RENDERED: May 14, 1999; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002330-WC

CITY OF LOUISVILLE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-80453

LARRY SLACK; HONORABLE FREEDA CLARK,
INDIVIDUALLY; HONORABLE DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by the City of Louisville challenging the constitutionality of Kentucky Revised Statute (KRS) 342.320(2)(c), which requires an employer, or the employer's insurer, to pay up to $5,000 of the employee's attorney fees if the employer appeals a benefit determination of an arbitrator or order of an administrative law judge and does not prevail on the appeal. We hold that KRS 342.320(2)(c) is constitutional.

In May 1997, Larry Slack (Slack) filed a workers' compensation claim for an injury that occurred in August 1996.

The matter was referred to an arbitrator pursuant to KRS 342.270. In August 1997, the arbitrator issued her written benefit determination decision. The arbitrator found Slack to have a 40% permanent partial impairment as a result of his injury and awarded him permanent partial disability benefits in the amount of $100.83 per week.

The City of Louisville appealed that decision and requested a de novo hearing before an administrative law judge (ALJ) pursuant to KRS 342.275. On March 9, 1998, the ALJ issued her opinion, which found Slack to be totally disabled and awarded him $250.06 per week in temporary total disability income benefits, an award more favorable to Slack than the arbitrator's award.

Thereafter, Slack moved for an award of attorney fees pursuant to KRS 342.320(2)(c). The ALJ subsequently granted Slack a $4,000 fee to be assessed against the City of Louisville. The City of Louisville filed for reconsideration of the award, alleging that KRS 342.320(2)(c) is unconstitutional and that imposition of the fee constituted an unjust taking of property. Pursuant to KRS 418.075, the Office of the Attorney General was notified of the challenge to the statute's constitutionality.

The ALJ declined to rule on the constitutional issue, correctly noting that the constitutionality of a statute is reserved for the Court of Justice. See Blue Diamond Coal Company v. Cornett, Ky., 189 S.W.2d 963 (1945); and Kentucky Alcoholic Beverage Control Board v. Jacobs, Ky., 269 S.W.2d 189 (1954). The City of Louisville subsequently appealed the issue to the

Workers' Compensation Board. For the same reasons cited by the ALJ, the Board appropriately declined to pass on the constitutionality of KRS 342.320(2)(c). This appeal followed.

KRS 342.320(2)(c), which is a part of the revisions to the Workers' Compensation Statutes passed by the Legislature in 1996, provides, in pertinent part, as follows:

> Upon an appeal by an employer or carrier from a written determination of an arbitrator or an award or order of an administrative law judge, if the employer or carrier does not prevail upon appeal, the administrative law judge shall fix an attorney's fee to be paid by the employer or carrier for the employee's attorney upon consideration of the extent, quality, and complexity of the services rendered not to exceed five thousand dollars ($5,000) per level of appeal.

The City of Louisville argues that KRS 342.320(2)(c) is unjust because it constitutes class legislation; is a denial of due process; and is a violation of the Constitution of the United States and of the Constitution of the Commonwealth of Kentucky.

The City of Louisville relies primarily upon the case Burns v. Shepherd, Ky., 264 S.W.2d 685 (1953). Burns considered the constitutionality of KRS 342.320(2), Acts of 1952, Chapter 182, Sec. 12, under which an employer was required to pay one-half of the claimant's attorney fees in the case of an award by the Workmen's Compensation Board growing out of injury or death of an employee.

The Burns Court found the statute to be unconstitutional, holding:

> Unless based upon some unreasonable delay or willful failure of the employer, there could be no more constitutional

> justification for requiring the employer to pay all or part of the employee's attorney fee than to require payment of his grocery bill. Unless some standards are provided by which the requirement would apply only to employers who have unreasonably or willfully violated some obligation which they owe to an employee, we do not think the statute can be sustained as constitutional. It violates the due process clause of the Federal Constitution and Section 2 of the Kentucky Constitution which declares that absolute and arbitrary power exists nowhere in a republic.

Burns at 687-688.

