

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000420-MR

SONDRA CAROLE JOHNSON

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 96-CI-000391

GEORGE FRANK JOHNSON

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: JOHNSON, KNOX, and SCHRODER, JUDGES.

KNOX, JUDGE: Appellant, Sondra Carole Johnson (Sondra), appeals the judgment of the Letcher Circuit Court holding that appellee's workers' compensation benefits were entirely non-marital property, not subject to division at dissolution of marriage.

Sondra and appellee, George Frank Johnson (George), were married on May 12, 1994. In August 1994, George filed a workers' compensation claim arising out of a work-related injury he sustained in December 1993. The administrative law judge (ALJ) found George to have a 75% permanent partial disability, concluding, however, that one-third (1/3) of his disability predated the occupational injury and, as such, was not compensable.

George appealed this decision to the Workers' Compensation Board (Board) which reversed and remanded the claim to the ALJ for entry of a conforming award. George's employer appealed the Board's decision to this Court, which affirmed. A subsequent appeal was taken to the Kentucky Supreme Court, which, on June 19, 1997, rendered an opinion affirming the decision of the Court of Appeals and remanding the matter to the ALJ. Ultimately, the ALJ's final opinion and award were entered on September 24, 1997.¹

In December 1996, while his workers' compensation claim was winding its way through the court system, George filed a petition for dissolution. On July 2, 1997, the circuit court entered a partial decree of dissolution, reserving all questions of property and maintenance for future determination. Sondra filed a motion to set aside the partial decree on the basis that it may possibly divest her of a property right in the pending workers' compensation claim. The dissolution cause came on for hearing before the domestic relations commissioner on September 22, 1997. As a result of that hearing the commissioner filed his findings on October 3, 1997, recommending, in part, that any workers' compensation benefits to be received as a result of the pending claim were non-marital property belonging to George. Sondra filed exceptions to these findings.

¹ On remand, the ALJ entered an opinion and award on September 5, 1997. However, there was an oversight with respect to the payment of interest on the benefits and George filed a petition for reconsideration on September 10, 1997. It was from this petition that, on September 24, 1997, the ALJ's final opinion and award were entered.

On October 30, 1997, a check in the amount of \$40,794.14 was issued to George by his employer's insurer, representing past due benefits for the period of August 19, 1994, to November 3, 1997. Sondra's motion to have the partial decree set aside was denied on January 30, 1998. The circuit court's ruling on the exceptions was entered on February 4, 1998, and ordered, inter alia, that at the time of the final hearing, September 22, 1997, George's workers' compensation claim was not final, though remanded to the ALJ by the Supreme Court, and no benefits had actually been paid over to him prior thereto. The court reasoned that since George had not actually received the benefits during the marriage, the injury claim and benefits therefor were not marital property. The court further found that, even if the benefits were marital property, KRS 403.190(1) would be applicable to the distribution of same. In applying said statute the court concluded:

Respondent would not be entitled to any disposition of the workers' compensation award because she did nothing to contribute to the acquisition of the award, there was very little property to be divided, the duration of the marriage was only 30 months, the Petitioner is now totally disabled, the Respondent is able bodied and holds a college degree, and there were no children of the marriage.

On appeal, Sondra argues the court erred in failing to award her any portion of the workers' compensation benefits as marital property. She posits a percentage of the benefits, representing back pay prior to the dissolution, constitutes marital property regardless of when they were received. George,

on the other hand, contends the circuit court correctly decided the matter. We disagree.

As a preliminary issue, we note that KRS 403.190(2) pronounces that marital property consists of all property acquired by either spouse subsequent to the marriage with certain enumerated exceptions, none of which are applicable under these facts. Although the court cites case law in support of its findings, we believe it misconstrued the appropriate application of that authority. Addressing the court's view that benefits must, necessarily, be received during the marriage in order for them to assume the posture of marital property, we believe Mosley v. Mosley, Ky. App., 682 S.W.2d 462 (1985) to be controlling.

In Mosley, this Court considered the appropriate division of workers' compensation benefits where a party to the dissolution received a lump sum representing back pay and was to receive future payments which would accrue and be made post-dissolution. After contemplating the nature and purpose of a workers' compensation award, i.e. "to replace the injured or diseased employee's loss of ability to work in the future[,]"" this Court concluded:

Payments that are received, or weekly benefits that have actually accrued but have not yet been paid as of the date of the dissolution of the marriage, are to be included as marital property, just as earned income. But, payments which accrue and are paid after the dissolution of the marriage are not part of the marital property any more than the worker's future earnings would be.

Id. at 463. (Emphasis added).

As such, irrespective of the actual time frame in which the benefits are received, whether it be pre- or post-dissolution, that portion of the award representing benefits which accrued during the marriage is to be treated as marital property, just as earned income. In the case sub judice, George was paid \$40,794.14 which represented back pay for the period of August 19, 1994, to November 3, 1997. In that the parties were not legally divorced until July 2, 1997, that portion of the past due benefits which accrued during the marriage, or between August 14, 1994, and July 2, 1997, constitutes marital property, subject to division.

As noted supra, the circuit court hypothesized that even if the workers' compensation benefits were marital property then KRS 403.190(1) would be applicable to the distribution of same. In applying the relevant factors under KRS 403.190(1), the court appears to have relied heavily on Reeves v. Reeves, Ky. App., 753 S.W.2d 301 (1988). We do not believe Reeves to be dispositive since the facts underlying Reeves are readily distinguishable from those at hand.

In Reeves, this Court addressed the division of an award for injuries under the Jones Act where the parties' marriage had lasted a mere nineteen (19) months, and the injury occurred a scant six (6) weeks following the marriage. The appellant in that case settled the Jones Act claim for \$175,000 which was reduced to \$107,500 following the payment of medical expenses, costs, and attorney fees. The appellant voluntarily paid the appellee \$7,500, yet the circuit court allocated to her

twenty-five percent (25%) of the final award. On appeal, this Court concluded the Jones Act award to be marital property, but in applying KRS 403.190(1)² to the division thereof, stated as follows:

The appellee did nothing to contribute to the acquisition of the award. There was very little property to be divided other than [t]he Jones Act award. The duration of the marriage was only nineteen months, and the parties had been separated the last six of those. Appellant is now totally disabled, while the appellee is able-bodied. There were no children of the marriage.

² KRS 403.190(1) provides:

(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(b) Value of the property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

We hold that any disposition of the award to the appellee above the \$7,500 voluntarily paid to her would be an abuse of discretion under the statute.

Reeves, 753 S.W.2d at 302.

It is our opinion the facts above-stated differ from those at bar in that the Jones Act award represented a lump sum award with no future payments for loss of ability to earn income due to the injuries sustained. It stands to reason that equity would dictate a lopsided division of such an award, especially in light of the fact that the parties had lived together as man and wife for scarcely over one (1) year. However, before us is a situation in which the lump sum payment merely represented back pay, a portion of which accrued during the marriage. George will continue to receive future benefits to be dedicated to his own interest as a result of his injuries.

We believe that where a workers' compensation award represents back pay, a portion of which accrued during the marriage, these funds represent marital property, as they operate as an income substitute. The trial court then must, through application of KRS 403.190(1), consider an equitable division of that asset, and make findings of fact peculiar to the case with respect to each of the criteria contained in KRS 403.190(1).

Concerning the case at hand, we believe the circuit court's finding that Sondra was not entitled to any portion of George's workers' compensation award was an inaccurate application of legal precedent. As such, we remand this matter to the Letcher Circuit Court to further consider the division of that asset considering KRS 403.190(1).

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell Hall
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Gene Smallwood, Jr.
Whitesburg, Kentucky