RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000172-WC

FORD MOTOR COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-94841

STRETTA[1] SANTOS, HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE, AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2008-CA-000318-WC

STRETTA SANTOS — CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-94841

FORD MOTOR COMPANY, HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE, AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

[1] In the Cross-Petition for Review, Ms. Santos spells her first name as "Streta" while in the Petition for Review, Ford Motor Company spells Ms. Santos's name as "Stretta." We note that throughout the administrative record both spellings were used. For the sake of convenience, we will spell Ms. Santos's first name as "Stretta" in this opinion.

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE AND WINE, JUDGES.

MOORE, JUDGE: Ford Motor Company petitions this Court to review an opinion of the Workers' Compensation Board in which the Board vacated an opinion, order and award of the Administrative Law Judge (ALJ) that was in favor of Stretta Santos. In its petition, Ford argues that the ALJ's finding that Santos did not retain the physical capacity to return to the type of work she performed at the time of her injury was not supported by substantial evidence. In addition to Ford's petition, Santos filed a cross-petition, arguing the evidence supported the ALJ's finding. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1995, Ford hired Santos as a vehicle assembly technician to work in one of the company's truck manufacturing plants in Louisville, Kentucky. In January 2002, while Santos was working on the assembly line removing crossbars,[2] she sustained a work-related injury to her neck when she struck a crossbar with a hammer. Santos gave timely notice of her injury, and Ford's in-house physician placed Santos on medical leave.

After being placed on medical leave, Santos was referred to Dr. Rolando Puno, an orthopedic surgeon, and Dr. John Harpring, a neurosurgeon.

[2] Santos subsequently testified explaining the details of the crossbar job and explaining that the crossbars were approximately five feet long and weighed between 13 and 15 pounds each.

Eventually in September 2002, these surgeons performed discectomies and a bone graft fusion on Santos's neck vertebrae. In due course, Santos returned to work at Ford on July 8, 2003.[3] Later that year, Santos filed a workers' compensation claim against Ford. In February 2004, Ford and Santos settled her claim for a lump sum payment of $50,000.00. In the settlement agreement, the parties stated that Santos had a 28% functional impairment rating. However, the agreement was not comprehensive because the parties failed to address whether Santos was eligible for the three-multiplier found in Kentucky Revised Statutes (KRS) 342.730(1)(c)1.

After the parties settled Santos's claim, she continued to experience pain and loss of mobility. In August 2004, Ford again placed Santos on medical leave due to her neck problems and, in October of that year, Dr. Harpring and Dr. Puno performed a second surgery on Santos's neck in which they placed a metal cage onto her neck vertebrae to fuse them together. After this second surgery, Santos returned to work in February 2006, but she was restricted to sedentary work.

Dr. Puno removed Santos's metal cage in May 2006 because it was loose. In September, several months after this third surgery, Santos returned once more to work but was still limited to sedentary jobs.

[3] The Board noted that conflicts existed regarding when Santos initially returned to work. Santos testified she returned to work in May 2002, while in the ALJ's opinion, order and award, he stated she returned to work on May 5, 2003. In its opinion, the Board noted the parties had stipulated that Santos returned to work on July 8, 2003. Because of the parties' stipulation, we will use July 8, 2003, as the date that Santos initially returned to work.

After Santos's second surgery but before the third, Santos moved to reopen her workers' compensation claim arguing that her condition had deteriorated. In October 2005, Santos's motion was granted and her claim was assigned to an ALJ for adjudication. On July 17, 2007, the ALJ issued his opinion, order and award. As a preliminary matter, the ALJ addressed Santos's prior settlement. The ALJ noted that, upon reopening, it was necessary to compare Santos's level of disability at the time of settlement with her then-current level of disability. Furthermore, the ALJ noted the parties' prior settlement agreement was not a judicial determination, so *res judicata* did not apply to the disability rating in the settlement agreement. Therefore, the ALJ determined *de novo* that, at the time of the settlement agreement, Santos suffered from a 37.8% permanent partial disability.

In addition to reconsidering Santos's initial disability rating, the ALJ also decided that

> [b]ased upon review of the medical and lay evidence in the underlying [proceedings], the Administrative Law Judge finds [Santos] did retain the physical capacity to return to the type of work she was performing at the time of her injury and in fact, had done so. Therefore, the Administrative Law Judge finds [Santos] was not entitled to application of the three-time statutory multiplier in the underlying [proceedings].

