

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 1, 2016

CLAIM NO. 201391477

TRUITT BROTHERS, INC.

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

HALEY MORRIS MULLINS and
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

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

ALVEY, Chairman. Truitt Brothers, Inc. ("Truitt Brothers") appeals from the Opinion, Award and Order rendered November 19, 2015 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") awarding Haley Morris Mullins ("Mullins") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits increased by the three

multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits for a work-related right shoulder injury. Truitt Brothers also appeals from the December 17, 2015 Order ruling on the petitions for reconsideration.

On appeal, Truitt Brothers argues the ALJ did not perform a proper analysis regarding the third prong of the test set forth in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and therefore erred in finding the three multiplier applicable pursuant to KRS 342.730(1)(c)1. Because we agree the ALJ failed to perform the requisite analysis concerning the third prong of the test, we affirm in part, vacate in part, and remand for additional findings of fact regarding the application of the three multiplier.

Mullins filed a Form 101 alleging she injured her right shoulder on October 3, 2012 while jerking a bin of product through an x-ray process on the production line. She also alleged she developed bilateral carpal tunnel syndrome on February 25, 2015. The ALJ ultimately found Mullins failed to prove her bilateral carpal tunnel syndrome was casually related to her work activities, and dismissed that portion of her claim. Since that finding was not appealed, we will not discuss the medical or lay evidence pertaining to Mullins' carpal tunnel syndrome.

Mullins testified by deposition on July 16, 2015, and at the hearing held September 29, 2015. Mullins is a resident of London, Kentucky, and is right hand dominant. Mullins was initially placed with Truitt Brothers through Job Shop, a temporary service agency, in October 2009. Truitt Brothers then hired her as a full-time employee on December 26, 2009. Truitt Brothers makes microwavable meals. Mullins stated the line runs 110 packages per minute.

Mullins testified she was working as "lead seal" at the time of her October 3, 2012 injury. This required her to monitor the assembly line, do "all the rework," complete paperwork, and relieve other workers on the line during breaks. Mullins explained rework required her to reweigh products which were flagged by the weight machine. If "they don't weigh good you put them back on the line, and if they don't weigh good you have to open the package and dump the products out for it to run back through the machine." If the x-ray machine flagged the product, Mullins had to run it again through the x-ray machine up to three times before taking the product to quality control for inspection. Mullins stated she constantly flipped trays, checked seals, handled totes and lifted product weighing sixty to seventy pounds. At the hearing, Mullins

was unsure of the exact amount she earned at the time of her injury stating, "I went from 10.68 to 10.98 to 11.14 there real close, you know. So I'm not sure . . . what was what." Mullins testified at the time of her injury, she had applied to transfer to a quality control position, and was training for that job.

On October 3, 2012, Mullins testified she was training a co-worker to do lead seal when the x-ray machine got "hung up." Mullins was "jerking it out of the machine so it wouldn't get stopped and still trying to flip at the same time, and that's when my arm started hurting." Mullins notified her crew leader of her injury, and she was sent back to lead seal. Shortly thereafter, Truitt Brothers had a temporary layoff for two weeks. During this time, Mullins sought medical treatment with her family physician. He ordered an MRI, administered an injection, and referred her to Dr. Patrice Beliveau.

Dr. Beliveau performed surgery in March 2013 after physical therapy and an injection provided little relief. Thereafter, Mullins underwent an additional course of physical therapy, an injection, and took pain medication. Despite this treatment, Mullins states she continues to experience right shoulder pain and muscle

spasms. Dr. Beliveau permanently restricted her from overhead lifting or stair climbing.

Mullins also treated conservatively with Dr. Veronica Vasicek. She eventually referred Mullins to pain management with Dr. Oliver James who prescribed Tramadol, Amitriptyline, Gabapentin, Baclofen, Hydrocodone, and Voltaren gel for her right shoulder. Mullins was taking none of these medications prior to her injury.

