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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000160-WC

FORD MOTOR COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-10-88863

JEFFREY GRANT; HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Ford Motor Company (Ford Motor) petitions this Court to review an Opinion of the Workers' Compensation Board entered December 21, 2012, affirming the Administrative Law Judge's (ALJ) award of permanent partial disability benefits enhanced by the three multiplier to Jeffrey Grant. We affirm.

Grant was employed by Ford Motor when he suffered a work-related injury to his right shoulder while lifting a transfer case. He was later diagnosed with a right rotator cuff tear and bicep tendon tear. Grant filed a claim for workers' compensation benefits. The matter went before the ALJ. By Opinion, Award, and Order entered August 27, 2012, the ALJ awarded Grant 10 percent permanent partial disability and enhanced the award by the three multiplier under Kentucky Revised Statutes (KRS) 342.730(1)(c) 1. Ford Motor sought review with the Workers' Compensation Board (Board); the Board eventually affirmed the ALJ's award, thus precipitating our review.

As an appellate court, we will only reverse the Board's opinion if it has overlooked or misconstrued the law or flagrantly erred in its evaluation of the evidence causing gross injustice. *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). To do so, we must necessarily review the ALJ's opinion. *Abbott Laboratories v. Smith*, 205 S.W.3d 249 (Ky. App. 2006). It is within the sole province of the ALJ as fact-finder to weigh the credibility and determine the weight of evidence. *Id.* Moreover, this Court reviews issues of law *de novo*. *Com., ex rel. Stumbo v. Ky. Pub. Serv. Comm'n*, 243 S.W.3d 374 (Ky. App. 2007).

Ford Motor contends that the ALJ erred by applying the three multiplier under KRS 342.730(1)(c) 1. Ford Motor points out that Grant returned to work at the same job he was performing before the injury and at the same or greater wage. Ford Motor believes that the ALJ improperly shifted the burden of proof to it and improperly applied the KRS 342.730(1)(c).

When calculating an income benefit based upon permanent partial disability, the benefit is calculated by considering the worker's average weekly wage, the disability impairment rating, and the relevant statutory factor, which includes the three multiplier found in KRS 342.730(1)(c) 1. KRS 342.730(1)(b).

At issue in this appeal is KRS 342.730(1), which provides in part:

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

Under KRS 342.730(1)(c) 1 and 2, the claimant is entitled to application of the three multiplier if he is unable to return to the same type of work after the injury;

however, if the claimant returns to work earning a weekly wage greater or equal to his wage before injury and will likely continue to do so in the indefinite future, the claimant is not entitled to the three multiplier. In determining whether to apply KRS 342.730(1)(c) 1 or 2, our Supreme Court has clarified that the ALJ must consider whether the claimant possesses the physical capacity to return to the type of work he was performing before the work-related injury. *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003); *Adkins v. Pike County Bd. of Educ.*, 141 S.W.3d 387 (Ky. 2004). In particular, the ALJ must consider "a broad range of factors, only one of which is the ability to perform the current job." *Adkins v. Pike County Bd. of Educ.*, 141 S.W.3d at 390. And, the Supreme Court has specifically instructed:

> 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.

Adams v. NHC Healthcare, 199 S.W.3d 163, 168-69 (Ky. 2006).

In our case, the ALJ found that the three multiplier in KRS 342.730(1)(c) 1 should be applied and reasoned:

> Having determined that both sections 1 and 2 are applicable, the ALJ must next determine which of the multipliers is the most appropriate under the facts of the case. *Fawbush v. Gwinn*, 103 S.W.3d 5 (2003) [sic]. The ALJ must determine if the claimant is likely to be able to continue earning the same or greater wage for the foreseeable future. If the ALJ determines that it is unlikely the claimant will be able to continue earning the

same or greater wage for the foreseeable future, then the 3x multiplier is applicable.

In performing this analysis, the ALJ will consider various factors, including, but not necessarily limited to, whether the claimant's current job is within his medical restrictions, whether he is on medications and the level of such medications, his own testimony as to his ability to perform the job duties, the level of accommodation provided by the current employer, and whether or not the claimant's current position is a bona fide job or not. The claimant is just 47 years of age and presumably has a long work life in front of him. He is performing a job which is nearly a "one-armed job." He can lift no more than 5 pounds with his right arm. He cannot work above shoulder level with his right arm. But for the accommodation of lowering the pedestals which his employer has made and but for his being permitted to stay on the same job and not rotate among the three different roles of the job, he would be unable to perform the job and he would not be earning his current wage. In fact, it is doubtful that he could be earning any significant wage at all. Although the employer's attitude toward Mr. Grant has been commendable and the willingness of Ford Motor Company to alter the work station and to provide the accommodations which it has provided is praiseworthy, Mr. Grant finds himself at the mercy of the employer. If Mr. Grant should lose this job for any reason whatsoever, it is unlikely that he would be able to obtain any other employment which would compensate him within the same level or range. The ALJ must look to the likelihood of whether or not this current job will extend into the indefinite future. Although Mr. Corkum has nearly "guaranteed" a job for the claimant, there are many factors of which Mr. Corkum has no control. If the general public's enthusiasm for the Ford product should diminish, then where does that leave Mr. Grant? Even though the general policy of Ford Motor Company has been to retain tenured employees and to make reasonable accommodations for such employees, there is no contractual duty for Ford Motor Company to do so and no guarantees of the continuation of such policy. Management may change, as well as company policy.

> The claimant has sustained an extremely serious injury which has required two major surgeries. Neither surgery was much of a success. As a result thereof, he has been regulated to the role of a job requiring essentially one arm only. He cannot work above shoulder level. He has been fortunate to be the recipient of Ford Motor Company's generosity, but he has no guarantee of knowing how long that will continue. If he should be transferred to another position in the plant, it is unlikely he would be able to do it. Plaintiff estimates he could only perform 2-3% of the jobs within the plant.
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> Considering all of the factors stated above, the ALJ finds that claimant is entitled to the 3x multiplier.

Upon review of its Opinion, it is clear that the ALJ properly considered a variety of factors before deciding to apply the three multiplier in KRS 342.730(1)(c) 1. The ALJ found that Grant suffered a "serious" work-related injury that left him unable to lift more than five pounds with his right arm or to work above shoulder level with his right arm. The ALJ noted that Grant was not able to perform the duties of his job as such duties existed prior to the injury. Prior to injury, Grant's job duties required him to both work above shoulder level and to lift more than five pounds with his right arm. After the injury, the ALJ found that Grant could no longer perform these duties because of the injury. Ford Motor points out that it modified the duties of Grant's job so that no employee "needs to work at or above shoulder level." Ford Motor's Brief at 1. But, the ALJ found that the injury permanently diminished Grant's ability to earn money and, in particular, that it was unlikely that Grant would be able to earn the same wage or a

greater wage in the foreseeable future. And, we do not believe the ALJ improperly shifted the burden to Ford Motor; rather, as recognized by the Supreme Court:

> If every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job. . . .

Adkins v. Pike County Bd. of Educ., 141 S.W.3d at 390.

Considering the evidence herein, we think substantial evidence existed to support the ALJ's finding that the injury permanently diminished Grant's ability to earn income and that Grant would be unable to continue to earn the same or greater wage into the indefinite future. Upon the whole, we cannot say that the Board erred by affirming the ALJ's application of the three multiplier under KRS 342.730(1)(c) 1. *See W. Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

For the foregoing reasons, the Opinion of the Workers' Compensation Board is affirmed.

COMBS, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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