IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: December 21, 2006
AS CORRECTED: January 9, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-0095-WC

FINAL

DATE Jan 11, 07 ELA Graham P.C.

NINA BLACKBURN, INDIVIDUALLY AND
AND AS EXECUTRIX OF THE ESTATE OF
GARY BLACKBURN, DECEASED
LESLIE DWAYNE BLACKBURN,
DEPENDENT CHILD OVER THE AGE OF
18 INCAPABLE OF SELF SUPPORT — APPELLANTS

APPEAL FROM COURT OF APPEALS
V. 2004-CA-1652-WC
WORKERS' COMPENSATION NO. 01-WC-72911

LODESTAR ENERGY, INC.;
KENTUCKY EMPLOYERS' MUTUAL INSURANCE;
UNINSURED EMPLOYERS' FUND;
HON. KEVIN KING, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

AND 2006-SC-0228-WC

KENTUCKY EMPLOYERS' MUTUAL INSURANCE — APPELLANT

APPEAL FROM COURT OF APPEALS
V. 2004-CA-1687-WC
WORKERS' COMPENSATION NO. 01-WC-72911

LODESTAR ENERGY, INC.;
ESTATE OF GARY BLACKBURN;
UNINSURED EMPLOYERS' FUND;
HON. KEVIN KING, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board and the Court of Appeals have affirmed an Administrative Law Judge's (ALJ's) findings that KRS 342.750(1)(b) entitled Gary Blackburn's widow and dependent adult son to death benefits totaling 60% of the state's average weekly wage; that KRS 342.165(1) authorized their compensation to be enhanced by 30% because Lodestar's intentional safety violation caused Blackburn's death; and that KRS 342.375 required Kentucky Employers Mutual Insurance (KEMI) to pay the 30% enhancement to the claimants despite a contractual term to the contrary.

Appealing, the claimants assert that the ALJ should have awarded death benefits under KRS 342.750(3) or (4), which they assert entitle them to receive either the state's average weekly wage or 75% of the state's average weekly wage. KEMI asserts that it is not liable for the 30% enhancement. It argues that the enhancement is a penalty or a form of punitive damages and that KRS 342.165(1) is unconstitutional because it denies employers due process, violates the contracts clause, and denies employers equal protection. In the alternative, KEMI argues that if the statute is not punitive, Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1995), must be overruled.

Because KRS 342.750(3) limits the deceased worker's average weekly wage for the purposes of KRS 342.750 to the state's average weekly wage, we have concluded that the weekly benefits awarded are correct and affirm in that regard. Having also concluded that KEMI is directly responsible to the claimants for Lodestar's workers' compensation liability; that the 30% enhancement is not a penalty; and that KRS 342.165(1) is constitutional, we affirm in that regard as well. Because KRS 342.165(1)

implicitly creates an exception to KRS 342.730(1)(a) by increasing "the compensation for which the employer would otherwise have been liable under [Chapter 342]," we are not convinced that Apex Mining v. Blankenship, supra, must be overruled.

On October 3, 2001, Gary Blackburn's employer asked him to drive a fuel truck carrying approximately 3,000 gallons of fuel into a strip mining pit. Known as the "Hell Hole," the pit could only be entered by descending a steep slope. Blackburn began the descent and was found approximately 1,600 feet down the slope, lying by the road, fatally injured. An ALJ later found that he lost control of the truck and jumped from it. An investigation by the United States Department of Labor, Mine Safety and Health Administration (MSHA) revealed maintenance defects that resulted in a severely reduced braking capacity in all six of the fuel truck's brakes. Evidence also established that management knew that the brakes were inadequate to stop the vehicle on a road as steep as that into the pit. As a consequence, MSHA issued citations regarding the brakes.

Lodestar covered its workers' compensation liability at the time of the accident with KEMI. The insurance policy specified that Lodestar was responsible for any payments KEMI made on its behalf that exceeded benefits regularly provided by workers' compensation law, including payments resulting from any serious or willful misconduct by Lodestar or from its failure to comply with a health or safety law or regulation. The policy specifically excluded coverage for bodily injury that Lodestar intentionally caused or aggravated and for fines or penalties imposed on Lodestar for violating state or federal law.

