Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 15, 2019

CLAIM NO. 201764631

KEVIN SLUSHER PETITIONER

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

ROCK HAMPTON ENERGY, LLC and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

ALVEY, Chairman. Kevin Slusher ("Slusher") appeals from the Opinion, Order and Award rendered October 25, 2018 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). Slusher was awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") based upon a 20% impairment rating (with no multipliers), and medical benefits for injuries he sustained to his left eye on

September 7, 2017 while working for Rock Hampton Energy, LLC ("Rock Hampton"). Slusher also appeals from the November 26, 2018 order denying his petition for reconsideration.

On appeal, Slusher argues the ALJ erred by failing to enhance his award of benefits by the three multiplier contained in KRS 342.730(1)(c)1. In the alternative, Slusher argues the ALJ erred by failing to enhance his benefits by the two multiplier contained in KRS 342.730(1)(c)2.

We determine the ALJ properly considered the medical evidence of record, and the fact Slusher returned to his usual job at the same or higher rate of pay in determining he is not entitled to the three multiplier contained in KRS 342.730(1)(c)1. Therefore we affirm, in part. However, although the ALJ appropriately found Slusher is not currently entitled to an enhancement of his award of PPD benefits by the two multiplier contained in KRS 342.730(1)(c)2, this does not foreclose Slusher from an enhancement of his award by that multiplier at a later date. We must therefore vacate, in part, and remand for a determination by the ALJ regarding Slusher's entitlement to the enhancement of his award by the two multiplier in the event he is no longer employed at the same or higher rate of pay.

Slusher filed a Form 101 alleging injuries to his left eye on September 7, 2017 when he was struck by a piece of metal while attempting to repair a continuous miner for Rock Hampton. In the Form 104 filed in support of the claim, Slusher indicated he has worked as an underground coal miner since 2008, and has been an electrician for various coal companies since December 2013.

Slusher testified by deposition on June 1, 2018, and at the hearing held August 27, 2108. Slusher resides in London, Kentucky. Slusher was born on August 25, 1989, and is a high school graduate. While in high school, he received training in carpentry and Information Technology. After working in the coal mining industry, he became certified as an underground mechanic and electrician through the Kentucky Department of Mines and Minerals. On September 7, 2017, he was working at a mine in Kettle Island, Kentucky when he sustained an injury to his left eye.

Slusher testified he eventually returned to work for Rock Hampton performing the same job he was performing prior to his injury, at the hourly rate of $28.00, the same pay rate he earned at the time of the injury. He continues to work as an electrician, repairing mining equipment.

At the time of the accident, Slusher was repairing the chain on a continuous miner. He was holding a piece of metal that a co-worker was hammering. A piece of metal flew from the hammering, and struck him in the left eye. He initially treated at the Pineville Medical Center. The next day, he followed up with Dr. Sarah Huffman, O.D., who referred him to the University of Kentucky where he eventually underwent three surgeries for his left eye injury.

Slusher testified he has been released to return to work without restrictions, other than to wear eye protection. He testified he has some light sensitivity, and has some difficulty seeing with his left eye. He has assistance when needed to perform his job duties. Dr. Huffman is working with him to obtain contact lenses to assist with the sensitivity. He continues to work the same job, with

the same duties, on the same shift, although he does not always work overtime when offered. He drives approximately an hour to get to work, and operates power tools.

In support of his claim, Slusher filed Dr. Huffman's September 8, 2017 office note. She noted his complaints of aching, burning, foreign body sensation, pain, irritation and light sensitivity in the left eye. She additionally noted metal was removed from his left eye the previous day, ointment was provided, and Slusher was advised to follow up with her office. She found his eye injury was moderately severe but stable. Slusher also filed Dr. Huffman's April 20, 2018 note. She noted he complained of photophobia, and difficulty with night driving. She also noted he was status post vitrectomy, scleral buckle and retinal detachment in the left eye.

Slusher also filed multiple records from Dr. Peter Blackburn at the University of Kentucky Healthcare. On September 8, 2017, Dr. Blackburn performed a surgical repair of a scleral laceration of the left eye caused by an intraocular foreign body. Slusher also filed Dr. Blackburn's November 2, 2017 operative note for repair of the left retinal detachment. Slusher additionally filed Dr. Blackburn's November 8, 2017 office records, which are illegible.

