

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
April 25, 2011 Session

**NAOMI JEWELL KELLEY v. UNION CARBIDE CORPORATION**

**Appeal from the Circuit Court for Maury County  
No. 12679     Robert L. Jones, Judge**

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**No. M2010-01563-WC-R3-WC - Mailed - August 8, 2011  
Filed - September 8, 2011**

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This case involves a claim for workers' compensation benefits by the dependent spouse of a deceased employee. The decedent was exposed to asbestos in the course of his employment and contracted asbestosis as a result. His claim for benefits was settled in 1991. He died in December 2007, and his widow filed this action seeking death benefits under the workers' compensation law. The trial court awarded benefits, and the employer has appealed, contending that the widow's claim was barred by the terms of the 1991 settlement. The widow contends that the trial court incorrectly set the rate at which benefits are to be paid.<sup>1</sup> We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed**

DONALD P. HARRIS, SR. J., JUDGE, delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and E. RILEY ANDERSON, SP. J., joined.

John R. Lewis, Nashville, Tennessee, for the appellant, Union Carbide Corporation.

Tracy W. Moore, Columbia, Tennessee, for the appellee, Naomi Jewell Kelley.

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<sup>1</sup>Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

## MEMORANDUM OPINION

The decedent, John Kelley, worked for Union Carbide Corporation from 1952 until his retirement in 1985. In 1990, he was diagnosed with asbestosis. In 1991, he filed a suit seeking workers' compensation benefits. The claim was settled, and the settlement was approved by the trial court later the same year. Mr. Kelley died in December 2007, at the age of eighty. Dr. Jon Freels, a pulmonary specialist who treated Mr. Kelley, testified that the asbestosis contributed significantly to his death. Union Carbide did not present any contrary evidence at trial and does not contest the trial court's finding of causation in this appeal.

Mr. Kelley's widow, Naomi, filed a request for a benefit review conference with the Department of Labor and Workforce Development. The benefit review conference was held in October 2008 and resulted in an impasse. This civil action followed. At trial, and in this Court, Union Carbide has taken the position that Mrs. Kelley's claim is barred by the terms of the 1991 settlement, viewed in light of Tennessee Code Annotated section 50-6-306(a) (1983).<sup>2</sup>

The relevant portion of the judgment approving the 1991 settlement states as follows:

The court further finds that this lump sum payment . . . made by the Defendant, Union Carbide Corporation, to the Plaintiff, will constitute a final settlement of any and all claims the Plaintiff has or may have against the Defendant as a result of claims for occupational disease of asbestosis or asbestos related ailments sustained by the Plaintiff by reason of his employment with the Defendant. By agreement of the parties the court further finds that this settlement includes any cause of action for Worker's [sic] compensation benefits arising out of asbestosis or asbestos related lung disease or silicosis or any aggravation of any ailment or physical condition caused by such asbestosis, asbestos related diseases and/or silicosis, but does not include cancer, mesothelioma or chronic obstructive pulmonary disease.

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<sup>2</sup>Union Carbide argues that section 50-6-306(a) as it existed on the date of Mr. Kelley's injury (1990) is applicable. The statute was amended in 2004. Act of June 15, 2004, Pub. Ch. 962, § 21, 2004 Tenn. Pub. Acts 2346, 2360. The effect of the change was to reflect that the Benefit Review Conference process must now be exhausted before a civil action may be filed. Tenn. Code Ann. §§ 50-6-203(a)(1), -225(a)(1), -306(a) (2008). The substance of the statute was not affected by this amendment. In our view, the amendment does not affect the outcome of this appeal.

Union Carbide correctly asserts that this language would have prevented Mr. Kelley from making a claim for additional disability benefits based upon the asbestosis which accelerated his demise. See Wilhelm v. Krogers, 235 S.W.3d 122, 130 (Tenn. 2007). It further asserts that the same language, viewed in light of Tennessee Code Annotated section 50-6-306(a), also bars his survivor from making a claim based upon his death. “The interpretation of a statute and its application to undisputed facts involve questions of law.” Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Id.; Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Mrs. Kelley asserts that her claim for benefits due to her husband’s death is separate from and independent of his claim for disability benefits during his lifetime. She relies upon Hotel Claridge Co. v. Blank, 89 S.W.2d 758 (Tenn. 1936). In that case, the employee was injured on the job. Id. at 759. There was a dispute concerning whether he had given timely notice of his injury, or whether his employer had actual notice of it. Id. He eventually settled his claim with his employer for a lump sum payment. Id. at 760. He subsequently died as a consequence of a cancerous condition that developed as a result of his injury. Id. at 759. His surviving spouse and daughter were awarded death benefits by the trial court. Id. On appeal, the employer asserted that the settlement of the employee’s claim acted as a bar to recovery by his widow and son. Id. at 760. After reviewing cases from several other states, our Supreme Court rejected that argument:

Under our statute, which this court has said creates contractual rights by reason of the statutory provisions, the employer is charged with the liability to pay the statutory compensation to the injured employee, and upon his death, to make the statutory payments to the dependents of the employee, when death results under such facts as to create liability. The rights of the dependents vest in them upon the death of the employee, and arise out of the death; such rights do not exist until the death; they belong to the dependents, and their rights are wholly independent of the rights which the employee himself had during his lifetime. For the reason that the rights of the dependents are independent of the employee’s rights, the employee has no interest in nor control over the dependents’ rights, and in his lifetime he can do nothing to deprive the dependents of the benefits which our statute gives to them. This necessarily follows from the express provisions of the act itself. It follows for another fundamental reason, namely, the dependents are not

parties to, and have no interest in or control over, an action by the employee to recover for, or to settle and discharge his individual rights.

Id. at 761.<sup>3</sup>

Applying that reasoning to the case before us, Mrs. Kelley's claim for workers' compensation death benefits is unaffected by Mr. Kelley's settlement of his claim for disability benefits. But Union Carbide argues that Hotel Claridge is not applicable because the survivors' claim in that case arose from an injury, while the claim before us arose from an occupational disease. It relies on Tennessee Code Annotated section 50-6-306(a), which applies to occupational disease claims and was enacted after Hotel Claridge. It argues that the statute precludes a survivor's action for death benefits where, as here, the deceased employee has entered into a court-approved settlement of his disability claim prior to his death. Mrs. Kelley argues that section 50-6-306 precludes a survivor's action for death benefits only when the deceased employee allowed his disability claim to expire before his death.

As it existed at the time Mr. Kelley's claim arose, Tennessee Code Annotated section 50-6-306(a) provided:

**Limitations.** -- (a) The right to compensation for occupational disease shall be forever barred unless suit therefor is commenced within one (1) year after the beginning of the incapacity for work resulting from an occupational disease, and if death results from the occupational disease, unless a suit therefor be commenced within one (1) year thereafter; provided, however, that *if upon the date of the death of the employee the employee's claim has become barred, the claim of his dependents shall likewise be barred*, and in such case the claim shall be barred whether or not the employer gives the notice required by subdivision (2) of § 50-6-224.

Tenn. Code Ann. §50-6-306(a) (1983) (emphasis added)

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<sup>3</sup>As Mrs. Kelley points out in her brief, the rule announced in Hotel Claridge is consistent with the majority rule in those states which have addressed the issue. See, e.g., Duran v. Goff Grp., 23 So. 3d 45, 48 (Ala. Civ. App. 2009) cert denied (May 8, 2009); Kibble v. Weeks Dredging & Constr. Co., 735 A.2d 1142, 1146-47 (N.J. 1999); Shawver & Sons, Inc. v. Wise, 242 P.3d 583, 587 (Okla. Civ. App. 2010), cert. denied (Oct. 25, 2010); 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 98.01[2] (Rev. ed. 2009).

Union Carbide asserts that this language effectively abrogates Hotel Claridge as to occupational injury claims. We disagree.

