

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001838-WC

FLYNN ENTERPRISES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-75240

RAYETTA M. SETTLE; HON. W. DOUGLAS MYERS;
THOMAS A. NANNEY, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * * * **

BEFORE: COMBS, EMBERTON, and HUDDLESTON, Judges.

COMBS, JUDGE: Flynn Enterprises, Inc., has appealed from an opinion rendered by the Workers' Compensation Board on August 1, 2001, that affirmed an award of attorney's fees to the claimant's attorney pursuant to KRS 342.320(2)(c). In light of the Kentucky Supreme Court's recent holding in City of Louisville v. Slack, Ky., 39 S.W.3d 809 (2001), we are compelled to reverse.

On October 9, 1997, Rayetta M. Settle filed a claim for workers' compensation benefits against her employer, Flynn Enterprises, Inc. ("Flynn"), alleging that she suffered with carpal tunnel syndrome and deQuervain's syndrome as a result of

her employment. The claim was assigned to an arbitrator, who eventually awarded Settle temporary total disability benefits.

Flynn appealed to an administrative law judge ("ALJ"), requesting a *de novo* review of the award. The ALJ determined that the appeal was interlocutory in nature and dismissed the matter. Flynn then filed an appeal to the Workers' Compensation Board ("Board"). The Board affirmed and remanded the claim to the arbitrator for further proceedings.

Ultimately, the arbitrator system was abolished and the claim was reassigned to an ALJ for consideration on the merits. Following a hearing, the ALJ concluded that Settle had failed to establish a permanent occupational disability and determined that her employer was not responsible for surgery as proposed by one of her physicians. The ALJ confirmed, however, the period of temporary total disability benefits as previously paid.

Following the ALJ's order, Settle's attorney, Douglas Myers, filed a motion requesting an attorney's fee of some \$17,000.00. According to the motion, a portion of this amount was to be paid from the proceeds of Settle's award pursuant to KRS 342.320(2)(b). The remaining \$10,000.00, however, was to be paid by Flynn pursuant to KRS 342.320(2)(c), providing that in the event an employer appeals an award and "does not prevail upon appeal," then up to \$5,000, per level of appellate review may be awarded as a penalty.

The ALJ agreed with Myers and awarded an attorney's fee of slightly more than \$13,000.00 – \$10,000.00 of which was to be paid directly by Flynn and/or its insurer pursuant to KRS

342.320(2)(c). Flynn appealed this order to the Board, which affirmed. In this petition for review, Flynn contends that the Board erred by failing to apply the law as established by the Kentucky Supreme Court in City of Louisville v. Slack, Ky., 39 S.W.3d 809 (2001). We agree.

At the time of Settle's injury, KRS 342.320(2)(c) provided 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.

(Emphasis added). The ALJ's decision to award an attorney's fee pursuant to this provision was entered approximately one week before the Kentucky Supreme Court determined that KRS 342.320(2)(c) was unconstitutional. In City of Louisville v. Slack, 39 S.W.3d at 813, the Supreme Court opined that the attorney's fee statute was improperly and unconstitutionally motivated -- "to punish an employer who brings an appeal in good faith." Reversing this court's opinion in Earthgrains v. Cranz, Ky. App, 999 S.W.2d 218 (1999), the Kentucky Supreme Court held the statute to be both arbitrary and violative of an employer's right to procedural due process.

Flynn's claim was still pending at the administrative level prior to the final word on the issue from the Supreme

Court. Application of the Supreme Court's holding to this claim does not violate our rule against unrestricted retroactive application of new decisions holding statutes unconstitutional. See Burns v. Level, Ky., 957 S.W.2d 218 (1998).

Consequently, the opinion of the Board affirming the award of an attorney's fee of \$10,000 to the appellant, attorney Myers, pursuant to KRS 342.320(2)(c), must be reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ben S. Fletcher III
Hopkinsville, KY

BRIEF FOR APPELLEE:

W. Douglas Myers
Hopkinsville, KY