IMPORTANT NOTICE

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RENDERED: December 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-8-04 Ella Grauitt, D.C.

2003-SC-0065-WC

TELEPLAN — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1537-WC
WORKERS' COMPENSATION BOARD NO. 01-01189

VICKIE CONNER; HON. JAMES L, KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

The Workers' Compensation Board (Board) and the Court of Appeals have affirmed a finding that the claimant lacks the physical capacity to return to the type of work that she performed at the time of her injury. Appealing, the employer maintains that an award under KRS 342.730(1)(c)1 was erroneous as a matter of law because the claimant returned to the same job that she was performing at the time of her injury, working within her medical restrictions, and with only an accommodation in the height of her work table. Consistent with the principles that were expressed in Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003), we reverse and remand the claim for the entry of an award under KRS 342.730(1)(c)2.

The claimant was born in 1966 and graduated from high school with training in health occupations. She has worked as a cashier and retail clerk, machine operator,

special order clerk for a building supplies company, customer service agent, and fast food worker. After working for the defendant-employer as a temporary employee through an agency since November 28, 2000, the claimant became a regular employee on March 12, 2001. The company packages hard drives for computers.

The claimant testified that hard drives were sent to her department on carts, packaged in foam buns that she thought contained up to 28 drives. As she described her duties, she was required to stand at three tables, remove each hard drive, inspect it, and package it for shipping. Her claim alleged that she sustained an injury due to the heavy and/or repetitive nature of her work and the height of her work station. Although the claimant admitted that she returned to her previous job and earned the same or a greater wage, her claim alleged that she did not retain the physical capacity to perform the type of work that she performed when injured. Among the contested issues was whether an award to the claimant should be made under KRS 342.730(1)(c) 1 or 2.

The claimant testified that the work was fast-paced and involved repetitive and forceful gripping and pushing with her hands. She indicated that she inspected and packed approximately 1,250 hard drives per shift. Due to her 5 foot 1 inch height and the height of the table, she worked with her arms at and above shoulder level, a factor that she thought contributed to her problems. She indicated that, at the time of her injury, the number of workers decreased for a period of time from the usual four or five down to two. Thus, the work was more stressful at that time because there were fewer workers than there were presently.

The claimant denied any previous arm or elbow problems and stated that on March 14, 2001, she began to experience pain in her right forearm and informed her supervisor. She described her initial symptom as a constant ache in her forearms.

Eventually, both arms were affected, and she experienced numbness and tingling in her hands. About a week later, she went to Baptistworx and was placed on light duty, told to restrict her movements, and prescribed Motrin and heat packs for pain. She indicated that she was released to regular duty for about a month, but her symptoms worsened, and she was placed on light duty again. However, the employer had no light duty available, so she did not work for about three months. She indicated that after she was evaluated by Dr. Kasdan, the employer terminated voluntary benefits. Then, early in August, 2001, the employer informed her that light duty was available, and she returned to work. The record indicates that the claimant returned to work on August 13, 2001.

At the hearing, the claimant testified that after trying other duties, she had returned to her previous job as a packer and presently worked in that capacity. She testified that the company had lowered her work tables and that her elbow problem was "much better." Although her elbows were still tender, they no longer ached. She indicated that she continued to experience occasional tingling and pinching sensations in the bottom of her wrists but indicated that they, too, had improved. She testified that although her job could at times require lifting buns of hard drives that weighed more than 20 pounds off a cart, help was available when such lifting was required. She did not have to do it herself. She did not state whether such help was available at the time of her injury. On cross-examination, the claimant indicated that Dr. Breidenbach knew she had returned to her previous job and did not object as long she complied with her restrictions.

On March 21, 2001, about a week after her symptoms began, the claimant sought medical treatment at Baptistworx. Treatment records indicated that she was

prescribed Naprosyn and B-complex vitamins for wrist strain. She was restricted from forceful or repetitive gripping and limited to wearing splints while working. On March 28, 2001, limitations from lifting more than 5 pounds and from wrist flexion or extension were added. By April 12, 2001, the claimant was released to return to work without restrictions but was advised to wear splints as needed. Her symptoms increased thereafter, and on May 16, 2001, both the previous restrictions and an additional restriction against reaching above shoulder level were imposed. Unable to accommodate all of the restrictions, the employer took her off work altogether, and the parties stipulated that the employer paid temporary total disability benefits from May 17, 2001, through July 24, 2001.

