

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: October 2, 2020

CLAIM NO. 201501407

ROGER HALL

PETITIONER/
CROSS-RESPONDENT

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

LETCHER COUNTY BOARD OF EDUCATION;
DR. DAVID A. NARRAMORE, DMD;
RAWLINGS AND ASSOCIATES, PLLC; AND
HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS/
CROSS-PETITIONERS

RESPONDENT

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

* * * * *

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

ALVEY, Chairman. Roger Hall (“Hall”) appeals and Letcher County Board of Education (“Letcher Co.”) cross-appeals from the April 9, 2020 Opinion, Award & Order on Remand rendered by Hon. Christina D. Hajjar, Administrative Law Judge

(“ALJ”), and from the May 8, 2020 Order ruling on their respective Petitions for Reconsideration.

Hall argues the ALJ erred in finding his last injurious exposure to asbestos occurred on April 18, 2014, rather than when he retired as a teacher for Letcher Co. in June 2003. Hall also argues the ALJ erred in finding the applicable average weekly wage (“AWW”) is \$68.65. Finally, Hall argues the ALJ erred in finding Letcher Co. is not responsible for his past medical bills and reimbursement for expenses due to his failure to timely submit his requests.

Letcher Co. argues the Kentucky Department of Workers’ Claims has no jurisdiction over this claim, which it asserts Hall should have filed with the Kentucky Claims Commission pursuant to KRS 49.020(1). Letcher Co. additionally argues the ALJ erred in awarding 12% interest on past due and unpaid benefits through June 18, 2017, and 6% interest on unpaid amounts thereafter. Letcher Co. also argues the Kentucky Supreme Court in Letcher County Board of Education v. Hall, 579 S.W.3d 123 (Ky. 2019), has already determined Hall’s last injurious exposure date was April 18, 2014. Letcher Co. next argues the ALJ did not err in determining Hall’s AWW was \$68.65. Finally, Letcher Co. argues the ALJ did not err in determining it has no liability for the contested past due bills and requests for reimbursement. For the forgoing reasons, we affirm the ALJ’s decision on all issues, except for her determination the contested medical expenses and reimbursements were not timely or properly submitted. On that issue, we find the requests for payment of medical expenses were timely submitted and therefore reverse the ALJ’s decision, and remand for a determination regarding whether the bills and requests for

reimbursement are causally related to Hall's Mesothelioma. We direct payment for any such expenses found compensable be paid in accordance with the applicable medical fee schedule.

Hall filed a Form 102 on September 4, 2015, alleging he contracted Mesothelioma due to exposure to asbestos while working as a teacher for Letcher Co. The Form 102 did not allege any particular date of exposure. In the Form 104 attached to the claim, Hall noted he last worked for Letcher Co. in 2003. In a Response filed on June 9, 2017, Hall indicated his last exposure was in April 2015. On September 5, 2017, Hall filed a Notice of Correction, noting his last date of employment with Letcher County was approximately April 18, 2014. In the Interlocutory Opinion & Award on Remand issued July 26, 2019, the ALJ determined April 18, 2014 was Hall's last injurious exposure date, citing to Miller v. Tema Isenmann, Inc. 542 S.W.3d 265, 271 (Ky. 2018).

The ALJ had previously dismissed Hall's claim as untimely in a decision rendered October 25, 2017. She noted the asbestos at Letcher Co. was abated in 1990, and Hall failed to file a claim within twenty years for any asbestos-related disease pursuant to KRS 342.316(4)(a). This Board reversed the ALJ's determination in a decision entered April 27, 2018, finding the earliest possible last injurious exposure date was in June 2003; therefore, the claim was timely filed. Both the Kentucky Court of Appeals and the Kentucky Supreme Court affirmed this Board's determination.

Hall testified by deposition on November 8, 2015, and at the hearings held on August 29, 2017 and February 11, 2020. Hall, a resident of Letcher County,

Kentucky, was born on January 9, 1951. His work history consists of working in shipping and packing while in high school, as a clerk in a clothing store, as a temporary social worker, as a supply specialist in the United States Army from 1972 to 1974, and as a social studies teacher for Letcher Co. from 1976 until his retirement in 2003. Subsequent to his retirement, Hall worked sporadically as a substitute teacher for Letcher Co. until April 18, 2014. Hall also produced and conducted a weekly thirty-minute program for a local radio station from 2005 to 2009.

