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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001516-WC

JAMES WOODFORD — APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-67906

FORD MOTOR COMPANY, HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE, AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,[1] SPECIAL JUDGE.

HOWARD, SPECIAL JUDGE: James Woodford appeals from an opinion of the Workers' Compensation Board ("the Board") affirming an opinion and order of the Administrative Law Judge ("ALJ"). The ALJ awarded benefits consistent with a 12% permanent partial disability arising from a work-related back injury, found that a neck injury was not compensable, and ruled that the KRS 342.730(1)(c)(1) and (2) multipliers were not applicable. Woodford brings this appeal from the failure of the ALJ or the

[1] Special Judge James I. Howard sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution.

Board to apply the multipliers. For the reasons stated below, we affirm.

The facts are not disputed. On February 27, 2002, Woodford filed an Application for Resolution of Injury Claim with the Department of Workers' Claims. Woodford alleged that he sustained a number of injuries arising during the course of his employment with Ford Motor Company ("Ford"). These alleged injuries occurred or manifested themselves between March, 2000 and March, 2001 and included neck, right arm and wrist injuries resulting from the use of an air gun, injuries to his lower back sustained while lifting a crossbar and a re-injury of his back and neck which occurred when he jerked to avoid hitting his head at work.

The claim proceeded before the Honorable Irene Steen, ALJ, who upon taking proof rendered an opinion dismissing the claim in its entirety. ALJ Steen found that the injuries were temporary and had been resolved. She also noted that while Woodford might experience flare-ups in the future, he was a strong and motivated individual who had returned to his job duties and whose symptoms had resolved. Woodford filed a petition for reconsideration, whereupon ALJ Steen granted Woodford an award for future medical costs pursuant to KRS 342.020, "as his work-related flare-ups occur, rather than on an

ongoing basis." No appeal was taken by either Woodford or Ford.

On January 22, 2004, Woodford filed a motion to reopen the claim, alleging a work-related worsening of his low back condition. Woodford submitted a December 4, 2003 medical report of Dr. Ricky Collis, who diagnosed Woodford with lumbar degenerative disc disease, DeQuervain's syndrome and depression from chronic pain. Dr. Collis opined that "this is all a condition which was started with the initial injury on September of 2000." He assessed an 8% whole body impairment and stated that Woodford had been "unable to function." Other medical reports were also provided. Woodford stated that he had not worked since April 17, 2003. The motion to reopen was granted, and the matter was assigned to the Honorable Grant S. Roark, ALJ.

Depositions were taken and other proof, including Woodford's testimony, was submitted. Woodford stated that he initially worked in a "fluid fill" position with Ford, but because of his back problems was assigned as a shop driver. After several weeks, his supervisor told him to "find a job on the line." Woodford complied, and began installing scuff plates. He claims that he was then released by Ford because "no work was available." He has not returned to Ford, nor has he worked anywhere since.

Ford introduced evidence that the fluid fill position was not physically demanding and that Woodford was able to handle its physical requirements. Persons doing this job use a hose on the assembly line to supply various fluids to the engine area as vehicles move slowly past the worker.

A final hearing on the matter was conducted on September 28, 2005. Additional proof was tendered and sometime thereafter, ALJ Roark accompanied the parties to the Ford plant in Louisville, Kentucky to observe the fluid fill position. Woodford filed a brief on November 7, 2005 arguing that his injuries were work-related; that he was entitled to additional benefits under KRS 342.125 based on a worsening of his condition; that he was entitled to an award of benefits based on a 25% whole body impairment enhanced by the KRS 342.730(1)(c)(1) 3-multiplier; that he was entitled to an award of additional temporary total disability through January, 2005 and that he was entitled to medical benefits to address low back and cervical injuries and erectile dysfunction.

On December 2, 2005, the ALJ rendered a decision holding that Woodford's back injury and erectile dysfunction were work-related and that he was entitled to medical expenses for the back injury. The ALJ relied on the medical report of Dr. Wolens to conclude that Woodford's cervical injury was not

work-related, and went on to hold that Woodford was not entitled to an additional period of temporary total disability benefits and was not entitled to the 3-multiplier.

