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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-000321-WC

RONNIE BEAN — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-84038

COLLIER ELECTRIC SERVICE;
ATTORNEY GENERAL DANIEL
CAMERON; HON. JOHN MCCRACKEN,
ADMINISTRATIVE LAW JUDGE;
and KENTUCKY WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

KRAMER, JUDGE: On September 21, 2018, an administrative law judge (ALJ) entered an order awarding appellant Ronnie Bean permanent partial disability

benefits (PPD) based upon a 5% permanent impairment rating attributable to a left shoulder injury Bean sustained while working as an electrician for appellee Collier Electric Service, Inc. Bean later appealed to the Workers' Compensation Board, arguing the evidence compelled a finding that his left shoulder injury rendered him incapable of returning to the same type of work he had performed pre-injury, thereby entitling him to the "three" multiplier benefit enhancement set forth in Kentucky Revised Statute (KRS) 342.730(1)(c)1;[1] or alternatively, that his left shoulder injury rendered him incapable of returning to any work, thereby entitling him to permanent total disability benefits. Additionally, he argued that the current version of KRS 342.730(4), which provided a limit to the duration of his PPD, was unconstitutional. Upon review, the Board affirmed. Bean now appeals to this Court; upon review, we likewise affirm.

Bean made his living for fifty years working as an electrician. He also performed occasional odd jobs and has experience driving commercial trucks. Bean filed a Form 101 on or about February 22, 2018, alleging he had sustained a shoulder injury while working for Collier at a jobsite in Blandville, Kentucky, on February 20, 2014. At the time of his injury, he was sixty-eight years of age. He

[1] KRS 342.730(1)(c)1 provides: "If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments[.]"

and a co-worker were installing a cable tray, trying to "line it up" to bolt it in; the two men were pulling the tray in opposite directions, and Bean injured his left shoulder when his co-worker "jerked it" from him.

Beginning July 2014, Bean sought treatment for his left shoulder injury at Vanderbilt University Medical Center. Much of the controversy regarding the level of Bean's impairment stems from a March 14, 2016 office note and list of work restrictions from one of Bean's treating physicians, Dr. John Kuhn. Dr. Kuhn is an orthopedic surgeon and the only medical professional who provided an impairment rating associated with Bean's February 20, 2014 injury. His note documented not only the nature and treatment of Bean's February 20, 2014 injury, but also summarized subsequent medical issues that had affected Bean's overall condition. In relevant part, the note states:

> Ronnie Bean is well known to me. He is a 70-year-old electrician who had been treating since 2007 for his shoulders. His right shoulder had a resurfacing hemiarthroplasty done in June 2008 for rotator cuff tear arthropathy. He did get a little bit weak after that in 2012 and underwent physical therapy and although that shoulder has given him a little bit of discomfort generally and [sic] done well through the years. He has had good function and good range of motion until recently. His left shoulder had a work-related injury and we saw him for that on July 15, 2014. We tried physical therapy without success. An MRI scan showed a bursal-sided near full-thickness rotator cuff tear affecting the supraspinatus and on October 20, 2014 we performed a repair of that small full-thickness rotator cuff tear. By March 2015, he had reached his maximal medical

improvement. He was released to work without restrictions and on the fifth edition to the AMA guidelines had an 8% upper extremity impairment rating for the left shoulder, which equated to a 5% whole person impairment rating. Of note, he has also had [sic] history of cervical arthritis and has received neck injections for that problem.

He returned to see me approximately 6 months after his reaching the MMI and he failed nonoperative treatments. We obtained a new MRI scan, which showed his rotator cuff tear had progressed significantly. We took him back to the operating room on November 17, 2015 whereas rotator cuff tear had extended over the biceps tendon was more of a full-thickness tear and we repaired that. He has gone through physical therapy since November 17. During his postoperative course, he had a cerebrovascular accident and has a bit of an expressive aphagia. In addition, he has lost some strength and function in his right arm.

With regard to his left shoulder, he seems to be doing fairly well. He has a little bit of discomfort raising his arm, but overall his pain is significantly better. His forward elevation is 180 degrees, external rotation is 45 degrees, and internal rotation is fairly good. He has excellent strength on strength testing.

