

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 6, 2019

CLAIM NO. 201595919

CAROLYN LUNDY

PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE**

CUSTOM PACKAGING COMPANY, INC. and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING**

* * * * *

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

ALVEY, Chairman. Carolyn Lundy (“Lundy”) appeals from the Remand Opinion Award and Order rendered June 20, 2018, and the Order denying her petition for reconsideration issued July 12, 2018 by Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”). The ALJ dismissed Lundy’s claim for a right thumb injury, but determined she sustained bilateral carpal tunnel injuries while working for Custom

Packaging Company, Inc. (“Custom Packaging”), for which permanent partial disability (“PPD”) benefits were awarded.

On appeal, Lundy argues the tier-down provision contained in the 1994 version of KRS 342.730(4) is unconstitutional. Lundy also argues the changes to KRS 342.730(4), effective July 14, 2018 are applicable, and her benefits should terminate when she reaches age seventy. In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), we vacate the ALJ’s determination regarding the application of the tier-down provisions of KRS 342.730(4), and remand for a determination in accordance with the amended version of that statute effective July 14, 2018.

Lundy filed a Form 101 on July 7, 2016, alleging she sustained bilateral carpal tunnel injuries manifesting on October 1, 2014, and a right trigger thumb injury manifesting on September 22, 2015. Lundy worked for Custom Packaging from April 18, 1985 until March 18, 2016. The medical evidence filed in the claim is irrelevant to the issues which are subject of this appeal, and will not be discussed.

In the Opinion Award and Order issued April 24, 2017, the ALJ dismissed Lundy’s claim for a right thumb injury. She awarded PPD benefits based upon a 14% impairment rating, terminating when Lundy reaches normal Social Security retirement age. The ALJ declined to enhance Lundy’s award by the three multiplier contained in KRS 342.730(1)(c)1, but determined that if she ever returned to a position earning the same or higher rate of pay, and subsequently left that position she may be entitled to an enhancement of her award pursuant to KRS

342.730(1)(c)2. The ALJ preserved Lundy's argument regarding the constitutionality of KRS 342.730(4), as amended in 1996.

Lundy filed a petition for reconsideration arguing the ALJ committed multiple errors, including her determination regarding KRS 342.730(1)(c)1, dismissal of the claim for the right thumb injury, and termination of her benefits when she reaches normal old age retirement. The ALJ denied the petition, except for the determination regarding the termination of benefits. The ALJ found Lundy was entitled to benefits for 425 weeks. Lundy subsequently filed a petition for reconsideration of the award of attorney fees since the ALJ based the award upon the benefits applicable pursuant to the 1996 version of KRS 342.730(4). The ALJ granted the petition.

Custom Packaging filed a notice of appeal, arguing that based upon the holding in Parker v. Webster County Coal, 529 S.W.3d 759 (Ky. 2017), which held the 1996 change to KRS 342.730(4) was unconstitutional, the 1994 version applies, and Lundy's award is subject to its tier-down provisions. This Board issued a decision on March 23, 2018, vacating the ALJ's decision, in part, and remanding for application of the tier-down provision contained in the 1994 version of KRS 342.730(4).

The ALJ issued a Remand Opinion, Award and Order on June 20, 2018. She determined Lundy was entitled to PPD benefits based upon the tier-down provision contained in the 1994 version of KRS 342.730(4). Lundy filed a petition for reconsideration essentially re-arguing many of the issues previously raised in her petition from the ALJ's original decision. Lundy additionally argued it was

inappropriate to apply the 1994 version of KRS 342.730(4) to her claim, which she argued was unconstitutional. The ALJ denied the petition by order entered July 12, 2018.

Lundy filed a notice of appeal on July 17, 2018, arguing KRS 247.730(4), amended effective July 14, 2018, was applicable to this claim. Lundy filed a motion to remand this appeal to the ALJ on July 31, 2018, which this Board denied on August 15, 2018, pending the finality of Lafarge Holcim v. James Swinford, Claim Number 2016-90245, 2018-CA-000414-WC (rendered September 7, 2018)(Designated to be Published), then pending before the Kentucky Court of Appeals. The decision in that case became final with the Kentucky Supreme Court on September 24, 2019.

On November 14, 2019, this Board issued an order requesting the parties to show cause why this appeal should not be removed from abeyance and a briefing schedule issued. A telephonic conference was held on November 25, 2019. The parties agreed this claim should be removed from abeyance, and stand submitted for decision. This Board issued an order on November 25, 2019, removing this appeal from abeyance and noting it stood submitted for decision.

On appeal, Lundy argues the ALJ's decision should be remanded, in part, for application of the 2018 changes to KRS 342.730(4). Custom Packaging argued in its brief the 1994 version of that statute controls. However, that brief was filed prior to the decision of the Kentucky Supreme Court in Holcim v. Swinford, supra.

We note House Bill 2, 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) 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 vacate the ALJ's decision regarding the applicability of the 1994 version of KRS 342.730(4), and remand for an amended award of PPD benefits pursuant to KRS 342.730(4) effective July 14, 2018.

We additionally note that Lundy had preserved an argument regarding the constitutionality of the 1994 version of KRS 234.730(4). Since we have determined that provision is not applicable to this claim, that argument is moot. Even if we deemed that provision applicable, this Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945), and would therefore be compelled to affirm.

Accordingly, the June 20, 2018 Remand Opinion, Award and Order, and the July 12, Order on Petition for Reconsideration issued by Hon. Jane Rice Williams,

Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for an amended award applying the version of KRS 342.730(4), effective July 14, 2018, to the award of PPD benefits.

ALL CONCUR.

DISTRIBUTION:

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