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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000423-WC

HEATHER MORGAN — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-14-91253

BLUEGRASS OAKWOOD, INC.;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: KRAMER, NICKELL, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: On February 17, 2014; June 14, 2015; and April 19, 2016, Heather Morgan respectively sustained three work-related injuries while employed by Bluegrass Oakwood, Inc., as a "residential associate." Ultimately, the Workers'

Compensation Board affirmed an order of an Administrative Law Judge (ALJ) that considered Morgan's three injuries and awarded her permanent partial disability (PPD) income benefits enhanced by the double multiplier set forth in KRS[1] 342.730(1)(c)2. On appeal before this Court, Morgan argues the ALJ misunderstood the evidence relating to the enhancement of her award; misapplied the law to his own factual findings in that respect; and that her award should have instead been enhanced by the triple multiplier set forth in KRS 342.730(1)(c)1. For the reasons discussed below, we reverse.

Before discussing the underlying facts, a brief discussion of KRS 342.730 is necessary for context. In general, this statute governs the authority of an ALJ to enhance a claimant's award of income benefits under Kentucky's Workers' Compensation Act. If, for example, substantial evidence supports that a permanent disability prevents the claimant from performing any type of work, thus rendering the claimant "totally disabled,"[2] the ALJ is authorized to significantly enhance the claimant's income benefits as set forth in KRS 342.730(1)(a).[3] If, on

[1] Kentucky Revised Statute.

[2] *See* KRS 342.0011(11)(b) (defining "permanent total disability").

[3] KRS 342.730(1)(a) provides:

> For temporary or permanent total disability, sixty-six and two thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability. Nonwork-related impairment and conditions compensable under

the other hand, a claimant does not return to work and the evidence only supports the claimant's permanent disability is "partial" (*i.e.*, does not prevent the claimant from performing work[4]) and does not prevent the claimant from indefinitely returning to the same type of work the claimant performed pre-injury, the ALJ has no authority to enhance a claimant's award of income benefits. The claimant's award is calculated pursuant to the basic partial benefit criteria set forth in KRS 342.730(1)(b).

Between those two extremes are the mutually exclusive enhancements specified in KRS 342.730(1)(c)1 and (c)2, which are at issue in this appeal. In relevant part, KRS 342.730(1)(c)1 provides:

> 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[.]

Next, the latter of these two multipliers, KRS 342.730(1)(c)2, provides:

> KRS 342.732 and hearing loss covered in KRS 342.7305 shall not be considered in determining whether the employee is totally disabled for purposes of this subsection.

[4] *See* KRS 342.0011(11)(c) (defining "permanent partial disability"); KRS 342.0011(34) (defining "work").

> 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.

One caveat to these provisions arises where either KRS 342.730(1)(c)1 or (c)2 could apply; that is, a situation in which substantial evidence supports that a claimant: (1) cannot return to the *type* of work[5] performed at the time of the injury in accordance with KRS 342.730(1)(c)1; but (2) has *also returned* to some form of work at an average weekly wage equal to or greater than the claimant's pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2. In that situation, the ALJ has the discretion to choose the more appropriate enhancement, and the ALJ's discretion depends upon whether the

[5] For purposes of the triple multiplier set forth in KRS 342.730(1)(c)1, '"[T]he type of work that the employee performed at the time of injury' was most likely intended by the legislature to refer to the actual jobs that the individual performed." *Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (Ky. 2004). Thus, if a claimant "does not have the capacity to perform *all* of the same [pre-injury work] tasks," it is a sufficient ground for holding that a claimant, within the meaning of KRS 342.730(1)(c)1, "does not retain the physical capacity to continue the same type of work he was performing at the time of his injury." *Ford Motor Co. v. Grant*, No. 2013-SC-000772-WC, 2014 WL 5410306 at *5 (Ky. Oct. 23, 2014) (emphasis added). We find *Grant* to be consistent with *Forman*, persuasive authority, and proper to cite as it fulfills the criteria of Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

claimant has the capacity to continue earning those equal or greater weekly wages into the foreseeable future. If substantial evidence indicates the claimant *cannot* do so, the ALJ is authorized to immediately enhance the claimant's award pursuant to the triple multiplier set forth in KRS 342.730(1)(c)1. Conversely, if substantial evidence indicates the claimant *can* do so, the ALJ is authorized to enhance the claimant's award pursuant to KRS 342.730(1)(c)2. *See Fawbush v. Gwinn*, 103 S.W.3d 5, 12 (Ky. 2003); *Kentucky River Enters., Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003).

This caveat ("the *Fawbush* rule") is the subject of Morgan's appeal. The parties agree Morgan is only partially disabled and is therefore capable of working. The parties agree that while Morgan returned to work at the same wages prior to the date of her award, she lacks the physical capacity to perform the type of work she performed pre-injury.

The dispositive issues presented are: (1) whether Morgan returned to work at an equal or greater weekly wage *after* she sustained a work injury that caused her to lose the physical capacity to perform the full range of her duties as a residential associate for Bluegrass Oakwood; and, assuming she did return to work *afterward*, (2) whether Morgan could have continued to earn those equal or greater weekly wages into the foreseeable future.

As will be seen below, three further details complicate these issues; namely, this case involves: (1) an approximately two-year period during which Morgan intermittently returned to work, but sustained three different work injuries that caused her to be temporarily totally disabled and entirely off of work for months at a time; (2) confusion over *which* of the three work injuries caused Morgan to lose the physical capacity to perform the full range of her pre-injury duties, owing in large part to a treating physician's *retrospective* opinion regarding Morgan's physical capacity; and (3) an ALJ's findings of fact, revised findings of fact, and *re*-revised findings of fact which somewhat equivocated about *why* Morgan lacked the physical capacity to perform her pre-injury type of work.

FACTUAL AND PROCEDURAL HISTORY

Morgan was born in 1983 and became a "residential associate" for Bluegrass Oakwood in 2007. In that position, Morgan functioned as a caregiver for patients with physical and mental disabilities who resided on Bluegrass Oakwood's campus. The general duties of all residential associates included bathing, feeding, and lifting patients; pushing wheelchairs; and sweeping, mopping, and dusting the patients' residences. These duties, according to the description of this position that Bluegrass Oakwood filed of record, frequently required residential associates to lift, pull, and push more than fifty pounds during a typical workday.

