

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 24, 2020

CLAIM NO. 201793657 & 201675497

BRENDA MARKS

PETITIONER

VS.

APPEAL FROM HON. BRENT DYE,
ADMINISTRATIVE LAW JUDGE

BAPTIST HEALTHCARE SYSTEM, INC.
and HON. BRENT DYE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Brenda Marks (“Marks”) appeals from the February 22, 2019, Opinion, Award, and Order and the March 18, 2019, Order of Hon. Brent Dye, Administrative Law Judge (“ALJ”). In the February 22, 2019, Opinion, Award, and Order, the ALJ awarded permanent partial disability (“PPD”) benefits for Marks’ work-related injury of June 24, 2016, permanent total disability (“PTD”) benefits for her work-related injury of February 11, 2017, and medical benefits. The ALJ explicitly

limited Marks' award of income benefits pursuant to the version of KRS 342.730(4) as amended by House Bill 2.

On appeal, Marks asserts House Bill 2 does not have retroactive applicability. In addition, Marks asserts it would be unconstitutional to apply House Bill 2 retroactively to her awards of PPD and PTD benefits. By order dated June 10, 2019, this Board held in abeyance Marks' appeal pending the finality of, at that time, Lafarge Holcim v. Swinford, 2018-CA-000414-WC, rendered September 7, 2018, Designated to Be Published.

In an Order dated October 30, 2019, we noted the Kentucky Supreme Court upheld the retroactivity of KRS 342.730(4) in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019) but did not resolve the constitutional arguments. By order dated November 20, 2019, this Board removed the claim from abeyance and set a briefing schedule.

On December 9, 2019, Marks filed a supplemental brief re-asserting that the retroactive provisions of KRS 342.270(4) should be void because they violate both the United States and Kentucky Constitutions.

An extensive procedural and factual recitation of this litigation is unnecessary due to the limited issues on appeal.

This is a consolidated claim. The first Form 101 (Claim No. 2016-75497), filed on May 22, 2018, alleges Marks sustained a work-related injury to her "shoulder(s)." Under "cause of injury" is the following: "Strain or injury by holding or carrying." Further, under "Describe how the accident/injury occurred" is the following: "6/24/2016 Right Shoulder AND 2/11/2017 Left Shoulder." The second

Form 101 (Claim No. 2017-93657), filed on July 5, 2018, alleges Marks sustained work-related injuries to her “shoulder(s)” on February 11, 2017, after throwing a trash bag into a dumpster. By order dated July 19, 2018, the ALJ consolidated both claims under Claim No. 2017-93657.

The Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: “AWW,” “TTD benefits,” “KRS 342.730 benefits,” “vocational rehabilitation benefits,” and “unpaid or contested medical expenses.” Under “other contested matters” is the following “(1) Constitutionality of KRS 342.730(4)’s age cut-off, as well as retroactively applying it. (2) Whether certain pharmacy bills are compensable due to out [sic] out-of-network.”¹

In the February 22, 2019, decision, the ALJ set forth the following findings regarding the issues now on appeal:

The ALJ finds KRS 342.730(4)’s 2018 amendment applies to this claim. House Bill 2’s final version, which the Governor Matthew Bevin signed into law, contains sections 19 and 20. These sections explain which amendments are retroactive. In fact, sections 19 and 20 appear on the page just before the Governor’s signature. The fact these sections were in the final bill establishes the Legislature and the Governor intended them to become law. Although retroactively applying KRS 342.730(4) may fail on other grounds, it is the ALJ’s opinion that sections 19 and 20 are the law, and the ALJ must follow them. The ALJ notes the Kentucky Court of Appeals has recently issued several conflicting opinions on this issue.

The ALJ does not have jurisdiction to address whether KRS 342.730(4)’s age cut-off or retroactivity is constitutional. Adjudicating a statute’s constitutionality is an issue reserved for Justice Courts. An ALJ does not have authority to rule on this issue. Blue Diamond Coal

¹ By order dated January 25, 2019, the ALJ amended the BRC Order to note the parties’ agreement regarding AWW.

Co. v. Cornett, 189 S.W.2d 963 (Ky. 1945). The Board also does not have authority to decide constitutional issues. Commonwealth v. DLX, Inc., 42 S.W.3d 624, 626 (Ky. 2001). If Marks wants redress, concerning KRS 342.730(4)'s amended (2018) version's constitutionality and retroactivity, she will have to appeal to the Kentucky Court of Appeals or higher.

Marks filed a petition for reconsideration asserting the same errors set forth on appeal. In the March 18, 2019, Order, the ALJ stated as follows:

The Plaintiff filing a petition for reconsideration from the Administrative Law Judge's 2/22/19 Opinion, Award and Order, the Defendant responding thereto, and the ALJ being in all ways sufficiently advised;

It is hereby **ORDERED**: The Plaintiff's petition for reconsideration is **Denied**.

KRS 342.281 outlines a petition for reconsideration's parameters. It states that "[t]he [ALJ] shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision...[.]"

The ALJ may not reweigh the evidence, when considering and deciding a petition for reconsideration. Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky. 1971). Moreover, KRS 342.281 "precludes an ALJ...from reconsidering the case on the merits and/or changing the findings of fact." Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003).

It is not enough for a party to show the record contained some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). If substantive evidence supports an ALJ's findings, then the evidence does not compel a different result. Special Fund v. Francis, 708 S.W.2d 641, 642 (Ky. 1986).

The "patent" errors the Plaintiff asserts pertain to constitutional issues, concerning KRS 342.730(4)'s 2018 amended version, and House Bill 2's sections 19 and 20. The ALJ previously addressed these issue and arguments. These issues and arguments are currently before the Kentucky Supreme Court. The Court will soon provide all the answers. The ALJ respectfully asserts he applied

the appropriate legal standards, at least as they currently stand.

The ALJ respectively asserts he properly reviewed, summarized, and understood, the evidence. The ALJ made all the appropriate factual findings, as well as sufficiently explained his reasoning in reaching the ultimate result.

There are no just reasons for delay. This is a final and appealable Order.

We affirm the ALJ's retroactive application of KRS 342.730(4) to Marks' awards of PPD and PTD benefits.

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, *supra*, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) has retroactive applicability and, in doing so, opined as follows:

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.

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.

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.

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).

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 43-44.

Whether the amended version of KRS 342.730(4) has retroactive effect has been decided by our state's highest court. The record in this litigation reveals Marks' date of birth is August 12, 1951. Accordingly, the ALJ's determination to limit Marks' awards of both PPD and PTD benefits by the version of KRS 342.730(4) as amended by House Bill 2 is affirmed.

Finally, Marks asserts retroactive applicability of the amended version of KRS 342.730(4) violates both the United States and Kentucky Constitutions. The Board, as an administrative tribunal, has no jurisdiction to rule on 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 Marks' second argument. Thus, we affirm on this issue.

Accordingly, the February 22, 2019, Opinion, Award, and Order and the March 18, 2019, Order are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON SCOTT F SCHEYNOST
P O BOX 58308
LOUISVILLE KY 40268

LMS

COUNSEL FOR RESPONDENT:

HON DOUGLAS A U'SELLIS
HON JOHN HARRISON
600 E MAIN ST STE 100
LOUISVILLE KY 40202

LMS

LMS

ADMINISTRATIVE LAW JUDGE:

HON BRENT DYE
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS