100th ANNIVERSARY OF THE ENACTMENT OF THE WORKERS' COMPENSATION ACT

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TABLE OF CONTENTS

The Presenter ........................................................................................................................................... i

Kentucky Workers’ Compensation
100 Years of Compromise and Evolution ......................................................................................... 1

Top Ten Appellate Court Decisions in
Workers’ Compensation Claims Since January 1, 2015 ................................................................. 13

Photo: The First Workers’ Compensation Board and Staff .............................................................. 29

Photo: Kentucky Governor A.O. Stanley .............................................................................................. 30
COMMISSIONER DWIGHT T. LOVAN received his Bachelor's degree from Baylor University and J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1977, Commissioner Lovan worked as a staff attorney for the Kentucky Court of Appeals with responsibility for workers' compensation appeals for fifteen months. From 1979 to 1990 he practiced law in Owensboro, concentrating in the areas of workers' compensation and civil litigation. In May of 1990, Commissioner Lovan was appointed Administrative Law Judge and remained in that position until August of 1994 when he was named to the Kentucky Workers' Compensation Board. Between July 2000 and January 2004, he served as Chair of the Kentucky Workers' Compensation Board before returning to private practice in the firm of Jones, Walters, Turner & Shelton. By executive order signed on February 7, 2008, he was appointed to serve as the Commissioner of the Department of Workers' Claims.
This year marks 100 years since the passage of the constitutional form of the Workers' Compensation Act in Kentucky. The workers' compensation legal community formed a committee to commemorate the centennial of this important piece of legislation, with various events, activities and presentations. The history of the Workers' Compensation Act in Kentucky demonstrates the efforts our state government, within the broader context of a modern social movement toward safety and fairness in the workplace, to balance the interest of individuals and society in protecting workers against the need for industry to manage liability for injury as a cost of doing business.

**ORIGINS OF THE ACT**

The legal concept of compensation for injury has been traced to the Hammurabi Code, law of Ur, and ancient Arab, Chinese, Greek and Roman law, which provided for specific compensation for particular injuries. These codes, and compensation for injury in the common law, were based on fault of the liable party. During the industrialization of Europe, Otto von Bismarck passed the first modern workers' compensation act in 1871 which provided compensation to workers for accidental injuries which occurred while working. In 1884, an industrial accident insurance act was created that absolved employers of liability other than that provided under the insurance code. Thus began the historical compromise of guaranteed coverage of injuries without regard to fault, in exchange for limitation of liability.

The United States in the late 1800s and early 1900s saw many state governments pass workers' compensation laws which were struck down or limited on constitutional grounds. Beginning with Wisconsin in 1911, numerous states passed comprehensive workmen's compensation laws in the 1910s which were based on voluntary acceptance of the Acts. During that decade, a total of forty-three states adopted such laws.
The earliest effort to enact workers' compensation in Kentucky was 1912. Governor James B. McCreary, in his message to the General Assembly on January 2, stated:

"we favor the enactment of wise laws for the protection from accident and injury of all laborers engaged in hazardous employments . . . ' And there should be also, an Employers Liability Law."

No workers' compensation was passed in 1912, however, and Governor McCreary again recommended such legislation in his address on January 6, 1914. He said:

The principle, that the cost of industrial accidents must be charged to the industries causing them or owners thereof, and not be permitted to fall entirely upon the unfortunate workers, who are injured, has been recognized in many states.

I recommend that the subject of workmen's compensation for injuries while they are actually laboring, be carefully examined and a wise and just law enacted.

A hastily drafted law was passed by March 1914. That law was modeled largely on existing Ohio law. The statute provided for a State Fund but also allowed an option for buying private insurance or carrying the risk uninsured, upon sufficient proof of solvency.

The law was put in operation in June 1914 with the creation of a Board which consisted of the Attorney General, the Commissioner of Insurance, and the Commissioner of Agriculture.

In anticipation of possible constitutional questions, the Attorney General brought a lawsuit against the Kentucky State Journal, which agreed to act as defendant. In Kentucky State Journal v. Workmen's Compensation Board, 170 S.W. 1166 (Ky. 1914), a divided court in a four to three decision held the Act unconstitutional on the basis that the Act deprived an employee of his right to recovery for injuries at common law in violation of Section 54 of the Kentucky Constitution. The law constituted a legal compulsion and was, therefore, unconstitutional. Upon rehearing, the Court clarified that the law was not unconstitutional as to employers. State Journal Co. v. Workmen's Compensation Board, 162 Ky. 387, 162 S.W 674 (Ky. 1915).

A second attempt in 1916 set in place a system of workers' compensation that continues to the present, under Governor A. O. Stanley. A number of changes were made to the law to address the earlier constitutional challenge. The law was made clearly elective and each employer and employee who elected to come under the act was required to complete and sign a form to be covered.

The effort to pass the law was led by Sen. Charles Knight and Rep. William Duffey. Primary opposition came from Sen. Hiram Brock.

The Act, Senate Bill No. 40, was approved March 23, 1916. Administrative provisions became effective April 1, 1916. Liability provisions were not effective until August 1, 1916.
The 1916 Act was again challenged in the courts. This time it was upheld as constitutional in Greene v. Caldwell, 186 S.W. 648 (Ky. 1916).

The law differed from the 1914 Act by clearly being elective on the part of the employee. It also incorporated the use of private insurance and self-insurance. The State Fund model of Ohio was rejected. The new Board also was radically different from that established by the 1914 Act. Rather than being composed of elected officials, or heads of state agencies or cabinet, the Board consisted of three members appointed by the Governor for four year terms.

The first three members were: R. C. P. Thomas of Bowling Green, for a four year term; S. W. Hager of Owensboro, for a three year term; and Robert T. Caldwell of Campbellsville, for a two year term. Caldwell's term included the title of *ex officio* chairman. The members also were assigned to districts with Hager in the Central District, Thomas in the Western District, and Caldwell in the Eastern District.

Thomas and his older brother practiced law in Bowling Green. In addition to being on the first Workmen's Compensation Board, he served as judge of the Warren County Court from 1930 to 1933 when he was appointed as District Judge for the Panama Canal Zone. After his term as judge, he returned to his law practice.

Hager previously practiced law in Ashland. In 1886, he was elected Boyd County Judge. In 1899, he was elected Kentucky State Treasurer. In 1903, he was elected State Auditor. He ran for governor in 1907 but lost. He was appointed to the Board by Governor Stanley.

Caldwell also practiced law in Ashland. However, he began his practice in Louisville in 1910 and later became an Assistant Attorney General. As Assistant Attorney General he was involved in writing the 1916 Workers’ Compensation Act. After serving as Chairman of the Workmen’s Compensation Board for two years he was an artillery captain in World War I.

The Board also chose Alexander Gilmour as secretary and Charles J. Howes as assistant secretary. Gilmour was actively engaged in the insurance field and subsequently left the Board to return to the insurance business in Louisville. Howes had been clerk of the Kentucky House of Representatives.

The Board also employed its first medical officer, Dr. Milton Board. Dr. Board practiced medicine for many years in Kentucky, including being director of the State’s Bureau of Tuberculosis.

The First Workmen's Compensation Board was active in implementing the new system. The Board also issued several published annual reports which provide detailed information on the number of injuries and claims. 13,894 injuries were reported and 5,850 agreements were approved for a total of $ 293,522.09 in payments. 208 formal claims were filed with the Board. Over one-third of all injuries were attributable to the coal mining industry. The Board recommended that many employees had failed to accept the Act and were thereby deprived of its protections, and recommended that the legislature attempt a constitutional amendment to remedy this problem. Additionally, the Board published several reports of leading decisions which provide a glimpse into the important issues presented in an emerging field of law. These decisions deal with many
of the same types of issues we still encounter today, such as questions of the course and scope of employment, penalties for violations of safety rules, survivors' benefits, and statutes of limitation.

