WORKERS' COMPENSATION PLEADINGS FOR THE NON-COMP ATTORNEY

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Galt House Hotel
Louisville, Kentucky

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THE PRESENTERS

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REBEKKAH BRAVO RECHTER has been a member of the Kentucky Workers' Compensation Board since 2013. Prior to her appointment, Ms. Rechter worked for the Kentucky Supreme Court for ten years. She is a graduate of Johns Hopkins University and Georgetown University Law Center.

WORKERS' COMPENSATION PLEADINGS FOR THE NON-COMP ATTORNEY

Judge Chris Davis and Rebekkah Bravo Rechter

Handling your first workers' compensation claim can be daunting, but starting with a review of KRS Chapter 342 and the corresponding regulations is helpful. Free access to the Chapter and the regulations is offered on the Department of Workers' Claims website.

I. LITIGATION MANAGEMENT SYSTEM

As a preliminary matter, the Department of Workers' Claims has created an online filing platform called Litigation Management System ("LMS"). The DWC **requires** all attorneys to utilize LMS to file all pleadings. All orders and opinions are posted only on LMS.

II. PRIOR TO ACCEPTING A WORKERS' COMPENSATION CLIENT

A. Conduct an interview with the prospective client and obtain authorization for a records check.

B. All attorneys must use the LMS for all pleadings and all Orders will be posted here. Orders are not mailed to attorneys.

C. You should write to the Department of Workers' Claims requesting all prior claims information. Include claimant's name, social security number and date of birth.

D. Check medical facilities in the prospective client's home area to determine the prospective client's medical history or illnesses which may have an effect on the prospects of recovery.

E. Execute an attorney/client agreement.

F. 803 KAR 25:010 Section 6(7) requires that a motion for attorney's fees be accompanied by this signed contingency fee contract.

III. WHAT TYPES OF BENEFITS ARE AVAILABLE TO AN INJURED EMPLOYEE

A. Income Benefits for Disability and Death

1. The employee's average weekly wage (AWW) provides the basis for determining the amount of income benefits for disability and death.

2. The computation of the AWW is determined by KRS 342.740, not by the employer. The method to calculate the AWW depends on how the employee was paid – whether hourly, salary, with tips. The statute takes many different scenarios into consideration. The goal of the statute is to accurately reflect the employee's overall compensation.

3. The AWW is limited to a maximum amount set by the state. *See* KRS 342.140.

4. Income benefits for total disability, temporary or permanent (KRS 342.730) – 66-2/3 percent of employee's AWW, but not to exceed 100 percent of the State's AWW, and not less than 20 percent of the State's AWW, payable for so long as employee is disabled (lifetime).

5. Income benefits for permanent partial disability (KRS 342.730) – 66-2/3 percent of employee's AWW (but not to exceed 75 percent of State's AWW) x percentage of disability for total of 425 weeks (if 50 percent or less), or 520 weeks (if over 50 percent).

6. Types of disability.

    a. Temporary total disability (TTD).

        i. No benefits for first seven days; if disability continues for more than two weeks, then benefits payable from first day.

        ii. TTD benefits usually stopped when employee reaches maximum medical improvement ("MMI") or returns to work. MMI is when your condition has stabilized and there will likely be no further improvement. A doctor will determine when you have reached MMI.

        iii. KRS 342.0011(11)(a) defines TTD as follows: "[T]he condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." (Emphasis added). Some people are able to return to work even before their doctor has placed them at MMI. TTD benefits will end when they return to work at their regular wages, even if they are still on light duty. *See Trane Commercial Systems v. Tipton*, 481 S.W.3d 800 (Ky. 2016) (attached) for a discussion of the most recent standard to determine a claimant's entitlement to TTD benefits after a return to work.

    b. Permanent partial and permanent total.

        i. "Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating, but retains the ability to work.

        ii. "Permanent total disability" means the condition of an employee who, due to an injury, has a permanent

disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. There are some situations when permanent total disability is presumed, such as the loss of eyesight, or paralysis.

iii. The Administrative Law Judge (ALJ) will determine if the employee is permanently partially disabled or permanently totally disabled. She will take into account the employee's experience, education, training, age and physical condition to determine if the employee is no longer able to perform any type of work. The ALJ will also consider the employee's future earning potential.

7. The ALJ will also consider other factors which can increase or decrease the benefits which are paid. Benefits are increased when:

a. The employee is able to return to work – therefore, is partially disabled, not totally disabled – but is unable to return to the work he or she was performing when injured.

b. The employee returns to work at the same or greater average weekly wage.

c. The injured employee is over the age of 50 or has less than 12 years of formal education.

d. Income benefits will be increased by 30 percent if the ALJ determines the injury occurred as a result of the employer's intentional failure to comply with a safety regulation or statute. Likewise, the employee's benefits can be reduced by 15 percent if the ALJ determines the employee intentionally failed to use a safety device or to obey the employer's safety regulations.

B. Hearing Loss

1. No income benefits for loss equating to less than 8 percent whole body impairment under AMA *Guides*. The constitutionality of this provision is currently on appeal to the Kentucky Supreme Court. *See Napier v. Enterprise Mining Company*, 2018 WL 1439998 (Ky. App. Mar. 23, 2018) (attached) for the Court of Appeals decision which is currently pending review.

2. Income benefits under KRS 342.730 for impairment over 8 percent.

3. Rebuttable presumption of work-relatedness if audiogram or other tests reveal loss pattern compatible with that caused by noise exposure and employee demonstrates history of repetitive work place noise.

4. Impairment ratings for Hearing loss cannot be combined with impairments for injury, or occupational disease. KRS 342.730(1)(e).

C. Other Types of Benefits beyond Income Benefits

1. Death benefits.

a. Death benefits are provided in the unfortunate case when an employee dies from a work-related injury. The benefit is for those persons dependent upon the deceased. KRS 342.750: spouse, children, statutorily defined dependents.

b. Income benefits for death are set by statute; KRS 342.750.

c. Income benefits to survivor/dependent shall be paid at 50 percent of the rate of the award. If the widow/widower remarries, then he/she will receive two years' worth of benefits in lump sum.

d. In addition to other benefits, a one-time death benefit is provided pursuant to KRS 342.750(6).

2. Medical benefits.

a. Employer is required to pay for the cure and relief from the effects of an injury or occupational disease within thirty (30) days of receipt of statement of services.

b. The employer may file a motion to reopen to challenge the medical bills within 30 days of receipt of the bills.

c. Payment of medical expenses is required.

d. Employee has the right to select treating doctor and medical facility as long as the treatment is reasonable and necessary. There is a procedure for employer to request authority to dictate medical provider.

e. Medical providers/injured workers must present statements for services within 45 days of the date services were provided.

3. Vocational rehabilitation.

IV. PRELIMINARY PLAINTIFF'S PLEADINGS

A. To initiate an injury claim, a claimant must file a Form 101, a Form 104, a Form 105 and a Form 106. In some claims, a Form 102 and/or Form 103 will be filed.

B. Form 101 – Application for Resolution of Injury Claim

This form calls for specific information. It should be completed carefully and be well-worded, as this is the first piece of information reviewed by the ALJ and sets the tone for how the claim will be practiced.

C. Form 102 – Application for Resolution of Occupational Disease Claim.

The claimant must also file one medical report supporting the existence of the occupational disease.

D. Form 103 – Application for Resolution of Hearing Loss Claim

The claimant must also file one medical report describing the Hearing loss.

E. Once a claim has been initiated by the filing of a Form 101, 102, and/or 103, a scheduling order will be issued by the Department of Workers' Claims.

V. PRELIMARY DEFENDANT'S PLEADINGS

A. Form 111

Once the plaintiff has initiated proceedings with the filing of a Form 101,102 and/or 103, the employer must respond with a Form 111. If no Form 111 is filed, all of the allegations contained in the Form 101,102 or 103 are deemed admitted. The employer should state in detail why the claim is being denied in the Form 111.

B. Special Defense

If the employer wishes to assert a special defense, it must do so within 45 days of the scheduling order being issued. Special defenses include: unreasonable failure to follow medical advice, failure to comply with safety laws, false statement on an employment application, voluntary rejections of the Workers' Compensation Act, voluntary intoxication, self-infliction of injury, refusal to accept rehabilitative services, expiration of statute of limitations or statute of repose.

VI. PRESENTATION OF EVIDENCE

A. The scheduling order will set forth the proof time which is 60 days for the Plaintiff, 30 days for the Defendant, and 15 days for Plaintiff's rebuttal.

B. Counsel should take the Plaintiff's deposition and other lay depositions during the proof time. Plaintiff's counsel may take the Plaintiff's deposition, but standard practice is for defense counsel to take it. Non-medical evidence may only be introduced by deposition or Agreed Order. You may attempt to introduce lay evidence without a deposition but if an objection is made your evidence would be inadmissible.

C. Medical evidence introduced by Notice of Filing. If the evidence includes an impairment rating or is otherwise included on a Form 107 (or reasonable facsimile) within the body of the Notice of Filing it should include the physician's DWC qualifications number and a very brief summary of the most relevant information in the report (if the injury is work-related, impairment rating and opinion as to the ability to return to work). If the doctor does not have a DWC qualifications number their CV should be submitted with the report. Treatment medical records may be introduced by Notice of Filing and do not require a DWC number or CV. Treatment records should be screened carefully for relevancy and duplication. Workers' Compensation ALJs do not have staff attorneys and the vast majority of final decisions are written Opinions. If the ALJ has to review hundreds and hundreds of pages of medical records when many are not relevant or are duplicative, you take the risk that something relevant and important to your case will be missed.

D. If you intend to introduce any video, including surveillance, you musttake the deposition of a witness who can authenticate it. Any evidence that cannot be submitted via the LMS system must be sent to the DWC in Frankfort and they will forward it to the ALJ.

E. 803 KAR 25:010 provides that discovery is to be taken in accordance with CR 26 to 37 with the exception of CR 27, 33 and 36. Typically discovery is taken through oral deposition and Request for Production of Documents. Neither Requests nor Responses need to be served on the Department or the ALJ and neither constitute admissible evidence. However, all depositions in workers' compensation cases do become evidence of record. Your court reporter is responsible for filing it onto LMS. If you have an objection to a question or answer at a deposition you must make the objection at the deposition and via written Motion request a ruling for the ALJ on your objection after the deposition.

F. In Re-Opening, either for worsening of condition or a medical dispute, any evidence in the prior record only becomes evidence in the Re-Opening if the party who wishes it to be considered files a Notice of Designation setting for what the evidence is and when it was originally filed.

VII. BENEFIT REVIEW CONFERENCE

A. A Benefit Review Conference (BRC) is an informal conference designed to discuss settlement of the claim, enter into a list of stipulations and contested issues and assign a Hearing date, and to discuss any other outstanding or unusual issues.

