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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000543-MR
AND
NO. 1999-CA-001080-MR

TERESA ESENBOCK; AND
STEVEN ESENBOCK, ADMINISTRATOR
OF THE ESTATE OF JUANITA ESENBOCK — APPELLANTS

v.

APPEALS FROM BOYD CIRCUIT COURT
HONORABLE C. HAGERMAN, JUDGE
ACTION NO. 98-CI-00531

COMMONWEALTH OF KENTUCKY,
BOARD OF CLAIMS,
HON. MICHAEL MULLINS, CHAIRMAN;
COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: This is an appeal by Teresa Esenbock and the estate of Juanita Esenbock from an Opinion and Order of the Boyd Circuit Court. The Opinion and Order affirmed a determination by the Kentucky Board of Claims (Board) as to the liability of the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (Transportation Cabinet) in an accident that claimed the

life of Juanita Esenbock, and caused multiple injuries to Teresa Esenbock.

On May 21, 1988, near Cannonsburg, Kentucky, Teresa Esenbock was attempting to make a left turn from the turn lane of US 60 onto Ky 180. Before the turn could be completed, Teresa Esenbock's vehicle was struck by a vehicle traveling in the opposite direction on US 60 driven by Joann Hardwick. Both drivers, Teresa Esenbock and Hardwick, had a green light, there being no left turn limiting signal at the intersection at the time of the accident. While Teresa Esenbock had a duty to yield the right of way to oncoming traffic, Hardwick was operating her vehicle at a speed in excess of the posted 55 mph speed limit. Shortly before the accident, Hardwick, who had a Georgia licence, had pled guilty to Driving Under the Influence and had been informed by the Greenup District Court that her licence would be revoked in accordance with Georgia law; however, due to clerical errors, the district court did not notify the Department of Transportation of Hardwick's DUI conviction, the Department of Transportation therefore did not notify Georgia of the conviction, and Hardwick's licence was apparently never officially suspended.

Expert testimony disclosed that there was a significant amount of open pavement at the intersection sufficient to create hesitancy and errors in driver decision making. Further, the road grade at the intersection added to the dangerous condition causing drivers to miscalculate their own vehicle's acceleration capabilities as well as the speeds of approaching vehicles.

Between January 1, 1983, and May 21, 1988, there had been eighteen left turn accidents and thirty total accidents involving two fatalities at the intersection. During the one year period ending April 16, 1987, there had been five left-turn accidents at the intersection. The accident resulted in multiple injuries to Teresa Esenbock, and also caused the death of her mother, passenger Juanita Esenbock. Serious injuries were also suffered by Joann Hardwick.

The appellants filed an action with the Kentucky Board of Claims seeking to fasten liability upon the Transportation Cabinet as the result of several matters, including an insufficient traffic light, excess open pavement in the intersection, and an improper grade at the intersection. On April 8, 1998, the Board entered its Findings of Fact, Conclusions of Law and Order determining that the Transportation Cabinet was 20% at fault in causing the accident, Teresa Esenbock was 20% at fault, and Joann Hardwick was 60% at fault.

In calculating the Transportation Cabinet's damage award liability to Teresa Esenbock and the estate of Juanita Esenbock, the Board applied, without regard to the actual damages suffered by the claimants, the Cabinet's 20% comparative fault to the $100,000.00 statutory prescribed in KRS 44.070(5). This calculation determined the Cabinet's comparative fault liability to be $20,000.00 to each claimant. The Board determined that Juanita Esenbock's estate had received $27,500.00 in collateral source payments, and deducted that amount from the Cabinet's comparative fault liability to arrive at a net damage liability

of zero. Teresa Esenbock's collateral source payments of $11,015.75 were likewise deducted from the Cabinet's comparative fault liability to produce a net award of $8,984.25.

The appellants filed a motion for reconsideration with the Board, which motion was denied on May 21, 1998. The appellants thereupon appealed the decision of the Board to the Boyd Circuit Court. On February 10, 1999, the trial court entered its Opinion and Order affirming the Board's decision. The appellants filed a motion for additional findings of fact and conclusions of law, which was denied by order entered March 24, 1999. This appeal followed.[1]

First, the appellants contend that the trial court erred in determining that the Board correctly applied comparative fault to the statutory cap. The appellants argue that in a comparative fault Board of Claims case, the defendant's comparative fault apportionment should be applied to the total damages proven by the claimant, and not the $100,000.00 statutory cap as set forth in KRS 44.070(5). We agree.

The issue of comparative negligence as it applies to the statutory cap in a Board of Claims case, was resolved by this court in Truman v. Kentucky Board of Claims, Ky. App., 726 S.W.2d 312 (1986). In Truman, Commodore Lewis Truman died as a result of injuries sustained in a roof fall at a coal mine owned by C & T Mining Co. in Floyd County, Kentucky. Truman's estate filed a claim with the Board, and the trial court determined that the

[1]On June 25, 1999, because the cases share common issues, these cases were ordered to be consolidated with Transportation v. Taylor, 1999-CA-000026-MR.

Department of Mines and Minerals, because of inadequate inspection practices, was 50% at fault in causing the accident. At the time, KRS 44.070(5) capped a Board of Claims recovery at $50,000.00. The parties stipulated that the lost earning capacity of Truman was in excess of $100,000.00. The trial court in Truman applied the 50% fault apportionment to the $50,000.00 cap, and awarded Truman's estate $25,000.00. Truman's estate appealed. We resolved the issue as follows:

> The sole issue on appeal is whether the appellant should recover one-half of the $50,000.00 limitation on awards as set forth in KRS 44.070(5) or whether she should recover one-half of the stipulated damages up to the $50,000.00 limitation on awards as stated above.
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> This issue, although being one of first impression in this Commonwealth, is fairly simple to resolve. The statute with which we are concerned in pertinent part states:
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> > Regardless of any provision of law to the contrary, the jurisdiction of the board is exclusive, and a single claim for the recovery of money or a single award of money should not exceed fifty thousand dollars ($50,000.00), exclusive of interest and costs.
>
> This language clearly deals with the limitation on the amount of money one can recover on a claim. There is no logical relationship between such limitation and damages which are proven by a party in a law suit. As the above noted stipulation stated, the decedent suffered damages in excess of $100,000.00 in lost earnings alone. Under that stipulation, appellant's damages award under the comparative negligence doctrine would be at least $50,000.00 or one-half of at least the damages stipulated of $100,000.00. The comparative negligence doctrine applies to damages rather than to limitation of recovery. Therefore, the trial court was in error in awarding the appellant one-half of the statutory limitation of

> $50,000.00. Rather her award should have been one-half of the damages stipulated but not to exceed $50,000.00, the statutory recovery limitation.

The present language of KRS 44.070(5), except insofar as it has been modified to increase the cap to $100,000, is unchanged since Truman was rendered. In light of Truman, the Board and the trial court were incorrect in applying the Transportation Cabinet's comparative fault apportionment, without regard to actual damages suffered by the claimants, to the $100,000.00 statutory cap. We therefore reverse the trial court insofar as it affirmed the Board's method for calculating the Transportation Cabinet's comparative fault liability, and remand to the Board for a determination of damages in accordance with Truman.

Next, the appellants contend that the trial court erred by not correcting the Board's overlooking of the stipulation that Teresa Esenbock's damages included lost wages of $285,570.00, and further erred by not correcting the Board's misstating of the criterion for determining damages as to Teresa's earning capacity.

The Board's April 8, 1998, Findings of Fact, Conclusions of Law, and Order does not include a finding of actual damages for either claimant. In light of our determination that the Transportation Cabinet's uncapped comparative fault liability must be based upon the application of its comparative fault apportionment to actual damages, we remand the issue of damages to the Board for a determination of each claimant's actual damages.

On remand, we remind the Board that the measure for damages of loss of future earnings is the reduction of earning power. Spurlock v. Spurlock, Ky., 349 S.W.2d 696 (1961).

