

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000610-WC

SOUTH KENTUCKY RURAL ELECTRIC
COOPERATIVE CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-84-23605 & WC-85-15508

PAUL E. DYE; HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: South Kentucky Rural Electric Cooperative Corporation (RECC) has petitioned for review of an opinion of the Workers' Compensation Board entered on February 20, 2002, which affirmed an order by the Administrative Law Judge which had granted Paul E. Dye permanent and total occupational disability benefits. Having concluded that the Board did not overlook or misconstrue controlling statutes or precedent, or

commit an error in assessing the evidence so flagrant as to cause gross injustice, we affirm.¹

The Board's opinion by Member Stanley thoroughly summarized the facts as follows:

Dye, born on June 6, 1950, sustained a work-related injury in the course of his employment with RECC on February 14, 1980. He originally settled his claim on December 2, 1987 for a lump sum of \$36,000.00, representing a 20.88% occupational disability. He filed the present motion to reopen on September 13, 2000, alleging an increase in occupational disability. In an order entered October 27, 2000, Dye's motion to reopen was sustained. Dye filed a motion to amend his reopening to assert a psychological/psychiatric claim on February 12, 2001.

Dye has a high school education and two years vocational training as a machinist. On February 14, 1980, while working as a lineman for RECC, he sustained an injury when he fell from a forty foot utility pole attached to the safety belt. He was impaled on a rosebush at the bottom of the pole. The bush penetrated his scrotum, pierced his right thigh, and entered his abdominal or peritoneal space. He was treated at the hospital in Somerset, Kentucky, and returned to work as a lineman after six to eight weeks.

Dye continued to have problems complaining of back pain and weakness. His local doctor referred him to Dr. Hiram Polk, the Chairman of the Department of Surgery at the University of Louisville. Dr. Polk diagnosed an abscess interabdominally and performed surgery along with Dr. M. Amin. Apparently, a portion of the rosebush had

¹ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

worked its way into the abdominal cavity. Dye had an abscess the size of cantaloupe and underwent surgery which included the removal of a kidney, part of his colon, and a portion of the psoas muscle of the back. During this period of time, Dye underwent three surgeries and was off work from February 14, 1984 to March 1985.

Upon his return to work, Dye worked as a right-of-way supervisor until 1999. He described the job as stress filled, working nine to ten hours a day. The job went from supervising twelve to fourteen people to sixty or seventy people. It involved extensive travel in thirteen counties. Part of his duties included returning electric power after bad weather outages. His job duties included light lifting, walking on rough and irregular terrain, and occasionally working around the clock during emergencies. Dye testified that in 1993, during a snow or ice storm, he was placed on Prozac for a short period of time because of the stress of the job.

In 1999, Dye developed a hydrocele or collection of fluid on the left testicle. Dr. Polk performed surgery to remove the hydrocele on May 26, 1999. Dye's last day of work with RECC was May 26, 1999. After the relatively minor surgery to remove the hydrocele, Dye developed an increase in symptomology. He developed a staggering gait and a change in his mental health.

Dye testified he continues to experience numbness in his left leg and pain in his hip. He stated he has trouble walking and that he falls. He is weaker, has lack of stamina, and drags his left foot. He described crying spells and takes Xanax and Celexa (replaced Zoloft). He testified he could not perform his job as right-of-way supervisor, nor one as a dispatcher because of the prolonged sitting and high stress of the job. Dye has been

awarded Social Security disability benefits and is eligible for long-term disability benefits from RECC.

The medical evidence in the record consists of the deposition and records of Dr. Hiram Polk, a treating surgeon; deposition and records of Dr. Maynard Stetten, an orthopedic surgeon; and the deposition and report of Dr. Philip Corbett, an evaluating orthopedic surgeon. Psychiatric testimony came from Dr. Robert Woolley and Dr. David Shrabert, both psychiatrists. Also introduced into the record is the report of Dr. Ralph Crystal, a vocational expert.

