

Case Name, Citation, Author, Date Entered: Lafarge Holcim v. James Swinford; No. 2018-CA-000414-WC; Clayton, Chief Judge; Rendered 9/7/2018; TO BE PUBLISHED.

Procedural History: Lafarge appeals from an opinion of the WCB which affirmed in part and reversed in part an order of the ALJ. The WCB affirmed an award of PPD benefits to Swinford, a former employee who suffered a workplace injury, and reversed the ALJ's determination that the benefits were subject to the "tier down" provision of the 1994 version of KRS 342.730(4).

Facts: Swinford, age 75, sustained a work injury on March 10, 2016, when his bulldozer slid down an embankment. At the time of injury, Swinford was working 12 hour shifts, 5 days a week.

Swinford had undergone a cervical surgery in the 1990s without significant improvement in symptoms in the neck and upper extremities, and, he continued to experience tingling and numbness in the hands. He continued to work without restrictions or limitations. He had not sought medical treatment for the neck until after the March, 2016 injury.

Swinford was treated conservatively following the injury, including PT and pain management, without a great deal of relief. Surgery was considered, but not performed.

Dr. Brandon Streng acknowledged the previous surgery, but noted Swinford was able to work without restrictions. An MRI showed a T1-T2 disc herniation causing mild central and foraminal stenosis. This was caused by the accident, which exacerbated the neck pain and caused worsening of right arm numbness and a new onset of right triceps weakness. He assigned a 15% rating all due to the injury.

Dr. J. T. Ruxer described Swinford's condition as a worsening of pre-existing neck and right arm pain, and noted he had been working without restrictions until the accident.

Dr. Robert Weiss, a neurosurgeon, performed an IME, and found degenerative changes in the cervical spine and cervical spondylosis typical of a male Swinford's age but no evidence of a surgical lesion or disc herniation. The injury was work-related, and no surgery or further treatment was needed. He did not recommend returning to operate heavy equipment.

The ALJ found a work injury, and, relying on Swinford's testimony, and Drs. Streng and Ruxer, did not find a pre-existing impairment rating relating to Swinford's condition and awarded 15% impairment so long as he was eligible to receive benefits "in accordance with KRS 342.730 (4) and applicable case law."

The version of KRS 342.730 (4) then in effect terminated income benefits for employees who qualified for old-age Social Security retirement benefits.

In Orders on Reconsideration, the ALJ ordered application of a prior version of KRS 342.730(4) dating from 1994. The WCB affirmed the finding that Swinford did not have an active pre-existing impairment but reversed the ALJ's ruling that a prior version of KRS 342.730 (4) was applicable to Swinford's case.

Issues: 1) Did Swinford's prior neck surgery and subsequent treatment with pain medication constitute a pre-existing and active disability not resulting from the bulldozer accident and therefore was not compensable?

2) Does the new provision of KRS 342.730(4) which provides that all income benefits shall terminate as of the date upon which the employee reaches the age of 70, or four years after the employee's injury, or last exposure, whichever last occurs, apply to this case?

Holding: 1) No

2) No

Reasoning: 1) According to the Finley case, to be characterized as active, an underlying condition must be symptomatic *and* impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. The burden of proving this falls on the employer.

In finding the condition was not symptomatic prior to the accident, the ALJ relied on Swinford's testimony that he worked 12 hour shifts, 5 days a week prior to the accident and that he had no trouble getting in and out of the bulldozer or operating its controls.

The WCB affirmed the ALJ's analysis, and further noted that none of the experts, including Dr. Weiss, assessed a pre-existing active impairment.

The COA agreed with the WCB's analysis, and stated the ALJ was free to accept or reject any testimony. There was no medical testimony that Swinford had a ratable pre-existing impairment and that there was no evidence that any symptoms experienced by Swinford following the surgery had any effect whatsoever on his ability to perform his job.

2) The COA finds that the revised statute did not specifically include language to make this section of the amended Act retroactive. The version of KRS 342.730 in effect at the time of injury included the unconstitutional provision in subsection (4). Because the remainder of the statute is valid and can be executed without subsection (4), the duration of Swinford's benefits is controlled by KRS 342.730 (1) (d), which specifies a compensable period of 425 weeks for PPD benefits of 50% or less.

Despite being a part of the wording of the Act that was passed and signed into law by the Governor, and as set forth in the HB2, Section 20, the COA ruled the language was a “note” and not statutory language (However, see attached for your review). Therefore, retroactive effect would not be given to terminate income benefits at age 70, notwithstanding the actual date of injury.

RECOMMENDATION: We advise not making final decisions concerning benefits to injured employees that may be affected until this issue is finally decided by the Supreme Court of Kentucky.