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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001417-WC

SQUARE D COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-08435

LOWELL MILLER; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

VANMETER, JUDGE: KRS 342.730(1)(c)1 requires an injured employee's disability benefits to be multiplied by three if he does not retain the physical capacity to return to the type of work that he performed at the time of his injury. In this case, we must decide whether the Workers' Compensation Board erred by vacating and remanding an

[1] Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Administrative Law Judge's (ALJ's) decision that Lowell Miller's disability award was not subject to this triple multiplier. For the following reasons, we reverse the Board's decision, and remand the matter to the Board for reinstatement of the ALJ's opinion and award.

In May 2004, Miller injured his low back while performing his duties as a mold technician at Square D Company. Miller underwent surgery and returned to work in September 2004 under certain restrictions which have since been lifted.

An ALJ found that Miller had a 10% impairment rating as a result of his work-related injury and awarded him $37.51 per week in permanent partial disability income. The ALJ also found that Miller was not entitled to a triple multiplier pursuant to KRS 342.730(1)(c)1 because he returned to the same classification and same position after his injury, even if he had to alter the means of accomplishing his work. For example, Miller inspected various machines via computer post-injury, rather than physically walking to and inspecting the machines as he would have done before his injury. Further, after the injury Miller used mechanical lifting aids that he did not need or use before the injury. While these computers and mechanical aids were also available to Miller before his injury, he only used them after his physical capacity to walk and lift were lessened by his injury. The ALJ also recognized that while Miller accepted all available overtime work before his injury, after his injury he worked overtime only if it was mandatory, and when possible he then took vacation days to recuperate from the overtime. Although Miller's post-injury hourly wage was more than his pre-injury wage,

his total income lessened because he could not work as much overtime. Ultimately, the ALJ declined to apply the triple multiplier because Miller returned to the same job classification and performed the same duties as before his injury.

The Board vacated the ALJ's decision in part and remanded for further proceedings, finding that in denying application of the multiplier, the ALJ relied too heavily on the fact that Miller had returned to the same job classification. It directed the ALJ to consider on remand the specific tasks Miller performed pre-injury, and whether he was capable of performing those same tasks post-injury. It also directed the ALJ to consider Miller's testimony that his pre-injury overtime included assembly work which he was unable to perform post-injury. This petition for review followed.

Square D argues that the Board erred by vacating the ALJ's decision that Miller's award was not subject to the triple multiplier found in KRS 342.730(1)(c)1. We agree.

If an ALJ finds against a claimant, the Board will uphold the ALJ's decision unless it is clearly erroneous. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). On appeal to this court, we will only correct the Board's decision if it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

KRS 342.730(1)(c)1 provides as follows:

> 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 multiplied by three (3) 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 Board relied on the Kentucky Supreme Court's construction of this provision in *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2004), when vacating and remanding the ALJ's decision for further proceedings. In *Forman*, the claimant was classified as a "vehicle assembly technician" both pre- and post-injury. This classification included many different jobs with differing physical requirements, all of which pertained to assembling the parts of a vehicle. Forman testified that although she returned to work in a position in the same job classification post-injury, she could no longer perform many of the jobs that she could perform pre-injury. While the ALJ recognized that Forman could not perform all of the tasks in her job classification post-injury, he declined to apply the triple multiplier because she returned to the same classification and could "perform a sufficient number of the tasks to allow her to function in the classification[.]" *Id.* at 144. The supreme court reversed and remanded the ALJ's decision, finding that the ALJ had relied too heavily on Forman's return to the same job classification and had applied the incorrect standard to determine whether she had the "post-injury physical capacity and ability to perform the same type of work as at the time of injury[.]" *Id.* On remand the ALJ was to "determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs." *Id.* at 145.

Here, as in *Forman*, the ALJ denied Miller the triple multiplier based on the fact that Miller had returned to the same job classification. Also as in *Forman*, the fact that Miller returned to the same job classification post-injury does not resolve the issue of whether he retained the physical capacity to perform his job, as the job classification may have included many positions since the classification was based on pay scale rather than the tasks performed. However, unlike *Forman*, here the ALJ clearly looked beyond the mere classification of Miller's job in reaching her decision. As such, *Forman* is informative but not controlling in our review of the ALJ's decision.

It is undisputed that Miller returned not only to the same classification but also to the same position post-injury. We recognize that, post-injury, Miller modified the manner in which he lifted certain heavy items and checked certain machines. Although Miller testified that it was beneficial for him to go physically to the machines because seeing and hearing them gave him a better feel for how they were running, he also testified that he was capable of performing his job by reading the machines' signals on a computer. Accordingly, the modifications Miller made in performing his duties as a mold technician did not compel a finding that he lacked the physical capacity to return to that position.

As the only other change in Miller's post-injury employment has been the reduction in his overtime work, we must determine whether the ALJ erred by failing to apply the triple multiplier in light of that change. Again, Miller testified that pre-injury he worked mandatory overtime and all of the additional overtime available to him,

including assembly work. Post-injury, Miller only worked mandatory overtime and even sometimes took vacation days in order to recuperate. He was unable to perform overtime assembly work post-injury.

Miller's voluntary overtime is akin to a second job in that whether he undertakes such overtime does not affect his regular job as a mold technician. In *Lowe's # 0507 v. Greathouse*, 182 S.W.3d 524 (Ky. 2006), the claimant had a second job in addition to one at Lowe's, where he sustained a work-related wrist injury. While the claimant eventually was able to return to his job at Lowe's, his injury left him unable to return to his second job. The Kentucky Supreme Court held that although the claimant was unable to return to his second job, he was not entitled to the triple multiplier under KRS 342.730(1)(c)1. Rather, the statute provided only

> a triple benefit for a loss of the physical capacity to perform "the type of work that the employee performed at the time of injury." It does not refer to the capacity to perform other types of work.

Id. at 527. Accordingly, in the matter now before us, the ALJ did not err by holding that Miller was not entitled to the triple multiplier due to his inability to maintain the overtime he worked pre-injury, and the Board erred by vacating the ALJ's decision.

The Workers' Compensation Board's opinion is reversed, and this matter is remanded for reinstatement of the ALJ's opinion.

THOMPSON, JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, DISSENTS.

PAISLEY, SENIOR JUDGE, DISSENTING: I respectfully dissent. Although the appellant was able to return to his primary job as a mold technician and perform that job by modifying the manner in which he did it, he was unable to perform the overtime work he had previously done in the assembly department. I do not believe that *Lowe's # 0507 v. Greathouse*, 182 S.W.3d 524 (Ky. 2006) is controlling in this situation. I would affirm the Board.

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