

OPINION ENTERED: AUGUST 20, 2012

CLAIM NO. 200874367

BILL CHURCH PAINTING CO. INC.

PETITIONER

VS.

**APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE**

CLAUDE BLANKENSHIP
and JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. Bill Church Painting Co., Inc. ("Church") appeals from the March 20, 2012 Opinion, Order and Award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), finding Claude Blankenship's ("Blankenship") September 19, 2008 injury occurred within the course and scope of his employment with Church and finding Blankenship's counsel was entitled to an attorney fee to be

paid by Church pursuant to KRS 342.040(2). Church also appeals from an the April 10, 2012 Order denying its petition for reconsideration, the April 12, 2012 Order awarding an attorney's fee pursuant to KRS 342.040(2), the May 11, 2012 Order on Petition for Reconsideration, and the Amended Opinion and Award rendered May 11, 2012. On appeal, Church argues the ALJ misapplied the law in finding Blankenship sustained a work-related injury and in granting an attorney fee pursuant to KRS 342.040(2). We affirm.

Blankenship filed a Form 101, Application for Adjustment of Injury Claim on November 3, 2008, alleging an injury to his left leg when he fell during an attempt to climb a fence to leave his work area after finding the exit gate locked. The claim was assigned to Honorable Irene Steen, Administrative Law Judge ("ALJ Steen"), who granted Blankenship's request for interlocutory relief on April 1, 2009. ALJ Steen ordered payment of temporary total disability ("TTD") benefits and medical benefits, placed the claim in abeyance and cancelled the scheduled benefit review conference.

After Blankenship's deposition was taken on April 22, 2009, Church filed a motion for summary judgment. By order dated July 15, 2009, the ALJ denied the motion stating:

This case is before me upon Defendant's Motion to Dismiss or in the alternative for Summary Judgment and the Plaintiff having responded thereto, it is the finding of this ALJ that Summary Judgment is not available in Worker's Compensation.

...

The ALJ is of the opinion that it is premature for me to render a final decision on the issue at this time without having all of the evidence before me. The Defendant's motion shall be overruled at this time and the case shall proceed with proof taking of any potential lay witnesses. The case is currently in abeyance due to ongoing treatment and the Defendant is paying TTD and medicals, pursuant to a previous order from this ALJ dated April 1st, 2009, and which shall continue until Plaintiff has reached MMI.

The claim remained in abeyance with no scheduling order entered or additional evidence introduced except for records from the Veteran's Administration in response to ALJ Steen's order for a status report. Church, however, filed multiple medical fee disputes.

On October 9, 2009, while the claim remained in abeyance, Church filed a motion to dismiss the claim, stating the same grounds as the previous motion for summary judgment. Blankenship filed a response and on November 3, 2009, ALJ Steen granted Church's motion dismissing the claim.

On appeal, the Board vacated the order dismissing the claim, holding in pertinent part as follows:

In awarding income and medical benefits, it is implicit the ALJ found Blankenship eligible for the relief. Significantly, although the ALJ had previously been persuaded as to the validity of Blankenship's claim to the extent that she awarded interlocutory relief benefits, she subsequently inconsistently dismissed the claim without the introduction of any evidence to the contrary. She did so without removing the claim from abeyance to allow the parties to prove or disprove the merits of the claim. Absent a showing of new evidence, fraud, or mistake, our courts of justice have instructed that an ALJ in a workers' compensation case may not reverse a dispositive interlocutory factual finding on the merits in a subsequent final opinion. Bowerman v. Black Equipment Co., 297 S.W.3d 858, 867 (Ky. App. 2009). What is more, this action by the ALJ deprived Blankenship of the fundamental due process rights of developing proof to support his claim, and the opportunity to be heard. Id.; K & P Grocery, Inc. v. Commonwealth, Cabinet for Health Services, 103 S.W.3d 701, 703 (Ky. App. 2002). Based upon the foregoing, it is apparent the ALJ abused her discretion in arbitrarily dismissing the claim.

It is undisputed Blankenship sustained a significant injury to his left tibial plateau when he fell during an attempt to climb a fence to leave his work area. Relatively little evidence was introduced in the claim. The ALJ in her award of interlocutory relief canceled the Benefit Review Conference, and placed the claim in abeyance,

thereby removing it from the normal cycle for the introduction of evidence. No evidence was introduced after the award of interlocutory relief except for the deposition of Blankenship which was consistent with the deposition of his employer that had been taken and introduced prior to the entry of the award of interlocutory relief. The only other evidence submitted were records from the Veteran's Administration supporting that Blankenship had not yet reached maximum medical improvement, in response to a request for a status report by the ALJ. The claim remained in abeyance after the award of interlocutory relief, with TTD being paid until it was dismissed. At no time did the ALJ institute a proof schedule, nor did she remove the claim from abeyance. Likewise, at no time was a Benefit Review Conference held, and no Hearing was scheduled.

The dismissal by the ALJ was contrary to the procedures set forth in KRS 342.010 et. seq., and 803 KAR 25:010 pertaining to the prosecution and decision of a workers' compensation claim. It would be contrary to fundamental fairness, and the purpose of the Kentucky Workers' Compensation Act to permit this matter to stand as decided by the ALJ. We believe the ALJ abused her discretion by prematurely dismissing the claim without properly allowing the parties to proceed, at a minimum, with the taking of additional proof, conducting a benefit review conference and a final hearing, followed by a written decision on the merits, thereby depriving Blankenship of his fundamental due process rights.

The inconsistency between an award of interlocutory relief, and a final decision was previously addressed by the

Court of Appeals in Bowerman v. Black Equipment Co., supra, wherein the Court of Appeals stated:

KRS 342.285 also establishes a "clearly erroneous" standard of review for appeals concerning factual findings rendered by an ALJ, and is determined based on reasonableness. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Although an ALJ must recite sufficient facts to permit meaningful appellate review, KRS 342.285 provides that an ALJ's decision is "conclusive and binding as to all questions of fact," and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact[.]" *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky. App. 1982). In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Board of Education, Shelby County*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

...

The primary issue before us is whether an ALJ, as finder of fact, may reverse a dispositive interlocutory

factual finding on the merits in a subsequent final opinion, absent a showing of new evidence, fraud, or mistake. Though this appears to be a matter of first impression, our review of relevant legal authority leads us to conclude the reversal of prior dispositive factual findings rendered by an ALJ in an interlocutory opinion, absent introduction of new evidence, fraud, or mistake, is arbitrary, unreasonable, unfair, and unsupported by sound legal principles. In such instances, the ALJ exceeds the exercise of reasonable discretion, operates outside the bounds of statutory authority, and must be reversed. In affirming the ALJ's final opinion, we believe the Board misinterpreted its own cited legal authority and overlooked legal authority drawn from analogous circumstances involving petitions for reconsideration and motions for reopening.

...

The question presented on appeal is whether the ALJ's reversal of her initial factual findings in her final opinion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing*. If so, the ALJ abused her discretion and reversal is mandated. *Medley*.

