

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0665-WC

DATE 7-7-05 ELLIAGRAWHP.C.

RONALD BOWLING

APPELLANT

V.
APPEAL FROM COURT OF APPEALS
2003-CA-2225-WC
WORKERS' COMPENSATION BOARD NO. 99-WC-91837

THE CHISHOLM COAL COMPANY; KENTUCKY
WORKERS' COMPENSATION BOARD; AND
HON. SHEILA C. LOWTHER, CHIEF ADMINISTRATIVE
LAW JUDGE

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals which upheld the Workers' Compensation Board in affirming the decision of the Administrative Law Judge which denied the motion to reopen.

The question presented is whether a prima facie case for reopening is made on grounds of fraud if the same is established by a sworn allegation of the claimant that a settlement agreement disposed of all claims between the parties. Bowling believes that the settlement should be reopened because Chisholm defrauded him as well as the ALJ who approved the settlement. Bowling alleges that the insertion of "Health/Sick benefits" as an adequate source of income served as a waiver in which all liabilities and obligations between Bowling and Chisholm had been settled.

Bowling, while employed by Chisholm Coal, tripped, fell and injured his low back, right knee and right leg on January 20, 1998. Thereafter, on September 8, 1999, Bowling and Chisholm entered a settlement agreement that resolved the workers' compensation claim. This agreement was reviewed and approved by Arbitrator J. Kevin King. Bowling agreed to be assigned an 11% impairment rating and agreed to a lump sum payment of \$25,000 as compensation for his permanent partial disability. The applicable law at the time the parties reached agreement required any workers' compensation claimant who was to receive a lump sum payment that represented weekly benefits greater than \$10 to state in the settlement agreement that there is a reasonable assurance that the worker has an adequate source of income during the disability. KRS 342.265(2). The parties used a standard agreement form which asked if the claimant had an adequate source of income. Bowling listed as an adequate source of income "health/sick benefits in the amount of \$167 per week" and also stated that he had applied for disability social security payment benefits and a United Mine Workers' Pension.

Chisholm filed suit against Bowling in February 2003 in Pike Circuit Court alleging that it paid Bowling sick and accident benefits pursuant to its sick and accident plan. Chisholm stated that pursuant to its plan, Bowling was required to indemnify it for any social security disability benefits he received that exceeded what Chisholm paid to him as sick and accident benefits. The company asserted that it had overpaid Bowling by approximately \$4,900 and sought reimbursement in Pike Circuit Court.

Bowling then filed a motion to reopen his workers' compensation claim on April 10, 2003. He stated that it was his understanding that the settlement agreement resolved all claims between himself and the company. Consequently, when Chisholm

brought suit against him, it violated the terms of the agreement. Bowling maintained that Chisholm had waived its right to seek indemnification for the sick and accident benefits paid to him. Bowling maintained that the company committed fraud when it led him to believe that he would have no further obligation to it. He claimed that the settlement agreement in which health and sickness benefits were listed as an adequate source of income for him during the time of his disability was proof of the fraud by the employer.

After reviewing the motion to reopen, the Administrative Law Judge denied the motion to reopen because the dispute between the parties with regard to the litigation in Pike Circuit Court was unrelated to the workers' compensation proceeding, and thus could not serve as a basis for reopening the claim. The ALJ also denied a petition for reconsideration. Bowling appealed to the Workers' Compensation Board which affirmed the decision of the ALJ. The Court of Appeals also affirmed the Board. This appeal followed.

In this appeal, Bowling continues to argue that he established a *prima facie* case to justify reopening the workers' compensation claim. He contends that the employer committed a fraud not only against him but also against the arbitrator who approved the settlement agreement. He states that the employer led him to believe that all possible claims between them had been settled or waived when they executed the agreement. He refers to the health and sickness benefits that were listed as an adequate source of income in the agreement to support his contentions.

In support of his position on fraud, Bowling refers to KRS 342.125 as having a much broader meaning than that when used in common parlance. He cites Ray v. Black Mountain Corp., 254 Ky. 800, 72 S.W.2d 477 (Ky. 1934), in support of that proposition as well as various other Kentucky cases. His position is that the nature of

the fraud is contrary to the public policy upon which the workers' compensation law is based and would thus justify a rescission of the settlement agreement. Bowling asserts that the arbitrator did not know that Chisholm never intended for Bowling to receive the health and sickness benefits. If he had, the arbitrator would have been prohibited by KRS 342.265(2) from approving the settlement.

Pursuant to KRS 342.125(1), an ALJ may reopen and review any award upon one of the four following grounds: fraud, newly discovered evidence, mistake, or change of disability as shown by objective medical evidence. The party seeking to reopen must present a reasonable *prima facie* showing of a substantial possibility that one or more of the conditions listed in the statute exist. Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972).

As noted by the Board and adopted by the Court of Appeals, a settlement agreement is a contract between the parties. The scope of the agreement is determined primarily by the intent of the parties as expressed within the four corners of the instrument. Here there is no expression of intent on the part of the employer to settle or waive any action other than those that are directly part of the compensation claim. In the "other information" section of the agreement, it is clearly stated that Bowling is to receive an amount of money in consideration of a waiver of the right to reopen for future indemnity benefits including rehabilitation costs.

Although Bowling argues that the agreement was to extinguish all claims, such intent may not be presumed. See Huff Contracting v. Sark, 12 S.W.3d 704 (Ky.App. 2000). In addition, it is thoroughly legitimate for the Board and the Court of Appeals to disagree with the argument that listing health/sick benefits as a source of income on the agreement form constitutes an agreement to pay such benefits. We fully realize that Bowling argues that the employer never intended to pay those benefits. However,

Chisholm did pay the benefits. It was only after Bowling received social security disability benefits that the employer sought to recover sickness and accident benefits because of his receipt of social security. Even had the arbitrator been aware that Bowling would receive sickness and accident benefits but would be required to reimburse the plan if there was an overlap with social security, the arbitrator would have been allowed to approve the agreement because social security and the UMWA pension provided substantial evidence to support the decision.

Both the Court of Appeals and the Workers' Compensation Board concluded that the dispute in this matter is not a basis for reopening. It relates only to an offset in sick and accident benefits for payments made by social security benefits. The dispute is beyond the jurisdiction of the ALJ, and jurisdiction of the subject matter cannot be conferred by waiver, estoppel or consent. Duncan v. O'Nan, 451 S.W.2d 626 (Ky. 1970).

Moreover we must agree with the Board and the Court of Appeals that Bowling has not alleged he was entitled to any additional workers' compensation benefits. It is clear from the motion to reopen and from his arguments on appeal that what he seeks to recover is relief from reimbursing the employer for the overlap of social security payments. The proper forum for such a dispute is the circuit court.

Finally, we must observe that the settlement agreement does not provide a foundation to support the claims that the employer has committed fraud. Bowling has failed to establish a *prima facie* showing of fraud which would justify reopening this matter.

The analysis provided by the ALJ, the Board and the Court of Appeals is correct. There is nothing in this record to support a different result. Thus, the decision of the Board and the Court of Appeals is affirmed.

Lambert, C.J., Cooper, Graves, Johnstone, Scott and Wintersheimer, JJ., sitting.

All concur.

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