Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 12, 2016

CLAIM NO. 201383845

ARMSTRONG WOOD PRODUCTS PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

LOVENA OAKES
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Armstrong Wood Products ("Armstrong") seeks review of the September 22, 2015, Amended Opinion and Order on Remand and the October 27, 2015, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ found Lovena Oakes ("Oakes") sustained a low back injury on May 3, 2014, and awarded permanent partial disability ("PPD") benefits

enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 and medical benefits.

In a March 18, 2015, Opinion and Order the ALJ awarded PPD benefits based on a 5% impairment rating enhanced by the three multiplier. Armstrong appealed contending the ALJ provided inaccurate findings of fact to support his decision regarding the applicability of the three multiplier. It also argued there was insufficient evidence to support his determination pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) that enhancement by the three multiplier was more appropriate. We vacated the ALJ's award of income and medical benefits and remanded for reasons not raised by Armstrong stating as follows:

> Because the award of PPD benefits is erroneous as a matter of law, it is vacated. Specifically, we note in the March 18, 2015, decision and in the May 5, 2015, Opinion and Order ruling on the petition for reconsideration, the ALJ never made a finding as to the impairment rating attributable to Oakes' injury. As noted previously, the March 2015 decision contains no finding as to whether Oakes' injury merited an impairment rating. In the March 18, 2015, decision, the ALJ clearly acknowledges Dr. Bilkey's opinion Oakes has a 5% impairment rating pursuant to the AMA Guides. However, he never states he adopts that impairment rating. Similarly, in his May 5, 2015, Opinion and Order ruling on the petition for reconsideration, the ALJ does not adopt Dr. Bilkey's

impairment rating. Thus, the ALJ must make a finding as to whether Oakes has an impairment rating attributable to the work injury.

In resolving this issue, the ALJ cannot rely solely upon the opinions of Dr. Bilkey. In his February 3, 2014, report, Dr. Bilkey diagnosed Oakes' injury as a lumbar strain which is causing chronic low back pain. He also stated "the question was raised here as to whether or not the work injury in reality caused an aggravation of an orthopedic problem related to the left hip." Consistent with that diagnosis, Dr. Bilkey stated as follows:

> I can't say that Ms. Oakes is at MMI. Although her lumbar spine has been dealt [sic] I think in an adequate fashion, I think there is medical indication here for an orthopedic evaluation regarding the left hip and pelvis. For this reason I would not be placing Ms. Oakes at MMI now.

Significantly, Dr. Bilkey went on to state:

> For now a permanent partial impairment rating, based on today's evaluation, physical exam and medical record review, may be described. According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Ms. Oakes satisfies criteria for a Lumbar DRE Category II impairment as referenced on Table 15-3 of the Guides. This allows for a range of impairment of 5-8%. Ms. Oakes has 5% whole person

> impairment solely attributable to the 5/3/13 work injury.
>
> PPI is predicated on MMI. Should Ms. Oakes have further evaluation and treatment for her pain problem, there may be a need to reassess permanent impairment after MMI status is reached.

Dr. Bilkey's report firmly establishes that at the time he saw Oakes she was not at MMI. Thus, his impairment rating cannot be used by the ALJ unless the ALJ finds Oakes was at MMI prior to the time she was seen by Dr. Bilkey. 2.4 of Chapter 2 of the AMA Guides states as follows:

> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on

> the individual's activities of daily living.
>
> . . .
>
> On remand, the ALJ may rely upon the impairment rating of Dr. Bilkey if he determines Oakes attained MMI prior to the date Dr. Bilkey saw her and concluded she was not at MMI. As noted by the ALJ, Dr. Lyon stated in his report that Oakes had attained MMI on November 13, 2013, the date of her final consultation with Dr. El-Kalliny. Similarly, Dr. El-Kalliny's November 13, 2013, record appears to reflect he believed MMI was reached when he saw her on November 13, 2013. Should the ALJ find November 13, 2013, is the date of MMI, then he is free to rely upon Dr. Bilkey's impairment rating.
>
> . . .
>
> Lest there be no misunderstanding, on remand, the ALJ must first determine the date of MMI. Then he must determine whether Oakes has a permanent impairment as a result of the work injury. There shall be no award of TTD benefits as the ALJ has already determined the issue of entitlement to TTD benefits is moot. Further, there shall be no additional evidence taken. The ALJ shall enter a final decision by determining whether Oakes is entitled to PPD benefits as a result of her injury and enter the appropriate award based on that determination and no more. Should the ALJ find Oakes has a permanent impairment, he shall cite to the medical evidence he has relied upon in support of this finding.[1] Similarly, regardless of whether he determines Oakes has a permanent impairment, the

[1] We acknowledge only Dr. Bilkey assessed an impairment rating.

