Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 31, 2014

CLAIM NO. 201283766

BRANDON BELL
and JOHNNIE L. TURNER PETITIONERS

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

REX COAL COMPANY
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Brandon Bell ("Bell") appeals from the March 27, 2014, Opinion and Award and the April 30, 2014, and June 16, 2014, Orders on Petition for Reconsideration of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits already paid; permanent partial disability ("PPD")

benefits enhanced by the three multiplier “to be interrupted by payment of the weekly amount of $75.09 for any and all weeks wherein the Plaintiff was unable to make the same or greater wages due to the effects of the work injury”; and medical benefits.

The Form 101 alleges Bell injured his right ankle on May 24, 2012, while in the employ of Rex Coal Company (“Rex Coal”), in the following manner: "Plaintiff was traveling out of the mines on a buggy when his right ankle was caught in a loop of belt laying [sic] in the roadway."

Bell’s January 6, 2013, deposition reveals he engaged in roof bolting for Rex Coal for four and a half years. The job required him to do a lot of climbing. Bell earned $17.07 per hour before bonuses, and he worked 57 hours a week. After his injury, he tried to return as a roof bolter for three weeks earning the same wages and working the same hours. He testified regarding what occurred after the three weeks:

> Q: Then after those three weeks, what happened?
>
> A: I was having trouble climbing up and down the pod, and my boss put me on the belts because I wasn't fast enough to do it no more where I was having so much trouble.
>
> Q: When you were moved to the belts, did your hourly rate change?

> A: Yes, ma'am.
>
> Q: What did it change to?
>
> A: Like $15 dollars an hour and plus I didn't get weekly- I didn't get as much as [sic] a weekly coal bonus and I didn't get as much as [sic] a month coal bonus, and I didn't get as much of a weekly safety and attendance bonus.

Bell was terminated on October 8, 2013, when the Safety Director accused him of sleeping on the job.

Bell is not taking any pain medication. He believes he is unable to return to the type of job he was performing at the time of the injury because of the "climbing and the jumping."

The January 16, 2014, Benefit Review Conference Order lists the following contested issue: "benefits per KRS 342.730."

In the March 27, 2014, Opinion and Order, the ALJ set forth the following Findings of Fact and Conclusions of Law:

Benefits Per KRS 342.730

> 8. The ALJ is presented with the medical opinions of both the treating physician, Dr. Jenkins and the independent medical evaluation and deposition of Dr. David Muffly. The ALJ notes that the impairment ratings issued by both physicians are similar but the thorough and convincing records

and testimony of Dr. Muffly have persuaded the ALJ. Dr. Muffly added an impairment rating for the development of arthritis in the Plaintiff which is more thorough and more consistent with the testimony of the Plaintiff in the opinion of the ALJ.

9. The ALJ further finds that Dr. Muffly was more convincing when describing the restrictions of the Plaintiff given the range of motion limitations that were described and the stated physical requirements of the work. The ALJ finds that Dr. Jenkins was less credible in his conclusion that the Plaintiff could return to that same type of work given the stated impairment to the Plaintiff's foot.

10. The ALJ therefore finds that the Plaintiff has suffered an 8% whole person impairment in accordance with the opinion of Dr. Muffly and that the Plaintiff does not retain the ability to return to the same type of work due to the restrictions of avoiding walking on rough or irregular ground and restricted walking distance, standing duration, and all climbing. The ALJ further finds that the foregoing restrictions will not allow the Plaintiff to perform the stated climbing and overhead lifting in a coal mine on an ongoing basis.

11. The ALJ therefore finds that the Plaintiff has an 8% whole person impairment and does not retain the ability to return to the same type of work.

12. In *Fawbush v. Gwinn*, 107 S.W.3d 5 (2003), the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which

provision is more appropriate based upon the facts of the individual claim. *Id*. at 12.

13. The Plaintiff has testified and it is otherwise undisputed that he returned to work at the same wage before being unable to continue due to the difficulties that he experienced because of the work injury. He testified that he was then moved to the belt line at a lesser rate of pay. The ALJ therefore finds based upon the undisputed testimony of the Plaintiff, that it is unlikely that the he will be able to continue to perform the same job.

