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(2005-SC-0836-WC)

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2004-CA-002177-WC

ARNOLD ADAMS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-96193

NHC HEALTHCARE; HON. GRANT ROARK,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2004-CA-002387-WC

NHC HEALTHCARE

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-96193

ARNOLD ADAMS; AND WORKERS'  
COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING ON THE PETITION FOR REVIEW  
AND  
REVERSING ON THE CROSS-PETITION FOR REVIEW

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BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Arnold Adams has petitioned for review from an opinion of the Workers' Compensation Board entered on September 24, 2004, which affirmed in part, reversed in part, and remanded the Administrative Law Judge's opinion and award rendered on May 18, 2004, which found Adams to have a permanent, partial disability of 13% with a 2-multiplier. The employer, NHC Healthcare, has filed a cross-petition challenging the Board's reversal on Adams's entitlement to the 3-multiplier found in KRS 342.730(1)(c)1. Having concluded that the evidence did not compel a finding of greater disability, we affirm on the petition for review. Having concluded that the Board's decision as to the 3-multiplier is erroneous as a matter of law, we reverse on the cross-petition.

Adams, who was born on November 6, 1967, graduated from high school and later earned a medical technology certificate. Adams has worked primarily in the health care

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

field and he was employed by NHC from 1996 until August 29, 2002, his last day of paid employment.

On April 16, 2002, Adams was working for NHC as a nurse assistant when he injured his low back while attempting to lift a patient from a chair while moving the patient to the bed.<sup>2</sup> He immediately reported the injury to a supervisor, but an injury report was not filed until later.<sup>3</sup> Adams finished his shift on that day and continued to work until August 29, 2002, when he testified that he could no longer tolerate the pain.

Adams was first treated for this low-back injury by his family physician, Dr. Gary James, on April 17, 2002. Dr. James referred Adams to Dr. Theodore Davies, a neurosurgeon, who reviewed Adams's MRI scans taken in April 2002 and February 2003. The scans revealed foraminal disc herniation at the L5-S1 level to the left. Dr. Davies diagnosed Adams with lumbar disc displacement and lumbar radiculopathy. He performed surgery on Adams on February 28, 2003, consisting of a lumbar hemilaminotomy, foraminotomy, and discectomy at the L5-S1 level. Dr. Davies opined that Adams reached maximum medical improvement on July 30, 2003, and assessed a 13% impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment. Dr.

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<sup>2</sup> Adams testified that during the move from the chair to the bed, the 200-pound patient slipped in the lift and began to fall. Adams testified that he caught the patient and helped him to the bed, and in the course of this maneuver he injured his low back.

<sup>3</sup> It is unclear from the record the date the injury report was filed.

Davies recommended that Adams lift no more than five pounds and avoid any activities which required him to bend, twist, or sit for prolonged periods of time. He further stated that Adams could only return to work at a very sedentary level, which would allow him to rest frequently.

Following surgery, Adams underwent a course of pain management with Dr. Riley Love from May 16, 2003, through September 8, 2003. Dr. Love noted that Adams walked with the assistance of a cane and continually complained of low-back pain and increased leg pain. Dr. Love performed several epidural injections on Adams, but the injections did not relieve Adams's pain.

Dr. James continued treating Adams until June 2003. He diagnosed Adams as having severe low-back pain, degenerative disc disease of the lumbar spine, and failed back syndrome caused by the work-related injury. Dr. James stated that Adams could not rise from a chair or walk without assistance. Dr. James opined that Adams's condition was not likely to improve and would continue to worsen over time.

Adams testified by deposition on December 5, 2003.<sup>4</sup> He stated that he still suffered from pain and numbness in his low back which radiated into his left leg. He also testified that

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<sup>4</sup> Adams testified that he had suffered at least two prior work injuries while working for NHC, including an injury to his low back and an injury to his wrist. Adams continued working following both injuries and it is unclear from the record whether he was compensated for the injuries.

due to the pain he could not sit for more than 15 to 20 minutes at a time, could not bend over to pick up anything, and could not walk without the assistance of a cane, or for more than ten to 20 minutes at a time. Adams testified that he underwent surgery on his back on February 28, 2003, but that the surgery did not help the pain and he felt that his condition had worsened. He testified that due to his pain, he engaged in limited physical activity, including household chores.

