Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 5, 2024

CLAIM NO. 202186177

SUSAN PIOTROWSKI — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

NORTON HEALTHCARE LOUISVILLE — RESPONDENT/ CROSS-PETITIONER
AND
HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

MILLER, Member. Susan Piotrowski ("Piotrowski") appeals and Norton Healthcare Louisville ("Norton") cross-appeals from the December 23, 2023 Opinion, Award, and Order and the January 20, 2024 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ").

The ALJ found Piotrowski suffered a work-related right wrist injury and awarded permanent partial disability ("PPD") benefits, temporary total disability ("TTD") benefits, and medical expenses. He found she sustained only a temporary injury to the left knee and awarded TTD benefits from February 12, 2021 to June 29, 2021 for that condition.

Piotrowski appeals, arguing the ALJ erred in failing to consider her wages filed by Norton in its amended filing of post-injury wages and in not enhancing her award of benefits by the two-multiplier contained in KRS 342.730(1)(c)2. She also argues the ALJ failed to properly conduct an analysis per Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007) in determining her left knee pain impairment rating per the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") was pre-existing and active. Piotrowski argues there is no evidence her knee condition was symptomatic and impairment ratable before her injury.

Norton cross-appeals, arguing the ALJ erred in finding no post-injury, after-tax wage records were filed which would have entitled it to a credit during overlapping periods of TTD based on KRS 342.730(7). Both parties agree that post-injury wage records were filed with two separate filings and the second filing contained after-tax wages. For the reasons set forth below, we affirm in part, vacate in part, and remand.

BACKGROUND

Piotrowski was born on August 17, 1959. She holds a Ph.D. in computer science but has worked as a pharmacy technician as a second career. She

worked at CVS Pharmacy and Jewish Hospital before working as a certified pharmacy technician in the inpatient pharmacy at Norton beginning in August 2020. Piotrowski testified by deposition on February 6, 2023 and at the final hearing on October 31, 2023. Piotrowski had a previous injury claim, involving 1984 injuries to both knees. In 2012, she underwent bilateral total knee replacements. She settled that claim for over $100,000 including waiving her right to medical benefits.

Piotrowski's job duties as a pharmacy technician required spending 75% of her time walking and standing, restocking shelves, and delivering medicines to different rooms and replacing them. She occasionally sat when mixing compounds if the singular chair in the office was not already taken. She occasionally had to lift boxes weighing five to 50 pounds. She was paid $26.00 an hour for 40 hours of work per week.

This claim involves a February 12, 2021 injury to her left knee and right wrist. Piotrowski was leaving work when she slipped and fell in the snowy parking garage. She reached out her right arm to catch herself and landed on her left knee. She attempted to drive home but turned around and went to the Norton emergency room. Her left knee had an abrasion and effusion and diminished range of motion. The right wrist was swollen and tender. Piotrowski was diagnosed with a closed fracture of the distal end of the right radius and an acute left knee pain. She was provided a splint and Dr. Donald J. Pomeroy assigned restrictions of occasional walking and standing.

She returned to light duty and worked reduced hours after her injury. She used flex and vacation time for some of her time off work from the injuries, and she has not returned to consistent 40-hour work weeks.

Piotrowski treated with Dr. Pomeroy for her bilateral knee condition prior to her February 12, 2021 work injury and continued treating with him afterward. Dr. Pomeroy performed Piotrowski's bilateral total knee replacements in 2012. She saw Dr. Pomeroy approximately once a year following surgery for checkups. After her surgeries, she took medication for arthritis and two medications for a nerve condition. During her annual check-ups, the office notes report Piotrowski was doing well and reported she could perform activities of daily living. She often denied having any pain or swelling. In 2019, she reported some occasional pain in her right knee. At her February 2020 follow-up, she reported her pain was a zero out of 10. She was not seen by Dr. Pomeroy again until after the February 12, 2021 work incident. On February 19, 2021, she relayed her knees had been doing great until her fall in the parking garage at work. On March 5, 2021, she reported having left knee numbness. On April 23, 2021, she reported pain, tightness, and reduced range of motion. Dr. Pomeroy recommended manipulation and on May 14, 2021, Piotrowski had improved but was still symptomatic. On August 13, 2021, she reported she was not able to walk any distance at all. Piotrowski's last appointment with Dr. Pomeroy was on November 8, 2022. She reported occasional pain in her left knee with instability on exam bilaterally but more symptomatic on the left. She was prescribed a hinged knee brace.