His right shoulder is functioning a little bit better. He has forward elevation to about 160 degrees. His hand is still weak and his speech is a little bit better, but not a lot better. He is still getting speech therapy for that problem.

With regard to his left shoulder, he has reached his maximal medical improvement. I would keep his impairment rating the same at 8% for the upper extremity and 5% for the whole person. I think his limitations to go back to work will be related more to his stroke that is not work related and is under his primary insurance for treating that. If he recovers enough to go back to work,

> but is having trouble, he will return to see me and we will determine what restrictions he might need, but at this point I do not think he is likely to head back. Given the dysfunction he has in his right hand, it would be difficult for him to work as an electrician. I did not make an appointment to see him back, but certainly would be happy to see him back if he has any questions or problems in the future.

The focus of this matter is a February 20, 2014 injury to Bean's left shoulder. With that in mind, Dr. Kuhn's office note—which comprises the bulk of the medical evidence adduced in this matter—undercuts the notion that Bean's February 20, 2014 injury to his left shoulder prevented him from returning to his pre-injury work as an electrician. In Dr. Kuhn's view, Bean's left shoulder had, as of March 2015, *recovered as well as it would ever recover* (*i.e.*, had reached "maximal medical improvement") and, in so doing, required no work restrictions. Indeed, on March 16, 2016, Dr. Kuhn remarked that Bean's left shoulder was doing "fairly well"; Bean's pain in that region was "significantly better"; his elevation and rotation was "fairly good"; and Bean had "excellent strength[.]"

By contrast, Dr. Kuhn emphasized that Bean had suffered a stroke or "cerebrovascular accident" at some point after November 17, 2015, which had affected Bean's speech and caused him to lose "some strength and function in his right arm." Bean had less mobility in his right arm, and Bean's right hand was weak. Dr. Kuhn believed Bean's right arm might *not* have *recovered as well as it would ever recover*. Specifically, Dr. Kuhn stated he was issuing Bean work

restrictions "related more to his stroke that is not work related[,]" and indicated he might later amend those work restrictions if Bean "recovers enough to go back to work[.]"

In line with his statement that Bean's cerebrovascular accident and right arm affected Bean's ability to work, Dr. Kuhn issued a list of work restrictions on March 14, 2016, referencing his office note, prefaced with the following relevant notations:

> **Diagnosis:** L CUFF REPAIR
>
> . . .
>
> **Physically unable to do any type of work at this time**:
> **Yes** X **Until** TBD
>
> **Remarks/Special Instructions**: RELATED TO CVA R ARM.

Two of the three restrictions Dr. Kuhn issued Bean provide no real controversy in this matter; they limited Bean to lifting and carrying up to ten pounds "occasionally (up to 33%)" and only "occasionally (up to 33%)" reaching above shoulder level. With that said, Bean argued his left shoulder injury nevertheless entitled him to the "three" multiplier benefit enhancement set forth in KRS 342.730(1)(c)1 because Dr. Kuhn's third restriction provided:

> **Worker CANNOT use hands for repetitive tasks as indicated:**
>
> Simple Grasping Pushing and pulling

Right	_____	_____
Left	_____	_____X_____

In his various briefs before the ALJ, the Board, and now this Court, Bean has asserted this restriction "had nothing to do with his old right shoulder injury, or with his stroke," and that this restriction, taken in conjunction with Bean's own testimony that it was actually the condition of his left shoulder that causes him the most difficulty and gave rise to his restrictions, "would seem to compel a finding that [he] could not return to work as an electrician, or for any position that is not sedentary in nature," due to his February 20, 2014 left shoulder injury.

