RENDERED: July 13, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2000-CA-000878-WC

CHED JENNINGS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-90-24860

RED, HOT & BLUE; LESLIE MCKINNEY;
HON. THOMAS LEWIS, ARBITRATOR;
HON. THOMAS A. NANNEY, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Ched Jennings has appealed from an opinion rendered by the Workers' Compensation Board on March 3, 2000, that reversed an attorney's fee award to him of $5,000.00. Having concluded that pursuant to the recent Supreme Court case of City of Louisville v. Slack,[1] that KRS[2] 342.320(2)(c) is unconstitutional and that Jennings is not entitled to relief, we

[1]Ky., ___ S.W.3d ___, 2000 Ky. LEXIS 54 (rendered March 22, 2001, final April 12, 2001).

[2]Kentucky Revised Statutes.

affirm.[3]

On January 15, 1998, Leslie McKinney filed a claim for workers' compensation benefits against her employer, Red, Hot and Blue, alleging that she suffered an injury while she was unloading a truck during the course of her employment. The claim was assigned to Arbitrator Thomas Lewis; and the employer contested the following issues: (1) extent and duration of disability, (2) exclusion of a portion of the impairment as being due to the "natural aging process," (3) due and timely notice,

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[3]Jennings also argues in his petition for review that the employer, by failing to file a petition for reconsideration pursuant to KRS 342.281, failed to properly preserve for review the decision of the administrative law judge. Jennings contends that if a party fails to file a petition for reconsideration pursuant to KRS 342.281 that the party has waived its right for appellate review. This argument is without merit.

KRS 342.281 provides:

> Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the arbitrator or administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission [emphasis added].

Clearly, the error alleged by the employer is not the type of error that is required to be corrected under KRS 342.281. We believe this statute is intended to apply to patent errors by the ALJ, such as an error in a mathematical computation. In the case sub judice, the issue of whether the employer prevailed was a question of law that had been properly presented to the ALJ for decision and thus was properly preserved for further review.

(4) average weekly wage, (5) the compensability of certain medical expenses, (6) whether the employer could choose a treating physician pursuant to KRS 342.020, and (7) overpayment of temporary total disability (TTD) benefits.

On September 2, 1998, the arbitrator rendered a benefit review determination favorable to McKinney on the issues of notice, exclusions due to the natural aging process, compensability of medical expenses, choice of a treating physician, and payment of TTD benefits. The arbitrator awarded McKinney permanent partial disability benefits based upon a 5% impairment; and having found that she did not have the functional capacity to return to her regular employment, he applied the 1.5 multiplier as provided for in KRS 342.730(1)(c)1 to her award.

On September 4, 1998, the employer filed a petition for reconsideration on the issues of average weekly wage, the duration of TTD, the use of the 1.5 multiplier, and vocational rehabilitation benefits. The claim was assigned to Administrative Law Judge Thomas A. Nanney. On September 24, 1998, the ALJ entered an order denying the petition for reconsideration on the issues of average weekly wage, the duration of TTD, and the use of the 1.5 multiplier, but he sustained the employer's objection to the award of vocational rehabilitation benefits.

On October 15, 1998, the employer requested a hearing before the ALJ on the following issues: (1) whether the alleged work-related injury occurred, (2) due and timely notice, (3) extent and duration of any disability, (4) average weekly wage, (5) compensability of the contested medical expenses, (6)

appropriate periods of TTD, and (7) whether sanctions should be imposed against either party.

The ALJ conducted a hearing on these issues on March 3, 1999, and on August 17, 1999, he issued his decision. In discussing whether sanctions should be imposed on either party, the ALJ stated:

