

RENDERED: JANUARY 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001408-WC

JAMES BRADY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-94750

KENTUCKY AMERICAN WATER;
HON. ROBERT L. SWISHER, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CAPERTON, JUDGE: The Appellant, James Brady, appeals the June 25, 2010,
opinion and order of the Workers' Compensation Board affirming the March 2,
2010, order of the Administrative Law Judge (ALJ) and subsequent April 5, 2010,

order of the ALJ denying Brady's petition for reconsideration. On appeal, Brady makes one argument, that he is entitled to a reinstatement of benefits pursuant to Kentucky Revised Statutes (KRS) 342.0011. Having reviewed the record, the arguments set forth by Brady, and the applicable law, we affirm.

Brady is a 54-year-old man with a high school education. He began working for Kentucky American Water in 1988. On December 18, 2007, Brady injured his left elbow while turning off the water. Thereafter, on July 2, 2008, Brady injured his right shoulder, again while turning off the water. Brady underwent surgery for both injuries, using 12 weeks of sick time for the first injury and 18 weeks of sick time for the second. According to Brady, although he received temporary total disability checks from the workers' compensation carrier, Kentucky American forced him to "sign over" his checks to them. Brady further testified that after all of his sick time was used, he was allowed to keep his workers' compensation checks. It is undisputed that following each injury, Brady returned to work at the same job earning the same or a higher rate of pay.

In reviewing the record, we note that Kentucky American did not enter an appearance in this matter nor did it in any other way attempt to defend this claim. No evidence was submitted on its behalf and it has not filed a brief for consideration on appeal.

After reviewing the evidence submitted by Brady, which consisted primarily of his own testimony and medical evidence, the ALJ issued an opinion, award, and order in this matter on March 3, 2010. The ALJ found in favor of

Brady and awarded him permanent partial disability (PPD) benefits based upon a 3% impairment rating for the December 18, 2007, injury to the left elbow in accordance with the 5th Edition of the *AMA Guides*. Further, the ALJ awarded PPD benefits for the right shoulder injury of July 2, 2008, based upon a 7% impairment rating in accordance with the *Guides*.

In addition to the award of PPD benefits, the ALJ also awarded periods of temporary total disability (TTD) benefits, stating:

For temporary total disability, Plaintiff shall receive from the Defendant/Employer or its carrier such benefits as have heretofore been paid by the Defendant/Employer and/or its carrier as to the injury of December 18, 2007 and the injury of July 2, 2008. Defendant/Employer shall take credit for any and all such payments heretofore paid.

See March 3, 2010, Opinion, Award, and Order of Administrative Law Judge, p. 7.

The ALJ addressed the issue of whether Brady was entitled to the TTD or if he was required to give the TTD to his employer and opined that this was a contractual issue between the employer and employee over which the ALJ had no jurisdiction. In so finding, the ALJ stated:

I can only speculate that there may be a condition or term in the plaintiff's employment agreement pertaining to the coordination of benefits under which the TTD checks were delivered to the employer. Any dispute as between the Plaintiff and employer as to that procedure, condition, or term would appear to the undersigned to be a contractual/civil matter between those parties not falling within the jurisdiction of the ALJ. No evidence as to actual TTD payment dates (i.e. duration), nor rates has been introduced although Plaintiff testified that he was paid TTD while off-work following each of his injuries. I find, therefore, that Plaintiff is entitled to such TTD

benefits as have already been actually paid as to each injury date both as to rate and duration but that no additional TTD is awarded herein.

See March 3, 2010, Opinion, Award, and Order of Administrative Law Judge, pp. 4-5.

As noted, Brady filed a petition for reconsideration which was denied in an order entered on April 5, 2010. In denying the Petition for Reconsideration, the ALJ noted that there was no evidence in the record as to whether Brady's sick time was "recredited" to the extent of the TTD surrendered by Brady to Kentucky American, nor was there evidence as to the employment contract between Brady and Kentucky American concerning sick pay or any potential coordination of benefits as a result of a work-related injury. The ALJ went on to opine that any request to reinstate "accumulated sick pay" would be an issue not within the auspices of KRS 342, and would more appropriately be addressed in an employment benefit action. Concerning Brady's request for reimbursement of TTD benefits, the ALJ found that request to be more properly addressed in a circuit court enforcement action pursuant to KRS 342.305.

Brady then appealed to the Board, arguing that the ALJ erred in failing to order Kentucky American to repay the TTD benefits which he was required to give to Kentucky American. The Board affirmed the ALJ. In doing so, the Board first affirmed the TTD award itself, finding that there was no objection to the appropriateness of the award or the period for which it was issued and, further, that it appeared to be supported by substantial evidence. Concerning the issue of

whether Brady should be reimbursed sick pay in the amount of the surrendered TTD benefits, the Board agreed with the ALJ that the reinstatement of accrued sick pay is not a workers' compensation issue. The Board agreed with Brady that he was entitled to payment of TTD benefits but agreed with the ALJ that there was no evidence in the record as to whether Brady's sick time account was recredited to the extent of the TTD surrendered. Accordingly, the Board affirmed the opinion of the ALJ. It is from that opinion that Brady now appeals to this Court.

On appeal, Brady makes only one argument; namely, that he is entitled to a reinstatement of benefits. In support thereof, Brady asserts that KRS 342.0011(11)(a) clearly states that TTD is to be paid when an employee "has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." Thus, Brady argues that, unlike sick pay, TTD is only to be paid to the injured worker in connection with a work injury. He therefore asserts that other types of policies, including sick pay and vacation pay, are not interchangeable with TTD.¹

Accordingly, Brady argues simply that his employer should not have taken his TTD and forced him to exhaust his sick pay for a work-related injury. Brady argues that those benefits should have remained untouched because they have nothing to do with a work-related injury. He requests that his benefits be

¹ Brady argues that if an employee has a nonwork-related illness or injury, the employer cannot simply decide that he or she should receive TTD payments rather than "sick pay" or payments from some other policy of insurance.

restored or that he be paid directly the TTD owed to him. As noted, Kentucky American Water has not filed a brief in response to Brady's arguments.

In reviewing the arguments made by Brady, we note that our Kentucky Supreme Court has long recognized that the function of the Court of Appeals in reviewing the decisions of the Board is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We review this matter with this standard in mind.

Having reviewed the record and applicable law concerning the payment of TTD and credits entitled in connection therewith, we are in agreement with Brady that if in fact the employer did require Brady to surrender his TTD and use his sick time in its place without crediting his account for the amount surrendered, such action would be both contrary to the workers' compensation statute and detrimental to the injured worker. Having so stated, we are nevertheless in agreement with the ALJ that if this did in fact occur, the proper venue to address that issue would be in an enforcement action filed in the circuit court pursuant to KRS 342.305.

It is the function of this Court to review the opinions of the Board and the ALJ and to ensure that those opinions were supported by substantial evidence, and to verify that the Board in affirming the ALJ has not overlooked or misconstrued the law, or committed an error causing gross injustice. *See Kelly*,

supra. In the matter *sub judice*, there is no question that TTD was paid to Brady. Stated simply, Kentucky American should be provided credit for their payments. There has been no dispute as to the award of TTD itself, either as to the amount awarded or as to the duration of the award. Thus, we are in agreement with the Board that the award of TTD itself was supported by substantial evidence and shall not be disturbed on appeal. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

Having so found, we further note that proper crediting of sick leave is an employment issue which is beyond our review in the matter *sub judice*. Likewise, this Court is not the proper forum to issue an original decision on an enforcement action under KRS 342.305. The circuit court is the proper forum for Brady to file an original enforcement action pursuant to KRS 342.305, should he wish to do so.

Wherefore, for the foregoing reasons, we hereby affirm the June 25, 2010, opinion and order of the Workers' Compensation Board affirming the March 2, 2010, order of the Administrative Law Judge and subsequent April 5, 2010, order of the Administrative Law Judge denying Brady's petition for reconsideration.

ALL CONCUR.

BRIEF FOR APPELLANT:

Theresa Gilbert

NO BRIEF FOR APPELLEES:

Lexington, Kentucky