The ALJ ultimately rejected Bean's argument, determining that if Bean was unable to return to work as an electrician, the evidence was not convincing enough to demonstrate Bean's inability was due to Bean's February 20, 2014 work injury. In the September 21, 2018 opinion and order at issue in this matter, the ALJ explained in relevant part:

> Dr. John Kuhn has been Mr. Bean's treating physician. He is the only doctor to assign an impairment. The ALJ relies on Dr. Kuhn, and Mr. Bean's testimony, to find that Mr. Bean has a 5% impairment as a result of that injury.
>
> Mr. Bean stated that he did not believe he could return to his work because of his left shoulder. However, the medical proof regarding his left shoulder restrictions are not so clear. The ALJ is mindful of his stroke and right

shoulder injury. However, contrary to Mr. Bean's testimony, the restrictions listed by Dr. Kuhn only specify that he cannot use his hands for repetitive tasks involving pushing and pulling as relates to the left side. The wording of the restrictions is important due to Mr. Bean having medical problems with both shoulders as well as a prior stroke. Dr. Kuhn noted the CVA [cerebrovascular accident] on the work restrictions. His failure to specifically mention the left shoulder, except in one section, leads the ALJ to believe that he included both shoulders in the work restrictions listed.

Mr. Bean testified that his job required him to lift heavy objects, to work in junction boxes and to work with wires. Mr. Bean stated that he could not reach out or have the strength to push and pull objects away from his body. He stated that he could hold a gallon of milk next to his body. He had difficulty holding it away from his body. He stated that his inability to get in and out of heavy commercial trucks was due to his inability to climb.

The ALJ is not convinced by Mr. Bean's testimony that his left shoulder surgeries alone would prevent him from having the physical capacity to return to his former type of work as an electrician. On March 11, 2015, Dr. Kuhn had no plans to see him in the future in regards to the left shoulder. The March 14, 2016 note states that on March 11, 2015, Dr. Kuhn released Mr. Bean to return to work without restrictions as relates to the left shoulder. The ALJ realizes that he had a second surgery in 2015 to his left shoulder. Dr. Kuhn did not clarify whether the restrictions were only to the left shoulder.

The ALJ relies on Dr. Kuhn to find that Mr. Bean retains the physical capacity to return to the type of work he performed on February 20, 2014, as a result of the left shoulder injury. The ALJ finds that Mr. Bean is not entitled to a multiplier based upon KRS 342.730(1)(c)1.

Following a petition for reconsideration from Bean, in which he asked the ALJ to reconsider applying the "three" multiplier benefit enhancement to his award or awarding him permanent total disability, the ALJ entered an October 15, 2018 order reiterating his prior findings and once again denying Bean's requests, adding: "Dr. Kuhn does not single out the left shoulder as the reason Mr. Bean is unable to return to his prior work as an electrician. To the contrary, Dr. Kuhn seems more concerned with the prior CVA and right hand, than [Bean's] left shoulder."

Thereafter, Bean appealed this determination to the Board, which affirmed. He now appeals to this Court, arguing the ALJ's failure to apply the "three" multiplier to his award, or failure to alternatively find him permanently totally disabled, qualifies as reversible error.

We disagree. As the claimant in a workers' compensation proceeding, Bean had the burden of proving each of the essential elements of his claim and likewise carried the risk of non-persuasion. *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979). Because Bean was unsuccessful below, the question on appeal is whether the evidence compels a different result. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). "In order to rise to the level of compelling evidence, and thereby justify reversal of the ALJ under this circumstance, the evidence must be so overwhelming that no reasonable person could reach the same

conclusion as did the ALJ." *Groce v. VanMeter Contracting, Inc.*, 539 S.W.3d 677, 682 (Ky. 2018) (citations omitted). The function of the Board and this Court in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

Here, the ALJ determined Bean was not entitled to the "three" multiplier or permanent total disability benefits due to the left shoulder injury of February 20, 2014, because Dr. Kuhn imposed no restrictions upon Bean's work activities due to that left shoulder injury or due to Bean's subsequent left shoulder surgeries. The ALJ's interpretation of that evidence is not unreasonable. Moreover, the evidence Bean cites in favor of a contrary conclusion, which consists of his self-serving testimony and his own interpretation of Dr. Kuhn's records, is not so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Accordingly, we affirm the Board's determination that no error occurred in this respect.

