

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: May 1, 2020

CLAIM NO. 201701756 & 201602747

HOPKINS COUNTY COAL LLC

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,  
ADMINISTRATIVE LAW JUDGE

CHARLES MICHAEL SYERS  
and HON. R. ROLAND CASE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Hopkins County Coal LLC (“Hopkins County”) appeals from the June 4, 2018, Opinion, Award, and Order and the June 19, 2018, Order of Hon. R. Roland Case, Administrative Law Judge (“ALJ”).<sup>1</sup> The ALJ found Charles

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<sup>1</sup> It appears Hopkins County is a subsidiary of Alliance Coal, as most pleadings in the litigation name Alliance Coal as the defendant/employer and not Hopkins County.

Michael Syers (“Syers”) sustained a cumulative trauma lumbar injury and contracted coal workers’ pneumoconiosis (“CWP”) while in the employ of Hopkins County. Syers was awarded permanent partial disability (“PPD”) benefits for his cumulative trauma lumbar injury, retraining incentive benefits (“RIB”) for the CWP, and medical benefits. The ALJ dismissed Syers’ claims alleging work-related cumulative trauma injuries to his cervical spine and knees. PPD benefits were awarded for 425 weeks “subject to the limitations set forth at KRS 342.730(4) as amended in 1994.” Interest was assessed at the rate of 12% on all unpaid income benefits due through June 28, 2017, and 6% on all unpaid income benefits due on or after June 29, 2017.

On appeal, Hopkins County asserts the ALJ erred by subjecting Syers’ PPD benefits to the 1994 version of KRS 342.730(4). It argues the ALJ should have limited the duration of his income benefits pursuant to the 2018 version of KRS 342.730(4). Hopkins County also asserts the ALJ should have assessed 6% interest on all past due income benefits.

### **BACKGROUND**

The Form 102 for Claim No. 2016-02747, filed December 12, 2016, alleges Syers contracted work-related CWP with the last date of exposure on July 3, 2014.

The Form 101 for Claim No. 2017-01756, filed October 13, 2017, alleges Syers sustained work-related cumulative trauma injuries to his knees, elbows,

back, feet, and ankles on July 3, 2014.<sup>2</sup> By order dated July 2, 2017, the claims were consolidated.

The March 28, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: date of last exposure and physical capacity to return to the type of work performed at time of injury. Under “other contested matters” is the following: “KRS 342.732,” “[Parker] decision,” and “HB 2.”

In the June 4, 2018, decision, the ALJ found “Dr. Madden correctly indicated the plaintiff would have 6% impairment which carries a multiplication factor of .85 for a 5.1% permanent partial disability under KRS 342.730(1)(b).” Relying on Dr. Sanjay Chavda’s opinions, the ALJ found Syers was entitled “to a RIB award pursuant to KRS 342.732.” Because Syers was 63 years of age at the time of his last exposure, in lieu of the RIB award, he had the option pursuant to KRS 342.732(1)(a)7, of receiving \$144.20 per week, based upon a 25% disability rating, from the date of last exposure until he reached age 65.

Hopkins County’s petition for reconsideration contested the ALJ’s calculation of PPD benefits and also asserted the same arguments it now makes on appeal. In the June 19, 2018, Order, the ALJ corrected the award of PPD benefits and overruled Hopkins County’s petition for reconsideration concerning the applicable interest rate. The ALJ did not address Hopkins County’s argument regarding the applicability of House Bill 2. However, we note the ALJ’s order ruling on the petition

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<sup>2</sup> At the March 28, 2018, Hearing, in lieu of a separate motion to amend, Syers amended his Form 101 to include a work-related cumulative trauma injury to his neck and withdrew all injury claims except for injuries to his back, neck, and knees.

for reconsideration was entered prior to the effective date of House Bill 2, July 14, 2018.

During the 2018 legislative session, the Kentucky General Assembly passed House Bill 2 which, in part, amended KRS 342.730(4) so as to terminate income benefits “as of the date upon which the employee reached the age of seventy (70) or four (4) years after the employee’s injury or last exposure, whichever last occurs.” This bill was signed by the Governor on March 30, 2018, and KRS 342.730(4) as amended, became effective July 14, 2018.

On July 18, 2018, Hopkins County filed its notice of appeal. On September 7, 2018, in Lafarge Holcim v. James Swinford, Claim No. WC 2016-90245, 2018-CA-000414-WC (rendered September 7, 2018) (Designated To Be Published), the Kentucky Court of Appeals held that the limitations contained in the recently enacted KRS 342.730(4) do not have retroactive application. Since the retroactive effect of the newly enacted KRS 342.730(4) was one of the issues raised in this appeal and Lafarge Holcim v. James Swinford, supra, was not final, the appeal was placed in abeyance pending finality of Lafarge Holcim v. James Swinford, supra. The parties were to file periodic status reports.