Piotrowski testified that she switched care to Dr. Tyler Keller when Dr. Pomeroy retired. She stated she had seen Dr. Keller twice as of the date of the hearing.

Dr. Keller responded to a questionnaire on June 5, 2023 stating the February 12, 2021 fall did not cause Piotrowski any permanent injury and did not result in any permanent restrictions. When asked if Piotrowski has a pre-existing active condition in both her knees prior to the February 12, 2021 fall, he stated, "Yes, history of bilateral total knee arthroplasties and remote patellectomy right knee."

Piotrowski first treated with Dr. Ethan Blackburn on February 28, 2021 for a work-related right wrist injury. He diagnosed a right distal radius fracture and recommended immobilization and no use of the right arm. On March 5, 2021, Piotrowski's right wrist was stiff but less painful. The pain radiated into her right arm and she continued immobilization. On April 2, 2021, her wrist was sore and Dr. Blackburn advised her to continue using the brace and to avoid use of the right arm. On April 30, 2021, Piotrowski reported the pain was worse, but Dr. Blackburn wrote she could return to full duty work.

On a May 27, 2021 visit, Piotrowski had a positive Phalen's and was diagnosed with moderate right carpal tunnel syndrome, a non-displaced radial styloid fracture, and an unchanged scaphoid cyst. She was given an injection and was told she could continue full duty work. On August 27, 2021, her carpal tunnel syndrome had worsened, as she was experiencing numbness, tingling, and pain. Dr. Blackburn restricted her from using her right hand. He recommended a carpal tunnel release, which was performed on September 14, 2021.

On September 28, 2021, Piotrowski reported complete relief of her nocturnal right wrist symptoms and almost complete relief of her daytime symptoms. She was given restrictions of no lifting more than five pounds with her right arm for four weeks. On November 22, 2021, she could use her right arm as tolerated and was to return as needed. Piotrowski presented on January 31, 2022 with sharp pain in her right middle finger with pain in her palm. Dr. Blackburn diagnosed right middle trigger finger and provided an injection. On March 29, 2023, Dr. Blackburn performed a right middle trigger finger release. Dr. Blackburn released her for full duty work as of May 15, 2023. On March 30, 2023, he confirmed the zero percent impairment rating he assigned for the right wrist on November 22, 2021.

Dr. Jeffrey Fadel examined Piotrowski on October 31, 2022 at her attorney's request. She had diminished right wrist range of motion and trigger finger. Her left knee was tender and had diminished range of motion. Dr. Fadel diagnosed a non-displaced distal radial and ulnar styloid right wrist fracture, right carpal tunnel syndrome, right middle finger stenosing tenosynovitis, and loosening of the tibial compartment. He assigned a 6% impairment rating for the wrist and a 3% impairment rating for the left knee for a total work-related impairment of 9%. He assigned restrictions of a 16-hour work week, avoid repetitive stair climbing and continuous standing of more than 55 out of every 60 minutes, no walking or standing more than 55 out of every 60 minutes, walking no more than 30 minutes without a break and avoid ladders, and no carrying more than 25 pounds or pushing/pulling more than 40 pounds.

On July 10, 2023, Dr. Fadel responded to the questionnaires completed by Dr. Keller and Dr. Blackburn. He disagreed with Dr. Keller's assessment because prior to February 12, 2021, Piotrowski was asymptomatic. He also disagreed with Dr. Blackburn stating he did not take into account an impairment rating can be assigned for loss of range of motion.

Dr. Thomas Loeb examined Piotrowski on June 29, 2021 at Norton's request. On physical examination, Piotrowski had diminished bilateral knee range of motion, PVT zero degrees left, and mild tenderness to palpitation of the left knee. He diagnosed a resolved left knee contusion, recommended home exercises, and said no restrictions were needed. He opined she was at maximum medical improvement ("MMI") as of June 30, 2021.

