

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 13, 2019

CLAIM NO. 201701942

DENISE MURRAY

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,  
ADMINISTRATIVE LAW JUDGE

FORD MOTOR COMPANY;  
AND HON. R. ROLAND CASE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**RECHTER, Member.** Ford Motor Company ("Ford") appeals from the April 22, 2019 Opinion, Award and Order, the April 25, 2019 Order, and the May 23, 2019 Order rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). On appeal, Ford argues the ALJ erred in enhancing permanent partial disability benefits

by the three multiplier pursuant to KRS 342.730(1)(c)1. Because the ALJ's determination is supported by substantial evidence, we affirm.

Denise Murray worked at Ford in a utility position. At the time of her work injury, she was filling in for the team leader who was on medical leave. In the utility position, she was required to fill in on twenty different jobs when other employees were absent, needed assistance, or needed to go on break. These positions required repetitious and strenuous physical activities including lifting above the shoulder level, pulling overhead, turning and twisting her body, using pneumatic guns, and turning or twisting her head. Murray testified she worked more than forty hours per week and earned \$29.45 per hour.

On June 19, 2017, Murray was installing mirrors when she experienced a pop and pain in her neck, left shoulder, and left upper extremity radiating to her elbow and hand. Another worker had to finish installing the mirror. However, she did not report the incident to her supervisor that day because it happened at the end of the shift. The following morning, she reported the incident and sought treatment at Ford's medical center.

Following the injury, Murray worked as a team leader on the assembly line. Murray was fired in August 2017 due to an altercation with another employee. After she was fired, Murray underwent cervical surgery on September 11, 2017. The union filed a successful grievance and Murray returned to work on February 19, 2018 with restrictions. However, Ford did not clear her for the utility position.

Murray testified she tried three or four different jobs before she found one that she could perform. She is no longer a utility employee and works the

regulator operator job on the assembly line. Murray does not earn the same wage and is not working the same number of hours that she did as a utility worker. Utility workers are paid more per hour and work more overtime or extra days.

Murray stated she is unable to perform all of the jobs required for the utility position. She still experiences burning pain in her shoulder and her neck, but does not have the numbness radiating to her hand as much. Her current job on the assembly line involves installing the belt molding using two screws and a gun, and then securing the regulator using two bolts. She continues to work full time on the assembly line. Murray stated she is concerned about her job security.

Dr. Jules Barefoot conducted an independent medical evaluation (“IME”) on February 8, 2018. Dr. Barefoot diagnosed status post anterior cervical fusion at C5-C6. Dr. Barefoot stated Murray would have difficulty with any job that required repetitive rotation of the head and it would not be safe for her to work on ladders, scaffolding, or at heights unprotected. He recommended Murray lift or carry no more than twenty pounds occasionally and ten pounds frequently. Dr. Barefoot assigned a 27% impairment rating for the work injury pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition (“AMA Guides”). Dr. Barefoot felt Murray is disqualified medically from returning to her pre-injury activities.

Dr. Thomas Loeb performed an IME on March 27, 2018. Dr. Loeb diagnosed longstanding, pre-existing, multi-level degenerative disease in the cervical spine, which he noted had progressed over time. He noted Murray “was quiescent apparently at the time of her alleged work injury, but had an active, ongoing,

preexisting degenerative process, particularly at the C5-6 level.” Her shoulder pain is related to radicular symptoms from the cervical disc disease, which is a classic pattern for the C5-6 level to the shoulder. Dr. Loeb stated, “The only work-relatedness in this case is indirect, as an aggravation of an underlying dormant condition into a disabling reality.” Dr. Loeb directed Murray to avoid overhead work on a repetitive basis, or lifting greater than fifteen pounds, particularly above chest level. Dr. Loeb assigned a 25% impairment rating pursuant to the AMA Guides for DRE Cervical Category IV, apportioning 75% of the impairment to her pre-existing impairment and 25% to the work injury.

The ALJ determined Murray is permanently partially disabled and has a 25% impairment rating. Because the impairment rating is based on the fusion surgery after the accident, the ALJ determined Murray did not have a pre-existing active impairment. The ALJ then made the following findings relevant to this appeal:

[T]he ALJ must also determine whether the provisions of KRS 342.730(1) (c) 1 or 2 apply. Subparagraph one applies when the plaintiff lacks the physical capacity to return to the type of work he was performing at the time of his injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages, a determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. If employment is found to be not likely then the three multiplier would apply. See Fawbush vs Gwynn, [sic] 103 SW3d 5 (Ky. 2003).

In this particular case, the plaintiff was released to return to work by her surgeon on January 8, 2018 and in fact returned to work for the defendant-employer on February 19, 2018. The plaintiff testified that she did not return to the same job she had been performing prior to her injury and did not return at equal or greater wages.

The issue is whether or not the plaintiff retains the physical capacity to return to the type of work performed at the time of the plaintiff's injuries. In this particular case, the ALJ is persuaded that the plaintiff does not have the physical capacity to return to the work being perform[ed] at the time of the injuries and has not returned to earning same or greater wages. The ALJ notes the plaintiff has returned to work on the assembly line, but was unable to return to work as a utility worker. As a result, her hourly wage is less than that of a utility worker and she gets less overtime hours. The employer presented no evidence indicating the plaintiff was earning equal or greater wages and the ALJ is persuaded by the testimony of the plaintiff that she is earning less wages. The ALJ is aware her hourly rate is more than her hourly rate at the time of the injury herein, but is less than she would be earning as a utility worker and based on her testimony she is getting less overtime and earning less wages. Based on the plaintiff's testimony and restrictions of Dr. Barefoot the ALJ finds the plaintiff cannot return to the work she was performing at the time of the injury and does not have the physical capacity to do so. The plaintiff will therefore be entitled to the 3 factor.

