

RENDERED: FEBRUARY 6, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001623-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00917

DENNIS BRADLEY, AS THE PUBLIC ADMINISTRATOR
FOR THE ESTATE OF CARMELO ANGEL ISIDORO MAYO
(DECEASED), A/K/A EDUARDO, ANGEL, A/K/A CARMEL
ANGEL ISIDORO-MAYO; BRUCE RECTOR, GUARDIAN/
CONSERVATOR FOR A MINOR CHILD, ALEXANDRIA DEL
CARMEN DORANTES MEJIA; GARRY WISE; HON. MARCEL
SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** * * * * *

BEFORE: MOORE, TAYLOR AND VANMETER, JUDGES.

MOORE, JUDGE: The Uninsured Employers' Fund (UEF) appeals from an opinion of the Workers' Compensation Board affirming an opinion and award of the Administrative Law Judge (ALJ). In the ALJ's opinion and award, the ALJ ordered the UEF to pay a lump-sum death benefit to Carmelo Angel Isidoro Mayo's estate and benefits to Mayo's survivor in the event Mayo's employer failed to pay. On appeal, the UEF argues that it was not required to pay interest on the death benefit and that the death benefit should have been reduced by 50 percent. After reviewing the UEF's arguments and the applicable law, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to Mayo's death on December 3, 2002, he had worked for the past five years as an undocumented laborer for Garry Wise, a contractor. Mayo died from asphyxiation because the trench in which he was working had not been reinforced and collapsed. Immediately after the accident, the Kentucky Office of Occupational Safety and Health investigated the circumstances surrounding Mayo's death and determined Wise had violated six different federal safety regulations.

Subsequent to Mayo's death, Dennis Bradley (hereinafter "administrator") was appointed as the public administrator of Mayo's estate. The administrator filed a workers' compensation claim seeking both death and survivor's benefits from Wise. An investigation into Mayo's background disclosed that he was survived by one minor child, Alexandria del Carmen Dorantes Mejia, a

citizen and resident of Mexico. Because Mejia was Mayo's surviving family member but was still a minor, Bruce Rector (hereinafter "conservator") was appointed as her guardian/conservator and was joined as a party to the workers' compensation claim. The UEF was joined as a party pursuant to Kentucky Revised Statutes (KRS) 342.760 because Wise had failed to purchase workers' compensation insurance and had failed to qualify as a self-insurer.

Before the claim proceeded to a final hearing, the parties made numerous stipulations. Among those stipulations, the parties agreed that Mejia was Mayo's biological daughter, entitling her to benefits, and that a safety violation had occurred, requiring any benefits to be enhanced by 30 percent pursuant to KRS 342.165. The only issues that remained for adjudication after the parties' stipulations were: (1) whether the UEF was responsible for paying for the 30 percent enhancement, (2) whether the UEF was responsible for paying interest on a lump-sum death benefit, and (3) the amount of Mayo's average weekly wage.

Pursuant to KRS 342.750(6), the ALJ ordered Wise to pay a lump-sum death benefit to the administrator of Mayo's estate. Due to KRS 342.165, the ALJ enhanced the death benefit by 30 percent and ordered Wise to pay interest, at the maximum legal rate, on the death benefit as well. In addition, the ALJ ordered Wise to pay \$104.00 per month in compensation to Mejia's conservator. The amount was enhanced by 30 percent due to KRS 342.165 but was cut in half pursuant to KRS 342.130 because Mejia was a non-resident, alien dependent.

Finally, the ALJ ordered,

[p]ursuant to KRS 342.760, the Defendant Uninsured Employer's Fund shall be responsible for payment of compensation herein, including [the] increase pursuant to KRS 342.165(1) and interest, when there has been a default on the payment of compensation due to the failure of the employer to secure payment as provided by the Act.

In response to the adverse judgment, the UEF ultimately filed an appeal with the Board. In the UEF's notice of appeal, it named the administrator of Mayo's estate and the ALJ. The UEF raised four issues: (1) there was no evidence introduced regarding Mayo's weekly wage; (2) the ALJ erred in not striking the deposition of Mejia's mother; (3) the ALJ erred in awarding interest on the lump-sum death benefit and, in the alternative, the ALJ should have reduced the death benefit by half pursuant to KRS 342.130; and (4) the ALJ erred when it applied the 30 percent enhancement to the compensation it awarded to the estate and to Mejia.

The UEF failed to name Wise and Mejia, who were indispensable parties, in its notice of appeal. The Board determined it could not resolve issues one, two, and four without Wise and Mejia and dismissed those assignments of error for lack of jurisdiction. Thus, the Board only addressed the UEF's third allegation, affirming the ALJ's decision regarding interest on the lump-sum death benefit.

After the Board's adverse decision, the UEF sought review from this Court.

II. STANDARD OF REVIEW

When reviewing the Board's decisions, we reverse only when the Board has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that its decision has resulted in a gross injustice. *Daniel v. Armco Steel Co.*, 913 S.W.2d 797, 798 (Ky. App. 1995).

