Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 16, 2014

CLAIM NO. 201000851

SCOTT JOHNSON PETITIONER

VS. **APPEAL FROM HON. GRANT ROARK, ADMINISTRATIVE LAW JUDGE**

TROY REED
UEF
and HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

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

RECHTER, Member. Scott Johnson ("Johnson") appeals from the October 4, 2013 Opinion, Order and Award and the November 12, 2013 Order on Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). Johnson argues the ALJ erred in calculating his average weekly wage, and in denying enhanced benefits. For the reasons

set forth herein, we affirm in part, vacate in part, and remand this matter to the ALJ for further findings of fact.

On March 12, 2010, Johnson was injured while working as a mechanic at Troy Reed's auto repair shop ("Reed"). He was working on a bearing when a small piece of metal lodged in his left eye. He subsequently underwent three surgeries, but the left eye was ultimately removed and replaced with a prosthesis. The issues on appeal concern the ALJ's calculation of Johnson's average weekly wage ("AWW") and enhancement of his benefits, and therefore a recitation of the medical proof is unnecessary. Furthermore, it should be noted the ALJ concluded Johnson was Reed's employee, not an independent contractor. That finding has not been appealed.

Johnson began working for Reed as a mechanic in October of 2009. According to both Reed and Johnson, Johnson was paid 40% of the labor charge on any work performed. Additionally, he earned $3.00 for each tire changed, and was paid "shop help" fees for general cleaning and maintenance of the repair shop. Occasionally, Johnson performed mechanic work on Reed's family's personal vehicles, though he was unsure exactly what rate he was paid for these jobs.

Due to the restrictions placed on Johnson immediately after the injury, he was unable to return to work at Reed's shop. Three weeks later, Reed fired Johnson. Both men essentially testified Johnson was fired because he had pursued a lawsuit against Reed. In the fall of 2010, after his third surgery, Johnson was released to return to work. He hauled scrap metal and performed some farm labor for cash. On May 16, 2011, he began working for Hometown Tire as a mechanic. He worked there until the winter of 2012, when he was laid off due to a slowdown in business. Though he was later called back for a short period, he eventually left Hometown Tire in May, 2013. Johnson testified he was scheduled to work fewer hours because he performed the work slower due to the injury and resulting loss of depth perception and acuity. Dewayne Lear, a manager at Hometown, confirmed Johnson performed his work slower than other mechanics, and was unable to perform certain tasks. As a result, he earned less money than other similarly qualified employees.

The final hearing took place on August 5, 2013, nearly 3 years and 5 months after the injury. About one month prior to the final hearing, Johnson started to work for Brashear HVAC earning $8.00 per hour. Johnson testified he believed he could work more efficiently if he

learned an altogether new trade under his current vision disability.

In the October 4, 2013 Opinion and Order, the ALJ awarded Johnson temporary total disability benefits at the minimum rate from March 13, 2010 to September 3, 2010, the date at which he determined Johnson had reached maximum medical improvement ("MMI"). He also awarded permanent partial disability ("PPD") benefits beginning September 4, 2010. Relying on the actual wages Johnson earned between December 11, 2009 and March 12, 2010, the ALJ concluded his AWW at the time of the injury was $204.23. The ALJ further determined, pursuant to KRS 342.730(1)(c)1, Johnson does not retain the physical capacity to return to the type of work he performed at the time of the injury. However, Johnson had returned to work at Brashear HVAC earning an AWW greater than $204.23. Because both KRS 342.730(1)(c)1 and 2 were applicable, the ALJ then engaged in the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). He reasoned:

> In this case, given [Johnson's] low pre-injury AWW with the defendant, the fact that his subsequent work has been at greater wages, and the fact that his current rate of pay, if extrapolated to 40 hours per week as one would expect, the [ALJ] is persuaded it is likely that [Johnson] can continue to earn more than $204.23 per week for the

> indefinite future. Accordingly, the 3x multiplier does not apply.

