Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 16, 2014

CLAIM NO. 201300431

BAE SYSTEMS HOLDINGS, INC. PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

MILDRED PEYMAN
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Bae Systems Holdings, Inc. ("Bae") appeals from the October 28, 2013, opinion and order and the November 22, 2013, order ruling on its petition for reconsideration of Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). In the November 22, 2013, opinion and order, the ALJ awarded Mildred Peyman ("Peyman") temporary total disability ("TTD") benefits, permanent partial

disability (“PPD”) benefits enhanced by the three multiplier, and medical benefits.

On appeal, Bae asserts it is unclear whether the ALJ performed an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), therefore the claim should be remanded to the ALJ with instructions to perform the correct analysis. In its second argument, Bae argues assuming the ALJ performed a Fawbush analysis, “he relied upon erroneous findings of fact.”

The Form 101 alleges Peyman sustained cumulative trauma to her back within the scope and course of her employment on September 19, 2012.

The August 14, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice, average weekly wage, unpaid or contested medical expenses, injury as defined by the ACT, credit for short term disability, exclusion for pre-existing disability/impairment, TTD, extent and duration with multiplier, and statute of limitations. Under stipulations is the following: "Plaintiff returned to work on 3/4/2013 at a wage = his/her AWW. Plaintiff currently earns wages = his/her AWW."

In the November 22, 2013, opinion and order, the ALJ stated as follows regarding the applicability of the two and three multiplier:

> The Plaintiff has returned to full employment at a lesser wage than she was making at the time of her injury. The job to which she was assigned did accommodate her restrictions as imposed by Dr. Hoskins, and in part she makes less money than previously due to the change in the employer's compensation plan. Depending upon whether one references her own testimony or the restrictions recommended by Dr. Hoskins, she does not retain the physical capacity to return to the type of work that she performed at the time of her injury. While she is capable of performing some of the duties required of her at the time of her injury, she is not physically capable of performing all which were required. It is also unlikely that the employer will be able or willing to allow her the freedom of movement stressed by Dr. Hoskins after sustained sitting or standing. She is entitled to a 3 multiplier. In making this finding, I rely on the medical opinion of Dr. Robert Hoskins and Plaintiff's own testimony, which I find to be credible, compelling and persuasive. *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). KRS 342.730 (1) (c) 1.

Bae asserts the ALJ erred by making the determination the two multiplier is not applicable, as Peyman stipulated at the BRC she returned to work at wages equal to the wages she was earning at the time of the injury and that stipulation was never withdrawn. Indeed, a

review of the record reveals a stipulation at the August 14, 2013, BRC that Peyman returned to work on March 4, 2013, at wages equal to her wages at the time of the injury.

In addition, during her June 3, 2013, deposition concerning her pre and post-injury wages Peyman testified as follows:

> Q: What's your current hourly rate of pay?
>
> A: Ten dollars an hour.
>
> Q: What was it before September of 2012, if you recall?
>
> A: We done incentive pay. I'm not quite sure what the flat rate was, but the more over 100 percent you done was the more money you made.
>
> ...
>
> Q: All right. In your estimation, are you making about the same amount of money now as you were before September of 2012?
>
> A: Before September 2012?
>
> Q: Yes.
>
> A: Yeah.

At the final hearing, Peyman testified as follows regarding her pre-injury wages:

> Q: First, in the event that we're not able to get wage information, can you tell me, do you know what your hourly

> rate was at the time that you [sic] working?
>
> A: $10 an hour.
>
> Q: And you were making $10 an hour in September of last year?
>
> A: Yes, sir.
>
> Q: Do you know about how many hours a week that you worked?
>
> A: Forty (40) hours a week.
>
> Q: So did you work any overtime?
>
> A: Not that I can remember.
>
> Q: So, say, for the year prior to September of last year, were you working 40 hours a week at $10 an hour?
>
> A: Before the September?
>
> A: We [sic] working at incentive pay. But they had just recently come up and changed that a little bit before September, so I was actually making before that incentive pay- which worked on a line, which meant that my pay was based on how many extra baskets that the line got off.

In its November 4, 2013, petition for reconsideration, Bae contested the ALJ's determination Peyman earned less money upon her return to work than she was earning at the time of the injury. The ALJ failed to address this issue in his November 22, 2013, order.

