

RENDERED: OCTOBER 4, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001328-MR

2051782 ONTARIO LTD., D/B/A JDW INTERNATIONAL;
AND MARTIN J. ENGERER

APPELLANTS

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 18-CI-00028

KRISTIN J. MACKEY; GREEN TRANSPORTATION, LLC;
CASEY'S RIDES, INC.; AND
JONATHAN A. SALINAS

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, SPALDING AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: 2051782 Ontario Ltd., d/b/a JDW International
(hereinafter referred to as JDW) and Martin Engerer appeal from an order denying
their motion to dismiss. Appellants argue that the trial court erred in concluding

that they were not entitled to immunity under certain provisions of the Kentucky Workers' Compensation Act. We find no error and affirm.

FACTS AND PROCEDURAL HISTORY

Kristin J. Mackey and Engerer work for JDW. Mackey is a resident of Canada and JDW is a Canadian company. Mackey and Engerer drove a semi-trailer truck as a team for JDW. On May 30, 2017, Mackey was riding in the sleeper compartment of the truck and Engerer was driving. While traveling through Rockcastle County, Kentucky, the truck came upon a 1998 Ford F700 truck being driven by Jonathan Salinas and hauling carnival ride equipment. The truck was owned by Green Transportation, LLC¹ and Salinas was an employee of that company.

It is alleged that the Green Transportation truck was either stopped or moving slowly in the right lane of traffic. When Engerer came upon the truck, he swerved, but was unable to avoid a collision. The JDW truck struck the Green Transportation truck in the rear. This caused the carnival ride equipment to swing loose and tear a gash in the passenger compartment of the JDW truck. Mackey was severely injured in the accident.

¹ Casey's Rides, Inc. and Green Transportation have the same principal office address and the same registered agent for service. The relationship between these two companies is not entirely clear from the record.

JDW maintained a workers' compensation account with the Workplace Safety and Insurance Board (WSIB) of Ontario, Canada. The WSIB is a government-run workers' compensation insurance carrier and an administrative body which processes workers' compensation claims. The WSIB's authority comes from the Workplace Safety and Insurance Act (WSIA). After the accident, the WSIB informed Mackey she was eligible for workers' compensation benefits. She was required by the WSIA to make an election to either pursue workers' compensation benefits or pursue her claims against any third parties that may have been responsible for her injuries. WSIA § 30(1)-(2).² Mackey decided to reject the workers' compensation benefits and proceed with a civil action. The WSIB acknowledged this rejection in a letter dated September 19, 2017.

On February 5, 2018, Mackey filed a complaint in the Rockcastle Circuit Court. She filed suit against Green Transportation, Casey's Rides, JDW, Engerer, and Salinas. All the defendants filed answers soon thereafter. On May 23, 2018, Appellants filed a motion to dismiss. Appellants argued that the Kentucky Workers' Compensation Act applied to Mackey's injury; therefore, KRS 342.690 and KRS 342.670 made the company and its employee immune from a civil suit.

² The WSIA only allows employees to opt out of workers' compensation benefits after a workplace injury. The Kentucky Workers' Compensation Act requires employees to opt out of the Act before an injury occurs. Kentucky Revised Statute (KRS) 342.395.

KRS 342.690(1) states in relevant part:

If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

JDW did not obtain Kentucky workers' compensation insurance because it is located in Canada. KRS 342.670(3) allows an employer from another state or Canada to be deemed to have secured the payment of compensation under the Kentucky Workers' Compensation Act if certain conditions are met. KRS 342.670(3) states:

If any employee is entitled to the benefits of this chapter by reason of an injury sustained in this state in employment by an employer who is domiciled in another state and who has not secured the payment of compensation as required by this chapter, the employer or his carrier may file with the commissioner a certificate, issued by the commission or agency of the other state having jurisdiction over workers' compensation claims, certifying that the employer has secured the payment of compensation under the workers' compensation law of the other state and that with respect to the injury the employee is entitled to the benefits provided under that law, and that the benefits to which the employee or his or her dependents is entitled are at least as great as those to which he or she would be entitled if the injury occurred and was processed under Kentucky law, under Kentucky coverage.

Appellants argued that they had workers' compensation insurance in Canada, that Mackey's injury would be covered by that insurance, that the compensation benefits are better than those offered in Kentucky, and that they filed information with the Workers' Compensation Commissioner to this effect. Appellants claimed that they met the KRS 342.670(3) requirements, that the Kentucky Workers' Compensation Act applied, and that they were entitled to immunity under KRS 342.690(1).

Mackey argued that because she rejected the WSIB workers' compensation benefits she was not "entitled to" workers' compensation benefits. This would mean that KRS 342.670(3) does not apply, that the injury was not subject to the Kentucky Workers' Compensation Act, and that Appellants are not entitled to immunity.

