2015 Mid-Winter Meeting & CLE Seminar

El Dorado Royale Resort
Riviera Maya, Mexico

Presented by the
Kentucky Bar Association
Workers’ Compensation Law Section

Kentucky Bar Association
514 West Main Street
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The Kentucky Bar Association
Workers’ Compensation Law Section
presents:

2015 Mid-Winter Meeting
&
CLE Seminar

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# 2015 Mid-Winter Meeting & CLE Seminar

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2015 Workers' Compensation Law Section Mid-Winter Meeting & CLE Seminar
January 22-24, 2015
El Dorado Royale Resort
Riviera Maya, Mexico

THURSDAY, JANUARY 22

8:00-8:10 a.m. Welcome and Opening Remarks
Christopher P. Evensen

8:10-9:10 a.m. Cumulative Trauma Injuries
(1.00 CLE credit)
Bonnie Hoskins

9:10-10:10 a.m. Advanced Analysis of Temporary Benefits under Kentucky Law (Total & Partial)
(1.00 CLE credit)
Edward Lee Jones

10:10-10:30 a.m. Break

10:30-11:30 a.m. Neuropsychological Evaluations
(1.00 CLE credit)
Dr. Michael H. Cecil, Psy.D.

11:30 a.m.-12:30 p.m. Ethics Overview
(1.00 Ethics credit)
Bayard V. Collier

FRIDAY, JANUARY 23

8:00-9:00 a.m. Application of KRS 342.730(1)(C)1 or 2 and the Fawbush Analysis
(1.00 CLE credit)
Peter J. Naake

9:00-10:00 a.m. Case Law Update
(1.00 CLE credit)
Carl M. Brashear
10:00-10:20 a.m.  Break

10:20-11:20 a.m.  Neuropsychological Evaluation in the Impairment Rating of Brain Injury  
(1.00 CLE credit)  
Dr. Michael H. Cecil, Psy.D.

11:20 a.m.-12:20 p.m.  Negotiation & Drafting Considerations for Complex Settlement Agreements  
(1.00 CLE credit)  
C. Patrick Fulton

SATURDAY, JANUARY 24

8:00-9:00 a.m.  Average Weekly Wage Analysis  
(1.00 CLE credit)  
Christopher P. Evensen

9:00-10:00 a.m.  Black Lung Analysis  
(1.00 CLE credit)  
James Douglas Holliday and Paul E. Jones

10:00-10:20 a.m.  Break

10:20-11:20 a.m.  Medical Fee Disputes  
(1.00 CLE credit)  
Gary W. Anderson

11:20 a.m.-12:20 p.m.  Ethical Issues in Black Lung Discovery  
(1.00 Ethics credit)  
Bayard V. Collier
SPEAKERS

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Bonnie Hoskins graduated from the University of Kentucky in 1978 with honors and high distinction, and studied at the Centre for Renaissance Studies in Oxford, England before entering the University of Kentucky College of Law in 1979. She was a member of the National Moot Court Team while at the College of Law and received her J.D. in 1979. Since that time, Ms. Hoskins has practiced primarily administrative law specializing in workers' compensation defense. She clerked with Kentucky's Special Fund while in law school and then practiced with the Special Fund for a short time after completing her law degree. Ms. Hoskins then engaged in private practice in Eastern Kentucky representing clients primarily in the coal industry from 1983-1986 before joining Stoll, Keenon & Park in 1987, where she was a member of the firm's Administrative Committee and Strategic Planning Committee. She was also instrumental in developing and upgrading computer software specifically designed for the Workers' Compensation Department. In 2001, Ms. Hoskins founded Hoskins Law Offices PLLC. She is a former Chair of the Kentucky Bar Association Workers' Compensation Law Section and a contributing author to the University of Kentucky Workers' Compensation Desk Book. Ms. Hoskins is a frequent speaker at continuing legal education seminars and has published numerous outlines and articles in continuing legal education publications.

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Bayard Collier became a partner with Boehl, Stopher & Graves, LLP in 1995 after serving as both Pike Circuit Judge and Pike District Judge for eight years. Prior to being elected as a member of the judiciary, Mr. Collier was a prosecutor and Chief Assistant County Attorney in Pike County. His areas of practice include civil litigation and trial practice with emphasis in insurance defense, medical malpractice, legal malpractice and other negligence matters. He has represented insurance and corporate clients in both state and federal court in Kentucky. Mr. Collier received his B.A., with high distinction, from Eastern Kentucky University in 1976, and his J.D. from the University of Kentucky College of Law in 1979. From 2001-2004, Mr. Collier served as Chairman of the Mine Safety Review Commission overseeing trials of violations of Kentucky's Mine Safety Law. From 1992-1995, he served as a member of the Commission on Corrections and Community Service reviewing corrections issues in Kentucky. Mr. Collier was awarded the Henry Pennington Outstanding Judge in the State of Kentucky award in 1992. He is a member of the American, Kentucky and Pike County Bar Associations.
Peter Naake is a partner at Priddy, Cutler, Naake & Meade PLLC, in Louisville, which represents clients in workers' compensation, Social Security disability, personal injury, union, and personnel matters. He received his B.A. from the University of Michigan in 1985 and his J.D. from the University of Kentucky College of Law in 1988. Mr. Naake previously served as Acting Directing Attorney and Staff Attorney for the Appalachian Research and Defense Fund from 1988-1991 and as an appeals and litigation attorney for the Kentucky Labor Cabinet Special Fund from 1991-1993. From 1993-2001, he maintained a solo private practice in Louisville, concentrating in workers' compensation and personal injury law before joining Priddy, Cutler, Miller & Meade PLLC. Mr. Naake served as Editor-in-Chief of the Kentucky Academy of Trial Attorneys Workers' Compensation Review from 1995-1997 and as a contributing editor at LouisvilleLaw.com reviewing published and non-published Kentucky Court of Appeals and Supreme Court decisions from 2003-2008. He also served as a contributing editor of the Kentucky Justice Association Appellate Law Report. Mr. Naake is a member of the Kentucky Bar Association and serves as Vice Chair of its Workers' Compensation Law Section.

Carl Brashear received his B.S. from Centre College in 1985, his J.D. from the University of Kentucky College of Law in 1989, and his M.B.A. from the University of Kentucky’s Gatton College of Business in 1999. There he was a member of the Beta Gamma Sigma Business Honor Society and an Honors member of the Financial Management Association’s Student Division. While in law school, Mr. Brashear worked as a policy analyst for the Coal Development Division of the Kentucky Energy Cabinet. He began practicing law in 1990 with Wells, Porter, Schmitt and Walker in Paintsville, and later practiced workers' compensation defense for Clark, Ward & Cave and Stoll, Keenon & Park in Lexington before taking a position as a staff attorney with the Kentucky Workers' Compensation Board in 1994. While working for the Board, Mr. Brashear authored numerous opinions covering all aspects of Kentucky workers' compensation and prepared summaries of noteworthy opinions issued by the Board. During the 2000 legislative session, he prepared analyses of proposed statutory changes which were used by the Legislative Research Commission. In 2002, Mr. Brashear became associated with Hoskins Law Offices PLLC, where his practice areas have been in workers' compensation and federal black lung defense. He is a member of the Kentucky Bar Association and its Workers' Compensation Law Section.
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I cannot forecast to you the action of the Kentucky Courts with regard to cumulative trauma claims. It is a riddle, wrapped in a mystery, inside an enigma; but perhaps there is a key.

I. CUMULATIVE TRAUMA AS DEFINED IN KENTUCKY LAW

A. The History

In 1972, the Kentucky legislature changed the definition of “injury” from “traumatic personal injury” to “any work-related change in the human organism.”

B. The Statute

**KRS 342.0011(1)** defines “injury” as follows:

“Injury” means any work related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause of producing a harmful change in the human organism evidenced by objective medical findings. (1996).

C. The Case Law

**Haycraft v. Corhart Refractories Co.,** 544 S.W.2d 222 (Ky. 1976) recognized “wear and tear injuries,” “repetitive injuries,” “gradual injuries,” and “overuse syndrome” as compensable injuries.

II. WHAT IS THE REQUIREMENT FOR GIVING NOTICE?

A. **KRS 342.185(1)** requires that notice of the accident shall be given to the employer as soon as practicable after the occurrence of the work injury.

B. Larson’s Worker's Compensation states that the practical problem of setting a specific date for a cumulative trauma injury has generally been handled by fixing the date of the accident as the date on which disability manifests itself.
C. In Randall Co./Randall Div. of Textron, Inc. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1988) required notice as soon as practicable after the injury manifested itself. The Court stated as follows:

We therefore conclude that in cases where the injury is the result of mini-traumas the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injury becomes manifest.

D. Alcan Foil Products, a Div. of Alcan Aluminum Corp. v. Huff, 2 S.W.3d 96 (Ky. 1999), clarified that the manifestation date is not controlled by the date of last employment. The Court stated:

The question remains, therefore, whether the phrase “manifestation of disability” refers to the physical disability or symptoms which cause a worker to discover that an injury has been sustained or whether it refers to the occupational disability due to the injury. We conclude that it refers to the worker’s discovery that an injury had been sustained.

The Court noted that the date of last employment is not the same as the date of manifestation of disability.

D. In Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the Court defined the term “manifestation of disability” as it was used in Randall Co. v. Pendland, as referring to these physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained. Once a worker is aware of the existence of a disabling condition and the fact that it is caused by work, notice is required.

F. The Court in Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), required that the claimant receive a diagnosis from a medical expert. The Court stated as follows:

Medical causation is a matter for the medical experts, and therefore, the Claimant cannot be expected to have self-diagnosed the cause of the harmful change to his cervical spine as being a gradual injury versus a specific traumatic event. He is not required to give notice that he sustained a work related gradual injury to his spine until he was informed of that fact. See, Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999).

G. In American Printing House for the Blind ex rel. Mutual Ins. Corp. of America v. Brown, 142 S.W.3d 145 (Ky. 2004), the court again made it clear that a claimant is not required to self-diagnose. The Court stated it is undisputed that Claimant sustained work related trauma and that harmful changes from the trauma were symptomatic on June 5, 2000. Therefore, the Claimant sustained an injury as defined by KRS 342.011(1) although
Chapter 342’s notice and limitation provisions were not triggered until she received a medical diagnosis in January 2001. The Court held that a worker is not required to self-diagnose the cause of harmful change as being a work related cumulative trauma or gradual injury. See Hill v. Sextet Mining Corp., *supra*. Nothing prohibits a worker who thinks she has sustained a work related gradual injury from reporting it to her employer before the law requires her to do so, and nothing prevents her from reporting an injury that she thinks is work related before a physician confirms her suspicion. *Id.* at 148-149.

### III. WHEN DOES THE STATUTE OF LIMITATIONS BEGIN TO RUN?

A. **KRS 342.185(1):** "... an application for an adjustment of a claim for compensation with respect to an injury shall have been made with the office within two (2) years after the date of the accident."

B. In Randall Co./Randall Div. of Textron, Inc. v. Pendland, 770 S.W.2d 687 (Ky. App. 1988), the Kentucky Court of Appeals adopted a “rule of discovery” with regard to cumulative trauma injuries, holding that the date of injury “is when the disabling reality of the injury becomes manifest.”

C. In Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the Kentucky Supreme Court stated that in cumulative trauma injury claims the date upon the obligation to give notice is triggered by the date of manifestation.

D. In summation, for cumulative trauma claims, a Plaintiff has two (2) years after the “manifestation of disability” or the cessation of temporary total disability (TTD) benefits to file a claim for income or medical benefits. A cumulative trauma injury manifests when “a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work.” Alcan Foil Products v. Huff, *supra*. A worker is not required to self-diagnose the cause of a harmful change as being work-related cumulative trauma injury. A physician must diagnose the condition and its work relatedness.

### IV. WHAT TOLLS THE STATUTE OF LIMITATIONS?

In Toyota Motor Mfg., Kentucky, Inc. v. Czarnecki, 41 S.W.3d 868 (Ky. App. 2001), the Court of Appeals held that the statute of limitations was tolled where a company physician informed an employee his condition had resolved. The Court determined that an employer is bound by the statements of a physician it employs to tend to its workers and the employee is entitled to rely on the judgment of the employer’s in-house physicians.

### V. DOES THE STATUTE OF REPOSE APPLY?

A. In Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601 (Ky. 2006), the Kentucky Supreme Court held that **KRS 342.185(1)** “imposes a two year period of repose... for gradual injuries and acknowledge[d] that such a claim may expire before a worker is aware of the injury.”
Application of the two year repose period does not turn on the worker’s knowledge of the cumulative injury.

B. As a statute of repose, KRS 342.185(1) bars a cumulative injury claim if the claim is not filed within two years of the Claimant’s last exposure to the Kentucky work condition giving rise to the injury, even if the injury is not discovered until later.

C. There is a significant difference between a statute of limitation and a statute of repose. “A statute of limitations limits the time in which one may bring suit after the cause of action accrues, while a statute of repose potentially bars a plaintiff’s suit before the cause of action accrues.” Coslow v. General Elec. Co., 877 S.W.2d 611, 612 (Ky. 1994).

D. In Consol of Kentucky, Inc., v. Goodgame, 2014 WL 2154091 (Ky. App. May 23, 2014) (NOT FINAL), the statute of repose was mentioned in the dissenting opinion.

E. In the case of Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276 (Ky. 2005), the Court held in pertinent part that:

The manifestation of disability date is a fact intensive determination by the fact finder based upon the particular circumstances in each case… An ALJ is authorized to conclude, if supported by the evidence of record that a disability could manifest on the date the claimant seeks treatment and is informed on that occasion that her condition is related to work.

F. However, the Brummitt case also requires the ALJ to consider the effect of work performed within the two year period before the claim was filed.

VI. AND THAT IS WHERE THE CLARITY ENDS: PENDING CASES


The ALJ found Hale to be permanently and totally disabled as a result of a cumulative trauma injury which occurred over his thirty years of employment. The ALJ determined Hale sustained cumulative trauma to his neck and back, to both upper extremities, and his left lower extremity

2 Borrowed from Mark Knight.
and right lower extremity as the result of working for a long period of time in the operation of heavy machinery in the mines. The Board and Court of Appeals determined that the evidence from Dr. Madden was sufficient to establish that a cumulative injury occurred while Hale was employed from November 11, 2011, through February 7, 2012, as an equipment operator for CDR. (Opinion and Award 12/17/2012).

On appeal to the Board the employer argued that Dr. Madden had not made observations which comprised objective findings.

The Board vacated and remanded to the ALJ. (May 17, 2013). The Board determined that the evidence from Dr. Madden was sufficient to establish that a cumulative trauma injury occurred while Mr. Hale was employed from November 11, 2011, to February 7, 2012, as an equipment operator with CDR. The Board stated that “simply because Hale was last employed by CDR, does not place the entirety of the liability for Hale’s alleged total occupational disability on CDR.” The WCB stated there must be evidence of record establishing that Hale’s work activities performed during the last three (3) months of employment with CDR contributed to the overall permanent condition, producing “some degree of harmful change to the human organism.” The WCB held that Southern Kentucky Concrete Contractors, Inc. v. Campbell, 662 S.W.2d 221 (Ky. App. 1983), required a determination by the ALJ as to whether Plaintiff’s work for the employer “contributed to his overall cumulative trauma injury or injuries, and then, with specificity denote to what degree it contributed.”

The Court of Appeals affirmed the WCB as to the issues raised by appeal of CDR and the issues raised on appeal by Hale. The Court of Appeals noted that pursuant to Gibbs v. Premier Scale Company/Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), it is not required that a harmful change be “both directly observed and apparent on testing in order to be compensable as an injury.” The Court of Appeals affirmed the Board’s reasoning under Southern Kentucky Concrete Contractors, Inc. v. Campbell, supra, which stands for the proposition that liability should be apportioned to the employer based upon the percentage of disability attributable to the work performed by the employee while in the employ of that company.

The matter is now on appeal to the Kentucky Supreme Court.

In its brief to the Supreme Court, CDR states that the evidence failed to establish a cumulative injury by objective medical findings. CDR contends that the Court of Appeals did not identify what change in the human organism was due to the Plaintiff’s employment with CDR and the Board’s opinion was also silent on this issue. CDR also contends that under the dictates of Southern Kentucky Concrete Contractors, Inc., supra, an apportionment of liability for Hale’s cumulative trauma injury is appropriate.

In his brief, Hale argues that the WCB has applied a new standard to cumulative trauma cases based on whether the injuries arise “to some degree” from the work at the last employer. Hale argues that the decision of the ALJ, the Last Injurious Exposure rule, applies, pursuant to which the last employer is to be assessed for the entirety of the effects of the cumulative trauma, which is consistent with the practice of worker’s compensation in all the years since Haycraft, supra.

In Haycraft, the Special Fund was liable for the portion of the disability attributable to the arousal of a dormant non-disabling condition brought into disabling reality by a subsequent compensable injury or occupational disease. The Court in the Southern Concrete case held that the Special Fund was liable pursuant to statute for the apportionment of the pre-existing dormant component for a cumulative trauma injury.

The 1996 legislature amended KRS 342.120 abolishing the liability of the Special Fund. The Plaintiff has argued that since the legislature, at the same time, amended the definition of injury to specifically include cumulative trauma the legislative intent was not to leave an injured worker without recourse against prior employers.

The Plaintiff cites to McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), that applies the Last Injurious Exposure Rule holding that when a work-related trauma causes a pre-existing dormant degenerative condition to be disabling, the worker is entitled to indemnity benefits from the employer without excluding the portion for which the Special Fund had previously been liable.

The Plaintiff argues that the Board in Coleman v. TECO Coal Corp., Claim No. 05-01356 (2006), reversed a Worker’s Compensation ALJ who strayed from the long-standing rule of law providing for an apportionment of all liability for a cumulative trauma injury to the last employer. The Board held that the general rule in cumulative trauma cases, the last employer with whom a worker suffers a harmful change bears the liability for the entirety of the injury, citing Hill v. Sextet Mining Corp., Alcan Foil Products v. Huff, and Special Fund v. Clark, supra. In Coleman, the WCB stated that prior to 1996, the argument of the employer had merit, as at that time the Special Fund shared liability with the last employer in those cases of which the apportionment provision of KRS 342.120 were properly implicated. Since the 1996 amendments to the Act, the cases involving cumulative trauma, what was once the liability of the Special Fund now falls to the employer and who’s employed the injured worker when he first experiences manifestation of disability. Date of manifestation fixes the rights and obligations of the party including charge for the whole of the employee’s disability up and to that date.

The WCB stated, as required by Southern Kentucky Concrete, supra, the ALJ must determine whether Stacy sustained cumulative trauma wrist injuries during his employment with Austin Powder, and if so, whether all, a portion, or none of the impairment rating assessed for the condition of each wrist is directly attributable to Stacy’s employment from May 3, 2005 through April 16, 2012 with Austin Powder. There must be evidence of record establishing that Stacy’s work activities performed during the period of employment between May 3, 2005 and April 16, 2012, contributed to his overall permanent condition producing some degree of harmful change to the human organism.

The ALJ determined that the Plaintiff was permanently and totally disabled as a result of cumulative trauma injuries to his back and bilateral wrists. The cumulative trauma was due to working in the coal mines as a heavy equipment operator and drill operator for forty-one years.

The Board reversed the ALJ Opinion and Award. In part, the Board stated as follows:

> In the December 23, 2013, Opinion, Order and Award the ALJ imposed liability for all of Stacy’s disability on Austin Powder. However, this determination can only stand if the evidence indicates the period from May 3, 2005, through April 16, 2012, in and of itself, caused all of Stacy’s occupational disability. Stacy’s testimony on this issue may or may not be consistent with such a finding as he indicated he began experiencing problems with his hands and back approximately six years from the date of his testimony. Dr. Hughes’ statement regarding causation is not sufficient to impose liability upon Austin Powder for all of Stacy’s disability due any cumulative trauma injury the ALJ may find Stacy sustained.

C. **Lone Mountain Processing, Inc. v. Sizemore**, Claim No. 13-01196 (09/29/2014). ALJ found Plaintiff totally occupationally disabled due to cumulative trauma injuries to his neck and back.

WCB vacated in part, and remanded. On remand, the ALJ is to first determine the date of manifestation for Plaintiff’s cumulative trauma injuries. In addition the Board cites to Southern Kentucky Concrete as support for its position that the employer is only responsible for any impairment attributable to his work with the defendant-employer. The Board stated that on remand the ALJ must determine the following:

1. Whether Plaintiff sustained cumulative trauma injuries to neck, back, and right shoulder during employment with employer.
2. If so, whether all, a portion, or none of the impairment rating assessed for each injury is directly related to the employment with the employer.

3. The ALJ must cite the medical proof that establishes Plaintiff’s work at the employer contributed to his overall cumulative injury or injuries, and denote to what degree it contributed.

4. There must be specific findings establishing Plaintiff’s work activities performed during his period of employment contributed to his overall permanent condition producing some degree of harmful change to the human organism.

5. The ALJ shall specifically define each work injury he may determine Plaintiff suffered.

6. The ALJ must set forth specific findings demonstrating an appropriate understanding of the medical evidence.

VII. EVIDENCE ISSUES IN CUMULATIVE TRAUMA

A. Has the Claimant given notice of the cumulative trauma injury to the employer?

B. When and how was notice given?

C. When did the Claimant begin to experience physical symptoms of the cumulative trauma?

D. When did the Claimant come to understand that his/her symptoms were being caused by the work activity?

E. Has there been a diagnosis made by Claimant’s treating physician of a work related cumulative trauma?

F. Was the diagnosis relayed to the Claimant?

G. When did the doctor tell the Claimant that his or her condition was work related?

H. New proof requirements.

I. What portion of the Claimant’s impairment rating is attributable to his/her work for the last employer?

J. Medical proof establishing that the Claimant’s work for last employer contributed to the cumulative trauma injury and to what degree it contributed.
K. What is the date of manifestation if Claimant is not told by a medical provider that he/she has sustained cumulative trauma after the date that he/she last worked?
I. DEFINITION OF TTD – KRS 342.0011(11)(a)

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.

II. ENTITLEMENT TO TEMPORARY TOTAL DISABILITY BENEFITS (TTD)

While completely restricted from work by a doctor or under light duty restrictions the employer will not/cannot accommodate for at least eight consecutive days, a claimant is entitled to payment of Temporary Total Disability benefits (TTD) paid at two-thirds of the pre-injury average weekly wage, up to a State Maximum for TTD, ($769.06 for injuries occurring in 2014), until the claimant is released to return to work or until the claimant reaches Maximum Medical Improvement (MMI).

A. Claimant Is Completely Restricted from Work

If the claimant is completely restricted from work, TTD is payable until the claimant reaches Maximum Medical Improvement (MMI). Issues which arise:

1. Determination of the Average Weekly Wage to determine TTD rate.

2. Time period for initiation of benefits.
   a. KRS 342.040(1) directs, “no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability.
   b. KRS 342.040(1) directs TTD benefits shall be instituted no later than the fifteenth day after disability and shall be paid no less often than semi-monthly.

3. Situation where treating physician continues to completely restrict from work, but Defense IME opines claimant can return to work or is at MMI.

1 With assistance from Hon. Chris Evensen and Hon. Gary Anderson.
Pursuant to KRS 342.020(1), the Employer shall pay for the cure and relief from the effects of a work-related injury as may reasonably be required at the time of injury and thereafter during disability. KRS 342.020(1), further, provides, “the employee may select medical providers to treat his injury.”

B. Case Law

1. W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

   TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant’s condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, ... the question presented is one of fact no matter how TTD is defined.

2. In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court held:

   Where an employee has not reached Maximum Medical Improvement and faces restrictions that preclude the employee from returning to his customary work or work that the employee was performing at the time of the injury, it is permissible to find the employee temporarily totally disabled for the duration of those conditions. Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657 (2000) (Emphasis added). See also Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W. 3d 327 (2000).

   The Court, further, explained:

   [i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she was performing at the time of his injury. Id. at 659.

3. In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury:
In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work. *Id.* at 580-581.

III. IS THERE SUCH A THING AS TEMPORARY PARTIAL DISABILITY

**Example**: The Claimant is not at MMI (still undergoing regular treatment), however, the treating physician releases to light duty work. The Employer claims it can accommodate the restrictions, and brings the claimant back to work for “minimal” hours. Is the claimant entitled to TTD or hybrid “Temporary Partial Disability?”

A. [KRS 342.730](#) Does Not Recognize Temporary Partial Disability

B. Kentucky Courts May Be Allowing for Such Payments

- Central Kentucky Steele v. Wise, 19 S.W.3d 657 (Ky. 2000).

A worker who was able to work fifteen hours a week but was not able to return to the employment they were performing at the time of their injury is entitled to temporary total disability benefits. *Double L Construction, Inc. v. Mitchell*, 182 S.W.3d 509 (Ky. 2005); *citing* Central Kentucky Steele v. Wise, 19 S.W.3d 657 (Ky. 2000). Central Kentucky Steele v. Wise, *supra*, stands for the legal principle that when a worker has not reached MMI, a release to perform minimal work rather than “the type that is customary or that he was performing at the time of his injury” does not constitute “a level of improvement that would permit a return to employment” and the injured worker is entitled to temporary total disability benefits. Moreover, the Kentucky Court of Appeals explained the holding of Wise in *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 581 (Ky. App. 2004): “The statutory phrase ‘return to employment’ was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.”

See discussion of Arnold v. Nesco Resource, DWC Claim No. 2011-68484 (Board Decision rendered May 24, 2013), below, where the Board held a return to “menial work” does not constitute a “return to employment” under [KRS 342.0011(11)(a)](#) and ordered the employer to pay TTD during such a period of return to work. **This case has been appealed to the Court of Appeals**: Case No: 2013-CA-001098.

IV. CREDITS

**Example**: The Claimant was paid TTD at $500.00 per week for twenty-five weeks. Later, evidence demonstrates the TTD rate should have been $400.00
per week and the MMI date was a week earlier than TTD ceased. The Defendant may be entitled to a credit.

A. Burden of Proof

1. Does burden shift to Defendant to prove its credit?

   a. Defendant bears burden of proving its right to other types of credits, such as short-term disability. Dravo Lime Co., Inc. v. Eakins, 156 S.W. 3d 283, 290 (Ky. 2005)

   b. In Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008), the Court held, “An employer seeking a credit against its workers’ compensation liability has the burden to show a proper legal basis for the request.”

2. Does the Defendant/Employer need to preserve its entitlement to such a credit?

   a. 803 KAR 25:010 §13(14) states, “Only contested issues shall be the subject of further proceedings.”

   b. In Leslie County Fiscal Court v. Adams, 965 S.W.2d 152, 153-154 (Ky. 1998), the Court held:

      It is apparent from the regulations set forth by the Board that the principles concerning the preservation of issues for further consideration applies in workers’ compensation proceedings. The regulations provide that only those issues which are listed as contested on the prehearing order may be the subject of further proceedings. (Emphasis added)

   c. Roberts v. Estep, 845 S.W.2d 544, 547 (Ky. 1993), in which the workers’ compensation claimant contended for the first time before the Board that the Defendant/Employer had improper contact with Claimant’s treating physician. In refusing to address the issue the Court held:

      Additionally, as noted above, this issue was neither listed as a contested issue on the prehearing order nor raised at the hearing itself. 803 KAR 25:011 sec. 8(6) limits discussion to those contested issues which are contained on the prehearing order. Since this issue was not properly raised before the ALJ, the Board cannot address it on appeal. Id. (Emphasis added)
d. TTD is arguably covered under “Extent & Duration.”

*It is – I have lost this issue with the Board.*

B. Against Which Type of Benefits Is the Credit Granted

1. The Benefit can (may) only be taken against past-due benefits.

   In Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990), the Court found an employee who has received an overpayment of income benefits should not be deprived of future income as a result of any such overpayment. However, an overpayment which can be credited fully against a past due amount without affecting future benefits is within the purview of the statutes. It is the holding of the Court that when a claimant’s future benefits are not affected, the employer shall be allowed a full dollar for dollar credit on past benefits.

   But, the WCB may disagree with this analysis as it recently held (citing its own prior opinions) where TTD is involuntarily paid, (i.e. paid pursuant to an Interlocutory Order), the credit can be taken against future PPD benefits. Dotson Trucking v. Hunt, WCB #2011-97859 (Rendered November 27, 2013).

2. Is there a credit for “bona fide wages?”

   In Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008), the Supreme Court of Kentucky affirmed the decision of the Court of Appeals affirming the Board's reversal of the ALJ, "on the ground that Chapter 342 does not authorize a credit for bona fide wages." Id. at 340. (emphasis added) The Court determined "claimant's wages were 'bona fide' because they were paid ostensibly for labor and because the evidence did not permit a reasonable finding that the employer intended to pay them in lieu of workers' compensation benefits." Id.

   Further, the Court noted Larson, Larson's Workers' Compensation Law, Chapter 82 (2006), notes that an employer may be permitted to receive credit for post-injury wages if the facts indicate that it intended to pay them in lieu of compensation. Id. at 342.

   In Arnold v. Nesco Resource, DWC Claim No. 2011-68484 (Board Decision rendered May 24, 2013), Arnold was off work from November 4, 2011 through December 5, 2011 and was also off work from March 27, 2012 through April 12, 2012, although he received salary continuation for both periods. From December 6, 2011 through March 26, 2012 and from April 13, 2012 through July 18, 2012, Arnold was returned to “work,” prior to attaining MMI, at a modified duty position, which had him performing only menial tasks or sitting in a room on the employer’s
premises. Arnold argued he is entitled to TTD benefits for the period from December 3, 2011 through July 18, 2012.

The Board held a return to “menial work” does not constitute a “return to employment” under KRS 342.0011(11)(a) and an employer is not entitled to a credit for bona fide wages paid for even menial work in the absence of proof the wages were paid in lieu of workers’ compensation benefits. This case has been appealed to the Court of Appeals: Case No: 2013-CA-001098.

See also Ford Motor Company v. Head, 2012-83691 (WCB Opinion rendered 6/20/14), wherein claimant was asked to report to work and sit in a room doing nothing, but was paid her regular pay for forty hours per week. The Board found the wages were “bona fide” and when TTD was subsequently awarded, Ford was not provided a credit for payment of such wages.

3. Is there a credit for “Wage Continuation?”

In Arnold v. Nesco Resource, DWC Claim No. 2011-68484 (Board Decision rendered May 24, 2013), the Board held, “wage continuation is not a benefit for which the statute provides credit against workers’ compensation benefits. KRS 342.730(6).” This case has been appealed to the Court of Appeals: Case No: 2013-CA-001098.

V. TTD ON REOPENING

Pursuant to Bartee v. University Medical Center, 244 S.W.3d 91 (Ky. 2008), an Employee is not entitled to Temporary Total Disability benefits prior to the filing of his motion to reopen.

VI. RECENT TTD CASES


B. Tipton v. Trane Commercial Systems, DWC Claim No. 2010-89621, (Board Decision rendered March 14, 2014)

OPINION

MOORE, Judge.

An Administrative Law Judge (ALJ) determined that Sonia Mull was entitled to an award of temporary total disability income benefits (TTD) from May 15, 2011, until December 29, 2011. Mull's employer, Zappos.com, Inc. (Zappos), appealed to the Workers' Compensation Board and the Board subsequently reversed. Mull now appeals to this Court. We reverse.

FACTUAL AND PROCEDURAL HISTORY

Mull began her employment with Zappos in August 2010, working ten-hour shifts on weekends and earning $11.00 per hour. Her work at Zappos largely required her to engage in prolonged standing while retrieving boxes from a conveyor belt, scanning the boxes, and putting them into Zappos boxes for shipping. Mull's work was fast paced and repetitive, often requiring her to handle 300 boxes per hour. She first noticed numbness and stiffness in her right hand in January 2011. On February 5, 2011, she had difficulty lifting the middle finger of her right hand from a closed fist and had a snapping or flicking sensation in the finger.

In early March, Mull's treating physician, Dr. Dennis Sparks, diagnosed her with trigger finger. As Dr. Sparks described in a treatment note, he gave Mull "a note to be off of work,"
but believed that being off work was “probably not going to do anything at all for her trigger finger.” On March 5, 2010, Mull brought Dr. Sparks' note to her supervisor at Zappos, told her supervisor that she did not feel physically capable of performing her usual work because of the condition of her hand, and she requested a one-month leave of absence. Her request was refused and she was instead directed to take a drug test, pursuant to Zappos's policy. After she passed the drug test, she was placed on what Zappos categorized as “light duty” or “alternative” work.

Mull continued her light duty work at Zappos every weekend until she eventually quit on May 15, 2011. She filed a workers' compensation claim on August 17, 2011, alleging that she had sustained a repetitive motion injury to the middle finger of her right hand during the course and scope of her employment with Zappos on February 5, 2011. As her claim progressed, she requested TTD from May 15, 2011, until December 29, 2011 (the date that she was eventually determined to be at maximum medical improvement or “MMI”). When her claim was later submitted to the ALJ for final adjudication, the ALJ found that Mull had proven that she had lacked the physical capacity to “return to employment” during her requested period of TTD within the meaning of Kentucky Revised Statute (KRS) 342.0011(11)(a); that Mull had not reached MMI until December 29, 2011; and that Mull was, therefore, entitled to TTD income benefits from her requested date of May 15, 2011, to December 29, 2011.

Zappos filed a petition for reconsideration arguing in relevant part:

It is absolutely uncontroverted that alternative work was provided for [Mull] within the restrictions assigned. Despite alternative work being made available, [Mull] elected to leave her part time position at Zappos so she could spend more time with her family. While [Mull's] reasons for leaving her part time work at Zappos are legitimate, they are not sufficient to warrant the awarding of Temporary Total Disability Benefits. Meanwhile, [Mull] continued to work full time for Travel Exchange after cutting back her time demands for “family reasons.”

There is absolutely no evidence to suggest that [Mull's] cessation of the alternative duty at Zappos had anything to do with her physical capabilities to perform the light duty job. [Mull] admits that the reason why she quit working her part time job at Zappos was because of “family reasons” instead of anything to do with her trigger finger. Accordingly, it is respectfully submitted that error patently appears on the face of the Opinion & Award as it relates to the awarding to Temporary Total Disability Benefits. There has been no finding of fact that [Mull] was disabled from doing the alternative job at Zappos during which time TTD was awarded.

2 The ALJ was persuaded that a set of restrictions assessed by Dr. Anthony McEldowney, one of Mull's experts, applied to Mull during the period of requested TTD. Dr. McEldowney's report stated that Mull no longer retained the physical capacity to return to the type of work performed at the time of her injury, and further stated that Mull was restricted to “no repetitive gripping or grabbing/lifting activities with her right hand.”

3 While working part-time with Zappos, Mull also worked full-time during the week with a different employer, Travel Exchange. Mull's position with Travel Exchange was sedentary accounting-type work. Based upon Mull's undisputed description of this work, it had no duties or physical requirements in common with her work at Zappos.
Overruling Zappos's petition for reconsideration, the ALJ stated “In this instance the plaintiff was not placed at maximum medical improvement until December 29, 2011 and was on light duty work restrictions. Therefore, she met the two pronged test and her ability to do light duty work is irrelevant.”

