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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
FEBRUARY 13, 2008
(2007-SC-0363-D)

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000423-MR

MITCHELL METZINGER

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-00479

KENTUCKY RETIREMENT SYSTEMS,
BOARD OF TRUSTEES OF THE
KENTUCKY RETIREMENT SYSTEMS,
AND DISABILITY APPEALS COMMITTEE
OF THE KENTUCKY RETIREMENT SYSTEMS

APPELLEE

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AFFIRMING

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BEFORE: VANMETER, JUDGE; KNOPF AND ROSENBLUM, SENIOR JUDGES.¹

¹ Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KNOPF, SENIOR JUDGE: Appellant, Mitchell Metzinger, appeals the order of the Franklin Circuit Court affirming the Kentucky Retirement Systems' decision to reduce his monthly benefits and to require reimbursement for amounts overpaid. We affirm.

Metzinger worked as an electrician for the City of Louisville Department of Public Works. On May 31, 1998, Metzinger was electrocuted on the job and sustained severe injuries that disabled him for life. Metzinger filed suit against Louisville Gas & Electric, Co. (LG&E) and Bill's Electric, Inc., each of whom was responsible for maintaining the light and pole that injured him. He also filed a workers' compensation claim against the City of Louisville. Ultimately, the parties negotiated a settlement whereby LG&E and Bill's Electric accepted primary responsibility for Metzinger's injuries and each paid a lump sum payment. Additionally, LG&E and the City of Louisville purchased an annuity to make monthly payments of approximately \$1,800.00 to Metzinger. The workers' compensation claim was merged into the civil matter and was settled.

Kentucky Retirement Systems awarded Metzinger disability retirement benefits on May 15, 2002. A calculation of maximum disability was performed pursuant to KRS 61.607. Based on that calculation, Kentucky Retirement Systems determined that Metzinger had been overpaid \$27,142.20 because of the annuity payments. The calculation also indicated that Metzinger's current disability benefits should be lowered to \$827.70. Metzinger appealed that determination. The hearing officer recommended that the determination be upheld and the Board of Trustees of the Kentucky Retirement Systems adopted those findings. Metzinger then petitioned the Franklin Circuit Court for

review. The trial court affirmed the decision of the Board of Trustees in a well-reasoned opinion and order. This appeal follows.

Metzinger argues that the settlement payments should be characterized as sounding solely in tort, and as such, should not be considered as an offset to disability benefits under KRS 61.607. We disagree.

KRS 61.607 provides in pertinent part:

Notwithstanding any other provisions of KRS 16.505 to 16.652, 61.510 to 61.705, or 78.510 to 78.852, a maximum disability benefit is hereby established which shall apply, upon disability retirement, to any disabled employee's account to which service credit is added to determine disability benefits or in any case where disability benefits are determined by computing a percentage of the disabled employee's final monthly rate of pay. The maximum disability benefit shall be determined by the following formula:

- (1) Add the monthly benefit payable to the disabled employee from the retirement system, using the monthly disability retirement allowance (not optional plan) but excluding dependent children's allowances, if any, to his monthly benefit, if any, from Social Security, even though these payments may not begin for a period of time as required for qualification under the federal Social Security law, excluding spouse or dependent benefits, **and his monthly benefit, if any, from workers' compensation, even though these payments may not have begun as of the date the disabled member applies for disability retirement benefits, excluding spouse or dependent children's allowances, from workers' compensation, to arrive at a projected combined monthly benefit.**
- (2) If the projected combined monthly benefit exceeds one hundred percent (100%) of the disabled employee's final rate of pay or his final compensation, whichever is greater, his disability retirement allowance from the retirement system shall be reduced to an amount which would cause his projected combined monthly benefit to equal one hundred percent (100%) of his final rate of pay or his final compensation, whichever is greater; however, the disability retirement allowance shall not be reduced below an amount which would result from a computation of his disability

retirement allowance from the retirement system using the disabled employee's actual total service. [Emphasis added.]

Examination of the settlement agreement, as well as the Administrative Law Judge's order approving the settlement, convinces us that the annuity payments in question fall within the purview of that statute.

