

RENDERED: November 21, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0269-WC

W.M.N. COAL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-86-38107

ROGER D. BELL, Deceased;
DIANE S. BELL, Widow; THE
SPECIAL FUND, HONORABLE ROBERT
E. SPURLIN, Director;
HONORABLE IRENE STEEN,
Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON, KNOPF, and MILLER, Judges.

MILLER, JUDGE: W.M.N. Coal, Inc. (WMN), asks us to review an opinion of the Workers' Compensation Board (board) rendered January 3, 1997. Ky. Rev. Stat. (KRS) 342.290. We affirm.

On November 19, 1986, Roger D. Bell (Roger), sustained a work-related injury while in the employ of WMN. This injury resulted in blindness to his left eye. He settled his claim with WMN on November 5, 1987, wherein it was agreed that he suffered a 30% permanent partial disability. In March 1989, Roger reopened

his claim and ultimately settled for an increase of 17.38% in his disability rating.

Starting in 1990, Roger was hospitalized for psychiatric problems at Charter Ridge Hospital (Charter Ridge) on four separate occasions. Consequently, WMN voluntarily paid him temporary total disability (TTD) payments until he died on November 14, 1993.

On February 22, 1995, some fifteen months after Roger's death, Diane S. Bell (Diane), his widow, filed a motion to reopen. She claimed that Roger had been totally and permanently disabled at the time of his death. The ALJ sustained the motion, and on July 23, 1996, she found that Roger was totally and permanently disabled at the time of his death "due to his eye injury and psychiatric disabilities as a result therefrom" The ALJ further found that Diane was entitled to "receive benefits as if her husband had been declared 100% occupationally disabled at the time of his death." WMN appealed to the board, which, in turn, affirmed the ALJ's decision. This appeal followed.

WMN maintains that because Roger's disability was non-work related, Diane was not entitled to benefits. WMN specifically sets forth the following arguments: 1) that Roger's disability, specifically his headaches, was caused by a condition referred to as "obstructive sleep apnea"; 2) that Roger's disability was caused by the combination of his alleged drug problem and his obstructive sleep apnea; and 3) that Roger's disability was caused by his own reckless behavior.

Under the precepts of Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), we believe the board committed no error in holding that there was substantial evidence on which to base the ALJ's decision that Roger's disability was work related. Dr. Bunch, Roger's treating psychiatrist since 1988, testified that Roger's psychological problems rendered him totally disabled at the time of his death. Dr. Bunch believed these problems resulted from Roger's 1986 eye injury. Drs. Pursley and Kennedy testified that Roger was 100% disabled as a result of his headaches and that his headaches were caused by his eye injury. We believe this evidence sufficient to support the ALJ's conclusion that Roger's permanent total disability was caused by the 1986 work-related injury.

WMN also makes several arguments concerning the cause of Roger's death, found by the ALJ to be caused "by sleep apnea in conjunction with narcotics with a breathing depressant feature." We are urged to apply KRS 342.610(3) to the facts at hand. KRS 342.610(3) reads:

Liability for compensation shall not apply where injury, occupational disease, or death to the employee was proximately caused primarily by his intoxication or by his willful intention to injure or kill himself or another.

It is our opinion that KRS 342.610(3) relates only to the compensable condition in question and has no application to the case at bar. See Advance Aluminum Company v. Leslie, Ky., 869 S.W.2d 39 (1994). The compensable condition is not Roger's death but rather

his eye injury and related headaches and psychological problems. Thus, cause of death is not herewith relevant.

WMN next maintains that, contrary to the ALJ's decision, Roger's condition had not worsened, pursuant to KRS 342.125, and his percentage of disability had not changed. On this issue, we agree with the board that there was substantial evidence supporting the ALJ's findings. Roger worked sporadically following his second settlement with WMN, but after five months could not continue. Furthermore, beginning in 1990, he was hospitalized on four separate occasions at Charter Ridge. We note also the testimonies of Drs. Pursley and Kennedy who opined that Roger was 100% disabled at the time of his death. We believe this evidence sufficient to support the ALJ's finding.

WMN contends that Diane did not timely revive the action herein as a motion to reopen should have been made within a year of Roger's death. Diane waited fifteen months after Roger's death to move to reopen. Pursuant to KRS 395.278, an application to revive an action must be made within one year after the death of a party. This is a statute of limitation. Snyder v. Snyder, Ky. App., 769 S.W.2d 70 (1989). This time limitation is mandatory unless waived by the opposing party. See id. and Young v. Tackett, Ky., 481 S.W.2d 661 (1972). Failure to assert it as an affirmative special defense constitutes waiver. See id.; Ky. R. Civ. P. 8.03.

803 Ky. Admin. Regs. (KAR) 25:011 §5(3)¹ states as follows:

If any defendant in an application for adjustment of injury claim relies upon an affirmative special defense, he shall plead the defense in a special answer filed within twenty days after the date of issuance of the scheduling order with the Department of Workers Claims, or within ten days after the defense is discovered if the defense could not have been discovered earlier in the exercise of reasonable diligence.

A review of the record indicates that this defense was never pled in a special answer as required by 803 KAR 25:011 §5(3). We agree with the board that the ALJ was correct to conclude that the defense had been waived.

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

¹803 Ky. Admin. Regs. 25:011 §5(3) was repealed on June 15, 1995.

BRIEF FOR APPELLANT:

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