# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: August 14, 2015**

CLAIM NO. 201383845

ARMSTRONG WOOD PRODUCTS PETITIONER

VS. **APPEAL FROM HON. WILLIAM RUDLOFF, ADMINISTRATIVE LAW JUDGE**

LOVENA OAKES
and HON. WILLIAM RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**VACATING AND REMANDING**
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**STIVERS, Member.** Armstrong Wood Products ("Armstrong") seeks review of the March 18, 2015, Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Lovena Oakes ("Oakes") permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)(1) and medical benefits. Armstrong also appeals from the May 5, 2015,

Opinion and Order on Reconsideration overruling its petition for reconsideration.

On appeal, Armstrong argues the ALJ misapplied the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) in awarding enhanced PPD benefits pursuant to KRS 342.730(1)(c)(1). Armstrong challenges the initial determination the three multiplier is applicable. It contends the ALJ provided inadequate findings of fact to support his decision regarding the applicability of the three multiplier and there is insufficient evidence to support his determination enhancement by the three multiplier is more appropriate. Armstrong argues there is no indication Oakes cannot return to the same or greater wages for the foreseeable future since she continues to work at her pre-injury job earning the same or greater wages.

For reasons not raised by Armstrong, we vacate the ALJ's award of income and medical benefits and remand.

Oakes alleged a lower back injury occurring on May 3, 2013, "due to cumulative trauma – performing repetitive movements." During her November 10, 2014, deposition, Oakes described her injury as follows:

> A: We was on 3 inch wood, and the two expediters I had for the first half of the day – they rotate too [sic] every

> break, and we only get one break and one lunch – and they don't – they wouldn't straighten the wood. And if it gets clogged up, it just comes all down at one time on top of each other along with the hasko's wood, and they don't care if they straighten it up or not. And I was in the first boxing station and I had to – it could be two or three layers deep all the way back to the fifth boxing station and you have got to – you've got to spread that out and try to pick up the good wood in your charge and help wipe the 9's and flip them over.
>
> Q: So what happened on that date that..
>
> A: The first half of the day they about killed me. I just – I kept doing that the first half, and by lunch I was just over the edge. And then it's just too much, too much wood at one time, and you've got to bend over there to try to get the little ones and sort out the good wood from the bad; what's going back to the hasko, and it just overtook me.
>
> Q: And so what happened to you when you say it overtook you?
>
> A: I got to hurting in my low back and my hips and my legs and I couldn't hardly straighten up, in severe pain. And it just – the last round one- and a guy that is a grader, he came over there and he's really good at straightening the wood up and that helped me get through the day. I just barely made it through the day.

Oakes testified she first went to Dr. Patrick Jenkins, her family physician, and Armstrong sent her to

Dr. Jeffrey Golden, both of whom are with Lake Cumberland Medical Associates.

The medical records of Dr. Magdy El-Kalliny dated July 24, 2013, and November 13, 2013, were also introduced.

Oakes relied upon the February 3, 2014, independent medical evaluation ("IME") of Dr. Warren Bilkey who assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Armstrong introduced the December 4, 2014, report of Dr. J. Rick Lyon.

Oakes testified at her deposition and at the hearing. Oakes is currently taking medication for the symptoms from her May 3, 2013, injury. She has only missed seven or eight days of work. She works approximately six days a week. Oakes testified Armstrong mandates she work overtime at least three weeks out of the month. As a result, she works forty-eight hours three weeks and forty hours one week. She testified the job continues to cause her significant pain and the only reason she continues to work is because she has no other means of supporting herself. Because Oakes believes she will eventually be unable to perform her current job, she is looking for other employment. Oakes testified her job is "too hard."

However, she refuses to take a less strenuous job if it means she will earn less money. Oakes testified she performs her job in constant pain and her pain level is currently at seven or eight.[1] She testified she is unable to work without her medication which she takes at night so it is in her system the next day. At the hearing, she testified she has worked every day since her November 10, 2014, deposition. She is attempting to find a job which will allow her to move around so she can walk off the pain. She intends to stay at Armstrong until she finds another job.

In the March 18, 2015, decision, after briefly summarizing the lay testimony, the records of Drs. Jenkins and El-Kalliny, and the medical reports of Drs. Bilkey and Lyon, the ALJ entered, in relevant part, the following findings of fact and conclusions of law:

> I saw and heard the plaintiff Ms. Oakes testify at length at the Final Hearing. I sat a few feet from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony and carefully observed her body language during her testimony. I am the only decision maker who actually saw and heard Ms. Oakes testify. She was a very open and stoic lady. I make the determination that she was a credible and convincing

[1] Presumably, this is on a scale of one to ten.