Dr. Polk first saw Dye in 1984 and described him as one of the most unusual cases he had ever seen. Dye had been referred to him by Dr. Truman Mays for a retroperitoneal abscess on the left side. He explained that upon performing surgery, a piece of rosebush was discovered in the abscess. Dr. Polk testified that the rosebush piece had migrated along the backbone, near the kidney on the left side, and was the cause of the abscess. The abscess was removed, along with the left kidney and a portion of the psoas muscle which Dr. Polk described as the tenderloin which runs alongside the backbone. He described the surgery as major and testified that Dye was one of the "best soldiers" he had ever cared for and that he coped very well with the surgery in 1984.

The May 1999 surgery for the hydrocele was a different story. Dr. Polk testified that the hydrocele, the swelling in the left side of the testicle, was related to the scar tissue from the prior surgery. He explained that a hydrocele, though usually idiopathic, in this case was more than likely due to the scar tissue from the previous surgery. Following the hydrocele surgery, Dye began experiencing acute

anxiety and depression. Dr. Polk also noted that Dye developed staggering and gait difficulties which he related to the injury. On cross-examination, Dr. Polk was questioned whether Dye had a good result from the surgery. Dr. Polk explained that the hydrocele turned out okay and he did not see that the psychological component and problem with his gait were directly related to the hydrocele, but certainly arose temporally following the hydrocele surgery. On redirect examination, Dr. Polk reiterated that the hydrocele, the difficulty in gait, and curvature in his spine were directly related to the surgery performed in 1984.

Dr. Polk referred Dye to Dr. Maynard Stetten who he described as the best orthopedist for hard problems in Kentucky. Dr. Stetten described Dye as in need of psychiatric help inasmuch as he was very depressed with bouts of crying and was very emotional. He testified that Dye was suffering from leg weakness due to his injury and he assigned a 10-15% functional impairment due to his orthopedic problem which did not include the abdominal surgery, nor psychological condition.

Dr. Phillip Corbett examined Dye on January 5, 2001. He diagnosed s/p severe retroperitoneal infection with loss of left psoas muscle and left kidney. Dr. Corbett noted that during the course of the interview and examination, Dye had several episodes of emotional breakdown with the discussion of his loss of professional opportunity. Dr. Corbett did not think an orthopedic evaluation did justice to Dye's impairment. It was his impression that Dye's impairment had been established on the basis of his abdominal difficulties.

Dr. Woolley, a psychiatrist, first saw Dye on April 23, 2001, and again for a follow-up appointment on June 4, 2001. He diagnosed Dye as suffering from clinical

depression, also known as dysthymic disorder and anxiety disorder. He stated that Dye initially had an onset of symptoms in 1993 due to a change in work, but was able to deal with it until May of 1999. Dr. Woolley assigned a Class III moderate impairment and stated he had a 25-50% functional impairment. He believed Dye could not return to work as a dispatcher because it would be too stressful. Dr. Woolley was asked to explain how an event like the hydrocele might make Dye's anxiety and depression disabling. He believed that Dye getting hit down by the complications and the surgeries and impairments to the point that depression and anxiety became more chronic and unremitting. He further explained that Dye was a hard working individual who had denied his emotional problems previously.

Dr. Shraberg evaluated Dye on March 16, 2001. He diagnosed adjustment disorder of adult life with depressed anxious mood which would resolve within three to six months. He found no evidence of any deterioration psychologically that would prevent him from doing the type of job he had done in the past for alternate employment consistent with his skills if he were given physical restrictions.

Dr. Ralph Crystal evaluated Dye on March 12, 2001. He felt Dye could perform jobs at a sedentary or light level of exertion. He believed Dye could return to work at his past employment as a right-of-way superintendent.

