

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 10, 2020

CLAIM NO. 201755817

GREGG ROBERTS

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

COMMONWEALTH DODGE;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE; AND
HON. ANDY BESHEAR, ATTORNEY GENERAL

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. Gregg Roberts (“Roberts”) appeals from the May 28, 2019 Opinion, Award and Order, and the June 18, 2019 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for an October 3, 2017 bilateral inguinal hernia. The ALJ

additionally found that all benefits shall terminate pursuant to KRS 342.730(4) as amended by House Bill 2 effective July 14, 2018.

On appeal, Roberts argues the ALJ erred in finding the PPD award is subject to KRS 342.730(4) as amended by House Bill 2. He argues the retroactive application violates the contracts clause of the United States and Kentucky Constitutions, and is an exercise of arbitrary power in contravention of section 2 of the Kentucky Constitution. We affirm.

At the Benefit Review Conference held March 14, 2019, contested issues included benefits per KRS 342.730, TTD rate, and “Duration of Benefits per KRS 342.730(4).” At the hearing, the ALJ described the remaining contested issues as “benefits per KRS 342.730 and the duration of benefits per the current iteration of KRS 342.730(4).”

The ALJ determined Roberts sustained a compensable injury. Regarding the issue of duration of income benefits per KRS 342.730(4), the ALJ provided as follows: “The ALJ is without the authority to address this issue. The issue is therefore hereby preserved for appellate review.” The award section provided, “All benefits shall terminate pursuant to KRS 342.730(4).”

Roberts filed a petition for reconsideration that did not list the Attorney General as a party, nor did he serve notice on the Attorney General. Roberts’ petition provided as follows:

Counsel for the Claimant would request that the Award be amended to state that the duration of benefits awarded in this case is subject to the provisions of KRS 342.730(4) in effect as of July 14, 2018, unless that statute as it existed/exists is ruled not to be retroactive as it relates to any date of injury prior to July 14, 2018

and/or unconstitutional as to any retroactive application of KRS 342.730(4) per the July 14, 2018 amendment.

In his Order on reconsideration, the ALJ clarified that all benefits shall terminate pursuant to KRS 342.730(4) as amended by House Bill 2 effective July 14, 2018.

Roberts filed his notice of appeal on July 3, 2019, naming Hon. Andy Beshear, Attorney General, as a respondent. Roberts also filed a motion to hold the appeal in abeyance. The Board sustained the motion by order dated July 17, 2019. Following finality of Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the claim was removed from abeyance. Roberts filed his brief on January 17, 2020, and served Attorney General Daniel Cameron as a respondent.

On appeal, Roberts argues the ALJ erred in applying the amended provisions of KRS 342.730(4) to this claim. Roberts notes the version of KRS 342.730 in effect at the time of his injury included the version of subsection (4) which was found to be unconstitutional in Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). Roberts observes it is well settled law that the rights of the parties to compensation for injuries at work become fixed and vested on the date of the injury. The law in existence at the time of injury controls the rights of the parties because the agreement to waive the employee's constitutional rights is the foundation of the workers' compensation law. Roberts maintains retroactive application of a law limiting the duration of PPD benefits impairs the obligation of the contract made at the time of the injury. Roberts contends retroactive application of a limit on the award of benefits pursuant to KRS 342.730(4) would be a retroactive application of the law to the substantive, vested rights of the injured worker, and is

therefore unconstitutional. He argues the imposition of a retroactive change to an injured workers' rights, after he has waived his constitutional jural rights, is an exercise of arbitrary power violating the Kentucky Constitution's prohibition on such an exercise.

We do not believe Roberts' constitutional issue was preserved. Although the BRC Order listed "Duration of benefits per the current iteration of KRS 342.730(4)" as a contested issue, Roberts did not specifically argue the statute is unconstitutional. Nothing in the record indicates a constitutional challenge was presented to the ALJ or that the Attorney General was provided the required notice prior to entry of the ALJ's decision. Roberts' petition for reconsideration was not provided to the Attorney General.

We note Roberts' notice of appeal filed on July 3, 2019, is the first notification to the Kentucky Attorney General. Roberts filed his brief on appeal on January 17, 2020, and served a copy of his brief on Hon. Daniel Cameron, Kentucky Attorney General, arguing the 2018 changes to KRS 342.730(4) are unconstitutional. However, the Kentucky Attorney General was never properly notified of the action as required by KRS 418.075, which provides, "In any proceeding which involves the validity of a statute, the Attorney General of the state shall, **before judgment is entered**, be served with a copy of the petition, and shall be entitled to be heard." (Emphasis added). We further note CR 24.03 states: "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General." The Kentucky Court of Appeals

in Delahanty v. Commonwealth of Kentucky, 558 S.W.3d 489 (Ky. App. 2018), stated: “Strict compliance with the notification provisions of KRS 418.075 is mandatory.”

Because we determine the constitutionality of the amended version of KRS 342.730(4) was not raised prior to the ALJ’s decision, and proper notice was not given to the Kentucky Attorney General, we affirm. Even if we deemed the Attorney General had been notified properly of the challenge to the constitutionality of this statute, 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 we would therefore be compelled to affirm.

House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) provides 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 accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, *supra*, we affirm the ALJ’s application of KRS 342.730(4) as amended in 2018. There the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has

retroactive applicability. We therefore find the limitations set forth in the amended statute govern Roberts' award.

Accordingly, the May 28, 2019 Opinion, Award and Order, and the June 18, 2019 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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