

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 18, 2020

CLAIM NO. 201670744

MARIANNE HEARN

PETITIONER

VS.

APPEAL FROM HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

ELDER BEERMAN
and HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Marianne Hearn (“Hearn”) seeks review of the April 30, 2018, Opinion, Order, and Award of Hon. Richard E. Neal, Administrative Law Judge (“ALJ”). The ALJ found Hearn sustained a work-related right hip injury on August 29, 2016, while in the employ of Elder Beerman, and awarded permanent partial

disability (“PPD”) and medical benefits.¹ The ALJ awarded PPD benefits for 425 weeks. Hearn also appeals from the July 26, 2018, Opinion, Award, and Order in which the ALJ ordered Hearn’s “PPD benefits are subject to the newly amended version of KRS 342.730(4), which became effective July 14, 2018.”

On appeal, Hearn challenges the decision on two grounds. Hearn first asserts the ALJ incorrectly applied KRS 342.730(4), enacted in 2018 which became effective July 14, 2018, to her award of income benefits. Hearn also argues the same version of KRS 342.730(4) retroactively terminating her benefits at age 70 is unconstitutional. We affirm.

BACKGROUND

The Form 101 alleges Hearn sustained an August 29, 2016, work injury while in the employ of Elder Beerman when she slipped and fell on a wet floor that had just been mopped. As a result, Hearn sustained multiple fractures in the pelvic region and ultimately underwent right hip replacement surgery on November 17, 2016. The ALJ determined Hearn has a 20% permanent impairment rating due to the work injury.

The award of PPD benefits for 425 weeks was unenhanced by any multipliers. In the July 26, 2018, Opinion, Award, and Order ruling on Elder Beerman’s petition for reconsideration, the ALJ amended his calculation of Hearn’s average weekly wage and also found KRS 342.730(4), which became effective July 14,

¹ In his decision, the ALJ noted the parties stipulated TTD benefits were paid from August 30, 2016, through January 16, 2017. The award of PPD benefits was suspended during any intervening period of TTD payments as set forth in the stipulation.

2018, applied to the award of PPD benefits. Therefore, Hearn's benefits terminated upon her attaining the age of 70. Hearn timely appealed.

Because the issue of the retroactive application of KRS 342.730(4) was pending on appeal and there were inconsistent decisions from the Kentucky Court of Appeals, both of which were not final, in a December 7, 2018, Order, the Board removed the appeal from submission and placed the appeal in abeyance until Lafarge Holcim v. James Swinford, 2018-CA-000414-WC, pending in the Kentucky Supreme Court was finally decided.

On February 12, 2020, the Board entered an Order noting Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019) became final on September 24, 2019. The parties were granted fifteen days from the date of the order to show cause why the appeal should not be removed from abeyance and a supplemental briefing schedule set.

Elder Beerman subsequently filed a motion representing that the parties were discussing settlement and requested the appeal remain in abeyance to determine whether a settlement could be reached. Elder Beerman sought additional time after the initial thirty days in which to attempt settlement. On July 2, 2020, the Board entered an Order granting the parties fifteen days from the date of the order to show cause why the appeal should not be removed from abeyance and briefing schedule set. That motion was sustained and the parties were given forty-five (45) additional days to accomplish a settlement. Settlement has not been reached.

On September 18, 2020, the Board ordered the appeal be removed from abeyance and the appeal submitted for a decision.

In arguing KRS 342.730(4) which became effective July 14, 2018, does not have retroactive application, Hearn relies upon the Court of Appeals' decision in Holcim v. Swinford, supra, rendered September 7, 2018. However, we note the Kentucky Supreme Court subsequently reversed the decision by the Court of Appeals.

Hearn next argues the limitation of benefits is unconstitutional relying upon Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). Hearn also relies upon the Court of Appeals' decision in Holcim v. Swinford, supra.

ANALYSIS

The ALJ correctly determined KRS 342.730(4), as amended, which became effective on July 14, 2018, applies to Hearn's award of PPD benefits. 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, supra, the Supreme Court determined the amended version of KRS 342.730(4) has retroactive applicability and, in doing so, opined as follows:

Lafarge also asserts that the Court of Appeals erred in addressing the retroactivity of KRS 342.730(4) at all - and, in the alternative, in holding that the statute is not retroactive. For the following reasons, while we hold the Court of Appeals was correct in addressing the issue, we reverse its holding that the statute is not retroactive.

