RENDERED: May 27, 2005; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002667-WC

JAMES A. GREATHOUSE — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-00182

LOWE'S #0507; HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: James Greathouse petitions for review of an opinion of the Workers' Compensation Board which affirmed the decision of the Administrative Law Judge (ALJ). The ALJ had denied enhanced benefits in conjunction with an award of

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

permanent partial occupational disability benefits. Greathouse argues that the Board erred in affirming the ALJ's denial of his claim for the enhanced benefits provided in KRS[2] 342.730(1)(c)1. We vacate and remand in light of a recent decision of the Kentucky Supreme Court that analyzes the proper application of KRS 342.730(1)(c)1. See, Highland Heights Volunteer Fire Department v. Ellis, ___ S.W.3d ___ (Ky. 2005).

The facts relating to Greathouse's claim are not in dispute. While working for Lowe's #507 (Lowe's) in July 2001, Greathouse sustained a severe injury, which required the fusion of his left wrist. In addition to his employment at Lowe's, Greathouse also worked at Mini-Data Forms as a printing press operator -- a job that involved repetitive heavy lifting. Greathouse had maintained concurrent, full-time employment with both employers for twelve years prior to his injury. His average weekly wage at the time of the 2001 injury was $917.75; $420 of that sum was derived from his employment at Lowe's, and $497.75 was earned at Mini-Data Forms.

After his injury, Greathouse was unable to return to his work at Mini-Data Forms; but he was able to return to Lowe's. Following a hearing on his disability claim, the ALJ determined that Greathouse had sustained a 12% functional

[2] Kentucky Revised Statutes.

impairment and awarded him permanent partial disability benefits.

The issue for our review is whether the ALJ erred in refusing to award Greathouse the enhanced benefits provided by KRS 342.730(1)(c)1 which 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[.]

The ALJ found that Greathouse lacked the ability to return to his primary employment with Mini-Data Forms (ALJ's Opinion, Order and Award at p. 6). In determining not to apply the multiplier, the ALJ relied on this Court's reasoning in the unpublished opinion, Highland Heights Volunteer Fire Department v. Gavin Ellis, No. 2003-CA-001313-WC, rendered April 30, 2004. Ellis, the claimant, worked both as a stockbroker and as an unpaid volunteer firefighter for the City of Highland Heights. He was injured while working as a firefighter. After he recovered from his injuries, Ellis was able to return to work as a stockbroker but not as a firefighter. The ALJ determined that Ellis had sustained a 6% impairment attributable to the burns and to the back injury that he suffered in the accident.

However, he did not award the multiplier because Ellis retained the physical ability to return to his gainful employment as a stockbroker. The Board reversed. In affirming the Board, this court concluded:

> Firefighting was the job Ellis was performing at the time of injury and it is the relevant employment for determining entitlement to the multiplier found in KRS 342.730(1)(c)1.

In harmony with our reasoning in Ellis, the ALJ in the case before us determined that Lowe's was the "relevant employment for determining [Greathouse's] entitlement to the multiplier." (ALJ's opinion at p. 7.) Since Greathouse was able to return to work at Lowe's, the ALJ concluded that he was not entitled to the multiplier. In affirming the decision of the ALJ, the Board observed that while the unpublished opinion in Ellis did not constitute controlling authority, an abundance of prudence dictated that it follow the decision until there was "published guidance to the contrary." (Board's Opinion of December 10, 2004, at p. 4.)

While Greathouse's appeal was pending in this court, the Kentucky Supreme Court completed its review of Ellis and reversed this Court, reasoning as follows:

> Just as under previous versions of the Act, the purpose of awarding an income benefit under the 1996 version is to compensate workers for a loss of wage-earning capacity due to industrial injury;

> therefore, KRS 342.730 bases the amount of a worker's benefit on the average weekly wage and the amount of occupational disability the injury causes. See Adkins v. R&S Body Company, 58 S.W.3d 348 (Ky. 2001). . . . We conclude, therefore, that the work to be considered for the purpose of KRS 342.730(1)(c)1. is the individual's regular work, **the work from which their** [*sic*] **average weekly wage is derived**. (Emphasis added.)

Ellis, Supreme Court slip op. at p. 5.

Although Ellis was unable to return to the actual work (firefighting) that he was performing at the time of the injury, the court determined that the multiplier in KRS 342.730(1)(c)1 did not come into play because it did not have any impact on Ellis's **average weekly wage** (*i.e.*, Ellis was able to return to the work from which he derived his actual weekly wage).

Factual distinctions between the two cases indicate that Greathouse should receive the benefit of the multiplier. Unlike Ellis, Greathouse had a truly concurrent work situation -- earning wages at **both** places of employment. Pursuant to KRS 342.750(5), **his average weekly wage** was calculated by adding his wages **from both jobs**. Thus, Greathouse's "regular work," "the work from which his average weekly wage [was] derived," included his employment at Mini-Data Forms. A literal application of the most recent interpretation of KRS 342.730(1)(c)1 by the Supreme Court thus dictates that Greathouse is entitled to the

multiplier based on the loss of his ability to earn wages at his second job.

Lowe's presents arguments based on several policy reasons that would preclude enforcement of the multiplier in concurrent work situations. For example, it contends that employers may "be tempted to demand" that their employees "cease the concurring employment" as a condition of continued employment. It also contends that it is not fair to expose employers to the risks inherent in concurrent employment situations. Although these arguments are both sensible and persuasive, they may be addressed only to the Legislature as the Supreme Court has now articulated the pertinent law that we are bound to follow.

The opinion of the Board is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Kenneth B. Fouts, II Lexington, Kentucky	Charles E. Lowther Lexington, Kentucky