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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001136-WC

LOWE'S HOME CENTERS, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-12-88059

SONYA LAMB MIDDLETON;
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

KRAMER, JUDGE: Lowe's Home Centers, Inc., appeals an opinion and order of an Administrative Law Judge (ALJ) and affirming opinion of the Workers' Compensation Board (Board) awarding the appellee, Sonya Lamb Middleton,

income disability benefits enhanced pursuant to Kentucky Revised Statute (KRS) 342.730(1)(c)1. For the reasons discussed below, we reverse.

Middleton has been employed by Lowe's as a "project specialist for exteriors" for over twelve years. On January 9, 2012, Middleton sustained a work-related injury consisting of a ruptured disc at the C6-C7 level. Surgical treatment (an anterior cervical discectomy and fusion) provided her with a measure of relief, but she continues to experience pain that radiates into her cervical region, mid to upper back and neck area, and both shoulders. The parties agree that, due to her injury, Middleton sustained a whole person impairment rating of 27%. The overarching issue presented in this appeal is whether Middleton's January 9, 2012 injury, as it existed when the ALJ eventually awarded Middleton worker's compensation income benefits on January 15, 2014, warranted the "three" multiplier enhancement specified in KRS 342.730(1)(c)1, rather than the "two" multiplier specified in KRS 342.730(1)(c)2.

Before discussing the underlying facts in greater detail, a brief discussion of KRS 342.730, as a whole, is necessary for context. In general, KRS 342.730 governs the authority of an ALJ to enhance a claimant's award of income benefits under Kentucky's Worker's Compensation Act. If, for example, substantial evidence supports that a permanent disability prevents the claimant from performing any type of work, thus rendering the claimant "totally disabled,"[1] the ALJ is authorized to substantially enhance the claimant's income benefits as set

[1] *See* KRS 342.0011(11)(b) (defining "permanent total disability").

forth in KRS 342.730(1)(a).[2] If, on the other hand, a claimant does not return to work, but the evidence only supports that the claimant's permanent disability is "partial" (*i.e.*, does not prevent the claimant from performing work[3]) and does not prevent the claimant from indefinitely returning to the same type of work the claimant performed pre-injury, the ALJ has no authority to enhance a claimant's award of income benefits, and the claimant's award is calculated pursuant to the basic partial benefit criteria set forth in KRS 342.730(1)(b).

The parties agree Middleton is only partially disabled and is therefore fully capable of working; that she returned to work as of December, 2012; and, that she is now making a higher wage than she did pre-injury.[4] As such, the mutually exclusive enhancements specified in KRS 342.730(1)(c)1 and (c)2, which fall

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[2] KRS 342.730(1)(a) provides:

> For temporary or permanent total disability, sixty-six and two thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability. Nonwork-related impairment and conditions compensable under KRS 342.732 and hearing loss covered in KRS 342.7305 shall not be considered in determining whether the employee is totally disabled for purposes of this subsection.

[3] *See* KRS 342.0011(11)(c) (defining "permanent partial disability"); KRS 342.0011(34) (defining "work").

[4] Prior to her injury, Middleton was salaried based upon a 48-hour workweek at $20.59 per hour, was entitled to 2.5% commissions on sales, and made quarterly bonuses for meeting sales quotas. Currently, she is salaried based upon a 48-hour work week at $16.75 per hour, does not receive bonuses, but is entitled to a 7% commission on sales. Middleton testified that this restructuring resulted from a corporate-wide decision relating to the project specialist exteriors program, and that it was not something they changed just for her. Middleton also testified that, while her base salary is now lower, the increase in her commission percentage effectively increased her average weekly earnings from $964.79 (pre-injury) to approximately $1,500 (post-injury).

between the two extremes discussed above, become relevant. In pertinent part, KRS 342.730(1)(c)1 provides:

> 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[.]

Next, the latter of these two multipliers, KRS 342.730(1)(c)2, provides:

> 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.

One qualification to these provisions, which is the primary subject of Lowe's' appeal, arises where either KRS 342.730(1)(c)1 or (c)2 could apply; that is, a situation in which substantial evidence supports that a claimant: (1) cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; but (2) has returned to work at an average weekly wage equal to or greater than her pre-injury average weekly wage in accordance with KRS

342.730(1)(c)2. In that situation, where substantial evidence also supports (3) that the claimant cannot continue to earn that level of wages into the indefinite future, the ALJ is authorized to immediately enhance the claimant's award pursuant to KRS 342.730(1)(c)1. *See Fawbush v. Gwinn*, 103 S.W.3d 5, 12 (Ky. 2003); *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003).