The ALJ reviewed the lay and medical testimony in the record and concluded that Dye's psychiatric condition was based on his work injury, relying on the testimony of Dr. Polk and Dr. Woolley. He therefore concluded that Dye's psychiatric condition was an injury defined by KRS 342.620(1) which defined "injury" in 1980 as "any work-

related harmful change in the human organism, arising out of and in the course of employment. . . ." Concerning the statute of limitations, the ALJ concluded that the motion to reopen was timely filed pursuant to KRS 342.125 and therefore the issue of the statute of limitations under KRS 342.185 was not applicable to a reopened claim. The ALJ next determined that Dye sustained an increase in occupational disability and found him totally occupationally disabled based on his own testimony, as well as that of his wife and the opinions of Dr. Polk, Woolley, and Corbett. He concluded there was no medical evidence which indicated Dye's conditions were the result of the arousal of a dormant non-disabling condition and inasmuch as the Special Fund was not a party to the original claim, dismissed the Special Fund. He refused to give retroactive application to KRS 342.730(4), providing for the termination of benefits at the age of 65.

RECC filed a petition for reconsideration, which was denied by the ALJ on October 2, 2001. By opinion entered on February 20, 2002, the Board affirmed the ALJ's decision. This petition for review followed.

RECC claims that (1) Dye's present complaints are not related to his original work-related injury; (2) Dye's psychiatric claim is barred by the applicable statute of limitations; (3) Dye's occupational disability has not increased; (4) any award should be apportioned between RECC and the Special Fund; and (5) Dye's benefits should be terminated when he reaches age 65.

On reopening his claim and seeking an increase in his award, Dye had the burden of proving that there had been a change of condition resulting from his original compensable injury.² The Supreme Court of Kentucky "has construed KRS 342.285 to mean that the fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence."³ The ALJ "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof[.]"⁴ "[W]here the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion."⁵

"When the . . . Board reviews the findings of the ALJ, its review is restricted to a determination of whether the factual findings of the trier of fact was 'clearly erroneous.'"⁶ "Substantial evidence has been defined as some evidence of

² Griffith v. Blair, Ky., 430 S.W.2d 337, 339 (1968)(citing KRS 342.125; and Jude v. Cabbage, Ky., 251 S.W.2d 584 (1952)).

³ Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002)(citing Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985)).

⁴ Burton, supra at 929 (citing Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977)).

⁵ Burton, supra at 929 (citing Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986)).

⁶ Union Underwear Co. v. Searce, Ky., 896 S.W.2d 7, 9 (1995)(citing Hudson v. Owens, Ky., 439 S.W.2d 565, 568 (1969)).

substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people.”⁷ “Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ’s decision, such evidence is not an adequate basis for reversal on appeal.”⁸ The Board does not have the authority to substitute its judgment for that of the ALJ in issues regarding the weight to be afforded to the evidence involving questions of fact.⁹

Decisions rendered by the Board are subject to direct review by this Court.¹⁰ “KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board.”¹¹ The function of further review of the decisions of the Board in this Court “is to correct the Board only where the [] Court perceives 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.”¹²

⁷ Burton, 72 S.W.3d at 929 (citing Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971)).

⁸ Burton, supra at 929 (citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974)).

⁹ KRS 342.285.

¹⁰ Kentucky Rules of Civil Procedure (CR) 76.25(1).

¹¹ Burton, supra at 929.

¹² Western Baptist Hospital, 827 S.W.2d at 687-88.

RECC claims that the ALJ's finding that Dye's psychological impairment is related to his original work-related injury is not supported by substantial evidence. RECC states that, "[in] over twenty (20) years following his work-related injury, Dye never treated with a mental health provider." RECC relies on the testimony from Dr. Polk for its argument that "Dye's recent psychological complaints are not caused by his work-related injury." RECC further contends that, based on Dr. Stetten's testimony, Dye's current physical complaints with his low back are likely due to deconditioning. RECC also relies upon evidence from Dr. Shraberg.

The ALJ found Dye to be a credible witness and was persuaded by his testimony. The ALJ was further persuaded by the testimony of Dr. Polk and Dr. Woolley. Dr. Polk testified that it was more likely than not that the hydrocele was due to scar tissue from Dye's original injury. Dr. Woolley testified that Dye's psychological condition was due to his most recent surgery. This constituted substantial evidence in support of the ALJ's finding of work-relatedness.

