

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000673-WC

ROBERT L. WHITTAKER,
Director of SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-01865

GARY DAVID DOTSON (Deceased);
ELIZABETH ANN DOTSON (widow);
DONALD G. SMITH, Administrative Law
Judge; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, Chief Judge; COMBS and McANULTY, Judges.

COMBS, JUDGE: This is an appeal from the opinion of the Workers' Compensation Board (the Board) which affirmed the decision of the Administrative Law Judge (ALJ) awarding Elizabeth Ann Dotson (Elizabeth) benefits based upon the work-related death of her husband, Gary David Dotson (Gary). The Special Fund challenges the ALJ's apportionment of liability between itself and McCoy Elkhorn Coal Corporation (McCoy Elkhorn), Gary's employer. We have reviewed the record and have found no error.

On December 6, 1996, Gary suffered a fatal heart at work. At the time of his death, he was employed by McCoy Elkhorn Coal Corporation (McCoy Elkhorn) as a mine foreman and had worked in the coal mining industry for approximately thirty-three years. As Gary's widow and only dependent, Elizabeth filed two separate claims for workers' compensation benefits on December 3, 1998. Specifically, she filed an Application for Resolution of Occupational Disease Claim (the occupational disease claim) and an Application for Resolution of Injury Claim (the injury claim). In the occupational disease claim, Elizabeth alleged that Gary's death was caused by the coal workers' pneumoconiosis, an occupational disease. She asserted in the injury claim that Gary's death was a work-related injury.

In March 1999, Elizabeth settled her claims with McCoy Elkhorn but reserved the right to proceed against the Special Fund. Subsequently, Elizabeth's two claims were consolidated and assigned to an Arbitrator, who transferred the case to an Administrative Law Judge (ALJ). The medical evidence before the ALJ consisted of testimony and medical reports from Dr. James A. Dennis and a medical report by Dr. J. Timothy Kohari. Dr. Dennis testified in his deposition that the probable of cause of Gary's death was cardiac arrhythmia. He further testified that Gary had severe coal workers' pneumoconiosis at the time of his death and that this disease was probably a significant contributing factor to Gary's death. Dr. Dennis concluded that the cardiac arrhythmia may have been aggravated or caused by Gary's underlying respiratory problems attributable to pneumoconiosis.

Dr. Dennis's testimony and report were based upon his review and examination of the report and slides prepared by the Chief Medical Examiner of the Commonwealth of Kentucky in conjunction with Gary's autopsy. The medical report by Dr. Kohari indicated that prior to his death, Gary had undergone spirometric testing and that he had been diagnosed with severe obstructive lung disease.¹

On August 18, 1999, the ALJ rendered his opinion awarding Elizabeth full benefits on her consolidated claims. Relying upon the testimony of Dr. Dennis, the ALJ found that while the cause of Gary's death was a heart attack, pneumoconiosis was a substantial factor in causing the heart attack. The ALJ also restated the stipulations upon which the parties had agreed at the pre-hearing conference: (1) that Gary had sustained multiple exposures to the hazard of occupational disease and (2) that his last exposure occurred during his employment with McCoy Elkhorn. The parties also agreed that any award under the occupational disease claim would be apportioned as follows: 75% to the Special Fund and 25% to the McCoy Elkhorn. However, any award as to the injury claim would be apportioned equally between the Special Fund and McCoy Elkhorn. The ALJ apportioned liability 50% to the Special Fund and 50% to McCoy Elkhorn without bifurcating the now consolidated claims.

_____ On September 8, 1999, upon Elizabeth's petition for reconsideration, the ALJ entered an order amending its original

¹The medical report by Dr. Kohari was not signed nor dated, a fact noted by the ALJ in his opinion.

opinion and award with respect to the manner in which it had apportioned liability between the Special Fund and McCoy Elkhorn. He stated that "since pneumoconiosis was a substantial contributing cause to [sic] death," liability should be apportioned 75% to the Special Fund and the remaining 25% to McCoy Elkhorn. Shortly thereafter, the ALJ entered a second order, again amending the original opinion on a ground not pertinent to this appeal.

The Special Fund appealed the ALJ's decision to the Workers' Compensation Board (the Board), challenging the apportionment of liability. On February 21, 2000, the Board entered its opinion affirming the ALJ's decision. The Board found that the ALJ's award was correctly based upon the conclusion that an occupational disease was a substantial factor in causing Gary's death and that, therefore, the Special Fund was properly held responsible for 75% pursuant to KRS 342.316.² This appeal followed.

The Special Fund argues on appeal that the ALJ erred in holding it liable for 75% of Elizabeth's award. It characterizes this case as a "heart attack claim" and maintains that KRS 342.1202 is controlling. Pursuant to this statute, awards in claims involving a pre-existing disease or pre-existing condition of the heart must be apportioned equally 50% to the Special Fund and 50% to the employer. The Special Fund also argues that

²KRS 342.316 was amended by the legislature effective December 12, 1996. However, Gary died before the effective date of the amendments and the version in effect at the time of his death is controlling. The ALJ properly applied the older version and it is that version to which we cite in this opinion.

Elizabeth stipulated that liability would be apportioned pursuant to KRS 342.1202. Since she had not been discharged from this stipulation, the Special Fund claims that the ALJ was bound by it and the he should have apportioned liability accordingly. We disagree.

In the case before us, the ALJ held that Gary's pneumoconiosis rather than a pre-existing condition triggered his heart attack. Thus, the compensability of Elizabeth's claim was based upon Gary's occupational disease – the causal and inextricable connection between his death and his work. Since Elizabeth's award was based upon an occupational disease, KRS 342.316 was controlling – not KRS 342.1202. KRS 342.316 directs that under the circumstances of this case, liability is to be automatically apportioned 75% to the Special Fund and 25% to the employer. If the ALJ had found that Gary's death was caused by a pre-existing condition (*i.e.*, pre-existing heart disease), then KRS 342.1202 would have been applicable. Instead, the ALJ concluded and resolved this matter to be an occupational disease claim.

Furthermore, the parties had agreed that liability for the occupational disease claim would be apportioned 75% to the Special Fund and 25% to the employer – per the mandate of KRS 342.316. The ALJ awarded Elizabeth benefits based upon Gary's occupational disease and apportioned liability as stipulated by the parties and as required by statute: 75% to the Special Fund for an occupational disease. We find no error.

Based upon the foregoing reasons, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE ELIZABETH
ANN DOTSON:

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