866 S.W.2d 435
Supreme Court of Kentucky.

Vicki G. NEWBERG, Acting
Director of Special Fund, Appellant,
v.
Jerry W. WEAVER; Energy Producers Associates;
Richard H. Campbell, Administrative Law Judge;
and Workers' Compensation Board, Appellees.

No. 93–SC–17–WC.
|
Sept. 30, 1993.
|
As Modified on Denial of Rehearing Dec. 22, 1993.

Court of Appeals affirmed decision of Workers' Compensation Board to approve settlement agreement between worker and employer, and director of state Special Fund appealed. The Supreme Court held that portion of settlement agreement which provided for payments to worker until end of worker's life and accelerated liability of Special Fund was void as contrary to public policy.

Reversed and remanded.

Wintersheimer, J., concurred in result only.

Attorneys and Law Firms

*436 Mark C. Webster, Labor Cabinet, Sp. Fund, Louisville, for appellant Newberg.

Sidney B. Douglass, Harlan, for appellee Weaver.

Thomas L. Ferreri, Joel W. Aubrey, Lexington, for appellee Energy Producers Associates.

OPINION OF THE COURT

This workers' compensation case concerns whether the Special Fund's payment period for an award of income benefits may be accelerated when the worker and his employer enter into a pre-award settlement agreement providing for periodic payments over the worker's lifetime rather than for a lump-sum payment.

Claimant and his employer, Energy Producers Associates, entered into a pre-award settlement agreement which provided for 17.41% of a permanent, total, occupational disability benefit to be paid by the employer in periodic payments over claimant's lifetime or for a minimum of ten years. The Administrative Law Judge (ALJ) approved the agreement, and an order to that effect was entered on January 3, 1991. The Special Fund was not a party to the agreement, and the issue of its liability proceeded to a hearing, after which the ALJ determined that claimant was 100% occupationally disabled. Liability was apportioned 20% to the employer and 80% to the Special Fund. The ALJ also ordered that the Special Fund's obligation to pay the award should begin on May 29, 1989, the day after the last payment of temporary, total, disability benefits. The Special Fund's petition for reconsideration, which alleged that the ALJ erred in accelerating the date on which it should begin payment, was overruled.

On appeal to the Workers' Compensation Board (Board) the Special Fund argued that the ALJ erred in ordering its payments to begin immediately following the period of temporary, total disability rather than after 20% of claimant's life expectancy had passed. In support of this argument, the Special Fund cited KRS 342.120(4) and (5) [now KRS 342.120(6) and (7)] and *Palmore v. Helton*, Ky., 779 S.W.2d 196 (1989). The Board believed, however, that the difference between a pre-award lump-sum settlement, as was present in *Palmore v. Helton, supra,* and a periodic settlement over the worker's lifetime, as was present in the instant case, was immaterial to the result. The Board concluded that either type of agreement accelerated the liability of the Special Fund to the date the ALJ approved the settlement. Accordingly, the case was remanded to the ALJ with directions to begin Special Fund liability as of January 3, 1991, the date of the settlement between claimant and his employer. Pursuant to the Board's directions, payment should be made for the number of weeks equalling 80% of claimant's life expectancy. That decision was affirmed by the Court of Appeals.

[1] [2] It is well established that the Workers' Compensation Act is social legislation which encompasses a number of public policy considerations. Foremost of these is the policy of compensating disabled workers for the decrease in their wage earning capacity which has resulted from an injury caused by work. See KRS

342.0011(11). Under the Act, a worker who sustains a permanent, occupational disability is awarded a benefit which is paid periodically in order to provide a continuing source of income in an amount sufficient to enable the worker and his dependents to meet their ongoing and essential requirements for food, clothing, and shelter. Second, with the goal of promoting the prompt disposition of compensation claims and of controlling the expense of prosecuting a claim, both the legislature and the courts have adopted a policy encouraging the settlement of these claims. KRS 342.265; *Beale v. Faultless Hardware,* Ky., 837 S.W.2d 893 (1992).

[3] The third policy consideration involves the Special Fund. The purpose of a subsequent injury fund is to encourage employers to hire workers who are disabled or who may become disabled due to the work- *437 related arousal of an underlying physical condition. *Stovall v. Dal-Camp, Inc.,* Ky., 669 S.W.2d 531, 533 (1984); *Transport Motor Express v. Finn,* Ky., 574 S.W.2d 277, 280-81 (1978). This is accomplished by holding the Special Fund responsible for compensating a worker for that portion of his occupational disability which is attributable to the arousal of a previously dormant condition or which is attributable to the excess disability which results because the latest disability is superimposed on a previous disability. Presently, the Special Fund is financed by assessments on workers' compensation insurance premiums and self-insurance contributions. Historically, the cost of the Special Fund's liability ultimately has been spread among all of the employers in the state who participate in the workers' compensation system.

[4] Before 1982, the employer paid the entire award to the worker, and the Special Fund reimbursed the employer quarterly for its apportioned share of each periodic payment. However, since the effective date of the 1982 amendments to KRS 342.120, the employer has paid the entire benefit for enough weeks to satisfy its share of the award, after which the Special Fund pays its share. This change in the payment scheme indicated an attempt by the legislature to improve the financial status of the Special Fund. It allowed the Fund to delay paying its share of the award for a longer period of time. By shifting the entire obligation to pay for the initial weeks of the award to the employer in whose employ the injury occurred, the legislature effectively decreased the amount of assessments necessary to finance the obligations of the Special Fund, which ultimately were paid by all employers who participated in the workers' compensation system. [1]

In *Palmore v. Helton, supra,* this Court ruled that, pursuant to the 1982 amendments to KRS 342.120, the employer and the Special Fund were in the position of codefendants in workers' compensation cases. Therefore, a worker could settle with one defendant and maintain a cause of action against the other. If a worker reached a pre-award lump-sum settlement with an employer, the employer's liability was discharged upon payment of the lump sum, and the liability of the Special Fund became due. It was the worker's receipt of the lump sum that caused the Special Fund's financial obligation to come due. *Palmore v. Helton, supra* at 198.

Subsequently, in *Newberg v. Chumley,* Ky., 824 S.W.2d 413 (1992), we ruled that neither *Palmore v. Helton, supra,* nor KRS 342.120 entitled a worker who reached a pre-award lump-sum settlement with his employer to receive during his life expectancy an amount of benefits from the Special Fund greater than he otherwise would have received. When payment of the Special Fund's share of the award was complete, payment would be suspended until such time as the worker lived beyond his anticipated life expectancy. We also noted that KRS 342.120 controls the distribution of benefits during the worker's life expectancy. It does not address the procedure to be followed where the worker lives beyond his anticipated life expectancy. Because the worker and the employer in that case had reached a settlement and its terms had been fulfilled, the employer's obligation was complete. However, if the worker lived beyond his life expectancy the Special Fund would, at that time, resume payment for its percentage of a total disability award for so long as the worker lived.

Although the settlement of workers' compensation claims is highly desirable and is to be encouraged as a matter of policy, we believe that settlements which are reached also must comply with the other public policy considerations embodied in the Workers' Compensation Act. Accordingly, an ALJ is without authority to approve settlement agreements which do not comply with those policy considerations.

*438 [5] In *Palmore v. Helton, supra,* there was a lump-sum settlement, the payment of which caused the Special Fund's liability to come due. In the instant case, instead

of a lump-sum payoff, the contract provided that the employer's payment period was to extend throughout the worker's life. Therefore, the date for discharge of the employer's obligation was postponed until the end of the worker's life. This is contrary to the policy behind periodic payments in two respects. First, even though the agreement presupposed that the worker was totally, occupationally disabled, it would result in the worker receiving periodic payments during the employer's payment period in an amount equal only to 17.41% of a total, occupational disability benefit, an amount insufficient to meet the worker's essential needs. Second, because the employer will not have paid its entire liability until the end of the worker's life, the Special Fund's obligation would not come due until that time pursuant to the plain language of KRS 342.120. Furthermore, it is contrary to the public policy embodied in the 1982 amendments to KRS 342.120 to accelerate the date upon which the Special Fund's liability becomes due and to allow the employer to extend its payment period throughout the worker's life, as is urged by the employer. The legislature placed the obligation for payment of the initial weeks of the award on the employer in whose employ the injury occurred in order to minimize the increase in Special Fund assessments that otherwise would be necessary to meet the obligations of the Special Fund and which ultimately are borne by all employers. We conclude, therefore, that the agreement reached by the employer and the worker in this case is void, insofar as it would extend the period for payment of the employer's obligation on the award throughout the worker's life, because it is contrary to public policy. Voiding this portion of the agreement has no effect on the remainder of the agreement.

[6] [7] We reiterate our continuing view that agreements to settle workers' compensation claims are to be encouraged. Unless an agreement is contrary to the Act or to public policy, its approval by an ALJ is authorized. Lump-sum agreements are contemplated by the Act, and workers are, of course, always free to invest the proceeds of a lump-sum agreement or to purchase an annuity that will provide for periodic payments. See KRS 342.150; KRS 342.155. Workers and their employers also are free to reach an agreement which contemplates periodic payments for an agreed-upon percentage of occupational disability. We believe, however, that in order to comply with the public policy considerations embodied in the Workers' Compensation Act, periodic payments may not extend beyond the percent of the worker's life expectancy represented by the percent of disability to which the parties have agreed. In the instant case, the agreement was premised on 17.41% of a total disability benefit; therefore, public policy would require that the agreement provide for a total disability benefit payable over no more than 17.41% of the worker's life expectancy. After the employer's obligation was paid in full, the obligation of the Special Fund would come due.

Energy Producers Associates' motion to be dismissed as a party is hereby denied. The decision of the Court of Appeals is hereby reversed, and the case is remanded to the ALJ for proceedings consistent with this opinion.

All concur except WINTERSHEIMER, J., who concurs in result only.

All Citations

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Footnotes

1 This claim arose prior to the effective date of the 1987 Amendments to the Workers' Compensation Act. We note, however, that those amendments retained the payment scheme enacted in 1982. They also created the Kentucky Workers' Compensation Funding Commission to hold and invest Special Fund assessments, also consistent with the goal of minimizing the amount of assessments necessary to meet the liabilities of the Special Fund. KRS 342.1223.

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294 S.W.3d 459
Court of Appeals of Kentucky.

Mary BELL, Substituted Party For Rodney Bell, Deceased, Appellant,
v.
CONSOL OF KENTUCKY, INC.; Hon. R. Scott Borders, Administrative Law Judge; and Workers' Compensation Board, Appellees.

No. 2009–CA–000673–WC.
|
Sept. 4, 2009.

Synopsis

Background: Claimant, substituted party for deceased employee, sought review of a decision of the Workers' Compensation Board, which affirmed decision of the administrative law judge (ALJ), to reduce workers' compensation benefits awarded pursuant to settlement agreement by 50% after employee's death. Claimant appealed.

Holdings: On an issue of first impression, the Court of Appeals, Harris, Senior Judge, held that:

[1] statute providing that a claimant's widow is to be paid a portion of benefits when claimant dies of injuries other than work-related injuries applies to a court-approved workers' compensation settlement agreement, and

[2] statute providing for reopening of workers' compensation award due to fraud, newly-discovered evidence, mistake, or change of disability did not apply.

Affirmed.

Attorneys and Law Firms

***460** Kenneth C. Smith, III, Catlettsburg, KY, for appellant.

Stuart Bennett, Lexington, KY, for appellee, Consol Of Kentucky, Inc.

Before MOORE and NICKELL, Judges; HARRIS,[1] Senior Judge.

***461** *OPINION*

HARRIS, Senior Judge.

Mary Bell, substituted party for Rodney Bell, deceased, filed this petition for review of a decision by the Workers' Compensation Board, which affirmed the decision of the Administrative Law Judge (ALJ) to reduce the benefit payments by 50% pursuant to KRS 342.730(3). Bell argues that KRS 342.730(3) does not apply to settlement agreements and that the Board should have applied KRS 342.125 and KRS 342.265. The question of whether KRS 342.730(3) applies to settlement agreements appears to be one of first impression. We find that KRS 342.730(3) is applicable to settlement agreements and affirm the decision of the Workers' Compensation Board.

Rodney Bell was employed by Consol of Kentucky, Inc. Bell filed a consolidated workers' compensation claim for hearing loss and injuries sustained to his spine, joints, and limbs. The claims were settled by agreement approved on April 17, 2007. The agreement provided that Bell would receive $70.00 per week to be paid weekly for 425 weeks beginning on February 1, 2006. Bell agreed to waive the right to reopen the settlement for consideration of $125.00.

On July 4, 2007, Rodney Bell died in a motorcycle accident. On July 19, 2007, a motion was filed in the name of Rodney Bell to change the payee of the settlement agreement to Mary Bell and requested that the full amounts of the remaining settlement benefits be paid to her. Neither Mary Bell nor the estate of Rodney Bell was substituted as a party. On August 3, 2007, the ALJ granted the motion to change the payee of the settlement benefits to Mary Bell and provided that she was to receive benefits at 50% of the rate specified in the settlement agreement pursuant to KRS 342.730(3). Bell filed a petition for reconsideration, which the ALJ denied.

