Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 11, 2021

CLAIM NO. 201800941 & 201701441

JOHN MICHAEL BROWN PETITIONER

VS. **APPEAL FROM HON. TONYA M. CLEMONS, ADMINISTRATIVE LAW JUDGE**

TYSON FOODS, INC. AND
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

TYSON FOODS, INC. PETITIONER

VS.

JOHN MICHAEL BROWN AND
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**AFFIRMING IN PART,
REVERSING IN PART, VACATING IN PART & REMANDING**

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

BORDERS, Member. John Michael Brown ("Brown") and Tyson Foods, Inc. ("Tyson") appeal from the December 17, 2020 Opinion, Award and Order and the January 15, 2021 Orders on Petitions for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability ("PPD") benefits enhanced by the three-multiplier for an August 21, 2015 shoulder injury, and PPD benefits without the application of a multiplier for a November 24, 2017 knee injury. The ALJ permitted Tyson to take credit for short-term disability ("STD") benefits paid in the knee injury claim.

On appeal, Brown argues the ALJ erred in her analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) regarding the knee injury, and in granting Tyson a credit for STD benefit payments. Tyson argues the ALJ erred in her Fawbush analysis regarding the left shoulder injury. We affirm in part, reverse in part, vacate in part, and remand. On Remand the ALJ is directed to perform a more detailed Fawbush analysis regarding the November 24 2017 right knee injury, and to perform additional analysis, in lieu of this Opinion, to determine Tyson met their burden of proving entitlement to any credit for STD benefits paid.

Brown filed Claim No. 2017-01441 alleging a left upper extremity injury due to a fall on August 21, 2015. He filed Claim No. 2018-00941 alleging injury to his right knee while pulling a stack of chicks on November 24, 2017. The claims were consolidated for litigation purposes in an Order dated August 10, 2018.

Brown testified by deposition on three separate occasions and at the hearing held October 20, 2020. In his first deposition on December 6, 2017, Brown testified he was injured on August 21, 2015 when stepping down from a trailer. While holding onto a bar to step down, he slipped, causing him to spin around and fall to the ground, landing sideways on the concrete. He immediately felt pain in his left arm. He was taken to Tyson Medical and then to Multicare in Madisonville. Brown did not miss any work, but continued on light duty with few tasks assigned. He eventually rode in a truck while training other drivers. After being evaluated by Dr. Thomas O'Brien, Brown returned to his regular job, although he was unable to perform all his pre-injury duties. Brown testified he still has problems with popping in his shoulder and throbbing.

Brown testified by deposition on October 17, 2018 regarding the November 24, 2017 right knee claim. At the time of the incident, a trolley became lodged in the doorway as he was exiting, causing him to twist his right knee and fall. He had continued to use a hook to pull the trolley to the dock since the 2015 arm injury. He went to the medical office at Tyson on the Monday after the injury and was referred to Owensboro Health Medical Group. Diagnostic tests were ordered and he was referred for physical therapy. Brown eventually saw Dr. David Bealle in February 2018, who administered a steroid shot and performed surgery on April 18, 2018. After surgery, Brown returned to light duty work completing paperwork, but eventually went back to driving a truck in August 2018. Brown does not believe he is capable of continuing his current job due to the required climbing in and out of trucks. Brown testified he previously tore his right knee in September 2012 and had

surgical repair performed by Dr. James C. Dodds in May 2013. Brown returned to truck driving a month afterward, and experienced no knee symptoms.

During his third deposition on January 13, 2020, Brown stated he had no problems with his right knee between the 2013 surgery and the November 2017 incident. He returned to light duty work following surgery in April 2018. Dr. Bealle eventually performed a total knee replacement in February of 2019. Brown received short-term disability payments for six weeks, then received long-term disability payments for four weeks. Brown testified he paid for the long-term disability policy. He then returned to modified duty driving a truck. Brown stated he works slower because of his injuries and he cannot perform the extra work he engaged in prior to his injuries. At the time of this deposition, Brown was off work for an unrelated right wrist surgery performed on December 27, 2019.

At the hearing, Brown testified he returned to work in June 2018 after Dr. Bealle performed meniscus surgery in April 2018, but he still has pain and swelling in his right knee. Brown earns less because he is not working as many hours and is unable to work as quickly. Brown underwent a total knee replacement in February of 2019 and received short-term and long-term disability payments while off work. Tyson provided the short-term disability policy as part of his employment, but Brown paid the premiums for the long-term disability policy. Brown was not sure whether he has to repay the long-term disability benefits. He returned to work in the middle of July 2019 without restrictions; however, he had to self-restrict activities such as climbing in and out of a truck. He noticed more pain in the shoulder blade and sometimes in the elbow with activity. Other workers bring the

trollies to the dock for him. He no longer pulls loaded trollies to the dock. Other workers pull the trollies to Brown and he loads them. He unloads the empties with a machine. He has trouble lifting above shoulder level. Brown uses his right arm as much as possible. He stated climbing on and off equipment causes knee problems. His torn biceps cause sharp joint pain. Brown is concerned that eventually he will not be able to continue his work because of the knee injury. He was also concerned that his limitations and restrictions may impact his CDL license. He believes the November 2017 knee injury and subsequent knee replacement are work-related.

Dr. Dodds saw Brown on August 28, 2015 for left shoulder and humerus pain after the August 21, 2015 injury, when he fell out of the back of a trailer. Dr. Dodds diagnosed shoulder pain and a biceps rupture. He recommended non-operative treatment with home exercise, and released Brown to modified duty. Dr. Dodds previously treated Brown for right knee pain from 2010 through 2013. His notes reflect Brown received treatment and underwent a right knee arthroscopy with debridement of the medial meniscus on May 17, 2013. The August 20, 2013 office note indicates Brown reported he still had pain and soreness after surgery. Dr. Dodds placed Brown at maximum medical improvement ("MMI"), assessed a 1% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), and assigned permanent restrictions of no pushing/pulling over thirty or forty pounds of force, with limited climbing.

Dr. Jeana J. Lee initially treated Brown on September 9, 2015, for the August 21, 2015 left biceps and shoulder injury. Dr. Lee diagnosed a left proximal

biceps rupture. She recommended conservative treatment with physical therapy. On October 21, 2015, Dr. Lee noted Brown had completed fourteen physical therapy visits. Dr. Lee believed Brown should be back to work without restrictions and felt he should seek additional treatment elsewhere.

Dr. O'Brien evaluated Brown on November 23, 2015 at Tyson's request. Dr. O'Brien diagnosed a left proximal biceps tendon rupture on August 21, 2015, with pre-existing degeneration in the rotator cuff-bicep mechanism. Dr. O'Brien stated Brown developed a nonorganic/nonphysiologic component to his symptoms and has subjective symptoms out of proportion to his objective findings. Dr. O'Brien did not feel any additional treatment or restrictions were required. He stated Brown reached MMI by October 21, 2015. Dr. O'Brien assigned a 1% impairment rating pursuant to the AMA Guides.

Dr. O'Brien testified by deposition on December 11, 2017. Dr. O'Brien stated a biceps tendon rupture typically heals within six to eight weeks. Dr. O'Brien found Brown exhibited full range of motion and normal strength, indicating he had healed from the biceps tendon rupture. Dr. O'Brien felt surgery could possibly take care of his cosmetic bicep deformity, but it would actually make Brown worse physically and functionally. He did not believe a biceps tenodesis procedure was indicated and stated restrictions were not necessary.

Dr. James Farrage evaluated Brown on November 29, 2017. After taking a history of injury and reviewing the medical records in this case, he diagnosed status-post left long head of the biceps rupture related to the August 21, 2015 work injury. Dr. Farrage assigned restrictions of no lifting more than thirty

pounds on occasion, fifteen pounds frequently, pulling/pushing to fifty pounds on occasion, and no reaching/lifting above shoulder level. He believed Brown could return to his previous job with restrictions. Dr. Farrage assigned a 4% impairment rating pursuant to the AMA Guides.

Dr. Farrage evaluated Brown's right knee on August 29, 2018. He diagnosed status-post right arthroscopic partial medial meniscectomy with associated end-stage degenerative joint disease with ongoing pain, swelling, decreased strength, gait abnormality, and impaired functional capacity. He recommended additional restrictions of standing, walking, sitting for no more than an hour at a time, climbing two flights of stairs occasionally, avoiding uncertain terrain, no ladder climbing, no running, no kneeling, and no crawling. He did not believe Brown could return to his pre-injury work and assessed a 1% impairment rating related to the November 24, 2017 injury.

Dr. Farrage prepared a supplemental report on January 8, 2019. After reviewing additional records, he stated there is no documentation suggesting significant symptoms or treatment involving the right knee at the time of his arthroscopy in May 2013 until the work injury of November 2017, or any traumatic injury occurring to the right knee between the first arthroscopy and the work injury. Although there was objective evidence of arthritic changes in the right knee prior to the work injury, Dr. Farrage stated it was dormant and asymptomatic. He stated the work injury and subsequent procedure brought the pre-existing arthritic condition into disabling reality. Dr. Farrage assigned a 9% impairment rating for the right knee

condition and felt Brown's current symptoms and limitations are related to the work injury.

After reviewing further documentation of the total knee replacement and subsequent treatment, Dr. Farrage prepared a supplemental report on December 9, 2019. Dr. Farrage assessed a 15% impairment rating, attributable to the work injury of November 2017. He stated the surgery and medical treatment were related to the work injury and medically necessary.

Dr. Stacie Grossfeld testified by deposition on November 2, 2018. She performed a records review on October 16, 2018 at the request of Tyson. She noted Brown had an arthroscopic right knee surgery on May 17, 2013, when the operating surgeon noted osteoarthritis. She opined when Brown underwent surgery on April 18, 2018, the osteoarthritis had worsened at a natural rate. She felt the November 2017 incident caused a right knee medial meniscal tear. She further stated that, based on her review of the medical records, even if the work incident did not occur, Brown would still have the same osteoarthritic condition that he has today. On cross-examination, Dr. Grossfeld agreed Brown's arthritis could have been dormant until the work injury. She testified only the meniscal tear is work-related and resulted in a 1% impairment rating. If the arthritic condition is found to be work-related, she would assign an 8% whole person impairment rating, plus 1% for the tear, for a combined 9% impairment rating. In a November 7, 2018 supplemental report, Dr. Grossfeld stated Brown had an 8% impairment rating prior to the work injury. She stated the work injury temporarily aggravated the pre-existing osteoarthritis.

Dr. Bealle testified by deposition on February 6, 2020. He stated Brown sustained work-related medial and lateral posterior meniscal tears requiring arthroscopic debridement. Brown reached MMI on October 18, 2018 with a 9% impairment rating. Dr. Bealle placed no restrictions on Brown after he reached MMI following the arthroscopic surgery. Brown's continued symptoms of stiffness, swelling, and pain are secondary to underlying osteoarthritis, and did not result from the work injury. Following the knee replacement surgery on February 11, 2019, Brown qualified for a 15% impairment rating. Brown reached MMI on June 18, 2019. Dr. Bealle assessed a 9% impairment rating for the meniscal tears. He stated the arthritis, the total knee replacement, and any increased impairment from that procedure is unrelated to the work injury. Dr. Bealle disagreed with Dr. Farrage's opinion relating the arthritis to the work injury. Dr. Bealle stated the arthritis was a pre-existing condition. The work event, the meniscal tear, and the resulting arthroscopic debridement would not have accelerated the underlying arthritic changes in any way. Dr. Bealle placed no restrictions on Brown after he reached MMI.

Tyson filed the STD plan description indicating benefits are fully paid by Tyson without team member contribution. The description is silent regarding any offset.

Tyson filed wage records as part of its stipulations. The parties stipulated to a pre-injury average weekly wage for the August 21, 2015 injury of $2,273.66. For the November 24, 2017 injury, the parties stipulated to an average weekly wage of $2,164.80.

Tyson filed CDL Medical Examination records dated August 8, 2016; August 4, 2017; and June 8, 2018. Each examination found Brown met the CDL health requirements, but noted monitoring is required annually. The CDL Medical Examination for his 2020 certification, dated June 19, 2019, documented his previous injuries including the right total knee replacement.

The ALJ's findings regarding the shoulder injury relevant to this appeal are set forth as follows *verbatim*:

> The parties do not dispute that the injury to Plaintiff's left upper extremity occurred on August 21, 2015. Accordingly, this ALJ must determine the impairment rating and income benefits. Plaintiff asserts that due to the August 2015 incident, he is entitled to permanent partial disability benefits based upon 4% impairment and, when coupled with his physical restrictions, a three multiplier based upon the opinions of Dr. Farrage. Defendant, however, asserts that Plaintiff is only entitled to permanent partial disability benefits based upon 1% impairment with no statutory multiplier as Plaintiff returned to his prior employment based upon the opinions of Dr. O'Brien.
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> Both experts agree that there was a work-related biceps tendon injury and that Plaintiff was not a surgical candidate. The difference in the experts' opinions is based upon the findings with respect to strength. Dr. O'Brien examined Plaintiff in November 2015 per his IME report—approximately three months post-injury—and was able to take range-of-motion measurements per his deposition testimony. His opinions show no atrophy, full range-of-motion, and normal strength. Dr. O'Brien's opinions are also consistent with the medical records of Dr. Dodd and Dr. Lee. Dr. Farrage, on the other hand, examined Plaintiff more than two years after the left arm injury.
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> Having reviewed and considered all the evidence, the ALJ finds the opinions of Dr. O'Brien to be more credible and persuasive on the issue of impairment. Accordingly, the ALJ concludes that Plaintiff retains 1%

AMA impairment for the August 21, 2015 left shoulder injury.

