Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 8, 2021

CLAIM NO. 201976093

KENTUCKY TRANSPORTATION CABINET PETITIONER

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

JOHN FARMER
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

STIVERS, Member. Kentucky Transportation Cabinet ("KTC") seeks review of the June 7, 2021, Opinion, Award, and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded John Farmer ("Farmer") permanent partial disability ("PPD") benefits enhanced by the three-multiplier pursuant to KRS 342.730(1)(c)1 and medical benefits based on a June 21, 2019, injury he incurred while in the employ of KTC. KTC also appeals from the June 30,

2021, Order ruling on the parties' Petitions for Reconsideration and the June 30, 2021, Amended Opinion, Award, and Order attached to the Order.

On appeal, KTC argues Farmer does not qualify for the three-multiplier and PPD benefits should not have been awarded since his claim for an alleged left shoulder injury was dismissed.

BACKGROUND

Farmer's Form 101 alleges he was injured on June 21, 2019, while "lifting/carrying five-pound buckets of concrete when he felt pain in his left shoulder." The cause of the shoulder injury was listed as "strain or injury by holding or carrying." Among the documents attached to the Form 101 is the July 24, 2019, "PT Evaluation" of Clay County Physical Therapy.

KTC introduced Farmer's March 6, 2020, and January 18, 2021, depositions and he also testified at the April 8, 2021, Hearing. During the March 6, 2020, deposition, Farmer testified he began working for KTC in May 2007. At the time of his March 6, 2020, deposition, his left arm was in a sling and he was off work. He provided a description of the June 21, 2019, incident:

> A: We were pouring concrete on a bridge deck. We were building a new bridge. And my job as an inspector is to test the concrete, which involves getting a sample when it gets distributed on the bridge deck. We were having to take five gallon buckets, fill them up with concrete, carry them approximately thirty or forty feet across the bridge deck, pour them in a wheelbarrow, take them off the bridge, make test cylinders. We started that morning around four o'clock, four AM, got finished up that afternoon probably about five, six o'clock. So, that's what we were doing pretty much all day.
>
> Q: Okay. When did you notice your left shoulder bothering you?

> A: Well, I noticed about midday. I thought maybe I'd pulled a muscle, or I knew I'd done something. I didn't know what. But as the day went along it just kept getting more sore. The following – that was on a Friday. That weekend I noticed a knot on my shoulder, and it just – it kept getting more sore and more sore, and I came back Monday morning and reported the injury.
>
> Q: Did you have a specific injury on that day, John, or just throughout the day you just noticed it just kept bothering you?
>
> A: Oh, it just – it just kept bothering me. I noticed when I picked up the bucket and started carrying it, I had to set it down.
>
> Q: Now, were you able to finish your shift? You said it started bothering you midday. Did you finish your shift that day?
>
> A: I did finish the shift, but I stopped carrying the buckets.

Since June 21, 2019, was a Friday, he reported the incident to his supervisor on Monday and an incident report was completed. Farmer was placed on light duty encompassing no carrying, lifting, or twisting until he underwent surgery on December 19, 2019, performed by Dr. Srinath Kamineni.[1] Farmer's job title at the time of the injury was "transportation engineering technologist three." He described his job duties as follows:

> Q: Alright. And briefly tell me about your job duties from a physical standpoint. You already described what you were doing the day of the incident, but on an average day what kind of physical activities will you have to do at the Transportation Cabinet?
>
> A: Well, it's according to what – what the contractor's doing at the time, you know. If they're pouring concrete, you know, obviously, it's our job to take the concrete sample. We do a air test. We make test cylinders. If

[1] Dr. Kamineni is with the University of Kentucky Orthopaedic department.

they're putting rock down, you know, after a certain number of tons they put down we get a sample in a bag. If they're blacktopping we – we take their tickets, make sure their blacktop is the right temperature, make sure their lane widths are correct.

Q: Tell me about the heavy lifting, pushing, pulling you'd have to do there at the Transportation Cabinet.

