

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: **January 12, 2018**

CLAIM NOS. 201501339 & 201492114

SOUTH KENTUCKY RURAL ELECTRIC
COOPERATIVE CORPORATION

PETITIONER

VS.

**APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE**

RAYMOND B. FLEMING,
AND HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

RAYMOND B. FLEMING

PETITIONER

VS

SOUTH KENTUCKY RURAL ELECTRIC
COOPERATIVE CORPORATION,
AND HON JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

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

* * * * *

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

RECHTER, Member. Raymond Fleming ("Fleming") and South Kentucky Rural Electric Cooperative Corporation ("South Kentucky RECC") appeal from the August 21, 2017 Opinion, Award and Order and the September 15, 2017 Order rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD") benefits. On appeal, South Kentucky RECC argues the award of PPD benefits is not supported by substantial evidence and the ALJ erred in awarding interest at 12% for a portion of the past due benefits. Fleming also appeals, and argues he is entitled to a full 425 weeks of PPD benefits pursuant to Parker v. Webster County Coal, LLC, 509 S.W.3d 759 (Ky. 2017). For the reasons set forth herein, we affirm in part, reverse in part and remand.

On August 26, 2015, Fleming filed claim number 2014-92114 alleging left knee and left shoulder injuries sustained on August 27, 2013. He simultaneously filed claim

number 2015-01339 alleging a left shoulder injury occurring on March 3, 2014. The claims were consolidated by order dated September 21, 2015.

Fleming has worked for South Kentucky RECC since October 1974. He testified that, on August 27, 2013, a Kudzu vine wrapped around his leg, causing him to fall on rocks and injure his left knee and shoulder. He lost no time from work, and reported the injury the next day. Initially, he experienced knee pain and visited his family physician, Dr. Daniel Gallo, who referred him to Lake Cumberland Occupational Health. Fleming was diagnosed with a left knee contusion and treated conservatively with pain medication. He testified his left knee pain resolved but he developed left shoulder pain. A pulled muscle was diagnosed and he visited a chiropractor. No additional treatment was provided and Fleming continued working. However, an office note from Dr. Patrick Jenkins indicates further investigation of left shoulder pathology was suspected due to Fleming's continued complaints of pain.

Before any further investigation could occur, Fleming re-injured his left shoulder on March 3, 2014. The work injury occurred when he slipped while crossing an icy road as his crew cleaned up storm damage. He returned to Dr.

Jenkins, who diagnosed a rotator cuff strain. After conservative treatment failed, an MRI was ordered which revealed a rotator cuff tear.

Fleming was referred to Dr. Jesse Pace, who performed left shoulder arthroscopy and repair on May 8, 2014. After a course of post-operative physical therapy, Fleming's treatment was managed by Dr. Robert Supinski. Dr. Supinski completed a questionnaire on November 21, 2014 stating Fleming reached maximum medical improvement on August 13, 2014. He indicated Fleming had no impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and requires no restrictions or further medical treatment.

Fleming continued working after the left shoulder surgery, but his symptoms worsened. He visited Dr. Ben Kibler of the Lexington Clinic for a second opinion. Based upon his range of motion at that time, Dr. Kibler opined Fleming would have a 13% impairment to the body as a whole. Dr. Kibler indicated surgery would relieve him of most of his anterior symptoms and improve his strength. South Kentucky RECC challenged this surgical recommendation. The claim was bifurcated on the issues of work-relatedness, and

reasonableness and necessity of the surgery proposed by Dr. Kibler.

Dr. Daniel Primm conducted an independent medical examination ("IME") on December 11, 2014. His impressions were status post left-shoulder injury with rotator cuff tear and status post left shoulder arthroscopy with very good clinical result. He noted Fleming reported no left knee injury at the time of his examination, nor did he report any residual symptoms. Therefore, Dr. Primm opined Fleming's knee injury was only a contusion, which had resolved. Regarding Fleming's left shoulder, Dr. Primm opined he sustained a left shoulder strain in the 2013 incident and a rotator cuff tear in the 2014 accident. He did not believe the surgery proposed by Dr. Kibler was necessary or related to the 2014 incident. Dr. Primm assigned no impairment rating for the knee injury, and assigned a 1% impairment rating for the shoulder based upon very slightly diminished active flexion. Dr. Primm indicated Fleming does not require formal supervised medical treatment for either of his injuries.

Dr. Frank Burke performed an IME on December 3, 2015. Dr. Burke opined Fleming sustained injuries to his knee and shoulder on August 27, 2013 and that his shoulder was markedly worsened by the fall on March 3, 2014. Dr. Burke

assigned a 12% whole person impairment rating for the shoulder condition and a 2% impairment rating for the knee pursuant to the AMA Guides. He noted Fleming had an ongoing rotator cuff tear. Dr. Burke concurred with Dr. Kibler's recommendation for shoulder surgery.

