

RENDERED: September 19, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002599-WC

ADAMS STONE CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 92-WC-03964

TERRY CANTRELL, SR. (DECEASED); CAROL
CANTRELL (SURVIVING SPOUSE); SPECIAL FUND;
HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: PAISLEY AND TACKETT, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

PAISLEY, JUDGE. Adams Stone Corporation (Adams) petitions for review of a decision of the Workers' Compensation Board which affirmed an order of an Administrative Law Judge (ALJ). The ALJ determined that Adams and the Workers' Compensation Funds (WCF) were each responsible for one-half of the total dollar value of

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

an award payable to the estate of Terry Cantrell, Sr. (Cantrell). The ALJ calculated the award to Cantrell's estate by adding the permanent total disability (PTD) benefits awarded for the period preceding Cantrell's death, and the survivor's benefits awarded to Cantrell's widow for the remainder of Cantrell's life expectancy. In making his calculations, the ALJ credited Adams with a dollar-for-dollar credit for temporary total disability (TTD) benefits previously paid to Cantrell. After reviewing the record and the applicable law, we affirm.

On January 21, 1992, while he was employed by Adams, Cantrell sustained a severe work-related injury. Adams voluntarily paid TTD benefits from that date until Cantrell died of lung cancer on December 7, 1995. Cantrell's surviving spouse thereafter filed an Application for Resolution of Injury Claim. On November 4, 1996, the ALJ determined that Cantrell was permanently totally disabled because of his work-related injury and awarded him PTD benefits in the amount of \$333.33 per week from the date of his injury until the date of his death. Further, the ALJ awarded Cantrell's spouse \$166.67 per week survivor's benefits for the remainder of Cantrell's life expectancy in accordance with KRS 342.730(3), and each award was apportioned equally between Adams and the WCF.

Both Adams and the WCF appealed from the award, arguing that the "tier down" provision of KRS 342.730(4), which

became effective April 4, 1994, applied and reduced their respective liabilities. The WCF also asserted that certain language in the ALJ's award, apportioning liability for the benefits applicable to the period preceding Cantrell's death, improperly required it to pay its one-half share of the liability up-front, rather than after the expiration of Adams's payment period. The board rejected the tier down argument on the ground that the tier down provision could not be applied retroactively, and neither party challenged that decision on appeal to this court. Moreover, the board also rejected the WCF's contention that the ALJ's award required the WCF to pay up-front its share of the award of benefits applicable to the period preceding Cantrell's death, and concluded that the award conformed to Kentucky law. That holding was affirmed by this court in an unpublished opinion rendered on June 19, 1998.

Meanwhile, the board ordered Adams to begin paying benefits pending the outcome of the appeal, and Adams calculated the ending date of its payment period by equally apportioning the total weeks for which it and the WCF were liable. However, for unknown reasons Adams credited the WCF for one-half of the TTD benefits which Adams had voluntarily paid, although the ALJ's original 1996 opinion had converted the TTD benefits to PTD benefits payable at the same rate. Accordingly, Adams

arrived at and paid benefits through an ending date of April 11, 2000.

On July 17, 2000, after unsuccessfully demanding reimbursement from the WCF, Adams filed a motion to reopen this matter alleging a mistake in payment and requesting that the WCF be directed to reimburse Adams for benefits paid after April 15, 1996. The ALJ subsequently issued a decision calculating the proper apportionment of Cantrell's combined PTD and survivor's benefits between Adams and the WCF, based upon his finding that the combined award had a dollar value of \$210,493.60. Having determined that Adams was entitled to a credit of \$67,332.66 for previously-paid TTD benefits against its one-half share of the combined award, the ALJ concluded that Adams remained responsible for an additional \$37,914.14 in benefits. Thus, calculated at the compensable rate of \$166.67 per week, Adams was liable for paying benefits for an additional 227.48 weeks through April 23, 2000. The board affirmed the ALJ's decision. This petition for review followed.

