Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 6, 2014

CLAIM NO. 200985684

FORD MOTOR COMPANY PETITIONER

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

CAROLYN JUSTICE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

* * * * * *

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

RECHTER, Member. Ford Motor Company ("Ford") appeals from a June 28, 2013 Opinion and Order and from a July 31, 2013 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ awarded Carolyn Justice permanent partial disability

("PPD") benefits enhanced by a 3.2 multiplier for injuries to her hip and knees sustained in separate incidents, occurring on January 31, 2008 and December 2, 2008. Ford argues the ALJ erred in finding Justice would be unable to earn the same or greater wage for the indefinite future with regard to the January 2008 injury. Additionally, it claims there was no evidence Justice's job duties or capacity to perform them were in any way affected by the December 2008 injury, making the award of the 3.2 multiplier erroneous under the plain language of KRS 342.730(1)(c)1 and pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). We affirm in part and remand in part for further fact-findings.

Justice initially identified five different injuries occurring during her employment at Ford. Consequently, a significant amount of the proof presented concerned the various job duties Justice performed at Ford between 2008 and 2011. Because the ALJ awarded benefits for only two of those injuries, we discuss only those facts which relate to the injuries occurring in January and December of 2008.

Justice began working for Ford in 1989. She was injured on January 31, 2008 when she fell backwards over a tow motor hitch attached to a cart filled with cleaning

supplies. At the time, she worked on a cleaning crew which required her to carry heavy bags of trash, push and pull a cart, and climb multiple flights of stairs. During the week, the crew cleaned offices. On the weekends, the crew was required to clean pits, which involved significant crawling and climbing.

After the fall, she immediately experienced pain in her tail bone and right leg. She sought medical treatment the next day and was placed on light duty in a clean-up job involving less stair climbing and no pit work. Justice continued to work until February, when she went on voluntary lay-off until September 2008. She returned to work at the light duty cleaning crew position, and continued to experience pain in her hips. Eventually, Justice underwent hip replacement surgery in October, 2010, though she testified the pain in her low back and hips persisted. By the time of her surgery, Justice was no longer working on the cleaning crew and had been reassigned to a less-physically demanding position inspecting finished vehicles in the MOD center.

However, Justice was still working on the light-duty cleaning crew in December, 2008 when she suffered a second injury. She was in the Ford parking lot when an employee drove a truck dangerously close to her.

Attempting to avoid being hit, she fell to the ground, injuring both knees. Justice testified she has experienced significant pain in both knees immediately, which presently continues.

In 2009, after these two injuries, the clean-up job was eliminated and Justice was able to bid into a job in the MOD center installing remote starters. She then transitioned to the position inspecting finished vehicles. Her current post involves driving super duty trucks, Navigators and Expeditions off the line and inspecting them. She is concerned about her ability to continue in her current position in the MOD center. She indicated the constant crawling in and out of the back of vehicles involved in pad inspection causes shooting pain in her hip.

Justice also expressed concern about her ability to perform other positions at Ford should her inspection job be eliminated. According to Justice, the twenty three workers currently working in the inspection job would be reduced to eleven. Retention in the position would be based on testing rather than seniority. Those who were not retained in the inspection jobs would be placed in available positions on assembly lines. However, Justice testified she is physically unable to perform work on a production line and feared no position would be available.

Justice filed the medical report of Dr. Warren Bilkey who performed an independent medical evaluation ("IME") on February 26, 2013. She provided a history of injuring her back, pelvis, tail bone and left shoulder when she fell on January 31, 2008. She also reported injuring her knees when she fell on December 2, 2008. Dr. Bilkey noted Justice's symptoms of pain affecting the right groin and low back. Justice had a leg length discrepancy for which she used a 3/8th inch lift. Dr. Bilkey noted Justice had knee pain that is troublesome if she is kneeling or climbing into trucks. He opined the January 2008 injury produced a contusion to the back and pelvis, right hip strain, and aggravation of asymptomatic and dormant degenerative joint disease of the right hip. He stated the December 2008 injury produced contusion injuries to the knees with subsequent aggravation from later knee contusions. He noted residual bilateral knee pain occurring with activity.

Dr. Bilkey assigned a 20% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for the January 2008 hip injury. He assigned a 1% impairment for each knee related to the December 2008 injury. He indicated Justice could occasionally lift forty

pounds and frequently lift twenty-five pounds. He stated Justice could stand and/or walk about six hours in an eight hour workday. Dr. Bilkey limited her to occasionally climbing, crouching, stooping and reaching in all directions, and never kneeling or crawling.

Ford filed the report of Dr. Robert Jacob, who examined Justice on February 13, 2013. Dr. Jacob opined Justice did not sustain any injury or harmful change to her right hip as a result of the January, 2008 injury. He further indicated her hip condition was not exacerbated or aggravated by the work injury. Dr. Jacob stated Justice had an excellent result from the hip surgery and her subjective complaints of pain cannot be corroborated by any objective measure. He found none of Justice's complaints to be referable to her knees and no ratable impairment pursuant to the AMA Guides. Dr. Jacob felt Justice was capable of performing her pre-injury job duties, although he did recommend she avoid deep knee bends or squatting to minimize stresses on her hip arthroplasty.

