

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000317-WC

KAREN SUE DEATON AND  
McKINNLEY MORGAN

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-O2-80125

HAZARD APPALACHIAN REGIONAL  
HOSPITAL; HON. A. THOMAS  
DAVIS, II, ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: McANULTY<sup>1</sup> AND SCHRODER, JUDGES; ROSENBLUM,<sup>2</sup> SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Karen Sue Deaton and her attorney,  
McKinnley Morgan, petition for review from an opinion of the  
Worker's Compensation Board (Board) affirming an order of the  
Administrative Law Judge (ALJ) denying the appellants' request

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<sup>1</sup> Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

for an award of attorney fees and costs against Hazard Appalachian Regional Hospital (ARH) in connection with a medical fee dispute resolved in favor of Deaton. For the reasons stated below, we affirm.

In March 2002 Deaton was working as a nurse at ARH. On March 4, 2002, she was injured in a work-related accident while trying to restrain an out-of-control patient. The incident resulted in injuries to Deaton's right arm, back, and neck. On December 5, 2002, Deaton filed a workers' compensation claim in connection with the incident. On May 14, 2003, Deaton settled her claim for a lump sum based upon a 7% impairment rating. The settlement included a waiver of her right to past and future medical expenses related to her lower back; however, Deaton reserved her right to compensation for future medical expenses, as well as the right to reopen for the remainder of her condition.

Deaton underwent a right cubital release and was able to return to work. Deaton was treated by Dr. George Chaney, her family physician, who prescribed physical therapy.

Deaton eventually came under the care of Dr. Brett Muha, a physician selected for Deaton by ARH's workers' compensation carrier. Dr. Muha requested approval for further physical therapy and EMG/NCV testing of Deaton's upper and lower

extremities. ARH filed a motion to reopen in order to dispute the compensability of the additional treatment and testing.

On February 10, 2005, the ALJ entered an opinion resolving the medical fee dispute in favor of Deaton. Deaton thereafter filed a motion for allowance of attorney fees and costs pursuant to Kentucky Revised Statutes (KRS) 342.310. On August 26, 2005, the ALJ entered an order denying Deaton's motion for attorney fees and costs. On January 13, 2006, the Board entered an opinion affirming the ALJ's decision. This petition for review followed.

Before us, Deaton argues that the ALJ and the Board did not, based upon the evidence and the ALJ's findings, properly apply applicable authority in denying her request for attorney fees and costs. KRS 342.310(1) provides as follows:

If any 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.

The statute states that fees and costs "may" be assessed. Thus, it is clear that the determination about

whether a party should be assessed this penalty is discretionary, and, accordingly, our standard of review is whether the ALJ abused his discretion in denying Deaton's request for costs and fees. "The test for abuse of discretion is whether the . . . decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004).

The record does not support Deaton's contention that the ALJ abused his discretion in denying her request for fees and costs. Following Dr. Muha's recommendation of additional therapy and testing, ARH filed a motion objecting to the additional procedures. In support of its position, ARH filed utilization review reports from Dr. Stephen Huffman. Dr. Huffman indicated that there was no medical justification for physical therapy, noting that the injury was now over two years old. Dr. Huffman also reviewed the nerve conduction study/EMG request and recommended against its approval. Dr. Huffman stated that there was no medical justification for bilateral EMG/NCV of the upper and lower extremities. Dr. Huffman noted that the injury was now over two years old and stated that there was no relationship to the initial injury. He noted that Deaton had had an MRI that did not encroach on the nerves in the cervical or lumbar area. He stated an EMG was not indicated for the current complaints and physical findings.

In light of the supporting medical opinions of Dr. Huffman, we cannot conclude that the ALJ abused his discretion in concluding that ARH was without reasonable grounds in objecting to the program of therapy and testing proposed by Dr. Muha. Dr. Huffman's medical opinions provided reasonable grounds for ARH's position. In addition, we adopt the following discussion of the issue from the Board's January 13, 2006, opinion:

On appeal, Deaton argues there was no reasonable basis for ARH to file a medical fee dispute, and the ALJ's failure to impose sanctions provided by KRS 342.310 is contrary to the spirit of the law. Deaton argues the only evidence presented by ARH to prove that the recommended physical therapy and repeat EMG/NCV studies were not reasonable or necessary was the opinion of Dr. Huffman, who recommended denial because Deaton's injury was over two years old and that there needed to be a comprehensive treatment plan going forward. Deaton notes the ALJ, based upon the opinions of Dr. Muha, as well as Deaton's own testimony, agreed with Deaton that it would be impossible for Dr. Muha to prepare a comprehensive treatment plan without repeating those tests to determine the current status of her work-related injury. The ALJ found that ARH had failed in its burden of proof and resolved the medical fee dispute in favor of Deaton. Deaton argues she was entitled to legal representation to defend the medical dispute that was unreasonably filed by ARH and that it is unconscionable that she should be required to pay for that legal representation and out-of-pocket expenses out of her own funds.

The imposition of sanctions pursuant to KRS 342.310 falls within the discretion of the ALJ. In order to impose sanctions, pursuant to KRS 342.310, it is necessary for an ALJ to determine that an action has been brought, prosecuted or defended without reasonable ground. Our review of the appropriateness of an award of costs and attorney fees is based upon the determination of whether or not the fact finder abused his discretion. The Board has consistently utilized the standard set forth by the Kentucky Supreme Court in Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993). The standard set forth in Estep is whether or not it can be reasonably conceived that the object of the proposed costs was acting in good faith when bringing the action.

We find no abuse of discretion on the part of the ALJ in declining to award sanctions and, therefore, affirm. The defendant/employer, post award, had the burden regarding the reasonableness and necessity of medical treatment. National Pizza C. v. Curry, 802 S.W.2d 949 (Ky.App. 1991). Here, ARH produced substantial evidence that could have supported a finding in its favor. Dr. Huffman stated that neither the additional physical therapy nor the proposed EMG/NCV testing were reasonable and necessary. He referenced various medical guidelines in support of his position. Although the ALJ, in weighing the evidence, was not convinced by ARH's evidence, the failure to convince an ALJ of one's position of the merits does not compel the imposition of sanctions. We further note that Deaton's settlement agreement waived her low back claim, and Dr. Muha's request for EMG/NCV testing related to both the upper and lower extremities. We see no basis for disturbing the ALJ's ruling. See, Roberts v. Estep, supra.

This Court's function when reviewing the Board's affirmance of a decision of the ALJ is to correct the Board only where we perceive "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). Such did not occur in this case, and we accordingly affirm.

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

ALL CONCUR.

BRIEF FOR APPELLANTS:

McKinnley Morgan  
London, Kentucky

BRIEF FOR APPELLEE HAZARD  
APPLACHIAN REGIONAL HOSPITAL:

George T. T. Kitchen, III  
Rodney J. Mayer  
Louisville, Kentucky