The ALJ erred by determining Peyman "has returned to full employment at a lesser wage than she was making at

the time of the injury." The record firmly establishes Peyman was making $10.00 per hour at the time of the injury and was working forty hours per week. Peyman testified at the hearing that Bae stopped the incentive pay "a little bit before September," the month of her injury. More importantly, the stipulation contained in the BRC order reflects Peyman is earning wages equal to the wages earned at the time of injury and was never withdrawn. Consequently, KRS 342.730(1)(c)2 is potentially applicable. Therefore, the determination Peyman returned to employment in March 2013 at a lesser wage than she was earning at the time of the injury, must be vacated.

Bae next contends the finding Peyman does not retain the physical capacity to return to her pre-injury work is not supported by the evidence. We will address this argument before addressing the need to conduct an analysis pursuant to Fawbush.

The ALJ, in the October 28, 2013, opinion and order, relied upon Dr. Robert Hoskins' opinions and Peyman's testimony in finding that pursuant to KRS 342.730(1)(c)1, Peyman does not retain the physical capacity to return to her pre-injury work.

In the June 20, 2013, Form 107 he completed, Dr. Robert Hoskins diagnosed lumbosacral sprain/strain, L5-S1

posterior disc protrusion, and L5-S1 neuroforaminal and lateral recess stenosis "secondary to cumulative trauma and repetitive strain associated with the physical job demands encountered through her employment as a sewer [sic] for BAE Systems Holdings, Inc." He assessed a 6% whole person impairment rating.

Dr. Hoskins described Peyman's job duties as follows:

> Ms. Peyman's job involves sewing military ammunition holders. Such work requires prolonged sitting, lifting baskets weighing less than 10 lbs, pushing, pulling, prolonged sitting, extended reaching, handling, and fingering. Ms. Peyman presently works on the 'molded-waist-belts line and comments that her supervisor allows her to get up and changes [sic] postures throughout the work shift.

Dr. Hoskins checked "yes" next to the question, "does the plaintiff retain the physical capacity to return to the type of work performed at the time of the injury?" He wrote as follows: "So long as Ms. Peyman is given the freedom to alternate her posture throughout the day between sitting and standing, then I see no reason why she cannot continue to work." He imposed the following restrictions:

> 1. No lifting > 50 lbs
> 2. No lifting > 25 lbs below waist level
> 3. No continuous sitting > 2 hours. Plaintiff needs a few minutes to stand

> and walk around after 2 hours of continuous sitting.
> 4. No continuous standing or walking > 2 hours. Plaintiff needs a few minutes to sit after 2 hours of continuous standing and/or walking.
> 5. No prolonged or repetitive stooping or crouching.
> 6. No activities that involve sustained posturing of the lumbosacral spine at extremes of motion or repetitive movement into extremes of lumbosacral motion.

During her June 3, 2013, deposition, Peyman described her primary pre-injury duties as follows:

> Q: Okay. When you- when they hired you on officially, for what position were you hired?
>
> A: A line sewer. I sew on the line.
>
> Q: Tell me about the primary job duties for a line sewer.
>
> A: Just- we take parts out of a basket and we attach whatever we have to to [sic] it and send it on down the line.
>
> Q: What do you have to do to attach the parts to the basket? Are you attaching them to the basket?
>
> A: No. I'm attaching parts to parts.
>
> Q: Okay. And what types of parts are you referencing? Are these pieces of plastic or...
>
> A: Material, plastic, just different stuff.
>
> Q: Okay. What- what is the- what are you all producing when you're working on the line?

A: Military stuff.

Q: Okay.

A: I can't go into much detail about that. I signed a- a [sic] affidavit or something.

Q: Oh, sure. How large are the parts that you'd be handling?

A: It- at that time, they was [sic] probably that wide, maybe that tall (indicating).

Q: You're indicating a little bit less than a foot wide-

A: Yes.

Q: - and maybe about nine inches tall or something like that?

A: Yes.

Q: I see you're indicating. I'm just guessing for the judge who's going to be reading this. Does that sound about accurate?

A: Yeah.

Q: Okay.

A: Yeah.

Q: And how much would these parts normally weigh?

A: They was [sic] 10 parts to a basket and it would weigh from three- each indiv - individual basket weighed from three to five pounds.

Q: So the parts would typically weigh less than a pound, then?

A: Yes.

Q: Okay. Was this fast-paced work?

A: Yes.

Q: And when you're attaching these parts together, are you attaching them by- what kinds of tools are you using to attach the parts together?

