

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001667-WC

DANA WHEELER AND DAVID B. ALLEN

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-21443

TOYOTA MOTOR MANUFACTURING, INC.;
HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Dana Wheeler and David B. Allen petition for our review of an opinion of the Workers' Compensation Board (Board) affirming an order of an administrative law judge (ALJ) denying Allen's motion for an additional attorney's fee of \$3,500 pursuant to KRS¹ 342.320(2)(c) and an order denying Allen's petition for reconsideration. Because the Kentucky Supreme Court has recently held the statute in question to be unconstitutional, we affirm.

¹ Kentucky Revised Statutes.

Wheeler suffered separate work-related injuries in 1995 and 1998.² Allen represented her, and an application for resolution of injury claim was filed in July 1998. That application made reference to only the 1995 injury. In December 1998, Wheeler's application was amended to include the 1998 injury.³

On July 7, 1999, an arbitrator rendered a written benefit review determination granting Wheeler benefits based upon a twelve percent permanent partial disability (PPD) as a result of her 1995 injury and a six percent PPD rating as a result of her 1998 injury. The benefit review determination contained separate findings of fact and conclusions of law with regard to each injury.

Toyota thereafter requested a de novo hearing before an ALJ with regard to all issues pertaining to Wheeler's claim. In an opinion and award rendered on January 24, 2000, an ALJ determined that Wheeler was entitled to only a six percent PPD as a result of the effects of her 1995 injury rather than the twelve percent disability previously awarded by the arbitrator. As for the 1998 injury, the ALJ awarded Wheeler the same six percent PPD rating as was awarded by the arbitrator.

² The 1995 injury was to the left hand, and the 1998 injury was to the right shoulder.

³ This amendment was pursuant to KRS 342.270(1) which requires an employee to join all causes of action against the employer which have accrued and are known. Failure to join all such causes of action will result in the claims not joined being barred. Id.

Allen thereafter filed a motion for approval of an attorney's fee pursuant to KRS 342.320(2)(b) requesting a fee of \$3,371.10 representing twenty percent of the total income disability benefits to be received by Wheeler. In a separate motion filed on the same day, Allen requested an additional attorney's fee of \$3,500 pursuant to KRS 342.320(2)(c).⁴ The ALJ granted the first motion and awarded Allen a fee of \$3,371.10, but the ALJ denied the second motion and refused to grant an additional attorney's fee pursuant to KRS 342.320(2)(c).

KRS 324.320(2)(c) states 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. This attorney's fee shall be in addition to any fee awarded under paragraphs (a) and (b) of this subsection.

In denying the motion for an additional attorney's fee, the ALJ held that "as the Defendant/Employer did prevail on its appeal to an Administrative Law Judge, the Plaintiff is not entitled to an additional attorney fee pursuant to KRS 342.320(2)(c)." Wheeler and Allen then appealed to the Board, which affirmed the ALJ's denial of Allen's motion. The petition for our review followed.

⁴All references to the provisions of KRS 342.320 shall be to the version of the statute as amended effective December 12, 1996. The provisions of the statute have since been amended again effective July 14, 2000.

Since briefs were filed by the parties in this case, the Kentucky Supreme Court held KRS 342.320(2)(c) to be unconstitutional. See City of Louisville v. Slack, 1999-SC-0580-WC. That holding is dispositive of the issue herein.

The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David B. Allen
Lexington, Kentucky

BRIEF FOR APPELLEES:

H. Douglas Jones
J.R. Schrand
Covington, Kentucky