

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002658-WC

WHITAKER COAL CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-14502

PHILLIP HOSKINS; SPECIAL FUND;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE: The sole issue in this appeal is whether the 1996 amendments to KRS 342.732(1)(a) apply to the claim of Phillip Hoskins. Both the Administrative Law Judge ("ALJ") and the Workers' Compensation Board ("Board") concluded that they did not. We agree, based on the recently rendered decision in Whitaker Coal v. Melton, Ky. App., 18 S.W.3rd 361 (2000).

This case has followed a lengthy and arduous path to reach this Court. After he had worked in coal mines for approximately nineteen years, Phillip Hoskins filed an

application for adjustment of claim to receive retraining incentive benefits ("RIB") for pneumoconiosis on April 4, 1994. At the time he filed his claim, Hoskins worked for Whitaker Coal Corporation ("Whitaker"). Whitaker subsequently sold the operation where Hoskins worked to Cockerills Fork Mining and Hoskins discontinued his employment with Whitaker and began working for the new owner. Nevertheless, the ALJ determined that Whitaker was the proper defendant in the claim, based on National Mines Corporation v. Pitts, Ky., 806 S.W.2d 637 (1991).

After examining the proof submitted, the ALJ entered an Opinion and Order, which was later amended to an Opinion, Order and Award, on February 17, 1995. In this document, the ALJ specifically found that Hoskins suffered from category 1 pneumoconiosis with normal pulmonary function studies. The ALJ then concluded that Hoskins would ordinarily be eligible for a one time only RIB award. However, the ALJ observed that the parties disputed whether the 1994 amendments to KRS 342.732 applied to Hoskins' claim. In that regard, the ALJ held the claim in abeyance pending a final decision in Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995) which involved that precise issue.

Whitaker appealed the ALJ's determination that Hoskins was entitled to an RIB award and asked the Board to hold the appeal in abeyance, pending the outcome of Thornsbury, supra. In Thornsbury the Kentucky Supreme Court determined that the 1994 amendment to KRS 342.732(1)(a) was remedial and could be applied retroactively to claims that arose before the effective date of

the amendment. As such, Hoskins would only be able to receive RIB directly if he were no longer employed in the coal industry. If he remained employed in the industry, the RIB would be sent directly to the institution providing the approved training or education. By an opinion rendered December 8, 1995, the Board reversed and remanded Hoskins' claim to the ALJ for issuance of a modified award.

For some reason which is not explained in the record, the ALJ did not issue the opinion and award until three years later on January 7, 1998. At that time the ALJ amended the February 17, 1995 order to find Hoskins eligible to participate in an approved training or education program for a period of 208 consecutive weeks and that RIB was to be paid directly to the appropriate training institution as long as Hoskins continued to work in the coal industry. The ALJ further amended the order to provide that Hoskins may petition to receive the benefits directly in the event that he ceases employment in the mining industry.

Whitaker then filed a petition for reconsideration and asked the ALJ to once again hold the claim in abeyance pending a final decision in Colonial Coal Company v. Breeding. A panel of this Court had issued an opinion in Breeding holding that the 1996 amendments to KRS 342.732(1)(a) were remedial and applied to all pending RIB claims. The Supreme Court had granted discretionary review of the case but had not yet rendered an opinion. The ALJ granted Whitaker's motion to hold the claim in abeyance. Subsequently, in its decision in Breeding v. Colonial

Coal, Ky., 975 S.W.2d 914 (1998), the Supreme Court determined that the issue of retroactivity of the 1996 amendments was not properly before the Court of Appeals and therefore, did not address the matter.

Whitaker once again moved to hold the claim in abeyance to await the outcome of Whitaker Coal Corp. v. Melton, which was pending before this Court. The ALJ declined and held that the 1996 amendments did not apply to Hoskins claim. Whitaker appealed to the Board. The Board affirmed the decision of the ALJ and this appeal followed.

A panel of this Court has recently examined the issue of the retroactivity of the 1996 amendment to KRS 342.732(1)(a). In Whitaker Coal v. Melton, Ky. App., 18 S.W.3rd 361 (2000), this Court held that the amendment, which acted to reduce the period of time in which a claimant could receive RIB, "affects the vested rights of claimants and cannot therefore be applied retrospectively without a specific expression by the Legislature of its intent for the provisions to be so applied." Id. at 364. It is clear, therefore, that the 1996 amendment should not be applied to Hoskins' claim.

Accordingly, we affirm the opinion of the Board.

ALL CONCUR.

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