Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 15, 2016

CLAIM NO. 201401072

FORD MOTOR CO. (LAP) PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

PHYLLIS D. RUSS and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, & REMANDING

* * * * * *

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

ALVEY, Chairman. Ford Motor Company (LAP) ("Ford") appeals from the Opinion, Order and Award rendered May 5, 2015 by Hon. Chris Davis, Administrative Law Judge ("ALJ") awarding Phyllis D. Russ ("Russ") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits increased by the three multiplier pursuant to KRS

342.730(1)(c)1, and medical benefits for work-related injuries to both hands and arms due to repetitive job duties. Ford also appeals from the June 22, 2015 Order sustaining in part, and denying in part its petition for reconsideration.

On appeal, Ford argues the ALJ erred in awarding TTD benefits for time periods Russ was on light duty earning the same or greater wages. Ford also argues the ALJ erred in enhancing the award of PPD benefits by the three multiplier contained in KRS 342.730(1)(c)1. We agree the ALJ did not perform a proper analysis regarding entitlement to TTD benefits during the periods Russ returned to light duty work in light of Livingood v. Transfreight, LLC, et. al., 467 S.W.3d 249 (Ky. 2015) and Trane Commercial Systems v. Delena Tipton, 2014-SC-000561-WC, 2016 WL 671170 (Ky. February 18, 2016)(designated to be published). However, because the ALJ did not determine the applicability of the two multiplier contained in KRS 342.730(1)(c)2, and this was not preserved as an issue or raised in the petition for reconsideration, there was no requirement to perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Therefore, we affirm the enhancement of Russ' benefits by the three multiplier contained in KRS 342.730(1)(c)1. We vacate in part, and remand for

additional findings and analysis regarding the periods to which Russ may be entitled to TTD benefits.

Russ filed a Form 101 on May 20, 2014 alleging she injured both of her hands and forearms on May 21, 2012[1] due to her repetitive duties while working for Ford, where she is still employed. Russ is a high school graduate with no specialized or vocational training. The Form 104 indicates Russ began working for Ford in June 2012. She previously worked as a lunch room assistant with the Jefferson County Public Schools from 1982 to 1991. She next worked for Lear, an automobile part assembly plant, as an assembler from 1991 to June 2012.

Russ testified by deposition on August 21, 2014, and at the hearing held March 18, 2015. Russ is a resident of Louisville, Kentucky. She previously had problems with hand tingling and numbness when she began working for Lear in 1991. Those symptoms resolved when Lear adopted a work rotation plan. She had no additional problems, and continued to work for Lear until it closed on December 16, 2010.

[1] This date is incorrect since she did not begin working for Ford until June 2012. Although the record does not reflect a motion to amend the claim, the Benefit Review Conference ("BRC") Order and Memorandum lists the date of injury as May 21, 2013. Because the date of injury was not disputed on appeal, the May 21, 2013 date of injury is deemed to be correct.

Russ began working for Ford on June 12, 2012, where she has performed several different jobs. She initially placed push pins in tail gates for two weeks. She next placed screws in bumpers, which required her to use her hands overhead. She was next moved to the motor line where she performed several different jobs filling in for other workers who were absent. She next installed heater hoses. She was later moved to a position where she placed rubber seals around truck doors by pushing with both hands. She developed symptoms in her left hand after doing that job for a week. On May 1, 2013, she was moved to a job which required her to push wiring and pins throughout trucks. She later returned to the door seal position and her left thumb "locked up" after two days. Her additional symptoms included pain, swelling and throbbing in both hands and her fingers. When she reported her thumb had locked, Russ was moved to another position.

She was eventually sent to the Ford medical department where ice was applied to her left hand. She was advised to see the Ford doctor. She received a cortisone injection, and when her hands failed to improve within thirty days, she was referred to Dr. Charity Burke at Louisville Arm and Hand who administered another cortisone injection, and prescribed a course of physical therapy. On

September 16, 2013, Dr. Burke performed surgery on the left thumb, and Russ was allowed to return to light duty three days later.

Russ missed no work after her return to light duty, and continues to work in the assembly department. She has received regular pay and some overtime while working light duty. She has also received multiple pay raises since the date of injury. She stated her left thumb did not unlock even after the surgery. She has been reluctant to have surgery which has been recommended for the right middle and ring fingers because the left hand surgery was so unsuccessful.

