

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001558-MR

WHITAKER COAL CORPORATION

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS COMBS, JUDGE
ACTION NO. 98-CI-00168

WAYNE ROBINSON

APPELLEE

OPINION
VACATING AND REMANDING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Whitaker Coal Company (WCC) appeals from a final judgment of the Perry Circuit Court entered June 2, 1998, which ordered it to commence payment of workers' compensation benefits to Wayne Robinson (Robinson). We vacate and remand.

This case has a long, grievous and tortured history. Robinson filed a claim for retraining incentive benefits (RIB) in August 1993. The Administrative Law Judge (ALJ) entered an opinion and award of RIB in favor of Robinson on April 14, 1994. WCC filed a petition for reconsideration citing House Bill 928 which was denied.

WCC then appealed to the Workers' Compensation Board (the Board). By an order entered August 19, 1994, WCC's appeal

was placed in abeyance pending a decision of the Kentucky Supreme Court in Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995). Following the Supreme Court's decision in Thornsbury, the Board reversed the ALJ's decision and remanded based on Thornsbury by opinion and order entered December 8, 1995.

On remand, the ALJ dismissed Robinson's claim by order entered December 14, 1995. Robinson then sought relief from the Board, which reversed the dismissal and remanded the matter for entry of an award in compliance with KRS 342.732.

Upon this remand, the ALJ entered an award on September 23, 1996, granting benefits pursuant to Thornsbury. Still not happy, Robinson once again appealed to the board. Subsequent to his appeal, Robinson asked that his claim be again held in abeyance pending the ruling of the Kentucky Supreme Court in Meade v. Spud Mining, Ky., 949 S.W.2d 584 (1997), and the Board complied by order entered October 18, 1996.

Following the rendering of Supreme Court's decision in Meade, the Board removed the case from abeyance and based on Meade rendered a decision on October 3, 1997. The Board remanded this claim back to the ALJ with instructions to "enter a specific order directing payment of benefits in accordance with the language of KRS 342.732(1)(a) payable for a period of 208 consecutive weeks upon the finality of the amended award." The Board further added that "this matter is REMANDED for the entry of a "final" award in accordance with [Meade]."

Robinson then appealed the Board's 1997 opinion to this Court on October 14, 1997. WCC moved to dismiss Robinson's

petition for review, arguing that the Board's order was interlocutory and thus not appealable.

Instead of waiting for this Court to either rule on WCC's motion to dismiss or his petition for review, Robinson filed a motion with the ALJ on October 31, 1997, requesting that WCC be ordered to commence payment of RIB on the ground that he had been awarded benefits on April 14, 1994, and had been laid off from his current employer on October 17, 1997. On November 10, 1997, Robinson filed a motion with this Court seeking dismissal of his appeal, which was granted by order entered December 18, 1997. Subsequent to the dismissal of his appeal, Robinson renewed his motion for commencement of payment of benefits on December 29, 1997.

As if the waters were not muddy enough already, the Board reentered the fray on January 16, 1998, when it entered what appears to be a sua sponte order which stated:

The Board having been advised that the Kentucky Court of Appeals has dismissed the appeal before it pursuant to petitioner's motion and being otherwise sufficiently advised,

IT IS HEREBY ORDERED, on the Board's own motion, that the herein claim be and the same is REMANDED to the Administrative Law Judge for consideration of petitioner's motion to commence payment of benefits.

This was followed by WCC's filing of a petition for reconsideration and motion to once again hold the claim in abeyance pending the Kentucky Supreme Court's decision in Colonial Coal Co. v. Breeding, Ky., 975 SW. 914 (1998). In a further reply brief filed by WCC on January 28, 1998, WCC pointed

out that the ALJ had not yet ruled on Robinson's motion to commence payment and again asked that the claim be placed in abeyance. WCC's motion was granted by an order of the ALJ entered February 10, 1998. Robinson attempted to appeal the February 1998 order to the board, but his appeal was dismissed by the Board on March 16, 1998, on the ground that it was interlocutory.

At some point in time during March 1998, Robinson filed a complaint to enforce a workers' compensation award in the Perry Circuit Court. In his complaint, Robinson alleged:

(1) By Opinion and Award dated April 14, 1994, and Amended Award dated September 23, 1996, the defendant was responsible for paying Workers' Compensation Benefits to the Plaintiff.

(2) All appeals in this action were final as of December 18, 1997.

(3) The defendant/employer has refused to pay the Award; therefore, this action is being filed Perry Circuit Court to enforce the payment of same.

WCC argued that the trial court lacked jurisdiction over the matter on the ground that the order Robinson sought to enforce had never become final due to entry of the Board's order remanding the matter to the ALJ for consideration of Robinson's motion to commence payment. On June 5, 1998, the trial court entered a final judgment finding that the action was final and enforceable as of December 18, 1997, and ordering WCC to commence payment of benefits.