Therefore, based on the plaintiff's testimony corroborated by the opinion of Dr. Barefoot it is found the plaintiff cannot return to the occupation being performed at the time of the injury and therefore the plaintiff is entitled to the 3 factor. The plaintiff will be entitled to 25% impairment rating multiplied by 1.15 multiplied by 3 multiplied by \$626.49 or the sum of \$540.18 for a period of 425 weeks. The appropriate award will be entered.

Ford filed a petition for reconsideration arguing the ALJ erred in enhancing Murray's permanent partial disability benefits by three multiplier. In his order on reconsideration, the ALJ provided the following additional findings:

The ALJ would first note the petition is essentially an attempt to reargue the merits of the case. It raises no patent errors appearing on the face of the Opinion.

Although the Plaintiff has returned to work for the Defendant, she is in a different job classification. At the time of the injury, she was a utility worker and that classification pays more than her present classification as a regular operator on the assembly line. Additionally, she receives less overtime. The ALJ is persuaded the Plaintiff cannot return to her job as a utility worker based on her testimony and the restrictions of the physicians.

The employer also asserts that the Plaintiff did not carry her burden of proof with substantial evidence that she is earning less money post-injury. While the employer calls the Plaintiff's testimony "self-serving testimony", the ALJ notes the Plaintiff returned to work for Ford Motor Company and, obviously, Ford Motor Company would have the wage records of the Plaintiff and could easily disprove the Plaintiff's "self-serving testimony" if it in fact was inaccurate. The Plaintiff's testimony is un rebutted and constitutes substantial evidence and the ALJ is persuaded by same.

On appeal, Ford argues the ALJ's application of the 3.0 multiplier is clearly erroneous. Although Murray's job title has changed since her injury, she is still performing assembly line work. Ford contends the change is in title and classification alone, and is not appropriate grounds to award the 3.0 multiplier. Ford asserts enhanced benefits unjustly enrich Murray, who is employed full-time earning more money per hour and doing the same work she performed pre-injury.

As the claimant in a workers' compensation proceeding, Murray bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was successful in proving entitlement to the three multiplier, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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 (Ky. 1977).

Ford's argument that all assembly line work is the same has been rejected by the Kentucky Supreme Court in Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2004). In Forman, the Court stated that in making a determination regarding the applicability of KRS 342.730(1)(c)1, the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether he retains the physical capacity to return to those jobs." Id. at 145. There, the Court noted a general job classification of vehicle assembly technician includes all of the jobs that are involved in assembling a vehicle. For that reason, proof of the claimant's present ability to perform some jobs within the classification does not necessarily indicate that she retains the physical capacity to perform the same type of work that she performed at the time of injury. Id.

In Miller v. Square D Co., 254 S.W.3d 810 (Ky. 2008), the Court further explained:

When a worker performs two different jobs for the same employer, the employer bears liability for an injury that occurs in either job and insures its liability based on the risks of performing both jobs. 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. Id. at 813.

We find substantial evidence supports the ALJ’s determination that Murray is entitled to have her award of income benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. An ALJ may give weight to a claimant’s own testimony regarding her retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). A claimant’s testimony is competent evidence as to whether the claimant retains the physical capacity to return to the type of work performed at the time of injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

Murray testified she could not perform a number of the approximately twenty jobs a utility worker must be able to perform. She testified she tried three or four positions prior to finding a job she was capable of performing. Additionally, Ford did not clear her to return to the utility position when she was rehired. A utility worker must be able to perform jobs involving repetitious and strenuous physical activities including lifting above the shoulder level, pulling overhead, turning and twisting her body, using pneumatic guns, and turning or twisting her head. The ALJ relied upon Dr. Barefoot’s restrictions in finding Murray is unable to meet these requirements. Additionally, Dr. Loeb agreed Murray should avoid overhead work

on a repetitive basis and avoid lifting greater than fifteen pounds, particularly above chest level. The ALJ could reasonably conclude Murray is incapable of performing the full range of jobs required in the utility position.

Finally, although Murray now is paid at a higher hourly rate, she testified she earns less because she does not work as much overtime as in the utility position. The ALJ granted Ford time to submit post-injury wage information to rebut Murray's testimony, but it failed to submit such evidence. Therefore, any assertion by Ford on appeal that Murray is earning a higher wage is illusory. The ALJ acted within his discretion to determine which evidence to rely upon, and reached a conclusion supported by substantial evidence.

Accordingly, the April 22, 2019 Opinion, Award and Order and the April 25, 2019 Order and the May 23, 2019 Order rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON. PRISCILLA C. PAGE  
HON. JOSHUA W. DAVIS  
401 S. FOURTH STREET, STE 2200  
LOUISVILLE, KY 40202

**LMS**

**COUNSEL FOR RESPONDENT:**

HON. CHED JENNINGS  
455 S. FOURTH STREET  
LOUISVILLE, KY 40202

**LMS**

**ADMINISTRATIVE LAW JUDGE:**

HON. R. ROLAND CASE  
MAYO-UNDERWOOD BUILDING  
500 MERO STREET, 3<sup>RD</sup> FLOOR  
FRANKFORT, KY 40601

**LMS**