Bell appealed to the Board, which affirmed the decision of the ALJ. This Court reversed the Board's holding that the ALJ lacked jurisdiction to substitute the payee because Mary Bell had not been substituted as a party. *Bell v. Consol of Kentucky, Inc.*, 2008 WL

2231131 (Ky.App.2008) (2008–CA–000227–WC). This Court remanded with directions that Mary Bell be substituted as the real party in interest and for the ALJ to reissue his decision. On remand, Bell was substituted as the real party in interest, and the ALJ again ordered that benefits be paid to Bell at 50% of the rate specified in the settlement agreement pursuant to KRS 342.730(3). Bell filed a motion for reconsideration, which the ALJ denied. The Board affirmed the decision of the ALJ, finding that KRS 342.730(3) applied to the settlement agreement and that KRS 342.265(4) and KRS 342.125 specifically did not apply. This petition for review of the decision of the Board followed.

[1] Bell first argues that KRS 342.730(3)(a) does not apply to settlement agreements. KRS 342.730(3)(a) provides:

> (3) Subject to the limitations contained in subsection (4) of this section, when an employee, who has sustained disability compensable under this chapter, and who has filed, or could have timely filed, a valid claim in his lifetime, dies from causes other than the injury before the expiration of the compensable period specified, portions of the income benefits specified and unpaid at the individual's death, whether or not accrued or due at his death, shall be paid, under an award made before or after the death, for the period specified in this section, to and for the benefit of the persons within the classes at the time of death and in the ***462** proportions and upon the conditions specified in this section and in the order named:
>
> (a) To the widow or widower, if there is no child under the age of eighteen (18) or incapable of self-support, benefits at fifty percent (50%) of the rate specified in the award[.]

[2] The law is well established that an approved settlement agreement carries the force and effect of an award. *Jude v. Cubbage*, 251 S.W.2d 584, 586 (Ky.1952). The Board correctly found that "once the ALJ approved the settlement agreement on April 25, 2007, upon being subsequently apprised of Bell's untimely death, the provision of KRS 342.730(3) provides the mechanism for the payment of the remaining benefits to the applicable classes of persons eligible to receive these benefits." We find no error in the application of KRS 342.730(3)(a) to the settlement agreement.

[3] Bell next argues that KRS 342.265(4) and KRS 342.125 should have been applied to this situation. We disagree.

KRS 342.265(4) states:

> If the parties have previously filed an agreement which has been approved by the administrative law judge, and compensation has been paid or is due in accordance therewith and the parties thereafter disagree, either party may invoke the provisions of KRS 342.125, which remedy shall be exclusive.

KRS 342.125(1) provides in pertinent part:

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
>
> (a) Fraud;
>
> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
>
> (c) Mistake; and
>
> (d) 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.

None of the KRS 342.125(1) factors are applicable to the circumstances of this case. The issue in this case is how the remaining benefits of an award are to be distributed to a widow after the employee's death from a non-work related injury. As stated above, KRS 342.730(3) controls the resolution of this issue.

[4] [5] [6] Finally, Bell argues that the application of KRS 342.730(3) to settlement awards is contrary to public policy.

> It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative

> of the legislature to declare that acts constitute a violation of public policy.

Com. ex rel. Cowan v. Wilkinson, 828 S.W.2d 610, 614 (Ky.1992). We decline to declare that the application of KRS 342.730(3) to settlement awards violates public policy.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

All Citations

294 S.W.3d 459

Footnotes

1 Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

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391 S.W.3d 705
Supreme Court of Kentucky.

John A. RICHEY; Harned, Bachert & Denton, LLP; and Norman E. Harned, Appellants
v.
PERRY ARNOLD, INC.; Honorable Joseph W. Justice, Administrative Law Judge; and Workers' Compensation Board, Appellees.

No. 2011–SC–000326–WC.
|
March 22, 2012.
|
Rehearing Denied Oct. 25, 2012.

Synopsis

Background: Claimant and employer filed cross-appeals from decision of Workers' Compensation Board (WCB), in a post-award reopening filed by claimant, that awarded temporary total disability benefits (TTD) but declined to assess sanctions against employer for failure to timely pre-authorize or contest a surgical procedure. The Court of Appeals, 2011 WL 135008, Acree, J., reversed TTD award. Claimant appealed.

Holdings: The Supreme Court held that:

[1] lump sum settlement of $15,500 "for a complete resolution of indemnity benefits" indicated that employer and claimant intended lump sum to compensate claimant not only for his present claim but also for any future claim to TTD benefits;

[2] settlement agreement provided consideration for a waiver of claimant's right to reopen claim to obtain future TTD benefits; and

[3] an ALJ has discretion to assess sanctions when an employer never files a medical dispute of post-award medical bill, never files a motion to reopen, continues to refuse to pay medical expenses, and requires claimant to seek litigation of those benefits.

Decision of Court of Appeals affirmed in part and reversed in part; claim remanded.

Attorneys and Law Firms

*706 Norman E. Harned, Harned Backert & McGehee, PSC, Bowling Green, KY, for Appellants, John A. Richey; Harned, Bachert & Denton, LLP; and Norman E. Harned.

Douglas Anthony U'Sellis, U'Sellis & Kitchen, PSC, Louisville, KY, for Appellee, Perry Arnold, Inc.

OPINION OF THE COURT

An Administrative Law Judge determined in this post-award reopening filed by the claimant that a surgery the employer failed to pre-authorize was reasonable and necessary; that the employer must pay for the procedure and related expenses; but that the parties' settlement precluded any claim for temporary total *707 disability (TTD) benefits relative to the surgery. The ALJ also determined that the employer's failure to pre-authorize or contest the surgery within 30 days did not warrant the imposition of sanctions.

The Workers' Compensation Board reversed to the extent that it interpreted the settlement agreement as not precluding future TTD benefits but affirmed otherwise. Convinced that the agreement precluded additional income benefits, the Court of Appeals reversed with respect to future TTD and reinstated the ALJ's decision.

This appeal by the claimant raises two issues. First, he argues that the terms of the parties' agreement did not bar a future TTD claim. Second, he argues that KRS 342.310(1) and 803 KAR 25:012 § 2(*1*)(a) warranted sanctions based on what he alleges was the employer's unreasonable defense to his motion to compel payment for the surgery after it violated 803 KAR 25:096, § 8(1) by refusing to pre-authorize the surgery and then failing to file a motion to reopen and medical dispute within 30 days.

We affirm insofar as the settlement barred a future TTD award but reverse and remand with respect to the issue of sanctions. The ALJ must reconsider the claimant's request based on a correct understanding of the employer's obligations concerning the pre-authorization request and on any other considerations relevant to the reasonableness of its action in defending the reopening.

The claimant, a carpenter, injured his right shoulder on July 13, 2004, while pulling on a beam that he was attempting to install beneath a floor system. After conservative treatment failed to relieve his symptoms, he saw Dr. Richards, an orthopedic surgeon. Dr. Richards performed arthroscopic surgery and a subacromial decompression in October 2004. He diagnosed subacromial bursitis. The claimant returned to light-duty work in December 2004 although his shoulder symptoms continued. Dr. Richards noted in January 2005 that he could not explain the claimant's ongoing pain complaints and recommended a second opinion because his condition was not improving.

Dr. Goldman performed an independent medical evaluation for the employer in February 2005. He recommended an MR arthrogram to be certain that a labral tear did not occur during physical therapy or that there was not a problem with the biceps anchor. Finding the claimant to be at maximum medical improvement if neither condition was present, Dr. Goldman assigned a 9% impairment rating based on a decreased range of motion in the shoulder.

Dr. Dunn evaluated the claimant in August 2005 at his primary care physician's request. He thought that the claimant did not have a labral tear that was significant mechanically and thought that further surgery would be harmful. He recommended that the claimant follow up with his primary care physician.

The claimant sought pre-authorization for a referral to Drs. Kleinert and Kutz shortly after seeing Dr. Dunn. His employer denied the request in September 2005 based on a utilization review report by Dr. Olash, who opined that the referral was not medically necessary.

Dr. Gladstein evaluated the claimant on the employer's behalf in September 2005, at which time he exhibited a full range of motion in the shoulder but complained of discomfort. Dr. Gladstein found no evidence of atrophy, crepitus, instability, or appreciable muscle weakness. He also noted that no significant radiographic abnormality supported a diagnosis of a significant SLAP lesion. Dr. ***708** Gladstein reviewed the MR arthrogram with a radiologist and noted that the "relatively normal" findings were supported by the arthroscopy performed by Dr. Richards, which also revealed no significant pathology. He concluded that further surgery was not indicated.

The parties agreed to settle the matter on November 2, 2005 although the claimant had not filed a formal application for benefits. As approved by an ALJ on November 9, 2005, their Form 110–I agreement characterized the claimant's injury as a right shoulder rotator cuff tear. It stated that his average weekly wage was $417.23; that the employer paid $14,693.31 in medical expenses through September 16, 2005; that it paid $6,040.04 in TTD expenses through November 2, 2005; and that the percent of disability was 9%. The agreement did not include a calculation of the lump sum provided and made no reference to a multiplier. It concluded with the following statement:

> This is a lump sum settlement of $15,500 for complete resolution of indemnity benefits. Medical benefits remain open per the Act.

The motion and affidavit requesting an attorney's fee, filed by the claimant's then-attorney, stated among other things that the parties agreed to settle the claim and that the claimant retained the right to future medical treatment but waived the right to reopen.

In August 2006 the claimant sought pre-authorization for a referral to the Tennessee Orthopedic Alliance. Dr. Kirsch performed a utilization review and recommended denying the request as being not medically necessary. He noted that three orthopedic experts saw no evidence of a significant labral lesion and also that Dr. Richards evaluated the labrum "under direct vision." The employer relied on the recommendation to deny the referral. Pleadings the employer filed before the ALJ in the present proceeding state that the claims adjuster advised the claimant in at least three separate conversations prior to February 20, 2007 that the evaluation was not approved for compensation. The employer did not, however, file a motion to reopen or medical dispute.

The claimant saw Dr. Anderson at the Tennessee Orthopedic alliance on February 20, 2007, at his own expense. Dr. Anderson examined him and interpreted the 2005 MR arthrogram as revealing a tear of the anterior glenohumeral ligament and a SLAP tear. He

recommended arthroscopic surgery to evaluate and repair an anterior laxity and SLAP tear if necessary.

The employer did not dispute that it received a message the claimant sent by fax on February 27, 2007 to the claims adjuster's attention along with a copy of Dr. Anderson's February 20, 2007 office note. The claimant stated in the fax that he sought reimbursement for various expenses incurred in the visit to Dr. Anderson. He also requested compensation for the proposed surgery, time off work related to the surgery, travel expenses, and physical therapy if recommended. The employer did not respond to the request.

Having received no response from the employer, the claimant underwent the surgery on April 3, 2007. Dr. Anderson performed an arthroscopic repair of the anterior and posterior glenoid labrum and a subacromial decompression. He opined in December 2007 that the claimant's work-related injury caused a tear in the glenoid labrum; assigned a 4% impairment rating; and limited the claimant to lifting 40 pounds presently but stated that he should able to work without restrictions within three months.

***709** On April 4, 2007 the claimant filed a motion to reopen, motion for enforcement, motion for sanctions, and medical fee dispute. He sought to recover his medical and travel expenses with respect to the surgery; TTD benefits; and the expenses incurred with respect to the motions.

The employer objected on two grounds: 1.) that it had no duty to submit the claimant's request for pre-authorization to utilization review because it was not made by a physician; and 2.) that it had no obligation to file a motion to reopen or medical dispute because a pre-authorization request does not constitute a "statement for services" that 803 KAR 25:096, § 8(1) requires an employer to pay or contest within 30 days of receipt. The employer also filed a medical fee dispute on April 26, 2007 in order to contest payment for the surgery.

The claimant testified at the hearing that Dr. Anderson released him to return to work on November 19, 2007. He stated that he felt better than he had previously and considered the surgery to be successful. He had returned to work with a different employer.

The ALJ determined that the surgery, physical therapy, and related travel expenses were compensable because they were reasonable and necessary treatment for the effects of the work-related injury. Rejecting the claimant's request for TTD benefits, the ALJ interpreted the terms of the settlement agreement as barring any future income benefits. The ALJ noted that the agreement would have little effect if the term "indemnity benefits" were not interpreted as referring to income benefits.

The ALJ also rejected the claimant's request for sanctions, convinced that 803 KAR 25:096, § 8(1) did not require the employer to approve and pay for the surgery or to file a motion to reopen and medical dispute within 30 days after receiving the claimant's fax and Dr. Anderson's office note. The ALJ opined that such a requirement would place an employer in the untenable position of having to respond to every request that a plaintiff made when accompanied with a "to whom it may concern" note by a physician. Although a later order granted the claimant's petition for reconsideration to the extent of awarding him sanctions in the form of attorney's fees and costs, the ALJ reconsidered the order at the employer's request and ultimately denied sanctions. The claimant appealed.

