OPINION ORIGINALLY ENTERED: FEBRUARY 1, 2013
OPINION WITHDRAWN: FEBRUARY 7, 2013
OPINION RE-ENTERED: FEBRUARY 7, 2013

CLAIM NO. 200900868

TRIANGLE ENTERPRISES PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

JOHN STEPHENS
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * * *

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

SMITH, Member. Triangle Enterprises, Inc. ("Triangle") seeks review of the order on remand rendered August 17, 2012, by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ Polites"), who found KRS 342.730(1)(c)2 is applicable to John Carmi Stephens ("Stephens") and entitles him to an enhancement of his award of permanent partial disability ("PPD") benefits by the two multiplier. Triangle also

appeals from the order rendered September 19, 2012, denying its petition for reconsideration. On appeal, Triangle argues the ALJ erred as a matter of law in concluding Stephens is entitled to the 2x enhancement multiplier.

This is the third time this claim has been appealed. On the first appeal, we vacated and remanded Hon. Richard Joiner's ("ALJ Joiner") determination that Stephens was not entitled to an enhancement of his PPD award pursuant to KRS 342.730(1)(c)2 on the basis of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009). In the previous appeal, Stephens argued the ALJ failed to make a finding of fact as to whether he had ceased earning the same or greater wage due in part to his work-related injury, and had failed to make an appropriate Chrysalis House analysis.

In the Opinion Vacating and Remanding the ALJ's decision, rendered on June 18, 2012, we ordered as follows:

> That said, we do not believe the ALJ adequately set forth the reasons why Stephens is not entitled to the 2x multiplier set forth in KRS 342.730(1)(c)2. The ALJ found Stephens was earning less now than he was at the time of the accident, but without explaining why, merely stated an enhancement of benefits was precluded pursuant to Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky., 2009).

We also stated:

In our original decision, we determined the ALJ failed to provide an explanation or analysis regarding why Stephens was not entitled to the additional enhancing multiplier, and the claim was remanded to him to provide an explanation for his determination. As we noted, the ALJ, while not required to perform a detailed fact finding, was required to make findings sufficient to inform Stephens of the basis for his decision which would allow for meaningful review on appeal. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). We further stated the ALJ's decision may in fact be correct, but we were not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Rather than providing the basis for his determination as directed, the ALJ reversed course, awarded the 2 multiplier, and improperly shifted the burden of proof to Triangle. Except for affirmative defenses, none of which are present in this claim, Stephens bore the burden of proving each of the essential elements of his claim, Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), including entitlement to the 2 multiplier.

Again, whether the ALJ awards the 2 multiplier pursuant to KRS 342.730(1)(c)2, is his prerogative, but he must perform the appropriate analysis and provide his basis for doing so. He is not permitted to shift the burden of proof.

Since the ALJ failed to comply with our previous instructions, we must

> again vacate and remand his decision. On remand, the ALJ, must make a determination regarding whether KRS 342.730(1)(c)2 is applicable, and the reason for that determination. Triangle does not bear the burden of proving the "cause of the reduction in wage". This burden rests with Stephens. On remand, the ALJ must provide his determination, based upon the appropriate analysis, and likewise provide an adequate explanation regarding his decision as to whether Stephens is entitled to the additional multiplier.
>
> Accordingly, the ALJ's decision rendered December 29, 2011, as well as the order ruling on the petition for reconsideration dated January 27, 2012 are hereby **VACATED** and **REMANDED** for further proceedings consistent with the views expressed in this opinion.

On remand, ALJ Polites issued the following order rendered August 17, 2012:

> This matter is before the Administrative Law Judge on remand from the Workers' Compensation Board to "make a determination regarding whether KRS 342.730(1)(c)2 is applicable and the reason for that determination. On remand, the ALJ must provide his determination, based upon the appropriate analysis, and likewise provide an adequate explanation regarding his decision as to whether Stephens is entitled to the additional multiplier."
>
> In the original Opinion and Award in this claim issued on May 19, 2011, the ALJ determined that Plaintiff had returned to work at an average weekly wage equal to or greater than the

average weekly wage at the time of the injury and that he had ceased that employment which potentially would qualify him for the application of the two multiplier contained in KRS 342.730(1)(c)2. However, the ALJ found that because of the Supreme Court decision in Chrysalis House v. Tackett, 283 S.W. 3d 670 (Ky. 2009) the plaintiff in this claim was not entitled to an enhancement of his benefits by application of the two multiplier.

