

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 16, 2019

CLAIM NO. 201172979

EDWARD REINKE (DECEASED)
VICTORIA REINKE (EXECUTRIX)

PETITIONER

VS.

**APPEAL FROM HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE**

ASSOCIATED PRESS and
HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Edward Reinke (Deceased), through Victoria Reinke (Executrix) ("Reinke"), appeals from the Order issued April 16, 2019 by Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"). The CALJ denied Reinke's March 12, 2019 Motion to Reopen the claim against The Associated Press ("Associated"). No Petition for Reconsideration was filed from that order.

On appeal, Reinke argues the CALJ erred in denying her Motion to Reopen. She argues that based upon the holding in Parker v. Webster County Coal, LLC, 529 S.W.3d 759 (Ky. 2017), and the legislative changes to KRS 342.730(4), effective July 14, 2018, it was inappropriate to terminate her benefits when she reached age sixty. Reinke argues she is entitled to either a continuation of benefits subject to the “tier-down” benefits contained in the 1994 version of the Kentucky Workers’ Compensation Act, or in the alternative, until her deceased husband would have reached age seventy. We disagree, and affirm.

Reinke filed a Form 101 on October 8, 2013 alleging Edward Reinke died due to the effects of a work-related fall he sustained on October 2, 2011. On July 6, 2015, Hon. R. Scott Borders, ALJ (“ALJ Borders”) rendered a decision finding Reinke sustained a work-related injury resulting in his death. ALJ Borders awarded TTD benefits from October 2, 2011 until October 18, 2011, the date he died. ALJ Borders also awarded \$361.00 per week to Victoria Reinke beginning October 2, 2011, “and continuing for so long as the Plaintiff is a widow subject to the limitations contained in KRS 342.730(4) as that statute read on October 2, 2011 ...” ALJ Borders’ decision was not appealed. Reinke did not challenge the constitutionality of KRS 342.730(4) as it existed on October 2, 2011.

On January 16, 2018, Reinke and Associated submitted a Form 110-I settlement agreement for approval. The settlement agreement indicated the remaining payments to Reinke until Victoria Reinke’s sixtieth birthday were being commuted to a lump sum. The CALJ issued an order on February 1, 2018, declining to approve the settlement agreement. The order stated, “The proposed

settlement agreement is not approved. The proposed agreement contemplates a limited duration of benefits based on the version of KRS 342.730(4) that was recently ruled unconstitutional ...” No appeal was taken from that order. Associated continued to make weekly payments to Victoria Reinke until she reached the age of sixty.

Reinke filed a motion to reopen on March 12, 2019, arguing, “This is a death case. The Defendant/Employer terminated widow benefits upon the surviving spouse reaching age 60, instead of continuing benefits until such time as the decedent would have reached 70 years pursuant to KRS 342.730(4).”

On April 16, 2019, the CALJ entered an order denying the motion to reopen. The CALJ specifically found as follows:

Edward Reinke suffered a fatal fall at work on October 2, 2011. In 2015, his widow, Plaintiff Victoria Reinke, was awarded weekly benefits “for so long as the Plaintiff is a widow subject to the limitations contained in KRS 342.730(4)”; the law at the time terminated her benefits on her 60th birthday. Mrs. Reinke has moved to reopen the claim for a longer period of benefits, consistent with the amended version of KRS 342.730(4) passed after the Supreme Court of Kentucky held the prior version unconstitutional in Parker v. Webster County Coal, LLC, 509 S.W.3d 759 (Ky. 2017).

Section 20(3) of HB 2 that amended KRS 342.730(4) stated that the subsection “shall apply prospectively and retroactively to all claims:... (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.” Since Plaintiff’s claim was final – it had been “fully and finally adjudicated” – she has no grounds to reopen under KRS 342.125 or as a consequence of the July 14, 2018 amendment to the statute. The motion is overruled.

We initially note the procedure for reopening a workers' compensation claim pursuant to KRS 342.125 is a two-step process. Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 216 (Ky. 2006). The first step is the *prima facie* motion, which requires the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). "*Prima facie* evidence" is evidence which "if un rebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced ... but it does not shift the general burden" Prudential Ins. Co. v. Tuggle's Adm'r., 254 Ky. 814, 72 S.W.2d 440, 443 (1934).

The burden during the initial step is on the moving party and requires establishment of grounds for which the reopening is sought. Jude v. Cabbage, 251 S.W.2d 584 (Ky. 1952); W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (Ky. 1946). It is only after the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening that the adverse party is put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001). When an ALJ determines the movant failed to present a *prima facie* case for reopening, the decision is reviewed for an abuse of discretion. Harold Turner v. Bluegrass Tire Co., 331 S.W.3d 605, 610 (Ky. 2010). An abuse of discretion occurs when the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id.; Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

The CALJ determined Reinke was precluded from reopening the claim to assert a longer period of entitlement to benefits payable to Victoria Reinke contained in the amended version of KRS 342.730(4), reflected in House Bill 2, signed by the Governor on March 30, 2018, and effective July 14, 2018. Those changes reflect, as noted by the CALJ above, with limited exceptions, 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.

Section 20(2) of House Bill 2, as noted by the CALJ, reflects that the changes in KRS 342.730(4) (reflected in the Legislative Research Commission Note following the statute) are applicable, subject to the following restrictions:

This statute was amended in Section 13 of 2018 Ky. Acts ch. 40. Subsection (2) of Section 20 of that Act reads, "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." 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.**" (Emphasis added).

We note this language is not specifically contained in the body of the statute. However, it is contained in the Legislative Research Commission Note in the official version of the statute. We also note the language was contained in House Bill 2 signed by the Governor. We additionally note this case differs from the situation contemplated in Holcim v. Swinford, 2018-CA-000414-WC, 2018 WL 4261757, which is currently pending before the Kentucky Supreme Court. Here, the claim was finally adjudicated when ALJ Borders rendered his decision in 2015. We additionally note that by the time Reinke filed the motion to reopen, all benefits had been paid pursuant to ALJ Borders' decision.

Based upon the clear language contained in the changes to KRS 342.730(4), we agree with the CALJ that Reinke is precluded from reopening this claim since it had been fully and finally adjudicated, and was not pending at the time of the motion to reopen. Therefore, we find the CALJ did not abuse his discretion in denying Reinke's motion to reopen.

Accordingly, the April 16, 2019 order issued by Hon. Douglas W. Gott, Chief Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON JOSEPH M SCHULTE
127 EAST THIRD STREET
COVINGTON, KY 41011

COUNSEL FOR RESPONDENT:

LMS

HON TIMOTHY J WALKER
300 EAST MAIN STREET, STE 400
LEXINGTON, KY 40507

CHIEF ADMINISTRATIVE LAW JUDGE:

LMS

HON DOUGLAS W GOTT
657 CHAMBERLIN AVE
FRANKFORT, KY 40601