pounds, repetitive bending, and sitting or standing more than 30 minutes at a time. These restrictions related solely to the 2013 low back injury and subsequent surgery.

Dr. O'Brien re-evaluated Dunbar on June 21, 2017, following surgery. He concluded the surgery significantly improved her back and leg symptoms, but he continued to believe her conditions are degenerative in nature. He further explained neither the 2005 injury nor the 2013 injury accelerated the pre-existing degenerative disc disease of the lumbar spine. Dr. O'Brien also emphasized Dunbar did not fracture her hip following the 2013 accident.

Dr. Warren Bilkey conducted an IME on March 20, 2017. Dr. Bilkey diagnosed a lumbar strain and aggravation

of lumbar degenerative disc disease as a result of the 2013 fall. He also diagnosed a fracture of the left hip caused by the 2013 work accident. He assessed a 33% permanent impairment, attributing 8% to the 2005 accident and 25% to the effects of the 2013 work injury and resulting surgery. He further assessed a 3% impairment rating for the hip injury, for a total combined 27% impairment resulting from the 2013 work accident. Dr. Bilkey restricted Dunbar from repetitive bending, lifting over 10 pounds, and sitting or standing more than 30 minutes at a time. He opined these restrictions would prevent her return to the full scope of duties as a floor nurse.

November 27, 2017 Opinion

After a period of abatement following the interlocutory order, Dunbar's claim proceeded to a final hearing. In the November 27, 2017 Opinion, Award and Order, the ALJ adopted ALJ Polite's conclusion that the 2013 accident caused a permanent exacerbation of Dunbar's pre-existing and active low back condition. In independently reaching this conclusion upon her own review of the evidence, the ALJ relied on the reports and treatment records of Drs. McCord, Lach and Robbe. She emphasized that Dunbar was able to work prior to the 2013 injury, and thereafter was unable to work and

suffered more significant symptoms. Relying on Dr. Robbe's opinion, the ALJ concluded Dunbar did not suffer a permanent hip injury.

The ALJ considered the extent of Dunbar's low back injury, and explained her reliance on Dr. Bilkey's impairment rating:

> In this case, the ALJ finds that Plaintiff had an 8% whole person impairment rating prior to the injury based upon the opinions of Dr. Bilkey and Dr. Lach. Further, the ALJ finds that the conditions were symptomatic and impairment ratable immediately prior to the injury, as Plaintiff saw Dr. Sheth less than one week prior to the injury, and reported very similar symptoms, including low back pain, with reports of radiating symptoms into the lower extremities. Although Dr. McCord gave a prior impairment of only 5%, he testified he did not have all of Plaintiff's prior treatment records. Further, Dr. Lach initially assessed an 8% impairment rating years prior to the injury. He later changed his impairment and assessed a 7% impairment, then added a 1% impairment following the injury. However, the ALJ finds that Dr. Lach's impairment rating performed at the time of Plaintiff's pre-existing condition was the most credible, rather than the 5% assessed by Dr. O'Brien or the one he assessed years after the second injury. Additionally, Plaintiff's own IME doctor, Dr. Bilkey, agreed that Plaintiff had an 8% impairment rating prior to the injury. This rating is also supported by Dr. Sheth's examination which clearly documented pain with complaints of

> radicular symptoms just six days prior to the injury.
>
> The ALJ relies upon Dr. Bilkey to find that Plaintiff has a 33% impairment rating due to the injury and resulting surgery. The ALJ finds Dr. Bilkey's impairment rating more credible because he explained how he arrived at the 33% figure by using his examination findings of loss of forward and back bending and loss of side bending. Dr. O'Brien agreed with Dr. Bilkey's method, but he failed to provide the reasoning behind the calculations that lead to the 30% rating he assessed, such as his own physical examination findings. Additionally, Plaintiff's treating neurosurgeon agreed with Dr. Bilkey's impairment assessment, although he agreed that he did not personally assess an impairment. For these reasons, the ALJ finds Dr. Bilkey's opinion concerning permanent impairment more credible, and finds that Plaintiff has a 33% impairment following the injury.