> It is to be noted that the criterion is the reduction of earning power — not in earnings. This permits recovery of the fair equivalent in money for the impairment of capacity or lessening of ability to render service worth money as the proximate result of injuries sustained. As well said in Sutherland on Damages, § 1244, p. 4727:
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> > 'It seems plain that wrongful interference with any capacity or function of a human being should be compensated for, aside from any existing need for the exercise of such capacity or function. The vicissitudes of life may call upon any person to put forth every effort to serve himself or those who are dependent upon him. In many if not all cases of serious personal injury the public may have an interest, and its welfare may require that the injured person be compensated for the wrong done him, thus in a measure lessening the demand which may be made upon the public. Impaired ability to work is in itself an injury and deprivation of a substantial right of everybody, distinct from any loss of earnings it entails and the sufferer is entitled to compensation for it. It may be treated as part of the mental suffering resulting from the injury and as due to the consciousness of impaired power to care for one's self. In the nature of the case the sum which will compensate for such damage is not ascertainable by mathematical computation; it must be fixed by the jury with respect to the evidence and the probabilities, and should be sufficient to compensate therefor."

Spurlock at 699.

On remand, the Board should determine the appellants' loss of future earnings in accordance with Spurlock.

Regarding the stipulation issue, it is our understanding that the Board did not consider the stipulation because, under its formula for calculating the Transportation Department's comparative liability, actual damages in excess of $100,000.00 were assumed to be irrelevant. Because the Board was incorrect in this assumption, on remand, it should give proper consideration to all stipulations entered into by the parties.

Next, the appellants contend that the trial court erred by not correcting the Board's error in reducing the award to Juanita Esenbock by Teresa Esenbock's negligence. We disagree with the appellants' premise that Juanita's estate's award from the Transportation Cabinet was "reduced by the percentage of fault attributable to Teresa." The Board determined Hardwick to be 60% at fault, Teresa Esenbock to be 20% at fault, and the Transportation Cabinet to be 20% at fault. The proceedings before the Board of claims were, ultimately, only to consider the fault and liability of the Transportation Cabinet. Since this was a comparative negligence case, incidental to that, the comparative fault of Teresa was likewise determined. However, Juanita's estate's award was not "reduced" by Teresa's 20% fault. The Transportation Cabinet's comparative fault was 20% upon the initial apportionment of fault, and was in no way "reduced" to the detriment of Juanita's estate.

Next, the appellants contend that the reduction or credit for collateral source payments should be proportionate to

the degree of fault. Juanita Esenbock's estate and Teresa Esenbock received collateral source payments of $27,500.00 and $11,015.75, respectively. The Board and the trial court determined that the collateral source payments should be deducted after the Transportation Board's comparative fault liability damages have been calculated. The appellants contend that the collateral source deduction should be deducted from the total damages proven by a claimant, and only then should the defendant's comparative fault apportionment be applied. This issue was addressed in Commonwealth, Transportation Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W.2d 322 (1996).

In Roof, claimant Teresa Lynn Roof's vehicle crashed through a bridge guardrail and fell ten feet into a creek. As a result of the accident, Roof sustained personal injury damages in excess of $314,602.90. Roof filed a claim with the Board of Claims alleging negligence by the Transportation Cabinet. The Board determined that the negligence of the Transportation Cabinet was the predominant cause of the accident and awarded Roof the statutory maximum of $100,000.00. In the meantime, Roof had received $10,000.00 in basic reparation benefits in conjunction with the accident. As to the question of whether this amount should be offset against the $100,000.00 award, the Supreme Court stated as follows:

> As a first matter, we reiterate that the Commonwealth is under no obligation to make payment to injured parties because of the protections provided by the doctrine of sovereign immunity. KY. CONST. § 231. It is the province of the General Assembly to waive immunity, if at all, and only to the extent it sees fit. Currently, the maximum

award available in the Board of Claims is $100,000.00, regardless of actual loss.

Under KRS 44.070(1), the General Assembly provided that:

> [A]ny damage claim awarded shall be reduced by the amount of payments received or right to receive payment from workers' compensation insurance, social security programs, unemployment insurance programs, medical, disability or life insurance programs or other federal or state or private program designed to supplement income or pay claimant's expenses or damages incurred.

