

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

NO. 2014-CA-001056-WC

ANGELA WARREN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-12-80644

CUMBERLAND VALLEY DISTRICT  
HEALTH DEPARTMENT; HON R. SCOTT  
BORDERS, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Angela Warren, appeals the December 20, 2013, opinion, order, and award of the Administrative Law Judge, determining that she sustained a work-related lumbar injury on June 9, 2010, and a cervical injury on June 22, 2012, while in the employ of Appellee, Cumberland Valley District

Health Department (“Cumberland”), as well as the June 6, 2014, opinion of the Kentucky Workers’ Compensation Board, which affirmed in part, vacated in part, and remanded the decision of the Administrative Law Judge. On appeal, Warren argues that the ALJ erred in determining that she was not entitled to the application of any multipliers pursuant to KRS 342.730. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Warren was in charge of Cumberland’s HANDS program, which involved assisting young mothers who are determined to be at risk prior to and after delivery. As a result, she was required to make numerous home health visits. Warren was initially injured on June 9, 2010, while carrying a box of magazines out the back door of her building. Warren testified that when she attempted to stop, she felt and heard a pop in her back. Warren reported the injury and filled out an accident report. Approximately three or four days later, she experienced pain radiating into her left leg and low back. She was initially treated by Dr. Shin, who referred her to Dr. William Brooks, a neurosurgeon.

Warren continued to work for approximately three months following that injury until Dr. Brooks took her off work on September 14, 2010. Temporary total disability (TTD) benefits were paid for that injury from September 15, 2010, through June 28, 2011. Dr. Brooks performed a discectomy at the L5-S1 level on March 9, 2011, and assessed a 10% impairment for the June 9, 2010, injury pursuant to the *5<sup>th</sup> Edition of the AMA Guides*.

We note that in January of 2011, Dr. Brooks initially attempted to return Warren to work with certain restrictions of light duty, with no lifting greater than 15 pounds, no repetitive bending, lifting, twisting, stooping, and limited stair climbing and driving, which the employer asserted that it could not accommodate. Warren thereafter underwent surgery on her low back in April of 2011, after which time she was released to return to work by Dr. Brooks without restriction in June of 2011. She returned to work on June 29, 2011, and continued working until June 22, 2012.

Warren had been given notice by her employer that June 22, 2012, would be her last day of work because her job was going to be eliminated. On that date, Warren injured her cervical spine in a work-related motor vehicle accident, which occurred when she ran off the road and ended up in a ditch while operating a health department vehicle. Warren has not returned to work since that time.

Warren was seen in the emergency room of Middlesboro Appalachian Regional Hospital immediately following her motor vehicle accident, at which time she reported problems with her shoulder and neck. She was then seen by her family doctor, Dr. Shin, and subsequently referred to Dr. Brooks for an evaluation. Dr. Brooks diagnosed a cervical strain but did not recommend cervical surgery.

Medical evidence was submitted from various sources below. Dr. Brooks did not assess an impairment rating for Brooks's cervical injury. However, after performing an orthopedic evaluation on May 13, 2013, Dr. David Muffly

assessed a 12% impairment rating for the lumbar spine injury of June 9, 2010, and a 6% impairment rating for the cervical spine injury of June 22, 2012.

A report of Dr. Brooks dated September 27, 2012, was also submitted into evidence, and that report stated that Dr. Brooks anticipated that Warren would be able to return to work without restriction by November 1, 2012, in light of the improvement she had made thus far. Subsequently, however, Dr. Brooks issued a letter on October 7, 2013, wherein he stated that:

Although I discussed with her restrictions, her employer would not allow her to return with any limitation. She wishes to do so and I acquiesced to that, although, I told her that she needed to be careful with bending, twisting, lifting, etc. I also told her that I was not sure that she would be able to continue. Yet, she wished to do so. Subsequent to her motor vehicle accident, she had exacerbation of her neck and back. Unfortunately, there is little else to offer her as she did not have a surgically correctable abnormality.

Once again, she wished to return to work. I told her to continue to do so and gave her a return to work slip on 11/01/2012.

Her restrictions that I had mentioned to her were no lifting above 15 lbs., no repetitive bending, lifting, twisting, stooping, and limited stair climbing and driving.

The latter are restrictions that I placed in reference to her lumbar spine.

Cumberland also introduced the September 24, 2013, report of Dr.

Joseph Zerga, as well as Dr. Zerga's October 2, 2013 deposition. Dr. Zerga testified that he agreed with the decision of Dr. Brooks to release Warren to return to work without restriction on both June 29, 2011, and subsequently in June of

2012, and that he did not believe Dr. Brooks would have done so if it were not safe for Warren to return to work.

