

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 20, 2019

CLAIM NO. 201691920

KIMBERLY COFFEY

PETITIONER

VS.

**APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE**

McCREARY COUNTY FISCAL COURT and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Kimberly Coffey (“Coffey”) appeals from the August 5, 2019 Opinion, Order and Award rendered by Hon. Grant. S. Roark, Administrative Law Judge (“ALJ”) awarding her permanent total disability (“PTD”) benefits and medical benefits. The ALJ determined Coffey sustained a right foot crush injury, complex regional pain syndrome of the right lower extremity, and a psychological

condition due to a March 2, 2016 work accident. Coffey also appeals from the August 30, 2019 Order on petitions for reconsideration.

On appeal, Coffey argues the ALJ erred in applying the amended version of KRS 342.730(4), effective July 14, 2018, to her claim. She also argues the 2018 amendment to KRS 342.730(4) is unconstitutional. We determine the ALJ properly applied the 2018 revision of KRS 342.730(4) to Coffey's claim pursuant to the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37, 41-44 (Ky. 2019). We also note we cannot determine the constitutionality of a statute, and therefore affirm.

Coffey filed a Form 101 on November 27, 2018, alleging a right foot injury occurring on March 2, 2016, when a defective hydraulic lift was lowered on her foot and could not be removed for an extended period. Coffey alleged a safety violation by her employer, McCreary County Fiscal Court ("McCreary County"), pursuant to KRS 342.165(1). Subsequently, McCreary County alleged a safety violation by Coffey pursuant to KRS 342.165(1). At the time of her injury, Coffey worked as a secretary/dispatcher for McCreary County. She held concurrent employment as a bartender at the Veterans of Foreign Wars at the time of her work injury. Because the issues on appeal concern the application of the amended version of KRS 342.730(4), effective July 14, 2018, and the constitutionality of that amendment, we will not summarize the evidence submitted in this claim. Coffey, who was born in October 1963, testified by deposition on January 14, 2019, and at the final hearing held June 4, 2019.

Coffey also filed a “Notice of Constitutional Challenge” on February 26, 2019, asserting the retroactive application of House Bill 2, as well as the prior version of KRS 342.730(4), are unconstitutional.

A Benefit Review Conference was held June 4, 2019. The parties identified the following contested issues: benefits per KRS 342.730, permanent total disability, work-relatedness/causation regarding psychological condition, average weekly wage-concurrent, temporary total disability benefits, KRS 342.165 violation, return to work dates/wages, and “constitutionality of HB2-duration of benefits.”

The ALJ rendered an opinion on August 5, 2019. The ALJ determined Coffey’s pre-injury average weekly wage, she sustained a permanent total disability due to her injuries, and she sustained a work-related psychological condition. The ALJ also found McCreary County committed an intentional violation of a safety regulation by failing to maintain the hydraulic lift in fully operational condition, and failing to have it serviced and maintained. The ALJ found the violations substantially caused Coffey’s injury and that she is entitled to have her award of benefits increased by 30% pursuant to KRS 342.165(1).

The ALJ stated as follows pursuant to “HB2/Constitutionality/Duration of Benefits:”

The parties also listed as a contested issue the applicability of the changes to the duration of benefits in House Bill 2, which amended KRS 342.730 such that any income benefits cease at age 70 or after four years, whichever last occurs. Language included in that bill states that the change to the duration of benefits was made retroactive 20 claims not finalized before the effective date of July 14, 2018. Plaintiff maintains this is unconstitutional and further points out the Kentucky Court of Appeals has indicated that provision may not

be made retroactive. However, the case has been appealed to the Kentucky Supreme Court and, as such, is not final and the law currently in effect, as written, states that plaintiff's award of benefits shall cease as of age 70, and the administrative law judge so finds. The ALJ has no authority to comment on constitutional issues, so plaintiff has properly preserved that issue for appellate review.

The ALJ awarded medical benefits and PTD benefits increased by 30% beginning on March 2, 2016, "and continuing until she reaches the age 70, with interest at 12% on all past due amounts up to June 28, 2017, and at 6% on all past due amounts from June 29, 2017 up to the present"

Both parties filed petitions for reconsideration. Relevant to this appeal, Coffey argued the recently enacted version of KRS 342.730(4) has no retroactive application to her claim. She also argues the amended statute is unconstitutional. In the August 30, 2019 Order on petitions for reconsideration, the ALJ awarded temporary total disability benefits from March 3, 2016 through June 22, 2016, followed by permanent partial disability benefits from June 23, 2016 through February 26, 2017, and then PTD benefits from February 27, 2017 through the attainment of age seventy. The ALJ, in relevant part, stated as follows:

Turning to plaintiff's petition regarding the termination date for her award of benefits, the ALJ notes that the Kentucky Supreme Court has now reversed the Court of Appeals in the *LaFarge Holcim v. Swinford* claim referenced by plaintiff in her petition, and specifically concluded the newly amended KRS 342.730(4) is retroactive. As noted previously, the ALJ has no authority to address plaintiff's constitutional concerns so that question is passed for further appellate review. Plaintiff's petition requesting her benefits be extended for her lifetime rather than terminating at age 70 is, therefore, overruled.

On appeal, Coffey argues the ALJ erred in terminating her award of PTD benefits at age seventy pursuant to the recent amendment of KRS 342.730(4), effective July 14, 2018. Coffey argues the age limitation contained in the recently enacted KRS 342.730(4) is unconstitutional and she is entitled to an award of lifetime PTD benefits.

House Bill 2, effective July 14, 2018, 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 Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. However, the Court declined to address the constitutionality of the amended version of KRS 342.730(4) since it had not been properly raised as an issue before the Court and the Attorney General had not been timely notified of a constitutional challenge. Id. at 44. We find the ALJ properly applied the amended version of KRS 342.730(4), effective July 14, 2018, to terminate Coffey's benefits at age seventy.

We also note Coffey has challenged the constitutionality of the revised version of KRS 342.730(4), effective July 14, 2018. This Board, as an administrative tribunal, cannot determine the constitutionality of a statute. Blue Diamond Coal

Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945); *See also* Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011); Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 752 (Ky. 2011). Because this Board has no authority or jurisdiction to reverse rulings of the Kentucky courts, we can render no determination on this issue, and we are compelled to affirm.

Accordingly, the August 5, 2019 Opinion, Order and Award, and the August 30, 2019 Order on petitions for reconsideration rendered by Hon. Grant. S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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