RENDERED: JULY 10, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001253-WC

JACQUELINE NOELLE LUNTE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-69759

TWO CHICKS, LLC; HON. STEVEN BOLTON, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE; CHIEF JUDGE; COMBS AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: The Workers' Compensation Board reversed an Administrative Law Judge's (ALJ) conclusion that Appellant Jacqueline Lunte was entitled to the statutory enhancement of a "3 multiplier" pursuant to Kentucky

Revised Statutes (KRS) 342.730(1)(c)1 because she lacked the physical capacity to return to the type of work performed at the time of her injury. The Board erred. Accordingly, we reverse the Board and reinstate the opinion of the ALJ.

I. Facts and Procedure

In 2011, Lunte was employed as a part-time sales clerk at Appellee Two Chicks, LLC, a boutique specializing in jewelry, home décor, and gift items, such as purses, scarves, pewter, wreaths, jackets, accessories, and various other trinkets. The store is also stocked with other, heavier home accent pieces – chairs, side tables, mirrors, lamps, pictures, and wall hangings. Merchandise is displayed on tables, set on buffets and shelves (the highest of which is eight feet), placed on the floor in tubs or buckets, and hung on the wall or ceiling.

Lunte did not have a formal job description. Generally, her role as a sales clerk was to welcome and interact with customers, suggest items, operate a cash register, wrap gifts, organize the tables, straighten the store, restock merchandise on shelves, "fill holes," and assist with ordering inventory and inventory pricing. Lunte described her job as constant walking and standing, and stooping or kneeling to retrieve items under tables and on the floor. When not assisting customers, Lunte would restock merchandise, ensuring there were no empty spots on the wall, shelves, or tables. Because some merchandise was hung eight to twelve feet high on the wall or displayed on the eight-foot shelves, Lunte testified she had to use a ladder or stool to place this inventory or retrieve it at a

customer's request. Lunte described the stepstool as a wobbly, four-legged wooden stool about three feet tall with an attached step.

On October 29, 2011, a customer asked Lunte to retrieve an ornament from a Christmas tree situated on a display table in the store. Lunte could not reach it, so she stood on the wooden stool. While descending, the stool tipped and Lunte fell, fracturing her right tibial plateau. She was taken by ambulance to the hospital, and Dr. Craig Roberts performed surgery the next day. The surgery involved placing several screws through the bone, using a six-hole tubular plate and a four-hole laberal plate, then reducing the fractures that had extended into the tibial plateau, and finally filling a bone-loss crack with a bone-graft substitute. An open meniscus repair was performed with sutures. A torn patella tendon was non-repairable. By all accounts, the fracture was severe. The surgery was successful.

Following surgery, Lunte underwent extensive physical therapy, closely monitored by Dr. Roberts. She was in rehabilitation for many months. Her leg did not tolerate weight bearing until roughly the spring of 2012. Lunte returned to her primary employment – a preschool teaching position – in August 2012.

On January 28, 2013, Dr. Roberts found Lunte to be at maximum medical improvement and assessed an 8% whole person impairment rating. In a supplemental report, the doctor stated Lunte will experience difficulty climbing ladders, and is unable to climb stairs or ladders, or perform repetitive deep knee bending, squatting, or heavy lifting.

In April 2013, Lunte filed this Workers' Compensation claim. The ALJ conducted a final hearing on November 20, 2013. Lunte testified by deposition and at the hearing. Her primary job duty at Two Chicks was to assist customers. However, Lunte is five feet tall, and she testified she regularly climbed the stepstool three to four times per shift to help customers, to access inventory in the store room, and to restock merchandise. She also used the ladder on occasion. Lunte testified she would occasionally help a customer carry a piece of furniture to his or her car, unload heavy boxes of pewter, and move items in the back storage room. Lunte testified she frequently had to squat or bend to access merchandise, whether at a customer's request or to restock inventory.

Since the accident, Lunte can no longer climb a stool or ladder, lift heavy boxes or items, and cannot stand or walk around for long periods of time. Being on her feet is physically demanding. Her leg is often painful, and she experiences swelling regularly. She takes Tylenol as needed for pain management.

Karen Mayes, co-owner of Two Chicks, also testified by deposition and at the final hearing. She admitted that, because some merchandise was not reachable from the floor, a sales clerk might need to use the six-foot industrial ladder or stepstool to place inventory or retrieve it at a customer's request. But she explained that help was always present (two employees were always at the store); a hook was available to reach high-up items; and there are usually multiples of the same item found throughout the store, eliminating the need to climb or reach. Mayes stressed that climbing a ladder or stool is not an essential function of the

job. In fact, several sales clerks refuse to climb under any circumstances and Two Chicks encourages clerks to rest during their shifts. Mayes testified that the shelving in the back room is seven to eight feet tall, and merchandise is stored on the shelves from bottom to top. A sales clerk might need a ladder to reach items on the top shelf, and may need to squat or bend to reach items on the lowest shelf. When asked if it was part of Lunte's job as a sales clerk "to retrieve items from high places or squatting down from low places to give them to customers," Mayes replied: "It's part of a sales clerk's job if that is their comfort level."

Two Chicks submitted medical evidence from physician Michael Best, an independent medical expert. Dr. Best evaluated Lunte and her medical records regarding the 2011 injury. The doctor assessed a 5% whole person impairment rating, but opined Lunte retains the physical capacity to return to the type of work performed at the time of her injury.

The ALJ issued an Opinion, Award, and Order on February 6, 2014, in Lunte's favor. Relevant to this appeal, the ALJ awarded Lunte partial permanent disability benefits based upon an 8% impairment rating, which he enhanced with the three multiplier pursuant to KRS 342.730(1)(c)1. With respect to the multiplier, the ALJ reasoned:

> Dr. Roberts also noted that Ms. Lunte will be unable to do stair and ladder climbing, repetitive deep knee bending, squatting, or heavy lifting. Given the description of her job duties at [Two Chicks], it is clear that she does not retain the physical capacity to return to her employment as a retail clerk for [Two Chicks]. In making that finding, I rely on the medical testimony of

> Dr. Roberts who assigns restrictions to [Lunte's] physical activities as well as the testimony of [Lunte] herself as to the duties she performed for [Two Chicks,] which included squatting and reaching to obtain or replace merchandise on display from floor to ceiling.
>
> I note the testimony and personal interest of [Two Chicks], who are assuredly concerned for the welfare of their employee. However, with regard to the award of a statutory multiplier, the test before me is essentially whether, due to her current physical condition, [Lunte] can return to the same job duties she was performing at the time of her work-related injury. This language has been construed by the Supreme Court of Kentucky as meaning the actual jobs the individual performed. Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004). The weight of the evidence convinces me that she cannot. Thus, as to the application of statutory enhancement under KRS 342.730 (the "3 multiplier"), I find the testimony of Dr. Craig Roberts to be persuasive. [Lunte] reached MMI and her surgery was by all accounts successful.
>
> Dr. Roberts recommended light-duty work restrictions that would preclude [Lunte] from returning to the job she had previously performed for [Two Chicks] as a retail clerk. Although Dr. Roberts did not specifically opine that [Lunte] was precluded from returning to her pre-injury work duties, the effect of his restrictions effectively does the same thing. [Lunte] has not returned to work.

(R. at 688-89).

Two Chicks filed a petition for reconsideration, arguing the ALJ tendered insufficient findings to support the award of a statutory multiplier. The ALJ addressed Two Chick's reconsideration petition in an order entered on February 28, 2014. The ALJ explained:

> Dr. Roberts permanently restricted [Lunte] from climbing stairs or ladders and repetitive deep knee bending, deep knee squatting and deep knee heavy lifting, all of which [Lunte] testified she was required to do in order to perform her job. I believe that I so found in my Opinion, Award and Order, but if I didn't then, I do now.
>
> As to whether [Lunte] had to perform these functions, she adequately testified to the fact that merchandise was strung from floor to ceiling and in order to serve customers, she had to squat and climb a ladder frequently, especially during the Christmas season.

(R. at 707).