I. TTD.

[1] [2] [3] [4] [5] An agreement to settle a workers' compensation claim is a contract between the parties.[1] Questions concerning the construction and interpretation of contractual terms are legal in nature as are questions regarding the existence of an ambiguity.[2] An ambiguous contract is one that is capable of multiple, reasonable interpretations.[3] The primary rule for construing an ambiguous or inconsistent contract is to discern the parties' intent from the entire document; reconcile inconsistent terms where possible; and effectuate the parties' intent.[4] The court may also ***710** consider relevant extrinsic evidence when construing an ambiguous contract, such as the situation of the parties, the purpose of the agreement, and the circumstances under which it was executed.[5]

The Board reversed with respect to the waiver of future income benefits, interpreting the parties' agreement as settling any past claim for TTD but not any future claim. The Board noted that the sentence containing

the statement "for a complete resolution of indemnity benefits" is written in the present tense and may be interpreted as referring only to the claimant's present entitlement to income benefits. Noting also that the agreement contains no explicit waiver of the right to reopen and no explicit consideration for such a waiver, the Board relied on *Huff Contracting v. Sark*[6] for the principle that consideration given for a waiver of the right to reopen must be contained on the face of the agreement and may not be simply implied from some other activity.

The Court of Appeals reversed the Board and reinstated the ALJ's decision, convinced that the Board misinterpreted *Huff v. Sark* and misconstrued the parties' contract. The court concluded that, unlike the settlement in *Huff v. Sark*, the settlement at issue presently provided adequate consideration for a waiver of the right to reopen. We agree.

Huff Contracting v. Sark concerned an agreement, drafted by the employer's counsel, in which the worker received "[a] lump sum settlement of 3%, discounted at 6%, Total to be paid by the employer is $2,685.20." The agreement noted the amounts of TTD and medical benefits that the employer had paid and indicated that the settlement was "inclusive of all attorney fees and also includes all future medical expenses beyond that already paid...." Sometime thereafter, the worker moved to set aside the agreement or, in the alternative, to reopen based on mistake or constructive fraud, stating that it had not been his intent to waive his right to future medical expenses. The court stated that consideration for a waiver of the right to reopen "must be direct on the [face] of the agreement and may not simply be implied from some other activity"[7] and held ultimately that the purported waiver was invalid because neither the letter proposing a settlement nor the settlement, itself, contained substantial evidence that any consideration supported the waiver. The consideration provided was nothing more than the amount to which the worker was entitled by virtue of the agreed-upon impairment rating.

[6] [7] *Huff v. Sark* stands for the principle that an agreement to waive the right to future benefits is invalid unless it demonstrates that the waiver is supported by consideration in addition to that provided for past and present benefits. In other words, the agreement must show that the employer provided consideration for the waiver. When an agreement includes a waiver of future benefits but fails to state explicitly what consideration supports the waiver and also fails to include the calculation from which a lump sum is derived, the ALJ must determine from the agreement as a whole whether the lump sum is adequate to include consideration not only for any agreed-upon benefits but also for the waiver.

[8] Having reviewed the agreement at issue presently, we conclude that the parties used the phrase "complete resolution *711 of indemnity benefits" to indicate that they intended the lump sum to compensate the claimant not only for his present claim but also for any future claim to income benefits. We reach that conclusion because the agreement also stated explicitly that the claimant reserved his right to future medical benefits but did not provide a reservation of his right to reopen. Moreover, the contents of the motion in which the claimant's attorney requested a fee resolves any doubt concerning what the parties intended when using the present tense in the statement concerning indemnity benefits.

[9] The agreement failed to specify what consideration supported the waiver and failed to provide the calculation used to arrive at a $15,500.00 lump sum. Thus, the issue becomes whether the agreement provided consideration that was adequate for the permanent income benefits to which the parties agreed as well as for a waiver of the right to reopen. We conclude that it did.

KRS 342.730(1)(b) entitled the claimant to receive weekly benefits for 425 weeks in an amount equal to 66 2/3% of his average weekly wage, multiplied by the agreed-upon 9% permanent impairment rating, and multiplied again by the statutory factor of 0.85. The agreement contains nothing to indicate that the parties agreed to any additional benefit multipliers. The resulting award would have been approximately $9,047.00, which reduced to a lump sum of approximately $7,756.00 in 2005. Thus, the terms of the agreement supported a reasonable inference that the lump sum provided consideration not only for the agreed-upon permanent partial disability but also for a waiver of the right to reopen in order to obtain additional TTD or permanent income benefits in the future. Moreover, nothing in the agreement indicated that the lump-sum amount in excess of that provided for permanent income benefits related to something other than the waiver.

II. DENIAL OF SANCTIONS.

KRS 342.310(1) permits an ALJ to assess the whole cost of a workers' compensation proceeding upon a party who brings, prosecutes, or defends the proceeding without reasonable ground. 803 KAR 25:012 § 2(*1*)(a) requires a sanction to be assessed if an employer or its payment obligor challenges a medical bill without a reasonable medical or factual foundation.

The Board affirmed the ALJ's decision to deny sanctions, convinced that 803 KAR 25:12, § 2(1) did not apply to the present facts and that the conflicting medical evidence permitted the ALJ to conclude reasonably under KRS 342.310(1) that the employer did not challenge the treatment proposed by Dr. Anderson or defend the reopening without reasonable grounds. The Board then proceeded, however, to agree with the claimant's assertion that an employer who refuses to pre-authorize a recommended post-award medical procedure but fails to file a medical dispute and motion to reopen is liable for all associated medical charges if the worker undergoes the procedure. The Board also agreed that the claimant's fax and accompanying note from Dr. Anderson were sufficient under the applicable statute and regulations to trigger the employer's obligation to approve the procedure; deny authorization and file a medical dispute within 30 days; or promptly submit the request to utilization review. Moreover, the Board considered the fact that an employer might have to respond to a personal request from an injured worker to be irrelevant if the request was accompanied by appropriate documentation from a medical provider. The Court of Appeals affirmed.

Neither the Board nor the Court of Appeals addressed the claimant's argument ***712** squarely. He argued that the employer acted unreasonably by defending against his motion to reopen because, by failing to pre-authorize the surgery but failing to file a timely medical dispute and reopening, the employer waived any defense to payment. Thus, 803 KAR 25:096, § 8(1) required it to pay for the surgery without regard to the medical evidence.

The claimant concedes that the conflict in the medical evidence was relevant to the employer's refusal to pre-authorize the surgery. He argues, however, that the Board and the Court of Appeals erred because they failed to recognize that the conflict in the medical evidence was irrelevant to the reasonableness of the employer's actions in defending against his motion to reopen, which sought an order that required the employer to comply with 803 KAR 25:096, § 8(1) by paying for the surgery and related medical expenses. We agree.

[10] An approved settlement agreement is equivalent to an award and is enforceable as a final judgment.[8] KRS 342.020(1) places on an employer who wishes to dispute a post-award medical bill the burden to file a medical dispute and motion to reopen within 30 days and to prove that the expense is unreasonable or unnecessary.[9] An employer that fails to do so waives its right to contest the bill.[10]

Kentucky Associated General Contractors Self–Insurance Fund v. Lowther[11] concerned a dispute over the propriety of a fine based on unfair claims settlement practices by an employer's insurance carrier. Central to the dispute was whether the injured worker or the employer bore the burden of filing a post-award medical dispute and motion to reopen when the employer denied a requested treatment following utilization review. The court acknowledged that neither KRS 342.020 nor the applicable regulations states explicitly that a decision to deny pre-authorization constitutes a "statement for services," which 803 KAR 25:096, § 8(1) requires the employer to pay or contest within 30 days. We noted with approval, however, that the Board had interpreted the regulations since 2001 as equating a final utilization review decision to deny pre-authorization with a "statement for services."[12] The same rule clearly applies when an employer refuses to pre-authorize a medical procedure without submitting it to utilization review because the effect of the utilization review process under 803 KAR 25:096, § 8(2)(d) is simply to toll the 30–day period.

The fine at issue in *Kentucky Associated General Contractors Self–Insurance Fund v. Lowther* was imposed under KRS 342.267 based on the employer's failure to meet the time constraints for paying the claim and its failure to pay a claim in which liability was clear. The statute permits the Commissioner of the Department of Workers' Claims to fine an insurance carrier for unfair claims settlement practices. It provides no remedy to the injured worker who incurred the expense of a reopening in order to obtain an order that compels the recalcitrant

employer to comply with its legal obligation to pay for *713 the treatment. KRS 342.310(1) provides a remedy.

[11] The Board, since at least 2001, has viewed an employer who waives its right to contest a medical expense but defends against the injured worker's motion to reopen as having done so without reasonable ground. Then-Chairman Lovan stated on behalf of a unanimous Board as follows:

> When, as here, the employer never files a medical dispute, never files a motion to reopen, continues to refuse to pay medical expenses, even if based upon utilization review, and requires the employee to seek litigation of those benefits either through the workers' compensation administrative process or through KRS 342.305, we believe an ALJ becomes virtually obligated to assess sanctions pursuant to KRS 342.310. In order for KRS 342.310 to be used by an ALJ, it matters not whether a party asks for sanctions. [13]

We agree but also acknowledge that KRS 342.310(1) is discretionary.

The ALJ denied sanctions in the present case based on a conclusion that the employer had no obligation to file a medical dispute and motion to reopen. *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, which determined that an employer did have such an obligation, was rendered while the present case was pending before the Court of Appeals. The claimant raised the same argument concerning an employer's obligation from the outset and preserved it on appeal. [14] We conclude, therefore, that the case must be remanded to the ALJ to reconsider the question of sanctions based on a correct understanding of the employer's obligations and on any other considerations relevant to the reasonableness of its action under KRS 342.310(1) and 803 KAR 25:012, § 2(1)(a).

The decision of the Court of Appeals is hereby affirmed in part and reversed in part, and this claim is remanded to the ALJ to reconsider the issue of sanctions.

All sitting. All concur.

All Citations

391 S.W.3d 705

Footnotes

1 *Whittaker v. Pollard*, 25 S.W.3d 466, 469 (Ky.2000).
2 *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440 (Ky.2005); *Bullock v. Young*, 252 Ky. 640, 67 S.W.2d 941 (1933).
3 *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky.1981).
4 *Black Star Coal Corp. v. Napier*, 303 Ky. 778, 199 S.W.2d 449 (1947); *Bullock v. Young*, 252 Ky. 640, 67 S.W.2d 941 (1933); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App.1998).
5 *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 107 (Ky.2003).
6 12 S.W.3d 704, 706 (Ky.App.2000).
7 *Id.* at 706.
8 KRS 342.305.
9 *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky.1993); *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky.App.1997).
10 *Phillip Morris, Inc. v. Poynter*, 786 S.W.2d 124 (Ky.App.1990).
11 330 S.W.3d 456, 460 (Ky.2010).
12 *See Garrett Mining # 2 v. Rondal Miller*, Claim No. 97-78726 (August 29, 2001).
13 *Garrett Mining # 2 v. Rondal Miller*, 97-78726 at 8.
14 *See Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky.1984).

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236 Ky. 83
Court of Appeals of Kentucky.

BRASHEAR
v.
OLD STRAIGHT CREEK COAL CORPORATION.

Nov. 18, 1930.

Appeal from Circuit Court, Bell County.

Proceeding under the Workmen's Compensation Act by Tilda Brashear, claimant, for the death of her husband, opposed by the Old Straight Creek Coal Corporation, employer. From an adverse judgment of the circuit court on claimant's petition to review the failure of the Workmen's Compensation Board to act upon her application for adjustment of claim, claimant appeals.

Reversed and remanded, with directions.

Attorneys and Law Firms

*717 James S. Golden, of Pineville, for appellant.

A. G. Patterson, of Pineville, for appellee.

Opinion

LOGAN, J.

The appellant filed her petition in the Bell circuit court asking for a review of the action, or failure to act, of the Workmen's Compensation Board on a claim by her for compensation growing out of the death of her husband. She was the unmarried widow of Harve Brashear who was injured while working for appellee, coal corporation, on the 15th day of October, 1928. She was living with her husband at the time of his death. After the injury of her husband compensation was paid for some weeks and he finally signed a receipt showing final payment. She alleged in her petition for a review that after the final settlement and agreement the condition of her husband grew worse, and that he actually died as the result of the injuries which he had received in the course of his employment. She alleged that she filed a motion to review and reopen the case with the Workmen's Compensation Board, setting forth the death of her husband and supporting her motion by an affidavit of a doctor to the effect that his death was the result of the injuries which he received for which he was paid compensation. The board, so it is alleged, denied her motion to reopen the case and refused to grant her any hearing.

*718 [1] [2] With the petition for a review there is filed a copy of the application for adjustment of claim made by the appellant in which she makes claim as the widow of Harve Brashear and as his dependent. She prayed that the appellee, coal corporation, be required to answer, and that a time and place be fixed for hearing. Following this application of appellant in the record is an affidavit of Dr. P. L. Fuson in which statements are made tending to show that the death of Harve Brashear was not the result of the injuries which he received. How this affidavit was placed in the record does not appear. Immediately following the affidavit is what purports to be an order overruling the motion to reopen the case. Following this is a motion by appellant to reopen the case, and that motion is supported by the affidavit of a doctor which states that the death of Harve Brashear resulted from the injury received while he was engaged in performing his duties for the appellee, coal corporation. The record does not make it clear whether any action was taken at all upon the application of appellant for an adjustment of her claim. There is nothing to show that it was considered by the Workmen's Compensation Board. The order which the board entered apparently relates to the motion to reopen the case. It is apparent from this record that the claim of appellant has not been considered by the Workmen's Compensation Board. It may be that she has no claim, but that does not mean that she is not entitled to a hearing. The injury to Harve Brashear was received in the course of his employment, and there is no dispute about his being entitled to compensation. It may be that he fully recovered and that his widow is not entitled to any award, but, as we understand this imperfect record, she makes the claim that the death of her husband was caused by the injury which he received. 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.

Under the authority of the case of Johnson et al. v. J. P. Taylor Co., 211 Ky. 821, 278 S. W. 169, the widow was within her rights in filing her original application for compensation and the board should have granted her a hearing and allowed her to produce her proof. Her 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.

[3] Under the authority cited the court has reached the conclusion that the judgment of the lower court should be reversed, and that the whole matter should be referred to the Workmen's Compensation Board, with directions that it grant her a hearing and allow her to present her proof which shall be considered by the board with the proof offered by the appellee, coal company, and that the rights of the parties should be determined by the board.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

All Citations

236 Ky. 83, 32 S.W.2d 717

239 Conn. 19
Supreme Court of Connecticut.

Beatrice DUNI
v.
UNITED TECHNOLOGIES CORPORATION/
PRATT AND WHITNEY AIRCRAFT DIVISION et al.

No. 15373.
|
Argued May 30, 1996.
|
Decided Aug. 20, 1996.

Widow of deceased employee filed claim for survivor's benefits under workers' compensation statute. Employer sought dismissal of claim on ground it was barred by prior settlement agreement between employee and employer. The Workers' Compensation Commissioner denied motion to dismiss. On appeal, the Workers' Compensation Review Board reversed decision of Commissioner, ruling that settlement agreement was binding. Widow appealed to the Appellate Court, and case was transferred. The Supreme Court, Palmer, J., held that: (1) employee, in settling his or her claim for disability compensation, may also compromise his or her surviving dependents' rights under statute governing survivor's benefits, and (2) stipulation entered into by employee, employer, its carrier, and Second Injury and Compensation Assurance Fund was effective to bar widow's claim.

Affirmed.

Attorneys and Law Firms

**100 *20 Sydney T. Schulman, Hartford, for appellant (plaintiff).

Nancy S. Rosenbaum, Glastonbury, for appellees (named defendant et al.).

Kenneth H. Kennedy, Jr., Assistant Attorney General, with whom, on the brief, were Richard Blumenthal, Attorney General, and William J. McCullough and Michael J. Belzer, Assistant Attorneys General, for appellee (defendant second injury fund).

Before PETERS, C.J., and CALLAHAN, BORDEN, KATZ and PALMER, JJ.

Opinion

PALMER, Justice.

The dispositive issue raised by this appeal is whether a stipulation entered into by an employee and his employer in full and final settlement of the employee's workers' compensation claim can bar a claim for survivor's benefits by the employee's widow after the death of the employee. The employee, William Duni (decedent), filed a workers' compensation claim against his former employer, United Technologies Corporation/Pratt and Whitney Aircraft Division (Pratt & Whitney), the named defendant. The decedent, Pratt & Whitney, the defendant Liberty Mutual Insurance Company (Liberty)[1] and the defendant Second Injury and Compensation Assurance Fund (fund)[2] entered into a stipulated settlement agreement that purported to bind the decedent and anyone else who might ever have a claim against the defendants on account of the decedent's work-related injuries. After the decedent's death, his widow, the plaintiff, Beatrice Duni, filed a claim for survivor's benefits under General Statutes § 31–306.[3] *21 Pratt & Whitney and Liberty sought dismissal of the claim on the ground that it was barred by the settlement agreement. The workers' compensation commissioner (commissioner) denied the motion to dismiss. On appeal, the workers' compensation review board (review board) reversed the decision of the commissioner, concluding that the settlement agreement was binding on the plaintiff. The plaintiff appealed from the decision of the review board to the Appellate Court, and we transferred the appeal **101 to this court pursuant to Practice Book § 4023 and General Statutes § 51–199(c). We affirm the decision of the review board.

The facts relevant to this appeal are undisputed. The decedent was employed by Pratt & Whitney from 1941 *22 to December, 1982. On December 3, 1984, the decedent filed a workers' compensation claim asserting that during the course of his employment with Pratt & Whitney he had been exposed to various substances that had caused injury to his lungs, heart, eyes, nose and other body parts, leaving him disabled.

The decedent and the defendants subsequently agreed to settle the claim and entered into an agreement entitled

"Stipulation for Full and Final Settlement" (stipulation). Under the terms of the stipulation, the defendants agreed to make a lump sum payment to the decedent in return for his agreement to release them from any further liability in connection with his claim. The stipulation purported to "constitute a complete satisfaction of all claims due or to become due at any time in favor of anybody on account of the claimed injuries or on account of any condition in any way resulting out of the said injuries."[4] The parties' stipulation was approved by the commissioner on September 15, 1986.

On December 14, 1991, the decedent died. Approximately two months later, the plaintiff submitted to Pratt & Whitney a claim for survivor's benefits pursuant to § 31–306. The plaintiff alleged that the decedent's *23 death was the result of the injuries that he had sustained during the course of his employment with Pratt & Whitney and, consequently, that she was entitled to survivor's benefits.

Pratt & Whitney and Liberty contested the claim and, thereafter, sought its dismissal on the ground that the stipulation barred the plaintiff's recovery.[5] The commissioner denied the motion, concluding that the plaintiff's right to survivor's benefits was independent of the decedent's claim and that the plaintiff was not bound by the stipulation because she was not a signatory to it. The defendants appealed to the review board, which reversed the commissioner's decision on the ground that the plaintiff's application for survivor's benefits was precluded by the stipulation. This appeal followed.

On appeal, the plaintiff contends that the review board improperly concluded that she was not entitled to seek survivor's benefits under § 31–306. Specifically, the plaintiff maintains that her right to compensation under § 31–306 is completely independent of the decedent's rights to compensation for work-related injuries under the Workers' Compensation Act (act),[6] and, accordingly, that the decedent lacked the authority to settle any claim for survivor's benefits that she might later have arising from his work-related injuries. Alternatively, the plaintiff argues that the stipulation cannot reasonably be construed to bar her right to make a *24 claim under § 31–306. We disagree with both of these claims.

**102 I

The plaintiff first contends that the stipulation entered into by the decedent does not bar her claim for workers' compensation benefits because her rights under § 31–306 are entirely independent of the decedent's compensation rights and, consequently, that the decedent had no authority to compromise her right to seek benefits under § 31–306 after his death. We disagree.

[1] Our resolution of this issue is guided by well established principles of statutory construction. "Our fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter...." (Citations omitted; internal quotation marks omitted.) *State v. Metz,* 230 Conn. 400, 409, 645 A.2d 965 (1994); *Fleming v. Garnett,* 231 Conn. 77, 92, 646 A.2d 1308 (1994). "We have previously recognized that our construction of the Workers' Compensation Act should make every part operative and harmonious with every other part insofar as is possible.... In applying these principles, we are mindful that the legislature is presumed to have intended a just and rational result...." (Citations omitted; internal quotation marks omitted.) *Dos Santos v. F.D. Rich Construction Inc.,* 233 Conn. 14, 20–21, 658 A.2d 83 (1995).

[2] [3] "It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner *25 and review board.... A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny." (Citation omitted; internal quotation marks omitted.) *Davis v. Norwich,* 232 Conn. 311, 317, 654 A.2d 1221 (1995).

[4] As is often the case in the context of workers' compensation legislation; see *Dos Santos v. F.D. Rich Construction Inc.,* supra, 233 Conn. at 20, 658 A.2d 83; the statutory language provides little guidance for our determination of whether the decedent, in settling his own workers' compensation claim, also had the

authority to compromise whatever right the plaintiff might have to survivor's benefits. Furthermore, the pertinent legislative history is silent on the question. Several considerations persuade us, however, that, under our statutory scheme, a surviving dependent's right to compensation is subordinate to an employee's right to settle his or her workers' compensation claim.

First, the availability of survivorship benefits under § 31–306 is inextricably linked to, and wholly dependent upon, the existence of a compensable injury or illness suffered by the employee. Thus, in the absence of a work-related injury or illness, a surviving dependent of the employee has no claim whatsoever under § 31–306. Moreover, a dependent has no compensation rights unless and until the employee dies as a result of the occupational injury or disease. Further, the calculation of the amount of survivor's benefits to which a dependent may be entitled is determined as of the date of the employee's injury and not as of the date on which the dependent becomes eligible to receive such benefits. General Statutes § 31–306(a)(2). Similarly, a person who has not attained dependent status until after the date of the employee's injury is not entitled to bring a claim *26 under § 31–306. See General Statutes § 31–275(6).[7] Thus, a surviving dependent's compensation rights under § 31–306 flow directly from the work-related injury or disease suffered by the employee.[8]

**103 Second, our conclusion advances the public policy favoring the pretrial resolution of disputes. As we have *27 long recognized in the context of civil actions, "the pretrial settlement of claims is to be encouraged because, in the vast number of cases, an amicable resolution of the dispute is in the best interests of all concerned. 'The efficient administration of the courts is subserved by the ending of disputes without the delay and expense of a trial, and the philosophy or ideal of justice is served in the amicable solution of controversies.' *Krattenstein v. G. Fox & Co.*, 155 Conn. 609, 614, 236 A.2d 466 (1967).... At a time when our courts confront an unprecedented volume of litigation, we reaffirm our strong support for the implementation of policies and procedures that encourage fair and amicable pretrial settlements." *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 174, 646 A.2d 195 (1994). We see no reason to eschew this sound public policy in connection with claims arising under our workers' compensation statutes.

To conclude, as the plaintiff urges, that an employee may not compromise his or her dependent's future rights under § 31–306 would unduly undermine the public interest in the prompt and comprehensive resolution of workers' compensation claims. Under the plaintiff's view, a full, final and global settlement of a workers' compensation claim involving a potentially fatal work-related injury or illness would be impossible without the express authorization of all the employee's dependents. Under such circumstances, it is less likely that a comprehensive settlement would be reached. An employer who is faced with the prospect of litigating additional claims upon the employee's death is less apt to be willing to settle the employee's claim.[9]

*28 Finally, the statutory interpretation advanced by the defendants promotes the public policy in favor of administrative simplicity. As we have noted in a related context, the plaintiff's statutory construction would require **104 employers to maintain records for a considerable period of time after each disability compensation claim had been settled, an interpretation that "would undermine the statutory purpose of administrative simplicity." *Davis v. Norwich*, supra, 232 Conn. at 323, 654 A.2d 1221. This construction would also frustrate the related public interest in the finality of administrative determinations.

The plaintiff cites *Muldoon v. Homestead Insulation Co.*, 231 Conn. 469, 650 A.2d 1240 (1994), in support of her contention that the act should not be read to permit an employee to settle any possible claim that his or her dependent may have under § 31–306 after the employee's death. In *Muldoon*, the employee and employer entered into a stipulated settlement of the employee's claim for compensation stemming from injuries suffered as a result of exposure to asbestos. *Id.*, at 472, 650 A.2d 1240. Several years after the stipulation was approved, the employee filed a second workers' compensation claim, alleging that, in the interim, additional exposure to asbestos had caused him further injuries. *Id.*, at 473, 650 A.2d 1240. We concluded that the stipulation's preclusion of " 'future ... claims ... resulting out of the said injury ...' " did not foreclose a future claim based upon a subsequent, although similar, injury. *Id.*, at 479, 650 A.2d 1240. We did so in *29 part "because to decide otherwise would conflict with public policy and the remedial purpose of the act. Except in very rare instances, the settlement and release of a claim does not cover claims based on

events that have not yet occurred.... The usual general release, then, is not ordinarily construed to include in its coverage claims based upon occurrences which have their beginning after the instrument is executed.... For that reason, language covering 'future claims' and 'unknown claims' in releases is ordinarily construed to cover only inchoate claims that are in being at the time of release but which have not yet manifested themselves." (Citations omitted; internal quotation marks omitted.) *Id.*, at 481–82, 650 A.2d 1240.

