OPINION ENTERED: MAY 24, 2012

CLAIM NO. 200876281

ELLIS & SONS TIRE REPAIR, LLC. PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

STEVEN NEWBERRY
and JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * * *

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

SMITH, Member. Ellis & Sons Tire Repair, LLC ("Ellis") appeals from the December 5, 2011 Opinion and Award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") and the ALJ's December 28, 2011 order on reconsideration. The sole question on appeal is whether the ALJ erred in awarding Steven Newberry ("Newberry") enhanced benefits pursuant to the provisions of KRS 342.730(1)(c)1 after

determining he was unable to return to his pre-injury work. Ellis contends the ALJ erred in the application of the statute and in concluding the requirements of Fawbush vs. Gwinn, 103 S.W.3d 5 (2003) were inapplicable. We affirm in part, vacate in part and remand in part.

Newberry filed a Form 101, Application for Resolution of Injury Claim, on July 15, 2010, alleging he injured his left shoulder on July 15, 2008, as he was stacking truck tires. Newberry testified by deposition on September 21, 2010 and again at the formal hearing conducted on October 14, 2011. Born October 11, 1961, he completed the ninth grade and obtained his GED during his enlistment in the US Army. He is married with two children.

Newberry's employment history shows he was employed by GH Insulation Contractors and Fleming Furniture before working for Ellis. After his work injury, he returned to GH Insulation Contractors where he continues to work full-time earning $13.00 per hour.

At the formal hearing, he explained the injury as follows:

> I was at work. We had just gotten a shipment of semi tires in. We were stacking them up and we stack them eight high in the stack. And I had already had the sixth one up there and went to throw the seventh one up there, which goes up over my head. And then the

> eighth one even goes up higher than that and you have to just about stand on your tippy toes to push it into the pile. When I threw the eighth one up there, I felt a burning sensation in my shoulder, my left shoulder. I told my boss about it he said for me to go and have it checked out.

Newberry sought treatment at RediCare the same day. He was diagnosed with "either tendinitis or bursitis", given pain medication and sent home. Later, he was sent for an MRI which revealed a massive tear of the rotator cuff. He underwent surgery in November 2008 and physical therapy. Newberry testified the physical therapy helped, but he remains unable to lift his arm above his head or lift objects greater than 15 to 20 pounds.

A benefit review conference was held on October 14, 2011. Unable to reach agreement on all the issues, the parties stipulated: 1) Newberry's average weekly wage at the time of the injury was $410.47; 2) Newberry returned to work on July 16, 2008 and worked through September 10, 2008 at a wage of "$10.25/hour (=) his AWW"; 3) Newberry changed employers in May 2009, and currently earns "wages of $13.00/hour (>) his AWW".

Newberry submitted the medical report of Charles Epstein, D.C., who evaluated Newberry on April 6, 2010. Dr. Epstein noted a history that Newberry's left hand "gets numb

and tingles several times a week [and] it always occurs on or after activity." Newberry also reported headaches occurring 3 to 4 times a week and his shoulder was always sore. Dr. Epstein's examination revealed "ROM of the cervical spine is restricted to left and painful. He has Brachial Radiculitis resulting from the injury. Maximum foraminal compression test is positive on the right." He noted Dr. O'Neill had assessed an impairment rating of 2% for the shoulder injury. Dr. Epstein determined Newberry had an 8% impairment for the cervical spine, DRE cervical category II. Dr. Epstein combined the two impairments for a 10% total impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Ellis submitted the report of Jacob O'Neill, M.D. who conducted an independent medical examination on May 9, 2011.[1] Dr. O'Neill noted a history of the shoulder injury at work with subsequent rotator cuff repair of the left shoulder on November 3, 2008, followed by a four and a half month program of physical therapy. Newberry complained of mild pain in the left shoulder at the end of each work day, but no particular activity aggravated the left shoulder.

[1] Dr. O'Neill indicated that he previously examined Ellis on August 1, 2009 but that report does not appear to be in the record.

