

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 14, 2020

CLAIM NO. 201800206 & 201680953

AARON DAVIS

PETITIONER

VS.           **APPEAL FROM HON. JOHN M. McCracken,  
ADMINISTRATIVE LAW JUDGE**

CENTRAL BRIDGE and  
HON. JOHN H. McCracken,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**ALVEY, Chairman.** Aaron Davis (“Davis”) appeals from the January 14, 2019 Opinion, Award and Order, and the February 22, 2019 Order on petition for reconsideration rendered by Hon. John McCracken, Administrative Law Judge (“ALJ”). The ALJ found Davis is permanently totally disabled from the effects of the May 26, 2016 work injury he sustained while working for Central Bridge, and awarded permanent total disability (PTD”) benefits and medical benefits.

On appeal, Davis argues the version of KRS 342.730(4) effective July 14, 2018, and its retroactive application is unconstitutional, and he is entitled to income benefits subject to the 1996 version of that statute. Although we note Davis raised the constitutionality of the amended version of KRS 342.730(4) effective July 14, 2018 at the Benefit Review Conference, there is no indication the Kentucky Attorney General was notified as required by KRS 418.075. We note the only service upon the Attorney General was the brief filed by Davis on January 3, 2020. We further note the ALJ properly determined that changes to KRS 342.730(4) effective July 14, 2018 are applicable in accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). Therefore, we affirm.

Davis filed a Form 101 alleging a sledgehammer struck him on May 26, 2016, while working as a laborer for Central Bridge. Davis alleged injuries to his head/brain and neck with upper extremity symptoms. The Form 101 was later amended to include psychological overlay. Davis contemporaneously filed a Form 103 alleging he sustained hearing loss due to the May 26, 2016 work accident. The claims were subsequently consolidated. Because the sole issue on appeal pertains to the application of the version of KRS 342.730(4) effective July 14, 2018, we will not summarize the medical evidence.

Davis testified by deposition on May 11, 2018, and at the final hearing held November 26, 2018. Davis was born in December 1968, and resides in Beattyville, Kentucky. Davis testified he began working for Central Bridge as a carpenter in April 2016. Davis was 47 years old at the time of the May 26, 2016

work accident. Davis testified that on May 26, 2016, his supervisor accidentally struck the left side of his head with a sledgehammer. He was taken to the emergency room, where his head laceration was closed. He then received treatment at United Clinics of Kentucky, with Dr. William Gay, and with Dr. Aleksandr Mogilevski. He also sought treatment for hearing loss in his left ear with Dr. Matthew Bush.

A Benefit Review Conference was held on November 15, 2018. The following were identified as contested issues: Permanent income benefits per KRS 342.730, ability to return to work, vocational rehabilitation, unpaid or contested medical expenses, future medicals, and application and constitutionality of KRS 342.730(4).

The ALJ rendered a decision on January 14, 2019. The ALJ first noted there was no dispute Davis was struck in the head with a sledgehammer on May 26, 2016. The ALJ found Davis sustained a permanent cervical injury due to the work accident warranting a 6% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) based upon Dr. Anthony McEldowney’s and Dr. Joseph Zerga’s opinions. The ALJ found Davis sustained a neurocognitive injury due to the work accident warranting a 15% impairment rating pursuant to the AMA Guides based upon Dr. Walter Butler’s opinions. The ALJ found Davis sustained a permanent psychological injury due to the physical injury he sustained on May 26, 2016 warranting a 12% impairment rating based upon Dr. Dennis Sprague’s and Dr. Butler’s opinions. The ALJ found Davis sustained work-related bilateral hearing loss warranting a 0% impairment rating, but awarded future medical benefits for that

condition. The ALJ found Davis is permanently totally disabled pursuant to an analysis under City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015) and Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ awarded PTD and medical benefits, and ordered a vocational rehabilitation evaluation. The ALJ further found the version of KRS 342.730(4) effective July 14, 2018, is applicable to Davis' claim and therefore restricted his income benefits to age 70.

Central Bridge filed a petition for reconsideration challenging several aspects of the ALJ's analysis addressing permanent total disability. The ALJ summarily denied the petition on February 22, 2019.

On appeal, Davis argues the version of KRS 342.730(4) effective July 14, 2018 and its retroactive application is unconstitutional. Davis further argues the 1996 version of KRS 342.730(4) is applicable, and he is entitled to PTD benefits throughout his disability as provided in subsection 1(a).

House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) to provide as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In Holcim v. Swinford, supra, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of

benefits at age seventy has retroactive applicability. Because the Kentucky Supreme Court has determined the newly enacted amendment applies retroactively, we affirm the ALJ's decision.

In his supplemental brief filed January 3, 2020, Davis argued that the change to KRS 342.730(4) amended effective July 14, 2018, is not applicable to his claim, and is unconstitutional. We note Davis served a copy of his brief to the Hon. Daniel Cameron, Kentucky Attorney General. However, there is no indication from the record that the Kentucky Attorney General was ever properly notified of the action as required by KRS 418.075. Therefore, we determine that issue was not properly preserved.

CR 24.03 states that, "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General." This was also noted in Delahanty v. Commonwealth, 558 S.W. 3d 489 (Ky. App. 2018), where the Kentucky Court of Appeals stated, "Strict compliance with the notification provisions of KRS 418.075 is mandatory".

Although we determine Davis raised the constitutionality of the amended version of KRS 342.730(4) before the ALJ, the Kentucky Attorney General was not properly notified. Therefore, we affirm. Even if we deemed the Kentucky Attorney General had been properly notified of the constitutionality of this statute, this Board, as an administrative tribunal, has no jurisdiction to make a determination

on this issue. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945), and we would therefore be compelled to affirm.

Accordingly, the January 14, 2019 Opinion, Award and Order, and the February 22, 2019 Order rendered by Hon. John McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:** **LMS**

HON MELISSA M ANDERSON  
640 SOUTH FOURTH ST, STE 400  
LOUISVILLE, KY 40202

**COUNSEL FOR RESPONDENT:** **LMS**

HON TROY K PEAKE  
138 SOUTH THIRD STREET  
LOUISVILLE, KY 40202

**COUNSEL FOR RESPONDENT:** **LMS**

HON WARD BALLERSTEDT  
1315 HERR LN, STE 210  
LOUISVILLE, KY 40222

**ADMINISTRATIVE LAW JUDGE:** **LMS**

HON JOHN H McCracken  
MAYO-UNDERWOOD BLDG  
500 MERO STREET, 3<sup>rd</sup> FLOOR  
FRANKFORT, KY 40601