RENDERED: SEPTEMBER 29, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000108-WC

ROBERT L. WHITTAKER,
DIRECTOR OF THE SPECIAL FUND — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-88-27482

PAULINE VANMETRE (NOW REYNOLDS);
ANDERSON FOREST PRODUCTS;
J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: The Special Fund appeals from a December 13, 1999, order of the Workers' Compensation Board upholding a ruling by an Administrative Law Judge (ALJ) that the Fund is liable to the appellee Anderson Forest Products pursuant to a settlement agreement. The Fund maintains that the ALJ abused his discretion by approving what had become a stale and unfair agreement and that the Board erred by failing to correct the ALJ. For reasons somewhat different from those advanced by the Board, we agree

with it that the Fund was properly held liable. Accordingly, we affirm.

The pertinent facts are not in dispute. Anderson's employee, Timothy VanMetre, suffered a work-related death in 1988. The responsibility for the benefits awarded to his widow, appellee Pauline VanMetre (now Reynolds), were apportioned equally and sequentially between Anderson and the Fund. The award also provided that, in the event of Pauline's remarriage, periodic benefit payments would cease, but Pauline would be entitled to a final lump sum indemnity of approximately $17,000.00, half paid by Anderson and half by the Fund. The Fund objected to this last provision. It maintained that liability for the entire lump sum should reside with the party whose liability for periodic payments was current at the time of the remarriage.

Pauline remarried in 1995, at which time, the Fund asserts, this issue became ripe for decision. Anderson was then the party liable for periodic payments, and the Fund sought to reopen the award on the ground that Anderson should bear full liability for the lump sum. Aware that final resolution of this question could take years, Anderson, in early September 1995, offered to pay Pauline immediately the entire lump sum due her in exchange for the Fund's promise to reimburse Anderson half of that amount should the dispute ultimately be decided in Anderson's favor. This agreement was memorialized in a letter and was executed by the Fund on September 11, 1995. To reflect its understanding that the agreement was governed by KRS 342.265

(which provides for settlement agreements among the parties to a claim for benefits), the Fund added to the agreement the phrase "to the extent the ALJ will approve the same."

Anderson promptly paid Pauline the full lump sum as agreed, but neglected to submit the written agreement to an ALJ for approval. Meanwhile, the Fund's quest to reopen Pauline's award failed, first before the ALJ and then at each level of appeal, all the way to our Supreme Court, whose denial of the Fund's petition became final on March 21, 1998. By that time the Fund had forgotten its agreement with Anderson. Consequently, instead of repaying Anderson as it was obliged to do under the agreement, the Fund paid directly to Pauline its share of her lump-sum award. Anderson's demand a few months later for reimbursement no doubt came as an unpleasant reminder. Pauline refused, apparently, to return the money mistakenly overpaid to her, but rather than pursue the matter against Pauline, the Fund denied Anderson's demand for reimbursement on the ground that Anderson's failure to have the agreement approved rendered it unenforceable. Anderson thereupon petitioned an arbitrator for an order "compelling" reimbursement, which the arbitrator granted. That order was adopted by an ALJ on *de novo* review, and affirmed, as noted above, by the Board. The Fund now appeals from the Board's order affirming the ALJ.

We may observe at the outset that our standard for reviewing Board decisions

> is to correct the Board only where [we] perceive[] the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing

> the evidence so flagrant as to cause gross injustice.

Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). With this standard in mind, we turn to the substance of the Fund's appeal, which concerns the application of KRS 342.265.

That statute, which recognizes and regulates the voluntary settlement of workers' compensation claims, was first enacted in 1952. In 1998, at the time Anderson sought approval of its agreement with the Fund, the statute provided in pertinent part as follows:

> If the employee and employer and special fund or any of them reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement signed by the parties or their representatives shall be filed with the commissioner, and, if approved by an arbitrator or administrative law judge, shall be enforceable pursuant to KRS 342.305.[1]

The parties do not dispute that their agreement--which was one between an employer and the special fund in regard to compensation--is governed by this statute, but they disagree as to whether the statute was properly applied. In arguing that it was not, the Fund contends that Anderson's delay in seeking approval of the agreement has made the granting of that approval inappropriate. For the following reasons, we disagree.

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[1]Between 1995, when the parties entered their agreement, and 1998, when Anderson sought approval for it, KRS 342.265 was amended to provide for approval by an arbitrator as well as by an ALJ. In other respects the earlier version of the statute was the same as that quoted. We agree with the Board (and the parties concede) that the amendment was purely procedural and was therefore properly applied to the parties' 1995 agreement. Miracle v. Riggs, Ky. App., 918 S.W.2d 745 (1996).

Not surprisingly given the unusual facts in this case, precedent sheds little light on the question before us. The Board referred to Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (1968), and Carter v. Taylor, Ky. App., 790 S.W.2d 448 (1990), for the propositions that settlement agreements need not be memorialized on official commission forms, but must nevertheless be evidenced by a writing. The Board concluded that the letter from Anderson that was executed by the Fund satisfied this requirement, and the parties do not dispute that their agreement was thus evidenced. On the question of the effect of Anderson's delay in seeking approval of the agreement, however, Kentucky precedent seems to be silent. Foreign precedent, too, is sparse. At least one court has held, however, that, while a workers' compensation claimant retains a right to withdraw from a settlement agreement until the agreement has been approved, the same right does not extend to employers or insurers. *See* Oceanic Butler, Inc. v. Nordahl, 842 F. 2d 773 (5th Cir. 1988) (construing the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 908 (1984)). The same rule against withdrawal would apply to the Special Fund. For these latter parties, at least, a settlement agreement is binding when entered, but the obligation to perform is conditioned upon administrative approval. *Id.* If approval is denied, the duty to perform under the agreement is discharged. *Restatement (Second) of Contracts* § 225 (1981).

Thus, when the Fund received Anderson's demand for reimbursement in 1998, after it had mistakenly paid to Pauline benefits she had already received from Anderson, the agreement

had not yet been approved, and the Fund's duty to perform thereunder had not yet arisen. At that point, the Fund's refusal to perform was not wrongful. To this extent we agree with the Fund. The Fund's refusal prompted Anderson's motion to "compel," which was properly understood by the Board as a motion to approve the agreement and thus to satisfy the condition precedent to the Fund's duty.[2] The question raised by the Fund is whether, at that point--three-plus years after the agreement had been entered and months after the Fund's liability to Pauline had become final and had been satisfied--approval was still appropriate. We agree with the Board that it was.

First, as Anderson observes, KRS 342.265 does not limit the time within which approval for a settlement agreement must be sought. Nor is there such a limit in the agreement itself, notwithstanding the Fund's addendum to the writing emphasizing the necessity of administrative approval. Furthermore, although in certain circumstances a court (or administrative tribunal) may supply a contract term omitted by the parties, *see The Restatement (Second) of Contracts* § 204 (1981), we are not persuaded that an "approval-must-be-sought-within-a-reasonable-

[2]Anderson's initial pleading sought enforcement of the as yet unapproved agreement, and the Fund makes much of the fact that the administrative body lacks authority to grant such relief. *See* KRS 342.305. The arbitrator further confused matters by asserting that he was approving the agreement *nunc pro tunc.* There having been no prior approval or attempted approval that the arbitrator could belatedly recognize, his approval of the agreement was not *nunc pro tunc,* but was simply an exercise of his responsibility under KRS 342.265 to approve or disapprove the agreement in the first instance. This error, however, was harmless. Harmless, too, was Anderson's characterization of its motion, inasmuch as the relief actually granted--approval of a settlement agreement--was within the arbitrator's authority, and the pleading, upon proper objection, could have been amended accordingly.

time" term could have been supplied here even if the Fund had so argued because it is not clear that such a term is necessary to the agreement nor is it clear what "a reasonable time" would have been. By the terms of the statute, therefore, and of the agreement, Anderson's motion for administrative approval was timely.

The thrust of the Fund's argument, however, is not that approval of the agreement was strictly illegal, contrary to the letter of the statute or of the contract, but that it was inequitable. Conceding that it had agreed to reimburse Anderson as Anderson claims, the Fund nevertheless contends that, within the larger picture of workers' compensation administration, Anderson's failure promptly to submit the agreement for approval was a more significant cause of its injury and a less excusable departure from bureaucratic cooperation than was the Fund's forgetting that Anderson was to be paid rather than Pauline. In essence, the Fund seems to us to be urging an estoppel: it relied to its detriment on Anderson's silence or inaction with respect to the agreement, with the result that Anderson's assertion of its agreement-based rights has now become inequitable. In as much as we agree with the Fund that Anderson's failure to submit the agreement promptly for approval was remiss, we find more merit in this argument than the Board apparently did. Nevertheless, we can not say that the Board abused its discretion by affirming the decisions of the ALJ and the arbitrator. It is well established that one asserting an estoppel must have *reasonably* relied on the action or inaction of the party to be

estopped, Gailor v. Alsabi, Ky., 990 S.W.2d 597 (1999), but the facts here do not compel a finding that the Fund's alleged reliance was reasonable. On the contrary, the Board was well within its discretion by affirming a finding that the Fund could and should have remembered its agreement (despite Anderson's inaction) and made inquiry before paying Pauline. An estoppel, therefore, was not required to be found.

Finally, the Fund maintains that only matters cognizable under KRS 342.125, the reopening statute, may be litigated after an award has become final and that Anderson's claim for reimbursement does not justify a reopening. We agree with the Board, however, that settlement agreements, which are subject to their own reopening provision, KRS 342.265(4), are cognizable at any time during the course of an award, and that where, as here, a post-finality agreement does not affect the claimant and has not previously been filed and approved, it may be addressed directly under KRS 342.265 without resort to a reopening.

In sum, Anderson's failure to seek prompt approval of its agreement with the Fund was careless at best and unco-operative, contributing to rather than alleviating the administrative burden of Kentucky's Workers' Compensation system.[3] It did not, however, violate KRS 342.265; breach the

[3]Anderson, of course, discounts the role of its own fault in bringing about this mistake. Insisting that a bargain is a bargain and that the Fund has unreasonably refused to honor its bargain, Anderson has requested, without motion, sanctions against the Fund and an award of interest on the Fund's liability. For the reasons mentioned in the text, however, we are not persuaded that the Fund's position is unreasonable or indicative of bad faith. The Fund must

(continued...)

parties' agreement; or give rise, as a matter of law, to an equitable default. The Board did not err, therefore, or abuse its discretion by upholding the ALJ's order approving the agreement and rendering it enforceable against the Fund. Accordingly, we affirm the December 13, 1999, order of the Workers' Compensation Board.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

David R. Allen
Special Fund
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE ANDERSON FOREST PRODUCTS:

James G. Fogle
Ferreri & Fogle
Louisville, Kentucky

[3](...continued)
closely observe the statutes and regulations governing the workers' compensation system. Its efficient operation requires that those with whom it deals do the same. For example, the approval of settlement agreements by arbitrators and ALJs serves, among its other functions, to create the records upon which the Fund depends. It is not unreasonable for the Fund to assert its need for co-operation in such matters even if in this instance that need does not give rise to a right to relief. Accordingly, Anderson's request for sanctions is denied. Anderson's request for interest is also denied. Its right to interest was not raised before the Board and so is not properly before this Court.