On January 18, 2023, Dr. Loeb reiterated that his June 29, 2021 examination of Piotrowski's left knee was normal. He stated there is no way to prove the right middle trigger finger is work-related. He opined the impairment rating for the left knee is zero but if he were to assess an impairment rating for pain it would be 1% but none of it would be work-related.

Dr. Loeb performed a second evaluation on October 10, 2023. He noted Piotrowski's right wrist had diminished range of motion and she was tender over the distal palmer crease of the right longer finger. She had reduced bilateral knee range of motion. He opined she was at MMI for the left knee as of June 29, 2021 and she was at MMI for the right wrist six weeks after the carpal tunnel release. He opined Piotrowski had no signs of symptom magnification and requires no restrictions of further treatment.

Piotrowski testified that prior to the February 12, 2021 work injury, she was able to perform fine work required of a pharmacy technician. She was able to walk three to five miles a day and could drive a car, albeit with hand controls because it was easier on her knees. She stated that prior to the February 12, 2021 injury, she sometimes took the stairs instead of the elevator to get additional exercise. When asked about her activities after her knee replacement, Piotrowski testified:

> A. I played tennis, ran track.
>
> Q. Okay.
>
> A. Scuba dive, you know, that kind of thing. Hiking. In fact, I sent Dr. Pomeroy pictures of hiking to the top of the Chimney Tops after my knee replacement to show him how well I did my rehab and that all was good in the world, because those were things I couldn't do before the knee replacement.
>
> Q. Okay. Did you play tennis after your knee replacements?
>
> A. Yes.
>
> Q. Do you still play tennis?
>
> A. No.

Piotrowski took Gabapentin and Celebrex for her knee condition but was not in any pain or seeking any medical treatment prior to the work incident. She stated she has never been able to return to full duty work and that Dr. Keller still has her on work restrictions due to her knee condition. She testified she did not need any restrictions prior to the work incident.

The parties stipulated to a pre-injury AWW of $858.08. On October 30, 2023, Norton filed post-injury wage records from February 12, 2021 through

September 15, 2023. These records included her gross wages but did not include after-tax amounts. However, on November 2, 2023, Norton filed amended wage records that also included tax deductions and Piotrowski's net pay for pay periods from February 12, 2021 through the period ending October 27, 2023. The ALJ's October 31, 2023 Order at the final hearing stated, *verbatim*: "Defendant has 21 days to file any additional post DOI written wage records."

The Benefit Review Conference Order and Memorandum listed the following as contested issues: Benefits under KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, TTD, KRS 342.165, correct use of the AMA Guides, and multipliers. The issue of an employer credit against TTD benefits for wages paid was added as an issue at the final hearing.

The ALJ made the following findings regarding her left knee injury and the application of multipliers which are set forth *verbatim*:

> I do, in fact, find Piotrowski credible. I do not disbelieve her when she says she has more pain in her left knee than prior to February 12, 2021. I also respect Dr. Fadel and will, on other issues, rely upon him. However, I cannot ignore her significant prior medical history for the left knee. These includes an injury in 1974, an injury in 1984 and a total knee replacement in 2012. Since then, she continued to follow up regularly and while she generally did well she did have problems when required to stand or walk for work. She had a modified car and had difficulty standing at Thornton's. She continued in pain management. No diagnostic test since February 12, 2021, has shown a change in condition and Dr. Keller has said she has no change in condition. Dr. Pomeroy, before he retired did not say or do anything that would imply, she had a change in condition.

In reliance on the above analysis and with specific reliance on Dr. Loeb the left knee injury is dismissed as not resulting in any permanent work-related condition.

She did have a temporary injury for it. This is verified by the ER records, the photos she introduced, the records from Dr. Pomeroy and the opinions of Dr. Loeb regarding the injury and when it reached MMI.

…

I reject the impairment rating as assigned by Dr. Blackburn. First, he assigned that rating prior to his final treatment and surgery for Piotrowski and therefore prior to her being at MMI. His subsequent endorsement of that rating seems perfunctory. Further, that rating, as noted by Dr. Fadel, did not take into account range of motion, which is an entirely reasonable way to rate an injured worker, but relied solely on the EMG. Further, as noted, I find Ms. Piotrowski credible. If she says she continues to have pain and limitations I believe her.

I also note that when Dr. Loeb finally examined Piotrowski's right wrist, he noted diminished range of motion and he specifically said scar tissue could provide an anatomical reason for the loss of range of motion. As such and in reliance on Dr. Fadel I accept the 6% rating assigned by Dr. Fadel.

Piotrowski never returned to work at equal or greater wages and KRS 342.730(1)(c)2 does not apply.

As for KRS 342.730(1)(c)1 there are no restrictions of records, solely for the right wrist, which would prevent Piotrowski from returning to the type of work done on the date of injury. The sole restrictions she has for that injury are carrying no more than 25 pounds and push/pulling more than 40 pounds. There is nothing in her testimony that would imply those restrictions would prevent her from doing her work. She testified that sometimes she had to lift, not carry, up to 50 pounds, but usually it was no more than 5 pounds. Dr. Blackburn assigned no restrictions. Dr. Loeb assigned no restrictions. Since Piotrowski can return to the work done on the date of injury KRS 342.730(1)(c)1 does not apply.

Both parties filed Petitions for Reconsideration. Piotrowski requested additional findings regarding how her knee condition was symptomatic and impairment ratable prior to the work injury in accordance with Finley v. DBM Technologies, supra. She also contended the ALJ erred in finding the employer did not file post-injury wages, establishing she did return to work at the same or greater wages in the June 11, 2021 pay period, and thus, should be awarded the two-multiplier pursuant to KRS 342.730(1)(c)2. Piotrowski also requested additional findings on other points regarding her left knee condition and the period of TTD benefits.

In its Petition, Norton asserted the ALJ committed error by finding that the record did not contain sufficient documentation of Piotrowski's post-injury wages earned, minus taxes, to offset any claim for TTD benefits.

In his January 20, 2024 Order on Petitions for Reconsideration, the ALJ provided the following additional findings, *verbatim*:

> 1. I did not say that the Defendant did not file post injury wage records, in fact I made a summary of them and reference to them. I found that the Plaintiff has never returned to work earning wages equal to or greater than on the date of injury.
>
> 2. Any interpretation of Dr. Pomeroy's records that Plaintiff makes may, or may not, be reasonable, but they are not required and my inferences are reasonable and remain.
>
> 3. Radiographic lucency does not mean what I think Plaintiff is trying to imply. Should she have felt so she should have asked a doctor to explain it, but, again, it does not correlate to an objective finding of a work-related injury.

> 4. The treating physician, Dr. Keller, said there was no change in the condition of the knees due to the work injury.
>
> 5. The evidence that the Defendant did not offer light duty to the Plaintiff is contained solely within the medical record from Dr. Blackburn, which I am doubtful constitutes substantial evidence. Beyond that I have found that the Plaintiff could do the work of a pharmacy tech with both hands and arms and any conclusion by him that she must be on "light duty" is null.
>
> 6. Again, as for the Defendant's Petition, I summarized the post-date of injury wage records and analyzed them relevant to two different issues. No evidence of after tax, post date of injury wages was filed.
>
> 7. To the extent the parties requested further findings of fact the Petitions are SUSTAINED. To the extent they requested alternative relief the Petitions are OVERRULED.

This appeal/cross appeal follows. Piotrowski continues to assert the ALJ erred in failing to analyze whether her knee impairment was pre-existing and active pursuant to Finley v. DBM Technologies, supra. She also argues the ALJ erred in failing to award the two-multiplier contained in KRS 342.730(1)(c)2. Both parties agree the ALJ erred in finding no after-tax post-injury wages were filed, albeit for differing purposes.

