

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2002-SC-0196-MR

FINAL

DATE *June 12, 2003 EIA Growth, P.C.*

KENTUCKY EMPLOYERS' MUTUAL
INSURANCE AUTHORITY, D/B/A
KENTUCKY EMPLOYERS' MUTUAL INSURANCE

APPELLANT

ORIGINAL ACTION FROM COURT OF APPEALS

2001-CA-2672

V.

FAYETTE CIRCUIT COURT NO. 01-CI-2955

EDWIN CASADA; JAMES CASADA, D/B/A
CASADA BROTHERS TRUCKING; AND
HARLEY CASADA
(REAL PARTIES IN INTEREST)

APPELLEES

AND

REBECCA M. OVERSTREET, JUDGE,
FAYETTE CIRCUIT COURT

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On February 9, 1998, Appellee Harley Casada was injured in a trucking accident in the course of his employment with Appellee Casada Brothers Trucking, a proprietorship owned and operated by his sons, Edwin and James Casada. Appellant Kentucky Employers' Mutual Insurance Authority ("KEMI") was Casada Brothers' workers' compensation insurer and began making payments for Harley's benefit,

including payments for "home nursing services."¹ However, KEMI notified Harley that it would not pay a July 28, 2001, bill for \$124,215.00 for "home nursing services" and "skilled nursing care" until and unless the workers' compensation board determined that those services were reasonable and necessary for the cure and relief of Harley's work-related injuries.

KEMI claims that the bills for "home nursing services" allegedly provided by Harley's son and former employer, Edwin Casada, were fraudulent or exaggerated. The July 28, 2001, bill indicates that Edwin had provided both "home health services" and "skilled nursing care" for Harley pursuant to the orders of Dr. Gerald Klim from October 27, 2000, until July 26, 2001, at a rate of \$360.00 per day as a "home health aide" and \$95.00 per day as a "skilled nurse." No invoices or other supporting documentation accompanied this bill and no evidence was provided to even suggest that Edwin was qualified or competent to provide either "home health services" or "skilled nursing care." On August 28, 2001, Dr. Klim sent KEMI a letter stating that "at no time have I asked for home health therapy for this patient."² Further, KEMI asserts and the Casadas do not deny that they admitted during the proceedings in the underlying action that the amount claimed for "skilled nursing services" was based on the cost of services that could have been rendered, not services that were actually rendered, for Harley.

¹As of September 24, 2001, KEMI had paid medical benefits totaling \$201,812.00, wage/loss indemnity of \$13,885.00 (which terminated by law when Harley reached age 67), and medical rehabilitation benefits of \$3,447.00.

²Dr. Klim did concede in a February 15, 2001 letter to Appellees' counsel that Edwin's assistance appeared to allow Harley to remain at home and avoid institutionalization.

Contesting KEMI's denial, Harley filed a claim in his workers' compensation case, No. 99-44419, for payment of the July 28, 2001, bill, as well as a claim of "bad faith" under KRS 342.267. Harley, individually, and his two sons, Edwin and James Casada, d/b/a Casada Brothers Trucking, also filed a civil action in the Fayette Circuit Court, demanding (1) payment of the claimed medical expenses, (2) compensatory and punitive damages for KEMI's "bad faith" refusal to pay the bill, (3) attorney's fees and costs, and (4) trial by jury. (In their response to KEMI's motion to dismiss, the Casadas asserted that their complaint also stated a cause of action for the "tort of outrage." They have not reasserted that claim in response to KEMI's petition for a writ of prohibition. However, we have held that a workers' compensation insurer's mere refusal to pay a claimed medical expense does not amount to "outrageous conduct." Zurich Ins. Co. v. Mitchell, Ky., 712 S.W.2d 340, 343-44 (1986).)

On September 24, 2001, KEMI filed a motion to dismiss the circuit court action, CR 12.02(a), claiming that the exclusive remedy provision of the Workers' Compensation Act, KRS 342.690(1), deprived the Fayette Circuit Court of subject-matter jurisdiction over the Casadas' claims. Although KEMI asserts that the circuit judge denied the motion to dismiss, no order to that effect is found in this record. On December 31, 2001, KEMI petitioned the Court of Appeals for a writ of prohibition. The Court of Appeals denied the petition, finding that KEMI "has an adequate remedy either in the trial court after the Kentucky Supreme Court disposes of The Traveler's [sic] Indemnity Company v. Reker, 2000-SC-000846, or eventually in this Court by appeal as a matter of right. . . ." KEMI now appeals to this Court as a matter of right from the denial of the petition for a writ. Ky. Const. § 115; CR 76.36(7)(a).

As noted by the Court of Appeals, this case is controlled by our recent decision in The Travelers Indemnity Company v. Reker, Ky., 100 S.W.3d 756 (2003). As in Reker, the Casadas' primary claim is that KRS 342.267 provides a jurisdictional exception to the exclusive remedy provision in KRS 342.690(1). The Casadas, as did Reker, assert that KRS 342.267 allows them to pursue their claim in circuit court via KRS 446.070, which provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." Thus, they argue that the Fayette Circuit Court has subject-matter jurisdiction pursuant to KRS 446.070.

We rejected this exact argument in Reker, supra, holding that "KRS 342.267 does not and was never intended to create an exception to KRS 342.690(1)," 100 S.W.3d at 759, and that KRS 342.690(1), a statute that specifically pertains to remedies for violations of the Workers' Compensation Act, prevails over KRS 446.070, a statute of general applicability. Id. at 763. Reker further explained that the sole purpose of KRS 342.267 was to authorize "punitive action against the insurer or self-insurer by the commissioner of the Department of Workers' Claims." Id. at 762. Put simply, enactment of KRS 342.267 did not affect the exclusive remedy provision of KRS 342.690(1). Furthermore, "a circuit court has no jurisdiction to resolve a dispute over an unpaid medical bill; the Workers' Compensation Board has exclusive jurisdiction." Id. at 760 (citing Brown Badgett, Inc. v. Calloway, Ky., 675 S.W.2d 389, 390-91 (1984)); see also Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 310 (1993) (decision whether treatment is medically necessary in a particular case is within the province of an administrative law judge).

