OPINION ENTERED: June 12, 2013

CLAIM NO. 201075201

CHRISTOPHER BRADLEY PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

RICKY ROBINSON CONSTRUCTION, INC.
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Christopher Bradley ("Bradley") seeks review of the January 10, 2013, opinion, award, and order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and future medical benefits against Ricky Robinson Construction, Inc. ("Robinson"). Bradley also appeals from

the February 11, 2013, order overruling his petition for reconsideration.

There is no dispute Bradley sustained a significant injury while working for Robinson constructing a house. Bradley has worked for Robinson since 2004 as a general carpenter. He was injured on October 9, 2010, when he fell through a fireplace opening approximately thirteen feet onto the concrete floor below. As a result, Bradley sustained a significant fracture of his right foot and fractured ribs. Bradley was taken to Highlands Regional Medical Center in Prestonsburg. Because of the nature of the injury he was sent to Cabell Huntington Hospital where surgery was performed by Dr. Zach J. Tankersley.[1] After Bradley underwent surgery on his right foot involving the insertion of metal hardware, he developed "flap necrosis with wound dehiscence."[2] As a result, he was referred to Paul B. Hall Hospital in Paintsville for hyperbaric oxygen treatments. Bradley testified he underwent thirty-five hyperbaric oxygen treatments. All of the physicians who

[1] Unfortunately, the surgical report was not introduced in the record. However, the x-rays performed at Highlands Regional Medical Center reveal Bradley sustained a comminuted fracture involving the anterior calcaneus with articular involvement at the calcaneocuboid joint. There was also diffuse soft tissue swelling involving the hindfoot.

[2] See Dr. Tankersley's November 8, 2010, medical record.

evaluated Bradley assessed an impairment rating as a result of the right foot injury.

Bradley testified at an August 20, 2013, deposition. At the time of his deposition, Bradley was thirty-five years old and had returned to work for Robinson in April 2011. Before the accident, Bradley did most of the framing and was the saw man. As the saw man, he cut everything for the five man crew. Each man would bring him the specifications of what was needed and he would cut the lumber. After the injury he has not performed that task. Bradley acknowledged he makes the same wages he was making at the time of the injury. Upon his return to work, Bradley does not perform much more than light duty work. He has attempted to do some framing with the help of another worker but primarily does trim work which involves cutting the board, staining, and nailing it. Bradley explained he works approximately forty hours a week when he is able. He testified Robinson allows him to sit down or go home as needed. Bradley acknowledged Robinson has other jobs which will permit him to continue working into the near future.

Bradley sees Dr. Tankersley as needed. Bradley testified Dr. Tankersley recently fitted him for an Arizona brace which is designed to keep the foot from moving up and

down. He is to wear his boot over the brace. At the time of his deposition, Bradley was taking Xanax, Lorcet Plus, Xanoflex, Zoloft, and Motrin. Bradley testified he experiences some shooting pain in his left foot and does not experience significant problems with his ribs. He has shooting pains from his right foot to his knee. He experiences significant pain when he stands on an incline. Consequently, he cannot walk on roofs. Bradley testified he now has a “bad limp.”

Bradley developed some nervous issues because of the fall. He was depressed because he could not do what he was previously able to do. At the time of his deposition, he also experienced occasional panic attacks at night. He believed his emotional problems have gotten better since he returned to work.

Bradley explained the notation in Dr. Tankersley’s records indicating he worked twelve to fourteen hours a day is incorrect. He stated the twelve to fourteen hours included his time spent at work and at his home working in the garden and mowing grass. He acknowledged his foot is a little bit better since he stopped gardening. Bradley maintains a garden and he and his wife do all the maintenance work around his home.

Bradley does not fish and hunt as much as he did prior to the injury.

At the hearing, Bradley again explained that prior to the injury he performed general carpentry work which involved heavy lifting, and since he returned to work he does finish and trim work involving painting, and touching up drywall. Since the injury, Robinson has hired an individual to help him. Bradley estimated the lumber he lifts daily weighs approximately forty to sixty pounds. Before his injury, Bradley carried items weighing in excess of 100 pounds and spent all of his working time on his feet. He also climbed ladders and scaffolding. He has done none of that since the injury. Someone is with him at all times to do the climbing and heavy work.

