Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 13, 2014

CLAIM NO. 201288059

LOWE'S HOME CENTERS, INC. PETITIONER

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

SONYA LAMB MIDDLETON
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Lowe's Home Centers, Inc. ("Lowe's") appeals from the January 15, 2014, Opinion and Award and the January 31, 2014, Opinion and Order on Reconsideration by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the January 15, 2014, Opinion and Order, the ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by

the three multiplier, and medical benefits. On appeal, Lowe's asserts the ALJ's determinations that Sonya Lamb Middleton ("Middleton") did not have the physical capacity to return to the type of work performed at the time of her injury and the effects of the work injury were likely to prevent her from continuing to earn the same or greater wage are erroneous.

The Form 101 alleges Middleton’s January 9, 2012, injury occurred in the following manner:

> I was riding along on a delivery of a window with Jason Bingham (because the delivery team had already gone home). As I was stepping out of the box (delivery) box, I missed the bottom step on the box truck (The steps on the box truck were very closely spaced). I was holding onto a handrail with my left hand as I descended the steps on the box truck. When I missed the bottom step, my body pivoted and slammed my back against the side of the truck, striking mainly on the right side of my back, and pulling my LEFT 'extended' arm/hand/shoulder area very severely.

Middleton alleged the following injury: "Ruptured disc a [sic] C6-C7 resulting in anterior cervical discectomy/fusion; pain radiating into my mid to upper back and neck area and into both shoulders; Cervical pain."

The Form 101 describes the physical requirements of Middleton's job at the time of her injury as follows: "Lifting; mainly taking samples out of my vehicle and

carrying them into customers [sic] homes; traveling back & forth from Lowe's to customers [sic] homes; paperwork/sales order."

Middleton underwent an anterior cervical discectomy and fusion at C6-7 on April 23, 2012.

Regarding application of the three multiplier, the ALJ determined as follows in the January 15, 2014, Opinion and Award:

> I saw and heard Mrs. Middleton testify at the Final Hearing and make the factual determination that she is clearly a well-motivated worker and her sworn testimony was very credible and convincing. I also make the factual determination that the medical report of Dr. Owen is very persuasive and compelling. Summarized hereinabove is the plaintiff's testimony and the evidence from Dr. Owen. Both Dr. Owen and Dr. Goldman opined that Mrs. Middleton will sustain a 27% permanent impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.
>
> In this case, I am required to make an analysis under *Fawbush v. Gwinn,* 103 S.W.3d 5 (Ky.2003). Based upon the plaintiff's sworn testimony and the medical evidence from Dr. Owen, which is summarized above, I make the factual determination that the plaintiff Mrs. Middleton cannot return to the type of work which she performed at the time of her work injuries in accordance with KRS 342.730(1)(c)1. I base that factual determination on the plaintiff's diagnosis being status post C6-7 anterior cervical discectomy and

decompression with microsurgical technique and insertion of anterior interbody Synthes cage, arthrodesis local harvested allograft, anterior instrumentation with Synthes plate and screws with persistent neck pain, her 27% permanent impairment rating, her statement that she has daily pain at her job consisting of aching and stabbing and burning pain from the base of her neck radiating up the back of her head posteriorly, muscle spasms between her shoulder blades with burning and pins and needles radiating down her left upper extremity, and pins and needles and numbness into her left long and index fingers, and also the fact that she takes on a daily basis pain medications, consisting of Ibuprofen, Levothyroxine, Flexeril and Imitrex. She testified at the Final Hearing that she has a limited range of motion in her neck and that her job is getting progressively more difficult and painful. Again, I found her testimony to be very credible and convincing. In addition, I make the factual determination that the plaintiff has returned to work for the defendant earning the same or greater average weekly wage than she earned at the time of her work injuries as per KRS 342.730(1)(c)2. I make the factual determination that potentially both the 2 and the 3 multipliers could apply in this case and I must determine which is appropriate. I also have to make the determination whether Mrs. Middleton is unlikely or likely to be able to continuing earning the wage that equals or exceeds her wage at the time of her work injuries for the indefinite future. Based upon the plaintiff's sworn testimony and the persuasive and compelling medical report from Dr. Owen, I make the further factual determination that under the decision

