Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 2, 2014

CLAIM NO. 200700249

MIKE MELLO PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, ADMINISTRATIVE LAW JUDGE**

WAL-MART
and HON. OTTO D. WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REMANDING

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

RECHTER, Member. Mike Mello ("Mello") appeals from the September 17, 2013 Opinion, Order and Award rendered by Hon. Otto D. Wolff, Administrative Law Judge ("ALJ"), and from the October 30, 2013 Order on Petition for Reconsideration. On reopening, the ALJ determined Mello

had a worsening of his condition warranting an increase in his permanent partial disability award, but was not entitled to enhancement by the two or three multiplier pursuant to KRS 342.730 (1)(c)1 or (1)(c)2. On appeal, Mello argues the ALJ failed to conduct a complete analysis of the appropriate multiplier. We remand for further findings of fact.

Mello sustained a hernia injury on August 8, 2006 while employed by Wal-Mart as a stocker. His claim was litigated, resulting in an Opinion and Award rendered December 29, 2008. The parties stipulated to an average weekly wage ("AWW") of $388.29. The ALJ awarded permanent partial disability benefits based upon a 6% impairment with no multiplier.

Mello reopened his claim on October 29, 2009, alleging his condition worsened and he has been diagnosed with inguinal neuropathy secondary to the inguinal hernia. Between the time of the original injury and the present, Mello has undergone substantial medical treatment of his condition, including implantation and subsequent removal of a spinal cord stimulator and a triple neurectomy. Additionally, he has sought various forms of pain management. Unfortunately, his treatment has been to virtually no avail and his testicular pain is worse. He

continues to have a stabbing pain from the incision area into his left testicle.

Currently, Mello's pain is relieved 70–80% by his medication and he is able to continue working. He has a stool to use if needed and sits on the bag carousel at times. The employer "pretty much" respects his lifting restrictions and he is able to perform his job most of the time, though at times with pain. Mello enjoys his work, receives good evaluations, and has earned raises to a current rate of $14.90 per hour.

Nonetheless, Mello stated he had to reduce his hours from 40 per week to 36 due to his pain. He misses approximately three or four days per month, and exercises his own discretion in determining when to take off from work. When his pain is too great, he uses Family Medical Leave Act ("FMLA") time to excuse his absence. At the hearing, Mello indicated he had 207 hours of FMLA leave remaining for the year, which he uses at a rate of seven hours per day off. He expects he will use his leave at the same rate for the remainder of the year.

Though his testimony was not summarized in the ALJ's opinion, Mark Trogden, an assistant manager for Wal-Mart, explained Mello primarily monitors the U-scan lanes, but also works at the registers. He has a hand held

scanner that can be used to ring up heavy items, so he is not required to lift them. Trogden classified Mello as a "solid employee" who performs at a satisfactory level, and has received appropriate raises. Trogden indicated if Mello exceeded his FMLA limit and continued to miss work, his attendance would suffer. An employee is likely to be terminated if he accumulates seven occurrences of unexcused absence in a six month period. An absence of up to three days constitutes a single "occurrence."

In the Opinion and Award, the ALJ noted there was no dispute Mello's condition had worsened, as even Wal-Mart's physician opined he now has a 12% impairment. Ultimately, the ALJ relied upon the 19% impairment rating assessed by Dr. Jules Barefoot, who performed an independent medical evaluation at Mello's request. The ALJ further determined Mello was not permanently totally disabled, though he lacks the physical capacity to perform the job of stocker. Also, Mello continues to work earning a wage equal to or greater than he was earning at the time of the injury. The ALJ made the following findings regarding the third prong of the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003):

> The last question is whether Plaintiff can continue to earn his present level of wages into the indefinite future.

> Though the plaintiff works in pain, his testimony showed a strong desire to continue working for Defendant, therefore it appears, at this time, he can continue to earn his present level of wages into the indefinite future.
>
> Based upon the answers to the Fawbush criteria, it is appropriate to award the Plaintiff the two multiplier under KRS 342.730(1)(c)2 rather than the three multiplier under KRS 342.730(1)(c).

