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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001433-WC

UPS AIRLINES — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-06-99327

EDWIN COREY WEST; HONORABLE JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

WINE, JUDGE: UPS Airlines ("UPS") petitions this Court for review of a decision of the Workers' Compensation Board ("the Board") reversing and remanding the opinion and award of the Administrative Law Judge ("ALJ"). The question presented for our review is whether the "Loss of License" benefit plan, as negotiated under a collective bargaining agreement between UPS and the

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Independent Pilots Association ("IPA"), is exclusively funded and thus, subject to the dollar for dollar credit under Kentucky Revised Statute ("KRS") 342.730(6). UPS contends that the Board misconstrued controlling law by finding that UPS was not entitled to a credit for the Loss of License benefits it paid to the appellee, Edwin Corey West, an IPA pilot, against the workers' compensation benefits West was awarded. After a careful review of the record, we affirm the Board, finding that UPS is not entitled to a credit against the workers' compensation benefits that were paid to West.

West began working for UPS as a pilot in 1996. In 2003, West suffered a work-related injury while moving his suitcase from a storage area. This injury ultimately resulted in the necessity of fusion back surgery. West had no complaints of back pain prior to this incident. The surgery performed on West's back was successful and he was able to return to work on December 21, 2005. West received workers' compensation "temporary total disability" (TTD) benefits during the time that he was out of work due to the injury. He received a total of $35,019.88 in TTD benefits over the period from October 18, 2004, through December 21, 2005.

Although West's weekly wage at UPS was around $2,377 per week, he was drawing only around $571 per week in TTD benefits. However, West was also entitled to receive other benefits from UPS under the terms of the collective

bargaining agreement between UPS and the IPA. The collective bargaining agreement is quite voluminous, spanning more than three hundred pages. Under the terms of the agreement, after a pilot has been off work and unable to use his FAA certificate to fly for a period of six months, he is entitled to a negotiated benefit termed a Loss of License benefit. This benefit covers a payment to the pilot, which is based upon a percentage of the pilot's pay, for up to twenty-four months.

West received $50,936.67 in Loss of License benefits during the time that he was injured and unable to work.[2] A payroll supervisor from UPS testified via deposition that no deductions were ever made from West's paychecks for the receipt of this benefit. The payroll supervisor further testified that pilots are paid 66.67% of their guaranteed hours pursuant to the Loss of License benefit. West received loss of license benefits for approximately eight months, until he was able to return to work.

Although West concedes that pilots do not pay any amount toward the benefit through a payroll deduction, he maintains that because the benefit is the product of a collective bargaining process, it is not an exclusively employer funded benefit. The president of the IPA, Robert Miller, testified in his deposition that the

[2] West received a combined total of around $69,000 in TTD and loss of license benefits during the period he was out of work. If West had been working at that time, he would have earned approximately $77,000 during this period.

collective bargaining process with UPS usually takes a couple of years before an agreement is reached. He testified that they often had to make "trade-offs" in certain areas in order to bargain for things they found more important in other areas. Miller stated, "We negotiated, we traded off certain other areas that we could have obtained in exchange for that benefit."

The ALJ found that the Loss of License benefit was exclusively employer funded, and entered an order granting UPS a credit representing an offset against the amount of TTD benefits that West had received. West petitioned the Board for review and argued that since the Loss of License benefit was obtained through negotiations in the collective bargaining process, it was not "exclusively funded" by the employer. The Board agreed, reversing and remanding the ALJ's order, and finding that the benefit was not exclusively employer funded.

UPS now petitions this Court for review of the Board's decision and requests that this Court reverse the Board's finding that the benefit was not exclusively employer funded.

West cites *GAF Corp. v. Barnes*, 906 S.W.2d 353 (Ky. 1995), for the proposition that benefits negotiated through a collective bargaining process are "bargained-for benefits" and are not a gift to employees due to the employer's good will. In *GAF Corp.*, the Supreme Court found that an employer was not entitled to a credit or offset against an award of income benefits to its employee

under an employer-funded disability retirement pension plan. *Id*. The Court noted that "an employee benefit which is the product of a collective bargaining process . . . may properly be presumed to be a bargained-for benefit and cannot accurately or speculatively be characterized as the product of employer largess." *Id*. at 355.

