RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002345-WC

ANNA MARIE THOMAS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-63348

JEFFERSON COUNTY BOARD OF EDUCATION; HONORABLE IRENE STEEN, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: This appeal centers upon the proper application of the "2-multiplier" provided for in KRS 342.730(1)(c)2 to the stipulated facts of this case. The Workers' Compensation Board determined that the enhanced statutory benefit is available only to injured employees who

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

return to work at wages equal to or greater than their average weekly wage at the time of injury and who are thereafter unable to sustain that employment. The Board further determined that in applying the statute, the focus must be upon the level of a worker's post-injury wages, not upon the source of those wages. Finding no error in the Board's analysis, we affirm.

The facts pertinent to our review were stipulated by the parties. Appellant Thomas sustained a work-related injury in the course of her employment as a bus driver for appellee Jefferson County Board of Education. At the time of injury, appellant's average weekly wage was $428.70. She returned to work for Jefferson County at a higher wage on August 7, 2003 and resigned that employment on October 29, 2003. Less than one week later, appellant commenced employment as a bus driver transporting mentally disabled people for Hazelwood center at the same or greater wages than her average weekly wage with Jefferson County and was continuing to perform that work at the time of the final hearing before the Administrative Law Judge.

Despite these stipulations, the ALJ found that appellant had only temporarily returned to work at the same or greater wage and awarded benefits enhanced by the 2-multiplier for the weeks she worked for less than the wages she had earned at Jefferson County. The ALJ directed the parties to confer to establish the specific weeks that appellant had worked for less

than her average weekly wage at the time of injury. Jefferson County moved to reconsider the award asserting that the ALJ failed to give effect to the parties' stipulation as to appellant's wages and failed to address the proper application of the multiplier. After correcting her oversight concerning the stipulation, the ALJ nevertheless reaffirmed her decision regarding the use of the 2-multiplier during the period of appellant's cessation of employment with Jefferson County.

Appellant subsequently appealed to the Board alleging that she was entitled to application of the "3-multiplier" contained in KRS 342.730(1)(c)1. She also maintained that even if the 2-multiplier is appropriate, the ALJ erred in directing the parties to confer as to specific weeks of entitlement contending that she was entitled to the enhanced award from the date of injury and placing the burden on Jefferson County to reopen if it desired modification of the award. Jefferson County lodged a cross-appeal alleging an improper application of the 2-multiplier given the stipulations as to appellant's wages. The Board set out a thorough and well-reasoned explanation of its conclusion that the statutory provision had not been given proper effect in this case.

In her appeal to this Court, appellant takes exception to the Board's decision but does little more than set out a series of questions for this Court to answer. The well-settled

role of an appellate court in reviewing decisions of the Workers' Compensation Board is to correct the Board only in those instances in which "the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[2] In order for us to fulfill that function, it is incumbent upon the party seeking to overturn the Board's decision to provide this Court with an argument, supported with reference to specific facts of the case, demonstrating in what way the Board's decision falls within the Western Baptist Hospital[3] criterion. Despite the lack of such argument in this case, we have nevertheless reviewed the Board's decision and have concluded that it fully comports with the intent of the statute and controlling precedent.

In enacting amendments to KRS 324.730(1)(b) and (c), the Legislature sought to provide a greater incentive for workers who retain the physical capacity to return to their pre-injury type of employment to do so, presumably allowing them to earn the same or greater wages than at the time of injury. To that end, the statute permits an injured worker who continues in his pre-injury employment to receive the basic permanent partial disability benefit in addition to his wage. Furthermore, the

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[2] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-8 (Ky. 1992).

[3] Id.

amendments offer workers the statutory assurance that if for any reason they are unable to maintain their former employment earning the same or a greater wage, they will be entitled to receive double the basic benefit.[4] In its opinion, the Board gives full effect to that legislative purpose and correctly applies the statute to the stipulated facts of this case:

> ...in summarizing the method by which the fact-finder is to calculate and compare the claimant's pre- and post-injury wages for purposes of applying the benefits multiplier under subsection (1)(c)2 of KRS 342.730, the court [in Ball v. Big Elk Coal Co. Inc., 25 S.W.3d 115 (Ky. 2000)] focuses upon the level of earnings and not the source of those earnings.
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> Consistent with Laurel Cookie Factory, [Laurel Cookie Factory v. Forman, 2002-SC-000867 (a non-published opinion rendered September 18, 2003)], we have held that KRS 342.730(1)(c)2 may not be applied to enhance an award of PPD benefits unless the injured employee has returned to work at a wage that is equal to or exceeds her AWW at the time of injury, and thereafter ceases such employment. Taking the argument posed by Thomas to its logical conclusion, an injured employee who temporarily returns to work at greater wages for some employer other than the defendant/employer and then is forced to cease that employment because of her work injury nonetheless would not be entitled to an enhanced award of benefits under Laurel Cookie Factory, supra. Thomas essentially would have us ignore the fact that, within four days of ceasing her employment at Jefferson County, she was working for

[4] KRS 342.730(1)(c)2.

> another employer earning a weekly wage greater than her AWW at the time of injury, treating the situation no differently than if she had ceased working altogether. However, Thomas' argument does not accord with either the plain language of the statute or the policy underlying its amendment, as expressed by the supreme court in both Ball, supra, and Laurel Cookie Factory, supra.

As we previously noted, appellant has presented no argument by which we might conclude that the Board's analysis is in any way faulty or fails to give proper effect to KRS 342.730(1)(c)2. On the contrary, we fully concur in the Board's thoughtful and well-reasoned opinion.

Accordingly, the opinion of the Workers' Compensation Board is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Ched Jennings Louisville, Kentucky	Carole Meller Pearlman Louisville, Kentucky