Generally, "arbitrariness" arises when an ALJ renders a decision on less than substantial evidence, fails to afford procedural due process to an affected party, or exceeds her statutory authority. *K & P Grocery, Inc. v. Commonwealth, Cabinet for Health Services*, 103 S.W.3d 701, 703 (Ky. App. 2002). Arbitrariness is one of five reasons identified in KRS 342.285(2) authorizing reversal of an ALJ's decision. [Footnote omitted.]

...

As used in the statute, an arbitrary decision is synonymous with one that is "capricious" or "characterized by abuse of discretion or clearly unwarranted exercise of discretion." A capricious decision is defined as one "contrary to the evidence or established rules of law[,]" or arbitrary, while a capricious fact-finder would be defined as being "characterized by or guided by unpredictable or impulsive behavior." [Footnote omitted.] These terms are also synonymous with an "unreasonable" decision, which is defined as one "[n]ot guided by reason; irrational or capricious." [Footnote omitted.]

Based on KRS 342.285(2) and the foregoing definitions of terms contained therein, we hold the ALJ's unexplained

turnabout regarding her initial factual findings to be arbitrary, capricious, and so unreasonable as to be erroneous as a matter of law. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). Thus, the ALJ's reversal of previously adjudicated factual findings represents an abuse of her discretion as fact-finder, and because she thereby acted in excess of her statutory authority, reversal is mandated.

Id. at 866-868.

. . .

Based upon the procedural facts of this case, we *sua sponte* determine the dismissal of this action was arbitrary, capricious, and a clearly constituted an unwarranted abuse of discretion as described by KRS 342.285(2). We, therefore, vacate the November 3, 2009 opinion and dismissal, and remand this matter with instructions that the ALJ as designated by the Acting Chief Administrative Law Judge, at a minimum, issue a standard order scheduling time for taking proof for all parties, to be followed by a benefit review conference and a final hearing, and a decision on the merits of Blankenship's claim once the case has properly been submitted for a determination in accordance with the Act and regulations.

On remand, the claim was reassigned to Honorable Jeanie Owen Miller, Administrative Law Judge ("ALJ Miller"). Additional medical evidence was filed but is not relevant to the issues on appeal and therefore will not be summarized.

In her Opinion, Order and Award dated March 20, 2012, ALJ Miller extensively summarized the relevant portions of Blankship's testimony as follows:

The owner of Church Painting had been the successful bidder on the painting portion of a contract at Oldham County High School. The general contractor was renovating (building an addition onto) the school. The Defendant/employer's crew had been on-location since late-July or early-August. Other contractors were simultaneously working on location carpenters, plumbers, block-layers and electricians, inside and outside the buildings. The construction workforce totaled about 20 men. School was back in session when Plaintiff got hurt.

When classes recommenced, the general contractor over the project had designated that the construction workers park in two designated areas and had erected temporary chain-link fencing around the perimeter of the school where the work was being done. The fence was 6-ft. high. It was not a continuous, unbroken length of "stretched" chain link - it was assembled of panels which were about 10-ft. long and were fastened together. There were several separate fenced-in areas around the school and each area had a gate. There was a lot of distance between areas. The panels' support-leg-posts had been set down into the open holes of concrete-blocks. In places where there was no concrete or asphalt paving, the fence builders had driven fence posts into the dirt, along the fencerow. The panels were heavy, but flexible.

The area of school grounds adjacent to the gymnasium was in use as the "main

construction lay-down yard" at the worksite. The various contractors had parked their tool/material/equipment-storage trailers inside the fenced-area, including building materials and construction vehicles. The temporary fencing near the gym had one double-gate which could be swung-open to allow equipment to be driven through. The framing-posts of that gate were set/concreted into the ground. There were long runs/multiple panels of six feet high chain-link fencing attached to each side of that main gate. At the end of the fence nearest the gym [sic], there was a short transition section for the blocklayers' use in bringing concrete blocks and sand, etc., back and forth from the work area when the kindergarten students were not coming and going. The chain-link fence transitioned to four feet via orange-plastic netting. The orange fencing was attached to the chain-link by use of tie-wraps. At the other end of the plastic netting, a slender steel-reinforcing-bar was driven into the ground and served as a fence post. The workers used tie-wraps to fasten the fence to the rebar rod. Plaintiff's foreman testified that there was also a "man-gate" in the perimeter-fence around the "lay-down-yard." That smaller gate was located about 10 or 15 ft. beyond the big gate. (Deposition of Kenneth Church, pg. 19).

The man in charge of the site unlocked the gates in the morning to permit the workers to pass in and out and to permit suppliers to bring in materials. At the end of each workday the gates were chained together and padlocked to prevent trespassing, theft and vandalism. The general contractor was supposed to check to be sure all

workers from all crafts had departed before locking-up.

The Defendant/employer's foreman testified there was a gap in the fencing of the "lay-down-area", about 30 feet away from the gate, over to the left, by the ag-center. There was also an open place in the fence where a trailer was parked - a person could crawl underneath the trailer and get out. He testified there was another open place in the fencing, about 100 feet to the other side of the gate of the "lay-down-yard". (February 4, 2009 Depo. of Kenneth Church, pg. 10). Kenneth Church testified he had never seen Plaintiff either climb or jump over the fence. (Church Depo., pg. 22).

On September 19, 2008, Plaintiff was a member of a three man crew. Eric Atkins and Kenneth Church were the other workers at the site. They had been painting inside Oldham County High School. The crew had worked in the school over a month. They were working from 7:30 a.m. to 4:00 p.m., Monday through Friday. The three painters were working in different areas of the school. Each man parked his car in the parking lot which was closest to the building he was to work in that day. Plaintiff's injury occurred Friday afternoon, September 19, 2008, about 30 minutes after the 4:00 quitting time. Church's crew members had cleaned their brushes and locked-up their tools and equipment. They had to wait for Kenny Church, the foreman, to come hand out their paychecks. The three painters then "headed for home for the weekend."

By 4:00 p.m., nobody but the painters remained on-location. The three painters took separate routes when they departed the school building and

construction area. Eric Atkins had parked his vehicle in the parking lot which was close to the school's kitchen. Kenny Church had parked in the lot in front of the school. Each man headed for the exit closest to where he had parked his vehicle.

That morning, Plaintiff had parked his truck in the designated parking lot closest to the school's gymnasium and directly in front of the "contractors' construction-lay-down yard." The man in charge of that area had unlocked the gate and also unlocked the school's door. Plaintiff walked through the gate and went through the lay-down-area and entered the school door closest to the gym. He obtained his tools and paint at 7:30 a.m. He then went to his station, climbed on the scaffold, and commenced working. The Plaintiff testified he used that same route to go out to his truck during the first break at 9:00 a.m., at noon to eat, at 2:00 p.m. for a break and then finished his day's work. Close to end of the day he cleaned his equipment, brushes and tools, and took them back to the construction workers' storage area (inside the school) and locked them up in the gang-box. (Hearing Transcript, pp. 16-17). He decided to exit the jobsite via that same route. When he exited the school door, the lock tripped-shut and he was locked out of the building. When he arrived at the gate, he discovered that someone had already padlocked it for the weekend. He was the sole person in the "lay-down-yard." He realized he would have to walk all the way around the school grounds and go through other parking lots, and circle-back to his vehicle. The general contractor had forbidden the workers from pulling-down the orange plastic-net-fencing near the schoolbus-pullup, as the kindergarten

students would then be able to get into the "lay-down area" and could get hurt. (Hearing Transcript, pg. 17). Plaintiff testified the General Contractor had conducted a safety meeting pertaining to that issue just a week prior to his injury. During that mid-September meeting, all the workers were ordered to never try to step over that plastic fencing when it was secured. They were only permitted to travel through that fence when it was rolled open. (Hearing Transcript, pp. 43-44). He testified it was a "firing-offense" and he would have lost his job if he had cut the nylon tie-wraps and gone out that way. Even if he could have found some tie-wraps and re-connected the plastic fencing, he would have been fired for disobeying the General Contractor's specific orders. (Hearing Transcript, pp. 20-21).

