

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 27, 2013

CLAIM NO. 201201273

LOUISVILLE TRANSPORTATION COMPANY

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

ERIC NEWMAN  
and HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING IN PART AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Louisville Transportation Company ("LTC") seeks review of the May 20, 2013, opinion and order and the July 11, 2013, order ruling on the petitions for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the May 20, 2013, opinion and order, the ALJ awarded Eric Newman ("Newman") temporary total disability ("TTD") benefits, permanent

partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. The ALJ calculated Newman's pre-injury average weekly wage ("AWW") based upon his earnings from three sources; the Louisville Regional Airport Authority ("Louisville Regional Airport"), LTC, and an electrical business he and his wife owned. The ALJ calculated Newman's post-injury AWW based upon his income from Louisville Regional Airport and his electrical business. Based on these calculations, the ALJ determined Newman did not return to work at a weekly wage equal to or greater than his AWW at the time of the injury. Thus, KRS 342.730(1)(c)2 was not applicable. Relying upon the opinion of Dr. Wayne Villanueva, the ALJ determined Newman had a 13% impairment, with 2% of the 13% attributable to a prior active condition. Consequently, the award of PPD benefits was based upon an 11% impairment enhanced by the three multiplier.

Both parties filed petitions for reconsideration. In the July 11, 2013, order, the ALJ amended his opinion finding Newman did not have a prior active impairment and increasing the award of PPD benefits by calculating the award based on a 13% impairment. In addition, finding LTC was not aware of Newman's electrical business prior to the

work injury, the ALJ re-calculated the pre-injury AWW by excluding the amount Newman earned per week from his electrical business. Thus, the ALJ calculated Newman's pre-injury AWW based on his earnings from Louisville Regional Airport and LTC. The ALJ re-calculated Newman's post-injury wages deleting the income from his electrical business and basing the post-injury AWW solely upon Newman's earnings from Louisville Regional Airport. After re-calculating Newman's pre-injury and post-injury AWW, the ALJ again concluded the two multiplier was not applicable since Newman did not return to work following the injury at an AWW equal to or greater than his pre-injury AWW. The ALJ entered an award based on the re-calculated pre-injury AWW, and the 13% impairment enhanced by the three multiplier. The ALJ also resolved other issues not relevant to this appeal which will not be discussed. In response to Newman's petition for reconsideration, the ALJ found there had been an underpayment in the rate of TTD benefits paid and amended the award accordingly.

On appeal, LTC challenges the ALJ's decision on the two grounds. First, it argues the ALJ abused his discretion by reversing his previous finding of fact that Newman had a pre-existing active impairment. Next, it argues the ALJ erred in finding Newman did not return to

work at the same or greater wages and in not performing an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), since both the two and three multipliers were potentially applicable.

Newman alleged a work-related low back injury occurring on February 24, 2010, while working for LTC as a part-time emergency medical technician ("EMT"). He testified he was injured while he and another EMT were carrying a patient from the patient's residence to the ambulance. Newman testified as they were nearing the ambulance he felt something pop in his back. He reported the injury the next day.

Newman was referred to Dr. Villanueva who performed microdiscectomy surgery at the left L5-S1 level on April 10, 2010. The operative procedure report of April 10, 2010, reflects a diagnosis of left L5-S1 herniated lumbar disc with free fragment and left S1 radiculopathy with motor deficit.

There is no dispute that at the time of his injury, LTC was aware Newman was employed by Louisville Regional Airport as a public safety officer. In fact, LTC introduced its calculations of Newman's pre-injury AWW based on his concurrent employment with LTC and Louisville Regional Airport. It also submitted three different

calculations of Newman's post-injury AWW based solely upon his employment with Louisville Regional Airport.

