OPINION ENTERED: November 30, 2011

CLAIM NO. 200995839

JOSEPH KENNY HINTON PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

NORTON HEALTHCARE, INC.
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Joseph Kenny Hinton ("Hinton") appeals from the June 17, 2011, opinion, award, and order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") granting him an award of permanent partial disability ("PPD") benefits from January 31, 2009, to January 31, 2011, and medical benefits. Hinton also appeals from the

July 28, 2011, order overruling his petition for reconsideration.

Hinton was injured on January 31, 2009, while employed as the "manager" of security for Norton Healthcare, Inc. ("Norton"), at its Norton Audubon Hospital. Hinton sustained an injury to his right ankle and foot after stepping in a hole while returning to his vehicle after turning off contractor lights in Norton's parking facility. Hinton's only testimony was at the April 19, 2011, hearing. After falling into the hole, Hinton testified he was taken by wheelchair to the emergency room. X-rays revealed a "bad break," and he underwent surgery. As a result of the right ankle injury, Hinton underwent three surgical procedures, two of which involved the removal of hardware. Hinton testified in 2009 he developed an ulcer on the side of his right foot causing infection for which he underwent lengthy and extensive treatment.[1]

Hinton testified his job before the injury involved patrolling the hospital and parking lot and keeping a log at the desk. He would also "sit on 72-hour holds, do doctor quicks in the hospital when it was called,

[1] There appears to be no dispute the ulcer was a direct consequence of Hinton's work injury.

[and] remove deceased bodies from the hospital with the funeral directors." Hinton explained a "doctor quick" occurs when someone is out of control in the hospital, and he is called to try to calm the individual to avoid injury to the individual and staff. Hinton was also involved in assisting the nursing staff in putting restraints on patients. Prior to the injury, he patrolled the parking lot and hospital halls mostly on foot. On some occasions, Hinton used a golf cart to patrol the parking lot. After his injury, Hinton returned to work "mostly sitting at the desk and working in the office doing mostly paperwork." He used a scooter to get around, and used crutches when he was required to walk. After the second and third surgeries, Hinton returned to work doing the same type of work he performed after the January 31, 2009, injury. Hinton described his job after he returned to work as follows:

> A: Same as it was before, the desk work and keeping the log up and working in the office and putting in the incident reports and such as that, doing scheduling and –- and doing payroll and stuff like that, whatever was required in the office.

Hinton was given a surgical option of "either get my foot fused together or have surgery for a plastic ankle." Hinton testified he still uses a scooter and is only able to walk with the aid of a cane. He has problems

going up and down stairs with the cane and walking "some distance." Hinton's ankle swells unless he wears a stocking. He is in constant pain. Hinton testified he will work at Norton "as long as my health will let me." At the time of the hearing, Hinton's work included scheduling and doing payroll. He also trains and manages twenty employees. He explained the biggest part of his day is spent making sure the employees are doing the work they are assigned.

Hinton testified he is a salaried employee, and his current salary is higher than it was in 2009. Norton introduced Hinton's pre-injury and post-injury wage records which reflect Hinton continued to receive his salary without interruption after the injury and his salary increased in May, 2009, and again in May, 2010.

The April 19, 2011, Benefit Review Conference ("BRC") order reflects the contested issues were as follows: benefits per KRS 342.730, average weekly wage, multipliers, and post-injury wages. As a result of the injury, the ALJ determined Hinton had a 16% permanent impairment pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). With regard to the multipliers, the ALJ determined as follows:

The only real issue in this case is whether or not plaintiff is entitled to the 3x multiplier provided for in KRS 342.730(1)(c)(1), as expanded and clarified in Fawbush v. Gwinn, 103 S.W.3d 5 (Sup. Ct. 2003); Adams v. NHC Healthcare, 199 S.W.3d 163 (Sup. Ct. 2006); and Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004).

The relevant facts in this claim are not disputed. Joseph K. Hinton is now 75 years of age. He was 72 years of age at the time of his injury on January 31, 2009. He continues to work at his position of security department manager, despite the serious injury which he sustained on January 31, 2009. The injury led to three surgical procedures. Mr. Hinton developed infections and had to undergo many debridement proceedings to remove necrotic tissue from his fractured ankle. Despite the post-injury complications which he has suffered, Mr. Hinton has stoically continued to work full-time and to perform his modified job duties. Although he now uses a mechanical scooter to move about around the hospital, he manages to supervise 20 security officers and on occasion to fill in and perform the duties of a security officer who does not show up for work. Mr. Hinton has a strong work ethic and has exhibited remarkable motivation. He is a valuable employee to the hospital and it is understandable why this employer has seen fit to make such accommodations as necessary to allow Mr. Hinton to continue to do his job. Mr. Hinton is a remarkable individual and his motivation and desire is worthy of applause.

KRS 342.730(4) provides that all income benefits payable under the Act shall terminate as of the date on which an employee qualifies for normal old age Social Security retirement benefits or two (2) years after the employee's injury, whichever last occurs. In the case at hand, since Mr. Hinton was already beyond the normal Social Security retirement age at the time of his work related injury on January 31, 2009, his benefits are limited to a period of two (2) years.