DEVELOPMENTS AND AMENDMENTS 1927-1952

During this period employers and employees had to accept the provisions of the Act, and many cases turned on whether the employee had signed the employer's register prior to his injury. Conversely, lawsuits by employees or their estates could be dismissed on proof that the employee had elected to come under the provisions of the Workers' Compensation Act prior to injury or death. In 1934, the General Assembly extended coverage to operators of threshing machines and for deaths due to inhalation of "bad air." This amendment also specified that employers and employees engaged in operations which caused diseases such as silicosis could voluntarily subject themselves to the Act. The 1944 session extended compensation benefits to include any employer and their employees. Prior law had exempted employers with fewer than three employees.

Amendments were made to the provision of medical expenses for accidents at work. The original 1916 Act stated that medical benefits could not exceed ninety days and could not be more than $100.00. From that time through 1946, the only changes were increases in the amount of benefits. After the 1946 session, not only was there some increase in the amount of medical benefits, but the ninety day cut-off was eliminated. In 1950, the amount of medical expenses was again raised. In 1952, an employer was deemed liable for artificial limbs and braces.

From 1916 forward, there was no requirement to pay for the first two weeks of disability. While eventually that was reduced to seven days, the issue of how long a person needed to be disabled to get retroactive pay was changed. In 1948, the period of duration before retroactive payment from the first day of injury was reduced from four to three weeks. It was again changed in 1956 from three weeks to two weeks. Medical benefits were not affected by these provisions.

The death benefit provision has changed over the years which started in 1916 with $75 in funeral expenses and $100 to the decedent's estate where there were no dependents. Widows and surviving children were provided with income benefits based on the decedent's average weekly wage, 50 percent to the widow and a portion to surviving children, not to exceed $4,000 over 335 weeks. There were changes in 1946, 1950, 1952 and thereafter raising the amount of death benefits.

Compensation for total disability in the 1950 Act included the losses of a hand, an eye or a foot. The loss of a hand and an eye or the foot and an eye was added to the list of total and permanent disabilities. The original Act set compensation for Permanent Partial Disability at 65 percent of the weekly average earnings but not less than $16.00 and no more than $33.00 determined by the percentage of disability caused by the injury and not exceeding 400 weeks or $13,200.00. Earnings of the employee subsequent to the accident did not affect the compensation. That section was not changed until 1946 when an amendment was passed prohibiting compensation for an injury or disability to a member to be greater than the amount allowable for the loss of the member.
In 1946, a Subsequent Injury Claim Fund was created which provided for payment for any disability resulting from a combination of existing permanent partial disability and a subsequent compensable injury. KRS 342.120. The Fund would pay the increased disability after subtracting the prior pre-existing disability and the portion to be paid by the Employer for the subsequent injury.

The concept of the contribution of a pre-existing disease or condition being the basis for an award of disability gradually expanded. The statute in 1947 excluded diseases as compensable accidents, stating: "personal injury by accident' as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident, nor shall it include the results of a preexisting disease * * *

However in Wood-Mosaic Co. v. Shumate, 204 S.W.2d 331 (Ky. 1947), the Court of Appeals stated benefits could be awarded if the pre-existing disease had lain dormant and had not manifested its active disabling effect prior to the traumatic injury, as happens in heart attack and hernia cases. A later amendment of the statute to include the word "traumatic" before the term "personal injury by accident" was held not to change the compensability of heart attacks caused by previously dormant arteriosclerosis and over-exertion at work. Grimes v. Goodlett & Adams, 345 S.W.2d 47 (Ky. 1961).

The liability of the Subsequent Injury Fund, originally created to encourage employment of injured veterans returning from World War II, expanded to include excess disability caused by the combination of an injury at work and a pre-existing disability caused by a disease. Combs v. Gaffney, 282 S.W.2d 817, 819-20 (Ky. 1955). In 1960, the Subsequent Injury Fund's liability was expanded to include the effects of a dormant non-disabling disease condition aroused into disabling reality by a work-related injury or occupational disease. In 1964, the Fund was renamed the Special Fund, and awards based upon the arousal of dormant conditions were apportioned between the employer and Special Fund.

In 1952, the workers' compensation laws became less voluntary and more mandatory. Most workers' compensation acts were written in such a way that an employer was deemed to have accepted the provisions of the workers' compensation law and an employee was required to affirmatively reject the Act rather than accept it. In Wells v. Jefferson Cnty., 255 S.W.2d 462 (Ky. 1953), the Kentucky Court of Appeals held that Act's requirement of a rejection by the employee instead of an affirmative acceptance was nonetheless a constitutional waiver of jural rights. The Court noted that the Act was constitutionally valid as to employers as was held in the State Journal case upon rehearing. As late as 1975, the Kentucky Supreme Court in Davis v. Turner, 519 S.W.2d 820, 822 (Ky. 1975) mandated that except for employers of exempt employees, there was no option on the part of the employer not to come under the law. In fact, employers who might otherwise have exempt employees under the Act can, if they so desire, operate under the Act by securing workers' compensation insurance and appropriately notifying the Department of Workers' Claims. An employee may continue to reject the Act by executing a standard form available through the Department of Workers' Claims and by filing that rejection with the Department. The courts have generally taken a dim view of voluntary rejections, however, particularly in circumstances where it appears the employer has made rejection of the Act as an obligation of employment.
In *Dick v. International Harvester Co.*, 310 S.W.2d 514 (Ky. 1958), the Court discussed acceptance of the coverage of the Worker's Compensation Act in the context of an occupational disease. In that case the employer had entered into a contract with the deceased employee's union. Coverage under the Act was found even though the employee had not specifically elected to come under the Act with regard to occupational disease. Later legislation provided that employees were covered under the Act in occupational disease cases as with injury cases.

Over the years between 1950 and 1972, the Act was periodically updated to increase the maximum amount of medical expenses that could be paid as a result of an injury, from $2,500 in 1950, up to $3,500 in 1966, and in 1964 adding an option to apply to the Board for payment of extraordinary medical expenses beyond that amount. In 1972, the act was amended to allow medical treatment for an injury at any time during disability, meaning for lifetime.

Permanent disability benefits were paid for ten years in the case of total disability, and for 450 weeks in the case of partial disability, according to the 1950 law. In 1956, the periods were reduced to 425 weeks for total disability, and 400 for partial disability. Certain injuries, such as loss of a finger or leg, were paid according to a schedule of weeks for the loss, and other injuries limited to 400 weeks.

**REFORMS AND MODERNIZATION OF THE ACT 1972-1987**

In 1972, the National Commission on Workmen's Compensation Laws sought to make uniform the various state laws concerning workers' compensation, and proposed Federal oversight in the form of national minimum standards to eliminate the disparities in laws across state borders and insure fair and equitable treatment of injured workers. Such federal oversight was never enacted due to the states' legislative responses in attempting to achieve the goals the Commission had established.

In late 1972, a special session of the Kentucky Legislature occurred. That Act, which became effective January 1, 1973, constituted a substantial change in the workers' compensation law. All disability benefits were paid for life. Claims for coal workers' pneumoconiosis became more significant and substantial. Coincidently, the wages of coal miners were on a significant upturn as was the awarding of Federal black lung benefits. Weekly benefits continued to be fairly low and were less than the state's average weekly wage.

1976 brought forth two decisions that played a significant role in a change in the workers' compensation law by the 1980 Legislature. The first was *Apache Coal Co. v. Fuller*, 541 S.W.2d 933 (Ky. 1976), in which the Supreme Court interpreted certain provisions of the Act as mandating a minimum weekly benefit whether it be a permanent total or permanent partial award and regardless of the individual's average weekly wage. The other decision was rendered in *C. E. Pennington Co. v. Winburn*, 537 S.W.2d 167 (Ky. 1976), in which the Court concluded the percentage of disability was multiplied by an individual's average weekly wage before it was reduced to the maximum benefit. Because of increasing wages being paid to employees, it was conceivable that a high wage earner would receive the statutory maximum benefits for life even though their actual disability might be 50 to 60 percent. In essence, individuals were permitted to return to work without fear of reopening by the employer while continuing to receive maximum benefits under the Act.
Compensation for death as a result of a work-related accident remained at $10,000 from 1972 until 1996, reducible by income benefits already paid, and not payable where there was a widow or survivor. In addition a funeral expense capped by $2,500 remained in effect until that time. Survivors' benefits were paid at 50 percent of the deceased's average weekly wage to the widow, and to the children based on a formula for the number of children.

During the regular Legislative session in 1980, significant modifications occurred. First, permanent partial disability benefits were limited to 425 weeks with any temporary total disability benefits reducing the number of weeks payable for permanent partial. By the same token, however, the weekly benefits under the Act received by the employee were increased. If an individual received a total occupational disability, it would be for that individual's life. The requirement for minimum weekly benefits ceased to exist for permanent partial disability claims but continued for total claims. Although the courts had, on a number of occasions, differentiated between "impairment" and "disability," the Act for the first time made reference to the use of the American Medical Association Guidelines to Functional Impairment. A statutory provision addressing permanent partial disability directed that disability be determined in accordance with the latest edition of the American Medical Association Guidelines to Functional Impairment or actual occupational disability. The court in Cook v. Paducah Recapping Serv., 694 S.W.2d 684 (Ky. 1985) concluded the language used by the Legislature did not mandate a minimum benefit in accordance with the American Medical Association Guidelines to Functional Impairment nor, for that matter, did it establish a maximum. In reality, the AMA Guidelines became merely one of the many factors to be used in determining "disability."

In 1980, the Act was amended to be known as the Workers' Compensation Act, and the Workmen's Compensation Board began being called the Workers' Compensation Board, in order to reflect the social and legal trend toward gender neutrality.

AMENDMENTS TO REDUCE COSTS 1987-1997

During the 1980s, the rising cost of workers' compensation to Kentucky employers, and the continued growth of the unfunded liability of the Special Fund became a major concern for industry and governmental leaders. Governor Martha Layne Collins formed a Task Force comprised of representatives of industry and labor following the end of the 1986 Regular Session of the General Assembly. The goals included achieving a less costly and speedier adjudication system. The General Assembly met in an Extraordinary Session, and the Workers' Compensation Act was amended effective October 26, 1987. Ten full-time Administrative Law Judges replaced the Workers' Compensation Board as the adjudicator of the merits of claims. A full-time three-member Workers' Compensation Board replaced the Circuit Courts as the first level of appeal. The Department of Workers' Claims was created, and was administered by the Workers' Compensation Board through a commissioner. The time frame for litigation of a claim was shortened. Medical and vocational evidence was permitted to be introduced into evidence without depositions. The number of medical witnesses was limited to three per party. Inconsistent provisions for survivor's benefits were changed. The Workers' Compensation Funding Commission was created to manage the Special Fund's finances. A more current life expectancy table was adopted. Two new options were provided to the claimant for payment of attorney fees. The reopening criteria was amended to provide for a change in occupational disability, rather than a change of condition. The black lung system was amended to provide criteria based upon both
chest x-rays and spirometric studies. A claimant with category 1 coal workers' pneumoconiosis and no breathing impairment was provided with a Retraining Incentive Benefit (RIB). A claimant with category 1 simple CWP and a breathing impairment of 10 to 20 percent was awarded 75 percent PPD benefits for 425 weeks. A claimant with category 1 CWP and a breathing impairment of 50 percent or more was presumed to be 100 percent PTD. If a claimant had category 2, 3, or complicated CWP, that claimant was presumed to be PTD. The Act was amended to require that miners must be exposed to the hazards of CWP in Kentucky for a continuous period of not less than two years during the ten years, or any five of the fifteen years, immediately preceding the date of last exposure. The coal mining industry was required to pay a larger share of the Special Fund assessment. Apportionment between the employer and Special Fund in claims involving pre-existing conditions of the back or heart were automatically fifty-fifty. The definition of a "partner" in a business was amended to eliminate shams attempting to exempt employees from coverage. The employer or insurer were required to pay medical bills within thirty days of receipt. Employers were prohibited from discriminating against workers with coal workers' pneumoconiosis in the hiring process. A civil action was created for employees who are harassed, coerced, discharged or discriminated against for pursuing a claim. The Workers' Compensation Nominating Commission was created to select candidates for ALJ and WCB positions. The attorney fee was capped at $6,500 in the original proceeding and at $3,500 on reopening.

In 1990, the Supreme Court held in Vessels v. Brown-Forman Distillers Corp., 793 S.W.2d 795 (Ky. 1990) that review by the Workers' Compensation Board was not equivalent to a review by a court, and that a litigant in a workers' compensation claim was constitutionally entitled to one appeal as a matter of right from one court to another. Ky. Const. §115. The first court review of a claim occurs in the Court of Appeals. Since that decision, Workers' Compensation Claims were entitled to an appeal as a matter of right to the Supreme Court, instead of by discretionary review. Special Civil Rules were created to accommodate the number of workers' compensation cases appealed to the Court of Appeals from the Workers' Compensation Board and to the Supreme Court.

The Act was amended effective July 13, 1990. The cap on the attorney fee was removed both for the original claim and for reopening. The number of ALJs was increased to fifteen. Additional language was included in KRS 342.012 regarding the definition of a qualified partner, and requiring the filing of the partnership identification number assigned by the IRS and the tax return of the partnership. If TTD benefits were denied, delayed or terminated without reasonable foundation, the rate of interest was 18 percent, not 12 percent, and the ALJ can award an attorney fee not charged against or deducted from benefits otherwise due the employee. New provisions were made for adjudication of RIB claims. The insurer was no longer required to advise the WCB when a policy lapsed, terminated, expired or non-renewed; it was only required to report when a policy was cancelled. Any mutual insurance association, except city, county, municipal or urban-county employers, are required to have eleven members, instead of only two. The rehabilitation panel was eliminated. Burial expense was increased from $2,500 to $4,000. For calculation of PPD benefits, the "latest edition available" was to be used instead of the 1977 edition. The provision allowing forty-five days to appeal from an ALJ decision in a RIB claim was deleted.

