Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 3, 2014

CLAIM NO. 201169759

TWO CHICKS, LLC PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

JACQUELINE NOELLE LUNTE
and STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

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

ALVEY, Chairman. Two Chicks LLC ("Two Chicks"), appeals from the Opinion, Award and Order rendered February 6, 2014 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), and the order on reconsideration rendered February 28, 2014, awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by

the three multiplier contained in KRS 342.730(1)(c)1, and medical benefits to Jacqueline Noelle Lunte ("Lunte") for injuries she sustained on October 29, 2011.

On appeal, Two Chicks argues the ALJ erred in his analysis of KRS 342.730(1)(c)1 by erroneously applying Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004), rather than providing an analysis pursuant to Miller v. Square D Company, 254 S.W.3d 810 (Ky. 2008). Because the ALJ failed to provide a proper analysis in determining Lunte does not retain the physical capacity to return to the work she performed at Two Chicks, we vacate in part, and remand for further determination.

Lunte filed a Form 101 on April 30, 2013 alleging she sustained a right tibial plateau fracture in her right lower extremity when she fell from a stepladder on October 29, 2011. At the time of the accident, Lunte worked for Two Chicks on a part-time basis. Her primary employment was as a pre-school teacher. Neither the accident nor the concurrent employment is disputed by Two Chicks.

Lunte testified by deposition on July 2, 2013, and at the hearing held November 20, 2013. She was born on May 24, 1970 and is a resident of Louisville, Kentucky. She has a Bachelor of Science degree from Murray State University in early childhood education, and receives approximately

twenty-four hours of continuing education annually. Her work history consists of employment as a teacher's aide, sales clerk, account representative and pre-school teacher. She has been employed as a pre-school teacher with the same school since 2000.

Lunte began working for Two Chicks in either 2005 or 2006 on a part-time basis, working eight to fifteen hours per week, to supplement her income. She stated Two Chicks is a boutique which sells gifts, jewelry, purses, accent pieces, and decorations. She waited on customers, straightened the store, stocked shelves, priced items, wrote sales tickets, wrapped gifts, etc. She claimed she regularly climbed a step stool three to four times per shift, and occasionally used a ladder. Her primary job duty was to assist customers. She stated two to four employees were present at all times, and assistance was available. At the time of the accident she earned $8.50 per hour, and had the option of taking store credit in lieu of pay.

On the date of the accident, a customer wanted a particular ornament from a Christmas tree located in the store. She climbed a step ladder to retrieve the ornament, and fell as she was climbing down. She was taken to the hospital by ambulance, and had surgery on October 31, 2011. She subsequently missed work both from Two Chicks, and from

her pre-school teaching position. She returned to teaching in August 2012, and has not returned to work at Two Chicks. She stated although she had returned to teaching, she performs her job differently than she did before the accident. She stated she takes no medication, and her pain varies from day-to-day. She stated she has not looked for another part-time job, but would return to Two Chicks if her restrictions would be accommodated.

Karen Mayes ("Mayes"), one of the owners of Two Chicks, testified by deposition on July 17, 2013. She manages the store, does payroll and finances, prepares for tradeshows, and does marketing. She stated Two Chicks primarily sells jewelry. The store also sells accent pieces such as side tables and chairs, but no large furniture. She stated all employees are sales clerks, and assistance is always available. She stated there are duplicates of items in the store, and in fact the particular item Lunte was retrieving at the time of the accident was available in multiple locations in the store.

Lunte began working for Two Chicks in 2006. She worked more hours during the summer. Lunte has made no inquiry about a return to work, although Mayes indicated her restrictions would be accommodated. She stated Lunte was not required to climb, and in fact several of the employees

refuse to do so. Lunte is not precluded from working as a sales clerk at Two Chicks because she cannot climb. Mayes stated items located in higher locations can be retrieved by the use of a hook. She also stated squatting or deep knee bends would be rare.

In support of her claim, Lunte filed records from Dr. Craig Roberts, her treating orthopedic surgeon. In a report dated January 28, 2013, Dr. Roberts stated she sustained, "A complex bicondylar tibial plateau fracture and a lateral meniscus tear for which she underwent open reduction/internal fixation and meniscal repair on October 30, 2011." He stated Lunte had reached maximum medical improvement ("MMI"), and assessed an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") due to her work injuries. In a subsequent report dated February 21, 2013, he opined Lunte would be unable to climb stairs or ladders, or do repetitive deep knee bends, squatting, or heavy lifting.

Lunte also filed numerous records from Dr. Roberts for treatment beginning October 30, 2011. Included in those records were notes from office visits, the operative report, physical therapy records from KORT, and utilization review

reports from Dr. Shelley Freimark. Lunte filed a Form 112 medical dispute on June 12, 2013 regarding unpaid bills.

