

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002776-WC

KENTUCKY RIVER ENTERPRISES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-00-67419

JERRY OTIS ELKINS;
LLOYD. R. EDENS,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, HUDDLESTON and McANULTY, Judges.

HUDDLESTON, Judge: Kentucky River Enterprises, Inc. appeals from a Workers' Compensation Board opinion that affirmed an administrative law judge's opinion and award finding that Jerry Elkins suffered a work-related injury, awarding him permanent partial disability benefits based on a 9.5% functional impairment and multiplying his weekly benefit by three pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)(1) as he cannot return to the type of work he was performing at the time of the injury. On appeal, Kentucky River argues that the evidence does not support

the finding that a work-related injury occurred, that the ALJ erred in relying upon an impairment rating that is not based on the Diagnostic Related Estimates (DRE) Model in the American Medical Association (AMA) Guides and that the ALJ improperly applied the times three multiplier as Elkins returned to work at a wage equal to or greater than his wage at the time of the injury.

Elkins earned an associate degree from Southeast Community College and also has a commercial driver's license (CDL). His employment history includes fourteen years of experience as a truck driver, twelve of which were spent operating a coal truck. Elkins began his employment with Kentucky River as a coal truck driver on January 1, 1996. At the time of the alleged injury, he was working as a mechanic and heavy equipment operator. On September 8, 2000, he was working in that capacity when he felt pain in his lower back and a tingling sensation in his left leg while servicing a large truck with another employee. Specifically, he was carrying a five-gallon can of oil to the truck at the time. Although Elkins completed his shift, his fellow employee, Benny Bentley, performed the remainder of the required lifting.

According to Elkins, he informed his supervisor of the incident that day. On the following Sunday, he called his employer and explained that he could not return to work due to his back injury. Elkins ultimately underwent low back surgery which was performed by Dr. Mukut Sharma, an orthopedic surgeon. On December 6, 2000, Elkins returned to work in a supervisory capacity and, at

the time of the hearing, he continued to earn a wage equal to his preinjury wage.¹

Elkins testified both by deposition and at the hearing. In his testimony, he indicated that he continues to experience pain in his lower back and left leg. He does not believe that he is able to return to his prior employment. Elkins previously suffered a lower back injury while changing a tire on a tractor-trailer in 1989.² He underwent surgery on his lower back in November 1990. While he acknowledges that he continued to have difficulties with his back following that procedure, he was last seen for medical treatment of those injuries in late 1991. According to Elkins, his lower back pain was resolved and he continued to work without further difficulty until his most recent injury.

In the opinion which prompted the present appeal, the Board accurately summarized the lay and medical testimony as follows:

In support of his claim, Elkins submitted testimony from Dr. Mukut Sharma, his treating orthopedic surgeon. Dr. Sharma began treating Elkins on September 14, 2000. In his records from the initial visit, Dr. Sharma indicated Elkins reported having low back pain for

¹ The parties stipulated to the fact that Elkins returned to work at the same wage he earned at the time of his injury at the benefit review conference as documented in the ALJ's opinion.

² Elkins filed a claim as the result of two injuries that allegedly occurred on April 6 and June 5, 1989. With respect to the former injury, the claim was dismissed for failure to prove the existence of a work-related injury, while his failure to give due and timely notice of the latter injury resulted in the dismissal of that portion of the claim.

approximately five weeks and denied any recent injury. The doctor stated that after a conversation with Elkins on November 7, 2000, he amended his report to reflect that Elkins indicated a history of five days of low back pain on the initial visit. Dr. Sharma diagnosed a herniated disc at L5-S1 with degenerative changes at L4-L5. He performed a discectomy on Elkins on October 25, 2000. He stated that Elkins had a good result from that surgery. Dr. Sharma reviewed records from Dr. Kennedy, the orthopedic surgeon that performed Elkins' [s] low back surgery in 1990. Dr. Sharma stated that Dr. Kennedy performed essentially the same type of procedure at the L4-L5 level in 1990 as he had performed in 2000 at the L5-S1 level.

