OPINION ENTERED: DECEMBER 21, 2012

CLAIM NO. 201088863

FORD MOTOR COMPANY PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

JEFFREY W. GRANT
HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

SMITH, Member. Ford Motor Company ("Ford") appeals from the August 27, 2012 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative Law Judge, ("ALJ"), awarding Jeffrey W. Grant ("Grant") permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. No petition for reconsideration was filed. On appeal, Ford argues the ALJ misapplied the requirements of Fawbush v. Gwinn, 103 S.W.3d

5 (Ky. 2003) and as a result, erred in his assessment of the three multiplier. We disagree and affirm.

Grant, now age 47, is a high school graduate who has worked at the Ford Truck Assembly Plant since August 7, 1995. He filed a Form 101, Application for Resolution of Injury Claim, on February 14, 2012, alleging that on March 12, 2010, as he was lifting a transfer case, he heard and felt a pop followed by pain in his right shoulder. He testified by deposition on May 24, 2012 and at the final hearing on June 27, 2012 where he explained his injury as follows:

> I work with an overhead hoist. I hold a controller for the hoist in my left hand, and that controls the hoist to go up and down. From side to side or forward and back, that's manually done.
>
> I pick up transfer cases with a hook that's on the end of the chain. I use a hook in my right hand, and I hook the transfer case and raise it up. They are 122 pounds each. They are carried to a conveyor, set on a conveyor. The other end of the conveyor, they are picked up, taken to the line, and installed on the back of the transmission.
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> When I was picking one up, the same job I had been doing for like 15 years, I just -- I felt a ripping and heard this popping noise in my right shoulder, and it was excruciating pain, and it ripped all the muscles completely off my shoulder.

Grant first sought medical treatment with Dr. Greg W. Rennirt, who diagnosed right rotator cuff tear and biceps tendon tear. Dr. Rennirt performed shoulder surgery on April 8, 2010.

Grant testified that after the surgery he continued to experience pain and weakness, and never regained the ability to externally rotate his arm. He subsequently saw Dr. Mark Smith, who determined his shoulder had not healed correctly despite the previous surgery. There was a bulge in his biceps which was not attached properly to his shoulder. He had no external rotation. Dr. Smith performed a second surgery in an attempt to correct the problem, but with limited results.

Grant testified he has lifting restrictions of no greater than five pounds with the right arm and no work above shoulder level. Although he continues to work for Ford making the same or greater wage, he could not return to the same duties he was performing at the time of his injury. In fact, he stated he could actually do only two or three percent of the jobs available at the plant. Grant testified that if his employment was terminated, he would have no training or experience in a job paying as much as he currently earns.

On cross-examination, Grant confirmed he returned to his pre-injury duties in November 2010 and continues in that job. Based upon his seniority, he had the opportunity to select one of three jobs and he chose to continue with the job duties he was performing before his injury with some modifications.

Lonnie Corkum ("Corkum"), a Ford employee working in labor relations, testified at the final hearing Grant has seventeen years seniority among hourly workers at the plant. He stated, based on Grant's seniority, "he is on the upper echelon of employees currently…" Corkum testified the particular line where Grant worked is essential for the production of vehicles. He confirmed there was no reason to believe the line would be ended anytime in the foreseeable future and no reason to believe Grant would be unable to work on that line. He also testified there were other jobs available to Grant that would be less labor-intensive. In summary, based upon his classification and seniority, Grant will always have a job at Ford.

Grant introduced the medical records and reports from Dr. Greg W. Rennirt. Grant first presented to Dr. Rennirt on March 17, 2010 with complaints from a work injury occurring five days earlier. Grant reported that, as he was moving a part weighing 120 pounds on a hoist, he felt a

ripping sensation in his arm. He has been in pain ever since.

Dr. Rennirt diagnosed right rotator cuff tear and biceps tendon tear, and performed surgery on April 8, 2010 consisting of rotator cuff repair, right shoulder; debridement of biceps tendon stump, subacromial decompression, and debridement of degenerative labral tear.