B. Prior to the BRC the parties should have completed discovery and the filing of evidence. If a party has not completed or does not believe that discovery and/or the filing of evidence can be completed prior to the BRC they should file a Motion, no less than 10 days prior to the BRC, requesting an Extension of Time. The Motion should set forth the cause for the delay, what discovery/proof is still sought and an exact date that the extension is being requested to. Counsel may request either that the BRC be

rescheduled or held, depending on the outstanding discovery/proof and the length of the requested extension. The regulations hold that each successive request for an extension should be harder to justify.

C. In addition to the completion of discovery/proof prior to the BRC the parties should complete a Notice of Disclosure and Witness List which would include a brief summary of what each witness has or will testify to (including medical reports/records as "witnesses") and a list of stipulations and contested issues. Prior to the BRC the Plaintiff should have provided to the Defendant a copy of all unpaid medical bills. Prior to the BRC the Plaintiff should have made at least one settlement demand in writing and the Defendant should have made at least one settlement offer in writing.

D. The BRC itself is a relatively informal proceeding. They take place at regional Hearing sites with general courtroom decorum at specific times. However, other than the list of stipulations and contested issues there is no written record and it is inappropriate to later cite to anything said at the BRC as if it were evidence or an admission. Depending on the ALJ the allotted time for the BRC is 15-30 minutes. The parties should be prepared to have meaningful settlement negotiations at the BRC. A person with the authority to approve any settlement should either be present or available by phone. The parties should be prepared to briefly explain their position on settlement to the ALJ. Again, as there is no written record, a lengthy presentation is not necessary or expected.

VIII. HEARING

A. Typically, the Hearing is scheduled two to six weeks after the BRC. If it is scheduled within this time frame it should be conducted at the same regional Hearing site. If it is determined at or after the BRC that for whatever reason the case is not ready for a Hearing there is no guarantee that the Hearing will take place that the same Hearing site or that the ALJ will have the same flexibility to work with counsel's schedule.

B. The Hearing takes place before the ALJ. Testimony is transcribed by a court reporter in written format. There is no video record. The Rules of Evidence apply to all workers' compensation Hearings but typically the objections that are raised are either relevancy or hearsay.

C. Typically, Plaintiffs are the only witnesses at a Hearing. The Hearing is an opportunity to update the Plaintiff's testimony since her deposition or emphasize a particular point(s). DO NOT essentially repeat the Plaintiff's discovery deposition. However, it is not unusual for a Plaintiff's loved one to testify as to the Plaintiff's condition before and after the injury or have an employer representative testify as to the Plaintiff's actual job duties or regarding a safety violation. Remember, all of this testimony can done by deposition prior to the Hearing. DO NOT use the Hearing as an opportunity to take an endless stream of testimony from multiple witnesses for any reason.

D. The Hearing is another chance to discuss settlement.

E. Typically, Hearings are scheduled for 45 minutes but frequently do not take that long. If you expect that the Hearing will take longer you should notify the ALJ when the Hearing is scheduled. If your (cross)-examination of witnesses is repetitive, rambling, irrelevant or argumentative you will probably be given some leeway, but you can expect that eventually the ALJ will intervene, so it is in your interest to address your most important points right way or you may miss the opportunity.

F. In most cases oral arguments are not made at the Hearing. Some ALJs may require them but will notify prior to the date of the Hearing. Likewise, it is highly unusual to have a decision on the record be entered at the Hearing. You should advise your clients that it can take up to 60 days post-Hearing to receive a decision.

IX. ALJ'S OPINION, ORDER AND AWARD

A. At the Hearing the ALJ should provide you with a deadline to submit a written post-Hearing brief. No written exhibits should be attached to the brief other than relevant case law. The maximum length of the brief is 15 pages unless otherwise previously stated. If you feel the need to file a longer brief you must ask for permission in a written Motion.

B. Following the Hearing the ALJ has 60 days to provide his written Opinion, Order and (possibly) Award.

C. If you take issue with anything in the ALJ's Opinion or wish to preserve your appellate rights, the appropriate pleading to file is a Petition for Reconsideration. This must be filed within 10 days of the date of the Opinion. The ALJ has 20 days to rule on your Petition. Successive Petitions on the same issue DO NOT extend your appeals deadline. Typically, the only time second or later Petitions extend your appeals deadline if is the Order on the prior Petition both changed the Opinion AND contains a new error not contained within the original Opinion.

D. Your deadline to file an appeal to the Workers' Compensation Board is 30 days from the date of the Order on Reconsideration. The Board is a three-person panel to whom all appeals must be taken before the case can then be appealed to the Court of Appeals.

X. FORM 110, AGREEMENT AS TO COMPENSATION (SETTLEMENT AGREEMENT)

A. The Form 110 is the document by which claims are settled. All settlements must be approved by an ALJ. For those claims in which a Form 101 has been filed the settlement must be approved by the ALJ to whom the claim is assigned. Pre-litigation Form 110s must be served on the Frankfort Motion Docket for approval by the Chief Administrative Law Judge.

B. The Form 110 is generally self-explanatory. However, for each right waived valuable consideration of an actual dollar amount must be given. Reciting that the right was waived in exchange for any other consideration (*i.e.*

medical benefits are waived by the Plaintiff in return for the Defendant waiving subrogation rights) is insufficient.

C. When entering an amount, either weekly or in lump sum for the amount the income benefits settled, it is acceptable to simply provide the final number and parenthetically note it is a compromise. But if you show your work for the entire calculation it must be correct.

D. The Form 110 can only include matters covered by KRS Chapter 342. This includes not only what is include in the checklist on the form but can also include safety violations, subrogation, additional provisions for the payment of attorney's fees and possibly other waivers. It cannot include employment resignations, the payment of litigation costs or any other matter not included within KRS Chapter 342.

XI. APPEALS

A. A Notice of Appeal to the Workers' Compensation Board must be filed no less than 30 days from the Order on Reconsideration, or, if no Order on Reconsideration was issued, 30 days from the date of the Opinion. The regulations regarding your appeal to the Board are found at 803 KAR 25:010 Section 22.

B. Appeals to the Court of Appeals and the Supreme Court are governed by the Civil Rules. Workers' compensation claims have a right of appeal to the Kentucky Supreme Court restricted only by a good faith requirement.

XII. ATTORNEY FEE MOTIONS

A. Within 30 days of an Opinion becoming Final both Plaintiff and Defendant's counsel must file before the ALJ a Motion for Attorney Fee. Plaintiff's counsel's Motion MUST be served on the Plaintiff as the Plaintiff is the only party with standing to object to the Motion and include a copy of an executed Form 109 and the attorney-client contract. All Fee Motions must include an itemization of services rendered and time expended. The per case cap on the fee is $18,000. The formula for the calculation of fees is found in KRS 342.320.

B. Failure to timely file your Motion may result in the Motion not being considered and any fee taken or paid being unlawful.

C. The Fee Motion is just that, a Fee Motion; it cannot address any matters not covered by KRS Chapter 342 including litigation costs. That is a separate matter between the attorney and the client.

D. If as a Plaintiff's attorney you believe that you have performed valuable work for the Plaintiff, but your representation is terminated prior to a final recovery you should file an Attorney Lien with the same information as an Attorney Fee Motion.

XIII. MISCELLANEOUS

A. The workers' compensation Bar has a reputation for being congenial. Objections to Motions for Extension of Proof Time are almost unheard of and certainly not if they would not materially delay the resolution of the claim. Objections to questions based on "form" or "leading" are likewise rare. Objections to relevancy usually only take place after a particular line of questioning has extended a significant period of time.

B. Workers' compensation is unlike any other form of law and probably closest to social security law. While it is true that it can seem daunting at first it can be a worthwhile endeavor.

C. All of the workers' compensation basics can be found in the statute book, including statutes, regulations and some case law citations.

2018 WL 1439998
Only the Westlaw citation is currently available.

Court of Appeals of Kentucky.

Herman NAPIER, Appellant
v.
ENTERPRISE MINING COMPANY, Hon. William J. Rudloff, Administrative Law Judge; and Workers' Compensation Board, Appellees
and
Robbie Hatfield, Appellant
v.
McCoy-Elkhorn Coal Co., Inc.; Hon. Jane Rice Williams, Administrative Law Judge; and Workers' Compensation Board, Appellees
and
Paul Feltner, Appellant
v.
TECO/Perry Co. Coal; Hon. Grant Roark, Administrative Law Judge; and Workers' Compensation Board, Appellees

NO. 2014-CA-001473-WC, NO. 2015-CA-000126-WC, NO. 2015-CA-001951-WC
|
MARCH 23, 2018; 10:00 A.M.

Synopsis
Background: Three workers' compensation claimants sought review of Workers' Compensation Board orders denying their permanent partial disability (PPD) benefits for hearing loss based on application of the statutory 8 percent impairment rating threshold. Appeals were consolidated.

Holdings: The Court of Appeals, Nickell, J., held that:

statute precluding PPD compensation for hearing loss claimants not meeting the 8 percent threshold treated those claimants differently under the equal protection clause;

hearing loss claimants not meeting the 8 percent threshold were similarly situated to other claimants;

the differing treatment of claimants was not rationally related to a legitimate state interest, and thus violated equal protection.

Vacated and remanded.

PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD, ACTION NOS. WC-13-00451, WC-13-01486, WC-13-01487 AND WC-15-00058

Attorneys and Law Firms

BRIEF FOR APPELLANT, HERMAN NAPIER: McKinnley Morgan, London, Kentucky.

BRIEF FOR APPELLANT, ROBBIE HATFIELD: C. Phillip Wheeler, Jr., Pikeville, Kentucky.

BRIEF FOR APPELLANT, PAUL FELTNER: Timothy J. Wilson, Lexington, Kentucky.

BRIEF FOR APPELLEE, ENTERPRISE MINING COMPANY: H. Brett Stonecipher, Aziza H. Ashy, Lexington, Kentucky.

BRIEF FOR APPELLEE, MCCOY ELKHORN COAL COMPANY: Timothy C. Feld, Lexington, Kentucky.

BRIEF FOR APPELLEE, TECO/PERRY COUNTY COAL: Sarah K. McGuire, Pikeville, Kentucky.

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND NICKELL, JUDGES.

OPINION

NICKELL, JUDGE:

These three consolidated appeals arise from similar facts and procedural histories. They present a common equal protection constitutional challenge to KRS[1] 342.7305(2). The statute authorizes compensation for occupational hearing loss as provided in KRS 342.730, "except income benefits shall not be payable where the binaural[2] hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%)" pursuant to the AMA *Guides.*[3]

In the interest of judicial economy, we have consolidated the three cases for review and resolution in a single Opinion. Following careful review of the records, the briefs and the law, we hold KRS 342.7305(2) violates equal protection guarantees established in the Fourteenth Amendment to the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. In particular, we hold the Supreme Court of Kentucky's decision in *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011), is dispositive. Therefore, we vacate and remand each case for further proceedings and entry of orders consistent with this Opinion.

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[1] Kentucky Revised Statutes.

[2] Involving both ears.

[3] *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, Linda Cocchiarella & Gunnar B.J. Anderson, American Medical Association (AMA Press, 2000).

