

COMMONWEALTH OF KENTUCKY
OFFICE OF WORKERS' CLAIMS
CASE NO: 06-01247
BEFORE: JOHN B. COLEMAN, ALJ

FILED

WB: _____
DOC. TYPE: Board
CLAIM NO: _____

2007 SEP 10 A 8:50

STEPHEN C BAYTOS

PLAINTIFF

DEPT. OF WORKERS' CLAIMS
DATA ENTRY SECTION

VS

OPINION AND AWARD

FAMILY DOLLAR INC

DEFENDANT

Hon. Carl E Grayson
130 Dudley Rd Ste 250
Edgewood, KY 41017

Hon. Kimberly D Newman
P O Box 34048
Lexington, KY 40588

INTRODUCTION

The plaintiff, Stephen Baytos, filed this claim against the defendant-employer, Family Dollar, Inc., on September 29, 2006 alleging he sustained multiple injuries while lifting heavy boxes during the course and scope of his employment with the defendant-employer on February 9, 2006. A benefit review conference was held on June 18, 2007 followed by a final hearing on July 19, 2007. The Administrative Law Judge has reviewed all of the evidence of record and the matter is now ripe for decision.

CONTESTED ISSUES

1. Occurrence of a work injury as defined by the Act?
2. Causation and work relatedness?

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3. Appropriate temporary total disability and medical expenses?
4. Extent and duration of disability?

SUMMARY OF EVIDENCE

1. Prior to going on the record at the final hearing, the parties agreed to coverage under the Act and that an employment relationship existed at all relevant times. They agreed to an alleged work related injury on February 9, 2006 of which the defendant-employer had due and timely notice. No temporary total disability or medical benefits were paid as a result of the alleged injury. The plaintiff earned an average weekly wage of \$700.00 at the time of the injury, but the plaintiff has not returned to work. His date of birth is May 18, 1949 and he has fourteen years of education with no specialized or vocational training.

2. The plaintiff, Stephen Baytos, was born May 18, 1949 and is now age 57. He has a high school education as well as two years of college courses and vocational training in a carpentry apprentice program. The biggest part of the plaintiff's adult work career has been spent in the construction industry, either as an owner or as project superintendent or manager for other companies. He indicated that a great deal of his work in the construction industry was spent in a supervisory role where he was primarily responsible for overseeing the projects and completing the necessary paperwork. He began working for the defendant-employer in November 2005 as a store manager. He indicated that he was a salaried employee and worked between 60 and 70 hours per week. He indicated that his work involved scheduling, stocking, unloading trucks, making bank deposits, and operating the cash register. He further indicated that he worked with one other employee during his shifts at the store and that

he was primarily responsible for the stocking and unloading the trucks as he was the only male employee in the store. He indicated the boxes of stock would weigh anywhere for a few pounds to 70 or 80 pounds.

3. On February 9, 2006, the plaintiff was working in the stock room lifting boxes of linoleum tiles weighing between 40 and 50 pounds each. He estimated that he had lifted about 24 boxes when he felt pain in his chest at about 8:15 or 8:30 that morning. He testified that he initially thought he had pulled a muscle in his chest and that he went home to use a heating pad on his chest until the pain subsided. According to the plaintiff, his wife took him to the emergency room and he was diagnosed with a torn aorta that was subsequently repaired in surgery. He testified that he did not remember the drive to the hospital or anything that occurred after he left home until he woke up on February 14, 2006. He did not know who gave the doctors at the hospital the history, but denied that he experienced pain in his chest at 6:00 that morning or that he had taken Nitroglycerin that day. He also disagreed with the report of Dr. Judith Mickelson indicating that his pain began at 6:00 a.m. The plaintiff acknowledged that he had been treated for hypertension with medication and the placement of stints in either 2000 or 2001, but denied that he was having chest pain at that time. He further denied that he had any chest pain whatsoever until he was lifting the boxes on February 9, 2006. He also acknowledged that he was a heavy smoker since the age of 16 smoking between a pack and a pack and a half of cigarettes a day. However, he indicated that he stopped smoking for five years between 2000 and 2005, but then resumed smoking about half a pack of cigarettes per day after his son deployed to Iraq. He also testified that his father died of a stress related heart attack at the age of 69.

4. The plaintiff testified that he has experienced numbness in the fingertips of his left hand and hoarseness with difficulty talking since the surgery to repair his torn aorta.

He further testified that he continues to have shortness of breath when walking for long distances and dizziness when climbing stairs or getting up after a prolonged period of sitting. He testified that he leads a very sedentary lifestyle now and is very limited in his activities. The plaintiff indicated that he and his wife had moved to Florida to live with their son after they lost their home to foreclosure. He further indicated that he helps his wife care for their three grandsons, ages 14 months, 3 years and 6 years, but denied that he does any lifting of the children. He does not feel that he would be able to return to the work of store manager in his present physical condition.

5. Maime Baytos, the plaintiff's wife, also testified at the final hearing. She indicated that she was also employed by the defendant-employer, but had taken a leave of absence to move to Florida with their son because she lost her home and her son needed someone to help him with his children. She testified that her job as store manager for the defendant-employer required her to take care of employees, payroll, unload the stock and to make sure the stock was on the floor within 48 hours. Mrs. Baytos testified that she and the plaintiff had breakfast shortly after 6:00 a.m. on February 9, 2006 and that he was fine at the time he left work that morning. She further testified that she received a telephone call from her daughter who informed her the plaintiff had returned home indicating that he had pulled something in his chest. According to Mrs. Baytos, she went home and discovered the plaintiff was very pale and told her that his arm hurt when he lifted it. She testified the plaintiff was somewhat incoherent and asked her what day it was and things of that nature. She acknowledged that she provided the history to the intake people at the emergency room and indicated she informed them the plaintiff awoke at 6:00 that morning and was fine and the next thing she knew she received the phone call at work. She testified that once she discovered the error in the medical

history given at the emergency room, she contacted the hospital and was instructed to write a letter to show that she disputed same. However, she indicated that she was also informed the record could not be changed. She indicated the plaintiff was babbling at one point and then would be completely normal the next while he was in the emergency room. Mrs. Baytos testified the plaintiff's surgery changed their lives. She testified that her husband is not the same man as he can no longer do the things he did previously. She indicated that he could not even have a simple telephone conversation now and that he gets pale and tired when walking short distances such as to the end of their driveway. She did not feel the plaintiff would be capable of returning to work for the defendant-employer. A copy of the letter written to the hospital is attached to the hearing transcript as an exhibit. Also attached as exhibits are medical records of The Christ Hospital indicating a history of the plaintiff awaking with chest pain at 6:00 a.m. that lasted for four or five hours.

6. Melinda Keneavy testified by deposition on July 16, 2007. She is currently employed as a clerk at a Sunoco gas station in Erlanger, Kentucky. She testified that she has been so employed for five months, but she was employed by the defendant-employer as a cashier/stocker from just before Christmas in 2005 until she terminated in March 2006. She further testified that her job required her to unload the trucks and then move the boxes from the stockroom and put the merchandise onto the shelves. She indicated the plaintiff also performed that work and that he, in fact, trained her to do the work. She considered the work to be very physical as she had to repetitively lift, push and pull to put up the stock. She recalled that she and the plaintiff arrived at the store at 8:00 a.m. and he showed her how to put the code into the alarm system. She indicated that she proceeded to open her cash register while the plaintiff was moving boxes of linoleum tiles in the stock

room. She testified the plaintiff appeared to be fine when they were putting the code into the alarm system, but he told her that he needed to go home a little later in the morning. She further testified that she prepared a written statement of the events of that morning within a few days of its occurrence. On cross examination, Mrs. Keneavy explained that she prepared the statement on her own because no one was sent in to act as store manager and she knew that an injury report needed to be completed as the plaintiff had been hurt on the job. She indicated that she had no further contact with the plaintiff after he left to go home and she did not know if he had filed his own injury report. She testified that she was not lifting the boxes at the time the plaintiff's chest pain began as she was at the register, but indicated that her written statement was not incorrect she did lift the boxes that day as well. On redirect examination, Mrs. Keneavy explained that while she did not witness the plaintiff's injury, she did hear him say "Hold on. I think I pulled a muscle in my chest", as the cash register was only ten feet away from where the plaintiff was working. She was positive, in her own mind, the plaintiff injured himself at work.

7. Melinda Keneavy's written statement dated February 9, 2006 is attached to her deposition as an exhibit to her deposition. In that statement, she indicated that she and the plaintiff met at the store at 7:55 a.m. so that she could be trained in disarming the alarm. She indicated the plaintiff was fine at that time. She further indicated that after the alarm was disarmed, the plaintiff was working in the storeroom and she was counting out her cash register drawer. She indicated that at approximately 8:30 a.m., "We were lifting heavy boxes. Steve said 'Hold on. I think I pulled a muscle in my chest.'" She further indicated that she asked the plaintiff if he was okay and he told her that he was going home for a while.

8. In a letter dated May 31, 2006, Dr. Steven Park, a cardiothoracic surgeon, indicated that he had performed the

surgery to take care of the plaintiff's aortic dissection, but he did not evaluate him pre-operatively as he was in the operating room at the time the plaintiff presented at the hospital. He further indicated that he could not weigh in on the dispute in the recorded history of the events preceding the dissection as he was not present. However, based on the statement of Melinda Keneavy, he felt, more likely than not, the plaintiff's aortic dissection began after lifting at work. He noted that there is usually an underlying aortic media disease with aortic dissections, but there is usually an inciting event such as lifting or straining that acutely elevates the blood pressure resulting in initiation of dissection. He noted that it appeared the plaintiff's inciting event was more likely than not related to the heavy lifting performed at the Family Dollar Store.

9. Dr. Thomas Rankin, a cardiologist, evaluated the plaintiff on August 24, 2006 and prepared a Form 107 medical report. He noted a history of the plaintiff's injury on February 9, 2006 wherein he developed chest pain while lifting boxes at work. He further noted the plaintiff sought emergency treatment and was diagnosed with an acute dissection of the thoracic aorta, type A which required surgical repair. After conducting a physical examination and reviewing medical records, Dr. Rankin diagnosed the plaintiff with acute thoracic aortic dissection, type A, status post graft repair, coronary artery disease, abdominal aortic aneurysm, and iatrogenic paralysis of the left true vocal cord. He felt the plaintiff's injury was the cause of his complaints and explained the plaintiff's lifting of 50 pounds multiple times caused muscular straining and an acute rise in systemic arterial resistance resulting in the arterial intima of the proximal thoracic aorta. He assessed the plaintiff with a 40% whole body impairment rating for the aortic tear and noted the plaintiff did not have an active condition at the time of his injury. He opined the plaintiff reached maximum medical improvement as of March 17, 2006. He did not feel the plaintiff

retained the physical capacity to return to the type of work he was performing at the time of his injury and recommended restrictions against lifting greater than 10 pounds as well as stooping, climbing, crawling, and prolonged standing. However, he noted the plaintiff should walk as tolerated.

10. Dr. Marcus Stoddard, a cardiologist, evaluated the plaintiff on April 25, 2007. He noted a history of the plaintiff presenting to Christ Hospital on February 9, 2006 for complaints of chest pain at which time he was diagnosed with a type-A thoracic aortic dissection involving the ascending aorta. He further noted that cardiac catheterization revealed arterial stenosis with a left ventricular ejection fraction of 55 to 60%. He noted that surgery was subsequently performed the following day to repair the tear. Dr. Stoddard noted that the plaintiff's history of the events of February 9, 2006 differed from the history noted in the records of Christ Hospital as the plaintiff reported that his chest pain began about 30 to 60 minutes after he began work at the Family Dollar Store while the hospital notes indicate that his pain began at 6:00 a.m. He further noted the plaintiff had a prior medical history of coronary artery disease, percutaneous coronary angioplasty and stents of the posterior descending and circumflex coronary arteries on May 2, 2001, abnormal EKG, chronic hypertension, chronic obstructive pulmonary disease, tobacco abuse and melanoma. Medical history since February 9, 2006 includes amaurosis fugax with duplex carotid ultrasound performed on February 23, 2006, documented moderate atherosclerotic plaque with 20 to 49% stenosis of bilateral internal carotid arteries, abdominal aortic aneurysm with no recurrent aortic dissection and successful abdominal aortic aneurysm surgical repair in June 2006. He further noted the plaintiff had a smoking history of 30 years, but had reportedly stopped for six months at the time of his office visit and had one prior five year period of cessation. The plaintiff reported current symptoms of dizziness while standing with relief upon

sitting and dyspnea when walking for more than two blocks. He denied chest pain or discomfort or shortness of breath during the night or when lying flat, or swelling of his feet. After conducting a physical examination and reviewing the medical records, Dr. Stoddard opined the plaintiff's aortic dissection on February 9, 2006 was unrelated to his work and occurred as the result of aortic atherosclerosis. He felt the plaintiff's complaints of intermittent dizziness were due to orthostatic hypotension likely from his current antihypertensive medication. He also did not feel the current symptoms of shortness of breath were attributable to the prior aortic disease. Dr. Stoddard assessed the plaintiff with a 20% whole body impairment rating under the 5th Edition of the A.M.A. Guidelines to the Evaluation of Permanent Impairment for the aortic dissection, but again opined that it was not related to the plaintiff's work. He felt the plaintiff's activities should be restricted secondary to the aortic dissection including no lifting greater than 75 pounds, but did not feel he should be restricted on walking, running, stooping, crawling, standing or other activities of daily living.

He felt the plaintiff needed a reduction in his current Lisinopril dosage which is like the cause of his orthostatic hypotension and dizziness. He also felt the plaintiff would benefit from a cardiac rehabilitation program over a period of one to two months for reconditioning. He recommended the plaintiff be prescribed an anti-cholesterol medication directed at treating the atherosclerosis. He indicated the plaintiff would need twice yearly medical visits with his primary care physician throughout his lifetime. He also disagreed with the opinions offered by Dr. Rankin in his August 24, 2006 report wherein that physician opined the plaintiff's aortic dissection was work related. He also disagreed with the impairment rating and restrictions assessed by Dr. Rankin.

11. In a letter dated July 10, 2007, Dr. Thomas Rankin indicated that he had reviewed the report of Dr. Stoddard. He

agreed with the diagnosis of Type A aortic dissection with severe atherosclerotic cardiovascular disease offered by the physician, but disagreed with his opinions regarding causation. Dr. Rankin noted the plaintiff had no symptoms related to aortic dissection prior to February 9, 2006 and that his symptoms developed soon after lifting heavy objects at work. Therefore, he felt that it was within reasonable medical probability that the physiologic changes that occur with physical stress contributed to the acute aortic dissection he suffered at that time. He considered the aortic dissection to be a work related injury that converted a pre-existing asymptomatic disease process into a symptomatic state of chest pain due to a Type A thoracic aortic dissecting aneurysm. Therefore, he felt the acute disease state requiring surgery was work related. He further noted the plaintiff had a 40% whole body impairment rating and should not be required to lift greater than ten pounds singly or repetitively.

12. In a letter dated April 7, 2006, Dr. Creighton Wright indicated, based on his review of the records, the plaintiff had substantial difficulty with an identified dissection of his thoracic aorta requiring urgent surgical intervention. He further opined the plaintiff likely dissected his aorta while performing strenuous work at his job. He doubted the plaintiff's previous angioplasty had any particular causative effect on the thoracic dissection. He noted that it was more common than not that hypertension and some sort of strenuous or isometric activity are involved in the occurrence of such a dissection.

ANALYSIS AND CONCLUSION

1. This is an interesting claim wherein the defendant-employer contests the issues of causation and the occurrence of a work injury as defined by the Act. An injury is now defined as

any work related traumatic event or series of traumatic events, including cumulative trauma, arising out of or in the course of employment which is the proximate cause producing a harmful change to the human organism evidenced by objective medical findings... K.R.S. 342.0011(1). In this particular instance, the plaintiff alleges he was lifting some heavy boxes in the course and scope of his employment on February 9, 2006 when he suffered an immediate onset of chest pain. The defendant-employer contests this incident occurring and also contests whether the described incident was the actual cause of the plaintiff's aortic dissection. The defense is two-fold in that the defendant-employer has offered medical evidence from Dr. Marcus Stoddard who offered the opinion that the plaintiff's aortic dissection was not caused by this traumatic event at work, but was instead caused by other risk factors which the plaintiff is known to have. In addition, the defendant-employer questions the occurrence by pointing to the medical history noted in the emergency room record which indicates the plaintiff awoke with chest pain rather than suffered his chest pain while at work. On the other hand, the plaintiff's version of events indicate that he felt fine on the morning of February 9, 2006 when he awoke and when he went to work where he arrived at 7:45 a.m. The plaintiff indicates that he continued to feel fine until doing some heavy lifting of boxes at around 8:30 a.m. when he sustained an immediate onset of severe chest pain which caused him to go home. He further notes that he became incoherent and did not recall any events until a few days later when he awoke following his surgical correction. The plaintiff bears the burden of proof and risk of non-persuasion to convince the trier of fact as to each and every element of his claim including the element of causation. Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). In this particular instance, the plaintiff has a difficult burden due to the emergency room record. However, the plaintiff's version of the events is confirmed by two witnesses with one

being an independent witness. The plaintiff's wife was very credible in her testimony that the plaintiff was okay when they each left for work the morning of February 9, 2006, but that she was called from her work later that morning to transport the plaintiff to the hospital. She confirmed his testimony that he was incoherent and babbling and also testified the emergency room history was incorrect. Perhaps, most importantly, an independent witness, Melinda Keneavy, worked with the plaintiff that morning. She testified that he arrived on the job shortly before 8:00 a.m. and he showed her how to decode the alarm system. She testified the plaintiff was moving boxes of linoleum tile when he exclaimed that he felt he had pulled a muscle in his chest and then left work. Based on that witness' testimony as well as the credible testimony of the plaintiff and his wife, the Administrative Law Judge is convinced this version of the events is correct. In making this determination, the Administrative Law Judge also notes that it would be highly incredible for the plaintiff to suffer the kind of intense pain described as being caused by the aortic dissection, but continue on to work anyway regardless of the fact that he had known risk factors of atherosclerosis and high blood pressure as well as stents in his heart. This would simply be an unbelievable version of the events of the morning of February 9, 2006. Therefore, I am convinced the incident occurred while the plaintiff was lifting boxes of linoleum tile on February 9, 2006 between the hours of 8:15 a.m. and 8:30 a.m. I am further convinced by the testimony of the plaintiff's treating physician, Dr. Steven Park, and Dr. Thomas Rankin that the inciting event for the aortic dissection was the lifting and straining the plaintiff was doing that morning which caused an elevation in his blood pressure resulting in the initiation of dissection. Dr. Park explained that while the plaintiff had underlying aortic media disease, the inciting event was the actual lifting and straining. This is confirmed by the independent medical evaluator, Dr. Thomas Rankin, who also noted

the lifting of boxes multiple times caused muscular straining and an acute rise in systemic arterial resistance resulting in the arterial intima of the proximal thoracic aorta. Therefore, it seems clear that while the plaintiff had general risk conditions for developing this type of problem, the inciting event was the straining at work while lifting on February 9, 2006. Therefore, the Administrative Law Judge rules for the plaintiff on the issues of occurrence of a work injury as defined by the Act and causation and work relatedness.

2. The plaintiff argues for a permanent total disability award arguing that the event has rendered him permanently and totally disabled. Permanent total disability is now defined as the condition an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury... K.R.S. 342.0011(11)(c). In this instance, the plaintiff is now age 57 and has college training as well as vocational training in carpentry. He has spent much of his work life in a supervisory role overseeing projects and completing paperwork. He describes his current limitations as numbness in his fingertips, hoarseness, shortness of breath and dizziness when climbing stairs or getting up after a prolonged period of sitting. He testified that he now lives a sedentary lifestyle, but does help his wife care for their three grandchildren. He does not feel that he could return to work of a store manager as he did at the time of injury in his present physical condition. In making a determination of total disability, an Administrative Law Judge can consider an individual's own testimony as well as vocational testimony and physiological testimony in the record. Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000). The Administrative Law Judge notes that Dr. Rankin would restrict the plaintiff against lifting greater than ten pounds as well as stooping, crawling, climbing or prolonged standing. However, he noted the plaintiff should walk as tolerated. The limitations

placed upon him by another cardiologist, Dr. Stoddard, were not nearly as severe. He felt the plaintiff could lift as much as 75 pounds, but felt he should not be restricted on walking, stooping, crawling, standing, running or other activities of daily living. The plaintiff's own testimony would not indicate that he would be unable to perform sedentary supervisory work. While I am convinced the plaintiff lacks the physical capacity to return to his job as a manager of Family Dollar Store which did require him to do some heavy lifting, I am not convinced that he lacks the capacity to perform any type of work on a regular and sustained basis. Therefore, I do not find the plaintiff to be permanently totally disabled and his benefits must be based upon a permanent partial disability award.

3. There are two impairment ratings in the file from which the Administrative Law Judge may choose to award permanent partial disability benefits. Each of the physicians has cited Table 4-3 in assessing either a 20 or 40% impairment. The Administrative Law Judge notes that the table indicates that an individual qualifies for between a 10% to 29% impairment of the whole person if they are asymptomatic during ordinary activities; has a known progressive aortic abnormality or recovered from aortic surgery, asymptomatic, and is not expected to be at risk for future aortic disease as a consequence of surgery. On the other hand, a 30% to 49% impairment to the whole person is appropriate if there are mild to moderate symptoms from aortic abnormality despite medication or recovered from aortic surgery, continued mild to moderate symptoms, or at risk for recurrence of aortic abnormality. In reviewing the plaintiff's testimony, he indicates that he has some dizziness upon sitting for a long period of time which Dr. Stoddard indicates is due to his blood pressure medication. He also has some shortness of breath, but does not describe any continued pain or symptoms in his chest area. Based upon the evidence as contained in the entire record including the plaintiff's own testimony, I am convinced that Dr.

Stoddard more accurately gave the impairment for the plaintiff as being 20% or a Class II impairment. However, I am convinced by the plaintiff's own testimony as well as the opinions of Dr. Rankin that the plaintiff lacks the physical capacity to return to his job as store manager wherein he did a lot of lifting and strenuous activity. Under K.R.S. 342.730(1)(b), a 20% impairment carries a multiplication factor of 1 for a 20% permanent partial disability. However, as the plaintiff lacks the ability to perform the continued heavy strenuous activity required from his job as a manager for Family Dollar, he is entitled to have the benefits increased by a factor of 3 pursuant to the provisions of K.R.S. 342.730(1)(c)1. Further, as the plaintiff was over age 55 at the time of his injury, he is entitled to have an additional four-tenths multiplier added to that factor of 3 pursuant to K.R.S. 342.730(1)(c)3. The Administrative Law Judge is further convinced the plaintiff reached maximum medical improvement on March 17, 2006 as opined by Dr. Rankin. Therefore, the plaintiff is entitled to temporary total disability benefits during the period of time from February 10, 2006 through March 17, 2006. He is also entitled to reasonable and necessary medical care for his work related injury under K.R.S. 342.020.

ORDER


1. The plaintiff, Stephen Baytos, shall recover from the defendant-employer, Family Dollar, Inc., and/or its insurance carrier, temporary total disability benefits in the amount of \$466.67 per week beginning on February 10, 2006 and continuing through March 17, 2006. Thereafter, beginning on March 18, 2006, he shall further recover from the defendant-employer, permanent partial disability benefits in the amount of \$317.32 per week for a period not to exceed 425 weeks. The benefits are payable together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation and are subject to

the limitations set forth at K.R.S. 342.730(4), (5), (6) and (7).

2. The employer shall pay all reasonable and necessary medical expenses for the cure and relief of his aortic dissection injury pursuant to K.R.S. 342.020.

3. All motions for approval of attorney's fees shall be filed with the Administrative Law Judge within thirty (30) days after the final disposition of this award. Any such motions must include an itemization of services together with either the actual times or a reasonable accurate estimate of the times expended on each of the itemized services listed.

SO ORDERED, this 4th day of September, 2007 with copies to all parties by regular U.S. mail.



JOHN B. COLEMAN
ADMINISTRATIVE LAW JUDGE

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FORM 110-I
INJURY
Revised July, 2006

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KENTUCKY OFFICE OF WORKERS' CLAIMS
Frankfort, KY 40601

AGREP
HTD

**AGREEMENT AS TO COMPENSATION
AND
ORDER APPROVING SETTLEMENT**

**Workers' Compensation Claim No: 2006-01247
Before: FRANKFORT MOTION DOCKET**

**IF THIS FORM IS NOT PROPERLY COMPLETED, IT WILL BE RETURNED.
Every section should be completed. If a section is not applicable, fill in the blank with N/A.**

Stephen Baytos 02/09/2006
Claimant Date of Injury
221-72-0342 ✓ 05/18/1949 ✓
Social Security No. Date of Birth
255A Peacock Drive
Address
Panama City, FL 32407
City, State, Zip Code

Risk Enterprise Management, administrator
Insurer/Self-Insured-Insurance Group
P.O. Box 105679
Insurer's Address
Atlanta, GA 30328
City, State, Zip Code

Family Dollar ✓
Employer
3921 South Dixie Highway
Address
Elsmere, KY 41311
City, State, Zip Code

RECEIVED
KENTUCKY WORKERS' CLAIMS
2008 JUL 10 A 8:36
AGREEMENT SECTION

INJURY

Date: 02/09/2006 ✓ County in which injury occurred: Elsmere, Kentucky
Brief description of occurrence resulting in injury: Plaintiff was stocking items and sustained injury to his heart (torn aorta), larynx, left hand and eyes.
Nature of injury(ies) including body part(s) affected: heart (torn aorta), larynx, left hand and eyes

MEDICAL INFORMATION

Medical expenses paid: \$106,752.86 Date of last medical payment: ongoing to date of settlement
Medical expenses unpaid or contested: \$ N/A
Surgery performed (Circle one): (Yes) No Nature of surgery: repair of aortic dissection
Impairment ratings: (Attach entire medical report that provides ratings)

See prior evidence of record, including Opinion and Award dated September 4, 2007
Restrictions on activities
Diagnosis or diagnoses:
If medical treatment is continuing, attach a copy of the executed Form 113 indicating a designated physician. N/A

CHECKED
JUL 10 2008
AGREEMENTS

pg 1 of 4

WORK INFORMATION

Type of work performed at time of injury: Store Manager
Average weekly wage at time of injury: \$700.00
Date of return to work after injury: did not return.
Wages upon return to work: \$N/A Type of work performed after injury: unknown
Type of work performed at time of settlement: Unknown

BENEFIT AND SETTLEMENT INFORMATION

If consolidated Claims, indicate amount for each Claim separately:

Temporary total disability paid from \$466.67 from 02/10/2006 through 03/17/2006 for a total of \$2,400.02

Monetary terms of settlement: \$100,000.00 paid in lump sum x, or weekly for _____
of weeks

Settlement computation: 120 weeks of PPD benefits in the amount of \$317.32 (pursuant to the Opinion and Award) have been paid. The remaining 305 weeks of benefits are commuted to a lump sum of \$85,740.82 (\$317.32 x 269.9478)

Amount for Waiver(s)

Please circle:

WMPR

Waiver or buyout of past medical benefits	<input checked="" type="radio"/> Yes	No	<u>\$500.00</u>
Waiver or buyout of future medical benefits	<input checked="" type="radio"/> Yes	No	<u>\$12,000.00</u>
Waiver of vocational rehabilitation	<input checked="" type="radio"/> Yes	No	<u>\$259.18</u>
Waiver of right to reopen	<input checked="" type="radio"/> Yes	No	<u>\$1,500.00</u>

Does settlement include Medicare Set Aside? Yes No If yes, amount of Medicare Set Aside: N/A
Lump Sum

Periodic Payments: 0 * 0 * 0 = N/A
Amount Frequency Duration Total

Other: Plaintiff certifies that he does not receive Medicare benefits and does not have a reasonable expectation of receiving them in the next 36 months.

If settlement terms provide for lump sum representing weekly benefits greater than \$100, does claimant have an adequate source of income during disability? Yes No

Source of income: family Amount: \$ N/A

OTHER INFORMATION

If additional information is pertinent to settlement, explain, (Attach additional pages if necessary):

1.) This settlement represents a compromised agreement of an adjudicated claim, wherein the Claimant, Steven Baytos, agrees to accept the total sum of \$100,000.00, in consideration for a complete discharge with prejudice of any claim he may have now or in the future against the Employer, Family Dollar, third party

administrator REM, or any of their successors in interest, as it relates to a work injury of February 9, 2006, to the Claimant's heart, larynx, and eyes. All parties herein agree to settle this claim based upon a commutation the remaining weekly indemnity benefits to a lump sum of \$85,740.82.

2.) The Claimant agrees to accept the additional sum of \$12,000 in consideration for a full and final waiver of any and all rights to compensation for future medical expenses that may result from the work-related injury and \$500 in consideration for a full and final waiver of any and all rights to compensation for past medical expenses as a result from the work-related injury. Such waiver by the Claimant means that he forever waives any statutory or common law rights he may have now or in the future that would allow him to seek payment or reimbursement for medical expenses against Family Dollar, third party administrator REM, its workers' compensation insurer, or any of their successors in interest.

