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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-000451-WC

DEBRA SUE DARNELL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-89179

SAPUTO DAIRY;
HON. GREG HARVEY, ADMINISTRATIVE
LAW JUDGE; and WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, LAMBERT AND TAYLOR, JUDGES.

KRAMER, JUDGE: Debra Sue Darnell appeals from the Workers' Compensation Board, which affirmed a January 25, 2019 order of an administrative law judge (ALJ) granting her permanent total disability (PTD) income and medical benefits for an injury she sustained to her sacral iliac joint in the course and scope of her

work for appellee Saputo Dairy. The entirety of her appeal asserts, for the several reasons discussed below, that the ALJ improperly determined the most recent version of KRS[1] 342.730(4) limited the duration of her award. Upon review, we affirm.

A discussion of the evidence is unnecessary because it is irrelevant to the issue raised on appeal. Suffice it to say that Darnell was born in 1956; she filed her Form 101 on July 17, 2018, alleging a March 16, 2016 work injury; and there is no dispute regarding the ALJ's ultimate determination, consistent with the allegations of Darnell's Form 101, that Darnell was indeed permanently and totally disabled due to a March 16, 2016 work injury.

As indicated, the controversy surrounding this appeal involves the application of the newly-enacted version of KRS 342.730(4) to Darnell's award. After the date of Darnell's alleged work injury, *Parker v. Webster Cty. 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 her 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

[1] Kentucky Revised Statute.

> 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, shortly before Darnell filed her Form 101, 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, Darnell contested the retroactive application of the new version of KRS 342.730(4) to her 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[2] and because it impaired the vested rights of injured workers. Further, Darnell argued that *if* the new and current version of KRS 342.730(4) did not apply to her claim, other portions of the act – or prior versions of KRS 342.730(4) that could otherwise take effect instead – effectively entitled her to uncapped workers' compensation benefits for the full duration of her disability, *i.e.*, her lifetime.

But, in the January 25, 2019 order and award at issue herein, the ALJ determined KRS 342.730(4) *was* intended to have retroactive effect. Accordingly, the ALJ limited Darnell's benefits to the date Darnell turned seventy years of age.

Darnell then appealed to the Board, arguing the ALJ incorrectly applied KRS 342.730(4) retroactively to her claim. During the pendency of her 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.

[2] *See* KRS 446.080(3).

We now turn to the substance of Darnell's constitutional arguments. First, Darnell 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, Darnell appears to assert that this disparity violates constitutional principles.

But, Darnell cites no authority favoring her 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.

Darnell's next argument 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, Darnell 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." And, for the same reasons, Darnell argues it violates principles of equal protection.

With that said, this Court largely addressed those points 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[3] 76.28(4)(c) for citation and guidance. We find its reasoning persuasive in the context of Darnell's arguments. 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

[3] Kentucky Rule of Civil Procedure.

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.

Darnell also asserts an ostensible "due process" argument. She contends:

> 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)).
>
> Darnell received an award from an Administrative Law Judge. So, she 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 Darnell.

Darnell's argument has no merit. True, Darnell was awarded workers' compensation benefits. And, Darnell is correct 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 Darnell's frequent references to it, a violation of "procedural due process" is not implicated in her argument: She is not complaining that the workers' compensation benefits she was *awarded* were *terminated* because, indeed, they were not. Setting aside its verbiage, the substance of her argument is that she would have been awarded *more* benefits if an earlier version of KRS 342.730(4), rather than the current one, had been applied to her claim.

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

And incidentally, that is exactly Darnell's *next* argument, which she frames 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.

With that said, this Court addressed and rejected that same point in the recent case of *Adams v. Excel Mining, LLC*, No. 2018-CA-000925-WC, 2020 WL 864129 (Ky. App. Feb. 21, 2020) (unpublished), which we deem persuasive and believe offers sound guidance on this issue consistently with the requirements of CR 76.28(4)(c). 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 Darnell's argument. There is no reason to depart from the sound reasoning in *Adams*.

In conclusion, Darnell has set forth no basis for holding KRS 342.730(4) unconstitutional. Moreover, the Board did not err in determining the ALJ properly applied that statute to Darnell's award. Thus, we AFFIRM.

LAMBERT, JUDGE, CONCURS.

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