

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000809-WC

ROBERT L. WHITTAKER,
Director of SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-90-36354 & WC-95-48386

SILAS PATRICK (Deceased);
MAVIS PATRICK (Widow of Silas Patrick);
ESTATE OF SILAS PATRICK through
Administratrix, Sharon Smith, daughter);
MILLER BROTHERS CONSTRUCTION;
ROGER D. RIGGS, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

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

COMBS, JUDGE: Robert L. Whittaker, Director of Special Fund (Fund), asks us to review an opinion of the Workers' Compensation Board (Board) rendered March 3, 2000. Kentucky Revised Statutes (KRS) 342.290. We affirm.

This claim has been much litigated. In 1991, Silas Patrick was found to be entitled to an award of retraining incentive benefits. Contending that he could establish a

decrease in pulmonary capacity and that he was thus entitled to an award based upon his total disability, Patrick reopened his claim was reopened in May 1995. After a hearing on the reopening, a decision from the Administrative Law Judge, and an appeal to the Board, this court examined the claim in light of the Kentucky Supreme Court's holding in Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998). Following our analysis, we remanded for a finding of whether Patrick suffered from category two rather than category one pneumoconiosis. Silas Patrick died while the case was pending before the ALJ on remand.

The ALJ issued a final order, opinion, and award on September 24, 1999, and thereafter issued several orders on petitions for reconsideration. The ALJ's last order – rendered November 15, 1999 – found that Patrick's death was not work-related and that benefits were payable pursuant to KRS 342.732. He found that the tier-down provisions of KRS 342.730(4) were inapplicable since the original award was the result of a 1990 claim. He also ordered that all benefits were payable to Mavis Patrick, Silas Patrick's widow, who had been substituted as a party. The award of total benefits was ordered payable at the full rate from the time of the reopening on May 5, 1995, until the date of Patrick's death on February 9, 1999. Thereafter, the award was payable to the widow at 50% of the total award pursuant to KRS 342.730(3). The ALJ directed that Miller Brothers Construction, Patrick's employer, would pay the first 25% and that the Special Fund would pay the remaining 75% for both the full-rate award and the reduced-rate award to the widow. On

appeal, the Board affirmed in part, and reversed and remanded in part. The Fund seeks review.

The extent of Patrick's disability is not at issue on appeal. Instead, the Fund contends that the ALJ erred in his apportionment of liability between Patrick's motion to reopen and the date of his death. Relying on Williamson v. Island Creek Coal Co., Ky. App., 899 S.W.2d 499 (1995), the Fund contends that it should not be liable for any benefits accruing during the interval. It insists that these benefits were due and owing during the employer's payment period and, as a result, were the responsibility of Miller Brothers Construction alone. The Fund explains as follows:

[T]he decedent had a life expectancy of 910 weeks as of the date of the motion to reopen. The employer owed the first 25%, or 227, weeks of that 910-week period. In other words, the employer would have owed benefits to the decedent through approximately November 1999, and the Special Fund would have owed benefits thereafter if the decedent had lived to collect the same.

We do not agree that the ALJ was required to make the entire award payable by the employer – nor do we believe that the ALJ erred by requiring the Fund to make its payment of benefits before the employer had exhausted its liability to the payees. On the contrary, we believe that the ALJ correctly apportioned the benefits. Because Williamson is factually different from the case before us, we have found no error.

The Fund also asks us to clarify whether benefits payable for the period prior to Patrick's death are to be paid to his estate. We read the Board's opinion as indeed requiring

payment of these benefits to the estate. We find no error in this conclusion.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

David R. Allen
Frankfort, KY

BRIEF FOR APPELLEES PATRICK:

J. Drew Anderson
Prestonsburg, KY

BRIEF FOR APPELLEE MILLER
BROTHERS CONSTRUCTION COMPANY:

Monica J. Rice
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