Russ stated Ford has paid for all of her medical treatment, and she earns more per hour now than she did at the time of the injury. She stated her right middle and ring fingers “lock up” every morning, and she continues to experience tingling, throbbing and swelling in the left hand. Russ stated she currently has restrictions of no use of the right middle and ring fingers, and no use of the left thumb. She additionally has a ten pound lifting limitation. She stated she has difficulty putting on her shoes, socks and generally getting dressed. She does not believe she can perform all assembly jobs, but could do the requirements of the inspector position she held at Lear.

In support of the Form 101, Russ filed the March 10, 2014 record from KORT Physical Therapy, which reflects the onset, or date of injury as May 21, 2013. Kalen Morgan, a physical therapist with KORT, noted Russ has a 4% impairment rating due to loss of range of motion pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (AMA Guides).

Dr. Warren Bilkey evaluated Russ at her request on October 17, 2014. He stated she developed pain and triggering of the left thumb and developed pain affecting the right mid fingers. He stated the surgery performed by Dr. Burke on September 13, 2013 did not resolve the problem. Dr. Bilkey diagnosed Russ with a left trigger thumb injury, status-post surgical release with a poor outcome, right trigger finger at the third and fourth digits treated conservatively, residual contracture and chronic bilateral hand pain. He stated all of these diagnoses are due to her work injury. He stated she had reached maximum medical improvement ("MMI"), and assessed a 16% impairment rating pursuant to the AMA Guides for the upper extremities which converts to a 10% whole person impairment. Dr. Bilkey recommended Russ use finger guards and anti-inflammatory medication.

Ford filed Dr. Burke's September 16, 2013 note excusing Russ from work on September 16 and 17, 2013 due to her surgery. She allowed Russ to return to right hand duty only on September 18, 2013.

Dr. Richard Dubou evaluated Russ at Ford's request on October 15, 2014. He diagnosed her as status-post left trigger thumb release with a poor result. He stated the prognosis of the right hand is good, but the left hand is poor. He stated additional treatment would not be helpful. Dr. Dubou opined her work likely caused her condition. He stated she reached MMI twelve to sixteen weeks post-injury, and assessed a 2% impairment rating pursuant to the AMA Guides. Dr. Dubou advised Russ to avoid use of her left thumb or her right middle and ring fingers. He also recommended she not engage in pushing greater than fifty pounds. He stated he does not believe she can return to the job performed at the time of the injury. In a supplemental note dated December 30, 2014, Dr. Dubou agreed with Dr. Burke that Russ should not have surgery on the right due to her poor outcome on the left. In an additional supplemental report dated January 15, 2015, Dr. Dubou stated at the time of his examination, Russ was able to get past the point of triggering, and made a full fist. He stated he had no problem assessing the 2% impairment rating due to pain.

A BRC was held on March 18, 2015. The issues preserved for decision included benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, and TTD benefits.

In the opinion rendered May 5, 2015, the ALJ determined Russ sustained permanent work-related cumulative trauma injuries to her left thumb and right third and fourth fingers. He awarded PPD benefits based upon a 14% impairment rating. Regarding the award of TTD benefits, the ALJ stated as follows:

> The final issue to be addressed is that of temporary total disability benefits. I understand the Defendant's argument that the work done by the Plaintiff was for the actual benefit of the employer and that the Plaintiff considered some of it bona fide work. I understand the argument that by placing the Plaintiff on light duty the employer was actually helping the Plaintiff so that she could earn a higher wage, keep insurance benefits, and no doubt other advantages.
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> Nonetheless, the appellate courts have chosen to focus on KRS 342.730, and not KRS 342.0011, when defining when an injured worker is and is not entitled temporary total disability benefits. Their clear findings and rules hold that if an injured worker is not doing the same job as on the date of injury then the injured worker is entitled to TTD even if paid wages during that period. At the very least a job must be an actual job, not created for the special purpose of

> providing light duty, and that the injured worker can and does do. That is not the case here either. Cleaning poles, greasing doors and the like are not actual, permanent, full-time jobs.
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> I understand that this interpretation of the statute is currently on appeal to the Kentucky Supreme Court. It may well be that that august body will refine or define this issue in a way more favorable to the Defendant. However, I do not have the discretion to hold this matter in abeyance pending that resolution. The *Michael Arnold v. Nesco*, (cite unnecessary) has been settled before it could be appealed.
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> I also understand, and have read, the Board's decision cited by the Defendant. Whether or not I agree with that reasoning and its reliance on KRS 342.0011 is not relevant.
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> As such the Plaintiff is entitled to TTD from the date of injury, May 22, 2013, through the date upon which Dr. Bilkey placed her at MMI, October 7, 2014. The reason Dr. Bilkey is relied upon is that only he diagnosed and discussed the right fingers condition and being at MMI solely for the left thumb is not applicable. The reason I selected October 7, 2014 is that is the date he assigned her an impairment rating and MMI can be inferred.

