# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: December 21, 2015**

CLAIM NO. 201359496

HOME DEPOT INC. PETITIONER

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

ITALIA POYNTER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

**STIVERS, Member.** Home Depot Inc. ("Home Depot") seeks review of the July 8, 2015, Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Italia Poynter ("Poynter") sustained a work-related left shoulder injury and awarding temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits enhanced pursuant to KRS

342.730(1)(c)1. Medical benefits were also awarded. Home Depot also appeals from the August 18, 2015, Opinion and Order on Reconsideration denying its petition for reconsideration.

In her Form 101, Poynter alleged on November 21, 2013, she sustained a left shoulder injury while moving a refrigerator on a flatbed dolly. Surgery was subsequently performed.

The July 11, 2015, Benefit Review Conference Order & Memorandum reveals the parties stipulated Poynter sustained a work-related injury on November 21, 2013, and Home Depot received due and timely notice of the injury. The parties also stipulated TTD benefits were not paid and Poynter returned to work at a wage greater than her average weekly wage. The parties noted Poynter was still working for Home Depot. The contested issues were: "benefits per KRS 342.730; TTD; and medical benefits."

On appeal, Home Depot challenges the award of TTD benefits and the ALJ's Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) analysis resulting in enhancement by the three multiplier was more appropriate.

Poynter's April 20, 2015, deposition was introduced and she testified at the June 25, 2015, hearing. At the time of the injury, Poynter worked as a cashier. In

addition to working at the cash register checking out customers, on occasion Poynter was also required to help unload items coming into the store and help customers load their vehicles when there was a shortage of employees.

After Poynter injured her left shoulder, she worked the same amount of hours at the same hourly rate as she did before the injury. However, she characterized her post-injury work as light duty performing the same kind of job with accommodations. She explained she usually worked at the cashier's line but after the injury she was moved to self-checkout because she did not have to do as much.

Poynter worked through the day before her December 2, 2014, surgery. While off work she underwent physical therapy. She returned to work on January 16, 2015. At the time of her deposition, Poynter testified her hourly rate had increased to $9.00 an hour.

Poynter was working as a cashier at the time of the June 25, 2015, hearing. Her work limitations as a cashier precluded her from throwing mulch, loading trucks, or working in the garden section. She cannot carry items for customers nor is she able to use her arm above the shoulder level. Although she has limited range of motion and is in constant pain, Poynter hoped to work until she

attained the age of 70.[1] She enjoys her job and plans on continuing to work at Home Depot.

At the time of the hearing, Poynter was taking no prescription medication. She takes Aleve twice a day. Although Poynter was adamant she was unable to return to her pre-injury job, she still believed she was capable of working as a cashier as long as she does not have to work in the garden area and load items. She testified there have been no complaints about her job performance and Home Depot is happy with her work. Her doctor has released her to return to work. Poynter denied having any discussions with her doctor about specific work restrictions.

In awarding TTD benefits, the ALJ entered the following findings of fact and conclusions of law:

> Based upon the plaintiff's credible and convincing lay testimony, as covered above, and the persuasive, compelling and reliable medical evidence from the examining physician, Dr. Barefoot, as covered above, I make the determination that Mrs. Poynter sustained serious work-related injuries to her left shoulder while employed by Home Depot on November 21, 2013.
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> KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a

[1] Poynter was 66 years old when she was injured.

> level of improvement that would permit a return to employment.
>
> In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App.2004), the Court of Appeals instructed 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 *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.
>>
>> Id. at 580-581.
>
> Based upon the credible and convincing lay testimony of Mrs. Poynter, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Barefoot, the examining physician, as covered above, as well as the wage records filed by the defendant, and the medical evidence from Dr. Grossfeld, I make the determination that the plaintiff is entitled to recover from the defendant temporary total disability benefits, beginning on December 12, 2013 and continuing until March 11, 2015, when Dr. Barefoot stated that the plaintiff had reached maximum medical improvement.

Regarding enhancement of the PPD award, the ALJ provided the following findings of fact and conclusions of law:

*Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) requires in this case that I perform an analysis of the application KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2. Step1 is to determine whether KRS 342.730(1)(c)1 is applicable. In other words, does the worker have the physical capacity to return to the type of work she was performing at the time of her injury? Of course, I may rely upon Mrs. Poynter's testimony regarding her ability to labor under the *Hush* case. Based upon the plaintiff's credible and convincing lay testimony and the persuasive, compelling and reliable medical evidence from Dr. Barefoot, I make the determination that Mrs. Poynter does not have the physical capacity to return to the type of work she was performing at the time of her work injury.

Step 2 is to determine whether KRS 342.730(1)(c)2 is applicable. In other words, has the worker returned to work at equal or greater wages than she earned at the time of her injury? The parties stipulated that the plaintiff's average weekly wage at the time of her injury was $314.80 per week. The defendant's wage records seem to indicate that the plaintiff's average weekly wage after returning to work was greater than her average weekly wage at the time of her injury. In addition, the parties stipulated that the plaintiff returned to work at a wage greater than her average weekly wage at the time of her injury. I, therefore, make the determination that Mrs. Poynter returned to work at equal or greater wages than at the time of her injury.