The ALJ declined to enhance Dunbar's income benefits by the three multiplier permitted by KRS 342.730. She explained:

> When Dr. Paresh Sheth evaluated Plaintiff on October 4, 2013, Plaintiff was in a lot of pain, and she had a hard time functioning and doing her job properly. He stated that she is a good nurse and somehow she cannot do her job properly because she has a hard time standing, sitting, walking, twisting, turning, pushing, and pulling. He stated that these activities cause a lot of pain, and she has to sit down and rest, but prolonged sitting also causes pain. Plaintiff admitted in her testimony that

she was not working full-time due to her limitations, and she was not doing everything she was supposed to do prior to the injury. Following the surgery, Plaintiff's testimony concerning her inability to walk, sit, stand, push, pull, etc. and her continuing complaints of significant pain are simply not consistent with Dr. McCord's records. Additionally, Plaintiff never actually testified regarding all of her prior job duties as a nurse that she was actually performing at the time of the injury. However, the ALJ finds that based upon the records of Dr. Sheth, and even considering the restrictions of Dr. Bilkey, Plaintiff retains the ability to perform the same work she was performing at the time of her injury given that Dr. McCord's performed what appears to be a successful fusion. On March 24, 2016, Plaintiff reported to Dr. McCord that she was not quite at two miles a day, but she was close and was walking every day. She felt she was "heading the right way." On April 8, 2016, she reported to Dr. McCord, her back was doing well with no radiculopathy and her exam was normal.

On June 28, 2016, Dr. McCord stated that Plaintiff had intermittent complaints, but nothing like before. She stated she was getting better and better. She was increasingly more active and is happy with her outcome. On January 5, 2017, Plaintiff reported to Dr. McCord, she was better than before her surgery and was more active. Plaintiff testified at the hearing that the intensity of the left leg radiculopathy is better than it was prior to the surgery. Plaintiff stated she told Dr. McCord she was walking around the block in the morning and in the evening.

> Dr. O'Brien restricted Plaintiff to repetitive lifting greater than 50 pounds. Although Dr. McCord did agree with Dr. Bilkey's opinions in the IME report, Dr. McCord did not specifically assess restrictions. Given Dr. McCord's essentially normal exam, good result from the surgery, his hope that she could return to work following the surgery, and his statement that the radiculopathy was gone, Dr. Bilkey's restrictions based upon Plaintiff's testimony that she cannot work in any capacity do not seem credible. Thus, the ALJ finds Dr. O'Brien's restrictions are more in line with Dr. McCord's examination findings, and that Plaintiff is not entitled to the 3x multiplier.

Dunbar filed a petition for reconsideration arguing the ALJ erred in failing to award the three multiplier and objecting to the application of the tier-down provision to her award. The ALJ provided the following additional findings in her January 3, 2018 order ruling on the petition for reconsideration:

> In finding that Plaintiff can return to the work she was performing at the time of the injury, the ALJ considered the restrictions recommended by the treating and evaluating doctors and acknowledges that such restrictions would not allow her to perform the functions of a typical floor nurse. However, the ALJ does not believe that Plaintiff was performing the work of a typical floor nurse prior to the injury.
>
> When asked about her activities prior to the injury, she testified that she could not pickup []. She stated, "I

> just don't want you to think I did everything I was supposed to do." It was not clear what Plaintiff was doing prior to the injury in light of her pre-existing and active complaints, but it was clear from her doctor that she was unable to perform her job properly just 6 days before the injury. He stated that she had a hard time standing, sitting, walking, twisting, turning, pushing, and pulling. It was Plaintiff's burden to prove she was unable to perform the job she was performing at the time of the injury. Plaintiff has not convinced the ALJ that her capabilities after the surgery are worse than her capabilities prior to the injury. The ALJ also found Plaintiff's testimony concerning her physical abilities to be not credible in light of Dr. McCord's treatment records, which indicate that Plaintiff was doing well following the surgery. For these reasons, the ALJ found the 3x multiplier to be inapplicable.

Both Dunbar and JSMC appeal. Dunbar challenges the application of the 1994 version of KRS 342.730(4) to her claim, and the ALJ's refusal to enhance her income benefits by the three multiplier. JCMS challenges the determination the 2013 accident caused a permanent exacerbation of the 2005 injury.

ANALYSIS

Application of 1994 Version of KRS 342.730(4)

Dunbar first contends the 1994 version of KRS 342.730(4) is inapplicable to her claim. According to Dunbar, the effect of the ruling in Parker v. Webster County Coal,

LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017) is that subsection 4 is simply deleted, and her income benefits are not reduced. We recently dealt with an identical argument in Pickett v. Ford Motor Co., Claim No. 2015-01910 (WCB February 16, 2018). We explained:

> The Supreme Court determined the 1996 version of KRS 342.730(4) does not pass constitutional muster because it treats injured older workers in the Commonwealth who *do not* qualify for old-age Social Security benefits, such as teachers, differently from all other injured older workers in the Commonwealth who qualify for old-age Social Security benefits. That said, the Supreme Court's pronouncement in Parker lacks guidance as to how income benefits should now be calculated for injured older workers. In other words, should income benefit calculations for injured older workers be devoid of any age-related restrictions or should income benefit calculations revert back to the previous version of KRS 342.730(4) immediately preceding the 1996 version? Having had another opportunity to offer guidance in Cruse v. Henderson, Not To Be Published, 2015-SC-00506-WC (December 14, 2017), the Supreme Court declined. Thus, this Board must turn to other sources in order to address this inquiry.
>
> The previous version of KRS 342.730(4) reads as follows:
>
>> If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be

> reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday.