Dr. O'Neill diagnosed "rotator cuff tear, left shoulder, status post repair, work related" and, "degenerative disc disease cervical spine non-work-related." He opined Newberry could continue work without restrictions and assessed a 2% whole person impairment pursuant to the AMA Guides. Dr. O'Neill also criticized Dr. Epstein's findings and opinions and stated Dr. Epstein's findings were based on a "limited/cursory examination, his failure to take an adequate history, and his failure to even obtain a simple x-ray cervical spine."

The ALJ, in reliance upon the opinions of Dr. O'Neill, dismissed Newberry's cervical claim and awarded benefits based upon a 2% shoulder impairment. She then determined the award should be enhanced by the provisions of KRS 342.730(1)(c)1 stating:

> After considering the medical and lay witnesses in this case, I find that as a result of the July 15, 2008 work-related injury Plaintiff suffered a functional impairment and occupational disability to his left shoulder. I also find Plaintiff sustained a 2% permanent impairment pursuant to the AMA Guides, 5th edition, as a result of this work injury.
>
> In making this finding I rely on the opinion of Dr. O'Neill. I find Dr. O'Neill's opinion more accurately reflects the Plaintiff's impairment under the AMA Guides and is therefore more persuasive. This 2% functional

impairment rating, pursuant to KRS 342.730(1)(b), is converted to a 1.30% permanent partial disability.

In determining whether the Plaintiff, as a result of the July 15, 2008 work-related injury, is entitled to any statutory enhancement per KRS 342.730(1)(c), also commonly known as the "multipliers", the following analysis was made. Under KRS 342.730(1)(c)(1), an injured employee who lacks the physical capacity to return to the work performed on the date of the injury may receive a triple income benefit, while KRS 342.730(1)(c)(2) encourages those who retain the physical capacity to return to the same type of work and earn the same or greater wage to receive a double income benefit during any period of time that employment at that wage level ceases. If both sections of KRS 342.732(1)(c) are applicable, an Administrative Law Judge is required to make a further determination.

In this case the Plaintiff did not return to the job he was performing for this Defendant. He has not returned to the same type of work he was performing at the time of the injury. I find persuasive the restrictions and limitations placed upon the Plaintiff by his treating physician, Dr. Patel. I believe Dr. Patel is in the best position to determine the residual effects of the work injury. After applying Dr. Patel's opinion of a 5 to 10 pound overhead lifting restriction, as well as the absolute prohibition of "throwing tires" to the Plaintiff's situation, I believe the Plaintiff does not retain the physical capacity to perform the same type of work he was performing at the time of the injury. In making this finding I rely on the

> testimony of the Plaintiff and the opinion of Dr. Patel. Therefore, I find Plaintiff is entitled to an enhancement of the PPD award of 3 pursuant to KRS 342.730(1)(c)(1).

Ellis filed a petition for reconsideration arguing that, since Newberry continued to work post injury at the same job making the same wage until his surgery, and, since he was now working for a different employer earning a greater wage than at the time of the injury, an analysis pursuant to the directives in Fawbush vs. Gwinn, 103 S.W.3d 5 (Ky., 2003) was required. Ellis further argued the evidence did not support the application of the three multiplier, or, in the alternative, the parties had already stipulated Newberry had returned to work at a greater wage and thus, did not qualify for the enhancement.

The ALJ issued a detailed order on reconsideration denying the petition stating:

> The facts of this case are that the Plaintiff did not return to work for the Defendant/employer after surgery for his shoulder injury. He was unable to perform the work required of him by his employer. I have considered the holding in an unpublished case, not for any legal authority, but for the analysis provided on this specific question. In Trucking vs. Beeler, 2010-CA-002060-WC (KYCA) the court noted:
>
> > . . . [I]f, 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 [of his or her permanent partial disability award].
>
> KRS 342.730(1)(c)1.
>
> The assignment of a 3% impairment rating, based on Beeler's medial meniscectomy, which was not present in the original award, is proof of increased disability. Furthermore, the ALJ specifically **found that Beeler no longer has the physical capacity to return to his pre-injury work. KRS 342.730(1)(c)1 necessitates no other requirements for application of the multiplier. (Emphasis ours).**

I determined the 3 multiplier was the appropriate multiplier primarily based upon the non-contradicted medical evidence and undisputed facts that Plaintiff did not retain the physical capacity to return to the type of work he performed at the time of injury. This is not a situation where he returned to the employer in a job in which they accommodated those restrictions or allowed him to work by exceeding those restrictions at the same or greater wage, or by doing some form or portion of the former work. It is also not a Fawbush inquiry for those same reasons. Whether Plaintiff remains able to continue some other type of work in the indefinite future

> is not part of our consideration of the statutory requirements. Plaintiff, in the undersigned's opinion, fits the statutory mandates of KRS 342.730(1)(c)(1).

On appeal, Ellis argues the ALJ erred in the application of KRS 342.730(1)(c)1. Ellis argues a Fawbush analysis is required whether the return to work at the same or greater wage is with the same or a different employer. Ellis also argues Trucking v. Beeler, *supra*, is distinguishable since that case only involved the reopening of a claim seeking application of the three multiplier and there was no question regarding the possible application of KRS 342.730(1)(c)2. Ellis acknowledges there is evidence to support application of the three multiplier. However, Ellis argues the ALJ never considered that KRS 342.730(1)(c)2 is potentially applicable to this claim.

We agree it was necessary for the ALJ to conduct a Fawbush analysis prior to awarding the three multiplier. The finding Newberry did not retain the physical capacity to perform the work he performed at the time of his injury has not been appealed. However, the parties stipulated to an AWW at the time of injury of $410.47 and that Newberry returned to work with Ellis from July 16, 2008 through September 10, 2008 at the same AWW. Newberry's testimony

established his current AWW with a different employer was higher than the AWW at the time of his injury.

Since Newberry returned to work earning the same or greater wage, it was incumbent upon the ALJ to determine whether Newberry could continue to do so for the indefinite future. The ALJ's failure to make this finding was a patent error which could have been corrected in ruling on the petition for reconsideration.

In Fawbush, the Supreme Court stated in cases where KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 both apply, the ALJ must conduct an additional analysis, directing as follows:

> 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.

Id. at 12.

The Supreme Court reaffirmed this holding in Adams v. NHC Healthcare, 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.

Id. at 168, 169.

In the case *sub judice*, after finding the provisions of KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 were applicable, the ALJ was required to conduct an analysis pursuant to Fawbush, supra. In determining enhancement of the award by the three multiplier was appropriate, the ALJ merely recited the factors upon which she relied in determining Newberry did not retain the physical capacity to return to the type of work he performed at the time of the injury. However, the ALJ was required to conduct further analysis.

After determining KRS 342.730(1)(c)1 is applicable, since KRS 342.730(1)(c)2 is also applicable, pursuant to Fawbush, supra, and Adams v. NHC Healthcare, supra, the ALJ then was required to determine whether Newberry is "unlikely to be able to continue for the indefinite future to do work from which to earn such a wage." Adams v. NHC Healthcare supra, at 169. There is no discussion or

finding by the ALJ as to whether Newberry is unlikely to be able to continue earning a wage that equaled or exceeded his wage at the time of the injury for the indefinite future.

Since the ALJ failed to make such a determination, that portion of the December 5, 2011, Opinion and Award enhancing Newberry's benefits by the three multiplier must be vacated and this matter remanded to the ALJ for a determination, pursuant to Fawbush, supra, whether Newberry is likely to be able to continue earning a wage which equals or exceeds his wage at the time of the injury for the indefinite future. On remand, the ALJ must also set forth the factors upon which she relies in making the determination whether enhancement of Newberry's benefits pursuant to KRS 342.730(1)(c)1 or KRS 342.730(1)(c)2 is appropriate. After reconsideration of the evidence of record, the ALJ may or may not arrive at the same conclusions as in her previous decision. We certainly are not attempting to substitute our judgment for that of the ALJ, as the final result may be the same.

Accordingly, that portion of the December 5, 2011, Opinion and Award and the December 28, 2011 order ruling on the petition for reconsideration enhancing Newberry's PPD benefits by the three multiplier is **AFFIRMED** in part, and

VACATED and is **REMANDED** to the ALJ for entry of an amended Opinion and Award determining whether enhancement of the award by the two or three multiplier is appropriate.

ALL CONCUR.

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