On August 29, 2019, the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019) reversed the Court of Appeals determining the newly enacted KRS 342.730(4) applied retroactively and, thus, must be used to determine the duration of the claimant’s benefits. The Supreme Court remanded the claim to the ALJ to apply the time limits set out in the 2018 version of KRS 342.730(4) to Swinford’s income benefits. Holcim became final on September 24, 2019.

On February 12, 2020, this Board entered a show cause order granting the parties fifteen (15) days to show cause why the appeal should not be removed from abeyance and a briefing schedule set.

On February 27, 2020, we ordered the appeal removed from abeyance and granted Hopkins County thirty (30) days from the date of the order to file a supplemental brief. Syers was granted thirty (30) days thereafter to file a supplemental brief with Hopkins County granted ten (10) days from the date Syers filed his brief to file a reply brief, if so desired. On March 27, 2020, Hopkins County filed its brief stating it stood by its original brief to the Board. On April 23, 2020, Syers filed his brief.

### **ANALYSIS**

Because the ALJ erred in applying the tier-down provision contained in the 1994 amendment to KRS 342.730(4) and in not applying KRS 342.730(4) enacted in 2018, we vacate the duration and amount of the award of PPD benefits. Pursuant to House Bill 2, KRS 342.730(4) mandates 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 Holcim v. Swinford, *supra*, the Supreme Court determined the current version of KRS 342.730(4) has retroactive applicability decreeing as follows:

Since the newly-enacted amendment applies retroactively, it must be used to determine the duration of

Swinford's benefits. We remand this matter to the ALJ to apply the time limits set out in the 2018 amendment to KRS 342.730(4).

Whether the current version of KRS 342.730(4) has retroactive effect has been decided by our state's highest court. The record in this litigation reveals Syers' date of birth is May 15, 1951. Accordingly, the ALJ erred in not limiting the award of income benefits pursuant to KRS 342.730(4) as amended in 2018. Thus, we vacate the award of PPD benefits and remand for an amended award of PPD benefits.

Hopkins County's second argument is as follows: "The ALJ should also assess interest based upon the recent amendments to KRS 342.040." As an initial matter, we observe this Board is presented with five decisions from the Court of Appeals, three which hold that the amendment to KRS 342.040(1) (contained in House Bill 223) does not have retroactive application and two which hold the amendment has retroactive application when an award is rendered on or after June 29, 2017. 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% rate of interest was not applicable to unpaid income benefits due prior to June 29, 2017. In Parton Bros. Contracting, Inc. v. Lawson, 2018-CA-000804-WC, rendered November 15, 2019, Designated Not To Be Published, and Warrior Coal, LLC v. Martin, 2018-CA-001430-WC, rendered January 10, 2020, Designated Not To Be Published, the Court of Appeals held all income benefits awarded on or after June 29, 2017, bear 6% interest. Consequently, the Board was reversed in upholding the awards of 12% interest on 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, decreasing 12% interest is payable on all unpaid installments of income benefits due on or before June 28, 2017, and 6% interest is payable on all unpaid installments of income benefits due on or after June 29, 2017.

We choose to 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, and not prior to that date. Thus, we affirm the ALJ's award of 12% interest on all due and unpaid installments of income benefits due on or before June 28, 2017, and of 6% interest on all unpaid installments of income benefits due on or after June 29, 2017. In Lawnco, LLC v. White, Claim No. 2014-69882, rendered January 12, 2018, we held as follows:

We previously addressed this issue in Limb Walker Tree Service v. Ovens, Claim No. 201578695, Opinion rendered December 22, 2017, holding as follows:

In Stovall v. Couch, supra, the Court of Appeals resolved the very issue raised by Limb Walker on appeal. Couch was determined to be totally occupationally disabled due to coal workers' pneumoconiosis ("CWP"). The issue on appeal was whether the Board erred in awarding interest at the rate of 12% on all past due benefits. On the date of last injurious exposure to CWP the statute allowed 6% interest on unpaid benefits. However, the statute was subsequently amended effective July 15, 1982, increasing the interest rate to 12% per annum on each installment from the time it is due until paid. In determining the employer owed 6% interest on all past due installments through July 14, 1982, and 12% on all unpaid installments thereafter, the Court of Appeals concluded as follows:

On this appeal, appellants contend that KRS 342.040, governing the rate of interest on past due installments, was misapplied. On the date of last injurious exposure, that statute allowed 6% interest on such benefits. However, the provision was amended, effective July 15, 1982, increasing the rate of interest to 12% per annum on each installment *from the time it is due* until paid. To uphold the Board's award would amount to retroactive application of the amendment, appellants contend.

