

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-000480-MR

INTECH CONTRACTING, LLC;  
and ZURICH AMERICAN INSURANCE  
COMPANY

APPELLANTS

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE BRIAN WIGGINS, JUDGE  
ACTION NO. 15-CI-00280

GEOFFREY HAMPTON

APPELLEE

OPINION AND ORDER  
REVERSING IN PART AND  
DISMISSING IN PART

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BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

KRAMER, JUDGE: On August 5, 2015, Geoffrey Hampton filed a civil action in Muhlenberg Circuit Court against the above-captioned appellants (collectively “Zurich”) under the auspices of Kentucky Revised Statute (KRS) 342.305.<sup>1</sup> His

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<sup>1</sup> KRS 342.305 provides:

Any party in interest may file in the Circuit Court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the administrative law judge, or of an order or decision of the administrative law judge or board, or of an award of the administrative

complaint alleged that on October 6, 2014, he had secured an award of workers' compensation warranting income and medical benefits; Zurich was obligated to pay for those benefits; Zurich had "failed to pay all benefits awarded and found compensable," and had "failed to approve all medical treatment found compensable in the opinion, award and order rendered on October 6, 2014;" and that he was seeking enforcement of Zurich's obligations along with an award of attorney's fees. Hampton also attached to his complaint a copy of his award which provided in relevant part that he was entitled to the following from Zurich:

- Membership at a gymnasium with a swimming facility;<sup>2</sup>
- A prosthetic leg;
- Treatment for dysphagia;
- Dental treatment relating to Hampton's teeth, some of which had been fractured due to his work injury;

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law judge unappealed from, or of an award of the board rendered upon an appeal whether or not there is a motion to reopen or review pending under KRS 342.125. The court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though it had been rendered in a suit duly heard and determined by that court. Any such judgment, unappealed from or affirmed on appeal or modified in obedience to the mandate of the Court of Appeals, shall be modified to conform to any decision of the administrative law judge ending, diminishing, or increasing any weekly payment under the provisions of KRS 342.125 upon a presentation to it of a certified copy of such decision.

<sup>2</sup> In his appellee brief, Hampton points out, at length, that the circuit court directed Zurich to pay for his membership dues to a gym in Lexington. It is unclear why he raises this point; Zurich raises no point of error associated with it.

- Ophthalmologic treatment relating to brain damage Hampton sustained due to the work injury;
- Viagra;
- Permanent total disability benefits in the amount of \$523.79 per week payable together with interest at the rate of 12% per annum, beginning on September 9, 2009, and subject to the limitations set forth in KRS 342.730(4), (5), (6), and (7); and
- Reasonable and necessary medical expenses for the cure and relief of his work-related injuries pursuant to KRS 342.020.

Hampton never amended his complaint in this matter, nor does his complaint specify, aside from what is set forth above, any aspect of his workers' compensation award that he believed required enforcement from the circuit court. But, through a succession of what he styled as motions for "partial summary judgment," Hampton made a variety of piecemeal "enforcement" requests throughout the underlying litigation which, from all appearances, remains pending. Three such requests are at issue in this appeal, and we will address them to the extent permitted by our appellate jurisdiction.<sup>3</sup>

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<sup>3</sup> Hampton has filed a motion to dismiss, asking this Court to refrain from doing more than dismissing the entirety of this appeal as interlocutory. In conformity with our disposition of this matter, we grant his motion, in part, as set forth herein.

## I. PAST-DUE INCOME BENEFITS

In what he styled “plaintiff’s fourth motion for partial summary judgment,” Hampton alleged Zurich had failed to pay him various installments of income benefits in a timely manner, and that he was consequently owed a specific amount representing interest on the past-due payments – namely, \$6,579.59. In a March 6, 2017 order, the circuit court granted Hampton’s motion, directing Zurich to pay Hampton that amount “together with an interest rate of twelve percent (12%) interest compounded annually from October 6, 2014 to the date it is paid in full.”

Zurich appeals. However, we must dismiss its appeal in this respect. To explain, the circuit court clearly had jurisdiction to resolve this type of issue. *See, e.g., Stearns Coal & Lumber Co. v. Duncan*, 271 Ky. 800, 113 S.W.2d 436, 438 (1938) (explaining, in the context of enforcing a workers’ compensation award, that a circuit court may adjudge a recovery of past-due payments). But, there is no indication from the record that the circuit court *relinquished* its jurisdiction: Hampton’s complaint included a prayer for an award of attorney’s fees, which are permitted in this context pursuant to KRS 342.310; the circuit court has never ruled upon Hampton’s request; and because the circuit court’s March 6, 2017 order does not include the finality language specified in Kentucky Civil Rule (CR) 54.02(1), it must be deemed interlocutory and, to this extent, beyond the

scope of our review. *See Tax Ease Lien Invs. 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011).