Contrary to the plaintiff's contention, *Muldoon* does not support a conclusion that an injured employee who settles his or her workers' compensation claim is without authority to compromise any claims that his or her surviving dependents might have under § 31–306. In fact, the claim asserted by the plaintiff is much more analogous to an "inchoate [claim] that [is] in being at the time of release but which [has] not yet manifested [itself]" than it is to the unforeseeable subsequent injury that was suffered by the employee in *Muldoon*. Id., at 481–82, 650 A.2d 1240. Although it is true, of course, that the plaintiff's rights under § 31–306 did not arise until after the stipulation had been signed, the decedent's death was a reasonably foreseeable consequence of the disabling occupational injuries that he had suffered and, accordingly, such a consequence was likely within the contemplation of the parties when they agreed to bar all claims "on account of any condition in any way resulting out of the said injuries." [10]

***30** In light of the derivative nature of the rights created under § 31–306 and the public policy considerations involved, we agree with the review board that, under our workers' compensation scheme, an employee, in settling his or her claim for disability compensation, may also compromise his or her surviving dependents' rights under § 31–306. [11] Having determined that the decedent had the authority to extinguish the plaintiff's rights under § 31–306, we now turn to the question of whether the review board properly concluded that the stipulation accomplished ****105** that end. [12]

II

The plaintiff maintains that even if the decedent had the authority to extinguish her rights under § 31–306, the stipulation was ineffective in doing so. We disagree.

[5] In the context of workers' compensation, "[a] stipulation is a compromise and release type of settlement similar to settlements in civil personal injury cases where a claim is settled with a lump sum payment accompanied by a release of the adverse party from ***31** further liability.... Although the act does not explicitly provide for this type of settlement, we have consistently upheld the ability to compromise a compensation claim as inherent in the power to make a voluntary agreement regarding compensation...." (Citation omitted; internal quotation marks omitted). *Muldoon v. Homestead Insulation Co.*, supra, 231 Conn. at 479–80, 650 A.2d 1240. [13]

[6] The stipulation entered into by the decedent and the defendants provides that it is in "complete satisfaction of *all claims* due or to become due at *any time* in favor of *anybody* on account of the claimed injuries or on account of *any condition in any way* resulting out of the said injuries." (Emphasis added.) There is no doubt that the stipulation was intended to be broad in scope and, by its plain terms, purported to foreclose any and all workers' compensation claims arising out of the decedent's alleged injuries. On its face, then, the stipulation clearly encompasses a workers' compensation claim filed under § 31–306. [14]

Notwithstanding the unambiguous breadth of the stipulation, the plaintiff argues that the word "anybody" in the stipulation reasonably can be construed to include only the estate of the decedent and his creditors but not his surviving dependents. As the review board stated in reversing the decision of the commissioner, however, " '[a]nybody' is a far more general term that simply refers to any person, and we will not favor a ***32** strained interpretation of that term over a straightforward one. We think it evident that the parties to the agreement contemplated the release of *all claims* that might result from the [decedent's] previous injuries, including those arising in favor of a third party." (Emphasis added.) Because we agree with the conclusion of the review board, we reject the plaintiff's argument regarding the scope of the stipulation. [15]

The decision of the review board is affirmed.

All Citations

239 Conn. 19, 682 A.2d 99

In this opinion the other justices concurred.

Footnotes

1 Liberty was Pratt & Whitney's insurance carrier.

2 Subsequent to entering the stipulated settlement agreement at issue in this appeal, the fund was renamed the Second Injury Fund. Public Acts 1991, No. 91–32, §§ 38, 41, effective July 1, 1991.

3 General Statutes § 31–306 provides in relevant part: "Death resulting from accident or occupational disease. Dependents. Compensation. (a) Compensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease as follows....

> "(2) To those wholly dependent upon the deceased employee at the date of his injury, a weekly compensation equal to seventy-five per cent of the average weekly earnings of the deceased calculated pursuant to section 31–310, after such earnings have been reduced by any deduction for federal taxes or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31–310, as of the date of the injury but not more than the maximum weekly compensation rate set forth in section 31–309 for the year in which the injury occurred or less than twenty dollars weekly. (A) The weekly compensation rate of each dependent entitled to receive compensation under this section as a result of death arising from a compensable injury occurring on or after October 1, 1977, and before July 1, 1993, shall be adjusted annually as provided in this subdivision as of the following October first, and each subsequent October first, to provide the dependent with a cost-of-living adjustment in his weekly compensation rate as determined as of the date of the injury under section 31–309. If the maximum weekly compensation rate, as determined under the provisions of section 31–309, to be effective as of any October first following the date of the injury, is greater than the maximum weekly compensation rate prevailing at the date of the injury, the weekly compensation rate which the injured employee was entitled to receive at the date of the injury shall be increased by the percentage of the increase in the maximum weekly compensation rate required by the provisions of section 31–309 from the date of the injury to such October first. The cost-of-living increases provided under this subdivision shall be paid by the employer without any order or award from the commissioner. The adjustments shall apply to each payment made in the next succeeding twelve-month period commencing with the October first next succeeding the date of the injury...."

We use the current statutes herein because there are no relevant differences, for the purposes of this opinion, between these statutes and those in effect during the administrative proceedings.

4 The stipulation provides in relevant part: "The payment of SEVENTY–TWO THOUSAND DOLLARS ($72,000) of which the respondent employer and insurer shall pay $36,000 and the respondent Second Injury and Compensation Assurance Fund shall pay $36,000, shall be made and accepted as a full and final settlement for all compensation including specific[ally] for said injuries and for all results upon the claimant past, present and future and for all claims for medical, surgical, hospital and incidental expenses to the end that the payment of such sum shall constitute a complete satisfaction of all claims due or to become due at any time in favor of anybody on account of the claimed injuries or on account of any condition in any way resulting out of the said injuries."

Neither Pratt & Whitney nor the fund admitted any liability for the decedent's injuries.

5 In response to the claim submitted by the plaintiff, Pratt & Whitney and Liberty mailed to the commissioner and the decedent, at his last residence, a notice entitled "Notice to Compensation Commissioner and Employee of Intention to Contest Liability to Pay Compensation." The plaintiff sought to preclude Pratt & Whitney and Liberty from contesting her claim on the ground that this notice was not addressed to her as required by General Statutes § 31–294c. The commissioner and, on appeal, the review board, both rejected the plaintiff's contention. Because we conclude that the stipulation entered into by the decedent and the defendants bars the plaintiff from any recovery, we need not reach this issue.

6 General Statutes § 31–275 et seq.

7 General Statutes § 31–275(6) provides: " 'Dependent' means a member of the injured employee's family or next of kin who was wholly or partly dependent upon the earnings of the employee at the time of the injury."

8 Although we have previously had occasion to construe § 31–306, we have not heretofore addressed the precise question presented by this appeal and, therefore, our prior cases are inconclusive on the issue. For example, in *Bassett v. Stratford Lumber Co.*, 105 Conn. 297, 300, 135 A. 574 (1926), we held that, upon the employee's death, the unpaid balance of a workers' compensation award to the employee is payable not to the estate of the employee but to the surviving dependents. See also *Cappellino v. Cheshire*, 226 Conn. 569, 628 A.2d 595 (1993) (affirming continued viability of *Bassett*). More recently, in *Davis v. Norwich,* supra, 232 Conn. at 321–22, 654 A.2d 1221, we considered the effect of an employee's death on an employer's ability to transfer a claim to the fund. We concluded that an employer must file notice of intent to transfer to the fund following the initial claim by the employee; the employee's death does not trigger a second window of opportunity for the employer to do so. As the defendants maintain, these cases lend some support to the conclusion that a claim for survivor's benefits under § 31–306 is merely an adjunct of the employee's disability claim.

On the other hand, we have also stated that "[t]he intent of the Workmen's Compensation Act to make the claim of the injured employee for compensation for his incapacity a personal claim belonging to him alone, and to make the claim of the dependent for compensation come into existence upon the employee's death and to belong wholly to the dependent ... seems entirely clear...." *Jackson v. Berlin Construction Co.*, 93 Conn. 155, 158, 105 A. 326 (1918). In *Biederzycki v. Farrel Foundry & Machine Co.*, 103 Conn. 701, 704–705, 131 A. 739 (1926), however, we cast doubt on the breadth of our statement in *Jackson,* observing that *Jackson* merely "holds that the classes of compensation awarded the employee and his [or her] dependents are separate and independent of each other. But each arises out of the same compensable injury. If the employee is awarded compensation for an injury, and in consequence of it subsequently dies, the injury preceding the death and the death arose out of the one injury, compensation for the latter is payable to and belongs to the dependent, while the compensation awarded to the living employee is payable to and belongs to him [or her]." Thus, although it is apparent that the dependent of an injured employee who dies as a result of work-related injuries has certain compensation rights that exist independent of the employee's rights, we have never decided whether the employee, in agreeing to settle his workers' compensation claim, may also compromise any claim that the dependent may have upon his or her death.

9 We also note that stipulations in settlement of workers' compensation claims must be approved by the commissioner, a requirement that serves to protect interested parties against settlements that are not fair and equitable. As we have recently stated regarding such stipulations, "[t]he commissioner decides whether to approve a stipulation only after thoroughly reviewing it, along with all the pertinent medical bills and reports, and after evaluating employment possibilities and any concurrent claims. The commissioner undertakes such exhaustive inquiry in order to judge properly whether the stipulation is fair and comprehensive.... We can therefore assume that a commissioner is well acquainted with the terms generally used in stipulations and the proper ... authority conferred upon commissioners by the legislature." (Citation omitted.) *Muldoon v. Homestead Insulation Co.*, 231 Conn. 469, 480 n. 9, 650 A.2d 1240 (1994).

10 The plaintiff points to cases from other jurisdictions, cited in 2 A. Larson, Workmen's Compensation (1996) § 64.11, pp. 11–195–11–203, to support her contention that the stipulation does not bar her claim under § 31–306. Each of the cases relied on by the plaintiff, however, is distinguishable from the present case, because in none of those cases had the employee entered into a full, final and comprehensive settlement of his claim prior to his death.

11 As the review board stated, "[a]ll existing rights to compensation for [the decedent's] compensable injuries were vested in [him] at the time he signed the stipulation. No claim then existed that was not personal to him. Therefore, [the decedent] had the authority at the time the settlement was reached to release the [defendants] from liability for future claims arising out of his allegedly compensable injuries."

12 The defendants maintain that the plaintiff's right to compensation under § 31–306 is wholly derivative of the decedent's rights and, arguing by analogy to our law concerning loss of consortium claims; see *Hopson v. St. Mary's Hospital,* 176 Conn. 485, 494, 408 A.2d 260 (1979); contend that any settlement of a workers' compensation claim by an injured employee and his or her employer bars recovery by a surviving dependent. We disagree with the defendants' categorical characterization of the rights established under § 31–306 as derivative. We hold today only that an employee has the *authority* to compromise the compensation rights of his or her dependents and that a clear and unequivocal expression of intent to do so by the employee will bar a claim under § 31–306.

13 "There are three types of stipulations [in workers' compensation cases]: (1) a full and final stipulation that closes all aspects of the claim whether they are for past, present or future wages and medical expenses, known and unknown; (2) a stipulation to date that is used to close out only a portion of a claim with the remainder left open or that is used to close out an entire claim but only up to a certain date; and (3) an open medical stipulation that closes all aspects of

the claim except for medical expenses that are related to the accident or the disease." *Muldoon v. Homestead Insulation Co.*, supra, 231 Conn. at 480, 650 A.2d 1240.

14 Furthermore, the plaintiff has adduced no facts to suggest that we should ignore the plain language of the stipulation.

15 In light of our resolution of this issue, we need not decide whether the plaintiff's notice of claim was untimely pursuant to General Statutes § 31–294c, as maintained by the defendants.

End of Document

161 N.J. 178
Supreme Court of New Jersey.

Mary KIBBLE, Petitioner-Appellant,
v.
WEEKS DREDGING & CONSTRUCTION CO., Respondent-Respondent.

Argued March 2, 1999.
|
Decided Aug. 9, 1999.

Spouse of deceased employee filed dependency claim. The Division of Workers' Compensation dismissed claim, and appeal was taken. The Superior Court, Appellate Division affirmed. Petition for certification was granted, 157 N.J. 541, 724 A.2d 801. The Supreme Court, Stein, J., held that: (1) as matter of apparent first impression, in lump-sum settlements where parties contemplate waiver of dependency claims in event that employee's death occurs as result of injuries encompassed by his compensation claim, the Division must be satisfied that spouse and other dependents join in the waiver of future dependency claims; and (2) spouse or other dependent must knowingly, intelligently, and voluntarily waive dependency benefits in connection with lump-sum settlements, and this principle applies prospectively.

Reversed and remanded.

Coleman, J., dissented and filed opinion in which Pollock and Garibaldi, JJ., joined.

Attorneys and Law Firms

**1144 *181 Patrick R. Caulfield, Edison, for petitioner-appellant (Levinson, Axelrod, Wheaton, Grayzel, Caulfield, Marcolus & Dunn, attorneys).

Francis T. Giuliano, Ramsey, for respondent-respondent (Mr. Giuliano, attorney; Mr. Giuliano and David P. Kendall, on the briefs).

Craig H. Livingston, submitted a brief on behalf of amici curiae New Jersey State American Federation of Labor and Congress of Industrial Organizations, New Jersey State Industrial Union Council, AFL-CIO, District 15 of the International Association of Machinists and Aerospace Workers, AFL-CIO and New Jersey Advisory Council on Safety and Health (Ball & Livingston, attorneys, Nutley; Mr. Livingston and Sherry G. Chachkin, of counsel and on the briefs).