Following the trial court's entry of judgment, WCC filed this current appeal. Not surprisingly though, the filing

of WCC's appeal did nothing to stop the piecemeal procedure of this matter, as on November 30, 1998 the ALJ entered an order on remand holding:

That Plaintiff shall be entitled to receive from the Defendant/Employer the sum of \$155.98 per week for a period not to exceed 208 weeks, together with interest thereon at the rate of 12% per annum on all due and unpaid installments, and the Defendant/Employer shall take credit for any and all payments heretofore paid towards this award. Inasmuch as this case became final on or about December 18, 1997, pursuant to the opinion by the Court of Appeals, this award shall commence as of that date.

WCC moved to set aside the order on remand arguing that the matter was presently pending before this Court. The ALJ denied WCC's motion by order entered December 18, 1998, and WCC appealed to the Board. On February 19, 1999, the Board entered an opinion and award stating:

Whitaker now appeals requesting that the Board enter an order setting aside and holding for naught the ALJ's order on remand dated November 24, 1998. As grounds therefor, Whitaker cites to an enforcement action filed by Robinson in the Perry Circuit Court in March 1998 which is now on appeal to the Court of Appeals. The issue presently pending before the Court is the finality of the RIB award.

Accordingly, the Board being otherwise sufficiently advised, it is hereby ordered on the Board's own motion that this appeal be and the same is HELD IN ABEYANCE pending a final appellate resolution or dismissal of Whitaker coal Co. v. Wayne Robinson, 1998-CA-001558-MR.

Not to be outdone by WCC, Robinson filed a motion to dismiss with this Court on December 11, 1998 arguing that:

(1) The Appellee filed a original action in Perry Circuit Court to enforce a Workers'

Compensation Award. There was a dispute as to whether the Workers Compensation Award was final or not. The Workers' Compensation action is now final. Although the Appellant filed this appeal with this Court, the Appellee, Wayne Robinson is advising this Court that he will not be seeking any enforcement action in the Perry Circuit Court claim on the case number he filed below, from which this present appeals stems. Therefore, there being no reason for this Court to issue any ruling as the issues raised below are moot, the Appellee believes this appeal should be dismissed.

Robinson's motion was denied by a three-judge panel of this Court on January 15, 1999.

WCC argues that the trial court's judgment should be reversed because Robinson is seeking to enforce an interlocutory order. WCC also contends that under KRS 342.305, a claimant can seek enforcement of a workers' compensation award at the circuit court level only when the decision has not been appealed.

First, WCC's argument pertaining to KRS 342.305 is without merit. We have reviewed that statute and find no language in it which even marginally supports WCC's argument. Although KRS 342.305 does allow for enforcement of "an award of the administrative law judge unappealed from," it also allows for enforcement of "an award of the board rendered on appeal." If WCC's interpretation of KRS 342.305 is correct, it would mean that a party's right to seek enforcement of an award at the circuit court level would be foreclosed by virtue of the fact that the opposing party sought appellate review. Such a result would be ludicrous.

WCC also maintains that the Board's opinion and order of October 3, 1997 is interlocutory. Again, we disagree. By

virtue of the fact that Robinson voluntarily dismissed his appeal coupled with the fact that WCC did not seek further review of the order, that order became final and thus capable of enforcement at the circuit court level.

Having held that the Board's order is final and enforceable, however, we are still of the opinion that it was improper for the trial court to enter a judgment in this case. Although we do not have the official workers' compensation record before us, it appears that Robinson was awarded RIB's which he would not be able to recover until he left employment in the mining industry. It appears that the Board's opinion of October 3, 1997, affirmed the RIB award.

From the language of his motion to commence benefits filed before the ALJ on October 31, 1997, it appears that Robinson left the mining industry when he was laid off from his current employer, thus triggering his right to receive the RIB benefits under the Board's October 1997 order. Until Robinson's entitlement to the award has been established, which it does not appear has occurred, there is no award to be enforced.

In so ruling, we rely on Armour Co. V. Hardin, Ky., 432 S.W.2d 38 (1968), for support of our decision. In Armour, the Court held that "the circuit court has no authority to enter judgment enforcing an award while a motion to reopen is pending." Armour, 432 S.W.2d at 39. Although this case does not involve a motion to reopen, we believe that Robinson's motion to commence payment is akin to a motion to reopen in that it asks the ALJ to make a determination as to whether he is now entitled to receive

the RIB award. If the rationale of Armour does not apply, then we are stuck with the situation we have now where the claimant has a final judgment in an enforcement action on a claim which is still pending before the ALJ. It is absolutely incredulous to this Court that this matter is now spread out over three different tribunals at the same time.

Based on the foregoing, the final judgment of the Perry Circuit Court is vacated, and this matter is remanded with instructions to dismiss Robinson's complaint. Only if (1) a determination is rendered allowing Robinson to begin to receive RIB benefits is made and affirmed and if appealed (2) WCC ignores the award would an enforcement action be proper.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles W. Berger
Harlan, KY

BRIEF FOR APPELLEE:

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