The ALJ found Justice sustained an injury to her hip as a result of the January 31, 2008 work injury and injuries to both knees as a result of the December 2, 2008 fall. Based upon Justice's testimony and the medical report of Dr. Bilkey, the ALJ determined Justice could not

return to the type of work she performed at the time of her injuries. The ALJ also determined Justice had returned to work at the same or greater wage than she earned at the time of the injuries. Based upon Justice's testimony and the report of Dr. Bilkey, the ALJ determined Justice was unlikely to be able to continue to earn the same or greater wage and was entitled to the three multiplier based upon application of the third prong of the Fawbush analysis.

Ford filed a petition for reconsideration which raised the arguments it now makes on appeal. In his July 31, 2013 Opinion and Order on Reconsideration, the ALJ acknowledged his reliance on Justice's complaints of ongoing knee pain since the December 2, 2008 injury. He noted Dr. Bilkey indicated Justice had a leg length discrepancy, chronic groin and back pain and, as a result of the knee injury, has residual bilateral knee pain. The ALJ further noted Dr. Bilkey stated Justice has a significant permanent impairment to the body as a whole due to the work injuries.

On appeal, Ford challenges the results of the Fawbush analysis conducted by the ALJ. In Fawbush, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate

based upon the facts of the individual claim. Fawbush v. Gwinn, 103 S.W.3d 5, 12 (Ky. 2003). In Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004), the Court held the Fawbush analysis includes a "broad range of factors", only one of which is the ability of the injured worker to perform his pre-injury job. Hence, where both the three multiplier and the two multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush and its progeny require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

Because Justice was successful before the ALJ, the question on appeal is whether the determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of

reasonable persons. Smyzer v. B. F. Goodrich Chem. Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. Gen. Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Disc. Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh St. Rd. Tobacco

Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

On appeal, Ford accepts the ALJ's determination that the first two prongs of the Fawbush analysis have been satisfied with respect to the January 2008 injury. Instead, it challenges the ALJ's finding Justice is unlikely to be able to earn the same or greater wage for the indefinite future as unsupported by substantial evidence. Ford notes Justice's high seniority level allows her to bid on less strenuous jobs. It also emphasizes Justice is able to perform her current job in the MOD center without restrictions. According to Ford, there is nothing in the record to indicate Justice's position is in jeopardy, other than her own stated concerns.

Certainly, Ford has identified considerable evidence on the record supporting its position; however, our analysis is limited solely to whether evidence exists to support the ALJ's conclusion. Based upon the evidence of record, he determined Justice is not likely to perform work at the same or greater wage into the indefinite future. Justice testified to some difficulty performing her current inspection work. Although Justice is a long-

time Ford employee, that seniority does not necessarily guarantee continued employment. Despite her high seniority level, Justice indicated she is unable to successfully bid many jobs due to her permanent restrictions. Further, in the event her inspection job is eliminated, which Justice anticipates as a possibility, she would be unable to return to an assembly line position, which is where the displaced inspection workers would be assigned. Notwithstanding other circumstances supporting Justice's job security, this proof constitutes the requisite substantial proof to support a finding that she is unlikely to continue to earn the same or greater wage for the indefinite future. Because the ALJ performed the appropriate analysis and his findings are supported by substantial evidence, his decision will not be disturbed.

Ford next argues there exists no evidence in the record supporting the conclusion Justice's job duties or her capacity to perform them were in any way affected by the December 2, 2008 knee injuries. Therefore, Ford asserts, the award of a 3.2 multiplier is patently erroneous under the plain language of the statute, as well as pursuant to Fawbush.

We find it necessary to vacate and remand concerning the ALJ's application of the three multiplier to

the December 2, 2008 knee injuries. Reading the ALJ's opinion as a whole, including both the summary of the evidence and the findings of fact, it is not apparent the ALJ understood the December knee injuries occurred while Justice was working in the lighter duty clean-up job. Indeed, the ALJ notes that, following hip surgery, Justice "did not return to a full clean-up job." In fact, the cleaning crew position had been eliminated and Justice had successfully bid the MOD job over a year before she underwent surgery. On remand, the ALJ must make specific findings identifying how the December 2008 knee injuries impact Justice's ability to perform the lighter duty clean-up job she was performing at the time of the injury. This involves an analysis independent of the Fawbush analysis conducted with respect to the January 2008 hip injury.

Accordingly, the June 28, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge, and the July 31, 2013 Opinion and Order on Reconsideration are **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** for additional findings consistent with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON PHILIP J REVERMAN
400 W MARKET ST STE 2300
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON STEPHANIE WOLFINBARGER
429 W MUHAMMAD ALI BLVD STE 1102
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J. RUDLOFF
400 EAST MAIN STREET, SUITE 300
BOWLING GREEN, KY 42101