Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 12, 2016

CLAIM NO. 201200420

ICG KNOTT COUNTY, LLC PETITIONER

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

DOWELL THORNSBERRY
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. ICG Knott County, LLC ("ICG") appeals from the January 7, 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 Dowell Thornsberry ("Thornsberry") suffers from coal workers' pneumoconiosis ("CWP") and is eligible to receive a retraining incentive

benefit ("RIB") award pursuant to KRS 342.732(1)(a)1. The ALJ further ordered Thornsberry is eligible to elect the alternate award set forth in KRS 342.732(1)(a)7 because he is over the age of 57. On appeal, ICG argues the ALJ erred in his calculation of this alternative award. We disagree and affirm.

There is no dispute Thornsberry suffers from CWP Category 1/1 with pulmonary function studies above 80%, thereby making him eligible for a RIB award pursuant to KRS 342.732(1)(a)1. Because Thornsberry was 59 years old at the date of last exposure, the ALJ also determined he is eligible to elect the alternate award set forth in KRS 342.732(1)(a)7. The ALJ ordered the award pursuant to KRS 342.732(1)(a)7, if elected, would commence on the date of Thornsberry's last injurious exposure.

ICG argued the award pursuant to KRS 342.732(1)(a)7 should commence as of the date of the award. In the Order on Reconsideration, the ALJ rejected this argument. ICG has now appealed. The sole issue on appeal is the appropriate commencement date of the alternate award.

In another case rendered this same day, 3M Energy v. Philpot, Claim No. 2011-01204 (WCB 2016), we considered

the same issue for a similarly situated claimant.[1] We concluded the date of commencement for an award pursuant to KRS 342.732(1)(a)7 is the date of last injurious exposure, or the date of actual disability, as set forth in KRS 342.316(1)(b). We adopt that reasoning herein, and refer the parties to our opinion in Philpot for a more detailed explanation of our rationale.

For the foregoing reasons, the January 7, 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 AND FILES A SEPARATE CONCURRING OPINION.

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-

[1] It is noted the employer's counsel in this matter also represents the employers in 3M Energy v. Philpot and Sequoia Energy, LLC v. Jones, Claim No. 2013-01570. Counsel for the employer moved this Board to place the Philpot appeal in abeyance pending a decision in Thornsberry's appeal. Thornsberry's counsel, who also represents the claimant in Sequoia Energy, LLC v. Jones, did not oppose the motion to abate and agreed the legal issue presented in each case is identical. This Board denied the motion to abate, so that we would be afforded the opportunity to fully review each case and ensure no factual distinctions are present. Having thoroughly reviewed the underlying facts in this case, as well as in Jones, it is clear the three claims present identical legal questions with no relevant factual distinction.

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.
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> 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 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

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

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.

ALVEY, Chairman. I concur with the majority in result only. I believe the parties are entitled to a full exploration of the issues and a reference to another Board opinion decided the same day without providing the rationale is inappropriate. The full analysis and reasoning behind each and every decision should be included in each and every decision. Therefore, I concur in result only.

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