

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**JULY 1, 2016 to JULY 31, 2016**

**I. ADMINISTRATIVE LAW**

**A. *Commonwealth of Kentucky, Public Protection Cabinet v. Veitch***

[2014-CA-001973](#) 07/15/2016 2016 WL 3905614 DR Pending

Opinion by Judge Clayton; Judges Combs and Maze concurred.

John Veitch, the former Chief State Steward of the Kentucky Horse Racing Commission, who had been appointed to his position by the Governor at the request of the then-secretary of the Environmental and Public Protection Cabinet, was terminated from his job by the appointing authority for the Public Protection Cabinet. Veitch filed a personnel action raising two claims: (1) he was a merit employee; and (2) only the executive director of the Kentucky Horse Racing Commission had the authority to hire and fire its employees. On appeal, the Court of Appeals held that Veitch was an appointed, non-merit employee. All of the circumstances surrounding his hire indicated he was a non-merit employee, and he was given non-merit employee benefits, including a higher salary. The Court also held that Veitch was validly terminated from employment by the Public Protection Cabinet, as the statutory structure permits the Public Protection Cabinet to perform administrative functions for the Kentucky Horse Racing Commission, including terminating employees' employment.

**B. *Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Commission***

[2015-CA-000398](#) 07/15/2016 2016 WL 3886312

Opinion by Judge Jones; Chief Judge Kramer and Judge Taylor concurred.

Appellant brought this appeal to challenge the Kentucky Public Service Commission's approval of Kentucky Power Company's application to recover from its customers an estimated \$1.26 billion in costs associated with purchasing biomass energy from ecoPower Generation-Hazard, LLC, over a twenty-year contract period. The Commission had approved the proposed cost

recovery pursuant to KRS 278.271. On appeal, the Court of Appeals determined that the Commission abused its authority in elevating policy considerations in favor of biomass over the economic realities inherent in the proposed project. The Court noted that while the General Assembly's policy goals in favor of biomass energy are entitled to consideration by the Commission, they are not a substitute for evidence supporting the overall fairness of the agreement. The Commission must still fulfill its statutory charge to determine whether the agreement is a fair, just, and reasonable one under the circumstances. Here, there was no evidence to support a present need for biomass-generated energy, that the costs of acquiring the biomass energy under the agreement were reasonable for biomass energy (or other forms of renewable energy), or that the agreement would actually have a positive net effect on the economy of eastern Kentucky. In fact, the evidence of record was to the contrary. Thus, because substantial evidence did not support the Commission's decision, the Court reversed and remanded with instructions for the Commission to deny Kentucky Power Company's application for cost recovery.

C. *Marcum v. Cabinet for Health and Family Services*

[2015-CA-000047](#) 07/15/2016 2016 WL 3886476

Opinion by Judge VanMeter; Judges Combs and D. Lambert concurred.

Upon review of an order affirming the decision of the Cabinet for Health and Family Services to deny an applicant retroactive Medicaid benefits, the Court of Appeals reversed and remanded. The Court determined that the Cabinet failed to comply with 907 KAR 1:560 §14, the administrative regulation detailing the Medicaid eligibility appeals process, when the Appeal Board failed to provide the applicant with written notice acknowledging her appeal and did not offer her the opportunity to file a brief or to provide additional proof. Since the Cabinet's final order was entered in violation of 907 KAR 1:560 §14, a clear violation of the administrative procedure for Medicaid appeals had occurred. Under these circumstances, KRS 13B.150(2)(a) mandated that the Court reverse.

## II. AGENCY

### A. *Select Portfolio Servicing, Inc. v. Blevins*

[2015-CA-000807](#) 07/08/2016 2016 WL 3667909

Opinion by Judge Clayton; Chief Judge Kramer and Judge Taylor concurred.