Step 3 requires me to resolve the following question: Is the worker

unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of her injury for the indefinite future in any employment? In other words, is Mrs. Poynter likely to be able to continue earning the same or greater wage for the indefinite future? Based upon the plaintiff's credible and convincing lay testimony, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Barefoot, as covered above, and reliance upon the Opinion of the Kentucky Court of Appeals in *Adkins v. Pike County Board of Education,* 141 S.W.3d 387 (Ky. App. 2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform her current job. Under the *Adkins* case, the standard for the decision is whether her injuries have permanently altered her ability to earn an income and whether KRS 342.730(1)(c)1 is appropriate where the individual returns to work at the same or greater wage, but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. Based upon all of the above factors, I make the determination that the third prong of the *Fawbush* analysis applies here, and that Mrs. Poynter's injuries have permanently altered her ability to earn an income, and that she is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. I, therefore, make the determination that the third prong of the *Fawbush* analysis applies here and that under that application the plaintiff is entitled to recover the 3 multiplier based upon Dr. Barefoot's 10% permanent whole person impairment under the AMA Guides, Fifth Edition.

Home Depot filed a petition for reconsideration maintaining the ALJ did not apply the standard set forth in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) in determining the period during which Poynter was entitled to TTD benefits. It also took issue with the sufficiency of the ALJ's analysis required by Fawbush v. Gwinn, supra.

In the August 18, 2015, Opinion and Order on Reconsideration overruling the petition for reconsideration, the ALJ set forth much of the same language used in his opinion and order. However, regarding the award of TTD benefits, the ALJ added the following:

> The award to the plaintiff of temporary total disability benefits from December 12, 2013 until March 11, 2015, when Dr. Barefoot stated that the plaintiff had reached maximum medical improvement, was based upon the plaintiff's credible and convincing lay testimony and the persuasive, compelling and reliable medical evidence from Dr. Barefoot, as well as the persuasive, compelling, and reliable medical evidence from Dr. Grossfeld, and the medical records from Louisville Orthopaedic Clinic, which were reviewed in the prior Opinion and Order.

Concerning Home Depot's complaint regarding his Fawbush analysis, the ALJ provided the following additional paragraph:

> The defendant also argues that the initial Opinion and Order does not

> contain a *Fawbush* analysis and that the plaintiff is not entitled to enhanced permanent partial disability benefits. On the contrary, Pages 10, 11 and 12 contain a comprehensive *Fawbush* analysis based upon the ruling case law and the plaintiff's credible and convincing lay testimony, as well as the persuasive, compelling and reliable medical evidence from Dr. Barefoot, the examining physician. Clearly, there is no legitimate basis for the defendant's argument.

Concerning the award of TTD benefits, Home Depot asserts the ALJ did not analyze Poynter's entitlement in accordance with the directives of Central Kentucky Steel v. Wise, supra. Home Depot asserts immediately before the injury Poynter was performing cashier work which is the same type of work she performed post-injury. It contends the only difference in Poynter's post-injury work is that she does not lift heavy items. Home Depot notes Poynter testified this light duty cashier job was not "made up" work and she made the same wages while performing these duties. Therefore, it contends the award of TTD benefits is improper.

Concerning its argument the ALJ's analysis pursuant to Fawbush v. Gwinn, supra, is insufficient, Home Depot contends the ALJ's conclusion Poynter was unlikely to be able to continue to make equal or greater wages for the indefinite future is not supported by any fact-finding. It

argues the ALJ did not cite to any facts which support a finding Poynter could not continue her current work making the same or greater wages in the indefinite future. Home Depot contends all the evidence suggests Poynter is capable of continuing her current work earning the same or equal wages into the indefinite future.

Because we are unable to determine how the ALJ arrived at the period during which Poynter is entitled to TTD benefits and the evidence he relied upon in awarding TTD benefits, we vacate the award of TTD benefits.

KRS 342.0011(11)(a) defines TTD as follows:

> '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.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or

> some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, supra, the Supreme Court further explained that "[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." Id. at 659. In other words, where a claimant has not reached maximum medical improvement ("MMI"), TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he or she was customarily performing at the time of the traumatic event.

More recently, 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 she remains disabled from her customary work or the work she was performing at the time of the injury. The Court in 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.

> . . .
>
> 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.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court further elaborated with regard to the standard for awarding TTD 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).

. . .