III. ANALYSIS

In the UEF's petition for review, it names as appellees the administrator of Mayo's estate, the ALJ, and the Board. In addition, the UEF also names Garry Wise and Mejia's conservator, attempting to correct the mistake it made before the Board. Furthermore, in the UEF's brief, it raises three issues: (1) whether a safety violation is automatically intentional and whether the UEF is required to pay for a safety violation; (2) whether the UEF is required to pay interest on the lump-sum death benefit; and (3) whether, in the event that a death benefit qualifies as an income benefit, KRS 342.130 applies to the death benefit, reducing it by 50 percent.

The UEF, however, did not appeal the Board's dismissal of three of the UEF's four assertions of error. Consequently, despite the arguments set forth in the UEF's brief, the only issues properly before us are those previously addressed by the Board: (1) whether the UEF is responsible for paying the interest on the lump-sum death benefit; (2) whether sovereign immunity prohibits the UEF from paying for the interest on the death benefit; and (3) whether KRS 342.130 applies to that benefit.

Regarding the issue of interest on lump-sum death benefits, the Board, in its opinion, first cited *Realty Improvement Co. v. Raley*, 194 S.W.3d 818, 822 (Ky. 2006), which held that lump-sum death benefits authorized by KRS 342.750(6) are income benefits. Then, the Board noted that KRS 342.040(1) provides that all income benefits are subject to interest. Hence, the Board concluded, “[g]iven that the Supreme Court has defined the lump-sum death benefit authorized under KRS 342.750(6) as an income benefit, KRS 342.040(1) mandates that interest be paid on the amount of that installment when past due.”

On appeal, the UEF reiterates that it is not responsible for paying the interest awarded by the ALJ regarding the lump-sum death benefit. In addition, the UEF insists that *Realty Improvement*, 194 S.W.3d 818, on which the Board relies in determining that death benefits constitute income benefits, does not apply because that case did not address interest. Therefore, according to the UEF, death benefits are not income benefits and are not subject to interest under KRS 342.040(1).

Although the UEF insists *Realty Improvement* does not apply to the present case because the Supreme Court did not address the issue of interest, that fact does not lessen the impact of the high Court’s reasoning in that case.

According to the Supreme Court,

[t]he lump sum authorized by KRS 342.750(6) is paid “in addition to other benefits,” indicating that it, too, is a benefit. Although KRS 342.750(6) directs payment of the benefit to the deceased worker’s estate, it is a subsection of KRS 342.750, which expressly authorizes “income benefits” that are payable to specified “persons” when an injury results in death. This implies that a

deceased worker's estate is a "person" for the purposes of the statute and also that benefits authorized under subsection (6), like those under subsection (1), are income benefits.

Realty Improvement, 194 S.W.3d at 822. Thus, the Court determined that lump-sum death benefits are income benefits. As such, death benefits are subject to interest according to KRS 342.040(1). Consequently, we affirm the Board's reasoning to this extent.

Regarding the issue of whether sovereign immunity prohibits the UEF from paying interest on the death benefit, the Board began its analysis by noting that the UEF is required to pay compensation when an employer has failed to pay an award due to lack of insurance or failure to qualify as a self-insurer.

Furthermore, citing KRS 342.790(3), the Board noted that the Attorney General is authorized to file suit on the UEF's behalf against a defaulting employer and:

[i]n that action, it shall be sufficient for plaintiff to set forth a copy of the award of the administrative law judge relative to the claim as certified by the executive director and to state that there is due to plaintiff on account of the opinion, order, or award of the administrative law judge a specified sum which plaintiff claims with interest.

The Board determined, pursuant to KRS 342.790(3), the UEF is obligated to seek reimbursement from a defaulting employer for the amount of the ALJ's award

"with interest." According to the Board,

[w]e interpret the use of the phrase "with interest" as included in KRS 342.790(3) to be that interest which has accrued in accordance with KRS 342.040(1) "at the rate of twelve percent (12%) per annum on each installment" from the time income benefits are due until paid. By our

reckoning, if the UEF is statutorily compelled to seek recompense from a defaulting employer for all amounts of compensation due and payable to an injured employee including interest under KRS 342.040(1), then, as a matter of law, the UEF is equally accountable for payment of any interest due that injured employee from the outset of its liability.

Based on this reasoning, the Board held that sovereign immunity did not prohibit the UEF from paying interest on the lump-sum death benefit.

In the UEF's brief, it cites *Powell v. Bd. of Educ. of Harrodsburg*, 829 S.W.2d 940, 941 (Ky. App. 1991), and *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 140 (Ky. 2003), for the proposition that the Commonwealth and its agencies are exempt from paying interest on public debts due to sovereign immunity unless interest is specifically authorized by statute or contract. In addition, the UEF challenges the Board's interpretation of KRS 342.790(3). The UEF contends that the statute refers to the UEF as the plaintiff in a civil suit and claims the phrase, "with interest," does not refer to the interest that accrues on income benefits pursuant to KRS 342.040.