The capacity to return to work is at issue. Plaintiff asserts entitlement to application of the three multiplier following the 2015 work incident while Defendant argues that Plaintiff retained the physical capacity to return to his prior employment after the 2015 incident and did, in fact, return to work.

It is undisputed that Plaintiff returned to work following the August 2015 left arm injury. He testified that he returned to a form of light duty work after the incident for a period of time and then returned to his work as a truck driver for Defendant. Plaintiff also testified that following the August 2015 incident, he was unable to perform all his normal job duties with unloading trolleys from his truck upon arrival at facilities and was unable to perform tasks in addition to his driving duties.

No physician of record found that Plaintiff did not retain the physical capacity to return to his pre-injury work as a truck driver. While Dr. Farrage did recommend activity modifications with respect to lifting and pushing, Dr. O'Brien felt restrictions would not be indicated.

When there is conflicting evidence, the ALJ may choose whom or what to believe and judge all reasonable inferences to be drawn from the evidence. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adverse party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000).

Having reviewed all the evidence, the ALJ finds Plaintiff's testimony regarding his physical inability to perform his job duties for Defendant after the August 2015 work incident when coupled with Dr. Farrage's recommendations for activity modifications to be credible. Thus, Plaintiff qualifies for application of the 3.0 statutory multiplier with a .4 enhancement for his age at the time of the August 2015 incident under KRS

342.730(1)(c)1. Thus, the award of PPD benefits is calculated as follows:

$2,273.66 x 66 2/3% =$1,515.85 $580.21 (2015 PPD max rate) x. 1% x 0.65 x 3.4=$12.82 per week for 425 weeks.

Relevant findings regarding the knee injury are as follows:

A. Work-relatedness/Causation per Form 112s:

Plaintiff maintains that he suffered a right knee injury on November 24, 2017 and all treatment for his right knee injury including, but not limited to, a right total knee replacement, has been causally related to the work incident. Defendant does not dispute that an injury occurred to Plaintiff's right knee on November 24, 2017. Defendant has, however, filed Form 112s contesting a visco-supplementation procedure and a total knee replacement both recommended and/or performed by Dr. Bealle as not causally related to the alleged November 24, 2017 incident.

The work-related arousal of a pre-existing dormant condition into disabling reality is compensable. Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007). A pre-existing condition, on the other hand, must be both symptomatic and impairment ratable immediately before a work-related injury occurs in order to be viewed as a pre-existing, active condition that is not compensable in a claim of injury and worthy of apportionment. Id.

The Administrative Law Judge has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The Administrative Law Judge may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adverse party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000).

When the causal relationship between an injury and a medical condition is not apparent to a lay person, the issue of causation is solely within the province of a

medical expert. Elizabethtown Sportswear v. Stice, 720 S.W. 2d 732, 733 (Ky. App. 1986); Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W. 2d 184 (Ky. 1981).

The records and evidence reflect that Plaintiff did have a right knee injury in 2012 with a meniscectomy in 2013. Plaintiff testified, however, that he suffered no symptoms and required no treatment from 2013 until the November 2017 right knee injury. There are no medical records in the file to substantiate that Plaintiff experienced any symptoms or sought any treatment between 2013 and the November 2017 incident at work.

Defendant has submitted the reports and testimony of Dr. Bealle and Dr. Grossfeld as well as a utilization/peer review report of Dr. Freimark in support of its position that Plaintiff had a pre-existing, impairment ratable osteoarthritic condition that was the cause of the visco-supplementation procedure and the total knee replacement. Although these physicians opine that the need for the contested treatment is due to the osteoarthritic condition, there is no evidence that any right knee condition was actively symptomatic immediately prior to the work incident.

Dr. Farrage found no apparent apportionment for a pre-existing condition. He explained that the "pre-morbid degenerative joint disease involvement which was exacerbated by the acute injury and would benefit from a trial of a Vscosupplementation injection." Further, he noted that "[t]he acceleration of the underlying arthropathy may eventually require consideration of a total knee arthroplasty for symptom management and improved function." See August 29, 2018 Farrage Report at p. 3.

Dr. Farrage also stated that the asymptomatic, premorbid degenerative joint involvement was brought into disabling reality by an exacerbated inflammatory response caused by the work incident and subsequent meniscectomy that resulted in progressive post-traumatic arthritis that was unresponsive to basic, non-interventional strategies. He found the surgery was medically necessary to address the pathological process and restore functional capacity.

Having reviewed all the evidence in light of the facts on this issue, the ALJ finds the opinions of Dr. Farrage to be the most credible and persuasive. Thus, the ALJ finds that the right knee condition was dormant and brought into a disabling reality by the November 2017 work event and; therefore, the contested treatment is related to the work incident. Accordingly, the medical fee disputes contesting the compensability of the visco-supplementation and total knee replacement procedures are resolved in favor of Plaintiff.

B. Benefits per KRS 342.730; Exclusion for pre-existing impairment

The ALJ has found that Plaintiff suffered a right knee injury due to the November 24, 2017 work incident without any pre-existing, active right knee condition. The ALJ must now determine the impairment associated with the same.

There are three assessments of impairment in this matter associated with Plaintiff's November 2017 right knee injury. Dr. Grossfeld assessed 8% AMA impairment prior to the November 2017 work injury with only a temporary aggravation of the pre-existing osteoarthritis. She testified during her deposition that Plaintiff retained 1% AMA impairment for the meniscus tear.

Dr. Bealle assessed 9% AMA impairment for the meniscectomies, but qualified for 15% AMA impairment for the good result from the knee replacement. See February 6, 2020 Bealle Deposition at p. 5. Finally, Dr. Farrage assessed 15% AMA impairment following the total knee replacement wholly attributable to the November 2017 incident as he felt the November 2017 brought any pre-existing right knee condition into a disabling reality.

This ALJ finds Dr. Farrage has provided the most accurate assessment of Plaintiff's impairment for his work-related right knee condition. Accordingly, Plaintiff retains a 15% AMA impairment rating for his right knee due to the November 24, 2017 work incident.

> The physical capacity of Plaintiff to return to his prior employment is also at issue. Dr. Bealle testified that he released Plaintiff to return to work with no restrictions. Dr. Farrage noted in a supplemental report that Plaintiff had been medically cleared to return to regular duty work activities without restriction. At the formal hearing, Plaintiff testified that his knee no longer bothers him because he had the replacement. He only has to be careful climbing in and off of the equipment. He also stated that he was concerned that his CDL license may be impacted.
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> Despite his testimony, Mr. Brown has returned to his pre-injury job as a truck driver with no restrictions. Accordingly, the ALJ finds Plaintiff retains the capacity to return to work without restrictions, which is the most credible and persuasive on this issue. Consequently, Plaintiff qualifies for the one multiplier. Thus, the award of PPD benefits is calculated as follows:
> $2,164.80 x 66 2/3% =$1,443.27 $626.29 (2017 PPD max rate) x 15% x 1.0 x 1.0 = $93.94 per week for 425 weeks.
> . . . .
> As to credit for short-term disability benefits, Defendant's short-term disability plan reflects it is a fully employer funded plan. It does not state, however, whether the plan contains an internal offset provision as required under KRS 342.730(6). Accordingly, the ALJ does not find Defendant entitled to a credit for its short-term disability payments. Defendant did continue to pay Plaintiff his regular salary following the November 2017 incident during periods in which TTD have been found to be payable and; therefore, is entitled to an offset as prescribed under KRS 342.730(7).

Brown filed a Petition for Reconsideration arguing the ALJ failed to perform a complete analysis under Fawbush regarding the knee injury, and failed to provide for increased benefits with application of the two-multiplier.

The ALJ provided the additional findings on reconsideration, which are set forth, *verbatim*:

On September 10, 2020, Defendant submitted into evidence post-injury wage records for the November 2017 incident that reflected a post-injury average weekly wage of $1,757.74. Under a September 24, 2020 Order amending the BRC Memorandum and Order, the parties stipulated that Plaintiff's pre-injury average weekly wage for the 2017 injury was $2,164.80. The parties further stipulated in that Order that Plaintiff returned to work at a wage lesser than his AWW. The stipulation does not indicate to which injury it referred. The post-injury wage records indicate, however, that Plaintiff has not returned to the same or greater wage following the November 2017 injury.

Under KRS 342.730(1)(c)2, in order to qualify for the two multiplier, an employee must return to work at equal or greater wages than the pre-injury average weekly wage and that work must cease in accordance with the standards set forth in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

The facts and stipulations in this matter reflect that Plaintiff has not yet earned the same or greater wage than his pre-injury average weekly wage for the 2017 injury. Ball v. Big Elk Creek Coal Co., Inc. 25 S.W.3d 115, 117 (Ky. 2000). Accordingly, Plaintiff is not currently entitled to application of the two multiplier in connection with the November 24, 2017 left knee injury. Should he earn the same or greater wage and then cease earning such wage in the future, he would then be entitled to the two multiplier under KRS 342.730(1)(c)2.

