

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002060-WC

MICHAEL FRANKS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-03-83334

LONE MOUNTAIN PROCESSING, INC.;
RICHARD M. JOINER, ADMINISTRATIVE
LAW JUDGE; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOFF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: On April 23, 2003, Michael D. Franks was working for Lone Mountain Processing, Inc. in one of the corporation's underground coal mines when he sustained a work-related injury. On September 9, 2003, Franks filed a workers' compensation claim against Lone Mountain. Franks was represented by Johnnie L. Turner, a Harlan, Kentucky, attorney.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On May 10, 2004, the Administrative Law Judge awarded Franks permanent partial disability benefits in the amount of \$87.43 per week for 425 weeks. In addition, the ALJ found that Franks did not retain the physical ability to perform the type of work that he performed prior to his injury. Despite this finding, the ALJ did not address the issue of vocational rehabilitation since Franks never raised it.

On May 21, 2004, Franks filed a petition for reconsideration, which the ALJ denied. Again, the petition did not address vocational rehabilitation. However, on August 16, 2004, Franks filed a motion claiming that he was entitled to vocational rehabilitation and that Lone Mountain should pay for it. The ALJ did not address the merits of Franks' claim but simply denied the motion as time-barred. Franks appealed to the Workers' Compensation Board. The Board vacated the ALJ's order and remanded with instructions for the ALJ to address the merits of Franks' claim. The ALJ ordered that Franks be evaluated, at Lone Mountain's expense, to determine if he would benefit from vocational rehabilitation.

Subsequently, Franks' attorney, Turner, filed a motion for attorney fees and argued that, in determining his fees, the ALJ should consider the value of Franks' rehabilitation benefits, although none had been awarded. Turner felt that such benefits were worth \$5,000.00. Based on this speculation,

Turner argued that his fee should be \$7,607.89. However, the ALJ awarded Turner \$6,607.89. Turner appealed to the Board, but it affirmed the ALJ's decision. Turner filed a petition for review, in Franks' name, with this Court.

In Franks' petition, Turner claims that the Board and the ALJ misconstrued the law regarding attorney fees in workers' compensation claims. Citing Kentucky Revised Statutes (KRS) 342.310 and *W.T. Sistrunk & Co. v. Kells*,² Turner contends that he should have been awarded an additional \$1,000.00 in attorney fees since Lone Mountain "egregiously" defended against Franks' claim for vocational rehabilitation causing Turner to perform additional work to secure said benefits.

When we review the Board's decisions, we reverse only if the Board has overlooked or misconstrued controlling law or has so flagrantly erred in evaluating the evidence that its decision caused a gross injustice.³

It is well settled that this Court has no authority to review issues that were never raised before nor ruled upon by a lower court or the ALJ.⁴ Nor will this Court review errors

² 706 S.W.2d 417 (Ky. App. 1986).

³ *Daniel v. Armco Steel Co.*, 913 S.W.2d 797, 798 (Ky. App. 1995).

⁴ *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

unless said errors were precisely preserved and identified below.⁵

Franks never claimed before the ALJ that Lone Mountain acted unreasonably in defending against either Franks' original workers' compensation claim or his claim for vocational rehabilitation benefits. Since this issue was never presented to ALJ, it was not properly preserved for review by the Board nor is it preserved for appellate review. Thus, the Board did not misconstrue any law when it affirmed the ALJ's decision regarding Turner's fees.

Finally, we note that the claimant's attorney, Johnnie L. Turner, is not a party to this appeal. He is a necessary party to the appeal, and his failure to join this appeal as an appellant is fatal to his demand for an attorney's fee.⁶

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Turner Landis
JOHNNIE L. TURNER, P.S.C.
Harlan, Kentucky

BRIEF FOR APPELLEE:

Denise M. Davidson
BARRET, HAYNES, MAY, CARTER &
DAVIDSON, P.S.C.
Hazard, Kentucky

⁵ *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986).

⁶ *Peabody Coal Co. v. Goforth*, 857 S.W.2d 167, 170 (Ky. 1993).