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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001025-WC

JAMES CRUME

APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-95922

v.

BROWN FORMAN CORP.; HON.
GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

AND
NO. 2018-CA-001119-WC

BROWN FORMAN CORPORATION,
BLUEGRASS COOPERAGE

CROSS-APPELLANT

CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-95922

v.

JAMES CRUME; HON. GRANT S.
ROARK, ADMINISTRATIVE LAW JUDGE;
AND THE WORKERS' COMPENSATION
BOARD

CROSS-APPELLEES

OPINION
REVERSING AND REMANDING

** **

BEFORE: JONES, NICKELL,¹ AND TAYLOR, JUDGES.

JONES, JUDGE: This appeal and cross-appeal arise out of an opinion rendered by the Workers' Compensation Board ("Board") on June 8, 2018. The sole issue on appeal concerns which law governs the duration of the benefits awarded to James Crume in the wake of *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). For the reasons set forth below, we reverse the opinion of the Workers' Compensation Board and remand this matter with instructions to apply the amended version of KRS² 342.730(4), which became effective July 14, 2018.

The facts leading up to the award of the Administrative Law Judge ("ALJ") are not disputed on appeal. Therefore, we will provide only a brief factual overview. Crume was born on February 4, 1951. On January 28, 2014, Crume slipped and fell in a parking lot while working for Brown Forman, injuring his neck and back. Crume filed a Form 101 Application for Resolution of Injury Claim with the Department of Workers' Claims. His claim was assigned to an

¹ Judge C. Shea Nickell concurred in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

² Kentucky Revised Statutes.

ALJ. Following discovery, a benefit review conference and a final hearing, the ALJ rendered an opinion, order and award on April 24, 2017. The ALJ awarded Crume permanent partial disability benefits beginning January 28, 2014, and continuing until “he qualifies for old age Social Security retirement benefits.” Three days later, the Kentucky Supreme Court held that the version of KRS 342.730(4) in effect at the time was constitutionally infirm on equal protection grounds because it treated injured older workers, like Crume, who qualified for normal old-age Social Security retirement benefits differently than it treated injured older workers who did not so qualify. *Parker*, 529 S.W.3d at 770.

Crume appealed the ALJ’s decision with respect to the duration of his benefits to the Board. Therein, he challenged the applicability of KRS 342.730(4) based on *Parker*. Crume argued before the Board that because the section of the statute regarding duration of benefits relied on by the ALJ had been declared unconstitutional, he was entitled to benefits for the full 425 weeks without an age-limit cutoff. On June 8, 2018, the Board vacated the ALJ’s award and remanded for entry of a new award based on the prior version of KRS 342.730(4), known as the tier-down version, that was in effect from 1994 to 1996, immediately prior to the version struck down by *Parker*.

Both parties took umbrage with the Board’s decision to apply the older, tier-down version of the statute, and they appealed to our Court. While the

parties agreed that the Board erred in applying the tier-down version of the statute, they disagreed on how the duration of Crume's benefits should be determined. Crume continued to assert that he should be awarded the full 425 weeks of benefits with no age cutoff. Brown Forman argued that the duration of Crume's benefits should be determined by a newly enacted version of KRS 342.730(4), which became effective July 14, 2018, shortly after this appeal and cross-appeal were filed. This version amended the duration of benefits provision 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 last occurs."

The amendment at issue is contained in Section 13, subsection 4 of Kentucky House Bill 2 (Kentucky 2018 Regular Session). House Bill 2 was signed by the Speaker of the House and President of the Senate and sent to the Governor for approval. The Governor approved House Bill 2 in March of 2018. House Bill 2, as approved by the Governor, was filed with the Kentucky Secretary of State on March 30, 2018. It became effective July 14, 2018. In addition to its many codified sections, House Bill 2 contains two non-codified sections, Section 19 and Section 20. Section 20, subsection 3 of House Bill 2 explicitly provides:

Subsection (4) of Section 13 of 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.

The central issues raised in the parties' briefs required this Court to determine the enforceability of this non-codified retroactivity provision. By the time this appeal and cross-appeal were assigned to this panel for a decision, the retroactivity issue was already pending before the Kentucky Supreme Court. Accordingly, by order entered January 25, 2019, this Court placed this appeal and cross-appeal in abeyance pending finality of the two retroactivity cases pending before the Kentucky Supreme Court, *Holcim v. Swinford*, 2018-SC-000627-WC, and *Lanier v. University of Louisville*, 2018-SC-000685-WC. *Lanier* was dismissed as settled in March of 2018. *Holcim*, however, remained active through rendition of an opinion by the Kentucky Supreme Court. Following finality of the opinion, *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019), on September 24, 2019, we restored this appeal and cross-appeal to our active docket.

The issue before us is the exact same issue decided by our Supreme Court in *Holcim*: whether the newly amended version of KRS 342.730(4) applies retroactively to claims pending when the statute became effective on July 14, 2018.

Our Supreme Court ultimately held that the amended version of the statute applies retroactively as set forth in the non-codified portion of House Bill 2. It explained:

[T]he 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).

Holcim, 581 S.W.3d at 44.

Crume was injured on January 28, 2014, well after December 12, 1996, and his claim was “in the appellate process . . . as of the effective date of [House Bill 2].” Accordingly, based on the Kentucky Supreme Court's holding in *Holcim*, the amended version of KRS 342.730(4), which became effective July 14, 2018, governs the duration of Crume's benefits. The Board erred as matter of law when it remanded Crume's claim with instructions to apply the prior tier-down version of the statute.

Accordingly, we REVERSE the Kentucky Workers' Compensation Board's June 8, 2018 opinion and REMAND this matter for further action consistent with this Opinion and *Holcim*.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
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