Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 20, 2016

CLAIM NO. 201396954

FORD MOTOR CO (LAP) PETITIONER

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

SCHANDA CHURCHILL-WINBURN
HON. WILLIAM J RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

RECHTER, Member. Ford Motor Company ("Ford") appeals from the April 9, 2015 Opinion, Award and Order and the May 26, 2015 Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ determined Schanda Churchill-Winburn ("Churchill-Winburn") suffered a work-related injury to her right wrist, and

awarded temporary total disability ("TTD") benefits. He also awarded permanent partial disability benefits enhanced by the three multiplier. Ford appeals, arguing the ALJ erred in awarding TTD benefits and enhanced income benefits. For the reasons set forth herein, we vacate in part and remand.

Because the opinion fails to make certain findings of fact necessary to the consideration of this appeal, we recite only those facts found by the ALJ.

Churchill-Winburn began working for Ford in 2012 as a utility assembler. Prior to that employment, she worked as a social worker and sales representative, and has some training in electrical work. On November 12, 2012, she was attempting to assemble a part using an air tool when it recoiled. The tool popped in the opposite direction, and she immediately experienced pain in the elbow and wrist.

Churchill-Winburn reported the injury to her supervisor and was sent to the company medical service, who directed her to the emergency room. After three months of conservative care, she was referred to Dr. Huey Tien of Kleinert Kutz and Associates. Dr. Tien ordered an MRI, physical therapy and steroid injections. Eventually, he

performed surgery on her right wrist in June, 2014. She continues to treat with Dr. Tien, and uses a bone stimulator as well as prescription medication.

Dr. James Farrage conducted an Independent Medical Evaluation ("IME") on January 13, 2015. He diagnosed status post ulnar shortening osteotomy with arthroscopic debridement and mild right lateral epicondylitis. He noted restricted range of motion, decreased strength and impaired functional capacity. He placed her at maximum medical improvement ("MMI") as of the date of his exam, and assessed an 11% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He restricted Churchill-Winburn from lifting over five pounds, the use of vibratory or power tools, and repetitive actions involving her wrist. He opined she is unable to return to her pre-injury work due to the injury.

Dr. Richard DuBou conducted an IME on February 12, 2015. He diagnosed a tear of the triangular fibrocartilage on the right wrist, status post right wrist arthroscopy with debridement of the triangular fibrocartilage and ulnar shortening with a Rayhack plate.

He noted she wore a bone stimulator. Dr. DuBou did not believe Churchill-Winburn was at MMI as of the date of his exam, though he opined her ultimate impairment rating would be 7%.

After her surgery and recovery period, Churchill-Winburn returned to work at light duty on August 15, 2014. She testified at a deposition and at the final hearing, and explained the work she performed both before and after her injury.

The ALJ determined Churchill-Winburn suffered a work-related injury to her right wrist. He relied upon Dr. Farrage's report to conclude she suffers an 11% whole person impairment, and she reached MMI on January 13, 2015. Noting she had returned to work on August 15, 2014, the ALJ considered her entitlement to TTD benefits during this period of light duty work before she reached MMI. He found: "She stated that she is not physically able to return to work at her former job as an assembler."

The ALJ further considered application of multipliers pursuant to KRS 342.730(1)(c). The ALJ first noted the physical restrictions placed by Dr. Farrage, as well as Churchill-Winburn's testimony that she is unable to perform her pre-injury work. He next determined she

returned to work at an average weekly wage higher than her pre-injury wages. Finally, the ALJ concluded Churchill-Winburn is unable to continue earning these wages for the indefinite future due to her pain level, physical restrictions and the fact she wears a brace. Ultimately, he determined the three multiplier is most appropriate.