3.) The Claimant further agrees to accept an additional sum of \$1,500.00 in consideration for a full and final waiver of any and all rights he may have to reopen this claim under KRS 342.125, for any reason, including a change in condition.

4.) The Claimant further agrees to accept the additional sum of \$259.18 in consideration for a full and final waiver of any and all rights he may have to vocational benefits afforded under KRS Chapter 342.

5.) The Claimant furthermore agrees to indemnify and hold harmless Family Dollar, third party administrator REM, or any of their successors in interest, with respect to any and all potential claims which may hereinafter arise as a result of the work-related injury.

6.) The Claimant, Steven Baytos, states and affirms that he has negotiated, read and understands the terms of this Agreement. He further states that he is not represented by counsel and is signing said agreement voluntarily and without duress. The Claimant further understands that this Agreement represents a complete dismissal with prejudice, and that he will be forever barred from seeking any medical, wage loss or vocational benefits for this claim as against Family Dollar, third party administrator REM, or any of their successors in interest. The Claimant further understands that he will be forever barred from reopening this claim for any increase in occupational disability. The terms of this Agreement are not severable, and in the event that this Agreement is not approved in its entirety, then it shall be void.

Other responsible parties against who further proceedings are reserved: N/A

If waving medical benefits, please acknowledge by signing below:

I understand that my health insurance may not cover any medical expenses for my injury and I may be held responsible for payment of medical expenses for my injury. X *St Baytos* ✓

Claimant (Signature)

If not represented by an Attorney, please acknowledge by signing below:

I understand that I have a right to obtain an Attorney of my choice to review this Agreement and by signing below I acknowledge that I have waived that right. By waiving that right, I understand I will be held to the same standard as an Attorney and this Agreement will be enforceable as if represented by

Attorney: X *St Baytos* ✓

Claimant (Signature)

X St Baytos ✓
Claimant (Signature)

Steven Baytos
Claimant
255A Peacock Drive.
Address
Panama City, FL 32407
City, State, Zip Code

Melanie Gabbard ✓
Attorney for Employer (Signature)

Hon. Melanie Gabbard
Attorney or representative for employer
P.O. Box 34048
Address
Lexington, Kentucky 40588
City, State, Zip Code

This the 5TH day of July, 2008.

DO NOT WRITE OR MARK BELOW THIS LINE

ORDER APPROVING SETTLEMENT AGREEMENT

IT IS ORDERED that the above Agreement as to Compensation be and the same is hereby **APPROVED**.

This the 10th day of July, 2008.

Alonna H. Perry
Administrative Law Judge

DISTRIBUTION:

Melanie Gabbard, Esq.
P.O. Box 34048
Lexington, KY 40588

Mr. Steven Baytos
255A Peacock Drive
Panama City, FL 32407

16

RECEIVED

AUG 31 2011

DEPT. OF WORKERS CLAIMS
BY *DS*

COMMONWEALTH OF KENTUCKY
OFFICE OF WORKERS' CLAIMS
BEFORE HON. JOHN COLEMAN, ALJ
CLAIM NO: 06-01247

WB: _____
DOC. TYPE: *MRCP*
CLAIM NO. _____ *02*

STEPHEN BAYTOS

PLAINTIFF

v.

FAMILY DOLLAR

DEFENDANT

MOTION TO REOPEN AND AWARD
SURVIVOR BENEFITS TO WIDOW

N Comes Mamie Baytos, widow of Plaintiff, Stephen Baytos, by and through counsel, and moves the Court for an Order reopening this claim and ordering Defendant/Employer to pay her benefits for the work related death of Stephen Baytos, pursuant to KRS 342.750. As grounds therefore, it is submitted that Stephen Baytos suffered a work related injury, in particular a torn thoracic aorta, on February 9, 2006. (Exhibit A, Opinion and Award of September 4, 2007) He died December 3, 2009 from the work related injury. (Exhibit B, Certificate of Vital Record/Death Certificate) Mr. Baytos leaves his unremarried widow Mamie Baytos. (Exhibit C, Affidavit of Mamie Baytos)

Stephen Baytos settled the benefits awarded by Form 110 entered July 10, 2008. (Exhibit D) This settlement included waivers, however, the benefits to which Mamie Baytos is entitled to under KRS 342.750 are her benefits and not waivable by Stephen Baytos. *Taylor v. Cornett*

Lewis Coal Co., 281 Ky. 366, 136 S.W.2d 21, 23 (1940).



Stephen Baytos died from the same condition which was previously found to have been work related. (Exhibits A and B) As set forth in KRS 342.750(1)(a) and KRS 342.750(6), Mamie Baytos is entitled to receive a separate and distinct award since Mr. Baytos died within four years of his work injury, and the death was the result of the work related injury. The benefits to be received include but are not limited to income benefits and the applicable death benefit under KRS 342.750.

Plaintiff also attaches an updated Form 106 Medical Waiver and Consent.

No prior Motion to reopen has been made by the moving party .

Wherefore it is respectfully requested that this matter be reopened for consideration of Ms. Baytos' claim for benefits.

Respectfully submitted,



Carl E. Grayson, Esq. (KBA#83674)
Sutton Rankin Law, PLC
130 Dudley Road, Suite 250
Edgewood, Kentucky 41017
(859) 331-8883
Attorney for Plaintiff

CERTIFICATE OF SERVICE

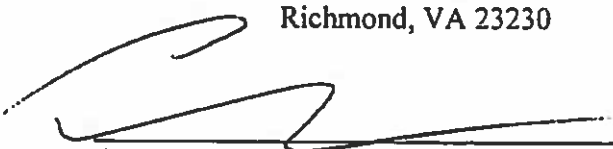
I hereby certify that a true and correct copy of the foregoing has been served by regular US Mail, postage prepaid, this 31st day of August, 2011, on the following:

Kimberly D. Newman, Esq.
Allen, Kopet & Associates, PLLC
P.O. Box 34048
Lexington, Ky 40588

Family Dollar
Employer
3921 South Dixie Highway
Elsmere, KY 41311

Risk Enterprise Management
P.O. Box 105679
Atlanta GA 30328
David M. Andrew, Esq.

Indemnity Insurance Company
of North America/CIGNA
P.O. Box 11808
Richmond, VA 23230



Carl E. Grayson, Esq. (#83674)

Attachments

Opinion and Award
Death Certificate for Stephen Baytos
Affidavit of Mamie Baytos
Form 110, dated July 10, 2008
Marriage Certificate
Affidavit of Carl E. Grayson

