

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2019

CLAIM NO. 201782405

ROGER ALLGOOD

PETITIONER

VS.

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

MIDWEST TRANSPORTATION
and HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Roger Allgood (“Allgood”) appeals from the April 27, 2019, Opinion, Award, and Order and the May 21, 2019, Order overruling his petition for reconsideration of Hon. Jeff V. Layson, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability benefits which had already been paid, permanent partial disability (“PPD”) benefits and medical benefits for Allgood’s work-related right wrist injury. The ALJ dismissed Allgood’s claim for alleged injuries to his low back and left elbow.

Allgood asserts three arguments on appeal. First, Allgood argues the ALJ erred in not finding he returned to work at the same or greater wages and that his award is subject to the two multiplier pursuant to KRS 342.730(1)(c)(2). Next, Allgood asserts the 2018 amendment to KRS 342.730(4) as part of House Bill 2 does not have retroactive effect because it impairs the vested rights of the injured worker. Finally, Allgood argues retroactive application of the amended version of KRS 342.730(4) violates the contracts clause of the United States Constitution and comprises an exercise of arbitrary power in violation of Section 2 of the Constitution.

The Form 101 alleges Allgood sustained work-related injuries to his right wrist, low back, and left elbow on April 28, 2017, while in the employ of Midwest Transportation in the following manner: “I was working and my binder broke and I fell to the ground.”

Allgood was deposed on September 10, 2018. He testified concerning what occurred on April 28, 2017, as follows:

A: I had moved several containers, picked them up, moved them out of my way, so I could get to the container that I actually had to load. I backed up into it.

I lifted it up, drug it on the trailer, pulled out of there, set it on the ground, picked up the containers that I had moved, put them back to where the company wanted them.

I loaded my container, put it in the proper position on my trailer, which the container was fairly light. I chained down the front of the trailer, the container with a cross chain, a chain onto both sides of the trailer.

It makes like an X. I went to the back of the trailer, and that’s where you put the little extra pressure to it to hold the trailer itself.

I did the right side of the trailer, and I went over the driver's side, which is the left side and went to bind the chain down, pulled down on it. And the pin broke in the binder sending me flying backwards.

I landed awkward. I landed on my right hand, my wrist area, on my lower back. And when I finally hit the ground, I dropped my arm down and cracked my elbow against the rock driveway.

At the time of his injury, Allgood was paid thirty-eight cents a mile, and earned between \$700.00 and \$1,600.00 weekly.

On May 12, 2017, Allgood was taken off work, and on July 21, 2017, he underwent surgery on his right wrist.

Allgood also testified at the February 28, 2019, hearing. The following exchange regarding stipulations took place at the beginning of the hearing:

ALJ: Mr. Allgood's preinjury average weekly wage was \$1,025.71. Whether or not the plaintiff retains the physical capacity to return to that type of work done – or he was performing at the time of the injury is at issue. Mr. Allgood has not returned to work since the injury and is not currently working.

...

Counsel for Employer: Judge, the only correction I have is on number nine. I think the plaintiff continued to work for a bit of time into May; is that right?

Counsel for Allgood: Approximately two weeks or so, up until the time of the beginning of TTD, yes.

ALJ: Okay. Well, let's amend the BRC order to reflect that Plaintiff did return to work following the injury on April 26th [sic], 2017, and continued to work until May the 11th of 2017, which is the TTD date; is that right?

Counsel for Employer: Yes, sir.

Importantly, nothing was filed in the record reflecting Allgood's post-injury earnings.

The Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: work-related injury, permanent income benefits per KRS 342.730, and ability to return to work. Under "other contested issues" is the following: "1) work-related/causation for anything except right wrist; 2) 'injury' as defined by the Act – whether condition is permanent or temporary; 3) permanent, total disability; 4) proper application of KRS 342.730(4); 5) occurrence of subsequent injury."

In Allgood's brief to the ALJ, he did not argue entitlement to the two multiplier nor did he introduce any information regarding post-injury average weekly wage.

Understandably, in the April 27, 2019, Opinion, Award, and Order, the ALJ provided no findings regarding the two multiplier. Further, the ALJ limited Allgood's award of PPD benefits based on the applicability of the version of KRS 342.730(4) "in effect as of July 14, 2018."

