PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

MARCH 1, 2016 to MARCH 31, 2016

I. ADMINISTRATIVE LAW

A. ***Sunrise Children's Services, Inc. v. Kentucky Unemployment Insurance Commission***

2014-CA-000633 03/11/2016 2016 WL 929370 Rehearing Pending

Opinion by Judge Nickell; Judges Clayton and Kramer concurred. The circuit court affirmed the decision of the Kentucky Unemployment Insurance Commission (KUIC) finding that an employee was entitled to receive unemployment benefits. The Court of Appeals also affirmed, holding that appellant failed to present sufficient evidence before the administrative body justifying its position that the employee was discharged for work-related misconduct. Appellant purported to rely on a videotape of the incident precipitating the employee's termination from employment. However, the videotape had never been introduced into the administrative record. Appellant attempted to introduce the tape before the circuit court but was rebuffed as judicial review is based solely upon the certified administrative record. According to appellant, the contents of the videotape were dispositive and completely supported its claim that the employee was terminated for misconduct. It contended that the referee conducting the administrative hearing erred in failing to *sua sponte* request the videotape; that KUIC erred in refusing to consider the untendered evidence; and that the circuit court erred in ignoring its reasonable request for remand for the purpose of introducing the videotape. However, the Court concluded that appellant had failed to create an adequate record supporting its burden of proof and declined the invitation to save appellant from its own errors. On the merits, the Court concluded that the referee weighed the conflicting evidence presented and found the employee's evidence more convincing. Because substantial evidence supported the referee's decision, the Court affirmed the circuit court's judgment affirming KUIC's adoption of the referee's determination. The Court also rejected appellant's unsupported claims related to waiver of defenses by the employee, as well as its contention that it was entitled to oral argument before the circuit court.

II. COURTS

A. ***Mefford v. Norton Hospitals, Inc.***

2014-CA-001036 03/25/2016 2016 WL 1166120

Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred. Appellant challenged a summary judgment dismissing her medical malpractice claims against Norton Hospitals based on the doctrine of judicial estoppel. The trial court concluded that appellant intentionally failed to disclose the pending malpractice claim to the bankruptcy court prior to its granting a converted Chapter 7 discharge and that she consequently was estopped from pursuing her claim. The Court of Appeals reversed and remanded, holding that a tort action arising after the filing of a Chapter 13 petition, but prior to a Chapter 7 conversion, was not part of the bankruptcy estate. Therefore, appellant did not have a motive to fail to disclose her malpractice claim. There could be no inference of bad faith solely because appellant's cause of action arose after she and her husband filed for Chapter 13 bankruptcy and later elected to convert their case to a Chapter 7. Absent a motive to conceal the claim, judicial estoppel did not apply, and reversal was merited.

III. CRIMINAL LAW

A. ***Chesher v. Commonwealth***

2014-CA-000759 03/04/2016 2016 WL 834306

Opinion by Judge J. Lambert; Chief Judge Acree and Judge Taylor concurred. In a direct appeal from a final judgment convicting appellant of first-degree manslaughter and tampering with physical evidence, the Court of Appeals affirmed, holding that appellant's *Batson* challenge lacked merit because no purposeful discrimination was established and because the Commonwealth offered a race-neutral reason for striking an African-American female from the jury. The Court noted that two African-Americans remained in the jury pool after this particular juror was stricken. Therefore, appellant failed in his burden of establishing a *Batson* violation. Moreover, even if he had met this burden of showing purposeful discrimination, the Commonwealth offered a race-neutral reason for striking the third juror, which was her demeanor and lack of interest in the proceedings. The Court also held that a police officer's testimony was properly admitted as it did not bolster the victim's testimony, but rather addressed the officer's observations. In addition, the Court found no abuse of discretion in the trial court's permitting the officer to testify when he had not been identified as a witness during *voir dire*. RCr 9.38 did not require the trial court or the Commonwealth to question the potential jurors regarding their knowledge about the officer.

