

RENDERED: DECEMBER 6, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001313-WC

DRAYER PHYSICAL THERAPY.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-10-00616

KRISTIN REESE; MARC CHRISTOPHER  
DAVIS, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Drayer Physical Therapy, appeals the June 28, 2013, opinion of the Workers' Compensation Board reversing and remanding the January 22, 2013, opinion of the Administrative Law Judge ("ALJ"), wherein the ALJ denied application of the two multiplier set forth in Kentucky Revised

Statutes (KRS) 342.730(1)(c)(2) to an award of permanent partial disability benefits granted to Appellee Kristin Reese. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Reese began working as a physical therapist for Drayer in October 2006. She testified that in November 2008, sometime before Thanksgiving, she began experiencing pain in her left scapular area while doing extension mobilizations on patients. Reese stated that her symptoms progressively worsened over the course of the next two weeks, eventually spreading to her neck. Reese testified that over the next several months, she began to experience constant headaches and pain “going down” her left arm. She denied that her symptoms arose as a result of a single work-related event, but came on gradually as a result of performing extension mobilizations on patients.

Reese did not immediately inform her employer about the symptoms. She testified that she discussed it with a coworker, Kathryn Hunt, sometime “before Christmas” in December 2008. Reese asserts that she also told Hunt that she believed her work activity was the cause of her symptoms. In January 2009, Reese provided the same information to Jeffrey Wills, the center manager. However, Wills testified that he did not recall Reese claiming that her symptoms were work related.

Reese testified that she self-treated her symptoms at work throughout 2009 using ice and heat and performing self-massage and self-immobilization. She stated that other physical therapists at the clinic assisted her during this period,

including Hunt and Wills. However, Reese's symptoms continued to worsen, and she stated that she was subject to "flare-ups" of pain.

On December 14, 2009, Reese completed an "Incident Report" which described her symptoms, and in which she stated that they began in November of 2008. Reese asserts that following another "flare-up" of her condition, Hunt referred her to outside medical treatment in January 2010.

Thereafter, in February 2010, Reese submitted applications for both short-term and long-term disability benefits through Drayer. During this period she also consulted with Dr. Charles Johnson, D.O., for treatment. After an initial consultation on January 8, 2010, Dr. Johnson diagnosed her with cervical radiculopathy radiating into the left shoulder and arm and took her off work. Thereafter, Dr. Johnson referred Reese to Dr. Dennis Whaley for a thoracic and MRI scan. Dr. Whaley interpreted the thoracic scan as showing, "no significant abnormality," and found that the cervical scan revealed evidence of "slight kyphosis at C3-4 and again at C6-7 with straightening of the cervical spine between these levels." Electromyography/nerve conduction studies were subsequently performed on February 8, 2010, by Dr. Patrick K. Leung. Those tests were interpreted as revealing evidence of mild chronic left C5 and C6 radiculopathies, as well as mild median neuropathies involving both wrists. Reese also continued physical therapy at Drayer through May 25, 2010.

In February of 2010, Drayer's workers' compensation carrier also presented Dr. Johnson's medical records, including x-rays and other diagnostic

testing for peer review to Dr. Brian McCrary, D.O. Dr. McCrary noted that Reese had only seen Dr. Johnson on a couple of occasions, and that the records presented were handwritten and hard to read. Dr. McCrary opined that it was “possible” that Reese “suffered an acute soft tissue strain to the neck and upper back on 11/1/08.” Dr. McCrary felt that if such were the case, “a soft tissue injury such as this would have resolved without permanent sequela within a few weeks.” Dr. McCrary stated that it was also possible that Reese had “early osteoporosis or degeneration at the upper thoracic spine which has not been consistent with, or reported as, due to any occupational injury that could have caused permanent injury to the thoracic spine.” Dr. McCrary stated that he was uncertain as to Reese’s actual diagnosis, but felt “any radiculopathy at the cervical or thoracic spine, and any bony injury or degenerative changes at the cervical or thoracic spine are not consistent with the reported mechanism of injury and would be more likely than not due to unrelated or pre-existing medical process.”

On February 26, 2010, at Dr. Johnson’s request, Reese was seen for consultation by Dr. Alexis Norelle, who recommended epidural steroid injections, which she received from Dr. Daniel Keck between March and April 2010. Reese also received cervicothoracic trigger point injections from Dr. Keck and physical therapy at Kort Physical Therapy from May 26, 2010, through September 9, 2010, at Dr. Keck’s direction.

Reese also began treating with Dr. Jonathan Cole, Ph.D., a licensed clinical psychologist, on May 27, 2010. On September 27, 2010, Dr. Cole referred

her to Beaumont Behavioral Health, PSC, for psychiatric evaluation. Reese was ultimately diagnosed with adjustment disorder, depression, and anxiety, for which she was treated with medication and psychotherapy.