I. FACTUAL AND PROCEDURAL HISTORY

A. THE NAPIER CLAIM

Herman Napier (Napier) filed an Application for Resolution of Hearing Loss Claim (Form 103), alleging onset of occupational hearing loss due to repetitive exposure to loud noise in the workplace.[4] His last employer, Enterprise Mining Company (Enterprise), denied the claim.

In his deposition, Napier testified he has a high school education, with no specialized training or military experience, and has labored as an underground miner since 1988, performing various mining jobs. He was most recently employed at Enterprise, where he last worked on February 4, 2012.

At the hearing, Napier testified he had worked around noisy machinery and heavy equipment 40 to 60 hours per week throughout his 24 year career, but had always worn mandated ear protection. He had also worn ear protection when hunting or riding a motorcycle. Due to worsening hearing difficulty, he sought testing at a Beltone Hearing Care Center, learning for the first time he had binaural hearing loss and required hearing aids. Napier emphasized the necessity of good hearing to the individual miner and coworkers when engaging in subterranean mining operations. He explained a miner "could get covered up" if unable to hear subterranean "cracking," and would pose a risk to himself or others if unable to hear instructions or warnings over the din of underground equipment.

Dr. Raleigh Jones performed a University Medical Evaluation (UME), noting Napier reported worsening hearing loss dating back four to five years. Medical findings were compatible with hearing loss associated with extended workplace exposure to hazardous noise. Dr. Jones diagnosed sloping binaural high frequency sensorineural hearing loss, opining it was causally related to repetitive exposure to hazardous noise over an extended period of employment. He assigned a 4 percent impairment rating, recommended binaural hearing aid amplification, and restricted Napier to working with ear protection.

Due to Dr. Jones' assignment of a 4 percent impairment rating, the ALJ sustained Napier's motion at the hearing to add a constitutional equal protection challenge to KRS 342.7305(2) as a contested issue. The Attorney General of Kentucky received notice of the constitutional challenge pursuant to KRS 418.075.

In the Opinion and Order, the ALJ found Napier had sustained a work-related, noise-induced hearing loss due to many years of working as an underground coal miner. Declaring KRS 342.7305(2) unconstitutional, the ALJ awarded permanent partial disability (PPD) income benefits under KRS 342.730 based on Napier's 4 percent impairment rating, saying:

> [b]ased upon ... the holding of the Kentucky Supreme Court in the *Vision*

[4] Napier had also filed a separate Application for Resolution of Injury Claim (Form 101), alleging a work-related back injury and a separate Application for Resolution of Coal Workers' Pneumoconiosis Claim (Form 102), alleging a work-related onset of that disease, but because these claims were already under submission before a different trier, the Administrative Law Judge (ALJ) overruled a motion to consolidate those claims with Napier's hearing loss claim.

> *Mining* case, I make the determination KRS 342.7305(2) is unconstitutional, in that it requires plaintiffs, such as Mr. Napier, to meet a certain impairment rating threshold substantially different than the requirement in other types of injury claims and violates Mr. Napier's constitutional guarantee of due process of law, and further that the legislature's requirement of the 8% threshold has no rational basis in fact and that said requirement is discriminatory, since Mr. Napier is treated differently than injured workers who sustain a single traumatic injury or other types of cumulative traumas. The bottom line is that Mr. Napier's constitutional guarantee of due process is being violated, and that said statute is unconstitutional.

Enterprise petitioned for reconsideration, asserting the ALJ erred in awarding PPD income benefits in contradiction of KRS 342.7305(2) because an ALJ lacks authority to determine statutory constitutionality. Upon review, the ALJ agreed and issued a revised Opinion and Order excluding any PPD income benefits.

Napier sought review from the Workers' Compensation Board (Board). Citing *Blue Diamond Coal Co. v. Cornett*, 300 Ky. 647, 189 S.W.2d 963 (1945), the Board held neither it nor an ALJ was authorized to determine statutory constitutionality and affirmed the amended Opinion and Award. Napier appealed.

B. THE HATFIELD CLAIM

Robbie Hatfield (Hatfield) filed a Form 101, alleging a July 2, 2012, work-related ear injury at McCoy-Elkhorn Coal Company, Inc. (McCoy-Elkhorn), when a piece of hot slag, or molten waste material, landed in his left ear canal while he was welding, burning and perforating his left eardrum. He also filed a Form 103, alleging occupational hearing loss due to long-term exposure to loud workplace noise, with the last exposure occurring at McCoy-Elkhorn. McCoy-Elkhorn denied both claims. The ALJ consolidated the claims.[5]

In his deposition, Hatfield testified he was a high school graduate, had completed one year of vocational training, and was a certified welder. He had been employed since 1992 in the mining industry as an above-ground maintenance and utility worker, which required operation of welders, torches, other tools and equipment. Following his work-related ear injury, he underwent two corrective ear surgeries and several courses of cauterization treatments with no noticeable improvement. He continued to have difficulty listening to television programs, hearing telephone discussions, and distinguishing conversation around noise and crowds of people. He had missed no work due to his ear injury, and had continued working at McCoy-Elkhorn until September 2013, when he was laid off.

At the hearing, Hatfield testified he had suffered ongoing intermittent pain and constant humming in his left ear in addition to the hearing loss. About five months after being laid off by McCoy-Elkhorn, he had found work in a similar position at another mine. Work restrictions included use of ear protection, including ear plugs, and avoiding any foreign substances entering his ear canal.

[5] At the first benefit review conference (BRC), the ALJ sustained Hatfield's motion to include a work-related psychological impairment, and granted all parties additional time to present further proof. Because Hatfield has not appealed the ALJ's subsequent dismissal of the psychological claim, we will not reference it further.

Dr. William Parell, a board-certified otolaryngologist, examined Hatfield at the request of McCoy-Elkhorn. Medical history and records review revealed a work-related significant left tympanic membrane perforation, an audiogram evidencing conductive hearing loss, an unsuccessful tympanoplasty surgery, development and resolution of post-operative Bell's palsy, and a second audiogram evidencing "mild to profound left sensorineural hearing loss" with a conductive component. Dr. Parell recommended the tympanoplasty surgery be repeated to repair the left eardrum and eliminate any conductive component of the hearing loss. Even if successful, however, he recommended hearing aids for post-operative amplification.

Dr. Barbara A. Eisenmenger, a clinical audiologist, performed a UME. Complaints included constant tinnitus; sporadic episodes of sharp ear pain; dizziness and loss of balance when rising from a seated position; difficulty understanding others, especially when background noise was present; and, difficulty hearing telephone conversations and television programs. She diagnosed a tympanic membrane perforation in the left ear resulting in moderate-to-profound mixed hearing loss, poor word recognition greater than would be expected for an individual of Hatfield's age, and decreased communication skills. She opined the work-related traumatic injury was the primary cause of Hatfield's hearing loss and assigned a 4 percent impairment rating. She recommended use of ear protection when exposed to loud noise, but cautioned against any hazardous work activities impeded by utilization of such devices. She doubted the condition was amenable to further medical or surgical intervention, but recommended hearing aids and other assistive listening devices.

Dr. Thomas Huhn, board-certified in emergency medicine, performed an independent medical examination (IME) at the request of McCoy-Elkhorn. Complaints included "infrequent and not very intense" left ear pain, constant buzzing, decreased hearing with background noises, inability to discriminate intended noises from background noises, and occasional balance issues. Following medical records review and examination, he diagnosed "a minor direct trauma to the left ear," or "thermal injury," which perforated the tympanic membrane, resulting in left-sided hearing loss. Maximum medical improvement (MMI) had been reached six weeks after the second ear surgery, no further corrective ear surgery was indicated, and over-the-counter anti-inflammatory medications were recommended for any intermittent ear pain. He opined the condition was caused by the reported work-related traumatic event, but assigned no impairment rating for the tympanic membrane perforation itself. He deferred to Dr. Eisenmenger for assessment of impairment due to actual hearing loss.

Hatfield's constitutional equal protection challenge to KRS 342.7305(2) was listed by the ALJ as a contested issue at a BRC held prior to the hearing. The Attorney General of Kentucky was provided notice of the constitutional challenge pursuant to KRS 418.075.

In the Opinion and Order, the ALJ awarded Hatfield medical benefits under KRS 342.020(1) for the cure and relief of his occupational hearing loss, but denied PPD income benefits under KRS 342.7305(2) because he had failed to prove an impairment rating of 8 percent or greater. Citing *Cornett,* the ALJ held she lacked authority to address Hatfield's constitutional equal protection challenge. She denied Hatfield's subsequent petition for reconsideration.

On appeal, the Board affirmed the ALJ's conclusion that Hatfield was barred by KRS 342.7305(2) from an award of PPD income benefits. Though recognizing Hatfield's constitutional challenge, the Board held neither it nor the ALJ, as administrative tribunals, possessed authority to determine the constitutionality of a legislative statute. Hatfield appealed.

C. THE FELTNER CLAIM

Paul Feltner (Feltner) filed both a Form 103, alleging the onset of an occupational hearing loss due to "daily and continuous exposure to noise," and a Form 101, alleging work-related upper back, neck, and bilateral shoulder injuries arising when he tried to untangle a knot from a miner cable. TECO/Perry Co. Coal (TECO) denied both claims, which were thereafter consolidated by the ALJ.

In his deposition, Feltner testified he is a high school graduate with no vocational or specialized training; had worked 34 years in the coal mining industry, most recently employed by TECO; had worked primarily as an underground bolt machine operator; and, had been constantly exposed to loud noise and the "roaring" of equipment, but had routinely worn ear protection. He denied any prior ear infections, injuries, or need for hearing aids. He had drawn temporary total disability (TTD) income benefits due to work-related back, neck, and shoulder injuries before returning to light work duties, but ultimately retired due to the severity of his permanent restrictions.

A UME was performed by Dr. Brittney Brose, a clinical audiologist. She recorded a medical history of long-term, repetitive occupational hazardous noise exposure with progressive binaural hearing loss. Ear protection had been worn, but hearing loss had become increasingly noticeable over the most recent seven to eight years. Though Feltner self-described mild to moderate hearing loss, objective auditory testing revealed severe hearing loss in his right ear, with milder findings sloping to a profound hearing loss in his left ear. Dr. Brose testified this degree of hearing loss was greater than normally expected in a 53-year-old individual, and was consistent with long-term noise exposure. Testing also revealed a significant perceived hearing handicap, with diminished communication abilities.

