Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 15, 2013

CLAIM NO. 201200066

EMERSON POWER TRANSMISSION PETITIONER

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

DANNY EDINGTON
and HON. WILLIAM J. RUDLOFF
ADMINISTRATVIE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

RECHTER, Member. Danny Edington ("Edington") sustained two injuries while working at Emerson Power Transmission ("Emerson") as a "heat treat" specialist. By Order dated September 10, 2012, Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarded Edington permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. By Opinion rendered January 18, 2013, the Board vacated in part and

remanded for the ALJ to perform a complete analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

On remand, the ALJ again applied the three multiplier. Emerson now appeals from this February 25, 2013, Amended Opinion and Order on Remand and the March 22, 2013 Opinion and Order on Reconsideration. On appeal, Emerson argues the ALJ once again failed to perform a complete Fawbush analysis. Because we find the ALJ's analysis on remand is insufficient, we vacate in part and remand.

The Board's January 18, 2013 opinion affirming in part, vacating in part, and remanding provided as follows:

> In the case *sub judice*, the record indicates KRS 342.730(1)(c)(2), the statutory provision relating to the two multiplier, was triggered. The June 12, 2012, BRC order indicates as follows under "wages currently earned": "same or greater than on dates of injury." Further, in Edington's March 14, 2012, deposition, he testified he is currently making more money than at the time of the September 1, 2010, and the May 25, 2011, injuries. Thus, KRS 342.730(1)(c)(2) is applicable, as Edington has returned to work "at a weekly wage equal to or greater than the average weekly wage at the time of injury." KRS 342.730(1)(c)(2). The ALJ failed to discuss the application of the two multiplier in the August 16, 2012, opinion, award, and order and the September 10, 2012, order ruling on the petition for reconsideration.

> Therefore, on remand he must engage in this analysis.
>
> Pursuant to Fawbush v. Gwinn, supra, and Adams v. NHC Healthcare, supra, after determining the provisions of KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 are applicable, the ALJ is required to determine whether Edington 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 at 169. The ALJ has determined the three multiplier pursuant to KRS 342.730(1)(c)(1) is applicable. As noted, the record indicates the two multiplier pursuant to KRS 342.730(1)(c)(2) is also applicable. However, in the August 16, 2012, opinion, award, and order or the September 10, 2012, order ruling on the petition for reconsideration there is no discussion or finding by the ALJ as to whether Edington 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 as required by Fawbush v. Gwinn, supra. On remand, the ALJ must determine whether Edington is "unlikely to be able to continue for the indefinite future to do work from which to earn such a wage." Id. If the ALJ determines Edington is unable to earn this wage into the indefinite future, the three multiplier is applicable.

On remand, the ALJ found Edington entitled to the three multiplier. In rejecting application of the two multiplier, the ALJ found as follows:

> Based on the sworn testimony of the plaintiff and the convincing medical

> evidence from Dr. Bilkey, I make the factual determination that although Mr. Edington has returned to work at an average weekly wage equal to or greater than his pre-injury wage, the 2 multiplier does not apply. In addition, it is important to remember that under the holding of the Court of Appeals in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform his current job. Under the *Adkins* case, the standard for the decision is whether the injury has permanently altered the worker's ability to earn an income and the application of KRS 342.730(1)(c)1 is appropriate, if the individual returns to work at the same or greater wage, but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. Based on the sworn testimony of the plaintiff and the persuasive medical evidence from Dr. Bilkey, I make the factual determination that the third prong of the *Fawbush* analysis applies here, and that under that application the plaintiff is entitled to the 3 multiplier.

On appeal, Emerson argues the ALJ again failed to perform a complete Fawbush analysis. Emerson contends the ALJ failed to properly analyze whether Edington was likely to be able to continue to earn the same or greater wage than that earned at the time of his injury. Emerson specifically points to Edington's testimony he planned to continue working as a "heat treat" specialist. Emerson

contends the ALJ completely omitted any analysis of the broad range of factors to be considered in reaching a determination regarding application of the appropriate multiplier. While the ALJ stated he relied upon the medical evidence from Dr. Bilkey and Edington's testimony, Emerson asserts neither actually supports the award.

In our previous decision, we made it clear both KRS 342.730(1)(c)1 and 2 applied and it was necessary for the ALJ to perform the third prong of the Fawbush analysis *i.e,* whether Edington was likely to be able to continue to earn, for the indefinite future, the same or greater wage than that earned at the time of injury. The ALJ's determination the two multiplier as set forth in KRS 342.730(1)(c)2 does not apply to the case *sub judice* is incorrect. Because both the two and the three multipliers are potentially applicable to this claim, the ALJ must determine which is more appropriate, and must provide an adequate basis to support his conclusion.

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, 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 average weekly wage equal to or exceeding his average weekly wage at the time of the injury. Id. At 7-8. The Court in Fawbush articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work he or she performed at the time of injury, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and whether the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. at 12. In Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004), the Court held the Fawbush analysis includes a "broad range of factors" only one of which is the ability of the injured worker to perform his pre-injury job.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the

ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the Kentucky Supreme Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

Here, on remand, the ALJ provided only a conclusion without any discussion of the facts and how they affect the likelihood Edington will or will not be able to continue to earn the same or greater wage. The ALJ's finding was insufficient to apprise the parties of the basis for the decision or provide for meaningful review.

On remand, the ALJ is directed to provide with more specificity the rationale supporting his determination and address the factors he considered in reaching the determination and the evidence relied upon regarding those factors. As noted previously, while the ALJ is not required to perform a detailed fact-finding, he is required to make findings sufficient to inform parties of the basis for his decision which would allow for meaningful review on appeal. Kentland Elkhorn Coal Corp. v. Yates, supra; Shields v. Pittsburgh and Midway Coal Mining Co., supra.

Accordingly, the February 25, 2013 Amended Opinion and Order on Remand of Hon. William J. Rudloff, Administrative Law Judge, and the March 22, 2013 Opinion and Order on Reconsideration are **VACATED IN PART** and this matter is **REMANDED** for entry of an amended opinion, order and award in conformity with the views expressed herein.

ALL CONCUR.

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