> ALJ shall determine the extent of the medical benefits to which Oakes is entitled. The absence of a permanent impairment rating does not necessarily preclude an award of future medical benefits.
>
> If the ALJ determines MMI was attained prior to Dr. Bilkey's report and adopts Dr. Bilkey's impairment rating, he shall then determine whether a Fawbush v. Gwinn, supra, analysis is necessary.
>
> As a final note, should the ALJ again conduct an analysis pursuant to Fawbush v. Gwinn, supra, we believe his previous analysis as to the first and third prong is insufficient.

In the September 2015 decision, relying upon the opinions of Dr. J. Rick Lyon and Dr. Magdy El-Kalliny, the ALJ determined maximum medical improvement ("MMI") was attained on November 13, 2013. Relying upon the impairment rating of Dr. Bilkey assessed in his February 3, 2014, report, the ALJ found Oakes sustained a 5% permanent impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

In resolving whether the three multiplier set forth in KRS 342.730(1)(c)1 was applicable, the ALJ adopted the same language set forth in his original decision which reads as follows:

In this case I am required to conduct an analysis under *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky.2003). Based upon the plaintiff's sworn testimony, as covered above, which I found to be credible and convincing, and the medical evidence from her treating physician, Dr. Jenkins, as summarized above, and the medical evidence from her treating neurosurgeon, Dr. El-Kalliny, as summarized above, as well as the medical evidence from Dr. Bilkey, the examiner, all of which is persuasive and compelling, I make the determination that the plaintiff cannot really return to the type of work which she performed at the time of her work injury in accordance with KRS 342.730(1)(c)1. I specifically rely on the plaintiff's credible and convincing lay testimony at the Hearing that she still has bad pain in her back, hips and left leg while working and is taking multiple prescription pain medications. I also rely heavily on the persuasive, compelling and reliable medical evidence from Dr. Jenkins, her treating physician, who stated that she must be able to change positions at will, since she has pain in her back with minimal lifting. I make the determination that the only reason that this lady continues working for the defendant is that that is the only way she can make earn money to support her basic living expenses. I make the determination that she has applied for other jobs, and that as soon as she obtains an alternate job, she will do so.

However, the ALJ added the following:

I note that the plaintiff's treating physician, Dr. Jenkins, referred her for physical therapy and referred her to Dr. Weber for continuing pain

> management, including pain medication, muscle relaxants and a TENS unit. I specifically adopt the evidence from Dr. Jenkins, wherein he stated that he placed upon Ms. Oakes physical restrictions that she must be able to change positions at will and that she will have pain in her back with minimal lifting. This leads me to make the determination that the plaintiff cannot legitimately return to the type of work which she performed at the time of her work injury in accordance with KRS 342.730(1)(c)1.

The ALJ utilized the same language contained in his March 18, 2015, Opinion and Order in determining the two multiplier contained in KRS 342.730(1)(c)2 was applicable.

In conducting the third step of the analysis as required by Fawbush v. Gwinn, supra, the same language contained in the original decision was inserted, but the ALJ added the following:

> There is a very recent Kentucky appellate decision which is directly on point with the case at bar. In *Lunte v. Two Chicks, LLC,* __ S.W.3d __, 2015 WL 4605414 (Ky. App. 2015), the Workers' Compensation Board reversed the decision by Judge Bolton, wherein he concluded that the plaintiff was entitled to the 3 multiplier pursuant to KRS 342.730(1)(c)1 because she lacked the physical capacity to return to the type of work which she performed at the time of her injury. The case was appealed to the Court of Appeals and the Court of Appeals held that the Board erred, whereupon the Court of

> Appeals reversed the Board and ordered the Opinion of Judge Bolton to be reinstated. Judge Bolton stated in his Opinion that the test before him is essentially whether, due to her current physical condition, the plaintiff can return to the same job duties she was performing at the time of her work-related injury. The plaintiff Lunte argued that the Board exceeded its authority when it vacated Judge Bolton's decision to award the 3 multiplier, stating that Judge Bolton applied the correct legal standard and that his decision was supported by substantial evidence. Judge Bolton relied upon the plaintiff's sworn testimony and the medical evidence from Dr. Roberts, the plaintiff's treating physician. The Court of Appeals concluded that Judge Bolton applied the correct standard and that his analysis related thereto was certainly adequate to sustain the enhanced award. After so concluding, the Court of Appeals reversed the Board's decision.

Armstrong filed a petition for reconsideration noting the ALJ's Fawbush analysis in the amended opinion is almost identical to that as set forth in the original opinion and requested additional findings of fact. Concerning the determination the three multiplier was applicable, it requested the ALJ set forth the portions of Oakes' testimony and the records of Dr. Jenkins and Dr. El-Kalliny he relied upon. Armstrong requested the ALJ also provide the portions of Dr. Bilkey's report he relied upon in determining the three multiplier was applicable.

Finally, it also requested the ALJ provide additional findings to explain his finding Oakes did not retain the physical capacity to return to her previous work when she testified she has continued to perform that work since May 2013.

With respect to the third prong of the Fawbush analysis, Armstrong requested the ALJ provide the portions of Oakes' testimony and the records of Dr. Jenkins upon which he relied in determining enhancement by the three multiplier was more appropriate. It also requested the ALJ provide additional findings of fact as to why Oakes would be unable to continue working at this job for the indefinite future when she testified she has continued working since May 2013 and why he disregarded Oakes' testimony that she wanted to continue doing this job because she would make more money.

In the opinion and order on reconsideration, the ALJ stated, in relevant part, as follows:

> Defendant requests that I provide additional findings as to what portions of the plaintiff's testimony I relied upon in making the determination that she cannot return to the type of work which she performed at the time of her work injury. However, said Opinion and Order stated that I specifically relied on the plaintiff's credible and convincing lay testimony at the Hearing that she still has bad pain in her

back, hips and left leg while working and is taking multiple prescription pain medications. Said Opinion and Order further stated that I made the determination that the only reason Ms. Oakes continues to work for the defendant is that that job is the only way she can make and earn money to support her basic living expenses. I further made the determination that she has applied for other jobs, and that as soon as she obtains an alternate job she will move to it. Plaintiff's testimony at the Hearing was consistent with her testimony given in her deposition taken on November 20, 2014. Plaintiff specifically described her painful symptoms in her deposition on pages 24 & 25 and pages 29-32.

The defendant also requests that I provide additional findings of fact as to what evidence from Dr. Jenkins and Dr. El-Kalliny I relied upon in making the determination that the plaintiff cannot return to the type of work she performed at the time of her work injury. In the Amended Opinion and Order on Remand, I specifically stated that I relied upon the persuasive, compelling and reliable medical evidence from Dr. Jenkins, the plaintiff's treating physician, who stated that she must be able to change positions at will on her job because she has pain in her back with minimal lifting. My reliance upon the persuasive, compelling and reliable medical evidence from Dr. Jenkins is supported by his treatment records showing that the plaintiff must be able to change positions at will. Dr. Jenkins also noted that Ms. Oakes has pain in her back with minimal lifting. The plaintiff's job, which requires her to pick up wood 12 in. x 48 in. long on a conveyor and turn to place it in a

box every 15 seconds clearly requires more than minimal movement and lifting, and I so determined. I specifically find that the determinations made in the Amended Opinion and Order on Remand are specifically supported by the opinions of Dr. Jenkins, the plaintiff's treating physician.

In addition, the record shows that the plaintiff was seen by Dr. El-Kalliny, her treating neurosurgeon, on two appointments in 2013. Dr. El-Kalliny noted that the plaintiff had a history of significant pain into her low back radiating into both hips and the groin area. Dr. El-Kalliny emphasized that the plaintiff's injury was work-related. Dr. El-Kalliny stated that if Ms. Oaks could tolerate doing her job, he would not advise her to be off work. Dr. El-Kalliny ordered prescription pain medication for the plaintiff's painful condition. Dr. El-Kalliny noted that Ms. Oakes stated that her pain is severe and denied any relieving factors. Dr. El-Kalliny noted that it is an objective medical fact that the plaintiff has annular tears at the L3-4 level of her back, which explains her pain. It is clear that the plaintiff's history and the findings by Dr. El-Kalliny support my conclusion that the plaintiff cannot continue to do the type of work she was performing at the time of her work injury.

The defendant also requests that I provide additional findings of fact as to why Ms. Oakes will be unable to do her current job with the restriction of "changing positions at will." Ms. Oakes testified both in her deposition and at the Hearing that she has to pick up pieces of wood every 15 seconds and turn to put the wood into a box. She testified that she takes 2 steps to the

conveyor and then 1 step backward toward the box. She is required to stand throughout the work day. She is not able to sit during her shift, which would, of course, be a change of positions from standing to sitting. Her job requires her to be on her feet throughout the entire work day. I make the determination that the physical requirements of her job do not permit her to change positions at will.

The defendant also requests that I provide additional findings of fact as to what evidence from Dr. Bilkey I relied upon in making the determination that the plaintiff cannot really return to the type of work she was doing at the time of her work injury. I make the determination that Dr. Bilkey stated that he did not believe that Ms. Oakes was at maximum medical improvement and recommended that she have an orthopedic evaluation, as well as x-rays of her left hip, and that she may need additional diagnostic testing. I made the determination that Mr. Bilkey did not prescribe any work restrictions for Ms. Oakes, but that Dr. Bilkey did not think that she could continue with her work duties, although she was at that time succeeding with them. It is clear that I have already made the determinations requested by the defendant on this issue.

The defendant also requests that I provide additional findings as to why the plaintiff does not have the physical capacity to return to her previous work when she testified that she had done so ever since May 13, 2013. However, I specifically made the determination that under the plaintiff’s sworn testimony and the medical evidence from her treating physician, Dr. Jenkins, which is

covered in detail, it is unlikely that Ms. Oakes will be able to continue for the indefinite future to do work from which to earn a wage. It is clear that my determination on this issue is supported by the medical evidence from Dr. Bilkey, Dr. Jenkins and Dr. El-Kalliny. The evidence which I relied upon is sufficient to make the determination that the plaintiff does not have the capacity to return to her previous work.

The defendant also requests that I make additional findings regarding the plaintiff's inability to continue to earn the same or greater wages for the indefinite future. The Amended Opinion and Order on Remand specifically addressed the findings made on said issues. I emphasize that the plaintiff testified at the Hearing and in her deposition that it was doubtful she was going to be able to continue to perform her duty or the same duties due to her low back pain, and that that is the reason that she applied for other jobs. I make the determination that the plaintiff stated that she had no choice under the circumstances but to continue the work she was doing until she finds another job that is not as physically demanding as her job with the defendant. Plaintiff emphatically testified that she has to continue working to provide for herself, since she does not have anyone else to support her.

I saw and heard the plaintiff Ms. Oakes testify at length at the Final Hearing. I sat a few feet from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony and carefully observed her body language during her

testimony. I am the only decision maker who actually saw and heard Ms. Oakes testify. She was a very open and stoic lady. I make the determination that she was a credible and convincing lay witness and that her testimony rang true.

. . .

In this case I am required to conduct an analysis under *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky. 2003). Based upon the plaintiff's sworn testimony, as covered above, which I found to be credible and convincing, and the medical evidence from her treating physician, Dr. Jenkins, as summarized above, and the medical evidence from her treating neurosurgeon, Dr. El-Kalliny, as summarized above, as well as the medical evidence from Dr. Bilkey, the examiner, all of which is persuasive and compelling, I make the determination that the plaintiff cannot really return to the type of work which she performed at the time of her work injury in accordance with KRS 342.730(1)(c)1. I specifically rely on the plaintiff's credible and convincing lay testimony at the Hearing that she still has bad pain in her back, hips and left leg while working and is taking multiple prescription pain medications. I also rely heavily on the persuasive, compelling and reliable medical evidence from Dr. Jenkins, her treating physician, who stated that she must be able to change positions at will, since she has pain in her back with minimal lifting. I make the determination that the only reason that this lady continues working for the defendant is that that is the only way she can make earn money to support her basic living expenses. I make the determination that she has applied for

> other jobs, and that as soon as she obtains an alternate job, she will do so. I note that the plaintiff's treating physician, Dr. Jenkins, referred her for physical therapy and referred her to Dr. Weber for continuing pain management, including pain medication, muscle relaxants and a TENS unit. I specifically adopt the evidence from Dr. Jenkins, wherein he stated that he placed upon Ms. Oakes physical restrictions that she must be able to change positions at will and that she will have pain in her back with minimal lifting. This leads me to make the determination that the plaintiff cannot legitimately return to the type of work which she performed at the time of her work injury in accordance with KRS 342.730(1)(c)1.
>
> In addition, I make the determination that the plaintiff has continued working for the defendant earning the same or greater average than she earned at the time of her work injury, as per KRS 342.730(1)(c)2. I rely upon the plaintiff's sworn testimony to that effect.

The ALJ inserted the same language contained in his amended opinion and order on remand in determining enhancement by the three multiplier was appropriate and added the following:

> In making the above determinations, I rely upon the unanimous Opinion of the Supreme Court of Kentucky in *Wilder v. Enterprise Mining,* 2014 WL 7239812 (Ky. 2014). There, the Supreme Court ruled that (1) the ALJ has the sole authority to determine the weight, credibility, substance and inference to be drawn

> from the evidence; (2) where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination; (3) although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal; (4) the ALJ is free to interpret the expert evidence and reach conclusions; (5) while evidence has been presented to counter the ALJ's conclusion, the mere fact that contrary evidence could lead to a different result does not provide grounds to reverse the ALJ.