Dr. Rennirt saw Grant on April 12, 2010 in follow-up of his right rotator cuff repair. He noted Grant seemed to be doing well and noted he also had a biceps tendon tear. He recommended no work with his right arm and no lifting more than ten pounds with his left arm. On April 26, 2010, Dr. Rennirt noted Grant seemed to be doing really well and had almost 60° of external rotation. On May 17, 2010, Dr. Rennirt noted Grant had full passive range of motion. He recommended Grant continue with physical therapy with no lifting over three pounds and no overhead or repetitive work.

On June 2, 2010, Dr. Rennirt noted Grant was experiencing pain in his right arm and a bulge could be seen. Physical examination revealed a knot in the front of Grant’s arm consistent with a biceps tendon tear. His impression was a biceps tendon tear. He noted it was likely to be a permanent condition. However, Dr. Rennirt concluded

it would not limit him and there is no specific treatment for it. On June 23, 2010, Dr. Rennirt noted Grant was still weak and had a fair amount of crepitation in the shoulder, which was beginning to be of some concern. On July 14, 2010, Dr. Rennirt ordered an MRI. His July 23, 2010 report states as follows:

> **MRI:** the MRI does show a complete failure of his rotator cuff. The biceps stump looks okay. He obviously has a complete biceps tendon tear, but that was there prior to his surgery. He has had a complete failure of his rotator cuff.
>
> **PLAN:** At his age, this is not a great injury to have. If he was older, I would tell him to live with it the way it is or do a debridement. However, at age 45, he needs a functioning cuff, so I would attempt another repair. He is going to think about his options and give me a call. I have warned him, though, that the failure rate for a revision rotator cuff of this magnitude could be 50/50.

Ford introduced medical records and reports of Dr. Mark G. Smith, who first evaluated Grant on August 16, 2010. Dr. Smith noted a history of the March 12, 2010 work injury and subsequent surgery performed by Dr. Rennirt on April 12, 2010. Dr. Smith stated:

> Unfortunately, during the course of things he states he has not seemed to heal right. He has continued to have consistent pain and weakness, and he

> never regained the ability to externally rotate his arm. He notes that he has weakness to the point where he had difficulty even lifting a cup properly to his mouth.

Dr. Smith also noted an MRI performed July 21, 2010 showed a large tear of the supraspinatus into the infraspinatus with associated retraction and atrophy. He diagnosed a large rotator cuff tear which is retracted and symptomatic. Grant expressed an intent to have it repaired although Dr. Smith discussed with him that there was a 40/60% chance of success. Dr. Smith performed surgery on September 16, 2010. In a follow-up on January 28, 2011, Dr. Smith noted improvement in pain relief, with continued weakness in his arm and shoulder. He also noted "to raise his arm he had to abduct his shoulder and externally rotate his hand to bring it to his mouth before being able to perform a smooth motion." Dr. Smith continued Grant in physical therapy and imposed a lifting restriction of five pounds.

In April 2012, Dr. Smith noted Grant was medically stable and assigned an 8% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Grant introduced the medical report of Dr. Anthony McEldowney who examined him on October 20, 2011. He provided a history to Dr. McEldowney of feeling a twisting, ripping, and popping sensation in his right arm as he was moving a 120 pound base at work. He also noted Grant had undergone two surgeries, but still continued to have residual loss of abduction and external rotation. Dr. McEldowney noted Grant could hold a 3-5 pound weight for 5-10 seconds at most. He is unable to sleep on his right side at times and has tingling around his right shoulder, which is always sore. Grant is unable to throw, and has difficulty eating, shaving, brushing his teeth or performing any hygiene around his face or head requiring overhead use of his right arm.

