Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 18, 2022

CLAIM NO. 201401039

KENTUCKY EMPLOYERS' MUTUAL
INSURANCE AUTHORITY, FORMERLY
KENTUCKY COAL WORKERS' PNEUMOCONIOSIS FUND
MARGARET P. MOVELLAN, DIRECTOR — PETITIONER

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

LENVILLE FLEMING, DECEASED
DEBRA FLEMING, INDIVIDUALLY AND
IN HER CAPACITY AS WIDOW OF LENVILLE FLEMING
AND AS EXECUTRIX AND/OR ADMINISTRATOR
OF THE ESTATE OF LENVILLE FLEMING
CAM MINING, LLC
ROCKWOOD CASUALTY INSURANCE COMPANY
and HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE — RESPONDENTS

AND

CAM MINING, LLC — PETITIONER

VS.

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HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * * *

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

STIVERS, Member. Kentucky Employers' Mutual Insurance Authority ("KEMI") seeks review of the April 22, 2022, Order of Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ") substituting Debra Fleming ("Debra"), widow of Lenville Fleming ("Fleming"), deceased, as a party and continuing payment of benefits to her pursuant to a previous settlement agreement.[1] The CALJ sustained Debra's Form 11 Request to Substitute Party and Continue Benefits and ordered her to receive the weekly benefits Fleming was to receive pursuant to a settlement agreement entered into between Fleming, Rockwood Casualty Insurance ("Rockwood") and Cam Mining, LLC ("Cam Mining") approved by Hon. R. Roland Case, Administrative Law Judge, ("ALJ Case"), on February 16, 2015. The CALJ directed Debra receive these benefits through Fleming's 70th birthday pursuant to KRS 342.730(3)(a) subject to the tier-down provision of the 1994 version of KRS 342.730(4). No Petition for Reconsideration was filed.

On appeal, KEMI argues filing the Form 11 was not the proper procedure to be utilized by Debra to recover benefits as Fleming's spouse. Rather, she should have filed a separate claim pursuant to KRS 342.750. KEMI also insists the Kentucky Coal Workers' Pneumoconiosis ("CWP") Fund only pays benefits to

[1] KEMI's predecessor, Coal Workers' Pneumoconiosis Fund, was under the direction of Margaret P. De Movellan.

coal miners and not their widows. KEMI next contends Debra is not entitled to a continuation of benefits since she was 63 years old at the time of Fleming's death. KEMI insists the 1996 version of KRS 342.730(4) directs Debra is not entitled to any benefits as the 1996 version denies benefits to surviving spouses once he/she attains the age of 60. According to KEMI, the Kentucky Supreme Court's holding in Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017) striking down the 1996 version of KRS 342.730(4), cannot be retroactively applied. KEMI also maintains the approved settlement agreement precludes reopening of the claim since Fleming waived the right to reopen. Further, KEMI insists the previously approved Form 110 cannot be re-written to extend the compensable period and the CALJ's Order erroneously combined different versions of KRS 342.730(4).

BACKGROUND

The Form 110-CWP approved by ALJ Case on February 16, 2015, reflects the parties settled Fleming's CWP claim based on a date of last exposure of March 28, 2012, under the following terms:

> $632.92 per week beginning with the date of last exposure of March 28, 2012 and continuing until Mr. Fleming reaches social security disability age on September 6, 2029. Payments shall be equally shared by the employer and the CWP Fund. Plaintiff acknowledges that the periodic payments cannot be accelerated, deferred, increased or decreased by any payee; nor shall Plaintiff have the power to sell, mortgage, encumber, or anticipate the periodic payments, or any part thereof, by assignment or otherwise.

Fleming waived his entitlement to past medical benefits, vocational rehabilitation, and right to reopen. He did not waive his right to future medical

benefits. Under the heading "Other Information," the Form 110-CWP settlement agreement provides, in relevant part, the following:

> 1) In consideration of any claim under KRS 342.732, KRS 342.730, and/or KRS 342.316 in connection with this claim for occupational lung condition/coal workers' pneumoconiosis, the Defendant and CWP Fund agree to pay and the Plaintiff agrees to accept $623.92 per week of the weekly amount is designated.
>
> 2) In consideration of a waiver of reopening under KRS 342.125 for an increase in benefits under the Act, including but not limited to KRS 342.750, KRS 342.730, KRS 342.316 or KRS 342.732 for lung disease or any new claim thereunder against this Defendant for occupational lung disease as related to this employment, the Employer and CWP Fund agree that $5.00 of the aforementioned amount is designated as consideration thereof. Without waiving any defenses available in this claim, the employer agrees to pay said amount upon the current state of the law or any changes thereto that may be deemed retroactive in nature as related to reopening of previously awarded or settled claims for occupational lung disease and additionally pays said amount for any potential filing of any new lung claim in connection with his prior employment with this Defendant in response to any change that may occur in the language of KRS Chapter 342 (including language of retroactivity) or application thereof relative to claims for occupational lung disease due to coal mining employment within this state.
>
> 3) In consideration of a waiver to any past, present or future claim for TTD in the CWP claim, the Defendant agrees to pay $1.00 per week from the total weekly amount.
>
> 4) In consideration of a waiver of vocational retraining/education benefits, Plaintiff agrees to receipt of $2.00 per week from the above proceeds.
>
> 5) In consideration for any claim under KRS Chapter 342 which has not heretofore been identified which might later arise and be claimed by claimant and/or his dependents as compensable under the Workers' Compensation Act as related to this claim for alleged