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

CERTIFICATE OF DEATH

3200937017958

1. NAME OF DECEDENT - FIRST (PRINT)		2. MIDDLE		3. LAST (PRINT)		4. DATE OF BIRTH (month/day/year)		5. AGE (in years)		6. SEX	
STEPHEN		CYRIL		BAYTOS III		05/18/1949		60		M	
7. BIRTH STATE/COUNTRY		8. SOCIAL SECURITY NUMBER		9. MARITAL STATUS (at time of death)		10. DATE OF DEATH (month/day/year)		11. HOUR (24 HOUR)			
OHIO		227-72-0342		MARRIED		12/03/2009		1700			
12. EDUCATION - HIGHEST GRADE COMPLETED		13. RACE		14. DECEDENT'S RACE - (Up to 2 boxes may be filled per individual on same)		15. OCCUPATION		16. YEARS IN OCCUPATION			
SOME COLLEGE		WHITE		WHITE		OWNER MANAGER		35			
17. DECEASED'S RESIDENCE (Print the number of building)		18. DECEASED'S RESIDENCE (Print the number of building)		19. DECEASED'S RESIDENCE (Print the number of building)		20. DECEASED'S RESIDENCE (Print the number of building)		21. DECEASED'S RESIDENCE (Print the number of building)		22. DECEASED'S RESIDENCE (Print the number of building)	
108 SANTA ROSA DRIVE		108 SANTA ROSA DRIVE		108 SANTA ROSA DRIVE		108 SANTA ROSA DRIVE		108 SANTA ROSA DRIVE		108 SANTA ROSA DRIVE	
23. CITY		24. COUNTY		25. ZIP CODE		26. YEARS IN COUNTY		27. STATE/COUNTRY			
OCEANSIDE		SAN DIEGO		92058		1		CALIFORNIA			
28. DECEASED'S MARITAL STATUS		29. DECEASED'S MARITAL STATUS		30. DECEASED'S MARITAL STATUS		31. DECEASED'S MARITAL STATUS		32. DECEASED'S MARITAL STATUS		33. DECEASED'S MARITAL STATUS	
MAMIE E TRAMMELL BAYTOS WIFE		MAMIE E TRAMMELL BAYTOS WIFE		MAMIE E TRAMMELL BAYTOS WIFE		MAMIE E TRAMMELL BAYTOS WIFE		MAMIE E TRAMMELL BAYTOS WIFE		MAMIE E TRAMMELL BAYTOS WIFE	
34. NAME OF SURVIVING SPOUSE - FIRST		35. MIDDLE		36. LAST (maiden name)		37. BIRTH STATE		38. BIRTH STATE		39. BIRTH STATE	
MAMIE		ELEANOR		TRAMMELL		OHIO		OHIO		OHIO	
40. NAME OF FATHER - FIRST		41. MIDDLE		42. LAST		43. BIRTH STATE		44. BIRTH STATE		45. BIRTH STATE	
STEPHEN		CYRIL		BAYTOS JR		OHIO		OHIO		OHIO	
46. NAME OF MOTHER - FIRST		47. MIDDLE		48. LAST		49. BIRTH STATE		50. BIRTH STATE		51. BIRTH STATE	
MARGUERITE		CATHERINE		PATRICHOVICH		OHIO		OHIO		OHIO	
52. DATE OF DEATH		53. PLACE OF FINAL DEPOSITION		54. NAME OF DECEASED'S SURVIVING SPOUSE		55. ADDRESS OF DECEASED'S SURVIVING SPOUSE		56. ADDRESS OF DECEASED'S SURVIVING SPOUSE		57. ADDRESS OF DECEASED'S SURVIVING SPOUSE	
12/08/2009		108 SANTA ROSA DRIVE, OCEANSIDE, CA 92058		RES MAMIE TRAMMELL BAYTOS WIFE		108 SANTA ROSA DRIVE, OCEANSIDE, CA 92058		108 SANTA ROSA DRIVE, OCEANSIDE, CA 92058		108 SANTA ROSA DRIVE, OCEANSIDE, CA 92058	
58. TYPE OF DEPOSITION		59. SIGNATURE OF EMBALMER		60. LICENSE NUMBER		61. DATE		62. DATE		63. DATE	
CR/RES		NOT EMBALMED		F6		12/08/2009		12/08/2009		12/08/2009	
64. NAME OF FUNERAL ESTABLISHMENT		65. LICENSE NUMBER		66. SIGNATURE OF LOCAL REGISTRAR		67. DATE		68. DATE		69. DATE	
BALBOA CREMATION SERVICES		FD-1370		WILMA WOOTEN, MD		12/08/2009		12/08/2009		12/08/2009	
70. PLACE OF DEATH		71. HOSPITAL, SPECIFY ONE		72. OTHER THAN HOSPITAL, SPECIFY ONE		73. DATE		74. DATE		75. DATE	
NAVAL MEDICAL CENTER		HOSPITAL		OTHER THAN HOSPITAL		12/08/2009		12/08/2009		12/08/2009	
76. COUNTY		77. FACILITY ADDRESS OR LOCATION WHERE FOUND (Print the number of building)		78. CITY		79. STATE		80. STATE		81. STATE	
SAN DIEGO		34800 BOB WILSON DRIVE		SAN DIEGO		CALIFORNIA		CALIFORNIA		CALIFORNIA	
82. CAUSE OF DEATH		83. CAUSE OF DEATH		84. CAUSE OF DEATH		85. CAUSE OF DEATH		86. CAUSE OF DEATH		87. CAUSE OF DEATH	
ACUTE RUPTURE OF THORACIC AORTA		ACUTE RUPTURE OF THORACIC AORTA		ACUTE RUPTURE OF THORACIC AORTA		ACUTE RUPTURE OF THORACIC AORTA		ACUTE RUPTURE OF THORACIC AORTA		ACUTE RUPTURE OF THORACIC AORTA	
ATHEROSCLEROTIC CARDIOVASCULAR DISEASE		ATHEROSCLEROTIC CARDIOVASCULAR DISEASE		ATHEROSCLEROTIC CARDIOVASCULAR DISEASE		ATHEROSCLEROTIC CARDIOVASCULAR DISEASE		ATHEROSCLEROTIC CARDIOVASCULAR DISEASE		ATHEROSCLEROTIC CARDIOVASCULAR DISEASE	
CORONARY ARTERY DISEASE, HYPERTENSION, HYPERLIPIDEMIA, DIABETES MELLITUS II, TOBACCO USE		CORONARY ARTERY DISEASE, HYPERTENSION, HYPERLIPIDEMIA, DIABETES MELLITUS II, TOBACCO USE		CORONARY ARTERY DISEASE, HYPERTENSION, HYPERLIPIDEMIA, DIABETES MELLITUS II, TOBACCO USE		CORONARY ARTERY DISEASE, HYPERTENSION, HYPERLIPIDEMIA, DIABETES MELLITUS II, TOBACCO USE		CORONARY ARTERY DISEASE, HYPERTENSION, HYPERLIPIDEMIA, DIABETES MELLITUS II, TOBACCO USE		CORONARY ARTERY DISEASE, HYPERTENSION, HYPERLIPIDEMIA, DIABETES MELLITUS II, TOBACCO USE	
88. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RECORDED IN THE UNDERLYING CAUSE OF DEATH		89. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RECORDED IN THE UNDERLYING CAUSE OF DEATH		89. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RECORDED IN THE UNDERLYING CAUSE OF DEATH		89. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RECORDED IN THE UNDERLYING CAUSE OF DEATH		89. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RECORDED IN THE UNDERLYING CAUSE OF DEATH		89. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RECORDED IN THE UNDERLYING CAUSE OF DEATH	
CABG - 7/2008		CABG - 7/2008		CABG - 7/2008		CABG - 7/2008		CABG - 7/2008		CABG - 7/2008	
90. COUNTY AND TITLE OF CORPSE		91. COUNTY AND TITLE OF CORPSE		92. COUNTY AND TITLE OF CORPSE		93. COUNTY AND TITLE OF CORPSE		94. COUNTY AND TITLE OF CORPSE		95. COUNTY AND TITLE OF CORPSE	
BRYAN M. SPALDING M.D.		BRYAN M. SPALDING M.D.		BRYAN M. SPALDING M.D.		BRYAN M. SPALDING M.D.		BRYAN M. SPALDING M.D.		BRYAN M. SPALDING M.D.	
96. DATE OF DEATH		97. DATE OF DEATH		98. DATE OF DEATH		99. DATE OF DEATH		100. DATE OF DEATH		101. DATE OF DEATH	
12/03/2009		12/03/2009		12/03/2009		12/03/2009		12/03/2009		12/03/2009	
102. PLACE OF DEATH		103. PLACE OF DEATH		104. PLACE OF DEATH		105. PLACE OF DEATH		106. PLACE OF DEATH		107. PLACE OF DEATH	
34800 BOB WILSON DRIVE		34800 BOB WILSON DRIVE		34800 BOB WILSON DRIVE		34800 BOB WILSON DRIVE		34800 BOB WILSON DRIVE		34800 BOB WILSON DRIVE	
108. SIGNATURE OF CORONER / DEPUTY CORONER		109. SIGNATURE OF CORONER / DEPUTY CORONER		110. SIGNATURE OF CORONER / DEPUTY CORONER		111. SIGNATURE OF CORONER / DEPUTY CORONER		112. SIGNATURE OF CORONER / DEPUTY CORONER		113. SIGNATURE OF CORONER / DEPUTY CORONER	
WILMA J. WOOTEN, MD		WILMA J. WOOTEN, MD		WILMA J. WOOTEN, MD		WILMA J. WOOTEN, MD		WILMA J. WOOTEN, MD		WILMA J. WOOTEN, MD	



A 002051488

County of San Diego - Department of Health Services - 3851 Rosecrans Street. This is to certify that, if bearing the OFFICIAL SEAL OF THE STATE OF CALIFORNIA, the OFFICIAL SEAL OF SAN DIEGO COUNTY AND THEIR DEPARTMENT OF HEALTH SERVICES EMBOSSED SEAL, this is a true copy of the ORIGINAL DOCUMENT FILED. Required fee paid.

DATE ISSUED: December 9, 2009

WILMA J. WOOTEN, MD
REGISTRAR OF VITAL RECORDS
County of San Diego

This copy not valid unless prepared on engraved border displaying seal and signature of Registrar



16.

WD: _____
DOC. TYPE: RRVP
CLAIM NO: _____

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
CLAIM NO. 06-01247
BEFORE: FRANKFORT MOTION DOCKET

RECEIVED 10
COMMISSIONER
SEP 12 2011
WORKERS' CLAIMS

STEPHEN BAYTOS

PLAINTIFF

v. DEFENDANT'S RESPONSE AND OBJECTION TO
PLAINTIFF'S MOTION TO REOPEN

FAMILY DOLLAR

DEFENDANT

.....

Comes the Defendant/Employer, Family Dollar Stores, Inc., by and through counsel, and for its Response and Objection to Plaintiff's Motion to Reopen, states as follows:

1. That prior to putting the Defendant/Employer through the expense of re-litigation, the Plaintiff's Motion must set forth a reasonable prima facie preliminary showing warranting a reopening of the case.
2. That pursuant to KRS 342.125, a claim may only be reopened based upon these grounds: (1) fraud; (2) newly discovered evidence which could not have been discovered with the exercise of due diligence; (3) mistake; and (4) a change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order. The Plaintiff's Motion herein is not based on any of these grounds and, as such, does not support a prima facie showing as required by law.
3. That, further, as evidenced by the attached Agreement as to Compensation and Order Approving Settlement, the underlying claim was settled on a full and final

compromised basis and was dismissed with prejudice. Under this Agreement, the income benefits that had been awarded to the Plaintiff, Stephen Baytos, by an Administrative Law Judge in an Opinion and Award were commuted to a lump sum. Further, the Plaintiff received separate and additional consideration from the Defendant/Employer for a waiver of the right to reopen the claim "for any reason." (Exhibit A, Form 110-1). In addition, under this Agreement, the Plaintiff agreed to indemnify and hold harmless Family Dollar, its workers' compensation third party administrator or any of their successors in interest, with respect to "any and all potential claims which may hereinafter arise as a result of the work-related injury."

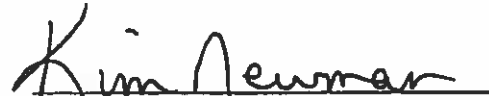
4. That although Plaintiff's counsel acknowledges in the Motion to Reopen that the Plaintiff settled the claim with all waivers, he asserts that the income benefits under KRS 342.750 are benefits to the widow and were not waivable by the Plaintiff. In support of this assertion, Plaintiff's counsel references Taylor v. Cornett Lewis Coal Co., 281 Ky. 366, 16 S.W.2d 21, 23 (1940). The Defendant/Employer respectfully submits, however, that this decision, attached herewith as Exhibit B, does not stand for the assertion alleged by Plaintiff.

