

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 26, 2021

CLAIM NO. 201701543

FLOYD METCALF

PETITIONER

VS.

APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

ADVANCED PAVING & CONSTRUCTION AND
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Floyd Metcalf (“Metcalf”) appeals from the September 16, 2020 Opinion, Award and Order on Remand rendered by Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”) finding the current version of KRS 342.730(4) is retroactive and applicable to the award of permanent total disability (“PTD”) benefits.

On appeal, Metcalf argues the ALJ erred in retroactively applying KRS 342.730(4) to his award of PTD benefits. He argues the retroactive application of the current version of KRS 342.730(4) is unconstitutional. We find the ALJ's Opinion on Remand is in conformity with the directives of the Kentucky Court of Appeals in Advanced Paving & Construction v. Metcalf, et. al., No. 2018-CA-001196-WC, rendered March 27, 2020 (rendered not to be published) and with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). We additionally note this Board lacks the authority to make determinations on constitutional issues. We also note this appeal is not barred by the "law of the case" doctrine, or *res judicata*, since the Kentucky Court of Appeals previously declined to render a decision on the issue of constitutionality. Therefore, we affirm.

Metcalf filed a Form 101 on September 6, 2017. Metcalf was operating a hoe-ram on November 9, 2016, when rock struck his right eye. The right eye injury resulted in several surgeries and near total blindness. Metcalf worked as a heavy equipment operator for Advanced Paving and Construction ("Advanced Paving") at the time of his injury. Metcalf was born in July 1965. He previously sustained a left eye injury as a child resulting in total blindness in that eye.

The ALJ rendered an Opinion, Award and Order on March 30, 2018. The ALJ determined the November 9, 2016 work-related right eye injury warranted a 76% impairment rating. The ALJ also determined the November 9, 2016 work injury rendered Metcalf permanently and totally disabled, and the prior non-work-related left eye impairment was not occupationally disabling. The ALJ awarded

PTD benefits, subject to the tier down provision contained in the 1994 version of KRS 342.730(4), and medical benefits.

Both parties filed Petitions for Reconsideration. In an Order rendered April 26, 2018, the ALJ denied Metcalf's petition, finding the 1994 version of KRS 342.730(4) applied since House Bill 2 was not effective until July 14, 2018. The ALJ denied Advanced Paving's petition challenging his finding that Metcalfe is permanently totally disabled.

This Board affirmed the ALJ's determination, in part, and vacated, in part, in an Opinion rendered July 20, 2018. The Board determined the ALJ performed the appropriate analysis, and substantial evidence supported his determination the November 9, 2016 work injury rendered Metcalf permanently and totally disabled. The Board also noted the ALJ properly applied the tier-down provision contained in the 1994 version of KRS 342.730 at the time he rendered the opinion. However, the Board noted that subsequent to the March 30, 2018 Opinion and April 26, 2018 Order, House Bill 2 became effective on July 14, 2018. Section 13 of that bill amended KRS 342.730(4). That statute now states 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 as seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

After reviewing Section 20(2) & (3) of House Bill 2, the Board vacated the ALJ's decision of the applicability of the 1994 version of KRS 342.730(4), and

remanded for an amended award regarding the termination of Metcalf's award pursuant to the version of KRS 342.730(4) effective July 14, 2018.

Both parties appealed to the Kentucky Court of Appeals. Advanced Paving challenged the finding of permanent total disability. Metcalf argued the ALJ erred in applying the tier down provision contained in the 1994 version of KRS 342.730(4). He further argued the Board erred in finding KRS 342.730(4) effective July 14, 2018 applies to an injury that occurred prior to the effective date of the Act. The appeal was placed in abeyance pending the finality of Holcim v. Swinford, No. 2018-SC-000627-WC and Lanier v. University of Louisville, No. 2018-SC-000685-WC. Subsequently, the claim was removed from abeyance in October 2019.

The Kentucky Court of Appeals rendered an Opinion Affirming on March 27, 2020. The Court determined the evidence did not compel a finding contrary to the ALJ's determination that Metcalf is permanently and totally disabled, and did not establish he had a pre-existing disability due to the loss of vision in his left eye. The Court noted the Kentucky Supreme Court had held in Holcim v. Swinford, supra, that the current version of KRS 342.730(4) is retroactive. "Due to the retroactivity of the statute, Metcalf's arguments to this Court are moot. We shall not address them except to hold that the current version of KRS 342.730(4) is applicable to Metcalf's PTD." The Court did not address the constitutionality of KRS 342.730(4). The Court affirmed the Board, including its decision to vacate and remand to the ALJ regarding the application of KRS 342.730(4) pursuant to Holcim v. Swinford, supra.

The ALJ issued an Opinion, Award, and Order on Remand on September 16, 2020, stating, "The Supreme Court has held that the amended version of KRS

342.730(4), passed and signed into law in the form of HB 2, applies retroactively to benefits and controls the duration of Metcalf's permanent total disability award." Therefore, the ALJ determined KRS 342.730(4) limits Metcalf's award of PTD benefits to age 70. The remainder of the March 2018 Opinion and April 2018 Order remained unchanged.

Metcalf now appeals from the September 16, 2020 Opinion. On appeal, he again argues the ALJ erred in retroactively applying KRS 342.730(4). Metcalf also challenges the constitutionality of the retroactive application of KRS 342.730(4).

In Holcim v. Swinford, supra, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) effective July 14, 2018, regarding the termination of benefits at age 70 has retroactive applicability. Because the Kentucky Supreme Court has determined this amendment applies retroactively, we affirm the ALJ's opinion on remand ordering the PTD benefits are limited by KRS 342.730(4), effective July 14, 2018.

However, we reject Advanced Paving's argument that Metcalf's appeal is barred by the "law of the case" doctrine regarding the constitutionality of KRS 342.730(4). This Board previously denied Advanced Paving's Motion to Dismiss. We specifically note the Kentucky Court of Appeals did not previously address the constitutionality of KRS 342.730(4). We also note 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). Consequently, we are

without authority to render a decision upon Metcalf's argument regarding the constitutionality of the amended statute. Thus, we affirm.

Accordingly, the September 16, 2020 Opinion, Award and Order on Remand rendered by Hon. W. Greg Harvey, Administrative Law Judge, is hereby **AFFIRMED.**

ALL CONCUR.

DISTRIBUTION:

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