With that said, the typical workday of a given residential associate, along with its typical risks, depended largely upon where the residential associate was stationed. Each residential associate was stationed at a cottage that housed a group of patients with a specific category of disability; and, depending upon the type of disability, different cottages presented different challenges. For instance, a cottage that housed less self-sufficient patients could require more physically demanding work from a residential associate stationed there because those types of patients required a greater amount of day-to-day physical assistance. Moreover, a cottage that housed patients with behavioral disabilities could expose residential associates to a risk of being physically assaulted.

Morgan was stationed in a cottage of the latter variety; she worked with patients with behavioral disabilities who would occasionally kick, punch, and bite. In a November 17, 2017 opinion and order entered in this matter, the ALJ summarized the evidence relating to the three injuries Morgan sustained while working as a residential associate in her assigned cottage; the treatment she received for those injuries; and the effects of those injuries upon her ability to work according to the medical professionals who provided opinions in this matter. We quote the ALJ's summary in full because the ALJ's understanding of that evidence is raised by Morgan as an issue in this appeal:

> 3. [Morgan] testified by deposition on April 27, 2017, and at the Formal Hearing on September 18, 2017.

> [Morgan] testified at the Formal Hearing on September 19, 2017, and stated that she had not returned to work. She said that she last worked on April 19, 2016, the date of her last injury. She said that her first injury occurred on February 17, 2014, when she was hit by a client in the back of the neck on the right. She said that since that time, she has had headaches, pain, and numbness in her middle and ring finger. [Morgan] said that she did not return to work until August 16, 2014, at the same or greater wages and performing the same job duties. [Morgan] said that she continued working until the second injury on June 14, [2015[6]], when she was hit by a client in the neck. She said that the resident weighed approximately 190 pounds and that she weighs about 112 pounds. [Morgan] said that she returned to work in August of 2015 and continued working until her surgery. [Morgan] said that she did not return to work until she was released by Dr. [Magdy] El-Kalliny. A prior Opinion was completed in this case in August of 2015[[7]] and thereafter [Morgan] had surgery to her neck on October 1, 2015. [Morgan] returned to work in February, 2016 following surgery to the same position and then was injured again in April of 2016. When she returned, she was having problems with her back and headaches. [Morgan] explained that the April 2016 injury occurred when a resident pulled her hair and jerked her neck trying to bite her. She recalled that she reported the injury to Max McAdoo and completed an injury report. She then sought medical treatment from Urgent Care following the injury. Following the injury, she began treating with Dr. El-Kalliny who found that [Morgan] reached MMI as of January 11, 2017. She said that since her third injury, she has had numbness in the middle and ring fingers on the left hand, with headaches, and severe neck pain. Dr. El-Kalliny restricted her to taking breaks every 30

[6] The ALJ originally and incorrectly listed this date as June 14, 2014.

[7] In August 2015 the ALJ directed Bluegrass Oakwood to pay for Morgan's anterior cervical discectomy surgery.

minutes and changing positions with lifting no more than 20 pounds. [Morgan] did not believe she could return to her prior employment due to her pain, and her inability to sit/stand for long periods of time or lift, pull, push, or tug. She stated that the residents sometimes bite, hit, spit, punch, and head butt. She added that she is scared of being injured again due to the combative residents but that she is still an employee for the Defendant and is currently on medical leave. She also said that she would like to return to some type of employment, but is unable to do so at this time due to her pain and headaches. She added that she usually has around three headaches per week, which last all day and keep her in bed.

On cross examination, she stated that she is still an employee,[8] but has talked to Christy Underwood[9] and found that there are no positions within her restrictions. She said that when she returned after being released by Dr. El-Kalliny, she needed assistance from other staff members in order to complete her job duties.

4. The medical records of Dr. Warren Bilkey were introduced into evidence on behalf of both parties. [Morgan] was seen for an independent medical evaluation on October 11, 2016. After performing a physical examination, reviewing medical records and diagnostic studies, Dr. Bilkey diagnosed a February 17, 2014, work injury, cervical strain, cervical disc herniation with C7 radiculopathy ([Morgan] underwent anterior cervical discectomy at C6-7 level with artificial disc placement at the C6-7 level with artificial disc placement with chronic headache); additional cervical strain injury occur [sic] post operatively on April 19, 2016, with aggravation of chronic neck pain. He noted

[8] Morgan testified she was on "medical leave" from her position as a residential associate. In light of that status, she was not being paid or receiving medical benefits.

[9] According to various documents of record, Christy Underwood was at all relevant times an employee and representative of Bluegrass Oakwood. Bluegrass Oakwood has never disputed Morgan's claim that it has no positions available within her restrictions.

that [Morgan] was a small individual who was struck by a resident in the neck. Dr. El-Kalliny performed surgery, which was beneficial and allowed her to return to work until another injury occurred at work hyper extending her neck when a resident yanked her hair backwards aggravating her neck condition. [Morgan] had not returned to work since that time. Dr. Bilkey found that [Morgan's] diagnosis was due to the work injury of February 17, 2014, she had no active impairment prior to that date, and is currently at MMI. Dr. Bilkey recommended that [Morgan] follow up with a spine surgeon as needed and added that [Morgan] should be limited to maximum lifting, pushing, and pulling no more than 20 pounds; alternate sitting and standing every 30 minutes. These restrictions were placed by Dr. El-Kalliny but Dr. Bilkey agreed with them. [Morgan] was directed [by Dr. El-Kalliny] to remain off work until January 11, 2017, and [Dr. Bilkey] was in agreement with Dr. El-Kalliny. Dr. Bilkey assessed a Cervical DRE Category IV and 28% impairment pursuant to the AMA Guides. He noted that the impairment takes into account the April 19, 2016, work injury as it was impossible to apportion between the work injuries of February 17, 2014, and April 19, 2016.

5. The medical records of Urgent Medical Care dated June 14, 2015, through April 27, 2016, were introduced into evidence on behalf of [Morgan]. These records have been reviewed and considered into evidence.