> of the Court of Appeals of Kentucky in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform her current job. Under the *Adkins* case, the standard for the decision is whether the plaintiff's injuries have permanently altered her ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. I make the factual determination under the plaintiff's sworn testimony and the medical report from Dr. Owen that it is unlikely that the plaintiff will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon all of the above-cited evidence, which is summarized above, I make the factual determination that the third prong of the *Fawbush* analysis applies here and that the plaintiff Mrs. Middleton's injuries have permanently altered her ability to earn an income, that she is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. I, therefore, make the factual determination that the third prong of the *Fawbush* analysis applies here and that under the application the plaintiff is entitled to the 3 multiplier under KRS 342.730(1)(c)1.

In the January 31, 2014, Opinion and Order on Reconsideration, the ALJ set forth an additional eight-pages of findings which are, in part, as follows:

> Defendant argues that plaintiff is not entitled to an award of enhanced permanent partial disability benefits and that the Administrative Law Judge erred in so deciding.

The plaintiff Mrs. Middleton testified that after her neck surgery she returned to work for Lowe's. She testified in detail about the physical requirements of her current job. She stated that since returning to work her job has been very physically demanding. She has a limited range of motion in her neck and has difficulty climbing into attics, stooping down and crawling. She also has difficulty moving items weighing 25-30 pounds in and out of her vehicle. She stated that her ability to physically perform her job has become progressively more difficult because of having to lift, pull and extend and because of the limitations in her neck and left arm. Those physical activities have become more painful for her. She testified that she has extreme sharp shooting pains that go into the back of her skull and pain down her left arm. After driving, she has a burning sensation going down into her hands and fingers. She has numbness in the fingers of her left hand. She has been attempting to modify her job. She has changed her schedule. At the end of her work day she goes home and takes pain medication and then rests on the couch with a heating pad or ice pad. She takes Motrin, Tylenol and Flexeril to relieve muscle spasms between her shoulder blades. Due to her painful symptoms, she has difficulty sleeping at night. She has to take another Flexeril in the middle of the night for relief. She stated that taking Flexeril makes her sleepy. She stated that since her deposition the physical condition of her neck has gotten worse and the pain has gotten more frequent, causing her to take more pain medication. She testified that she did not think that she would be able to keep up her present pace on the job into the

foreseeable future, which will result in her having to take a huge pay cut.

Two physicians presented medical evidence in this case. Both Dr. Owen and Dr. Goldman opined that Mrs. Middleton will sustain a 27% permanent impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

I saw and heard the plaintiff Mrs. Middleton testify at length at the Final Hearing. I carefully observed her facial expressions and voice tones during her testimony. I carefully observed her body language at the Final Hearing. She is a very nice lady and was a very credible and convincing lay witness. Her testimony about her physical pain and symptoms ring true.

Dr. Owen stated in his report that restrictions should be placed upon Mrs. Middleton's work activities as a result of her neck injury and cervical fusion, being avoidance of activities, such as extending her arm posteriorly and pulling, which seem to exacerbate her neck pain and cause radiating pain. Dr. Goldman stated in his report that Mrs. Middleton's sensory examination in the left upper extremity is consistent with a C7/T1 radiculopathy on the left and that she also has 2 centimeters of atrophy in her left forearm, as compared to her right forearm.