Zappos then raised the same argument on appeal before the Workers' Compensation Board. Reversing, the Board held:

Here, Zappos accommodated Mull's restrictions with a scanning position, which she testified was a normal part of her employment prior to the injury. Zappos correctly notes Mull acknowledges she was capable of continuing to perform the light duty work but ceased her employment with Zappos for personal reasons completely unrelated to the work injury. Nothing in the record establishes the light duty work constituted “minimal” work and she worked regular shifts while under restrictions. She also was capable of performing, and continued to perform for more than one year post-injury, her primary full time employment with Travelex. Given Mull was capable of performing work for which she had training and experience, and voluntarily ceased her employment for reasons unrelated to her injury or the job duties, substantial evidence does not support the award of TTD benefits[.]

Mull now appeals.

**STANDARD OF REVIEW**

The ALJ is the finder of fact in workers' compensation matters. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000). In that regard,

KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, Ky., 379 S.W.2d 450, 457 (1964). Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). Although a party may note evidence which would have supported a conclusion contrary to the ALJ’s decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. Special Fund v. Francis, supra, at 643.

Id.
ANALYSIS

The overarching issue presented in this appeal is whether Mull was entitled to an award of Temporary Total Disability income benefits from May 15, 2011, to December 29, 2011. In Bowerman v. Black Equipment Co., 297 S.W.3d 858, 874-75 (Ky. App. 2009), this Court explained the law regarding TTD as follows:

Entitlement of a workers' compensation claimant to TTD benefits is a question of fact to be determined in accordance with KRS 342.0011(11)(a). Statutory interpretation is a matter of law reserved for the courts, and courts are not bound by the ALJ's or the Board's interpretation of a statute. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327, 329-330 (Ky. App. 2000). Indeed, it is the appellate court's province to ensure that ALJ decisions, and the Board's review thereof, are in conformity with the Workers' Compensation Act. KRS 342.290; Whittaker v. Reeder, 30 S.W.3d 138, 144 (Ky. 2000).

TTD is statutorily defined in KRS 342.0011(11)(a) as "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 [...]" In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court of Kentucky established how the statutory definition was to be interpreted and applied in determining the duration of any appropriate award of TTD benefits. In Wise, the employer argued KRS 342.0011(11)(a) required termination of TTD benefits as soon as an injured worker is released to perform any type of work. However, relying upon the plain language of KRS 342.0011(11)(a), the Supreme Court 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 that is customary or that he was performing at the time of his injury.” Id. at 659. Thus, a release “to perform minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

Thus, as defined by the statute, there are two requirements for an award of TTD benefits: first, the worker must not have reached MMI; and, second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. Absent either requirement, a worker is not entitled to TTD benefits. Furthermore, pursuant to the construction assigned under Wise, KRS 342.0011(11)(a) takes into account two distinct realities: first, even if a worker has not reached MMI, temporary disability can no longer be characterized as total if the worker is able to return to the type of work performed when injured or to other customary work; and, second, where a worker has not reached MMI, a release to perform minimal work does not constitute “a level of improvement that would permit a return to employment” for purposes of KRS 342.0011(11)(a).

The purpose of awarding income benefits, such as TTD, was explained by the Supreme Court in Double L. Construction, Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005), which applied the two-pronged TTD standard announced in Wise. The Supreme Court held:

[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.
Id. at 514. The Court clarified that TTD is not based on a finding of AMA impairment, nor based on an inability to perform any type of work. Id. at 515.

In the case at bar, no evidence of record disputes: 1) Mull sustained a work-related injury on February 5, 2011, and it warranted an impairment rating; 2) Mull reached maximum medical improvement (MMI) from that injury on December 29, 2011; 3) Mull's injury did not cause her any absences from her job with Zappos or any reduction in wages or of her regularly scheduled hours of work; 4) Mull was able to perform the post-injury “light duty” work Zappos assigned to her without difficulty; and 5) Mull voluntarily terminated her employment with Zappos on May 15, 2011, for reasons not associated with either her work-related injury or her light duty work.

Also not in dispute are the various duties Mull performed pre- and post-injury. Pre-injury, her regular job assignment was in the shipping department. Her pre-injury duties sometimes required her to work in inventory or refurbishing, but mostly involved working on a conveyor belt where she would perform 100 to 300 repetitive activities per hour consisting of holding a scanner gun in her left hand, scanning a box of shoes brought in on a conveyor belt, placing the box of shoes into a Zappos box, taping the Zappos box shut, and adding a bar code to the Zappos box. Conversely, Mull's post-injury light duty work in-

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4 Mull contends that the ALJ could have reasonably inferred from certain evidence that she terminated her employment with Zappos because she was incapable of performing her light duty employment. In her brief, she argues:

[The Board inappropriately concluded that Ms. Mull ceased her employment with Zappos for “personal reasons completely unrelated to the work injury.” That is, the Plaintiff testified that she terminated her employment with Zappos based on a “work life balance.” However, this testimony is only part of the evidence of record that was considered by the ALJ, and it is completely within the ALJ’s discretion to believe or not believe any portion of the Plaintiff’s testimony. It will be noted that on page 11 of the hearing transcript of evidence Ms. Mull testified that when she resigned she was extremely busy. At that time tax refunds contributed to customers’ increased buying activity. She explained that the departure of the seasonal help following the holidays led to a very busy job where the boxes sometimes “would even pile up from the conveyor and get stuck right there.” It was certainly within the ALJ’s discretion to infer that Plaintiff’s injury, continuing pain, and overwhelming workload, coupled with Dr. McEldowney’s restrictions and Dr. Sparks’ record of medical care, supported the conclusion that the Plaintiff found herself trying to perform a job that exceeded her physical capacity.

The ALJ, however, did not conclude that Mull’s work injury caused her to quit her employment with Zappos. Moreover, the evidence cited in Mull’s argument merely demonstrates that Mull was restricted in the use of her right hand, and that the holiday and tax seasons made work at Zappos busy for every worker. It does not support an inference that Mull was incapable of or had any difficulty performing her light duty work, which did not require the use of her right hand beyond her medical restrictions. And, as Mull’s argument indicates, inferring that she quit due to an inability to perform the light duty work would be contrary to Mull's unrefuted and unequivocal testimony that she was able to perform the light work, and that the only reason she quit was because it was simply “too much time away from [her] family, you know, working for seven days.”
volved scanning items and keeping account of the scanner guns that were being used by other workers.

With this in mind, the specific question presented in this appeal is whether Mull's ability to continue working for Zappos, albeit in a "light duty" capacity, demonstrated that she had never departed from a level of improvement constituting a "return to employment" within the meaning of KRS 342.0011(11)(a) – if so, then Mull was not entitled to any period of TTD income benefits. This is an inquiry that involves the application of law to the facts of this case. Because the facts relevant to this inquiry (as stated above) are undisputed, we owe no deference to the ALJ's decision on this point. See Hinkle v. Allen-Codell, Co., 298 Ky. 102, 106-7, 182 S.W.2d 20 (1944).

For her part, Mull does not contest the Board's statement that the light duty work Zappos assigned her was "work for which she had training and experience" or that it was comprised of duties that were "a normal part of her employment prior to the injury." She argues in her brief, however, that "it should not matter that [she] was performing a function that was a part of the overall activity at Zappos" because she "did not possess the physical ability to continue her gripping/grabbing activities while scanning the boxes." Stated differently, Mull's position is that of the ALJ: She should be considered totally disabled for the purpose of a TTD award because she was capable of performing some, but not all, of her customary pre-injury duties within the parameters of her medical restrictions.

Incidentally, at least one unpublished decision demonstrates that the Board and this Court have interpreted "return to employment" in roughly the same manner as Mull and the ALJ. In Heaven Hill Distilleries, Inc. v. Lawson, No.2008-CA-001041-WC, 2008 WL 5147138 (Ky. App. Dec. 5, 2008), the claimant, Bonnie Lawson, was a quality control inspector at a bottling plant whose job included inspecting half-pint, quart, and half-gallon bottles. Lawson sustained a work-related injury in October, 2003, and her physician, Dr. Shea, consequently restricted her from working for a period of time thereafter. The employer argued that Lawson was not entitled to TTD during the period of restriction because Dr. Shea testified that, at that time, Lawson would have been capable of performing lighter duty work inspecting only half-pint bottles, and that he was unaware that the employer had in fact made such a job available to Lawson when he ordered Lawson not to return to work. Id. at *1-2. Nevertheless, the Board affirmed the ALJ's decision to award Lawson TTD for the period of restriction; in relevant part, it held:

Even if we were to conclude Lawson misled Dr. Shea into believing no work she could perform was available, the fact remains that the evidence clearly established Lawson could not perform the work on the half-gallon line following the October 2003 injury, nor during the time periods she was taken off work by her physicians. Since this was the work she was performing at the time of her shoulder injury, we cannot say the ALJ's award of TTD benefits was so unreasonable under the evidence that it must be reversed as a matter of law.

Id. at *2. In affirming the Board, this Court added:

In the case sub judice, Lawson's pre-injury employment duties included lifting both half-pint and quart bottles from the assembly line. Even if Lawson were released to perform her job on a light duty by lifting only
half-pint bottles, we do not deem such restricted work as tantamount to the type of work she performed customarily or before injury.

Id. at *3.

Thus, because the claimant in Lawson could have returned to work consisting entirely of duties she customarily performed pre-injury (i.e., inspecting half-pint bottles), but to work that excluded two of her usual and customary pre-injury duties (i.e., inspecting quart and half-gallon bottles), she was deemed temporarily and totally disabled.

Zappos's position, on the other hand, is that of the Board in this case: The term “return to employment” should be interpreted broadly enough to include a claimant's demonstrated ability to perform a job at approximately the same wage and for the same number of hours primarily consisting of duties (but not necessarily every duty) that the claimant had the training and experience to perform pre-injury and which constituted a normal part of the claimant's employment pre-injury.

And, incidentally, at least one unpublished decision demonstrates that the Board and this Court have interpreted “return to employment” in roughly the same manner as Zappos. In Livingood v. Transfreight, LLC, No. 2013-CA-000349-WC, 2014 WL 356605 (Ky. App. Jan. 31, 2014), the claimant, Alton Livingood, was a forklift operator whose pre-injury duties included changing batteries in forklifts and ensuring freight was in the correct location. He sustained a work-related injury in September, 2009. Following surgery, Livingood returned to work in March, 2010, on “modified duty” at the same wage he was previously paid until he underwent another surgery in October, 2010. Id. at *1. His “modified duty” did not include operating a forklift; “25 percent” of his modified work consisted of duties he had never previously been assigned;5 but, “75 percent” of his modified work consisted of pre-injury duties (i.e., changing batteries in forklifts and ensuring freight was in the correct location). Id. at *2. Livingood asserted that he was entitled to TTD income benefits for the period of time when he worked in his modified duty capacity because his modified duty work did not include all of his pre-injury duties. Id. The Board rejected Livingood's claim, and this Court affirmed, for the following reasons:

[D]uring his return to work, Livingood was paid the same wage he was paid prior to his injury. The ALJ found that a majority of Livingood's work during his time was work he had been trained to do, and work that he had previously performed for the employer. Once he returned to work, Livingood spent half of his time changing batteries in forklifts and 25 percent of his time ensuring freight was in the correct location, both tasks Livingood performed prior to his injury. In total, 75 percent of Livingood's post-injury work was work he customarily and regularly performed for his employer pre-injury.

Id. at *2.

5 This “25 percent” figure related to Livingood's new duties as a “bathroom monitor.” In its own review, the Board explained that this was a function that was required in the operation of Transfreight's business and that it did not simply qualify as a “make-work” project. See Livingood v. Transfreight, LLC, W.C.B. Claim No. 2009-73444 (entered January 25, 2013).
We pause for a moment to emphasize that Lawson and Livingood are unpublished cases. We do not cite them as either precedent or persuasive authority regarding Mull's or Zappos's interpretation of "return to employment" within the meaning of KRS 342.0011(11)(a). See Kentucky Civil Rule (CR) 76.28(4)(c). They merely underscore a level of inconsistency in the Board's decisions on the subject of awarding TTD and, as such, they demonstrate why no form of deference should be accorded in this instance to the Board's construction of its own statutory mandate. See Homestead Nursing Home v. Parker, 86 S.W.3d 424, 426 (Ky.App.1999) (“Although our review of the Board's statutory interpretations is less deferential than our review of its factual determinations, nevertheless, an administrative agency's construction of its statutory mandate, particularly its construction of its own regulations, is entitled to respect” (citations omitted)).

With this in mind, however, published Kentucky decisions provide limited guidance with respect to which interpretation of “return to employment” is correct.

To begin, Wise, 19 S.W.3d 657, is cited as authority on this subject by both parties. There, the claimant (a journeyman ironworker) ceased his employment with Central Kentucky Steel (CKS) after fracturing his left arm in a work-related injury on April 28, 1997. On July 11, 1997, the claimant's treating physician released him to return to work, so long as the work in question would not require him to lift more than five pounds with his left arm. Upon review, the Kentucky Supreme Court determined that the five-pound lifting restriction prohibited a “return to employment” because it only permitted the claimant to “perform minimal work but not the type that is customary or that he was performing at the time of his injury.” Id. at 659. The Court further determined that the claimant did not “return to employment” until September 30, 1997, when he “moved to Florida and returned to work earning approximately $13.00 per hour,” which was less than his pre-injury hourly wage of $18.76. Id. at 658-59.

The Wise decision does not answer several questions posed in this case. For example, we are left to assume that most, if not all, of the claimant's ironworking duties could not have coexisted with his five-pound lifting restriction. Wise does not indicate whether CKS was inclined to accommodate the claimant's restrictions, or if doing so would have made any difference for the purpose of awarding TTD. In determining when a claimant can “return to work,” Wise appears to place weight upon a doctor's report indicating that the claimant could be released back to work without any restrictions. Id. at 659. But, the Wise Court ultimately found that substantial evidence supported that the claimant had achieved a “return to employment” on September 30, 1997 – a date that no doctor had placed any significance upon inasmuch as medical restrictions were concerned. The date of September 30, 1997, only appears significant because, according to the opinion, that was the date when the claimant chose to begin working at an unspecified job in a different state at a lower wage.

Mull also cites Double L Const., Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2006). There, the claimant sustained a compensable injury to his left eye on January 6, 2003, while working

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6 Indeed, Livingood is currently on appeal before the Kentucky Supreme Court.

7 Wise does not explain what work the claimant performed in Florida. In light of the rule espoused in Wise and the outcome of that case, the assumption would be that the claimant performed at least some of the duties typically assigned to an ironworker.
full-time as a carpenter in the construction business. As of September 25, 2003, he had not returned to work as a carpenter. Id. at 512. The claimant's doctor released him to perform unspecified “light-duty” work on March 3, 2003. The Mitchell opinion does not explain what the claimant's medical restrictions were as of that date. But, in light of the result reached in Mitchell, and the fact that he was awarded TTD until his doctor released him back to work without any restrictions on August 18, 2003, Mitchell could either mean 1) the employer's ability to accommodate the claimant's restrictions was irrelevant for the purpose of awarding TTD; or 2) most or all of the claimant's typical and customary work as a construction carpenter could not have been performed within the “light-duty” restrictions. See id. at 511 (“Concerned about the stitches that remained in his eye, the lifting required in the carpentry job, and effects of exposure to dust, the claimant did not return to carpentry [as of March 3, 2003]”).

The Mitchell Court also found that the claimant's continued ability in spite of his injury to perform a second, part-time job involving “emptying trash cans throughout Kroger’s corporate headquarters” did not qualify as a “return to employment,” explaining:

The claimant's injury occurred in his employment as a construction carpenter; therefore, his customary work for the purposes of KRS 342.0011(11)(a) was construction carpentry, including the duties that he was performing at the time he was injured. It is undisputed that the injury rendered him unable temporarily to perform his customary work until August 18, 2003; therefore, he did not reach a level of improvement that would permit a return to employment until August 18, 2003.

Id. at 514 (emphasis added).

It remains unclear from this language and the remainder of the opinion whether, by using the word “duties,” the Mitchell Court meant “every duty” as urged by Mull. It appears that the Mitchell claimant's respective jobs of full-time construction carpenter and part-time office trash collector had no duties in common. Mitchell does make clear, however, that a worker's ability to perform other concurrent employment involving a different set of duties and physical requirements has no bearing upon the analysis of whether a claimant is entitled to an award of TTD. Thus, it is apparent that the Board misconstrued the applicable law when it focused upon Mull's ability, post injury, to perform her concurrent full-time employment at Travel Exchange in determining that Mull was not entitled to TTD. See Note 2, supra.

Another case touching upon whether a return to “light duty” work qualifies as a “return to employment” is Bowerman, 297 S.W.3d 858. There,

Bowerman's [e.g., the claimant's] customary work at Black [e.g., the employer] was as a forklift operator, and ... this was the type of work he was performing at Black when he sustained his work-related injury. According to Bowerman's uncontradicted testimony, his pre-injury work duties as a forklift operator included “lots of heavy lifting, doing engine repairs, pulling heads off, pulling motors out, transmissions, brake jobs, and pulling wheels and tires off.” In performing these duties, Bowerman “tried not to lift anything over 100-120 pounds if he could help it.”

Id. at 876.
Bowerman sustained a work-related back injury on October 14, 2004, and his doctor assigned him restrictions that allowed him to return to some light work activities. *Id.* at 861. From October 25, 2004, to April 22, 2005, Bowerman continued working at Black in a “light duty” capacity. To that end, there is no indication from the opinion itself whether Bowerman’s hours of work or wages were reduced in this position. But, as it relates to his duties,

He was kept in the office in the parts room. He cleaned the office, took out the garbage, filled parts orders and pulled parts for customers. He said that he had problems performing this job because there was a lot of reaching involved. Some parts were too heavy and he could not pick them up. He could not kneel down or get down on his knees. His service manager, Donnie Hertter[,] would assist him in this job.

*Id.* at 876.

Upon review, this Court determined that even though Bowerman had in fact resumed working for Black as of October 25, 2004, his ability to perform the light duties assigned to him merely demonstrated, at best, 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). *Id.* Thus, Bowerman, like Mitchell, can at least be said to stand for the proposition that light work consisting of duties entirely different from pre-injury work duties cannot be considered a “return to employment” for the purpose of awarding TTD. What Bowerman adds is that it makes no difference whether this light work is performed for, or is offered by, the pre-injury employer.

Finally, a decision providing a further measure of guidance is FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). There, the claimant was a trained millwright employed as a “working foreman” on construction projects, supervising a small crew of four to six workers. In that capacity,

[H]e directed the other members but would also change out bolts; lift and carry on his shoulder angles that weighed up to 120 pounds; and use his hands to push and pull, grasp and grip, climb, perform various over-the-shoulder activities, and bring supplies to the crew.

*Id.* at 315.

After he sustained a work-related injury to his right arm, his treating physician, Dr. Kilambi, restricted him to “light-duty work that required minimal use of his right hand” between August 24, 2003 (the date of the injury) and November 17, 2003 (the date of an ensuing surgery). *Id.* at 315. The claimant's employer argued that the claimant was not entitled to TTD during this period because the physical demands of his customary work did not exceed his restrictions. *Id.* at 317. The ALJ denied the claimant's request for TTD. In particular, the ALJ chose to believe the testimony of the claimant's superintendent, Scott Brown, to the effect that the claimant's restrictions could have been accommodated because the physical activity or the use of tools in the claimant's pre-injury work as a foreman, described above, was optional and not a required function of the job. *Id.* at 316. Reversing, the Kentucky Supreme Court held that certain evidence compelled a finding that the claimant's injury prevented him from performing his customary work, that his
It was undisputed that during the relevant period Dr. Kilambi restricted the claimant to light-duty work. The only documentary evidence also indicates that he also restricted the claimant from more than minimal use of his right hand. The claimant was right-handed. Although Mr. Brown testified that the foreman's job did not require more than light-duty work, he also testified that all of the foremen of the four to six-man crews “jumped in” and helped their crews. The claimant described himself as the “working foreman” of a small crew. Like his crew, he was required to wear a safety harness, although he was not required to wear a tool belt. His description of the work he performed clearly exceeded his restrictions, and its accuracy was supported by the fact that he was injured while ratcheting a bolt on a conveyor. Moreover, nothing refuted his testimony that he took medication after the injury that prevented him from performing his duties and that Dr. Kilambi placed his right arm in a sling for a period five or six weeks after the injury.

Id. at 317.

To summarize: Whether or not it was a required duty of the foreman job, it was customary for those working in the claimant's position (i.e., that of a foreman) to jump in and help their crews, which entailed physical labor and the use of tools. The claimant's injury to his dominant hand prevented him from doing so. Thus, irrespective of whether the employer would have continued to make this duty optional for the claimant post-injury as part of an accommodation to the claimant's medical restrictions, the Kentucky Supreme Court found that the claimant's inability to perform this type of duty post-injury was dispositive for the purpose of awarding TTD – essentially this inability indicated that the claimant had not yet reached a requisite level of medical improvement.

The Williams Court could have cited the claimant's use of pain medication to treat his work-related injury during this period of time as the sole basis for compelling an award of TTD. As the Court noted, the claimant testified that he “was told [by Brown] that he could not work because he was on medication,” id. at 315, and “[m]oreover, nothing refuted his testimony that he took medication after the injury that prevented him from performing his duties.” Id. at 317 (emphasis added). From its use of the word “moreover” to preface this point, however, we read Williams to mean that this was merely cited by the Court as an alternative basis for granting TTD. Indeed, if the claimant's use of medication in and of itself prevented the claimant from performing all of his duties as a foreman, and an inability to work all of the duties of a given job were the only criterion for determining entitlement to TTD, then it would have been meaningless for the Court to have focused extensively upon the claimant's inability to perform just one optional but customary duty (i.e., that the claimant's injury prevented him from jumping in and helping his crew) in its analysis.

Having reviewed the applicable case law on the subject of what constitutes a “return to employment,” we are left to make the following conclusions. First, as Wise tends to indicate, a worker can “return to employment” by returning to work at a lower wage post-injury. Second, no published case places emphasis on the amount of hours that a worker is capable of performing at any job post injury. But, if the amount of hours a worker is capable of working is relevant at all, it is relevant only within the context of the pre-injury
employment. See Mitchell, 182 S.W.3d at 514. Third, Bowerman and Williams indicate that it makes no difference whether the post-injury job is performed for the same pre-injury employer, or whether the pre-injury employer would consider the job to be "light duty." The dispositive factor is always the worker's ability to perform the pre-injury job. Finally, Williams indicates that Kentucky precedent favors Mull's interpretation of the phrase "return to employment": an employee has achieved this level of improvement if, and only if, the employee can perform the entirety of his or her pre-injury employment duties within the confines of their post-injury medical restrictions.

We are cognizant that this interpretation flies in the face of the plain meaning of the words "totally disabled"; it narrowly defines otherwise broad language such as "return to employment"; and, when applied in the context of a worker who is capable of performing most pre-injury duties or pursuing some other employment for equal wages and for an equal amount of hours each week, it would seem to contradict the very purpose of awarding TTD, that 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." Mitchell, 182 S.W.3d at 514. Be that as it may, this interpretation is consistent with binding precedent and, whether we agree with it or not, we are bound to follow it. It is the purview of the Kentucky Supreme Court or the General Assembly to say otherwise.

Applying this interpretation, it also becomes apparent that the Board erred in reversing the ALJ's determination that Mull was entitled to TTD from May 15, 2011, to December 29, 2011. Due to her work-related injury, Mull no longer retained the physical ability to perform any activities requiring gripping and grabbing with her right hand or both hands. Her pre-injury employment was undisputedly and largely comprised of such activities. And, her post-injury light duty work was not.

CONCLUSION

For these reasons, we REVERSE the Board and direct it to reinstate Mull's award of TTD income benefits.

ACREE, Chief Judge, Concurs.
JONES, Judge, Concurs in Result Only.

Mull v. Zappos.com, Inc.
Not Reported in S.W.3d, 2014 WL 3406684 (Ky. App.)
ALVEY, Chairman. Delena Tipton ("Tipton") seeks review of the October 7, 2013 opinion rendered by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and future medical benefits against Trane Commercial Systems ("Trane"). Tipton also appeals from the November 25, 2013 order overruling her petition for reconsideration.

On appeal, Tipton argues the ALJ erred in not awarding TTD benefits from March 23, 2011, when she returned to light duty work, through July 7, 2011 when she reached maximum medical improvement ("MMI"). She also argues the ALJ erred in failing to enhance her award of PPD benefits by the three multiplier contained in KRS 342.730(1)(c)1. Because we determine the ALJ committed no error, and conducted the appropriate analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), we affirm.

It is undisputed Tipton sustained a right knee injury while working for Trane, where she has worked since 1990. The parties stipulated to the date of the work accident, the period of time Tipton missed work, the fact she was paid TTD benefits for the entire period of time she missed work due to her injury, and she is entitled to PPD benefits based upon the 3 percent impairment rating assessed by Dr. Wallace Huff, her treating orthopedic surgeon, pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition.
Tipton filed a Form 101 on February 25, 2013 alleging she injured her right knee on May 5, 2010, when she fell at work. The date was later amended to reflect the injury actually occurred on May 6, 2010. Tipton supported the claim with the record from Bluegrass Orthopedics and Hand Care dated May 10, 2010, reflecting the history of the fall at work which resulted in a non-displaced fracture of the right patella, and outlined the activities from which she was restricted at that time.

Tipton subsequently testified by deposition on April 19, 2013, and at the hearing held August 8, 2013. Tipton, a resident of Lawrenceburg, Kentucky, is a high school graduate with some college coursework consisting of secretarial training, although she did not receive a degree. She is also certified as a forklift operator through Trane.

She testified Trane manufactures air conditioning units. She began working there in 1990. Her job for the five years prior to the accident consisted of assembling and testing controls for those units. Since returning to light duty work in March 2011, she has worked as a circuit board assembler which is not as physically demanding as her previous position, but is in the same labor grade, or pay classification. She has had at least one pay increase since returning to work. Regarding her current pay with Trane, Tipton testified as follows:

A. I can tell you what I make an hour, I mean...

Q. Do you feel that you're making less now?

A. No.

Trane filed Tipton's tax records from 2009 through 2012, reflecting higher earnings in 2012.

On May 6, 2010, Tipton connected wires to a unit for testing. As she turned, a ground wire had wrapped around her leg causing her to fall onto her right knee. Her job at the time of the accident consisted of lifting, moving, bending, squatting, and crawling. When she returned to work in March 2011, her job was far less physically demanding, and she sat all day. Currently, her job requires some standing and occasional climbing. She also testified she works some overtime. She continues to experience some pain and discomfort in her right knee, and her current medical treatment includes the application of Voltaren gel, injections and occasional use of anti-inflammatory medication.

Tipton filed copies of Dr. Huff's treatment visits from May 10, 2010 through February 25, 2013. Those records document her return to work, physical therapy, Euflexxa injections, and restrictions. Trane also filed return to work slips from Dr. Huff outlining her restrictions.

A benefit review conference ("BRC") was held on January 9, 2013. The BRC order and memorandum reflects the parties stipulated Tipton was entitled to PPD benefits based upon a 3% impairment rating. The parties also stipulated TTD benefits were paid from May 6, 2010 until Tipton returned to work on March 22, 2011. Significantly, the parties stipulated Tipton had returned to work at a wage equal to, or greater than her average weekly wage which was later stipulated as $949.97.
The ALJ rendered his decision on October 17, 2013, awarding TTD benefits through Tipton's return to work on March 22, 2011. He based the award of PPD benefits on the stipulated 3 percent impairment rating, and found both the three and two multipliers pursuant to KRS 342.730(1)(c)1 and 2 applicable. The ALJ explained the basis for his determination as follows:

Having reviewed and considered the entirety of the evidence on this issue, the ALJ concludes that when the release and restrictions assessed by Dr. Huff restricting plaintiff from performing work requiring constant climbing and bending are considered in light of the plaintiff's testimony that she cannot perform her pre-injury job, her testimony that the job requires a lot of bending and squatting, and the job description attached to the Form 111 filed by the employer which indicates that plaintiff's pre-injury work requires constant stooping and bending as well as frequent squatting, the ALJ concludes that plaintiff does not retain the physical capacity to return to the type of work she performed at the time of her injury and as such, she qualifies for the three multiplier contained in KRS 342.730(1)(c)1.

While Dr. Huff's July 24, 2013 work status form is not entirely clear as to what his recommendations are, as he does indicate that she can return to the occupation which she performed at the time of her injury, the form also indicates that plaintiff has limitations in bending and climbing as the form states "patient is able to: bend/climb" in the "frequent" category only, which is "34-66%" of the time but that she cannot engage in activities that require "constant" bending or climbing, which the form indicates is "67-100%" of the time. Plaintiff testified on page 13 of her hearing transcript that when she returned to her pre-injury job for one day, the work aggravated her knee condition as the job required "a lot of bending, squatting. My knees swelled up." The job description filed by the employer as an attachment to the Form 111 states the plaintiff's pre-injury job as an assembler/controls operator requires, among other things, "stooping/bending on a constant(ly), 67-100% basis." Given this evidence, the ALJ concludes that plaintiff's testimony and the job description filed by the employer are in accord that plaintiff's pre-injury job requires bending in the constant range, 67 to 100% of the time, which by the terms of Dr. Huff's July 24, 2013 work status form, plaintiff is restricted from performing in her current condition due to her work injury, and as such, Dr. Huff's restrictions and the job description support the plaintiff's testimony that she cannot physically return to the job she performed [sic] time of her injury. As such, the ALJ concludes that plaintiff qualifies for application of the three multiplier contained in KRS 342.730(1)(c)1. The ALJ understands that Dr. Huff did check the box on the work status form indicating the plaintiff could return to work in the occupation which she regularly performed at the time of injury, but the ALJ believes that this general statement or opinion is qualified by the specific restrictions listed in the remainder of the form regarding bending and climbing. As such, the ALJ is more persuaded by the specific restrictions indicated in the work status form rather than the general release to return to the work performed at the time of injury.
However, as directed by the Supreme Court in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the analysis regarding the applicability of the multipliers in KRS 342.730 must also take into consideration the two multiplier contained in KRS 342.730(1)(c)2. The parties stipulated that plaintiff returned to work at a wage equal to or greater than her average weekly wage at the time of her injury and this stipulation triggers the application of KRS 342.730(1)(c)2, which allows enhancement of permanent partial disability benefits by the two multiplier for a claimant who returns to work at the same or greater wage if that employment at the same or greater wage then ceases for a reason related to the work injury. As such, given that both KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 apply, a Fawbush analysis is necessary to determine which of the multipliers is most appropriate. In making this determination the ALJ is required to determine whether the claimant can continue to earn the same or greater level of wages for the indefinite future. As applied to this claim, the ALJ first notes that plaintiff's current job in which she is earning greater wages is sit down work which the plaintiff has no physical difficulty in performing despite her ongoing symptoms in her injured knee. The ALJ also notes plaintiff has been employed with the employer for approximately twenty two years which is evidence of a stable employment relationship and she is a member of a union which provides some degree of job protection for the plaintiff. In addition, the employer seems to have been cooperative in providing plaintiff the opportunity to perform less physically demanding work that is consistent with plaintiff's ongoing symptoms and restrictions. Further, plaintiff testified she attended two years of college although she did not obtain a degree which demonstrates the plaintiff has the intellectual capacity to perform work other than factory or manual labor and that she is suited for vocational rehabilitation from a cognitive standpoint. Also, the wage records reflect the plaintiff has been able to earn more in the year 2012 than in the years 2009, 2010 and 2011. Lastly, it should be remembered that Dr. Huff placed minimal restrictions on plaintiff's functional activity and only restricted her from constant bending and climbing and the ALJ infers from these minor restrictions the plaintiff has the physical ability to perform a wide range of jobs and in fact, nearly the entire range of jobs she would have been able to perform prior to her injury.

Having reviewed and considered all of the above factors, the ALJ concludes that plaintiff is likely to be able to continue to earn the same or greater for wage into the indefinite future and therefore the ALJ determines that the application of the two multiplier is more appropriate on the facts of this claim and as such, plaintiffs[sic] permanent partial disability benefits based upon a 3 percent impairment rating shall be enhanced by the factor contained in KRS 342.730(1)(c)2 and should plaintiff's employment at the same or greater wage cease, for a reason related to her injury, the weekly benefit for permanent partial disability shall be two times the amount otherwise payable for any period of cessation of that employment.
Regarding Tipton’s entitlement to TTD benefits, the ALJ found as follows:

The plaintiff has raised TTD as to duration as a contested issue and argues that she should be entitled to payment of TTD benefits during the period that she was released to light duty work by Dr. Huff and in fact performed light duty sit-down work for the employer from March 23, 2011 through July 7, 2011 during which time she earned her pre-injury hourly wage, but did not perform any overtime work. Plaintiff asserts that she had never performed the light duty job prior to her work injury and that the wage records reflect that she made "much less during this period of light duty since she was not working hardly any overtime." The employer responds by arguing that an award of TTD for the period is inappropriate given the plaintiff was actually employed, she earned her normal pre-injury hourly pay, the work that she did was not minimal employment as defined in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) and the work she performed building circuit boards is an essential component of the employer's end product of industrial air conditioner units.

Whether plaintiff is entitled to TTD for the argued period is controlled by KRS 342.0011(11)(a) which defines TTD as: "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." In Central Kentucky Steel, supra, the Supreme Court further explained: "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." Also, in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury.

Analyzing the facts of the instant claim in light of the above precepts, the ALJ concludes plaintiff had not reached MMI during the contested period as she was on significant restrictions from Dr. Huff, was treating with Dr. Huff during this period with Euflexxa injections, and she was not released to full duty work until July 7, 2011 as indicated in his treatment note of that date. Based on Dr. Huff's treatment records, the ALJ concludes the plaintiff did not reach MMI until July 7, 2011. Given this finding, plaintiff would be entitled to TTD for the contested period unless she had returned to her pre-injury work or customary, non-minimal, work.

Having reviewed and considered the testimony regarding the nature of plaintiff's circuit board building work that she performed while on sit-down restrictions from Dr. Huff, the ALJ concludes that the work plaintiff performed during this time was not minimal work, but is the type of work that plaintiff performed for the employer, that is, manual labor dealing with circuit boards in a factory or manufacturing setting and therefore plaintiff is not entitled to payment of TTD benefits for the argued period. Plaintiff testified that her pre-injury job involved testing circuit boards that were ultimately incorporated in the industrial air conditioner[sic] units the
employer manufactures. When she returned to work following her injury and a period of TTD, she was placed in a job building the circuit boards she previously was testing. While the testing job required her to bend, squat and stoop repeatedly, the board building job allowed her to sit throughout the work day. While the plaintiff was not performing the exact same job she did prior to her injury, the job she was performing on light duty building circuit boards was very similar in nature to the work she performed at the time of injury as well as the factory work she performed for the employer for almost twenty years prior. It should also be noted that plaintiff actually bid on the sit-down work as a permanent job and she continues to perform it to this day. In addition, plaintiff earned her same hourly rate of pay, if not a greater hourly rate of pay, for the work that she performed during this time. Given that the sit-down work was a legitimate job for the employer, performed as a routine and necessary component to the overall process of production of industrial air-conditioners which is the end product of the employer's business, and given that plaintiff continues to perform this job currently, the ALJ concludes that plaintiff's performance of the sit-down work precludes an award of TTD for this period of time as the ALJ believes the work she performed during this time was sufficiently similar or reasonably similar to her pre-injury work to be considered customary work.