Since the injury, Bradley has no flexibility or movement in his right foot and no padding on his right heel. He is unable to bend his toes toward his shin and cannot to put his foot all the way down on the ground. He wears a brace to keep his foot in a fixed position. Bradley has been unable to find a boot which would fit his foot with the brace on. Currently, he wears tennis shoes at work. He estimated his post-injury work is approximately 95% lighter. Now he walks with a much slower

gait. Bradley has trouble driving and cold rainy weather causes his ankle to swell.

At the time of the hearing, Bradley was only taking Lorcet Plus and Motrin. He avoids taking Lorcet at work and instead takes Motrin to relieve his pain. He explained the Lorcet and Motrin help with the pain although they do not completely alleviate it.

After work Bradley sits with his foot propped up to reduce the swelling. He also sleeps with his foot propped up. Bradley testified his salary has remained the same from the time he was hired up to the present. He acknowledged he and Robinson are pretty good friends.

Relying upon the impairment rating of Dr. James C. Owen, the ALJ determined Bradley has a 7% impairment due to the right foot injury. Based on the reports of Drs. David E. Muffly and Owen, the ALJ found Bradley did "not retain the physical capacity to return to the full gamut of his pre-injury job duties due to the residual effects of the pain and restricted motion in his right foot." Thus, the provisions of KRS 342.730(1)(c)1 applied. Since the parties stipulated Bradley returned to work as of March 28, 2011, and has continued to earn an average weekly wage ("AWW") equal to his pre-injury AWW, the ALJ determined KRS 342.730(1)(c)2 also applied. In performing the analysis

pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) as to which multiplier was more appropriate, the ALJ entered the following findings of fact and conclusions of law:

> Since both of the statutory multiplier provisions are applicable based on the foregoing findings, the ALJ must make a determination whether it is likely that the plaintiff will be able to maintain his employment at equal or greater wages for the indefinite future. If employment is found to be not likely, then the triple multiplier would apply. *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky. 2003) and *Kentucky River Enterprises v. Elkins*, 107 S.W.3d 206 (Ky. 2003). Having carefully considered the evidence in the record, the ALJ finds that it is likely the plaintiff will continue to earn an average weekly wage of $540 into the foreseeable future. In so finding, the ALJ notes that the plaintiff has worked for the defendant/employer for nine years including the past two years upon his return from treatment for the work injury. Although the plaintiff is not performing all of the duties he was performing at the time of injury, the ALJ notes that he still does many of those duties and performs necessary services and finishing work as a carpenter and painter. Fortunately, at this point in time he requires minimal medication and is not required to work beyond his restrictions. It is clear to the ALJ that the employer thinks highly of the plaintiff considering its decision to hire an additional worker to assist the plaintiff with the heavier aspects of his work. Moreover, the ALJ notes from the plaintiff's testimony that plaintiff and the owner of the employer, Ricky Robinson, are

> personal friends thereby rendering more likely his continuing employment. Finally, the ALJ infers that the employer's business is robust in that the plaintiff has been continuously employed in the residential and commercial construction field with the defendant for the past nine years. From the plaintiff's testimony it is uncontroverted that the employer always has at least one project going on at a time and often more than that. Although the plaintiff continues to have residual pain and restriction in the motion in his right foot which limits his performance to some extent, he has been able to work through those issues which speaks highly of his strong work ethic. Accordingly, considering the totality of the evidence, the ALJ finds that it is likely the plaintiff will continue to earn the same or greater wages for the indefinite future. As such, the triple multiplier of KRS 342.730(1)(c)(1) is not applicable but the provisions of KRS 342.730(1)(c)(2) do apply. Accordingly, plaintiff is entitled to an award of permanent partial disability benefits calculated as follows: $540 X 2/3 X 7% X .85 = $21.42 per week provided, however, that should the plaintiff experience a cessation of employment earning at least $540 a week due to the disability arising from the work injury, the plaintiff's weekly benefits shall be doubled to $42.84 per week during the period of such cessation.

