

OPINION ENTERED: JUNE 4, 2012

CLAIM NO. 200886703

EASTERN ALLOYS OF KENTUCKY, LLC.

PETITIONER

VS.

APPEAL FROM HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

WARREN MATTHEW SKAGGS
and HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Eastern Alloys of Kentucky, LLC, ("Eastern") appeals from the January 4, 2012 Opinion and Award on remand rendered by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") enhancing Warren Skaggs' ("Skaggs") permanent partial disability ("PPD") award for an April 19, 2008 injury by the three multiplier pursuant to KRS 342.730(1)(c)1. On appeal, Eastern argues the ALJ erred as a matter of law in changing his decision on the merits on

remand based on the same evidence that was in the record prior to the initial Opinion and Award.

Skaggs sustained injuries to his legs on November 3, 2007, when he was burned by molten aluminum. After being off work for 3 months, he returned to his prior duties but was injured again on April 19, 2008 as he was lifting a 60 pound bucket. He also alleged a resulting psychological injury.

The claim was litigated, resulting in an April 20, 2011, Opinion and Award granting PPD benefits for the two injuries enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2. On the issue of multipliers, the ALJ determined as follows:

Does the claimant have the physical capacity to return to the type of work performed at the time of the injury? There are two factors which must be determined in order to properly calculate the benefit for permanent partial disability. The first factor is whether or not the claimant retains the physical capacity to perform the type of work done at the time of the injury. I believe that Mr. Skaggs does retain the physical capacity to do the type of work done [sic] the time of the injury. I understand he may have some difficulty from a psychological standpoint of returning to the exact same type of work. However, I believe that he does retain the physical capacity to do that type of work.

Has the plaintiff returned to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury? The second factor is whether the claimant is earning a wage which is equal to or greater than the wage earned at the time of the injury. Since Warren Matthew Skaggs did return to work after the injury of November 3, 2007 at the same or greater wage but has not returned since the injury of April 19, 2008 [sic] is eligible for the "2" multiplier. Mr. Skaggs is not now working, and does not have wages that are greater than or equal to the wage at the time of [the] injury. I believe that the reason that he has not returned to work since the second injury is the effect of the first injury in the form of posttraumatic stress disorder. Therefore, the benefit related to the first injury will be multiplied by two.

Regarding the two multiplier, the ALJ's relevant "Conclusion" is set forth as follows:

9. Because Warren Matthew Skaggs has returned to work at an average weekly wage equal to or greater than the average weekly wage at the time of the injury and has ceased that employment for reasons relating to the injury, the benefit for permanent partial disability shall be multiplied by two pursuant to KRS 342.730(1)(c)2.

In the June 21, 2011, order ruling on the petition for reconsideration, the ALJ stated, in relevant part, as follows:

In its supplement to petition for reconsideration, the defendant suggests

that it is inappropriate to apply the "2" factor to the impairment rating assessed by reason of the second injury. However, the recent Supreme Court case of *Hogston v. BellSouth Telecommunications*, 325 SW.3d 314 (Kentucky, 2010) held that other injuries, even nonwork [sic] related injuries, may be used to support a finding applying the "2" multiplier. I believe that the "2" multiplier should be applied to both injuries.

Regarding Skaggs' request in his petition for reconsideration for additional findings pertaining to the three multiplier, the ALJ failed to respond and, instead, stated as follows:

The plaintiff's petition for reconsideration may have some merit if I had the power to reconsider the merits of the claim. KRS 342.285 does not give me that power. If I had that power, I might as well consider changing my decision concerning the application of the "3" multiplier.

Eastern appealed, asserting that the ALJ erred by enhancing the award of PPD benefits for the April 19, 2008 injury by the two multiplier.

The Board, in a decision dated October 21, 2011, held the two multiplier could not be applied to the April 19, 2008 injury, since Skaggs never returned to work following this injury, and did not earn a weekly wage equal to or greater than his average weekly wage at the time of injury.

Therefore, the Board held the ALJ's enhancement of the award by the two multiplier for the April 19, 2008 injury must be vacated.

Additionally, the Board held the claim must be remanded to the ALJ for further findings regarding the three multiplier. We explained and directed as follows:

Further, this claim must be remanded to the ALJ for further findings on the applicability of the three multiplier to the award of PPD benefits for the April 19, 2008, injury, as the ALJ's analysis of this issue is both inadequate and erroneous as a matter of law. As an initial matter, the ALJ failed to address the applicability of the three multiplier, with any amount of specificity, in the context of either the November 3, 2007, injury or the April 19, 2008, injury. In fact, the ALJ's single paragraph analysis regarding the three multiplier on page 19 of the April 20, 2011, opinion and award contains no reference to any injury dates. The ALJ states "Mr. Skaggs does retain the physical capacity to do the type of work done [sic] the time of the injury," but fails to specify if he is referring to the November 3, 2007, injury or the April 19, 2008, injury. This is clearly inadequate, and on remand, the ALJ must set forth an analysis of the applicability of the three multiplier with respect to the PPD benefits for the April 19, 2008, injury.

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That aside, the language regarding the three multiplier on page 19 of the April 20, 2011, opinion and award also indicates that when analyzing Skaggs' ability to return to the type of work he

performed at the time of the injury, the ALJ separated Skaggs' physical injury from his psychological injury. In doing so, the ALJ concluded while Skaggs "may have some difficulty from a psychological standpoint of [sic] returning to the exact same type of work," Skaggs retains the *physical* capacity to perform that type of work. For the purposes of an analysis of the applicability of the three multiplier pursuant to KRS 342.720(1)(c)1, the ALJ must determine if Skaggs retains the capacity to return to his pre-injury job, following the April 19, 2008, injury, in light of the combined effects of both his physical and psychological injuries resulting from November 3, 2007, and April 19, 2008. It is clear from the record, following the November 3, 2007, injury, Skaggs was able to return to his pre-injury job, albeit a modified version of that job. However, following the April 19, 2008, injury, Skaggs maintains he has been unable to return to his previous employment, and there is considerable testimony from Skaggs in the record addressing his inability, from a physical and psychological standpoint to return to his previous employment. This Board is not a fact-finding tribunal, and we will not engage in fact-finding by discussing the relevant evidence. However, the ALJ, as the finder of fact, must adequately address this evidence and determine if Skaggs is capable, both physically and psychologically, of returning to his pre-injury job as a result of the second injury.

Accordingly, the Board vacated that portion of the April 20, 2011, Opinion and Award enhancing Skaggs' PPD benefits by the two multiplier for the April 19, 2008

injury, and remanded the claim for further findings on the applicability of the three multiplier for the April 19, 2008 injury, and entry of an amended Opinion and Order consistent with the views expressed in the Board's opinion.

On remand, the ALJ issued additional findings of fact stating:

I am limited on remand to determine whether the "3" multiplier under KRS 342.730(1)(c)1. [sic] The stipulated facts remain as identified in the first decision.

Does the claimant have the physical capacity to return to the type of work performed at the time of the April 2008 injury? There are two factors which must be determined in order to properly calculate the benefit for permanent partial disability. The first factor is whether or not the claimant retains the physical capacity to perform the type of work done at the time of the injury. At the time of the second injury Mr. Skaggs was working at the same plant in a different job. He returned to work in February 2008, not as a crane operator, but as a fork truck driver. This job did not expose him to the risk of burning by spilled molten metal, but it did require him to engage in occasional lifting of heavy objects. At the time of his April 2008 injury he was lifting a 70 pound bucket of flux injuring his shoulder. Now, according to Dr. Bilkey whose report I accept in this regard, he is limited to no overhead lifting with the left upper extremity, no repetitive activities with the left upper extremity, and to avoid lifting over 15 pounds with the left upper limb due to the April 21, 2008 work injury

exclusively. I believe that Mr. Skaggs does not retain the physical capacity to do the type of work done at the time of the injury in April 2008.

The ALJ's "Conclusions on Remand" stated in part:

4. With respect to the injury of November 3, 2007 Warren Matthew Skaggs has a permanent disability rating of 25.30% which is 22% impairment under the *AMA Guides* multiplied by 1.15, the factor contained in KRS 342.730.

5. With respect to the injury of April 22, 2008, Warren Matthew Skaggs has a permanent disability rating of 5.95% which is 7% impairment under the *AMA Guides* multiplied by 0.85, the factor contained in KRS 342.730.

...

8. Because Warren Matthew Skaggs does retain the physical capacity to perform the type of work performed at the time of the November 3, 2007 injury, the benefit for permanent partial disability shall not be multiplied by three pursuant to KRS 342.730(1)(c)1.

9. Because Warren Matthew Skaggs did return to work at an average weekly wage equal to or greater than the average weekly wage at the time of the November 3, 2007 injury and has ceased that employment for reasons relating to the injury, the benefit for permanent partial disability shall be multiplied by two pursuant to KRS 342.730(1)(c)2.

10. Because Warren Matthew Skaggs does not retain the physical capacity to perform the type of work performed at the time of the April 21, 2008 injury, the benefit for permanent partial

disability shall be multiplied by three pursuant to KRS 342.730(1)(c)1.

11. Because Warren Matthew Skaggs has not returned to work at an average weekly wage equal to or greater than the average weekly wage at the time of the April 21, 2008 injury and ceased that employment for reasons relating to the injury, the benefit for permanent partial disability shall not be multiplied by two pursuant to KRS 342.730(1)(c)2.

