

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 19, 2014

CLAIM NO. 201371656

MAKER'S MARK

PETITIONER

VS.

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

DAVID MATTINGLY  
AND HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART, AND REMANDING  
AND ORDER

\* \* \* \* \*

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

**ALVEY, Chairman.** Maker's Mark seeks review of the Opinion and Order rendered April 21, 2014 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding David Mattingly ("Mattingly") sustained a work-related right shoulder injury on July 8, 2013. The ALJ awarded temporary

total disability ("TTD") benefits, permanent partial disability ("PPD") benefits increased by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Maker's Mark also seeks review of the May 22, 2014 and the May 23, 2014 orders denying its petition for reconsideration.

On appeal, Maker's Mark argues the ALJ erred by failing to consider what it classified as Mattingly's "perjured" deposition testimony in assessing his overall credibility and by increasing the award of PPD benefits by the three multiplier. We vacate in part, though for reasons not raised by Maker's Mark, and remand for additional findings regarding its entitlement to a credit for short term disability ("STD") benefits paid to Mattingly and to delete the analysis made pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

Mattingly filed a Form 101 on September 17, 2013, alleging he injured his right shoulder "while stacking boxes of bourbon on July 8, 2013 as a result of his repetitive job duties." In support of his claim, he attached the August 14, 2013 office note of Dr. Daniel Hunt reflecting Mattingly reported his right shoulder pain began around July 5<sup>th</sup> or 6<sup>th</sup>, 2013. Mattingly stated his positions with Maker's Mark required "a lot of repetitive movement at work." Dr. Hunt

diagnosed a SLAP lesion tear, AC joint osteoarthritis and subacromial impingement syndrome, for which he recommended surgery, and restricted Mattingly from work. Dr. Hunt allowed Mattingly to return to work without restrictions on January 13, 2014.

Mattingly testified by deposition on December 16, 2013 and at the final hearing held March 25, 2014. Mattingly began working for Maker's Mark in January 2003 and has worked in the warehouse, distillery, bottling/dipping line and in the shipping department. Mattingly is right hand dominant and had been working in the shipping department for approximately one year at the time of the alleged injury. At his deposition, Mattingly testified as follows regarding his duties and the physical requirements in the shipping department:

A: Well, I go in the mornings. We do partials, or they do partials, and I got to - - for trucking, you know, we load pallets off the side, and we'll make our partial orders and we'll stack them up five to six high, and after we get that done, a matter of, you know, some days it might be ten minutes, some days it might be 30 to 45 minutes.

Q: Okay.

A: Then we run our order. Sometimes we run them all day long and don't touch it again, and sometimes we'll switch over and it might be another five, ten

minutes of stacking whiskey on top of pallets again. . .

Mattingly explained he operated a forklift to load and move pallets, except when he hand stacked whiskey in the mornings for partial orders. The amount of time it took to complete the partial orders varied, but Mattingly estimated it took between ten and forty-five minutes. In completing partial orders, Mattingly filled boxes holding either six or twelve bottles of whiskey and lifted them onto a pallet which would then be moved with a forklift. At the hearing, Mattingly again stated he was required to do "partial orders like grabbing pallets of whiskey on top, making orders or vice versa, grabbing from a lower pallet to make an order." Mattingly indicated his job required work above shoulder level. On cross examination, Mattingly stated his primary responsibilities were driving a forklift and making orders. The majority of his day was spent driving a forklift moving pallets. The amount of time he spent actually breaking down or filling pallets varied.

Mattingly testified that on Monday, July 8, 2013, the back of his neck and his right shoulder began hurting between 8:30 and 9:30 a.m. after he finished filling cases and making partial orders. His pain progressively worsened throughout the day. Mattingly told a co-worker he would go

to a doctor if his symptoms did not improve. The following morning he called his supervisor, Tammy Baker, and informed her he was going to the doctor because his neck and shoulder were hurting, and he would not report to work. Mattingly visited his family physician, Dr. Garner, the following morning on July 9, 2013. Following a course of conservative treatment, Dr. Garner ordered a right shoulder MRI and restricted Mattingly from work. Mattingly provided Maker's Mark with his time off slips and kept them informed throughout his treatment with Dr. Garner.

