RENDERED: NOVEMBER 22, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001528-WC

WILLIAM STILWELL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-67697

KENTUCKY STATE UNIVERSITY; JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: This case is before us on appeal from the Workers' Compensation Board ("Board"). After having closely reviewed the administrative record in conjunction with the applicable legal authority, we AFFIRM.

I. BACKGROUND

The Appellant, William Stilwell, was employed by Kentucky State University ("KSU") from 2001 through 2015 as a coordinator two and manager of KSU's Environmental Education Research Center. On September 16, 2013, Stilwell was injured on the job while operating a chainsaw. On May 22, 2015, Stilwell filed a Form 101 Application for Resolution of Injury Claim ("Form 101") with the Department of Workers' Claims ("Department"). As part of the Form 101, Stilwell alleged that the September 16th incident caused injuries to his "left leg, left lower extremity; back."

On the section of the Form 101 asking Stilwell to describe how his injuries occurred, he alleged as follows:

> I used improper form to fell a tree, Cut the tree with chainsaw-tree did not fall-pushed tree with shoulder and tree falling pulled chain off bar. Chain whipped around and cut leg. University PPE[1] was not [Occupational Safety and Health Administration ("OSHA")] approved. Also, abnormal gait from left leg injury caused back condition that result [sic] in surgery performed by Dr. Phillip Tibbs and Dr. Mathew Tutt.

Stilwell also checked the box indicating that he was alleging a violation of a "safety rule/regulation pursuant to KRS[2] 342.165."

[1] We assume that "PPE," as used in Stilwell's Form 101, refers to "personal protective equipment."

[2] Kentucky Revised Statutes.

Stilwell attached a physician report from Dr. Frank Burke to his Form 101. Dr. Burke examined Stilwell on April 30, 2015, approximately a month before Stilwell filed his Form 101. Following examination, Dr. Burke provided the following medical impression:

> This patient sustained a complex laceration involving skin, subcutaneous tissue, facia muscle, and bone in a chainsaw accident on 09/16/2013, which required extensive wound care treatment, including the use of wound VAC and multiple debridements. He has residuals from this that have reached maximum medical improvement. This patient also reportedly had multiple near-falls secondary to his left leg giving way with a limp with the development of back pain, which evolved into right-sided sciatica. This was treated with initial discectomy on 11/03/2014 and a second exploration and discectomy in March of 2015. He has not reached maximum medical improvement from this, but can be provisionally rated.
>
> Dr. Burke then concluded as follows:
>
> Utilizing the AMA's Guides to the Evaluation of Permanent Impairment, Fifth Edition and Table 8-2 on Page 178, this patient has a class 1 impairment with 9% whole person impairment. He has skin disorders with signs and symptoms that are present and permanent. They do not cause significant limitations, despite the loss of sensation and the pain to this area of the lower extremity, which requires no specific additional treatment.
>
> In addition, this patient has had a lumbar discectomy, with re-exploration for a far lateral syndrome component with a right radiculopathy, following development of low back pain and signs and symptoms of a disc herniation. Utilizing Table 15-3 on Page 384, this patient would be a

> DRE lumbar category 3 with 12% whole person impairment.
>
> Finally, the patient did sustain an injury with damage to the superficial peroneal nerve. Utilizing Table 17-37 on Page 552 for the EMG nerve conduction velocity study confirmed the presence of a superficial peroneal nerve[3] injury as 2% whole person impairment. These values are combined for a total of 21% total whole person impairment.

In accordance with its regulatory duties, by letter dated June 3, 2015, the Department notified KSU that Stilwell had filed an application for resolution of injury claim. The letter further advised KSU to notify its carrier or counsel of the claim and to provide the Department with the name and address of said counsel. KSU was warned that it was important to do so because "there are specific time requirements for defensive responses." On June 16, 2015, the Department sent a letter to KSU and its insurance carrier notifying them that Stilwell's claim had been assigned to Administrative Law Judge ("ALJ") John B. Coleman, who would be conducting a benefit review conference ("BRC") on October 6, 2015, at 10:30 a.m. in Frankfort, Kentucky. The letter concluded by setting out the following schedule:

> Within **forty-five (45) days** of this notice, Defendants **SHALL** file a notice of claim denial or acceptance (Form 111). If no Form 111 is filed, all allegations of the application **shall be deemed admitted**.