The ALJ has reviewed prior cases where TTD was awarded to a claimant for a period in which they had returned to work that was determined to be non-customary or minimal work, but the ALJ concludes that facts of this claim are significantly different. For example, in Arnold v. Nesco Resources, WCB No. 2011-68484, TTD was ordered by the Worker's Compensation Board for a period of time the plaintiff had returned to work on modified duty in which he spent much of his time "simply sitting in an empty room with absolutely nothing to do." The ALJ believes the facts in Arnold and the facts in the instant claim are distinctly different and therefore a different result is warranted. Plaintiff herein has continued to perform the circuit board building job she performed on light duty even though she is now only under the minimal restrictions of no constant bending and climbing and the ALJ concludes based on this fact as well as the other findings above that the circuit board building work is customary employment and therefore TTD for the requested period is inappropriate.

Tipton filed a petition for reconsideration arguing the ALJ erred in failing to award the three multiplier pursuant to KRS 342.730(1)(c)1. She also argued the ALJ erred in considering her tax returns for 2009 through 2012. Tipton additionally argued the ALJ erred in refusing to award TTD benefits through the date she reached MMI in July 2011. Trane filed a petition for reconsideration arguing the weekly PPD benefits should be $10.41 per week rather than the $12.34 per week reflected in ALJ's decision. In an order issued November 25, 2012, the ALJ granted Trane's petition for reconsideration, and denied Tipton's petition.

As the claimant in a workers' compensation proceeding, Tipton had the burden of proving each of the essential elements of her cause of action, including entitlement to enhanced income benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was unsuccessful, the question on appeal is whether the evidence compels a
As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/PepsiCo, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We first address Tipton's argument regarding application of the appropriate multiplier. In Fawbush v. Gwinn, supra, the Supreme Court held:

Although the employer maintains that paragraph (c)2 modifies the application of paragraph (c)1 and, therefore, takes precedence, we note that the legislature did not preface paragraph (c)2 with the word "however" or otherwise indicate that one provision takes precedence over the other. We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.

Here, the ALJ based the decision to apply paragraph (c)1 upon a finding of a permanent alteration in the claimant's ability to earn money due to his injury. The claimant's lack of the physical capacity to return to the type of work that he performed for Fawbush was undisputed. Furthermore, although he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely. Under those circumstances, we are convinced that the decision to apply paragraph (c)1 was reasonable.
Thus, where KRS 342.730(1)(c)1 and (1)(c)2 are both applicable, the ALJ is charged with determining which provision is more appropriate. As part of that analysis, the ALJ must determine whether the injured employee is likely to continue earning a wage which equals or exceeds his or her wages at the time of the injury for the indefinite future. In Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004), the Court of Appeals defined the criteria to be used by the ALJ in determining which multiplier was more appropriate stating as follows:

The Board in this case, while it was correct in remanding the case for a further finding, incorrectly stated that upon remand the ALJ was to determine whether Adkins could continue to perform his current job as opposed to whether he could continue to earn a wage that equals or exceeds his pre-injury wages.

These two determinations, though ostensibly equivalent in this case, are quite different in their long-term ramifications. Between two similarly situated claimants not returning to the same type of work, if one gets a job fitting his restrictions and paying the same wage, but unexpectedly ending after only a year, and the other does not, then it is likely that, under a determination such as that ordered by the Board, only the second would receive benefits based on a multiplier of three. If, however, the ALJ makes a determination under the Fawbush standard as to the "permanent alteration in the claimant's ability to earn money due to his injury," then it is likely both claimants would be treated the same.

If every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he or she could continue to earn a wage that equals or exceeds his or her pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job. Therefore, we remand this case to the ALJ for a finding of fact as to Adkins' ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future. If it is unlikely that Adkins is able to earn such a wage indefinitely, then application of Section c(1) is appropriate.

The Supreme Court in Adams v. NHC Healthcare, 199 S.W.3d 163, 168, 169 (Ky. 2006) concurred with the holding in Adkins, supra, stating as follows:

The court explained subsequently in Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), that the Fawbush analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The
application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

Unlike the situations in Fawbush, supra, and Adkins, supra, the claimant continued to work as a nursing assistant for several months after his injury but quit before his claim was heard. He asserted that he could no longer work. Having found the claimant to be only partially disabled, the ALJ's task was to determine whether his injury permanently deprived him of the ability to do work in which he could earn a wage that equaled or exceeded his wage when he was injured. The claimant asserts that it did and that he was entitled to a triple benefit under KRS 342.730(1)(c)1.

Here, the ALJ determined both the two and three multipliers are applicable. He then conducted an analysis pursuant to Fawbush, supra, and provided a detailed explanation for his determination the two multiplier was more appropriate. The ALJ specifically determined Tipton would be able to continue to earn a wage equaling or exceeding her average weekly wage at the time of the injury for the indefinite future by finding she would be able to continue working at her current employment. The ALJ based this finding on the fact Tipton had worked for Trane since 1990, and although she was not performing all of her former duties, her current job provides a necessary service. Thus, the ALJ considered Tipton's ability to perform her current job and adequately set forth his analysis as to why he determined she would be able to continue to earn a wage that equals or exceeds her pre-injury wages.

In resolving the issue of whether Tipton could continue earning a wage which equals or exceeds her pre-injury wages, the ALJ applied the criteria set down by the Court of Appeals in Adkins, supra, and adopted by the Supreme Court in Adams, supra.

The ALJ provided a detailed analysis setting forth a clear and adequate basis for his determination. Thus, we find no error in the ALJ's determination of which multiplier was more appropriate. Based upon this determination, he awarded TTD benefits until Tipton returned to employment at Trane which he found necessary, and reasonably related to her pre-injury job. Substantial evidence supports the ALJ's decision concerning enhancement of Tipton's income benefits, and his determination was in accordance with the correct applicable law as set forth above, therefore his decision will not be disturbed.

We next review Tipton's argument regarding application of the appropriate period of TTD benefits. It is undisputed she received such benefits, voluntarily paid by Trane, until her return to work on March 22, 2011. Tipton argues she is entitled to additional TTD benefits until she was assessed as having reached MMI in July, 2011. Essentially, she argues entitlement to both TTD benefits and the wages she actually earned. We cannot say the outcome arrived at by the ALJ in finding Tipton entitled to TTD benefits only through March 22, 2011, is so unreasonable based upon the evidence it must be reversed as a matter of law.

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.
The above definition has been determined by our courts to be a codification of the principles originally espoused in *W.L. Harper Const. Co., Inc. v. Baker*, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, ... the question presented is one of fact no matter how TTD is defined.

In *Central Kentucky Steel v. Wise*, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court further explained, "[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she was performing at the time of his injury." In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he or she was customarily performing at the time of the traumatic event. In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in *Helms, supra*, stated:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

*Id.* at 580-581.

Here the ALJ provided a detailed analysis of the job to which Tipton returned in March 2011. He determined the job was a necessary one which Tipton continues to perform. He concluded the work was not minimal, but was the type of work Tipton had performed prior to her injury. He determined building circuit boards was similar to the testing she had performed previously. Specifically, the ALJ determined the job was a necessary part of Trane's business, she continues to perform the same job, and the job was sufficiently or reasonably similar to the work performed prior to the injury. Therefore, she was not entitled to TTD benefits from March 23, 2011 through July 7, 2011. The ALJ distinguished Tipton's claim from *Arnold v. Nesco Resources*, WCB No. 2011- 68484, where TTD was awarded where the injured workers' modified or light duty consisted of "simply sitting in an empty room with absolutely nothing to do." Because we determine the ALJ performed an appropriate analysis and considered all appropriate factors, his award of TTD benefits is supported by substantial evidence, and a contrary result is not compelled.

Finally, Tipton requested an oral argument be held. After having reviewed the record, IT IS HEREBY ORDERED AND ADJUDGED an oral argument is unnecessary in arriving at a decision, and therefore the request is DENIED.
Accordingly, the October 7, 2013 opinion and award, and the November 25, 2013 order overruling Tipton's petition for reconsideration, rendered by Hon. Thomas G. Polites, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

MICHAEL W. ALVEY, CHAIRMAN
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OPINION

THOMPSON, Judge.

Julie Camps appeals from an opinion and order of the Workers' Compensation Board affirming the decision of the Administrative Law Judge (ALJ) excluding wages from a second employer in calculating her average weekly wage (AWW).

Camps worked as a full time paramedic for the Garrard County Fiscal Court, working two twenty-four hour shifts a week. On May 13, 2011, Camps suffered an acute ankle sprain while working for Garrard County. She required reconstructive surgery for a complete lateral ligament tear. Camps filed a workers' compensation claim based on her AWW from Garrard County and concurrent employment with Clark County EMS.

For almost the entire year prior to her injury, Camps was simultaneously employed by both Garrard County and Clark County. Garrard County was aware of Camps's dual employment. Camps resigned from her position with Clark County effective May 6, 2011, intending to obtain another paramedic position closer to her home. At the time of her injury, she was only employed by Garrard County.

Camps testified she typically had two employers, as did most other paramedics and, in her field, it is easy to obtain employment because there is a high demand for paramedics. Camps explained dual employment was essential for her to achieve a living wage to support her family as a single mom. She submitted wage records from Clark County for her most favorable quarter when she was working full time. Camps testified that a few months before resigning from Clark County she moved from Winchester, in Clark County, to Danville, Kentucky, and found the long commute too difficult to continue. When she resigned, she planned to obtain a second, closer paramedic job with Boyle County EMS. She had not yet secured that employment before her injury.

Garrard County did not challenge Camps's impairment and entitlement to benefits, but disputed Camps's claim that her AWW should include her wages from Clark County. The ALJ awarded Camps temporary total disability benefits and permanent partial disability benefits based on her AWW from Garrard County and determined she did not retain the capacity to resume work as a paramedic.

In rejecting Camps's claim for AWW to include her Clark County wages, the ALJ reasoned as follows:

Camps makes a very compelling and rational argument to support her inclusion of wages from Clark County. The ALJ, however, is duty bound to follow published authority from the higher appellate courts. The ALJ finds Wal-Mart v. Souther, 152 S.W.3d 242, 246-47 (Ky. App. 2004), controls the case at hand. In this case, the Kentucky Court of Appeals held that: "The statute in question only lists two elements necessary to establish concurrent employment: proof the claimant was working under contract with more than one employer at the time of injury, and proof the defendant employer had knowledge of the employment."

In this case, Camps was not working under contracts with more than one employer at the time of the injury. Certainly, she had done so in the past and based on her testimony, the ALJ finds that Camps[sic] intent was to continue to do so in the future. However, at the time of injury she had terminated her employment with Clark County and had not yet secured a contract for employment with another employer. As such, the ALJ is precluded from including Camps' concurrent wages from Clark County, earned in the weeks prior to her injury.

In many respects, the ALJ recognizes that this is a harsh result. Again, however, the ALJ finds current authority clear with respect to the requirements for including concurrent wages. Those requirements were not satisfied in this claim with respect to Camps employment with Clark County. Based on the wage records submitted by Garrard County, the ALJ finds that Camps AWW was $470.96.

Camps filed a petition for reconsideration arguing the ALJ failed to make sufficient findings concerning the issue of concurrent employment and the award should reflect her AWW was $1,038.17 based on a concurrent wage. The ALJ denied Camps's petition for reconsideration. Camps appealed and the Board affirmed.

The only issue on appeal is whether Camps's wages from her most favorable quarter as an hourly employer under KRS 342.140(1)(d) should include her wages from Clark County under KRS 342.140(5). "The interpretation to be given a statute is a matter of
law, and we are not required to give deference to the decision of the Board.” Wilson v. SKW Alloys, Inc., 893 S.W.2d 800, 801-802 (Ky. App. 1995). In interpreting statutes, we seek to “ascertain from their terms, as contained in the entire enactment, the intent and purpose of the Legislature, and to administer that intent and purpose.” Lach v. Man O’War, LLC, 256 S.W.3d 563, 568 (Ky. 2008) (quoting Seaboard Oil Co. v. Commonwealth, 193 Ky. 629, 237 S.W. 48, 49 (1922)). See KRS 446.080(1). To the extent words in the statute’s definitions are not defined, we give them their common and literal meanings unless to do so would lead to an absurd result. Kentucky Unemployment Ins. Co. v. Jones, 809 S.W.2d 715, 716 (Ky. App. 1991); KRS 446.080(4).

Workers’ compensation statutes are to be interpreted consistently with their beneficent purpose. Wilson, 893 S.W.2d at 802; Jewish Hosp. v. Ray, 131 S.W.3d 760, 764 (Ky. App. 2004). As a form of social welfare legislation, workers’ compensation is intended to compensate workers for their loss of wage-earning capacity by replacing some of the income they will lose. Keith v. Hopple Plastics, 178 S.W.3d 463, 466 (Ky. 2005); Adkins v. R & S Body Co., 58 S.W.3d 428, 430 (Ky. 2001). However, “we must also keep in mind the duty of the Court to construe the law so as to do justice both to employer and employee.” Fitzpatrick v. Crestfield Farm, Inc., 582 S.W.2d 44, 47 (Ky. App. 1978).

KRS 342.140 provides as follows:

The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:

(1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:

...

(d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;

...

(5) When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his or her wages from all the employers shall be considered as if earned from the employer liable for compensation.

The purpose of KRS 342.140 is to realistically estimate an injured worker's earning capacity. Marsh v. Mercer Transp., 77 S.W.3d 592, 595 (Ky. 2002). A worker's earning capacity is generally based upon the worker's pre-injury earnings. Id. Pre-injury earnings should generate “a realistic estimation of what the worker would have expected to earn
had the injury not occurred.” Desa Int’l, Inc. v. Barlow, 59 S.W.3d 872, 875 (Ky. 2001). If they do not provide a realistic estimate of earning capacity, such as when previous employment was of short duration, other provisions of KRS 342.140 permit the consideration of other factors. Marsh, 77 S.W.3d at 595. An hourly worker’s earning capacity, where the worker was employed for more than a year preceding the work injury, is established through the computation of the worker’s AWW under KRS 342.140(1)(d). See Desa Int’l, 59 S.W.3d at 875.

In Wal-Mart v. Southers, 152 S.W.3d 242 (Ky. App. 2004), our Court interpreted whether KRS 342.140(5) allowed Southers, who was injured while working for Wal-Mart, to obtain wage benefits from her most favorable quarter under KRS 342.140(1)(d), which also included wages from H & R Block, where she was not earning wages from H & R Block at the time she was injured. Wal-Mart challenged the ALJ’s determination that Southers was under a contract of hire with H & R Block at the time of the injury where she was not currently receiving wages from H & R Block and her employment was intermittent. The Court upheld the ALJ’s finding that Southers was under a contract for hire and determined this was a sufficient basis for using her wages from H & R Block in calculating her most favorable quarter of AWW. Id. at 247. In making this determination our Court explained that KRS 342.140(5) “only lists two elements necessary to establish concurrent employment: proof the claimant was working under contracts with more than one employer ..., and proof the defendant employer had knowledge of the employment.” Id. at 246.

We believe the Southers Court artfully worded the requirements of the statute and did not intend to preclude an employee who was concurrently employed during the look-back period of KRS 342.140(1)(d) from obtaining an AWW that reflected her relevant earning capacity based on actual past earnings from two employers. We find the reasoning of our sister courts whose workers’ compensation provisions allow AWW to be calculated for concurrent employment under similar circumstances, to be persuasive.

In Lowry v. Industrial Comm’n of Arizona, 195 Ariz. 398, 401, 989 P.2d 152, 155 (1999), the Arizona Supreme Court held that an employee’s workers’ compensation benefits for an average monthly wage included earnings from concurrent employment held within thirty days prior to, but not on the date of, a work injury. Similarly to our KRS 342.140, the Arizona Workers’ Compensation Act defined an injured worker’s monthly wage for the purpose of determining benefits and A.R.S. §23-1041(A) provided that employees “shall receive the compensation fixed in this chapter on the basis of such employee’s average monthly wage at the time of injury.” Lowry, 195 Ariz. at 399, 989 P.2d at 153. The Court reasoned that the one month look-back period for determining an employee’s average wage should include wages for concurrent employment that ended before the date of the injury but within the look-back period by broadly construing the workers’ compensation statute in accordance with its beneficent purpose to realistically reflect a claimant’s monthly earning capacity based on the income that the employee actually earned. Id. at 400-401, 989 P.2d at 154-155. Other sister courts have also construed their workers’ compensation statutes to calculate AWW as including concurrent wages even though the employee was not still employed by a second employer on the date of the injury. Flynn v. Industrial Comm’n, 211 Ill.2d 546, 561-562, 813 N.E.2d 119, 128-129 (2004); Kinder v. Murray & Sons Const. Co., Inc., 264 Kan. 484, 490-495, 957 P.2d 488, 493-496 (1998); Forrest v. A.S. Price Mechanical, 373 S.C. 303, 310-311, 644 S.E.2d 784, 787-788 (S.C. App. 2007); Blind v. It’s a Bit Fishy, Inc., 639 So.2d 703, 704 (Fl. App. 1994). See also Forsyth v. Staten Island Developmental Disabilities Servs. Office,
We believe the reasoning in Lowry is sound and that we can best fulfill the beneficial purpose of our workers' compensation statute by compensating injured workers for the ongoing loss in their earning capacity as gauged by the economic reality of their past performance. See Marsh, 77 S.W.3d at 595; Desa Int'l, 59 S.W.3d at 875. In assessing an ongoing loss in earning capacity, courts should credit employees for past performance during a relevant look-back period that includes wages earned in concurrent employment even if the injury occurred while the employee was only employed by one employer. See Triangle Bldg. Center v. W.C.A.B. (Linch), 560 Pa. 540, 547-548, 746 A.2d 1108, 1112 (2000); Gillen v. Ocean Acc. & Guarantee Corp., 215 Mass. 96, 97-99, 102 N.E. 346, 347-348 (1913). It would be unjust to deny Camps an AWW calculated from her concurrent employment where "[i]t was merely a fortuitous circumstance that claimant herein was not actually working at both jobs on the date of the accident." Gomez v. Murdoch, 520 So.2d 600, 601 (Fl. App. 1987).

We believe the elements necessary to establish concurrent employment are established by interpreting KRS 342.140 as a whole to appropriately compensate an injured worker for the loss of earning capacity. When the relevant look-back period of KRS 342.140(1) or (2) is incorporated into the wording of KRS 342.140(5), the "is" in the statement "[w]hen the employee is working under concurrent contracts" refers to the period for looking back to establish AWW as set by when the injury occurred, rather than the date of the injury. In this manner, "wages from all the employers shall be considered as if earned from the employer liable for compensation" just as if the employee was merely working a variety of jobs for a single employer, which may or may not have continued the entire relevant look back period. See Miller v. Square D Co., 254 S.W.3d 810, 813-814 (Ky. 2008).

Therefore, we interpret KRS 342.140(5) as requiring the following two elements as necessary to establish concurrent employment: proof the claimant was working under contracts with more than one employer during the relevant look-back period following an injury and proof the defendant employer had knowledge of the employment. As Camps met both requirements, the ALJ erred by failing to make sufficient findings concerning the issue of concurrent employment and denying Camps benefits based AWW from both employers, and the Board erred in affirming this decision.

Accordingly, we reverse and remand for the ALJ to hold a new evidentiary hearing to develop the record, make additional findings and issue a new award.

STUMBO, Judge, concurs.
TAYLOR, Judge, dissents and files separate opinion.

TAYLOR, JUDGE, dissenting:

Respectfully, I dissent. I believe Wal-Mart v. Southers, 152 S.W.3d 242 (Ky. App. 2004), is controlling in this case and I would affirm the Workers' Compensation Board's decision.

Camps v. Garrard County Fiscal Court
Not Reported in S.W.3d, 2014 WL 4526904 (Ky. App.)
I. NEUROANATOMY
   A. Frontal Lobe Functioning
   B. Temporal Lobe Functioning
   C. Parietal Lobe Functioning
   D. Occipital Lobe Functioning
   E. Subcortical Functioning

II. RIGHT HEMISPHERIC FUNCTIONING
   A. Visual Nonverbal Information
   B. Visual Attention and Visual Memory
   C. Visuospatial/Visuoperceptual Ability
   D. Nonverbal Concept Formation
   E. Constructional Ability
   F. Motivation/Initiation/Organization
   G. Planning and Foresight

III. LEFT HEMISPHERIC FUNCTIONING
   A. Processing of Auditory-Verbal Information
   B. Auditory Attention
   C. Expressive and Receptive Language
   D. Auditory Memory
   E. Left-Right Awareness
   F. Verbally-Mediated Executive Functions
IV. TRAUMATIC BRAIN INJURY

A. Involves Linear and Rotational Forces to the Brain which Disrupt Normal Neural Networks

B. No two Brains alike and no two Brain Injuries alike

C. Loss of consciousness not required for TBI

D. Two Year Recovery Course

E. Recovery can be Measured very specifically via Neuropsychological Evaluation

V. MECHANISMS OF TRAUMATIC BRAIN INJURY

A. Coup

B. Countercoup

C. Twisting and Shearing Causing Microscopic Lesions most Common in Frontal and Temporal Lobes

D. Produces Damage to the Major Fiber Tracts of the Brain, especially Those Crossing the Midline, such as the Corpus Callosum Leading to Disconnection Syndrome

E. Hematoma and Edema

VI. MOTOR VEHICLE ACCIDENTS

A. Head is Moving when Blow is Struck

B. Increases the Velocity of Impact

C. Multiplies the Number and Severity of Small Lesions throughout the Brain

D. Diffuse Brain Injury and Enlarged Ventricles

E. Generalized and Multifocal Impairment

VII. LOSS OF FUNCTION

A. Bright People Most Affected by TBI because They are Acutely Aware of a Loss of Cognitive Skill that Prevents Them from Returning to Their Previous Competence Level

B. Impact on Personality and Social Adjustment

C. May not Resume Studies or Return to Gainful Employment
D. Return to Employment usually at Lower Level than before the Accident

VIII. MILD TBI NOT SO MILD
A. Mild Concussion Involves Microscopic Lesions which can be Inflicted on the Brain from what usually are Regarded as Trivial Head Injuries
B. Majority of Mild Head Injury May Have Lesions
C. Almost Inescapable that Mild Head Trauma may be Associated with some Pathology

IX. RECOVERY
A. Recovery May Occur for Two to Three Years or Longer
B. Majority of Recovery Occurs within First Six to Nine Months
C. Less Optimism about the Recovery of Social Interactions or Personality
D. Relatives Report Great Strain which Increases over Time

X. NEUROPSYCHOLOGICAL EVALUATION
A. General Intellect
B. Academic Achievement Skills
C. Higher-level Executive Functions
D. Attention and Concentration
E. Learning and Memory
F. Language
G. Visual-spatial abilities
H. Motor Functioning
I. Sensory Functioning
J. Objective Personality Functioning

XI. CASE STUDY #1
A. Forty-nine-year-old Female
B. MVA Occurred on 12/18/2012
C. Severe Damage Noted in Collision
D. MRI of the brain using 3T technology with DTI was performed. Impression included multiple tract cutoffs of the corpus callosal tracts as well as the cortical spinal tracts suggestive of white matter trauma.

XII. CASE STUDY #1 NEUROPSYCHOLOGICAL RESULTS

A. Initial Evaluation Conducted on 2/26/13
B. Full Scale IQ score = 86 (Low Average)
C. Wechsler Test of Adult Reading Score = 77 (borderline)
D. Education: GED
E. Category Test: 115 errors; T-score = 24 (moderate to severe impairment)
F. COWA T-score = 28 (moderately impaired)
G. Animal Naming Test: T-score = 41 (borderline impaired)
H. Re-evaluation Occurred on 1/16/14
I. Full Scale IQ score = 90 (average)
J. Category Test = 83 errors (mildly impaired)
K. COWA T-score = 25 (moderately impaired)
L. Animal Naming Test: T-score = 46 (average)

XIII. UTILITY OF THE NEUROPSYCHOLOGICAL EVALUATION

A. Useful Method of Detecting and Diagnosing Brain Dysfunction and Subsequent Learning Disabilities
B. Allows for Greater Differential Diagnosis (psychosomatic disorder versus traumatic brain injury versus malingering)
C. Provides Valuable Data for the Remediation of Neurocognitive Disorders
D. Correlates highly with MRI, CT, PET, and SPECT Imaging of the Brain
E. Identifies Neuropsychological Strengths and Weaknesses
F. Identify Problems Related to Medical Conditions that Affect Memory and Thinking
G. Establish a Baseline or Document a Person’s Skills and Abilities before there is a Problem
H. Resolving Medical-legal Questions
I. Identifying Attentional Disorders

XIV. PSYCHIATRIC CO-MORBIDITY

A. High Rate of Psychiatric Disorders in Individuals with Neurological Disorders
B. Depression and Anxiety Most Common
C. Alcohol and Drug Abuse and Dependence
D. Difficulty in Sustaining Employment and Relationships

XV. INFORMATION OBTAINED FROM A NEUROPSYCHOLOGICAL EVALUATION

A. Level of Overall Functional Brain Impairment
B. The Most Likely Neuropathological Process (e.g., TBI, stroke)
C. Specific Brain Functioning Disabilities (e.g., memory deficits, frontal lobe dysfunction, specific learning disabilities)
D. Intellectual Functioning Strengths and Weaknesses
E. Ability to Obtain and Maintain Employment with and without Supports (e.g., vocational rehabilitation)
F. Ability to Drive or Operate Machinery
G. Issues Related to Competency (i.e., is patient capable of managing financial and healthcare decisions?)
H. Capacity to Benefit from Post-secondary Educational Training
I. Ability to Monitor Brain Functioning over Time to Determine if Profile is Remaining Static, Improving, or Declining

XVI. NEUROPSYCHOLOGICAL TEST INSTRUMENTS

A. Wechsler Adult Intelligence Scale-IV
   1. Provides a Full Scale IQ score for overall intellectual ability (e.g., Extremely Low, Borderline, Low Average, Average, High Average, Superior, Very Superior).
   2. Provides four composite scores including Verbal Comprehension, Working Memory, Perceptual Reasoning, and Processing Speed.
   3. Allows for the establishment of clinically significant differences between intellectual abilities.
4. Each subtest has a scaled score with ten as the mean and three as the standard deviation.

B. Wechsler Test of Adult Reading
   1. Developed specifically to provide clinicians with an assessment tool for estimating premorbid intellectual functioning of adults aged sixteen to eighty-nine.
   2. Based on a reading-recognition paradigm, requiring the reading and pronunciation of words that have irregular grapheme-to-phoneme translation but not requiring text comprehension or knowledge of word meaning.

C. Category Test
   Probably the best measure in the Halstead-Reitan Battery requiring abstraction, reasoning, and logical analysis abilities. These abilities, in turn, are essential for organized planning.

D. Stroop Color and Word Test
   1. Measures processing speed, selective attention, automaticity, and parallel-distributed processing.
   2. Sensitive to lesioning of dorsolateral prefrontal cortex and anterior cingulate cortex.

E. Controlled Oral Word Association Test
   1. A measure of verbal retrieval, word-finding, and naming.
   2. Sensitive to lesioning of left frontal lobe functions.

F. Animal Naming Test
   1. Also a measure of verbal fluency.
   2. Sensitive to lesioning of left temporal lobe functions.

G. Finger Tapping Test
   1. Measures fine motor speed and provides valuable information regarding lateralizing cortical deficits localizing to motor strip cortex.
   2. One of the most sensitive indicators of brain dysfunction.
H. Reitan-Indiana Aphasia Screening Examination
   1. Useful in detecting the suppression of bilateral simultaneous stimulation in tactile, auditory and visual modalities.
   2. Also provides lateralizing posterior (post-Rolandic) cortical deficit information.

I. Wechsler Memory Scale-Fourth Edition (WMS-IV)
   1. Assesses auditory and visual memory in both immediate and delayed conditions with recognition formats available.
   2. Can provide reliable information regarding lateralizing signs of dysfunction (e.g., visual memory more impaired than auditory memory suggests deficits localized in right temporal lobe whereas if auditory memory were more impaired, this would indicate greater left temporal lobe dysfunction).

J. Minnesota Multiphasic Personality Inventory-2
   Objective measure of personality and psychopathology focusing more on clinical syndromes (e.g., Depression, Anxiety).

K. Measures of Level of Effort
   1. Important in determining if a patient is putting forth her best effort on measures of intellectual and neuropsychological functioning.
   2. If scores fall below normal, results become questionable in terms of their ability to represent the person’s brain functioning.
I. KEEP YOUR CLIENTS INFORMED AND DOCUMENT, DOCUMENT, DOCUMENT

A. Many of the ethical complaints that we all read so much about in the advance sheets deal with failure to keep your client informed.

1. Ethics Rule: You have a duty to keep the client informed of the case. Rules of the Supreme Court (SCR) Rule 3.130, Rules of Prof. Conduct Rule 3.130(1.4).

   (a) A lawyer shall:

   (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

   (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

   (3) keep the client reasonably informed about the status of the matter;

   (4) promptly comply with reasonable requests for information; and

   (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

   (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Amended by Order 2009-05; eff. 7-15-09; Adopted by Order 89-1, eff. 1-1-90]

2. Defense attorneys get paid to write letters, so when you are writing your adjusters a letter telling them about a deposition, either copy the Defendant on that letter or write a separate letter to the client if you don't think he/she needs or wants all of the information you might give the adjuster.
3. Plaintiffs’ counsel, I know that you communicate with your clients more by phone than defense attorneys do. However, it is easy to deny phone calls and none of us want to have to try to reconstruct telephone records two or three years after the fact. In some ways it is like practicing defensive medicine, but it is a good idea to confirm important phone calls with your client.

a. Setting of trial.

b. Settlement authority.

c. Notification of depositions.

d. Notification of IMEs.

B. Always memorialize your acceptance of a case or the declining of representation.

1. Rules of the Supreme Court (SCR) Rule 3.130, Rules of Prof. Conduct Rule 3.130(1.5).

   (a) Whether the fee is fixed or contingent.

   (b) When the lawyer has not regularly represented the client, the basis or rate of the fee should be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

2. Even if you don’t accept representation you need to clearly indicate that to the client and be able to prove that you do not represent that client. Rules of the Supreme Court (SCR) Rule 3.130, Rules of Prof. Conduct Rule 3.130(1.16).

   (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

      (1) The representation will result in violation of the Rules of Professional Conduct or other law;

      (2) The lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

      (3) The lawyer is discharged.

   (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) Withdrawal can be accomplished without material adverse effect on the interests of the client; or

(2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(3) The client has used the lawyer's services to perpetrate a crime or fraud; or

(4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; or

(5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Amended by Order 2009-05; eff. 7-15-09; Adopted by Order 89-1, eff. 1-1-90.

II. CONFLICTS, CONFLICTS, CONFLICTS

A. Always do a conflicts check before accepting any case or filing a third party complaint. (In our firm this is a major undertaking because of the many different offices).
B. Is it okay to sue your client? Rules of the Supreme Court (SCR) Rule 3.130, Rules of Prof. Conduct Rule 3.130(1.7)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

Amended by Order 2009-05, eff. 7-15-09; Adopted by Order 89-1, eff. 1-1-90

Answer: No. You cannot sue someone you represent at the present time, even if it is in a separate case.

This is especially important for County Attorneys and attorneys who represent governmental entities to remember.

C. Is it permissible for a defense attorney to sue an insurance company that he or she also represents for subrogation rights or for apportionment?

The answer is: This is probably a waivable conflict that occurs a great deal. Some insurance carriers have a strict policy that if you sue us you don't get to represent us. Others understand that filing suit for subrogation interest or apportionment is something that just has to happen from time
D. Multiple Representation of Plaintiffs and Defendants

1. Can you represent the driver and her mother and three sisters that were injured in a car wreck?
   a. This is a case by case analysis and you would be best served to obtain a waiver. The difficulty arises when the defense attorney asserts the comparative negligence of the driver of the vehicle as a defense. If there is any chance that the driver is comparatively negligent it is difficult if not impossible to represent the driver and the passengers.
   b. This is more complicated when minors are involved. Who waives their claims against their mother?

2. Can you represent the driver of the coal truck who rear ended the Plaintiff, his employer, and the seven (7) other defendants who will be named who ship coal with the trucking company?
   a. This is also a case by case basis and sometimes a waivable conflict.
   b. In many instances even though parties start out with a totally consistent defense things change as the proof develops. What if it is determined that your coal truck driver has received numerous citations while driving his coal truck? Does this present a conflict?
      i. It certainly does if there are any allegations of negligent entrustment or punitive damages. You then must look at whose interest you have to protect.
      ii. Can you stand up and tell a jury that this poor coal truck driver was just doing the best he could and that this company knew all about these citations and in fact paid some of them off with coal company checks?
      iii. Or, do you tell the jury that the company had no knowledge that this driver was guilty of these previous violations and that if they are angry then they ought to take it out on the poor slob behind the wheel?

Answer: Neither argument is a good one to have to make and defend in an ethics inquiry.
This can be really complicated by a late Amended Complaint adding punitive damages.

3. Other examples of potential conflicts.

a. One individual owning two companies insured by two separate insurance carriers and all have been sued. Each of the different insurance carriers will want you to place as much fault on the other's insured as possible. In this circumstance, unless you have a written agreement between the two insurance companies as to how fees and damages will be split, it is a dangerous proposition to go ahead with the representation of all the parties.

b. Several Defendants are sued, and they are all insured by the same insurance carrier with what appears to be a sufficient amount of insurance to cover any claims for damages.

This scenario occurs all of the time for defense attorneys and is fraught with peril. I am concerned that at some point down the line one of the Defendants may become the "bad actor" and it may be in the best interest of the other Defendants to jettison this individual and point him out to the jury as being the black sheep of the family. You cannot do this and continue to represent the other three. Even the most basic analysis will tell you that you have to disqualify from this case, but giving it a little more thought you will certainly come to the conclusion that you cannot stand up and pound on the fellow that was your client for the last nine months at trial. Therefore, you are out for all of your clients.

c. Any claim involving punitive damages.

Most insurance companies write policies that cover punitive damages whether they know it or not. The trend in the law is that punitive damages are covered unless they are clearly excluded. In any claim for punitive damages you need to immediately address the situation with the carrier and get a clear understanding as to whether or not punitive damages will be covered. If they are not, it is impossible to represent multiple defendants under these circumstances. If punitive damages are covered, get this in writing and discuss it with your clients and memorialize the discussion in writing to protect yourself.

III. WITHDRAWING FROM REPRESENTATION

Even if you have been fired or a conflict has arisen between you and your client, you must insure that your withdrawal does not do harm to the person you
represent. In other words you can't tell the judge that "my client is being unreasonable and won't take the settlement offer, so I'm getting out of this case." Nor can you say, "I can't talk this adjuster into paying a dime on a case that is clearly worth half a million dollars, I need to get out."

A. Any withdrawal needs to be done as soon as the conflict becomes apparent. Trying to salvage a fee or maintain representation after a conflict has arisen only leads to a compounding of problems. Always write a letter to your client before you file the Motion to Withdraw.

One of the most embarrassing things to do is to have filed a Motion to Withdraw from representation in a case and then have to file a second Motion to Withdraw the first motion because you and the client have resolved your differences. Make sure that withdrawal is what you want to do, and then follow through with it.

B. Be sure that you protect the client's rights by obtaining a Stay of Proceedings and explain to the client what that means. It doesn't mean that the client must obtain another lawyer within thirty or sixty days, but that if they do not they are proceeding pro se.

Many defense firms move for Dismissal for Lack of Prosecution and after a time limit has expired and as long as it works I guess it is fine. However, we all know that individuals can represent themselves, but corporations cannot. An individual can proceed with his or her case pro se and make the other attorney's life as miserable as possible.

