OPINION ENTERED: July 16, 2012

CLAIM NO. 201081293

MIDLAND ELECTRIC CO., INC. PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

DANIEL MATTINGLY
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Midland Electric ("Midland") seeks review of the opinion and award rendered March 29, 2012 by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by a 3.2 multiplier pursuant to KRS 342.730(1)(c)1 and 3, and

medical benefits to Daniel Mattingly ("Mattingly") for injuries suffered on August 5, 2010. Midland also appeals from the April 25, 2012 order denying its petition for reconsideration.

On appeal, Midland argues the ALJ erred in enhancing Mattingly's PPD benefits by the 3.2 multiplier pursuant to KRS 342.730(1)(c)1 and Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Specifically, Midland argues Mattingly failed to prove he will not be able to continue earning the same or greater wages for the indefinite future. Midland also argues the ALJ erroneously inferred Mattingly's job and future earnings may be affected by an economic downturn causing the employer to have less business when he stated Mattingly's "situation is tenuous as he is now only able to work on approximately half of the jobs" on which he previously worked. It argues pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) and subsequent cases, claimant's inability to earn at or better wages for the indefinite future has to be related to the effects of the disabling work injury. "Thus putting consideration of any possible economic downturn aside, it is essentially undisputed that claimant will be able to continue performing his current job for the indefinite future." We affirm.

It is undisputed on August 5, 2010, Mattingly injured his lower back and left heel/foot when he fell approximately twenty feet from an extension ladder while employed by Midland. Mattingly submitted the Form 101 on August 12, 2011 and attached medical records from Dr. Hueg-Yuan, Dr. Quill and Dr. Reiss. He also attached the first report of injury and a utilization review notice denying his request for pain management. Dr. Hueg-Yuan treated Mattingly for a right wrist contusion due to the accident, an injury which has since resolved and not the subject of this appeal.

On August 10, 2010, Dr. Quill, an orthopedic surgeon, diagnosed left displaced intra-articular fracture, lumbosacral strain, and wrist contusion. A subsequent CT scan demonstrated a severely comminuted calcaneal fracture and generalized soft tissue swelling and edema. On August 23, 2010, Dr. Quill performed an ORIF of the left calcaneus fracture at Baptist East Hospital, and he subsequently ordered physical therapy. In a follow-up medical record dated September 8, 2010, Dr. Quill noted post-surgery improvement, but continued back pain and leg numbness. He then referred Mattingly to Dr. Reiss, a neurosurgeon. An MRI of the lower spine performed September 10, 2010 demonstrated compression fractures at L1, L2 and possibly

L3. On February 16, 2011, Dr. Quill noted Mattingly would obtain medical maximum improvement ("MMI") and could return to work on February 21, 2011 with regard to his left heel/ foot. He also assigned the following permanent restrictions:

> Permanent restrictions will include using and standing on ladders no more than ½ hour at a time twice during a single work day. It would be nice if he were able to sit for 20 minutes or so every 4 hours of the work day. He should avoid continuous work on uneven ground, although he should be able to do this daily with certain limitations. Walking sideways across a ramp or a rooftop may be a little difficult for him. Mid to high-rise boots would be preferable to oxfords, and he will have to make certain shoewear allowances.

Mattingly treated with Dr. Reiss for his lower back pain and left leg numbness, from September 17, 2010 to June 9, 2011. An MRI of his lumbar spine performed January 9, 2011 demonstrated mild compression deformities at L2 and L3 and minimal edema at L2, suggesting a subacute or remote fracture. On February 3, 2011, Dr. Reiss diagnosed a closed fracture of the lumbar vertebrae, lumbago and lumbar/lumbosacral degeneration. He noted no improvement since completing physical therapy and referred him for three lumbar spine epidural steroid injections. He also noted "stay off work." Subsequent to the injection

treatment, Dr. Reiss noted some improvement and released him effective April 4, 2011 with a temporary lifting restriction of no greater than fifty pounds. On June 9, 2011, Dr. Reiss released Mattingly from treatment, opined he would reach MMI in early August, permanently restricted him from lifting no more than fifty pounds and referred him to pain management. Subsequently, Mattingly's request for pain management was denied by Utilization Review. Mattingly also submitted the medical records of Dr. Nelson, from Bluegrass Pain Consultants dated in July 2011. Dr. Nelson treated Mattingly's lower back with Tramadol and injection therapy.

Mattingly submitted the report of Dr. Baker, an orthopedic surgeon, who evaluated him on October 20, 2011. He opined Mattingly had reached MMI regarding both his foot and lower back within twelve months after the accident for his foot, and within six months for his lower back. Dr. Baker assessed a 24% impairment rating for his lumbar spine injury and a 5% impairment rating for his left foot injury, yielding a combined impairment rating of 28% pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Baker agreed with Mattingly's treating physicians regarding restrictions of no lifting more than fifty pounds, limited

ladder work with respect to standing, climbing and descending, and avoidance of working on uneven grounds and slanted surfaces (such as roofs or ramps) as much as possible. Dr. Baker recommended mild to moderate pain medications on an intermittent basis, continuation of a home exercise program, and he declined to recommend invasive low back surgery or invasive pain management.

Midland submitted the report of Dr. Loeb, an orthopedic surgeon, who evaluated Mattingly on December 6, 2011. Dr. Loeb diagnosed healed compression fractures at L2 and L3, less than 25%, and healed left calcaneus fracture, in satisfactory position. He opined both conditions were causally related to the August 5, 2010 accident. He opined Mattingly reached MMI when seen by Dr. Quill and he also noted the lumbar fracture would have healed before the MMI date given by Dr. Quill on February 21, 2011. Dr. Loeb assessed a 14% impairment rating for the left foot injury and a 5% impairment rating for the low back injury, yielding a combined impairment of 18% pursuant to the AMA Guides. Dr. Loeb agreed with the restrictions of no lifting over fifty pounds, no working on uneven group or slanted surfaces on any extended basis, and he should limit working on ladders with respect to standing, climbing or descending.

Mattingly testified by deposition on October 13, 2011 and again at the hearing held January 16, 2012. Mattingly was born February 24, 1958 and resides in Louisville, Kentucky. He completed the eleventh grade and later received his GED. He has specialized training as a master electrician. Mattingly's prior work history includes work as a maintenance electrician for Humana from 1977 to 1989 where he repaired hospital equipment. He then worked as a maintenance mechanic at Frito Lay from September 1989 to May 1991, before working for Midland from July 1993 to the present.

Mattingly testified he had a prior work-related wrist injury in 1987 that required surgery which subsequently resolved requiring no treatment. He also had a prior work-related injury where he crushed his left forearm while working at Frito Lay, resulting in surgery which also resolved requiring no additional treatment. Prior to August 5, 2010, Mattingly testified he had never experienced problems with his back, left foot or left heel.

Mattingly began working for Midland in July 1993 as a construction electrician which involved installing equipment. He was a foreman both prior to and after the accident. He returned to work for Midland in April 2011. Mattingly testified his job at Midland requires heavy

lifting of more than fifty pounds on a regular, daily basis. Prior to the accident, he climbed ladders regularly. Mattingly testified Dr. Quill has limited his ladder use to a half hour a day, two times a day, “but there are times we have to spend eight hours on a ladder.”

On August 5, 2010, Mattingly testified he was working on a ladder at an apartment complex for Midland inspecting a lighting fixture. The lighting fixture gave way causing him to fall approximately twenty feet. He was taken to University of Louisville emergency room where x-rays were taken of his left foot and back. He was informed he had shattered his heel bone and was prescribed pain medication. Mattingly then treated with Dr. Quill for his left heel/foot who performed surgery on August 23, 2010. Physical therapy for his left foot provided some relief.

Mattingly stated Dr. Reiss treated his lower back, and recommended a back brace for two months. When the back brace provided no relief, Dr. Reiss ordered epidural injections. Mattingly testified the epidural injections provided some pain relief until he returned to Midland. Dr. Reiss then referred him to Dr. Nelson at Bluegrass Pain Consultants where he received several series of injections. Mattingly testified the series of

injections provided some relief, but he still suffers from low back pain.

Mattingly testified immediately prior to the August 5, 2010 fall, he performed primarily commercial industrial electrical installations without restriction or limitation. He returned to full-time work on April 6 or 10, 2011, with restrictions. Since his return, he has been performing strictly remodeling work. He explained he can no longer work on new buildings because he can no longer walk on rough ground nor run pipes and conduit through ditches. Mattingly testified Midland has kept him on remodeling jobs due to his restrictions consisting of limited bending and stooping, no lifting over fifty pounds, no more than thirty minutes on a ladder twice per day, and avoidance of uneven ground, rough terrain, roofs and moving from side to side. Mattingly testified his restrictions have not changed since returning to work full-time as an electrician/job foreman, and he testified he earns the same or greater wages as he did on August 5, 2010. Mattingly testified as follows when asked what type of tasks he cannot do now that he could do prior to his fall:

