

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000343-WC

SUSAN MITCHELL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-97505

THE TFE GROUP;
HON. SHELIA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, LAMBERT AND MOORE, JUDGES.

ACREE, JUDGE: Susan Mitchell appeals from an order of the Workers' Compensation Board (Board) denying her request for attorney's fees in an unfair claims practices proceeding against her employer's insurer. The Board upheld the finding of the Administrative Law Judge (ALJ) that Kentucky Revised Statutes (KRS) Chapter 342 makes no provision for the award of attorney's fees in such a proceeding. We agree and affirm the Board.

Mitchell suffered a workplace injury for which she was awarded temporary total disability and permanent partial disability benefits. The case number assigned to this claim was 2003-97505. Mitchell's employer, The TFE Group (TFE), chose not to appeal the award. Thereafter, TFE's insurer, Zurich North American Insurance Company (Zurich), was late making payments owed to Mitchell on several occasions. Mitchell, through counsel, made an unfair claims practices complaint to the Office of Workers' Claims which ordered Zurich to show cause for the delayed payments. The show cause proceeding was assigned case number 2005-0023. After a hearing, Zurich was found to have violated 803 Kentucky Administrative Regulation (KAR) 25:240 Section 5(4) and assessed the minimum fine of \$1,000.00.

There followed a somewhat confusing set of proceedings initiated when Mitchell's counsel filed a motion asking for \$1,065.00 in attorney's fees for the work done on the unfair claims practices complaint. In the caption, counsel referred to 2003-97505, which was the case number for the original injury claim. TFE filed a response objecting to an award of attorney's fees. The Executive Director of the Office Workers' Claims first denied the motion on the ground that there was no statutory authority for such an award. After Mitchell filed a petition for reconsideration, the Executive Director entered a new order, noting that the motion for attorney's fees had been filed with the wrong case number, and declared his previous

order void *ab initio, nunc pro tunc*. This second order also referred the issue to the Chief ALJ.

TFE then filed a petition for reconsideration, noting the incorrect case number and objecting to the matter being referred to the Chief ALJ. Mitchell's counsel filed an objection to TFE's petition for reconsideration and a new motion for attorney's fees, this time using the proper number for the unfair claims practices complaint. TFE's response to this second motion argued that an award of attorney's fees for an unfair claims practices complaint was not authorized by statute. The Chief ALJ denied TFE's petition for reconsideration, as well as the motion for attorney's fees. The Board upheld the Chief ALJ's determination that there was no statutory authority for such an award. This appeal followed.

Mitchell presents one argument on appeal. Essentially, she admits that the statutes and regulations governing workers' compensation claims do not provide for an award of attorney's fees in unfair claims practices complaints. Consequently, there is neither case law, nor statute, cited in support of her position. However, she argues that failure to make such an award violates public policy by discouraging attorneys from representing claimants in these proceedings. The Board's opinion, authored by Judge Cowden, does an excellent job explaining the differences between workers' compensation benefits claims and show-cause proceedings for unfair collections practices.

We begin by noting that workers' compensation claims and show-cause proceedings for UCP [unfair claims practices] violations before the Executive Director are two separate actions. Although the UCP action out of necessity touches upon the workers' compensation claim, it is a separate and distinct proceeding. Documents and pleadings in the show-cause proceeding are not a part of the workers' compensation claim and are not automatically a part of the record in the workers' compensation claim. The employer's liability to the claimant is limited to benefits in the worker's compensation claim. An UCP violation does not create a private cause of action for the claimant and results in no additional benefits for the claimant. *Travelers Indemnity Company v. Reker*, 100 S.W.3d 756 (Ky. 2003).

Typically, a claimant triggers an investigation by the Office of Workers' Claims through the filing of a complaint with the Office of Worker's Claims. The Office of Workers' Claims investigates the matter and, if deemed appropriate, the Executive Director will order a show-cause hearing. The true party in interest in the UCP proceeding is the Commonwealth since the only purpose of the proceeding is to determine whether the insurance carrier, self-insured group or self-insured employer providing workers' compensation coverage has engaged in claim settlement practices in violation of the chapter or the provisions of KRS 304.12-230 that warrant imposition of a fine. The UCP proceeding is an action by the state to see that the law is enforced. KRS 342.267 provides for a fine from \$1,000 to \$5,000 for each violation, but does not provide for the assessment of attorney's fees. Since the UCP proceeding produces no additional benefits for the claimant, it does not create a fund of benefits from which a claimant may pay an attorney fee.

The Kentucky Supreme Court has previously stated, "[w]orkers' compensation is a creature of statute, and the remedies and procedures described therein are exclusive."

Williams v. Eastern Coal Corp., 952 S.W.2d 696, 698 (Ky. 1997). KRS 342.690(1) provides for exclusive liability under the Workers' Compensation Act. Thus, covered employees are not permitted to seek damages in a civil suit when an injury is covered under the Act. In fact, this Court has even held that KRS 342.690(1) precludes an employee for suing his employer's insurance carrier for failure to pay medical expenses under either a bad faith theory or a tort of outrage theory. *Zurich Insurance Co. v. Mitchell*, 712 S.W.2d 340 (Ky. 1986). "Courts are not at liberty to add or subtract from a legislative enactment. . . ." *Lindall v. Kentucky Retirement Systems*, 112 S.W.3d 391, 394 (Ky.App. 2003) (citation omitted). Consequently, the fact that KRS Chapter 342 does not provide a means to award attorney's fees in unfair claims practices proceedings is fatal to this appeal.

For the foregoing reasons, the order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE, THE TFE
GROUP:

Scott C. Wilhoit
Louisville, Kentucky