

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000278-MR

LANNIE DOOM

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 07-CI-00493

ACETY-ARC, INCORPORATED;
AND LIBERTY MUTUAL INSURANCE
COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Under KRS¹ 342.305, a circuit court only has limited jurisdiction to enforce certain orders, decisions and awards of a workers' compensation administrative law judge or the Workers' Compensation Board. The issue we must resolve in this case is whether the Marshall Circuit Court erred in

¹ Kentucky Revised Statutes.

dismissing Lannie Doom's action to enforce an August 2007 opinion and award of an ALJ. As we hold that the opinion and award was interlocutory, the circuit court did not err. We therefore affirm.

In December 2005, Doom was injured during his employment as a truck driver for Acety Arc, Inc. Following the injury, Doom continued to work for a time, but a July 2006 surgical procedure on his shoulder left his arm partially paralyzed. Doom returned to work in a limited capacity from December 5, 2006 until February 20, 2007.² Acety Arc continued to pay Doom his regular bi-weekly salary of \$1,085 through this latter date, when it changed his pay to an hourly rate.

Doom then filed for workers' compensation benefits. Following a hearing, the ALJ found that Doom was temporarily totally disabled and had not reached maximum medical improvement (MMI). The ALJ further found that any determination concerning permanent partial disability would be premature. The ALJ issued an interlocutory award in lieu of a final award of temporary total disability (TTD), which the ALJ believed would require the initiation of the reopening process when Doom achieved MMI. Doom therefore was awarded "temporary total disability benefits at the rate of \$362.52 per week from July 5, 2006 through December 4, 2006, and from February 27, 2007 to the present time and continuing. . . ." Since Acety Arc had paid salary continuation in lieu of workers' compensation benefits, the ALJ held that it was entitled to credit for those

² Doom has not returned to work since February 2007.

payments in accordance with *Triangle Insulation & Sheet Metal Co. v.*

Stratemeyer, 782 S.W.2d 628 (Ky. 1990).

Following the issuance of this award in August 2007, the parties disagreed over the need for Doom to attend a scheduled independent medical examination (IME), and over the amount of credit Acety Arc was entitled to take for the salary continuation benefits. In a November 2007 order, the ALJ resolved the IME issue and ordered any disputes regarding the credit amount to be brought before him by motion.

Instead of filing a separate motion, Doom sought enforcement of the award in the Marshall Circuit Court pursuant to KRS 342.305. The circuit court granted Acety Arc's motion to dismiss, as the workers' compensation award was not a final award and the ALJ retained jurisdiction.

Doom appeals, arguing that KRS 342.305 broadly applies to this situation, and that its application is mandatory. We disagree.

KRS 342.305 provides a mechanism by which a party may obtain limited enforcement of a workers' compensation decision by the circuit court of the county in which the injury occurred. The party seeking enforcement must file

a certified copy [i] of a memorandum of agreement approved by the administrative law judge, or [ii] of **an order or decision of the administrative law judge** or board, or [iii] of an award of the administrative law judge unappealed from, or [iv] of an award of the board rendered upon an appeal whether or not there is a motion to reopen or review pending under KRS 342.125.

KRS 342.305 (emphasis and roman numerals added).

While Doom essentially argues that the ALJ’s August 2007 opinion and award constitutes “an order or decision of the administrative law judge” under KRS 342.305, case law interpreting this statute has consistently required a final workers’ compensation award. *See Southeast Coal Co. v. Mansfield*, 231 S.W.3d 122, 124 (Ky. 2007) (holding that circuit court is “the proper forum for an action to enforce the terms of a **final** workers' compensation award”) (emphasis added); *KI USA Corp. v. Hall*, 3 S.W.3d 355, 358 (Ky. 1999) (holding that “interlocutory TTD awards are not final and appealable”); *Scheurich & Fritz Roofing Co. v. DeWitt*, 424 S.W.2d 390, 392 (Ky. 1968) (construing KRS 342.305 to mean that an award “reducible to judgment under KRS 342.305 must be final in the sense of being out of the hands of the board and not pending on appeal”);³ *Owensboro Wagon Co. v. Adams*, 309 Ky. 302, 308, 217 S.W.2d 637, 640 (1949) (holding “the procedure outlined in KRS 342.305 is permissible only where the award of the Board has become final”); *Stearns Coal & Lumber Co. v. Duncan*, 271 Ky. 800, 802, 113 S.W.2d 436, 437 (1938) (holding that “[t]he sole purpose of section 4939⁴ . . . is to enforce the agreement approved by the board, or the order, decision, or award of the board, if unappealed from, or affirmed on appeal”). *See also Transit Auth. of River City v. Saling*, 774 S.W.2d 468, 469 (Ky.App. 1989)

