

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."  
PURSUANT TO THE RULES OF CIVIL PROCEDURE  
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),  
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER  
CASE IN ANY COURT OF THIS STATE; HOWEVER,  
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,  
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR  
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED  
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE  
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION  
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED  
DECISION IN THE FILED DOCUMENT AND A COPY OF THE  
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE  
DOCUMENT TO THE COURT AND ALL PARTIES TO THE  
ACTION.**

Supreme Court of Kentucky

**FINAL**

2013-SC-000439-WC

DATE 10-9-14 211A Ground D

DONNA SEBASTIAN

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2013-CA-000016-WC  
WORKERS' COMPENSATION NO. 08-79374

COMMUNITY BASED SERVICES;  
HONORABLE CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

In this workers' compensation appeal, Appellant, Donna Sebastian, argues that the Administrative Law Judge ("ALJ") exceeded his authority on a petition for reconsideration by finding that the three multiplier provided in KRS 342.730(1)(c)1 did not apply to her award. For the below stated reasons, we affirm the Court of Appeals.

Sebastian suffered a work-related left knee injury while working for Appellee, Community Based Services ("CBS"). On September 1, 2011, the ALJ awarded Sebastian workers' compensation benefits, but did not apply any of the statutory multipliers under KRS 342.730. Sebastian appealed to the Workers' Compensation Board who, in a decision entered February 28, 2012,

affirmed in part, vacated in part, and remanded the case to the ALJ for additional findings and analysis on the applicability of the multipliers. Specifically, the Board ordered the ALJ to perform a full analysis pursuant to *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) because his failure to do so was an error of law.

On remand, the ALJ entered an order on May 4, 2012, finding that the three multiplier applied to Sebastian's award under KRS 342.730(1)(c)1. In so finding, the ALJ stated that since Sebastian "is earning equal or greater wages than on the date of injury she cannot, as a matter of **statute**, which trumps case law, receive the multiplier pursuant to KRS 342.730(1)(c)2." (Emphasis in original). CBS filed a petition for reconsideration. In the order on reconsideration entered June 18, 2012, the ALJ reinstated the original benefits awarded on September 1, 2011, and removed the three multiplier. Instead, the ALJ found that Sebastian was entitled to the two multiplier pursuant to KRS 342.730(1)(c)2 for any time in which her employment ceases due to her work-related disability. The order stated that "Despite careful and repeated reviews of this Board's Opinion the Administrative Law Judge misconstrued it and this resulted in a patent error appearing on the face of the May 4, 2012 Opinion on Remand."

Sebastian appealed again to the Board arguing that the ALJ exceeded his authority on a petition for reconsideration when he decreased her award by changing his mind about the applicability of the three multiplier. The Board held that the ALJ did not exceed his authority because he was attempting to

remedy an error caused by his misunderstanding of the Board's opinion. The Board stated that an attempt by the ALJ to fix errors made in following a directive from the Board qualifies as a patent or apparent error which is correctable on a petition for reconsideration. KRS 342.281 (stating that on a petition for reconsideration "The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision . . ."). However, the Board vacated the May 4, 2012 opinion, order and award, and the order on reconsideration rendered on June 18, 2012, because the ALJ again failed to conduct a proper *Fawbush* analysis. The Court of Appeals affirmed the Board. This appeal follows.

Sebastian argues that the ALJ exceeded his authority by changing his mind on the applicability of the three multiplier on the petition for reconsideration. She contends that an award of the three multiplier pursuant to KRS 342.730(1)(c)1 is a factual finding which cannot be changed by an ALJ in an order on reconsideration. Therefore, Sebastian believes the Board should have vacated the June 18, 2012 order on reconsideration and directed the ALJ to reinstate the May 4, 2012 order which granted her the three multiplier. We disagree.

It is clear from the ALJ's order of May 4, 2012, that he misunderstood the Board's directive and this led him to admit he misapplied the law regarding the multipliers provided in KRS 342.730. The ALJ's finding that Sebastian was earning a weekly wage equal to or greater than the average weekly wage at the time of her injury would make her potentially eligible to receive the two

multiplier provided in KRS 342.730(1)(c)2, not prevent her from receiving it as he stated in the order. Because of this misunderstanding, it appears the ALJ erroneously applied the triple multiplier despite his failure to find that Sebastian was unable to physically perform the type of work she performed at the time of her injury. The ALJ did not exceed his authority on reconsideration when he attempted to correct his misinterpretation of the Board's remand order. Therefore, the Court of Appeals is affirmed and this matter is remanded to the ALJ for an opinion consistent with the Board's opinion rendered on February 28, 2012. *See Wells v. Beth-Elkhorn Coal Corp.*, 708 S.W.2d 104, 106 (Ky. App. 1985) (holding that KRS 342.218 is "to be liberally construed and is not intended to merely address clerical errors but all patent errors.").

For the above stated reasons, we affirm the Court of Appeals.

All sitting. All concur.

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