At the request of NHC, Dr. Russell Lee Travis, a neurosurgeon, performed an independent medical evaluation of Adams on February 2, 2004. In his deposition, Dr. Travis testified that he had reviewed Adams's medical records, including his X-rays and MRI scans, and performed a physical examination of Adams. Dr. Travis stated that Adams had normal postoperative fibrosis and no evidence of a recurrent or residual disc fragment. He stated that Adams had atrophy in his lower left leg and possible mild generalized neuropathy. Dr. Travis indicated that Adams was positive on five Waddell findings, which indicated signs of overt symptom magnification. Dr. Travis assessed a 13% impairment rating on Adams's whole body based on the AMA Guides. He opined that Adams could return to at least medium work activity, and that he could lift a maximum of 35 to 50 pounds.

In support of NHC's claim that Adams suffered from a pre-existing active disability, it relied on the medical report of Dr. William Guyette. This report was completed after Dr. Guyette reviewed Adams's radiology report dated October 25, 2000, which indicated L5-S1 disc narrowing and a mild degenerative change.

On March 24, 2004, Adams testified before the ALJ regarding his injury, and stated that he suffered from low-back pain and complete and total numbness in his left leg. Adams further stated that Dr. James subsequently told him to stop using a cane and advised him to use a walker to ambulate. Adams stated that his medications included Lortab, Zanaflex, Ativan, Zantac and Senoquen. Adams claimed that he spent most of his time either lying on the couch or lying in bed, and that he could drive a vehicle only when absolutely necessary.

The ALJ entered his opinion on May 20, 2004, finding Adams to be permanently, partially disabled, with a 13% impairment rating, and a 2-multiplier. The ALJ observed that Adams was a 36-year-old educated man with the ability to be trained in some capacity. The ALJ chose to rely on Dr. Travis's opinion that Adams could return to medium duty work based on the "lack of post-surgical neurological findings[.]" The ALJ agreed that Adams showed signs of "overt symptom magnification" which "undermines [Adams's] own testimony that he cannot return to any

gainful employment." Further, the ALJ noted that Adams did not have the physical capacity to return to the same type of employment he held at the time of his injury; and therefore, he was entitled to an enhancement of benefits based on the 2-multiplier as set forth in KRS 342.730(1)(c)1.<sup>5</sup>

On May 28, 2004, Adams filed a petition for reconsideration in which he argued that the ALJ's finding of permanent, partial disability was erroneous. Adams further stated that the ALJ should have (1) allowed into evidence the decision of the Social Security Administration as to his disability; (2) discussed and considered his use of a walker to ambulate; and (3) considered medical evidence other than that of Dr. Travis to determine whether he had the ability to return to work and in setting forth the use of the 2-multiplier to calculate his enhanced benefits. The ALJ overruled the petition for reconsideration on June 23, 2004,<sup>6</sup> and Adams appealed to the Workers' Compensation Board.

In an opinion entered on September 24, 2004, the Board reversed the ALJ's decision to apply the 2-multiplier in

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<sup>5</sup> Because the ALJ's opinion incorrectly stated that he was applying the 3-multiplier in calculating Adams's benefits, but correctly set forth the calculations pursuant to the 2-multiplier, an amended opinion and order was entered on May 24, 2004.