B. ***Hardin v. Commonwealth***

2015-CA-000034 03/25/2016 2016 WL 1166038

Opinion by Judge J. Lambert; Chief Judge Acree and Judge Taylor concurred. Appellant entered a guilty plea to operating a vehicle under the influence, fourth offense, a Class D felony, but preserved his right to appeal the denial of his motion to suppress evidence seized during his arrest. Holding that there was reasonable suspicion that appellant was committing a crime and that the police did not violate his right to an independent blood-alcohol test pursuant to *Commonwealth v. Long*, 118 S.W.3d 178 (Ky. App. 2003), the Court of Appeals affirmed the judgment of conviction.

C. ***Jackson v. Commonwealth***

2015-CA-000411 03/04/2016 2016 WL 833993 DR Pending

Opinion by Judge J. Lambert; Chief Judge Acree and Judge Maze concurred. Following the denial of his motion to suppress, appellant was convicted on a conditional guilty plea of trafficking in a controlled substance, tampering with physical evidence, possession of marijuana, and resisting arrest. On appeal, the Court of Appeals affirmed, holding that police had probable cause to conduct a warrantless strip search of appellant's person under the totality of the circumstances. KSP troopers conducted an automobile stop based on an informant's tip that the driver and passengers, one of whom was appellant, were transporting narcotics. A K9 alerted on the front driver's side door, which provided probable cause to search the vehicle, and troopers smelled marijuana in the vehicle and observed a white powdery substance in a backpack found in the vehicle. The K9 subsequently alerted on the portion of the vehicle where appellant was sitting, and appellant became very nervous and behaved strangely, including placing his hands under his buttocks, when the K9 was close to him. The Court also agreed that the strip search was conducted in a reasonable manner and that the intrusion was not overly broad. Appellant's pants were already pulled down halfway down his buttocks, exposing his boxer shorts and buttocks. Moreover, he consented to a request that he pull out the front of his boxer shorts and then pushed his genitals to the side. Appellant then moved his hands beneath his buttocks as if to catch something and began resisting, which resulted in a trooper taking him to the ground. However, appellant was not fully naked and he was not visible from the road as he was on the ground since a vehicle was blocking any view of him from the road. The Court also noted that the search ultimately consisted of the trooper visibly observing and then removing a plastic bag sticking out from between appellant's buttocks, and that there was minimal, if any, pain or trauma to appellant's body.

D. ***Moorman v. Commonwealth***

2014-CA-001179 03/04/2016 2016 WL 834040

Opinion by Judge J. Lambert; Judges Combs and VanMeter concurred. Appellant, who had been convicted of manslaughter in the first degree, filed a motion for post-conviction relief. Appellant's conviction became final on December 9, 2010. On July 24, 2013, appellant filed a *pro se* RCr 11.42 motion to vacate her conviction. Appellant was subsequently appointed an attorney to represent her. Appellant's appointed counsel entered an appearance on September 3, 2013, but on September 24, 2013, the ordered time for counsel to file a supplement to the *pro se* RCr 11.42 motion lapsed, and no supplement was filed. Sometime afterward, appellant's counsel made a request for additional time to file the supplement. The circuit court entered an order on November 15, 2013, granting an additional 60 days. This order was entered 52 days after the supplement was originally due. Counsel ultimately filed a supplement to the *pro se* RCr 11.42 motion on January 14, 2014. In the supplement, he addressed several of Moorman's *pro se* issues and raised several new issues. The Commonwealth filed a response opposing both the *pro se* motion and counsel's supplement. Specifically, the Commonwealth contended that the new claims raised in counsel's supplement were untimely because they were raised beyond the three-year statute of limitations provided for in RCr 11.42. The circuit court subsequently entered an opinion and order denying appellant's RCr 11.42 motion without an evidentiary hearing. The circuit court found that appellant's original *pro se* claims were without merit and that she did not make specific allegations that the court could examine in light of the record. The circuit court also determined that the claims in the supplemental motion filed by counsel were untimely. The circuit court also denied appellant's subsequent motion for reconsideration, in which she argued that equitable tolling should apply and, therefore, the additional claims raised in the supplement should be considered on their merits. The Court of Appeals affirmed, holding that appellant's counsel's untimely amended motion for post-conviction relief did not qualify for equitable tolling of the three-year limitations period for filing such motions. Attorney miscalculation of a filing deadline is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel.