Plaintiff decided to simply climb over the fence right at that locked big gate. (Plaintiff's Affidavit of March 16, 2009). Plaintiff testified he thought there would be no harm in climbing the fence. He was strong and agile and did a lot of climbing (ladders and scaffolds) and jumping and walking and bending and standing, in performing his duties as a painter; he thought there would be no risk. (Plaintiff's depo., pp. 33-34). His truck was parked a short distance beyond the gatepost. He grabbed hold of the top rail, stepped up 3-ft. onto the center-pipe, and climbed to the top of the fence panel. He swung his body over the other side. When he turned loose and jumped down, he lost his balance and fell to the pavement. He heard a "snap" in his left leg and knee. He saw a large "knot" or "rising" beneath the britches-leg at his left knee. He was in severe pain and could not stand. He began hollering for help.

Plaintiff's co-worker, Eric Atkins, coincidentally drove by and saw Plaintiff lying in the parking lot and heard him yelling. He used his cell-phone to report the injury to the foreman. Kenny Church drove his vehicle around the school building, to where Plaintiff was lying. Kenny Church did not summon an ambulance. Eric helped him load Plaintiff into his vehicle and Mr. Church immediately transported Plaintiff to the Veterans' Administration Hospital on Zorn Avenue in Louisville, Kentucky.

After reviewing the evidence and noting the parties' positions, the ALJ issued the following analysis and findings of fact quoting extensively from the Board's decision in Eurest Dining Service v. Raymond, Claim No. 2004-00627 rendered February 10, 2006 and containing similar facts.

The Defendant/employer argues that for Plaintiff's injury to have arisen out of his employment it must have been as a direct and natural result of a risk reasonably incident to his employment in which he was engaged. They argued that the risk associated with the Plaintiff climbing the fence to exit the work premises could "not be in any way considered reasonably incident to his employment." (Defendant's brief, p. 10). They argue that climbing the fence was a risk that was not in "any way incident to his work" because it was not required of him as a painter, he did not have to climb the fence to get to his car, and his employer did not instruct or command him to climb the fence. The

Defendant/employer also argues that the Plaintiff cannot prove that he was "in the course of" his employment in that the injury happened after the work day had ended and he had vacated the building where he was painting.

The Plaintiff argues he was injured on the work site of the Defendant/employer. That the Defendant/employer, through the general contractor, exercised "complete control" of the area and the exit gate and that the physical act of the Plaintiff in climbing over the fence was "in contact with the employment environment." (Plaintiff's brief, p. 3).

The Kentucky Workers' Compensation Board issued an Opinion in 2006 that discusses most if not all of the legal arguments made by the parties in the case at bar. In the case of Eurest Dining Service vs. Raymond, No. 04-00627 (2006), the Board stated in pertinent part:

. . . Generally speaking, a traumatic event that occurs while an employee is going to or coming from work is not deemed to arise "out of and in the course of employment." This generality is known as the "going and coming" rule and was succinctly stated by the supreme court in Receveur Construction, Co. v. Rogers, Ky., 958 S.W.2d 18 (1997), as follows:

The general rule is that injuries sustained by workers when they are going to or returning from the place where they regularly perform the duties connected with their employment are not deemed to arise out of and in the course

of the employment as the hazards ordinarily encountered in such journeys are not incident to the employer's business.

Id. at 20; See also Haney v. Butler, Ky., 990 S.W.2d 611 (1999); Olsten-Kimberly Quality Care v. Parr, Ky., 965 S.W.2d 155, 157 (1998); Baskin v. Community Towel Service, Ky., 466 S.W.2d 456 (1971); Kaycee Coal Co. v. Short, Ky., 450 S.W.2d 262 (1970). Thus, an employee who is in "going and coming" status does not enjoy coverage under the Act.

Eurest argues that the "going and coming" rule does not apply to the case *sub judice* because Raymond had already clocked in for work and was merely on break at the time of her injury.

. . . .

Moreover, as may be gleaned from Eurest's brief before this Board, there is little substantive distinction between Eurest's argument and one based on the "going and coming" rule. The following treatment of the subject, found in American Jurisprudence, illuminates this point:

One of the rationales behind the going and coming rule is that the employment relationship between the employer and employee does not begin until the employee enters the employer's premises. Thus, the going and coming rule does not apply to an employee who has arrived at the work place or the zone of employment; after entry on to

the employer's premises, an injury to an employee is generally presumed compensable as arising in the course of employment. In other words, there is a premises exception to the coming and going rule, under which an employee going to or from work, while on premises owned or controlled by the employer, and within a reasonable time before or after working hours, is presumed to be in the course of employment.

82 Am.Jur. 2d Workers' Compensation
§ 283 (2003).

The "operating premises" exception, cited by the ALJ in his findings and conclusions, was first adopted in Kentucky by the Supreme Court in Ratliff v. Epling, 401 S.W.2d 43 (Ky. 1966), and explained as follows:

The 'operating premises' concept is somewhat related to the idea expressed by this Court in Barker v. Eblen Coal Company, Ky., 276 S.W.2d 448, where the test applied was: 'work connected activity'. If we interpret 'work connected activity' as including 'work connected place', we really reach the concept of 'operating premises'. See Cooper, 'Workmen's Compensation--The 'Going and Coming' Rule and Its Exceptions in Kentucky', 47 Ky.L.J., pages 420, 424. (This might be considered a

justifiable extension of the
'industrial hazard' theory.)

As in the case *sub judice*, the Ratliff court was required to address what was alleged to have been a substantial deviation by the employee from his work-connected activity. In Ratliff, supra, the employee, a miner, had quit work for the day and was intending to share a ride home with a co-worker. While waiting for the co-worker to secure assistance in getting his car started, the employee took a box and set off to gather some loose coal from the base of a "high wall" for his personal use. It was approximately 30 minutes after his shift had ended and precisely 173 feet from the drift mouth where the employee worked that he was killed when the embankment collapsed. The court held that the accident occurred outside the course and scope of the miner's employment. The court made clear that the accident might have been considered to have occurred on the "operating premises" of the mine, but that the employee's personal mission was of such a nature and length as to constitute a "substantial deviation" taking him outside the protection of the Act. The court explained its rationale as follows:

Our final question is whether the Board was justified in finding that the activity of the employee at the time of his death was such a 'deviation' from the course of his employment that he was beyond the pale of coverage. It may be stated generally that the deviation should be

substantial, or to put it another way, 'minor interludes are immaterial'. Larson's Workmen's Compensation Law, Vol. 1, section 19.63 (page 294.99)

. . . .

