

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2020

CLAIM NO. 201900183, 201792247 & 201776944

LEE HOWARD

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

STERICYCLE
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Lee Howard (“Howard”) seeks review of the December 13, 2019, Opinion, Award, and Order of Hon. John B. Coleman, Administrative Law Judge (“ALJ”) awarding income and medical benefits for work-related injuries to Howard’s shoulders while in the employ of Stericycle. The awards of income benefits were subject to KRS 342.730(4) as amended in House Bill 2, enacted in 2018. Consequently, Howard was awarded permanent partial disability (“PPD”) benefits in

both claims payable through June 1, 2023. The ALJ dismissed Howard's claim for an alleged left shoulder cumulative trauma injury manifesting on April 20, 2018. Howard also appeals from the January 16, 2020, Order ruling on his petition for reconsideration.

On appeal, Howard challenges the constitutionality of retroactive provision of KRS 342.730(4) set forth in House Bill 2, which became effective on July 14, 2018.

BACKGROUND

On February 15, 2019, Howard filed three Forms 101 alleging a right shoulder injury occurring on February 23, 2017, (Claim No. 2017-92247), a left shoulder injury occurring on June 22, 2017, (Claim No. 2017-76944), and a cumulative trauma left shoulder injury manifesting on April 20, 2018, (Claim No. 2019-00183). The claims were subsequently consolidated by the ALJ.

The September 11, 2019, Benefit Review Conference Order and Memorandum reflects the parties stipulated Howard sustained injuries on the alleged dates, and the amount of temporary total disability ("TTD") benefits and medical benefits paid. The contested issues were benefits per KRS 342.730, AWW, and unpaid or contested medical expenses. Under the heading of "Other" is "proper use of AMA Guides/duration of benefits, constitutionality of HB2 version of KRS 342.730(4)." By Order dated September 20, 2019, the ALJ included as a contested issue "appropriate temporary total disability and credit for temporary total disability benefits paid."

In the December 13, 2019, Opinion, Award, and Order, relying upon the impairment rating of Dr. Jules Barefoot, the ALJ determined Howard retained a

13% impairment rating as a result of his right shoulder injury. The ALJ found the three multiplier appropriate and because of Howard's age, his income benefits were enhanced by a total factor of 3.6 pursuant to KRS 342.730(1)(c)1 and 3. The ALJ also awarded TTD benefits from February 24, 2017, through April 16, 2017, and again from November 8, 2018, through April 12, 2019. Relying upon the opinion of Dr. Barefoot, the ALJ found Howard's left shoulder injury resulted in a 17% impairment rating. The ALJ again concluded the three multiplier set forth in KRS 342.730(1)(c)1 was appropriate and because of Howard's age, his income benefits were enhanced by a 3.6 factor pursuant to KRS 342.730(1)(c)1 and (1)(c)3. TTD benefits were awarded from June 22, 2017, through November 7, 2018. Pursuant to KRS 342.730(7), as amended in 2018, Stericycle received a credit for wages paid against the TTD benefits awarded. As previously noted, pursuant to KRS 342.730(4), both awards were payable through June 1, 2023.

Howard's petition for reconsideration requested the ALJ correct a typographical error in the award of TTD benefits. Howard stated he was preserving for appellate purposes, the duration of the award of PPD benefits. By Order dated January 16, 2020, the ALJ corrected the award of TTD benefits, but left the remainder of the decision unaltered.

Howard filed a Notice of Appeal on January 10, 2020. At that time, the ALJ had not ruled on Howard's petition for reconsideration filed on December 27, 2019. Thus, the ALJ had lost jurisdiction to rule on the petition for reconsideration. By Order dated January 15, 2020, the appeal was placed in abeyance and the claim remanded to the ALJ for entry of an order ruling on the petition for reconsideration.

Upon entry of the January 16, 2020, Order, by order dated February 5, 2020, this Board removed the appeal from abeyance and set a briefing schedule.

On appeal, Howard asserts the retroactive application of KRS 342.730(4) as amended in 2018 by House Bill 2 is unconstitutional. Howard notes Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017), declared the 1996 version of KRS 342.730(4) unconstitutional. Howard contends the version of KRS 342.730(4), declared unconstitutional, does not state the remainder of the statute is deemed null and void if one subsection of the statute is deemed unconstitutional. Therefore, Howard maintains the remainder of KRS 342.730 is capable of standing alone and being executed without subsection 4. Howard argues the amended version of KRS 342.730(4), which became effective July 14, 2018, causes disparate treatment of Kentucky's injured workers without reasonable justification and violates the equal protection clause of the Constitution.

Howard asserts Kentucky courts have consistently held the statute in effect at the time of the claimant's work injury is deemed to control. He also asserts there is no dispute the rights of the parties become fixed and vested on the date of injury. Thus, in Howard's view, applying legislative changes retroactively to a contract in derogation of a party's rights violates the contracts clause of the United States and Kentucky Constitutions. Further, retroactive application of a law limiting the duration of income benefits violates the equal protection clause of the Kentucky Constitution. Howards seeks reversal and remand for an award of 425 weeks of PPD benefits for each injury.

ANALYSIS

The ALJ correctly determined KRS 342.730(4) which was amended by House Bill 2 and became effective on July 14, 2018, applies to Howard's award. Pursuant to House Bill 2, signed by the Governor on March 30, 2018, and 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, 581 S.W.3d 37, 44 (Ky. 2019), the Kentucky Supreme Court determined the amended version of KRS 342.730(4) has retroactive application, declaring 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).

Thus, the ALJ was required to apply KRS 342.730(4), as amended in 2018, since the Supreme Court has determined the statute has retroactive application. The record reveals Howard's date of birth is May 15, 1951. Accordingly, the ALJ correctly limited Howard's award of PPD benefits pursuant to KRS 342.730(4).

Howard contends retroactive application of the amended version of KRS 342.730(4) violates both the United States and Kentucky Constitutions. The Board, as an administrative tribunal, has no jurisdiction to rule on the constitutionality

of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945).¹ Consequently, we are without authority to render a decision based upon Howard's sole argument on appeal. Thus, we must affirm on this issue.

Accordingly, the December 13, 2019, Opinion, Award, and Order and the January 16, 2020, Order of the Administrative Law Judge are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

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

COUNSEL FOR RESPONDENT:

HON JO ALICE VAN NAGELL **LMS**
300 E MAIN ST STE 400
LEXINGTON KY 40507

ADMINISTRATIVE LAW JUDGE:

HON JOHN B COLEMAN **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

¹ We question whether the constitutionality of KRS 342.730(4) was properly preserved for review on appeal. Although the parties listed duration of benefits as a contested issue, we note KRS 418.075 requires that notice be provided to the Attorney General in any proceeding which involves the constitutionality of a statute. After reviewing the record, we can find no indication notice of such a challenge was ever given to the Attorney General by Howard.