

RENDERED: AUGUST 1, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002078-WC

KATHY A. DAVIDSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-82591

BLUEGRASS OAKWOOD, INC.,
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE
AND WORKERS' COMPENSATION BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Kathy A. Davidson petitions for review of an opinion of the Workers' Compensation Board affirming in part, vacating in part, and remanding the opinion and order of the Administrative Law Judge (ALJ). Finding Davidson

suffered a work-related injury to her right knee while employed as a residential aide at Bluegrass Oakwood, Inc. (“Bluegrass”), the ALJ awarded temporary total disability (TTD) benefits, medical benefits, and permanent partial disability (PPD) benefits including the three multiplier.¹ The Board vacated the ALJ’s application of the three multiplier. Having reviewed the record, we affirm.

Davidson sustained a work-related injury at Bluegrass on July 28, 2009. As she walked into the hospital to visit a patient, Davidson injured her right knee when she stepped off a curb into a hole in the ground. She underwent surgery in October 2009. She returned to work following her surgery, but continued to experience pain and swelling in her knee.

Davidson filed the instant claim seeking medical and income benefits on December 19, 2011. Following a Benefits Review Conference (BRC) on May 16, 2012, an order was entered listing contested issues and stipulations identified by the parties, including stipulations that Davidson retained the physical capacity

¹ The enhancement of PPD benefits is governed by KRS 342.730(1)(c), which provides, in pertinent part, as follows:

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.

to return to her former work, and returned to work earning the same or greater wages.

On July 2, 2012, the ALJ found Davidson was entitled to PPD enhanced by the three multiplier. The ALJ found that while Davidson currently did not have difficulty performing her job, she continued to experience pain and swelling. A physician performing an independent medical evaluation, Dr. Robert Johnson, opined Davidson was putting herself at risk by continuing her current work. Citing *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), the ALJ found Davidson was entitled to the three multiplier because it was likely she would not continue to earn the level of her current wages for the indefinite future.

Bluegrass filed a petition for reconsideration, arguing the ALJ's application of the three multiplier was in direct conflict with the stipulation in the BRC order regarding Davidson's capacity to return to work. The ALJ denied Bluegrass' petition. Bluegrass appealed to the Board. On November 2, 2012, the Board entered an opinion affirming in part, vacating in part, and remanding this case to the ALJ. The Board vacated the ALJ's award of benefits with the three multiplier, concluding the application of the three multiplier was precluded by the parties' stipulation that Davidson retained the physical capacity to return to work.

The Board held:

We believe the purpose of [the stipulation] is to resolve by agreement whether an issue remains as to entitlement to the application of the three multiplier. We arrive at this conclusion by comparing the plain language of the statute with the corresponding language of the

stipulation, and considering the purpose served by stipulations in general. Although Davidson argues there is evidence in the record supporting the ALJ's application of the three multiplier, namely her own testimony and the opinion of Dr. Johnson, we simply cannot ignore the fact that no party moved to set aside the stipulation.

The Board further held that if at some point during the benefits period Davidson's employment ceases due to reasons related to the disabling injury or a previous work-related injury, a two multiplier would be applicable, pursuant to KRS² 342.730(1)(c)(2). This appeal follows.

The function of this Court on review is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

On appeal, Davidson argues her stipulation does not preclude the ALJ from performing an analysis under *Fawbush*. In addition, she maintains the ALJ was permitted to apply the three multiplier because the issue of her capacity to return to work was tried by implied consent. Furthermore, Davidson argues the three multiplier is appropriate because "benefits per KRS 342.730" was identified as a contested issue at the BRC, and this statute provides for PPD benefits, including multipliers.

² Kentucky Revised Statutes.

The purpose of a BRC is to expedite the processing of a claim and avoid the need for a hearing, if possible. 803 KAR 25:010 § 13(1). Issues that are not listed as contested at a BRC cannot be the subject of further proceedings. 803 KAR 25:010 § 13(14). 803 KAR 25:010 § 16(2) allows a party to be relieved of a stipulation, upon cause shown, if a motion is filed at least ten days prior to the hearing.

The language of the stipulation at issue, asking whether Davidson “retain[s] the physical capacity to return to former work,” directly mirrors the language found in KRS 342.730(1)(c)(1), permitting application of the three multiplier if an employee “does not retain the physical capacity to return to the type of work that the employee performed at the time of injury.” *Id.* We agree with the Board, which held the purpose of this stipulation was to resolve by agreement whether an issue remained as to entitlement to the three multiplier. As such, Davidson’s stipulation that she retains the physical capacity to return to work nullifies a necessary element of the three-multiplier. Davidson did not file a motion to be relieved of this stipulation. To allow one party to disregard the stipulation would negate the purpose of limiting the issues at the BRC and would contravene the intent of the regulations. Contrary to Davidson’s assertion, a *Fawbush* analysis to evaluate which multiplier to apply is precluded; such an analysis is unnecessary due to the stipulation.

Davidson also argues the ALJ’s application of the three multiplier was appropriate under to CR 15.02, which permits issues not raised in pleadings, but

tried by express or implied consent, to be treated as if they had been raised in the pleadings. Davidson claims CR 15.02 is applicable because the ALJ was presented with evidence regarding her capacity to return to work at the hearing. We reject this contention. CR 15.02 does not apply to the instant case because the issue of Davidson's physical capacity was raised in the BRC order. Furthermore, there is no authority to support Davidson's position that CR 15.02 can invalidate an express stipulation entered by the parties.

Lastly, Davidson argues she is entitled to the three multiplier because the issue of "benefits per KRS 342.730" was identified as being contested, and the statute provides for PPD benefits and multipliers. We disagree. "Benefits per KRS 342.730" is identified on the BRC order as a general contested issue with no specific mention of multipliers. This general reference does not supersede the specific stipulation pertaining to multipliers.

For the foregoing reasons, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

McKinnley Morgan
London, Kentucky

BRIEF FOR APPELLEE:

Johanna Frantz Ellison
Brittany C. MacGregor
Lexington, Kentucky