

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001657-WC

CITY OF MURRAY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-94011

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

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: The City of Murray has petitioned for review of an opinion of the Workers' Compensation Board entered on July 3, 2002, which dismissed its appeal from the Administrative Law Judge on the grounds that it was barred by the doctrines of res judicata and the "law of the case." Having concluded that the Board correctly held that the issues raised by Murray are barred

by the doctrines of res judicata and the "law of the case", we affirm.

Robert Billington suffered a work-related injury on February 17, 1997, while employed by the City of Murray. Billington was subsequently found to be totally disabled under the old "arbitrator" system,¹ after which Murray filed a request for a de novo hearing before an ALJ.² On November 13, 2000, ALJ James Kerr entered an opinion awarding Billington total disability benefits. Shortly thereafter, Billington's attorney, Kristi Saladino Schaaf, filed a motion for an award of attorney's fees of \$17,000.00. Specifically, Schaaf requested \$12,000.00 in attorney's fees pursuant to KRS 342.320(2)(a) and (b), and \$5,000.00 in attorney's fees pursuant to KRS 342.320(2)(c). KRS 342.320(2)(c), which was repealed by the General Assembly effective July 14, 2000, provided as follows:

Upon an appeal by an employer or carrier from a written determination of an arbitrator or an award or order of an administrative law judge, if the employer or carrier does not prevail upon appeal, the administrative law judge shall fix an attorney's fee to be paid by the employer or carrier for the employee's attorney upon consideration of the extent, quality, and complexity of the services rendered not to

¹ Pursuant to KRS 342.270(2), as it existed prior to July 14, 2000, workers' compensation claims were initially assigned to arbitrators. KRS 342.270(2) was amended effective July 14, 2000. Ky. Acts Ch. 514 § 17. Workers' compensation claims are now assigned directly to ALJ's.

² See KRS 342.275(1), as it existed prior to July 14, 2000. KRS 342.275(1) was also amended effective July 14, 2000. Ky. Acts Ch. 514 § 18.

exceed five thousand dollars (\$5,000) per level of appeal. This attorney's fee shall be in addition to any fee awarded under paragraphs (a) and (b) of this subsection.³

On December 21, 2000, the ALJ entered an order approving Schaaf's request for attorney's fees in the amount of \$17,000.00. On January 3, 2001, Murray filed a petition for reconsideration, which was denied by the ALJ on February 14, 2001. The ALJ's order stated, in relevant part, as follows:

This matter comes before the undersigned Administrative Law Judge upon the Petition for Reconsideration filed by the defendant-employer. The Petition was filed challenging the award of \$17,000.00 in attorney fees by order of December 21, 2000. The defendant-employer does not contest the award of a \$5,000.00 fee pursuant to KRS 342.320(2)(c), but instead contest fees awarded pursuant to KRS 342.320(2)(a) and KRS 342.320(2)(b). The Administrative Law Judge finds that the defendant-employer lacks standing to contest those fees. The only real party with standing, Robert Larry Billington, has not objected to the fees awarded. Accordingly, the Administrative Law Judge denies the Petition for Reconsideration and the order of December 21, 2000 shall remain as entered.

On March 16, 2001, Murray filed a notice of appeal with the Workers' Compensation Board, but it failed to name Schaaf as a party to the appeal. On April 13, 2001, Murray filed an amended notice of appeal along with a motion to join Schaaf as a party to the appeal. The Board decided to pass

³ See 2000 Ky. Acts Ch. 514 § 24.

Murray's motion to join Schaaf to the appeal. In the interim, on March 22, 2001, the Supreme Court of Kentucky rendered its decision in City of Louisville v. Slack,⁴ where the Court held KRS 342.320(2)(c) to be unconstitutional.⁵ Subsequently, Murray attempted to raise the constitutionality of KRS 342.320(2)(c) in its appeal before the Board.