On appeal, Armstrong again challenges the ALJ's determination Oakes cannot return to the type of work she performed at the time of the injury. Armstrong maintains KRS 342.730(1)(c)1 is inapplicable as Oakes has continued to do the same job she was performing at the time of the injury and is now earning more money. It notes in response to its petition for reconsideration, the ALJ stated Oakes testified she had pain in her back, hips, and left leg while working and takes multiple prescription pain medications. Armstrong posits while this may be true, her pain level does not establish Oakes cannot return to her previous work. It notes the ALJ relied upon Oakes' statement she was still working only to earn money to support her basic living expenses. Armstrong suggests this

could be said of almost any worker, but does not indicate Oakes cannot return to the work she was performing at the time of the injury.

Armstrong also notes the ALJ stated he relied upon the records of Drs. Jenkins and El-Kalliny. However, it asserts the only evidence of work restrictions in Dr. Jenkins' records is his statement that Oakes must change positions. It asserts there is no indication Oakes cannot change positions at will in her job and that this restriction prevented her from doing the job as she has continued during for almost two years following the injury. It notes in summarizing Dr. El-Kalliny's records, the ALJ did not cite to any portion of his records indicating Oakes could not perform her job. It emphasizes the ALJ noted Dr. El-Kalliny stated if Oakes could tolerate her job, he would not advise her to be off work.

Armstrong notes the ALJ stated he relied upon the report of Dr. Bilkey as summarized in his original opinion without specifying the conclusions of Dr. Bilkey which he found persuasive. It observes that in the original opinion the ALJ noted Dr. Bilkey assigned no work restrictions and Oakes was succeeding in her work duties.

Armstrong concedes the ALJ's finding Oakes returned to her work at an average weekly wage ("AWW")

greater than or equal to the wage she was earning at the time of the injury is appropriate.

With regard to the third prong of the Fawbush analysis, Armstrong maintains Oakes has continued to work at her regular job since May 2013 and has passed up other jobs to continue this job because she wants to make more money. It contends in the order overruling its petition for reconsideration, the ALJ recited the evidence upon which he relied previously without specifying the evidence establishing Oakes could not continue earning wages for the foreseeable future. Armstrong also notes the ALJ concluded Oakes was continuing to work because it was the only way to earn money and as soon as she is able to secure another job she will take it. Assuming such to be true, Armstrong maintains this does not indicate Oakes cannot continue to earn the same or greater wages. Although Oakes may hypothetically quit someday, Armstrong insists there is no indication at this time she will do so as she testified she wants to keep this job to earn more money. Thus, there is no indication at this time Oakes cannot earn the same or greater wages for the foreseeable future as she has done since the injury.

Armstrong contends Lunte v. Two Chicks LLC, supra, recited by the ALJ is inapplicable. It argues the

ALJ misapplied the Fawbush analysis in awarding the three multiplier as there is no evidence Oakes cannot return to the type of work she performed at the time of the injury, and that she will not continue to earn the same or greater wages for the foreseeable future.

Alternatively, Armstrong cites the Board's statement in its opinion vacating that the Fawbush analysis was insufficient and argues the matter should be remanded for additional findings of fact for an explanation of the evidence which supports a finding Oakes cannot return to the job she was performing at the time of the injury and cannot continue to earn the same or greater wages for the foreseeable future.

During her November 10, 2014, deposition, Oakes testified Dr. Jenkins treats her back injury and other unrelated health problems. Regarding the symptoms resulting from the work injury, she testified:

> Q: Tell me about your back symptoms, and I don't mean right this minute, but I mean just generally tell me what problems you have with your back?
>
> A: It's just across my low back and down my left leg; the stinging, burning, numbness. You know I'm getting to where I'm – my foot and leg are pins and needles anymore. I just got to keep walking or lay down and rest, you know, that's about all.

> Q: And as far as the pain that you have, where is the pain located:
>
> A: It’s in my low back and my hips. It’s getting in my right hip now.
>
> Q: And as far as the severity of the pain, if you had to put it on a Scale of 1 to 10 where is it?
>
> A: A 9 or 10. If I don’t keep walking or lay down for a little bit, it’s over.
>
> Q: Does the medication help you?
>
> A: Sometimes. Not like it should, you know. It never eases off.
>
> Q: Do you have problems in the performance of your duties at work?
>
> A: I hurt pretty bad, but I just keep doing it; I have to.

Oakes estimated she missed approximately seven or eight days of work following the injury. Concerning the problems her work poses, Oakes testified as follows:

> Q: As far as doing your job now, what’s the worst part of it for you?
>
> A: The whole thing.
>
> Q: The movements?
>
> A: Yeah, and you can’t walk. You have nowhere to step. You got two steps here, and one step back and you’re in the next boxing station, you know. You just got nowhere to go.

