# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: July 1, 2022**

CLAIM NO. 201785945

AXELON PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY , ADMINISTRATIVE LAW JUDGE**

KELLY PORTER,
DR. JACQUEMIN/ORTHOCINCY, and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**VACATING & REMANDING**

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

**MILLER, Member.** Axelon appeals from the January 6, 2022 Remand Opinion and Award and the February 18, 2022 Order on Cross Petitions for Reconsideration, rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). This is the second appeal of this claim to the Board.

In his initial Opinion, rendered April 21, 2021, the ALJ determined Kelly Porter ("Porter") sustained a work-related low back injury on March 27, 2017, and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. The ALJ found Porter has a 20% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment Rating ("AMA Guides") due to the March 27, 2017 work injury. The ALJ also found Porter retains the ability to return to the same type of work. The ALJ determined Porter's pre-injury average weekly wage ("AWW") to be $580.80. The ALJ stated:

> 25. If an hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees. KRS 342.140(1)(f).
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> 26. The Pre-Injury wage records submitted indicate that the Plaintiff earned $14.52 per hour for a typical 40-hour week. In the absence of a full quarter of wages of any similarly situated employee, the ALJ finds that the evidence yields an average weekly wage of $580.80.

It should be noted Porter commenced work in January 2017 and had not worked a full quarter at the time of his injury. The ALJ further determined Axelon's argument concerning medical pre-authorization inapplicable since 803 KAR 25:096 §11 applies post-award only, and because medical expenses are not compensable until an award is entered.

Both parties filed Petitions for Reconsideration. Significantly, the pre-injury AWW was not at issue. The ALJ rendered an Order and Amended Opinion and Award on May 13, 2021. This Amended Opinion included additional findings

regarding the inapplicability of the three-multiplier and the determination Porter is not permanently totally disabled.

Both parties filed Petitions for Reconsideration, once again with no mention of the ALJ's AWW finding. On June 2, 2021, the ALJ rendered an Order and Second Amended Opinion and Award and included additional findings regarding Porter's justifiable reasons for not designating Dr. John Jacquemin as his Form 113 physician and finding the remedy within the ALJ's discretion did not contemplate a forfeiture of benefits.

Axelon appealed and Porter cross-appealed from the April 21, 2021 Opinion and Award, the May 13, 2021 Amended Opinion and Award, and the June 2, 2021 Second Amended Opinion and Award. There was no appeal from the ALJ's finding regarding the pre-injury AWW. The Board affirmed, holding substantial evidence supported the ALJ's findings, but remanded the claim for the ALJ to analyze Porter's entitlement to the two-multiplier.

The Board specifically stated:

> The ALJ determined Porter's pre-injury average weekly wage was $580.80, a finding not challenged on appeal. On remand, the ALJ is directed to determine whether the two-multiplier is applicable. Specifically, the ALJ is directed to determine whether there was a "return" to work and whether Porter returned to work at a weekly wage equal to or greater than the pre-injury average weekly wage. We direct no particular result, and the ALJ may make any determination based upon the evidence.

In his January 6, 2022 Remand Opinion and Award, the ALJ found Porter was entitled to the two-multiplier contained in KRS 342.730(1)(c)2. The ALJ relied on Porter's testimony that he returned to light duty from March 31, 2017

through July 11, 2017, performing the same duties including cleaning, washing, and sanding parts, and that he earned the same hourly wage before voluntarily quitting his position. For these reasons, the ALJ awarded the two-multiplier and further stated ceasing work voluntarily did not disqualify Porter from receiving the two-multiplier. There was no mention of the post-injury wage records that were filed as evidence.

Axelon filed a Petition for Reconsideration arguing Porter did not return to work at the same or greater wages and requested additional findings of fact on the issue of Porter's post-injury AWW. Porter filed a Response and a Petition for Reconsideration arguing he met his burden of proving he was entitled to the two-multiplier, but he requested the ALJ reconsider his methodology in arriving at the $580.80 AWW. Porter believed the employer must present evidence of Porter's wage and any similarly situated employees so the requirement of KRS 342.140(1)(d) can be met.

On February 18, 2022, the ALJ issued an Order overruling Porter's Petition for Reconsideration to correct the AWW methodology; however, the ALJ made additional factual findings regarding the post-injury AWW and the application of the two-multiplier. The ALJ found in relevant part:

> The ALJ is compelled to find that when viewing the wages in the light most favorable to the Plaintiff, he returned to the same rate of pay for 16 weeks and thus returned at the same or greater wages. The Plaintiff is therefore entitled to the "2" multiplier per KRS 342.730(1)(c)2.

Axelon now appeals, arguing the ALJ's finding of a return to work at equal or greater wages was not supported by substantial evidence. Axelon maintains

it is the injured worker's pre and post-injury AWW that must be compared, not the wage rate at those times. The sole issue on appeal is whether the ALJ erred in awarding the two-multiplier pursuant to KRS 342.730(1)(c)2. For the foregoing reasons, we vacate and remand this claim to the ALJ to make additional findings.

