RENDERED: SEPTEMBER 25, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000967-WC

TINA UPTON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-91018

STANDARD PARKING GROUP;
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Tina Upton appeals the decision of the Workers' Compensation Board, reversing the Administrative Law Judge's (ALJ) award increasing Upton's base permanent partial disability (PPD) benefits pursuant to the three times multiplier contained in Kentucky Revised Statutes (KRS)

342.730(1)(c)1. The Board concluded there was no evidence that Upton will be unlikely to earn her current wage for the indefinite future. We agree and affirm.

Since 1999, Upton has worked as an airport shuttle bus driver for Standard Parking Group. In 2010, she received a work injury to her left shoulder while helping a passenger with a suitcase. After two surgeries and therapy, she was released to work and her employer accommodated her limitations by assigning her to drive the employee bus which did not require her to assist with luggage.

Upton testified at her workers' compensation hearing and via deposition. Upton has a long work history primarily consisting of various bus driving jobs throughout her career, including being a school bus driver. Although Upton testified she has only completed the 10th grade and has not passed the GED exam, she does have a commercial driver's license (CDL) with the certification to carry passengers.

Upton received her injury when Standard Parking had her drive a bus on the long-term parking route over the busy spring break season. When picking up passengers on this route, they expect assistance with their luggage. Upton was injured when she was assisting a passenger with her heavy luggage by lifting it into the overhead rack.

Following her injury and recovery from her second surgery, Upton has been driving the employee bus. This assignment requires a CDL, which is not required to drive the smaller buses used on the passenger routes, and does not require her to lift luggage.

Upton testified although she was released to full-duty work, she has ongoing problems with using her left arm, continues to get throbbing pain and takes Ibuprofen. She has trouble with activities that involve lifting or pressure on her left side and can no longer lift luggage.

Dr. Wunder's November 11, 2011, report explained Upton's injury required two major surgeries on her left shoulder, consisting of a distal clavicle resection, a subacromial decompression and a rotator cuff repair causing 15% upper extremity impairment and a 9% whole person impairment. He recounted that Upton noted her shoulder still causes her pain with lifting and especially reaching and she takes 800 mg. of Ibuprofen at night. In Upton's current driving assignment, "she really doesn't have to lift, push or pull on luggage now and that is working out much better." Standard Parking Group "put her in a restricted area where she has to drive and not do other heavy lifting, pushing and pulling of luggage. She is able to tolerate such an occupation."

Flemming Jackson, Upton's current supervisor at Standard Parking Group, testified Upton is a "good employee," an "[e]xcellent driver," performing a necessary job and he anticipates her continuing in her employment as a driver for the company for the indefinite future. Jackson testified that Upton, as an employee driver, is not required to assist with luggage. When Upton returned to work, her driving assignment had the same hours and wage. She recently received a raise. Jackson also noted: "I wish I had more like her . . . we need more like her."

The ALJ determined Upton returned to work in a position with much less lifting, earned the same or greater average weekly wage, could not continue to earn her current wage indefinitely and "[b]ased on her inability to perform her pre-injury job, I find that she is entitled to the three multiplier." In the Board's first opinion entered on December 14, 2012, it affirmed the ALJ's decision regarding Upton's base PPD benefits, vacated in part and remanded for more specific findings on the issue of the appropriate multiplier.

On January 22, 2013, the ALJ rendered an amended opinion and order on remand determining the three times multiplier was appropriate under the totality of the circumstances. Standard Parking Group appealed, arguing the ALJ's award of three times multiplier was not supported by the evidence.

In the Board's second opinion entered on October 21, 2013, the Board again vacated the ALJ's decision and remanded for specific identification of the evidence from Upton's testimony and Dr. Wunder's report supporting the determination that Upton would be unlikely to continue to earn her current wage for the indefinite future.

On second remand, the ALJ rendered a decision on January 28, 2014. The ALJ made factual findings summarizing Upton's testimony regarding her lack of education, injury, surgeries, inability to now handle luggage and ongoing pain, and Dr. Wunder's report regarding her physical limitations and ongoing impairment. While the ALJ concluded Upton was unlikely to earn her current wage into the indefinite future, the ALJ did not explain how his factual findings supported this

conclusion. On appeal, Standard Parking Group again argued the ALJ's application of KRS 342.730(1)(c)1 was not supported by substantial evidence.

