

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 11, 2021

CLAIM NO. 201898331

CURTIS EMBRY (DECEASED)
ELLISHA BOOKER,
ADMINISTRATOR OF THE ESTATE

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE**

MIDWEST LOGISTIC SYSTEMS, INC.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Elisha Booker (“Booker”), daughter of Curtis Embry (“Embry”), deceased, and Administrator of the Estate of Curtis Embry (“Embry’s Estate”), appeals from the December 28, 2020, Opinion, Award, and Order and the January 23, 2021, Order ruling on the Petitions for Reconsideration of Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ awarded Booker, as

Administrator, permanent partial disability benefits, interrupted by temporary total disability (“TTD”) benefits, and past due medical expenses for Embry’s work-related right shoulder injury. The ALJ also awarded TTD and temporary partial disability benefits already paid with no credit to the employer, Midwest Logistics Systems, Inc. (“Midwest Logistics”) for overpayment. The ALJ dismissed Embry’s left shoulder injury claim.

On appeal, Booker asserts that she, as heir to Embry’s Estate, is entitled to survivor benefits pursuant to KRS 342.730(3). As this is the only issue on appeal, we will not recount the medical evidence or lay testimony. A brief procedural history will suffice.

The Form 101 filed December 10, 2018, alleges Embry sustained work-related injuries on January 8, 2018, in the following manner: “I was working and involved in a motor vehicle accident injuring my right shoulder, bicep and arm.” The May 29, 2019, Fatality Letter indicates Embry passed away on May 1, 2019. Importantly, the record indicates Embry passed away from *non-work-related causes*.

The April 10, 2019, Benefit Review Conference Order and Memorandum (“BRC Order”) lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, and TTD. Under “Other” is “subrogation.” The BRC Order indicates TTD benefits were paid totaling \$26,406.53 and medical expenses were paid totaling \$38,067.83.

Booker filed the Prenuptial Agreement entered into between Embry, deceased, and Evelyn Macamos (“Macamos”) twice. On October 20, 2020, Booker filed the Marriage License of Embry and Macamos dated October 5, 2013.

Booker also filed the October 5, 2020, Order of the Hardin District Court which reads, *verbatim*, as follows:

On motion of Elisha Booker, Administrator of the Estate of CURTIS R. EMBRY having moved the court to not recognize Evelyn Bibay Macamos, wife of Curtis Embry due to a prenuptial agreement, by and through counsel, and the Court being sufficiently advised, and the court having reviewed the prenuptial agreement and found that Evelyn Bibay Macamos waived any rights to an inheritance from Curtis Embry; it is hereby ORDER [sic] and ADJUDGED as follows:

That Evelyn Bibay Macamos, wife of Curtis Embry, waived her rights as an heir of the Estate of Curtis Embry in a prenuptial agreement duly executed by both Curtis Embry and Evelyn Bibay Macamos, and therefore it is hereby ordered that Evelyn Bibay Macamos take nothing from the Estate of Curtis Embry.

On December 3, 2020, Midwest Logistics filed a “Motion to Amend November 4, 2020, BRC Order” in order to include the issues of work-relatedness, “Injury” as defined by the Act, and exclusion for pre-existing active disability to the list of contested issues. Midwest Logistics’ motion was sustained by Order dated December 3, 2020.

In the December 28, 2020, Opinion, Award, and Order, regarding the issue on appeal, the ALJ set forth the following findings *verbatim*:

I. Work-relatedness/causation and Injury as Defined by the Act

There is no question the right shoulder injury is work-related. All three doctors who have given an opinion,

including Dr. Moskal, Dr. Barefoot and Dr. Been, the treating surgeon, agree that it is work-related. In reliance on Dr. Been the right shoulder injury, the surgery he did, and the restrictions he assigned, are work-related.

As to the left shoulder injury, only Dr. Barefoot states it is work-related. Dr. Moskal states it is not. The treating surgeon, Dr. Been, who clearly examined the left shoulder, and was able to provide a causation opinion for the right shoulder, is affirmatively silent on the issue. I also note that the Plaintiff had a prior symptomatic left shoulder injury in 2016 that he never treated. There is no clear objective medical evidence that the condition of the left shoulder is due to overuse, especially inasmuch as after the accident the Plaintiff only worked light duty until he returned to an easier job. The left shoulder is dismissed as not work-related in reliance on Dr. Moskal.

II. Temporary Total Disability Benefits

This issue is complicated by the fact that the Plaintiff worked light duty from around the date of injury through March 8, 2018 and then again from August 21, 2018 to January 31, 2019. It is also complicated by the fact that although the parties have stipulated to a total amount paid of combined TTD and TPD they have not provided dates for each, amount that may vary, especially for the TPD nor the wages the Plaintiff specifically earned for each week of light duty that may have been offset by the TPD.

I can conclude that the Plaintiff was paid a total of \$26,406.53 in TTD and TPD.

I can conclude that the Plaintiff was owed TTD at a rate of \$760.52 a week from March 8, 2018 through August 20, 2018.

I can conclude that the Plaintiff is not owed any more TTD from both the evidence and his brief.

I cannot conclude, from the evidence presented, what credit, if any, is owed to the Defendant for overpayment of TTD and TPD because I don't know if, in fact, TPD, was overpaid. I can conclude it was voluntarily overpaid as there exists no Order in the file.

No additional TTD or TPD will be Ordered and no credit granted.

III. Unpaid or contested medical expenses

I am aware of no outstanding medical expenses for the right shoulder, but if there are any they should be paid as soon as possible according to the fee schedule.

I have dismissed the left shoulder claim as not work-related and thus any outstanding medical expenses for it are non-compensable.

IV. Benefits per KRS 342.730, exclusion for pre-existing, active disability/impairment rating including benefits owed from the date of injury through Mr. Curtis Embry's death

Mr. Embry had a 6% impairment rating and his award will be enhanced according to KRS 342.730(1)(c)1.

A. Impairment rating

Dr. Moskal and Dr. Barefoot agree with the type of injury and surgery to the right shoulder a 6% impairment rating is appropriate. I see no reason not to adopt this rating.

B. KRS 342.730(1)(c)1 and 2.

There is insufficient evidence for me to determine if the Plaintiff ever returned to work earning equal or greater wages. I have not been presented with his return to work wages either for the Defendant or with Maximum Transportation. Since, after the injury, he only worked light duty for the Defendant and was paid TPD during these periods we can infer he never returned to work at equal or greater wages for them.

For the subsequent employer, Maximum, we have testimony that had he continued to work for them he would earn \$1149.65 or more per week, which is more than his average weekly wage, \$1140.78, for the Defendant. However, I have no evidence of his wages for them from February 5, 2019 through May 1, 2019. There are 13 multiple reasons why, during that period that was less than one full quarter he would not have

earned \$1140.78 or more. I need not speculate as to those, as the evidence is insufficient for me to determine that he earned more than \$1140.78.

KRS 324.730(1)(c)2 does not apply.

The final set of restrictions assigned by Dr. Been as of December 2018 include no use of the right arm and not to lift more than two pounds. In fact, he remained on light duty with the Defendant and it can be inferred that it was felt the Plaintiff could not return to the type of work done on the date of injury. That he eventually went to a lighter duty position, as confirmed by the testimony of Ms. Roberts, is further proof that he could not do the type of work done on the date of injury.

In reliance on the above analysis and with specific reliance on Dr. Barefoot, the Plaintiff lacked the capacity to return to the type of work done on the date of injury.

The Plaintiff never returned to work at equal or greater wages during the closed benefit period.

The Plaintiff's benefits will be enhanced according to KRS 342.730(1)(c)1.

V. Return to work AWW

The parties have preserved this as an issue but there is insufficient evidence for me to adjudicate it.

VI. Benefits payable to the widow or estate

This issue is really the crux of the dispute, other than perhaps the work-relatedness of the left shoulder. I am in agreement with the Defendant's arguments. As a matter of law Ms. Elisha Booker, in any capacity, nor the estate of Mr. Embry, is entitled to any post-May 1, 2019 benefits.

The Order of the Hardin District Probate Court is undoubtedly correct and the widow has waived any of her rights to the estate of Mr. Embry. However, survivor benefits under KRS 342.730(3) have never been considered part of an estate such as is adjudicated in a state probate court. It is entirely a creation of the

Workers' Compensation Act and fully defined by the statute.

Under the statute Ms. Booker nor the estate, meet any the criteria for benefits under KRS 342.730(3). First, inasmuch as Ms. Booker has been appointed the administrator of her father's estate we can presume she is over 18 years of age and does not have a disability that would disqualify her or, by extension, imply she is dependent. It may be possible that she was actually dependent upon Mr. Embry but given the lack of evidence, and the sureness I have that if she were the Plaintiff would have proven it, I find she was not dependent.

I also note that while the Hardin District Probate Court has found that the widow, Ms. Macamos, waived her rights under a pre-nuptial agreement, it does not say she assigned those rights. Even if she had assigned those rights said rights cannot be legally assigned. KRS 342.180. Finally, while, again, I do not doubt the correctness of the Probate Court's Order in general I am dubious, to say the least, that Ms. Macamos, via the pre-nuptial agreement or any other affirmative act did, or maybe could, waive her rights under the Act. The only way she could waive those rights is by inaction of not pursuing her rights, which is the course she has apparently elected.

In short I find no statutory authority or authority in case law to find that an adult non-dependent child qualifies for benefits under KRS 342.730(3) whether styled as "estate" or "administrator" or any other role, even when a widow has been excluded from the estate.

VIII. Award

The Plaintiff's permanent partial disability award is: $1140.53 \text{ (AWW)} \times \frac{2}{3} \text{ (workers' compensation rate subject to statutory maximum)} \times .06 \text{ (impairment rating)} \times .85 \text{ (grid factor)} \times 3.4 \text{ (KRS 342.730(1)(c)1)} = \121.38 a week, from January 8, 2018 through May 1, 2018 and excluding the period of TTD from March 8, 2018 through August 20, 2018. All past due medical expenses for the right shoulder are compensable. The left shoulder is dismissed as to any benefits, income or medical.

Both parties filed Petitions for Reconsideration. Booker's Petition for Reconsideration asserted the ALJ made a typographical in the award of benefits. Further, she asserted the ALJ erred as a matter of law by not awarding survivor benefits to Embry's Estate.

Midwest Logistics' Petition for Reconsideration asserted several errors, none of which are directly relevant to this appeal.

In the January 23, 2021, Order, regarding the issue on appeal, the ALJ held as follows: "There is no legal authority to award the estate the additional benefits the Plaintiff seeks."

Significantly, the ALJ's finding Macamos waived her rights to an inheritance from Embry's Estate has not been contested by Booker on appeal. Further, Booker has not contested the ALJ's finding that Macamos is unable to legally assign her rights to survivor benefits under KRS 342.180. Booker has also not contested the following finding made by the ALJ: "I am dubious, to say the least, that Ms. Macamos, via the pre-nuptial agreement or any other affirmative act did, or maybe could, waive her rights under the Act. The only way should could waive those rights is by inaction of not pursuing her rights, which is the course she has apparently elected." Lastly, Booker has not contested the ALJ's finding that she is not entitled to survivor benefits pursuant to KRS 342.730(3) by virtue of being a child under the age of eighteen or a child incapable of self-support. Whether these findings have merit has not been raised in this appeal. Consequently, we will not address or provide findings concerning these issues.

Booker's sole argument on appeal is she is entitled to survivor benefits pursuant to KRS 342.730(3) by virtue of being an heir to Embry's Estate. As asserted by Booker, Macamos waived her rights to survivor benefits, and those waived benefits passed to Embry's Estate. Further, since Macamos waived her right to any inheritance from Embry's Estate, Booker, as heir to Embry's Estate and "the De Jure if not the De Facto 'widow' pursuant to KRS 342.730(3)," is entitled to the waived benefits which should allegedly be a part of Embry's Estate. We affirm.

As an initial matter, we note that Macamos has not, during the pendency of the litigation or in this appeal, pursued her rights to survivor benefits pursuant to KRS 342.730(3). Therefore, whether she has waived or can waive her statutory right to those benefits is not an issue this Board needs to address. The only individual claiming such rights is Booker.