The above-cited language does not induce the same constitutional quandary identified by the Parker Court, as the tier-down directed in the previous version of KRS 342.730(4) does not differentiate between injured older workers eligible for old-age Social Security benefits and those who are not. All workers injured before the age of sixty-five are subject to the tier-down provisions regardless of their eligibility for Social Security benefits. The previous version of KRS 342.730(4) does, however, differentiate between injured younger workers and injured older workers, because those injured above the age of sixty-five are not subjected to the tier-down. The Parker Court has already addressed the rational basis of providing for such a distinction:

> The rational bases for treating younger and older workers differently is: (1) it prevents duplication of benefits; and (2) it results in savings for the workers' compensation system. Undoubtedly, both of these are rational bases for treating those who, based on their age, have qualified for normal Social Security retirement benefits differently from those who, based on their age, have yet to do so.

Id. at 768.

However, there must be a determination of whether the Supreme Court's pronouncement in Parker revives the previous iteration of KRS 342.730(4).

KRS 446.160 states as follows:

> If any provision of the Kentucky Revised Statutes, derived from an act that amended or repealed a pre-existing statute, is held unconstitutional, the general repeal of all former statutes by the act enacting the Kentucky Revised Statutes ***shall not prevent the pre-existing statute from being law if that appears to have been the intent of the General Assembly***.
> (emphasis added).

In making an educated assessment of the legislative intent at the time the current version of KRS 342.730(4) was enacted in 1996, we turn to a contemporaneous provision, contained in the 1996 legislation, in which the legislature addressed the dire need to preserve the long-term solvency of the Special Fund, now the Division of Workers' Compensation Funds, which reads as follows:

> **Section 90.** The General Assembly finds and declares that workers who incur injuries covered by KRS Chapter 342 are not assured that prescribed benefits will be promptly delivered, mechanisms designed to establish the long-term

> solvency of the special fund have failed to reduce its unfunded competitive disadvantage due to the cost of securing worker's vitality of the Commonwealth's economy and the jobs and well-being of its workforce. Whereas it is in the interest of all citizens that the provisions of this Act shall be implemented as soon as possible, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

The language of Section 90 indicates the legislature, at the time the 1996 version of KRS 342.730(4) was enacted, intended to preserve the solvency of the Special Fund. Indeed, the language used in Section 90 speaks to this intent as being "an emergency." This legislative intent cannot be ignored in the wake of the Supreme Court's determination the 1996 version of KRS 342.730(4) is unconstitutional. This expressed concern certainly bolsters the conclusion the legislature contemplated a revival of the tier-down provisions in the previous version of KRS 342.730(4).

Accordingly, we hold that income benefits are to be calculated pursuant to the tier-down formula as set forth in the pre-existing version of KRS 342.730(4) in place when the statute in question was enacted in 1996. As the record indicates Pickett was sixty at the time of the July 13, 2015, injury to his left shoulder, and the ALJ awarded PPD benefits commencing on July 13, 2015, we vacate the ALJ's award of PPD benefits which are "subject to the limitations set forth in

> KRS 342.730(4)" and remand for a revised calculation of PPD benefits and an amended award consistent with the views set forth herein.

In accordance with our holding in Pickett, and because Dunbar was not sixty-five years old at the time of the October 10, 2013 injury, we conclude the ALJ properly awarded PPD benefits subject to the tier-down provision contained in KRS 342.730(4) as enacted in 1994.

Three Multiplier

Dunbar next argues the ALJ erred in refusing to enhance her income benefits by the three multiplier. Though the ALJ placed emphasis on the fact Dunbar was not working full-time prior to the 2013 accident, she explains she was in fact working 24-36 hours a week. Dunbar claims the opinions of Drs. Robbe, Bilkey, and McCord are unanimous that she is unable to return to her pre-injury work.

