

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000599-WC

EDWARD F. LEWIS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-85912

FORD MOTOR COMPANY;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: Edward F. Lewis appeals from the Opinion of the Worker's Compensation Board affirming the Opinion and Award of the Administrative Law Judge (ALJ). We affirm.

The sole issue presented for our review is whether the Board erred in affirming the portion of the opinion of the ALJ

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.

denying the application of the "3 multiplier" provided in KRS² 342.730(1)(c)1. That statute provides that, in the event that an injured employee is physically unable to return to the same kind of work, the employee's benefit for permanent partial disability shall be multiplied by a factor of three. If, on the other hand, the employee returns to work at a weekly wage equal to or greater than that earned prior to the injury, no multiplier is used during the period of such employment. KRS 342.730(1)(c)2.

Our Supreme Court has stated that "[t]he function of further review of the [Worker's Compensation Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992). Appellant Edward Lewis contends that the Board and the ALJ overlooked and misconstrued Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) in failing to apply the "3 multiplier" to the award in this case.

The tip of Mr. Lewis's right middle finger was crushed in an accident at the Ford assembly plant in Louisville, resulting in an impairment of function. After his injury Lewis bid on, and obtained, a different job in the plant at higher

² Kentucky Revised Statutes.

pay. The ALJ awarded Lewis benefits to compensate him for an 11% permanent partial disability, based on the medical evidence. The ALJ determined that, although Lewis is probably medically unable to return to the job he was doing prior to his injury, he has demonstrated his ability to perform his new job, and it is likely that he will be able to continue in that job at wages that equal or exceed those he was receiving prior to his injury. After discussing the Fawbush case as it applies to the facts of this case, the ALJ determined that the "3 multiplier" provided in KRS 342.730(1)(c) would be inappropriate here.

Lewis argues that the holding of Fawbush requires the application of the "3 multiplier" to his situation. In Fawbush, Gwinn, the claimant, got a job with a different employer making more money after his injury. The Kentucky Supreme Court affirmed the decision of the ALJ, the Board and the Court of Appeals that the "3 multiplier" was applicable to the specific facts of that case, primarily because the "unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed." Fawbush, 103 S.W.3d at 12. That being so, Gwinn "was not likely to be able to maintain the employment indefinitely." Id. While it is true that in the case sub judice the ALJ found that Lewis is "more likely than not, medically disqualified . . . from

returning to his pre-injury work activities", and that Lewis is earning more than he did prior to his injury, the similarity to Fawbush ends there. The holding of Fawbush that is important to this case is the conclusion of the Supreme Court that:

[A]n ALJ is authorized to determine which provision³ 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.

Fawbush, 103 S.W.3d at 12. Here the ALJ specifically found that Lewis is likely to be able to continue earning equal or greater wages than he did prior to his injury. The Board carefully analyzed the decision of the ALJ and the law applicable to this case. The Board neither overlooked nor misconstrued controlling law, and there is no allegation that there was an error in the assessment of the evidence. Western Baptist Hospital v. Kelly, supra. The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE:

Wesley G. Gatlin
Louisville, Kentucky

³ That is, KRS 342.730(1)(c)1 or (c)2.