Marion Reed Whitaker (“Whitaker”), the maintenance supervisor for Letcher Co., testified by deposition on February 3, 2016. He testified regarding multiple sample and inspection reports. He stated asbestos insulation was removed from the boiler room at Letcher Co., and all other asbestos had been removed from the building, except for floor tiles, which were still in place on the date of his deposition. He also testified the boiler had been completely removed in 2003. He stated that as long as the tiles were waxed and sealed there was only a minimal risk of asbestos exposure. He explained that friable asbestos is that which can be reduced to dust by finger pressure.

Subsequent to his retirement, Hall developed a hernia and underwent repair surgery in 2008. A second surgical repair was performed in 2011. A third hernia repair surgery was scheduled in November 2014, but was aborted when Mesothelioma nodules were found in his abdomen. Hall was referred to Vanderbilt University Medical Center, then to Pikeville Medical Center. Dr. Vickie Morgan at the Pikeville Medical Center referred Hall to Dr. Paul Sugarbaker in Washington D.C. Dr. Sugarbaker diagnosed Hall with malignant peritoneal Mesothelioma. Dr.

Sugarbaker subsequently performed extensive surgery on March 5, 2015 consisting of a small bowel resection with low anastomosis, a rectosigmoid colon resection with a low anastomosis, and a port placement for prolonged chemo fusions. He performed additional surgery on July 5, 2019 for recurrence of pathology and hernia repair.

On October 3, 2019, Hall filed multiple medical bills, statements, EOBs, check copies, requests for reimbursement for expenses, and bank account information outlining the medical expenses he incurred for treatment of his Mesothelioma. Included in those bills was a statement from Dr. David A. Narramore, DMD, for dental treatment necessitated due to the side effects of the chemotherapy Hall underwent for treatment of his Mesothelioma.

Dr. Fred Rosenblum, the university evaluator, examined Hall on December 16, 2016, and then completed a Form 108-OD. He confirmed Hall has abdominal Mesothelioma. He noted the history of asbestos removal at Letcher Co. in 1988 and 1990. He noted floor tiles at the school contained asbestos. He also noted those tiles were not completely removed until after Hall was diagnosed with Mesothelioma. Dr. Rosenblum opined asbestos exposure in the work environment caused Hall's Mesothelioma. We will not further review the medical evidence since the ALJ's determination that Hall has Mesothelioma caused by exposure to asbestos in his work environment rendering him totally disabled is not contested on appeal.

In the Interlocutory Opinion & Order on Remand issued on July 26, 2019, the ALJ noted she relied on Hall's testimony that he and other teachers took breaks and ate lunch in the boiler room. She noted Dr. Rosenblum's report indicated

he continued to be exposed to asbestos found in the floor tiles through his last date of work for Letcher Co. The ALJ specifically found as follows:

Based upon this reasoning, and the Supreme Court's decision noting that the asbestos was not eradicated from the Letcher County School building, the evidence compels a finding that Hall was exposed to the remaining asbestos material, which could have caused the asbestosis. Thus, this ALJ finds that his last date of exposure was April 18, 2014, the date he believes he last worked for the school district, and it was within the 20 year limitation to file the claim.

In the Opinion, Award & Order on Remand issued April 9, 2020, the ALJ thoroughly summarized the evidence of record, and found, contrary to Letcher Co.'s assertion, the Kentucky Department of Workers' Claims has jurisdiction to decide Hall's claim. She next determined Hall's last injurious exposure occurred on April 18, 2014. She noted he had retired in June 2003, but sporadically served as a substitute teacher until his last injurious exposure date. She also noted Hall continued to be exposed to asbestos in the floor tiles. She cited to Whitaker's testimony, which revealed those floor tiles remained in service as of the date of his 2016 deposition. The ALJ also determined Hall provided Letcher Co. with due and timely notice of his asbestos exposure and condition. The ALJ next determined Hall's AWW at the time of his last injurious exposure was \$68.65 based upon his earnings as a substitute teacher. The ALJ determined Hall has a 19% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, based upon Dr. A. Dahhan's opinion. The ALJ next performed the five-step analysis required by City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015) in determining Hall is permanently totally

disabled. The ALJ determined the award of permanent total disability benefits terminates on January 9, 2021 in accordance with KRS 342.730(4), effective July 14, 2018, as upheld by Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). Finally, the ALJ determined Hall's requests for payment of medical bills and requests for reimbursement were not timely submitted in accordance with 803 KAR 25:096 Section 11(3). She also noted Hall did not utilize a Form 114 in filing his request for reimbursement. Therefore, she found the contested medical bills and requests for reimbursement are not compensable.

