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Workmen's Compensation--Judicial Review--Final Order

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Recent Cases

WORKMEN'S COMPENSATION — JUDICIAL REVIEW — FINAL ORDER. — The claimant filed an application with the workmen's compensation board, and the case was given to a referee for findings. The referee issued an order dismissing the claim, subject to the right of the claimant to reopen the case for the purpose of proving jurisdiction. The claimant filed a motion to reopen with the board, but it was overruled on the ground that the case had been decided by the referee's order. The claimant then appealed to the circuit court, which took jurisdiction of the case and remanded it to the board with directions to reopen. *Held:* Reversed. A ruling on a motion to reopen is not a final order where the board has not yet approved the award of the referee. Since there was no final order, the circuit court lacked jurisdiction for the appeal. *Creech v. Roberts,* 362 S.W.2d 734 (Ky. 1962).

According to the statutory procedure, if the initial findings were not made by the full board, the board must make a final award or order upon application of a party.[1] Appeal must be taken to the circuit court within twenty days of such final order.[2] It is established case law that, under these provisions, the order of the referee is not a final, appealable order.[3] The court in the principal case treated this precedent as controlling of the issue before it.[4] However, it should be pointed out that there was no motion to reopen in these cases.[5]

The principal case well illustrates the undesirability of rigid adherence to procedural technicalities in workmen's compensation cases. The referee has made his dismissal of the claim expressly subject to the right to reopen to prove jurisdiction. Consequently, an attempt by the board to affirm his disposition summarily, while ignoring his proviso, would probably constitute reversible error. The circuit court treated the cryptic ruling of the board as a final order,

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[1] Ky. Rev. Stat. § 342.280(1) (1963).

[2] Ky. Rev. Stat. § 342.285(1) (1963).

[3] Epling v. Ratliff, 364 S.W.2d 327 (Ky. 1963); Kabai v. Majestic Collieries Co., 286 Ky. 279, 150 S.W.2d 898 (1941); Spencer v. Chavies Coal Co., 280 Ky. 152, 132 S.W.2d 746 (1939). The *Epling* case was decided after the principal case in the same term, while the *Kabai* and *Spencer* cases anteceded and were relied on by the principal case.

[4] Creech v. Roberts, 362 S.W.2d 734, 735 (Ky. 1962).

[5] It should also be pointed out that a motion to reopen has a different meaning when there has already been an award and the purpose of the motion is to establish grounds for modifying the award. In that instance, the denial of the motion is a refusal to exercise further jurisdiction, while in the principal case there is the possibility of further action by the board. See Paul v. Allender Brown Co., 249 S.W.2d 163 (Ky. 1952).

since it indicated the clear intention of the board summarily to dismiss the claim, and held the action of the board to be erroneous. The court of appeals, on the other hand, has looked at the technical form of the board's action and has invalidated the action taken by the circuit court. The net effect is that the board must now go through the formality of issuing a final order which on appeal will be invalidated.

The interval between the initial assignment to the referee and the decision of the court of appeals was three years.[6] A similar time lapse presumably is now attending the review of the erroneous final order. Still another period of delay very likely will accompany the ultimate review on the merits. It is submitted that substantive treatment of the board's ruling could have reduced these detrimental delays by one, while the technical treatment given the ruling by the court of appeals unnecessarily postpones the possibility of recovery by the injured workman and clutters the court docket with repetitious review of what is essentially one issue.

T. R. Fitzgerald

ANTITRUST LAW—APPLICATION OF THE SHERMAN ACT, SECTION ONE, TO BANK MERGERS.—The First National Bank and Trust Company and the Security Trust Company, both of Lexington, Ky., after receiving authorization from the Comptroller of the Currency pursuant to the Bank Merger Act,[1] consolidated[2] to form the First Security National Bank and Trust Company. Suit based on sections one[3] and two[4] of

[6] Creech v. Roberts, *supra* note 4, at 734.

[1] 12 U.S.C. § 1828(c) (1960). It seems to be settled that Congress did not intend by its enactment of the Bank Merger Act to supersede the provisions of the Sherman Act in any respect. Approval by the Comptroller of the Currency does not immunize the plan from attack by the Justice Department. California v. Federal Power Commission, 369 U.S. 482 (1962); United States v. Philadelphia National Bank, 374 U.S. 321, 350 (1963); United States v. First National Bank & Trust Co., 208 F. Supp. 457, 458 (E.D. Ky. 1962).

[2] There is a recognized distinction between "merger" and "consolidation" as applied to corporations. In a "merger," one corporation absorbs the other but remains in existence, while the other is dissolved. In a "consolidation" a new corporation is created and the consolidating corporations are extinguished. Personal Credit Plan v. Kling, 20 A.2d 704, 706 (N.J. 1941). In the Philadelphia National Bank case, the "merger" was technically a "consolidation" and thus it is a moot question whether the rule of law of that case covers true mergers. In the *First National Bank* case, although the district court referred to the plan as a consolidation *or* merger, it is implicit that the plan was in fact a consolidation.

[3] 15 U.S.C. § 1 (1958). This section provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

[4] 15 U.S.C. § 2 (1958).