Mullins testified she did not miss any work after October 3, 2012 until her surgery on March 21, 2013, despite her continuing right shoulder pain. Mullins received TTD benefits for the six weeks she was off work following surgery. At some point following the work injury, Mullins was transferred to a quality control position, although it is unclear when this exactly occurred. At the hearing, Mullins stated she continues to work in the quality control position at Truitt Brothers, earning \$14.16 per hour. At her deposition, Mullins provided the following testimony regarding the job she returned to following her surgery and time off from work:

Q: When you went back to work did you go back doing the same job or a different job?

A: I had - - at the time when I had got hurt, I was training to do quality and . . .

Q: Quality control, is that what you're talking about?

A: Yes, which is a different job. And I had received a bid on it just before my surgery, so I went back into quality.

Q: When you say you received a bid, they approved you to transfer?

A: Yes.

Q: So tell us a little bit about that job. What do you do in that job?

A: I do testing on the products to make sure that they pass the USDA qualifications.

Q: Now, the physical requirements of that job versus the job you're doing, how is that different?

A: I'm not having to do the heavy lifting. I still do repetitive work, but it's nothing like I was doing before. I do a lot of writing and a lot of testing on the products.

Q: Do you use a computer or anything now or . . .

A: No.

Q: Okay, just handwritten?

A: Right, it's all handwritten.

When asked to compare her lead seal job at the time of injury with her current job in quality control, Mullins stated her current position "for the most part" meets her restrictions. She is still required to do

overhead lifting. She performs limited tasks with her left hand, but she is unable to retrieve books. At the hearing, Mullins indicated products are stored on shelves, and she is unable to reach the top shelf to do special testing without help from her coworkers. She also stated her shoulder hurts when she handles the "big funnels to check the RAS." Mullins stated her coworkers assist her in the tasks she has trouble with and agreed Truitt Brothers have worked with her accommodations. At both her deposition and hearing, Mullins testified she could not perform her current job duties in quality control without the medication she is prescribed by Dr. James, explaining as follows:

Not - - no, the pain medication helps with the pain to where before I got on the medications it was like my brain was numb where I hurt, I couldn't think. And the medication has eased my pain enough to where I can function.

At her deposition, Mullins stated she has to continue to work in order to maintain her insurance and she did not see any reason in the near future why she would not continue to do so.

In support of her claim, Mullins filed a November 12, 2012 right shoulder MRI report which revealed, "tear of

the rotator interval," as well as tendinopathy and cystic degeneration of the supraspinatus infraspinatus tendon.

Mullins also filed the records of Dr. Beliveau, who treated her right shoulder from December 19, 2012 through October 2, 2013. On December 19, 2012, a physician's assistant diagnosed right shoulder pain with a questionable tear of the rotator cuff. He recommended physical therapy and a cortisone injection. At the following visit on January 28, 2013, Dr. Beliveau noted Mullins reported only slight improvement with physical therapy and the injection. Dr. Beliveau restricted her to no overhead activities, lifting, twisting, or fast motion of the right arm. On February 25, 2013, Dr. Beliveau recommended surgery, and noted Mullins works on a quality control assembly line requiring repetitive motion. Dr. Beliveau performed a right shoulder arthroscopy with partial synovectomy plus rotator cuff repair on March 21, 2013.

Following a period of no work, Mullins was released to light duty on May 3, 2013. She underwent post-operative physical therapy, work hardening, and was prescribed medication. At her last office visit on October 2, 2013, Dr. Beliveau noted Mullins continued to complain of right shoulder pain and difficulty with activities of

daily living and driving, despite undergoing six months of conservative treatment, surgery, and a long course of physical therapy. Mullins reported she is unable to perform any work duties in addition to what she is doing now, and is unable to return to her regular duty. Dr. Beliveau stated Mullins has exhausted all treatment options, and is at maximum medical improvement ("MMI"). He permanently restricted her from lifting or carrying over five to ten pounds, and from overhead lifting activities with her right arm.

Mullins filed the November 20, 2013 Functional Capacity Evaluation ("FCE") report which found she is capable of sustaining a light level of work. The report noted her subjective complaints of pain are consistent with her observed movement patterns.

