Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2022

CLAIM NO. 201986691

JENNIFER WHITAKER PETITIONER

VS. **APPEAL FROM HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE**

IRVINE NURSING & REHABILITATION
DR. DAVID BONOMWORTH
and HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART AND REMANDING

* * * * * *

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

STIVERS, Member. Jennifer Whitaker ("Whitaker") appeals from the February 8, 2022, Opinion, Award, and Order and the March 2, 2022, Order of Hon. W. Greg Harvey, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits and medical benefits through October 4, 2019, for a temporary injury to Whitaker's lumbar spine. Irvine Nursing & Rehabilitation

("Irvine Nursing") received a credit for post-injury wages paid against its obligation to pay past due TTD benefits. The ALJ dismissed Whitaker's claim for permanent injuries to her right hand and lumbar spine.

On appeal, Whitaker asserts the ALJ erred in granting Irvine Nursing a credit for post-injury wages because it allegedly failed to introduce proof of her post-injury *net* wages.

The medical evidence is irrelevant to the issue on appeal and will not be summarized herein.

The Form 101 alleges Whitaker sustained work-related injuries to multiple body parts on March 25, 2019, in the following manner: "Plaintiff injured her back and right upper extremity while assisting a patient who was in a motorized wheelchair. The control stick of the wheelchair was accidentally struck, causing the wheelchair to move and knock Plaintiff and the patient into a wall."

On December 23, 2021, Irvine Nursing filed Whitaker's pre-injury and post-injury *gross* wages. Net wages are not included in this filing.

Whitaker testified by deposition on June 17, 2021. Whitaker also testified at the hearing. Regarding her return to work following the work-related injury, Whitaker testified as follows:

> Q: Okay. You'll agree with me that when you returned to work at Irvine Nursing and Rehabilitation of July of 2019, that your hourly rate of pay was $13.49, the same as it was on the alleged date of injury, correct?
>
> A: Correct.
>
> Q: Now, on the alleged date of injury, you were working 40 hours a week; am I correct?

A: Yes.

Q: Okay. When you returned to work for Irvine Nursing, you were, again, working 40 hours a week; am I correct?

A: Correct.

The November 29, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: "Extent and duration, Permanent income benefits per KRS 342.730, including multipliers, AWW pre and post, TTD Benefits, Pre-existing active impairment, Temporary/aggravation vs. permanent injury, Pending medical dispute, and Future Medical benefits."

In the February 8, 2022, Opinion, Award, and Order, the ALJ set forth the following findings of fact and conclusions of law:

A. Temporary vs. Permanent Injury/Temporary Total Disability

…

Whitaker argues she has sustained a permanent injury as a result of the March 25, 2019 incident and that she had no pre-existing active impairment or disability. Although she treated for low back and radicular symptoms of the same character in 2015 and 2018, Whitaker argues she was symptoms free and working without restrictions until the incident on March 25, 2019. Thereafter, she has worked different jobs but has not returned to her pre-injury work. She has also undergone injective therapy and begun taking Norco. Whitaker relies on Dr. Nazar's opinion that she has a left-sided herniated disc that was caused by the 2019 work incident.

The Defendant argues Whitaker has had degenerative changes in the lumbar spine that wax and wane and have been symptomatic prior to the work incident in question. It contends the same scenario applies here. Whitaker was involved in an incident, had some treatment and reported to Dr. Ganzel she was 100%

relieved of symptoms. He released her to return to work without restrictions and found no permanent impairment. It also relies upon Dr. Hodes opinion. He concluded the source of Whitaker's symptoms were the degenerative changes in the spine and the impact of the L5-S1 nerve root as it exits the foramen near the left lateral recess. In Dr. Hodes' opinion, the findings on the 2019 MRI were present prior to that date as evidenced by the 2018 CT scan and the fact that Whitaker had similar symptoms and treatment in 2015 and 2018. He did not feel the 2019 work incident caused any alteration to the lumbar spine and was a lumbar sprain that resolved after appropriate treatment. The ongoing complaints Whitaker has of back pain and radiculopathy stem from the same degenerative changes that have caused symptoms off and on over the years.

The ALJ has considered the evidence and does not have the discretion to deviate from the opinions of record on the question of causation. In this case, that means the ALJ must either find the March 25, 2019 event entirely caused Whitaker's problems or had nothing to do with them. Although neither choice is particularly attractive, the ALJ will undertake to make and explain his finding.