West concedes that *GAF Corp.* was decided before the legislative enactment of KRS 342.730(6), which states:

> All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

West contends that the same rationale from *GAF Corp.* is still applicable as the language in KRS 342.730(6) does not state that a benefit negotiated through a collective bargaining agreement is to be deemed exclusively employer funded. The Supreme Court, in *GAF Corp.*, noted the difference between an employee benefit which is employer funded and is not subject to a collective bargaining agreement, and benefits which are employer funded and arise from collective bargaining agreements. *Id*. Indeed, the Court noted that in *Beth-Elkhorn Corp. v. Lucas*, 670 S.W.2d 480 (Ky. 1983), *overruled in part by Williams v. Eastern Coal Corp.*, 952 S.W.2d 696 (Ky. 1997), the plan was employer-funded and did not arise from any negotiated agreement. *Id*. Therefore, the Court held that the

employer should be "entitled to benefit from its own generosity" in offering the additional disability benefit. *Id*. at 482. The Court in *GAF Corp.* noted that benefits arising from collective bargaining agreements are not due to the employer's generosity or largess, but instead are a bargained-for benefit.

However, the Supreme Court overruled both of these cases, in part, in *Williams v. Eastern Coal Corp.*, in 1997. The Court noted that, despite the dicta present in *Beth Elkhorn* and *GAF Corp.*, an employer is never entitled to a credit for an employer-funded disability pension benefit, regardless of whether it may be considered "largess." *Williams* did not address plans other than disability retirement pensions, or reverse *Beth Elkhorn* or *GAF Corp.*, beyond their application to disability retirement pension plans.

UPS argues on appeal that the Board misapplied the law in relying on *GAF Corp.* because KRS 342.730(6) supersedes *GAF Corp.* and *Williams*. UPS also argues that these cases are distinguishable in that they deal with disability retirement pension benefit plans instead of Loss of License benefit plans. Ordinarily, we defer to the Board unless the Board has misconstrued or overlooked controlling law or has flagrantly erred in evaluating the evidence in the case, resulting in a gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). However, as the present case turns on a question of statutory

interpretation, we owe no deference to the Board and review the matter *de novo*. *Newberg v. Thomas Industries*, 852 S.W.2d 339, 340 (Ky. App. 1993).

The Board agreed with the ALJ that KRS 342.730(6) is determinative of the issue at hand. The Board further agreed with the ALJ that KRS 342.730(6) requires a three-part analysis before it may be determined whether a particular benefit is covered under the section: (1) that the plan must be exclusively employer funded, (2) that it must extend income benefits for the same disability covered by workers' compensation, and (3) that it must not contain an internal offset provision for workers' compensation benefits. However, the Board's analysis differed from the ALJ's in that its opinion rested upon a finding that the first prong of the three-part test could not be met. Specifically, the Board found that the Loss of License benefit plan was not "exclusively employer funded."

The Board was guided in its decision by *GAF Corp*. It based its decision on the holding in *GAF Corp.* that benefits negotiated through the collective bargaining process are contractual benefits. The Board quoted *GAF Corp.*, in pertinent part, as follows:

> The employment contract which emerges from a collective bargaining process contains terms which are the culmination of a bargaining process between workers and employer. Accordingly, an employee benefit which is the product of a collective bargaining process . . . may properly be presumed to be a bargained-for benefit . . . .

Id. at 355. The Board stated that "[t]his declaration by the Supreme Court, while not directly stating benefits negotiated through the collective bargaining process can never be deemed 'exclusively employer funded,' comes close enough that it cannot be ignored." The Board acknowledged that the decision in *GAF Corp.*, preceded the enactment of KRS 342.730(6), but stated that *GAF Corp.* was "the last pronouncement by our Supreme Court on the issue of benefits negotiated through the collective bargaining process in the context of KRS 342.730(6)." The Board defended its application of *GAF Corp.*, by noting that the Supreme Court in *GAF Corp.* considered the same criteria which were ultimately codified into KRS 342.730(6), including whether the plan was exclusively funded by the employer. The Board found that the dicta withdrawn from *GAF Corp.* by *Williams* pertained solely to the implication that a credit could be authorized for an employer-funded disability retirement pension plan, but was not germane to the issue of benefits paid pursuant to a collective bargaining agreement. The Board noted that *Williams* did not retract any of the language cited hereinabove from *GAF Corp*.

