

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001306-WC

HON. RON CHRISTOPHER,
Director of SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-84-001497

BILL SMITH, deceased; SALLY SMITH, widow;
WOLF CREEK COLLIERIES; HON. DONNA H. TERRY,
Chief Administrative Law Judge; and KENTUCKY
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, JOHNSON, and MILLER, Judges.

COMBS, JUDGE: The Special Fund petitions for review of a decision of the Workers' Compensation Board (the Board) affirming the decision of the Chief Administrative Law Judge (CALJ), which held that Sally Estep Smith (Smith), the widow of William B. Smith (Bill), is entitled to the continuation of workers' compensation benefits previously awarded to Bill pursuant to Kentucky Revised Statutes (KRS) 342.730. We affirm.

Sally Smith was married to Bill in 1954. His entire work life was spent in the mining industry. He was injured in

1984 while employed by Wolf Creek Collieries in Lovely, Kentucky. In December 1986, Bill was determined to be totally occupationally disabled and was awarded benefits, which were apportioned 71.43% to his employer and 28.57% to the Special Fund. On January 10, 1995, Bill died of congestive heart failure – a condition unconnected to his work-related injury.

Mrs. Smith, who was represented by the same attorney who had represented her husband in the original workers' compensation proceeding, moved to be substituted as a party as Bill's widow on July 16, 1996 – some eighteen months after Bill's death. The petition was overruled "with leave to reinstate" at such a time as her motion was accompanied by necessary documentation (i.e., a copy of Bill's death certificate and a copy of their marriage certificate). Accordingly, on September 3, 1996, she filed a renewed motion to substitute party. Wolf Creek responded on September 9, 1996, stating that it had no objection to the substitution of Sally Smith for the purpose of receiving the continuation of benefits.

A notice of representation was filed by counsel for the Special Fund on September 25. On October 22, 1996, the Special Fund filed a special answer in which it asserted that the one-year statute of limitations contained in KRS 395.278 was a "complete and total defense for the widow's claim for continuation of benefits." In her response to that special answer, Smith's attorney outlined the following steps that he had taken in representing Smith in this matter:

3) That on or about January 23, 1995, a letter was sent to Wolf-Creek Collieries

regarding benefits Mrs. Smith would be entitled to as a result of her husband's death

4) That on or about February 3, 1995, we received a letter from Wolf-Creek Collieries . . . advising us to contact Ms. Molin. Thereafter, we made numerous attempts to contact Ms. Molin by telephone and, in fact, we even faxed several letters to her before we finally received a response from anyone regarding these benefits.

5) That we wrote a letter to the Employers Service Corporation on or about June 27, 1996, to obtain the status of the Plaintiff's claim and finally about the first of July we were contacted by telephone and advised that it would be necessary for us to have Mrs. Smith substituted as the Plaintiff in this action.

6) That immediately after we were advised that it would be necessary to have Mrs. Smith substituted as the Plaintiff in this action, we did so. Although we had been attempting to obtain these benefits for Mrs. Smith since January, 1995, right after her husband's death, it wasn't until July, 1996, that we were advised that it would be necessary to have her substituted in order for her to receive these benefits.

In her order of January 21, 1997, the CALJ found that Smith had "attempted on numerous occasions to contact appropriate personnel for the defendant-employer" regarding her benefits and that the employer's failure to "respond in a timely fashion . . . prevent[ed] Sally Smith from moving to be substituted as a party plaintiff within the statutory period." The CALJ overruled the Special Fund's special answer and ordered the continuation of benefits to Smith.

