

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000804-WC

PARTON BROS. CONTRACTING, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-01027

RODNEY LAWSON; JOHNNIE L. TURNER;
HON. JOHN B. COLEMAN, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Parton Brothers Contracting, Inc. (Parton Bros.) petitions for review of an opinion and order by the Workers' Compensation Board (Board)

affirming an October 30, 2017, opinion and award by the administrative law judge (ALJ) to Rodney Lawson. Parton Bros. argues that the recent amendments to KRS¹ 342.730(4) and 342.040, relating to termination of benefits and the interest rate on past-due benefits, were applicable to Lawson's claim. In light of recent authority from the Kentucky Supreme Court, we agree. However, we find that the ALJ did not clearly err by declining to credit Parton Bros. for income earned by Lawson after he left employment relating to the severance and processing of coal. Hence, we affirm in part, reverse in part, and remand for entry of a new award.

The relevant facts of this appeal are as follows. Lawson was born on September 15, 1965. On May 16, 2016, Lawson filed a Form 102 alleging he contracted coal workers' pneumoconiosis (CWP) while working for Parton Bros. Lawson alleged he was exposed to coal dust for over twenty-four years while working for various coal companies. He alleged his last injurious exposure to coal dust occurred on October 14, 2014, when he was laid off by Parton Bros. After he was laid off, Lawson attempted to go to work for another coal mine but could not pass the pre-employment physical examination. Subsequently, Lawson worked for multiple employers as a truck driver.

¹ Kentucky Revised Statutes.

Based on the evidence presented at the hearing, the ALJ determined Lawson's last injurious exposure occurred while working for Parton Bros. The ALJ further determined Lawson was totally disabled pursuant to KRS 342.732(1)(e). Based on Lawson's average weekly wage of \$988.81, the ALJ awarded permanent total disability (PTD) benefits of \$659.21 per week for so long as he remains disabled. The ALJ awarded 12% interest on accrued benefits through June 28, 2017 and 6% thereafter. Pursuant to the holding in *Smith v. Leeco, Inc*, 897 S.W.2d 581 (Ky. 1995), the ALJ determined Lawson was not entitled to income benefits until he was laid off from Parton Bros. Finally, the ALJ found that Parton Bros. was not entitled to credits based upon Lawson's exposure to coal dust with subsequent employers or for Lawson's income earned with those subsequent employers. Thereafter, Parton Bros. filed a petition for reconsideration, which was later denied.

Both Lawson and Parton Bros. appealed from the ALJ's decision. The Board affirmed the ALJ's award in its entirety. In pertinent part, the Board first found that the ALJ properly applied the tier-down provisions from the 1994 version of KRS 342.730(4). Next, the Board found that the ALJ did not err in finding that Lawson's last injurious exposure occurred while employed by Parton Bros. Although Lawson testified that he occasionally hauled loads of coal for subsequent employers, he also testified that he was not exposed to coal dust while

doing so. Since this testimony was unrefuted, the Board found that Parton Bros. was not entitled to a credit for Lawson's subsequent earnings with those employers. Finally, the Board affirmed the ALJ's award of 12% interest on Lawson's benefits accrued from the date of his last injurious exposure through June 28, 2017, and at 6% thereafter. This petition for review followed.

As an initial matter, Parton Bros. argues that the March 30, 2018 amendments to KRS 342.730(4) are applicable to this claim. In the matter below, the Board pointed to the then-recent opinion in *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017), which held KRS 342.730(4), as amended in 1996, was unconstitutional on equal protection grounds. Based on *Parker*, the Board found that the ALJ properly applied the 1994 version of the tier-down provisions of KRS 342.730(4).

While Parton Bros.'s appeal was pending in this Court, the General Assembly passed House Bill 2, effective July 14, 2018, which amended KRS 342.730(4) 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.

Also, during the pendency of this appeal, two panels of our Court issued opinions concerning the retroactive application of this amendment - *Holcim*

v. Swinford, No. 2018-CA-000414-WC, 2018 WL 4261757 (Ky. App. Sept. 7, 2018) and *University of Louisville v. Lanier*, No. 2018-CA-000687-WC, 2018 WL 6264422 (Ky. App. Nov. 30, 2018). This case was placed in abeyance while those cases were reviewed by the Kentucky Supreme Court.

