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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: May 18, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 6-8-06 ELA Group PLC

2005-SC-0651-WC

GLEN DALE COLEMAN — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0207-WC
WORKERS' COMPENSATION NO. 02-79826

ROAD FORK DEVELOPMENT CO., INC./
RAWL SALES AND PROCESSING, INC.;
HON. SHEILA C. LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant retained the post-injury physical capacity to return to work as a roof bolter. Based on evidence that he was laid off upon his return to work and presently earned a lower average weekly wage, the ALJ awarded him a double benefit under KRS 342.730(1)(c)2. In a decision that was affirmed by the Court of Appeals, the Workers' Compensation Board affirmed the denial of a triple benefit under KRS 342.730(1)(c)1 and vacated the order awarding benefits under KRS 342.730(1)(c)2. We affirm.

The claimant was born in 1962 and quit school during the tenth grade. He received some on-the-job training in welding but did not have a certificate. On July 11, 2002, he injured his eye while working for the defendant-employer. He underwent

surgery and received TTD benefits from July 12, 2002, through November 17, 2002. He last worked for the employer on July 11, 2002, at which time he earned $862.50 per week working as a roof bolter. He testified that when he attempted to return to work, he was informed that he had been laid off. He explained that the mining business was slow at that time and that it was difficult to find a job anywhere. On February 1, 2003, he found work with a different employer, also as a roof bolter. He worked about the same number of hours but earned $812.50 per week because the hourly wage was 77 cents lower. He received the same hourly wage as the other roof bolters.

The claimant testified that he continued to experience symptoms from his injury, including drainage from the eye, decreased peripheral vision, and headaches that appeared to be triggered by exposure to bright light. On his doctor's advice, he wore sunglasses when driving; however, miner's lamps and the headlights on machinery bothered him and slowed his performance. He testified that his work at the time of injury required him to do occasional welding, but he could no longer do so because the light from the welding torch triggered headaches. Asked at the hearing how often he performed welding, he responded, "On average maybe twice a month."

Although acknowledging that a residual sensitivity to light prevented the claimant from welding, the ALJ determined that welding was only an incidental part of his job for the defendant-employer. Moreover, he passed a pre-employment physical when applying for his present job, which was also as a roof bolter, and he continued to perform that job. On that basis, the ALJ concluded that he was not entitled to a triple benefit under KRS 342.730(1)(c)1 and rendered an initial award of $35.11 per week under KRS 342.730(1)(b). After granting the claimant's petition for reconsideration, the ALJ amended the award to provide a double benefit under KRS 342.730(1)(c)2 "during

any cessation of employment with earnings equal to or greater than the plaintiff's average weekly wage at the time of the injury." The Board and the Court of Appeals determined, however, that the plain language of KRS 342.730(1)(c)2 required a return to work at the same or greater wage and that the amended award must be vacated.

Appealing, the claimant raises arguments under KRS 342.730(1)(c)1 and 2. He asserts that he is entitled to a triple benefit because his sensitivity to bright light and inability to weld prevent him from performing all of his previous duties, rendering him physically incapable of the type of work he performed at the time of the injury. In the alternative, he asserts that he is entitled to a double benefit based on his testimony that he returned to work with the defendant-employer but was laid off. He argues that he should not be penalized because the employer laid him off rather than permitting him to return to his former job. He also argues that it would be absurd to construe KRS 342.730(1)(c)2 to permit a worker to obtain a double benefit simply by working for one day at the same or greater wage but to deny him a double benefit.

As amended effective July 14, 2000, KRS 342.730(1)(b) and (c) refined the system for awarding partial disability benefits that was enacted in 1996. The 2000 version of KRS 342.730(1)(b) provides a basic partial disability benefit without regard to whether the individual has returned to work. The formula for determining the amount of the benefit considers the average weekly wage at the time of the injury as well as the resulting impairment, and it gives more severe impairments greater weight. KRS 342.730(1)(c) provides, in pertinent part, as follows:

> 1. 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; or

> 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. (emphasis added).

Subsection (1)(c)3 permits enhancement of the triple benefit awarded under subsection (1)(c)1 for workers of specified ages and educational levels. KRS 342.730(4) and KRS 125(3) permit a reopening at any time to conform an award to KRS 342.730(1)(c)2.

The burden was on the claimant to prove every element of his claim, including that he lacked the physical capacity to return to the type of work he performed at the time of injury. Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963). KRS 342.285 designates the ALJ as the finder of fact with the sole authority to weigh the evidence. A finding against the party with the burden of proof may not be reversed on appeal unless the favorable evidence was so overwhelming that it compelled a finding in the party's favor. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.730(1)(c)1 bases a triple benefit on a loss of "the physical capacity to return to the type of work that the employee performed at the time of injury." After reviewing the evidence, the ALJ determined that the claimant worked as a roof bolter, both at the time of his injury and when his claim was heard. Moreover, although he performed occasional welding for the defendant-employer, it was only an incidental part of his duties as a roof bolter. In reaching that conclusion, the ALJ noted the claimant's statement that he did welding "maybe twice a month" as well as the fact that he passed

a pre-employment physical and was hired by a subsequent employer for whom he performed roof bolting presently. Under the circumstances, the favorable evidence was not so overwhelming as to compel the award of a triple benefit.

Eligibility for a double benefit under KRS 342.730(1)(c)2 requires both a post-injury return to work "at a weekly wage equal to or greater than the average weekly wage at the time of injury" and a "cessation of that employment." A post-injury employment cannot cease if it has not begun. The evidence in the present case indicates that at no time after his injury was the claimant employed to work at the same or a greater wage. Therefore, such employment did not cease, and he was not entitled to an award under KRS 342.730(1)(c)2.

The claimant is correct that KRS 342.730(1)(c)2 does not prevent an employer from laying a worker off in order to avoid the potential of liability for a double benefit. Nonetheless, the evidence in this case does not support such an assertion. The claimant testified that he was one of many workers who were laid off because business was slow. Moreover, KRS 342.730(1)(c)2 does not base eligibility on a return to the employment, a return to the same type of work, or simply on a return to work; therefore, its purpose appears to be something other than to compensate individuals, such as the claimant, who return to work at a wage lower than what they earned at the time of injury.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cooper, Graves, Johnstone, Roach, and Wintersheimer, JJ., concur. Scott, J., dissents without opinion.

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