6. The medical records and deposition dated July 18, 2017, of Dr. Magdy El-Kalliny were introduced into evidence on behalf of both parties. [Morgan] was seen on June 2, 2015, with continued complaints of cervical pain. Dr. El-Kalliny diagnosed cervical radiculitis, HNP cervical, neck pain, and myofascitis muscle pain. He had requested an anterior cervical discectomy and fusion but the surgery was denied. Dr. El-Kalliny noted that physical therapy or an epidural injection would not help due to the size of the disc herniation and the pressure on

C7 nerve root. [Morgan] had surgery on October 1, 2015, for a microsurgical anterior cervical discectomy at C6-7 with a placement of artificial cervical disc with good results. [Morgan] returned on October 7, 2015, with improvement following surgery. [Morgan] was directed to follow up on December 2, 2015, and to remain off work until that time per a letter of the same date. Upon return, she was feeling better, but had aching in the shoulders and some sharp pain in the anterior aspect of the neck. [Morgan] was directed to remain off work until January 20, 2016, as [Bluegrass Oakwood] did not accept restrictions. X-rays revealed good alignment of the artificial disc. On follow up, she continued to have cervical pain, more so on the right side. She had no shoulder pain or soreness and was released to return to work on January 20, 2016, with no restrictions. [Morgan] was directed to return in three months and was seen on June 29, 2016, with a new injury from work on April 19, 2016. She was to remain off work until the follow up on July 20, 2016. A cervical MRI was performed on July 7, 2016, and was compared to prior imaging studies dated December 2, 2015, and March 25, 2015. It was found that there was limited exam secondary to metallic streak artifact; small posterior disc bulge at C4-5 which does appear to minimally efface the anterior aspect of the thecal sac and flatten the anterior surface of the cord. [Morgan] was seen on July 20, 2016, and Dr. El-Kalliny reviewed the MRI and pointed out the broad based disc bulge at C4-5. He did not recommend surgery. An X-ray of the cervical spine dated July 20, 2016, revealed disc prosthesis in satisfactory position at C6-7. Dr. El-Kalliny released [Morgan] with restrictions on July 20, 2016, with no lifting of more than 20 pounds and to alternate sitting and standing every 30 minutes. Another note from the same day, states that [Morgan] was off work, but restricted to no contact with clients. Dr. El-Kalliny was concerned about an adjacent level causing the need for a cervical fusion and stated that if he would have put [Morgan] on restrictions to begin with the additional injuries may have been avoided. On cross-

examination, Dr. El-Kalliny stated that the life expectancy of the artificial disc is 10-15 years.

Dr. El-Kalliny found that [Morgan] was at MMI as of January 11, 2017, and assessed a 25% impairment pursuant to the AMA Guides for the February 17, 2014, work injury. He found that there was no apportionment between the injury of February 17, 2014, and the injury of April 19, 2016. Dr. El-Kalliny found since an artificial disc is not addressed in the AMA Guides, he found that the cervical artificial disc fits into the DRE Category IV since there was a complete removal of the disc as in a fusion. He added that all treatment rendered for the cervical condition had been due to the work injuries of February 17, 2014, and April 19, 2016. Dr. El-Kalliny permanently restricted [Morgan] to no pushing, pulling, lifting more than 20 pounds and alternating sitting and standing every 30 minutes for the February 17, 2014 injury. [Morgan] was found temporarily totally disabled from the date of her injury on April 19, 2016, until January 11, 2017. [Morgan's] work injury on February 17, 2014, was determined to be the cause of her cervical injury resulting in impairment and restrictions. In his deposition, he noted that C4-5 was considered an adjacent disc problem, related to the first injury.

7. The medical records of Dr. Ellen Ballard were introduced into evidence on behalf of [Bluegrass Oakwood]. [Morgan] was seen for an independent medical evaluation on June 1, 2016. After performing a physical examination, reviewing medical records and diagnostic studies, Dr. Ballard diagnosed history of reported work injury times three, status post cervical surgery at C6-7 October 2015 and history of recent cervical spine injury. Dr. Ballard found that [Morgan] was at MMI from her previous event when she returned to work in February 2016. Dr. Ballard assessed a 16% impairment pursuant to the AMA Guides and found that [Morgan] needs no restrictions. Dr. Ballard stated that

[Morgan] was able to perform her job duties prior to her new injury. Dr. Ballard recommended that an MRI be performed to determine if [Morgan] had a new injury and what needed to be done next. [Morgan] was determined to be a maximum medical improvement from her February 17, 2014, injury.

In a letter dated August 22, 2016, Dr. Ballard reviewed [Morgan's] MRI dated July 7, 2016. She reviewed the MRI and noted that the C4-5 disc is of minimal importance and is unchanged from the findings previously noted. [Morgan] was determined to be at MMI as of the date of her MRI on July 7, 2016. Dr. Ballard did not assign any work restrictions. She found that [Morgan] had the physical abilities to perform her job duties as a residential associate.

8. [Morgan's] first reports of injury were introduced into evidence on behalf of [Bluegrass Oakwood]. [Morgan's] injury on February 17, 2014, injured her neck and was witnessed by Scott Griffin. [Morgan] was injured again on June 14, 2015, resulting in an injury to her neck and shoulders. That injury was witnessed by Ed Meadors. [Morgan's] third injury occurred on [April[10]] 19, 2016, resulting in an injury to her neck.

9. The medical records and deposition dated August 4, 2017, of Dr. John Vaughan were introduced into evidence on behalf of [Bluegrass Oakwood]. [Morgan] was seen on June 5, 2017, for an independent medical evaluation. After performing a physical examination and reviewing medical records, Dr. Vaughan diagnosed cervical disc herniation at C6-7 and status post disc replacement C6-7. Dr. Vaughan assessed a 25% impairment pursuant to the AMA Guides. He found that the initial injury caused the diagnosis of the C6-7 disc herniation and that the second and third injuries exacerbated the pre-existing condition. Dr. Vaughan

[10] The ALJ originally listed this date as "June 19, 2016," and later corrected it to April.