Dr. Sharma stated that Elkins' [s] functional impairment following the 2000 injury would be something less than 10%, perhaps 7% or 8%. He stated this impairment was made using the Range of Motion Model. When asked about the DRE Model, he stated that radiculopathy would indicate a 10% impairment, but still estimated Elkins' [s] impairment would be less than 10%. Dr. Sharma acknowledged that the AMA Guides indicate that a preexisting impairment to the same anatomic system should be subtracted from the current impairment to determine the impairment related to the most recent injury. When asked whether the impairment related to his 1990 injury should be subtracted from the 2000 injury,

Dr. Sharma stated "the answer is yes or no." He stated Elkins might have improved to the point he had no impairment following his 1990 surgery. He stated, however, that he had no reason to disagree with Dr. Kennedy's assessment of a 14% impairment in 1990. Dr. Sharma was uncertain how to apply the language from the Guides indicating that a preexisting impairment should be subtracted from the current impairment when the injuries are to two different disc levels in the low back.

Elkins also submitted testimony from Dr. James Templin, a specialist in pain management and occupational medicine. Dr. Templin diagnosed an L5-S1 disc herniation with subsequent laminectomy and discectomy at L5-S1; chronic low back pain syndrome; and left leg radiculopathy. He noted Elkins'[s] history of a prior L4-L5 disc herniation with surgery. Dr. Templin assessed a 10% impairment for Elkins'[s] low back problems using the DRE model in the AMA Guides, Fourth Edition. He noted the presence of scar tissue from the previous surgery and some degenerative disc changes; the arousal of which he felt contributed to Elkins'[s] current condition. Dr. Templin stated Elkins felt that 5% of his left leg radiculopathy problems were due to his previous injury, while the remaining 95% were due to his current condition. On that basis, Dr. Templin apportioned 5% of his 10% impairment (i.e., .5%) to a preexisting active condition, and the remaining 9.5% to the 2000 injury.

Kentucky River submitted records from the Whitesburg ARH, which included records from Dr. Tidal and Dr. Sharma. Dr. Tidal saw Elkins on September 11, 2000, just after the alleged injury. There was no mention of a work-related injury at that time, only a mention of long-standing low back pain. The initial record of Dr. Sharma, dated September 14, 2000, as noted above, indicated Elkins gave a history of a recurrence of low back pain about five weeks prior with no history of recent injury.

Kentucky River also submitted testimony from Dr. Leon Ensalada, a specialist in occupational medicine. Dr. Ensalada reviewed Elkins' [s] medical records. He concluded that Elkins had not suffered an injury on September 8, 2000. He based this conclusion on the Whitesburg ARH records and Dr. Sharma's records indicating a history of five weeks of low back pain. Dr. Ensalada also concluded that Elkins suffered a 10% impairment under the AMA Guides prior to September 2000 and this was due to the 1989 injury. Dr. Ensalada also concluded that Elkins had no impairment as the result of any September 2000 injury and has suffered no occupational consequences as a result of such an injury. Dr. Ensalada stated Elkins should have had permanent restrictions of lifting no more than fifty pounds occasionally or twenty-five pounds frequently and avoiding repetitive bending, stooping and twisting. He

believed these restrictions would also be appropriate subsequent to the 2000 discectomy surgery.

Kentucky River also submitted testimony from Dr. Richard Sheridan, an orthopedic surgeon. Dr. Sheridan also believed Elkins had not suffered an injury on September 8, 2000. He stated the L5-S1 herniation was due to increased stresses at that disc space occurring over a ten year period subsequent to the prior low back injury at L4-L5. He assessed a 10% impairment under the AMA Guides using the DRE Model and believed Elkins also would have had a 10% preexisting active impairment due to the L4-L5 disc injury. He believed there was no need to place any restrictions on Elkins' [s] physical activities.