On June 27, 2001, the Board entered an opinion dismissing Murray's appeal on jurisdictional grounds. The Board's opinion stated, in relevant part, as follows:

Although Murray's original notice of appeal was timely filed, it did not name Schaaf as a party to this appeal until April 13, 2001, approximately 24 days after the expiration of its original time in which to file a notice of appeal. Kentucky's courts of justice, as well as this Board, have consistently held that if an attorney fee is at issue, then the attorney receiving said fee is an indispensable party to any appeal. See, Peabody Coal v. Goforth, Ky., 857 S.W.2d 167 (1993). The failure to name such an indispensable party is fatal to any issue or appeal directed toward that attorney's fee.

Appellate bodies are granted a certain degree of discretion in amending or modifying notices of appeal at the request of the parties. This is particularly true since the advent of the substantial compliance rule as contained in CR 73.02 which became effective January 1, 1985. However, as noted by our Supreme Court in City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990), the substantial

⁴ Ky., 39 S.W.3d 809 (2001).

⁵ Id. at 810.

compliance rule applies only to non-jurisdictional defects in a notice of appeal. The Court went on to hold that the failure to name an indispensable party is a jurisdictional defect and, therefore, cannot be remedied, citing to Manly v. Manly, Ky., 669 S.W.2d 537 (1984). We think it is particularly important that in Stallings, the Court there, as here, was presented with a motion to amend to add an indispensable party after the original time for the filing of a notice of appeal had expired.

In the case sub judice, the motion was approximately 24 days beyond the expiration of that time, while in Stallings, it was 55 days. The length of time, however, is not important other than both periods were beyond the original 30-day time frame. We therefore conclude that Murray's appeal which deals solely with the ALJ's order of February 14, 2001 addressing Schaaf's attorney fee may not be considered and this appeal must be dismissed by the Board for lack of jurisdiction.

Murray did not petition this Court for review of the Board's decision.⁶

On September 19, 2001, counsel for Murray, John C. Morton of Morton & Bach, sent Schaaf a check for \$17,000.00 along with a letter advising her that Murray intended to recoup the entire \$17,000.00 award of attorney's fees from Billington's weekly disability checks. Schaaf responded to Morton by objecting to Murray's attempt to recoup the entire \$17,000.00 from Billington's disability checks; and on December 7, 2001, Schaaf filed a motion for a corrected order pursuant to Kentucky

⁶ Murray did, however, petition the Board for an order reissuing its opinion, which was summarily denied.

Rules of Civil Procedure (CR) 60.02 and KRS 342.125.

Specifically, Schaaf requested that the ALJ enter an order specifying that of the \$17,000.00 awarded in attorney's fees, only \$12,000.00 was subject to recoupment from Billington's future benefits, and that the remaining \$5,000.00 was not subject to recoupment.⁷ On January 2, 2002, the ALJ entered an order requiring Murray to "immediately cease recoupment of the entire \$17,000.00 fee from the Plaintiff's future benefits." The order further provided that "[t]he \$5,000.00 fee awarded pursuant KRS 342.125(2)(c) [sic]⁸ is to be paid directly by the Defendant/Employer and [is] not capable of recoupment from Plaintiff, Larry Billington."

On January 14, 2002, Murray once again filed a petition for reconsideration with the ALJ. Murray claimed that based on the Supreme Court's holding in Slack, supra, the ALJ's order was erroneous. In response, Schaaf contended that any arguments pertaining to the attorney's fee award pursuant to KRS 342.320(2)(c) were barred by the doctrine of res judicata. On

⁷ KRS 342.320(2)(a) and (b), as they existed prior to July 14, 2000, both provided that any attorney's fees awarded "shall be paid by the employer from the proceeds of the award or settlement." In other words, both subsections allowed the employer to recoup the amount of attorney's fees awarded from the actual award or settlement. KRS 342.320(2)(c), however, did not contain such a provision in that it was intended to act as a penalty against the employer for bringing an unsuccessful appeal.

⁸ Unfortunately, the ALJ referenced the wrong statute in his order. Since KRS 342.125(2)(c) clearly does not apply, we are convinced that the ALJ intended to reference KRS 342.320(2)(c).