14. The ALJ finds based upon the foregoing that KRS 342.730(1)(c)1 is more generally applicable but that KRS 342.730(1)(c)2 shall apply for the periods of time that the Plaintiff worked on the belt line due to the work injury.

Calculations

15. The Plaintiff's permanent partial disability benefits pursuant to KRS 342.730(1)(c)1 shall therefore be calculated as follows: $552.13 x 8% x .85 x 3 = $112.63.

16. During weeks when the Plaintiff was unable to make the same or greater wages due to the effects of the work injury, the following calculation shall apply pursuant to KRS 342.730(1)(c)2: $552.13 x 8% x .85 x 2 =$75.09.

Paragraph one of the Award reads as follows:

1. The Plaintiff, Brandon Bell, shall recover from the Defendant, Rex Coal Company, and/or its insurance carrier

> temporary total disability benefits already paid and thereafter the sum of $112.63 per week commencing on January 8, 2013, and continuing for a period not to exceed 425 weeks, to be interrupted by payment of the weekly amount of $75.09 for any and all weeks wherein the Plaintiff was unable to make the same or greater wages due to the effects of the work injury, together with interest at the rate of 12% per annum on all past due and unpaid installments of such compensation. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made. All benefits shall terminate pursuant to KRS 342.730(4) as of the date on which Plaintiff qualifies for normal old-age Social Security retirement benefits.

Bell filed a petition for reconsideration asserting as follows:

> 4. The Administrative Law Judge did correctly award the Plaintiff benefits of $112.63 per week, but added a clause 'to be interrupted by payment of weekly amount $75.09 for any weeks wherein the Plaintiff was unable to make the same or greater wages due to the effects of the work injury.'
>
> 5. The Plaintiff is of the opinion the word 'unable' should be corrected to read 'able.'
>
> 6. The Plaintiff would move the Administrative Law Judge to strike the paragraph 'to be interrupted by payment of weekly amount $75.09 for any weeks wherein the Plaintiff was unable to make the same or greater wages due to the effects of the work injury' based

> upon the Administrative Law Judge finding that the Plaintiff could not perform the job duties that he was qualified and did perform for the remainder [sic] his working life.

In the April 30, 2014, Order on Petition for Reconsideration, the ALJ amended paragraph one of the Award as follows:

> 1. The Plaintiff, Brandon Bell, shall recover from the Defendant, Rex Coal Company, and/or its insurance carrier temporary total disability benefits already paid and thereafter the sum of $112.63 per week commencing on January 8, 2013, and continuing for a period not to exceed 425 weeks, to be interrupted by payment of the weekly amount of $75.09 for any and all weeks wherein the Plaintiff earned the same or greater wages despite the effects of the work injury said amount representing the application of the '2' multiplier pursuant to KRS 342.730(1)(c)2, together with interest at the rate of 12% per annum on all past due and unpaid installments of such compensation. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made. All benefits shall terminate pursuant to KRS 342.730(4) as of the date on which Plaintiff qualifies for normal old-age Social Security retirement benefits.

Rex Coal filed a petition for reconsideration requesting clarification as to whether income benefits between January 8, 2013, through September 28, 2013, should

be enhanced by the two multiplier or three multiplier. In the June 16, 2013, Order on Petition for Reconsideration, the ALJ amended paragraph one of the Award as follows:

> The Plaintiff, Brandon Bell, shall recover from the Defendant, Rex Coal Company, and/or its insurance carrier temporary total disability benefits already paid and thereafter the sum of $112.63 per week commencing on January 8, 2013, and continuing for a period not to exceed 425 weeks, together with interest at the rate of 12% per annum on all past due and unpaid installments of such compensation. In the event that the Plaintiff ceases to earn the same or greater wages due to the effects of the work injury in the future, and for the period of time that he returned to work between January 8, 2013, and September 28, 2013, he shall be entitled to benefits pursuant to KRS 342.730(1)(c)2 as calculated herein. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made. All benefits shall terminate pursuant to KRS 342.730(4) as of the date on which Plaintiff qualifies for normal old-age Social Security retirement benefits.

