RENDERED: May 28, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001818-WC

GOLDEN OAK MINING COMPANY, L.P. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 97-00367

ROBERT E. SPURLIN, DIRECTOR, KENTUCKY COAL WORKERS' PNEUMOCONIOSIS FUND; LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE; LARRY DAVID COOK; and WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Golden Oak Mining Company, L.P. (Golden Oak) petitions for a review of a decision of the Workers' Compensation Board (Board) which does not require the Kentucky Coal Workers' Pneumoconiosis Fund (Fund) to participate in a settlement agreement reached between Golden Oak and the injured appellee. The issue on appeal presents a case of first impression involving statutory construction of KRS 342.1242, KRS 342.732(1)(a), and KRS 342.265, as these sections were created or amended in 1996

(1st Extra. Sess.) Kentucky Acts, Chapter 1, effective December 12, 1996. This appeal also involves interpretation of 803 KAR 25:010, § 29, promulgated by the Commissioner, Department of Workers' Claims (DWC), following enactment of the 1996 amendments to Chapter 342.

Larry David Cook (Cook) was last exposed as an underground coal miner on December 26, 1996, while employed by Golden Oak. Cook submitted a claim for benefits on February 7, 1997. In support of his claim, Cook submitted x-ray interpretation of 1/0 by Dr. Myers, Jr., and an x-ray interpretation of 1/0 by Dr. Zadeh. Dr. Zadeh performed pulmonary function tests which demonstrated an FVC of 75% of an FEVI of 57% of predicted. Golden Oak's Dr. Westerfield interpretation found a 1/1 category of coal workers' pneumoconiosis. Cook submitted Dr. Westerfield's reading and Golden Oak submitted Dr. Joyce's interpretation of 0/0. Dr. Joyce is the University of Louisville Medical School designated evaluator pursuant to KRS 342.315. On January 14, 1997, Cook enrolled in the Nashville Auto Diesel College to study automobile diesel engines in a program that was to last until December 1997.

On August 30, 1997, Cook and Golden Oak entered into an agreement as to compensation. The settlement stated:

> In settlement of a disputed claim, the Defendant/Employer shall pay to the Plaintiff in a lump sum the amount of $6,500.00. In compliance with KRS 342.265(2) the Plaintiff shall execute an affidavit verifying an adequate source of alternate income during the 104 week compensable period. This settlement is inclusive of attorney's fees.

The agreement was submitted to the ALJ for approval and on September 19, 1997, the ALJ entered the following order:

> The plaintiff has entered into an agreement with the defendant/employer for settlement of the his [sic] claim. Attached to the agreement is the affidavit of the plaintiff in which he states that he has other sources of income adequate to maintain his household, specifically, the plaintiff earns a gross weekly income of $320.00. Plaintiff feels that a lump sum settlement would be more beneficial to him than weekly payments. Accordingly, there is a reasonable assurance of income during disability, and the lump sum settlement in the amount of $6,500.00 is approved.

On October 16, 1997, Golden Oak made a formal request for participation by the Fund in the conclusion of the case. The letter was sent pursuant to KRS 342.1242 and 803 KAR 25:010, § 29, requesting participation by the Fund in the settlement reached by the parties. Robert E. Spurlin, Director of the Fund, notified Golden Oak and all other parties of his denial of the request. The basis of his denial included the following:

> This will notify you that your request for participation by the Coal Workers' Pneumoconiosis Fund in the above-referenced claim is denied. The reasons - any of which standing alone is sufficient for denying participation - are as follows:
>
> 1. There were four (4) interpretations of x-rays submitted with your application, none of which meet the minimum statutory requirements of KRS 342.732(1).
>
> - Dr. Betty Joyce - 0/0 with a negative spirometric test.
> - Dr. J. E. Myers - 1/0 with a negative spirometric test.
> - Dr. B. T. Westerfield - 1/1 reading with a negative spirometric test.
> - Dr. Ali Zadah [sic] - 1/0 reading with a seventy-five percent (75%) spirometric test.