Opinion

The opinion of the Court was delivered by

*182 STEIN, J.

The critical issue in this appeal is whether a worker who settles his or her workers' compensation claim pursuant to *N.J.S.A.* 34:15-20 (Section 20) simultaneously can waive the future right of his or her spouse to assert a statutory claim for dependency benefits in the event of the worker's death. See *N.J.S.A.* 34:15-13. The Division of Workers' Compensation held that the worker's waiver of his spouse's dependency claim was binding on his widow. In an unpublished opinion the Appellate Division affirmed. We granted certification, 157 *N.J.* 541, 724 *A.*2d 801 (1998), and now reverse.

I

Carl Kibble was employed by respondent Weeks Dredging & Construction Co. from September 1980 until March 1984 as a welder/torch cutter. He had worked for other employers in the same capacity from the mid-1950s until 1980. During the course of that employment, Kibble was exposed to chromium, nickel, and other welding fumes.

A chest x-ray taken in 1977 revealed that he was suffering from pneumonoconiosis, **1145 a lung condition caused by the retention of dust in the lungs. In 1984, he sought treatment from his family physician, Dr. James R. Robin, for a chronic cough. Dr. Robin diagnosed Kibble with pulmonary fibrosis and concluded that that condition had been caused by Kibble's exposure to welding fumes. Dr. Robin also concluded that Kibble was "totally disabled with welder[']s lung," and advised him that he "absolutely should not work in this field again."

In June 1984, Kibble filed a workers' compensation claim against Weeks and seven other prior employers, seeking benefits for "permanent disability to lungs, internal and nervous system." A doctor who evaluated Kibble in connection with his claim concurred with Dr. Robin's conclusion that Kibble was totally disabled and found that

because of his exposure to welding fumes he was at an "increased risk" of developing lung cancer in the *183 future. In January 1989, Kibble settled his compensation claim pursuant to Section 20 for a lump-sum payment of $36,000. [1] As part of the prevailing practice in the Division of Workers' Compensation (Division), the settlement was placed on the official record of the proceedings and approved by the judge of compensation. Regrettably, the transcript of those proceedings was lost or destroyed. The pre-printed settlement form that apparently was used routinely by the Workers' Compensation Court in processing Section 20 settlements stated that the settlement "has the effect of a dismissal with prejudice, *being final as to all right[s] and benefits of the petitioner and the petitioner's dependents* and is a complete and absolute surrender and release of all their rights *arising out of this/these claim(s).*" (Emphasis supplied).

Kibble and his wife Mary (petitioner) also had filed suit in federal court alleging claims based on products liability and failure to provide a safe workplace. That case settled prior to the Section 20 settlement. The release in the third-party action explicitly waived any and all claims for injury "including pulmonary fibrosis or any other illness or injury yet undiagnosed, past, present or future ... and all future claims for wrongful death ... caused by any occupational disease, diagnosed, or yet undiagnosed, past, present, or future."

In November 1993, almost four years after the Section 20 settlement, Kibble was diagnosed with lung cancer. He died on March 5, 1994. Kibble's death certificate lists his cause of death as "lung cancer [and] pneumoconiosis." In April 1994, petitioner filed a dependency claim, pursuant to *N.J.S.A.* 34:15-13, alleging *184 that her husband's lung cancer and death were caused by his occupational exposure to welding fumes. The Division dismissed petitioner's claim, finding that "the intention of the parties [in the Section 20 settlement] was to make a total settlement of all claims related to lung problems, including dependency claims." The Appellate Division affirmed that judgment, finding ample support in the record to sustain the Division's conclusion.

Petitioner argues that Section 20 settlements do not extinguish future causes of action, such as those for dependency benefits and claims for diseases not manifest at the time of settlement. She maintains that her husband's original claims related solely to pulmonary fibrosis, and that the lung cancer that caused his death did not manifest until four years after the Section 20 settlement. Thus, she argues that because her dependency claim is based on **1146 the cancer that had not manifested itself at the time of the Section 20 settlement, it is not barred. She also contends that even if dependency claims can be waived in a Section 20 settlement, the evidence in this case failed to establish that the parties intended to waive dependency benefits.

Respondent counters that Kibble's original claim was for "permanent disability to the lungs, internal and nervous systems" and was not restricted to pulmonary fibrosis. It maintains that the scope of a Section 20 settlement must be derived from the intent of the parties.

The New Jersey State AFL-CIO, New Jersey State Industrial Union Council, AFL-CIO, District 15 of The International Association of Machinists and Aerospace Workers, AFL-CIO, and New Jersey Advisory Council on Safety and Health, as *amici curiae,* argue in support of the petitioner's position that Section 20 settlements should not extinguish future dependency claims unless "such claims arise from the same condition that was the basis for the settlement of the compensation claim." The *amici* argue that because the cancer was not manifest when the Section 20 settlement was approved by the judge, the dependency claims based on cancer were not waived.

*185 After argument of this appeal, the Court requested and the parties submitted supplemental briefs on whether waivers of dependency claims in connection with Section 20 settlements were statutorily authorized and, if so, what proofs should be required to establish the validity of such waivers.

II

A

[1] [2] Separate from and in addition to the right of workers to receive compensation benefits under the Workers' Compensation Act (Act or WCA), *N.J.S.A.* 34:15-1 to -128, in the event of permanent partial or total disability caused by a compensable accident or occupational disease, the Act provides benefits to dependents of deceased workers. Accordingly, if an accident or occupational disease that arises out of and

in the course of employment causes or contributes to the cause of the employee's death, the Act requires payment of benefits to the workers' dependents. *N.J.S.A.* 34:15-13. Our cases emphasize that "[t]he rights of dependents to compensation are independent and separate rights flowing to them from the [WCA] itself. They are not rights to which [dependents] succeed as the representatives of the [deceased employee]." *Eckert v. New Jersey State Highway Dep't,* 1 *N.J.* 474, 480, 64 *A.*2d 221 (1949); *accord McAllister v. Board of Educ.,* 42 *N.J.* 56, 59-60, 198 *A.*2d 765 (1964); *Luszcs v. Seaboard By-Products Co.,* 101 *N.J.L.* 170, 173, 127 *A.* 212 (E. & A.1925); *Adams v. Woodbridge Sanitary Pottery Corp.,* 174 *N.J.Super.* 284, 287-88, 416 *A.*2d 422 (App.Div.1980); *Roberts v. All Am. Eng'g Co.,* 104 *N.J.Super.* 1, 7, 248 *A.*2d 280 (App.Div.1968), *certif. denied,* 53 *N.J.* 351, 250 *A.*2d 753 (1969). Professor Larson succinctly describes the separate and independent status of dependency claims:

> 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, or by an adverse holding on decedent's claim, or by claimant's failure to claim within the statutory period.
>
> [2 Arthur Larson, *The Law of Workmen's Compensation* § 64.00 (1989).]

***186** Only a small minority of states permits a settlement of a compensation claim by a worker during his or her lifetime to preclude a claim for future death benefits by that worker's dependents. In the vast majority of states, a dependent's right to seek worker's compensation death benefits is not affected by a lump-sum settlement agreement between an injured worker and that worker's employer. Deborah Tauber, *A Proposal to Resuscitate the Abrogated Rights of Dependents Under Section 20 of* ****1147** *the New Jersey Workers' Compensation Act,* 20 *Rutgers L.J.* 513, 519 n.30 (1989). The majority rule is based on the "sound theory that the dependents' rights are not derived from the employee's rights, but instead, are separate and independent rights of the dependent." *Ibid.; accord Lewis v. Connolly Contracting Co.,* 196 *Minn.* 108, 264 *N.W.* 581, 586 (1936); *Industrial Comm'n v. Davis,* 126 *Ohio St.* 593, 186 *N.E.* 505, 505 (1933); *Hotel Claridge Co. v. Blank,* 169 *Tenn.* 575, 89 *S.W.*2d 758, 760 (1936); *Laird v. Vermont Highway Dep't,* 112 *Vt.* 67, 20 *A.*2d 555, 561 (1941). In those jurisdictions adopting the majority view, "[a] unilateral settlement or release by a worker of his or her own claims does not bar the surviving dependent's claim *even if the release signed by the worker explicitly purports to release the dependent's claim.*" *Buchanan v. Kerr-McGee Corp.,* 121 *N.M.* 12, 908 *P.*2d 242, 245 (Ct.App.) (emphasis supplied), *cert. denied,* 120 *N.M.* 715, 905 *P.*2d 1119 (1995).

The New Mexico Supreme Court in *Buchanan,* explained the majority rule:

> The WCJ's decision presupposes that Worker's valid release is also effective to release Claimant's cause of action as a surviving dependent under the Occupational Disease Law. We disagree with this premise and the conclusion that follows from it. We hold that Claimant, as Worker's widow and dependent, has independent statutory rights to death benefits which arise upon Worker's death, and Claimant is not bound by the Release. *The claim of a dependent arising from the death of a worker is a new and separate claim and is not derivative of the worker's claim.* A unilateral settlement or release by a worker of his or her own claims does not bar the surviving dependent's claim even if the release signed by the worker explicitly ***187** purports to release the dependent's claim, as was the case here. Our holding is in accord with the great weight of authority from other jurisdictions.
>
> [*Id.* at 245 (emphasis supplied) (citations omitted).]

Professor Larson observes that a

> striking consequence of the independent status of dependency rights is the rule, accepted by the majority of jurisdictions, that an adverse decision on the merits of a claim by the employee while he was alive does not bar a dependency claim under the doctrine of res judicata, since the parties and rights involved are different, and since the dependent is not in privity with the injured employee as to the rights asserted by him.
>
> [*Larson, supra,* § 64.14.]

Prior to 1980, there was no provision in the WCA, that permitted a worker to settle a compensation claim with his or her employer. However, that did not prevent parties from entering into "surreptitiously negotiated" settlements whereby the worker would agree to dismiss his or her claim voluntarily and with prejudice in exchange

for a subsequent payment from the employer. See Tauber, *supra,* 20 *Rutgers L.J.* at 515.

That informal, out-of-court settlement procedure was found to be "contrary to public policy" by the Appellate Division in *Brown v. General Aniline & Film Corp.,* 127 *N.J.Super.* 93, 95, 316 *A.*2d 478, *aff'd o.b.,* 65 *N.J.* 555, 325 *A.*2d 689 (1974). In *Brown,* the injured worker testified before a judge of compensation that "he could not prove a compensable accident, and requested a dismissal of his petitions with prejudice against ever reopening his claims." *Id.* at 94, 316 *A.*2d 478. After the judge dismissed the worker's claims, the employer paid the worker $20,000. Following the worker's death, his widow filed dependency petitions, which were dismissed by the judge of compensation on the theory that the widow was "collaterally estopped from relitigating decedent's claim which had been dismissed with prejudice because a compensable claim had not been proven." *Id.* at 95, 316 *A.*2d 478. The Appellate Division reversed, holding that the WCA precluded the out-of-court settlement. ****1148** Relying on Larson, *supra,* the court held that because dependency benefits are "separate and distinct" from the benefits due to an injured worker, "nothing that the decedent does, or attempts to do during his lifetime, can deprive dependents of their statutory benefits." *Id.* at 96, 316 *A.*2d 478.

***188** In 1980, as part of extensive revisions to the WCA, the Legislature amended Section 20 to include a provision allowing lump-sum settlements between employers and employees. *L.* 1979, *c.* 283, § 8. That amendment apparently was enacted as a partial response to the Appellate Division's holding in *Brown, supra:*

> [Section 20] would benefit employers by ... clarifying the effect of the decision in *Brown v. General Aniline* by permitting compensation judges to enter an award approving settlement in matters where causal relationship, jurisdiction, dependency or liability are in issue, resulting in the payment of a lump sum having the effect of a dismissal of the petition and a complete surrender of any future right to compensation or other benefits arising out of that claim.
>
> [Senate Labor, Industry & Professions Committee, *Joint Statement to Senate Committee Substitute for S. Bill 802 and Assembly Committee Substitute for A. Bill 840,* Nov. 13, 1979, at 2.]

In relevant part the amended Section 20 reads as follows:

> [A] judge of compensation may with the consent of the parties, after considering the testimony of the petitioner and other witnesses, together with any stipulation of the parties, and after such judge of compensation has determined that such settlement is fair and just under all the circumstances, enter "an order approving settlement." Such settlement, when so approved, notwithstanding any other provisions of this chapter, shall have the force and effect of a dismissal of the claim petition and shall be final and conclusive upon the employee and the employee's dependents, and shall be a complete surrender of any right to compensation or other benefits arising out of such claim under the statute.
>
> [*N.J.S.A.* 34:15-20.]

[3] For a Section 20 lump-sum settlement to be effective, the only statutory requirements are that the settlement be approved by the judge of compensation as "fair and just under all the circumstances," and that the settling petitioner be represented by counsel. *Ibid.* The applicable regulations require that the terms of the settlement be entered on a prescribed form, that *the employee,* employer and compensation judge sign the form, and that the employee "be fully advised of all rights." *See N.J.A.C.* 12:235-6.14. The regulations impose no other procedural requirements.

