Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 30, 2015

CLAIM NO. 201286379

PRECISION MECHANICAL, INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS**
ADMINISTRATIVE LAW JUDGE

BRADLEY RIDDELL
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Precision Mechanical, Inc. ("Precision") appeals from the May 27, 2015 Opinion, Award and Order on Remand and the June 22, 2015 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). In a prior award dated November 24, 2014, the ALJ awarded Bradley Riddell ("Riddell") permanent partial

disability ("PPD") benefits enhanced by the three multiplier, temporary total disability benefits, and medical benefits for a work-related shoulder injury. Precision appealed the award to this Board, and we remanded the claim to the ALJ for additional findings of fact concerning the application of the three multiplier. On remand, the ALJ again enhanced the award of PPD award by the three multiplier. Precision now appeals, arguing the ALJ failed to conduct the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004). For the reasons set forth herein, we affirm.

Riddell worked as a boiler tech and pipe fitter for Precision. He injured his right shoulder on May 4, 2012 when a pipe fell on his shoulder. He underwent an arthroscopy for a right shoulder labral tear. He underwent a course of physical therapy following surgery, but never fully recovered. He eventually underwent a repeat operative procedure with a right shoulder arthroscopy with biceps tenodesis and rotator cuff repair. His treating physician, Dr. Greg Grau assigned a permanent impairment rating of 6% pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Grau also assigned permanent restrictions

against lifting over ten pounds, pushing and pulling more than five pounds, and overhead use of his right arm.

Riddell testified he is no longer able to perform his work as a pipe fitter or boiler tech because of his physical restrictions. However, Precision had accommodated his circumstances and he continues to earn the same wages. Currently, he works in the “tool cage” as an attendant and occasionally drives a delivery truck. Additionally, he is used as an “answer man” or “consultant” for the supervisors.

Riddell testified he plans to continue working at Precision as long as they are able to accommodate his restrictions. Brandon Winkle, a facility manager at Precision, testified the tool cage attendant position requires lifting 15 to 20 pounds, but not overhead lifting. He also testified Precision plans to accommodate Riddell’s restrictions indefinitely, and that the position of tool cage attendant is a permanent position.

In the November 24, 2014 Opinion, the ALJ adopted Dr. Grau’s 6% impairment rating, and that finding was not appealed. Thus, in the Opinion, Award and Order on Remand, the ALJ revisited only the issue of enhanced PPD benefits. He explained:

> As of the most recent evidence available the Plaintiff continued to earn wages equal to or greater than on the date of

injury. As such no enhancement to his award pursuant to KRS 342.730(1)(c)2 can be made. At most any entitlement to such an enhancement would be the appropriate subject of a Motion to Re-Open.

Pursuant to the original Opinion, the Plaintiff's testimony regarding his original job duties, including the need to lift more than ten pounds, and the restrictions assigned by Dr. Grau, i.e. not to lift more than ten pounds, the Plaintiff lacks the capacity to return to the type of work done on the date of injury. This has not really been contested by the Defendant, and by that I mean the actual employer and the Plaintiff's supervisors. The Plaintiff has been placed into a light duty position.

The real question is whether he can continue to perform the duties of the tool crib attendant for the foreseeable future. The Defendant argues that the employer has always accommodated the Plaintiff and there is no reason to suspect that simply when this claim is over they will not still accommodate him. They also argue that in addition to being the tool crib attendant that the Plaintiff is the local "answer man."

I am unpersuaded by the "answer man" argument and in fact find that this clearly does not constitute a full time job and it is highly unlikely that the Defendant will continue to pay the Plaintiff the same or greater wages for answering the stray question.

As for the tool crib attendant job it is true that to date the employer has accommodated the Plaintiff. It is also true that the Plaintiff does not have to take narcotics to do it.

