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Supreme Court of Kentucky

2020-SC-0024-WC

SHIRLEY DONATHAN

APPELLANT

ON APPEAL FROM COURT OF APPEALS
NO. 18-CA-1371
WORKERS' COMPENSATION BOARD
NO. WC-14-86413

V.

TOWN AND COUNTRY FOOD MART;
HONORABLE ROLAND CASE,
ADMINISTRATIVE LAW JUDGE;
KENTUCKY ATTORNEY GENERAL,
FORMERLY ANDY BESHEAR, NOW
DANIEL CAMERON; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Shirley Donathan appeals to this Court as a matter of right from the opinion of the Court of Appeals upholding the constitutionality of the 2018 amendment to Kentucky Revised Statute (KRS) 342.730(4), a provision governing the duration of workers' compensation benefits, against her challenge that the amended statute violates the Contracts Clause of the United States and Kentucky Constitutions. We affirm the Court of Appeals' holding.

We recently addressed this exact issue in *Dowell v. Matthews Contracting*,¹ and we found the amendment constitutionally sound. We will now again explain our reasoning in the context of Donathan's circumstances. As we held in *Dowell*, litigants like Donathan do not have a contract with their employer or the state for workers' compensation benefits and therefore have no contractual right to payment curtailed by the 2018 amendment to KRS 342.730(4).

I. FACTS

In April 2014, Shirley Donathan, then aged sixty-nine, was injured when she slipped and fell while working as a cook for Town and Country Food Mart. She injured her left ankle and side, as well as her chest. On November 2, 2015, ALJ Case found Donathan permanently and totally disabled. At the time of the award, the 1996 version of KRS 342.730(4) was the controlling law. ALJ Case applied the 1996 version to Donathan's benefits award, finding that her benefits would terminate when she reached the normal retirement age for old-age Social Security benefits.

Donathan's appeal to the Workers' Compensation Board was held in abeyance until this Court rendered *Parker v. Webster County Coal*,² which struck down as unconstitutional the 1996 version. The Board then in 2018 remanded the matter to the ALJ with direction to enter an award of lifetime

¹ Nos. 2020-SC-0170-WC, 2020-SC-0137-WC, 2021 WL 3828612, at *1 (Ky. Aug. 26, 2021).

² 529 S.W.3d 759 (Ky. 2017).

benefits to Donathan under the 1994 version of KRS 342.730(4). The ALJ did so in a decision rendered May 8, 2018.

Town and Country appealed to the Board, arguing that even though *Parker* had set aside the 1996 version of the statute, the issue should be reconsidered. Before the Board reached Town and Country's appeal, the General Assembly's 2018 amendment to KRS 342.730(4) became effective. The Board then vacated the ALJ's award of lifetime benefits to Donathan and remanded the case to the ALJ for application of the 2018 amendment.

Donathan appealed to the Court of Appeals, but the case was held in abeyance until this Court decided *Holcim v. Swinford*,³ which held that the 2018 amendment to KRS 342.730(4) applied to all pending appeals. The Court of Appeals then applied the 2018 amendment to Donathan, finding her benefits to terminate at the later of her reaching age 70 or four years after the date of her injury.

II. ANALYSIS

A. The retroactive application of the 2018 amendment to KRS 342.730(4) does not violate the Contracts Clause of the United States or Kentucky Constitutions.

Donathan argues that applying the 2018 version of KRS 342.730(4) to her workers' compensation benefits award violates the Contracts Clause of the United States and Kentucky Constitutions. Article 1, Section 10 of the United States Constitution reads:

³ 581 S.W.3d 44 (Ky. 2019).

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Similarly, the Kentucky Constitution provides, “No ex post facto law, nor any law impairing the obligation of contracts, shall be enacted.”⁴

Donathan did not raise this issue in the Court of Appeals. While Donathan challenged the constitutionality of the 2018 amendment to KRS 342.730(4) on special legislation and equal protection grounds, she did not argue that the amendment also violated the Contracts Clause of the Kentucky and United States Constitutions. As such, Town and Country argues this issue was not properly preserved and is therefore waived. We agree. We have long held that a “new theory of error cannot be raised for the first time on appeal.”⁵ Each argument raised on appeal must have been raised in the court below. Accordingly, we find this issue to be unpreserved.⁶

Although the issue is unpreserved, we will address it summarily as we have recently addressed the same argument in *Dowell v. Matthews Contracting*.⁷ Donathan argues that the Workers’ Compensation Act creates a contract between employers and employees and that the 2018 amendment to

⁴ Ky. Const. § 19.

⁵ *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999).

⁶ Donathan points this Court to pages 11-14 of her brief to the Workers’ Compensation Board. However, neither her brief to the Board nor her brief to the Court of Appeals raise the argument advanced here.

⁷ 2021 WL 3828612, at *1.