> occupational lung disease, the Defendant agrees to pay $1.00 per week of the total weekly payment.
>
> Plaintiff agrees to receipt of the above identified amounts of consideration and acknowledges by his signature that said amounts are reasonable and that said consideration is paid based upon the current state of the law any changes thereto that may be deemed retroactive in nature as it relates to reopening of previously awarded or settled claim for occupational lung disease.
>
> …

The Form 110-CWP settlement agreement was executed by Fleming, his attorney, the attorney for the CWP Fund, and the attorney for Cam Mining and Rockwood.

On February 18, 2022, Debra filed a Form 11 styled "Request to Substitute Party and Continue Benefits" which reflects Fleming died on January 31, 2022. The Form 11 lists the cause of death as follows: "heart failure/coal workers pneumoconiosis." KEMI and Rockwood are listed as the entities paying benefits. Debra requested that she be substituted as the plaintiff and the unpaid benefits her husband was to receive per the settlement agreement be paid directly to her. Attached to the Form 11 is a certified copy of the death certificate. The death certificate reveals Debra is the spouse and Fleming was pronounced dead on January 31, 2022. It also contains the following:

Immediate cause: (Final disease or condition resulting in death)	a. Congestive heart failure Due to or as a consequence of
Sequentially list conditions, if any, leading to the cause listed in line a:	b. COPD Due to or as a consequence of

Enter the underlying cause: (disease or injury that initiated the events resulting in death) LAST	c. Coal miners pneumoconiosis Due to or as a consequence of

Debra also attached her marriage license.

On February 25, 2022, the Commissioner of the Department of Workers' Claims entered an Order allowing any interested party to file a response. On March 7, 2022, KEMI filed a response objecting and primarily asserting the same arguments it puts forth on appeal.

On March 16, 2022, the CALJ entered an Order noting that to date only KEMI, formerly KCWPF, had filed a response and granted any interested party an additional 15 days to file a response. When no response was filed, the CALJ entered the April 22, 2022, Order sustaining Debra's request to be substituted as a party and continuing the payment of income benefits to her. The Order, in relevant part, reads:

> Lenville Fleming and Defendants Cam Mining, LLC, and Kentucky Coal Workers' Pneumoconiosis Fund settled this claim on February 16, 2015. The agreement provided for $632.92 per week from March 28, 2012, through September 6, 2029, to be paid equally between the Defendants.
>
> Mr. Fleming died on January 31, 2022. His widow, Debra, has filed a Form 11, Request to Substitute Party and Continue Benefits. Cam Mining, LLC, or its carrier Rockwood Casualty, did not respond to the Form 11. KCWPF responded and objected to the continuation of benefits.
>
> The CALJ sustains the Form 11 and orders benefits continued to Debra from both Defendants through Lenville's 70th birthdate under KRS 342.730(3)(a), subject to the "tier-down" provision of the 1994 version of KRS 342.730(4).

> The arguments to the contrary raised by KCWPF have been rejected in several prior cases, including the decision of the Court of Appeals in Lone Mountain Processing, Inc., v. Brewer, 2020-CA-1452, claim number 2003-68141; and by the Workers Compensation Board in B&D Mining, LLC v. Blakley, 2006-00426, and Highland Mining LLC v. Hedgepath, 2015-01592.

Subsequently, both Cam Mining and KEMI filed Notices of Appeal. Only KEMI has filed a brief. Cam Mining has not filed a brief.

On appeal, KEMI observes there are two types of survivors' claims; one created by KRS 342.730(3) and the other by KRS 342.750(1). Citing to the death certificate, KEMI argues since the injury caused Fleming's death, Debra's claim must be asserted in accordance with KRS 342.750(1). Relying upon the Supreme Court's decisions in Family Dollar v. Baytos, 525 S.W.3d 65 (Ky. 2017) and Calloway County Sheriff's Dept v. Woodall, 607 S.W.3d 557 (Ky. 2020), it argues Debra may only assert a claim for income benefits in her own right by filing a separate action. Further, KEMI insists Debra has no right of recovery against it for two reasons. First, the CWP Fund only pays benefits to coal miners and not their dependents and second the fund cannot be held liable for new claims as directed in KRS 342.732(1). It cites to the following provisions of KRS 342.1242:

> 342.1242 Kentucky coal workers' pneumoconiosis fund; liability for and manner of making payments for awards for coal workers' pneumoconiosis; assessments to finance fund; when assessments cease; distribution of excess assessments to employers; reimbursement of funding commission by Kentucky Employers' Mutual Insurance Authority.
>
> (1) There is created the Kentucky coal workers' pneumoconiosis fund which shall have one-half (½) of the liability for income benefits, including retraining benefits, **payable for claims brought under KRS**

> **342.732 for last exposure incurred on or after December 12, 1996, which are filed on or before June 30, 2017.** Income benefit payments by the Kentucky coal workers' pneumoconiosis fund shall be made contemporaneous with the payments made by the employer, **except that the employer shall make all payments due under a final award or approved settlement for any claims filed after June 30, 2017.**
>
> (2) For claims brought under KRS 342.732 for last exposure incurred on or after December 12, 1996 which are filed on or before June 30, 2017, the employer shall defend any claim brought under KRS 342.732 and upon conclusion shall seek participation in payment of the final award or settlement by the Kentucky coal workers' pneumoconiosis fund by making written request upon the director in the manner prescribed by administrative regulation to be promulgated by the commissioner of the Department of Workers' Claims.
>
> …
>
> (7) Claims for benefits by reason of the development of coal workers' pneumoconiosis shall be maintained pursuant to KRS 342.732, and the Kentucky coal workers' pneumoconiosis fund shall be liable for payment of a part of the liability **only for employees of employers** engaged in the severance or processing of coal as defined in KRS 342.0011(23)(a) and (b). (Emphasis in original).

Since the CWP Fund has no liability, the CALJ should have denied Debra's request to be substituted as a party without prejudice to her to file a new claim to recover any benefits to which she may be entitled.

Next, KEMI argues assuming, *arguendo*, Debra is entitled to income benefits pursuant to KRS 342.730(3), the CALJ's Order is contrary to the statute which provides for a 50% rate reduction and, for that reason alone, the Order is not in accordance with the Act and must be reversed.

Without conceding the applicability of KRS 342.730(3), KEMI further argues Debra is not entitled to a continuation of benefits because she was 63 years old on the date of Fleming's death. It relies upon the 1996 version of KRS 342.730(4) as interpreted by the Supreme Court in Morsey, Inc. v. Frazier, 245 S.W.3d 757 (Ky. 2008). The Supreme Court held the statute precluded the payment of Social Security benefits at the age of 60 when the wife "qualifies under 42 U.S.C § 402(e) at 60 for Social Security benefits as the [deceased widow]." As argued by KEMI, since Debra was 63 years old when Fleming died, the 1996 version of KRS 342.730(4) in effect on the date of Fleming's last exposure prohibits Debra from receiving the income benefits due Fleming pursuant to the settlement agreement.[2]

KEMI's reasoning for asserting Debra is not entitled to income benefits is that the law in effect on the date of last exposure and the executed settlement controls. It observes that Maggard v. International Harvester, 508 S.W.2d 777 (Ky. 1974) and Beth-Elkhorn Corporation v. Thomas, 404 S.W.2d 16 (Ky. 1966) mandate the law in effect on the date of the injury controls the right of the parties. Since Fleming's cause of action arose on the date of last exposure, all rights of the parties in this claim are defined by the statutory scheme in effect on that date which was the version of KRS 342.730(4) enacted in 1996. KEMI notes that on Fleming's date of last exposure, March 8, 2012, and the date the settlement agreement was approved, February 16, 2015, Morsey, Inc. v. Frazier, supra, prohibited the payment

[2] We note, as does KEMI, that KRS 342.730(4) enacted in 2018 now limits the duration of income benefits to the latter of two events, attaining the age of 70 or two years after the last injurious exposure.

of widow's benefits after the widow qualifies for Social Security benefits at age 60.[3] Since Debra was 63 years old when Fleming died, pursuant to Morsey, supra, she is not entitled to benefits. KEMI maintains the Supreme Court's holding in Parker v. Webster County Coal, LLC (Dotiki Mine), supra, striking down as unconstitutional the 1996 version of KRS 342.730(4), does not affect the applicability of the holding in Morsey.

Citing to Burns v. Level, 957 S.W.2d 218 (Ky. 1997), KEMI insists the decision in Parker, supra, declaring the 1996 version of KRS 342.730(4) unconstitutional, cannot be retroactively applied. Thus, it takes issue with the decisions of the Kentucky Court of Appeals in Lone Mountain Processing, Inc. v. Brewer, Claim No. 2020-CA-1452-WC, rendered April 16, 2021, Designated Not To Be Published, and Yamamoto FB Engineering, Inc. v. Elrod, Claim No. 2020-CA-1202, rendered August 12, 2022, Designated Not To Be Published, currently on appeal to the Supreme Court, refusing to apply Morsey and the 1996 version of KRS 342.730(4) in situations such as these. It argues that since the law in effect on the date of last exposure applies in the case *sub judice*, the holding in Parker, supra, cannot be retroactively applied to vitiate the effectiveness of the 1996 version of KRS 342.730(4).

