Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **August 16, 2019**

CLAIM NO. 201658939

SOPHIA PETH PETITIONER

VS.

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

AMAZON,
And HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Sophia Peth appeals from the March 18, 2019 Opinion, Award and Order and the April 10, 2019 Order rendered by Hon. W. Greg Harvey, Administrative Law Judge ("ALJ"), awarding permanent partial disability benefits enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2. On appeal, Peth

argues KRS 342.730(1)(c)2 is not applicable to her case and she is entitled to the three multiplier pursuant to KRS 342.730(1)(c)1. We affirm.

The facts necessary for resolution of the issue on appeal are not in dispute. Peth worked in an Amazon fulfillment center warehouse. On November 3, 2016, she was processing a return package when an automotive part fell through a box, striking her on the hip and knee. Peth received temporary total disability benefits from December 15, 2016 through January 4, 2017, and from February 6, 2017 through December 24, 2017. On April 30, 2018, Amazon accommodated Peth's restrictions, placing her in a customer service position at a call center. Her best post-injury quarter produced a higher average weekly wage ("AWW") than she was earning at the time of the injury. At the time of the hearing, Peth had relocated to South Carolina and was working at Walgreens earning an AWW less than what she earned at the time of the injury.

The ALJ found Peth has a 5% impairment rating from trochanter bursitis and piriformis syndrome as a result of the November 3, 2016 work injury. The ALJ further determined she lacks the physical capacity to perform the work in the warehouse she was performing at the time of her injury. The ALJ also determined Peth returned to work in the customer service center at an AWW of $599.74, slightly greater than her pre-injury AWW of $556.00. The ALJ then provided the following analysis and findings:

> Having found that both KRS 342.730(1)(c)1 and (1)(c)2 apply to Peth's situation the holdings in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006) require a determination of whether or not Peth is likely to be able

to continue earning a wage equal to or greater than her pre-injury wage.

The Kentucky Supreme Court instructed that once the Administrative Law Judge determines KRS 342.730(1)(c)1 and (1)(c)2 both apply as follows additional analysis must be completed:

> We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that 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, the application of paragraph (c)1 is appropriate.

Fawbush, at 12.

In Adams, *supra*, the Kentucky Supreme Court explained further:

> The court explained subsequently in Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), that the Fawbush analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

Id. at 168-169.

In making that decision the law requires a number of factors to be evaluated. The facts reveal Peth has now left the call center position and is working in another position for Walgreens where she is actually earning less. The departure from the call center position must be

> evaluated. Peth testified that she stopped working in the call center because she could not sit all day and sometimes was on a call when she needed to change positions and could not. She was not taking a level of medication that made it difficult or unlikely she could continue her work in the call center. Amazon accommodated Peth by putting her in the call center where she could work in a sedentary position which indicates a level of accommodation and also a commitment to Peth by Amazon. Finally, the work performed, as indicated by the vital nature of customer service was vital and essential to Amazon's business.
>
> Based on these findings, the undersigned is persuaded that Peth has the ability to be able to continue working in her capacity as a call center operator and thereby earn wage that exceed her pre-injury average weekly wage. In so doing, the Administrative Law Judge is cognizant of the fact that Peth left that position and felt it was problematic for her due to sitting. However, the fact that she returned to the job and that it meets her restrictions indicates she could procure and continue to be employed in a position that would provide the same or greater wages.
>
> Here, the undersigned has found that KRS 342.730(1)(c)2 is appropriate because of Peth's post-injury return to work at greater wages and the finding that she is capable to continue to be able to perform that level of work and make the same or greater wages for the foreseeable future. Because of that finding, the law dictates what permanent partial disability benefits the undersigned may award.

In her petition for reconsideration, Peth made the same argument regarding the appropriate multiplier that she raises on appeal. The ALJ overruled Peth's petition as a re-argument of the case.

On appeal, Peth argues the ALJ erred in failing to enhance her benefits by the three multiplier. She agrees she is entitled to the three multiplier because she

does not retain the physical capacity to return to her pre-injury work. While acknowleging she returned to work at the same or greater wage, Peth argues the issue of her ability to continue earning the same or greater wage was not before the ALJ because she was no longer earning the same or greater wage at the time of the hearing or the rendition of the ALJ's decision. For this reason, she contends her case should not have been analyzed under Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006).

We find no error in the ALJ's analysis. The ALJ's determination that Peth lacks the physical capacity to do the work she was performing at the time of the injury is not at issue on appeal. Nor does Peth contest the finding that her work as an Amazon customer service associate constituted a return to work at the same or greater wage. Thus, the ALJ properly determined a Fawbush analysis was required.

KRS 342.730(1)(c)2 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. This provision shall not be construed so as to extend the duration of payments.

KRS 342.730(1)(c)2 is triggered when the worker returns to work at an AWW equal to or greater than the pre-injury AWW. The language of the provision places no

restriction upon the duration of the post-injury employment. It simply requires a return to work at a post-injury AWW that meets or exceeds the pre-injury AWW.

In Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), the Supreme Court observed the standard is whether the injury has permanently altered the worker's **ability** to earn an income. The determination is based upon the ability to earn the same or greater wage, rather than the actual earnings at the time of the decision. Significantly, in Adams, the claimant was not earning any wage when the decision was rendered, but the award of benefits enhanced by the two multiplier was found appropriate. In Adkins v. Pike County Bd. Of Educ., 141 S.W.3d 387 (Ky. App. 2004), the Court of Appeals held the Fawbush analysis includes a "broad range of factors", only one of which is the ability of the injured worker to perform his pre-injury job. Once there has been a return to work at the same or greater wage, the claimant's current wage is only one factor an ALJ may consider in determining the likelihood the worker will continue to earn that wage for the indefinite future. An ALJ may consider the cessation of the return at the same or greater wage prior to the hearing, but the cessation prior to the hearing is not determinative.

Here, the ALJ was aware Peth no longer earned the same or greater wage at the time of the hearing. The ALJ was free to assign whatever weight he felt appropriate to that fact. He considered Peth's retained physical capacity, restrictions, post-injury earnings, and medication level, and was convinced she has the ability to perform work that would produce the same or greater wage for the indefinite future. The record contained substantial evidence supporting the ALJ's conclusion. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be

said his conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the March 21, 2019 Opinion, Award and Order and the April 10, 2019 Order rendered by Hon. W. Greg Harvey, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR

DISTRIBUTION:

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