A: Well, the aggregate sample bags is probably around seventy – sixty to eighty pounds. You know, we have to carry those to our vehicle and then take them to the lab, carry them in. The concrete is – you know, the wheelbarrows, it's pretty heavy when you get a wheelbarrow full of wet concrete. Put it in a – in a bucket and do the test samples. They're – I mean they're not ridiculously heavy, but they're – you know, they're not light. The test cylinders are – you know, they're a twelve-by-twelve cylinder mold. They're not ridiculously heavy, but they are – you know, they're not light. But that's – that's pretty much – pretty much it.

Q: Would you have days where you're in the office and days that you're outside the office? Would you have days in office working at a desk?

A: Yes, sir.

Q: Okay. And, again, I know it varies, I'm sure. In summer – summer you're pretty much probably out there almost every day, if not every day. But on average would you think you're in the office one day a week, two days a week? Just on average.

A: Probably one to two days a week, yes.

Q: Then the other three to four days a week you're out on the road doing work.

A: Yes, sir.

Following the injury, Farmer was first seen by Tammy Saylor ("Saylor") with Family Medical Associates. She obtained an x-ray and referred him to physical therapy. Farmer believes twenty sessions of physical therapy worsened

his condition. Saylor referred Farmer to Dr. Kamineni who, after obtaining the results of an MRI, informed him he had a rotator cuff tear in the left shoulder. Because the workers' compensation carrier denied liability for the surgery, Farmer submitted the bills to Anthem, his private health insurance carrier. Dr. Kamineni performed the December 19, 2019, outpatient surgery at Good Samaritan Hospital, in Lexington, Kentucky. At Dr. Kamineni's direction, Farmer currently was undergoing physical therapy. He was scheduled to see Dr. Kamineni on April 15, 2020. He has seen no other doctors. Farmer believed his shoulder condition had improved since the surgery. He received no income benefits from his workers' compensation carrier. He used his sick leave and vacation time to remain off work.

Farmer's January 18, 2021, deposition reveals he saw Dr. Kamineni's assistant in April 2020. At that time, he was instructed to complete physical therapy. He returned to work on June 15, 2020, and has not seen a physician since. He has no future medical appointments. Dr. Kamineni placed him on light duty for three months but because KTC only allows light duty for six weeks, he returned to full duty six weeks after returning to work. He detailed his current job duties and hours worked:

> Q: Okay. Now, tell me a little bit about your employment now. Are you fulltime?
>
> A: I am, yes.
>
> Q: And how many hours a week do you get right now?
>
> A: Well, this past week I think I had probably around forty-eight or forty-nine hours. You know, my job depends on if I've got – if I am assigned to a job with a contractor. You know, I was when I first went back, and that lasted for a couple of months. So, probably the end of – somewhere around the end of November, middle of

> November, end of November. And then from November up till last week, you know, I was working thirty-seven and a half hours a week. And I got assigned another job last week. So, I'm back to working overtime when they work.
>
> Q: And has your wages changes any since you returned back to work in June of 2020, Russ?
>
> A: No, they've not.
>
> …
>
> Q: So, real quick, Russ, and you don't have to go into great detail, but just kind of walk us through an average day at work. What are you doing now?
>
> A: Well, I have a contractor that is doing some dig-outs on the roads where we put drill steel in. We've had some slips in the road. The road's breaking up. Different contractors come in and put railroad steel in. And what we're doing now is I've got a contractor in there digging out the road, filling it back up with rock and putting the cribbing panels against the – against the steel and, you know, just building the road back up where it's broke off.
>
> Q: And, Russ, from a physically-demanding aspect, what's the hardest part about your job now?
>
> A: Well, that really doesn't have anything that I'm - that I'm actually doing except, you know, inspecting what they're doing. I don't have really any physical things that I'm doing right now.

He receives the same rate of pay. No special accommodations were provided after his return to work. He assessed his current condition as follows:

> Q: Alright. And tell me a little bit about your left shoulder now. When I took your deposition, I think you were still in physical therapy and you said you noticed some range of motion was coming back, starting to feel a little bit better. How's it doing now, Russ?
>
> A: It's doing a whole lot better. Really, I've not had any problem with it; but, you know, I've not – I've not went

> to lift a bucket of concrete or anything like that. And, you know, I don't know if that would be advisable. But I'm not having any problem at all with my shoulder.

Farmer believed the surgery was a success. He planned to continue his employment with KTC. When asked if everything seems to be working pretty well right now, he responded "Everything's so far, so good, yeah."