[3] The peroneal nerve is a branch of the sciatic nerve, which supplies movement and sensation to the lower leg, foot and toes.

> Proof-taking for all parties shall commence as of the date of this notice and extend for sixty (60) days, followed by thirty (30) days for Defendants only and fifteen (15) days thereafter for rebuttal by the Plaintiff.
>
> At least ten (10) days prior to the benefit review conference, the parties shall file a witness list and copies of all known exhibits proposed stipulations and notice of contested issues.
>
> If necessary, a hearing will be scheduled by the Administrative Law Judge following the benefit review conference.

(emphasis in original).

KSU did not file a Form 111 within 45 days of the Department's letter. Accordingly, on August 7, 2015, Stilwell moved to have all allegations in his application deemed admitted. On August 19, 2015, counsel entered an appearance on behalf of KSU. On that same day, counsel filed a motion seeking leave to file a tardy Form 111. The motion indicated that the Form 111 was not timely filed because the lawyer the insurance company directed to respond to Stilwell's Form 101 "abruptly left [his firm] shortly after the referral" without notifying any of the other members of the firm that a Form 111 answer was due. The ALJ allowed KSU to file its late Form 111, but reserved judgment on what effect, if any, the untimely filing would have on the merits of Stilwell's claim. The ALJ also extended the discovery deadlines.

The ALJ held the required BRC on October 6, 2015. As part of the BRC, the parties stipulated to: (1) jurisdiction under Kentucky's Workers' Compensation Act ("the Act"); (2) an employment relationship between Stilwell and KSU; (3) the date of alleged injury (September 16, 2013); (4) KSU received due and timely notice of Stilwell's alleged left lower extremity claim; (5) no temporary total disability benefits were paid to Stilwell; (6) medical expenses were paid on Stilwell's behalf; (7) Stilwell's date of birth (June 6, 1974); and (8) Stilwell's education level (Master's Degree). Later, at the formal hearing the parties stipulated Stilwell's average weekly wage ("AWW") $874.52.

The parties also agreed on the contested issues: (1) permanent disability benefits pursuant to KRS 342.730; (2) work-relatedness and causation regarding Stilwell's alleged back injury; (3) notice regarding the alleged back injury; (4) entitlement to medical expenses for the alleged back injury; (5) injury as defined by the Act regarding the alleged back injury; (6) credit for unemployment insurance benefits; (7) pre-existing active impairment regarding the alleged back injury; (8) temporary total disability benefits; (9) safety violation; (10) and the effect of KSU's failure to timely file its Form 111.

The ALJ presided over a final hearing on December 22, 2015. At the final hearing, testimony was provided by Stilwell and Eddie Reed, another KSU employee. In addition to the testimony received at the final hearing, additional

evidence received by the ALJ included the September 8, 2015, deposition testimony transcript of Stilwell; the November 19, 2015, deposition testimony transcript of Dr. Frank Burke; various medical treatment records and reports including the treatment records of Dr. Burke; Dr. Burke's medical evaluation report; and the independent medical examination of Dr. Phillip Corbett. Exhibits included a note from Dr. David Cassidy releasing Stilwell to light duty work as of January 28, 2014; Stilwell's college transcript from 1999-2001; and OSHA regulations.