Based on medical history and examination, Dr. Brose opined Feltner's hearing loss was caused by long-term repetitive exposure to occupational hazardous noise, his condition was not amenable to further medical treatment or surgery, he required use of prescribed hearing aids and other assistive listening devices, and he qualified for a 5 percent impairment rating. She explained his serious to profound binaural hearing loss means he can hear speech but cannot understand conversations with clarity due to significant loss in perceiving high pitches, making it difficult to understand telephone, radio, and television communications. She emphasized the advisability of restricting Feltner from work environments exposing him to further occupational hazardous noise, explaining no ear protection device – not even custom ear plugs – would completely protect him from further traumatic ear injury and hearing loss. Even if using workplace ear protection, she recommended he be restricted from jobs incompatible with use of such sound-muffling devices due to safety concerns.
In addressing Feltner's minimal hearing loss impairment rating, Dr. Brose testified his treatment, limitations, and occupational restrictions would have been the same regardless of whether he had qualified for a 5 percent or an 8 percent impairment rating. She opined his impairment rating inadequately evinced his substantial functional loss and

occupational restrictions, which are likely to limit or preclude wide-ranging work activities and employment opportunities. Specifically, she noted hearing loss significantly limits or precludes working in underground and surface mining operations, road construction, manufacturing, and other hazardous jobs due to the necessity for communication and attentiveness to workplace dangers. She also explained job opportunities for the hearing impaired are substantially reduced because employers are reluctant to implement workplace accommodations and are hesitant to hire workers perceived to present increased jobsite risks.

Moreover, Dr. Brose opined varying levels of hearing loss can impact individuals differently, and divergent hearing loss impairment ratings may not accurately reflect actual comparative functional difficulties and workplace impediments experienced by particular individuals. She noted persons qualifying for a low hearing loss impairment rating may actually experience equal or greater impacts on their ability to engage in normal activities of daily living and occupational restrictions than persons qualifying for higher hearing loss impairment ratings. She also stated individuals qualifying for high impairment ratings related to traumatic injuries to other organs, body parts and systems, may actually experience fewer functional effects and occupational constraints than others with low hearing loss impairment ratings. For example, she noted traumatic spinal cord injuries typically qualify for much higher impairment ratings than ear injuries producing hearing loss, but often offer a better prognosis for improvement or full recovery with less significant permanent functional losses and resulting occupational restrictions.

Though Feltner's back, neck, and shoulder injury claims were settled, two BRC orders listed his constitutional challenge to the impairment rating threshold in KRS 342.7305(2) as a contested issue. The Attorney General of Kentucky was provided notice of the constitutional challenge pursuant to KRS 418.075. A formal hearing was waived, and Feltner's occupational hearing loss claim was submitted on the record.

The ALJ entered an Opinion and Award finding Feltner had sustained a 5 percent impairment rating for hearing loss caused by longtime exposure to occupational noise, with the last exposure occurring while he was employed by TECO. Lacking authority to determine constitutional challenges, the ALJ awarded medical benefits pursuant to KRS 342.020, but denied income benefits based on KRS 342.7305(2)'s impairment rating threshold.

The Board affirmed the ALJ's decision, agreeing Feltner's claim for PPD income benefits was controlled by KRS 342.7305(2), and neither it nor an ALJ possessed jurisdictional authority to review constitutional challenges to statutes. Feltner appealed.

II. ANALYSIS

Napier, Hatfield, and Feltner (Appellants) each suffered work-related traumatic ear injuries resulting in significant hearing loss sufficient to qualify for impairment ratings pursuant to the AMA *Guides.* All filed timely claims and obtained awards of medical benefits pursuant to KRS 342.020(1). All were blocked from receiving awards of PPD income benefits because their impairment ratings were less than the 8 percent impairment rating threshold contained in KRS 342.7305(2). All are prevented from filing a civil action seeking damages to compensate for lost earning capacity and occupational disability due to the exclusive liability provision of KRS 342.690(1), and are therefore left with no remedy. *State Farm Mut. Auto Ins. Co. v. Slusher*, 325 S.W.3d 318, 323 (Ky. 2010); *Shamrock Coal Company,*

Inc. v. Maricle, 5 S.W.3d 130, 134 (Ky. 1999).

Appellants have each raised constitutional equal protection challenges asserting KRS 342.7305(2) arbitrarily imposes different treatment on them and other members of their class and subclass for awards of PPD income benefits. First, all allege the statute arbitrarily treats them differently than similarly situated workers with other traumatic injuries who may receive awards of PPD income benefits under KRS 342.730 by simply qualifying for *any* impairment rating. Second, all allege KRS 342.7305(2), itself, arbitrarily treats them and other members of their subclass differently than all other similarly situated hearing loss claimants who are authorized to receive PPD income benefit awards by satisfying the statute's 8 percent impairment rating threshold, even though all impairment-ratable hearing loss claimants purportedly endure the same or similar functional losses, diminution of daily activities, physical and social limitations, medical treatment modalities, and occupational restrictions. All argue the Supreme Court of Kentucky's decision in *Vision Mining* is dispositive.

A. STANDARD OF REVIEW

The Supreme Court of Kentucky has provided a succinct summary of the standard for appellate review of constitutional equal protection challenges to legislatively enacted workers' compensation statutes in *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39 (Ky. 2009). There, the Court held:

> [t]he 14th Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. Workers' compensation statutes concern matters of social and economic policy. Statutes are presumed to be valid and those concerning social or economic matters generally comply with federal equal protection requirements if the classifications that they create are rationally related to a legitimate state interest. Sections 1, 2, and 3 of the Kentucky Constitution provide that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with Kentucky equal protection requirements if a "reasonable basis" or "substantial and justifiable reason" supports the classification that it creates. Analysis begins with the presumption that legislative acts are constitutional.

Id. at 42-43 (citations omitted). *See also Vision Mining*, 364 S.W.3d at 465-69.

The purpose of the Act "is to compensate workers who are injured in the course of their employment for necessary medical treatment and for a loss of wage-earning capacity, without regard to fault," thereby enabling them "to meet their essential economic needs and those of their dependents." *Adkins v. R & S Body Co.*, 58 S.W.3d 428, 430-31 (Ky. 2001) (citations omitted). The long-established general rule of construction for applying the Act is its statutes must be liberally construed to effect their humane and beneficent purposes. *Oaks v. Beth-Elkhorn Corporation*, 438 S.W.2d 482, 484 (Ky. 1969). Even so, courts must interpret the law to do justice to both employer and employee. *Fitzpatrick v. Crestfield Farm, Inc.*, 582 S.W.2d 44, 47 (Ky. App. 1978).

Analysis of Appellants' constitutional equal protection challenge to the KRS 342.305(2)'s impairment rating threshold in KRS 342.7305(2) is three-pronged. First, we must determine whether the statute establishes differing treatment for hearing loss claimants

with less than an 8 percent impairment rating than is provided other traumatic injury and hearing loss claimants. Second, we must determine whether hearing loss claimants with less than an 8 percent impairment rating are in all relevant respects the same as other traumatic injury and hearing loss claimants. And third, we must determine whether any differing treatment of similarly situated claimants is rationally related to achieving a legitimate state interest.

B. DIFFERING TREATMENT

Our review begins by determining whether KRS 342.7305(2) segregates Appellants and other hearing loss claimants into a separate class and subclass of injured workers by imposing different statutory treatment for awards of PPD income benefits. We hold it does.

In enacting KRS Chapter 342, known as the Workers' Compensation Act (Act), "the legislature set forth a comprehensive scheme for compensating employees injured on the job ... for medical expenses, rehabilitation services and a portion of lost wages." *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 733 (Ky. 1983). KRS 342.0011(1) defines a compensable "injury" as:

> any work-related traumatic event or series of traumatic events, including cumulative trauma, arising in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical finding.

1. KRS 342.730(1)(b)

KRS 342.730 governs the extent and duration of awards of disability income benefits. KRS 342.730(1)(b) and (c) sets forth the procedure for determining PPD income benefits for work-related traumatic injuries and occupational diseases. KRS 342.0011(11)(b) defines PPD as "the condition of an employee who, due to an injury, has a permanent *disability* rating but retains the ability to work." (Emphasis added). Under KRS 342.730(1)(b), the permanent disability rating is derived by multiplying the injured employee's

> permanent *impairment* rating caused by the injury or occupational disease as determined by the "Guides to the Evaluation of Permanent Impairment"

by the statute's graduated disability factor scale. (Emphasis added).

According to the AMA *Guides*, impairment is a loss, derangement, or dysfunction of "any body part, organ system, or organ function," and permanent impairment ratings are medically determined

> estimates that *reflect the severity of the medical condition* and the degree to which the impairment decreases an individual's ability to perform common activities of daily living, excluding work.

AMA *Guides*, at 2, 4 (emphasis added). Thus, a permanent impairment rating is only assigned when there has been a medical determination of a significant functional consequence to a body part, organ system or organ function limiting the performance of common activities of daily living. AMA *Guides*, at 5.

In enacting KRS 342.730(1)(b), the legislature understood impairment and disability are not synonymous with the former relating to loss of physiological function and the latter relating to loss of occupational capability. *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181, 183 (Ky. 2003); *Cook v. Paducah Recapping Service,* 694 S.W.2d 684, 687 (Ky. 1985); *Newberg v. Garrett*, 858 S.W.2d 181, 185 (Ky. 1993).

> As defined in KRS 342.0011(35) and (36), the term "permanent impairment rating" refers to "the percentage of impairment caused by the injury" as determined by the *Guides* and the term "permanent disability rating" refers to the product of the permanent impairment rating selected by the ALJ and the corresponding factor found in KRS 342.730(1)(b).

Tudor v. Industrial Mold & Mach. Co., Inc., 375 S.W.3d 63, 66 (Ky. 2012). The AMA *Guides* explain permanent impairment ratings "were designed to reflect functional limitations and not intended to measure disability," and are "only one aspect of disability determination," which "also includes information about the individual's skills, education, job history, adaptability, age, and environment requirements and modifications." AMA *Guides*, at 4, 5, 8-9, and 13.

Under KRS 342.730(1)(b), the ALJ's "finding of a permanent impairment rating ... is *a threshold issue* that forms the basis of an award." *LKLP CAC Inc. v. Fleming*, 520 S.W.3d 382, 387 (Ky. 2017) (emphasis added). The statute's graduated disability factor scale then provides an objective method for the ALJ to calculate PPD income benefits under which compensation "is the product of the worker's average weekly wage, AMA impairment, and a statutory factor." *Fawbush v. Gwinn*, 103 S.W.3d 5, 11 (Ky. 2003). After the ALJ has found a permanent impairment rating and determined the corresponding permanent disability rating under KRS 342.730(1)(b),

> KRS 342.730(1)(c) provides benefit multipliers based on the worker's physical capacity to perform the type of work performed at the time of the injury, age, and education as well as on the cessation of employment after a return to work at the same or a greater wage. Moreover, KRS 342.730(1)(d) adjusts the duration of the award and maximum benefit to favor disability ratings that exceed 50%.

Tudor, 375 S.W.3d at 65-66. As explained by the Supreme Court of Kentucky,

> [a]lthough a worker's impairment rating is a factor in determining the amount of benefits, it is but one of three factors. The statutory multiplier weights the formula to favor those workers who are more severely impaired, and the formula takes into account not only a worker's physical capacity to return to the pre-injury employment but also whether a worker who does return to work has suffered a loss of income.
>
> Clearly, a worker's ability to perform physical labor is affected by the extent of his impairment. The greater a worker's impairment, the more difficulty he is likely to have in finding work after being injured. Although the formula that was devised in 1996 to compensate partially disabled workers may imperfectly measure an individual worker's loss, it cannot be said that it bears no rational relationship to the purpose of the income benefit or that it provides injured workers without a remedy for their loss.

