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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001086-WC

FORD MOTOR COMPANY (KTP)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-68234

JOHN BANNON; DR. JOSEPH WERNER;
DR. GREGORY NAZAR;
HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD; AND
ATTORNEY GENERAL ANDY BESHEAR

APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: ACREE, KRAMER AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: The single question in this appeal is whether the
Workers' Compensation Board erred in failing to apply the 2018 version of
Kentucky Revised Statutes ("KRS") 342.730(4) to the award of benefits in this

case. Having reviewed the record in conjunction with applicable legal authority, we reverse the decision of the Board.

FACTS AND PROCEDURAL BACKGROUND

After being injured while working on the assembly line at Ford Motor Company, John Bannon filed the workers' compensation claim which is the subject of this appeal. On September 29, 2017, an Administrative Law Judge issued an opinion awarding Bannon temporary total disability benefits and a 27% permanent partial disability benefit for a period not to exceed 425 weeks or until Bannon qualified for Social Security benefits, whichever occurred first. Because Bannon was 65 at the time of the hearing, and thus qualified for Social Security at the time of the award, the tier-down provisions of the 1994 version of KRS 342.730(4) were applied to his award. Bannon was to collect full permanent disability benefits from August 2013 to the date of his 65th birthday, at which time his benefits were to be reduced by 10% each year until he turned 70. Citing *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017) (holding the reduction of benefits provisions of the 1996 version of KRS 342.730(4) to be unconstitutional), Bannon moved to reconsider its application to his award. In a February 2018 ruling on his motion, the ALJ declined to change her decision concerning the application of the tier-down provisions of the statute as enacted in 1994. The Board affirmed the decision of the ALJ in June 2018.

This appeal followed.

ANALYSIS

We review decisions of the Workers' Compensation Board to determine if the Board "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Ford argues in this appeal that the 2018 version of the statute supersedes the 1994 statute and must be applied to Bannon's award. As previously noted, the Kentucky Supreme Court in *Parker* struck down that portion of the 1996 version of KRS 342.730(4) which provided for a reduction of benefits based upon the recipient's age and qualification for Social Security benefits:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs.

KRS 342.730(4), 1996 (1st Extra. Sess.), Ky. Acts ch. 1 sec. 30. The Supreme Court concluded that the 1996 version of KRS 342.730(4), in treating injured older workers differently from injured younger workers, ran afoul of the equal protection

clause of the 14th Amendment to the United States Constitution, as well as Sections 1, 2, and 3 of the Kentucky Constitution.

As applied to Bannon's award, the tiering formula set out in the 1994 version of KRS 342.730(4) operates to affect his award in the following manner:

If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.730 or 342.732 shall be reduced by ten percent (10%) beginning at age sixty-five (65) and, by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday.

KRS 342.730(4), 1994 Ky. Acts ch. 181, Part 7, sec. 25. Thus, Bannon's award would be reduced by ten percent beginning at age 65 and continue to be reduced by ten percent each year thereafter up to and including the year in which he turned 70, although his income benefits would not be reduced in the years beyond his 70th birthday.

However, cognizant of the *Parker* decision, the Kentucky General Assembly amended KRS 342.730(4) in 2018 to provide in pertinent part:

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.

KRS 342.730(4), 2018 Ky. Acts ch. 40, sec 13. Under the 2018 statutory guidelines, Bannon’s award of permanent partial disability benefits would not be subject to any tier down, but his benefits would terminate according to the statute.

In general, “Kentucky law prohibits the amended version of a statute from being applied retroactively to events which occurred prior to the effective date of the amendment unless the amendment expressly provides for retroactive application.” *Commonwealth Dep’t of Agriculture v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000). As a fundamental principle of statutory construction, “retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result.” *Id.* In addition, KRS 446.080(3) expressly provides a guide for interpreting statutory enactments: “No statute shall be construed to be retroactive, unless expressly so declared.”

However, there is also authority supporting the proposition that “the **entire act** is to be considered with the judicial eye upon . . . the objects to be accomplished, the mischief intended to be remedied, and all other attendant facts and circumstances which throw intelligent light upon the intention of the law-making body.” *Dougherty v. Kentucky Alcoholic Beverage Control Bd.*, 279 Ky. 262, 130 S.W.2d 756, 760 (1939) (citing *Sewell v. Bennett*, 187 Ky. 626, 220 S.W. 517 (1920)) (emphasis added). Here, the intent of the amendment to KRS 342.730(4) was to amend that statute in a form which would pass constitutional

muster given the declaration by the Kentucky Supreme Court that the 1996 version of the statute was unconstitutional age discrimination.

Viewing the entire act in which the amendment was passed into law and signed by the Governor, we find that the General Assembly clearly provided the necessary expression of its intent:

(2) Sections 2, 4, and 5 and subsection (7) of Section 13 of this Act are remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

(3) Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims:

(a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and

(b) That 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, sec. 20 (emphasis added). Additionally, a Legislative Research Commission note appears below the official version of KRS 342.730(4) stating that this statute would apply retroactively to claims that have not been fully adjudicated or are in the appellate process.

Our holding today comports with the recent holding of the Kentucky Supreme Court in *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019). In *Holcim*, the

Court found that the statute applies retroactively as set forth in the Legislative Research Commission note that appears below the statute. *Id.* at 44. Specifically, the Court held that the statute is retroactive for injuries or last exposures which occurred on or after December 12, 1996, and for claims that have not been fully adjudicated, are in the appellate process, or for which the time to file an appeal has not lapsed. *Id.*

Because the Board issued its final order on Bannon's claim on June 22, 2018, and the new law took effect on July 14, 2018, the time in which either party could file an appeal had not lapsed. Thus, Bannon's claim falls squarely within the parameters established by the General Assembly and must be construed as subject to the retroactive application of the 2018 statute.

Therefore, as a matter of law, Bannon's claim is not subject to the tier-down provisions of the 1994 statute as applied by the Workers' Compensation Board, but rather it is subject to the 2018 amendments to KRS 342.730(4).

CONCLUSION

Based upon the foregoing, we reverse the opinion of the Workers' Compensation Board concerning the application of the 1994 statute to Bannon's award of benefits and remand with instructions that the current version of KRS 342.730 be applied.

ALL CONCUR.

BRIEF FOR APPELLANT:

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