After determining that Santos was not entitled to application of the three-multiplier, the ALJ decided that Santos had proved she had suffered a 13% increase in her permanent partial disability rating. The ALJ determined that Santos

was no longer physically capable of performing the type of job that she had performed at the time of her injury. Therefore, the ALJ applied the three-multiplier found in KRS 342.730(1)(c)1 and awarded Santos permanent partial disability benefits of $413.00 per week for 520 weeks.

Subsequently, Santos moved the ALJ to reconsider his calculations. Simultaneously, Ford filed a motion for reconsideration as well. Among the many issues raised in Ford's motion, the company complained that the ALJ erred when he found that, at the time of settlement, Santos was not entitled to receive the benefit of the three-multiplier. Ford argues that Santos was initially entitled to the benefit of the three-multiplier at the time of settlement because, if Santos was found to be entitled to it initially, then upon disposition of the reopening, her award would be smaller, thus, saving Ford money. The ALJ granted Santos's motion but denied Ford's. Ford then filed an appeal with the Workers' Compensation Board.

Before the Board, Ford raised the same issues presented in its motion for reconsideration including the issue regarding the application of the three-multiplier. After the Board reviewed the record and considered the arguments of both parties, it issued an opinion vacating the ALJ's opinion and remanding the matter for further proceedings. Regarding the issue of the application of the three-multiplier at the time of settlement, the Board opined

> in this instance we believe the evidence concerning Santos's physical capacity at the time of the original settlement to return to the crossbar job she was performing on January 30, 2002 to be conflicting. Santos testified the crossbars in question weighed between

> thirteen and fifteen pounds. While there is an abundance of evidence that would support finding Santos was limited to lifting nothing in excess of ten pounds prior to February 11, 2004, there is also other evidence that conflicts with those limitations. The April [24], 2003 progress note from Dr. Harpring plainly lists Santos's restrictions as no excessive lifting greater than fifteen to twenty pounds, no repetitive reaching above shoulder level and no pushing or pulling heavy equipment. Based on these restrictions, as well as Santos's description of her job activities on January 30, 2002, we believe the ALJ could reasonably conclude that despite other testimony to the contrary Santos retained the physical capacity to return to the crossbar job at Ford at the time of the original proceedings.
>
> That having been said, the April [24], 2003 progress note from Dr. Harpring is nowhere referenced in the ALJ's decision on reopening and this Board is not a fact finding tribunal. *See* KRS 342.285. What is more, we deem the ALJ's findings as set out in the July 17, 2007 opinion pertaining to this issue to be insufficient to apprise the parties of the basis for his decision or to permit meaningful appellate review. *Kentland Elkhorn Coal Company v. Yates,* 743 S.W.2d 47 (Ky. App. 1988); *Shields v. Pittsburgh & Midway Coal Mining Co.,* 634 S.W.2d 440 (Ky. App. 1982). We, therefore, vacate that portion of the ALJ's decision relative to the inapplicability of KRS 342.730(1)(c)1 at the time of the original proceedings. On remand, the ALJ is instructed to revisit the merits of the issue and render a determination specifically identifying the witnesses and evidence relied on in reaching his conclusions.

Id. at 1021-1022. Both Ford and Santos have requested this Court to review this portion of the Board's opinion.

II. STANDARD OF REVIEW

When we review a decision of the Worker's Compensation Board, we will only reverse the Board's decision where the Board has overlooked or

misconstrued the controlling law or so flagrantly erred in evaluating the evidence that a gross injustice has occurred. *Daniel v. Armco Steel Company,* 913 S.W.2d 797, 798 (Ky. App. 1995). Ultimately, we must review the ALJ's decision to accomplish this.

Regarding the ALJ's decision, the Supreme Court of Kentucky has held that when the ALJ finds in favor of the party with the burden of proof, then the reviewing court will affirm the ALJ's decision if it is supported by substantial evidence. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986). However, if the ALJ finds against the party with the burden of proof, then the reviewing court may only reverse if the evidence compels a finding in the favor of the party with the burden of proof. *Daniel,* 913 S.W.2d at 800; *see also Lee v. International Harvester Company,* 373 S.W.2d 418, 420-421 (Ky. 1963). In addition, as the finder of fact, the ALJ, not this Court and not the Board, has sole discretion to determine the quality, character and substance of the evidence. *Whittaker v. Rowland,* 998 S.W.2d 479, 481 (Ky. 1999) (*quoting Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418, 419 (Ky. 1985)). Not only does the ALJ weigh the evidence, but the ALJ may also choose to believe or disbelieve any part of the evidence regardless of its source. *Whittaker,* 998 S.W.2d at 481 (*quoting Caudill v. Maloney's Discount Stores,* 560 S.W.2d 15, 16 (Ky. 1977)).