> A: Working on any kind of underground stuff, I couldn't do. Walking on uneven ground or anything like that, would kill me. The bigger sizes of conduit, I couldn't run those if I had

> to. Hauling wire, small stuff, I can do, but the bidder wire, I can't handle anymore.
>
> Q: You mentioned earlier you're limited on the amount of time you can spend on a ladder?
>
> A: Yeah.
>
> Q: What happens on jobs where you would normally do that type of work?
>
> A: I have to have somebody else do it for me.
>
> Q: Are those job duties that you would come across on a normal day?
>
> A: Since I've been back, they kind of kept me on remodeling-type jobs where I don't have any ground work to deal with. Midland has been real good about it.
>
> Q: Do you still have the same position, as far as being an electrician?
>
> A: Yes, sir. Well, I'm a job foreman, is what I do. So it's usually me and a helper, at least, and then sometimes I have more guys on the job than the two of us.

At the hearing, Mattingly further explained:

> Q: . . . What kind of things are you still able to do for them and what kind of things can't you do that you were doing before your injury work wise?
>
> A: Well, generally, what my job is, I'm a working job foreman. I have to be involved with the hands-on part of the job, as well as supervise the men that I have on the job. Sometimes it's

> me and a helper. Sometimes I might have four, five or six other guys with me. So it depends on how big the job is as to what I'm required to do. The more guys I have, the less physical labor I have to do.

Mattingly testified Midland is a good company and he has not had any problems concerning his restrictions. However, he acknowledged there is no guarantee this will continue into the future, since it depends on what job opportunities Midland will have available (new construction as opposed to remodeling jobs). If only new construction jobs were available, Mattingly testified he would not be able to work. He is also concerned whether he will be able to continue working for Midland in the future.

Mattingly continues to treat approximately twice per month with Dr. Nelson, his pain management physician, who prescribes Tramadol and Lortab. He testified he would be unable to perform his job without his Tramadol prescription, which enables him to "at least attempt to do my job." Mattingly anticipates requiring more injections. He further testified all of his medical expenses have been paid except for the pain management provided by Dr. Nelson. Mattingly currently suffers from lower back pain, left leg numbness and left heel pain particularly when traversing

rough terrain, uneven ground, inclined surfaces, doing any side-to-side movement or standing for long periods.

Midland submitted the deposition of Timothy Freedman ("Freedman"), president of Midland, taken January 16, 2012. Freedman confirmed Mattingly is an electrician with Midland where he has been employed for approximately 15 to 20 years. As a foreman, Mattingly's job duties include the following: ensure jobs are installed in accordance with the plans and specs; supervise and assign jobs to his crew; perform daily planning; and order materials. When asked if there is less physical demand for a foreman similar to Mattingly, Freedman testified it depended on the size of the job and crew, explaining the more people you have on a crew the less time you spend physically working and vice-versa.

Freedman testified Mattingly returned to the same position he held prior to the accident as an electrician/ foreman with work restrictions. When asked if Mattingly's restrictions have been accommodated, Freedman testified:

> We have been, as far as I know. He hasn't said that we haven't been - - you know, he hasn't said he can't do it, that we haven't been - - haven't accommodated him to the point he can't do it.

He did not believe the accommodations have caused work availability to decrease. Mattingly has been able to keep normal work hours and no supervisor or co-worker has complained about his job performance. Freedman testified if there is a concern about Mattingly's ability to perform a job duty, it is typically discussed beforehand in order to provide an alternative method to accomplish the task. Mattingly normally has at least one helper with him on job sites. When asked if he thought a helper could handle most duties, such as significant lifting or ladder climber, Freedman stated:

> The lifting, yes; the ladder climbing, maybe, maybe not. You know, there's just - - there's some - - our line of work involves a lot of time spent on ladders and there's some jobs - - particularly if it's just a two-man job, there's some jobs that he would be required to do a lot of work on a ladder.

Freedman testified he has not noticed a change in Mattingly's work quality and thinks he is doing a good job. Midland intends to continue to employ Mattingly as long as it can accommodate his restrictions -- within reason. Mattingly has not been sent home because of too much ladder work. His hourly wage is the same or greater than prior to accident. When asked if Midland would be able to

accommodate his restrictions for the foreseeable future, he testified:

> A: If his restrictions or his abilities stay the same as they are today, I believe we will be able to.
>
> Q: In what way would his restrictions have to get more severe for you guys not to be able to accommodate him?
>
> A: Well, if he came to us and said, I just - - I can't do any ladder work any longer or I can't, you know, Climb (sic) in and out of a ditch at all or something of that nature, then we would have a problem finding enough work for him, I believe.
>
> Q: Okay. But you've never had any type of conversation with him like that?
>
> A: No. I mean, he has voiced concerns as to how long he - - you know, he has been concerned about whether or not he'll be able to continue in this line of work until his retirement, which I think is about - - I think he mentioned 14, 15 years.
>
> Q: Okay. Have you had conversations with any other supervisors that believe that they could only accommodate these restrictions on a temporary basis?
>
> A: No.