The Burns opinion addressed prior Kentucky cases dealing with statutes imposing attorney fees upon one party when the opposing party was not granted a similar right if successful.[1] In regard to these cases, the Burns Court stated:

> Throughout all of the cases is the fundamental principle that the imposition of the fees is justified solely on the ground that the person responsible for their payment has brought about the situation through which the fees are incurred by the willful violation of some statutory or contractual obligation. In the statute under consideration, no distinction is made between the just and the unjust. It applies with equal force to the employer who, without reasonable basis for his position, is trying to escape his statutory responsibility, and the employer who is neither seeking to avoid or delay payment of a valid claim asserted by the employee.

Burns at 687.

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[1] See Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 208 Ky. 643, 271 S.W. 695 (1925) (upholding the Bingham Co-operative Marketing Act, one provision of which imposed attorney fees against the warehouse if it should become liable for a violation of the Act); and W. W. Mac Co. v. Teague, 297 Ky. 475, 180 S.W.2d 387 (1944) (holding as constitutional a provision of the Women and Minors' Act requiring payment of attorney fees by the employer where he had failed to pay the wages prescribed and an action was instituted against him by the employee on that account).

Burns has not been explicitly overruled by the Kentucky Supreme Court and ostensibly supports the City of Louisville's position. However, Owens v. Clemons, Ky., 408 S.W.2d 642 (1966), substantially weakened Burns. The Owens Court stated "[t]he broad statement in [Burns] that the sole justification for the imposition of fees is the willful violation of a statutory obligation is inaccurate." Owens at 645. The Court noted that cases preceding Burns had upheld the assessment of attorney fees to successful litigants against nonprevailing litigants.[2] Id.

Owens upheld the constitutionality of KRS 337.360, which permitted the awarding of attorney fees against a losing employer in claims brought by employees under the minimum wage laws. Owens, noting the conflict with the Burns opinion, stated "[s]ince . . . the public policy exemplified under both laws is basically the same, we now have some question concerning the soundness of the Burns decision." Owens at 646. In view of the foregoing, we do not believe Burns is controlling in the case at bar. See Supreme Court Rule 1.030(8)(a).

The City of Louisville identifies three bases whereby KRS 342.320(2)(c) is unconstitutional: (1) because it constitutes class legislation; (2) because it is a denial of due process; and (3) because it generally violates the Constitution

[2]See Teague, 297 Ky. 475, 180 S.W.2d at 387 (fees can be justified as a protective measure for a certain class of workers); Chicago & N.W.Ry. Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35, 43 S. Ct. 55, 67 L. Ed. 115 (1922) (basis for upholding a statute allowing attorney fees to those asserting property damage claims against railroad companies was that such a law stimulated the seasonable consideration and prompt payment of such claims).

of the United States and the Constitution of the Commonwealth of Kentucky. We disagree.

KRS 342.320(2)(c) is not unconstitutional under Section 59 of the Kentucky Constitution as impermissible class legislation. Section 59 does not prohibit the legislature from making reasonable classifications. Kentucky Milk Marketing and Anti-Monopoly Commission v. Borden Co., Ky. 456 S.W.2d 831, 835 (1969). Where a classification is one made on a reasonable and natural distinction, having a reasonable relationship to the purposes of the Act, it does not run afoul of Section 59. Id. The fact that a statute discriminates in favor of a certain class does not render it unconstitutional if the discrimination is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to sustain it. Id. KRS 342.320(2)(c) reasonably requires employers to help finance an employee's additional attorney fees when the employer appeals a benefit determination decision and does not prevail on the appeal. It may reasonably be conceived that employers and their insurers have greater financial resources than employees to pursue workers' compensation litigation. Hence, "discrimination" between the employer "class" and the employee "class" is founded upon a reasonable distinction and is not impermissible class legislation under Section 59.