KEMI also argues Debra cannot reopen the claim since the settlement agreement directs Fleming waived his right to reopen the claim. According to KEMI,

[3] Morsey interpreted KRS 342.730(4) as it applied to the eligibility of a surviving spouse and dependents to receive income benefits upon the death of the injured worker.

the settlement agreement clearly demonstrates Fleming waived all rights to any further claims.

KEMI also maintains the previously approved Form 110 cannot be rewritten to extend the compensable period for three additional years. KEMI observes memorandums of agreement approved by an ALJ are final judgments capable of enforcement by a circuit court under KRS 342.305. Thus, the settlement agreement approved by the CALJ is a final judgment. KEMI notes the concept of finality is supported by the principle that litigation should end when the rights of the parties have been finally determined. Turner v. Bluegrass Tire Co., 331 S.W.3d 605, 608 (Ky. 2010). The doctrine of finality precludes further litigation of issues that were decided on the merits in a final judgment. Consequently, the appellate courts cannot change the terms of the settlement. Further, it argues a settlement may not be set aside on the ground of one party's inability to correctly predict the future. KEMI notes the settlement agreement states Fleming understood there might be a "change that may occur in the language of KRS Chapter 342 (including language of retroactivity) or application thereof relative to claims for occupational lung disease due to coal mining employment within this state." KEMI asserts the approved settlement agreement carries the same full force and effect as an award, and the courts have held "KRS 342.730(3) applies with the same effect for a settlement as with an opinion and award." Thus, employees are not permitted to receive increases in income benefits allowed by a subsequent statute since the employer's liability would be increased. KEMI posits: "In cases concerning the award of survivor's benefits, the amount of which is a function of the amount of benefits which the

worker is awarded, the settlement agreement controls if there was a waiver of reopening."

Finally, KEMI complains the CALJ's Order directing Debra shall receive income benefits until she reaches the age of 70 subject to the tier-down provision combines different versions of KRS 342.730(4) as the CALJ applied the 1994 version to impose the tier-down provision. Further, the CALJ refused to apply the December 12, 1996, version invalidated by the Supreme Court in 2017 and utilized a portion of the July 14, 2018, version of KRS 342.730(3)(a) in ordering Debra's benefits terminated upon the date the injured worker would have attained the age of 70.

ANALYSIS

We disagree Baytos, supra, is applicable and Debra's sole remedy is to file a separate action pursuant to KRS 342.750. Rather, we conclude the parties are bound by the terms of the contract/agreement approved by ALJ Case. Baytos involved a completely different factual pattern than presented in the case *sub judice*. Baytos had settled his workers' compensation claim with Family Dollar for a lump sum. The settlement included separate consideration for a waiver of Baytos' future claims, including future medical expenses and a full and final waiver of any rights he may have to reopen the claim for any reason including a change of condition. Baytos' death a year later resulted from the work-related injury and two years after that his widow, Mamie, who was not a party to the settlement, filed a Motion to Reopen the claim to assert her claim for workers' compensation death benefits. The ALJ sustained the motion and awarded death benefits. This Board reversed and the

Court of Appeals reversed the Board. In affirming the Court of Appeals, the Supreme Court agreed that Mamie, as the widow, had a separate and viable claim for death benefits under KRS 342.750. However, the Supreme Court stated it was permitting an exception in this case because the widow had improperly moved to assert a claim through reopening rather than by filing a separate action. The Supreme Court directed that surviving spouses asserting claims for death benefits pursuant to KRS 342.750 must do so in a separate action. Since she was not a party to the settlement negotiations and the final approved settlement agreement did not include any reference to any future benefits to which she may be entitled, Mamie's action was viable. The Supreme Court explained:

> KRS 342.750 provides for the recovery of income benefits for the surviving spouse if the injured employee dies as a result of a work-related injury. [footnote omitted] For surviving spouses, like Mamie, with no children, the statute provides that she is entitled to fifty percent of Steven's average weekly wage during widowhood. [footnote omitted] Of course, this law makes no overt reference to how to treat these income benefits when the injured party settles his injury claim with his employer before dying from the effects of the injury.
>
> It is clear by the plain meaning of the text that income benefits deriving from KRS 342.730 belong to the injured worker. Those benefits are totally derivative from the workplace injury. This provision specifically relates to income benefits awarded to injured workers for workplace injuries. And sure enough, KRS 342.730 contemplates a surviving spouse's share of those benefits in the event the injured spouse dies for causes unrelated to the work injury but before the expiration of benefits still owed to the worker. [footnote omitted] These surviving-spouse benefits are totally and completely derivative of the injured spouse's disability benefits; any surviving spouse's share of remaining benefits is tied to whatever the worker is awarded or