Of course, the question of whether the UEF is liable to pay the interest on the lump-sum death benefit is an issue of sovereign immunity as it is an agency of the Commonwealth. Furthermore,

[i]t is a well-settled principle that neither a state nor public agency is liable for interest on public debts unless there is statutory authority or a contractual provision authorizing the payment of interest. *Commonwealth, Dept. of Transportation v. Lamb*, Ky., 549 S.W.2d 504, 507 (1976), (citing *Bankers Bond Co. v. Buckingham*,

Commonwealth Treasurer, 265 Ky. 712, 718, 97 S.W.2d 596 (1936)). . . .

Merely because a state agency has waived its sovereign immunity for purpose of suit, it does not necessarily follow that the agency has also waived its immunity from liability for payment of interest in such suit. . . . Since a state can be sued only with its consent, a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified. *See generally Brown v. State Highway Commission*, 206 Kan. 49, 476 P.2d 233, 234 (1970); Annot., 24 ALR 2d 928 (1952).

Powell, 829 S.W.2d at 941.

To circumvent the doctrine of sovereign immunity, the Board determined that KRS 342.790(3) requires the UEF to seek reimbursement from a defaulting employer through a separate civil action and interpreted the phrase “with interest” found in that statute to refer to the interest which accrues on an income benefit due to KRS 342.040(1). The Board reasons that if the UEF is required to seek the interest which is applicable pursuant to KRS 342.040(1), then the UEF must be obligated to pay such interest in the first place.

While the Board’s analysis of this issue is logical, and its interpretation of KRS 342.790(3) is not unreasonable, its reasoning collides with one of the basic tenets of the doctrine of sovereign immunity. As this Court stated in *Powell*, “a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so **specified**.” 829 S.W.2d at 941 (emphasis added). Kentucky Revised Statute 342.790(3) does not specifically waive the UEF’s immunity and does not specifically require it to pay the interest

that has accrued on an income benefit per KRS 342.040(1). The fact that the Board had to engage in an extended analysis to reach such a conclusion simply reinforces that KRS 342.790(3) does not specifically waive the UEF's immunity from paying interest. Consequently, the Board erred in its interpretation of KRS 342.790(3) and erred when it held that the UEF was required to pay the interest that has accrued on the lump-sum death benefit in this case.

Regarding the application of KRS 342.130 to the death benefit, the Board acknowledged that the statute acts to reduce by half any compensation awarded to "alien dependent widows, widowers and children, not residents of the United States[.]" However, the Board pointed out that Mayo had resided in Lexington, Kentucky, for at least five years, the administrator of Mayo's estate resided in Lexington, and that Mayo's estate was probated in Kentucky.

Hence, because the death benefit is to be paid directly to the estate and since the estate does not exist in a foreign jurisdiction nor qualify as an alien dependent, i.e., widow, widower or child, KRS 342.130 has no application or effect in connection with that aspect of the award.

On appeal, the UEF relies on the basic facts found in *Maryland Casualty Co. v. Chamos*, 203 Ky. 820, 263 S.W. 370 (1924). In *Chamos*, Chamos was a citizen of Hungary who was killed while working in a coal mine in the Commonwealth. Chamos's wife and children filed a workers' compensation claim; however, they were citizens and residents of Hungary. Because Chamos's dependents were non-resident aliens, the compensation awarded to them was

reduced by half. Based on the factual similarities between *Chamos* and the present case, the UEF argues that Mejia, as the beneficiary of Mayo's estate, is a non-resident alien. Accordingly, if the Board is correct that death benefits are income benefits, then the death benefit in this case must be reduced by half pursuant to KRS 342.130.

While there are certainly similarities between the facts in *Chamos* and the facts in the present case, there is, however, one glaring difference. In *Chamos*, the compensation was awarded directly to Chamos's dependents who were non-resident aliens, but, in the present case, the lump-sum benefit was awarded to Mayo's estate in accord with KRS 342.750(6),¹ not to his dependent Mejia. As the Board pointed out in its opinion, Mayo resided in Lexington, Kentucky; the administrator of his estate resided in Lexington; and the estate was probated in Lexington. Furthermore, while the estate qualified as a person per the holding in *Realty Improvement*, 194 S.W.3d at 822, it could not qualify as a non-resident alien dependent. Consequently, KRS 342.130 would not apply to the death benefit awarded to Mayo's estate.

For the foregoing reasons, that part of the Workers' Compensation Board's opinion which affirmed the ALJ's opinion and award regarding interest on

¹ The pertinent part of that statute reads:

In addition to other benefits as provided by this chapter, if death occurs within four (4) years of the date of injury as a direct result of a work-related injury, a lump-sum payment of fifty thousand dollars (\$50,000) shall be made to the deceased's estate, from which the cost of burial and cost of transportation of the body to the employee's place of residence shall be paid.

the lump-sum death benefit and that part of the ALJ's opinion and award are reversed. The remainder of the Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. D. Batson
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE,
DENNIS BRADLEY:

Mark J. Hinkel
Lexington, Kentucky