

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 20, 2021

CLAIM NO. 201967531

KENNETH ROBINSON

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

GRAVES COUNTY BOARD OF EDUCATION
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

* * * * *

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

STIVERS, Member. Kenneth Robinson (“Robinson”) seeks review of the May 5, 2021, Opinion and Award of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ found he sustained an August 20, 2019, right shoulder injury while in the employ of Graves County Board of Education (“Graves County”) and awarded permanent partial disability benefits (“PPD”), temporary total disability benefits (“TTD”), and medical benefits. Robinson was not entitled to enhanced

benefits pursuant to KRS 342.165 and KRS 342.730(1)(c)2. Robinson also appeals from the May 26, 2021, Order sustaining in part his Petition for Reconsideration as well as the May 26, 2021, Amended Opinion and Award providing additional findings concerning Robinson's average weekly wage ("AWW") and the ALJ's refusal to enhance the award pursuant to KRS 342.730(1)(c)2.

On appeal, Robinson argues the ALJ erred in failing to enhance the award by the two multiplier from March 1, 2020, forward. As this appeal only relates to the findings regarding Robinson's pre-injury AWW and the applicability of the two multiplier, we will only discuss the evidence relating to those aspects of the decision.

BACKGROUND

Robinson's Form 101 alleges on August 20, 2019, he fell from a ladder injuring "multiple upper extremities." The record contains only one impairment rating assessed by Dr. Spencer Romine with the Orthopedic Institute of Western Kentucky. Dr. Romine assessed a 5% impairment rating and opined Robinson retained the ability to perform the job he was performing at the time of the injury.

Robinson testified at a January 20, 2021, deposition and at the March 23, 2021, hearing. His deposition testimony reveals he was born April 8, 1964, and began working for Graves County on January 3, 2005. At the time of his injury, his job title was "Maintenance Tech 3." Robinson recounted his job responsibilities as follows:

Q: And in that job, what were your responsibilities for Graves County Board of Education?

A: Electrical, plumbing, refrigeration, heating and cooling. We – we never – we don't have a one specific job duty. You know, some school systems has just electricians, some have just plumbers. We do it all, carpentry.

Concerning his earnings, Robinson testified as follows:

Q: Were you paid a salary as of August 20, 2019?

A: Well, I mean, I'm hourly but it's almost salary, too. It's like they take the whole year and divide it up.

...

Q: A moment ago you told me a bit about your pay for Graves County Board of Education and I have filed some records provided to me by the Board. It looked like leading up to August 20 of 2019, you would receive pay based on 166.66 hours per month.

A: Yes, sir.

Q: Does that ring any bells?

A: Yes, sir. I didn't know the exact thing but when you said it, yes. It's – it's a figure they use because like February is less days than March, but we're paid equally the same amount every month.

Q: As I reviewed the records or your pay records since August 20 of 2019, I saw where there was a decrease in the number of hours per month from 166.66 to 160 effective in July of 2020. Is that accurate?

A: Yes, sir.

Q: What caused that to occur, that decrease by 6.66 hours per month?

A: They made me go to 240 workdays a year. I was 250 before that, they made me go to 240.

Q: So before July of 2020, you were at 250 workdays per year. And then for the 2020-2021 school year, you were reduced to 240 workdays per year?

A: Yes, sir.

Q: Do you know why that reduction by ten days per school year occurred?

A: Not really. I don't know.

Q: You testified they made me reduce down. When you say they, are you referring to the Board of Education?

A: Yes, sir.

Q: And you also used the word made, in terms of, you know, some action by the Board.

A: They didn't say I could stay 250. They just said we're going to make you go 240.

...

Q: Did anyone offer you anything, either in writing or verbally to explain the reduction?

A: They said that they was making everybody go but –

Q: It's your understanding all at Graves County Board of Education received the reduction by ten days?

A: That's what they said, the Board of Education said.

Prior to undergoing right shoulder surgery on January 30, 2020, Robinson worked full-time at Graves County on light duty. He was off work approximately six weeks following the surgery. While off work, he used his sick days so he would receive his regular earnings because he could not live on the TTD benefits to which he was entitled.

Concerning his post-injury wages, Robinson testified:

Q: Did you return back to the salary that you were receiving as of August 20, 2019?