The Plaintiff appealed to the Worker's Compensation Board and the Board remanded the claim for the ALJ to provide an explanation and analysis as to why Plaintiff was not entitled to the additional multiplier. While the Board found that adequate evidence existed to support the ALJ's decision, it was remanded for him to provide an explanation for his determination.

An Opinion and Award on Remand was issued on December 29, 2011 in which supplemental findings of fact were made as well as an award of permanent partial disability benefits enhanced by the application of the two multiplier. The supplemental findings of fact made were as follows:

> 2. Mr. Stephens did return to work at the same wage for some time but is not earning the same or greater weekly wage as he was at the time of injury.
>
> 3. Since the injury, the average number of hours worked per employee of Triangle Enterprises has in fact increased. The average number of hours worked by Mr. Stephens has decreased.

> 4. Neither Mr. Stephens nor Mr. Heath, testifying on behalf of the employer, can point to any reason other than his injury as to why his hours have decreased.
>
> 5. There is no reason, other than the injury, why Mr. Stephens earns less money now.
>
> 6. Mr. Stephens limits its activities now, but the limitations do not prohibit him from doing the type of work he did at the time of the injury.
>
> 7. I infer from the findings four, five, and six that the employer has not demonstrated that the increase in earnings is a result of any fault of the plaintiff or because of any neutral reasons.
>
> (See Opinion and Award on Remand, pages 3 —4)

The ALJ went on to find that the burden of proof in regard to the-two-multiplier should be placed on the Employer to demonstrate that Plaintiffs [sic] cessation of earning the same or greater wage sufficient to invoke the application of the two multiplier was not due to the work injury pursuant to Chrysalis House, supra. The ALJ then concluded that in this claim, the Employer had not demonstrated that the cessation of the return to work at the same or greater wage was the fault of the Plaintiff or because of a neutral reason and therefore an award of benefits enhanced by the two multiplier was made. (Opinion and Award on Remand, p.3-4)

The Employer filed a Petition for Reconsideration and the ALJ issued an

order denying the petition, stating as follows:

> As to the request for additional findings of fact, the first request asked me to state what reasonable inference was drawn from the fact that the average number of hours worked per employee of triangle enterprises has in fact increased to lead to the conclusion that the plaintiff is no longer earning the same or greater wage [sic] a result of the effects of his work injury. That fact does not stand alone. In [sic] of itself, the fact that the average number of hours worked per employee of Triangle Enterprises has increased would not necessarily lead to the conclusion that any individual has wages that are greater or less than his previous average. However, taken with the fact that the plaintiff's average weekly hours has decreased the face of an overall average increase in hours over the employer's workforce in conjunction with an inadequate explanation for why the plaintiff falls below that average, it makes one wonder why. Where no explanation is given as to why by the employer or the employee can come up with no reason other than the injury to explain why, it is reasonable to conclude that the injury has something to do with Mr. Stephens current reduction in wage. The second supplemental finding of fact the employer seeks is why the Plaintiff is currently working fewer hours. I do not know why. The employer could explain it if it did not relate [sic] the injury. The Employer did not adequately

explain it. (Order on Reconsideration, p.2-3)

The Employer appealed and the Worker's Compensation Board again vacated the ALJ's decision holding that the ALJ improperly shifted the burden of proof on the issue of the two multiplier to the Defendant and remanded the claim to the ALJ for further findings including a decision as to whether the two multiplier is applicable along with an explanation regarding the decision.

In analyzing whether the two multiplier contained in KRS 342.730(1)(c)2 applies, the first determination that must be made is whether the Plaintiff returned to work at the same or greater wage and whether that employment had ceased. In the original Opinion and Award as well as the Opinion and Award on Remand, the ALJ found that the Plaintiff had in fact returned to work at the same or greater wage. Likewise, in both decisions the ALJ found that the Plaintiff had ceased to earn the same or greater average weekly wage. As such, the two multiplier is clearly applicable and the Plaintiff is therefore eligible for enhancement of his benefits by the two multiplier as long as he meets the criteria set out in Chrysalis House, supra.

In Chrysalis House, supra, the Supreme Court held that for the two multiplier to apply, the claimant's cessation of return to work at the same or greater wage must be due to a reason that relates to the disabling injury.

As applied in this claim, somewhat contradictory findings and conclusions were made in the original Opinion and Award in which the two multiplier was

not awarded and the Remand Opinion in which it was awarded. However, having reviewed all the evidence in the record and considering the additional findings of fact as set forth in the Opinion and Award on Remand as well as the analysis and findings contained in the Order on Reconsideration, the ALJ believes that a sufficient showing of a relationship between Plaintiff’s injury and his cessation of working at the same or greater wage has been made such that an enhancement of benefits by application of the two multiplier is warranted.

