

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 7, 2014

CLAIM NO. 201171798

U.S. SMOKELESS TOBACCO CO./
ALTRIA, INC.

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

HERALD CLINE
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

* * * * *

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

STIVERS, Member. U.S. Smokeless Tobacco Co./Altria, Inc. ("U.S. Smokeless Tobacco") appeals from the April 28, 2014, Order and the June 19, 2014, Order ruling on U.S. Smokeless Tobacco's petition for reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the April 28, 2014, Order, the ALJ awarded Herald Cline ("Cline")

temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced pursuant to KRS 342.730(1)(c)1, and medical benefits.

On appeal, U.S. Smokeless Tobacco asserts the ALJ's award of the three multiplier is erroneous in light of the evidence in the record.

The Form 101 alleges Cline sustained an injury to his right wrist and hand, "near amputation," on October 12, 2011, in the following manner: "Plaintiff was cleaning [sic] product chute when a pipe fell on his right wrist and hand."

The Notice of Claim Denial indicates U.S. Smokeless Tobacco accepted the claim in part as compensable, but disputed the amount of compensation owed to Cline. Under the designation "other reasons for denial" is the following: "There is an issue regarding the extent and duration of disability. The defendant/employer reserves the right to modify its Notice of Claim Denial and add any additional defenses during the course of litigation."

Cline was deposed on November 11, 2013, during which he described his job title and duties at U.S. Smokeless Tobacco as follows:

Q: Okay. What is your job title with U.S. Smokeless Tobacco?

A: A Mechanic, Level 5.

Q: And what does this facility you work at do?

A: Processes green leaf, takes tobacco from the farmer and packs it for storage in one plant. And the second plant I work in they start cutting it and flavoring it for the finished product.

Q: Okay. What does [sic] your job duties entail over there?

A: Preventative maintenance and repair as needed and maintain and utilities of the plants and boilers and air compressor and such.

Q: So you're- you said preventative maintenance and maintaining these machines. I guess does that include repairs and-

A: Yes, yes. I don't really know how to explain that.

Q: Okay.

A: If a machine breaks during a run, it's our responsibility to repair it at that time and return it to service.

Q: Okay. Anything else you do over there?

A: (No response.)

Q: Is that about it?

A: Well, I monitor ADT systems, any problems with that system.

Q: What is the ADT system?

A: It's a security system.

Q: Okay.

A: You know, I'm kind of a middle man in between their techs and our problems.

Q: Tell me a little bit more about the machines that you work on and help keep running and stuff?

A: In the one plant it's more- well, we've got some mills that tear the tobacco up and separates the stem from the leaf, and a lot of belt conveyors and two driers. And then a hydraulic press to press it all in a hogshead. On the other plant it's- you have machines that take it out of the head and shred it. Of course, add flavor and some other things to it. And then we cut it into a smaller form; well, to it's [sic] final form, and then ship it. We've got bins and silos, and most of it's [sic] just belt conveyors and stuff to move it.

Q: All right. Thank you. Tell me about the physical demands of this job? How many hour shifts are you working?

A: Normally eight, depending on who's on vacation or what breaks, you know, but we shoot for eight.

Q: Okay. Of that eight-hour shift, how much of that time do you spend on your feet?

A: I'd say 70 percent.

Q: Okay. What about- how much do you have to lift on average over there?

A: Fifty pounds or so. It's seldom- if we need more than that, we get multiple people.

Q: Okay. How often do you think you'd have to lift, say, 50 pounds?

A: Probably daily.

Q: Like a couple of times a day or? [sic]

A: Yeah, a couple of times a day would be? [sic]

Q: Okay. Do you have to do any pushing or pulling over there?

A: Yeah. Just pushing and pulling wrenches.

Q: Okay. So not anything too terribly heavy you're pushing or pulling?

A: No, no, no.

Cline testified that he was earning approximately \$20.00 an hour at the time of his injury. At the time of his deposition, he was earning approximately \$21.00 an hour.

Cline returned to a modified job which is different than the job he performed at the time of his injury. He testified as follows:

Q: Okay. How is this job modified?

A: Well, I- under my doctor's restrictions I can't climb ladders or handle anything sharp. Which we have a couple of machines that you replace blades in, and I just don't do that any more.

Q: Is that the only way your job duties have changed since prior to the accident?

A: Well, everything else I have to do I just have to figure out a new way of doing it, so I'm a little slower than I once was.