A: When I went back, that's when they told me they was taking the truck away and reduced me to the 240.

...

Q: The records I have indicate that in June of 2020, you completed physical therapy. My first question to you is, does that sound right?

A: Yes, sir.

Q: There's a record from June 22nd of 2020 from Orthopaedic Institute that indicates you were released to return to work without any restrictions as of that date.

A: Yes, sir.

Q: Does that sound correct to you as well?

A: Yes, sir.

...

Q: And it looked to me like the reduction in the days from 250 to 240 started in July of 2020.

A: Yes.

Q: Is that correct as well?

A: Yes.

Q: Did the work truck, did that privilege stop effective July of 2020 when the hours, I'm sorry, when the days went down by ten?

A: No, sir. It was immediately the first day I went back to work after the injury.

Q: After the injury or after the surgery?

A: When I went back after, when I was released from therapy to go back to work. When I went to have surgery, I left the truck at work. I didn't take it home. When I was released by the doctor to start back to work, I was no longer using the truck to take home.

Q: That would be after the six weeks you were off from work?

A: Yes, sir.

At the hearing, Robinson testified he was paid monthly. He offered testimony concerning his July 19, 2019, and November 20, 2020, pay stubs.¹

Regarding the pay stubs, he provided the following testimony:

Q: Right. And under classified July it's got 19.04. What's, what's your understanding of what the 19.04 means?

A: That's my hourly rate.

...

Q: Okay. And then if we, and it showed here that for that month, under unit it's got 166.66. What does that, what's your understanding of what that means?

A: That's what was added to my check.

Q: The 166.66?

A: Yes.

Q: When you say that was added to your check, what do you mean?

A: For the month. Like for driving a vehicle.

Q: It's there for both?

A: Oh, oh. That's that's the number of hours in the month that I worked.

Q: Okay.

A: What they pay me for working.

Q: Okay. And then on the next stub that we provided, that was for November 20th, 2020; is that correct?

A: Yes.

Q: Okay. And right there it shows for classified July on that one 19.27?

¹ The pay stubs were not introduced at the hearing but were introduced by Robinson in a separate filing.

A: Yes, sir.

Q: And do you think that's again your hourly rate of pay?

A: That's my hourly rate of pay.

Q: So you've had a slight increase in your hourly rate of pay since the work injury?

A: Yes, sir.

Q: Okay. But now, under the unit it's got 160 there. Has the number of hours you're working per month gone down?

A: Yes, sir.

Q: And then the vehicle fringe is no longer on there?

A: Yes, sir.

Q: When did they take the vehicle away from you?

A: The day I went back to work.

Q: After the surgery?

A: Yes, sir.

Q: Okay. When was your surgery; if you recall?

A: January 3rd I think. January 3rd? It was the first of January, within the first week of January was my surgery.

Q: I understand. If the records indicate January 30th, 2020—

A: Was that when it was? Dang.

Q: And were you off work a period of time because of the, well, because of the work injury and the surgery for the work injury?

A: Yes.

Q: How long were you off work?

A: I think it was six weeks.

The balance of Robinson's testimony is a reiteration of his deposition testimony.

The March 9, 2021, Benefit Review Conference Order and Memorandum ("BRC Order") reflects the parties stipulated Robinson sustained an August 20, 2019, work injury and Graves County received due and timely notice. The parties also stipulated medical expenses were paid in the amount of \$27,368.79. The contested issues included "benefits per KRS 342.730, average weekly wage, credit for opting against TTD, TTD (1/30/20-3/15/20), and KRS 342.165 violation." Indicated under Other is "Application of Multipliers."

In the May 5, 2021, Opinion and Award, the ALJ provided the following regarding Robinson's AWW at the time of the injury:

10. The ALJ finds, per KRS 342.140(1)(b), that the Plaintiff's pre-injury average weekly wage was \$746.13.

The ALJ found the work injury generated a 5% impairment rating and Robinson retained the physical capacity to return to the same type of work. Although he did not address the applicability of KRS 342.730(1)(c)2, the ALJ found "no statutory multiplier shall apply." As previously noted, the ALJ declined to enhance Robinson's benefits pursuant to KRS 342.165. The ALJ awarded TTD benefits without a credit to Graves County for Robinson's use of his sick days from January 30, 2020, through March 15, 2020. PPD benefits were awarded at the rate of \$16.17 per week for 425 weeks beginning August 20, 2019, to be interrupted during any period TTD benefits were paid.