Blackburn's widow (both individually and as the executrix of Gary's estate) and his dependent adult son sought death benefits under KRS 342.750 and a 30%

enhancement under KRS 342.165(1) based on the employer's intentional safety violation. The claimants and Lodestar reached a partial settlement that was approved on June 26, 2003. They agreed that the average weekly wage at the time of injury was $946.28; that the beneficiaries would receive a total of $530.07 per week in death benefits; but that questions regarding the 30% enhancement would be adjudicated by an ALJ.

On September 24, 2003, Lodestar moved to amend the settlement agreement to permit the ALJ to determine the amount of weekly benefits. The motion indicated that there had been an error in calculating the amount of the benefit. The claimants maintained that the figure contained in the agreement was correct and that the agreement could not be amended. However, they acknowledged the ALJ's authority to correct a mistake in the benefit rate. In an order entered on February 4, 2004, the ALJ found that the correct weekly death benefit was $318.04 ($238.53 for Nina and $79.51 for her son). The claimants petitioned for reconsideration, but no relief was granted.

After considering the evidence under KRS 342.165(1), the ALJ determined that Blackburn's death resulted from Lodestar's intentional violation of a specific safety statute or regulation and that Lodestar knew of the statute or regulation. Therefore, KRS 342.165(1) entitled the claimants to a 30% increase in compensation. The ALJ determined that KEMI was responsible to the claimants for the 30% increase because KRS 342.375 requires every workers' compensation insurance policy to cover an employer's entire liability for compensation and KRS 342.165(1) specifically provides for increased "compensation."

As we explained in Floyd County Board of Education v. Ratliff, 955 S.W.2d 921, 925 (Ky. 1997), the court's function is to interpret statutes according to their plain

meaning and the legislature's intent. KRS 342.750 provides, in pertinent part, as follows:

> If the injury causes death, income benefits shall be payable in the amount and to or for the benefit of the persons following, subject to the maximum limits specified in subsections (3) and (4) of this section:
>
> (1)(a) If there is a widow or widower and no children of the deceased, to such widow or widower 50 percent of the average weekly wage of the deceased, during widowhood or widowerhood.
>
> (b) To the widow or widower, if there is a child or children living with the widow or widower, 45 percent of the average weekly wage of the deceased, or 40 percent, if such child is not or such children are not living with a widow or widower, and in addition thereto, 15 percent for each child. Where there are more than two (2) such children, the indemnity benefits payable on account of such children shall be divided among such children, share and share alike.
>
> . . . .
>
> (f) To each parent, if actually dependent, 25 percent.
>
> (g) To the brothers, sisters, grandparents, and grandchildren, if actually dependent, 25 percent to each such dependent. If there should be more than one (1) of such dependents, the total income benefits payable on account of such dependents shall be divided share and share alike.
>
> . . . .
>
> (3) For the purposes of this section, the average weekly wage of the employee shall be taken as not more than the average weekly wage of the state as determined in KRS 342.740. In no case shall the aggregate weekly income benefits payable to all beneficiaries under this section exceed the maximum income benefit that was or would have been payable for total disability to the deceased, including benefits to his dependents.
>
> (4) The maximum weekly income benefits payable for all beneficiaries in case of death shall not exceed 75 percent of the average weekly wage of the deceased as calculated

> under KRS 342.140, subject to the maximum limits in subsection (3) above.

KRS 342.730(1)(a) provides an injured worker with a total disability benefit of 66 2/3% of the worker's average weekly wage but limits the maximum benefit to the state's average weekly wage, which in this case was $530.07. Because Blackburn's average weekly wage would have resulted in a total disability benefit that exceeded $530.07, KRS 342.730(1)(a) limited his total disability rate to $530.07.

As the claimants construe KRS 342.750, subsection (1)(b) would entitle them to $567.77 per week (60% of Blackburn's average weekly wage, i.e., 60% of $946.28), but subsection (3) limits their benefits to Blackburn's total disability rate of $530.07. Their argument is based on the apparent misconception that the first sentence of subsection (3) is inapplicable when calculating benefits under subsection (1). Yet, the sentence clearly limits the deceased worker's average weekly wage "for the purposes of this section" (i.e., for the purposes of KRS Chapter 342, section 750) to the state's average weekly wage. Therefore, the ALJ did not err in calculating their benefits under KRS 342.750(1)(b) as being 60% of the state's average weekly wage rather than 60% of Blackburn's average weekly wage. Had there been additional dependents eligible for benefits under KRS 342.750(1)(b), (f), and/or (g), the second sentence of subsection (3) would have limited the aggregate of all of the dependents' benefits to Blackburn's total disability rate. Because he was relatively well-paid, subsection (3) limits the aggregate of all dependents' benefits to the state's average weekly wage. Had his average weekly wage been low enough to have entitled him to a benefit that was less than the state's average weekly wage, his dependents would have been limited to an amount that was less than the state's average weekly wage.