In August 2013, Mattingly was referred to Dr. Hunt who reviewed the MRI and recommended surgery. Mattingly indicated Dr. Hunt told him his injuries were work-related. At this point, Mattingly returned to Maker's Mark and told Michelle Kuykendall ("Kuykendall") he wanted to submit his injury to worker's compensation. Mattingly proceeded with the surgery in September 2013 and filed it with his private health insurance after his workers' compensation claim was denied. He applied for and received STD benefits. Dr. Hunt returned Mattingly to work with no restrictions on January 12, 2014.

Mattingly has not worked since July 8, 2013. He continues to experience constant pain in his right shoulder which bothers him when he reaches up, at, or above shoulder

level. He indicated work at or above shoulder level exacerbates his pain. He experiences weakness in his right arm and is unable to lift heavy objects with his right arm at or above shoulder level. He believes he would have difficulty retrieving heavy objects from shelves. Based upon his restrictions and limitations, Mattingly does not believe he can return to his job at Maker's Mark "because like I said from halfway up above, I cannot grab big boxes of whiskey and put them on pallets and stuff and make orders to go out."

At both his deposition and the hearing, Mattingly denied telling anybody at Maker's Mark he thought he injured his right shoulder outside of work. Specifically, Mattingly denied hurting his right shoulder while riding an off-road vehicle the weekend before July 8, 2013.

Kuykendall, a continuous improvement and safety specialist with Maker's Marker, also testified at the hearing. She testified that in late July 2013, Mattingly came to her office to give her a work slip and reported he had been riding four-wheelers on Saturday and woke up Sunday with his neck and shoulder hurting. Mattingly did not mention the alleged July 8, 2013 injury. A copy of the company's STD plan was attached as an exhibit. Kuykendall

confirmed Maker's Marker offers STD to all of its employees which is fully funded by Maker's Mark.

Mattingly also denied "working" at his wife's bar while recovering from his surgery and receiving STD benefits. Mattingly's wife opened a bar and tavern called the Wagon Wheel on November 8, 2013. At his deposition, Mattingly stated while he has not worked at the Wagon Wheel, he spends a lot of time there sitting around and talking to people. Other than counting money, Mattingly denied helping his wife with the books, cooking, entertainment, upkeep and maintenance, waiting on customers or stocking the cooler. When asked "You've not done anything at all with respect to the bar?" Mattingly replied "No. Like I said, I got friends and family that's helped out and stuff."

At the hearing, counsel for Maker's Mark attached several photographs and surveillance videos dated November 8, 2013 and December 14, 2013 to impeach Mattingly's deposition testimony. The pictures purportedly depict Mattingly waiting on customers, delivering food, serving drinks, carrying beer, stocking the cooler, cleaning up and fixing a broken door at the Wagon Wheel. Mattingly again stated he has never worked at his wife's bar, but "if she asked me every now and then to go do something, I'll go do it for her." He insisted all of the pictures depict him

merely helping his wife at the new bar, and that he was not working. On cross-examination, Mattingly stated he was never on the Wagon Wheel's payroll, was not considered an employee and did not work any shifts at the bar.

Mattingly filed the February 26, 2014 report of Dr. Ronald Fadel. Mattingly reported working in the shipping department and described his work activities. Mattingly reported that on July 8, 2013, he developed pain in his neck and right shoulder after stacking cases of whiskey and while operating a forklift. Dr. Fadel diagnosed status post SLAP tear lesion repair, acromioplasty/decompression and sprain injury of the right shoulder. Dr. Fadel opined only the sprain injury was work-related. He found the SLAP lesion was an old, chronic injury. He stated nothing in the details of Mattingly's July 8, 2013 work injury or work activities supported the conclusion of a work-related SLAP tear. Dr. Fadel also stated the acromioplasty was incidentally performed and there is nothing which would support a work-related impingement syndrome.

Dr. Fadel stated Mattingly had reached maximum medical improvement ("MMI") for his work-related condition. Dr. Fadel found no need for permanent restrictions and opined Mattingly retains the physical ability to return to

his prior position with Maker's Mark in the shipping department. Dr. Fadel assigned a 1% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for Mattingly's work-related sprain injury.

Mattingly filed the February 5, 2014 report of Dr. Jules Barefoot. Mattingly reported his job with Maker's Mark involved heavy lifting and carrying. He developed neck and shoulder pain in early July, and denied a specific traumatic event. Dr. Barefoot diagnosed Mattingly as status post right shoulder arthroscopy for a SLAP lesion. Dr. Barefoot answered yes to the following question: "Absent an injury history to the contrary, do you believe more likely than not that my client's work-related injury brought his condition into disabling reality?" Dr. Barefoot stated Mattingly appeared to have reached MMI at the time of his examination. Dr. Barefoot assigned a 5% impairment rating pursuant to the AMA Guides.

Dr. Barefoot opined Mattingly should be able to frequently lift and carry at waist level 50-75 pounds, occasionally lift and carry at waist level 75-100 pounds and would have difficulty using his right arm above shoulder level repetitively. Dr. Barefoot noted Mattingly would be

able to lift ground to waist and ground to knees, and occasionally lift ground to above shoulders and waist to above shoulders. He further stated Mattingly would be able to occasionally push and pull with his right arm. Dr. Barefoot stated as follows regarding Mattingly's ability to return to his pre-injury work activities:

Mr. Mattingly would have marked difficulty with repetitive heavy lifting, and, in particular, use of his right arm at or above shoulder level on a repetitive basis. It may be difficult for him to return to his position without certain restrictions. This would include no repetitive use of his right arm above shoulder level. He would additionally have the lifting and carrying restrictions as previously noted.

In the April 21, 2014 opinion, under the "Summary of Evidence" section, the ALJ listed the evidence submitted by the parties, including Mattingly's deposition and hearing testimony. After stating he had reviewed and considered all of the evidence, the ALJ provided a one paragraph summary of Mattingly's testimony. The ALJ did not specifically mention the conflicting testimony regarding whether Mattingly worked at his wife's bar while recovering from shoulder surgery. He also summarized Kuykendall's testimony, the records of Dr. Hunt, and the reports of Drs. Barefoot and Fadel. Regarding Dr. Barefoot's report, the ALJ summarized the

medical history, diagnosis, opinion of causation, assessment of impairment and restrictions as referenced above.

After quoting the definitions of injury and objective medical evidence pursuant to KRS 42.0011(1) and (33), and finding Mattingly to be credible lay witness; the ALJ made the following findings of fact and conclusions of law regarding injury, work-relatedness and causation:

I make the factual determination that he was a credible and convincing lay witness. Based upon the credible and convincing testimony of Mr. Mattingly, as covered above, and the persuasive and compelling medical evidence from Dr. Barefoot, as covered above, I make the factual determination that on July 8, 2013, while working for the defendant, Mr. Mattingly sustained an injury to his right shoulder as defined by the Workers' Compensation Act. . . .

The ALJ also cited to McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001) in support of his determination of an injury.

The ALJ then determined Mattingly provided due and timely notice of his injury to Maker's Mark, relying upon and citing to specific portions of Mattingly's testimony. The ALJ found Mattingly did not have a pre-existing, active right shoulder condition specifically relying upon Dr. Barefoot's opinion of the same.

Under his analysis of "Benefits per KRS 342.730," the ALJ began by noting Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), requires an ALJ to make three findings of fact, and also summarized Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979) and Jeffries v. Clark & Ward, 2007 WL 2343805 (Ky. App. 2007). The ALJ then performed an unnecessary Fawbush analysis, stating as follows:

Based upon the plaintiff's sworn testimony, which I found to be very credible and convincing, and the persuasive and compelling medical evidence from Dr. Barefoot, all of which is summarized in detail above, I make the factual determination that Mr. Mattingly cannot return to the type of work which he performed at the time of his work injuries in accordance with KRS 342.730(1)(c)1. I make the factual determination that Mr. Hornback's job at the time of his July 8, 2013 work injuries was a strenuous physical labor job, requiring him to work with heavy weights above shoulder level. In addition, I make the factual determination that Mr. Mattingly did not return to work for the defendant earning the same or greater average weekly wage that he earned at the time of his work injuries as per KRS 342.730(1)(c)2, since he has not worked anywhere for wages since July 8, 2013. I also have to make the determination whether Mr. Mattingly was unlikely or likely to be able to continue earning the wage that equals or exceeds his wage at the time of his injuries for the indefinite future. I make the factual determination that Mr. Mattingly's sworn testimony that he has continuing pain in his right shoulder,

cannot do heavy lifting and cannot return to his former job with the defendant is credible and convincing. Based upon the plaintiff's sworn testimony and the persuasive and compelling evidence from Dr. Barefoot, all of which is covered above, I make the further factual determination that under the decision 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 his current job. Under the *Adkins* case, the standard for the decision is whether the plaintiff's injuries have permanently altered his ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. Based upon the plaintiff's sworn testimony, as covered above, and the persuasive and compelling medical evidence from Dr. Barefoot that the plaintiff will have marked difficulty with repetitive heavy lifting, particularly using his right arm at or above shoulder level on a repetitive basis, I make the factual determination that it is unlikely that Mr. Mattingly will be unable to continue for the indefinite future to do work from which to earn such a wage. Based upon the above-cited evidence from the plaintiff and the above-cited medical evidence from Dr. Barefoot, I make the factual determination that the third prong of the *Fawbush* analysis applies here, and that the plaintiff's July 8, 2013 work injuries have permanently altered his ability to earn an income and that he is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage, and that Mr. Mattingly is, therefore, entitled to the 3 multiplier under KRS

342.730(1)(c)1. In making that determination, I also rely upon the Opinion of the Kentucky Supreme Court in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006).

Regarding credit for STD benefits pursuant to KRS 342.730(6), the ALJ made the following analysis:

. . . . In this case, the defendant introduced a copy of its disability plan and Michelle Kuykendall testified that the plan was fully funded by the defendant-employer. I, therefore, make the determination that the defendant is entitled to a credit for short term disability benefits paid pursuant to the provisions of KRS 342.730(6), as specified above.

The ALJ awarded Mattingly PPD benefits based upon the 5% impairment rating assessed by Dr. Barefoot and increased by the three multiplier. He also awarded TTD benefits from July 8, 2013 to February 5, 2014 (when Dr. Barefoot found he had attained MMI), and medical expenses. The ALJ provided Maker's Mark credit for STD benefits paid to Mattingly.

Maker's Mark filed a petition for reconsideration essentially raising the same arguments it now makes on appeal. Importantly, Maker's Mark did not request additional findings of fact regarding the ALJ's analysis of causation and the application of the three multiplier. In the May 22, 2014 Opinion and Order on Reconsideration, the ALJ again stated he carefully observed Mattingly throughout

the final hearing. He found "his testimony rang true" and determined he was a credible and convincing lay witness. He again summarized Jeffries v. Clark & Ward, supra, and Hush v. Adams, supra. The ALJ then made the following findings of facts in support of his April 21, 2014 opinion:

Mr. Mattingly testified that he worked for the defendant in the shipping department, which required him to work above shoulder level, and that while working for the defendant on July 8, 2013 his neck and shoulders started hurting. He then went to Dr. Garner for treatment and Dr. Garner took him off work. Mr. Mattingly told Dr. Barefoot in his history that his job frequently required heavy lifting and carrying. I made and again make the factual determination that the plaintiff's work for the defendant required frequent heavy lifting and carrying and working above shoulder level. Mr. Mattingly testified that he continues to have pain in his right shoulder and cannot do any heavy lifting, and further that he is not physically capable of returning to his former job with the defendant. Dr. Barefoot stated that using the AMA Guides, Fifth Edition, Mr. Mattingly will sustain a whole person permanent impairment of 5% due to his work-related right shoulder injuries. Dr. Barefoot stated that Mr. Mattingly will have difficulty using his right arm above shoulder level repetitively and that he will have marked difficulty with repetitive heavy lifting and in particular use of his right arm at or above shoulder level on a repetitive basis. I made and again make the factual determination that that medical evidence from Dr. Barefoot and the lay

testimony from Mr. Mattingly was credible, convincing, persuasive and compelling.

