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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000525-WC

JAMES RIVER COAL CO.;
HEALTHSMART CAS CLAIMS
SOLUTIONS; AND KY COAL
EMPLOYERS' SELF INSURANCE FUND — APPELLANTS

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-97597

DOYLE WHITAKER;
HON. ROBERT L. SWISHER, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

JONES, JUDGE: Insolvent employer, James River Coal Co. (James River); Kentucky Coal Employers Self-Insurance Fund (the Fund); and its third-party administrator, HealthSmart Casualty Claims Solutions (HealthSmart), petition for

review of an opinion of the Workers' Compensation Board (the Board) reversing and remanding a decision by the Chief Administrative Law Judge (CALJ) to reopen the claim and to deduct from the Fund's liability a thirty-percent increase in benefits awarded to Doyle Whitaker pursuant to KRS[1] 342.165(1). For the reasons set forth below, we affirm.

I. BACKGROUND

Whitaker was adjudged permanently and totally disabled following an injury sustained when a rock fell from the roof of a coal mine during his employment with James River. The Board's opinion provides:

> His award of income benefits was increased pursuant to KRS 342.165, upon determining his injury was caused by James River's failure to comply with several safety regulations.
>
> At the time of the accident, James River was self-insured and, until 2014, paid Whitaker bi-weekly pursuant to his award. However, on December 30, 2014, James River informed the Department of Workers' Claims it had received approval from a U.S. Bankruptcy Court to sell all remaining coal companies and was no longer able to fulfill its workers' compensation payment obligations. It further informed the Department of Workers' Claims that it would make a final payment of all workers' compensation benefits on December 31, 2014. All claims were transitioned to the Fund. Whitaker's claim was referred to the Self-Insurance Fund's third-party administrator, HealthSmart.

[1] Kentucky Revised Statutes.

> On June 10, 2016, the Fund, through HealthSmart, filed a motion to reopen Whitaker's claim pursuant to KRS 342.125. Citing KRS 342.910(2), it argued it was not responsible for the payment of any penalties, including those imposed pursuant to KRS 342.165. KRS 342.910(2) states the Fund "shall not be liable for the payment of any penalties or interest assessed for any act or omission on the part of any person, including but not limited to the penalties provided in this chapter." In an Order dated August 23, 2016, the CALJ granted the motion to reopen and agreed the Fund is not responsible for payment of any increased compensation awarded pursuant to KRS 342.165. He ordered that the Fund is no longer liable for any payment above Whitaker's base compensation rate.
>
> Whitaker filed a petition for reconsideration, arguing the Fund's motion to reopen was untimely, and that the CALJ erred in relieving it of its obligation to pay the increase in his income benefits pursuant to KRS 342.165. The petition for reconsideration was summarily denied.
>
> On appeal, Whitaker argues the motion to reopen was untimely. He also asserts the Fund lacks the legal right to reopen the claim because it was not a party to the original claim. Finally, Whitaker argues the enhanced benefit provision of KRS 342.165 is not a penalty from which the Fund is exempt.

The Board concluded that the CALJ erred when he reopened the claim, and the CALJ incorrectly determined that the Fund was not required to pay the enhancement. Thus, the Board reversed and remanded the claim to the CALJ for entry of an order denying the Fund's motion to reopen. This appeal followed.

II. STANDARD OF REVIEW

The issue before us is a matter of statutory interpretation. "Statutory interpretation is a matter of law reserved for the courts and this Court is not bound by the Board's interpretation of the statute." *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 330 (Ky. App. 2000) (internal citations omitted). Thus, we review the issue *de novo*. *Saint Joseph Hospital v. Frye*, 415 S.W.3d 631, 632 (Ky. 2013) (internal citation omitted).

III. ANALYSIS

Appellants make two entwined arguments: (1) the Board erred in determining the CALJ should not have reopened the claim and (2) the Fund is not liable for or obligated to pay increased benefits awarded under KRS 342.165 for safety violations because the increase is in the nature of a penalty.

