RENDERED: August 29, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002540-WC

FORD MOTOR COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-80688

MALINDA FORMAN;
WORKERS' COMPENSATION BOARD;
AND HON. RICHARD JOINER, ALJ — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BARBER, AND DYCHE, JUDGES.

BARBER, JUDGE: The Appellant, Ford Motor Company, seeks review of a Workers' Compensation Board Opinion reversing the ALJ's determination that the Appellee, Malinda Forman, (hereinafter Forman), retained the capacity to return to the same type of work she had performed pre-injury. Finding no error, we affirm.

We refer to the record as necessary to resolve the issues on appeal. Forman alleged three 1999 injuries in which she experienced neck pain. She had surgery in October 1999, and

returned to work in the first part of 2000, with restrictions of no overhead work, no pushing, pulling, tugging or lifting more than five pounds. The ALJ was persuaded by Dr. Guarnaschelli's 18% functional rating and awarded 27% permanent disability, using the 1.5 multiplier according to the then-applicable version of KRS 342.730.

The ALJ declined to apply the KRS 342.730(1)(c)1 enhancer, concluding:

> Before her injury, Ms. Forman was performing work as an assembler in a Ford Motor Company assembly plant. The types of work at this assembly plant are classified by a union-management agreement. Ms. Forman continues to work as an assembler at the same Ford Motor Company assembly plant. There are multiple stations where she can work as an assembler. With the restrictions claimed by Ms. Forman, she would be unable to work at certain of those stations. Even accepting that, I still find that she has the physical capacity to perform the type of work that she performed at the time of her injury. This is based principally upon the determination, in accordance with the union-management agreement, that her work is classified as an assembler before the injury and . . . after the injury. Where the types of work are defined as a result of the collective bargaining agreement, I think it appropriate for an administrative law judge to defer to that agreement in determining the type of agreement of work for purposes of enhancement of benefits.

On reconsideration, the ALJ explained that:

> The type of work performed by an individual is defined by their classification under the union management agreement. Ms. Forman's limitations

> are such that she cannot perform all of the tasks performed by persons classified as assemblers.
>
> However, she can perform a sufficient number of the tasks to allow her to function in the classification of assembler.

On appeal to the Board, Forman contended, *inter alia,* that the ALJ erred by refusing to enhance her benefits by the 1.5 factor, in reliance upon the classification in the labor management agreement between the United Auto Workers ("UAW") and Ford.

The Board explained that the 1.5 enhancement under KRS 342.730(1) and the .5 reducer under KRS 342.730(1)(c)(2) became effective December 12, 1996. Effective July 14, 2000, a modification to the Workers' Compensation Act ("the Act") made the two provisions mutually exclusive; however, both provisions potentially apply to claims for injuries falling between the two effective dates. The Board further explained that there was no question that Forman's benefits were subject to the reduction.

In considering whether the ALJ erred in using the collective bargaining agreement as the standard to determine whether Forman had returned to her pre-injury work, the Board stated:

> What we do believe is that in no circumstance may the collective bargaining agreement in any way place an injured worker in the position of receiving lesser benefits simply because of that agreement than would a non-union employee. As

with alternative dispute resolution provision ("ADR") in the Kentucky Workers' Compensation

> Act, a facility may choose not to proceed through the standard adjudicatory process. However, through ADR there can be no lessening of the opportunity for income or medical benefits than would be received by an injured worker not subject to ADR.[1]
>
> Applying this reasoning, we believe the ALJ used an inappropriate standard in determining whether or not Forman was entitled to the 1.5 enhancer. There is nothing in the agreement, either in its language or by its application, that would permit Forman to be treated differently than would any other worker. Rather, the single and sole question that must be answered by the ALJ is does Forman lack the physical capacity to return to the same type of work she was engaged in prior to her injury? Whether she does or does not return to the same specific or general job classification may or may not be relevant. From the testimony of Forman and Anderson [the labor relations representative], it would appear an individual who is classified as a vehicle assembly technician may perform actual work in any number of job locations within the Ford facility, all with a wide variety of physical requirements. Many of these physical requirements are outside Forman's present capabilities.
>
> Upon remand, the ALJ shall analyze the testimony of Forman and Anderson and [sic] it relates to the actual jobs being performed at the time of injury and after considering Forman's testimony and the medical testimony relating to restrictions, determine whether she lacks the physical capacity to return to these jobs. In doing so, no deference is to be given to the

[1] KRS 342.277(1) allows for a collective bargaining agreement to contain an alternative dispute resolution system; however, subsection (3) provides that "no agreement shall be recognized as valid and binding that diminishes the rights of any of the parties under this chapter. . . ."

> collective bargaining agreement nor is there to be any specific emphasis to be placed upon the union management agreement. The simple reality is that it is because of that union management agreement that Forman is subject to the .5 multiplier in KRS 342.730(1)(c)2 in that she is now back to work earning the same or greater wages. To automatically exclude Forman from receiving the 1.5 enhancer is to fail to give proper application to the Kentucky Workers' Compensation Act which supercedes any contrary labor management agreement and further reduces the potential for her receipt of benefits.
>
> Since the ALJ never made a specific finding as to whether Forman lacked the physical capacity to return to the same work, we believe it would be inappropriate for us to simply review the evidence and make such a factual finding. The evidence is not so incontrovertible as to mandate the application of the 1.5 enhancer as a matter of law.

On appeal, Ford asserts that the Board erred in "rejecting" the ALJ's finding that, "as a matter of fact," Forman retained the physical capacity to return to the type of work she had performed at the time of the injury. Ford would have us believe that the Board erred, because the ALJ's finding has a substantial evidentiary foundation. Ford misconstrues the nature of the Board's analysis.

The Board concluded that the ALJ erred, *as a matter of law*, because he applied the wrong standard to assess Forman's post-injury physical capacity to return to work -– the union-management agreement. Despite acknowledging that Forman would

not be able to work at certain assembler jobs within that classification, the ALJ still found that Forman had "the physical capacity to perform the type of work that she performed at the time of her injury." The ALJ based this finding, not upon Forman's actual post-injury physical capacity, but "**principally upon the determination**, **in accordance with the union-management agreement,"** that Forman's work was classified as an assembler both before and after the injury. The ALJ thought "**it appropriate . . . to defer to that agreement in determining the type of work for purposes of enhancement of benefits."** (Emphasis added)

The unanimous Board did not think it appropriate to defer to the subject agreement in assessing an employee's post-injury capacity, because to do so would effectively treat Forman differently from other workers not subject to the agreement. The Board held that to automatically exclude Forman from receiving the 1.5 enhancer would fail to give proper application to the Act. We agree.

The then-version of KRS 342.730(1)(c)1 provided:

> 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 one and one-half (1-1/2) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend

the duration of payments.

The language of the statute requires a finding in the context of the individual employee's physical capacity. The ALJ erred in basing this determination upon a job classification, rather than upon the physical requirements of Forman's former work and her current restrictions. We are not persuaded by Ford's arguments to the contrary.

Accordingly, we affirm the November 13, 2002 Opinion of the Workers' Compensation Board, affirming in part, reversing in part, and remanding.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wesley G. Gatlin
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BRIEF FOR APPELLEE, MALINDA FORMAN:

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