C. Special Consideration in Criminal Cases

I realize that many criminal defendants don't have a lot of money. Be aware of this when you agree to represent them and get your fee well before trial. It is very frustrating to a judge to have a Motion to Withdraw filed a week before trial by the criminal defense attorney only to have it withdrawn upon payment of the attorney's fee the morning of trial. These types of motions are dangerous in and of themselves and, in my opinion, could lead to some sort of sanction from the Kentucky Bar Association if your client complains that you threatened to withdraw in order to coerce payment from him/her.

IV. SETTLEMENT RESOLUTION AND DOCUMENTATION OF CLOSING OF THE FILE

After the case is resolved, defense attorneys in particular need to be sure to inform their client that the case has been settled and that they no longer represent them. I suggest plaintiff attorneys write a similar letter because most folks think you represent them cradle to grave.
V. GENERAL MUSINGS

Civility amongst lawyers continues to decline in spite of a lot of efforts to improve it. I have a couple of suggestions on ways to improve civility and lower your blood pressure.

Kentucky Bar Association Code of Professional Courtesy

Attorneys are required to strive to make the system of justice work fairly and efficiently. In carrying out that responsibility, attorneys are expected to comply with the letter and spirit of the applicable Code of Professional Responsibility adopted by the Supreme Court of Kentucky.

The following Code of Professional Courtesy is intended as a guideline for lawyers in their dealings with their clients, opposing parties and their counsel, the courts and the general public. This Code is not intended as a disciplinary code nor is it to be construed as a legal standard of care in providing professional services. Rather, it has an aspirational purpose and is intended to serve as the Kentucky Bar Association's statement of principles and goals for professionalism among lawyers.

1. A lawyer should avoid taking action adverse to the interests of a litigant known to be represented without timely notice to opposing counsel unless ex parte proceedings are allowed.

2. A lawyer should promptly return telephone calls and correspondence from other lawyers.

3. A lawyer should respect opposing counsel's schedule by seeking agreement on deposition dates and court appearances (other than routine motions) rather than merely serving notice.

4. A lawyer should avoid making ill-considered accusations of unethical conduct toward an opponent.

5. A lawyer should not engage in intentionally discourteous behavior.

6. A lawyer should not intentionally embarrass another attorney and should avoid personal criticism of other counsel.

7. A lawyer should not seek sanctions against or disqualification of another attorney unless necessary for the protection of a client and fully justified by the circumstances, not for the mere purpose of obtaining tactical advantage.

8. A lawyer should strive to maintain a courteous tone in correspondence, pleadings and other written communications.
9. A lawyer should not intentionally mislead or deceive an adversary and should honor promises or commitments made.

10. A lawyer should recognize that the conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter – "leave the matter in the courtroom."

11. A lawyer should express professional courtesy to the Court and has the right to expect professional courtesy from the Court.

HISTORY: Adopted by Order 93-1, eff. 9-1-93

A. Check with other counsel before setting deposition dates. I know this may not apply when scheduling a doctor because you may not have any choice. Even then, it is best to call the opposing counsel and be sure that an 8:00 a.m., Sunday morning deposition will not be a conflict for him or her.

B. Respect one another's calendars. Most attorneys are very busy and I understand that particularly on the plaintiff's side there is a big push to finish cases in a speedy manner. However, we all have to live with each other and hopefully maintain some semblance of a family life. I don't believe I have ever refused a request for an attorney to reschedule a deposition, IME, or trial unless it was for purely frivolous means.
1. Beware of the prospective client who is changing attorneys.

2. Be leery of a case that has been rejected by one or more other firms.

3. Does the prospective client have a history of questionable prior litigation?

4. Does the prospective client have unrealistic expectations for the matter that cannot be altered?

5. Does the prospective client have an unreasonable sense of urgency over the matter? Beware of a case that has an element of avoidable urgency.

6. Beware of the client who has already contacted multiple government representatives to plead his case.

7. Beware of the client who wants to proceed with his or her case because of principle and regardless of cost.

8. Beware of a client who has done considerable personal legal research on his or her case.

9. If your first impression of the prospective client or the matter in question is unfavorable, think twice before accepting the case. It is best to avoid a prospective client who demonstrates a difficult personality along with other indications that he or she will be uncooperative. If your intuition tells you to avoid a prospective client, listen to it.

10. Is the prospective client difficult about reaching agreement on fees? Do they appear to be price shopping? Can they afford your services? Do they refuse to give an adequate retainer?

11. Avoid prospective clients with matters outside your firm’s regular practice areas unless you are prepared to spend the time and resources necessary to develop the required competence to practice the matter. Can the prospective client afford the cost associated with this effort?

12. Avoid prospective clients when the statute of limitations is about to run or other deadline is impending on their matter unless you are absolutely sure you can meet the limitation or deadline. A good rule of thumb is that a new case should not be accepted if it is within three months of the statute of limitations. This is just too short a time to identify and name all the parties. Accepting unrealistic time pressure to represent a client is an invitation to commit malpractice (think medical malpractice suits).

13. Be leery of accepting prospective clients who are family or friends. Fee misunderstandings along with the loss of objectivity when representing family or friends can lead to bitter results.
14. Learn everything you can about the quality of a prospective client before you take the matter – not just verification of the facts of the case. Do a Google search – look for websites, blogs, and participation on sites such as Facebook. Determine whether the prospective client has:

- Good credit and is financially solvent
- A criminal record
- Frequently filed claims for injuries
- Retained numerous lawyers in the past
- Ever sued a lawyer for malpractice or filed a bar complaint

15. Verify the identity of non-face-to-face prospective clients – those who contact you by phone, mail, or over the Internet. Scams targeting lawyers are everyday occurrences.
APPLICATION OF KRS 342.730(1)(C)1 OR 2 AND THE FAWBUSH ANALYSIS
Peter J. Naake

I. HISTORY

Prior versions of the Workers’ Compensation Act allowed the Workers’ Compensation Board (as the fact finder was designated at the time) to award either the lost wages of the injured worker, or the impairment rating assessed pursuant to the A.M.A. Guides to the Evaluation of Permanent Impairment, whichever was higher, for permanent partial disability. The statute allowed the fact finder the discretion to determine if the worker’s present work status reflected his occupational disability, and permitted an award of a higher occupational disability if it was found that there was a greater degree of occupational disability than that shown by his impairment rating. Later, the award for occupational disability was limited to twice the impairment rating if the injured worker had returned to work earning the same or greater average weekly wage, but the fact finder found that worker’s occupational disability exceeded his impairment rating.

The 1996 version of KRS 342.730 provided for a one and a half multiplier on weekly benefits for permanent partial disability if an employee did not retain the physical capacity to return to his pre-injury type of work. It also provided for a reduction of half if the employee returned to work at an equal or greater wage than his pre-injury wage. In some instances both would be applied simultaneously to achieve a three-fourths multiplier on permanent partial disability benefits.

After the changes made to the statute in 2000, which were intended to remedy the harsh changes made in 1996, KRS 342.730(1)(c)1 would ordinarily be applied, enhancing the benefits for permanent partial disability by a factor of three, if a worker did not retain the ability to return to the type of work he was performing at the time of the injury, regardless of whether he returned to work earning a greater wage. This interpretation may have rested on the wording of the statute, which refers to a “return to work” at an average weekly wage equal to or greater than that he earned at the time of his injury, which was assumed to mean the same work as the injured worker was performing at the time of his injury, or the legislative history indicating an intent to liberalize the statute. The Administrative Law Judge in Fawbush v. Gwinn, for instance, cited to the sequence of the wording of the statute, which applies the triple multiplier first, and interpreted that to mean that KRS 342.730(1)(c)1 took precedence over KRS 342.730(1)(c)2.

II. FAWBUSH v. GWINN

In Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the Supreme Court focused on the disjunctive “or” in the new version of the statute appearing between the two sections of the law to mean that the Administrative Law Judge could choose either the 1 or the 3 multiplier if the claimant had found other, lighter work at an equal or higher average weekly wage after his injury. The Supreme Court held that when both KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 can apply, an Administrative Law Judge must choose which is the most appropriate. The ALJ’s
decision to award the 3 multiplier was supported by his finding that the claimant's injury permanently altered his ability to earn money. Factors that the ALJ cited to establish a permanent alteration in the ability to earn money were that he was working out of necessity, that his work exceeded his medical restrictions and that he was taking more pain medication than prescribed.

Shortly thereafter in Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Supreme Court reiterated the holding the Administrative Law Judge could choose between KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 if the claimant had found other, lighter work at a higher average weekly wage after his injury. The Supreme Court remanded the claim for a finding of whether or not the claimant was earning a higher average weekly wage, by performing an equal or greater number of overtime hours as before his injury, and if so, whether he would be able to continue to earn the same or greater wages into the indefinite future pursuant to the Fawbush factors.

A Court of Appeals decision in 2006, Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004) pointed out that the Fawbush analysis requires an ALJ to determine whether the claimant will be able to earn a greater or equal wage into the indefinite future in the general economy, not only whether he is able to sustain his current, equal or higher paying employment into the indefinite future. Noting that Kentucky is an employment-at-will state, and that continued employment is not guaranteed in a job accommodating an injured worker's limitations, the Court stated that the ALJ must consider a broad range of factors under the Fawbush analysis, not only whether the current employment is likely to continue indefinitely. The test is whether the claimant would be able to earn an equal or greater average weekly wage given the limitations of his injury, not whether the claimant is likely to be able to earn an equal or greater wage at his current post-injury job.

The Courts have given the Administrative Law Judge substantial deference in making the choice of application of either KRS 342.730(1)(c)1 or KRS 342.730(1)(c)2. In Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), the Supreme Court upheld a finding by the ALJ that the claimant would be able to earn an equal or greater wage into the indefinite future – even when he was not doing so at the time of the hearing. The claimant was injured while working as a nurse's aide, which required lifting patients. After his injury, which resulted in permanent restrictions preventing heavy lifting, he had returned to work as a medical technician, where he earned an equal or greater average weekly wage. He was not working at the time of the hearing in the case. The ALJ determined that he was able to continue to earn an equal or greater average weekly wage indefinitely, despite the fact that he was not doing so at the time of the hearing. Thus, application of the Fawbush analysis should occur if the claimant returned to work at the same or greater wages at any time after his injury, despite whether he continues to work at that higher paying job at the time of the hearing.

A recent, unpublished Supreme Court decision further defines the evidence necessary to support the analysis under Fawbush. In Ford Motor Co. v. Grant, 2013-SC-000772-WC, 2014 WL 5410306 (Ky. Oct. 23, 2014), (copy attached) the Supreme Court reversed the Administrative Law Judge’s findings under Fawbush.
because they felt the evidence upon which he relied was too speculative. The ALJ had found that the plaintiff's injuries prevented him from performing the job that he was doing at the time of his injury based upon Ford Motor Co. v. Forman, supra. The ALJ found that Mr. Grant's job involved three assembly positions, two of which he could no longer perform because of his injury, and the remaining one which he could perform with accommodation from his employer. The Supreme Court upheld the ALJ's finding that he was unable to perform the work that he was performing at the time of his injury. It was stipulated that he was earning the same or greater wages than at the time of his injury. The ALJ reasoned that under the circumstances, given that his restrictions essentially put him in a one-handed duty category, he may not be able to earn the same or greater wage from a different employer if he should lose his job at Ford, or even if circumstances changed at Ford, for instance, a slowdown in business or a change in management's willingness to accommodate him. The ALJ did not find that he was currently working beyond his restrictions, that he was taking more pain medications than were prescribed, or that coworkers were aiding him with his job.

The Supreme Court reversed and remanded for further findings by the ALJ, requiring him to rely upon concrete evidence of present facts rather than speculation concerning whether the job which accommodated his restrictions was available indefinitely. The evidence cited by the ALJ, that the job at Ford which accommodated his restrictions was not guaranteed, was too speculative to support the decision of awarding the triple multiplier. The Supreme Court did not direct an award of either the triple or the single multiplier upon remand, so long as it was supported by substantial evidence.

These requirements complicate an analysis which necessarily requires some speculation: whether an injured worker may continue to earn the same or greater wage into the indefinite future. There may be a place for findings which assess the workers’ occupational disability under the standards outlined in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), and revived in the analysis of permanent, total disability claims, such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. The analysis required there also considered the likelihood that the particular worker would be able to find work consistently under normal employment conditions, and whether 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. These standards sound remarkably similar to the Fawbush and Elkins requirements, and would be consistent with one of the Workers’ Compensation Act's original purposes: to compensate for occupational disability. That theory, however, is mere speculation.

III. TYPE OF WORK PERFORMED AT THE TIME OF THE INJURY

An Administrative Law Judge is given broad discretion to choose which evidence to rely upon in determining whether the claimant is able to perform the type of work she was performing at the time of the injury. Usually, this only involves an analysis of the requirements of the job, as he or she believes them to be based upon substantial evidence, and comparing those requirements to medical restrictions. Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). A claimant’s
testimony as to his physical capabilities both before and after an injury is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. Hush v. Abrams, 584 S.W.2d 48, 51 (Ky. 1979). Consequently there is not a great deal of case law interpreting medical restrictions and whether a claimant can perform the type of work performed at the time of the injury, as those cases are usually affirmed based upon the substantial evidence rule.

There is considerable case law; however, interpreting which work is referenced in the statute as being the basis for comparison to post-injury capabilities.

Although decided under the previous version of the statute, Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2004), stands for the holding that the “type of work” performed at the time of the injury was intended to mean the actual jobs performed by the employee at the time of her injury, not merely her job classification. Forman was a vehicle assembly worker at Ford, and after suffering three injuries which required a neck surgery, was restricted from overhead work and from lifting more than five pounds. She returned to work, and under the Union’s collective bargaining agreement, was still classified as an assembler, which was the same classification that she held prior to her injury. The Administrative Law Judge relied upon this classification to hold that the claimant was able to return to the type of work she was performing at the time of the injury. However, the Workers’ Compensation Board reversed and remanded for a finding of what job she was performing when she was injured, and what the physical requirements of that job were. The Supreme Court affirmed, noting that the statute was designed to compensate more severely impaired workers, i.e., those who are more occupationally disabled, at higher rates than those who are less impaired. Adkins v. R & S Body Co., 58 S.W.3d 428 (Ky. 2001).

In Lowe’s #0507 v. Greathouse, 182 S.W.3d 524 (Ky. 2006), the claimant was a salesperson at Lowe’s home improvement store, and concurrently had employment as a printing press operator, which was a job involving heavier lifting. He was injured while working at Lowe’s, and underwent a wrist fusion surgery. His injury prevented him from performing his printing press operator job, but not his job at Lowe’s. The Supreme Court held that for an employee who is concurrently employed and performs two types of work, the statute allowing enhancement of the award refers to the inability to perform the job in which the injury occurred, not the inability to perform the concurrent employment.

Contrasting the concurrent employment situation is the case where an employee performs different jobs for the same employer. In Miller v. Square D Co., 254 S.W.3d 810 (Ky. 2008), the claimant worked as a mold technician, but also performed voluntary overtime work as an assembler for Square D Company. After his back injury he was unable to perform overtime work as an assembler, but continued to work as a mold technician. The defendant/employer argued, and the Administrative Law Judge agreed, that the triple-multiplier would not apply to permanent partial disability benefits because the claimant was not unable to do the part of the job for Square D Company in which he was injured. The Supreme Court reversed and held that when an employee performs more than one job for the same employer, the test of whether he retains the physical capacity to perform the type of work performed at the time of the injury refers to all of the
jobs he performed for the employer. KRS 342.730(1)(c)1 includes all work that he performed for the same employer.

An unpublished Supreme Court case reveals that this is a bright-line rule. In Asher v. Tecumseh Products Co., 2005-SC-0481-WC, 2006 WL 436136 (Ky. Feb. 23, 2006), the claimant was a clerical worker in the shipping department at Tecumseh Products for twelve years, before transferring to the machine shop. She was injured there after working for three and a half hours. The Administrative Law Judge awarded the triple multiplier under KRS 342.730(1)(c)1, and the Supreme Court reinstated the award, holding that the claimant’s inability to perform the work she was doing for the employer at the time of the injury dictated that the statutory enhancement applied, even though she had only been doing that type of work for a short time.

IV. CONCLUSION

A flow-chart may be helpful in navigating the decision making process under KRS 342.730(1)(c), and the Court opinions interpreting the statute (see attached). However, the type of evidence which supports the application of the different levels of compensation for permanent partial disability continue to be highly scrutinized by the Workers’ Compensation Board and the Courts, while our workers’ compensation system struggles over how to compensate for permanent, partial occupational disability and how much discretion the Administrative Law Judge should have in awarding benefits.
MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Ford Motor Company, appeals from a Court of Appeals decision which upheld the award of permanent partial disability benefits to Appellee, Jeffrey Grant, enhanced by the three multiplier. Ford argues that the Administrative Law Judge ("ALJ") erred by applying the three multiplier to Grant's award because he returned to the same job he was performing at the time of his injury and earns the same or greater wages. Specifically, Ford argues that: 1) since Grant has returned to work at the same job he was performing at the time of his injury, and continues to earn the same or greater wages, the finding that he does not retain the physical capacity to continue that same type of work is an error as a matter of law; 2) the case of Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004), is distinguishable from this matter; and 3) the ALJ improperly shifted the burden of proof to the employer while performing a Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), analysis. For the reasons set forth below, we reverse the Court of Appeals and remand this matter to the ALJ for further proceedings.

Grant was employed by Ford when he suffered a work-related injury to his right shoulder while lifting a transfer case. At the time he was injured, Grant worked on the transfer case line where he rotated between three different tasks – the "hoist" job, the "install" job, and the "tightening" job. Grant was performing the "hoist" job when he was injured. As a result of his injury, Grant was diagnosed with a right rotator cuff tear and bicep tendon tear. Grant has undergone two surgeries to repair the damage, but these have
had limited success. Grant is now limited to lifting only five pounds with his right arm and cannot perform any work above shoulder level.

Grant returned to work at Ford, but now only performs the "hoist" job. While Grant was off work, the "hoist" job was ergonomically modified so that the position does not require any above shoulder work. Grant earns the same or greater wages than he did at the time of his injury. Ford's Labor Relations Specialist, Lonnie Corkum, testified as a part of this matter that there was no reason to believe that Grant's job position would be eliminated any time in the foreseeable future. Additionally, Corkum stated that since Grant has seventeen years of seniority at the plant, he would have plenty of opportunities to obtain a different job with Ford if necessary. However, in his deposition Grant expressed concern that he would not be able to find another job at Ford if the "hoist" job was eliminated.

The ALJ, after a review of the record, awarded Grant permanent partial disability benefits based on a 10% impairment rating. In deciding that Grant was entitled to have the three multiplier applied to his award the ALJ wrote:

Awards for permanent partial disability benefits are governed by KRS 342.730. Subsections (1)(c)1 and (1)(c)2 provide for enhancement of the basic award as follows:

KRS 342.730(1)(c)1: If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or

KRS 342.730(1)(c)2: If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

What is meant by the 'type of work' indicated in (1)(c)1?

When trying to determine whether the three time multiplier in KRS 342.730(1)(c)1 applies, the ALJ is required to considered [sic] whether the claimant retains the physical capacity to return to the type of work that the employee performed at the time of the injury. In Ford Motor Co. v.
Forman, Ky., 142 S.W.3d 141 (2003) [sic],\(^1\) the Kentucky Supreme Court clarified that for purposes of 342.730(1)(c)\(^1\), the 'type of work' referred to means [sic] the 'actual jobs' performed by the claimant and is not determined by whether the return to work is within the same job classification.

At the hearing of this claim, Mr. Grant explained his work activities prior to the injury, as well as his work activities following the work injury. Prior to the injury, he was rotating between three different positions in the performance of the 'hoist' job. In order to reduce the physical wear and tear of performing the 'hoist' job, the plaintiff had, prior to his injury, rotated with two other co­employees. This job required him to move 120-pound transmission cases and install them on the back of transmissions. He worked on an assembly line which required him to repetitively lift significant weight with both hands and to work above shoulder level. There were actually three different jobs involved in the position and he and his co­employees rotated between the three jobs. The injury occurred on March 12, 2010 when the plaintiff was picking up a transfer case with the use of the hoist. He heard a popping and felt a ripping in his right shoulder. Although the actual lifting was being done by a hoist and plaintiff had simply bent over to hook it and hit a lever which raised it up, while so doing, his shoulder popped.

Subsequent to the work-related injury and the two surgical procedures, the claimant has returned to the same job position or title, but the actual job or jobs which he has performed subsequent to the injury are dramatically different. The claimant is restricted from lifting more than five pounds with his right arm and he is restricted from working above shoulder level.

Subsequent to the surgeries, the plaintiff is doing one part of the three­part job all of the time. He is able to do this because the employer has lowered the pedestals on the conveyor and has modified the job, thereby enabling him to perform it. The Defendant has argued that plaintiff has returned to the same job for which he was being paid. In essence, however, he is performing only one of the three roles in the job. He is paid according to 'classification' of the job. He is working within a classification of 'vehicle assembly technician' and is being paid based on that classification, not on the particular job in which he is doing. Mr. Corkum testified that Mr. Grant is not precluded by his injury from returning to his classification, of which his job is only one of many jobs that he was hired to do. Thus, the defendant argues that plaintiff is capable of performing his job. However, in Ford Motor Co. v. Forman, 142 S.W.3d 141 (Ky. 2003) [sic],\(^2\) the Kentucky Supreme Court held that 'the type of work that the employee performed at the time of injury' refers to the actual jobs that the employee performed as that phrase is used in

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\(^1\) Ford Motor Co. v. Forman was decided in 2004.

\(^2\) See footnote 1.
workers’ compensation statute providing an enhanced permanent partial disability benefit for those who lack the physical capacity to return to the type of work performed at the time of injury. The Supreme Court went on to hold that since each classification contained in a collective bargaining agreement included many different jobs, with different physical requirements, proof of the claimant’s present ability to perform some jobs within the classification did not necessarily indicate that the claimant retains the physical capacity to perform the same type of work that he or she was performing at the time of the injury with respect to the statute providing for enhanced benefits. Thus, considering this application of the law, the strict post-injury work restrictions imposed upon Mr. Grant, and the fact that he has only been able to perform his present job due to the modifications which the employer has made, the ALJ finds that claimant does not retain the physical capacity to return to the type of work or the type of jobs that he was performing at the time of injury.

In the case at hand, it is stipulated that Mr. Grant has returned to work at a weekly wage equal to or greater than the average weekly wage at the time of his injury. Thus, in the event of a cessation of work due to a reason related to the claimant's disabling injury [see Chrysalis House, Inc. v. Tackett, Ky., 283 S.W.3d 671 (2009)], Mr. Grant would be entitled to the 2x multiplier provided for in KRS 342.730(1)(c)(2).

Having determined that both sections 1 and 2 are applicable, the ALJ must next determine which of the multipliers is the most appropriate under the facts of the case. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). The ALJ must determine if the claimant is likely to be able to continue earning the same or greater wage for the foreseeable future. If the ALJ determines that it is unlikely the claimant will be able to continue earning the same or greater wage for the foreseeable future, then the three time multiplier is applicable.

In performing this analysis, the ALJ will consider various factors, including, but not necessarily limited to, whether the claimant's current job is within his medical restrictions, whether he is on medications and the level of such medications, his own testimony as to his ability to perform the job duties, the level of accommodation provided by the current employer, and whether or not the claimant's current position is a bona fide job or not. The claimant is just forty-seven years of age and presumably has a long work life in front of him. He is performing a job which is nearly a 'one-armed job.' He can lift no more than five pounds with his right arm. He cannot work above shoulder level with his right arm. But for the accommodation of lowering the pedestals which his employer has made and but for his being permitted to stay on the same job and not rotate among the three different roles of the job, he would be unable to perform the job and he would not be earning his current wage. In fact, it is doubtful that he could be earning any significant wage at all. Although the employer's attitude toward Mr. Grant has been commendable and the willingness of Ford Motor Company to alter the work station and to provide the accommodations which it has provided is praiseworthy, Mr. Grant finds himself at the mercy of the employer. If Mr. Grant should lose
this job for any reason whatsoever, it is unlikely that he would be able to obtain any other employment which would compensate him within the same level or range. The ALJ must look to the likelihood of whether or not this current job will extend into the indefinite future. Although Mr. Corkum has nearly 'guaranteed' a job for the claimant, there are many factors of which Mr. Corkum has no control. If the general public's enthusiasm for the Ford product should diminish, then where does that leave Mr. Grant? Even though the general policy of Ford Motor Company has been to retain tenured employees and to make reasonable accommodations for such employees, there is no contractual duty for Ford Motor Company to do so and no guarantees of the continuation of such policy. Management may change, as well as company policy. The claimant has sustained an extremely serious injury which has required two major surgeries. Neither surgery was much of a success. As a result thereof, he has been relegated to the role of a job requiring essentially one arm only. He cannot work above shoulder level. He has been fortunate to be the recipient of Ford Motor Company's generosity, but he has no guarantee of knowing how long that will continue. If he should be transferred to another position in the plant, it is unlikely he would be able to do it. Plaintiff estimates he could only perform 2-3% of the jobs within the plant.

Considering all of the factors stated above, the ALJ finds that claimant is entitled to the three time multiplier.

Ford appealed the ALJ's decision to the Workers' Compensation Board which affirmed in a two to one decision. The majority held that while there was evidence which contradicted the ALJ's decision, it was supported by substantial evidence and therefore should be affirmed. However, the dissenter believed that the ALJ misapplied Fawbush. In his analysis, the ALJ focused on whether Grant would find other suitable employment if he lost his job and ultimately concluded that his job at Ford might be affected by speculative factors. The dissenter believed that the focus should have been whether Grant's employment at same or greater wages will continue into the foreseeable future. The Court of Appeals affirmed, with Judge Moore concurring in result only without opinion. This appeal followed.

I. THE RECORD SUPPORTS THE FINDING THAT GRANT DOES NOT RETAIN THE PHYSICAL CAPACITY TO PERFORM THE JOB HE WAS PERFORMING WHEN INJURED

Ford first argues that the ALJ erred by finding Grant does not retain the physical capacity to continue the same type of work because he has returned to the job he was performing at the time of his injury. To properly address this argument, we must first address Ford's second argument, whether this matter is distinguishable from Forman, 142 S.W.3d 142.

In Forman, the claimant suffered a work-related injury but, upon returning to her employer, was placed in the same job classification she held at the time of her accident and earned an equal or greater wage. She did however have several physical restrictions which prevented her from performing all of the job tasks she did before her injury. The ALJ found that the claimant was not entitled to the three time multiplier because she returned to the same job classification. Id. at 143. The Board reversed
holding that the ALJ's reliance on the job classification was error. The Court of Appeals and this Court affirmed. In affirming, we stated that when dealing with an award that is based upon an objectively determined functional impairment, "the type of work that the employee performed at the time of injury' was most likely intended by the legislature to refer to the actual jobs that the individual performed." Id. at 145. Thus, "proof of the claimant's present ability to perform some jobs within the classification does not necessarily indicate that she retains the physical capacity to perform the same type of work that she performed at the time of injury. On remand the ALJ must analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs." Id.

Forman is analogous to this matter. Like the claimant in Forman, Grant has physical restrictions but has returned to work within the same job classification he was in before suffering his work-related injuries. Accordingly, the question is whether Grant retains the physical capacity to perform the same type of work within that classification now, as he did prior to his accident. The ALJ found that Grant does not have the capacity to perform all of the same tasks. He based this finding on: the fact that Grant only performs one of the three jobs he did at the time of his injury and the fact that Grant can only perform the "hoist" job because Ford lowered the pedestals eliminating the need for him to work above his shoulder level. These facts are supported by the record, and are sufficient grounds for the ALJ to have held that Grant does not retain the physical capacity to continue the same type of work he was performing at the time of his injury.

II. THE ALJ'S FAWBUSH ANALYSIS MISPLACED THE BURDEN OF PROOF ON TO FORD

Ford's last argument is that the ALJ misapplied Fawbush. Fawbush provides that if both the multiplier provided in KRS 342.730(1)(c)1 and 342.730(1)(c)2 are applicable to a claimant's award, then the ALJ has the discretion to choose which of the multipliers to apply. Fawbush, 103 S.W.3d at 12. "If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate." Id.

The ALJ found that he needed to perform a Fawbush analysis because Grant did not maintain the physical capacity to perform the job he was performing when injured ((c)1) and that he was earning equal to or greater wages now than at the time of his injury ((c)2). We agree with the ALJ that a Fawbush analysis was appropriate.

The ALJ then found the three time multiplier was the better multiplier to apply because he believed Grant would not be able to earn equal or greater wages for the indefinite future. In so holding, the ALJ noted that although Ford stated it would continue to employ Grant in some capacity, there were many factors which could affect his employment that Ford had no control over. In particular, the ALJ worried that the public may stop purchasing Ford vehicles leading to the closure of the factory, that there is no contractual duty for Ford to continue to employ Grant, that management changes may occur which could lead to a more difficult work environment for Grant, and that he does not have the physical capacity to perform similar jobs which might pay comparable wages. Ford argues that this analysis effectively forced it to present evidence that Grant was guaranteed the same job for the rest of his career, something that no employer can do. We agree.
While Grant does have physical limitations in regard to the type of work he can perform, the ALJ's analysis of whether he can earn the same or greater wage for the foreseeable future is speculative. The ALJ's analysis is based on events which may never occur. In contrast, the holding in Fawbush that the claimant was not likely to be able to earn a comparable wage for the foreseeable future was based on concrete evidence — that the only way he could perform his job was to work outside of his medical restrictions and take more narcotic pain medication than he was prescribed. Id. at 12. There is no similar evidence that Grant's current job is outside of his medical restrictions. Therefore, we reverse the determination that Grant was entitled to have his award enhanced by the three time multiplier, and remand this matter for the ALJ to reconsider his findings. We note that on remand the ALJ is free to still decide the three time multiplier is appropriate as long as it is supported by the record.

For the above stated reasons, we reverse the Court of Appeals and remand this matter to the Administrative Law Judge for further proceedings.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ. concur. Keller, J., concurs in result only.

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FAWBUSH AND KRS 342.730(1)
LOSS OF PHYSICAL CAPACITY

Does Claimant retain physical capacity to return to type of work performed at the time of the injury?

YES

Has he returned to work at the same or greater AWW?

YES

1x Applies; 2x May apply in the future if he ceases earning same or greater AWW for some reason connected to the disability

NO

NO

NO

Has he returned to work at the same or greater AWW?

NO

3x Applies

YES

Is he able to continue earning the same or greater average weekly wage for the indefinite future?

YES

1x Applies; 2x May apply in the future if he ceases earning same or greater AWW for some reason connected to the disability

NO

3x Applies
I. ATTORNEY’S FEES

A. Fee Cap

Watts v. Danville Housing Authority, 439 S.W.3d 158 (Ky. 2014)

B. Standing


II. AVERAGE WEEKLY WAGE


III. EMPLOYMENT RELATIONSHIP

A. Employee Leasing


B. Pre-employment Activity


IV. EXTRATERRITORIAL COVERAGE


B. Kentucky Employers’ Mutual Ins. v. Burnett, 432 S.W.3d 733 (Ky. App. 2014)

V. MEDICAL FEE DISPUTE – CAUSATION


VI. OPERATING PREMISES

Hanik v. Christopher & Banks, Inc., 434 S.W.3d 20 (Ky. 2014)
VII. REOPENING – CREDIT FOR PRIOR SETTLEMENT


VIII. STATUTE OF LIMITATIONS – CUMULATIVE TRAUMA

*Consol of Kentucky, Inc. v. Goodgame*, *supra*

IX. SUBJECT MATTER JURISDICTION


X. TOTAL DISABILITY – SUFFICIENCY OF FINDINGS

I. ATTORNEY’S FEES

A. Fee Cap

Watts v. Danville Housing Authority, 439 S.W.3d 158 (Ky. 2014)

Facts: Plaintiff (Langford) suffered a back injury in 2005. Surgery was recommended, which the Employer denied. Plaintiff filed a medical fee dispute and a form 101. The claim was bifurcated to determine the compensability of the proposed surgery. The ALJ found the surgery compensable and placed the claim in abeyance pending MMI. Plaintiff received TTD of more than $72,000 during that time. After the claim was returned to the active docket, the parties settled for a lump sum of $175,000. Plaintiff’s attorney then filed two motions for attorney’s fees: one for $12,000 for obtaining the lump sum settlement, and one for $8,369.19 for obtaining TTD and medical benefits in the interlocutory award. The ALJ approved the $12,000 fee, but denied the second fee. The Board and Court of Appeals affirmed. Plaintiff’s counsel then appealed.

Holding: The plain language of KRS 342.320(2)(a) caps attorneys’ fees at $12,000. The fact that part of the benefits obtained for the Plaintiff were pursuant to an interlocutory award and part due to a subsequent settlement does not permit the award of two fees. An interlocutory order is a method of adjudicating the claim and ultimately obtaining a final judgment. It does not constitute a separate proceeding, since interlocutory orders are not final and appealable. §12(6), which allows for an award of attorney fees from TTD benefits paid pursuant to an interlocutory award, provides for advance payment of a part of the attorney’s fees, but does not allow circumvention of the fee cap.

B. Standing


Facts: Plaintiff (Sipes) hired Attorney to represent her in her claim. Attorney sent notice of his representation to Employer's TPA. On 5/6/11, Plaintiff's TTD benefits were terminated. Plaintiff asked Attorney for help getting TTD reinstated. Plaintiff claimed Attorney did nothing. Plaintiff contacted the TPA herself and TTD was reinstated. Plaintiff claimed she discharged Attorney on 5/20/2011 by phone and followed up with a letter on 5/23/11. On 7/28/11, Attorney received a letter from TPA with an offer of settlement. The following day, Plaintiff contacted the TPA and was informed of the settlement offer. TPA asked Plaintiff to have Attorney send documentation of the termination before discussing settlement with her. Plaintiff emailed Attorney, stating that she had discharged him by letter dated 5/23/2011 and requesting he send acknowledgement of this to the TPA. Attorney then wrote Plaintiff, stating he had no such letter and was attempting to contact the TPA to understand the status of the
claim, after which they could discuss continued representation. Plaintiff subsequently advised TPA she was no longer represented by counsel and entered into a settlement. Attorney did not file a lien notice nor seek to intervene in the claim. On 7/27/12, he filed a motion to reopen the claim along with a motion for attorney's fees in the amount of $7,521.32. The ALJ found that Attorney had been terminated no later than 7/29/2011, but that the termination was without good cause. The ALJ found Attorney entitled to a $3,000 fee. Attorney appealed, arguing that the ALJ abused her discretion in reducing the fee. The Board found Attorney did not have standing to reopen the claim and vacated the ALJ's order. Attorney then appealed.

Holding: The plain language of KRS 342.125 allows for reopening only by motion of a party. Attorney was aware no later than 7/29/2011 that his representation had been terminated, but he made no effort to intervene in order to assert his lien. The Board's opinion was affirmed.

II. AVERAGE WEEKLY WAGE


Facts: Employer would periodically lay workers off during retooling periods or during times of reduced demand. During such periods, Employer would apply for unemployment benefits on behalf of the laid off workers and would pay supplemental unemployment benefits (SUB) so that workers would make about 95 percent of their normal wages during layoffs. In calculating Plaintiff's average weekly wage, his best quarter contained one week of layoff. Plaintiff argued that both unemployment benefits and SUB should be included in determining AWW. The ALJ included SUB, but not unemployment benefits. The Board affirmed as to unemployment benefits, but reversed as to SUB. Plaintiff appealed.

