RENDERED: DECEMBER 27, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002773-WC

CHED JENNINGS, ATTORNEY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-63785

KENTUCKY MIRROR AND PLATE GLASS;
CHRISTOPHER DERRICK BRIAN; HON. DONNA
H. TERRY, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BARBER, COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Ched Jennings, the attorney for Christopher Derrick Brian, has petitioned this Court for review of a Workers' Compensation Board opinion which affirmed the Administrative Law Judge's opinion and award on his motion for an attorney's fee pursuant to KRS[1] 342.320(2)(c)[2]. Having concluded that the Board

[1]Kentucky Revised Statutes.

[2]At the time Jennings moved for an attorney's fee, KRS 342.320(2)(c) provided:

Upon an appeal by an employer or carrier from
(continued...)

has not overlooked or misconstrued controlling statutes or precedent by affirming the ALJ, we affirm.

On August 20, 1998, Brian was injured while working for Kentucky Mirror & Plate Glass. On August 25, 1999, the ALJ entered an opinion which awarded Brian temporary total disability benefits in the amount of $465.35 per week from September 4, 1998, through December 20, 1998. On February 18, 2000, the Board affirmed the award by the ALJ. A petition for review was filed with this Court and the Board was affirmed on April 13, 2001. The case was not appealed to the Supreme Court of Kentucky.

On May 21, 2001, Jennings filed a motion requesting the award of an attorney's fee pursuant to KRS 342.320(2)(c). On July 19, 2001, the ALJ denied the motion stating:

> As the parties are aware, the relevant statutory provision was declared unconstitutional in City of Louisville v. Slack, Ky., 39 S[.]W[.][3]d 809 (2001). While counsel for plaintiff does make an interesting argument regarding the applicability of Slack to the pending motion, the Administrative Law Judge finds no support in the Supreme Court's decision for allowance of an attorney fee under a statutory provision which has been declared

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[2](...continued)
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.

unconstitutional.

On December 5, 2001, the Board affirmed the ALJ's ruling. This petition for review followed.

Jennings argues that Slack should not apply to the case sub judice because his work on Brian's case had been "substantially completed" before Slack became final. We agree with the Board's conclusion that the case law, including Slack, required the ALJ to deny a claim for an attorney's fee that was based on a statute that had been declared unconstitutional.

In Slack, the Supreme Court held that KRS 342.320(2)(c) was unconstitutional as a violation of the employer's right to procedural due process and as "a pure act of arbitrary power that violates Section 2 of the Kentucky Constitution."[3] Slack became final on May 20, 2001, one day before Jennings filed his motion for an attorney's fee pursuant to KRS 342.320(2)(c).

Jennings argues that Slack should not be retroactively applied to bar his claim for an attorney's fee because his work was "substantially completed" before Slack was final. Jennings states in his petition that "[t]he work and litigation of the claim of Christopher Derrick Brian had already been substantially completed [when Slack became final]. . . . As such, Ched Jennings is entitled to receive an attorney fee from Kentucky Mirror & Plate Glass." However, Jennings fails to provide any legal authority for this argument other than to argue that Slack is being improperly applied retroactively.

Board Member Gardner in writing for the Board clearly

[3]Slack, 39 S.W.3d at 813.

and concisely addressed the issue raised by Jennings as follows:

> In the instant case, unlike in Burns v. Level, [Ky., 957 S.W.2d 218 (1998)] the issue of constitutionality of KRS 342.320(c) was properly raised by Kentucky Mirror. Obviously, the issue of the constitutionality of that statute could not be raised until Jennings requested an attorney fee pursuant to it. It is well-settled that an attorney is not entitled to a fee until the fee is approved by the ALJ. Land v. Newsome, Ky., 614 S.W.2d 948 (1981). That portion of the claim, then, was not concluded at the time Slack was rendered. One day after Jennings filed his motion for an attorney fee pursuant to KRS 342.320(2)(c), Kentucky Mirror filed a response in which it raised the issue of constitutionality of that statute. Thus, the issue of constitutionality of that statute was properly raised at the earliest possible time. Even under the holding in Burns v. Level, it would be proper to apply the Supreme Court's holding in City of Louisville v. Slack to this claim.

We agree with the Board and affirm on this issue.

As a final matter, Kentucky Mirror claims that Jennings's petition for review is so frivolous that sanctions pursuant to KRS 342.310 are appropriate. KRS 342.310(1) states:

> If any arbitrator, administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them.

Further, CR[4] 73.02(4) provides:

> If an appellate court determines that an

[4]Kentucky Rules of Civil Procedure.

> appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

From our research it appears that the workers' compensation cases in which sanctions have been imposed have been cases where a party has challenged a finding of fact made by the ALJ that was supported by substantial evidence.[5] In Western Baptist Hospital v. Kelly,[6] the Supreme Court stated that "[t]he WCB is suppose to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result. These are judgment calls. No purpose is served by second-guessing such judgment calls, let alone third-guessing them."[7]

In the case sub judice, Jennings has challenged whether a recently decided case could be applied to deny his request for attorney's fees. While we have clearly rejected the novel legal argument advanced by Jennings, we do not find that the appeal "is totally lacking in merit that it appears to have been taken in bad faith."[8]

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

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[5]Peabody Coal Co. v. Goforth, Ky., 857 S.W.2d 167 (1993); Daniel v. Armco Steel Co., Ky.App., 913 S.W.2d 797 (1995).

[6]Ky., 827 S.W.2d 685 (1992).

[7]Western Baptist, 827 S.W.2d at 687.

[8]CR 73.02(4); see also Woolum v. Woolum, Ky.App., 684 S.W.2d 20, 22-23 (1984).

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas A. Dockter
Louisville, Kentucky

BRIEF FOR APPELLEE:

James G. Fogle
Louisville, Kentucky