

### CASE LAW UPDATE

#### WORK-RELATEDNESS/CAUSATION

##### *Melissa Walker v. UPS Logistics (Claim No. 08-00091) (ALJ Opinion)*

Walker alleged that she sustained a low back injury while working for UPS as a pick pack, which involved going around the warehouse to different skids, collecting her order into a cart. She testified to a prior low back strain while working with TFE, which was subsequently bought out by UPS Supply Solutions. The Plaintiff alleged injury to her back when she pulled a case which was loaded backwards on the skid. She did not have immediate pain, and did not immediately report same to her supervisor. The Plaintiff began conservative treatment and went on vacation to Myrtle Beach, denying injury while there. However, medical evidence showed that the Plaintiff had fallen in the ocean. Diagnostics taken just after the alleged work injury and then again after the fall in the ocean, revealed that a free fragment existed following the fall in the ocean (not after the work injury). The ALJ was persuaded by the substantial amount of medical evidence by the Defendant which showed that the Plaintiff suffered from chronic low back conditions and that it was not until she went on vacation with her family and sustained a fall or twisting in the ocean, that her severe pain started and which ultimately resulted in another MRI, which now showed a free fragment. The ALJ noted there was no convincing proof by the Plaintiff that the work incident was anything other than a temporary exacerbation of the Plaintiff's already long-standing degenerative disc disease. The Plaintiff's claim was dismissed.

#### 2.0 MULTIPLIER

##### *Chrysalis House, Inc. v. Tackett (2008-SC-000221-WC) (to be published) (on remand to ALJ)*

The claimant was employed by Chrysalis House and sustained a work injury in 2003 with an 11% impairment rating. The ALJ determined that he lacked the physical capacity to return to the type of work performed at the time of injury but that he had returned in a light duty capacity at the same or greater wage and would be able to continue same for the indefinite future. The claimant was awarded income benefits, including double benefits during any period of cessation of such employment. He moved to reopen his claim, asserting that his employment had ceased and that he was now earning a lower wage. Chrysalis resisted on the ground that the claimant was discharged for cause due to theft (though the resident from whom a money order was stolen did not press charges). The ALJ found the alleged criminal activity to be irrelevant for the purposes of KRS 342.730(1)(c)(2), noting that the double benefit did not result from the illegal act but from the decision to discharge him. Chrysalis appealed, asserting that public policy should prohibit the claimant from profiting from criminal activity and that the legislature did not intend for the words "with or without cause" to supersede that policy. KRS 342.730(1)(a) - (e) provide compensation for "disability" caused by a work-related injury and (1)(c)(2) permits a double income benefit if post-injury employment at the same or a greater wage ceases "for any reason with or without cause," provided that the reason relates to the disabling injury. The claimant argued that the statute is clear and unambiguous.

The Supreme Court noted that the above cited statute appears at first blush to provide clearly a double benefit during a period of cessation of employment at the same or greater wage "for any reason, with or without cause." They observe that KRS 342.730(1) authorizes income benefits to be awarded for "disability" that results from a work-related injury. Therefore, the Court concluded that when read in context, the statute permits a double recovery during any period that employment at the same or a greater wage ceases, provided that the reason relates to the disabling injury. The Supreme Court remanded to the ALJ to determine if the reason for a cessation of employment at the same or a greater wage related to the claimant's injury.

#### "GOING AND COMING" RULE

##### *Barry v. US Airways (2008-CA-001811-WC)(not to be published, not final)*

The ALJ dismissed Barry's claim because it was barred by the "going and coming" rule; the Board upheld the dismissal, which was reversed by the Court of Appeals. Barry was injured in a motor vehicle accident upon returning from a 3-day computer training program in North Carolina. She flew into the Louisville airport, her normal place of employment, following the training and while on her way home, was involved in the accident. The Court of Appeals held that as Barry was required to attend a training in North Carolina, as a condition to her employment and for the benefit of US Airways, her travel (and thus injury) fell under the traveling employee exception to the "going and coming" rule. The car trip was noted as the final step necessary to complete the travel required for the training, and as such, it was an integral step in her attendance at the training.



