

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002299-WC

WAYNE C. DAUB AND
FRED ELLER

APPELLANTS

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-73511

BAKER CONCRETE; SPECIAL FUND;
HON. BEN CHANDLER, ATTORNEY GENERAL;
WORKERS' COMPENSATION BOARD; AND
CHIEF ADMINISTRATIVE LAW JUDGE
DONNA H. TERRY; HON. MAHLIAN GRINSTEAD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: HUDDLESTON, JOHNSON AND MCANULTY, JUDGES.

JOHNSON, JUDGE: Fred Eller (Eller), the claimant, and Wayne C. Daub (Daub), his attorney, have petitioned this Court to review the final decision of the Kentucky Workers' Compensation Board (Board) which affirmed the Administrative Law Judge's (ALJ) decision to award an attorney's fee of \$2,000.00. Daub and Eller contend that the ALJ erred in ruling the attorney's fee was limited to \$2,000.00 pursuant to the provisions of Kentucky Revised Statutes (KRS) 342.320(2)(a)(4), amended effective

December 12, 1996. Daub and Eller also challenge the constitutionality of KRS 342.320. We affirm the award of attorney's fees and hold KRS 342.320 to be constitutional.

The material facts are as follows. Attorney Daub contracted on June 23, 1997, with Eller to represent him concerning his claim for workers' compensation benefits due from injuries sustained on May 13, 1996. Eller was found by the arbitrator to be 100% occupationally disabled, with 70% of the responsibility for the loss attributable to the employer and 30% to the Special Fund. The total award to Eller was approximately \$295,765.70. After the award was final, Daub moved the arbitrator to approve an attorney's fee in the amount of \$15,000.00. The arbitrator applied the \$2,000.00 maximum to the attorney's fee award pursuant to KRS 342.320, as amended on December 12, 1996. Upon appeal to Chief Administrative Law Judge Donna H. Terry (CALJ), she found as follows:

Upon review pursuant to KRS 342.320, it is apparent that there was a high quality of legal skill and service rendered in this case, and that a substantial amount of work was required in undertaking representation following withdrawal by other counsel. Consideration of the nature, scope, and quality of legal services in conjunction with a recognition that the fee was contingent in nature and no fee would have been payable in the event that an award had not been rendered, lead to a conclusion that a very substantial attorney fee should be awarded herein. The agreement between Eller and Daub executed on June 23, 1997 provided that Daub would receive a fee in accordance with the following schedule 20% of the first \$25,000.00, 15% of the next \$10,000.00, and 5% of the remainder recovered in past and future benefits.

On December 12, 1996, KRS 342.320 was amended to provide for a maximum attorney fee of 20% of the award, not to exceed \$2,000.00, for services performed up to and including the date of a written benefit review determination by an Arbitrator. KRS 342.320(2)(a). Further, the statute was amended to provide that any contract for the payment of attorney fees otherwise than as provided in the statute would be void.

Daub seeks payment of an attorney fee of \$15,000.00 under the contract executed on June 23, 1997. However, the undersigned Administrative Law Judge is constrained by the provisions of KRS 342.320(2)(a) and (4) to award a maximum fee of \$2,000.00 for services [sic] rendered before the Arbitrator. Daub has propounded a constitutional argument against the amended provisions hereinabove [sic]. However, an Administrative Law Judge is without authority to render decisions on the constitutionality of a legislative provision. Any issue relating to the constitutionality of a statute is reserved for Courts of Justice. Blue Diamond Coal Company v. Cornett, Ky., 189 S.W.2d 963 (1945); Kentucky Alcohol Beverage Control Board v. Jacobs, Ky., 269 S.W.2d 189 (1954). The undersigned therefore declines to rule on the constitutional issue raised by the parties.

On appeal to the Board, Daub and Eller continued to argue that the attorney's fee limitation of KRS 342.320, as amended by the 1996 Extraordinary Session of the Kentucky General Assembly, was unconstitutional. The Board ruled, similar to the CALJ below, that "[a]s an administrative body, the Board is powerless to rule on the constitutionality of a statute." This petition for review followed.

Daub and Eller first argue that Daub's attorney's fee claim is not limited by the \$2,000.00 maximum that became effective on December 16, 1996. They rely upon Hamilton v. Desparado Fuels, Inc., Ky., 868 S.W.2d 95 (1993), and note the

general rule that the allowance of attorney's fees is governed by the law in existence at the time of the injury. In this case, Eller's injury occurred on May 13, 1996.

In Hamilton, the Supreme Court stated as follows:

[W]e believe that what constitutes an authorized attorney's fee for prosecuting a claim for those particular benefits also should be determined by the law in effect on the date of the injury. A contract that provides otherwise is void. KRS 342.320(2).