ANALYSIS

As the claimant in a workers' compensation proceeding, Piotrowski had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Piotrowski was unsuccessful in her burden with respect to the alleged knee injury and her entitlement to the two-multiplier, 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal,

may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Piotrowski first argues the ALJ erred in failing to analyze whether her left knee impairment was pre-existing and active pursuant to the dictates of Finley v. DBM Technologies, supra. It is well-established that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). In Finley, the claimant suffered from pre-existing congenital scoliosis. Before her work injury, Finley's congenital scoliosis was both asymptomatic and required no treatment. Finley at 263. It was undisputed the work injury aroused the scoliosis into a disabling reality. Id. The Court of Appeals stated:

> To summarize, a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary.

Id. at 265.

The Court ultimately remanded the claim because the ALJ erroneously failed to make an essential finding of fact upon whether Finley's pre-

existing dormant scoliosis was temporarily or permanently aroused by the work-related back injury. Id. at 266. However, the pre-existing condition must be asymptomatic and produce no impairment prior to the work injury to be considered a "pre-existing dormant condition." Id. In both McNutt and Finley, the dormant underlying condition was neither disabling nor treated prior to the work injury.

In Wetherby v. Amazon.com, 580 S.W.3d 521 (Ky. 2019), the Kentucky Supreme Court discussed the impact of Finley when a claimant has had a prior surgery at the same spinal segment as the work injury, but not the exact spinal level. In that case, there were two prior surgeries to the cervical spine. The Court acknowledged Wetherby's pre-injury condition was asymptomatic and found to be unrelated to the work injury, nevertheless it was proper to subtract prior impairment pursuant to the Guides. Id. at 529. Finley was not applicable, as the issue was not the arousal of a pre-existing dormant or active condition that was affected by the work injury.

Two years later in ViWin Tech Windows & Doors, Inc. v. Ivey, 621 S.W.3d 153 (Ky. 2021), the Court held the ALJ erred in applying Finley where the claimant had a prior surgery at the same spinal level as that caused by the work injury. The Court stated:

> The difference between this case and Finley is that Ms. Finley had a dormant, asymptomatic congenital condition. She had never been treated. On the other hand, Ivey had undergone two prior surgeries at the precise location, L4-5, that his workplace injury occurred. Although he was asymptomatic, under the AMA Guides, he had an impairment rating because of the prior surgeries. We find it completely illogical to conclude that a worker who has had two prior surgeries of the type Ivey had and who reinjures himself at the

> precise same location can be said not to have a pre-existing condition. Accordingly, the ALJ erred in concluding otherwise.

VinWin Tech, supra, at 158.

ViWin Tech involved prior surgeries to the exact lumbar disc level where the subsequent work injury occurred. The Court held, because the prior condition was impairment ratable, there must be a deduction of the prior impairment from the PPD impairment rating for the work injury. Id.

Here, Piotrowski had a prior surgery to the same body part, the left knee, where the work injury occurred. This is not the same as Finley, where Finley's condition had not been treated. Piotrowski had bilateral total knee replacements in 2012 and had continued on medications for her knee condition. Although she had zero pain and was working without restrictions prior to the work incident, she had a ratable condition due to the prior surgery. Accordingly, any work-related impairment assessed would require the ALJ to deduct the prior impairment rating for the surgery. However, here, the ALJ found the entirety of Piotrowski's permanent impairment to the left knee was pre-existing and not related to the work incident. In doing so, he relied upon Dr. Loeb. The ALJ noted her significant history with her knee condition, including a 1974 injury, the 1984 work injury, and 2012 total knee replacement. He stated that while Piotrowski had generally done well, she continued to follow up with her provider, continued pain management, had a modified car, and had difficulty with standing and walking at work.

The ALJ did not use the terms "pre-existing" or "active condition," but explained the evidence he relied upon in finding she suffered only a temporary

work-related left knee injury and any permanent impairment was not work-related. The ALJ also referred to Dr. Keller in finding there was no change in condition after the February 12, 2021 injury, and the fall did not result in any permanent restrictions. It is the quality and substance of a physician's testimony, not the use of particular "magic words," that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact. Turner v. Commonwealth, 5 S.W.3d 119, 122–23 (Ky. 1999). An analysis under Finley v. DBM Technologies, supra was not required, as the claimant in Finley had been asymptomatic and did not have an impairment rating. Piotrowski would certainly have an impairment rating by nature of the prior surgery. The ALJ was also not required to perform any kind of analysis under ViWin Tech as he did not find any permanent impairment work-related.

Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) addressed when an ALJ finds only a temporary injury, stating: "But in order to qualify for an award of permanent partial disability under KRS 342.730, the claimant was required to prove not only the existence of a harmful change as a result of the work -related traumatic event, he was also required to prove that the harmful change resulted in a permanent disability as measured by an AMA impairment." Id. at 286 (citing KRS 342.0011(11), (35)-(36)).

Substantial evidence supports the ALJ's finding of a temporary injury and the evidence does not compel a contrary result.

Piotrowski next argues the ALJ erred in failing to enhance her award by the two-multiplier contained in KRS 342.730(1)(c)2. She contends that, because

her average weekly wage ("AWW") was equal or greater than her pre-injury wage during the June 21, 2021 two-week pay period, a single week with equal or greater wages is sufficient to invoke the two-multiplier.

KRS 342.730(1)(c)2 state as follows:

> 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.

To qualify for the two-multiplier, two separate findings are required. First, a claimant must have returned to work. This requires a cessation of work following the work injury followed by a return to work. Helton v. Rockhampton Energy, LLC, 647 S.W.3d 233 (Ky. 2022). The second necessary finding is whether the claimant returned at "a weekly wage equal to or greater than the average weekly wage at the time of injury." KRS 342.140 sets forth the method for determining the AWW. It states in relevant part:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> …

> (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;
>
> (e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation; and
>
> (f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees.

Here, there was certainly a cessation followed by a return to work, so we must determine whether the ALJ erred in finding Piotrowski did not return at an equal or greater AWW. Kentucky's appellate courts have provided guidance in the calculation of post-injury wages. In Ball v. Big Elk Creek Coal Co., 25 S.W.3d 115 (Ky. 2000), the Kentucky Supreme Court interpreted a previous version of KRS 342.730(1)(c)2 containing the same operative language as the current version. Both versions of KRS 342.730(1)(c)2 provide: "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 Ball Court recognized the General Assembly enacted KRS 342.140 as a method to

determine a worker's earnings by computation of the AWW. In Garcia v. Cent. Kentucky Processing, Inc., No. 2015–SC–000382–WC, 2016 WL 2605564, at *2 (Ky. May 5, 2016), the claimant argued the Board erred in relying on Ball in calculating the post-injury wage utilizing KRS 342.140 because KRS 342.730(1)(c) was amended in 2000 and Ball interpreted the pre-amended version of KRS 342.730(1)(c). The Kentucky Supreme Court held Ball is still controlling, and KRS 342.140 is the proper statute to determine a worker's post-injury wages under KRS 342.730(1)(c)2. Id. We acknowledge Garcia is unpublished and cannot be cited as legal authority. Ky. R. App. Prac. 41. Nevertheless, the Board agrees with the Supreme Court's analysis and finds it instructive.

Piotrowski was paid hourly prior to and after her injury. Accordingly, KRS 342.140(d) is the provision which covers her employment. The Board is aware this provision describes ascertaining the four consecutive quarters of 13 weeks of wages in the 52-week period **immediately preceding** the injury. Hence, it is unambiguous that this provision applies pre-injury. While there is no specific statutory language as to how to ascertain an AWW post-injury, Toyota Motor Mfg., Ky., v. Tudor, 491 S.W.3d 496 (Ky. 2016) posits: "Thus, the ALJ is required to look at the wages Tudor earned in the fifty-two-week period following the injury, which the ALJ determined to be March 23, 2010. He must then find the highest quarter in that fifty-two-week period and determine if that is equal to or greater than Tudor's pre-injury average weekly wage." Id. at 505.

Since the Supreme Court mandates there must be a cessation and then return to work for the two-multiplier to be applicable, it follows logically that the 52-

week period commences upon the return to work. Novolex Holdings, LLC v. Diop, Claim No. 2020-87856 (Workers' Comp. Bd. Jan. 13, 2023).