“The meaning of the statute is determined by viewing the statute as a whole and in light of its general purpose.” City of Lenoir City v. State ex rel. City of Loudon, 571 S.W.2d 297, 299 (Tenn. 1978). As Mrs. Kelley points out, the unambiguous purpose of section 50-6-306 is to establish the time period for bringing an action to recover benefits for an occupational disease. There is no reference to any other subject. Section 50-6-306(a), as it existed on the date of injury, consisted of a single sentence. The word “barred” appears four times in that sentence. The first clause of the sentence states that an employee’s occupational disease claim is “forever barred unless suit therefor is commenced within one (1) year after the beginning of the incapacity for work” caused by the disease. The meaning of this language is simple and clear. It is a time limitation, nothing less and nothing more. The second clause of the statute addresses survivors’ claims for death benefits. In that clause, the word “barred” is used three more times. There is nothing in the language of the statute which suggests that the word has a different, broader meaning in its second, third and fourth iterations than in its first. Viewing the statute as a whole, and considering its purpose, we conclude that the word “barred” has the same meaning throughout section 50-6-306(a), and that meaning refers solely to the time period for the filing of a claim.

It is undisputed that Mr. Kelley pursued his claim for workers’ compensation benefits in a timely manner. It follows that Mrs. Kelley’s claim for benefits is not barred by Tennessee Code Annotated section 50-6-306(a).

## II.

Mrs. Kelley has raised an additional issue. This issue also concerns the application of a section of the workers’ compensation law to undisputed facts. We therefore review it de novo with no presumption of correctness. Seiber, 284 S.W.3d at 298. Mrs. Kelley contends that the trial court incorrectly set the rate at which she is to receive payments at \$138.10 per week and argues that the correct rate should be \$201.60 per week. The parties are in agreement that the correct benefit rate is \$252.00 per week, pursuant to Tennessee Code Annotated sections 50-6-102(a)(5)(E) (Supp. 1989) and 50-6-210(e)(1) (2008). The statutory maximum total benefit is \$100,800.00. Id. § 50-6-102(a)(7)(E) (Supp. 1989). It was further agreed that Union Carbide was entitled to a credit against that maximum for the amount of disability benefits paid to Mr. Kelley under the 1991 settlement. See Hotel Claridge, 89 S.W.2d at 761-62. The amount of that credit was \$31,752.00. The maximum recovery available to her is therefore \$69,048.00. Her attorney was awarded a fee of \$13,809.60 from that amount, leaving \$55,238.40. The trial court ordered this amount to be paid to Mrs. Kelley over a four-hundred-week period, resulting in the rate of \$138.10.

Mrs. Kelley agrees that the trial court correctly accounted for the lump sum fee paid to her attorney by reducing her benefit rate, rather than the number of weekly payments. She contends that the trial court erred by accounting for Union Carbide's credit in the same manner. She cites Amell v. Liberty Mut. Ins. Co., No. E1999-01021-WC-R3-CV, 2000 WL 559552 (Tenn. Workers' Comp. Panel May 3, 2000), in support of her assertion. We do not find Amell to be applicable to the issue raised. In that case, the question before the Panel was whether the maximum total benefit available to a surviving spouse was four hundred times the deceased spouse's weekly benefit rate or the statutory maximum award set out in Tennessee Code Annotated section 50-6-102. Id. at \*1. The Panel held the benefit was not limited to 400 weeks but the statutory maximum. Id. at \*5.

Union Carbide points to Reece v. York, 288 S.W.2d 448 (Tenn. 1956), and Gray v. Cullom Machine Tool & Die, Inc., 152 S.W.3d 439 (Tenn. 2004), as cases which support the method used by the trial court. In Reece, the employer was entitled to a subrogation credit for a tort recovery made by the employee. 288 S.W.2d at 449. Our Supreme Court held that the proper method for applying the credit was to defer the commencement of periodic disability payments until the amount of the credit had been reached. Id. at 450. In Gray, the Court held, pursuant to Tennessee Code Annotated section 50-6-207(4)(A)(ii)(c) (Supp. 2004), that the proper method to account for a partial lump sum award in a case of permanent total disability was to prorate the amount of the lump sum and reduce the periodic payments accordingly. 152 S.W.3d at 446. Like Amell, neither of these decisions directly addresses the situation which the trial court faced in the present case. In our view, the cases demonstrate that trial courts have some flexibility in accounting for credits due to an employer against a periodic award. With that in mind and absent a statutory provision governing how such credits should be calculated, we conclude that the trial court's method of accounting for the amount of Mr. Kelley's prior settlement was appropriate.

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Union Carbide Corporation and its surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
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**JUDGMENT**

This case is before the Court upon 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, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Union Carbide Corporation and its surety, for which execution may issue if necessary.

PER CURIAM