In the May 23, 2014 Amended Opinion and Order on Reconsideration, the ALJ amended the award of benefits to correct a clerical error.

On appeal, Maker's Mark argues the ALJ should have considered Mattingly's "perjured" deposition testimony in assessing his overall credibility and finding in his favor regarding causation. Maker's Mark alleges the ALJ only relied upon Mattingly's hearing testimony in finding a work-related injury, and failed to refer or cite the deposition testimony in discussing his credibility. Maker's Mark pointed to several statements made by Mattingly during his deposition which conflict with the pictures and video surveillance presented at the hearing regarding whether he worked at the Wagon Wheel after the shoulder surgery. Maker's Mark further points to the conflicting testimony of Mattingly and Kuykendall regarding the cause of his shoulder problems. Maker's Mark also argues the ALJ's award of the three multiplier is contrary to the undisputed medical evidence. It asserts all the physicians, Drs. Hunt, Fadel and Barefoot, opined Mattingly could return to his prior job in the shipping department. Maker's Mark argues Dr. Barefoot's restrictions do not preclude Mattingly from

returning to his prior position since it did not involve the repetitive use of his right arm at shoulder level. Again, in its arguments to the Board, Maker's Mark does not challenge the sufficiency of the ALJ's findings of fact and analysis regarding causation and the application of the three multiplier.

As the claimant in a workers' compensation proceeding, Mattingly had the burden of proving each of the essential elements of his cause of action, including causation/work-relatedness and the application of the multipliers pursuant to KRS 342.730(1)(c). See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Mattingly was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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 discretion to determine

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). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We begin by finding unpersuasive Maker's Mark's argument the ALJ did not consider Mattingly's "perjured" deposition testimony in assessing his overall credibility.

The ALJ identified all of the evidence submitted by the parties, including Mattingly's deposition and hearing testimony, for which a short, one paragraph summary was provided. In the opinion and order on reconsideration, the ALJ generally found Mattingly to be a reliable and credible witness after being afforded the opportunity to observe him at the final hearing. In addition, at the final hearing, counsel for Maker's Mark attempted to impeach Mattingly's deposition testimony regarding his denial of working following surgery by introducing video surveillance/pictures. Counsel quoted statements made by Mattingly during his deposition which seemingly conflicted with the video surveillance. In light of the above, we find the ALJ properly considered all of the evidence of record, including Mattingly's deposition testimony, in assessing his credibility. The ALJ properly exercised his discretion in determining the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985); Square D Co. v. Tipton, supra.

We likewise find the ALJ's determinations of causation and the application of the three multiplier are supported by substantial evidence. Regarding the issue of causation, in the "Findings of Fact and Conclusions of Law"

section of the opinion, the ALJ found Mattingly sustained a right shoulder injury on July 8, 2013 while working for Maker's Mark based upon Mattingly's testimony and Dr. Barefoot's report, "as covered above." In the summary of evidence, the ALJ provided an admittedly scant one-paragraph discussion of Mattingly's testimony, and an adequate discussion of Dr. Barefoot's opinions regarding the existence of a work-related injury. By referencing his previous summary of Mattingly's testimony and Dr. Barefoot's testimony, the ALJ sufficiently identified substantial evidence in the record supporting his decision of a work-related shoulder injury. Therefore, his decision regarding this issue will not be disturbed on appeal.

