

Commonwealth Of Kentucky
Court of Appeals

NO. 2013-CA-000327-WC

MEGAN LYON,
NORMAN E. HARNED, AND
HARNED BACHERT & MCGEHEE, PSC

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-00131

NHC HEALTHCARE;
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: This appeal is taken from a Workers' Compensation

Board opinion affirming an order of the Administrative Law Judge (ALJ) denying

an additional attorney's fee based upon the award of vocational rehabilitation benefits. We affirm.

On March 23, 2010, Megan Lyon sustained a work-related knee injury during the course of her employment with NHC Healthcare. After undergoing surgery, she was found by her treating physician to be at maximum medical improvement and she was released to return to work with restrictions on September 15, 2010. She filed a motion for interlocutory relief requesting payment of temporary total disability (TTD) benefits and vocational rehabilitation benefits. She also filed a supplemental motion for interlocutory relief. NHC responded to both motions. The ALJ entered an order on Feb. 1, 2011, denying the motions.

Lyon later filed a formal claim for benefits for permanent impairment, additional TTD, and vocational rehabilitation. NHC accepted her claims as compensable, but disputed the amount of compensation owed. The parties introduced medical reports and records, and Lyon gave her deposition. She also filed another motion for interlocutory relief, requesting payment of TTD benefits and vocational rehabilitation benefits. She estimated the latter would require a two-year program, at a cost of \$42,000.00. A formal hearing was conducted on January 25, 2012. The ALJ entered an opinion, award and order on March 23, 2012. In addition to awarding TTD benefits, permanent partial disability (PPD) benefits, expense reimbursement, and medical benefits related to the knee injury, the order stated:

Plaintiff shall further recover vocational rehabilitation expenses in the form of costs attendant to Lyon's pursuing the applicable diploma or certificate at Bowling Green Technical College for an ultrasound technician or a coding and billing clerk. The Defendant's liability shall not exceed 52 school weeks. Lyon is currently studying medical coding and billing.

Lyon's attorney, Norman Harned, filed a motion seeking approval of an attorney's fee to be paid by NHC in the amount of \$6,399.11, based upon the recovery of a total amount of \$34,327.45. The ALJ approved an attorney fee in the amount of \$2,681.49 calculated on the total amount of TTD and PPD benefits awarded. He refused to award an attorney's fee for the vocational rehabilitation benefits:

As to the request for a fee on the award of vocational rehabilitation, such is denied as it is requested to be paid by the Defendant/employer. Under the circumstances of this claim, there is clearly no authority requiring the Defendant to pay attorney's fees in any manner other than as part of the indemnity award made to Plaintiff, from which her attorney's fees are to be paid. The ALJ acknowledges the efforts of Plaintiff's counsel in this case, and does not quarrel with the fact that his recovery may not be commensurate with the value of those efforts, but there is no provision in KRS [Kentucky Revised Statutes] 342.320 for an attorney's fee for an award of vocational rehabilitation. Such is no different than if a request for attorney's fees was sought for the value of an award of future medical benefits.

To attend vocational retraining, Lyon borrowed money to pay for tuition, school materials and travel expenses. She also borrowed money to pay for her living expenses, although the appellants acknowledge that those expenses are not reimbursable by NHC. The appellants argued that when a claimant borrows

money to attend vocational rehabilitation which is subsequently approved by the ALJ, the claimant's attorney is entitled to a fee for obtaining reimbursement in a contested proceeding.

The Board disagreed, stating as follows:

While we acknowledge an award of attorney fees is not confined to income benefits, *Duff Truck Lines, Inc. v. Vezolles*, 999 S.W.2d 224 (Ky. App. 1999), based on the language in both the ALJ's opinion and the applicable statute, we find no error in limiting the award of attorney fees to \$2,618.49. While securing vocational rehabilitation is a significant benefit obtained for Lyon, it is apparent here the fees are to be paid directly to the vocational rehabilitation provider, not directly to Lyon. This situation is unlike *Wheeler v. Overfield*, WCB Claim No. 2009-96309 (July 23, 2012), where the injured worker actually received a monetary benefit for the waiver of a right.

