

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000511-WC

EXCEL MINING, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-00035

DENNIS MAYNARD;
HON. JOHN COLEMAN,
Administrative Law Judge;
and KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

KRAMER, JUDGE: Excel Mining, LLC, appeals from a decision of the Workers'
Compensation Board affirming an award of benefits entered in favor of Excel's

former employee, Dennis Maynard.¹ The issue presented in Excel's appeal concerns the rate of interest applicable to unpaid installments of workers' compensation income benefits when the statute specifying the effective rate (*i.e.*, Kentucky Revised Statute (KRS) 342.040(1)) is amended after a claimant sustains a compensable injury, but before the claimant receives an award. This was the situation below: At the time Maynard sustained his last injurious exposure to the cause of his compensable occupational disease (October 25, 2016), KRS 342.040(1)² provided for a rate of 12%; but on June 29, 2017, during the pendency

¹ Maynard's award was based upon a compensable occupational disease; he suffers from coal workers' pneumoconiosis.

² Prior to June 29, 2017, KRS 342.040(1) provided:

Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. 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 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, delay, or termination in the payment of income benefits was without reasonable foundation, the rate of interest shall be eighteen percent (18%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the

of his claim, the statute was amended to reflect a rate of 6%. When the ALJ entered Maynard's award on November 27, 2017, and considered the change in the rate of statutory interest, the ALJ determined the proper course was to award Maynard 12% interest on unpaid installments of income benefits that were payable between October 25, 2016, and June 28, 2017, and then 6% interest on installments payable on or after June 29, 2017. Excel argues the ALJ erred in doing so, and that the Board erred in affirming because a rate of 6% should have been applied to the

employee or known dependent of right to prosecute a claim under this chapter.

As of June 29, 2017, KRS 342.040(1) provided:

Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. 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, except that if the administrative law judge determines that a denial, delay, or termination in the payment of income benefits was without reasonable foundation, the rate of interest shall be twelve percent (12%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

entirety of Maynard's award to the extent that it represented any outstanding installments of pre-award income benefits. We disagree and therefore affirm.

Kentucky workers' compensation law deems work-related injuries compensable as of the date the injury is sustained or as of the date of the worker's last injurious exposure to the cause of an occupational disease; accordingly, those dates – *not* the date that a claim is filed or the date that an award is entered – are the starting points for when installments of workers' compensation income benefits are considered due and when interest on unpaid installments of income benefits begins to accrue. *See, e.g., Bradley v. Commonwealth*, 301 S.W.3d 27, 30 (Ky. 2009) (explaining that for workers' compensation purposes, income benefits were considered due, and interest began to accrue on unpaid installments thereof, on the date a worker sustained a compensable injury); KRS 342.316(5)(b) (“The time of the beginning of compensation payments shall be the date of the employee's last injurious exposure to the cause of the disease, or the date of actual disability, whichever is later[.]”); *see also* KRS 342.040(1).

To be sure, until a claimant receives an award, the claimant has no vested right in either a specific amount of weekly benefits or the total amount of an award. *See Miracle v. Riggs*, 918 S.W.2d 745, 747 (Ky. App. 1996). Indeed, an employee who files a claim may *never* receive an award. Notwithstanding, workers' compensation law in Kentucky is designed to encourage employers to

voluntarily pay income benefits before any claim is filed or liability is assessed.

See Officeware v. Jackson, 247 S.W.3d 887, 891-92 (Ky. 2008). To that end, KRS 342.040(1) imposes interest on past-due benefits if the employer is later found liable for such benefits but permits an even higher rate of interest to be awarded if an employer's denial, delay, or termination of benefits was without reasonable foundation.

Here, Excel and Maynard shared a mutual right that vested during the pendency of Maynard's claim – namely, the right to have a rate of interest consistent with the prior version of KRS 342.040(1) applied to any award Maynard might eventually receive, to the extent that his award ultimately represented outstanding installments of income benefits due from October 25, 2016 (the date of his last injurious exposure or disability) through June 28, 2017 (the last effective date of the prior version of KRS 342.040(1)). This right was discussed at length in *Stovall v. Couch*, 658 S.W.2d 437 (Ky. App. 1983), a case that essentially involved the reverse of the situation presented here. In *Stovall*, this Court explained that where KRS 342.040(1) initially provided for a 6% rate of interest on past due installments of benefits during the pendency of a claim, but was later amended prior to the ultimate award to provide for a 12% rate of interest, the amendment could not be considered retroactive; rather, the 6% rate applied to the pre-amendment past-due installments, but the 12% rate applied to the post-amendment

past-due installments because increases of statutory interest rates are presumed to apply *prospectively*, absent an explicit statement to the contrary from the legislature. *Id.* at 438; *see also* KRS 446.080(3) (“No statute shall be construed to be retroactive, unless expressly so declared.”).

That said, Excel points out that House Bill 223, Section 5 (which effectuated the June 29, 2017 amendment of KRS 342.040(1)) provided that the amendment “shall apply to all worker’s compensation orders entered or settlements approved on or after [June 29, 2017].” Excel argues that Section 5 expressly indicates the legislature, through its amendment, intended to retroactively alter the parties’ above-described, mutual vested right.

However, Excel’s argument lacks merit. Equivalent statements from the legislature have been held *not* to clearly express such an intent. *See, e.g., William A. Pope Co. v. Howard*, 851 S.W.2d 460, 463 (Ky. 1993) (explaining that version of KRS 342.318, specifying that “KRS 342.316(3) shall apply to employes’ asbestos-related disease claims filed on or after July 15, 1986[,]” did not evince such an intent); *Maggard v. International Harvester Co.*, 508 S.W.2d 777, 783 (Ky. 1974) (language in amendment to workers’ compensation statute providing the act shall be effective on January 1, 1973, and further providing that it is “effective for all claims filed on or after January 1, 1973,” held not to apply to claims involving “one last exposed to black lung in 1972” because “the law in

effect on the date of the injury or the date of the last exposure, as the case may be, is the law that fixes the rights of the claimant[.]”); *see also Vater v. Newport Bd. of Ed.*, 511 S.W.2d 670, 671 (Ky. 1974).

Accordingly, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

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MAYNARD:

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