A mortgage trustee executed a limited power of attorney for its servicer that gave the servicer authority to issue additional limited powers of attorney to subservicers. The servicer executed a limited power of attorney for Select Portfolio Servicing, Inc., granting it, among other powers, authority to release deeds contained within the mortgage trust. Select Portfolio Servicing attempted to record a deed release, along with its limited power of attorney and the limited power of attorney granted the servicer, in the Fayette County Clerk's office. However, the Clerk's office would not permit the documents to be recorded because there is no statutory authority expressly permitting limited powers of attorney to be granted to subservicers by servicers. The Court of Appeals held that under agency principles, a mortgage trustee may grant its servicer, in a limited power of attorney document, the authority to execute additional limited powers of attorney for subservicers. The Court also held that such documents, including the mortgage releases and the limited powers of attorney, are recordable instruments.

### III. CONTRACTS

#### A. *Chin v. Chin*

[2015-CA-000914](#) 07/08/2016 2016 WL 3667956

Opinion by Judge J. Lambert; Judge Thompson concurred; Judge Acree concurred in result only.

The Court of Appeals affirmed a judgment finding in favor of Terry and Susan Chin on their breach of contract claims against their son, Raymond. The Court held that Raymond's oral agreements to repay a small private loan and a school loan were not invalidated by the Statute of Frauds, as the Chins had performed their portion of the agreement and Raymond had demonstrated his intention to pay them back by transferring money and making some payments. The Court also held that the circuit court's consideration of the parties' incomes was harmless error, and the circuit court did not err when it awarded attorneys' fees to the Chins.

## IV. CORRECTIONS

### A. *Dixon v. Bottom*

[2015-CA-000618](#) 07/29/2016 2016 WL 4098737

Opinion by Judge Maze; Judge J. Lambert concurred; Judge Acree dissented and filed a separate opinion.

In a prison disciplinary action, appellant challenged an order denying his petition for declaration of rights. The Court of Appeals affirmed, holding that the record lacked sufficient evidence to establish that appellant's due process rights were violated. Appellant was involved in an altercation with three officers at the Franklin County Regional Jail and was administratively charged with, and found guilty of, "Physical Action Against an Employee or Non-Inmate." The Court first rejected appellant's argument that the "some evidence" standard set forth in *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985) was not met. The Court noted that there was an incident/arrest report and also that appellant's own admissions established that an altercation occurred due to his refusal to follow orders. The Court next rejected appellant's contention that if video evidence of the incident existed, the adjustment officer did not review it as appellant requested. The Court noted that the record indicated that the officer went out of her way to review the surveillance footage, delaying the hearing seven days to accommodate its arrival from the jail; moreover, she twice referenced her review of the video, stating that "the incident was seen on video" and that her decision to affirm appellant conviction was based on a review of "all the evidence." Notably, the Court concluded that this demonstrated that appellant was not denied his right to present exculpatory evidence and, hence, the dictates of procedural due process did not compel the circuit court to undertake additional review of that evidence. Finally, the Court rejected appellant's argument that the trial court wrongly charged and overcharged him for a filing fee on his petition and appeal. Judge Acree dissented for reasons set forth in *Lawless v. Conover*, 2015-CA-000039-MR, --- S.W.3d ----, 2016 WL 2981580 (Ky. App. May 20, 2016), *motion for disc. rev. filed* (Ky. June 16, 2016) (2016-SC-000320), and opined that procedural due process required the circuit court to review the surveillance footage in considering appellant's petition.

## V. CRIMINAL LAW

### A. *Bentley v. Commonwealth*

[2015-CA-000806](#) 07/29/2016 2016 WL 4056411

Opinion by Judge J. Lambert; Judges Acree and Thompson concurred.

The Court of Appeals reversed a judgment ordering appellant to pay restitution to Kentucky Farm Bureau pursuant to KRS 533.030(3). Appellant was charged with complicity to receiving stolen property valued at \$10,000.00 or more. As part of his plea agreement, appellant was sentenced to five years' imprisonment, which was probated for five years, and was ordered by the trial court to pay restitution of \$1,000.00 to the victims of his crime and \$11,000.00 to Kentucky Farm Bureau, the victims' insurer. Finding that Kentucky Farm Bureau paid damages under a contract of insurance to the victims of appellant's crimes and was not a direct victim of the crime itself as contemplated by KRS 533.030(3), the Court held that the trial court's order requiring appellant to pay restitution to the insurer was improper.