III. ANALYSIS

A. FORD'S PETITION

In Ford's brief, the company argues that the Board erred when it vacated the ALJ's findings regarding the application of the three-multiplier and remanded the matter to the ALJ; instead, Ford contends that the Board should have reversed the ALJ's decision regarding the three-multiplier. To support this proposition, Ford argues that no evidence supports the ALJ's finding that Santos was not entitled to application of the three-multiplier at the time the parties entered into their settlement agreement. Ford claims that the evidence in the record is overwhelming that, at the time of the settlement, Santos was not physically capable of returning to the crossbar job. In fact, Ford asserts that the ALJ based his decision on patently false evidence. Moreover, Ford argues that Santos's work restrictions prohibited her from returning to the crossbar job and points out that Santos did not, in fact, return to that job. Additionally, citing neither statute nor case law, Ford claims that Dr. Harpring's April 24, 2003, progress note, which the Board cited in its opinion, could not form the basis of substantial evidence to support the ALJ's decision.

B. SANTOS'S COUNTER-PETITION

In Santos's brief, she argues that the Board erred when it vacated and remanded the ALJ's decision. According to her, the Board should have affirmed the ALJ's decision regarding the application of the three-multiplier. Santos avers that in Dr. Harpring's April 24, 2003, progress note, he restricted her from excessively lifting over twenty pounds. According to Santos, this restriction did not specifically preclude her from returning to the crossbar job. Consequently,

Santos reasons that, at the time of the settlement agreement, she retained the physical capacity to return to her prior job. Santos argues that her testimony and Dr. Harpring's April 24, 2003, progress note constituted substantial evidence supporting the ALJ's findings.

In addition, Santos cites *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky. 2003), and argues that it held that where a claimant cannot physically perform the same type of work as previously performed but has returned to work earning equal to or greater wages than prior to the injury, then the ALJ has the discretion to determine whether it is appropriate to apply the three-multiplier. Furthermore, if the evidence demonstrates that the claimant is not likely to continue earning wages equal to or greater than pre-injury wages for the indefinite future, then the ALJ should apply the three-multiplier.

In light of *Fawbush*, Santos argues that when she returned to work in 2003, she worked with the same assembly team and earned the same or greater wages than she did at the time of her injury. Additionally, she argues that, at the time of the settlement, there was no indication that she would not continue to earn this amount for the foreseeable future. Thus, she concludes that, at the time of the settlement, she was not entitled to receive the benefit of the three-multiplier.

As a preliminary matter, we find *Fawbush* to be inapplicable to the case at hand. In *Fawbush*, it was undisputed that the claimant did not retain the physical capacity to return to the type of work that he performed at the time of his injury, but, when he returned to work, he earned greater wages than he did at the

time of his injury. *Id*. at 12. So, the question before the Supreme Court was which multiplier was applicable: the three-multiplier found in KRS 342.730(1)(c)1 or the two-multiplier set forth in KRS 342.730(1)(c)2. *Id*. The Court in *Fawbush* held that it was within the ALJ's discretion to determine which multiplier was more appropriate based on the facts of the case. *Id*. In the present case, the dispute is not which multiplier should apply but whether Santos was eligible for application of the three-multiplier at the time the parties initially settled her claim.

Because this case revolves around the applicability of the three-multiplier found in KRS 342.730(1)(c)1, we turn to that statute which reads, in pertinent part,

> [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, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection[.]

To receive the benefit of the three-multiplier, Santos must have lost the physical capacity to return the actual jobs she performed at the times she was injured. *See Ford Motor Company v. Forman,* 142 S.W.3d 141, 145 (Ky. 2004); *see also Lowe's No. 0507 v. Greathouse,* 182 S.W.3d 524, 527 (Ky. 2006) (The statute refers to the capacity to perform the actual job performed at the time of injury, not the capacity to perform other types of work.)

Regarding this issue, the ALJ made a finding of fact that, at the time of the initial settlement agreement, Santos retained the physical ability to return to

the crossbar job. However, he did not explain the basis of his decision but merely stated it was based on "the medical and lay evidence[.]" Because the ALJ did not identify the evidence upon which he relied, we turn to the evidence in the administrative record. As a result, we find, as mentioned previously, that Dr. Harpring generated a type-written progress note on April 24, 2003, stating that Santos was released to return to work but was restricted to light duty. In the progress note, Dr. Harpring restricted Santos from excessively lifting more than 15 to 20 pounds, from repetitively reaching above her shoulders and from pushing or pulling heavy equipment. However, in comparison with the April 24, 2003, progress note, someone from Dr. Harpring's office drafted a handwritten note on the same day in which it was noted that Santos was released to return to work and that she was restricted to light duty and not lifting greater than 10 pounds.