Dr. McEldowney conducted a physical examination, noting Grant had significant strength deficits with any overhead abduction and flexion. Dr. McEldowney further found:

> The patient has significant strength deficits with any overhead abduction and flexion as well has essentially 4-/5 strength in the external rotators as well as 5-/5 strength with the right elbow supinators. There is obvious instability around the right shoulder and there is a negative O'Bryan and a negative speed test. There is minimal tenderness anteriorly and this is mostly where the biceps tendon was torn but there is no lateral tenderness. His reflexes are symmetrical in the bicep

> region and although there is no distal neurovascular deficits his grip strength on the right hand is 28 kilograms and on the left hand is 42 kilograms. There is no evidence of hypersensitivity or causalgia.

Dr. McEldowney diagnosed traumatic right shoulder rotator cuff and biceps tendon tear with underlying impingement. He determined Grant's injury is the cause of his complaints. Dr. McEldowney also concluded Grant's present subjective complaints and objective findings are the direct result of the May 12, 2010 work-related injury to his right shoulder. Dr. McEldowney assigned a 10% whole person impairment pursuant to the AMA Guides, and stated he did not have any active impairment prior to his injury.

Dr. McEldowney concluded Grant did not retain the physical capacity to return to the type of work performed at the time of his injury and recommended lifting restrictions of no more than five pounds with the right arm and no overhead work with the right shoulder.

Persuaded by the opinions of Dr. McEldowney, the ALJ found Grant to have a 10% permanent impairment to the body as a whole based upon the AMA Guides. The ALJ then determined Grant should be awarded the three multiplier, stating as follows:

> Awards for permanent partial disability benefits are governed by KRS

342.730. Subsections (1)(c)1 and (1)(c)2 provide for enhancement of the basic award as follows:

> KRS 342.730(1)(c)1: If, 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 the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
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> KRS 342.730(1)(c)2: If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

What is meant by the “type of work” indicated in (1)(c)1? When trying to determine whether the 3x multiplier in KRS 342.730(1)(c)1

applies, the ALJ is required to considered whether the claimant retains the physical capacity to return to the type of work that the employee performed at the time of the injury. In Ford Motor Co. v. Forman, Ky., 142 S.W.3d 141 (2003), the Kentucky Supreme Court clarified that for purposes of 342.730(1)(c)1, the "type of work" referred to means [sic] the "actual jobs" performed by the claimant and is not determined by whether the return to work is within the same job classification.

At the hearing of this claim, Mr. Grant explained his work activities prior to the injury, as well as his work activities following the work injury. Prior to the injury, he was rotating between three different positions in the performance of the "hoist" job. In order to reduce the physical wear and tear of performing the "hoist" job, the plaintiff had, prior to injury, rotated with two other co-employees. This job required him to move 120-pound transmission cases and install them on the back of transmissions. He worked on an assembly line which required him to repetitively lift significant weight with both hands and to work above shoulder level. There were actually three different jobs involved in the position and he and his co-employees rotated between the three jobs. The injury occurred on March 12, 2010 when the plaintiff was picking up a transfer case with the use of the hoist. He heard a popping and felt a ripping in his right shoulder. Although the actual lifting was being done by a hoist, and plaintiff had simply bent over to hook it and hit a lever which raised it up, while so doing, his shoulder popped.

Subsequent to the work-related injury and the two surgical procedures, the claimant has returned to the same job position or title, but the actual job or jobs which he has performed subsequent to the injury are dramatically different. The claimant is restricted from lifting more than 5 pounds with his right arm and he is restricted from working above shoulder level.