On May 24, 2001, the claimant's family physician prescribed ibuprofen and referred her for an EMG study. The study was performed by Dr. Weston on June 11, 2001, and the results were introduced into evidence. They were normal.

Dr. Kasdan evaluated the claimant on July 25, 2001. X-rays and nerve conduction studies that he ordered were negative for carpal or cubital tunnel syndrome, leading him to diagnose chronic wrist and elbow pain. He did not think that the condition was work-related because the claimant reported that her symptoms worsened while she was off work. Furthermore, in the absence of sufficient information about the physical requirements of the claimant's work, he would not recommend any work restrictions.

The claimant sought treatment with Dr. Breidenbach on August 9, 2001, shortly before she returned to work. He diagnosed bilateral lateral epicondylitis and mild right carpal tunnel syndrome for which he prescribed physical therapy. On that date, he indicated that the claimant could return to light work, which he described as "Lifting 20

lbs maximum. Frequent lifting or carrying restricted to objects weighing 10 lbs or less (using both hands)." He also required her to wear a brace. On September 26, 2001, he injected both arms because the claimant continued to complain of elbow pain as well as tingling and numbness. As of November 1, 2001, he limited the claimant to light work, required her to wear splints, and prohibited overtime work. On January 9, 2002, Dr. Breidenbach permanently restricted the claimant to light work, as previously described on August 9, 2001. Although the form that he completed does not indicate that she was required to wear braces permanently, the parties appear to agree that she does so.

On August 17, 2001, Dr. Wolens, conducted a utilization review of the claimant's medical records and the results of Dr. Kasdan's evaluation. He determined that because the claimant's symptoms continued to increase when she was off work, the condition was probably not work-related.

Dr. Bilkey examined the claimant on November 12, 2001, and reviewed her medical records. He noted that July 24, 2001, x-rays and June 11 and July 24, 2001, nerve conduction studies were all normal. Range of motion was normal, but there was some grip strength weakness. He noted that, consistent with Dr. Breidenbach's diagnosis of bilateral epicondylitis, there was tenderness below the elbows. In his opinion, the claimant's symptoms were work-related. Dr. Bilkey recommended no lifting more than 20 pounds occasionally and 10 pounds frequently, no overtime work, and continued use of splints on both wrists. He assigned a 0% impairment under the Fourth edition of the AMA Guides and a 3% impairment for chronic pain under the Fifth edition. Furthermore, he indicated that the claimant could be evaluated on the basis of grip strength, in which case the whole-body impairment would be 12%.

Jeffrey Hooper, the claimant's supervisor, testified that the company had no work available within the restrictions that were in place from May 17 to August 13, 2001. He testified that after the claimant returned to work on August 13, 2001, her work tables were lowered, at her request. He also testified that the duties of a packer complied with the claimant's restrictions and did not require heavy lifting. He explained that both before and after the claimant's injury, other workers would do such lifting when it was necessary.

Relying upon Drs. Breidenbach and Bilkey, the Administrative Law Judge (ALJ) determined that the claimant sustained a work-related cumulative trauma injury. Although noting that the diagnostic tests were negative, the ALJ pointed out that there was objective evidence of grip strength weakness and a 3% AMA impairment. The ALJ determined that the claimant was at maximum medical improvement on July 24, 2001, when examined by Dr. Kasdan, and that no temporary total disability benefits were warranted thereafter. Finally, the ALJ determined that the claimant was entitled to a triple benefit as provided by KRS 342.730(1)(c)1, stating as follows:

> The Administrative Law Judge further finds that the plaintiff lacks the physical capacity to returned (sic) to the type of work performed at the time of the injury based upon the permanent restrictions of Dr. Breidenbach. The Administrative Law Judge notes that while plaintiff has returned to the work earning the same or greater wages, her work station has had to be modified to accommodate her and plaintiff essentially works on a light duty basis within her restrictions.