**B. Commonwealth v. Perry**

[2014-CA-001282](#) 07/15/2016 2016 WL 3886891

Opinion by Judge Thompson; Judges Clayton and Nickell concurred.

The Commonwealth appealed from two orders, one dismissing two counts of an indictment and the other dismissing an indictment, on the basis of prosecutorial vindictiveness. At issue was whether the doctrine of prosecutorial vindictiveness precluded the Commonwealth from pursuing additional charges against appellee after he successfully appealed his conviction. The Court of Appeals reversed. The Court first held that there was no reasonable presumption of vindictiveness after appellee's successful appeal when the Commonwealth obtained a new indictment that added charges based on conduct unrelated to the initial indictment. The Court held that the additional charges, while carrying fewer penalties than the original charge, could make the presumption of prosecutorial vindictiveness applicable in a particular fact situation. However, in this case, because the additional charges were based on unrelated conduct and one indictment charged crimes against a different victim, no presumption applied. The fact that the prosecutor was aware of appellee's conduct prior to the first trial was of no consequence, as it is within the prosecutor's discretion to decide when to seek an indictment. Because there was no presumption of prosecutorial vindictiveness, appellee had the burden to prove actual vindictiveness. Under the facts, there was no evidence of actual vindictiveness. Therefore, reversal was merited.

C. *Edmondson v. Commonwealth*

[2015-CA-001198](#) 07/22/2016 2016 WL 3962310

Opinion by Judge Nickell; Chief Judge Kramer and Judge Combs concurred.

Appellant was convicted of first-degree sexual abuse of a victim under the age of twelve. On appeal, appellant argued that he should have been granted a new trial because: (1) the jury foreman was the brother-in-law of the prosecutor's assistant and concealed this fact during voir dire; (2) during the Commonwealth's summation, the trial court should have admonished the jury when the prosecutor referenced Catholic priest cases and tried to bolster the victim's testimony by saying the video showed her typing the note that was ultimately viewed by other witnesses but was erased before it could be collected as evidence and was never seen by the defense; (3) the trial court should have granted appellant's request for a directed verdict because there was no proof of sexual gratification; and (4) the trial was marred by cumulative error. The Court of Appeals rejected all four arguments and affirmed.

D. *Gooch v. Commonwealth*

[2014-CA-001582](#) 07/15/2016 2016 WL 3905620

Opinion by Judge J. Lambert; Judge Combs concurred; Judge Thompson concurred in result only.

The Court of Appeals granted discretionary review of an opinion and order affirming the district court's judgment convicting appellant of driving under the influence. The district court entered its judgment pursuant to a guilty plea conditioned on appellant's right to appeal the order denying a motion to suppress evidence because he was not given an opportunity to take an independent blood test. Appellant alleged that reversal was merited because he was not offered the opportunity for an independent blood test after the police officer's blood test was completed. The Court considered the interplay of KRS 189A.105(4) and KRS 189A.103(7) and held that because appellant refused the officer's requested breath test, he was not eligible to request an independent blood test, despite the officer's acceptance of his offer to submit to the more invasive blood test.



E. *Muchrison v. Commonwealth*

[2014-CA-001375](#) 07/08/2016 2016 WL 3672209 DR Pending

Opinion by Judge D. Lambert; Judge Combs concurred and filed a separate opinion; Judge VanMeter dissented and filed a separate opinion.

Appellant was convicted of first-degree trafficking in a controlled substance and being a first-degree persistent felony offender. His conviction stemmed from a purchase of a quantity of heroin by a confidential informant acting on behalf of law enforcement. The confidential informant in question had a romantic history with appellant, but also, in her own words, had “about three or four boyfriends” at or near the time she made the purchase from appellant. One of those boyfriends was Christopher Trent. Trent had been arrested for theft and was represented by the same counsel who would later come to represent appellant at trial. On the day before appellant’s trial, the Commonwealth provided counsel with notice that the confidential informant with whom appellant had conducted the subject transaction had originally acted with the intention of “helping Christopher Trent with his current charges,” which were the same charges for which appellant’s counsel was representing Trent. Counsel subsequently moved to withdraw as appellant’s attorney due to a conflict of interest, but the circuit court denied the motion, finding no conflict. The Court of Appeals reversed appellant’s convictions, holding that the circuit court erred in denying counsel’s motion to withdraw. The Court agreed with counsel’s position that his representation of Trent, and the ethical responsibilities inherent therein, precluded him from fully exploring exculpatory facts in his cross-examination of the informant, which prevented him from fully presenting appellant’s defense. In reaching this conclusion, the Court noted the fact that Trent still expected counsel to file post-conviction motions in his case. In her concurring opinion, Judge Combs asserted that the circuit court also committed reversible error in failing to sanction the Commonwealth for its highly dilatory conduct in disclosing (“mere hours” before trial) the informant’s involvement with Trent. In dissent, Judge VanMeter indicated that he would affirm in all respects.

