

OPINION ENTERED: APRIL 12, 2013

CLAIM NO. 201069374

E.W. JAMES & SONS

PETITIONER

VS.

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

SANDRA CLARK
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
REVERSING IN PART, VACATING IN PART
AND REMANDING**

* * * * *

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

ALVEY, Chairman. E. W. James & Sons Pharmacy ("E. W. James") appeals from the November 29, 2012 opinion and order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Sandra Clark ("Clark") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits due to a

work-related low back injury. Additionally, the ALJ referred Clark to the Department of Vocational Rehabilitation for a vocational evaluation. E. W. James also appeals from the December 19, 2012 opinion and order on reconsideration.

On appeal, E. W. James argues the ALJ erred in determining Clark's average weekly wage ("AWW"), failed to perform a proper analysis regarding the appropriate multiplier, and erred in awarding vocational rehabilitation benefits. Because we find the ALJ's determination of AWW is not supported by substantial evidence and his analysis regarding the appropriate multiplier and vocational rehabilitation is inadequate, we reverse in part, vacate in part and remand.

Clark testified by deposition on July 30, 2012 and at the hearing held November 13, 2012. Clark, who is 30 years of age, is a high school graduate and obtained a pharmacy technician license. On the date of the accident she was employed by E.W. James as a pharmacy technician. Prior to her employment with E. W. James, she worked as an assistant manager of a campground, the sales manager for a grocery, airport ramp worker, ticket agent, and pharmacy technician. Her work at E. W. James required her to fill prescriptions,

work as a cashier, answer telephones, receive and stock products and medication, and enter data into a computer.

Clark sustained an injury to her low back while lifting empty totes, which eventually required low back surgery. She stated she earned \$11.13 per hour at the time of her injury. She indicated she received raises during the thirteen week period prior to the work injury. At the hearing, she stated she worked 40 hours per week for E. W. James. In May 2011, she began working for Bluegrass Cellular ("Bluegrass") as a network surveillance technician before being promoted to administrative assistant. She is currently earning wages in excess of her earnings at the time of her injury. She stated she presently earns \$11.39 per hour and works 40 hours per week for Bluegrass.

Clark stated she is able to perform all aspects of her current position at Bluegrass and indicated the job is within her restrictions. Her current job duties consist of processing purchase orders which involves sitting at a computer, performing data entry, and speaking on the telephone. The job allows her to sit or stand as needed and involves no lifting. Clark testified her current position is permanent, but there is a high rate of turnover of employees in the telecommunications industry. Clark acknowledged she has no reason to believe her job is in

jeopardy. Clark indicated she has not missed any time from work at Bluegrass due to her back condition.

Clark testified she could no longer perform the pharmacy technician job because she cannot be on her feet for an eight hour shift. She indicated the position also involved constant bending to get prescriptions from the bottom shelf, which she can no longer do. She also indicated she is unable to lift anything without experiencing pain.

Carmel L. Powell, formerly a pharmacist at E. W. James and Clark's supervisor at the time of her injury, testified by deposition on October 11, 2012. He stated Clark was not required to lift and was able to work in a seated position 60% of the time. He stated Clark was required to bend only occasionally and did not have to climb.

Dr. Kimathi Doss, Clark's treating neurosurgeon, performed surgery on January 14, 2011. Based upon his May 22, 2012 examination, Dr. Doss indicated Clark was "likely" at maximum medical improvement ("MMI"), but he had not determined her lifting restriction since she was still in the process of increasing her activities. He did not believe Clark retained the ability to return to her position as a pharmacy technician. Dr. Doss indicated the compensation carrier had provided incomplete and inaccurate

information at the time he completed a report indicating Clark had a 13% impairment rating. He stated the carrier had provided the 13% impairment rating and he had not been informed of a 26% rating.

Dr. Jules Barefoot examined Clark on March 28, 2012. He found Clark was status post right L4-5 laminotomy, foraminotomy, medial facetectomy and microdiscectomy at L4-5, and right hip trochanteric bursitis. Using the range of motion method, Dr. Barefoot assigned a 26% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Barefoot stated Clark would have marked difficulty with any job requiring repetitive squatting, crouching, crawling or climbing; should not work on ladders or scaffolding; will have difficulty operating machinery with foot controls; will have difficulty with heavy lifting and carrying; and must be allowed to change positions frequently for relief of pain and discomfort. Dr. Barefoot did not believe Clark would be able to return to her prior position as a pharmacy technician.

In a November 6, 2012 supplemental report, Dr. Barefoot provided a detailed explanation of why use of the range of motion method was appropriate in Clark's case. He explained

the Diagnosis Related Estimates ("DRE") Table 15-3 was not applicable in this case.

Dr. Timir Banerjee examined Clark on December 1, 2010 and again in February 2012. He prepared reports and testified by deposition on two occasions. He stated Clark had reached MMI but remained symptomatic. Using the DRE model, Dr. Banerjee assigned a 13% impairment pursuant to the AMA Guides. Dr. Banerjee felt Clark retained the physical capacity to return to her job as a pharmacy technician. Dr. Banerjee disagreed with Dr. Barefoot's use of the range of motion method in assessing Clark's impairment.

E. W. James filed pre-injury wage records on September 14, 2012, indicating Clark's best quarter of earnings produced an AWW of \$399.40. The wage certification showed Clark's weekly earnings at a rate of \$10.50 per hour.

Clark filed pre-injury wage information on November 9, 2012. She noted she had received pay increases to \$10.81 and \$11.13 per hour documented by copies of her pay stubs establishing when each raise became effective. Based upon the hours from the employer's certification, which she accepted as accurate, Clark applied the correct hourly rates and calculated an AWW of \$425.39.

E. W. James filed an amended AWW-1 and supporting wage documentation on November 16, 2012. The amended AWW-1 established an AWW of \$426.10.

In the November 20, 2012 opinion and order, after noting the requirements of Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ made the following findings regarding the appropriate multiplier:

I saw and heard the plaintiff testify at the hearing. She was a credible and convincing witness. I found the medical reports of Dr. Barefoot to be very persuasive and compelling. I make the factual determination that Mrs. Clark cannot return to the type of work which she performed at the time of her work injuries. I, therefore, make the determination that she is entitled to enhanced permanent partial disability benefits under KRS 342.730(1)(c)1.

With regard to Clark's AWW, the ALJ found as follows:

As indicated above, Mrs. Clark was a very credible and convincing witness and testified that at the time of her work injury she was earning \$11.13 per hour and working 40 hours per week, which translates into an average weekly wage of \$445.20. I make the factual determination that the plaintiff's average weekly wage at the time of her work injury was \$445.20 . . .

With regard to vocational rehabilitation, the ALJ found as follows:

KRS 342.710 provides that when as a result of a work injury the plaintiff is

unable to perform work for which she has previous training or experience, she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore her to suitable employment. The administrative law judge on his own motion, may refer the employee to a qualified physician or facility for evaluation of the practicality of, need for, and kind of service, treatment, or training necessary and appropriate to render her fit for a remunerative occupation. After reviewing the record this Administrative Law Judge is persuaded the plaintiff should be afforded this opportunity and finds accordingly.

On December 3, 2012, E. W. James filed a petition for reconsideration raising essentially the same arguments it now raises on appeal, asking the ALJ to make additional findings required pursuant to Fawbush, supra.

The ALJ issued his opinion and order on reconsideration on December 19, 2012 denying E. W. James' petition for reconsideration without providing additional findings.

On appeal, E. W. James argues the ALJ erred in finding Clark's AWW was \$445.20 since it is not supported by substantial evidence. E. W. James asserts the ALJ's reliance on Clark's testimony was erroneous since wage records and calculations filed by both parties establish her testimony is inaccurate. E. W. James contends the wage records are the best evidence of her earnings and notes

Clark was only paid at the rate of \$11.13 for seven of the thirteen weeks in the quarter preceding the work injury. E. W. James concludes the ALJ's finding is clearly erroneous and asks the Board to remand with directions to find an AWW of \$426.20.

Next, E. W. James argues the ALJ erred as a matter of law in failing to provide a proper analysis and make essential findings of fact regarding the application of the three multiplier pursuant to KRS 342.730(1)(c)1. E. W. James notes the ALJ correctly observed he was required by Fawbush, supra to make three essential findings, however, he only addressed the first prong before concluding Clark was entitled to enhancement of her award by the three multiplier. E. W. James asserts the wage records establish Clark is currently earning a greater AWW than at the time of her injury. E. W. James contends the evidence, including Clark's testimony, establishes she will be able to perform her current employment earning a greater wage for the foreseeable future. Further, it notes her current employment is within her restrictions and she has no difficulty performing the work. E. W. James asserts Clark is not entitled to the application of either the two or three multiplier.