As this particular application of KRS 342.040 has yet to be the topic of an appellate decision, both sides in this controversy look for analogy to the case of *Ridge v. Ridge*, Ky., 572 S.W.2d 859 (1978). *Ridge* dealt with the application of an amendment to the statute governing the legal rate of interest on judgments. The Kentucky Supreme Court decided:

... to adopt the position that the rate of interest on judgments is a statutory rather than a contractual matter. We therefore hold that the increase of the legal interest rate applies prospectively to prior unsatisfied judgments, the new rate beginning with the effective date of the amendment. *Id.* at 861.

Appellants assert that, employing the logic of *Ridge*, the 12% rate of interest should begin on the effective date of the statutory amendment, July 15, 1982, and that prior to that date, interest should be 6% as per the old statute. Appellee Couch looks to the language in *Ridge*, namely that the new rate of interest “applies prospectively to prior unsatisfied judgments,” thus concluding that the rate of interest is controlled by the date of judgment and not the date of accrual of the cause of action,

and that the 12% rate in effect upon the date of judgment is applicable.

In *Campbell v. Young*, Ky., 478 S.W.2d 712, 713 (1972), the then Court of Appeals discussed the question of when interest was to begin accruing on unpaid compensation benefits. That court held that interest was due from the date *the claim for compensation was filed*. In the instant case, when Couch filed his claim, the interest rate in effect was 6% per annum. In our opinion, the plain wording of KRS 342.040 dictates that appellants may only be assessed interest on unpaid benefits at 6% prior to July 15, 1982, and at 12% thereafter. Consequently, the Board's award to the contrary and the lower court's affirmation thereof was in error.

Id. at 437-438.

The same logic applies in the case *sub judice*. Ovens' entitlement to PPD benefits vested at the time of the injury. Thus, as of the date of injury and up through June 28, 2017, Ovens is entitled to 12% interest on all past due benefits. Ovens is entitled to 6% interest on income benefits accrued from and after June 29, 2017.

...

The language contained in Section 5 of HB 223 does not provide any support for the premise that unpaid benefits due prior to June 29, 2017, bear interest at the rate of 6%. Rather, we conclude Section 5 of HB 223 denotes that any awards entered on or after June 29, 2017, shall contain a provision that any unpaid benefits generated on or after June 29, 2017, bear interest at the rate of 6% per annum. There is nothing in Section of HB 223 which mandates that income benefits due prior to June 29, 2017, bear interest at the rate of 6% per annum. More importantly, Section 5 is not contained in the actual amendment of KRS 342.020. As directed by KRS 446.080(3), no statute shall be construed to be retroactive unless expressly so declared. There is no language in the amended statute containing an express provision that the applicable interest has retroactive application.

...

Contrary to Lawncó's assertion, Stovall, *supra*, resolves the issue before us. In our view, the language contained in Section 5 of HB 223 does not compel the result Lawncó seeks, especially since the language is not in the present version of KRS 342.040. Consequently, we find no distinction between the facts in Stovall, *supra*, and the case *sub judice*.

Contrary to Hopkins County's assertion, the recently enacted House Bill 2, which became effective July 14, 2018, provides no support for its position. 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).

Notably, Section 20 of House Bill 2 directs that 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 enacted in 2017 amending KRS 342.040(1), which is set forth in Section 2 of the Act, contains no statement or provision directing the change in interest rate has retroactive application. 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 that, in all awards rendered or settlements approved on or after June 29, 2017, the interest rate on all unpaid income benefits due on or after June 29, 2017, changed to 6%.

The assertion that House Bill 2 supports the conclusion the 2017 amendment has retroactive application to unpaid income benefits due on or before July 28, 2017, has no merit, as 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 July 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 portions of the 2018 amendment to Chapter 342. Consequently, Section 5 of House Bill 223 cannot be construed as requiring a change to 6% interest 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 intended House Bill 223 to have retroactive effects, it would have so decreed as it did in Section 20 of House Bill 2. Therefore, the ALJ's determination of the applicable interest rates due on all unpaid income benefits awarded will be affirmed.

Accordingly, that portion of the June 4, 2018, Opinion, Award, and Order and the June 19, 2018, Order applying the tier-down provision contained in KRS 342.730(4) as amended in 1994 is **VACATED**. Those portions of the June 4, 2018, Opinion, Award, and Order and the June 19, 2018, Order relating to the award of 12% interest on all due and unpaid installments of income benefits due on or before June 28, 2017, and 6% per annum on such income benefits due and unpaid on or after June 29, 2017, are **AFFIRMED**. This claim is **REMANDED** to the ALJ for entry of

an amended award subjecting Syers' award to the provisions of KRS 342.730(4) which became effective July 14, 2018.

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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