

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000478-WC

NU WAY MANUFACTURING, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-97-67171 & WC-98-01037

JERRY WYNN; HONORABLE PHYLLIS L.
ROBINSON; HONORABLE BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION REVERSING

** ** * * *

BEFORE: GUDGEL, Chief Judge; COMBS, and McANULTY, Judges.

McANULTY, JUDGE: Nu Way Manufacturing, Inc. appeals from an opinion of the Workers' Compensation Board reversing a decision by the Administrative Law Judge (ALJ) denying Jerry Wynn's attorney, Phyllis Robinson, a \$5,000 appellate attorney's fee under KRS 342.320(2)(c) in his workers' compensation claim. Given the recent decision of the Kentucky Supreme Court in City of Louisville v. Slack, Ky., 39 S.W.3d 809 (2001) that KRS 342.320(2)(C) is unconstitutional, we hold that Robinson is not

entitled to an award of attorney's fees under that statute, and therefore reverse.

While employed by Nu Way Manufacturing, Jerry Wynn injured his back on February 15, 1997, when he lifted 20-25 stainless steel bars from a table and carried them to a milling machine. He reported experiencing pain and a stinging sensation in his neck and arms. Wynn continued working until March 4, 1997, after which he did not return due to pain in his neck and back. Wynn was examined by Dr. William Brooks, a neurosurgeon, on April 7, 1997, who ordered an MRI. Dr. Brooks reported that the MRI showed Wynn had focal herniation at the C6-7 level centrally and left laterally with foramina narrowing at C6-7 due to facet joint hypertrophy. There also was evidence of disc bulging at the C5-6 level and facet joint hypertrophy at the C4-5 level left laterally. After undergoing some therapy, Wynn continued to complain of neck, shoulder, arm, and lower back pain, so Dr. Brooks had a second MRI performed in May 1997. This MRI showed that Wynn had disc degeneration at the L4-5, L5-S1, and L3-4 levels associated with degenerative osteoarthritis and facet sclerosis. Dr. Brooks assigned a 15% impairment rating based on Wynn's lower back condition. In April 1997, Wynn also saw Dr. James Bean, a neurosurgeon, who concurred in Dr. Brook's reading of the April MRI as indicating disc herniation at the C6-7 level.

On December 9, 1997, Dr. John Vaughan examined Wynn and reported herniation at the C6-7 level laterally and severe degenerative disc disease at the L4-5 level based on the April

1997 MRI. Dr. Vaughan indicated that Wynn suffered from both cervical and lumbar spondylosis. He assigned a total impairment rating of 20% with 15% related to Wynn's cervical spine and 5% to the lumbar spine. Dr. Vaughan apportioned 50% of his impairment rating to a pre-existing dormant condition and 50% to the February 1997 injury. Dr. Vaughan restricted Wynn's activities to lifting no more than 10 pounds repetitively or 20 pounds at once, and no reaching above the shoulder. He stated that Wynn was unable to return to the type of factory manual labor he had performed at Nu Way.

On December 1, 1997, Wynn filed an application for resolution of injury claim, No. WC-97-67171, involving the injury on February 15, 1997, and his neck and back condition. In a benefit review determination, an arbitrator assigned a 15% functional impairment rating under the American Medical Association (AMA) Guidelines based on a work-related injury. After concluding that Wynn could not return to his previous type of employment, the arbitrator applied the statutory enhancement factor of 1.5 pursuant to KRS 342.730(1)(c)1 and the regular factor of 1.25 associated with the impairment rating pursuant to KRS 342.730(1)(b) for a total permanent partial disability rating of 18.75% [15% x 1.25] subject to enhancement by the 1.5 multiplier. For purposes of arbitration, the parties stipulated that Wynn's average weekly wage was \$350.03. After filing a petition for reconsideration that was denied, Nu Way filed a notice on March 27, 1998, raising a constitutional challenge to the attorney's fees statute, KRS 342.320(2)(c) based on due

process and equal protection. On May 11, 1998, Nu Way filed a request for a hearing before an ALJ.

While the initial claim was awaiting assignment to an administrative law judge, Wynn filed a second workers' compensation claim against Nu Way on June 4, 1998, alleging hearing loss from exposure to loud noises at work. In support of this claim, No. WC-98-01037, Wynn submitted a report from Dr. Albert Cullum indicating that Wynn suffered from severe tinnitus and a hearing loss of 16.9% in the right ear and 35.6% in the left ear for a total average binaural hearing loss of 20%. Dr. Cullum assessed a total disability rating of 20% based on the hearing loss.

After Claim No. WC-97-67171 was assigned to ALJ W. Bruce Cowden, Nu Way filed an amended statement of proposed stipulations and contested issues that listed the constitutionality of KRS 342.320(2)(c) as an issue and modified the stipulation on the previous average weekly wage amount to \$319.30 from \$350.03.¹ While the cervical spine/back claim was pending, ALJ Cowden was assigned as arbitrator in Claim No. WC-98-01037 involving the hearing loss claim. On August 12, 1998, Wynn filed a motion to add a third claim for depression/psychological problems to Claim No. WC-98-01037. ALJ Cowden on his own motion ordered that Claim No. WC-97-67171 and Claim No. 98-01037 be heard together.