In Taylor, the widow and infant children of Mr. Taylor filed a claim seeking benefits under the Workers' Compensation Act after he died in the mine of Cornett Lewis Coal Company. As noted by the Court in this decision, the only issue in the claim was "whether or not the deceased, Taylor, had accepted the provisions of the Act." (Id., p. 23). The Court determined that Mr. Taylor had not opted into the Act and, accordingly, his widow and dependents were not entitled to benefits under the Act. In the case, one of the arguments made was that because the Company had entered into a settlement

agreement with the administrator of Mr. Taylor's estate following his death, that this meant the parties made a settlement "under the Workers' Compensation Act." The Court rejected this argument, pointing out that the administrator had no claim under the Workers' Compensation Act, since such claim was vested only in the dependents of the deceased workman, and the fact that there was a settlement agreement between the administrator and the Employer was not itself evidence that the decedent had accepted the provisions of the Act. It appears that Plaintiff in the subject claim is using this dicta in Taylor regarding the dependents to assert that the Plaintiff, Stephen Baytos, had no standing to enter into a settlement agreement to fully resolve his workers' compensation claim. Clearly, however, the claims are distinguishable in that the subject settlement agreement was made between the Defendant/Employer and the Plaintiff/injured worker himself, not some third party. Mr. Baytos was the injured worker, he was awarded permanent partial disability benefits for his work injury and subsequently elected to settle his claim in its entirety with the Defendant/Employer. The widow, Mamie Baytos, has no standing to seek income benefits under KRS 342.750 as she does not have a separate entitlement to benefits under the Act arising from this claim. The right to income benefits under KRS 342.750 is derivative of the injured workers' rights under the Act. Indeed, Mamie Baytos has acknowledged as much in her "Motion to Add or Substitute" her as a party to the claim. In this Motion, it is specifically requested that Mamie Baytos be substituted as the proper party "*for Stephen Baytos*" in this case. Here, there are no remaining rights available to Stephen Baytos or his dependents related to the subject claim as he waived those rights in a settlement of the claim prior to his death.

5. That in accordance with the foregoing, it is respectfully submitted that the Plaintiff has not shown a prima facie case, as required by Kentucky law, to allow a reopening of this claim under KRS 342.125. Therefore, the Defendant/Employer requests that the Plaintiff's Motion to Reopen be dismissed in its entirety.

Respectfully Submitted,



Kimberly D. Newman
Allen, Kopet & Associates, PLLC
P.O. Box 34048
Lexington, Kentucky 40588
(859) 281-1301
Attorney for Defendant/Employer

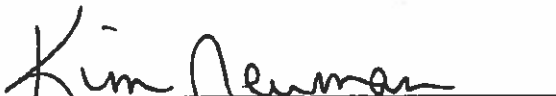
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon the following on this the 9th day of September, 2011.

Carl E. Grayson, Esq.
Sutton Rankin Law PLC
130 Dudley Road, Ste. 250
Edgewood, Kentucky 41017

and the original to:

Hon. Dwight Lovan
Commissioner
Department of Workers' Claims
657 Chamberlin Avenue
Frankfort, Kentucky 40601



KIMBERLY D. NEWMAN

WB: _____
DOC TYPE BPDS
CLAIM NO. 6

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS CLAIMS
CLAIM NO. 2006-01247
HON. RICHARD M. JOINER, ADMINISTRATIVE LAW JUDGE

STEPHEN C. BAYTOS (DEC) , MAMIE
BAYTOS (WIDOW)

PLAINTIFF

VS.

FAMILY DOLLAR

DEFENDANT

OPINION & ORDER OF HON. RICHARD M. JOINER, ADMINISTRATIVE
LAW JUDGE

INTRODUCTION

This is a claim for widow's benefits which are alleged to be due as a result of an injury of February 9, 2006. On that day, Stephen Baytos was working for Family Dollar and suffered a torn thoracic aorta. He made a claim for workers compensation benefits which was resolved by settlement approved on July 10, 2008 by Administrative Law Judge Donna H Terry. Mr. Baytos died on December 3, 2009. His death certificate indicates the immediate cause of death is an acute rupture of the thoracic aorta. The employer acknowledges the injury but disputes whether the widow may now claim benefits in view of the worker's prior settlement of the claim. The plaintiff widow, Mamie Baytos, was not a party to the settlement.

ISSUES

At the February 8, 2012 benefit review conference, the parties agreed upon the issues to be resolved by this decision. Those issues are: Is Mamie Baytos, the widow of Stephen Baytos, entitled to widow's benefits under KRS 342.750 for the death of Stephen Baytos. Coverage under the Act (Stephen Baytos settled his claim and it was dismissed with prejudice on July 10, 2008.). Under Other Matters, the case was bifurcated to resolve the legal question of whether Mamie Baytos can make this claim in view of the prior proceedings.

THE RECORD

No hearing was held. The case is submitted on the record. The evidence in this case consists of the following: Opinion and Award dated 9/4/07, Death Certificate of Steven Baytos, Affidavit of Mamie Baytos, and Form 110 - Order approving Settlement dated 7/10/08.

DISCUSSION AND FINDINGS

A benefit review conference was held on February 8, 2012, at which conference, the following stipulations were agreed to:

1. Jurisdiction under the Kentucky Workers' Compensation Act. -- **DISPUTED**
2. An employment relationship existed between the plaintiff and defendant-employer at all times herein relevant. -- **AGREED**
3. Stephen Baytos sustained a work-related injury or injuries on 2/9/06. -- **AGREED**
4. The defendant-employer received due and timely notice of plaintiff's injury(ies). -- **AGREED**

5. Temporary total disability benefits were paid to Stephen Baytos at the rate of \$466.67 per week from 2/10/06 through 3/17/06 for a total of \$2,400.02.
6. The defendant-employer has paid on behalf of Stephen Baytos medical expenses.
7. Plaintiff's average weekly wage (AWW) was \$700.00
8. Does plaintiff retain the physical capacity to return to former work. Not Applicable.
9. Plaintiff returned to work on: Wages currently earned:
10. Stephen Baytos' Date of Birth: 5/18/49.
11. Stephen Baytos educational level: 12th grade .
12. Plaintiff's specialized or vocational training:
13. Mamie Baytos is the widow of Stephen Baytos.

ISSUES

Is Mamie Baytos, the widow of Stephen Baytos, entitled to claim widow's benefits for the death of Stephen Baytos. Coverage under the Act (Stephen Baytos settled his claim and it was dismissed with prejudice on July 10, 2008.)

This case has been bifurcated such that the only issue for me to determine is whether the claimant Mamie Baytos may proceed in view of the prior claim and settlement by Stephen Baytos. In my judgment she may. KRS 342.730 provides for income benefits for injuries. There is a provision in KRS 342.730, KRS 342.730 (3) that provides for income benefits awarded to an employee to continue to certain dependents in the event of his death during the period of an award. This is not what we are dealing with here.

KRS 342.750 provides for income benefits for death. In order for a dependent to qualify for death benefits as a result of a work-related death of an employee, the claimant must demonstrate his or her status as an eligible claimant under KRS 342.750 (1). The claimant must show that the decedent died as a result of a work related condition or injury. The claim must be made within two years of the date of death. The death must occur within four years of the date of the injury in order for the additional death benefits provided in KRS 342.750 (6) to be payable. This involves a payment to the deceased employee's estate as opposed to a payment to a statutory dependent. This benefit is not claimed here. What is claimed here is that Stephen Baytos has died as a result of the injury for which compensation had previously been granted. For purposes of the bifurcation, the parties and I assume this is true. Additional proof time will be permitted to allow the parties to present evidence on that question.

The employer asserts the prior settlement with the employee as a bar to the widow's claim. Ordinarily, an award would have been made granting the deceased income benefits on a weekly basis. Upon the death of the injured employee, the widow would make her claim and, if she can establish that the death was due to the injury, then widow's benefits would be awarded. If she cannot establish that the death was due to the injury then a continuation of benefits would be awarded under KRS 342.730(3). This type of claim would be entirely derivative of the employees claim and would be subject to being barred if the type of lump sum settlement had been entered into as was entered into here.

The widow's claim, however where she has to establish that death was caused by the injury is not barred by the settlement. This claim is entirely the widow's and cannot be waived by the employee.

CONCLUSIONS

1. Stephen C. Baytos sustained a work-related injury on February 9, 2006. Mr. Baytos gave due and timely notice of this injury.
2. As found by a previous Administrative Law Judge, as a result of the injury, Stephen C. Baytos was temporarily totally disabled from February 10, 2006 through March 17, 2006.
3. Stephen C. Baytos, had a permanent disability rating for which income benefits to Mr. Baytos were awarded.
4. Stephen C. Baytos died on December 3, 2009, less than four years after the injury.
5. Mamie Baytos is the widow of Stephen Baytos. If she can establish that Stephen's death was caused by the injury of February 9, 2006, she will be entitled to widow's benefits pursuant to KRS 342.750.

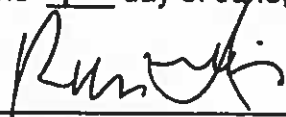
ORDER

It is hereby **ORDERED AND ADJUDGED** by the Administrative Law Judge as follows:

1. The plaintiff, Mamie Baytos (widow), is eligible for widow's benefits pursuant to KRS 342.750 if she can establish that Stephen's death was caused by the injury of February 9, 2006. She may have 60 days from the date of this decision within which to present evidence on the issue of causation. The defendant may have 30 days thereafter to present its proof. The plaintiff may have 15 days after that for rebuttal.

After these time periods have expired, the case shall be set for another benefit review conference.

Rendered and copies of the foregoing were deposited in the United States mail addressed to the parties shown below this the 19th day of June, 2012.



Richard M. Joiner
Administrative Law Judge

Copies to:

Hon. Carl Grayson
504 Erlanger Road
Erlanger, KY 41018
Attorney for Stephen C. Baytos (dec) , Marnie Baytos (widow)

Hon. Melanie Gabbard
P.O. Box 34048
Lexington, KY 40588
Attorney for Family Dollar

11

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 2, 2014

DM

CLAIM NO. 200601247

FAMILY DOLLAR

PETITIONER

VS.

