Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 3, 2015

CLAIM NO. 201286379

PRECISION MECHANICAL, INC. PETITIONER

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

BRADLEY RIDDELL
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Precision Mechanical, Inc. ("Precision") appeals from the October 20, 2014, Opinion, Award, and Order and the November 24, 2014, Order on Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the October 20, 2014, Opinion, Award, and Order, the ALJ awarded Bradley Riddell ("Riddell") permanent partial disability ("PPD") benefits enhanced by

the three multiplier, temporary total disability ("TTD") benefits, and medical benefits. On appeal, Precision asserts the ALJ failed to conduct a full analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

Riddell's Form 101 alleges on May 4, 2012, while working as a pipe fitter for Precision, he sustained injuries to his right shoulder in the following manner: "Mr. Riddell was carrying a pipe with another employee. That employee fell and the pipe fell into his shoulder, causing his injury."

The May 10, 2013, Benefit Review Conference ("BRC") Order and Memorandum lists the following stipulation: "Plaintiff sustained a work-related injury or injuries on 05/04/12." Under contested issues, only "wage continuation has been paid" has been typed in under "other." Also, under "additional matters" is the following: "Claimant is seeking an additional surgery by Dr. Grau. TSC set for 05/15/13, at 11:30 EST, to be initiated by office of the ALJ."

The September 2, 2014, BRC Order and Memorandum lists the following contested issue: benefits per KRS 342.730. Handwritten in this section is "No claim for additional TTD."

Riddell's February 18, 2013, deposition was introduced. Riddell testified that following the May 4, 2012, incident, he returned to light duty work until Dr. Greg Grau took him off of work. During his time off work, Riddell underwent physical therapy. He eventually underwent surgery on October 3, 2012.

He provided the following testimony regarding his limitations after returning to work:

> A: Yes. I went back to work in November, like the middle of November.
>
> Q: Mid November of 2012?
>
> A: Yes.
>
> Q: When you returned to work in mid November of 2012, who allowed you to go back at that point?
>
> A: My physician with the restriction-
>
> Q: Who was that?
>
> A: Dr. Gregory Grau?
>
> Q: Dr. Grau?
>
> A: Yeah.
>
> Q: With restrictions?
>
> A: With the restriction of no use of the right arm.
>
> Q: How long were you on this modified work, then?
>
> A: I'm still on modified work. It changed through a month and a half of

no use of right arm. And since then, it's been no overhead use of right arm and no pushing, pulling or lifting more than five pounds.

Q: No overhead use of right arm, no lifting, pushing in excess of five pounds?

A: Right.

Q: With the right-

A: With the right arm, yes.

Riddell described his post-injury work:

Q: What are you currently doing for the employer, then, since you've been back to work on modified work in November of 2012?

A: I do whatever they ask me to do that I don't have to use the arm. My employer has been really good.

Q: When you talk about doing whatever they want you to do, what have you been doing?

A: I've delivered parts, when [sic] purchased parts and delivered them, help guys in the shop.

Q: When you talk about helping guys in the shop, what is it that you all do?

A: Anything I can- like if they need to weld something that normally they take the time to put in a vice to hold, if I can just hold it in my left hand while they tack weld it or something.

Q: So you help weld. Do you actually do the welding yourself?

A: No.

Q: You just help weld?

A: No.

Q: No actual welding?

A: No.

Q: Anything else you do?

A: Clean up.

Q: Anything else?

A: That's pretty much it.

Riddell is working forty hours per week earning the same hourly wage he was earning at the time of the injury. He takes an anti-inflammatory twice a day.

Riddell also testified at the September 2, 2014, hearing. At the time of the May 4, 2012, injury, his job as a boiler tech and pipe fitter entailed the following:

> Q: And, as a boiler tech and pipe fitter, you had certain physical responsibilities?
>
> A: Yes.
>
> Q: What- what-tell us, generally, what they might have been.
>
> A: As a boiler tech, a lot of times we changed out tubes in boilers, which was a lot of heavy lifting and opening of heavy doors on the boilers. As a pipe fitter, it was also= usually it's fitting anywhere from two inch to

twelve inch pipe, which is also very heavy.

Q: After your accident, did you ever return to that job?

A: No.

Q: Are you able to return to that job?

A: No. Not at this time.

Q: Tell us, since your accident, what kinds of work have you been doing? You're doing- you said something about this sort of nebulous job that you're talking about. Has- has- have you been doing any other kinds of work?

A: I have worked in a tool cage at our office, just signing out tools, when people needed it. And, I've also filled in as a driver, when they've needed it, to the, now, currently, I guess, the driving, getting parts for EKU and also consulting with matters of the boilers and chillers that some of the guys there may not understand.

Q: Has your- physically, has your job changed substantially?

A: Yes.

Q: What kind of physical work are you doing now?

A: Now, it's mostly just walking. I'm not really allowed to do anything, as far as picking anything up or anything.

Q: All right. Do you- what do you understand your limitations or restrictions are at this time?

A: No overhead with the right arm at all. And, really not supposed to pick

> up anything more than ten pounds or push or pull more than ten pounds with the right arm.
>
> Q: When you were doing your boiler tech job or your pipe fitter job, would you have to do that?
>
> A: Oh, absolutely.
>
> Q: Did you have to use your right arm and lift ten pounds or more?
>
> A: Yes. Yes.

At the time of the hearing, Riddell was taking Advil and had discontinued his use of prescription medication for his shoulder condition. Regarding his continued employment at Precision, Riddell testified as follows:

> Q: Do you plan to continue working for Precision?
>
> A: Yes, sir.
>
> Q: Okay. So, you plan to work there indefinitely at this point?
>
> A: Yeah.
>
> Q: Okay. Have they accommodated your restrictions?
>
> A: Yes, sir.
>
> Q: Okay. Have they been good to you that way?
>
> A: Yes, sir. As far as restrictions, absolutely.

> Q: Okay. So, whatever restrictions you've had, they've accommodated and-
>
> A: Yes, sir.
>
> Q: -continued your employment.
>
> A: Yes, sir.

The September 5, 2014, deposition of Brandon Winkle ("Winkle"), a facility and asset manager for Precision, was introduced. Riddell was under Winkle's supervision from October/November 2013 until July 2014 while working as a tool crib attendant. Regarding the weight Riddell lifted performing that job, he testified as follows:

> A: The max would probably be 15 to 20 pounds. We didn't really have too big of items in the cage.
>
> Q: And that 15 to 20 pounds, he would use both upper extremities to lift?
>
> A: Yes, yes.
>
> Q: And as I understand it, he's not supposed to lift above his head, I would assume?
>
> A: No, not above head height.
>
> Q: And he did not lift anything above head height?
>
> A: No.
>
> Q: Okay. As far as you knew, his job in the tool crib was indefinite until his most recent transfer: is that correct?

A: Yes, yes.

Winkle testified Riddell basically performs the same tasks in his assigned position at Eastern Kentucky University ("EKU").

In a May 8, 2014, report, Dr. Grau wrote, in part, as follows:

> He is here for a follow up of his right shoulder scope. This is a 42 year old gentleman that had sustained injury to his right shoulder at work. He had an injury on 5/4/2014. He was carrying a heavy steel pipe that landed on his shoulder and he had continued pain with that. He was treated initially conservatively and eventually he had undergone an arthroscopy for right shoulder labral tear. He had a labral tear and rotator cuff debridement on 10/3/2012. He went through a course of therapy but never fully recovered from this. He eventually went on to have a repeat MRI and repeat operative procedure with a right shoulder arthroscopy with biceps tenodesis and rotator cuff repair. He continued with therapy and he is back at work on restrictions of no lifting of greater than 10 pounds and no overhead use of his right arm. He has gone on to have stiffness of the shoulder with persistent pain that he takes anti-inflammatories for.

Dr. Grau determined Riddell was at maximum medical improvement ("MMI") and provided the following analysis concerning Riddell's impairment rating:

> According to "The Guide for Permanent Impairment" the Fifth Edition, pages 476-478, Figure 16:40-16:46 adduction of 5 is 1%, extension of 30 is 1%, abduction of 110 is 3%, forward flexion of 150 is 2%, external rotation of 75 is 0%, and internal rotation of 45 is 3%. Giving him a 10% of upper extremity impairment and then using the Conversion Table on 16:3 this would convert to a 6% whole person impairment. I would consider his restrictions permanent of no lifting greater than 10 lbs and no overhead use of his arm. He is at MMI at this point.

In the October 20, 2014, Opinion, Award, and Order, the ALJ provided the following Findings and Fact and Conclusions of Law:

> 8. The issue preserved for adjudication is benefits pursuant to KRS 342.730.
>
> As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W. 2d 418 (Ky., 1985).
>
> In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

As far as impairment rating and restrictions are concerned I choose to rely upon the treating physician, Dr. Grau. Dr. Grau has followed Riddell on numerous occasions and demonstrates no known or proven bias. Certainly I respect Dr. Primm and Dr. Hughes and whatever differences in the ratings they assign their ultimate findings are not that different.

Based on the opinion of Dr. Grau the Plaintiff has a 6% impairment rating and cannot lift more than 10 pounds.

