

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 19, 2021

CLAIM NO. 201386565

MICHAEL KLIMKO

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

MIDDLETOWN HEATING AND AIR and  
HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
REVERSING & REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

**ALVEY, Chairman.** Michael Klimko (“Klimko”) appeals from the July 1, 2021 Opinion, Award, and Order and the July 31, 2021 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ disagreed with Klimko’s assertion he is entitled to permanent partial disability (“PPD”) benefits enhanced by the two-multiplier contained in KRS

342.730(1)(c)2 beginning on July 7, 2017, and instead found he was only entitled to enhanced benefits from December 28, 2020 through January 24, 2021. The ALJ denied Klimko's Petition for Reconsideration by Order dated July 31, 2021.

Klimko argues he is entitled to the application of the two-multiplier for all periods since July 7, 2017, when he ceased earning the same or greater wages as he earned at the time of injury. Klimko asserts he never earned more than \$13,257.27 in any 13-week period from July 7, 2017 through April 1, 2021. Klimko asserts his earnings from Earl Age and Son Heating and Air Conditioning ("Age and Son") cannot be used for calculating either his pre-injury or post-injury average weekly wage ("AWW") since he was an independent contractor. Klimko worked for Airstream Technologies ("Airstream") in the fall and winter of 2020. He remains unemployed, and he has not worked in any capacity since suffering a heart attack. Klimko contends his testimony, coupled with the records from Airstream and the information regarding his taxes in 2017, clearly show he never earned greater than \$13,257.27 in the period in question. Klimko argues the Board should reverse the ALJ's decision and instruct him to award enhanced benefits from July 7, 2017 through April 1, 2021.

Klimko was previously awarded PPD benefits enhanced by the two-multiplier beginning June 20, 2014, by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ Kinney"), in the Opinion, Award and Order issued March 21, 2016, and in the Order ruling on Middletown Heating and Air's ("Middletown") Petition for Reconsideration, issued May 4, 2016. The ALJ reiterated the award of enhanced PPD benefits in the Remand Opinion and Order rendered July 2, 2018,

and again in the July 27, 2018 Order ruling on Middletown's Petition for Reconsideration. No appeal was taken from either the July 2, 2018 decision, or from the July 27, 2018 Order. Therefore, the ALJ's award became the law of the case.

Apparently at some point Klimko returned to some employment, and Middletown unilaterally reduced paying PPD benefits enhanced by the two-multiplier, although no motion was filed for this relief. Klimko alleged he ceased working at the higher pay rate on July 7, 2017, thereby entitling him to again receive PPD benefits at the enhanced rate. Because Klimko was awarded PPD benefits enhanced by the two-multiplier, Middletown bore the burden of proving he was no longer entitled to the enhancement. Middletown bore the burden of proving Klimko was not entitled to the application of the two-multiplier during the period of cessation. Middletown introduced no evidence supporting the reduction of the payment of benefits enhanced by the two-multiplier between June 20, 2014 and July 7, 2017. Because we determine the ALJ improperly placed the burden on Klimko, and erroneously found in Middletown's favor, we reverse his decision. We remand this claim to the ALJ for a determination that Middletown failed to seek relief from ALJ Kinney's previous determination and failed to introduce any evidence supporting its position that Klimko was not entitled to the application of the two-multiplier from at least 2017 to 2020.

Klimko filed a Form 101 on August 28, 2015, alleging he injured his low back, and experienced right leg pain from an accident he sustained while working for Middletown on April 16, 2013. ALJ Kinney found Klimko was entitled to PPD benefits based upon an 11% impairment rating assessed by Dr. Ellen Ballard

in an Opinion and Award rendered March 21, 2016. As noted above, the ALJ enhanced the PPD benefits by the two-multiplier contained in KRS 342.730(1)(c)2 beginning June 20, 2014 for the remainder of the 425-week period, interrupted by any period of entitlement to temporary total disability benefits. ALJ Kinney reiterated this award in the May 4, 2016 Order on Petition for Reconsideration, the July 2, 2018 Remand Opinion and Order, and in the July 27, 2018 Order on Petition for Reconsideration. As noted above, no appeal was taken after entry of the July 27, 2018 Order. Likewise, Middletown never sought relief from the application of the two-multiplier.

