

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: June 5, 2020

CLAIM NO. 201871609 & 201782100

NELSON COUNTY BOARD OF EDUCATION

PETITIONER

VS. APPEAL FROM HON. CHRISTINA D. HAJJAR,  
ADMINISTRATIVE LAW JUDGE

MELANIE CAIN  
HON. CHRISTINA D. HAJJAR,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** The Nelson County Board of Education (“Nelson County”) appeals from the February 6, 2020 Opinion, Award, and Order, and the March 6, 2020 Order on Reconsideration, rendered by Hon. Christina Hajjar, Administrative Law Judge (“ALJ”). The ALJ determined Melanie Cain (“Cain”) suffered two work-related injuries. The first occurred on May 15, 2017 when she was assaulted by a student injuring her neck, left shoulder, left arm, and back with psychological overlay.

The second occurred on July 26, 2018 when she fell injuring her head, chin, shoulders, neck, right knee and right ankle.

The ALJ determined Cain sustained permanent injuries to her neck and shoulder and aroused her prior active psychological condition entitling her to permanent partial disability (“PPD”) benefits based on a 12% impairment rating with the 2x multiplier when applicable. The ALJ also awarded interest on Cain’s unpaid benefits from May 15, 2017 through June 28, 2017 at the rate of 12% per annum, and all due and unpaid installments thereafter be paid with interest payable at the rate of 6% per annum reflecting the statutory changes to KRS 342.040.

Nelson County filed a Petition for Reconsideration arguing the amendments to KRS 342.040 are retroactive and should be limited to 6% on all benefits due. The Petition was overruled by the ALJ and this appeal followed.

On appeal, Nelson County argues the ALJ erred in not retroactively applying the 6% interest rate to the award. Therefore this matter should be remanded to the ALJ for application of 6% interest to the entire award. For the reasons set forth herein, we affirm.

As the facts of this case are not in dispute, and the issue on appeal is well defined, there is no need to review the medical or lay evidence presented. The sole issue on appeal is whether the amendments to KRS 342.040 apply retroactively to the entire award in this case, or whether the amendments reducing the interest rate to 6% only apply to benefits accrued and owing after June 29, 2017.

Nelson County argues the ALJ should assess interest based upon the recent amendments to KRS 342.040. As an initial matter, we observe this Board is

faced with five decisions from the Court of Appeals; three of which hold the amendment to KRS 342.040(1) (contained in House Bill 223) does not have retroactive application, and two of which hold the amendment has retroactive application when an award is rendered on or after June 29, 2017. In Excel Mining, LLC v. Maynard, 2018-CA-000511-WC, rendered September 14, 2018, Designated Not To Be Published, and Slater Fore Consulting, Inc. v. Rife, 2018-CA-000647-WC, rendered June 21, 2019, Designated Not To Be Published, the Court of Appeals held the 6% rate of interest was not applicable to unpaid income benefits due prior to June 29, 2017. In Parton Bros. Contracting, Inc. v. Lawson, 2018-CA-000804-WC, rendered November 15, 2019, Designated Not To Be Published, and Warrior Coal, LLC v. Martin, 2018-CA-001430-WC, rendered January 10, 2020, Designated Not To Be Published, the Court of Appeals held all income benefits awarded on or after June 29, 2017, bear 6% interest. Consequently, the Board was reversed in upholding the awards of 12% interest on income benefits due on or before June 28, 2017. Most recently, in Excel Mining, LLC v. Sowards, 2018-CA-001316-WC, rendered March 20, 2020, Designated Not To Be Published, the Court of Appeals reaffirmed its holding in Excel Mining, LLC v. Maynard, *supra*, declaring 12% interest is payable on all unpaid installments of income benefits due on or before June 28, 2017, and 6% interest is payable on all unpaid installments of income benefits due on or after June 29, 2017.

We choose to rely upon the first, second, and fifth decisions of the Court of Appeals, holding the 6% interest rate only applies to unpaid installments of income benefits due on or after June 29, 2017, and not prior to that date. Thus, we affirm the ALJ's award of 12% interest on all due and unpaid installments of income benefits due

on or before June 28, 2017, and of 6% interest on all unpaid installments of income benefits due on or after June 29, 2017. In Lawnco, LLC v. White, Claim No. 2014-69882, rendered January 12, 2018, we held as follows:

We previously addressed this issue in Limb Walker Tree Service v. Ovens, Claim No. 201578695, Opinion rendered December 22, 2017, holding as follows:

In Stovall v. Couch, *supra*, the Court of Appeals resolved the very issue raised by Limb Walker on appeal. Couch was determined to be totally occupationally disabled due to coal workers' pneumoconiosis ("CWP"). The issue on appeal was whether the Board erred in awarding interest at the rate of 12% on all past due benefits. On the date of last injurious exposure to CWP the statute allowed 6% interest on unpaid benefits. However, the statute was subsequently amended effective July 15, 1982, increasing the interest rate to 12% per annum on each installment from the time it is due until paid. In determining the employer owed 6% interest on all past due installments through July 14, 1982, and 12% on all unpaid installments thereafter, the Court of Appeals concluded as follows:

On this appeal, appellants contend that KRS 342.040, governing the rate of interest on past due installments, was misapplied. On the date of last injurious exposure, that statute allowed 6% interest on such benefits. However, the provision was amended, effective July 15, 1982, increasing the rate of interest to 12% per annum on each installment *from the time it is due* until paid. To uphold the Board's award would amount to retroactive application of the amendment, appellants contend.

As this particular application of KRS 342.040 has yet to be the topic of an appellate decision, both sides in this controversy look for analogy to the case of

*Ridge v. Ridge*, Ky., 572 S.W.2d 859 (1978). *Ridge* dealt with the application of an amendment to the statute governing the legal rate of interest on judgments. The Kentucky Supreme Court decided:

... to adopt the position that the rate of interest on judgments is a statutory rather than a contractual matter. We therefore hold that the increase of the legal interest rate applies prospectively to prior unsatisfied judgments, the new rate beginning with the effective date of the amendment. *Id.* at 861.

Appellants assert that, employing the logic of *Ridge*, the 12% rate of interest should begin on the effective date of the statutory amendment, July 15, 1982, and that prior to that date, interest should be 6% as per the old statute. Appellee Couch looks to the language in *Ridge*, namely that the new rate of interest “applies prospectively to prior unsatisfied judgments,” thus concluding that the rate of interest is controlled by the date of judgment and not the date of accrual of the cause of action, and that the 12% rate in effect upon the date of judgment is applicable.

In *Campbell v. Young*, Ky., 478 S.W.2d 712, 713 (1972), the then Court of Appeals discussed the question of when interest was to begin accruing on unpaid compensation benefits. That court held that interest was due from the date *the claim for compensation was filed*. In the instant case, when Couch filed his claim, the interest rate in effect was 6% per annum. In our opinion, the plain wording of KRS 342.040 dictates that appellants may only be assessed interest on unpaid benefits at 6% prior to July 15, 1982, and at 12% thereafter. Consequently, the Board's award to the contrary and the

lower court's affirmation thereof was in error.

Id. at 437-438.

The same logic applies in the case *sub judice*. Ovens' entitlement to PPD benefits vested at the time of the injury. Thus, as of the date of injury and up through June 28, 2017, Ovens is entitled to 12% interest on all past due benefits. Ovens is entitled to 6% interest on income benefits accrued from and after June 29, 2017.

...

The language contained in Section 5 of HB 223 does not provide any support for the premise that unpaid benefits due prior to June 29, 2017, bear interest at the rate of 6%. Rather, we conclude Section 5 of HB 223 denotes that any awards entered on or after June 29, 2017, shall contain a provision that any unpaid benefits generated on or after June 29, 2017, bear interest at the rate of 6% per annum. There is nothing in Section of HB 223 which mandates that income benefits due prior to June 29, 2017, bear interest at the rate of 6% per annum. More importantly, Section 5 is not contained in the actual amendment of KRS 342.020. As directed by KRS 446.080(3), no statute shall be construed to be retroactive unless expressly so declared. There is no language in the amended statute containing an express provision that the applicable interest has retroactive application.

...

Contrary to Lawnco's assertion, Stovall, supra, resolves the issue before us. In our view, the language contained in Section 5 of HB 223 does not compel the result Lawnco seeks, especially since the language is not in the present version of KRS 342.040. Consequently, we find no distinction between the facts in Stovall, supra, and the case *sub judice*.

Contrary to Nelson County's assertion, the recently enacted House Bill 2, which became effective July 14, 2018, provides no support for its position. Section 3 of House Bill 2 contains the following amendment of KRS 342.040(1):

(1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of six percent (6%) per annum on each installment from the time is due until paid, except that if the administrative law judge determines that **the delay was caused by the employee, then no interest shall be due, or determines that** a denial, delay, or termination in the payment of income benefits was without reasonable foundation, **then** the rate of interest shall be twelve percent (12%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter. (emphasis in original).

Notably, Section 20 of House Bill 2 directs that the amendment of KRS 342.040(1) contained in Section 3 of the bill "shall apply to any claim arising from an injury or occupational disease or last exposure to the hazards of an occupational disease or cumulative trauma **occurring on or after the effective date of this Act.**" (emphasis added). The remainder of Section 20 delineates those portions of House Bill 2 which have retroactive application:

(2) Sections 2, 4, and 5 and subsection (7) of Section 13 of this Act are remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally

adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

(3) 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, for which time to file an appeal has not lapsed, as of the effective date of this Act.

Conversely, House Bill 223 enacted in 2017 amending KRS 342.040(1), which is set forth in Section 2 of the Act, contains no statement or provision directing the change in interest rate has retroactive application. Subsection 5 of House Bill 223 states Section 2 of the Act amending KRS 342.040(1) applies to all workers' compensation orders entered or settlements approved on or after the effective date of the Act. We interpret this to mean that, in all awards rendered or settlements approved on or after June 29, 2017, the interest rate on all unpaid income benefits due on or after June 29, 2017, changed to 6%.

The assertion that House Bill 2 supports the conclusion the 2017 amendment has retroactive application to unpaid income benefits due on or before July 28, 2017, has no merit as House Bill 2 is devoid of language suggesting the 2017 change in interest rate to 6% applied to unpaid income benefits due on or before July 28, 2017. The 2017 legislature drew a line of demarcation by decreeing the change in the interest rate applied prospectively to all awards rendered or settlements approved on or after June 29, 2017, since it inserted no language in House Bill 223 referencing retroactive application. The legislature did not decree the 2017 amendment to KRS

342.040(1) had retroactive application as it did in certain portions of the 2018 amendment to Chapter 342. Consequently, Section 5 of House Bill 223 cannot be construed as requiring a change to 6% interest on unpaid income benefits due on or before June 28, 2017, since unlike House Bill 2, it contains no retroactive verbiage. If the 2017 legislature intended House Bill 223 to have retroactive effects, it would have so decreed as it did in Section 20 of House Bill 2.

Therefore, the ALJ's determination of the applicable interest rates due on all unpaid income benefits awarded will be **AFFIRMED**.

ALL CONCUR.

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