At the time of the injury, Oakes was making over $13.00 an hour and is currently makes $15.00 an hour. She

acknowledged her earnings are greater than her earnings at the time of injury. Oakes continues to work the same hours she did prior to the injury. Because Armstrong mandates she work overtime at least three weeks out of the month, Oakes works 48 hours three weeks and 40 hours for one week. Oakes testified her current job as a nester/packer is the hardest job in the factory as it takes more toll on the body. Regarding whether she would move to a less strenuous position earning less money, she provided the following testimony:

> Q: Let me ask it this way. If you had the opportunity to do a job where you made less money, you say that you make more money you think than the hasko puller job, maybe box maker, maybe grader. If you had the opportunity, if the opportunity is given to you, if this claim were accepted and you got benefits and your medical treatment and all that stuff, would you be willing to take a lesser paying job, but one that would be easier on you physically that you would not have as much problems?
>
> A: Well I guess if I had to you'd do anything.
>
> Q: Yeah, that – no, I'm not saying you have to. I'm just saying if we're trying to work …
>
> A: I wouldn't want to make less money, no.
>
> Q: Okay. You would rather make more money even though it's more physically demanding and it's causing you the issues you've described for Mr. Knight?

> You’re going to tough it out, is what I’m hearing.
>
> A: No. I’d rather not tough it out.
>
> Q: Okay. And that’s my question.
>
> A: But I don’t want to lose money either; nobody ever does.
>
> Q: I understand. And everyone wants to make as much as they can, that’s America. But I guess what I’m saying is, if you had the opportunity to do what you’re doing being as physically demanding as it is with the problems you already described for Mark earlier, or you went to one of the easier jobs that you think would be easier on you physically, maybe prolong your work life, or just not be in as much pain or whatever Ms. Oakes, but you may make less money, would one would you prefer?
>
> A: I would prefer the one with less money.
>
> Q: Okay. And of those jobs, what would be your preference? If you were given that opportunity to choose, which one that would be available to you, which of those other jobs would you have the choice to make? What would you choose to make?
>
> A: I’d rather have one I could walk around, but I don’t think there’s one there for that; but I’d probably go to box maker or the pit.

Regarding the medication she takes since the injury, Oakes testified as follows:

> Q: Are you taking over-the-counter medication for this problem since you haven’t had any treatment since you saw El-Kalliny in November of 13?

A: No. I just take my Mobic and my gabapentin.

Q: Which you said is what arthritis [sic] is paying for? And they had paid for that before . . .

A: No. I didn't ever take it until my doctor and Dr. Golden put me on it. And I take a pain pill too, once a day.

Q: Is that the Neurontin?

A: No. I take Percocet 5 once a day.

Q: Let me just make sure I've got those straight. There was Neurontin; there was Mobic; there was – if I can read my notes – the gallapentin [sic] …

A: Gabapentin.

Q: I'm sorry, I can't read my notes. And then you're taking Perc as well, Percocet?

A: I take a Percocet 5. I take Neurontin, which is gabapentin; a Mobic, and four muscle relaxers a day.[2]

. . .

Q: What's the muscle relaxer?

A: It's for my back muscles.

Q: What is it? What the name of it?

A: They changed it. Methocarbamol, I think.

Q: Mobic, gabapentin, Neurontin, Percocet 5 and the one you just mentioned?

A: Methocarbamol.

[2] Gabapentin is the generic name for Neurontin.

At the February 25, 2015, hearing, Oakes testified she is still working at Armstrong performing the same job she performed as a nester/packer when she was injured in May 2013. Oakes indicated she must continue to work to support herself and she cannot afford to quit. Her job entails boxing "hardwood flooring" and it takes approximately two minutes to fill a box. She has worked for Armstrong for twenty years. Oakes recounted a particular incident which occurred after she returned to work:

> A: Yes. He returned me to work on light duty and my hands started – I was making boxes. My hands started swelling, and I was in miserable pain.
>
> Mr. Baker brought me out a little old back foldup stool to sit on, which I couldn't sit because my back and legs and hips were killing me.
>
> My supervisor come over, and I showed him my hands and he said you got to show Mr. Baker. I saw him in the office in front of our work area. So I went in there and showed him my hands, and he said I was on so many anti-inflammatories that I shouldn't be swelling.
>
> So the next day when I got up, my feet and legs were so swollen I barely could walk.

Oakes testified she was referred to Dr. El-Kalliny who saw her twice. At the present time she is only being treated by Dr. Jenkins.[3]

Regarding her current symptoms, Oakes provided the following testimony:

> Q: As far as your present condition, and I don't mean just this incident, but just tell me generally or tell the Judge about what symptoms or problems that you have with your low back and leg that you attribute to this injury.
>
> A: I didn't exactly understand that.
>
> Q: I just need to know how you feel generally with your back and your leg.
>
> A: I'm miserable. I'm just hurting so bad I can't stand it. It's across my low back down into both of my hips and down my left leg to my feet and toes.
>
> It's like my leg and toes and foot tingle. It's like pins and needles and stinging, burning pain. I'm miserable.
>
> Q: And you've mentioned that you're taking Mobic and Neurontin. Do you take those now?
>
> A: I took – I do that the Neurontin, but my blood pressure went up at work. Mr. Baker took my blood pressure, and it was like 214/102. I had to leave and go to the ER, and my family physician, Mr. Patrick Jenkins, took me off the Mobic because it was interfering with my blood pressure he thought.

