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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002631-WC

SANDRA TOY APPELLANT

v.

PETITION FOR REVIEW OF A DECISION OF THE
WORKERS' COMPENSATION BOARD
CLAIM NO. WC-01-93106

COCA COLA ENTERPRISES;
HONORABLE SHEILA LOWTHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: DIXON, KELLER, AND THOMPSON, JUDGES.

KELLER, JUDGE: Sandra Toy (Toy) filed a motion to reopen, contesting a reduction in her benefit rate made by Coca Cola Enterprises (Coke). The ALJ denied Toy's motion and the Workers' Compensation Board (the Board) affirmed that denial. It is from the Board's Opinion that Toy appeals. For the reasons set forth below, we affirm.

FACTS

Toy suffered a cervical spine injury as a result of repetitive trauma. She continued to work for Coke earning at least the same wage as she earned at the time of her injury. Following the presentation of proof, the parties entered into a settlement agreement whereby Coke agreed to pay Toy $59.63 per week for a period of 425 weeks. Because Toy continued to work at the same or greater wage, none of the multipliers set forth in KRS 342.730(1)(c) were applied in calculating the permanent partial disability benefit rate.

Ten days after the settlement agreement was approved, Coke discharged Toy. The parties then entered into a second settlement agreement, whereby Coke agreed to pay benefits at the rate of $119.26 as provided for in KRS 342.730(1)(c)2, "for the remaining term of the 425 weeks" set forth in the initial settlement agreement.

Toy ultimately returned to work for a different employer and the parties agree that, upon her return to work, Toy earned a wage equal to or greater than her wage at the time of her injury. When Coke became aware of Toy's employment, it subpoenaed a copy of her wage records and, based on those records, reduced Toy's benefit rate to $59.63 per week. In response, Toy filed a motion to reopen, contesting Coke's right to reduce her benefits. As noted above, the ALJ denied Toy's motion and her subsequent petition for reconsideration. The Board affirmed the ALJ and it is from the Board's Opinion that Toy appeals.

STANDARD OF REVIEW

The issue raised by Toy involves interpretation of KRS 342.730(1)(c)2 and is therefore subject to *de novo* review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky.App. 1999); *see also Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky.App. 1998) (citing *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 458 (Ky. 1964)).

When interpreting a statute, the Court is to assume that the General Assembly intended the statute to mean exactly what it says. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). The Court should be primarily guided by legislative intent and legislative purpose, *City of Louisville v. Helman*, 253 S.W.2d 598 (Ky. 1952), which can be gleaned from the language of a statute. *Commonwealth v. Carroll Co. Fiscal Court*, 633 S.W.2d 720 (Ky.App. 1982). With these standards in mind, we will review the issue raised by Toy on appeal.

ANALYSIS

The only issue Toy has raised is whether KRS 342.730(1)(c)2 permitted Coke to reduce her permanent partial disability benefit rate when she returned to work at the same or greater wage but for a different employer. Toy argues that, by retaining her as an employee earning the same or greater wage, Coke was complying with the clear intent of KRS Chapter 342. However, when Coke discharged Toy, it violated the spirit of KRS Chapter 342, and it should not be permitted to benefit from Toy's initiative in obtaining

work with a different employer. Having reviewed the record, the briefs of the parties, and the well-reasoned opinion by Board Member Stanley, we disagree with Toy and adopt the following analysis from the Board's opinion.

> KRS 342.730(1)(c)2. expressly provides that:
>
> > ***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. (Emphasis added.)
>
> Hence, following a work-related traumatic event where an injured employee resumes or continues earning an average weekly wage equal to or greater than her wage at the time of injury, the injured worker upon later ceasing that employment is entitled to have her award of periodic indemnity benefits, as calculated under KRS 342.730(1)(b), doubled under § (c)2. for so long as "the period of cessation" continues. In AK Steel Corporation v. Childers, supra, the Court of Appeals recognized the enhancement created by § (c)2. as an incentive to encourage injured workers' [sic] to return to work post injury. In so ruling, the court explained the legislative policy behind KRS 342.730(1)(c)2. as follows:
>
> > When the General Assembly amended the workers' compensation statute in 2000, the method for awarding permanent partial