Appealing to the Board, the Special Fund relied on Hammons v. Tremco, Inc., Ky., 887 S.W.2d 336 (1994), which held as follows:

Therefore, when considered together, KRS 395.278 and CR 25.01(1) require that when a plaintiff dies any action pending on the part of the deceased plaintiff must be revived by the decedent's successor or personal representative within one year, and the successor or personal representative must be substituted as the real party in interest. Although an opposing party may, by its action, lose the right to require the timely revival of an action, a party cannot, by such action, confer personal jurisdiction over a successor or personal representative who has not appeared or been substituted as a party. Mitchell v. Money, [Ky. App., 602 S.W.2d 687 (1980)]. Likewise, jurisdiction could not be conferred over dependents who had not asserted their rights to survivors' benefits and moved to be substituted as parties to the action.

(Emphasis added.) Id. at 338.

In its opinion, the Board recognized the implications of KRS 395.278 and Hammons v. Tremco, Inc., supra. It also alluded to the "difficult situation" in attempting to estop the Special Fund from asserting a defense because of the employer's actions since its liability is no longer derivative. The Board noted that while it did "not necessarily agree with the basis for the CALJ's opinion," it was nonetheless affirming her decision because the Special Fund had failed to comply with the directives of 803 KAR 25:010 § (8), which states in pertinent part as follows:

'Special defenses' means defenses that shall be raised by 'special answer' filed within twenty (20) days of the date of the scheduling order, or within ten (10) days after discovery of facts supporting the defense if discovery could not have been had earlier in the exercise of due diligence. Special defenses are waived if not timely raised. Special defenses which shall be pleaded are defenses arising under:

. . .

(g) Running of periods of limitations or repose under KRS 342.185, 342.270, 342.316, or any other applicable statute.

(Emphasis added.)

In a split decision, the majority of the Board ruled that the Special Fund had waived the defense and stated as follows:

Here, the renewed motion to substitute Smith as the widow of Bill Smith was filed with the Department of Workers['] Claims on September 3, 1996[,] and served upon the S[pecial] F[und] on or about that date. The S[pecial] F[und] filed a notice of representation of September 25, 1996. The renewed motion to substitute contained more than sufficient information upon which the S[pecial] F[und] could and should have asserted the special defense but the defense was not actually raised by them until October 22, 1996. The failure to raise this special defense constitutes a legal waiver.

(Emphasis added.) Chairman Abell dissented, citing Schultz v. Schultz, Ky., 332 S.W.2d 253 (1960), and Caldwell v. Bethlehem Mines Corporation, Ky., 455 S.W.2d 67 (1970), and stating that the statute of limitations contained in KRS 395.278 was "jurisdictional and therefore need not be pled by a special answer."

On appeal, the Special Fund argues correctly that since its liability is no longer derivative of that of the employer, it is not bound by Wolf Creek's waiver. Yet the Special Fund has a procedural problem of its own: the filing of its special answer out of time. 803 KAR 25:010 § (8) provides for waiver of any special defense not timely raised, specifically defining a special defense to include any applicable statute of limitations.

The Special Fund seeks to cure its unquestionable waiver by a bootstrapping argument in the alternative that since

Smith did not object to the belated filing of the special answer and since the CALJ did not address it, the issue was tried by implied consent. CR 15.02 and Collins v. Castleton Farms, Inc., Ky. App., 560 S.W.2d 830 (1978). We disagree.

The CALJ decided the case on other grounds. We cannot agree that her failure to address the untimeliness of the Special Fund's filing clothed it with a special status capable of curing its own omission by implication. Such an interpretation is convoluted to the point of becoming ludicrous.

We agree with both the Board and the CALJ, each of whom found in favor of Mrs. Smith -- but for different reasons, respectively. In a procedurally-oriented approach, the Board cited the waiver of the Special Fund as the flaw fatal to its position. In a substantive/equitable analysis, the CALJ looked at the numerous efforts of Mrs. Smith to contact the employer and cited the employer's failure to respond as the real impediment to timely substitution of Sally Smith as a party, impliedly relying on the relative equities of the situation to uphold Smith's right to continuation of benefits.

The last argument to be addressed is the Special Fund's insistence that Hammons v. Tremco, supra, amounts to an absolute jurisdictional bar to Sally Smith. We disagree and hold that its reliance is misplaced since Hammons is highly distinguishable factually.

The Supreme Court in Hammons employed mandatory language in dismissing an action to substitute more than a year after the employee's death. Significantly, that case dealt with

a situation in which the claim was still pending. The claimant died with his claim was on appeal to the Workers' Compensation Board, and the failure of the personal representative to move to revive the action or to be substituted as a party within one year proved to be a fatal flaw jurisdictionally.

Such is not the case in the matter before us. There is no question that Sally Smith – as Bill Smith's widow – was entitled to a continuation of the benefits awarded to him in 1986. The underlying claim had long since been adjudicated (December 1986) prior to the employee's death in January 1995. All rights, liabilities, and expectations had been settled *pendente lite*. There is no reason to invoke a hyper-technical application of jurisdictional rules as to revival or survival where the original claim is no longer pending. This claim was at most a matter of administrative paperwork and should not be barred as the circumstances cited by the CALJ so clearly dictate.

Accordingly, the decision of the Board is affirmed.

MILLER, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. I respectfully dissent.

There is no question that Mrs. Smith, as Bill Smith's widow, was entitled to a continuation of the benefits he was awarded in 1986. However, it is also settled that in order to obtain those benefits, Mrs. Smith was required to move to be substituted as a party before the Board within one year of Bill's death. See KRS 395.278; CR 25.01(1); and, Hammons v. Tremco, Inc., supra. The Majority attempts to distinguish Hammons on the basis that the

claim in Hammons was pending as opposed to the fact that the claim herein had been adjudicated. However, it appears to me that the Supreme Court in Hammons intended to establish a bright line rule for revival of all workers' compensation actions, whether they were pending or finally adjudicated. While the claim by Bill Smith had been adjudicated, under our workers' compensation laws his claim was still subject to modification upon a reopening and Mrs. Smith was entitled to survivors benefits if she met certain statutory requirements. The implication by the Majority that since Bill Smith had received an award that Mrs. Smith had some type of vested interest in Bill's award is misleading. The rights to survivor's benefits that Mrs. Smith had were only those rights that were statutorily provided.

As to the procedural issue, it is settled that the limitations defense can be waived. Indeed, CR 25.01(1) contemplates that "the right to have the action dismissed [can be] lost, as by waiver, estoppel, or consent." Daniel v. Fourth and Market, Inc., Ky., 445 S.W.2d 699, 701 (1968). Obviously in this case, the employer, Wolf Creek, voluntarily waived the defense.

803 KAR 25:010 (8) plainly provides for waiver of any special defense not timely raised, the regulation plainly defines a special defense to include any applicable statute of limitations, and the Special Fund plainly filed its special answer out of time. For these reasons, I would not hesitate to affirm the Board's determination that the defense was waived had

Mrs. Smith objected to the untimely assertion of the defense by the Special Fund.

However, Mrs. Smith did not object to the untimely special answer. Its untimeliness was not addressed by the CALJ. Accordingly, the issue was tried by implied consent. See CR 15.02; and Collins v. Castleton Farms, Inc., Ky. App., 560 S.W.2d 830, 831 (1978). Clearly, there was absolutely no allegation, much less any evidence before the CALJ, that the Special Fund did anything that would estop it from asserting the statute of limitations defense. The CALJ did not make any findings that the Special Fund misled Mrs. Smith or in any way prevented Mrs. Smith from timely filing her motion for substitution. Essentially, the CALJ held that the Special Fund was estopped from asserting the issue solely because of the inaction of Wolf Creek in answering inquiries made by Mrs. Smith's attorney. I know of no authority that would allow estoppel to be transferred or imputed to the Special Fund in this regard. Mrs. Smith, who has not filed a brief in this Court, has not alleged the existence of any such authority.

I hope the Supreme Court will clarify the scope of its holding in Hammons and publish its decision in the case sub judice to give more guidance in this area of the law.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEES

Judith K. Bartholomew
Louisville, KY