In Hush v. Abrams, 584 S.W.2d 48 (Ky.1979), the Kentucky Supreme Court stated that where the medical evidence clearly and unequivocally shows the plaintiff's actual bodily condition, his lay testimony is competent on the question of the extent of disability which has resulted from his bodily condition, and that where there is

medical testimony from which the decision maker could conclude that the plaintiff did suffer trauma, the decision maker could then use lay testimony to determine the extent of the plaintiff's occupational disability. In this case, I relied upon all of the above evidence, both the medical evidence and Mrs. Middleton's credible and convincing lay testimony, and made the factual determination that she cannot return to the type of work which she performed at the time of her work injuries in accordance with KRS 342.730(1)(c)1. Since Mrs. Middleton returned to work for the defendant earning the same or greater average wage than she earned at the time of her work injuries, as per KRS 342.730(1)(c)2, I made and make the factual determination that potentially both the 2 and the 3 multipliers could apply in this case, and I must determine which is appropriate. I also have to make the determination whether Mrs. Middleton is unlikely or likely to be able to continue earning the wage that equals or exceeds her wage at the time of her work injuries for the indefinite future.

Taking all of the above-cited evidence into consideration, I make the factual determination that the third prong of the Fawbush analysis applies here and that under that application the plaintiff Mrs. Middleton is entitled to the 3 multiplier under KRS 342.730(1)(c)1. In making that determination, I also relied upon the opinion of the Kentucky Supreme Court in Adams v. NHC Healthcare, 199 S.W.3d 163, 168-69(Ky.2006), where the high court stated that the standard for decision is whether the injury has permanently altered the workers' ability to earn an income and that the

> application of KRS 342.730(1)(c)1 is appropriate if the plaintiff returns to work at the same or greater wage, but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.
>
> In addition, I rely upon the very recent Opinion of the Court of Appeals of Kentucky in Ford Motor v. Grant, 2013 WL 5888275 (Ky.App.2013), which involved a serious injury to the plaintiff's right shoulder resulting in two shoulder surgeries. Mr. Grant returned to work at the same job he was performing before his injuries at the same or greater wages. Judge Hays made the determination that the plaintiff had sustained an extremely serious shoulder injury which required two major surgeries, and that he had been fortunate to return to work for Ford, but had no guarantee of knowing how long his job will continue. Judge Hays made the determination that the plaintiff's shoulder injury and surgeries diminished Mr. Grant's ability to earn money and further determined that it was unlikely that Mr. Grant would be able to earn the same wage or a greater wage in the foreseeable future. Judge Hays awarded the plaintiff enhanced permanent partial disability benefits under KRS 342.730(1)(c)1. On appeal, the Court of Appeals of Kentucky affirmed the award.

Middleton's November 8, 2013, deposition reveals she has been in project sales at Lowe's since 2011. She spends one hour of a ten hour workday in her office. Middleton described her job duties as follows:

> Q: Now, I assume once you go to the home and take your measurements and

> talk with the customers and they decide what materials they want to use in their- is it primarily kitchens?
>
> A: No. It's actually all exterior projects. It's roofing, siding, gutters, windows, doors, HVAC systems, whole house generators, fencing and decking.
>
> Q: Then you would have to come back to [sic] store and enter all of that into the system or-
>
> A: Actually I do not. I carry a laptop and printer with me. I actually figure the jobs for the customers in their home and I carry samples within my car. I actually carry large window samples that I have to carry into the home so that the customer can actually see the product that they're purchasing.
>
> ...
>
> Q: Do you take care of it, assuming a customer would want Lowe's to arrange for installation?
>
> A: Yes, sir, that is part of my job. My job is from completion to the end to make sure that the customer is completely taken care of through the process. We do have a designated office set up that is supposed to schedule deliveries of the product the day before the install. And there is a manager in that department that is supposed to oversee the installation process. If there are any issues, then they are to revert back to me and I am to take care of the issues.

When asked if she has plans to leave her current position, Middleton testified as follows:

> 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.

Middleton's assistant, Leah, assisted with loading and unloading samples before Middleton's fusion surgery. Currently, Middleton does not receive any assistance "because of the liabilities." She explained:

> By corporate standards, you have to have a certain title which would enable them to carry the liability insurance on you to be able to leave. And that would involve my position, of course, the delivery drivers, the manager of the installed sales department and the gentleman at commercial sales, the specialist at commercial sales. Those are the only people that are allowed to leave the store and it be covered by policy.