Subsequent to the surgeries, the plaintiff is doing one part of the three-part job all of the time. He is able to do this because the employer has lowered the pedestals on the conveyor and has modified the job, thereby enabling him to perform it. The Defendant has argued that plaintiff has returned to the same job for which he was being paid. In essence, however, he is performing only one of the three roles in the job. He is paid according to "classification" of the job. He is working within a classification of "vehicle assembly technician" and is being paid based on that classification, not on the particular job which he is doing. Mr. Corkum testified that Mr. Grant is not precluded by his injury from returning to his classification, of which his job is only one of many jobs that he was hired to do. Thus, the defendant argues that plaintiff is capable of performing his job. However, in Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2003), the Kentucky Supreme Court held that "the type of work that the employee performed at the time of injury" refers to the actual jobs that the employee performed as that phrase is used in workers' compensation statute providing an enhanced permanent partial disability benefit for those

who lack the physical capacity to return to the type of work performed at the time of injury. The Supreme Court went on to hold that since each classification contained in a collective bargaining agreement included many different jobs, with different physical requirements, proof of the claimant's present ability to perform some jobs within the classification did not necessarily indicate that the claimant retains the physical capacity to perform the same type of work that he or she was performing at the time of the injury with respect to the statute providing for enhanced benefits. Thus, considering this application of the law, the strict post-injury work restrictions imposed upon Mr. Grant, and the fact that he has only been able to perform his present job due to the modifications which the employer has made, the ALJ finds that claimant does not retain the physical capacity to return to the type of work or the type of jobs that he was performing at the time of injury.

In the case at hand, it is stipulated that Mr. Grant has returned to work at a weekly wage equal to or greater than the average weekly wage at the time of his injury. Thus, in the event of a cessation of work due to a reason related to the claimant's disabling injury [see Chrysalis House, Inc. v. Tackett, Ky., 283 S.W.3d 671 (2009)], Mr. Grant would be entitled to the 2x multiplier provided for in KRS 342.730(1)(c)2.

Having determined that both sections 1 and 2 are applicable, the ALJ must next determine which of the multipliers is the most appropriate under the facts of the case. Fawbush

v. Gwinn, 103 S.W.3d 5 (2003). The ALJ must determine if the claimant is likely to be able to continue earning the same or greater wage for the foreseeable future. If the ALJ determines that it is unlikely the claimant will be able to continue earning the same or greater wage for the foreseeable future, then the 3x multiplier is applicable.

In performing this analysis, the ALJ will consider various factors, including, but not necessarily limited to, whether the claimant's current job is within his medical restrictions, whether he is on medications and the level of such medications, his own testimony as to his ability to perform the job duties, the level of accommodation provided by the current employer, and whether or not the claimant's current position is a bona fide job or not. The claimant is just 47 years of age and presumably has a long work life in front of him. He is performing a job which is nearly a "one-armed job". He can lift no more than 5 pounds with his right arm. He cannot work above shoulder level with his right arm. But for the accommodation of lowering the pedestals which his employer has made and but for his being permitted to stay on the same job and not rotate among the three different roles of the job, he would be unable to perform the job and he would not be earning his current wage. In fact, it is doubtful that he could be earning any significant wage at all. Although the employer's attitude toward Mr. Grant has been commendable and the willingness of Ford Motor Company to alter the work station and to provide the accommodations which it has provided is praiseworthy, Mr. Grant finds himself at the mercy of the

employer. If Mr. Grant should lose this job for any reason whatsoever, it is unlikely that he would be able to obtain any other employment which would compensate him within the same level or range. The ALJ must look to the likelihood of whether or not this current job will extend into the indefinite future. Although Mr. Corkum has nearly "guaranteed" a job for the claimant, there are many factors of which Mr. Corkum has no control. If the general public's enthusiasm for the Ford product should diminish, then where does that leave Mr. Grant? Even though the general policy of Ford Motor Company has been to retain tenured employees and to make reasonable accommodations for such employees, there is no contractual duty for Ford Motor Company to do so and no guarantees of the continuation of such policy. Management may change, as well as company policy. The claimant has sustained an extremely serious injury which has required two major surgeries. Neither surgery was much of a success. As a result thereof, he has been relegated to the role of a job requiring essentially one arm only. He cannot work above shoulder level. He has been fortunate to be the recipient of Ford Motor Company's generosity, but he has no guarantee of knowing how long that will continue. If he should be transferred to another position in the plant, it is unlikely he would be able to do it. Plaintiff estimates he could only perform 2-3% of the jobs within the plant.