## II. A CAMOUFLAGED POWER WHEELCHAIR AND A TRIP TO OKLAHOMA

As to Hampton's second and third requests at issue in this appeal, we reach a different result. Hampton grounded these requests (which he asserted respectively in what he styled as his "third" and "fifth" motions for partial summary judgment) upon the operative effect, as he understood it, of a thirty-day period specified in KRS 342.020(4). In relevant part, KRS 342.020(4) provides:

The employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services. The commissioner shall promulgate administrative regulations establishing conditions under which the thirty (30) day period for payment may be tolled.

Seizing upon this language and a pair of cases interpreting it, Hampton argued that because he was the recipient of a workers' compensation award, KRS 342.020(4) permitted him to do the following: (1) file an open-ended "enforcement action" in circuit court under the auspices of KRS 342.305 against Zurich, the party obligated to pay his income and medical benefits; (2) submit one or more "statement for services" to Zurich during the pendency of his "enforcement action"; and (3) on the basis of either waiver or estoppel, compel

Zurich, through the authority of the circuit court, to approve and satisfy each “statement for services,” and to pay his attorney’s fees, if Zurich failed to either pay or administratively dispute each “statement for services” *within thirty days*.

Thus, Hampton’s third motion for partial summary judgment, which he filed on or about September 9, 2016, involved what he alleged was a “statement for services” he claimed to have submitted to Zurich on or about September 8, 2015 – a date roughly one month after he filed the instant proceedings.

Consistently with his view of the law set forth above, he argued that because more than thirty days had elapsed since September 8, 2015, the circuit court had acquired the authority and was required as a matter of law to compel Zurich to approve and pay the statement for services he had allegedly submitted – namely, the cost of a camouflaged power wheelchair with all-terrain tires.

Hampton’s fifth motion for partial summary judgment, dated February 17, 2017, involved travel expenses he claimed to have incurred after filing the instant proceedings. Specifically, he sought reimbursement for mileage and other costs associated with a November 2015 road trip he had taken to Tahlequah, Oklahoma, for what he claimed was treatment relating to his work injury. Asserting that he had submitted a statement for services representing those expenses on December 17, 2015, and noting that more than thirty days had passed since that date, he likewise contended that the circuit court had acquired the

authority and was required as a matter of law to compel Zurich to pay. As a side-note, Hampton conceded Zurich *had* filed a medical fee dispute at the administrative level on January 26, 2016, regarding these travel expenses.<sup>4</sup> But, because there were more than thirty days between December 17, 2015, and January 26, 2016, Hampton concluded his motion by stating “the ALJ [administrative law judge] does not have jurisdiction over the foregoing the [sic] requests and this Honorable Court does.”

In its March 6, 2017 order, the circuit court agreed with Hampton and granted both of his motions. On appeal, Zurich argues, as it did below, that the circuit court lacked subject matter jurisdiction to do so. We agree.

Hampton’s view of the law, as stated above, was actually presented to and rejected by the Kentucky Supreme Court thirty-four years ago in *Brown Badgett Inc. v. Calloway*, 675 S.W.2d 389 (Ky. 1984). There, like Hampton, the claimant had obtained a workers’ compensation award that generally required his employer to pay bills associated with the cure and relief of his work injury. He later filed a proceeding in circuit court, ostensibly under the purview of KRS 342.305, to compel his employer to approve and pay for what he claimed were compensable medical expenses. *Id.* at 390. The claimant’s employer defended, arguing the circuit court lacked subject matter jurisdiction to compel it to approve

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<sup>4</sup> From all indications of the record before us, the medical fee dispute Zurich filed in this respect remains pending before a workers’ compensation ALJ.

of and pay the bill absent an administrative order finding the bill compensable. *Id.* And ultimately, the Kentucky Supreme Court agreed with the employer – even though the employer “never raised the issue of the reasonableness and compensability” of the claimant’s bill in any workers’ compensation proceedings. *Id.* The Court explained this was because *only* the workers’ compensation tribunal – not the circuit court – had subject matter jurisdiction to determine the compensability of medical fees associated with a workers’ compensation award. Thus, irrespective of any “waiver” or “estoppel” argument to the contrary, the circuit court lacked authority to compel approval and payment of any medical fee associated with a workers’ compensation award until the administrative tribunal first deemed it compensable. *Id.* at 391.

Hampton asserts, however, that the law has changed with respect to this issue, and that precedent from the Workers’ Compensation Board (Board) supports his position. He is incorrect.