Bradley filed a petition for reconsideration citing Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), asserting the ALJ determined he was capable of performing his current job yet made no

determination as to the "'permanent alteration in the claimant's ability to earn money due to his injury.'" Accordingly, Bradley asserted as follows:

> 4) Due to the plaintiff's longstanding relationship with this particular employer, both professional and personal, he was able to return to his current job at the same wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage, therefore the application of KRS 342.730(1)(c)1 is appropriate. [citation omitted]

Bradley argued in determining whether a claimant can continue to earn equal or greater wages, the ALJ is required to consider a broad range of factors, only one of which is his ability to perform his current job. Bradley asserted the ALJ "erroneously applied the standard enunciated in Fawbush and its progeny" in determining he was not entitled to the three multiplier.

In the February 11, 2013, order overruling Bradley's petition for reconsideration, the ALJ concluded Bradley's petition for reconsideration was "in essence a re-argument of the merits of the claim as to the application of KRS 342.730(1)(c)1." However, the ALJ then stated as follows:

> That said, having reviewed the Opinion and Award the Administrative Law Judge fails to find patent error appearing on the face of the Opinion with respect to

> the *Fawbush* analysis conducted herein. While it is true that the undersigned considered the ability of the plaintiff to continue on in his current employment as a significant factor in disallowing the triple multiplier, the Administrative Law Judge also considered the fact that the plaintiff still performs many of the duties of a finish carpenter, requires minimal medication and is able to work within his restrictions. In addition, the plaintiff's strong work ethic and solid work history convinced the undersigned that the plaintiff will be able to continue to earn wages at a weekly rate equal to or greater than $540 for the indefinite future regardless of the continuation of his present employment.

On appeal, Bradley posits as follows:

> An ALJ's determination should be based on the probable rate at which the claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

Accordingly, Bradley asserts the reasoning set forth in the ALJ's order overruling his petition for reconsideration was "patently distorted by all of the wrong considerations mentioned above." He argues the ALJ should have considered the probable rate at which Bradley can sell his services in a competitive labor market. Bradley maintains the ALJ relied upon the fact he had worked for Robinson for nine years, two of which were post-injury, in finding it was

likely Bradley will continue to earn an AWW of $540.00 in the foreseeable future. Bradley argues as follows:

> Moreover, based on the arbitrary finding that the Respondent-Employer's business is robust, the ALJ drew upon an unreasonable inference to determine that Mr. Bradley will continue to earn the same or greater wages for the indefinite future. [citation omitted] Aside from distorted considerations of "robust" business, long-time friendship, and strong work ethic, the ALJ failed to make a determination as to the "permanent alteration in the claimant's ability to earn money due to his injury" and erroneously found that Mr. Bradley is not entitled to the statutory multiplier. [citations omitted]

Since the ALJ erroneously declined to enhance his income benefits by the three multiplier, Bradley argues the decision must be reversed.

As the claimant in a workers' compensation proceeding, Bradley had the burden of proving each of the essential elements of his cause of action, including entitlement to enhanced income benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Bradley was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same

conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by

superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In Fawbush v. Gwinn, supra, the Supreme Court held:

> Although the employer maintains that paragraph (c)2 modifies the application of paragraph (c)1 and, therefore, takes precedence, we note that the legislature did not preface paragraph (c)2 with the word "however" or otherwise indicate that one provision takes precedence over the other. We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that 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, the application of paragraph (c)1 is appropriate.
>
> Here, the ALJ based the decision to apply paragraph (c)1 upon a finding of a permanent alteration in the claimant's ability to earn money due to his injury. The claimant's lack of the physical capacity to return to the type of work that he performed for Fawbush was undisputed. Furthermore, although

> he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely. Under those circumstances, we are convinced that the decision to apply paragraph (c)1 was reasonable.

Id. at 12.

Thus, where KRS 342.730(1)(c)1 and (1)(c)2 are both applicable, the ALJ must determine which provision is more appropriate by determining whether the injured employee is likely to be able to continue earning a wage which equals or exceeds his or her wages at the time of the injury for the indefinite future.

In Adkins v. Pike County Board of Education, supra, the Court of Appeals defined the criteria to be used by the ALJ in determining which multiplier was more appropriate stating as follows:

> The Board in this case, while it was correct in remanding the case for a further finding, incorrectly stated that upon remand the ALJ was to determine whether Adkins could continue to perform his current job as opposed to whether he could continue to earn a wage that equals or exceeds his pre-injury wages.