F. *Patton v. Commonwealth*

[2014-CA-001115](#) 07/29/2016 2016 WL 4098759 DR Pending

Opinion by Judge D. Lambert; Judge Jones concurred; Judge VanMeter dissented.

Appellant challenged an order denying his motion to withdraw his post-verdict guilty plea to first-degree rape of a victim under twelve years old and unlawful transaction with a minor in the third degree, as well as his waiver of the right to appeal. He also sought review of the conviction itself. The Court of Appeals reversed and vacated appellant's conviction, agreeing with appellant that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently made. The Court noted that during his plea colloquy, conducted pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d (1969), appellant was advised that because he was found guilty by a jury, he had the right to appeal the verdict. After subsequently agreeing to the sentence, appellant was presented with his rights both in writing on the guilty plea form and orally in the colloquy. He was asked if he was knowingly, voluntarily, and intelligently entering into the agreement and whether he understood that he was waiving his right to appeal to a higher court. He answered in the affirmative to the trial court's questions and signed the form, indicating agreement. The Court of Appeals concluded that appellant's waiver of the right to appeal was not knowingly, voluntarily, and intelligently made, owing to the combination of the plea colloquy and the waiver language in the agreement. The plea colloquy, which included the trial court advising appellant that the entry of the guilty plea waived his right to appeal, occurred shortly after the trial court advised appellant that he *did* have the right to appeal the jury's verdict. The Court of Appeals noted that the standard *Boykin* colloquy is not appropriate in the situation where a defendant enters into a plea agreement after a jury verdict, and it concluded that this procedure undoubtedly created confusion, which was not assuaged by the trial court's failure to explain to appellant which of the rights affected by the waiver remained applicable. Thus, this created a clear question as to whether appellant possessed the requisite knowledge of the full array of likely consequences of the plea. The Court further held that the trial court erred in allowing certain bolstering testimony to come into evidence.

## VI. CUSTODY

### A. *Ball v. McGowan*

[2015-CA-000302](#) 07/22/2016 2016 WL 3962294

Opinion by Judge Acree; Chief Judge Kramer and Judge Maze concurred.

This appeal addressed interstate jurisdictional questions governed by the UCCJEA. In 2007, a Nevada court entered an agreed original custody order granting joint custody to unwed parents, making Father the primary residential parent, allowing him to move with Child to Kentucky, and establishing liberal visitation for Mother in Kentucky. Father was also to take Child back to Nevada once each year to visit with Mother. After 2007, the relationship between Mother and Child broke down. Child has not visited with Mother, either in Kentucky or in Nevada, since at least 2009. In 2013, Mother filed a motion to modify custody in Nevada; Father failed to appear and the motion was granted. When served with the Nevada order, Father filed a petition and motion to modify custody in Boyd Circuit Court, setting up the jurisdictional conflict. After corresponding with the Nevada court, the Kentucky court held that the Nevada court retained exclusive, continuing jurisdiction pursuant to KRS 403.824 and dismissed Father's petition and motion to modify. Father appealed. The Court of Appeals held that the Nevada court was the sole determiner of whether it had exclusive, continuing jurisdiction and affirmed the circuit court's ruling in that regard. However, the Court then held that such a finding did not require immediate dismissal; the UCCJEA (KRS 403.834) allowed the circuit court to request the Nevada court to decline exercise of its jurisdiction, an option the record does not show was ever discussed between the courts of the two states. In view of the fact that the most recent order of the Nevada court required reunification counseling in Kentucky, the Court of Appeals reversed the dismissal and remanded the case with instructions that the circuit court: (1) request that the Nevada court decline to exercise its jurisdiction further; (2) to dismiss the Kentucky action if Nevada did not so decline; but (3) to adjudicate the custody issues if the Nevada court did so decline exercise of its jurisdiction.