At the Hearing, Farmer described his job duties and the June 21, 2019, event. Although he finished his shift on June 21, 2019, he did not carry concrete the rest of the day. Following the incident, his condition continued to worsen throughout the day. He returned to work on Monday, but because the pain prevented him from performing his duties, on Tuesday, he obtained an appointment with Saylor for the following Monday. Saylor referred him to Dr. Komineni. He was placed on light duty work until the surgery. He appraised the successfulness of his surgery as follows:

> A: … Since the surgery, I'm – I'm – it's – it's helped 110 percent. I can do pretty much anything I need to do at work. I mean, I – you know, I do have some pain in it at times but nothing that I can't deal with. I have a little bit of limited range of motion but very little. It – it's – I'm going to say it helped 100 percent.
>
> Q: … You consider the surgery a success; is that correct?
>
> A: Absolutely; yes.

Farmer provided the following testimony concerning his ability to perform the job he performed on the date of injury:

> A: Well, they asked me to – when they sent me back sent me back on light duty for three months, which the state only – I think they only say you can do two weeks at a time and then they reevaluate. So after the first two weeks, I went back to regular – regular duty.

Q: Are you still doing your regular duty work now?

A: Yes, sir.

Q: Are you making the same or greater wages now that you were in June of '19?

A: I'm making the same; yes.

Q: Now, I think you said this earlier but I want to confirm. Are you doing all the job duties you need to do at this time?

A: Yes, I am.

Q: Are you doing your work the same as you were doing it back in June of '19?

A: Yes.

Q: … Any other problems out of your shoulder now that you can think of?

A: No.

Q: Do you plan on continuing to work this job into the immediate future?

A: Yes.

Q: Or the indefinite future? Let me try it that way.

A: Yes.

On cross-examination, Farmer again discussed his work capabilities upon returning to full duty.

Q: … Did I hear you say that you went back to light duty around June the 15th of 2020 but then after a couple of weeks you went ahead and started doing full duty work like the 1st of July of 2020?

A: Yes.

Q: … I know that the doctor released you in September 2020, but it sounds like you went ahead and you were doing okay and you just went ahead and started doing

> the – your normal jobs back 1st of July. Is that the way it was?
>
> A: … I just went ahead and done regular duty.
>
> Q: Okay. And it sounds like that's been pretty much what you've been doing since then; is that right?
>
> A: Right. Yes.
>
> Q: Same – and you – I think Gerald touched on it, same job duties and same title, same rate of pay, same hours, the whole – the whole thing as far as that goes?
>
> A: Yes.

In addition to the physical therapy evaluation, Farmer introduced the August 7, 2019, medical records of UK Orthopaedic Surgery, and Dr. Jared Madden's February 7, 2020, and February 10, 2020, reports. KTC introduced the October 30, 2019, report of Dr. Thomas O'Brien and three reports of Dr. Gregory Snider dated May 8, 2020, June 16, 2020, and March 2, 2021.

The July 1, 2020, Benefit Review Conference Order and Memorandum lists the contested issues as "benefits under KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, TTD, and proper rating per Guides." Significantly, the parties stipulated Farmer sustained a June 21, 2019, work injury.

In the initial decision of June 7, 2021, after summarizing the lay and medical testimony, the ALJ provided, in relevant part, the following findings of fact and conclusions of law:

> 16. The ALJ finds that the opinion of Dr. Madden is the most persuasive in this matter because he demonstrated the most comprehensive understanding of the Plaintiff's job duties that resulted in the injury at issue. Specifically, Dr. Madden referenced the Plaintiff's carrying of five-

gallon buckets and credibly described how that activity caused the injury.

17. The ALJ further finds that Dr. Madden properly based his opinion upon Table 16-26 of the Guides to the Evaluation of Permanent Impairment, Fifth Edition.

18. The ALJ finds that the thorough, well-organized, and credible opinion of Dr. Madden constitutes objective medical findings upon which upon which a determination of a harmful change to the human organism may be properly based.

19. Dr. Madden credibly diagnosed a bicep tendon injury resulting in a 4% whole person impairment pursuant to the AMA Guides. Dr. Madden also credibly found that the Plaintiff did not retain the physical capacity to return to his job duties.