On December 14, 2005, Woodford filed a petition for reconsideration, arguing for the first time that he was entitled to a KRS 342.730(1)(c)(2) 2-multiplier enhancement of his award. As a basis for this argument, he maintained that he returned to his employment following his October 27, 2002 back injury at the same or a higher wage, and that he continued at that wage until April 15, 2003. He also noted that although the ALJ found his erectile dysfunction to be compensable, an award for its treatment was inadvertently omitted from the ALJ's opinion.

ALJ Roark rendered an order on January 30, 2006 amending the opinion to include medical benefits to treat Woodford's erectile dysfunction. He did not enhance Woodford's award by the 2-multiplier upon finding that Woodford did not offer sufficient evidence showing that his wages after October 27, 2005 were the same or greater than his pre-injury wages.

Woodford appealed to the Board, which rendered an opinion on June 23, 2006 affirming ALJ Roark's December 2, 2005 decision. This appeal followed.

Woodford first argues that the Board committed reversible error in upholding the ALJ's refusal to award the 3-

multiplier. While conceding that substantial evidence exists in support of the finding that he was physically able to return to work, Woodford argues that the ALJ and the Board improperly failed to consider that Ford did not place him in appropriate employment. That is to say, Woodford contends that the 3-multiplier is applicable because he was not offered any position at Ford where he was able to make the same wages he enjoyed before the injury.

We find no error on this issue. KRS 342.730(1)(c)(1) states,

> 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 dispositive issue, then, is whether Woodford "retains[s] the physical capacity to return to the type of work that ... [he] performed at the time of injury." This question must be answered in the affirmative. Dr. K. M. Farmer, the Ford plant physician, was personally familiar with the fluid fill job and not only stated that Woodford could do that job, he encouraged Woodford to do so. This testimony constitutes

substantial evidence in support of the ALJ's finding on this issue. *Wolfe Creek Collieries v. Crum*, 637 S.W.2d 735 (Ky. App. 1985). Woodford concedes that there is evidence in the record to support this finding. If the ALJ's opinion is supported by substantial evidence, it will not be reversed. *Special Fund v. Francis*, 708 S.W.2d 671 (Ky. 1986).

There is no basis in the statute or the case law for the conclusion that an employer's failure to offer a position paying the same wage as before the injury triggers application of the 3-multiplier. Rather, the only question is whether the employee has "the physical capacity" to return to the type of work engaged in prior to the injury. Substantial evidence exists that Woodford retains that capacity, and as such the Board properly affirmed the ALJ on this issue.

The other issue raised by Woodford is his claim that he was entitled to the KRS 342.730(1)(c)(2) 2-multiplier. He maintains that an employer-provided printout of his wages constitutes a sufficient basis for calculating his wages for purposes of KRS 342.730(1)(c)(2), and that the Board erred in failing to so rule.

KRS 342.730(1)(c)(2) states,

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be

> determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

The burden rests with Woodford to prove entitlement to Chapter 342 benefits generally, and the KRS 342.730(1)(c)(2) 2-multiplier specifically. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 735 (Ky. 1985). He did not raise this issue in his petition to re-open, but only, for the first time, on his petition for reconsideration.[2] Woodford offered no evidence on the issue himself, but relied only on a printout provided and filed of record by Ford. Thus, the question is whether this printout was sufficient to satisfy Woodford's burden of proof. Both the ALJ and the Board concluded that it was not.

KRS 342.140 provides a statutory basis for calculating average weekly wage. It states at section (1)(d) that, for purposes of KRS Chapter 342, wages are calculated "not including overtime or premium pay." Both the ALJ and the Board concluded

[2] It is questionable whether this issue was timely raised. KRS 342.281 states that, in addressing a petition for reconsideration, "The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order or decision." However, as the ALJ and the Board both considered this issue on its merits and as this Court is affirming their decisions, we will do the same.

that the data sheet submitted by Ford, and upon which Woodford relies, did not provide data sufficient for calculating Woodford's base pay or average weekly wage. We find no basis in the record or the law for reversing this conclusion. The sheet clearly indicates that its figures include some overtime. But it does not reveal the number of hours worked in a given time period, either at regular pay or overtime; nor the rate of pay for either. When the record is viewed in its totality on this issue we find no error in the Board's decision.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
James D. Howes Louisville, Kentucky	Wesley G. Gatlin Louisville, Kentucky