Since the adoption of the 1980 amendments there has been virtually no New Jersey case law considering the preclusive effect of Section 20 settlements on subsequently-filed dependency claims. That entire body of law consists of one unpublished Appellate ***189** Division opinion and a written opinion of the Division of Workers' Compensation.

B

(1)

In *Alfone v. Sarno,* 87 *N.J.* 99, 432 *A.*2d 857 (1981), this Court was presented with an issue analogous to the primary issue in this appeal: whether a judgment in favor of a plaintiff in a personal injury suit precluded a subsequent action for wrongful death on behalf of that

plaintiff's heirs. Noting that wrongful death actions create in a decedent's beneficiaries rights independent of and distinct from those involved in the underlying personal injury claim, we held that the wrongful death action could be maintained provided there was no duplication of damages. *Id.* at 114-23, 432 *A.*2d 857. We recognized that that holding "may prevent insurance carriers **1149 from obtaining complete releases from all possible wrongful death claims, *except perhaps by the inclusion in any such agreement of all persons who subsequently are determined to be wrongful death beneficiaries.*" *Id.* at 123, 432 *A.*2d 857 (emphasis supplied).[2]

The analogy to *Alfone* is germane to our disposition of this appeal. Both a wrongful death claim sounding in negligence, *N.J.S.A.* 2A:31-1 to -6, and a workers' compensation dependency claim, *N.J.S.A.* 34:15-13, are statutory causes of action with the same purpose: to compensate surviving dependents for the pecuniary losses resulting from death. Further, both causes of action are independent and distinct from the underlying claim of the injured party. *See Alfone, supra,* 87 *N.J.* at 107, 432 *A.*2d 857 ("New Jersey's wrongful death statute created a new cause of *190 action 'beyond that which the deceased would have had if he had survived, and based on a different principle-a new right of action.' ") (quoting *Cooper v. Shore Electric Co.,* 63 *N.J.L.* 558, 563, 44 *A.* 633 (E. & A. 1899)); *Eckert, supra,* 1 *N.J.* at 480, 64 *A.*2d 221 (holding that rights of dependents to compensation are independent and separate rights that are derived from WCA).

(2)

[4] [5] A loss of consortium, or *per quod,* claim is intended to compensate a person for the loss of a spouse's "society, companionship and services due to the fault of another." *Wolfe v. State Farm Ins. Co.,* 224 *N.J.Super.* 348, 350, 540 *A.*2d 871 (App.Div.), *certif. denied,* 111 *N.J.* 654, 546 *A.*2d 562 (1988). Although a *per quod* claim is derivative of the injured spouse's personal injury cause of action, *Tichenor v. Santillo,* 218 *N.J.Super.* 165, 173, 527 *A.*2d 78 (App.Div.1987), "it is also independent, as the damages which may be awarded to the spouse pursuant to the *per quod* claim are clearly different from the damages which may be awarded to the spouse suffering the direct injury," *Hauck v. Danclar,* 262 *N.J.Super.* 225, 227, 620 *A.*2d 479 (Law Div.1993).

[6] A spouse's cause of action for loss of consortium is not compromised by settlement of the underlying personal injury claim. *Neely v. Kossove,* 198 *N.J.Super.* 503, 507, 487 *A.*2d 788 (Law Div.1984). The court in *Neely* explained the rationale for its holding:

> Logic dictates that the wife's action [for loss of consortium] is vested in her and may not be dismissed unless authorized by her. The right ... can only be released by the wife who owns it. Were it otherwise, a husband who refuses to litigate for whatever reason could effectively eliminate a claim that is not possessed by him.
>
> [*Ibid.*]

That holding appears to be consistent with the rule in the majority of jurisdictions. *See, e.g., Gillespie v. Papale,* 541 *F.Supp.* 1042 (D.Mass.1982) (applying Massachusetts law); *Nealy v. Fluor Drilling Servs., Inc.,* 524 *F.Supp.* 789 (W.D.La.1981), *aff'd, Stretton v. Penrod Drilling Co.,* 701 *F.*2d 441 (5th Cir.1983); *Jones v. Elliott,* 551 *A.*2d 62 (Del.1988); *Huber v. Hovey,* 501 *N.W.*2d 53 (Iowa); *191 *Bowen v. Kil-Kare, Inc.,* 63 *Ohio St.*3d 84, 585 *N.E.*2d 384 1992); *Buttermore v. Aliquippa Hosp.,* 522 *Pa.* 325, 561 *A.*2d 733 (1989); *Whittlesey v. Miller,* 572 *S.W.*2d 665 (Tex.1978).

[7] That a spouse's *per quod* claim survives the release of his or her spouse's personal injury claim supports the view that a spouse must participate in and consent to a Section 20 settlement proceeding purporting to waive future workers' compensation **1150 dependency benefits. Both a *per quod* claim and a claim for dependency benefits belong not to the injured party but to that party's spouse. Accordingly, in both instances, the spouse alone has the authority to compromise the claim.

(3)

[8] An analogy also may be drawn to cases involving court-ordered child-support payments. Similar to workers' compensation dependency benefits, child support is designed to guarantee that the financial needs of unemancipated children are fulfilled following a divorce. *Pascale v. Pascale,* 140 *N.J.* 583, 590, 660 *A.*2d 485 (1995) ("Child support after divorce is necessary to ensure that a child's basic needs are provided by his parents, who

might otherwise neglect their responsibilities to maintain the child.").

[9] That the right to child support belongs to the child and not to the custodial parent is a fundamental principle of family law. *Id.* at 591, 660 *A.*2d 485; *Martinetti v. Hickman,* 261 *N.J.Super.* 508, 512, 619 *A.*2d 599 (App.Div.1993); *ESB, Inc. v. Fischer,* 185 *N.J.Super.* 373, 378, 448 *A.*2d 1030 (Ch.Div.1982). Accordingly, the right to child support "cannot be waived by the custodial parent." *Pascale, supra,* 140 *N.J.* at 591, 660 *A.*2d 485 (quoting *Martinetti, supra,* 261 *N.J.Super.* at 512, 619 *A.*2d 599); *see also ESB, Inc., supra,* 185 *N.J.Super.* at 378, 448 *A.*2d 1030 (noting that child's right to support "does not belong to the husband or wife to bargain with"). Our courts consistently have held that an agreement between parents purporting to waive child support does not affect the child's right to those benefits. See *Kopak v. Polzer,* 4 *N.J.* 327, 332-33, 72 *A.*2d 869 (1950) (holding that ***192** mother's agreement to release father from child-support obligations did not discharge father's statutory obligation to support child); *Martinetti, supra,* 261 *N.J.Super.* at 512, 619 *A.*2d 599 (holding that consent order, whereby parents agreed that support would discontinue after two years, was not binding on child); *Ryan v. Ryan,* 246 *N.J.Super.* 376, 383, 587 *A.*2d 682 (Ch.Div.1990) ("Agreements by parents [concerning child support] have no binding effect as to the welfare of the children"). The refusal by our courts to enforce releases of child-support obligations executed by a child's parents is consistent with the principle that an injured worker should not be permitted to waive future dependency benefits without the informed consent of that worker's dependents.

C

In the event the Court determines that dependency benefits may be waived in Section 20 settlements but that the Division's longstanding procedures for effecting such settlements require modification, a related issue is whether petitioner would benefit from that holding.

[10] "[T]he general rule applied in civil cases [is] that a new ruling shall apply to all matters that have not reached final judgment." *Coons v. American Honda Motor Co.,* 94 *N.J.* 307, 318-19, 463 *A.*2d 921 (1983) (*Coons I*) (citing *Fox v. Snow,* 6 *N.J.* 12, 14, 76 *A.*2d 877 (1950)), *reh'g granted,* 96 *N.J.* 419, 476 *A.*2d 763 (1984) (*Coons II*), *cert. denied,* 469 *U.S.* 1123, 105 *S.Ct.* 808, 83 *L.Ed.*2d 800 (1985). Further, in the interest of justice and fundamental fairness this Court repeatedly has rewarded litigants who challenge existing law by applying a new rule of law to those successful litigants, despite otherwise applying its decision only prospectively. *Hopkins v. Fox & Lazo Realtors,* 132 *N.J.* 426, 449, 625 *A.*2d 1110 (1993); *Devins v. Borough of Bogota,* 124 *N.J.* 570, 580, 592 *A.*2d 199 (1991); *Spiewak v. Bd. of Educ.,* 90 *N.J.* 63, 83, 447 *A.*2d 140 (1982); *see also Coons II, supra,* 96 *N.J.* at 436, 476 *A.*2d 763 (Garibaldi, J., dissenting) ("It has long been the ***193** position of this Court that 'fundamental fairness' compels that 'champions of the cause' should be rewarded for their effort and expense in challenging existing law."). That "limited prospective ****1151** approach" is motivated by the related policies of providing an incentive to litigants to challenge existing law and of rewarding successful litigants for their efforts and expenses. *Fischer v. Canario,* 143 *N.J.* 235, 246, 670 *A.*2d 516 (1996); *Ramirez v. Amsted Indus., Inc.,* 86 *N.J.* 332, 357, 431 *A.*2d 811 (1981); *see also Darrow v. Hanover Township,* 58 *N.J.* 410, 420, 278 *A.*2d 200 (1971) ("[P]urely prospective rulings do not provide any inducement for litigants to challenge common law doctrines.").

The Supreme Court of California, in a case involving facts similar to these, invalidated a standard form signed by an employee settling a workers' compensation claim that purported to waive dependency benefits. That court, however, was firmly of the view that its holding should be applied for the benefit of the widow that challenged the waiver. In *Sumner v. Workers' Compensation Appeals Bd.,* 33 *Cal.*3d 965, 191 *Cal.Rptr.* 811, 663 *P.*2d 534 (1983), the employee signed a standard release form that waived "all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury, including any and all liability ... to the dependents, heirs, executors, representatives, administrators or assigns of said employee." *Id.* 191 *Cal.Rptr.* 811, 663 *P.*2d at 537. Following the employee's death from a work-related condition, his wife filed a claim for death benefits. The workers' compensation judge dismissed the claim based on the language in the release signed by the employee.

Although the Supreme Court of California agreed that an employee may, as part of a settlement of a workers' compensation claim, compromise his dependents' right to death benefits, the court reinstated the dependency

claim. Observing that the release form failed to refer expressly to death benefits, the court found that "a layman executing that form might be unaware of the fact that he was releasing any claim of his spouse or children to ***194** such benefits." *Id.* 191 *Cal.Rptr.* 811, 663 *P.*2d at 539. The court noted that in an earlier decision it had instructed the Workers' Compensation Appeals Board (Board) to revise its settlement form and procedure to better protect dependents against inadvertent or unwise releases of dependency claims, but that the Board had failed to comply. *Id.* 191 *Cal.Rptr.* 811, 663 *P.*2d at 535. Accordingly, the court declared that the standard settlement form would no longer be accepted, and directed the Board to revise the form to include "clear and non-technical language" indicating that the waiver includes a surrender of the employee's dependents' right to death benefits. The court declined to apply its holding retroactively, recognizing the potential burden on the workers' compensation system. However, the court gave the benefit of its holding to the petitioner "in recognition of her service in bringing the matter to our attention." *Id.* 191 *Cal.Rptr.* 811, 663 *P.*2d at 540.

III

[11] **[12]** We are persuaded that the 1980 amendment to Section 20 was intended to modify *Brown v. General Aniline, supra,* 127 *N.J.Super.* 93, 316 *A.*2d 478, to permit employers to enter into settlements pursuant to Section 20 that would result in a compromise of the employee's compensation claim and also constitute a waiver of the dependency claims of the employee's spouse and children. However, in our view the Legislature did not intend to diminish the separate and independent status of the dependency claim, *Eckert, supra,* 1 *N.J.* at 480, 64 *A.*2d 221, by allowing the employee to waive it unilaterally. Accordingly, we hold that in all future Section 20 settlements in which the parties contemplate waiver of dependency claims in the event the employee's death occurs as a result of the injuries or conditions encompassed by the employee's compensation claim, the Division must be satisfied that the spouse, other adult dependents, and any minor dependents (whose interests ordinarily ****1152** will be represented by the employee's spouse) join in the waiver of future dependency claims. As a general rule, we anticipate that such waiver by the spouse (and ***195** other dependents) will occur on the record of the Division's Section 20 settlement proceedings, and will be preceded by an adequate explanation by the Judge of Workers' Compensation of the preclusive effect that the Section 20 settlement will have on any potential dependency claims. The Division should adopt regulations that will specify the procedures to be followed in Section 20 settlements that involve waivers of dependency claims, and should make appropriate revisions to its pre-printed form to take into account the need for consent to such waivers by spouses and other adult dependents. In general, we leave to the Division the responsibility for adopting and implementing procedures consistent with our holding, but we require that in each such case the Division ensure that a spouse's or other dependent's waiver of dependency benefits is given knowingly, intelligently and voluntarily.