We now turn to the second aspect of Bean's appeal, which challenges the constitutionality of the newly-enacted version of KRS 342.730(4) on a variety of bases. We begin with what gave rise to his constitutional challenges. During the pendency of Bean's claim, *Parker v. Webster County Coal, LLC (Dotiki Mine)*,

529 S.W.3d 759 (Ky. 2017), was decided by the Kentucky Supreme Court. There, it was determined that the version of KRS 342.730(4) in effect at the time of Bean's injury was unconstitutional because it violated principles of equal protection. That version provided in relevant part:

> 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.

When the Kentucky Supreme Court deemed this provision unconstitutional in *Parker*, it did so on narrow grounds. The Court noted this provision had been unsuccessfully challenged before by litigants who had argued it violated the so-called "jural rights doctrine," principles of due process, and equal protection. But, "equal protection" was the only reason the *Parker* Court cited in favor of its conclusion that the provision was unconstitutional. Summarizing its conclusion in that regard, the Court explained:

> The problem with KRS 342.730(4) is that it invidiously discriminates against those who qualify for one type of retirement benefit (social security) from those who do not qualify for that type of retirement benefit but do qualify for another type of retirement benefit (teacher retirement).

Parker, 529 S.W.3d at 769 (footnote omitted).

On July 14, 2018, while Bean's claim remained pending, the General Assembly responded to *Parker* by enacting a new version of KRS 342.730(4) through its passage of House Bill 2. This version provided a new benefit ceiling, stating in relevant part that payments of income benefits were limited to "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)

During the administrative proceedings below, Bean contested the retroactive application of the new version of KRS 342.730(4) to his claim, arguing the July 2018 amendment to KRS 342.730(4) could not have retroactive effect because the General Assembly had not specifically stated it was designed to have retroactive effect and because it impaired the vested rights of injured workers. *See* KRS 446.080(3). Further, Bean argued that *if* the new and current version of KRS 342.730(4) did not apply to his claim, other portions of the act – or prior versions of KRS 342.730(4) that could otherwise take effect instead – effectively entitled him to uncapped workers' compensation benefits for the full duration of his disability and possibly his lifetime.

But, by way of an order entered September 21, 2018, the ALJ determined KRS 342.730(4) *was* intended to have retroactive effect. Thus, because Bean was sixty-eight years of age at the time of his February 20, 2014

work injury, the ALJ limited payment of Bean's income benefits to four years after the date of his work injury.

Bean then appealed to the Board, arguing the ALJ incorrectly applied KRS 342.730(4) retroactively to his claim. During the pendency of his appeal, however, the Kentucky Supreme Court rendered *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019), which confirmed the ALJ's interpretation and application of KRS 342.730(4). *Id*. at 41-44. Accordingly, the Board affirmed.

With that said, before we address the substance of Bean's constitutional arguments, there is an issue of preservation. Specifically, Collier notes Bean never effectively raised any constitutional challenge to KRS 342.730(4) before the ALJ or the Board and never notified the Kentucky Attorney General of any such challenge during the pendency of those administrative proceedings pursuant to KRS 418.075. As such, Collier asserts Bean "arguably" waived any right to challenge the constitutionality of KRS 342.730(4) before this Court.

Collier is incorrect. Raising a constitutional challenge during administrative proceedings before the ALJ and Board would have been ineffective because an administrative tribunal has no authority to determine the constitutionality of a statute. *See Blue Diamond Coal Co. v. Cornett*, 300 Ky. 647, 189 S.W.2d 963 (1945). Likewise, because administrative proceedings cannot qualify as "any proceeding which involves the validity of a statute" pursuant to

KRS 418.075(1), it would have been equally pointless and unnecessary for Bean to have notified the Kentucky Attorney General of any constitutional challenge at that juncture.

Only the Court of Justice could resolve a constitutional challenge to KRS 342.730(4). And because the Court of Appeals is the first tribunal with jurisdiction to address any such challenge in this matter, the operative rules are KRS 418.075(2) and Kentucky Rule of Civil Procedure (CR) 76.25(8). The former rule provides:

> In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

Whereas the latter rule, CR 76.25(8), provides:

> Before filing, a copy of the petition [for review by the Court of Appeals of decisions of the Workers' Compensation Board] and any response shall be served on counsel of record, or on any party not represented by counsel, and on the Workers' Compensation Board. Such service shall be shown by certificate on the petition or response when filed in the Court of Appeals pursuant to CR 5.02 and CR 5.03. In any case in which the constitutionality of a statute is questioned, a copy of the petition and response shall be served on the Attorney General of the Commonwealth by the party challenging the validity of the statute. The Attorney General may file

> an entry of appearance within ten (10) days of the date of such service. If no entry of appearance is filed, no further pleadings need be served on the Attorney General.