³ Pre-1987 cases, properly construed, mean that KRS 342.305 requires finality “in the sense of being out of the hands of the [ALJ or] Board and not pending on appeal.” *DeWitt*, 424 S.W.2d at 392.

⁴ Ky. Stat. § 4939, the predecessor to KRS 342.305, was originally enacted in 1916. 1916 Ky. Acts ch. 33, § 56. While the statute has been amended several times, including in 1987 to reflect the creation of Administrative Law Judges to conduct hearings with an initial appeal to the Board, 1987 Ky. Acts, Ex. Sess. ch. 1, § 38, the text has remained essentially unchanged since its original enactment in 1916.

(holding that General Assembly intended “no appeal . . . from an award of interlocutory relief in the form of temporary total disability benefits”).

In this instance, the ALJ issued an interlocutory award of TTD benefits and retained jurisdiction. Certain issues remain pending and unresolved by the ALJ. In fact, although the parties’ primary dispute concerns the amount of credit Acety Arc is entitled to take for salary continuation benefits against the payments for TTD, a careful reading of the ALJ’s August 2007 interlocutory award discloses that he did not clearly set out the credit amount. Such an award is not subject to circuit court enforcement under KRS 342.305.

Finally, we question how the circuit court could enter a judgment on the ALJ’s August 2007 interlocutory award in light of the fact that Acety Arc is entitled to an unspecified credit for salary continuation benefits. This dispute between the parties is properly resolved by the ALJ.

The Marshall Circuit Court’s order is affirmed.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

CAPERTON, JUDGE, DISSENTING: I dissent because I believe the order of the ALJ was enforceable by the circuit court.

First, I would like to distinguish an appeal of an order or decision of the ALJ to the Workers Compensation Board from a petition for enforcement of an agreement, order, decision or award of the ALJ in the circuit court.

KRS 342.285 states that either party may appeal to the Workers' Compensation Board for the review of "[a]n award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281 ...".

In contrast, a petition for enforcement under KRS 342.305 states that "[a]ny party in interest may file in the Circuit Court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the administrative law judge, or of an order or decision of the administrative law judge or board, or of an award of the administrative law judge unappealed from, or of an award of the board rendered upon an appeal ...".

KRS 342.285 sets forth the criteria for review of the ALJ's award or order. No such criteria exists in KRS 342.305 because there is no review; KRS 342.305 merely demands strict enforcement of the agreement, award, decision or order by the circuit court. *See Southeast Coal Company v. Mansfield*, 231 S.W.3d 122, 124 (Ky. 2007). While the characterization of an award of temporary total disability benefits (TTD) as interlocutory may distinguish it from a final award for purposes of an appeal, that characterization for purposes of an enforcement action is without distinction.

I am certainly aware of decisions in this Commonwealth which have held that the circuit court is without power to enforce an interlocutory award on

appeal⁵. However, I opine that an action to enforcement action based on an award of TTD benefits is not an award of that nature.

Part of the reasoning that disallows the appeal of interlocutory awards is to prevent depriving an injured worker of temporary and immediate relief in a timely manner. This same reasoning supports the enforcement of TTD benefits by a KRS 342.305 action.

