

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2020

CLAIM NO. 201782705

MARY KASSE

PETITIONER

VS.

APPEAL FROM HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE

GLOBAL POLYMERS;
HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE; AND
HON. ANDY BESHEAR, ATTORNEY GENERAL

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. Mary Kasse (“Kasse”) appeals from the February 18, 2019 Opinion, Award and Order, and the March 19, 2019 Order rendered by Hon. Jeff V. Layson, Administrative Law Judge (“ALJ”), awarding temporary total disability, permanent partial disability (“PPD”), and medical benefits for a low back injury.

On appeal, Kasse argues the ALJ erred in finding the PPD award is subject to KRS 342.730(4) as amended by House Bill 2. She argues the retroactive application violates the contracts clause of the United States and Kentucky Constitutions, and is an exercise of arbitrary power in contravention of section 2 of the Kentucky Constitution. For the reasons set forth herein, we affirm.

At the Benefit Review Conference held December 6, 2018, the contested issues preserved for adjudication included permanent income benefits per KRS 342.730 and whether Kasse is permanently totally disabled. No additional issues were added and there was no discussion of retroactive application of KRS 342.730(4).

The ALJ determined Kasse sustained a compensable injury. The ALJ awarded PPD benefits for 425 weeks enhanced by the three multiplier. The ALJ's decision was silent as to any application of the limits on duration of income benefits per KRS 342.730(4), due to Kasse's age, and due to the fact any PPD benefits awarded would not be subject to the statutory mandates of KRS 342.730(4), limiting the duration of the benefits. Kasse filed a petition for reconsideration that did not list the Attorney General as a party, nor did she serve notice on the Attorney General. Kasse's petition provided as follows:

Counsel for the Claimant would request that paragraph 2, last sentence, be amended to state that the duration of benefits awarded in this case is subject to the provisions of KRS 342.730(4) in effect as of July 14, 2018, unless that statute as it existed/exists is ruled not to be retroactive as it relates to any date of injury prior to July 14, 2018 and/or unconstitutional as to any retroactive application of KRS 342.730(4) per the July 14, 2018 amendment.

In his Order on reconsideration, the ALJ provided *verbatim* as follows:

The Plaintiff correctly points out that the constitutionality of KRS 342.730(4), in effect as of July 14, 2018, and/or the retroactive application of that statute is currently before the appellate courts. In her Petition, however, the Plaintiff essentially asks the Administrative Law Judge to make a contingent ruling. In other words, the Plaintiff requests a ruling that “based on one interpretation of the law the outcome is X but, if the law changes, the outcome is Y.”

While the Administrative Law Judge understands the situation the Plaintiff is in because of the current issues involving the statute in question, the ruling in this case must conform with the law as it exists at the time the ruling is issued. The Administrative Law Judge is without authority to issue a decision based on what the law may or may not be at some point in the future. If the Plaintiff feels strongly about the correct application of KRS 342.730(4), the proper course is to appeal the decision so that this case can be subject to any future decision by the courts regarding the statute in question.

Based on the foregoing, the Plaintiff’s Petition for Reconsideration is overruled.

Kasse filed a notice of appeal on April 2, 2019, naming Hon. Andy Beshear, Attorney General, as a respondent. Kasse also filed a motion to hold the appeal in abeyance. The Board sustained the motion by order dated April 17, 2019. Following finality of Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the claim was removed from abeyance. Kasse filed her brief on February 7, 2020, and served Attorney General Daniel Cameron as a respondent.

On appeal, Kasse argues the amended provisions of KRS 342.730(4) should not apply to her claim. Kasse notes the version of KRS 342.730 in effect at the time of her injury included the version of subsection (4) which was found

unconstitutional in Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). Kasse argues it is well settled that the rights of the parties to compensation for injuries at work become fixed and vested on the date of the injury. She further argues the law in existence at the time of injury controls the rights of the parties because the agreement to waive the employee's constitutional rights is the foundation of the workers' compensation law. Kasse maintains retroactive application of a law limiting the duration of PPD benefits impairs the obligation of the contract made at the time of the injury. Kasse contends retroactive application of a limit on the award of benefits pursuant to KRS 342.730(4) would be a retroactive application of the law to the substantive, vested rights of the injured worker, and is therefore unconstitutional. She argues the imposition of a retroactive change to an injured workers' rights, after she has waived her constitutional jural rights, is an exercise of arbitrary power violating the Kentucky Constitution's prohibition on such an exercise.

We do not believe Kasse's constitutional issue was properly preserved as a contested issue. Although the BRC Order listed "permanent income benefits per KRS 342.730" as a contested issue, Kasse did not argue the statute is unconstitutional. Nothing in the record indicates a constitutional challenge was presented to the ALJ, or that the Attorney General was provided the required notice prior to entry of the decision. Kasse's petition for reconsideration was not provided to the Attorney General.

We note Kasse's notice of appeal filed on April 2, 2019, is the first notification to the Kentucky Attorney General. Kasse filed her brief on appeal on

February 7, 2020, and served a copy of his brief on Hon. Daniel Cameron, Kentucky Attorney General, arguing the 2018 changes to KRS 342.730(4) are unconstitutional. However, the Kentucky Attorney General was never properly notified of the action prior to the ALJ's decision as required by KRS 418.075, which provides, "In any proceeding which involves the validity of a statute, the Attorney General of the state shall, **before judgment is entered**, be served with a copy of the petition, and shall be entitled to be heard." (Emphasis added). We further 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." The Kentucky Court of Appeals in Delahanty v. Commonwealth of Kentucky, 558 S.W.3d 489 (Ky. App. 2018), 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 not raised prior to the ALJ's decision, and proper notice was not given to the Kentucky Attorney General, we affirm. Even if we deemed the Attorney General had been properly notified of the challenge to the constitutionality of this statute, this Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945), and we would therefore be compelled to affirm.

House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) provides 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 accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, *supra*, we affirm the application of KRS 342.730(4) as amended in 2018. There the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. We therefore find the limitations set forth in the amended statute governs Kasse's award.

We further note the issue of the application of the amended statute is likely moot as it applies to Kasse's claim since the period of PPD benefits is almost certain to expire prior to her reaching age 70. For the age limitation to apply in Kasse's claim, she apparently would need to reopen her claim and prove a permanent total disability. KRS 342.125 currently limits her time for reopening to prove a permanent total disability to four years from the finality of the ALJ's original decision. It is important to note a right to reopen is not a vested right. Any right a worker has to be compensated for a post-award increase in disability is inchoate until such time as he or she sustains a post-award change of occupational disability, at which point the right becomes vested. McCool vs. Martin Nursery & Landscaping, Inc., Ky., 43 SW3d 256 (2001). Thus, Kasse presents only a speculative application

of the provision to her claim, rather than an actual controversy. Essentially, Kasse has requested an advisory opinion regarding future application of the age limit in KRS 342.730(4). While ALJs are obligated, pursuant to KRS 342.230, KRS 342.270, and KRS 342.275 to decide actual disputes, they are neither obligated nor authorized to provide advisory opinions.

Accordingly, the February 18, 2019 Opinion, Award and Order, and the March 19, 2019 Order rendered by Hon. Jeff V. Layson, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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