> obtained through settlement with the employer. So it is easy for us to see in that context that the spouse's claim is dependent on the worker's claim. But with respect to surviving-spouse benefits stemming from a workplace injury resulting in death, we are given no such luxury.
>
> KRS 342.750 declares that if the workplace injury causes death, "income benefits *shall* be payable" to the benefit of specified persons within the statute, dependent upon the injured workers familial status. Before leaping head-first into some sort of legal fiction, we must first realize that of course a spouse's claim is not a unique and separate claim totally divorced of any other actors. For Mamie to be entitled to income benefits under the statute, Baytos must die as a result of his work-related injury. It follows, therefore, that this claim is created by *his* injury.
>
> This is consistent with the underlying goal and purpose of the Workers' Compensation Act: As a matter of quasi-contract law, the Act establishes a streamlined process for quickly aiding injured workers in exchange for the forfeiture of whatever tort claims the injured worker may have against the employer. Mamie, not unlike her role in Baytos's settlement negotiations, was not a party to this implicit agreement under the Act. Likewise, she is only entitled to any benefits at all because of Baytos's participation in this statutory agreement. [footnote omitted] Baytos's eligibility under the Act, and his subsequent injury and death, are the only reasons Mamie qualifies for any benefits under the Act whatsoever. So we reject the fantasy that Mamie has her own separate action under the Act wholly without consequence of Baytos's claim against his employer.

Id. at 68-69.

The Supreme Court noted Larson's agreed with its holding.

The Supreme Court also addressed its holding in Tackett v. Bethenergy Mines, 841 S.W.2d 177 (Ky. 1992):

> Family Dollar discounts reliance on Larson as a distracting influence on the true nature of this claim. Instead, the employer wishes us to rely upon *Tackett v. Bethenergy Mines* [footnote omitted], a case involving

> surviving spouses of former coal miners who filed for workers' compensation benefits under KRS 342.750's companion statute; KRS 342.730(3) (death resulting from non-work injury). In that case, we dismissed the claims because no benefits were due or owed to the workers themselves at the time of their deaths. [footnote omitted] This was because, "any claim which a deceased worker's estate might have derives from a valid claim by the worker." [footnote omitted] So, as Family Dollar frames the issue, for Mamie to bring a valid claim for benefits she must first prove entitlement to those benefits. And because Baytos had no benefits due to him at his death because of his fully settled claim with Family Dollar, there are no benefits to which Mamie would be entitled to spark her claim.

Id. at 71.

The Supreme Court reaffirmed its holding in Baytos in Calloway County Sheriff's Department v. Woodall, 607 S.W.3d 557 (Ky. 2020) by holding as follows:

> **1. Woodall properly filed a claim for benefits in her own right.**
>
> Procedurally, a widow is entitled to assert her claim for death benefits. In *Family Dollar v. Baytos*, we held that KRS 342.750 "create[s] a separate cause of action for [a] surviving spouse[ ] independent of the injured worker's claim." 525 S.W.3d 65, 72 (Ky. 2017). The Department attempts to distinguish *Baytos*, but any factual differences do not affect the holding that the proper way for a widow to assert her claim is "to file a claim for benefits in her own right." *Id.* Because reopening is inapplicable to this case, we need not address the parties' arguments about the retroactivity of the 2018 amendment to KRS 342.125(3).
>
> **2. KRS 342.750(1)(a) contains no temporal limitation on Woodall's receipt of income benefits.**
>
> Additionally, the Department argues that a widow cannot claim death benefits after the deceased's 425 weeks of PPD benefits have been paid in full. A related issue is whether the four-year limitation found in KRS

> 342.750(6) also applies to KRS 342.750(1)(a). In pertinent part, KRS 342.750 states as follows:
>
> If the injury causes death, income benefits shall be payable in the amount and to or for the benefit of the persons following, subject to the maximum limits specified in subsections (3) and (4) of this section:
>
> (1) (a) If there is a widow or widower and no children of the deceased, to such widow or widower 50 percent of the average weekly wage of the deceased, during widowhood or widowerhood.
>
> ....
>
> The Department again argues that the instant case is distinguishable from *Baytos*. The deceased worker, Baytos, had settled his workers' compensation injury claim with his employer for a lump sum, which he received. Baytos died the next year as a result of his work-related injury. Two years after that, Baytos's widow asserted her claim for death benefits. As noted, we determined that she was entitled to a death benefit. In the instant case, Spillman received his full 425 weeks of PPD before his death. The Department argues that because Baytos died before his 425 weeks of PPD benefits *would have* expired, Baytos's widow was entitled to death benefits while Spillman's widow was not. These limited factual distinctions, however, do not compel a different legal result. The claims of both Baytos and Spillman had been settled, paid in full, and closed.
>
> The plain language of KRS 342.750(1)(a) does not impose any temporal limitation on benefits available, and we decline to read one into it. We therefore affirm the Court of Appeals' holding regarding benefits under KRS 342.750(1)(a). The Court of Appeals affirmed the Board's holding, which had remanded to the ALJ for a determination of Woodall's eligibility for benefits under this statute.

Id. at 562-563.

The Supreme Court further held that KRS 342.750(6), in providing a four-year limitation on lump sum benefits, is constitutional.