Cline does not take prescription medication in order to perform his job. Other than for reasons related to the economy, Cline does not believe his job is in jeopardy, and believes he will be able to perform his job for the indefinite future.

Cline described the current condition of his wrist as follows:

Q: Okay. Are you still having pain in your right hand and wrist?

A: Just my wrist. My hand, I don't have much feeling at all.

Q: Okay. Can you describe the pain you are having for me in your wrist?

A: It's not very often, but it's just achy, you know, where I can- I don't know what causes it. I mean it is so rare, I'm doing something that causes it I'm sure, but.

Q: Okay. So you are just occasionally having some achy pain?

A: Yeah.

Q: When does it bother you most?

A: Oh, seems like in the evening.

Q: Okay. Does it go down to any other body parts?

A: No.

Q: Can you describe for the Judge that's going to be reading this transcript the physical condition your wrist is in?

A: Well, my wrist has a real limited range of motion.

Q: Okay.

A: And my fingers are the same. I can close it about enough to hold a broom handle maybe. And I can't fully extend my fingers flat either.

Q: Okay.

A: You know, the whole hand, everything about it is limited in its mobility.

Q: Do you think, say, over the past year your range of motion has been getting any better, or has it been pretty static?

A: Uh, it might have got [sic] a little better, but not a terrible bunch.

Q: Okay. I mean, is it a noticeable difference or?

A: Um, not really. I mean, my fingers and wrist, they're all still- they might- now, not really any.

Q: Okay. How about the feeling in your hand? How is that now?

A: It's just tingling all the time. You know, it's just- I can tell something is there sometimes, but I- there's no definition to the feeling, you know.

Q: Okay. How about the feeling in each finger? Let's start with the pinkie, how is that feeling?

A: It doesn't have a lot at all. The ring finger has got a little more. The index is the only one- it's- I can really tell something is there, but I can't- like I say, it's no definition in it.

Cline occasionally wears a brace on his wrist at work. He believes the most he can lift with his right hand is approximately thirty to forty pounds.

Cline testified at the February 25, 2014, hearing that he is right-hand dominant. He confirmed his work history prior to working for U.S. Smokeless Tobacco includes maintenance and labor jobs. At the time of his injury, Cline was working as a level five mechanic, was earning approximately \$21.00 or \$22.00 per hour, and worked around forty-five hours per week. He is currently earning wages greater than his pre-injury wages.

Cline testified regarding the type of work he was performing at the time of the injury and the type of work he is currently performing at U.S. Smokeless Tobacco:

Q: Our contention with the judge is that you're unable to return to the type of work performed at the time of the injury, which is a quote from the statutes. So what I'd like you to do is tell the judge what you used to do before this injury, what your job

duties were, and then how they're different at this point. So you want to start with what you were doing before the injury.

A: Well it's kind of all inclusive what I done [sic] before, you know. Lifting, climbing, I operated boilers, mechanic on the machines that went down during the process, and PMS on the machines, which it's vast the different things I done [sic]. And now I can't climb ladders, I'm not supposed to, but whatever the doctor said.

The February 11, 2014, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; average weekly wage; TTD [handwritten: "rate"]. Under "other," the following is handwritten: "RTW wages; [] not claiming any additional periods of TTD beyond the period already paid." Stipulations include a work-related injury occurred on October 12, 2011.

Regarding extent and duration, the ALJ set forth the following analysis, findings of fact, and conclusions of law in the April 28, 2014, Order:

The more contested issue is the extent and duration of plaintiff's impairment. Plaintiff suffered a horrific injury to his hand, for which the impairment ratings of record are quite significant, ranging from 37% to 41%. Although these impairment ratings are rather substantial, the more

contested issue is whether plaintiff is entitled to application of the 3x multiplier in KRS 342.730(1)(c)1. He does not retain be [sic] physical ability to return to the kind of work he was performing at the time of his injury. However, plaintiff has returned to work for the defendant employer at an average weekly wage greater than his pre-injury average weekly wage. As such, the defendant employer maintains plaintiff is not entitled to application of the 3x multiplier.

As a starting point the Administrative Law Judge first finds the 41% impairment rating assigned by Dr. Thayer to be most accurate. Given the near amputation of plaintiff's hand and subsequent surgeries and current limitations, Dr. Thayer's impairment rating is found to most accurately represent plaintiff's condition.