Adkins, 58 S.W.3d at 432.

By requiring a medically-assigned permanent impairment rating and creating a graduated disability factor scale in KRS 342.730(1)(b), the legislature put into force its conclusion that workplace injuries with greater severity will typically correlate to greater occupational disability. Moreover, by adopting a mathematical disability formula for determining PPD income benefits, the legislature clearly sought a more objective method to achieve its legitimate state interest in limiting such income benefits to fairly compensate only severe work-related traumatic injuries resulting in actual disability.

2. KRS 342.7305(2).

Without explanation for excluding traumatic hearing loss injuries from the all-inclusive provisions of KRS 342.730(1)(b) and (c), KRS 342.730(1)(e) declares:

> [f]or permanent partial disability, ... hearing loss covered in KRS 342.7305 shall not be considered in determining the extent of disability or duration of benefits under this chapter.

Instead, echoing KRS 342.0011(1)'s definition of a traumatic "injury," KRS 342.7305(1) states its provisions shall instead apply:

> [i]n all claims for occupational hearing loss caused by either a single incident of trauma or by repetitive exposure to hazardous noise over an extended period of employment....

As in KRS 342.730(1)(b), this provision adopts the AMA *Guides* for assigning permanent impairment ratings for hearing loss.

Central to the present constitutional challenges, KRS 342.7305(2) inexplicably proceeds to impose a different, substantially higher, and more difficult to satisfy 8 percent impairment rating threshold for hearing loss claimants, stating:

> [i]ncome benefits payable for occupational hearing loss shall be as provided in KRS 342.730, *except* income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%). No impairment percentage for tinnitus shall be considered in determining impairment to the whole person.

Id. (Emphasis added). Thus, KRS 342.7305(1) segregates all traumatic hearing loss claimants into a special class, isolating them from all other traumatic injury claimants authorized to receive income benefits under the more inclusive impairment rating threshold enacted in KRS 342.730(1)(b). The statute also erects a wall of separation between two subclasses of hearing loss claimants, granting income benefits to those who qualify for an impairment rating of 8 percent or greater, but denying compensation to those failing to reach its impairment rating threshold.

Based on the foregoing, we hold by imposing an impairment rating threshold of 8 percent or greater for income benefits, KRS 342.7305(2) treats hearing loss claimants differently than all other traumatically injured claimants authorized to receive PPD income benefits by satisfying the minimal impairment rating threshold required by KRS 342.730(1)(b).

Further, we hold KRS 342.7305(2) treats hearing loss claimants with an impairment rating of less than 8 percent differently than all other hearing loss claimants qualifying for impairment ratings of 8 percent or higher, effectively depriving the former of any relief while granting the latter fair compensation under KRS 342.730(1)(b) and (c) commensurate with all other traumatically injured claimants.

C. SIMILARLY SITUATED

Next, our analysis turns to determining whether the two classes and subclasses of PPD income benefit claimants created by the differing statutory treatment enacted in KRS 342.7305(2) are similarly situated. We hold claimants suffering traumatic ear injuries resulting in hearing loss severe enough to qualify for assignment of an impairment rating under the AMA *Guides* are in all relevant and consequential respects similarly situated to all other claimants suffering traumatic injuries to other body parts, organ systems, and organ functions resulting in symptoms severe enough for assignment of an impairment rating under the AMA *Guides.* Further, among the two subclasses of hearing loss claimants, lay and medical proof evince the same or similar functional losses, diminution of daily activities, physical and social limitations, medical treatment modalities, and occupational restrictions regardless of the degree of impairment.

Though the Act defines a compensable traumatic "injury" in KRS 342.0011(1), no separate definition is provided for "hearing loss" as addressed in KRS 342.7305. For purposes of the present appeals, "hearing loss" is best understood to mean the "[d]ecreased ability to perceive sounds."[6] The Supreme Court of Kentucky has noted hearing loss is addressed in the AMA *Guides*, Section 11.2, aptly titled "The Ear." *AK Steel Corp. v. Johnston*, 153 S.W.3d 837, 840 (Ky. 2005); AMA *Guides*, 246-55. According to the AMA *Guides*, "[t]he ear provides sensorineural input critical to the sense of hearing and balance," and "[p]ermanent hearing impairment is a permanently reduced hearing sensitivity." AMA *Guides*, 246. Thus, hearing loss is a symptom of an underlying traumatic injury or diseased condition involving the ear.

Moreover, the Supreme Court of Kentucky has characterized hearing loss as a traumatic injury involving the ear. The Court has noted the legislature enacted KRS 342.7305 "to govern claims for traumatic hearing loss." *Alcan Foil Products, a Div. of Alcan Aluminum Corp. v. Huff*, 2 S.W.3d 96, 102 n.1 (Ky. 1999). It has also held hearing loss due to long-term occupational exposure to hazardous workplace noise represents a "harmful change" caused by workplace trauma, qualifying as an "injury" under KRS 342.0011(1). *Caldwell Tanks v. Roark*, 104 S.W.3d 753, 756 (Ky. 2003). Again, noting "[t]he legislature enacted KRS 342.7305 in 1996 specifically to address claims for hearing loss due to single accident trauma or repetitive exposure to hazardous noise," the Court has held "[n]oise-induced hearing loss is a form of cumulative trauma injury as defined by KRS 342.0011(1)." *Quebecor Book Co. v. Mikletich*, 322 S.W.3d 38, 40 (Ky. 2010) (citing *Caldwell Tanks*). Finally, the Court has characterized noise-induced hearing loss as a "gradual injury" under KRS 342.0011(1), stating:

> [r]epetitive exposure to loud noise produces noise-induced hearing loss, *a form of injury* caused by *the traumatic effect* of the vibrations produced by loud noise on the membranes of the inner ear.

[6] *Taber's Cyclopedic Medical Dictionary* 852 (17th ed. 1993).

Greg's Const. v. Keeton, 385 S.W.3d 420, 424-25 (Ky. 2012) (emphasis added).

When hearing loss claims under KRS 342.7305 are more precisely understood to be symptomatic, impairment-ratable traumatic ear injuries, it is axiomatic such conditions are no different than other symptomatic, impairment-ratable traumatic injuries effecting other body parts, organ systems, and organ functions. For example, the loss of range of motion is a symptom commonly associated with traumatic injuries and diseases involving the spine or extremities which is impairment-ratable under the AMA *Guides* to measure severity; and loss of visual acuity is a symptom commonly associated with traumatic injuries and diseases involving the eye which is similarly impairment-ratable to establish severity.[7] We further note all forms of traumatic injuries, regardless of the body part, organ system, or organ function adversely impacted, arise either suddenly, from a single harmful incident, or gradually, from long-term exposure to cumulative harmful events, and can be difficult to diagnose, treat, measure, or manage. The shared characteristics common to all traumatic injuries lead us to hold symptomatic, impairment-ratable traumatic ear injuries are in all relevant and consequential respects the same as any other type of symptomatic, impairment-ratable traumatic injury involving other parts of the human organism. Such conditions are compellingly the same or similar in cause (occupational), in type (traumatic injury), in impact (functional loss or "impairment"), in result (permanent restrictions), and/or in outcome (disability). Whether involving the ear or any other body part, organ system, or organ function, we hold "a traumatic injury is a traumatic injury is a traumatic injury."[8]

Even within the two subclasses of hearing loss claimants created by the heightened impairment rating threshold of KRS 342.7305(2), we discern no relevant or consequential differences rationally justifying the statute's grant of PPD income benefits based on KRS 342.730(1)(b) and (c) to some, but not all, claimants suffering symptomatic, impairment-ratable hearing loss. Lay and medical evidence convinces us all hearing loss claimants – whether qualifying for an impairment rating at, above, or below 8 percent – share many commonalities, including significant functional losses, diminution of daily activities, physical and social limitations, medical treatment modalities, and occupational restrictions.

Regardless of impairment rating, it has been universally recommended claimants suffering significant hearing loss rely on hearing aids and other amplification devices, use ear protection, avoid further ear trauma and hazardous noise, and/or eliminate jobs requiring

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[7] AMA *Guides*, at 389-404 (spine generally); 417-22 (cervical spine); 533-38 (lower extremities); 405-11 (lumbar spine); 593-98 (measurement techniques); 423-26 (nerve root/spinal cord); 411-17 (thoracic spine); and 277-304 (visual system).

[8] In *Vision Mining*, the Supreme Court of Kentucky abrogated its prior decision in *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994). In *Holmes*, a coal mine presented an equal protection challenge to KRS 342.732's irrebuttable presumption of total disability for coal miners' pneumoconiosis, arguing the statute discriminated "unlawfully between coal companies and businesses in other industries." The Court disagreed, holding the statute was designed to address burgeoning costs placed on other Kentucky industries by the coal industry. *Holmes*, 872 S.W.2d at 448-49. However, Chief Justice Robert Stephens dissented, writing, "With apologies to Gertrude Stein, 'pneumoconiosis is pneumoconiosis is pneumoconiosis.'" *Id.* at 456. Seventeen years later, in *Vision Mining*, the Court reversed itself, quoting Chief Justice Stevens' paraphrase and holding, "unlike *Holmes*, we discern no rational basis" justifying KRS 342.316's differing treatment, "as it is simply counterintuitive to prescribe differing standard of proof requirements *for the same disease*." *Vision Mining*, 364 S.W.3d at 472 (emphasis original).

hearing acuity to avoid risk of harm to themselves and others. Further, Dr. Brose's testimony indicated no direct correlation between increasing hearing loss impairment ratings and greater disabling hearing loss impacts. Thus, in determining traumatic hearing loss to be permanent, incurable, and disabling at any symptomatic, impairment-ratable level, we hold relative to the subclasses of hearing loss claimants created by KRS 342.7305(2), "hearing loss is hearing loss is hearing loss."

D. NO RATIONAL RELATION TO A LEGITIMATE STATE INTEREST

Our analysis ends with determining whether the differing treatment of similarly situated traumatic ear injury and hearing loss claimants under KRS 342.7305(2) is rationally related to achieving a legitimate state interest. We hold it is not.

Appellants argue the Supreme Court of Kentucky's decision in *Vision Mining* is dispositive regarding this issue. We agree.

In *Vision Mining*, two injured underground coal mine workers filed separately for income benefits due to work-related pneumoconiosis. Both applications were dismissed pursuant to KRS 342.316. The statute imposed a stringent two-step procedure to establish coal workers' pneumoconiosis, consisting of a procedure for consensus radiographic readings by a three-member panel of physicians and rebuttal of consensus panel assessments pursuant to a clear and convincing evidence standard. In contrast, KRS 342.315 allowed all other occupational pneumoconiosis and diseases to be established through evaluation by an appointed university medical examiner (physician), whose clinical findings and opinions could be rebutted pursuant to the less demanding reasonable basis standard. In each claim, the Board affirmed the dismissal, holding statutory provisions had been correctly applied. On review, two panels of this Court held the statute unconstitutional due to violation of equal protection guarantees.