The 1987 amendments did not meet expectations for sufficiently reducing the cost of workers' compensation to Kentucky employers, and did not sufficiently address the issues involving the Special Fund's growing unfunded liability. The voluntary insurance
market had declined due to prohibitive costs, insurance options were becoming fewer, and approximately 50 percent of the private workers' compensation insurance market was in the assigned risk pool. The General Assembly recognized that this situation threatened the economic welfare of the Commonwealth and its ability to create and maintain jobs for the citizens. The Act was amended again effective April 4, 1994. The authority to administer the Department of Workers' Claims was removed from the WCB, and placed in the commissioner. The role of WCB was now solely as an appellate body. An Ombudsman program was created to help injured workers navigate a system where the limitations on attorneys' fees prevented workers from obtaining counsel. The definition of "physician" was expanded. Employers were allowed to provide medical services through a managed care organization. Provision was made to preclude acceleration of the Special Fund's payment period when the claimant unilaterally settled with the employer. Apportionment to the Special Fund was capped at 50 percent in all claims. Income benefits for permanent partial disability were based upon the impairment rating or the percentage of occupational disability, whichever was greater. If there was no occupational disability, then there was no award of PPD benefits based upon the impairment rating. If the employee returned to work at equal or greater wages, then the award of PPD benefits could not exceed double the impairment rating. The impairment rating was to be determined pursuant to the most recent edition of the AMA Guidelines to the Evaluation of Permanent Impairment. The "tier down" provisions reduced all income benefits beginning at age sixty-five, with identical reductions at ages sixty-six, sixty-seven, sixty-eight, sixty-nine and seventy, if the injury occurred prior to the employee's sixty-fifth birthday. If the PPD was 50 percent or less, the compensable period was 425 weeks. If the PPD was over 50 percent, then the compensable period was 520 weeks. The attorney fee was capped at $15,000. Mental/Mental claims were excluded from coverage. The commissioner was allowed to establish a pilot program to integrate workers' compensation medical benefits with health insurance benefits. The commissioner was required to contract with a qualified consultant to evaluate the methods of health care delivery, quality assurance and utilization mechanisms, type, frequency and intensity of medical services, risk management programs, and the medical fee schedule, and then promulgate Regulations to effect a 25 percent reduction in the total cost of the system. The nature of vocational rehabilitation was changed from mandatory to voluntary, in the absence of an Order – these amendments essentially eliminated Regulations promulgated pursuant to earlier law providing these services on a mandatory basis. The number of ALJs was increased to sixteen. The Workers' Compensation Insurance Plan, the assigned risk pool, was not allowed to write new policies or renew policies after September 1, 1995. Kentucky Employers' Mutual Insurance (KEMI) was created, and became the market of last resort and a competitive source of insurance in the voluntary market.

Kentucky again faced an emergency situation. The cost of workers' compensation continued to climb, attracting new businesses to Kentucky was becoming even more difficult, and some insurers were cutting back on writing workers' compensation insurance. What was intended to be another sweeping reform of the Workers' Compensation System was enacted by the General Assembly meeting in an Extraordinary Session, with the amendments becoming effective December 12, 1996. Many of the 1994 amendments were deleted. The Workers' Compensation Board was to be abolished in four years, with the creation of an informal claim resolution system using Arbitrators, with a right of appeal to an Administrative Law Judge. In an attempt to reduce the number of claims and the number of awards of permanent total disability benefits, significant changes were made in definitions of terms, such as "injury,"
"temporary total disability," "permanent partial disability" and "permanent total disability." For example, "injury" does not include the effects of the natural aging process. The Special Fund was abolished for claims arising from and after December 12, 1996. The commissioner was authorized to promulgate Regulations establishing Utilization Review of medical treatment. The commissioner was authorized to promulgate Medical Practice Parameters, and later adopted practice parameters for treatment of acute lower back injuries. A four-year limitation was placed on reopening, except for medical fee disputes, fraud or the 2x multiplier. No claim could be reopened for two years, which created a two-year window of opportunity for reopening. Attorney fees were capped at $2,000 before an Arbitrator, and $10,000 before an ALJ. The caps on attorney fees were also made applicable to defense attorneys. PPD benefits were reduced by 50 percent when the employee returned to work at equal or greater wages. PPD benefits were multiplied by 1.5 when the employee lost the physical capacity to perform the same type of work he performed when injured. A statute limiting compensation and establishing a procedure for compensating occupational hearing loss was added. All income benefits terminate when the claimant becomes eligible for normal old age Social Security retirement benefits.

AMENDMENTS TO THE 1996 CHANGES AND THE PRESENT LAW

The 2000 Amendments to the Act became effective on July 15, 2000. Part of the theme of the 2000 amendments was that the General Assembly had gone too far in its attempts to reduce the cost of workers' compensation, rendering it unfair to injured workers. The Workers' Compensation Board was retained as an appellate body, rather than being abolished. The Arbitrator system was abolished. Claims were again initially litigated before an Administrative Law Judge. The statutory grid factors for converting the impairment rating to PPD were increased. When the employee returned to work at equal or greater wages, during cessation of that employment, PPD benefits were multiplied by two. If the employee lost the physical capacity to return to the type of work performed at the time of injury, PPD benefits were multiplied by three with add-ons for advanced age or less than a high school education. The penalty for a safety violation by the employer was increased from 15 percent to 30 percent. The $25,000 lump sum payment for a work-related fatality was increased to $50,000, with an annual escalation clause based upon the Average Weekly Wage of the state. The four-year limitation on reopening does not apply to seeking TTD benefits during the period of the award. The prohibition on reopening within two years of the award was eliminated. Reopening was prohibited within one year of a prior motion to reopen. The terms of the WCB members were staggered. Attorney fees were capped at $12,000. The number of ALJ positions was increased to nineteen.

The theme of the 2002 amendments again was to ease the impact of the 1996 amendments on the black lung program. The Division of the Special Fund was renamed the Division of Workers' Compensation Funds. The Coal Workers' Pneumoconiosis Fund ceased to be a Division with its own Director, and is administered by the Director of the Division of Workers' Compensation Funds. Major changes were made to the black lung program in terms of how claims were to be adjudicated. This was known as the consensus process. For black lung claims, only chest x-rays could be used, and only interpretations by B-readers were admissible. A miner with category 1 CWP and spirometric values of 80 percent or more were allowed the one time only RIB award which shall only be paid while the employee is enrolled and actively and successfully participating in a bona fide training and education program or pursuing a GED. The
schedule of benefits which provided irrebuttable presumptions of degrees of disability based on the category of pneumoconiosis and the degree of reduced spirometric findings was modified from the previous Act.

In 2004, the Act was amended to establish minimum financial standards for self-insured groups. In 2006, the Act was amended to create a guaranty fund to pay claims that occurred prior to the creation of the self-insurance guaranty funds previously created effective March 1, 1997.

In 2007, the Act was amended to provide that public sector self-insured employers shall not be required to deposit funds as security, indemnity, or bond to secure the payment of liabilities under this chapter, if the public employer has authority to raise taxes; raise tuition; issue bonds; raise fees or fares for services provided; or has other authority to generate funds for its operation. In an effort to encourage drug-free workplace programs, the legislature authorized the commissioner to approve rating plans and premium credits for employers with drug-free workplace programs. The medical fee schedule was required to provide coverage and payment for surgical first assisting services to registered nurse first assistants.


On December 28, 2011, the Kentucky Supreme Court issued its Opinion in Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011). The Court declared that the consensus process for adjudicating black lung claims violated due process of law constitutional protections. To date, the Department of Workers' Claims has struggled to administer these claims without a remedial enactment by the Legislature.

In 2014, the Act was amended to require every partnership and limited liability company to provide, upon the request of the commissioner, a copy of its partnership agreement or articles of organization for purposes of demonstrating compliance with the Act. The following language was deleted from KRS 342.640 defining "employee": "every person regularly selling or distributing newspapers on the street or to customers at their homes or places of business."

CONCLUSION

In 2016, we still practice under much the same statute as was enacted in 2000, constructed around the principles of the original statute. Interpretations of the 2000 statute have altered the language of some of the provisions, but income benefits are still calculated under that law, and the procedure of adjudication and appeal has remained the same since that time. Modern changes to procedure may be coming by way of electronic filing of pleadings and constant re-interpretation of the act by the Workers' Compensation Board, the Court of Appeals and Supreme Court. All of these are manifestations of the continuation of 100 years of evolution and compromise of the Workers' Compensation Act in Kentucky.
I. SETTLEMENT

Baytos v. Family Dollar, 2014-CA-001053-WC, 2015 WL 1610075 (Ky. App. Mar. 20, 2015). Carl Grayson and ALJ Polites v. Melanie Gabbard. To Be Published. Mamie Baytos’ husband, Stephen, sustained a serious work-related injury (a torn thoracic aorta) on 2/9/06, and died on 12/3/09. Before Stephen passed away, he entered into a settlement with Family Dollar. He accepted a lump-sum payment and agreed not to pursue any future claims. The settlement was not signed by Mamie, and it did not include references to any future rights that she might have. On 8/31/11, Mamie filed a motion to reopen Stephen’s claim in order to seek death benefits. The ALJ determined that Stephen’s death was a result of the injury, and he awarded death benefits to Mamie. WC B reversed, finding that Mamie’s claims were barred by the settlement agreement, and denied her benefits. CA vacated and remanded.