Here, Bean's petition and Collier's response both provide statements certifying they were served upon the Kentucky Attorney General prior to being filed with this Court. And, less than three weeks after being served with Bean's petition, the Kentucky Attorney General filed a response which, upon review, demonstrates a firm understanding of the statute Bean was challenging and the nature of the constitutional defects he alleged, which are discussed in greater depth below. Accordingly, Bean's constitutional challenge was adequately preserved. *Cf. Austin Powder Co. v. Stacy*, 495 S.W.3d 732, 737 (Ky. App. 2016) (constitutional challenge following decision of Workers' Compensation Board not preserved because the record did not reflect that the appellant "complied with the notification requirements of CR 76.25(8) and KRS 418.075(2)").

Accordingly, we now turn to the substance of Bean's constitutional arguments. First, Bean observes that when the General Assembly enacted House Bill 2 into law, it specified that some parts of that legislation (such as the new and current version of KRS 342.730(4)) were designed to operate retroactively, whereas other parts of that legislation were designed only to operate prospectively. Citing this fact, Bean concludes: "[R]etroactivity for certain sections of House Bill 2 and not for other sections of House Bill 2 is arbitrary and in violation of the due

process and equal protection provisions of the Kentucky Constitution and the United States Constitution."

But, Bean cites no authority favoring his position that a House Bill containing both prospective and retroactive provisions is somehow unconstitutional. House Bill 2 merely demonstrates that the General Assembly exercised its prerogative to amend Kentucky's workers' compensation system in different ways to address different problems.

Bean's next argument is as follows:

> [R]etroactivity for certain changes to the workers' compensation statutes by HB 2 and not others is also arbitrary and a violation of the due process and equal protection provisions of the Kentucky Constitution. There are no reasons or references by the Legislature in House Bill 2 for any "emergency" need for retroactive application of Section 20, subparagraph 3, or for that matter, any provision of House Bill 2 being an "emergency." As such, the subject provision should not be permitted to be retroactive and should only apply to cases involving injuries occurring after July 13, 2018. In fact, while Section 20 states that some portions of HB 2 are remedial, it does not indicate that the changes to KRS 342.730(4) are remedial.

Stripped of its general references to "due process" and "equal protection," however, Bean's contention merely questions whether the General Assembly effectively enacted retroactive changes to KRS 342.730(4) through House Bill 2. In determining that KRS 342.730(4) *is* retroactive, the Kentucky Supreme Court has already resolved that issue. *See Holcim,* 581 S.W.3d 37.

Next, Bean argues the new and current version of KRS 342.730(4) is invalid "special legislation" that violates Sections 59 and 60 of the Kentucky Constitution because it "applies to injured older workers, but not all injured workers."

However, Bean cites no caselaw in support of his argument. He does not cite the legal framework governing "special legislation" challenges. Furthermore, Bean acknowledges his argument in this vein is a repackaging of an "equal protection" challenge to KRS 342.730(4) this Court recently addressed in *Donathan v. Town and Country Food Mart*, No. 2018-CA-001371-WC, 2019 WL 6998653 (Ky. App. Dec. 20, 2019). Although *Donathan* is unpublished and remains pending, we believe it fulfills the requirement of CR 76.28(4)(c) for citation and guidance. We find its reasoning persuasive in the context of Bean's "special legislation" challenge, such as it is. Although unpublished, we quote *Donathan* because it explains this area of the law:

> In determining the constitutionality of a statute, courts apply three different scrutiny levels – strict, intermediate, and rational basis. *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465-66 (Ky. 2011). The scrutiny level applied depends on the classifications made in the statute and the interests affected. *Id*. at 465 (citation omitted). Strict or intermediate scrutiny applies if a statute makes a classification because of a suspect or quasi-suspect class. *Id*. at 466 (citation omitted). If the statute merely affects social or economic policy, it is subject to the rational basis test. *Id*. (citation omitted).

