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NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000122-WC

RUSSELL WATTERS — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-000818
WORKERS' COMPENSATION BOARD NO. 17-WC-00296

KENTUCKY TRANSPORTATION CABINET;
THE WORKERS' COMPENSATION BOARD;
AND HONORABLE JONATHAN R.
WEATHERBY, ADMINISTRATIVE LAW
JUDGE — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Russell Watters filed a worker's compensation claim seeking occupational disability benefits arising out of a work-related head injury he suffered while working for the Kentucky Transportation Cabinet. Watters argues on appeal to this Court that the Administrative Law Judge was correct in awarding him benefits enhanced by the three-multiplier under KRS[1] 342.730(1)(c)1. Based upon the undisputed fact that Watters returned to work performing the same job as he was performing pre-injury, the Workers' Compensation Board reversed the ALJ's application of the three-multiplier

[1] Kentucky Revised Statutes.

enhancement and remanded the claim to the ALJ for application of the two-multiplier enhancement provided under KRS 342.730(1)(c)2. The Court of Appeals affirmed the Board's decision. After careful review, we affirm the opinion of the Court of Appeals.

I. BACKGROUND.

Watters began working for the Kentucky Transportation Cabinet in 2013 as a heavy-equipment operator. In August 2016, he was on the job working on a lawn mower when a pry bar he was using slipped and hit him in the head, causing him to fall and hit his back and head on the concrete floor of the shop. Watters received stiches for his head injuries and returned to his normal work duties the next day.

Over the following weeks Watters suffered headaches and vision problems, for which he sought treatment at urgent care facilities and, eventually, UK Healthcare. An MRI revealed that he sustained "extensive bilateral dural venous thrombosis with no seizure activity" and a CT scan revealed "extensive dual sinus thrombosis," for which Watters was hospitalized and treated with anticoagulants. Dr. Jessica Lee of the UK Neuroscience Institute examined Watters at a follow-up visit following his hospitalization and diagnosed a "cerebral venous sinus thrombosis with a history of traumatic brain injury."

Dr. Lee released Watters to regular duty with no restrictions in January 2017, but Watters was placed on light duty for an additional six-weeks, the maximum amount of time allowed by the employer, during which time he

performed all normal work duties except for CDL driving.[2] Watters testified that after six-weeks of light duty, he used his accumulated sick leave to remain off work until August of 2017, when his CDL license restrictions were lifted. By the time of the final hearing on his worker's compensation claim in September 2017, the CDL restrictions were lifted and Watters had been back at work for a full month doing "exactly" the same job he was performing pre-injury.

The ALJ found that Watters's condition was worked-related and relied on the 7% functional impairment rating assessed by Dr. Stephen Autry. 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.

In response to the Kentucky Transportation Cabinet's petition for reconsideration, the ALJ offered the following additional analysis:

> 1. The ALJ has relied upon the opinion issued by Dr. Autry in this matter in order to reach the conclusion that the Plaintiff does not retain the physical capacity to return to the same type of work. The ALJ was persuaded by the credibility of Dr. Autry who reviewed the Plaintiff's job [description] and determined that he would be unable to return to his pre-injury job. Dr. Autry specifically stated that the Plaintiff, due to his diagnosis, lacked the physical capacity to return to work in the same type of employment and job description . . . .
> 2. Dr. Autry then noted that the Plaintiff had returned to full work activities without restriction. It is clear from the report of Dr.

[2] While Dr. Lee did not place any restrictions on Watters's ability to work, Watters was prohibited by law from using his CDL license until he was seizure-free for one year.

Autry that while he declined to issue more specific restrictions, he still believed that the Plaintiff did not retain the physical capacity to perform his prior job on indefinite basis.

3. When KRS 342.730(1)(c)(1) and KRS 342.730(1)(c)(2) both may be applicable, *Fawbush v. Gwinn*, 107 S.W.3d 5 (2003), and its progeny require an ALJ to make three essential findings of fact, even if not specifically requested to do so by the parties. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an [average weekly wage] AWW equal to or greater than her pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for an indefinite future.
4. In performing the analysis required herein, the ALJ determines that while the Plaintiff has returned to the same job at a wage that is equal to or greater than his pre-injury wage, the ALJ also finds based upon the credible opinion of Dr. Autry that the Plaintiff is unlikely to be able to continue in this capacity on an indefinite basis.
5. The ALJ therefore finds that the Plaintiff is unlikely to be able to continue to earn the same or greater wages on a continuing basis going forward and therefore declines to disturb the award of the "3" multiplier [under KRS 342.730(1)(c)1].