On the other hand, it has been said: 'If the incidents of the deviation itself are operative in producing the accident, this in itself will weigh heavily on the side of non-compensability, * * *.' Larson's Workmen's Compensation Law, Vol. 1, section 19.61 (page 294.94).

. .

In the present case we not only have what apparently was a personal mission unrelated to the trip home, but we also have an obviously increased hazard. . . . There is no evidence that the cave-in covered the roadway or that the employee would have been injured had he [sic] remained in or about the automobile in which he proposed to ride.

In connection with the increased hazard by reason of a personal mission, we think the time factor is an important consideration. To the extent that an employee is covered on the 'operating premises' while going to or leaving his work, he remains in the course of his employment only for a reasonable time necessary to accomplish the 'going' or 'coming' process. Delay in

departure itself increases the hazard. It may be said that the longer the delay, the lesser the deviation which will take the employee out of the course of his employment. Here the delay in departure plus the nature of the deviation unreasonably compounded the risks to which the employer should be subjected.

It is therefore our conclusion that even though coverage reasonably could be extended to the general area where the employee was killed as being part of the 'operating premises', the time factor coupled with the nature of the deviation was such as to take the employee out of the course of his employment.

Id. at 45-46.

The supreme court has more recently expounded on the "operating premises" exception in Warrior Coal Co., LLC v. Stroud, 151 S.W.3d 29 (Ky. 2004), holding as follows:

The theory for the exception is that coverage should apply when an injury arises from a peril that is related to the employment, regardless of whether it occurs at the actual worksite. Consistent with the theory, an injury that occurs while the worker is on a personal mission that substantially deviates from the employment is not viewed as being work-related even if it occurs on

the employer's operating premises. [Ratliff v. Epling, supra]. In other words, although a worker is viewed as being exposed to the risks of his employment when he crosses the threshold onto private property where the job site is located, the cause of his injury must be considered as well as the place. Hayes v. Gibson Hart Co., Ky., 789 S.W.2d 775, 779 (1990). The cause of the injury may outweigh the place if it represents a significant deviation from normal coming and going activity at that place. Id. But an injury is compensable if the worker is engaged in normal coming and going activity at the time it occurs and has access to the place where it occurs because of his employment. Id.

Id. at 31.

In Hayes v. Gibson Hart Co., supra, cited by the Stroud court, the employee was working for a contractor performing services at a job site within a plant owned by the contractor's employer, T.V.A. The employee was injured when he stumbled over a "gob of concrete" while traversing a sidewalk after entering T.V.A.'s gate but before reaching the contractor's job site. In reversing a finding of no coverage, the court extended the "operating premises" exception to include private property within which is located the job site where the employer is providing services. The court held, "Hayes not only would not have been where the injury

occurred, he could not have been there, but for his employment." Id. at 777.

Eurest distinguishes the case *sub judice* from Hayes, supra, by pointing out that Raymond was injured "in a location where she would never be required to be present for purposes of performing her job duties." This assertion is questionable, given that Raymond was injured very near the doorway separating the canteen in which she was working on the date of injury from the production area of the Ford plant, through which she was routinely required to travel in order to reach two of the other three canteens in which she worked for Eurest. Moreover, Eurest's argument glosses over one important similarity between Hayes, supra, and the case *sub judice*; i.e., Raymond would not have been in the place where her injury occurred but for her employment with Eurest.

Of course, the compensability of Raymond's claim does not turn on this one similarity, or any other single factor. The Kentucky courts have acknowledged that it is not possible to spell out an exact formula that would automatically resolve every case concerning the applicability of the "going and coming" rule and its exceptions. Gray v. W. T. Congleton Co., 93 S.W.2d 829 (Ky. 1936). In an effort to establish some consistency, however, the courts have regularly turned to Professor Larson's authoritative treatise. In Jackson v. Cowden Manufacturing Co., 578 S.W.2d 259, 262 (Ky. App. 1978), the

court of appeals provided the following analysis:

According to Larson, the first inquiry must be whether the injury occurred on the employer's premises and during working hours. The presence of either or both of these factors will frequently be a sufficient basis for finding that the recreational activity was work-related. As stated by Larson:

When seeking for a link by which to connect an activity with the employment, one has gone a long way as soon as one has placed the activity physically in contact with the employment environment, and even further when one has associated the time of the activity somehow with the employment. This done, the exact nature and purpose of the activity itself does not have to bear the whole load of establishing work connection, and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might. Conversely, if the recreational

activity takes place on some distant vacant lot, several hours after the day's work has ceased, some independently convincing association with the employment must be built up to overcome the initial presumption of disassociation with the employment established by the time and place factors.

Id. § 22.11, pp. 5-72. When the injury-causing activity occurs on the employer's premises during working hours, Kentucky courts have deemed the injury work-related even though the activity was in no way connected with the employee's work-duties and was strictly for personal purposes. In W. R. Grace & Co. v. Payne, Ky., 501 S.W.2d 252 (1973),

. . . The decision of whether a particular injury is covered under the Act must be based upon the "quantum of aggregate facts rather than the existence or non-existence of any particular fact." Jackson v. Cowden Manufacturing Co., supra, at 262.

The ALJ rendered the following findings of fact and conclusions of law relevant to this appeal:

After considering the evidence in this case, and particularly considering the testimony of the Plaintiff at the hearing, I find that Plaintiff was injured while in the scope of his employment. Exiting the premises is necessary after a work day. I found the Plaintiff very credible. His explanation of why the [sic] he climbed a locked fence, instead of exiting the premises by the alternative means suggested by the Defendant/employer, was reasonable to the undersigned. The alternative of going over the plastic portion of the fencing had been specifically forbidden by the defendant - with warnings of significant consequences. He could not re-enter the building to exit another way through the building because it had been locked. His easiest and fastest way to leave the work premises was to climb over the locked gate. The fact that the gate of the construction site fencing (closest to the parking area where his vehicle had been parked) had already been locked before all the workers had exited presented a peril imputed to the employer. Plaintiff's conduct did not constitute a deviation from his work duties nor an unreasonable risk of injury in my opinion. Absent the freak landing that broke his leg, this "climbing" the fence would not have constituted anything unusual on a construction work site. It was a [sic] not an inherently risky maneuver but rather a solution to the problem before him - getting out of the locked construction site. The fact that there may have been less "risky" alternatives does not render his decision unreasonable.

For all the above-stated reasons and after considering all of the circumstances surrounding this injury, I

find that Plaintiff's injury was work-related and occurred during the course and scope of his employment with the defendant.

Church filed a petition for reconsideration arguing the evidence showed the injury was not work-related and did not occur during the course and scope of Blankenship's employment.

The ALJ rendered an Order on April 10, 2012, denying Church's petition as a re-argument of the merits.

On April 12, 2012, the ALJ entered an order granting Blankenship's counsel an attorney fee in the amount of \$12,710.00 pursuant to KRS 342.040(2). The ALJ specified the fee was in addition to any other fee awarded pursuant to KRS 342.320 and was not to be taken or deducted from Blankenship's award.

Church filed a petition for reconsideration of the April 12, 2012 Order arguing the ALJ did not make a determination that payments of TTD benefits were delayed without reasonable foundation and such a determination could not be made.

The ALJ rendered an Order on Petition for Reconsideration and Amended Opinion and Award on May 11, 2012. The ALJ held as follows:

KRS 342.040 provides a fee shifting provision which specifically applies to overdue TTD income benefits if the denial or delay in the payment of those benefits was "without reasonable foundation." KRS 342.040(2) further provides:

If overdue temporary total disability income benefits are recovered in a proceeding brought under this chapter by an attorney for an employee, or paid by the employer after receipt of notice of the attorney's representation, reasonable attorney's fee for these services may be awarded. The award of attorney's fees shall be paid by the employer if the administrative law judge determines that the denial or delay was without reasonable foundation.

To the extent my original Opinion and Award was not clear, I find that the Defendant/employer in this claim has repeatedly ignored the orders of this tribunal with regard to the payment of Temporary Total Disability as to income benefits and the payment of medical expenses. There were no income payments and no medical payments made, despite the interlocutory order of the ALJ and the order of the Workers' Compensation Board. The Defendant/employer has repeatedly insisted that the Orders were not final and therefore ignoring them was reasonable. It was not. The authorities cited by the Defendant/employer are not applicable to the issue of denial of ordered TTD payments. The very purpose of interlocutory benefits is to prevent irreparable harm to the Plaintiff. In the case at bar, the Plaintiff testified he has undergone and suffered great financial hardship since this injury, directly due to no payment(s) of income benefits. He also was relegated to

medical treatment at the VA, where his treatment was not by the providers of his choosing. This was all due to the non-payment of ordered benefits.

If the undersigned's Opinion and Award was not crystal clear to the [sic] as the egregious conduct of the Defendant/employer throughout this litigation being found without reasonable foundation - then the opinion and award is now **AMENDED**:

The Opinion and Award of March 20, 2012 is amended as follows:

"I find that denial and delay of the Plaintiff's temporary total disability benefits was without reasonable foundation. I find that the Defendant/employer failed to pay the temporary total disability benefits of the Plaintiff as ordered by the Administrative Law Judge and the Kentucky Workers' Compensation Board. I find that the Defendant's refusal was not based in law or fact and was unreasonable and unfounded. For those reasons, I award attorney fees pursuant to KRS 342.040(2) to the plaintiff's attorney."

The remainder of the Opinion and Award shall remain as originally decided.

On appeal, Church argues the ALJ misapplied the law in finding Blankenship's injury was work-related. Church notes Blankenship had the burden of showing his injury arose out of and in the course of his employment. Church further notes "arising out of" and "in the course of" are not synonymous and if either of these elements is absent there

can be no recovery. For an injury to have arisen out of employment, the injury must have been as a direct natural result of a risk reasonably incident to the employment. Church contends the risk which caused Blankenship's injury was his climbing of the fence and the risk could not be considered reasonably incident to his employment. Church notes Blankenship's employment was as a painter and he was not climbing the fence to paint, nor did he have to climb the fence to perform his duties. Church further notes Blankenship's injury did not occur during work hours. Church asserts Blankenship admitted he did not have to climb the fence to get to his car to leave work, was not commanded to climb the fence, and did not have to climb the fence to vacate the area where he left the building. Thus, Church argues the risk that gave rise to Blankenship's injury was not in any way incident to his work as a painter.

Church argues the injury did not occur in the course of the employment. Church asserts that, pursuant to the holding in the Billiter, Miller & McClure v. Hickman, 56 S.W.2d 1003 (Ky. App. 1933), an injury arises in the course of the employment when it occurs within the period of the employment, in a place where the employee reasonably may be in the performance of his duties, and while he is fulfilling those duties or engaged in an incidental activity. Church

argues Blankenship does not meet the "in the course of employment" test. Church notes Blankenship testified his employment for that day terminated at 4:00 p.m., and he was injured after that time after he vacated the building. Church notes the area where the injury occurred was neither owned by nor under its control. Church notes Blankenship was not hurt while in the performance of his duties. Blankenship was not engaged in activities incidental to his employment. Church asserts climbing a fence cannot be considered incidental to the employment of a painter unless he is climbing the fence to paint.

Church argues the injury cannot be deemed work-related under the going and coming rule. Church notes the operating premises exception to the going and coming rule only applies if the employee is injured in the process of going or coming while on premises owned or controlled by the employer, and within a reasonable time before or after working hours. Church notes the primary factor to be considered in determining what area constitutes an employer's premises is whether the employer could control the risks associated with the area where the injury occurred. Citing Kmart Discount Stores v. Schroeder, 623 S.W.2d 900 (Ky. 1981), Church notes an area that is neither owned nor maintained by the employer cannot be considered part of the employer's premises if the

employer does not have sufficient control over the risks associated with that area. Church notes Blankenship was injured after work hours and on premises that were not owned, leased, maintained or used by Church. Church notes the construction yard was owned by the Oldham County High School and controlled by a general contractor. Church argues the operating premises comprised only the interior of the school building where Church was painting. Church notes Blankenship was neither instructed to park where he did nor to leave through the construction yard. He was not required to go through the construction yard to get to his car, and, once he decided to go that way, he was certainly not required to climb the fence to get to his car.

Church further argues the operating premises exception does not apply where the employee's conduct constitutes a personal mission or a substantial deviation from the course of his employment. Church contends there can be no doubt Blankenship's conduct was a substantial deviation from the course of his employment and his deviation was operative in producing the accident. Church notes that, upon finding the gate to the construction yard locked, Blankenship was faced with several alternative means of egress and chose the most perilous and frolicsome means available to him. Church contends climbing the fence was of such a different

character and was so far removed in time and place from the duties of his employment that it is unquestionably a deviation.

Finally, Church argues the ALJ erred in granting Blankenship's counsel an attorney fee pursuant to KRS 342.040(2). Church states it paid TTD benefits pursuant to ALJ Steen's interlocutory order until she dismissed the case on November 3, 2009. Church contends any denial of TTD benefits subsequent to the dismissal was reasonable because it was asserting a legitimate defense to payment of those benefits which, if successful on remand, would relieve it of responsibility for payment of any TTD benefits. Church notes no final award of TTD benefits had yet been rendered. Church contends it would be unfair and unjust to require payment of TTD benefits in a pending case where such benefits are disputed. Church notes it would be unable to recoup any such payments if its defense succeeded. The claim had previously been dismissed, and Church argues it was reasonable to believe the claim would be dismissed again on remand. For these reasons, Church argues its failure to pay TTD benefits subsequent to the dismissal by ALJ Steen was reasonable.