[13] **[14]** **[15]** Under our precedents, and in the context of the Division's longstanding past practice, the principle that a spouse or other adult dependent must knowingly, intelligently and voluntarily waive dependency benefits shall have the effect of a new rule of law for purposes of retroactivity analysis. For a holding to constitute a new rule of law there must be a " 'sudden and generally unanticipated repudiation of a long-standing practice.' " *State v. Afanador,* 151 *N.J.* 41, 58, 697 *A.*2d 529 (1997) (quoting *State v. Cupe,* 289 *N.J.Super.* 1, 12, 672 *A.*2d 1233 (App.Div.), *certif. denied,* 144 *N.J.* 589, 677 *A.*2d 761 (1996)). Another formulation is that "there must be 'some appreciable past from which the [new] rule departs.' " *State v. Purnell,* 161 *N.J.* 44, 51, 735 *A.*2d 513 (1999) (quoting *Afanador, supra,* 151 *N.J.* at 58, 697 *A.*2d 529); *see also Stafford v. Stafford Township Zoning Bd. of Adjustment,* 154 *N.J.* 62, 74, 711 *A.*2d 282 (1998) (concluding that Court's holding requiring applicants for non-conforming use certification to comply with notice to adjoining landowner provisions of Municipal Land Use Law constituted new rule of law). We are satisfied that our holding constitutes a substantial and significant departure from the Division's past practice and appropriately ***196** should be regarded as a new principle of law for retroactivity purposes.

Applying the standards we described in *State v. Knight,* 145 *N.J.* 233, 251, 678 *A.*2d 642 (1996), we will apply our holding only prospectively, except that petitioner, who successfully litigated the issue, shall receive the benefit of our holding. " 'Fundamental fairness' compels that 'champions of the cause' should be rewarded for their effort and expense in challenging existing law." *Coons*

II, supra, 96 *N.J.* at 436, 476 *A.*2d 763 (Garibaldi, J., dissenting). Although no evidence in the record suggests that petitioner was fully informed of and consented to the waiver of her dependency benefits, on remand to the Division respondent may move for a hearing on that issue if it can demonstrate to the Division's satisfaction that there exists a genuine factual dispute on the question of petitioner's actual consent to the waiver.

Because of our holding, resolution of the issue that occupied the lower courts-whether Kibble intended to waive his wife's future dependency claim when he entered into his Section 20 settlement-is unnecessary to our disposition of this appeal. That issue was vigorously contested before us, respondent contending that no purpose would be served by its consent to the Section 20 settlement unless dependency claims were waived; and petitioner contending that that settlement was intended only to compromise Kibble's claims based on pneumonoconiosis and pulmonary fibrosis, and not intended to affect claims based on the lung cancer that Kibble contracted years later. Because the Division's record is no longer available, resolution of the issue is unusually difficult. We note, however, ****1153** that in 1989, when the settlement was effected, petitioner was sixty-years old with a life expectancy exceeding twenty-two years, and that her annual dependency benefit would exceed $13,000. As a matter of simple economics, a lump-sum settlement of $36,000 that purports to waive annual dependency benefits of over $13,000 per year for the remainder of the life of the worker's wife, at a time when the worker allegedly was likely to develop cancer from his occupational pulmonary exposure, is ***197** suspect. We note that Kibble could have insisted on an adjudication of his right to compensation benefits and, had he prevailed, no waiver of dependency benefits would have occurred. In any event, that economic evaluation underscores our conviction that in the future only a knowing, informed and voluntary waiver of dependency benefits by a spouse or other dependent will be valid.

Finally, we note that if respondent ultimately is required on remand to pay dependency benefits to petitioner, and if petitioner's right to sue for wrongful death benefits had not been released, then respondent could have been "subrogated to the rights of the widow ... to assert a claim against the third-party tortfeasor under the Death Act." *Roberts, supra,* 104 *N.J.Super.* at 8, 248 *A.*2d 280. However, petitioner released her right to sue for wrongful death as a condition of settlement of decedent's third-party action. Significantly, no provision of the Act conditions her right to seek dependency benefits on her preservation of her wrongful death claim for the employer's benefit. In *Roberts, supra,* the employee's net recovery from his third-party action exceeded the employer's liability under the Act for compensation and dependency benefits combined, and the employer contended that that recovery by the employee barred his widow's dependency claim. Rejecting that contention the Appellate Division observed that "[s]ince the widow and children had no legal rights in the fund created by the employee's third-party action, the employer had no right to be subrogated to any part of this fund by way of reimbursement therefrom for any dependency benefits made to the widow and children." *Id.* at 9, 248 *A.*2d 280. Similarly, the record before us does not indicate that any portion of the settlement of the third-party action was paid directly to petitioner to compensate her for her release of the right to institute a wrongful death claim. Accordingly, as in *Roberts,* allowing petitioner on this record to seek dependency benefits "does not effectuate 'a double recovery.' " *Ibid.* If the remand proceedings disclose otherwise, appropriate adjustments may be sought.

***198** IV

We reverse the judgment of the Appellate Division and remand the matter to the Division of Workers' Compensation for further proceedings consistent with this opinion.

Baldwin's Kentucky Revised Statutes Annotated
Title XXVII. Labor and Human Rights
Chapter 342. Workers' Compensation

KRS § 342.750

342.750 Income benefits for death; additional lump-sum payment for deaths occurring within four years of injury

Effective: July 15, 2010
Currentness

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.

(b) To the widow or widower, if there is a child or children living with the widow or widower, 45 percent of the average weekly wage of the deceased, or 40 percent, if such child is not or such children are not living with a widow or widower, and in addition thereto, 15 percent for each child. Where there are more than two (2) such children, the indemnity benefits payable on account of such children shall be divided among such children, share and share alike.

(c) Two (2) years' indemnity benefits in one (1) lump sum shall be payable to a widow or widower upon remarriage.

(d) To the children, if there is no widow or widower, 50 percent of such wage for one (1) child, and 15 percent for each additional child, divided among such children, share and share alike.

(e) The income benefits payable on account of any child under this section shall cease when he dies, marries, or reaches the age of eighteen (18), or when a child over such age ceases to be physically or mentally incapable of self-support, or if actually dependent ceases to be actually dependent, or, if enrolled as a full-time student in any accredited educational institution, ceases to be so enrolled or reaches the age of 22. A child who originally qualified as a dependent by virtue of being less than 18 years of age may, upon reaching age 18, continue to qualify if he satisfies the tests of being physically or mentally incapable of self-support, actual dependency, or enrollment in an educational institution.

(f) To each parent, if actually dependent, 25 percent.

(g) To the brothers, sisters, grandparents, and grandchildren, if actually dependent, 25 percent to each such dependent. If there should be more than one (1) of such dependents, the total income benefits payable on account of such dependents shall be divided share and share alike.

(h) The income benefits of each beneficiary under paragraphs (f) and (g) above shall be paid until he, if a parent or grandparent, dies, marries, or ceases to be actually dependent, or, if a brother, sister, or grandchild, dies, marries, or reaches the age of eighteen (18) or if over that age ceases to be physically or mentally incapable of self-support, or ceases to be actually dependent.

(i) A person ceases to be actually dependent when his or her income from all sources exclusive of workers' compensation income benefits is such that, if it had existed at the time as of which the original determination of actual dependency was made, it would not have supported a finding of dependency. In any event, if the present annual income of an actual dependent person including workers' compensation income benefits at any time exceeds the total annual support received by the person from the deceased employee, the workers' compensation benefits shall be reduced so that the total annual income is no greater than such amount of annual support received from the deceased employee. In all cases, a person found to be actually dependent shall be presumed to be no longer actually dependent three (3) years after each time as of which the person was found to be actually dependent. This presumption may be overcome by proof of continued actual dependency as defined in this subsection, but full payments shall not be suspended during the pendency of any proceeding to determine dependency.

(2) Upon the cessation of income benefits under this section to or on account of any person, the income benefits of the remaining persons entitled to income benefits for the unexpired part of the period during which their income benefits are payable shall be that which such persons would have received if they had been the only persons entitled to income benefits at the time of the decedent's death.

(3) For the purposes of this section, the average weekly wage of the employee shall be taken as not more than the average weekly wage of the state as determined in KRS 342.740. In no case shall the aggregate weekly income benefits payable to all beneficiaries under this section exceed the maximum income benefit that was or would have been payable for total disability to the deceased, including benefits to his dependents.

(4) The maximum weekly income benefits payable for all beneficiaries in case of death shall not exceed 75 percent of the average weekly wage of the deceased as calculated under KRS 342.140, subject to the maximum limits in subsection (3) above. The maximum aggregate limitation shall not operate in case of payment of two (2) years' income benefits to the widow or widower upon remarriage as provided under paragraph (c) of subsection (1) of this section, to prevent the immediate recalculation and payments of benefits to the remaining beneficiaries as provided under subsection (2) of this section, but the weekly income benefits as to such remaining beneficiaries shall not exceed the weekly income benefit that was or would have been payable for total disability to the deceased. The classes of beneficiaries specified in paragraphs (a), (b), and (d) of subsection (1) of this section shall have priority over all other beneficiaries in the apportionment of income benefits. If the provisions of this subsection should prevent payment to other beneficiaries of the income benefits to the full extent otherwise provided for by this section, the gross remaining amount of income benefits payable to such other beneficiaries shall be apportioned by class, proportionate to the interest of each class in the remaining amount. Parents shall be considered to be in one class and those specified in paragraph (f) of subsection (1) in another class.

(5) All relations of dependency referred to in this section shall mean dependency existing at the time of the accident to the employee or at the time his or her disability from an occupational disease began.

(6) 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. Annually, the commissioner shall compute, in accordance with KRS 342.740, the increase or decrease in the state average weekly wage, and consistent therewith, shall adjust the amount of the lump-sum payment due under this subsection for injuries occurring in the succeeding year.

(7) All benefits awarded pursuant to this section, other than those provided in subsection (6) of this section, shall be subject to the limitations contained in KRS 342.730(4).

Credits

HISTORY: 2010 c 24, § 1846, eff. 7-15-10; 2000 c 514, § 39, eff. 7-14-00; 1996 1st ex s, c 1, § 31, eff. 12-12-96; 1994 c 181, § 28, eff. 4-4-94; 1976 ex s, c 26, § 2, eff. 1-1-77; 1972 c 78, § 16

KRS § 342.750, KY ST § 342.750
Current through the end of the 2016 regular session

End of Document

Baldwin's Kentucky Revised Statutes Annotated
Title XXVII. Labor and Human Rights
Chapter 342. Workers' Compensation

KRS § 342.125

342.125 Reopening and review of award or order; grounds; procedures; time limitations; credit for previously-awarded retraining incentive benefits or income benefits awarded for coal-related pneumoconiosis

Currentness

(1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

(a) Fraud;

(b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;

(c) Mistake; and

(d) 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.

(2) No claim which has been previously dismissed or denied on the merits shall be reopened except upon the grounds set forth in this section.

(3) Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

(4) Reopening and review under this section shall be had upon notice to the parties and in the same manner as provided for an initial proceeding under this chapter. Upon reopening, the administrative law judge may end, diminish, or increase compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke a previous order. The administrative law judge shall immediately send all parties a copy of the subsequent order or award. Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen. No employer shall suspend benefits during pendency of any reopening procedures except upon order of the administrative law judge.

(5) (a) Upon the application of the affected employee, and a showing of progression of his previously-diagnosed occupational pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due

to that pneumoconiosis and two (2) additional years of employment in the Commonwealth wherein the employee was continuously exposed to the hazards of the disease, the administrative law judge may review an award or order for benefits attributable to coal-related pneumoconiosis under KRS 342.732. An application for review under this subsection shall be made within one (1) year of the date the employee knew or reasonably should have known that a progression of his disease and development or progression of respiratory impairment have occurred. Review under this subsection shall include a review of all evidence admitted in all prior proceedings.

(b) Benefits awarded as a result of a review under this subsection shall be reduced by the amount of retraining incentive benefits or income benefits previously awarded under KRS 342.732. The amount to be deducted shall be subtracted from the total amount awarded, and the remaining amount shall be divided by the number of weeks, for which the award was made, to arrive at the weekly benefit amount which shall be apportioned in accordance with the provisions of KRS 342.316.

(6) In a reopening or review proceeding where there has been additional permanent partial disability awarded, the increase shall not extend the original period, unless the combined prior disability and increased disability exceeds fifty percent (50%), but less than one hundred percent (100%), in which event the awarded period shall not exceed five hundred twenty (520) weeks, from commencement date of the original disability previously awarded. The law in effect on the date of the original injury controls the rights of the parties.

(7) Where an agreement has become an award by approval of the administrative law judge, and a reopening and review of that award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party. The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits.

(8) The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. However, claims decided prior to December 12, 1996, may be reopened within four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later, provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well.

Credits

HISTORY: 2000 c 514, § 7, eff. 7-14-00; 1996 1st ex s, c 1, § 6, eff. 12-12-96; 1994 c 181, § 27, eff. 4-4-94; 1987 ex s, c 1, § 16, eff. 10-26-87; 1980 c 104, § 4; 1972 c 78, § 24; 1960 c 147, § 12; 1942 c 208, § 1; KS 4902

KRS § 342.125, KY ST § 342.125
Current through the end of the 2016 regular session

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