Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 12, 2016

CLAIM NO. 201101204

3M ENERGY PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

MITCHELL PHILPOT
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. 3M Energy appeals from the April 13, 2015 Opinion, Award and Order and the October 5, 2015 Order on Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). The ALJ determined Mitchell Philpot ("Philpot") suffers from coal workers' pneumoconiosis ("CWP") and is entitled to a retraining incentive benefit ("RIB"). The ALJ further determined

Philpot is entitled to elect an alternative award pursuant to KRS 342.732(1)(a)7, which would commence on the date of Philpot's last exposure. 3M Energy now argues the alternative award pursuant to KRS 342.732(1)(a)7 should commence on the date Philpot's RIB award is final. For the reasons set forth herein, we affirm.

It is uncontested Philpot alleged he became affected by CWP Category 1/0 with a last date of exposure on January 21, 2011. His pulmonary function studies were above 80%. Therefore, Philpot is entitled only to a RIB award pursuant to KRS 342.732(1)(a)1. Because he was 64 years old on the last date of exposure, the ALJ further determined Philpot is eligible to elect an alternative award pursuant to KRS 342.732(1)(a)7. Before the ALJ, 3M Energy argued the alternative award pursuant to KRS 342.732(1)(a)7 should commence on the date the award is final if Philpot makes the election. The ALJ rejected this assertion, stating:

> Logically, those benefits would start from the date of last exposure otherwise the employee would lose benefits during the pendency of the claim. Additionally, KRS 342.316(5)(b) specifically provides:
>
> > The time of the beginning of compensation payments shall be the date of the employee's last injurious exposure to the cause of

> the disease, or the date of actual disability, whichever is later.
>
> Therefore the commencement date of the benefits would be the last date of exposure.

3M Energy again raised the issue in a petition for reconsideration, citing to the prior decision of this Board in Kirk v. 17 West Mining, Inc., Claim No. 2003-00713 (2004). The ALJ denied the petition for reconsideration, and this appeal followed.

3M Energy argues a claimant must be over 57 years old and have been "awarded" RIB in order to be eligible for the alternate award set forth in KRS 342.732(1)(a)7. It claims Philpot was not "awarded" a RIB until the ALJ's April 13, 2015 Opinion, at which time he was over the age of 65 and therefore, no longer eligible to receive the alternate award. It further cites to KRS 342.040(3), which states a RIB award is "payable" after the ALJ's award becomes final. It urges this Board to follow the rationale espoused in the Kirk case.

We begin with an analysis of the Kirk case. In Kirk, the claimant, Edgar Day, suffered from CWP and was 63 years old on the last date of his exposure in 2001. He filed a claim for RIB in 1992, which was dismissed. He filed a second claim for RIB and was awarded benefits in

1995. However, because Day continued to work, he never received actual payment.

Day filed a third claim in 2003. The ALJ dismissed the claim on February 25, 2004, at which point Day was now 65 years old. The ALJ noted KRS 342.732(1)(a)7 provides benefits payable for a period of 425 weeks until the claimant reaches 65 years of age. Because Day was 65 years old as of the date of the award and order, the ALJ reasoned he no longer qualified to receive benefits pursuant to KRS 342.732(1)(a)7.

This Board affirmed the ALJ's decision. The Board concluded a claimant is eligible to elect the alternate payment in lieu of a RIB if (1) the employee is age 57 years or older on the date of last exposure, and (2) the employee is awarded a RIB. Analyzing these requirements, the Board then noted the time for the running of a RIB award pursuant to KRS 342.040(3): "All retraining incentive benefits awarded pursuant to KRS 342.732 shall be payable on the regular payday of the employer, commencing with the second regular payday after the award of the retraining incentive benefits by the administrative law judge become final." Citing Meade v. Spud Mining, 949 S.W.2d 584 (Ky. 1997), the Board emphasized the Kentucky Supreme Court had determined "an award of RIB begins on the

date upon which the award becomes final and extends for the 208 consecutive weeks which follow the award."

In essence, the Board concluded that a claimant must first qualify for a RIB award before he is eligible to elect the alternate benefit pursuant to KRS 342.732(1)(a)7. The Board stated, as a matter of law, a RIB award is payable from the date of the finality of the award, as opposed to the date of last exposure. Further, a claimant who is over 65 years of age may not receive an award pursuant to KRS 342.732(1)(a)7. Therefore, a claimant who is over 65 years old on the date of the ALJ's award does not qualify for a RIB award and thus, is not eligible to elect the alternate benefit. The Board acknowledged the "harsh" result but, again citing to Meade, noting "it was Day who controlled the time of the filing of this claim for benefits."