On May 24, 2010, Reese filed an application for workers' compensation benefits. Therein, she alleged work-related cumulative trauma involving her cervical spine with radicular symptoms involving the left scapula, left arm, and left hand. In her application, Reese identified November 24, 2008, as the date her work-related disability became manifest. Reese was later permitted by the ALJ to amend her application for benefits to include a claim for psychological overlay secondary to her physical complaints. Reese testified that she was ultimately terminated by Drayer on May 27, 2010, due to medical restrictions imposed by Dr. Johnson, a fact also confirmed by Wills in his testimony.

On September 21, 2010, Reese underwent an independent medical evaluation ("IME") performed by Dr. Frank Burke. Following a review of Reese's medical records and a physical examination, Dr. Burke diagnosed Reese as having a "cervical injury as a result of her work as a physical therapist, which started in the fall of 2008." Dr. Burke identified Reese's condition as cervicalgia with left C5 and C6 radiculopathies, along with symptomology and electrodiagnostic studies consistent with a bilateral carpal tunnel syndrome. Dr. Burke felt Reese was not a surgical candidate based on the studies previously performed. He recommended further evaluation consisting of a "cervical myelogram CT scan" and an additional "EMG nerve study." Pursuant to the AMA Guides to the

Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, Dr. Burke assigned a 15% whole person impairment rating, and indicated that he felt “cross-training into hand therapy or possible occupational therapy should be a consideration.”

Reese also underwent an IME with Dr. Timothy Kriss at Drayer’s request on November 15, 2010. Following a review of medical records and a physical examination, Dr. Kriss opined that Reese had suffered a musculoskeletal strain of the left posterior muscles, left trapezius muscle, and left upper thoracic paraspinous muscles. Dr. Kriss stated that this was “consistent with the location of her complaints, the mechanism of injury, and the aggravation of symptoms with movement or physical activity.” Dr. Kriss also felt that Reese exhibited “fairly impressive symptom magnification.” In addition, Dr. Kriss found no evidence that Reese’s current condition was work related or that she suffered from any impairment. He concluded that if Reese had suffered any injury, she would have reached maximum medical improvement (“MMI”) no later than March 24, 2010. Dr. Kriss found no need for any permanent work-related restrictions.

Finally, Reese saw Dr. Dennis Sprague, Ph.D., a licensed clinical psychologist, and Dr. Robert P. Granacher, a forensic psychiatrist, for IMEs in late 2010. Dr. Sprague diagnosed Reese with a “Mood Disorder NOS” and “Pain Disorder with Psychological Factors and General Medical Condition.” Dr. Sprague stated within reasonable medical/psychological probability, Reese’s “pain symptoms created mood changes and symptoms of chronic pain” and, consequently, were a direct result of her work-related physical injury. Dr.

Granacher diagnosed Reese with “mood disorder (major depression), mostly in remission at the present time.” Both Dr. Sprague and Dr. Granacher assessed Reese as having a 10% whole person impairment rating.

Upon review of the evidence below, the ALJ dismissed Reese’s claim in its entirety, concluding that she had failed to give timely notice of her injury. In so doing, the ALJ concluded that Reese was trained and employed as a physical therapist, and thus was qualified to identify her injury and the fact that it was work related. The ALJ determined that Reese knew of her injury no later than January 2009, but continued to perform the same work duties for Drayer for another eleven months without giving notice or seeking formal treatment. The ALJ also addressed other aspects of the evidence, stating that he was not convinced that Reese had proven that she suffered a work-related injury and that, in any event, he accepted Dr. Kriss’s opinion that there was no evidence of any connection between Reese’s current symptoms and any work-related injury which she sustained in November 2008. Accordingly, the ALJ concluded that Reese’s claim for benefits and medical expenses must also fail on the merits.

Reese appealed to the Workers’ Compensation Board, which issued an opinion on July 19, 2011, reversing the ALJ on the issue of sufficiency of notice. The Board found that a physical therapist does not qualify as a physician within the meaning of the Workers’ Compensation Act, and concluded that Reese could not be expected to self-diagnose the cause of her problem. Accordingly, the Board found that Reese gave timely notice on December 14, 2009. Concerning the

merits of the claim itself, the Board affirmed the ALJ's reliance upon the opinion of Dr. Kriss that Reese did not sustain a permanent work-related physical injury. Both Drayer and Reese appealed the opinion of the Board, and this Court affirmed the Board's opinion in its entirety in an unpublished opinion rendered on August 3, 2012<sup>1</sup>.

On remand, the ALJ awarded permanent partial disability benefits to Reese based upon the 10% impairment ratings assessed by Dr. Granacher and Dr. Sprague. However, the ALJ declined to apply the two multiplier set forth in KRS 342.730(1)(c)(2), finding that Reese's physical restrictions and subsequent termination were due to her "symptom magnification and belief, honestly held or not, that she cannot perform tasks and duties which she can, objectively do."

