

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."  
PURSUANT TO THE RULES OF CIVIL PROCEDURE  
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),  
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER  
CASE IN ANY COURT OF THIS STATE; HOWEVER,  
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,  
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR  
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED  
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE  
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION  
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED  
DECISION IN THE FILED DOCUMENT AND A COPY OF THE  
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE  
DOCUMENT TO THE COURT AND ALL PARTIES TO THE  
ACTION.

# Supreme Court of Kentucky

2012-SC-000348-WC

SIDNEY COAL COMPANY, INC.

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2011-CA-001455-WC  
WORKERS' COMPENSATION NO. 09-98109

TIMOTHY BROCK;  
HONORABLE JEANIE OWEN MILLER,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

The sole issue in this appeal is whether Appellee, Timothy Brock, is entitled to have his workers' compensation income benefit tripled pursuant to the multiplier provided in KRS 342.730(1)(c)1. Brock's employer, Sidney Coal Company, Inc., concedes that Brock is entitled to workers' compensation income benefits, but argues that he is not entitled to the triple multiplier because he returned to his original job. For the reasons set forth below, we affirm the Court of Appeals.

On the date he was injured, Brock was working in one of Sidney Coal's mines as a mine electrician/repairman. Brock was also a part of Sidney Coal's

electrician training program. Prior to his injury, Brock was paid \$23.50 per hour and worked approximately fifty to sixty hours a week.

Brock's work-related injury occurred when his left hand was crushed between the canopy of a piece of equipment he was operating and the mine roof. As a result of the accident, Brock's left ring finger had to be amputated and he has reduced mobility and use of his left hand. Brock was assigned a 28% whole person impairment rating.

Despite these serious injuries, Brock obtained his certifications to become a mine electrician. Upon reaching maximum medical improvement, Brock returned to work for Sidney Coal as a mine electrician/repairman. Brock now receives \$30.70 per hour and works fifty to sixty hours per week. While Brock is unable to complete all of the tasks of his job that he was able to complete prior to his accident, he testified that other Sidney Coal employees regularly help complete those tasks for him.

The ALJ determined that Brock was entitled to have his income benefits enhanced by the "multipliers" provided by KRS 342.730(1)(c). Under KRS 342.730(1)(c)1, an injured employee who lacks the physical capacity to return to the work performed on the date of the injury may receive a triple income benefit, while KRS 342.730(1)(c)2 allows an employee who maintains the physical capacity to return to the same type of work and earn the same or greater wage to receive a double income benefit if at any time his wages drop below that level due to a work-related injury. If both sections of KRS 342.730(1)(c) are applicable to the claimant, then the ALJ must determine

which section to apply. *Fawbush v. Gwinn*, 103 S.W.3d 5, 12 (Ky. 2003). “If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.” *Id.*; see also *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 211 (Ky. 2003). “[I]n determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.” *Adkins v. Pike County Board of Education*, 141 S.W.3d 387, 390 (Ky. App. 2004).

In this matter, the ALJ made the following findings:

[Brock] returned to work for [Sidney Coal] at the same or greater wage and continues working in the underground coal mine. However, it is obvious to this ALJ [that] he does not retain the physical capacity to return to the same type of work he was performing at the time of his injury. His amputation and severely restricted remaining digits of his left hand, which resulted in the permanent restrictions per Dr. Tien and Dr. Muffly, would not allow him to return to work that required heavy lifting on a frequent basis or fine manipulation. The uncontested evidence from [Brock] has been that he performs a modified job with the assistance of co-workers. He is unable to do the lifting or fine manipulation his job required before this injury. Therefore, I find [Brock] is entitled to the three multiplier pursuant to KRS 342.730(1)(c)1.

Sidney Coal filed a petition for reconsideration which was denied. The Workers’ Compensation Board and Court of Appeals subsequently affirmed the ALJ’s decision to apply the three multiplier.

Sidney Coal now appeals, arguing that the ALJ misapplied *Fawbush*. It contends that not only did Brock return to his former job after the accident,

but there is not substantial evidence to support the conclusion that Brock is unlikely to be able to continue to earn a wage equal to or greater than the wage earned at the time of the injury. Sidney Coal believes that instead of applying the multiplier in KRS 342.730(1)(c)1, the ALJ should have applied KRS 342.730(1)(c) 2 which allows for an increased income benefit if Brock's wages dip below his pre-injury wages for work-related injury reasons. We disagree.

In *Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (Ky. 2004), which applied *Fawbush*, this Court stated that "both the 1996 and 2000 versions of KRS 342.730(1)(c)1 provide an enhanced benefit for those who lack the physical capacity to return to the type of work performed at the time of injury. When used in the context of an award that is based upon an objectively determined functional impairment, 'the type of work that the employee performed at the time of injury' was most likely intended by the legislature to refer to the actual jobs that the individual performed." Based on that conclusion, the Court remanded *Forman* to the ALJ for a determination of what particular jobs the claimant performed at the time of the injury and whether post-injury she retains the physical capacity to complete those specific jobs. This was despite the fact that post-injury the claimant in *Forman* worked within the same job classification at the factory as she did when she was injured. Thus, it is clear that in determining whether KRS 342.730(1)(c)1 applies the question is not whether the claimant can return to a job with the same title as he had before, but whether the claimant is able to perform the same job tasks as he could pre-injury.

The ALJ in this matter reviewed the facts of the case and made a determination that Brock is no longer physically able to perform some of the aspects of his job as a mine electrician as he could pre-injury. Indeed, if not for Brock's generous co-workers who assist him daily with his job and Sidney Coal's acceptance of Brock's physical limitations, it is clear he could not be employed as a mine electrician. It is quite possible that Brock will be unable to maintain employment at his current level for the indefinite future. See *Fawbush*, 103 S.W.3d at 12. This conclusion is supported by substantial evidence. Thus, despite the fact that Brock's job title is classified as a mine electrician, and he even earns a higher salary, because he cannot perform specific requirements of the job like he could before the injury, the ALJ did not abuse her discretion in awarding him the triple multiplier provided in KRS 342.730(1)(c)1.

Sidney Coal alternatively argues that it is against public policy to award Brock the triple multiplier in KRS 342.730(1)(c)1 since it has made efforts to accommodate his physical limitations and even pays him more today than pre-injury. However, this Court's interpretation of KRS 342.730(1)(c), and how to apply the multipliers, is long standing. If the General Assembly believes our interpretation is incorrect, then it has the authority to amend the statutes. Because the General Assembly has not done so, we reject Sidney Coal's argument that allowing Brock to receive the triple multiplier violates public policy. *Wilfong v. Commonwealth*, 175 S.W.3d 84, 93 (Ky. App. 2004) ("It is well-established that the enunciation of public policy is the domain of the

legislature; the courts interpret the law and do not enact legislation. The propriety, wisdom and expediency of statutory enactments are exclusively legislative matters.”)

For the reasons set forth above, we affirm the decision of the Court of Appeals.

All sitting. All concur.

COUNSEL FOR APPELLANT,  
SIDNEY COAL COMPANY, INC.:

A. Stuart Bennett

COUNSEL FOR APPELLEE,  
TIMOTHY BROCK:

Glenn Martin Hammond