A: A sewing machine-

Q: Okay.

A: -or- or a tacker.

Q: And what's a tacker?

A: It's- it's a machine that puts a tack in the material.

Q: Would you typically be sitting or standing for this type of work?

A: Sitting.

Q: Would you be sitting at a desk or at a higher table?

A: At a- at a table.

Q: Okay. Would you be on a bench or have your own seat?

A: Have my own seat.

Q: Okay. And can you adjust those seats-

A: Yes.

Q: - to accommodate you as far as the height that you want to sit?

A: Yes.

Q: Okay. How long were your normal shifts working as a line sewer?

> A: At that time, it was eight hours a day, five days a week.
>
> Q: And during an eight-hour shift, about how much time would you spend being seated?
>
> A: Out of eight hours, I would get two 10-minute breaks and then a 30-minute lunch period. The rest of that time, I would be at my seat.

Peyman was working on the "mag tab line" at the time of her injury. She described her duties on that line as follows:

> Q: What would you have to do on that line?
>
> A: I would take parts- or take a basket from the floor to set it on my table, and then from the table, I would take my parts out of the basket and sew other parts to it and then put it back into another basket to send it on down the line.
>
> Q: How much would those baskets weigh?
>
> A: Probably five to 10 pounds.
>
> Q: And how many baskets would you go through in a normal day there?
>
> A: I was supposed to do 30 and I could only get anywhere between 20 and 25.
>
> Q: Was that work more difficult than some of the other jobs that you've done?
>
> A: No.
>
> Q: Okay. Did you have to do any lifting besides the baskets you talked about?

A: No.

Regarding her return to work in March 2013, Peyman testified as follows:

> Q: Did you return to work in March of 2013?
>
> A: Yes.
>
> Q: And did your- did you get a full-duty release?
>
> A: Yes.
>
> Q: Have you been completing all of your normal job duties since you returned to work?
>
> A: Yes.

However, at the final hearing, concerning her job duties at the time of the injury, Peyman testified:

> Q: So let's talk about what physically you had to do, okay? What was your job responsibility? What did you have to do physically that you had to perform each day?
>
> A: Okay. I would- all of my parts come to me on the floor and we had to- we all have to turn around to pick up parts up off the floor to set them on the table. Then we get our parts out individually and sew our parts to the other parts to complete the vest. And when you got all 10 pieces done, you put them back in the basket, and then turn around and send them on down the line.
>
> Q: Do I would assume you're talking about materials-
>
> A: (Interrupting) Yes.

Q: -straps-

A: (Interrupting) Yes.

Q: -things of that nature?

A: Yes.

Q: And you would have to lift these things, put them on there, sew them together and move them on down the line?

A: Yes, sir.

Q: Okay. Now, was that your job up until September?

A: Oh, no. That was the job- oh, yes, yes, that's correct.

Q: Okay. How long had you done that particular job?

A: For about a year.

Q: Now, was there something about that job that you felt was causing your problems?

A: I had noticed that during this duration that the position that I was stuck in, all bent over constantly all the time of having just repetitive motions was causing me problems. And I had requested to be moved because that job was bothering me and they denied to move me.

Q: Okay. So for a year or so, you've been doing that kind of job and you were having some problems?

A: Yes, sir.

Concerning the differences between her post-injury job and her pre-injury job, Peyman explained:

Q: What's different about the job you're doing now as opposed to the job you were doing in September when you had to quit for a while?

A: I'm no longer on a sewing machine. I am on a tacker. And it consists of- I'm one of the first jobs at the beginning of the line, so the- the parts are not as big and it doesn't take as much time to do these parts as it did the parts before.

Q: Now, from your point of view, from- from what- how that might affect your body-

A: (Interrupting) Uh-huh (Affirmative).
Q: - do you feel like this is an easier job than the job you had in September?

A: Yes.

Q: Okay. So you feel like you can perform this job as opposed to the other job. Do you feel like you could continue to do the other job that you had?

A: To do the other job?

Q: The job in September?

A: No, I wouldn't be able to do- perform that job that I done [sic] in September.

Q: Okay. So can you tell us- you say- you say the parts are lighter and they're easier?

A: Uh-huh (affirmative).

Q: What the most significant change in this job that makes it easier for you to do this job where you would not be able to do the other job?

