Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 8, 2015

CLAIM NO. 201079332

SAMUEL TODD WEBSTER PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, CHIEF ADMINISTRATIVE LAW JUDGE**

JAMES WELDING NOW ALL PURPOSE STEEL
and HON. ROBERT L. SWISHER
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Samuel Webster ("Webster") appeals from the October 17, 2014, Opinion, Award and Order and the November 26, 2014, Order on Petition for Reconsideration of Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ"). As a result of the August 25, 2010, injury sustained while in the employ of James Welding now All Purpose Steel ("James Welding"), the CALJ awarded Webster

temporary total disability ("TTD") benefits, permanent partial disability ("PTD") benefits, and medical benefits.

On appeal, Webster argues the CALJ erred by not applying the three multiplier pursuant to KRS 342.730(1)(c)1. Additionally, Webster challenges the holdings in Ball v. Big Elk Creek Company, Inc., 25 S.W.3d 115 (Ky. 2000) and Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009).

The Form 101 alleges on August 25, 2010, Webster sustained an injury to his right ankle while working for James Welding in the following manner: "I was working and fell from a ladder when it slipped and injured my right ankle."

The March 12, 2014, Benefit Review Conference ("BRC") Order and Memorandum reveals the parties stipulated Webster sustained a work-related injury on August 25, 2010; an average weekly wage ("AWW") of $680.00; and Webster returned to work at same or greater wages. The contested issue was benefits per KRS 342.730.

Webster testified by deposition on February 18, 2014. At the time of the deposition, Webster was still working at James Welding as a "shop foreman." He had been performing that job for two years. Before that, his job was "field foreman." Webster has worked for James Welding since

2010. Concerning his original job duties, Webster testified:

> A: As- as a working foreman, we- I- it was iron work, and we worked for all the Nugent Sand & Gravel. At all power plants, we do mostly conveyors and hoppers and stuff like that. We build them and install them all.
>
> Q: Okay. What kind of weights would you be working with in that position?
>
> A: Oh, Lord, anything between one pound up to a [sic] thousands.
>
> Q: What kind of weights would you have to lift by yourself?
>
> A: Up to 100 pounds.

Webster moved to the role of shop foreman in 2012 in order to keep his job. He explained:

> Because I can't do my physical things that I use [sic] to do, and he moved me as a shop foreman to keep me working an took a little bit of pressure off my foot, so, they put me on limitations in that direction.

He is still working with the same amount of weights at James Welding.

Before working at James Welding, Webster was a pipe fitter at LG&E in Trimble County for approximately three years. Before that, he worked for National Transit Lodge for sixteen years changing out boiler systems and

turbines in the power plants. Before working for National Transit Lodge, Webster worked for HTA for approximately four years in the Louisville area where he “drilled the shot dynamite.” Right after high school, Webster worked at Dayton Walter making knuckles for Ford Rangers for about a year.

After his injury at James Welding on August 25, 2010, Webster returned to work in September 2011. He had to take off work for an additional surgery and returned in April 2012.

He testified regarding the pain he is experiencing:

> Q: And the pain that you have in the ankle, what part of your ankle is it in now; is it kind of in-
>
> A: Well, it- it's the- actually, it's the whole ankle from right to left and the front, and...
>
> Q: Is the pain, I guess, around what I would call the ankle bone or or [sic] knobs above your feet, or is it lower than that or somewhere-
>
> A: It's-
>
> Q: -higher?
>
> A: Well, it's the whole- the- my concerns of the ankle is the- the joints where it's together, where your foot motivates- rotates.

Q: Is it right around those bones, though, or...

A: Yes. Yes, sir.

Q: And do- does the pain stay right in that part of your ankle, or does it ever hurt anywhere else in your foot or up your leg or anything, or...

A: Goes up to my knee.

Q: How often does that happen?

A: Within about two or three hours at- during the work process where my knee compensates for the- my ankle where it don't [sic] move no more.

Q: Okay. Do you just start having pain in the knee, or does it actually run up your leg into the knee?

A: Runs up my leg to my knee.

Q: Is it more in the front of your leg or the back of the leg, in the calf, or-

A: It seem- it's hard to explain. I mean, it's- feels like it just runs up the whole shin area.

Q: Okay. And how often do you have swelling in the ankle now?

A: Daily.

Q: Does that mainly happen when you've been on it for a while?

