

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

NO. 2005-CA-000171-WC

MICHELLE BASTIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-77748

NORTON SUBURBAN HOSPITAL;  
HON. JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR  
JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Michelle Bastin (Bastin) has petitioned  
for review of an opinion of the Workers' Compensation Board  
(Board) entered on December 23, 2004, which affirmed an opinion  
and award of the administrative law judge (ALJ) rendered August  
4, 2004, 1) limiting her award of permanent partial disability  
(PPD) benefits against Norton Suburban Hospital (Norton) to a

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the  
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and  
Kentucky Revised Statutes 21.580.

13% permanent impairment rating calculated pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(b) and (c)2;<sup>2</sup> and 2) declining to award her an additional period of temporary total disability (TTD) benefits resulting from a broken collarbone sustained in a

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<sup>2</sup> (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

\* \* \*

(b) For permanent partial disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the table that follows:

AMA Impairment	Factor
0 to 5%	0.65
6 to 10%	0.85
11 to 15%	1.00
16 to 20%	1.00
21 to 25%	1.15
26 to 30%	1.35
31 to 35%	1.50
36% and above	1.70

Any temporary total disability period within the maximum period for permanent, partial disability benefits shall extend the maximum period but shall not make payable a weekly benefit exceeding that determined in subsection (1)(a) of this section. Notwithstanding any section of this chapter to the contrary, there shall be no minimum weekly income benefit for permanent partial disability and medical benefits shall be paid for the duration of the disability.

(c) 1. If, 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 injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or

2. 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.

fall at home that she related back to her original work injury of March 10, 2003.

Before us, Bastin claims that the Board erred in not remanding the case to the ALJ 1) for additional findings concerning Bastin's pre- and post-injury physical abilities, contending that she is entitled to findings of fact concerning both, and if both KRS 342.730(1)(c)1 and 2 are applicable, then she is entitled to an award based on (c)1, the "times-three" multiplier; and 2) with directions to award additional appropriate TTD benefits from June 9, 2003, through July 28, 2003.

Our standard of review of a decision of the Board "is to correct the Board only where the the (sic) Court perceives the Board 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). Having reviewed the Board's application of the law and the evidence, we conclude that the Board committed no error.

Bastin, born March 27, 1970, has a bachelor of science degree in nursing. Since May, 1994, she has worked as a registered nurse (RN). In October, 2002, after a six to eight-month orientation period, she fulfilled a personal goal when she

transitioned to Norton's labor and delivery unit, working the seven p.m. to seven a.m. shift.

On March 10, 2003, while lifting the end of a bed during a typical reassembly following a delivery, Bastin felt back pain. She reported the injury to Norton, and sought treatment from her family physician. Occupational Physician's Services (OPS) referred her to a specialist, who diagnosed a low back strain, prescribed medication and released her to return to work at light duty.

Bastin continued to work from the date of her injury until June 9, 2003, when, according to her testimony, her right leg gave out from under her at home and she fell, breaking her collarbone. Following that incident, she was off work for six weeks. She went off work again on July 28, 2003, and that date TTD benefits commenced.

When the pain in her back failed to improve, Bastin was first referred to an orthopedic surgeon and later to a neurosurgeon. On August 25, 2003, she had back surgery. Immediately thereafter, she enjoyed complete relief of her back and leg pain; however, the pain soon returned and did not respond to treatment.

Bastin continued to complain of pain in the right lumbar region which was aggravated with walking. Motor strength was also reduced. A referral for pain management was made to

physical medicine and rehabilitation specialist Dr. Rodney Chou, who took over her case on November 6, 2003. Ultimately, Dr. Chou prescribed pain medication and recommended restrictions on lifting, bending, twisting, standing and walking. He advised that she could work twelve-hour shifts as long as she was able to take regular sit-down breaks and remain within the recommended restrictions.

Bastin returned to work at Norton on November 7, 2003, and TTD benefits were terminated. Because of the restrictions, she was unable to return to her pre-injury work as an RN in labor and delivery and was reassigned to light work duties in triage in labor and delivery, earning the same or greater wages.

In a follow-up visit with Dr. Chou on December 4, 2003, he noted that she had returned to work within the recommended restrictions and was tolerating her duties well. He adjusted her medications. In another follow-up on February 4, 2004, he ordered a Functional Capacity Evaluation (FCE) to establish a baseline of Bastin's physical abilities. According to the FCE, Bastin did not meet the minimum physical demands required of her pre-injury job as she did not meet the minimum lifting requirements, was unable to perform repetitive squatting due to weakness in the right leg, could not tolerate standing more than 30 minutes due to cramping in the right posterior thigh, and reported back pain and cramping in the right

posterior thigh after prolonged walking. Dr. Chou advised by letter dated April 15, 2004, that he agreed with the results of the FCE, indicating that Bastin was at maximum medical improvement at that time. He assessed permanent restrictions consistent with the therapist's recommendations and advised that Bastin's permanent impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) would be 10%.

Bastin had an independent medical examination performed on April 22, 2004. Dr. S. Pearson Auerbach assessed a 13% permanent impairment rating in accordance with the AMA Guides, advising that it was unlikely that Bastin would be able to return to her pre-injury work as an RN with moderate to heavy physical activities. He recommended insofar as lifting and carrying that while Bastin could occasionally carry a maximum of twenty pounds and frequently carry five pounds, she could not perform frequent or occasional lifting up to twenty-five pounds. He additionally recommended that she never bend or crawl; only occasionally stand or kneel; and could tolerate between two to four hours per day of twisting, turning, sitting, walking, pushing, and pulling but could not return to heavy physical activities.