Baytos and Calloway County Sheriff's Department v. Woodall, supra, are inapplicable as income benefits were due Fleming at the time of his death. Thus, we disagree that Debra's sole remedy is to file a separate action under KRS 342.750. We point out Fleming's death certificate does not *per se* establish that his death was work-related. Rather, the death certificate reflects congestive heart failure was the immediate cause with COPD as a contributing condition and CWP as an underlying cause. Thus, additional proof was needed to establish the applicability of KRS 342.750. In light of the fact additional benefits were to be paid to Fleming, we are unwilling to state Debra's sole avenue of relief is to file an action pursuant to KRS 342.750.

However, because of the terms of the settlement agreement, we do not need to address whether Debra's sole relief is through KRS 342.750. The parties executed a very specific and stringent settlement agreement not based upon any statutory compensatory formula. A compromise agreement was reached as there are no settlement computations set forth delineating how the parties arrived at the weekly monetary benefit and the duration of the income benefits. Additionally, nothing in Chapter 342 requires the payment of income benefits through the age the claimant reaches Social Security disability age. Fleming, and now his widow, are to be paid $632.92 per week through September 6, 2029. By agreement, Fleming nor any other payee could alter the amount or mode of payment, nor could he sell or encumber his right to those payments. The inalterability of the amount of income benefits due is very clearly spelled out within the agreement under the heading "Benefit and Settlement Information." The "Monetary Terms of Settlement"

mandates the periodic payments cannot be "accelerated, deferred, increased or decreased by **any payee**." This language evidences the parties' intent that neither Fleming nor a successor recipient of the weekly amount, in this case the widow, could alter the weekly amount. Our conclusion is reinforced by the language in numerical paragraph 5 under the heading "Other Information" which states the settlement encompasses any claim "which might later arise and be claimed by [Fleming] and/or his dependents." By implication, Cam Mining and KEMI may not alter the weekly amount. During the specified period, none of the parties, including Fleming's wife, could in any manner change the amount or mode of payment to be paid by the Defendants. As pointed out in Richey v. Perry Arnold, Inc., Claim No. 2009-CA-001954-WC, rendered January 7, 2011, Designated Not To Be Published:

> "An agreement to settle a workers' compensation claim constitutes a contract between the parties." *Whittaker v. Pollard,* 25 S.W.3d 466, 469 (Ky. 2000). Such an agreement is therefore subject to contract law and the accompanying standards of review. "The construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court." *Morganfield Nat'l Bank v. Damien Elder and Sons,* 836 S.W.2d 893, 895 (Ky. 1992).

Slip Op. at 3.

Relevant also is the case of Whittaker v. Pollard, 25 S.W.3d 466, 469 (Ky. 2000) in which the Supreme Court emphasized:

> We begin by noting that there is a strong public policy favoring the settlement of workers' compensation claims. *See Newberg v. Weaver,* Ky., 866 S.W.2d 435 (1993); *Newberg v. Sarcione,* Ky., 865 S.W.2d 317 (1993).
>
> …
>
> An agreement to settle a workers' compensation claim constitutes a contract between the parties. Once

> approved, an agreement to settle a claim becomes an award. *Stearns Coal & Lumber Co. v. Whalen,* 266 Ky. 227, 98 S.W.2d 499 (1936). Unless precluded by the terms of the underlying agreement, a settled award may be reopened pursuant to KRS 342.125.

We construe the terms of this contract/agreement as requiring the Respondents to pay a weekly amount through September 6, 2029, without alteration in the manner and amount of the weekly payment. The parties are bound by the contract/settlement agreement which became an enforceable award.

As noted by KEMI, KRS 342.265 is the proper vehicle for seeking resolution of Debra's entitlement to the remaining benefits due Fleming, and it reads as follows:

> (1) If the employee and employer and special fund or any of them reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement signed by the parties or their representatives shall be filed with the commissioner, and, if approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305. …

The above-cited section specifically applies when there exists a disagreement concerning a settlement agreement approved by an ALJ and compensation has been paid or is due in accordance therewith. Therefore, we do not have to address the applicability of Baytos or Woodall, or for that matter the provisions of KRS 342.750.

We are cognizant of the holding in Bell v. Consol of Kentucky, Inc., 294 S.W.3d 459 (Ky. App. 2009) in which the Court of Appeals found KRS 342.730(3) is applicable to settlement agreements.[4] In Bell v. Consol of Kentucky, Inc., supra, the claimant, the widow of Rodney Bell, was substituted as the real party of interest and the ALJ ordered benefits paid to her at 50% of the rate specified in the settlement agreement. However, the language in the settlement agreement in the present case is unequivocal and mandates $632.92 will be paid per week without alteration of the manner of payment and amount to be paid through September 6, 2029. In essence, Fleming and the Defendants agreed $632.92 would be paid weekly through September 6, 2029, without modification of the amount. We are cognizant of the fact Debra was not a party to the settlement agreement. That fact aside, the phrase immediately following the monetary terms of the settlement states as follows: "$632.92 per week beginning with the date of last exposure of March 28, 2012, and continuing until Mr. Fleming reaches Social Security disability age on September 6, 2029." Thus, the language setting out the monetary terms of the settlement agreement firmly demonstrates the parties intended the Defendants are to pay the same weekly amount through September 6, 2029, to Fleming and now his widow without reference to a statutory provision which would alter the weekly amount.