> found that [Morgan] retains the physical capacity to return to her prior employment unrestricted and that she needed to further treatment or diagnostic studies. He agreed with Dr. Bilkey's DRE impairment rating and added that [Morgan] had subjective complaints and had a successful surgical disc replacement. In his deposition, he agreed that [Morgan] had a prior probability of injuries, like 5% or 10%, at adjacent levels than at the level of the artificial disc. He believed that any restrictions placed would be preventative for injuries in the future. On redirect, Dr. Vaughan did not believe that [Morgan] was at a higher risk factor while working for [Bluegrass Oakwood]. He found that she was somewhere in the middle and that it was not unreasonable for her to go back to her prior job duties.

There is nothing materially inaccurate about the ALJ's summary of the conflicting evidence. But, for the sake of analyzing the ALJ's subsequent application of the *Fawbush* rule, it is necessary to highlight and elaborate upon four points the ALJ touched upon in his summary. First, the ALJ understood Morgan *never returned to any kind of work after her injury of April 19, 2016*.[11] She only returned to work after her injuries of February 17, 2014 and June 14, 2015,[12] and after her October 1, 2015 surgery. After her February 17, 2014 injury, she was paid temporary total disability until June 16, 2014, and she returned to

[11] Morgan testified that she was on "medical leave" from her position as a residential associate. In light of her status, she was not being paid a salary.

[12] While not an issue presented before this Court, it remains in dispute whether Morgan missed any work following her June 14, 2015 injury. The Board remanded for a determination of whether Morgan was entitled to TTD for the period between June 14, 2015, and September 30, 2015, the day before Morgan's surgery.

work on August 16, 2014. And, after her October 1, 2015 surgery, Morgan returned to work January 25, 2016.

Second, the ALJ noted that when Morgan was released to return to work following her injuries of February 17, 2014, and June 14, 2015, "she was having problems with her back and headaches" and "needed assistance from other staff members in order to complete her job duties." This was a reference to Morgan's repeated testimony that since her February 17, 2014 injury, work activities which involved lifting, pushing, and pulling continuously caused her pain in the region of her neck and shoulders.

Indeed, Drs. Bilkey and El-Kalliny contemplated that surgery – specifically, the anterior cervical discectomy and artificial disc placement at the C6-7 level that Morgan eventually received in October 2015 – might remedy Morgan's pain and improve her condition; notwithstanding, both doctors still recommended permanent work restrictions for Morgan due to her February 17, 2014 injury, even *before* Morgan sustained her June 14, 2015 and April 19, 2016 injuries.[13] During his May 12, 2015 deposition, Dr. El-Kalliny testified:

[13] In his March 24, 2015 independent medical evaluation, Dr. Bilkey opined:

> Work restriction recommendations for Ms. Morgan are that she be confined to light duty work with maximum lift of 20 lbs occasional. She should avoid overhead work and avoid activities that involve repetitive neck motion. These restrictions are due to the 2/17/14 work injury. In my opinion Ms. Morgan is not capable of carrying out the full scope of work activities successfully

> Q: Should [Morgan] have restrictions right now as far as her work condition?
>
> EL-KALLINY: Well she – I asked her if she needs to be on restrictions and she's afraid that she would lose her work, so that's why I left her. And I told her, this is not good because it can get worse and it can press on the cord and it can make you paralyzed. She – but I would say restrictions not to lift, push or pull more than fifteen pounds would be reasonable at this time.
>
> Q: Okay. But I understand you haven't put those on her because of –
>
> EL-KALLINY: No, I did not.
>
> Q: -- she wanted to continue to work?
>
> EL-KALLINY: She did, yeah.

Bluegrass Oakwood has never disputed Morgan's testimony that, for purposes of employing her as a residential associate, it could not accommodate the type of restrictions that Drs. El-Kalliny and Bilkey recommended. Thus, when Morgan did return to work after her periods of temporary total disability following her respective injuries of February 17, 2014, and June 14, 2015, she returned

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> performed prior to her 2/17/14 work injury and as outlined in the job description reviewed above.
>
> . . . .
>
> Should Ms. Morgan have access to additional treatment including the MRI scan with follow-up with Dr. El-Kalliny and subsequent treatment as directed by Dr. El-Kalliny, there would be a need to reassess permanent impairment after MMI status is indeed reached.

without restrictions and to the full range of her residential associate duties. At least on paper, she returned the same *type* of work.

Third, the ALJ acknowledged that the physicians who concluded Morgan *lacked the physical capacity* to perform the full range of duties associated with being a residential associate for Bluegrass Oakwood (*i.e.*, Drs. El-Kalliny and Bilkey) definitively arrived at that conclusion, and the conclusion that Morgan *required* permanent work restrictions, *after* Morgan sustained her April 19, 2016 injury. The ALJ also acknowledged that the permanent work restrictions Morgan was assigned precluded her from performing the full range of her pre-injury residential associate duties, and consequently the same *type* of work. *See Forman*, 142 S.W.3d at 145. As indicated, on July 20, 2016, Dr. El-Kalliny determined (and Dr. Bilkey later agreed) Morgan: (1) "should not lift, push, or pull more than twenty pounds. She should be able to sit and stand every thirty minutes;" and (2) should "have no contact with patients/clients."[14]

Fourth, despite what the chronology of Morgan's injuries outlined in the prior three points might imply, the permanent restrictions Dr. El-Kalliny assigned were unrelated to Morgan's April 19, 2016 injury; they were still entirely related to her February 17, 2014 injury.

[14] As the ALJ indicated, these quoted restrictions respectively appeared in two separate notes from Dr. El-Kalliny's office, each dated July 20, 2016.

This begs a question. Clearly, Morgan had no greater impairment on in July 2016 than in January 2016; after all, each of the physicians who examined Morgan in this matter opined that the entirety of her permanent impairment – and the necessity of her permanent medical restrictions – owed to Morgan's February 17, 2014 injury. So, why did Dr. El-Kalliny release Morgan back to work with *no restrictions* on January 2016, but later impose *permanent restrictions* in July 2016?

