

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001981-WC

ALPH KAUFMAN CONSTRUCTION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-96-66502

TOMMY OWEN DOWELL; HON. NEIL WEINER;  
SPECIAL FUND; HON. W. BRUCE COWDEN,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

BARBER, JUDGE: The employer challenges the constitutionality of KRS 342.320(2)(c). The statute, as amended effective December 12, 1996, provides for the employer to pay the plaintiff's attorney fee where the employer appeals and does not prevail. We hold that KRS 342.020(2)(c) is constitutional.

Tommy Dowell filed a workers' compensation claim on March 12, 1998, alleging a November 5, 1996 low back injury during the course of his employment with Alph Kaufman Construction. The case was initially decided in Dowell's favor

by an arbitrator. The employer sought de novo review before an ALJ. The ALJ determined that Dowell was totally occupationally disabled. Dowell's attorney, Hon. Neil S. Weiner, subsequently requested approval of his attorney fee including a \$5,000.00 fee to be paid by the defendant-employer under KRS 342.320(2)(c), as amended December 12, 1996, the plaintiff having prevailed on appeal. The employer filed a response and "partial objection," contending that KRS 342.320(2)(c) is unconstitutional, in violation of §§ 27, 28 and 115 of the Constitution of Kentucky.

By order of May 19, 1999, the ALJ awarded an attorney fee, including \$5,000.00 to be paid by the Defendant-Employer under KRS 342.020(2)(c):

[A]fter full review of the above factors and of the record in this claim, and further exercising the discretion afforded an Administrative Judge to balance the competing interest of the injured worker and those of his legal counsel, and noting that the employer appealed and did not prevail on appeal, an attorney's fee in the amount of . . . \$5,000.00 is to be paid by the defendant-employer pursuant to KRS 342.320(2)(c).

The ALJ passed the issue of the constitutionality of KRS 342.320(2)(c) to a court for ruling. By opinion rendered August 6, 1999, the Board affirmed the ALJ's award of attorney fees, stating that "as an administrative tribunal, the Workers' Compensation Board lacks the authority and has no jurisdiction to determine the constitutionality of a statute . . . ."

Appellant contends KRS 342.320(2)(c) is unconstitutional because it: (1) prevents the employer from exercising its constitutional right to appeal; (2) violates

separation of powers doctrine; (3) is unconstitutionally vague; (4) constitutes class legislation and violates the employer's right to equal protection; (5) denies the employer due process; (6) violates the prohibition against special legislation; (7) should not be applied retroactively.

KRS 342.320(2)(c), effective December 12, 1996, 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.

Our decision in Earthgrains v. Cranz, Ky. App., 999 S.W.2d 218 (1999), disposes of the majority of Appellant's arguments. In Earthgrains, we adjudged the statute to be constitutional under the Constitutions of the United States and this Commonwealth. We rejected reliance upon Burns v. Shepherd, Ky., 264 S.W.2d 685 (1953), as support for the argument that KRS 342.320(2)(c) violated the due process provision of Section 2 of the Kentucky Constitution. We held that Owens v. Clemons, Ky., 408 S.W.2d 642 (1966), "substantially weakened Burns." Id at 221.

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 "since . . . 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).

Id., at 222. We held that KRS 342.320(2)(c) does not violate equal protection. The discrepancy in the financial resources of a disabled employee compared to those of an employer and its workers' compensation carrier provides a sufficient rational basis for shifting the cost of litigation to the employer where it appeals and does not prevail. We rejected the contention that KRS 342.320(2)(c) violates substantive due process considerations, under essentially the same analysis. Id., at 222-223. We held that KRS 342.320(2)(c) does not unconstitutionally restrict the right to appeal guaranteed by Section 2 of the Kentucky Constitution. The statute "does not prevent employers from appealing adverse decisions. Employers are still free to appeal, but with the condition that they will have to pay attorney fees if . . . unsuccessful. The state's interest in seeing that the injured employee is promptly compensated outweighs any limiting effect the statute may have on the employer's appeal." Id. at 223.

Appellant fails to convince us that the statute violates separation of powers -- that the Legislature impermissibly usurped the judiciary's power of review by attempting to block a litigant's access to the courts. As we held in Earthgrains, supra, the statute does not impermissibly restrict the employer's right of appeal.

We are unpersuaded by appellant's argument that KRS 342.320(2)(c) is "unconstitutionally vague." Appellant argues that the meaning of "prevail" is not clear. We disagree; regardless, the fact that a statute is may be susceptible to more than one interpretation does not require a holding that the statute is unconstitutional if those who are affected by it can reasonably understand what the statute requires of them. Gurnee v. Lexington-Fayette Urban County Gov't, Ky. App., 6 S.W.3d 852, 856 (1999). It can be reasonably understood from KRS 342.320(2)(c) that the employer will pay for the plaintiff's attorney fee, if it appeals and loses.

We are perplexed by the argument that the statute fails to give the ALJ guidance in determining the amount of the attorney fee. The statute clearly states the factors to be considered: the extent, quality, and complexity of the services rendered. The statute also provides that the fee is not to exceed five thousand dollars (\$5,000) per level of appeal. Appellant also argues that the amount is arbitrary and punitive; however, \$5,000 is a maximum, and the ALJ has the discretion to fix a lesser amount.

We are not persuaded by Appellant's argument that KRS 342.320(2)(c) constitutes impermissible special or class legislation.

Section 59 prohibits the general assembly from passing local or special acts concerning certain subjects when a general law can be made applicable. . . . [T]his particular section of the Constitution does not prohibit the legislature from making reasonable classifications. . . . [W]here 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 this section. . . . [citation omitted] [T]he 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.

Kentucky Milk Marketing & Anti-Monopoly Com.v. Border Co, Ky., 456 S.W.2d, 831, 836 (1969). There is a reasonable distinction between the financial positions of a disabled employee and the employer/workers' compensation carrier. Appellant acknowledges the distinction, but complains about being denied "access to the appeal process just because parties have the funds to pursue an appeal." The 1996 revision of the Workers' Compensation Act substantially reduced benefits and limited attorney fees. Were it not for the fee shifting mechanism contained in KRS 342.320(2)(c), it would be difficult for many disabled employees to obtain legal representation. In our view, KRS 342.320(2)(c) simply levels the playing field.

We disagree with Appellant's contention that KRS 342.320(2)(c) effectively denies the employer procedural due process, because of constraints in putting on proof at the Arbitrator level. Appellant argues that it is forced to appeal to an ALJ in order to obtain due process. Procedural due process requires: "[A] hearing, the taking and weighing of evidence, if such is offered, a finding of fact based upon consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the administrative action.

Kentucky Alcoholic Beverage Control Board v. Jacobs, Ky., 269 S.W.2d 189, 192 (1954). The fact that the plaintiff's attorney fees will be charged to the employer if it appeals and loses, does not deprive the employer of procedural due process.

Appellant also contends that KRS 342.320(2)(c) is unconstitutional, if applied retroactively, because it imposes a new obligation and duty upon the employer. Appellant argues that the law on the date of injury should control and that there is nothing in the statute to indicate it has retrospective application. We disagree. KRS 342.0015, entitled "Application of 1996 (1<sup>st</sup> Extra. Sess.) Ky. Acts ch 1," specifically states that the provisions of KRS 342.320 are remedial. Remedial amendments do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991).

\_\_\_\_\_ For the foregoing reasons, we find KRS 342.320(2)(c) constitutional.

EMBERTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF AND ORAL ARGUMENT FOR  
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BRIEF AND ORAL ARGUMENT FOR  
APPELLEE, TOMMY OWEN DOWELL:

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