

Kentucky Supreme Court
Cases of Note
March-April, 2012

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

WORKERS COMPENSATION

Randy Lewis v. Ford Motor Company
2011-SC-000294-WC March 22, 2012

Opinion of the Court, affirming. All sitting; all concur. Lewis’s claims for work-related lumbar spine injuries sustained in 2001 and 2002 (Claim #01-88767) and for a work-related cervical spine injury sustained in 2005 (Claim #06-00277) were litigated together. The ALJ awarded triple benefits for the injuries, which resulted in 425-week awards of \$315.46 per week beginning on August 17, 2004 in Claim #01-88767 and \$498.00 per week beginning on November 22, 2007 in Claim #06-00277. Petitioning for reconsideration, the employer noted that the combined partial disability awards exceeded the statutory maximum of \$607.23 for total disability during the period that they overlapped. The ALJ granted the petition and amended the award in Claim 06-00277 to give the employer credit for the entire \$315.46 per week

John A. Richey; Harned Bachert & Denton, LLP; And Norman E. Harned v. Perry Arnold, Inc.
2011-SC-000326-WC March 22, 2012

Opinion of the Court, affirming in part and reversing in part. All sitting; all concur. Richey sustained a work-related shoulder injury; received a diagnosis of subacromial bursitis; and underwent surgery. His surgeon could not explain his continued pain complaints. Dr. Goldman assigned a 9% impairment rating but recommended an MR arthrogram to be certain that Richey did not have an undetected problem. Two other physicians found nothing significant. The parties’ settlement listed the injury as a rotator cuff tear; listed the disability as 9%; and listed the average weekly wage and the amounts paid previously in temporary total disability (TTD) and medical expenses. It provided a \$15,500.00 lump sum “for complete resolution of indemnity benefits” but did not include a waiver of future medical benefits. The insurance carrier refused a subsequent request to pre-authorize a referral to an orthopedic surgeon, so Richey proceeded at his own expense. Dr. Anderson opined that the MR arthrogram revealed torn shoulder ligaments and recommended surgery. After the carrier failed to respond to Richey’s request for pre-authorization, which he accompanied with Dr. Anderson’s treatment notes, he underwent surgery to repair his anterior and posterior glenoid labrum and a subacromial decompression. His condition improved and Dr. Anderson assigned a 4% impairment rating. Richey then reopened his claim to recover his surgical expenses, associated TTD benefits, and, under KRS 342.310(1), his expenses related to the reopening. The ALJ found the surgery to be compensable but denied TTD based on the settlement and denied the sanctions request, convinced that 803 KAR 25:096, § 8(1) did not require the employer to pay for the surgery or file a reopening or medical dispute within 30 days of Richey’s pre-authorization request. The Board reversed only with respect to TTD benefits, but the Court of Appeals reversed and reinstated the ALJ’s decision. The Supreme Court affirmed with respect to TTD benefits, finding nothing in the agreement to indicate that the lump-sum amount in excess of that provided for permanent income benefits related to something other than a waiver of future income benefits. The court reversed with respect to the denial of sanctions, remanding to the ALJ to reconsider the matter based on a correct understanding of the employer’s obligations under 803 KAR 25:096, § 8(1) and on any other considerations relevant to the reasonableness of its action under KRS 342.310(1) and 803 KAR 25:012, § 2(1)(a).

Sidney Coal Company, Inc. v. Paul Kirk; Hon. Lawrence F. Smith, Administrative Law Judge; and Workers' Compensation Board
[2011-SC-000175-WC](#) April 26, 2012

Opinion of the Court. All sitting; all concur. Kirk's claims for work-related injuries that occurred in April, May, and October 2006 and his claim for an occupational hearing loss with a last exposure date of October 2006 were litigated together. The ALJ determined that the injuries produced a 24% impairment rating; that the hearing loss produced a 23% impairment rating; and that Kirk was partially disabled. The ALJ also determined that he was entitled to a 3.0 benefit multiplier under KRS 342.730(1)(c)1 because both impairments caused him to lack the physical capacity to return to his work as an underground coal miner and that he was entitled to an additional 0.2 multiplier based on his educational level. Having calculated awards of \$429.16 for the injuries and \$400.71 for hearing loss, the ALJ determined that KRS 342.730(1)(d) limited the combined weekly benefits to a maximum of \$473.42, which was 75% of the state's average weekly wage. Although KRS 342.730(1)(d) limits the maximum benefit to the lesser of 99% of 66 2/3% of an individual's average weekly wage or 100% of the state's average weekly wage when KRS 342.730(1)(c)1 applies, Kirk failed to petition for reconsideration or appeal. The Workers' Compensation Board rejected Sidney Coal Company's argument that the ALJ erred by applying the 3.2 multiplier to the hearing loss benefit and affirmed in that respect. The Board acted *sua sponte* and relied on its authority KRS 342.285(2)(c), however, to reverse with respect to the ALJ's misapplication of KRS 342.730(1)(d) and to remand the claim with directions to correct the benefits limitation. The Court of Appeals affirmed. The Supreme Court affirmed with respect to both issues. Noting a physician's testimony that occupational noise exposure caused a compensable hearing loss and would progress if the exposure continued, the court determined that such evidence permitted a reasonable inference that Kirk did not retain the physical capacity to return to underground coal mining because it would involve continued exposure to hazardous noise. The court determined that the Board acted properly by reversing *sua sponte* and directing the ALJ to correct what was a patent legal error in applying the law to the facts as found. The court reasoned that whether an award conforms to Chapter 342 is a question of law that a court should review, regardless of whether contested by a party, and that KRS 342.285(2)(c) allows the Board to do so.

Commonwealth of Kentucky, Uninsured Employers' Fund v. Jessie Rogers D/B/A Quality Exteriors; William Willis Ballard; Honorable Edward D. Hays, Administrative Law Judge; and Workers' Compensation Board
[2011-SC-000335-WC](#) April 26, 2012

Opinion of the Court. All sitting; all concur. William Willis Ballard injured his right wrist, hand, knee, and ankle when he fell from a roof on February 27, 2009, his first day of work as a roofer for Jessie Rogers. His application for benefits alleged that his weekly wage on the date of injury was "\$12.00/hr – 40 hrs/wk." The Uninsured Employers' Fund (UEF) was made a party and denied the existence of an employment relationship. Ballard testified that he injured his right shoulder in January 2009, while working for another roofing company; that Rogers hired him for \$10.00 per hour in cash; and that he worked for Rogers for about three hours before the accident occurred. The ALJ found that Ballard was Rogers' employee; found that his average weekly wage was \$400.00; and awarded income and medical benefits. The Board determined that the record contained insufficient evidence to apply KRS 342.140(1)(e) properly and relied on KRS 342.285(2)(c) as authority to remand the claim for further proceedings to include the taking of additional proof. The Court of Appeals affirmed, but the Supreme Court reversed. The court agreed that the record would not support a reasonable finding that Ballard's average weekly wage would have been \$400.00 in the 13-week period immediately preceding his injury, as required by KRS 342.140(1)(e). The court determined, however, that the Board exceeded its authority by directing the ALJ to order additional proof because Ballard argued from the outset that KRS 342.140(1)(e) governed the calculation; failed to meet his burden of proof; and was not entitled to a second opportunity to do so.