RENDERED: March 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0817-WC

MICHAEL ROBINSON APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-96-001905

CLIFFCO ENTERPRISES;
SPECIAL FUND;
HON. RICHARD CAMPBELL, JR.,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING IN PART - REVERSING IN PART

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Michael Robinson (Robinson) appeals from a decision of the Workers' Compensation Board entered on February 28, 1997, which affirmed the opinion, award, and order entered by the Administrative Law Judge (ALJ) holding that he was only entitled to benefits for a 4% impairment rating. We affirm in part and reverse in part.

Robinson was employed by appellee, Cliffco Enterprises (Cliffco) as an underground coal miner. He sustained a work-related injury to his left knee on April 7, 1995 (the Cliffco injury). Physicians who examined and treated Robinson

gave impairment ratings ranging between 1% and 4%, and advised him against returning to underground mining work. At the time of his injury, Robinson earned $12.00 an hour and worked approximately 48-50 hours per week. Robinson's average weekly wage at Cliffco was stipulated to be $480.

Following his recovery from his left knee injury, Robinson was employed by Elkhorn Crystal Coal Company (Elkhorn) as a mechanic. Robinson worked for Elkhorn for approximately two weeks before sustaining an injury to his right knee (the Elkhorn injury). Robinson stated that he was paid $10.00 per hour at Elkhorn, and that he worked 50-60 hours per week. However, Robinson also testified that because Elkhorn was a surface mining operation, his work was weather-dependent and that no work was performed during periods of inclement weather. At the time of the hearing for the Cliffco injury, Robinson was not working because of the Elkhorn injury and was being paid Temporary Total Disability (TTD) benefits by Elkhorn.

Robinson filed his Form 101 for the Cliffco injury on January 9, 1996, naming both Cliffco and the Special Fund. Robinson also filed an application for retraining benefits (RIBS) on the same day alleging that he had contracted coal workers' pneumoconiosis. Only Cliffco was named in this petition. Robinson's claims were consolidated by order of the ALJ on February 14, 1996.

In his opinion, order and award entered on October 8, 1996, the ALJ noted that while Robinson's "hourly wage rate [at

Elkhorn] was lower than that paid him by [Cliffco], the amount of his weekly wage at Elkhorn Crystal was greater than that he earned prior to the injury of April 7, 1995." The ALJ then held:

> Because it has been determined that plaintiff returned to work at a wage equal to or greater than that which he earned prior to his injury, the assessment of his disability is controlled by the provisions of KRS 342.730(1)(b). Therefore, his recovery of income benefits must be based upon the maximum amount payable for permanent partial disability, his average weekly wage having been sufficient to warrant that level of benefits, "multiplied by his percentage of impairment caused by the injury . . . as determined by the 'Guides to the Evaluation of Permanent Impairment,' American Medical Association, latest edition available, unless the employee establishes a greater percentage of disability as determined under KRS 342.0011(11), in which event the benefit shall not exceed two (2) times the functional impairment rate." However, before he can be awarded benefits for his impairment, there must be a finding that the work injury produced a degree of permanent occupational disability. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985). If permanent disability is established, he is entitled to the greater of the impairment or disability, subject to the maximum imposed by the provisions of KRS 342.730(1)(b).
>
> 13. That plaintiff retains at least a modicum of permanent functional impairment and is subject to some rather significant limitations on his activities lead to the conclusion that he suffers some permanent disability as a result of the work injury that is the subject matter of this claim. That disability is substantial, as it is evident that the residuals of such injury, will severely impinge upon his ability to return to the type work he performed in and around the coal mining industry and probably make it difficult for him to work as a rough carpenter. Therefore, while he is still a young man who has advanced his education to the high school level, plaintiff is deemed to be suffering a permanent occupational disability of 30% as a consequence of the work injury of April 7, 1995.
>
> 14. Because the extent of his permanent occupational disability exceeds the level of his permanent functional impairment as measured in accordance with the A.M.A. Guides, two percent (2%) as assessed by Dr.

> Goodman, plaintiff is entitled to an award of income benefits equivalent to the factor, four percent (4%), obtained by doubling that impairment rating. Limiting plaintiff's award to such a minimal recovery seems unjust; however, that disposition is required by KRS 342.730(1)(b), a part of the April 4, 1994, amendments to the Act.

The ALJ also found that Robinson was entitled to RIBS and that Cliffco was responsible for payment of those benefits. Additionally, the ALJ ordered Robinson to notify Elkhorn of the recovery awarded against Cliffco in order to allow Elkhorn "to adjust the level of temporary total disability benefits being paid him for the work injury of June 1, 1996."

Both Robinson and Cliffco appealed from the ALJ's opinion. Neither party sought to join Elkhorn on appeal. In an opinion rendered on February 28, 1997, the Board affirmed the ALJ's order in part and reversed and remanded in part.