A: Yes, sir. Yes, sir.

Webster takes Hydrocodone for his pain.

In August 2010, Webster was earning $17.00 an hour at James Welding working 40-60 hours a week. His hourly rate at the time of the deposition was $20.00 and he worked approximately 40 hours a week.

Webster testified at the hearing that at the time of the injury, he was performing welding duties for James Welding. He described the demands of the job:

> A: I was going to stainless steel plants, North American, Gallatin Stainless, here in Old Downtown Louisville, an old feed mill welding ibeams and mostly structural work for power plants and stuff.
>
> Q: Okay. And, is that the type of contracts he usually had?
>
> A: Yes.
>
> Q: And, what's physically involved in that type of work, the welding you've just described?
>
> A: Well, it's heavy lifting, a lot of walking and welding and a lot of prep- metal prepping, getting it prepared for the- to be installed and-
>
> Q: And, did you do all aspects of that?
>
> A: Yes.

Webster takes Hydrocodone three times a day and has been taking this medication since his first surgery.

Webster recounted why he was moved to a different position after the injury:

> A: Due to my injury, I wasn't capable of doing my full duty of climbing ladders and scaffolds and stuff. We was [sic] on doctor's restrictions on that. And-
>
> Q: Okay. So- and, were those restrictions from which doctor?
>
> A: Valentino.
>
> Q: Okay. Have those restrictions been changed?
>
> A: No, sir.
>
> Q: Okay. So, your employer accommodated you by letting you return to work, but you went to the shop instead of outside?
>
> A: Yes, sir.

Regarding his pre-injury and current earnings, Webster testified as follows:

> Q: Now, in your deposition, I think you told us, wage- and if you remember, that's fine. We have your wages at 680. What's your memory of what your weekly wage- I'm sorry, your hourly rate was, when you were injured?
>
> A: 17.
>
> Q: And how many hours a week were you working?
>
> A: Between forty to seventy.
>
> Q: Okay. Now, that- at that point you're working outside of the shop.
>
> A: Yes, sir.

> Q: You just told me a minute ago that your wages- your hourly rate was reduced, when you moved into the shop?
>
> A: Yes. It went down to- took a dollar away from me.
>
> Q: Okay. Now, presently, what is your hourly rate?
>
> A: Twenty.

Webster explained he is unable to return to his pre-injury job in the field:

> The climbing and the gravel, walking and running machinery, using my driver's foot- my right foot. And, driving the heavy equipment to where we needed it. And- and I can't stand very long, if I've got to stand and weld for hours and on hours, I'd have to back off and take a break and go back at it. And-

In the October 17, 2014, Opinion, Award and Order, the CALJ entered the following findings of fact and conclusions of law

> 1. The ALJ finds the facts as stipulated by the parties.
>
> **2. Benefits per KRS 342.730.**
>
> Plaintiff has the burden of proving each of the essential elements of his claim, including that he is entitled to benefits. *Snawder v. Stice,* 576 S.W.2d 276 (Ky. App. 1979). 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).

Plaintiff contends that as a result of his right ankle injury he is entitled to an award of permanent partial disability benefits based on the 10% impairment rating assigned by Dr. Bilkey enhanced by the triple multiplier of KRS 342.730(1)(c)(1). The defendant/employer, on the other hand, takes the position that any award of permanent partial disability benefits should be based on the 5% impairment rating assigned by Dr. Jenkinson and that, in any event, plaintiff does not qualify for the application of any statutory multiplier.

The record contains impairment ratings assigned by three physicians, Dr. Jenkinson (5% assigned August 19, 2011), Dr. Barefoot (7% assigned June 14, 2012), and Dr. Bilkey (10% assigned February 13, 2014). Having reviewed the evidence in the record and having considered the medical evidence along with plaintiff's credible testimony regarding his ongoing symptoms and limitations, the ALJ finds that Dr. Bilkey has offered the most authoritative, probative and persuasive opinion with respect to the extent to which plaintiff retains permanent impairment as a result of the work injury. In so finding the ALJ notes that the rating assigned by Dr. Jenkinson is now three years old and was assigned prior to plaintiff's last surgical procedure. Likewise, Dr.

Barefoot's impairment rating was assigned two years ago and prior to the last surgical procedure. The ALJ finds those assessments, therefore, unreliable and non-persuasive. While the defendant/employer argues that the 2% rating assigned by Dr. Bilkey for dysesthesia should be disregarded as non-work-related (i.e., related to plaintiff's diabetes), there is no persuasive medical evidence in that regard. The ALJ acknowledges that Dr. Hubbard felt that plaintiff had some slight sensory diminishment of the toes which he felt was not work-related but related, instead, to plaintiff's diabetic condition. Dr. Bilkey was, as revealed in his report, certainly aware of plaintiff's lower extremity diabetic condition but found, on physical examination, evidence of nerve injury which he felt was related to the traumatic work injury. No medical evidence has been specifically offered by the defendant/employer in rebuttal to Dr. Bilkey's opinion in this regard, and the ALJ is simply not persuaded that the reference in Dr. Hubbard's report to sensory diminishment of the toes bilaterally is sufficient support to disregard Dr. Bilkey's assessment of specific nerve injuries. Accordingly, in reliance upon the report and opinion of Dr. Bilkey, the ALJ finds that plaintiff retains a 10% whole person impairment rating as a result of the August 25, 2010 work injury.

With respect to the application of statutory multipliers, the ALJ finds that plaintiff does not retain the physical capacity to return to the type of work performed at the date of injury. Specifically, plaintiff testified that his work as a welder entailed some climbing in scaffolds and ladders. The restrictions assigned by

Dr. Bilkey would preclude plaintiff from returning to the full range of those duties considering that he is to avoid climbing on ladders. Although Dr. Jenkinson felt that plaintiff was not restricted other than walking on uneven ground, his assessment is, as set forth above, more than three years old and does not take into consideration the progression of plaintiff's arthritic changes and symptoms over the past three years. Likewise, the last office note from Dr. Valentino, June 16, 2012, indicates that plaintiff was continuing with pain and had an antalgic gait and was awaiting consultation with Dr. Gupta for his traumatic arthritis and neuritis. She felt, however, that plaintiff could return to work with "minimal restrictions" which were not otherwise specified. She amplified that "however, I do anticipate some level of limitation." Long term, however, she expected that plaintiff may develop arthritis of the subtalar joint and calcaneal cuboid joint which may warrant conversation to a full triple arthrodesis but she did not want to proceed with complete hind foot fusion at that point in time. In other words, even Dr. Valentino, although she did not assign specific restrictions or limitations, acknowledged that plaintiff continued with a painful foot for which ongoing pain management would be required and additional surgery in the future was contemplated. She acknowledged that plaintiff would have some limitation, an opinion completely consistent with the employer's decision to take plaintiff out of field work and assign him to the shop. Moreover, plaintiff's testimony with respect to his residual symptoms and complaints and the effect on his ability to perform activities of daily living and work activity is probative and

persuasive. *Hush v. Abrams,* 584 S.W.2d 48 (Ky. 1979). The ALJ finds and concludes, therefore, that plaintiff does not retain the physical capacity to return to the type of work performed at the time of injury, and in so finding relies upon the report of Dr. Bilkey, plaintiff's own testimony and the treatment records of Dr. Valentino. The triple multiplier of KRS 342.730(1)(c)(1), therefore, is triggered.

Given that the parties stipulated that plaintiff returned to work at an average weekly wage equal to or greater than his average weekly wage at the time of injury, the double multiplier of KRS 342.730(1)(c)(2) is also potentially triggered. Under these circumstances, therefore, the ALJ is required to conduct an analysis pursuant to the precepts of *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky. 2003) in order to determine which statutory multiplier is more appropriate. In essence, the ALJ must determine whether it is likely that plaintiff will continue to earn a weekly wage equal to or greater than his average weekly wage at the date of injury, $680, for the indefinite future. While plaintiff has presented evidence that subsequent to the initial Formal Hearing in this claim he was laid off for a few weeks because of lack of work, he acknowledged at the Formal Hearing that he has since returned to work earning a higher hourly wage than at the time of injury but occasionally working fewer hours because of the variance in demand for work to be performed in the shop. Wage records submitted by plaintiff at the supplemental hearing demonstrate that plaintiff was paid varying weekly amounts from April 4, 2014 through August 22, 2014. For the entire period

encompassed by these wage records, plaintiff's average weekly wage is $696.18 ($11,835 ÷ 17 weeks).

The ALJ acknowledges that plaintiff has testified that the work available to him in the shop is less "regular" and consistent than the work available to him when he worked in the field based on production demand and the location of job sites. Although plaintiff may now on occasion earn less on a weekly basis than $680, it appears to the ALJ from the records submitted that he routinely earns more than that amount. Moreover, there is no evidence suggesting that plaintiff's employment is in jeopardy or likely to be terminated. In fact, the opposite is true. Plaintiff's testimony and wage records submitted establish to the satisfaction of the undersigned that plaintiff has been able to maintain his employment with the defendant/employer, albeit in a different position, routinely since following each of his surgical procedures. He is able to complete his work as a shop welder at this point even taking pain medication as prescribed without adverse consequence. While plaintiff is precluded from doing that work of a welder which would require him to climb on ladders and scaffold, there is nothing about his restrictions that precludes him from performing exactly the type of work that he is performing now, shop welding. He is not working outside of his restrictions and apparently has not required significant time off as a result of his ongoing symptoms since his return to work. Although plaintiff's ability to return to work for the specific employer with whom he was injured is only one factor to be considered in the *Fawbush* analysis, the ALJ finds, based on

> plaintiff's demonstrated work history and abilities that were work unavailable with the defendant/employer, he would be able to perform the same type of services for another employer. In other words, plaintiff retains the ability to perform welding work generally in a shop setting and, perhaps to a more limited extent, in the field, whether for James Welding/All Purpose Steel or a different employer. The evidence in the record, while establishing that plaintiff may experience periods when there is less work available than at other times thereby affecting his wages on a temporary basis, there is no compelling evidence that plaintiff will be unable to earn an average weekly wage equal to or greater than $680 into the indefinite future. Accordingly, the ALJ finds that the application of KRS 342.730(1)(c)(2) is more appropriate under the facts of this claim than the provisions of KRS 342.730(1)(c)(1).
>
> Plaintiff is entitled, therefore, to an award of permanent partial disability benefits calculated as follows: $680 X 2/3 X 10% X .85 = $38.53 per week. Provided, however, that during any period of cessation of such employment due to the work injury, plaintiff's weekly benefits shall be doubled to $77.06.

In a petition for reconsideration, Webster argued the CALJ erred in not awarding the three multiplier. Webster also asserted as follows:

> Counsel feels that it should be clearer to the carrier that for any weeks after August 25, 2010, excluding the weeks that were suspended during

> periods of payment of temporary total disability benefits, Claimant will receive $77.06 per week and not the base rate of $38.53 per week.

In the Order on Petition for Reconsideration, the CALJ stated:

> This matter is before the Administrative Law Judge on plaintiff's petition for reconsideration. Therein plaintiff contends that the ALJ considered patent error in the finding that it is likely that plaintiff will be able to earn an average weekly wage equal to or greater than $680 for the indefinite future and, therefore, not awarding the triple multiplier of KRS 342.730(1)(c)(1) as well as failing to award PPD benefits at the "double" rate of $77.06 per week subsequent to the date of injury. The defendant/employer has filed a response to the petition for reconsideration, and the undersigned has considered the petition, the response and the record.
>
> With respect to the non-application of the triple multiplier, plaintiff is, in essence, asking the Administrative Law Judge to reassess the evidence and make new findings of fact to the effect that it is unlikely he will be able to continue to earn an average weekly wage of $680 for the indefinite future. Pursuant to KRS 342.281, the Administrative Law Judge is precluded from reconsidering the case on the merits and/or changing findings of fact on a petition for reconsideration. *Garrett Mining Company v. Nye,* 122 S.W.3d 513 (Ky. 2003). Petitions for reconsideration are limited to addressing errors patently appearing on the face of the opinion. While plaintiff may disagree with the

ALJ's assessment of the evidence in this matter, including the *Fawbush* analysis conducted herein, that disagreement does not provide the basis for a petition for reconsideration. Plaintiff has failed to demonstrate that the opinion contains patent error on its face with respect to the non-application of the triple multiplier.