On February 18, 2016, the ALJ rendered an Opinion, Award and Order regarding Stilwell's claim. At the outset, the ALJ determined that KSU's failure to timely file its Form 111 was caused by the "inattentiveness" of its former counsel. The ALJ then concluded that "inattentiveness is not sufficient to show good cause." As such, the ALJ deemed "the allegations of injury set forth in the plaintiff's Form 101 . . . admitted." The ALJ explained this meant that he was required to "accept as true that the plaintiff sustained a left leg, lower extremity, and back injury as a result of the September 16, 2013 work related incident." However, the ALJ rejected Stilwell's argument that the late filing mandated that the ALJ accept the conclusions set forth in Dr. Burke's report, which Stilwell had attached to his Form 101.

Even so, the ALJ was convinced from the evidence that Dr. Burke correctly assessed Stilwell's lower back impairment at 12% following his lumbar surgeries. However, the ALJ was not persuaded with respect to Dr. Burke's impairment rating for Stilwell's left lower extremity condition. The ALJ indicated that based on the evidence, he found the opinion of KSU's medical examiner, Dr. Corbett, to be more persuasive. As such, the ALJ found that Stilwell sustained a 2% whole person impairment for the left lower extremity injury instead of the 9% impairment rating Dr. Burke had put forth for that injury. The ALJ then combined the 12% impairment rating for the lumbar spine injury as assessed by Dr. Burke with the 2% impairment rating assessed by Dr. Corbett for the lower left extremity injury resulting in a total combined impairment rating of 14%.

The ALJ then turned to the issue of multipliers pursuant to KRS 342.730(1)(c). Based on Dr. Corbett's opinion, the ALJ determined that Stilwell maintained the physical capacity to return to his position with KSU and that the injuries did not permanently alter his ability to earn an income equal to or greater than the wages he was earning at the time of the injury. *Id.* The ALJ noted that Stilwell was terminated from his employment on January 7, 2015. Accordingly, the ALJ next considered whether the two multiplier was applicable. Ultimately, the ALJ rejected application of the two multiplier after finding that Stilwell was

terminated for sexual harassment, an act the ALJ considered to be an intentional deliberate action with reckless disregard of the consequences. Next, the ALJ considered whether KSU owed Stilwell any temporary total disability benefits. From the date of his injury through January 7, 2015, Stilwell was maintained on salary continuation. As such, the ALJ concluded that KSU did not owe any temporary total disability for this period. The ALJ determined that KSU did owe Stilwell temporary total disability from January 7, 2015, through April 6, 2015, the date the ALJ determined Stilwell was "capable of returning to employment." The ALJ allowed KSU a credit against its temporary total disability obligation for this period equal to the amount of unemployment insurance benefits Stilwell received during the same period.

The last issue the ALJ took up was Stilwell's claim that his benefits should be increased by 30% pursuant to the safety violation statute, KRS 342.165. Stilwell first asserted that the ALJ was required to impose a safety violation increase because Stilwell asserted one in his Form 101, which was deemed admitted as a result of the late Form 111. The ALJ rejected this argument after concluding that the allegations in Stilwell's Form 101 were not sufficient to support an increase in benefits based upon a safety violation. After weighing the evidence, the ALJ determined that any safety violation did not result in Stilwell's injuries. Rather, the ALJ concluded that the evidence indicated that KSU did make

personal protective equipment available to Stilwell that could have prevented the injury, but Stilwell failed to utilize it.

Based on his findings and conclusions, the ALJ awarded Stilwell permanent partial disability benefits in the amount of $70.03 per week for his 14% permanent partial disability beginning September 16, 2013, for a period not to exceed 425 weeks. The period of permanent partial disability was suspended and extended by the period of temporary total disability benefits the ALJ awarded Stilwell for the period beginning on January 8, 2015, and continuing through April 6, 2015. KSU was ordered to pay "all reasonable and necessary medical expenses for the cure and relief of [Stilwell's] left leg, left lower extremity, and lower back injuries" pursuant to KRS 342.020.

After the ALJ denied Stilwell's petition for reconsideration, he appealed to the Board. The Board affirmed all assignments of error except the ALJ's temporary total disability determination. However, the decision was not unanimous. Chairman Alvey dissented with respect to the ALJ's failure to deem Dr. Burke's impairment ratings conclusively established. He explained that in his opinion, medical evidence containing an impairment rating filed with the Form 101 does constitute part of the claim which can be admitted by the late filing of a Form 111.