**BACKGROUND**

Porter began working for Axelon in January 2017. He was assigned to GE Power working as a production technician/laborer. He was 58 years old at the time of his injury.

Porter testified by deposition and at the final hearing on February 23, 2021. On March 27, 2017, Porter was holding a 20-pound vibrating tool and was twisting it side to side to clean a large part sitting on the floor when he experienced pain on the right side of his low back. He initially treated at Saint Elizabeth Business Health. He was then referred to OrthoCincy. There, Porter treated with Dr. Richard Hoblitzell. Dr. Hoblitzell referred Porter to Dr. Steven Wunder. Porter last treated with Dr. Hoblitzell on December 26, 2017, when he was placed at maximum medical improvement ("MMI") and released from his care despite ongoing symptoms and pain. Neither Dr. Hoblitzell nor Dr. Wunder recommended surgery.

Porter continued to experience symptoms and sought additional treatment on his own. He treated with Dr. Pragya Gupta from 2018 to 2019 and then sought treatment with Dr. Jacquemin, who performed a lumbar fusion on April 16, 2019. After the fusion surgery, Dr. Jacquemin placed Porter at MMI and released him from treatment in September 2019. AMA impairment ratings were assessed for the fusion surgery. Since the only issue on appeal concerns the

application of KRS 342.730(1)(c)2, we will not summarize the medical evidence in further detail.

Porter received TTD benefits for three days, March 28 through March 30, 2017. He then returned to light duty for Axelon from March 31, 2017 until July 11, 2017, earning the same rate of pay, when he voluntarily quit due to his back pain. Porter has not returned to any work since July 11, 2017.

In his January 6, 2022 Remand Opinion and Award, the ALJ found Porter was entitled to the two-multiplier contained in KRS 342.710(1)(c)2, stating as follows:

> 11. Having found that the Plaintiff's pre-injury average weekly wage was $580.80, the ALJ also finds per the testimony of the Plaintiff at his deposition that he returned to work on light duty from March 31, 2017, through July 11, 2017, performing the same duties including cleaning, washing, and sanding parts and that he earned the same hourly wage before voluntarily quitting the position.
>
> 12. For the injured employee who is capable of returning to the same type of work at the same or greater wage, and does so, such an employee is assured a double benefit during any period that he is not employed for whatever reason, and thus, he is compensated at an enhanced rate for having attempted to perform his previous work even if the attempt later proved to be unsuccessful. AK Steel Corp. v. Childers, 167 S.W.3d 672, 676 (Ky. App. 2005).
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> 13. KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another. Livingood v. Transfreight LLC, 467 SW3d 249.

> 14. The ALJ finds, per the Plaintiff's credible testimony, that he returned to work at the same or greater wage and that he ceased that work voluntarily and for reasons that do not disqualify him from the "2" multiplier per KRS 342.730(1)(c)1. The Plaintiff shall be entitled to the "two multiplier" per KRS 342.730(1)(c)2, for periods of time in which he failed to earn the same or greater wages.

After both parties filed Petitions for Reconsideration, the ALJ issued an Order on Petition for Reconsideration making the following additional findings of fact *verbatim*:

> 1. The Plaintiff credibly testified that he returned to work on light duty on March 31, 2017, and that he returned earning the same wages. He continued in that capacity until July 17, 2017.[1]
>
> 2. The ALJ finds that this roughly 16-week period constitutes a return to work.
>
> 3. The ALJ finds that the Plaintiff also returned at the same rate of pay and that the duration of the return prevents the calculation contemplated per KRS 342.140.
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> 4. The ALJ is compelled to find that when viewing the wages in the light most favorable to the Plaintiff, he returned to the same rate of pay for 16 weeks and thus returned at the same or greater wages. The Plaintiff is therefore entitled to the "2" multiplier per KRS 342.730(1)(c)2.

## ANALYSIS

The sole issue on appeal is whether the ALJ erred in finding Porter returned to work at an equal or greater wage; and thus, was entitled to the two-multiplier contained in KRS 342.730(1)(c)2.

[1] Porter testified, and the parties stipulated, that he returned to work until July 11, 2017. The benefit review conference order and the ALJ's opinions all correctly state as such, so the Board presumes the July 17, 2017 date contained in the ALJ's Order on Reconsideration is a clerical error.

KRS 342.730(1)(c)2 states:

> 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. This provision shall not be construed so as to extend the duration of payments.

To qualify for the two-multiplier, two separate findings are required. First, Porter must have returned to work, an issue which Axelon has conceded. There must be a cessation of work after the work injury followed by a return to work. Helton v. Rockhampton Energy, LLC, 2021-SC-0248-WC, S.W.3d (Ky. June 16, 2022). TTD benefits were paid from March 28, 2017 through March 30, 2017. In its brief, Axelon stated, as stipulated by the parties, Porter returned to work on April 1, 2017 and continued to work through July 11, 2017, a period covering 16 weeks.