Holding: Wages are defined as "money payments for services rendered." KRS 342.140(6); KRS 342.0011(17). Unemployment benefits have not been included as wages in AWW calculations to determine the benefits for volunteer firefighters under KRS 342.140(3). Justice v. Kimper Volunteer Fire Dept., 379 S.W.3d 804 (Ky. App. 2012). Unemployment benefits are the "antithesis of wages" since they are paid when services are not rendered. The Court noted that other states have rejected similar arguments, as well as Federal courts considering wages under the LHWCA.

SUB payments, however, are more in the nature of wages than fringe benefits. The Court noted that Pennsylvania considered a similar pay system and concluded that SUB payments made pursuant to a collective bargaining agreement are in the nature of wages if they are the result of an entitlement accrued as a result of the claimant's services to the employer. See Bucceri v. W.C.A.B. (Freightcar America Corp.), 31 A.3d 985 (Pa. Cmwlth. 2011). The Board's opinion was affirmed as to unemployment benefits, but reversed as to SUB.
III. EMPLOYMENT RELATIONSHIP

A. Employee Leasing


Facts: Plaintiff was employed as a truck driver by Four Star Transportation. Four Star entered into an agreement with Better Integrated (an employee leasing company) to handle payroll and other administrative responsibilities concerning its workforce, including providing workers' compensation coverage. Better, in turn, leased its employment responsibilities to Beacon Enterprises, another employee leasing company which already had other employee leasing clients in Kentucky and had workers' compensation coverage through KEMI. KEMI argued that it did not provide coverage for Plaintiff's injury because it only insured Beacon, with whom Hoskins had not entered into a contract of hire. The ALJ found that there was a valid employee leasing arrangement between Beacon and Four Star at the time of Plaintiff's injury and that KEMI's policy with Beacon covered the injury. The Board reversed, citing the "loaned servant" doctrine which provides, among other things, that an employee cannot have an employer forced upon him without his knowledge. Since Plaintiff was unaware of the employee leasing arrangements with Better and Beacon, they could not be regarded as his employer. The Court of Appeals used similar reasoning and affirmed the Board. The Supreme Court initially agreed with the Board and Court of Appeals. Kentucky Uninsured Employers' Fund v. Hoskins, 440 S.W.3d 370 (Ky. 2013). UEF requested rehearing, which was granted.

Holding: There is a fundamental difference between a "loaned servant" situation and an "employee leasing" situation. Under a "loaned servant" scheme, a general employer sends its employees to assignments with a special employer, usually on a short term basis when the special employer needs additional workers or specialized skills. Under an employee leasing arrangement, the lessee contracts with an employee leasing company (the lessor) to transfer certain administrative tasks associated with its workforce to the lessor. The lessee remains in control of hiring, firing, and directing the work of its employees. Both types of arrangements are recognized by KRS 342.615. Applying the "loaned servant" doctrine to an employee leasing arrangement as the Board and Court of Appeals did has the paradoxical effect of defeating the purpose of the rule. Under the Board's holding, Plaintiff's ignorance of the employee leasing arrangement would result in the employee leasing companies avoiding their contractual obligation to provide workers' compensation coverage and stick the UEF with the bill. Under an employee leasing arrangement, there is no reason to require employee knowledge of the arrangement, and KRS 342.615 does not require it. The Court reversed and remanded to the Court of Appeals for consideration of other arguments raised by KEMI which were not addressed below.
B. Pre-employment Activity


Facts: Plaintiff received an offer of employment contingent upon successful completion of a pre-employment physical and drug screen. Plaintiff injured her neck during the course of the physical, but did not report it for fear of losing her job offer. Plaintiff began her employment a few weeks later. After learning she would need surgery for her neck, Plaintiff filed her claim. The ALJ dismissed the claim, finding that Plaintiff was not under a contract of hire at the time of the injury. The Board affirmed. Plaintiff appealed.

Holding: The Board and the Court distinguished this case from the situation in **Hubbard v. Henry**, 231 S.W.3d 124 (Ky. 2007). In that case, a logger agreed to work for a logging company on a "trial basis" and would receive no pay unless the potential employer liked his work. The logger was injured in the course of working during his "try-out." The Court pointed out that in **Hubbard**, the claimant was injured performing work which benefited the logging company. Here, Plaintiff was not involved in any activity which benefited the Employer. A pre-employment physical is not a "service in the course of the trade, business, profession, or occupation of an employer." **KRS 342.640(4)**. The Court affirmed the Board's opinion.

IV. EXTRATERRITORIAL COVERAGE


Facts: Plaintiff was employed in a Kentucky mine until August 1, 2009. At that time, Employer shut down the Kentucky mine and allowed employees to transfer to a Virginia operation, which Plaintiff elected to do. Plaintiff left work at the Virginia mine on January 19, 2010, and filed a cumulative trauma claim on January 17, 2012. Plaintiff supported his claim with an IME report dated December 21, 2011. The ALJ held that Kentucky lacked jurisdiction over the portion of Plaintiff's claim arising from his employment in Virginia. The ALJ also determined that the statute of limitations on Plaintiff's claim began to run with his last date of employment in Kentucky, thus his claim was untimely. The Board affirmed with respect to the jurisdiction issue, but reversed on the limitations issue, stating that the ALJ must determine the date of manifestation and determine if the claim was filed within two years of that date. Both parties appealed.

Holding: Kentucky does not have jurisdiction over the portion of Plaintiff's claim arising from his employment in Virginia. The record was clear that Employer ceased all Kentucky operations in 2009 and that after August 1, 2009, Plaintiff's work was exclusively in Virginia. The ALJ correctly
determined that Plaintiff's employment was "principally localized" in Virginia pursuant to KRS 342.670(5)(d)(1) and that no portion of his working time was spent in Kentucky pursuant to KRS 342.670(5)(d)(2); thus the extraterritorial provisions of KRS 342.670(1)(a) and (b) were inapplicable. There was no evidence that Virginia's workers' compensation law was inapplicable to the claim, thus KRS 342.670(1)(c) was likewise inapplicable. The ALJ correctly concluded that Kentucky did not have jurisdiction over the portion of Plaintiff's claim arising from his work in Virginia.

The ALJ erred with regard to the statute of limitations issue. Rather than looking at the last date of employment in Kentucky, the ALJ must determine the date of manifestation of the cumulative trauma injury. Randall Co./Randall Div. of Textron, Inc. v. Pendland, 770 S.W.2d 687 (Ky. App. 1988). The date of manifestation is the date on which the claimant discovers the existence of a disabling injury and knows it is caused by work. Alcan Foil Products, a Div. of Alcan Aluminum Corp. v. Huff, 2 S.W.3d 96 (Ky. 1999). The claimant is not required to self-diagnose the cause of his injury, thus the date of manifestation is the date on which a physician diagnoses the condition and informs the claimant that it is work-related. American Printing House for the Blind ex rel. Mutual Ins. Corp. of America v. Brown, 142 S.W.3d 145 (Ky. 2004). The ALJ must therefore determine whether Plaintiff was informed of the existence and work causation of his cumulative trauma condition more than two years prior to the date of filing the claim. If not, then the portion of Plaintiff's cumulative trauma claim arising from his work in Kentucky is viable. The Board's opinion was affirmed.

Dissent: The Board overlooked Manalapan Mining Company, Inc. v. Lunsford, 204 S.W.3d 601 (Ky. 2006) and Coslow v. General Elec. Co., 877 S.W.2d 611 (Ky. 1994), which make it clear that the two-year period for filing a claim set forth in KRS 342.185(1) is both a statute of limitations and of repose. Failure to file the claim within two years of the last Kentucky exposure results in the claim being time-barred, regardless of the date of manifestation.

B. Kentucky Employers' Mutual Ins. v. Burnett, 432 S.W.3d 733 (Ky. App. 2014)

Facts: Plaintiff was an Indiana resident. He had previously done work for Employer on a few occasions on a contract basis. In February 2009, owner of Employer called Plaintiff in Indiana and asked him to help with a job in Kentucky. After completing the job, the owner and Plaintiff had dinner in LaGrange, Kentucky, at which time the owner offered Plaintiff full time employment. Hours and wages were discussed and Plaintiff accepted the offer at that time. The owner testified that he did not have a set place of business, but operated it primarily via cell phone. Plaintiff worked both in Kentucky and Indiana, but primarily worked in Kentucky. Plaintiff was injured in 2011 while working in Indiana. He filed a workers' compensation claim in Kentucky. KEMI intervened and asserted Kentucky did not have jurisdiction and that its policy did not cover this claim. The
ALJ held that Plaintiff's contract of hire was made in Kentucky and that the employment was not principally localized in any state, thus Kentucky has jurisdiction under KRS 342.670(1)(b). The Board affirmed. KEMI and Employer appealed.

Holding: The place of making a contract for hire is the place where the final act necessary for its formation is made. Peabody Painting & Waterproofing, Inc. v. Kentucky Employers' Mutual Ins. Co., 329 S.W.3d 684 (Ky. App. 2010). The terms of Plaintiff's full time employment were discussed and the offer was accepted by Plaintiff while at dinner in Kentucky, thus there is substantial evidence to support the ALJ's finding. The owner of Employer stated that he did not have a formal place of business, but conducted business by cell phone. In order to say that an employer "has" a place of business in a state, as contemplated by KRS 342.670(5)(d), he must own or lease a location from which it regularly conducts business affairs. Haney v. Butler, 990 S.W.2d 611 (Ky. 1999). Since Plaintiff stated that 90 percent of his work was in Kentucky, while he was domiciled in Indiana, KRS 342.670(5)(d)2, likewise does not apply. There is substantial evidence supporting the ALJ's finding that Plaintiff's employment was not localized in any state, thus Kentucky has jurisdiction under KRS 342.670(1)(b).

The Court also addressed whether it was proper for the ALJ to make an award of PTD when Plaintiff only requested a PPD award. The Court held that the issue of "benefits per KRS 342.730" was broad enough to preserve the issue of PTD.

Question: The Court concluded that KRS 342.670(5)(d)2, did not apply because Plaintiff was domiciled in Indiana, but spent 90 percent of his working time in Kentucky. However, the statute requires that the worker "spends a substantial part of his or her working time" in the state. Is 10 percent of your working time not substantial enough? The Court did not address this aspect.

V. MEDICAL FEE DISPUTE – CAUSATION


Facts: Plaintiff suffered cervical and thoracic strain/sprain in 1992. In 2012, Employer moved to reopen her claim to dispute liability to treatment expenses including office visits with her PCP, pain medications, and muscle relaxers. Employer contested both the causation of her current complaints and the reasonableness/necessity of her current treatment. Employer submitted the report of an IME physician finding that Plaintiff's ongoing back symptoms were not the result of the work injury, noting that the treating physician's notes indicated primarily low back symptoms. Two office notes from the treating physician were submitted which indicated pain in the thoracic and lumbar spine. Plaintiff testified she had never been pain-free following the work injury. She stated that her neck pain was worse than her low back pain. The ALJ relied on
Plaintiff's testimony and resolved the medical fee dispute in her favor. The Board affirmed. Employer appealed.

Holding: Plaintiff had degenerative changes in her low back at the time of her original injury. She admitted to an instance of "overdoing it" and experiencing back pain in 1999 and to a fall in 2011. Plaintiff was also significantly obese. Given these facts, and the lapse of twenty-three years from the date of injury, it cannot be said that causation of her back complaints was a matter easily observable by a layman, therefore it needed to be demonstrated by competent medical proof. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). It was therefore impermissible for the ALJ to rely on Plaintiff's lay testimony in determining causation. The Board's opinion was reversed.

Dissent: Citing C&T of Hazard v. Stollings, 2012-SC-000834-WC, 2013 Ky. Unpub. LEXIS 66, 2013 WL 5777066 (Ky. Oct. 24, 2013), the dissent felt that the burden of proof on the issue of causation was on the Employer. Since the ALJ was not persuaded by Employer's IME physician, Plaintiff's testimony would be sufficient to support the ALJ's findings.

VI. OPERATING PREMISES

Hanik v. Christopher & Banks, Inc., 434 S.W.3d 20 (Ky. 2014)

Facts: Plaintiff employed by a retailer located in a shopping center. The center had two parking lots – front and back. Plaintiff was injured while walking to her car in the back parking lot. Plaintiff testified that when she was hired, she was told by a manager for Employer and by shopping center management to park in the back lot. One employee testified she was told to park in the back lot, but did not always do so. Other employees testified they were never told where to park. Certain spaces in the front lot were set aside for parking of employees of the businesses in the shopping center. The shopping center management sent memos to the businesses asking that employees park in the back lot during the week before Christmas. Employer had no control over or responsibility for maintaining the lots. The ALJ determined that Employer had no control over the lots and did not direct its employees where to park. He therefore found the injury did not occur on Employer's premises, and dismissed the claim. The Board reversed, holding that Employer "tacitly conveyed" where employees should park and benefited from employees leaving more "customer-friendly" spots open. The Court of Appeals reversed, finding that the Board had engaged in impermissible fact-finding. Plaintiff appealed.

Holding: There are four factors that must be examined to determine whether a parking lot may be considered part of the employer's operating premises: 1) whether the employer, either directly or indirectly, owns, maintains, or controls the parking facility or a portion of it; 2) whether the employer designated where in the facility its employees were to park; 3) whether the employees parked in the designated area; and 4) whether the employee was taking a reasonable path from her car to her work station when injured. These determinations must be made on a case-by-case basis and necessarily require factual findings. There was no evidence that Employer owned, maintained, or controlled the parking lots.
There was conflicting evidence over whether Employer directed its employees where to park. It is for the ALJ to determine whom and what to believe when the evidence conflicts. There was substantial evidence supporting the ALJ's conclusion. The Board's opinion impermissibly reweighed the evidence. The Court of Appeals opinion was therefore affirmed.

The Court declined to consider the "benefit to the employer" factor to which the Board referred. The Court also declined to apply the "positional risk" doctrine to parking lot cases.

Dissent: The back parking lot was implicitly designated as employee parking due to the fact that it is inconvenient to access the customer entrances from there. The Employer also had influence over the shopping center due to the nature of its leasing agreement, similar to the situation in Pierson v. Lexington Public Library, 987 S.W.2d 316 (Ky. 1999).

VII. REOPENING – CREDIT FOR PRIOR SETTLEMENT


Facts: Plaintiff was injured in 2006. She subsequently underwent cervical fusion surgery and was able to return to work without restrictions. She settled her claim for $100,000 representing an impairment of 29 percent with a compromise multiplier of about 1.55. In 2011, Plaintiff moved to reopen her claim alleging a worsening of impairment. The ALJ found Plaintiff’s impairment had increased to 30 percent and that she was now entitled to the 3x multiplier since she did not retain the physical capacity to return to her pre-injury work. The ALJ awarded Plaintiff $456.25 per week from the date of the motion to reopen for the remainder of the original 425 week period. She granted Employer credit of $180.42 per week representing benefits payable for the actual disability at the time of the settlement (i.e. 29 percent impairment with no multiplier). Employer appealed, arguing that it was entitled to a dollar-for-dollar credit for amounts paid under the settlement. The Board affirmed.

Holding: The figure for occupational disability contained in a settlement is a compromise that may, or may not, reflect the claimant’s actual disability at the time of settlement. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). The relevant inquiry on reopening is the degree to which claimant's present disability differs from her actual disability at the time of settlement. Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992). The ALJ appropriately calculated credit due to Employer. The Board's opinion was affirmed.

VIII. STATUTE OF LIMITATIONS – CUMULATIVE TRAUMA

Consol of Kentucky, Inc. v. Goodgame, supra under "Extraterritorial Coverage"
IX. SUBJECT MATTER JURISDICTION


Facts: Plaintiff was injured in 2006. Claim was settled in 2009 for a "complete and total dismissal of any and all claims" except that Plaintiff reserved his right to future medical. ALJ issued an order approving the settlement and ordering the claim "DISMISSED, with prejudice as SETTLED." In 2012, Employer filed a medical fee dispute over Plaintiff's treatment. The ALJ found in Employer's favor. No party disputed the ALJ's jurisdiction over the dispute. On appeal, the Board sua sponte dismissed the appeal, finding that the language of the 2009 order dismissing with prejudice deprived the ALJ of subject matter jurisdiction over any reopening.

Holding: The language dismissing with prejudice does not deprive the ALJ of subject matter jurisdiction. There is a distinction between "subject matter jurisdiction" and "particular case jurisdiction." Subject matter jurisdiction concerns a tribunal's authority to act in a particular area at all and cannot be waived by the parties. Particular case jurisdiction deals with the tribunal's ability to act under a specific set of facts and is subject to waiver by the parties. At most, the ALJ's order dismissing with prejudice would go to "particular case" jurisdiction since there is no question that the DWC would still have authority to hear reopenings and medical fee disputes in general.

The language dismissing with prejudice did not deprive the ALJ of even "particular case" jurisdiction, however. A claim may be reopened if a prima facie showing of one of the grounds for reopening is made, even if the claim was dismissed with prejudice. See Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972). This is particularly the case in a claim that is settled with the right to future medicals remaining open, since the only way to challenge treatment expenses is through reopening and a medical fee dispute. The Board's opinion was reversed.

X. TOTAL DISABILITY – SUFFICIENCY OF FINDINGS


Facts: Plaintiff was a CNA who suffered a low back injury while moving a patient. Her job involved bathing, dressing, transferring, and feeding patients who would weigh up to several hundred pounds. The treating physician found no surgery necessary and released her from care after some physical therapy and epidural steroid injections. He assessed a 5 percent impairment and placed restrictions of no lifting over thirty pounds. Plaintiff's two IME physicians assessed 8 percent and 12 percent impairment and felt Plaintiff should lift no more than twenty and ten pounds, respectively. An FCE submitted by Employer found Plaintiff able to lift up to twenty-five pounds. The ALJ stated he considered the severity of the injury, Plaintiff's age, her work history, her education, her testimony, and the IME physician's opinions. He found that she "cannot find work consistently under
regular work circumstances and work dependably." He therefore found Plaintiff permanently and totally disabled. Employer appealed, arguing that the ALJ's finding of total disability was not supported by substantial evidence. The Board affirmed.

Holding: The ALJ did not provide sufficient findings to support his award of total disability benefits. In determining whether a claimant is totally disabled, the ALJ must consider factors "such as the worker's post-injury physical, emotional, intellectual, and vocational status and how these factors interact." Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ must balance these factors against one another. Here, the ALJ simply listed the factors and made a conclusory statement without offering any meaningful analysis of the factors. The Board's opinion was reversed and the claim remanded with instructions to vacate the award of total disability benefits and make an award with adequate evidentiary grounds.
NEUROPSYCHOLOGICAL EVALUATIONS AND DISABILITY RATINGS

I. REVIEW OF AMERICAN MEDICAL ASSOCIATION GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (5TH EDITION) – CHAPTER 1: PHILOSOPHY, PURPOSE, AND APPROPRIATE USE OF THE GUIDES

A. Guides Definition of Impairment

1. Guides continues to define impairment as “a loss, loss of use, or derangement of any body part, organ system, or organ functions,” which can develop from an illness or injury.

2. An impairment is considered permanent when it has reached maximal medical improvement (MMI) meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.

3. The term impairment in the Guides refers to permanent impairment, which is the focus of the Guides.

4. Loss, loss of use, or derangement implies a change from a normal or preexisting state.

5. Options in evaluating an individual include considering the individual’s health pre-injury or pre-illness state or the condition of the unaffected side as “normal” for the individual if this is known, or compare that individual to a normal value defined by population averages of healthy people.

B. Impairment Percentages or Ratings

1. Developed by medical specialists and are consensus-derived 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 (ADL), excluding work.

2. Ratings were developed to reflect functional limitations and not disability.

3. The whole person impairment percentages listed in the Guides estimate the impact of the impairment on the individual’s overall ability to perform activities of daily living, excluding work.
4. Work is not included in the clinical judgment for impairment because (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker’s age, education, and prior work experience to determine the extent of work disability.

C. Guides Definition of Disability

1. “A disability is an alteration of an individual’s capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment.”

2. Disability also includes information about the individual’s skills, education, job history, adaptability, age and environment requirements and modifications.

D. Handicap Definition

1. Handicap is a term historically used in both a legal and a policy context to describe disability or people living with disabilities.

2. Though the term continues to be used, generally it is being replaced with the preferred term disability.

E. Impairment Evaluations in Worker’s Compensation

“Impairment percentages derived from the Guides criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary first step for determining disability.”

II. REVIEW OF AMERICAN MEDICAL ASSOCIATION GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (5TH EDITION) – CHAPTER 13: THE CENTRAL AND PERIPHERAL NERVOUS SYSTEM

A. The Guides discuss that “Neuropsychologic assessment can characterize cognitive and behavioral alterations and therefore is useful in the clinical assessment and planning of patient management. The results of this assessment must be interpreted in the context of clinical and other test information. Many factors affect neuropsychological performance – age, education, socioeconomic status, and cultural background – and they must therefore be considered for their influence on test results. Neuropsychological tests may be able to distinguish between abnormal and normal performance but cannot determine the cause of the problem. In other words, neuropsychological testing cannot demonstrate consistent diagnostic validity. Traumatic brain injury, for example, may have a profile similar to that of other forms of dementia.”
B. 13.3d Mental Status, Cognition, and Highest Integrative Function

1. Organic brain syndrome, dementia, and some specific, focal and neurologic deficiencies.

2. Orientation, attention, immediate recall, calculations, abstraction, construction, information and recall mental status measures utilized.

3. Screening tests can identify severely impaired individuals and are used to determine whether further evaluation with neuropsychological testing is needed.

C. Neuropsychological Evaluation

1. According to Guides, the neuropsychological test battery encompasses many functional domains – attention, language, memory, visuo-spatial skills, executive function, intelligence, motor speed, and educational achievement – using tests with established validity and reliability.

2. Neuropsychological testing more beneficial for the individual with subtle cognitive changes who benefits from neuropsychological testing.

3. Traumatic Brain Injury, Parkinson’s Disease, Human Immunodeficiency Virus, Dementia, Encephalopathy, Multiple Sclerosis, Epilepsy, Neurotoxic Exposure, chronic pain, and personality assessment in individuals with neurologic disease are described as being “amenable” to neuropsychological evaluation.

D. Clinical Dementia Rating (CDR)

1. Includes ratings for memory, orientation, judgment and problem solving, community affairs, home and hobbies, and personal care (Table 13-5).

2. CDR score is then applied to Table 13-6 Criteria for Rating Impairment Related to Mental Status into its corresponding class.

E. 13.3f Emotional or Behavioral Impairments

1. Disturbances in emotions, mood, and behavior highlight the relationship between neurology and psychiatry.

2. “Emotional disturbances originating in verifiable neurologic impairments (e.g., stroke, head injury) are assessed using the criteria in this chapter” (Table 13-8).

3. Impairments may include depression, manic states, emotional fluctuations, socially unacceptable behavior, involuntary laughing
or crying, impulsivity, general disinhibition with obsessive and scatological behaviors, and other kinds of CNS responses.

III. REVIEW OF CHAPTER 14 – MENTAL AND BEHAVIORAL DISORDERS (5TH EDITION) (NO NEUROLOGIC IMPAIRMENT)

A. Psychiatric manifestations and impairments that do not have documented neurologic impairments are evaluated using criteria in the Chapter on Mental and Behavioral Disorders (Chapter 14).

B. Because the 5th edition of the AMA Guides (Chapter 14) does not contain numerical values for psychological conditions, practitioners are instructed to place the claimant within a Class pursuant to Table 14-1 of the 5th edition of the AMA Guides, then go to the corresponding Class set forth in Chapter 12 of the 2nd edition of the AMA Guides and assign the appropriate impairment rating.

IV. CASE STUDY EXAMPLE

A. Subject

Twenty-eight year-old, right-handed, married, Caucasian woman with twelve years of education.

B. History

This individual was the mother of two young children when she was assaulted while employed by a convenience store. She was struck in the forehead with the claw of a hammer which caused a comminuted skull fracture and significant contusions to bilateral frontal lobe structures. She was rendered unconsciousness for seventy-two hours with an estimated posttraumatic amnesia period of seventeen days. She participated in three months of inpatient/outpatient neurorehabilitation.

C. Current Symptoms

Neuropsychological evaluation results revealed moderate to severe impairment of functional brain ability. In particular, her Full Scale IQ score of 90 was significantly lower than her Wechsler Test of Adult Reading score of 109 and is suggestive of a significant decline in her intellectual functioning from a previously higher level. Her performances on measures of frontal lobe functioning were impaired for both verbally-mediated and visually-mediated information (e.g., verbal fluency, non-verbal concept formation and abstract reasoning). Fine motor speed was impaired bilaterally. Visual memory was significantly lower than her auditory memory indicating lateralizing deficits involving the right temporal lobe. Impaired response inhibition and impulse control were noted revealing impaired functioning of dorsolateral prefrontal cortex and anterior cingulate cortex.
Activities of daily living that were impaired as a result included her inability to return to work due to impaired neuropsychological functioning and right sided weakness. She was also unable to participate in her typical social interactions due to issues of dyscontrol and impulsivity. Recreational functioning became very limited due to issues of balance, abulia, and impaired motor functions. Communication became difficult due to impaired word-finding abilities.

D. Clinical Studies

3T MRI of the brain revealed large areas of contusion with identifiable hemosiderin deposits involving both left and right frontal and prefrontal lobe areas.

E. Diagnosis: Traumatic Brain Injury

F. Impairment Rating

Thirty-nine percent impairment due to neurocognitive impairment.

G. Comment

This case is most appropriately assigned a CDR of 2.0 with Class of Impairment of 3.
I. INTRODUCTION

An agreement to settle a Workers’ Compensation claim is a contract between the parties. Whittaker v. Pollard, 25 S.W.3d 466, 469 (Ky. 2000). All Workers’ Compensation settlement agreements must be reviewed and approved by an Administrative Law Judge per KRS 342.265. The statute requires a “memorandum of agreement” signed by the parties or their representatives. However, other than the provision with respect to the lump sum payment of future income benefits greater than $100 under KRS 342.265(2) and utilizing the proper present value discount rate prescribed by KRS 342.265(3), the statute offers little guidance as to what is specifically required to be contained in a settlement agreement. The regulations contain specific provisions for calculations of an Employer’s liability using the present value discount. 803 KAR 25:010 §20.

An ALJ is granted broad discretion in reviewing a settlement agreement and determining whether it should be approved. Case law indicates that parties to a suit have an absolute right to settle their dispute at any time, even after litigation has been initiated. Jones v. Conner, 915 S.W.2d 756 (Ky. App. 1996). Even so, while “the settlement of workers compensation claims is highly desirable and to be encouraged as a matter of policy, we believe that settlements which are reached also must comply with other public policy considerations embodied in the Worker’s Compensation act. Accordingly, an ALJ is without authority to approve settlement agreements which do not comply with those policy considerations.” Newberg v. Weaver, 866 S.W.2d 435 (Ky. 1993).

Practice tip for Defense Counsel: The DWC has been known to reject settlement agreements with unrepresented claimants that do not comply with all of the provisions of the Act. This can include improper calculation of the lump sum value by including past weeks in the 425 week present value discount in violation of 803 KAR 25:010 §20. Interest on past due benefits as per KRS 342.040 can be waived, but the waiver has to be clearly set out in the agreement. Also, the settlement agreements must include sufficient past due weeks under Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009).

When submitting a settlement agreement to the Department of Workers’ Claims, it is highly desirable that the settlement agreement be approved in the first instance. There is a clear risk that an unrepresented claimant will back out of a settlement agreement and seek counsel if the DWC declines to approve a settlement agreement prepared by an insurance carrier or counsel for the Employer. The delay in having to resubmit a settlement agreement even where both sides are represented by counsel entails a delay in the claimant receiving his settlement funds and delays the carrier from closing their file.
At the 2014 Mid-Winter Meeting and CLE seminar, the Kentucky Bar Association Workers’ Compensation Law Section had excellent papers and lectures presented by Laura R. Beasley, Esq. and Peter J. Naake, Esq. pertaining to "Workers’ Compensation Settlement Strategies and Medicare Set-Aside Accounts“ and "Settlement Considerations from Plaintiff’s Perspective: Workers’ Compensation Wrap-Arounds, Medicare Set-Aside, and Other Provisions Contained in Settlement Agreements.” They are excellent resource materials and a good background for this presentation regarding negotiation and drafting considerations for complex settlement agreements.

II. THE BASIC SETTLEMENT FORMAT

The DWC requires that all settlement agreements be submitted on a Form 110 which provides a general outline of the information required from the parties. There are different variations of a Form 110 for use with injuries, coal workers’ pneumoconiosis, other occupational diseases, fatalities & hearing loss. 803 KAR 25:010 §§26 & 27.

The basic Form 110 – Settlement Agreement format used by the DWC does not lend itself to preparing complex settlement agreements. In some instances, simple changes can be made to the form to incorporate all of the terms of the Parties’ agreement. In other instances, addendum need to be attached to cover complex portions of a Medicare Set-Aside agreement and delineating the particular waivers and structured payments that will be made under the terms of the agreement.

A. Section 1 – Parties

In the first section of the form 110, the parties to the agreement are listed along with their insurance carrier or TPA. This would appear to be an obvious section, but the parties must be sure to delineate where multiple employers or separate insurance carriers or TPAs are involved.

B. Section 2 – Injuries

The injury date blank section of the Form 110 is obvious when only one injury has been pled and the evidence has only reflected one injury. However, there are often multiple injuries claimed in the Form 101 and additional evidence may be introduced during the proceedings asserting an additional date of injury or an additional type of injury. At the very least, the dates should include all of the dates alleged in the Form 101 and any Motions to Amend or Supplement.

When there are multiple injuries, the brief description of the occurrence resulting in an injury needs to include all of the injuries and a terse statement indicating how the injury occurred. Again, reference should be made to the allegations of the Form 101. However, a plaintiff may have referenced additional injuries during his or her deposition or at the Final Hearing. The omission of an injury that has been litigated creates a risk that the claim may be subsequently reopened based upon "mutual
mistake.” KRS 342.125(c). This may also create a “failure to join all known causes of action” per KRS 342.270(1).

C. Section 3 – Medical Information

This section needs to separately itemize the medical expenses paid for each separate injury. The DWC also wants the date of the last medical benefit paid listed. This is especially important where future medical benefits are to be waived under the terms of the agreement. The Parties need to be especially careful about listing or describing unpaid or contested medical expenses and making sure that the subsequent sections of the agreement address how the dispute over these expenses has been resolved. If there have been multiple surgeries performed, the “nature of surgery” needs to be either abbreviated or additional lines added to the agreement.

On my standard settlement form, the DWC Form 110 has been amended to have additional checkmarks to indicate whether the medical report is attached to the Form 110 or whether the medical report and/or deposition have already been filed in evidence. Likewise, the section regarding restrictions states whether a medical report is attached or the medical report and/or deposition describing the restrictions have already been filed in evidence. For a complex settlement agreement involving multiple injuries and multiple ratings, it is necessary to delineate the different physicians that have assigned ratings and the particular injury or injuries that they have rated. For example, if an IME physician has rated two separate injuries to two separate body parts, those should be listed individually.

The final item in the medical information section relates to the Designated Treating Physician. If the F-113(s) for the claim are readily available, they can be attached to the Form 110. However, the most efficient basis is to simply have the First and/or Second Designated Treating Physician listed on the bottom of page 1 or to specifically denote this is no longer applicable where future medical benefits are being waived.

D. Section 4 – Work Information

Again, the type of information requested in the section of the settlement agreement appears relatively straightforward. However, the parties should be sure to make sure that the AWW listed corresponds with the stipulated AWW in the Form 111. Likewise, the date the claimant returned to work and his earnings upon return to work need to be specified. This section can be used by the ALJ or DWC staff personnel to determine whether the settlement includes appropriate modifiers and multipliers under KRS 342.730. See also, Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).
E. Section 5 – Benefit and Settlement Information

The initial section of the benefit and settlement information section requires the parties to list the TTD previously paid on the claim. The DWC staff “checks the math,” so be sure the weekly rate is correct and that the number of weeks corresponds to the dates listed. The total amount should be the amount shown in the DWC claim database. As noted earlier, cases involving unrepresented claimants need to have the TTD dates correspond with PPD start and stop dates so that they properly correspond with any past due PPD benefits payable in full with interest shown in the following calculations.

The monetary terms of settlement section lists the lump sum amount to be paid to the claimant as well as the weekly benefits to be paid, if applicable. Please note that lump sum payment for indemnitee should be clearly identified and in some cases listed as a separate amount from monetary lump sums for settlement of medical or other rights under the Act.

The settlement computation section requires calculations for additional TTD and PPD benefits being paid to the claimant. If there are separate injuries, separate payments should be clearly delineated. If multiple permanent impairment ratings are listed on the first page, the parties should list the permanent impairment rating used for the calculations as a “compromise” PIR rating. The total amount of any additional payments as denoted in the section below can also be listed here so that the total of indemnity and other payments will correspond with the lump sum amount specified in the Monetary Terms of Settlement section.

The following section delineates the specific waivers negotiated between the parties and the amount being paid for each waiver. This section often requires revision in a complex settlement agreement so that separate consideration is listed for each waiver covered by the settlement agreement. For example, if the employer has paid for the right to acquire an MSA subsequent to this settlement, the additional amount being paid needs to be listed separately from the amount being paid for waiver of vocational rehabilitation, waiver of the right to reopen, and waiver of past medical expenses.

If the claim could be brought in another jurisdiction in addition to Kentucky, the parties should clearly specify whether this settlement is also intended to resolve or preclude an additional claim in that jurisdiction. Extraterritorial injuries for employees based in Kentucky with claims being brought in Kentucky per KRS 342.670 are the most common example. Determining whether or not including such a provision will effectively preclude the filing of such other claim may require referral to counsel from that jurisdiction or research of the statutory and case law of the other jurisdiction, but inclusion of the waiver or election of remedy in the F-110 would at least evidence the parties' intentions and should be allocated separate consideration.
The MSA section on the bottom of page 2 provides space for basic information pertaining to an MSA. In most instances, the specifics of the MSA agreement will need to be included in the following section under Other Information. Regardless, it is important that the start and stop dates of any periodic payments and amounts be consistent with the information in the subsequent sections and that the lump sum seed money for the MSA be clearly delineated, if known.

The penultimate line on the Benefits and Settlement Information section includes a space labeled “Other.” This is an appropriate place to note the compromise nature of the settlement agreement. For example, I commonly reference:

The settlement calculations and proration are for illustrative purposes only, and this settlement reflects multiple compromises on several disputed issues. The _________ lump sum payment for a full and final settlement of this claim (except as to medical benefits, if applicable) is based on a final settlement with prejudice, and such is being paid and accepted as proper consideration for all of the compromised issues in this claim.

The final part of the Benefit and Settlement Information section includes spaces for information on whether the claimant has an adequate source of income during disability if the lump sum payment represents weekly benefits greater than $100. This section is to demonstrate compliance with KRS 342.265(2). If there has been a lapse of time between the claimant’s deposition or final hearing testimony and the completion of the settlement agreement, counsel will need to discuss the claimant’s current status and what information can be included in order to have the agreement approved. Information such as retirement benefits, Social Security disability benefits, or other family income can be included to demonstrate that the claimant has a reasonable expectation of an ongoing stream of financial support beyond this lump sum payment.