Similarly, KRS 342.320 is not unconstitutional as a violation of equal protection. The standards for equal protection classifications under the State Constitution are the same as those under the Fourteenth Amendment to the Federal

Constitution and a single standard can be applied to both State and Federal Constitutions. Delta Air Lines, Inc. v. Commonwealth of Kentucky, Revenue Cabinet, Ky., 689 S.W.2d 14, 18 (1985). The constitutionality of a statute that regulates economic matters will be upheld if its classification is not arbitrary, or if it is founded upon any substantial distinction suggesting necessity or propriety of such legislation. Leeco, Inc. v. Baker, Ky. App., 920 S.W.2d 79 (1996). In the area of economic legislation, the legislature does not violate equal protection or due process merely because the classifications made by its statutes are imperfect. Unless a classification requires some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause of the Federal Constitution requires only that the classification be analyzed under the rational basis test. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); Commonwealth v. Howard, Ky., 969 S.W.2d 700, 702-703 (1998).

Under the rational basis test, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Heller v. Doe by Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993), citing F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); Commonwealth v. Howard, 969 S.W.2d at 700. In the workers' compensation context, the General

Assembly may properly classify in its legislation, provided the "objective is legitimate and the classification is rationally related to that objective." Mullins v. Manning Coal Corp., Ky., 938 S.W.2d 260, 263 (1997), cert. denied, _____ U.S. _____, 117 S. Ct. 2511, 138 L. Ed. 2d 1014 (1997), quoting Chapman v. Eastern Coal Corp., Ky., 519 S.W.2d 390, 393 (1975); see also Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446 (1994).

The discrepancy of financial resources available to an employer and its insurance carrier in comparison to the financial resources available to a partially or wholly disabled employee is a rational basis sufficient to justify requiring employers to pay attorney fees upon losing an appeal, while not requiring employees to do likewise. Hence, KRS 342.320(2)(c), under the equal protection rational basis test, does not create unconstitutional classifications by permitting employees to recover attorney fees from nonprevailing employers, while not permitting employers to recover from nonprevailing employees.

The City of Louisville's contention that KRS 342.320(2)(c) violates due process constitutional protections is likewise unpersuasive. When economic and business rights are involved, rather than fundamental rights, substantive due process requires that the statute be rationally related to a legitimate state objective. Stephens v. State Farm Mut. Auto. Ins. Co., Ky., 894 S.W.2d 624, 627 (1995). A court dealing with a challenge to the constitutionality of an act of the General Assembly must "necessarily begin with the strong presumption in favor of constitutionality and should so hold if possible."

Brooks v. Island Creek Coal Co., Ky. App., 678 S.W.2d 791, 792 (1984). Due process or equal protection is violated "'only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective.'" Edwards v. Louisville Ladder, Ky. App., 957 S.W.2d 290, 295-296 (1997). Hence, again, legislation concerning economic matters is tested for constitutional substantive due process violations using the rational basis test. For reasons similar to those set forth in our discussion of the rational basis test under equal protection, supra, the statute at issue is rationally related to a legitimate state objective, and hence is not a violation of substantive due process constitutional rights.

KRS 342.320(2)(c) is likewise not unconstitutional under procedural due process. The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and manner. Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Conrad v. Lexington-Fayette Urban County Government, Ky., 659 S.W.2d 190, 197 (1983). "It is an established rule that an enactment accords due process of law, if it affords a method of procedure, with notice, and operates on all alike." Parrish v. Claxon Truck Lines, Ky., 286 S.W.2d 508, 512 (1955), quoting Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S. Ct. 637, 60 L. Ed. 1084 (1916). Procedural due process is always had when a party has sufficient notice and opportunity to make his defense. Somsen v. Sanitation Dist. No. 1 of Jefferson County, Ky., 197 S.W.2d 410, 411 (1946).

The statute is silent as to notice and hearing requirements; however, KRS 342.320(1) provides that "[a]ll fees of attorneys . . . shall be subject to the approval of an administrative law judge or arbitrator pursuant to the statutes and administrative regulations." Hence, we will construe KRS 342.320(2)(c) to require notice and the opportunity to be heard in accordance with procedural due process requirements. See Kentucky Alcoholic Beverage Control Board v. Jacobs, 269 S.W.2d at 192. In the case at bar, the City of Louisville was provided with adequate notice and was afforded the opportunity to challenge the ALJ's award of attorney fees. There is no evidence that the City of Louisville sought a hearing and was denied same, or was in any way denied the opportunity to challenge the arbitrator's award.

