

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

January 28, 2008 Session

THE ESTATE OF MARY ELLEN REAGAN v. TENNPLASCO, ET AL.

Direct Appeal from the Circuit Court for Macon County

Nos. 5032 and 5143 John D. Wooten, Jr., Judge

No. M2007-01427-WC-R3-WC - Mailed - March 18, 2008
Filed - May 22, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The trial court awarded lump sum benefits. On appeal, a previous workers' compensation appeals panel reversed and remanded for further proceedings. The Employee died for reasons unrelated to the injury, while the appeal was pending. The trial court modified its previous award and again commuted the amount to a lump sum. The Second Injury Fund has appealed, contending that the trial court erred by awarding benefits in excess of those which had accrued prior to the Employee's death. We agree, modify the judgment accordingly, and remand to the trial court for the calculation of the benefits payable to the Estate.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Circuit Court Modified and Remanded

JERRY SCOTT, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lauren S. Lamberth, Assistant Attorney General, for the appellant, Second Injury Fund.

William J. Butler and Frank D. Farrar, Lafayette, Tennessee, for the appellee, Estate of Mary Ellen Reagan.

OPINION

Factual and Procedural Background

This is the second appeal in this case. In the earlier appeal, Reagan v. Transcon. Ins. Co., No. M2006-00009-WC-R3-CV, 2006 WL 3804402 at *2 (Tenn. Workers' Comp. Panel Dec. 27, 2006), the panel held that the trial court had erred in making separate awards to the employee, Mary Ellen Reagan, for injuries to her left arm and left shoulder. That panel found that those injuries were concurrent, and therefore a single award to the body as a whole should have been made. The case was remanded to the trial court to make one award, encompassing both injuries. Ms. Reagan died on October 6, 2006 while the appeal was pending. On remand, her estate was substituted as plaintiff. The trial court modified its award to 60% to the body as a whole for the two injuries, amounting to 240 weeks of compensation. The trial court ordered the entire amount be paid to Ms. Reagan's estate because the original award had been made as a lump sum. The Second Injury Fund has appealed, contending that the trial court erred by awarding benefits to the estate that accrued after Ms. Reagan's death.

Analysis

This case presents an issue of law. Therefore, our review of the matter is de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). The Second Injury Fund contends that Ms. Reagan's estate can recover only those benefits which accrued before her death. This position is based upon Warrick v. Cheatham County Highway Dep't., 60 S.W.3d 815, 819 (Tenn. 2001). In that case, the Supreme Court overruled prior case law concerning the effect of an employee's death upon his unadjudicated claim for workers' compensation benefits, stating: "Wages cease with death and therefore compensation must also cease with death. Since the purpose of workers' compensation is to provide benefits in lieu of wages, a worker's claim for benefits between injury and death should and does survive the claimant's nonwork-related death." Id.

Ms. Reagan's estate contends that the trial court should be affirmed for two reasons. First, her estate argues that the Second Injury Fund waived the issue by not contesting the commutation of the awards in the first appeal. Second, the estate argues that Warrick is distinguishable because the employee in this case died after, rather than before, trial.

The estate bases its first argument upon Lynch v. City of Jellico, 205 S.W.3d 384, 394-95 n.6 (Tenn. 2006), in which the Court held, inter alia, that the State of Tennessee had waived the defense of sovereign immunity by not raising it in the trial court. However, as the Fund notes in its reply brief, the Supreme Court has stated that the correctness of a trial court's decision concerning commutation of an award is not subject to waiver. Leab v. S & H Mining Co., 76 S.W.3d 344, 351 (Tenn. 2002); Duckworth v. Globe Bus. Furniture, Inc., 806 S.W.2d 526, 526-27 (Tenn. 1991). Hence, we conclude that the Fund did not waive the right to raise the issue under the circumstances of this case.

The second question raised by the parties is whether Warrick applies when, as here, a lump sum award was made and the employee dies while the appeal is pending. The Fund contends that the timing of the employee's death is irrelevant. In support of its position, the Fund relies on three

cases. In Sherlin v. Liberty Mut. Ins. Co., 584 S.W.2d 455, 456 (Tenn. 1979), the employer and employee reached an agreement settling the employee's workers' compensation claim. However, the employee died before the agreement was approved by the court. The trial court found that the agreement was not binding on either party, but awarded benefits which had accrued prior to the employee's death. Id. On appeal, the Supreme Court affirmed, citing Chief Justice Grafton Green's opinion in Bry-Block Mercantile Co. v. Carson, 154 Tenn. 273, 277-78, 288 S.W. 726, 728 (1926). Id. at 457. More recently, in Craven v. Corr. Corp. of America, No. W2005-01537-SC-WCM-CV, 2006 WL 3094121, at *10 (Tenn. Workers' Comp. Panel Oct. 26, 2006), the employee died while the case was on appeal. Relying on Warrick, the Workers' Compensation Panel remanded the case to the trial court to adjust the award of benefits to the time of the worker's death due to cancer. Id. However, there is no indication in that opinion whether the award had initially been commuted to a lump sum by the trial court.

The Fund also relies upon Hannah v. Yellow Freight Sys., Inc., No. M2001-00617-WC-R3-CV, 2002 WL 1308324, at *10 (Tenn. Workers' Comp. Panel June 17, 2002). In Hannah, the case had been tried and the trial court had issued a memorandum opinion finding the employee to be permanently and totally disabled as a result of a compensable injury. The employee died two weeks later, before the judgment was entered. The trial court ultimately awarded benefits only until the date of the employee's death, and the employee's estate appealed. Id. at *1. The Workers' Compensation Appeals Panel affirmed the modification of the award, stating "[w]e are unaware of any authority for an award of disability benefits, adjudicated or otherwise, beyond the date of the injured worker's death." Id. at *4.

The common thread among these decisions is that the death of the injured employee altered the obligations of the parties which had previously been determined or agreed upon. In Sherlin, that determination was the result of an agreement, while in Craven and Hannah, a court had ruled on the issues after a trial on the merits. In Craven, a judgment had been entered, while in Sherlin and Hannah, no judgment had been entered. The results of these three cases are consistent with "the primary purpose of workers' compensation, which is to provide benefits in lieu of wages." Warrick, 60 S.W.3d at 818.

The employee's estate has not cited any decision where the Tennessee Supreme Court has approved or permitted recovery of unpaid and unaccrued disability benefits after the death of the injured employee. In our view, permitting such a recovery here would directly conflict with the principle clearly stated in Warrick that "[w]ages cease with death and therefore compensation must also cease with death." Id. at 819. We must therefore, respectfully, modify the decision of the trial court.

Conclusion

The judgment of the trial court is modified to provide that permanent partial disability benefits are payable only to the date of Ms. Reagan's death. The case is remanded to the trial court for calculation of the benefits payable to the Estate. Costs are taxed to the appellee, the Estate of

Mary Ellen Reagan, for which execution may issue if necessary.

JERRY SCOTT, SENIOR JUDGE

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ORDER

This case is before the Court upon the motion for review filed on behalf of the Estate of Mary Ellen Reagan pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to the Estate of Mary Ellen Reagan, for which execution may issue if necessary.

PER CURIAM

Clark, J. - Not Participating