Here, the ALJ enhanced Middleton's award by the KRS 342.730(1)(c)1 triple multiplier based upon the rule set forth in *Fawbush.* The upshot of Lowe's argument on appeal is that it was error for the ALJ to do so, and that the ALJ should have instead applied KRS 342.730(1)(c)2, because, in Lowes's' view, no substantial evidence of record demonstrated Middleton, post-injury, was either unable to return to the same type of work, or unlikely to be able to continue indefinitely earning a wage equaling or exceeding the wage she earned prior to her January 9, 2012. Stated differently, Lowe's argues that Middleton failed to prove the first and third elements of the above-stated *Fawbush* rule; the ALJ therefore lacked the authority to immediately enhance Middleton's award; and that the ALJ should have instead allowed for Middleton's award to be reopened, per KRS 342.730(1)(c)4, for an application of the KRS 342.730(1)(c)2 two-times multiplier to any benefit period during which Middleton's employment ceases in the future for a reason relating to her injury.[5]

[5] The phrase "for any reason, with or without cause," as used in KRS 342.730(1)(c)2 to describe the circumstances under which employment must cease for purposes of applying the two times multiplier, has been interpreted by the Kentucky Supreme Court to mean "for any reason, with or without cause, provided that the reason relates to the disabling injury." *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, 672 (Ky. 2009).

"An injured worker has the burden to prove every element of a claim for benefits, one of which is the amount of AMA impairment that it caused." *Lanter v. Kentucky State Police*, 171 S.W.3d 45, 51 (Ky. 2005) (citing KRS 342.0011(11); KRS 342.730(1)(b); *Roark v. Alva Coal Corporation*, 371 S.W.2d 856 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984); *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979)). Accordingly because Middleton was successful before the ALJ, the task in this appeal is to determine whether Middleton presented substantial evidence supporting the first and third elements of the *Fawbush* rule.

Upon review of the record, it is clear that she did not.

As to the first *Fawbush* element, the only limit that has been placed upon Middleton's ability to work consists of a "recommendation" "that she avoid activities, such as extending her arm posteriorly and pulling . . . [because] it seemed to exacerbate her neck pain and cause radiating pain."[6] Otherwise, every physician who has evaluated Middleton has released her to resume her pre-injury employment. Middleton also returned to her project specialist for exteriors position with Lowe's (*i.e.*, the very same type of work that she performed at the time of her injury) in December, 2012, which entailed the same, pre-injury physical requirements; has continued at that position to date; and, she has received no criticism regarding her performance from her employer.

[6] This was the recommendation of Middleton's treating physician, James C. Owen, M.D. No other physician who evaluated Middleton recommended any work restrictions.

Moreover while Middleton testified that certain employment activities cause her an amount of pain, the record reflects that she has continued to perform the full array of tasks associated with her job without any accommodations from her employer. When asked if she has plans to leave her current position in the immediate future, Middleton testified:

> Not currently. But I do have problems with the unloading and carrying the materials into the home. I will do this position as long as I can because but [sic] I do enjoy the position that I am in.

Likewise, Middleton's attorney asked her the following question during the hearing before the ALJ:

> Do you believe, and I'm not asking what anybody else says, I'm asking you, do you believe that you'll be able to keep the pace that you currently have into the foreseeable future? Do you believe you can continue to go at this pace at the job doing what you have to do into the foreseeable future?

In response, Middleton testified:

> I can see in several years down the road keeping the pace to where it's going to affect my ability to perform at home with my family like I need to. I know that while I have the ability to do at least what I'm doing and push where I'm pushing, making as much as I can, put back as much as I can because when I step down, I'm going to take a huge pay cut.

The ALJ and Board both emphasized in their respective reviews Middleton's testimony that performing the full array of her job tasks caused her enough pain to make her question how long she would be able to continue in that position. This evidence, however, was relevant to the *third* element of the

Fawbush rule; it was irrelevant for the purpose of the *first* element of the *Fawbush* rule, which mandates that both KRS 342.730(1)(c)1 and (c)2 must apply.