The facts indicate Whitaker had episodes of back pain in 2015 and 2018. In 2018, eight months prior to the alleged work injury, she had pain sufficient to result in an emergency room visit and a CT scan. She reported back pain with radiation into the lower extremities. The radiologist who interpreted the CT scan suggested an MRI be done if her symptoms persisted. At the time, her symptoms did improve until the work incident. She then underwent a course of care that included an MRI and two epidural steroid injections. The first was administered on the right and resulted in substantial relief. The second was administered bilaterally given Whitaker's complaints. She then reported 100% resolution of her symptoms just as she had after the prior episodes of pain.

These facts, coupled with the opinions of Dr. Ganzel and Dr. Hodes are persuasive. Dr. Ganzel opined Whitaker had a work injury that was properly treated and resolved. He found no permanent impairment and released her to return to full duty work as of October 4, 2019. He was the treating physician and has the most

interaction with Whitaker. Dr. Hodes' opinion echoes that of Dr. Ganzel. He acknowledges Whitaker has degenerative changes in the spine that, when active, cause her to report radicular symptoms and cause her to be impaired. Like Dr. Ganzel, Dr. Hodes views Whitaker's symptoms to be episodic, non-surgical and subject to injective therapy on an as-needed basis when flare ups occur. Structurally, neither Dr. Ganzel nor Dr. Hodes identified any demonstrable change to the lumbar spine that could be attributed to the work incident. Each conceded the presence of pathology on imaging.

Dr. Nazar opined the 2018 episode of lumbar pain with radicular symptoms was attributable to a lumbar sprain that resolved. He contends the 2019 incident resulted in a left herniated disc. Dr. Hodes and Dr. Ganzel disagree with that conclusion and have explained why. Dr. Hodes demonstrated the degenerative changes in his report with images to explain why Whitaker has symptoms that wax and wane.

The ALJ finds Dr. Ganzel, Plaintiff's treating physician persuasive on the issue of whether Whitaker suffered a permanent injury. Dr. Hodes explanation of the cause of Whitaker's symptoms is also persuasive. In reliance upon their opinions and Whitaker's report of 100% relief following her second epidural steroid injection, the ALJ finds she suffered only a temporary injury. She was not placed at MMI by Dr. Ganzel from that lumbar strain until October 4, 2019 and TTD is payable from the date of injury until October 4, 2019.

The record reflects TTD was terminated as of July 29, 2019 when Whitaker returned to work at the same hourly rate. The parties stipulated TTD was paid at the weekly rate of $343.32 which was apparently premised on a proposed AWW of $514.98. The parties could not stipulate to a pre-injury AWW. Defendant filed records, post-hearing, that suggest an AWW of $458.64. Plaintiff argues her pre-injury AWW was $539.60 as she worked 40 hours a week at the hourly rate of $13.49.

Defendant's pre-injury wage records only go back one quarter to January 15, 2019 and therefore are incomplete. The ALJ finds Whitaker's testimony persuasive on her pre-injury wages and finds her pre-injury AWW was $539.60. She is entitled to TTD at the

> weekly rate of $359.73. Although Whitaker returned to work on July 29, 2019, she was doing different work. It was not until October 4, 2019 that she was released to return to full duty. The ALJ finds Whitaker was doing work as a receptionist for which she did not have prior experienced and training. That work was not the same as her work as a restorative aid and CNA and was not her regular and customary work. For that reason she is entitled to TTD until October 4, 2019 when Dr. Ganzel released her to return to full duty.
>
> The ALJ further finds that pursuant to KRS 342.730(7), the Defendant is entitled to a credit for wages actually paid during the additional period of TTD awarded herein above.
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> **B. Medical Benefits**
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> Whitaker suffered a temporary injury from which she reached MMI on October 4, 2019. At that time, Dr. Ganzel opined she needed no additional treatment specifically related to the effects of the March 25, 2019 incident. Dr. Hodes echoed that sentiment. Although Whitaker may require additional 16 treatment for the degenerative condition of her lumbar spine, the undersigned finds the Defendant's responsibility for medical treatment ended as of October 4, 2019 when Dr. Ganzel placed Whitaker at MMI and released her to return to full duty. Any medical treatment incurred thereafter is not the Defendant's responsibility.