IV. FAMILY LAW

A. ***E.Y. v. Cabinet for Health and Family Services***

2015-CA-000104 03/11/2016 2016 WL 929359

Opinion by Judge VanMeter; Judges Combs and J. Lambert concurred. The Cabinet for Health and Family Services filed a juvenile dependency, abuse, and neglect petition. The circuit court found the child to be dependent and subsequently denied Mother's motion to alter, amend, or vacate the adjudication order. On appeal, the Court of Appeals affirmed. The Court held that the trial court's finding that the child was dependent, after the trial court had conducted a hearing and determined the child was not neglected, did not constitute palpable error. Nothing in Kentucky's statutory scheme prohibited the trial court from finding dependency following a hearing on a neglect petition as long as the statutory requirements were met. The Court further held that the evidence was sufficient to support the order removing the child from Mother's care, and the trial court's refusal to order services be provided to Mother and the child as a less restrictive alternative to removal from the home did not constitute palpable error.

V. HEALTH

A. ***Reid v. KentuckyOne Health, Inc.***

2015-CA-000092 03/18/2016 Rehearing Pending

Opinion by Judge Dixon; Judges Nickell and Taylor concurred. The Court of Appeals reversed a decision of the Jefferson Circuit Court granting a judgment on the pleadings and dismissing appellant's tort and contractual claims against appellee. Appellant is a general surgeon who was a member of the medical staff at Jewish Hospital & St. Mary's Healthcare, Inc. ("the Hospital") for over forty years. On February 4, 2013, appellant received a letter from the Hospital's Surgery QA & I Committee that all of his cases from January 31, 2013, through June 30, 2013, would be subject to a focus review. He was also told that he could no longer perform any further surgical procedures unless he was accompanied by an actively practicing and board certified general surgeon or endoscopist. Appellant did not perform any additional surgeries at the Hospital after February 2013. On August 5, 2013, appellant received a second letter informing him that the focus review had ended without any finding of quality concerns. Appellant was granted a conditional reappointment to the medical staff for six months, which permitted him to practice at the hospital as long as he met certain conditions. However, he did not exercise his privileges during the six-month period and his medical staff membership expired. Appellant ultimately filed suit against appellee and its subsidiaries, including the Hospital, seeking compensatory and punitive damages for breach of contract, intentional infliction of emotional distress, tortious interference with business and contractual relations, and slander. Appellee argued that it was entitled to immunity under the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101, *et seq.* ("HCQIA"), because the Hospital's conduct with respect to appellant was related to its professional review activities. The circuit court agreed. In reversing, the Court of Appeals concluded that the Hospital's requirement that appellant be accompanied by another qualified surgeon while in the operating room effectively prevented appellant from performing surgeries and, thus, fit squarely within the HCQIAA's definitions of "adversely affecting" and "clinical privileges." *See* U.S.C. § 11151(1) and (3). As such, the Hospital's conduct constituted a professional review action rather than simply professional review activities, as the trial court found. For a professional review body to be afforded immunity under the HCQIA, the professional review action must meet the standards set forth in 42 U.S.C. § 11112(a). Namely, it must have been taken: (1) in the reasonable belief that the action was in the furtherance of quality health care; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting

the requirement of paragraph (3). The trial court, because it concluded that the Hospital's conduct was a professional review activity, never considered the standards set forth in § 11112(a). Accordingly, the Court of Appeals concluded that the matter had to be remanded for the trial court to consider whether the Hospital met all of the standards in § 11112(a) so as to be afforded immunity under the HCQIA.