The ALJ's determination that Blankenship sustained a work-related injury is supported by substantial evidence and

we therefore affirm. As we noted in our prior decision, pursuant to Bowerman v. Black Equipment Co., 297 S.W.3d 701 (Ky. App. 2009), absent a showing of new evidence, fraud, or mistake, an ALJ in a workers' compensation case may not reverse a dispositive interlocutory factual finding on the merits in a subsequent final opinion. Our prior decision determined ALJ Steen abused her discretion, arbitrarily dismissing the claim. Blankenship's deposition was the only evidence touching on the issue of the work-relatedness of the injury introduced following the ALJ's first order denying Church's motion to dismiss. In the prior decision, the Board noted Blankenship's deposition testimony was consistent with the testimony of Kenneth Church. Thus, the dismissal was based upon the same facts known to the ALJ at the time of the initial determination of a work-related injury. Accordingly, the Board vacated ALJ Steen's dismissal. Vacating of an opinion is, in essence, rendering it null and void. *Black's Law Dictionary* defines "vacate" in part as, "to nullify or cancel, make void, invalidate". Thus, with regard to a finding that has been vacated, the earlier finding is without force or effect, as if it never existed. Vacating an ALJ's decision is one of the authorized directives available to a reviewing body. See,

for example, Skelton vs. Roberts, 673 S.W.2d 733 (Ky. App. 1984).

There is no significant variation between Blankenship's hearing testimony on remand and his deposition testimony. Again, we stress this testimony is consistent with the testimony of Kenneth Church. The hearing testimony is merely cumulative evidence. Our holding in the first appeal, which was affirmed by the Court of Appeals, is the law of the case. Since there was no new evidence filed on remand regarding this issue, the ALJ was constrained to find the injury was work-related.

Even if we did not find the ALJ was constrained to find a work-related injury, the record contains evidence to support a finding the accident was within the operating premises exception to the going and coming rule. We believe our jurisprudence interpreting the "going and coming" rule and its various exceptions, including operating premises and the "positional risk" doctrine, sufficiently addresses the legal issue raised on appeal. Clearly, Blankenship would not have been in a position of risk but for his employment with Church. See Corken v. Corken Steel Products, Inc., Ky., 385 S.W.2d 949 (1965) (setting out the "positional risk doctrine"). His injury was not the result of exposure to a risk common to the streets. See Kaycee Coal Co. v. Short,

Ky., 450 S.W.2d 262 (1970) (relying on Corken, supra, and setting out the "street risk" doctrine). The ALJ's conclusion is sound. Church attempts to define the operating premises as the interior of the school. We believe the "operating premises" includes the entirety of the school property.

In King v. Lexington Herald-Leader, 313 S.W.2d 423 (Ky. 1958), the Court noted as follows:

Where a workman suffers an accidental injury at a place within the building or structure or plant where he is expected or is expressly or impliedly permitted in going to or from his immediate spot of active labor, he is within the protection of the Workmen's Compensation Act. If he is injured by a hazard existing or occurring there, the resulting disability is compensable. This, of course, takes into consideration not only the actual doing of the man's work but also allows a reasonable margin of time and space necessary to be used in passing to and from the point where the work is to be done. The hazards encountered on the working premises are in the zone of his employment.

In the case *sub judice*, there is no indication Blankenship was on a personal mission at the time of his injury. He was simply attempting to exit the locked area of the worksite at the end of his workday. There was no evidence of a delay in his leaving the worksite, nor was there evidence he was engaged in any activity of a personal

nature. He utilized the closest means of egress apparently available to him at the time. Blankenship's testimony indicates he did not perceive a risk in climbing over the gate since he routinely jumped off scaffolding in his work as a painter.

While Church identifies other means of egress, those means were not necessarily without risk. Blankenship testified he could be fired if he exited over the plastic fence or if he unfastened the fence. One can easily conceive exiting by crawling under the trailer could have exposed Blankenship to risks including spiders, insects, snakes or animals. Additionally he could have been exposed to cuts or scrapes leading to infections. We cannot say the ALJ's finding that climbing the fence was reasonable and was not an inherently risky maneuver was an unreasonable finding.

Because there are procedural defects concerning the KRS 342.040(2) attorney fee issue, we find it necessary to vacate the ALJ's ruling. The March 20, 2011 Opinion, Order and Award adjudicated the issue of entitlement to an attorney fee pursuant to KRS 342.040(2). However, the ALJ's determination was not supported by any findings of fact regarding whether Church's denial or delay in paying TTD benefits was without reasonable foundation. Although Church

filed a petition for reconsideration of the decision, it neither addressed nor requested additional findings concerning the question of entitlement to the fee. When Church filed its second petition for reconsideration directed to the April 12, 2012 order, the period for filing a petition for reconsideration of the Opinion, Award and Order had expired. Only errors in the April 12, 2012 order could be properly addressed by the petition and subsequent order. Thus, with regard to the entitlement to a fee pursuant to KRS 342.040(2), the ALJ was without authority to render an amended opinion with additional findings on the issue.

That having been said, KRS 342.285(2) obligates the Board on appeal to correct: (1) acts by an ALJ without or in excess of her powers; and (2) orders, decisions or awards that are not in conformity with the provisions of Chapter 342. Whether an award is in conformity to the Act is a question of law. Whittaker v. Reeder, Ky., 30 S.W.3d 138 (2000). The Board has authority to reach the issue without regard to whether the defect was contested by a party. Id. at 144.

On remand, the ALJ shall make specific findings of fact concerning the reasonableness of Church's delay or denial of TTD benefits at the various times involved. We note

payments of TTD benefits did not commence until entry of the interlocutory order and were not resumed following the Board's opinion vacating the dismissal, nor were they reinstated following the opinion of the Court of Appeals affirming the Board's decision. Additionally, on remand the ALJ entered an order on July 25, 2011 directing Church to pay past-due TTD benefits from November 3, 2009 to July 10, 2010. Despite this order, no TTD benefits were paid. We also note the ALJ discussed Church's failure to pay medical benefits as ordered. Medical benefits are irrelevant to the determination of the fee pursuant to KRS 342.040(2) and shall not be considered on remand.

The award of attorney's fees pursuant to KRS 342.320 and KRS 342.040 are not to be duplicative. KRS 342.320 et seq. provides both for the payment of and limits on attorney fees. The statute further recognizes and sets out as a general proposition that each party is responsible for payment of its own attorney fee. Attorney's fees are subject to maximum limits and the limit on the attorney's fee may not be exceeded in those cases where the responsibility for payment of the fee is shifted to the employer or carrier. KRS 342.040 provides a fee shifting provision but is much more specific in that it only applies to overdue TTD income benefits if the denial or delay in

payment of those benefits was "without reasonable foundation." See KRS 342.040(2). Because the KRS 342.040 fee is calculated on the basis of the amount of TTD recovered, we believe the sanction, in addition to the increased interest rate provided by KRS 342.040 constitutes a reasonable attorney's fee to be paid by the employer. Thus, given the facts in this claim, a reasonable attorney's fee would be calculated pursuant to KRS 342.320(2)(b).

Finally, we note if a fee is awarded on remand pursuant to KRS 342.040, the total amount of the fee shall not exceed \$12,000.00, and any fee based upon permanent income benefits is limited to the remainder of the \$12,000.00 limit once the KRS 342.040 fee has been deducted from the \$12,000.00 cap. The Board, in this decision, directs no particular finding as to the correct amount, if any, of the attorney fee pursuant to KRS 342.040(2).

