

**Kentucky Supreme Court**  
**Cases of Note**  
**[March-April, 2022](#)**

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## **TORTS**

### **Seiller Waterman, LLC, et al. v. Bardstown Capital Corporation, et al.**

**[2020-SC-0312-DG](#) March 24, 2022**

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Lambert, and VanMeter, concur. Keller, J., concurs in result only. Nickell, J., not sitting. Bardstown Capital Corporation sought to develop Jefferson County residential property into a commercial center. Neighboring homeowners opposed the development, expressing concerns with respect to noise, drainage, and increased automobile traffic. The proposed development was ultimately approved, and the homeowners initiated an appeal of the rezoning ordinance in Jefferson Circuit Court pursuant to Kentucky Revised Statute (KRS) 100.347(3), contesting it on several grounds including the adequacy of notice of the various zoning hearings. After the neighboring homeowners’ unsuccessful zoning appeal, Bardstown Capital filed a complaint against them and their attorneys for wrongful use of civil proceedings and abuse of process. In granting the homeowners’ motion for summary judgment, the Jefferson Circuit Court determined that the homeowners were entitled to immunity under the Noerr-Pennington doctrine, which protects an individual’s right to petition the government for grievances. The Court of Appeals agreed the Noerr-Pennington doctrine applied but applied the “sham” exception to that doctrine to reverse the trial court, holding that a fact-finder must determine the legitimacy of the homeowners’ underlying appeal. On discretionary review, the Supreme Court reversed the Court of Appeals’ holding that summary judgment was improper. The Court held that the Noerr-Pennington affords the neighboring homeowners and Seiller Waterman immunity from wrongful use of civil proceedings claims and therefore the doctrine bars Bardstown Capital’s claim. Based on the statutory right to appeal zoning decisions and the importance of the First Amendment right to petition, the Court expressly applied the Noerr-Pennington doctrine to zoning litigation in the context of appeals pursuant to KRS 100.347. The Court remanded the case to the trial court for reinstatement of summary judgment in favor of the homeowners and their attorneys.

## **WORKERS COMPENSATION**

### **Kindred Healthcare v. Carlye Harper, et al.**

**[2020-SC-0200-WC](#) March 24, 2022**

Opinion of the Court by Justice Nickell. All sitting. All concur. Harper suffered a workrelated lifting injury while employed by Kindred Healthcare. ALJ ultimately determined she had sustained an eight percent whole person impairment, lacked physical capability of returning to work for which she had training and experience at time of injury, and was entitled to an award of permanent partial disability income benefits enhanced by the three multiplier. Though Harper requested vocational evaluation in hearing testimony, ALJ refused to address request due to her failure to specifically list vocational rehabilitation services as a contested issue in benefit review

5 conference memorandum or at hearing. ALJ's award was not appealed and became final. Sixteen months later, after unsuccessfully attempting a return to suitable gainful employment and having independently obtained a vocational evaluation, Harper sought to file an application for vocational rehabilitation services and acceleration of income benefits. Because no official template exists for filing motions to reopen seeking vocational rehabilitation services under KRS 342.710, she utilized a form setting forth the four grounds for reopening compensation claims under KRS 342.125, but attached a separate motion setting out her claim for the former under KRS 324.710. CALJ overruled motion to reopen, holding Harper had failed to preserve and contest issue in original proceeding or demonstrate authorization to seek such services post-award under one of the four grounds listed for reopening in KRS 342.125. Board reversed CALJ's decision, holding KRS 342.710 contemplates independent ground for reopening to seek vocational rehabilitation services separate to four grounds listed in KRS. 342.125. The Court of Appeals agreed, holding KRS 342.710 mandates ALJ inquiry upon finding claimant incapable of performing previous employment and Harper's failure to appeal ALJ's original refusal to address vocational rehabilitation services did not preclude a post-award motion to reopen to seek such services once requirements were established. Concerning a matter of first impression, Supreme Court held KRS 342.710 separately governs vocational rehabilitation services and authorizes raising of disputes relating to such services at any time by any mechanism, whether during original claim or postaward reopening. Statute provides independent ground for reopening apart from grounds enumerated in KRS 342.125 relating to motions to reopen to end, diminish, or increase compensation. As used in the workers' compensation statute, "compensation" does not encompass vocational rehabilitation services. Upon factual finding claimant incapable of performing previous work, ALJ is statutorily mandated to inquire regarding voluntary evaluation and reasonable provision or rejection of vocational rehabilitation services and may exercise discretion in assessing merits of an award of vocational rehabilitation services. Statutorily mandated administrative procedure need not be preserved by a request or by listing as a contested issue. Harper implicitly raised issue of vocational rehabilitation benefits when she identified "[a]bility to return to work performed at time of injury" as contested issue, and because ALJ refused to address the merits, claim preclusion doctrine was inapplicable.

**Apple Valley Sanitation, Inc. v. Jon Stambaugh, et al.**

**2021-SC-0227-WC April 28, 2022**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Workers' Compensation Appeal. Jon Stambaugh was awarded benefits by the Administrative Law Judge for two separate work-related injuries that occurred in the course and scope of his work for Apple Valley Sanitation. The ALJ applied the 3x multiplier from KRS 342.730(1)(c) to both Stambaugh's awards, finding that each injury individually precluded him from returning to the type of work he performed at the time of the injuries. Apple Valley appealed, arguing that the ALJ erred in applying the 3x multiplier to both awards because it reasoned that there was no change in Stambaugh's job duties between injuries and Stambaugh could not lose the same ability twice. Both the Workers' Compensation Board and the Court of Appeals affirmed the ALJ's decision. The Kentucky Supreme Court held that the 3x multiplier was properly applied to Stambaugh's benefits awards because his injuries were assessed at the time of the benefits hearing, rather than at the time immediately following his injuries. Although Stambaugh returned to his job after his first injury, by the time of his benefits hearing, his injuries were both independently and individually severe enough to preclude him from returning to the type of work he performed at the time of his injuries. As such, the Court affirmed the Court of Appeals.