KRS 446.080(1) provides that statutes are to be liberally construed in order to promote their objectives and the legislative intent, and KRS 446.080(3) provides that no statute is to be applied retroactively absent an express legislative directive. In Peach v. 21 Brands Distillery, Ky.App., 580 S.W.2d 235 (1979), the court emphasized that the rule against the retroactive application of statutes should be strictly construed. Particularly where a statute creates new rights or duties, it should be presumed that the legislature intended for the statute's application to be prospective only. The 1990 amendment to KRS 342.320(1) exposes injured workers to liability for substantially greater attorney's fees in relation to the size of their awards than was authorized at the time the maximum amount of the award was fixed. We find no indication, whatever, that the legislature intended for the 1990 amendment to KRS 342.320 to apply retrospectively to awards of attorney's fees relative to injuries which occurred before its effective date.

Id. at 97. However, Hamilton is easily distinguishable from the case sub judice since the amendment that became effective on December 12, 1996, specifically stated that "[t]he provisions of . . . 342.320 . . . are remedial."

Where the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written. Griffin v. City of

Bowling Green, Ky., 458 S.W.2d 456 (1970).
An unambiguous statute must be applied
without resort to any outside aids. Delta
Airlines, Inc. v. Commonwealth of Kentucky,
Revenue Cabinet, Ky., 689 S.W.2d 14 (1985).

Lincoln County Fiscal Court v. Dept. Of Public Advocacy, Ky., 794
S.W.2d 162, 163 (1990). "We have a duty to accord to words of a
statute their literal meaning unless to do so would lead to an
absurd or wholly unreasonable conclusion." Bailey v. Reeves,
Ky., 662 S.W.2d 832, 834 (1984), (citing Department of Revenue v.
Greyhound Corporation, Ky., 321 S.W.2d 60 (1959)).

In Napier v. Scotia Coal Company, Ky., 874 S.W.2d 377
(1993), the Supreme Court held that since the 1988 amendments to
KRS 342.320 were "remedial," they were to apply not only
prospectively to those claims that arose after the effective date
of the amendment, but also retrospectively to those claims that
arose before its effective date. Based on Napier, supra, and the
remedial language in KRS 342.320, we believe that the December
12, 1996 amendments apply retrospectively to Daub's claim for
attorney's fees, thereby limiting those attorney's fees to
\$2,000.00, even though Eller's injury occurred before the
effective date of the amendments.

Furthermore, and of equal importance, is the language
in the amended KRS 342.320 concerning the date of the contract.
KRS 342.320 states in pertinent part as follows:

(1) All fees of attorneys and physicians,
and all charges of hospitals under this
chapter, shall be subject to the approval of
an administrative law judge or arbitrator
pursuant to the statutes and administrative
regulations.

(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.

(b) Upon an appeal by an employee from a written determination of an arbitrator or an award or order of an administrative law judge, a fee to be fixed by the administrative law judge upon consideration of the extent, quality, and complexity of services not to exceed twenty percent (20%) of the first twenty-five thousand dollars (\$25,000) of any increased income benefits awarded, ten percent (10%) of the next fifteen thousand dollars (\$15,000) of increased income benefits, and five percent (5%) of the remainder of the additional income benefits awarded and not to exceed in all ten thousand dollars (\$10,000). This fee shall be paid by the employee from the proceeds of the award or settlement and shall be in addition to the fee, if any, awarded under paragraph (a) of this subsection.

(c) Upon an appeal by an employer or carrier from a written determination of an arbitrator or an award or order of an administrative law judge, if the employer or carrier does not prevail upon appeal, the administrative law judge shall fix an attorney's fee to be paid by the employer or carrier for the employee's attorney upon consideration of the extent, quality, and complexity of the services rendered not to exceed five thousand dollars (\$5,000) per level of appeal. This attorney's fee shall be in addition to any fee awarded under paragraphs (a) and (b) of this subsection.

(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 paragraphs (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 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 [emphases added].

The language in subsection (2)(d) of the statute clearly provides that for the \$2,000.00 limit not to apply to a contract, the "[a]ttorney-client employment contract[] [must have been] entered into and signed prior to December 12, 1996, for injuries or date of last exposure occurring prior to December 12, 1996." For emphasis, subsection (4) of the statute further provides that "any contract for the payment of attorney's fees otherwise than as provided in this section shall be void." While Eller's date of injury was before the effective date of the amendment, the employment contract was entered into after the effective date of the amendment. Therefore, Daub's attorney's fee claim fails to meet the requirements of the amended statute and is limited to \$2,000.00.

