

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 15, 2020

CLAIM NO. 201669753

SUSAN BUSH

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

PUBLISHER'S PRINTING COMPANY AND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

* * * * *

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

BORDERS, Member. Susan Bush ("Bush") appeals from the June 19, 2019 Opinion, Order, and Award, and the Order on Reconsideration dated July 11, 2019, rendered by the Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ determined Bush is permanently and totally disabled as the result of her July 22, 2016 work-related neck injury. The ALJ limited her benefits to her 70th birthday,

pursuant to the recently amended provisions of KRS 342.730(4), and denied Bush's request for reimbursements of mileage expenses as not timely submitted. The ALJ overruled Bush's Petition for Reconsideration. This appeal followed. For reasons to be set forth herein, we affirm in part, reverse in part, and remand.

As this appeal concerns two specific issues, only the evidence concerning those issues will be addressed in this opinion.

Bush suffered a work-related neck injury on July 22, 2016 when she was pulling back on a conveyor, the end came up, and threw her backwards into a handrail and then onto the floor. Bush subsequently developed headaches, neck pain, and numbness down her left arm. Bush underwent a previous cervical fusion in 2008, due to degenerative disc disease. She returned to work thereafter, without restrictions or residuals, and worked until her accident of July 22, 2016. As a result of the work accident, Bush underwent a second cervical fusion surgery on September 1, 2017 and has not returned to work in any capacity.

In the Opinion, Order, and Award, the ALJ determined Bush suffered a work-related cervical spine injury rendering her permanently and totally disabled. The ALJ further ruled Bush's benefits will terminate on her 70th birthday pursuant to the amended version of KRS 342.730(4), and denied her request for reimbursement of mileage expenses because it was not being timely submitted.

In regards to the issue of mileage reimbursement, the ALJ found, "The Plaintiff submitted her mileage request more than 60 days from their incurrences. While it is true that a delay can be considered in some cases, no reason has been proffered herein. The mileage is non-compensable as untimely submitted."

Bush filed a Petition for Reconsideration arguing the retroactive application of KRS 342.730(4) was unconstitutional. This petition was overruled due to his lack of authority to address the issue. Bush also argued the mileage expenses were compensable as the forty-five (45) day and sixty (60) day time limits to request reimbursement of medical expenses and mileage expenses do not apply pre-award. On reconsideration, the ALJ stated in pertinent part as follows:

R.J. Corman Railroad Const. v Haddix, 864 S.W.2d 915 (Ky. 1993), with regard to this issue, concerns only the time period in which the Defendant must contest medical bills after they are presented, not when they must be presented. With respect to the Board when the ALJ is presented with a difference between the clear language of the statute and regulations on the one hand and the Board on the other I am bound to follow the statute and regulations.

Thereafter, the ALJ overruled the petition and this appeal followed. Regarding the issue of the constitutionality of KRS 342.730(4), this 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), and we would therefore be compelled to affirm.

House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) provides 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 accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), we affirm the application of KRS 342.730(4) as amended in 2018. There the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. We therefore find the limitations set forth in the amended statute governs Bush's award.

Bush also appeals the decision of the ALJ refusing to allow reimbursement for mileage expenses incurred finding they were untimely submitted with no justifiable excuse given.

Bush, through her counsel, submitted a request for reimbursement of mileage to Defense counsel on March 21, 2019. No payment was made by the Workers' Compensation carrier. The issue of mileage was preserved on the benefit review conference Order and addressed by the parties in their briefs. The ALJ determined the mileage request was non-compensable as untimely submitted. In the Order on reconsideration, the ALJ indicated he was required to follow the statutes and regulations.

In TARC v. Florence, WCB #2010-87602 (Rendered June 12, 2012), citing R.J. Corman Railroad Construction v. Haddix, 864 S.W. 2d 915, 918 (Ky. 1993), this Board held the forty-five (45) day and sixty (60) day time limits to submit requests for reimbursement of medical expenses and mileage do not apply to pre-award medical bills/requests for reimbursement. In Haddix, the Supreme Court

held the thirty (30) day rule for the payment of medical bills in KRS 342.0011(1) is only applicable post-award stating the following:

The amendments of KRS 342.0200) requiring the payment of medical benefits in thirty (30) days is clearly intended to hasten payment of those medical bills that the employer is obligated to pay. Until an award has been rendered, the employer is under no obligation to pay any compensation, and all issues, including medical benefits, are justiciable.

More recently, in Tim Short Auto Sales v. Shawn Robinette, WCB #2017-75459, (Rendered October 4, 2019), the Board confirmed its prior holdings with regard to this issue, “We find no merit to the argument the ALJ erred by finding Tim Short liable for medical bills submitted more than forty-five (45) days after service was rendered pursuant to KRS 342.020(1). The Board has held on a number of occasions the forty-five (45) day rule for submission of statements for services in KRS 342.020(1) has no application in a pre-award situation.”

Further, in Martha McGeorge v. St. Joseph Healthcare, Inc., WCB #2007-89156 (Rendered February 25, 2010) citing R.J. Corman Railroad v. Haddix, 864 S.W.2d 915 (Ky. 1993); and Susan Garno v. Solectron-USA, et al, WCB #2002-66400, this Board held the sixty (60) day rule to submit mileage reimbursement does not apply until after an award.

In this specific instance, we see no reason to disregard our previous holding regarding this issue. Therefore, we reverse and vacate that portion of the ALJ’s opinion, and remand for entry of a decision in conformity with this Opinion.

Accordingly, the June 19, 2019 Opinion, Order, and Award, and the July 11, 2019 Order rendered by Hon. Chris Davis, Administrative Law Judge, are

hereby **AFFIRMED IN PART and REVERSED IN PART**. This claim is hereby **REMANDED** for entry of an amended opinion considering the compensability of the requested expenses on the merits.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON MARK D KNIGHT
PO BOX 49
SOMERSET, KY 42502

COUNSEL FOR RESPONDENT:

LMS

HON ANDIE BRENT CAMDEN
401 SOUTH FOURTH ST, STE 2200
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

LMS

HON CHRIS DAVIS
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601