The ALJ acknowledged this Court's opinion in *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017), in which we found the then-current version of KRS 342.730(4) unconstitutional on equal protection grounds. Since a portion of the statute had been ruled unconstitutional, the ALJ applied an earlier version of the statute which included a tier system. On appeal to the Workers' Compensation Board, Swinford argued he should receive the full 425-week award without the tier system from the previous version of the statute utilized by the ALJ. Lafarge argued the award should state that benefits should be payable to Swinford "for so long as he is eligible to receive them in accordance with KRS 342.730(4)." Lafarge noted that there were legislative efforts underway to re-examine the duration of benefits payable to older claimants under the Workers' Compensation Act.

The Board held that Swinford was entitled to the full 425-week period and Swinford did not pursue further appeal. Lafarge appealed to the Court of Appeals on this issue (along with the previously-discussed issue concerning Swinford's pre-existing condition). Lafarge pointed out that proposed legislation pending before the Kentucky General Assembly may further amend KRS 342.730. While the appeal was pending before the Court of Appeals, the amendment became effective. The amended version of KRS 342.730(4) reads:

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 determining which version of the statute to apply, the Court of Appeals discussed whether the statute was retroactive, and held that it was not. Therefore, it applied the statute in force at the time of Swinford's injury

after severing the portion this Court had held unconstitutional. Based on that statute, it held that Swinford was entitled to receive benefits for 425 weeks.

On appeal to this Court, Lafarge argues that the Court of Appeals overstepped its bounds by addressing whether the newly-amended version of KRS 342.730(4) was retroactive. It argues that “the award in place in favor of Swinford indicated that permanent partial disability benefits would be payable for a period of 425 weeks, without limitation. The only issue regarding that award was whether the 425[-]week duration was correct.” However, we fail to see how the Court of Appeals could have analyzed the duration of benefits without first ascertaining which version of the statute applied. Lafarge made the duration of benefits an issue. It cannot now complain that the Court of Appeals resolved this issue by determining whether a newly-amended statute impacting the duration of those benefits was applicable.

Lafarge asserts that even if the statute’s retroactivity was properly before the Court of Appeals, that court erred in holding that KRS 342.730(4) was not retroactive. This difficult issue was created by the failure to codify subsection (3) of Section 20 of 2018 Ky. Acts ch. 40 as part of the Kentucky Revised Statutes (KRS). Codification means “[t]he process of compiling, arranging, and systematizing the laws of a given jurisdiction...” CODIFICATION, Black’s Law Dictionary (11th ed. 2019). “The Legislative Research Commission shall formulate, supervise, and execute plans and methods for ... codification[] and arrangement of the official version of the Kentucky Revised Statutes.” KRS 7.120(1). Subsection (2) of KRS 7.120 requires that “[t]he Commission shall prepare and submit to the General Assembly such consolidation, revision, and other matters relating to the statutes as can be completed from time to time.”

After the legislature has passed an act and it is signed into law, then the official version of the Kentucky Revised Statutes shall be maintained by the Legislative Research Commission. KRS 7.131(1) (“[t]he Legislative Research Commission shall maintain the official version of the Kentucky Revised Statutes...”). Furthermore, “[t]he official version of the Kentucky Revised Statutes shall contain all permanent laws of a general nature that

are in force in the Commonwealth of Kentucky.” KRS 7.131(2). The General Assembly has mandated that courts shall rely on that official version. KRS 7.138(2)(a) states, “[i]n any judicial or administrative proceeding, the text of any codified Kentucky statute which is submitted or cited by a party or *upon which the court ... relies shall be that text contained in the official version of the Kentucky Revised Statutes....*” (Emphasis added.)

The maintenance of the Kentucky Revised Statutes is vital for research and understanding the laws under which we must live, function and plan future actions. Anyone who is seeking to know the law researches the Kentucky Revised Statutes. It would be impractical and extremely difficult if people had to search all the acts of every legislative session in order to advise clients or know what law to follow. It is essential that the official version of the Kentucky Revised Statutes be accurate and up to date.

The reviser of statutes “shall be appointed by the [Legislative Research] Commission upon recommendation of the director.” KRS 7.140(1). The reviser of statutes has the duty to execute the functions set forth in KRS 7.120, 7.131, 7.132, 7.134, 7.136, 7.138, and 7.140 for the Legislative Research Commission. KRS 7.140(1). This includes the duty to “formulate, supervise, and execute plans and methods for ... codification[] and arrangement of the official version of the Kentucky Revised Statutes.” KRS 7.120(1). The reviser of statutes has the duty to prepare and submit to the General Assembly such revisions of the statutes as can be completed from time to time. KRS 7.120(2). The reviser of statutes also has the duty to execute the Legislative Research Commission’s function of maintaining the official version of the Kentucky Revised Statutes. KRS 7.131.

