

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 1, 2020

CLAIM NO. 201779404 & 201772455

ECLIPSE COLLIERIES, INC.

PETITIONER

VS.

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

JOEY TACKETT AND
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Eclipse Collieries, Inc. (“Eclipse”) appeals from the Opinion and Order rendered January 13, 2020 by Hon. Grant S. Roark, Administrative Law Judge (“ALJ”) awarding Joey Tackett (“Tackett”) permanent partial disability (“PPD”) and medical benefits for a work-related right shoulder injury he sustained on May 23, 2017. The ALJ assessed 12% interest on all past due income benefits through June 28, 2017, and 6% from and after June 29, 2017. Eclipse also appeals

from the February 5, 2020 Order overruling its petition for reconsideration. On appeal, Eclipse argues the ALJ erred by failing to assess 6% interest on all past due income benefits. For the foregoing reasons, we affirm.

Tackett filed a Form 101 on March 19, 2019 alleging he injured his right shoulder on May 23, 2017 when he pulled on a gate. Tackett filed a second Form 101 on the same day alleging he injured his low back and right leg on July 26, 2017 when he lost his footing while stepping down from the bed of his work truck. At all relevant times, Tackett worked for Eclipse as an engineering technician. We will not summarize the lay or medical evidence since the sole issue on appeal concerns the appropriate interest rate on past due income benefits.

In the January 13, 2020 opinion, the ALJ determined Tackett did not sustain a work-related low back injury and dismissed that portion of his claim. The ALJ found Tackett sustained a work-related right shoulder injury due to the May 23, 2017 work event. He relied upon the 9% impairment rating assessed by Dr. Frank Burke and determined Tackett is not entitled to the three multiplier. The ALJ awarded PPD and medical benefits for the right shoulder injury. Regarding the award of PPD benefits, the ALJ determined the applicable interest was “12% on all past due amounts up to June 28, 2017 and at 6% on all past due amounts from June 29, 2017 up to the present.”

Eclipse filed a petition for reconsideration requesting the ALJ to amend the interest rate to 6% on all unpaid benefits, citing to Parton Brothers Contracting v. Lawson, 2018-CA-000804-WC, rendered November 15, 2019 (Designated Not To Be Published). In an Order dated February 5, 2020, the ALJ

overruled the petition noting Parton Brothers Contracting v. Lawson, *supra*, is unpublished and not binding.

On appeal, Eclipse argues the ALJ erred by failing to award 6% interest for all past due unpaid benefits prior to June 28, 2017 pursuant to the recent amendments of KRS 342.040(1). It noted in passing the amendment, the Kentucky General Assembly specifically stated, “KRS 342.040 shall apply to all worker’s compensation orders entered or settlements approved on or after the effective date of this Act.” Here, the ALJ rendered his opinion on January 13, 2020 but declined to award interest at 6% for benefits retroactively awarded through June 28, 2017. In support of its argument, Eclipse relies upon Parton Brothers Contracting v. Lawson, *supra*. There, the Kentucky Court of Appeals concluded the entirety of Lawson’s award of benefits was subject to the amended 6% interest rate.

House Bill 223, effective June 29, 2017, Section 2 changed interest rate on past due and owing benefits from 12% per annum to 6% per annum. Subsection 5 of House Bill 223 states, “Section 2 of this Act shall apply to all worker’s compensation orders entered or settlements approved on or after the effective date of this Act.” We note the original version of House Bill 223 contained a provision for retroactive application, but it was not included in the version of the bill signed by the governor, and is therefore not included in KRS 342.040(1) effective June 29, 2017. This Board has consistently found the logic contained in Stovall v. Couch, 658 S.W.2d 437 (Ky. App. 1983) is applicable. We have held a Claimant’s entitlement to PPD benefits vests at the time of the injury. Thus, we have consistently held a Claimant is entitled to 12% interest on all past due benefits from the date of injury

through June 28, 2017, and 6% interest on income benefits accrued from and after June 29, 2017. See Limb Walker Tree Service v. Ovens, Claim No. 201578695, rendered December 22, 2017 and Lawnco, LLC v. White, Claim No. 2014-69882, rendered January 12, 2018.