Day appealed, emphasizing that KRS 342.732(1)(a)7 sets forth only the time at which a RIB award must end; that is, when the claimant turns 65 years old. It does not, Day argued, set forth the date when the RIB award commences. He asserted the commencement of a RIB award should be controlled by KRS 342.316(5)(b), which designates the commencement date of all other occupational disease awards. The Court of Appeals rejected this argument,

adopting the Board's reasoning, and its reliance on Meade, instead.

In addition to the Kirk v. 17 West Mining, Inc. case, we have analyzed the Kentucky Supreme Court's holding in Meade. In Meade, the Court considered the date upon which a RIB award commences pursuant to KRS 342.732. KRS 342.732 requires that a RIB be awarded for 208 consecutive weeks. The Court concluded a RIB award begins on the date upon which the award becomes final and extends for the 208 consecutive weeks which follow the award.

However, the Meade Court analyzed a prior version of KRS 342.316(1)(b), which expressly provided that a RIB award shall begin on "the date the award for such benefits by the administrative law judge becomes final." That provision no longer is contained in KRS 342.316(1)(b). It was removed in the 1996 revisions to the Workers' Compensation Act.

We turn back to Philpot's case. 3M Energy urges this Board to adhere to the reasoning of the Board and the Court of Appeals in Kirk v. 17 West Mining, Inc. Prior decisions of this Board are not binding precedent. Furthermore, though useful for guidance, an unpublished Court of Appeals' opinion for which review was not sought

at the Kentucky Supreme Court, is likewise of limited precedential value.

We disagree with the holding in Kirk for two reasons. First, both the Board and the Court of Appeals relied on the Supreme Court's holding in Meade, yet failed to expressly acknowledge that KRS 342.316(1)(b) had since been revised to remove the provision that a RIB award begins on the date the ALJ's decision becomes final. Given the Supreme Court's reliance on the pre-1996 version of KRS 342.316(1)(b), we find any citation to Meade on this issue less than persuasive.

More importantly, we disagree with the reasoning in Kirk, and the unjust results which would necessarily follow were we to adopt 3M Energy's arguments. In Kirk, the Board and Court of Appeals premised their conclusion on the rationale that a claimant cannot simultaneously be over the age of 65 and qualify for a RIB award. However, there is no provision in KRS 342.732 which prohibits a RIB award to a claimant over the age of 65. That age limitation applies only to the alternate benefit provided in KRS 342.732(1)(a)7.

Recently, we expressed our view that, absent express statutory language in KRS 342.732(1)(a)7 concerning the commencement date of the alternate benefits, it should

be governed by KRS 342.316(1)(b). In Kentucky Fuel Corp. v. Senters, Claim No. 201301850 (WCB January 29, 2016), we reasoned:

> KRS 342.732(1)(a)7, which sets forth the award a claimant may elect in lieu of a RIB, does not expressly state when the award commences for calculation purposes. In light of this ambiguity, we must read the provision "in context with" other parts of the Workers' Compensation Act. Id. Though special provisions for calculation of CWP awards are promulgated in KRS 342.732, CWP is nonetheless an occupational disease and therefore, we conclude reference must be made to KRS 342.316(1)(b) and the two provisions must be read together.
>
> It is true, as Senters points out, the award provided in KRS 342.732(1)(a)7 is not a true award of income benefits based on actual disability. However, the award is not entirely dissimilar to any other award of income benefits provided in Chapter 342. It is calculated in the same manner, through reference to the claimant's average weekly wage and a disability rating. For this reason, we are compelled to conclude the General Assembly intended the award provided in KRS 342.732(1)(a)7 be calculated in the same manner as other income benefits for occupational disability, and therefore is subject to the requirements of KRS 342.316(1)(b).

We continue to adhere to this rationale. Further, we are unpersuaded by 3M Energy's argument that KRS 342.040(3) governs when a RIB award commences. By its

plain language, KRS 342.040(3) governs when a RIB award is "payable." "Payable" refers to the time when the award can or must be paid. It does not govern the *amount* which must be paid, or the date when benefits commence for calculation of that amount. We again conclude the *amount* of a RIB award is calculated through reference to KRS 342.316(1)(b).

Finally, we must emphasize the rationale advanced by 3M Energy would lead to extremely unjust results under the circumstances of this case and other similarly situated claimants. Philpot's claim was abated by the Commissioner of the Department of Workers' Claims pending the Kentucky Supreme Court's decision in Vision Mining, Inc. v. Garder, 364 S.W.3d 455 (Ky. 2011). Philpot cannot be penalized for the delay in adjudication of his claim.

