Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 2, 2013

CLAIM NO. 201200873

CITY OF BEATTYVILLE PETITIONER

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

TIMOTHY BRANDENBURG
and HON WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. The City of Beattyville ("Beattyville") appeals from the amended opinion and order on remand rendered June 14, 2013 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In that order, the ALJ awarded permanent partial disability ("PPD") benefits, medical benefits, and a vocational rehabilitation

evaluation to Timothy Brandenburg ("Brandenburg") for a right hand injury. Beattyville also appeals from the order entered July 22, 2013 denying its petition for reconsideration. On appeal, Beattyville argues the ALJ erred in awarding enhanced benefits. For the reasons stated herein, we affirm.

Brandenburg was employed as a truck driver for Beattyville when he injured his right hand. As he attempted to repair a cable on a garbage truck, a piece of wire punctured his right hand. By the following day, his hand was swollen and numb. He sought medical treatment with his family physician, and was eventually referred to Dr. Steven Umansky.

Dr. Umansky diagnosed trigger finger and performed surgery. Brandenburg underwent physical therapy and was eventually released to light duty. Despite the surgery, he continued to experience symptoms in his right hand. Dr. Umansky has recommended additional surgery, which Brandenburg has declined despite experiencing significant pain in his right hand.

Brandenburg continued to perform his job for three months after the accident, though he experienced pain performing many of his usual tasks. He then began working at the Beattyville water treatment plant as a plant

operator. This job consists primarily of monitoring computers, and therefore does not aggravate his hand. Also, he earns a higher hourly wage as a plant operator, and works overtime.

Two independent medical evaluations ("IME") were performed. Dr. James C. Owen evaluated Brandenburg on September 6, 2012 and assessed a 3% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Owen opined Brandenburg lacks the physical capacity to return to the type of work he performed at the time of the injury, because he cannot grip a gear shift with his right hand. He particularly cautioned against any type of work or action causing pain in the right hand, "because it is likely to be a neuropathic type pain and, therefore, could potentially progress to something as severe as RSD if it is persistently aggravated."

Dr. Ronald Burgess performed an IME on September 28, 2012, at Beattyville's request. Dr. Burgess assessed a 1% impairment pursuant to the AMA Guides. In a subsequent report, Dr. Burgess disagreed with the impairment rating assessed by Dr. Owen and with his assessment of a neurological injury. Dr. Burgess further opined Brandenburg can return to regular duty.

The ALJ awarded PPD benefits based upon a 3% impairment rating, enhanced by the three multiplier found at KRS 342.730(1)(c)1. Brandenburg was also awarded medical benefits and was referred to the Department of Vocational Rehabilitation for evaluation. Beattyville petitioned for reconsideration, arguing there was insufficient evidence to support the finding that Brandenburg could not continue to earn his current wage for the indefinite future. The ALJ denied the petition, and Beattyville now appeals.

The ALJ first determined Brandenburg cannot return to the type of work he performed at the time of the injury, relying on Dr. Owen's opinion and Brandenburg's testimony. The ALJ then found Brandenburg returned to work earning the same or greater average weekly wage. Beattyville does not challenge these factual findings.

Having concluded both the two and three multiplier could apply, the ALJ then conducted the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). The ALJ concluded it is unlikely Brandenburg "will be able to continue for the indefinite future to do work from which to earn such a wage." In reaching this conclusion, the ALJ stated his reliance on Dr. Owen's report and Brandenburg's testimony. Beattyville argues this evidence is

insufficient to support the conclusion and the three multiplier is more appropriate.

Fawbush requires a determination as to whether Brandenburg is unlikely "to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future." Id. at 12. Stated otherwise, "[t]he standard for the decision is whether the injury has permanently altered the worker's ability to earn an income." Adams v. NHC Healthcare, 199 S.W.3d 163, 168 (Ky. 2006). "[I]n 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." Adkins v. Pike County Bd. Of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004).

Beattyville argues Brandenburg's current position as a plant operator is light duty and does not aggravate his hand condition, and there is no indication he will not be able to continue in that position for the foreseeable future. However, as stated in Adkins, Brandenburg's ability to perform his current job is only a single factor. Brandenburg testified he experiences pain in his right hand "constantly", and particularly when gripping or operating machinery. Dr. Owen advised against Brandenburg "working through" pain, as he might aggravate and progress any

neuropathy in the hand. Brandenburg's previous employment history includes work as a cashier, stocker, logger, truck driver, heavy equipment operator, mechanic, constable, and deputy sheriff. He testified each of those positions required "two able bodied hands." It is reasonable to conclude Brandenburg's condition would impair his ability to perform these jobs should his current position be terminated. This proof constitutes substantial evidence to support a finding that Brandenburg's injury permanently altered his ability to earn an income. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

For the foregoing reasons, the June 14, 2013 opinion and order on remand and the July 22, 2013 order rendered by Hon. William J. Rudloff are hereby **AFFIRMED**.

ALL CONCUR.

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