Freedman testified the fact that Mattingly has been assigned to mostly remodeling jobs since the accident is not the result of any conscious effort. A large percentage of Midland's work is renovation or remodeling,

which have recently been the jobs available. Freedman testified as follows when asked if Midland would be able to accommodate a request to work less on ladders:

> A: To some degree. I don't know - - you know, at some point you would have to say, you know, you're not able to do the job, but to some degree we could, yes.
>
> Q: And like you were saying earlier, if he said he couldn't work on ladders at all anymore, that would become a problem?
>
> A: It would, yes.
>
> Q: But currently he is able to work on ladders?
>
> A: Yes.

Freedman also testified Midland has been able to accommodate Mattingly's lifting and uneven surface restrictions. Based on the past ten months of providing work to Mattingly with his restrictions, he feels Midland will be able to accommodate him for the foreseeable future. On cross-examination, Freedman testified over the last few years, fifty percent of Midland's business is remodeling/ renovations, forty-five percent is new construction and five percent involves industrial facilities. The types of jobs available at a given time fluctuate, are hard to predict and driven by customer demand.

In the opinion and award rendered March 29, 2012, the ALJ awarded TTD benefits, medical benefits and PPD benefits based upon a combined 23% impairment rating, pursuant to the AMA Guides. In applying the three multiplier pursuant to KRS 342.730(1)(c)1, the ALJ stated as follows:

> Under KRS 342.730 (1)(b), a 23% impairment carries a multiplication factor of 1.15 for a 26.45% permanent partial disability. However, the analysis does not end there as the Administrative Law Judge must also determine whether the provisions of KRS 342.730 (1)(c) 1 or 2 apply. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages a determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. See *Fawbush v. Gwynn* 103 S.W. 3d 5 (Ky., 2003), *Kentucky River Enterprises Inc. v. Elkins* 107 S.W. 3d 206 (Ky., 2003) and *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App. 2004). Subparagraph 2 applies only in the limited instance where the plaintiff returns to work earning same or greater wages, but then ceases to do so by reason of the work injury. *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009). In this instance, the plaintiff has returned to work earning equal or greater wages. However, he remains under some severe work restrictions which require accommodation from his

employer. His treating neurosurgeon restricted him to working on ladders no more than one half hour at a time and only twice during a single workday. He also recommended the plaintiff be able to sit for 20 minutes each hour. He was also placed [sic] a 50 pound lifting restriction and against working on uneven or slanted surfaces. The plaintiff's own testimony was that he could not return to his full-line of duties as he performed them prior to his injury because he was required to do a lot of heavy lifting as well as work on ladders and uneven surfaces. On his return to work, he has been accommodated with only having to work at light duty remodeling projects which are less physical in nature and require less work on uneven ground and from ladders. The president of the company confirmed that even in this work atmosphere there will be days when the plaintiff is required to do a great deal of work on a ladder when there is only a two-man crew. He also explained that at the current time 50% of his projects were remodeling while 45% were new construction and 5% industrial. This situation allows the plaintiff to work on approximately half of the jobs for his employer. However, Mr. Friedman[sic] further explained that it was hard to predict where the business will be generated from in the future as the projects fluctuate. While it was his intention to keep the plaintiff for the indefinite future and was accommodating his restrictions, he noted that the accommodation of the restrictions required some planning before projects began, but the plaintiff may be unable to do so if he were to become unable to do any ladder work or climbing. After consideration of the entirety of this testimony, it is clear the plaintiff lacks the

> physical capacity to return to the type of work he performed [sic] the time of his injury and is[sic] only been unable[sic] to return to earning same or greater wages by reason of the accommodation afforded him by his benevolent employer. However, the plaintiff's situation is tenuous as he is now only able to work on approximately half of the jobs and even some of those jobs require a great deal of ladder work which goes against his restrictions. As such, I am convinced the application of the three multiplier is appropriate in this instance as it cannot be said the plaintiff will be able to continue earning same or greater wages for the indefinite future. In addition, the plaintiff is entitled to an additional multiplier based upon his age at the date of injury.