> 2. The Administrative Law Judge's order approving the settlement did not reject the clinical findings of the University evaluation. Therefore, Dr. Betty Joyce's interpretation of the x-ray report (0/0 reading with a negative spirometric test) must be afforded presumptive weight. Her findings do not meet the minimum statutory requirements of KRS 342.732(1).
>
> 3. The agreement dated September 17, 1997, specifies a lump sum based on a 104-week compensable period. This indicates that the award was ordered under the provisions of a claim for retraining incentive benefits. KRS 342.732(1)(a) states, in pertinent part, that ". . . These benefits shall be paid only while the employee is enrolled and actively successfully participating as a full-time student taking twenty-four (24) or more instruction hours per week in a bona fide training or education program. . ."

Golden Oak appealed to an Administrative Law Judge. The contested issues before the ALJ were: (1) whether the denial of payment by the Fund was arbitrary, capricious or in excess of the statutory authority of the director; (2) whether the employer's settlement of the claim was supported by the medical evidence; (3) whether an employer can settle a "new Act" retraining incentive benefit ("RIB") claim for a lump sum payment without certifying that the required training was provided and then seek payment from the Fund.

The ALJ determined that KRS 342.265(2) and (3) specifically retained the authority for lump sum settlements; that Cook would have been entitled to retraining incentive benefits; that Cook was actively participating in a vocational training program; and that a settlement of a RIB claim would not require a finding by the ALJ that the presumptive weight accorded the University evaluation has been overcome or a finding that a

claimant is currently enrolled in an educational program as provided in KRS 342.732(1)(a). Based upon: the principle that a settlement involves the elimination of risk on behalf of the settling parties; the showing of a prima facie entitlement to RIB by the medical evidence introduced; and Golden Oak's settlement of the claim for approximately 17% of its potential liability, the ALJ determined that the denial of participation by the director was an unfair and unreasonable decision. The Fund appealed.

The Board, in a well-reasoned opinion, concluded that Golden Oak and Cook could enter into a lump sum settlement, but before the Fund could be required to participate, Cook had to meet the criteria for a RIB award. Golden Oak petitions for a review of that decision. In affirming the Board, we adopt portions of the Board's opinion rendered June 19, 1998, as our own.

"The General Assembly, in the 1996 Extraordinary Session called for the purpose of reforming workers' compensation, created a new division of the Kentucky Coal Workers' Pneumoconiosis Fund within the Department of Workplace Standards of the Labor Cabinet. The legislation prescribed that the Fund shall be headed by a director appointed by the Commissioner of Workplace Standards with the prior written approval of the Governor. KRS 342.1242(1) required the director to be responsible for overseeing the administration and legal representation of the Fund and the maintenance of records regarding the payment of claims by the Fund.

In addition, in the newly created KRS 342.1241, the General Assembly made specific legislative findings and declarations on its creation of the Kentucky Coal Workers' Pneumoconiosis Fund. KRS 342.1241(2) states:

> (2) The General Assembly finds and declares that the purpose of creating the Kentucky Coal Workers' Pneumoconiosis Fund in KRS 342.1242 is to assure that liabilities incurred as a result of workers' compensation awards for coal workers' pneumoconiosis with dates of last exposure after December 12, 1996, shall be the financial responsibility of employers engaged in severance and processing of coal.

KRS 342.1241(3) provides that the Fund shall have one-half of the liability for income benefits including retraining benefits payable for claims brought under KRS 342.732 for last exposure incurred on or after December 12, 1996. The statute further provided the method for employer access to the Fund in KRS 342.1242(2), which states:

> (2) The employer shall defend any claim brought under KRS 342.732 and upon conclusion shall seek participation in payment of the final award or settlement by the Kentucky coal workers' pneumoconiosis fund by making written request upon the director in the manner prescribed by administrative regulation to be promulgated by the commissioner of the Department of Workers' Claims.

