

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000227-WC

RODNEY D. BELL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-01037

CONSOL OF KENTUCKY, INC.; HON.
R. SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

WINE, JUDGE: In this petition for review, Mary Bell appeals from an order by the Workers' Compensation Board (Board), affirming the administrative law judge's (ALJ) order substituting her as payee for the remaining benefits on an award to her deceased husband, Rodney D. Bell (Bell). But, since Mary Bell was

never substituted as a party to this action, we conclude that the ALJ lacked jurisdiction to address the merits of her motion. Consequently, the ALJ's order must be set aside and this matter remanded for entry of an order substituting Mary Bell as a party for further proceedings on the merits of her motion.

In 2006, Bell filed two applications for workers' compensation benefits based upon injuries while employed by Consol of Kentucky, Inc. (Consol). In File No. 06-01037, he sought benefits for occupational hearing loss as a result of exposure to loud noise. And in File No. 06-01304, he sought benefits based upon cumulative trauma to his spine, joints and limbs, and for a February 1, 2006, work injury to his left wrist. The applications were consolidated for a benefit review conference before the ALJ.

But prior to the conference, the parties reached a settlement of the claims. Under the settlement agreement, Bell would receive \$70.00 per week to be paid weekly for 425 weeks beginning February 1, 2006. In addition, the parties agreed to waive or buy out past medical benefits in the amount of \$125.00, waive or buy out future medical benefits in the amount of \$125.00, waive the rights to vocational rehabilitation for \$125.00, and waive the right to reopen for \$125.00. The parties further noted that the agreement was a compromised settlement of the disputed claims with no acceptance of liability by Consol. It was further noted that Consol had not paid medical expenses or temporary total disability benefits for the alleged injury or hearing loss. On April 17, 2007, the ALJ entered an order approving and adopting the settlement agreement.

On July 19, 2007, a motion to change the payee of the settlement agreement was filed, ostensibly by Bell. However, the motion stated that Bell was killed in a motorcycle accident on July 4, 2007, and requested that the full amount of any remaining settlement payments be made to Bell's widow, Mary Bell. After considering Consol's response, the ALJ granted the motion to change the payee, but held that benefits are to be paid to the widow at 50% of the rate specified in the settlement agreement pursuant to KRS 342.730(3).

Thereafter, a timely petition for reconsideration was filed, arguing that the statutory reduction of remaining benefits to the widow is inapplicable because the benefits were awarded pursuant to a settlement agreement. The ALJ denied the petition for reconsideration, concluding that a settlement agreement becomes an award upon adoption by the ALJ. Consequently, the ALJ determined that KRS 342.730(3) requires that the remaining benefits be paid to the widow at 50% of the specified rate, whether made pursuant to a settlement agreement or an award following a hearing on contested issues.

On appeal, a majority of the Board affirmed. A majority of the Board also found that the application of KRS 342.730(3) does not violate public policy because the parties could have negotiated a provision for payment of benefits to Bell's widow. In a dissenting opinion, Member Stivers agreed with the majority's analysis, but expressed concern that neither Bell's estate nor Mary Bell had been substituted as a party to this action. While no party had raised the issue, Member Stivers concluded that the ALJ and the Board lacked jurisdiction to consider the

motion until such a substitution of parties is made. Consequently, Member Stivers would remand this matter to the ALJ directing him to enter an order substituting Mary Bell as the real party in interest in place of Rodney Bell, and thereafter direct the ALJ to reissue his decision. This petition for review followed.

As an initial matter, we agree with dissenting Member Stivers that the ALJ lacked jurisdiction to address the merits of the motion. In the absence of a specific provision within Chapter 342 regarding the revival of workers' compensation actions after the injured worker's death, the general law regarding the abatement, survival, and revival of actions applies to workers' compensation cases. *Hammons v. Tremco, Inc.*, 887 S.W.2d 336, 338 (Ky. 1994). Unlike in *Hammons*, this case does not involve an action which is pending at the time of the plaintiff's death. Rather, it concerns compliance with the provisions of a final workers' compensation award with regard to surviving dependents. Consequently, the rules concerning the survival of a pending cause of action do not apply to this case. *Whittaker v. Smith*, 998 S.W.2d 476, 478 (Ky. 1999).

Nevertheless, the rules requiring substitution of the real party in interest remain in effect under these circumstances. *See Whittaker v. Brock*, 80 S.W.3d 428 (Ky. 2002). Furthermore, 803 KAR 25:010(10) provides that a party seeking continuation benefits may be substituted for a deceased claimant by filing a Form 11. Since Mary Bell did not move to be substituted as a party, there was no proper motion before the ALJ for her to receive continuation benefits.

Therefore, we agree with Member Stivers that this matter must be remanded to substitute Mary Bell as a party to the action.

Accordingly, the January 3, 2008, opinion of the Workers' Compensation Board is reversed, and this matter is remanded to the ALJ with directions to enter an order substituting Mary Bell as the real party in interest in place of Rodney Bell, and thereafter to reissue his decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth C. Smith, III
Catlettsburg, Kentucky

BRIEF FOR APPELLEE, CONSOL
OF KENTUCKY, INC.:

A. Stuart Bennett
Lexington, Kentucky