> It is true however that the Plaintiff does this work out of necessity and a sense of dignity. My prior comments that he would continue to do this work even in great pain were intended to reflect my findings that he does this work under physical duress and in pain. An injured workers' right to benefits should not depend on being either a pill-fiend or a constant complainer.
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> I also note that the job description for the tool crib attendant requires that the Plaintiff lift over ten pounds, it requires he lift as least twenty pounds. As such the job, as it is designed and without modifications, is beyond his restrictions and it is reasonable to find, as I do, that he will not be able to continue to do it for the foreseeable future.
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> Just as light duty and performing a different job than on the date of injury cannot form the basis for denying TTD, *Bowerman v. Black Equipment*, 297 S.W.3d 858 (Ky. App. 2009), nor should a modified job, with no guarantee of continuation be a bar to applying KRS 342.730(1)(c)1. The employer's future forbearance in this matter is no more certain and just as speculative as whether or not the Plaintiff will continue to earn these wages. Actually it is more speculative. The Plaintiff relies entirely on the good graces of the employer, who has all the power of choices and timing herein.

Precision filed a petition for reconsideration, which was summarily denied. Precision now appeals, arguing the ALJ did not fully consider Riddell's future earning

capacity when considering the enhancement of PPD benefits. It requests the matter be remanded to the ALJ for further findings of fact.

In awarding PPD benefits, KRS 342.730(1)(c)1 and 2 require the ALJ to determine whether a claimant is able to return to the type of work performed at the time of injury, and whether the claimant has returned to work at a wage equal to or greater than his pre-injury wage. Here, the ALJ concluded Riddell is physically unable to return to his work as a boiler tech or pipe fitter. He also determined Riddell has returned to work at an average weekly wage equal to his pre-injury wages. On appeal, Precision does not dispute either of these findings.

As the ALJ and Precision correctly note, when both KRS 342.730(1)(c)1 and 2 apply, the ALJ is required to determine which provision "is more appropriate on the facts." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "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." Fawbush, 103 S.W.3d at 12. In other words, is the injured worker faced with a "permanent alteration in the … ability to earn money due to his injury." Id. If the ALJ

determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury, the three multiplier under KRS 342.730(1)(c)1 applies.

The Fawbush Court articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. The Court in Adkins v. Pike County Bd. of Educ., directed a determination of whether an injured employee is able to continue in his or her current job constitutes an insufficient analysis. The Court stated:

> Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.

Id. at 390.

Under the circumstances of this claim, the ALJ's analysis was sufficient. The ALJ determined Riddell's physical restrictions prohibit a return to work as a boiler tech or pipe fitter, and Precision has not challenged that finding. The ALJ also considered the testimony of Brandon Winkle, who explained Riddell's current position in the tool cage exceeds his physical restrictions due to occasional lifting between 15 and 20 pounds. For this reason, Riddell requires assistance at times. Additionally, the ALJ acknowledged Riddell works without medication, though he is in pain, and is an extremely dedicated and diligent employee.

Thus, the ALJ considered several of the factors enunciated in Fawbush. We note the Fawbush Court listed these factors as examples of the circumstances which the ALJ "may" consider; it is not an exhaustive list of factors which the ALJ must consider. The crux of the inquiry is whether the injury has permanently altered Riddell's ability to earn an income. Adkins, 141 S.W.3d at 390.

Here, there was no dispute Riddell is unable to ever return to work as a pipe fitter or boiler room tech, his chosen profession. He will be confined to light duty jobs with any future employer. The ALJ additionally acknowledged Precision has accommodated Riddell's

restrictions thus far, but explained his doubt this arrangement could continue indefinitely. When considered in light of the totality of the circumstances of this claim, we conclude the ALJ has articulated sufficient rationale for the conclusion Riddell's permanent ability to earn an income has been altered. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988)(parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review).

For the foregoing reasons, the May 27, 2015 Opinion, Award and Order on Remand and the June 22, 2015 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, DISSENTS WITHOUT SEPARATE OPINION.

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