RECC also claims that even if Dye's psychiatric problems were due to his work-related injury, his claim for benefits is nevertheless barred by KRS 342.185, KRS 342.270(1),

and KRS 342.125(8). KRS 342.125(8)¹³ has been expressly declared remedial by the Legislature.¹⁴ The Legislature intended for the four-year limitation in KRS 342.125(8) to retroactively apply to claims that arose before and were decided prior to December 12, 1996.¹⁵

Member Stanley's opinion for the Board ably addressed RECC's statute of limitations argument, and we adopt it as follows:

Dye filed his motion to reopen for an increase in occupational disability on September 19, 2000. Attached was his affidavit which alleged an increase in disability, in part due to emotional problems directly related to his injury. Also attached was the affidavit of Dr. Polk, wherein he noted that Dye suffered from certain nervous conditions and mental involvement as a result of deterioration, surgery, and sequelae thereof. Dye formally amended his motion to reopen to include the psychiatric condition on February 12, 2001.

A motion to reopen cannot be based on a condition known to a claimant during the

¹³ KRS 342.125(8) provides:

The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. However, claims decided prior to December 12, 1996, may be reopened within four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later, provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well.

¹⁴ KRS 342.0015; Meade v. Reedy Coal Co., Ky., 13 S.W.3d 619, 621 (2000).

¹⁵ Id.

pendency of his original action but for which some reason he did not choose to litigate. Slone v. Jason Coal Co., KY., 902 S.W.2d 820 (1995). That, however, is not the factual situation with which we are now faced. Dye may have had some psychiatric problems in 1993, but this was well past the settlement of his original claim in 1987. Our Supreme Court ruled in Fischer Packing Co. v. Lanham, Ky., 804 S.W.2d 4 (1991) that a new condition may be the basis for a reopening where it is a causal result of the original work-related injury and becomes manifest after the time of the original award. Additionally, such a new condition may be the type of reopening based on a change of occupational disability as provided in KRS 342.125. See, Slone v. Jason Coal Co., *supra*, at 822. We disagree that Dye was bound by KRS 342.185 to reopen and seek benefits for his psychological condition within two years of its discovery. It is well established that reopening as a remedy is intended for redressing specific situations that occur or come to light after an award is entered. Brooks v. University of Louisville Hospital, Ky., 33 S.W.3d 526 (2000). Furthermore, KRS 342.125 specifically provides for its own limitation requirements and therefore supersedes KRS 342.185 with regard to reopened claims. Id. at 530.

KRS 342.125 was amended effective December 12, 1996, to include language providing that all claims decided prior to that date could only be reopened within four years of the original award or order or four years from December 12, 1996, whichever was later. See, KRS 342.0015 and KRS 342.125(8), as amended in 1996, and Meade v. Reedy Coal Co., Ky., 13 S.W.3d 619 (2000).

Statutory construction requires that when two statutes appear to be in conflict, the one dealing with the subject matter specifically is controlling over a more

general statute. See, Boyd v. C & H Transport, Ky., 902 S.W.2d 823 (1995). In this instance, we find KRS 342.125 to be specific with regard to reopenings, while KRS 342.730 is a general limitations statute. Although KRS 342.185 establishes the period of limitations for most types of claims controlled by the Act, that provision, by law, does not govern causes of action properly raised on reopening.

Hence, the only period of limitations controlling Dye's claim for a psychiatric condition was the requirement that said cause of action be raised on reopening by the respondent prior to December 12, 2000. Furthermore, unlike KRS 342.185, under the limitations requirement of KRS 342.125, the date of discovery post-award of a new condition that is causally related to a claimant's original action is not a factor. In other words, since Dye's reopening was timely filed, we believe the requirements of KRS 342.125(8) were met. The statute of limitations pursuant to KRS 342.185 does not apply and the fact that Dye procedurally conformed with KRS 342.125(8), makes his filing timely. The fact that he did not formally amend his reopening until a later date is immaterial. It is simply a matter of a timely reopening and not the timely filing of a claim under KRS 342.185.

