

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000442-WC

JOYCE WHITE;
DR. BRENT BABAT;
AND THOMAS W. DAVIS

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
WC-84-12701 & WC-84-12700

CUMBERLAND VALLEY MANOR;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from a Workers' Compensation Board order entered on January 31, 2008, affirming an order denying a motion to approve attorney fees entered by Administrative Law Judge John Coleman (hereinafter

¹ Senior 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 Statutes (KRS) 21.580.

ALJ) on September 21, 2007, and an order on reconsideration entered October 23, 2007. The motion for attorney fees was filed by Thomas Davis (hereinafter Mr. Davis), who was trial counsel for Joyce White (hereinafter Mrs. White). The order on reconsideration awarded Mr. Davis attorney fees in the amount of \$6,493.75, pursuant to KRS 342.320, which were to be paid by Mrs. White. The order specifically held that attorney fees should not be paid pursuant to KRS 342.310. This appeal challenges that ruling. KRS 342.310 is a sanction statute and would permit an award of attorneys' fees payable by Appellee, Cumberland Valley Manor, if the underlying case is found to have been brought in bad faith. The ALJ and Workers' Compensation Board (hereinafter Board) both found that the issue of recovery of attorney fees under KRS 342.310 had not been preserved, but went on to note that even if the issue was viable, they would still have denied recovery under that statute. Upon review, we believe that the issue was preserved, but hold that the reasons set forth below to deny the award were reasonable and not an abuse of discretion.

Mrs. White is a 63 year-old woman who sustained work injuries in 1983 and 1984, while an employee of Cumberland Valley Manor. In the original workers' compensation action, Cumberland Valley Manor was ordered to pay her present and future medical expenses relating to the injury. Mrs. White continues to require treatment for her work-related injuries. In 2006, she was referred to Dr. Brent Babat (hereinafter Dr. Babat) for evaluation of low back and leg pain. Dr.

Babat recommended surgery because physical therapy had not helped ease Mrs. White's pain. The surgery was performed on September 18, 2006.

Prior to the surgery, Dr. Babat received some past medical information from Cumberland Valley Manor's insurer. On August 2, 2006, Dr. Babat noted in his records that with the limited information provided to him from the insurer, he was unable to link her current pain to the work-related injury. Dr. Babat later received further medical records and revised his conclusion. He concluded that the current pain was related to the work-related injury and that Cumberland Valley Manor's insurance should pay for the surgery.

Nevertheless, on December 15, 2006, Cumberland Valley Manor filed a motion to reopen the workers' compensation claim to contest payment for the September 18, 2006, surgery. As the basis for the dispute, Cumberland Valley Manor used Dr. Babat's August 2, 2006, note that the current pain was not related to the injury.

In January, 2007, Cumberland Valley Manor obtained an independent medical examination by Dr. Thomas O'Brien. Dr. O'Brien also indicated that Mrs. White's current medical condition was not due to the work-related injuries.

On July 26, 2007, the ALJ found Dr. Babat's opinion most persuasive and held that Mrs. White's current injuries stemmed from the work-related injuries. Mr. Davis then filed a motion for attorney fees pursuant to KRS 342.310 and KRS 342.320. Initially, the ALJ denied the motion for attorney fees. The ALJ held that Mr. Davis failed to preserve the issue of the right to KRS 342.310 fees. Although

the ALJ did not note this in his order, it appears as though he found the issue had not been preserved because it was not raised at the Benefit Review Conference (BRC). According to 803 KAR 25:010, Section 13, only issues raised at this conference are subject to further proceedings. Additionally, the ALJ found that had the issue been preserved, he would have denied it because the dispute was brought with reasonable grounds. The ALJ did not address the issue of attorneys' fees pursuant to KRS 342.320.

Mrs. White, through counsel, filed a motion to reconsider, asking the ALJ to rule upon the request for fees pursuant to KRS 342.320 and to reconsider his holding as to the KRS 342.310 fees. The ALJ again denied fees pursuant to KRS 342.310 stating that the medical fee dispute was brought upon reasonable grounds. However, the ALJ did find that Mr. Davis was entitled to fees pursuant to KRS 342.320 and ordered that the money be paid by Mrs. White rather than Cumberland Valley Manor.

