Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 25, 2019

CLAIM NO. 201581290

ANTHONY HELTON PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

TM POWER ENTERPRISES, INC.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

STIVERS, Member. Anthony Helton ("Helton") appeals from the July 8, 2019, Opinion and Order of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the July 8, 2019, Opinion and Award, the ALJ was charged only with resolving whether KRS 342.730(4), as amended July 14, 2018, applies retroactively to terminate Helton's income benefits from TM Power Enterprises, Inc. ("TM Power") when he reaches the age of seventy. The ALJ determined that the statute does.

On appeal, Helton asserts three arguments. First, Helton argues the July 2018 amendment to KRS 342.730(4) cannot have retroactive effect because it impairs the vested rights of injured workers. Next, Helton asserts retroactive application of the amended version of KRS 342.730(4) violates the contracts clause of the Kentucky and United States Constitutions. Finally, Helton asserts income benefits should be paid for the duration of Helton's disability which is his lifetime.

The Form 101 indicates Helton was injured on June 9, 2013, while in the employ of TM Power in the following manner: "Claimant fell from a 36' ladder while painting a house, injuring his back, neck, lung, ribs, legs, head, and spinal cord. Claimant is now paraplegic."[1] Helton's date of birth is June 15, 1968.

The June 7, 2017, Benefit Review Conference Order and Memorandum lists the following contested issues: unpaid or contested medical expenses and KRS 342.165 violation. Under "Other" is the following: "Compensability of revised ramp; Compensability of spouse care; Psychological referral."

The record contains the Form 110 Settlement Agreement approved by the ALJ on April 26, 2019. The agreement indicates medical expenses totaling $408,958.39 were paid which included the cost of the surgery. Dr. Jeffrey Fadel assessed a whole person impairment rating of 88% on May 25, 2017. The settlement agreement requires continued payment of permanent total disability benefits in the amount of $420.79 per week and a lump sum payment of $3,000 to Vivian Helton, Helton's mother, for caregiver services rendered prior to the execution of the

[1] By Order dated April 13, 2017, the ALJ changed the name of Helton's employer in the record to "TM Power Enterprises."

settlement agreement. The agreement contains no waiver or buyout of past and future medical benefits, vocational rehabilitation, or Helton's right to reopen. Under the heading "Other Information" is, in part, the following language:

> The parties recognize that KRS 342.730(4) states such benefits shall terminate when the Plaintiff reaches the age of 70, on 6/15/2038. The Plaintiff, Anthony Helton, reserves the right to appeal the application of KRS 342.730(4) retroactively to his claim both on grounds of statutory construction and constitutionality of retroactive application of the statute. (See Notice of Constitutional Challenge filed October 9, 2018). The Defendant does not concede either of these issues by agreeing to this settlement.

On April 23, 2019, Helton filed a "Motion For Ruling On Issues Not Decided By Settlement Agreement" requesting the ALJ to determine the duration of his benefits pursuant to KRS 342.730(4).

In the July 8, 2019, Opinion and Order, the ALJ determined TM Power's liability for Helton's income benefits terminates when Helton reaches seventy years of age. No petition for reconsideration was filed.

Helton first argues the amendment to KRS 342.730(4) cannot have retroactive effect because it impairs the vested rights of injured workers. Helton asserts that his disability will last a lifetime; therefore, his income benefits should as well. We disagree and affirm the decision of the ALJ.

Pursuant to House Bill 2, signed by the Governor on March 30, 2018, and effective July 14, 2018, KRS 342.730(4) mandates 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, 581 S.W.3d 37 (Ky. 2019), the Kentucky Supreme Court determined the amended version of KRS 342.730(4) has retroactive applicability. The Supreme Court held:

> Lafarge also asserts that the Court of Appeals erred in addressing the retroactivity of KRS 342.730(4) at all - and, in the alternative, in holding that the statute is not retroactive. For the following reasons, while we hold the Court of Appeals was correct in addressing the issue, we reverse its holding that the statute is not retroactive.
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> The ALJ acknowledged this Court's opinion in *Parker v. Webster County Coal, LLC (Dotiki Mine),* 529 S.W.3d 759 (Ky. 2017), in which we found the then-current version of KRS 342.730(4) unconstitutional on equal protection grounds. Since a portion of the statute had been ruled unconstitutional, the ALJ applied an earlier version of the statute which included a tier system. On appeal to the Workers' Compensation Board, Swinford argued he should receive the full 425-week award without the tier system from the previous version of the statute utilized by the ALJ. Lafarge argued the award should state that benefits should be payable to Swinford "for so long as he is eligible to receive them in accordance with KRS 342.730(4)." Lafarge noted that there were legislative efforts underway to re-examine the duration of benefits payable to older claimants under the Workers' Compensation Act.
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> The Board held that Swinford was entitled to the full 425-week period and Swinford did not pursue further appeal. Lafarge appealed to the Court of Appeals on this issue (along with the previously-discussed issue concerning Swinford's pre-existing condition). Lafarge pointed out that proposed legislation pending before the Kentucky General Assembly may further amend KRS 342.730. While the appeal was pending before the Court of Appeals, the amendment became effective. The amended version of KRS 342.730(4) reads:

> 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 determining which version of the statute to apply, the Court of Appeals discussed whether the statute was retroactive, and held that it was not. Therefore, it applied the statute in force at the time of Swinford's injury after severing the portion this Court had held unconstitutional. Based on that statute, it held that Swinford was entitled to receive benefits for 425 weeks.

On appeal to this Court, Lafarge argues that the Court of Appeals overstepped its bounds by addressing whether the newly-amended version of KRS 342.730(4) was retroactive. It argues that "the award in place in favor of Swinford indicated that permanent partial disability benefits would be payable for a period of 425 weeks, without limitation. The only issue regarding that award was whether the 425[-]week duration was correct." However, we fail to see how the Court of Appeals could have analyzed the duration of benefits without first ascertaining which version of the statute applied. Lafarge made the duration of benefits an issue. It cannot now complain that the Court of Appeals resolved this issue by determining whether a newly-amended statute impacting the duration of those benefits was applicable.

Lafarge asserts that even if the statute's retroactivity was properly before the Court of Appeals, that court erred in holding that KRS 342.730(4) was not retroactive. This difficult issue was created by the failure to codify subsection (3) of Section 20 of 2018 Ky. Acts ch. 40 as part of the Kentucky Revised Statutes (KRS). Codification means "[t]he process of compiling, arranging, and systematizing the laws of a given jurisdiction...." CODIFICATION, Black's Law

Dictionary (11th ed. 2019). "The Legislative Research Commission shall formulate, supervise, and execute plans and methods for ... codification[ ] and arrangement of the official version of the Kentucky Revised Statutes." KRS 7.120(1). Subsection (2) of KRS 7.120 requires that "[t]he Commission shall prepare and submit to the General Assembly such consolidation, revision, and other matters relating to the statutes as can be completed from time to time."

After the legislature has passed an act and it is signed into law, then the official version of the Kentucky Revised Statutes shall be maintained by the Legislative Research Commission. KRS 7.131(1) ("[t]he Legislative Research Commission shall maintain the official version of the Kentucky Revised Statutes...."). Furthermore, "[t]he official version of the Kentucky Revised Statutes shall contain all permanent laws of a general nature that are in force in the Commonwealth of Kentucky." KRS 7.131(2). The General Assembly has mandated that courts shall rely on that official version. KRS 7.138(2)(a) states, "[i]n any judicial or administrative proceeding, the text of any codified Kentucky statute which is submitted or cited by a party or *upon which the court ... relies shall be that text contained in the official version of the Kentucky Revised Statutes*...." (Emphasis added.)

The maintenance of the Kentucky Revised Statutes is vital for research and understanding the laws under which we must live, function and plan future actions. Anyone who is seeking to know the law researches the Kentucky Revised Statutes. It would be impractical and extremely difficult if people had to search all the acts of every legislative session in order to advise clients or know what law to follow. It is essential that the official version of the Kentucky Revised Statutes be accurate and up to date.

The reviser of statutes "shall be appointed by the [Legislative Research] Commission upon recommendation of the director." KRS 7.140(1). The reviser of statutes has the duty to execute the functions set forth in KRS 7.120, 7.131, 7.132, 7.134, 7.136, 7.138, and 7.140 for the Legislative Research Commission. KRS 7.140(1). This includes the duty to "formulate, supervise, and execute plans and methods for ... codification[ ] and arrangement of the official version of the Kentucky Revised Statutes." KRS 7.120(1). The reviser of statutes

has the duty to prepare and submit to the General Assembly such revisions of the statutes as can be completed from time to time. KRS 7.120(2). The reviser of statutes also has the duty to execute the Legislative Research Commission's function of maintaining the official version of the Kentucky Revised Statutes. KRS 7.131.

The dilemma facing the Court in this case is that portions of the Act passed by the General Assembly were completely omitted from the official version of the Kentucky Revised Statutes. A Legislative Research Commission note appears below the official version of KRS 342.730(4) stating:

> This statute was amended in Section 13 of 2018 Ky. Acts ch. 40..... Subsection (3) of Section 20 of that Act reads, "Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims: (a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and (b) That have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act."

