

RENDERED: OCTOBER 14, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000158-WC

MERCER COUNTY FISCAL COURT

APPELLANT

V. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
WC-09-96126

JERRY ARNOLD; HONORABLE JACKSON
W. WATTS; HONORABLE JEANIE OWEN
MILLER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: This is an appeal by Mercer County Fiscal Court from an award of workers' compensation to Jerry Arnold. Mercer County makes a number of arguments related to the Workers' Compensation Board's (hereinafter Board) and Administrative Law Judge's (hereinafter ALJ) decisions not to give it a credit

for amounts Arnold received from unemployment benefits. We find no error and affirm.

On January 30, 2009, Arnold suffered physical injury while working for Mercer County. Arnold alleged that this injury rendered him totally disabled. He received temporary total disability payments for about a year. He was then terminated from his employment in March of 2010 because he was unable to perform his tasks.

A hearing was held before an ALJ to determine if he was permanently and totally disabled. During that hearing, it was revealed that after his termination, he began collecting unemployment benefits. He testified that he received about \$433 every two weeks and then another \$44 “from Obama, or whatever.” Arnold was not sure how long he had been receiving these benefits, but stated that it was around three or four months.

The ALJ ultimately found that Arnold was permanently and totally disabled. The ALJ accordingly awarded Arnold workers’ compensation in the sum of \$400.34 per week. Mercer County then filed a petition for reconsideration requesting that the award be amended to state that Mercer County was allowed to take a credit for all unemployment benefits paid to Arnold after he became disabled. This motion was denied. The ALJ held that because this issue was not listed in either the Benefits Review Conference (BRC) order or hearing order, it was not preserved as a contested issue to be determined by the ALJ.

The ALJ further found that even if the issue is one that required no preservation, Mercer County “totally failed” in its proof. The ALJ found there was no evidence of specific dates, duration, or amounts of unemployment benefits paid to Arnold. The ALJ held that without this specific and necessary evidence, it would be impossible to make a finding or to award a credit. The ALJ cited to a previous Board opinion *Casey Industrial Co. v. Tara Johnston et al*, claim no. 08-00034,¹ which discussed a very similar, almost identical outcome.

Mercer County then appealed to the Board. The Board affirmed the decision of the ALJ. It found that the issue of this credit was first raised in the petition for reconsideration, that it was not listed as an issue during the BRC, and that Mercer County failed to present any evidence regarding the amount of unemployment benefits Arnold received. The Board also cited to *Casey Industrial*. This appeal followed.

At issue is KRS 342.730(5), which states that “[a]ll income benefits pursuant to this chapter otherwise payable for temporary total and permanent total disability shall be offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability.”

Mercer County argues that Arnold had an affirmative duty to disclose his unemployment information and Mercer County had no duty to list its entitlement to a credit as an issue on the BRC memo and order. Ultimately, Mercer County’s argument boils down to the fact that it believes the credit listed in

¹ We reference this Board opinion not because it has any precedential effect, but because both the ALJ and Board rely upon it.

KRS 342.730(5) is mandatory and the lack of specific evidence and preservation via the BRC is irrelevant. We disagree.

First, as to the issue of disclosing unemployment benefits, we note that this information was never sought during discovery and that once it was discovered during the hearing, the issue was only minimally pursued.

Second, in *Casey Industrial* the Board held that the issue of credit was waived because it was never raised during the BRC. There as here, the Board relied upon 803 KAR 25:010 Section 13(14) which states “[o]nly contested issues shall be subject to further proceedings.” It went on further by stating:

The intent behind on 803 KAR 25:010 Section 13(14) is to identify the contested and uncontested issues. Based on the proceedings at the BRC and the resulting order, the ALJ is apprised of the contested issues to be decided once the evidence has been introduced and briefs submitted. Until Casey filed its petition for reconsideration, the ALJ was never given the opportunity to rule upon this issue.

Casey Industrial, supra.

In the case at hand, the issue of a credit was first mentioned in the petition for reconsideration. Using the rationale of *Casey Industrial*, the Board found the issue had been waived. We agree.

Furthermore, as held by the ALJ and Board, there was insufficient evidence presented at the hearing to determine the amount of credit Mercer County was entitled to. Mercer County hinges its main argument on the fact that KRS 342.730(5) uses the word “shall.” While “shall” does make application of the

statute mandatory, the lack of evidence concerning the amount of unemployment benefits and dates Arnold received them renders the issue irrelevant. Mercer County had the burden of proof about the credit issue. It failed to carry this burden.

Finally, Mercer County asks us to assess sanctions against Arnold for continuing to defend this appeal on what it contends are not reasonable grounds. We disagree, as shown above. Sanctions are unwarranted here.

Based on the above we affirm the opinions of the ALJ and Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

John S. Harrison
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jackson W. Watts
Versailles, Kentucky