The Board's decision with respect to the other issues was unanimous. With respect to temporary total disability, the Board determined that the ALJ had not made sufficient findings regarding the nature and purpose of the salary Stilwell was paid while on administrative leave to entitle KSU to receive a credit or offset under KRS 342.730(6). The Board also concluded that the ALJ "made insufficient findings regarding the specific period or periods when Stilwell was temporarily totally disabled." As such, it vacated the temporary total disability award and remanded the claim to the ALJ for additional findings as to only that issue. In doing so, however, the Board was clear that the ALJ did not err in relying on Dr. Tutt to conclude that Stilwell was capable of returning to employment on April 6, 2015.

Stilwell now appeals to us. On appeal, Stilwell asserts: (1) the ALJ erred in failing to deem Dr. Burke's conclusions with respect to Stilwell's left leg injury admitted;[4] (2) the ALJ erred in failing to deem Stilwell's allegation of a safety violation admitted, or alternatively, the ALJ erred in failing to find a safety violation based on the evidence; (3) the ALJ erred in failing to award Stilwell temporary total disability benefits through October 22, 2015, because this is the only date a physician, Dr. Burke, placed him at maximum medical improvement

[4] Dr. Burke assigned a 9% impairment rating for the left lower leg and a 2% impairment rating for damage to Stilwell's superficial peroneal nerve.

for his back surgery; and (4) the ALJ erred in failing to award any multiplier under KRS 342.730(1)(c).

II. STANDARD OF REVIEW

KRS 342.285 provides that the ALJ is the sole finder of fact in workers' compensation claims. Kentucky courts have construed this authority to mean that the ALJ has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth–Elkhorn Corporation*, 514 S.W.2d 46, 47 (Ky. 1974).

On review, neither the Board nor the appellate court can 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, the reviewing body cannot 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).

However, "[w]hen considering questions of law or mixed questions of fact and law, the reviewing Court has greater latitude in determining whether the findings were supported by evidence of probative value than when only a question

of fact is at issue." *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001). "As a reviewing court, we are bound neither by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo.*" *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

III. ANALYSIS

A. The Effect of a Late Form 111

The workers' compensation claims process begins with the filing of a "written application for resolution of claim." KRS 342.270(1). The applicable Kentucky Administrative Regulations[5] ("KAR"), state that "for an injury claim, an applicant shall submit a completed Form 101, Application for Resolution of Injury Claim." 803 KAR 25:010, Section 3(1)(a).[6] The claimant is required to file the Form 101 with several additional documents.[7] 803 KAR 25:010, Section 5(1)(a)-(f). These include: the claimant's employment history; the claimant's chronological medical history; medical release; a medical report, which must

[5] Stilwell filed his Form 101 on May 22, 2015. The relevant administrative regulations, 803 KAR 25:010, were amended effective October 7, 2016. The regulations in effect at the time Stilwell filed his claim are cited in the body of this Opinion. The regulations as amended are identified in corresponding footnotes.

[6] As amended 803 KAR 25:010, Section 5(1)(a) states: "For each claim, an applicant shall submit a completed application for resolution of injury claim."

[7] As amended, the regulations now allow the claimant fifteen days to submit these materials. *See* 803 KAR 25:010, Section 7.

describe the injury which is the basis of the claim and contain a medical opinion establishing a causal relationship between the work-related events or medical condition which is the subject of the claim; documentation substantiating pre-injury and post-injury wages; and documentation establishing additional periods for which temporary total disability benefits are sought. *Id.*[8]

Within forty-five days of the Department's notice to the parties that a claim has been filed and assigned to an ALJ, "the employer or carrier shall file notice of claim denial or acceptance, setting forth specifically those material matters which are admitted, those which are denied, and the basis of any denial of the claim." KRS 342.270(2). "If a claim is denied in whole or in part, [the employer must set forth in the Form 111] a detailed summary of the basis of the denial." 803 KAR 25:010, Section 5(2)(c)2.[9] "If a Form 111 is not filed, all allegations of the application shall be deemed admitted." 803 KAR 25:010, Section 5(1)(2)(b).[10]

In this case, it is undisputed that KSU failed to file a timely Form 111 as required by KRS 342.270(2). It is also undisputed that its failure was found to

[8] As amended, the regulations set forth the requirements necessary to complete the application at 803 KAR 25:010, Section 7(a)-(f).