Both Hall and Letcher Co. filed Petitions for Reconsideration. Hall argued the ALJ erred in determining his last injurious exposure date was April 18, 2014. Hall also argued the ALJ erred in determining his AWW was \$68.65. He argued the ALJ should have relied upon his earnings as of June 2003 when he retired, and the appropriate AWW rate is \$865.38. Hall also argued the ALJ erred in finding Letcher Co. is not responsible for payment of medical bills or reimbursement. Letcher Co. argued the ALJ erred in determining the Kentucky Department of Workers' Claims has jurisdiction over this claim. Letcher Co. also argued the ALJ erred in awarding 12% interest on past due and owing benefits through June 28, 2017, and 6% on all unpaid amounts thereafter. The ALJ denied both petitions in an Order issued on May 8, 2020.

On appeal, Hall argues the ALJ erred in finding his last injurious exposure date was April 18, 2014, rather than June 2003. He also argues the ALJ erred in determining the applicable AWW is \$68.65. Finally, Hall argues the ALJ erred in finding Letcher Co. is not responsible for his past medical expenses.

Letcher Co. argues the Kentucky Department of Workers' Claims has no jurisdiction over Hall's claim. Letcher Co. next argues the ALJ erred in finding 12% interest applicable on unpaid amounts of income benefits due through June 28, 2017, and 6% interest on any unpaid amounts due thereafter.

We initially determine the ALJ did not err in finding the Kentucky Department of Workers' Claims has jurisdiction over this claim. Letcher Co. cites to KRS 49.020 in support of its argument. We note the Kentucky Claims Commission exists as an exception to sovereign immunity by allowing negligence claims against the Commonwealth in certain instances. Nothing contained in that statute thwarts the right of an employee to proceed in a claim against his or her employer pursuant to the Kentucky Workers' Compensation Act. In its brief, Letcher Co. provides the text of KRS 49.020(1) which clearly sets forth that the purpose of the Kentucky Claims Commission is to:

... investigate, hear proof, and compensate persons for damages sustained to either person or property as a **proximate result of negligence on the part of the Commonwealth**, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus ... (Emphasis added).

As noted by the ALJ, the statute specifically notes any award from that Commission "shall be reduced by the amount of payments received or the right to receive payment from workers' compensation insurance". While the statute relied upon by Letcher Co. indicates claims against school systems for asbestosis must be brought before Kentucky Claims Commission, this obviously pertains to claims by third parties, not claims by employees for workers' compensation benefits. We

additionally note KRS 49.040 references negligence claims. KRS 49.060 specifically states as follows:

It is the intention of the General Assembly to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies to be able to assert their just claims as herein provided.

The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth.

KRS 342. 630 and 640 specifically state as follows:

342.630 Coverage of employers. The following shall constitute employers mandatorily subject to, and required to comply with, the provisions of this chapter: (1) Any person, other than one engaged solely in agriculture, that has in this state one (1) or more employees subject to this chapter. (2) The state, any agency thereof, and each county, city of any class, school district, sewer district, drainage district, tax district, public or quasipublic corporation, or any other political subdivision or political entity of the state that has one (1) or more employees subject to this chapter.

342.640 Coverage of employees. The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650: ... (3) Every person in the service of the state or any of its political subdivisions or agencies, or of any county, city of any class, **school district**, drainage district, tax district, public or quasipublic corporation, or other political entity, under any contract of hire, express or implied, and every official or officer of those entities, whether elected or appointed, while performing his official duties shall be considered an employee of the state. (Emphasis added).

Letcher Co. argues as follows:

It is fundamental there must be jurisdiction before the ALJ has authority to decide a workers' compensation claim. Jurisdiction is the procedural threshold through which all cases and controversies must pass prior to having their substance examined. Wilson v. Russell, 162 S.W.3d 911, 913 (Ky. 2005). Each court or administrative body "must determine for itself whether it has jurisdiction." Hubbard v. Hubbard, 197 S.W.2d 923 (Ky. 1946)). The question of jurisdiction is one of law. Appalachian Regional Healthcare, Inc. v. Coleman, 239 S.W.3d 49, 54 (Ky. 2007).