The Supreme Court of Kentucky consolidated the two appeals and affirmed the Court of Appeals. Though KRS 342.316 had survived previous equal protection challenges, the Court noted "this is the first challenge based on the less favorable statutory evidentiary treatment to which coal workers' pneumoconiosis claimants are subjected compared to all other pneumoconiosis claimants." *Vision Mining*, 364 S.W.3d at 470. Upon review, the Court determined "there is no 'natural' or 'real' distinction between coal workers' pneumoconiosis and other forms of pneumoconiosis," noting "whether caused by coal, rock, asbestos, or brick dust, 'pneumoconiosis is pneumoconiosis is pneumoconiosis.'"[9] *Id.* at 472 (quoting *Holmes*). Thus, the Court concluded:

[9] In addition to abrogating its earlier decision in *Holmes*, the Supreme Court of Kentucky also reversed its prior holding in *Durham v. Peabody Coal Co.*, 272 S.W.3d 192 (Ky. 2008). There, claimants seeking income benefits due to coal miners' pneumoconiosis asserted an equal protection challenge to KRS 342.316's consensus procedure and clear and convincing rebuttal standard. They argued the statute unlawfully discriminated between them and workers seeking income benefits for traumatic injuries under KRS 342.730, which allowed various types of proof and merely required proof of a permanent impairment rating. *Durham*, 272 S.W.3d at 195. The Court upheld the statute, holding, in part, "inherent differences between coal workers' pneumoconiosis and traumatic injuries provide a reasonable basis or substantial and justifiable reason for different statutory treatment." *Id.* at 195-196. In *Vision Mining*, the Court distinguished *Durham*, holding "[u]nlike *Durham*, different names do not justify differing treatment – all forms of pneumoconiosis (whatever type) develop gradually and can be difficult to diagnose." *Vision Mining*, 364 S.W.3d at 472.

> [h]aving carefully reviewed the record and the arguments of the parties, we cannot discern a rational basis or substantial and justifiable reason for the disparate treatment of coal workers in this instance. Pneumoconiosis caused by exposure to coal dust is the same disease as pneumoconiosis caused by exposure to dust particles in other industries, yet coal workers face different, higher standard-of-proof requirements than those other workers. This is an arbitrary distinction between similarly situated individuals, and thus it violates the equal protection guarantees of the Federal and State Constitutions.

Id. at 474. The Court premised its holding on the purpose of federal and state equal protection guarantees to prevent "governmental decision makers from treating differently persons who are in all relevant respects alike." *Id.* at 465 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992)). To that end, the Court observed, "[a]lthough the rational basis standard certainly favors the government, it would be incorrect to state that courts always hold that legislatively-created classifications are rationally related to a legitimate state interest." *Id.* at 466. The Court emphasized "the rational basis standard, while deferential, is certainly not demure."[10] *Id.* at 469.

The Supreme Court held "it is simply counterintuitive to prescribe differing standard of proof requirements *for the same disease.*" *Id.* at 472 (emphasis original). Because we discern no "inherent differences" among traumatic injuries, we hold it is simply counterintuitive to prescribe differing impairment rating thresholds *for the same type of injury. Durham*, 272 S.W.3d at 194. In *Vision Mining,* the Court rejected several justifications asserted in support of disparate treatment of coal miners' pneumoconiosis claimants allowed by KRS 342.316. Regarding cost-savings, the Court reasoned,

> it is axiomatic that, if the enhanced procedure saves money, the state would save more money by subjecting *all* occupational pneumoconiosis claimants to the more exacting procedure and higher rebuttable standard.

Vision Mining, 364 S.W.3d at 472 (emphasis original). Regarding expediting claims, the Court reasoned,

> we reject any contention that the two-step procedure promotes prompt and efficient processing of coal mining pneumoconiosis cases, as an additional step presents nothing more than another formidable hurdle for the coal worker before he or she can receive compensation.

Id. Finally, regarding impeding physician dishonesty, the Court reasoned,

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[10] The constitutional analysis announced in *Vision Mining* was reaffirmed in *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759, 767 (Ky. 2017), where the Supreme Court struck a statute terminating PPD income benefits relative to a claimant's qualifying for normal old-age Social Security retirement benefits, but not impacting compensation awarded to teachers drawing from their retirement plan. There, the Supreme Court similarly held, "[p]roving the absence of a rational basis or of a substantial and justifiable reason for a statutory provision is a steep burden; however, it is not an insurmountable one."

> we believe any venal element to an initial doctors' medical diagnosis in the context of coal workers' pneumoconiosis would apply with equal force to pneumoconiosis caused by asbestos, rock, or metal dust. To hold otherwise, we must assume that doctors providing the initial diagnosis for all other types of pneumoconiosis are inherently more trustworthy, and thus the additional consensus panel is only necessary to defend against physicians that testify for coal workers. There is no basis for such an assumption limited to physicians from the coal fields of Kentucky and it belies common sense[.]

Id. Because "the more stringent proof and procedures required" for coal workers' pneumoconiosis claims under KRS 342.316 lacked "a rational basis or substantial justification," the Court declared the statutory provisions unconstitutional. *Id.* at 473.

The Supreme Court of Kentucky's analysis in *Vision Mining* resolves the present appeals. If the overarching legislative goal under the Act was merely cost-savings, the minimal impairment rating threshold of KRS 342.730(1)(b) could simply be replaced with the heightened requirement of KRS 342.7305(2). However, the legislature's mathematical disability formula enacted in KRS 342.730(1)(b) and (c) evinces a balanced primary goal of fair compensation to accomplish the Act's humane and beneficent purposes while providing justice to both employer and employee. Regardless of the impairment rating threshold chosen, the same requirement must apply to all work-related traumatic injuries.

Further, the choice of impairment rating threshold – whether minimal or heightened – bears little or no relevance to promoting greater efficiency and accuracy in the claims process, but can erect a "formidable hurdle" to obtaining PPD income benefits. It is well-established

> [a] classification renders a statute special where it is made to depend, not upon *any natural, real or substantial distinction,* inhering in the subject matter, such as suggests the necessity or propriety of different legislation in regard to the class specified, but upon *purely artificial, arbitrary, illusory, or fictitious conditions*, so as to make the classification unreasonable, and unjust. Sometimes, it is said that a law is special where its classification is not based upon *some reasonable and substantial difference in kind, situation, or circumstance bearing a proper relation to the purpose of the statute*, but which embraces less than the entire class of persons to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed.

Reid v. Robertson, 304 Ky. 509, 200 S.W.2d 900, 903 (1947) (emphasis added). Because we have held there is no "real or substantial" difference in the physical, functional, medical, and/or occupational impacts associated with all significant hearing loss qualifying for impairment ratings, we further hold the heightened impairment threshold enacted in KRS 342.7305(2) is founded on a "purely artificial, arbitrary, illusory, or fictitious" distinction bearing no "proper relation to the purpose of the statute," and results in an "unreasonable" and "unjust" classification. By denying PPD income benefits to those failing to reach its heightened impairment rating threshold, the statute improperly affords governmentally sanctioned separate and unequal treatment to a subclass of hearing loss claimants *vis-à-vis* all other traumatically injured hearing loss claimants who are granted fair compensation under KRS 342.730(1)(b) and (c).

Finally, it is disingenuous to suggest the heightened impairment rating threshold in KRS 342.7305(2) offsets any greater dishonesty, inability, or incompetence among physicians evaluating occupational hearing loss, and any such suggestion "encapsulates the very meaning of arbitrariness, irrationality, and unreasonableness." *Vision Mining,* 364 S.W.3d at 472-73. In KRS 342.730(1)(b), the legislature adopted impairment ratings medically assigned in accordance with the AMA *Guides* as a reliable "standardized, objective approach" for identifying significant traumatic injuries and measuring severity. *See* AMA *Guides*, at 1. In doing so, the legislature evinced its understanding that no impairment rating is assigned if a traumatic injury "has no significant organ or body system functional consequences and does not limit the performance of the common activities of daily living." *Id.*, at 5. Thus, the legislature's enactment of an arbitrarily higher impairment rating threshold in KRS 342.7305(2) fails to advance its primary goal of fair compensation of significant traumatic injuries, a purpose already accomplished in KRS 342.730(1)(b) and (c).

Vision Mining held the legislature must treat claimants suffering all forms of occupational pneumoconiosis the same. For the same reasons, all traumatically injured claimants – including those suffering hearing loss – must also be treated the same. On the strength of *Vision Mining*, we discern no rational basis to justify differing and discriminatory treatment of workers seeking PPD income benefits to compensate traumatic ear injuries resulting in significant hearing loss, as objectively measured by impairment ratings under the AMA *Guides.*

Countering Appellants' assertion that *Vision Mining* is dispositive, Appellees argue the Supreme Court of Kentucky has already impliedly approved a legitimate state interest justifying KRS 342.7305(2)'s heightened impairment rating threshold for hearing loss claimants in *AK Steel Corp. v. Johnston,* 153 S.W.3d 837 (Ky. 2005). We disagree.

The two consolidated appeals in *Johnston* concerned proper construction of KRS 342.7305(2) and (4), rather than a constitutional equal protection challenge. The issues were two-fold. First, whether statistical estimates of age-related hearing loss could rebut and reduce an impairment rating otherwise satisfying the heightened threshold in KRS 342.7305(2), and thereby preclude an award of PPD income benefits. Second, if not, whether statistical estimates of age-related hearing loss could rebut the rebuttable presumption in KRS.7305(4) that a claimant's entire impairment is work-related, and thereby require apportionment of causation, reducing an employer's liability for PPD income benefits. *Johnson*, 153 S.W.3d at 841.[11]

[11] In *Johnston*, a university medical examiner diagnosed claimants with occupational hearing loss under KRS 342.7305(1) and assigned impairment ratings qualifying for PPD income benefits under the heightened threshold of KRS 342.7035(2). These findings triggered the rebuttable presumption of causation in KRS 342.7305(4). *Id*. at 838-39. However, the examiner testified government statistical estimates of age-related hearing loss based on impairment ratings suggested substantial portions of the claimants' impairment ratings could possibly be non-work-related. *Id.* Even so, the examiner cautioned: not all people experience age-related hearing loss; the estimates of age-related hearing loss were not part of the AMA *Guides*; the estimates merely reflected statistical hearing loss averages which might not accurately reflect individualized experience; the estimates were not directly applicable to impairment ratings assigned under the AMA *Guides*, which measured hearing loss only at the middle frequencies involved in speech; and using the estimates to apportion age-related hearing loss was "definitely speculative." *Id.* at 839, 841.

