

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 12, 2018

CLAIM NO. 201469882

LAWNCO, LLC

PETITIONER

VS.

APPEAL FROM HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

BRYANT WHITE
and HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

STIVERS, Member. Lawnco, LLC ("Lawnco") seeks review of the August 21, 2017, Opinion, Order, and Award of Hon. Grant Roark, Administrative Law Judge ("ALJ"), finding Bryant White's ("White") bilateral knee problems work-related and his medical treatment including surgeries to be reasonable and necessary treatment of the work injuries and thus compensable. The ALJ also found White sustained a 28%

impairment rating as a result of the injuries and awarded benefits enhanced pursuant to KRS 342.730(1)(c)1. The language at issue in the Opinion, Order, and Award reads as follows:

For permanent, partial disability, plaintiff shall receive from the defendant the sum of \$697.70 per week beginning May 15, 2014 and continuing for 425 weeks thereafter except that such PPD benefits shall be suspended during any intervening periods of TTD paid, and with interest at 12% on all past due amounts up to June 28, 2017 and 6% beginning June 29, 2017.

Lawnco also appeals from the September 21, 2017, Order ruling on the petitions for reconsideration filed by the parties.

On appeal, Lawnco challenges the ALJ's award of 12% interest on all past due income benefits prior to June 29, 2017, and the award of 6% interest on all unpaid income benefits due from and after June 29, 2017. Lawnco's challenge to the ALJ's decision is two-pronged. First, it contends the ALJ misapplied KRS 342.040 by failing to award interest at the rate of 6% on all past due benefits. House Bill 223 ("HB 223"), enacted by the General Assembly effective June 29, 2017, changed the legal rate of interest from 12% per annum to 6% per annum. Lawnco cites to the language in Section 5 of HB 223 which reads as follows:

Section 5. Section 2 of this Act shall apply to all worker's compensation orders entered or settlements approved on or after the effective date of this Act.

Lawnco maintains that although the above language does not appear in the statute, it demonstrates the intent of the amendment; thus, the ALJ's interpretation ignores Section 5 of HB 223. Lawnco contends the statute applies to all awards of worker's compensation benefits entered on or after June 29, 2017. It maintains the ALJ's fragmentary application of post-judgment interest of both 12% and 6% is an "absurd, unreasonable, and ineffectual result" prohibited by the applicable case law, as it requires "separate calculations for application of separate interest rates under a singular award or order." Lawnco posits the simple, effectual, and reasonable result is that interest owed on all past due and unpaid income benefits is 6% per annum since the award was entered after June 29, 2017.

In anticipation of White relying on Stovall v. Couch, 658 S.W.2d 437 (Ky. App. 1983), Lawnco contends the ruling in Stovall has no relevance, as the General Assembly in 1982 chose not to include the language found in Section 5 of the 2017 amendment in the 1982 statute changing the interest rate on past due and unpaid benefits to 12%.

Lawnco also argues the amendment is remedial in nature and, therefore, retroactive. It relies in part upon Peabody Coal Co. v. Gossett, 819 S.W.2d 33 (Ky. 1991) wherein the Kentucky Supreme Court determined the 1987 amendment to KRS 342.125 relating to reopenings was remedial in nature and applied to awards entered prior to October 26, 1987, the effective date of the amendment. Lawnco contends the reduction in the interest rate is a similar statutory modification as it was enacted to enforce "an already vested right of an award while not affecting any of the substantive evidence or legal practice that forms the basis of an award." It insists the amendment did not take away a vested right but operates to further the statutory purpose of awarding a fair interest rate on past due benefits. In Lawnco's view, the current amendment addressed an outdated interest rate without altering White's vested right to income benefits.

Lawnco cites to the two-pronged inquiry set forth in Kentucky Ins. Guar. Ass'n v. Jeffers, 13 S.W.3d 606 (Ky. 2000) to be utilized in determining whether the statute is remedial and has retroactive application. Lawnco asserts that in the case *sub judice*, the answers to both questions reveal the statute is remedial and has retroactive effect. Lawnco notes the Legislature also changed the interest rate

for civil judgments set forth in KRS 360.040 from 12% to 6% and amended KRS 360.010, the Kentucky Usury Statute, to change the legal rate of interest from 12% to 8%. In light of those changes, Lawncó asserts as follows:

Certainly, it was not the intent of the Legislature for claimants to received [sic] and employer [sic] to have [sic] pay an interest rate of 50% more than the current Usury rate, and in direction violation the very statute they just amended. Application of the 12% interest to past due benefits owed before June 28, 2017 would produce that very result and violate the State's own Usury rate.