The second necessary finding is whether Porter returned at "a weekly wage equal to or greater than the average weekly wage at the time of injury." KRS 342.140 sets forth the method for determining the AWW. It states in relevant part:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> …

> (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;
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> (e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation; and
>
> (f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees.

In his original Opinion, Award, and Order rendered on April 21, 2021, the ALJ noted the absence of a full quarter of pre-injury wage records or records regarding similarly situated employees and found Porter made $14.52 per hour for a typical 40-hour week. The ALJ determined Porter's pre-injury AWW was $580.80. This finding was not appealed by either party at the time of the first appeal to this Board and is, therefore, the law of the case. Brooks v. Lexington-Fayette Urban County Housing Authority, 244 S.W. 3d 747, 751 (Ky. App. 2007).

Since the cessation and return to work is not at issue, the final component is whether Porter's post-injury weekly wage was equal to or greater than

$580.80. In Ball v. Big Elk Creek Coal Co., 25 S.W.3d 115 (Ky. 2000), the Kentucky Supreme Court interpreted a previous version of KRS 342.730(1)(c)2 that contained the same operative language as the current version. Both versions of KRS 342.730(1)(c)2 provide: "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 Ball Court recognized the General Assembly enacted KRS 342.140 as a method to determine a worker's earnings by computation of the AWW. In Garcia v. Cent. Kentucky Processing, Inc., No. 2015–SC–000382–WC, 2016 WL 2605564, at *2 (Ky. May 5, 2016), the claimant argued the Board erred in relying on Ball in calculating the post-injury wage utilizing KRS 342.140 because KRS 342.730(1)(c) was amended in 2000 and Ball interpreted the pre-amended version of KRS 342.730(1)(c). The Kentucky Supreme Court held Ball is still controlling, and KRS 342.140 is the proper statute to determine a worker's post-injury wages under KRS 342.730(1)(c)2. Id.

An injured worker has the burden of proving every element of a claim for income benefits, including the applicable AWW. Commonwealth of Kentucky, Uninsured Employers' Fund v. Rogers, 396 S.W.3d 292, 295 (Ky. 2012); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Porter had the burden of proving each of the essential elements of his claim. Because he was successful in that burden, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In the present case, the ALJ was unable to calculate Porter's pre-injury AWW pursuant to KRS 342.140(1)(d) as there were not sufficient weeks to show a full quarter of wages. However, the same cannot be said for his post-injury wages. Axelon submitted post-injury wage records. Because Porter was an hourly employee, his post-injury weekly wage must be calculated pursuant to KRS 342.140(d), if there are sufficient wages earned to show a full quarter of earnings. Axelon filed earning statements, which include gross and net pay. It would appear a full 13-week period of wages has been filed as evidence, but this is a finding and calculation for the ALJ to make.

In his Remand Opinion, the ALJ did not discuss this specific wage evidence; rather, he solely relied on claimant's testimony that he returned to work at the same wage. The ALJ specifically found, per Porter's credible testimony, that he returned to work at the same or greater wage and that he ceased work voluntarily and for reasons that do not disqualify him from the two-multiplier per KRS 342.730(1)(c)2. The ALJ concluded Porter shall be entitled to the two-multiplier for periods of time he failed to earn the same or greater wage. In the Order on Reconsideration the ALJ found there was a return to work for roughly 16 weeks but again relied on the Plaintiff's testimony that he returned earning the same wages. The ALJ found that Porter returned at the same rate of pay and the duration of the return prevented the calculation based on KRS 342.140.

An ALJ must provide findings sufficient to inform the parties of the basis for his decision to allow for meaningful review. 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); Big Sandy Community Action Programs v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

While the AWW is a finding of fact which must be decided on a case-by-case basis, it must be calculated pursuant to KRS 342.140. *See* Huff v. Smith Trucking, 6 S.W.3d 819, 822 (Ky. 1999); Ball, supra, at 117-118. Here, the ALJ failed to explain why the duration of the return prevented the calculation contemplated per KRS 342.140(d). Whittaker v. Robinson, 981 S.W. 2d 118 (Ky. 1998). Particularly, the ALJ must address the post-injury wage records filed into evidence and how they are to be utilized in rendering his award. The wage records were not contested and cannot simply be ignored.

The Board **VACATES** the award of the two-multiplier in the January 6, 2022 Remand Opinion and Award and the February 18, 2022 Order on Cross Petitions for Reconsideration. This claim is **REMANDED** to the ALJ with directions to calculate the post-injury wages utilizing all evidence of record, and thereafter, explain his determination and reasoning.

ALL CONCUR.

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