The Board concluded that under the terms of KRS 342.320, Lyon would be responsible for the payment of the fee for procuring the vocational rehabilitation benefits from her own funds, yet she did not and would not actually receive those funds and thus it would be manifestly unfair for her to pay an attorney's fee for payments made directly to a third party provider (i.e. the college where she received her training). This appeal followed.

Our standard of review requires us to show deference to the rulings of the Board.

The function of further review of the WCB in the Court of Appeals is to correct the Board only where the Court perceives 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, 687–88 (Ky. 1992).

In *Rager v. Crawford & Co.*, 256 S.W.3d 4, 6 (Ky. 2008), the Supreme Court of Kentucky summarized the statutory framework governing the award of attorney’s fees in workers’ compensation cases:

Chapter 342 holds an injured worker responsible for his or her own attorney’s fee. KRS 342.320(2)(a) authorizes a fee for legal services performed in an initial claim and states that the fee “shall be paid by the employee from the proceeds of the award or settlement.” KRS 342.320(7) authorizes an attorney’s fee for obtaining an additional recovery at reopening. . . . KRS 342.320(5) requires a worker to select a method for paying the attorney’s fee at the commencement of the attorney-client relationship. “Except when the attorney’s fee is to be paid by the employer or carrier,” KRS 342.320(4) offers two methods for payment. KRS 342.320(4)(a) permits the worker to pay the fee from personal funds. KRS 342.320(4)(b) permits the worker to request an order requiring the employer to pay the fee and then deduct it from weekly benefits.

The appellants argue KRS 342.320 does not contain any provision specifically stating attorney’s fees are to be paid only when the proceeds of income benefits are recovered. They question the Board’s reliance on one of its own opinions, *Wheeler v. Overfield*, WCB Claim No. 2009-96309 (July 23, 2012), which they contend undermines the rehabilitative purpose of the workers’ compensation statutes. In *Wheeler*, the Board affirmed an ALJ’s award of attorney’s fees calculated on lump sums which were awarded to the claimant in exchange for the waiver of his rights to future medical expenses, vocational

rehabilitation expenses and future right to reopen the claim for additional disability benefits.

The appellants argue that it is unfair and inconsistent on the part of the Board to allow attorney's fees to be awarded for waiver of the right to receive future vocational rehabilitation expenses, yet not allow them when the attorney actually obtains such expenses for a claimant. They argue the Board's decision will encourage attorneys to negotiate waivers for lump sums, which they allege claimants will spend irresponsibly on new cars, boats, vacations and "temporary pleasures," thus defeating one of the primary objectives of the Workers' Compensation Act: the "restoration of the injured employee to gainful employment." KRS 342.710(1).

The cases are nonetheless distinguishable. *Wheeler* was a reopening case, governed by KRS 342.320(7), which specifically allows attorney's fees to be paid for the recovery of additional "amounts." In *Wheeler*, the claimant received a direct monetary benefit for the waiver of his rights, whereas in Lyon's case, the funds will be paid directly to indemnify the college. As the Board pointed out, the award of vocational rehabilitation services is akin to an award of medical benefits. The Board relied on *Wheeler* to support its conclusion that it was unfair to expect the claimant to pay the fees on benefits she did not receive directly.

NHC argues it may not even have standing as an appellee in this case. Insofar as there is no dispute about the reasonableness of NHC's defense in this claim, NHC is correct.

KRS 342.310 provides the only statutory basis to require an employer or insurance carrier to pay the worker's attorney's fee from its own funds rather than the worker's benefits. It permits an ALJ to assess "the whole cost of the proceedings," including attorney's fees, on a party who "brought, prosecuted, or defended [the claim] without reasonable ground."

Rager, 256 S.W.3d at 6.

In conclusion, although the appellants' arguments are well-reasoned, we have been cited to no legal authority allowing attorney's fees to be deducted from an award of vocational rehabilitation benefits. While the matter of awarding attorney's fees for the recovery of vocational rehabilitation benefits in workers' compensation cases may reasonably invite consideration by the General Assembly, under the present circumstances, we cannot say the Board "overlooked or misconstrued controlling statutes or precedent[.]" *Western Baptist Hosp.*, 827 S.W.2d at 687–88. The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE NHC
HEALTHCARE:

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