Concerning the samples she routinely has in her vehicle, Middleton testified:

> A: I have two large window samples. I have four corner window samples. I have railing systems, aluminum railing systems. I have composite decking material samples that I carry in and out of the home, roofing samples, gutter samples. I'm trying to think if that's all. I think that's all the samples that I carry in my car.
>
> Q: And the roofing samples, are they in a binder of some sort, are they on a board or-

A: They are on a board, a large board, and they are actual sheets of the roofing materials, the asphalt shingle materials. And then we do have the tin metal roofing also. So I carry those in. And I do have vinyl samples that I carry in. I keep those in a portfolio bag for the different options of the windows that you can choose, the different colors, the different grid style, all the differences within that portfolio of all the window categories that we carry.

Q: How big is the board of asphalt samples?

A: It's probably a ten-pound board.

Q: And then it would have a small cutting from one of the asphalt shingles to show its pattern and its-

A: It actually has larger samples of the cutting and there are layers that shows the different layers that we do on the roofing. It has pictures of the sheeting and then over top of it, it have [sic] a sample of an ice and water shield membrane, a starting strip, a felt membrane and then the actual shingle. And then it has a perforated piece at the top that is your ridge cap, and then it has a hip and ridge shingle that contours over that, so I can show the customer what's involved in the process.

Q: Is it a full shingle that they put on the board?

A: It is a cutdown shingle, probably half a shingle, so a foot and a half piece.

Q: And then the gutter samples, what-

> A: It is probably a 12-inch sample of aluminum gutter on a prefab board with a sample of the gutter guard over top of that. That is very light weight because it is aluminum.
>
> ...
>
> Q: And then you said composite decking, is that-
>
> A: I have a couple of different composite decking samples. It's almost like a briefcase with different samples within that briefcase and they're cut down probably six inch by at least eight inches samples within that portfolio, so the customer can actually feel that sample, look at the colors and make sure it's something [sic]- so the whole bag, the whole portfolio probably weighs, I would say, 10 to 15 pounds.
>
> Q: I'm assuming you don't carry samples of regular wooden treating decking?
>
> A: I do, yes, sir, and fencing samples, the pickets cut down into smaller sections, so the customer can see the differences.

She provided the following additional details about her job duties:

> Q: Do you always go into Lowe's before you go to a job, or do you sometimes go directly to a job; how does that work?
>
> A: It really depends on the needs of the customer. If it is an early appointment, I go directly to the customer's home before I ever go to the store. I have a mobile selling station that is my laptop and my printer. So I can perform my duties away from the

store, the same as I could at the store.

There are times that I do need to go into the store to pick up different samples. And then sometimes I have to switch things out because there's only so much room in my car to be able to put product. So if I take something in, I have to take something out.

Q: Give me, if you could, just the range of weights of the types of things, depending on the job, that you would have to, not only unload, but then load at the end of each appointment.

A: At each appointment, if I were to come [sic] your home and you were looking at windows, upon entering your home, I would carry my laptop, my printer, the binder, your folder into the home.

Q: Tell me how much the laptop and printer weighs.

A: I would say that weighs at least 15 pounds together.

Q: Go ahead, I'm sorry.

A: That's okay. Once we have decided what you are needing for your home, I do the measurement. At that point I go back to the car and then I pull both windows out. I carry both windows. I carry one and then I'll go back and I'll carry the other.

Q: What kinds of windows are we talking about?

A: It's probably a two foot by four foot actual window.