In its petition for reconsideration, Midland argued the ALJ erroneously placed the burden on it when he stated, “I am convinced the application of the three multiplier is appropriate in this instance as it cannot be said the plaintiff will be able to continue earning the same or greater wages for the indefinite future.” The remainder of its petition raised the same arguments appearing on this appeal. In his order denying Midland’s petition for reconsideration on April 25, 2012, the ALJ noted his statement was not intended to indicate Midland had the burden of proof. The ALJ then stated:

> To the contrary, plaintiff brought forth several factors which led the ALJ

> to be convinced that the plaintiff will not be able to continue earning same or greater wages for the indefinite future. The reasoning was set forth in the body of the opinion and careful consideration was given to the plaintiff's limitations and difficulties in his current position.

Since Mattingly was successful before the ALJ, the question on appeal is whether there was substantial evidence to support the ALJ's decision, including application of the three multiplier pursuant to KRS 342.730(1)(c)1. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979);

Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Upon consideration of the ALJ's analysis, we are satisfied he made adequate findings of facts sufficient to apprise the parties of the basis for his decision. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

As we have stated previously, in Fawbush v. Gwinn, *supra*, the Kentucky Supreme Court concluded in those instances where both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. *Id.* at 12. In Fawbush, the claimant, due to the effects of

the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury. However, the claimant had returned to work at a lighter job earning an average weekly wage ("AWW") equal or exceeding his AWW at the time of the injury. The unrebutted testimony indicated the post-injury work the claimant performed was performed out of necessity, was outside his medical restrictions, and was possible only when the claimant took more narcotic pain medication than prescribed. Based upon those facts, the Court concluded that the ALJ's decision to apply (1)(c)1 over (c)2 was reasonable. *Id*.

Subsequently, in Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court remanded a claim for a determination of the claimant's average weekly wage following his return to work. The Court instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury, "the ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, *supra*, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts." *Id*. at 211; *See also* Adkins v. Pike County Board of Education, 141

S.W.3d 387 (Ky. App. 2004) (holding the Fawbush analysis includes a "broad range of factors," only one of which is the ability of the injured worker to perform his pre-injury job.) The Supreme Court reaffirmed this holding in Adams v. NHC Healthcare, 199 S.W.3d 163, 168-169 (Ky. 2006), stating as follows:

> The court explained subsequently in Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky.App.2004), that the Fawbush analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

Therefore, where both the three multiplier and the two multiplier are applicable under the given facts of a claim, the principles enunciated in Fawbush v. Gwinn, *supra*, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, that a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage

equal to or greater than his pre-injury wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

We agree it was necessary for the ALJ to conduct a Fawbush analysis. Midland only disputes the ALJ's finding of fact concerning the third element of whether Mattingly can continue to earn that level of wages into the indefinite future. We find there is substantial evidence in the record to support the ALJ's determination the three multiplier is more appropriate pursuant to his Fawbush analysis. In this instance, the ALJ pointed to several factors in his determination. He noted Mattingly's "severe work restrictions" requiring accommodations from Midland. He relied on Mattingly's testimony he could not return to full duty following his accident and, since his return, he has been accommodated with only light duty remodeling projects. The ALJ also cited testimony by Freedman, the president of Midland, who stated there will be days when Mattingly is required to do more ladder work when working with a small crew. The ALJ also relied on Freedman's testimony that currently fifty percent of his projects were remodeling, while forty-five percent were new construction and five percent industrial. Since Mattingly testified he

could only do remodeling jobs, the ALJ inferred Mattingly can only work on approximately half of the jobs for Midland. Freedman also stated it was hard to predict where the business will be generated from in the future because the type of projects fluctuate. As a result, the ALJ found the application of the three multiplier more appropriate. Although Midland points to testimony supporting a finding Mattingly can continue to earn the same or greater level of wages into the indefinite future and notes other inferences which could be made from the testimony, such is not an adequate basis to reverse on appeal.

We also find Midland's argument the ALJ inferred Mattingly's job and future earnings may be affected by an economic downturn causing Midland to have less business when he found "plaintiff's situation is tenuous as he is now only able to work on approximately half of the jobs" speculative. No such inference of economic downturn was stated by the ALJ. Rather, the ALJ noted Mattingly's testimony concerning his ability to perform remodeling work, the percentage break-down of the types of job Midland performs, and unpredictability and fluctuation of future projects. We believe the ALJ performed the appropriate analysis and his decision is supported by substantial evidence.

Accordingly, the ALJ's decision rendered March 29, 2012 and order denying Midland's petition for reconsideration rendered on April 25, 2012, are hereby **AFFIRMED.**

ALL CONCUR.

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