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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-000493-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND. APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01019

MICHELE LYNN TURNER;
LEE WARNER, D/B/A FLIP CITY GYMNASTICS
ACADEMY, INC.; ASHLEY STRATTON,
D/B/A FLIP CITY GYMNASTICS ACADEMY, INC.;
HON. R. SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

CLAYTON, JUDGE: This is an appeal of a decision of the Kentucky Workers' Compensation Board (Board) by the Kentucky Uninsured Employers' Fund (Fund). Based upon the foregoing we will affirm the decision of the Board.

BACKGROUND INFORMATION

The following facts were found by the Board:

> The injury which is the subject matter of this litigation occurred on May 14, 2009 when Turner was working as a coach and gymnastics instructor for Flip City. She was spotting a gymnast who was performing gymnastics on the parallel bars. The gymnast was doing a forward roll off the bar and let go. When she let go, Turner saw the gymnast was going to hit her head on the ground. She reached in to prevent this event from happening and when she did, the gymnast's legs went to the side hitting Turner on the forehead jerking her head backward. Turner felt immediate neck and arm pain and felt like she had a million needles running through her arms. She was transported by ambulance to Baptist Hospital East where an MRI of her neck and shoulders were performed. The next day, Turner underwent a cervical fusion at the C4-C5 level. She returned to work at Flip City on Fourth of July weekend of 2009 but did not return to the same duties. When she returned to her coaching work, she was told not to lift greater than 20 to 25 pounds. Prior to the injury, she described her job at Flip City as being "hands-on." When she returned to work at Flip City after the injury, she no longer performed anything "hands-on". She also stressed she was unable to "spot" gymnasts. When she needed a spot performed, she asked another coach to perform this task.
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> Turner testified she began her employment at Flip City Memorial Day weekend in 2008 as a gymnastics coach/instructor. She estimated she worked for Flip City a total of 1 ½ years teaching and coaching gymnastic classes. She testified she earned $10.00 an hour and worked 18 hours per week at Flip City prior to the injury. She identified Lee Warner as head coach at Flip City and

Ashley Stratton as his assistant coach. It was her understanding Stratton and Warner had gone into business together as co-owners and partners at Flip City.

Turner testified when the injury at Flip City occurred, she held concurrent employment at JCPS [Jefferson County Public School] as a substitute teacher's assistant, which began in April 2008. She further noted Lee Warner at Flip City knew she had a second job at JCPS at the time of the injury. Because she was a substitute teacher at JCPS prior to the injury, she was only paid during the school year when she was working and was not paid during the summer months.

Introduced through Turner's testimony at her discovery deposition and at the formal hearing was a W-2 statement from JCPS for 2008 which showed total annual income of $5,277.33. Also introduced was a W-2 for 2008 from Flip City which showed total annual income of $2,812.50 and a W-2 for 2009 which showed total income earned through approximately August of 2009 in the amount of $3,520.00. Also introduced in Turner's discovery deposition was a September 4, 2009 letter from Payroll and Cash Management at JCPS which verified Turner began her employment at JCPS on April 17, 2008 as a support staff substitute at the hourly wage rate of $8.73. The letter further provided that as a substitute, she worked with no benefits on an "as needed" basis and was not eligible for sick or vacation days. Turner also testified she worked the same number of hours at JCPS pre-injury (32.5 hours) as she did post-injury.

After her injury, she returned to work at Flip City until it went out of business. She continued working at Competitive Edge, the successor company to Flip City, as a gymnastics instructor. Turner testified she earned $10.00 per hour and worked eight hours per week at Flip City after the injury, for a total income of $80.00 per week post-injury and earned the same amount per hour and worked the same hours per week for Competitive Edge after Flip City ceased operation. In addition, she returned to work after the injury at JCPS and starting October 26, 2009, she earned $11.31 per hour and

> worked 32.5 hours per week. Turner confirmed she earned a total of $447.58 per week from both employers post-injury. She acknowledged she earned more per week prior to the injury than she earned afterward, primarily because she could not put more hours in at the gym due to the effects of her work injury.
>
> Introduced through Turner's formal hearing testimony was a pay stub from JCPS which represented her wages earned during a two-week period of time ending May 28, 2010 in the amount of $735.50. This same pay stub indicated total annual wages earned up to that date of $13,747.30. Turner, however, testified she did not receive the specific wage amount for the two-week period. In reality, she earned $434.66 after deductions were taken out. Part of these deductions went into escrow so she could be paid in the summer months. As a permanent employee at JCPS, she now gets paid year-round.