B. ***Spalding v. Spring View Hospital, LLC***

2013-CA-000842 03/11/2016 2016 WL 929507 Rehearing Pending

Opinion by Judge Maze; Judge Thompson concurred in result only and filed a separate opinion; Chief Judge Acree dissented and filed a separate opinion. In five consolidated appeals, the Court of Appeals recognized negligent credentialing as a cause of action and as a means by which individuals can hold hospitals liable for the latter's negligent extension or renewal of staff privileges and credentials to independent contractor physicians. The Court held that the standard of care in a negligent credentialing claim against a hospital is one of reasonable care under the same or similar circumstances, and that a plaintiff asserting such a claim must provide expert testimony that a hospital failed to meet its standard of care in credentialing a physician. A hospital owes a duty to use reasonable care in maintaining safe and adequate facilities and equipment, to select and retain only competent physicians, to supervise all persons practicing medicine within the hospital, and to formulate, adopt, and enforce adequate rules and policies to ensure quality patient care. The Court further noted that the standard of care in a negligent credentialing claim against a hospital is an objective one that is not based solely upon a hospital's own bylaws. A plaintiff must show as part of her *prima facie* claim that a physician's treatment caused the patient harm and that the hospital's negligence was a substantial factor in bringing about the harm. In his concurring opinion, Judge Thompson indicated that negligent credentialing should be expressly adopted by the Court if only to bring temporary resolution until the Kentucky Supreme Court conclusively decides the issue. However, he expressed concern about the possible ramifications of adopting the tort. In dissent, Chief Judge Acree opined that the tort of negligent credentialing should only be recognized, if at all, by the Supreme Court.

VI. INSURANCE

A. ***Davis v. Kentucky Farm Bureau Mutual Insurance Company***

2014-CA-001609 03/11/2016 2016 WL 929362

Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred. Appellants' child died after choking on a push-pin while in the care of Kentucky Farm Bureau's insured, Trina's Treehouse Childcare, LLC. The claims against Trina's and its employees were resolved except for the amount of available insurance coverage. The parents maintained that each act of negligence by Trina's and its employees contributing to their child's death was a separate occurrence providing coverage under the Farm Bureau policy for the aggregate maximum of $1,000,000. Farm Bureau maintained that there was a single occurrence - the child's choking on a push-pin - and that the maximum "per occurrence" limit of $500,000 applied. The Court of Appeals agreed with Farm Bureau's position, holding that Kentucky applies the cause approach in determining the number of occurrences when "occurrence" is defined synonymously with "accident" in the insurance policy. Therefore, coverage was limited to $500,000. Merely because multiple negligent acts combine to cause a single injury or multiple causes of action may be asserted does not mean there are multiple occurrences.

VII. LABOR AND EMPLOYMENT

A. ***Smith v. Norton Hospitals, Inc.***

2014-CA-001126 03/04/2016 2016 WL 834337

Opinion by Judge Kramer; Judge Dixon concurred; Judge Jones dissented and filed a separate opinion. Appellant was visiting her son at Norton Suburban Hospital. An off-duty Louisville Metro Department of Corrections officer, Benjamin Phillips, was working security at Norton and was stationed outside appellant's son's room. Security had been assigned to the room because appellant's son had allegedly made threats to Norton's staff. Phillips was dressed in plain clothes and was sitting in a chair across the hall from appellant's son's room. After Phillips delayed appellant from entering her son's room and identified himself as a "cop," appellant admitted that she said either, "What if I have a gun in my purse?" or "I have a gun in my purse," and that she then turned to walk away. Phillips attempted to grab appellant's purse to check for a gun. During this incident, appellant's son came out of his room, began verbally assaulting Phillips, and attempted to hit him. Appellant alleges that Phillips violently pushed her against a wall and detained her, causing her injuries that required back surgery. A gun was not found in her purse. Based upon these events, appellant filed suit in Jefferson Circuit Court asserting claims of negligence, assault, battery, false imprisonment, and intentional infliction of emotional distress directly against Phillips. These claims were voluntarily dismissed. Through the doctrines of vicarious liability and *respondeat superior*, appellant also sought to impute liability for these claims upon what she asserted were Phillips's employers and principals (*i.e.*, Norton, along with Securitas and Brooks Security). The circuit court summarily dismissed appellant's claims, finding that these entities could not be held vicariously liable for Phillips's conduct toward appellant because, by virtue of qualified immunity, Phillips's conduct was not legally actionable. On appeal, appellant argued that the defense of qualified immunity should have failed, even though KRS 446.010(31) provides that correctional officers such as Phillips are "peace officers" with arrest authority and qualified immunity, because: (1) at the time of the events allegedly giving rise to the tort liability described above, Phillips was off-duty, working a different job away from any correctional facility; thus, he was working outside the scope of his employment as a correctional officer; and (2) Phillips's decision and resulting efforts to search appellant were, she asserted, nondiscretionary acts. The Court of Appeals affirmed. The Court explained that a peace officer's jurisdiction to arrest and to issue citations typically encompasses the territorial limits of the appointing authority, and if a metropolitan and urban-county government correctional officer's arrest and citation authority were strictly limited to the inside of a correctional facility, much of the authority granted to them as peace officers would be meaningless. KRS 431.005(1)(e) and (f), for example,

