

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001354-WC

HERITAGE HEALTHCARE/
MIDDLESBORO NURSING & REHAB

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-96907

MELISSA DANIELS; HON. WILLIAM J.
RUDLOFF, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Heritage Healthcare/Middlesboro Nursing & Rehab petitions this Court to review an Opinion of the Workers' Compensation Board (Board) affirming the Administrative Law Judge's award of permanent partial disability benefits to Melissa Daniels. We affirm.

Daniels was employed by Heritage Healthcare as a physical therapy assistant when she suffered a work-related injury to her right ankle on January 25, 2013. Daniels fell in an icy parking lot at work that resulted in a right ankle trimalleolar fracture. She underwent two surgeries and eventually returned to Heritage Healthcare in her position as physical therapy assistant.

On September 15, 2014, Daniels filed a workers' compensation claim due to her right ankle injury. The matter went before the Administrative Law Judge (ALJ). By Opinion and Order rendered April 1, 2015, the ALJ found that Daniels suffered a 3 percent permanent partial disability (PPD) due to the right ankle injury and also enhanced Daniels' income benefits by the three multiplier found in Kentucky Revised Statutes (KRS) 342.730(1)(c). Being dissatisfied with the award, Heritage Healthcare sought review with the Board. By Opinion entered August 21, 2015, the Board affirmed the ALJ's award. Our review follows.

To begin, we only reverse the Board's opinion if it has overlooked or misconstrued the law or flagrantly erred in its evaluation of the evidence causing a gross injustice. *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). To do so, we must necessarily review the ALJ's opinion. As fact-finder, the ALJ must assess the weight and credibility of the evidence. And, in this case, the ALJ's findings of fact will be upheld if supported by substantial evidence of a probative

value. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). We review issues of law *de novo*.

Heritage Healthcare contends that the ALJ erred by enhancing Daniels' award of PPD benefits by the three multiplier under KRS 342.730(1)(c)1. Heritage Healthcare emphasizes that Daniels returned to her same job as physical therapy assistant without medical restrictions after recovery from the right ankle injury. Heritage Healthcare points out that Daniels retained the physical capacity to perform the tasks of physical therapy assistant, thus application of the three multiplier was improper per KRS 342.730(1)(c)1.

Under KRS 342.730(1)(c)1, an award of PPD income benefits may be enhanced by three times "the amount otherwise determined" if the "employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury." The "type of work" performed at the time of injury means the actual daily jobs and tasks performed by the employee. *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2004); *Miller v. Square D Co.*, 254 S.W.3d 810 (Ky. 2008).

In this case, substantial evidence supported the ALJ's findings that Daniels was not physically able to perform the same daily jobs or tasks of a physical therapy assistant as she performed before the injury. In her deposition, Daniels stated that she was unable to lift, transfer, and ambulate heavier patients

without assistance from other staff members after her injury. The evidence indicates that these were tasks routinely performed by a physical therapy assistant at Heritage Healthcare. Before her injury, Daniels could perform these job tasks alone and without any assistance. The ALJ not only considered Daniels' physical incapacity to perform these job tasks but also the fact that Daniels suffered from daily pain and chronic swelling of her right ankle. And, the evidence indicates that Daniels had lost range of motion in her right ankle due to the injury.

Under these circumstances, the ALJ found that application of the three multiplier was proper because Daniels no longer possessed the physical capacity to perform the job tasks of physical therapy assistant. The ALJ was well within its discretion to rely upon Daniels' testimony as to her inability to lift, transfer, and ambulate heavier patients without assistance after the injury. And, the Kentucky Supreme Court has concluded that if an employee returns to the same job post-injury but is unable to perform some of the tasks of that job, the employee is entitled to the three-multiplier under KRS 342.730(1)(c)1. *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2004).

In sum, we conclude that the Board properly affirmed the ALJ's application of the three-multiplier pursuant to KRS 342.730(1)(c)1.

For the foregoing reasons, the Opinion of the Workers' Compensation

Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald J. Niehaus
Lexington, Kentucky

BRIEF FOR APPELLEES:

Johnnie L. Turner
Harlan, Kentucky