[3] Oakes was sent to Dr. Jeffrey Golden by Armstrong after the injury. Since Dr. Golden is in the same office as Dr. Jenkins, she continues to see only Dr. Jenkins.

> Q: So are you just taking the Neurontin now?
>
> A: I take the Neurontin and the muscle relaxer and the pain pill.
>
> Q: Okay. And what's the pain pill that you take?
>
> A: Percocet 5. I get one a day.
>
> Q: And the muscle relaxer do you know what that is?
>
> A: Methocarbamol.
>
> Q: And would you be able to continue to work your job as a nester/packer without those medications?
>
> A: No.
>
> Q: Tell us why not.
>
> A: Because it just helps me get through my day. I take all my medications at night, therefore they are in my system for the next day.

Regarding her ability to continue working at her current job, Oakes testified as follows:

> Q: Ms. Oakes, I know I had asked you this in your deposition, but I'll ask you again.
>
> I terms of your ability to continue to do the job that you're doing now in your present condition, are you going to be able to continue to do that?
>
> A: I have no choice. I have to.
>
> Q: Have you looked for any other jobs or –

> A: I am looking for another job. I've applied at several different places.
>
> Q: And tell us why you've done that.
>
> A: Because I'm not going to be able to keep doing this job every day. It's just too hard.
>
> . . .
>
> Q: Okay. I did want to ask you one thing. As far as your pain level, what is your pain on an average day?
>
> A: Seven or eight.
>
> Q: Are you ever without pain?
>
> A: No.
>
> Q: In terms of your pain, what types of activities make your pain worse?
>
> A: Physical activity, sitting, just anything with fast pace. The only thing that helps me if I recline in a recliner or lay [sic] down and get up and walk, walk as much as I can.
>
> Q: As far as doing the work that you're doing as a nester/packer, how does that effect [sic] your pain?
>
> A: It makes it worse. It never eases off.

Oakes acknowledged since the deposition she works daily performing the same type of job she performed prior to May 3, 2013. She offered the following testimony concerning whether she will continue working at her current job:

> Q: And you told me in your deposition even if it was a job that was less physically demanding on you, you would rather tough it out, your word, Page 41 and 42 of your deposition, as opposed to making less money.
>
> Is that still true as we sit here in February of 2015?
>
> A: I have to tough it out because I'm a single person, and I have to support myself. I have no one at home to support me.
>
> Until I can find another job that is better on my body, I have to tough it out.
>
> Q: Even if there is a job available based on your seniority and your ability to try to seek it that's less physically demanding, you'd rather tough out the more demanding job to make more money?
>
> A: I have to make all I can make to pay my bills. I mean, that's common sense with just anybody.

Oakes testified she has attempted to find other jobs and provided the names of some of the employers she has contacted. She testified if none of those jobs allow her to change positions, it was her intention to stay at Armstrong for the foreseeable future or "until [she] can find another job."

Because the decision of the Court of Appeals in Lowe's Home Centers, Inc. v. Middleton, Claim No. 2014-CA-001136-WC, rendered February 13, 2015, Designated To Be

Published, as affirmed by the Kentucky Supreme Court in Middleton v. Lowe's Home Centers, Inc., 2015-SC-000120-WC, rendered October 29, 2015, Designated Not To Be Published, prohibits enhancement by the three multiplier in the case *sub judice* we reverse that portion of the decision enhancing Oakes' benefits by the three multiplier.

In Lowe's Home Centers, Inc. v. Middleton, supra, Middleton sustained a work-related injury consisting of a ruptured disc for which surgery was performed. Middleton continued to experience pain radiating in the cervical region, mid to upper back and neck area, and both shoulders. It was undisputed Middleton had a whole person impairment rating of 27%. The ALJ awarded PPD benefits enhanced by the three multiplier. Since Middleton had returned to the same job she was performing at the time of the injury, Lowe's appealed complaining enhancement by the three multiplier was error. This Board affirmed the enhanced award. However, the Court of Appeals reversed noting:

> 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.

Slip Op. at 2.

Thus, since Middleton failed to prove the first and third elements of the above-stated Fawbush rule it reversed the enhanced award. The Court of Appeals described Middleton's situation as follows:

> 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." [footnote omitted] 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. [footnote omitted]

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.

Slip Op. at 6-7.