APPEAL FROM HON. THOMAS POLITES,
ADMINISTRATIVE LAW JUDGE

MAMIE BAYTOS, widow of STEPHEN BAYTOS;
and HON. THOMAS POLITES,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

ABDRM
280
DM

DOC TYPE
CLAIM NO

ABDRM

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Family Dollar appeals from the February 3, 2014 Opinion and Award of Hon. Thomas G. Polites, Administrative Law Judge ("ALJ") and from the June 19, 2012 Opinion and Order of Hon. Richard M. Joiner, ALJ. In this appeal, we are asked to determine whether an employee's settlement of his claim extinguishes his dependents' right to seek benefits pursuant to KRS 342.750(1), when the

employee later dies as a direct result of the work-related injury. Under the circumstances of this case, we conclude the settlement agreement bars the recovery of benefits pursuant to KRS 342.750(1).

Stephen Baytos sustained a torn thoracic aorta on February 9, 2006 while lifting heavy boxes at Family Dollar. He made a claim for workers' compensation benefits, which was resolved by a settlement approved on July 10, 2008. He was not represented by an attorney when he signed the settlement agreement, a fact he expressly acknowledged in the document. Mr. Baytos subsequently died on December 3, 2009 of an acute rupture of the thoracic aorta.

His widow, Mamie Baytos, filed a motion to reopen the claim in order to pursue benefits under KRS 342.750(1). The claim was bifurcated to first resolve the question of whether the settlement agreement barred the claim. ALJ Joiner concluded Mr. Baytos' waiver of his right to reopen did not preclude his widow from seeking benefits pursuant to KRS 342.750. The claim was later reassigned to ALJ Polites, who resolved the sole remaining contested issue: that Mr. Baytos' death was caused by his work-related injury. He awarded benefits pursuant to KRS 342.750(1).

On appeal, Family Dollar does not challenge the finding Mr. Baytos died as a direct result of his work-related injury. Instead, it argues Mrs. Baytos' claim for benefits is barred by the settlement agreement Mr. Baytos signed. That agreement contained the following pertinent language:

(1) This settlement represents a compromised agreement of an adjudicated claim, wherein the Claimant, Steven Baytos, agrees to accept the total sum of \$100,000.00, in consideration for a complete discharge with prejudice of any claim he may have now or in the future against the Employer, Family Dollar, third party administrator REM, or any of their successors in interest, as it related to a work injury of February 9, 2006, to the Claimant's heart, larynx, and eyes. All parties herein agree to settle this claim based upon a commutation the remaining weekly indemnity benefits to a lump sum of \$85,740.82.

(2) The Claimant agrees to accept the additional sum of \$12,000 in consideration for a full and final waiver of any and all rights to compensation for future medical expenses that may result from the work-related injury and \$500 consideration for a full and final waiver of any and all rights to compensation for past medical expenses as a result from the work-related injury. Such waiver by the Claimant means that he forever waives any statutory or common law rights he may have now or in the future that would allow him to seek payment or reimbursement for medical expenses against Family Dollar, third party

administrator REM, its workers' compensation insurer, or any of their successors in interest.

(3)The Claimant further agrees to accept an additional sum of \$1,500.00 in consideration for a full and final waiver of any and all rights he may have to reopen this claim under KRS 342.125, for any reason, including a change in condition.

(4)...

(5)The Claimant furthermore agrees to indemnify and hold harmless Family Dollar, third party administrator REM, or any of their successors in interest, with respect to any and all potential claims which may hereinafter arise as a result of the work-related injury.

(6)... The Claimant further understands that this Agreement represents a complete dismissal with prejudice, and that he will be forever barred from seeking any medical, wage loss or vocational benefits for this claims [sic] as against Family Dollar, third party administrator REM, or any of their successors in interest. The Claimant further understands that he will be forever barred from reopening this claim for any increase in occupational disability.

The settlement agreement was approved, and the claim was dismissed with prejudice. Following Mr. Baytos' death, Mrs. Baytos sought benefits pursuant to KRS 342.750(1), which provides:

If the injury causes death, income benefits shall be payable in the amount and to or for the benefit of the

persons following, subject to the maximum limits specified in subsections (3) and (4) of this section:

(1)(a) If there is a widow or widower and no children of the deceased, to such widow or widower 50 percent of the average weekly wage of the deceased, during widowhood or widowerhood.

ALJ Joiner reasoned the right to benefits contained in KRS 342.750(1) belongs to the dependent. Though Mr. Baytos could waive his own right to reopen the claim, he had no authority to waive the rights of his dependents. Family Dollar argues Mrs. Baytos has no separate right of action under KRS 342.750 because her entitlement to benefits is derivative of her husband's claim. Because he settled his claim and expressly waived his right to reopen, no claim exists. It further emphasizes the public policy implications of allowing a settlement agreement to be set aside under these circumstances.

This matter appears to raise an issue of first impression in Kentucky. Our analysis must begin with the plain language of the statute, though it provides insufficient guidance in this case. KRS 342.750 simply states that the calculations contained in the provision shall be used when the work-related injury causes death.

It is silent as to whether a prior settlement agreement made during the worker's lifetime can bar recovery.

However, we bear in mind that the General Assembly intended the statute to "harmonize with related statutes." Jefferson County Bd. of Educ. v. Fell, 391 S.W.3d 713, 718 (Ky. 2012). The benefits set forth in both KRS 342.750 and KRS 342.730 are referred to as "income benefits." We also note KRS 342.750(6), which permits a lump sum death benefit to be paid to the claimant's estate "in addition to other benefits as provided by this chapter." KRS 342.750(1) contains no such language, instead referring to the award as "income benefits." For this reason, we are compelled to conclude the General Assembly intended KRS 342.730(1) and KRS 342.750(1) to be two alternate methods of calculating the same award of benefits, depending on whether the claimant died as a result of the injury. In this sense, the two provisions are mutually exclusive. To allow Mrs. Baytos' claim would be to frustrate this purpose, because it would effectively permit a claimant (or his dependents) to collect the same benefit - that is, income benefits - twice.

We also consider that Chapter 342 evinces a strong public policy favoring the prompt resolution of workers' compensation claims, with minimal litigation

expenses. Hitachi Automotive Products USA, Inc. v. Craig, 279 S.W.3d 123, 126 (Ky. 2008). Further, the Workers' Compensation Act encourages the settlement of claims. See Newberg v. Weaver, 866 S.W.2d 435, 438 (Ky. 1993). Public policy also favors the enforceability and acceptance of valid settlement agreements. In fact, "[t]he law is well established that an approved settlement agreement carries the force and effect of an award." See Bell v. Consol of Kentucky, Inc., 294 S.W.3d 459, 462 (Ky. App. 2009) citing Jude v. Cabbage, 251 S.W.2d 584, 586 (Ky. 1952). Thus, a claim, even one resolved by settlement agreement, may only be reopened pursuant to KRS 342.125. Furthermore, a claimant may validly waive his right to reopen. See Richey v. Perry Arnold, Inc., 391 S.W.3d 705, 710 (Ky. 2012). Here, Mr. Baytos was given specific consideration for the express waiver of his right to reopen.

This statutory analysis, however, does not satisfactorily resolve the issue presented by Mrs. Baytos' claim. Essentially admitting Mr. Baytos effectively waived his right to reopen the claim, it is her position that he was without authority to waive her right to reopen and pursue KRS 342.750(1) income benefits. This argument necessarily rests on the premise that her right to KRS 342.750(1) income benefits is wholly independent from Mr.

Baytos' right to benefits. We cannot agree. Any survivor's right to compensation under Chapter 342 is necessarily and inextricably linked to the worker's claim for compensation. Without Mr. Baytos' work-related injury, Mrs. Baytos would have no claim. Had Mr. Baytos not been eligible to be compensated for a work-related injury, Mrs. Baytos would likewise be ineligible. Her claim is derivative of his.

Given Kentucky's public policy encouraging the settlement of workers' compensation claims, and the derivative nature of survivor's benefits, we conclude an injured worker may compromise his or her surviving dependents' rights in a settlement agreement. In this case, we conclude Mr. Baytos effectively exercised this right and extinguished his survivor's right to compensation. Looking to the language contained in the settlement agreement, there is little doubt Mr. Baytos fully waived the right to reopen his claim, even in the event his condition worsened or "an increase in occupational disability." In addition to waiving any claim he may have in the future, the agreement references "any and all potential claims which may hereinafter arise as a result of the work-related injury." The waiver is not expressed in complicated legal terminology but in clear,

unambiguous terms. When read as a whole, the settlement agreement evinces the parties' intent to fully and finally settle Mr. Baytos' claim, even in the event his condition worsened. We believe the broad language of the agreement encompasses any claims relating to the worsening of an already grave injury, including claims brought by his survivors. Given that such occurrence was bargained for, it cannot therefore constitute a change of condition or mistake as contemplated by KRS 342.125.

We are sympathetic to Mrs. Baytos' position on appeal. Indeed, many states adhere to the policy that a settlement agreement cannot bind the worker's dependents in the event of his later death as a result of the work-related injury. See generally 100 CJS *Workers' Compensation* § 882. At least one Kentucky court has so opined, though in dicta. Brashear v. Old Straight Creek Coal Corp., 32 S.W.2d 717 (Ky. App. 1930) presented a similar factual situation, in which the claimant fully settled his claim during his life. After his subsequent death as a result of his injuries, his wife sought to reopen the claim. In directing the lower court, which had summarily dismissed the motion without a hearing, to consider the merits, the Court of Appeals stated, "If he acknowledged a final settlement, that would not prevent an

award to the widow, if, in truth and in fact, his death was brought about as the direct result of his injuries so received." Id. at 718. The Court offered no further explanation for the conclusion Mr. Brashear's final settlement would not bar his widow's claim for benefits, but seemed merely to be stating what was the majority rule at the time. Given the substantial development of the workers' compensation framework since Brashear was rendered, we do not find this single case to be particularly persuasive.