Johnson petitioned for reconsideration, primarily challenging the calculation of his AWW and the denial of the three multiplier. As to the AWW issue, Johnson argued his wages should have been calculated pursuant to KRS 342.140(1)(f), by reference to other similarly situated mechanics in the area. Johnson's argument regarding the appropriate multiplier had two components. First, he claimed entitlement to the three multiplier for those quarters prior to the final hearing during which he was unemployed. Second, he urged the ALJ to reconsider his conclusion Johnson could continue to earn his current AWW into the indefinite future. In the November 12, 2013 Order on Reconsideration, the ALJ rejected these arguments. As to the appropriate multiplier, he explained:

> Moreover, as was pointed out in the Opinion, a claimant's ability to continue in a post-injury job at same or greater wages is only one factor to be considered. The critical inquiry is the claimant's **wage earning capacity**. Adkins v. Pike County Board of Education, Ky. App., 141 S.W.3d 387 (2004). As indicated in the Opinion, plaintiff's pre-injury AWW was determined to be $204.23 and, although plaintiff herein was not paid hourly, if plaintiff's AWW is extrapolated to an hourly wage for a typical 40 hour work week, it amounts to $5.11 per

> hour, which is less than minimum wage. Therefore, as there is no question that plaintiff is not totally disabled and because he has returned, albeit sporadically, to full time work since the injury, it stands to reason that if plaintiff returns to any full-time work at even minimum wage, his post-injury *wage earning capacity* is greater than $204.23. This wage earning capacity remains in effect even during those weeks plaintiff was unemployed. Thus, because plaintiff's post-injury wage earning capacity was always greater than his pre-injury AWW, he is not entitled to application of the 3x multiplier.
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> Instead, as indicated in the Opinion, plaintiff is entitled to application of the 2x multiplier for any periods he ceased earning a greater wage post-injury for reasons relating to his work injury. KRS 342.730(1)(c)2 and Chrysalis House, Inc. v. Tackett, Ky., 283 S.W.3d 671 (2009). Plaintiff has also concurrently moved to reopen his claim to request application of the 2x multiplier post-injury and that Motion will be addressed by separate Order.
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> For the foregoing reasons, plaintiff's petition to reconsider application of the 3x multiplier for limited periods post-injury and his petition for additional findings with respect to the 3x multiplier are denied.

On appeal, Johnson raises three arguments. He first claims he is entitled to application of the three multiplier for those post-injury/pre-award quarters during which he did not earn the same or greater AWW. Next, he

argues his AWW should have been calculated pursuant to KRS 342.140(1)(f), rather than KRS 342.140(1)(d). Finally, he challenges the ALJ's determination he is likely to continue to earn the same or better AWW for the indefinite future.

We first address the issue concerning the appropriate multiplier to be applied from the date of injury to the date of the final hearing (August 5, 2013). It is Johnson's position the ALJ was required to examine his actual wages for each post-injury/pre-award quarter. For those quarters when he did not earn an AWW of $204.23, he claims he is entitled to a PPD benefit enhanced by the three multiplier. Indeed, a review of the wage records submitted reveals Johnson did not earn an AWW of $204.23 for seven of twelve applicable quarters.

Johnson relies on Ball v. Big Elk Creek Coal Co., Inc., 25 S.W.3d 115 (Ky. 2000), which he reads to stand for the proposition that the ALJ must examine a claimant's actual wages for each post-injury quarter leading up to the final hearing, and determine if he was making the same or greater AWW. We disagree with this interpretation.

In Ball, the claimant's post-injury/pre-award earnings exceeded his pre-injury average weekly wage in two of the three quarters. However, the claimant's weekly wage exceeded the stipulated average weekly wage in only 8 of

the 42 post-injury/pre-award weeks. Stated otherwise, in the period between the injury and the award, the claimant had several highly lucrative weeks which significantly raised his average quarterly earnings. The claimant argued his weekly benefit should only be reduced for those 8 weeks he earned more than his stipulated AWW. The ALJ rejected this assertion, looked instead to the claimant's quarterly earnings, and applied KRS 342.730(1)(c)2 to the entire award. The Supreme Court's analysis in Ball focused on whether KRS 342.730(1)(c) requires a review of weekly earnings versus quarterly earnings. The Court determined the proper analysis is on quarterly earnings.

Thus, though Ball instructs the ALJ to analyze quarterly earnings as opposed to weekly earnings, it does not require the ALJ to amend the award each quarter if the claimant's earnings fluctuate, as Johnson propounds. In fact, in Ball, the ALJ applied KRS 342.730(1)(c)2 to the entire award, even to the quarter in which his post-injury AWW did *not* exceed his pre-injury AWW. The Court affirmed the ALJ's award, despite the apparent incongruity. We otherwise find no authority for the proposition Johnson's post-injury/pre-award benefits must be enhanced quarterly according to his actual earnings.

However, we agree with Johnson the ALJ has not conducted a sufficient analysis as required by Fawbush and its progeny. In the October 4, 2013 Opinion and Order, the ALJ rested his decision on Johnson's relatively low pre-injury AWW and the fact that, at the time of the final hearing, he was already earning a higher hourly wage. In the Order on Reconsideration, the ALJ again pointed to Johnson's relatively low pre-injury AWW, reasoning he would only have to earn $5.11 per hour if working a 40-hour week in order to exceed his pre-injury AWW. As support for the conclusion Johnson would be able to work a 40-hour week, the ALJ pointed to the fact he is not totally disabled and has worked since the injury, "albeit sporadically."

In Adams v. NCH Healthcare, 199 S.W.3d 163 (Ky. 2006), the Supreme Court announced the standard as whether the claimant would be able to return to regular employment at the same or greater wages than he earned at the time of the injury. The Court explained this third prong of the Fawbush analysis includes a "broad range of factors, only one of which is the ability to perform the current job." Id. at 168. The correct inquiry is whether the claimant's future ability to earn an income has been permanently altered by the work injury.

Unfortunately, it appears the ALJ has looked only to the fact Johnson was employed at the time of the final hearing and his relatively low pre-injury AWW. The circumstances of this case require a deeper analysis. Though not totally disabled, Johnson was severely injured in a manner which would affect virtually every aspect of his daily life. He has been unable to hold consistent employment since the time of the injury. He testified extensively to the difficulty he has performing mechanic work and other daily tasks. On remand, the ALJ is instructed to conduct an analysis of Johnson's future earning capacity which considers more than the mere fact he was employed at the time of the final hearing.

If, on remand, the ALJ again concludes the three multiplier is not appropriate, he must then consider the potential application of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) to the period prior to the final hearing. Though the ALJ noted Johnson would be entitled to a double award during any period he ceases to earn a same or greater wage for reasons relating to the work injury, it does not appear any findings were made concerning his periods of unemployment prior to the final hearing. Johnson experienced at least two periods of unemployment following the injury. There is evidence on the record from

which one could reasonably conclude Reed fired Johnson for reasons relating to his work injury. Furthermore, though Hometown Tire laid Johnson off due to a slow-down in business, one could reasonably conclude from the totality of the evidence he was laid-off over other employees due to his work injury and resulting inability to perform work quickly. If the ALJ determines these periods during which Johnson failed to earn his pre-injury AWW were for reasons relating to his injury, he is entitled to a double benefit pursuant to KRS 342.730(1)(c)2.

Johnson next argues the ALJ erred in calculating his AWW pursuant to KRS 342.140(1)(d). He contends his AWW should have been computed pursuant to KRS 342.140(1)(f), based on the earnings of other mechanics in the area. The evidence was uncontroverted Reed paid Johnson 40% of the labor cost of any work he completed. He occasionally earned additional wages for "shop help", which were paid by the hour. The ALJ concluded Johnson's wages were essentially fixed "by the output" and relied on his actual wage records to determine AWW. As the finder of fact, the ALJ was authorized to consider the available evidence, and to draw reasonable inferences therefrom. Affordable Aluminum, Inc. v. Coulter, 77 S.W.3d 587, 591 (Ky. 2002). We find no abuse of the ALJ's discretion in relying on

Johnson's actual wage records, as opposed to reliance on the usual wages for similar services in the area.

Accordingly, the ALJ's determination of Johnson's AWW is hereby **AFFIRMED**. The ALJ's finding determination Johnson is not entitled to enhancement of benefits by the three multiplier is **VACATED** and this matter is hereby **REMANDED** to the Administrative Law Judge for further findings of fact as expressed herein.

ALL CONCUR.

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