[9] As amended 803 KAR 25:010, Section 7(2)(c)2.

[10] As amended 803 KAR 25:010, Section 7(2)(b).

be without good cause by the ALJ.[11] As a result, Stilwell maintains that the ALJ was required to accept as true *all* the allegations contained in his Form 101, including his claim for a safety violation increase and the impairment ratings in Dr. Burke's medical opinion, which Stilwell attached to his Form 101.

The safety violation allegation is easily disposed of in this case. In pertinent part, KRS 342.165(1) provides:

> If an accident is *caused* in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

(Emphasis added). In his Form 101, Stilwell asserted that he was claiming a safety violation by KSU. He alleged he used "improper form to fell a tree" and that KSU's personal protective equipment "was not OSHA approved." Deeming these allegations admitted does not establish causation with respect to the accident as required by the statute. To the contrary, the Form 101 indicates that accident was caused by Stilwell's failure to properly fell the tree. The failure of Stilwell's safety violation claim resulted from the insufficiency of the allegations in his Form 101, not from the ALJ's failure to deem those allegations admitted.

[11] KSU has not appealed the ALJ's conclusion that KSU failed to show good cause for its failure to timely file the Form 111.

This brings us to Stilwell's assertion that the ALJ erred as a matter of law when he failed to deem the impairment ratings assigned by Dr. Burke as having been conclusively established. This is a much harder question because Dr. Burke's opinion was attached to Stilwell's Form 101. After reviewing the applicable regulations in conjunction with our recent opinion in *American Woodmark Corp. v. Mullins*, 484 S.W.3d 307 (Ky. App. 2016), the majority of the Board concluded that "an employer has admitted only a work-related injury when the employer fails to timely file a Form 111." The Board reasoned that this result is in harmony with the regulations insomuch as they require a Form 101 to be accompanied by a medical opinion establishing causation, not a medical opinion containing an impairment rating. The Board explained that the impairment rating should not be viewed a part of the application itself, but "rather an element to be proven as the claim proceeds." Ultimately, we agree with the Board.

The seminal Supreme Court of Kentucky opinion on the effect of an employer's failure to file a timely Form 111 is *Gray v. Trimmaster*, 173 S.W.3d 236 (Ky. 2005). In that case, the claimant, Gray, filed a Form 101 alleging that her employment with Trimmaster caused repetitive motion injuries to her arms. Along with her Form 101, as required by 803 KAR 25:010, Section 5(1)(d),[12] Gray submitted a letter from Dr. Brooks to her attorney. Therein, Dr. Brooks expressed

[12] Now 803 KAR 25:010, Section 7(d)(1)-(2).

the opinion that "Ms. Gray's underlying 'inflammatory process' is most likely caused by work and then further aggravated by continuing within the repetitive work environment." The employer failed to file a timely Form 111, to introduce any proof, or to appear at the BRC. Before the hearing, the employer filed a late Form 111 denying Gray's claim for a variety of reasons. Despite the fact that the ALJ deemed all the allegations in Gray's Form 101 to be admitted, he dismissed her claim on the basis that Gray had failed to prove a harmful change to the human organism through objective medical findings. Gray appealed. The Board and the Court of Appeals affirmed. After reviewing the relevant statutes and administrative regulations, the Supreme Court reversed and remanded Gray's claim to the ALJ.

