

RENDERED: November 26, 1997; 2:00 p.m.
TO BE PUBLISHED

NO. 96-CA-002908-WC

HON. ROBERT E. SPURLIN, DIRECTOR
of the SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-013017

GERALD PAYNE; W. R. GRACE & COMPANY;
HON. DONNA H. TERRY, CHIEF ADMINISTRATIVE
LAW JUDGE; and, WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: WILHOIT, CHIEF JUDGE;¹ COMBS, and JOHNSON, JUDGES.

JOHNSON, JUDGE: The Special Fund has petitioned this Court for review of an opinion of the Workers' Compensation Board (Board) rendered on September 27, 1996, which affirmed the order of the Chief Administrative Law Judge (CALJ) which required the Special Fund to advance the entire attorney's fee from its portion of the

¹ Chief Judge Wilhoit concurred in this Opinion prior to his retirement effective November 15, 1997. Release of this Opinion was delayed by administrative handling.

award of disability benefits made to the appellee, Gerald Payne (Payne). Finding no error, we affirm.

The facts in this case are not in dispute. On March 24, 1990, Payne, an employee in the maintenance department of W. R. Grace & Company (Grace), sustained an injury to his back while lifting a 100-pound motor. He was not able to work after December 1990. Grace voluntarily paid temporary total disability benefits (TTD) to Payne from December 1990, until the pre-hearing conference in April 1993, for a total of nearly \$41,000. On July 31, 1995, the CALJ rendered her opinion and order in which she found Payne to be occupationally disabled due to the back injury of March 1990, and its arousal of a preexisting dormant disc disease and osteoporosis into disabling reality. She ordered that responsibility for the occupational disability be apportioned equally between Grace and the Special Fund. She further determined that Payne was entitled to TTD from December 1990, until December 3, 1991, the date Payne should have been able to return to work but for a non-work related progressive disease, osteopenia/osteoporosis. Thus, Grace had voluntarily paid Payne TTD for an approximate sixteen-month period for which he was not entitled.

On January 30, 1996, Payne's counsel filed an affidavit and motion in which he sought approval of an attorney's fee of \$7,564.77. Attached to the motion was a Standard Form for Attorney Fee Election (Form 109), executed by Payne, indicating that he wanted his attorney to be paid in a "lump sum" and to

have his "weekly benefits equally reduced until the defendants have recouped the amount of my attorney's fee." Grace objected to the motion. Although it did not dispute counsel's entitlement to the fee, the employer contended that the Special Fund should be responsible for the entire fee since due to the overpayment of TTD it had already paid Payne \$9,586.44 more than the total amount for which it was determined to be liable under the terms of the CALJ's award. By an order dated March 14, 1996, the CALJ approved the fee sought and ordered Grace and the Special Fund to pay one-half of the amount to Payne's counsel.

Grace petitioned the CALJ for reconsideration and reiterated that because it had overpaid Payne, it owed no weekly benefits from which it could recoup the attorney's fee. Neither the Special Fund nor Payne responded to the motion. On May 8, 1996, the CALJ entered the following order: "In order to prevent overpayment of the award, IT IS HEREBY ORDERED that the entire attorney fee shall be deducted from the Special Fund's portion of the award, as it appears that the defendant-employer's portion has already been satisfied."

Both the Special Fund and Payne² appealed to the Board. The Special Fund argued, as it does in this Court, that a defendant may be required to advance only so much of an attorney's fee as is commensurate with that defendant's percentage of liability for the disability award. The Special

²Payne has not pursued an appeal in this Court.

Fund relied on A & K Coal Company v. Blankenship, Ky., 708 S.W.2d 638 (1986), which stated as follows:

Since the sole purpose of the statute [Kentucky Revised Statutes (KRS) 342.320] is to benefit the claimant in allowing him to satisfy his present debt to his attorney for representation in the case, we find it anomalous to saddle either the Special Fund or the employer with the sole responsibility for payment of that fee. We conclude therefore that the attorney's fee is the joint responsibility of the Special Fund and the employer in such a case and that they should pay a portion of the fee in relation to their respective responsibility for the employee's disability.

Id. at 640 (emphasis original). In affirming the CALJ, the Board rejected the Special Fund's argument that Blankenship was controlling and stated that "[o]ther policy considerations must be utilized" in analyzing the issue vis-a-vis an overpayment by the employer. The Board stated as follows:

A policy wholly supported within our workers' compensation system is that an employer will make timely voluntary TTD benefit[s] to a claimant who has been injured and timely hassle-free medical payments as a result of treatment afforded to an injured employee. Here, W. R. Grace paid voluntary payments until the date of the pre-hearing conference which amounted to a sum more than \$9,000.00 beyond what ultimately was awarded against W. R. Grace by the CALJ. The position taken by Payne and the Special Fund is that W. R. Grace should now make an additional payment of \$3,782.00 in order to satisfy its proportionate obligation in the award of attorney's fees.