We have consistently held that, except for the clause pertaining to a "willful or unprovoked physical aggression" at the hands of the employer or insurer or their agents, KRS 342.690(1) and its predecessor statutes shield a covered employer and its insurer from any other liability to a covered employee for damages arising out of a work-related injury.

100 S.W.3d. at 760. Harley does not claim that he was injured as a result of any physical aggression by either of his sons, by KEMI, or by their agents; thus, the Fayette Circuit Court is proceeding without subject-matter jurisdiction. KRS 342.690(1).

That conclusion is not affected by the fact that Edwin and James Casada joined the action as plaintiffs in their capacity as Harley's employer, "Casada Brothers Trucking." Indeed, James and Edwin have no standing because the complaint does not allege that, as Harley's employer, they incurred any damages or expenses. Coots v. Allstate Ins. Co., Ky., 853 S.W.2d 895, 902-03 (1993) (the right to subrogation arises only if loss is incurred). They claim that KEMI breached its insurance contract with them by refusing to pay Harley's claimed medical expenses. They do not claim that they paid the claimed expenses. Thus, they cannot assert that they have been harmed by any alleged breach of contract or bad faith on the part of KEMI. Cf. Commonwealth. Dept. of Hwys v. Combs, Ky., 357 S.W.2d 316, 317-18 (1962) (employer cannot contest attorney's fees that are paid by commuted final payments from the worker's award). Of course, even if standing did exist, "KRS 342.690 is the exclusive remedy for the collection of compensation payments." Zurich Ins. Co. v. Mitchell, Ky., 712 S.W.2d 340, 344 (1986).

We express no opinion as to whether Edwin Casada could bring a claim before the Workers' Compensation Board in his capacity as a "medical service provider" under KRS 342.020(1) and 803 KAR 25:012(1) in an attempt to prove that his services to Harley were "medically necessary, performed competently, and provide[d] cure and

relief from the effects of the injury." Bevins Coal Co. v. Ramey, Ky., 947 S.W.2d 55, 59 (1997). Reker notes that "any dispute over the payment of a medical bill is between the provider and the carrier," and that such disputes should be resolved pursuant to KRS 342.020(1). 100 S.W.3d at 761. KRS 342.020(1) provides that "[t]he commissioner may promulgate administrative regulations establishing . . . procedures by which disputes relative to the necessity, effectiveness, frequency, and cost of services may be resolved." The commissioner has done so. 803 KAR 25.012(1) provides:

A dispute regarding payment, nonpayment, reasonableness, necessity, or work-relatedness of a medical expense, treatment, procedure, statement, or service which has been rendered or will be rendered under KRS Chapter 342 shall be resolved by an administrative law judge following the filing of a Form 112 (Medical Dispute).

Thus, even if Edwin had asserted a claim as a medical provider in the underlying action (he did not), such a claim could only be resolved by an administrative law judge and would not confer subject-matter jurisdiction upon the Fayette Circuit Court. Brown Badgett, *supra*.

All that having been said, however, we conclude that the Court of Appeals did not abuse its discretion in denying the writ. As stated, this record does not even prove that the trial judge has yet ruled on the motion to dismiss. Further, if the motion to dismiss has been denied, the trial judge may have been persuaded to do so by the Court of Appeals' nonfinal decision in Reker v. The Travelers Indemnity Co., No. 1999-CA-000061-MR (June 23, 2000), which was improperly cited as authority by the Casadas in their brief in response to KEMI's motion to dismiss. CR 76.28(4)(c) (unpublished opinions "shall not be cited or used as authority in any other case in any court of this state"); Kohler v. Commonwealth, Transp. Cab., Ky. App., 944 S.W.2d 146, 147 (1997) (trial court cannot rely on nonfinal opinion of appellate court). Of course, the

Court of Appeals' decision in Reker was reversed by this Court and there is no reason to assume that the trial judge in the underlying case will not adhere to the binding precedent now established by our decision in Reker. SCR 1.040(5).

Accordingly, we affirm the Court of Appeals' denial of the petition for a writ of prohibition.

All concur.

COUNSEL FOR APPELLANT:

Perry M. Bentley
Lucy Anne Ferguson
Stoll, Keenon & Park, LLP
Suite 2100
300 West Vine Street
Lexington, KY 40507

COUNSEL FOR REAL PARTY IN INTEREST APPELLEE EDWIN CASADA:

Tamara Todd Cotton
Rodney J. Mayer
Tamara Todd Cotton & Associates
1102 Republic Building
429 West Muhammad Ali Blvd.
Louisville, KY 40202

Douglas H. Morris, II
Andrew J. Horne
Oldfather & Morris
1330 South Third Street
Louisville, KY 40208

COUNSEL FOR REAL PARTIES IN INTEREST APPELLEES JAMES CASADA, D/B/A CASADA BROTHERS TRUCKING; AND HARLEY CASADA:

Douglas H. Morris, II
Andrew J. Horne
Oldfather & Morris
1330 South Third Street
Louisville, KY 40208

Rodney J. Mayer
1102 Republic Building
429 West Muhammad Ali Blvd.
Louisville, KY 40202

COUNSEL FOR APPELLEE REBECCA M. OVERSTREET, JUDGE, FAYETTE
CIRCUIT COURT:

Hon. Rebecca M. Overstreet
Fayette Circuit Court
Third Division
215 West Main Street
Lexington, KY 40507