Here, workers' compensation benefits concern social and economic policy, thereby requiring the rational basis test. *Parker*, 529 S.W.3d at 767 (citation omitted). Courts will uphold a statute if it passes the rational basis test, which requires a "rational basis" or "substantial and justifiable reason" supporting the classifications created. *Id*. (citation omitted). "Proving the absence of a rational basis or of a substantial and justifiable reason for a statutory provision is a steep burden; however, it is not an insurmountable one." *Id*. (citation omitted).

Donathan argues KRS 342.730(4) is unconstitutional because of a perceived discrimination between older and younger injured workers. This argument triggers the rational basis analysis based on the alleged discrimination being age-related.

Parker determined the state's interest in age-related disparate treatment is to: (1) prevent duplication of benefits; and (2) result in savings for the workers' compensation system. *Id*. at 768. The Kentucky Supreme Court rejected the state's argument the interest satisfied the rational basis test and ruled the 1996 version unconstitutional. The Court held the statute unconstitutional because it treated workers who qualified for Social Security differently than those who did not. The Court made the distinction that teachers who suffer work-related injuries are not subject to KRS 342.730(4) because they do not participate in Social Security, as they have their own retirement program. Therefore, the Court found the statute unconstitutional based upon there being no rational basis for treating other workers differently than teachers in the Commonwealth.

Here, the disparate treatment is no longer linked to Social Security benefits. Instead, the current and applicable version of KRS 342.730(4) states "[a]ll income benefits . . . 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."
>
> Applying the rational basis test, we find this version of the statute constitutional. The legislators enacted this version in response to *Parker*. We are also cognizant of the strong presumption of constitutionality afforded to legislative acts. *Brooks v. Island Creek Coal Co.*, 678 S.W.2d 791, 792 (Ky. App. 1984) (citations omitted). Accordingly, we find the statute, as enacted, does not treat similarly situated persons differently. The statute allows for the benefits to terminate upon reaching the age of 70, or four years after the employee's injury, whichever occurs last. This stipulation rationally relates to the government's basis for the legislation – to save taxpayer dollars allocated to the workers' compensation system. It places a limit on the amount of benefits every person is awarded, not just a select group of individuals. Therefore, we find the statute constitutional.

Id. at *3.

"Special legislation" is "arbitrary and irrational legislation that favors the economic self-interest of the one or the few over that of the many." *Zuckerman v. Bevin*, 565 S.W.3d 580, 599 (Ky. 2018) (citation omitted). In other words, special legislation "applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation, and that relates to classes of persons or subjects." *Id*. There is a "simple, two-part test for determining whether a law constitutes general legislation in its constitutional sense: (1) equal application to all in a class, and (2) distinctive

and natural reasons inducing and supporting the classification." *Id*. at 600 (citations omitted).

As indicated above, KRS 342.730(4) does not impermissibly differentiate between injured workers; it places a limit on the amount of benefits every injured worker is awarded, not just a select group of individuals. Moreover, there is a "distinctive and natural reason" that KRS 342.730(4) provides a cutoff and ceiling for benefits at either the age of seventy or four years after the injury, whichever is later: At that age, injured workers are typically eligible for other income-replacement income, such as old-age Social Security retirement benefits or, for teachers, a public pension. Treating younger and older workers differently in this respect serves the rational legislative purposes of preventing duplication of benefits and maintaining the solvency of the workers' compensation system. *Parker*, 529 S.W.3d at 768.

Lastly, Bean asserts an ostensible "due process" argument. He contends:

> In addition, the retroactivity of KRS 342.730(4) is unconstitutional because it violates due process under the 14th Amendment to the United States Constitution. In *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970), the United States Supreme Court held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in those benefits that is safeguarded by procedural due process. Clearly, workers' compensation in Kentucky has statutory and

administrative standards defining eligibility for those compensation benefits. It is true that to have a property interest in a benefit, a claimant must have more than an abstract need or desire for it or a unilateral expectation of it. Instead, they must have a legitimate claim of entitlement to it. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577; 92 S.Ct. 2701, 2709; 33 L.Ed.2d 548 (1972). Mr. Bean received an award from an ALJ. So, he has a legitimate claim of entitlement to the awarded benefits.