KRS 342.730(3) holds as follows:

3) Subject to the limitations contained in subsection (4) of this section, when an employee, who has sustained disability compensable under this chapter, and who has filed, or could have timely filed, a valid claim in his or her lifetime, dies from causes other than the injury before the expiration of the compensable period specified, portions of the income benefits specified and unpaid at the individual's death, whether or not accrued or due at his or her death, shall be paid, under an award made before or after the death, for the period specified in this section, to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the conditions specified in this section and in the order named:

- (a) To the widow or widower, if there is no child under the age of eighteen (18) or incapable of self-support, benefits at fifty percent (50%) of the rate specified in the award; or

- (b) If there are both a widow or widower and such a child or children, to the widow or widower, forty-five percent (45%) of the benefits specified in the award, or forty percent (40%) of those benefits if such a child or children are not living with the widow or widower; and, in addition thereto, fifteen percent (15%) of the benefits specified in the award to each child. Where there are more than two (2) such children, the indemnity benefits payable on account of two (2) children shall be divided among all the children, share and share alike; or
- (c) If there is no widow or widower but such a child or children, then to the child or children, fifty percent (50%) of the benefits specified in the award to one (1) child, and fifteen percent (15%) of those benefits to a second child, to be shared equally. If there are more than two (2) such children, the indemnity benefits payable on account of two (2) children shall be divided equally among all the children; or
- (d) If there is no survivor in the above classes, then the parent or parents wholly or partly actually dependent for support upon the decedent, or to other wholly or partly actually dependent relatives listed in paragraph (g) of subsection (1) of KRS 342.750, or to both, in proportions that the commissioner provides by administrative regulation.
- (e) To the widow or widower upon remarriage, up to two (2) years, benefits as specified in the award and proportioned under paragraphs (a) or (b) of this subsection, if the proportioned benefits remain unpaid, to be paid in a lump sum.

Regarding the principles of statutory construction, in Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 613-614 (Ky. 2004), the Kentucky Supreme Court held as follows: “The most commonly stated rule in statutory interpretation is that the ‘plain meaning’ of the statute controls. This Court has steadfastly adhered to the plain-meaning rule ‘unless to do so would constitute an absurd result.’” Where the language of a statute is clear and unambiguous, it is not open to construction or interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008).

Here, the ALJ determined that, based upon the plain language of KRS 342.730(3), Booker is not entitled to survivor benefits. Assuming, *arguendo*, Macamos waived her right to survivor benefits under KRS 342.730(3) by failing to pursue them, a finding made by the ALJ that was not contested by Booker in this appeal, there is nothing within the plain language of the statute allowing those benefits to pass to the Estate. As concluded by the ALJ, “Ms. Booker **nor the estate**, meet any the criteria for benefits under KRS 342.730(3).” (Emphasis added). Indeed, KRS 342.730(3) clearly defines the class of people entitled to survivor benefits when a claimant dies from non-work-related causes and it does not include the Estate of the decedent. If there is no widow and no child under the age of eighteen or incapable of self-support, KRS 342.730(3)(d) is applicable. As noted, the ALJ determined the widow waived her right to survivor benefits by failing to pursue them, and that finding has not been challenged on appeal. Consequently, for the purposes of KRS 342.730(3), there is no widow. Further, Booker has not challenged the ALJ’s finding that she is neither a child under the age of eighteen nor a child “incapable to self-

support.” Consequently, Booker, as Embry’s daughter, is also not entitled to survivor benefits pursuant to KRS 342.730. Therefore, KRS 342.730(3)(d) is applicable, and the survivor benefits are granted to either Embry’s surviving parent or parents, if they are “wholly or partly actually dependent for support upon the decedent,” or, if not, to the relatives listed in KRS 342.750(1)(g) if any are wholly or partly dependent. *There is simply nothing within the plain language of KRS 342.730(3) that supports the Estate being entitled to survivor benefits.* There is a clear chain of entitlement to survivor benefits in the event there is no widow and no qualified child, and the decedent’s Estate is not included. Consequently, as the plain-meaning of the statute must prevail, the ALJ’s determination that Booker is not entitled to survivor benefits pursuant to KRS 342.730(3) as heir to Embry’s Estate is affirmed.

The December 28, 2020, Opinion, Award, and Order and the January 23, 2021, Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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