Lay testimony was submitted from Benny Bentley, a co-worker of Elkins' [s]. Bentley testified he was working with Elkins on September 8, 2000. He stated Elkins carried a five-gallon can of oil to the truck they were working on, and he indicated he had hurt his back and could not lift the oil. Bentley stated he performed all the lifting and completed servicing the truck. He stated Elkins returned to work in [a] supervisory capacity following his surgery and did no heavy work.

Relying on the un rebutted testimony of Elkins and Bentley, the ALJ concluded that Elkins did in fact suffer a work-related injury on September 8, 2000, namely the large herniation at L5-S1 as reflected by the magnetic resonance imaging (MRI) scan performed by Dr. Sharma. The ALJ was also "persuaded by [Elkins's]

testimony, in conjunction with that of Dr. Templin, that the herniation was the result of the work incident[,]” ultimately saying: “Therefore, I find [Elkins’s] herniation was an injury as defined by the aforementioned statute.”³ Regarding the extent and duration of Elkins’s current disability, the ALJ found as follows:

The final issues for determination are extent and duration, pre-existing active and temporary total disability benefits. Drs. Templin, Sheridan and Ensalada assigned [Elkins] a 10% functional impairment due to the condition of his low back. Drs. Sheridan and Ensalada were of the opinion that the entire 10% was pre-existing active. [Elkins] returned to work following his injury and continued to work as a coal truck driver, and at the time of the most recent injury, was working as a mechanic. I am, therefore, persuaded by the opinion of Dr. Templin and apportion .5% to the 1989 injury and 9.5% to the current injury. Pursuant to KRS 342.730(1)(b), as amended July 14, 2000, the 9.5% functional impairment is multiplied by a factor of .85 yielding a permanent disability of 8.08%. At the time of the injury, [Elkins] was servicing a large truck and was carrying a 5 gallon bucket of oil. His work at that time was as a mechanic and operator of heavy equipment. Based upon [Elkins’s]

³ Under Ky. Rev. Stat. (KRS) 342.0011(1), an injury is defined as: “. . . any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” An injury does not include the effects of the natural aging process.

testimony concerning his condition, as well as the restrictions placed upon him by Dr. Templin, I find that he cannot return to the type of work he was performing at the time of his injury. Accordingly, his weekly benefit shall be multiplied by 3 pursuant to KRS 342.730(1)(c)(1).

On appeal to the Board, Kentucky River took issue with the ALJ's findings as to work-relatedness and causation, arguing that they are not supported by substantial evidence. In addressing these contentions, the Board engaged in the following analysis:

Kentucky River points out that evidence from Elkins' [s] 1990 claim indicates he suffered from low back pain and left leg symptoms similar to those he complained of following the September 2000 injury. Kentucky River also points out that Dr. Kennedy, the orthopedic surgeon that treated Elkins in 1990, read a January 1990 MRI as indicating an L5-S1 disc herniation. Kentucky River asserts that the ALJ erred in relying upon evidence of causation that was not supported by "objective medical findings." It also contends the definition of injury found in KRS 342.0011(1) requires that in order to qualify as an injury, evidence of causation must be supported by objective medical findings, citing Gibbs v. Premier Scale Co.⁴

⁴ Ky., 50 S.W.3d 754, 761 (2001).

KRS 342.0011(1) makes it clear that not all
(continued...)

We cannot agree with Kentucky River's characterization of Elkins' [s] condition being due solely to preexisting conditions. We note that Dr. Kennedy, in his deposition, only mentioned a diagnosis of an L4 herniation. He made no mention of an L5-S1 disc herniation in the deposition. A report attached to the deposition indicated that Dr. Kennedy read a CT scan as indicating a very mild disc herniation at the L5 level, which was of no clinical significance. Dr. Kennedy did state that the L4-L5 disc herniation was very large and could well be involving the L5-S1 nerve roots. Clearly, when he gave his deposition in 1990, Dr. Kennedy believed

⁴(...continued)

work-related harmful changes are compensable. Therefore, we are constrained to conclude that although a worker may experience symptoms and although a physician may have diagnosed a work-related harmful change, the harmful change must be evidenced by objective medical findings as that term is defined by KRS 342.0011(33). Otherwise, it is not compensable as an "injury." KRS 342.0011(1).