In issue is the question of how plaintiff's post-injury wages compare to the average weekly wage at the time of the work related accident. The Plaintiff testified during the final hearing on April 19, 2011, that he is earning more now than he was at the time of injury. He specifically testified that his income according to his W2 statements is higher now than it was at the time of the injury (see page 30 of transcript of evidence). Wage records introduced by the defendant verify that Mr. Hinton is earning higher wages now than he was at the time of the injury. The wage records, together with plaintiff's testimony, confirm that since the injury his earnings have been the same or greater than they were at the time of injury.

The primary issue presented in this case is whether or not Mr. Hinton's impairment rating should be enhanced by the 3x multiplier. Based on the statute and the cases cited above, the 3x multiplier under paragraph (c)1 is appropriate if Mr. Hinton 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. See Adkins, supra, at pages 389-390 and

Kentucky River Enterprises, Inc. v. Elkins, Ky. 107 S.W.3d 206 (2003). If it is unlikely that the worker is able to earn the same or greater wages indefinitely, then application or Section (c)1 is appropriate. The Plaintiff, in the case before the ALJ, argues that it is unlikely that Mr. Hinton will be able to earn the same or greater wages for an indefinite period of time and he is therefore entitled under Section (c)1. On the other hand, the defendant argues that the 'indefinite' future does not extend beyond the period of compensability. Benefits are limited to 104 weeks from the injury date. Mr. Hinton confirmed that he has already worked without interruption between the dates of January 31, 2009 and January 31, 2011, the compensable period of time. His post-injury wages have been the same or greater than at the time of the injury. The defendant asserts that the analysis of the indefinite future in Mr. Hinton's case must be limited to his compensability period. Any analysis beyond the period of compensability would have no logical, legal, or monetary effect.

The ALJ has given this matter much deliberation and is inclined to agree with the defendant-employer. The ALJ finds no cases directly in [sic] point with the facts of this particular case. However, the case law cited and utilized herein does not appear to preclude 'hindsight' and does not require the ALJ to ignore the facts which have already occurred in favor of an exercise in determining what is likely to occur. In cases where the period of compensation extends into the future, and the employee is currently earning the same or greater wages, it makes sense that a determination be

> made as to whether or not the plaintiff is likely to continue to earn such greater wages. However, in the case at hand, where the period of compensation has already expired, the ALJ is not required to guess or speculate as to what might occur, but is bound by undisputed facts which establish that the claimant continued to earn the same or greater wages until the expiration of the period of compensation. The ALJ finds and believes this to be dispositive of the issue presented.
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> Based on Mr. Hinton's average weekly wage of $776.40, permanent partial disability benefits should be calculated as follows: Average weekly wage of $776.40 x 2/3 = $517.60 x 16% permanent impairment = $82.82 per week x disability factor of 1.0 = $82.82 per week.

Hinton filed a petition for reconsideration making the same argument he now makes on appeal and requesting additional findings of fact regarding his entitlement to the three multiplier. As previously noted, the petition for reconsideration was overruled.

On appeal, Hinton asserts the ALJ misapplied the law and did not conduct a proper analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Hinton asserts when KRS 342.730(1)(c)(1) and KRS 342.730(1)(c)2 both may be applicable Fawbush v. Gwinn, supra, and its progeny require an ALJ to make three essential findings of fact. First, the ALJ must determine whether a claimant can return

to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an average weekly wage ("AWW") equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future. Hinton argues the ALJ acknowledged Hinton did not have the physical capacity to perform his pre-injury job duties but "declined to determine whether [Hinton] was capable of earning the same or greater wages for the indefinite period of time as required by Fawbush." Hinton asserts the Fawbush standard applies "whether the benefits are prospective or retrospective." Regardless, Hinton asserts he is entitled to a complete Fawbush analysis and requests the ALJ's opinion, award, and order be reversed and this claim remanded for additional findings pursuant to Fawbush.

Norton argues Hinton is currently performing the same job he performed at the time of the injury. It posits although Hinton may be performing the job with some accommodations, he still remains the security manager. Norton maintains Hinton's job duties have not changed. The fact Hinton may have more difficulty performing his job is an expected result of his impairment. Therefore, Norton argues the law does not require the employee, post-injury,

to have the exact same physical capacity to perform his pre-injury job. Norton asserts even though Hinton does not have the physical capacity to do his pre-injury job, the question becomes "should the Judge still apply the indefinite future wage earning capacity test to see if benefits should be tripled." It asserts "the indefinite future test has no relevancy to Hinton's situation." Norton maintains because Hinton's benefit period of two years has now expired, and during that period his wages did not decrease, there is no need "to address the indefinite future." Norton also argues Hinton has not presented substantial evidence establishing he will not be able to earn the same or greater wages for the indefinite future. It asserts Hinton's testimony confirms he intends to continue to work as long as his health holds up. In this case, Norton argues where the period of compensation expires, the ALJ is not required to guess or speculate as to what might occur but is bound by undisputed facts which establish the claimant continued to earn the same or greater wages during the period he was entitled to benefits.

