

Kentucky Supreme Court
Cases of Note
[January-February, 2022](#)

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WORKERS COMPENSATION

Dee Whitaker Concrete v. Austin Ellison, et al.

[2021-SC-00070-WC](#) February 24, 2022

Opinion of the Court by Justice Hughes. All sitting; all concur. Austin Ellison was employed by Dee Whitaker Concrete as a general laborer. Whitaker Concrete employees, including Ellison, routinely met at the employer’s premises and traveled together to various jobsites. While leaving a jobsite and traveling back to the employer’s premises, Ellison was injured in an automobile accident. Whitaker Concrete denied Ellison’s workers’ compensation claim, asserting that injuries sustained while going to or returning from the workplace are not compensable. The Administrative Law Judge (ALJ) determined that the “service to the employer” and “traveling employee” exceptions to the “going and coming” rule were applicable and awarded disability benefits. On appeal, the Workers’ Compensation Board and Court of Appeals affirmed. The Kentucky Supreme Court held that the traveling employee exception is applicable. Grounded in the positional risk doctrine, the traveling employee exception considers that an injury that occurs while the employee is in travel status is work-related unless the worker was engaged in a significant departure from the purpose of his trip. Ellison’s work required travel away from the employer’s premises and Ellison’s employment was the reason for his presence at what turned out to be a place of danger. Travel was an implicit part of Ellison’s employment and Whitaker Concrete acquiesced to this practice by providing company vehicles and paying for gas. Additionally, the service to the employer exception also applies because the employees traveling together ensured that employees arrived at jobsites on time and as a group, which was essential to the coordination of the arrival of concrete. The travel benefitted the employer by furthering his business. The Court affirmed the Court of Appeals.

Deborah Robbins French v. Rev-A-Shelf, et al.

[2021-SC-0146](#)-WC February 24, 2022

Opinion of the Court by Justice Keller. All sitting; all concur. Robbins was employed by Rev-A-Shelf as an assembly line leader. While in that employment, Robbins tripped over a pallet and fell on her extended left arm. She was eventually diagnosed with a Type II SLAP tear. She sought workers’ compensation benefits. The Administrative Law Judge (ALJ) awarded Robbins temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits. He enhanced the PPD benefits by the two-times multiplier from Kentucky Revised Statute (KRS) 342.730(1)(c)2. 7 On appeal, the Supreme Court held that the ALJ’s award of TTD benefits was supported by substantial evidence and affirmed that award. In order to determine if the ALJ erred in enhancing Robbins’s PPD benefits by the two-times multiplier, the Court had to determine if the ALJ properly included the wages from her concurrent employment in the calculation of her post-injury weekly wage. The Court held that because Robbins did not obtain her concurrent employment until after she sustained the work-related injury, the requirement that Rev-A-Shelf have knowledge of the concurrent employment before the date of injury found in KRS

342.140(5) did not apply. Further, the Court held that the ALJ failed to make any findings regarding whether Robbins's earnings from her concurrent employment were covered by the Workers' Compensation Act. Therefore, the Court could not determine if those findings were supported by substantial evidence. Accordingly, the Court vacated the ALJ's enhancement of Robbins's PPD benefits by the two-times multiplier and remanded for further factual findings on that issue.