Kentucky Revised Statute[s] (KRS) 342.750 allows surviving spouses to receive death benefits if the injured employee dies within four years of sustaining the injury. It makes no mention of prior agreements reached between the employer and the injured employee.

There is no dispute that the settlement between Family Dollar and Stephen precluded him from asserting any future claims. [WCB] relied on the settlement when ruling that Mamie’s claim is derivative of Stephen’s claim, holding that her claim was barred. [WCB] reasoned that KRS 342.750 (the statute which governs death benefits) and KRS 342.730 (the statute under which Stephen and Family Dollar reached a settlement) are both direct income benefits. Thus, Mamie’s entitlement to any benefits was not addressed or implicated.

The predecessor to our Supreme Court provided guidance for this scenario in Brashear v. Old Straight Creek Coal Corp., 32 S.W.2d 717 (Ky. 1930). The employer coal company compensated Brashear for an injury covering a period of time until he signed a receipt indicating that he had received the final payment. Id. The Court held that Brashear’s "final settlement [did] not prevent an award to the widow . . ." 32 S.W.2d at 718. The Court went on to explain that:

"[H]er motion to reopen the case should properly be treated as a motion to reopen so far as the application which she had filed was concerned. The compensation due her, if any, is quite a different thing from the compensation paid to her husband."
The clear holding of Brashear circumvents any need for us to seek guidance by statutory construction. Nothing in the current statutes contradicts Brashear, and its circumstances are strikingly similar to the ones in the case before us.

Additionally, other sources are harmonious with Brashear indicating the clear and separate right of the surviving spouse to seek compensation.

The dependent's right to death benefits is an independent right derived from statute, not from the rights of the decedent. Accordingly, death benefits are not affected by compromises or releases executed by decedent.

[WCB] did not provide authority for its holding that Mamie's claim was barred by Stephen's settlement with Family Dollar. Therefore, we must follow the precedent provided by Brashear and reinforced by other sources.

COMMENT: Family Dollar has appealed to the Supreme Court.

II. PAYMENTS IN LIEU OF COMPENSATION

Quad/Graphics, Inc. v. Holguin, 2014-SC-000391-WC, 2015 WL 1544253 (Ky. Apr. 2, 2015). Jo Alice Van Nagell v. Larry Ashlock & ALJ Hays. Not to Be Published. Mario Holguin was injured when the tip of the third finger on his left hand was severed by a machine. The fingertip was successfully reattached by surgery. Holguin was then released to "one handed duty" and returned to work the next day. He was placed in several light duty jobs from 12/28/11 through 2/12/12. The light duty work included checking books for printing errors, painting the facility, and odd jobs. Quad's safety coordinator testified that the work performed by Holguin would not have been assigned to an employee under normal conditions. She stated the jobs were assigned to Holguin in an attempt to find work which he could complete within the constraints of his physical restrictions. Quad contended that the wages paid to Holguin were not bona fide, but were paid as a benefit to him and should be treated as being paid in lieu of TTD benefits. The ALJ awarded TTD benefits from 12/28/11 to 2/12/12. The ALJ found that Holguin had not reached MMI and that he was not able to physically perform his customary work during that time period. The ALJ did not allow Quad a credit for the wages paid during the period of TTD because those payments did not qualify as an offset or credit for unemployment benefits, and were not made under a non-compensation disability plan funded solely by the employer. WCB affirmed and found as a matter of law that Holguin was paid bona fide wages. CA affirmed.

KRS 342.730 provides two circumstances where an employer can receive a credit against its TTD benefits obligation. KRS
342.730(5) allows an offset for unemployment benefits paid during a period in which TTD or [PTD] benefits were paid. KRS 342.730(6) provides for an offset for payments made under a qualifying employer-funded disability or sickness and accident plan. Quad does not argue it is entitled to a credit under these statutes and the ALJ found that neither provision applied in this matter. Those findings are supported by the record.

However, Quad does argue that it should receive an offset against the TTD benefits obligation it owes Holguin for the period he received light duty wages because the work he performed was not 

*:bona fide*. Quad argues that it voluntarily paid Holguin his regular salary and benefits in lieu of paying him TTD benefits and should receive a credit as granted in Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990). In that matter a credit for voluntary payments paid against past-due income benefits on a dollar for dollar basis was allowed as long as future income benefits were not affected. See Millersburg Military Institute, 260 S.W.3d 339 at 342. Quad argues that if it does not receive the offset, Holguin receives an unfair and unnecessary windfall. Quad contends that without an offset for the light duty wages, employers will stop placing its[sic] injured employees on light duty work and the result will force employees to live off of reduced TTD benefits.

While Quad makes a good public policy argument in favor of receiving an offset, the workers' compensation statutes do not allow for a credit like the one requested in this situation. "Workers' compensation is a statutory creation. Thus, the proper forum for the argument is the legislative." (internal citation omitted) Quad has failed to satisfy its burden to present a proper legal basis for its offset request.

### III. AVERAGE WEEKLY WAGE

Jewell v. Ford Motor Company, 2014-SC-000234-WC, 462 S.W.3d 713 (Ky. 2015). Ched Jennings v. Pete Glauber. Joseph Jewell was injured on 12/4/09. The ALJ determined that: Jewell had an AWW of $968.20; he suffered a period of TTD entitling him to benefits at the rate of $645.47 per week; and he has 5.95 percent PPD, entitling him to benefits at the rate of $30.98 per week. The ALJ found that unemployment benefits paid to Jewell during the fifty-two-week period prior to the injury should not be included in the calculation of AWW. WCB, CA & SC affirmed.

... unemployment compensation benefits are not money payments for services rendered ... such payments to a laid off employee are made because the employee is not rendering any service to the employer, not because he or she is rendering a service to the employer.
Furthermore, with the exception of gratuities, wages are "received from the employer." Unemployment benefits are not received from the employer but, as noted in Ford's benefit plan document, are "State System Benefit[s]." In fact, Ford cannot calculate sub-pay until after an employee begins receiving unemployment benefits because Ford does not know how much unemployment compensation the employee will receive. Certainly, if Ford was paying that benefit to the employee, it would know the amount of the payment. Therefore, based on the unambiguous language of KRS 342.140(6), unemployment compensation benefits are not wages.

. . . Jewell argues that unemployment compensation benefits should be included as wages because: (1) employers are entitled to a credit for unemployment benefits pursuant to KRS 342.730(5); (2) unemployment compensation benefits, like wages, are paid directly to the employee and taxable; and (3) Ford uses unemployment benefits "to compensate their employees instead of paying the contractual base rate." We address each argument below.

First, KRS 342.730(5) provides that "[a]ll income benefits pursuant to this chapter otherwise payable for TTD and PTD shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or [PTD]." This part of KRS Chapter 342 addresses liability for benefits due to disability that results after an injury has occurred. It has nothing to do with AWW, which is based on wages earned before an injury occurred.

