RENDERED: MAY 11, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001464-WC

PEABODY COAL COMPANY APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-00438

KENNY SMITH; HON. THOMAS M.
RHOADS; HON. ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Peabody Coal Company has petitioned for review of an opinion of the Workers' Compensation Board rendered on May 21, 1999, which affirmed an award of total occupational disability benefits in favor of the appellee, Kenny Smith. Peabody Coal does not challenge the Board's determination that the ALJ's findings are supported by substantial evidence; but rather, it argues that the Board failed to properly interpret and apply amendments to the workers' compensation statutes made by the Legislature in 1996 that define disability. Peabody Coal also

contends that KRS[1] 342.320(2)(c), as amended in 1996, which allows for an award of an attorney's fee to the claimant's attorney, is unconstitutional. The petition for review was held in abeyance by an order of this Court entered on February 4, 2000, pending the resolution of issues raised in two cases before the Supreme Court of Kentucky that were identical to the issues raised by Peabody Coal. The recent holdings of our Supreme Court in Ira A. Watson Department Store v. Hamilton,[2] and City of Louisville v. Slack,[3] are now final, and this case is now ripe for our review. Based on Watson and Slack, we affirm in part, reverse in part and remand.

On May 13, 1997, Smith, a 46-year-old coal miner, suffered a severe injury to his neck and cervical spine when the shuttle car he was operating ran over a rock and caused his head to be jammed into the roof of the mine. Smith had spent the majority of his adult life working in the coal mining industry and he was employed by Peabody Coal from 1974 until shortly after his injury in 1997. Smith's claim for workers' compensation benefits was filed on March 4, 1998, and assigned to an arbitrator. After reviewing medical reports, the arbitrator found Smith to be totally disabled as a result of his neck injury.

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[1]Kentucky Revised Statutes.

[2]Ky., 34 S.W.3d 48 (2000).

[3]Ky., ___ S.W.3d ___, 2000 Ky. LEXIS 54 (rendered March 22, 2001, final April 12, 2001).

Peabody Coal sought a de novo hearing before an ALJ. In his opinion and award, the ALJ recited Smith's testimony and the testimony of various experts and found and concluded as follows:

> Dr. [Eric A.] Norsworthy and Dr. [Ray] Hester both express the opinion that Mr. Smith does not have the physical capabilities to return to his work in the mines and Dr. Hester has stated that he would not be able to return to any type of gainful employment considering his injuries and restrictions. When one considers the plaintiff's age, skill, education and work experience based upon the restrictions even as assigned by Dr. [Daniel] McHugh, [Smith] has clearly become totally disabled under the Act. KRS 342.0011.

In his opinion, the ALJ fully concurred with the result reached by the arbitrator. Further, since Peabody Coal was unsuccessful before the ALJ, an order was entered allowing Smith's attorney, Thomas M. Rhoads, to be paid $5,000 directly from Peabody Coal as an attorney's fee pursuant to KRS 342.320(2)(c).

In its appeal to the Board, Peabody Coal argued that the ALJ's conclusion that Smith was totally disabled was incompatible with the 1996 amendment to KRS 342.0011(11)(c), which defines permanent total disability as "a complete and permanent inability to perform any type of work as a result of an injury." Peabody Coal also asserted that although the restrictions placed on Smith precluded his return to the mining industry, there were jobs Smith could still perform. The Board agreed with Peabody Coal's contention that the Legislature intended to change the definition of permanent injury, but it

rejected Peabody Coal's argument that it was no longer relevant to consider whether an injured worker could compete for jobs. The Board ruled:

> [T]he very nature of the language used by the Legislature and to which we must give credence . . . mandates an analysis of the impact of the injury on the individual's ability to compete for those jobs remaining after physical restrictions are considered.

Although a final appellate decision at that time had not been rendered in Watson, supra, the Board reiterated the reasoning it had employed in that case, and ruled that "[a]lthough the full impact of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) has been modified", it was not "gone" with respect to the ALJ's assessment of total disability. Finally, the Board concluded that the ALJ

> did accurately understand the testimony of the physicians, and through reasonable inferences from their testimony and the testimony of the claimant, concluded that Smith presently has a total inability to work as that is defined in KRS 342.0011(11)(c).

Since the Board lacked jurisdiction to address the constitutionality of KRS 342.320(2)(c), it affirmed the decision of the ALJ in all respects.

Clearly, the Board did not err in its application of KRS 342.0011(11)(c), as amended by the Legislature in 1996. In Watson, supra, the Supreme Court unanimously endorsed the Board's interpretation of the amendments and held that

> determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. For that reason, we conclude that

> some of the principles set forth in Osborne v. Johnson, supra, remain viable when determining whether a worker's occupational disability is partial or total.
>
> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.[4]

Our Supreme Court also reiterated that despite the vast changes in the workers' compensation statutes made by the Legislature in 1996, "the ALJ remains in the role of the fact-finder,"[5] and where a finding of total disability has been made, the "inquiry on appeal" is whether the finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law."[6] Peabody Coal does not contend that the ALJ's findings are not supported by substantial

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[4] Watson, supra at 51.

[5] Id. at 52.

[6] Id.

evidence. Thus, that portion of the Board's opinion affirming the award of total disability benefits to Smith must be affirmed.

Peabody Coal has devoted the majority of its brief to the issue of the constitutionality of KRS 342.320(2)(c), which at one time provided that an employer or its insurer would be required to pay up to $5,000 directly to the claimant's attorney if the employer's appeal of an arbitrator's determination were not successful.[7] Peabody Coal has attacked the constitutionality of the statute on several grounds that had been previously rejected by this Court.[8] However, in Slack, supra, the Supreme Court, in a 4-3 decision, agreed with the arguments advanced by the employer that the statute was unconstiutional and reversed the Court of Appeals. The Court opined that the attorney's fee statute had the single purpose "to punish an employer who brings an appeal in good faith," and it held the statute to be both arbitrary and violative of an employer's right to procedural due process.[9] Thus, the opinion of the Board affirming the award of an attorney's fee of $5,000 to the appellee, attorney Rhoads, must be reversed.

Accordingly, the opinion of the Board is affirmed in part, reversed in part, and this matter is remanded to the ALJ with instructions to enter an order setting aside the award of $5,000 in attorney's fees.

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[7]KRS 342.320(2)(c) was repealed by the Legislature effective July 14, 2000.

[8]See Earthgrains v. Cranz, Ky.App., 999 S.W.2d 218 (1999)(overruled by Slack, supra).

[9]Slack, slip op. at 7.

ALL CONCUR.

BRIEF FOR APPELLANT:

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