. . . .

Under the circumstances presented in this case, the CALJ concluded that, based upon the overpayment by W. R. Grace to Payne, that a fair resolution within KRS 342.320 required the Special Fund to pay the entirety of the attorney fee. We believe that was within the CALJ's discretionary authority based upon the factual situation the CALJ then confronted.

The sole issue in this appeal is whether the Special Fund should be required to advance the entire attorney's fee when the employer has totally satisfied its liability to a claimant by its voluntary payment of TTD. Prior to 1987, KRS 342.320(2) provided that the attorney's fee would be paid in a lump sum which was taken from the last payments due under the award. In 1987, the Legislature made significant changes in our workers' compensation laws, including an amendment to KRS 342.320(2),³ which gave claimants various options for paying their attorney as follows:

(a) The entire attorney's fee in a lump sum shall be paid directly to the attorney of record and the administrative law judge shall order the payment of same, commuting sufficient [amount] of the final payments of compensation payable under the award to a lump sum for that purpose; or

(b) The claimant may pay the attorney's fee out of his personal funds; or

(c) The administrative law judge upon request of the claimant, may order

³The Legislature made further changes to this statute in 1996, though none relevant to this appeal. The options for payment of attorney's fees are now located at KRS 342.320(4). The options contained in subsections (b) and (c) above are essentially unchanged, but the option in KRS 342.320(2)(a) is no longer available.

the payment of the attorney's fee in a lump sum directly to the attorney of record and deduct the attorney's fee from the weekly benefits payable to the claimant in equal installments over the duration of the award or until the attorney's fee has been paid.

There have been no published cases that deal with the proportionality rule mandated by Blankenship since KRS 342.320(2)(c), the amendment providing for the option chosen by Payne, became available to claimants. However, we are aware, as was the Board, of some unpublished decisions of our Supreme Court that hold, in the context of a settlement between the employer and the claimant, that the 1987 changes to KRS 342.420(2), have no impact on the viability of the proportionality rule in Blankenship. Those cases reason that the Legislature did not intend, by providing options for payment of the attorney's fee, to give a claimant the ability to alter the Special Fund's obligation to advance more than its share of the attorney's fee.

We agree with the Board that these decisions, even if published, are not controlling under the circumstances presented in this case. The reason that the Special Fund is required to advance the entire fee is not attributable to the manipulation of KRS 342.320(2) to the advantage of either Payne or Grace, but is the result of the employer's voluntary payment of TTD in an amount exceeding its liability to the claimant. Clearly, Blankenship does not contemplate the circumstances that exist in this case.

The Special Fund argues that "by forcing the Special Fund to pay the entire fee, the ALJ has made the Special Fund bear responsibility for the employer's share of the attorney fee." This argument is misleading as neither defendant bears responsibility for the attorney fee. The fee is advanced and then recouped from benefits which would otherwise be paid to the claimant under the award. KRS 342.320(2). If the Special Fund should prevail, Grace would be out-of-pocket \$3,782, without the means of recouping any of that sum. The Special Fund, on the other hand, can advance the entire attorney fee and recoup 100% of it from the weekly benefits it owes Payne. All the Special Fund will lose is the interest on one-half the fee over the duration of the award.

We believe the solution reached by the CALJ and affirmed by the Board is the only one that comports with the policy of encouraging employers to pay TTD payments to their injured workers. As this Court stated in Western Casualty & Surety Company v. Adkins, Ky.App., 619 S.W.2d 502, 503-504 (1981), "the voluntary payment of compensation benefits during the pendency of proceedings before the Board is a matter of great importance to an injured worker and should not be discouraged." See also Triangle Insulation and Sheet Metal Company v. Stratemeyer, Ky., 782 S.W.2d 628 (1990). Thus, we hold that an employer who has made an overpayment of TTD should not be required to advance its portion of an attorney's fee when another

defendant is liable to the claimant and can recover the entire attorney's fee from the weekly benefits it owes the claimant.

Finally, the Special Fund argues in the alternative that the matter should be remanded to require Payne to pay Grace's portion of the attorney's fee from amounts he has already received from his employer. However, the Special Fund did not seek this remedy below, and accordingly, this question has not been preserved for consideration in this review.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. David R. Allen
Louisville, KY

BRIEF FOR APPELLEE, W. R.
Grace & Company:

Hon. William P. Swain
Hon. Walter E. Harding
Louisville, KY