Second, Jewell is correct that unemployment compensation is paid directly to the employee and taxable, just as wages are. However, . . . it is, in part, the source of a payment that determines whether that payment is considered wages. Wages, excluding gratuities, are "received from the employer." The unemployment compensation system is funded, in part, by employer assessments; however, funds in the system are "commingled and undivided," KRS 341.490(2), and benefits are "paid through employment offices, or such other agencies as may be designated by regulation." KRS 341.380(1). Because unemployment benefits are not directly traceable to an individual employer and are not directly paid to a claimant by an individual employer, they are not "received from [an] employer" and are not wages. Furthermore, because unemployment compensation benefits are not wages, whether they are taxable is irrelevant.

Third, Jewell states that Ford is obligated by its contract with the Union to pay 95 percent of base pay during lay-offs. He insinuates that Ford nefariously uses unemployment benefits in order to meet that obligation. Jewell has not cited to where in the record we can find the actual contract to which he refers. Instead, he cites us to the "Your Employee Benefits" document to support his argument.
That document states that employees are entitled to weekly "Regular Benefits" based on 95 percent of weekly after-tax pay less any state unemployment benefits. It does not state that Ford is obligated to pay 95 percent of weekly after-tax pay. In fact, it says just the opposite. If this document and Ford's method of calculating "Regular Benefits" are not in keeping with the collective bargaining agreement, that is an issue for a different forum. Furthermore, whether Ford takes, or does not take, a credit for unemployment compensation benefits in calculating "Regular Benefits" does not change the nature of the unemployment compensation benefits for workers' compensation purposes. Those benefits are not payments for services rendered and they are not received from the employer; therefore, they are not wages.

... 

Our workers' compensation statute ... is separate and apart from our unemployment statute. Our workers' compensation system ... is designed to compensate for injuries, not economic fluctuations. And our wages ... are based on actual earnings from employment, not payment made to the unemployed.

IV. EQUAL OR GREATER WAGES – TEMPORARY TOTAL DISABILITY

Livingood v. Transfreight, LLC, 2014-SC-000100-WC, 467 S.W.3d 249 (Ky. 2015). Larry Ashlock v. Walter Ward & ALJ Swisher. Alton Livingood injured his left shoulder on 9/16/09, while working as a forklift operator. He underwent two shoulder surgeries and was off work from 11/11/09 through 3/2/10. He returned to light duty from 3/3/10 through 10/5/10. Livingood subsequently underwent a third shoulder surgery and was off work again from 10/6/10 through 12/12/10. TTD benefits were paid for the periods he was off work. On 12/13/10, Livingood returned to work without restrictions. Four hours into his shift, Livingood bumped into a pole while operating the forklift. There was no damage. On 12/23/10, Transfreight terminated his employment. Livingood was already on "full and final warning" status with the next step being termination when the forklift incident occurred. Otherwise, his employment would have continued. On 12/18/11, Livingood started working for Vogt Management packing post-it notes at $8.50 an hour. Livingood testified that he would have had to work two weeks at Vogt to get close to what he had earned in one week at Transfreight. The AWW was stipulated to be $550.43. The ALJ noted that Livingood's hourly rate remained $13.25 from the time of the injury until his termination. While on light duty, Livingood was on the payroll at his regular rate of pay. His light-duty activities included changing batteries in forklifts and monitoring restrooms to see who was writing on walls. In addition, he was given an assignment to find freight that was in the wrong place, write it down and have the forklift operators move it. He estimated that he spent 50 percent of his time changing batteries, 25 percent of his time monitoring bathrooms and 25 percent going around and making sure everything was in the right place. Even before his injury, he performed the "misplaced freight" duties on a daily basis. Prior to the injury Livingood also had the job of changing batteries for a five-month period. Immediately before his injury, however, he operated a forklift 100 percent of the time. The ALJ denied
Livingood's request for TTD benefits while he was on light duty. Except for bathroom monitoring, Livingood had performed the other activities before the injury; further, they were not a make-work project. The ALJ was not persuaded that Livingood was terminated due to his disabling shoulder injury and declined to award the 2x multiplier. The ALJ awarded PPD benefits in the amount of $11.93 per week, based upon a 5 percent impairment rating. WCB & CA affirmed. SC affirmed the TTD ruling, and reversed the 2x multiplier ruling.

. . . [Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000)] does not "stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD." Livingood had the burden of proof on the issue. Where the ALJ finds against the party with the burden of proof, the standard of review on appeal is whether the evidence compelled a contrary finding. (internal citation omitted) [WCB] and [CA] were not convinced that it did. Nor are we.

. . .

We conclude that the construction of KRS 342.730(1)(c)2 in [Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009)] does not effectuate the legislative intent. Requiring that the cessation of employment at the same or greater wage must relate to the disabling injury does not promote the statute's obvious purpose of encouraging continued employment. Instead, it limits the statute's application. Moreover, such a construction does little to discourage employers from taking workers back after an injury just long enough to avoid liability for a greater award.

. . .

Given our analysis, we conclude that Chrysalis House was incorrect in holding that the reason for cessation of work at the same or greater wage under KRS 342.730(1)(c)2 must relate to the disabling injury. To that extent, Chrysalis House is overruled. Nevertheless, a literal construction of KRS 342.730(1)(c)2 would lead to an unreasonable result if an employee like the one in Chrysalis House is allowed to benefit from his own wrongdoing. KRS Chapter 342 evinces a legislative intent that an employee should not benefit from his own wrongdoing.

. . .

[W]e conclude that the legislature did not intend to reward an employee's wrongdoing with a double benefit. We hold that KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another. In the instant case, the substantial evidence
of record does not establish that Livingood's conduct was of that nature. Rather, the ALJ concluded that "but for the prior transgressions the pole bumping incident would not have resulted in [Livingood's] termination."

V. CUMULATIVE TRAUMA

Consol of Kentucky, Inc. v. Goodgame, 2014-SC-000305-WC, 2015 WL 5654854 (Ky. Sep. 24, 2015). To Be Published. Jeffrey Robert Soukup & ALJ Miller v. Sherry Brashear. Osie Goodgame, Jr. worked for Consol as a coal miner in Kentucky from 1992 until 7/31/09 when Consol stopped operations at the mine where he worked. Goodgame began working at one of Consol's mines in Virginia on 8/1/09. On 1/19/10, Goodgame resigned and took early retirement. Goodgame filed this claim on 1/17/12, alleging that he suffered injuries to his upper and lower extremities and to his entire spine as a result of cumulative trauma suffered performing work as an underground coal miner. Following the hearing, the ALJ dismissed Goodgame's claim, finding that, at the latest, Goodgame's two-year statute of limitations began to run on 8/1/09, two years after he last worked in Kentucky. Furthermore, the ALJ found that Goodgame had not suffered any injury in Virginia. WCB reversed. CA affirmed. SC affirmed.

... [F]or cumulative trauma injuries, the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised by a physician that he has a work-related condition.

... [T]he ALJ in this case did not make a factual determination concerning when Goodgame was advised he had a work-related condition. ... Thus, ... the ALJ must, on remand, make that determination.

Consol argues ... that the manifestation date of Goodgame's injury is irrelevant because KRS 342.185(1) acts as both a statute of limitations and a statute of repose.

