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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals
NO. 1997-CA-003190-MR

JOHN WILLIAM CAMPBELL

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
CIVIL ACTION NO. 96-CI-00659

SEXTET MINING CORPORATION

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, MCANULTY and SCHRODER, Judges.

HUDDLESTON, Judge. John William Campbell appeals from a judgment in a proceeding to enforce an Administrative Law Judge's award in a workers' compensation case.

Campbell, while employed by Sextet Mining Corporation, sustained two work-related injuries, on December 15, 1987, and August 24, 1989, respectively. Campbell was fired on May 4, 1990, because his employer felt that Campbell was unable to perform his job as a result of his injuries. On August 20, 1991, an ALJ, finding Campbell 100 percent occupationally disabled, awarded him workers' compensation benefits for the 1987 injury for 425 weeks

and lifetime benefits for the 1989 injury. Campbell appealed this decision, arguing that the weekly benefits from the 1987 injury should have been for a greater amount and payable for life. The Supreme Court agreed and held that Campbell was entitled to lifetime total disability benefits stemming from both injuries, the combined effect of which was to render him totally and permanently disabled. Campbell v. Sextet Mining Co., Ky. 912 S.W.2d 25, 28 (1995) (citing Ky. Rev. Stat. (KRS) 342.730(1)(a,b)). Upon remand, the ALJ, on August 12, 1996, awarded Campbell benefits as directed by the Supreme Court. The award included a provision that the employer shall take credit for any payments of compensation previously made.

Subsequent to the ALJ's August 12, 1996, order, a controversy arose between Campbell and Sextet concerning the calculation of the credit due Sextet for payments made prior to the award.¹ Campbell, in a motion for summary judgment, argued below that Sextet was not entitled to any credit for the salary paid to Campbell for 38 days he was absent between August 24, 1989, and May 4, 1990. The circuit court, on May 16, 1997, said that:

As stated above, Sextet is not attempting to credit salary benefits against amounts that it owes after the

¹ Workers' compensation benefits accrue from the date of disability. A portion of these benefits will, therefore, be past due when the award is made. It is against this past-due portion of the award that a credit for voluntary disability payments has been allowed. Eastern Coal Corp. v. Blankenship, Ky., 813 S.W.2d 808, 810 (1991) (citations omitted). Such a policy encourages employers in "prompt issuance of voluntary compensation benefits" Triangle, supra, at 629.

date of the judgment. Plaintiff is attempting to enforce a judgment dated August 12, 1996 Sextet is arguing it should be credited with amounts up to that time. As the case of Triangle Insulation v. Stratemeyer, Ky., 782 S.W.2d 628 (1990) says, the Courts are concerned with the effect that a full credit will have on future benefits. Sextet is not attempting to credit anything against future benefits. Therefore, Mr. Campbell's future benefits will not be affected by any credit.

As the Triangle case further says, a dollar for dollar credit is within the purview of the workers['] compensation statutes. This Court finds that Sextet is entitled to a dollar-for-dollar credit of the amounts paid to Mr. Campbell during the periods when he was not working as a result of the injury which was the subject of the previous action before the ALJ.

Campbell further sought attorney's fees and costs pursuant to KRS 342.310, claiming that unreasonable proceedings had occurred. The circuit court denied Campbell's motion, stating that no unreasonable proceedings had occurred warranting an award of attorney's fees.

Campbell appeals to this Court, advancing essentially the same arguments raised below. Campbell's first assertion is that Sextet should not have been granted credit for past salary paid him. Campbell supports this position with a two-fold argument:

(1) the issue of taking credit was not properly preserved by Sextet, and (2) a week-for-week rather than dollar-for-dollar credit should have been granted Sextet for payments made up to the date of the Opinion and Award. Campbell relies principally upon Ephraim McDowell Regional Center v. Grigsby, Ky. App., 862 S.W.2d 331 (1993), to support his argument. In Grigsby, this Court ruled that a circuit court properly refused to allow credit to the employer for payments of compensation previously made to claimant. The lower court had so ruled because the employer had failed to prove the specific terms of a disability policy either in the circuit court action or in proceedings before the ALJ.² The court stated that "[t]here is no proof in the record to support their contention that they should receive credits for these amounts." Id. at 332.