In the Board's third opinion entered on May 16, 2014, the Board reversed and remanded, determining the ALJ's third decision failed to provide a sufficient basis to support the three times multiplier. The Board concluded neither Upton's testimony nor Dr. Wunder's report indicated Upton would be unable to perform her job into the indefinite future. Instead, Dr. Wunder stated "'She is able to tolerate such occupation' in reference to her current job." The Board also noted Upton's supervisor, Jackson, testified Upton would continue performing her job into the indefinite future. The Board determined the ALJ failed to identify specific evidence supporting his award of the three times multiplier and there did not appear to be any evidence of record supporting such an award. Therefore, the Board reversed this enhancement for amendment to the three times multiplier. Because we determine the ALJ failed to identify any evidence supporting the three times multiplier, we affirm.

"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). The claimant must prove each element through substantial evidence, which is "defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Whittaker v. Rowland*, 998 S.W.2d 479, 481-82 (Ky. 1999).

The ALJ is the exclusive finder of fact pursuant to KRS 342.285(1). The ALJ "has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009). When a workers' compensation claimant is successful before the ALJ, the Board must affirm if there is substantial evidence to support the ALJ's conclusions. *Carnes v. Parton Bros. Contracting, Inc*., 171 S.W.3d 60, 68 (Ky.App. 2005). The Board or the appellate courts can correct an error in the ALJ's decision if the decision was erroneous as a matter of law. *James T. English Trucking v. Beeler*, 375 S.W.3d 67, 70 (Ky. 2012).

Our standard of review of a decision of the Board "is limited to determining whether the decision was erroneous as a matter of law." *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). We will only correct the Board where "the . . . 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." *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky.App. 2008) (quoting *Western Baptist Hosp. v. Kelly,* 827 S.W.2d 685, 687–88 (Ky. 1992)).

KRS 342.730(1)(c) provides 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.

In *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, 674 (Ky. 2009) (footnotes omitted), the Kentucky Supreme Court explained the relationship of KRS 342.730(1)(c)1 and 2:

> KRS 342.730(1)(c) adjusts the benefit to account more accurately for the injury's occupational effects by considering the worker's physical capacity to perform the type of work performed at the time of injury, a return to work at the same or a greater wage, age, and educational level.
>
> KRS 342.730(1)(c)1 compensates a worker who does not retain the physical capacity to return to the type of work performed at the time of the injury with a triple benefit. Consistent with KRS 342.710(1), KRS 342.730(1)(c)2 encourages a worker who retains the physical capacity to return to work at the same or a greater wage to do so. It permits the worker to receive the basic partial disability benefit in addition to the wage from working but assures the worker of a double benefit if the attempt later proves to be unsuccessful.

If the employee does not retain the physical capacity to return to the type of work performed at the time of the injury but is now working at a weekly wage the same or greater than the employee's previous wage, whether (c)1 benefits are appropriate depends upon a determination as to whether the employee can continue to earn a wage that equals or exceeds the employee's pre-injury wage. *Adkins v. Pike Cnty. Bd. of Educ.*, 141 S.W.3d 387, 390 (Ky.App. 2004). "If 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 application of paragraph (c)1 is appropriate." *Fawbush v. Gwinn*, 103 S.W.3d 5, 12 (Ky. 2003). In making such determination, an employee who does not retain the capacity to return to the type of work performed before the injury, but performs such work out of necessity as facilitated by taking more narcotic pain medication than prescribed, may properly receive benefits under (c)1. *Id.*

We agree with the Board that the ALJ's decision to grant the (c)1 three times multiplier was not supported by substantial evidence. All evidence of record shows Upton is physically capable of continuing to drive as an employee driver, she can continue in this employment indefinitely, and by doing so she will continue to earn a wage that exceeds her prior wage.

The ALJ seemed to assume that Upton's continued employment with Standard Parking Group is uncertain in a highly competitive marketplace and if her current employment should terminate, Upton's lack of education and age will make it more difficult for her to obtain future employment at a comparable wage to

her pre-injury wage given her lifting limitations. However, these assumptions are speculative. There is no evidence in the record to suggest Upton's current employment as an employee driver for Standard Parking Group is likely to end. Instead, Upton's lengthy prior employment as a driver for Standard Parking Group suggests the opposite. Even if her employment for Standard Parking Group should end, there is no evidence that her education, age and physical limitations make it unlikely for her to obtain equivalent wages as a bus driver for another employer, given her past positive performance, long-standing work history in this field and CDL qualification.

Accordingly, we affirm the opinion of the Workers' Compensation Board, which reversed and remanded the Administrative Law Judge's opinion applying the three times multiplier contained in KRS 342.730(1)(c)1.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Joseph M. Schulte Covington, Kentucky	Scott E. Burroughs Louisville, Kentucky