... In Manalapan Mining Company, Inc. v. Lunsford, 204 S.W.3d 601 (Ky. 2006), ... a hearing loss claim, this Court specifically held that KRS 342.185(1) acts as both a statute of limitations and a statute of repose in cumulative trauma claims. Lunsford, who last worked in 2001, testified he had been exposed to hazardous occupational noise for thirty-seven years. Id. at 602. In late 2003, Lunsford underwent a hearing exam and, in early 2004, a physician advised him that he had a noise-related hearing loss. Id. He filed his claim for benefits related to that hearing loss shortly thereafter. Id. This Court held that the logic expressed in Coslow of not applying the discovery rule to a single-traumatic-event injury, absent a statute of repose, applied to cumulative trauma claims. Id. at 605. Therefore, the Court held that Lunsford's claim
was barred because he did not file it within two years of his last exposure to hazardous occupational noise. *Id.*

While we agree that KRS 342.185(1) acts as both a statute of limitations and a statute of repose, we now disagree with the holding in *Lunsford* that the repose aspect of that statute is triggered by the date of last exposure for three reasons. First, the specific statutory repose periods in KRS 342 all begin to run when their related statutes of limitations begin to run. In occupational disease claims, the date of last exposure triggers the running of both periods. KRS 342.316(4)(a). In HIV claims, the date of injurious exposure triggers the running of both periods. KRS 342.185(2). Therefore, there is a clear legislative intent that the same date should trigger both limiting provisions.

In cumulative trauma claims, this Court has determined that, for statute of limitations purposes, the date of accident, which triggers the running of the statute of limitations, is the date a claimant is informed of a work-related cumulative trauma injury. To be consistent with the legislative intent as directly expressed in KRS 342.316(4)(a) and KRS 342.185(2), the repose aspect of KRS 342.185(1) must also begin to run on the date the statute of limitations begins to run – the date a claimant is informed of a work-related cumulative trauma injury.

Second, in *Lunsford*, the majority tied the limitations and repose periods to the last date worked or the date of last exposure to the trauma. . . . There is no "date of last exposure" or "date last worked" language in KRS 342.185(1). As the majority noted in *Coslow*, the legislature has amended KRS 342 numerous times. *Id.* at 614. However, it has not added the aforementioned language to KRS 342.185(1).

Finally, KRS 446.080 states that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . .". We have long held that KRS Chapter 342 should be construed so as to effectuate its beneficent purposes, i.e. to compensate injured workers for the effects of their injuries. (internal citation omitted) The majority opinion in *Lunsford* does exactly the opposite by setting a different method for determining the triggering date for the statute of limitations and the period of repose.

**VI. DEATH BENEFITS INTEREST**

benefit to Mindy, as administratrix of the estate, in the amount of $73,988.98, plus $583.37 interest. The ALJ ruled that Keeling's estate was entitled to additional interest from the day of his death. WCB & CA affirmed.

Flagship argues that it did not become obligated to pay the death benefit until the "deceased estate was opened and a representative appointed." According to Flagship, the deceased estate did not exist until May 6, 2014, when Mindy Keeling was appointed as the administratrix of her late husband's estate. We disagree.

The statute does not say that the payment is due when the administrator is appointed or when some other action in probate has been accomplished. It states that the payment is due to the "decedent's estate." The estate comes into existence at the moment of the death . . . Mr. Keeling's estate came into existence at the very moment of his death. Because his death was the result of a work-related injury, Flagship became responsible for making the lump-sum payment to the estate at the moment of death. The liability existed regardless of whether an administrator had been appointed to represent the estate and interest began accruing on the payment when it was due.

VII. TEMPORARY TOTAL DISABILITY

Zappos.com v. Mull, 2014-SC-000462-WC, 2015 WL 6590024 (Ky. Oct. 29, 2015). Not to Be Published. Don Walton v. Jim Howes & ALJ Coleman. Sonia S. Mull worked full time for Travelex and part time for Zappos. She began her employment with Zappos in 8/2010, working ten hour shifts on the weekend. Mull's job required her to engage in prolonged standing while retrieving boxes from a conveyor, scanning the boxes, and putting them into shipping boxes. The job was fast paced and repetitive. Mull often handled up to 300 boxes per hour. At some time in 1/2011, Mull began to notice numbness and stiffness in her hands. Mull continued to work hoping that the problems with her hands would improve. Unfortunately, Mull did not improve and she sought treatment from her family physician, Dr. Sparks, on 3/4/2011. Dr. Sparks believed the problem with Mull's hands was related to her work at Zappos. Mull reported the doctor's diagnosis to her manager, and was assigned light duty work. The light duty work involved scanning packages. Mull continued to work at Zappos performing the light duty work until 5/15/2011, when she quit, not because she could no longer perform the light duty tasks, but because she wanted to spend more time with her family. Mull filed this claim alleging she sustained a repetitive motion injury to her right middle finger during the scope of her employment with Zappos. She continued in her concurrent employment as a currency exchange clerk with Travelex. Dr. McEldowney placed Mull at MMI on 12/29/2011. The ALJ awarded TTD benefits for the period from 5/15/2011 through 12/29/2011. WCB reversed on the grounds that nothing in the record establishes the light duty work constituted minimal work and she worked regular shifts while under restrictions. She was also capable of performing, and continued to perform for more than one year post-injury, her primary fulltime 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. CA reversed and reinstated the award of TTD benefits. CA held that the phrase "return to employment" was only achieved if the employee can perform the entirety of her pre-injury employment duties within the post-injury medical restrictions. SC reversed.

... [In order for a claimant to be entitled to TTD benefits, she must satisfy a two-prong test: (1) she must not have reached MMI; and (2) she must not have reached a level of improvement that would permit her return to employment. (internal citation omitted) Central Kentucky Steel v. Wise stands for the proposition that TTD benefits for a claimant should not be terminated just because she is released to perform minimal work if it is not the type of work that was customary or that she was performing at the time of his[sic] injury. 19 S.W.3d at 657. However, "Wise does not 'stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.'" Livingood v. Transfreight, LLC, __ S.W.3d __ (Ky. 2015). Accordingly, the ALJ must analyze the evidence in the record and determine whether the light duty work assigned to the claimant is not minimal and is work that she would have performed before the work-related injury.

...Mull satisfied the first prong of the TTD benefit test because she had not reached MMI. But, the ALJ did not perform an in depth analysis of the second requirement, whether the light duty work Mull performed was a return to her regular and customary employment. However, despite the lack of an in depth analysis the facts of this matter are relatively clear, and we must agree with [WCB] that substantial evidence does not support the ALJ's award of TTD.

Prior to her injury, Mull's job tasks included retrieving a product, scanning it, and placing it in a shipping box. After the injury, Mull was restricted to scanning items. Mull testified that scanning was a normal part of her pre-injury employment. The light duty work is not a significant diversion from her original employment and there is no indication the work was minimal. Mull also received the same hourly wage. Mull returned to her regular and customary employment at Zappos and she does not satisfy the second requirement to receive TTD benefits.

Additionally, we note that Mull admitted she voluntarily quit working for Zappos because she wanted to spend more time with her family and not because she was unable to continue performing light duty work. The purpose of TTD benefits is to cover a period of time in which an employee cannot work or can only perform minimal work. We acknowledge that a claimant can
receive TTD for an injury sustained at one job while able to continue working a second job. (internal citation omitted) But, TTD benefits should not be awarded to a claimant who chooses not to work for reasons unrelated to her work-related disability. Accordingly, the record does not support the ALJ's grant of TTD benefits to Mull.

VIII. CUMULATIVE TRAUMA

Hale v. CDR Operations, Inc., 2014-SC-000062-WC, 474 S.W.3d 129 (Ky. 2015). McKinnley Morgan v. James Cooper. Ronnie Hale was employed by CDR for three months as a bulldozer operator. Before that, Hale had worked as a bulldozer operator for various other employers for thirty years. Hale filed this claim against CDR alleging cumulative trauma and an injury date of 2/7/2012. Relying on Dr. Madden, the ALJ concluded that Hale sustained cumulative trauma injuries which became manifest on 2/7/2012, while he was employed at CDR, and that he was PTD. WCB vacated and remanded, concluding that 2/7/2012 could not be the date of manifestation and that Southern Kentucky Concrete Contractors, Inc. v. Horace W. Campbell, 662 S.W.2d 221 (Ky. App. 1983), required apportionment of liability based upon the percentage of Hale's impairment attributable to the three months he worked at CDR. CA affirmed. SC reversed.

"Although both the employee and the employer have rights under the Workers' Compensation Act, the primary purpose of the law is to aid injured . . . workers." (internal citation omitted) Nothing in KRS Chapter 342 limits the liability of the employer, in whose employ the date of manifestation occurred, to the percentage of the claimant's work-life spent there. Kentucky Southern Concrete has no application under the current statutory scheme.

. . .

The date of manifestation was not raised as an issue on appeal to [WCB]. Nevertheless, [WCB] determined that February 7, 2012, "does not comprise a date of manifestation."

The date of manifestation was never at issue before the ALJ. It was stipulated. The signed BRC Memorandum and Order reflects that the parties stipulated that "[Hale] sustained work-related injury(ies) on 2-7-12 (alleged)." Neither party sought relief from the stipulation.

Only contested issues shall be the subject of further proceedings.

Here, the ALJ properly found that the date of manifestation was February 7, 2012, because he was bound by the parties' stipulation. (internal citations omitted)

. . .
[WCB] has no authority to set aside a valid stipulation of fact, *sua sponte.*

... 

Dr. Madden noted that Hale’s past medical history was significant for two injuries due to MVAs – a lumbar compression fracture in 2008 with subsequent kyphoplasty and a cervical fracture in the late 1980s. Dr. Madden reviewed medical records from Hale's primary care provider from 2004-2010 which suggest "a gradual progression of increasing neck and back problems due to chronic degenerative changes . . ." He also reviewed the report of a 2008 lumbar MRI which revealed degenerative disc disease, post traumatic changes with kyphoplasty due to L-1 compression fracture . . . 

... 

Dr. Madden explained that Hale "suffered cumulative workplace trauma over the course of many years, resulting in a cervical and lumbar disc disorder with radiculopathy that is consistent with the abnormal findings on exam."

... 

Dr. Madden was asked if he could determine, within reasonable medical probability, whether the three-month period Hale operated a bulldozer at CDR would have contributed to his condition. Dr. Madden explained that he considered operating a bulldozer to be fairly significant trauma . . . Dr. Madden testified that "even three months, even a short period of time – again, that straw that broke the camel's back scenario. So yes, that could have occurred during that three month period."

... 

CDR emphasizes that Dr. Madden did not review any diagnostic studies performed after Hale started working there . . . It is not apparent of record that any diagnostic studies were performed after Hale started working at CDR. It matters not.

... 

"Although KRS 342.0011(1) clearly requires that there be objective medical findings of a harmful change in the human organism in order for that change to be compensable, we are not persuaded that KRS 342.0011(1) requires causation to be proved by objective medical findings." (internal citation omitted)
Dr. Madden's opinion provides a sufficient evidentiary foundation to support the ALJ's decision.

IX. TEMPORARY TOTAL DISABILITY

Trane Commercial Systems v. Tipton, 2014-SC-000561-WC, 2016 WL 671170 (Ky. Feb. 18, 2016). To Be Published. Don Walton & ALJ Polites v. Larry Ashlock. On 5/6/10, while working in the control department testing air conditioner units, Delena Tipton fell and fractured her right patella. Tipton's job required her to frequently bend, squat, crawl, and kneel in order to connect various electrical components in the units for testing. Prior to performing this job, Tipton had worked assembling the units. Following her injury, Tipton was off work until 3/22/11, when she was released by her treating physician to return to sedentary work activity with no overtime. Tipton did return to work at a different job, assembling electrical-circuit boards and earning the same hourly rate of pay as she had before the injury. This job required no squatting, bending, kneeling, or crawling, and Tipton could perform it while either sitting or standing. On 7/7/11, Tipton's physician released her to return to her pre-injury job duties, but continued the eight-hour-per-day restriction. Tipton, who did not believe she could perform her pre-injury job duties without significant problems, bid on and was permanently placed in the circuit board assembly job. At some point thereafter Tipton began working overtime again, and her hourly pay rate has increased. Trane stopped paying Tipton TTD benefits when she returned to work. Tipton argued that she was entitled to those benefits through 7/7/11, when her physician determined that she had reached MMI and released her to return to her pre-injury job. The ALJ denied Tipton's claim for the additional TTD benefits, finding that her release and return to "customary, non-minimal work" justified termination of TTD benefits when Tipton returned to work on 3/22/11. WCB affirmed. CA reversed. SC reversed.

. . . [T]he following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

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

Applying the preceding to this case, we must agree with the ALJ that Tipton was not entitled to TTD during the period in question.

X. EQUAL OR GREATER WAGES

Fuertes v. Ford Motor Co., 2015-SC-000268-WC, 2016 WL 671801 (Ky. Feb. 18, 2016). To Be Published. Ched Jennings v. Peter Glauber & ALJ Kerr. John Fuertes suffered a work-related accident on 10/30/03. He was later fired for "performance related issues." Fuertes contends that he was fired because of his work-related injuries. Specifically, Fuertes states that he missed a lot of work to undergo rehabilitation or physical therapy. He also was under work restrictions which limited his ability to perform his job. The ALJ declined to apply the 2x multiplier to Fuertes's award. He stated there was no evidence that Fuertes's cessation of employment was the result of his work-related injury, and cited Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009). WCB found that the ALJ did not address why Fuertes was terminated from Ford. CA found that the ALJ did address the applicability of the 2x multiplier, but remanded the matter to WCB for consideration of whether the ALJ erred in finding that substantial evidence did not support application of the multiplier. On remand, WCB stated that the evidence did not compel a finding Fuertes was entitled to the 2x multiplier. WCB further stated that Fuertes' speculative testimony did not compel the ALJ to find that the injury led to his termination. CA affirmed. SC reversed.

Fuertes argues that [WCB] and [CA] erred by usurping the ALJ's role as fact finder and interpreter of the evidence concerning application of the two multiplier to his award. Fuertes also contends that the ALJ erred when he found that there was no evidence the termination was related to the work-related injury. However, we need not address the merits of Fuertes's arguments because this matter must be remanded for further fact finding.

Since the ALJ issued the opinion and order on remand and the opinion and order on reconsideration, this Court has reversed the portion of Chrysalis House (internal citation omitted) which held that the claimant's failure to earn the same or greater wages must be related to the work-related injury before the two multiplier may be awarded. Livingood, 467 S.W.3d at 249. Instead this Court now holds that "KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases for any reason, with or without cause, except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." (internal citation omitted)
In this matter, no finding has been made whether Fuertes's conduct at Ford satisfies this new standard so as to justify the denial of the application of the two multiplier . . . We note that this is a high standard and basic bad behavior will not bar application of the two multiplier. If Fuertes did not engage in such conduct, the two multiplier may be applied to his award.

Fuertes has additionally requested that this Court decide whether the claimant or employer has the burden of proof to show the employee was fired due to the type of misconduct as described in Livingood. To prove that the claimant was fired because he committed that type of misconduct, evidence must be provided which supports the conclusion the claimant acted inappropriately. Obviously it is unlikely that the claimant would admit to misconduct. Because of this, and since proving that type of misconduct occurred is a defense against application of the two multiplier, the burden of proof is upon the employer to show the claimant's termination was caused by the type of behavior described in Livingood.
The First Workers Compensation Board and staff taken in front of the Old Capitol, Frankfort, Kentucky, circa 1916.

In the front row: second from left, Dr. Milton Board, Medical Officer, third from left, S.W. Hager, Board Member; fourth from left, R. C.P. Thomas, Board Member; far right, Robert T. Caldwell, Board Member and Chairman. Also shown are Alexander Gilmour, Secretary, and Charles Howes, Assistant Secretary.