Because we believe the ALJ did not conduct the appropriate Fawbush analysis, we vacate that portion of the June 17, 2011, opinion, award, and order determining Hinton

is not entitled to enhanced benefits by the three multiplier and the order overruling Hinton's petition for reconsideration, and remand for the correct findings pursuant to Fawbush v. Gwinn, supra.

When both KRS 342.730(1)(c)1 and (1)(c)2 are applicable, the Supreme Court in Fawbush v. Gwinn, supra, directed as follows:

> We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that 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, the application of paragraph (c)1 is appropriate.

At the beginning of his analysis on this issue, the ALJ indicated the sole issue was whether Hinton was entitled to the three multiplier pursuant to Fawbush v. Gwinn, supra, and the subsequent cases dealing with the analysis required by Fawbush v. Gwinn, supra. Although the ALJ discussed the fact Hinton had sustained a serious injury resulting in three surgical procedures and had continued to work full-time with modified job duties, he made no finding, pursuant to KRS 342.730(1)(c)1, Hinton did not retain the physical capacity to return to the type of work he performed at the time of the injury.

The ALJ found the wage records introduced verify Hinton returned to work at a weekly wage equal to or greater than the AWW he was earning at the time of the injury. That finding clearly establishes KRS 342.730(1)(c)2 is applicable. Since the ALJ continued to emphasize the sole issue is whether Hinton is able to work into the indefinite future at the same or greater wage, we conclude the ALJ believed a Fawbush analysis was required. Since the ALJ did not make a specific finding as to whether Hinton retained the physical capacity to return to the type of work he was performing at the time of the injury, the second prong of the three-prong Fawbush analysis, this matter must be remanded to the ALJ for a finding on this issue.

Contrary to Norton's argument, in Ford Motor Company v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), in dealing with an award pursuant to KRS 342.730(1)(c)1, the Supreme Court stated as follows:

> When used in the context of an award that is based upon an objectively determined functional impairment, 'the type of work that the employee performed at the time of injury' was most likely intended by the legislature to refer to the actual jobs that the individual performed.

The Supreme Court went on to explain:

> For that reason, proof of the claimant's present ability to perform some jobs within the classification does not necessarily indicate that she retains the physical capacity to perform the same type of work that she performed at the time of injury. On remand, the ALJ must analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs.

In the case *sub judice*, the ALJ must make the same determination. The ALJ must determine the actual jobs Hinton was performing prior to the injury and whether he was capable of performing those same jobs after the injury.

If the ALJ determines KRS 342.730(1)(c)1 is applicable, he must conduct a Fawbush analysis since he has already made a finding KRS 342.730(1)(c)2 is applicable. On remand, if the ALJ determines KRS 342.730(1)(c)1 is applicable, he must determine whether Hinton is likely to be able to continue earning a wage which equals or exceeds his wage at the time of injury for the indefinite future. In doing so, the ALJ may certainly consider the periods of time Hinton worked during the two year period he was entitled to PPD benefits.

Further, if the ALJ determines, as he did in the initial award, Hinton is likely to be able to continue

earning a wage that equals or exceeds his wages at the time of the injury for the indefinite future, Hinton is entitled to an award of benefits enhanced by the two multiplier for any period his employment at those wages ceased so long as the reason for the cessation falls within the purview of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). We realize Hinton's benefit period has expired and he may never qualify for enhanced benefits pursuant to KRS 342.730(1)(c)2; nevertheless, after conducting a Fawbush analysis, the law requires the ALJ to provide for the potential enhancement of income benefits pursuant to KRS 342.730(1)(c)2 should he determine Hinton is capable of earning a wage that equals or exceeds his wage at the time of injury for the indefinite future.

That said, we do not believe the fact Hinton worked at various times during the two year period he was entitled to benefits is determinative of the ultimate issue which must be resolved in a Fawbush analysis. Presumably, Hinton did not assert a claim for TTD benefits because Norton continued to pay his salary during the time he was off work. However, it is clear after the injury, Hinton did not work while recuperating from extensive surgery. We also note Hinton must have been off work for a period of

time following each of the subsequent surgeries involving the removal of the hardware. Further, the record is silent as to whether Hinton missed any work for the forty days he was placed in a hyperbaric chamber in an attempt to heal the ulcer on his right foot. Although we find nothing in the record establishing the time period Hinton actually missed work, logic dictates Hinton did miss work during the two year period he was entitled to benefits. Therefore, the fact Hinton was working at the time his benefit period expired is not determinative of whether Hinton is likely to be able to continue earning a wage that equals or exceeds his wage at the time of the injury for the indefinite future.

Accordingly, that portion of the June 17, 2011, opinion, award, and order determining Hinton is not entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1 and the July 28, 2011, order overruling Hinton's petition for reconsideration are **VACATED** and this claim is **REMANDED** to the ALJ for an analysis pursuant to Fawbush v. Gwinn, supra, and entry of an amended opinion, award, and order consistent with the views expressed in this opinion.

ALL CONCUR.

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