Before the Board, Robinson argued that the ALJ erred in holding that KRS 342.730(1)(b) controlled the amount of benefits payable by Cliffco for the Cliffco injury. In affirming the ALJ, the Board held:

> [W]e must now turn to the question of what standard is to be used when determining whether an individual is earning a wage greater than or equal to the wage he was earning at the time of his injury. "Wages" is defined in KRS 342.0011(17). Included therein is the individual's hourly pay. While working for Cliffco he was earning $12 per hour and while working for Elkhorn Crystal he was earning $10 per hour. We are, however, also cognizant that benefits are payable in accordance with an individual's average weekly wage. This, of course, is controlled by the provisions of KRS 342.140. When, as here, the ALJ is faced with the

> issue of the applicability of the hourly wage versus the average weekly wage, there clearly exists a significant question. While we can perceive of a multitude of potential questions arising within these conflicting standards, we are of the opinion that when the general purpose of Workers Compensation is considered in conjunction with the greater likelihood of consistency of determination that the more appropriate comparison would be average weekly wage at the time of the injury versus average weekly wage upon return to work. It must be remembered that one of the basic purposes of Workers Compensation is to indemnify an employee who has sustained an injury from financial loss as a result of that injury. Harlan Collieries vs. Shell, Ky., 239 SW2d 923 (1951). In order to effectuate such a purpose analyzing an individual's average weekly wage before the injury and after the injury is a more reasonable standard than merely to compare an hourly wage before and after the injury.

As to Cliffco's argument that Robinson could not receive RIBS while receiving TTD, the Board held:

> The ALJ appropriately recognized that an injured worker may not receive more than 100% of the State's average weekly wage and therefore directed Robinson to notify Elkhorn Crystal of his award of retraining incentive benefits. Presumably, Elkhorn Crystal would then take credit for these dollars paid. Cliffco, however, believes that so long as Robinson receives temporary total disability benefits, he may not receive payments for retraining incentive benefits. We agree. While the net effect of the ALJ's decision is to prevent an excess recovery on the part of Robinson in contravention of McCoy Elkhorn Coal Corp. vs. Sullivan, Ky., 862 SW2d 891 (1993), we believe that the issue is more directly addressed in Arch of Kentucky, Inc. vs. Halcomb, Ky., 925 SW2d 460 (1996). The Court in Halcomb discussed Sullivan and reached a more far reaching conclusion than they did in Sullivan. The Court in Halcomb in spite of some of the language contained in Sullivan held that the award of retraining incentive benefits in conjunction with total

> disability benefits was not an economic issue but rather a retraining issue. So long as the individual is incapable of engaging in "rehabilitation" as a result of a work injury from which he is totally disabled, he may not receive retraining incentive benefits. The ALJ here treated the retraining incentive benefits as an economic issue. We therefore conclude that Robinson is not entitled to receive benefits pursuant to KRS 342.732 (1) (a) so long as he is receiving total disability benefits whether temporary or permanent.

On appeal, Robinson again argues that the ALJ erred in holding that his benefits award is controlled by KRS 342.730(1)(b), which provides in pertinent part:

> For permanent, partial disability, where an employee returns to work at a wage equal to or greater than the employee's preinjury wage, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by his percentage of impairment caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, unless the employee establishes a greater percentage of disability as determined under KRS 342.0011(11), in which event the benefits shall not exceed two (2) times the functional impairment rate, for a maximum period, from the date the disability arises, of four hundred twenty-five (425) weeks subject to the provisions of subsection (1)(d) of this section.

Robinson argues that his actual hourly rate should be used in deciding whether he falls under KRS 342.730(1)(b) as opposed to his average weekly wage. We agree.

KRS 342.730(1)(b) requires us to look at whether the employee has returned to work at a <u>wage</u> which is equal to or

greater than his pre-injury wage. As defined in Chapter 342 of the Kentucky Revised Statutes, "wage" is "money payments for services rendered[.]" KRS 342.0011(17). When a word is specifically defined by statute, courts are not to look to the common and approved use of the word to construe the statute. See Claude N. Fannin Wholesale Co. v. Thacher, Ky. App., 661 S.W.2d 477, 480 (1983).

In this case, Robinson was paid $10 per hour while working at Elkhorn. There can be no argument that this hourly wage is less than what he earned at Cliffco. Therefore, Robinson is entitled to benefits pursuant to KRS 342.730(1)(c). If the Legislature intended for the average weekly wage to be used in calculations under KRS 342.730, it was perfectly capable of specifying average weekly wage. However, the Legislature used the word "wage", and under KRS 342.0011(17) we hold that the Legislature intended calculations to be based on the wage rate fixed by the employer, be it by piece, hourly, weekly, or monthly.

Robinson next argues that the Board lacked jurisdiction to allow Cliffco to take credit on its liability for payment of RIBS during the time he was receiving TTD benefits from Elkhorn because Cliffco failed to name Elkhorn as a party to its cross-appeal from the opinion of the ALJ. Our review of the record shows that Robinson did not raise this issue before the Board, therefore, it is not properly preserved for our review.

Lost Mountain Mining v. Fields, Ky. App., 918 S.W.2d 232, 234 (1996).

Having considered the parties' arguments on appeal, the opinion of the Board is affirmed in part and reversed in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas G. Polites
Lexington, KY

BRIEF FOR APPELLEE, CLIFFCO ENTERPRISES:

David H. Neeley
Prestonsburg, KY

BRIEF FOR APPELLEE, SPECIAL FUND:

Joel D. Zakem
Louisville, KY