Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 19, 2016

CLAIM NO. 201301258

D & C MINING PETITIONER

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

DARRELL MIDDLETON and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

ALVEY, Chairman. D & C Mining ("D & C") appeals from the October 26, 2015 Opinion, Award and Order and the November 30, 2015 order denying its Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). The ALJ determined Darrell Middleton ("Middleton") suffers from coal workers' pneumoconiosis ("CWP") and is entitled to a retraining incentive benefit

("RIB"). The ALJ further determined Middleton is entitled to elect an alternative award pursuant to KRS 342.732(1)(a)7, which would commence on the date of his last exposure.

On appeal, D & C argues Middleton is not entitled to elect an alternative award pursuant to KRS 342.732(1)(a)7 until the RIB award is final; and therefore, he is not entitled to benefits commencing on the date of his last exposure. Because we agree with the determination by the ALJ, we affirm.

Middleton filed a Form 102 on August 19, 2013 alleging he contracted CWP due to exposure to coal dust during his lengthy employment in the coal mining industry from 1969 to 2013, where he was engaged in the severance and processing of coal. He last worked, and alleged he was last exposed to the coal dust, on August 13, 2013. Middleton is a high school graduate, and was last employed by D & C as a mine foreman.

In support of his claim, Middleton filed an x-ray report from Dr. Glen R. Baker dated August 9, 2013, which he read as being of quality 1 and which he interpreted as 1/0 for CWP. Middleton later filed Dr. Baker's Form 108 report generated from an examination performed August 18, 2014. At that time, Dr. Baker took another x-ray, which he

again classified as quality 1. He read the x-ray as 1/0 for CWP. Dr. Baker noted Middleton's FVC was 97% of predicted value, and the FEV_1 was 81% of predicted value, which he stated was in the range of normal. Dr. Baker diagnosed Middleton with CWP 1/0, and chronic bronchitis. He stated the disease was due to the exposure to coal dust in the severance and processing of coal.

D & C filed the August 20, 2014 report of Dr. Bruce Broudy. Dr. Broudy interpreted an x-ray taken at the Lexington Clinic on that date as a quality 1, and which he read as 0/0, finding no evidence of CWP.

On August 20, 2015, Middleton underwent an evaluation with Dr. Sanjay Chavda at the direction of the Commissioner of the Department of Workers' Claims. Dr. Chavda noted Middleton had worked thirty-eight years underground in the coal mining industry, and five years on the surface. An x-ray taken on the date of the examination was read by Dr. J. Crum as being quality 1. Dr. Chavda agreed with Dr. Crum's reading of the x-ray as 1/1 for CWP. Dr. Chavda stated pulmonary function studies performed on that date revealed an FVC of 103% of predicted value, and an FEV_1 of 98% of predicted value. He diagnosed CWP due to exposure to coal dust in the severance and processing of coal, with no pulmonary impairment.

A Benefit Review Conference ("BRC") was held on September 23, 2015. The BRC order and memorandum reflects the issues preserved for determination were benefits per KRS 342.732 and average weekly wage.

In the Opinion, Award and Order rendered October 26, 2015, the ALJ found and awarded as follows:

> It is therefore found the Plaintiff has established the presence of Coal Workers' Pneumoconiosis, Category 1/1 and no pulmonary impairment based upon pulmonary function studies above 80%. The plaintiff will only be entitled to a Retraining Incentive Benefit pursuant to KRS 342.732(1)(a)1. Also, since the plaintiff was sixty-two (62) years old at the time of his last exposure, he does have the option pursuant to KRS 342.732(1)(a)7 to elect to receive, in lieu of Retraining Incentive Benefits, a 25% disability rating from the date of last exposure until sixty-five (65) years of age.
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> **AWARD AND ORDER**
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> Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED AND ADJUDGED that:
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> 1. Plaintiff, Darrell Middleton, shall recover of Defendant Employer, D & C Mining Corp., and/or its insurance carrier, the sum of $564.52 per week for Retraining Incentive Benefits for a period not to exceed 104 weeks. These benefits shall be paid only while Plaintiff is enrolled and actively and successfully participating as a full-time student taking the equivalent of 12 or more credit hours per week in a training or education program approved under the regulations. If Plaintiff becomes a part-time student taking not less than the equivalent of six nor

> more than 11 credit hours per week in a bona fide training or education program approved under the regulations, the weekly income benefits shall be $282.26 per week for a period not to exceed 208 weeks.
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> 2. Defendant Employer shall also pay, directly to the institution conducting the training or education program, instruction, tuition, and material costs not to exceed $5,000.00.
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> 3. If Plaintiff successfully completes a *bona fide* training or education program approved under the regulations, Defendant Employer shall pay to Plaintiff the sum of $5,000.00 for completion of a program that requires a course of study of not less than 12 months no more than 18 months, or the sum of $10,000.00 for completion of a program that requires a course of study of more than 18 months.
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> 4. In lieu of the Retraining Incentive Benefit award, the plaintiff may elect to receive a 25% disability rating from his date of last exposure until he reaches sixty-five (65) years of age in the amount of $141.13 per week with a 12% interest on all past due and unpaid installments.

D & C filed a petition for reconsideration arguing, as it does on appeal, the ALJ's order allowing the election of benefits based upon a 25% disability rating is flawed. It argues as follows:

> The retraining incentive benefits the plaintiff is entitled to would begin after the award is final. Therefore, the election of a 25% disability award

> instead would also begin only after the award becomes final. The award is also contrary to the Workers' Compensation Board Opinion of *Kirk v. 17 West Mining*, Inc., No. 03-00713 (2004).

