

RENDERED: JUNE 8, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002645-WC

LOUIS PERRY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-66357

D.D. WILLIAMSON CO., INC.;
HON. HOWARD FRASIER, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2007-CA-000087-WC

D.D. WILLIAMSON CO., INC.

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW FROM A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-66357

LOUIS PERRY;
HON. HOWARD FRASIER, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

STUMBO, JUDGE: This appeal and cross-appeal comes from a decision by the Workers' Compensation Board (Board) regarding the workers' compensation benefits awarded to Betty Perry due to the death of her husband, Louis Perry. In a decision which affirmed the ALJ, the Board held that Mrs. Perry was entitled to two years worth of workers' compensation benefits under KRS 342.730(4). Both Mrs. Perry and her husband's employer, D.D. Williamson Co. (Williamson), appeal this decision. Based on a recent Court of Appeals decision regarding the interpretation of KRS 342.730(4), we reverse the Board's decision and remand the matter for an award of benefits until the date her husband would have been eligible for normal old-age Social Security retirement benefits.

Louis Perry was killed on April 11, 2003, when a pressurized feeding tank exploded while he was working at D.D. Williamson Co. Days before the parties were due to file their briefs with the ALJ in this case, the Workers' Compensation Board decided the case of *Frazier v. Morsey, Inc.*, No. 04-84884 (WCB March 31, 2006). That case interpreted KRS 342.730(4). The statute says:

¹ Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. Secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate when such spouses and dependents qualify for benefits under the United States Social Security Act by reason of the fact that the worker upon whose earnings entitlement is based would have qualified for normal old-age Social Security retirement benefits.

The *Frazier* decision interpreted KRS 342.730(4) to require that workers' compensation death benefits payable to an employee's widow terminate when she qualifies for Social Security Widows Benefits at age 60. Mrs. Perry was 63 years old when her husband died of work-related causes at the age of 46. If we strictly adhere to the *Frazier* decision, Mrs. Perry would not be entitled to any workers' compensation benefits because she had surpassed the starting age of Social Security Widows Benefits. Williamson argues that *Frazier* was properly decided while Mrs. Perry asks this Court to hold that the Board misinterpreted the statute in question and hold that she is entitled to workers' compensation benefits until the date her husband would have been eligible for normal old-age Social Security retirement benefits. The ALJ and Board in the present case held that the decision in the *Frazier* case was accurate, but refined the analysis further.

The ALJ noted that *Frazier* did not involve a widow over 60. The ALJ further stated that it must not have been the intent of the Legislature to deprive a surviving widow of death benefits solely because of her age. To remedy this, the ALJ found Appellant was entitled to payment of benefits for two years. The ALJ and Board

reached this conclusion by using the “two (2) years after the employee’s injury or last exposure” and “In like manner” phrases in the statute. They felt that the “In like manner” phrase in the second sentence made the aspects of the first sentence apply to it. To the ALJ and Board this meant that if a widow had already reached the Social Security Widows Benefits age when her husband died at the workplace, she would be entitled to two years of workers’ compensation benefits.

Soon after the Appellate briefs were filed in this case, a panel of the Court of Appeals ruled on the *Frazier* case. On January 19, 2007, that Court held that “the Legislature triggered the benefits termination date to the date the spouse or dependent *would have* qualified for Social Security benefits based upon the earnings entitlement of the worker who *would have* qualified for normal old-age Social Security retirement benefits, if not for the worker’s work-related death.” We agree with this holding. Interpreting the statute any other way would be rendering the “worker upon whose earnings entitlement is based would have qualified for normal old-age Social Security retirement benefits” language meaningless. The Legislature clearly based this section of the statute on the age of the worker and not the spouse or dependent. The only age discussed in the statute is that of the worker. Granted, the age of the spouse and dependent is implicitly involved in the statute by virtue of the Social Security benefits language, but it is qualified by the normal old-age benefits of the worker.

We are in agreement with the *Frazier* panel of the Court and reverse the decision of the Workers’ Compensation Board and remand for entry of an order directing

payment to Mrs. Perry of workers' compensation benefits up until the time her late husband would have naturally been entitled to receive normal old-age Social Security retirement benefits and dismiss Appellee's cross-appeal.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Udell B. Levy
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BRIEF FOR CROSS-
APPELLANT/APPELLEE,
D.D. WILLIAMSON CO., INC:

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NO BRIEFS FOR APPELLEES,
CROSS-APPELLEES,
HON. HOWARD FRASIER,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD