

Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-000398-WC

UNINSURED EMPLOYERS' FUND,
DIVISION OF KENTUCKY
ATTORNEY GENERAL'S OFFICE

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-93-027848

HON. WALTER TURNER,
(COMMISSIONER, DEPARTMENT
OF WORKERS' CLAIMS);
HON. DENIS S. KLINE,
ADMINISTRATIVE LAW JUDGE;
GAY HALL; PORTER INDUSTRIES,
INC. OF ALLEN, KENTUCKY; and
HON. ROBERT WHITTAKER,
DIRECTOR OF SPECIAL FUND

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE: The Uninsured Employers' Fund (UEF) petitions for review of an opinion of the Workers' Compensation Board (Board) affirming an order of Hon. Denis s. Kline, Administrative Law Judge (ALJ).

The question presented in this appeal relates to payment of benefits by the UEF. We believe the ALJ and the Board have correctly interpreted recent legislative and administrative changes relating to the payment of benefits and have not

overlooked or misconstrued the controlling statutes, administrative regulations or precedent. Nor do we believe that the ALJ or the Board committed error in assessing the evidence so flagrant as to cause gross injustice as required by Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992). We, therefore, affirm. Not believing we can improve upon the Board's opinion, we adopt it as our own:

The Uninsured Employers' Fund ("UEF") appeals from an Order dated September 9, 1997 by Hon. Denis S. Kline, Administrative Law Judge ("ALJ"), and from the ALJ's order of October 3, 1997 overruling its petition for reconsideration.

Gay Hall ("Hall") sustained a work-related hernia injury on June 28, 1993 while lifting a heavy piece of steel. At that time, Hall was employed by Porter Industries, Inc. ("Porter"). Hall filed a claim against Porter and the Special Fund seeking workers' compensation benefits since neither temporary total disability ("TTD") benefits, nor medical benefits, were paid and surgery had been recommended for repair of Hall's hernia condition. Subsequently, on September 7, 1994, the Commissioner, Department of Workers' Claims, certified that Porter did not have workers' compensation insurance coverage on the date of Hall's injury. The UEF was thereafter joined as a party defendant by ALJ order entered September 26, 1994.

Hall's claim was adjudicated before ALJ Kline who rendered an Opinion, Award, and Order on May 22, 1995, awarding Hall TTD benefits beginning July 7, 1993 until he reaches maximum medical improvement following the anticipated hernia surgery, along with interest at the rate of 12% per annum on all past due and unpaid installments of compensation. Porter was additionally ordered to authorize and pay for all medical, surgical, and hospital expenses related to

Hall's hernia and hernia surgery. The issue of whether Hall was entitled to permanent occupational disability benefits was reserved and placed in abeyance by the ALJ.

Porter appeals to the Workers' Compensation Board ("WCB") which affirmed the ALJ's award of benefits to Hall, but dismissed Porter's appeal as an appeal from an order granting interlocutory relief. Porter then appealed to the Court of Appeals which rendered an opinion on August 30, 1996 affirming the WCB and the ALJ. The claim was remanded to the ALJ with directions for the ALJ to finalize remaining considerations in accord with the ALJ's original Opinion dated May 22, 1995.

On remand, the ALJ ordered that a pre-hearing conference be held on December 10, 1996. That conference was held and the ALJ ordered Porter to pay TTD from July 7, 1993 through July 14, 1995, along with 12% interest and all reasonable medical expenses to be paid before December 17, 1996. Further, the ALJ reopened proof time on the issue of whether Hall sustained any permanent occupational disability. The UEF participated in this proceeding.

Subsequently, on December 20, 1996, Hall filed a motion requesting an order from the ALJ establishing the monetary liability for the TTD awarded. Thereafter, the ALJ, in an order of January 10, 1997, ordered that the liability for TTD, as of December 16, 1996, was \$18,749.57. Moreover, the ALJ, noting that the appeal time had run from the finality of the Court of Appeals decision, stated that his award of TTD "...is now final and there is no just cause for delay in entry." Thereafter, based on a motion for attorney's fee, the ALJ, in an order dated February 20, 1997, approved a fee for Hall's attorney in the amount of \$3,750.00.

On July 30, 1997, Hall filed a motion to commence payments on the award by the UEF pursuant to KRS 342.760(4) and 803 KAR 25:010, § 27. Hall's affidavit of July 24, 1997 was attached to the motion wherein he

stated that 30 days had passed since the ALJ's order of January 10, 1997 directing payment of TTD in the amount of \$18,749.57; that Porter had not paid any of the awarded amount; and, that he requested an order of the ALJ directing payment from the UEF. The UEF responded to the motion that Hall must first pursue an action in circuit court to enforce payment of the award against Porter, as an uninsured employer, and then assert a default in payment of the judgment by Porter before liability attaches to the UEF. This was a requirement in 803 KAR 25:050, §24, prior to the amendment to KRS 342.760(4), §27, effective December 12, 1996, and prior to the promulgation of 803 KAR 25:010, §27, effective as an emergency regulation on February 17, 1997 and formally adopted by legislative review on July 27, 1997.

The ALJ, in an order of September 9, 1997, concluded that the new regulation was procedural in nature and applied to Hall's claim. Accordingly, he entered the following order:

ORDER DIRECTING UNINSURED
EMPLOYERS' FUND PAYMENT

Plaintiff has moved for payment from the Uninsured Employers' Fund of the employer's portion of the Award dated May 22, 1995 and has certified that the Award has been final for more than 30 days and that the employer is in default by failing to timely commence payment thereunder. The employer has failed to secure payment of compensation as provided in KRS 342.340.

Accordingly, IT IS ORDERED that the Uninsured Employers' Fund shall immediately commence payment of the employer's portion of the Award dated May 22, 1995.

The UEF filed a timely petition for reconsideration asserting a patent error by the ALJ in overlooking the established

practice and procedure for collection of an award from the UEF. The UEF argued that Hall had alleged the award had not been paid without any allegation of circuit court attempt to collect the award and that the order entered by the ALJ was based upon a new regulation promulgated by the Commissioner of the Department of Workers' Claims. The UEF's position was that, notwithstanding the new regulation, KRS 342.760(4) still requires a showing of an actual default on behalf of the defendant/employer before the UEF can be ordered to pay benefits. The ALJ, in a subsequent order dated October 3, 1997 overruled the UEF's petition for reconsideration. This appeal by the UEF to the WCB then ensued.

KRS 342.760(4), amended by the Legislature on December 12, 1996, states as follows:

(4) The uninsured employers' fund shall be responsible for the payment of compensation when there has been default in the payment of compensation due to the failure of an employer to secure payment of compensation as provided by this chapter. Such employer shall be liable for payment into the fund of all the amounts authorized to be paid therefrom under the authority of this subsection including reimbursement of the special fund of all liability apportioned to it and for the purposes of enforcing this liability the Labor Cabinet, for the benefit of the fund, shall be subrogated to all the rights of the person receiving such compensation from the fund. This provision shall apply to all pending claims upon which a final order has not been entered. (emphasis added).

In addition, the Legislature, enacted KRS 342.0015, effective December 12, 1996, which provides:

Procedural provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to all claims irrespective of the date of injury or last exposure, including, but not exclusively, the mechanisms by which claims are decided and workers are referred for medical evaluations.

Further, in KRS 342.0015, the Legislature directed that the provisions contained in KRS 342.760(4) to be remedial.

Pursuant to the authority and directives embodied in KRS 342.260, the Commissioner promulgated regulations for the procedure for adjustment of claims; and pursuant to KRS 342.760, promulgated §27 of 803 KAR 25:010 in connection with "payment of compensation from uninsured employers' fund" which states as follows:

(1) Payment from the Uninsured Employer's Fund of compensation shall be made upon the determination by an arbitrator or administrative law judge that the responsible employer failed to secure payment of compensation as provided by KRS Chapter 342.340 and:

(a) Thirty (30) days have expired since the finality of an award and a party in interest certifies the responsible employer has failed to initiate payments in accordance with that award; or

(b) Upon showing that the responsible employer has filed a petition under any section of the

Federal Bankruptcy code;
or

(c) The plaintiff or any other party in interest has filed in the circuit court of the county where the injury occurred an action pursuant to KRS 342.305 to enforce payment of the award against the uninsured employer, and there has been default in payment of the judgment by the employer.

(2) The plaintiff may by motion and affidavit demonstrate compliance with this section and request an arbitrator or administrative law judge to order payment from the Uninsured Employers' Fund in accordance with KRS 342.760.

(3) This section shall not be construed to prohibit the voluntary payment of compensation by an employer, or any other person liable for payment thereof, who has failed to secure payment of compensation as provided by KRS Chapter 342, the compromise and settlement of a claim, or the payment of benefits by the Special Fund.

(4) The sample form, Motion for Payment from Uninsured Employers' Fund, provided by the department may be used by the employee.

Here, the UEF argues that contrary to 803 KAR 25:010, §27, there has been no finding that the employer failed to secure payment of compensation. In addition, the UEF contends that this new regulation should be ruled illegal since it alters the status of the UEF

from a "pay last" fund to a "pay first" fund. In connection with the UEF's first argument, it appears that the UEF is asserting that the ALJ simply failed to make a finding in accordance with the regulation if 30 days has elapsed since the finality of the award and the claimant has not been paid. We believe, however, that the language utilized by the ALJ in his September 9, 1997 order effectively makes such a finding.

The UEF, in connection with its second argument on appeal, traces, in its brief, the language utilized by the Legislature in KRS 342.760(4) since its enactment in 1972. The UEF points out that the relevant language regarding default has remained unchanged throughout the period of time since 1972 and is contained within the amended statute effective December 12, 1996. Through its citation to court precedent, beginning with Davis v. Turner, Ky., 591 S.W.2d 820 (1975) through Yocum [sic], et a. v. Campbell, et al., Ky., 536 S.W.2d 470 (1976), Davis v. Goodin, et al., Ky.App., 639 S.W.2d 381 (1982), and more recently in Wells v. Blair, et al., Ky., 736 S.W.2d 346 (1987), the UEF asserts that the established procedure in the past has required a claimant to provide proof that he has reduced an Administrative Law Judge's compensation award to a judgment in a circuit court as required by KRS 342.305. Then, and only then, reasons the UEF, where a default in such payment is then shown, would the UEF, as secondarily liable for the claimant's award, be required to, in fact, make payment on the award as ordered originally by the ALJ. Finally, the UEF points out that where an administrative regulation is contrary to a statute, the statute will prevail. The UEF requests the WCB to remand the claim to the ALJ for an appropriate finding as to whether the "responsible employer failed to secure payment of compensation as provided by KRS Chapter 342.340" and/or an opinion from the WCB that the new regulation is illegal and contrary to the established law and legislative intent that the UEF be a "pay last" fund.

While the UEF has argued that past procedure and custom required a claimant to file a proceeding before the circuit court in order to obtain a judgment and then demonstrate proof of default by a responsible employer who had not secured insurance coverage under the Act for injuries to its employees, the statutory language in KRS 342.760, as previously enacted or as amended effective December 12, 1996, has never contained such a requirement. Moreover, while it is true that the previous regulation, 803 KAR 25:010, §24(1), required the claimant "or any other party in interest" to demonstrate that an action to enforce payment of the award against the UEF had been filed in the circuit court of the county where the injury occurred and that there has been a default in payment of the judgment by the employer, the previous language of the statute did not require this procedure. The procedure was developed by the administrative agency as a method of demonstrating that an uninsured employer failed to make payment of the award pursuant to the statutory mandate enacted by the General Assembly.

The new regulation which was applied to Hall's claim against the UEF in this case, continues to provide the procedure that a claimant, or any other party in interest, demonstrate that it has filed a circuit court action to force payment of the award against the uninsured employer and that there has been a default in payment of the judgment by the uninsured employer. However, the regulation now provides additional methods for a claimant to demonstrate that the employer has defaulted in the payment of the award without requirement that it proceed to a circuit court judgment action.

Here, the Commissioner has certified that Porter was uninsured on the date of Hall's injury. That certification meets the requirement of subsection (1) of 803 KAR 25:010, §27, that Porter, as the responsible employer, failed to secure payment of compensation as provided by KRS 342.340. In addition to that certification, present in the record before us, Hall, as the claimant,

must additionally demonstrate or show that "[t]hirty (30) days have expired since the finality of an award and a party in interest certifies the responsible employer has failed to initiate payments in accordance with that award...."

In Hall's case, this was accomplished by his motion and affidavit. The ALJ determined that this complied with the alternative method contained in the regulation to demonstrate that liability should now be afforded against the UEF in accordance with KRS 342.760(4). We conclude the application of the new regulation to the then pending claim is supported by the amendment to KRS 342.760(4), effective December 12, 1996. We further conclude that the procedures adopted in the regulation by the Commissioner are within the authority of the powers delegated to the Commissioner and are not outside the parameters of KRS 342.760(4).

Accordingly, the Order entered by Hon. Denis S. Kline, Administrative Law Judge, is hereby **AFFIRMED** and the appeal by the Uninsured Employer's Fund is hereby **DISMISSED**.

The opinion of the Workers' Compensation is affirmed.

ALL CONCUR.

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