Newman testified at the time of the injury he had an electrician's license and he and his wife owned a business, Easy E's Electric, an LLC.<sup>1</sup> The business primarily inspected vacant houses for Century 21 and performed residential electrical work. During his December 6, 2012, deposition, Newman testified his business is steadily growing. In a good week he will make \$2,000.00 and in a bad week \$500.00. However, at the March 19, 2013, hearing Newman testified that since the injury he does not "do near what I used to do," because the "job market has slowed down." He was unable to state if the business still made between \$500.00 and \$2,000.00 a week. He denied ever receiving a check from the business. Newman testified his tax returns for 2010, 2011, and 2012 show a loss.<sup>2</sup>

The February 14, 2013, benefit review conference ("BRC") order and memorandum reflects the contested issues were: "benefits per KRS 342.730; work-relatedness/causation; average weekly wage; unpaid or

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<sup>1</sup>Newman testified his wife owns 51% and he owns 49% of the LLC.

<sup>2</sup>Only the 2010 and 2011 tax returns containing a Schedule C for this business were filed in the record. The 2010 tax return reflects gross receipts of \$31,704.00 and a net loss of \$3,266.00. The 2011 tax return reflects gross receipts of \$33,537.00 and a net loss of \$5,029.00.

contested medical expenses; exclusion for pre-existing disability/impairment."

Introduced into the record was a Form 110 settlement agreement relative to shoulder and back injuries Newman sustained on February 15, 1995, while an employee of Heat Transfer Specialties which was approved by an Administrative Law Judge on April 6, 1998. The settlement agreement indicates Newman settled his claim for both injuries for a lump sum of \$5,263.86. Attached to the settlement agreement is the January 12, 1998, letter from Dr. Mark Smith, an orthopedic surgeon in which he assessed a whole body impairment of 2% for a lumbar spine condition and a 3% impairment for a shoulder injury for a total of 5%. Also introduced was the Form 107 completed by Dr. Smith on June 4, 1997, and a two page attachment in which Dr. Smith again set out the impairment rating for the lumbar spine injury and the shoulder injury.

A central issue in the proceedings before the ALJ was the existence of a pre-existing active impairment. Newman introduced the February 22, 2013, deposition of Dr. Villanueva with Newman's medical records and other documents attached as a collective exhibit. Dr. Villanueva testified based on the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent

Impairment ("AMA Guides"), Newman had a 13% impairment for his lower back condition, 2% of which was attributed to a pre-existing active condition. Newman also introduced the report of Dr. James Farrage and a questionnaire he completed. Dr. Farrage assessed a 13% impairment pursuant to the AMA Guides, none of which was attributed to a pre-existing active condition.

LTC relied upon the June 15, 2013, independent medical examination ("IME") report and the January 2, 2013, report of Dr. Robert Sexton, Jr. In the latter report based on the AMA Guides, Dr. Sexton assessed a 10% impairment for Newman's lumbar condition and attributed 8% to a pre-existing active lumbar condition leaving 2% attributable to the February 24, 2010, injury.

Newman testified that prior to the work injury he had no ongoing back problems and any back problems for which he had been previously treated had resolved.<sup>3</sup> Newman testified after recovering from surgery he requested Dr. Villanueva place no restrictions upon him so he could return to work at the Louisville Regional Airport. Because he did not believe he could perform his job with LTC, Newman never returned to work there after the work injury.

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<sup>3</sup> Medical records were introduced which reflect that after 1998, Newman was seen sporadically over the years for lower back symptoms.

He testified that after the injury he continued to perform electrical work through the business which he and his wife owned.

Concerning Newman's pre-injury and post-injury AWW, in the May 20, 2013, opinion and order, the ALJ entered the following analysis, findings of fact, and conclusions of law:

**Average Weekly Wage**

The parties were not able to stipulate to a pre-injury or post-injury average weekly wage. The dispute primarily revolves around the fact that plaintiff had three sources of income at the time of his injury and maintains at least two of those sources since the injury. In addition to his approximately 20 hours per week working for the defendant employer, plaintiff's primary job was with the Louisville Airport Authority, a position which he still holds. In addition, plaintiff also has maintained his own electrical business for the last seven years.

According to wage records filed by the parties, plaintiff's pre-injury average weekly wage with Louisville Transportation Company was \$299.80, and his average weekly wage with Louisville Regional Airport was \$836.44. Combined, these yield a total pre-injury average weekly wage of \$1,136.24, and the Administrative Law Judge so finds.

The real issue becomes how much plaintiff earned from his electrical business both before and after his injury. Although plaintiff testified at the Final Hearing that he has lost

money on the business for the last two years, the Administrative Law Judge is more persuaded by plaintiff's deposition testimony wherein plaintiff testified earnings of between \$500 and \$2000 per week in his electrical business. This is considered more credible than plaintiff's later testimony that he would continue working in a business on the side in which he continually lost money. However, there is nothing in the record to quantify the degree, if any, to which plaintiff's post injury wages from his electrical business differed from his pre-injury wages from that business. Given that plaintiff testified in this matter, obviously after his injury, that he earned between \$500 and 2,000 per week in his business, it is determined that plaintiff earned \$500 per week before his injury and earns \$500 per week since his injury from his electrical business. Combining this \$500 with the \$1,136.24 per week plaintiff earned prior to his injury yields a total pre-injury average weekly wage of \$1,636.24 per week.

Because plaintiff has not worked at Louisville Transportation Company since the injury, he obviously has not earned \$299.80 per week from that employment as he did prior. Post-injury wage records filed into evidence indicate plaintiff has a post-injury AWW from Louisville Regional Airport of \$951.37 per week. Combined with the \$500 per week plaintiff earns from his electrical business, and not including the \$299.80 per week he previously received with the defendant employer, yields a total post injury average weekly wage of \$1451.37 per week, and the Administrative Law Judge so finds.

Regarding the impairment rating attributable to the injury and whether Newman had a pre-existing impairment for a prior active condition, the ALJ entered the following analysis, findings of fact, and conclusions of law:

The next issue to be determined is the extent and duration of plaintiff's impairment, and how much, if any, prior active impairment plaintiff had for his lower back immediately before this work injury.

As a starting point, the Administrative Law Judge is persuaded by Dr. Villanueva's and Dr. Farrage's opinion that plaintiff currently has a total impairment rating of 13%. Their rating is within the same DRE category as the 10% assigned by Dr. Sexton. However, Dr. Sexton opined plaintiff could return to work as an EMT with no restrictions, thereby indicating his belief that plaintiff had no ongoing problems to warrant the additional 3% as assigned by Dr. Farrage and Dr. Villanueva. Yet Dr. Villanueva followed plaintiff most closely and is the physician charged with his care, and he testified return to work as an EMT was likely not a viable long term option. Plaintiff, too, testified he could not return to work as an EMT because of the climbing and his ongoing symptoms. Plaintiff's and Dr. Villanueva's testimony persuades the Administrative Law Judge that the latter's 13% rating is most accurate. It is therefore determined plaintiff has a 13% total impairment rating.

With respect to any prior active impairment, it is noted that the only rating assigned at the time of the 1995 injury is the 2% assigned by Dr. Smith.

Dr. Villanueva also testified plaintiff would have had a 2% rating prior to the February, 2010 injury. Conversely, Dr. Sexton concluded plaintiff's lumbar condition was severe enough since 1995 to warrant an 8% impairment rating prior to February, 2010. Given that plaintiff continued to work without restrictions after 1995 and that he only had very sporadic episodes of lumbar symptoms in the 15 years afterward before February, 2010, the Administrative Law Judge is more persuaded by the 2% prior active rating assigned by Dr. Villanueva. Accordingly, it is determined plaintiff has an 11% rating due to the February, 2010 injury.

The ALJ determined based upon Newman's testimony, and "as corroborated by Dr. Villanueva's opinions," Newman did not retain the capacity to return to the job he was performing as an EMT at the time of his injury. Therefore, the three multiplier was applicable. Since Newman did not return to work at an equal or greater AWW after the injury, the ALJ found Newman was not eligible for application of the two multiplier pursuant to KRS 342.730(1)(c)2.

LTC filed a petition for reconsideration maintaining the ALJ adopted Dr. Villanueva's 13% impairment rating and the 2% impairment rating he assessed for the pre-existing active impairment "as assessed by Dr. Mark Smith following Newman's February 15, 1995 low back injury." It argued there was no medical evidence

establishing Dr. Smith's impairment rating was based upon the 5<sup>th</sup> Edition of the AMA Guides.<sup>4</sup> It noted that at the time Dr. Smith assessed his impairment rating, the AMA Guides had not been published. LTC contended the ALJ must adopt an impairment rating based upon the AMA Guides and any impairment for a pre-existing active condition must be based on the AMA Guides. Since Dr. Sexton assessed a 5% to 8% permanent impairment rating based upon the AMA Guides, it requested the ALJ enter a finding Newman had a pre-existing active impairment in the range of 5% to 8%.

LTC also argued the ALJ erroneously calculated Newman's pre-injury AWW by including the income he received from his electrical business. LTC argued since it did not have knowledge of this concurrent employment, KRS 342.140(5) prohibited the ALJ from including Newman's income from his electrical business in determining his pre-injury AWW. Although it was aware of his employment with Louisville Regional Airport, LTC insisted there is no evidence in the record it had knowledge of Newman's electrical business. It also noted Newman testified that at the time of the work injury he did not perform any electrical work and someone else was performing that work.

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<sup>4</sup> In discussing LTC's argument, from this point on we refer to the 5<sup>th</sup> Edition as the "AMA Guides."

LTC requested the ALJ determine Newman's pre-injury AWW to be \$1,136.24 based upon Newman's employment with LTC and Louisville Regional Airport. LTC posited upon finding the pre-injury AWW is \$1,136.24, based on the ALJ's finding of Newman's post-injury AWW, the two multiplier was applicable since Newman had returned to work at an AWW equal to or greater than his pre-injury wage. Therefore, the ALJ was required to perform an analysis as required by Fawbush v. Gwinn, supra, and determine whether Newman can continue to earn this level of wages into the indefinite future. It conceded the ALJ had already determined Newman did not retain the physical capacity to return to his pre-injury work. Therefore, additional findings of fact were necessary.<sup>5</sup>

In the July 11, 2013, order ruling on the petitions for reconsideration, concerning LTC's argument the ALJ erred in determining Newman had a 2% impairment for a pre-existing active lumbar condition, the ALJ amended his findings as follows:

Addressing first the defendant's argument as to prior active impairment, the Administrative Law Judge notes that, upon further review of the record, there is nothing to indicate Dr. Smith's original assessment of 2%

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<sup>5</sup> LTC also made another argument, however it is not relevant to the appeal.

impairment rating was provided based on any edition of the AMA Guides, neither the 4<sup>th</sup> or 5<sup>th</sup> Edition. Dr. Smith's records (attached to the Defendant's filing of the DWC records regarding the prior settlement) state only:

I would give him a 2% whole body impairment as I do feel he does have some mild impairment of the lumbar spine secondary to his sprain.

Thus, there is nothing to indicate that Dr. Smith's prior 2% rating was based on any edition of the AMA Guides. Accordingly, it is determined it was error to rely upon Dr. Smith's prior active impairment rating of 2%.

However, contrary to the defendant employer's Petition and Objection and Response to plaintiff's Amended Petition, it does not necessarily follow that plaintiff therefore has a 5-8% DRE II prior active impairment as determined by Dr. Sexton. As pointed out in the Opinion, prior to this work injury, plaintiff had returned to full work without restrictions, was non-surgical and had treated only sporadically in the previous 10 years for a sprain which occurred 15 years before this work injury which necessitated lumbar surgery. Moreover, even if plaintiff had received an award instead of a settlement after the 1995 injury, his 425 week period of PPD would long have expired prior to this work injury in 2010. Therefore, by any measure, this Administrative Law Judge is simply not convinced that Dr. Sexton's prior active impairment rating of 5-8% is an accurate assessment of plaintiff's lower back condition immediately before February 24, 2010.

Instead, the 0% prior active impairment assigned by Dr. Villanueva

in his deposition is considered most accurate in this instance given the factors noted above and based on Dr. Villanueva's testimony as to why he would not have assigned any impairment rating immediately before February 24, 2010. Accordingly, the entirety of Dr. Villanueva's 13% impairment rating is compensable.

With respect to LTC's argument regarding Newman's pre-injury and post-injury AWW, the ALJ entered the following findings and amended award:

With respect to AWW, it is determined it was error to include plaintiff's earnings from his electrical business in the AWW calculation. The record does not establish that the defendant employer was ever made aware of plaintiff's electrical business prior to the work injury. As such, the \$500 per week earned in that business should properly be excluded. Accordingly, plaintiff's pre-injury AWW is found to be \$1,136.24.

However, with respect to plaintiff's post-injury wages, it would not make sense to include the \$500 from the electrical business only in the post-injury AWW calculation when that amount has been excluded from the pre-injury AWW. Accordingly, based on the findings set forth in the Opinion, it is determined plaintiff's post-injury AWW was \$951.37, that being the amount earned from Louisville Regional Airport Authority. Therefore, the ultimate finding remains that plaintiff never returned to work following the injury at a weekly wage equal or greater to his pre-injury AWW and, as such, the 2x multiplier in KRS 342.730(1)(c)2 cannot

apply. Accordingly, plaintiff remains entitled to application of the 3x multiplier as determined in the Opinion.

Based on the foregoing findings, plaintiff's award of benefits is now calculated as follows:

$\$1,136.24 \times \frac{2}{3} = \$757.49 \rightarrow$   
 $\$533.84$  (maximum 2010 PPD rate)  $\times .13 \times$   
 $3 = \$208.20$  per week.

In addition, based on the above finding that plaintiff's pre-injury AWW was \$1,136.24, plaintiff is correct that there has been an underpayment of TTD as to rate. Plaintiff is therefore entitled to TTD benefits at the rate of \$711.79 from February 25, 2010 through May 31, 2010, with interest at 12% on all past due amounts.

On appeal, LTC argues the ALJ erred in reversing his previous findings of fact. It argues the ALJ was compelled to assess an impairment for Newman's pre-existing active condition which must be based upon an impairment rating assessed pursuant to the AMA Guides. It asserts even though Dr. Smith's 2% impairment rating was not assessed pursuant to the AMA Guides, the ALJ completely ignored his previous factual finding Newman had a pre-existing active impairment.

It argues revisiting issues previously decided is precluded by *res judicata* and "the ALJ is not permitted to conduct an unauthorized second review of the merits of the claim." It contends the ALJ "would not have assessed

impairment" but for a factual finding Newman retained a pre-existing active impairment. LTC argues the ALJ erroneously reversed his previous factual finding and entered a new finding Newman did not have an impairment rating for a pre-existing active condition. Therefore, since the pre-existing impairment rating must be based upon the 5<sup>th</sup> Edition of the AMA Guides, Dr. Sexton's assessment of an 8% impairment for a pre-existing condition is overwhelming medical evidence which supports an assessment of a pre-existing active impairment of 8%. It requests the ALJ's finding Newman does not have a pre-existing active impairment be vacated and remanded with instructions to assess an impairment for Newman's pre-existing active condition based upon Dr. Sexton's impairment rating.

Next, LTC argues the ALJ erred by ignoring Newman's earnings from his electrical business in calculating his post-injury AWW. Further, since Newman returned to work and has earned a greater AWW than he earned at the time of the injury, the ALJ was required to conduct a Fawbush analysis. Further, it argues there is no evidence indicating Newman will not be able to continue earning the same or greater wages in the indefinite future. Consequently, it requests the award enhancing the PPD benefits by the three multiplier be vacated and remanded to

the ALJ to enter a finding that Newman's post-injury wage is \$1,636.24 a week and further order the ALJ to conduct a complete Fawbush analysis.<sup>6</sup>

Relative to the first issue raised on appeal by LTC, we observe that its petition for reconsideration contains misstatements of law and fact. We take issue with LTC's assertion Dr. Smith's impairment rating must have been assessed pursuant to the 5<sup>th</sup> Edition of the AMA Guides. In order for the ALJ to rely on Dr. Smith's impairment rating concerning a 1995 injury, Dr. Smith's impairment rating need only be based upon the edition of the AMA Guides in existence at the time of Newman's 1995 injury. In addition, LTC has incorrectly argued to the ALJ and the Board that nothing in the record indicates Dr. Smith's 2% impairment was assessed pursuant to the AMA Guides. The record reveals otherwise. The Form 107 completed by Dr. Smith on June 4, 1997, filed in the record, reveals a diagnosis of "left shoulder rotator cuff tendinitis with multi-directional laxity" and "lumbar strain." Dr. Smith linked Newman's complaints to the work injury. Dr. Smith also concluded Newman's injuries were due in part to an

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<sup>6</sup>The post-injury AWW advocated by LTC appears to be erroneous as there is no dispute Newman's post-injury AWW based on his earnings at Louisville Regional Airport is \$951.37. Adding the \$500.00 AWW for the electrical business would result in a post-injury AWW of \$1,451.37.

arousal of a pre-existing dormant non-disabling condition and Newman did not have a prior active impairment. Under the heading of "Impairment," Dr. Smith wrote "see attached" to the following question: "Using the most recent AMA Physician Guides to the Evaluation of Permanent Impairment, the patient's permanent whole body impairment is \_\_\_\_\_%."

In the attachment, Dr. Smith stated as follows:

I would give him a 2% whole body impairment as I feel he does have some mild impairment of the lumbar spine secondary to his sprain. In regards to his shoulder, at this time I am unable to render an impairment rating but feel there is a fairly high likelihood he will have an impairment percent at about 3%.

Thus, in assessing the impairment ratings, Dr. Smith utilized the most recent edition of the AMA Guides. Consequently, we find no merit in LTC's argument concerning Dr. Smith's impairment ratings.

In addition, the May 20, 2013, opinion and order reflects the ALJ did not rely upon Dr. Smith's impairment rating in finding Newman had a pre-existing impairment for a prior active condition. Instead, he relied upon the specific testimony of Dr. Villanueva that Newman had a 2% impairment rating prior to the February 2010 injury. Consequently, the ALJ determined Newman had an 11% impairment rating due to the work injury.

With respect to whether Newman had a pre-existing impairment, Dr. Villanueva testified as follows:

A: I think there was some pre-existing problem. He had the same complaints of back pain and left leg pain several years before that he had when he came to see me. I'm not aware of a diagnosis being made that he had a herniated disk, but chances are he had some disk problems at that time which would lead me to say that some of that two percent should be incorporated into the final assessment, meaning subtract it from the 13.

In the May 20, 2013, opinion and order the ALJ appropriately relied upon Dr. Villanueva's 11% impairment rating for the injury and his 2% impairment rating for the pre-existing condition assessed pursuant to the AMA Guides. Significantly, LTC does not attack Dr. Villanueva's impairment rating of 13%, nor does it attack Dr. Villanueva's assessment of a 2% pre-existing active impairment.

That said, we agree with LTC the ALJ impermissibly reversed himself in the July 11, 2013, order ruling on a petition for reconsideration. KRS 342.281 permits an ALJ to correct "errors patently appearing on the face of the award" when such errors are raised in a petition for reconsideration. While the scope of the ALJ's authority in ruling on a petition for reconsideration is

not strictly limited to the correction of clerical errors, the ALJ does not have the authority to reverse himself on the merits of the claim. Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003); Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky. 1971). In his order ruling on the petition for reconsideration, when the ALJ stated he was amending his opinion and award to reflect Newman did not have a 2% prior active impairment rating and the entirety of Dr. Villanueva's 13% impairment rating is compensable he reversed his previous finding concerning the portion of the impairment rating which was compensable. The ALJ's finding of a 2% prior active impairment and an 11% compensable impairment was based on Dr. Villaneuva's testimony which constituted substantial evidence supporting that finding. This finding of fact was not an error "patently appearing upon the face of the award," therefore the ALJ could not reverse that finding. See KRS 342.281.

In summary, the ALJ did not rely upon Dr. Smith's impairment. Rather, he clearly stated he relied upon Dr. Villanueva's testimony regarding the impairment ratings attributable to the work injury and the pre-existing active condition. Dr. Villanueva's testimony is substantial evidence which supports the ALJ's initial decision regarding these issues. The ALJ's statement there was

nothing to indicate Dr. Smith's prior 2% impairment rating was based upon any edition of the AMA Guides is erroneous. Clearly, the Form 107 and the attachments thereto reflect that at the time he assessed the impairment rating, Dr. Smith's impairment rating was based upon the most recent edition of the AMA Guides. Thus, the award of income benefits based upon a 13% impairment rating must be vacated. The Supreme Court has held the language in KRS 342.281 precludes the ALJ from reconsidering the case on the merits and/or changing the findings of fact. Garrett Mining Co. v. Nye, supra, at 521. There is no question Dr. Villanueva's testimony constitutes substantial evidence in support of the determination Newman had a 13% impairment rating and 2% of that impairment rating was attributable to an pre-existing active condition. In this respect, the ALJ had no authority to change the award.