<sup>6</sup> The June 23, 2004, order of the ALJ is styled "Corrected Opinion on Petition For Reconsideration." The first order entered on June 18, 2004, did not address Adams's claim, but instead mistakenly placed the heading for Adams's claim on a decision for an unassociated case of a different workers' compensation claimant.

calculating Adams's benefits and remanded the case for a recalculation using the 3-multiplier. The Board stated:

Here, the evidence indicates, and the ALJ so found, that Adams was incapable of returning to his pre-injury work which required the heavy lifting of patients. Adams returned to this exact job post-injury and ultimately had to quit because of his inability to perform that type of work. In sum, the same job that produced the pre-injury wage produced the post-injury wage. The ALJ concluded Adams did not retain the physical capacity to perform that type of work and that finding is supported by substantial evidence. If Adams can no longer physically perform the type of work performed both at the time of injury and thereafter, it follows as a matter of law that he is "not likely to be able to maintain the employment indefinitely."<sup>7</sup> The ALJ erred in applying the two multiplier and instead, should have awarded benefits enhanced by the three multiplier [emphasis original] [citation omitted].

The Board, however, affirmed the ALJ's opinion as to the exclusion of the decision of the Social Security Administration, the ALJ's reliance on Dr. Travis's medical opinion in finding Adams permanently partially disabled, and the ALJ's issuance of a corrected order on Adams's petition for reconsideration. This petition and cross-petition for review followed.

Adams argues to this Court that (1) the ALJ erred when he refused to consider the favorable decision of the Social

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<sup>7</sup> The Board was quoting from Fawbush v. Gwinn, 103 S.W.3d 5, 12 (Ky. 2003).

Security Administration as evidence; (2) the evidence compels a finding that Adams is permanently, totally disabled; and (3) the ALJ's corrected order on Adams's petition for reconsideration did not comply with KRS 342.125. When reviewing one of the Board's decisions, this Court will only reverse the Board's decision when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice.<sup>8</sup>

After reviewing the parties' arguments and the record, we conclude that the Board's discussion of Adams's arguments is correct. Accordingly, we quote the pertinent parts of Member Gardner's well-written opinion on these issues and adopt them as our own:

Adams first argues that the ALJ erred in his refusal to place evidence concerning Adams'[s] Social Security disability decision in the record pursuant to 803 KAR 25:010 Section 14(2). That regulation states:

Any party may file as evidence before the administrative law judge pertinent material and relevant portions of hospital, educational, Office of Vital Statistics, Armed Forces, Social Security, and other public records. An opinion of a physician which is expressed in these records shall not be considered by an administrative law judge in violation of the

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<sup>8</sup> Daniel v. Armco Steel Co., 913 S.W.2d 797, 798 (Ky.App. 1995).

limitation of the number of  
physician's opinions established  
in KRS 342.033.

Adams contends because his Social Security decision was not rendered until after the hearing, he did everything possible to provide the information to the ALJ and the respondent in a timely fashion. He requests this matter be remanded to another ALJ for consideration of the record, including the favorable Social Security Administration decision.

The purpose behind 803 KAR 25:010 Section 14(2) is to allow for submission into evidence additional relevant information in the form of public records, bypassing expenses characteristically associated with depositing public record keepers. It is clear from Adams'[s] argument that he sought to introduce the Social Security Administration decision as further evidence that he is totally occupationally disabled from any and all types of employment. We agree with the ALJ, however, that he is not obligated to consider a Social Security Administrative Law Judge's account of medical evidence before him. The ALJ correctly cited Kington v. Zeigler Coal Co., [629 S.W.2d 560 (Ky.App. 1982)] for the proposition that a favorable Social Security decision is in no way binding as to the outcome of a workers' compensation claim and is of little or no evidentiary significance. The legal standards before the Social Security Administration are different from those in the Workers' Compensation Act, and the information submitted in the Social Security claim is often different from that submitted in a workers' compensation claim. Since an ALJ is not required to consider evidence of a Social Security Administration decision, we do not believe the ALJ committed error in refusing to admit the evidence. Further, as pointed out by NHC, pursuant to 803 KAR

25:010 Section 15, since Adams did not file for an extension of proof time prior to the expiration of the deadline, the ALJ did not commit error in refusing admission of the proposed evidence.