On appeal, Eastern argues the ALJ erred as a matter of law in "changing his mind on the merits of the claim on remand" based upon the same evidence that was in the record prior to the initial opinion and award. Eastern argues the ALJ did not make additional findings of fact in support of his original decision, but instead reversed the original conclusion of law and made findings to justify the opposite decision on the merits of the claim. Citing Beth-Elkhorn Corporation v. Nash, 470 S.W.2d 329 (Ky. 1971), Eastern notes an ALJ, in ruling on a petition for reconsideration, is precluded from changing the ultimate finding of fact or conclusion of law on the merits of the claim. Similarly, Eastern notes an ALJ, with no new evidence, is precluded from changing a conclusion of law on the merits when issuing an opinion and award following an interlocutory order pursuant to the holding in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). Eastern argues the same

legal rationale should preclude the ALJ, with no new evidence, from reaching the opposite ultimate finding of fact and conclusion of law when the Board remands for additional findings of fact in support of the original finding of fact or conclusion of law. Eastern argues the ALJ, in rendering his decision on remand, acted without or in excess of his limited powers, and the opinion and award on remand is arbitrary, capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Beth-Elkhorn v. Nash, supra, and Bowerman v. Black Equipment Co., supra, are easily distinguished from the present case. It is well established an ALJ, upon reconsideration, may not apply the same analysis to the same facts and reach a different conclusion than that reached in the original decision. More recently, it was determined in Bowerman an ALJ may not conduct an unauthorized second review of the merits of a claim for compensation benefits in a final decision based upon the same evidence before the ALJ at the time an interlocutory decision was rendered. Citing Garrett Mining v. Nye, 122 S.W.2d 513 (Ky. 2003), the Court of Appeals stated:

Legal consequences streaming from an ALJ's factual determinations must not be left to ebb and flow according to

the changing current of the ALJ's mere whim as fact-finder. Thus, absent newly discovered evidence, fraud, or mistake, parties have a reasonable expectation that they may rely on factual findings that have been fully and fairly adjudicated by an ALJ, even when rendered in an interlocutory decision.

The Court held the ALJ, in Bowerman's claim, rendered a final opinion with factual findings inconsistent with those previously adjudicated in her interlocutory opinion regarding the same factual questions and based on the same evidence. To do so was arbitrary, unreasonable, unfair, and unsupported by sound legal principles, and was an abuse of the ALJ's discretion.

Perhaps most importantly, the Court stated:

Reason, logic, and sound principles of justice dictate that findings regarding questions of fact, once fully litigated by the parties and properly adjudicated by the fact-finder, should not be subject to change absent new evidence, fraud, or mistake, regardless of whether rendered in an interlocutory order or a final decision. (emphasis ours).

In those cases, there was no error in the ALJ's initial analysis and the original decisions were supported by substantial evidence.

Here, the multiplier issue was incorrectly adjudicated by the ALJ. The Board found it necessary to vacate the ALJ's findings, regarding the appropriate multiplier for the

2008 injury, because the two multiplier could not apply to the 2008 injury, and it could not be determined from the ALJ's initial decision whether he properly analyzed the issue of the appropriate multiplier. Further, we could not discern the injury for which the ALJ was applying any multiplier. It was unclear whether the ALJ, in his original decision, considered whether the three multiplier applied to the 2008 injury. The Board's decision did not direct any particular result. On remand, upon conducting a proper analysis, the ALJ was free to apply or reject the three multiplier.

Vacating of an opinion is, in essence, rendering it null and void. *Black's Law Dictionary* defines "vacate" in part as, "to nullify or cancel, make void, invalidate". Thus, with regard to a finding that has been vacated, the earlier finding is without force or effect, as if it never existed. Vacating an ALJ's decision is one of the authorized directives available to a reviewing body. See, for example, Skelton vs. Roberts, 673 S.W.2d 733 (Ky. App. 1984). There, the Court of Appeals vacated an opinion of a circuit judge who, in a case tried solely before the judge, failed to make appropriate findings of fact and conclusions of law. The Court noted a trial court is required to "find

the facts specifically and state separately its conclusions of law thereon..."

The effect of our directive was to set aside the ALJ's ultimate conclusions. Upon remand, the ALJ was not limited in his ultimate conclusion with the exception that he could not apply the two multiplier to the 2008 injury. The ALJ was only limited to the issues the Board directed to be addressed based upon the record before him. The Board clearly directed the ALJ to analyze the possible application of the three multiplier to the 2008 injury.

We believe the ALJ followed the directives upon remand, understood and accurately addressed the issues presented for determination, and supported his conclusions with adequate findings of fact which were supported by substantial evidence of probative value. The ALJ provided a separate analysis for the application of the appropriate multiplier for the 2008 injury. Under these circumstances, his decision should not and will not be disturbed on appeal. KRS 342.285; Wolf Creek Collieries vs. Crum, 673 S.W.2d 735 (Ky. App.1984); Special Fund vs. Francis, 708 S.W.2d 641 (Ky. 1986); and McCloud vs. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Accordingly, the January 4, 2012 Opinion and Award on remand rendered by Hon. Richard M. Joiner, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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