¹ Nu Way also asked to consolidate the claim with two prior workers' compensation claims filed by Wynn in 1993.

Following an evidentiary hearing, the ALJ issued an opinion and order on December 21, 1998, finding that Wynn had suffered a work-related injury to his cervical spine in February 1997, based on Dr. Vaughan's report and the April 1997 MRI. However, the ALJ also found that Wynn could not recover on his hearing loss claim because he did not provide sufficient notice to the employer, did not establish injurious exposure to noise while at Nu Way, and failed to show injury leading to impairment exceeding the minimum 8% functional impairment rating. The ALJ also found that Wynn had not established a work-related psychiatric condition or alternatively any functional impairment due to his psychiatric condition. The ALJ concurred with the arbitrators decision by assessing a 15% impairment rating to the cervical spine resulting in an 18.75% permanent partial disability rating after applying the 1.25 conversion factor in KRS 342.730. He also found Wynn could not return to his previous work so the 1.5 enhancement factor under KRS 342.730(1)(c)1 would apply. The ALJ declined to decide the issue of the constitutionality of KRS 342.320(2)(c) in favor of review by the appropriate judicial body. He awarded benefits on the stipulated average weekly wage of \$319.30. The ALJ denied Nu Way's petition for reconsideration.

On April 28, 1999, Wynn's attorney filed a verified motion for attorney's fees seeking a regular attorney's fee of \$2,000 plus an amount of \$5,000 payable by the employer for work done on the appeal from the arbitrator to the ALJ based on KRS 342.320(2)(c) for a total fee of \$7,000. Nu Way filed a response

challenging the request for appellate based fees on the grounds that KRS 342.320(2)(c) was unconstitutional and that Wynn did not "prevail" on appeal as required by the statute.

On June 1, 1999, the ALJ awarded Wynn's attorney fees of \$5,044 under KRS 342.320(1) payable by the claimant, and denied the request for a penalty fee under KRS 342.320(2)(c). The ALJ found that Nu Way prevailed on the appeal because he awarded Wynn a lower amount of benefits than the arbitrator.² The ALJ denied Wynn's motion to reconsider the attorney's fees award. Wynn filed an appeal to the Workers' Compensation Board on the sole issue of attorney's fees and Nu Way filed a protective cross-appeal based on the constitutionality of KRS 342.320(2)(c) with notice to the Attorney General.

On January 28, 2000, the Board entered an opinion reversing and remanding the ALJ's decision. It declined to address the constitutional issue and held that KRS 342.320(2)(c) was applicable to the cervical spine claim but not the hearing loss and depression/psychological claims because the former was decided by the arbitrator and appealed to another decision-maker. The Board rejected the ALJ's basis for his decision by stating Nu Way should not be considered to have prevailed merely because of a mathematical modification in the stipulated average weekly wage of the claimant. It found that the ALJ's decision on the cervical spine claim concurred with the arbitrator's decision on

² Although the ALJ applied the same functional impairment rating and enhancement factors, he utilized the lower average weekly wage amount in the modified stipulation resulting in a lower benefit amount.

the relevant issues. The Board reversed the ALJ's decision and remanded the case for an attorney's fee award payable by the employer under KRS 342.320(2)(c). This appeal followed.

Subsequent to the Board's opinion, the Kentucky Supreme Court decided in City of Louisville v. Slack, Ky., 39 S.W.3d 809 (2001), which held KRS 342.320(2)(c) unconstitutional.³ In Slack, the court accepted many of the arguments raised by Nu Way in its briefs before the Board and this Court. Relying on Burns v. Shepherd, Ky. App., 264 S.W.2d 685 (1953), the 4-3 majority in Slack held that KRS 342.320(2)(c) was arbitrary and violated the employer's right to procedural due process protected by Section 2 of the Kentucky Constitution.⁴ Given the Supreme Court's decision in Slack, we need not discuss whether Nu Way "prevailed" in its appeal.

Thus, we reverse the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Berry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE:

Phyllis L. Robinson
London, Kentucky

³ The Court overruled the previous Court of Appeals' opinion in Earthgrain v. Cranz, Ky. App., 999 S.W.2d 218 (1999), which had upheld the constitutionality of the statute and is cited in appellee's brief.

⁴ See also Commonwealth, Transportation Cabinet v. Guffey, Ky., 42 S.W.3d 618 (2001). In 2000, the General Assembly eliminated the arbitrator and deleted KRS 342.320(2)(c), the provision for an award of attorney's fees based on an appeal. See 2000 Ky. Acts Ch. 514 §624 (effective July 14, 2000).