In so doing, the Supreme Court of Kentucky held as follows:

> When concluding that the claimant failed to prove a compensable injury, the ALJ erred by failing to consider the effect of the employer's failure to file a timely Form 111. Although Dr. Owen's testimony did not establish that the claimant sustained a compensable injury, the employer's failure to file a timely Form 111 resulted in an admission that she sustained a work-related inflammatory process. If there is an injury as defined by KRS 342.0011(1), Chapter 342 imposes no additional requirement that AMA impairment from the injury be based on objective medical findings. Mindful that an ALJ may pick and choose among the witnesses' testimonies, we note that the ALJ could have determined from the evidence that the "injury" to which the employer admitted resulted in the impairment that Dr. Owen measured. If so, the claimant would have been entitled to

> income benefits. The evidence did not compel such a result, but by dismissing the claim for lack of a compensable "injury," the ALJ failed to even consider that possibility and must do so on remand.

Id. at 243.

While *Gray* is instructive, it is not dispositive. Consistent with the administrative regulations, the medical report attached to Gray's Form 101 described Gray's injury and opined that the injury was caused by Gray's employment. As such, the Supreme Court concluded that it was error for the ALJ to disregard that both injury and causation had been deemed admitted. Unlike the present case, however, the medical report Gray attached to her Form 101 did not include an impairment rating. Therefore, the Supreme Court was not tasked with determining whether an impairment rating submitted when a claim is filed is deemed admitted when a Form 111 is not timely filed.

The only other published opinion on this matter was recently issued by our Court in *Mullins*, 484 S.W.3d 307. *Mullins* comes closer to addressing the issue at hand. Mullins was injured when a piece of lumber fell from above a forklift he was operating and struck him in the face. On January 23, 2013, he filed Form 101 alleging he suffered work-related injuries to various body parts; he later amended his claim to allege a safety violation. His employer, Woodmark, did not file a Form 111 within the required 45 days. However, like in this case, Woodmark did eventually submit a Form 111 and participated in discovery and the

BRC. *Id.* In considering the effect of Woodmark's late Form 111, we pointed out that: "[t]he failure to timely file a Form 111 does not, by itself, entitle the claimant to benefits." *Id.* at 314. We explained that when an employer fails to file a timely Form 111, the employer is deemed to have admitted that the claimant sustained an injury within the scope of employment, but the employee is still required to prove extent and duration. *Id.* "The result is analogous to a default judgment in a civil action which determines liability but damages may be awarded only after a hearing and findings of fact and conclusions of law." *Id.*

The Board clearly struggled to apply *Gray* and *Mullins* to this scenario noting that neither was completely dispositive. Ultimately, the Board was tasked with interpreting its own regulations. In so doing, the Board reasoned as follows:

> The guidance from Chapter 342 and related regulations and case law is less than clear . . . . *Gray* and *Mullins*, both published, do not specifically answer our question, though tend to indicate that an impairment rating is not "admitted even when attached to the Form 101." Again, we note that there is no requirement the Form 101 include a medical opinion containing an impairment rating.
>
> Finally and importantly, we emphasize the purpose of the mandatory regulations—to effectuate handling of cases. That purpose is not frustrated here. KSU filed its Form 111 late. However, the delay was relatively short at three weeks, and KSU entered an appearance well before the BRC.

Like the majority of the Board, we find it instructive that 803 KAR 25:010, Section 5 requires only a medical report describing the injury or injuries at issue and their casual connection to the claimant's work to be included with the Form 101.[13] Neither the statutes nor the regulations require an impairment rating to be submitted as part of the Form 101. Likewise, in *Mullins*, our Court held "that the burden remained on the claimant to prove the extent of the employer's liability" notwithstanding a late Form 111. *Mullins*, 484 S.W.3d at 314. Thus, we hold that an untimely filed Form 111, by the employer, shall result in the admittance that the employee sustained a work-related injury if such is alleged as part of the application. However, impairment ratings and other opinions attached to the Form 101 that are not required by the statutes or regulations to be included as part of a completed application are not deemed conclusive by the filing of a late Form 111. The employee still bears the burden of proving the extent of his injuries before the ALJ.

The ALJ properly deemed admitted the allegation of an alleged work-injury contained in Stilwell's Form 101 based on KSU's untimely Form 111 and the mandatory language of 803 KAR 25:010, Section 5(2)(b). However, the burden still remained with Stilwell to prove the extent of his alleged injuries, including the impairment rating, if any, he suffered as a result of the injury. And,

[13] As amended, 803 KAR 25:010, Section 7.

given that an impairment rating is not required to be included as part of the application, the ALJ was not bound to accept Dr. Burke's impairment rating. He was only bound to accept Dr. Burke's opinion that there was a "causal relationship between the work-related events or medical condition which is the subject of the claim" as this is required for an application to be complete. *See* 803 KAR 25:010, Section 5(1)(d).[14] Consequently, we agree with the Board majority that it was within the ALJ's discretion to determine that portions of Dr. Corbett's report as to impairment ratings were more reliable than Dr. Burke's report on the impairment rating issue.

B. Temporary Total Disability Cut-off Date

Stilwell's next argument is that the ALJ erred in selecting April 6, 2015, as the cutoff date for temporary total disability benefits. Stilwell asserts that he should have been awarded temporary total disability benefits through October 22, 2015, because this is the only date a physician, Dr. Burke, placed him at maximum medical improvement for his back surgery.

Pursuant to KRS 342.0011(11)(a), a temporary total disability is defined as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" Thus, in order for an employee to be

[14] Now 803 KAR 25:010, Section 7(d)(1)-(2).

entitled to receive temporary total disability benefits for an alleged work-related injury, that employee must prove: (1) he has not reached maximum medical improvement and (2) he is unable to return to his customary, pre-injury employment. *See, e.g.*, *Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman*, 233 S.W.3d 710, 714 (Ky. 2007) ("As interpreted in [*Wise*], KRS 342.0011(11)(a) authorizes [temporary total disability] benefits if a worker has not reached [maximum medical improvement] *and* has not reached a level of improvement that would permit a return to his customary employment." (emphasis added)).

While Stilwell may not have reached maximum medical improvement until sometime after April 6, 2015, the ALJ determined that the medical evidence indicated that Stilwell was able to return to work on this date. We have reviewed Dr. Tutt's notes from the April 2015 visit. The notes indicate that Stilwell was ambulating well with good motor strength and sensation. He was encouraged to increase his activities, especially walking. No restrictions were indicated. Stilwell's job at KSU involved "maintaining a website, writing grants, giving tours and also involved some cleaning of the trail." While there were some physical components to Stilwell's position, nothing he did could be characterized as excessive.

Based on the record, it was reasonable for the ALJ to find that Stilwell had the ability to return to work as of April 6, 2015. Since Stilwell had the ability to return to work as of April 6, 2015, he would not be eligible for temporary total disability benefits beyond this date as "both factors must be present throughout an awarded period of [temporary total disability]." *Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56, 60-61 (Ky. 2012).

C. Multipliers Pursuant to KRS 342.730(1)(c)

Stilwell also argues his permanent partial disability benefits should have been enhanced by the three multiplier or, in the alternative, the two multiplier pursuant to KRS 342.730(1)(c).

KRS 342.730(1)(c) provides:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
>
> 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation

> shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

Regarding the three multiplier, we cannot say the evidence of record compels a different result from the one reached by the ALJ. In this case, conflicting expert medical testimony existed regarding Stilwell's ability to return to his pre-injury employment. Dr. Corbett opined that Stilwell retained the physical capacity to return to the type of work he was performing at the time of his work injury. Dr. Burke, however, recommended restrictions that Stilwell avoid activities that may overly strain his back and that Stilwell should avoid excessive, repetitive bending, squatting, and heavy lifting. It was well within the discretion of the ALJ to rely on Dr. Corbett's opinion.