The law Hampton cites in support of his argument consists of two cases. The first, *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, 330 S.W.3d 456 (Ky. 2010), concerned a dispute over the propriety of a fine based on unfair claims settlement practices by an employer’s insurance carrier – a matter unrelated to the compensability of any post-award medical expense. The *Lowther* Court did not hold that a circuit court can become vested with



authority to compel a workers' compensation payment obligor to approve and satisfy a medical cost represented in a statement for services in the absence of an order to that effect from an administrative law judge. At most, the Court merely wondered if Wallace, the injured worker whose complaint had served as the basis for the administrative fine against the carrier in that matter, had *ever* satisfied the administrative preconditions for compelling approval and payment of his various post-award medical expenses. *Id.* at 458 (noting “[t]he employer failed to file a medical dispute or motion to reopen Wallace’s claim in order to contest the compensability of the proposed treatment. *Wallace likewise failed to do so in order to obtain an order compelling the employer to pre-authorize the treatment.*” (Emphasis added.)).<sup>5</sup>

The second case Hampton cites, *Lawson v. Toyota Motor Mfg.*, 330 S.W.3d 452 (Ky. 2010), further undermines his argument. By way of background,

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<sup>5</sup> The workers' compensation regulations permit “an *employee*, employer, carrier or medical provider” to file post-award medical fee disputes. See 803 Kentucky Administrative Regulation (KAR) 25:012 § 1(2) (emphasis added.). *Lowther* illustrates why an employee would do so: To obtain an order from an administrative law judge to compel approval of the medical fee. See also *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 11 (Ky. 2007), noting:

Mr. Tackett claimed that the delays, refusals to pay, and other difficulties with KEMI forced him to use his own limited resources and exacerbated his medical problems. *In response to KEMI’s behavior, Mr. Tackett sought to reopen his workers’ compensation claim and to compel KEMI to pay for his medical care.* He alleged that KEMI’s refusal to pay some medical expenses and delay in paying for others (including prescription medications, travel expenses, and medical equipment), and refusal to approve name brand drugs were in violation of KEMI’s obligations under the Workers’ Compensation Act.

(Emphasis added.)

the claimant in that matter, Lawson, filed a motion requesting an award, post-settlement, of TTD benefits from her former employer (Toyota) prospectively during recovery following a surgery that had been pre-authorized through utilization review. Toyota responded to Lawson's motion well in excess of thirty days following the utilization review pre-authorization decision, contesting the reasonableness and necessity of the surgery. The ALJ eventually denied Lawson's motion after finding the surgery was not compensable because it was not reasonable and necessary. Following an administrative appeal, the Board reversed and remanded with respect to Lawson's claim for TTD benefits, and its reason for doing so was based upon the aforementioned deadline specified in KRS 342.020(4); it held that because Toyota had failed to file a medical fee dispute and motion to reopen within thirty days after surgery was pre-authorized through utilization review (which the Board equated to a "statement for services" within the meaning of the statute), Toyota had *waived* its right to contest the reasonableness and necessity of the surgery. *Id.* at 455.

In its subsequent review of the facts underlying the Board's decision, the Kentucky Supreme Court specifically noted the ALJ's Benefit Review Conference order entered during the underlying administrative proceedings encompassed, *as an issue for adjudication at the administrative level*, Lawson's argument that Toyota had failed to timely file a medical fee dispute and motion to

reopen contesting the utilization review decision, thus causing the proposed surgery to be compensable without regard to reasonableness and necessity. *Id.* at 453. The Court further noted that Lawson had *briefed that argument before the ALJ* and had *preserved* it for her administrative appeal before the Board. *Id.* With that stated, the Court agreed with the Board's decision, adding in relevant part as follows:

[A]n employer, *having failed to invoke an ALJ's jurisdiction* by filing a timely medical dispute and motion to reopen, may not circumvent KRS 342.020 and the regulations by engrafting such a dispute onto a worker's pending motion for TTD.

...

[T]he employer's failure to file a timely medical dispute and motion to reopen to contest the favorable utilization review decision rendered the proposed surgery and related TTD compensable without regard to reasonableness and necessity. *Mindful that the claimant reiterated the argument in her petition for reconsideration and preserved it on appeal*, we conclude that the ALJ erred by dismissing the TTD request based on a finding that the surgery was not compensable.

*Id.* at 456 (emphasis added).

