RENDERED: March 19, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002958-WC

THOMAS DAVIS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-95-08848

ISLAND CREEK COAL COMPANY; HON. RICHARD CAMPBELL, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, GARDNER, AND MILLER, JUDGES.

MILLER, JUDGE: Thomas Davis (Davis) asks us to review an opinion of the Workers' Compensation Board (board) rendered October 4, 1996. Ky. Rev. Stat. (KRS) 342.290. We affirm.

Davis filed an application for retraining incentive benefits (RIB) pursuant to KRS 342.732 on February 28, 1995. The employer, Island Creek Coal Company (Island Creek), failed to file a notice of resistence within the prescribed time period under KRS 342.316(2)(d)(3). On June 13, 1995, the chief administrative law judge (CALJ) entered an order submitting the case to an administrative law judge (ALJ) for entry of an Opinion

and Order. On June 21, 1995, Island Creek filed an entry of appearance, through counsel, and moved to vacate the June 13 order so that a notice of resistence could be filed. Same was overruled by the CALJ on August 2, 1995. Thereafter, Island Creek filed a petition for reconsideration, which, was overruled on September 25, 1995. On May 10, 1996, the CALJ assigned the case to an ALJ. The ALJ entered an Opinion and Award on May 22, 1996. He found that Davis had presented a *prima facie* showing that he suffered from category 1 pneumoconiosis and awarded him RIB. The ALJ noted that because Island Creek had failed to file a timely notice of resistence pursuant to KRS 342.316(2)(d)(3), an award was mandated. Island Creek appealed to the board. Reversing and remanding, the board held that the ALJ erred in strictly construing KRS 342.316(2)(b)(3) by failing to consider whether good cause existed for Island Creek's noncompliance. This appeal followed.

Davis first argues that Island Creek is time-barred from bringing this appeal. He asserts that the order of the CALJ, on June 13, 1995, was essentially a default judgment which became final and appealable on September 25, 1995. He maintains Island Creek should have filed its notice of appeal within thirty days therefrom. 803 Ky. Admin. Reg. (KAR) 25:010 §13. We disagree. A final order is determined in accordance with CR 54.02. Id. CR 54.02(1) states, in relevant part, that when more than one claim for relief is presented or when multiple parties are involved, a court "may grant a final judgment upon one or more but less than all of the claims or parties only upon a

determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final." The June 13, 1995 order did not finally decide all the rights of all the parties.[1] Thus, to be appealable, said order must contain the CR 54.02 language indicating that it was a final judgment. As the order did not contain same, we are of the belief that the May 22, 1996 Opinion and Award was the proper decision from which to appeal. Accordingly, we cannot say the board erred on this issue.

Next, Davis argues that the language of KRS 342.316(2)(d)(3) is mandatory and that if a notice of resistence is not filed pursuant thereto, a judgment must be entered in favor of the claimant.

KRS 342.316(2)(d)(3) reads in relevant part as follows:

> Within sixty (60) days of the receipt of the claim, the employer shall notify the commissioner and the claimant whether or not the claim will be resisted. If the claim is not resisted, an administrative law judge shall within ten (10) days enter an order and award for the claimant.

We are of the opinion that this provision was intended by the legislature to act as a default judgment device. See Young v. Daniels, Ky., 481 S.W.2d 295 (1972). Said provision, however, does not provide for a method of setting aside a judgment entered pursuant thereto. As such, Davis urges us to believe that no

[1]The June 13, 1995 order did not fix the amount of Davis's award. Under Ky. Rev. Stat. 342.732, it was incumbent upon him to present a *prima facie* showing that he suffered from category 1 pneumoconiosis.

recourse is available for an offending party. We do not believe the legislature intended such a harsh result.[2]

As the Workers' Compensation Act does not provide a method to set aside such a default judgment, we look to the Kentucky Rules of Civil Procedure (CR) for guidance. Cf. Whittaker v. Wright, Ky., 969 S.W.2d 209 (1998). CR 55.02 states that for good cause shown, a default judgment may be set aside in accordance with CR 60.02. CR 60.02 states that a final judgment may be set aside upon a finding of mistake, inadvertence, surprise, or excusable neglect. We believe the CALJ erred in failing to determine whether the judgment against Island Creek should be set aside under the precepts of CR 55.02 and 60.02. In sum, we are of the opinion that the board neither misconstrued the law nor erred in assessing the evidence. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

For the foregoing reasons, the decision of the Workers' Compensation board is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
Dick Adams
Madisonville, KY

BRIEF FOR APPELLEE/ISLAND CR:

Michael O. McKown
St. Louis, MO

[2]It is well-established that the law does not favor default judgments. Dressler v. Barlow, Ky. App., 729 S.W.2d 464 (1987).