III. “OTHER INFORMATION” – AN EXAMPLE OF SPECIAL TERMS

A. Overview or Summary of Settlement Terms

This is a compromise settlement of Plaintiff’s 2009 and 2011 workers’ compensation injury claims based upon a lump sum payment of $325,000.00 for a full and final waiver of all rights to additional workers’ compensation benefits of any nature except for Plaintiff’s reasonable, necessary & related medical expenses for his left knee (2009) and left shoulder (2011). The Plaintiff further understands and agrees that he is also extending the right to the Defendant-Employer and/or its carriers to secure a CMS approved MSA or MSAs to fund a buyout of his rights to future reasonable, necessary & related medical expenses for arising from his 2009 (left knee) and 2011 (left shoulder) injuries.
B. Details of Consideration to be Paid to Claimant and Waiver of Potential Credits

The consideration extended by the Employer further includes waiver of the potential credits or offsets it may otherwise have been due based on overlapping indemnity benefit periods and for workers’ compensation benefits paid under the laws of other jurisdictions. No credits or offsets shall further be applied to the lump sum of $50,000.00 being paid for the settlement of the 2009 injury or the $275,000.00 being paid for the settlement of the 2011 injury. Any funds to be paid by the Employer or its carriers necessary to fund the CMS approved MSA or MSAs for settlement of future medical benefits shall be in addition to the $325,000.00 lump sum total specified herein. Any attorney fee(s) due Plaintiff’s counsel as approved by the Administrative Law Judge is to be deducted from the lump sum payment(s).

C. Indemnity Waiver and Waiver of Claims for Additional Body Parts

The Plaintiff understands and agrees that, under the terms of this settlement, the Defendant-Employer will not be responsible for any future income or vocational rehabilitation benefits under the Workers’ Compensation Act in Kentucky or any other jurisdiction. Plaintiff also understands that the Employer and its carriers have denied all liability for benefits relative to his allegations of a right knee injury or injuries as well as his allegation of a neck injury and Plaintiff agrees that all claims for any compensation benefits for such injury or injuries to those body parts is/are expressly dismissed with prejudice.

D. Ongoing Obligation for Medical Expenses

The Employer shall remain responsible for reasonable, necessary & related medical expenses for the 2009 (left knee) and 2011 (left shoulder) injuries subject to the Employer's rights to obtain and fund a CMS approved MSA or MSAs in an amount or amounts to be determined hereafter that will then relieve the Employer of the obligation to pay medical expenses related to these injuries. As a material part of this settlement, Plaintiff affirmatively represents that he is not aware of any unpaid or outstanding past medical expenses related to this injury and that he understands that the employer will have the right to contest additional expenses if such expenses were not timely presented to the carriers for payment or if such expenses appear unnecessary, unreasonable, or unrelated to the 2009 and 2011 injuries.

E. Finality of Agreement, Waiver of Reopening Rights, Waiver of Claims in Other Jurisdictions

The Plaintiff understands and agrees that under the terms of this settlement his claims arising from the 2009 and 2011 injuries as against the Defendant-Employer and its carriers are settled with prejudice and can never be reopened for any reason whatsoever other than to enforce his right to additional medical benefits as provided under this agreement.
The Plaintiff understands and acknowledges that a settlement of his claims with prejudice means that he fully, finally, and forever waives and releases the Defendant-Employer for and from any and all liability for outstanding or future workers’ compensation indemnity benefits or other potential benefits under the Kentucky Act or the laws of any other jurisdiction other than medical benefits as specified herein. The Plaintiff's settlement of these claims and acceptance of the lump sum payments totaling $325,000.00 constitutes an irrevocable election of remedy to settle these claims under Kentucky law and he is agreeing to forgo any and all rights to request or pursue additional benefits in another jurisdiction.

F. Employer’s Right to Obtain an MSA to Terminate Obligation for Future Medical Benefits

The Employer and its respective carriers for 2009 and 2011 shall remain responsible for reasonable, necessary & related medical expenses incurred as a result of the 2009 and 2011 injuries until such time as the Employer or either of its carriers secure and fund (a) CMS approved MSA or MSAs for the reasonable, necessary and related medical expenses resulting from the 2009 and 2011 injuries. Plaintiff further acknowledges and agrees that the Employer shall have the right to obtain a CMS approved MSA or MSAs that will allow the Employer to fully settle its liability for Plaintiff’s right to reasonable, necessary and related medical expenses associated with his 2009 and 2011 injuries. Plaintiff agrees that the consideration paid for the Employer’s right to purchase such MSA or MSAs as full settlement of future medical benefits includes adequate consideration for waiver of potential medical benefits that may fall outside the purview of Medicare and the MSA or MSAs obtained pursuant to this agreement.

G. Plaintiff’s Duty to Cooperate in Obtaining MSA Estimate and CMS Approval

Plaintiff agrees to fully cooperate with all reasonable requests to complete the necessary paperwork to obtain an appropriate estimate for the MSA or MSAs and to get the estimates approved by CMS as adequately considering Medicare’s interests. This includes, but is not limited to, obtaining and providing proper documentation from his treating physician indicating that chronic use of narcotic medication(s) is not reasonably necessary for his injury or injuries at this time but recognizing that such may be appropriate on a temporary basis in the event Plaintiff requires additional surgery or other major procedure relating to his injury or injuries.

H. Specific MSA Terms, Payments and CMS Approval Required

Plaintiff understands and agrees that he shall have no right to object to the amount to be included in the MSA or MSAs or any right to object to structure of the MSA or MSAs funding (lump sum seed money, periodic payments or both) provided that (1) such MSA or MSAs are approved by
CMS as properly considering Medicare’s interests, (2) the MSA or MSAs include and are funded to cover professional management of the medical benefit payments from the MSA or MSAs, and (3) that the company selected by the Employer for any periodic funding of the MSA or MSAs by annuity or otherwise has or have reasonable financial stability as evidenced by an A.M. Best rating of “A” or higher.

I. Employer’s Right to Purchase an Annuity to Fund MSA, Duty of Cooperation, and Extinguishment of Employer’s Obligation for further Payments

The Plaintiff understands and agrees that the Defendant-Employer or its carriers for the respective injuries shall have the right to purchase an annuity or annuities as appropriate to fund any periodic payments required for the CMS approved MSA or MSAs referenced herein. Plaintiff agrees to fully cooperate with all reasonable requests to complete the necessary paperwork reasonably necessary to effectuate such annuity purchase. The Employer retains the right to choose the financial institution from which to purchase the annuity provided that the company chosen by the Employer has reasonable financial stability as evidenced by an A.M. Best rating of “A” or higher. Following the Defendant-Employer’s purchase of the annuity or annuities as provided herein and paying any lump sum necessary as seed money for such MSA or MSAs, Plaintiff relinquishes and waives any and all claims as against the Defendant-Employer for such periodic payments.

J. Amendment of Form 110 by Supplemental QARP

The parties further agree that this Form 110 shall be self-amending following the establishment and funding of the MSA or MSAs as provided herein for full and final settlement of the Employer’s liability for future medical expenses and that no additional approval from the DWC for the full and final settlement of future medical benefits shall be necessary. The Defendant Employer shall be entitled to file a SUPPLEMENT TO FORM 110 that includes the Qualified Assignment, Release and Pledge Agreement (QARP), if applicable, for the MSA or MSAs to document its election to secure and fund such MSA or MSAs and fully settle and resolve the Defendant’s liability for future medical benefits under the terms of this agreement.

K. Waiver of Beneficiaries’ Rights

The Plaintiff understands that, under the terms of this settlement, he fully and forever settles with prejudice his claims against the Defendant-Employer as provided herein, and this includes a waiver of any claim that could be asserted or maintained by any heir, survivor, dependent, widow, estate, executor or executrix, and administrator or administratrix. This settlement with prejudice includes a waiver of any claim that could be asserted or maintained upon the death of Plaintiff under KRS 342.730 or KRS 342.750.
L. Plaintiff’s Review of F-110 Terms with Counsel and Request for Approval by ALJ

The Plaintiff states to the Administrative Law Judge that he has read and understands the terms of this Settlement Agreement and that the terms of this Agreement have been explained to him in detail by his attorney. The Plaintiff further states to the Administrative Law Judge that the consideration extended by the Defendant-Employer is fair and adequate. The Plaintiff requests the Administrative Law Judge to approve this Settlement Agreement in its entirety because it serves his best interest.

M. Payment and Waiver Summary for Signature Page

Upon approval of this Settlement Agreement by the Administrative Law Judge, the Defendant-Employer shall pay to the Plaintiff, in care of his attorney, a lump sum payment of $50,000.00 by the carrier for his 2009 injury and a lump sum of $275,000.00 by the carrier/TPA for the 2011 injury. Upon approval of this Settlement Agreement by the Administrative Law Judge, the Plaintiff’s claims against the Defendant-Employer and its workers’ compensation insurance carrier are settled with prejudice and cannot be reopened for any reason other than to enforce his rights to future medical benefits as provided herein. Upon payment of these lump sum amounts, the Defendant-Employer and its workers’ compensation insurance carrier are fully and forever released from any and all liability for workers’ compensation benefits to or on behalf of the Plaintiff for his 2009 and 2011 injuries other than as to medical expenses as provided herein.

N. Addendum for SS Disability with Monthly Equivalent

This matter arises from two (2) alleged work-related injuries Mr. Williams claims to have sustained while working for the Employer; the first occurring on (i) March 18, 2009 to his left knee, (Employer insured by Zurich Insurance Group, Ltd. at the time of this injury); and the second occurring on (ii) March 13, 2011 to his left shoulder / upper extremity, (Employer insured by Continental Indemnity Co. at the time of this injury). Mr. Williams was paid Temporary Total Disability (hereinafter TTD) at a rate of $694.30 per week from March 19, 2009 through August 18, 2010 as a result of the March 18, 2009 injury; and also paid TTD at a rate of $997.38 per week from March 21, 2011 through June 16, 2013 as a result of the March 13, 2011 injury.

This is a highly contested claim. While the Defendant/Employer acknowledges these work-related events occurred on March 18, 2009 and March 13, 2011 for which Mr. Williams provided timely notice and sought medical treatment, the Defendant/Employer contests (i) whether Mr. Williams has been rendered totally disabled as a result of one or both of these injuries, and (ii) if, only partially disabled, what is the appropriate impairment rating for each injury and whether Mr. Williams is entitled to one of the enhancement factors of KRS 342.730(1)(c) to the PPD award.
for each injury. Further, the Defendant Employer argues for a credit for overpayment of TTD regarding the March 13, 2011 injury.

Mr. Williams would be entitled to benefits ranging from:

(i) Permanent Total Disability from June 15, 2013, (the day after TTD was terminated) through the present (5/2/14) and continuing until January 13, 2029 (the date Mr. Williams will be eligible for normal old-age Social Security Retirement at the age of 67). These benefits would be paid at a case rate of $721.97 per week, then subject to various “carve-outs” for prior PPD awards as well as a carve out for the PPD award associated with the March 2009 injury


To

(ii) Two Permanent Partial Disability benefits (PPD) awards for each injury; paid at $93.73 per week for 425 weeks for the March 2009 injury, and paid at $211.17 per week for 425 weeks for the March 2011 injury.

The parties recognize the discretion an Administrative Law Judge has to decide a claim and agree to settle based on the following:

The Defendant, (Employer and/or its workers’ compensation insurance carriers), will pay Mr. Williams and his attorney $325,000.00 in a lump sum in exchange for waiver of his right to indemnity benefits (PPD, PTD, TTD and death benefits), waiver of his right to vocational rehabilitation, and waiver of his right to reopen this claim for indemnity benefits. The Defendant/Employer will establish MSA accounts for payment of Mr. Williams’ medical treatment for the claimed injuries and based on CMA approval/response to their MSA proposals will either fund the MSA account approved by CMS or have the option to simply leave Mr. Williams’ medical coverage “open.”

Of the total $325,000.00 settlement payable to Mr. Williams and his attorney, $12,000.00 will be recovered by Christopher P. Evensen
(attorney) as an attorney’s fee (subject to approval by an Administrative Law Judge). In addition, all litigation expenses (currently $1,667.80) will be recovered by Christopher P. Evensen.

Taking the $325,000.00 settlement amount, and reducing for attorney’s fees ($12,000.00) and litigation costs ($1,667.80) leaves $311,332.20 which will be dispersed to Mr. Williams, (less any additional litigation expenses incurred).

The plaintiff submits this $311,332.20 to be paid to the employee/plaintiff for the agreement, is calculated without commutation of interest, and shall represent the negotiated compromise Agreement for benefits from (i) June 15, 2013 through the present, May 2, 2014 (45.71 weeks) and continuing for the claimant’s life expectancy (claimant is 52 years old – DOB January 13, 1962) which is 25.1 years (1,305.2 weeks) forward from this date, pursuant to 803 KAR 25:036, Appendix A. Plaintiff submits this settlement, therefore, represents benefits paid over a period of 1,350.91 weeks (45.71 weeks + 1,305.2 weeks).

Thus the settlement represents the payment of $230.45 per week, ($311,332.20 / 1,350.91 weeks) or $998.62 per month ($230.45 x 52 weeks = $11,983.40 / 12 months = $998.62 per month).
AGREEMENT AS TO COMPENSATION
AND
ORDER APPROVING SETTLEMENT
Workers' Compensation Claim No. 2011-93703

IF THIS FORM IS NOT PROPERLY COMPLETED, IT WILL BE RETURNED.
Every section should be completed. If a section is not applicable, fill in the blank with N/A.

ROBERT WILLIAMS
Plaintiff

APPLIED UNDERWRITERS –TPIA (2011)
Insurer/Self-Insured/Self Insurance Group
P.O. Box 3804

JACK COOPER TRANSPORT CO., INC., AS INSURED BY CONTINENTAL INDEMNITY COMPANY (2011)
Insurer’s Address
Omaha, NE 68103

Employer
2650 East 32nd, Ste. 220

City, State, Zip Code
Joplin, MO 64804-4313

JACK COOPER TRANSPORT CO., INC., AS INSURED BY ZURICH INSURANCE GROUP, LTD. (2009)
Other participating parties

Address
2650 East 32nd, Ste. 220

City, State, Zip Code
Joplin, MO 64804-4313

INJURIES
Date: 3/18/2009 & 3/13/2011
Brief description of occurrence resulting in injury: 2013 - strap broke while falling being tightened causing him to fall backward
Nature of injury(ies) including body part(s) affected: 2009 - Left knee; 2011 - Left shoulder

MEDICAL INFORMATION (2009 INJURY)
Medical expenses paid: 2009 - $29,654.46; 2011 - $35,686.00
Date last medical paid: -current-
Medical expenses unpaid or contested: - all right knee and neck treatment expenses are denied -
Surgery performed: ☑ Yes ☐ No
Nature of surgery: TKR left knee; left shoulder arthroscopy x 2

Impairment Ratings:
☐ Medical report attached ☑ Medical report(s) and/or deposition already filed in evidence
Restrictions:
☐ Medical report attached ☑ Medical report(s) and/or depositions already filed in evidence

<table>
<thead>
<tr>
<th>Date Given</th>
<th>18%</th>
<th>3/10/11</th>
<th>Dr. Jules Barefoot (left knee)</th>
</tr>
</thead>
<tbody>
<tr>
<td>13%</td>
<td>6/26/13</td>
<td>Dr. Jules Barefoot (left shoulder)</td>
<td></td>
</tr>
<tr>
<td>20%</td>
<td>10/9/12</td>
<td>Dr. Rhoads (left knee)</td>
<td></td>
</tr>
</tbody>
</table>

Diagnosis or diagnoses: 2009 - Status post left patellofemoral replacement 2011 - status post left shoulder arthroscopy x 2 with rotator cuff repair and biceps tendinopathy

If medical treatment is continuing, indicate the designated physician below. Attach a copy of executed Form 113 indicating a designated physician if there has not been a physician previously designated.
First Designated Physician: Dr. Jacobs/Stanton Second Designated Physician: Dr. Rhoads/Pomeroy N/A
**WORK INFORMATION**

Type of work performed at time of injuries: OTR truck driver (car hauler)

AWW on DOI's: 2009 - $1,309.63; 2011 - $1,584.87 Date RTW: 2009 - 8/19/10; 2011 - none


**BENEFIT AND SETTLEMENT INFORMATION**

*If consolidated Claims, indicate amount for each Claim separately:*

<table>
<thead>
<tr>
<th>2009 - TTD paid from: (multiple periods paid □)</th>
<th>3/19/09 to 8/18/10</th>
<th>@ $694.30</th>
<th>* 74</th>
<th>= $51,378.20</th>
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<tr>
<td>(MM/DD/YY)</td>
<td>(MM/DD/YY)</td>
<td>Amount</td>
<td># Wks</td>
<td>Total</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2011 - TTD paid from: (multiple periods paid □)</th>
<th>3/14/11 to 6/16/13</th>
<th>@ $997.38 (IL)</th>
<th>* 118</th>
<th>= $117,690.84</th>
</tr>
</thead>
<tbody>
<tr>
<td>(MM/DD/YY)</td>
<td>(MM/DD/YY)</td>
<td>Amount</td>
<td># Wks</td>
<td>Total</td>
</tr>
</tbody>
</table>

**Monetary Terms of Settlement**

Total amount to be paid in lump sum 2009 - $50,000.00; 2011 - $275,000.00 = $325,000.00 total

*Individual amounts being paid or prorated for income benefits, past or future medical benefits (including any MSA agreement), or other waiver or buy outs must be specified below.*

Weekly benefits of N/A for N/A starting on N/A

| Settlement computation*: 2009 - 18% PIR x 1.0 AMA multiplier = 18% PPD |
|--------------------------|--------------------------------------------------------|
| computation*:           | 18% PPD x 1.0 (.730 multiplier) x $520.72/week (2009 stat. max. PPD) = $93.73/week PPD |
| (See below)              | $93.73/week PPD x 384.4136 weeks (2014 PV for 425 weeks) = $36,031.09 PPD LS |
|                         | $36,031.09 PPD LS + $13,968.91 (add'l waivers listed below) = $50,000.00 lump sum |

**2011 - 13% PIR x 1.0 AMA multiplier = 13% PPD**

13% PPD x 3.0 (.730 multiplier) x $541.47/week (2011 stat. max.) = $211.17/week PPD

$211.17/week PPD x 384.4136 weeks (2014 PV for 425 weeks) = $81,176.62 PPD LS

$81,176.62 PPD LS + $193,823.38 (add'l waivers listed below) = $275,000.00 lump sum

*Include specific calculations for any additional TTD benefits and PPD benefits to be paid*

<table>
<thead>
<tr>
<th>Waiver or buyout of all past, present and future income benefits</th>
<th>☑ Yes ☐ No</th>
<th>$117,207.71</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissal of alleged neck and right knee injury (ies)</td>
<td>☑ Yes ☐ No</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>Waiver or buyout of past and future medical benefits</td>
<td>☑ Yes ☐ No</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>Consideration for right to future buyout of future medical</td>
<td>☑ Yes ☐ No</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>benefits w/ CMS approved MSA (amount to be determined)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waiver of vocational rehabilitation benefits</td>
<td>☑ Yes ☐ No</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>Waiver of right to reopen indemnity/compromise on PTD claim</td>
<td>☑ Yes ☐ No</td>
<td>$167,792.29</td>
</tr>
<tr>
<td>Waiver of WC rights other jurisdictions/election of remedy</td>
<td>☑ Yes ☐ No</td>
<td>$10,000.00</td>
</tr>
</tbody>
</table>

**TOTAL OF LUMP SUM PAYMENTS:** $325,000.00

Does settlement include Medicare Set Aside? ☑ Yes ☐ No If yes, amount of MSA: $-TBD-

Periodic Payments for MSA: -TBD- * -TBD- * -TBD- = -TBD-

Amount Frequency Duration Total

Robert Williams v. Jack Cooper Transport Co., Inc., WC No. 2011-93703; Form 110-I, Page 2 of 5

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*Please see attached settlement addendum. The settlement calculations and proration are for illustrative purposes only, and this settlement reflects multiple compromises on several disputed issues. The $325,000.00 lump sum payment, for a full and final settlement of this claim except as to medical benefits is based on a final settlement with prejudice, is being paid and accepted as proper consideration for all of the compromised issues in this claim.

If settlement terms provide for lump sum representing weekly benefits greater than $100, does Plaintiff have an adequate source of income during disability? Yes ☒ No ☐ Not Applicable ☐

Source of income: Social Security Disability benefits Amount: $

OTHER INFORMATION

If additional information is pertinent to settlement, explain, (Attach additional pages if necessary):

This is a compromise settlement of Plaintiff 2009 and 2011 workers' compensation injury claims based upon a lump sum payment of $325,000.00 for a full and final waiver of all rights to additional workers' compensation benefits of any nature except for Plaintiff's reasonable, necessary & related medical expenses for his left knee (2009) and left shoulder (2011). The Plaintiff further understands and agrees that he is also extending the right to the Defendant-Employer and/or its carriers to secure a CMS approved MSA or MSA's to fund a buyout of his rights to future reasonable, necessary & related medical expenses for arising from his 2009 (left knee) and 2011 (left shoulder) injuries.

The consideration extended by the Employer further includes waiver of the potential credits or offsets it may otherwise have been due based on overlapping indemnity benefit periods and for workers' compensation benefits paid under the laws of other jurisdictions. No credits or offsets shall further be applied to the lump sum of $50,000.00 being paid for the settlement of the 2009 injury or the $275,000.00 being paid for the settlement of the 2011 injury. Any funds to be paid by the Employer or its carriers necessary to fund the CMS approved MSA or MSAs' for settlement of future medical benefits shall be in addition to the $325,000.00 lump sum total specified herein. Any attorney fee(s) due Plaintiff's counsel as approved by the Administrative Law Judge is to be deducted from the lump sum payment(s).

The Plaintiff understands and agrees that, under the terms of this settlement, the Defendant-Employer will not be responsible for any future income or vocational rehabilitation benefits under the Workers' Compensation Act in Kentucky or any other jurisdiction. Plaintiff also understands that the Employer and its carriers have denied all liability for benefits relative to his allegations of a right knee injury or injuries as well as his allegation of a neck injury and Plaintiff agrees that all claims for any compensation benefits for such injury or injuries to those body parts is/are expressly dismissed with prejudice.

The Employer shall remain responsible for reasonable, necessary & related medical expenses for the 2009 (left knee) and 2011 (left shoulder) injuries subject to the Employer's rights to obtain and fund a CMS approved MSA or MSA's in an amount or amounts to be determined hereafter that will then relieve the Employer of the obligation to pay medical expenses related to these injuries. As a material part of this settlement, Plaintiff affirmatively represents that he is not aware of any unpaid or outstanding past medical expenses related to this injury and that he understands that the employer will have the right to contest additional expenses if such expenses were not timely presented to the carriers for payment or if such expenses appear unnecessary, unreasonable, or unrelated to the 2009 and 2011 injuries.

The Plaintiff understands and agrees that under the terms of this settlement his claims arising from the 2009 and 2011 injuries as against the Defendant-Employer and its carriers are settled with prejudice and can never be reopened for any reason whatsoever other than to enforce his right to additional medical benefits as provided under this agreement. The Plaintiff understands and acknowledges that a settlement of his claims with prejudice means that he fully, finally, and forever waives and releases the Defendant-Employer for and from any and all liability for outstanding or future workers' compensation indemnity benefits or other potential benefits under the Kentucky Act or the laws of any other jurisdiction other than medical benefits as specified herein. The Plaintiff's settlement of these claims and acceptance of the lump sum payments totaling $325,000.00 constitutes an irrevocable election of remedy to settle these claims under Kentucky law and he is agreeing to forgo any and all rights to request or pursue additional benefits in another jurisdiction.
The Employer and its respective carriers for the 2009 and 2011 shall remain responsible for reasonable, necessary & related medical expenses incurred as a result of the 2009 and 2011 injuries until such time as the Employer or either of its carriers secure and fund (a) CMS approved MSA or MSA’s for the reasonable, necessary and related medical expenses resulting from the 2009 and 2011 injuries. Plaintiff further acknowledges and agrees that the Employer shall have the right to obtain a CMS approved MSA or MSA’s that will allow the Employer to fully settle its liability for Plaintiff’s right to reasonable, necessary and related medical expenses associated with his 2009 and 2011 injuries. Plaintiff agrees that the consideration paid for the Employer’s right to purchase such MSA or MSA’s as full settlement of future medical benefits includes adequate consideration for waiver of potential medical benefits that may fall outside the purview of Medicare and the MSA or MSA’s obtained pursuant to this agreement.

Plaintiff agrees to fully cooperate with all reasonable requests to complete the necessary paperwork to obtain an appropriate estimate for the MSA or MSA’s and to get the estimates approved by CMS as adequately considering Medicare’s interests. This includes, but is not limited to, obtaining and providing proper documentation from his treating physician indicating that chronic use of narcotic medication(s) is not reasonable necessary for his injury or injuries at this time but recognizing that such may be appropriate on a temporary basis in the event Plaintiff requires additional surgery or other major procedure relating to his injury or injuries.

Plaintiff understands and agrees that he shall have no right to object to the amount to be included in the MSA or MSA’s or any right to object to structure of the MSA or MSA’s funding (lump sum seed money, periodic payments or both) provided that (1) such MSA or MSA’s are approved by CMS as properly considering Medicare’s interests, (2) the MSA or MSA’s include and are funded to cover professional management of the medical benefit payments from the MSA or MSA’s, and (3) that the company selected by the Employer for any periodic funding of the MSA or MSA’s by annuity or otherwise has or have reasonable financial stability as evidenced by an A.M. Best rating of “A” or higher.

The Plaintiff understands and agrees that the Defendant-Employer or its carriers for the respective injuries shall have the right to purchase an annuity or annuities as appropriate to fund any periodic payments required for the CMS approved MSA or MSA’s referenced herein. Plaintiff agrees to fully cooperate with all reasonable requests to complete the necessary paperwork reasonably necessary to effectuate such annuity purchase. The Employer retains the right to choose the financial institution from which to purchase the annuity provided that the company chosen by the Employer has reasonable financial stability as evidenced by an A.M. Best rating of “A” or higher. Following the Defendant-Employer’s purchase of the annuity or annuities as provided herein and paying any lump sum necessary as seed money for such MSA or MSA’s, Plaintiff relinquishes and waives any and all claims as against the Defendant-Employer for such periodic payments.

The parties further agree that this Form 110 shall be self-amending following the establishment and funding of the MSA or MSA’s as provided herein for full and final settlement of the Employer’s liability for future medical expenses and that no additional approval from the DWC for the full and final settlement of future medical benefits shall be necessary. The Defendant Employer shall be entitled to file a SUPPLEMENT TO FORM 110 that includes the Qualified Assignment, Release and Pledge Agreement (QARP), if applicable) for the MSA or MSA’s to document its election to secure and fund such MSA or MSA’s and fully settle and resolve the Defendants liability for future medical benefits under the terms of this agreement.

The Plaintiff understands that, under the terms of this settlement, he fully and forever settles with prejudice his claims against the Defendant-Employer as provided herein, and this includes a waiver of any claim that could be asserted or maintained by any heir, survivor, dependent, widow, estate, executor or executrix, and administrator or administratrix. This settlement with prejudice includes a waiver of any claim that could be asserted or maintained upon the death of Plaintiff under KRS 342.730 or KRS 342.750.

The Plaintiff states to the Administrative Law Judge that he has read and understands the terms of this Settlement Agreement and that the terms of this Agreement have been explained to him in detail by his attorney. The Plaintiff further states to the Administrative Law Judge that the consideration extended by the Defendant-Employer is fair and adequate. The Plaintiff requests the Administrative Law Judge to approve this Settlement Agreement in its entirety because it serves his best interest.

**-CONTINUED ON NEXT PAGE-**
Upon approval of this Settlement Agreement by the Administrative Law Judge, the Defendant-Employer shall pay to the Plaintiff, in care of his attorney, a lump sum payment of $50,000.00 by the carrier for his 2009 injury and a lump sum of $275,000.00 by the carrier/TPA for the 2011 injury. Upon approval of this Settlement Agreement by the Administrative Law Judge, the Plaintiff’s claims against the Defendant-Employer and its workers’ compensation insurance carrier are settled with prejudice and cannot be reopened for any reason other than to enforce his rights to future medical benefits as provided herein. Upon payment of these lump sum amounts, the Defendant-Employer and its workers’ compensation insurance carrier are fully and forever released from any and all liability for workers’ compensation benefits to or on behalf of the Plaintiff for his 2009 and 2011 injuries other than as to medical expenses as provided herein.

Other responsible parties against whom further proceedings are reserved: N/A

If waiving medical benefits, please acknowledge by signing below:
I understand that my health insurance may not cover any medical expenses for my injury and I may be held responsible for payment of medical expenses for my injury. XX

Plaintiff (Signature)

If not represented by an Attorney, please acknowledge by signing below:
I understand that I have a right to obtain an Attorney of my choice to review this Agreement and by signing below I acknowledge that I have waived that right. By waiving that right, I understand I will be held to the same standard as an Attorney and this Agreement will be enforceable as if represented by Attorney.

Plaintiff (Signature)

Christopher P. Evensen, Esq. Date
Attorney for Plaintiff
6011 Brownsboro Park Blvd., Suite A
Louisville, Kentucky 40207
(502) 719-3145

C. Patrick Fulton Date
Attorney for Jack Cooper Transport Co., Inc., as insured by Continental Indemnity Company
1315 Herr Lane, Ste. 210
Louisville, KY 40222
(502) 813-7802

Robert Williams, Plaintiff Date

Rodney J. Mayer Date
Attorney for Jack Cooper Transport Co., Inc., as insured by Zurich Insurance Group, Ltd.
600 E. Main Street, Suite 100
Louisville, Kentucky 40202
(502) 736-3600

DO NOT WRITE OR MARK BELOW THIS LINE

ORDER APPROVING SETTLEMENT AGREEMENT

IT IS ORDERED that the above Agreement as to Compensation be and the same is hereby APPROVED.

This the 14th day of May, 2014

HON. THOMAS J. POLITES, ALJ

Robert Williams v. Jack Cooper Transport Co., Inc., WC No. 2011-93703; Form 110-I, Page 5 of 5

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ADDENDUM TO FORM 110

This matter arises from two (2) alleged work-related injuries Mr. Williams claims to have sustained while working for the Employer; the first occurring on (i) March 18, 2009 to his Left Knee, (Employer insured by Zurich Insurance Group, Ltd. at the time of this injury); and the second occurring on (ii) March 13, 2011 to his Left Shoulder / Upper Extremity, (Employer insured by Continental Indemnity Co. at the time of this injury).

Mr. Williams was paid Temporary Total Disability (hereinafter TTD) at a rate of $694.30 per week from March 19, 2009 through August 18, 2010 as a result of the March 18, 2009 injury; and also paid TTD at a rate of $997.38 per week from March 21, 2011 through June 16, 2013 as a result of the March 13, 2011 injury.

This is a highly contested claim. While the Defendant / Employer acknowledges these work-related events occurred on March 18, 2009 and March 13, 2011 for which Mr. Williams provided timely notice and sought medical treatment, the Defendant / Employer contests (i) whether Mr. Williams has been rendered totally disabled as a result of one or both of these injuries, and (ii) if, only partially disabled, what is the appropriate impairment rating for each injury and whether Mr. Williams is entitled to one of the enhancement factors of KRS 342.730(1)(c) to the PPD award for each injury. Further, the Defendant Employer argues for a credit for overpayment of TTD regarding the March 13, 2011 injury.

Mr. Williams would be entitled to benefits ranging from:

(i) Permanent Total Disability from June 15, 2013, (the day after TTD was terminated) through the present (5/2/14) and continuing until January 13, 2029 (the date Mr. Williams will be eligible for normal old-age Social Security Retirement at the age of 67). These benefits would be paid at a case rate of $721.97 per week, then subject to
various “carve-outs” for prior PPD awards as well as a carve out for the PPD award associated with the March 2009 injury


To

(ii) Two Permanent Partial Disability benefits (PPD) awards for each injury; paid at $93.73 per week for 425 weeks for the March 2009 injury, and paid at $211.17 per week for 425 weeks for the March 2011 injury.

The parties recognize the discretion an Administrative Law Judge has to decide a claim and agree to settle based on the following:

The Defendant, (Employer and/or its workers’ compensation insurance carriers), will pay Mr. Williams and his attorney $325,000.00 in a lump sum in exchange for waiver of his right to indemnity benefits (PPD, PTD, TTD and death benefits), waiver of his right to vocational rehabilitation, and waiver of his right to reopen this claim for indemnity benefits. The Defendant / Employer will establish MSA accounts for payment of Mr. Williams’ medical treatment for the claimed injuries and based on CMA approval / response to their MSA proposals will either fund the MSA account approved by CMS or have the option to simply leave Mr. Williams’ medical coverage “open.”
Of the total $325,000.00 settlement payable to Mr. Williams and his attorney, $12,000.00 will be recovered by Christopher P. Evensen (attorney) as an attorney’s fee (subject to approval by an Administrative Law Judge). In addition, all litigation expenses (currently $1,667.80) will be recovered by Christopher P. Evensen.

Taking the $325,000.00 settlement amount, and reducing for attorney’s fees ($12,000.00) and litigation costs ($1,667.80) leaves $311,332.20 which will be dispersed to Mr. Williams, (less any additional litigation expenses incurred).

The plaintiff submits this $311,332.20 to be paid to the employee / plaintiff for the agreement, is calculated without commutation of interest, and shall represent the negotiated compromise Agreement for benefits from (i) June 15, 2013 through the present, May 2, 2014 (45.71 weeks) and continuing for the claimant’s life expectancy (claimant is 52 years old – DOB [redacted], which is 25.1 years (1,305.2 weeks) forward from this date, pursuant to 803 KAR 25:036, Appendix A. Plaintiff submits this settlement, therefore, represent benefits paid over a period of 1,350.91 weeks (45.71 weeks + 1,305.2 weeks)

Thus the settlement represents the payment of $230.45 per week, ($311,332.20 / 1,350.91 weeks) or $998.62 per month ($230.45 x 52 weeks = $11,983.40 / 12 months = $998.62 per month)

Claimant (Signature):

5-23-14
Christopher P. Evensen
Attorney or representative for claimant

6011 Brownsboro Park Blvd., Ste. A
Address

Louisville, Kentucky 40207
City, State, Zip Code

Rodney Mayer
Attorney or representative for employer

600 E. Main Street, Ste. 100
Address

Louisville, Kentucky 40202
City, State, Zip Code

Attorney for Defendant as insured by Zurich Insurance Group, Ltd.

C. Patrick Fulton
Attorney or representative for employer

1315 Herr Lane, Ste. 210
Address

Louisville, Kentucky 40222
City, State, Zip Code

Attorney for Defendant as insured by Continental Indemnity Co.
I. AWW FOR HOURLY WORKERS

Pursuant to KRS 342.140(1)(d), if;

The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury.

II. CLAIMANTS WHO HAVE WORKED LESS THAN A FULL THIRTEEN-WEEK QUARTER

Pursuant to KRS 342.140(1)(e), if;

The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation;

A. Huff v. Smith Trucking, 6 S.W.3d 819, 821 (Ky. 1999)

The goal of KRS 342.140(d) and (e) “is to obtain a realistic estimation of what the injured worker would be expected to earn in a normal period of employment.” KRS 342.140(e) utilizes the averaging method set forth in section (d) and “attempts to estimate what the worker’s average weekly wage would have been over a typical 13-week period in the employment by referring to the actual wages or workers performing similar work when work was available.” Id. at 821.