Based upon the recent holding by the Kentucky Supreme Court in *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019), we must conclude that the 2018 amendment to KRS 342.730(4) is applicable to the current claim. In Section 20(3) of HB 2, the General Assembly expressly declared the newly amended version of KRS 342.730(4) “shall apply prospectively and retroactively to all claims” where the injury occurred after December 12, 1996, and the claims “have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act.” 2018 *Ky. Acts* Ch. 40 (HB 2), § 20(3) (eff. July 14, 2018). In *Holcim*, the Supreme Court held that this language clearly evidenced the General Assembly’s intention that the statute apply retroactively, even though it was included in a non-codified portion of the statute. *Holcim*, 581 S.W.3d at 43-44. *See also Baker v. Fletcher*, 204 S.W.3d 589, 597 (Ky. 2006). Therefore, we conclude the claim at bar satisfies the conditions for retroactive application of the newly-amended version of KRS 342.730(4). Consequently, we must reverse that portion of the Board’s opinion and remand this

matter to the ALJ for entry of an award applying the 2018 version of KRS 342.730(4).

Turning to the remaining issues, Parton Bros. next argues that it was entitled either to a credit for Lawson's subsequent earnings or to hold his permanent total disability award in abeyance during periods of his full-time employment. In *Smith v. Leeco, Inc.*, 897 S.W.2d 581 (Ky. 1995), our Supreme Court held that a claim for occupational disability due to CWP under KRS 342.732(1)(b)–(d) should be held in abeyance as long as the worker is employed by the same employer against whom the claim is filed rather than dismissed outright. *Id.* at 582. Along similar lines, Parton Bros. contends that a finding of total disability should preclude an employee from collecting PTD benefits while he remains engaged in other employment.

However, an employer seeking credit against its workers' compensation liability has the burden to show a proper legal basis for the request. *Millersburg Military Inst. v. Puckett*, 260 S.W.3d 339, 342 (Ky. 2008). KRS 342.730 provides certain offsets against income benefits but does not include post-injury wages earned outside the severance and processing of coal. *Id.* As the Board noted, Lawson testified that he attempted to find new coal-mining work after he left Parton Bros., but he was unable to pass a pre-employment physical. Furthermore, the ALJ found that Lawson was not exposed to coal dust in the

course of any of his subsequent employment. Since these findings were supported by substantial evidence, we agree with the ALJ that Parton Bros. was not entitled to a credit for Lawson's subsequently-earned income.

Finally, Parton Bros. argues that the award of 12% interest on unpaid benefits through June 28, 2017 and 6% thereafter was inappropriate. This award of interest was consistent with the version of KRS 342.040(1) in effect at the time Lawson filed his claim. But effective June 29, 2017, the General Assembly amended KRS 342.040 to provide for a 6% interest rate on all income benefits payable on the regular payday seven days after the injury or disability resulting from an occupational disease. Parton Bros. argues that the amendment to KRS 342.040 is remedial and should be applied retroactively to Lawson's award.

In rejecting this argument, the Board noted that Lawson's entitlement to PTD benefits vested at the time his condition became disabling. Thus, interest accrues from the date the claim for compensation was filed unless the statute provides otherwise. *Stovall v. Couch*, 658 S.W.2d 437, 438 (Ky. App. 1983) (citing *Campbell v. Young*, 478 S.W.2d 712, 713 (Ky. 1972)). Consequently, the Board determined that any benefits accrued up to June 29, 2017 were subject to the 12% interest rate.

However, the General Assembly's amendment specifies that "[KRS 342.040] shall apply to all worker's compensation orders entered or settlements

approved on or after the effective date of this Act.” 2017 *Ky. Acts* Ch. 17 (HB 223), § 5 (eff. June 29, 2017). Like the amendment to KRS 342.730(4), this language is included in a non-codified section of the Act; but as was the case in *Holcim v. Swinford*, the General Assembly clearly stated its intention that the amendment to KRS 342.040 shall apply to awards entered after the statute’s effective date, regardless of when the claim was filed. In light of this express language, we must conclude that the entirety of Lawson’s award of benefits was subject to the amended 6% interest rate.

For the reasons stated above, the April 27, 2018, opinion of the Workers’ Compensation Board is affirmed in part, reversed in part, and remanded with direction that the ALJ enter a new award in accord with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE RODNEY
LAWSON:

Johnnie L. Turner
Harlan, Kentucky