Likewise, citing *Adkins v. Pike County Board of Education*, 141 S.W.3d 387, 390 (Ky. App. 2004), Middleton urges that her ability to perform the same type of work she performed prior to her injury was merely one of many considerations that the ALJ was required to weigh and is not dispositive. The "current job" described in *Adkins*, however, refers to a type of work different from the pre-injury employment, which is also relevant to the third element of a *Fawbush* analysis. In *Adkins*, for example, the claimant worked pre-injury as a lead mechanic repairing school buses; presented substantial and persuasive evidence that he no longer retained the capacity to do so; and, he returned to work in a lighter capacity where his duties included stocking, ordering, and conducting inventory in the parts department. *Id*. at 388. In that context, this Court held: "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." *Id*. at 390 (emphasis added). On the other hand, the "current job" described by Middleton is her same pre-injury employment. Her ability to perform it necessarily renders KRS 342.730(1)(c)1 inapplicable to her claim and, consequently, it renders any analysis of the third *Fawbush* element moot.

For KRS 342.730(1)(c)1 to apply at all, the claimant must lack the capacity to perform the pre-injury type of employment on the date of the award,

not sometime in the future.[7] We are aware of no Kentucky case—and Middleton cites none—indicating that the *Fawbush* rule should apply, or has ever been applied, under circumstances in which the claimant returns, post-injury, to exactly the same pre-injury employment and admittedly maintains the capacity to perform it on the date of her award. To the extent that *Fawbush* has been applied in any published case, it has always been applied where a claimant proves he or she *no longer* has the capacity to work the same type of pre-injury employment, and has either returned to some accommodated form of the prior employment[8] or to an altogether different form of employment. *See, e.g., Fawbush*, 103 S.W.3d 5; *Elkins*, 107 S.W.3d 206; *Adkins v. Pike County Bd. of Educ.*, 141 S.W.3d 387 (Ky. App. 2004); *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006).

With that said, Middleton also offers another argument in favor of the KRS 342.730(1)(c)1 multiplier. In her brief, she represents:

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[7] Similarly, a claimant may later reopen an award for application of the KRS 342.730(1)(c)1 multiplier if, as of the date of reopening, the claimant's condition has worsened. *See* KRS 342.125(1)(d).

[8] Accommodated work which incorporates less than all of a claimant's pre-injury work tasks is not necessarily "the same type of work" for purposes of KRS 342.730(1)(c)1. *See Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (Ky. 2004) (explaining '"the type of work that the employee performed at the time of injury' was most likely intended by the legislature to refer to the actual jobs that the individual performed."). Thus, evidence supporting that a claimant is working an accommodated position that incorporates less than all of the claimant's pre-injury work tasks because the claimant "does not have the capacity to perform *all* of the same [pre-injury work] tasks" is a sufficient ground for holding that a claimant "does not retain the physical capacity to continue the same type of work he was performing at the time of his injury." *See Ford Motor Co. v. Grant*, No. 2013-SC-000772-WC, 2014 WL 5410306 at *5 (Ky. Oct. 23, 2014) (Emphasis added). This evidence, in turn, is therefore capable of satisfying the first element of a *Fawbush* analysis. *Id*. We find *Grant* to be consistent with *Forman*, persuasive authority, and proper to cite as it fulfills the criteria of Civil Rule (CR) 76.28(4)(c).

> In this case, it is pertinent that Ms. Middleton has asked her employer to modify her job duties or lessen the amount she has to load and unload when she does her sales commission jobs. Although Middleton remains capable of performing most of the tasks which she did prior to the injury, she lacks the capacity to perform her job without exceeding the restrictions placed upon her by Dr. Owen. Middleton cannot avoid activities such as extending her arm posteriorly and pulling. Pushing the cart, which contains her mobile sales office and pulling out sales samples, such as windows, aggravates her neck. Getting samples and supplies in and out of her vehicle aggravates her neck. Middleton therefore lacks the capacity to perform the full range of tasks which her position entails.

Despite what is represented, there is no testimony of record from any physician, or from Middleton herself, to the effect that Middleton *currently* lacks the physical capacity to perform the full range of her job-related duties. The larger problem with this argument, however, is that it addresses work that has not, as of yet, been accommodated.

To explain, even if Middleton had presented evidence that satisfied the first element of the *Fawbush* analysis (*i.e.*, evidence demonstrating that for over a year now she has been performing a type of work that she lacks the physical capacity to perform), the third element of the *Fawbush* analysis would also require her to demonstrate with concrete evidence that, due to the disabling effects of her work injury, she cannot continue to earn her pre-injury (and thus, pre-January, 2012) level of wages into the indefinite future. *Fawbush*, 103 S.W.3d at 12. And, necessarily, analysis of this element would require an assessment of what

Middleton is capable of doing with reasonable accommodations from her employer.