KRS 342.730(4) as effective July 14, 2018 has the effect of taking away benefits from Mr. Bean. The ALJ awarded benefits to Mr. Bean based on the law in effect at the time of the ALJ's award.

The Supreme Court of Kentucky said that the law on the date of injury controls the rights of the parties with respect to a workers' compensation claim. *See Maggard v. International Harvester Co.*, 508 S.W.2d 777 (Ky. 1974) and *Beth-Elkhorn Corporation v. Thomas*, 404 S.W.2d 16 (Ky. 1966). Mr. Bean's cause of action arose on February 20, 2014, the day of his injury. Mr. Bean's property rights to workers' compensation benefits are defined by the statutory scheme in effect on that date. By the terms of that statutory scheme and the Supreme Court holding in *Parker v. Webster Coal*, *supra*, he acquired a property right in his workers' compensation benefits. *See Tatum v. Mathews*, 541 F.2d 161, 165 (6th Cir. 1976). Procedural due process precludes termination of benefits without prior notice and hearing. *Goldberg v. Kelly*, *supra*, at 267-68, 90 S.Ct. at 1020. Mr. Bean was awarded income benefits. Applying the amended version of KRS 342.730(4) to his claim retroactively deprives Mr. Bean of benefits without due process of law.
In this case, the enacted amendment to KRS 342.730(4) is clearly a substantive change in the law for Mr. Bean's injury. It is not remedial in that it directly affects Mr. Bean's vested rights per the Workers' Compensation Act. The change takes away benefits from Mr. Bean.

> Remedial provisions generally expand a remedy without affecting the substantive basis, prerequisites or circumstances giving rise to a remedy. *See Kentucky Insurance Guarantee Association v. Jeffers*, 13 S.W.3d 606 (Ky. 2000) and *Moore v. Stills*, 307 S.W.3d 71 (Ky. 2010).
>
> The Kentucky Supreme Court has long recognized the fundamental principle of statutory construction that bans the retroactive application of statutory amendments. *See Comm. Dept. of Agriculture v. Vinson*, 30 S.W.3d 162 (Ky. 2000). Although House Bill 2 specifically provides retroactive application, such a retroactive application may still not infringe upon an injured worker's rights and constitutional protections that vested on the date of his injury. As such, the 2018 version of KRS 342.730(4) violates prohibitions on retroactive application and should be found by the Court of Appeals to not apply to Mr. Bean. The Court of Appeals should decline to apply a statute which was not in effect at the time of Mr. Bean's injury. Mr. Bean asks that relief.

Bean's argument has no merit. True, Bean was awarded workers' compensation benefits. And, Bean is correct that that a person receiving benefits under statutory and administrative standards has an interest in those benefits that cannot be terminated in the absence of procedural due process. *Goldberg*, 397 U.S. at 267, 90 S.Ct. at 1020. But despite Bean's frequent references to it, a violation of "procedural due process" is not implicated in his argument: He is not complaining that the workers' compensation benefits he was *awarded* were *terminated* because, indeed, they were not. Setting aside its verbiage, the substance of his argument is that he would have been awarded *more* benefits if an

earlier version of KRS 342.730(4), rather than the current one, had been applied to his claim.

Essentially, Bean's complaint is that the retroactive application of the current version of KRS 342.730(4) infringed upon his *right to recover* workers' compensation benefits pursuant to the statute in effect at the time of his injury. In other words, he agreed to take part in Kentucky's workers' compensation scheme and demands he receive the benefits he was entitled to at the time he was injured—and not pursuant to the new retroactive statute, which, taking the substance of his argument objectively, he believes to be an invalid *ex post facto* law.