> Q: One of them probably weighs in the range of 20 to 25 pounds, and the other is a heavier product. It probably weighs between 30 and 35 pounds.
>
> Q: Okay. Go ahead.
>
> A: I carry that into your home. We go through the demonstration of what the window entails, the mechanics of the window. And then, again, at the close of the project, I actually carry the windows back to the car and come back in and get my other materials and carry those back to the car. And usually I have to rearrange things because nothing goes back in the way that you took it out. So that involves a lot of leaning into the car and pulling the materials out and redistributing them so that I can get the windows back in place.

Middleton has worked for Lowe's for approximately one year since her fusion surgery. Her testimony pertaining to her current symptoms follows:

> Q: The surgery that Dr. Franzen performed, did that improve your condition and improve your symptoms?
>
> A: Upon the completion of the surgery, the sharp shooting pain that was going down my arm, that did subside at that time. And then over a period of time the numbness started to dissipate. But then as I began to work and pulling samples and lifting samples, I noticed that some of the symptoms were coming back.
>
> Q: What symptoms do you currently have?
>
> A: If I extend my arm and pull on the samples, I have the shooting pain down

my arm and up into the back of my head, and then I do have the muscle spasms. And then consequently because of the pain that I have and the muscle spasms around my back, it gives me worse headaches.

Q: Is that pulling with either your right or your left?

A: Yes.

Q: It doesn't matter?

A: It does not matter. I think it's just the overexertion of pulling, the action of the pulling.

Q: Is there any specific weight that you've noticed begins to make it or-

A: Anything probably over 15 pounds.

Q: If you just reached across the table to pick up a cup of coffee, would that-

A: There have been times, yes, that it has shot that electrical current down my arm, but it is not consistently that electrical current just with reaching, unless it is over my head in an exaggerated stretch.

Q: Do you have pain with moving your head to the right or left?

A: Yes, sir, I do.

Q: Both the right and the left?

A: Yes, sir.

Q: What about moving it up or down?

A: Yes, sir. My range of motion for lifting my head is very limited. And

then if I try to exceed the limitation, it is very painful.

...

A: After the surgery, I do not have the ability to turn my neck in [sic] the [sic] driving. So when I'm pulling off an exit ramp off of the interstate into traffic, it's very difficult for me to turn my neck to be able to see the oncoming traffic. The same thing when I get into positions where I have- I'm not allowed to pull into the customer's driveway. I've had to pull into areas where it makes it difficult to back out into traffic. I mainly use just my mirrors when backing because I have a very difficult time turning my head to do that.

Q: When you attempt- well, just tell us how do you make those adjustments as you're driving. Tell me what you do with your body.

A: I pivot my whole body at the waist.

Q: Either direction?

A: I will turn to the right or the left at the waist to make the corrections to try to accommodate the need for the visual of the oncoming traffic.

Q: Now, clearly you can do that. I'm just trying to figure out whether or not after the fusion, you're able to turn your neck without turning your body?

A: No, sir, a very limited amount.

...

A: Because of the issues that I have- as I go through a typical day of work,

the day will start to where I'm in moderate pain. But by the end of the day, my pain is so much greater and I'm having extreme muscle spasms in my back. I can't lay down in my bed of [sic] a [sic] night without having extreme muscle spasms.

So I feel like long term the pulling of the samples, the loading and the unloading, the taking of the laptop into the home, I don't see that that's something I'll be able to do long term.

Q: And you just described how you feel at the end of the day. What do you do to be able to make it through a day on the four days that you're out doing the sales work?

A: Typically what I'll do, I'll go home and, of course, I take so more [sic] Ibuprofen. I put heat on it and then I'll put ice on it. And then I bought a hot tub. And then I get in the hot tub at the end of the night and allow the jets to kind of stimulate the muscles to try to relax the muscles around the neck. And then before I go to bed, I take the Flexeril before I go to bed.

Q: Do you have any idea what milligram the Flexeril is?

A: I think it is 50 milligrams.

Q: You take one pill?

A: She said I can take up to three a day, but I cannot operate my truck if I'm taking that muscle relaxer. So I can only take it of [sic] a [sic] night once I come home.

Q: How many do you take at night typically?

