Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 19, 2016

CLAIM NO. 201487092

GEORGE SPRINGATE — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE**

FOUR ROSES DISTILLERY — RESPONDENT/ CROSS-PETITIONER
and
HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART,
VACATING IN PART, & REMANDING

* * * * * *

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

ALVEY, Chairman. George Springate ("Springate") appeals, and Four Roses Distillery ("Four Roses") cross-appeals from the Opinion, Award and Order rendered September 25, 2015, and the October 26, 2015 order denying petitions for reconsideration rendered by Hon. J. Gregory Allen,

Administrative Law Judge ("ALJ"). The ALJ found Springate sustained a work-related low back injury on March 31, 2014 while working for Four Roses, and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits.

On appeal, Springate argues the ALJ erred in finding the parties stipulated to a pre-injury average weekly wage ("AWW"), because the determination did not include concurrent wages he earned at Lowe's prior to the injury. Springate argues the ALJ failed to make sufficient findings of fact to support his determination. Springate also argues the ALJ erred by failing to enhance his award by the two-multiplier contained in KRS 342.730(1)(c)2. Four Roses argues Springate is not entitled to an enhancement of his award pursuant to KRS 342.730(1)(c)2.

We affirm the ALJ's determination Springate is entitled to TTD benefits, PPD benefits, including the duration of the award of such benefits, as well as the award of medical benefits. However, we vacate that portion of the ALJ's decision regarding Springate's pre-injury AWW. On remand, the ALJ must calculate Springate's pre-injury AWW based upon his earnings at both Four Rose's and his concurrent employment at Lowe's. Once this has been determined, the ALJ must make a determination of

entitlement to any enhancement pursuant to KRS 342.730(1)(c)2.

Springate, a resident of Lawrenceburg, Kentucky, filed a Form 101 on October 23, 2014 alleging he injured his low back and left hip while lifting a panel box at Four Roses on March 31, 2014. He has worked in maintenance for Four Roses since 1996. At the time of the accident, Springate was concurrently employed part-time at Lowe's. He began working part-time at Lowe's as a customer service representative in the plumbing department in 2002.

The fact Springate sustained a work-related injury while working for Four Roses for which he provided due and timely notice is not in dispute. Likewise, the award of an additional period of TTD benefits, the award of PPD benefits based upon the 5% impairment rating assessed by Dr. Chris Stephens, and the finding Springate is not entitled to an enhancement of his award pursuant to KRS 342.730(1)(c)1 are not at issue on appeal, and will not be addressed further. Because the medical evidence is not relevant to this appeal, it likewise will not be addressed.

Springate testified by deposition on January 7, 2015 and at the hearing held on July 28, 2015. He is a maintenance worker for Four Roses, and although he spends most of his time working on instruments, he also performs

various other general maintenance tasks. On March 31, 2014, he had constructed a frame to fit a panel box onto a machine. As he lifted the panel box, he experienced pain in his low back into his left hip. Springate reported the incident, and went to the emergency room at Frankfort Regional Hospital later that day. At the time of the accident, Springate was primarily employed at Four Roses, and was concurrently employed at Lowe's. It is not disputed Four Roses was aware of Springate's concurrent employment at Lowe's. He never returned to work for Lowe's after the accident. Springate was off work from Four Roses until September 2, 2014, when he returned as a maintenance worker, the same job he performed before the accident. Springate has no restrictions on his activities, but continues to receive some treatment.

A benefit review conference ("BRC") was held prior to the hearing on July 28, 2015. The BRC order and memorandum reflects conflicting information regarding the calculation of the AWW. Paragraph 7 of the BRC order and memorandum states, "Plaintiff's average weekly wage (AWW) was $1,253.25 (concurrent wages)." However the listing at the bottom of the page notes AWW was reserved as a contested issue. Under "Other", the form reflects, "∏'s

weekly wage from 6-3-14 to present: which multiplier is applicable." At the hearing the ALJ stated as follows:

> Average weekly wage was $1,253.25. Now there is a caveat to this. That is the concurrent wages between the Defendant in the case and the Plaintiff's additional employment which I understand the Defendant knew of at the time. I will discuss a little bit more about the other wages when we get down here to the bottom of our BRC Order.

On the same page of the hearing transcript, the ALJ noted AWW was listed as a contested issue. He also listed as issues Springate's wages from after June 3, 2014, and the appropriate multiplier. The ALJ provided the parties thirty days after the hearing to introduce wages from a "concurrent employer".