Robinson filed a Petition for Reconsideration arguing the ALJ failed to address his entitlement to enhanced benefits via the two multiplier. He asserted he continued to earn the same salary he earned at the time of injury for six months following his work-related injury. Therefore, his income benefits must be enhanced by the two multiplier beginning March 1, 2020, when his salary was reduced. Robinson alleged another error which is not relevant to our decision.

The May 26, 2021, Order reflects the Petition for Reconsideration was sustained in part and states “The ALJ has made additional findings and attached an Amended Opinion and Award.” The May 26, 2021, Amended Opinion and Award contains a new numerical paragraph 11 under the heading “Average Weekly Wage” which reads as follows:

11. Similarly, the Plaintiff’s post-injury average weekly wage must be calculated using the same method. Application of this method to the post injury wages of the Plaintiff yields a sum of \$735.74. The ALJ thus finds that the Plaintiff’s post-injury average weekly wage was \$735.74, and thus the Plaintiff did not return to work at the same or greater wages following the work injury.

The Amended Opinion and Award also contains a new numerical paragraph 17 under the heading of “Benefits per KRS 342.730” which reads as follows:

17. The ALJ also declines to award the “two” multiplier per KRS 342.730(1)(c)2 because the Plaintiff has not returned to work at the same or greater wages.

Except as amended above, the remainder of the May 5, 2021, Opinion and Award remained unaltered.

On appeal, Robinson states the ALJ “correctly found that [he] earned a monthly salary.” Therefore, the calculation of his AWW is governed by KRS 342.140(1)(b) which directs that when the wages are fixed by the month, the AWW shall be calculated by multiplying the monthly wage by twelve and dividing by fifty-two. Robinson argues the post-injury wage records reveal he continued to earn the same monthly salary he had earned prior to the injury. That amount multiplied by twelve and divided by fifty-two yields the same AWW as his post-injury AWW. Robinson observes he continued to earn the same monthly amount during October, November, and December of 2019, and January and February of 2020. His wages were reduced in March 2020 to \$3,173.21. Multiplying that amount by twelve and multiplying by fifty-two reduced Robinson’s AWW to \$732.27 per week. In July 2020, Robinson’s monthly salary was reduced again to \$3,083.20. When multiplied by twelve and divided by fifty-two, his AWW reduced to \$711.51 per week.

Robinson complains the ALJ did not utilize the formula set forth in KRS 342.140(1)(b) in determining his post-injury AWW. Instead, the ALJ utilized the total wages earned for fifty-two weeks following the injury and divided that yearly amount by fifty-two. He contends the ALJ calculated his return-to-work wages utilizing KRS 342.140(1)(c). However, he notes since he received a monthly salary, his return-to-work wages are to be calculated by KRS 342.140(1)(b).

Robinson advises he is not appealing the ALJ’s finding he was paid a monthly salary. His sole complaint is the ALJ calculated his post-injury AWW based on a yearly salary. Robinson requests the Board reverse the ALJ’s failure to award

the two multiplier and remand with directions to enhance his benefits by the two multiplier beginning March 2020.

For reasons not espoused by Robinson, we vacate the ALJ's calculation of the AWW and the award of PPD benefits and remand for additional findings consistent with the views expressed herein.

ANALYSIS

Robinson's un rebutted testimony and the wage records filed by Graves County establish he was paid on an hourly basis. Robinson testified that prior to and at the time of the injury he was paid monthly based on 166.66 hours. Graves County's December 22, 2020, filing summarizing Robinson's pre-injury wage records reveals the following:

Month	Monthly Check Date	Reg Hours	Class ADD	VEH Fringe	Gross Wages
1	8/20/2019	166.66 +		\$60.00 =	\$3,233.21
2	7/19/2019	166.66 +		\$60.00 =	\$3,233.21
3	6/20/2019	166.66		\$60.00 =	\$3,196.54
4	5/20/2019	166.66		\$60.00 =	\$3,196.54
5	4/19/2019	166.66		\$60.00 =	\$3,196.54
6	3/20/2019	166.66		\$60.00 =	\$3,196.54
7	2/20/2019	166.66		\$60.00 =	\$3,196.54
8	1/18/2019	166.66		\$60.00 =	\$3,196.54
9	12/19/2018	166.66		\$60.00 =	\$3,196.54
10	11/20/2018	166.66		=	\$3,136.54

