Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 11, 2014

CLAIM NO. 201274830

SUPER SERVICE, LLC PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

BOBBY MILLER
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

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

RECHTER, Member. Super Service, LLC ("Super Service") appeals from the October 22, 2013 Opinion, Award and Order and November 19, 2013 order denying its petition for reconsideration rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"). The ALJ awarded Bobby

Miller permanent partial disability ("PPD") benefits enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2. For the reasons set forth herein, we vacate that portion of the award enhancing Miller's income benefits and remand.

Miller suffered an injury to his back during the course of his employment as an over-the-road truck driver for Super Service. Twenty-one months later, he injured his foot, which the ALJ concluded was a direct result of the back injury. The sole issue on appeal is whether the ALJ correctly enhanced Miller's income benefit through application of the two multiplier, which was based on the finding he was terminated from Super Service as a result of the work injuries.

Miller testified he was in Atlanta, Georgia on a work assignment in January, 2013. A "safety guy" performed an unannounced inspection of his truck and found a pellet gun. Miller explained the gun belonged to his son, and he kept the gun with him so that his son would not use it unsupervised. Nonetheless, it was a violation of company policy and Miller was fired on the spot. Miller later talked to Roger Waddle, "the CEO of Somerset", who said he would overturn the firing and suspend Miller for two weeks instead. Despite this assurance, he was fired after the

two week suspension ended. Miller testified to his belief he was fired in retaliation for being placed on light duty following the foot injury.

Joseph Patrick Dunn, Jr., workers' compensation administrator for Super Service, testified by deposition on March 26, 2013. He confirmed Miller was fired because he had a gun in his truck in violation of company policy. According to Dunn, Miller was not fired for any reason related to his ability to perform his job. A January 2, 2013 "Notice of Employee Separation" form, submitted by Super Service, indicates Miller was fired for violation of a company rule and contained the notation: "Had pellet gun in truck. Termed by Safety."

The ALJ was not persuaded by Super Service's proof, and concluded the firing was due to Miller's injury and the resulting assignment to light duty. Relying on KRS 342.730(1)(c)(2), the ALJ enhanced the award of PPD benefits by the two multiplier. In its petition for reconsideration, Super Saver challenged the evidentiary basis for the conclusion Miller was fired due to the injury. It primarily argued Miller's testimony, which contained hearsay statements, cannot constitute substantial evidence. By order dated November 19, 2013, the ALJ denied the petition for reconsideration.

On appeal, Super Service continues to challenge the enhancement of benefits on the grounds it is unsupported by substantial evidence. It argues the overwhelming weight of the evidence establishes Miller was terminated for cause unrelated to his work injury, and is therefore not entitled to the two multiplier pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009). However, we need not reach this precise issue to determine an enhancement of benefits by the two multiplier is unwarranted.

Miller testified he was hired by CorTrans immediately after being terminated by Super Service. Regarding Miller's post-injury earnings, the ALJ found as follows:

> In the case of Mr. Miller, the records reveal that his post-injury earnings with Super Service, LLC, were $884.08 per week, a substantial increase from his pre-injury AWW of $748.32 per week. Mr. Miller is now working at CorTrans, where his wages are $951.98 per week.

With this unrebutted proof in mind, we turn to KRS 342.730(1)(c)2, which 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.

In Chysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009), the Kentucky Supreme Court held the double benefit is permitted during a period of cessation of employment at the same or greater wage for any reason, with or without cause, provided the reason relates to the disabling injury.

While the ALJ and the parties focused their attention on the reason Miller was terminated from his employment with Super Service, they seem to have overlooked the fact his subsequent employment with CorTrans constitutes a return to work at a greater average weekly wage ("AWW") than that earned at the time of the injury.

The application of KRS 342.730(1)(c)2 is not limited to the initial employment where the injury was sustained. *See* Ball v. Big Elk Creek Coal Co., Inc., 25 S.W.3d 115 (Ky. 2000). Miller secured employment with CorTrans on January 14, 2013, the same day he contends he was notified of his termination from Super Service. He worked for a sufficient time to calculate a quarter of

earnings at a greater AWW than that earned at the time of his injury. Furthermore, the ALJ specifically found Miller's AWW at CorTrans exceeded his AWW at the time of injury. Because Miller established earnings at the same or greater wage with the subsequent employer, the reason for his termination from Super Service became irrelevant to the question of whether his benefits may currently be enhanced by the two multiplier.

In order to qualify for the two multiplier, the question became whether Miller had ceased to earn the same or greater AWW in his employment with CorTrans. His testimony at the hearing indicated he continues in that employment. He did not prove a cessation of the earnings at the same or greater wage at CorTrans. Because Miller continued to earn a greater AWW at CorTrans than that earned at the time of his injury, as a matter of law he does not currently qualify for enhancement of his weekly benefit.

Although Super Service did not argue this point on appeal, KRS 342.285(2) obligates the Board on appeal to correct orders, decisions or awards that are not in conformity with the provisions of Chapter 342. Whether an award is in conformity to the Act is a question of law. Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000). The Board

has authority to reach the issue without regard to whether the defect was contested by a party. Id. at 144.

Although we find the ALJ's enhancement pursuant to KRS 342.730(1)(c)2 at present was in error, Miller may qualify for enhancement in the future during the 425 week period of his PPD award should he cease to earn the same or greater AWW, in accordance with Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009).

Accordingly, the October 22, 2013 Opinion, Award and Order and the November 19, 2013 order overruling Super Service's petition for reconsideration rendered by Hon. Edward D. Hays, are **REVERSED and REMANDED** for entry of an amended award providing KRS 342.730(1)(c)2 applies to Miller's claim but he is not presently entitled to enhancement of his benefits by the two multiplier.

ALL CONCUR.

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