Finally, we note that the awarding of attorney fees is permitted, or required, in a number of other situations. KRS 403.340(4) requires attorney fees and costs to be assessed against a party seeking modification of child custody if the court finds that the modification action is vexatious and constitutes harassment; KRS 403.220 permits a circuit court in a domestic relations case, after consideration of the financial resources of the parties, to order a party to pay a reasonable amount for the cost to the other party of maintaining or defending an action; KRS 453.060(1) permits a successful party represented by a licensed attorney, when no jury is impaneled, to be awarded attorney fees; KRS 453.060(2) requires a guardian ad litem or warning order attorney to be paid a reasonable fee for

his services, to be paid by the plaintiff and taxed as costs; KRS 387.305 requires a reasonable fee to be paid to a guardian ad litem by the plaintiff; KRS 453.260 permits the awarding of attorney fees in lawsuits in which the Commonwealth is a party to the action; KRS 271B.13-310, in an appraisal proceeding commenced under KRS 271B.13-300, permits a court to assess the fees and expenses of counsel for the respective parties.

Hence, the treatment of attorney fees under KRS 342.320(2)(c) is not particularly unique in requiring a party to defer the legal expenses of his opposing party.

For the foregoing reasons, KRS 342.320(2)(c) is adjudged constitutional under the Constitution of the United States and the Constitution of the Commonwealth of Kentucky.

GUDGEL, CHIEF JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent. Initially, I would point out that Burns v. Shephard, Ky., 264 S.W.2d 688 (1953), has not been overruled and is still controlling. Supreme Court Rule 1.030(8)(a). The majority held that Owens v. Clemons, Ky., 408 S.W.2d 642 (1966), has "substantially weakened" Burns and as such, they do not believe Burns is controlling in the case at bar. I do not agree. SCR 1.030(8)(a) mandates the Court of Appeals to follow applicable precedents established in the opinions of the Supreme Court and its predecessor court. As such, until Burns is explicitly

overturned by the Kentucky Supreme Court, we, as an inferior appellate court, are bound by its holding.

Further, I would state that KRS 342.320(2)(c) does appear to violate the due process clause of the Federal Constitution and Section 2 of the Kentucky Constitution and thus is unconstitutional. I believe the mandatory language of the statute requiring the employer to pay the employee's attorney fees is solely punitive in nature. The statute mandates the employer who appeals to pay a punitive fine if he is unsuccessful, but does not require the same of an unsuccessful employee who rightfully exercised his due process right. As aptly stated in Burns:

> In the statute under consideration, no distinction is made between the just and the unjust. It applies with equal force to the employer who, without reasonable basis for his position, is trying to escape his statutory responsibility, and the employer who is neither seeking to avoid or delay payment of a valid claim asserted by the employee.
>
> As illustrating how the statute may penalize an innocent employer, there may be many instances in which there would be a good faith disagreement between the employer and employee as to the extent of disability resulting from an injury. The award of the Board may agree with the employer in determining the extent of disability; yet, if there is any award whatever, the employer is required to pay one-half of the attorney fee, notwithstanding he may have been completely successful in sustaining his position.
>
> Unless based upon some unreasonable delay or willful failure of the employer, there could be no more constitutional justification for requiring the employer to pay all or part of the employee's attorney fee than to require payment of his grocery

> bill. Unless some standards are provided by which the requirement would apply only to employers who have unreasonably or willfully violated some obligation which they owe to an employee, we do not think the statute can be sustained as constitutional.

Burns, supra, at 687-688.

Finally, I would point out that the majority's reliance upon the discrepancy of financial resources between employer and employee as a rational basis to justify the constitutionality of the statute is misplaced. KRS 342.310 specifically addresses the assessment of cost in an unreasonable proceeding. Pursuant to subsection (1) the arbitrator, ALJ, Workers' Compensation Board, or any court may assess the entire cost of the proceedings, including attorney fees, if it is determined that any proceeding therein has been "brought, prosecuted or defended without reasonable ground(s)."

For the foregoing reasons, I believe the majority has overstepped its authority and further believe that KRS 342.320(2) is unconstitutional.

BRIEF FOR APPELLANT: NO BRIEF FOR APPELLEES

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