

**Commonwealth of Kentucky  
Workers' Compensation Board**

**OPINION ENTERED: September 4, 2020**

CLAIM NO. 201296799

YAMAMOTO FB ENGINEERING INC.  
AS AN INSURED OF  
KENTUCKY EMPLOYERS' MUTUAL INSURANCE                      PETITIONER

VS.                      **APPEAL FROM HON. DOUGLAS W. GOTT,  
CHIEF ADMINISTRATIVE LAW JUDGE**

ANTHONY ALLEN, DECEASED; AND  
KIMBERLY ALLEN, INDIVIDUALLY  
AND IN HER CAPACITY AS WIDOW  
OF ANTHONY ALLEN;  
ADMINISTRATOR OF THE ESTATE OF  
ANTHONY ALLEN; AND,  
HON. DOUGLASS W. GOTT,  
CHIEF ADMINISTRATIVE LAW JUDGE                      RESPONDENTS

**OPINION  
VACATING IN PART,  
AFFIRMING IN PART & REMANDING**

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

**BORDERS, Member.** Yamamoto FB Engineering, Inc. (“Yamamoto”), as insured by Kentucky Employers’ Mutual Insurance Company (“KEMI”), appeals from the Order dated May 22, 2020 rendered by Chief Administrative Law Judge, Douglass W. Gott (“CALJ”). In the Order, the CALJ sustained the Motion for Continuation of Benefits submitted by Kimberly Allen (“Allen”), the widow of the claimant Anthony Allen. The CALJ ordered the benefits Yamamoto agreed to pay to the decedent pursuant to the Agreement as to Compensation and Order Approving Settlement (Form 110) be continued to Allen at the same weekly rate of \$475.00, and for the duration of the agreed period, or until February 17, 2031.

On April 18, 2020, Yamamoto simultaneously submitted a Motion to file a Petition for Reconsideration *Nunc Pro Tunc*, a Notice of Appeal to this Board, and a Motion with the Board to hold the appeal in abeyance and to remand to the ALJ for a ruling on the Petition for Reconsideration. This Board denied the Motion by Order dated July 8, 2020.

The facts are not in disputed. Anthony Allen suffered significant injuries to his lower extremities on January 25, 2012 resulting in the amputation of his right leg below the knee, and a total left knee replacement caused by being pinned by falling rolls of metal coils. On December 16, 2013, a Form 110 Settlement was approved. The agreement reflects that Anthony Allen was to receive a compromised \$475.00 per week until February 17, 2031 when he was eligible for Social Security retirement benefits in conformity with KRS 342.730(4), as that statute read on December 16, 2013. On March 26, 2020, Allen submitted a Motion to Substitute

Parties and to Continue Benefits. On March 26, 2020, the Department of Workers' Claims acknowledged the filing and issued an Order to Yamamoto setting forth the time-frame in which to respond. No response was filed. The CALJ issued a Show Cause Order on April 23, 2020 giving Yamamoto additional time to respond and otherwise show cause as to why the Motion to Substitute should not be granted. Again, no response was made. On May 22, 2020, the CALJ entered an Order sustaining Allen's Motion to Substitute and to Continue Benefits and ordered the benefits to be paid to Allen at the rate of \$475.00 per week until February 21, 2031. This appeal followed. For reasons to be set forth herein, we affirm in part, vacate in part, and remand for a decision in conformity with this Opinion.

Yamamoto did not file a timely petition for reconsideration from the May 22, 2020 Order sustaining the Motion to Substitute and Continue Benefits. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, on appeal, we must determine whether substantial evidence supports the ALJ's decision.

Allen argues on appeal that Yamamoto waived its right to challenge the CALJ's determination because it did not timely submit a petition for reconsideration. We disagree. While the CALJ's opinion regarding findings of fact may not be disturbed on appeal, this Board is still charged with the duty of assuring the CALJ's opinion contains no errors of law for which this Board retains the right to *de novo* review.

Yamamoto argues the CALJ erred by awarding Allen continuation of benefits at 100% of the rate paid to Anthony Allen and erred by not ceasing the widow's benefits at her 60<sup>th</sup> birthday pursuant to the holding in Morsey v. Frasier, 245 S.W. 3d 757 (Ky. 2004).