> A: I'll take one and then in the middle of [sic] night, when I get up, I'll take another in the middle of the night.
>
> Q: Did you typically get up- do you sleep straight through or do you get up, how does that work?
>
> A: No, sir. I've not slept straight through a night for over a year now. I constantly have to change positions. I'll lay on my back for a little while and then I'll turn to my right and then I'll turn to my left. Sometimes I'll get up and just go up on the couch and prop myself up with pillows because that's more comfortable. It kind of relieves the pressure off of my back.
>
> Q: So, again, and I'm asking you to generalize, on a typical evening how much Flexeril do you take and when do you take it?
>
> A: I usually try not to take it until right before I go to bed because I usually don't get home until 8 o'clock at night. So that's when I start the heating and icing and getting in the hot tub, and then I take the Flexeril. It's kind of a routine that I have now. That is what I do before I go to bed. And then I'll get up- I always get up of [sic] a [sic] night, but most of the time I do take another Flexeril in the middle of the night.

Middleton sleeps on a special memory foam mattress and has four different types of pillows which she rotates throughout the night.

Concerning whether performing her job over the past year has become easier, stayed the same, or has become more difficult, she testified as follows:

> A: As far as the mental capacity, I can do the job, but my body puts great limitations on how I am able to do the job properly. It limits me and makes me slower in the process of being able to transition from one job to another job, the next job. So it has become more difficult in the past year doing my job.
>
> Q: Physically, has the job over time become easier to do, remained about the same since you've been back post surgery or become more difficult?
>
> A: It's more difficult than it was. And if I may, the reason I feel like it's more difficult is because of the pain that I do have in my neck and in my arm. So therefore, my body guards against me trying to pull that stuff out. When I'm trying to reach into the truck and grab those samples, those muscles are always contracting and constricting and making it more difficult for me to do it. And in that instance, it just causes more pain by the end of the day. It's almost unbearable.
>
> ...
>
> Q: And I think Mr. Cooper asked you this, so I've got to ask you this to make sure I've got it in my head. Have you gone to them 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

> comfortable so that you can continue to make the money you're making; what's your thought process there?
>
> A: 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?
>
> A: I do.
>
> Q: Currently to do what you do, do you have to be able to physically perform the job, pull the samples out, load the samples, unload the samples, the types of things you talked about yourself?
>
> A: Yes. For the job requirements that I have, it says that I must be able to lift 50 pounds consistently.

Middleton testified at the December 17, 2013, hearing that she was still working at Lowe's in the same position described during her deposition and works the same number of hours. Her official job title is "project specialist of exteriors."

Middleton, again, testified to the physical demands of her job:

> Q: Let's talk a little bit about physical demands of that job that you just described. Do you, yourself, perform the measurements in the attic, in the basements, and in the house?
>
> A: I do, yes, sir.
>
> Q: What does that physically require you to be able to do?
>
> A: It's very demanding since the return. I have limited movement of my neck so when I'm climbing up into the attic and I'm having to stoop down I have a really hard time with that. Crawling into the crawl spaces, I have a very difficult time with that. When I measure for siding, I have to be able to look up and make sure that they don't have any kind of deterioration or rot in the eaves. Same thing with the roofing, I have to be able to look up into that area to make sure that I'm assessing it properly and providing them an adequate quote while I'm there in the home.
>
> Q: Let's talk about your materials. After you've done the measurements, you mentioned you go out to your car. Let's talk about the things that you have to bring back into the home to show the customer and the various weights of those items.
>
> A: The most difficult thing for me to get in and out of my vehicle are the windows, of course. Those weigh between 25 and 30 pounds. And in getting those out, it's not physically just pulling them out. Unfortunately, there's so much stuff within the back of my

Explorer I have to move things around. So the reaching into the truck and scooting things around to be able to access the windows to pull those out, that's very difficult. And then again, once I take it into the home, I have to have full control of that window when I take it and I'm setting it up on a table so that the customer can actually visually see the product so I have to make sure that I have complete control at all times so that I don't damage their material in their home.