In his May 8, 2019, petition for reconsideration, for the first time, Allgood asserted entitlement to the two multiplier by stating as follows:

2. In that the Claimant returned to work making the same or greater wages from the date of accident until May 10, 2017, the Claimant is entitled to a doubling of his benefits pursuant to KRS 342.730(1)(c)(2) and the Administrative Law Judge erred in not placing that language in the Order on the Award.

Allgood also asserted the ALJ erred in limiting his award of PPD benefits by the version of KRS 342.730(4) in effect as of July 14, 2018.

In the May 21, 2019, Order, the ALJ set forth the following findings:

The first assertion made by the Plaintiff in his Petition is that the ALJ erred in not increasing the award of weekly PPD benefits by a factor of 2 pursuant to KRS 342.730(1)(c)2 because the Plaintiff returned to work after the injury and earned the same or greater wages. The record in this case does establish that, following the work-related accident on April 28, 2017, the Plaintiff did continue to work for the Defendant/Employer until May 11, 2017. There is not, however, any testimony or evidence regarding the wages earned by the Plaintiff during that time. Specifically, there is no testimony or evidence upon which to base a finding that the post-injury wages were equal to or greater than the stipulated pre-injury average weekly wage.

The second issue raised by the Plaintiff relates to that part of the Order which directs that the duration of the benefits awarded is subject to the provisions of KRS 342.730(4) in effect as of July 14, 2018. This part of the order is consistent with the law as it existed at the time of the Opinion and Award and as it exists as of the date of this Order.

Based on the foregoing, the Plaintiff's Petition for Reconsideration is overruled in its entirety.

Allgood first asserts the ALJ erred by failing to find he returned to work at the same or greater wages. We affirm on this issue.

As the claimant, Allgood bore the burden of proving each of the essential elements of his cause of action, including entitlement to the two multiplier. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

While we acknowledge Allgood returned to work for approximately two weeks following his injury, there is no evidence, as correctly pointed out by the ALJ in the May 21, 2019, Order, establishing the wages Allgood earned during that two-week period. There were no wage records filed in the record documenting Allgood's earnings during this time period, and there is no testimony, including from Allgood, on this subject. Thus, the evidence does not support a finding he returned to work at the same or greater wages. Similarly, in his brief to this Board, Allgood fails to reference his earnings during this time period and, instead, asserts as a matter-of-fact that he returned to work "making the same or greater wages." As a matter of law, this is insufficient proof.

803 KAR 25:010 § 13(11)(12) reads as follows:

(11) If at the conclusion of the BRC the parties have not reached agreement on all the issues, the administrative law judge shall:

(a) Prepare a final BRC memorandum and order including stipulations and identification of all issues, which shall be signed by all parties or if represented, their counsel, and the administrative law judge; and

(b) Schedule a final hearing.

(12) Only contested issues shall be the subject of further proceedings.

Since entitlement to enhanced benefits via the two multiplier was not raised as an issue in the BRC Order, Allgood waived his right to have the ALJ resolve this issue and to raise this issue on appeal. Further, Allgood failed to set forth any argument regarding entitlement to the two multiplier in his brief to the ALJ, and the issue was untimely raised for the first time in Allgood's petition for reconsideration.

Allgood next argues the July 14, 2018, amendment to KRS 342.730(4) does not have retroactive effect. We affirm the ALJ's determination that the applicable version of KRS 342.730(4) is that in effect on July 14, 2018.

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, 2018-SC-000627-WC, rendered August 29, 2019, Designated To Be Published, which became final on September 24, 2019, the Kentucky 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.

Slip Op. 4-6.

Whether the amended version of KRS 342.730(4) has retroactive effect has been decided. Accordingly, the ALJ's determination to limit Allgood's award of PPD benefits by the version of KRS 342.730(4) "in effect as of July 14, 2018" is affirmed.

Finally, Allgood asserts retroactive applicability of the amended version of KRS 342.730(4) violates the Contracts Clause of both the United States and Kentucky Constitutions. The 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). Consequently, we are without authority to render a decision upon Allgood's final argument. Thus, we affirm on this issue.

Accordingly, on all issues raised on appeal, the April 27, 2019, Opinion, Award, and Order and the May 21, 2019, Order are **AFFIRMED**.

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