

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-002273-WC

BLUEGRASS TOWING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-99297

CURTIS CLARK; WORKERS'
COMPENSATION BOARD; AND
HON. DONALD G. SMITH, ALJ

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is a petition for review of a decision of the Workers' Compensation Board (board) affirming an award and order of an Administrative Law Judge (ALJ). Appellant, Bluegrass Towing, argues that the award to appellee, Curtis Clark, was excessive due to the fact that the ALJ based appellee's "average weekly wage" on the amount that appellee provided as his "weekly wage at the date of injury" in his application for resolution of injury claim (form 101) instead,

of calculating this figure by using the formula required by KRS 342.140(1)(d). For the reasons stated hereafter, we reverse and remand this matter for further proceedings.

After appellee incurred a work-related back injury in 1997 while employed by appellant, he filed an application for resolution of injury claim (form 101). Appellee received an award based on a 10% impairment rating, but he continued working for appellant. Upon his reinjury in 2000, appellee filed both a motion to reopen the 1997 claim and a new form 101 alleging that he had suffered further injury to his back as well as an injury to his left leg. The new form 101 stated that appellee's "weekly wage at the date of injury" was \$638.00. Although appellant did not file a form 111 in response to appellee's new form 101, during the benefit review conference, it filed appellee's wage information into evidence and listed appellee's "average weekly wage" as a contested issue. The ALJ subsequently issued an opinion and order which found that because appellant failed to file a form 111, all facts provided in appellee's application were deemed admitted under 803 KAR 25:010 §5(2). Hence, based on the figure which appellee provided as his "weekly wage at the date of injury", his "average weekly wage" was found to be \$638.00. The ALJ denied appellant's petition for reconsideration, and the Board

subsequently affirmed the opinion and award. This appeal followed.

Appellant's sole contention on appeal is that its failure to file form 111 should have had no effect on the calculation of appellee's "average weekly wage." Specifically, appellant claims that KRS 342.140(1)(d) provides the proper method for calculating the "average weekly wage" of an hourly wage employee such as appellee, and that the ALJ and the Board erred by finding that an admission of the amount of appellee's "weekly wage at the date of injury" was the same as an admission of appellee's "average weekly wage". We agree.

Statutory language is to be given its "plain meaning unless to do so would constitute an absurd result." Executive Branch Ethics Commission v. Stephens, Ky., 92 S.W.3d 69, 73 (2002) (citation omitted). 803 KAR 25:010 §5(2) provides that an employer's failure to file form 111 results in the admission of all facts contained in a claimant's form 101. However, a review of form 101 shows that it requests the claimant to provide the amount of his or her "weekly wage at the date of injury," and not the amount of his or her "average weekly wage." Simply put, while it is true that appellee's "weekly wage at the date of injury" has been deemed admitted by appellant's failure to file form 111, his "average weekly wage" was not requested on the application, and it cannot be deemed admitted under 803 KAR

25:010 §5(2). Thus, this matter is remanded to the board, with directions that it remand this matter to the ALJ for a determination of appellee's average weekly wage, calculated in accordance with the formula provided by KRS 342.140(1)(d).

ALL CONCUR.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE:

David B. Allen
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