

RENDERED: MARCH 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001734-WC

DAVID CAUDILL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-00-66378

MONESSEN HEARTH SYSTEMS;
W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹
HUDDLESTON, SENIOR JUDGE: David Caudill petitions for review of
an opinion of the Workers' Compensation Board that affirmed a
decision of the Administrative Law Judge denying him a tripling

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of his permanent partial disability benefits under Kentucky Revised Statutes (KRS) 342.730(1)(c). We affirm.

The facts of this case are not in dispute. Caudill, who was born in 1968, has a 12th grade education. He has completed one college class but has no specialized training. In August 2000, he began working as a press operator at Monessen Hearth Systems earning an average weekly wage of \$435.91. On October 1, 2000, Caudill's left hand was caught in a press, crushing four of his fingers. He required immediate emergency surgery following the accident. He has had two additional surgical procedures to repair his hand, and has undergone extensive physical therapy. As a result of the injury, the range of motion in his injured hand is severely limited, and Caudill is restricted in the amount he can lift and grip and the type of tools he can use. He also suffers from cold sensitivity in the hand.

Caudill returned to work in February 2001. Because his left hand is permanently impaired, Caudill is no longer able to perform a full range of tasks as a press operator. For example, he cannot now operate a heavy press that requires the use of both hands. Since the accident, however, Caudill has been promoted to a supervisory position over six other employees as third shift lead man, and is earning more money than he did before the accident. Although Caudill is no longer required to

run the heavier presses that require two-handed operation, he occasionally needs the assistance of his coworkers in performing his job.

On December 31, 2003, the ALJ rendered an opinion, order and award granting Caudill permanent partial disability benefits for 425 weeks based on a functional impairment rating of 23%. The more difficult issue was whether Caudill was entitled to the triple multiplication of his benefits under KRS 342.730(1)(c). The statute permits such an enhancement if an employee does not retain the physical capacity to return to the type of work he or she was performing prior to the injury. Applying the standard formulated by the Kentucky Supreme Court in Fawbush v. Gwinn,² the ALJ determined that Caudill was not eligible for the enhanced benefits because it was likely that he would be able to maintain his higher-paying employment indefinitely. The Board affirmed the ALJ's decision.

The sole issue on appeal, therefore, is whether the Board erred in affirming the ALJ's ruling that Caudill was not eligible for the triple multiplier. The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an

² 103 S.W.3d 5 (Ky. 2003).

error in assessing the evidence so flagrant as to cause gross injustice.³

KRS 342.730(c) provides, in relevant part, that:

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 . . . ; 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.

Caudill's case presents us with a similar situation to that in Fawbush: whether to apply KRS 342.730 (c)1 or (c)2 in the case of an employee who is permanently partially impaired

³ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687 (Ky. 1992); Whittaker v. Rowland, 998 S.W.2d 479, 482 (Ky. 1999).

yet has returned to work earning a higher wage than he was earning prior to the injury. Under these circumstances, the Fawbush Court gave the ALJ authority 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 [the triple multiplier] is appropriate."⁴

In Caudill's case, the ALJ found that Caudill did "not retain the physical capacity to return to all aspects of work that he performed in the past," yet that he also was earning higher wages than he had at the time of the injury. On this basis, the ALJ acknowledged that both sections of the statute could apply. The ALJ found that Caudill is limited to running parts on presses that he can operate with one hand, and that his ability to perform his job has diminished. On the other hand, the ALJ noted that Caudill testified that in his new position as the supervisor and team leader he suspects he can tell the members of his team to assist him as necessary, that he has no reason to believe his employer is going out of business or that he will be laid off in the foreseeable future.

The ALJ thereafter distinguished Caudill's situation from that of the claimant in Fawbush, who had returned to a job

⁴ Supra, note 2, at 12.

that involved performing tasks that were outside his medical restrictions. Consequently, he had to take pain medication in order to perform his job, and it was unlikely he would be able to maintain that employment indefinitely. Under these circumstances, the Supreme Court affirmed the award of the triple multiplier.

On appeal, Caudill argues that the evidence in his case also compels a finding that he does not retain the capacity to continue to perform the job requirements that produce the same or greater average weekly wage into the indefinite future. We agree with the Board's well-reasoned review of this argument, and we therefore adopt the following relevant portions of its opinion:

We agree with Caudill to the extent that an appropriate analysis does not end with the singular finding that a claimant has returned to work at wages equal or greater than his pre-injury average weekly wage. A complete analysis requires the essential finding as to whether post-injury work, which produces the requisite wage level, can be performed by the injured claimant for the "indefinite future." We disagree with Caudill however that the ALJ did not make this finding or the finding is not supported by substantial evidence. To the contrary, the ALJ specifically concluded "[u]nlike the fact situation in

Fawbush however, the record does not contain any evidence that the Plaintiff as a working supervisor is working outside his restrictions or is it not likely that the Plaintiff would be able to maintain that employment indefinitely." That conclusion was reached only after a thorough summary of both Caudill's and Ratcliff's [the human resources manager at Monessen Hearth Systems] testimony.

Here, the evidence established that upon Caudill's return to work, he has missed no work; is not required to work outside his restrictions; is no longer under medical treatment; nor is he required to take prescription medications, much less narcotic or, for that matter, over-the-counter pain medications. There is no indication from either Caudill or Ratcliff that Caudill believes his job to be in jeopardy. In fact, he is able to meet his productions quotas and has been promoted. While it is true Caudill requires assistance from co-employees to perform certain aspects of his work, we are not satisfied that this factor, standing alone, compels the result Caudill seeks.

Because we find no error in this assessment of the evidence or in the construal of the statute, the Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth A. Buckle
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BRIEF FOR APPELLEE:

Lee Jones
Pikeville, Kentucky