

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 14, 2014

CLAIM NO. 200364300

JOHN FUERTES

PETITIONER

VS.

APPEAL FROM HON. JAMES KERR,
ADMINISTRATIVE LAW JUDGE

FORD MOTOR COMPANY
and HON. JAMES KERR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
AND REMANDING IN PART

* * * * *

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

RECHTER, Member. This matter is before the Board on remand from the Court of Appeals. The Board previously rendered an opinion on October 27, 2011 affirming in part, reversing in part and remanding the October 21, 2010 Opinion and Award and June 24, 2011 Opinion and Award rendered by Hon.

James Kerr, Administrative Law Judge ("ALJ"). The Board affirmed portions of the ALJ's decisions determining Fuertes did not sustain a compensable low back injury, is not entitled to enhancement of his benefits by the three multiplier contained in KRS 342.730(1)(c)1, and is entitled to medical benefits, but not income benefits, as a result of his work-related hearing loss. However, the Board reversed the ALJ's decision regarding Fuertes' entitlement to temporary total disability ("TTD") benefits, and remanded for entry of an amended opinion and award overruling Ford's amended petition for reconsideration and reinstating the award of TTD benefits from September 7, 2004, through September 28, 2004. The Board further determined the ALJ failed to address whether the two multiplier specified in KRS 342.730(1)(c)2 could have applied, and remanded for additional findings on this issue.

Ford Motor Company ("Ford") appealed the Board's holding concerning the remand for additional findings regarding the applicability of the two multiplier. The Court of Appeals rendered its Opinion Reversing and Remanding on October 4, 2013. It noted the ALJ specifically held there is no evidence Fuertes' cessation of employment was the result of his work-related injury,

and broadly refused to apply "any multiplier" to Fuertes benefits. The Court of Appeals further noted the ALJ on reconsideration held Fuertes retained the capacity to return to the type of work performed at the time of injury until the termination for other reasons. The Court of Appeals concluded:

Taken as a whole, we find that the phraseology of the ALJ's two orders clearly conveys the ALJ's belief that Fuertes failed to produce substantial evidence supporting that his termination was related to any work-related disability (i.e., the third of the above factors).

The Court of Appeals remanded this matter to the Board to rule on the question of whether the record compelled a finding KRS 342.730(1)(c)2 applied to Fuertes' award.

In his Form 101, Fuertes alleged he returned to work with Ford earning the same wage he earned at the time of his injury. In its Form 111, Ford acknowledged Fuertes returned to work at the same wage. The May 24, 2010 Benefit Review Conference order indicates "Stip" for current wage. Because the post-injury average weekly wage was not at issue, the record compels a finding KRS 342.730(1)(c)2 is applicable to Fuertes' claim as he did return to work at the same wage as that earned at the time of his injury.

The evidence did not compel a finding Fuertes was entitled to enhancement by the two multiplier at the time of the ALJ's decision. Fuertes testified he was terminated for "performance related issues", though he believed his absence from work for procedures related to his shoulder and knee played a role in his termination. However, he also testified he had asserted a claim for discrimination related to pay issues which preceded the termination. The ALJ determined Fuertes was terminated for reasons other than his work injury. Fuertes' speculative testimony, even if un-rebutted, does not compel a finding in his favor regarding the reason for his termination.

Fuertes is not presently entitled to receive permanent partial disability ("PPD") benefits enhanced by the two multiplier. Nonetheless, pursuant to the Court's holding in Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009), KRS 342.730(1)(c)2 is applicable to his claim because he did return to work at the same wage as he earned at the time of his injury, albeit for a limited period. His right to enhancement by the two multiplier is not triggered until such time as he again returns to work at the same wage and then subsequently ceases to earn that wage for a reason connected to his work injury.

The Board's previous ruling regarding the TTD issue was not appealed and is now the law of the case. On remand, the ALJ is again directed to enter an amended opinion and award overruling Ford's amended petition for reconsideration and reinstating the award of TTD benefits from September 7, 2004 through September 28, 2004. The ALJ's determination that Fuertes is not currently entitled to enhancement of his PPD benefits by the two multiplier is **AFFIRMED**. This matter is **REMANDED** to the ALJ with direction to amend his decision to reflect that KRS 342.730(1)(c)2 is applicable, and Fuertes may reopen his claim should he return to work at the same or greater wage and subsequently cease to earn that wage for a reason related to his injury.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON UDELL B LEVY
455 S FOURTH ST STE 1450
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON PETER GLAUBER
400 W. MARKET STE. 2300
LOUISVILLE, KY 40202

CHIEF ADMINISTRATIVE LAW JUDGE:

HON LANDON OVERFIELD
110 NORTH WATER ST STE B
HENDERSON, KY 42420