KRS 342.0011(33) limits "objective medical findings" to information gained by direct observation and testing applying objective or standardized methods. Thus, the plain language of KRS 342.0011(33) supports the view that a diagnosis is not an objective medical finding but rather that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. The fact that a particular diagnosis is made in the standard manner will not render it an "objective medical finding." We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purposes of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims.

Elkins' [s] L4-L5 disc herniation was the cause of all his problems. Furthermore, although there are indications in Dr. Kennedy's testimony that Elkins suffered symptoms at that time that are similar to the symptoms he complained of following the 2000 injury, Elkins testified that those symptoms resolved following his 1990 surgery and did not reoccur until the 2000 injury. As the ALJ pointed out, an MRI taken shortly after the 2000 injury indicated the presence of a large L5-S1 disc herniation. Given that Dr. Kennedy's reports only indicated a mild L5-S1 disc herniation of no clinical significance, we find no error with the ALJ's conclusion that Elkins' [s] L5-S1 disc herniation was a result of his 2000 injury.

In a workers' compensation claim, the claimant bears the burden of proving each of the essential elements of his claim.⁵ As fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence.⁶ In doing so, the ALJ may choose to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof.⁷

When the decision of the fact-finder is in favor of the party with the burden of proof (Elkins), the question on appeal is

⁵ Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000).

⁶ Id.; Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

⁷ Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977); Magic Coal Co., supra, n. 5, at 96.

whether the ALJ's decision is supported by substantial evidence.⁸ Substantial evidence is defined as evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people.⁹ As a result, a party challenging the ALJ's factual findings (Kentucky River) must do more than present evidence supporting a contrary conclusion to justify reversal.¹⁰

When reviewing decisions of the Board, our function is to correct the Board only where we perceive that the Board "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."¹¹ As evidenced by the Board's assessment, there is substantial evidence to support the ALJ's determination that Elkins suffered a work-related injury. That being the case, the Board has committed no such error here and further discussion as to this issue is unnecessary.

In a related vein, Kentucky River also argues that the ALJ's analysis of the causation issue is incorrect under Gibbs as Elkins failed to submit any "objective, direct causation testimony." According to Kentucky River, Elkins's testimony and the reports of Dr. Sharma and Dr. Templin constitute nothing more than "subjective medical opinion evidence and 'a patient's

⁸ Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986); Magic Coal Co., supra, n. 5, at 96.

⁹ Id.

¹⁰ Ira A. Watson Dep't Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000).

¹¹ Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

complaints of symptoms,' types of evidence which do not meet the Gibbs definition of objectivity." The Kentucky Supreme Court addressed this contention in Staples, Inc. v. Konvelski,¹² saying: "Although KRS 342.0011(1) clearly requires that there be objective medical findings of a harmful change in the human organism in order for that change to be compensable, we are not persuaded that KRS 342.0011(1) requires causation to be proved by objective medical findings." As was the case in Staples, "the ALJ was persuaded by the claimant's experts, both with regard to the existence of the harmful changes that [the claimant] alleged and to the cause of those harmful changes."¹³ Since the ALJ found in favor of Elkins, i.e., the party with the burden of proof here, the standard for review of the finding is whether it is supported in the record by any evidence of substance and, therefore, is reasonable.¹⁴ Like the Board, we find no error in the ALJ's reliance on the opinions of Dr. Sharma and Dr. Templin as to the causation of Elkins's injury as they constitute "evidence of substance."

