Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 11, 2014

CLAIM NO. 200080676

RENITA MURPHY PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

FORD MOTOR COMPANY
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * * *

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

ALVEY, Chairman. Renita Murphy ("Murphy") seeks review of the Opinion, Award, and Order rendered February 10, 2014 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding her work-related low back condition had worsened causing increased impairment and awarding additional permanent partial disability ("PPD") benefits enhanced by

the 1.5 multiplier beginning June 3, 2008, the date she filed a motion to reopen.[1] Murphy also seeks review of the March 10, 2014 Order partially denying her petition for reconsideration. On appeal, Murphy argues she is entitled to additional benefits prior to the date of her motion to reopen. Specifically, she argues the ALJ erred in failing to find the .5 modifier pursuant to KRS 342.730(1)(c)2 (as it existed at the time of Murphy's injury) was inapplicable from December 15, 2005 through the date of the motion to reopen. Because KRS 342.125(4) does not preclude an increase in benefits pursuant to KRS 342.730(l)(c)2 prior to the filing of the motion to reopen, we vacate in part and remand.

This claim originated when Murphy filed a Form 101 on May 23, 2002. Murphy alleged she injured her low back and leg as she picked up a door frame on May 25, 2000 while working for Ford Motor Company ("Ford") as an assembler. A Form 110 settlement agreement was approved by Hon. Ron Johnson, Administrative Law Judge, on October 15, 2002. The agreement reflects Dr. Warren Bilkey assessed an 8% impairment rating on August 12, 2002. The agreement also states Murphy's average weekly wage at the time of her

[1] Since the date of injury precedes the July 15, 2000 statutory changes, the law in effect on May 25, 2000 applies.

injury was $870.19, and she returned to work on August 21, 2000 earning $961.15. The agreement reflects the parties settled the claim for a lump sum of $5,431.03 based upon an 8% impairment rating. In the settlement computation section, the following is handwritten: “381.77 x 8% x 355.6477 x 50% Plaintiff has not requested 1.5 modifier as employer has allowed her to perform restricted work.”

On November 30, 2004, Murphy filed a motion to reopen alleging she ceased earning an equal or greater wage because Ford placed her on “no work available” status. A Form 110 settlement agreement was approved on January 20, 2006 by Hon. James Kerr, Administrative Law Judge, reflecting the parties settled for a lump sum of $400.00.

On May 1, 2008, Ford filed a motion to reopen and a medical dispute challenging the compensability of a surgery proposed by Dr. Wayne Villanueva based upon the March 10, 2008 utilization review of Dr. Daniel Wolens. Treatment records reflect Dr. Villanueva recommended a L4/5 discectomy and decompression on January 9, 2008. In response, Murphy filed a motion to reopen on June 11, 2008, seeking authorization of the proposed surgery, temporary total disability (“TTD”) benefits, and alleging a worsening of condition entitling her to an enhancement of her award of PPD benefits pursuant to KRS. 342.730. The claim was

assigned to Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ Smith").

In a June 29, 2009 opinion and order, ALJ Smith determined the contested surgery proposed by Dr. Villanueva was reasonable, necessary and related to Murphy's original May 25, 2000 work injury based upon the opinions of Drs. Bilkey and Villanueva. On November 11, 2008, Dr. Bilkey diagnosed Murphy with a lumbar strain superimposed on spinal stenosis; a lumbar disc herniation L4-5 with left radiculopathy; and chronic low back pain, all due to the May 25, 2000 work injury. He recommended Murphy proceed with the surgery as recommended by Dr. Villanueva and noted she would not attain maximum medical improvement ("MMI") until after it was performed. At the time of the report, Dr. Bilkey opined Murphy had a 13% impairment rating and temporarily restricted her to sedentary work. The ALJ dismissed Ford's motion to reopen and directed it to authorize and pay for the surgery proposed by Dr. Villanueva. The ALJ also awarded Murphy TTD benefits from the date of surgery through the attainment of MMI and placed the claim in abeyance.

The claim was removed from abeyance on October 15, 2012. The record indicates Murphy never had the contested surgery. In a follow-up visit on May 12, 2010, Dr.

Villanueva reviewed an April 27, 2010 lumbar MRI and noted Murphy "states unequivocally that she can live with left leg pain and weakness. She [sic] call us if she changes her mind about surgery, which I have recommended in the past". He also recommended her to follow up as needed.