The trial court held a hearing on the matter. The court ultimately denied the motion to dismiss. The court analyzed the issue thusly:

The question before the Court is whether Mackey's rejection of WSIB benefits in September 2017 in order to allow her to pursue a civil claim against third party tortfeasors means that she is not "entitled" to WSIB benefits under KRS 342.670(3). If that is the case, then Kentucky's exclusive remedy bar does not apply to prohibit her claims against the JDW Defendants.

The court went on to announce that it agreed with Mackey. It held that her rejection of benefits meant that she was not “entitled to” benefits and not subject to Kentucky’s exclusive remedy bar. This appeal followed.

ANALYSIS

Appellants argue that Mackey’s rejection of WSIB benefits does not mean she is not entitled to benefits; therefore, KRS 342.670(3) applies, and they are immune from civil suit. Appellants claim that at the time of Mackey’s injury, she was entitled to WSIB benefits and that her later rejection of these benefits has no bearing on the issue. In addition, WSIA § 30(14) allows an employee who has rejected benefits to be eligible for limited benefits after the completion of a civil action. Under this statute, if after a civil action the employee receives damages in an amount less than what he or she would have been entitled to under the WSIB benefits, the employee may apply for certain benefits.³ Mackey argues that by rejecting her workers’ compensation benefits, she was not entitled to benefits and the Kentucky Workers’ Compensation Act does not apply.

³ Appellants also claim that Mackey is currently receiving WSIB benefits. Mackey is currently receiving motor vehicle accident benefits. Pursuant to an assignment of benefits agreement, any WSIB benefits Mackey receives will be given to the motor vehicle insurance company. Appellants claim that this proves she is currently receiving WSIB benefits. This is a misleading statement. There is nothing in the record to show that either Mackey or the motor vehicle insurance company is receiving WSIB benefit payments. The assignment agreement, along with WSIA § 30(1)-(2) and WSIA § 30(14), indicate that should Mackey receive WSIB benefits sometime in the future, that money will go to the motor vehicle insurance company.

The issue in the case before us concerns statutory interpretation, jurisdiction, and immunity. All of these are questions of law and are reviewed *de novo*. *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007); *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003). We conclude that the trial court did not err in its decision.

In the trial court's order, the court discussed the exclusivity provision of the Kentucky Workers' Compensation Act. Citing *General Elec. Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007), the court explained how the original version of the Act did not give employees the opportunity to reject or accept coverage but made it compulsory. This was deemed to be violative of the Kentucky Constitution. The right to accept or reject the Act was later added, which allowed it to pass constitutional muster.

The trial court found that Mackey was only allowed to reject workers' compensation benefits after an accident and that she did so before filing suit. While Mackey may have been entitled to benefits at the time of the accident, she rejected those benefits. We agree with the court that this rejection means that she is not "entitled to" workers' compensation benefits. As the trial court discussed in its order, the ability of an employee to opt out of the Act by rejecting workers' compensation benefits is an integral part of Kentucky workers' compensation

jurisprudence. If Mackey is not “entitled to” benefits, then the extraterritorial coverage provided by KRS 342.670(3) does not apply. Without the extraterritorial coverage, the Kentucky Workers’ Compensation Act does not have jurisdiction over this injury and the exclusivity and immunity provision in KRS 342.690(1) does not apply.

As for the potential benefits available via WSIA § 30(14), these benefits are too speculative and not guaranteed. Only if Mackey’s judgment in her civil case is small would she be eligible for these benefits. Furthermore, these benefits would be limited. She would only receive benefits in an amount that would increase her civil judgment to the amount she would have been eligible for if she had elected to receive WSIB benefits from the start. For example, if Mackey would have received \$10,000 in workers’ compensation benefits had she not rejected the coverage, but she only received a \$5,000 judgment from her civil action, then she could apply for an additional \$5,000 in benefits from the WSIB. As stated, these benefits are limited and are in no way at “least as great as those to which . . . she would be entitled if the injury occurred and was processed under Kentucky law, under Kentucky coverage.” KRS 342.670(3). These speculative, limited benefits do not meet the requirements of the extraterritorial coverage.

CONCLUSION

It is a fundamental rule that an employee be able to opt out of receiving workers' compensation benefits. Mackey did so in this case by rejecting the WSIB benefits after her accident. Mackey was not entitled to benefits; therefore, there was no Kentucky workers' compensation coverage and Appellants are not entitled to immunity. For the foregoing reasons, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Ashley W. Ward
Marshall R. Hixson
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Ashley W. Ward
Lexington, Kentucky

BRIEF FOR APPELLEE KRISTIN J. MACKEY:

John C. Roach
W. Keith Ransdell
David T. Royse
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEE KRISTIN J. MACKEY:

John C. Roach
Lexington, Kentucky