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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: September 23, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 10-14-04 ELIA Growth, D.C.

2003-SC-0840-WC

CITY OF MURRAY — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1657-WC
WORKERS' COMPENSATION BOARD NO. 97-94011

ROBERT LARRY BILLINGTON; HON. KRISTI SALADINO SCHAAF; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On January 2, 2002, an Administrative Law Judge (ALJ) ordered the defendant-employer to cease recouping from the claimant's benefits a $5,000.00 attorney fee that was awarded under KRS 342.320(2)(c). Affirming a decision of the Workers' Compensation Board (Board), the Court of Appeals rejected the employer's argument that the fee was not awarded until January, 2, 2002, and that the ALJ had erred by ordering it to pay a fee that had been found to be unconstitutional. City of Louisville v. Slack, Ky., 39 S.W.3d 809 (2001). The Court of Appeals based its decision on the employer's failure to name the claimant's attorney as a party to its 2001 appeal, causing it to be dismissed and the award to become the law of the case. We affirm.

The claimant sustained a work-related injury on February 17, 1997. He retained counsel and filed a workers' compensation claim, after which an Arbitrator awarded him a permanent total disability. His employer sought de novo review by an ALJ but did not

prevail. The claimant's attorney then filed a motion requesting a $17,000.00 fee. The motion explained that KRS 342.320(2)(a) and (b) authorized a fee of $12,000.00, to be deducted from the claimant's award. It also explained that based on the employer's failure to prevail before the ALJ, KRS 342.320(2)(c) authorized a fee of $5,000.00, to be paid by the employer.

On December 21, 2000, the ALJ approved the request for a $17,000.00 attorney fee but failed to state that $12,000.00 was to be deducted from the claimant's award, and $5,000.00 was to be paid by the employer. In a petition for reconsideration, the employer asserted that the maximum attorney fee should be $7,000.00, under KRS 342.320(2)(a) and (c), because the claimant did not receive a greater award before the ALJ than he did before the Arbitrator and, therefore, was not entitled to an additional fee under KRS 342.320(2)(b).[1] In an order dated February 14, 2001, the ALJ noted that the employer contested only the fees awarded under KRS 342.320(2)(a) and (b) and "[d]id not contest the award of a $5,000.00 fee pursuant to KRS 342.320(2)(c)." On that basis, the ALJ determined that the employer lacked standing. Noting that the claimant was the only party with standing to contest that portion of his attorney's fee and that he had not done so, the ALJ denied the motion.

On March 16, 2001, the employer filed a notice of appeal, listing only the claimant and ALJ as respondents. Shortly thereafter, on March 22, 2001, this Court rendered City of Louisville v. Slack, supra, which determined that KRS 342.320(2)(c) was unconstitutional. On April 13, 2001, approximately 24 days after the time for filing a notice of appeal expired, the employer moved to amend its notice of appeal to include the claimant's counsel as a party. The Board passed the motion to a consideration of

[1] KRS 342.320(2)(a) permitted a maximum fee of $2,000.00 up to and including the date of a written determination of an arbitrator. KRS 342.320(2)(b) authorized an additional fee based upon an increase in income benefits awarded upon a worker's successful appeal of an arbitrator's decision.

the merits. The employer's arguments on appeal were that the award of an attorney fee under KRS 342.320(2)(b) was erroneous on these facts and also that the $5,000.00 attorney fee under KRS 342.320(2)(c) was unconstitutional under City of Louisville v. Slack. Concluding that the claimant's counsel was an indispensable party to an appeal concerning the amount of the attorney's fee, the Board dismissed the appeal without making a decision on the merits. See Peabody Coal Co. v. Goforth, Ky., 857 S.W.2d 167 (1993); City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990). No appeal was taken from the decision.

On December 7, 2001, the claimant moved for a corrected attorney fee order that delineated the amounts to be paid from the claimant's future benefits and to be paid from the employer's own funds. The motion noted that the ALJ had previously awarded the attorney the $17,000.00 fee as requested under KRS 342.320(a), (b), and (c), and the award became final. Nonetheless, having paid the attorney, the employer began recouping from the claimant's future benefits the $5,000.00 that was awarded under KRS 342.320(2)(c) in addition to the $12,000.00 that it was entitled to recoup.

The employer asserted that it had paid the $17,000.00 as ordered; admitted that it was recouping the entire amount from future benefits; and admitted that it had failed to notify the claimant, his counsel, or the ALJ that it was doing so. Its justification was that the December 21, 2000, order awarded a $17,000.00 fee but did not indicate that $5,000.00 was awarded under KRS 342.320(2)(c) or direct the employer to pay that amount from its own funds. The order did indicate, however, that the fee was to be paid according to the claimant's election, and the claimant's Form 109 indicated that he wished to have his attorney's fee deducted from future benefits. Noting that City of Louisville v. Slack, supra, had subsequently found KRS 342.320(2)(c) to be

unconstitutional, the employer asserted that the ALJ lacked the authority to modify the attorney fee order and impose liability on the employer for $5,000.00 of the attorney fee.

On January 2, 2002, the ALJ sustained the claimant's motion and ordered the employer to cease recouping the entire attorney fee from the claimant's future benefits. Correcting the order of December 21, 2000, the ALJ indicated that the employer was liable for $5,000.00 of the fee under KRS 342.320(2)(c) and that the amount was not subject to recoupment. After its petition for reconsideration was denied, the employer appealed, arguing that the $5,000.00 fee was not awarded until January 2, 2002, at which point the award was erroneous under City of Louisville v. Slack, supra.

Rejecting the employer's argument, the Board dismissed the appeal. The Board noted that the ALJ's order of February 14, 2001, denied the employer's petition for reconsideration of the December 21, 2000, order but also specified that $5,000.00 of the attorney fee was awarded under KRS 342.320(2)(c). The employer's subsequent failure to name the claimant's counsel as a party to its initial appeal and the resulting dismissal of the appeal rendered the ALJ's orders final. Therefore, the fully litigated award became the law of the case, a status that was unaffected by the subsequent order directing the employer to cease its unauthorized recoupment of the $5,000.00. On its own motion, the Board referred the matter to the Commissioner under KRS 342.267 and 803 KAR 25:240 for an investigation regarding unfair claims settlement practice.

It is apparent from the ALJ's orders of December 21, 2000, and February 14, 2001, that the ALJ awarded $5,000.00 of the $17,000.00 attorney fee under KRS 342.320(2)(c). Furthermore, the employer's initial appeal to the Board asserted that the ALJ erred by awarding a $10,000.00 attorney fee under KRS 342.320(2)(b)and a

$5,000.00 fee under KRS 342.320(2)(c). Therefore, we reject the employer's assertion that the $5,000.00 fee was not awarded until the order that is the subject of this appeal.

The claimant's attorney is an indispensable party to an appeal concerning the amount of the attorney's fee. Peabody Coal Co. v. Goforth, supra. Furthermore, an appellant's failure to name an indispensable party within the time for filing a timely notice of appeal is a jurisdictional defect that cannot be remedied. City of Devondale v. Stallings, supra. Although the employer sought to challenge the fees that were awarded under KRS 342.320(2)(b) and (c) in its initial appeal to the Board, its failure to name the claimant's attorney as a party caused the award to become the law of the case, regardless of whether it was correct. Therefore, when the Board was confronted with the second appeal, the principle of res judicata prohibited it from considering questions concerning whether the award was erroneous. Under the circumstances, the Board did not err in refusing to do so and dismissing the second appeal.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Johnstone, Cooper, Keller, Stumbo, Wintersheimer, JJ., concur. Graves, J., not sitting.

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