Mullins also filed the records of Dr. Vasicek, who treated her on four occasions in 2014. Dr. Vasicek diagnosed status post right shoulder rotator cuff repair with residual capsulitis, impingement, and parascapular weakness. Dr. Vasicek ordered additional physical therapy, prescribed Flector patches and Neurontin, administered an injection, and ordered a shoulder MR arthrogram. She agreed with the restrictions imposed by Dr. Beliveau. On July 18, 2014, Dr. Vasicek noted Mullins did not want to

undergo a diagnostic arthroscopy and conservative treatment had been exhausted. She then referred Mullins to pain management.

Mullins filed the records of Dr. James who saw her on four occasions. Dr. James diagnosed a scar neuroma of the right shoulder, in addition to myositis, myalgia, and status post right shoulder injury surgery. He injected the right shoulder, and prescribed Lortab, Norco, a Flector patch, Neurontin, Elavil, and Tramadol.

Mullins filed the December 18, 2014 report of Dr. David Muffly. He diagnosed a right shoulder rotator cuff tear related to the October 2012 work injury with residual loss of motion and chronic right shoulder pain. Dr. Muffly assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (AMA Guides). Dr. Muffly stated Mullins had reached MMI, recommended continued treatment for chronic shoulder pain, and restricted her from overhead reaching, and overhead lifting over ten pounds. Dr. Muffly noted Mullins continues to work at Truitt Brothers, but is now in quality control, which requires less lifting but more writing, rather than production. Dr. Muffly opined Mullins has the capacity to

return to the type of work performed at the time of injury "within restriction."

Truitt Brothers filed the September 3, 2015 report of Dr. Gregory Snider. He noted Mullins currently works full time as a quality inspector and is able to work with her restrictions. Prior to that, Mullins worked as lead seal. Dr. Snider diagnosed right shoulder pain, prior right shoulder injury of unknown nature and status post rotator cuff tear. Dr. Snider found Mullins had reached MMI, but could not give a firm opinion regarding the etiology of her shoulder injury. Dr. Snider stated Mullins is capable of working, and restricted her from lifting, pushing or pulling greater than fifteen pounds with her right upper extremity. Dr. Snider assessed a 7% impairment rating pursuant to the AMA Guides. Dr. Snider found no indication for the prescriptions of Tramadol, Elavil, Neurontin, Norco or Baclofen. He recommended home exercise and stretching, anti-inflammatory medication, and a follow-up visit every six months with her primary care physician.

Mullins filed the September 4, 2015 report of Dr. Jeffery Uzzle. He noted at the time of her injury, Mullins was working on the assembly line. Now, Mullins is working in quality control which is physically easier and does not require the repetitive use of her upper extremities like

the former position. Dr. Uzzle diagnosed a right shoulder rotator cuff injury treated surgically with a fair to poor outcome after rehabilitation. He found the right shoulder injury was caused by the October 3, 2012 event and assessed a 5% impairment rating pursuant to the AMA Guides. Dr. Uzzle stated Mullins reached MMI in December 2014, at the time of Dr. Muffly's examination. Dr. Uzzle opined Mullins does not retain the physical capacity to return to the type of work performed at the time of injury. After noting his agreement with the restrictions imposed by previous doctors, Dr. Uzzle adopted the restrictions noted in the FCE report, which include the following:

overhead lifting 10 pounds, floor to waist level lifting 20 pounds, carrying 20 pounds. These are considered occasional for these lifting tasks. She should avoid overhead reaching with the right shoulder. She should limit pushing and pulling at 20 and 40 pounds of force respectively on an occasional basis.

The ALJ found Mullins sustained a work-related right shoulder injury based upon the treatment records, and the opinions of Drs. Muffly, Snider and Uzzle. The ALJ relied upon the 7% impairment rating for the right shoulder assessed by Dr. Snider. The ALJ awarded TTD benefits from March 21, 2013 through May 15, 2013 using the stipulated average weekly wage of \$489.00, and medical benefits

pursuant to KRS 342.020. She found Mullins's TTD benefits were underpaid.