However, it failed to include it in the official version of KRS 342.730. KRS 7.134(1)(c) requires that certified versions of the Kentucky Revised Statutes shall contain "[t]he text of laws contained in the applicable version of the Kentucky Revised Statutes...." Subsection (1)(f) provides that the Legislative Research Commission and the reviser of statutes may include "[a]ny annotations, historical notes, and other information that the Commission deems appropriate to include." These two subsections make it clear that the text of laws in the official version of the Kentucky Revised Statutes and the Legislative Research Commission notes are separate and distinct.

Lafarge points out that "not all legislation passed by our Legislature becomes codified." Lafarge's argument is based on the example of the budget of the Commonwealth of Kentucky which has the force of law but is not embodied in any statute. KRS 7.131(2) requires

that "[t]he official version of the Kentucky Revised Statutes shall contain all permanent laws of a general nature that are in force in the Commonwealth of Kentucky." Subsection (3) of that statute specifically provides that "the Commission may omit all laws of a private, local, or temporary nature, including laws for the appropriation of money...." The statute requires that all permanent laws of a general nature shall be included in the official version of the Kentucky Revised Statutes, but the Commission may omit laws for the appropriation of money (i.e., the budget).

While the Act in the present case is not an appropriations bill, those are not the only laws exempt from codification. KRS 7.131(3) states that the Legislative Research Commission "may omit all laws of a private, local, or temporary nature." Here, the language in the Act regarding retroactivity is temporary. It applies to those cases which "have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal as not lapsed, as of the effective date of this Act." For any new injuries and claims, the retroactivity of the Act will not be an issue. Therefore, the language is only relevant to a particular time frame and once cases arising during that time frame are fully adjudicated, it will be unnecessary. Therefore, due to the temporary nature of the language regarding retroactivity in the Act, codification was not required.

Lafarge cites *Baker v. Fletcher,* 204 S.W.3d 589 (Ky. 2006), a case concerning a budget act. Therein, we stated, "[t]hough it is clear that the General Assembly must expressly manifest its desire that a statute apply retroactively, magic words are not required." *Id.* at 597. In that case, we looked to language contained in the Act in question in order to determine that the legislature intended that it apply retroactively. As noted, budgets are exempt from codification requirements—as are temporary laws. Therefore, in both that case and the case at bar this Court may go to the language of the Act to determine retroactivity.

This Court has great respect for the language the General Assembly included in the official Kentucky Revised Statutes. The General Assembly made a clear pronouncement regarding retroactivity in KRS 446.080(3): "[n]o statute shall be construed to be

> retroactive, unless expressly so declared." With no mention of retroactivity or any language from which retroactivity may be inferred, the express language of KRS 342.730(4) does not make the statute retroactive. However, the Legislative Research Commission note following the statute references the Act from which the statute was enacted and, as discussed, is exempt from the codification requirements, as it is temporary in nature. Thus, the legislature has made a declaration concerning retroactivity in this case.
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> Since the newly-enacted amendment applies retroactively, it must be used to determine the duration of Swinford's benefits. We remand this matter to the ALJ to apply the time limits set out in the 2018 amendment to KRS 342.730(4).
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> While Swinford attempted to belatedly challenge the constitutionality of the amendments to KRS 342.730(4), it did so only after the Court of Appeals had rendered its opinion. The Court of Appeals denied that issue as moot. Swinford did not file a cross-appeal to this Court to address that issue. Therefore, the constitutionality of the statute is not at issue before us in this case. Furthermore, the Attorney General was not timely notified of a constitutional challenge pursuant to KRS 418.075.

Id. at 41-44.

Whether the amended version of KRS 342.730(4) has retroactive effect has been decided. Accordingly, the ALJ's determination to limit TM Power's liability for Helton's income benefits pursuant to the amended version of KRS 342.730(4) must be affirmed.

Helton next argues that retroactive application of the amended version of KRS 342.730(4) violates the contracts clause of the Kentucky and United States Constitutions. The Board, as an administrative tribunal, cannot determine the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647,

189 S.W.2d 963 (1945). Consequently, we are without authority to render a decision upon Helton's second argument. Thus, we affirm on this issue.

Helton's final argument – i.e. income benefits should be paid for the duration of Helton's lifetime – has been rendered moot by our resolution herein of Helton's first argument on appeal.

Accordingly, on all issues raised on appeal, the July 8, 2019, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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