As stated in the Order on Reconsideration, the fact that the Plaintiff’s average weekly hours had decreased whereas the remainder of the Employer's work force experienced an increase in hours, when viewed in light of the fact that the Employer could offer no reason why the claimant's hours have been decreased, and in view of the claimant's argument that the decrease was as a result of the injury, leads to a reasonable conclusion that the claimant's injury had something to do with his reduction in wages.

This conclusion is supported by the Supplemental Finding of Fact Number 6 contained in the Opinion and Award on Remand that states "There is no reason, other than the injury, why Mr. Stephens earns less money now." (Opinion and Award on Remand, page 3).

In addition, plaintiff testified at his deposition and at his hearing that he was limited in some aspects of his physical capacity to perform the job he was doing at the time of the injury. (Deposition pages 31 - 35, hearing transcript 17 - 24). He also testified that the reason that he was earning less was that he was not getting the overtime

> hours that he was before the injury, primarily at the Employer's Paducah facility. While plaintiff testified at his deposition that he could not say why he was getting less overtime, he testified at his hearing as follows:
>
> > Q: Okay I understand. Now do you know of any reason, other than your work injury, as to why you would not be getting that overtime?
> >
> > A: No. (Hearing Transcript p. 23)
>
> The Administrative Law Judge, as fact finder, has the sole discretion to determine the quality character and substance of the evidence and to draw all reasonable inferences from the evidence. Paramount Foods Inc. v. Burkhart, Ky. 695 S.W.2d 241 (1985). It is the finding of the Administrative Law Judge herein that it is a reasonable inference to conclude that the reason the claimant is no longer earning the same or greater wages is related to his injury and as such, an award of benefits enhanced by the 2 multiplier contained in KRS 342.730 (1)(c)2 is appropriate.

On September 4, 2012, Triangle filed a petition for reconsideration arguing the ALJ's statement that "the employer could offer no reason why the claimant's hours had been decreased" was not a true statement. Triangle noted Mr. Dale Heath ("Heath"), the safety director, testified Stephens' work hours decreased because less work was available. He also testified Stevens had never been excluded from a job because of his injury.

Triangle further argued the ALJ erred in finding the decrease in work available to Stevens “leads to a reasonable conclusion that the claimant’s injury had something to do with his reduction in wages”. In his September 19, 2012 order, ALJ Polites summarily denied Triangle’s petition for reconsideration.

On appeal, Triangle argues that both ALJ Joiner and ALJ Polites erred when they failed to follow the Board’s instructions to make additional findings of fact in support of the conclusion Stevens was not entitled to the 2X multiplier. Triangle argues that, instead of making an additional finding of fact to support ALJ Joiner's original conclusions, both, ALJ Joiner and ALJ Polites, reversed those original findings, determining Stevens did qualify for the 2X multiplier.

Second, Triangle argues the ALJ's findings of fact that Stevens’ hours had declined are incorrect. Triangle argues the evidence does not support the factual conclusions of ALJ Polites.

Third, Triangle argues ALJ Polites erred in placing significance on Stevens’ argument that he is entitled to the 2X multiplier. Triangle argues Stephens' statement is not substantial evidence and proves nothing.

Finally, Triangle argues ALJ Polites erred by drawing "inference from a leading question posed by his attorney, and a rather ambiguous answer made by Stephens that is taken out of context of his entire relevant testimony." Triangle notes Stephens clearly testified he could not state he worked less hours due to the injury, and agreed the declining state of the economy was a potential cause for his working less hours. However, ALJ Polites found otherwise.

Once again, as the Board stated in its previous order, the ALJ, while not required to perform a detailed fact-finding, is required to make findings sufficient to inform Stephens of the basis for his decision, which would allow for meaningful review on appeal. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). We further stated the ALJ's decision may in fact be correct, but we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). We noted the ALJ, on remand, must make a determination regarding whether KRS 342.730(1)(c)2 is applicable, and the reason for that determination. Triangle does not bear the burden of proving the "cause of the reduction in wage". This burden

rests with Stephens. We then directed the ALJ must provide his determination, based upon the *appropriate analysis,* and likewise provide an *adequate explanation* regarding his decision as to whether Stephens is entitled to the additional multiplier.