For the most part, the answer is found in paragraph 6 of the ALJ's summary. Initially, Dr. El-Kalliny intended to impose permanent restrictions in January 2016, before he released Morgan back to work from her post-surgery period of temporary total disability. But, he remained optimistic and chose not to do so at that time. He testified:

> DR. EL-KALLINY: To tell you the truth, after the first surgery, I was trying to put [Morgan] on some restrictions, but she felt that she was doing very well, and she wants to go back to work. She wants to work, obviously.
>
> Q: Sure.
>
> DR. EL-KALLINY: So, I said, "You just go back and hopefully, you'll be fine."
>
> Q: Be careful and do what you can do within limits?
>
> DR. EL-KALLINY: Yes.
>
> Q: Now, you said you were thinking about restrictions even before, and she wanted to – now, you testified

> before you did the replacement, you anticipated full duty, release?
>
> DR. EL-KALLINY: Yes.

When Dr. El-Kalliny treated Morgan again in June 2016 (in relation to her April 19, 2016 injury), he concluded that in hindsight he should not have released her without restrictions for three reasons. As to the first reason, when he had released Morgan back to work in January 2016, he had predicted that Morgan's surgery would eventually resolve the residual pain Morgan continued to experience when she engaged in lifting, pushing, and pulling activities. However, when he treated Morgan again in June 2016, she complained of worsened pain; and, after assessing her condition, he deemed her complaints credible and realized his prediction had been incorrect.

As to the second reason, after reviewing a more recent MRI of Morgan's cervical region, Dr. El-Kalliny discovered something new. As the ALJ noted:

> A cervical MRI was performed on July 7, 2016, and was compared to prior imaging studies dated December 2, 2015, and March 25, 2015. It was found that there was limited exam secondary to metallic streak artifact; small posterior disc bulge at C4-5 which does appear to minimally efface the anterior aspect of the thecal sac and flatten the anterior surface of the cord. [Morgan] was seen on July 20, 2016, and Dr. El-Kalliny reviewed the MRI and pointed out the broad based disc bulge at C4-5.

In his deposition, Dr. El-Kalliny clarified that the disc bulge was *not* the result of Morgan's June 14, 2015 injury, or even her April 19, 2016 injury – both of those injuries, he testified, were merely exacerbations that had fully resolved and had caused no objective changes in Morgan's overall condition. Rather, Dr. El-Kalliny attributed the C4-5 posterior disc bulge to the surgery Morgan had undergone due to her February 17, 2014 injury. He testified:

> DR. EL-KALLINY: C4-5 here is considered an adjacent disc problem, which is an adjacent disc problem related to the first injury.
>
> Q: Still related to the original injury?
>
> DR. EL-KALLINY: Still related in some form because there is a twenty percent chance – in the literature, twenty to twenty-five percent chance of adjacent disc disease, okay, after previous discectomy and fusion or discectomy and disc replacement.

Dr. El-Kalliny further testified that while the disc bulge appeared largely inconsequential[15] in July 2016 when he reviewed Morgan's MRI, it could evolve into a full herniation and require cervical fusion surgery if subjected to enough trauma.

And as to the third reason, Morgan's April 19, 2016 injury played a role in Dr. El-Kalliny's decision to impose permanent restrictions on July 20, 2016. But, it was not the *effect* of that injury that ultimately caused him to assign her

[15] In his deposition, Dr. El-Kalliny characterized the disc bulge as a "tiny little protrusion at 4-5."

permanent work restrictions; again, he testified that in his opinion, the April 19, 2016 injury was merely an *exacerbation* which had caused no objective, lasting changes to Morgan's condition. Instead, it was Dr. El-Kalliny's *realization* that Morgan had sustained her April 19, 2016 injury because she had resumed working at Bluegrass Oakwood with the same group of patients who had behavioral disabilities that caused them to kick, punch, and bite the residential associates. He testified:

> DR. EL-KALLINY: I think my mistake – I did not predict that she's going to go back to Oakwood and she be subjected to another trauma or something else. I mean--
>
> Q: So really, then, if I understand you right, it's not the C6-7 level?
>
> DR. EL-KALLINY: No.
>
> Q: It's your concern over her having an adjacent level, new injury, new herniation –
>
> DR. EL-KALLINY: Yes.
>
> Q: – that's going to inherently now mandate cervical fusion?
>
> DR. EL-KALLINY: Yes.
>
> . . . .
>
> Q: You're familiar with the history of the type of work that [residential associates at Bluegrass Oakwood] do in taking care of mentally handicapped individuals?

DR. EL-KALLINY: Yes.

Q: And with the types of incidents that [Morgan] has with attacks by aggressive clients, is that something that you would believe that she should avoid?

DR. EL-KALLINY: She definitely should avoid.

Q: Because she has this artificial disc in her neck, is that the reason she should avoid that?

DR. EL-KALLINY: Yes.

Q: Is she susceptible to future reinjury because of more attacks?

DR. EL-KALLINY: Definitely.

. . . .

DR. EL-KALLINY: In retrospect, I think I should have put her on some restrictions, keeping in mind she's going to have that type of work, and she's expected to be exposed to some injuries like that.

Q: And that's because of your experience in dealing with Oakwood people?

DR. EL-KALLINY: With Oakwood, yeah. But if she's doing a different type of job, I think that would have been fine. But here in this situation, I think it might have avoided that.

Thus, when asked about the purpose of the permanent restrictions he assigned to Morgan, Dr. El-Kalliny testified the purpose was two-fold:

Q: As she is right now, Ms. Morgan, the anatomy of her cervical spine, there's no objective reason or abnormality that would prevent her from doing full-time, full-duty

> work? It's just that the restrictions, if I'm understanding correct, are preventative to keep her from being in another one of these types of accidents that could lead to cervical fusion?
>
> DR. EL-KALLINY: No. I think because she's still having some residual pain, I think it is related to the condition that she has right now. So part of it is because of the residual neck pain and headaches and some arm pain, not radiculopathy. And part of it, also, is to avoid her to have a full-blown radiculopathy, like a cervical disc herniation. So it's probably both.

In short, it was Dr. El-Kalliny's opinion that when Morgan had *returned* to working the full range of her duties as a residential associate for Bluegrass Oakwood in February 2016, Morgan had *returned* to a type of work that she *lacked the physical capacity to perform*.

