

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

**Supreme Court of Kentucky** **FINAL**

2005-SC-0481-WC

DATE 8-24-06 EIA/Gramp.

GENEALIA ASHER

APPELLANT

V. APPEAL FROM COURT OF APPEALS  
2005-CA-0288-WC  
WORKERS' COMPENSATION NO. 01-86301

TECUMSEH PRODUCTS COMPANY;  
HON. W. BRUCE COWDEN, JR.,  
ADMINISTRATIVE LAW JUDGE  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**REVERSING**

An Administrative Law Judge (ALJ) determined that the claimant sustained a work-related injury, that she was partially disabled, and that she was entitled to an enhanced income benefit under KRS 342.730(1)(c)1. Although the Workers' Compensation Board (Board) affirmed in all respects, the Court of Appeals determined that the enhanced benefit must be vacated under Highland Heights Volunteer Fire Department v. Ellis, 160 S.W.3d 768 (Ky. 2005). Having concluded that Ellis is inapplicable to these facts, we reverse and reinstate the award.

The claimant began working on the defendant-employer's assembly line in 1977. She transferred to the shipping office in 1989 and performed mostly clerical work there through April 1, 2001, when the employer eliminated the job in the process of phasing

out the plant. Due to the claimant's seniority, on April 2, 2001, the employer transferred her to the machine shop. About 3 to 3 ½ hours later, she injured her back when she slipped and fell while working. There was medical evidence indicating that she could return to clerical work but not to work in the machine shop. Among other things, the employer asserted that the claimant's regular work was clerical and that her ability to return to clerical work precluded a triple benefit under KRS 342.730(1)(c)1. The employer also asserted that her failure to return to work after the injury precluded a double benefit under KRS 342.730(1)(c)2.

An ALJ determined subsequently that the effects of the injury did not prevent the claimant from returning to clerical work but that she lacked the physical capacity to return to work in the machine shop. Noting that she was working in the machine shop at the time of the injury, the ALJ awarded an enhanced income benefit under KRS 342.730(1)(c)1. The employer appealed.

The Court of Appeals determined that the decision was erroneous under Highland Heights Volunteer Fire Department v. Ellis, *supra*, and must be vacated. Ellis concerned a volunteer fireman who was injured while fighting a fire. After the injury, he was able to return to his paid employment as a licensed stockbroker but lacked the physical capacity to return to firefighting. On that basis, he asserted that he was entitled to an enhanced award. This Court disagreed.

The Ellis court noted that individuals who do not work under a "contract of hire" are not covered by the Act; however, KRS 342.640(3) provides coverage for volunteer fire, police, and emergency personnel by deeming them to be employees of the political subdivision that they serve. Under KRS 342.140(3), the average weekly wage for calculating such an individual's benefits is "the average weekly wage in their regular

employment." The court noted that an individual who is injured while performing volunteer fire, police, or emergency work but who has no paid employment will receive no income benefit. It determined, therefore, that the purpose of KRS 342.640(3) and KRS 342.140(3) is to compensate those individuals who do have regular (i.e., paid) employment for a loss of the ability to perform that work. For that reason, the work to be considered for the purpose of KRS 342.730(1)(c)1 is not the gratuitous work but "the individual's regular work, the work from which their average weekly wage is derived." Id., 160 S.W.3d at 770. Noting that Mr. Ellis returned to his paid employment as a stockbroker, the court concluded that he was not entitled to an enhanced benefit.

The present case does not involve concurrent employments or an injury that occurred in a gratuitous employment, causing a physical incapacity to perform that employment but not a concurrent, paid employment. The claimant had a single, paid employment. Nonetheless, the Court of Appeals applied the cited language from Ellis literally, without considering the context in which it was used. Although the claimant's job in the shipping office was eliminated and although she was transferred to the machine shop and was working there when she was injured, the court determined that Ellis rendered her physical capacity to return to work in the machine shop immaterial for the purposes of KRS 342.730(1)(c)1. We disagree.

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.

This statute clearly bases the entitlement to a triple benefit on "the physical capacity to

return to the type of work that the employee performed at the time of injury." In the present case, the ALJ determined that the claimant lacked the physical capacity to return to the type of work she was performing at the time of the injury, and the finding was supported by substantial evidence. The employer has pointed to nothing that would have required the ALJ to disregard the plain language of the statute and base the finding on the claimant's ability to perform work that she had previously performed for the employer. Under the present circumstances, it is unnecessary to address whether the statute would have encompassed a physical incapacity to perform clerical work.

The decision of the Court of Appeals is hereby reversed, and the decision of the ALJ is reinstated.

All concur.

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