OPINION ENTERED: January 18, 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,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Emerson Power Transmission ("Emerson") appeals from the August 16, 2012, opinion, award, and order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") in which the ALJ awarded Danny Edington ("Edington") permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS

342.730(1)(c)(1). Emerson also appeals from the September 10, 2012, order denying its petition for reconsideration.

On appeal, Emerson asserts two arguments. First, Emerson asserts the ALJ's application of the three multiplier is not supported by substantial evidence. Second, Emerson asserts the ALJ failed to perform a complete analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

The Form 101 indicates Edington sustained injuries on September 1, 2010, and May 25, 2011, in the following manner: "1st accident- I [sic] just placed a basket of hot steel on a rack to cool when a big box fax [sic] fell and as I jerked the hot steel I felt a pop in my shoulder. 2nd accident- I was shocked causing me to fall." The Form 101 lists the following physical requirements of Edington's job at the time of his injuries:

> Standing, Walking, Bending, Stooping, Kneeling, Crouching, Lifting, Carrying, Pulling, Tugging, Operating Machinery, Reaching, Climbing, Pushing, Crawling, Twisting, Turning, Grasping, Squatting, Repetitive use of Hands.

The June 12, 2012, benefit review conference ("BRC") order lists the following contested issues: "extent & duration; causation/work relatedness for alleged back injury; pre-existing active on back; medical expenses;

injury as defined by Act." The list of stipulations reflects Edington did not lose time from work. Under "wages currently earned" is the following: "same or greater than on dates of injury."

Regarding enhancement by the three multiplier, the ALJ stated as follows in the August 16, 2012, opinion, award, and order:

> I further find, consistent with the opinion of Dr. Bilkey, that the plaintiff lacks the capacity to return to his pre-injury job. He can lift only eight pounds with his left shoulder, and his work tasks have changed to accommodate his diminished abilities. I therefore find that he is entitled to the triple enhancement provision of KRS 342.730.

In its petition for reconsideration, Emerson requested additional findings regarding the ALJ's decision to enhance Edington’s PPD benefits by the three multiplier, asserting no physician imposed work restrictions. Additionally, Emerson asserted the ALJ failed to carry out an analysis pursuant to Fawbush v. Gwinn, supra. Emerson argued because Edington has continued to earn the same or greater wages since the time of his injuries, a complete analysis under Fawbush, supra, was required.

In the September 10, 2012, order ruling on the petition for reconsideration, the ALJ set forth the following additional findings:

> 8. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky.2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.
>
> 9. Plaintiff testified that he is not physically capable of performing his pre-injury job and that his co-employees assist him with lifting. Dr. Bilkey stated in his medical report that Mr. Edington is not capable of doing the full scope of his usual work duties which he carried out prior to his first work injury and that he cannot lift more than eight pounds. Based upon the plaintiff's testimony and Dr. Bilkey's medical report, I made and again make the factual determination that the plaintiff is not physically capable of performing his pre-injury job and that he is entitled to recover enhanced permanent partial disability under Fawbush and KRS 342.730(1)(c)1.

When determining whether KRS 342.730(1)(c)1 applies, the ALJ is required to consider whether the claimant retains the physical capacity to return to the

type of work the employee performed at the time of the injury. As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). If "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Additionally, with respect to application of the three multiplier, the ALJ has the discretion to rely on a claimant's self-assessment of his or her ability to perform prior work. *See* Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim. Durham v. Peabody

Coal Co., 272 S.W.3d 192 (Ky. 2008). As Edington was the party with the burden of proof on the issue of enhancement of his income benefits by the three multiplier pursuant to KRS 342.730(1)(c)(1) and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence is defined as evidence of substance and relevant consequence and having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367 (Ky. 1971). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict if the matter were being tried before a jury. Durham v. Peabody Coal Co., supra.