However, in this case, proof was presented to the circuit court about the voluntary payments made to Campbell for which Sextet was seeking credit. Sextet had paid Campbell his salary from August 24, 1989, through May 4, 1990, including the 38 documented days Campbell had been absent from work. Campbell failed to challenge the accuracy of that evidence. Sextet met its burden

² Campbell argues that since Sextet did not present proof before the ALJ as to the payments made to Campbell, no credit should be granted for those payments. However, should that be the case, Campbell's reliance on Grigsby is perplexing. In Grigsby, the Court did not hold that the issue must be raised before the ALJ, but only that there was no proof in the record upon which the employer could base a claim for credit. The circuit court in the instant case rightly observed that "the present action is an appropriate place for presentation of evidence on this issue."

of proof as to its entitlement to credit. Id. As to Campbell's assertion that Sextet did not preserve the issue of credits, Sextet, in its response to Campbell's Motion to Initiate Benefits Pending Appeal,³ stated its intent to seek credit for the voluntary salary continuation payments to Campbell against past-due benefits.

Campbell's second argument for denying Sextet credit is that the circuit court erred in determining that a dollar-for-dollar credit should be applied to the amounts paid Campbell for the days he did not work from August 24, 1989, to May 4, 1990.⁴ Campbell cites numerous cases and mistakenly concludes that the court should have instead applied a week-for-week credit.⁵ Campbell's reasons for reaching this conclusion are unclear; thus, it is impossible for us to address his conclusion except to declare him mistaken.

³ This is in reference to that appeal, described earlier, which resulted in the Supreme Court's opinion that Campbell was entitled to lifetime total disability benefits for his two work-related injuries.

⁴ Properly speaking, Campbell's argument must be construed as: credit granted Sextet should not be on a dollar-for-dollar basis, but on a week-for-week basis. Surely, Campbell is not suggesting that should the circuit court have erred in determining which basis to apply, Sextet is to be denied credit altogether. As noted by the circuit court, Campbell was not appealing the ALJ's determination that Sextet is entitled to a credit. The issue before that court was what amount, if any, was Sextet allowed to credit against the past-due payments it owed Campbell.

⁵ Many of the cases Campbell cites concern disability payments made with off-sets to be made against workers' compensation awards. These cases are not pertinent to the issue on appeal.

However, Campbell's real argument appears to be that the circuit court incorrectly fixed the date on which the decision of the ALJ became final and thus erred in determining the past-due date. The past-due date is an important issue, since Sextet can claim credit for past-due benefits but not for future benefits. Triangle at 630. Campbell argues for applying the August 1991 date, whereas Sextet argues for the August 1996 date. The circuit court declared that the award did not become final until the second decision by the ALJ in August 1996. Thus, Sextet was allowed credit for payments made prior to that date.

We agree with the circuit court's determination under Triangle, an employer is entitled to a dollar-for-dollar credit on past benefits since Campbell's future benefits -- those accruing after August 12, 1996 -- are not affected. Thus, Sextet is entitled to credit for the salary paid to Campbell for the 38 days he was absent between August 24, 1989, and May 4, 1990.

Campbell's final point is that he should have been granted attorney's fees pursuant to KRS 342.310. Sextet did not act unreasonably in defending itself before the circuit court in this matter, and its having prevailed in that action is manifest evidence that it did not. See Kendrick v. Bailey Vault Co., Inc., Ky.App., 944 S.W.2d 147, 151 (1997).

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

Dick Adams
ADAMS, RAMEY & BURNS
Madisonville, Kentucky

John C. Morton
Samuel J. Bach
MORTON & BACH
Henderson, Kentucky