Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 19, 2014

CLAIM NO. 201098044

FORD MOTOR COMPANY PETITIONER

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

JAMES HART,
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

* * * * * *

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

RECHTER, Member. Ford Motor Company ("Ford") appeals from the August 14, 2013 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), and from the October 8, 2013 and October 18, 2013 orders ruling on the parties' petitions for reconsideration. The

ALJ awarded James Hart ("Hart") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits as a result of an August 19, 2009 injury to his left upper extremity. Ford argues TTD benefits should have been limited to a period from October 24, 2011 through July 24, 2012. Ford additionally argues the ALJ erred in applying a 12% impairment for the entirety of the 425 weeks of PPD benefits, and in applying the three multiplier on reconsideration. Because we find the ALJ failed to perform an adequate analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), we vacate the ALJ's finding regarding the appropriate multiplier. In all other respects, we affirm.

Hart began working for Ford in 1999 as an assembly line worker. At the time of the work injury on August 19, 2009, he was performing a job that required him to lean underneath a truck and reach over his head to force in a metal plate. As he was doing so, he experienced pain in his left arm. Following numerous visits to Ford's medical facilities, he was referred to Dr. Greg Rennirt, an orthopedist, who treated him conservatively for ten months. Eventually, he was referred to Dr. David Tate, who performed two surgeries. The first surgery was to treat

his lateral epicondylitis. The second surgery was necessary due to infection and problems with the sutures.

Dr. Warren Bilkey performed an independent medical evaluation ("IME") on March 21, 2011. He diagnosed an elbow strain as a result of a work injury. Dr. Bilkey did not believe Hart had reached maximum medical improvement ("MMI") but assessed a 3% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for chronic pain. Dr. Bilkey stated Hart was unable to perform grip strength testing due to complaints of pain.

In an August 28, 2012 addendum, Dr. Bilkey indicated Hart performed grip strength testing. He assessed a 12% impairment pursuant to the AMA Guides and opined Hart was at MMI. He stated the 12% rating "supersedes and replaces" the prior 3% rating.

Dr. Michael Best performed an IME on December 15, 2010, and re-evaluations on May 18, 2011 and August 15, 2012. On June 13, 2011, he diagnosed left elbow pain, the symptoms of which had resolved. Dr. Best stated Hart was at MMI, and could return to work without restrictions. In a June 30, 2011 letter, Dr. Best indicated he had reviewed the MRI and determined there was no evidence of lateral

epicondylitis, tendinopathy, or tenosynovitis. He assessed a 0% impairment and felt Hart was at MMI as of June 30, 2011. Dr. Best opined Hart needed no further medical treatment or permanent work restrictions.

Following re-evaluation on August 15, 2012, Dr. Best diagnosed left elbow pain. He noted an October 2011 MR/arthrogram revealed mild extensor tendinosis without a tear and extensor fasciotomy without reattachment of bone. He placed Hart at MMI and imposed medium restrictions with no lifting of more than fifty pounds, though he believed he could transition to unrestricted work in six months. Dr. Best assessed a 2% impairment and stated Hart retained the physical capacity to return to the type of work performed at the time of the injury.

Hart submitted medical records from Dr. James Redmon, his family physician. Dr. Redmon obtained a functional capacity evaluation performed at BaptistWorx on July 17, 2012. He agreed with the findings and assigned restrictions of twenty pounds maximum for material handling, ten pounds frequently, and five pounds maximum for continuous lifting. Hart had limited use of the left hand and was directed not to perform unilateral overhead work with it. Hart was also restricted from the use of

heavy, vibratory or dangerous power tools requiring both arms.

The ALJ found the post-surgery IME report of Dr. Bilkey to be the most credible medical evidence "because of the inclusion of the grip strength assessment as well as a rating for chronic pain." The ALJ determined Hart had a 12% impairment rating as a result of the work injury. The ALJ then found as follows regarding the appropriate multiplier:

> It is undisputed that the Plaintiff returned to work for a period of time at the same or greater wages and that he is currently listed as "No Work Available" due to his stated restrictions. In light of the foregoing facts establishing that the Plaintiff cannot return to the job that he was performing at the time of the injury and the inability of the Defendant to continue to accommodate the Plaintiff's restrictions, the ALJ finds that the Plaintiff is entitled to the "two" multiplier pursuant to KRS 342.730(1)(c)2.

The ALJ awarded TTD benefits from January 4, 2010 through January 21, 2010 and from June 1, 2011, the date Ford was no longer able to accommodate Hart's restrictions, through August 28, 2012.

Ford filed a petition for reconsideration raising the same arguments it now raises on appeal. Finding Ford identified no patent error, the ALJ denied Ford's petition

by order dated October 8, 2013. Hart filed a petition for reconsideration arguing the ALJ committed patent error in awarding benefits based upon the two rather than three multiplier.