This appeal concerns the application of KRS 342.730(3) and (4), which states in pertinent part, as follows:

**342.730 Determination of income benefits for disability -- Survivors' rights --**

**Termination -- Offsets -- Notification of return to work -- Professional athletes.** (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

(3) who has sustained disability compensable under this chapter, and who has filed, or could have timely filed, a valid claim in his or her lifetime, dies from causes other than the injury before the expiration of the compensable period specified, portions of the income benefits specified and unpaid at the individual's death, whether or not accrued or due at his or her Subject to the limitations contained in subsection (4) of this section, when an employee, death, shall be paid, under an award made before or after the death, for the period specified in this section, to and for the benefit of the persons within the classes at the time of death and in the proportions

and upon the conditions specified in this section and in the order named:

(b) To the widow or widower, if there is no child under the age of eighteen (18) or incapable of self-support, benefits at fifty percent (50%) of the rate specified in the award; or

(c) If there are both a widow or widower and such a child or children, to the widow or widower, forty-five percent (45%) of the benefits specified in the award, or forty percent (40%) of those benefits if such a child or children are not living with the widow or widower; and, in addition thereto, fifteen percent (15%) of the benefits specified in the award to each child. Where there are more than two (2) such children, the indemnity benefits payable on account of two (2) children shall be divided among all the children, share and share alike; or

(d) If there is no widow or widower but such a child or children, then to the child or children, fifty percent (50%) of the benefits specified in the award to one (1) child, and fifteen percent (15%) of those benefits to a second child, to be shared equally. If there are more than two (2) such children, the indemnity benefits payable on account of two (2) children shall be divided equally among all the children; or

(e) If there is no survivor in the above classes, then the parent or parents wholly or partly actually dependent for support upon the decedent, or to other wholly or partly actually dependent relatives listed in paragraph (g) of subsection (1) of KRS 342.750, or to both, in proportions that the commissioner provides by administrative regulation.

(f) To the widow or widower upon remarriage, up to two (2) years, benefits as specified in the award and proportioned under paragraphs (a) or (b) of this

subsection, if the proportioned benefits remain unpaid, to be paid in a lump sum.

(4) 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.

As can be seen from a plain reading of the statute, KRS 342.730(3) mandates that any award of survivors' benefits are payable to the widow at 50% of the amount awarded to the decedent. In this case, the Motion for Substitution of Party and Continuation of Benefits indicated the benefits were being awarded to the decedent Allen at the rate of \$950.00 biweekly, equating to \$475.00 weekly. In the Order sustaining Allen's Motion to Substitute Parties and for a Continuation of Benefits, the CALJ erroneously granted the continuation of benefits at 100% of the rate awarded to Anthony Allen and not the statutorily mandated 50%. Accordingly, that portion of the CALJ's Order is vacated and remanded for entry of an order in conformity with this Opinion.

While Yamamoto agrees Allen is entitled to the continuation of the decedent Allen's benefits, at 50% of the rate, it argues the CALJ erred by awarding the benefits for the remainder of the award or through February 17, 2031. It argues that Allen's benefits should terminate when she reaches the age of 60 and is eligible

for Social Security Benefits pursuant to 42 U.S.C. section 402(h). See Morsey v. Frasier, *supra*. We disagree.

The Morsey case is not applicable in this situation. The Court in Morsey considered the impact of KRS 342.730(4), in existence in 2004, which called for all benefits to cease when the injured worker becomes eligible for Social Security benefits. At the time of the Morsey decision, the Kentucky Supreme Court had entered decisions in McDowell v. Jackson Energy RECC, 84 S.W.3d 71 (Ky. 2002), and Keith v. Hoppel Plastics, 78 S.W.3d 463 (Ky. 2005) as corrected on December 13, 2005, finding the provisions of KRS 342.730(4) to be constitutional. Thereafter, the Supreme Court rendered the decision in Parker v. Webster Coal, 529 S.W.3d 759 (Ky. 2017), revisiting the decisions in the McDowell and Keith cases, and determined the provisions of KRS 342.730(4), terminating a workers' benefits when they qualify for Social Security retirement, were unconstitutional. In response to the Parker decision, the Kentucky General Assembly passed House Bill 2 on July 14, 2018, terminating a workers' benefits when he or she reaches the age of 70, or 4 years after the date of injury or last exposure, whichever last occurs. In the case of Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the Supreme Court determined the amendments to KRS 342.730(4) were retroactive to all claims still pending on the effective date of the statutory changes.

We do not believe the mandates set forth in Morsey v. Frasier, *supra*, are applicable in this instance. The determination by the Morsey court that the widow's benefits cease when the widow qualifies for Social Security benefits at age

60 is not controlling, as it concerned a statute, KRS 342.730(4), that was subsequently deemed unconstitutional.

Therefore, we conclude that if the statute terminating a workers' benefits when he or she becomes eligible for Social Security benefits is found unconstitutional, then logically, any case law concerning the termination of benefits for a widow when she is eligible for Social Security benefits would likewise be found unconstitutional as the rights of the widow pursuant to KRS 342.730(3) are derivative of the injured worker's rights. *See, Baytos v. Family Dollar*, 525 S.W.3d 65 (Ky. 2017). We believe the CALJ correctly applied KRS 342.730(3) and (4) in this case in awarding Allen benefits for the duration of the award period.

Accordingly, the May 22, 2020 Order of Douglass W. Gott, Chief Administrative Law Judge is **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for an order consistent with this Opinion.

ALL CONCUR.

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