

RENDERED: April 15, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000084-WC

JAMEY D. GOODWIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 03-WC-01263

KOPPERS INDUSTRIES;
WORKERS' COMPENSATION BOARD;
AND HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Jamey D. Goodwin petitions for review from an opinion of the Workers' Compensation Board affirming a decision of the Administrative Law Judge that awarded permanent partial occupational disability benefits for a hand injury. Goodwin sustained the injury while in the employ of Koppers Industries

¹ Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

when his hand was crushed between a railroad tie and a railing. He argues that the ALJ erred in failing to apply the KRS 342.730(1)(c)(1) multiplier to his award and for failing to accept as a judicial admission Koppers' statement that he should be entitled to a multiplier for the duration of the award. For the reasons stated below, we affirm the Board's opinion.

Goodwin was employed as a railroad treatment laborer by Koppers from November 2000 until February 2003, where his job duties included operating a crane. On January 17, 2002, he was instructed to remove old railroad ties from a warehouse. While doing this work, which did not involve the use of a crane, Goodwin sustained the injury to his left hand. He left work after the injury occurred, and received medical attention at Clarksville Memorial Hospital the following day. Goodwin's hand was placed in a splint and he was prescribed pain medication. Thereafter, he returned to work and was placed on light duty.

After returning to work, Goodwin sought further medical treatment from Dr. William DeVries. After first receiving a cast on his left hand, which seemed to exacerbate the injury, his hand and wrist were again placed in a splint. Goodwin also received medication and physical therapy, and was placed on permanent work restrictions in February 2003. Dr. DeVries diagnosed a soft tissue crush injury with pain and numbness. He assessed as 12% whole body impairment. He also

concluded that Goodwin retained the ability to perform his previous work, albeit with restrictions.

That same month, Goodwin accepted a voluntary layoff from Koppers. He moved to Florida where he found work with a construction company.

Goodwin filed a claim for workers' compensation benefits. The matter proceeded before the ALJ, who considered the lay testimony and the medical evidence consisting solely of Dr. DeVries' report and Form 101. The ALJ undertook an analysis pursuant to Fawbush v. Gwinn² to determine whether the 3x multiplier of KRS 342.730(1)(c)(1) or the 2x multiplier of 342.730(1)(c)(2) was applicable to the facts. Upon determining that Goodwin's average weekly wage with the Florida employer exceeded his pre-injury wage with Koppers, the ALJ concluded that the 2x multiplier of 342.730(1)(c)(2) was applicable. The use of the multiplier, however, was limited to periods of cessation of employment. Benefits were awarded based on a 12% impairment rating pursuant to 342.730(1)(b).

Goodwin filed a petition for reconsideration, arguing that he was entitled to the 3x multiplier because it was unlikely that he would be able to continue earning a wage that equaled or exceeded the wage at the time of the injury. He also maintained that in the alternative he was entitled to the 2x

² 103 S.W.3d 5 (Ky. 2003).

multiplier over the full 425 weeks of the award because Koppers made a judicial admission in its brief that he was so entitled.

The petition for reconsideration was overruled, and Goodwin appealed to the Workers' Compensation Board. The Board affirmed the ALJ's opinion, order, and award, and this petition for review followed.

Goodwin now argues that the Board erred in affirming the ALJ's award of benefits. He again claims that the ALJ erred in finding that the 3x multiplier was not applicable. In the alternative, he argues that he should be entitled to the 2x multiplier for the entire 425 week period based on Koppers' alleged judicial admission. He seeks an order reversing the Board's opinion and remanding the matter to the ALJ for an award based on the 3x multiplier.

We have closely examined the record and the law, and find no basis for reversing the Board's opinion. KRS 342.730(1)(c) states,

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.

The ALJ determined both that Goodwin was unable to return to the type in which he was engaged at the time of the injury and that his wages after the injury exceeded his pre-injury wages. This finding implicates both sections (1) and (2) of KRS 342.730(1)(c). The Kentucky Supreme Court resolved this apparent conflict by holding in Fawbush that where both sections are implicated the ALJ is authorized to determine which is more appropriate based on the facts of the case.

In the matter at bar, the ALJ determined that the 2x multiplier was applicable. As the Board noted, the crux of Goodwin's argument on this issue is that he is not earning an average weekly wage equal to or greater than that earned at the time of the injury. Goodwin's Form 101, however, states that his average weekly wage at the time of injury was \$361.60, whereas his Florida employment provides an average weekly wage of \$440.00. Pursuant to Fawbush, the ALJ properly exercised his

authority to determine which multiplier was appropriate, and the record supports this determination. Accordingly, we find no error on this issue.

Goodwin's alternative argument is that if KRS 342.730(1)(c)(2) was applicable, as the ALJ found, the multiplier should have remained in effect for the duration of the 425 week award rather than for only the periods of cessation of employment. He bases this argument on what he maintains is Koppers' judicial admission that he is entitled to the multiplier for the duration of the award.

Koppers stated in its brief before the ALJ that Goodwin was entitled to the 2x multiplier for the entire 425 week period. The dispositive inquiry on this issue is whether this statement binds the ALJ. The Board correctly determined that it did not. This statement does not constitute a judicial admission. "A judicial admission is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question."³ Koppers' brief cannot be regarded as a formal act having the effect of waiving or dispensing with the necessity of producing evidence.

³ Nolin Production Credit Association v. Canmer Deposit Bank, 726 S.W.2d 693, 710 (Ky.App. 1986).

Another basis for finding Koppers' statement to be something other than a judicial admission is that it is contrary to the clear and unambiguous language of KRS 342.730(1)(c)(2). Again, the statute allows for application of the 2x multiplier only "[d]uring any period of cessation of that employment" If Koppers' statement were given effect as a judicial admission and made binding on the ALJ, it would run afoul of the statute by allowing for the use of the 2x multiplier for the duration of the award. A judicial admission has effect only where there is no probability of error in the party's statements.⁴ Koppers' statement is erroneous, and as such cannot be regarded as a judicial admission.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Douglas Myers
J. Michael Hearon
Hopkinsville, KY

BRIEF FOR APPELLEE, KOPPERS
INDUSTRIES:

Peter J. Glauber
Louisville, KY

⁴ Id., citing Moore v. Roberts by and through Roberts, 684 S.W.2d 276 (Ky. 1985).