First, we address whether ALJ Polites made a determination based upon an appropriate analysis regarding whether KRS 342.730(1)(c)2 is applicable, and the reason for that determination. ALJ Polites determined the two multiplier was appropriate based upon "the fact that the Plaintiff's average weekly hours had decreased whereas the remainder of the employer's workforce experienced an increase in hours". ALJ Polites accepted Stephens' argument that his decrease in hours could only have been a result of his work injury. We note the following testimony at the formal hearing:

> Q. Okay. As we sit here today with the condition of your right arm, could you go back and perform at the same physical capacity that you were performing at the time of your injury?
>
> A. No.
>
> Q. You are still doing the same job title?
>
> A. Yes.
>
> Q. Okay. And Mr. Kline confirmed I think, again, as he's already stated,

that you're not now earning the same average weekly wage as you were earning at the time of the injury.

A. Right.

Q. You would agree with that statement?

A. Yes.

Q. Your hourly rate of pay is the same rate or, actually, maybe a little greater?

A. Right.

Q. You're not getting the number of hours now?

A. No.

Q. Okay. At the time of the injury, were you getting overtime hours?

A. Yes.

Q. Okay. Was your overtime at the Wickliffe facility, at the Paducah facility, or both?

A. Mainly, Paducah.

Q. Okay. Since the injury, have you been working overtime at the Paducah facility?

A. None.

Q. Okay. To your knowledge, are others getting overtime at the Paducah facility?

A. Yes.

Q. And is overtime at the Paducah shop basically Saturday work?

> A. A lot of afternoons and weekends, yes.
>
> Q. Okay. So work in the afternoon after your normal shift plus working weekends as well?
>
> A. Right.
>
> Q. Okay. Are there others, to your knowledge, others that work at the Newpage facility like yourself that are getting overtime at the Paducah shop?
>
> A. It varies. It depends on who I have in Wickliffe. I mean we never have the same people, yes.
>
> Q. Okay, I understand. Now do you know of any reason, other than your work injury, as to why you would not be getting that overtime?
>
> A. No.
>
> Q. Okay. They've not told you – Nobody from Triangle has told you why you're not getting the overtime?
>
> A. No.

ALJ Polites also relied upon the testimony of both Stephens and Heath indicating his hours were reduced post injury while the hours of all other employees were increased. Heath's relevant testimony is as follows:

> Q. Mr. Heath, you gave a deposition a while back. I'm not going to bother you with all those questions again, but I do want to ask you some questions about Mr. Heath's [sic] current situation and number of hours he's worked –
>
> . . .

Q. Mr. Heath, at my request, did you go back and do a survey of the number of hours worked by the employees of Triangle Enterprises?

A. Yes. This document is obviously an internal document we use to mainly track our safety statistics. Obviously, that's not really what we're interested in here. But at Mr. Kline's request, what this document does show--and again, as I told Mr. Stephens' attorney--I'm looking at the row which is the second from the bottom on that bottom table where it says hours worked. And what these numbers show you is the total number of hours worked by all Triangle employees for those respective years, starting with '05 and this is actually updated through 2010.

Now I do want to state these hours do capture all hours. This is both all union craftsman, this is warehouse people, and this even includes salaried employee hours. So it's a grand total. And looking across those hours, you can see the drop in total hours worked starting with '08 and then dropping consecutively in '09 and 2010.

Q. Okay. Let me ask you to identify this document and we'll attach that to your testimony here today as Exhibit number 1 to your testimony.

ALJ JOINER: Do you want that marked as defendant's Exhibit 1?

MR. KLINE: Yes, uh-huh, please.

ALJ JOINER: And I take it you're offering that into evidence?

MR. KLINE: Yes.

MR. ROBERTS: I'm not going to object, Your Honor.

ALJ JOINER: All right. There's no objection, it's admitted.

Q. And this document also shows the average number in [sic] employees. Does that also include supervisors, clerical people, warehouse, and sheet metal workers?

A. Yes. That bottom row where it says average number of employees, that does capture all employees, all hourly, all salaried, and union craftsman as well.

Q. Okay.

A. And that is an average for the year. That's an OSHA statistic where I take the average number of employees per week. That's where I arrived at that number.

Q. And then the documents you took these figures from are kept in the usual course of business, I guess, --

A. Correct.

On cross-examination, Heath testified as follows:

Q. Mr. Heath, there are still employees getting overtime at Triangle, correct?

A. As far as I know, yes. Unfortunately, being safety director, I am not privy to a lot of the totals there, but I've got to assume that is correct.

Q. Okay. You've heard Mr. Stephens testify about his overtime before and after the injury.

A. Correct.

Q. Do you have any reason to dispute what he said about the hours that he's actually worked?

A. I have no reason to dispute the hours that Mr. Stephens is actually working.

Q. Okay. And from looking at the documents that you filed, his injury occurred in 2007, and if you take what the Judge was talking about for 2007, the total hours worked, which is the second from the bottom line, and divide by the average number of employees, for 2007 you have hours worked 517,815 for 274 employees. And if my math is correct, that's 1,889.83 hours.

A. I'll have to believe your math.

Q. Okay.

A. I can't do that one in my head.

Q. That's fine. 2008, if you utilize those numbers and did the division, it would be 2,016.06 hours per worker. So actually in 2008, the number of hours worked per worker would have increased if my math is correct?

A. If your math, that's correct.

Q. Okay. In 2009, it looks like -- Well first off, between 2007 and 2008, there was an increase in the number of employees that was working.

A. Correct.

Q. Okay. Between 2008 and 2009, there was a decrease in the number of employees working.

A. Correct.

Q. Okay. And for 2009, if you take the average hours worked and divide by the number of employees, my math comes to 1,741.11 hours per employee, which is slightly less than what 2007 was.

A. Okay.

Q. And if my math is correct, that would be accurate?

A. Correct.

Q. Okay. Then in 2010, there's been a further reduction in the number of employees.

A. Correct.

Q. And if you took the number for 2010 as far as hours worked and subtracted the number of employees, the average work per employee is 1,977.17 hours.

A. If your math is correct, I'll agree to that.

Q. Okay. So, again, 2010 there would be more hours worked per employee than was at the time of Mr. Stephens' injury or the year of his injury?

A. Correct.

Q. Okay. So just looking at the average number of employees and the hours worked to get an average per employee, there would be no reason why Mr. Stephens, from looking at these numbers, no reason why Mr. Stephens' number of hours should have been reduced, at least in the year of 2008 and in the year of 2010?

A. That is correct.

> Q. And only slightly reduced, if at all reduced, for the year of 2009?
>
> A. Right. But the only kicker with that, and this is information I don't know as far as those hours worked, and again, I can't give you the breakdown on what crafts those were.
>
> Q. I understand. We've just got to deal with the numbers we've got. And you heard Mr. Stephens testify here today. Is there anything Mr. Stephens testified about that you disagree with?
>
> A. There's nothing that I disagree with, no.

It is well established a claimant in a workers' compensation proceeding bears the burden of proving each of the essential elements of his cause of action, including the application of statutory multipliers. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

The evidence relied upon by ALJ Polites, in his order on remand, does not constitute substantial evidence, nor is it sufficient to provide a basis for any reasonable inference regarding the relationship between Stephens' disability and the cessation of his employment at the same

or greater wage. Therefore, we find it necessary to reverse the ALJ's finding.

Stephens' testimony is mere speculation regarding the reason he works fewer hours post-injury. As noted by Triangle, Stephens acknowledged he did not know the reason he was working fewer hours. He acknowledged no one told him his disability played a role in the decreased number of hours he worked post-injury. Further, he agreed the declining state of the economy was a potential cause for the decrease in the hours he worked.

ALJ Polites based the application of the two multiplier primarily on evidence concerning a decrease in the hours Stephens worked post-injury compared to the hours worked by Triangle's other employees. Mere calculation of the average number of hours worked by all classifications of employees at Triangle is not specific enough to constitute substantial evidence regarding the reason for the change in the number of hours Stephens worked. The only other basis stated by the ALJ for his determination is that Triangle offered no other reason why Stephens' hours decreased. Again, we stress Triangle did not have the burden to provide an explanation for the decrease in the hours worked by Stephens. This is especially true in light

of Stephen's failure to introduce substantial evidence on the issue.

This matter has now been before an ALJ on three occasions with no substantial evidence cited by any ALJ supporting a conclusion the cessation of employment at the same or greater wage was the result of the disabling injury. Upon careful review of the record, we are unable to ascertain any substantial evidence to warrant application of the two multiplier at this time. Although we find the ALJ's determination of the applicability of KRS 342.730(1)(c)2 at present is not supported by substantial evidence, this is not to say Stephens will not qualify for application of the multiplier at some time in the future during the 425 week period of his permanent partial disability award.

Accordingly, the order on remand rendered August 17, 2012, by Hon. Thomas G. Polites, Administrative Law Judge, and the September 19, 2012 order overruling Triangle's petition for reconsideration are **REVERSED and REMANDED** for entry of an amended award providing Stephens is not presently entitled to enhancement of his benefits by the two multiplier.

This Opinion is being withdrawn and re-entered due to ALJ William J. Rudloff being incorrectly named in the heading.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, DISSENTS WITHOUT SEPARATE OPINION.

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