The Court of Appeals concluded as follows:

> 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 or to an altogether different form of employment. [citations omitted]
>
> . . .
>
> 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.

. . .

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. ...

. . .

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.

Slip op. at 9-14.

In affirming the Court of Appeals, the Supreme Court stated as follows:

> The Court of Appeals held that a *Fawbush* analysis should not have been conducted because there was no testimony of record that Middleton currently lacks the physical capacity to perform the full range of her employment duties. The court noted that while Middleton indicated she would like some accommodations to make her job easier, she had not asked Lowe's to implement them. The Court of Appeals also cited to the fact that Middleton only feared she might need to increase the medicines she takes to continue performing her job, but had not requested or been prescribed those drugs. The Court of Appeals concluded:
>
>> 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.

Middleton appealed the reversal of the application to this Court.

. . .

In this matter, the uncontradicted evidence is that Middleton has returned, not only to the same job classification, but also performs the exact same tasks that she did before her work-related injury. While Middleton might have difficulty performing those tasks, she admits that she can complete them at this time. Thus, the Court of Appeals was correct in holding that KRS 342.730(1)(c)1 does not apply.

Middleton counters the fact that she is able to perform the same tasks now as she did before the work-related injury by stating that she is exceeding the restrictions placed upon her by her physicians. However, it is unclear that Middleton must significantly exceed any restriction placed upon her to perform her job. Additionally, while Middleton takes medications for her pain, she does not have to take them in excess to perform her job. *See Fawbush,* 103 S.W.3d at 8 (holding that the claimant may be eligible to have his award enhanced by the three multiplier because he had to take higher doses of narcotics than prescribed to be able to perform his job). Thus, the ALJ erred by finding that KRS 342.730(1)(c)1 could apply to Middleton's award.

Slip Op. at 6-8.

In the case *sub judice*, Oakes testified that even though she is in constant pain for which she takes medication she is still able to do her job. We acknowledge Oakes testified she has sought other employment and identified the employers to whom she applied for a job. Although Oakes testified she is in constant pain, she was not inclined to transfer to a less strenuous job earning less money. She specifically noted she is toughing it out in order to earn money to pay her bills. Further, she conceded she is making more money now than at the time of the injury. This unrebutted testimony demonstrates Oakes retains the capacity to perform her pre-injury job.

In the same vein, the November 13, 2013, report of Dr. El-Kalliny does not indicate Oakes is unable to return to work. Rather, Dr. El-Kalliny stated if Oakes could tolerate her job he would advise her not to be off work. In what appears to be an off work slip completed by Dr. Jenkins, he indicated Oakes had back pain with minimal lifting and she must be able to change positions at will. The form reflects Dr. Jenkins stated these restrictions ended on June 8, 2008. Significantly, in a note dated May 30, 2015, Dr. Jenkins indicated Oakes should be off work May 29, 2013, and May 30, 2013. However, in a subsequent note of June 19, 2013, Dr. Jenkins noted Oakes should

continue to work as tolerated. His note of September 26, 2013, indicates he instructed Oakes to continue to use pain medication, muscles relaxers, and a TENS unit. Oakes was to follow-up with Dr. El-Kalliny in a few weeks. She was to return "for worsening of symptoms." We are unable to locate in the record any subsequent notes of Dr. Jenkins beyond September 26, 2013.

In his report of February 3, 2014, Dr. Bilkey stated no work restrictions were issued. However, he stated as follows: "I wouldn't think that Mrs. Oakes could continue with her work duties but she appears to be succeeding with them."

Based on Oakes' testimony and the medical evidence, we conclude her entitlement to PPD benefits enhanced by the three multiplier is controlled by the holding in Lowe's Home Centers, Inc. v. Middleton, supra, as Oakes continued to work at the job she was performing at the time of injury through the date of the final hearing. At the hearing conducted on February 25, 2015, almost two years since the date of her injury, Oakes testified she has continued to perform the job she was performing at the time of the injury and only missed six or seven days as a result of the injury. Thus, the ALJ's award of the three multiplier must be reversed.

That said, we believe the record firmly supports an award of the two multiplier contained in KRS 342.730(1)(c)2 during any period Oakes' employment ceases for any reason with or without cause except where the reason is Oakes' "conduct shown to have been an intentional, deliberate action with reckless disregard of the consequences either to herself or another." *See* Livingood v. Transfreight, LLC, et al., 467 S.W.3d 249, 259 (Ky. 2015).

Accordingly, those portions of the September 22, 2015, Amended Opinion and Order on Remand awarding PPD benefits enhanced by the three multiplier and the October 27, 2015, Opinion and Order on Reconsideration affirming the award are **REVERSED**. This claim is **REMANDED** for entry of an award of PPD benefits in conformity with the views expressed herein.

ALL CONCUR.

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