In compliance with the statutory requirement, the Commissioner promulgated 803 KAR 25:010, § 29, involving a request for participation by the Fund. That regulation provides as follows:

> (1) Following a final award or order approving settlement of a claim for coal workers' pneumoconiosis benefits pursuant to KRS 342.732, the employer shall tender a

written request for participation to the Kentucky coal workers' pneumoconiosis fund within thirty (30) days. This request shall be in writing and upon a form supplied by the Director of the Kentucky Coal Workers' Pneumoconiosis fund and shall be accompanied by the following documents:

(a) Plaintiff's application for resolution of claim;

(b) Defendant's notice of resistance, notice of claim denial or acceptance, and any special answer.

(c) All medical evidence upon which the award or settlement was based;

(d) Final benefit review determination, opinion, or order of an arbitrator or administrative law judge determining liability for benefits, or order approving settlement agreement. If an administrative law judge's award was appealed, appellate opinions shall be attached.

(e) <u>If the request for participation includes retraining incentive benefits under KRS 342.732, the employer shall certify that the plaintiff meets the relevant statutory criteria</u>; (our emphasis)

(f) If the request for participation is for settlement of a claim, the employer shall certify that the settlement agreement represents liability for benefits in the claim, and does not include any sums for claims which the plaintiff may have against the employer.

(2) Within thirty (30) days following receipt of a completed request for participation, the director shall notify the employer and all other parties of acceptance or denial of the request.

(3) A denial may be made upon a finding by the director that the employer failed to defend the claim or entered into a settlement agreement not supported by the medical evidence or which was procured by fraud or mistake. Denial shall be in writing and shall state the specific reasons for the director's action.

> (4) Denial of a request for participation may be appealed to an administrative law judge within thirty (30) days following receipt. The administrative law judge shall determine whether the denial was arbitrary, capricious, or in excess of the statutory authority of the director, but shall not reexamine the weight assigned to evidence by an arbitrator or administrative law judge in a benefit review determination or award."

KRS 342.732(1)(a), applicable to Cook's claim on December 26, 1996, the date of his last exposure, represents a significant change from both the 1994 amendment and the 1987 amendment for a RIB award.

"Here, the 1996 amendment to KRS 342.732(1)(a) authorizes the awarding of a RIB to an employee who shows Category 1/1 or 1/2 by chest x-ray and who demonstrates spirometric test values of 55% or more, but less than 80% of the predicted normal values contained in the Guides to the Evaluation of Permanent Impairment. The statute authorizes direct payments to an employee for a period not to exceed 104 weeks but such benefits may only be paid while the employee is enrolled and actively and successfully participating as a full-time student taking 24 or more instruction hours per week in a bona fide training or education program approved by regulations promulgated by the Commissioner. The statute prohibits the payment of these benefits to an employee who is working in the mining industry. The statute, however, enhances the retraining purpose of the RIB by additionally authorizing the employer to pay directly to the institution conducting the training or education instruction, tuition, and material costs, not to exceed $5,000.00. The return

to work incentive of the RIB is additionally enhanced in the statute where the Legislature has provided that an employee who completes a training program in less than 104 weeks and who has accepted a bona fide offer of employment at a location more than 50 miles from his usual residence, shall be paid relocation expenses in a lump sum of either the sum of $3,000.00 or the amount remaining in unpaid weekly training benefits, whichever is less.

We agree that an agreement to settle a workers' compensation claim is a contract and if made between competent persons, should not be set aside lightly. Further, while KRS 342.265 provides for the approval of a workers' compensation agreement before it becomes enforceable as an award, we must remember that one of the primary purposes of KRS 342.265 is to give a factfinder the opportunity to review the terms of a settlement agreement in order to protect the interest of the worker and to assure that it conforms to the provisions of law.

There are clearly public policy considerations underlying and supporting the goal of settlement in workers' compensation claims and in retraining as a condition for entitlement to a RIB award. To the extent possible, we must give affect to all provisions of the statute, even if there may exist some apparent conflicts, with a goal of harmonizing those conflicts.

