

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ORIGINALLY ENTERED: August 21, 2020  
OPINION WITHDRAWN: September 3, 2020  
OPINION RE-ENTERED: September 4, 2020

CLAIM NO. 201673666

TINA SPURGEON

PETITIONER

VS.

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

MASTERSONS CATERING;  
HON. DANIEL CAMERON,  
KENTUCKY ATTORNEY GENERAL; AND  
HON. JEFF V. LAYSON, ALJ,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING

\* \* \* \* \*

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

**BORDERS, Member.** Tina Spurgeon (“Spurgeon”) appeals from the April 20, 2020 Opinion, Award, and Order and the Order on Petition for Reconsideration rendered on May 4, 2020 by Hon. Jeff V. Layson, Administrative Law Judge (“ALJ”). The ALJ determined Spurgeon is permanently totally disabled due to a May 14, 2016

work-related right shoulder injury for which she underwent three surgeries. The ALJ further determined the awarded benefits will terminate upon Spurgeon reaching the age of seventy, pursuant to the recent amendments to KRS 342.730(4), in effect on the date the award was issued.

Spurgeon filed a Petition for Reconsideration arguing the amendments contained in House Bill 2 concerning the retroactivity of the provision limiting Spurgeon's benefits to the age of seventy are unconstitutional. The petition was overruled by the ALJ. This appeal followed. We affirm in part, vacate in part and remand for additional determinations.

KRS 342.730(4), as amended effective July 14, 2018, 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, 581 S.W.3d 37 (Ky. 2019), the Kentucky Supreme Court determined the amended version of KRS 342.730(4), effective July 14, 2018, regarding the termination of benefits at age seventy has retroactive applicability. Because the Kentucky Supreme Court has determined the newly enacted amendment applies retroactively, we affirm the ALJ's decision ordering the permanent total disability benefits are subject to the limitations in KRS 342.730(4), effective July 14, 2018.

We additionally note that 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). Consequently, we are without authority to render a decision upon Spurgeon's argument regarding the constitutionality of the amended statute. Thus, we affirm in this regard.

Spurgeon also argues the ALJ's statement, "The Defendant/employer shall be entitled to a credit against permanent total disability benefits awarded herein for TTD benefits and wages previously paid" could be interpreted as a reference to KRS 342.730(7). Spurgeon concedes Masterson Catering ("Masterson") would be entitled to a credit for any actual periods of time that actual wages were paid; however, no temporary total disability ("TTD") benefits were paid to Spurgeon while she was actually working for Masterson. We agree. KRS 342.730(7) clearly concerns a situation where a claimant is both working and receiving TTD benefits, but does not address credit for earnings during the period of an award for permanent total disability benefits. Therefore, we believe the ALJ erred in providing a credit to Masterson for "wages" paid and accordingly vacate this portion of his decision and remand with instructions for entry of an opinion in conformity with the views expressed herein.

Accordingly, the April 20, 2020 Opinion, Award, and Order, as well as the May 4, 2020 Order on Petition for Reconsideration issued by Hon. Jeff V. Layson, Administrative Law Judge are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** for entry of an opinion in conformity with the views expressed herein.

ALL CONCUR.

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