The dilemma facing the Court in this case is that portions of the Act passed by the General Assembly were completely omitted from the official version of the Kentucky Revised Statutes. A Legislative Research Commission note appears below the official version of KRS 342.730(4) stating:

This statute was amended in Section 13 of
2018 Ky. Acts ch. 40..... Subsection (3) of

Section 20 of that Act reads, “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.”

However, it failed to include it in the official version of KRS 342.730. KRS 7.134(1)(c) requires that certified versions of the Kentucky Revised Statutes shall contain “[t]he text of laws contained in the applicable version of the Kentucky Revised Statutes....” Subsection (1)(f) provides that the Legislative Research Commission and the reviser of statutes may include “[a]ny annotations, historical notes, and other information that the Commission deems appropriate to include.” These two subsections make it clear that the text of laws in the official version of the Kentucky Revised Statutes and the Legislative Research Commission notes are separate and distinct.

Lafarge points out that “not all legislation passed by our Legislature becomes codified.” Lafarge’s argument is based on the example of the budget of the Commonwealth of Kentucky which has the force of law but is not embodied in any statute. KRS 7.131(2) requires that “[t]he official version of the Kentucky Revised Statutes shall contain all permanent laws of a general nature that are in force in the Commonwealth of Kentucky.” Subsection (3) of that statute specifically provides that “the Commission may omit all laws of a private, local, or temporary nature, including laws for the appropriation of money....” The statute requires that all permanent laws of a general nature shall be included in the official version of the Kentucky Revised Statutes, but the Commission may omit laws for the appropriation of money (i.e., the budget).

While the Act in the present case is not an appropriations bill, those are not the only laws exempt from codification. KRS 7.131(3) states that the Legislative Research Commission “may omit all laws of a private, local, or temporary nature.” Here, the language

in the Act regarding retroactivity is temporary. It applies to those cases which “have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal as not lapsed, as of the effective date of this Act.” For any new injuries and claims, the retroactivity of the Act will not be an issue. Therefore, the language is only relevant to a particular time frame and once cases arising during that time frame are fully adjudicated, it will be unnecessary. Therefore, due to the temporary nature of the language regarding retroactivity in the Act, codification was not required.

Lafarge cites *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006), a case concerning a budget act. Therein, we stated, “[t]hough it is clear that the General Assembly must expressly manifest its desire that a statute apply retroactively, magic words are not required.” *Id.* at 597. In that case, we looked to language contained in the Act in question in order to determine that the legislature intended that it apply retroactively. As noted, budgets are exempt from codification requirements—as are temporary laws. Therefore, in both that case and the case at bar this Court may go to the language of the Act to determine retroactivity.

This Court has great respect for the language the General Assembly included in the official Kentucky Revised Statutes. The General Assembly made a clear pronouncement regarding retroactivity in KRS 446.080(3): “[n]o statute shall be construed to be retroactive, unless expressly so declared.” With no mention of retroactivity or any language from which retroactivity may be inferred, the express language of KRS 342.730(4) does not make the statute retroactive. However, the Legislative Research Commission note following the statute references the Act from which the statute was enacted and, as discussed, is exempt from the codification requirements, as it is temporary in nature. Thus, the legislature has made a declaration concerning retroactivity in this case.

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).

While Swinford attempted to belatedly challenge the constitutionality of the amendments to KRS 342.730(4), it did so only after the Court of Appeals had rendered its opinion. The Court of Appeals denied that issue as moot. Swinford did not file a cross-appeal to this Court to address that issue. Therefore, the constitutionality of the statute is not at issue before us in this case. Furthermore, the Attorney General was not timely notified of a constitutional challenge pursuant to KRS 418.075.

Id. at 43-44.

Whether the amended version of KRS 342.730(4) has retroactive application has been decided by our state's highest court. Hearn testified her date of birth is March 16, 1941.² Accordingly, the limitation of the award of PPD benefits pursuant to KRS 342.730(4) amended in 2018 by House Bill 2 is affirmed.

Hearn also asserts retroactive applicability 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). Consequently, we are without authority to render a decision upon Hearn's second argument. Thus, we must affirm on this issue.

We note there is a plethora of unpublished decisions from the Court of Appeals upholding the constitutionality of KRS 342.730(4) which became effective July 14, 2018.

Accordingly, on all issues raised on appeal, the April 30, 2018, Opinion, Order, and Award and the July 26, 2018, Opinion, Award, and Order are **AFFIRMED**.

² The Form 101 reflects her date of birth is March 15, 1941.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON THERESA GILBERT
HON AMANDA PERKINS
177 N LIMESTONE
LEXINGTON KY 40507

LMS
LMS

COUNSEL FOR RESPONDENT:

HON W BARRY LEWIS
P O BOX 800
HAZARD KY 41702

LMS

ADMINISTRATIVE LAW JUDGE:

HON PAUL WHALEN
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS