

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001076-WC

EDWIN SOLIS and
CHED JENNINGS

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-69410

MONTGOMERY AUTOMOTIVE DEALERSHIP;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD; and
U'SELLIS & KITCHEN

APPELLEES

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Edwin Solis (Solis) and his counsel,
Ched Jennings (Jennings), have petitioned for review of an
opinion of the Workers' Compensation Board (Board) entered on
April 22, 2005, that affirmed and remanded an opinion and order

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

of the administrative law judge (ALJ) rendered November 18, 2004. The Board affirmed the ALJ's dismissal of Solis's claims against appellee Montgomery Automotive Dealership (Montgomery Automotive), but upon further concluding that the appeal was frivolous, remanded the matter to the ALJ for further proceedings pursuant to Kentucky Revised Statutes (KRS) 342.310(1), specifically directing that upon certification of Montgomery Automotive's expenses to defend the appeal, the ALJ order counsel for Solis (Jennings) to issue payment to counsel for Montgomery Automotive.

The sole issue before us is whether, pursuant to KRS 342.310(1), the Board erred in ordering Jennings, as counsel for Solis, to pay the assessed costs. Montgomery Automotive has declined to take a position as to whether Solis or his counsel is responsible for payment.

Our standard of review of a decision of the Board "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Having reviewed the Board's decision, we conclude that the Board committed error in its application of KRS 342.310(1).

KRS 342.310(1) provides that costs are assessed
against a party:

If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them.

See generally Peabody Coal Company v. Goforth, 857 S.W.2d 167, 170 (Ky. 1993).

As this Court stated in Wilson v. SKW Alloys, Inc., 893 S.W.2d 800, 801-02 (Ky.App. 1995), "(t)he interpretation to be given a statute is a matter of law, and we are not required to give deference to the decision of the Board," citing Newberg v. Thomas Industries, 852 S.W.2d 339, 340 (Ky.App. 1993).

Pursuant to KRS 446.080(1), "(a)ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature" But, as stated in Wilson, supra:

(A) statute should not be construed so as to give it a meaning which the language of the statute does not fairly and reasonably support as 'it is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has

not put there.' Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247, 248-249 (1962).

Statutes are to be construed according to the plain meaning of the words contained therein. Revenue Cabinet v. O'Daniel, 153 S.W.3d 815, 819 (Ky. 2005). It is undisputed that Jennings, as counsel for Solis, was not a party in the matter before the ALJ or the Board. The plain meaning of KRS 342.310(1) provides that when costs are assessed, they are assessed against a party. The Board thus erred in directing the ALJ to require Jennings, as counsel for Solis, to make payment of costs assessed.

For the foregoing reasons, the Board's opinion instructing the ALJ to issue an order directing counsel for Solis to issue payment is reversed, and this matter is remanded to the Board for further proceedings consistent with this Opinion.

SCHRODER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

DYCHE, JUDGE, CONCURRING: While I might agree with the result reached by the majority in this case, I feel that a more important ethical issue has been overlooked. There is without a doubt a conflict between the interests of Solis and his attorney requiring the attorney to withdraw from representation. Rule 1.7 (2) (b) of the Kentucky Rules of Professional Conduct (SCR 3.130) require withdrawal in such a

case absent full disclosure and consent by the client. We have no evidence of such disclosure and consent; the attorney is **not** arguing against the imposition of sanctions altogether, but that the sanctions should be imposed against his client instead of him. I would require evidence of disclosure and consent by the client in the record, or allow the client an opportunity to obtain other counsel following withdrawal by current counsel.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE:

George T. T. Kitchen, III
Rodney J. Mayer
Louisville, Kentucky