The ALJ awarded Turner the following:

> 1. An average weekly wage (AWW) based on working eighteen hours at Flip City;
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> 2. An AWW based on her concurrent employment with JCPS; and
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> 3. A multiplier of three on a combined AWW for her PPD.

The Board upheld the ALJ's decision. The Fund now appeals the Board's determination.

## STANDARD OF REVIEW

As a reviewing court in workers' compensation cases, our function is to correct the Board when we believe it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as

to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

"It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox,* 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). With this standard in mind, we examine the merits of the appeal.

DISCUSSION

The Fund first contends that Turner's average weekly wage (AWW) must be calculated based on the wages paid by the employer for whom Turner was working at the time of the injury and cannot include wages from a concurrent employer when the concurrent employment was unaffected by the injury. As to this issue, the Board found as follows:

> Contrary to the [Fund's] position, [Kentucky Revised Statutes] KRS 342.140(5) applies inasmuch as Turner was working under concurrent contracts with two or more employers and Flip City had knowledge of that employment prior to the injury. To this extent, Turner's wages for all the employers shall be considered as if earned from the employer liable for compensation. *See* KRS 342.140(5).
>
> Because Turner's wages from both Flip City and JCPS were fixed by the hour and because she worked in

the employment of both more than thirteen (13) calendar weeks immediately preceding the injury, KRS 342.140(1)(d) also applies in the calculation of wages in this case. That statute provides 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;

Substantial evidence supports the [Administrative Law Judge] ALJ's finding that pre-injury, Turner's wage at Flip City amounted to $180.00 per week based on Turner's testimony that she worked eighteen (18) hours per week at $10.00 an hour. Furthermore, substantial evidence supports the ALJ's finding Turner earned an AWW of $283.73 per week at JCPS prior to the injury based on Turner's testimony she worked 32.5 hours per week at $8.73 per hour. We find no error in the ALJ's application of KRS 342.140(5) in combining the wages Turner earned from both employers in his calculation.

It is clear the ALJ is allowed to rely on Turner's own testimony concerning the issue of AWW notwithstanding the existence of W-2 forms. As noted by the court in *Affordable Aluminum v. Coulter,* 77 S.W.3d 587 (Ky. 2002), "As the finder of fact, the ALJ was authorized to consider the available evidence, draw reasonable inferences from it, and to make reasonable findings." The [Fund] had the opportunity to obtain weekly payroll records concerning Turner's pre-injury

AWW from Lee Warner during his deposition or could have requested a subpoena for these records, but did neither. Absent the existence of payroll records which would reflect weekly payments, Turner's testimony concerning her AWW is more reliable than the information contained in a W-2 form which was intended only to summarize annual amounts and not weekly amounts. The ALJ was therefore not obligated to take any information appearing on the W-2 forms for either 2008 or 2009 at Flip City or JCPS. Moreover, calculations made from yearly amounts from the W-2 forms to determine a weekly wage is mere conjecture when some of the wage information contained therein represented less than a year's work. Based on the above, we reject the [Fund's] last argument wherein it argues the ALJ erred in not using the W-2 forms to determine pre-injury AWW as opposed to Turner's own testimony on the issue.

To the same extent, substantial evidence supports the ALJ's finding based on Turner's own testimony, her AWW post-injury amounted to $447.57 per week. This figure was arrived [at] pursuant to Turner's testimony in which she testified that due to the effects of her injury, she was only able to work eight hours per week at Flip City and its successor company after the injury in question and earned $10.00 an hour. Moreover, the ALJ relied on Turner's testimony, which is his prerogative as fact finder, in which Turner testified she worked 32.5 hours per week and starting in October of 2009, earned $11.31 per hour while working concurrently at JCPS.