> lay witness and that her testimony rang true.
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> . . .
>
> Based upon Ms. Oakes' credible and convincing lay testimony, which is covered in detail above, and the persuasive, compelling and reliable medical evidence from Dr. Jenkins, her treating physician, which is covered in detail above, and the persuasive, compelling and reliable medical evidence from Dr. El-Kalliny, the plaintiff's neurosurgeon, which is covered in detail above, as well as the persuasive, compelling and reliable medical evidence from Dr. Bilkey, the examining physician, which is covered in detail above, I make the determination that Ms. Oakes suffered significant work-related injuries to her low back, as well as radicular symptoms in her hip area and lower extremities, resulting from her work activities for the defendant on May 3, 2013.

Since the parties agreed temporary total disability ("TTD") benefits were not owed, the ALJ concluded the issue of entitlement to TTD benefits was moot. The ALJ determined Oakes did not have a pre-existing active disability.

Relative to the income benefits to which Oakes was entitled, the ALJ entered the following findings of fact and conclusions of law:

> Dr. Lyon, the examiner selected by the defendant, stated that it was his opinion that Ms. Oakes reached maximum

medical improvement as of the date Dr. El-Kalliny last treated her on November 13, 2013. Dr. Jenkins, the plaintiff's treating physician, stated that the plaintiff's condition was work-related and placed restrictions on her that she must be able to change positions at will, since she has pain in her back with minimal lifting. Dr. Bilkey stated in his report that he does not think that Ms. Oakes could continue with her work duties, although she appears to be succeeding with them. Ms. Oakes testified that she is still being treated by Drs. Jenkins and Golden and is still taking multiple prescription pain medications. She also testified that she still has bad pain in her back, hips and left leg. Due to her continuing painful symptoms at her present job, she has applied for other jobs. Dr. Bilkey stated that based upon his examination and review of the plaintiff's medical records, she will sustain a 5% permanent impairment to the body as a whole under DRE Category II of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

In this case I am required to conduct an analysis under *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky.2003). Based upon the plaintiff's sworn testimony, as covered above, which I found to be credible and convincing, and the medical evidence from her treating physician, Dr. Jenkins, as summarized above, and the medical evidence from her treating neurosurgeon, Dr. El-Kalliny, as summarized above, as well as the medical evidence from Dr. Bilkey, the examiner, all of which is persuasive and compelling, I make the determination that the plaintiff cannot really return to the type of work which she performed at the time of her work injury in accordance with KRS

342.730(1)(c)1. I specifically rely on the plaintiff's credible and convincing lay testimony at the Hearing that she still has bad pain in her back, hips and left leg while working and is taking multiple prescription pain medications. I also rely heavily on the persuasive, compelling and reliable medical evidence from Dr. Jenkins, her treating physician, who stated that she must be able to change positions at will, since she has pain in her back with minimal lifting. I make the determination that the only reason that this lady continues working for the defendant is that that is the only way she can make earn money to support her basic living expenses. I make the determination that she has applied for other jobs, and that as soon as she obtains an alternate job, she will do so.

In addition, I make the determination that the plaintiff has continued working for the defendant earning the same or greater average than she earned at the time of her work injury, as per KRS 342.730(1)(c)2. I rely upon the plaintiff's sworn testimony to that effect.

I also make the determination that potentially both the 2 and the 3 multipliers could apply in this case and I must determine which is appropriate. I also have to make the determination whether Ms. Oakes is unlikely or likely to be able to continue earning a wage that equals or exceeds her wage at the time of her work injury for the indefinite future. Based upon the plaintiff's sworn testimony, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Jenkins, her treating physician, as covered above, I

> make the further determination that under the decision of the Court of Appeals is *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform her current job. Under the *Adkins* case, the standard for the decision is whether the plaintiff's injuries have permanently altered her ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. I make the determination that under the plaintiff's sworn testimony, as covered above, and the medical evidence from the treating physician, Dr. Jenkins, as covered above, that it is unlikely that the plaintiff will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon all of the above-cited factors, I make the determination that the third prong of the *Fawbush* analysis applies here and that Ms. Oakes' work-related injuries have permanently altered her ability to earn an income, and that she is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. I, therefore, make the determination that the third prong of the Fawbush analysis applies here and that under application the plaintiff is entitled to the 3 multiplier under KRS 342.730(1)(c)1. I also rely on the decision of the Kentucky Supreme Court in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky.2006).