On appeal, the Workers' Compensation Board affirmed the ALJ's opinion, in part, but reversed the portion of the decision that held that Watters was entitled to benefits enhanced by the three-multiplier. The Board found that Dr. Autry's opinion as to whether Watters retained the physical capacity to perform his job on an indefinite basis would only be relevant under the *Fawbush* analysis if both the two and three-multipliers under KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 were applicable but was not a relevant consideration in determining whether KRS 342.730(1)(c)1 applied in the first instance. The Board further held that because the evidence compelled the conclusion that Watters had returned to his pre-injury work without restrictions,

KRS.342.730(1)(c)1 could not apply to enhance Watters's benefits by the three-multiplier. The Board did allow Watters's benefits to be enhanced by the two-multiplier under KRS 342.730(1)(c)2 because both parties stipulated that Watters was entitled to such enhancement. Watters appealed the Board's decision to the Court of Appeals, arguing that the Board improperly substituted its evaluation of the evidence regarding the three-multiplier for that of the fact-finder.

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[.]"[3] 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

[3] KRS 342.730(1)(c)1.

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.

II. ANALYSIS.

A. Standard of Review.

"When reviewing an ALJ's decision, this Court will reverse only if the ALJ overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice."[4] On appellate review, the issue is whether "substantial evidence" supports the ALJ's decision.[5] "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of evidence."[6] "However, we review the ALJ's application of the law *de novo*."[7] "On appeal, our standard of review of a decision of the Workers' Compensation Board '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.'"[8]

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[4] *U.S. Bank Home Mortgage v. Schrecker*, 455 S.W.3d 382, 384 (Ky. 2014) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992)).

[5] *Wetherby v. Amazon.com*, 580 S.W.3d 521, 526 (Ky. 2019) (citing *Whittaker v. Rowland*, 998 S.W.2d 479. 481–82 (Ky. 1999)).

[6] *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)).

[7] *Schrecker*, 455 S.W.3d at 384 (citing *Finley v. DBM Techs.*, 217 S.W.3d 261, 264 (Ky. App. 2007)).

[8] *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky. 2008) (quoting *W. Baptist Hosp. v. Kelly*, 827 S.W.2d at 687–88).

B. The Court of Appeals correctly affirmed the Board's ruling that the ALJ erred in applying the three-multiplier provided under KRS 342.730(1)(c)1 to enhance Watters's disability benefits.

As stated above, the only issue raised before this Court is whether the Court of Appeals erred in finding that the ALJ erred by applying the three-multiplier under KRS 342.730(1)(c)1 to enhance Watters's disability benefits.

Watters argues that the Board exceeded its authority by "superimposing" its own judgment for that of the ALJ as to the weight and credibility of the evidence presented. In support of this argument, Watters relies on the decision of this Court rendered in *Trim Masters, Inc. v. Roby*.[9] In *Trim Masters*, the Board vacated and remanded four times the ALJ's conclusion that the claimant was permanently totally disabled. With each remand, the Board insisted that the ALJ failed to explain sufficiently how the evidence presented supported such a finding.[10] On review of the ALJ's fourth opinion, the Board found that the ALJ failed numerous times to show "substantial evidence" supporting its finding that the claimant was totally disabled and remanded with directions to award permanent partial disability benefits as supported by the evidence.[11] On appeal to this Court, we agreed with the Court of Appeals that the ALJ's decision that claimant was permanently totally disabled was supported by substantial evidence based on the ALJ's reliance on the testimony regarding the impacts of claimant injury, age and educational background on her ability

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[9] 2016-SC-000451-WC, 2017 WL 3634153 *1 (Ky. Aug. 24, 2017).

[10] *Id.* at *1-*3.

[11] *Id.* at *3.

to work.[12] This Court held that while we may not have reached the same conclusion as the ALJ, there was substantial evidence to support a finding that the claimant was both totally or partially disabled, but the evidence did not compel a conclusion one way or the other.[13] So this Court concluded, as did the Court of Appeals, that the Board exceeded its authority when it vacated the ALJ's decision with directions to find that claimant only suffered a partial disability because the Board could only disturb an ALJ's factual findings when it is unsupported by substantial evidence.[14]

Here, we reject Watters's argument that the Board substituted its judgment for that of the ALJ as the Board did in *Trim Masters*. Here, the Board found that there was not "substantial evidence" to support the ALJ's decision regarding the applicability of the three-multiplier because the evidence compelled the finding that Watters had in fact returned to his pre-injury work. The Court of Appeals agreed, concluding that the Board did not err in determining that the ALJ's decision was not supported by substantial evidence because KRS 342.730(1)(c)(1) does not necessitate an inquiry about whether Watters would be able to perform his regular job on an indefinite basis, only whether the claimant "retain[s] the physical capacity to return to the type of work that the employee performed at the time of injury." We reversed the Board's decision in *Trim Masters* because the Board essentially disregarded the evidence relied on by the ALJ and remanded the case with directions to make

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[12] *Id.* at *4–*5.

[13] *Id.* at *5.

[14] *Id.* at *5–*6.

an alternate factual finding. 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.

KRS 342.730(1)(c) provides the following:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; **or**
> 2. 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.[15]

In 2000, the word "or" was inserted between paragraphs (c)1 and (c)2, indicating that the legislature intended for only one of the provisions be applied

[15] (emphasis added).

to a claim.[16] In *Fawbush v. Gwinn*, this Court explained how the amendment to KRS 342.730 affected the ALJ's process of calculating permanent partial disability benefits under KRS 342.730(1)(c)1 and (c)2. In *Fawbush*, the claimant sought disability benefits for injuries sustained while working for Fawbush, a builder, as a house framer.[17] The claimant was not able to return to his previous work of framing houses, but was able to find work as a construction supervisor where he earned more weekly wages than he did as a framer.[18] But the evidence showed that the claimant would not be able to continue earning the increased wages indefinitely because the duties required by the new employment exceeded his medical restrictions and required him to take more pain medication than prescribed.[19] The ALJ found that both KRS 342.730(1)(c)1 and (c)2 could apply to the claimant because the claimant lacked the ability to return to his pre-injury work but was currently earning more wages than before his injury.[20] The ALJ chose to apply the three-multiplier under KRS 342.730(1)(c)1 because the evidence showed that the claimant lacked the physical capacity to return to the type of work performed pre-injury and he would not be able to continue making the increased wages for an indefinite time.[21] This Court affirmed the ALJ's determination,

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[16] *Fawbush v. Gwinn,* 103 S.W.3d 5, 12 (Ky. 2003) (citing *Adkins v. R &S Body Co.*, 58 S.W.3d 428 (Ky. 2001)).

[17] *Id.* at 7–8.

[18] *Id.*

[19] *Id.* at 12.

[20] *Id.* at 11–12.

[21] *Id.*

concluding that in these type of cases it is within the discretion of the ALJ to determine which provision is more applicable based on the evidence.[22]

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.*.[23] 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.[24] 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.[25] The ALJ then conducted the *Fawbush* analysis and concluded that the claimant was entitled to the three-multiplier enhancement.[26] 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."[27] 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

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[22] *Id.* at 12.

[23] 2015–SC–000120–WC, 2015 WL 6591847 *1 (Ky. Oct. 29, 2015).

[24] *Id.* at *2.

[25] *Id.*

[26] *Id.*

[27] *Id.* at *4.

claimant would be able to continue earning the same or greater weekly wages for the indefinite future.[28]

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

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[28] *Id.*

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.

In sum, the Board did not err in finding that the undisputed fact that Watters had returned to work performing "exactly" the same type of work he was performing pre-injury compelled the conclusion that KRS 342.730(1)(c)1 could not apply to enhance Watters's disability benefits. As such, the Court of Appeals was correct in affirming the Board's determination that the ALJ erred in finding that KRS 342.730(1)(c)1 was applicable in Watters's case.

III. CONCLUSION.

Having found that the ALJ erred in finding that Watters was entitled to the three-multiplier enhancement under KRS 342.730(1)(c)1, we affirm the Board's reversal of the ALJ's decision. And because there is no dispute that Watters is entitled to the two-multiplier enhancement provided under KRS 342.730(1)(c)2, we also affirm the Board's direction that the case is remanded to the ALJ for further consistent proceedings.

Minton, CJ., Hughes, Lambert, VanMeter, JJ., concur. Keller, J., dissents by separate opinion in which Nickel, Wright, JJ., join.

KELLER, J., DISSENTING: I respectfully dissent. A claimant's ability, at the time of the hearing, to perform his pre-injury job duties does not, as a matter of law, prohibit the enhancement of permanent partial disability

benefits by the three-multiplier as set forth in KRS 342.730(1)(c)1. I dissent from the majority's holding that, as a matter of law, "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."