The three multiplier under KRS 342.730(1)(c)1 is also inapplicable. KRS 342.730(1)(c)1 provides that qualification for the three multiplier is appropriate if, due to an injury, the employee does not retain the physical capacity to return to the type of work he performed at the time of injury. Under Fawbush, when both the two or three multiplier can apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of each claim and a broad range of factors. Fawbush v. Gwinn, supra. In this matter, neither the two nor three multiplier were applicable.

> A workers' post-injury physical capacity and ability to perform the same type of work as at the time of injury are matters of fact to be determined by the ALJ. Ford Motor Company v. Forman, 142 S.W.3d 141, 144 (Ky. 2004); Miller v. Square D. Company, 254 S.W.3d 810, 814 (Ky. 2008).
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> Plaintiff returned to work following the November 2017 injury as a truck driver for Defendant and continues to work in that position. Plaintiff testified that his knee no longer bothers him because he had the replacement. He only has to be careful climbing in and off of the equipment. Dr. Bealle testified that he released Plaintiff to return to work with no restrictions. Dr. Farrage noted in a supplemental report that Plaintiff had been medically cleared to return to regular duty work activities without restriction.
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> Plaintiff has continued to work for Defendant as a truck driver. Accordingly, the ALJ declines to disturb the finding that Plaintiff is currently entitled to application of the one multiplier in this matter. Should Plaintiff earn the same or greater wage and then cease earning such wage in the future, he would then be entitled to the two multiplier under KRS 342.730(1)(c)2.

Tyson filed a Petition for Reconsideration arguing the ALJ failed to perform a Fawbush analysis regarding the shoulder injury and in finding Brown qualified for application of the three-multiplier. Tyson also argued the ALJ erred in finding it was not entitled to credit for payment of short-term disability benefits.

On reconsideration, the ALJ provided the following additional findings, which are set forth, *verbatim*:

> On September 10, 2020, Defendant submitted into evidence post-injury wage records for the August 2015 incident that reflected a post-injury average weekly wage of $2,354.08. Under a September 24, 2020 Order amending the BRC Memorandum and Order, the parties stipulated that Plaintiff's pre-injury average weekly wage for the 2015 injury was $2,273.66 and $2,164.80 for the 2017 injury. The parties also stipulated

that Plaintiff returned to work at a wage lesser than his AWW. The stipulation does not distinguish to which injury it refers.

While initially the ALJ considered the parties bound, on reconsideration, the post-injury wage records submitted by Defendant indicate that Plaintiff did return to work at the same or greater wages following the August 2015 work incident. As Plaintiff did return to work at the same or greater wage pursuant to the evidence, the ALJ will provide additional findings of fact with respect to the applicable statutory multipliers as a matter of course.

Under KRS 342.730(1)(c)2, in order to qualify for the two multiplier, an employee must return to work at equal or greater wages than the pre-injury average weekly wage and that work must cease in accordance with the standards set forth in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

Further, KRS 342.730(1)(c)1 provides that qualification for the three multiplier is appropriate if, due to an injury, the employee does not retain the physical capacity to return to the type of work he performed at the time of injury. Under Fawbush, an ALJ is authorized to determine which provision is more appropriate based upon the facts of each claim and a broad range of factors when both the two or three multiplier can apply. Fawbush v. Gwinn, supra.

A workers' post injury physical capacity and ability to perform the same type of work as at the time of injury are matters of fact to be determined by the ALJ. Ford Motor Company v. Forman, 142 S.W.3d 141, 144 (Ky. 2004).

An ALJ may rely upon the claimant's own testimony regarding capabilities and limitations in determining the extent of his disability as to whether or not an injured worker has the physical capacity to return to work. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

The Kentucky Supreme Court has construed, "the type of work that the employee performed at the time of the injury" to mean the actual jobs that the individual performed. Id. at 145. The phrase also has been

construed to refer broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred. Miller v. Square D. Company, 254 S.W.3d 810, 814 (Ky. 2008).

Plaintiff returned to work following the August 2015 left arm injury as a truck driver for Defendant. Plaintiff testified that following the August 2015 incident, however, that he was unable to perform all his normal job duties with unloading trolleys from his truck upon arrival at facilities and was unable to perform tasks in addition to his driving duties. Dr. Farrage also recommended activity restrictions of no lifting more than thirty pounds on occasion, fifteen pounds frequently, pulling/pushing to fifty pounds on occasion, and reaching/lifting above shoulder level.