The Fund admits it did not file its motion to reopen until June 10, 2016, which was outside the four-year statute of limitations under KRS 342.125. However, the Fund argues its motion to reopen was only technically made pursuant to KRS 342.125 as a means of getting the issue properly before the ALJ and argues the controlling statute is KRS 342.910(2), which provides "each guaranty fund shall not be liable for the payment of any penalties or interest assessed for any act or omission on the part of any person, including but not limited to the penalties provided in this chapter." The Fund further argues the thirty percent safety

violation enhancement is a penalty within the meaning of KRS 342.910(2), which we address below.

The Supreme Court of Kentucky has held the thirty percent safety violation enhancement is not a penalty under KRS 342.910(2), and thus, the Fund is obligated to pay it. *McCoy Elkhorn Coal Corp. v. Sargent*, 553 S.W.3d 802, 804 (Ky. 2018). "Sargent was killed on June 25, 2012, when a rib of coal fell on him while he was working as an outby foreman for McCoy Elkhorn," a subsidiary of James River Coal Company (James River).

> The United States Department of Labor Mine Safety and Health Administration (MSHA) investigated the accident and ultimately cited the employer for three violations. . . . As a result of these violations, the ALJ determined that Sargent's statutory beneficiaries—his widow, his children and his estate—were entitled to benefits enhanced by 30%, as mandated by KRS 342.165(1).

Id. Subsequently, McCoy Elkhorn and its parent, James River, became insolvent, and the Fund "assumed the benefit obligations" pursuant to KRS 342.750. *Id.* "[T]he Guaranty Fund contested whether the 30% safety violation enhancement was appropriate and, if so, whether the Guaranty Fund, a statutorily-created entity, was obligated to pay it." *Id.* The Supreme Court of Kentucky held that the thirty percent enhancement was appropriate, and the Fund was obligated to pay it based on the following rationale:

> [T]his Court has occasionally used "penalty" as a "metaphor" for the KRS 342.165(1) 30% enhancement

> for safety violations but it is not actually a penalty in the sense of being punitive, but rather an "increase . . . to compensate the party that benefits from it for the effects of the opponent's misconduct." We noted in *AIG/AIU*, that if the legislature had viewed it as a penalty it would have been included in KRS 342.990. That lengthy statute, dedicated exclusively to workers' compensation penalties, begins with the premise that "[t]he commissioner [of the Department of Workers' Claims] shall initiate enforcement of civil and criminal penalties imposed in this section." KRS 342.990(1). Clearly, the workers' compensation statute distinguishes penalties pursued by the commissioner for statutory violations from an increase in benefits premised on an employer's safety violations. Penalties are sought by the commissioner and paid to the Uninsured Employers' Fund pursuant to KRS 342.760(3), while the KRS 342.165(1) enhancement is sought by a compensation claimant to increase his or her personal benefits where the circumstances merit it. Under KRS 342.165(1), upon establishment of a safety violation, the benefit enhancement is mandatory, *i.e.*, a benefit the person is "entitled to receive." KRS 342.906(9). . . .
>
> [T]he Guaranty Fund . . . steps in where the self-insured employer is insolvent to provide workers' compensation beneficiaries the same full benefits they were entitled to from the employer. Interest on past-due benefits is part of that full benefit and thus part of the Guaranty Fund's statutory obligation. To the extent KRS 342.910(2) renders a guaranty fund "not be liable for the payment of any penalties or interest assessed for any act or omission on the part of any person," we construe the interest referred to as that interest that accrues on penalties imposed pursuant to KRS 342.990, not interest on overdue benefits owed to beneficiaries.

Id. at 806-08 (footnotes and internal citations omitted).

Here, Appellants' argument is nearly identical to the issue in *McCoy Elkhorn*. Our Supreme Court has made clear that the Fund is liable for the full amount of benefits James River provided to Whitaker before it became insolvent. Because the Fund's legal position relative to proper interpretation and application of KRS 342.125 is untenable, no sufficient prima facie showing exists to have warranted reopening. KRS 342.125; *Turner v. Bluegrass Tire Co., Inc*., 331 S.W.3d 605, 609 (Ky. 2010). As such, the Board properly reversed the CALJ's decision.

IV. CONCLUSION

For the foregoing reasons, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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