

Kentucky Supreme Court
Cases of Note
January-[February](#), 2016

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Note: No Court in January

WORKERS COMPENSATION

Trane Commercial Systems v. Delena Tipton; Hon. Thomas G. Polites, Administrative Law Judge, and Workers’ Compensation Board
[2014-SC-000561-WC](#) February 18, 2016

Opinion of the Court by Justice Keller. All sitting; all concur. The only issue before the Court was whether the ALJ properly denied Delana Tipton's claim for temporary total disability benefits (TTD). Tipton, who had worked for Trane for 20 years, injured her knee while testing industrial air conditioning units. Tipton, who had been released to return to lighter duty work, returned to work at Trane but in a different job. Several months later, her physician released her to return to her pre-injury job duties. However, Tipton did not believe she could perform that job so she bid on and was permanently placed in her lighter duty job. The ALJ denied Tipton's request for TTD during the period following her return to work and before her release to return to her pre-injury job duties. The Board affirmed, but the Court of Appeals reversed, finding that, while on lighter duty, Tipton was not performing the type of work she performed pre-injury, and she was therefore entitled to TTD. The Supreme Court reversed the Court of Appeals. In doing so, the Court analyzed previous opinions wherein the Court had found entitlement to TTD following a release to return to work. As the Court noted, in all of those prior cases, the claimant had not actually returned to work. Furthermore, the Court noted that the ALJs, the Board, and the Court of Appeals had occasionally used the definition of "work" as used in KRS 342.730 for the word "employment" as used in KRS 342.0011. Those two words have different meanings. As the Court noted, the purpose of TTD is to compensate injured workers for lost wages. Paying TTD to an injured worker who has returned to employment, simply because that employee is not performing the same type of work, does nothing to forward the purpose of TTD. 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. Finally, the Court did not attempt to define what those extraordinary circumstances might be but stated that an ALJ who makes such an award must set forth specific evidence based reasons for doing so.

Glenn Hampton v. Flav-O-Rich Dairies; Hon. William J. Rudloff, Administrative Law Judge; and Workers’ Compensation Board
[2015-SC-000095-WC](#) February 18, 2016

Opinion of the Court by Justice Keller. All sitting; all concur. The ALJ found Glenn Hampton to be permanently totally disabled. Flav-O-Rich appealed to the Board arguing, in pertinent part, that the ALJ's opinion lacked sufficient findings to permit a meaningful review. The Board agreed, vacating the ALJ's opinion and remanding for additional findings of fact. Hampton filed

a petition for review with the Court of Appeals, arguing that the ALJ's opinion was sufficient, and his findings were based on evidence of substance. The Court of Appeals dismissed Hampton's appeal as prematurely filed from a non-final Board opinion. The Supreme Court reversed the Court of Appeals. Because the Court of appeals had not addressed the substance of Hampton's appeal, the only issue decided by the Court was whether the Board's opinion was final and appealable. In finding that the Board's opinion was final and appealable, the Court first held that an opinion of the Board is final and appealable if it divests a party of a vested right or authorizes or requires a different award on remand. The Court clarified that the insertion of the word "and" for "or" in dicta in *Whittaker v. Morgan*, 52 S.W.3d 567, 569 (Ky. 2001) was incorrect. Applying the correct test to Hampton's claim, the Court found that the Board's opinion vacating the ALJ's opinion divested Hampton of a vested right – the ALJ's finding of permanent total disability. The Court also held that by vacating the ALJ's opinion, the Board nullified that opinion, thus authorizing the ALJ to enter a different award on remand. Thus, the Court remanded the claim to the Court of Appeals with instructions for it to consider the merits of Hampton's appeal.

John Fuertes v. Ford Motor Co.; Hon. James Kerr, Administrative Law Judge; and Workers' Compensation Board
2015-SC-000268-WC February 18, 2016

Opinion of the Court. All sitting; all concur. Fuertes suffered a work-related accident while employed by Appellee, Ford Motor Company. Before his 8 workers' compensation claim could be resolved, Fuertes was fired by Ford for "performance related issues." Fuertes contends that he was fired because of his work-related injuries. After a review of the evidence, the ALJ found that Fuertes suffered a work-related injury to his right shoulder, right knee and neck. The ALJ declined to apply the two multiplier, 342.730(1)(c)2, to Fuertes's award because "[t]here is no evidence that [Fuertes's] cessation of employment was the result of his work-related injury." *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009). After a series of appeals and remands, the Board ultimately agreed. The Court of Appeals affirmed the Board and this appeal followed. The Court reversed and remanded. Since the ALJ issued his latest opinion, the Court reversed the portion of *Chrysalis House*, 283 S.W.3d 671, 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 v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015). Instead now "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." Thus, on remand, the ALJ is to review the facts and apply the standard provided in *Livingood*. The Court further held that since it is unlikely that the claimant would admit to misconduct, 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*.