Similarly, in the "Findings of Fact and Conclusions of Law" section of the opinion, the ALJ found Mattingly cannot return to the type of work performed at the time he was injured, therefore entitling him to the three multiplier, based upon his own testimony and Dr. Barefoot's report, "all of which is summarized in detail above." In addition, the ALJ found Mattingly's job at the time of his July 8, 2013 work injuries was a strenuous physical labor job, requiring him to work with heavy weights above shoulder level. As noted by the ALJ, a claimant's self-assessment of his ability to labor based on physical

condition is evidence upon which the ALJ may rely. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

In the summary of Mattingly's testimony, the ALJ noted he testified he continues to experience pain, cannot do any heavy lifting, and is physically incapable of returning to his former job in the shipping department. The ALJ also summarized Dr. Barefoot's report, and outlined the restrictions he imposed. Again by referencing his previous summary of Mattingly's testimony and Dr. Barefoot's report, the ALJ sufficiently identified substantial evidence in the record supporting his decision to apply the three multiplier. Therefore, his decision regarding the application of KRS 342.730(1)(c)1 will not be disturbed on appeal.

In addition, in the order on reconsideration, the ALJ provided additional findings of fact supporting his ultimate determinations of injury, causation and the application of the three multiplier. He provided an additional summary of those portions of Mattingly's testimony and Dr. Barefoot's report he found persuasive.

Based upon the above, we find no error in the ALJ's determination regarding causation and the three-multiplier. Despite the ALJ's admittedly sparse findings, our scope of review on appeal is limited to whether the

ALJ's conclusions are so unreasonable under the evidence they must be reversed as a matter of law since Maker's Mark failed to file a petition for reconsideration requesting additional findings of fact. Pike County Board of Education v. Mills, 260 S.W.3d 366, 370 (Ky. App. 2008). Because Dr. Barefoot's report and Mattingly's testimony constitute the requisite substantial evidence supporting the ALJ's decision, his determinations will not be disturbed on appeal.

With that said, we must vacate and remand to the ALJ with directions to delete those portions of his April 21, 2014 Opinion and Order which refer to or engage in an analysis pursuant to Fawbush v. Gwinn, *supra*, since none was required. The Fawbush analysis applies only in cases in which the three and two multiplier are both potentially applicable. See Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004). Since the ALJ specifically found KRS 342.730(1)(c)2 did not apply since Mattingly has not worked anywhere for wages since July 8, 2013 and the parties stipulated Mattingly did not return to work following July 8, 2013 in the BRC order, the ALJ erroneously engaged in a Fawbush analysis in the April 21, 2014 opinion. In this instance, the ALJ only needed to determine whether the provisions of KRS 342.730(1)(c)1 applied to Mattingly.

This Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The ALJ failed to perform a complete and proper analysis in determining Maker's Mark is entitled to a credit for STD benefits paid to Mattingly. KRS 342.730(6) states as follows:

All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

KRS 342.730(6) requires a three-part analysis. In the case of either STD or long term disability benefits, the plan must be exclusively employer funded, it must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits. In this instance, in the April 21, 2014 opinion, the ALJ stated Maker's Mark

"introduced a copy of its disability plan and [Kuykendall] testified that the plan was fully funded by the defendant-employer. I, therefore, make

the determination that the defendant is entitled to a credit for [STD benefits paid pursuant to the provisions of KRS 342.730(6)]."

The ALJ clearly made a conclusory finding regarding the first prong of the statutory requirement, but did not address either the second or third elements required by the applicable statute. Therefore, that portion of the ALJ's decision is vacated and remanded to the ALJ with instructions to address each of the three requirements in determining whether Maker's Mark is entitled to a credit for STD benefits paid.

Finally, Maker's Mark requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED** the request is **DENIED**.

Accordingly, the April 21, 2014 Opinion and Order, the May 22, 2014 Opinion and Order on Reconsideration and the May 23, 2014 Amended Opinion and Order on Reconsideration by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED IN PART** regarding his determinations of credibility, causation and the application of the three multiplier. The April 21, 2014 Opinion and Order, the May 22, 2014 Opinion and Order on Reconsideration and the May 23, 2014 Amended Opinion and Order on

Reconsideration are **VACATATED IN PART** and **REMANDED** to the ALJ for a complete analysis regarding credit for STD benefits paid to Mattingly and to delete any analysis made pursuant to Fawbush v. Gwinn, supra.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN  
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