The Kentucky Court of Appeals has inconsistently rendered decisions regarding the retroactive application of the past due interest provision contained in KRS 342.040(1) effective June 29, 2017. We are faced with five decisions rendered by the Kentucky Court of Appeals regarding the application of interest in past due and owing benefits pursuant to the version of KRS 342.040(1) effective June 29, 2017. Three of those decision hold the amendment to KRS 342.040(1) does not have retroactive application and two hold it does. In Excel Mining, LLC v. Maynard, 2018-CA-000511-WC, rendered September 14, 2018 (Designated Not To Be Published) and Slater Fore Consulting, Inc. v. Rife, 2018-CA-000647-WC, rendered June 21, 2019 (Designated Not To Be Published), the Court of Appeals held the 6% interest rate was not applicable to unpaid income benefits due prior to June 29, 2017. In Parton Bros. Contracting, Inc. v. Lawson, *supra*, and Warrior Coal, LLC v. Martin, 2018-CA-001430-WC, rendered January 10, 2020 (Designated Not To Be Published), the Court of Appeals held the amendments to KRS 342.040(1) are retroactive and all income benefits awarded on or after June 29, 2017 are subject to a 6% interest rate. Consequently, the Court reversed the Board in upholding the awards of 12% interest on unpaid income benefits due on or before June 28, 2017. Most recently, in Excel Mining, LLC v. Sowards, 2018-CA-001316-WC, rendered March 20, 2020 (Designated Not To Be Published), the Court of Appeals reaffirmed

its holding in Excel Mining, LLC v. Maynard, *supra*, by finding 12% interest applies to all unpaid installments of income benefits due on or before June 28, 2017, and 6% interest applies to all unpaid installments of income benefits due on or after June 29, 2017. In light of our previous opinions, we rely upon the first, second, and fifth decisions of the Court of Appeals holding the 6% interest rate only applies to unpaid installments of income benefits due on or after June 29, 2017.

House Bill 2, effective July 14, 2018, provides no support for Eclipse's argument that KRS 342.040(1) should apply retroactively on all past due income benefits through June 28, 2017. Section 3 of House Bill 2 contains the following amendment of KRS 342.040(1):

(1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of six percent (6%) per annum on each installment from the time is due until paid, except that if the administrative law judge determines that **the delay was caused by the employee, then no interest shall be due, or determines that** a denial, delay, or termination in the payment of income benefits was without reasonable foundation, **then** the rate of interest shall be twelve percent (12%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise

the employee or known dependent of right to prosecute a claim under this chapter. (emphasis in original).

Section 20 of House Bill 2 directs the amendment of KRS 342.040(1) contained in Section 3 of the bill “shall apply to any claim arising from an injury or occupational disease or last exposure to the hazards of an occupational disease or cumulative trauma **occurring on or after the effective date of this Act.**” (emphasis added). The remainder of Section 20 delineates those portions of House Bill 2 which have retroactive application:

(2) Sections 2, 4, and 5 and subsection (7) of Section 13 of this Act are remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

(3) 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, for which time to file an appeal has not lapsed, as of the effective date of this Act.

Conversely, House Bill 223 contains no provision directing the change in interest rate has retroactive application. As noted above, Subsection 5 of House Bill 223 states Section 2 of the Act amending KRS 342.040(1) applies to all workers’ compensation orders entered or settlements approved on or after the effective date of the Act. We interpret this to mean the interest rate is 6% on all unpaid income benefits due on or after June 29, 2017; however, 12% interest is applicable on all unpaid income benefits through June 28, 2017.

House Bill 2 is devoid of language suggesting the 2017 change in interest rate to 6% applied to unpaid income benefits due on or before June 28, 2017. The 2017 legislature drew a line of demarcation by decreeing the change in the interest rate applied prospectively to all awards rendered or settlements approved on or after June 29, 2017, since it inserted no language in House Bill 223 referencing retroactive application. The legislature did not decree the 2017 amendment to KRS 342.040(1) had retroactive application as it did in other portions of the 2018 amendments to Chapter 342. Consequently, Section 5 of House Bill 223 cannot be construed as requiring retroactive application to the amended 6% interest rate on unpaid income benefits due on or before June 28, 2017, since unlike House Bill 2, it contains no retroactive verbiage. If the 2017 legislature had intended House Bill 223 to apply retroactively, it would have so decreed as it did in Section 20 of House Bill 2. Therefore, we find the ALJ properly construed and applied the interest rates on past due and owing benefits, and affirm the award of 12% interest on all due and unpaid installments of income benefits due on or before June 28, 2017, and 6% interest on all unpaid installments of income benefits due on or after June 29, 2017.

Accordingly, the Opinion and Order rendered January 13, 2020, and the February 5, 2020 Order by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON TERRI SMITH WALTERS
P.O. BOX 1167
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

LMS

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

LMS

HON GRANT S ROARK
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601