Murphy filed Dr. Bilkey's November 5, 2012 report. He noted since the surgery was never performed, Murphy would have reached MMI at the time of the November 11, 2008 report and he assessed a 13% impairment rating for her lumbar condition. Ford filed Dr. Richard Sheridan's December 5, 2012 report assessing a 0% impairment rating. It also filed Dr. Bart Goldman's February 14, 2013 report opining Murphy's condition had not worsened meriting an increase in impairment since the original settlement in 2002.

Murphy testified by deposition on August 19, 2002, August 21, 2008 and November 19, 2012. She also testified at hearings held April 28, 2009 and December 17, 2013. Murphy began working for Ford on May 31, 1994 as a vehicle assembly technician. On the date of injury, Murphy was working in the body shop on Operation 40, which required repetitive lifting and carrying of door frames weighing approximately ten pounds. Murphy testified that on May 25, 2000, she experienced pain in her left thigh as she was carrying a door frame. Following the holiday weekend,

Murphy returned to work and immediately reported her low back and left leg symptoms. Thereafter, Murphy's treating physicians pursued conservative treatment for several years. In 2008, Dr. Villanueva recommended surgery. Murphy stated she never had the recommended surgery following ALJ Smith's June 2009 decision because Dr. Villanueva changed his opinion and her pain level had subsided. She currently takes a muscle relaxer, an anti-inflammatory and pain medication.

Following the May 25, 2000 work injury, Murphy was restricted from returning to work until August 20, 2000, when she returned to a light duty position. Ford placed her on a medical placement job, essentially a clerical desk job, which accommodated her restrictions imposed by the plant physician. It is undisputed Murphy earned a wage equal to or greater than she earned at the time of injury during this time. She continued to perform the desk job until December 15, 2005, when she was laid off after her position was eliminated. On several occasions, Murphy and her counsel stated she was on medical layoff. Murphy has not worked anywhere since December 15, 2005. She briefly received unemployment and sub-pay benefits. She now draws disability retirement benefits and long-term disability benefits. During her most recent deposition and hearing, Murphy

indicated her symptoms have intensified and worsen during the winter. Murphy testified since the 2000 work injury, she has been physically incapable of returning to her job as an assembler. However, she indicated she could probably return to a clerical position, as long as the job duties fell within her prior medical restrictions. She stated she would be an unreliable employee in a clerical position during the winter when her back symptoms worsen.

The claim was reassigned to the ALJ on November 5, 2013. In the February 10, 2014 opinion, the ALJ determined Murphy sustained a worsening of her condition meriting an increase in impairment from 8% to 13%. The ALJ found at the time of the 2002 settlement, Murphy was entitled to PPD benefits based upon an 8% impairment rating with no enhancements based upon Dr. Bilkey's opinion. She noted the orignal settlement took into consideration the .5 modifier pursuant to the statute since she was earning greater wages than she earned at the time of her injury. The ALJ then found Murphy's condition worsened warranting a 13% impairment rating and qualified her for the application of 1.5 enhancement based upon her testimony and the opinions of Dr. Bilkey. The ALJ determined Murphy is not permanently totally disabled. The ALJ stated as follows in calculating Murphy's award:

Wherefore, Plaintiff is entitled to 13% whole person impairment with the 1.5 enhancement from the time of the reopening on June 3, 2008 and continuing for the remainder of the 425 week period per the original settlement agreement, with Defendant Employer taking credit for the value of benefits of the original claim, calculated as follows:

Value of original claim at the time of settlement:

$870.19 → 381.77 (max x 75%) x 8% x 1.00 x .5 = 15.27

Calculation on reopening:

$870.19 → 381.77 (max x 75%) x 13% x 1.25 x 1.5 = 93.06

Plaintiff, therefore, is entitled to 15.27 per week from the date of injury, May 25, 2000, for 425 weeks with the amount increased to $93.06 per week from the date of the Motion to Reopen, June 11, 2008, through the remaining weeks of the 425 week period with Defendant Employer, taking a credit for the amounts already paid.

VI. AWARD AND ORDER

1. The motion of Plaintiff, Renita Murphy, for a reopening for an increase in occupational disability benefits is **SUSTAINED**.

2. Plaintiff shall recover from Defendant Employer, Ford Motor Company and/or its insurance carrier, the sum of $15.27 per week for 8% permanent partial disability benefits multiplied by .5 (return to work at same or greater wages) beginning May 25, 2000 and continuing thereafter for 425 week with that amount increased on June 11, 2008 to $93.06 per week for 13%

> enhanced by 1.5 (does not have physical capacity to do the same job) for the remainder of the original 425 week period. Defendant Employer is entitled to a credit for any amounts already paid.