Subsequent to the hearing held July 28, 2015, Springate filed wage records from Lowe's for the period from July 22, 2012 through March 28, 2014. Four Roses provided wage information for Springate for his employment there for the fifty-two weeks prior to his accident, and wage records subsequent to his return to work. It also filed the records from Lowe's regarding the concurrent wages. According to the records filed by Four Roses, Springate earned $1,213.29 per week there prior to the accident. Four Roses also calculated Springate

concurrently earned an additional $407.83 per week from Lowe's prior to the accident.

In its brief to the ALJ, Springate noted the correct calculation of his AWW was listed as an issue. Regarding the wage records submitted by Four Roses, Springate stated as follows:

> The Defendant-Employer has recently filed pre-injury and post-injury wages from both Four Roses as well as Plaintiff's concurrent employment at Lowe's. Plaintiff is in agreement with those records and agrees that Plaintiff's pre-injury wages at Four Roses was $1,213.29 and pre-injury AWW at Lowe's was $407.83, for a total pre-injury AWW of $1,621.12. There is no dispute that Plaintiff had concurrent employment and that it is appropriate to consider wages from both Four Roses and Lowe's when determining the correct average weekly wage.
>
> Plaintiff also agrees that his post-injury AWW was $1,367.00, which is entirely his wages from Four Roses because he was unable to return to his job duties at Lowe's following this injury due to his pain and limitations. Therefore, his post-injury AWW does not include any wage records from Lowe's since he was unable to return to that employer secondary to the work injury that occurred at Four Roses. These numbers reflect the wage records filed by the Defendant-Employer in its August 19, 2015 filing.

In his decision rendered September 25, 2015, the ALJ stated as follows regarding the AWW:

> The plaintiff's pre-injury stipulated weekly wage was $1,253.25 based upon his concurrent employment. Upon return to work for the defendant, the parties were ordered on the BRC memorandum to file evidence and/or stipulations of plaintiff's wages from each employer and wages from the defendant post June 3, 2014. The defendant has filed such wage records and the plaintiff has acknowledged their correctness in its brief. These records indicate the plaintiff's highest wages from the defendant after return to work was $1,367.00 as of the quarter beginning February 1, 2015. This is higher than the plaintiff's average weekly wage pre-injury. Therefore, while plaintiff has satisfied KRS 342.730(1)(c)(2), plaintiff has not satisfied the required prong of KRS 342.730(1)(c)1. Thus, no further analysis is necessary.
>
> However, as considered in the case of Livingood v. Transfreight, LLC ., 2014-SC-000100-WC (August 20, 2015), if the plaintiff should cease to earn an average weekly wage of $1,253.25 for any reason, other than the plaintiff's conduct that is shown to be an intentional, deliberate action with a reckless disregard of the consequences either to himself or another the plaintiff's awarded weekly benefit shall be doubled for the time period of any such cessation.

Both Springate and Four Roses filed petitions for reconsideration. Springate argued the ALJ mistakenly stated the parties had stipulated $1,253.25 as the pre-injury wage. He cited to the wage records filed subsequent to the hearing. He stated the parties agreed the pre-

injury AWW, considering the concurrent wages, was $1,612.12, and the post-injury AWW was $1,367.00. Springate requested the ALJ to make specific findings regarding pre-injury and post-injury wages. He also argued, "The application of the 2 multiplier in this case is compelled by the evidence in this case." He also requested the ALJ to reconsider his reliance upon the 5% impairment rating assessed by Dr. Stephens, and asked him to rely upon the 12% assessed by Dr. Jules Barefoot instead.

Four Roses noted the ALJ did not apply the two multiplier pursuant to KRS 342.730(1)(c)2. It noted the ALJ stated if Springate ceases to earn an AWW of $1,253.35, for any reason, he would be entitled to the application of a two multiplier. It argued the triggering factor for the application of such multiplier should be $1,212.29, not $1,253.35.

In the order on the petitions for reconsideration issued by the ALJ on October 26, 2015, the ALJ stated as follows:

> As regards the arguments of both parties on the plaintiff's AWW, the ALJ notes that the parties stipulated to a concurrent AWW of $1,253.35 on the BRC form. While the ALJ did allow post-hearing wages[sic] records to be filed, it was the understanding of the

ALJ that the wage records that were allowed to be filed related to the plaintiff's post-injury wages. Moreover, although additional wage records were permitted to be filed, no party moved to be relieved from the stipulation on the BRC form. Pursuant to 803 KAR 25:010 (16)(2) a party may move to be relieved from a stipulation ten (10) days prior to the date of the hearing or "as soon as practicable after discovery that the stipulation was erroneous." Absent such a motion, the ALJ is unable to simply disregard the parties' stipulation regarding plaintiff's concurrent AWW.

