RENDERED: DECEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001965-WC

HERALD CLINE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-71798

U.S. SMOKELESS TOBACCO CO./ALTRIA, INC.;
HONORABLE GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

NICKELL, JUDGE: Herald Cline petitions for review of a Workers' Compensation Board ("Board") decision which vacated in part and remanded an opinion of Administrative Law Judge Grant S. Roark ("ALJ") regarding his claim for income benefits against U.S. Smokeless Tobacco Co./Altria, Inc. ("U.S. Smokeless Tobacco"). Cline contends the Board erred in remanding the matter to

the ALJ for further findings to support its application of the "3-multiplier" pursuant to KRS 342.730(1)(c)1 rather than the potentially equally-applicable "2-multiplier" set forth in KRS 342.730(1)(c)2. Following a careful review, we affirm.

The historical facts are relatively simple and undisputed. Cline sustained a work-related "near amputation" of his right wrist and hand on October 12, 2011. After an initial surgical procedure, Cline returned to work in February 2012. A second surgery was necessary approximately two months later, following which Cline again returned to work. At the time of the injury, Cline was making approximately $20.00 per hour. At the time of his deposition in late 2013, Cline was still employed by U.S. Smokeless Tobacco in a modified and somewhat different job than before the injury although his job classification of maintenance mechanic grade 5 remained constant. He was earning approximately $21.00 per hour. Cline was not receiving further medical care nor taking prescription medications for his injury.

Following a hearing at which the ALJ heard testimony from Cline and his work supervisor, reviewed depositions and medical records, and heard arguments, the ALJ noted the sole contested issue was whether Cline would be able to continue his employment for the foreseeable future. Cline was assessed a 41% whole person impairment rating and granted temporary total disability and permanent partial disability benefits. The ALJ further concluded Cline was not likely to be able to continue earning a weekly wage equal to or greater than his

average weekly wage at the time of the injury. Citing *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), the ALJ thus determined the 3-multiplier set forth in KRS 342.730(1)(c)1 was applicable rather than the 2-multiplier of KRS 342.730(1)(c)2. U.S. Smokeless Tobacco moved for reconsideration and requested additional findings of fact. The motion was summarily denied and U.S. Smokeless Tobacco petitioned the Board for review.

On November 7, 2014, the Board entered its opinion vacating in part and remanding the matter to the ALJ for further findings. Specifically, the Board concluded the ALJ failed to adequately address the third prong of the *Fawbush* analysis—the likelihood of Cline's ability to continue earning wages exceeding those at the time of his injury for the foreseeable future. The Board believed the ALJ's analysis considered only Cline's ability to continue in his current job and did not consider any other applicable factors. Because it believed U.S. Smokeless Tobacco was entitled to specific findings and a complete analysis regarding the appropriate multiplier, the Board vacated the ALJ's decision as to the enhancement and remanded for further findings. Cline petitioned this Court for review.

The Board's review in this matter was limited to determining whether the evidence is sufficient to support the ALJ's findings, or if the evidence compels a different result. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). Further, the function of the Court of Appeals is to "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as

to cause gross injustice." *Id*. at 687–88. Finally, review by this Court "is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Id*. The ALJ, as fact-finder, has the sole discretion to judge the credibility of testimony and weight of evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

The sole issue before us is whether the Board correctly concluded further findings were necessary under *Fawbush*. We believe they were.

In *Fawbush*, our Supreme Court held an ALJ must determine which multiplier under KRS 342.730(1)(c) is factually most appropriate. When a claimant meets the criteria for both the 2-multiplier and the 3-multiplier, the ALJ is authorized to choose between them as it sees fit under the facts of that particular case. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 211 (Ky. 2003). In its analysis, the ALJ must decide if the injured worker has a "permanent alteration in the claimant's ability to earn money due to his injury." *Fawbush*, 103 S.W.2d at 12. Only if it is determined a worker is unlikely to continue earning a wage exceeding his wages at the time of the injury for the indefinite future is an award enhanced by the 3-multiplier proper. *Fawbush* articulated several factors to be considered in the analysis, including the lack of physical capacity to return to the type of work the claimant previously performed, whether the post-injury work is done out of necessity, whether the post-injury work requirements are outside medical restrictions, and if completing the post-injury work is only possible when

the claimant takes more narcotic pain medication than prescribed. *Id*. In *Adkins v. Pike County Board of Education*, 141 S.W.3d 387, 390 (Ky. 2004), the Supreme Court clarified

> [i]f every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job. Therefore, we remand this case to the ALJ for a finding of fact as to Adkins' ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future. If it is unlikely that Adkins is able to earn such a wage indefinitely, then application of Section c(1) is appropriate.

In the instant case, as noted by the Board, the ALJ found both the 2- and 3-multipliers were potentially applicable, thus triggering the third prong of the *Fawbush* analysis. While the ALJ ostensibly conducted this portion of the analysis, the Board concluded the examination was incomplete, and we agree.

A plain reading of the ALJ's order reveals its consideration was limited solely to Cline's ability to continue in his current job, to the exclusion of any other potential factors impacting Cline's ability to continue earning an equal or higher weekly wage. The entirety of the ALJ's discussion on the issue was contained in a single paragraph which stated:

> [m]oreover, the Administrative Law Judge is persuaded plaintiff has carried his burden of proving it is not likely he will be able to continue earning the same or greater wages for the indefinite future. In reaching this conclusion, the defendant's efforts to accommodate plaintiff are obviously commendable, and the employer's representative testified at the hearing that plaintiff meets expectations and has no plans to terminate plaintiff. However, Mr. Hicks was careful to testify that, *from his point of view only*, plaintiff has no reason to worry about his job. Given that plaintiff is working, essentially, one-handed and that he is dependent upon his employer's understanding and accommodations to continue in his job, the Administrative Law Judge is simply persuaded it is not likely plaintiff will be able to continue such employment at an equal or greater average weekly wage for the indefinite future. Accordingly, plaintiff is entitled to application of the 3x multiplier. *Fawbush v. Gwinn*, Ky., 107 S.W.3d 5 (2003). His award of benefits is therefore calculated as follows: . . . .

(Emphasis in original).

Although the ALJ may have reached the correct result in applying the 3-multiplier, more detailed findings relative to its determination of Cline's future earning capability are required by *Fawbush*. Thus, as in *Adkins*, remand for further findings on the issue is necessary and was properly ordered by the Board. On remand, as directed by the Board, the ALJ should analyze the broad array of factors influencing Cline's ability to earn the same or greater wages for the foreseeable future and subsequently make specific findings as to the evidence supporting its decision of whether application of the 2-multiplier or 3-multiplier is appropriate.

Therefore, for the foregoing reasons, the decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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