Here, the ALJ's approval of the lump sum settlement between Golden Oak and Cook is clearly encouraged by the statute as a necessary ingredient for the functioning of the program.

Moreover, as the ALJ noted, lump sum settlements are authorized by statute and thereby are appropriate. However, while the lump sum settlement meets one policy goal of the Act, the question remains as to whether a lump sum settlement for RIB automatically requires the participation by the Fund for up to 50% of the liability in this case.

The Fund argues that the mandatory provisions contained in KRS 342.315, in connection with the finding of the medical school designated evaluator (in this instance, Dr. Joyce) required the ALJ to reject the lump sum settlement between Golden Oak and Cook, since Dr. Joyce's x-ray interpretation of Category 0/0 must be given presumptive weight. However, we must agree with the ALJ that a settlement of a RIB prior to final adjudication of the claim, would not require a finding by the ALJ that the presumptive weight accorded the university evaluation has been overcome, or a finding that Cook is currently enrolled in an educational program as provided in KRS 342.732(1)(a). We believe that this is a correct view in connection with the rights as to Cook and Golden Oak. However, the statutory provisions creating the Kentucky Coal Workers' Pneumoconiosis Fund require its director to be placed in a fiduciary relationship with all employers engaged in the severance or processing of coal. Assessments based on 3% of the workers' compensation premium are required to be paid for the benefit of the Fund. In addition, 2.5¢ is assessed on each ton of coal severed which sums are provided for the benefit of the Fund. Thus, the director of the Fund must insure that participation by the Fund for one-half of

the liability for income benefits payable for claims brought under KRS 342.732 for last exposure incurred on or after December 12, 1996 are made in strict conformity with the statutory requirements.

Is the director of the Fund required to accept participation by the Fund in payment of liability for a RIB claim in which the employer has agreed to pay a lump sum payment where the employer has been unable to certify that the employee meets the relevant statutory criteria as set forth in KRS 342.732(1)(a)? That specific certification is required from an employer which makes a request for participation by the Fund for RIB. See, 803 KAR 25:010, § 29(1)(e).

While we conclude that Golden Oak and Cook could appropriately enter into a lump sum settlement based upon medical evidence supporting Cook's entitlement to a RIB award, we do not conclude that the Fund is required thereby to participate in payment of the liability when Cook does not meet the criteria for a RIB award.[1]

We further conclude that the ALJ's determination that the Fund's denial of the participation in the liability under the statute as arbitrary must be reversed. We believe the Fund acted within constraints of its statutory power in denying

[1]We agree with Member Lovan's concurring opinion wherein he concludes that when benefits are based upon the new KRS 342.732(1)(a) and are resolved by way of settlement between the worker and the employer, that the Coal Workers' Pneumoconiosis Fund may participate in said settlement, and when the Fund does not, the employer should have an opportunity to establish the existence of grounds which would have entitled the individual to an actual award.

participation for payment under the circumstances as specifically presented here. Moreover, under the questions presented, we are unable to conclude that the yardstick of "fairness" utilized by the ALJ is sufficiently broad to measure the validity of the administrative action undertaken by the director of the Fund.

Having concluded that the director of the Fund acted within constraints of his statutory power and did not exceed them and that his denial of participation by the Fund in payment of the liability contained in the lump sum settlement between Golden Oak and Cook was not arbitrary, we must therefore reverse the decision of the ALJ.

Accordingly, the Opinion, Order and Award by Hon. Lloyd R. Edens, Administrative Law Judge, is hereby REVERSED and this claim is REMANDED to the ALJ for further findings consistent with this Opinion."

For the foregoing reasons, we affirm the decision of the Workers' Compensation Board which remands this matter back to the ALJ for further considerations.

GUIDUGLI, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Barkley J. Sturgill, Jr.
Prestonsburg, Kentucky

BRIEF FOR APPELLEE, ROBERT E. SPURLIN, DIRECTOR, KENTUCKY COAL WORKERS' PNEUMOCONIOSIS FUND:

Robert E. Spurlin
Frankfort, Kentucky