Next, Kentucky River contends that the ALJ erred in awarding benefits to Elkins for a permanent partial disability based upon the 9.5% functional impairment rating assessed by Dr. Templin since it was not calculated pursuant to the AMA Guides. In support of its argument, Kentucky River emphasizes that, under the

¹² 56 S.W.3d 412, 415-416 (2001). Although Kentucky River correctly asserts that Staples had not yet become final at the time of the Board's opinion, it has since been published and is binding upon this Court.

¹³ Id. at 416.

¹⁴ Id. (citation omitted).

DRE model (use of which is required unless specified conditions are met), impairment ratings are only assessed in 5% increments and, as such, Dr. Templin's 9.5% rating necessarily fails to comply with the Guides. As the Board has effectively addressed this argument, we reproduce that portion of its opinion below:

We would direct Kentucky River's attention to the fact that Dr. Templin actually assessed a 10% impairment rating, but excluded .5% as being due to preexisting active conditions. The 10% rating is explicitly based on the AMA Guides using the DRE Model. Since Dr. Templin's impairment [rating] is in fact based upon the Guides, we find no error with the ALJ's use of that rating.

Kentucky River also argues it was error for the ALJ to utilize an impairment rating that did not take into account the impairment attributable to Elkins' [s] 1989 injury. It relies on that portion of the Fourth Edition AMA Guides at Section 3.3f, p. 101, which provides:

9. From historical information and previously compiled medical data, determine if there was a preexisting impairment. If the previously compiled data can be verified as being accurate, they may be used in apportionment (see Glossary). The percent based on the previous findings would be subtracted from the percent based on the current findings.

Kentucky River argues Dr. Kennedy assessed a 14% impairment in 1990 and that Dr. Sheridan and Dr. Ensalada both believed Elkins had a 10% preexisting impairment. Kentucky River therefore contends Elkins cannot receive income benefits since the only evidence of impairment indicates that his current impairment rating is no higher than the preexisting impairment.

We must disagree with this argument also. We note that Dr. Sharma stated it is quite possible that Elkins may have ultimately recovered from the 1990 injury and surgery to the point he would not warrant an impairment rating. Furthermore, Dr. Templin assessed a 10% impairment, but excluded .5% as being due to a preexisting impairment. While it could be argued that Dr. Templin's method for assessing the preexisting impairment is not in keeping with the directives of the Guides, Kentucky River has not so argued. Since Dr. Templin did assess Elkins' [s] current impairment and then excluded the portion due to the preexisting impairment, we believe his methods, to that extent, comport with the Guides.

The Board's reasoning is sound; we agree that the ALJ did not err in opting not to exclude any additional impairment as being attributable to the 1989 injury.

Kentucky River's remaining contention is that the ALJ erred in applying the triple disability multiplier provided for in KRS 342.730(1)(c)1 rather than the multiplier set forth in KRS

342.730(1)(c)2.¹⁵ There is no dispute that Elkins returned to work in a supervisory capacity at a wage equal to his preinjury wage. Likewise, Kentucky River does not contest the ALJ's finding that Elkins is incapable of returning to the type of work he performed prior to the injury, arguing instead that the considerations integral to that determination are irrelevant given that KRS 342.730(1)(c)2 is applicable in this instance. As the facts presented satisfy the criteria in both subsections, the question then becomes which one should be applied? Although the current version of the statute at issue became effective on July 14, 2000, the language employed prior to the amendment was nearly identical, with the only changes being the multipliers¹⁶ to be applied to the

¹⁵ KRS 342.730(1)(c)1 and 2 provide:

1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or

2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

¹⁶ Originally, subsection 1 contained a x 1.5 multiplier and subsection 2 mandated that the weekly benefits be reduced by one-half for each week during which that employment was sustained.

benefit amounts and the insertion of the word "or" at the end of subsection 1.