authorize all peace officers to enforce drunk driving statutes and to arrest for certain criminal violations occurring in a hospital. Similarly, no statute or precedent relevant to peace officers limits a peace officer's arrest or citation authority to on-duty hours. Thus, Phillips remained a peace officer and retained the authority of his office because he was in a location within the territorial limits of the authority that appointed him as a peace officer. The Court held that appellant's vicarious liability claims against Norton, Securitas, and Brooks Security, which were based upon the above-described events, failed because vicarious liability extends only to negligent acts of an agent committed in the course and scope of the principal's business. Here, the authority for Phillips's actions, which he performed under color of law and in his capacity as a peace officer, was granted to him by statute and not by his private employers. Phillips's private employment as a security officer did nothing to diminish or relieve him of his duties and responsibilities as a peace officer or his authority to act under the color of law; nor could his private employment have legally directed, restrained, or otherwise interfered with his discretion to exercise his peace officer authority. Thus, Phillips's actions in exercising his peace officer authority could not have been taken in the course and scope of his private employment, and vicarious liability could not apply. In dissent, Judge Jones stated that she would reverse and remand this matter for a

VIII. LANDLORD/TENANT

A. ***Higdon v. Buisson Investment Corporation***

2013-CA-001908 03/04/2016 2016 WL 834651

Opinion by Judge Jones; Judges Combs concurred; Judge VanMeter concurred and filed a separate opinion. In a slip-and-fall premises liability case, appellant, a tenant, appealed from an order granting summary judgment in favor of appellee, her landlord, upon a finding that the ice that appellant slipped on outside her apartment building was an open and obvious hazard and, as such, that appellee owed no duty to warn of or to remedy the walkway area in which appellant fell. The Court of Appeals reversed and remanded. The Court held that the circuit court's opinion and order focused solely on appellee's duty (or lack thereof) to warn of or to remedy the condensation and dampness on the walkway. In doing so, the circuit court ignored the fact that appellant's allegations were much broader. The Court noted that appellant expressly pointed out that her case was "not about fog and accompanying dampness." Instead, it was "about a sloping bare wood ramp with no slip-resistant paint or adhesive applications that was ill-equipped to safely accommodate pedestrians with even the slightest natural accumulation." As such, the Court held that the "open and obvious" nature of the fog and ensuing condensation was an inappropriate basis upon which to grant summary judgment as the surface at issue was located within the common area of the apartment complex. The Court concluded that given appellee's heightened duty as a landlord, the circuit court should have allowed this matter to go to the jury to decide whether appellant knew or should have known that a dangerous condition existed with respect to the construction and maintenance of the walkway and, if so, whether appellee breached its duty to maintain the walkway in a safe condition for its tenants. Judge VanMeter concurred with the result reached by the majority based on recent decisions of the Kentucky Supreme Court that he believed mandated that this case was inappropriate for summary judgment. *See, e.g.*, *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015).

IX. TAXATION

A. ***Department of Revenue, Finance and Administration Cabinet, Commonwealth of Kentucky, v. Chegg, Inc.***

2014-CA-001922 03/04/2016 2016 WL 834585 DR Pending

Opinion by Judge Kramer; Judges Clayton and Stumbo concurred. This case concerned a tangible personal property tax issue involving appellee, which operates a network for students and online college textbook rentals. In February 2010, appellee opened a 611,000 square-foot facility in Shepherdsville as the sole site for its United States warehousing and distribution operations. A question subsequently arose as to whether Kentucky's warehouse/distribution center exemptions provided for in KRS 132.097 and KRS 132.099 applied to appellee's textbooks, which are stored in its warehouse center and are shipped outside of Kentucky within six months. The Department of Revenue determined that these exemptions did not apply because, although appellee's textbooks stored at its warehouse were shipped out of the state within six months, the textbooks ultimately return to Kentucky after being shipped out of the state and are thus not being shipped to a permanent or final destination outside of Kentucky. Reversing the Department's decision, both the Franklin Circuit Court and Court of Appeals determined that KRS 132.097 and KRS 132.099 are unambiguous and, when read together or independently, did not require that appellee's tangible personal property be shipped to a permanent or final destination; rather, the statutes only required that appellee, the owner of the textbooks, reasonably demonstrate that its personal property will be shipped out of state from its warehouse within the next six months. Because appellee reasonably demonstrated that it ships its textbooks outside of Kentucky within six months, it was entitled to claim the exemptions.

