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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002064-WC

MITCHELL J. MEADORS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-04-83993

PENNINGTON BLOCK COMPANY, INC.; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HOWARD AND MOORE, JUDGES.

HOWARD, JUDGE: This is an appeal from a decision of the Workers' Compensation Board, raising only one issue: whether or not the two-multiplier authorized under KRS 342.730(1)(c)(2) applies to the facts of this case, under the circumstances of the multiple injuries sustained by the Appellant, Mitchell Meadors. The Administrative Law Judge

(ALJ) found that the multiplier did apply; the Workers' Compensation Board reversed the ALJ and found that it did not. We agree with the Board and affirm its decision.

Mr. Meadors suffered three separate injuries, all while in the employ of the Appellee, Pennington Block Company. On December 13, 2002, he injured his thumb; on February 18, 2004, he injured his back and on June 14, 2004, he injured his back again. Mr. Meadors was able to and did return to the same type of work after each of the first two injuries, but was unable to return to work after the third injury. The parties stipulated that Mr. Meadors' average weekly wage at the time of the first injury was $359.61; at the time of the second injury it was $319.50 and at the time of the third injury it was $307.25. Mr. Meadors' hourly wage remained the same, $6.50 per hour, but the number of hours he worked per week apparently went down over this period of time.

The Administrative Law Judge, the Honorable R. Scott Borders, awarded permanent partial disability benefits for each of the three injuries, calculated separately. He enhanced the award for the third injury, of June 14, 2004, by the three-multiplier pursuant to KRS 342.730(1)(c)(1). All of these findings were affirmed by the Workers' Compensation Board, and no issue has been raised before this Court as to any of these matters. However, the ALJ also enhanced the award as to both of the first two injuries by the two-multiplier authorized in KRS 342.730(1)(c)(2), from the date of the third injury, after which Mr. Meadors was unable to return to work. This was appealed to the Workers' Compensation Board by the employer, Pennington Block Company. The Board reversed the ruling of the ALJ on this issue. Mr. Meadors brings this petition for review

from the Board's ruling, seeking to have the original order of the ALJ reinstated. Finding no error in the opinion of the Workers' Compensation Board, we affirm.

The calculations for permanent partial disability benefits are established in KRS 342.730. Subsection (1)(b) of that statute sets out the factors for calculating the basic benefits, based on the employee's average weekly wage before the injury. Subsection (1)(c)(1) then states that if an employee is not able to return to the same type of work, he will receive three times those basic benefits. Subsection (1)(c)(2) states, "If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury," and then later has a "period of cessation" of employment, "for any reason," he will receive two times the basic benefits for that period of cessation.

In this case, the ALJ determined the basic benefits for each injury and applied the three-multiplier to the third injury, from which Mr. Meadors was unable to return to work. He then applied the two-multiplier to each of the first two injuries, starting from the date of the third injury, his being off work after that date constituting a "period of cessation" of his employment.

Pennington Block Company has consistently argued, and the Board found, that Mr. Meadors did not qualify for the application of the two-multiplier to the first two injuries because he did not return to work after those injuries, "at a weekly wage equal to or greater than the average weekly wage at the time of injury." As set out above, Mr. Meadors' hourly wage remained the same, but his hours decreased, so that his average weekly wage was less after each injury.

Mr. Meadors argues that while he stipulated his average weekly wage for each date of injury, the Board was incorrect in stating that he "stipulated that when Meadors returned to work on each occasion his average weekly was less than his pre-injury average weekly wage." This seems to us to be a distinction without a difference. He stipulated his average weekly wage for the date of each injury and the numbers clearly show that these averages were less on each occasion.

Mr. Meadors further argues that he "returned to the same job at the same rate of pay although he may have worked a few less hours of overtime . . . ." He points out, correctly, that one of the policy reasons for this section of the statute is to encourage workers to return to work after an injury and argues that he "should not be punished for doing what the legislation was aimed at encouraging."

As quoted above, KRS 342.730 (1)(c)(2) expressly refers to "average weekly wage" as the measure of pre-injury income. The question then becomes, how is post-injury income ("weekly wage" in the statute, rather than "average weekly wage") measured, by the hourly rate of pay or also by a weekly average? Unfortunately for the Appellant's position, this issue has already been decided by the courts of this state. Two Kentucky Supreme Court decisions cited by the Board are almost exactly on point. In *Whittaker v. Robinson,* 981 S.W.2d 118 (Ky. 1998), the Supreme Court interpreted a previous version of KRS 342.730, but involving very similar language. The version of subsection (1)(b) of this statute in effect at that time provided certain basic benefits, "where an employee returns to work at a wage equal to or greater than the employee's preinjury wage . . . ." The same argument was made, as to whether the pre- and post-

injury wages to be compared should be measured hourly, weekly, or by some other means. The Court first noted that, "[I]t is apparent that income benefits pursuant to all sections of KRS 342.730 are calculated as a percentage of the worker's average weekly wage," and then went on to hold,

> Since the formulae for average weekly wage which are contained in KRS 342.140 more accurately measure a worker's actual income from a particular employment than the worker's pay rate, we conclude that for purposes of KRS 342.730(1)(b); it is the injured worker's pre- and post-injury average weekly wages which should be compared.

Whittaker, 981 S.W.2d at 121.

In *Ball v. Big Elk Creek Coal Co.,* 25 S.W.3d 115 (Ky. 2000), the Supreme Court applied a previous version of KRS 342.730(1)(c)(2), but containing the exact same language we are dealing with in this case, "If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury . . . ." Again, the issue was the comparison of pre- and post-injury wages. In that case, the worker returned to work at a lower hourly rate but worked more hours of overtime, resulting in a higher weekly average after his return to work. The argument made in *Ball* was that the wages should be evaluated week-by-week, as the worker only exceeded his pre-injury average weekly wage in eight of forty-one and one half weeks that he worked post-injury, even though his post-injury average was slightly higher. The Court cited *Whittaker v. Robinson, supra,* and held,

> [W]e read KRS 342.730(1)(c)2 as providing that the pre- and post-injury average weekly wages should be compared . . . .

Ball, 25 S.W.3d at 118.

Thus, the appropriate comparison is between pre-injury and post-injury average weekly wages. In Mr. Meadors' case, he stipulated that he was making an average weekly wage at the time of his first injury of $359.61; at the time of his second injury of $319.50 and at the time of his third injury of $307.25. At no time following either of his first two injuries was he making an average weekly wage "equal to or greater than" his pre-injury average weekly wage. Therefore, he did not qualify for the two-multiplier authorized by KRS 342.730(1)(c)(2) as to either of the first two injuries. The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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