Plaintiff continued to work for Defendant as a truck driver until, at least, November 2017 when the parties stipulated to a pre-injury average weekly wage for a subsequent injury at $2,164.80. While Plaintiff returned to work at the same or greater wages following the August 2015 injury, the evidence indicates that he was unlikely to continue earning a wage that equaled or exceeded his pre-injury average weekly wage for the indefinite future. As a result, Plaintiff qualified for application of the three multiplier under KRS 342.730(1)(c)1 and 3 for the August 21, 2015 injury. Accordingly, the ALJ declines to disturb the finding that Plaintiff is entitled to application of the three multiplier in this matter.

Next, Defendant asserts patent error with respect to the finding that it was not entitled to a credit for short-term disability benefits in connection with Claim No.: 2018-00941. Defendant also states that it was error to find that the plan does not state whether it contains an internal offset provision as required by KRS 342.730(6).

KRS 342.730(6) entitles an employer to credit disability or sickness and accident benefits that it funds exclusively against its liability under KRS 342.730(1) for overlapping past-due or future income benefits that are based on the same disability. As Defendant asserted this credit, it had the burden to establish entitlement to it.

> Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283, 290 (Ky. 2005); UPS Airlines v. West, 366 S.W.3d 472, 476 (Ky. 2012).
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> The disability plan submitted states that short-term disability benefits "provide income protection to team members during short periods of non-work-related illness or injury." The plan also states that the benefits are fully paid for by Defendant without team member contribution. Plaintiff testified during the hearing that he did receive short-term disability benefits, but he was not sure if he had to pay back those benefits received under the plan.
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> The ALJ agrees that it was error to state that the Act requires the plan to state that it did not contain an internal offset provision and that Defendant was not entitled to a credit against short-term disability benefits. The Opinion is corrected to reflect that KRS 342.730(6) does not require an employer funded disability plan to explicitly state the absence of an internal offset provision and Defendant is entitled to a credit for short-term disability plan benefits paid.
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> Accordingly, Defendant's Petition is SUSTAINED on this issue.

On appeal, Brown argues the ALJ erred in failing to perform a complete Fawbush analysis concerning the applicability of the three-multiplier for the November 24, 2017 knee injury. Brown asserts the conclusions reached by the ALJ are not supported by substantial evidence, and a contrary conclusion is compelled. Brown notes the ALJ found he was not entitled to the three-multiplier since he had returned to his pre-injury job duties without symptoms and/or limitations. However, Fawbush requires the ALJ to perform an additional analysis as to whether a claimant will likely be able to continue earning the same or greater post-injury wages into the future. Brown contends the medical evidence establishes his symptoms and limitations preclude him from returning to his pre-injury work

activities for Tyson. Those activities required heavy and unrestricted use of the knees and both upper extremities in pulling/pushing trollies weighing up to three-quarters of a ton. Brown asserts he provided uncontroverted testimony he no longer engages in many of the activities required of his position prior to November 24, 2017, and he must now rely on assistance from coworkers. Additionally, Brown now earns less money than he did prior to the subject injuries and he fears he may not be able to continue working in his present condition on a sustained and indefinite basis. Dr. Farrage provided restrictions and explicitly stated in his report Brown is precluded from returning to his pre-injury work by his resulting limitations and restrictions. Brown also argues the ALJ erred by providing credit for short-term disability benefits. Brown contends Tyson failed to meet its burden of proof for an entitlement to any credit against the awarded benefits.

We note no Fawbush analysis was required for the knee injury. The ALJ determined Brown had not returned to work at the same or greater wage following the knee injury. Thus, KRS 342.730(1)(c)2 currently is inapplicable. The ALJ determined Brown retains the physical capacity to return to the type of work performed at the time of the knee injury. Substantial evidence supports that finding. Dr. Bealle released Brown to return to work without restrictions. Dr. Farrage also noted Brown was cleared for work without restrictions. Brown testified his knee does not bother him since the knee replacement, and he only has to be careful while climbing on equipment. His concern that his knee might affect his CDL is merely speculation. After the knee replacement, Brown passed his CDL physical examinations. Thus, the evidence falls far short of compelling a finding that Brown

lacks the physical capacity to return to the type of work performed at the time of the knee injury. Therefore, we affirm on this issue.