In response to the medical dispute, Two Chicks filed the utilization review reports from Dr. Freimark, and notes from Drs. Mark Gladstein and Daniel Wolens. On March 9, 2012, Dr. Freimark stated recommended aqua therapy was not reasonable or necessary. On March 21, 2012, Dr. Freimark agreed eight additional physical therapy sessions were reasonable, but recommended denial of any additional passive modalities. On April 18, 2012, Dr. Freimark recommended denial of eight additional physical therapy sessions. On May 6, 2012, Dr. Gladstein opined Lunte needed no additional physical therapy. In a report dated March 1, 2013, Dr. Wolens assessed an 8% impairment rating pursuant to the AMA Guides. Two Chicks also filed 104 pages of physical therapy records for therapy administered between November 22, 2011 and July 20, 2012.

Two Chicks also filed the report of Dr. Michael Best who evaluated Lunte on August 9, 2013. Dr. Best assessed a 5% impairment rating pursuant to the AMA Guides. He also stated Lunte had reached MMI as of January 28, 2013. He opined she could return to work with no restrictions, and retains the physical capacity to perform her previous job at Two Chicks.

A Benefit Review Conference ("BRC") was held on November 5, 2013. The BRC order and memorandum reflects the contested issues preserved for resolution included benefits per KRS 342.730, unpaid or contested medical expenses, TTD benefits, credit for short term disability benefits, and extent and duration with multipliers. A hearing was held on November 20, 2013. It was acknowledged the issues concerning TTD benefits and credit for short term disability benefits had been resolved.

The ALJ rendered an Opinion, Award and Order on February 6, 2014. He found Lunte sustained a work injury on October 29, 2011. Regarding the medical dispute, the ALJ determined the expenses related to physical therapy from May 22, 2012 through July 28, 2012 were compensable, but found travel expenses were not.

The ALJ awarded TTD benefits from October 29, 2011 through January 28, 2013 at the rate of $347.34, and allowed Two Chicks a credit for any unemployment benefits received by Lunte during that time period. He awarded PPD benefits based upon the 8% impairment rating assessed by Dr. Roberts, which he enhanced with the three multiplier pursuant to KRS 342.730(1)(c)1 at the rate of $70.86 per week. In his analysis of the claim the ALJ stated as follows:

As to the issues of Benefits per KRS 342.730 including extent & duration w/multiplier, I rely on the medical opinion of Dr. Craig Roberts as being the most compelling, complete and persuasive medical evidence in the record as to the issue of the Plaintiff's percentage of whole person impairment (WPI) as the direct and proximate result of her work related injury. I have relied on that opinion in making my decision concerning that issue.

Using the AMA *Guides to the Evaluation of Permanent Impairment, 5th Edition,* Table 17-10 (Page 537), Dr. Roberts determined knee flexion less than 110 degrees equals 4% whole person impairment and flexion contracture 8 degrees equals 4% whole person impairment. Using the Combined Values Chart (Page 604) he calculated these values to be summed to 8% whole person impairment, which is the WPI he assigned to the Plaintiff.

Dr. Roberts also noted that Ms. Lunte will be unable to do stair and ladder climbing, repetitive deep knee bending, squatting or heavy lifting. Given the description of her job duties at the Defendant/Employers[sic] place of business, it is clear that she does not retain the physical capacity to return to her employment as a retail clerk for the Defendant. In making that finding, I rely on the medical testimony of Dr. Roberts who assigns restrictions to Plaintiff's physical activities as well as the testimony of the Plaintiff herself as to the duties she performed for the Defendant/Employer, which included squatting and reaching to obtain or replace merchandise on display from floor to ceiling.

> I note the testimony and personal interest of the Defendant/Employers, who are assuredly concerned for the welfare of their employee. However, with regard to the award of a statutory multiplier, the test before me is essentially whether, due to her current physical condition, the Plaintiff can return to the same job duties she was performing at the time of her work-related injury. This language has been construed by the Supreme Court of Kentucky as meaning the actual jobs the individual performed. Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2004). The weight of the evidence convinces me that she cannot.
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> Thus, as to the application of statutory enhancement under KRS 342.730 (the "3 multiplier), I find the testimony of Dr. Craig Roberts to be persuasive. The Plaintiff has reached MMI and her surgery was by all accounts successful. Dr. Roberts recommended light-duty work restrictions that would preclude the Plaintiff from returning to the job she had previously performed for the Defendant/Employer as a retail clerk. Although Dr. Roberts did not specifically opine that Plaintiff was precluded from returning to her pre-injury work duties, the effect of his restrictions effectively does the same thing. The Plaintiff has not returned to work.

Two Chicks filed a petition for reconsideration on February 20, 2014 arguing the ALJ provided insufficient findings of fact regarding Lunte's ability or inability to do her job. Two Chicks argued the ALJ failed to outline the essential functions of the job. Two Chicks then outlined

each of the job functions required of Lunte, and argued the ALJ failed to perform an analysis of her job functions, and whether she can do that work. Lunte responded by stating Two Chicks was merely re-arguing the merits of the claim, and the petition for reconsideration should be denied. In an order dated February 28, 2014, the ALJ denied the petition for reconsideration.