With that said, this Court addressed and rejected the same contention where it was more aptly framed as a challenge under Section 19(1) of the Kentucky Constitution and Article 1, Section 10, Clause 1 of the United States Constitution, which prohibit laws that impair the obligation of contracts. We find the recent case of *Adams v. Excel Mining, LLC*, No. 2018-CA-000925-WC, 2020 WL 864129 (Ky. App. Feb. 21, 2020) (unpublished), persuasive and believe it offers sound guidance on this issue; thus, it fulfills the requirement of CR 76.28(4)(c) for citation. In *Adams*, we explained in relevant part:

> Despite the seemingly unequivocal language of the federal and state Contract Impairment Clauses, "[a] constitutional prohibition against impairing the obligation of contracts . . . is not an absolute one to be read with literal exactness. The Contract Clause does

> not prevent a state from enacting regulations or statutes which are reasonably necessary to safeguard the vital interests of its people."

Maze v. Bd. of Directors for Commonwealth Postsecondary Educ. Prepaid Tuition Tr. Fund, 559 S.W.3d 354, 368 (Ky. 2018) (citation omitted). When determining whether a legislative act violated the contract impairment clause, we are to utilize the following standard:

> (1) whether the legislation operates as a substantial impairment of a contractual relationship; (2) if so, then the inquiry turns to whether there is a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem; and (3) if, as in this case, the government is a party to the contract, we examine "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers," and we determine if the impairment is "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

Id. at 369.

"The first step . . . is determining 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Id*. at 369-70 (citations omitted).

> A significant consideration in this step of the analysis is the extent to which the industry subject to the contract has been regulated in the past. The rationale for this rule is thusly stated: "One whose rights, such as they are, are subject to state restriction, cannot

> remove them from the power of the State by making a contract about them."

Id. at 370 (citations omitted). Here, we believe the new law substantially impairs Appellant's benefits. Although the workers' compensation scheme is heavily regulated, past versions of KRS 342.730(4) have allowed a benefit recipient to receive benefits for life. In fact, the 1994 version that was to be applied allowed Appellant to receive benefits for life, although they were subject to reduction from time to time. The current version terminates benefits once Appellant reaches 70 years of age.

> The second stage of the . . . analysis involves a determination of whether the newly-imposed conditions that impair the contract can be justified by a significant and legitimate public purpose. Among the purposes that justify such impairment is legislation aimed at the remedying of a broad and general social or economic problem.

Id. at 371 (citations omitted). The Kentucky Supreme Court has found that limiting the duration of benefits is justified by a legitimate public purpose. The Court found that limiting the duration of benefits solves two economic problems: "(1) it prevents duplication of benefits; and (2) it results in savings for the workers' compensation system." *Parker*, 529 S.W.3d at 768. This is evident from the fact some version of limiting the duration of benefits has been in effect in Kentucky since the 1996 version of KRS 342.730(4).

> The third stage of the . . . analysis examines whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public

> purpose justifying [the legislation's] adoption." Analysis under this prong varies depending upon whether the State is a party to the contract. When the State itself is not a contracting party, "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."
>
> *Maze*, 559 S.W.3d at 372 (citations omitted). The contracts at issue here are not between individuals and the state, but between an employee, an employer, and a workers' compensation insurance provider. We, therefore, will defer to the judgment of the legislature.
>
> We believe retroactive application of KRS 342.730(4) is reasonable and appropriate. As previously stated, limiting the duration of benefits has been a part of the workers' compensation system since 1996. *Parker*, *supra*, found the limitation which applied at that time to be unconstitutional. The Kentucky Legislature had to act quickly to return the workers' compensation system to the status quo. Had the legislature not acted, employees who still had workers' compensation claims which were not final between the rendering of *Parker* and the effective date of the current version of KRS 342.730(4) would be entitled to some amount of benefits for life. This would have placed a large financial burden on the workers' compensation system, employers, and insurers. *Holcim, supra*, holds that the Kentucky Legislature specifically intended that the current version of KRS 342.730(4) apply retroactively. As we have found it is constitutional, we conclude that it applies in this case.

Id. at *2-3.

Our analysis set forth above disposes of the substance of Bean's argument. There is no reason to depart from the sound reasoning in *Adams*.

In short, the ALJ did not clearly err in its assessment of the evidence regarding Bean's claim, and Bean has not set forth any basis for holding KRS 342.730(4) unconstitutional. Accordingly, we AFFIRM.

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