Similarly, we believe the ALJ erred in recalculating Newman's post-injury AWW for purposes of determining whether the two multiplier also applied. In determining Newman's post-injury AWW, the ALJ should have based his calculations on Newman's earnings from Louisville Regional Airport and his electrical business. We find no error in the ALJ declining to rely upon the income Newman generated from his electrical business in calculating his

pre-injury AWW as there is no evidence in the record establishing LTC was aware of Newman's electrical business and the income generated from that business at the time of injury. However, because Newman did not return to work at LTC, the ALJ should have calculated Newman's post-injury AWW based upon an AWW with Louisville Regional Airport of \$951.37 per week plus the \$500.00 per week he earned from the electrical business yielding a post-injury AWW of \$1,451.37, as he had correctly done in the May 20, 2013, opinion and order. The fact the ALJ could not consider the \$500.00 Newman earned from his electrical business in calculating Newman's pre-injury AWW, did not preclude him from considering the income earned from the electrical business in calculating Newman's post-injury AWW. Significantly, on appeal, neither party takes issue with the ALJ's finding regarding the AWW attributable to the electrical business.

In Toy v. Coca Cola Enterprises, 274 S.W.3d 433, 435 (Ky. 2008), the Supreme Court held as follows:

Consistent with the purpose of the benefit and with KRS 342.710(1)'s goal of encouraging a return to work, KRS 342.730(1)(c)2 focuses on post-injury wages. Although KRS 342.710(1) expresses a preference for a return to the same employment, KRS 342.730(1)(c)2 requires only that the injured worker "returns to work at a weekly wage equal

to or greater than the average weekly wage at the time of injury." Thus, it applies without regard to whether the worker returns to the employment in which the injury occurred or to other employment.

. . .

Had the legislature intended to limit the statute to one post-injury employment, it could have done so explicitly. It did not. We conclude, therefore, that the words "that employment" and the phrase "[d]uring any period of cessation of that employment" refer to the cessation of employment at which the individual earns an average weekly wage equal to or greater than the average weekly wage at the time of injury rather than to a particular employment. This interpretation is consistent with the purpose of awarding income benefits and with the principle of limiting the amount of income benefits paid to workers who experience no present loss of income. [footnote omitted]

The above language mandates the ALJ consider Newman's earnings from the electrical business in determining his post-injury AWW. Consequently, the ALJ erroneously amended his finding as to Newman's post-injury AWW. Accordingly, the ALJ's determination of Newman's post-injury AWW of \$951.37 must be vacated. The claim shall be remanded to the ALJ for entry of an amended opinion and order containing a finding Newman's post-injury AWW is as originally determined in the May 20, 2013,

opinion and award. Since the ALJ correctly determined Newman's pre-injury AWW is \$1,136.24 and the ALJ's initial determination of Newman's post-injury wage is correct, the two multiplier is also applicable. Consequently, the ALJ must conduct an analysis pursuant to Fawbush as to which multiplier is appropriate.

Accordingly, those portions of the July 11, 2013, order ruling on the petition for reconsideration finding all of Dr. Villanueva's 13% impairment to be compensable, Newman did not have a pre-existing 2% impairment, Newman's post-injury AWW is \$951.37, and the award of income benefits contained therein are **VACATED**. The ALJ's findings in the July 11, 2013, opinion and order and the May 20, 2013, order that the two multiplier is not applicable are also **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and order awarding PPD benefits based upon an 11% impairment rating, a pre-injury AWW of \$1,136.24, and a post-injury AWW of \$1,451.37. In addition, in calculating the award the ALJ shall also determine pursuant to Fawbush v. Gwinn, supra, whether KRS 342.730(1)(c)1 or (1)(c)2 is more appropriate.

ALL CONCUR.

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