In affirming the decision, the Board interpreted the words "type of work" in KRS 342.730(1)(c)1 as requiring a review of the specific requirements of the job that the worker was performing when injured rather than a more general review of the classification to which the job belonged. The Board was persuaded that although an

individual might return to work, factors such as restrictions from performing a job requirement, from working overtime, a requirement to wear splints, or special accommodations would warrant a finding in the worker's favor under KRS 342.730(1)(c)1. Noting that the claimant did not return to work symptom free, that she would not be able to work without accommodations, and that her permanent restrictions would likely reduce her future job opportunities, the Board determined that the award of a triple benefit under KRS 342.730(1)(c)1 was appropriate despite the claimant's return to work at the same or a greater wage.

As amended effective July 14, 2000, KRS 342.730(1)(c) provides, in pertinent part, as follows:

> 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.

KRS 342.730(1)(c)3 recognizes that "limited education and advancing age impact an employee's post-injury earning capacity" and, in certain instances, enhances the multiplier to be applied under paragraph (c)1. Finally, KRS 342.730(1)(c)4 provides

that, notwithstanding KRS 342.125, a claim may be reopened at any time during the period of partial disability to conform the award to KRS 342.730(1)(c)2.

As amended effective July 14, 2000, KRS 342.730(1)(b) and (c) refined the system for calculating partial disability benefits that was enacted in 1996. As amended, the provisions take into account the extent of a worker's physical impairment due to a work-related injury. KRS 342.730(1)(b) provides a basic partial disability benefit, but because the factors are smaller than under the 1996 Act, the benefit is smaller. An individual who does not retain the physical capacity to return to the previous type of work receives triple the basic benefit and may be entitled to additional enhancement of the award under KRS 342.730(1)(c)1 and 3. Whereas, an individual who retains the physical capacity to return to the previous type of work but fails to do so receives only the basic benefit under KRS 342.730(1)(b). An individual who returns to work earning the same or greater wage receives the basic benefit and is entitled to receive double the basic benefit for any period that the employment ceases, regardless of the reason. KRS 342.730(1)(c)2.

An apparent goal of the 2000 amendments was to provide a greater incentive for workers who retain the physical capacity to return to their previous type of work after an injury to do so and, presumably, to earn the same or a greater wage than when injured. While they continue in the employment, they are entitled to receive the basic benefit in addition to their wage. Yet, they are assured that if for any reason they are unable to maintain employment earning the same or a greater wage, they will receive double the basic benefit. Furthermore, KRS 342.730(1)(c)2 operates as an incentive to employers to make reasonable accommodations that will enable injured workers to continue working and earning the same or a greater wage.

As is demonstrated by the frequent amendment of the Act and the many judicial decisions interpreting the Act, situations arise that the Act does not directly address. Like their predecessors, the 2000 versions of KRS 342.730(1)(b) and (c) are imperfect. In Fawbush v. Gwinn, supra, which was decided while this appeal was pending, we were faced with a claim in which an ALJ determined that although the injured worker lacked the physical capacity to return to framing carpentry, he had returned to work as a construction superintendent and earned more than he had before the injury. The ALJ awarded a triple income benefit under KRS 342.730(1)(c)1.

Among the matters at issue on appeal was whether the award should have been made under the 2000 version of KRS 342.730(1)(c)1 or 2. It was undisputed that the worker lacked the physical capacity to return to framing carpentry. We concluded that because only one provision could apply and because the Act did not express a preference for either provision, an ALJ would be required to determine which was more appropriate on the facts. Focusing on the facts at hand, we determined that if a worker was unlikely to be able to continue earning a wage that equaled or exceeded the wage at the time of injury for the indefinite future, the application of KRS 342.730(1)(c)1 would be appropriate. Id. at 12. In view of the unrebutted evidence that Mr. Gwinn's 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, we concluded that it was apparent he would not likely be able to maintain the employment for the indefinite future. We determined, therefore, that the ALJ's decision to apply KRS 342.730(1)(c)1 was reasonable.