Moreover, the Administrative Law Judge is persuaded plaintiff has carried his burden of proving it is not likely he will be able to continue earning the same or greater wage for the indefinite future. In reaching this conclusion, the defendant's efforts to accommodate plaintiff are obviously commendable, and the employer's representative testified at the hearing that plaintiff meets expectations and has no plans to terminate plaintiff. However, Mr. Hicks was careful to testify that, *from his point of view only*, plaintiff has no reason to worry about his job. Given that plaintiff is working, essentially, one-handed and that he is dependent upon his employer's understanding and accommodations to continue in his job, the Administrative Law Judge is simply persuaded it is not

likely plaintiff will be able to continue such employment at an equal or greater average weekly wage for the indefinite future. Accordingly, plaintiff is entitled to application of the 3x multiplier. Fawbush v. Gwinn, Ky., 107 S.W.3d 5 (2003). His award of benefits is therefore calculated as follows:

$\$1,102.67 \times \frac{2}{3} = \$735.11 \rightarrow$
 $\$541.47(\text{maximum 2011 PPD rate}) \times .41 \times$
 $1.7 \times 3 = \$1,132.21 \rightarrow \721.97 (maximum
2011 PPD rate with application of 3x
multiplier) per week.

In its petition for reconsideration, U.S. Smokeless Tobacco requested additional findings in support of the ALJ's conclusion Cline was not likely to continue to earn the same or greater wages for the foreseeable future.

In the June 19, 2014, Order, the ALJ failed to provide any additional findings and summarily overruled the petition for reconsideration.

Because the ALJ did not fully address the third prong of the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), we vacate the ALJ's award of PPD benefits enhanced by the three multiplier and remand for additional findings.

Pursuant to Fawbush v. Gwinn, supra, an ALJ must determine which multiplier under KRS 342.730(1)(c) is "more

appropriate on the facts" when awarding PPD 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, the ALJ must decide if the injured worker is 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 for the indefinite future, the three multiplier under KRS 342.730(1)(c)1 applies.

In Fawbush, the Supreme Court articulated several factors an ALJ should 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. As articulated by the Court in Adkins, supra, it is not enough for the ALJ to

determine if an injured employee is able to continue in his or her current job. 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.

Id. at 390.

In the case *sub judice*, the ALJ determined both the two and three multipliers are potentially applicable. The ALJ determined Cline has returned to employment at U.S. Smokeless Tobacco at greater wages, thus triggering the potential applicability of the two multiplier. See KRS 342.730(1)(c)2. The ALJ also determined the three multiplier was potentially applicable by finding Cline "does not retain be [sic] physical ability to return to the kind of work he was performing at the time of his injury." See KRS 342.730(1)(c)1. It is important to note that U.S. Smokeless Tobacco did not request additional findings on the potential applicability of the two and three multipliers in its petition for reconsideration. Further, on appeal it does not contest the applicability of KRS 342.730(1)(c)1 and (1)(c)2.

As the ALJ determined both the two and three multipliers are potentially applicable, he was required to

apply the third prong of the Fawbush, supra, analysis and determine if Cline 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 performing this analysis, it is clear from the language in the April 28, 2014, Order that the ALJ only considered Cline's ability to continue in his current job, finding Cline is working one-handed and "dependent upon his employer's understanding and accommodations to continue in his job." However, as articulated by the Court of Appeals in Adkins v. Pike County Bd. of Educ., supra, it is not enough for the ALJ to determine whether an injured employee is able to continue in his or her current job. There, the Court of Appeals explained:

If every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. 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.

Therefore, we remand this case to the ALJ for a finding of fact as to Adkins' ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future.

Id. at 390.

In its petition for reconsideration, U.S. Smokeless Tobacco requested additional findings concerning this issue, seeking "a specific finding of fact regarding the evidence upon which the ALJ relied in finding that the plaintiff will not continue to earn the same or greater wages for the foreseeable future." U.S. Smokeless Tobacco is entitled to additional findings along with the requisite analysis regarding the appropriate multiplier as discussed herein.

Accordingly, the ALJ's award of PPD benefits enhanced by the three multiplier is **VACATED** and this claim is **REMANDED** to the ALJ for additional findings regarding Cline's ability to earn the same or greater wages for the indefinite future and entry of an amended opinion and award consistent with the views set forth herein.

ALL CONCUR.

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