20. The ALJ therefore finds that the Plaintiff has satisfied his burden to establish the occurrence of a harmful change to the human organism and that as a result thereof he sustained a 4% whole person impairment and no longer retains the physical capacity to return to the same type of work. The Plaintiff shall therefore be entitled to the "three multiplier" per KRS 342.730(1)(c)1.

Temporary Total Disability

21. Temporary total disability means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment…KRS 342.0011(11)(a)

22. The ALJ acknowledges that Dr. Madden said that the Plaintiff had reached maximum medical improvement by the time of his examination but the ALJ finds that Dr. Snider credibly determined that the Plaintiff reached MMI earlier on May 13, 2020. This opinion has convinced the ALJ and the ALJ thus finds that the Plaintiff shall be entitled to temporary total disability benefits in the maximum weekly amount from the date of surgery, December 19, 2019, through 8 May 13, 2020.

The ALJ awarded temporary total disability benefits from the date of surgery on December 19, 2019, through May 13, 2020. However, the ALJ found Farmer's left shoulder condition is not work-related and dismissed his claim for medical benefits related to treatment of the left shoulder.

> 23. It is the employer's responsibility to pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may reasonably be required at the time of injury and thereafter during disability…KRS 342.020.
>
> 24. The ALJ finds based upon the foregoing, that the Plaintiff sustained a bicep tendon injury for which benefits are to be awarded. The ALJ is persuaded by the opinion of Dr. O'Brien however, that the Plaintiff's left shoulder condition is not causally work related and the medical expenses related thereto shall not be compensable by this Defendant.
>
> 25. Dr. O'Brien convincingly pointed out that the Plaintiff's MRI revealed degenerative arthritic changes and rotator cuff degeneration, present in 50% of age-matched asymptomatic middle-aged men. Dr. O'Brien reviewed the Plaintiff's MRI and found that the left shoulder diagnostic arthroscopy with possible rotator interval tear and bicep tendinosis was not medically necessary or indicated. He explained that the clinical findings did not justify aggressive surgical treatment.
>
> 26. The ALJ therefore finds that the Defendant Employer is responsible for the reasonable and necessary expenses incurred by the Plaintiff for the cure and relief of the work-related bicep tendon injury found herein. The Plaintiff's claim for medical benefits related to the left shoulder is hereby **DISMISSED**.

In addition to TTD benefits, the ALJ awarded $55.89 per week commencing on June 21, 2019, for a period not to exceed 425 weeks together with interest at the applicable statutory rate of 6% on all past due and unpaid installments to be interrupted by any applicable periods of TTD benefits received.

The parties filed Petitions for Reconsideration. Farmer argued the evidence overwhelmingly supported a finding he sustained a work-related left shoulder injury. Farmer requested the ALJ correct the order and award medical benefits for the left shoulder injury. KTC asserted the same arguments put forth on appeal.

The ALJ's June 30, 2021, Order states the ALJ concluded a patent error had not been cited by either party, but out of an abundance of caution, he issued an attached Amended Opinion, Award, and Order containing additional findings. In the June 30, 2021, Amended Opinion, Award, and Order, the ALJ's findings of fact and conclusions of law relating to Farmer's bicep tendon injury and TTD benefits remained unchanged. However, under the heading of Unpaid and Contested Medical Expenses, after reiterating numerical paragraphs 23, 24, and 25, the ALJ furnished a different numerical paragraph 26 and the previous numerical paragraph 26 with certain changes became numerical paragraph 27. The paragraphs read as follows:

> 26. Importantly, Dr. O'Brien pointed out that there was no direct blow, fall, or traumatic event to the left shoulder and concluded that the Plaintiff's musculoskeletal complaints regarding the neck, trapezius, shoulder girdle, and shoulder, represented the manifestation of a non-work-related personal condition.
>
> 27. The ALJ therefore finds that the Plaintiff's left shoulder condition is not causally work-related. The Defendant Employer is therefore responsible for the reasonable and necessary expenses incurred by the Plaintiff for the cure and relief of the work-related bicep tendon injury only. The Plaintiff's claim for medical benefits related to the left shoulder is hereby **DISMISSED**.

