

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002539-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 06-CI-00002

CRYSTAL MCFARLAND CALDWELL,
ADMINISTRATRIX OF THE ESTATE OF
BERTHA ROSEANN WILSON; AND
KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION AND ORDER
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES,¹ SENIOR
JUDGE.

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

GRAVES, SENIOR JUDGE: The sole question presented is whether the failure to file exceptions to the recommended order of a hearing officer of the Kentucky Board of Claims failed to preserve any issues for further appellate review. We affirm.

Bertha Roseann Wilson was struck and killed by an automobile while she was walking her dog alongside a roadway at night. Crystal McFarland Caldwell, as administratrix of Wilson's estate, brought suit against the Transportation Cabinet for negligence in maintaining the shoulder of the roadway. The hearing officer of the Board of Claims made findings of fact and conclusions of law and recommended that the estate was entitled to damages in the amount of \$195,300. Neither party filed exceptions to the recommended order. The Board of Claims adopted the recommended order in its entirety. The Cabinet appealed to the Adair Circuit, which affirmed the Board on the basis that no exceptions were filed to the hearing officer's recommendations. This appeal followed.

As a preliminary matter, McFarland filed a motion to dismiss the Cabinet's appeal. The Cabinet filed a motion to consolidate and hold this appeal in abeyance. We deny both motions.

The Cabinet argues that the failure to file exceptions is not the jurisdictional threshold for an appeal.

The failure to file exceptions presents an issue of preservation rather than jurisdiction. *Rapier v. Philpot*, 130 S.W.3d 560, 563 (Ky. 2004). "Under Chapter 13B, the filing of exceptions provides the means for preserving and

identifying issues for review by the agency head. In turn, filing exceptions is necessary to preserve issues for further judicial review.” *Id.* The proceedings of the Board of Claims are exempted from the requirements of KRS Chapter 13B.

KRS 13B.020(3)(d)(5)(a). KRS 44.140 sets forth the procedure for appeals from awards of the Board of Claims by a state agency. KRS 44.140 states:

(1) Appeals may be taken by a state agency from all awards of the board where the amount in controversy, exclusive of interest and costs, is more than one thousand dollars (\$1,000). Appeals shall be taken to the Circuit Court of the county wherein the hearing was conducted, provided, however, that an appeal involving a nonresident claimant may be taken by a state agency to the Franklin Circuit Court with the approval of the board. No state agency can appeal any decision of the board without securing the prior approval of the Attorney General. Appeals shall be taken within forty-five (45) days from the rendition of the award, and the method of appeals shall follow as nearly as may be the rules of civil procedure, except the Commonwealth shall not be required to execute bond.

(2) Any claimant whose claim is one thousand dollars (\$1,000) or greater may within forty-five (45) days after receipt of the copy of the report containing the final decision of the board, file a proceeding in the Circuit Court of the county wherein the hearing was conducted to review the decision of the board. A copy of the filing and complaint shall be served on the Attorney General in the manner provided by the rules of civil procedure.

(3) The board, the state agency and the claimant shall be necessary parties to such appeals. It shall not be necessary for the board to file responsive pleadings unless it so desires.

(4) The executive director of the board shall within thirty (30) days after service of the summons file the entire original record properly bound, with the clerk of the

Circuit Court, after certifying that such record is the board's entire original record and such record shall be considered by the Circuit Court in its review. If either party requests a transcript of the evidence in writing, the requesting party shall bear the cost of the original copy of the transcript and it shall be furnished within ninety (90) days from the date of the written request.

(5) On appeal no new evidence may be introduced, except as to fraud or misconduct of some person engaged in the hearing before the board. The court sitting without a jury shall hear the cause upon the record before it, and dispose of the appeal in a summary manner, being limited to determining: Whether or not the board acted without or in excess of its powers; the award was procured by fraud; the award is not in conformity to the provisions of KRS 44.070 to 44.160; and whether the findings of fact support the award. The court shall enter its findings on the order book as a judgment of the court, and such judgment shall have the same effect and be enforceable as any other judgment of the court in civil causes.

While proceedings under KRS 44.140 are exempted from KRS Chapter 13B, under Kentucky law, the rule of preservation is generally applicable and “precludes judicial review of any part of the recommended order not excepted to *and* adopted in the final order.” *Philpot*, 130 S.W.3d at 564 (citing *United States v. Central Bank & Trust Co., Ky.*, 511 S.W.2d 212, 214 (1974)(italics in original)).

In the present case, the trial court did not dismiss the petition for lack of jurisdiction. The trial court affirmed the decision of the Board of Claims because the Cabinet did not file exceptions to the hearing officer's findings. It is undisputed that the neither party filed exceptions. Therefore, there was nothing for

the trial court to review. The trial court properly affirmed the decision of the Board of Claims.

For the foregoing reasons the order of the Adair Circuit Court is affirmed.

Additionally, the motion to dismiss the appeal is hereby DENIED. The motion to consolidate and hold the appeal in abeyance is hereby DENIED.

ALL CONCUR.

ENTERED: May 22, 2009

s/John W. Graves
SENIOR JUDGE, COURT OF APPEALS

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