Our Supreme Court held the statistical estimates of age-related hearing loss based on impairment ratings could not be employed as reliable rebuttal evidence relative to KRS 342.7305(2) or KRS 342.7305(4). *Id.* at 842. Further, the Court reasoned, "even if one were to assume" the presence of both age-related and occupational hearing loss, the heightened impairment rating threshold in KRS 342.7305(2) limited "income benefits to instances where the impairment is substantial and workplace trauma is likely to be a substantial cause." *Id.* at 841-42. Appellees argue the Court thereby recognized a rational basis for the heightened impairment rating threshold in KRS 342.7305(2). Their argument fails for several reasons.

First, no equal protection challenge to KRS 342.7305(2) was presented to the Supreme Court in *Johnston*. Thus, the validity of any surmised rational relationship was not addressed, and the decision is, therefore, neither instructive nor dispositive for our review.

Second, the Supreme Court specifically held "the magnitude of a hearing impairment" is to be calculated under the AMA *Guides* without regard to its cause, allocation of cause being a separate matter. *Johnston*, 153 S.W.3d at 841. The Court further recognized the rebuttable presumption of causation in KRS 342.7305(4) makes no reference to the natural aging process, and requires no direct proof of causation, but merely "proof of a pattern of hearing loss that is compatible with long-term hazardous noise exposure." *Id.* Thus, having rejected impairment-based statistical estimations of age-related hearing loss as reliable rebuttal proof, the Court's conjectural ruminations of any correlation between the heightened impairment rating threshold in KRS 342.7305(2) and causation apportionment were clearly not intended to provide a rational basis to justify the statute's differing treatment of similarly situated claimants.

Third, the Supreme Court has already held the "greater emphasis on impairment" enacted in KRS 342.730(1)(b) and (c) to be rationally related to achieving the legislature's legitimate goal of fairly compensating *all* claimants sustaining what it considered to be significant traumatic injuries as established and measured by impairment ratings assigned under the AMA *Guides. FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 318 (Ky. 2007). The Court held this emphasis reflected the legislature's conclusion that "existence of a permanent impairment rating" demonstrates a work-related injury resulting in "disability that is permanent and appreciable enough to warrant income benefits." *Id.* The Court has also held this legislative emphasis on impairment ratings was properly intended to limit an ALJ's discretion in determining the extent of PPD, while favoring "more severely impaired workers who were more likely to have a greater occupational disability" and granting those "who were the most severely impaired ... benefits for a longer period of time." *Fawbush,* at 11-12 (citing *Adkins v. R & S Body Co.*, 58 S.W.3d 428 (Ky. 2001)). Because the Court has specifically approved the legislature's adoption of *any* impairment rating under the AMA *Guides* as sufficient to establish a significant traumatic injury for PPD income benefit entitlement, Appellees' argument that the Court's ruminations in *Johnston* provide a rational basis for KRS 342.7305(2)'s differing higher and exclusionary impairment threshold for a similarly situated class and subclass of traumatic ear injury claimants is meritless.

And fourth, even if KRS 342.7305(2) is stricken as unconstitutional, KRS 342.0011(1) and KRS 342.730(1)(b) and (c) would exclude any pre-existing active age-related hearing loss conditions. The definition of a compensable traumatic "injury" in KRS 342.0011(1) already excludes "the effects of the natural aging process," and KRS 342.730(1)(b) and (c) already limits the required impairment rating to one "caused by the injury or occupational disease."

Further,

> [i]t has long been established that disability which exists prior to a work-related injury is viewed as prior, active, and noncompensable in the context of a claim for the injury unless the injury, by itself, would have caused the entire disability.

Spurlin v. Brooks, 952 S.W.2d 687, 691 (Ky. 1997) (citations omitted). Conditions are "pre-existing active" if "symptomatic and impairment ratable" immediately prior to the occurrence of a work-related injury. *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. 2007); *Comair, Inc., v. Helton*, 270 S.W.3d 909, 913 (Ky. App. 2008). Thus, Appellees' cannot reasonably argue the Court's ruminations in *Johnston* suggests a rational relationship between the discriminatory heightened impairment rating threshold in KRS 342.7305(2) and any legislative concern for excluding pre-existing active age-related conditions.

Finally, Appellees argue KRS 342.7305(2) should be upheld because its provisions apply equally to all hearing loss claimants and to all types of hearing loss. Specifically, Appellees note the statute requires all hearing loss claimants to undergo the same procedure for evaluation by a university medical examiner and to meet the same heightened impairment rating threshold. If considered in a vacuum, KRS 342.7305(2) admittedly imposes its heightened impairment rating threshold equally among all hearing loss claimants. However, with apologies to George Orwell, the argument is akin to asserting "all hearing loss claimants are treated equally, but some are treated more equally than others."[12] More precisely, the statute offends equal protection guarantees by creating two separate and unequal subclasses of similarly situated hearing loss claimants – *all* of whom suffered work-related injuries severe enough to qualify for an impairment rating under the AMA *Guides*, and *all* of whom endured equivalent permanent sensory loss, limited treatment modalities, diminution of daily activities, and occupational restrictions and preclusions, but *some* of whom are denied equal access to income benefits due to imposition of an arbitrary impairment rating threshold. If considered globally, KRS 342.7305(2) imposes its heightened impairment rating threshold unequally between traumatic ear injury claimants and all other traumatic injury claimants. In this respect, Appellees' argument glosses over the fact that traumatic ear injuries are in all relevant and consequential respects the same as all other traumatic injuries. As such, the mere fact KRS 342.7305(2) discriminates equally against the entire class of hearing loss claimants *vis-à-vis* all other traumatically injured claimants does not save the statute from equal protection perdition.

III. CONCLUSION

Having carefully reviewed the records and the arguments of the parties, we discern no rational basis or substantial and justifiable reason for the disparate treatment of workers seeking PPD income benefits for occupational hearing loss resulting from traumatic ear injuries. Traumatic injuries involving the ear are in all relevant and consequential respects the same as any other traumatic injury involving other organs, body parts and systems. Yet, KRS 342.7305(2) imposes a much higher impairment rating threshold on hearing loss claimants than KRS 342.730(1)(b) and (c) requires of all other traumatic injury claimants. This arbitrary difference in statutory treatment of similarly situated traumatic injury

[12] A reference to the phrase from George Orwell's 1945 novel, *Animal Farm*, stating, "All animals are equal, but some animals are more equal than others."

claimants violates the equal protection guarantees of the Federal and Kentucky Constitutions. Therefore, we hold the impairment rating threshold in KRS 342.7305(2) unconstitutional.

For the foregoing reasons, we vacate the Board's decision in each case and remand for further proceedings and entry of orders consistent with this Opinion.

ALL CONCUR.

All Citations

--- S.W.3d ----, 2018 WL 1439998

481 S.W.3d 800
Supreme Court of Kentucky.

TRANE COMMERCIAL SYSTEMS, Appellant
v.
Delena TIPTON; Honorable Thomas G. Polites, Administrative Law Judge; and Workers' Compensation Board, Appellees

2014-SC-000561-WC
|
FEBRUARY 18, 2016

Synopsis

Background: Worker sought review of decision of the Workers' Compensation Board affirming denial of temporary total disability (TTD) benefits when she returned to work. The Court of Appeals, 2014 WL 4197504, reversed. Employer appealed.

The Supreme Court, Keller, J., held that worker was not entitled to TTD benefits after she returned to work in a different role.

Reversed.

ON APPEAL FROM COURT OF APPEALS, CASE NO. 2014-CA-000626-WC, WORKERS' COMPENSATION BOARD NO. 10-WC-89621.

Attorneys and Law Firms

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Opinion

OPINION OF THE COURT BY JUSTICE KELLER

The sole issue before this Court is whether Delena Tipton was entitled to temporary total disability (TTD) income benefits after she had returned to work for Trane Commercial Systems (Trane). The Administrative Law Judge (ALJ) determined that she was not, a determination affirmed by the Workers' Compensation Board (the Board), but reversed by the Court of Appeals. Having reviewed the record, we reverse the Court of Appeals and reinstate the ALJ's opinion and award.

I. BACKGROUND.

The underlying facts are not in dispute. Tipton began working at the Trane commercial air conditioning manufacturing plant in 1990. On May 6, 2010, while working in the control

department testing air conditioner units, Tipton fell and fractured her right patella. At that time, Tipton's job required her to frequently bend, squat, crawl, and kneel in order to connect various electrical components in the units for testing. Prior to performing this job, Tipton had worked assembling the units.

Following her injury, Tipton was off work until March 22, 2011, when she was released by her treating physician to return to sedentary work activity with no overtime. Tipton did return to work at a different job, assembling electrical-circuit boards and earning the same hourly rate of pay as she had before the injury. This job required no squatting, bending, kneeling, or crawling, and Tipton could perform it while either sitting or standing. On July 7, 2011, Tipton's physician released her to return to her pre-injury job duties, but continued the 8 hour-per-day restriction. Tipton, who did not believe she could perform her pre-injury job duties without significant problems, bid on and was permanently placed in the circuit board assembly job. At some point thereafter Tipton began working overtime again, and her hourly pay rate has increased.

Trane stopped paying Tipton TTD benefits when she returned to work. Before the ALJ, Tipton argued that she was entitled to those benefits through July 7, 2011, when her physician determined that she had reached maximum medical improvement (MMI) and released her to return to her pre-injury job. The ALJ denied Tipton's claim for the additional TTD benefits, finding that she had not reached MMI until July 7, 2011, but that her release and return to "customary, non-minimal work" justified termination of TTD benefits when Tipton returned to work on March 22, 2011.

Tipton appealed the ALJ's award of TTD benefits to the Board, and the Board affirmed. Tipton then sought review before the Court of Appeals, which reversed the Board.[1] In doing so, the Court cited to its opinion in *Bowerman v. Black Equipment Co.,* 297 S.W.3d 858 (Ky .App. 2009), for the proposition that an injured employee who has not reached MMI but has returned to work is entitled to receive TTD benefits until she returns to the "type of work [she] had performed ... when injured or to other customary work." *Id.* at 876. Based on its review of the record, the Court determined that Tipton had not performed the circuit board assembly job prior to her injury; therefore, it concluded that her return to work on March 22, 2011 did not terminate her entitlement to TTD benefits. Trane appeals that determination and conclusion by the Court of Appeals.

II. STANDARD OF REVIEW.

The issue we must decide is what the phrase "return to employment" as used in Kentucky Revised Statute (KRS) 342.0011(11)(a) means. Resolution of that issue requires us to interpret a statute, which we do *de novo*. *Saint Joseph Hosp. v. Frye,* 415 S.W.3d 631, 632 (Ky.2013).

III. ANALYSIS.

"'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Or, to put

[1] Tipton also appealed the ALJ's failure to award her enhanced benefits under KRS 342.730(1)(c)1, the three-times multiplier, to the Board and the Court of Appeals, both of which affirmed the ALJ. Tipton has not filed a cross-appeal and is not pursuing that issue before us.

it positively, an employee is entitled to receive TTD benefits until such time as she reaches maximum medical improvement (MMI) or has improved to the point that she can return to employment. There is no dispute that Tipton reached MMI on July 7, 2011. However, the parties dispute whether Tipton reached the point that she could "return to employment" when she returned to work for Trane assembling circuit boards. The ALJ and the Board concluded that her return to work and return to employment occurred at the same time. As noted above, the Court of Appeals disagreed. For the reasons set forth below, we disagree with the Court of Appeals.