Adams next argues the ALJ erred in failing to find him totally occupationally disabled. He submits that since the ALJ ordered NHC to pay for a walker "it is inconceivable and incomprehensible that an individual who's going to be ambulating by a walker" can perform a medium job description. Again he argues the ALJ had a preconceived notion to find him only partially disabled. Adams submits the ALJ engaged in "profound hypothecation" that there might be some job he could perform in the labor market. He takes issue with the ALJ's reliance on Dr. Travis's evidence, and instead contends he should have relied on the evidence from Dr. James.

Since Adams was unsuccessful in his burden of proof and risk of persuasion on the issue of total occupational disability, our review of his argument is limited to whether the evidence as a whole is so overwhelming as to compel a finding in his favor. Wolf Creek Collieries v. Crum, Ky.App. 673 S.W.2d 735 (1984). Where the evidence is conflicting, the ALJ has the authority to pick and choose what evidence to believe and what evidence to disbelieve. Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000); Whittaker v. Rowland, Ky., 988 S.W.2d 479 (1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there is no substantial evidence of probative value to support his decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Determining whether an individual has sustained a partial or total occupational

disability, as defined by KRS 342.0011(11), requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. McNutt Construction Co. v. Scott, Ky., 40 S.W.3d 854 (2001). In that case, our Kentucky Supreme Court confirmed that some of the long-standing principles set forth in the seminal case of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), remain viable:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The definition of 'work' clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, Osborne v. Johnson, supra, at 803.

Although the Act underwent extensive revision in 1996, the ALJ remains in the role of the fact-finder. KRS 342.285(1). It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. See, Eaton Axle Corp. v. Nally, Ky. 688 S.W.2d 334 (1985); Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). A worker's testimony is competent evidence of his physical ability to perform various activities both before and after being injured. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979).

McNutt, at 860.

The evidence clearly established that Adams sustained a permanent impairment as a result of his work injury and suffered occupational disability as a result thereof. Further, the evidence from Adams'[s] treating physicians and his own testimony would support a finding of total occupational disability. However, as reviewed above, that is not the standard on appeal. Contrary to Adams'[s] arguments, Dr. Travis's testimony is substantial evidence upon which the ALJ could base his decision. The evaluating physician believed Adams could return to medium labor. Given Adams'[s] age and education, as well as the medical opinion that he can engage in labor post-injury, we are of the opinion that the decision of the ALJ is not "so unreasonable

that it must be viewed as erroneous as a matter of law." Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000).

Adams next argues the ALJ's corrected order on reconsideration does not comply with KRS 342.125. He contends that since the ALJ did not use language withdrawing the incorrect order and substituting it with the corrected order, he did not comply with Chapter 342. He again contends this matter should be remanded to another ALJ for consideration of the entire record including the Social Security disability award.

It is apparent the ALJ committed a mistake of a clerical nature. He attached the style of Adams'[s] claim to an order on petition for reconsideration addressing another claim. The ALJ corrected this deficiency and entered a corrected order dated June 22, 2004. While it probably would have [been] better for him to have specifically set out an explanation for the corrected order, the important consideration is that the order was corrected. There was no error on the part of the ALJ. Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767 (1993).

Based on the foregoing, we affirm the Board on Adams's petition for review.

On cross-petition, NHC argues that the Board erroneously applied the 3-multiplier to enhance Adams's disability benefits. We agree and reverse on this issue.

KRS 342.730 states, in relevant part, as follows:

- (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

. . .

- (c) 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.

Our Supreme Court has recently interpreted KRS 342.730(1)(c)1 and 2 in Fawbush, where it noted that KRS 342.730(1)(c)1 and 2 were amended effective July 14, 2000, and the word "or" was inserted between (c)1 and 2. Based upon the

recent amendment of KRS 342.730(1)(c)1 and 2 and upon its plain language, the Supreme Court stated:

[W]e note that the legislature did not preface paragraph (c)2 with the word "however" or otherwise indicate that one provision takes precedence over the other. We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.