February 15, 2002, the ALJ summarily dismissed Murray's petition for reconsideration.

On March 13, 2002, Murray filed an appeal with the Board. Murray claimed that the ALJ had not specifically stated that he was awarding a \$5,000.00 attorney's fee pursuant to KRS 342.320(2)(c) until he entered an order on January 2, 2002, ruling on Billington's motion for a corrected order. Thus, Murray contended that any arguments pertaining to the constitutionality of KRS 342.320(2)(c) were properly before the Board. On July 3, 2002, the Board entered an opinion and order dismissing Murray's appeal on jurisdictional grounds. The Board's opinion stated, in relevant part, as follows:

Right or wrong, ALJ Kerr's order granting Schaaf an additional attorney fee award of \$5,000.00 pursuant to KRS 342.320(2)(c) is res judicata and the law of the case. It cannot now be reconsidered in the instant appeal. The doctrine of res judicata recognizes that at some point in time, litigation must be finalized. Except as otherwise authorized under KRS 342.125, when an issue is fully litigated and a decision is reached upon the merits by an Administrative Law Judge, the conclusion of the Administrative Law Judge on all threshold issues becomes res judicata and the law of the case. E.F. Prichard Co. v. Heidelberg Brewing Co., 314 Ky. 100, 234 S.W.2d 486 (1950); Stewart v. Sizemore, Ky., 332 S.W.2d 281 (1960). The "law of the case" doctrine holds that an appeal settles all errors that were or might have been relied upon. . . . It is a rule universally recognizing that an opinion or decision of a court in the same cause of

action, once final, becomes the law for that case in any subsequent trial or appeal as to any issues previously ruled on, however erroneous the opinion or decision may be. Union Light, Heat & Power Co. v. Blackwell's Adm'r, Ky., 291 S.W.2d 539 (1956); Sowers v. Coleman, Ky., 4 S.W.2d 731 (1928). As we have no doubt that counsel for Murray is well aware, res judicata and the "law of the case" doctrine are aspects of finality. Once a decision by an Administrative Law Judge settles all matters at issue, as well as all matters that properly could have been presented therein, if no further action is taken by the parties, the doctrine of finality attaches. Parker v. White, 223 Ky. 561, 4 S.W.2d 380 (1928). The ruling then becomes legally enforceable for all times and in all situations, even if the ruling is erroneous as a matter of law.

The doctrine of res judicata and the "law of the case" doctrine apply to rulings in workers' compensation cases the same as to decisions of our courts of justice. In the instant case, the ALJ, in his orders of December 21, 2000 and February 14, 2001, made the necessary findings that Schaaf was entitled to a \$17,000.00 attorney fee and that \$5,000.00 of that fee was to be paid pursuant to KRS 342.320(2)(c). Although after the [S]upreme [C]ourt's determination in Slack, supra, we acknowledge that Murray could have completely avoided all liability for the additional \$5000.00 in attorney fees ordered payable to Schaaf by the ALJ. Nonetheless, when Murray failed to join Schaaf as an indispensable party and, as a result, failed to properly perfect its appeal before this Board, finality of the ALJ's original orders set in as a matter of law. Thereafter, Murray had no legal right or authority to unilaterally engage in the actions that it did without the knowledge of the ALJ, Billington and Schaaf. . . .

Moreover, the fact that the ALJ ordered Murray on January 2, 2002 to immediately cease its unauthorized recoupment of the \$5,000.00 portion of Schaaf's fee awarded pursuant to KRS 342.320(2)(c) from Billington's benefits, does not alter the finality of the ALJ's original attorney fee orders. The ALJ's original attorney fee orders remain res judicata and the law of this case.

This petition for review followed.

Murray now argues that the ALJ erred in applying the doctrines of res judicata and the "law of the case" to dismiss its appeal. Murray also claims the ALJ erred as a matter of law by awarding an attorney's fee pursuant to KRS 342.320(2)(c). We agree with the Board that Murray is precluded by the doctrines of res judicata and the "law of the case" from raising any issues concerning the attorney's fee of \$5,000.00 awarded pursuant to KRS 342.320(2)(c).

