

Kentucky Supreme Court
Cases of Note
July-August, 2012

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

Roger W. Tudor v. Industrial Mold & Machine Co., Inc.; Honorable Richard M. Joiner, Administrative Law Judge; and Workers’ Compensation Board
[2011-SC-000589-WC](#) August 23, 2012

Opinion of the Court. All sitting; all concur. This appeal concerned the method for excluding impairment from a non-compensable disability when calculating a worker’s permanent partial disability benefit under the post-1996 version of KRS 342.730(1)(b). The ALJ relied on *Transport Motor Express, Inc. v. Finn*, 574 S.W.2d 277 (Ky. 1978), to calculate a benefit based on the entire post-injury impairment rating; then subtracted an amount equal to a benefit based on the claimant’s pre-existing impairment rating; and awarded benefits based on the remainder. Reversing, the Board determined that the present version of KRS 342.730(1)(b) requires the calculation of income benefits to be based only on the permanent impairment rating caused by the injury being compensated. The Court of Appeals affirmed. On appeal, the Supreme Court affirmed, holding that “KRS 342.730(1)(e) is unambiguous.” The Court noted that the statute “prohibits ‘impairment’ from non-work-related disabilities to be considered when determining not only the extent of the worker's disability but also whether the worker's benefits will extend for 425 or 520 weeks.” Unlike the statutes at issue in *Transport Motors*, the post-1996 versions of KRS 342.730(1)(b)-(e) do not require “compensation” for non-work-related disability to be excluded from an award. Rather, the statute prohibits “impairment” from a non-work-related disability from being considered when selecting the permanent impairment rating caused by an injury; when calculating the disability rating and permanent partial disability benefit; and when determining the duration of the benefit.

Greg’s Construction v. Jerry Keeton; Johnson Floyd Coal Company; Miller Brothers Coal Company; Apostle Fuels; Honorable Otto Daniel Wolff, Administrative Law Judge; and Workers’ Compensation Board
[2011-SC-000605-WC](#) August 23, 2012

Opinion of the Court. All sitting; all concur. Keeton sustained a work-related hearing loss. An ALJ determined that KRS 342.7305(4) placed the entire liability for income and medical benefits on Greg’s Construction, the employer with whom he was last injuriously exposed to hazardous noise. The Board and the Court of Appeals affirmed. On appeal, Greg’s argued that Keeton failed to prove an injury attributable to his employment with Greg’s or to prove that the employment represented his last injurious exposure. Greg’s also argued that KRS 342.7305(4) does not preclude apportioning liability among employers where the evidence permits.

The Supreme Court affirmed, holding that the record contained substantial evidence that audiograms and other testing revealed a pattern of hearing loss compatible with that caused by hazardous noise exposure and contained substantial evidence that the claimant sustained repetitive exposure to hazardous noise in the workplace, including his final employment with Greg's. The Court also held that the legislature had clearly indicated its intent to place liability on the claimant’s last employer based on the language in KRS 342.7305(4), which states that "the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits."

James T. English Trucking v. Aaron K. Beeler; Honorable Douglas W. Gott, Administrative Law Judge; and Workers' Compensation Board
[2011-SC-000686-WC](#) August 23, 2012

Opinion of the Court. All sitting; all concur. An ALJ increased the claimant's partial disability benefit at reopening and tripled the entire income benefit awarded for his injury. The Board and the Court of Appeals affirmed. On appeal, the employer maintained that the ALJ erred by disregarding undisputed medical evidence when finding increased impairment at reopening and by tripling the entire partial disability benefit. The Supreme Court affirmed, holding that the ALJ did not err because substantial evidence supported the finding of increased impairment as well as the finding that the claimant lacked the physical capacity at reopening to perform the type of work performed at the time of his injury. The combined effects of the impairment present at the time of the initial award and the additional impairment present at reopening entitled the claimant to triple benefits based on the whole of his disability for the balance of the compensable period.

Brent Arnold v. Toyota Motor Manufacturing; Honorable Richard M. Joiner, Administrative Law Judge; and Workers' Compensation Board
[2011-SC-000588-WC](#) August 23, 2012

Opinion of the Court. All sitting; all concur. Arnold was awarded TTD benefits for his work-related shoulder injury from "the date he stopped work, May 10, 2007" until May 8, 2009. The Board affirmed although the claimant never asserted that he was unable to work as of May 10, 2007, when he took family medical leave to care for his pregnant wife and children because she was ill. He argued that his gradual injury prevented him from working on May 15, 2007. A divided Court of Appeals reversed on the ground that the opinion failed to contain "findings" adequate to make clear whether the ALJ considered and understood all of the evidence relevant to the date when TTD began. The court remanded the claim with directions to reconsider the issue and make additional findings. On appeal, Arnold argued that the ALJ made findings adequate to support the award. The Supreme Court reversed to the extent that the ALJ made the findings of fact required by KRS 342.0011(11)(a). However, the Court affirmed to the extent that the ALJ failed to state in the opinion that the evidentiary basis for finding that the claimant was not at a level of improvement from his injury that would permit a return to employment "from the date he stopped work, May 10, 2007." Mindful that a worker's entitlement to TTD may or may not begin on that date that a gradual injury becomes manifest, The Court remanded the case to the ALJ to clarify that portion of the decision.