#### JONES DIETZ & SWISHER PLLC WELCOMES WILLIAM P. EMRICK, ESQ. TO THE FIRM

William P. Emrick, Esq. has joined the law firm, Jones Dietz & Swisher PLLC. His practice includes the handling of legislative, regulatory and government affairs, including matters before the Commonwealth of Kentucky, Office of Workers' Claims, where he previously served as Commissioner/Executive Director from 2004-2008. The Commissioner is responsible for the administration of the Kentucky workers' compensation system. His experience includes the handling of surety bonding, certification of self-insured's and Unfair Claims Settlement Practices Act matters as well as the general practice of law. Mr. Emrick will also serve as a national and international consultant to employers, carriers, and TPA's with multi-state interests in the field of workers' compensation. His distinguished governmental service includes: Executive Director of Legal Services of the Environmental and Public Protection Cabinet and General Counsel to the Kentucky Horse Racing Authority. Mr. Emrick also served as acting Commissioner of Labor, and acting Executive Director of the Office of Financial Institutions.

For additional information: [William P. Emrick announcement](#)

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- ◆ Dwight Lovan, Commissioner, Dept. of Workers' Claims
- ◆ Roosalie Faris, R.N., CCM, COHN-S, Sr. VP, Occupational Managed Care Alliance, Inc.
- ◆ Michael M. Best, M.D., The Assessment Centers
- ◆ Ed Meredith, Claims Supervisor/SIU Manager, Underwriter's Safety and Claims
- ◆ Brian Sweeney, Vice President, the Matrix Companies

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#### NWCDN

The National Workers' Compensation Defense Network

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[www.nwcdn.com](http://www.nwcdn.com)

PLEASE CONTACT AN ATTORNEY BELOW IF WE CAN BE OF ANY HELP OR ASSISTANCE.

H. Douglas Jones [djones@jdspllc.com](mailto:djones@jdspllc.com)

Kenneth J. Dietz [kdietz@jdspllc.com](mailto:kdietz@jdspllc.com)

Robert L. Swisher [rswissher@jdspllc.com](mailto:rswissher@jdspllc.com)

William P. Emrick [wemrick@jdspllc.com](mailto:wemrick@jdspllc.com)

Jeffrey S. Smith [jsmith@jdspllc.com](mailto:jsmith@jdspllc.com)

Lisa K. Clifton [lclifton@jdspllc.com](mailto:lclifton@jdspllc.com)

Christopher G. Newell [cnewell@jdspllc.com](mailto:cnewell@jdspllc.com)

Lance O. Yeager [lyeager@jdspllc.com](mailto:lyeager@jdspllc.com)

[www.jdspllc.com](http://www.jdspllc.com)



#### ALJ Senate Confirmations

On March 26, 2009, the Kentucky Senate confirmed all of the following ALJ appointments of Governor Beshear:

Caroline Pitt Clark

Douglas W. Gott

Edward Hays

Richard M. Joiner

Joseph W. Justice

Otto Daniel Wolff, IV

#### New Mileage Rate

The mileage reimbursement rate beginning April 1, 2009 through June 30, 2009 is 38¢ per mile.

#### Documents to Acting Chief ALJ Overfield

Acting Chief ALJ Overfield requests that any document requiring his attention as Acting Chief on the Frankfort motion docket should be sent directly to the DWC office and should not be sent to his Henderson, KY office. This causes delay in whatever activity is required in those claims.

#### Hospital Fee Schedule

Please be advised that the final proposed change to the hospital fee schedule regulation has been submitted to LRC and should be considered by the Regulatory Review Subcommittee at its regular meeting in April. If approved by the Subcommittee, this regulation will replace the existing regulation. For a copy of the proposed regulation: [Hospital Fee Schedule Regulation](#).



#### NATIONAL WORKERS' COMPENSATION DEFENSE NETWORK AFFILIATION

The NWCDN is a nationwide and Canadian network of independent law firms. It was created to provide an organization where reputable law firms of the highest reputation and expertise could form a comprehensive network to provide employers and insurers access to the highest quality representation in workers' compensation and related employer liability fields.

Jones Dietz & Swisher PLLC is the sole Kentucky firm designated by the NWCDN and H. Douglas Jones is pleased to serve on the Board of Directors.

The website for the NWCDN is [www.nwcdn.com](http://www.nwcdn.com).

#### JDS Offices

51 Cavalier Boulevard  
Suite 260  
Florence, KY 41022  
859-594-4200  
859-594-4248 (fax)

259 West Short Street  
P.O. Box 34088  
Lexington, KY 40588  
859-255-6655  
859-255-6650 (fax)

10503 Timberwood Circle  
Suite 213  
Louisville, KY 40223  
502-420-1921  
502-420-1930 (fax)