That acceptance of the annuity has been properly characterized as an election to substitute his worker's benefits for a different type of payment is evident from the ALJ's review of the parties' agreement. After noting that, pursuant to KRS 342.700, the City intervened in Metzinger's suit against LG&E and Bill's Electric to recoup compensation benefits paid, the ALJ spelled out the purpose of the annuity:

The Defendant-Employer [City of Louisville] up-to-date has paid permanent partial disability benefits in the amount of \$55,766.89. The defendant was obligated under the award to pay permanent total disability benefits from 10/06/01 until 12/28/2035 at a rate of \$1,860.00 per month less \$12.70 per week to recoup an overpayment of LTD benefits. Thus, the employer had an outstanding obligation under the award for \$788,630.70. The parties in the third party claim in which City of Louisville has a subrogation interest have reached a global settlement. The plaintiff shall receive from Louisville Gas & Electric, a lump sum figure of \$542,149.00. Further, the plaintiff shall receive from LG&E an annuity. The City of Louisville had a claim of subrogation against Louisville Gas & Electric and Bill's Electric in the amount of \$882,809.51. It was decided between the City of Louisville and Louisville Gas & Electric, that they would split the cost of future exposure under the award, the purchase cost of the remaining \$788,630.70 payable pursuant to that award. The cost of the annuity is \$153,674.50 per party. City of Louisville shall pay \$153,674.50 towards an annuity package being purchased by Louisville Gas & Electric for the benefit of the plaintiff. LG&E will be paying additional monies to purchase an annuity which exceeds the payment under the Opinion & Award. Plaintiff understands and accepts \$153,674.50 as sufficient consideration for a buy-out and waiver of the City's obligation under the Opinion and Award of Judge Campbell. Further, the plaintiff acknowledges that the City of Louisville is waiving a lien totaling the amount of \$882,809.51 minus \$153,674.50 equals \$729,129.01 (minus \$25,000.00 to be paid lump sum to the City of Louisville by plaintiff from his settlement proceeds) for a total waiver of \$704,139.01. Thus, as further consideration for a buy-out and

waiver of the obligations under the Opinion and Award of Judge Campbell, the plaintiff is receiving a waiver of the intervening plaintiff's paid amounts and obligated amounts of \$729,139.01. The plaintiff understands and accepts the waiver of the City of Louisville['s] obligation of \$729,139.01 as sufficient consideration for a buy-out and waiver of his continued rights for indemnity benefits under the Opinion and Award. The plaintiff waives the right to reopen this claim per KRS 342.125 consideration recognized by the waiver of the remaining subrogation lien. [Emphasis added.]

The order also specified that Metzinger's entitlement to medicals provided for in the Opinion and Award would continue.

We are convinced that the ALJ's explanation of the components of the settlement agreement confirms the trial court's assessment that the "purpose of the annuity was to replace, at least in part, his workers' compensation." Reinforcing this conclusion are the facts that Metzinger retained his medical benefits under the award and waived his right to reopen the award. Metzinger simply chose to receive the annuity in lieu of his workers' compensation payments. It is clear to us that the annuity is in reality a substitute for the benefits awarded or, in other words, represents a re-named workers' compensation award. We agree with the trial judge that to allow Metzinger to avoid application of KRS 61.607 by merely accepting an annuity in place of his award would afford him a benefit the legislature did not intend.

In *Rue v. Kentucky Retirement Systems*, 32 S.W.3d 87, 89 (Ky.App. 2000), this Court considered the somewhat analogous situation of whether in applying the workers' compensation offset the Retirement System was required to use the net amount of payments received, rather than the amount set out in the award. Noting that the claimant in that case had elected to have his attorney fees deducted from his award as a matter of convenience, the Court concluded that there was no authority for reducing Rue's award to a net amount:

First, the statute is clear in providing which allowances are not to be considered. If the General Assembly intended to reduce the amount of the workers' compensation award by applicable attorney's fees, the wording of the statute would have reflected that intent. We are not free to add words to statutory enactments in order to enlarge their scope beyond that which can be gleaned from a reading of the words used by the legislature.

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We are convinced that to allow Rue to offset only his net award is to provide him a benefit our legislature did not intend.

The fact remains that Metzinger received an award of workers' compensation benefits that would fall within the offset provision but for his election to receive those payments in the form of an annuity. As was the case in Rue, we find no rationale by which we might allow a claimant's election as to form of payment to avoid the application of the offset.

Finally, like the trial court, we find no merit in Metzinger's complaint as to the use of the entire annuity amount in calculating the disability allowance. The Retirement Systems based its calculations of KRS 61.607(2) which takes Metzinger's total service into account in calculating his minimum benefit. The minimum benefit would not vary regardless of the amount of the annuity. The trial judge found, and we agree, that the Retirement Systems' method of calculation is a factual matter entitled to deference from the courts. Because there is evidence to support the use of KRS 61.607(2) as a basis for the recalculation of Metzinger's benefit amount, we will not disturb the trial court's decision on this issue.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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