

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 1, 2019

CLAIM NO. 201677912

PC METRO BOTTLING (PEPSI)

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

LONNIE FELTNER;
AND HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. PC Metro Bottling (Pepsi) appeals from the May 23, 2019 Opinion, Award and Order and the June 25, 2019 Order on Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). The ALJ determined Lonnie Feltner is entitled to enhanced benefits pursuant to KRS 342.730(1)(c)2, which Pepsi challenges on appeal. We affirm.

Feltner was employed as a bay driver for Pepsi, which required continual lifting and stacking of containers weighing up to fifty pounds. He injured his left shoulder on June 8, 2016 and subsequently underwent surgery on November 17, 2016. Feltner remained off work until April 16, 2017, when he returned to his pre-injury position as a bay driver. However, upon his return to work, the required lifting caused Feltner significant shoulder pain and he performed his tasks at a slower pace. Because of the pain and difficulty he experienced, Feltner sought a position as an account manager, which did not require lifting. He began work as an account manager on December 3, 2017.

The ALJ awarded Feltner permanent partial disability benefits based on upon an 8% impairment rating, and determined he retains the physical capacity to work as a bay driver. The parties stipulated Feltner's pre-injury average weekly wage ("AWW") was \$1,194.61. The ALJ determined that, when Feltner initially returned to work post-injury, his AWW was \$1,237.69. After December 3, 2017, when Feltner became an account manager, the ALJ determined his AWW dropped below his pre-injury AWW.

Based on these findings, the ALJ concluded Feltner is entitled to benefits enhanced by the 2 multiplier found at KRS 342.730(1)(c)2. The ALJ reasoned Feltner initially returned to work at a wage higher than his pre-injury AWW, but then ceased earning that AWW on December 3, 2017 when he moved to the account manager position.

Pepsi filed a petition for reconsideration, arguing Feltner never "ceased" his employment and therefore, KRS 342.730(1)(c)2 was never triggered.

The ALJ denied the petition. Pepsi raises this same argument on appeal. The relevant facts underlying the issue on appeal have not been challenged, and therefore our review of the ALJ's legal conclusions is *de novo*.

KRS 342.730(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, 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.

The parties agree Feltner returned to work at an AWW greater than his pre-injury AWW, thereby satisfying the first condition of KRS 342.730(1)(c)2. The dispute is whether his employment at that AWW ever "ceased" within the meaning of the statute. Pepsi asserts Feltner has continued within its company, albeit in a different position, and therefore his employment never "ceased". It relies on Ball v. Big Elk Creek Coal Co., 25 S.W.3d 115 (Ky. 2000), wherein the claimant's post-injury AWW fluctuated, and only exceeded his pre-injury AWW for some quarters. The Supreme Court determined the ALJ was not required to award enhanced benefits for those post-injury quarters in which Ball failed to earn his pre-injury AWW.

We agree with Pepsi that enhanced benefits are awarded without regard to any fluctuations that may occur quarter to quarter, as enunciated in Ball.

Here, however, no fluctuations occurred. Since transferring to the account manager position, Feltner's AWW has never exceeded his pre-injury AWW.

We believe the relevant inquiry, then, is whether one's employment may "cease" within the meaning of KRS 342.730(1)(c)2 even if the claimant remains continually employed by the defendant. We conclude it may. The first prong of the statute requires only that the claimant return to "work at a weekly wage equal to or greater than the average weekly wage at the time of injury". The second prong of the statute, which triggers the award of enhanced benefits, is satisfied "during any period of cessation of that employment". "That employment" is clearly defined in the prior sentence as "work at a weekly wage equal to or greater than the average weekly wage at the time of injury". There is no requirement that the claimant's employment with the defendant ceases. Further, it is well established that this provision is to be liberally construed, and is triggered by any cessation of the employment, even if voluntary. *See Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015)(claimant is entitled to enhanced benefits even if the reason for cessation of employment is unrelated to the work injury).

We find no error in the ALJ's conclusions. Pepsi does not dispute there is substantial evidence to support the determination that Feltner initially returned to work at an AWW higher than his pre-injury AWW, but then earned less than his pre-injury AWW after transferring to the account manager position. The plain language of KRS 342.730(1)(c)2 requires only that Feltner's employment at an AWW higher than his pre-injury AWW ceases. There is ample evidence to support the ALJ's determination the requirements of KRS 342.730(1)(c)2 have been satisfied.

For the foregoing reasons, the May 23, 2019 Opinion, Award and Order and the June 25, 2019 Order on Reconsideration rendered by Hon. R. Roland Case are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

HON CATE POOLE	LMS
HON STEVEN GOODRUM	LMS
771 CORPORATE DRIVE	
SUITE 101	
LEXINGTON, KY 40503	

HON RONNIE SLONE	LMS
PO BOX 909	
PRESTONSBURG, KY 41653	

HON. R. ROLAND CASE	LMS
ADMINISTRATIVE LAW JUDGE	
PREVENTION PARK	
657 CHAMBERLIN AVE	
FRANKFORT, KY 40601	