To be clear, Middleton herself has repeatedly stated that if certain accommodations were made to her current position, she could continue to perform it into the indefinite future. During her November 8, 2013 deposition, for example, she testified:

> Q: Have you gone to [Lowe's] to say I'm good at this job, but physically it's starting to really wear on me, can you make some kind of accommodations, can you get somebody to go with me, can you modify the job so that I can do what I do well comfortably so that you can continue to make the money you're making; what's your thought process there?
>
> MIDDLETON: I have not asked them that. I've kind of hinted in meetings to that, but they have not reciprocated any kind of information or input in that. If they could have concessions, it would be something that I could do if there was someone who could help me or if the samples were of a different nature. I bought a car because it was going to be easier on my neck as far as driving, but I can't drive the car because the samples go down into the trunk of the car and then I can't pull the samples back out. So if they're willing to make concessions, then, yes, I would continue in the position that I'm in.
>
> Q: All right. Do you plan at some point in the future to have those kinds of conversations with them?
>
> MIDDLETON: I do.

With this in mind, Middleton was asked one month later during the final hearing before the ALJ whether she had asked Lowe's for any type of accommodations. There, she testified that she still had not asked Lowe's to

employ an assistant to ride with her and assist her in lifting samples. She testified that she still had not asked Lowe's to design or help her "with anything as far as placement of [the] samples in [her] truck."

She did, however, testify that she had asked management about the possibility of making the samples she was required to carry smaller and more lightweight, and that management had not declined her request, but said it would help her. She also testified that she had recently spoken with management about the possibility of using a laser measuring device, rather than a tape measure; that it would help her when climbing into attics and reduce or eliminate her need to crawl; and, that management believed this, too, was a good idea. She also testified:

> Q: So [Lowe's] has been cooperative as far as working with you?
>
> MIDDLETON: Yes, sir. Lowe's is a good company to work for.

In a similar vein, Middleton testified that she takes nonprescription Motrin and Tylenol for pain relief following her work day, but that it was becoming less adequate in addressing her pain. However, she does not currently have any prescription for pain relief medication. As to why, she testified:

> MIDDLETON: I've called [the doctor] several times not for an appointment, sir, but to try to get some Tramadol so that I can have some pain relief other than just Tylenol and Motrin.

Q: But you've never scheduled an appointment? They want to see you before they gave any medications, don't they?

MIDDLETON: They never returned my call, sir.

Q: The only physician you have seen is your primary care physician?

MIDDLETON: That's correct.

Q: And have you seen her since your deposition?

MIDDLETON: I have not seen her since my deposition.

Q: As I recall in your deposition, your next scheduled appointment with her was in March of 2014?

MIDDLETON: Apparently. I think that is correct. I can't say.

Q: You said it would be six months from your prior appointment which you said in your deposition was about four months from November. Does that sound about right?

MIDDLETON: That sounds correct.

Q: And do you have any appointments scheduled with any other physician at this point?

MIDDLETON: I do not.

The holding in *Fawbush* that the claimant was not likely to be able to earn a comparable wage for the foreseeable future was based on concrete evidence —that the only way the claimant could perform the requirements of his accommodated supervisory job (not his pre-injury job as a framing carpenter) was to work outside of his medical restrictions and take more narcotic pain medication

than he was prescribed. *Fawbush*, 103 S.W.3d at 12. By contrast, to the extent that Middleton has been given any medical restrictions, no physician has opined that they would prohibit Middleton from performing her pre-injury work. No physician has prescribed her any pain medication. And, while Middleton believes that her current condition will eventually prohibit her from working at her position as it exists, there is no evidence that the aspects of her position currently giving her difficulty are requirements of her position and cannot be accommodated. To the contrary, the record demonstrates Lowe's has begun to accommodate Middleton to the extent that Middleton has asked for accommodations.

In short, Middleton was granted the three times multiplier based upon a hypothetical situation that accommodations (when she decides to ask for them) and a prescription for pain relief medication (when she obtains one from a physician) might entirely prevent. This, in turn, is speculation and does not support an enhancement pursuant to KRS 342.730(1)(c)1.

The evidence of record merely supports allowing for Middleton's award to be reopened, per KRS 342.730(1)(c)4, for an application of the KRS 342.730(1)(c)2 two-times multiplier to any benefit period during which Middleton's employment ceases in the future for a reason relating to her injury. We therefore REVERSE, and direct that Middleton's award be modified consistently with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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