With respect to plaintiff's request for a clarification regarding the application of the double multiplier, while the ALJ appreciates the practical dilemma of both parties in attempting to determine the application of the multiplier retrospectively, the Opinion and Award contains no patent error. The ALJ construes this aspect of the petition for reconsideration as a request for a finding that the double rate of $77.06 per week is applicable essentially from the date of injury except for those periods of time during which plaintiff was paid temporary total disability benefits. Initially, the ALJ notes that plaintiff testified that he returned to his full regular duties working in the field between the termination of the first period of TTD, September 21, 2011, and the commencement of the second period, April 24, 2012. In addition, no evidence has been submitted with respect to plaintiff's average weekly wage during that period of time and there is no basis, therefore, for a finding that the double multiplier would be applicable for that seven month period. The only post-injury wage records submitted were those for the period from April 4, 2014 through August 22, 2014, during which time plaintiff's average weekly wage was determined to be greater than his average weekly wage at the date of injury.

In any event, the question becomes whether plaintiff is entitled to the application of the double multiplier with respect to his award of PPD benefits for that period of time subsequent to June 25, 2012, the date of the last TTD period which is the date that plaintiff returned to work in the shop, and not in the field. No wage records have been submitted, however, to establish plaintiff's average weekly wage for any 13 week period beginning June 25, 2012 and continuing thereafter other than the 2014 wages described above. The potential application of the double multiplier is not the subject of a week-by-week analysis but quarter-by-quarter. *Ball v. Big Elk Creek Coal Co., Inc.*, 25 S.W.3d 115 (Ky. 2000). A claimant's wages upon return to work in any given week are relevant only in the context of determining average weekly wage for the 13 week quarter during which that week falls. In other words, while a claimant may earn less than the pre-injury average weekly wage for a specific week after a return to work, that fact, in and of itself, does not automatically result in the doubling of PPD benefits for that week (assuming that the reason for the lack of earnings is attributable to the injury). The calculation must be based on successive 13 week quarters beginning with the date of return to work, in this case June 26, 2012. There is no evidence in the record that will allow a meaningful calculation by the undersigned of any such post-return to work calendar quarter earnings (other than the 2014 earnings discussed above). The ALJ believes that it is the obligation of the parties to analyze plaintiff's post-return to work weekly earnings in successive 13 week quarters to determine whether the average weekly wage has fallen below $680. If the

> average weekly wage never falls below $680, the issue is moot. If the average weekly wage does fall below $680, however, a determination must be made as to whether the reason for the decrease in wages is attributable to the work injury. To the extent that it is, the employer/carrier would be obligated to make a "make-up" payment of past due benefits considering that the double benefits would have been payable for the entire 13 week quarter already past. The ALJ recognizes that this is convoluted, burdensome and somewhat labor intensive, but it is the method which prevailing statutory and case law imposes with respect to determining the application of the double multiplier. Having reviewed the Opinion and Award herein with respect to the potential application of the double multiplier of KRS 342.730(1)(c)(2), the ALJ finds that numerical paragraph 2 of the Award and Order as written accurately reflects the present state of the law and is, therefore, neither factually nor legally erroneous. Accordingly, plaintiff's petition for reconsideration is **OVERRULED.**

Webster argues the CALJ erred by not applying the three multiplier. We affirm the CALJ's determination enhancement by the two multiplier in accordance with the mandates of Chrysalis House v. Tackett, supra, is more appropriate.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his or her claim. Durham v.

Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id.

Kentucky law holds that when the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Wolf Creek Collieries at 735.

Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). So long as any evidence of

substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome.

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.
>
> Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643.

In the October 17, 2014, decision, after conducting a thorough analysis concerning the appropriate multiplier pursuant to Fawbush v. Gwinn, supra, the CALJ concluded "there is no compelling evidence that plaintiff will be unable to earn an average weekly wage equal to or greater than $680 into the indefinite future." In reaching this conclusion, the CALJ considered Webster's testimony at

the hearing regarding his return to work earning a higher salary, wage records, his ability to perform his job as a shop welder while taking pain medication "without adverse consequences," and his ability to work within his restrictions. The CALJ also acknowledged that Webster's ability to return to work for the specific employer where he was injured is only one factor to be considered pursuant to Fawbush. He concluded that based upon Webster's work history and ability, "he would be able to perform the same type of services for another employer" if work were unavailable at James Welding. The CALJ concluded as follows: "In other words, plaintiff retains the ability to perform welding work generally in a shop setting and, perhaps to a more limited extent, in the field, whether for James Welding/All Purpose Steel or a different employer."