Turning to Stilwell's alternative argument, regarding the two multiplier, we likewise find no error. The ALJ found that Stilwell was terminated for sexual harassment, which the ALJ concluded was an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another such that double recovery was not available. *See Livingood v. Transfreight*, LLC, 467 S.W.3d 249 (Ky. 2015).

> KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' except where the reason is the employee's conduct shown to have been an intentional, deliberate

> action with a reckless disregard of the consequences either to himself or to another.

Id. at 259. While Stilwell may disagree with the ALJ's finding with respect to the reason for his termination, that finding is supported by substantial evidence of record. Moreover, sexual harassment is within the scope of the type of wrongdoing that the *Livingston* court held an employee should not be able to benefit from by enjoying a double recovery after termination.[15]

D. Safety Violation

Stilwell's final assertion is that even if it is decided that his allegation of a safety violation should not have been deemed as admitted, the evidence regarding the safety violation compelled a finding in his favor. We disagree.

We begin with the applicable statute, KRS 342.165(1). It provides:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation

[15] The allegations of sexual harassment concerned Stilwell texting with a 25-year old female he met in conjunction with representing KSU at a conference. After the conference, the woman filed a complaint against Stilwell. He was placed on administrative leave, and ultimately dismissed.

> of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

Id. The statute discourages an employer from disregarding safety measures by allowing an injured employee 30% more in workers compensation benefits if the employer's disregard is intentional and contributes in any way to the injury. *See Hornback v. Hardin Memorial Hosp.*, 411 S.W.3d 220, 227 (Ky. 2013).

The ALJ made the following findings and conclusions with respect to Stilwell's safety violation claim:

> The plaintiff argues that his accident was the result of the employer's intentional failure to comply with 29 CFR 1910.266. A subsection of that regulation requires such employees to be furnished with leg protection constructed with a cut resistant material, such as ballistic nylon. The plaintiff argues the trousers he was wearing at the time of his injury did not qualify as the leg protection required by that regulation. However, the evidence indicates the plaintiff was very experienced in cutting trees according to his own testimony. The tree in question was described as a very small cedar tree. The supervisor testified that the defendant maintained personal protective chain saw chaps as well as other protective equipment including steel toed boots, glasses, helmets, respirators, and gloves. The evidence indicates, according to the plaintiff's own admission that he simply used improper form in cutting the tree. Therefore, the evidence indicates to the undersigned that the plaintiff simply did not take the time to obtain and utilize the provided safety equipment perhaps due to the small size of the tree which he was attempting to cut. However, the testimony of Mr. Reed makes it clear that the defendant

> did maintain the safety equipment to be utilized by plaintiff and other employees.
>
> . . . .
>
> Here, the defendant maintained the safety equipment, but the plaintiff failed to obtain and utilize the safety equipment when cutting the very small cedar tree. The accident occurred as a result of the plaintiff using improper technique and the injury occurred as result of his failure to obtain and utilize the provided safety equipment. The enhancement provisions of KRS 342.165 do not apply.

We have reviewed the testimony of Mr. Reed. Mr. Reed has worked at KSU since 1988. While Mr. Reed did not work at the same location as Stilwell, he managed another farm close by. He professed to have knowledge regarding the personal protective equipment KSU made available to its employees. His testimony does not indicate that his knowledge is limited to the equipment provided to employees at his particular work site. Mr. Reed testified that for the last eight or nine years KSU has made chain saw chaps or chain saw pants available for the use of employees whenever they were operating a chain saw. This testimony supports the ALJ's conclusion that KSU made the required personal protective equipment available to Stilwell. Based on Mr. Reed's testimony it was reasonable for the ALJ to conclude that Stilwell's injury was caused by his failure to utilize available protective equipment as opposed to KSU's failure to provide the required equipment to him. Therefore, we find no error.

IV. CONCLUSION

For the reasons set forth above, the September 16, 2016, Opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles W. Gorham
Lexington, Kentucky

BRIEF FOR APPELLEE:

Whitney L. Lucas
Lexington, Kentucky