Murphy filed a petition for reconsideration raising the same argument now made on appeal. She also requested the ALJ amend the award to reflect a suspension of PPD benefits during any period TTD benefits were paid. In the Order on reconsideration dated March 10, 2014, the ALJ amended the opinion to reflect PPD benefits were suspended during any period TTD benefits were paid, but denied the remainder of Murphy's petition regarding additional benefits prior to the date of the motion to reopen pursuant to KRS 342.125(4).

On appeal, Murphy argues the ALJ erred in failing to remove the .5 modifier from December 15, 2005 until the filing of the motion to reopen on June 11, 2008. In support of her argument allowing for additional benefits prior to her motion to reopen, Murphy relies upon the unpublished case of Tom Muthler v. Climate Control of Kentucky, 2010-SC-000302-WC, rendered April 21, 2011. Murphy argues this case supports her position KRS 342.125(4) does not preclude a change of benefits ordered pursuant to KRS 342.730(1)(c)2 from being awarded prior to the filing of

a motion to reopen. Murphy then notes "the award should probably not begin until January 20, 2006, the date of the previous settlement agreement."

The question on appeal is whether KRS 342.125(4) precludes an ALJ from awarding benefits pursuant to KRS 342.730(1)(c)2 prior to the date a motion to reopen filed by a claimant seeking an increase of PPD benefits based upon a worsening of condition. We hold it does not.

At the time of Murphy's injury, KRS 342.730(1)(c)2 provided as follows:

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury, the weekly benefit for permanent partial disability . . . shall be reduced by one-half (1/2) 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 disability during the period of cessation <u>shall</u> be restored** to the rate prescribed in paragraph (b) of this subsection. (emphasis ours)

KRS 342,125(4) provided in part:

> Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen.

We begin by noting the issue on appeal is a question of law. This Board is not bound by the ALJ's rulings on questions of law, as decisions dealing with the application of the law to the facts can be reviewed *de novo. See* Brown By and Through Brown v. Young Women's Christian Ass'n, 729 S.W.2d 190 (Ky. App. 1987). We also note a relevant rule of statutory construction, which provides when two statutes deal with the same subject, one in a broad way and the other specifically, the specific statute prevails. Land v. Newsome, 614 S.W.2d 948 (Ky. 1981).

Although KRS 342.230(1)(c)2 differs from that which existed at the time of injury, the same principle applies. This Board has previously addressed this issue in an opinion rendered June 11, 2010, although under a different factual scenario. In Commonwealth of Kentucky/ Cabinet for Families & Children v. Cassady, No. 2002-72302 (rendered June 11, 2010), the ALJ awarded income and medical benefits for an August 2002 work-related injury. The ALJ specifically ordered the award of PPD benefits would be enhanced by the two multiplier during any period of cessation of employment or inability to work at a weekly wage equal to or greater than the average weekly wage at the time of injury pursuant to KRS 342.730(1)(c)2. Four years later in August 2008, the Claimant filed a motion to reopen

alleging a worsening of her condition. Slip Op. at 3-4. The ALJ ultimately determined the Claimant was not entitled to an increase in benefits holding she failed to prove an increase in disability attributable to her work injury. However, she was entitled to the two multiplier since her employment ceased on December 14, 2005, due in part to her work injury. As such, the ALJ held the Claimant was entitled to have her benefits increased by the two multiplier beginning on December 14, 2005, the day her employment ceased. On appeal, the employer argued the ALJ erred by applying the two multiplier from December 14, 2005, the date the Claimant ceased working, instead of August 12, 2008, the date she filed her motion to reopen. Id. at 7-8. The Board affirmed the ALJ's decision holding the two multiplier should be applied from the date the Claimant ceased working on December 14, 2005.

When reviewing KRS 342.730 and KRS 342.125(4), the Board not only concluded KRS 342.730 is the more specific statute, but also determined the two statutes in fact do not conflict. After citing the most current version of KRS 342.730(1)(c)2, which provides "During any period of cessation of that employment . . . 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," the Board provided the following analysis:

> [KRS 342.730(1)(c)2] unambiguous on its face and mandates that payment of permanent partial disability benefits *during the period of cessation of employment* shall be subject to the two multiplier. The language used in this section of the statute is clearly mandatory and indicative of legislative intent. The language in this section expressly provides the date on which the enhancement of benefits occurs. "When considering the construction of statutes, KRS 446.010(20) provides that "may" is permissive, and "shall" is mandatory. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000). Being unambiguous on its face, a rule of statutory construction long accepted by Kentucky courts is that unambiguous statutes must be applied as written. . . .Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008). Thus, it would appear the two multiplier shall be applied from the date Cassady ceased working at a weekly wage equal to or greater than the average weekly wage at the time of her injury. That date is December 14, 2005.
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> However, this Board recognizes that an ambiguity does surface when comparing KRS 342.730(1)(c)2 with KRS 342.125(4). When making this comparison, the question then arises, does the statutory mandate in KRS 342.730(1)(c)2 apply if the two multiplier is granted pursuant to a motion to reopen or does it only apply if granted in the original award? This Board believes that KRS 342.730(1)(c)2 applies regardless of when the two multiplier is awarded. Indeed, one persuasive fact is that there is no qualifying or

modifying language in KRS 342.730(1)(c)2 that restricts its applicability to the original award. Also compelling is the fact . . . KRS 342.125 . . . does not include the two multiplier as a ground on which a claim can be reopened. Indeed, for this reason and others, KRS 342.730 is the only statute that can apply here.

KRS 342.125 pertains to motions to reopen. In this statute, specific grounds upon which a claimant may base his or her motion to reopen are listed in paragraph one. Fraud, newly discovered evidence, and mistake are among the grounds listed. Additionally, KRS 342.125(1)(d) reads as follows:

> Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

At first glance, this provision would appear to apply to the case *sub judice*, and, consequently, the date on which Cassady filed her motion to reopen would be the date on which the two multiplier is applied pursuant to KRS 342.125(4). However, the ALJ's June 4, 2009, order held that Cassady did not prove a change in disability attributable to the work injury. *It is important to note here that application of the two multiplier does not fit within the language of KRS 342.125(1)(d).* Stated differently, a "change of disability" and application of the two multiplier are separate and distinct legal determinations. Indeed, the ALJ's June 4, 2009 order exemplifies this distinction, as the

ALJ determined that Cassady did not meet her burden of proving a change in disability but was still entitled to the two multiplier. Thus, application of the two multiplier does not fall anywhere within the grounds on which a motion to reopen may be filed expressly listed in KRS 342.125. The only conclusion that can be drawn is that by excluding this as a specific ground for reopening in KRS 342.125, the legislature has indeed spoken on which statute must apply. The legislature's intent must be inferred "from words used in enacting statutes rather than surmising what may have been intended but was not expressed." Hall v. Hospitality Resources, Inc., supra. It is clear, then, that KRS 342.730, *in its entirety,* must be relied upon in dealing with the filing of a motion to reopen seeking the applicability of the two multiplier, as this is the only statute that speaks to the matter. This includes KRS 342.730(1)(c)2 which mandates that the two multiplier shall be applied during "any period of cessation" of employment.

The language contained in KRS 342.730(1)(c)4 lends further support to this Board's belief that the timing of the two multiplier, regardless of whether it is awarded during the original claim or upon a motion to reopen, is guided exclusively by KRS 342.730(1)(c)2. KRS 342.730(1)(c)4 reads as follows:

> 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.

Use of the phrase "*notwithstanding the provisions of KRS 342.125*" is determinative here. . . .

Thus, *in spite of KRS 342.125*, a claim may be reopened at any time in order to conform the award payments with the requirements of KRS 342.730(1)(c)2. This provision creates an explicit exception to the statute of limitations contained in KRS 342.125(3), once again distinguishing the two statutes and indicating that KRS 342.730 must be consulted regarding the timing of a motion to reopen and the applicability of two multiplier. This exception is reiterated in KRS 342.125(3), which reads, in relevant part:

> Except for…conforming the award as set forth in KRS 342.730(1)(c)2.,…no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

However, KRS 342.730(1)(c)4 does more than create a separate statute of limitations for a motion to reopen to determine applicability of the two multiplier. What is compelling in KRS 342.730(1)(c)4 is the following language: "*to conform the award payments with the requirements of subparagraph 2. of this paragraph*." This language makes this provision specific and clear in its mandates. When a motion to reopen is filed to

determine the application of the two multiplier, any application of said multiplier must conform with the requirements of KRS 342.730(1)(c)2. This opinion, then, comes full circle. As noted earlier, a critical requirement articulated in KRS 342.730(1)(c)2 is that the two multiplier shall be applied "during any period of cessation" of employment.