Initially, we note that KRS Chapter 342 ties entitlement to income benefits to an employee's employment status or ability to perform work in three pertinent areas: TTD, permanent total disability (PTD), and application of the three times multiplier in KRS 342.730(1)(c)1. Entitlement to PTD, in pertinent part, is tied to "a complete and permanent inability to perform any type of work," KRS 342.0011(11)(c). Entitlement to the three times multiplier is tied to the inability to "return to the type of work ... performed at the time of injury." KRS 342.730(1)(c)1. However, for reasons that are unclear from the statute, entitlement to TTD is tied to an employee's ability to "return to employment." KRS 342.0011(11)(a). Furthermore, while the legislature chose to define "work" – "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy" KRS 342.0011(34) – it did not choose to define "employment." Since the adoption of these statutory provisions in 1996, the ALJs, the Board, and the Courts have been called upon to interpret and apply them numerous times.

Those interpretations have evolved over time, and we believe that the case law regarding PTD and the three times multiplier is clear, if not always applied correctly. To determine if an injured employee is permanently totally disabled, an ALJ must consider:

> factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48, 51 (Ky.2000) (citation omitted). To determine if an injured employee is capable of returning to the type of work performed at the time of injury, an ALJ must consider whether the employee is capable of performing "the actual jobs that the individual performed." *Ford Motor Co. v. Forman,* 142 S.W.3d 141, 145 (Ky. 2004).

On the other hand, the case law regarding what constitutes a "return to employment" is less clear both in explanation and application. We first addressed "return to employment" in *Cent. Kentucky Steel v. Wise,* 19 S.W.3d 657 (Ky. 2000). Wise suffered a work-related left arm fracture on April 28, 1997. *Id.* at 658. His physician released him to return to work on July 11, 1997, with a left arm lifting restriction of five pounds; however, Wise did not return to work until September 30, 1997, and his physician stated that Wise reached MMI on October 28, 1997. *Id.* at 659. Faced with this evidence, the ALJ awarded Wise TTD

benefits from April 28, 1997 through September 30, 1997. *Id.* Central Kentucky Steel appealed that award, arguing that Wise's entitlement to TTD benefits ended on July 11, 1997, when he was released to return to restricted work duties. *Id.* This Court disagreed, holding: "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury" and noting that "Wise did not return to work until the end of September." *Id.* Therefore, we concluded that sufficient evidence of substance supported the ALJ's award of TTD benefits through the date Wise returned to work. *Id.*

We next addressed return to employment in *Double L Const., Inc. v. Mitchell,* 182 S.W.3d 509 (Ky. 2005). Mitchell worked full-time as a carpenter for Double L and part-time as a janitor for Sky Brite. *Id.* at 511. While working for Double L, Mitchell suffered a left eye injury on January 6, 2003. *Id.* Mitchell underwent surgery, and, on March 3, 2003, his physician released him to return to work on light duty. *Id.* Mitchell then changed physicians, and underwent two additional surgeries. *Id.* Mitchell's second physician released him to return to work as a carpenter on August 18, 2003. *Id.* During the litigation, Mitchell testified that he had not returned to work as a carpenter and that he had not missed any of his janitorial work. 182 S.W.3d at 512. The ALJ ordered Double L to pay Mitchell TTD benefits from the date of injury through August 18, 2003. *Id.* Double L argued that it should not have been required to pay any TTD benefits because Mitchell continued working in his part-time janitorial job. *Id.*

This Court disagreed. In doing so, the Court first held that, "unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.'" *Id.* at 513. The Court then reiterated the holding from *Wise,* and concluded that "a work-related injury results in a temporary inability to perform the job in which it occurred." *Id.* at 515. Therefore, the Court affirmed the ALJs finding that Mitchell was entitled to TTD benefits until released to return to work as a carpenter. *Id.*

We next addressed return to employment in *FEI Installation, Inc. v. Williams,* 214 S.W.3d 313 (Ky. 2007). Williams, a working foreman for FEI, injured his elbow on August 24, 2003, and was restricted to one-handed duty until he underwent surgery on November 17, 2003. *Id.* at 315. Following surgery, Williams's physician took Williams off work completely until March 1, 2004, when he released Williams to return to full-duty work. *Id.* at 316. FEI paid, and the ALJ awarded, TTD benefits from the date of surgery through March 1, 2004. *Id.* The ALJ denied Williams's claim for TTD benefits from the date of injury to the date of surgery based on his conclusion that one-handed work was within the scope of Williams's customary work. *Id.* at 317. This Court, like the Court of Appeals, concluded that "the overwhelming evidence, indicated that [Williams's] injury prevented him from performing his customary work" prior to surgery and that "[i]t was unreasonable to conclude that [Williams's] customary work came within his restrictions." 214 S.W.3d at 317.

The Court of Appeals then rendered *Bowerman.* Bowerman suffered a back injury on October 14, 2004, while working as a mechanic at Black Equipment. 297 S.W.3d at 861. He was able to return to light duty work and worked until April 22, 2005, when his physician took him off work and prescribed physical therapy. *Id.* Black Equipment did not pay for all of the recommended physical therapy and Bowerman sought interlocutory relief. *Id.* at 861-62. The ALJ held an interlocutory hearing on September 21, 2005, after which Bowerman filed an undated letter from Black Equipment indicating he had been discharged for failing to report for light duty work. *Id.* at 862. The ALJ entered an interlocutory opinion finding that Bowerman had not reached MMI and placing the claim in

abeyance so that Bowerman could get additional medical treatment. *Id.* at 863. However, because she found that Bowerman was "able to work consistently under normal employment conditions," the ALJ denied Bowerman's claim for TTD during the period of abeyance. *Id.* In October 2006, Bowerman moved to remove the claim from abeyance, and the ALJ reopened proof. *Id.* at 864. The parties filed additional medical evidence, all of which covered the period of treatment after the interlocutory hearing. *Id.* The ALJ then rendered a final opinion in which she found, contrary to her interlocutory opinion, that Bowerman had reached MMI on September 6, 2005, which was prior to the interlocutory hearing. 297 S.W.3d at 865. She then awarded Bowerman TTD benefits from April 27, 2005 through September 6, 2005; however, she did not award any TTD benefits for the period the claim was in abeyance. *Id.*

The Court of Appeals reversed the ALJ holding that, absent the introduction of new evidence, fraud, or mistake, the ALJ could not alter her interlocutory findings of fact. *Id.* at 867. The Court then held that "[t]he overwhelming weight of the lay and medical evidence adopted by the ALJ in her interlocutory opinion compelled an award of ongoing TTD benefits under proper application of KRS 342.0011(11)(a) and *Wise.*" *Id.* at 875. In doing so, the Court noted that the ALJ specifically stated in her interlocutory order that she believed Bowerman's physician who had taken Bowerman off work on April 22, 2005 and had not released Bowerman to "the type of work he performed when injured or to other customary work" prior to when he determined Bowerman had reached MMI. *Id.* at 865, 876. Based on the preceding, the Court concluded that Bowerman was entitled to TTD benefits "during abatement of [his] claim." *Id.*

The employee in only one of the preceding cases, *Williams,* worked while simultaneously being entitled to TTD. That case, which involved concurrent employment, is distinguishable on its face. The Court of Appeals in this case held that Tipton was entitled to TTD while she was working full-time for Trane and earning the same hourly rate. This holding by the Court of Appeals was based on a misunderstanding of *Bowerman* and an understandable misinterpretation of what "return to employment" means.

As to *Bowerman,* the Court of Appeals stated that:

> [E]ven though Bowerman had resumed working for Black Equipment as of October 25, 2004, his ability to perform the light duties assigned to him merely demonstrated that Bowerman was capable of returning to "some form of work," as opposed to the "type of work he had performed at Black when injured or to other customary work," and therefore, did not evince a "return to employment" within the meaning of KRS 342.0011(11)(a). Thus, *Bowerman,* indicates that light-duty assignments consisting of duties entirely different from pre-injury work duties cannot be considered a "return to employment" for the purpose of awarding TTD.

Tipton v. Trane Commercial Sys., No. 2014-CA-000626-WC, 2014 WL 4197504, *6 (Ky. Ct. App. Aug. 22, 2014), *as modified* (Sept. 12, 2014). However, as noted above, the Court of Appeals only held that Bowerman was entitled to additional TTD for part of the period his claim was in abeyance, a period when he was not working. It did not hold that he was entitled to TTD for the period before his claim was placed in abeyance and during which he had worked.

As to "return to employment," we recently addressed this issue in *Livingood v. Transfreight, LLC,* 467 S.W.3d 249 (Ky.2015). Livingood injured his shoulder on September 16, 2009, while operating a forklift for Transfreight. *Id.* at 252. He underwent two surgeries and was off work from November 11, 2009 through March 2, 2010, when he returned to work on light duty. *Id.* On October 5, 2010, Livingood underwent a third surgery and was off work again until December 13, 2010, when he returned to work without restrictions. *Id.* Transfreight discharged Livingood on December 23, 2010 because he had bumped a forklift he was operating into a pole. 467 S.W.3d at 252. The ALJ denied Livingood's claim for TTD benefits during the time that he worked light duty. *Id.* at 253. In doing so, the ALJ noted that Livingood had performed the majority of his light duty tasks as part of his pre-injury regular-duty job. *Id.*

On appeal, Livingood, relying on *Wise* and *Double L Construction,* argued that he was entitled to additional TTD benefits while on light duty because he was not performing his customary work as a forklift operator. *Id.* at 254. We disagreed and affirmed the ALJ, noting that *Double L Construction* involved concurrent employment, an issue not present in Livingood's case, and that the employee in *Wise,* unlike Livingood, had not returned to work during the disputed period. *Id.* Furthermore, in an attempt to clarify the *Wise* line of cases, we reiterated our holding from *Advance Auto Parts v. Mathis,* No. 2004-SC-0146-WC, 2005 WL 119750 (Ky. Jan. 20, 2005), that "*Wise* does not 'stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.'" *Id.* at *3.

We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise,* 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Applying the preceding to this case, we must agree with the ALJ that Tipton was not entitled to TTD during the period in question. Tipton's physician released her to perform light and sedentary work, which Trane provided for her. Additionally, although Tipton had not previously assembled circuit boards, she had assembled the air conditioning units and had tested them. Furthermore, she did not produce any evidence that assembling circuit boards required significant additional training or that it was beyond her intellectual abilities. In fact, it appears that Tipton was certainly capable of and wanted to perform the circuit board assembly job because she bid on and was awarded the job after her release to full-duty work. Thus, there was ample evidence of substance to support the ALJ's denial of Tipton's request for additional TTD benefits, and we reverse the Court of Appeals.

IV. CONCLUSION.

For the foregoing reasons, the Court of Appeals is reversed.

All sitting. All concur.

All Citations

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