

# Commonwealth Of Kentucky

## Court Of Appeals

No. 97-CA-1401-WC

MARY FRANCIS TURPIN (now  
Tallent)

APPELLANT

v.

PETITION FOR REVIEW  
OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
WC-91-10239

PULASKI COUNTY BOARD  
OF EDUCATION; SPECIAL FUND;  
HON. MARK C. WEBSTER,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: BUCKINGHAM, KNOX, and MILLER, Judges.

BUCKINGHAM, JUDGE. Mary Francis Turpin (now Tallent) petitions for review of an opinion of the Workers' Compensation Board (Board) affirming a decision of the administrative law judge (ALJ). For the reasons set forth hereinafter, we affirm.

Tallent was employed by the Pulaski County Board of Education (Pulaski County) as a speech pathologist which required

her to travel between three different elementary schools. On September 11, 1989, Tallent suffered work-related injuries to her neck, head, and shoulders in an automobile accident. She missed several days of work as a result of the accident, but she returned to the same position with Pulaski County through 1992. On March 25, 1991, the ALJ approved a lump-sum settlement agreement between Tallent and Pulaski County based on a twenty percent permanent partial disability.

On November 15, 1995, Tallent filed a motion to reopen pursuant to Kentucky Revised Statute (KRS) 342.125<sup>1</sup> based upon a worsening of her physical condition and an increase in her level of occupational disability. The Special Fund was not named as a party defendant in the motion to reopen, and the ALJ entered an order on January 12, 1996, reopening the case. On April 5, 1996, Pulaski County filed a motion to join the Special Fund as a party, and the ALJ entered an order on April 15, 1996, granting the motion and joining the Special Fund as a party. The Special Fund did not file any objection to its joinder prior to the ALJ's order. However, at the prehearing conference held on June 13, 1996,<sup>2</sup> the Special Fund objected to its joinder and argued that Tallent's claim against it was barred by the statute of limitations.

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<sup>1</sup> All references to statutes and regulations herein are to those in effect at that time.

<sup>2</sup> The prehearing conference report states that the hearing was held on March 13, 1996. However, both Tallent and the Special Fund agree that the hearing was held on June 13, 1996.

After hearing the case, the ALJ entered an opinion and award which found that Tallent was totally occupationally disabled but that "[t]he Special Fund shall have no liability placed upon it because of its late joinder and because the statute of limitations bars any liability on behalf of the Special Fund." The ALJ noted that "[w]ere this the usual case, I would also have no problem in making an apportionment of half of the liability to the Special Fund . . . ." In finding that the Special Fund should have no liability, the ALJ determined that there was a preexisting condition (scoliosis, for which Tallent had Herrington rods implanted in her body as a teenager) which required joinder of the Special Fund in the original action. The ALJ also stated, however, that "I do not find that there may have been a basis for Special Fund liability at that time." The ALJ also stated that since the statute of limitations had run, the issue of the timeliness of the joinder pursuant to Pulaski County's motion was moot.

On appeal, the Board noted that "those factors for establishing Special Fund liability were not present in Tallent's case until after the statute expired on September 11, 1991[,]" and it held that the ALJ's finding that the Special Fund should have been joined in the original action was in error. However, the Board affirmed the ALJ's dismissal of the Special Fund on the ground that Tallent did not allege any of the grounds for reopening set forth in KRS 342.125 in her motion to reopen so as to bring the Special Fund "within any statutory scheme for

liability." The Board also stated that it was not persuaded that the ALJ was incorrect in his determination that Tallent's claim against the Special Fund was barred by the statute of limitations. Following the Board's affirming of the ALJ's opinion and award, Tallent petitioned for our review.<sup>3</sup>

We agree with the ALJ and the Board that Tallent's claim against the Special Fund was barred by the applicable statute of limitations, KRS 342.185(1), which provides in relevant part as follows:

[N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident . . . .

As the statute provides a two-year period from the date of the accident in which to bring a claim for compensation, Tallent's claim against the Special Fund is barred by the statute due to its failure to bring such a claim within the two-year period.

Furthermore, the fact that Tallent apparently had no evidence to support the arousal of her preexisting back condition

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<sup>3</sup> One member of the Board dissented from the Board's opinion in part and stated that since the "injury" was not known until after the statute of limitations had run against the Special Fund, the case could be reopened on the ground of "newly discovered evidence" and the Special Fund could be made a party. That member also stated that, in his opinion, the statute of limitations has no application to reopenings.

until after the expiration of the two-year statute of limitations does not allow the claim to be filed after the statute has run. In injury claims involving a single traumatic event, the statute of limitations runs from the date of the accident and the "discovery rule" is inapplicable. See Coslow v. General Electric Co., Ky., 877 S.W.2d 611 (1994). Thus, the statute of limitations began to run on September 11, 1989 (the date of the accident), and expired on that date in 1991, even though there was no medical evidence concerning the low back injury until after the latter date.

The next issue concerns the actual procedure involved in the reopening of this case and in the joinder of the Special Fund as a party. As we noted previously herein, the ALJ's granting of Tallent's motion to reopen was proper as Tallent alleged a worsening of her condition and an increase in her occupational disability. See KRS 342.125(1). The problems and confusion arise because Tallent did not seek to make the Special Fund a party in her motion to reopen and because the Special Fund did not raise the statute of limitations as a special defense by special answer as required by 803 KAR 25:010 § 1(8)(g). The Special Fund argues that its status as a state agency shields it from the requirements of the regulation. It cites Commonwealth, Dept. of Highways v. Chinn, Ky., 350 S.W.2d 622 (1961). However, the Special Fund has obviously overlooked the case of Young v. Tackett, Ky., 481 S.W.2d 661 (1972), which held that the Special Fund's failure to properly plead an affirmative defense based on

the statute of limitations effected a waiver of its right to rely on that defense. Id. at 663.

The Special Fund also argues that the statute of limitations issue was tried by the consent of the parties and that Tallent thereby waived any objection to the Special Fund's failure to plead the statute of limitations as a special defense. The Special Fund cites Civil Rule (CR) 15.02 which provides in relevant part that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." As the parties contested the statute of limitations issue on its merits without objection by Tallent that the defense had not been properly raised, we conclude that the issue was tried by the consent of the parties although not specifically raised by the pleadings. CR 15.02. As Tallent's claim against the Special Fund was barred by KRS 342.185, we find no error in the dismissal of the Special Fund.

The opinion of the Board which affirmed the opinion and award by the ALJ is affirmed.

KNOX, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Mark D. Knight  
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BRIEF FOR APPELLEE, SPECIAL  
FUND:

David W. Barr  
Labor Cabinet  
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