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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000581-WC

HETTIE LEE JACOBS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 96-91630

FRUIT OF THE LOOM;
HON. ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND;
HON DONNA H. TERRY, CHIEF ADMINISTRATIVE LAW JUDGE; AND WORKERS COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, MILLER AND SCHRODER, JUDGES.

KNOPF, JUDGE: This is an appeal from an opinion and order by the Workers' Compensation Board (Board) affirming an opinion and award made by the Chief Administrative Law Judge (CALJ). We find that the Workers' Compensation Act as a whole, and the presumed acceptance provision of KRS 342.395 in particular, do not offend the constitutional doctrine of jural rights. We further find that the 1994 version of KRS 342.730(1)(b), which limits recovery of income benefits to an employee who has returned to work after

an injury at equal or higher wages, is not arbitrary. Hence, we affirm.

The underlying facts of this appeal are not in dispute. The appellant, Hettie Lee Jacobs, was employed by the appellee, Fruit of the Loom, as a sewing machine operator at its Campbellsville facility. On February 12, 1996, Jacobs fell off a platform and injured her lower back. She ultimately underwent low back surgery for a herniated disc at L3-L4 and a free disk fragment at L4-L5.

Jacobs subsequently returned to work at Fruit of the Loom on modified duty as a ticket stamper. During this time, Jacobs earned a greater weekly wage than she had earned prior to her injury. However, nearly a year after Jacobs accepted this position, Fruit of the Loom closed the Campbellsville plant. Jacobs states that she has been unable to find a suitable job since that time.

Since Jacobs' claim arose prior to the effective date of the current version of KRS Chapter 342, the ALJ applied the standards set out in the pre-1996 Act are applicable. Based on the medical evidence, the arbitrator found that Jacobs has a 15% permanent functional impairment to the body as a whole. The CALJ agreed with the arbitrator's assessment of the evidence. Both the arbitrator and the CALJ believed that Jacob's occupational disability was considerably higher. However, since she returned to work at the same or greater wage than she received prior to her injury, the CALJ was limited to an occupational disability rating of twice her functional impairment rating, or 30%. KRS 342.730(1)(b). The Board affirmed.

Jacobs now appeals to this Court, arguing that: (1) the Workers Compensation Act, KRS Chapter 342, is unconstitutional as a violation of the jural rights doctrine; (2) the opt-out provision in KRS 342.395 is unconstitutional because it presumes a waiver of her constitutional rights by her silence; and (3) the cap on income benefits contained in the 1994 version of KRS 342.730(1)(b) is arbitrary. These issues were presented to the ALJ and to the Board, although neither body had jurisdiction to consider the merits of the constitutional questions. Blue Diamond Coal Co. v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Jacobs also notified the Attorney General of her intention to challenge the constitutionality of the statute. The Attorney General filed a notice stating his intention not to intervene in the action.

We begin by noting that this Court is required to follow applicable precedents established in the opinions of the Supreme Court and its predecessor court. SCR 1.030(8)(a). It has long been established that the Workers Compensation Act is constitutional even though it may limit the amount of money and conditions under which a claimant may recover. Workmen's Compensation Board of Kentucky v. Abbott, 212 Ky. 123, 278 S.W. 533 (1925); Greene v. Caldwell, 170 Ky. 571, 186 S.W. 648 (1916). In Mullins v. Manning Coal Corp., Ky. 938 S.W.2d 260 (1997), our Supreme Court reiterated that the Workers' Compensation Act does not unconstitutionally restrict an injured party's right to recover compensation from the wrongdoer:

> With regard to the appellant's argument concerning § 14 of the Kentucky Constitution, we are unpersuaded. The appellant attempts

> to analogize this situation with that presented in Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932). In Ludwig, our highest court struck down as unconstitutional Kentucky's "guest statute" enacted in 1930. The Court held that § 14 of the Kentucky Constitution guaranteed an injured party's right to attempt to recover compensation from the wrongdoer who allegedly perpetrated the harm. Id. The Workers' Compensation Act, however, is not predicated upon redressing a wrong which has caused an injury. In fact, liability under the compensation act is not in any way dependent on negligence, tortious conduct, or comparative negligence. See generally Tyler-Couch Const. Co. v. Elmore, Ky., 264 S.W.2d 56 (1954). An employee's right to occupational disease benefits is purely statutory in nature and does not fall under the ambit of § 14 of the Kentucky Constitution. The General Assembly clearly is free to limit application of workers' compensation benefits as it has with KRS 342.316(3)(b). The appellant's theory of the case would lead to the absurd result that the General Assembly may not limit applicability of the Act in any way.