Even though the award of PPD benefits is based on a 5% impairment rating, the ALJ never made a specific finding as to the impairment rating attributable to Oakes' work injury. The ALJ noted Dr. Bilkey stated that based

upon a review of the medical records, Oakes sustained a 5% impairment rating to the body as a whole pursuant to the AMA Guides. However, he did not at any point thereafter state that he adopted the impairment rating of Dr. Bilkey or enter a finding the work injury generated an impairment rating. The remaining findings of fact are devoted solely to the analysis required by Fawbush v. Gwinn, supra. There is no finding regarding the impairment rating attributable to Oakes' work injury. Just as important, there is no finding of the date Oakes attained maximum medical improvement ("MMI").

Armstrong filed a petition for reconsideration requesting additional findings to support enhancement of the award by the three multiplier. It requested the ALJ to cite to the specific portions of Oakes' testimony and the records of Drs. Jenkins and El-Kalliny upon which he relied. In addition, it requested the ALJ provide additional findings of fact as to the portions of Dr. Bilkey's report upon which he relied. Armstrong also requested additional findings of fact explaining the conclusion Oakes did not have the physical capacity to return to her previous work when she testified she has done so since the May 2013 injury. Finally, Armstrong requested

additional findings regarding the ALJ's analysis of the third prong of Fawbush v. Gwinn, supra.

In the May 5, 2015, Order denying the petition for reconsideration, after providing the same summary of the lay and medical testimony contained in the March 18, 2015, decision, the ALJ provided the following:

> I note that in the original Opinion and Order I specifically determined that I relied upon the persuasive, compelling and reliable medical evidence from Dr. Jenkins, the plaintiff's treating physician, who stated that Ms. Oakes must be able to change positions at will, since she suffers pain in her back on minimal lifting. I note that my reliance on Dr. Jenkins' persuasive, compelling and reliable medical evidence is supported by his treatment records, stating that the plaintiff must be able to change positions at will on her job. Dr. Jenkins also stated that Ms. Oakes has severe pain on minimal movement at work. Dr. Jenkins also noted that Ms. Oakes has pain in her back with minimal lifting at work. Clearly, my findings are specifically supported by substantial medical evidence from the plaintiff's treating physician, Dr. Jenkins. I note that the plaintiff's job requires her to pick up wood 12 inches to 48 inches long from a conveyor and turn to place it in a box every 15 seconds and that that work activity requires more than minimal movement in the plaintiff's lifting at work. In addition, I note that Dr. El-Kalliny has seen the plaintiff on two occasions in 2013 and that he noted that the plaintiff had a history of significant pain in her low back, radiating into both hips and her

groin area. Dr. El-Kalliny also stated that the plaintiff's injury was work-related. In addition, Dr. El-Kalliny stated that if Ms. Oakes could tolerate doing her job he would not advise her to be off work. Dr. El-Kalliny prescribed pain medication for the plaintiff's condition. Dr. El-Kalliny stated that the plaintiff's pain is severe and she denied any relieving factors. Dr. El-Kalliny noted that objectively the plaintiff has annular tears at L3-4, which explains her pain. I make the determination that that plaintiff's history and Dr. El-Kalliny's objective medical findings support my conclusion that the plaintiff cannot continue to do the type of work she was performing and reviewed in conjunction with the totality of the evidence, both lay and medical.

The defendant also requests that I provide findings of fact concerning whether the plaintiff will be unable to do her current job with the restrictions of change of positions at will. I make the determination that the plaintiff testified in her deposition and at the Hearing that she had to pick up pieces of wood every 15 seconds and turn to put the wood in a box, and that she stated that she has to take two steps to the conveyor and one step backward toward the box. She stated that she has to stand throughout her work day. She stated that she is not able to sit during her shift which would be a change of position from standing to sitting. She stated that her job requires her to be on her feet throughout the entire work day and that the requirements of her job do not permit her to change positions at will. That was the sum and substance of her testimony at the Final Hearing.

