

RENDERED: MARCH 24, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-002140-WC

SHANNON NICKELL

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-96611

COMMUNITY ALTERNATIVES OF  
KENTUCKY; HON. THOMAS DAVIS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE. Shannon Nickell petitions this Court for review of an opinion of the Workers' Compensation Board affirming a decision and order of the Administrative Law Judge. The ALJ found Nickell to have an 18% impairment rating arising from a work-related injury, with 10% of the impairment being pre-existing active. Nickell argues that the Board erred in

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<sup>1</sup> Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

affirming the ALJ's calculation of benefits based upon an 8% impairment. For the reasons stated below, we affirm.

We have closely examined the record, the law and the written arguments. In the interest of judicial economy, and because no good purpose would be served by restating in our own words the well-written opinion by Chairman John Gardner, we adopt the Board's opinion as that of this Court. The Board stated in relevant part as follows:

The facts necessary to determine the issue before the Board are uncontroverted. Prior to the back injuries that are the subject matter of this claim, Nickell suffered a work-related back injury in 2001. She settled the 2001 claim based on a 10% impairment rating. It was uncontradicted that Nickell could return to her former job and the 0.85 grid factor and 1.0 modifier were applied to the 10% impairment rating.

Nickell returned to work without restrictions. She sustained the injuries which are the subject matter of this claim on January 28, 2003 and September 25, 2003, in the course of her employment with Community Alternatives. The ALJ relied on medical evidence which indicated Nickell had an 18% impairment rating due to her back condition. The ALJ concluded Nickell had a 10% impairment rating resulting from her prior lumbar spine injury.

The ALJ calculated benefits as follows:

Plaintiff is entitled to an 18% impairment with a 10% reduction for a pre-existing injury and further she is to receive a 3 multiplier as she is not able to perform the duties of

her former employment. Plaintiff shall receive benefits based on an 8% whole person impairment with the 3 multiplier.

Pursuant to KRS 342.730 the Plaintiff is entitled to PPD benefits for 425 weeks beginning the week of July 8, 2004 at the rate of \$57.42 per week calculated as follows:  $\$281.55 \times 8\% \times .85 \times 3 = \$57.42$ .

Thereafter, Nickell filed a petition for reconsideration, arguing the ALJ erred concerning the active disability carve-out and calculations of benefits pursuant to KRS 342.730(1)(b) and (c). The ALJ overruled the petition and Nickell now appeals to this Board.

Nickell argues that pursuant to KRS 342.730(2) the correct method to account for prior active disability is to first compute the benefits that would otherwise be payable for the injured worker's overall disability and then subtract the dollar amount that would be appropriate for the preexisting condition. In other words, she argues the carve-out for a prior active condition should be for the income benefits payable on account of the preexisting disability rather than subtracting the prior impairment rating from the correct impairment rating. Nickell's proposed calculation of benefits is as follows:

1) Take the current medical impairment rating and convert it to a disability rating using the grid factors. [ $18\% \times 1\% = 18\%$ ]

2) Triple benefits payable due to physical incapacity. [ $18\% \times 3.0$  modifier  $\times \$281.55 = \$152.04$ ]

3) Determine the income benefits payable on account of preexisting disability. [10% impairment x .85 grid factor x 1.0 modifier x 28.55 = \$23.93]

4) Subtract the preexisting benefit level from the current benefit level. [\$152.04 - \$23.93 = \$128.11]

We disagree and affirm the ALJ. KRS 342.730(1)(b) provides:

For permanent partial disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the table that follows:

AMA Impairment	Factor
0 to 5%	0.65
6 to 10%	0.85
11 to 15%	1.0
16 to 20%	1.0
21 to 25%	1.15
26 to 30%	1.35
31 to 35%	1.50
36 and above	1.70

A review of the relevant statutory language of KRS 342.730(1)(b) reveals that "sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined

by KRS 342.740" is "multiplied by the permanent impairment rating caused by the injury . . . times the factor set forth in the cable [.]" (Emphasis added.)

In awarding permanent partial disability benefits, the permanent impairment rating caused by the 2003 injuries is derived by subtracting Nickell's preexisting active impairment rating from her combined 18% impairment rating. See Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003). Thus, as correctly determined by the ALJ, Nickell's impairment rating due to the injuries which are the subject matter of this claim is 8%. Pursuant to the plain language of KRS 342.730(1)(b), benefit calculations begin, as a matter of law, with the impairment rating caused by the injury. The ALJ correctly calculated benefits.

The Board correctly interpreted KRS Chapter 342 and the case law in concluding that the ALJ's award was proper. Accordingly, we find no error. For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Zaring P. Robertson  
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BRIEF FOR APPELLEE, COMMUNITY  
ALTERNATIVES OF KENTUCKY:

Kimberly D. Newman  
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