The ALJ also found it is unlikely Russ will continue to earn her wages into the forseeable future, and enhanced her PPD benefits pursuant to the three multiplier contained in KRS 342.730(1)(c)1. Regarding the assessment of the multiplier, the ALJ found as follows:

As for multipliers the parties agree that based on all medical evidence the Plaintiff does not retain the capacity to return to the type of work done on the date of injury. What the parties contest is the Plaintiff's post-injury wage and whether or not she is likely to continue to earn that wage.

I disagree with the Plaintiff that her post injury average weekly wage is ambiguous or difficult to understand. I understand her testimony and that it can be interpreted as inconsistent with the wage records and calculations filed by the Defendant. However, absent a demonstration of some error in calculation or allegation of outright fraud it has always been our rule to accept the actual wage records over a claimant's testimony. As such the Plaintiff's average weekly wage is $818.23.

However, I conclude that the Plaintiff's ability to continue to earn that wage for the foreseeable future is not uncertain, but, rather, it is almost certain she will not be able to continue to earn that wage. The Defendant argues that she is a union employee and that she has been accommodated thus far in special jobs within her restrictions.

First, no proof has been entered, and I doubt it is so, that simply because she [sic] in the union that the Defendant is required to employ her indefinitely in made up jobs.

Second, even the jobs she has had have, variously, been changed from no-bid to bid jobs, been temporary jobs based on malfunctioning equipment, or simply been "made work" type jobs.

> Third and finally, given the severity of her restrictions it seems more likely than not that eventually they will no longer be able to accommodate her.
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> Based on the foregoing her benefits shall be enhanced by three. KRS 342.730(1)(c)1.

Ford filed a petition for reconsideration on May 14, 2015 arguing the ALJ utilized the wrong TTD benefit rate when awarding benefits. Ford also argued the award of PPD benefits should have been based upon a 10% impairment rating rather than a 14% rating. Ford next argued the ALJ erred in awarding TTD benefits when Russ was working full time. Finally, Ford argued the ALJ erred in enhancing the award of PPD benefits pursuant to KRS 342.730(1)(c)1. In an order issued May 22, 2015, the ALJ corrected the TTD benefit rate, and amended the award of PPD benefits to be based upon a 10% impairment rating as requested. The remainder of the petition for reconsideration was denied.

As the claimant in a workers' compensation proceeding, Russ had the burden of proving each of the essential elements of her cause of action, including the appropriate period of TTD benefits, and the entitlement of the multipliers contained in KRS 342.730(1)(c). *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App.

1979). Since she was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

TTD is statutorily defined in KRS 342.0011(11)(a) 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 employment[.]" In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

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 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 Magellan Behavioral Health v. Helms, supra, 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.
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> . . .
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> 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.
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> Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), regarding the standard for awarding TTD, the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140

> S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
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> . . .
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> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In Livingood v. Transfreight, LLC, et al., supra, the Kentucky Supreme Court addressed the ALJ's denial of Livingood's request for additional TTD benefits during the period he had returned to light duty work by stating, "Except for bathroom monitoring, Livingood had performed the other activities before the injury; further they were not a make-work project." The Court specifically stated as follows:

> As the Court explained in *Advance Auto Parts v. Mathis*, No. 2004-SC-0146-WC, 2005 WL 119750, at (Ky. Jan. 20, 2005), and we reiterate today, **Wise does not "stand for the principle that workers who are unable to perform their**

> **customary work after an injury are always entitled to TTD.**" Livingood had the burden of proof on the issue. Where the ALJ finds against the party with the burden of proof, the standard of review on appeal is whether the evidence compelled a contrary finding. *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). The Board and the Court of Appeals were not convinced that it did. Nor are we. "The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Western Baptist v. Kelly*, 827 S.W.2d 685, 688, 39 4 Ky. L. Summary 54 (Ky. 1992). (Emphasis added).

