# 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# NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

# Supreme Court of Kentucky



2006-SC-000633-WC

PHILLIPS TREE EXPERTS, INC. — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2006-CA-0095-WC
WORKERS' COMPENSATION NO. 02-95660

GENE TRAVIS; HON. SHEILA LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

The Chief Administrative Law Judge (CALJ) denied a motion by Phillips Tree Experts, Inc., to reopen a settlement in which it agreed to pay Gene Travis a triple income benefit under KRS 342.730(1)(c)1. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Having concluded that KRS 342.265(4) permits settling parties who later disagree to reopen but does not change the criteria for amending a final award; that Phillips failed to make a prima facie showing for reopening under KRS 342.125(1); and that KRS 342.730(1)(c)4 is inapplicable to these facts, we affirm.

On February 12, 2002, Travis fell about 20 feet while working and fractured his left leg. After he reached maximum medical improvement, his physician assigned a 5% permanent impairment rating and restricted him from working at unprotected heights

and climbing trees, especially when carrying extra weight such as a chainsaw. Before Travis filed an application for benefits, he and his employer agreed to settle the potential workers' compensation claim.

The Form 110 settlement agreement indicated that Travis had a 5% permanent impairment rating, which equaled a 3.25% permanent disability rating. It stated that although he had returned to work on October 28, 2002, doing "garage work," he was not working presently. The parties agreed to a triple income benefit under KRS 342.730(1)(c)1. Based on an average weekly wage of $437.70, the income benefit was $28.44 per week for a period of 425 weeks. An ALJ approved the agreement on September 17, 2003.

On July 1, 2005, the employer filed a motion to reopen that was supported by an affidavit from its insurance carrier's claims adjuster. The motion indicated that the ground for reopening was "conforming the award to employee's work status for injuries after 12-12-96." The employer asserted that the claimant had received a triple benefit in the settlement because he "was not performing the same type of work as at the time of the injury;" however, he now performed the same type of work as he did at the time of the injury, and his present average weekly wage was greater. Therefore, his award should be modified. The motion did not seek to reopen under any of the grounds set forth in KRS 342.125(1).

Travis objected, arguing that the motion failed to establish a permissible basis for reopening. The CALJ agreed and overruled it. The employer then appealed.

As explained in Hodges v. Sager Corporation, 182 S.W.3d 497 (Ky. 2005), the applicable standard of review is whether the decision to grant or deny reopening was an abuse of discretion. Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004), describes

such a decision as being "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Although the employer continues to argue that KRS 342.730(1)(c)4, KRS 342.125(3), and KRS 342.265(4) entitle it to reopen, we find no abuse of discretion.

Whittaker v. Pollard, 25 S.W.3d 466, 469 (Ky. 2000), explained that an agreement to settle a workers' compensation claim is a contract between the parties. KRS 342.265(1) and KRS 342.305 permit an approved agreement to be enforced in circuit court as a judgment. Although KRS 342.265(4) provides that the exclusive remedy for parties who settle a claim but later disagree is to "invoke the provisions of KRS 342.125," nothing in KRS 342.265(4) alters the grounds for which KRS 342.125(1) permits a final award to be reopened and modified.

This is not a case in which the employer sought to resolve a disagreement over the interpretation of the settlement contract. The parties agreed that the claimant did not retain the physical capacity to return to the work that he performed at the time of the injury and, therefore, that his benefit would be tripled under KRS 342.730(1)(c)1. Later, the employer sought to reopen the settled award and have it modified. The grounds for reopening stated in KRS 342.125(1) include: a.) fraud; b.) newly-discovered evidence that could not have been discovered with the exercise of due diligence; c.) mistake; and d.) change of disability as shown by objective medical evidence of a change of impairment. The employer's motion failed to allege and offer prima facie evidence of any of those grounds.

Arguing that KRS 342.730(1)(c)4 authorizes reopening when an injured worker returns to work earning the same or a greater wage than at the time of the injury, the employer asserts that the statute does not limit itself to awards that provide a benefit

under KRS 342.730(1)(c)2. Relying on Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), it asserts that an ALJ must analyze whether an award under KRS 342.730(1)(c)1 or 2 is more appropriate when considering a motion to reopen under KRS 342.730(1)(c)4. It concludes that KRS 342.730(1)(c)4 permits Travis's award to be reopened and conformed to KRS 342.730(1)(c)2 (i.e., reduced to either a double benefit or a basic benefit) because he has returned to work at a greater wage than he earned when he was injured. We disagree.

Fawbush v. Gwinn, supra, concerned a worker who lacked the physical capacity to return to the work performed at the time of injury. When his claim was heard, he had returned to similar work and earned the same or a greater wage; however, the work exceeded his medical restrictions and required him to take more than the prescribed dose of narcotic pain medication. Noting that subparagraphs 1 and 2 of the 2000 version of KRS 342.730(1)(c) are separated by the word "or," the court determined that the statute gave an ALJ the discretion to decide which subparagraph was more appropriate under the circumstances. Reopening was not at issue, and the decision did not address it.

KRS 342.730(1)(c) provides, in pertinent part, as follows:

> 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 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
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> 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.
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> . . .
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> 4. Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of subparagraph 2. of this paragraph. (emphasis added).

KRS 446.080 provides that all statutes must "be liberally construed with a view to promote their objects and carry out the intent of the legislature." KRS 342.730(1)(b) provides a basic income benefit for partially disabled workers, but KRS 342.730(1)(c) permits the benefit to be enhanced under certain circumstances. KRS 342.730(1)(c)1 permits injured workers who lack the physical capacity to return to the work performed at the time of injury to receive a triple benefit. KRS 342.730(1)(c)2 encourages those who retain the physical capacity to return to the work performed at the time of an injury to do so and to earn the same or a greater wage. It accomplishes that purpose by authorizing a basic income benefit during employment at the same or a greater wage but a double income benefit during any period that the employment ceases. KRS 342.730(1)(c)4 permits reopening at any time during the period of an award to conform it with the requirements of subparagraph 2.

Although KRS 342.730(1)(c)4 provides an additional ground for reopening, it mentions only subparagraph 2. It evinces a legislative intent to permit an award made under subparagraph 2 to be reopened and amended to reflect the cessation or resumption of employment at the same or a greater wage, regardless of whether KRS

342.125 would permit reopening. Nothing in subparagraph 4 evinces the intent to affect awards made under subparagraph 1. Contrary to the employer's assertion, KRS 342.125(3) does no more than create an exception to the usual time limits when reopening is sought under KRS 342.730(1)(c)4.

An ALJ approved the parties' agreement that the claimant would receive a triple income benefit under KRS 342.730(1)(c)1. Later, the employer moved to reopen under KRS 342.730(1)(c)4 and failed to allege or offer prima facie evidence of any of the grounds for reopening found in KRS 342.125. Under the circumstances, we are not convinced that the CALJ's decision to overrule the motion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. In other words, we are not convinced that it was an abuse of discretion. Nor are we convinced by the employer's argument that our interpretation of KRS 342.730(1)(c)4 will discourage settlements that provide benefits under KRS 342.730(1)(c)1. Nothing prevents a party who complies with the requirements of KRS 342.125(1) from reopening an award.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cunningham, McAnulty, Noble, Schroder and Scott, JJ., concur. Minton, J., not sitting.

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