In the case *sub judice*, KRS 342.730 is clearly the applicable statute. It is clearly the more specific statute. In fact, it is the only statute that can apply here, as a motion to reopen to determine the applicability of the two multiplier is a ground that has been specifically excluded from KRS 342.125. Nothing regarding the two multiplier on a motion to reopen is within the purview of KRS 342.125.

KRS 342.730 and KRS 342.125 exist in harmony with one another by acknowledging that the statutes speak to different grounds upon which a motion to reopen a claim can be filed. If Cassady had sustained her burden upon reopening of proving an increase in disability, the change in the amount of compensation awarded should have, in keeping with KRS 342.125(4), been ordered "from the date of filing the motion to reopen." However, after the ALJ denied that part of Cassady's motion to reopen, the only remaining issue was the application of the two multiplier. Recognizing that KRS 342.125 does not list this as a specific ground on which a claim can be reopened, KRS 342.730, in its entirety, controls. This includes the provision in KRS 342.730(1)(c)2 that the two multiplier shall be applied "during any period of cessation" of employment.

Id. at 10-16.

Although an unpublished opinion, we also find Tom Muthler v. Climate Control of Kentucky, supra, persuasive. There, the Claimant sustained a work-related injury on August 23, 2001. He returned to work earning a weekly wage equal to or greater than at the time he was injured. The Claimant continued to work until he was laid off. After the layoff, the Claimant formed his own business and insisted he earned less than he had at the time of his injury. The ALJ concluded the Claimant's work injuries were compensable and awarded income benefits. In a later order, the ALJ amended the decision to award of benefits, stating it was subject to being doubled for any period of cessation of that employment. The Claimant later filed a motion to reopen on November 15, 2005, requesting payments pursuant to the award be conformed to the requirements of KRS 342.730(1)(c)2. The ALJ agreed and found the Claimant was entitled to receive double benefits from the date his employment at the higher rate ceased, November 1, 2001. The Employer argued in part the double benefits should begin no earlier than November 15, 2005. Slip op. at 1-3. After review of the applicable statues, in determining the date for commencing enhanced benefits requested in a motion to reopen, the Supreme Court stated as follows:

> The employer argues that KRS 342.125(4) precludes a change in benefits ordered pursuant to KRS 342.730(l)(c) 2. from being awarded to a date before the filing of the motion to reopen. We disagree.
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> Although KRS 342.125(4) requires "any change in the amount of compensation" to be ordered "only from the date of filing the motion to reopen," KRS 342.730(l)(c) 2. states unequivocally that weekly benefits for partial disability "shall be" twice the amount otherwise payable "[d]uring any period of cessation" of employment at the same or a greater wage. Mindful that KRS 342.730(l)(c) 2. is a more specific provision that applies only to a discrete class of awards entered at reopening, we conclude that the legislature intended by its unequivocal language to exempt from the limitation imposed by KRS 342.125(4) those awards entered for the purpose of conforming the payments ordered previously with the requirements of subparagraph 2. of KRS 342.730(l)(c). In other words KRS 342.125(4) does not govern the date for commencing such an award. KRS 342.730(1)(c) 2. generally requires the award to commence with the cessation of employment at the same or a greater wage.
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> Id. at 5.

The analysis and reasoning utilized in Cassady and Muthler are applicable to the case *sub judice* and hold KRS 342.125(4) does not preclude an ALJ from conforming an award of benefits to the requirements of KRS 342.730(1)(c)2 during a period of time preceding a motion to reopen. We

find no statutory or case law supporting Ford's attempt to distinguish this claim from Muthler.[2] Therefore, we vacate the ALJ's calculation of benefits and remand for additional findings of fact addressing Murphy's argument the .5 modifier should be removed for a period of time prior to his motion to reopen since he ceased working on December 15, 2005. The analysis on remand should also consider the effect of the January 2006 settlement.

Therefore, the Opinion, Award, and Order rendered February 10, 2014 by Hon. Jane Rice Williams, Administrative Law Judge and the March 10, 2014 order are hereby **AFFIRMED IN PART, VACATED IN PART** and this claim is **REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

[2] Ford argues the original opinion and award in Muthler specifically provided for an increase of benefits based upon the Claimant's cessation of employment, which is not present in this claim since it stems from a Form 110 containing no similar provision.

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