RENDERED: JANUARY 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001698-WC

RANDY RANDALL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-73305

C. W. JOHNSON XPRESS, LLC;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO AND VANMETER, JUDGES.

TAYLOR, CHIEF JUDGE: Randy Randall petitions this Court to review a decision of the Workers' Compensation Board (Board) affirming an opinion of an Administrative Law Judge (ALJ) which awarded Randall benefits based on a 15

percent whole person impairment rating for an injury sustained during his employment with CW Johnson Xpress, LLC (Xpress). The ALJ declined to enhance the award by the 2x multiplier under Kentucky Revised Statutes (KRS) 342.730(1)(c)2. For the following reasons, we reverse and remand.

In October 2007, during the scope and course of his employment with Xpress, Randall sustained an injury to his neck while pulling open the rear door of a semi-trailer truck. He was later diagnosed with a herniated disk and underwent surgery in January 2008. Randall received a full release to return to work in April 2008; however, at that time Xpress had gone out of business. In September 2008, Randall began a job with UPS Freight earning less money than he was making with Xpress at the time of his injury.

In February 2009, the ALJ issued an order and opinion finding Randall to have suffered a work-related injury and assigned a 15 percent whole person impairment. The ALJ found Randall physically able to return to work and further found since returning to work Randall had not earned a wage equal to or greater than his wage at the time of his injury. The ALJ awarded Randall income benefits according to KRS 342.730(1)(b) but declined to enhance the benefit by the 2x multiplier under KRS 342.730(1)(c)2. The Board affirmed the ALJ's order, and this petition for review follows.

Randall argues the ALJ incorrectly applied KRS 342.730 to the circumstances of his work-related injury. We agree.

The standard for appellate review of a Board decision "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (quoting *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)).

KRS 342.730 states, in pertinent part:

> (1) . . . [I]ncome benefits for disability shall be paid to the employee as follows:
>
> > (c)2. 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.

KRS 342.730(1)(c)2.

In affirming the ALJ's decision not to enhance Randall's award by the 2x multiplier under KRS 342.730(1)(c)2, the Board cited to *AK Steel Corp. v. Childers*, 167 S.W.3d 672 (Ky. App. 2005) as authority. In *Childers*, the Court concluded that the ALJ erroneously applied the 2 multiplier in KRS 342.730(1)(c)2 to enhance an award. The Court held that the language in KRS 342.730(1)(c)2 was

"clear and unambiguous" and required "a claimant to return to work to qualify for the 2x multiplier benefit." *Id.* at 676. However, in *Childers*, the claimant retired and, thus, did not return to work at a weekly wage equal to or greater than the average weekly wage.

In this case, Randall was physically able to return to work with Xpress at an equal or greater wage than at the time of his injury; however, Xpress went out of business. Thus, through no fault of his own, Randall was unable to find work at an equal or greater wage than at the time of his injury. This is a distinguishing fact from *Childers*, 167 S.W.3d 672. Additionally, by denying Randall the 2x multiplier, the Board was effectively allowing external factors outside the requirement that a claimant be physically able to return to work, such as poor economic conditions and high unemployment, to affect his benefit. We do not believe the General Assembly intended this consequence under the statute.

For the foregoing reasons, we reverse the decision of the Board and remand for the award of the 2x multiplier under KRS 342.730(1)(c)2.

STUMBO, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. Randall argues the ALJ should have enhanced his award by the 2x multiplier pursuant to KRS 342.730(1)(c)2 . In support of this argument, Randall construes KRS 342.730(1)(c)2 to read that once the ALJ finds the employee is physically

able to return to the same job, the burden shifts to the employer to actually return the employee to work at the same or greater wage. Thus, if the employee is physically able to return to work, but the employer does not return the employee to work at the same or greater wage, Randall asserts the 2x multiplier should apply. This interpretation, Randall argues, better serves the purpose of the statute in urging injured employees to return to work.

"A statute is subject to judicial construction only when it contains ambiguous language." *AK Steel Corp. v. Childers*, 167 S.W.3d 672, 675 (Ky. App. 2005) (quoting *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 131 (Ky. App. 1990)). "While a workers' compensation statute is liberally construed to effectuate an beneficent purpose, a statute that is clear and unambiguous must be followed as written." *Childers* at 675-76 (quoting *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 802 (Ky. App. 1995)).

In *Childers*, a panel of this court reversed an ALJ decision enhancing a claimant's award by the 2x multiplier after the claimant developed a work-related injury and retired without returning to work. The court held the language in KRS 342.730(1)(c)2 was "clear and unambiguous," and to require, "a claimant to return to work to qualify for the 2x multiplier benefit." 167 S.W.3d at 676. The court explained further, "an injured employee who is physically able but fails to return to work is limited to the unenhanced benefit under KRS 342.730(1)(b)." *Id*.

In this case, Randall was physically able to return to work at an equal or greater wage than at the time of his injury. He did return to work, albeit not

with Xpress because it had gone out of business. Randall's new job paid less than the wage he earned at Xpress at the time of his injury. Under the plain and unambiguous language of the statute, Randall did not return to work at an equal or greater wage, and therefore is not eligible for the 2x multiplier benefit enhancement. Accordingly, the ALJ correctly applied KRS 342.730(1)(c)2, and the Board did not err by affirming the ALJ's decision.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Larry D. Ashlock Elizabethtown, Kentucky	James R. Wagoner Louisville, Kentucky