These two determinations, though ostensibly equivalent in this case, are quite different in their long-term ramifications. 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. Therefore, we remand this case to the ALJ for a finding of fact as to Adkins' ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future. If it is unlikely that Adkins is able to earn such a wage indefinitely, then

> application of Section c(1) is appropriate.

Id.

The Supreme Court in Adams v. NHC Healthcare, 199 S.W.3d 163, 168, 169 (Ky. 2006) concurred with the holding in Adkins, supra, stating as follows:

> 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.
>
> Unlike the situations in *Fawbush, supra*, and *Adkins, supra*, the claimant continued to work as a nursing assistant for several months after his injury but quit before his claim was heard. He asserted that he could no longer work. Having found the claimant to be only partially disabled, the ALJ's task was to determine whether his injury permanently deprived him of the ability to do work in which he could earn a wage that equaled or exceeded his wage when he was injured. The claimant asserts that it did and that he was entitled to a triple benefit under KRS 342.730(1)(c)1.

Here, in the opinion, award, and order the ALJ

determined that based on all the evidence, Bradley would be able to continue to earn a wage that equals or exceeds his wage at the time of the injury for the foreseeable future by determining he would be able to continue working at his current employment. The ALJ relied upon the fact Bradley had worked for Robinson for nine years, two of which were after his injury, and although he was not performing all of his duties, Bradley still performs many of those duties and provides necessary services to Robinson. The ALJ pointed out Bradley is taking minimal medication. The ALJ believed the fact Robinson thought highly of Bradley and they had been friends for a long time rendered his continued employment more likely. Furthermore, because Robinson's business was good, the ALJ believed it was likely Bradley would be able to continue earning his current wages with Robinson. Thus, the ALJ considered Bradley's ability to perform his current job and not the bigger picture as to whether he would be able to perform work which would allow him to continue to earn a wage that equals or exceeds his pre-injury wages.

That said, we believe the ALJ addressed the deficiency in his analysis in the order ruling on Bradley's petition for reconsideration. Although the ALJ felt Bradley's petition for reconsideration was merely a re-

argument of the merits regarding which multiplier was more appropriate, the ALJ explained he had considered Bradley's ability to continue in his current employment a significant factor in making his decision. The ALJ stated he considered the fact Bradley had continued to perform many of the same duties he had performed as a finish carpenter, took minimal medication, and was able to work within his restrictions. As referenced in his opinion, award, and order, the ALJ stated he was convinced by Bradley's "strong work ethic and solid work history" that he would be able to earn wages equal to or greater than the wages he earned at the time of injury for the indefinite future regardless of whether he continued working at his present employment.

In resolving the issue of whether Bradley could continue to earn a wage which equals or exceeds his pre-injury wages, the ALJ applied the criteria set down by the Court of Appeals in Adkins, supra, and adopted by the Supreme Court in Adams, supra. The ALJ stated Bradley's ability to continue working for Robinson was only one of the factors he relied upon in determining Bradley was not entitled to enhanced benefits by the three multiplier because he would be able to continue to earn wages which equal or exceed his wages at the time of the injury. The ALJ also recited other factors he considered in making this

determination. Thus, we find no error in the ALJ's analysis in determining which multiplier was more appropriate.

Although not raised by Bradley on appeal, we conclude substantial evidence supports the ALJ's decision concerning enhancement of Bradley's income benefits. In the opinion, award, and order, in deciding whether Bradley was likely to be able to continue to earn a wage that equals or exceeds his wage at the time of the injury, the ALJ stated he considered all the evidence in the record. Dr. Tankersley's October 21, 2011, medical report which firmly supports the ALJ's decision reads, in part, as follows:

> Christopher presents to the clinic today for a followup evaluation. He is 1 year status post ORIF of a comminuted intra-articular joint depression calcaneus fracture. He had complications with the flap and wound healing issues that went on to heal uneventfully after prolonged treatment with hyperbaric oxygen therapy at the local wound center. He is full weightbearing today in his regular shoe gear. He is back to work full time, climbing ladders, walking on stilts. He has not yet returned to roofing which he probably will not, he states. He states that most of his difficulties come when he is walking on uneven ground because he is back to hunting, but he states that he does everything, just gets some achiness with it.

Accordingly, the January 10, 2013, opinion, award, and order and the February 11, 2013, overruling the petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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