The ALJ's award of permanent partial disability benefits was calculated with the application of the two multiplier.

Both Mello and Wal-Mart filed petitions for reconsideration. Mello requested additional findings of fact regarding the application of multipliers. Wal-Mart argued the ALJ erred in applying the two multiplier because Mello had not ceased earning the same or greater wage as he earned at the time of his injury.

By order rendered October 30, 2013, the ALJ overruled Mello's petition for reconsideration as a re-argument of the merits. Regarding Wal-Mart's petition for reconsideration, the ALJ acknowledged he had committed a legal error by enhancing the award of income benefits by the two multiplier, as the statute only permits an increase in benefits during cessation of earnings at the same or greater wage than that earned at the time of the injury.

Accordingly, the ALJ modified the award to apply a one multiplier.

On appeal, Mello argues the ALJ failed to conduct a complete Fawbush analysis. Indeed, 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). At the outset, we reject Mello's contention the ALJ failed to address the first two prongs of the Fawbush analysis.

As noted by the ALJ, there was no real disagreement regarding Mello's ability to return to the stocker position, nor was there disagreement he continued to earn an AWW greater than that earned at the time of the injury. Contrary to Mello's assertions, the ALJ did specifically find Mello lacked the physical capacity to perform the stocker job: "When Plaintiff's initial injury is combined with the current increased pain, limitations and restrictions, it is determined he does not retain the physical capacity to do the job of stocker, the job he was doing when originally injured." Likewise, the ALJ specifically acknowledged Mello now works fewer hours per

week, but earns a higher hourly wage and, therefore, his AWW is equal to or greater than at the time of injury.

The thrust of Mello's argument on appeal concerns the ALJ's consideration of the third prong of the Fawbush analysis; that is, whether Mello is likely to earn his pre-injury AWW for the indefinite future. In answering this question affirmatively, the ALJ acknowledged Mello's ongoing pain, but lent more weight to his stated desire to continue working. In the subsequent Order on Reconsideration, the ALJ acknowledged Mello's argument that he would be subject to termination once he exhausts his FMLA leave. He understood this as an impermissible attempt to reargue the merits of the case. On appeal, Mello argues this analysis is inadequate because a claimant's desire to work cannot be the sole basis upon which to conclude he can physically continue working indefinitely.

As the ALJ correctly noted, the third prong of the Fawbush analysis asks whether the claimant is likely able to continue earning his AWW for the indefinite future. As the Court of Appeals explained in Adkins v. Pike County Bd. Of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004), the question is not whether the claimant can continue to perform his present job. Rather, the ALJ "must consider a broad range of factors, only one of which is the ability to

perform the current job." The Kentucky Supreme Court articulated the standard as "a permanent alteration in the claimant's ability to earn money due to his injury." Fawbush, 103 S.W.3d at 12.

The ALJ's decision appears to rely solely on the fact Mello is currently working and his stated desire to continue working. 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). However, a person's *desire* to continue working does not necessarily equate to a *physical ability* to continue working. This distinction is highlighted by Mello's testimony. While Mello did state he wished to continue at Wal-Mart, he likewise expressed doubts as to how long he will be physically capable of working. Furthermore, Adkins instructs that a person's ability to continue in his present position does not necessarily mean he can continue to earn his AWW, should his employment be discontinued for other reasons. Id. at 390.

Considering the totality of evidence presented in this matter, we conclude the ALJ's analysis is insufficient to adequately apprise the parties of its basis. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). On remand, the ALJ must articulate an analysis of

Mello's future ability to earn his same AWW that considers more than his stated desire to continue working at Wal-Mart.

Accordingly, the September 17, 2013 Opinion, Order and Award rendered by Hon. Otto D. Wolff, Administrative Law Judge and the October 30, 2013 Order on Petition for Reconsideration are **REMANDED** for further findings of fact consistent with this opinion.

ALL CONCUR.

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