The award of income benefits was not altered in any manner.

KTC first asserts the facts indisputably demonstrate Farmer is currently working for KTC earning the same or greater wages, and his Hearing testimony confirms the three-multiplier is not applicable since he was released to return to full duty employment and is performing the same duties he was performing at the time of the Hearing. It cites to Farmer's Hearing testimony set forth herein. KTC also observes that in his brief to the ALJ, Farmer conceded the three-multiplier was not applicable.

Next, KTC contends since the alleged shoulder injury was dismissed, there is not an impairment rating for a work-related bicep tendon injury. Therefore, the claim for PPD benefits should have been dismissed with only medical awarded for the bicep tendon injury.

For the following reasons, we vacate the ALJ's findings of fact regarding the injury and the award of income benefits, and remand for an amended opinion based on the evidence of record.

ANALYSIS

We first address KTC's second argument. In doing so, we must first note that in spite of Farmer's testimony he returned to work performing the same job duties at the same wage, he did not maintain the two-multiplier contained in KRS 342.730(1)(c)2 is applicable. Further, although the ALJ determined the three-multiplier contained in KRS 342.730(1)(c)1 is applicable, neither party contended the two-multiplier contained in KRS 342.730(1)(c)2 was applicable thereby necessitating an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). We also note

the parties stipulated Farmer sustained a work injury on June 21, 2019. Further, in its appeal brief, KTC agrees Farmer sustained a work-related bicep tendon injury.

In the case *sub judice*, the ALJ provided conflicting findings regarding the nature of Farmer's injury. In both the initial opinion and the amended opinion, the ALJ found Dr. Madden properly based his opinion upon Table 16-26 of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). The ALJ characterized Dr. Madden's opinion as thorough, well organized, and credible. He concluded Dr. Madden had credibly diagnosed a bicep tendon injury resulting in a 4% impairment rating pursuant to the AMA Guides. Thus, the ALJ found Farmer had satisfied his burden of establishing an occurrence of a harmful change to the human organism resulting in a 4% whole person impairment rating. However, under the heading Unpaid or Contested Medical Expenses, the ALJ accepted Dr. O'Brien's opinion that Farmer's left shoulder condition is not work-related and any medical expenses related to it were not compensable. He went on to explain why he accepted Dr. O'Brien's opinions. Therefore, KTC was only responsible for the reasonable and necessary expenses for the cure and relief of the bicep tendon injury and the claim for benefits for the left shoulder injury was dismissed. The ALJ's acceptance of the opinions of Drs. Madden and O'Brien is inconsistent. Dr. Madden's impairment rating is based upon Table 16-26 of the AMA Guides, which is entitled Upper Extremity Impairment Due to Symptomatic Shoulder Instability Patterns. In his February 10, 2021, report, Dr. Madden assessed a 4% impairment rating for an "Occult Symptomatic Shoulder Instability 6% UEI = 4% WPI, Table 16-26, page 505." Thus,

Dr. Madden's impairment rating was unequivocally assessed as a result of a left shoulder injury. Without question, the ALJ accepted Dr. Madden's diagnosis and assessment. Dr. O'Brien's opinions contained in his October 30, 2019, report are diametrically opposed to Dr. Madden's opinions as he opined Farmer did not sustain a work-related injury in the course of his job as there was no direct blow. Concerning the need for surgery, he opined as follows: "The diagnostic shoulder arthroscopy, with or without a subacromial decompression and distal clavicle excision will be extremely unlikely to provide Farmer any symptomatic benefit for his diffuse musculoskeletal symptoms." The ALJ's reliance upon the opinions of Drs. O'Brien and Madden cannot be reconciled.