Q: What else do you physically have to take into the home to show the customer to perform your job?

A: My mobile selling center is a portable laptop, a portable printer. And inside there also I'll keep my portfolio and then literature. Also, I'll take any books in case when I get into the home with my wireless, my air card doesn't work, I have a book that I can always refer it back to so that I'm not standing still, not being able to take care of-

Q: What does that portable mobile station-

A: It weighs about 25 pounds.

Q: Is it a cart it's on?

A: It is on a rolling cart. Most of the time, if you have a level area, I can roll it from the vehicle into the home, but I have to, you know, pull it out of the vehicle and then put it back into the vehicle. The same thing within the home, once I get into the customer's home, I'm not going to wheel it through their home. I'm going to pick it up and carry it to the place where they direct me to.

Middleton also recounted the difficulties she experiences at work since her fusion surgery as follows:

> Q: As you have performed your job when you came back from your fusion on your neck, tell the judge, please, if you would, what you've noticed about your ability to physically perform that job?
>
> A: It has become progressively more difficult to do it instead of becoming easier which any job when you're into it for a while should become easier. Because of having to lift and pull and extend, because of the limitations of my neck and my left arm, it has been become [sic] more difficult to do that. It's become more painful to do that. I push myself because, honestly, my salary is based on how well I perform. So I push myself so that I can make as much as I can because I know in the future it's going to get to the point to where I can no longer, you know, no longer do the same thing that I'm doing now.
>
> Q: What physical problems are you experiencing as a result of the work and demands of the work? I want you to talk about on your body.
>
> A: With my neck, I have very limited movement to the right or to the left or the leaning of my head back. And when I do have to do that, I have extreme, sharp, shooting pains that go into the back of my skull. And then on a daily basis, I have pain always down my left arm, but it changes based on how I have to lift and pull that day. Like today, just driving up here, it's a burning sensation in the muscle and the top muscle and down into the lower part. Sometimes in driving when I have to overextend, it's like a sharp, shooting

> pain almost like lightening going down my arm.

Regarding her attempts to modify her duties in order to keep performing her job, Middleton explained:

> A: I have been trying to modify it to some degree, but it is required that I take the laptop, the mobile selling center, and the samples into the home to be able to adequately help the customer come to the decision on what they're wanting to purchase for the project that they're interested in doing. I have tried to get smaller samples so it's easier to carry them in and out of the car, but that would be the [sic] most of the modifications that I could do.
>
> Q: Recently, have you made any requests of your employer to look at ways to assist you with the lifting, with the physical demands of that job so that you can continue to perform it?
>
> A: I did. I spoke to Mr. Roberts, and we talked about getting smaller samples. I told him that I was afraid that I would not be able to do it, you know, long term for him. I want to do a good job for him, but I can't do it at the expense of my own health.

The physical requirements of her job are the same as they were at the time she was injured.

The Form 107-I of Dr. James C. Owen reflects he assessed a 27% whole person impairment rating. Dr. Owen opined Middleton retains the physical capacity to return to

the type of work she performed at the time of the injury. However, he also opined as follows:

> It would be my recommendation that she avoid activities, such as extending her arm posteriorly and pulling. As she described to me today, it seemed to exacerbate her neck pain and cause radiating pain.

The November 12, 2013, Independent Medical Examination ("IME") report of Dr. Bart J. Goldman was introduced by Lowe’s. Dr. Goldman determined Middleton’s sensory examination in the left upper extremity is consistent with "C7/T1 radiculopathy on the left." He also found two centimeters of atrophy in her left forearm as compared to the right. Dr. Goldman assessed a 27% whole person impairment rating and opined as follows:

> Assuming her fusion is solid she is at maximum medical improvement. Her permanent partial impairment rating is 27% of the whole person. Based on my examination at this time there is nothing to preclude her from continuing to do her previous regular duty work.