As a final matter, we note the ALJ determined Philpot's RIB award would commence as of the date of his last exposure. KRS 342.316(1)(b) states an award for occupational disability commences on the date of last exposure, or the date of actual disability, whichever occurs last. The ALJ cited to KRS 342.316(1)(b) in reaching his determination, and no party has challenged the sufficiency of that analysis. Therefore, unlike in Senters, we find it unnecessary to remand this claim to the ALJ for an analysis of Philpot's date of actual disability.

For the foregoing reasons, the April 13, 2015 Opinion, Award and Order and the October 5, 2015 Order on Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN, JOINS IN STIVERS' CONCURRENCE.

STIVERS, Member. I agree with the majority, but wish to expound further on the issue raised in these appeals. Today, we have decided three appeals (3M v. Philpot, 2011-01204, ICG Knott County, LLC v. Thornsberry, 2012-00420, and Sequoia Energy, LLC v. Jones, 2013-01570) all concerning the same issue. The sole issue in each appeal is whether KRS 342.040(3) or KRS 342.316(1)(b) determines the date when liability for a RIB award (KRS 342.732(1)(a)1 and for the alternative award (KRS 342.732(1)(a)7) begins. KRS 342.040(3) and KRS 342.316(1)(b) read as follows:

KRS 342.040(3)

> All retraining incentive benefits awarded pursuant to KRS 342.732 shall be payable on the regular payday of the employer, commencing with the second regular payday after the award of the retraining incentive benefit by the administrative law judge becomes final. Retraining incentive benefits shall be due and payable not less often than semimonthly.

KRS 342.316(1)(b)

> The time of the beginning of compensation payments shall be the date of the employee's last injurious exposure to the cause of the disease, or the date of actual disability, whichever is later.

Clearly, KRS 342.316(1)(b) applies in the event the employee elects to receive the alternative award contained in KRS 342.730(1)(a)7. Should the employee choose to elect to receive an award pursuant to KRS 342.730(1)(a)7, he is not receiving a RIB award. Thus, KRS 342.040(3) is not applicable as the employee will receive an award pursuant to KRS 342.730(1)(a)7 which is a regular award of 425 weeks and not a RIB award as set out in KRS 342.730(1)(a)1. Thus, pursuant to KRS 342.316(1)(b) liability for this award commences on one of two dates, the date of last injurious exposure to the cause of the disease or the date of actual disability.

Further, KRS 342.040(3) does not determine when liability for a RIB award begins. Rather, KRS 342.316(1)(b) again determines the point at which the employer’s liability for an award of RIB benefits commences. Consequently, liability either begins on the date of the employee’s last injurious exposure to the cause of the disease or the date of actual disability whichever

occurs later. KRS 342.040(3) only determines when the payment of the RIB award commences. In situations where the RIB award is appealed to the Board and on to the appellate courts, the entire RIB award may be payable on the date specified in KRS 342.040(3). To be clear, the date liability commences is not governed by KRS 342.040(3). KRS 342.316 is, in part, entitled "Liability of Employer and Previous Employers for Occupational Disease." Therefore, since a RIB award is based on the existence of an occupational disease, Section (1)(b) governs when the employer's liability commences and not KRS 342.040(3).

An award of an Administrative Law Judge rendered when the employee is in his early 60s could easily not become final until the employee is 65 years old or older. Our adoption of the employer's position in the three appeals we have decided could easily result in none of the claimants receiving the award to which they are entitled solely because of the time their claim is in litigation.[1] In Philpot's case he was 59 years old on January 21, 2011, the date of last exposure. He is now 69 years old. Thus, he would not be entitled to any award. In Thornsberry's case, he was 59 years old on January 25, 2011, the date of

[1] We also note that through no fault of their own, the claims remained in abeyance for years.

last exposure. He is now 64 years old. Consequently, if his claim is not final prior to his birthday in the latter part of this year, he will not receive an award. Jones is in the same position as he was 61 years old at the date of his last exposure on May 12, 2013. He is now 64 years old. If his award becomes final after he turns 65 in the middle of this year, he is not entitled to an award. Such scenarios are ludicrous and a gross injustice. This is the reason the legislature amended the statute, as noted in the majority's opinion, to delete certain language from KRS 342.316. Accordingly, whether the employee opts to receive the regular award under KRS 342.730(1)(a)7 or to receive the RIB award under KRS 342.730(1)(a)1, benefits should accrue on the date of the employee's last injurious exposure to the cause of the disease or the date of actual disability.

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