Further, we question whether the ALJ can rely upon Dr. O'Brien's opinion since it was offered before the December 19, 2019, surgery revealing Farmer had sustained an injury as described by KTC's evaluating physician, Dr. Snider. Dr. Snider characterized the surgery as a biceps repair, labrum repair, and distal clavicle excision.[2] In his May 8, 2020, Independent Medical Evaluation ("IME") report, Dr. Snider believed the June 21, 2019, incident is adequate to have caused the injury and assessed a 4% whole person impairment for the left shoulder condition. Notably, maximum medical improvement had not been attained. In the June 16, 2020, supplemental report, Dr. Snider noted Farmer is status post "biceps tenodesis, labrum repair, and distal clavicle excision." He disagreed with Dr. O'Brien as he concluded the "mechanism of injury could have caused an aggravation of Farmer's injury." He assessed a 7% impairment rating for the loss of range of motion. Farmer

[2] Dr. Snider offered this description of Farmers' surgery in all three reports.

had a distal clavicle excision which yielded a 10% upper extremity impairment. The combined values chart yielded a 16% upper extremity impairment rating which converted to a 10% whole person impairment rating. In the March 2, 2021, supplemental IME report, Dr. Snider described the subject injury as "an aggravation of a pre-existing, asymptomatic condition." He altered his impairment rating based on the tables in Chapter 16 of the AMA Guides concluding there is a 7% impairment rating.

The ALJ's finding that Farmer's injury generated a 4% impairment rating based on Dr. Madden's opinions and his finding Farmer did not sustain a left shoulder injury based upon Dr. O'Brien's opinions cannot be reconciled. Consequently, the findings of fact, conclusions of law, and award relating to the work injury must be vacated and the claim remanded for additional findings and entry of an amended decision.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the Courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Reporting Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990). The ALJ's reliance upon the opinions of Drs. Madden and O'Brien demonstrate the ALJ held an erroneous understanding of the relevant evidence as Dr. Madden clearly assessed an impairment rating due to a shoulder injury. Thus, the finding Farmer did not sustain a left shoulder injury cannot be

reconciled with the ALJ's findings consistent with Dr. Madden's opinions. The ALJ's findings of fact and conclusions of law contain internal inconsistencies.

Further, Dr. O'Brien's opinions, expressed approximately a month and a half before the December 19, 2019, surgery, are clearly suspect. His opinion is:

> Mr. Farmer did not sustain the work-related injury in the course of his job duties on 06/21/2019. The work activities described on 06/21/2019, in which Mr. Farmer was simply carrying some 5-gallon buckets of concrete did not cause injury. There was no direct blow.

However, the medical evidence demonstrates Dr. O'Brien's opinion concerning the need for surgery is unfounded, as KTC's evaluating physician stated he underwent a bicep and labrum repair as well as a distal clavicle excision. Dr. Snider's reports contain a diagnosis of left shoulder pain and note surgical repair of the left shoulder. In the May 8, 2020, report, he opined "the June 21, 2019, injury mechanism described is adequate to have caused injury." In the June 16, 2020, report he expressed a similar opinion. In the last report, Dr. Snider opined the June 21, 2019, incident was an aggravation of a pre-existing asymptomatic condition for which he assessed a 7% whole person impairment.

The opinions of the doctors following the surgery, which Dr. O'Brien concluded was unnecessary, establish surgery was necessary to remedy left shoulder pain. Thus, in light of the medical evidence submitted post-surgery and the ALJ's conflicting findings, we vacate the ALJ's findings of fact and conclusions of law set forth in the June 7, 2021, initial decision and the June 30, 2021, amended decision, and remand this claim for additional findings of fact and conclusions of law

regarding the nature of Farmer's injury and an award of income and medical benefits, if appropriate.

In the interest of judicial economy, we will also address KTC's first argument that KRS 342.730(1)(c)1 is not applicable in light of Farmer's testimony. In Middleton v. Lowe's Home Centers, Inc., 2015-SC-000120-WC, rendered October 29, 2015, Designated Not To Be Published, the ALJ found the three-multiplier applicable in spite of the fact Middleton had returned to her employment performing all the physical tasks associated with her job. This Board affirmed. In noting the Court of Appeals reversed the ALJ and this Board, the Kentucky Supreme Court stated:

> The Court of Appeals held that a *Fawbush* analysis should not have been conducted because there was no testimony of record that Middleton currently lacks the physical capacity to perform the full range of her employment duties. The court noted that while Middleton indicated she would like some accommodations to make her job easier, she had not asked Lowe's to implement them. The Court of Appeals also cited to the fact that Middleton only feared she might need to increase the medicines she takes to continue performing her job, but had not requested or been prescribed those drugs. The Court of Appeals concluded:
>
> > In short, Middleton was granted the three times multiplier based upon a hypothetical situation that accommodations (when she decides to ask for them) and a prescription for pain relief medication (when she obtains one from a physician) might entirely prevent. This, in turn, is speculation and does not support an enhancement pursuant to KRS 342.730(1)(c)1.