Of great significance is the fact that both the Supreme Court's holding in Morsey and the provisions of KRS 342.730(4) as amended in 1996 were still viable and in effect at the time this settlement agreement was reached and approved.[5] In

[4] Bell filed a workers' compensation claim for work-related hearing loss and multiple injuries.

[5] Parker was rendered in November 2017.

fact, at the time of the settlement agreement, KRS 342.730(4) previously had been declared constitutional by the Kentucky Supreme Court. This unequivocally leads to the conclusion that although the parties were aware of the holding in Morsey and the provisions of the 1996 version of KRS 342.730(4) when they entered into this settlement agreement, they intended Morsey, and KRS 342.730(4) would not apply to the settlement agreement. The terms of the settlement agreement demonstrate the parties' intent that it would not be subject to the provisions of KRS 342.730(4) as amended in 1996 and the Supreme Court's holding in Morsey.

In summary, we do not have to determine whether Baytos mandates Debra's sole remedy is to file a separate action pursuant to KRS 342.750 as we believe the terms of the settlement agreement are clear and the parties are bound by the agreement without alteration.

We also find no merit in KEMI's argument that the Kentucky CWP Fund only pays benefits to coal miners and not their widows. KRS 342.1242 directs the CWP Fund is to pay for claims brought under KRS 342.732 for last exposure incurred on or before December 12, 1996, and filed on or before June 30, 2017. Therefore, KEMI is required to make all payments pursuant to the approved settlement agreement entered into between the parties in the case *sub judice*. KEMI owed the benefits to Fleming and now owes the remaining benefits to his widow.

We decline to interpret Section 7 of KRS 342.142 as limiting KEMI's liability to solely paying employees of employers. To follow KEMI's logic, regardless of the terms of the approved settlement agreement and the applicable statutory provisions, all benefits cease at the time the employee dies. Section 7 merely directs

the CWP Fund will be liable for payment of part of the liability only for the employees of employers engaged in the severance and processing of coal. It does not state KEMI and the CWP Fund's liability ends when the employee dies. To adopt such an interpretation would violate numerous provisions of the Act. Consequently, Section 7 of the statute is not applicable to the substitution of parties when the injured coal miner is still due income benefits at the time of his/her death. The intent of the statute was to limit the CWP Fund's liability to paying claims of employees against those employers engaged in the severance and processing of coal.

We disagree with KEMI's assertion that the holding in Morsey prohibits Debra from being substituted as a party for purposes of receiving the income benefits to be paid pursuant to the settlement agreement. Relying upon the holding in Morsey and the 1996 version of KRS 342.730(4), KEMI asserts that in spite of the subsequent decision in Parker, Debra is precluded from receiving any benefits. It insists the holding in Parker striking down KRS 342.730(4) as unconstitutional is not applicable to the case *sub judice*. This same argument was addressed by the Court of Appeals in the unpublished opinion of Lone Mountain Processing, Inc. v. Brewer, supra. There, the Court of Appeals declined to apply the version of KRS 342.730(4) enacted in 1996 retroactively, holding as follows:

> Lone Mountain contends the CALJ and the Board erred by applying the current version of KRS 342.730(4) retroactively. It argues the law in effect at the time Harold's award became final governs – the version ruled unconstitutional by *Parker*, 529 S.W.3d 759. We agree it was error to apply the current version of KRS 342.730(4) retroactively. However, we disagree with Lone Mountain's position that the unconstitutional version governs. We first address the retroactivity of the current version of KRS 342.730(4).

> Because the current version of KRS 342.730(4) does not apply retroactively in this instance, we necessarily must determine which version of the statute is to be applied. In this instance we are left with two options: (1) applying the unconstitutional version in effect at the time of Harold's award; or (2) applying the most recent, prior, constitutional version – the 1994 version of the statute.
>
> Lone Mountain contends the version in effect at the time of Harold's award should apply. *See Morsey v. Frasier*, 245 S.W. 3d 757 (Ky. 2008). It argues the Supreme Court's decision in *Parker* only found unconstitutional the first sentence of the then-current version of KRS 342.730(4) – the sentence terminating **employee** benefits once he or she qualified for old-age Social Security retirement benefits. But the Court did not find unconstitutional the second sentence of that provision – the sentence relating to the termination of **spouse and/or dependent** benefits. We disagree.
>
> Termination of spousal and dependent benefits in that version of the statute was premised on the same criteria as the termination of the employee's benefits – qualification for old-age Social Security retirement benefits. The Supreme Court held that termination employee benefits based on this criterion was a violation of the Equal Protection Clause of the United States and Kentucky Constitutions. *Parker*, 529 S.W.3d at 770 ("KRS 342.730(4) violates the right to equal protection and is constitutionally infirm."). That Court made no distinction between the first and second sentences of that provision; instead it deemed KRS 342.730(4), in total, unconstitutional. We decline to draw the distinction Lone Mountain urges. (Emphasis not ours).

