RENDERED: December 30, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000909-WC

WINN TRANSPORTATION — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-008571

BOBBY D. DOSS; SHEILA C. LOWTHER, Administrative Law Judge; WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BUCKINGHAM, COMBS, and KNOPF, Judges.

COMBS, JUDGE: In this petition for review of a decision of the Workers' Compensation Board ("Board"), Winn Transportation argues that the provisions of KRS 342.732(1)(a), as construed in Arch of Kentucky, Inc. v. Halcomb, Ky., 925 S.W.2d 460 (1996), preclude an award of benefits to Bobby Doss. In reviewing the briefs and the record, we agree that the opinion of the Board appropriately addressed the single issue presented to this court by the appellant. As a result, we adopt the Board's opinion in full as follows:

> Winn Transportation ("Winn") appeals from the decision of Hon. Sheila C. Lowther, Administrative Law Judge

("ALJ"), rendered August 29, 1997 and from her order dated October 29, 1997 overruling its petition for reconsideration.

Bobby D. Doss ("Doss"), born September 8, 1940, completed the eighth grade and has no specialized or vocational training. He has been employed in and around the mining industry for approximately 28 years. His last employment was on June 11, 1994 with Winn. On that date, Doss was driving a coal truck which was involved in an accident and he sustained a significant injury to his back. Doss filed a workers' compensation claim seeking benefits as a result of those injuries. A compromise settlement was reached wherein Winn paid Doss a lump sum of $40,000.00 and the Special Fund paid a lump sum of $20,000.00. The agreement indicated the extent and duration of Doss' permanent occupational disability remained in dispute. Doss filed his claim for retraining incentive benefits in December 1996.

Doss testified by deposition. He has not worked since June 1994. He currently receives Social Security disability benefits. Doss stated he is precluded from returning to gainful employment because of his health problems. He further stated that if awarded retraining incentive benefits he did not plan to enroll in any type of vocational training program.

Based upon evidence from Drs. Robert Powell and Emery Lane, the ALJ found Doss had satisfied his burden of demonstrating the existence of Category 1 pneumoconiosis without pulmonary impairment. This finding has not been appealed and, therefore, the medical evidence will not be summarized.

After summarizing the evidence, the ALJ entered the following finding relevant to this appeal:

> 2. Having found that the plaintiff has demonstrated the existence of the disease, the next question which must be considered concerns his entitlement to retraining incentive benefits. The employer in this proceeding argues that Mr. Doss is permanently and totally occupationally disabled because of his 1994 accident. Therefore, it asserts that pursuant to Arch of Kentucky, Inc. vs. [sic] Halcomb, Ky., 925 SW2d [sic] 460 (1996), the plaintiff is not entitled to benefits. That claim concerned a coal miner who had sustained a back injury. In the injury claim, the Administrative law [sic] Judge found the plaintiff to be totally and permanently occupationally disabled. Subsequently, Mr. Halcomb filed a claim for retraining incentive benefits. The Supreme Court held that

while the Workers' Compensation Act does not require that a RIB be used for retraining, Mr. Halcomb was not entitled to these benefits. The Court explained that it would be absurd to award RIB benefits to a worker who was no longer employer [sic] in the mining industry due to an injury, who was receiving benefits for total disability, and who was incapable of rehabilitation. The Court further noted that the judicial and legislative history of KRS 342.732(1)(a) demonstrate that its primary purpose is to provide an inducement to encourage affected workers to seek employment outside the mining industry. Consequently, a claimant who is totally disabled due to an injury, and who has left the mining industry because of that injury, is not entitled to retraining incentive benefits. Eastern Coal Corp. vs. [sic] Blankenship, Ky., 813 SW2d [sic] 808 (1991).

In light of the foregoing, it is obvious that if Mr. Doss were totally disabled as a result of the 1994 injury, he would not be entitled to retraining incentive benefits. However, this gentleman compromised his claim and settled it on the basis of a permanent partial disability. The Administrative Law Judge recognizes that in the context of reopenings, such a settlement is not res judicata. However, this is not a reopening. The Administrative Law Judge does not believe that she has the authority nor does she consider it appropriate to now attempt to look behind this settlement, speculate that the plaintiff in fact was totally disabled, and hence find him ineligible for retraining incentive benefits. In light of this, she must reject the defendant's argument that Halcomb precludes an award of benefits. The Administrative Law Judge finds no impediment to Mr. Doss receiving the retraining incentive benefits for which he is otherwise qualified by virtue of the existence of category 1 pneumoconiosis.

On appeal, Winn argues that Doss is not entitled to retraining incentive benefits as a matter of law. Winn argues that Doss is totally disabled and therefore[,] pursuant to Arch of Kentucky, Inc. vs. [sic] Halcomb, Ky., 925 SW2d [sic] 460 (1996)[,] he is not entitled to retraining incentive benefits. Winn contends the only evidence of record concerning the issue of whether Doss is totally disabled in Doss' own testimony that he believed he was unable to return to any type of work and had no intention of returning to work or being retrained.

The plain language of KRS 342.732(1)(a) provides that retraining incentive benefits may be paid directly to the worker only if the worker is not working in the mining industry. However, the statute establishes no other criteria or requirements, aside for employment status, which must be met before a worker no longer employed in the mining industry is qualified for direct payment of retraining incentive benefits. Therefore, there is no statutory support for Winn's contention that the ALJ should make a determination of whether of whether Doss is totally disabled.

There being no statutory support for Winn's argument, we must review judicial precedent to determine whether there is any support for Winn's position. In our opinion, Winn's reliance on Halcomb is misplaced. The court in that case indicated that KRS 342.732(1)(a) has never required retraining of those retraining incentive benefits recipients who have left the mining industry and that the worker's ability to be rehabilitated is not dispositive of his entitlement to a retraining incentive benefits award. The court stated the ultimate legislative purpose was not retraining but providing affected workers with the means to leave the mining industry and to seek employment elsewhere. Halcomb had been found to be totally occupationally disabled as a result of a work-related injury and pre-existing active disability. Because of his disability, Halcomb was no longer able to work in the mining industry. As result of that prior adjudication of Halcomb's total disability, the court stated that an award of benefits, the purpose of which was to encourage him to leave the mining industry, would be absurd. In the instant case, there has been no determination that Doss is totally occupationally disabled or that he is incapable of returning to the mining industry. As noted by the ALJ, the prior claim resulted in a compromised settlement agreement with the extent of disability remaining in dispute. Further, the ALJ noted that the prior claim had not been reopened. Nothing in Halcomb indicates that the ALJ should undertake an independent consideration of

> whether the claimant is totally disabled in those cases where there has been no prior determination. To require the claimant to additionally show that he is not totally disabled would be adding a condition to KRS 342.732(1)(a) which the Legislature did not provide in that statute. In our opinion, the ALJ properly rejected Winn's argument that Halcomb precluded an award of benefits.

(Emphasis added.)

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE BOBBY D. DOSS:

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