Unhappy with the ALJ's decision, Two Chicks took the matter before the Board. A two-to-one decision by the Board vacated and remanded for a more detailed analysis of Lunte's physical capacity to return to the work she performed at Two Chicks at the time of injury. After faulting the ALJ for not engaging "in the appropriate analysis" and discussing *Ford Motor Company v. Forman*, 142 S.W.3d 141 (Ky. 2004), and *Miller v. Square D. Company*, 254 S.W.3d 810 (Ky. 2008), at length, the Board concluded:

> While Lunte may be restricted from certain activities, as found by the ALJ in relying upon Dr. Roberts, an analysis must be made in determining from the evidence whether those restrictions impact her ability to perform her job as a sales clerk. We agree with Two Chicks the ALJ did not perform an adequate analysis in determining the impact of her restrictions upon whether she retains the physical capacity to her pre-injury job. Therefore, we vacate the ALJ's application of the three multiplier pursuant to KRS 342.730(1)(c)1, and remand for a more detailed analysis based upon the evidence.

(R. at 896). This appeal now follows.

II. Standard of Review

Generally, our task when reviewing a decision of the 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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

The issue before us, as framed, involves mixed questions of law and fact. We must first determine if the ALJ applied the proper legal standard in ascertaining whether Lunte is entitled to the statutory multiplier contained in KRS 342.730(1)(c)1. This is a question of law; our review is *de novo*. *Bowerman v. Black Equip. Co.,* 297 S.W.3d 858, 866 (Ky. App. 2009).

Second, predicated upon a finding that the ALJ applied the proper legal standard, we must verify that the ALJ's factual findings adequately support its legal conclusion. The ALJ, not the Board, is empowered "to determine the quality, character and substance of the evidence." *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). The ALJ is free to reject testimony, *id.*, and "to believe part of the evidence and disbelieve other parts of the evidence[.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Neither the Board nor this Court shall ever substitute its judgment for that of the ALJ "as to the weight of evidence on questions of fact." KRS 342.285; *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007).

III. Analysis

Lunte argues that the Board exceeded its authority when it vacated the ALJ's decision to award the statutory multiplier and bases that argument on the assertion that the ALJ applied the correct legal standard and its decision was supported by substantial evidence. Two Chicks counters that the Board was correct to reverse the ALJ because the ALJ improperly focused narrowly on Lunte's inability to perform the singular task she happened to be performing at the time of injury: climbing a stool or ladder. This, Two Chicks argues, is indicative of the ALJ's misunderstanding of the legal standard actually to be applied.

Central to all the various positions expressed in this case is an understanding of KRS 342.730(1)(c)1 and two pivotal cases interpreting that provision, *Ford Motor Company v. Forman*, *supra*, and *Miller v. Square D. Company*, *supra*. The statute states, in relevant part:

> 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[.]

KRS 342.730(1)(c)1. Construing this provision, the Kentucky Supreme Court held in *Ford Motor Company v. Forman* that the phrase "the type of work that the employee performed at the time of injury" meant "the actual jobs that the individual performed." 142 S.W.3d at 145. It is essential that we not lose sight of the factual underpinnings of *Forman*.

In *Forman*, the claimant was classified an assembler, "a classification that included a number of different jobs pertaining to the assembly of trucks." *Id.* at 142. Different jobs within that classification had different physical requirements. The claimant performed some, but not all, of the jobs under the assembler classification. The ALJ refused to enhance the claimant's award on the ground that, because she could return to the same job classification, regardless of whether she could execute the actual jobs she performed prior to her injury, she could return to the same type of work as before her injury. The Board found this to be error and the appellate courts agreed. The classification was not controlling. Instead, the focus should have been on "the actual jobs the claimant performed at the time of her injury" and whether she retained the physical capacity to return to those jobs post-injury. *Id.* at 144-45.

