

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-001619-WC

BRENDAMOUR-YOKKAICHI
WORLDWIDE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 01-WC-83795

JOHNNY L. ABNEY;
HONORABLE IRENE STEEN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Brendamour-Yokkaichi Worldwide (hereinafter "Brendamour") brings this petition for review from an opinion of the Workers' Compensation Board (hereinafter "the Board") that affirmed an opinion and award entered by an Administrative Law Judge (hereinafter "ALJ"). For the reasons stated hereafter, we reverse and remand.

This petition for review involves the interpretation of the multiplier factors contained in KRS 342.730 and the issue

of proper notice. In that there were several cases addressing KRS 342.730 pending before the Kentucky Supreme Court, this case was ordered to be held in abeyance pending final disposition of those cases. Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003) and Kentucky River Enterprises v. Elkins, Ky., 107 S.W.3d 206 (2003), each of which addresses KRS 342.730, are now final.

This Court requested the parties hereto to file supplemental briefs on the impact of these cases to the issue of the multiplier factors contained in KRS 342.730. Both parties have complied and concede that under Fawbush and Kentucky River Enterprises this case must be reversed and remanded to the ALJ for additional findings as set forth in those cases. In Fawbush, our Supreme Court held:

Since December 12, 1996, KRS 342.730 has limited an ALJ's discretion in determining the extent of permanent partial disability. The formula for calculating income benefits that was enacted at that time was weighted to favor more severely impaired workers who were more likely to have a greater occupational disability. Other considerations were the worker's physical capacity to return to the pre-injury employment and post-injury earnings. Those who were the most severely impaired were entitled to benefits for a longer period of time. See Adkins v. R&S Body Co., Ky., 58 S.W.2d 428 (2001).

As amended in 2000, the formula for calculating a permanent partial disability benefit was further refined. The statutory factors in subsection (1)(b) were decreased. In subsection (1)(c), paragraphs (c)1 and 2

were amended, and the word "or" was inserted between them. Furthermore, paragraph (c)3, which contains additional multipliers based upon age and education, was added. The Board's opinion referred to decisions wherein it determined that the pre-2000 versions of KRS 342.730(1)(c)(1) and 2 could be applied concurrently where appropriate. Thus, the legislature presumably knew of those decisions when it inserted the word "or" at the end of paragraph (c)1 and by doing so, evinced an intent for only one of the provisions [to] be applied to a particular claim. See Whitley County Board of Education v. Meadors, Ky., 444 S.W.2d 890 (1969).

Although the employer maintains that paragraph (c)2 modifies the application of paragraph (c)1 and, therefore, takes precedence, we note that the legislature did not preface paragraph (c)2 with the word "however" or otherwise indicate that one provision takes precedence over the other. We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. 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.

Fawbush, 103 S.W.3d at 12. In Kentucky River Enterprises, the Kentucky Supreme Court advised that if the ALJ had not made the determination set forth in Fawbush, the matter must be remanded to the ALJ for such determination.

Specifically, the Court stated:

In Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003), we determined that where the evidence in a post-July 14, 2000, claim

would support applying both KRS 342.370(1)(c)1 and 2, the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision. We explained that the application of paragraph (c)1 is appropriate if the evidence indicates that the worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future. There, the evidence and the ALJ's findings supported the decision to apply paragraph (c)1.

Here, the ALJ determined only that the claimant could not return to the type of work that he was performing at the time of his injury and, on that basis, concluded that his weekly benefit must be multiplied by 3 under KRS 342.730(1)(c)1. For that reason, the claim must be remanded for further consideration.

Kentucky River Enterprises, 107 S.W.3d at 211.

Based upon Fawbush and Kentucky River Enterprises and the fact that both parties concede that the case must be remanded to the ALJ for further determination, we reverse and remand.

ALL CONCUR.

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