Ford petitioned for reconsideration, requesting further analysis regarding Churchill-Winburn's entitlement to TTD benefits and the three multiplier. The ALJ offered the following additional explanation:

> I make the determination that since her work injuries on November 12, 2012, the plaintiff has never returned to her customary work duties. She has not been performing any bonafide work duties. Her job at the time of her injuries was an assembly line job. The work done by the plaintiff since her injuries has been at menial tasks and not her customary work or the work she was performing at the time of her injuries.
>
> I, therefore, again determine that the plaintiff is entitles to recover temporary total disability benefits of $345.12 per week for the period November 13, 2012 to January 13, 2015.
>
> The defendant also requests that I reconsider my determination that the plaintiff is unlikely to continue for the indefinite future to do work from which to earn her former or current wage. In making that determination, I relied upon the plaintiff's sworn

> testimony, which was credible and convincing, as well as the persuasive, compelling and reliable medical evidence from Dr. Farrage, a specialist in rehabilitation medicine, as well as the holdings of the Courts in *Fawbush v. Gwinn, Adkins v. Pike County Board of Education* and *Adams v. NHC Healthcare.*

Ford appealed, arguing the Churchill-Winburn is not entitled to TTD benefits during the periods she worked light duty or enhancement of benefits by the three multiplier. Following submission of briefs, this appeal was abated pending the Kentucky Supreme Court's ruling in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). The parties submitted supplemental briefs following rendition of the Tipton case.

We must vacate the award of TTD benefits as well as the application of the three multiplier, and remand this claim for further analysis. The ALJ's analysis on both issues is deficient, and fails to adequately articulate the basis of his decision or display a comprehensive application of the law. Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004).

The ALJ determined Churchill-Winburn attained MMI on January 13, 2015. That determination is supported by

Dr. Farrage's opinion and has not been appealed; therefore, it will not be disturbed. The ALJ also determined she returned to work on August 15, 2014 at light duty. He made no specific findings of fact regarding what duties she performed during this period. 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. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court further explained, "[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 that is customary or that he was performing at the time of his injury." To be entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury.

In Tipton, the Supreme Court recently clarified when TTD is appropriate in cases where the employee returns to modified duty. The Court stated:

> 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.

In the order on reconsideration, the ALJ stated Churchill-Winburn returned to work performing menial tasks. No specific testimony or proof was offered to support this conclusion. On remand, the ALJ must support this conclusion with specific testimony or evidence in the record and a comparison of her pre-injury duties to her light duty tasks. Additionally, the ALJ must determine whether the light duty work performed by Churchill-Winburn

constituted a return to customary employment, as described the Supreme Court in Tipton.

Additionally, the ALJ's consideration of enhanced benefits is insufficient. Ford concedes an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is necessary because Churchill-Winburn could be entitled to both the two and the three multipliers pursuant to KRS 342.730(1)(c). Stated otherwise, Ford agrees she is unable to return to her pre-injury employment, however she returned to work at a greater average weekly wage. In such circumstances, Fawbush requires the ALJ to determine which multiplier is most appropriate. As a part of this analysis, the ALJ must determine whether "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." Fawbush, 103 S.W.3d at 12. In other words, is the injured worker faced with a "permanent alteration in the … ability to earn money due to his injury." Id. If the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury, the three multiplier under KRS 342.730(1)(c)1 applies.

The Fawbush Court articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. The Court in Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004), directed a determination of whether an injured employee is able to continue in his or her current job constitutes an insufficient analysis. The Court stated:

> 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.

Id. at 390.

Under the circumstances of this claim, the ALJ's analysis was insufficient. He stated only that he relied upon Churchill-Winburn's testimony and Dr. Farrage's opinion in reaching the conclusion she is unable to

continue to earn her current wage into the indefinite future. These conclusory statements do not identify the evidentiary basis of the ALJ's decision, or demonstrate the appropriate legal standards have been considered and applied. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). On remand, the ALJ must consider the factors set forth in Fawbush and Adkins, and articulate a decision determining which multiplier is most appropriate in this instance. We direct no particular result.

Accordingly, the April 9, 2015 Opinion, Award and Order and the May 26, 2015 Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **VACATED** in part and this claim is **REMANDED** for further consideration as expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON GEORGE T.T. KITCHEN, III
600 E MAIN ST, #100
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON CHED JENNINGS
401 W MAIN ST, #1910
LOUISVILLE, KY 40202

CHIEF ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601