We agree with this assertion. We determine the ALJ did not err, and as a matter of law appropriately found the Kentucky Department of Workers' Claims has jurisdiction over Hall's claim. Letcher Co. erroneously asserts Hall was required to file his claim before the Kentucky Claims Commission. As noted above, KRS 49.010 *et. seq.* merely provides a manner of redress for negligence claims, and does not deprive an employee of the Commonwealth or one of its subdivisions from filing a claim for workers' compensation benefits. Although KRS 49.020 lists "damages as the result of exposure to asbestos", we do not deem this prohibits a claim such as asserted by Hall. Therefore, the ALJ's determination on this issue will not be disturbed.

We next determine the ALJ appropriately found Hall's last injurious exposure date was April 18, 2014. Apparently, Letcher Co. engaged in significant asbestos eradication from 1988 to 1990. The boiler was completely removed in 2003. However, floor tiles containing asbestos remained in place at least through the date of Whitaker's deposition in 2016. Whitaker provided a discussion regarding friable

(that which can be reduced to dust by finger pressure) versus non-friable asbestos. He testified the asbestos contained in floor tiles were considered a minimal risk as long as they were sealed and waxed. He noted some tiles had been removed even after Hall filed his claim.

The ALJ performed the appropriate analysis in reviewing both the lay and medical evidence in reaching her determination regarding the last injurious exposure date. As the claimant in a workers' compensation proceeding, Hall had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hall was unsuccessful in proving his last injurious exposure date was in June 2003 rather than April 18, 2014, 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 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) (superseded by statute on other grounds as stated in Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001)).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable under the evidence that reversal is required as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The ALJ determined Hall's last injurious exposure date was April 18, 2014, when he last worked as a substitute teacher at Letcher Co. The ALJ took into consideration that floor tile was still present at Letcher Co. on that date. We note Whitaker's testimony that the existence of the floor tile posed at least a "minimal" exposure risk, not no risk. We additionally note there is no medical evidence in the record specifically establishing the last injurious exposure date; therefore, it was incumbent upon the ALJ to determine the appropriate date based upon the totality of the evidence. We also note the Plaintiff's Notice of Correction filed on September 5, 2017, indicating he last worked for Letcher Co. on April 18, 2014.

The ALJ engaged in the appropriate analysis as set forth by the Kentucky Supreme Court in Letcher County Board of Education v. Hall, 576 S.W.3d 123 (Ky. 2019). The Supreme Court noted there was still asbestos tile in the school when Whitaker testified in 2016. It further stated as follows:

We note that the issue here is not whether Hall's exposure to the tiles *caused* his mesothelioma. Rather, "the statute requires only that exposure could independently cause the disease--not that it did in fact cause the disease." *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265, 271 (Ky. 2018). *See also Childers v. Hackney's Creek Coal Co.* 337 S.W.2d 680, 683 (Ky. 1960). It is abundantly clear from the evidence that Letcher County failed to eradicate all asbestos containing material from the school building. It is also clear that this material, including tiling, was present in the school until 2003 **and beyond**. This evidence compels reversal of the ALJ's order. Moreover, barring some clear evidence that Hall was not, or could not have been, exposed to the remaining asbestos material, Letcher County cannot meet its present burden. In the absence of such evidence, the ALJ's decision here is clear error. (Emphasis added).

Id. at 127

The Supreme Court did not specifically designate a last injurious exposure date as asserted by Letcher Co., although it clearly stated the asbestos material remained in the school beyond 2003. Whitaker testified such material was still present as of the date of his deposition posing a minimal risk. We therefore conclude that based upon the totality of the evidence, the ALJ did not err in determining Hall's last injurious exposure occurred on April 18, 2014. A contrary result on this issue is not compelled, and therefore we affirm.