The employer maintains that the claimant not only retains the physical capacity to return to the type of work that she performed at the time of the injury, she has done

so and earns the same or a greater wage than before the injury. For that reason, the employer asserts that an award under KRS 342.730(1)(c)1 is clearly erroneous. Furthermore, the employer asserts that Fawbush v. Gwinn, supra, supports its argument that the award should have been made under KRS 342.730(1)(c)2.

The employer argues that the claimant returned to the same job that she was performing when she was injured, that she continues to perform the full range of her prior duties, that all of those duties are within her medical restrictions, and that its only accommodation is a lower work table, something that no physician required. Although acknowledging that the claimant is restricted from lifting more than 20 pounds as a result of her injury, the employer maintains that she was not required to do so before the injury. Likewise, although acknowledging that the claimant wears wrist splints while working, the employer maintains that they do not interfere with her physical capacity to do her job. Taking issue with the opinions of the Board and the Court of Appeals, the employer asserts this is not a case where a special job with less strenuous requirements was created for the claimant. It maintains that the job requirements are no different than they were before the claimant's injury and that it should not be penalized for making a minor accommodation at her request.

It is unnecessary for us to interpret KRS 342.730(1)(c)1 in order to determine whether the finding that the claimant lacked the physical capacity to return to the type of work that she performed at the time of injury was erroneous as a matter of law. We reach that conclusion because, regardless of whether the evidence supported a finding under KRS 342.730(1)(c)1, our decision in Fawbush v. Gwinn, supra, compelled an award under KRS 342.730(1)(c)2 on these facts. When stating a rationale for affirming the award, the Board and the Court of Appeals misstated the claimant's permanent

restrictions, indicated that the employer had made "numerous accommodations," and concluded that the employer had simply provided the claimant with 'sheltered employment.' The evidence does not reasonably support such a conclusion.

Dr. Breidenbach used the same form each time he imposed work restrictions. Although restrictions that were imposed temporarily included the wearing of splints and no overtime work, the sole permanent restriction that Dr. Breidenbach imposed on January 9, 2002, was a limitation to "light work." As defined on Dr. Breidenbach's form, the term "light work" means: "Lifting 20 lbs maximum. Frequent lifting or carrying restricted to objects weighing 10 lbs or less (using both hands)." On January 24, 2002, after having returned to her job for five months, the claimant testified that since the employer had lowered her work tables, not only was she able to perform her duties as a packer, her condition had improved. Although her elbows remained tender, they no longer ached, and the tingling and pinching sensations in her wrists had improved. She also testified that she was not required to lift more than 20 pounds. Under those circumstances, the evidence would not reasonably have permitted a finding that the effects of the claimant's injury were likely to prevent her from continuing to perform her job indefinitely.

The decision of the Court of Appeals is reversed, and the claim is remanded to the ALJ for the entry of an award under KRS 342.730(1)(c)2.

Cooper, Johnstone, Keller, and Wintersheimer, JJ. concur. Lambert, C.J., dissents by separate opinion in which Graves and Stumbo, JJ., join.

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TELEPLAN — APPELLANT

V.

ON REVIEW FROM THE COURT OF APPEALS
2002-CA-1537-WC
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VICKIE CONNER; HON. JAMES L. KERR,
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DISSENTING OPINION BY CHIEF JUSTICE LAMBERT

Respectfully, I dissent from the majority's decision, and would affirm the Court of Appeal's holding that the claimant lacked the physical capacity to return to the type of work that she performed at the time of her injury thereby warranting an award under KRS 342.730(1)(c)1.