The Appellants appealed to the Board. They continued to argue Mr. Thomas should be granted attorney fees pursuant to KRS 342.310. The Board affirmed the holding of the ALJ that the issue should have been preserved at the BRC. The Board held that 803 KAR 25:010, section 13(14) requires issues to be preserved at the BRC, but that the issue of KRS 342.310 attorney fees was not. It also went on to state that it found the KRS 342.310 sanctions of attorney fees would not be appropriate in this case because the medical fee dispute was brought in good faith and with reasonable grounds. This appeal followed.

KRS 342.310(1) reads:

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. (Emphasis added).

The Appellants argue that the ALJ and Board erred in finding that the issue of KRS 342.310 attorney fees had not been preserved. As stated above, the ALJ and Board held that since the issue of KRS 342.310 attorney fees was not raised during the BRC, it was not preserved and cannot be raised later. We disagree. While we acknowledge 803 KAR 20:010, section 13(14) states that “[o]nly contested issues shall be the subject of further proceedings,” it is illogical to require preservation of the attorney fee issue at the BRC level.

As KRS 342.310 states, any ALJ, Board, or any other court may assess costs. Thus costs, including attorney fees, may be assessed at any time during litigation. In fact, these sanctions may be assessed by the court *sua sponte*. See *Woolum v. Woolum*, 684 S.W.2d 20 (Ky. App. 1984). If they may be assessed at any time, or by the court without prompting by counsel, why would one need to preserve it during the BRC? As the Appellants note, when an administrative

regulation is in conflict with a statute, the statutory provision prevails. *See Wathal v. Harrod*, 229 S.W.3d 599 (Ky. App. 2007).

According to KRS 342.320(7) and *Duff Truck Lines, Inc. v. Vezolles*, 999 S.W.2d 224 (Ky. App. 1999), the legislative purpose in awarding attorney fees when workers' compensation cases are reopened is to "encourage attorneys to undertake such representation and to ensure an opportunity for injured workers to exercise their rights." *Id.* at 226. While *Duff* and KRS 342.320(7) deal with the attorney fee awards in other situations, we believe that the legislative intent of KRS 342.310 is similar. When you consider that KRS 342.310 attorney fees may be assessed at any level of the proceedings, by the court *sua sponte*, and that the legislative intent is to encourage attorneys to take these cases, we see no reason to so strictly apply the preservation standard. As such, we reverse the holding of the ALJ and Board as to the preservation issue.

However, we will not grant attorney fees under KRS 342.310 in this case. The ALJ and Board found that the Appellee had reasonable grounds to bring this action and, therefore, did not assess attorney fees under the above statute. Since KRS 342.310(1) states that costs "may" be assessed, it is permissive. As such, the decision whether or not to grant the attorney fees must be reviewed for abuse of discretion. *Peabody Coal Co. v. Goforth*, 857 S.W.2d 167, 170 (Ky. 1993). The standard for reviewing an exercise 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).

When considering a motion for attorney fees, the ALJ must decide whether the employer acted without reasonable grounds in bringing the medical fee dispute. Here, the dispute was initiated based on the August 2, 2006, note from Dr. Babat stating he could not link the current medical condition with the work-related injury. Later, Cumberland Valley Manor also had an independent medical examination of Mrs. White's medical records. Dr. O'Brien performed the examination and determined the current medical condition did not stem from the work-related injury.

Based upon this evidence, which included conflicting reports from the treating physician, the ALJ found, and the Board agreed, that there were reasonable grounds to prosecute a medical fee dispute. We cannot see this as an abuse of discretion since there was reasonable evidence to suggest Mrs. White's current medical condition was not related to the work injury. As such, we affirm the denial of attorney fees pursuant to KRS 342.310.

Alternatively, the Appellants argue that Mrs. White's legal fees should be paid by Cumberland Valley Manor as an "integral portion of the cost of the reasonable and necessary medical treatment for Mrs. White." Mr. Davis was granted attorney fees pursuant to KRS 342.320, which provides that the attorney fees are to be paid by the employee. This is plainly set forth in the statute and we cannot rule otherwise.

For the forgoing reasons, we affirm the denial of attorney fees pursuant to KRS 342.310.

ALL CONCUR.

APPELLANTS' PETITION FOR
REVIEW AND ORAL ARGUMENT
BY:

Thomas W. Davis
Glasgow, Kentucky

APPELLEE, CUMBERLAND
VALLEY MANOR'S, RESPONSE
TO PETITION FOR REVIEW BY:

R. Christion Hutson
Sharlott K. Thompson
Paducah, Kentucky

ORAL ARGUMENT FOR
APPELLEE, CUMBERLAND
VALLEY MANOR, BY:

R. Christion Hutson
Paducah, Kentucky