The next issue is the calculation of Hall's AWW. Letcher Co. submitted the only relevant evidence of record pertaining to this determination. Hall provided no wage information to the contrary. Since the ALJ determined the last injurious exposure date was in April 2014, she performed the appropriate calculation in arriving at the \$68.65 wage determination. Although we note Hall's argument that his AWW should be calculated based upon his 2003 wages, we disagree. Once the ALJ made her last injurious exposure determination, she appropriately relied upon Hall's wages pertinent to that finding. We therefore affirm the ALJ's determination regarding Hall's AWW.

We next determine the ALJ erred in finding Letcher Co. is not responsible for Hall's medical bills or requested reimbursement. The ALJ determined Hall did not properly submit medical bills or requests for reimbursement within 60 days pursuant to 803 KAR 096. This Board has held on a number of occasions the forty-five day rule for submission of statements for services in KRS 342.020(1) has no pre-award application. The Kentucky Supreme Court in R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993) pointed out the requirement in KRS 342.020(1) for the payment of bills within 30 days of receipt of the statement for services "applies to medical statements received by an employer after an ALJ has determined that said bills are owed by the employer." In other words, it does not apply pre-award.

We held in Brown Pallet v. David Jones, Claim No. 2003-69633, (entered September 20, 2007) the reasoning of the Supreme Court in R.J. Corman Railroad Construction, supra, concerning the thirty-day provision for payment of

medical benefits should also apply to the forty-five day rule for submission of medical bills.

The Court in R.J. Corman stated, “Until an award has been rendered, the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable.” By extension, we find the sixty-day requirement contained in 803 KAR 25:096 is likewise not applicable until an award has been entered finding the claim is compensable. In this instance, the ALJ entered an interlocutory decision finding Letcher Co. liable for Hall’s medical bills and reimbursements on July 26, 2019. Letcher Co. filed a Petition for Reconsideration of that decision, which the ALJ denied in an Order entered on August 9, 2019. Hall filed the medical bills and requests for reimbursement on October 3, 2019, within sixty-days of that Order, which we determine was timely. Pursuant to Garno v. Selectron USA, 329 S.W.3d 3001 (Ky. 2010), the sixty-day rule found at 803 KAR 25:096 §11 applies only after an interlocutory decision or final award has been entered. We additionally note the requests and bills were apparently not properly submitted on a Form 114. However, there is no evidence Letcher Co. ever accepted responsibility for Hall’s medical treatment or provided the appropriate form to be utilized. We therefore reverse the ALJ’s determination regarding compensability of the contested bills and requests for reimbursement, and remand for additional findings regarding whether the disputed bills and requests are causally related to Hall’s work-related Mesothelioma, which must be paid or reimbursed in accordance with the applicable fee schedule.

Finally, we find the ALJ appropriately determined Letcher Co. is responsible for 12% interest on any unpaid and owing benefits due through June 28, 2017, and 6% on any unpaid amounts due afterward. Letcher Co. argues the ALJ should only assess 6% interest based upon the 2017 amendments to KRS 342.040. This Board is faced with five decisions from the Court of Appeals on this issue - 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. 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*.

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 after that date, changed to 6%.

The 2017 legislature decreed 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 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 amendments 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.

We therefore affirm the ALJ's decision, with the exception of the denial of medical bills and reimbursement. On remand, the ALJ must determine the compensability of the submitted medical bills and requests for reimbursement based upon work-relatedness, reasonableness, and necessity in accordance with the applicable medical fee schedule.

Accordingly, the April 9, 2020, Opinion, Award & Order on Remand, and the May 8, 2020 Order rendered by Hon. Christina D. Hajjar, Administrative

Law Judge, are **AFFIRMED IN PART and REVERSED IN PART**. This matter is **REMANDED** for additional determinations in accordance with the views expressed herein.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER/CROSS-RESPONDENT: **LMS**

HON DANIEL F DOTSON
178 MAIN ST, STE #1
WHITESBURG, KY 41858

COUNSEL FOR RESPONDENT/CROSS-PETITIONER: **LMS**

HON W BARRY LEWIS
PO BOX 800
HAZARD KY 41702

RESPONDENTS/CROSS-PETITIONERS:

DR DAVID A NARRAMORE, DMD **USPS**
353 MAIN STREET
WHITESBURG, KY 41858

RAWLINGS AND ASSOCIATES, PLLC **USPS**
PO BOX 49
LA GRANGE, KY 40031

ADMINISTRATIVE LAW JUDGE: **LMS**

HON CHRISTINA D HAJJAR
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601