On appeal, Two Chicks argues the ALJ used an improper standard in applying the three multiplier pursuant to KRS 342.730(1)(c)1.

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. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount 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 Street Road 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).

That said, the ALJ must engage in the appropriate analysis when reviewing the facts, and making his determination. Here the ALJ relied upon Ford Motor Company v. Forman, supra. In that case, the ALJ determined the employee retained the capacity to perform the same type of work as he did at the time of the injury. This was based on the fact that numerous positions were lumped together pursuant to a collective bargaining agreement into certain classifications. The ALJ reasoned because the employee could perform some of the jobs within the classification, she retained the physical capacity to perform her pre-injury work. Id. at 143. The Kentucky Supreme Court stated

merely because an employee retains the capacity to perform some of the jobs in the job classification does not necessarily indicted she retains the physical capacity to perform the same type of work performed at the time of injury. On remand, the ALJ was directed to determine what jobs were performed at the time of injury and to determine from the evidence whether she retained the physical capacity to perform those jobs. Id. at 145.

In Miller v. Square D. Company, supra, the employee performed two different jobs, with two separate requirements. The Kentucky Supreme Court stated the ALJ was required to determine whether the employee retained the physical capacity to perform each of the jobs performed at the time of the work injury. The Court stated as follows:

> Thus, it seems more likely that the legislature intended for the phrase "the type of work that the employee performed at the time of injury" to refer broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred. We conclude, therefore, that Lowe's # 0507 v. Greathouse, supra, is inapplicable to these facts.
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> As explained in Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984); and Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), the burden is on an injured

worker to prove every element of a claim. This is not a case in which the employer modified the job requirements after the injury. Nor is it a case such as Ford Motor Co. v. Forman, supra in which a general classification included jobs with varying physical requirements. Mold technician was a specific job, and the claimant testified that only one worked each shift.

When analyzing the evidence under KRS 342.730(1)(c)(1), the ALJ noted that the claimant was injured while working as a mold technician, that he had no post-injury medical restrictions, and that he was able to return to work and perform his duties as a mold technician. The claimant acknowledged that the employer provided a computer to determine if machines were working properly before the injury and also encouraged workers to use a forklift for weights over fifty pounds. Although he stated that he did not use those aids until after the injury, the finding that he retained the physical capacity to return to work as a mold technician was reasonable under the evidence as a whole. As explained in Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986), a finding that is reasonable may not be disturbed on appeal.

The ALJ must determine on remand whether the claimant lacks the physical capacity to work as an assembler. Based on his own testimony, the claimant asserted that he did not. He acknowledged, however, that he no longer took any prescription medication, had not seen a physician for back complaints for a number of months, and was not under any written restrictions from his treating

> physician. Grider Hill Dock v. Sloan, 448 S.W.2d 373 (Ky. 1969), and Bullock v. Gay, 296 Ky. 489, 177 S.W.2d 883 (1944), explain that the testimony of an interested witness does not bind the fact-finder even when it is uncontradicted. Thus, the evidence would permit but does not compel a favorable finding.
> Id. at 813-814.

While Lunte may be restricted from certain activities, as found by the ALJ in relying upon Dr. Roberts, an analysis must be made in determining from the evidence whether those restrictions impact her ability to perform her job as a sales clerk. We agree with Two Chicks the ALJ did not perform an adequate analysis in determining the impact of her restrictions upon whether she retains the physical capacity to her pre-injury job. Therefore, we vacate the ALJ's application of the three multiplier pursuant to KRS 342.730(1)(c)1, and remand for a more detailed analysis based upon the evidence. We do not direct any particular result and the ALJ may make any determination which is supported by the evidence.

Finally, Lunte in her respondent's brief requests sanctions against Two Chicks for bringing an unreasonable proceeding. Lunte also requested sanctions because Two Chicks had not initiated payment of the amount not in controversy. We note Lunte did not appeal from the ALJ's

decision, nor did she file a motion for such sanctions, or for benefits pending appeal. We further note Two Chicks responded by stating the payments on the uncontested amounts were inadvertently not paid, but were being processed. Regarding sanctions for the lack of initiation of benefits, we note this is not properly before the Board because no motion was ever filed. This was first noted in Lunte's brief which is not the proper mechanism for bringing this issue. Secondly, because we determine the ALJ did in fact use an improper standard in determining entitlement to the enhancing multiplier, it cannot be said this appeal was unreasonable. Therefore, we decline to issue sanctions pursuant to KRS 342.310.

Accordingly, the opinion, award and order rendered February 6, 2014 and the February 24, 2014 order on reconsideration by Hon. Steven G. Bolton, Administrative Law Judge, are **VACATED IN PART**. This claim is **REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, DISSENTS AND WILL NOT FURNISH A SEPARATE OPINION.

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