The ALJ issued an interlocutory award on March 29, 2016. Relying on the opinions of Drs. Kibler and Burke, the ALJ found the surgery causally related to the work injury, and reasonable and necessary treatment. The ALJ further noted Dr. Primm's opinions were not supported by the diagnostic testing.

Dr. Kibler performed the recommended left shoulder subscapularis repair and biceps tenodesis on June 8, 2016. At an October 14, 2016 follow-up, Dr. Kibler assigned a 6% whole person impairment rating for the shoulder pursuant to the AMA Guides. He based this rating on range of motion measurements. Dr. Kibler placed Fleming at maximum medical improvement as of November 1, 2016.

In a December 30, 2016 supplemental report, Dr. Burke indicated Dr. Kibler had incorrectly determined Fleming's impairment rating post-surgery. Using Dr. Kibler's measurements, Dr. Burke determined Fleming has an 8% whole person impairment rating pursuant to the AMA Guides for the

left shoulder condition. In a January 15, 2016 report, Dr. Burke indicated he had reviewed Dr. Primm's December 11, 2015 report and disagreed with his impairment rating and opinion regarding the knee injury. Dr. Burke explained:

In addition, this patient had an MRI proven injury to the patellofemoral joint as a result of falling on the rocks. Dr. Primm agrees that the MRI identified a full thickness loss of articular cartilage in the trochlea. This is not something that grows back. It is a permanent injury. His physical examination at the time of my review noted mild crepitus in the retropatellar space, as well as mild tenderness on patellofemoral compression testing. Therefore, the impairment rating as noted in my IME of December 3, 2015 stands. The fact that this patient currently is complaining of minimal symptomatology, i.e. stiffness in the knee does not mean the knee is normal following direct trauma. It is given impairment as noted in Table 17-31 on Page 544, as I noted in my report.

Impairments are [sic] noted in the Guides reflect loss of function e.g. a partial meniscectomy still rates a 1% impairment even though the patient is asymptomatic.

The ALJ's findings in the August 21, 2017 Opinion, Order and Award relevant to the appeal are as follows:

The issue of work-relatedness/causation, was discussed and decided in the Interlocutory Opinion and Order of 3/29/2016 and are restated herein by reference. Specifically, I find that the plaintiff's work injury of 8/27/2013, was a work injury as that term

is defined in our statute, that caused injury to Mr. Fleming's left shoulder and left knee. The left knee symptoms improved through the next year - however it is noted by the treating physician, Dr. Frank Jenkins, on 2/17/2014 that Mr. Fleming's suffered a "osteochnrcral defect" in a review of the diagnostic tests. Dr. Jenkins notes that Mr. Fleming is "markedly improved" as to his knee.

The 3-3-2014 injury to Mr. Fleming's left shoulder was diagnosed by Dr. Jenkins on 3/24/2014, as a left shoulder strain. Injections and PT was tried as conservative treatment before the surgery by Dr. Pace. The remainder of the causal relationship is discussed in the Interlocutory Opinion and Order and will not be reiterated here.

However, the issue of the "Injury as defined by the Act" regarding the left knee, is specifically found to be an injury as it is defined by our statute. Certainly, the knee had a specific diagnosis with supporting diagnostic testing as a osteochrondral defect by Dr. Patrick Jenkins on 2/17/2014. I rely on the opinion of Dr. Burke and the records of the treating physicians and find that Mr. Fleming sustained a left knee injury on August 27, 2013.

4. Benefits pursuant to KRS
342.730

I find that the left knee injury of August 27, 2013, has resulted in a 2% impairment pursuant to the AMA Guides, 5th Edition. For this finding I rely on the opinion of Dr. Burke.

As to the left shoulder, I find that Mr. Fleming suffers from 8% impairment to the body as a whole as a result of the

injury of 3-3-2014 injury and rely on Dr. Burke's opinion for this finding. Additionally, I find that Dr. Burke's uncontested explanation of the application of the AMA Guides using Dr. Kibler's measurements, is the most persuasive. Accordingly, I find Mr. Fleming retains 8% impairment to the body as a whole for his left shoulder injury of 8/27/2017.

The ALJ awarded interest at 12% for all due and unpaid compensation through June 28, 2017, and at 6% thereafter.

Fleming filed a petition for reconsideration to preserve his argument that he is entitled to a full 425 week award of PPD benefits pursuant to Parker v. Webster County Coal. Id. South Kentucky RECC filed a petition for reconsideration raising the same arguments it makes on appeal.

By Order rendered September 15, 2017, the ALJ denied the petitions. She noted Parker was not final and she was bound to the current language of the statute. In overruling South Kentucky RECC's petition, the ALJ reiterated that she found Dr. Burke's impairment rating more persuasive and that his explanation for the application of the AMA Guides using Dr. Kibler's measurements went unchallenged. The ALJ indicated she relied on the holding in Stovall v Couch, 658 S.W.2d 437 (Ky. App. 1983) wherein the Court held the plain reading of KRS 342.040 dictates that the interest assessed on

unpaid benefits begins on the effective date of the statutory revision. Thus, any decision after June 28, 2017, would carry a 6% interest rate on benefits accrued after the effective date of the statutory change and 12% before the effective date of the statutory revision.

On appeal, South Kentucky RECC argues the ALJ erred in determining the impairment ratings for the two injuries and in calculating the PPD benefits. It contends the ALJ treated the evidence inconsistently. In the interlocutory decision, the ALJ relied on Dr. Kibler's opinion. However, in the final decision, the ALJ credited Dr. Burke's opinion and his 8% rating, while rejecting Dr. Kibler's 6% impairment rating for the shoulder injury. South Kentucky RECC also contends Dr. Burke changed his impairment rating for the knee to 1% in his January 15, 2016 supplemental report. South Kentucky contends the ALJ impermissibly reversed her finding regarding Dr. Kibler's credibility, and was bound to award a 6% impairment rating for the shoulder injury and 1% for the knee injury.

We disagree with South Kentucky RECC's characterization of Dr. Burke's medical opinion. In the January 15, 2016 report, Dr. Burke unequivocally stated in that report that his prior rating for the knee stands. His

statement regarding the 1% rating was an indication that the AMA Guides call for a minimum of a 1% rating based upon the mere fact of the surgery. This 1% applies in the absence of symptoms, but it is increased by the presence of symptoms. The ALJ was free to rely upon the 2% impairment rating assessed by Dr. Burke for the knee condition.

The ALJ was under no obligation to continue to rely upon Dr. Kibler's opinion in the final decision. Any determination of credibility between physicians' opinions on the issue of causation and reasonableness and necessity of the shoulder surgery expressed in the interlocutory opinion are not binding on the issue of the appropriate impairment following the subsequent surgery. Fleming's impairment rating was not at issue in the interlocutory decision. Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009), cited by South Kentucky RECC on appeal, only establishes that where an issue is decided in an interlocutory decision, the finding may not be reversed in a subsequent decision in the absence of additional evidence. The ALJ was well within her role as fact-finder in relying upon the impairment rating assessed by Dr. Burke for the left shoulder condition.

Because the decision was rendered after the effective date of the amendment to KRS 342.040, South Kentucky RECC argues Fleming could only receive interest at a rate of 6% for the entire period of past due benefits. Prior to June 29, 2017, KRS 342.040 read, in relevant part, as follows:

All income benefits shall be payable on the regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, except that if the administrative law judge determines that a denial, . . .

Effective June 29, 2017, the Kentucky legislature amended KRS 342.040 to read, in relevant part, as follows:

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 it is due until paid, . . .

In Campbell v. Young, 478 S.W.2d 712 (1972), the former Court of Appeals, now Supreme Court, held that interest was payable on each installment from the time it was due until paid, regardless of the employer's lack of knowledge. In Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835, 839, 840 (Ky. 2009), the Kentucky Supreme Court concluded, "the

compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration." Thus, the compensable period began on the date of Fleming's injury.

We have recently considered an identical issue in Limb Walker Tree Service v. Ovens (WCB No. 2015-78695, December 22, 2017) and Lake Cumberland Health Dep't v. Oliver (WCB No. 2012-71309, December 21, 2017). In both cases, we relied upon Stovall v. Couch, id., to conclude a change in the legal interest rate applies prospectively. As applied to this claim, Fleming's entitlement to PPD benefits vested at the time of the injury. Thus, as of the date of injury and up through June 28, 2017, Fleming is entitled to 12% interest on all past due benefits. Fleming is entitled to 6% interest on income benefits accrued from and after June 29, 2017. We find no indication that the legislature desired the recent amendment to have retroactive effect. See KRS 446.080(3). Accordingly, the decision of the ALJ as to the applicable interest rate is affirmed.

Fleming argues he is entitled to the full 425 weeks of PPD benefits pursuant to the holding in Parker, wherein

the age limitation in KRS 342.730(4) was found unconstitutional as a violation of equal protection rights.

Parker is now final. Pursuant to Parker, Fleming is entitled to a full 425 weeks of benefits subject to the limitations in KRS 342.730(4) as that section provided prior to its amendment in 1996. When a statute is ruled unconstitutional, the unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it. It is void *ab initio*, as inoperative as if it had never been passed and never existed. See Legislative Research Com'n v. Fischer, 366 S.W.3d 905 (Ky. 2012). KRS 342.730(4) as it existed prior to the 1996 amendment provided:

If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday.

Accordingly, the August 21, 2017 Opinion, Award and Order and the September 15, 2017 Order rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED IN PART, REVERSED IN PART AND REMANDED** for entry of an award of

PPD benefits consistent with KRS 342.730(4) as that section existed prior to the 1996 amendment to the Act.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS WITH THE SOUTH KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION VS. RAYMOND B. FLEMING DECISION.

STIVERS, MEMBER, CONCURS IN RESULT ONLY WITH THE RAYMOND B. FLEMING VS. SOUTH KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION DECISION.

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