

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 17, 2020

CLAIM NO. 201360999

PAMELA E. JOHNSON

PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE**

PRESCOTECH INDUSTRIES INC.
HON JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE
and HON. ANDY BESHEAR,
ATTORNEY GENERAL

RESPONDENTS

**OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING**

* * * * *

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

STIVERS, Member. Pamela E. Johnson (“Johnson”) appeals from the November 20, 2018, Opinion, Award, and Order and the January 2 and 7, 2019, Orders ruling on the parties’ petitions for reconsideration of Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”). In the November 20, 2018, decision, the ALJ resolved Johnson’s

Motion to Reopen in her favor, finding she is now permanently totally disabled. The ALJ awarded temporary total disability (“TTD”) benefits from the date of Johnson’s first surgery, March 7, 2016, continuing until she reached maximum medical improvement on March 1, 2108; permanent total disability (“PTD”) benefits from May 12, 2016, the date Johnson filed the Motion to Reopen, until she reaches the age of 70; and medical benefits.

On appeal, Johnson sets forth two arguments. Johnson first argues the ALJ erred in finding the award of PTD benefits is subject to the amended version of KRS 342.730(4), as House Bill 2 cannot be applied retroactively. Johnson next argues retroactive application of the newly amended version of KRS 342.730(4) is unconstitutional.

The Form 101 alleges Johnson sustained a work-related injury to her low back on March 4, 2013, while in the employ of Prescotech Industries (“Prescotech”) in the following manner: “I was working and catching product and felt pull and pain in low back.”

On October 18, 2014, Johnson filed a Motion to Amend in order to change the date of injury from March 4, 2013, to November 4, 2013.¹

The November 18, 2014, BRC Order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice, injury as defined by the

¹ While this Board has been unable to locate the order granting this motion, we note that November 4, 2013, was stipulated as the alleged date of injury in the November 18, 2014, Benefit Review Conference (“BRC”) Order.

Act, credit for unemployment, exclusion for pre-existing disability/impairment, TTD (rate), and vocational rehabilitation. Under “other” is PTD.

In the February 6, 2015, Opinion, Award, and Order, Hon. Jonathan R. Weatherby, Administrative Law Judge, awarded Johnson TTD benefits, permanent partial disability benefits, and medical benefits for her work-related low back injury.

On May 12, 2016, Johnson filed a Motion to Reopen alleging she is now permanently totally disabled. On November 11, 2016, Prescotech filed a Medical Fee Dispute, describing the nature of the dispute as follows:

On February 6, 2015 ALJ Weatherby issued his Opinion and Award in this claim. On March 7, 2016 the Plaintiff underwent surgery with Dr. Joseph Werner. The Plaintiff did not request authorization for the surgery. The Plaintiff and medical provider failed to submit billing and reports as required by 803 KAR 25:10. Further, Dr. Werner is not the Plaintiff’s Form 113 designated physician.

The September 11, 2018, BRC Order lists the following contested issues: benefits per KRS 342.730 (PTD), unpaid or contested medical expenses (post award/surgery and meds), and TTD. Under “other” is the following: “Whether there is change in condition attributable to the work injury either temporary or permanent. [Plaintiff] failure to comply w/regs on preauthorization.”

The ALJ’s findings of fact and conclusions of law are set forth, in relevant part, *verbatim*:

A. Whether there is a worsening of condition attributable to the work injury either temporary or permanent.

...

After careful consideration of the conflicting medical evidence, The ALJ finds Plaintiff has met her burden of proof for a *prima facie* case of reopening and of proving a worsening of condition. The ALJ found Plaintiff to be credible. She was straightforward and did not appear to exaggerate her symptoms. There is no question that she has a worsening of her condition since the original opinion – she has had two back surgeries. In the prior opinion, the ALJ found her impairment to be 8%. Defendant continues to argue that her worsening condition is not due to the work injury but is due to degenerative changes, not work related. The ALJ in the original claim found Plaintiff's condition work related and the opinions of Dr. Bilkey and Dr. Nazar are persuasive that her surgeries were the result of the work injury. The opinion of Dr. Loeb has been considered but is not found persuasive. As noted by Dr. Nazar, the degenerative conditions were present prior to the work injury but were not producing pain. Dr. Nazar and Dr. Bilkey are persuasive that her impairment as a result of the work injury is now 23%. At the time of the prior opinion, Plaintiff had tried to find work at K-Mart and cleaning houses. She has to change positions often, cannot stand for long and is not able to lift a gallon of milk. She no longer believes there are any jobs where she could sustain employment.

B. Benefits per KRS 342.730.

Johnson's disability as a result of her work injury is now permanent and total. In so finding, the ALJ relies on Johnson's testimony and on the impairments as provided by Dr. Nazar and Dr. Bilkey. Dr. Nazar's restrictions are persuasive that she cannot lift more than 5 pounds and can do no bending or lifting below the waist. She should change positions frequently. This would make it impossible for her to return to factory work. Her education is only 10th grade, greatly decreasing her job prospects. She is 60 years old, another factor that greatly decreases job availability. While her emotional state does not appear to be a negative factor, were she able to find a job, she has too many restrictions to be able to sustain a job day in and day out. Thus, with her age, limited vocational experience and significant medical restrictions, it is not likely that she will be able to find and continue performing sustained employment.

Plaintiff is entitled permanent total disability benefits to be paid at the rate of \$223.71 per week ($\$335.61 \times .66667 = \223.74) beginning May 12, 2016 and continuing thereafter until she reaches age 70, with Defendant Employer taking credit for the value of benefits of the original claim already paid at the rate of \$51.73 per week after the reopening.

C. TTD

...

With respect to TTD, a claimant is entitled to sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability.

Johnson is entitled to TTD at the rate of \$273.38 per week from the date of her first surgery on March 6, 2016 until Dr. Nazar placed her at MMI on March 1, 2018. Beginning May 12, 2016, the date of reopening, this amount is offset by the payment of permanent total disability. Plaintiff is not entitled to both during the same period.

The ALJ subjected the award of PTD benefits to the limits set forth in the amended version of KRS 342.730(4) and terminated the award of benefits when Johnson reaches the age of 70.

Both parties filed petitions for reconsideration. Johnson asserted the ALJ erred by limiting her PTD benefits pursuant to the amended version of KRS 342.730(4). In both the January 2 and January 7, 2019, orders responding to both parties' petitions, the ALJ affirmed the termination of Johnson's award of PTD benefits when she reaches the age of 70.

Johnson first asserts the ALJ erred by retroactively applying the amended version of KRS 342.730(4) to her award of PTD benefits. We affirm on this issue.

Johnson's injury occurred on March 4, 2013. The ALJ's award of PTD benefits in response to Johnson's Motion to Reopen, was rendered on November 20, 2018. 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.

The ALJ correctly determined KRS 342.730(4), as amended, which became effective on July 14, 2018, applies to Johnson's award of PTD benefits. 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).

Whether the amended version of KRS 342.730(4) has retroactive effect has been decided by our state's highest court. Accordingly, the ALJ correctly limited

the duration of Johnson's award of PTD benefits pursuant to KRS 342.730(4) as amended in 2018.

Johnson next asserts retroactive application of the amended version of KRS 342.730(4) is unconstitutional, as it violates the Contracts Clause of the both the United States and Kentucky Constitutions. We affirm on this issue.

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 on Johnson's second argument on appeal. Thus, we must affirm on this issue.

That said, pursuant to Bartee v. University Medical Center, 244 S.W.3d 91 (Ky. 2008), we vacate the ALJ's award of TTD benefits from March 7, 2016, through May 11, 2016, the day before Johnson filed the Motion to Reopen. In Bartee, supra, the ALJ awarded Bartee TTD benefits from the date of her knee surgery until she returned to work, a span of time that pre-dated the employer's motion to reopen. In affirming the Court of Appeals' determination to vacate the award of TTD benefits, the Supreme Court set forth the following which is directly relevant to the ALJ's award of TTD benefits in the case *sub judice*:

As amended effective December 12, 1996, KRS 342.125(4) gives an ALJ broad authority over a reopened claim. But by codifying longstanding decisions that any changes in the amount of benefits due to a post-award change of disability must be prospective, it places an unambiguous limit on an ALJ's authority to order a change in the amount of compensation. KRS 342.125(4) states, in pertinent part, as follows:

Upon reopening, the administrative law judge may end, diminish, or increase compensation previously awarded, within

the maximum and minimum provided in this chapter, or change or revoke a previous order.... Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen. No employer shall suspend benefits during pendency of any reopening procedures except upon order of the administrative law judge.

Workers' compensation is a statutory creation that confers rights and responsibilities on workers and employers. The very right to reopen what equates to a final judgment and be awarded additional income benefits is a matter of legislative grace. Although KRS 342.125(4) limits an ALJ's flexibility in cases where the onset of TTD is sudden, this case does not involve the sudden onset of TTD due to an emergency. The claimant underwent an elective procedure. Nothing would have prevented her from preserving her rights by filing a prospective motion, supported with a report from her treating physician, in which she sought to compel the employer to authorize the surgery and to pay TTD from the surgery date through the recovery date. The fact remains that she failed to attempt to invoke the ALJ's jurisdiction to consider a claim for TTD benefits until several months after her period of TTD ended. The sole question before the ALJ until that date was whether the surgery was compensable. Because disability that resulted from the surgery was not material to whether it was compensable, the date of neither party's motion supported the TTD award. The Board erred in concluding otherwise.

Id. at 94-95.

Consequently, pursuant to statutory and case law, the ALJ was unable to award TTD benefits for any duration of time pre-dating Johnson's May 12, 2016, Motion to Reopen, and the two-month span of TTD benefits awarded from March 7, 2016, through May 11, 2016, must be vacated.

As the Court of Appeals instructed in the case of AGI Transportation, Inc. v. Adkins, Claim No. 2018-CA-000861-WC, rendered November 30, 2018, Designated Not To Be Published, "[w]hether an award conformed to Chapter 342 was a question of law that a court should review, regardless of whether contested by a party....[citation omitted]." Pursuant to KRS 342.285(2), this Board is authorized to determine an award does not conform with Chapter 342 regardless of whether the particular error was contested by a party or whether the initial award was appealed on a different ground.

Accordingly, the ALJ's award of TTD benefits from March 7, 2016, through May 11, 2016, the day before Johnson's Motion to Reopen was filed, as set forth in the November 20, 2018, Opinion, Award, and Order and affirmed in the January 2 and 7, 2019, Orders is **VACATED**. Concerning all issues raised on appeal, the November 20, 2018, Opinion, Award, and Order and the January 2 and 7, 2019, Orders are **AFFIRMED**. This claim is **REMANDED** to the ALJ for entry of an amended award of TTD benefits in accordance with the views expressed herein.

ALL CONCUR.

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