In the August 16, 2012, opinion, award, and order, the ALJ indicated he relied upon the opinions of Dr. Warren Bilkey to determine Edington lacks the capacity to return to his pre-injury job. The ALJ's reliance on Dr. Bilkey was reiterated in the September 10, 2012, order ruling on the petition for reconsideration, along with his reliance upon Edington's testimony "that he is not physically capable of performing his pre-injury job and that his co-employees assist him with lifting." If contained in the record, Dr. Bilkey’s opinion or Edington’s

testimony comprises substantial evidence in support of the ALJ's decision the three multiplier is applicable.

Regarding his ability to perform the work he was performing at the time of the two injuries, Edington testified at the August 2, 2012, hearing as follows:

> Q: All right. And now you returned to work; is that right?
>
> A: I never missed a day. They called an ambulance and they got me there and the ambulance talked to me, and I said I'm going to go ahead and stay and try to do my job even though I'm hurt.
>
> Q: Okay. And what do you do for Emerson as far as lifting? Prior to this injury, how much would you lift?
>
> A: Pretty well whatever I wanted to do.
>
> Q: A hundred pounds?
>
> A: Yeah.
>
> Q: Can't do that now, can you?
>
> A: No, sir. I get- if it's anything real heavy, I try to get somebody, get someone to help me.
>
> Q: Okay. Does [sic] the other employees pitch in and help you then?
>
> A: I just go find somebody in there that's not doing something to help me to shove one on or off it it's heavy, yes, sir, or I use a chain hoist more often.
>
> Q: And that lifts it?
>
> A: Yes, sir.

Edington testified he has pain on a daily basis, and his pain is worse when he gets home from work. Edington takes muscle relaxers to help with the pain.

In Dr. Bilkey's June 25, 2012, report he opined as follows:

> No work restrictions are issued. Mr. Eddington [sic] does not want any. He has resumed what he calls his regular duty work. In my opinion however, he is not capable of doing the full scope of the usual work duties that he carried out prior to the 9/1/10 work injury. In other words, he is getting help from co-workers with respect to the heavier lifting tasks. This is because there has been a substantial change in his tolerated level of physical functioning. After all, he cannot lift more than 8 lbs through the left shoulders [sic] restricted range of motion.

Edington's testimony and Dr. Bilkey's opinion, standing alone or in concert, constitutes substantial evidence which supports the ALJ's decision the three multiplier pursuant to KRS 342.730(1)(c)(1) is applicable. The fact Dr. Bilkey did not impose restrictions is irrelevant, since he clearly expressed the opinion Edington is unable to perform the full scope of the work duties he performed prior to his first injury on September 1, 2010.

That said, we vacate the ALJ's award of the three multiplier and remand for further analysis pursuant to Fawbush v. Gwinn, supra.

In Fawbush v. Gwinn, supra, the Supreme Court held that 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*, 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.

If the ALJ determines enhancement by the two multiplier is appropriate then such enhancement is subject to the conditions set forth in Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). While we acknowledge Edington has not yet met the requirements as set forth in Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra, *at some point* during the 425 weeks Edington receives income

benefits, he may cease working due to reasons which relate to the disabling injury or a previous work-related injury. At that point, he would be entitled to have his income benefits enhanced by the two multiplier upon a properly filed motion to reopen. Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra. This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2," i.e., the two multiplier.

As Edington has already met the requirements of KRS 342.730(1)(c)2 before the entry of the final award, if the ALJ determines enhancement by the three multiplier is not appropriate, the two multiplier language must be included in the amended award indicating this is contingent upon his meeting the requirements as set forth in Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bell South Telecommunications, supra. The failure to include such language in the amended award would constitute an error of law.

Accordingly, those portions of the August 16, 2012, opinion, award, and order and the September 10, 2012, order ruling on the petition for reconsideration determining Edington does not retain the physical capacity

to return to the type of work performed at the time of injury are **AFFIRMED**. However, those portions of the August 16, 2012, opinion, award, and order and the September 10, 2012, order ruling on the petition for reconsideration enhancing the PPD benefits by the three multiplier are **VACATED**. This claim is **REMANDED** for entry of an amended opinion and award containing additional findings of fact and a complete analysis pursuant to Fawbush, supra, consistent with the view expressed herein.

ALL CONCUR.

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