Tyson had the burden of establishing entitlement to a credit for the STD payments. Dravo Lime Co. Inc., v. Eakins, 166 S.W.3d 283 (Ky. 2005). KRS 342.730(6) provides:

> All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

KRS 342.730(6) requires a three-part analysis before it applies to a particular benefit, in this case, short-term disability benefits. The plan must be exclusively employer funded, it must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits. The ALJ initially denied Tyson a credit for STD benefits since the STD plan description did not state whether the plan contains an internal offset provision as required under KRS 342.730(6). While Brown testified he was not sure whether he would have to repay the STD benefits, he did not have the burden of proof on the issue of the credit, and his testimony is not substantial evidence establishing there was no offset. It was Tyson's burden to establish the STD plan did not contain an offset. Tyson submitted a plan description directed to the employees, but it did not submit the actual policy. The ALJ identified no evidence that the plan did not contain an offset provision. There being no

substantial evidence concerning whether the STD policy contains an offset, we reverse.

Tyson argues the ALJ erred by performing an inadequate Fawbush analysis concerning the left shoulder injury. Tyson notes the correct standard to be applied is whether the injury has permanently altered the worker's ability to earn an income. Tyson contends the ALJ reduced this standard to a mathematical formula rather than a consideration of a broad range of factors. The ALJ determined that, since Brown's average weekly wage ("AWW") was $2,273.66 and the "preinjury AWW for a subsequent injury" was $2,164.80, Brown was unlikely to continue earning a wage that equaled or exceeded his pre-injury AWW for the indefinite future. Tyson asserts the ALJ failed to discuss the variability in wages earned, the fact that Brown frequently earned greater weekly wages, and was able to continue working as a truck driver. All of these factors weighed in favor of finding the two-multiplier was applicable.

Tyson argues the ALJ relied upon evidence that was arbitrary and did not constitute substantial evidence supporting the finding. The ALJ cites to Brown's pre-injury AWW from a subsequent injury as evidence indicating he was unlikely to continue earning the same or greater wages. However, Tyson contends this 52-week period is an arbitrary formulation. Rather, the ALJ should have considered the wages earned on a week-by-week basis. Had she done so, the ALJ would have noted that Brown's weekly wages frequently exceeded his pre-injury AWW, and were commensurate with what he earned pre-injury. Tyson urges the Board to find that a post-injury 52-week AWW calculation is not a proper method to determine a

workers' ability to earn the same or greater wages. It believes that, when considering the actual wages earned as part of the broad range of factors in a Fawbush analysis, the ALJ should consider the wages on a week-by-week basis. Accordingly, the Board should find that the ALJ's Order improperly relies on a pre-injury AWW from a subsequent injury.

We agree with Tyson that the ALJ did not carry out the precise analysis required by Fawbush v. Gwinn, supra, and as explained in Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). Substantial evidence supports the ALJ's determination Brown does not retain the physical capacity to perform his pre-injury job after the shoulder injury. In Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), the Kentucky Supreme Court stated that, in making a determination regarding the applicability of KRS 342.730(1)(c)1, the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the time of injury" and "determine from the lay and medical evidence whether he retains the physical capacity to return to those jobs." Brown testified he required assistance with certain job duties. Dr. Farrage assigned restrictions that would preclude some of Brown's work activities. However, we conclude the ALJ's determination regarding Brown's ability to earn the same of greater wage is inadequate. The ALJ cited only Brown's pre-injury AWW for the subsequent knee injury as the basis for the determination. While actual post-injury earnings, especially for an extended period, may constitute some evidence concerning the likelihood of continued earnings, the ALJ's analysis does not provide enough.

Fawbush directs that when a claimant meets the criteria of both KRS 342.730(1)(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, 103 S.W.3d at 12. In other words, Fawbush requires the determination of whether the injured worker has a permanent alteration in the ability to earn money due to his injury. Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage equaling or exceeding the wage at the time of the injury, the three-multiplier pursuant to KRS 342.730(1)(c)1 is applicable.

The Fawbush Court articulated several factors an ALJ may consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. Those 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 performed out of necessity, whether the post-injury work is performed 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, 103 S.W.3d at 12. The Court in Adkins, supra, directed that the ALJ "must consider a broad range of factors, only one of which is the ability to perform the current job" in determining whether a claimant can continue to earn an equal of greater wage. Id. at 390. Fawbush does not contain an exhaustive list of

factors an ALJ may consider in making the determination of whether a worker is likely to continue earning the same or greater wage. Rather, the ALJ's determination is fact-specific and individualized. Because the ALJ's analysis was limited to the question of whether Brown has the ability to earn the same or greater wage in his employment with Tyson, we vacate and remand for a determination based on a correct analysis as required by Fawbush and Adams. We express no opinion as to the outcome.

Accordingly, the December 17, 2020 Opinion, Award and Order and the January 15, 2021 Orders on Petitions for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge, are hereby **AFFIRMED IN PART, REVERSED IN PART,** and **VACATED IN PART.** We **REMAND** for entry of an opinion in conformity with the views expressed herein.

ALL CONCUR.

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