The ALJ found the three multiplier pursuant to KRS 342.730(1)(c)1 applicable. The ALJ engaged in the following analysis pursuant to Fawbush v. Gwinn, supra:

In determining whether the 3 multiplier is appropriate to apply in this case, I turn to the principles dictated by Kentucky Supreme Court's decision in Fawbush vs. Gwinn, 103 SW3d 5 (Ky. 2003). The principles enunciated in Fawbush require an ALJ to make three essential findings. First, the ALJ must determine, based on substantial evidence, that a claimant cannot return to the type of work performed at the time of the injury; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury wage; and, third, it is unlikely the claimant can continue to earn that level of wages into the indefinite future.

In considering the first of these three required findings, I find that the Plaintiff cannot return to the type of work performed at the time of the injury. Plaintiff's description of the job she was performing at the time of her injury specifically was taking the place of a co-worker on the assembly line. She had to jerk packages off the assembly line - where the x-ray machine was hanging up the packages. She was trying to pull the packages off at the same time "flipping" the packages. It is noted that Plaintiff's job duties in the lead seal position included relieving other co-workers on the line. She was required to clear product off the line if it did not weigh correctly

and then put the discarded or re-checked product in totes. These totes would weigh 60 to 70 pounds. She would have to transport the totes to the other end of the line. Plaintiff's testimony and description of her job duties at the time of the injury went undisputed. Additionally, I found Plaintiff to be a credible witness.

There is also medical testimony that Plaintiff cannot perform the job functions as outlined above. Essentially all of the evaluators opined Plaintiff would have permanent restrictions on her physical activities. I found Dr. Uzzle's testimony persuasive when he opined that the result of the FCE done were the best "guideline" to go by in determining her restrictions. The restrictions included no overhead lifting more than 10 pounds, floor to waist lifting 20 pounds, carrying 20 pounds - occasional. She should avoid overhead reaching with the right shoulder and limit pushing and pulling at 20 and 40 pounds of force respectively on an occasional basis.

Plaintiff was allowed to return to work with the Defendant/employer making the same or greater wage. However, even the Defendant/employer concedes the job she is doing now is one that she must ask for assistance when it exceeds the above-referenced restrictions. Importantly, the Plaintiff testified she would not be able to perform even her present job without her prescription medications for pain and nerve pain.

The second prong of the Fawbush inquiry is met in this case. I find that Plaintiff returned to work at an average weekly wage equal to or greater

than her pre-injury wage. I rely on Plaintiff's testimony in making this finding and the post-hearing wage information agreed upon by the parties.

It is the third prong of this three prong test that, pursuant to Fawbush, the ALJ is authorized to determine which of the multipliers contained in KRS 342.730(1)(c)1 and (c)2 is more applicable to the facts of the case. In Fawbush, the Court took several factors into consideration, including the claimant's un rebutted testimony that he was working, post-injury, out of necessity, that his post-injury work was outside of his medical restrictions, and he was only able to perform said work when he took more narcotic pain medication than what was prescribed. The Court concluded based on the evidence, the claimant would be unable to maintain his employment indefinitely. The Supreme Court of Kentucky then reached the following conclusion in Fawbush:

If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future, the application of paragraph (c)(1) [the three multiplier] is appropriate. Fawbush at 12.

In Adams vs. NHC Healthcare, 199 SW3d 163 (Ky. 2006), the Supreme Court refined the analysis of the application of the three multiplier even further by stating the following:

The standard for the decision is whether the injury has permanently altered the

worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual 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. Adams at 168-169.

In applying the above-stated judicial standards to the substantive evidence in Plaintiff's claim, I find she does not have the ability to perform her prior work. In making this finding I rely on the opinion of Dr. Uzzle and the medical records of Dr. Beliveau. I note that Dr. Beliveau stated specifically Plaintiff may return to work "with restrictions". Dr. Uzzle placed medical restrictions on Plaintiff's work activities that when applied to the Plaintiff's testimony of her job duties, convinces the undersigned Plaintiff cannot perform her prior job.

I find that based upon the totality of the medical evidence and the Plaintiff's testimony, the Plaintiff is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future. She is entitled to the 3 multiplier.

