

RENDERED: JULY 20, 2007; 2:00 P.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002184-WC

GORDON T. RAGER AND DEATHRAGE,
MYERS, SELF & LACKEY, ACTING BY
AND THROUGH W. DOUGLAS MYERS,
PARTNER

APPELLANTS

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-80609

CRAWFORD & COMPANY,
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: HOWARD AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

¹Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

HOWARD, JUDGE: The Appellants, Gordon Rager (hereinafter “Rager”) and his attorney, the Honorable W. Douglas Myers, appeal from an order of the Worker's Compensation Board affirming a ruling of the Administrative Law Judge, the Honorable Donna H. Terry, awarding Rager an attorney's fee pursuant to KRS 342.320(7), but denying his motion that the Appellee, Crawford and Company (hereinafter “Crawford”), his former employer, be required to pay that attorney's fee. Finding no error, we affirm.

Rager was employed by Crawford & Company as an insurance adjuster. During the course of his employment, Rager was injured on October 15, 1998 when he fell off of a pontoon boat while appraising damage to that boat. As a result of his injury, Rager commenced a worker's compensation action on April 18, 2003. An Agreement as to Compensation and Order Approving Settlement was signed by both parties and approved by the Administrative Law Judge on April 22, 2003. This settlement included a stipulation that Crawford would pay future medical expenses incurred by Rager which were causally related to the October 15, 1998 injury. Subsequently, Rager sought additional medical treatment, including multiple surgeries, and incurred corresponding medical expenses.

On February 16, 2005, Crawford & Company made a motion to reopen to resolve a medical fee dispute, contesting the reasonableness of another proposed back surgery. During the proceedings, the issue of certain other unpaid medical bills was raised by Rager. In addition, Rager requested sanctions in the form of attorney fees

pursuant to KRS 342.310, based on the alleged unreasonableness of Crawford's reopening of the proceedings.

The ALJ entered an order on October 3, 2005, holding that the proposed medical procedures, including the additional surgery, were reasonable and ordering Crawford & Company to pay the expenses for such procedures as well as all other disputed medical bills. However, the ALJ denied Rager's request for sanctions pursuant to KRS 342.310, finding that Crawford had a reasonable basis for reopening the proceedings and contesting the necessity of the additional expenses. The ALJ's order did, however, invite a standard motion for attorney fees by the claimant.

On October 20, 2005, Rager filed such a motion, pursuant to KRS 342.320. The ALJ granted that motion and awarded Rager attorney fees on November 3, 2005, stating that such fees were to be paid by Crawford & Company. Crawford filed a petition to reconsider. The ALJ granted the petition on November 22, 2005, with an order vacating the previous order and requiring the attorney fees to be paid by Rager, personally. Rager filed a notice of appeal to the Worker's Compensation Board from this November 22, 2005 order.

The Worker's Compensation Board found that the matter was not final and remanded the case for a determination of the amount of the attorney's fee which was awarded. On remand the ALJ entered an order on June 20, 2006, awarding an attorney's fee in the amount of \$3916.50 and reaffirming the November 22, 2005 order in all other respects. Rager again appealed to the Workers' Compensation Board. The Board

affirmed the ALJ's June 20, 2006 order on September 22, 2006. This Petition for Review followed.

Rager did not appeal, to the Workers' Compensation Board or to us, from the denial of his request for sanctions, including attorney fees, against Crawford pursuant to KRS 342.310. His only claim is that he should have been awarded attorney fees against Crawford pursuant to KRS 342.320. While that statute does not expressly prohibit the award of attorney fees against the employer, neither does it make any provision for such an award.²

The Workers' Compensation Board addressed this issue as follows:

In cases where the claimant prevails in a reopening for a medical fee dispute, but the defendant-employer is not subject to sanctions pursuant to KRS 342.310, an ALJ may not assess the claimant's attorney fee against the defendant-employer. In Duff Truck Lines, Inc. v. Vezolles, supra, the court of appeals determined that a claimant's attorney is entitled to payment of a fee for successfully defending a medical fee dispute on reopening by the employer. Unfortunately, the court did not address the question of how the fee was to be paid. At present, there is no published authority on this question. Nonetheless, in Cetrulo v. Overhead Door, Claim No. 0808721 (November 15, 2000), this Board held that an attorney fee awarded for the successful defense of a medical fee contest by the claimant's attorney could be paid through two potential means. In Cetrulo, we stated that because there were past due medical expenses still outstanding, the ALJ could order the deduction of the attorney fee from the payments yet to be issued to the medical providers. Alternatively, we advised that the claimant could be ordered

² The only mention of claimants' attorney fees being paid by the employer in KRS 342.320 is in subsection (4), where it states, "Except when the attorney's fee is to be paid by the employer or the carrier, ... [it shall be paid either by the employee individually or directly from his award.]" Since there is no other provision in the statute for such a fee to be paid by the employer or the carrier, we interpret this language as referring to fees imposed as sanctions under KRS 342.310.

to pay the fee out of personal funds, assuming a properly executed Form 109, attorney fee election, was filed in connection with the medical fee dispute. . . . We continue to believe that unpaid medical fees or the claimant's own funds are the only two sources of funds available when sanctions are not warranted.

For the most part, Rager's arguments concern public policy. The ALJ and the Board, however, do not make public policy. Such concerns are better addressed to the General Assembly.

. . . we believe it is impermissible to impose an attorney fee simply because a party was unsuccessful without regard to fault. The imposition of sanctions pursuant to KRS 342.310 is available as a deterrent in a reopening to contest medical expenses. If reasonable grounds exist for the reopening, there should be no deterrent . . .

The function of the Court of Appeals in reviewing a Worker's Compensation Board decision “is to correct the Board only where the the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992). We do not find the Board has committed either error in this case. On the contrary, we believe the Board's holding is consistent with a common-sense interpretation of KRS 342.320 and also with the overall statutory scheme, allowing attorney fees only from the employee personally or from his recovery, in the absence of grounds for sanctions.

Though *Duff Truck Lines, Inc. v. Vezolles*, 999 S.W.2d 224(Ky.App. 1999), provides that the ALJ has the authority to award attorney fees in a medical-fee dispute under KRS 342.320(7), we do not construe this statute as permitting the imposition of

fees on the defendant employer in this situation. Nor does Rager cite to any authority for such construction. Under the statutory scheme, attorney fees can be imposed upon an employer only as a sanction under KRS 342.310, for prosecuting or defending workers' compensation proceedings "without reasonable ground." The ALJ found that Crawford had reasonable grounds for reopening and for their position in this matter. Rager did not appeal from that ruling.

The appellant asserts that his position is consistent with the legislative purpose of KRS 342.320(7), which allows the award of attorney fees on the reopening of a case. But there is nothing in that section which suggests that those fees should come from any other sources than they would come from in the ordinary case, before a reopening; that is, from the employee personally or from his recovery. We also agree with the Board that Rager's argument, based as it is primarily on public policy, would be better addressed to the General Assembly. This court also "do[es] not make public policy."

The decision of the Worker's Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE
CRAWFORD & COMPANY:

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