

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003011-MR

SHARON JOHNSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 98-CI-01095

ALL AMERICAN BOTTLING COMPANY;
CNA INSURANCE COMPANY;
CNA RISK MANAGEMENT;
AND SUSAN RIVERA

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND KNOFF, JUDGES.

KNOFF, JUDGE: This is an appeal from an order of the Hardin Circuit Court, dismissing the appellant's tort claims against her employer, and her claim against her employer and its workers' compensation insurance carrier for bad faith and unfair claims settlement practices. Since all of her arguments concerning the constitutionality of the Workers' Compensation Act have either been rejected by the Supreme Court of Kentucky, or are not ripe for review, we affirm the trial court's dismissal on this ground. We further find that any claims which the appellant may have

under the Unfair Claims Settlement Practices Act (UCSPA) are also precluded by the exclusive liability provision of the Workers' Compensation Act.

Because the trial court disposed of this matter on a motion to dismiss, the underlying facts of this appeal were not fully developed. However, the allegations are straightforward and can be briefly summarized here. The appellant, Sharon Johnson, was employed by All American Bottling Company (All American) as a merchandiser. On November 2, 1997, she allegedly sustained a severe injury to her left foot and ankle when a pallet loaded with soft drinks was dropped on her leg. There is no dispute that these injuries were sustained within the course and scope of her employment.

On July 10, 1998, Johnson brought a civil action in Hardin Circuit Court against All American, alleging that her injuries occurred as a result of its negligence. She also brought a claim for bad faith and unfair claims settlement practices against All American and its workers' compensation insurance carrier, CNA Insurance Company/CNA Risk Management (CNA), and CNA's agent, Susan Rivera. Johnson argued that the Workers' Compensation Act in its entirety, as well as specific amendments to the Act made in 1996, are unconstitutional. Johnson 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.

All American and CNA moved to dismiss the action because the trial court lacked subject matter jurisdiction over

matters assigned exclusively to the Workers' Compensation Board. KRS 342.690(1). Following briefing of the issues by all parties, the trial court agreed with All American and CNA, and dismissed the action. This appeal followed.

Johnson again argues 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 method of calculating income benefits for disability contained in the 1996 version of KRS 342.730 is arbitrary. She also argues that the trial court erred in dismissing her claim against All American and CNA pursuant to the UCSPA. KRS 304.12-230. For the following reasons, we affirm the trial court's order dismissing these claims.

We begin by noting that this Court is required to follow applicable precedents established by 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.

Johnson 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 limitation on recovery for punitive damages arising out of gross negligence violated §§ 14, 54 and 241 of the Kentucky Constitution. Johnson 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, Johnson has waived any rights which 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 unused 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, Ky., 938 S.W.2d 260 (1997).¹

¹ **Please note:** In Shamrock Coal Co, Inc. v. R. Cletus Maricle, Judge, Ky., No. 1998-SC-0664-MR (Nov. 18, 1999), the
(continued...)

In addition, Johnson argues that the 1996 version of KRS 342.730 is arbitrary because of the manner in which the statute determines disability. Much of her argument centers around the use of functional impairment rating established by the American Medical Association's "Guides to the Evaluation of Permanent Impairment" (AMA Guides), as a criterion for awarding benefits. 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 AMA Guides caution against using the impairment percentages therein to make direct financial awards or direct estimates of disabilities.

Prior to 1996, the terms "functional impairment" and "occupational disability" were clearly distinguished. Newberg v. Garrett, Ky., 858 S.W.2d 181, 185 (1993). The term "disability," as used in the former version of KRS 342.0011(11), meant occupational disability. Under the former version of KRS 342.730, 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 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

¹(...continued)
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.

disability." Under the current definition, "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). Likewise, "permanent total disability" means "a condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury ..." KRS 342.0011(11) (c). 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). Johnson contends that because the AMA Guides are not intended to be used in such a direct and exclusive manner 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.

Nonetheless, we conclude that Johnson's arguments that the 1996 amendments to the Workers' Compensation Act are unconstitutional must fail because they are not ripe for review. Johnson asserts that since the Workers' Compensation Act no longer provides a fair or complete remedy to injured workers, she no longer has a "remedy" under the Act as amended in 1996. Thus, she argues that she is entitled to bring this action in circuit court to recover for her injuries. However, before Johnson would be entitled to appellate review of these issues, she must first have exhausted her remedies through the administrative process. Tharp v. Louisville & Nashville Railroad Co., 307 Ky. 322, 210 S.W.2d 954 (1948).

Furthermore, the constitutionality of the 1996 amendments to the Workers' Compensation Act is not relevant to the issue of whether the trial court erred in dismissing Johnson's tort claim against her employer. Even if a court were to determine that all of the 1996 amendments were unconstitutional, we would still be required to affirm the dismissal since Johnson's tort action would be governed by the statutes in effect at the time of the amendment. Vestal Lumber Co. v. Clark, Ky., 268 S.W.2d 954, 956 (1954). Because the exclusive remedy provision of the Act, KRS 342.690(1), was in effect prior to the 1996 amendments, a judicial voidance of the 1996 amendments would only affect the benefits to which Johnson is entitled under the Act.

Yet that issue is not presented to this Court. The only issue which is properly before us is whether Johnson may bring a civil action against her employer in circuit court. The fact that a remedy for a work-related injury may be unavailable under the Act does not authorize bringing a civil action in circuit court. Davis v. Solomon, Ky., 276 S.W.2d 674, 676 (1955). Therefore, because both the former and the current versions of the Workers' Compensation Act create an exclusive remedy for all matters falling within their purview, the trial court has no subject matter jurisdiction over such a matter. Rather, jurisdiction over matters falling within the purview of the Workers' Compensation Act lies solely with the Workers'

Compensation Board. Consequently, the trial court did not err in dismissing Johnson's tort action against All American.²

Finally, Johnson argues that she is entitled to bring a claim against All American and CNA for bad faith and unfair claims settlement practices, pursuant to KRS 304.12-230. Prior to 1996, this Court held that the exclusive liability provision of the Workers' Compensation Act precluded a civil action against an employer or insurance carrier under the Consumer Protection Act, KRS 367.170, or under the UCSPA. General Accident Insurance Co. v. Blank, Ky. App., 873 S.W.2d 580, 581-82 (1993). However, KRS 342.267, as enacted in 1996, subjects an insurance carrier, self-insurance group or self-insured employer to the provisions of the UCSPA.³

Nonetheless, KRS 342.267 and 803 KAR 25:240 each specify that the authority to fine carriers for engaging in unfair claims settlement practices belongs to the commissioner of the Department of Workers' Claims. KRS 342.990 sets out procedures by which the commissioner may assess civil penalties. Consequently, we find that the extension of the applicability of the UCSPA to workers' compensation carriers does not carry with it a separate right to bring a civil action. Rather, we find

² Shamrock Coal Co. v. Maricle, Slip Op. at pp. 7-8.

³ In addition, KRS 342.310 authorizes an arbitrator, an administrative law judge, the Board or a court (in which an enforcement action has been brought pursuant to KRS 342.305) to determine that proceedings have been brought, prosecuted or defended without reasonable ground. Upon such a finding, the finder of fact may assess costs of the proceeding against the party so offending, including, but not limited to: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses.

that KRS 342.267 vests exclusive jurisdiction over claims under the UCSPA against workers' compensation carriers with the commissioner for the Department of Workers' Claims. Therefore, the trial court correctly dismissed this claim as well.

Accordingly, the order of the Hardin Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS WITH RESULT.

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