Accordingly, the March 20, 2012 Opinion, Order and Award, the April 12, 2012 Order on Petition for Reconsideration, the April 12, 2012 Order, and the May 11, 2012 Order on Petition for Reconsideration and Amended Opinion and Award are hereby **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** for further proceedings consistent with the views expressed in this opinion.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I concur and agree the ALJ's decision concerning the attorney fee award should be vacated, and remanded, for two reasons. First, pursuant to KRS 342.320, the maximum attorney fee which the ALJ could award is \$12,000.00, pursuant to KRS 342.320 which states as follows:

(2) In an original claim, attorney's fees for services under this chapter on behalf of an employee shall be subject to the following maximum limits:

(a) Twenty percent (20%) of the first twenty-five thousand dollars (\$25,000) of the award, fifteen percent (15%) of the next ten thousand dollars (\$10,000), and five percent (5%) of the remainder of the award, not to exceed a maximum fee of twelve thousand dollars (\$12,000). This fee shall be paid by the employee from the proceeds of the award or settlement.

The ALJ is without statutory authority to award a fee in excess of that amount.

Second, pursuant to KRS 342.040, the ALJ exceeded her authority in assessing the entire attorney fee to Blankenship's attorney against Church. KRS 342.040(2) states the following:

(2) If overdue temporary total disability income benefits are recovered in a proceeding brought under this chapter by an attorney for an employee, or paid by the employer after

receipt of notice of the attorney's representation, a reasonable attorney's fee for these services may be awarded. The award of attorney's fees shall be paid by the employer if the administrative law judge determines that the denial or delay was without reasonable foundation. No part of the fee for representing the employee in connection with the recovery of overdue temporary total disability benefits withheld without reasonable foundation shall be charged against or deducted from benefits otherwise due the employee.

Pursuant to this statute, only the fee calculated for wrongfully failing to pay TTD benefits can be charged against Church. The remainder of the attorney fee must be paid from Blankenship's proceeds.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

STIVERS, MEMBER. I agree with the majority's decision affirming ALJ Miller's determination Blankenship sustained a work-related injury. However, I submit there is no reason to remand this matter to ALJ Miller for "specific findings of fact concerning the reasonableness of Church's delay or denial of TTD benefits at the various times involved."

The BRC order reflects attorney's fees pursuant to KRS 342.040 was a contested issue. Likewise, the hearing

order also reflects attorney's fees pursuant to KRS 342.040 was a contested issue. Church's brief, however, is silent on that issue. Significantly, Blankenship addressed the issue in his brief to ALJ Miller. In the opinion, order, and award, ALJ Miller made two specific findings regarding the issue of TTD benefits and entitlement to attorney's fees pursuant to KRS 342.040(2). Those findings are as follows:

4. TTD.

Because I have found the Plaintiff totally and permanently disabled as a result of his work injury, Plaintiff shall be entitled to total disability weekly benefits in the amount of \$519.63 per week. The portion of benefits considered to be Temporary Total Disability would be from September 20, 2008 until the day he reached maximum medical improvement per Dr. Rhoads [sic] opinion, that being July 10, 2010. The period of TTD upon which the Plaintiff's attorney can claim attorney's fees pursuant to KRS 342.040(2) is pursuant to ALJ Steen's Order and Notice as the date TTD began (that being September 20, 2008) to the date of MMI, July 10, 2010. (Per the February 2, 2010 Order of the WCB vacating ALJ Steen's Order of November 3, 2009).

. . .

6. Attorney's fee for TTD, per KRS 342.040(2).

As previously determined, I find that Plaintiff's attorney is entitled

to fees pursuant to KRS 342.040(2). These fees will be paid by the Defendant/employer with no reduction to Plaintiff's weekly benefits. This award of attorney's fees is in addition to the fees counsel is entitled to pursuant to KRS 342.320.

I find that Plaintiff's [sic] is entitled to a reasonable attorney fee pursuant to KRS 342.040(2) on the TTD benefits of \$519.63 from September 20, 2008 through the date of MMI, July 10, 2010. Pursuant to KRS 342.040(2), this portion of Plaintiff's attorney's fee "shall not be charged against or deducted from benefits otherwise due the employee".

Church's petition for reconsideration does not address the award of attorney's fees pursuant to KRS 342.040(2). Rather, Church argued ALJ Miller erred in determining Blankenship sustained a work-related injury. Therefore, I submit Church waived its right to assert on appeal that ALJ Miller did not make sufficient findings of fact regarding entitlement to attorney fees under KRS 342.040(2). In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support ALJ Miller's conclusion. Stated otherwise, inadequate, and incomplete, or even inaccurate fact-finding on the part of ALJ Miller will not justify reversal or remand if there is identifiable evidence in the record that

supports the ultimate conclusion. See Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); See also Halls Hardwood Floor Co. v. Stapleton, supra.

Even though Church filed a petition for reconsideration, it did not file a petition for reconsideration relative to the finding of entitlement to attorney's fees pursuant to KRS 342.040(2). Therefore, we are limited to determining whether substantial evidence supports ALJ Miller's award of attorney's fees pursuant to KRS 342.040(2). The majority opinion, as well as Church's brief on appeal, clearly establish grounds for the award of attorney's fees. In its brief to the Board, Church states it paid TTD benefits pursuant to the April 1, 2009, order of ALJ Steen until the case was dismissed by ALJ Steen on November 3, 2009. Church concedes it did not pay TTD benefits from November 3, 2009, to July 10, 2010, in compliance with ALJ Miller's July 25, 2011, order. The majority notes Church did not pay TTD benefits as ordered, and Church refused to resume payment of TTD benefits following the Board's opinion vacating ALJ Steen's order of dismissal.

Significantly, the first time Church addressed the issue of attorney's fees pursuant to KRS 342.040(2) is in response to Blankenship's counsel's motion for attorney's

fees. In the motion, Blankenship's counsel itemized his time and requested an attorney's fee of \$25,420.00. In its response, Church failed to raise a lack of fact-finding by ALJ Miller nor did it address the amount of attorney's fees sought by Blankenship's counsel. Church argued since this matter was on appeal, a successful appeal could potentially result in the determination Blankenship is not entitled to income benefits including TTD benefits. Thus, an order awarding attorney's fees is premature. Church continued to take the position it was reasonable for it not to pay TTD benefits since it was asserting Blankenship did not suffer a work-related injury. Therefore, Church posited until there was a final decision in favor of Blankenship, a ruling regarding attorney's fees was premature.

After ALJ Miller entered an order granting an attorney's fee pursuant to KRS 342.040(2), in a second petition for reconsideration Church for the first time argued "the ALJ never determined that any overdue [TTD benefits] were denied or delayed without reasonable foundation." Citing R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993), Church asserted as follows:

Although interlocutory orders had been issued regarding TTD benefits in this case, no final award of TTD benefits

was rendered until the Opinion, Order and Award, dated March 20, 2012.

Because no final award of TTD benefits had yet been rendered, and because the Defendant continued to assert a legitimate work-relatedness defense to payment of TTD benefits in this case, it could not be determined that TTD benefits were denied or delayed without reasonable foundation. In fact, no such determination was made by the ALJ in her Order.