In addition to Dr. Harpring's notes, Dr. Farmer, Ford's in-house physician, also addressed the issue of Santos's work restrictions. Dr. Farmer opined in May 2003 that Santos was restricted from lifting over 10 pounds, no heavy pulling or pushing involving her neck and no over-the-shoulder work. Due to Santos's extensive neck problems, Dr. Farmer would not recommend that Santos return to the crossbar job.

Moreover, prior to the settlement, Santos submitted to an independent medical examination performed by Dr. Tinsley Stewart. Dr. Stewart generated a report concerning the results of his examination. A multi-page work sheet

containing information regarding recommended work restrictions for Santos was attached to Dr. Stewart's report. This document contained the following table:

4) Repetitive Lifting restricted?

	Never	Occasionally	Frequently	Continuously
10 lbs. or less	(__√__)	(____)	(____)	(____)
20 lbs. or less	(__√__)	(____)	(____)	(____)
30 lbs or less	(__√__)	(____)	(____)	(____)
40 lbs or less	(____)	(____)	(__√__)	(____)
50 lbs or less	(____)	(____)	(____)	(__√__)
51 lbs or less	(____)	(____)	(____)	(____)

While this table sets forth Dr. Stewart's recommended lifting restrictions, it is ambiguous and susceptible to two interpretations. First, it is possible to interpret the table to mean that Dr. Stewart recommended that Santos should be restricted from continuously lifting 50 pounds or less; restricted from frequently lifting 40 pounds or less but that she was not restricted at all from lifting 30 pounds or less, 20 pounds or less, and 10 pounds or less. Second, it is possible to interpret this table to mean that Dr. Stewart recommended that Santos was restricted from lifting 30 pounds or less, 20 pounds or less, and 10 pounds or less but she could continuously lift 50 pound or less and could frequently lift 40 pounds or less. When compared, the first interpretation is more reasonable than the second. However, neither interpretation would necessarily prohibit Santos from performing the crossbar job.

In addition to this medical evidence, Santos testified via deposition prior to the initial settlement in this case. Santos testified that she returned to work as a vehicle assembly technician but she was under work restrictions. According to Santos, she was restricted from doing work over her head, from lifting over 10 pounds and from doing any overhead lifting. During her deposition, when asked whether she felt that she could perform the crossbar job, Santos explained that, prior to her injury, she was required to perform the crossbar job for a full ten-hour shift. After she was placed on medical leave, her assembly team was allowed to rotate in and out of the crossbar job. Thus, the team was no longer required to perform the crossbar job for a full ten-hour shift. Santos testified that if she performed the crossbar job on a rotating basis, she felt she could perform the job for short periods of time but not constantly.

When we consider Dr. Farmer's recommended restrictions, the handwritten note from Dr. Harpring's office, the fact that Santos never returned to the crossbar job and Santos's testimony about her work restrictions, the record contains evidence that supports a finding that, at the time of the settlement, Santos had lost the physical capacity to perform the crossbar job and would have been eligible to receive the benefit of the three-multiplier. However, when we consider Dr. Harpring's April 24, 2003, progress note, Dr. Stewart's report and Santos's testimony that she felt that she could have performed the crossbar job on a rotating basis, there is evidence supporting the ALJ's findings that Santos retained the

physical capacity to return to the crossbar job and would not have been entitled to receive the benefit of the three-multiplier.

In light of the administrative record, we agree with the Board that conflicts exist between the various pieces of evidence regarding this issue. Because the ALJ cited no evidence to support his decision, he did not properly apprise the parties of the basis for his decision and, in failing to do so, prevented the Board and this Court from meaningfully reviewing his decision. *See Shields v. Pittsburg and Midway Coal Mining Company,* 634 S.W.2d 440, 444 (Ky. App. 1982) and *Kentland Elkhorn Coal Corporation v. Yates,* 743 S.W.2d 47, 49-50 (Ky. 1988). Furthermore, given these evidentiary conflicts, we believe that it was incumbent upon the ALJ to address and resolve them. *See Kentland Elkhorn,* 743 S.W.2d at 49-50 and *Whittaker,* 998 S.W.2d at 481. Hence, the Board did not err when it vacated the ALJ's opinion and remanded the three-multiplier issue for further proceedings.

Consequently, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE, FORD MOTOR COMPANY:

Wesley G. Gatlin
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

Christopher P. Evensen
Louisville, Kentucky