A Benefit Review Conference was held in this matter, at which the contested issues were identified as being whether Warren's claim was barred by the statute of limitations, whether she was subject to a supervening or intervening act, work-relatedness and causation, and entitlement to benefits pursuant to KRS 342.730.<sup>1</sup>

A Final Hearing was held on October 23, 2013, and thereafter, on December 20, 2013, the ALJ issued an opinion, order, and award in this matter. Therein, the ALJ found that Warren had sustained her burden of proving that she suffered a work-related injury to her lumbar spine on June 9, 2010. The ALJ awarded permanent partial disability benefits based upon a 12% functional impairment rating, without the application of any multipliers pursuant to KRS 342.730. The ALJ also found that Warren met her burden of proving that she suffered a work-related injury to her cervical spine on June 22, 2012, for which she was awarded permanent partial disability benefits based upon a 6% functional impairment rating without the application of any multipliers.

Warren appealed the ALJ's decision, arguing that the ALJ erred in finding that she retained the physical capacity to return to the same type of physical work she was performing at the time of the injury. In an order dated

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<sup>1</sup>On appeal, we address only the issues raised by the parties, namely, whether the ALJ erred in declining to apply any multipliers to Warren's award pursuant to KRS 342.730.

January 22, 2014, in response to Warren's petition for reconsideration, the ALJ stated:

In finding that the Plaintiff retained the physical capacity to return to the type of work she was performing at the time of the injury, the Administrative Law Judge relied upon the opinions of Dr. Zerga and Dr. Brooks both whom opined that the Plaintiff did retain the physical capacity to return to work without restrictions, and further based on the fact that the Plaintiff did in fact return to work subsequent to the September 9, 2010, accident on June 29, 2011, and worked until her second injury of June 22, 2012, performing her normal job duties until the occurrence of her June 22, 2012, work accident.

Warren then appealed to the Kentucky Workers' Compensation Board arguing that in making the determination, Warren was not entitled to any multipliers pursuant to KRS 342.730, because he relied upon medical opinions that had been recanted or changed.

On June 6, 2014, the Board issued an opinion in this matter. Therein, the Board found that the decision of the ALJ was supported by substantial evidence, in light of the opinions of Drs. Brooks and Zerga, that Warren retained the capacity to return to work without any restrictions. Accordingly, the Board affirmed the decision of the ALJ to decline the application of any multipliers in that regard. The Board did, however, find that the ALJ should have applied the two multiplier pursuant to KRS 342.731(1)(c)(2), and accordingly, reversed and remanded for entry of an amended award.<sup>2</sup> It is from that opinion that Warren now appeals to this Court.

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<sup>2</sup> Warren has not appealed the finding of the Board on this issue, and accordingly, we do not address that portion of the Board's holding herein.

On appeal, Warren argues, as she did to the Board and the ALJ below, that in declining to apply the 3x multiplier of KRS 342.730(1)(c)(1), the ALJ relied, in error, upon the opinions of physicians who later changed or recanted their opinions. Specifically, Warren relies upon the aforementioned October 7, 2013, letter of Dr. Brooks in asserting that the ALJ should have found the multiplier to apply in this instance. Warren also asserts that Dr. Zerga agreed, in substance, with Dr. Brooks and that the ALJ erred in finding that the opinions of these physicians supported a finding that Warren could return to work without restriction. Cumberland disagrees, and asserts that the letter of Dr. Brooks was merely a summary of the totality of the opinions rendered during the course of treating Warren, and that the opinions of Drs. Brooks and Zerga constitute substantial evidence which supports the determination of the ALJ.

Prior to reviewing the arguments of the parties, we note that the function of this Court on review is to correct the Board only where the Court perceives that 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 W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). We review this matter with this standard in mind.

Upon review of the record, the applicable law, and the arguments of the parties, we are in agreement with the Board that the decision of the ALJ was supported by substantial evidence. As correctly noted by the Board, the ALJ is free to reject any evidence, and to 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. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000) *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such proof is not an adequate basis to reverse an appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

The record clearly indicates that Dr. Brooks released Warren to return to work without restriction on both occasions at issue. We disagree with Warren's assertion that the letter written by Dr. Brooks on October 7, 2013, constitutes a recanting of his previous opinion. We note that the letter, when read in its entirety, is clearly a reiteration of the opinions issued by Dr. Brooks during the course of his treatment of Warren based on the entirety of her medical file. We find that the opinions of Drs. Brooks and Zerga constitute substantial evidence to support the ALJ's decision that Warren was not entitled to application of the 3x multiplier contained in KRS 342.730(1)(c)(1), and accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the June 6, 2014, opinion of the Kentucky Workers' Compensation Board, affirming in part, vacating in part, and remanding the December 20, 2013, opinion, order, and award of the Administrative Law Judge in this matter.

ALL CONCUR.



BRIEF FOR APPELLANT:

Frank K. Newman  
John E. Anderson  
Barbourville, Kentucky

BRIEF FOR APPELLEE,  
CUMBERLAND VALLEY  
DISTRICT HEALTH  
DEPARTMENT:

Ralph D. Carter  
Hazard, Kentucky