Several years later, the Supreme Court rendered *Miller*. In that case, the claimant performed two different jobs at the time of injury: mold technician and assembler. He was injured while working as a mold technician. In refusing to award the statutory enhancement, the ALJ focused solely on whether the claimant was able to return to work and perform his duties as a mold technician. (He could.) The Supreme Court held that "KRS 342.730(1)(c)1 includes both sets of duties[,]" 254 S.W.3d at 811, not just the mold-technician job the claimant was performing at the time of injury, and remanded the matter back to the ALJ to determine "whether the claimant lacks the physical capacity to work as an assembler." *Id.* at 814. The Court found "the phrase 'the type of work that the employee performed at the

time of injury' to refer broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred." *Id.*

Forman and *Miller* are not at odds with one another. In *Forman*, the ALJ focused too broadly on the general classification and all the jobs it encompassed instead of the actual jobs performed by the claimant within that classification. In *Miller*, the ALJ focused too narrowly on only one of the jobs the claimant performed for the employer instead of both jobs. The guiding principle of both *Forman* and *Miller* is this: "the type of work that the employee performed at the time of injury" refers to *all* the jobs and tasks *actually performed* by the claimant for the employer. *Miller*, 254 S.W.3d at 813-14; *Forman*, 142 S.W.3d at 145. Contrary to Two Chicks' argument, *Forman* remains good law and is a vital part of our workers' compensation jurisprudence.

Applying *Forman* and *Miller* to this case is relatively simple because Lunte only held one job at Two Chicks: sales clerk. Of course, that job entails numerous mundane tasks. But *Forman* and *Miller* caution the fact-finder, here the ALJ, to focus on all the tasks the claimant actually performed for the employer. The ALJ in this case complied with that mandate. While he did not cite *Miller*, he properly focused on the job and tasks Lunte actually performed for Two Chicks prior to her injury.

Two Chicks contends the ALJ erred because it focused too narrowly, in fact solely, on the task Lunte was performing at the time of injury – that is,

climbing on a stepstool. This contention is not supported by the record. The ALJ described in detail *all* the duties associated with Lunte's job as a sales clerk and discussed how the restrictions imposed by Dr. Roberts prevented her from performing several of them.

What, then, were those duties? Some were undisputed – Lunte greeted, assisted, and checked out customers at the cash register. She wrapped purchases and ordered inventory. Whether she performed other duties was hotly contested. Lunte testified she had to climb, squat, and bend frequently, particularly during the holiday season, to assist customers, retrieve merchandise, fill spaces in displays when customers purchased a product making up that display, restock products, and organize and straighten tables, merchandise, and the store generally. She also claimed she had to lift heavy objects at times. Mayes asserts climbing was never a requirement of the sales clerk position, and it was possible for a sales clerk to entirely avoid squatting, deep bending, and heavy lifting. When the evidence is conflicting, it is within the province of the ALJ to pick and choose what and whom to believe. *Kroger v. Ligon*, 338 S.W.3d 269, 272 (Ky. 2011). The ALJ exercised his discretion and found Lunte's testimony to be most convincing and credible.

Considering the evidence as a whole, the ALJ was convinced that Lunte could not return to work as a sales clerk in light of the restrictions imposed by Dr. Roberts. As stated in his opinion, the ALJ relied strongly on Lunte's testimony as to her ability to perform her prior job duties. "The testimony of the

worker is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." *Transportation Cabinet v. Poe*, 69 S.W.3d 60, 64 (Ky. 2001). Although Lunte remains capable of performing some of the tasks associated with a sales clerk position – such as ringing up purchases and greeting customers – she specifically testified she cannot perform many of the other duties associated with the job. She testified that she is unable to stand and walk to the degree demanded by her former position as a sales clerk. It was clear to the ALJ that she lacks the capacity to perform the full range of tasks associated with that position. We cannot disagree.

In sum, we believe the Board misconstrued *Miller* and *Forman* when it implied the ALJ applied the wrong legal standard. We conclude that the ALJ applied the correct standard and his analysis related thereto is certainly adequate to sustain an enhanced award. In light of this conclusion, the Board's decision to vacate the ALJ's award misconstrues the law and, under our standard of review, must be reversed.

IV. Conclusion

Accordingly, we reverse the Board's July 3, 2014, Opinion Vacating in Part and Remanding, and remand the case to the Board with instructions to reinstate the ALJ's February 6, 2014, Opinion, Award, and Order.

ALL CONCUR.

Peter J. Naake

BRIEF FOR APPELLEE TWO

Louisville, Kentucky

CHICKS:

Thomas L. Ferreri
Louisville, Kentucky