## VII. EMPLOYMENT

### A. *Wilson v. Kentucky Unemployment Insurance Commission*

[2014-CA-001023](#) 07/01/2016 2016 WL 3574612 DR Pending

Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred.

The circuit court dismissed a complaint seeking judicial review of the denial of unemployment compensation benefits due to a lack of proper verification, as required by KRS 341.450. The Court of Appeals reversed, holding that appellant substantially complied with KRS 341.450 by signing a verification statement. Although appellant's signature was not notarized, his clear attempt at verification was sufficient under *Shamrock Coal Co., Inc. v. Taylor*, 697 S.W.2d 952 (Ky. App. 1985), *abrogated on other grounds by Kentucky Unemployment Ins. Com'n v. Cecil*, 381 S.W.3d 238 (Ky. 2012), to invoke the jurisdiction of the reviewing court. The Court of Appeals remanded for reinstatement of appellant's verified complaint and review of the Kentucky Unemployment Insurance Commission's ruling denying appellant's request for unemployment benefits.

## VIII. GARNISHMENT

### A. Lee v. Lee

[2014-CA-000387](#) 07/15/2016 2016 WL 3886894 Rehearing Pending

Opinion by Judge Dixon; Judges Combs and Stumbo concurred.

The Court of Appeals affirmed an order denying appellants' motion to quash a garnishment order. During the course of the underlying divorce proceeding, appellees Jill Lee and her attorney, Louis Waterman, obtained a common law judgment against appellant John Lee for attorneys' fees. Appellees obtained an order of garnishment for the bank account of John's company, Acceleris, LLC, based on a theory that the company was John's "alter ego." The family court denied John's motion to quash the garnishment, concluding that Acceleris, LLC was John's "alter ego." In affirming, the Court of Appeals held that the family court correctly followed the procedure delineated in KRS 425.501, which addresses garnishment orders. Appellants objected to the garnishment pursuant to KRS 425.501(4), contending that Acceleris, LLC was not a judgment debtor in the action before the family court. The Court noted that the family court held a hearing pursuant to KRS 425.501(5) to address appellants' objections and held that, based on the evidence presented, the family court properly concluded that Acceleris, LLC was a judgment debtor in its capacity as John's "alter ego."

## IX. IMMUNITY

### A. *Farmer v. Miller*

[2014-CA-000330](#) 07/15/2016 2016 WL 3886899

Opinion by Judge Nickell; Judges Acree and D. Lambert concurred.

Appellee was a court-appointed receiver for a failed business involving appellant and his business partner. Appellee was tasked by the appointing court with assisting the parties in finalizing dissolution and liquidation of the business assets. The parties did not cooperate. Following years of contentious litigation between the partners regarding the failed business, appellee sought and received an order awarding him payment for services rendered. When payment was not forthcoming from appellant, appellee filed a Notice of Judgment Lien against all of appellant's real property located in Jefferson County, Kentucky. Appellant tendered payment and filed suit against appellee alleging negligence, breach of fiduciary duty, and breach of contract. The suit - filed in mid-2012 - raised complaints about appellee's services for the first time since his appointment in 2007 and contended appellee's malfeasance caused substantial negative financial consequences to appellant. Appellee moved to dismiss the action on grounds of quasi-judicial immunity. Treating the motion as one for summary judgment, the trial court agreed that appellee was entitled to immunity; all acts complained of were discretionary in nature and/or were done in good faith; and it would be impossible for appellant to prevail at trial. On appeal, appellant challenged the trial court's finding that appellee was entitled to immunity, arguing the trial court erred in failing to find appellee's actions were ministerial in nature and/or appellee did not act in good faith. The Court of Appeals disagreed with appellant's assertions, holding that appellee was an agent of the appointing court and could only act within the parameters set by that court. So long as appellee did not act negligently or in bad faith with respect to the tasks assigned him, he was entitled to immunity. After carefully reviewing the record, the Court found no evidence was presented showing that appellee acted in a way to strip him of immunity. The Court refused to graft additional duties or responsibilities onto appellee, as urged by appellant, when the appointing court had not itself done so.