However, even if the ALJ were to accept the plaintiff's arguments, such would not entitle him to an award of two times multiplier. In order to qualify for such an award, the plaintiff must have returned to work at a weekly wage equal to or greater than his average weekly wage and then cease to make such a wage. Thus, under the plaintiff's proposal in his petition for reconsideration, the plaintiff must have returned to a weekly wage equal to or greater than $1,621.12 and then cease to make such a wage. Here, the parties agreed plaintiff did not return to such a wage post injury and seemingly agree the plaintiff's post-injury wages were no more than $1,367.00. Therefore, there are no current facts that would allow for assessment of a two times multiplier. The ALJ found that should plaintiff's wages fall below the stipulated amount of $1,253.25 his award would be multiplied by two times. The ALJ believes this is an accurate application of the current law.

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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

That said, it is clear the ALJ and the parties were not in accord regarding whether there was a stipulation regarding Springate's AWW. While the BRC order states the AWW was $1,253.25, it also reflects AWW was reserved as a contested issue. Likewise, although the ALJ stated at the hearing the parties had reached a stipulation regarding the AWW, that being $1,253.25, he allowed additional time for the introduction of wage records. Both parties subsequently filed wage records, and it appears they are in agreement with the correct calculations of pre-injury and post-injury AWW. Likewise, both parties

referenced the pre-injury and post-injury AWW calculations in their briefs. The ALJ made no calculation, and merely relied on the “stipulation”.

Both parties raised the issue in separate petitions for reconsideration. Likewise, they both appeared to agree as to the correct calculations which should be utilized for the pre-injury and post-injury AWW. While the ALJ clearly and accurately set forth what would happen if he found the pre-injury and post-injury wages as argued by the parties, he again found there had been a stipulation regarding AWW and denied both petitions.

Clearly, there was a misunderstanding regarding whether an AWW stipulation had been reached. The purported stipulation of $1,253.25 for an AWW apparently does not reflect the concurrent wage Springate earned at Lowe’s. It is undisputed Springate worked concurrently at Lowe’s, and this was known to Four Roses. KRS 342.140(5) states, “When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his or her wages from all the employers shall be considered as if earned from the employer liable for compensation.” Since there is no dispute, the wages from Lowe’s should have been utilized in calculating the pre-injury AWW.

Although the BRC order reflects an AWW in paragraph 7, it also notes AWW was reserved as an issue to be resolved. Likewise, although the ALJ stated at the hearing the parties had stipulated to an AWW, he then allowed the introduction of wage records. The fact the parties addressed the pre-injury and post-injury AWWs in their briefs and petitions for reconsideration indicates no stipulation had been reached. Interestingly, after the wage records were introduced the parties appear to be in agreement as to the correct pre-injury and post-injury AWW, which differs from that to which they had supposedly stipulated. Based upon these inconsistencies, and additionally due to the actions of the parties, we do not believe a stipulation regarding AWW was ever reached. Therefore, on remand the ALJ must determine the correct pre-injury and post-injury AWWs.

We also note KRS 342.730(1)(c)2 states as follows:

> 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.

Once the ALJ determines the correct pre-injury AWW, he must determine if Springate has ever returned "to work at a weekly wage equal to or greater than the average weekly wage at the time of injury." If Springate has not returned to his pre-injury wage, he is not entitled to enhancement of his award by the two-multiplier contained in KRS 342.730(1)(c)2. However, the ALJ may point out if Springate ever returns to work at a wage equal to or greater than that earned at the time of injury, based upon his combined wage, he would be entitled to such an enhancement for any work cessation thereafter. We make no determination and no finding of fact because we are not permitted to do so. However, we do determine the parties did not reach a stipulation regarding AWW, and therefore remand to the ALJ for determinations as set forth above.

Therefore, the September 25, 2015 Opinion, Award and Order, and the October 26, 2015 order on petitions for reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge, are hereby **AFFIRMED IN PART**, and

insofar as the issues raised on appeal, are hereby **VACATED IN PART,** and the claim is **REMANDED** for additional determinations as outlined above.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

RECHTER, Member. I concur in result only because the ALJ was presented with the question of whether a stipulation was reached by the parties, and he addressed the matter in his order on reconsideration. Therefore, the proper standard of review is whether the ALJ abused his discretion in determining a stipulation was reached by the parties.

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