> Since the beginning of this litigation, substantial amounts of time of the attorney's as well as this Administrative Law Judge have been taken up with attempting to resolve disputes between the attorneys as to scheduling of deposition dates and numerous other procedural aspects of the case. This case is a prime example of how a total lack of cooperation between counsel for the parties can result in extreme delays and the mushrooming of a relatively straightforward case into a "federal case." By this I, in no way mean to minimize the importance of plaintiff's case or the defense of it. Naturally, counsel on both sides point fingers to one another and each claims to be completely innocent of anything and asks me to believe that they are the victim of the unreasonable actions of the other side. I have previously noted and I again state that it is almost impossible to determine which side is at fault for the problems which have arisen in this case and I refuse to attempt to do so as it would clearly result only in further bickering between counsel for both parties.
>
> Nevertheless, as I have stated previously in this opinion, I believe that there were significant and close questions as to plaintiff's credibility. I, therefore, do not believe that this is an appropriate case for sanctions based upon an unreasonable defense. Further, I do not believe that it was unreasonable for the plaintiff to contest the issue of wages. Therefore, all requests for sanctions shall be denied.

The ALJ noted that the case presented a close question as to whether the injury was work-related, but he found that based on the uncontradicted testimony of McKinney, who was the

sole witness to the incident, that she had established her basic claim of a work-related injury. However, the ALJ's award of benefits was significantly less than the benefits awarded in the arbitrator's decision: (1) the ALJ agreed with the employer as to McKinney's average weekly wage; (2) although he decided that McKinney had a 5% impairment and awarded permanent partial disability accordingly, the ALJ applied a .5 multiplier pursuant to KRS 342.730(1)(c)2, rather than the 1.5 multiplier requested by McKinney and used by the arbitrator; and (3) he found that McKinney's TTD benefits should end on October 7, 1997, rather than March 3, 1998, as found by the arbitrator. Thus, McKinney received benefits that were significantly less than the benefits the arbitrator had awarded her and significantly less than the benefits she had sought.

On October 25, 1999, the ALJ entered an order awarding Jennings an attorney's fee in the amount of $5,241.40. Of this amount, $241.40 was to be paid from the proceeds of McKinney's award pursuant to KRS 342.320(2)(b), and the remaining $5,000.00 was to be paid directly to Jennings by the employer pursuant to KRS 342.230(2)(c).

In his order, the ALJ stated:

> In the instant case, it is found that the Respondent's claim has been practiced with a high level of skill and competence and an excellent result has been achieved. These factors, together with recognition that the attorney's fee was contingent in nature and no fee would have been payable in the event an Award were not rendered, all mitigate in favor of the approval of the maximum attorney's fee allowable.

The employer appealed this order to the Board and on March 3,

2000, the Board reversed. Jennings' petition for review followed.

The Board agreed with the employer's basic argument that KRS 342.230(2)(c) only authorizes an award of attorney's fees if the employer "does not prevail upon appeal." While the employer concedes that it did not prevail upon all issues that it raised before the ALJ, it contends that since it prevailed on some issues and since McKinney ultimately received far less than she was seeking, that it prevailed before the ALJ.

KRS 342.320(2)(c) provides:

> 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 [emphasis added].[4]

The parties' briefs and the oral arguments centered on the meaning of the term "prevail," which was not defined in the statute. However, since the oral arguments our Supreme Court has rendered Slack, supra, which held KRS 342.320(2)(c) to be unconstitutional. In City of Louisville v. Slack, supra, the Supreme Court, in a 4-3 decision, agreed with the arguments advanced by the employer that the statute was unconstitutional

[4]In 2000, the General Assembly amended Chapter 342 again and eliminated the arbitrator, modified the attorney's fees provisions and repealed KRS 342.320(2)(c).

and reversed the Court of Appeals.[5] The Court opined that the attorney's fee statute had the single purpose "to punish an employer who brings an appeal in good faith," and it held the statute to be both arbitrary and violative of an employer's right to procedural due process.[6]

Thus, the opinion of the Board reversing the award of an attorney's fee of $5,000 to the appellant, attorney Jennings, pursuant to KRS 342.320(2)(c), is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Ched Jennings
Louisville, KY

BRIEF FOR APPELLEE:

James G. Fogle
Louisville, KY

ORAL ARGUMENT FOR APPELLEE:

Sherri P. Brown
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[5]The Supreme Court also overruled Earthgrains v. Cranz, Ky.App., 999 S.W.2d 218 (1999), which had held the statute to be constitutional.

[6]Slack, slip op. at 7.