The CALJ's analysis pursuant to Fawbush is comprehensive, and his conclusions regarding the two multiplier being more appropriate than the three are fully supported by substantial evidence. After having completed a full analysis pursuant to Fawbush, the CALJ has the discretion to find one multiplier more appropriate than the other. Indeed, this discretion comprises the core of the analysis set forth in Fawbush. Since the determination the two multiplier is more appropriate is supported by

substantial evidence, the CALJ's determination cannot be disturbed.

Next, Webster attacks the holdings in Ball v. Big Elk Creek Company, Inc., supra, and Chrysalis House v. Tackett, supra, arguing as follows:

> This is a head on, flat out attack on two Appellate decisions. Specifically, Ball v. Big Elk Creek Company, Inc., 25 S.W.3rd 115 (Ky., 2000), and Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky., 2009).
>
> ...
>
> Clearly, the statement that the reason for the decrease in wages has to be attributable to the work injury is a direct reference to Chrysalis House. In a rather obvious disregard for the actual wording of the statute by the Appellate Court and in the words of the ALJ a resulting convoluted, burdensome and somewhat labor intensive method has been imposed with respect to determining the application of the double multiplier.
>
> The wording of the statue itself is clear: KRS 342.730(1)(c)2 states that if an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury, the weekly benefits for permanent partial disability shall be determined per KRS 342.730(1)(b) in that during any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for the permanent partial disability during the period of cessation shall be 2 times the amount

> otherwise payable. The statute talks in terms of a weekly wage. It mentions nothing about a 13-week period, an average weekly post injury or that the cessation be linked to the work injury. In fact it specifically says with or without cause. Noting that the plain wording of this statute could not [sic] any clearer, it is submitted that the ALJ erred and that the Workers' Compensation Board should decline to follow either of the two cited cases and instead should remand this claim back to the ALJ for a finding that the parties are to make a weekly analysis as to whether or not there has been a temporary or permanent cessation of employment without any consideration of relationship to the work injury.

We emphasize the Workers' Compensation Board is not the appropriate forum to challenge the law of the Commonwealth. We decline to challenge the holdings in Ball v. Big Elk Creek Company, Inc., supra, and Chrysalis House v. Tackett, supra, and engage in a speculative debate of their merit or alleged lack thereof.

As the CALJ correctly stated in the November 26, 2014, Order on Petition for Reconsideration, "[t]he potential application of the double multiplier is not the subject of a week-by-week analysis but quarter-by-quarter. Ball v. Big Elk Creek Coal Co., Inc. 25 S.W.3d 115 (Ky. 2000)." This is a correct statement of the current law as the Kentucky Supreme Court has decreed as follows:

> Having considered the arguments of the parties and the language employed in KRS 342.730(1)(c), we are persuaded that the legislature did not contemplate a weekly review of a worker's earnings and a weekly adjustment of benefits as the claimant advocates. It has long been established that the purpose of awarding income benefits to injured workers is to provide an ongoing stream of income to enable them to meet their essential needs and those of their dependents. As we explained in *Whittaker v. Robinson* and *Whittaker v. Johnson* when considering a similar provision, it is apparent that limiting the amount of income benefits being paid to those workers who have sustained no present loss of income is consistent with the purpose of the benefit. The method which the legislature has chosen to determine a worker's income from a particular employment is the average weekly wage, the computation of which is set forth in KRS 342.140. Rather than focusing upon a particular week which may or may not accurately reflect the worker's earning *118 capacity in the employment, KRS 342.140 requires the computation of an average of the worker's earnings over a period of 13 consecutive calendar weeks.

Id. at 117-118.

Additionally, as noted by the CALJ in the Order on Petition for Reconsideration, "[i]f the average weekly wage does fall below $680, however, a determination must be made as to whether the reason for the decrease in wages is attributable to the work injury." This determination is

consistent with the following language in Chrysalis House v. Tackett, supra, as follows:

> KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage "for any reason, with or without cause." It is, however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for "disability" that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," provided that the reason relates to the disabling injury.

Id. at 674.

We decline Webster's invitation to remand the claim to the CALJ for a finding the "parties are to make a weekly analysis as to whether or not there has been a temporary or permanent cessation of employment without any consideration of relationship to the work injury," as such a directive is not in accordance with the law.

The October 17, 2014, Opinion, Award and Order and the November 26, 2014, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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