> A: At this job that I'm currently at now, I have more motion. I have to reach to get different parts to tack them and just to constantly move the part around.
>
> Q: Okay. Now, you said the other job, you had to actually lift materials?
>
> A: Yes, but we do that with all jobs.
>
> Q: So this job, you actually have to lift materials on this job you're doing now?
>
> A: Yes.
>
> Q: But the materials you're dealing with are just lighter weight-
>
> A: (Interrupting) Yes.
>
> Q: -is that what you're talking about?
>
> A: Yes.

Regardless of Dr. Hoskins' restrictions, the above-cited hearing testimony by Peyman comprises substantial evidence in support of the ALJ's determination Peyman does not retain the physical capacity to return to her pre-injury work. We acknowledge some contradictions between Peyman's deposition testimony and her hearing testimony regarding her return to work, however the ALJ is free to rely upon only Peyman's hearing testimony. An injured worker’s testimony is probative of his or her ability to labor post-injury, and in light of clear testimony by Peyman that she is unable to return to her

pre-injury job it is not this Board's job to second-guess this testimony or the ALJ's reliance on it. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). The sole function of this Board on appeal is limited to whether the ALJ's conclusion is so unreasonable under the evidence that it must be reversed as a matter of law, and in light of Peyman's testimony it is not. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). Significantly, in its petition for reconsideration, Bae did not seek additional findings regarding applicability of the three multiplier. Dr. Hoskins' restrictions and Peyman's testimony constitute substantial evidence which supports the determination regarding applicability of the three multiplier.

However, the award of PPD benefits enhanced by the three multiplier must be vacated and the claim remanded for a Fawbush analysis.

KRS 342.730(1)(c)1 states, in relevant part, as follows:

> 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. . .; or

KRS 342.730(1)(c)2 further provides:

> 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.

Pursuant to Fawbush, when the ALJ has determined both the above provisions are potentially applicable, the ALJ must decide which provision is more appropriate. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush. In other words, whether the injured worker is faced with a "permanent alteration in the …ability to earn money due to his injury." Id.

The Fawbush Court articulated several factors an ALJ should consider when determining whether an injured employee is likely to be able to continue earning the same

or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. at 12. As the Court in Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004) stated, it is not enough to determine whether an injured employee is able to continue in his or her current job. The Court stated:

> 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.

Id.

Should the ALJ determine Peyman is unlikely to continue earning a wage that equals or exceeds her wage at the time of the injury, enhancement of her PPD benefits via the three multiplier is appropriate.

Here, the ALJ determined Peyman does not retain the physical capacity to return to her pre-injury work; thus the three multiplier, pursuant to KRS 342.730(1)(c)1

is potentially applicable. The ALJ should have found that the two multiplier had been triggered by Peyman's return to work at equal wages; thus, the two multiplier is potentially applicable. As both the two multiplier and three multiplier are potentially applicable, the ALJ was required to conduct a Fawbush analysis by determining whether Peyman is likely to be able to continue earning the same or greater wages for the indefinite future. Only after determining Peyman is unlikely to be able to continue earning the same or greater wages for the indefinite future, can the ALJ enhance PPD benefits by the three multiplier. KRS 342.730(1)(c)2.

That said, should the ALJ determine enhancement by the three multiplier is not appropriate, the amended opinion and order on remand must contain the appropriate language regarding the potential applicability of the two multiplier at some point during the 425 week award of PPD benefits subject to the requirements of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). While we acknowledge Peyman may not yet meet the requirements as set forth in Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra, at some point during the 425

weeks Peyman receives income benefits, she may cease working due to reasons which relate to the disabling injury or a previous work-related injury. At that point, she may be entitled to have her income benefits enhanced by the two multiplier upon a properly filed motion to reopen. This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2," i.e., the two multiplier.

Due to our resolution of Bae's first issue on appeal, its second argument on appeal is moot.

Accordingly, those portions of the October 28, 2013, opinion and order and the November 22, 2013, order relating to the ALJ's finding Peyman returned to work at wages less than what she was earning at the time of her injury, are **VACATED**. Additionally, those portions of the October 28, 2013, opinion and order and the November 22, 2013, order relating to the finding the three multiplier is applicable and the award of PPD benefits enhanced by the three multiplier are **VACATED**. This claim is **REMANDED** for an analysis pursuant to Fawbush and rendition of an amended order and award consistent with the views expressed herein.

ALL CONCUR.

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