In her Petition for Reconsideration, Whitaker asserted the same argument that she asserts on appeal.

> In the March 2, 2022, Order, the ALJ held as follows:
>
> This matter is before the ALJ on Plaintiff's Petition for Reconsideration. Whitaker argues the ALJ erred in awarding the Defendant a credit as set forth in KRS 342.730(7) against past due TTD awarded for wages paid. She contends there was no proof of wages submitted by the Defendant as to net wages earned and therefore no credit can be afforded.
>
> TTD was awarded from March 26, 2019 through October 4, 2019. The Defendant filed pre and post injury

> wages on December 23, 2021. That filing indicates Whitaker was paid wages for the weeks of March 26, 2019 through April 9, 2019 and again from August 13, 2019 through October 22, 2019 and continuing. Those were paid at the rates of $13.49 per hour until September 24, 2019 when Whitaker's hourly rate increased to $13.76. The credit is statutorily mandated and the ALJ finds evidence of Whitaker's wages were filed and not contradicted. For those dates she earned wages a credit is due that subsumes the TTD award for those weeks. During the period of TTD awarded, there are weeks during which Whitaker did not work and earn wages and during those weeks no credit applies.
>
> Plaintiff's Petition is SUSTAINED insofar as the award of a credit for wages paid is clarified hereinabove.

Whitaker argues that the ALJ erred in granting Irvine Nursing a credit for post-injury wages because it failed to offer proof of Whitaker's post-injury wages minus applicable taxes which is mandated by KRS 342.730(7). We reverse the ALJ's award of a credit for post-injury wages paid and remand the claim for entry of an amended opinion and award in accordance with the views set forth herein.

As an initial matter, Whitaker is not contesting the fact she returned to work following her injury. The only issue on appeal is Irvine Nursing's failure to introduce any proof of her post-injury gross wages minus applicable taxes. Because no such proof was introduced, Irvine Nursing is not entitled to the credit.

The newly enacted KRS 342.730(7), effective July 14, 2018, states as follows:

> Income benefits otherwise payable pursuant to this chapter for temporary total disability during the period the employee has returned to a light-duty or other alternative job position shall be offset by an amount equal to the **employee's gross income minus applicable taxes** during the period of light-duty work or work in an alternative job position. (emphasis added).

As a general rule, statutes and duly promulgated regulations are open to construction only if the language contained therein is ambiguous and requires interpretation. If, on the other hand, the language of the statute or regulation is clear and unambiguous on its face, statutory construction mandates that we follow the provision's plain meaning. Layne v. Newberg, 841 S.W.2d 181 (Ky. 1992); Overnite Transportation v. Gaddis, 793 S.W.2d 129 (Ky. App. 1990); Claude Fannin Wholesale Co. v. Thacker, 661 S.W.2d 477 (Ky. App. 1983). In this instance, we find nothing ambiguous within the explicit language of KRS 342.730(7). KRS 342.730(7), as amended, is clear. The credit against income benefits for post-injury wages encompasses the "employee's gross income **minus applicable taxes**." (emphasis added). As the party requesting the credit, Irvine Nursing had the burden to produce evidence showing entitlement to the credit. American Standard v. Boyd, 873 S.W.2d 822 (Ky. 1994); Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008). Here, Irvine Nursing filed only Whitaker's post-injury gross wages and not, as mandated by KRS 342.730(7), gross income minus applicable taxes. In its response brief to this Board, Irvine Nursing suggests that it can "easily provide" the necessary information so that the proper credit can be calculated. However, additional proof at this stage of the litigation is tantamount to a "second bite at the apple" and is inappropriate. Nesco vs. Jacklyn Haddix, 339 S.W.3d 465, 472 (Ky. 2016). The correct time to have introduced evidence of Whitaker's post-injury wages less applicable taxes was during the pendency of the litigation before the ALJ issued the final order and award. Irvine Nursing failed to produce the appropriate wage

records. Consequently, we must reverse the granting of an offset to Irvine Nursing against its obligation to pay TTD benefits for Whitaker's post-injury wages.

Accordingly, we **REVERSE** the ALJ's award of a credit for post-injury wages as set forth in the February 8, 2022, Opinion, Award, and Order as affirmed in the March 2, 2022, Order. This claim is **REMANDED** for entry of an amended order and award in accordance with the views set forth herein.

ALL CONCUR.

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