Id. at 2-3.

The Court of Appeals reversed and directed the ALJ to apply the tier-down provisions of the 1994 version of KRS 342.730(4). However, the application of Morsey and invocation of the 1994 version of KRS 342.730(4) is precluded by the settlement agreement in the case *sub judice*, because the parties very specifically spelled out that there would be no termination of benefits until Fleming reached the Social Security disability age on September 6, 2029. The version of KRS 342.730(4) addressed by the Morsey court dealt with a statute which specified income benefits terminate on the date the employee qualifies for normal old age Social Security retirement benefits. Morsey did not address claims pertaining to the termination of income benefits when the claimant reaches Social Security disability age as referenced in the settlement agreement. Thus, the parties clearly intended to avoid the consequences of any version of KRS 342.730(4) regarding Fleming's and his widow's entitlement to the "bargained for" benefits. We see no reason to invoke the provisions of the 1994 version of KRS 342.730(4) in the case *sub judice* nor do we conclude Morsey, regardless of the holding in Parker, is applicable because of the very specific terms of this settlement agreement.

We also disagree with KEMI's assertion that Debra could not reopen the claim since the right to reopen was waived. KEMI notes KRS 342.265(4) is the applicable vehicle through which Debra must proceed when the parties entering into an agreement approved by the ALJ thereafter disagree. The statute provides this remedy is exclusive. KEMI relies upon the provision within the settlement agreement that a waiver of reopening under KRS 342.125 for an increase in benefits under the Act is precluded, "including but not limited to KRS 342.750, KRS 342.730, KRS

342.316, or KRS 342.732." However, its argument misses the point, as Fleming waived the right to reopen to seek an increase in benefits. Here, Debra was not seeking an increase in benefits but was seeking to enforce the contract entered into between the parties by being substituted as a party to become the payee of the "bargained for" income benefits which terminate on September 6, 2029. The Motion to Reopen did not seek an increase in income benefits. Consequently, the settlement agreement did not prohibit Debra's Motion to Reopen.

That said, we agree with KEMI's assertion that the previously approved Form 110 cannot be rewritten to extend the compensable period for three additional years and the CALJ erroneously combined different provisions of KRS 342.730(4). As previously noted, the settlement agreement is a contract by which the parties are bound. Consequently, the CALJ erred in ordering Debra is entitled to benefits through Fleming's 70th birthday and the benefits are subject to the tier-down provision pursuant to the 1994 version of KRS 342.730(3)(a). The CALJ cannot expand the duration of Debra's income benefits through the date of Fleming's 70th birthday or subject her income benefits to the tier-down provisions of the 1994 version of KRS 342.730(4). We believe the settlement agreement clearly states there is to be no alteration in the mode and manner of payments pursuant to any version of KRS 342.730(4). We point out that Section 20(3)(a) and (b) of House Bill 2 effective July 14, 2018, reads as follows:

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

Subsection 4 of Section 13 is the amendment to KRS 342.730(4) requiring the termination of benefits upon the employee reaching the age of 70 or four years after the employee's injury or last exposure. KRS 342.730(4), enacted in 2018, is only applicable to claims for which the date of injury or date of last exposure occurred after December 12, 2019, and have not been finally adjudicated or are in the appellate process. Here, the settlement agreement was approved prior the effective date of the Act. Consequently, since the approved settlement agreement/ award had been fully and finally adjudicated as of February 16, 2015, the current version of KRS 342.730(4) is inapplicable to the case *sub judice*.

Further, the settlement agreement states the payments end on September 6, 2029. The death certificate reflects Fleming's date of birth date is September 6, 1962. Thus, he would attain the age of 70 on September 6, 2032. Consequently, the CALJ's award of benefits through Fleming's 70th birthday is error as the settlement agreement directs the payments cease on September 6, 2029. The provisions of the "bargained for" agreement/contract trump the applicability of KRS 342.730(4). Debra is entitled to $632.92 per week through September 6, 2029.

Accordingly, we **AFFIRM** that portion of the CALJ's April 22, 2022, Order substituting Debra as a party and directing she is entitled to $632.92 per week. However, we **VACATE** that portion of the April 22, 2022, Order finding Debra shall receive the benefits through Fleming's 70th birthday subject to the tier-down provisions of the 1994 version of KRS 342.730(4). On **REMAND**, the CALJ shall

enter an amended Order directing Debra is entitled to $632.92 per week until September 6, 2029, unaffected by any provisions of KRS 342.730.

ALL CONCUR.

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