Here, the ALJ based the decision to apply paragraph (c)1 upon a finding of a permanent alteration in the claimant's ability to earn money due to his injury. The claimant's lack of the physical capacity to return to the type of work that he performed for Fawbush was undisputed. Furthermore, although he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely. Under those circumstances, we are convinced that the decision to apply paragraph (c)1 was reasonable [emphasis added].<sup>9</sup>

Thus, in a case where both subsections apply, the ALJ must determine whether the employee is likely to continue to earn the same or greater wages for the indefinite future. If the

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<sup>9</sup> Fawbush, 103 S.W.3d at 12.

employee is able to earn the same or greater wage for the indefinite future, section (c)2 is applicable; if the employee is unable to earn the same or greater wages for the indefinite future, section (c)1 is applicable.

In this case, the ALJ found that Adams "could return to regular employment at same or greater wages than the position he held at the time of his injury sometime in the immediate future[,]" and applied the 2-multiplier from section (c)2 to enhance Adams's award of benefits. The Board, in reversing the ALJ, held that because the ALJ had concluded that Adams could no longer physically perform the type of work he performed at the time of injury, it followed, as a matter of law, that Adams would be unable to maintain the employment indefinitely.

The Board stated:

Here, the evidence indicates, and the ALJ so found, that Adams was incapable of returning to his pre-injury work which required the heavy lifting of patients. Adams returned to this exact job post-injury and ultimately had to quit because of his inability to perform that type of work. In sum, the same job that produced the pre-injury wage produced the post-injury wage. The ALJ concluded Adams did not retain the physical capacity to perform that type of work and that finding is supported by substantial evidence. If Adams can no longer physically perform the type of work performed both at the time of injury and thereafter, it follows as a matter of law that he is "not likely to be able to maintain the employment indefinitely." Fawbush, supra, at 12. The ALJ erred in

applying the two multiplier and instead, should have awarded benefits enhanced by the three multiplier [emphasis original].

It appears that the Board erred in its analysis by misunderstanding the Supreme Court's reference in Fawbush to "the employment."<sup>10</sup> The Board apparently read these words to refer to Adams's employment at the time of his injury as a nurse assistant, which he continued to perform until August 29, 2002. However, in Fawbush the claimant was working as a framing carpenter when he was injured, and following his injury he worked as a construction supervisor earning an amount that exceeded his earnings at the time of his injury. The Supreme Court's approval of the ALJ's choice of the 3-multiplier was based on the ALJ's determination that the claimant "was not likely to be able to maintain the employment indefinitely" [emphasis added].<sup>11</sup> The Supreme Court reference to "the employment" in Fawbush was to the claimant's post-injury employment as a construction supervisor, not to his employment at the time of his injury as a framing carpenter.

The case before us differs from Fawbush in that Adams continued to work as a nurse assistant following his injury on April 16, 2002, until August 29, 2002, and Adams has not taken a different job that pays more than he was earning at the time of

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<sup>10</sup> Fawbush, 103 S.W.3d at 12.

<sup>11</sup> Id.

his injury. However, the ALJ made the following findings concerning Adams's ability to earn an amount equal to or greater than his earnings at the time of his injury:

As to the extent and duration of plaintiff's disability, I am not persuaded that he is totally disabled. He is still a relatively young man at 36 years of age. He is educated and his history demonstrates he is capable of learning and training. More importantly, Dr. Travis, upon whom I rely on this issue, opined that plaintiff could at least return to medium duty work given the complete lack of post-surgical neurological findings relative to the L5-S1 level that is the subject of plaintiff's work injury. In other words, I do not find there is enough physical impairment caused by the work injury to warrant a finding of total disability. I find that, within the restrictions imposed by Dr. Travis, the plaintiff could return to some type of regular employment, probably even to his former employment as a "med tech," as plaintiff himself described his duties there as giving medications. It would seem such activities should not exceed the medium duty classification. I also find that the overt symptom magnification observed by Dr. Travis undermines plaintiff's own testimony that he cannot return to any gainful employment. For these reasons, I find that Plaintiff is permanently, partially disabled for the foreseeable future.