The ALJ's initial order approving Schaaf's request for an attorney's fee in the amount of \$17,000.00 became final and non-appealable when Murray failed to perfect its initial appeal before the Board. In Stallings, supra, the Supreme Court of Kentucky held that the appellant's failure to name an indispensable party in a timely-filed notice of appeal is a jurisdictional defect that cannot be remedied.⁹ Accordingly,

⁹ Stallings, 795 S.W.2d at 957. See also Peabody Coal Co. v. Goforth, Ky., 857 S.W.2d 167 (1993); and Rainwater v. Jasper & Jasper Mobile Homes Inc., Ky.App., 810 S.W.2d 63, 64 (1991).

once the ALJ's order became final and non-appealable, the doctrines of res judicata and the "law of the case" barred any further adjudication of any issues concerning the award of an attorney's fee of \$5,000.00 pursuant KRS 342.320(2)(c).¹⁰

Murray attempts to avoid this jurisdictional barrier by claiming that the ALJ "effectively re-opened the case by rendering the order dated January 2, 2002." Murray argues that once the ALJ reopened the case, it was permitted to relitigate any issues concerning the award of the attorney's fee of \$5,000.00 pursuant KRS 342.320(2)(c). This argument is totally without merit and borders on being frivolous.

The corrected order entered by the ALJ on January 2, 2002, in no way affected the finality of the initial order entered on December 21, 2000, which approved Schaaf's request for an attorney's fee in the amount of \$17,000.00. It is beyond dispute that Murray completely lacked the authority to recoup the entire attorney's fee award of \$17,000.00 from Billington's weekly disability checks, since \$5,000.00 had been awarded pursuant to KRS 342.320(2)(c). Schaaf's motion for a corrected

¹⁰ "The doctrine of res judicata prohibits the relitigation of matters which actually were, or could have been, litigated to a conclusion in an earlier action." Godbey v. University Hospital of the Albert B. Chandler Medical Center Inc., Ky.App., 975 S.W.2d 104, 105 (1998). If the parties to both actions are the same, the bar is termed res judicata. If the parties are different, then just the particular issues actually litigated are barred under the doctrine of collateral estoppel. Id. Furthermore, it is clear that the doctrine of res judicata applies to workers' compensation proceedings. See, e.g., Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767, 768 (1993).

order only became necessary when Murray took improper action against Billington's disability benefits. As the Board noted, "[b]ut for the diligence of Schaaf in monitoring her client's benefits post award, Murray's misconduct might have gone completely unnoticed[,]" and Billington's counsel is to be commended.

Furthermore, we note the following language from the ALJ's order, dated February 14, 2001, denying Murray's initial petition for reconsideration:

This matter comes before the undersigned Administrative Law Judge upon the Petition for Reconsideration filed by the defendant-employer. The Petition was filed challenging the award of \$17,000.00 in attorney fees by order of December 21, 2000. The defendant-employer does not contest the award of a \$5,000.00 fee pursuant to KRS 342.320(2)(c), but instead contest fees awarded pursuant to KRS 342.320(2)(a) and KRS 342.320(2)(b) [emphasis added].

Additionally, in Schaaf's motion for attorney's fees, she specifically stated that she was requesting \$12,000.00 in attorney's fees pursuant to KRS 342.320(2)(a) and (b), and \$5,000.00 in attorney's fees pursuant to KRS 342.320(2)(c). Murray's professed confusion as to the \$5,000.00 in attorney's fees awarded pursuant to KRS 342.320(2)(c) is inexplicable.

Based upon the forging reasons, the opinion of the Workers' Compensation Board entered on July 3, 2002, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Samuel J. Bach
Henderson, Kentucky

BRIEF FOR APPELLEES, ROBERT
BILLINGTON AND KRISTI SALADINO
SCHAAF:

Kristi Saladino Schaaf
Paducah, Kentucky