Considering all of the factors stated above, the ALJ finds that claimant is entitled to the 3x multiplier.

On appeal, Ford argues the ALJ misapplied the directives of Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Ford states Grant returned to the exact same job he was performing at the time of his injury. Ford notes that, although Grant could have selected one of three jobs, he chose to return to his pre-injury duty assignment. Ford acknowledges a Fawbush analysis requires consideration of whether the claimant could continue the job for the indefinite future. Ford points to the testimony of the Labor Relations Specialist who all but guaranteed Grant would have his job as long as he chose. Although noting the similarity between the case *sub judice* and Fawbush, Ford distinguishes this claim from Fawbush. In Fawbush, the claimant had a broken hip and only returned to work because he had no other source of income or means of obtaining income. Fawbush was taking more medication than was prescribed and was working outside of his medical restrictions. Ford notes none of this is true in the case *sub judice*. Grant is working within his restrictions at his pre-injury job and is protected by a union collective bargaining agreement. Based upon the evidence, Ford argues Grant does not qualify for the enhancement provisions of KRS 342.730(1)(c)1.

Since Grant was successful before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's decision, including application of the three multiplier pursuant to KRS 342.730(1)(c)1. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by

superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In the case *sub judice*, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Upon consideration of the ALJ's detailed analysis, we are satisfied he made adequate findings of facts and conclusions of law. The ALJ understood that, in those instances where both KRS 342.730(1)(c)1 and (c)2 apply, he is authorized to determine which provision is more appropriate based upon the facts of the individual claim.

Subsequent to Fawbush, the Supreme Court in Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003) instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury, "the ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, *supra*, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts." *Id*. at 211. The Supreme Court reaffirmed this holding in Adams v. NHC Healthcare, 199 S.W.3d 163, 168-169 (Ky. 2006), 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.

Here, the ALJ considered numerous factors in reaching his determination. Grant had a severe lifting restriction, could not work above shoulder level, essentially worked one-

arm duty, performed his job with accommodations from the employer and testified he could perform two to three percent of the jobs at Ford. We find there is substantial evidence to support the ALJ's determination the three multiplier is more appropriate. Although Ford points to testimony supporting a finding Grant can continue to earn the same or greater level of wages into the indefinite future, such is not an adequate basis to reverse on appeal.

Accordingly, the Opinion, Award and Order rendered August 27, 2012 by Hon. Edward D. Hays, Administrative Law Judge, is **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

I respectfully dissent. In Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), 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. In the case *sub judice*, unlike Fawbush, there is no evidence which indicates Grant's post-injury work is being performed out of necessity or outside his medical restrictions. Factually Grant's situation is very different.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court remanded a claim for a determination of the claimant's average weekly wage following his return to work. The Court instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury, "the ALJ must then apply the standard was set forth in Fawbush v. Gwinn, *supra*, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts." *Id*. at 211; *See also* Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004) (holding 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.)

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a

claim, the principles enunciated in Fawbush v. Gwinn, *supra*, and progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, that a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future. In this instance, it is apparent the ALJ provided a determination the enhancement pursuant to KRS 342.730(1)(c)1 was appropriate without the extenuating factors set forth in Fawbush, *supra*.

The ALJ determined in his decision if Grant loses his job, it is unlikely he will find other suitable employment, not whether his employment will continue into the foreseeable future. The burden to prove he will be unable to earn his current or greater wage into the forseeable future rests with the claimant. The ALJ appears to have impermissibly shifted that burden to the employer. Failure to establish he will be unable to continue earning the same or greater wage should prevent application of the three multiplier pursuant to KRS 342.730(1)(c)1.

For the above reasons, I would vacate and remand the ALJ's decision pertaining to the application of KRS 342.730(1)(c)1 for a determination consistent with the facts of the case applying KRS 342.730(1)(c)2.

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