The Board has consistently held that an ALJ's calculation of post-injury AWW must be based on the same criteria utilized in calculating pre-injury AWW. Ford Motor Company v. Banks, Claim No. 2016-94963 (Workers' Comp. Bd. May 9, 2018); *see also* Reed v. Toyota Motor Mfg., Kentucky, Inc., No. 2014-CA-001135-WC, 2015 WL 4880362 (Ky. App. July 17, 2015) (an unpublished decision wherein the Court of Appeals affirmed the Board in determining KRS 342.140(d) requires the use of consecutive weeks in calculating an AWW based on a 13-week period).

An injured worker has the burden of proving every element of a claim for income benefits, including the applicable AWW. Commonwealth of Kentucky, Uninsured Employers' Fund v. Rogers, 396 S.W.3d 292, 295 (Ky. 2012). We note the ALJ did not make a specific finding regarding the post-injury AWW, rather he stated *verbatim*: "Wage records for Piotrowski from February 13, 2021 through September 23, 2023 show that she did not ever return to work at equal or greater than $858.02." The records confirm there is no 13-week period where the post-injury AWW exceeded her pre-injury wage, thereby making the lack of specificity harmless in this instance. The AWW cannot be based on any single pay period. Substantial evidence supports the ALJ's decision.

Finally, Piotrowski appeals and Norton cross-appeals on the issue of post-tax wages. Both parties contend the ALJ erred in finding that no evidence of net

wages was filed, and therefore, no credit for wages against TTD benefits could be awarded. KRS 342.730(7) 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).

This Board has held, for KRS 342.730(7) to apply, the employer must file proof of net wages during the period of light-duty work or work in an alternative job position. *See* Whitaker v. Irvine Nursing & Rehabilitation, Claim. No. 2019-86691 (Workers' Comp. Bd. June 20, 2022); General Motors v. Smith, Claim No. 2022-01035, (Workers' Comp. Bd. Feb. 23, 2024) (not yet final). The Court of Appeals recently had the opportunity to interpret KRS 342.730(7) in Dart Container Co., Inc. v. Bailey, 2024 Ky. App. Unpub. LEXIS 249 (Ky. App. April 19, 2024) and adopted language from the Board: "[W]e 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 in original).

The party seeking the credit, in this case Norton, bears the burden of establishing a proper legal basis for the request. American Standard v. Boyd, 873 S.W.2d 822 (Ky. 1994); Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008). The parties contend Norton filed wage records that include evidence of net wages on November 2, 2023. We agree.

In the October 31, 2023 Hearing Order, the ALJ granted Norton 21 days to file any additional post-injury wage records. Piotrowski did not object. On October 30, 2023, Norton filed post-injury wage records that only included Piotrowski's gross wages. On November 2, 2023, Norton filed amended post-injury wage records which included the net after-tax wages. The ALJ failed to consider these records in determining whether the employer was entitled to a credit pursuant to KRS 342.730(7). The ALJ stated in his Opinion when discussing post-injury wage records *verbatim*: "They do not show or prove her net wages after taxes."

In the Order on Petition for Reconsideration, the ALJ stated *verbatim*: "No evidence of after tax, post date of injury wages was filed[,]" seemingly denying these records had been filed. We must vacate that portion of the decision and remand the claim for additional findings as the ALJ must review the November 2, 2023 filing of wage records.

The parties disagree regarding the amount of credit Norton should receive. The Board cannot fact-find. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, supra.

This claim is remanded to the ALJ for additional findings with instructions to consider the post-injury wage records filed by Norton on November 2, 2023 to determine any credit to which it may be entitled per KRS 342.730(7). We do not direct a particular result.

Accordingly, the December 23, 2023 Opinion, Award, and Order and the January 20, 2024 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are **AFFIRMED IN PART** and **VACATED IN PART.** This claim is **REMANDED** for additional findings regarding Norton's entitlement to a credit against TTD benefits awarded giving particular consideration to the post-injury wage records filed on November 2, 2023.

ALL CONCUR.

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