> disability benefits was amended to its current language, including the provision for a 2 multiplier enhancement. KRS 342.710(1) states that one of the primary purposes of Chapter 342 is to encourage an injured employee to return to work, preferably with the same employer and to the same or similar employment. The statute's provisions encourage an employer to return an injured employee to work at the same or greater wages, since an employee who cannot return to work because he is not physically able receives benefits enhanced by the 3 multiplier under KRS 342.730(1)(c) 1. However, an injured employee who is physically able but fails to return to work is limited to the unenhanced benefit under KRS 342.730(1)(b). *See generally,* Adkins v. Pike County Board of Education, 141 S.W. 387 [sic] (Ky.App. 2004). Thus, the statute provides an incentive for an injured employee who is able to return to his previous employment and able to earn the same wage or a greater wage than he earned when injured to do so. Such an employee is assured a double benefit during any period that he is not employed for whatever reason, and thus, he is compensated at an enhanced rate for having attempted to perform his previous work even if the attempt later proved to be unsuccessful.

Id. at 675 [sic].

The question then that must be answered is whether post injury the return-to-work incentive established by KRS 342.730(1)(c)2. was intended by the General Assembly to be a one-time enticement to injured employees to return to work earning the same or better wages, or more generally as a safety net effective for the duration of an award or settlement providing limited security to partially disabled workers with the expectation that they will continue to seek to maintain or improve upon their earnings through employment with successive employers if need be. Given the plain and

unambiguous language of KRS 342.730(1)(c)2., we believe the legislature intended the 2-multiplier to be not only an incentive for employees to return to work post injury, but also to provide ongoing monetary security to injured workers' [sic] with the understanding that their endeavors to remain economically productive shall be unending. Accordingly, we believe the 2-multiplier applies not only to the initial employment to which the worker returns following an injury commanding the same or better wages, but to all successive financially equivalent employments.

In this regard, we highlight the fact that KRS 342.730(1)(c)2. speaks of an employee's "return to work" generally. The phrase "return to work" is not otherwise explained within the Act. However, KRS 342.0011934) defines the term "work" as "**providing services to another** in return **for remuneration** on a regular and sustained basis **in a competitive economy.**" (Emphasis added.) On its face, therefore, the definition of "work" for purposes of the Act is not limited to a single employer or class of employers.

In line with KRS 342.0011(34), the phrase "return to work" as used in KRS 342.730(1)(c)2. is not limited to a particular employer or a single period of employment. Section (c)2. contains no language affecting the worker's right to change employers, nor does it expressly limit the application of its terms to a solitary interlude of service with a specific employer. Instead, the provision focuses on the average weekly wage earned by the employee post injury, and not on the employer in whose employment the wage is earned, not on the type of work performed as does its counterpart, KRS 342.730(1)(c)1. Instead, double benefits are mandated by § (c)2. "[d]uring any period of cessation of that employment . . . temporary or permanent," where the same or greater wages are earned. Thus by its plain language, § (c)2. contemplates potential periods of unemployment or underemployment, yet does not expressly cancel out the prospect that a partially disabled worker may change employers to seek out a higher wage. What is more, KRS 342.125(3) guarantees to either party the unfettered right to reopen a claim at any time in order to conform an award or

settlement to the requirements of KRS 342.730(1)(c)2. For these reasons, we interpret the phrase "that employment" as intended by the legislature to modify any interval of employment returned to by an injured worker during the duration of an award or settlement wherein the employee is able to command "a weekly wage equal to or greater than the average weekly wage at the time of injury." Had the General Assembly intended § (c)2. to operate as a one-time incentive solely limited to a single interlude of employment with a solitary employer, it could have expressly incorporated that limitation into the language of the provision when enacted. It did not. Hence, we find no error.

> The above ruling notwithstanding, we are troubled by the fact that Coca Cola *sua sponte* reduced Toy's benefits by one-half in contravention to the express terms of the supplemental settlement agreement without first seeking approval by an ALJ. Although the matter has not been raised on appeal, for purposes of future reference, we admonish the respondent that KRS 342.125(4) expressly provides that an employer shall not suspend benefits specified in a prior award or settlement "except upon order of the administrative law judge."

(Footnote in Board's opinion omitted.)[1]

For the above reasons, we affirm the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Theresa Gilbert
Ann F. Batterton
Lexington, Kentucky

BRIEF FOR APPELLEE:

Joel W. Aubrey
Mary E. Schaffner
Louisville, Kentucky

[1]The citation for *AK Steel Corporation v. Childers*, which is omitted from the portion of the Board's opinion cited above, is 167 S.W.3d 672 (Ky.App. 2005).