11	8/20/2020	160.00			\$3,083.20
12	9/18/2020	160.00			\$3,083.20

TOTAL \$38,108.49
÷52 weeks \$732.86

In a subsequent filing dated March 10, 2021, Graves County provided more gross wages information. The summary below establishes that from September 20, 2019, through June 2020, Robinson's monthly gross wages were based upon him working 166.66 hours each month.

Month	Monthly Check Date	REG Hours	Class ADD	VEH Fringe	Gross Wages
1	9/20/2019	166.66		\$60.00	\$3,233.21
2	10/19/2019	167.66		\$60.00	\$3,233.21
3	11/20/2019	166.66		\$60.00	\$3,233.21
4	12/20/2019	166.66		\$60.00	\$3,233.21
5	1/17/2020	166.66		\$60.00	\$3,233.21
6	2/20/2020	166.66		\$60.00	\$3,233.21
7	3/20/2020	166.66			\$3,173.21
8	4/20/2020	166.66			\$3,173.21
9	5/20/2020	166.66			\$3,173.21
10	6/19/2020	166.66			\$3,173.21

11	7/20/2020	160.00			\$3,083.20
12	8/20/2020	160.00			\$3,083.20

TOTAL \$38,258.50
÷ 52 weeks \$735.74

Thus, his AWW should have been determined pursuant to KRS

342.140(d) which reads as follows:

(d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury.

Robinson's deposition and hearing testimony is consistent with Graves County's summaries of Robinson's pre-injury and post-injury monthly gross wages. Robinson testified his wages were based upon 166.66 hours worked each month. Upon returning to work, his monthly hours were subsequently reduced to 160.00 hours. The wage record summaries reflect Robinson's hours were reduced to 160.00 beginning July 2020 and he was paid monthly through at least February 2021 based on 160.00 hours worked each month.

Robinson's hearing testimony establishes his hourly rate was \$19.04. Later, his hourly rate increased to \$19.27 per hour. Nothing in the record contradicts that testimony. Graves County's wage summaries reveal the number of hours worked each month and Robinson's gross earnings. They do not provide his hourly rate. The summaries also reveal Robinson received a vehicle fringe benefit of \$60.00

per month from December 19, 2018, through February 2020. However, the pay stubs provided by Graves County to Robinson reveal that for the month of July 2019, his hourly rate of pay was \$19.04 and he worked 166.66 hours. Unquestionably, Robinson's wages were fixed by the hour. Multiplying 19.04 x 166.66 results in \$3,173.21 earnings per month.

By contrast, Robinson's November 2020 pay stub reveals his hourly rate was \$19.27 and he worked 160.00 hours, thereby yielding monthly earnings of \$3,083.20. The parties and the ALJ mistakenly equated the frequency of payment in determining KRS 342.140(b) applicable. However, Robinson's wages were not fixed by the month but rather by the hours worked. We emphasize we are not bound by Robinson's assertion the ALJ correctly calculated his pre-injury AWW. Moreover, the pay stubs introduced by Robinson and the wage records introduced by Graves County evidence he was paid by the hour. Consequently, this claim must be remanded to the ALJ for a computation of Robinson's AWW utilizing KRS 342.140(d). As this Board has no fact-finding authority, it is the ALJ who must calculate the pre-injury AWW and determine whether KRS 342.730(1)(c)2 is applicable after arriving at Robinson's AWW.

Accordingly, those portions of the May 5, 2021, Opinion and Award and the May 26, 2021, Amended Opinion and Award determining Robinson's AWW is \$735.74 and the award of PPD benefits are **VACATED**. Similarly, the May 26, 2021, Order sustaining, in part, Robinson's Petition for Reconsideration is also **VACATED**. This claim is **REMANDED** to the ALJ for a calculation of Robinson's pre-injury AWW, a calculation of PPD benefits, and a determination of

his entitlement to enhanced benefits by the two multiplier in accordance with the views expressed herein.

ALL CONCUR.

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