X. TORTS

A. ***Bryant v. Jefferson Mall Company, L.P.***

2014-CA-000264 05/08/2015 2015 WL 2153209 Released for Publication

Opinion by Judge D. Lambert; Chief Judge Acree and Judge Nickell concurred. The circuit court dismissed appellant's premises liability action against Jefferson Mall Company via summary judgment. On appeal, the Court of Appeals affirmed. As a part of her routine, appellant walked in the mall every other weekday morning before the mall's individual shops opened. The mall began allowing this practice in 1998 and had never charged a fee for this convenience. Appellant walked a usual route for multiple laps during the designated walking time. At approximately 9:50 a.m. on the rainy morning of January 11, 2012, appellant allegedly slipped on a puddle of water and fell. She and two fellow mall walkers were on their fourth lap at the time. She did not see any water in the floor on the three previous laps and did not notice any signs or warnings posted in the vicinity alerting her of a wet floor. Appellant was not shopping at the time of her fall, as the individual shops within the mall were closed, but she did intend to shop after finishing her walk. Appellant subsequently filed suit against the mall for injuries sustained in her fall. The mall countered in a summary judgment motion that it did not have a duty under KRS 411.109 - the recreational use statute - to warn mall walkers of dangerous conditions on the premises or otherwise make the premises safe for them. The circuit court granted the mall's motion on this ground. In affirming, the Court of Appeals concluded that the mall could raise KRS 411.190 as a defense because mall walking qualified as a "recreational purpose" and the mall's interior qualified as "land" under the statute. The Court further noted that nothing showed that the mall acted with indifference by failing to warn of or guard against the puddle of water.

XI. WORKERS' COMPENSATION

A. ***Steel Creations by and through Kentucky Employer's Safety Association v. Injured Workers' Pharmacy***

2015-CA-000218 03/25/2016 2016 WL 1166224

Opinion by Judge VanMeter; Judges Combs and Nickell concurred. Upon review of a Workers' Compensation Board opinion, the Court of Appeals affirmed, holding: (1) that pharmacies are "medical providers" for purposes of the employee choice of provider rule, KRS 342.020(1), and (2) that commercially-published Average Wholesale Prices ("AWPs") for prescription drugs may be considered in determining the actual average wholesale price for a certain prescription drug pursuant to the Workers' Compensation pharmacy reimbursement fee schedule contained in 803 KAR 25:092 §1(6) & §2(2). KRS 342.020(1), commonly known as the "employee choice rule," states that in the absence of a managed healthcare system, an injured worker may choose his or her "medical provider" to treat his or her injury or occupational disease. The Court determined that pharmacists provide medical services in the treatment of injury and disease and therefore fall into the category of "medical providers." Accordingly, injured employees may choose the pharmacy at which they fill their prescriptions, and employers/workers' compensation payers may not dictate which pharmacies employees may patronize.

With respect to the amount pharmacies may charge to fill injured workers' prescriptions, 803 KAR 25:092 §1(6) & §2(2) direct that the maximum price a pharmacy can require a workers' compensation payer to pay for a prescription drug is the average of actual prices paid to wholesalers for that drug plus a $5 dispensing fee. The Court declined to hold that commercially published AWPs, which appellants alleged to be inflated, should be abolished from the workers' compensation reimbursement scheme. Instead, the Court ruled that AWPs may be utilized in determining the average actual prices paid to wholesalers for prescription drugs as long as they actually represent what pharmacies pay to wholesalers for the drug(s) at issue. The Court held that this regulatory fee schedule set forth by the Department for Workers' Claims was fair, current, and reasonable, and therefore appropriate.