Adams argues that the ALJ erred by including Cantrell's predeath benefits when calculating the total benefits which were to be apportioned between Adams and the WCF. Adams asserts that its liability instead should be limited to one-half of the value of the survivor's benefits and that it should be given credit for the payment of predeath TTD benefits, with the

result that it completed paying its share of the benefits on April 15, 1996. The WCF argues in response that Adams is asking to be granted an improper "double credit." We agree with the WCF.

Adams cites Leeco, Inc. v. Crabtree, Ky., 966 S.W.2d 951 (1998), which was issued some six weeks before this court's unpublished 1998 opinion herein, in support of its assertion that its liability ended on April 15, 1996. Leeco addressed the proper apportionment of liability between the employer and the Special Fund (the WCF's predecessor) in cases falling under the tier down provisions of KRS 342.730(4). More specifically, the Supreme Court held that the employer and the Special Fund should benefit proportionately from a tiered down reduction of benefits, and that their respective liabilities should be calculated by dividing the anticipated dollar value of the shared award rather than by simply dividing the remaining weeks of payments due. Relying on Leeco, Adams recalculated its liability based on a purported equal division of the total dollar value of the survivor's award to Cantrell's widow.

Although Leeco's discussion of the tier down provisions is irrelevant to this appeal since the parties never appealed the board's 1997 decision that those provisions do not apply retroactively to the matter before us, the WCF does not disagree with Adams's assertion that, consistent with Leeco, the

apportionment of liability between the WCF and Adams should be based upon an apportionment of the award's total dollar value rather than upon an apportionment of the number of weeks remaining in the award. The parties disagree, however, regarding which payments should be included for apportionment. Adams contends that only the \$140,953.16 payable as survivor's benefits should be apportioned between the parties, and that the ALJ erred by also including the benefits awarded for the period of total disability which preceded Cantrell's death. Adams asserts that the WCF was thereby improperly credited for one-half of the TTD benefits paid by Adams.

The record clearly reveals that although Adams voluntarily initiated and paid TTD benefits to Cantrell, the ALJ never awarded Cantrell TTD benefits since he instead was found to be entitled to PTD benefits from the date of his injury until his death. Those benefits, which are just as much a part of the permanent disability award as the survivor's benefits, were correctly apportioned between Adams and the WCF. In fact, under Kentucky's workers' compensation scheme, the surviving widow's entitlement to benefits operates merely as a lower-rate continuation of the injured worker's predeath benefits. As the Kentucky Supreme Court stated in Whittaker v. Randall Foods, Inc., Ky., 895 S.W.2d 571, 572 (1995),

nothing in the Act authorizes treating the liability of the employer and the Special Fund for an award of income benefits any differently simply because the benefits are paid to or on behalf of the worker's surviving dependents rather than to the injured worker, himself

. . . Therefore, we conclude that KRS 342.120 clearly requires the apportionment of the total amount of income benefits payable as a result of the worker's injury, regardless of whether the benefit is paid to the worker or to the worker's surviving dependents.

While Adams correctly asserts that TTD benefits may not be apportioned because the WCF has no responsibility for temporary income benefits, here there was no error in the ALJ's apportionment of PTD benefits.

Finally, we are not persuaded by Adams's argument that the ALJ's calculations are inconsistent with the original credit granted to it for predeath benefits which it voluntarily paid. It appears that Adams's argument on this issue is based on the fact that although the original ALJ awarded PTD benefits, and the ALJ expressly credited Adams with a dollar-for-dollar credit for all benefits which it had previously paid, on reopening the ALJ mistakenly termed the prior award "TTD" rather than "PTD" benefits. There is no dispute that Adams is entitled to a credit for those predeath benefits which it voluntarily paid to Cantrell, and this fact is not changed by the ALJ's mistaken description of those benefits as TTD rather than PTD benefits.

On reopening, the ALJ properly credited Adams with the entire amount of income benefits which Adams had voluntarily paid to Cantrell, and that credit was properly applied against Adams's one-half share of the total dollar value of the permanent award. Accordingly, we find no error.

The board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE
WORKERS' COMPENSATION FUNDS:

David W. Barr
Frankfort, Kentucky