To more fully explain, both disallowing an appeal from an interlocutory award and the enforcement of an award of TTD benefits with a KRS 342.305 action accomplish the same purpose. They both force an employer to pay desperately needed benefits to the injured worker in a timely manner. If TTD awards cannot be enforced based on the facts *sub judice*, there would be no safeguard in place to prevent employers and insurance carriers from simply refusing to pay the awards until all appeals were exhausted.⁶

Thirdly, if we assume that the ALJ could have retained jurisdiction over enforcement of the TTD award by deeming it “interlocutory”, his efforts to do so failed. To explain, 803 KAR 25:010§12(4)(a) clearly establishes that, “[e]ntitlement to interlocutory relief shall be shown by means of affidavit, deposition, or other evidence of record demonstrating the requesting party: (1) Is eligible under KRS Chapter 342; and (2) Will suffer irreparable injury, loss or

⁵ See *Transit Authority of River City v. Sailing*, 774 S.W.2d 468 (Ky. App. 1989), *Owensboro Wagon Co. v. Adams*, 217 S.W.2d 637 (Ky. 1949), and *Scheurich & Fritz Roofing Company v. DeWitt*, 424 S.W.2d 390 (Ky. 1968).

⁶ Absent a claim under the Unfair Claims Settlement Practices Act.

damage pending a final decision on the application.” In this particular instance, having reviewed the record in detail⁷, the findings made by the ALJ in the opinion could not support the issuance of an interlocutory award.

In reviewing the record, I note that it reveals *no evidence* that Doom met the standards set forth by the regulation to establish entitlement to interlocutory relief. Indeed, this is particularly so when the ALJ himself found that Doom failed to demonstrate irreparable harm as required by the regulation pertaining to interlocutory relief. Thus, the ALJ’s award in this instance was interlocutory in name only as the factual support necessary for an interlocutory award was absent. The ALJ apparently viewed the decision as to whether an award is final or interlocutory as a discretionary choice unguided by the regulations and the law.

Fourth, I would find it of critical importance that the ALJ recognized on the record that he could make an award “final”, but for the convenience of the parties the ALJ desired it to be “interlocutory” in stating “[r]ather than issue a running award, a final award of temporary total disability..., an interlocutory award

⁷ This includes the ALJ’s findings that “[r]ather than issue a running award, a final award of temporary total disability, which would require one of the parties to initiate the reopening process, an interlocutory award is the more appropriate way to dispose of this case. The evidence does not establish entitlement to interlocutory relief in the face of irreparable harm, but it does establish, after a final hearing, that the plaintiff is facing a period of temporary total disability as a result of the injury of December 8, 2005, and that he has not achieved maximum medical improvement following surgery performed as a result of that injury. He does not now presently have the ability to return to his regular job. Issuing a final award would require one party to reopen when maximum medical improvement is reached. This method will allow faster disposition when maximum medical improvement is achieved. Accordingly, the employer will be directed to institute temporary total disability benefits until maximum medical improvement is achieved. The claim will be put in abeyance.

is more appropriate...”. It is arbitrary for an ALJ to attempt to retain jurisdiction over enforcement of an award by designating it interlocutory “for the convenience of the parties” when such an award would otherwise be enforceable in circuit court.

While the ALJ’s decision might be laudable for reason that it could save the parties additional pleadings in reopening the case, in actuality it would preclude either party from enforcing their statutory right to bring an action in circuit court for enforcement of the award. In fact, the sole forum for the enforcement of any agreement, award, order or decision is through KRS 342.305 in the circuit court. *Southeast Coal Company v. Mansfield*, 231 S.W.3d 122, 124 (Ky. 2007).

Regardless of the ALJ’s findings on the issue of whether the award is final or interlocutory, I nevertheless opine that even if an award of TTD could be made interlocutory under our jurisprudence, same would still be enforceable in circuit court. Orders and awards rendered by an ALJ in workers compensation matters are not self-enforcing. KRS 342.305 is the avenue by which claimants have the power to ensure that the orders and awards made by an ALJ are enforced as written. *See* our reasoning *supra* regarding enforcement of awards and *Southeast Coal Company v. Mansfield*, 231 S.W.3d 122, (Ky. 2007).

I would find that Doom’s enforcement action in the Marshall Circuit Court was proper. Accordingly, I would reverse the January 10, 2007, order of the

Marshall Circuit Court dismissing the action as interlocutory and remand for additional proceedings.

BRIEF FOR APPELLANT:

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Paducah, Kentucky

BRIEF FOR APPELLEE:

R. Christian Hutson
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