

RENDERED: MARCH 27, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-001075-WC

GLORIA DOWELL, WIDOW  
AND SUCCESSOR-IN-INTEREST TO  
WILLIAM BRUCE DOWELL, DECEASED

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-86079

MATTHEWS CONTRACTING;  
HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

AND  
NO. 2018-CA-001113-WC

MATTHEWS CONTRACTING

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-86079

GLORIA DOWELL, WIDOW  
AND SUCCESSOR-IN-INTEREST TO  
WILLIAM BRUCE DOWELL, DECEASED;  
HON. JOHN B. COLEMAN, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
REVERSING

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BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

MAZE, JUDGE: Matthews Contracting and Gloria Dowell, widow of William Dowell,<sup>1</sup> both petition for review of an opinion by the Workers' Compensation Board (Board) affirming an administrative law judge's (ALJ's) award of benefits to Dowell. The sole issue on review is whether the 2018 amendments to KRS 342.730(4) apply retroactively to Dowell's award. Based upon the recent holding by the Kentucky Supreme Court, we conclude that they do apply. Hence, we reverse this portion of the award and remand this matter for entry of a new award.

William Dowell's workers' compensation claim involved two injuries.

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<sup>1</sup> William Bruce Dowell passed away on July 1, 2019, while this petition for review was pending. Pursuant to Kentucky Revised Statute (KRS) 342.730(3), when an employee dies from causes other than the injury and before the expiration of the compensable rate period, the employee's widow (or widower) is entitled to receive 50% of the rate specified in the award. Upon motion by Gloria Dowell, William Dowell's widow, this Court remanded the matter to the Board to file a motion to substitute parties. On January 16, 2020, the ALJ (at the Board's direction) entered an order substituting Gloria Dowell as Real Party in Interest/Successor in Interest. On January 29, 2020, the Board removed the matter from abeyance and referred the matter back to this Court for final disposition.

In August 2009, he injured his right shoulder, and in May 2011, he injured his right shoulder and right knee. On February 8, 2018, the ALJ entered an opinion and order finding no compensable impairment for either injury to the right shoulder but concluding Dowell's knee injury rendered him totally occupationally disabled. The ALJ awarded Dowell permanent total disability benefits commencing on May 25, 2011, and continuing for so long as he remained disabled. The ALJ applied the 1994 version of the tier-down provisions of KRS 342.730(4). In doing so, the ALJ cited 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.

Both parties appealed to the Board. Dowell argued that the ALJ's award should be paid for his lifetime without reduction in benefits as the then-current version of KRS 342.730(4) was held unconstitutional. Matthews Contracting argued the matter should be remanded to the ALJ because the March 30, 2018 amendments to KRS 342.730(4) were applicable to Dowell's claim. On June 22, 2018, the Board rendered an opinion affirming the ALJ's finding that the 1994 version of the tier-down provisions of KRS 342.730(4) applied. Both parties petitioned this Court for review.

During the pendency of this petition for review, two panels of our Court issued opinions concerning the retroactive application of these

amendments—*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 amendments to KRS 342.730(4) are 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. 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 set aside 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).

Accordingly, the June 22, 2018 opinion of the Workers' Compensation Board is reversed and remanded with direction that the ALJ enter a new award in accord with this opinion.

ALL CONCUR.

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