RENDERED: July 15, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000207-WC

GLEN DALE COLEMAN APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 02-WC-79826

ROAD FORK DEVELOPMENT COMPANY, INC./
RAWL SALES AND PROCESSING, INC.; HON.
SHEILA C. LOWTHER, CHIEF ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Glen Dale Coleman petitions this Court to review a December 30, 2004, opinion of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ's) decision not to apply the three multiplier of Kentucky Revised Statutes (KRS)

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[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 Kentucky Revised Statutes 21.580.

342.730(1)(c)1 and reversing the ALJ's decision to apply the two multiplier found in KRS 342.730(1)(c)2. We affirm.

On July 11, 2002, Coleman suffered a work-related injury to his eye while in the employment of Road Fork Development Company, Inc./Rawl Sales and Processing Company, Inc. (Road Fork). A piece of steel struck Coleman in his left eye, and he sustained an injury to his lower eyelid and the outside corner of the eye. To remove the steel, surgery was performed, and Coleman was off work for a period of time. Upon being released to return to work, Coleman learned that he had been laid off from Road Fork. For a time, he received unemployment benefits and was eventually hired by Excel Mining. At Road Fork, he was employed as a roof bolter; at Excel Mining, he was also employed as a roof bolter but at a lesser wage.

Coleman filed an application for worker's compensation benefits. The ALJ found Coleman to be partially permanently disabled and adopted a 10% impairment rating. The ALJ declined to use the three multiplier of KRS 342.730(1)(c)1 but determined that Coleman was entitled to the two multiplier found in KRS 342.730(1)(c)2. Being unsatisfied with the ALJ's decision, both parties sought review before the Workers' Compensation Board (the Board). Coleman argued the ALJ erred by failing to apply the three multiplier, and Road Fork argued the ALJ erred by applying the two multiplier. The Board subsequently entered its

opinion concluding that the ALJ properly declined to apply the three multiplier of KRS 342.730(1)(c)1 but erred in applying the two multiplier of KRS 342.730 (1)(c)2. Coleman now seeks review with this Court.

Coleman makes two alternative arguments. He argues initially the ALJ committed error by declining to apply the three multiplier found in KRS 342.730(1)(c)1, or alternatively, the ALJ properly applied the two multiplier found in KRS 342.730(1)(c)2 and the Board erroneously reversed the ALJ's application of the two multiplier. We disagree with both contentions.

KRS 342.730 provides, 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.

Under subsection 1, a claimant is entitled to the three multiplier if he demonstrates that because of a work-related injury he does not retain the physical capacity to return to the type of work performed prior to the injury. In declining to apply the three multiplier, the ALJ found as follows:

> Although this gentleman testified that he can no longer perform welding, that appears to have been no more that an incidental portion of his work. He was classified as a roof bolter prior to this injury, and following the injury underwent a pre-employment physical and again obtained employment in that job classification. Although he is now earning less, that is a reflection that he secured employment with a lower hourly wage, rather than as a result of decreased work hours. Based upon this, it is the finding of the Administrative Law Judge that Mr. Coleman does retain the physical capacity to return to and continue to perform the type of work which he was performing at the time of the injury.

To prevail, Coleman must demonstrate that the record compels a finding in his favor. We believe that he has failed to do so.

As found by the ALJ, Coleman performs the same job as he did before the injury, that of a roof bolter. Coleman believes that his inability to weld is sufficient to establish a lack of physical capacity to return to the type of work performed before the injury. However, the ALJ found that welding is only an incidental portion of his job duties, and as evidenced by his re-employment, he retained the physical capacity to return to work as a roof bolter. Accordingly, we conclude the ALJ properly determined Coleman was not entitled to the three multiplier of KRS 342.730(1)(c)1.

Alternatively, Coleman argues the ALJ properly determined he was entitled to the two multiplier of KRS 342.730(1)(c)2 and the Board committed error by reversing the ALJ. To be entitled to the two multiplier found in KRS 342.730(1)(c)2, a claimant must return "to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury . . . ." The evidence is uncontroverted that Coleman's weekly wage at the time of the injury was $862.50; after the injury, he returned to work with a different employer at a weekly wage of $812.50. From this evidence alone, it is clear that Coleman did not return to work at a weekly wage equal to or greater than the weekly wage earned at the time of the

injury; thus, KRS 342.730(1)(c)2 is clearly inapplicable. For this reason, we hold the Board properly reversed the ALJ's application of the two multiplier found in KRS 342.730(1)(c)2.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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Pikeville, Kentucky

BRIEF FOR APPELLEE:

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