The claimants' alternate argument is also misplaced. They assert that KRS 342.750(4) permits them to receive no less than 75% of the state's average weekly wage (i.e., to receive $397.55). Yet, subsection (4) clearly imposes another cap on weekly benefits rather than placing a floor beneath them. It limits "[t]he maximum weekly income benefits payable for all beneficiaries" to 75% of the deceased worker's average weekly wage "subject to the limits in subsection (3)." Because Blackburn was relatively well-paid, subsection (3) limits his average weekly wage for the purposes of KRS 342.750 to the state's average weekly wage. Therefore, the maximum weekly income benefits payable for all beneficiaries is 75% of the state's average weekly wage.

KEMI raises four grounds for reversal: 1.) that it is only liable for compensation under its policy with the employer and that the 30% enhancement is a penalty; 2.) that KRS 342.165(1) violates its due process rights under the United States Constitution by permitting punitive damages to be imposed without judicial review; 3.) that the Court of Appeals has construed KRS 342.375 in a manner than violates the contracts clause of the United States Constitution; and 4.) that the 2000 version of KRS 342.165(1) violates the equal protection clause of the United States Constitution by penalizing the safety violations of employers more than those of workers.

This court has addressed the first three grounds to some extent previously. In AIG/AIU Insurance Company v. South Akers Mining Company, LLC, 192 S.W.3d 687, 689 (Ky. 2006), the court rejected arguments that an increase or decrease in compensation under KRS 342.165(1) is a penalty or the legislative equivalent of punitive damages. The court noted that Chapter 342 involves a series of trade-offs for both parties. It provides medical benefits and benefits to replace part of an injured worker's lost wages without regard to fault. Likewise, it relieves an employer of liability

for pain, suffering, and punitive damages even in instances where its intentional safety violation causes the accident and injury. The court reasoned that KRS 342.165(1) gives employers and workers a financial incentive to comply with safety provisions "without thwarting the very purpose of the Act by subjecting them to the potentially disastrous consequences of removing claims involving intentional violations from its coverage." Id. at 689. Characterizing the use of the word "penalty" in Apex Mining v. Blankenship, supra, Whittaker v. McClure, 891 S.W.2d 80 (Ky. 1995), and Ernst Simpson Construction Co. v. Conn, 625 S.W.2d 850, 851 (Ky. 1981), as being a metaphor, the court determined that KRS 342.165(1) compensates the party that receives more or pays less for the effects of the opponent's intentional misconduct. Relying, in part on our decision in AIG/AIU Insurance Company v. South Akers Mining Company, supra, we determined in Realty Improvement v. Raley, 194 S.W.3d 818 (Ky. 2006), that benefits awarded under KRS 342.750(6) are a form of income benefits and that they are subject to enhancement under KRS 342.165(1).

KEMI argues that if the increase in compensation under KRS 342.165(1) is not a penalty, Apex Mining v. Blankenship, supra, must be overruled. It reasons that the court was only able to conclude that the increased benefit was not an income benefit and subject to the cap imposed by KRS 342.730(1)(a) by characterizing it as a penalty. We disagree.

The Blankenship court noted that KRS 342.730(1)(a) limits income benefits, not compensation. Characterizing benefits awarded under KRS 342.165(1) as being a penalty rather than income benefits, the court held that a worker may receive an income benefit for total disability as well as an increase in compensation under KRS 342.165(1). The fact remains, however, that the applicable version of KRS 342.165(1)

created an implicit exception to KRS 342.730(1)(a) by stating that "the compensation for which the employer would otherwise have been liable under this chapter shall be increased fifteen percent (15%) in the amount of each payment." The present version does the same except that the increase is 30%. We conclude, therefore, that although the increase or decrease in benefits is not a penalty, the Blankenship court's holding was correct and need not be disturbed.

