RENDERED: December 30, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003027-MR

TERRY BISCHOFF — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 98-CI-00540

BROWN & KERR, INC.; CNA INSURANCE COMPANY;
AND CNA RISK MANAGMENT — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from an order of the Bullitt Circuit Court, dismissing the appellant's tort claims against his employer, and his claim against his employer and its workers' compensation insurance carrier for bad faith and unfair claims settlement practices. Since all of his arguments concerning the constitutionality of the Workers' Compensation Act have either been rejected by the Supreme Court of Kentucky, or are not ripe for review, we affirm the trial court's dismissal on this ground. We further find that any claims which the appellant may have under the Unfair Claims Settlement Practices Act (UCSPA) are also precluded by the exclusive liability provision of the Workers' Compensation Act.

Because the trial court disposed of this matter on a motion for summary judgment, the underlying facts of this appeal were not fully developed. However, the allegations are straightforward and can be briefly summarized here. The appellant, Terry Bischoff, was employed by Brown & Kerr, Inc. as a roofer. On April 8, 1998, he fell from a roof on a job site, allegedly sustaining severe head and chest injuries. There is no dispute that these injuries were sustained within the course and scope of his employment.

On July 27, 1998, Bischoff brought a civil action in Bullitt Circuit Court against Brown & Kerr, alleging that his injuries occurred as a result of its negligence. He also brought a claim for bad faith and unfair claims settlement practices against Brown & Kerr and its workers' compensation insurance carrier, CNA Insurance Company/CNA Risk Management (CNA). Bischoff argued that the Workers' Compensation Act in its entirety, as well as specific amendments to the Act made in 1996, are unconstitutional. Bischoff notified the Attorney General of his intention to challenge the constitutionality of the statute. The Attorney General filed a notice stating his intention not to intervene in the action.

Brown & Kerr and CNA moved to dismiss the action because the trial court lacked subject matter jurisdiction over matters assigned exclusively to the Workers' Compensation Board. KRS 342.690(1). Following briefing of the issues by all parties, the trial court agreed with Brown & Kerr and CNA, and dismissed the action. This appeal followed.

Bischoff again argues that: (1) the Workers' Compensation Act, KRS Chapter 342, is unconstitutional as a violation of the jural rights doctrine; (2) the opt-out provision in KRS 342.395 is unconstitutional because it presumes a waiver of his constitutional rights by his silence; and (3) the method of calculating income benefits for disability contained in the 1996 version of KRS 342.730 is arbitrary. He also argues that the trial court erred in dismissing his claim against Brown & Kerr and CNA pursuant to the UCSPA. KRS 304.12-230. For the following reasons, we affirm the trial court's order dismissing these claims.

We begin by noting that this Court is required to follow applicable precedents established in the opinions of the Supreme Court and its predecessor court. SCR 1.030(8)(a). It has long been established that the Workers' Compensation Act is constitutional even though it may limit the amount of money and conditions under which a claimant may recover. Workmen's Compensation Board of Kentucky v. Abbott, 212 Ky. 123, 278 S.W. 533 (1925); Greene v. Caldwell, 170 Ky. 571, 186 S.W. 648 (1916). In Mullins v. Manning Coal Corp., Ky. 938 S.W.2d 260 (1997), our Supreme Court reiterated that the Workers' Compensation Act does not unconstitutionally restrict an injured party's right to recover compensation from the wrongdoer:

> With regard to the appellant's argument concerning § 14 of the Kentucky Constitution, we are unpersuaded. The appellant attempts to analogize this situation with that presented in Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932). In Ludwig, our highest court struck down as unconstitutional Kentucky's "guest statute" enacted in 1930. The Court held that § 14 of the Kentucky

> Constitution guaranteed an injured party's right to attempt to recover compensation from the wrongdoer who allegedly perpetrated the harm. Id. The Workers' Compensation Act, however, is not predicated upon redressing a wrong which has caused an injury. In fact, liability under the compensation act is not in any way dependent on negligence, tortious conduct, or comparative negligence. See generally Tyler-Couch Const. Co. v. Elmore, Ky., 264 S.W.2d 56 (1954). An employee's right to occupational disease benefits is purely statutory in nature and does not fall under the ambit of § 14 of the Kentucky Constitution. The General Assembly clearly is free to limit application of workers' compensation benefits as it has with KRS 342.316(3)(b). The appellant's theory of the case would lead to the absurd result that the General Assembly may not limit applicability of the Act in any way.