KRS 446.080(4) requires this Court to give statutory language its plain, ordinary meaning. "The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect."¹⁷ When determining legislative intent, a court must refer to the language of the statute rather than speculate as to what may have been intended but was not expressed.¹⁸ In other words, a court "may not interpret a statute at variance with its stated language."¹⁹

Applying those principles to the instant case, it is apparent from even a casual reading of these subsections that there are circumstances where both will apply equally, *i.e.*, they are not mutually exclusive. A finding that a claimant lacks the physical capacity to return to his preinjury employment is not dispositive as to the question of whether the same claimant has returned to work at a wage equal to or greater than his preinjury wage. Conversely, a finding that a claimant has returned to work at a wage equal to or higher than his preinjury wage does not necessarily imply that he possesses the physical ability to return to the same type of employment. It stands to reason, therefore, that the General Assembly was aware that, prior to the amendments, the language of these provisions could have been interpreted as

¹⁷ Interim Office v. Jewish Hosp. Healthcare, Ky. App., 932 S.W.2d 388, 390 (1996).

¹⁸ Commonwealth v. Allen, Ky., 980 S.W.2d 278, 280 (1998).

¹⁹ Id. (citation omitted).

allowing for them to be applied concurrently as long as the claimant satisfied both sets of criteria.

It is generally presumed that in amending a statute, the legislature intended to change the law.²⁰ The logical conclusion, then, is that the legislature did not intend for both of these subsections to be applied in a particular claim, as evidenced by the addition of the word "or." Clearly, the legislature could have made the provisions mutually exclusive but declined to do so. Having established that only one subsection may be properly applied, which subsection to apply in the present context, i.e., when both sets of criteria have been met, is still an unanswered question. Contrary to Kentucky River's assertion, there is no language in the statute itself which provides any guidance. In the absence of explicit direction, the purpose of the overall statutory scheme becomes our focus.

"The Workers' Compensation Act is social legislation, the purpose of which is to compensate workers who are injured in the course of their employment for necessary medical treatment and for a loss of wage-earning capacity, without regard to fault."²¹ In Osborne v. Johnson,²² this Court emphasized that one of the primary

²⁰ Whitley County Bd. of Educ. v. Meadors, Ky., 444 S.W.2d 890, 891 (1969).

²¹ Adkins v. R & S Body Co., Ky., 58 S.W.3d 428, 430 (2001).

²² Ky., 432 S.W.2d 800, 804 (1968). "While a workman who has sustained a permanent bodily injury of appreciable proportions may suffer no reduction of immediate earning capacity, it is likely that his ultimate earning capacity will either be reduced by a shortening of his work life or a reduction of employment opportunities through a combination of age and physical impairment." Id.

purposes of the Act is to compensate injured employees for their loss of earning capacity, not just a present loss of income. All presumptions are to be indulged in favor of those for whose protection the enactment was made.²³ Consistent with the foregoing principles, we believe that KRS 342.730(1)(c)1. must be given preference when the two provisions are equally applicable as is the case here. It could be argued that the result is counterintuitive given that the claimant will receive triple the normal benefit despite the fact that his wages have not been diminished. However, the legislature has acknowledged that a loss of earning capacity warrants a significant increase in income benefits as indicated by the amended income benefit multipliers found in KRS 342.730(1)(c)1 and 2 as well as the factors which are added to the multipliers pursuant to KRS 342.730(1)(c)3. Because the application of KRS 342.730(1)(c)1 in the present case is consistent with the stated purpose of the Act, the presumption in favor of the claimant and the overall statutory scheme, the ALJ did not err in multiplying Elkins's benefit award by three in accordance with KRS 342.730(1)(c)1.

As the Board was faced with the unenviable task of interpreting a statute without a binding precedent to follow and did not overlook or misconstrue the controlling statute or commit any error in assessing the evidence so flagrant as to cause gross injustice, its opinion is affirmed.

ALL CONCUR.

²³ Vance v. Unemployment Ins. Comm'n, Ky. App., 814 S.W.2d 284, 286 (1991) (citation omitted).

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