RECC also claims that Dye's occupational disability has not increased. The ALJ found the following:

Following the Plaintiff's initial surgery, which resulted in the removal of his left kidney and a portion of his colon, he returned to work in March 1985 and worked as a right-of-way superintendent until May 25, 1999. He testified at that time that he was experiencing depression with outbursts of crying, as well as numbness in his left leg, gait disruption and pain at the point of his surgical incision. I am persuaded by the

Plaintiff's testimony concerning his symptoms, physical and emotional difficulties, the testimony of his wife, and the opinions of Dr. Polk and Dr. Woollery [sic], his treating surgeon and his treating psychiatrist, in addition to the observations of Dr. Corbett, that the Plaintiff's emotional condition, including his dysthemia and anxiety disorder, coupled with his physical symptoms, and his age, education and work experience have rendered him permanently and totally disabled. While I realize that Dr. Shraberg has expressed the opinion that the Plaintiff's condition is temporary in nature, I find the Plaintiff to be a credible witness, and I am persuaded by his testimony, in addition to the observations of his long-term treating physician, Dr. Polk, that the emotional outbursts, depression which the Plaintiff experiences are permanent in nature as explained in the opinion of Dr. Woollery [sic]. In light of his physical and psychiatric condition, I am further persuaded that he cannot engage in the variety of jobs described by Dr. Crystal on a regular and sustained basis.

RECC argues that Dye has failed to establish that "he is a greater dreg on the marketplace than when he voluntarily stopped working for RECC on May 25, 1999."¹⁶ However, there was substantial medical evidence to support the ALJ's conclusion that Dye did suffer an increase in occupational disability from the injury of February 14, 1980.¹⁷ It was proper for the ALJ to then use lay testimony to determine the extent, if any, of

¹⁶ See Central City v. Anderson, Ky., 521 S.W.2d 24 (1975).

¹⁷ Hush v. Abrams, Ky., 584 S.W.2d 48, 51 (1979).

occupational disability; and the ALJ was persuaded by the testimony of both Dye and his wife.¹⁸

RECC also argues that any award Dye received should be apportioned between RECC and the Special Fund. RECC claims that the "only medical evidence supporting Dye's claim that he is disabled based on psychiatric problems comes from Dr. Woolley." RECC argues that because Dr. Woolley's testimony suggests that Dye's psychiatric problems are due to either a previously dormant, non-disabling condition which was aroused or due to a pre-existing, underlying psychological problem, any award should be apportioned between RECC and the Special Fund.¹⁹

Although the ALJ found that Dye suffered an increased occupational disability as a result of his injury, there was no medical evidence which indicated that Dye's conditions are, to any extent, the result of the arousal of a dormant, non-disabling condition. As the Workers' Compensation Fund observes, RECC does not allege that the Board overlooked or misconstrued controlling statutes or precedent. RECC does allege that the Board improperly assessed Dr. Woolley's testimony regarding Dye's psychiatric problems. We adopt the Board's opinion, which held that the ALJ's findings were supported by substantial evidence:

¹⁸ Id. at 51.

¹⁹ The Special Fund has since been renamed as the Workers' Compensation Fund.

As pointed out by the Special Fund, however, Dr. Woolley's testimony does not support a finding of apportionment. The psychiatrist testified that the hydrocele surgery was, in essence, the straw that broke the camel's back, to the point where Dye could no longer deal with his medical condition from an emotional standpoint. There is no evidence to suggest or, for that matter, support a finding of apportionment.

RECC's final claim of error is that under KRS 342.730(4) Dye's benefits should be terminated when he reaches age 65. KRS 342.730(4) provides, in pertinent part, that "[a]ll 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" The ALJ found that KRS 342.730(4), which was effective December 12, 1996, was not in effect at the time of Dye's injury, and it was not designated by KRS 342.0015 to have retroactive application. The ALJ thus determined that KRS 342.730(4) was not applicable to Dye's award, citing Maggard v. International Harvester Co.²⁰

RECC concedes that "[t]ypically, the law in effect on the date of the accident controls the amount of income benefits to which a worker is entitled to receive and which the defendants may be required to pay for disability caused by a resulting injury."²¹ RECC argues that "[a] statute is 'remedial'

²⁰ Ky., 508 S.W.2d 777 (1974).

