

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

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001053-WC

MAMIE BAYTOS, WIDOW OF STEPHEN BAYTOS

APPELLANT

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

FAMILY DOLLAR,
HON. RICHARD M. JOINER, ADMINISTRATIVE LAW JUDGE;
HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

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

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

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

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

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

When an appeal is based upon disputes of factual issues, the Board must uphold the ALJ's ruling if it was supported by substantial evidence in the record.

Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001). Similarly, when reviewing decisions of the Board, this Court may only reverse if the Board “has overlooked or construed controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). This appeal, however, has presented a question of law. Therefore, our review is *de novo*. *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

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

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

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

803 KAR 25:010 § 21(2)(c).

Mamie contends that Family Dollar did not follow the provision to identify the correct judge because it named ALJ Joiner and not ALJ Polites as authoring the

subject order. There is no merit to this argument. The notice of appeal began as follows:

[Family Dollar] requests a review by the Workers' Compensation Board of the opinion and award rendered herein by Honorable Richard Joiner, Administrative Law Judge, on June 19, 2012. The order on the petition for reconsideration was entered on July 10, 2012. This appeal was originally filed in August 2012 and was dismissed given the interlocutory nature of the underlying proceedings.

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

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

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

There is no dispute that the settlement between Family Dollar and Stephen precluded *him* from asserting any future claims. The Board relied on the settlement when ruling that Mamie's claim is derivative of Stephen's claim, holding that her claim was barred. The Board reasoned that KRS 342.750 (the

statute which governs death benefits) and KRS 342.730 (the statute under which Stephen and Family Dollar reached a settlement) are both direct income benefits. Thus, Mamie’s entitlement to any benefits was not addressed or implicated.

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

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

Id.

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

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

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

Arthur Larson, *Larson's Worker's Compensation*, Desk Edition § 98 Scope, 98-1 (2007)(cited by *Matter of Fossum*, 619 P.2d 233, 238 (Or. 1980); *State Indus. Ins. Sys. v. Lodge*, 822 P.2d 664, 666 (Nev. 1991)). The Supreme Court of New Jersey has stated that “the vast majority” of jurisdictions consider that “the dependents’ rights are not derived from the employee’s rights, but instead, are separate and independent rights of the dependent.”” *Kibble v. Weeks Dredging & Const. Co.*, 735 A.2d 1142, 1147 (N.J. 1999) (quoting *Brown v. General Aniline & Film Corp.*, 316 A.2d 478 (N.J. 1974)). See also *Judd v. Rinelli*, 268 P.2d 671, 672 (Idaho 1954); *Owens Corning Fiberglas Corp. v. Indus. Comm’n*, 555 N.E.2d 1233, 1238-39 (Ill. App. 1990); *Rouse v. WCC*, 342 S.E.2d 229, 231 (W.V. 1986); *Hampton’s Claimants v. Director of Div. of Labor*, 500 P.2d 1186, 1188 (Colo. 1972); *Buchanan v. Kerr-McGee Corp.*, 908 P.2d 242, 245 (N.M. 1995).

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

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

ALL CONCUR.

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