## X. JUDGMENT

### A. *Hashemian v. Louisville Regional Airport Authority*

[2015-CA-000741](#) 07/01/2016 2016 WL 3574619 Released for Publication

Opinion by Judge Stumbo; Judges Acree and Taylor concurred.

The Court of Appeals affirmed a judgment which found that appellant's claims were barred by *res judicata*. Appellant was terminated from his employment with the Louisville Regional Airport Authority in 2009. He then brought suit against appellees in the United States District Court for the Western District of Kentucky, Louisville Division, raising claims arising out of his employment with, and termination from, the airport. His claims were dismissed by the federal court and appellant was unsuccessful on appeal. Appellant then brought suit against appellees in state court in which he raised new claims arising out of his termination. Appellees moved for summary judgment and the circuit court granted the motion, finding that although the claims raised in the state case were new, they could have been brought in the federal case; therefore, they were barred by *res judicata*. The Court of Appeals agreed and affirmed.

## XI. TORTS

### A. *Mannahan v. Eaton Corporation*

[2013-CA-002005](#) 07/15/2016 2016 WL 3887037 DR Pending

Opinion by Judge Acree; Judge Clayton concurred; Judge Jones dissented and filed a separate opinion.

The Court of Appeals affirmed a mesothelioma victim's appeal of a summary judgment finding that appellant failed to create a genuine issue of fact as to whether he had actually been exposed to any of the products manufactured by appellees. In a 2-1 vote, the Court held that to prove causation in an asbestos-induced mesothelioma case, the plaintiff or decedent's estate must show, for each defendant, through direct or circumstantial evidence, that: (1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the plaintiff's or decedent's disease. Here, appellant failed to create a genuine issue of material fact regarding the first element - actual exposure. The circuit court concluded that proof of sale of a manufacturer's asbestos-containing product (amongst many other manufacturers and asbestos-containing products) to the employer of a plaintiff who worked on equipment that might have incorporated such a product was not enough to create a genuine issue that the particular-named defendant manufacturer's product was the source of asbestos that caused plaintiff's disease. Plaintiff could not rely on speculation of the mere possibility of asbestos exposure by the particular defendant manufacturer's product. Proof on defendant's motion for summary judgment that eliminated the probability of plaintiff's exposure to the movant's product was not met with plaintiff's proof to the contrary. In dissent, Judge Jones argued that appellant's demonstration of the possibility that the products at issue made their way into the worksite was sufficient under *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991) to survive summary judgment and create a jury question.



**B. Patmon v. Hobbs**

[2014-CA-001411](#) 07/15/2016 2016 WL 3886831

Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred.

Appellant, acting individually and on behalf of American Leasing and Management LLC, appealed from a judgment entered after remand from the Court of Appeals. Appellant argued that the trial court awarded inadequate damages on her claims that appellee breached his statutory duties as a managing member of American Leasing and diverted a business opportunity. The Court of Appeals reversed and remanded. As to appellant's claims for statutory damages under KRS 275.170, the Court held that the trial court erred in reducing appellee's profit gained by amounts he personally expended and, further, that the trial court erred by permitting appellee to retain a portion of the profit received from his misconduct. Regarding the diversion of business opportunity claim, the Court held that the law-of-the-case doctrine precluded it from reconsidering the application of the claim to LLCs or appellant's burden to establish American Leasing's financial solvency. However, the Court also held that the trial court did not make specific findings of fact or separate conclusions of law to allow meaningful review. The Court further held that appellant must only demonstrate that American Leasing was not financially insolvent to recover, and that the amount of recovery was not limited to appellee's profit but may be in the amount American Leasing would have profited from the diverted opportunity.

## XII. WORKERS' COMPENSATION

### A. *Austin Powder Company v. Stacy*

[2015-CA-001947](#) 07/15/2016 2016 WL 3886301

Opinion by Judge Combs; Judges Dixon and Stumbo concurred.

