

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000017-WC

TRI COUNTY OPERATIONS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. 01-WC-74075

CURTIS SURGENER; HON. R. SCOTT  
BORDERS, ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>  
TAYLOR, JUDGE. Tri County Operations petitions this Court to  
review a December 3, 2004, opinion of the Workers' Compensation  
Board affirming the Administrative Law Judge's (ALJ's) opinion  
awarding Curtis Surgener permanent partial disability and

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<sup>1</sup> 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 Kentucky Revised Statutes 21.580.

concluding that he was entitled to the three multiplier of Kentucky Revised Statutes (KRS) 342.730(1)(c)1. We affirm.

On June 12, 2001, Surgener sustained an injury while in the employment of Tri County. He injured his back while trying to pull a piece of steel out of a rack. The piece of steel weighed between 150 and 175 pounds. As a result, a discectomy was performed on January 19, 2002. He was off work for a period of four months and underwent physical therapy. He eventually returned to full time employment with Tri County but at a different job. Prior to his injury, he worked as a rebuild shop person and fabricator. After the injury, upon his return to work, he worked as a machine attendant and received a raise in pay.

The ALJ concluded that Surgener did suffer a work-related injury to his back and assessed a 13% permanent partial disability rating. The ALJ also found that Surgener was entitled to the three multiplier of KRS 342.730(1)(c)1 and awarded benefits accordingly. Tri County sought review with the Workers' Compensation Board. The only issue raised by Tri County revolved around the ALJ's utilization of the three multiplier contained in KRS 342.730(1)(c)1. By an opinion entered December 3, 2004, the Board affirmed the ALJ, thus precipitating our review.

Tri County contends the ALJ erred by applying the three multiplier set forth in KRS 342.730(1)(c)1. We disagree.

KRS 342.730 states, in relevant part, as follows:

(1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

. . . .

- (c) 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. This provision shall not be construed so as to extend the duration of payments.

Our Supreme Court has recently interpreted KRS 342.730(1)(c)1 and 2 in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky.

2003). Therein, the Supreme Court noted that KRS 342.730 (1)(c)1 and 2 were amended effective July 14, 2000, and the word "or" was inserted between (c)1 and 2. Based upon the recent amendment of KRS 342.730(1)(c)1 and 2 and upon its plain language, the Supreme Court held:

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.

Id. at 12. Thus, in a case where both subsections may apply, the ALJ must determine whether the employee is likely to continue to make the same or greater wages into the indefinite future. If the employee is unable to make the same or greater wages in the indefinite future, subsection 2 is applicable; if the employee is able to make the same or greater wage into the indefinite future, subsection 1 is applicable.

In the case at hand, Tri County argues there was simply no evidence that Surgener would not be able to indefinitely continue his employment at a greater wage. Tri County points out that Surgener currently works as a machine attendant at a higher wage that he was paid prior to the injury.

We are compelled to agree with the Board that the ALJ's application of the three multiplier was proper and refer to its reasoning herein:

Even though the evidence does not rise to the level of Fawbush, we are satisfied the ALJ drew inferences supported by the medical evidence contained in the record and those inferences are not unreasonable. See Jackson v. General Refractories, Co., Ky. [sic] 581 S.W.2d 10 (1979). Dr. Brooks testified Surgener was still having problems and will need further medical attention in the future. Dr. Johnson noted that even though Surgener had returned to work, he did so in the face of worsening back and leg pain. In 2004, Dr. Johnson received a history from Surgener that upon his return to work he was maintaining his job "by a hair."

We believe the aforementioned evidence and the reasonable inferences therefrom constitute substantial evidence to base the ALJ's application of the three multiplier of KRS 342.730(1)(c)1. Under Fawbush, the ALJ is vested with the authority to determine whether KRS 342.730(1)(c)1 or 2 is applicable. As substantial evidence supports the ALJ's conclusion that subsection 1 applies, we are constrained to affirm the ALJ's opinion.

We view appellant's remaining contentions of error to be without merit or moot.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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