Based upon the claimant's work restrictions, modification of her workstation, and the fact that she worked on a light duty basis within her restrictions, the ALJ found that claimant lacked "the physical capacity to return to the type of work performed at the time of the injury based upon the permanent restrictions of Dr. Breidenbach." The ALJ noted that claimant's workstation had been modified to accommodate her disability and that she essentially worked on a light duty basis. Upon these findings, the ALJ awarded benefits pursuant to KRS 342.730(1)(c)1. The Board agreed that the enhanced benefit

award was appropriate despite the claimant's return to work at the same or greater wage. The Board noted in its decision that the claimant did not return to work symptom free, that she would not be able to work without accommodations, and that her permanent restrictions would likely reduce her future job opportunities. Both the ALJ and the Board found that she could return to work with restrictions at the same or greater wage, but her future wage earning capacity was diminished due to the injury justifying an award under KRS 342.730(1)(c)1.

The majority opinion is inconsistent with this Court's recent decisions in Fawbush v. Gwinn[1] and inconsistent with Western Baptist Hosp. v. Kelly.[2] In Fawbush, the ALJ awarded the claimant benefits under KRS 342.730(1)(c)1 because the claimant was unlikely to be able to continue earning a wage that equaled or exceeded the wage at the time of injury for the indefinite future.[3] This Court held:

> 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.[4]

Fawbush specifically held that the ALJ was authorized, with discretion, to determine which statutory provision to apply to the disability award.[5]

Fawbush held that an award under KRS 342.730(1)(c)1 was reasonable under the following facts: First, the claimant's lack of physical capacity to return to the type of work that he performed was undisputed. Second, although he was able to earn more

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[1] Ky., 103 S.W.3d 5 (2003).
[2] Ky., 827 S.W.2d 685 (1992).
[3] 103 S.W.3d at 12.
[4] Id.
[5] Id.

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. Although the majority attempted to distinguish this case from Fawbush, it seems to have inadvertently established the Fawbush type facts as the only means of achieving entitlement to an enhanced award and excluded other factual circumstances, despite ALJ findings and conclusions to the contrary.

The key provision that determines the application of KRS 342.730(1)(c)1 is whether an injured worker is unlikely to be able to continue earning for the indefinite future a wage that equals or exceeds the wage at the time of injury. The ALJ so found, but the majority supplanted that finding and reversed the ALJ and the Board with its own finding. The Court of Appeals correctly held there was sufficient evidence to support the ALJ and the Board.

In the venerable Western Baptist,[6] an employer appealed a Workers' Compensation Board's (WCB) finding that an employee's injury was work related.[7] The employer appealed and the Court of Appeals affirmed. This Court held that it would not review the workers' compensation disability claim where the view taken by the Board and the Court of Appeals was not patently unreasonable or flagrantly implausible.[8] This Court held that the standard of review for resolving inferences from the evidence is as follows:

> The WCB is suppose[d] to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and

[6] Supra.
[7] Id. at 687-88.
[8] Id. at 688.

> compelling a different result. These are judgment calls. No purpose is served by second guessing such judgment calls, let alone third-guessing them. Our Court must provide appeals where the Constitution so mandates, but in so doing we need not obstruct legislative intent unnecessarily, nor should we encourage multiple appeals of the same issue.
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> The function of further review of the WCB in the Court of Appeals 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 addressing the evidence so flagrant as to cause gross injustice. The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude.[9]

In the present case, the finding by the ALJ, affirmed by the Board, was that the claimant was injured and was entitled to a treble award under (c)1. This does not amount to an error so flagrant as to cause a gross injustice. The ALJ and the Board heard the testimony concerning the claimant's ability to return to work. The decision that the claimant was injured thereby decreasing her future earning capacity was supported by competent evidence. Nothing in the record suggested that Board's decision was patently unreasonable or flagrantly implausible. Although there was conflicting testimony, it was not so convincing as to demand our "second guess" of the judgment of the ALJ, the Board, and the Court of Appeals.

I am hopeful that this opinion will be an aberration and not a retreat from the standard set by Western Baptist. As the fourth tribunal to consider workers' compensation cases we should neither be in the fact finding business nor in the business of determining what inferences are reasonable from the facts.

Graves and Stumbo, JJ., join this dissenting opinion.

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[9] Id. at 687-88.