Because plaintiff did continue working at his regular position at the same or greater wages after his injury date, KRS 342.730(1)(c)2 could apply so that his award would be multiplied by only 2. However, it further appears that plaintiff is not physically capable of returning to the position he held at the time of his work injury and, as such, he qualifies for the 3x factor set forth in KRS 342.730(1)(c)1. I

do not find that plaintiff could perform the physical aspects of his position with the defendant with even the medium duty restrictions assigned by Dr. Travis. Specifically, the occasionally lifting of patients of all different weights would appear beyond the medium duty level of functioning.

This is exactly the situation described in Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003), which requires the ALJ to determine which multiplier is more appropriate given the facts of the case. Accordingly, I find that, although plaintiff does not retain the physical capacity to return to his job with the defendant, he could return to regular employment at same or greater wages than the position he held at the time of his injury sometime in the immediate future. Plaintiff's average weekly wage was stipulated to be \$308.30, which comes to \$7.71 per hour based on a 40 hour week. I find that plaintiff should be able to find or train for suitable employment at the medium duty level that would pay at least \$7.71 per hour. This finding is further supported by plaintiff's own testimony in which he states he left his job administering medication as a med tech for New Dawson Springs to go to NHC for "better benefits" rather than mentioning better pay. It follows that employment as a med tech, to which I find plaintiff could return within the medium duty physical level, would likely pay the same wages as plaintiff earned for NHC. Plaintiff is therefore entitled to the 2x multiplier set forth in KRS 342.730(1)(c)2.

This determination by the ALJ is not only consistent with Fawbush, but is also supported by the more recent cases of

Kentucky River Enterprises, Inc. v. Elkins,<sup>12</sup> and Adkins v. Pike County Board of Education.<sup>13</sup> In Elkins, our Supreme Court acknowledged the ALJ's finding "the claimant could not return to the type of work that he was performing at the time of his injury," but ordered on remand that the ALJ also make a finding as to whether the claimant "is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future."<sup>14</sup>

In Adkins, this Court stated as follows:

[T]he facts as determined by the ALJ are that Adkins does not retain the physical capacity to return to the type of work that he performed at the time of his injury. Also, it is undisputed that Adkins is now working at a weekly wage greater than the average weekly wage he was earning at that time. However, the ALJ did not further determine whether Adkins was likely to be able to continue earning a wage that equals or exceeds the wage at the time of his injuries for the indefinite future. That determination is required by the Fawbush case. The Board in this case, while it was correct in remanding the case for a further finding, incorrectly stated that upon remand the ALJ was to determine whether Adkins could continue to perform his current job as opposed to whether he could continue to earn a wage that equals or exceeds his pre-injury wages.

These two determinations, though ostensibly equivalent in this case, are

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<sup>12</sup> 107 S.W.3d 206 (Ky. 2003).

<sup>13</sup> 141 S.W.3d 387 (Ky.App. 2004).

<sup>14</sup> Elkins, supra at 211.

quite different in their long-term ramifications. Between two similarly situated claimants not returning to the same type of work, if one gets a job fitting his restrictions and paying the same wage, but unexpectedly ending after only a year, and the other does not, then it is likely that, under a determination such as that ordered by the Board, only the second would receive benefits based on a multiplier of three. If, however, the ALJ makes a determination under the Fawbush standard as to the "permanent alteration in the claimant's ability to earn money due to his injury," then it is likely both claimants would be treated the same. 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. 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.

Thus, since there was substantial evidence to support the ALJ's finding that Adams was capable of returning to work as a medical technician earning as much or more than he was earning

as a nurse assistant at the time of his injury, the Board misconstrued the law in reversing the ALJ. Accordingly, we reverse the Board on NHC's cross-petition as to the Board's reversal of the ALJ's award of the 2-multiplier. As previously stated, we affirm the Board on all issues on Adams's petition for review.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

Dick Adams  
Madisonville, Kentucky

BRIEF FOR APPELLEE/CROSS-  
APPELLANT, NHC HEALTHCARE:

Whitni J. Cayce  
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