²¹ See Spurlin v. Adkins, Ky., 940 S.W.2d 900 (1997).

and can apply retroactively if it expands an existing remedy without [a]ffecting the substantive basis, prerequisites, or circumstances giving rise to the remedy."²² RECC further argues that "remedial statutes . . . do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes."²³ As RECC relies upon this contention for relief, this quote must be considered in its entirety. In Peabody Coal Co., regarding retrospective laws, our Supreme Court declared the following:

A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conceptions of a retrospective law, or the general rule against the retrospective operation of statutes. In this connection, it has been said that a remedial statute must be so construed as to make it effect the evidence purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct,

²² See Kentucky Insurance Guaranty Assoc. v. Jeffers, Ky., 13 S.W.3d 606, 609 (2000).

²³ Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 36 (1991).

unless to do so would impair some vested right or violate some constitutional guaranty. 73 Am.Jur.2d Statutes § 354 (1974) [footnotes omitted].²⁴

Peabody Coal dealt specifically with whether the 1987 amendment to KRS 342.125 could be applied retrospectively. Due to its remedial nature, our Supreme Court held that it could. However, in the case sub judice, KRS 342.0015 does not specifically pronounce KRS 342.730(4) to be remedial; and KRS 446.080(3) states that "[n]o statute shall be construed to be retroactive, unless expressly so declared."

In Leeco, Inc. v. Crabtree,²⁵ the issue presented to the Court was whether the "tier down" provision contained in KRS 342.730(4) applied to a combined award for successive disabilities, one of which occurred before the effective date of the provision. The claimant filed a workers' compensation claim based upon injuries he sustained on July 2, 1992, and May 24, 1994. The ALJ determined that both of the claimant's injuries contributed equally to his disability and awarded him lifetime benefits at the average of the applicable rates for total disability for 1992 and 1994. Liability for the combined award was apportioned equally between the claimant's employer and the Special Fund. Both the employer and the Special Fund appealed,

²⁴ Id. at 36.

²⁵ Ky., 966 S.W.2d 951 (1998).

arguing that the claimant's award should be amended to provide for a "tier down" of benefits when the claimant reached age 65.²⁶

The Supreme Court determined that "the rights and responsibilities of the parties with regard to the 1992 injury vested on July 2, 1992. Since KRS 342.730(4) was not in effect at that time, it may not be applied in order to reduce benefits attributable to the 1992 injury."²⁷ However, "since KRS 342.730(4) became effective before May 24, 1994, it does apply to benefits attributable to the 1994 injury."²⁸

In the case sub judice, KRS 342.730(4), as amended in 1996, was not in effect at the time of Dye's 1980 injury. Furthermore, our Supreme Court considered the amended version of KRS 342.730(4) in Leeco, wherein it held:

We believe that the primary purpose of enacting KRS 342.730(4) was not so much to benefit the Special Fund as to minimize a duplication of benefits. This argument is

²⁶ At that time, as enacted effective April 4, 1994, KRS 342.730(4) read as follows:

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, 342.732, or this section 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), as amended in 1996, now reads differently than at the time Leeco was rendered.

²⁷ Leeco, 966 S.W.2d at 953.

²⁸ Id. at 953.

strengthened by the fact that, in 1996, the legislature amended KRS 342.730(4) to provide for the termination of income benefits after a period of two years or after the worker become eligible for old age Social Security benefits, whichever last occurs. Acts 1996, 1st Ex.Sess., ch. 1, § 30. It is further strengthened by the fact that the Special Fund bears no liability for claims arising after December 12, 1996. Acts 1996, 1st Ex.Sess., ch. 1, § 3. We, therefore, conclude that the primary purpose of KRS 342.730(4) was to avoid duplicating other sources of income replacement, particularly old age Social Security.²⁹

In light of the foregoing, as well as the Legislature's failure to specifically designate KRS 342.730(4) as remedial, the ALJ properly determined that it does not apply to Dye's award.

Based on the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE, PAUL DYE:

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²⁹ Leeco, 966 S.W.2d at 955.