RENDERED: July 10, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-2616-WC

ROBERT L. WHITTAKER, ACTING
DIRECTOR OF SPECIAL FUND — APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-95-036092, WC-95-036066, WC-94-036506 & WC-85-006863

CLARENCE CLIFFORD HARMON;
CHAPPERAL COAL/
COSTAIN COAL, INC.;
HON. DENIS KLINE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: ABRAMSON, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: The Special Fund appeals from the decision of the Administrative Law Judge (ALJ) and the Workers' Compensation Board (Board) rejecting the Special Fund's argument that the Special Fund can rely upon the two-year statute of limitations

provided in KRS 342.185, even when the employer, through its failure to fully comply with KRS 342.040, cannot.

After sustaining injuries in a work-related accident on March 23, 1994, Clarence Clifford Harmon (Harmon) filed claims for benefits, alleging that he had suffered a work-related back injury several years earlier, on January 9, 1985, as well as a knee and back injury in the March 1994 accident. Harmon also filed a hearing loss claim and a black lung claim, both of which, however, have been resolved and are not in issue. Likewise, in view of the particular issue raised in this appeal, the injury of March 23, 1994, is not before this Court.

On January 9, 1985, while employed by Chapperal Coal,[1] Harmon injured his lower back while pulling on pipe. As a result of that injury, Harmon received temporary total disability benefits until he returned to work later that year. Following termination of Harmon's temporary benefits, however, Chapperal Coal failed to notify the commissioner for the Department of Workers' Claims that benefits had ceased, as it was required to do under KRS 342.040.

The issue before the ALJ was whether Harmon's claim relating to his 1985 injury was barred by the two-year statute of limitations set forth in KRS 342.185. The ALJ ruled that, since Chapperal Coal had not complied with KRS 342.040 by notifying the commissioner for the Department of Workers' Claims of the

[1]Apparently Chapperal Coal was subsequently either purchased by or merged with Costain Coal, Inc..

termination of temporary total disability benefits, Harmon's 1985 claim was not barred by the KRS 342.185 statute of limitations. The ALJ concluded that Harmon sustained an occupational disability of 20% as a result of the 1985 work injury, awarded 20% permanent partial disability benefits, and apportioned those benefits equally between Chapperal Coal and the Special Fund.

The Special Fund appealed to the Board, arguing that it could rely upon the two-year statute of limitations even though the employer, because it had failed to comply with KRS 342.040, could not. The Special Fund presents that same argument before us. However, we believe the Board's ruling was correct, and fully adopt its reasoning as follows:

> We turn now to the issue raised by the [Special Fund], which is that Harmon is barred from recovering against them for the percentage of disability attributable to the [Special Fund] from the 1985 injury. The ALJ in addressing the issue of statute of limitations relating to the 1985 injury found as a matter of law that Chapperal had failed to comply with the provisions of KRS 342.040 and, therefore, was estopped from raising the statute of limitations defense in accordance with City of Frankfort v. Rogers, Ky. App., 765 SW2d 579 (1988). That determination is not challenged by Chapperal. The [Special Fund], however, does not believe that this principal [sic] can be applied to them. In many circumstances, the [Special Fund] is now considered a co-defendant and their liability is not purely derivative. Dickerson v. Twentieth Century Hoov-R-Line, Ky., 893 SW2d 365 (1995). As we have frequently noted, the [Special Fund] is a unique entity and, although a co-defendant per Dickerson, it is not a pure co-defendant. The [Special Fund] has no responsibility for the payment of temporary total disability benefits. See KRS 342.040 and KRS 342.038. It further has no specific reporting requirements to the

> employee. Alternatively, the court in Rogers acknowledged that a viable claim should not be thwarted as a result of the failure of an employer to undertake its responsibilities as set out in the Workers' Compensation Act. Obviously, the [Special Fund] is able to rely upon an employer's compliance with notice of termination filings in asserting the statute of limitations although they have no involvement in that practice. Conversely, when the statute of limitations is tolled by the failure of an employer to file appropriate documentation, it is tolled not simply for the employer but for all parties involved. This includes the [Special Fund]. It was therefore not error, in our opinion, for the ALJ to assess benefits for the 1985 injury to both the employer and the [Special Fund].

Accordingly, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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