

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001436-WC

BILL G. ADAMS, AND
HON. JOHNNIE L. TURNER

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 94-10668

GREAT WESTERN COAL, INC.;
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MCANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: Bill G. Adams (Adams) and Johnnie L. Turner (Turner) ask us to review an opinion of the Workers' Compensation Board (board) rendered May 15, 1998. Ky. Rev. Stat. (KRS) 342.290. We affirm.

The sole issue presented in this appeal is whether a claimant's counsel was entitled to a fee when his client was awarded retraining incentive benefits (RIB)--pursuant to KRS 342.732 (1) (a), as amended April 4, 1994--yet remained employed

in the coal mining industry and was not enrolled in a bona fide training program.

In an opinion rendered October 26, 1994, Adams was awarded RIB by the administrative law judge (ALJ). The ALJ, however, held the award in abeyance pending the final resolution of Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995), which addressed the retroactivity of the 1994 amendment to KRS 342.732(1)(a).¹ Adams appealed to the board prior to the award being removed from abeyance. On December 8, 1995, the board affirmed the ALJ's decision and remanded the cause for entry of a final award consistent with Thornsbury, which became final on November 22, 1995. By Opinion and Award on Remand, dated January 31, 1996, the ALJ amended his original opinion and award. In conformance with Thornsbury, the ALJ indicated that although Adams was entitled to RIB, he would not receive it until he met one of the conditions set forth in KRS 342.732(1)(a), as amended April 4, 1994. The ALJ also limited Adams's entitlement to said award to the 208 weeks immediately following November 22, 1995.²

Adams appealed, challenging the date on which the 208 week entitlement period was ordered to begin. The board held the case in abeyance pending a decision in Meade v. Spud Mining, Ky.,

¹Pursuant to Ky. Rev. Stat. 342.732(1)(a), an award of retraining incentive benefits is payable if a claimant is either enrolled and actively participating in a "bona fide training or education program," or "through no fault of his own, is no longer working in the mining industry in the severance or processing of coal." In the former case, the award is payable to the retraining institution, in the latter case, the award is payable directly to the claimant.

²This is the date rehearing was denied in Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995).

949 S.W.2d 584 (1997), which dealt with the same issue. Meade became final on May 22, 1997. On October 3, 1997, the board reversed the ALJ's decision and remanded the case with directions. The board directed the ALJ to order the 208 week entitlement period to begin on the date the opinion and award would become final and to extend for 208 weeks thereafter. On November 21, 1997 the ALJ entered another Opinion and Award on Remand in compliance with the board's decision.

On November 21, 1997, the ALJ also issued an order awarding Turner an attorney fee in the amount of \$6,116.57. This amount was to be paid in a lump sum by the employer, Great Western Coal, Inc., d/b/a New Horizons Coal, Inc., by reducing Adams's weekly benefits equally over the duration of the award. On February 12, 1998, however, the ALJ vacated said award of attorney fees. He declared the award had been made prematurely as the record contained no evidence that Adams had met the conditions set forth in KRS 342.732(1)(a) to begin collecting his award. In his order, the ALJ indicated that Turner could file a subsequent motion for attorney fees once Adams has fulfilled one of the conditions. Adams and Turner appealed to the board, which, in turn, affirmed the ALJ. This appeal followed.

Appellants attempt to persuade us that the ALJ erred in concluding that the award of attorney fees was premature. Specifically, the appellants argue that Turner's fee became vested when Adams's award became final. Thus, they assert, Turner is entitled to receive same immediately. We disagree.

KRS 342.320(1), as effective prior to April 4, 1994, and the version applicable here, provides for attorney fees to be

calculated from the "amount recovered." "Recovery" is the sum received by the client by reason of a judgment. Snyder v. Howard's Adm'x, 251 Ky. 592, 65 S.W.2d 477 (1933). Under KRS 342.732(1)(a), as amended April 4, 1994, the Legislature effectively drew a distinction between entitlement of an award and conditions for collection of that award. Although Adams is indisputably entitled to a RIB award, he has not met either of the conditions necessary to collect the award. As he remains in the coal mining industry and is not enrolled in a bona fide training program, the value of the RIB award diminishes because the 208 weeks began to run from the date the ALJ's award became final. The attorney fee is based upon that amount recovered/received by the worker. *A fortiori*, until the worker has met one of the conditions necessary to recover/receive the RIB award, it is infeasible to set an attorney fee. It was held in Cox v. Cooper, Ky., 510 S.W.2d 530 (1974), that a fee cannot be assessed on what is not only unrecovered but unrecoverable.

Once one of the conditions for collection is met, an attorney is entitled to his fee based on the value of the award at that time. The attorney is entitled to that fee, regardless of subsequent events, such as if the worker does not complete the training program or reenters the coal mine industry. Elkhorn Stone Co. v. Webb, Ky., 478 S.W.2d 720 (1972); Warner v. Lexington Roller Mills, 314 Ky. 1, 233 S.W.2d 988 (1950); and Ford Motor Company v. Stewart, Ky. App., 762 S.W.2d 817 (1988).

Under the precepts of Western Baptist Hospital, Inc. v. Kelly, Ky., 827 S.W. 2d 685 (1992), we are of the opinion the board committed no error.

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR

BRIEF FOR APPELLANTS:

Ronald C. Cox
Harlan, KY

BRIEF FOR APPELLEE/GREAT
WESTERN COAL:

Effie L. Stidham
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