Rather, workers' compensation is a creature of statute and we are confined to the language contained in the Act. KRS Chapter 342 is silent as to the issue presented in this case. C.f. 820 ILCS 310/9 (West 1998) ("The payment of compensation in lump sum to the employee in his lifetime upon order of the Commission, shall extinguish and bar all claims for compensation for death..."). Based on the language contained in the applicable statutes, we are compelled to the conclusion that a worker's full and final settlement of a claim, the valid waiver of his right to reopen for a worsening of condition, and the dismissal of his claim with prejudice effectively bars recovery for his subsequent death as a result of the work-related injury.

For the foregoing reasons, the February 3, 2014 Opinion and Award of Hon. Thomas G. Polites, Administrative Law Judge, and the June 19, 2012 Opinion and Order of Hon. Richard M. Joiner, Administrative Law Judge, are hereby VACATED. This matter is REMANDED to the ALJ with directions to dismiss the claim.

ALL CONCUR.

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2015 WL 1610075

Only the Westlaw citation is currently available.

THIS OPINION IS NOT FINAL AND SHALL NOT
BE CITED AS AUTHORITY IN ANY COURTS
OF THE COMMONWEALTH OF KENTUCKY.

Court of Appeals of Kentucky.

Mamie Baytos, Widow of Stephen Baytos, Appellant

v.

Family Dollar, Hon. Richard M. Joiner,
Administrative Law Judge; Hon. Thomas
G. Polites, Administrative Law Judge; and
Workers' Compensation Board, Appellees

NO. 2014-CA-001053-WC

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RENDERED: MARCH 20, 2015; 10:00 A.M.

Synopsis

Background: Workers' compensation claimant's wife filed a motion to reopen his claim in order to seek death benefits after claimant died. The administrative law judge awarded death benefits. Employer appealed. The Workers' Compensation Board reversed. Claimant's wife appealed.

[Holding:] The Court of Appeals Combs, J., held that workers' compensation claimant's settlement of his claim with employer did not preclude claimant's wife from seeking to reopen the claim after claimant's death to seek death benefits.

Vacated and remanded.

PETITION FOR REVIEW OF A DECISION OF THE
WORKERS' COMPENSATION BOARD ACTION
NO. WC-06-01247

Attorneys and Law Firms

BRIEF FOR APPELLANT: Carl E. Grayson, Erlanger,
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BRIEF FOR APPELLEE FAMILY DOLLAR: Melanie
B. Gabbard, Lexington, Kentucky

AMICUS CURIAE BRIEF FOR KENTUCKY
WORKERS' ASSOCIATION (KIWA) Jeffery A.
Roberts, Murray, Kentucky

BEFORE: COMBS, D. LAMBERT, AND
VANMETER, JUDGES.

OPINION

COMBS, JUDGE:

*1 Mamie Baytos appeals the order of the Worker's Compensation Board which reversed the order of the Administrative Law Judge. After our review, we vacate the order of the Board and remand.

Mamie's husband, Stephen Baytos, was employed by Family Dollar Stores. He sustained a serious work-related injury (a torn thoracic aorta) on February 9, 2006. As a result of the injury, Stephen died on December 3, 2009. Pertinent to this case, before Stephen passed away, he entered into a settlement with Family Dollar. He accepted a lump-sum payment and agreed not to pursue any future claims. The settlement was not signed by Mamie, and it did not include references to any future rights that she might have.

On August 31, 2011, Mamie filed a motion to reopen Stephen's claim in order to seek death benefits. On June 19, 2012, Administrative Law Judge (ALJ) Richard Joiner ruled that Mamie's claim was viable, but that in order to obtain benefits, she needed to prove that Stephen's death was caused by the work injury. Therefore, his order was interlocutory. On July 16, 2012, ALJ Joiner retired, and the case was transferred to ALJ Thomas Polites. On February 3, 2014, ALJ Polites adopted the findings of ALJ Joiner. He determined that Stephen's death was a result of the injury, and he awarded death benefits to Mamie.

Family Dollar appealed to the Worker's Compensation Board. On March 14, 2014, Mamie filed a motion to dismiss the appeal. On June 2, 2014, the Board entered an order reversing the ALJ. It did not rule on the motion to dismiss, but finding that Mamie's claims were barred by the settlement agreement executed between Stephen and Family Dollar, it denied her benefits. Mamie now appeals.

[1] [2] When an appeal is based upon disputes of factual issues, the Board must uphold the ALJ's ruling if it was supported by substantial evidence in the record. *Transportation Cabinet v. Poe*, 69 S.W.3d 60, 62 (Ky.2001). Similarly, when reviewing decisions of the Board, this Court may only reverse if the Board “has overlooked or construed controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky.1992). This appeal, however, has presented a question of law. Therefore, our review is *de novo*. *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App.2009).

[3] Mamie first argues that the Board committed error by not dismissing Family Dollar's appeal. She claims that the notice was defective because it was taken from an interlocutory order rather than from a final order.

Kentucky Administrative Rule 803 KAR 25:010 § 21 governs the content of a notice of appeal from an ALJ to the Board. It provides that the notice must:

1. Denote the appealing party as the petitioner;
2. Denote all parties against whom the appeal is taken as respondents;
3. Name the administrative law judge who rendered the award, order, or decision appealed from as a respondent;
4. If appropriate pursuant to KRS 342.120 or 342.1242, name the director of the Division of Workers' Compensation Funds as a respondent; and

*2 5. Include the claim number.

803 KAR 25:010 § 21(2)(c).

Mamie contends that Family Dollar did not follow the provision to identify the correct judge because it named ALJ Joiner and not ALJ Polites as authoring the subject order. There is no merit to this argument. The notice of appeal began as follows:

[Family Dollar] requests a review by the Workers' Compensation Board of the opinion and award rendered herein by Honorable Richard Joiner, Administrative Law Judge, on June 19, 2012. The order on the petition for reconsideration was entered on July

10, 2012. This appeal was originally filed in August 2012 and was dismissed given the interlocutory nature of the underlying proceedings.

On February 4, 2014, Hon. Tom Polites, ALJ rendered a decision in this claim which now makes the 2012 decision by Judge Joiner final and appealable.

While the notice of appeal includes reference to ALJ Joiner, it explains that the order by ALJ Polites is the final order. We cannot conclude that the notice resulted in a defect as it recited the sequence of orders entered by the ALJs involved.

[4] The substantive issue which Mamie presents is whether the Board erred by determining that Stephen's agreement with Family Dollar prohibits her from seeking death benefits. Kentucky Revised Statute[s] (KRS) 342.750 allows surviving spouses to receive death benefits if the injured employee dies within four years of sustaining the injury. It makes no mention of prior agreements reached between the employer and the injured employee.

There is no dispute that the settlement between Family Dollar and Stephen precluded *him* from asserting any future claims. The Board relied on the settlement when ruling that Mamie's claim is derivative of Stephen's claim, holding that her claim was barred. The Board reasoned that KRS 342.750 (the statute which governs death benefits) and KRS 342.730 (the statute under which Stephen and Family Dollar reached a settlement) are both direct income benefits. Thus, Mamie's entitlement to any benefits was not addressed or implicated.

The predecessor to our Supreme Court provided guidance for this scenario in *Brashear v. Old Straight Creek Coal Corp.*, 236 Ky. 83, 32 S.W.2d 717 (Ky.1930). The employer coal company compensated Brashear for an injury covering a period of time until he signed a receipt indicating that he had received the final payment. *Id.* The Court held that Brashear's “final settlement [did] not prevent an award to the widow...” 236 Ky. at 85, 32 S.W.2d at 718. The Court went on to explain that:

[H]er motion to reopen the case should properly be treated as a motion to reopen so far as the application which she had filed was concerned. The compensation due her, if any, is quite a different thing

from the compensation paid to her husband.

Id.

The clear holding of *Brashear* circumvents any need for us to seek guidance by statutory construction. Nothing in the current statutes contradicts *Brashear*, and its circumstances are strikingly similar to the ones in the case before us.

Additionally, other sources are harmonious with *Brashear* indicating the clear and separate right of the surviving spouse to seek compensation.

*3 The dependent's right to death benefits is an independent right derived from statute, not from the rights of the decedent. Accordingly, death benefits are not affected by compromises or releases executed by decedent....

Arthur Larson, *Larson's Worker's Compensation*, Desk Edition §98 Scope, 98-1 (2007)(cited by *Matter of Fossum*, 289 Or. 787, 619 P.2d 233, 238 (1980); *State Indus. Ins. Sys. v. Lodge*, 107 Nev. 867, 822 P.2d 664, 666 (1991)). The Supreme Court of New Jersey has stated that “the vast majority” of jurisdictions consider that “the

dependents' rights are not derived from the employee's rights, but instead, are separate and independent rights of the dependent.’” *Kibble v. Weeks Dredging & Const. Co.*, 161 N.J. 178, 735 A.2d 1142, 1147 (1999) (quoting *Brown v. General Aniline & Film Corp.*, 127 N.J.Super. 93, 316 A.2d 478 (App.Div.1974)). See also *Judd v. Rinelli*, 75 Idaho 121, 268 P.2d 671, 672 (1954); *Owens Corning Fiberglas Corp. v. Indus. Comm'n*, 198 Ill.App.3d 605, 144 Ill.Dec. 714, 555 N.E.2d 1233, 1238-39 (1990); *Rouse v. WCC*, 176 W.Va. 262, 342 S.E.2d 229, 231 (1986); *Hampton's Claimants v. Director of Div. of Labor*, 31 Colo.App. 141, 500 P.2d 1186, 1188 (1972); *Buchanan v. Kerr-McGee Corp.*, 121 N.M. 12, 908 P.2d 242, 245 (App.1995).

The Board did not provide authority for its holding that Mamie's claim was barred by Stephen's settlement with Family Dollar. Therefore, we must follow the precedent provided by *Brashear* and reinforced by other sources.

We vacate the order of the Board and remand for further proceedings consistent with this opinion.

ALL CONCUR.

All Citations

--- S.W.3d ----, 2015 WL 1610075