This presents an issue of first impression for our courts as we have not before considered the question of whether benefits received pursuant to a collective bargaining agreement are "exclusively employer-funded" under the terms of KRS 342.730(6). Although we have dealt with section (6) of KRS 342.730 since its enactment, we have only squarely dealt with the issue of whether the benefits in

question were "duplicative" of workers' compensation benefits, *not* whether such benefits were "exclusively employer-funded." *See, e.g., Dravo Lime Co., Inc. v. Eakins*, 156 S.W.3d 283 (Ky. 2005); *Alcan Aluminum Corp. v. Stone*, 276 S.W.3d 817 (Ky. 2009). We certainly have not considered the question in the context of collective bargaining agreements.[3]

After careful consideration, we agree with the Board that benefits negotiated through the collective bargaining process are contractual in nature and are different from non-negotiated employer benefit plans. *GAF Corp., overruled on other grounds by Williams*. We further agree that benefit plans which are negotiated and obtained through the collective bargaining process cannot be said to be exclusively employer-funded, as this appears to be the last position of our Supreme Court on this issue. This view is supported to an extent by the fledgling jurisprudence that has cropped up along the outskirts of workers' compensation practice in other jurisdictions. *See e.g., Essick v. City of Springfield, By and Through Bd. Of Public Utilities of City of Springfield*, 680 S.W.2d 777 (Mo. App. 1984) (Disability pay pursuant to collective bargaining agreement cannot be

[3] We note that the question of whether UPS's "loss of license" benefit plan was "exclusively employer funded" was not raised by the parties in the case of *Fuller v. United Parcel Service*, 2007 WL 29664 (Ky. App. 2007). As such, this issue has not properly been before this Court until now.

considered "wages paid" and employer may not receive credit against compensation).

In LARSON'S WORKERS' COMPENSATION LAW, Professor Larson points out that a number of troublesome legal questions are beginning to arise from the increasing occurrence of contractual supplementation to workers' compensation. LARSON'S WORKERS' COMPENSATION LAW, §157.05[3] (2008). Larson notes however, that there is a cardinal principle that settles most such questions. *Id*. That cardinal principle "is the simple proposition that the contractual excess is not workers' compensation," but is "nothing more than the fruit of a private agreement to pay a sum of money on specified conditions." *Id*. *See also, Stoecker v. Brush Wellman, Inc*., 984 P.2d 534, 538-39 (Ariz. 1999) (Employment agreements expressly promising benefits in addition to those already mandated by the Worker's Compensation Act should be enforced according to normal contract law principles).

It is also worthy of note that West has to pay union dues for membership in the IPA in order to be eligible for receipt of the Loss of License benefits in question.[4] Indeed, were West not a member of the IPA, but rather a non-unionized employee of UPS, he would not be entitled to receive said Loss of License benefits. This gives further support to the idea that benefits negotiated

[4] West's union dues are evidenced as deductions on the paystubs entered into the record as exhibits to the deposition of UPS's payroll supervisor.

through the collective bargaining process are not simply regular employee benefits, but are bargained-for contractual benefits, supported by consideration to the contract, which are distinct from exclusively employer funded benefits.

Our view may be summed up by a quote from the Utah Supreme Court, as follows:

> [W]orkers' compensation is a quid pro quo, both granting and withdrawing specified employee and employer rights. For its part of this bargain, an employer obtains valuable protection from tort suits. The workers' compensation system, however, "was not designed or intended to free an employer from performing its contractual promises to provide specific benefits to its employees."

Shattuck-Owen v. Snowbird Corp., 16 P.3d 555, 561 (Utah, 2000) (internal citations omitted), *quoting Stoecker*, 984 P.2d at 538.

Accordingly, we affirm the Board's opinion reversing and remanding the opinion and award of the ALJ.

ALL CONCUR.

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