

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2020

CLAIM NO. 201701965, 201701964, & 201701961

LINDA WRIGHT

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

GENERAL ELECTRIC COMPANY and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

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

ALVEY, Chairman. Linda Wright (“Wright”) appeals from the Opinion, Order, and Award rendered August 24, 2018, and the September 17, 2018 order on her petition for reconsideration issued by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits for a right ring finger injury, and medical benefits for right and left ring finger injuries. The ALJ found Wright has no

impairment relating to her left ring finger injury. The ALJ determined Wright does not have the physical capacity to return to work at General Electric Company (“GE”), and enhanced the award of PPD benefits by the 3.6 multiplier contained in KRS 342.730(1)(c)1 based upon her age.

On appeal, Wright initially argued the amended version of KRS 342.730(4) effective July 14, 2018 is not applicable to her case. In her brief filed January 3, 2020, Wright argues the changes to KRS 342.730(4), effective July 14, 2018, are unconstitutional, and she should receive PPD benefits for 425 weeks. We note that Wright did not raise the constitutionality of the amended version of KRS 342.730(4), effective July 14, 2018, before the ALJ, and did not properly notify the Kentucky Attorney General as required by KRS 418.075. The issue was not raised until Wright argued it in her brief filed on January 3, 2020. We further note the ALJ properly determined that changes to KRS 342.730(4), effective July 14, 2018, are applicable, in accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). Therefore, we affirm.

Wright filed three claims alleging injuries while working for GE. In the first Form 101 filed on November 17, 2017, Wright alleged a hand injury caused by cumulative trauma she sustained at GE on December 16, 2015. She did not designate which hand. In a second Form 101 filed on November 17, 2017, Wright alleged a hand injury caused by cumulative trauma she sustained while working at GE on November 17, 2016. Again, she did not designate which hand was injured. Wright filed a third Form 101 on November 17, 2017, again alleging she had

sustained a hand injury on December 12, 2016, and did not designate which hand was injured.

The ALJ approved a Form 110-I settlement agreement on July 9, 2018 for the injury Wright allegedly sustained on December 16, 2015. The claim was settled for a lump sum of \$1,500.00, and contained waivers, or buyouts, of all income benefits, past medical benefits, future medical benefits, vocational rehabilitation benefits, waiver of right to reopen, and dismissal of the claim with prejudice. The lump sum settlement was apportioned between the waivers to provide consideration for each.

A Benefit Review Conference was held on June 25, 2018 regarding the remaining two claims. The issues preserved for determination included benefits per KRS 342.730, work-relatedness/causation, unpaid/contested medical expenses, injury as defined by the Act, credit for unemployment benefits, TTD (overpayment as to duration and underpayment as to rate), permanent total disability benefits, application of KRS 342.730(4), and medical expenses. A hearing was scheduled for June 25, 2018. The constitutionality of the amended version of KRS 342.730(4), effective July 14, 2018, was never raised as an issue before the ALJ.

The ALJ rendered her decision on August 24, 2018. She determined Wright sustained right and left ring finger injuries. Relying upon the opinion of Dr. Thomas Gabriel, who assessed a 1% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, the ALJ awarded PPD benefits for Wright's right ring finger injury. She found that although Wright sustained a left ring finger injury, she did not have

an impairment rating for that condition. The ALJ also determined Wright does not retain the capacity to return to the work she was performing at the time of the injury. The ALJ awarded PPD benefits based upon the 1% impairment rating, at the rate of \$8.46 per week, after application of the three multiplier contained in KRS 342.730(1)(c)1. The ALJ awarded TTD benefits at a rate of \$433.72 from March 2, 2017 through October 12, 2017. She acknowledged GE had actually paid TTD benefits through October 25, 2017, and was entitled to a credit for the overpayment as to duration. The ALJ also determined GE had only paid TTD benefits at the rate of \$415.72 per week, therefore there was an underpayment to which Wright was entitled. The ALJ also awarded 12% interest on any unpaid and owing benefits through June 28, 2017, and 6% on any unpaid amounts thereafter. Finally, the ALJ stated all income benefits would cease on Wright's seventieth birthday, or four years after the date of injury, whichever last occurs.

GE filed a petition for reconsideration requesting a modification of the language pertaining to the applicability of the version of KRS 342.730(4) effective July 14, 2018. Wright filed a petition for reconsideration arguing she is entitled to a 3.6 multiplier on the PPD award, based upon her age, pursuant to KRS 342.730(1)(c)1.

The ALJ granted both petitions. She included modified language regarding the application of KRS 342.730(4). She also amended the award of PPD benefits to include the 3.6 multiplier, thus changing the award to \$10.15 per week.

Wright filed a notice of appeal from the ALJ's August 24, 2018 decision, and from the September 13, 2018 order on reconsideration. In her brief

filed November 12, 2018, Wright argued the change to KRS 342.730(4), amended effective July 14, 2018, was not applicable to this claim. She cited to the holding by the Kentucky Court of Appeals in its decision rendered in Lafarge Holcim v. James Swinford, Claim Number 2016-90245, 2018-CA-000414-WC (rendered September 7, 2018). The decision in that case was later reversed by the Kentucky Supreme Court.

Wright filed a supplemental brief on January 3, 2020, arguing 2018 changes to KRS 342.730(4) are unconstitutional. GE argues this issue was not properly preserved. It argues the issue was never raised until Wright filed her brief on January 3, 2020. Our review of the records does not reveal the constitutionality of the version of KRS 342.730(4), effective July 14, 2018, was ever raised or preserved. We note Wright served a copy of her brief on Hon. Daniel Cameron, Kentucky Attorney General. However, the Kentucky Attorney General was never properly notified of the action as required by KRS 418.075; therefore, we determine that issue was not properly preserved.

We note CR 24.03 states: “When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General.” This was also noted in Delahanty v. Commonwealth of Kentucky, 558 S.W.3d 489 (Ky. App. 2018), where the Kentucky Court of Appeals stated: “Strict compliance with the notification provisions of KRS 418.075 is mandatory.”

Because we determine the constitutionality of the amended version of KRS 342.730(4) was never previously raised, and the Kentucky Attorney General

was not properly notified, we affirm. Even if we deemed the Kentucky Attorney General had been properly notified of the constitutionality of this statute, this Board, as an administrative tribunal, has no jurisdiction to make a determination on this issue. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945), and we would therefore be compelled to affirm.

Regarding Wright's argument in her November 12, 2018 brief, we note that 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. Because the Kentucky Supreme Court has determined the newly enacted amendment applies retroactively, we affirm the ALJ's decision.

Accordingly, the Opinion, Order, and Award rendered August 24, 2018, and the September 17, 2018 order on Wright's petition for reconsideration issued by Hon Monica Rice-Smith, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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