As the claimant in a workers' compensation proceeding, Dunbar had the burden of proving each of the essential elements of his cause of action, including entitlement to the three multiplier. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is

defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

The ALJ cited applicable law, and correctly examined whether Dunbar presently has the physical capacity to perform the job in the same manner as she had performed it prior to the injury. The ALJ considered Dunbar's testimony regarding her pre- and post-injury work duties. Although work as a floor nurse could involve lifting patients, Dunbar acknowledged she did not perform this duty prior to the 2013 accident. Dunbar further acknowledged she received assistance with other duties prior to the 2013 accident, stating she "didn't do everything [she] was supposed to do."

Examining the medical evidence relating to this issue, the ALJ referenced Dr. Sheth's notes, which state Dunbar was having difficulty performing job tasks just days before the 2013 accident. The ALJ emphasized Dr. McCord's treatment notes, which document the progressive abatement of her pain symptoms after the fusion surgery. At several office visits following the surgery, Dunbar reported to Dr. McCord

that her symptoms were greatly improved compared to her condition prior to the 2013 accident.

We recognize that the ALJ stated, "Dr. Bilkey's restrictions based upon [Dunbar's] testimony that she cannot work in any capacity do not seem credible." Dunbar argues the ALJ misconstrued Dr. Bilkey's restrictions because he actually restricted Dunbar to sedentary work. We disagree. The ALJ considered Dr. Bilkey's restrictions in light of the successful fusion surgery, and found them less than credible. We find nothing unreasonable in this interpretation of the evidence. We further conclude the ALJ properly examined the manner in which Dunbar was performing her pre-injury nursing duties. Because Dunbar acknowledged she was not performing all the standard floor nurse duties prior to the 2013 accident, it was correct to compare her actual pre- and post-injury duties.

The opinions of Drs. McCord and Sheth, in addition to Dunbar's testimony, constitute substantial evidence supporting the ALJ's determination that she was not performing the full range of the duties of a floor nurse prior to the October 10, 2013 injury. This proof also substantiates the ALJ's determination Dunbar has the post-injury ability to perform work as a floor nurse in the same manner as she had

been performing that job prior to the injury. While Dunbar identifies evidence supporting a finding that she is entitled to the three multiplier, there was substantial evidence presented to the contrary. The ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different outcome. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Exacerbation of 2005 Injury

JSMC argues that Dunbar sustained no permanent injury as a result of the 2013 accident, and her current low back condition relates solely to the 2005 accident. JSMC heavily emphasizes the evidence supporting this conclusion, including the fact Dr. Sheth treated Dunbar for the active low back condition just days prior to the 2013 injury. JSMC draws our attention to Dr. Sheth's office notes in October 2013, in which he recommends a lumbar MRI because Dunbar's symptoms were increasing. According to JSMC, this referral is indication that more significant pathology was suspected, and impeded Dunbar's ability to work before the 2013 accident. Additionally, JSMC points to the ongoing and continual care Dunbar received for her lumbar condition between 2005 and 2013, from Dr. Sheth as well as Drs. McCord and Lach. On

this basis, it contends the condition in 2013 is merely a continuation of the pre-existing active condition. Given the well-documented ongoing treatment, JSMC asserts need for surgery and current treatment relates to the 2005 injury.

JSMC's argument is essentially a request for this Board to re-weigh the evidence and substitute its judgment for that of the ALJ as to the weight and credibility of the evidence. We may not do so. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The record contained conflicting medical evidence that would have permitted the ALJ to rule in JSMC's favor. However, where the evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

Regardless of whether surgery had been recognized as an eventuality, an employer is responsible if testimony establishes the work incident hastened the date on which the surgery would be required. Derr Construction Co. v. Bennett, 873 S.W.2d 824 (Ky. 1994). The record contained substantial evidence that the work injury worsened Dunbar's condition, hastening or causing the need for surgery. Dr. Robbe opined the 2013 accident caused or exacerbated Dunbar's low back condition. Dr. McCord stated the 2013 injury clinically

exacerbated the low back condition and necessitated the need for fusion surgery to a significant degree. Dr. Lach, who had treated Dunbar following the 2005 injury, concluded the 2013 injury brought her facet arthropathy into disabling reality and caused a dramatic change in her symptoms. He stated the 2013 injury exacerbated her ongoing pain, noting she went from working and functioning to not being able to work following that injury. He felt the 2013 work injury was a substantial factor in causing her inability to work.

JSMC is able to point to evidence to support a conclusion in its favor. However, its interpretation of the evidence falls short of compelling a determination the 2013 accident played no role in Dunbar's current condition. We have found substantial evidence supports the ALJ's conclusions, and therefore we are not at liberty to disturb the opinion.

CONCLUSION

Accordingly, the November 27, 2017 Opinion, Award and Order and the January 3, 2018 Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge, and the October 26, 2015 Interlocutory Order of Hon. Thomas G. Polites, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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