The ALJ denied the petition for reconsideration, and in doing so stated as follows:

> … The Administrative Law Judge strongly believes the Board's decision in *Kirk v. 17 West Mining, Inc*. is erroneous for several reasons. Initially the former Board's conclusion, "In addition, KRS 342.732(1)(a)7 clearly provides that, KRS 342.370(4) notwithstanding, a person who is 65 years of age or older may not receive an award pursuant to KRS 342.732(1)(a)1 to 4", is totally without basis. The language cited by the former Board is only applicable if the employee makes the election pursuant to KRS 342.732(1)(a)7 to receive the 25% disability in lieu of the RIB benefit. Nowhere in KRS 342.732 does it indicate that a worker older than 65 cannot receive a RIB benefit. The conclusion of the Board would be clear age discrimination and although this Administrative Law Judge cannot rule on constitutional issues, he refuses to adopt interpretation that would be clearly unconstitutional. Quite simply, a worker can get a RIB award regardless of age. The issue is whether or not he can still make the election after he is age 65.
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> KRS 342.732(1)(a)7 provides that an employee who is age 57 or older at the time of last exposure may elect to receive in lieu of Retraining Incentive Benefit, a 25% disability rating. If he makes such an election in this Administrative Law Judge's opinion, he

would not be receiving a RIB benefit but a 25% disability in lieu of a RIB benefit. The Administrative Law Judge googled "in lieu of" and all the various sources indicate it means "instead of". Specifically, attention would be directed to *Merriam-Webster Dictionary*. Any commonsense interpretation of "in lieu of" would mean the employee is electing a 25% disability instead of a RIB benefit.

The interpretation of the former Board is inconsistent with a commonsense reading and interpretation of KRS 342.732. Surely the Legislature did not intend that an employer could avoid or decrease his obligation by appealing or otherwise delaying a case.

If the plaintiff elects to receive a 25% disability then that award would be governed by KRS 342.316(5)(b). The plaintiff can elect a disability award instead of a RIB benefit which would make KRS 342.316(5)(b) apply rather than the statute concerning the starting date of a RIB award.

The decision cited by the employer is by a former Board and none of those members are now on the Workers' Compensation Board. If this case is appealed the present Board is urged to carefully consider the ramifications of a decision allowing a defendant to benefit by delaying a case and contrary to a commonsense reading of the statute and defeat the clear intent of the legislature to allow a worker to elect a 25% disability in lieu of a RIB if he is over 57 years old at the time of last exposure.

On appeal, D & C 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 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 Kirk v. 17 West Mining, Inc., WCB No. 2003-00713 (2004).

In Kirk v. 17 West Mining, Inc., the claimant, Edgar Day, suffered from CWP and was 63 years old on the last date of his exposure in 2001. He filed a RIB claim in 1992, which was dismissed. He filed a second RIB claim and was awarded benefits in 1995. However, because Day continued to work, he never received actual payment.

Day filed a third RIB claim in 2003 which the ALJ decided on February 25, 2004, at which time he had reached 65 years of age. 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, concluding 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."

The Board concluded 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 determined, 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 v. Spud Mining, noted, "it was Day who controlled the time of the filing of this claim for benefits."

Day appealed, emphasizing 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 v. Spud Mining instead.

In Meade v. Spud Mining, supra, the Court considered the date upon which a RIB award commences pursuant to a previous version of KRS 342.316(1)(b). Based upon that version of the statute, 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. The Court in Meade v. Spud Mining, supra, analyzed a prior version of KRS 342.316(1)(b) which expressly provided a RIB award shall begin on "the date the award for such benefits by the administrative law judge becomes final." That provision is not contained in the current

version of KRS 342.316(1)(b), having been removed in the 1996 revisions to the Workers' Compensation Act. Therefore, neither our previous holding in Kirk v. 17 West Mining, Inc., supra, or the holding in Meade v. Spud Mining, supra, have any precedential value regarding this issue.

Recently, we stated 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.
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> 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, and we disagree with D & C's position 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).

We agree with the ALJ, the rationale advanced by D & C would lead to an extremely unjust result. Middleton'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). Failure to find entitlement to the payment of benefits from the date of last exposure would unjustly penalize Middleton due to circumstances beyond his control.

We also note, based upon D & C's rationale, 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, thereby preventing the election of benefits. Such a result would create a gross injustice. The legislature amended the statute to delete certain language from KRS 342.316 in order to prevent this situation. 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.

KRS 342.040(3) states as follows:

> 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)states as follows:

> 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 if the employee elects to receive the alternative award contained in KRS 342.732(1)(a)7. If the employee elects to receive an award pursuant to KRS 342.732(1)(a)7, he is not receiving a RIB award as set forth in KRS 342.730(1)(a)1 because he could receive benefits for up to 425 weeks. Therefore, KRS 342.040(3) is not applicable. 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.

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. 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).

As a final matter, we note the ALJ determined Middleton'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 last occurs. However, here the ALJ specifically cited to KRS 342.316(5)(b), not KRS 342.316(1)(b) in performing his analysis. KRS 342.316 (5)(b) states as follows:

> (5) The amount of compensation payable for disability due to occupational disease or for death from the disease, and the time and manner of its payment, shall be as provided for under the general provisions of the Workers' Compensation Act, but:
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> (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;

Because that provision is consistent with KRS 342.316(1)(b), we find the ALJ's analysis is analogous to that required, as stated above. Therefore, the ALJ's reasoning is sufficient.

For the foregoing reasons, the October 26, 2015 Opinion, Award and Order and the November 30, 2015 Order on Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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