An employer sought review of a Workers' Compensation Board decision affirming the Administrative Law Judge's award of 50% disability to appellee in a coal workers' pneumoconiosis claim. The Court of Appeals affirmed. The ALJ awarded benefits for 50% disability pursuant to KRS 342.732(1)(c), which provides that there shall be an irrebuttable presumption that the employee has a disability rating of fifty percent (50%) resulting from exposure to coal dust if certain requirements are met. The Court noted that in seeking reversal, the employer was effectively asking it to declare KRS 342.732 unconstitutional in light of the decision reached in *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011). The Court concluded that it could not consider this issue because the employer had failed to comply with the notification requirements set forth in CR 76.25(8) and KRS 418.075(2). Thus, the Court affirmed.

**B. Roby v. Trim Masters, Inc.**

[2015-CA-000923](#) 07/22/2016 2016 WL 3962602

Opinion by Judge D. Lambert; Judge VanMeter concurred; Judge Combs concurred and filed a separate opinion.

The question before the Court was whether the Workers' Compensation Board erred in reversing and remanding the matter to the Administrative Law Judge with instructions to issue particular factual findings regarding permanent partial disability. The Court held that the Board did err in this regard and reversed. The ALJ issued four opinions in this case, and the Board reversed and remanded each of them on grounds that the ALJ had not fully explained in his opinion how appellant's age and education related to her injury en route to finding her entitled to disability benefits. Notably, there was a clear disconnect and impasse between the ALJ and Board regarding the directives made by the Board in its opinions and the ALJ's efforts to abide by them. Appellant argued that the ALJ's findings were supported by substantial evidence and that the ALJ recited the evidence consistently each time the matter was remanded. In contrast, the employer argued that each time the Board remanded the matter, the ALJ merely "tweaked" his ruling, ignored the Board's directives, and only offered conclusory statements regarding how appellant's age and education played into the determination that she was permanently disabled. In reversing, the Court of Appeals noted that rather than remanding again for factual findings on the issue of benefits, the Board instead chose to shoehorn the situation into KRS 342.285(c) and (d), so that it could find the ALJ's ruling an abuse of discretion. The Board's ruling essentially ignored the ALJ's factual findings regarding the nature, severity, and duration of appellant's injury, and the effect thereof on her employment prospects, in favor of an overly strict reading of the authority regarding two of the other factors. The Board also focused on the perceived disregard the ALJ afforded its commands to make particular factual findings. The Court concluded that substantial evidence supported the ALJ's factual finding, and the Board's order directing the ALJ to make findings that contradicted his own impermissibly encroached on the role of the ALJ as fact-finder.

### XIII. ZONING

A. *Harrison Silvergrove Property, LLC v. Campbell County and Municipal Board of Adjustment*

[2014-CA-000619](#) 07/08/2016 2016 WL 3663030

Opinion by Judge Acree; Judges D. Lambert and Maze concurred.

A property owner sought a conditional use permit to allow a “dockage facility” for its river barge and boat transport business in an area zoned for “River Recreation/Conservation.” Defining the term broadly, the staff recommendation was approval, but the board of adjustment denied the permit. Reviewing the decision, the Court of Appeals reiterated that zoning regulations are in derogation of the common law and must be strictly construed. However, where terms (such as “dockage facility”) are not defined by the ordinance, it remains within the statutory authority of a board of adjustment to define it, and it must do so in the context of the entire ordinance and regulatory scheme. In this case, it was not an abuse of authority to limit the definition of “dockage facility” to recreational and conservation uses in the context of the subject ordinance and to prohibit the property owner’s use of the land as, among other things, a barge storage, cleaning and repair facility. Additionally, a board of adjustment is not compelled to follow the recommendations of its staff. The Court also restated the well-established concept that procedural due process is achieved in administrative hearings if there is notice of the hearing and a meaningful opportunity to be heard in the context of that hearing. Finally, the Court again held that when an applicant’s petition for administrative relief is denied, reversal of the administrative decision will not be justified by showing that substantial evidence would have supported a different outcome; rather, the record must compel a contrary decision in light of substantial evidence therein.