

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001384-WC

AERO ENERGY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93035615

JAMES THORNSBURY; HON. RONALD W. MAY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE, Judges.

COMBS, JUDGE: Aero Energy (Aero) appeals from the judgment of the Workers' Compensation Board, affirming the decision of the Administrative Law Judge (ALJ). As we agree that the Board has properly and thoroughly addressed the issues raised by Aero on appeal, we adopt the Board's opinion as our own:

Petitioner, Aero Energy ('Aero'), appeals from an order on remand rendered by Hon. Ronald W. May, Administrative Law Judge ('ALJ'), on January 16, 1998 and an order dated January 27, 1998 overruling its petition for reconsideration. The ALJ, on remand, awarded respondent, James Thornsbery ('Thornsbery'), retraining incentive benefits ('RIB') in the amount of \$147.90 per week

with the term of the award to be from the 'date of this decision (payable commencing with the second regular payday of the employer after this award becomes final) and continuing thereafter for a period not to exceed 208 weeks.' The award went on to provide that in the weeks Thornsburly was no longer engaged in the severance and processing of coal, the benefits would be paid directly to him and that in weeks that he did work in the severance and processing of coal and also attended an approved educational program, the benefits would be paid to the program provider so long as it did not exceed \$147.90 per week.

Thornsburly and Aero have been here before, on two prior occasions. Thornsburly initially filed a RIB claim on September 2, 1993 while he was still working in the mining industry. That claim resulted in an award being made to him on June 27, 1994. That award was appealed to this Board and then ultimately to the Kentucky Supreme Court for a determination as to whether or not the 1994 amendments to KRS Chapter 342 limiting the payment of RIB to claimants still working in the mining industry was [sic] remedial and therefore applicable to Thornsburly's claim. On November 22, 1995, the Supreme Court ruled that the amendments were remedial and did apply to Thornsburly's claim. On December 18, 1995, Thornsburly filed a motion indicating that he was no longer working in the mining industry and was therefore entitled to payment of benefits. In an award on remand entered apparently December 27, 1995 (although dated December 27, 1994), the ALJ rendered an award commonly referred to as a "drawing account" award under which Thornsburly could utilize the 208 weeks of his award during weeks he was eligible to directly receive those benefits or during weeks he was attending an approved educational program until such time as the total dollars in his RIB award had been paid out in full. The award on remand did not address Thornsburly's motion filed on December 18. That award was appealed by Aero to this Board and later to the Court of Appeals. Aero contended successfully that a drawing account award was improper and not authorized and unsuccessfully that Thornsburly was not entitled to benefits because he left the mining industry through his own volition. The Board in an opinion dated May 16, 1996 reversed the ALJ's "drawing account" award but rejected Aero's contention that Thornsburly was ineligible for RIB for having left the mining industry on his own volition. Aero appealed this latter ruling to the Kentucky Court of Appeals which affirmed the Board in an opinion that became final and was ordered to be published on December 5, 1997. On remand from that opinion, the ALJ entered the award at issue in this appeal.

On appeal, Aero contends the ALJ erred in not construing Thornsburly's RIB award as having become final on June 27, 1994, the date of the original opinion, order, and award made in this case in that it did not appeal on the issue of Thornsburly's entitlement to the award but only on the issue of his right to collect the award. It notes that it prevailed in that argument with the Supreme Court's decision in Thornsburly v. Aero Energy, Ky., 908 S.W.2d 109 (1995). It contends that the next appeal was

necessitated by the ALJ's entry of a drawing account award, an issue upon which it again prevailed, apparently referring to the Board's opinion reversing the ALJ's award of a "drawing account" RIB from which it appealed seeking an appellate opinion that Thornsburry, having left the mines on his own volition, was not entitled to any RIB payment. Aero contends the ALJ's award bestows a benefit upon Thornsburry as the result of appeals of issues on which it prevailed and that the effect of the ALJ's order beginning the RIB award after January 12, 1998 is to penalize it for pursuing appeals necessitated by the ALJ's errors. Aero contends that in Meade v. Spud Mining, Ky., 949 S.W.2d 584 (1997), the Supreme Court held that a RIB award begins on the date when the award becomes final and extends for 208 consecutive weeks after that date and that had the ALJ entered the correct order from the beginning, some of Thornsburry's benefits would have expired before he began missing work.

KRS 342.732(1)(a) in effect as of the date of Thornsburry's original RIB award provided that RIB would be paid as provided in KRS 342.040. KRS 342.040(3) states:

All retraining incentive benefits awarded pursuant to KRS 342.732 shall be payable on the regular payday of the employer, commencing with the second regular payday after the award of the retraining incentive benefit by the administrative law judge becomes final.

That same provision is contained in KRS 342.316(1)(b). A decision is 'final' unless a petition for reconsideration is filed destroying its finality or unless one of the parties appeals the decision. Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). In Meade v. Spud Mining, supra at 587, the Supreme Court stated with respect to the commencement date of a RIB award:

In those instances where an award has been appealed, the award becomes final for the purposes of KRS 342.316(1)(b) when the appellate process has been exhausted.

In the instant case, the appellate process had not yet been exhausted, and therefore, Thornsburry's RIB award had not yet become final. Although Aero contends that it is penalized by such an interpretation, we would note that KRS 342.040(1) provides for the accrual of interest on all other installments of benefits at the rate of 12 percent per annum on each installment from the time it is due until paid and that benefits are payable on those claims beginning on the regular payday of the employer commencing with the first regular payday seven days after the injury or disability resulting from an occupational disease. Aero has therefore avoided the accrual of any interest on Thornsburry's RIB during the course of these appellate proceedings, including its unsuccessful appeal to the Kentucky Court of Appeals wherein it contended Thornsburry was not entitled to RIB benefits in that he left the mining industry of his own volition. Although Aero indicates neither party appealed from the ALJ's initial finding that Thornsburry was 'entitled' to a RIB

award, it appears obvious that all three appeals to the Board, including the current one, relate to Thornsbury's 'entitlement' to his RIB award.

Aero contends, in the alternative, that the decision of the Kentucky Court of Appeals in Colonial Coal v. Breeding, 97-CA-585-WC, now on appeal to the Kentucky Supreme Court, would preclude Thornsbury from receiving any RIB. That decision was rendered December 24, 1997 and designated to be published. In that case, the Court of Appeals determined that the 1996 amendment to KRS 342.732 restricting the payment of RIB to claimants actively and successfully participating as a full time student in a retraining program was remedial and applicable to 'all claims pending on or after its effective date.' The 1996 amendment became effective while this case was before the ALJ on remand for a second time with directions to the ALJ to enter an opinion and award in conformity with decisions of the Board entered May 13, 1996 and of the Court of Appeals rendered October 10, 1997. The issue as to the applicability of the 1996 amendment to this claim is now being first raised before this Board on the third appeal of this claim to the Board. No petition for reconsideration addressing this issue was filed below, and therefore, in our opinion, the issue has not been preserved for review. KRS 342.281. Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609 (1995).

For the foregoing reasons, we affirm the judgment of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Natalie D. Brown
Lexington, KY

BRIEF FOR APPELLEE THORNSBURY:

J. Drew Anderson
Prestonsburg, KY