The only real issue is multipliers pursuant to KRS 342.730(1)(c). The Plaintiff has testified that he is able to do the work in the tool crib and believes the employer has accommodated his restrictions. His wages are equal to those on the date of injury.

The undersigned, however, is compelled to acknowledge the testimony of Mr. Winkle who testified that the requirements of tool crib attendant are to lift twenty or more pounds, in excess of the restrictions placed by Dr. Grau. I would further be remiss if I did not acknowledge that the Plaintiff, Bradley Riddell is a highly motivated, hardworking individual who despite this claim has done, and continues to do his best, to work whatever the situation. I do not think he would complain until he reached a level beyond most men.

Therefore, despite the fact that he is currently earning the same or greater wages than on the date of injury I do not feel as if he can reasonably be found to be able to do that job for the foreseeable future. Accordingly I find

> that he is entitled to the 3x multiplier under KRS 342.730(1)(c)1.
>
> Riddell's permanent partial disability award shall be 429.02 (workers' compensation rate) x .06 (impairment rating) x .85 (grid factor) x 3 (KRS 342.730(1)(c)1 = $65.64 a week, for 425 weeks, from May 4, 2012, and excluding all periods of temporary total disability benefits. He is also entitled to all reasonable and necessary, work-related medical expenses for the injury to his right shoulder.

Precision filed a petition for reconsideration asserting the ALJ failed to acknowledge Riddell's current position with Precision as the "Answer man" at EKU in his analysis regarding Riddell's ability to perform his job earning the same or greater wage for the foreseeable future. Precision's petition was denied by order dated November 24, 2014.

On appeal, Precision asserts the ALJ failed to conduct a proper analysis pursuant to Fawbush, supra, arguing as follows:

> While the Administrative Law Judge did mention that Mr. Riddell is a highly motivated, hardworking individual who continues to do his best and does not complain until faced with extreme circumstances, he did not explain how this is a factor that entitles Mr. Riddell to a 3 multiplier. Said traits are actually desirable in any employee and should be seen as increasing the

> likelihood that Mr. Riddell keep his current position at PMI or that he would be able to find and maintain employment at the same or greater wage, even if his indefinite employment at PMI were to end at some point. It is clear in this case that the Administrative Law Judge only considered the ability of Mr. Riddell to perform the duties required of a tool crib attendant with PMI in determining the application of KRS 342.730(1)(c)1. The precedent set forth in the above-cited cases clearly indicate that pursuant to Fawbush, the Administrative Law Judge must consider a broad range of factors, only one of which is the ability of the employee to continue performing his job.

Fawbush v. Gwinn, 103 S.W. 3d 5, 12 (Ky. 2003), directs the ALJ must determine which multiplier, contained in KRS 342.730(1)(c), is "more appropriate on the facts" when awarding permanent partial disability benefits. KRS 342.730(1)(c)1 states, in relevant part, as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection. . .; or

KRS 342.730(1)(c)2 further provides:

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for

> permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

When a claimant meets the criteria of both (c)1 and (c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." 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 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. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). 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. Fawbush at 12. The Court in Adkins, supra, directed a determination 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.

Adkins at 390.

We vacate the ALJ's award of PPD benefits and remand for additional findings consistent with the analysis required by Fawbush and Adkins.

The ALJ did not complete a Fawbush analysis in the October 20, 2014, Opinion, Award, and Order. The ALJ

determined Riddell's wages "are equal to those on the date of injury," indicating potential applicability of the two multiplier pursuant to KRS 342.730(1)(c)2. However, the ALJ failed to directly address Riddell's ability to return to the type of work he was performing at the time of the injury. Despite this oversight, it appears the ALJ attempted to resolve the third prong of the Fawbush analysis, whether Riddell 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 at 12. The ALJ's analysis concerning the third prong focuses entirely on Riddell's ability to perform his current job, only one factor of a broad range of factors the ALJ "must consider." Adkins at 390.

On remand, the ALJ must directly address Riddell's ability to perform the tasks associated with his pre-injury job and the potential applicability of the three multiplier set forth in KRS 342.730(1)(c)1. Should the ALJ determine both the two and three multipliers are potentially applicable, he must resolve the third prong of the Fawbush analysis- e.g. the likelihood Riddell will continue earning a wage that equals or exceeds his wage at the time of injury for the indefinite future. This analysis requires consideration of the range of factors articulated

in Fawbush and Adkins and not just the ability of Riddell to perform his current job.

Accordingly, the finding Riddell is entitled to enhanced PPD benefits by the three multiplier and the award of PPD benefits set forth in the October 20, 2014, Opinion, Award, and Order and the November 24, 2014, Order on Petition for Reconsideration are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings of fact and entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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