# IMPORTANT NOTICE
## NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 18, 2014
NOT TO BE PUBLISHED

# Supreme Court of Kentucky



2013-SC-000543-WC

STELLA KAVANAUGH — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-000398-WC
WORKERS' COMPENSATION NO. 06-01390

JEFFERSON COUNTY BOARD OF EDUCATION;
HONORABLE JOHN COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Stella Kavanaugh, appeals from a Court of Appeals decision that affirmed a Workers' Compensation Board opinion that held she was not entitled to the two multiplier under KRS 342.730(1)(c)2. The Board held that Kavanaugh was not entitled to the two multiplier because the reason she was no longer employed as a preferred substitute teacher for Appellee, Jefferson County Board of Education ("JCPS"), was unrelated to the disabling injury she suffered. Kavanaugh challenges the reversal and also argues that the ALJ erred by finding she was not entitled to the three multiplier under KRS

342.730(1)(c)1.[1] For the reasons set forth below, we affirm the Court of Appeals.

Kavanaugh was employed as a preferred substitute teacher by JCPS when she suffered a work-related injury on November 2, 2005. Kavanaugh's injuries occurred when a student, or group of students, ran into her as she was preparing for dismissal. As a result of the ensuing fall, she suffered injuries to her right and left elbow, back, legs, hip, and left thigh. Kavanaugh was treated at a local emergency room and was released to return to work with restrictions. However, after treatment she continued to experience pain in her left elbow, shoulder, and back. Ultimately, Kavanaugh underwent left elbow surgery on September 1, 2006, and filed a workers' compensation claim against JCPS on October 24, 2006. Kavanaugh was released to return to regular duty work as a preferred substitute teacher in January 2007. However, she continued to experience problems with her left elbow, and received localized injections on multiple occasions to relieve her pain.

In October 2007, Kavanaugh left her job as a preferred substitute teacher and became a full-time school clerk for JCPS. When asked during her deposition why she made the career change, Kavanaugh testified as follows:

> Q: And then from October of '07 to now, you have worked at what school?
>
> A: Meyers Middle as a clerk – a school clerk.

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[1] Kavanaugh also argues that the ALJ erred in assigning the time period by which her enhanced benefit was to be calculated. Due to the outcome of this decision, we need not address this issue.

Q: And that's a full-time job?

A: Yes, sir.

Q: Summers also?

A: No, sir. They kept me on an extra week, but now it's – I'm not working anywhere . . .

. . .

Q: And you find [working as a school clerk] less strenuous than the work as a school teacher?

A: I feel that, I mean, it's still – I still have pain, you know, when I do it, but I feel that as a school substitute I could no longer do it because, you know, when I got hurt, I tried to get a job somewhere through the board other than with the school kids.

Q: So you didn't want daily contact with the students?

A: Yes, sir.

Q: As a teacher.

A: As a teacher; yes, sir.

Q: So it's kind of a personal preference type thing?

A: M—hm, yes, sir.

At a later hearing, Kavanaugh made further comments indicating that her decision to quit as a preferred substitute teacher was based on a preference to not work around children.

After a review of the evidence, the ALJ rendered an opinion and award finding that Kavanaugh's left elbow injury was compensable and approving a requested second surgery. Temporary total disability benefits were reinstated until Kavanaugh reached maximum medical improvement and the remainder of the claim was placed in abeyance. The second surgery on Kavanaugh's left

elbow was performed on December 1, 2009, and she was released to return to work with a permanent lifting restriction of no more than twenty pounds. Kavanaugh's surgeon believed that she had a five percent whole-body impairment rating under the AMA *Guides*.

A final hearing was held on June 28, 2011, where Kavanaugh was again asked to explain why she chose to become a school clerk:

> Q: In your deposition and at the hearing, you said that you took [the school clerk position] because you didn't want to get into any type of confrontational situation with the students again?
>
> A: That's correct.
>
> Q: Is that still . . .
>
> A: That's . . .
>
> Q: . . . why you've not returned . . .
>
> A: Exactly.
>
> Q: . . . to teaching?
>
> A: I do not want to go into teaching.
>
> . . .
>
> Q: And, I've got your testimony here, while – you were working as a teacher and you decided you didn't want to do that anymore, is that correct?
>
> A: No. Yes. That's correct, sir.
>
> Q: And it wasn't because you couldn't use your left elbow teaching, correct?
>
> A: I just don't want to be with kids in a room. No, sir.

In an opinion and award rendered on August 12, 2011, the ALJ awarded permanent partial disability benefits based upon the five percent impairment

rating assessed by Kavanaugh's orthopedic surgeon. The ALJ further found that Kavanaugh was not entitled to the application of the three multiplier set forth in KRS 342.730(1)(c)1 because the evidence indicated that she maintained the physical capacity to perform the job she was doing at the time of her work-related injury. However, the ALJ found that Kavanaugh was entitled to the two multiplier under KRS 342.730(1)(c)2 because her work-related injury caused her to quit her job as a preferred substitute teacher to avoid students. Thus, Kavanaugh was to receive double income benefits for each week that her post-injury wages were less than her pre-injury average weekly wage.

On appeal, the Board entered an opinion affirming in part and reversing in part. The Board agreed with the ALJ that Kavanaugh was not entitled to the three multiplier, because she retained the physical capacity to work as a preferred substitute teacher. However, by a two-to-one vote, the Board reversed the ALJ's finding that Kavanaugh was entitled to the two multiplier. The Board's decision was based on *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009), which stated that the two multiplier could only be applied to an award if the claimant's inability to work was related to her work-related disabling injury. Thus, since Kavanaugh's own testimony indicated that she changed jobs to avoid children, and not because her left elbow made her unable to perform the duties of a preferred substitute teacher, the majority of the Board believed application of the two multiplier was erroneous. The majority noted that Kavanaugh returned to work as a preferred substitute

teacher and was able to physically perform those tasks before becoming a school clerk. The dissenting opinion argued that Kavanaugh was entitled to the two multiplier because it was not clear from her testimony that she changed jobs for reasons other than the work injury. He reasoned that Kavanaugh did not want to work around children in an attempt to avoid a repeat of her left elbow injury. The Court of Appeals affirmed, and this appeal followed.

## I. KAVANAUGH IS NOT ENTITLED TO THE THREE MULTIPLIER

Kavanaugh first argues that the ALJ erred by not applying the three multiplier to her award pursuant to KRS 342.730(1)(c)1 because she contends she does not retain the physical capacity to return to the type of work she performed at the time of her injury. Kavanaugh argues that since the ALJ made a finding that she quit her employment as a preferred substitute teacher because she was trying to avoid further injury, she in fact does not maintain the physical capacity to perform her job. Presumably this argument is based on the concept that Kavanaugh has some sort of psychological impairment caused by her work-related accident which makes her afraid to be a substitute teacher. We reject this argument.

Since Kavanaugh had the burden of proof, and was unsuccessful before the ALJ, she must show that the evidence was so overwhelming as to compel a finding in her favor. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ, as fact finder, has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods,*

*Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). An ALJ's findings will only be reversed if they are so unreasonable as to be erroneous as a matter of law. KRS 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

The ALJ's determination that Kavanaugh has the physical capacity to return to work as a preferred substitute teacher is supported by substantial evidence. Kavanaugh admitted in her deposition that her left elbow did not stop her from performing the job duties of a preferred substitute teacher and the record reflects that she did in fact work as a preferred substitute teacher for several months without incident post-surgery. While being around children might make Kavanaugh nervous that she will suffer a new injury, there is no evidence that her fear is caused by a work-related psychological injury. There is no error here.

**II. KAVANAUGH IS NOT ENTITLED TO THE TWO MULTIPLIER**

Kavanaugh next argues that the Board erred by reversing the ALJ's determination that she was entitled to double income benefits pursuant to the two multiplier pursuant in KRS 342.730(1)(c)2. Again, Kavanaugh argues that her work-related accident caused her to undertake a career path to avoid contact with children. Thus, Kavanaugh contends that *Chryslis House* is satisfied because her career path change was "related to the disability." 283 S.W.3d at 674. We acknowledge that since the ALJ found in Kavanaugh's favor on this issue, it can only be reversed if the finding was unreasonable under the evidence. *Special Fund*, 708 S.W.2d 641; *Wolf Creek*, 673 S.W.2d 736.

The majority of the Board found that the ALJ's finding, that Kavanaugh was entitled to the two multiplier, was not supported by substantial evidence based on her deposition. This testimony indicated that she changed jobs because she did not want to work around children anymore, not because her elbow prevented her from being a preferred substitute teacher. While Kavanaugh subtly implies that the work-related injury has caused her to have some sort of a mental block preventing her from being a preferred substitute teacher, as stated above, there is no evidence of a psychological impairment. We must agree with the Board and Court of Appeals that the evidence does not compel a finding that Kavanaugh's left elbow injury led her to change jobs.

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

All sitting. Minton, C.J.; Abramson, Noble, and Venters, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion in which Cunningham and Keller, JJ., join.

SCOTT, J., CONCURRING IN PART AND DISSENTING IN PART: While I concur with the majority's opinion on the three multiplier issue, I must respectfully dissent from the majority's opinion on the applicability of the two multiplier. I dissent because Kavanaugh's switch from a substitute teacher to a school clerk was *unquestionably related* to the fact and effects of the injury she suffered while substitute teaching, including her obvious fear (rational or otherwise) of a future similar occurrence. This was the finding made by the ALJ based upon all the evidence considered pursuant to our holding in

*Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, 674 (Ky. 2009) ("KRS 342.730(1)(c)2 permits a double income benefit if post-injury employment at the same or greater wage ceases *for any reason, with or without cause*, provided that the reason *relates* to the disabling injury.") (emphasis added).