More recently, in Trane Commercial Systems v. Tipton, supra, the Kentucky Supreme Court again addressed whether an employee was entitled to TTD benefits upon returning to light duty work prior to reaching MMI. The Court first noted:

> "'Temporary total disability' means 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 employment." KRS 342.0011(11)(a). Or, to put it positively, an employee is entitled to receive TTD benefits until such time as she reaches maximum medical improvement (MMI) or has improved to the point that she can return to employment. There is no dispute that Tipton reached MMI on July 7, 2011. However, the parties dispute whether Tipton reached the point that she could "return to

> employment" when she returned to work for Trane assembling circuit boards. The ALJ and the Board concluded that her return to work and return to employment occurred at the same time. As noted above, the Court of Appeals disagreed. For the reasons set forth below, we disagree with the Court of Appeals.

The court additionally stated the following:

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.
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> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise,* 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee

> who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

That said, the award of TTD benefits is hereby vacated. While Russ may have significant limitations on her activities, the evidence establishes she has continued to work in the assembly department at Ford since the date of the injury with only limited interruption, albeit in light duty jobs. On remand, the ALJ must determine, based upon the evidence, if Russ is entitled to TTD benefits during the period she worked prior to reaching MMI, and if so, the appropriate time period bearing in mind the direction of the Kentucky Supreme Court in Livingood v.

Transfreight, LLC, et al., supra and Trane Commercial Systems v. Delena Tipton, supra.

This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). However, any determination must be supported by the appropriate analysis and findings.

Ford also argues the ALJ erred in finding Russ would be unable to earn the same or greater wages into the indefinite future, the third prong of the Fawbush analysis, since it is purely speculative and not supported by any concrete evidence. Ford argues Russ has not satisfied the third prong of the Fawbush analysis.

The ALJ found Russ does not retain the capacity to perform the work she was doing on the date of her injury, thus entitling her to an enhancement of benefits pursuant to KRS 342.730(1)(c)1. However, he did not make the determination she is also entitled to the application of the two multiplier pursuant to KRS 342.730(1)(c)2. Therefore, the Fawbush analysis was not required. Such analysis is only required when there is a finding that both KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 are applicable. The ALJ made no such determination and, this was not an issue

preserved for the ALJ to decide, nor was it addressed in a petition for reconsideration. Therefore, based upon the ALJ's determination, the enhancement of benefits by the multiplier contained in KRS 342.730(1)(c)1 is affirmed.

In Fawbush v. Gwinn, supra, the Supreme Court decreed where both KRS 342.730(1)(c)1 and 2 are applicable, the ALJ must then determine which provision is more appropriate on the facts. If the evidence indicates a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future, the application of paragraph (1)(c)1 is appropriate. Id. at 12. In Fawbush v. Gwinn, supra, the Court noted the claimant's lack of the physical capacity to return to the type of work that he performed for his employer at the time of his injury was undisputed. In affirming the application of the three multiplier, the Court stated:

> Furthermore, although he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely. Under those circumstances, we are convinced that the

> decision to apply paragraph (c)1 was reasonable. Id.

Subsequently, the Court explained in determining whether the 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." Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004). In Adams v. NHC Healthcare, 199 S.W.3d 163, 168-169 (Ky. 2006), the Supreme Court stated as follows:

> The court explained subsequently in *Adkins v. Pike County Board of Education,* 141 S.W.3d 387 (Ky. App. 2004, that *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.

In Fawbush v. Gwinn, supra, the Court considered several factors, including the unrebutted testimony the Claimant could only do his post-injury work when he took more narcotic pain medication than prescribed. Again, because there was no determination by the ALJ that KRS 342.730(1)(c)2 was applicable, the Fawbush analysis was

unnecessary. Therefore, we affirm the ALJ's enhancement of Russ' award of PPD benefits pursuant to KRS 342.730(1)(c)1.

Accordingly, the May 5, 2015 Opinion, Award and Order and the May 22, 2015 Order on petitions for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge are hereby **AFFIRMED IN PART** and **VACATED IN PART.** This claim is **REMANDED** for additional findings of fact and an opinion in conformity with the views expressed herein.

ALL CONCUR.

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