E. W. James argues there is no substantial evidence supporting an award of vocational rehabilitation benefits since Clark has already returned to suitable employment pursuant to Wilson v. SKW Alloys, Inc., 893 S.W.2d 800 (Ky. App. 1995). Further, E. W. James contends Clark retains the ability to return to other work for which she has training or experience.

We conclude the ALJ's determination of Clark's AWW is not supported by substantial evidence and we therefore reverse. Clark admitted she did not earn \$11.13 per hour during the entire thirteen week period preceding her injury. In her filing regarding her pre-injury wages, she accepted the employer's representation of the hours worked each week and only took issue with the employer's hourly rate. Her filing included copies of pay stubs establishing the dates she received raises. She agreed she earned \$11.13 per hour during only seven of the thirteen weeks preceding the injury. Her calculation was slightly less than the employer's revised calculation. Accordingly, the ALJ's determination of Clark's AWW is reversed. On remand, the ALJ shall amend the award to reflect an AWW of \$426.10 as conceded by E. W. James.

We next turn to E. W. James' argument regarding the ALJ's failure to properly perform an analysis pursuant to

Fawbush, supra, in applying the three multiplier pursuant to KRS 342.730(1)(c)1. In Fawbush, supra, 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. In Fawbush, supra, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury. The claimant, however, had returned to work at a lighter job earning an AWW equal to or exceeding his AWW at the time of the injury.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court remanded a claim for a determination of the claimant's AWW following his return to work. The Court instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury:

The ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, supra, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts.

In Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), the Court held the Fawbush, supra analysis includes a "broad range of factors", only one of which is the ability of the injured worker to perform his pre-injury job.

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

Substantial evidence supports the ALJ's finding Clark does not retain the physical capacity to return to the type of work she performed at the time of the injury. The parties agree Clark returned to work for a different employer at the same or greater wage after reaching MMI. The issue of the appropriate multiplier turns upon whether

Clark can continue to earn the same or greater wage for the indefinite future. In this instance, the ALJ determined Clark could not return to her pre-injury employment, but failed to address the second and third steps. Because his analysis stops short of that required by Fawbush, supra, we vacate. On remand, the ALJ must perform a complete analysis and cite to the evidence relied upon in determining whether KRS 342.730(1)(c)1 is applicable. E. W. James has identified ample evidence supporting finding Clark is likely to continue earning a wage equal to or greater than she earned at the time of her injury. In remanding, we are not requiring any particular result.

With regard to vocational rehabilitation, we believe the ALJ's analysis is inadequate and we therefore vacate. KRS 342.710, states:

(1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . . .

(3) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

The Kentucky Court of Appeals in Wilson v. SKW Alloys, 893 S.W.2d 800 (Ky. App. 1995) noted a purpose of this statute is to expeditiously restore the injured worker as near as possible to a condition of self-support as an able bodied worker, and further held "work for which an employee has previous training or experience" must be suitable employment. Wilson defined "suitable employment" as:

work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement.

Id. at 802.

In Haddock vs. Hopkinsville Coating, Inc., 62 S.W.3d 387 (Ky. 2001), the Court noted, restoring a worker to "suitable employment" means "attempting to achieve a reasonable relationship between the worker's pre and post-injury earning capacity." The determination of whether a claimant has returned to suitable employment is a factual determination solely within the role of the ALJ as fact-finder.

Although the ALJ determined Clark could not return to the pharmacy technician position, he did not address whether she retained the ability to perform other jobs for which she has training or experience, nor did he analyze whether her current employment with Bluegrass constitutes suitable employment. If the ALJ on remand finds Clark is likely to continue to earn the same or greater wage for the indefinite future, an evaluation and award of vocational rehabilitation may be premature. If, on the other hand, the ALJ determines Clark is unlikely to continue to earn the same or greater wage for the indefinite future, or the employment with Bluegrass does not constitute suitable employment, the ALJ, upon making adequate findings, may order a vocational evaluation.

Accordingly, the November 29, 2012 opinion and order rendered by Hon. William J. Rudloff, Administrative Law Judge, and the December 19, 2012 opinion and order on reconsideration are **REVERSED IN PART, VACATED IN PART** and this matter is **REMANDED** for further proceedings in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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