KRS 342.730(4) infringes on her contractual right to a certain duration of compensation. Donathan argues the contract is formed once the employee has enrolled in the system and they are injured. Donathan asserts the occurrence of injury to be the critical moment the contract is accepted because, before that moment, the employee may freely reject the Workers' Compensation Act's provisions and regain her right to sue her employer; whereas, post injury, the employee cannot reject the Act. Under this alleged contract, Donathan argues that employees have a vested right to benefits, the duration of which is fixed by the law in effect when the contract was accepted—the date of injury.

We disagree and hold that Donathan has no contractual right to compensation. In *Dowell*, we explained that the Workers' Compensation System is a statutory scheme enacted to compensate injured Kentucky employees and to protect Kentucky employers from suit.⁸ But this system does not create a contract between the state and employees, nor employers and employees. Instead, the workers' compensation system consists of a number of intertwined statutes that create the legal protections previously mentioned. Because the workers' compensation system is not a contract, benefits recipients do not have a contractual right to a certain amount or duration of payment. As we said in *Dowell*:

The benefits an employee may receive after being injured while working are not a result of a bargained for exchange where there is an offer, acceptance, and consideration, but are the result of a statutory scheme intended to provide a form of insurance for Kentucky employees in case of injury. Therefore, the essential

⁸ *Id.* at *3-4.

premise of a Contracts Clause analysis—the existence of a contract—is absent and our analysis must stop there.⁹

And like *Dowell*, Donathan has failed to show the Workers' Compensation Act provided her express assurances that she would receive benefits for a certain duration that were bargained for and agreed to by her and her employer.¹⁰ Because Donathan has no contract guaranteeing her to workers' compensation benefits of a specific duration, it cannot be said that the 2018 amendment to KRS 342.730(4) infringes on any of her contractual rights.

Donathan is not wrong in asserting her injury date provides her with certain vested rights. But, to be clear, Donathan's injury date only vests her with statutory rights, not contractual ones. It is true a vested right, regardless of whether it is contractual or statutory, cannot be disturbed by substantive changes in the law. And as we explained in *Dowell* and *Cates v. Kroger*,¹¹ a claimant does not have a vested right to benefits until the claimant has received a final decision granting workers' compensation benefits. So, while Donathan's statutory right to file a claim to receive workers' compensation benefits vested the date of her injury, it cannot be said on that date she became entitled to benefits of a

⁹ *Id.*

¹⁰ See *Maze v. Bd. Of Dirs. For Comm. Postsecondary Educ. Prepaid Tuition Trust Fund*, 559 S.W.3d 354, 361 (Ky. 2018) (“Of crucial significance to our analysis [is that], KRS 164A.705(1) expresses an unequivocal assurance to plan participants that they will receive the benefits they purchased as promised[.]”).

¹¹ No. 2020-SC-0275-WC, 2021 WL 3828555, at *6-7 (Ky. Aug. 26, 2021).

certain duration because she has not received a final judgment granting her benefits. We find that the retroactive application of the 2018 amendment to KRS 342.730(4) does not infringe the Contracts Clauses of the United States or Kentucky Constitutions.

B. The 2018 amendment to KRS 342.730(4) applies to Donathan.

Donathan argues that because the 1996 version of KRS 342.730(4) is unconstitutional and was originally applied to her case, the proper remedy is to sever that version from the remainder of the statute such that permanent total benefits should be awarded to her without time limitation. This issue was properly preserved. But the Court of Appeals disagreed, finding that the 2018 amendment applies to Donathan because this Court has sanctioned as constitutional the retroactive application of the amendment. We agree that the 2018 Amendment to KRS 342.730(4) applies to Donathan, and we will briefly explain why.

Donathan's severability argument must fail for the simple reason that the General Assembly replaced the unconstitutional 1996 provision with the 2018 amendment to KRS 342.730(4). The amendment became effective on July 14, 2018 and has been interpreted to apply to all pending claims.¹² As such, because the statute's current version is the controlling law in all pending claims and Donathan's workers' compensation claim is still being litigated, the

¹² *Holcim v. Swinford*, 581 S.W.3d 37, 43 (Ky. 2019) ("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.").

current version applies to her claim. As a result, as the Court of Appeals found, under current law, Donathan's benefits will terminate upon her turning 70 or four years after her injury, whichever is later.

III. CONCLUSION

We reiterate our previous holding in *Dowell*, that the 2018 amendment to KRS 342.730(4) is not an unconstitutional violation of the Contracts Clause of the United States or Kentucky Constitutions.¹³ We affirm the Court of Appeals' holding that Donathan's benefits will terminate the later happening of her reaching the age of 70 or four years after her injury date.

Minton, C.J.; Hughes, Conley, Lambert, and VanMeter, JJ., concur.
Keller, J., concurs in result only. Nickell, J., not sitting.

¹³ *Dowell*, 2021 WL 3828555, at *3-4.

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