The clear language of the statute, "payments received ... from ... [a] private program designed to supplement income or pay claimant's expenses or damages incurred," encompasses basic reparation benefits. As such, we can reach no conclusion other than that the General Assembly has seen fit to reduce damages awarded by the Board of Claims by sums received from private insurance.

In Cooke v. Board of Claims, Ky. App., 743 S.W.2d 32 (1987), the Court of Appeals determined that a damage award of $19,255.10 was subject to reduction by $10,000.00, the amount received from benefits paid by a private insurer, the same reduction approved by the Board of Claims, the Hardin Circuit Court, and the Court of Appeals in this case. Roof claims that Cooke may be distinguished in that the injuries sustained there were fully compensated. It is alleged that as Roof suffered in excess of $314,602.90 in economic losses, there is no possibility she would be unjustly enriched. Thus, she reasons, any reduction in the $100,000 award is unnecessary. While such an argument appeals to our sense of equity, we must nonetheless affirm the Court of Appeals. The intent of the General Assembly is evident from the language of the statutes it enacted, and it is within its prerogative to impose such limitations and reductions as it sees fit. See KY. CONST. § 231; cf. Central Ky. Drying Co. v. Commonwealth, Ky., 858 S.W.2d 165, 168 (199[3])(holding that KRS 44.070(1)

> does not require set-off for payments received from a settling joint tortfeasor). The question presented is exclusively one of statutory construction and the language is clear. We are bound by the chosen words of the General Assembly.
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> We are also urged to determine that "award" means the Board of Claims' finding as to damages, here in excess of $314,602.90. Thus, if the $10,000.00 no-fault benefit is subtracted from the amount found, Roof's award of $100,000.00 would suffer no reduction. As stated herein above, we are constrained by the statutory language and conclude that only damages awarded by the Board of Claims were within the contemplation of the General Assembly without regard to total damages found. The reduction must be made from the award, not from the finding.

In this case it appears that, the Board and the trial court properly applied Roof; however, to summarize, on remand, for each claimant, the Board should first determine the total damages incurred. The Board should then apply the Transportation Cabinet's 20% comparative fault apportionment to the total damages determination. If the Cabinet's uncapped liability is determined to be greater that $100,000.00 for a claimant, the comparative fault liability of the Transportation Cabinet should be capped at $100,00.00 pursuant to KRS 44.070(5). Finally, the collateral source payments should be deducted to arrive at the final award.

Next, the appellants contend that the rules for applying the collateral source set off as set forth in Roof should be modified. However, Roof is a Supreme Court case. "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court[.]" Rules of the Supreme Court 1.030(8)(a). Therefore, if the

appellants wish to pursue a modification of Roof, they will have to do so in the Supreme Court.

Finally, the appellants contend that the Board's apportionment of fault to Hardwick is not supported by substantial evidence. We disagree.

We may not disturb the Board's findings if they are supported by substantial evidence. Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. Shadrick, Ky., 956 S.W.2d 898, 901 (1997). "If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." Transportation Cabinet v. Thurman, Ky. App., 897 S.W.2d 597, 599-600 (1995) (quoting Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970)). Substantial evidence is evidence which, when taken alone or in light of all of the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Id. "Although a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not deprive the agency's decision of support by substantial evidence." Id. "Simply put, 'the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.'" Id. (quoting Commonwealth of Kentucky, Transportation Cabinet, Department of Vehicle Regulation v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990)).

The evidence establishes that Hardwick was speeding and, further, was driving on a licence that was, or which she

knew should have been, suspended for a DUI conviction. Further, Teresa Esenbock turned in front of the Hardwick vehicle when she had a duty to yield. While the Transportation Department was determined to be negligent for maintaining an unsafe intersection, nevertheless, both drivers, at the time of the accident, were violating the highway traffic laws. We cannot say that the Board's apportionment of comparative fault was not supported by substantial evidence.

For the foregoing reasons, the judgment of the Boyd Circuit Court is affirmed in part, reversed in part, and remanded to the Board of Claims for additional proceedings consistent with this opinion.

ALL CONCUR.

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