On appeal, Bell asserts as follows:

> The Respondent/Employer requests credit for the approximate time period the Petitioner returned to work for the employer after his injury. The Petitioner's testimony makes it clear that he was unable to do and perform the job of roof bolter as he had previously done prior to the injury. The Petitioner testified that he last

> worked on October 8, 2013 for Rex Coal Company and testified thereafter that the job he performed then included him being a roof bolter when he was injured. The Petitioner further testified that when he was last employed he was working on the belts.
>
> The Petitioner testified the job of roof bolter was physically demanding and that he was making $17.07 before bonuses working 57 hours a week. After the injury, he attempted to return to work for 3 weeks, but was having trouble and could not do the job and the employer moved him to the belts, where he was only making $15.00 an hour and did not get any of the coal bonuses he previously received as a roof bolter.
>
> It is clear from the evidence the Petitioner is entitled to the 3 times multiplier as the Administrative Law Judge has ruled based upon the clear evidence he was unable to perform his job duties and lost hundreds of dollars in the eight months that he continued working in a job that paid him $2.00 less an hour plus no coal bonuses.
>
> Also, it is very clear that he only worked three weeks as a roof bolter following his injury, and therefore he is entitled to the 3 multiplier for the remainder of the weeks he worked through September 28, 2013, with the Respondent/Employer only receiving credit for those three weeks.

For reasons different from those urged by Bell, we vacate the Award as set forth in the March 27, 2014, Opinion and Award and the April 30, 2014, and June 16,

2014, Orders on Petition for Reconsideration and remand for additional findings.

Pursuant to Fawbush v. Gwinn, 103 S.W. 3d 5, 12 (Ky. 2003), an ALJ must determine which multiplier under KRS 342.730(1)(c) is "more appropriate on the facts" when awarding permanent partial disability benefits. 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.

When a claimant meets the criteria of both (c)1 and (c)2, "the ALJ is authorized to determine which

provision is more appropriate on the facts and to calculate the benefit under that provision." 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 v. Gwinn, supra. In other words, is the injured worker faced with a "permanent alteration in the … ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury for the indefinite future, the three multiplier is applicable.

The Fawbush Court articulated several factors an ALJ can 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. Fawbush at 12. As the Court in Adkins, supra, 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.

A review of the ALJ's analysis conducted pursuant to Fawbush v. Gwinn, supra, reveals it is incomplete. In the case *sub judice*, the ALJ alluded to the applicability of both multipliers by stating as follows:

> In Fawbush v. Gwinn, 107 S.W.3d 5 (2003), the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. *Id*. at 12.

However, despite ultimately awarding a hybrid of both the two and three multipliers, the ALJ provided findings regarding only the three multiplier. The ALJ failed to make a specific finding that the two multiplier is applicable.

On remand, the ALJ must make definitive findings of fact and conclusions of law regarding applicability of the two multiplier. If the ALJ determines the two and the three multipliers are both applicable, he must then determine which multiplier is more appropriate. *See* Kentucky River Enterprises, Inc. v. Elkins, supra. This means the ALJ must determine if Bell is likely or unlikely to continue earning a wage that equals or exceeds his wage at the time of the injury. *See* Fawbush v. Gwinn, supra. Should the ALJ determine Bell is unlikely to continue earning a wage that equals or exceeds his wage at the time of the injury for the indefinite future, the three multiplier is appropriate. Additionally, should the ALJ find the three multiplier is appropriate, the ALJ cannot also enhance the award of PPD benefits by the two multiplier. The ALJ may enhance the award of PPD benefits by the two multiplier or the three multiplier, not both.

Finally, the award of PPD benefits must begin on May 24, 2012, the date of the injury, to be interrupted by any periods TTD benefits are paid. *See* Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009). The ALJ began his award of PPD benefits the day after TTD benefits ended on January 7, 2013. This is incorrect.

Accordingly, the award of income benefits as set forth in the March 27, 2014, Opinion and Award and the April 30, 2014, and June 16, 2014, Orders on Petition for Reconsideration is **VACATED**. This claim is **REMANDED** for additional findings regarding the applicability of KRS 342.730(1)(c)2 and entry of an amended opinion and award consistent with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JOHNNIE L TURNER
P O BOX 351
HARLAN KY 40831

COUNSEL FOR RESPONDENT:

HON JEFFREY D DAMRON
P O BOX 351
PIKEVILLE KY 41502

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN WEATHERBY
2780 RESEARCH PARK DR
LEXINGTON KY 40511