In response to Church's second petition for reconsideration, ALJ Miller entered what I submit was the appropriate order addressing all issues raised. Respectfully, the majority is unnecessarily concerned with the fact ALJ Miller styled the order ruling on Church's second petition for reconsideration "Order on Petitioner for Reconsideration and Amended Opinion and Award." The majority insists the ALJ had no authority to issue an amended opinion. However, ALJ Miller was required to address the second petition for reconsideration since at the time her order was entered the matter was on appeal to the Board, and the Board had remanded the matter to ALJ Miller for entry of an order ruling on Church's petition for reconsideration. Church received the findings of fact it specifically requested in its second petition for reconsideration.

The majority has directed ALJ Miller "make specific findings of fact concerning the reasonableness of Church's delay or denial of TTD benefits at various times involved." However, this is what she has already done. There is no need for this matter to be remanded. Given ALJ Miller's perceptive nature, on remand, she will most likely recite what she previously stated in her April 5, 2012, order. Therefore, I submit remanding to ALJ Miller for additional findings of fact is an exercise in futility. More importantly, remand is not mandated since Church failed to timely raise as an issue the lack of findings of fact regarding the assessment of attorney's fees pursuant to KRS 342.040(2).

I also take issue with the majority's determination that KRS 342.040(2) and KRS 342.320(2)(a) are to be read in concert. Presumably, the majority's reasoning on this issue is based on this Board's decision in Aeroquip/Trinova v. Cobb, Claim No. 1990-38690, rendered January 9, 2002. Without rehashing the holding of the Board in that case, I simply state that I disagree with the Board's holding. I disagree with the majority's statement that KRS 342.040(2) provides a fee-shifting provision as it applies to overdue TTD income benefits when there is a denial or delay in the payment of TTD benefits without reasonable foundation.

The bases for awarding attorney's fees in KRS 342.040(2) and KRS 342.320(2)(a) are completely different. KRS 342.040(2) does not contain a provision requiring the calculation of a reasonable fee to be based on the amount of TTD benefits recovered; rather, the statute allows a "reasonable" attorney's fee. "The most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls." Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). Without any statutory basis, the majority has determined the attorney's fee to be assessed pursuant to KRS 342.040(2) is to be calculated pursuant to the formula in KRS 342.320(2)(a). I respectfully submit the time spent by an attorney in obtaining TTD benefits which have been denied or delayed without reasonable foundation has no relationship to the attorney's fee due pursuant to KRS 342.320(2)(a). ALJ Miller correctly determined a reasonable attorney's fee is to be based on the time spent obtaining the TTD benefits which have been unreasonably denied or delayed. A reasonable attorney's fee, as allowed in KRS 342.040(2), may have no relationship to the amount of wrongfully withheld TTD benefits recovered. When the attorney recovers a small amount of TTD benefits but spends substantial time recovering those benefits, an attorney's

fee based on the formula in KRS 342.320(2)(a) is not reasonable. The attorney's fee must be reasonable based on the facts and not based upon a percentage of the amount of TTD benefits recovered.

Further, I disagree with the majority's decision that the total allowable attorney's fee pursuant to KRS 342.040(2) and KRS 342.320(2)(a) is \$12,000.00. KRS 342.320(2)(a) reads as follows:

(2) In an original claim, attorney's fees for services under this chapter on behalf of an employee shall be subject to the following maximum limits:

(a) Twenty percent (20%) of the first twenty-five thousand dollars (\$25,000) of the award, fifteen percent (15%) of the next ten thousand dollars (\$10,000), and five percent (5%) of the remainder of the award, not to exceed a maximum fee of twelve thousand dollars (\$12,000). This fee shall be paid by the employee from the proceeds of the award or settlement;

The above language does lend support for the proposition that attorney's fees are to be capped at \$12,000.00. However, "[w]hen two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails." DeStock #14, Inc. v. Logsdon, 993 S.W.2d 952, 959 (Ky. 1999). Regarding the issue on appeal, KRS 342.320(2)(a) only has general application and is based solely upon the

amount of income benefits awarded. KRS 342.040(2), which permits a reasonable attorney's fee based on the collection of wrongfully withheld TTD benefits, is highly specific in nature. In awarding an attorney's fee, each statute references completely different scenarios. The attorney's fee permitted under KRS 342.040(2) is not tied to the provisions of KRS 342.320(2)(a). Thus, in instances where the ALJ awards an attorney's fee pursuant to KRS 342.040(2), the attorney's fee cannot be awarded based on the formula in KRS 342.320(2)(a).

Applying the majority's logic, after an ALJ has awarded an attorney's fee pursuant to KRS 342.040(2), that amount is to be subtracted from the attorney's fee calculated pursuant to KRS 342.320(2)(a). For instance, should an ALJ determine a reasonable attorney's fee pursuant to KRS 342.040(2) is \$4,000.00, the attorney cannot be awarded any more than \$8,000.00 regardless of the computations contained in KRS 342.320(2)(a). The majority is mixing apples and oranges. In order to harmonize the two statutes, the majority has determined a reasonable attorney fee under KRS 342.040(2) must be based solely on a mathematical calculation. Taken to the extreme, where the attorney is awarded a maximum fee of \$12,000.00 pursuant to KRS 342.320(2)(a), he can never receive an attorney's fee

pursuant to KRS 342.040(2), as he has already been awarded the maximum fee of \$12,000.00. Consequently, in contravention of KRS 342.040(2), the ALJ cannot award a reasonable attorney's fee based on the time spent by the attorney in recovering the improperly withheld TTD benefits. Rather, the ALJ would merely direct the employer, pursuant to KRS 342.040(2), to pay a portion or all of the attorney's fee awarded pursuant to KRS 342.320(2)(a). In instances where the attorney receives a maximum fee of \$12,000.00 pursuant to KRS 342.320(2)(a), the ALJ is never permitted to determine a reasonable attorney's fee based on the time spent by the attorney in recovering the improperly withheld TTD benefits.

In summary, the attorney's fee permitted in KRS 342.040(2) and the attorney's fee permitted in KRS 342.320(2)(a) are separate and distinct. Neither statute references the other, and the criteria for determining attorney's fees in each section is completely different. In KRS 342.320(2)(a), the attorney's fee is based solely upon the amount of income benefits awarded. In KRS 342.040(2), the attorney's fee is to be reasonable and should be based on the time spent by the attorney in obtaining TTD benefits which have been denied or delayed

without reasonable foundation. This fee is in addition to the attorney's fees allowed in KRS 342.320(2)(a).

That said, since there is no dispute Church voluntarily paid TTD benefits through the date ALJ Steen initially dismissed the claim, I submit this matter should be remanded to ALJ Miller for determination of a reasonable fee based on Church's failure to pay TTD benefits as ordered by ALJ Miller in her order of July 25, 2011. Church does not dispute it did not pay the TTD benefits as ordered by ALJ Miller upon remand; thus a reasonable attorney's fee is due Blankenship's attorney which is to be calculated separately and paid in addition to the attorney's fee allowed in KRS 342.320(2)(a).

COUNSEL FOR PETITIONER:

HON PAUL R BOGGS III
300 BUTTERMILK PIKE SUITE 100
FORT MITCHELL, KY 41017

COUNSEL FOR RESPONDENT:

HON JAMES W DUNN
310 W LIBERTY ST #206
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JEANIE OWEN MILLER
PO BOX 2070
OWENSBORO, KY 42302