Lowe's first argues the ALJ erred by determining Middleton does not have the physical capacity to perform the type of work performed at the time of the injury.

KRS 342.730(1)(c)1 states, in relevant part, as follows:

> 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. . .; or

When the issue is the claimant's ability to labor and the application of the three multiplier, it is within the province of the ALJ to rely on the claimant's self-assessment of her ability to perform her prior work. *See* Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We have consistently held that it remains the ALJ's province to rely on a claimant's self-assessment of her ability to labor based on her physical condition. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Clearly, the ALJ's decision to apply the three multiplier pursuant to KRS 342.730(1)(c)1, is based on a determination Middleton did not have the capacity to return to the type of work performed at the time of injury and is supported by substantial evidence in the record; therefore, it may not be set aside on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

While the record indicates Middleton returned to her pre-injury position at Lowe's following the April 23, 2012, anterior cervical discectomy and fusion at C6-7, the

record also fully supports the ALJ's determination that "Mrs. Middleton cannot return to the type of work which she performed at the time of her work injuries." The ALJ reached this determination in light of Middleton's fusion surgery, her impairment rating, her daily pain, her muscle spasms, the pins and needles sensation she experiences, and the fact that she is taking daily medication. The ALJ was also persuaded by Dr. Owen's restrictions such as avoiding extending her arm posteriorly and pulling which exacerbates her pain and Dr. Goldman's finding of radiculopathy and left forearm atrophy. In essence, while Middleton has returned to her pre-injury job at Lowe's, she is suffering as a result of it. Although Middleton returned to her same job, we believe her testimony sufficiently establishes she does not retain the physical capacity to perform that job and will be forced to stop working at her current position.

In summary, the above-cited evidence, analyzed and recited at length by the ALJ in the January 15, 2014, Opinion and Award and the January 31, 2014, Opinion and Order on Reconsideration, supports the ALJ's determination the three multiplier is applicable, thus satisfying the first prong of the Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) analysis. This determination will not be disturbed.

Lowe's "alternative" argument is the ALJ erred in resolving the third prong of the Fawbush analysis in Middleton's favor by determining the effects of the work injury were likely to prevent Middleton from continuing to earn the same or similar wage into the foreseeable future. *See* Fawbush.

Where the two and the three multiplier are both potentially applicable, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn, supra. In other words, is the injured worker faced with a "permanent alteration in the …ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines that the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury, the three multiplier under KRS 342.730(1)(c)1 applies.

The Fawbush Court articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Fawbush at 12. As the Court in Adkins v. Pike, supra, held, it is not enough to determine whether an injured employee is able to continue in his or her current job. The Adkins Court stated:

> 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.

The ALJ provided a lengthy analysis of his reasoning both in the January 15, 2014, Opinion and Award and the January 31, 2014, Opinion and Order on Reconsideration in support of his determination Middleton will be unable to "continue earning a wage that equals or

exceeds the wage at the time of injury for the indefinite future." Fawbush at 12. In both the January 15, 2014, Opinion and Award and the January 31, 2014, Opinion and Order on Reconsideration, the ALJ relied heavily on Middleton's deposition and hearing testimony regarding her ability to perform her job at Lowe's, which is within his discretion. *See* Hush v. Abrams, supra. The ALJ considered such factors as Middleton's pain level and her medication use, as testified to extensively by Middleton during her deposition and at the hearing. Mirroring the language in Fawbush, the ALJ determined based on the medical evidence and Middleton's testimony that her injuries have permanently altered her ability to earn an income. Id. Middleton's testimony establishes she is struggling to perform her current job which is physically taking its toll. Moreover, her testimony supports a conclusion she will soon be unable to perform her current job and also earn a wage which equals or exceeds her wage at the time of the injury. As substantial evidence supports this determination, it cannot be disturbed by this Board.

Accordingly, the January 15, 2014, Opinion and Award and the January 31, 2014, Opinion and Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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