As Justice Barber explained in his dissent in *Middleton v. Lowe's Home Centers, Inc.*, if a claimant is currently performing his pre-injury job duties but presents evidence that he will soon be unable to perform those duties, he may be entitled to the three-multiplier. 2015-SC-000120-WC, 2015 WL 6591847 *1, *7 (Ky. Oct. 29, 2015). Justice Barber stated,

> KRS 342.730(1)(c)1 provides that the three multiplier applies, "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury...." Retain is defined as "[t]o hold in possession or under control; to keep and not lose, part with, or dismiss."

Id. (citing *Black's Law Dictionary* (10th ed. 2014); *Merriam–Webster Dictionary OnLine* <http://www.merriam-webster.com/htlm> (visited October 14, 2015) ("to continue to have or use (something)")).

The Workers' Compensation Board in this case found that whether Watters could perform his job on an indefinite basis was not a consideration under the statute. However, a close analysis of the statute, which includes the word "retain," as defined above, requires that the claimant "keep" the ability to return to his pre-injury work. If evidence is submitted that the claimant does

not have the ability to "keep" or continue performing his pre-injury job duties for the indefinite future, then he may be entitled to the three-multiplier.

In the case at bar, Watters was performing his pre-injury job duties at the time of his hearing in front of the ALJ. Dr. Autry acknowledged Watters's return to full work activities without restriction but also opined that Watters "lack[ed] the physical capacity to return to work in the type of employment and job description performed at the time [he] ceased working." From this, the ALJ inferred that Dr. Autry believed that Watters "did not retain the physical capacity to perform his prior job on an indefinite basis." Time and again this Court has stated that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997).

Review of the record reveals additional support for the ALJ's inference in the hearing testimony of Watters. Watters testified that he still experienced balance problems approximately once each week that would last for minutes at a time. He further testified that while his headaches were getting better, he still had headaches one to two times each week that lasted about an hour each, requiring him to take over-the-counter pain medication and relax before the headache would go away.

"The Board, as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented to the Board." *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Our review on appeal is "whether substantial evidence of probative value supports the ALJ's findings." *Wetherby v. Amazon.com*, 580

S.W.3d 521, 526 (Ky. 2019) (citing *Whittaker v. Rowland*, 998 S.W.2d 479, 481-82 (Ky. 1999)). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265, 270 (Ky. 2018) (quoting *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971)). The above cited evidence constitutes substantial evidence to support the ALJ's finding that Watters did not *retain* the physical capacity to return to the type of work that he performed at the time of his injury.

Given this finding and the undisputed evidence that Watters returned to work at a weekly wage equal to or greater than the average weekly wage at the time of his injury, both KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 could apply to Watters's case. However, as explained in *Fawbush v. Gwinn*, the legislature's use of "or" to separate these two subsections indicates that "they are mutually exclusive and that only one may be applied." 103 S.W.3d 5, 8 (Ky. 2003). Thus, the ALJ should have determined which subsection "is more appropriate under the facts." *Id.* at 12. This analysis requires the ALJ to determine whether the claimant "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," in which case "the application of paragraph (c)1 is appropriate." The ALJ in this case made such a determination but did so in a conclusory fashion. Immediately after making the finding that Watters "had returned to the same job at a wage that is equal to or greater than his pre-injury wage" and that Watters was "unlikely to be able to continue in this capacity on an indefinite basis," the ALJ merely stated, "The ALJ therefore finds that [Watters] is

unlikely to be able to continue to earn the same or greater wages on a continuing basis going forward."

The Court of Appeals has previously explained the difference between determining whether a claimant could continue to perform his current job and determining whether a claimant could continue to earn a wage that equals or exceeds his pre-injury wages.

> If 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.

Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). In essence, a determination under *Fawbush* requires the ALJ to determine whether there has been a "permanent alteration in the claimant's ability to earn money due to his injury." *Id.*

While the ALJ made a conclusory finding that Watters was "unlikely to be able to continue to earn the same or greater wages on a continuing basis

going forward," he failed to support this finding by any facts from the record other than a general reference to Dr. Autry's report. Therefore, I would remand this case to the ALJ for further factfinding as to Watters's ability to continue, for the indefinite future, earning a wage that equals or exceeds the wage he was earning at the time of his injury. If it is unlikely that Watters will be able to earn such a wage indefinitely, then application of KRS 342.730(1)(c)1 is appropriate.

Nickell and Wright, JJ., join.

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Honorable Jonathan R. Weatherby, Administrative Law Judge