

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001240-WC

ROBERT THOMPSON, JR.; AND
HON. EDMOND COLLETT

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-92227

JAMES RIVER PROCESSING, INC.;
ROBERT L. WHITTAKER, DIRECTOR OF
SPECIAL FUND; HON. THOMAS A. NANNEY,
ADMINISTRATIVE LAW JUDGE; HON.
BENJAMIN CHANDLER, ATTORNEY GENERAL;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Robert Thompson, Jr., and his attorney, Edmond Collett, have filed a petition for review of an opinion rendered by the Workers' Compensation Board on April 14, 2000. Having concluded that the December 12, 1996, amendment to KRS 342.320(2)(a), which limits the maximum attorney's fee for representing an injured worker before an arbitrator to \$2,000.00, was properly applied to Thompson's claim which arose before the

amendment's effective date; and having concluded that the statute is constitutional, we affirm.

Thompson suffered a work-related injury to his lower back on September 16, 1996. On December 12, 1996, at the culmination of a special session of the Kentucky General Assembly, a major revision to the Workers' Compensation Act became effective. On August 21, 1998, Thompson contracted with Collett for Collett to represent him concerning his workers' compensation claim. Thompson's application for adjustment of injury was filed on September 14, 1998. The Arbitrator issued a decision on December 22, 1998, which found Thompson to be totally and permanently disabled as a result of his work injury. The Arbitrator denied Collett's request for an attorney's fee award of \$15,000.00 to be apportioned \$7,500.00 to the employer and \$7,500.00 to the Special Fund. Instead, the Arbitrator awarded Collett an attorney's fee of \$2,000.00, in accordance with the statutory cap on attorney's fees provided for in the 1996 version of KRS 342.320. Thompson and Collett requested a de novo review by an Administrative Law Judge of this award; and Administrative Law Judge Thomas A. Nanney affirmed the award on September 24, 1999. Thompson and Collett appealed the ALJ's decision to the Board, which also affirmed on April 14, 2000. This petition for review followed.

On the date of Thompson's initial injury, KRS 342.320(1) provided for a maximum attorney's fee of \$15,000.00 to the claimant's attorney, with the attorney's fee being based upon the amount of the award and factors such as the nature and complexity of the services rendered. The statutes provided that

the date of the worker's injury or last exposure controlled the maximum attorney's fee, except that the maximum attorney's fee for a working miner's claim pursuant to KRS 342.732(1)(a) was controlled by the date of the claim. The statutory scheme placed no limit on the maximum attorney's fee which could be paid to an employer's attorney.

As amended effective December 12, 1996, KRS 342.320 provided, in pertinent part, as follows:

- (2) Attorney's fees for services under this chapter on behalf of an employee shall be subject to the following maximum limits:
 - (a) Twenty percent (20%) of the award not to exceed two thousand dollars (\$2,000) for services performed up to and including the date of a written determination by the arbitrator. This fee shall be paid by the employee from the proceeds of the award or settlement.
 -
 - (d) Attorney-client employment contracts entered into and signed prior to December 12, 1996, for injuries or date of last exposure occurring prior to December 12, 1996, shall not be subject to the conditions of paragraph (a), (b), and (c) of this subsection, and the law existing at the date of the injury or last exposure to the hazards of an occupational disease shall apply.
- (3) In approving an allowance of attorney's fees, the administrative law judge or arbitrator shall consider the extent, complexity, and quality of services rendered, and in the case of death, the

Remarriage Tables of the Dutch Royal Insurance Institute. An attorney's fee may be denied or reduced upon proof of solicitation by the attorney. However, this provision shall not be construed to preclude advertising in conformity with the standards prescribed by the Kentucky Supreme Court. The date of injury or last exposure shall control the applicable maximum attorney's fee.

- (4) No attorney's fee in any case involving benefits under this chapter shall be paid until the fee is approved by the arbitrator or administrative law judge, and any contract for the payment of attorney's fees otherwise than as provided in this section shall be void.

. . .

- (8) Attorney's fees for representing employers in proceedings under this chapter pursuant to contract with the employer shall be subject to approval of the administrative law judge or arbitrator in the same manner as prescribed for attorney representation of employees. Employer attorney's fees are subject to the same limitations as to maximum fees at each level except that fees for representation before administrative law judges shall not exceed ten thousand dollars (\$10,000) and fees for representation before arbitrators shall not exceed two thousand dollars (\$2,000). Fees for representing employers shall not be dependent upon the result achieved.

As enacted effective December 12, 1996, KRS 342.0015

stated, in pertinent part, as follows:

Procedural provisions of [the 1996 Act], shall apply to all claims irrespective of the date of injury or last exposure, including, but not exclusively, the mechanisms by which

claims are decided The provisions of
KRS . . . 342.320 . . . are remedial.¹

Thompson and Collett make a wide-ranging constitutional argument that KRS 342.320 is arbitrary and capricious, but they fail to cite any particular section of the Constitution which has been violated. They claim in their brief that KRS 342.320 (a) "deprives injured workers access to attorneys because of the diminution of attorney's fees and allows non-attorneys to represent injured workers with no constraints upon the fees that they may charge the claimant in that the statute refers only to 'attorney fees'"; (b) the cap should be considered substantive and not procedural; and (c) the cap "violates the attorney's right to contract without due process and in this instance, required [Collett] to handle and process a claim, a portion of which he was denied compensation for; denying [Collett] the discretion as to whether he wished to provide a portion of his services on a pro bono basis." Having concluded that the statute is constitutional, we affirm the award of an attorney's fee of \$2,000.00.