Mullins, 938 S.W.2d at 263.

Bischoff places much emphasis on the recent Kentucky Supreme Court opinion in Williams v. Wilson, Ky., 972 S.W.2d 260 (1998). In Williams, our Supreme Court considered the constitutionality of the punitive damages statutes, KRS 411.184 & 186. Following an extensive discussion of the doctrine of jural rights, the Supreme Court found that the limitation on recovery for punitive damages arising out of gross negligence violated §§ 14, 54 and 241 of the Kentucky Constitution. Bischoff contends that the reasoning in Williams is equally applicable to the Workers' Compensation Act's abolition of his right to bring a tort action against his employer.

Although the Supreme Court's opinion in Williams was couched in expansive language, it was nonetheless limited to a consideration of the constitutionality of KRS 411.184. We find nothing in the text of Williams which indicates that the Supreme Court intended to overrule existing precedents regarding the

constitutionality of the Workers' Compensation Act. Moreover, by electing to proceed under the workers' compensation system, Bischoff has waived any rights which he could have asserted under § 14 and § 54 of the Kentucky Constitution. Edwards v. Louisville Ladder, Ky. App., 957 S.W.2d 290, 295 (1997). Consequently, the jural rights doctrine has no applicability to his claim for benefits.

Likewise, the validity of the opt-out procedure was upheld in Wells v. Jefferson County, Ky., 255 S.W.2d 462 (1953). The former Court of Appeals upheld the statute providing that an employee is deemed to have accepted the act unless he or she files with his or her employer a written notice of rejection. The Court stated that this section adequately preserves the right of an employee to make a voluntary election as to whether he will come under the Act. Thus, the former Court of Appeals concluded that the unused opportunity of the employee to reject coverage under the Act constitutes a waiver of his or her constitutional right of suit against the employer for personal injuries or wrongful death. Id. at 463. *See also*, Mullins v. Manning Coal Corporation, Ky., 938 S.W.2d 260 (1997).[1]

In addition, Bischoff argues that the 1996 version of KRS 342.730 is arbitrary because of the manner in which the statute determines disability. Much of his argument centers

[1] **Please note**: In Shamrock Coal Co, Inc. v. R. Cletus Maricle, Judge, Ky., No. 1998-SC-0664-MR (Nov. 18, 1999), the Supreme Court specifically reaffirmed the decision in Wells upholding the constitutionality of the Workers' Compensation Act and the presumptive acceptance provision contained therein. Id., Slip Op. at p. 6.

around the use of functional impairment rating established by the American Medical Association's "Guides to the Evaluation of Permanent Impairment" (AMA Guides), as a criterion for awarding benefits. The AMA Guides set out objective criteria for evaluation of medical evidence and for the evaluation of functional impairment to the body as a whole. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684, 687 (1985). However, the AMA Guides caution against using the impairment percentages therein to make direct financial awards or direct estimates of disabilities.

Prior to 1996, the terms "functional impairment" and "occupational disability" were clearly distinguished. Newberg v. Garrett, Ky., 858 S.W.2d 181, 185 (1993). The term "disability," as used in the former version of KRS 342.0011(11), meant occupational disability. Under the former version of KRS 342.730, the finder of fact had considerable discretion to translate the percentage of functional impairment into occupational disability. Cook, 694 S.W.2d at 687.

The 1996 version of KRS 342.0011(11) does not expressly define "disability," but speaks in terms of "temporary total disability," "permanent partial disability" and "permanent total disability." Under the current definition, "permanent partial disability" means "a condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work..." KRS 342.0011(11)(b). Likewise, "permanent total disability" means "a condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an

injury ..." KRS 342.0011(11)(c). The "permanent disability rating" is calculated by multiplying the functional impairment rating by the factor set out in the current version of KRS 342.730(1)(b). Bischoff contends that because the AMA Guides are not intended to be used in such a direct and exclusive manner to calculate occupational disability, then any statutory scheme which correlates occupational disability benefits to the impairment percentages contained in the AMA Guides must be arbitrary.

Nonetheless, we conclude that Bischoff's arguments that the 1996 amendments to the Workers' Compensation Act are unconstitutional must fail because they are not ripe for review. Bischoff asserts that since the Workers' Compensation Act no longer provides a fair or complete remedy to injured workers, he no longer has a "remedy" under the Act as amended in 1996. Thus, he argues that he is entitled to bring this action in circuit court to recover for his injuries. However, before Bischoff would be entitled to appellate review of these issues, he must first have exhausted his remedies through the administrative process. Tharp v. Louisville & Nashville Railroad Co., 307 Ky. 322, 210 S.W.2d 954 (1948).

Furthermore, the constitutionality of the 1996 amendments to the Workers' Compensation Act is not relevant to the issue of whether the trial court erred in dismissing Bischoff's tort claim against his employer. Even if a court were to determine that all of the 1996 amendments were unconstitutional, we would still be required to affirm the summary judgment since Bischoff's tort action would be governed

by the statutes in effect at the time of the amendment. Vestal Lumber Co. v. Clark, Ky., 268 S.W.2d 954, 956 (1954). Because the exclusive remedy provision of the Act, KRS 342.690(1), was in effect prior to the 1996 amendments, a judicial voidance of the 1996 amendments would only affect the benefits to which Bischoff is entitled under the Act.

Yet that issue is not presented to this Court. The only issue which is properly before us is whether Bischoff may bring a civil action against his employer in circuit court. The fact that a remedy for a work-related injury may be unavailable under the Act does not authorize bringing a civil action in circuit court. Davis v. Solomon, Ky., 276 S.W.2d 674, 676 (1955). Therefore, because both the former and the current versions of the Workers' Compensation Act create exclusive remedies for all matters falling within their purview, the trial court has no subject matter jurisdiction over such a matter. Rather, jurisdiction over matters falling within the purview of the Workers' Compensation Act lies solely with the Workers' Compensation Board. Consequently, the trial court did not err in dismissing Bischoff's tort action against Brown & Kerr.[2]

Finally, Bischoff argues that he is entitled to bring a claim against Brown & Kerr and CNA for bad faith and unfair claims settlement practices, pursuant to KRS 304.12-230. Prior to 1996, this Court held that the exclusive liability provision of the Workers' Compensation Act precluded a civil action against an employer or insurance carrier under the Consumer Protection

[2] Shamrock Coal Co. v. Maricle, Slip Op. at pp. 7-8.

Act, KRS 367.170, or under the UCSPA. General Accident Insurance Co. v. Blank, Ky. App., 873 S.W.2d 580, 581-82 (1993). However, KRS 342.267, as enacted in 1996, subjects an insurance carrier, self-insurance group or self-insured employer to the provisions of the UCSPA.[3]

Nonetheless, KRS 342.267 and 803 KAR 25:240 each specify that the authority to fine carriers for engaging in unfair claims settlement practices belongs to the commissioner of the Department of Workers' Claims. KRS 342.990 sets out procedures by which the commissioner may assess civil penalties. Consequently, we find that the extension of the applicability of the UCSPA to workers' compensation carriers does not carry with it a separate right to bring a civil action. Rather, we find that KRS 342.267 vests exclusive jurisdiction over claims under the UCSPA against workers' compensation carriers with the commissioner for the Department of Workers' Claims. Therefore, the trial court correctly dismissed this claim as well.

Accordingly, the order of the Bullitt Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS WITH RESULT.

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[3] In addition, KRS 342.310 authorizes an arbitrator, an administrative law judge, the Board or a court (in which an enforcement action has been brought pursuant to KRS 342.305) assess to determine that proceedings have been brought, prosecuted or defended without reasonable ground. Upon such a finding, the finder of fact may assess costs of the proceeding against the party so offending, including, but not limited to: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses.

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