The defendant also requests that I provide additional findings of fact as to what evidence from Dr. Bilkey I relied upon in determining that the plaintiff cannot really return to the type of work that she was doing at the time of her work injuries. **I made the determination that Dr. Bilkey stated that he did not believe that the plaintiff was at maximum medical improvement and that Dr. Bilkey recommended that Ms. Oakes have an orthopedic examination and x-rays of her left hip and that she may need other diagnostic tests.** I made the determination that Dr. Bilkey did not think that the plaintiff could continue with her work duties. The original Opinion and Order discusses the above evidence from Dr. Bilkey. (emphasis added).

The defendant also requests that I make additional findings of fact as to why the plaintiff does not have the physical capacity to return to her previous work. In the original Opinion and Order, I made the determination that the only reason that this lady continues working for the defendant is because that is the only way she can earn money to support her basic living expenses, and I further made the determination that she has applied for other jobs and that as soon as she obtains an alternate job she will do so. My determination on this aspect of this case is supported by the persuasive, compelling and reliable medical evidence from Dr. Jenkins, Dr. El-Kalliny and Dr. Bilkey, which is covered in great detail in the original Opinion and Order. I make the determination that that evidence relied upon in the original Opinion and Order constitutes more than substantial evidence that the plaintiff does not

> have the capacity to return to her previous work.
>
> The defendant also requests additional findings regarding the plaintiff's inability to continue to earn the same or greater wages for the indefinite future. I note that in the original Opinion and Order I made the determination that under the plaintiff's sworn testimony, which was covered in detail and which was credible and convincing lay testimony, as well as the persuasive, compelling and reliable medical evidence from the plaintiff's treating physician, Dr. Jenkins, which is covered in detail, that it is unlikely that the plaintiff will be able to continue for the indefinite future to do work from which to earn such a wage. In the original Opinion and Order I made the determination based upon substantial lay and medical evidence that the third prong of the *Fawbush* analysis applied in this case, and that the plaintiff is entitled to recover enhanced permanent partial disability benefits under KRS 342.730(1)(c)1. I make the determination that the plaintiff is between a rock and a hard place and that she continues to suffer severe pain in her present job, but continues to work at that job with the hope that she will find another job that is not as physically demanding and that she has only herself to rely upon.

Because the award of PPD benefits is erroneous as a matter of law, it is vacated. Specifically, we note in the March 18, 2015, decision and in the May 5, 2015, Opinion and Order ruling on the petition for reconsideration, the ALJ never made a finding as to the

impairment rating attributable to Oakes' injury. As noted previously, the March 2015 decision contains no finding as to whether Oakes' injury merited an impairment rating. In the March 18, 2015, decision, the ALJ clearly acknowledges Dr. Bilkey's opinion Oakes has a 5% impairment rating pursuant to the AMA Guides. However, he never states he adopts that impairment rating. Similarly, in his May 5, 2015, Opinion and Order ruling on the petition for reconsideration, the ALJ does not adopt Dr. Bilkey's impairment rating. Thus, the ALJ must make a finding as to whether Oakes has an impairment rating attributable to the work injury.

In resolving this issue, the ALJ cannot rely solely upon the opinions of Dr. Bilkey. In his February 3, 2014, report, Dr. Bilkey diagnosed Oakes' injury as a lumbar strain which is causing chronic low back pain. He also stated "the question was raised here as to whether or not the work injury in reality caused an aggravation of an orthopedic problem related to the left hip." Consistent with that diagnosis, Dr. Bilkey stated as follows:

> I can't say that Ms. Oakes is at MMI. Although her lumbar spine has been dealt [sic] I think in an adequate fashion, I think there is medical indication here for an orthopedic evaluation regarding the left hip and

> pelvis. For this reason I would not be placing Ms. Oakes at MMI now.

Significantly, Dr. Bilkey went on to state:

> For now a permanent partial impairment rating, based on today's evaluation, physical exam and medical record review, may be described. According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Ms. Oakes satisfies criteria for a Lumbar DRE Category II impairment as referenced on Table 15-3 of the Guides. This allows for a range of impairment of 5-8%. Ms. Oakes has 5% whole person impairment solely attributable to the 5/3/13 work injury.
>
> PPI is predicated on MMI. Should Ms. Oakes have further evaluation and treatment for her pain problem, there may be a need to reassess permanent impairment after MMI status is reached.

Dr. Bilkey's report firmly establishes that at the time he saw Oakes she was not at MMI. Thus, his impairment rating cannot be used by the ALJ unless the ALJ finds Oakes was at MMI prior to the time she was seen by Dr. Bilkey. 2.4 of Chapter 2 of the AMA Guides states as follows:

> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not

> anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living.