B. C & D Bulldozing Co. v. Brock, 820 S.W.2d 482, 486 (Ky. 1991)

Subsection (e) includes the consideration of a normal thirteen-week period of hire so an employee’s compensation will reflect his future loss of earnings in his regular employment.
C. **Nesco v. Haddix**, 339 S.W.3d 465, 471 (Ky. 2011)

In calculating AWW pursuant to **KRS 342.140(e)**, "the ALJ must consider the unique circumstances in a case involving an employment of less than 13 weeks and make a realistic estimate of what the individual probably would have earned in a normal 13-week period of employment."

D. **HR Solutions of America v. Jimmy Gross**, WCB #2011-00140 (Rendered 2/14/14)

Claimant worked for a temporary agency and had only worked two job assignments: a two-week assignment in June of 2010, and a week-long assignment in August 2010, on which he suffered his August 26, 2010 injury. Claimant testified he was to be performing carpentry and concrete work and earning $18.00 per hour. The Employer offered an AWW based on hours actually worked by the claimant of $162.21. The claimant filed wage records from the Defendant demonstrating wages earned by similar employees in the thirteen weeks immediately preceding the claimant's work-related injury which showed other employees earned wages from $10.00-$40.00 working a variety of hours.

ALJ determined had the Claimant been employed a full thirteen-week quarter prior to his injury, he would have averaged twenty-five hours per week at a rate of $18.00 per hour. The ALJ found work was available during this time period to other individuals in similar occupations. Therefore, the ALJ found an AWW of $450.00. The Board affirmed concluding substantial evidence existed in the record to support the ALJ’s determination of AWW in this case, that being the wages the Claimant actual earned, the payroll records of other similar employees, and the Employer representatives testimony.

### III. WHAT IS/IS NOT INCLUDED IN AWW CALCULATION

A. **Shift Differential**

**Gap v. Curtis**, 142 S.W.3d 111 (Ky. 2004)

Holds **shift differential is included** in calculation of AWW. **Curtis, supra**, stands for the proposition that the worker provides a benefit to the employer by working at undesirable times (*i.e.*, nights and weekends), that the difference in pay for those shifts is not “premium pay,” and that it is therefore averaged in with other wages earned during “regular” shifts.

B. **Bonuses**


The Court of Appeals held bonuses, (a **production bonus** in that case), **can be included** in calculation of a claimant’s pre-injury Average Weekly Wage. The employer had asserted that the extra six cents per pair Ms. Baker received for pressing more than 350
pairs of pants in a forty-hour week was "premium pay" and must be excluded when calculating her average weekly wage. The Court rejected the argument, stating that the evidence suggested the extra payment constituted "output pay" for her output above 350 pairs. Id. at 216. Relying on R. C. Durr Co., Inc. v. Chapman, 563 S.W.2d 743 (Ky. App. 1978), the Court also noted that Ms. Baker worked no extra hours and that KRS 342.140(1)(d)’s exclusion referred to "pay in excess of the employee's regular hourly rate because of the extra hours worked." Id. (emphasis original).

2. **Pendygraft v. Ford Motor Co.,** 260 S.W.3d 788, 792 (Ky. 2008)

Wages **do not include** amounts paid for **profit-sharing bonuses**.

3. **William Hubbard v. Adesa,** WCB #2010-69276 (Rendered 9/23/13)

Claimant was employed as a manager and received an annual salary ($38,576.00) as well as a bonus ($15,431.00 – paid in January 2010) under an incentive program for managers (deemed not a profit sharing plan). The Board held the bonus was includable in calculation of AWW, noting Larson's **Workers' Compensation Law §93.01[2][a]** notes, in addition to wages and salary, the calculation of AWW should also include “anything of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee.”

The Board also held a yearly salary is to be divided by fifty-two, regardless of when the wage earner actually works and earns the salary. Thus, in this case, the bonus is counted in the year it is earned.

C. **Unemployment & Unemployment Sub Pay**


Claimant, a Ford worker, was laid off for periods of time during the fifty-two-week period prior to his injury. While laid off, Claimant would draw unemployment benefits, and Ford also applies for state unemployment benefits on behalf of its workers and pays Supplemental Unemployment benefits (SUB) pursuant to a collective bargaining agreement. The combination of unemployment and SUB pay brings an employee to about 95 percent of their standard wage while laid off. The holding found **unemployment benefits cannot be included**, because they are not "money payments for services rendered." However, **unemployment SUB-payments are included** as they are more like "wages" than fringe benefits because it is a form of bargained-for pay, which Ford paid
directly to the claimant, accounted for on a W-2 with taxes withheld and is a part of an overall payment scheme to retain employees.

D. Fringe Benefits


   The Court of Appeals found fringe benefits such as employee pension fund contributions, health insurance benefits, and life insurance were not intended to be included pursuant to KRS 342.140 as “wages” on the basis that they did not fall within the class of “similar advantages received from the employer” such as board, rent, housing, or lodging.


   Fringe benefits such as employer pension plan contributions, health insurance benefits, life insurance premiums and the value of training and control are similarly excluded from being wages.

E. Vacation Pay

In Brooks v. Tri State Industrial Services, Inc., WCB #2006-97477, (Rendered 4/30/09), the Workers’ Compensation Board concluded vacation pay is a monetary payment for services rendered and therefore must be included in the calculation of AWW. In support of this conclusion, the Board noted the money received as vacation pay is treated in all ways as regular income for tax purposes, the employee earns vacation pay through work during the entire year, and it is paid at the regular rate the employee earns while working.

F. Holiday Pay

General Electric Co. v. Robinson, WCB #1995-32362, (Rendered 3/7/97)

For the purposes of calculating Average Weekly Wage, wages include shift differential which is part of an employee's regular pay. Wages include vacation and holiday pay since, for tax purposes, such pay is considered income.

G. Per Diem

Anderson v. Homeless & Housing COA, 135 S.W.3d 405, 413 (Ky. 2004).

The term "wages" has been held to only include items that are reported on an employee’s income tax return.

Under KRS 342.0011(17) and KRS 342.140(6), the term "wages" takes into account items that are reported on the employee's income tax returns. It includes money; the reasonable value of board, rent, housing,
lodging, fuel or other "similar advantage" from the employer; and any "gratuities received in the course of employment" from individuals other than the employer.

1. Meals.

   Claimant, a truck driver, argued expenses listed on her Schedule C, (meals and depreciation), should not be deducted from gross receipts since they were available for her to spend at her discretion while deductions for fuel and other direct expenses were not. The ALJ added the meals and depreciation allowance back into the net profit for determination of AWW. While the case was remanded for a calculation pursuant to KRS 342.140(1)(f), the Court did not indicate the ALJ should not have added these back in. Instead, the Court reversed the ALJ findings, holding he should have used KRS 342.140(1)(f).


   The Board addressed per diem payments made to the claimant to pay for meals while traveling, and found they should be included in calculating the average weekly wage, regardless of the fact the payments were not subject to income taxation. The Board stated as follows in its analysis:

   There is a dearth of Kentucky case law on the subject of the inclusion of meals and lodging in average weekly wage. However, Professor Larson in his treatise on workers' compensation instructs as follows:

   In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration of the work, as, for example, tips, bonuses, commission, room and board, even a car allowance, constituting real economic gain to the employee. (Footnotes omitted.) (Emphasis added.)

   The Board found the per diem payments represent "a real economic gain to the employee," and concluded;

   In addition, KRS 342.0011(17) and KRS 342.140(6) expressly mandate that “the
reasonable value of board . . . received from the employer” shall be included in the employee’s AWW calculation. Merriam-Webster’s Dictionary defines “board” as meaning “to provide with regular meals and often lodging usually as compensation.” Accordingly, as a matter of law we find no error concerning the ALJ’s inclusion of the entire amount of Comair’s per diem payments in the calculation of Aubert’s AWW. Given the plain language of KRS Chapter 342, the fact that a portion of those payments qualify as nontaxable under federal law is of no consequence, and merely serves to buttress the tangible measure of real economic gain realized by Aubert on account of the additional sums. (Emphasis added)

2. Mileage.


Cannot consider mileage reimbursement as part of wages if it was not reported for income tax purposes.

IV. CALCULATION OF POST-INJURY AWW

A. Calculation of Post-Injury AWW


The Kentucky Supreme Court set forth guides in analyzing pre- and post-injury wages. The Court noted the legislature intended a comparison of pre- and post-injury average weekly wage, not a comparison of the claimant’s pre-and post-injury hourly pay rate. Id. at 117, see also Whittaker v. Robinson, 981 S.W.2d 118 (Ky. 1998). Next, the Court held the legislature did not contemplate a weekly review of a worker’s earnings and a weekly adjustment of benefits. Id. at 117. Instead, the Court held the former KRS 342.730(1)(c)(2) provided for a comparison of pre- and post-injury average weekly wages. Id. at 118.


“An employee’s post-injury AWW is subject to calculation under KRS 342.140, using the same method employed to determine a claimant’s pre-injury AWW. Stated otherwise, the analysis must
focus on the worker’s AWW, not simply her hourly rate.” Further, “[t]hus, for an employee who is paid hourly, as Garcia, her post-injury average weekly wage must be calculated pursuant to KRS 342.140(1)(d) to determine whether there has been a return to work at a higher wage. This calculation requires an analysis of Garcia’s earnings over a fifty-two week period, and identification of her “best” quarter, the wage was $477.92, higher than the pre-injury wage of $474.28. For this reason, we are satisfied the ALJ conducted the analysis required by Ball and reached a result supported by substantial evidence.”

B. Comparison of Pre- and Post-Injury AWW

Entitlement to the double multiplier is not determined on a post-injury quarter by quarter basis.

1. Scott Johnson v. Troy Reed et al., WCB # 2010-00851 (Rendered 5/16/14).

“Though Ball instructs the ALJ to analyze quarterly earnings as opposed to weekly earnings, it does not require the ALJ to amend the award each quarter if the claimant’s earnings fluctuate …”


The two-factor of KRS 342.730(1)(c)(2) may be applied if:

a. A claimant continues to work post-injury for a period of time;

b. A claimant subsequently ceases work due to the disabling effects of his injury;

c. A post-injury AWW can be determined, inferred or projected by the ALJ from the evidence using one of the statutorily established methods under KRS 342.140(1); and

d. The post-injury AWW as determined by the ALJ is equal to or greater than the claimant’s AWW at the time of the injury.

V. QUESTIONS FOR DISCUSSION

A. If an employee has worked two full quarters and a partial third quarter (ten weeks), can one count the average of the ten-week quarter (even dividing the total by thirteen) if the wages earned in that ten-week quarter produce the highest AWW figure? Is that the “most favorable wage?”
B. If an employee has worked two full quarters and a partial third quarter (ten weeks), do you have to start counting weeks from the date of injury and work backwards? Or, can you start from date of hire and work forward?
I. HISTORY


B. 1986-2002 – Category 1 RIB – Retraining only paid to miner or facility.


II. BENEFIT LEVEL

A. The benefit level is contained in KRS 342.732.

1. If the employee has Category 1/0, 1/1, or 1/2 and spirometric test values of 80 percent or more the employee shall be awarded a one (1) time only retraining incentive benefit which includes tuition and weekly payments.

   An employee who is fifty-seven (57) years of age or older, on the date of last exposure, and who is awarded a retraining incentive benefits may elect to receive a 25 percent disability award for 425 weeks or until the employee reaches age sixty-five, whichever occurs first.

2. If the employee has Category 1/0, 1/1, or 1/2 with pulmonary function studies between 55 percent and 80 percent or Category 2/1, 2/2, or 2/3 with pulmonary function studies 80 percent or greater, the employee is entitled to a 25 percent award for 425 weeks.

3. If the employee has Category 1/0, 1/1, or 1/2 with pulmonary function values below 55 percent or Category 2/1, 2/2, or 2/3 with pulmonary function studies between 55 percent and 80 percent or Category 3/2 or 3/3 with pulmonary function studies above 80 percent, the Plaintiff is entitled to a 50 percent award for 425 weeks.

4. If the employee has Category 2/1, 2/2, or 2/3 with studies below 55 percent or Category 3/2 or 3/3 with pulmonary values between 55 percent and 80 percent, the employee is entitled to a 75 percent disability for 525 weeks.
5. If the employee has Category 3/2 or 3/3 and pulmonary function studies below 55 percent or complicated Category A, B, or C, the employee receives a total disability award.

B. Further Comments on KRS 342.732 and Respiratory Impairment

1. When valid pulmonary function studies are not provided and a physician certifies to the Administrative Law Judge that the testing is not medically indicated because of the permanent physical condition of the employee, the Administrative Law Judge may make his or her own decisions on the basis of evidence submitted which shall include one blood gas study. This could become a problem with the blood gas studies currently being submitted from physicians in Norton, Virginia and Beckley, West Virginia in federal claims.

2. KRS 342.732(2) – The presence of respiratory impairment resulting from exposure to coal dust shall be established by using the largest Forced Vital Capacity (FVC) value or the largest Forced Expiratory Volume in one second (FEV1) value determined from the totality of all such spirometric testing performed in compliance with accepted medical standards.


C. University Evaluations

UK and UL have not been able to handle the volume of back-logged claims since Vision Mining. Because of this, claims are being sent to Dr. Westerfield in Lexington and Dr. Chavda in Greenville. For some reason the x-rays from Dr. Chavda (Greenville) are being sent to Dr. Crum (Pikeville) for reading.

Statistics:\(^1\)

Dr. Crum – _________% positive
Dr. Westerfield – ______________ % positive

Compared to:
Consensus panel – ______________ % positive
UK/UL – ______________% positive

\(^1\) Current numbers have been requested from the Department of Workers’ Claims and, if available, will be provided to seminar attendees on site at the CLE program.
D. State and Federal Black Lung Interplay

1. Indemnity benefits.
   a. Federal – lifetime plus automatic widow for life under PPACA.
   b. State – ends at age sixty-six.


3. Plaintiff’s attorneys fees.
   a. State – capped at $12,000.
   b. Federal – $300 to $350 per hour – no cap ($20,000 to $30,000).

4. Litigation expense.
   2. Federal – we pay for DOL exam if we lose and all other expenses and evaluation fees. *Use film evaluation to get state benefits.

5. Offset – State – if total on cumulative trauma, injury, psych, or hearing loss then no offset against federal benefits and lifetime medical on all.


F. Considerations concerning Settlement of Pending Coal Workers’ Pneumoconiosis Claims

G. As everyone knows, Roland has been assigned the majority of these cases. He has been very active in pushing us to settle and also forcing the Coal Fund to kick in a contribution. We have settled approximately 50 percent of our claims.

III. CONCLUSION

We have gone from everybody has black lung (1970-1986) to few have black lung (1986-2010), page 11 – Footnote 12, to who really has a clue? Where is the medical truth in this??
This review of a decision of the Workers’ Compensation Board presents an issue of first impression under Ky. Rev. Stat. (KRS) 342.316(2)(b)2.b. and KRS 342.732, that is whether an Administrative Law Judge (ALJ) has the discretion to choose pre-bronchodilator or post-bronchodilator test results in a workers’ pneumoconiosis claim. We hold that the ALJ does not have such discretion and, therefore, reverse.

Ed Neil Fields has been employed in the mining industry since 1957. In April 1992, he began working for Carbon River Coal Company. Shortly thereafter, Fields filed for workers’ compensation benefits alleging he was totally occupationally disabled due to coal workers’ pneumoconiosis, although he continued to be employed by Carbon River Coal. The ALJ found Fields 75 percent permanently partially disabled as a result of coal
workers’ pneumoconiosis. Fields was awarded permanent partial disability benefits and retraining incentive benefits (RIB). In making this award, the ALJ used forced vital capacity (FVC) values to determine the extent of Fields’ respiratory impairment. Values above 55 percent but below 80 percent of predicted norms establish one of the two necessary prongs contained in KRS 342.732(1)(b) that entitle a claimant to an irrebuttable presumption of a 75 percent occupational disability. In using the FVC values, the ALJ ignored a test, administered by Dr. Abdul Dahhan, that obtained a value of 86 percent of the predicted norm, a percentage which exceeds the limit contained in KRS 342.732(1)(b).

On appeal to the Board, the Special Fund argued that the ALJ abused his discretion in disregarding the FVC test result obtained by Dr. Dahhan. Fields argued that the ALJ did not abuse his discretion in ignoring Dr. Dahhan’s result because the FVC value was determined after the administration of a bronchodilator which presented an artificially inflated rating. The Board agreed with Fields’ contention that it was within the ALJ’s discretion to ignore this test result, stating that, in its judgment, Dr. Dahhan utilized the bronchodilator in violation of procedures set forth in the latest edition of the American Medical Association’s guide to evaluating permanent impairment. This guide has been adopted by the General Assembly as the appropriate guide for administration of spirometric tests. KRS 342.316(2)(b)2.b.

However, the Board reversed the ALJ’s award of permanent partial disability payments because Fields continued to work for Carbon River Coal Company. The Board reasoned that under KRS 342.732(1)(b)-(d) the payment of benefits to working miners was disallowed. Thus, it found that Fields could not presently make a demand under the statute.

Fields appealed that part of the Board’s decision that determined he was not entitled to receive occupational disability benefits while still working in the mining industry. The Special Fund cross-appealed arguing that the Board erred when it held that the ALJ did not abuse his discretion in ignoring the FVC value obtained by Dr. Dahhan.

In the meantime, the case of Smith v. Leeco, Inc., Ky., 897 S.W.2d 581 (1995), was pending before the Kentucky Supreme Court. Smith involved the same issue in Fields’ appeal, that is: do the irrebuttable presumptions contained in 342.732(1)(b)-(d) entitle a coal worker to file a claim for occupational disability and receive benefits under the statute while he continues to work?1 The instant appeal was held in abeyance pending a decision in Smith. The Supreme Court has answered the question posed above and the views expressed in that opinion may have implications in this case. However, the cross-appeal of the Special Fund will be addressed first because, if Dr. Dahhan’s FVC test results should have been considered by the ALJ, then Fields would only be entitled to RIB benefits under KRS 342.732(1)(a).

KRS 342.732(1)(b) provides that a worker who is determined to have a radiographic classification of 1/0, 1/1 or 1/2 and has a respiratory impairment as a result of exposure to

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1 The claimant in Smith v. Leeco, Inc., Ky., 897 S.W.2d 581 (1995), was found 100 percent occupationally disabled, whereas the ALJ determined that Fields was 75 percent occupationally disabled. As Fields recognizes in his brief, there is no real distinction between Smith and the case before us based upon this factual dissimilarity. The two sections of the statute, KRS 342.732(1)(b) and (1)(d), both contain an irrebuttable presumption of occupational disability.
coal dust, measured by spirometric tests, equal to or greater than 55 percent but less than 80 percent of predicted normal values is entitled to an irrebuttable presumption of 75 percent occupational disability. The spirometric tests that determine respiratory impairment, by statute, must be administered in accordance with “the latest edition available of the guides to the evaluation of permanent impairment published by the American Medical Association.”  

KRS 342.732(1)(b).

The presence of a respiratory impairment is established through the largest FVC or forced expiratory volume in one second (FEV1) obtained in the spirometric testing and “performed in compliance with accepted medical standards.”  

KRS 342.732(2).  

KRS 342.316(2)(b)2.b. governs the admissibility of spirometric tests in workers’ compensation proceedings:

2. To be admissible, medical evidence offered in any proceeding under this chapter for determining a claim for occupational pneumoconiosis resulting from exposure to coal dust, shall comply with accepted medical standards as follows:

* * * * *

b. Spirometric testing shall be conducted in accordance with the standards recommended in the latest edition available of the guides to the evaluation of permanent impairment published by the American Medical Association and the 1978 ATS epidemiology standardization project. The FVC or the FEV1 values shall represent the largest of such values obtained from three (3) acceptable forced expiratory volumes maneuvers.... Reports of spirometric testing shall include a description by the physician of the procedures utilized in conducting such spirometric testing and a copy of the spirometric chart and tracings from which spirometric values submitted as evidence were taken.

The latest guidelines published by the American Medical Association (AMA) for spirometric testing in effect at the time Dr. Dahhan tested Fields’ respiratory impairment were contained in the third edition. That edition states that if, at the time of the spirometric testing, the physician observes evidence of wheezing or other evidence of bronchospasm, then the ventilatory studies should be done before and after the use of a bronchodilator. In addition, the guidelines state:

The spirogram indicating the best effort, either before or after administration of the bronchodilator, should be used to calculate the FVC and FEV1. (Emphasis supplied.)


The Board reasoned that Dr. Dahhan’s

2 In June 1993, the AMA published the Guides to the Evaluation of Permanent Impairment §5.2 (4th ed. 1993). The Fourth Edition provides that a bronchodilator should be used if: (1) wheezing is heard in the chest examination, (2) if the spirometric tests administered without medication indicate that an obstruction is present, or (3) if the FEV1/FVC ratio is below 0.70. The best effort, either before or after the administration of the bronchodilator, should be used to determine the presence of permanent impairment and the appropriate FEV1 and FVC values.
statement in his medical report that “[e]xamination of the chest showed good air entry into both lungs. No crepitation or wheezing are detected," established that the FVC value was obtained in violation of the AMA guidelines and was, therefore, invalid and properly excluded by the ALJ.

We review workers’ compensation claims in accordance with the standard set forth in Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). We are allowed to correct the Board only where the ... Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Id.

The hindsight determination by the Board of the ALJ’s motive in excluding Dr. Dahhan’s FVC test values after the administration of a bronchodilator to Fields was clearly an error, not only in statutory interpretation, but also an error of such a nature as to cause “gross injustice.”

KRS 342.316(2)(b)2.b. and 342.732(1)(b) require that the AMA guidelines be followed in the administration of spirometric testing. The Supreme Court and this Court have repeatedly held that the statutory directive is not discretionary; once the ALJ has determined the type of spirometric testing (FVC or FEV1) appropriate for the workers’ claim, he or she must take the highest valid percentage from the test results. Varney v. Newberg, Ky., 860 S.W.2d 752, 754 (1993); Wright v. Hopwood Mining, Ky., 832 S.W.2d 884, 885 (1992); Asher v. Blue Diamond Coal Company, Ky. App., 878 S.W.2d 27, 29 (1994); Watkins v. Ampak Mining, Inc., Ky. App., 834 S.W.2d 699, 701 (1992).

Dr. Ballard Wright, who the ALJ identified as presenting the more “persuasive” evidence, also performed spirometric testing of Fields. However, Dr. Wright did not administer a bronchodilator and obtain FVC and FEV1 test results for Fields, although he noted in his report that “[a]uscultation of the lung fields revealed mild expiratory wheezes.” According to the AMA guidelines in effect at the time, Dr. Wright, upon observing wheezing or other evidence of bronchospasm, should have then tested Fields after the administration of a bronchodilator. Dr. Wright did not do so; thus, his test results are just as invalid as Dr. Dahhan’s.

In the case before us, the Board essentially authorized the ALJ to pick and choose between the test results reported. Finding one physician’s test results invalid because the administration of the test was not in accordance with AMA guidelines and, therefore, did not meet the standards set forth in KRS 342.316(2)(b)2.b. and KRS 342.732(2), and finding another physician’s tests valid, even though his results were not reached in accordance with statutory mandates either, is arbitrary. The dangers of manipulating evidence and reaching inconsistent results in workers’ occupational disease claims are the very things KRS 342.316(2)(b)2.b. and 342.732(2) were designed to eliminate. See Wright v. Hopwood Mining, Ky., 832 S.W.2d 884, 885 (1992). The Board’s election to

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3 The Court stated: “Considering the plain meaning of this language [KRS 342.732(2)], the fact that spirometric test values are affected by the subject’s effort, and the apparent attempt by the legislature to incorporate more objective standards for the award of benefits, we believe that the legislature clearly intended for none but the highest FVC value and the highest FEV1 value to be
consider the validity of only one of the doctor’s test results amounted to a misinterpretation of the statute because, by statute, all spirometric testing must be performed in accordance with the AMA guidelines to be valid. KRS 342.316(2)(b).2.b. and 342.732(2).

We disagree with Fields’ contention that use of post-bronchodilator test results is inappropriate for the determination of respiratory impairment. KRS 342.316(2)(b).2.b. requires that spirometric testing be conducted in accordance with current AMA guidelines for the evaluation of permanent impairment. We are required to give the words of a statute their literal meaning unless to do so would lead to an absurd result or unreasonable conclusion. Bailey v. Reeves, Ky., 662 S.W.2d 832, 834 (1984). By the statute’s own language, the AMA standards contained in the guidelines can be considered to be incorporated into its text. That the AMA guidelines contain provisions for the administration of a bronchodilator in certain circumstances, and that these standards are incorporated by the statute, does not lead to an absurd or unreasonable conclusion. The language of the statute is clear: the AMA guidelines are to be utilized in determining respiratory impairment. This includes the use of bronchodilators.

The AMA guidelines (whether the third or fourth edition is followed) call for the administration of a bronchodilator and subsequent testing in certain objective situations. If a bronchodilator should be administered, then the guidelines direct the physician to calculate the FVC and FEV1 values from these results. Thus, pre-bronchodilator and post-bronchodilator results are both contemplated as valid predictors of respiratory impairment. KRS 342.316(2)(b).2.b. and 342.732(2) make no distinction between the two tests and, where there is no exception to the positive terms of a statute, we will not create one. Bailey v. Reeves, Ky., 662 S.W.2d 832, 834 (1984).

Thus, both pre-bronchodilator and post-bronchodilator spirometric testing used to calculate FVC and FEV1 values are equally instructive in determining a workers' respiratory impairment under Kentucky's statutory scheme. Of course, this presupposes that the tests are valid. In Fields’ case, neither the tests conducted by Dr. Dahhan nor those conducted by Dr. Wright yielded valid results upon which the ALJ could have premised an award. Neither administered the spirometric tests in accordance with AMA guidelines as required by statute. As a result, the decisions of the Board and the ALJ are reversed. Either new, valid, FVC and FEV1 values must be obtained or Fields’ occupational disability claim must be dismissed for a lack of proof of a necessary element under KRS 342.732(1)(b), that of respiratory impairment.

In the event that valid FVC and FEV1 results are obtained upon remand and a showing of occupational disability is made under the applicable sections of KRS 342.732, a few comments on the application of Smith v. Leeco, Inc., are necessary. Smith makes clear that a miner such as Fields is only entitled to receive RIB benefits while still employed. 897 S.W.2d at 582. However, the Supreme Court also held that a claim for occupational disability due to pneumoconiosis under KRS 342.732(1)(b)-(d) should be held in abeyance as long as the worker is employed by the same employer against whom the claim is filed rather than dismissed outright. Therefore, if it is determined on remand that Fields is occupationally disabled, and he continues to work for the same employer against whom he made the claim (Carbon River Coal), he is entitled to receive RIB benefits and his claim for occupational disability should be placed in abeyance in accordance with the

considered in determining the level of benefits to be awarded.” Wright, 832 S.W.2d at 885 (Emphasis supplied.)
directive in Smith, supra. The decision of the Board is reversed and the case remanded for proceedings consistent with this opinion.

All concur.
Wright filed a claim for disability benefits, alleging that he had contracted pneumoconiosis and/or chronic, occupational bronchitis. Subsequently, he settled with his last employer for its share of any liability. When the case came before the Administrative Law Judge (ALJ) he ruled that Wright had contracted category 1 coal workers' pneumoconiosis and had sustained a 75 percent permanent partial disability. Pursuant to KRS 342.732(1)(b), the Special Fund was liable for 75 percent of the award. The award was affirmed by the Workers' Compensation Board and the Court of Appeals.

On appeal, the Special Fund argues: 1) that the ALJ improperly adjusted Dr. Anderson’s calculation of Wright’s FEV1 value as a percentage of the predicted normal value for a man of his age and height, and 2) that because Wright’s largest spirometric test values were greater than 80 percent, he should not have been awarded benefits pursuant to KRS 342.732(1)(b).

According to KRS 342.732(1)(b), a claimant who has a category 1 radiograph and who has respiratory impairment resulting from exposure to coal dust, as evidenced by spirometric test values of 55 percent or more, but less than 80 percent of the predicted normal values found in the latest edition of the American Medical Association’s Guides to the Evaluation of Permanent Impairment (Guides), is entitled to a 75 percent occupational
disability benefit. Medical evidence in this case was given by three physicians. The ALJ’s finding that claimant’s X-rays exhibited category 1 disease is not disputed on appeal. The spirometric test data reported was as follows:

<table>
<thead>
<tr>
<th>Physician</th>
<th>FVC Value</th>
<th>FVC (% of predicted)</th>
<th>FEV1 Value</th>
<th>FEV1 (% of predicted)</th>
<th>Height</th>
<th>Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wright</td>
<td>4.0</td>
<td>(96%)</td>
<td>2.6</td>
<td>(78%)</td>
<td>69&quot;</td>
<td>61</td>
</tr>
<tr>
<td>Nash</td>
<td>3.7</td>
<td>(75.4%)</td>
<td>2.3</td>
<td>(61.3%)</td>
<td>71&quot;</td>
<td>61</td>
</tr>
<tr>
<td>Anderson</td>
<td>4.8</td>
<td>(100%)</td>
<td>2.8</td>
<td>(*86%)</td>
<td></td>
<td>61</td>
</tr>
</tbody>
</table>

*disputed

At the hearing on this case, counsel for the claimant argued that, while he had no dispute with the FEV1 value reported by Dr. Anderson, the calculation of that value as a percent of the predicted normal value for a man of claimant’s age and height was erroneous. Dr. Anderson, who testified for the Special Fund, failed to state the claimant’s height in his report. However, the spirometric tracing sheet, submitted with the report as required by KRS 342.316(2)(b)2.b., indicated that claimant’s height was 70.5".

The ALJ noted that he was without authority to look behind the test values reported by the physicians; however, because KRS 342.732(1)(b) requires the use of the Guides to calculate the reported values as a percent of the predicted normal value, he did have the authority to check the calculated percentage to ascertain that the Guides were used and were used correctly. According to the tables found in the Guides, the predicted normal values are a function of age and height. Because Dr. Anderson had failed to state claimant’s height in his report, the ALJ used the height reported by Dr. Wright, the Special Fund’s other medical expert, in order to find the appropriate normal value and to check Dr. Anderson’s calculation of the percent of normal represented by his 2.8 test value. When Dr. Anderson’s 2.8 test value was compared to the normal value for a 69" tall, sixty-one year old man, found in the appropriate table in the latest edition of the Guides, the resulting percent of the predicted normal was 78 percent. The ALJ noted that because the 69" height measured by Dr. Wright was the lowest in the record, this calculation produced the result least favorable to the claimant. If, for example, the 71" height found by Dr. Nash had been applied to the table and the percentage of normal calculated, the result would have been 58 percent.

The Special Fund does not assert that the ALJ’s percentage calculation was mathematically incorrect. It’s[sic] argument is that the ALJ was without authority to check and to correct the erroneous percentage calculation. Under these circumstances, however, we believe that the ALJ did act within his authority when he checked the calculation of the percentage of normal represented by Dr. Anderson’s FEV1 test value and when he found that the correct percentage represented by that value was 78 percent.

Next, the Special Fund argues that, pursuant to KRS 342.732(2), if either the FVC or the FEV1 value is greater than 80 percent of the predicted normal value, a claimant does not qualify for benefits under KRS 342.732(1)(b). Because this claimant’s largest FVC exceeded 80 percent of the predicted normal, the Special Fund argues that, regardless of the fact that his FEV1 was less than 80 percent, he qualifies only for Retraining Incentive benefits (RIB) under KRS 342.732(1)(a).
KRS 342.732(2) reads as follows:

The presence of respiratory impairment resulting from exposure to coal dust shall be established by using the largest forced vital capacity (FVC) value or the largest forced expiratory volume in one second (FEV1) value determined from the totality of all such spirometric testing performed in compliance with accepted medical standards.

As noted by both the Court of Appeals and the Board, the interpretations of the Special Fund and of the ALJ both conform to common usage of the language found in the statute. Because the intent of the legislature is not clear in this regard, it is necessary to consult outside sources in an attempt to ascertain that intent. See, Epsilon Trading Co. v. Revenue Cabinet, Ky. App., 775 S.W.2d 937 (1989).

KRS 342.316(2)(b)2.b. governs the admissibility of evidence obtained by spirometric testing. It requires that FVC or FEV1 values reported by a physician be the largest obtained from at least three acceptable spirometric maneuvers. The highest value reported by a physician for FVC or FEV1, therefore, represents at least two other values, both of which are less than or equal to the value used in evidence. Where a claimant’s highest FEV1 value in evidence is less than 80 percent, he actually has exhibited at least three FEV1 values of less than 80 percent to each physician who submitted medical evidence.

According to the Guides, upon which the legislature relies in KRS 342.732 and KRS 342.316, spirometry is a forced expiratory maneuver which indicates the degree of pulmonary impairment. There are three component parts of the maneuver: forced vital capacity (FVC), forced expiratory volume in the first second (FEV1) and the ratio of these measurements expressed as a percentage (FEV1/FVC ratio). The Guides indicate that FVC is a valid and reliable index of significant pulmonary impairment due to interstitial restrictive lung disease such as pneumoconiosis. FEV1 measures the degree of pulmonary impairment due to obstructive airways disease, an example of which is chronic bronchitis. The Guides note a high correlation between work status and FEV1 values. Because the result of either test is affected by the degree of the patient’s cooperation, the Guides indicate that the greatest result obtained on each test most accurately represents the actual impairment. They also indicate that a patient may suffer pulmonary impairment due to either restrictive or obstructive disease, or due to both. An impairment exists if either the FVC or the FEV1 is abnormal.

The purpose of KRS 342.732 is to establish a scheme of benefits for coal workers who have contracted pneumoconiosis. When KRS 342.732(1)(a) is compared with KRS 342.732(1)(b), it is apparent that the legislature intended to award a greater level of benefits to claimants who experience significant respiratory impairment as a result of their exposure to coal dust. We note that KRS 342.732(1)(b) does not restrict respiratory impairment to that resulting from pneumoconiosis, but refers to respiratory impairment resulting from exposure to coal dust. It is also apparent from KRS 342.732(2) that the legislature intended for both restrictive impairment, as indicated by the FVC value, and obstructive impairment, as indicated by the FEV1 value, to be considered in determining the level of benefits awarded. Under these circumstances, we believe it more likely that where a claimant exhibits differing degrees of restrictive and obstructive impairment, the legislature intended to award benefits based on the more severe impairment resulting from exposure to coal dust, regardless of whether it is due to pneumoconiosis or to
obstructive airways disease. We, therefore, interpret KRS 342.732(2) to require that if either the largest FVC value or the largest FEV1 value is 55 percent or more but less than 80 percent of the predicted normal, a claimant may qualify for benefits under KRS 342.732(1)(b).

It is no longer disputed that claimant suffers from category 1 coal workers’ pneumoconiosis or that claimant’s greatest FVC value is not less than 80 percent of the predicted normal value. The Special Fund now argues that claimant’s FEV1 value of 78 percent of the predicted normal did not result from his exposure to coal dust but was caused solely by his history of cigarette smoking. This argument was not raised before the ALJ or the Workers’ Compensation Board. The Special Fund’s argument to the ALJ and the Workers’ Compensation Board was, in effect, that where a difference in the FVC and FEV1 values would qualify claimant for either of two levels of benefits, the highest value must be used and the claimant awarded the lower level of benefits. We will, therefore, refrain from addressing the issue further.

