

# Kentucky Supreme Court

## Cases of Note

### July-August, 2011

Note: To open hyperlink, take one of the following steps:

1. Hold down the control ("Ctrl") key and click on the link.
2. Right-click on the link and select "Open Hyperlink".

**Note: No Court in July.**

#### **WORKERS COMPENSATION**

##### **Abel Verdon v. Miguel A. Rivera** **[2010-SC-000744-WC](#) August 25, 2011**

Opinion of the Court. All sitting; all concur. Rivera sought workers' compensation benefits from Verdon for injuries sustained when he fell through a hole in the second floor of a home that Verdon was constructing. Verdon denied liability on the grounds that Rivera was not working an employee and was an "unauthorized alien" for whom the Immigration Reform and Control Act of 1986 (IRCA) preempted the application of Chapter 342. The ALJ found Rivera to be Verdon's employee; determined his average weekly wage; and awarded TTD benefits followed by triple benefits for partial disability. The ALJ refused to certify Rivera's expert to testify concerning Verdon's alleged safety violation and concluded that no violation was applicable. The Court of Appeals determined subsequently that the Board erred by reversing the refusal to certify the safety expert but determined that KRS 342.165(1) did not require expert testimony; found that the Board did not err by remanding for additional consideration of a safety violation under the statute; and affirmed otherwise. The court also determined that the IRCA did not preempt the application of Chapter 342. The Supreme Court affirmed. The court held that substantial evidence supported the finding that Rivera was Verdon's employee and also held that the IRCA did not preempt KRS 342.640(1), which provides workers' compensation coverage without regard to the legality of the employment relationship. The court also held that substantial evidence supported the findings with respect to Rivera's average weekly wage for less than 13 weeks' employment as well as the date for terminating TTD. Finally, the court noted evidence in the record that residential construction regulations imposed certain requirements concerning fall protection at the time of the injury and that KRS 342.165(1) does not require expert testimony. Noting also that nothing covered or barricaded the hole through which Rivera fell, the court concluded that the ALJ must analyze the evidence to determine what regulation governed the facts; whether it required the employer to have some form of fall protection in place at the time of Rivera's accident; and, if so, whether the failure to have such protection helped to cause the accident. Justice Scott concurred separately with respect to KRS 342.610(1).

##### **Jeffrey Graham v. TSL, Ltd.** **[2010-SC-000676-WC](#) August 25, 2011**

Opinion of the Court. All sitting; all concur. Graham was a Kentucky resident who spent a majority of his time in no one state when working as a trucker. TSL had corporate offices in Missouri and Ohio but no Kentucky office. Graham sought workers' compensation benefits in Kentucky for an injury that occurred in New Jersey. He stated that he telephoned TSL's Missouri offices seeking employment and faxed the information requested by TSL's representative, who reviewed it during their phone conversation and told him that he could "start tomorrow." He traveled to TSL's Missouri offices, where he completed various requirements before receiving his truck and beginning to work. The ALJ dismissed the claim for lack of jurisdiction under KRS 342.670(1) and (5) based on TSL's evidence that it issues a letter for hire only after the applicant satisfies all pre-employment requirements, which Graham did in Missouri. The ALJ reasoned that Graham "may have been

assured employment over the telephone line while he was in Kentucky" but that the contract of hire was made in Missouri. The Workers' Compensation Board and Court of Appeals affirmed. The Supreme Court also affirmed, noting that a contract is made at the time the last act necessary for its formation is complete and at the place where that act is performed. The court acknowledged that a contract made by telephone is made in the place where the acceptor speaks his acceptance. It concluded, however, that the record supported the ALJ's finding that no contract was formed until the claimant completed TSL's pre-employment requirements in Missouri.