ALJ Kinney indicated on page 5 of the July 2, 2018 Remand Opinion and Order that Klimko was entitled to PPD benefits enhanced by the two-multiplier from August 8, 2014 through January 3, 2016. However, in the Order portion of the decision, ALJ Kinney found, "Plaintiff is awarded permanent partial disability benefits at the rate of \$124.20/week beginning on June 20, 2014 and continuing for the remaining 425 weeks." Following Middletown's Petition for Reconsideration, the ALJ amended the Opinion to reflect the award of PPD benefits enhanced by the two-multiplier begins on June 20, 2014 continuing for any period of cessation of the same or greater wages for the of the 425-week PPD benefit award.

Klimko filed a Motion to Reopen on August 1, 2020, stating he ceased earning the same or greater wages on July 7, 2017, and Middletown refused to increase his benefits by the two-multiplier contained in KRS 342.730 (1)(c)2.

Klimko testified at the hearing held May 5, 2021. After leaving work for Middletown, Klimko worked for Blackburn and Davis Plumbing and Heating

("Blackburn") replacing residential equipment. He was paid a fixed amount per job. A few weeks after leaving Blackburn, he began working for his brother-in-law, Earl Age, as an independent contractor with Age and Son. Klimko stated summer was a busy time of the year, and he worked twenty-five to thirty-five hours per week during that period. In January and February, he worked only one day per week. The company changed ownership and became Age Heating and Air ("Age Heating"). Klimko last worked at Age Heating in September or October 2020. Klimko testified he never earned \$13,000.00 in a thirteen-week period while working for either Blackburn or Age Heating.

Klimko admitted earning the same or greater wages during some of the weeks he worked with Age Heating. He explained, "I mean it's purely on demand, the work is. So, some weeks you're busy and you can make \$2,000 and the next week you might not be busy you make \$250." Klimko last worked for Age Heating in September or October 2020. Klimko began working part-time for Airstream in November or December 2020 as a supervisor and light service worker, averaging twenty to twenty-five hours a week. As of May 5, 2021, Klimko had not worked in three months due to a heart attack.

Klimko filed tax documents concerning his income in 2017, 2019, and 2020. A Form 1099 from 2017 indicates Klimko received non-employee compensation from Age and Son for \$11,662.00. A W-2 indicates Klimko received \$37,629.54 from Blackburn in 2017. A Form 1099 for 2019 indicates Klimko received non-employee compensation from Age Heating for \$20,817.50. Klimko received non-employee compensation for \$13,006.25 from Age and Son in 2019. A

Form 1099 from Age Heating for 2020 indicates he was paid \$30,275.00 in nonemployee compensation. A 2020 W-2 from Airstream indicates wages of \$2,578.50. Klimko also provided weekly wage information for his employment with Airstream showing weekly wages that were less than his AWW with Middletown.

The ALJ's findings are as follows, *verbatim*:

I am unaware of any case law that states that KRS 342.730(1)(c)2 is to be applied on a quarterly basis as I think the Plaintiff is arguing. I do adhere to the theory that when ascertaining if an injured worker has ever returned to work at equal or greater wages than on the date of injury a quarterly AWW calculation identical to when calculating date of injury AWW is used, but that's not what is going on here. The parties agree that he returned to work at wage equal or greater than on the date of injury for several months and now doesn't consistently earn equal or greater wages.

Further, only wages records that are broken down into individual weeks are wage records to prove this issue. Imprecise testimony, Form 1099s and W-2s are not wage records or sufficient evidence to prove a weekly wage.

As such, the Plaintiff is entitled to a PPD benefit of \$124.20 a week for the period of December 28, 2020 through January 24, 2021; the only provided weekly wage records.

A Plaintiff's entitlement to enhanced benefits under KRS 342.730(1)(c)2 begins automatically when his wages are less than on the date of injury and do not begin on the date of the Motion to Re-Open, do not require a Motion to Re-Open and do not require an Opinion. If there are additional weeks meeting these criteria, they should be paid.

On appeal, Klimko argues he is entitled to enhanced benefits for all periods since July 7, 2017, when he ceased earning the same or greater wages as he

earned at the time of injury. Klimko asserts he never earned greater than \$13,257.27 during any 13-week period from July 7, 2017 through April 1, 2021. Klimko asserts his work for Age and Son was and cannot be used for an AWW, either prior to the accident, or afterward. Klimko worked for Airstream in the fall/winter of 2020, until he had a heart attack. He remains unemployed, and he has not worked in any capacity since that event. Klimko contends his testimony coupled with the records from Airstream and the information regarding his taxes in 2017 clearly show his earning did not exceed \$13,257.27 at any time during the period in question. Klimko argues the Board should reverse the ALJ's determinations, and and instruct him to award enhanced benefits from July 7, 2017 through April 1, 2021.

ALJ Kinney awarded Klimko PPD benefits enhanced by the two-multiplier pursuant to KRS 342.730(1)(c)2 for the remainder of the 425 weeks of his award after June 20, 2014. Middletown at no time filed a Motion to Reopen seeking relief from this award. Apparently, it arbitrarily ceased paying PPD benefits enhanced by the two-multiplier without seeking an order granting such relief. Klimko's PPD benefits were paid without the two-multiplier supposedly because he was working for Blackburn, although no documentation was provided supporting this action. Although Klimko filed the Motion to Reopen, it is apparent he was merely seeking to obtain the benefits he had previously been awarded.

We additionally note Middletown filed no evidence supporting its decision to stop paying PPD benefits at the enhanced rate. We also note the ALJ's disdain and comments regarding the Form 1099's and W-2's Klimko filed. However, it was not Klimko's burden to establish entitlement to such benefits since

enhanced PPD benefits had previously been awarded. Because Middletown bore the burden of submitting evidence supporting its decision to cease paying PPD benefits enhanced by the two-multiplier, Klimko had no obligation to file any information. However, even if he did bear the burden, the ALJ should have considered all the information submitted.

Klimko had the burden of proving each of the essential elements of his cause of action, including entitlement to the two-multiplier in the original action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). ALJ Kinney determined he satisfied his burden of establishing entitlement to the application of the two-multiplier to the PPD benefits awarded. Once his claim became final, any alteration in the award, (i.e. in this case cessation of application of the two-multiplier), shifted the burden to Middletown to establish the basis for any reduction.

KRS 342.730(1)(c)2 provides:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

Klimko was awarded enhanced PPD benefits by ALJ Kinney on four occasions. Middletown did not move to reopen the claim, did not seek permission to reduce benefits, and submitted no evidence supporting such reduction. Middletown,

not Klimko, bore the burden of establishing he was no longer entitled to the benefits ALJ Kinney awarded. We therefore find the ALJ erroneously placed the burden of proof on Klimko and erred in finding he was not entitled to an enhancement of his PPD benefits by the two-multiplier during the period Middletown ceased paying such benefits.

Accordingly, the July 1, 2021 Opinion, Award, and Order and the July 31, 2021 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **REVERSED**. This claim is **REMANDED** for a determination that Klimko is entitled PPD benefits enhanced by the two-multiplier contained in KRS 342.730(1)(c)2 during the period at issue.

We acknowledge Klimko's request for oral arguments. However, based upon the foregoing, we find the request is moot, and unnecessary. Therefore, the request for oral arguments is **DENIED**.

ALL CONCUR.

/s/ Michael W. Alvey  
MICHAEL W. ALVEY, CHAIRMAN  
WORKERS' COMPENSATION BOARD

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