Contrary to [Fund's] assertions, the holding in *Double L Const., Inc. v. Mitchell,* [182 S.W.3d 509 (Ky. 2005)] *supra*, has no applicability in this case. In *Double L Const., Inc*., the Court dealt with the propriety of awarding [temporary total disability] TTD benefits and the rate of TTD benefits in a case where the worker had the ability to work continuously for the concurrent employer after the work injury. In that case, the court noted if an injury did not cause an inability to perform a concurrent job, KRS 342.140(5) was inapplicable and that income benefits for *TTD purposes* should be based

solely on the wages from the job in which the injury occurred. (Emphasis added). The Court's holding in *Double L Const., Inc*., however, did not provide for the exclusion of wages from the concurrent employment for [permanent partial disability] PPD purposes simply because after having reached maximum medical improvement, the worker was able to perform this concurrent employment. In this regard, the Court noted as follows:

> We have concluded, therefore, that when the decision is applied to a case in which a worker is injured in one concurrent employment but is unable temporarily to perform another, both the customary type of work and the work the individual was performing at the time of the injury refer to work performed in the employment in which the injury occurred. We reach this conclusion, in part, because we are convinced that a worker whose injury renders him temporarily unable to perform the work in which the injury occurred should not be penalized for performing what work he is able to do. Nor are we convinced that his employer should be absolved from liability for TTD benefits.

KRS 342.140 provides that:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> > (5) When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his or her wages from all the employers shall be considered as if earned from the employer liable for compensation.

In this case, Turner's supervisor at Flip City had knowledge of her concurrent employment with JCPS. Thus, pursuant to the statute set forth above, Turner's wages from JCPS were properly included in her AWW.

The Fund next contends that even if Turner's JCPS salary was to be included in her AWW, she cannot be awarded a three multiplier on her concurrent employment when that employment was unaffected by her injury. KRS 342.730(1)(c) provides that "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined[.]"

In this case, Turner was both a teacher's aide and a gymnastics instructor. The ALJ found that she could not continue as a gymnastics instructor, but would be limited to coaching. In *Lowe's No. 0507 v. Greathouse,* 182 S.W.3d 524, 527 (Ky. 2006), the Court held that:

> KRS 342.730(1)(c)1 provides a triple benefit for a loss of the physical capacity to perform "the type of work that the employee performed at the time of the injury." It does not refer to the capacity to perform other types of work. At the time of his injury, the claimant was working in retail sales for Lowe's. His work for Mini-Data Forms was to operate a printing press. Absent an explicit indication that the legislature intended for other types of work to be considered for the purposes of KRS 342.730(1)(c)1, we are not convinced that he is entitled to a triple benefit based on a loss of the physical capacity to operate a printing press."

In *Double L Construction,* 182 S.W.3d at 514, the Court found that:

> [W]hen the decision is applied to a case in which a worker is injured in one concurrent employment but is unable to temporarily perform another, both the customary type of work and the work the individual was performing at the time of the injury refer to work performed in the employment in which the injury occurred. We reach this conclusion, in part, because we are convinced that a worker whose injury renders him temporarily unable to perform the work in which the injury occurred should not be penalized for performing what work he is able to do. Nor are we convinced that the employer should be absolved from liability for TTD benefits.

The ALJ found that Turner was no longer capable of performing the work of a gymnastics instructor. Thus, it was appropriate for the ALJ to apply a three multiplier. Turner argues that nothing in the statute provides procedures which would allow for primary and secondary employment. We agree.

The Fund also argues that even if Turner's JCPS salary were to be included in her AWW, it would have to be averaged over the entire year, rather than the nine months of the year she worked. KRS 342.140 provides that:

> (1) If at the time of the injury which resulted in . . . disability:
>
> > (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[.]

The ALJ found that pre-injury, Turner was making $180 per week at Flip City and that she was making $283 per week at JCPS. Under the statute, this is a correct finding. Thus, we find the Board did not err in affirming it.

The Fund next asserts that Turner's documentary proof on her wages is not the best evidence of those wages and represents the only substantial proof as to those issues. Turner's testimony before the ALJ was that she began working at Flip City in May of 2008. She had already been working at JCPS, as she began there in April of 2008. By letter dated September 4, 2009, Payroll and Cash Management employee Jennifer Conner verified that Turner's hourly rate at JCPS was $8.73 and that she was used on an "as needed" basis. W-2 forms would provide yearly income, but not weekly. We find the Board did not err in upholding the ALJ's determination of AWW based on Turner's testimony.

For the foregoing reasons, we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

C.D. Batson
Assistant Attorney General
Uninsured Employers' Fund
Frankfort, Kentucky

BRIEF FOR APPELLEE MICHELE LYNN TURNER:

Scott P. Scheynost
Louisville, KY

NO BRIEFS FILED FOR APPELLEES, LEE WARNER, D/B/A FLIP CITY GYMNASTICS ACADEMY, INC., AND ASHLEY STRATTON, D/B/A FLIP CITY