

Kentucky Court Of Appeals
Cases of Note
March-April, 2018

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INSURANCE

Andrews v. Travelers

2016-CA-000107 03/09/2018 2018 WL 1219414

Opinion by Judge Nickell; Judges Dixon and Johnson concurred. Appellant was an injured passenger in an uninsured automobile accident. She applied for basic reparation benefits (BRB) through the Kentucky Assigned Claims Plan; her claim was assigned to Travelers. Appellant submitted medical bills exceeding \$10,000 to Travelers. However, shortly after doing so, she sent a letter to Travelers reserving the right to direct BRB payments. Appellant later filed suit against Travelers for its failure to issue BRB payments. Travelers moved for summary judgment, asserting that the BRB payments were not overdue because no direction of payment had been made pursuant to KRS 304.39-210. The circuit court agreed and entered summary judgment in favor of Travelers. The Court of Appeals affirmed, holding that the payments were not overdue under KRS 304.39-210(1) because “benefits are not overdue if a reparation obligor has not made payment to a provider of services due to the request of a secured person when the secured person is directing the payment of benefits among the different elements of loss.” Here, appellant reserved the right to direct payment, but she failed to actually direct payment after reserving this right; therefore, no BRB payments were overdue and the circuit court’s entry of summary judgment was correct.

NEGLIGENCE

Gonzalez v. Johnson

2016-CA-001911 04/06/2018 2018 WL 1659759

Opinion by Judge Thompson; Chief Judge Kramer and Judge Combs concurred. The issue presented was whether police officers could be liable for appellant’s death after a fleeing suspect crashed into the vehicle he occupied. The Court of Appeals held that pursuant to Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589 (Ky. 1952), the officers’ actions were not, as a matter of law, the proximate cause of appellant’s death and, therefore, they could not be found liable. The Court noted that Chambers remains the law despite the adoption of the substantial factor test for proximate cause or comparative negligence. The Court further held that even if the police vehicle’s sirens were not functioning during the pursuit as required by KRS 189.940, under Chambers there was no proximate cause. The Court urged the Supreme Court of Kentucky to review the issue, noting that a majority of jurisdictions no longer followed the per se “no proximate cause rule” followed in Chambers. The Court then concluded that until the Supreme Court overrules that decision or the General Assembly states otherwise, Chambers is controlling in Kentucky.

Pearson v. Pearson**[2016-CA-001391](#) 04/06/2018 2018 WL 1659682 Rehearing Pending**

Opinion by Judge D. Lambert; Judge Combs concurred; Judge Clayton concurred in result only. Appellant suffered respiratory injuries after being sprayed in the face by a motion-sensing air freshener device placed by his wife on a shelf above the parties' toilet. Appellant subsequently sued his wife for negligence and the manufacturer of the device in strict liability. The circuit court determined that the wife was entitled to summary judgment on the negligence claim because no argument could be made that the harm suffered by appellant was generally foreseeable by his wife, who installed a device that functioned in the manner in which it was designed to function. The Court of Appeals reversed and remanded. The Court noted that the instructions and the warnings included with the air freshener device directed against placing the device where it could spray individuals in the face. The wife admitted that she did not read the instructions or warnings on the packaging or on the device itself. Moreover, she did not place the device as intended by its designers; instead, she placed it in a manner directly contradicted by the manufacturer's safety warnings. The Court held that the consequences of misusing a product are within the natural range of effect of that misuse. Both the manufacturer's warnings and common sense cautioned users against spraying the device directly into someone's face, and an "injury of some kind" flows naturally from that. Therefore, the Court concluded that the circuit court erred in its conclusion that appellant's injury was not foreseeable.

WORKERS' COMPENSATION**D&L Mining v. Hensley****[2016-CA-001166](#) 03/30/2018 2018 WL 1546760**

Opinion by Judge Nickell; Judges Combs and Dixon concurred. The Court of Appeals affirmed an award of permanent partial disability benefits under KRS 342.7305 and KRS 342.730. D&L Mining (D&L) argued that Hensley's hearing loss was a preexisting and active condition and submitted results of Hensley's hearing test conducted prior to his employment with D&L. That audiogram showed that Hensley's hearing loss was substantially the same before and after his employment with D&L. However, Hensley was unaware of the results of that hearing test until after he filed the instant workers' compensation claim. The Court of Appeals applied the holding in *Greg's Construction v. Keeton*, 385 S.W.3d 420 (Ky. 2012) that an employee is not required to show his last employment caused a measurable hearing loss, nor does it require a minimum period of exposure. The Court also affirmed the application of a three-times multiplier on the grounds that Hensley could no longer continue to work due to his inability to wear hearing protective devices during similar work.

Napier v. Enterprise Mining Company**[2014-CA-001473](#) 03/23/2018 2018 WL 1439998**

Opinion by Judge Nickell; Chief Judge Kramer and Judge Clayton concurred. The Court of Appeals vacated and remanded three decisions of the Workers' Compensation Board affirming the denial of permanent partial disability (PPD) income benefits based on application of the statutory 8% impairment rating threshold set forth in KRS 342.7305(2). The Court held that the statute's imposition of a higher impairment rating threshold for traumatic ear injuries than required for all other traumatic injuries under KRS 342.730(1)(b) and (c) was violative of Constitutional equal protection guarantees. In vacating, the Court held that the Supreme Court of Kentucky's decision in *Vision Mining, Inc., v. Gardner*, 364 S.W.3d 455 (Ky. 2011) was dispositive. First, the Court determined that KRS 342.7305(2) treated traumatic ear injury claimants with impairment ratings of less than 8% differently than all other traumatic injury claimants who were entitled to an award of PPD income benefits under KRS 342.730(1)(b) by

qualifying for any impairment rating, as well as all other traumatic ear injury claimants who were likewise entitled to an award of PPD income benefits by meeting the challenged statute's higher impairment rating threshold. Second, the Court determined that traumatic injuries involving the ear are in all relevant and consequential respects the same as any other traumatic injury involving other organs, body parts, and systems, and all traumatic ear injuries are also essentially the same. Third, the Court determined that no rational basis or substantial and justifiable reason supported the statute's differing treatment of similarly-situated traumatically-injured claimants.

Woods v. Private Investigations & Counter-Intelligence, Inc.

[2017-CA-001240](#) 03/30/2018 2018 WL 1546283

Opinion and Order dismissing by Judge Johnson; Judges Dixon and Jones concurred. The Court of Appeals dismissed this workers' compensation appeal on grounds that it was improperly taken. Appellant attempted to appeal directly to the Court from the decision of an Administrative Law Judge upon remand from a decision of the Workers' Compensation Board. The Court noted that it was limited to reviewing decisions of the Board pursuant to KRS 342.290 and CR 76.25(2). Consequently, appellant's attempt to bypass the Board was not permitted and dismissal was required.