Reese then filed an appeal to the Board, arguing that she was entitled to application of the two multiplier. The Board agreed, finding that, in keeping with the language of KRS. 342.730(1)(c)(2) and the holdings of our Kentucky Supreme Court in *Chrysalis House v. Tackett*, 283 S.W.3d 671 (Ky. 2009), and *Hogston v. Bell South Telecommunication*, 325 S.W.3d 314 (Ky. 2010), Reese clearly qualified for an enhanced award. It is from that opinion that Drayer now appeals to this Court.

Prior to reviewing the arguments of the parties, we note that when reviewing a decision of the Board, we will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law, or has so flagrantly

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<sup>1</sup> *Drayer Physical Therapy v. Reese*, 2011-CA-001502-WC. (Ky. App., Aug. 3, 2103).



erred in evaluating the evidence that gross injustice has occurred. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

On appeal, Drayer makes one argument, namely, that the Board exceeded its authority and committed flagrant error by substituting its judgment for that of the ALJ as to the weight of the evidence on a question of fact concerning whether Reese qualified for the two multiplier. Drayer argues that the January 2013, opinion answered the factual question of whether Reese's restrictions and subsequent termination were the result of work-related physical limitations, or symptom magnification. Drayer asserts that the ALJ, after weighing the evidence, chose to rely upon the opinion of Dr. Granacher that Reese was "clearly magnifying" her symptoms, and that the restrictions were a result of those magnifications. Drayer now argues that the Board's finding that Reese's restrictions and termination were the result of work-related physical limitations was a substitution of its judgment for that of the ALJ on a question of fact. We disagree.

In reviewing this issue, we note that KRS 342.730(1)(c)(2) provides that:

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).

Drayer correctly asserts that pursuant to KRS 342.285(2), the Board shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact. And indeed, our courts have repeatedly held that the issue of the credibility and weight to be afforded the evidence rests with the fact-finder and not the reviewing body. *Caudill v. Maloney's Discount Store*, 560 S.W.2d 15 (Ky. 1977). However, this Court is of the opinion that *sub judice*, the issue is one of law – namely, the interpretation of KRS 342.730(1)(c)(2) and its application to the facts at hand.

Our review and interpretation of KRS 342.730(1)(c)(2) is consistent with that of the Board. Clearly, the first prong of KRS 342.730(1)(c)(2) requires that Reese return to work at an equal or greater wage than that earned at the time of the injury. It is undisputed that she did so. Turning to the second prong, which addresses cessation of that employment, we note that the statute addresses cessation which is “temporary, or permanent,” and “for any reason, with or without cause.” Below, the ALJ found the two multiplier to be inapplicable on the basis that, “her only permanent work-related condition is psychological, and she has no restrictions for that.” The ALJ further found that, “although the Defendant

terminated the Plaintiff when they were unable to meet the restrictions she presented to them she is likewise not entitled to any enhancements pursuant to KRS 342.730(1)(c)(2).” It was the reasoning of the ALJ that these restrictions were not accurate, and were assessed on the basis of Reese’s symptom magnification. The ALJ thus found that within the meaning of *Chrysalis House v. Tackett*, 283 S.W.3d 671, the fact that Reese “arbitrarily demands unnecessary accommodations and makes factually inaccurate claims” does not qualify her for an enhanced award pursuant to KRS 342.730(1)(c)(2).

The ALJ was correct to apply the holding of *Chrysalis House* to the facts *sub judice*. However, upon review of that opinion, we are in agreement with the Board that Reese is entitled to application of the two multiplier pursuant to the reasoning contained therein. In *Chrysalis*, our Kentucky Supreme Court narrowed the applicability of KRS 342.730(1)(c)(2) by holding as follows:

KRS 342.730(1)(c)(2) appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage ‘for any reason, with or without cause.’ It is, however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for ‘disability’ that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)(2) permits a double income benefit during any period that employment at the same or a greater wage ceases ‘for any reason, with or without cause,’ provided that the reason relates to the disabling injury.

*Chrysalis House v. Tackett*, 283 S.W.3d 671 at 674.

Our review of the facts reveals that without dispute, Reese sustained a temporary physical injury and that she was ultimately assessed a 10% impairment rating for her psychological condition by both Drs. Granacher and Sprague. We agree with the Board that the psychological condition was the result of the physical condition and that, accordingly, it is part and parcel of the injury. It is likewise without dispute that Reese continued working until the restrictions assessed by Dr. Johnson were presented to Drayer, at which time she was terminated because those restrictions could not be accommodated. While the ALJ may believe these restrictions to be both unnecessary and based upon symptom magnification, there is simply no dispute that they were assessed, that Drayer could not accommodate them, and that they were ultimately the reason that Reese's employment ceased. Accordingly, we agree with the Board that application of KRS 342.730(1)(c)(2) is warranted, and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the June 28, 2013, opinion of the Workers' Compensation Board, reversing and remanding the opinion, order, and award on remand issued by the Administrative Law Judge on January 22, 2013.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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