> 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 awarding TTD benefits, the ALJ relied upon the testimony of Poynter and the "medical evidence" from Drs. Jules Barefoot and Stacie Grossfeld. The ALJ addressed the attainment of MMI relying upon Dr. Barefoot's opinion. However, he did not address the second prong of the analysis required by the statute and case law by determining whether during this period Poynter had not reached a level of improvement that would permit a return to employment as defined by Central Kentucky Steel v. Wise, supra. There is no finding by the ALJ that from December 12, 2013, through March 11, 2015, Poynter was unable to return to the type of work that was customary or she was performing at the time of the injury. The ALJ could not rely upon Dr. Grossfeld's opinions since she stated Poynter could return to work on December 12, 2013. The ALJ's statement he relied upon the "persuasive, compelling, and reliable medical evidence from Dr. Barefoot" offers no

insight since his summary of Dr. Barefoot's opinions does not allude to any opinion of Dr. Barefoot regarding Poynter's physical capabilities prior to attaining MMI. Thus, we are unable to determine the opinions of Dr. Barefoot upon which the ALJ relied in awarding TTD benefits.

Similarly, the ALJ's statement he relied upon Poynter's testimony provides no instruction as to the portions of Poynter's testimony he relied upon in determining the period of TTD benefits to which she was entitled. Poynter testified that after her injury she did not miss any work and was moved to self-checkout where she worked until the day before her shoulder surgery. Further, after she returned to work she performed her same job as cashier with restrictions. At the June 2015 hearing, Poynter again testified when she returned to work in January 2015 it was as a cashier. Poynter acknowledged that even though there were limitations on her physical activities after she returned to work following surgery, she has continued to work as a cashier without complaint from Home Depot.

In summary, in order for Poynter to be entitled to TTD benefits, she must not have reached MMI and a level of improvement that would permit a return to employment as

defined in Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra. Since the ALJ did not perform the requisite analysis in awarding TTD benefits, the award of TTD benefits must be vacated and the claim remanded for a determination of the period Poynter is entitled to TTD benefits. There is no question Poynter is entitled to TTD benefits as she underwent surgery in December 2014. We are not suggesting any particular outcome on this issue.

Similarly, because the ALJ's Fawbush analysis is deficient, we vacate that portion of the award enhancing Poynter's PPD benefits by the three multiplier. 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 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 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 *169 for the indefinite future to do work from which to earn such a wage.

Here, in determining the three multiplier was applicable, the ALJ noted the Fawbush analysis includes a broad range of factors only one of which is the worker's ability to perform a certain job. However, the ALJ did not identify the factors which caused him to conclude enhancement by the three multiplier was appropriate. He stated that based upon all of the above factors he made the determination the third prong of the Fawbush analysis applies and Poynter's injuries permanently altered her ability to earn income. Such an analysis on its face is deficient, as the ALJ did not identify the factors he relied upon in determining Poynter would be unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury.

In addition, the ALJ did not cite to the evidence upon which he relied in determining the appropriate multiplier. This is particularly necessary in light of

Poynter's testimony that she returned to work as a cashier for Home Depot with certain restrictions. Her testimony demonstrates Home Depot accommodated those restrictions by placing her in a position not requiring lifting, carrying or overhead work. Germane to the Fawbush analysis in this case is Poynter's statement she can still work as a cashier as long as she does not have to load items or work in the garden area. Poynter emphasized she hoped to work until she is seventy years old. The ALJ failed to provide the basis for his determination that Poynter would be unable to work in the indefinite future at the same or greater wages.

The language contained in the August 18, 2015, Order does not provide support for the ALJ's decision on this issue. The ALJ added he had relied upon Poynter's testimony as well as the medical evidence from Dr. Barefoot. However, as recited herein, Poynter's testimony does not indicate it is unlikely she would be unable to continue earning a wage that equals or exceeds her wage at the time of the injury. Rather, her testimony indicates she is capable of earning such a wage as long as her restrictions are accommodated.

The ALJ's statement he relied upon the medical evidence from Dr. Barefoot is of no benefit since he does not identify the specific opinions of Dr. Barefoot upon

which he relied. Significantly, the ALJ's summary of Dr. Barefoot's testimony contains no reference to an opinion by Dr. Barefoot regarding the longevity of Poynter's employment with Home Depot. Thus, the mere reference to Poynter's testimony and Dr. Barefoot's opinions without citation to the specific testimony of both is of no benefit.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Here, the ALJ's decision does not supply the basic facts and evidence upon which he

relied in determining the period of TTD benefits to which Poynter was entitled. Similarly, the ALJ did not supply the basic facts and evidence upon which he relied in determining enhancement by the three multiplier was more appropriate.

Accordingly, the award of TTD benefits and enhancement of Poynter's PPD benefits by the three multiplier set forth in the July 8, 2015, Opinion and Order are **VACATED**. The August 18, 2015, Opinion and Order on Reconsideration denying Home Depot's petition for reconsideration relating to the award of TTD benefits and the enhancement of Poynter's PPD benefits by the three multiplier is also **VACATED**. This matter is **REMANDED** to the Administrative Law Judge as designated by the Chief Administrative Law Judge for entry of an amended opinion determining the extent to which Poynter is entitled to TTD benefits and the multiplier by which Poynter's PPD benefits are to be enhanced.

ALL CONCUR.

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