

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 2, 2013

CLAIM NO. 200991307

PELLA CORPORATION

PETITIONER

VS.

APPEAL FROM HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

TONIA SMALL
and HON J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Pella Corporation ("Pella") appeals from the June 20, 2013 Opinion and Award rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") and from the July 22, 2013 Order denying its petition for reconsideration. The CALJ awarded Tonia Small ("Small") permanent partial disability ("PPD") benefits enhanced by

the three multiplier pursuant to KRS 342.730(1)(c)1. Pella argues the CALJ erred in applying the three multiplier. We affirm.

Small filed her claim on March 4, 2010, alleging injuries to her neck, left shoulder, arm, and hand as a result of an incident occurring at Pella on March 27, 2008. She was treated by two physicians before being referred to Dr. Rex Arendall, a Nashville, TN neurosurgeon who recommended cervical surgery. Pella stipulated the occurrence of a work-related cervical injury, but contested the compensability of Dr. Arendall's proposed discectomy and fusion. Accordingly, the claim was bifurcated to determine compensability of the proposed cervical surgery. On October 12, 2010, the CALJ issued an interlocutory Opinion, Award and Order finding the proposed treatment compensable, including surgery. Small underwent cervical discectomy and fusion from C3 to C7, and subsequently had work-related bilateral carpal tunnel surgeries.

Following Small's surgeries and recovery, the parties resolved all remaining issues except the impairment rating and the appropriate multiplier. It was stipulated that Small did not retain the physical capacity to return to the type of work she performed at the time of injury, and that she returned to work at a wage equal to or greater

than she earned at the time of the injury. Under these circumstances, the CALJ noted Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), mandated a three prong analysis to determine the appropriate multiplier.

In the June 20, 2013 Opinion and Award, the CALJ provided the following analysis:

Plaintiff's treating neurosurgeon has restricted her to occasional lifting of less than 10 pounds and never lifting more than 20 pounds. Plaintiff should only rarely look down in a sustained flexion of her neck, turn her head left or right, look up, or hold her head in a static position. Without going into great detail, Plaintiff's testimony indicates that she must often exceed those restrictions in performing her current job with Defendant Employer. Defendant Employer's job description and Mr. Burgess both indicate that Plaintiff exceeds the restrictions in performing her job.

Plaintiff takes muscle relaxers and opioid analgesics three times per day. She routinely augments those prescription medications with doses of aspirin, acetaminophen and ibuprofen which are significantly in excess of the recommended doses. Plaintiff testified that she has significant pain while performing and after performing a day's work. She has significantly altered her non-work lifestyle due to the pain caused by the performance of her current job duties. Plaintiff further testified that she continues performing these duties only for economic reasons, most importantly, Plaintiff has serious concerns as to

whether or not she can continue performing in the capacity in which she currently works.

On the other side of the coin, Defendant Employer has commendably retained Plaintiff in her employment position. Plaintiff has received exemplary evaluations from her supervisor. Defendant Employer has promoted Plaintiff and has increased her salary to a level that is significantly above average for similarly employed individuals in Defendant Employer's employ. Whether or not the status quo will continue "indefinitely" or "into the indefinite future", however long that may be, is unknown to either party or the CALJ.

However, the trier of fact must choose one scenario over the other. The CALJ, based upon Plaintiff's testimony and the restrictions placed on her by her treating neurosurgeon, finds that Plaintiff, as a result of her workers compensation injuries, will not be able to continue working for Defendant Employer at the same salary level she now enjoys either "indefinitely" or "into the indefinite future". Based on that finding, the CALJ concludes Plaintiff is entitled to enhancement of her permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.

In its petition for reconsideration, Pella challenged the application of the three multiplier, arguing the CALJ's reliance on Small's subjective assessment of her ability was in error. It further argued the objective evidence indicated Small was capable of continuing to earn

a wage equal to or greater than the wage she earned at the time of the injury. The CALJ denied the petition for reconsideration as it related to the multiplier issue.

On appeal, Pella continues to challenge the appropriateness of awarding the three multiplier. It argues the CALJ's decision is based upon Small's speculation and is inconsistent with her continued employment, merit pay raises, and exemplary employee review/evaluation. Pella also points to Small's statements, made two months before the final hearing, indicating she wished to continue advancing at the company.

We begin by noting the parties' stipulations established KRS 342.730(1)(c)1 and 2 potentially apply to Small's claim. Where a claimant meets the criteria of both provisions, the ALJ is authorized to determine which 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 (Ky. 2003). As 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, id. at 12. In other words, the relevant question is whether the injured worker is faced with a "permanent alteration in the ... ability to earn

money due to his injury." Id. If the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury for the indefinite future, 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 he or she performed at the time of injury, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and whether the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. It is well within the ALJ's discretion to choose the three multiplier over the two multiplier, as long as a thorough Fawbush analysis has been carried out and substantial evidence supports the ALJ's ultimate conclusion.

In Small's case, we are satisfied substantial evidence supports the CALJ's ultimate determination she will not be able to continue earning a wage for the indefinite future that equals or exceeds her wage at the

time of the injury. Small has a severe lifting restriction, can only rarely look down in a sustained flexion of her neck, turn her head left or right, look up, or hold her head in a static position. She testified she often exceeded her restrictions in her post-injury position. In addition to muscle relaxers and opioids, she took over-the-counter pain relievers in excess of recommended doses on a daily basis. Small indicated the work is done out of financial necessity and the resulting pain limits her non-work activities significantly.

Pella submitted evidence supporting a different outcome, which the CALJ acknowledged and thoughtfully considered. However, the existence of conflicting evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974). Our inquiry is limited to a determination as to whether the CALJ's decision is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Having identified the requisite proof to support the decision, we may not reverse.

Accordingly, the June 20, 2013 Opinion and Award rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge, and the July 22, 2013 order denying Pella's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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