In support of their argument that KRS 342.230 "deprives injured workers access to attorneys because of the diminution of attorney's fees and allows non-attorneys to represent injured workers with no constraints upon the fees that they may charge the claimant in that the statute refers only to "attorney fees,"

¹In the 2000 legislative session, House Bill 992 was enacted. It eliminated the arbitrator level of adjudication and authorized an attorney's fee of up to \$12,000.00 for representation before an ALJ. Thus, the \$2,000.00 limitation which is presently at issue only applied from December 12, 1996, until July 14, 2000, the effective date of the 2000 amendments.

Thompson and Collett argue that "[w]hen this [\$2,000.00] cap was considered by [the] Legislature . . . it was taken into consideration that the proposed amendments to the Act would take into account the fact that the Special Fund would be eliminated from claims in the future as prior non-disabling conditions brought into disabling reality by an injury would no longer be considered in the disability process." They argue that since the Special Fund was a defendant in this case, Collett's representation included obtaining a settlement from the Special Fund, whereby Collett's representation became involuntarily, pro bono representation.

As our Supreme Court observed in the recent case of Daub v. Baker Concrete,² which addressed the constitutionality of the 1996 amendments to KRS 342.320(2)(a):

Workers' compensation is a legislative, not a common law remedy. The legislature has set limits on the type and amount of benefits which a worker may receive and, likewise, has set limits on the amount of the attorney's fee which the worker will be required to pay. Participation in the legislative remedy offered by the Workers' Compensation Act is voluntary, and those workers who choose to pursue that remedy must come within the provisions of the Act. . . . We are not persuaded that KRS 342.320 represents an unconstitutional interference in the attorney-client relationship with regard to a workers' compensation claim."³

When enacting the amendments in 1996 to the provisions authorizing attorney's fees, the Legislature recognized that there would be old Act claims that would be governed under the

²Ky., 25 S.W.3d 124 (2000).

³Id. at 128.

new procedures codified by the amended KRS 342.320. The Legislature specifically addressed these situations by enacting KRS 342.320(2)(d), which allows the former attorney's fee provisions to apply to those representation contracts entered into before December 12, 1996. The representation contract entered into on August 21, 1998, between Thompson and Collett simply does not come within the saving provision of KRS 342.320(2)(d). The Supreme Court in Daub emphasized the necessity for a claimant to come within the provisions of the Act in order to benefit from its remedies. Certainly, the fact that the representation contract between Thompson and Collett did not meet the requirement necessary to come under KRS 342.320(2)(d) does not render that section of the statute unconstitutional.

Thompson and Collett next argue that the \$2,000.00 attorney's fee cap should be considered substantive law and not procedural law; and that "[t]he date of the injury should control instead of the date of the contractual agreement as per all the previous decisions on attorney fees." However, the Supreme Court in Daub characterized the changes in KRS 342.320 as procedural, when it stated "the procedural changes which were enacted in 1996 were an apparent attempt to expedite the resolution of workers' compensation claims. . ." [emphasis added].⁴ Furthermore, even if this Court were convinced that the changes should be considered substantive in nature, there was no violation of Thompson's and Collett's substantive due process rights. To show that their substantive due process rights were violated by this

⁴Daub, supra at 127.

Legislative enactment, which does not involve a fundamental right, Thompson and Collett must establish that the statute is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."⁵ Thompson and Collett have failed to identify any rights, fundamental or otherwise, which KRS 342.320 violates; and our Supreme Court in Daub held the statute to not be clearly arbitrary or unreasonable. The Daub Court declared that the statute was rationally related to the objective of "expedit[ing] the resolution of workers' compensation claims."⁶

Thompson and Collett in their final argument claim the \$2,000.00 attorney's fee cap "violates the attorney's right to contract without due process and in this instance, required [Collett] to handle and process a claim, a portion of which he was denied compensation for; denying [Collett] the discretion as to whether he wished to provide a portion of his services on a pro bono basis." We, once again, find Daub to be dispositive of this issue. In Daub and in case sub judice, the representation contract between the claimant and his attorney were entered into after the amendments to the attorney's fee scheme was enacted by the Legislature on December 12, 1996. As the Supreme Court pointed out in Daub:

The attorney asserts that he had a vested right to be compensated at the rate on the

⁵Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926) (citing Cusack Co. v. City of Chicago, 242 U.S. 526, 530-31, 37 S.Ct. 190, 192, 61 L.Ed. 472 (1917); and Jacobson v. Mass, 197 U.S. 11, 30-31, 25 S.Ct. 358, 49 L.Ed. 643 (1905)).

⁶Daub, supra.

date of injury, as provided in the 1994 Act; however, he does not explain how that right vested before December 12, 1996, when the representation was not undertaken until months later. Likewise, he does not explain how the amendment could impair a contract which did not exist until after the amendment was enacted.⁷

Similarly, Thompson and Collett have failed to explain how a right to an attorney's fee award provided for prior to December 12, 1996, could have vested in a representation contract which did not come into existence until 1998, nor do they explain how the amended Act impairs a contract which did not exist until after the amendment was enacted.

Having concluded that KRS 342.320 (2) (a) is constitutional, the opinion of the Board awarding an attorney's fee of \$2,000.00 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Edmond Collett
Hyden, KY

BRIEF FOR APPELLEE, SPECIAL
FUND:

Joel D. Zakem
Frankfort, KY

⁷Id. at 129.