Both parties filed petitions for reconsideration.

In her petition, Mullins requested the average weekly wage be amended to \$489.80, and her TTD benefits adjusted. Mullins also argued the ALJ erred in rejecting her carpal tunnel syndrome claim. In its petition, in addition to

arguing the Fawbush analysis does not apply since Mullins is currently performing the job that she bid on and started performing prior to her work injury, Truitt Brothers made the same argument regarding the third prong of the Fawbush analysis as it does now on appeal.

In the December 17, 2015 order on petitions for reconsideration, the ALJ granted Mullins' petition regarding the average weekly wage, amended the award of TTD benefits, and denied the remainder of her petition. In addressing Truitt Brother's petition, the ALJ first found on October 3, 2012, Mullins was working on lead seal, training a new person on the line, and then later moved to quality control in the Spring of 2013. With regard to the Fawbush analysis, the ALJ stated as follows:

The undersigned finds no error with respect to the Fawbush analysis as set out in the Opinion, Award and Order. The Defendant argues that the Plaintiff made no allegation she would be unable to continue earning the same or higher wages in her current job. However, a review of the Plaintiff's arguments, as set forth in her Brief before the ALJ, specifically avers she [sic] entitled to the 3 multiplier as discussed in Fawbush vs. Gwinn, supra. (See pages 23 and 24 of Brief on Behalf of Plaintiff, filed November 6, 2015).

The finding is correct that Ms. Mullins was working the Lead Seal job at the time of her October 3, 2012 shoulder injury. She remained in that job until

sometime in the Spring of 2013 when she was moved to Quality Control. It was acknowledged that she was essentially being trained on the Quality Control job at the time of the injury, but she was still performing the Lead Seal job as well. However, there is no evidence to the contrary (medical or otherwise), that she can only perform that job (or any job) with the adherence to permanent restrictions and with significant prescription pain medications.

On appeal, Truitt Brothers argues the ALJ erred in finding Mullins would be unable to earn the same or greater wages into the indefinite future, the third prong of the Fawbush analysis, since it is purely speculative and not supported by any concrete evidence. Truitt Brothers cites to Lowe's Home Center v. Middleton, 2014-CA-001136, rendered February 13, 2015. There, the Court stated the claimant was required to "demonstrate with concrete evidence that, but for the disabling effects of her work injury, she cannot continue to earn her pre-injury . . . level of wages into the indefinite future," and requires an assessment of what the Claimant is capable of doing with reasonable accommodations from her employer.

Here, Truitt Brothers argues there is no such concrete evidence and Mullins is in fact performing her current job with reasonable accommodations. Truitt

Brothers states it gave Mullins a permanent bid job which is lighter duty and for which she is earning a higher hourly wage. Truitt Brothers also asserts it has reasonably accommodated Mullins on the few tasks she has trouble performing. Therefore, Truitt Brothers argues Mullins has not satisfied the third prong of the Fawbush analysis.

Truitt Brothers argues the fact Mullins asks for assistance and stated she would be unable to perform her present job without her current medication regime go to the first prong of the Fawbush analysis. It contends the ALJ's finding the third prong was satisfied because, "I find she does not have the ability to perform her prior work" and that her medical restrictions indicate she cannot perform her prior job address the first prong of the Fawbush analysis. Truitt Brothers argues the ALJ's conclusion Mullins is unlikely to be able to continue earning the same or higher wages "appears to have arisen out of the ALJ's observations concerning [Mullins'] inability to do the job she was doing prior to the injury. The ALJ does not point to any evidence that [Mullins] will be unable to continue performing her *current* job." (original emphasis). Therefore, Truitt Brothers argues Mullins failed to prove

the third prong of the Fawbush analysis, and therefore the ALJ erred in finding the three multiplier applicable.

As the claimant in a workers' compensation proceeding, Mullins had the burden of proving each of the essential elements of her cause of action, including entitlement of the multipliers contained in KRS 342.730(1)(c). See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Mullins was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. 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 Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We begin by noting Truitt Brothers does not appeal from the ALJ's finding regarding the first and second prongs of the analysis required by Fawbush v. Gwinn, supra. This appeal concerns only the ALJ's analysis of the final third prong.

As correctly noted by the ALJ, in Fawbush v. Gwinn, supra, the Supreme Court decreed where both KRS

342.730(1)(c)1 and 2 are applicable, the ALJ must then determine which provision is more appropriate on the facts. If the evidence indicates a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future, the application of paragraph (1)(c)1 is appropriate. Id. at 12. Similar to the case *sub judice*, in Fawbush v. Gwinn, supra, the Court noted the claimant's lack of the physical capacity to return to the type of work that he performed for his employer at the time of his injury was undisputed. In affirming the application of the three multiplier, the Court stated:

Furthermore, although he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely. Under those circumstances, we are convinced that the decision to apply paragraph (c)1 was reasonable. Id.

Subsequently, the Court explained in determining whether the 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." Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004). In Adams v. NHC Healthcare, 199 S.W.3d 163, 168-169 (Ky. 2006), the Supreme Court stated as follows:

The court explained subsequently in Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), that *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

Although Truitt Brothers heavily relies upon the language contained within Lowe's Home Center v. Middleton, 2014-CA-001136, rendered February 13, 2015, this opinion was appealed. In affirming the Court of Appeals' decision in Middleton v. Lowe's Home Centers, Inc., 2015-SC-000120, rendered October 29, 2015 (designated not to be published), the Court stated:

In this matter, the uncontradicted evidence is that Middleton has returned, not only to the same job classifications, 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 Opinion @ 4.

With the above standards in mind, we agree the ALJ's analysis regarding the third prong of the Fawbush test is insufficient and unclear. After reviewing Fawbush v. Gwinn, supra, and Adams v. NHC Healthcare, supra, the ALJ found Mullins does not have the ability to perform her prior work based upon the restrictions imposed by Dr. Uzzle and Dr. Beliveau. This addresses the first prong of the Fawbush analysis, which the ALJ had already addressed, not the third. Thereafter, the ALJ stated, "Based upon the

totality of the medical evidence and the Plaintiff's testimony, the Plaintiff is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future." This conclusory statement is insufficient and does not specifically cite to the evidence upon which she relied in reaching this determination. The order on reconsideration did not cure the opinion's deficiency. Simply referring to pages 23 and 24 of Mullin's brief to the ALJ, which is not evidence, is insufficient.

We also note in Fawbush v. Gwinn, supra, the Court considered several factors, including the unrebutted testimony the Claimant could only do his post-injury work when he took more narcotic pain medication than prescribed. Here, although Mullins testified as to the medications she is prescribed by Dr. James, she did not testify she has to take more medication than prescribed to carry out her position in quality control. Mullins has continued to work for Truitt Brothers since her work injury in October 2012, with the exception of the six weeks following her March 2013 surgery, initially in lead seal, and then in quality control. She testified she currently earns more per hour than she did at the time of her injury. She also testified her job in quality control "for the most part" meets her

restrictions, and her coworkers assist with tasks she cannot do, such as overhead lifting. Mullins also stated Truitt Brothers has worked with her since her injury, and she does not see any reason in the near future why she will not be working. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). However, any determination must be supported by the appropriate analysis and findings.

Therefore, we vacate and remand for additional findings of fact with regard to the third prong of the Fawbush analysis. On remand, the ALJ shall cite the evidence and provide an analysis supporting her determination as to whether Mullins is likely or unlikely capable of continuing to earn a wage that equals or exceeds the wage at the time of the injury for the indefinite future.

Accordingly, the November 19, 2015 Opinion, Award and Order and the December 17, 2015 Order on petitions for reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge are hereby **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** additional

findings of fact and an opinion in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON DOUGLAS A U'SELLIS
600 EAST MAIN ST, STE 100
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON FRANK K NEWMAN
PO BOX 250
BARBOURVILLE, KY 40906

ADMINISTRATIVE LAW JUDGE:

HON JEANIE OWEN MILLER
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601