In his October 18, 2013 Order, the ALJ provided the following additional findings:

> 1. The ALJ finds that the Plaintiff's testimony establishes that he returned to work post injury at the same or greater wages and that said testimony is not contradicted by any other evidence in the record.
>
> 2. The ALJ therefore finds that both KRS 342.730(1)(c)1 and (c)2 could apply and that a Fawbush analysis is appropriate.
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> 3. The ALJ finds that the Plaintiff was placed in a "no available work" category due to the Defendant's unwillingness to accommodate his restrictions and was consequently unable to continue earning the same wages. The ALJ therefore finds that Plaintiff is entitled to the "three" multiplier pursuant to KRS 342.730(1)(c)1.

Accordingly, the ALJ amended the PPD award calculation to reflect application of the three multiplier instead of the two multiplier.

On appeal, Ford argues the ALJ erred in awarding TTD benefits from June 1, 2011 until October 24, 2011, and after July 24, 2012. It emphasizes Hart worked under

restrictions for much of the twenty six months following the injury, and retained the same actual capacity to work prior to his surgery. Further, the "no work available" status was not a result of new restrictions or impairment, but of an economic downturn. Therefore, according to Ford, Hart is not eligible for TTD benefits during the period prior to surgery. Instead, benefits should have been terminated when Dr. Redmon, the treating physician, provided a release to return to work with new restrictions on July 24, 2012, rather than August 28, 2012 when Dr. Bilkey performed his examination.

KRS 342.0011(11)(a) defines temporary total disability as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to work." TTD is a factual finding requiring the ALJ to analyze the evidence presented and determine when an individual who is temporarily totally disabled as a result of an injury has reached MMI or has attained a level of improvement such that he is capable of returning to active gainful employment. Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000); W.L. Harper Construction Co. v. Baker, 858 S.W.2d 202 (Ky. 1993). A release to minimal work is not sufficient to terminate TTD benefits when a

claimant has yet to reach MMI. Wise, supra. In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004) the Court of Appeals instructed that until MMI is achieved, an injured employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury.

The Court in Helms, supra, specifically stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement **and** not have improved enough to return to work.
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Helms, 140 S.W.3d at 581.

Hart returned to restricted work and continued in that capacity until Ford would no longer accommodate his restrictions, placing him in the "no work available" classification. We find it disingenuous to claim Hart was

simply the victim of naturally occurring periods of layoffs during an economic downturn. There is no evidence on the record *uninjured* employees were laid off. In fact, Ford acknowledges the "no work available" designation applies when "jobs are modified and *injured* workers are unable to perform the exact jobs that they were performing before retooling." For purposes of the award of TTD benefits, it is only relevant that Hart was not at MMI and remained unable to return to his customary work. The ALJ properly determined Hart qualified for TTD benefits from that point until he reached MMI following the last surgery. Moreover, the ALJ was well within his role as fact-finder in choosing to rely on Dr. Bilkey's opinion regarding the date Hart reached MMI following surgery.

Ford next argues PPD benefits can only be awarded in accordance with physician opinions as to permanent impairment according to the AMA Guides, and any increase in impairment can only be reflected with an award that splits or apportions the 425 week period of benefits according to the relevant periods of ratable impairment. It contends the award of PPD benefits beginning August 20, 2011 based upon a 12% impairment is erroneous as a matter of law because there is no evidence to support greater than a 3% impairment prior to the surgeries.

Sweasy v. Wal-Mart Stores, Inc., 295 S.W. 3d 835 (Ky. 2009) provides guidance regarding the appropriate extent of the PPD award. Sweasy injured her back on November 28, 2005, and as a result she received medical treatment and was taken off work for a few days. She returned to work at light duty consistent with her light duty restrictions. Subsequently, Sweasy was terminated on March 1, 2007, because Wal-Mart refused to honor the restrictions any longer. The ALJ awarded TTD benefits from March 1, 2007, through August 24, 2007, during which time Sweasy had not reached MMI or a level of improvement which would permit her to return to employment. Thereafter, the ALJ determined Sweasy was entitled to PPD benefits. However, the ALJ commenced the benefit period of the award from August 25, 2007. On appeal, this Board determined the ALJ had committed palpable error by failing to award PPD benefits from the date of the injury because Sweasy's permanent disability began at the time of the injury. The Court of Appeals reversed based on the fact KRS 342.730(1)(d) only requires awards of compensable periods of a disability greater than fifty percent commence from the date of injury. The Supreme Court, in affirming this Board and reversing the Court of Appeals, stated as follows:

This appeal concerns KRS 342.730(1)(d), which provides compensable periods of 425 weeks for disability ratings of 50% or less and of 520 weeks for disability ratings that exceed 50%. KRS 342.730(1)(d)'s failure to specify when the period of a 425-week award begins may be read to imply legislative intent to permit such an award to begin on a date other than when the permanent impairment or disability of 50% or less arises. Yet, mindful of policy and purpose for which KRS 342.730(1)(b)-(e) were enacted, we conclude that the legislature intended no such absurdity. (footnote omitted) Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits.

A condition 'arises' when it comes into being, begins, or originates. (footnote omitted) Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's, Guides to the Evaluation of Permanent Impairment consider the amount of impairment that remains at MMI to be 'permanent.' The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that

> the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.
>
> The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.

Id. at 839-840.

Thus, Sweasy establishes that, where the injury produces immediate effects and a permanent partial disability, the entire period prior to the award must consist of either TTD or PPD. In the case *sub judice*, because it was undisputed Hart suffered immediate effects of the August 19, 2009 work injury and there was no latency period, the ALJ correctly ordered the payment of PPD benefits from the date following the initial period of TTD forward.

Regarding Ford's challenge to the impairment rating, we find no error. Dr. Bilkey initially assigned a 3% impairment rating for chronic pain at the time of his March 21, 2011 evaluation, but expressly stated Hart was not at MMI and his grip strength could not be rated due to complaints of pain. Clearly, Dr. Bilkey's rating at that

time was not complete and was not a rating of Hart's permanent condition at the time he reached MMI. Further, Dr. Bilkey's subsequent assignment of the 12% impairment rating was meant to fully replace the 3% rating. We find no error in the ALJ's application of the 12% impairment rating to the entire period of PPD benefits.

Finally, Ford argues the ALJ improperly reversed his factual findings and legal conclusions related to August 14, 2013 Opinion and Award. Additionally, it claims the ALJ failed to articulate a satisfactory Fawbush analysis. We agree the required analysis was insufficient.

The ALJ determined Hart lacked the physical capacity to return to the type of work he was performing at the time of his injury and he had returned to work at the same or greater wage as he earned at the time of the injury. In the opinion and award, the ALJ only cited Ford's inability to accommodate Hart's restrictions as a reason for applying the two multiplier. Although this constitutes evidence to support a conclusion the termination of the same or greater wage was for a reason related to Hart's disability, satisfying the requirement of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009), it is also some evidence of an inability to earn the same or greater wage for the indefinite future. The ALJ

made no specific finding as to whether Hart was likely to be able to earn the same or greater wage for the indefinite future.

On reconsideration, the ALJ acknowledged (1)(c)1 and (1)(c)2 could apply and a Fawbush analysis was required. However, in finding the three multiplier applicable, the ALJ only indicated Hart "was placed in a 'no work available' category due to the Defendant's unwillingness to accommodate his restrictions and was consequently unable to continue earning the same wages."

In Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), the Court of Appeals defined the criteria to be used by the ALJ in determining which multiplier was more appropriate stating as follows:

> The Board in this case, while it was correct in remanding the case for a further finding, incorrectly stated that upon remand the ALJ was to determine whether Adkins could continue to perform his current job as opposed to whether he could continue to earn a wage that equals or exceeds his pre-injury wages.
>
> These two determinations, though ostensibly equivalent in this case, are quite different in their long-term ramifications. Between two similarly situated claimants not returning to the same type of work, if one gets a job fitting his restrictions and paying the same wage, but unexpectedly ending after only a year, and the other does

> not, then it is likely that, under a determination such as that ordered by the Board, only the second would receive benefits based on a multiplier of three. If, however, the ALJ makes a determination under the *Fawbush* standard as to the "permanent alteration in the claimant's ability to earn money due to his injury," then it is likely both claimants would be treated the same.
>
> If every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job. Therefore, we remand this case to the ALJ for a finding of fact as to Adkins' ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future. If it is unlikely that Adkins is able to earn such a wage indefinitely, then application of Section c(1) is appropriate.

Id.

The Supreme Court in Adams v. NHC Healthcare, 199 S.W.3d 163, 168, 169 (Ky. 2006) concurred with the holding in Adkins, 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.
>
> Unlike the situations in *Fawbush, supra*, and *Adkins, supra*, the claimant continued to work as a nursing assistant for several months after his injury but quit before his claim was heard. He asserted that he could no longer work. Having found the claimant to be only partially disabled, the ALJ's task was to determine whether his injury permanently deprived him of the ability to do work in which he could earn a wage that equaled or exceeded his wage when he was injured. The claimant asserts that it did and that he was entitled to a triple benefit under KRS 342.730(1)(c)1.

Here, it appears the determination of whether Hart can continue to earn the same or greater wage was limited to consideration of whether he can continue employment with Ford. Accordingly, we vacate and direct

the ALJ to render a complete Fawbush analysis determining whether Hart is likely to earn the same or greater wage for the indefinite future in any employment.

Accordingly, the August 14, 2013 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, and the October 8, 2013 and October 18, 2013 orders ruling on the parties' petitions for reconsideration are **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for additional findings and entry of an amended opinion, order and award in conformity with the views expressed herein.

ALL CONCUR.

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