Neither this Court, nor our Supreme Court, has cited *Lawson* in any opinion in the eight years since it was rendered. However, we are mindful that courts give great deference to an administrative agency's reasonable interpretation of its own statutory mandate. *See Lowther*, 330 S.W.3d at 460. And, since at least

2011, the Board has cited *Lawson*, correctly in our view, as authority supporting that the thirty-day deadline specified in KRS 342.020(4) merely implicates an ALJ's *particular case* jurisdiction, not *subject matter* jurisdiction.<sup>6</sup> Stated differently, if the expiration of the deadline is not effectively raised and preserved as an issue before an ALJ, it does *not* preclude an employer from contesting the reasonableness and necessity of any statement for services at the administrative level. *See, e.g., Marion Taylor v. Alcoa Automotive Casting*, Claim No. 01-95185,<sup>7</sup> explaining:

[U]nlike Lawson, Taylor never asserted Alcoa had failed to file a motion to reopen and medical fee dispute during the proceedings before the ALJ until he filed his petition for reconsideration. The purpose of a petition for reconsideration is to raise errors patently appearing on the face of the opinion and order, not to raise, for the first time, issues to be decided by the ALJ. See KRS 342.281. In Lawson, the Supreme Court pointed out Lawson's attorney continuously raised the employer's failure to timely file a motion to reopen and medical fee dispute

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<sup>6</sup> In *Commonwealth v. Steadman*, 411 S.W.3d 717 (Ky. 2013), the Kentucky Supreme Court noted the difference between subject matter jurisdiction and "particular case" jurisdiction. While "subject-matter jurisdiction 'refers to a court's authority to determine 'this kind of case,'" jurisdiction over a particular case "refers to a court's authority to determine a specific case . . . ." *Id.* at 722 (quoting *Commonwealth v. Griffin*, 942 S.W.2d 289, 290 (Ky. 1997)). In *Steadman*, the Court found that "[a] court's power to affect its own judgment within ten days of entry or after the filing of a notice of appeal is this latter category: jurisdiction over a particular case." *Id.* at 722. For purposes of this case, the important distinction between subject matter jurisdiction and personal case jurisdiction is that, while issues of subject matter jurisdiction cannot be waived, issues concerning personal case jurisdiction are subject to waiver. *Id.* at 724; *see also Griffin*, 942 S.W.2d at 291 ("[A] lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived.") (quoting *Collins v. Duff*, 283 S.W.2d 179 (Ky. 1955)).

<sup>7</sup> Entered by the Board on August 1, 2011.

contesting the surgery. Since Taylor did not raise this issue as a contested issue to be decided by the ALJ at the BRC, he waived his right to assert on appeal Alcoa did not timely file a medical fee dispute. 803 KAR 25:010 Section 13(13) and (14).

In short, the expiration of the 30-day deadline specified in KRS 342.020(4) does not vest a circuit court with *any* kind of authority; it merely supplies the groundwork for an estoppel argument that must be made and preserved before an administrative law judge in a workers' compensation proceeding. Accordingly, Zurich was correct in arguing that the circuit court lacked subject matter jurisdiction to compel it to approve Hampton's requests for a camouflaged power wheelchair with all-terrain tires (as set forth in his third motion for partial summary judgment) and reimbursement for mileage and other costs associated with his November 2015 trip to Tahlequah, Oklahoma (as set forth in his fifth motion for partial summary judgment). Neither of those expenses were approved in Hampton's award, and they were required to be approved, in the first instance, by an ALJ. *See Calloway*, 675 S.W.2d 389.

Hampton also argues that even if the circuit court did lack subject matter jurisdiction to grant his third and fifth motions for partial summary judgment, its March 6, 2017 order – which granted those motions – was interlocutory and not a proper subject of this Court's review. Again, however, Hampton is incorrect. Zurich's argument that the circuit court was acting outside

the scope of its subject matter jurisdiction in this type of context was the functional equivalent of asserting an absolute immunity defense, the denial of which was subject to interlocutory review. *See Ervin Cable Constr., LLC v. Lay*, 461 S.W.3d 422 (Ky. App. 2015) (discussing interlocutory review of a denied defense of workers' compensation immunity); *see also Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 14-15 (Ky. 2007) (explaining "[worker's compensation] immunity is extensive, ranging from disputes over the payment for injuries of the employee, *Brown Badgett, Inc. v. Calloway*, 675 S.W.2d 389 (Ky. 1984), to allegations of tortious conduct related to dealing with the workers' compensation claim itself.").

## CONCLUSION

Consistent with the foregoing, we DISMISS Zurich's appeal IN PART, to the extent that it relates to Hampton's fourth motion for partial summary judgment. We REVERSE the Muhlenberg Circuit Court IN PART, concerning its judgments with respect to Hampton's third and fifth motions for partial summary judgment; and to the extent the circuit court believes Hampton effectively asserted any claims in those two motions, the circuit court is further directed to dismiss them.

ALL CONCUR.

ENTERED: 10-12-2018

/s/ Joy A. Kramer  
JUDGE, COURT OF APPEALS

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