

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 13, 2019

CLAIM NO. 201500581, 201370127 & 200797512

HOWARD DURHAM

PETITIONER

VS.

**APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE**

JACK COOPER TRANSPORT CO., INC.
ALLIED SYSTEMS HOLDINGS, INC.
ACTIVE TRANSPORTATION
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Howard Durham (“Durham”) seeks review of the March 8, 2019, Opinion, Order, and Award of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”) finding he sustained a November 26, 2014, left knee injury while in the employ of Jack Cooper Transport Co., Inc. (“Jack Cooper”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”)

benefits enhanced pursuant to KRS 342.730(1)(c)1 for 425 weeks, and medical benefits. The ALJ found Durham did not sustain permanent injuries to his right knee and lower back on August 26, 2013, while in the employ of Allied Systems Holdings, Inc., and to his lower back on November 26, 2014, while in the employ of Jack Cooper.

In response to Jack Cooper's petition for reconsideration, the March 19, 2019, Order corrected the award to reflect Durham "is entitled to PPD benefits for 425 weeks, but subject to any limitation set forth in KRS 342.730(4) which, at present, would require such PPD benefits cease when plaintiff turns 70 on July 24, 2024."

BACKGROUND

Durham filed a Notice of Appeal on April 18, 2019. Pursuant to Durham's May 6, 2019, motion to hold the appeal in abeyance pending the finality of Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), relating to the retroactivity of KRS 342.730(4), this Board placed the appeal in abeyance by Order dated May 22, 2019. The parties were ordered to file status reports within 120 days and notify the Board when a decision in Holcim was final. On August 29, 2019, the Kentucky Supreme Court rendered a decision in Holcim, which became final on September 24, 2019. By Order dated October 2, 2019, this Board removed the above-styled appeal from abeyance and set a briefing schedule.

Durham's sole argument on appeal is "the 2018 amendment to KRS 342.730(4) and its retroactive application is unconstitutional." Durham points out that in Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017), the Kentucky Supreme Court found the 1996 version of KRS 342.730 to be unconstitutional. He notes the 1996 version of KRS 342.730 does not state the

remainder of the statute is deemed null and void if one sub-section of the statute is deemed unconstitutional since “the remaining sections of KRS 342.730 are neither so essentially/inseparably connected with subsection (4), nor are the remaining parts incapable of standing alone/so incomplete so that they cannot be executed.”

Durham observes that, pursuant to the 1996 version of KRS 342.730, he would have received an award of PPD benefits for 425 weeks. However, during the pendency of his claim, the Kentucky General Assembly passed the amended version of KRS 342.730(4), which became effective July 14, 2018. That section now provides as follows: “All income benefits payable pursuant to this chapter 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 occurs last.” Durham argues “the 2018 version of KRS 342.730(4) continues to result in disparate treatment of Kentucky’s injured workers without reasonable justification and violates the equal protection clause of the Constitution.” As the rights of the parties become fixed and vested on the date of injury, Durham argues:

Applying legislative changes retroactively to a contract in derogation of a party’s rights violates the contracts clause of the United States and Kentucky Constitutions. Maze v. Bd. of Dirs. For the Commonwealth Postsecondary Educ. Prepaid Tuition Trust Fund, 559 S.W.3d 354 (Ky. 2018).

Retroactive application of a law which limits the duration of permanent partial disability payments to Mr. Durham violates the equal protection clause and the contracts clause of the Kentucky Constitution.

ANALYSIS

The parties do not dispute the Kentucky Supreme Court in Holcim held:

With no mention of retroactivity or any language from which retroactivity may be inferred, the express language of KRS 342.730(4) does not make the statute retroactive. However, the Legislative Research Commission note following the statute references the Act from which the statute was enacted and, as discussed, is exempt from the codification requirements, as it is temporary in nature. Thus, the legislature has made a declaration concerning retroactivity in this case.

Since the newly-enacted amendment applies retroactively, it must be used to determine the duration of Swinford's benefits. We remand this matter to the ALJ to apply the time limits set out in the 2018 amendment to KRS 342.730(4).

Id. at 44.

In accordance with the Supreme Court's holding in Holcim, the ALJ sustained Jack Cooper's petition for reconsideration and amended the award to reflect Durham's award of PPD benefits was subject to the newly-enacted version of KRS 342.730(4). Durham's sole challenge is to the constitutionality of the statute. This Board lacks jurisdiction to determine the constitutionality of the newly-enacted version of KRS 342.730(4). Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). *See also* Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011); Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 752 (Ky. 2011). Consequently, since this Board has no authority to rule on the propriety of the retroactive application of KRS 342.730(4), we must affirm, as there is no judiciable issue for this Board to decide.

Accordingly, concerning the sole issue raised in the appeal, the March 8, 2019, Opinion, Order, and Award and the March 19, 2019, Order amending the award of PPD benefits are **AFFIRMED**.

ALL CONCUR.

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