According to Bastin, her current position in triage fits within the restrictions recommended by her doctor. Her

duties are necessary to the hospital operations of the labor and delivery unit as she makes the initial assessment as to whether an incoming patient is in labor; and if so, starts the "I-V" and draws blood, but there is no heavy lifting or maneuvering of bodies. After a busy night in which she has done a lot of walking, she reports occasional increased pain that requires additional medication. She testified that she cannot perform her previous regular duties. Her condition is better now than it was before surgery, but she continues to have pain.

The sole issue before the ALJ was Bastin's entitlement to benefits pursuant to KRS 342.730. The parties stipulated to the following: that Bastin suffered a work-related injury on March 10, 2003; that TTD benefits were paid at the rate of \$549.14 per week from July 28, 2003, through November 6, 2003, for a total of \$8,001.72; that her average weekly wage was \$824.04 per week; and that she returned to work in November, 2003. Bastin's testimony and other evidence revealed that 1) she is earning greater wages now (\$866.02 per week) than at the time of the injury; 2) she works the same twelve-hour night shift; 3) she has no reason to believe that she will not be able to continue working and earning wages greater than her average weekly wage for the foreseeable future; and 4) she may move to a day shift when her children are in school, which would likely open up more job opportunities for her.

On August 4, 2004, the ALJ issued his opinion and award. With regard to PPD, after considering the two opinions on impairment, the ALJ awarded Bastin PPD benefits commensurate with the higher rating of 13%. The ALJ further determined that insofar as a multiplier, both KRS 342.730(1)(c)1 and 2 were applicable and concluded that KRS 342.730(1)(c)2 (no enhancement) was more appropriate than KRS 342.730(1)(c)1 (times-three multiplier) because Bastin was likely to be able to continue earning an average weekly wage equal to or greater than that earned at the time of the injury as determined under KRS 342.730(1)(b).

With regard to TTD, the ALJ awarded Bastin benefits from July 28, 2003, through November 6, 2003. Bastin argued for the first time in her brief before the ALJ that she was also entitled to TTD for the period from June 9, 2003 (the date she broke her collarbone in a fall at home) through July 28, 2003. The ALJ denied this request, finding no medical evidence to support her contention that her fall was caused by the work-related injury.

On appeal to the Board, Bastin argued that the ALJ improperly calculated her benefits under KRS 342.730(1)(c)2 by failing to properly apply Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), alleging that the ALJ failed to make a determination with respect to her post-injury physical capacity to engage in the



type of work she performed at the time of the injury, and thus contending that she is entitled to an award based on KRS 342.730(1)(c)1, the "times-three" multiplier. On December 23, 2004, the Board affirmed the opinion and award of the ALJ, finding that it was supported by substantial evidence, including but not limited to Bastin's testimony. In so affirming, the Board concluded that the ALJ properly applied Fawbush and Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), in that once he found both KRS 342.730(1)(c)1 and 2 applicable, he gave consideration to Bastin's future wage-earning capacity and properly concluded that she is likely to be able to continue to earn wages equal to or greater than her average weekly wage for the indefinite future.

Additionally, with regard to Bastin's claim of entitlement to TTD benefits calculated from the date of her fall on June 9, 2003, the Board concluded that the ALJ was free to accept or reject Bastin's account that her fall was attributable to the work-related injury, finding in support of the ALJ that there was no medical evidence in the record regarding the causation of the fall. This petition for review follows.

With regard to the issue of which section of KRS 342.730(1)(c) is applicable, the Board concluded that the ALJ correctly applied Fawbush, and we agree. As stated therein when analyzing KRS 342.730(1)(c)1 and 2:

(W)e note that the legislature did not preface paragraph (c)2 with the word "however" or otherwise indicate that one provision takes precedence over the other. We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts.

Fawbush at 12. In the instant case, the evidence is undisputed that Bastin could not return to her pre-injury duties. Such was the testimony of Bastin, and her testimony was termed "accurate" by her supervisor. Such was also implied in the findings of the medical experts. The threshold for the application of KRS 342.730(1)(c)1 was thus met.

Fawbush went on to indicate, however, that subsection (c)1 was appropriate "(i)f 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 evidence is further undisputed that Bastin returned to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, and that, according to her own testimony, she had no reason to expect that she would not be able to continue working and earning wages greater than her average weekly wage for the foreseeable future. The threshold for the application of KRS 342.730(1)(c)2 was thus met. Under Fawbush, therefore, the ALJ acted appropriately in determining which provision was more appropriate, and in the instant case, due to the undisputed evidence not only that

Bastin's weekly wage equaled or exceeded the average weekly wage at the time of the injury but that she expected to continue working and earning that wage, that KRS 342.730(1)(c)2 was the more appropriate section. See also Kentucky River Enterprises at 210-11. There was no error by the Board in affirming the ALJ.

With regard to Bastin's claim that she was entitled to TTD benefits from the date of the fall because the fall was caused by her leg giving way due to the work-related injury, we also conclude that the Board did not err in affirming the ALJ on this issue. The ALJ was free to accept or reject Bastin's uncontradicted testimony. See Grider Hill Dock v. Sloan, 448 S.W.2d 373 (Ky. 1969). In rejecting Bastin's testimony and concluding that there was no *medical* evidence to support this causation, the ALJ did not err, and neither did the Board.

For the foregoing reasons, the opinion of the Worker's Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Timothy P. O'Mara  
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