

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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-0692-WC

NATHAN HAM

APPELLANT

V.

APPEAL FROM COURT OF APPEALS  
2002-CA-0645-WC  
WC-00-85171

GIBSON PLUMBING & PIPING;  
LADEGAST & HEFFNER;  
HON. THOMAS A. NANNEY,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

This appeal is from an opinion of the Court of Appeals affirming a decision of the Workers' Compensation Board affirming an opinion of the Administrative Law Judge which awarded Ham temporary total disability benefits as have been previously paid and denied his request for sanctions.

The sole issue on appeal is whether the ALJ erred in refusing to allow Ham to present additional evidence in support of his request for sanctions.

Ham injured his right wrist, elbow and low back on March 29, 2000 when he fell while working as an apprentice plumber for Gibson Plumbing & Piping. He did not miss any work because of the injury until April 24, 2000. His physician released him to light duty work on May 3, 2000 and to full duty as of July 27, 2000, but Ham has not returned to work since April 2000.

Subsequent to the work related injury, Ham claimed that he re-injured his back on September 12, 2000, while using a chainsaw to cut wood at home. His physician again released him to full duty work in March 2001, but Ham stated that he is unable to work and that he has not sought employment.

Ham filed a workers' compensation claim and sought permanent partial disability benefits. Later, during the deposition of an insurance adjuster, he raised the issue of sanctions against his employer and its carrier. The grounds for his request for sanctions were alleged misrepresentations by the employer, false testimony by the insurance adjuster and unreasonable delay in instituting TTD benefits. In a July 23, 2001 hearing order, the ALJ bifurcated the claim on the issue of sanctions. Consequently, the ALJ did not permit any testimony on the issue of sanctions at the final hearing.

On October 3, 2001, the ALJ awarded Ham temporary total disability benefits as have already been paid, rejecting his claim for permanent partial disability benefits. He also concluded that because Ham was not a credible witness and the employer was completely successful in defending the claim, sanctions were not appropriate.

Ham filed a petition for reconsideration solely on the issue of sanctions for the late payment of temporary total disability. He submitted an avowal signed by his attorney that stated he would present the following evidence to support sanctions:

- 1) That the Defendant-Employer did not report this claim to the insurance adjusters in a timely manner.
- 2) That the Defendant-Employer falsely told the insurance adjusters that Plaintiff had refused light duty work, at the same time the Defendant-Employer was telling the Plaintiff that no light duty work was available.
- 3) That [the adjuster], contrary to her testimony, did not initiate payment of TTD benefits until after she was contacted by [the claims specialist] for the Department of Workers' Claims.
- 4) That the evidence proffered by the Plaintiff would establish a prima facie basis for the assessment of sanctions against the Defendants.

The ALJ overruled the petition for reconsideration, stating as follows:

In large part, the decision herein was based on the lack of credibility of the plaintiff. There was a specific finding that no "work-related" injury occurred. The defendant was totally successful in defending this claim as to disability benefits. If the plaintiff had been successful, a further review of sanctions would be appropriate. Under the facts of this case, it is not.

The Board affirmed the ALJ, but on different grounds. It reasoned that KRS 342.310 was not applicable because Ham supported his claim for sanctions upon the failure of Gibson to make prompt payments of TTD benefits. The Board further reasoned that the applicable statute was KRS 342.040, which provides for certain sanctions when payments are denied or delayed "without reasonable foundation." It recognized that the ALJ had erroneously stated that there was a specific finding of no work-related injury. However, it believed the misstatement was at most harmless error. The Court of Appeals affirmed the Board and this appeal followed.

Ham continues to argue that the ALJ erred in refusing to allow him to present evidence in support of his request for sanctions. He contends that his request for sanctions is based entirely on the handling of his claim during the time he was temporarily disabled. We disagree.

When Ham appealed to the Board, he stated that he was seeking sanctions pursuant to KRS 342.310. That statute provides for the assessment of the "whole cost of the proceedings" for any "proceedings which have been brought, prosecuted, or defended without reasonable ground . . ." The Board correctly noted that that statute did not apply here, but that KRS 342.040 may be applicable.

KRS 342.040 states in relevant part as follows:

(1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, except that if the administrative law judge determines that a denial, delay, or termination in the payment of income benefits was without reasonable foundation, the rate of interest shall be eighteen percent (18%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

(2) If overdue temporary total disability income benefits are recovered in a proceeding brought under this chapter by an attorney for an employee, or paid by the employer after receipt of notice of the attorney's representation, a reasonable attorney's fee for these services may be awarded. The award of attorney's fees shall be paid by the employer if the administrative law judge determines that the denial or delay was without reasonable foundation. No part of the fee for representing the employee in connection with the recovery of overdue temporary total disability benefits withheld without reasonable foundation shall be charged against or deducted from benefits otherwise due the employee.

.....

The purpose of the first section is to establish a procedure for written notification from the commissioner to an injured employee informing him of his right to prosecute a claim and the time-frame in which to do so. Another purpose is to facilitate prompt

resolution of work-related injury claims. See H.E. Neumann Co. v. Lee, Ky., 975 S.W.2d 917 (1998). Further, this section provides for interest on the payment of past due benefits and in certain circumstances assesses interest at a higher rate. In this case, however, Ham has not made a claim for interest. Nor has he appealed from that portion of the opinion of the ALJ awarding temporary total disability and finding it was the correct amount. Thus, under the facts of this case, this section of the statute has no application here.

The second section only applies to overdue temporary total disability income benefits which “. . . are recovered in a proceeding brought under this chapter by an attorney for an employee, or paid by the employer after receipt of notice of the attorney’s representation . . .” Here, the temporary total disability issue had long been resolved and all benefits paid by the time counsel for Ham gave notice of his representation. Ham has never claimed that he was entitled to any further temporary total benefits beyond what the ALJ awarded. Consequently, because counsel for Ham was not successful in recovering any additional temporary total disability benefits, sanctions under KRS 342.040 were not warranted. It was completely unnecessary for the ALJ to receive any further evidence on this issue.

In overruling the petition for reconsideration, the ALJ stated, “there was a specific finding that no ‘work-related’ injury occurred.” Ham contends that this statement was in error because the ALJ found that a work related injury occurred in March 2000 and awarded TTD benefits for the time he (Ham) was off work. We agree with the Board that this issue is without merit. The misstatement by the ALJ was at most harmless error and of no consequence to the outcome of this case.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Rodger W. Lofton  
928 Broadway  
P.O. Box 1737  
Paducah, KY 42002-1737

COUNSEL FOR APPELLEES:

J. David Boswell  
425 South Sixth Street  
P.O. Box 1265  
Paducah, KY 42002-1265