

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-00048-WC

LLOYD DAY, JR.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. 97-WC-77522

FAIRBANKS COAL COMPANY;  
THOMAS A. NANNEY,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION

### AFFIRMING

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BEFORE: HUDDLESTON, MILLER and TACKETT, Judges.

HUDDLESTON, Judge. Lloyd Day, Jr. appeals from an opinion of the Workers' Compensation Board that affirmed an Administrative Law Judge's award of disability benefits based on a finding that Day has a 5% functional impairment as the result of a work-related injury. Day challenges the constitutionality of the use of the American Medical Association "Guides to the Evaluation of Permanent Impairment" in determining income benefits for disability.

Day filed a claim for workers' compensation benefits. Initially, he received a benefit determination by an arbitrator.

He then requested a de novo review by an ALJ. The ALJ determined that Day had a 5% functional impairment according to the AMA Guides and awarded disability compensation. Day appealed the ALJ's decision to the Board to preserve his constitutional challenge and to exhaust his administrative remedies before filing an appeal to this Court.<sup>1</sup>

Day argues that the award was inadequate because of the use of the AMA Guides. He contends that sole reliance on the AMA Guides improperly encroaches upon the ALJ's duty as fact-finder to determine the occupational disability of an injured worker and yields an inadequate award in violation of the Kentucky Constitution. Specifically, Day urges us to hold that the limitation in discretion imposed upon the ALJ in determining the extent of his disability based on the AMA Guides under Kentucky Revised Statute (KRS) 342.730(1)(b) is a violation of Sections 14, 15 and 241 of the Constitution.

KRS 342.730(1)(b) provides that:

Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

For permanent partial disability, 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 the permanent impairment rating caused by the injury or occupational disease as

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<sup>1</sup> Although the Attorney General was notified of Day's constitutional challenge pursuant to Kentucky Revised Statute (KRS) 418.075, he has declined to participate in this appeal.

determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the table that follows:

AMA Impairment	Factor
0 to 5%	0.75
6 to 10%	1.00
11 to 15%	1.25
16 to 20%	1.50
21 to 25%	1.75
26 to 30%	2.00
31 to 35%	2.25
36% and above	2.50

Section 14 of the Constitution of Kentucky provides that:

All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law and right and justice administered without sale, denial or delay.

Section 15 provides that:

No power to suspend laws shall be exercised unless by the General Assembly or its authority.

Lastly, Section 241 provides that:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death,

from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

Over one hundred years ago, the Supreme Court interpreted the provision that is now Section 14 of the Constitution<sup>2</sup> in Johnson v. Higgins,<sup>3</sup> where it said that:

This provision is found in the bill of rights. It prescribes certain duties for the courts of the State, and also lays down general rules for the manner of conducting their business, the effect of which may be thus stated: 1. They are to be held in an open and public manner, and their proceedings are not to be secret or concealed from public view. 2. They are to administer justice without sale – that is, they are not to accept compensation from litigants; and 3. They are not to deny any one a fair trial, nor to delay the same, except upon sufficient legal grounds for continuance.

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<sup>2</sup> Section 14 of the Kentucky Constitution of 1891 was first adopted as Article XII, Section 13, of the 1792 Constitution and was readopted verbatim as Article X, Section 13 of the Constitution of 1799 and as Article XIII, Section 15, of the Constitution of 1850.

<sup>3</sup> 3 Metc. 566, 60 Ky. 566, 570-571 (1861). See also Barkley v. Glover, 4 Metc. 44, 61 Ky. 44 (1862); and Williams v. Wilson, Ky., 972 S.W.2d 260, 273 (1998) (Cooper, J., dissenting).

The terms and import of this provision show that it relates altogether to the judicial department of the government, which is to administer justice "by due course of law," and not to the legislative department, by which such "due course" may be prescribed.

Any other construction would make it inconsistent with other clauses of the constitution, and, in fact, render it practically absurd.

Day does not point to any specific rule or prohibition within this section of the Constitution that would render the use of the AMA Guides unconstitutional, nor do we find any language in this section that leads to the conclusion that the limitation in discretion imposed upon the ALJ's determination of the extent of a worker's disability based on the AMA Guides under KRS 342.730(1)(b) is constitutionally infirm.

Day's argument concerning KRS 342.730(1)(b) is similar to that raised in Edwards v. Louisville Ladder,<sup>4</sup> where the injured worker urged that the limitation, concerning the failure to consider nonwork-related disability, imposed by KRS 342.430(1)(a), violates Sections 14 and 54 of the Kentucky Constitution. In Edwards, this Court held the limitation on recovery constitutional because participation in the workers' compensation program is voluntary.

Our Kentucky Constitution, §§ 14, 54, and 241, preserve[s] to all persons, including the employee, the

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<sup>4</sup> Ky. App., 957 S.W.2d 390 (1997).

common law remedy in tort against a party at fault, except where the employee has made a voluntary election to waive such constitutional rights, express or implied. The foundation for declaring workers' compensation constitutional in Kentucky is built on recognition of this principle.<sup>5</sup>

In Wells v. Jefferson Co.,<sup>6</sup> the Supreme Court recognized "presumed acceptance" as a waiver of the worker's constitutional rights to common law tort claims.

A challenge to the constitutionality of an act of the General Assembly must "necessarily begin with the strong presumption in favor of constitutionality and [the Court] should so hold if possible."<sup>7</sup> Additionally, the constitutionality of a statute dealing with economic matters "will be upheld if its classification is not arbitrary, or if it is founded upon any substantial distinction suggesting the necessity or the propriety of such legislation."<sup>8</sup> Day's presumed acceptance of the provisions of the Workers' Compensation Act, including both its remedies and limitations, eliminates any argument that KRS 342.730(1)(b) is unconstitutional. In any event, we do not find the challenged statute arbitrary. KRS 342.730(1)(b) promotes an efficient

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<sup>5</sup> Wells v. Jefferson Co., Ky., 255 S.W.2d 462, 463 (1953).

<sup>6</sup> Id.

<sup>7</sup> Brooks v. Island Creek Coal Co., Ky. App., 678 S.W.2d 791, 792 (1984).

<sup>8</sup> Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446, 455 (1994).

resolution of claims for those classes of workers who are eligible for benefits under the Act.

Day's arguments concerning Sections 1 falls upon the same sword. His presumed acceptance of the Workers' Compensation Act allows the General Assembly to limit his benefits without violating the Constitution. Section 241, which relates to wrongful death actions, has no relevance to this case.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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