Without question, an impairment rating cannot be assessed prior to attainment of MMI. *See* Corbett v. Makers Mark Distillery, Claim No. 2013-CA-001102-WC, rendered March 13, 2004, Designated Not To Be Published. There, the Court of Appeals stated:

> Because Dr. Morris opined Corbett had not reached MMI, the AMA *Guides* prohibited him from assigning *any* impairment rating for *any* of Corbett's conditions.
>
> In addition, contrary to Corbett's novel assertion, Dr. Morris never characterized his "10%" response to Question 4(a) as a "procedural" impairment rating. He never conditioned his opinion that Corbett had not reached MMI on whether recommended neurological evaluation was provided. And, he never indicated he knowingly expressed an unauthorized and infirm 10% "procedural" impairment rating with the reasonable expectation or intention it would be legitimized and cured by a subsequent legal finding of MMI, whether based on another physician's contrary MMI opinion or non-provision of recommended treatment.

Slip Op. at 18.

Although neither party has raised this issue, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

On remand, the ALJ may rely upon the impairment rating of Dr. Bilkey if he determines Oakes attained MMI prior to the date Dr. Bilkey saw her and concluded she was not at MMI. As noted by the ALJ, Dr. Lyon stated in his report that Oakes had attained MMI on November 13, 2013, the date of her final consultation with Dr. El-Kalliny. Similarly, Dr. El-Kalliny's November 13, 2013, record appears to reflect he believed MMI was reached when he saw her on November 13, 2013. Should the ALJ find November 13, 2013, is the date of MMI, then he is free to rely upon Dr. Bilkey's impairment rating.

Therefore, because the ALJ did not make a specific finding as to an impairment rating attributable to the work injury, the award of benefits must be vacated. On remand, the ALJ must make an initial determination of the date Oakes reached MMI. The ALJ must then enter a finding of fact as to whether Oakes has an impairment rating due to the work injury. We specifically note the ALJ stated on page ten of his May 5, 2015, Opinion and Order ruling on

the petition for reconsideration that he previously determined Dr. Bilkey stated he did not believe Oakes was at MMI and recommended that Ms. Oakes have an orthopedic examination and x-rays of her left hip. We emphasize the ALJ did not find Oakes was not at MMI on the date Dr. Bilkey saw her. Rather, he stated he made the determination Dr. Bilkey did not believe she was at MMI. Thus, the ALJ cannot rely on Dr. Bilkey's impairment rating without first determining Oakes reached MMI prior to February 3, 2014, the date of Dr. Bilkey's independent medical evaluation.

Significantly, Armstrong does not contest the finding Oakes sustained a May 3, 203, work injury. Consequently, on remand, the ALJ must determine whether Oakes has a permanent impairment as a result of the injury and then enter the appropriate award.

Lest there be no misunderstanding, on remand, the ALJ must first determine the date of MMI. Then he must determine whether Oakes has a permanent impairment as a result of the work injury. There shall be no award of TTD benefits as the ALJ has already determined the issue of entitlement to TTD benefits is moot. Further, there shall be no additional evidence taken. The ALJ shall enter a final decision by determining whether Oakes is entitled to

PPD benefits as a result of her injury and enter the appropriate award based on that determination and no more. Should the ALJ find Oakes has a permanent impairment, he shall cite to the medical evidence he has relied upon in support of this finding.[2] Similarly, regardless of whether he determines Oakes has a permanent impairment, the ALJ shall determine the extent of the medical benefits to which Oakes is entitled. The absence of a permanent impairment rating does not necessarily preclude an award of future medical benefits.

If the ALJ determines MMI was attained prior to Dr. Bilkey's report and adopts Dr. Bilkey's impairment rating, he shall then determine whether a Fawbush v. Gwinn, supra, analysis is necessary.

As a final note, should the ALJ again conduct an analysis pursuant to Fawbush v. Gwinn, supra, we believe his previous analysis as to the first and third prong is insufficient.

Accordingly, the award of income and medical benefits as set forth in the March 18, 2015, Opinion and Order and the May 5, 2015, Opinion and Order on Reconsideration is **VACATED**. This matter is **REMANDED** to

[2] We acknowledge only Dr. Bilkey assessed an impairment rating.

the ALJ solely for the purpose of entering a final decision on the merits in conformity with the views expressed herein.

ALL CONCUR.

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