

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000905-WC

KI USA CORP.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 1997-01346

ROY HALL; ROBERT L. WHITTAKER,
DIRECTOR OF THE SPECIAL FUND;
DONNA H. TERRY, CHIEF ALJ; AND
THE WORKERS' COMPENSATION BOARD

APELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: COMBS, EMBERTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Roy Hall filed an application for resolution of an injury claim with the Department of Workers Claims on June 5, 1997. He alleged that he had suffered a work-related back injury on March 21, 1995. Pursuant to procedures delineated in 803 KAR Chapter 25, the commissioner assigned Hall's claim to an arbitrator. A benefit review conference was scheduled for September 4, 1997. The arbitrator's order followed on September 15, 1997, which noted Hall's long history of back problems, and the employer's denial that recent manifestation of those problems

was work related. He apparently found, however, that Hall's claim was colorable and found as well that at the time of the conference Hall "was totally disabled due to his back injury." Accordingly, the arbitrator awarded Hall temporary total disability benefits (TTD) to commence as of September 4, 1997, and to continue "until further order." He also placed Hall's claim in abeyance, noting that "[a]t such time as the Plaintiff reaches MMI [maximum medical improvement] or returns to work either party may move" to reactivate the claim.

The employer, KI USA, promptly petitioned for reconsideration of the TTD award or for assignment of the claim to an ALJ. The arbitrator denied the petition by order entered September 30, 1997, although he did amend the earlier order to require Hall to "provide a status report of his condition within 60 days." On October 29, 1997, KI USA petitioned to have the arbitrator's TTD decision reviewed by an ALJ. On November 11, 1997, the Chief ALJ dismissed the petition as having been brought from a non-final, non-appealable order. KI USA thereupon appealed to the Workers' Compensation Board. By order entered March 23, 1998, the Board agreed with the Chief ALJ and dismissed the appeal. Undaunted, KI USA now appeals to this Court and insists that the ALJ and the Board have misconstrued the 1996 legislative reform of the workers' compensation system. Under the revised procedures, KI USA maintains the arbitrator's award of temporary total disability benefits *is* appealable. We disagree and dismiss the appeal.

In 1996, the General Assembly enacted a significant revision of the Workers' Compensation Act. Among the changes introduced by that legislation were provisions for arbitration as the initial stage in the processing of most claims. KRS 342.270. The Department of Workers' Claims was mandated to hire arbitrators and to modify its regulations so as to incorporate a relatively informal arbitration procedure at the outset of a claim. The new procedure is meant to encourage prompt settlements. Where settlement proves impossible, moreover, it is hoped that administrative rulings can be expedited by having issues clearly defined and evidence substantially perfected before submission of the claim to an ALJ.

In response to this legislative mandate, the Department modified 803 KAR Chapter 25. That chapter now provides, at Section 3(4), that applications for resolution of claims shall be "assigned to an arbitrator or administrative law judge." Section 8 of that Chapter, **Benefit Review Before Arbitrator**, outlines the arbitration procedure; and Section 11, **Interlocutory Relief**, authorizes arbitrators, as well as ALJ's, to award TTD benefits pending stabilization of the employee/claimant's condition. It was pursuant to this new arbitration procedure that KI USA was ordered to provide TTD benefits to Hall, and it is by virtue of this new procedure, KI USA claims, that it is entitled to immediate review of that order.

In Ramada Inn v. Thomas, Ky., 892 S.W.2d 593 (1995), our Supreme Court ruled that an ALJ's TTD award was not a final and appealable order giving rise to a right to administrative or

judicial review. The Court rejected the employer's argument that review should be immediately available from such an award in order to minimize the risk that substantial benefits would be paid, would later be determined to have been unjustified, but would, by then, have become unrecoverable. The Court understood the General Assembly to have anticipated that in most cases TTD benefits would not be necessary for an extended time, and thus would not often give rise to a risk of significant over-payment. Otherwise, the Court opined, the General Assembly had manifested an intention to ensure protection of disabled employees by imposing a limited risk upon their employers. See also Transit Authority of River City v. Saling, Ky. App., 774 S.W.2d 468 (1989) (same).

In its opinion dismissing KI USA's administrative appeal, the Board noted that nothing in the 1996 amendments to the Workers' Compensation Act suggested a rejection of Ramada Inn and Saling or altered the analysis contained in those cases. We agree with the Board. Generally, TTD benefits are only appropriate at the outset of a claim, which means that under the new procedures arbitrators will frequently be called upon to grant them. Furthermore, until the injured employee's condition has stabilized, a final ruling on his or her claim is impossible. The official assessing that claim, therefore, whether an ALJ or an arbitrator, must have discretion to abate claims until they are ripe for decision. The revised statute and new regulations extend that authority to arbitrators. KRS 342.270(4); 803 KAR Section 11. See W. L. Harper Const. Co., Inc. v. Baker, Ky.

App., 858 S.W.2d 202 (1993) (discussing the role of TTD benefits within the workers' compensation system). See also KRS 342.275, which provides for review of an arbitrator's benefit review determination, intends, we believe, that such review will only be available from the arbitrator's final determination, when the entire claim may be passed on to an ALJ. Subjecting the arbitrator's interlocutory awards to immediate appellate scrutiny would be inconsistent with the informality envisioned for the arbitration phase of the claims process, and the considerable delay necessary for review would undermine the General Assembly's attempt to streamline that process.

KI USA insists, nevertheless, that, under the new arbitration system, the risk to employers of substantial loss from unwarranted TTD awards has so increased as to render the reasoning of Ramada Inn and Saling no longer tenable.¹ The arbitrator's authority to grant TTD awards of indefinite duration could be ruinous, it argues, unless immediate review is permitted. Its hyperbole aside, however, KI USA has failed to suggest any meaningful distinction between an arbitrator's award of TTD benefits and an ALJ's. Such awards, whether by arbitrator

¹KI USA also maintains that the guarantees of procedural due process in both the federal and Kentucky Constitutions require that TTD awards be subject to immediate review. It argues, therefore, that the provisions in our statutes and regulations making such awards interlocutory are unconstitutional. Before this Court may address a facial challenge to the constitutionality of a statute or regulation, however, the Attorney General must be notified. CR 24.03; KRS 418.075. KI USA has failed to give such notice. Our Supreme Court has held that the notification requirement is mandatory and should be strictly enforced. Maney v. Mary Chiles Hospital, Ky., 785 S.W.2d 480 (1990). We must decline, therefore, to address the constitutional question.

or ALJ, are necessarily open-ended at first and sometimes require abatement of the claim. Inasmuch as the ALJ's authority to award interlocutory relief under the former statutory scheme was not subject to immediate review, we believe that review of an arbitrator's essentially identical authority under the new scheme is similarly restricted.

We agree with KI USA that arbitrators and ALJ's should take pains to ensure that TTD benefits are genuinely warranted and that they continue for no longer than necessary. Both the Ramada Inn and Saling Courts noted the General Assembly's apparent presumption that in most cases TTD benefits would not be necessary for long. TTD awards are not to be employed as a substitute for or enhancement of permanent disability benefits. Otherwise, the workers' compensation system will not operate as fairly as it might. The current regulations embody this idea, among other ways, by anticipating that in most cases the arbitrator will be able to reach a final decision within ninety (90) days of the assignment of the claim. 403 KAR Section 8 (6). In most cases, therefore, the risk that KI USA objects to simply will not exist.

Even if an employee receiving TTD benefits attempts to circumvent this aspect of the system (for example by failing or refusing to abide by the arbitrator's order to submit periodic reevaluations of his or her condition), the regulations do not leave the employer utterly without recourse. They permit the employer to move to have the claim reactivated (803 KAR Section 11 (4)), to move to have the claim transferred to an ALJ (803 KAR Section 8 (7)), to move for a medical evaluation of the employee

(803 KAR Section 9 (2)), to move to have TTD benefits suspended (B.L. Radden & Sons, Inc. v. Copley, Ky. App., 891 S.W.2d 84 (1995)), or to move to have the claim dismissed for lack of prosecution (Bentley v. Aero Energy, Inc, Ky. App., 903 S.W.2d 912 (1995)). Although the arbitrator's rulings on these motions would not be final and appealable, in conjunction with the right to appeal from the arbitrator's final decision, these avenues of relief afford significant protection against exaggerated losses as a result of an erroneous TTD award.

For these reasons, we agree with the March 20, 1998, ruling of the Workers' Compensation Board that KI USA's attempted appeal from the amended September 4, 1997, order granting Hall TTD benefits was premature. Accordingly, KI USA's appeal to this Court is hereby DISMISSED.

ALL CONCUR.

ENTERED: January 22, 1999

/s/ Wm.L. Knopf
JUDGE, COURT OF APPEALS

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