Lawncó cites the treasury rates in effect in 1982 when the interest rate was changed from 6% to 12% as well as the treasury rates in effect prior to and at the time the statute was amended in 2017, none of which is in evidence.

Finally, attached to Lawncó's brief is a two-page document styled "Local Mandate Fiscal Impact Estimate, Kentucky Legislative Research Commission, 2017 Regular Session" which, with respect to the amendment of KRS 342.020, reads as follows:

If a local government is a self-insured employer for workers' compensation purposes and pays its own claims, the provisions would reduce the amounts of past due workers' compensation benefits owed to an injured worker because any interest on those benefits would be

calculated at a reduced interest rate. For example, if \$1,000 in past due benefits is owed, and they are one year behind in payment, interest would be \$120 under the current law only \$60 under HB 223 GA.

Based on the above, Lawnco contends the intent of the Legislature in amending KRS 342.020 is plain and it owes 6% on all past due and unpaid income benefits. We disagree and affirm the ALJ's decision on this issue.

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.

In Hamilton v. Desparado Fuels, Inc., 868 S.W.2d 95, 97 (Ky. 1993), the Supreme Court instructed:

Accordingly, we believe that what constitutes an authorized attorney's fee for prosecuting a claim for those particular benefits also should be determined by the law in effect on the date of the injury. A contract that provides otherwise is void. KRS 342.320(2).

KRS 446.080(1) provides that statutes are to be liberally construed in order to promote their objectives and the legislative intent, and KRS 446.080(3) provides that no statute is to be applied retroactively absent an express legislative directive. In *Peach v. 21 Brands Distillery*, Ky. App., 580 S.W.2d 235 (1979), the court emphasized that the rule against the retroactive application of statutes should be strictly construed. Particularly where a statute creates new rights or duties, it should be presumed that the legislature intended for the statute's application to be prospective only. The 1990

amendment to KRS 342.320(1) exposes injured workers to liability for substantially greater attorney's fees in relation to the size of their awards than was authorized at the time the maximum amount of the award was fixed. We find no indication, whatever, that the legislature intended for the 1990 amendment to KRS 342.320 to apply retrospectively to awards of attorney's fees relative to injuries which occurred before its effective date.

As we find no indication, express or implied, the legislature desired the recent amendment to have retroactive effect, the decision of the ALJ as to the applicable interest rate will be affirmed.

In addressing Lawncó's arguments on appeal, we first note the change in interest rate effective June 29, 2017, was not made a contested issue before the ALJ. The first time the applicable interest rate was raised as an issue was in Lawncó's Petition for Reconsideration with the amended statute attached. Lawncó did not introduce appendix "Exhibit H" attached to its brief styled "Local Mandate Fiscal Impact Estimate, Kentucky Legislative Research Commission, 2017 Regular Session" during the proceedings before the ALJ. Further, Lawncó did not provide a copy of HB 223 amending KRS 342.040, KRS 360.010,

and KRS 360.040. Nonetheless, we will address all arguments raised by Lawnc0.

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.

Further, we find nothing in the "Local Mandate Fiscal Impact Estimate, Kentucky Legislative Research Commission, 2017 Regular Session" indicating the statute is intended to have retroactive application to all income benefits owed prior to June 29, 2017. The relevant portion of that document provides an example of how the change in

interest rate will affect the interest rate on past due benefits owed. It does not state the change in the interest rate will apply to already vested income benefits. Absent such language, we must assume the example applied to the income benefits owed prospectively. More importantly, there is no provision in KRS 342.040 indicating the change in interest rate would apply to benefits owed prior to June 29, 2017. As previously noted, KRS 446.080 requires an express provision of retroactive effect which is missing from the amendment to KRS 342.020. Furthermore, the document attached as "Exhibit H" to Lawnco's brief is a memorandum from a staff member with the Legislative Research Commission. It does not reflect legislative intent.