Mullins, 938 S.W.2d at 263.

Jacobs places much emphasis on the recent Kentucky Supreme Court opinion in Williams v. Wilson, Ky., 972 S.W.2d 260 (1998). In Williams, our Supreme Court considered the constitutionality of the punitive damages statutes, KRS 411.184 & 186. Following an extensive discussion of the doctrine of jural rights, the Supreme Court found that the statutes' limitation on recovery for punitive damages arising out of gross negligence violated §§ 14, 54 and 241 of the Kentucky Constitution. Jacobs contends that the reasoning in Williams is equally applicable to the Workers' Compensation Act's abolition of her right to bring a tort action against her employer.

Although the Supreme Court's opinion in Williams was couched in expansive language, it was nonetheless limited to a

consideration of the constitutionality of KRS 411.184. We find nothing in the text of Williams which indicates that the Supreme court intended to overrule existing precedents regarding the constitutionality of the Workers' Compensation Act. Moreover, by electing to proceed under the workers' compensation system, Jacobs has waived any rights that she could have asserted under §§ 14 and 54 of the Kentucky Constitution. Edwards v. Louisville Ladder, Ky. App., 957 S.W.2d 290, 295 (1997). Consequently, the jural rights doctrine has no applicability to her claim for benefits.

Likewise, the validity of the opt-out procedure was upheld in Wells v. Jefferson County, Ky., 255 S.W.2d 462 (1953). The former Court of Appeals upheld the statute providing that an employee is deemed to have accepted the act unless he or she files with his or her employer a written notice of rejection. The Court stated that this section adequately preserves the right of an employee to make a voluntary election as to whether he will come under the Act. Thus, the former Court of Appeals concluded that the opportunity of the employee to reject coverage under the Act constitutes a waiver of his or her constitutional right of suit against the employer for personal injuries or wrongful death. Id. at 463. *See also*, Mullins v. Manning Coal Corporation, supra.[1]

[1] **Please note**: In Shamrock Coal Co, Inc. v. R. Cletus Maricle, Judge, Ky., No. 1998-SC-0664-MR (Nov. 18, 1999), the Supreme Court specifically reaffirmed the decision in Wells upholding the constitutionality of the Workers' Compensation Act and the presumptive acceptance provision contained therein. Id., Slip Op. at p. 6.

Jacobs further argues that the 1994 version of KRS 342.730(1)(b) is unconstitutional because it limits occupational disability benefits to a multiple of her functional impairment rating established by the American Medical Association's "Guides to the Evaluation of Permanent Impairment" (AMA Guides). As explained by the CALJ in her opinion and award:

> Under KRS 342.730(1)(b), as effective from April 4, 1994 to December 11, 1996, an employee who returns to work at that same or greater wage is limited to occupational disability benefits no greater than twice her permanent impairment rating under the AMA Guides. It is undisputed that Jacobs returned to work at the same or greater wages, albeit at a different and easier job. The only alternative to mandatory application of KRS 342.730(1)(b) is a finding of total disability and, based upon the medical and lay testimony of record, it simply cannot be found that Jacobs was permanently and totally disabled as the result of the February 12, 1996 injury. Indeed, she continued working (except for periods of recuperation) for nearly two years post-injury, until the plant closed for economic reasons. Thus, while the undersigned Administrative Law Judge believes that Jacobs has an occupational disability greater than 30 percent (twice the 15 percent permanent functional impairment rating) that is the maximum which may be awarded absent a finding of total disability. Since a total disability award cannot be rendered for the reasons set forth hereinabove, the Administrative Law Judge is constrained to limit Jacobs' occupational disability award to 30 percent.

Opinion and Award, November 30, 1998, pp. 3-4

Jacobs points out that the AMA Guides caution against using the impairment percentages therein to make direct financial awards or direct estimates of disabilities. She correctly notes that the standards set out in the AMA Guides for determining functional impairment are not intended to translate directly into

a finding of occupational disability. However, KRS 342.730(1)(b) caps her benefits at a multiple of her functional impairment rating, regardless of her actual occupational disability. Consequently, she contends that the method of determining occupational disability set out in KRS 342.730(1)(b) is arbitrary.

As noted above, Jacobs has waived any rights she could have asserted under §§ 14 and 54 of the Kentucky Constitution by failing to reject coverage under the workers' compensation system. Nonetheless, Section 2 of the Kentucky Constitution further prescribes, "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." City of Louisville v. Kuhn, 284 Ky. 684, 145 S.W.2d 851, 853 (1940). "The right of the legislature to declare what is a proper public policy, so as to authorize its being dealt with under the police power, seems to be limited only by the consideration that its action in the matter may not be arbitrary, but must be rested upon some tangible and reasonably clear public purpose to be served, and which has a reasonably substantial tendency to further the interest of the public welfare." Workman's Compensation Board of Kentucky v. Abbott, 278 S.W. at 536.

Section 2 is a curb on the legislature as well as any other public body or public officer in the assertion or attempted assertion of political power. Board of Education of Ashland, Ky. v. Jayne, Ky., 812 S.W.2d 129, 133 (1991). Whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary. Kentucky Milk

Marketing and Antimonopoly Commission v. Kroger Co., Ky., 691 S.W.2d 893, 899 (1985). The question of reasonableness is one of degree and must be based on the facts of a particular case. Id.

However, it is not our place to pass on the wisdom of the laws, only their application and constitutionality. Henderson v. Commonwealth, Ky., 507 S.W.2d 454, 458 (1974). Therefore, any analysis of whether a statute violates Section 2 must be limited. Moreover, statutes involving the regulation of economic matters or matters of social welfare are typically reviewed under the lowest level of equal protection scrutiny, the "rational relation" test. Legislative distinctions between persons, under traditional equal protection analysis, must bear a rational relationship to a legitimate state end. Chapman v. Eastern Coal Corp., Ky., 519 S.W.2d 390 (1975). Under this test, statutorily created classifications will be held invalid when they are not rationally related to the legislation's stated purpose, and when there is no other conceivable ground to justify them. McDonald v. Board of Election Commissioners., 394 U.S. 802, 808-809, 22 L.Ed.2d 739, 745, 89 S.Ct. 1404 (1969); Kentucky Association of Chiropractors, Inc. v. Jefferson County Medical Society, Ky., 549 S.W.2d 817 (1977).

Essentially, Jacobs contends that because the AMA Guides are not intended to be used exclusively to calculate occupational disability, then any statutory scheme which correlates occupational disability benefits to the impairment percentages contained in the AMA Guides must be arbitrary. For the following reasons, we disagree.

The AMA Guides set out objective criteria for evaluation of medical evidence and for the evaluation of functional impairment to the body as a whole. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684, 687 (1985). However, the terms "functional impairment" and "occupational disability" are not synonymous. Newberg v. Garrett, Ky., 858 S.W.2d 181, 185 (1993). Rather, the term "disability" as used in the 1994 version of KRS 342.0011(11), means occupational disability.[2] Prior to 1996, the finder of fact had considerable discretion to translate the percentage of functional impairment into occupational disability. Cook, 694 S.W.2d at 687.

The legislative purpose of the 1994 amendment to KRS 342.730(1)(b) was to limit the amount of compensation which was paid to those workers with no present loss of income. Where a worker can demonstrate that her occupational disability is greater than her functional impairment rating, but she has suffered no present wage loss, the maximum award is limited to two times the worker's functional impairment. Whittaker v. Johnson, Ky., 987 S.W.2d 320, 324 (1999). The statute preserves the distinction between functional impairment and occupational disability, but also seeks to prevent large awards of income benefits to claimants who have no present loss of income.

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[2] The 1996 version of KRS 342.0011(11) does not expressly define "disability," but speaks in terms of "temporary total disability," "permanent partial disability" and "permanent total disability." The current definition of "permanent partial disability" means "a condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work..." KRS 342.0011(11)(b). The "permanent disability rating" is calculated by multiplying the functional impairment rating by the factor set out in the current version of KRS 342.730(1)(b).

Although the result may work a hardship in Jacob's case, we conclude that the General Assembly's purpose in enacting this statutory scheme is rationally related to a legitimate state interest.[3] Therefore, the 1994 version of KRS 342.730(1)(b) is constitutional.

Accordingly, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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[3] *See also* Texas Workers Compensation Commission v. Garcia, 893 S.W.2d 504 (Tex., 1995), which considered the constitutionality of a provision in the Texas Workers Compensation Act which set a threshold requirement that a claimant suffer at least a 15 percent functional impairment before an employee is eligible for supplemental income benefits. The claimants argued that the statute's use of the functional impairment rating to measure the threshold for receiving benefits was arbitrary because functional impairment does not translate directly into occupational disability. They further argued that use of the AMA Guides to measure functional impairment violated their due process rights because the impairment rating produced by the Guides is not relevant to disability, is unreliable, and is an inadequate measure of the concept of injury. The Supreme Court of Texas disagreed, finding that the use of the functional impairment rating to set a threshold for recovery of benefits, and the statutes's use of the AMA Guides to measure functional impairment did not violate the equal protection or due process clauses of the Texas Constitution. Id. at 524-26.