In its opinion, the majority improperly substitutes its own judgment for that of the ALJ, which is against our longstanding standard of review. *Hanik v. Christopher & Banks, Inc.*, 434 S.W.3d 20, 23 (Ky. 2014) ("The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof."). For this and other reasons, I would uphold the double income benefit originally awarded to Kavanaugh by the ALJ, and note that such award is fully supported by our holding in *Chrysalis House.*

Even so, many now argue that our opinion in *Chrysalis House* ran aground upon the old adage that "[b]ad facts make bad law." *Haigh v. Agee*, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting). Still, *Chrysalis House* was based on the common sense principle that an employee actually fired for theft should not be entitled to double benefits under the workers' compensation statute. Theft, of course, is unrelated in any sense to a prior work-related injury an employee may have suffered. Thus, we held in *Chrysalis House* that KRS 342.730(1)(c)2 only permits a double income benefit during any period that employment at the "same or a greater wage ceases for any reasons, with or without cause, provided that the reason *relates* to the disabling injury."

*Chrysalis House*, 283 S.W.3d at 674 (emphasis added). We *did not hold* that the reason employment ceased had to be *because* of the injury. And we did so with the certain knowledge that the word "relates" has a much broader meaning than the word "because."[2]

*Webster's II New College Dictionary* 100 (3rd ed. 2005) defines "because" as "[f]or the reason that: since." It defines "related" as "connected: associated[,] [c]onnected by . . . common origin." *Id.* at 957. *Black's Law Dictionary* 1452 (4th ed. rev. 1968) defines "relate" as "[t]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with . . . ."

In this respect, I do not believe that any member of this Court has any doubts that Kavanaugh's employment move was prompted by her concerns for her injury and her fear (rational or irrational) of future re-injury from a similar occurrence. And, of course, this is exactly what the ALJ found.

Even the Court of Appeals admitted as much, when it acknowledged that "[w]hile the disabling event leading to Kavanaugh's claim perhaps can be said to have been a motivation for her change in employment, we cannot say that the change was *adequately related* to her disabling injury for purposes of KRS 342.730(1)(c)2." *Kavanaugh v. Jefferson County Board of Education*, 2012-CA-000398-WC, 2013 WL 3808015 at *7 (Ky. Ct. App. July 19, 2013) (original

[2] This conclusion is inescapable when you consider that prior to *and after* our opinion in *Chrysalis House*, KRS 342.730(1)(c)2 read "[d]uring 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." (Emphasis added.)

emphasis omitted and emphasis added). Again, however, what we said in *Chrysalis House* was simply that the reason—"any reason, with or without cause"—only had to be "related to [the] injury." *Chrysalis House*, 283 S.W.3d at 675. Nowhere in the opinion did we evince any intention to place limits on the degree of the relation, such as "adequately related," as did the Court of Appeals in its opinion. *Kavanaugh*, 2012-CA-000398-WC, 2013 WL 3808015 at *7. We simply said it had to be "related to [the] injury." *Id.* Kavanaugh's job switch was plainly "related" to her injury as it was clearly motivated by it.

In this regard, the majority acknowledges that the ALJ found in Kavanaugh's favor on the double multiplier issue (i.e., found that it was "related") and that we can only reverse that finding on the basis that it was unreasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). *See also, Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456, 461 (Ky. 2012) ("The courts have construed KRS 342.285 to require a party who appeals a finding that [favored] the party with the burden of proof to show that no substantial evidence supported the finding, i.e., that the finding was unreasonable under the evidence.").

Relying on *Chrysalis House*, the ALJ determined that Kavanaugh's decision to switch from a substitute teacher to school clerk was related to her injury because she testified that after her injury, which occurred as a result of a student or group of students knocking her down as she was preparing to dismiss class, she no longer wanted to work in a room with children. Mystifyingly, the majority now holds this finding to be unreasonable, and that

Kavanaugh's desire to no longer work in a room surrounded by mobile, active children is, in fact, totally unrelated to the injury she suffered as a result of such circumstances.

The majority further argues that here there is no evidence that Kavanaugh's fear of children "is caused by a work-related psychological injury" and that because she has the physical capacity to return to work as a teacher, her reason for switching was unrelated to her injury. In so holding, the majority substitutes its judgment for that of the ALJ, which it may not do. The ALJ's finding was clearly reasonable under the evidence presented.

Plainly, the word "related," does not mean "directly because of." And in the world of causation, Kavanaugh's cessation of work as a substitute teacher is very clearly related to the work-related injury she sustained under similar circumstances. In fact, it was clearly the motivating force for her change. Thus, it was related as we intended the phrase under *Chrysalis House*.

For these reasons, I must strongly dissent and would reverse the Court of Appeals and reinstate the ALJ's award of the benefits to Kavanaugh.

Cunningham and Keller, JJ., join.

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