

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000483-WC

PURCELL STAFFING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-52613

TERESA GILLESPIE, Executrix of the
ESTATE OF MICHAEL GILLESPIE; LOUISE
DELOS REYES, Mother, as Best Friend
and Natural Guardian of WHITNEY DAWN
GILLESPIE, Natural Daughter of Deceased
Michael Gillespie; W. BRUCE COWDEN,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * *

BEFORE: BUCKINGHAM, COMBS, and TACKETT, Judges.

COMBS, JUDGE. Purcell Staffing, Inc., appeals from an opinion and order of the Workers' Compensation Board. After our review of the record and legal arguments, we dismiss this appeal.

On February 2, 2001, Michael Gillespie, an employee of Purcell Staffing, Inc., a temporary staffing agency, was crushed by a forklift on his third day of work at American Cold Storage.

He was immediately rushed to University Hospital, where he died two weeks later. On May 25, 2001, an application for resolution of injury claim (Form 101) was filed on his behalf by Teresa A. Gillespie, Michael's widow and the executrix of his estate. In October 2001, Teresa Gillespie filed a "motion to revive her claim in place of her deceased husband."

The claim was assigned to an Administrative Law Judge (ALJ), who concluded that Michael's work-related injury was the proximate cause of his death. In an order entered on June 28, 2002, the ALJ addressed issues related to income benefits payable to Teresa Gillespie, Michael's widow, and to Whitney Gillespie, Michael's minor child from a former marriage, holding that they would be resolved only after Whitney's residence was determined.

After discovering Whitney's location, on August 29, 2002, the ALJ ordered the mother of the minor child to be joined in the proceeding as a party-plaintiff. A lump-sum award of \$50,000.00 was made to Michael's estate; Teresa Gillespie was awarded \$147.43 per week as Michael's widow pursuant to the provisions of KRS 342.750(1)(b); and pending a telephone conference, Whitney Gillespie's guardian was tentatively awarded \$55.29 per week for the child's benefit.¹

¹ The telephone conference scheduled to be held with the minor child's guardian was cancelled after the appeal to the Board was filed.

Purcell Staffing appealed the ALJ's order and award to the Board. In its brief, Purcell contended that the ALJ had erred by ordering benefits to be paid to Teresa Gillespie as Michael's widow since she had filed a claim only in her capacity as executrix of Michael's estate. It argued that the ALJ had erred as well by ordering benefits payable to Whitney Gillespie, the decedent's minor child, since the child's guardian had never made an appearance in the proceeding. "The alleged surviving child has her own claim for worker's compensation benefits, and is charged with knowledge of the law." Brief at 7. While the employer had previously stipulated at the Benefit Review Conference that the decedent was survived by Teresa Gillespie, his widow, and a dependent child, Whitney Gillespie, independent claims filed by either of them would be time-barred by this point in the litigation.

On February 5, 2003, the Board entered its opinion and order dismissing. The Board concluded that the appeal was interlocutory since a final and appealable order had yet to be entered. "Since the ALJ directed further actions, planned and scheduled another pre-hearing conference, it is quite obvious that all issues as to all parties have not been finally decided." Opinion and Order at 3.

Only a final decision of the Board is subject to judicial review. In Davis v. Island Creek Coal Co., Ky., 969

S.W.2d 712, (1998), the Kentucky Supreme Court held that when a decision of the Board sets aside an ALJ's decision and either directs or authorizes the ALJ to enter a different award upon remand, the action of the Board divests the party who prevailed before the ALJ of a vested right. Therefore, the decision is final and appealable to the Court of Appeals.

In the case before us, the opinion and order of the Board did not terminate the action; it made no determination with respect to the merits of the case, nor did it divest the prevailing party of a vested right. In refraining from intervening in the proceedings before the ALJ had reached a final determination, the Board made no binding decision that would become the "law of the case" so as to preclude a subsequent appeal of any issue. See Whitaker v. Morgan, Ky., 52 S.W.3d 567 (2001). As a result, the Board did not render a final decision amenable to our review. We conclude that Teresa Gillespie's motion to amend the pleadings, which is passed to this merits panel for consideration, should be presented to the ALJ.

The petition is HEREBY ORDERED dismissed.

ALL CONCUR.

/s/ Sara Combs
JUDGE, KENTUCKY COURT OF APPEALS

ENTERED: September 12, 2003

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