This court rejected an argument based on the contracts clause in AIG/AIU Insurance Company v. South Akers Mining Company, supra, noting that KRS 342.340(1), KRS 342.365, and KRS 342.375 evince a public policy requiring an employer's liability for workers' compensation benefits to be secured. Article I, Section 10, Clause 1 of the United States Constitution provides that "no state shall . . . pass any bill of attainder, ex post facto law or law impairing the obligation of contracts." In Long Sault Development Co. v. Call, 242 U.S. 272; 37 S.Ct. 79; 61 L.Ed. 294 (1916), the United States Supreme Court explained that the contracts clause is directed against the impairment of contracts by subsequently-enacted laws or constitutions.

Because KEMI acknowledges that its contract with Lodestar became effective after KRS 342.375 was enacted, it is clear that the statute did not impair it. KRS 342.375 requires every policy or contract of insurance to cover an employer's entire liability for compensation; therefore, KEMI must pay the increased compensation to the claimant despite a contractual term absolving it from such liability. The ALJ noted specifically in this case that the decision imposing liability on KEMI did not address whether KEMI had a civil cause of action against Lodestar and expressed the belief that an ALJ lacked jurisdiction to decide that question. KEMI complains that even if a civil action were available, it would be unable to collect any judgment due to Lodestar's

bankruptcy. However, the existence or lack of an effective civil remedy for KEMI is immaterial under KRS 342.375. Its purpose is to protect injured workers.

KEMI's final argument is that the 2000 version of KRS 342.165(1) violates the Equal Protection clause of the United States Constitution because an employer's intentional safety violation results in a 30% increase in compensation, but a worker's intentional safety violation results in only a 15% decrease in compensation. We disagree.

As we explained in Wynn v. Ibold, 969 S.W.2d 695 (Ky. 1998), Steven Lee Enterprises v. Varney, 36 S.W.3d 391 (Ky. 2000), and McDowell v. Jackson Energy RECC, 84 S.W.3d 71 (Ky. 2002), workers' compensation legislation concerns economic policy and social welfare. Where no suspect classification is involved, a statue complies with due process and equal protection requirements if it is rationally related to a legitimate state objective, i.e., if there is a rational basis for any perceived discrimination. Because statutes are presumed to be constitutional, the burden is on the party attacking a statute to show that it has no conceivable rational basis.

Workers are responsible for their own conduct but have little or no control over the work they are required to perform, the environment in which they must perform it, or the equipment that they must use. Yet, it is they who experience the physical and mental consequences of a workplace accident and they who experience the financial consequences of receiving limited income benefits for a decrease the ability to earn a living. Acknowledging that reality, KRS 338.031 provides:

> (1) Each employer:
>
> (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or

> serious physical harm to his employees;
>
> (b) Shall comply with occupational safety and health standards promulgated under this chapter.
>
> (2) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

Consistent with KRS 338.031, KRS 342.165(1) encourages workers and employers to follow safety statutes and regulations by providing a financial incentive for them to do so. Employers who comply are liable for lower workers' compensation benefits than if they do not. Workers who comply will receive greater benefits than if they do not.

There are numerous reasonable explanations for why the legislature gave employers a greater financial incentive to comply with safety statutes and regulations than it gave workers. For example, the legislature may have reasoned that employers require a greater financial incentive to comply due to their greater financial resources. The legislature may have considered that an employer's compliance is likely to have broader consequences than a worker's because employers control the work that is performed, the environment in which it is performed, and the equipment with which it is performed. Therefore, an employer's compliance with safety provisions is more likely than that of an individual worker to reduce the number of workplace accidents, the number of workers who are injured, and the seriousness of the injuries. The legislature may have also considered that employers are likely to weigh the sometimes substantial costs of complying with safety provisions against the benefits of doing so. Having determined that it was neither illogical nor irrational for the legislature to provide different financial incentives to employers and workers, we also conclude that KRS

342.165(1) constitutional.

The decision of the Court of Appeals is affirmed.

All concur.

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ORDER

On the Court's own motion, the Opinion of the Court rendered in the above-styled matter on December 21, 2006, is hereby corrected by the substitution of a new page one, hereto attached, in lieu of page one of the Opinion as originally rendered. Said correction does not affect the holding of the Opinion, but is made only to correct a typographical error in the rendition date.

Entered: January 9, 2007.

CHIEF JUSTICE