Keeping the above in mind, we now turn to the ALJ's findings of fact and conclusions of law relating to the enhancement of Morgan's award pursuant to KRS 342.730. In relevant part, the ALJ held:

> 10. The ALJ is compelled to reference that [Morgan] presented as an excellent witness and that her testimony is given significant weight herein. The ALJ therefore is persuaded by [Morgan's] testimony as it is supported by the medical evidence herein, that she is unable to return to the same type of work due to the pain that she experiences and because of the physical challenges and risks that the job poses.
>
> 11. The ALJ finds that the opinion of Dr. Bilkey is most consistent with the credible testimony of [Morgan] as his description of her limitations is directly in line with [Morgan's] testimony. The addition of an impairment for

> the inability to perform activities of daily living is what distinguishes the opinion of Dr. Bilkey from the rest and what makes it the most credible in the eyes of the ALJ.
>
> 12. Dr. Bilkey determined that [Morgan] was a small individual who was struck by a resident in the neck. He noted that Dr. El-Kalliny performed surgery before another injury occurred at work that hyperextending [sic] her neck. Dr. Bilkey found that [Morgan's] diagnosis was due to the work injury of February 17, 2014.
>
> 13. Dr. Bilkey assessed a 28% impairment and noted that he agreed with the restrictions placed by Dr. El-Kalliny.
>
> 14. The ALJ also finds that the opinion of Dr. El-Kalliny is persuasive as it is similar to that of Dr. Bilkey. The ALJ finds that both doctors have opined that [Morgan] does not retain the ability to return to the same type of work. This opinion has convinced the ALJ.
>
> 15. The ALJ finds that [Morgan] has sustained 28% whole person impairment and that she does not retain the ability to return to the same type of work.
>
> 16. The ALJ finds that [Morgan], despite not retaining the ability to return to the same type of work, did return at the same or greater wages and then ultimately had to stop due to the work injuries suffered herein. The ALJ therefore finds that the "2" multiplier applies per KRS 342.730(1)(c)2.

To review, Dr. El-Kalliny opined that when Morgan returned to work as a residential associate for Bluegrass Oakwood in January 2016, she lacked the physical capacity to perform that type of work due to the effects of her February 17, 2014 work injury. The ALJ was convinced by Dr. El-Kalliny's opinion. But,

because Morgan had nevertheless managed to continue in that position for a period of three months (*i.e.*, until April 19, 2016) until she "ultimately had to stop due to the work injuries suffered herein," Morgan was only entitled to the double multiplier, not the triple.

Over the course of three subsequent orders, the ALJ then clarified why, in his view, the double multiplier of KRS 342.730(1)(c)2 was a more appropriate enhancement to Morgan's award than the triple multiplier of KRS 342.730(1)(c)1. The first time he clarified his logic was in a January 9, 2018 order entered in response to a petition for reconsideration filed by Morgan. There, the ALJ explained in relevant part:

> After an additional review of the evidence, the facts found to be credible by the ALJ support the award of the "2" multiplier. The ALJ specifically finds that [Morgan's] credible testimony supports the issuance of the "2" multiplier. [Morgan] testified that she returned at the same wages but had to stop working due to the residual effects of her prior injuries. There is no credible evidence of any additional impairment suffered or of more significant restrictions issued that would constitute any change in her condition such that the "3" multiplier could be justified.

To be clear, nothing the ALJ stated in his January 9, 2018 order could reasonably be interpreted as holding that Morgan could return to work for Bluegrass Oakwood in her prior role as a residential associate. The ALJ still maintained that Morgan lacked the physical capacity to return to the full range of

her duties as a residential associate for Bluegrass Oakwood. The ALJ had also deemed Morgan's testimony credible; and Morgan had testified (and Bluegrass Oakwood has never disputed) that the restrictions Dr. El-Kalliny had assigned her prevented reemployment at Bluegrass Oakwood.

The only interpretation is that the ALJ concluded Morgan was entitled to the double multiplier, rather than the triple, because he believed – due to Morgan's sporadic performance of a job she lacked the physical capacity to perform – that Morgan *could* regularly perform some *other* unidentified type of work for an equal or greater weekly wage.

And, when the ALJ revisited his holding in this respect a second time (upon remand from the Board following Morgan's first administrative appeal in this matter), he clarified this was precisely what he had meant. By way of background, the Board vacated the ALJ's opinion and award on May 4, 2018, and it directed the ALJ "to conduct an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and in accordance with the Kentucky Supreme Court's directive in Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006)." In its decision to that effect, the Board explained:

> In the November 17, 2017 Opinion and Award, relying upon the opinion of Dr. El-Kalliny, the ALJ found Morgan retained a 28% impairment rating as a result of the February 17, 2014 work-injury.[FN]

> [FN] Neither party disputes the ALJ's finding that the impairment rating is solely attributable to the first injury.

As noted by Morgan, in paragraphs 10, 14, 15, and 16 within the findings of fact and conclusions of law, the ALJ found Morgan did not retain the ability to return to the same type of work. However, in paragraph 16, in addition to finding Morgan did not retain the ability to return to the same type of work, the ALJ also found as follows:

> The ALJ finds that the Plaintiff, despite not retaining the ability to return to the same type of work, did return at the same or greater wages and then ultimately had to stop due to the work injuries suffered herein. The ALJ therefore finds that the "2" multiplier applies per KRS 342.730(1)(c)2.

. . . .

Morgan filed a petition for reconsideration asserting, in relevant part, the ALJ had concluded in four different paragraphs that she did not retain the ability to return to the same type of work. However, the ALJ failed to award the three multiplier, and instead, chose to enhance Morgan's benefits by the two multiplier. Morgan contended the fact the ALJ found she returned to work at the same or greater wages following the first two injuries did not dispose of the issue of whether she is entitled to enhanced benefits by the two multiplier or the three multiplier. Thus, Morgan contended the award should be enhanced by the three multiplier. Alternatively, Morgan requested "additional Findings of Fact and/or Conclusions of Law regarding the application of the three (3) multiplier versus the two (2) multiplier" pursuant to Fawbush.

Agreeing with Morgan's contention that additional findings of fact and conclusions of law relative to the *Fawbush* rule were necessary, the Board further explained:

> Unquestionably, the ALJ found the three multiplier was applicable. The ALJ further found Morgan had returned to work earning the same or greater wages, thus causing the two multiplier to be applicable. Consequently, an analysis pursuant to Fawbush is mandated.
>
> . . . .
>
> In [*Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006)], the Supreme Court addressed the range of factors to be considered in conducting a Fawbush analysis, stating:
>
> > The court explained subsequently in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004), that the Fawbush analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.
>
> Id. at 168-169.
>
> In the case *sub judice*, the ALJ failed to determine, pursuant to Fawbush, whether Morgan is unlikely to be able to continue earning a wage that equals the wage at

> the time of the injury for the indefinite future based on the factors set forth in Adams.

Revisiting his holding in this respect a second time, and in response to the Board's directive, the ALJ then entered an August 30, 2018 order. There, the ALJ repeated the findings previously set forth in paragraphs "10" through "15" of his January 9, 2018 order; he maintained that Morgan, "despite not retaining the ability to return to the same type of work, did return at the same or greater wages;" he summarized the *Fawbush* rule set forth above; and he then added:

> 18. The ALJ finds that [Morgan] was ultimately able to return to work in the same job for a significant amount of time and that she stopped working with no increased impairment, restrictions, or disability. [Morgan] said that she felt uneasy about returning due to the nature of the work in that particular location. . . .
>
> 19. The ALJ finds that [Morgan] did not return due to her fear of the working conditions in that particular location but that she is not prevented from working and earning that same level of income. The ALJ finds that she *could* provide those same services to another employer or in another location for the same employer. The ALJ therefore finds that the "2" multiplier is applicable because [Morgan's] ability to earn an income at the same level has not been impaired.

(Emphasis added.)

When the ALJ clarified his holding with respect to the enhancement of Morgan's award for the *third* and final time, he did so in response to another petition for reconsideration from Morgan. In an October 24, 2018 amended order,

the ALJ once again clarified why, in his view, the double multiplier was more appropriate than the triple multiplier,[16] stating in relevant part:

> [Morgan] seeks additional findings of fact and [Bluegrass Oakwood] seeks a clarification of the award issued. Accordingly the following additional findings[17] and **AMENDED ORDER** are hereby entered:
>
> 1. The ALJ finds pursuant to the Plaintiff's testimony, that she is only unable to return to work in the particular location in which she was injured due to the specific residents that caused her injury and corresponding fear.

Morgan subsequently appealed to the Board, which determined the ALJ's Fawbush analysis was "more than sufficient" and otherwise affirmed the ALJ's decision to apply the double multiplier. This appeal followed.

ANALYSIS

On appeal, Morgan largely repeats the arguments she raised before the Board in both her first and second administrative appeals. In sum, she asserts that if the law had been correctly applied to the ALJ's findings of fact, it would have entitled her to the triple multiplier, not the double. We agree.

[16] Due to what can only be an ironic typo, the ALJ concluded his October 24, 2018 amended order by stating Morgan's "award amount shall be increased by a factor of two for periods of time wherein the Plaintiff ceases making an average weekly wage of at least $595.37 per KRS 342.730(1)(c)***1***." (Emphasis added.)

[17] Despite the ALJ's use of the phrase "additional findings," the October 24, 2018 order only added the singular finding that appears in paragraph "1."

The ALJ's reasons for determining Morgan *lacked the physical capacity to return to her same type of work* (*i.e.*, as a residential associate for Bluegrass Oakwood) were somewhat ambiguous. In his November 17, 2017 opinion and order, the ALJ was "convinced" by the opinions of Drs. El-Kalliny and Bilkey (*see* paragraph "14"); he agreed with the full range of restrictions both doctors assigned to Morgan due to their opinions about her lack of physical capacity to perform the same type of work (*see* paragraph "13"); and the ALJ unequivocally attributed Morgan's lack of physical capacity to "the pain that she experiences and because of the physical challenges and risks that the job poses." (*See* paragraph "10."). Despite *keeping* each of those findings following remand from the Board, the ALJ made an "additional," seemingly contradictory finding on October 24, 2018, that Morgan "is only unable to return to work in the particular location in which she was injured due to the specific residents that caused her injury and corresponding fear."[18]

What appears to have been the focus of the ALJ's attention in this matter is that Morgan *did* return to work, and to the very type of work she *lacked*

[18] A physician's restriction upon a worker, to the effect that the worker should not be exposed to a certain type of hazard and thus should not work in a certain location on the employer's premises, is nevertheless a ground for determining that the worker in question lacks the capacity to perform her pre-injury type of work for purposes of KRS 342.730(1)(c)1. *See Voith Indus. Serv., Inc. v. Gray*, 516 S.W.3d 817, 821 (Ky. App. 2017) (affirming an award enhanced by the triple multiplier because, while the claimant was able to perform his pre-injury tasks as a janitor, his work injury rendered him unable to perform those tasks "in the paint area in the presence of Purge solvent.").

the physical capacity to perform. Apparently, her sporadic ability to do so convinced the ALJ that Morgan *could* return to *another type* of work at an equal or higher weekly wage.

What has remained a *fact* that the ALJ consistently found across all his various orders, however, is that Morgan lacked the physical capacity to perform the full range of her duties as a residential associate for Bluegrass Oakwood due to her work-related injury of February 17, 2014. That *fact* was noted by the Board; it is not contested by Bluegrass Oakwood; and it is legally significant: Under a plain reading of KRS 342.730(1)(c)1, if Morgan had *never* returned to work after she sustained her February 17, 2014 work injury, she would have been entitled to the triple multiplier.

In other words, it would have made no difference whether Morgan *could* have gone back to some other type of work; that a claimant *could* return to some other form of work is not an exception to KRS 342.730(1)(c)1. *See Toyota Motor Mfg. Ky., Inc. v. Tudor*, 491 S.W.3d 496, 506 (Ky. 2016) (explaining that if an ALJ determines KRS 342.730(1)(c)1 applies, "the ALJ *shall* award benefits at three times the rate otherwise payable. However, if the ALJ also determines the employee *is earning* a wage equal to or greater than the pre-injury wage, the ALJ must then determine if the employee is likely to do so for the foreseeable future." (Emphasis added.)).

Moreover, "*could*" is not the standard for enhancing benefits under the double multiplier set forth in KRS 342.730(1)(c)2. Otherwise, any claimant who *maintained* the capacity to perform their pre-injury work, but simply chose not to return, would nevertheless be entitled to the double multiplier, rather than only the *basic* partial benefit calculated pursuant to KRS 342.730(1)(b). After all, that kind of claimant certainly *could* return to work at an equal or higher weekly wage. *See also Blaine v. Downtown Redevelopment Auth., Inc.*, 537 S.W.3d 811, 815 (Ky. 2017) (explaining in the context of KRS 342.730(1)(c)2 that "'returns to work' has no modifiers and using the statutory definition in KRS 342.0011(34) simply requires that the worker go back into the workforce and receive remuneration for services at a wage equal to or greater than she received pre-injury.").

As to the fact that Morgan *did* return to work for approximately three months, it is a detail of no legal significance considering the appellate record. Where the *Fawbush* rule has been applied in published caselaw, it has almost always been applied where a claimant who lacks the capacity to work the same type of pre-injury employment subsequently returns, post-injury, to a job that the claimant has the *capacity* to perform – that is, the claimant returns to either an accommodated form of the prior employment, or to an altogether different form of employment that accommodates the claimant's medical restrictions. *See Voith*,

516 S.W.3d 817; *Blaine v. Downtown Redevelopment Auth., Inc.*, 537 S.W.3d 811 (Ky. 2017); *Tudor*, 491 S.W.3d 496; *Pendygraft v. Ford Motor Co.*, 260 S.W.3d 788 (Ky. 2008); *Adkins*, 141 S.W.3d 387; *Elkins*, 107 S.W.3d 206; *Fawbush*, 103 S.W.3d 5. Hence, when this Court stated in *Adkins* that "the ability to perform the current job" is a factor to be considered in a *Fawbush* rule analysis (*i.e.*, in ascertaining whether a claimant is capable of maintaining a certain level of weekly wages post-injury), *that* was the "current job" we were referring to, not the pre-injury employment.[19]

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[19] *See Adkins*, 141 S.W.3d at 390, explaining:

> *Between two similarly situated claimants not returning to the same type of work*, if one gets a job fitting his restrictions and paying the same wage, but unexpectedly ending after only a year, and the other does not, then it is likely that, under a determination such as that ordered by the Board, only the second would receive benefits based on a multiplier of three. If, however, the ALJ makes a determination under the *Fawbush* standard as to the "permanent alteration in the claimant's ability to earn money due to his injury," then it is likely both claimants would be treated the same.
>
> If every claimant's *current job* was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that *current job* would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the *current job*.

(Emphasis added.)

And that makes sense. The objective of the *Fawbush* rule is not to speculate about the level of weekly wage a claimant *could* make; it is to make an assessment, according to the evidence, of the claimant's post-injury ability to *continue* earning an average weekly wage commensurate to what was earned pre-injury. If the only metric in that regard is the claimant's post-injury ability to perform her pre-injury type of work – a type of work which, as held by an ALJ, she *lacks* the physical capacity to perform – that would be a poor metric indeed. As a matter of law, that is not a type of work that such a claimant could continue performing indefinitely.[20]

Only one published case in Kentucky jurisprudence has cited a claimant's continuation of pre-injury work (*i.e.*, a pre-injury type of work the claimant has been deemed by an ALJ to have *lacked* the physical capacity to perform) as an indication of a claimant's ability, post-injury, to maintain a certain level of wages for purposes of the *Fawbush* rule. That case is *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006). But in *Adams*, the Court's ultimate decision to affirm an ALJ's award that enhanced the claimant's benefits by the double multiplier, rather than the triple, turned upon the claimant's proven ability

[20] If a claimant *maintained* the ability to perform her pre-injury type of work *indefinitely*, there would be no reason to apply the *Fawbush* rule at all. In that circumstance, the ALJ would have no discretion to apply the triple multiplier of KRS 342.730(1)(c)1 because, if a claimant maintains the ability to perform her pre-injury type of work indefinitely, the claimant clearly does not lack the capacity to return to it.

to perform a different job that was both within his post-injury medical restrictions and which, according to the evidence of record, paid at least an equal average weekly wage. *Id*. at 169 (explaining that while the claimant's medium duty restriction precluded his pre-injury work as a nursing assistant, it did not preclude the claimant from working his prior job as a "med tech."). Here, the facts are distinguishable. Unlike the claimant in *Adams*, no evidence of record indicates Morgan has ever performed another job that has paid her a weekly wage equal to or greater than what she was paid as a residential associate for Bluegrass Oakwood. The ALJ merely speculated that such a job existed; and from that, the ALJ proceeded to guess that such a job would pay an equal or greater wage.

We review this case to determine if 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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Under those standards we must also examine the evidence to see if it compels a result in Morgan's favor because she bore the burden of proof below and was unsuccessful. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984); *see also Kentucky State Police*, 171 S.W.3d 45, 51 (Ky. 2005) ("An injured worker has the burden to prove every element of a claim for benefits, one of which is the amount of AMA impairment that it caused." (Citations omitted.)). Compelling evidence is evidence so

overwhelming that no reasonable person could reach the same conclusion as the ALJ. *REO Mech. v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985).

Here, the ALJ made no error in his assessment of the evidence but misapplied the law to his findings. According to the ALJ's findings and the evidence he specifically deemed credible, Morgan only returned to a type of work – that of a residential associate for Bluegrass Oakwood – which she lacked the physical capacity to perform. Morgan could not perform that work indefinitely. There is no proof in the record that Morgan has been paid any wages – much less weekly wages equal to or greater than what she earned as a residential associate – since the date her work injuries caused her to stop working in that position. Moreover, the ALJ was not at liberty to speculate that Morgan *could* work in some other type of position for an equal or greater wage. As a matter of law, there is no meaningful difference between Morgan's situation and the situation in which a claimant who lacks the physical capacity to return to their pre-injury employment decides not to return to work at all.

Accordingly, we REVERSE with directions that Morgan's award be enhanced by the triple multiplier pursuant to KRS 342.730(1)(c)1.

ALL CONCUR.

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