Dr. Raymond Schulz evaluated Slusher on May 30, 2018. He noted Slusher was not wearing safety glasses at the time of the injury. Dr. Schulz noted Slusher had undergone a scleral laceration repair and foreign body removal on September 9, 2017. He noted Slusher underwent a traumatic cataract extraction of the left eye with an intraocular implant on October 25, 2017. He additionally noted that on November 2, 2017, Slusher underwent a retinal detachment repair. He determined all of those procedures were due to his work-related left eye injury. He

assessed a 20% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Dr. Richard Eiferman evaluated Slusher at Rock Hampton's request on January 29, 2018. He noted Slusher's left eye injury of September 7, 2017, which resulted in a scleral laceration and intraocular foreign body from the hammering of metal. Dr. Eiferman noted that due to the injury, Slusher later developed a traumatic cataract of the left eye repaired on October 25, 2017, and a retinal detachment repaired on November 2, 2017. Dr. Eiferman attributed all of the procedures to Slusher's work-related injury. He stated Slusher had normal left eye vision prior to the accident. He found Slusher had reached maximum medical improvement, and assessed a 20% impairment rating pursuant to the AMA Guides. He placed no restrictions on Slusher's activities other than to wear safety glasses.

A benefit review conference was held on August 14, 2018. The issues preserved for determination included benefits per KRS 342.730 with multipliers, unpaid medical bills, return to work wages, and whether Slusher retains the capacity to return to the type of work performed at the time of the injury.

In the Opinion, Order and Award rendered October 25, 2018, the ALJ determined Slusher sustained a work-related injury on September 7, 2017. He awarded TTD benefits from September 8, 2017 through November 26, 2018 at the rate of $835.04 (already paid by Rock Hampton). He determined Slusher was entitled to an award of PPD benefits based upon a 20% impairment rating. He also determined Slusher had returned to work performing the same job he was

performing at the time of the injury, at a higher wage. He therefore determined Slusher was not entitled to an enhancement of his award of PPD benefits by the three-multiplier contained in KRS 342.730(1)(c)1. He also determined Slusher is not entitled to an enhancement of his award of PPD benefits by the two-multiplier contained in KRS 342.730(1)(c)2 at this time. The ALJ specifically stated as follows:

> Considering the totality of evidence, the ALJ is simply not persuaded that plaintiff requires significant enough assistance to conclude that he is not capable of performing all the essential functions of his job duties as he did prior to his injury. For these reasons, he is not entitled to application of the 3x multiplier and KRS 342.730(1)(c)(1). Furthermore, although it has been determined he has returned to work at the same or greater average weekly wage, he has not ceased earning such an average weekly wage and, therefore, he is not yet entitled to the 2x multiplier and (1)(c)(2). His award of benefits is therefore calculated as follows:
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> $1446.31 x 2/3 = $964.21 → $626.29 (maximum 2017 PPD rate) x .20 x 1 = $125.26 per week

Slusher filed a petition for reconsideration. He argued the ALJ erred by finding he is not entitled to the three-multiplier because he is incapable of performing some jobs without assistance of co-workers. He requested the ALJ to perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). The ALJ denied the petition as merely a re-argument of the case.

As the claimant in a workers' compensation proceeding, Slusher had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was unsuccessful in that burden regarding the application of statutory multipliers, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d

735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than 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).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We find the ALJ properly evaluated the evidence, and appropriately set forth the basis for his determination that Slusher is not entitled to an

enhancement of his award by the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ noted the only medical restriction contained in the record is that Slusher should wear safety glasses. He also noted Slusher had returned to his previous job at the same or higher rate of pay. Therefore, a contrary result is not compelled. We additionally note that since the ALJ determined KRS 342.730(1)(c)1 does not apply, he was not required to perform an analysis pursuant to Fawbush v. Gwinn, supra.

However, that said, as noted above, the ALJ determined Slusher had indeed returned to work at the same or higher rate of pay. He correctly noted that, "Furthermore, although it has been determined he has returned to work at the same or greater average weekly wage, he has not ceased earning such an average weekly wage and, therefore, he is not **YET** entitled to the 2x multiplier and (1)(c)(2)." (Emphasis added).

KRS 342.730(1)(c)2 states as follows:

> 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.

Based upon the ALJ's determination that Slusher is not yet entitled to the "2x multiplier", we must vacate his decision, in part, and remand for additional findings. The ALJ implicitly determined KRS 342.730(1)(c)2 is applicable to

Slusher's claim, although he is not currently entitled to an enhancement of his award. We therefore must remand for the ALJ to determine Slusher's entitlement to the application of KRS 342.730(1)(c)2, and the enhancement of his award during any period of cessation of employment earning equal or greater wages during the period of his award in accordance with that statutory provision.

Accordingly, the October 25, 2018 Opinion, Order and Award, and November 26, 2018 Order on reconsideration, are hereby **AFFIRMED IN PART**, and **VACATED IN PART**. This claim is **REMANDED** for additional findings consistent with the views set forth herein.

ALL CONCUR.

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