Accordingly, because claimant has contracted category 1 pneumoconiosis and has exhibited FEV1 spirometric test values of less than 80 percent of the predicted normal values, he was properly awarded benefits pursuant to KRS 342.732(1)(b). The decision of the Court of Appeals to affirm the decisions of the Workers’ Compensation Board and the Administrative Law Judge is hereby affirmed.

All concur.
This workers’ compensation appeal concerns a matter of first impression with regard to the obligation of employers to defend claims brought under KRS 342.732 and then to seek participation in payment of the final award or settlement from the Kentucky Coal Workers’ Pneumoconiosis Fund (Fund) pursuant to KRS 342.1242 as effective December 12, 1996.

Claimant worked in the coal industry for fourteen years. He was last exposed to coal dust on December 26, 1996, while working for the defendant-employer as an underground coal miner. On January 14, 1997, he enrolled in a program of study at the Nashville Auto Diesel College. He expected to complete the program in December, 1997. On February 7, 1997, he filed a claim for benefits for coal workers’ pneumoconiosis.

Claimant’s evidence consisted of x-ray interpretations from Drs. Myers and Zadeh, both of whom reported category 1/0 disease. Dr. Zadeh reported an FVC of 75 percent of the predicted normal value and an FEV1 of 57 percent of the predicted normal value. The employer’s expert, Dr. Westerfield, reported category 1/1 disease. Dr. Joyce, the university evaluator, reported category 0/0.

On August 30, 1997, claimant and the employer agreed to settle the claim. The agreement provided that the employer would pay a lump sum of $6,500.00 and that the claimant
would execute an affidavit verifying an adequate source of income for the 104-week compensable period. Pursuant to KRS 342.265, the agreement was submitted to an Administrative Law Judge (ALJ) for approval. In a subsequent order, the ALJ noted claimant’s statement that he earned a gross weekly income of $320.00, that he had adequate sources of income to maintain his household, and that a lump sum payment would be more beneficial to him than weekly payments. The ALJ concluded that there was a reasonable assurance of income during the compensable period and, therefore, approved the lump sum settlement.

On October 16, 1997, the employer requested participation by the Fund pursuant to KRS 342.1242 and 803 KAR 25:010, §29. The Director of the Fund denied the request, stating three reasons for doing so. The Fund asserted that the x-ray interpretations submitted with the application did not meet the requirements of KRS 342.732(1). The Fund’s second reason was that the order approving the settlement agreement did not reject the clinical findings of the university evaluator, that those findings must be given presumptive weight, and that the findings which were made did not meet the minimum requirements of KRS 342.732(1). The third reason was that the settlement agreement provided for a lump sum payment and, therefore, was contrary to the provisions of KRS 342.732(1)(a).

The employer appealed the denial to an ALJ. Contested issues included: 1) whether the Fund’s denial of payment was arbitrary, capricious, and in excess of the Director’s statutory authority; 2) whether the employer’s settlement of the claim was supported by the medical evidence; and 3) whether an employer may settle a post-December 12, 1996, claim for a retraining incentive benefit (RIB) for a lump sum without certifying that the required training was provided and then seek payment from the Fund.

The ALJ noted that public policy favored encouraging the settlement of workers’ compensation claims. The ALJ also noted that KRS 342.732(1)(a) provided for periodic benefits, and that the lump sum settlement of claims for future periodic payments continued to be authorized subsequent to the December 12, 1996, amendments to KRS 342.265(2) and (3). The ALJ determined that the medical evidence would have justified the award of a RIB and that there was evidence the claimant was actively participating in a retraining program at the time of settlement; however, the ALJ was not persuaded that findings with regard to those matters were required when approving the settlement. In view of the prima facie evidence of claimant’s entitlement to a RIB, the fact that the settlement eliminated further risk with regard to the claim, and the fact that the employer settled the claim for 17 percent of its potential liability, the ALJ concluded that the Fund’s subsequent denial of participation was unreasonable and unfair. Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214, 217 (1945). The Fund was ordered to reimburse the employer for its half of the liability.

The Workers’ Compensation Board (Board) determined that claimant and the employer remained free to enter into a settlement agreement. The Board noted, however, that the Fund was in a fiduciary relationship with all employers engaged in the severance and processing of coal and concluded that the Fund was not required to reimburse the employer for half of the lump sum unless claimant met the statutory criteria for receiving a RIB award, including certification by the employer that the claimant met the relevant statutory criteria. Accordingly, the ALJ’s award was reversed and the claim was remanded to the ALJ for further findings.
In a concurring opinion, Board Member Lovan expressed the view that when a denial of participation is being appealed, the employer should be given an opportunity to establish that the worker would have been entitled to an award. The opinion noted that there was evidence of record which would have authorized a favorable finding with regard to every element necessary for a RIB award, although the evidence would not have compelled an award. If a question remained concerning whether the claimant was receiving the necessary twenty-four hours of weekly instruction, the employer should be given an opportunity to demonstrate that he was. The opinion also indicated that when ruling on the appeal, the ALJ should have addressed the question of the weight to be given Dr. Joyce’s clinical findings.

The Court of Appeals affirmed and adopted the view expressed in the concurring opinion at the Board to the extent that the employer should be given an opportunity to establish the existence of grounds which would have justified an award. This appeal by the employer followed.

The Fund was created pursuant to KRS 342.1242(1) as part of the 1996 revision of the Workers’ Compensation Act. As explained in KRS 342.1242(1), Special Fund assessments to fund awards of benefits for coal workers’ pneumoconiosis under prior law had placed a financial burden on all Kentucky employers. KRS 342.1242(2) explained that the purpose of creating a new Fund was to assure that those employers who engaged in the severance and processing of coal would bear liability for awards pursuant to KRS 342.732 in instances where the worker’s last exposure was incurred after December 12, 1996.

Consistent with the foregoing and with KRS 342.1242(3), KRS 342.1242(4)(a) and (b) set forth assessments for funding and prefunding the liability of the Fund and specify that the assessments are the responsibility of those employers engaged in the severance and processing of coal. KRS 342.1242(1) provides that the director of the Fund “shall be responsible for overseeing the administration and legal representation of the fund and the maintenance of records regarding the payment of claims by the fund.” KRS 342.1242(2) provides that the employer shall defend a claim brought pursuant to KRS 342.732 and then seek participation from the Fund in paying the final award or settlement by making a written request to the Director of the Fund in the manner prescribed by regulation. KRS 342.1242(3) provides that the Fund shall bear one-half of the liability for income and RIB benefits for claims brought under KRS 342.732 where the last exposure occurred on or after December 12, 1996. It also provides for the prompt payment of benefits to the worker, with the question of Fund participation being a matter between the employer and the Fund. See also, 803 KAR 25:010, §29(5), (6).

As effective July 17, 1997, 803 KAR 25:010, §29 provided:

(1) Following a final award or order approving settlement of a claim for coal workers’ pneumoconiosis benefits pursuant to KRS 342.732, the employer shall tender a written request for participation to the Kentucky coal workers’ pneumoconiosis fund within thirty (30) days. This request shall be in writing and upon a form supplied by the Director of the Kentucky Coal Workers’ Pneumoconiosis fund and shall be accompanied by the following documents:

(a) Plaintiff’s application for resolution of claim;
(b) Defendant’s notice of resistance, notice of claim denial or acceptance, and any special answer;

(c) All medical evidence upon which the award or settlement was based;

(d) Final benefit review determination, opinion, or order of an arbitrator or administrative law judge determining liability for benefits, or order approving settlement agreement. If an administrative law judge’s award was appealed, appellate opinions shall be attached;

(e) If the request for participation includes retraining incentive benefits under KRS 342.732, the employer shall certify that the plaintiff meets the relevant statutory criteria;

(f) If the request for participation is for settlement of a claim, the employer shall certify that the settlement agreement represents liability for benefits in the claim, and does not include any sums for claims which the plaintiff may have against the employer.

(2) Within thirty (30) days following receipt of a completed request for participation, the director shall notify the employer and all other parties of acceptance or denial of the request.

(3) A denial may be made upon a finding by the director that the employer failed to defend the claim or entered into a settlement agreement not supported by the medical evidence or which was procured by fraud or mistake. Denial shall be in writing and shall state the specific reasons for the director’s action.

(4) Denial of a request for participation may be appealed to an administrative law judge within thirty (30) days following receipt. The administrative law judge shall determine whether the denial was arbitrary, capricious, or in excess of the statutory authority of the director, but shall not reexamine the weight assigned to evidence by an arbitrator or administrative law judge in a benefit review determination or award.

(5) The employer shall promptly commence payment on all of the liability pursuant to the benefit review determination, award, or order and shall continue until the liability of the Kentucky Coal Workers’ Pneumoconiosis fund is established. This duty of prompt payment shall continue during pendency of an appeal from denial of a request for participation.

(6) Upon an appeal from the denial of a request for participation, if the Kentucky Coal Workers’ Pneumoconiosis fund does not prevail, it shall reimburse the employer for its proportionate share of the liability together with interest at the rate set forth in KRS 342.040.

As effective December 12, 1996, KRS 342.732(1)(a) authorizes the award of a RIB in instances where there is x-ray evidence of category 1/1 or 1/2 disease and spirometric test values which equal or exceed 55 percent but are less than 80 percent of the predicted normal values as contained in the latest edition of the American Medical Association’s
Guides to the Evaluation of Permanent Impairment. Direct payments to the worker are authorized for a period of up to 104 weeks of enrollment and active and successful participation in a bona fide training or education program, as a full-time student, taking twenty-four or more hours of instruction per week. Direct payment is prohibited if participation in the training or education program ceases or if the individual is working in the mining industry. Up to $5,000.00 in tuition and material costs is payable to the institution providing training or education. If the worker completes the training or education program in fewer than 104 weeks and accepts a bona fide offer of employment at a location more than fifty miles from his usual residence, he is entitled to be paid relocation expenses in a lump sum equal to the lesser of $3,000.00 or any unpaid weekly benefits.

As noted by the ALJ, there is a strong public policy favoring the settlement of workers’ compensation claims. See Newberg v. Weaver, Ky., 866 S.W.2d 435 (1993); Newberg v. Sarcione, Ky., 865 S.W.2d 317 (1993). It is undisputed that, as to the parties, the agreement between claimant and the employer to settle the claim for a lump sum is consistent with public policy and authorized by Chapter 342 provided that the agreement is approved by an ALJ as required by KRS 342.265. What is at issue is the effect of an agreement between a worker and an employer on the liability of the Fund. Also at issue are the requirements for obtaining participation by the Fund in instances where the worker and employer have agreed to settle a RIB claim, including whether Fund participation is authorized when the settlement involves the payment of a lump sum.

In defending its rejection of the employer’s request for participation, the Fund has argued that KRS 342.732(1)(a) contemplates the payment of a lump sum only in instances where the worker relocates. The Fund has asserted that it is not required to participate in the lump sum settlement of a RIB claim because such an arrangement is not consistent with KRS 342.732(1)(a). We note, however, that this same argument could apply to the lump sum settlement of any claim involving periodic payments and conclude that the Fund’s participation in the lump sum settlement of a RIB claim is not prohibited by Chapter 342 or by regulation. As noted by the ALJ, KRS 342.265(2) and (3) clearly contemplate the lump sum settlement of claims for periodic benefits.

KRS 342.1242(4)(a) makes it apparent that the financial interests represented by the Fund are those of all employers engaged in the severance and processing of coal on or after January 1, 1997. Although KRS 342.1242(3) imposes upon the Fund half of the liability for benefits awarded in claims brought under KRS 342.732 for last exposures on or after December 12, 1996, the Fund does not participate in litigation of the claim or in settlement negotiations. Instead, KRS 342.1242(2) provides that the employer “shall” defend the claim and later seek participation from the Fund.1 We note, however, that although they bear much in common, the interests of the employer and of the Fund are not entirely consistent. We are aware of no provision which provides for the Fund to share in the cost of the defense; thus, it appears that although the Fund derives benefit from the defense, the employer bears the entire cost. On the other hand, when conducting a defense, an employer is aware that it will be responsible only for half of the ultimate liability and that it will bear the entire cost of the defense, factors that would be expected to affect the extent to which the employer would be willing to defend against a meritorious claim or its eagerness to settle a particular claim. When seeking participation from the Fund, the

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1 803 KAR 25:010, §29(1) requires the employer to seek the Fund’s participation within thirty (30) days of a final award or the order approving a settlement.
burden is on the employer to comply with the requirements of 803 KAR 25:010, §29 which appear to be aimed at protecting the interests of the Fund.

803 KAR 25:010, §29(3) authorizes denial of an employer’s request for participation by the Fund upon a finding that it “failed to defend the claim or entered into a settlement agreement not supported by the medical evidence or which was procured by fraud or mistake.” When requesting participation by the Fund, the employer must submit the claim and a number of other documents, including all of the medical evidence upon which the award or settlement was based. No exception is made for those claims which are settled. The Board and the Court of Appeals have determined that, in instances where a claim is settled, the ALJ who approves the agreement between the worker and employer is not required to make findings that the presumptive weight of the university evaluator’s testimony has been overcome or that the worker is currently enrolled in a training or educational program as required by KRS 342.732(1)(a). We agree. They have also determined that a settlement between the worker and employer does not necessarily require participation by the Fund. Where the participation of the Fund is sought, the employer must certify that the award complies with the requirements of KRS 342.732(1)(a). Again, we agree.

In Magic Coal Co. v. Fox, 19 S.W.3d 88, which we have rendered today, we determined that KRS 342.315(2) created a rebuttable presumption that the clinical findings and opinions of a university evaluator accurately reflected the condition of the claimant. We also determined that the presumption could be overcome by substantial evidence that the worker’s condition was other than the university evaluator had indicated. In instances where an ALJ chose to reject the clinical findings and opinions of the evaluator, the only requirement was that a reasonable basis for doing so must be stated. Applying 803 KAR 25:010, §29(3) and the decision in Fox to the present facts, we conclude that although an approved agreement is binding on the parties, the Fund may not be required to participate in a settled RIB claim unless there is prima facie medical evidence of record which would authorize a RIB award.

803 KAR 25:010, §29(1)(e) requires the employer to certify that a worker receiving a RIB “meets the relevant statutory criteria” and makes no exception for those RIB claims which are settled. In view of the requirement that all medical evidence be submitted with the request for participation, documenting the existence of prima facie evidence to authorize a RIB award, we perceive that the purpose for requiring certification by the employer is to provide some assurance that the worker also has met the other requirements set forth in KRS 342.732(1)(a) for receiving a RIB. We conclude, therefore, that the Fund may not be required to participate in a settled RIB claim unless the employer so certifies.

In summary, an approved agreement between a worker and employer to settle a claim brought under KRS 342.732 constitutes a final award which is binding as to the parties but does not necessarily require participation by the Fund. The Fund may be required to participate in the payment of a RIB claim which is settled for a lump sum in instances where the employer complies with the requirements set forth in 803 KAR 25:010, §29; where the record contains prima facie medical evidence which would support an award; and where the employer has certified that the worker has complied with the requirements set forth in KRS 342.732(1)(a).

In the instant case, although the ALJ determined that there was prima facie evidence to support an award, the employer failed to provide the required certification. Under those
circumstances, we conclude that the Fund’s denial of the request for participation was not arbitrary and that the ALJ erred in requiring participation by the Fund. In view of the fact that this is a matter of first impression where the parties and the ALJ were unclear about precisely what was required, we are persuaded that the employer should be given an opportunity upon remand to provide the certification required by 803 KAR 25:010, §29(1)(e).

The decision of the Court of Appeals is hereby affirmed, and the claim is hereby remanded to the ALJ for further proceedings as set forth in this opinion.

All concur.
I. DISCUSSION OF 2014 DISPOSITION OF CWP/OD CASES
   A. ALJ Roland Case
   B. University Exams/Louisville/UK
   C. Alternative Exams/Westerfield/Chavda
   D. FBL Offset after Lump Sum Settlement

II. CASE LAW UPDATE
      WL 631887 (Ky. App. Feb. 14, 2014) (Not reported in S.W.3d)
      (Ky. App. Dec. 20, 2013) (Not reported in S.W.3d)
   C. Dana Corp. v. Roberts – Board Decision – 10/24/14; Claim No.
      200395433
      • Effect on CWP cases if AFFIRMED by the Courts

III. FEDERAL BLACK LUNG CASE LAW – 2014
      (6th Cir. Dec. 4, 2014)
   B. Frank v. Walker, 766 F.3d 755 (7th Cir. 2014)
   C. Drummond Co., Inc. v. Director, OWCP, 13-11800 (Eleventh Circuit)
   D. Antelope Coal Co. v. Goddard, 580 Fed.Appx. 665 (10th Cir. 2014)
   E. Navistar, Inc. v. Forester, 767 F.3d 638 (6th Cir. 2014)
   F. Jim Walter Resources, Inc. v. Director, Office of Workers’ Compensation
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   G. Peabody Coal Co. v. Director, Office of Workers’ Compensation
      Programs, 577 Fed.Appx. 469 (6th Cir. 2014) (Mem.)
   H. Central Ohio Coal Co. v. Director, Office of Workers’ Compensation
      Programs, 762 F. 3d 483 (6th Cir. 2014)
I. Arch on the Green, Inc. v. Groves, 761 F.3d 594 (6th Cir. 2014)
K. Eastern Associated Coal Co. v. Director, Office of Workers’ Compensation Programs, 578 Fed.Appx. 165 (4th Cir. 2014)
L. Collins v. Pond Creek Min. Co., 751 F.3d 180 (4th Cir. 2014)
N. Paramount Coal Co. of Virginia, LCC v. Director, Office of Workers’ Compensation Programs, 13-1114 (Fourth Circuit)
O. Oak Grove Resources, LLC v. Director, OWCP, 562 Fed.Appx. 836 (11th Cir. 2014)
P. Peabody Coal Co. v. Director, Office of Workers’ Comp. Programs, 746 F.3d 1119 (9th Cir. 2014)
Q. Mingo Logan Coal Co. v. Owens, 724 F.3d 550 (4th Cir. 2013)
S. Mann v. Turner Brothers, Inc., 560 Fed.Appx. 743 (10th Cir. 2014)
V. Antelope Coal Company/Rio Tinto Energy America v. Goodin, 743 F.3d 1331 (10th Cir. 2014)
W. National Mines Corp. v. Director, Office of Workers’ Compensation Programs, 553 Fed.Appx. 273 (3d Cir. 2014)
X. Arkansas Coals, Inc. v. Lawson, 739 F.3d 309 (6th Cir. 2014)
Y. Consolidation Coal Co. v. Maynes, 739 F.3d 323 (6th Cir. 2014)
Z. Fox ex rel. Fox v. Elk Run Coal Co., Inc., 739 F.3d 131 (4th Cir. 2014)
I. PRE-AWARD/SETTLEMENT

803 KAR 25:012 is an extensive regulation designed to expedite the payment of medical expense benefits. The regulation establishes a procedure for the resolution of a medical fee dispute when a dispute arises before a claim is filed, during the litigation, or subsequent to a final decision. Section (1)(a) provides:

[A] dispute regarding payment, nonpayment, reasonableness, necessity, or work-relatedness of a medical expense, treatment, procedure, statement, or service which has been rendered or will be rendered under KRS Chapter 342 shall be resolved by an administrative law judge following the filing of a Form 112 (Medical Dispute).• (Emphasis added).

Section (5) provides:

If an application for adjustment of claim is pending concerning the injury or disease which is the subject of the dispute, the movant shall file a Form 112 with the commissioner and shall also serve copies on the other parties of record. The movant shall further file a motion to join the medical provider as a party to the claim. This motion shall conform with the requirements of 803 KAR 25:010, Section 4. (Emphasis added).

II. POST-AWARD/SETTLEMENT

803 KAR 25:096 §8(1):

Regulation 803 KAR 25:096 §8(1) states that a post settlement/award medical fee dispute must be filed within thirty (30) days of a statement of services. In my claim, a Medical Fee Dispute filed ten (10) months after service and two (2) months after Commissioner issued show cause sanctions against the carrier. Judge dismissed the Medical Fee Dispute and since it was not timely filed ruled additional sanctions of Plaintiff's attorney fees and expenses were to be paid by the carrier.

So, if a Medical Fee Dispute in a claim is filed after settlement/award and not filed within thirty (30) days of submission or UR denial, one could file a UCSPA Complaint with the Commissioner while defending the Medical Fee Dispute. If sanctions are awarded against the carrier by the Commissioner (and they should be), this can assist in obtaining additional sanctions of attorney fees and expenses in the Medical Fee Dispute in front of the ALJ.
A. National Pizza Co. v. Curry, 802 S.W.2d 949, 950 (Ky. App. 1991). The Employer bears the burden of proving the medical treatment in question is unreasonable and unnecessary.

B. Bartree v University Medical Center, 244 S.W.3d 91, 94 (Ky. 2008). When an employer reopens for a medical fee dispute, it has the burden of proof to show that the treatment is non-compensable.

C. C & T of Hazard v. Stollings, 2012-SC-000834-WC, 2013 WL 5777066 (Ky. Oct. 24, 2013), Designated Not to Be Published, held the Movant/Employer, in a post-Opinion & Award Medical Fee Dispute, has the burden of proving not only that the recommended treatment is unreasonable, but also that it is not work-related. Id. at p. 4.

III. POST-AWARD MEDICAL FEE DISPUTES

Kentucky Associated General Contractors Self-Insurance Fund v. Lowther, 330 S.W.3d 456 (Ky. 2010), and Lawson v. Toyota Motor Mfg., Kentucky, Inc., 330 S.W.3d 452 (Ky. 2010): post-opinion after a final UR denial or pre-authorization, the workers’ comp carrier must either file a medical fee dispute within thirty days or pay for the requested treatment. If a Medical Fee Dispute is not filed within thirty days, the Employer/Defendant has no grounds to contest a requested medical treatment.

IV. POST AWARD OR OPINION MEDICAL FEE DISPUTES

A. After a claim is resolved, a timely Motion to Reopen must be filed to pursue a medical fee dispute. 803 KAR 25:012 §1(6); Westvaco Corp. v Fondaw, 698 S.W.2d 837 (Ky. 1985).

B. A Motion to Reopen must comply with 803 KAR 25:010 §4(6), and must include the following:

1. A current Form 106 (medical release);

2. An Affidavit setting forth the basis for reopening;

3. A current medical report, if necessary, supporting the reopening; and

4. A copy of the opinion, settlement agreement, or other decision showing the final resolution of the claim.

C. A Motion to Re-open must set forth a prima facie case for reopening, Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972). In most cases, medical evidence will be necessary to present a prima facie case that contested treatment is not reasonable and necessary.

D. A Motion to Re-open should be accompanied by a Form 112 Medical Fee Dispute prepared in the manner set forth above. The Motion to Re-open
and Medical Fee Dispute must be filed within thirty days of receipt of the bill or thirty days from the last UR decision, whichever is later.

E. As during the original claim, the medical provider or providers whose treatment is disputed should be joined in the claim, so that they will be bound by the ALJ’s decision.

F. As during the original claim, if UR is required, UR must be completed and a copy of the final decision must be attached to the Form 112. (803 KAR 25:190) If UR is not required (such as in the case that the work relatedness of the treatment is in dispute), the Form 112 should still be accompanied by a supporting medical report.

G. A decision may be rendered summarily on the pleadings by the Frankfort Motion Docket, or the matter may be reopened and assigned to an ALJ for further adjudication, with a proof schedule set. 803 KAR 25:012 §1(4)(d).

H. Once the claim is final, the burden of proof of lack of reasonableness/necessity is on the employer/payment obligor. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991); Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993).

V. FEES ON MEDICAL FEE DISPUTES

A. Duff Truck Lines, Inc. v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999), upheld fee in reopening by Defendant/Employer for meds. Furthermore, the statute read as a whole expresses no reason to require an award of income benefits before attorney fees may be awarded. Moreover, the legitimate purpose … authorizing fees...is to encourage attorneys to undertake such representation and to ensure an opportunity for workers to exercise their rights. Cites Napier v. Scotia Coal Co., 874 S.W.2d 377 (Ky. 1993).

B. Rager v. Crawford & Co., 256 S.W.3d 4 (Ky. 2008). As summarized by ALJ materials in 2009 Comp Ed seminar: Absent a showing that employer had disputed the expenses without reasonable grounds, the only ways for a claimants’ attorney to be paid are from the income benefits awarded or from the claimant’s own personal funds.

C. See Mohammed Zineddin, MD v. The Nielson Co., No. 2004-73617 (8/15/08) denying payment of fee from amount paid to dr. “... under the facts of this case the source of payment of any fee approved is exclusively the responsibility of his client alone.”
I. WEST VIRGINIA BLACK LUNG CASE AND ITS ETHICAL IMPORTANCE TO KENTUCKY LAWYERS

The case of Fox ex rel. Fox v. Elk Run Coal Co., Inc., 739 F.3d 131 (4th Cir. 2014), has generated more talk and gossip than most other cases in the last several years. The question asked most often is "can they do that," meaning is it legal and ethical to do what the defense did in this case?

A. The facts of this case are important so that we can understand what happened and what did not happen.

1. Gary Fox worked in a West Virginia coal mine for over thirty years and finally died from coal worker's pneumoconiosis in 2009.

2. X-rays taken of his chest in 1997 revealed an unidentified mass in his right lung.

3. In 1998, a pathologist in West Virginia named Dr. Koh concluded from surgical samples that among other things, the mass was an "inflammatory pseudotumor," but did not diagnosis black lung. Mr. Fox filed a claim in 1999 for benefits which was granted by the director in early 2000. His employer, Elk Run Coal Company, requested a hearing before the ALJ.

4. Prior to the hearing, Elk Run had obtained the pathology slides from Mr. Fox's 1998 surgical procedure and provided them to two additional pathologists, Dr. Naeye and Dr. Caffrey.

5. Both pathologists wrote reports summarizing their conclusions. Elk Run also obtained opinions from several radiologists and submitted them along with Dr. Koh's report (but NOT the reports of Dr. Naeye and Dr. Caffrey) to four pulmonary specialists. The four pulmonary specialists concluded that, based on the evidence they had been provided, Fox most likely did not have black lung at that time.

6. At the evidentiary hearing in September 2000, Mr. Fox appeared without counsel and offered only his own testimony.

7. Elk Run did NOT submit the reports of Dr. Naeye or Dr. Caffrey, nor did they disclose their existence to Mr. Fox or to the ALJ. The ALJ denied Mr. Fox's claim in January 2001, and Fox did not appeal.
8. In 2001, Mr. Fox retained counsel and filed a new claim. The director once again found him eligible for black lung benefits and once more Elk Run requested a hearing.

9. On this occasion Mr. Fox's counsel conducted vigorous discovery and Elk Run was forced to turn over the 1998 pathology slides and disclose additional documents and reports pertaining to Fox's medical condition including the pathology reports of Dr. Naeye and Dr. Caffrey.

10. Recognizing that the black lung law bars any entitlement to benefits before the ALJ's 2001 judgment became final, 20 C.F.R. §725.309(c)(6), Fox moved to set aside the judgment, contending that Elk Run had committed fraud on the Court because it had not disclosed the Naeye and Caffrey reports to its own expert pulmonologists.

B. Did Elk Run commit fraud on the Court?

1. The ALJ said "yes."

   In 2011, the ALJ found that the reports of Drs. Naeye and Caffrey diagnosed "complicated pneumoconiosis" and thus clearly contradicted Dr. Koh's finding. The ALJ also determined that Elk Run's failure to disclose the Naeye and Caffrey reports to its other expert witnesses tainted their conclusions and that while perhaps initially not concocted as such, Elk Run's actions constituted a scheme to defraud. The ALJ ruled that Elk Run had committed fraud on the Court and set aside the 2001 judgment and awarded Fox benefits back to January 1997.

2. The Benefits Review Board said "no."

   On appeal, the Benefits Review Board accepted the factual findings, but held that Elk Run's conduct did not rise to the level of fraud on the Court because Elk Run did not engage in a deliberate scheme to directly subvert the judicial process. There was one dissent who said that because Elk Run failed to disclose all the relevant evidence to its own experts it had committed fraud on the Court.

3. The United States Court of Appeals for the Fourth Circuit agreed with the Benefits Review Board and said no.

   Fox's wife asked the United States Court of Appeals to set aside the ALJ's 2001 judgment which would have moved the date of onset of her entitlement from June 2006 to January 1997. Her contention was that the judgment was fraudulently obtained because although Elk Run knew that the Naeye and Caffrey reports diagnosed her husband with pneumoconiosis, it intentionally failed to disclose those reports to its own experts and
later relied on the conclusions of those experts to controvert Fox's 1999 claim for black lung.

C. Why did the Court rule that it was not fraud on the Court?

Fraud on the Court does not involve your basic garden variety fraud. Fraud on the Court must involve an intentional plot to deceive the judiciary, and must also touch on the public interest in a way that fraud between the individual parties does not.

Typical fraud on the Court situations involve bribery of a judge or juror, or improper influence exerted on the Court by an attorney, in which the integrity of the Court and its ability to function impartially is impinged.

1. The Court held that Elk Run's alleged fraud does not directly impact the integrity and workings of the black lung benefits process and therefore does not rise to the level of fraud on the Court.

2. Fox's widow argued that Elk Run's non-disclosure of the pathology reports to its own witnesses "instills uncertainty and cynicism" into the black lung benefits system.

3. It is important to remember that at the initial hearing Mr. Fox was un-represented and did not avail himself of any discovery. If he had been represented and conducted discovery he may have discovered the other reports.

4. To impose a duty on a party to furnish its own expert witnesses with certain documents would unduly impinge that party's right to develop its own evidence, handle its own experts, and present its own case. Hickman v. Taylor, 329 U.S. 495 (1947).

5. The Court treated this as akin to a request for Brady information in a criminal case. Brady disclosures require the parties to disclose or at least identify any evidence that would be helpful to the other side regardless of whether it is privileged or not. The courts have been very reluctant to impose Brady requirements in civil litigation. The Court did not expand Brady to the administrative process under these facts.

6. The Court made clear its displeasure with the handling of the matter, but clearly held that the conduct of the Defendant did not arise to fraud upon the Court.

II. DISCOVERY AND ETHICS IN BLACK LUNG CASES

Of course Mrs. Fox did not stop there. Mrs. Fox, along with two other Plaintiffs, Norman Dale Eller and Clarence O. Carrol, currently have an action pending against Jackson Kelly for various claims of fraudulent misrepresentation during
its representation of various coal companies in the black lung process. This was originally filed in federal court but has been remanded to state court.

A. The allegations are that Jackson Kelly failed to act with candor towards the tribunal and engaged in knowingly fraudulent conduct toward Mr. Fox.

B. The case has currently been remanded back to the Circuit Court in Raleigh County, West Virginia and everyone awaits a final ruling.

C. Fallout

1. One of Jackson Kelly's attorneys, Douglas Smoot, has been sanctioned for similar misconduct in a black lung hearing.

2. In 2009, the West Virginia Office of Disciplinary Counsel alleged that Smoot disassembled an expert medical report and provided the favorable portions of the report to the ALJ and the opposing party while withholding portions of the report which were potentially damaging to his client.

III. THE LAW

A. **29 C.F. R §18.14 (a),(c)**

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative...only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.
B. **Fed R. Civ. P. 26**

*Fed R. Civ. P. 26(a)(2)(B)* mandates disclosure of data and information relied upon by experts in formulating the opinion that he or she will be testifying to in civil proceedings. The ALJ Rules of Procedure presently do not have a corresponding rule. However, in the *Elm Grove*¹ case, the 4th Circuit assessed the case law related to Rule 26 on the basis that the work product doctrine in the FRCP and the administrative rules of procedure were nearly identical.

Further, Rule 26(b) requires a showing of exceptional circumstances by a party seeking to obtain documents prepared by non-testifying experts in anticipation for trial. While this is a higher standard than the corresponding OALJ rule, the proposed changes to the rules would add this standard. Further an argument can be made that portions of Rule 26 actually are applicable to black lung proceedings.

C. **Proposed 29 C.F.R §18.51(d)(4)(B)**

Proposed 29 C.F.R §18.51(d)(4)(B) adopts language that closely mimics Rule 26(b)(4)(D)(ii) of the FRCP. This rule would replace the §18.14(c) standard and require a party to show "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." The DOL's stated purpose for the proposed amended regulations is to harmonize the administrative hearing procedure with the FRCP.

Not surprisingly, the heightened standard that would be created by the proposed rule has resulted in negative feedback from claimant advocates. On February 28, 2014, seven U.S. Senators and Representatives submitted an open letter to the Secretary of Labor objecting to the proposed rule. The legislators cited the now infamous study from the Center of Public Integrity, and argued that even the current standard for miners obtaining medical reports from operators was too high.

D. **Kentucky Rules of Court 2014**

**CR 26.02** Scope of discovery

(4) Trial preparation: experts.

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject

¹ *Elm Grove Coal Co. v. Director, O.W.C.P.*, 480 F.3d 278 (4th Cir. 2007).
matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) After a party has identified an expert witness in accordance with paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31. The court may order that the deposition be taken, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

(b) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

E. Work Product and Non-Testifying Experts Generally

FRCP 26(b)(3) states a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative without a showing of substantial need and a showing that the substantial equivalent cannot be obtained without undue hardship. (29 C.F.R § 18.14(c) language).

However, pursuant to FRCP 26(b)(4), a party can only discover non-privileged documents and tangible things prepared by a non-testifying expert by showing "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." As the plain language suggests, federal district courts have interpreted this to be a rather stringent burden. See U.S. Inspection Services, Inc. v. NL Engineered Solutions, LLC, 268 F.R.D. 614, 617 (N.D. Cal. 2010).

As noted above, the OALJ Rules of Procedure do not now include the "exceptional circumstances" language. Rather, the requesting party simply needs to show substantial need of the material and show that the substantial equivalent cannot be obtained without undue hardship.

IV. THE TAKEAWAY

Under both Federal and Kentucky ethics rules, the cutting and pasting of portions of expert reports is clearly not ethical. If you disclose a part of the report without disclosing the rest of it, I believe Kentucky would come down pretty hard for that violation. I believe this would also apply in the federal black lung arena.
Two Kentucky ethics rules are clearly implicated.

**SCR 3.130(3.3) Candor toward the tribunal**

(a) A lawyer shall not knowingly…

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

....

Supreme Court Commentary to the rule

**Preserving Integrity of Adjudicative Process**

(12) Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

**SCR 3.130(3.4) Fairness to opposing party and counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) knowingly falsify evidence, counsel, or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or deliberately fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Supreme Court Commentary

2009:

(1) The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

(2) Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

There is a big difference in refusing to turn over a report from a non-testifying expert and altering a report through cutting and pasting to either submit it to the tribunal or to another expert so he or she can rely on it to formulate an opinion that gets submitted to the tribunal. This could even be seen as falsifying evidence which is even worse.

I do believe you can protect your non-testifying experts' OPINIONS as is discussed above. Unless you let another expert use them or a part of them in forming that expert's opinion, you can protect them unless the circumstances set out above exist. In large part this is because these are OPINIONS and not FACTS.

One example of when you might have to turn over a non-testifying expert's factual information or their opinion is where a trucking company has an accident reconstructionist work up an accident and give them a report. If the police don't
do a good investigation, the gouge marks are gone and no measurements exist, it is likely you would at least have to give up the raw data but may be able to protect the opinions by arguing that plaintiff can hire his or her own expert to look at the same data and render opinions.

A clearer example is if one of your retained but non-testifying experts performs testing that destroys whatever he or she was testing. In that circumstance, I believe both the raw data and the opinion will likely be ordered to be given to the other side.