Lawnco argues the statute should be interpreted in a manner that avoids an absurd or unreasonable result. However, that argument cuts both ways, as Lawnco's interpretation of the statute would require an award entered on June 28, 2017, to direct all unpaid benefits bear interest at 12% per annum. However, the next day, the ALJ would then be required to reduce the interest on all unpaid benefits to 6% per annum. This would be an absurd and unreasonable result.

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*.

We also find no merit in Lawncó's assertion the amendment to KRS 342.040 is remedial. Peabody Coal Co. v. Gossett, supra, relied upon by Lawncó, is not insightful as the Supreme Court merely determined the 1987 amendment to KRS 342.125 relating to reopenings applied to awards entered before October 26, 1987, the effective date of the amendment. Peabody Coal Co. v. Gossett, supra, did not address a change in income benefits or the interest rate to be paid on those benefits.

In Kentucky Ins. Guar. Ass'n v. Jeffers, supra, the Supreme Court provided the following guidance for determining whether a statute was remedial and, thus, to be applied retroactively:

Thus, the judicial determination of whether a statutory amendment should be applied retroactively involves a two-step inquiry: (1) Is the amendment limited to the furtherance, facilitation, improvement, etc., of an existing remedy; and (2) If so, does it

impair a vested right. If the statute in question only serves to facilitate the remedy, and if no vested right is impaired, the amendment in question is then properly applied to preexisting unresolved claims if such application is consistent with the evident purpose of the statutory scheme.

Id. at 610.

The answer to the first question in this case is negative, as the amendment does not further, facilitate, or improve an existing remedy. Rather, it changes the interest rate on all benefits due and owing prior to June 28, 2017. Consequently, retroactivity would impair and carve into an existing remedy. As we noted in Limb Walker Tree Service v. Ovens, supra, a worker's entitlement to income benefits vests at the time of the injury. Pursuant to Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009), absent extraordinary circumstances, income benefits vest at the time of the injury. Thus, a change in the interest rate to be paid on the past due income benefits due prior to the effective date of the amendment adversely effects an injured worker's remedy by decreasing the interest on past due benefits.

Concerning Lawnco's reference to the amendments of KRS 360.010 and KRS 360.040, we believe there is a clear

distinction between the amendments of those statutes when compared to the amendment of KRS 342.040.

KRS 360.010 changes the legal rate of interest as of June 29, 2017. It does not attempt to change the interest rate prior to that. Further, the amendment to KRS 360.040 indicates that judgments entered on or after June 29, 2017, bear interest at the legal rate of 6%. As a general rule, a judgment for monetary damages states interest is to be paid from the date of judgment and not from the date of the successful party's injury. Therefore, the only interest due from and after the date of judgment is affected.

The second question put forth in Kentucky Ins. Guar. Ass'n v. Jeffers, supra, asks whether retroactivity of KRS 342.040 impairs a vested right. The answer is unquestionably "yes" as the impaired worker loses 6% interest on income benefits to which he is entitled as those benefits vest at the time of the injury. In fact, the interest to which the injured worker is entitled is cut in half should we determine retroactivity is appropriate. In any case, a 50% reduction in interest to be paid on past due income benefits is an impairment of a vested right. Applying the test in Kentucky Ins. Guar. Ass'n v. Jeffers, supra, to the facts in the case *sub judice* leads to the

conclusion retroactivity of the statute does not serve to facilitate an existing remedy. Rather, retroactivity impairs the worker's remedy while also taking away a vested right to interest. The amendment to KRS 342.040 is not remedial.

Since the "Local Mandate Fiscal Impact Estimate, Kentucky Legislative Research Commission, 2017 Regular Session" attached as "Exhibit H" to Lawnco's brief was not in evidence before the ALJ and was improperly introduced by Lawnco in its brief, we order it be stricken from the brief once the appellate process has been exhausted. As the document was not introduced before the ALJ it cannot be introduced for the first time on appeal.

Accordingly, the August 21, 2017, Opinion, Order, and Award and the September 21, 2017, Order ruling on Lawnco's Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON THOMAS EDELEN
1315 HERR LN STE 210
LOUISVILLE KY 40222

COUNSEL FOR RESPONDENT:

HON STEPHANIE WOLFINBARGER
640 S FOURTH ST STE 400
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON GRANT ROARK
657 CHAMBERLIN AVE
FRANKFORT KY 40601