

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-001191-MR

HOBART MASON  
D/B/A KENTUCKY FARM EQUIPMENT

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, JUDGE  
ACTION NO. 97-CI-000015

RANDALL PATRICK MULLINS

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Hobart Mason, d/b/a Kentucky Farm Equipment (Mason) appeals from a circuit court judgment enforcing a workers' compensation award. Finding no error, we affirm.

In November 1994, the appellee, Randall Patrick Mullins (Mullins), was injured during the course of his employment with Mason. After filing a claim for workers' compensation benefits, the Administrative Law Judge (ALJ) found Mullins to have a twenty percent (20%) occupational disability, and awarded temporary total disability benefits accordingly. The ALJ also directed Mason to pay Mullins's medical expenses. The ALJ further assessed a fifteen percent (15%) penalty against Mason for

violation of safety regulations. KRS 342.165. The Workers' Compensation Board (Board) affirmed the award on appeal.

In January 1997, Mullins brought a petition in Lincoln Circuit Court, pursuant to KRS 342.305, to enforce the award and to reduce to present value the total of the future payments due under the award. A copy of the petition was served upon Mason's counsel, but not directly to Mason. Mason did not file a response to the petition. On March 6, 1997, the trial court entered a judgment for Mullins, directing that all future payments due under the award be commuted and reduced to a lump sum which will equal the present value of the total sum of the probable future payments discounted at four percent (4%) true discount compounded annually on each payment.

On March 17, Mason filed motions pursuant to CR 59.05 and CR 60.02, to set aside the judgment on the grounds that he had not been served notice of the action, and that he was entitled to a credit for payments previously made. The trial court denied the motion to set aside the judgment. This appeal followed.

Mason again argues that the circuit court was without jurisdiction to enter a judgment because it had not been personally served. Nonetheless, the function and duty of the circuit court under KRS 342.305 is merely to enforce the order of the ALJ by rendering a judgment in accordance with the award. KRS 342.305 is a summary, ex parte procedure for obtaining a judgment on a workmen's compensation award. The only notice called for is a notice given by the court after the judgment is entered. Fruchtenicht v. U.S. Fidelity & Guaranty Co., Ky., 451

S.W.2d 835, 837 (1969). Therefore, service of process pursuant to CR 4.04(2) was not required.

Mason next contends that the trial court erred in commuting the future payments to a lump sum. We disagree. KRS 342.305 authorizes the circuit court to reduce a periodic compensation award to a lump sum. Hereford v. Storms, Ky. App., 808 S.W.2d 819, 820 (1990).

Along the same line, Mason argues that he was entitled to a credit for payments which its insurer made to Mullins. At the time of Mullins' injury, Mason did not have workers' compensation coverage for his employees.<sup>1</sup> However, Mason did have medical and disability insurance coverage through Employers' Underwriters, Inc., (Employers). Employers paid Mullins' medical expenses, and made disability payments totaling \$4,050.00 to Mullins up to the date of the ALJ's order. Mason contends that it was entitled to a "dollar for dollar" credit for those payments which Employers made to Mullins.

We disagree. The Supreme Court recently held that payments made pursuant to an employee benefit plan may not be credited against workers' compensation benefits. Williams v. Eastern Coal Corp., Ky., 952 S.W.2d 696, 698-701 (1997). Therefore, Mason is not entitled to credit for disability payments made by its insurer to Mullins.

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<sup>1</sup> In the proceedings before the ALJ, Mason argued that Mullins voluntarily waived workers' compensation coverage. The ALJ found that Mullins did not sign a valid rejection notice prior to the injury, and thus had not voluntarily waived coverage under the Act.

Moreover, we recognize the strong public policy against double recovery. See, Hardaway Management Co. v. Southerland, Ky., 977 S.W.2d 910, 918 (1998). However, an employer is only entitled to credit with respect to those portions of the judgment which duplicate payments previously made under an insurance policy. Id. at 919. The circuit court judgment represents the present value of Mullins' *future* benefits. Since these benefits do not overlap with the benefits paid by Mason's insurer, we find no equitable grounds which would entitle Mason to credit.<sup>2</sup>

Mullins argues that this Court should remand the action to circuit court with instructions to increase the judgment commensurate with the amount of credit which was given to Mason by the ALJ in the original award. However, Mullins did not raise this issue before the circuit court, and he failed to file a cross-appeal from the circuit court judgment on this issue. Consequently, this Court is without authority to grant the relief requested.

Last, Mullins asks this Court to impose sanctions upon Mason, pursuant to CR 11, for filing a frivolous appeal. CR 73.02(4) permits this Court to award costs and damages upon a determination that an appeal is so lacking in merit that it appears to have been taken in bad faith. If the Court finds that the appeal is totally lacking in merit in that no reasonable attorney could assert such an argument, bad faith may be inferred, and the appeal is frivolous. The factors to be

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<sup>2</sup> Furthermore, we note that the ALJ credited Mason with the payments made to Mullins by Employers under the disability insurance policy.

considered must necessarily be in the record which can be reviewed objectively. Leasor v. Redmon, Ky., 734 S.W.2d 462, 464 (1987).

Mullins contends this appeal was taken for no other reason than to delay collection of the workers' compensation award. We find considerable support for this position. When Mason filed its notice of appeal from the circuit court judgment, the Supreme Court had not yet issued its ruling in Williams v. Eastern Coal Corp., supra. The Supreme Court in Williams overruled a line of cases which suggested that an employer may be entitled to credit against workers' compensation benefits to the extent that they are duplicative of benefits provided under an employer-funded disability benefit package. Id. 952 S.W.2d at 700-01.

Yet even under the law in effect prior to Williams, we question the merit of Mason's position. In his opinion and award, the ALJ credited Mason for the disability benefits paid by Employers. Record on Appeal [ROA], pp. 20, 22. consequently, Mason cannot reasonably argue that Mullins reaped a double recovery.

The purpose of KRS 342.305 is to provide an expedited means to obtain judicial enforcement of a workers' compensation award. Although we find that Mason's position is without merit under both the current and the prior case law, we recognize that the conflicting rulings have created some ambiguity. Reasonable persons could differ on the justification for Mason's appeal. Therefore we decline to impute to Mason an improper motive in bringing this appeal and choose not to impose sanctions.

Accordingly, the judgment of the Lincoln Circuit Court  
is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cabel Francis  
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BRIEF FOR APPELLEE:

Jackson W. Watts  
Versailles, Kentucky