

RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000288-WC

TECUMSEH PRODUCTS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-86301

GENEILA ASHER; HON. BRUCE
COWDEN, ADMINISTRATIVE LAW
JUDGE; WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING IN PART; VACATING IN PART;
AND REMANDING

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: Tecumseh Products (Tecumseh) petitions for review of an opinion of the Workers' Compensation Board that affirmed an award of permanent occupational disability benefits to the appellee, Geneila Asher. Tecumseh argues that the ALJ erred in enhancing Asher's benefits by a multiplier of three as

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.

provided in KRS² 342.730(1)(c)1. It also contends that the award was based solely upon subjective symptoms rather than upon objective medical findings of a harmful change as required by KRS 342.0011(33). We affirm the award of permanent partial disability benefits. However, in light of a recent decision of the Kentucky Supreme Court analyzing the proper applicability of the multiplier, we must vacate the ALJ's three-times enhancement of the award. In Highland Heights Volunteer Fire Department v. Ellis, ___ S.W.3d ___ (Ky. 2005), the Supreme Court outlined the circumstances in which the multiplier shall apply.

The facts in this appeal are not in dispute. Asher began her employment with Tecumseh in 1977, and she worked in a series of positions. From 1989 until April 1, 2001, she worked in the shipping office in a clerical capacity. Because Tecumseh was phasing out its operation, Asher's job as a shipping clerk was eliminated. Because of her seniority with the company, she was given the opportunity to be transferred to the machine shop until the plant closed. On April 2, 2001, while working at her new position for approximately three (3) hours, Asher injured her back.

After reviewing all of the evidence, the ALJ determined that Asher had sustained a functional impairment of 8% -- equal to an occupational disability rating of 6.8%. The

² Kentucky Revised Statutes.

ALJ also found that Asher could return to clerical work but that she was unable to return to work in the machine shop -- the type of work that she was performing at the time of the injury. Accordingly, he enhanced her award by the three-times multiplier provided in KRS 342.730(1)(c)1.

Tecumseh challenged the application of the multiplier in its appeal to the Board. The statute at issue 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 the subsection, but this provision shall not be construed so as to extend the duration of payments[.]

In its review, the Board affirmed the award, including the application of the multiplier:

[W]e see nothing in the literal language of KRS 342.730(1)(c)1 which requires an ALJ, as a matter of law, to disregard the type of work being performed by an employee on the date of injury, and focus instead on the type of work performed by the employee in another position prior to the date of injury. . . . The ALJ's award of the 3-multiplier in this present claim was based on Asher's retained physical capacity to return to the type of work actually being performed by Asher on the day she was injured. There is no dispute in the present appeal that there is substantial evidence of record to support a determination that Asher does not retain the physical capacity to

return to the type of work Asher performed on the day she was injured. Hence, we find no error.

(Board's Opinion of January 7, 2005, at pp. 2-3.)

In Ellis, supra, the Kentucky Supreme Court analyzed the purpose of the statute and concluded:

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 428 (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.

Id., slip opinion p. 5. (Emphasis added.)

Asher argues that the Board acted properly in interpreting the statute literally, by focusing upon the type of work being performed at the precise moment of injury. However, Tecumseh argues that awarding the multiplier under the unique circumstances presented in this case does not comport with the purpose of the statute. We agree, and we also note that the award does not conform to the interpretation of the statute announced in Ellis -- a decision not available to the Board at the time it rendered its opinion.

Contrary to the Board's literal approach to the statute, the Ellis court determined that the relevant work to be considered is the injured worker's "regular work, the work from which [her] average weekly wage is derived." Id. By virtue of KRS 342.730(1)(d), Asher's average weekly wage was derived by reference to the wages she had earned as a shipping clerk, "in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks **immediately preceding the injury.**" (Emphasis added.) Asher's transfer to the brief period of employment in the machine shop had virtually no impact on her average weekly wage. She did not work long enough to establish a work history of an earning capacity as a machinist; thus, her momentary tenure as a machinist could not constitute the "type of work" contemplated by the statute. We must conclude that the multiplier cannot apply in this case pursuant to the holding in Ellis.

Next, Tecumseh argues that Asher failed to meet her burden of proving the existence of a harmful change as evidenced by objective medical findings. The Board held that the ALJ was entitled to believe the medical testimony that her underlying degenerative disc disease was aroused into a disabling, painful condition by the work-related accident. See McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001). We agree that the ALJ acted properly in exercising

his prerogative to select credible evidence from among the alternative theories presented.

The opinion of the Workers' Compensation Board is affirmed in part, vacated in part, and remanded for entry of an award consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Mark D. Knight
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