> Middleton appealed the reversal of the application to this Court.

Slip Op. at 4.

> The Supreme Court held:
>
> > In this matter, the uncontradicted evidence is that Middleton has returned, not only to the same job classification, but also performs the exact same tasks that she did before her work-related injury. While Middleton might have difficulty performing those tasks, she admits that she can complete them at this time. Thus, the Court of Appeals was correct in holding that KRS 342.730(1)(c)1 does not apply.
> >
> > Middleton counters the fact that she is able to perform the same tasks now as she did before the work-related injury by stating that she is exceeding the restrictions placed upon her by her physicians. However, it is unclear that Middleton must significantly exceed any restriction placed upon her to perform her job. Additionally, while Middleton takes medications for her pain, she does not have to take them in excess to perform her job. *See Fawbush,* 103 S.W.3d at 8 (holding that the claimant may be eligible to have his award enhanced by the three multiplier because he had to take higher doses of narcotics than prescribed to be able to perform his job). Thus, the ALJ erred by finding that KRS 342.730(1)(c)1 could apply to Middleton's award.

Slip Op. at 4.

In a subsequent opinion directly on point, Watters v. Kentucky Transportation Cabinet, 2019-SC-000122-WC, rendered February 20, 2020, Designated Not To Be Published, we reversed the ALJ's finding the three-multiplier is applicable since Watters had returned to work performing the same job duties he was performing pre-injury. The Supreme Court noted:

> The ALJ also relied on Dr. Autry's opinion that Watters did not retain the physical capacity to return to his pre-injury employment to enhance the

> award of permanent partial disability (PPD) benefits by the three-multiplier under KRS 342.730(1)(c) 1. The ALJ did not offer any analysis of the fact Watters had already returned to work without restrictions until the Kentucky Transportation Cabinet filed a petition for reconsideration.
>
> …
>
> The Court of Appeals' opinion affirmed the Board's opinion, agreeing with the Board that KRS 342.730(1)(c)1 does not necessitate an inquiry as to whether Watters would be able to perform his pre-injury job on an indefinite basis. The Court of Appeals stated that the sole inquiry to be conducted in determining whether the three-multiplier is applicable is whether the claimant "retain [s] the physical capacity to return to the type of work that the employee performed at the time of injury[.]" [footnote omitted] In conducting this analysis, the Court of Appeals held that "the evidence clearly showed that, as of the date of the award, Watters had returned to his pre-injury work ... perform[ing] 'exactly' the same work upon his return with no accommodations and making a higher hourly rate than at the time of his injury ... [and Watters] testified that he would be able to maintain his employment for the foreseeable future." **As such, the Court of Appeals concluded that the Board did not err in holding that the ALJ's reliance on Dr. Autry's opinion could not be considered substantial evidence relevant to a determination under KRS 342.730(1)(c)1.** Watters appealed to this Court solely on the issue of whether the Board and the Court of Appeals erred in reversing the portion of the ALJ's opinion regarding applicability of the three-multiplier under KRS 342.730(1)(c)1. (Emphasis added).

Slip Op. at 1-3.

In affirming this Board and the Court of Appeals, the Supreme Court held as follows:

> Here, the Board did not disregard any of the facts relied upon by the ALJ, it simply found that unlike the evidence presented in *Trim Masters,* the evidence compelled a finding that Watters had the physical

capacity to return to work because he had in fact returned to work.

We agree with the Board and the Court of Appeals that the ALJ's decision regarding the applicability of the three-multiplier must be reversed because it is not supported by substantial evidence. Furthermore, we agree that the ALJ erred in relying on the *Fawbush* analysis to consider the effect of Dr. Autry's testimony because the *Fawbush* analysis is inapplicable here.