In the alternative, Daub and Eller argue that KRS 342.320 is an unconstitutional attempt by the Legislature to encroach upon the authority of the Supreme Court of Kentucky by regulating and disciplining attorneys for charging and receiving payment of fees in excess of the limits imposed by statute. The Kentucky Workers' Compensation Act (the Act) is a mechanism provided by the Legislature as an option for a worker in this Commonwealth to pursue a claim for benefits for an injury arising out of his employment. Before the injury occurs, the worker can choose to reject coverage under the Act. If a worker rejects coverage under the Act, then he retains his common-law tort rights. See KRS 342.395.

We do not believe KRS 342.320 to be an unconstitutional regulation of the legal profession or of fees charged by attorneys, but believe that it is an option provided by the Legislature for workers. If a worker chooses to participate in the legislative remedy, then his participation necessarily must be within the parameters set forth by the Legislature. Therefore, the cases cited by Daub and Eller Foster v. Overstreet, Ky., 905 S.W.2d 504 (1995), Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995), Ex Parte Auditor of Public Accounts, Ky., 609 S.W.2d 682 (1980), and American Insurance Ass'n v. Kentucky Bar Ass'n, Ky., 917 S.W.2d 568 (1996), to the extent that they prohibit encroachment on the powers of the Supreme Court, are inapplicable here. We hold that KRS 342.320 is not an

unconstitutional interference with the attorney-client relationship.

Daub and Eller also contend that KRS 342.320 violates Sections 2, 14, 19, 28, 29, 109, and 116 of the Kentucky Constitution and Article 1, § 10 of the United States Constitution on the grounds that it is arbitrary and capricious. In deciding whether an act of the General Assembly is unconstitutional, we necessarily begin with the strong presumption in favor of constitutionality. United Dry Forces v. Lewis, Ky., 619 S.W.2d 489, 493 (1981), and Sims v. Board of Education of Jefferson County, Ky., 290 S.W.2d 491, 493 (1956). In Estridge v. Stovall, Ky. App., 704 S.W.2d 653, 655 (1985), the Court stated:

A statutory classification in the area of social welfare is not unconstitutionally arbitrary if it has a legitimate objective and it is rationally related to that objective. Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971). The constitutional protections of due process or equal protection are offended "only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective." Kentucky Association of Chiropractors, Inc., v. Jefferson County Medical Society, Ky., 549 S.W.2d 817 (1977).

The purpose of KRS 342.320 "is to benefit the claimant in allowing him to satisfy his present debt to his attorney for representation in the case." A & K Coal Company v. Blankenship, Ky., 708 S.W.2d 638 (1986). This is a legitimate state objective and we believe KRS 342.320 is rationally related to that purpose. As such, we hold that KRS 342.320 is constitutional. We are also persuaded by the fact that the United States Supreme Court has

held constitutional a federal statute limiting to \$10.00 the fee that may be paid to an attorney or agent who represents a veteran seeking benefits for service-connected death or disability.

Walters v. National Association of Radiation Survivors, 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). The opinion of the Board is affirmed.

HUDDLESTON, JUDGE, CONCURS.

MCANULTY, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

MCANULTY, JUDGE, CONCURRING: Although I agree with the result reached by the majority, I must take exception to the majority's contention that the United States Supreme Court's decision in Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985), is persuasive in this case. This is an inappropriate analogy for several reasons.

In Walters, the Supreme Court upheld a federal statute limiting to \$10.00 the fee for an attorney or agent who assists a veteran seeking benefits for service-connected death or disability. The Court stressed that this process is intended to be both informal and nonadversarial. Id. at 323. There is no formal questioning or cross-examination and there are no formal evidentiary rules. Id. at 311. The liberal appeals process is structured so that veterans have up to one year to perfect their appeal. Id. By limiting the amount an attorney can recover, the fee reflects a government interest:

that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the

employment of an attorney to obtain benefits to which a claimant was entitled. . .

Id. at 321. In fact, the Court refers to VA statistics showing that only two percent of claimants are represented by lawyers.

Id. at 311.

On the other hand, workers' compensation involves a more extensive and formalized procedure. Upon filing a claim, an employee is responsible for initiating discovery, drafting motions, and preparing for a prehearing conference. 803 KAR 25:011 §§ 4-8. The actual hearing may include witness testimony, cross-examination, and opening and closing statements. See id. § 10. In addition, the employee must file his petition for reconsideration within 14 days and any appeal within 30 days. See id. §§ 11-12. The procedures behind the workers' compensation system generate a necessity for attorneys and it is not reasonable to suggest that employees could obtain equitable relief without active representation. Employees inevitably benefit from an attorney's knowledge and assistance.

The procedures available to employees and veterans can certainly be distinguished and therefore the justification for the fee limitations is not the same. The reasoning behind Walters is irrelevant to the case at hand.

Apart from the aforementioned, I find this Court's reasoning to be legally sound and concur with the result.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS:

Hon. Wayne C. Daub
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, SPECIAL FUND:

Hon. David R. Allen
Louisville, KY

