Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 5, 2013

CLAIM NO. 200776459

WHITLEY COUNTY FISCAL COURT PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

JERRY NOE
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Petitioner, Whitley County Fiscal Court ("Whitley County"), appeals from the May 13, 2013 Opinion, Award and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), awarding Jerry Noe ("Noe"), permanent partial disability benefits ("PPD") and medical benefits. Whitley County also appeals from the

June 13, 2013 Order denying its petition for reconsideration. On appeal, Whitley County argues the ALJ erred in awarding income benefits for a thoracic spine injury and in enhancing the income benefit. We affirm.

Noe was injured on August 7, 2007, during his employment as a deputy with the Whitley County Sheriff's Department. While attempting to arrest a suspect, he was pushed to the ground and suffered injuries to his neck and shoulder. He sought medical attention the following day and was referred to Dr. Ronald Dubin, an orthopedist who primarily managed Noe's care over the following four years.

An MRI revealed a SLAP lesion and peri-labrial cyst from a SLAP tear. Dr. Dubin recommended physical therapy with the possibility for later arthroscopic surgery. The physical therapy brought Noe substantial relief, and he very briefly returned to work. However, he had another altercation with a prisoner while serving as bailiff in the Whitley District Court and his condition worsened significantly. Noe returned to Dr. Dubin shortly after this altercation, on October 15, 2007. Dr. Dubin's notes reflect Noe complained of pain radiating from his upper thoracic spine. A second MRI revealed evidence of disc desiccation throughout the thoracic spine.

Noe continued treatment with Dr. Dubin for the next four years for pain in his shoulder, neck and back. He had returned to work as a deputy sheriff for several years after the 2007 injury, though he never felt physically capable of fully performing his duties and often relied on others to perform more physical tasks. Eventually, he retired. In a July 18, 2012 report, Dr. Dubin's final impression was: cervical spine injury, thoracic spine injury, SLAP tear left shoulder, and chronic pain and weakness. Referencing the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition, he assigned a 14% whole body impairment, 5% of which was based on the injury to the thoracic spine.

The ALJ ultimately found Noe suffered a work-related injury to "his neck and shoulder." In making this conclusion, the ALJ stated her reliance on Dr. Dubin's opinion and Noe's testimony. The ALJ awarded PPD benefits based upon the 14% impairment rating, assessed by Dr. Dubin, enhanced by the three multiplier pursuant to KRS 342.730(1)(c)(1), and medical benefits.

On appeal, Whitley County first argues the ALJ should not have included impairment for the thoracic spine in determining Noe's award of PPD benefits because she made

no specific finding he injured the thoracic spine. Indeed, the relevant portion of the ALJ's findings of fact states only that Noe injured his "neck and shoulder." However, the ALJ's summary of Dr. Dubin's treatment records contains repeated reference to Noe's problems in his thoracic spine, as well to the MRI performed on his thoracic spine. The ALJ's summary also notes Dr. Dubin's final impression included a thoracic spine injury. Further, Noe testified he experienced problems with his back following the 2007 incident.

The courts have expressed a preference that fact-finders in each case make specific findings rather than expect reviewing courts to hold that the necessary findings are implicit in the ultimate finding. *See* Chemetron Corp. v. McKinley, 574 S.W.2d 332 (Ky. App. 1978). Even though the fact-finder may be remiss in not making a specific finding, where there is a clear implicit finding, the fact-finder's determination can be affirmed. *See* Brown v. Gregory, 398 S.W.2d 710 (Ky. 1966). The facts here differ from the situation in Shields v. Pittsburg & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982) where the parties were not apprised of the basis for the ALJ's decision. Despite the ALJ's failure to specifically list a thoracic spine injury in her findings of fact, it is

obvious and clear she fully adopted Dr. Dubin's report. Dr. Dubin believed Noe suffered a work-related injury to his thoracic spine, and his 14% whole body impairment rating included 5% for injury to the thoracic spine. By relying on the 14% impairment rating assessed by Dr. Dubin, the ALJ implicitly found Noe injured his thoracic spine.

Whitley County next argues the ALJ erred in determining Noe was entitled to enhanced benefits pursuant to KRS 342.730(1)(c)(1). Because the ALJ determined the three multiplier was applicable, she was not required to proceed to the third prong of the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003); that is, a determination as to whether Noe can continue to earn his pre-injury level of wages for the foreseeable future. Whitley County argues there is no evidence to support the determination that the two multiplier is inapplicable and, therefore, the ALJ should have proceeded to the third prong of the Fawbush analysis.

Regarding application of the two multiplier, the ALJ found:

> The parties previously stipulated that [Noe's] pre-injury average weekly wage was $412.50. While the record is unclear concerning post wages upon return to work, [Noe] testified that he did not work as many hours. Thus, based on the prior stipulations and

> Plaintiff's testimony the ALJ concludes that the two-multiplier is not applicable.

Whitley County argues the evidence does not support the finding Noe returned to work at reduced hours following the 2007 injury. Our review of the record does not reveal any testimony by Noe to this effect. This factual discrepancy was raised by Whitley County in its petition for reconsideration. It argued the two multiplier is, in fact, applicable and requested the ALJ to address the final prong of the Fawbush analysis. In the subsequent Order on Reconsideration, the ALJ explained:

> The ALJ determined on page 16 that the 2 multiplier is not applicable. However, even if the 2 multiplier had been found applicable, the outcome of a Fawbush analysis would be the same since the ALJ has found [Noe] is no longer able to be employed in his former line of work because of his work related injury.

Referring back to the original Opinion and Order, the ALJ made a specific finding Noe "is unable to return to his former line of work because of his work related injury making the three multiplier applicable." In making this determination, she relied on Noe's testimony he was not able to fully perform his regular duties and relied on others to perform more physically demanding tasks. She

also relied on Dr. Dubin's opinion Noe could not perform all duties of a deputy sheriff.

On appeal, Whitley County argues there is insufficient evidence to support the conclusion Noe could not continue his pre-injury level of wages for the foreseeable future. We disagree. The circumstances of this claim are somewhat unique because, by the time the claim was initiated, Noe had already retired from the Whitley County Sheriff's Office. The ALJ's brief analysis suffices under these circumstances because she found credible Noe's testimony he retired because he felt physically incapable of performing the job.

He testified, at both the deposition and at the final hearing, he returned to work for three years after the 2007 incident, but never felt fully capable of performing his duties. He asked other deputies to cover calls which he anticipated would involve physical confrontation. He continued to be treated by Dr. Dubin. Due to unrelated circumstances involving the Whitley County Sheriff, Noe did not feel he could retire. However, when a new sheriff was elected in 2011, Noe felt he had permission to retire. He specifically stated he chose to retire because he felt too physically constrained by his injury to adequately and safely perform the job. Dr. Dubin also

recommended Noe retire due to his physical limitations. This testimony constitutes the requisite substantial evidence to support the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In sum, the ALJ erred in concluding the two multiplier found at KRS 342.730(1)(c)(2) was not applicable. There was no testimony to support the finding Noe had returned to work at reduced hours. However, the ALJ corrected this error in her Order on Reconsideration, in which she determined the three multiplier is more appropriate, even if the two multiplier is applicable. Thus, when considering the ALJ's findings in both the original Order and the Order on Reconsideration, a full Fawbush analysis was conducted. Further, the ALJ's ultimate conclusion is supported by substantial evidence on the record.

Accordingly, the Opinion and Order dated May 13, 2013 and the Order on Reconsideration dated June 13, 2013 are hereby **AFFIRMED**.

ALL CONCUR.

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