…

This Court further explained the circumstances under which the *Fawbush* analysis would be necessary to calculate a claimant's disability benefits under KRS 342.730(1)(c) in *Middleton v. Lowes Home Centers, Inc.* [footnote omitted] In *Middleton,* we affirmed the reversal of the ALJ's determination that both the two and three-multipliers under KRS 342.730(1)(c)1 and (c)2 could apply. [footnote omitted] The ALJ found that even though the claimant had returned to her pre-injury work, earning the same or greater average weekly wage, it was unlikely that she would be able to continue such work for the indefinite future. [footnote omitted] The ALJ then conducted the *Fawbush* analysis and concluded that the claimant was entitled to the three-multiplier enhancement. [footnote omitted] This Court agreed with the Court of Appeals that KRS 342.730(1)(c)1 could not apply because "the uncontradicted evidence" was that the employee had returned to work, "perform[ing] the exact same tasks that she did before her work-related injury." [footnote omitted] Accordingly, this Court found that the ALJ erred in finding that both (c)1 and (c)2 could apply and thereafter conducting a *Fawbush* analysis to consider whether the claimant would be able to continue earning the same or greater weekly wages for the indefinite future. [footnote omitted]

Fawbush and *Middleton* establish that evidence regarding whether a disability claimant will be able to continue indefinitely earning the same or greater wages that he earned at the time of his work-related injury is relevant only when KRS 342.730(1)(c)1 and (c)2 could both apply; meaning that the claimant has not returned

> to type of work he performed pre-injury but is currently working and earning the same or greater average weekly wages than he earned at the time of his work-related injury. Under those circumstances, the ALJ is then directed to apply *Fawbush* and consider the likelihood that the claimant will be able to continue to earn the same or increased wages, considering the impairment suffered by the claimant because of the work-related injury. But, as *Middleton* holds, in cases where the claimant has in fact returned to his pre-injury work and is performing the same tasks as before the injury, KRS 342.730(1)(c)1 is not applicable and the *Fawbush* analysis is not proper.
>
> In the present case, the Court of Appeals correctly found that the ALJ erred by relying on the *Fawbush* analysis to determine that Watters is entitled to the three-multiplier enhancement under KRS 342.730(1)(c)1. It is undisputed that Watters has returned to work performing "exactly" the same job as he was performing pre-injury. KRS 342.730(1)(c)1 could not apply to enhance Watters's benefits because he does not lack the physical capacity to return to the type of work that he performed at the time of his injury. **Under *Middleton,* the *Fawbush* analysis was not necessary, and Dr. Autry's testimony that Watters would not be able to continue performing the type of work he performed pre-injury for an indefinite time would only have been relevant if Watters lacked the capacity to return to his pre-injury work.** (Emphasis added).

Slip Op. at 4-5.

As pointed out by KTC, Farmer's brief to the ALJ concedes KRS 342.730(1)(c)1 is not applicable. In relevant part, it reads:

> Farmer, suffered a work-related injury to his left shoulder as a direct result of a work-related injury. He has now returned to work for the Defendant, DOT and is earning equal wages to those before his injury. As in Fawbush, Farmer is entitled to receive PPD benefits, with a one multiplier.

> KRS 342.730(1)(b) set forth a method for calculating the income benefits for permanent partial disability under which the benefit is the product of the workers' average weekly wage, impairment rating, and a statutory factor.
>
> As such, Plaintiff prays that this Honorable ALJ award PPD benefits, based on a 7% WPI, in the amount of $42.63 for 425 weeks beginning February 07, 2020, being the day that Dr. Madden opined he reached MMI.

As in Watters, Dr. Madden's opinions that Farmer did not retain the capacity to return to the work performed at the time of injury cannot constitute substantial evidence "relevant to a determination under KRS 342.730(1)(c)1." Based on Farmer's uncontradicted testimony, on remand the ALJ is not permitted to find the three-multiplier applicable.

Accordingly, the findings of fact and conclusions of law contained in the June 7, 2021, Opinion, Award, and Order and the June 30, 2021, Amended Opinion, Award, and Order are **VACATED**. This claim is **REMANDED** for entry of an amended opinion containing additional findings of fact and conclusions of law regarding the nature of Farmer's injury and an award of income and medical benefits, if appropriate, in accordance with the views expressed herein. Further, for the reasons expressed herein, the ALJ may not enhance Farmer's benefits pursuant to KRS 342.730(1)(c)1.

ALL CONCUR.

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