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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000449-WC

MCCOY ELKHORN COAL CORPORATION -
INSOLVENT EMPLOYER;
KENTUCKY COAL EMPLOYERS
SELF-INSURANCE FUND AND ITS THIRD-PARTY
ADMINISTRATOR HEALTHSMART — APPELLANTS

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-80645

JEANNIE SARGENT, AS WIDOW,
PERSONAL REPRESENTATIVE,
ADMINISTRATRIX OF THE ESTATE
OF FARLEY SARGENT, II (DECEASED)
AND JEANNIE SARGENT AS GUARDIAN
OF THE MINOR CHILDREN OF FARLEY
SARGENT, II: JOSHUA SARGENT, ALYSSA
SARGENT AND SARAH SARGENT; AND
JOSHUA SARGENT, UPON REACHING THE
AGE OF EIGHTEEN; AND
HONORABLE JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND JONES, JUDGES.

DIXON, JUDGE: McCoy Elkhorn Coal Corporation – Insolvent Employer, Kentucky Coal Employers Self-Insurance Fund (KCESIF) and its third-party Administrator, HealthSmart, petition for review of an opinion of the Workers' Compensation Board affirming an ALJ's award of benefits to the surviving spouse and children of Farley Sargent, II (collectively Sargent). The sole issue presented is the ALJ's determination KCESIF is responsible for payment of enhanced benefits as a result of intentional safety violations by McCoy Elkhorn, which caused the accident. Finding no error, we affirm.

Farley Sargent was killed in a mining accident while employed by McCoy Elkhorn. The Mine Safety and Review Commission issued citations to McCoy Elkhorn for violating safety regulations relating to its roof safety plan. The ALJ determined McCoy Elkhorn committed intentional safety violations that caused Sargent's death and awarded enhanced benefits pursuant to Kentucky Revised Statute (KRS) 342.165(1). The statute states, in relevant part:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder . . . the compensation for which the employer

> would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

KCESIF does not dispute the ALJ's finding of intentional safety violations pursuant to KRS 342.165(1); rather, it challenges the ALJ's determination KCESIF is obligated to pay the 30% increased benefit.

The ALJ found *AIG/AIU Ins. Co. v. South Akers Mining Co., LLC*, 192 S.W.3d 687 (Ky. 2006), to be applicable to the case at bar. In *AIG/AIU*, the insurance company challenged the finding it was liable for enhanced benefits awarded under KRS 342.165(1), relying on language in the policy requiring the employer to pay any excess benefits awarded due to the employer's non-compliance with safety regulations. *Id*. at 688. The Court disagreed with the insurance company's argument that enhanced benefits for a safety violation were a "penalty" to be paid by the employer rather than the insurance carrier, explaining, in relevant part:

> Although KRS 342.165(1) authorizes what has commonly been referred to as a safety penalty and although the party that pays more or receives less is likely to view the provision as being a penalty, the legislature did not designate the increase or decrease as such or include it in KRS 342.990. Nor does KRS 342.165(1) imply that the legislature viewed the increase or decrease as being the equivalent of punitive damages. It authorizes an increase or decrease in compensation if an "intentional failure" to comply with a safety regulation contributes to causing an accident. Notwithstanding the use of the word 'penalty' as a

> metaphor in *Apex Mining v. Blankenship*, 918 S.W.2d 225 (Ky. 1996), *Whittaker v. McClure*, 891 S.W.2d 80, 84 (Ky. 1995), and *Ernst Simpson Construction Co. v. Conn*, 625 S.W.2d 850, 851 (Ky. 1981), it implies that the increase or decrease serves to compensate the party that benefits from it for the effects of the opponent's misconduct.

Id. at 689. The Court concluded the insurance company was liable for the award of enhanced benefits, "despite a contractual term to the contrary." *Id*.

KCESIF argues *AIG/AIU* is inapplicable here because it is a guaranty fund rather than an insurance carrier; consequently, the assessment of the 30% enhanced benefit unfairly penalizes KCESIF because the employer is insolvent. KCESIF relies on KRS 342.910(2), which provides: "[E]ach 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."

KRS 342.900 sets forth the legislative purpose underlying the guaranty funds:

> (1) The General Assembly hereby finds and declares that the establishment of self-insurance guaranty funds is a necessary component of a complete system of workers' compensation, to make provisions for the general welfare of workers and their dependents, to relieve the consequences of any industrial injury or death, and to secure the payment of workers' compensation benefits provided by this chapter.

> (2) The General Assembly further finds and declares that provision must be made for the continuation of workers' compensation benefits otherwise delayed or terminated due to the failure of a self-insured employer to meet obligations because of insolvency.

Further, KRS 342.906(9) states:

> All moneys in the individual guaranty funds, exclusive of costs reasonably necessary to conduct business, shall be used solely to compensate persons entitled to receive workers' compensation benefits from a Kentucky member who has defaulted in performance of its workers' compensation benefit payment obligations under this chapter.

We believe *AIG/AIU* clearly established that an award of benefits pursuant to KRS 342.165(1) is increased compensation owed to the worker, not a penalty against the employer. *AIG/AIU*, 192 S.W.3d at 689. Further, because *AIG/AIU* established KRS 342.165(1) does not impose a "penalty," KCESIF cannot rely on the language of KRS 342.910(2) exempting guaranty funds from liability for assessed penalties. Here, Sargent's award included the 30% benefit enhancement pursuant to KRS 342.165(1). Sargent's employer, McCoy Elkhorn, would have been liable for payment of the entire award but for its insolvency; accordingly, KRS 342.900 and KRS 342.906(9) support the conclusion that KCESIF is obligated to pay Sargent's entire award. Thus, we agree with the ALJ's determination that KCESIF "would indeed step in the shoes of the self-insured bankrupt coal company and be liable for payments awarded under KRS 342.165."

After careful review, we conclude the Board properly affirmed the ALJ's award of benefits.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Terri Smith Walters
J. Gregory Allen
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Roy J. Downey
Pikeville, Kentucky