Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 29, 2016

CLAIM NO. 201301850

KENTUCKY FUEL CORP. PETITIONER

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

SHELBY SENTERS
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART
AND REMANDING IN PART

* * * * * *

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

RECHTER, Member. Kentucky Fuel Corporation appeals from the July 22, 2015 Opinion, Award and Order and the August 20, 2015 Order on Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). On appeal, Kentucky Fuel argues the ALJ erred in calculation of an award pursuant to KRS 342.732(1)(a)7. For the

reasons set forth herein, we remand this claim to the ALJ for further findings of fact.

The facts underlying this claim are not disputed on appeal. Shelby Senters ("Senters") filed a claim alleging he became affected by coal workers' pneumoconiosis ("CWP"). His last date of exposure was September 2, 2012. He filed an x-ray interpretation by Dr. Michael S. Alexander, dated April 8, 2013. However, the ALJ was more persuaded by the report of Dr. Byron T. Westerfield, who evaluated Senters pursuant to KRS 342.316. Dr. Westerfield concluded Senters suffers from simple CWP based on x-ray evidence read as Category 1/0, but does not have pulmonary impairment or respiratory disability. Pulmonary function studies indicated pre-bronchodilator functions of FCV 92% and FEV1 95%.

Therefore, the ALJ awarded a Retraining Incentive Benefit ("RIB") pursuant to KRS 342.732(1)(a)1. However, because Senters was 63 years old at the time of his last exposure, the ALJ additionally noted KRS 342.732(1)(a)7, which permits the claimant to elect to receive an award based on a 25% disability rating in lieu of a RIB. The ALJ determined this award, if Senters so elected, would commence on the last date of exposure and would expire when he turned 65 years old.

Kentucky Fuel petitioned for reconsideration, arguing the award pursuant to KRS 342.732(1)(a)7 should commence on the date of actual disability, not the date of last exposure. It points to April 8, 2013, the date of Dr. Alexander's evaluation, as the date of actual disability. The ALJ overruled the petition, stating:

> Quite simply, there are no cases indicating an occupational disease award begins on a date other than last exposure. Although KRS 342.732 in various sections indicates the duration of the award, it does not indicate the commencement date of the award with the exception of a retraining incentive benefit. In this case, defendant argues for the commencement date to be the date of first positive x-ray. However, it is extremely unlikely that an x-ray read as Category 1/1 by a Board Certified Radiologist, Dr. Michael Alexander, on April 22, 2013 would not have shown the same changes when the plaintiff last worked on September 2, 2012. The x-ray changes quite simply would have been unlikely to develop in the timeframe between September 2, 2012 and April 22, 2013. The Administrative Law Judge would also note that the date of commencement of the award was not preserved as an issue and neither the plaintiff or defendant attempted to establish the actual date of disability. The Administrative Law Judge therefore commences the award if the plaintiff elects same from the date of last exposure which would be consistent with a long line of cases holding a worker has no disability as long as he continues to be exposed.

Kentucky Fuel now appeals, raising the same issue on appeal. At the outset, we conclude this issue is properly preserved for our review because Kentucky Fuel has raised solely a question of law. As such, it was not necessary for Kentucky Fuel to file a petition for reconsideration. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81 (Ky. 2005). We also note Kentucky Fuel addressed the proper commencement date of the award in its brief to the ALJ.

The primary issue in this case is when benefits pursuant to KRS 342.732(1)(a)7 commence. KRS 342.732(1)(a)7 sets forth a benefit which a claimant may elect to receive in lieu of a RIB:

> An employee who is age fifty-seven (57) years or older on the date of last exposure and who is awarded retraining incentive benefits under subparagraphs 1. to 4. of this paragraph, may elect to receive in lieu of retraining incentive benefits, an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage, not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740 multiplied by the disability rating of twenty-five percent (25%) for a period not to exceed four hundred twenty-five (425) weeks, or until the employee reaches sixty-five (65) years of age, whichever occurs first, KRS 342.730(4) notwithstanding.

Thus, while the statute plainly states this elected benefit shall cease upon the claimant reaching 65 years of age, it does not state when the benefit shall commence. Kentucky Fuel argues KRS 342.316, which sets forth an employer's liability for occupational disease, applies. Subsection (1)(b) provides: "The time of the beginning of compensation payments shall be on 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, Kentucky Fuel reasons, Senters' award must commence on the earliest recorded date of his disability – the date of Dr. Alexander's examination and diagnosis.

Senters responds that KRS 342.316 should not be referred to, because that provision relates only to a true award of income benefits for occupational disease. Senters draws a distinction between income benefits for occupational disease and the elected award provided by KRS 342.732(1)(a)7. The elected award is granted in lieu of a RIB and does not require a finding of occupational disability, and is therefore not a true award for disability. In fact, the 25% disability rating employed by KRS 342.732(1)(a)7 is statutorily assigned and is not an actual representation of his true impairment.

"The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002) (*citing* Commonwealth v. Harrelson, 14 S.W.3d 541 (Ky. 2000)). Thus, if a statute is clear and unambiguous and expresses the legislature's intent, the statute must be applied as written. Griffin v. City of Bowling Green, 458 S.W.2d 456, 457 (Ky. 1970). However, where an ambiguity does exist, an "absurdity which may follow one construction or another may properly be considered." Fayette County v. Hill, 201 S.W.2d 886, 889 (Ky. 1947). Statutes, of course, "must be read as a whole and in context with other parts of the law." Lewis v. Jackson Energy Co–Op Corp., 189 S.W.3d 87, 92 (Ky. 2005).

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).

The question remains whether Senters' date of "actual disability" is subsequent to his date of last injurious exposure. We note the record does not appear to be particularly developed on this point. Nonetheless, this is a question of fact to be determined by the ALJ alone, as this Board has no fact-finding authority. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). While the ALJ briefly addressed the question in his order on reconsideration, we conclude it is prudent to remand this claim so that the ALJ may squarely determine the issue in light of the legal analysis provided herein.

For the foregoing reasons, that portion of the opinion addressing the award pursuant to KRS 342.732(1)(a)7 is hereby **VACATED** and this claim is **REMANDED** to Hon. Roland R. Case, Administrative Law Judge, for further analysis in conformity with the opinions expressed herein.

ALL CONCUR.

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