

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 15, 2020

CLAIM NO. 201269227

MICHAEL HARDIN

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

BROWN FORMAN CORPORATION
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Michael Hardin (“Hardin”) appeals from the January 16, 2020, Opinion, Order, and Award and the February 17, 2020, Order ruling on his petition for reconsideration of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). The ALJ awarded permanent total disability (“PTD”) benefits terminating on January 20, 2025, the date upon which Hardin turns seventy years of age, “in accordance with KRS 342.730(4).”

On appeal, Hardin asserts retroactive application of KRS 342.730(4) is unconstitutional.

BACKGROUND

As the procedural history is irrelevant to the issue on appeal, the Board will provide only a cursory review.

The Form 101 alleges Hardin sustained work-related injuries to his back and left lower extremity on June 25, 2012, while in the employ of Brown Forman Corporation (“Brown Forman”) in the following manner: “Plaintiff was bending over to move a full whiskey barrel in the course of his employment when he felt a pop in his back and left lower extremity. Plaintiff suffered work-related injury causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides.” The Form 101 indicates Hardin’s date of birth is January 20, 1955.

On April 24, 2013, Hardin filed a “Motion to Supplement Plaintiff’s Form 101” in order to add a cumulative trauma element to his claim, asserting Dr. Charles Crawford informed him that there is a cumulative trauma aspect to his back and left lower extremity injuries leading up to the specific injury occurring on June 25, 2012. By order dated May 7, 2013, Hardin’s motion was sustained by Hon. Allison Jones, Administrative Law Judge.

On August 19, 2013, the ALJ issued an Interlocutory Opinion, Order, and Award in which he determined Brown Forman shall pay for the lumbar fusion surgery proposed by Dr. Crawford as well as temporary total disability (“TTD”)

benefits following the surgery. The ALJ also placed the claim in abeyance pending Hardin's recovery from surgery.

On August 17, 2015, the ALJ issued a second Interlocutory Opinion, Order, and Award determining Brown Forman shall pay for a second fusion surgery proposed by Dr. Crawford and reinstated TTD benefits following the surgery. The ALJ again placed the claim in abeyance pending Hardin's recovery from the surgery.

The November 6, 2019, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, injury as defined by the Act, and TTD. Written by "other" is the following: "Constitutionality of 342.730(4) of age-termination and retroactivity."

In the January 16, 2020, Opinion, Order, and Award, the ALJ found as follows:

Dr. Travis [assigned] a 29% impairment rating, while Dr. Barefoot assigned a 31% impairment rating. As between these impairment ratings, the ALJ is most persuaded by Dr. [Barefoot's] 31% impairment rating. As plaintiff pointed out in his brief, Dr. Travis did not include the additional 1% impairment rating for each level fused as he made his calculations. It is therefore determined plaintiff has a 31% impairment rating and his disability rating (impairment rating x KRS 342.730 grid factor) is 46.5%.

The ALJ determined Hardin is permanently totally disabled.

However, given that plaintiff is currently 64 years of age, the ALJ finds it unlikely plaintiff could be suitably retrained and be able to attain and retain employment on a regular and sustained basis. As such, it is determined plaintiff is permanently and totally disabled. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

Regarding the constitutionality of KRS 342.730(4), the ALJ held as follows: “The plaintiff has preserved, for appellate purposes, where the age termination of income benefits in KRS 342.730(4) is constitutional. The ALJ has no authority to address this issue. Accordingly, that issue is passed for consideration by any appellate bodies.”

Hardin did not file a petition for reconsideration.

On appeal, Hardin asserts retroactive application of the recently amended version of KRS 342.730(4) is unconstitutional. Specifically, Hardin asserts that KRS 342.730(4), enacted in 1996 and deemed unconstitutional, is severable from the remainder of KRS 342.730. Therefore, KRS 342.730(1)(a), as written in 1996, is applicable to his award of PTD benefits, and the income benefits should continue for the duration of his disability.

ANALYSIS

The ALJ correctly determined KRS 342.730(4), amended by House Bill 2, which became effective on July 14, 2018, applies to Hardin’s award of PTD benefits. Pursuant to House Bill 2, KRS 342.730(4) now 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).

Pursuant to Holcim, supra, the ALJ was required to apply KRS 342.730(4) since the Supreme Court has determined the statute has retroactive application. Accordingly, the ALJ correctly terminated Hardin's award of PTD benefits at the time he reaches seventy years of age pursuant to KRS 342.730(4) as amended in 2018.

Hardin contends retroactive application of the amended version of KRS 342.730(4) is unconstitutional as it violates the contracts clause of 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 the sole issue raised by Hardin on appeal. However, in Terry Adams v. Excel Mining, LLC, No. 2018-CA-000925-WC, rendered February 21, 2020, Designated Not To Be Published, the Court of Appeals held that retroactive application of KRS 342.730(4) is indeed constitutional, concluding

¹ We question whether the constitutionality issue was properly preserved. 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 was ever given to the Attorney General by Hardin, other than to serve the Attorney General with a copy of the appeal brief.

“retroactive application of KRS 342.730 does not infringe on the contract impairment clauses of the Kentucky and United States Constitutions.” Slip Op. at 3. The Court of Appeals reiterated its holding in Helton v. TM Power Enterprises, Inc., No. 2019-CA-001757-WC, rendered May 1, 2020, Designated Not To Be Published; O’Bryan v. Zip Express, et al, 2018-CA-001284-WC, rendered May 8, 2020, Designated Not To Be Published; Ford Motor Company (LAP) v. Pickett, 2018-CA-000415-WC and 2018-CA-000551-WC, rendered May 8, 2020, Designated Not To Be Published; and Kroger v. Cates, 2018-CA-001027-WC, rendered May 15, 2020, Designated Not To Be Published. Thus, we must affirm the ALJ’s application of the amended version of KRS 342.730(4) to the award of PTD benefits.

Accordingly, the award of PTD benefits as set forth in the January 16, 2020, Opinion, Order, and Award, is **AFFIRMED**.

ALL CONCUR.

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