

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000380-WC

CARITAS MEDICAL CENTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-61457

LYNDA STOUT; HON. HOWARD FRASIER, JR.,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE: Appellant Caritas Medical Center (hereinafter Caritas) appeals the Opinion of the Workers' Compensation Board (the Board). In its Opinion, the Board affirmed the Opinion and Award of the Administrative Law Judge (ALJ) which granted to Lynda Stout permanent partial disability benefits, and employed the three multiplier of KRS 342.730(1)(c)1. Caritas appeals and argues that the opinion of the Board was erroneous. We find no error and affirm.

The function of this Court when reviewing opinions of the Workers' Compensation Board is to correct the Board only where it 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 Hospital v. Kelly, 827 S.W.2d 685, 687 (Ky. 1992).

The controlling precedent in this case is Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), which interpreted the application of KRS 342.730(1)(c). The applicable provisions are 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.

Where a worker cannot physically return to the type of work performed at the time of the injury, but the worker has returned to work at a weekly wage equal to or greater than that at the time of injury, it is within the authority of the ALJ to "determine which provision is more appropriate on the facts." Fawbush, 103 S.W.3d at 12. Where a worker is unable to maintain that higher-wage employment into the indefinite future, it is reasonable to apply the three multiplier of KRS 342.730(1)(c)1. Id.

In this case the ALJ found that Stout's benefits should be multiplied by three as provided in KRS 342.730(1)(c)1 since she did not retain the physical capacity to return to the type of work she performed at the time of the injury *and* she returned to other employment at wages greater than the average weekly wage at the time of the injury. The ALJ then examined whether she was likely to be able to continue earning such a wage into the indefinite future. The ALJ cited the evidence that the sedentary position into which Stout had transferred was being eliminated because the office was moving to another state, and that she would be unlikely to find another position in which a new employer would tolerate her need for time off due to her medical condition. The ALJ also noted a lack of proof by

Caritas that Stout would continue to receive a higher wage for the indefinite future.

On appeal, Caritas argues that Stout's post-injury ability to work at her position demonstrates that she can work at the higher wage into the indefinite future. Caritas argues she did not provide proof of an inability to perform this job, and the ALJ should not have expected Caritas to provide proof on this issue. Caritas cites the fact that Stout did return to work making a greater rate of pay for two and a half years until the position was transferred to Pennsylvania. Caritas argues that she was eligible for other positions doing the same work she performed at Caritas, and the length of time she performed her sedentary job shows that she is capable of working indefinitely into the future.

We find no flagrant error in the assessment of the facts by the Board. Instead, the facts in the record amply support the Board's conclusion. Not only was Stout's position eliminated but the entire business office of her employer was moved. There was no indication that there were positions for her to transfer to which would allow her to work as before. Furthermore, the evidence showed that Stout had to take time away from work due to her foot pain, and she believed that her condition was worsening. There was great uncertainty which attached to the question of whether she could continue to work

at all, much less at her higher wage. Dr. Peters, who managed her pain, recommended that Stout cease working altogether. Thus, the fact that Stout had worked for a few years with this condition and her current degree of pain management does not necessarily indicate that she can continue to do so, in the face of the evidence she provided that she may not be able to continue working or to find an employer which could accommodate her. We cannot agree with Caritas that there was any error in the assessment of the evidence.

In addition, Caritas argues that the ALJ erred in applying the three multiplier to the duration of the award instead of beginning when her employment ended. Caritas complains because for those two and a half years, Stout earned a higher wage rate than before, and argues this level of benefits was not intended by the Workers' Compensation Act. Caritas offers no authority for this position. The Board found that the ALJ's award "comports with the plain language of the statute." We agree with the Board that the three multiplier applies to the entire statutory period of benefits awarded. Thus, we affirm under our standard of review.

For the above reasons, we affirm the Opinion of the Workers' Compensation Board.

ALL CONCUR.

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