

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002649-WC

DIANNA GAMBRELL AND  
GREGORY N. SCHABELL

APPELLANTS

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-97-77761

LEVI STRAUSS AND CO.;  
SPECIAL FUND; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

MILLER, JUDGE: Dianna Gambrell and Honorable Gregory N. Schabell ask us to review a decision of the Workers' Compensation Board rendered October 1, 1999. Kentucky Revised Statutes (KRS) 342.290. We affirm.

Gambrell sustained work related injuries on May 22, 1996, and November 4, 1996. On June 11, 1997, Gambrell entered into a contract with Schabell to represent her in a claim for income benefits under the Workers' Compensation Act. KRS Chapter

342. On January 15, 1999, the arbitrator awarded Gambrell \$23,761.75. No appeal was taken.

Schabell filed a motion for \$4,752.35 in attorney fees on March 19, 1999. On March 23, 1999, the arbitrator ordered attorney fees of \$2,000 pursuant to KRS 342.320(2)(a). The chief administrative law judge (CALJ) affirmed said award on June 23, 1999. Finally, the board affirmed the CALJ on October 1, 1999. This appeal followed.

At issue is the 1996 amendment to KRS 342.320 (the amendment) which became effective on December 12, 1996. The amendment limits attorney's fee awards as follows: 1) to \$2,000 for services performed prior to an arbitrator's written determination by an arbitrator, 2) to \$10,000 for services performed on appeal from an arbitrator's written determination or an award or order of an administrative law judge (ALJ); and, 3) to an additional \$5,000 upon an unsuccessful appeal by an employer or insurance carrier.

Gambrell and Schabell first assert the amendment is not remedial and should not have been applied retroactively to Schabell's attorney fee award. They argue the law in effect on the date of injury governs the allowance of attorney's fees. Gambrell's injuries occurred in May, 1996, and November, 1996. As such, they maintain the ALJ erred by applying the \$2,000 cap which became effective subsequent thereto. We disagree and adopt the following portion of the board's opinion:

The general rule is that the law in effect on the date of the injury is controlling unless there is a specific legislative mandate that it be applied retroactively. Maggard vs.

International Harvester Co., Ky., 508 SW2d 777 (1974). The Legislature identified the provisions of the 1996 Act in KRS 342.0015 that were to be applied remedially. KRS 342.320 was listed as one of those provisions. KRS 446.080 provides that a statute is not to be construed as retroactive unless so specified. The distinction between a purely retroactive statute and a remedial statute is significant. If a statute is identified as remedial or if it is construed as remedial, we must consider whether a vested right has been impaired.

We have recognized that remedial does not automatically equate to retroactive. While a remedial statute may be applied retroactively, if it impairs a vested right, it may not be so applied. Conversely, if a statute is identified as intended to be retroactive, presumably barring a constitutional issue, it shall be so applied.

We do not believe the analysis of the case law addressing attorney fees would support a finding that a vested right has been impaired pursuant to KRS 342.320. The court in Rye vs. Conkright, Ky., 311 SW2d 796 (1958) concluded that the actual vested right of the attorney did not come into being until the date of the award. Subsequent determinations in Hamilton vs. Desparado Fuels, Inc., Ky., 868 SW2d 95 (1993); Napier vs. Scotia Coal Co., Ky., 874 SW2d 377 (1993); Datsun [sic] vs. Southern Hills Coal Co., Ky., 896 SW2d 610 (1995); and Windchy vs. Friend, Ky., 920 SW2d 57 (1996) have further clarified this issue. The Legislature recognized this confusion and established the date of contract as controlling the attorney fee and the applicable statute.

As pointed out by the CALJ below, the clear and specific language of KRS 342.320(2)(a) is controlling in this claim. Gambrel [sic] and Schabell entered into an attorney fee contract after the effective date of the amendments. By the express provisions of KRS 342.0015 and KRS 342.320, the 1996 Act as amended dictates that for injuries occurring prior to December 12, 1996, unless there exists an attorney/client contract entered into and signed prior to

that date, the new law limitation on fees must apply. The statute as it now exists limits Schabell's attorney fee to \$2,000 before the Arbitrator. That is the fee that was awarded herein.

Gambrell and Schabell next claim the amendment encroaches upon the authority of the Kentucky Supreme Court. They aver it "regulat[es] and disciplin[es] attorneys for charging and receiving payment of fees in excess of the limits imposed by statute." Such power, they assert, is reserved for the Supreme Court under Section 116 of the Kentucky Constitution. We disagree. Section 116 reads as follows:

The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

The foregoing provision is the basis of the Supreme Court's supervisory powers over the judiciary and members of the bar. We fail to see how a limitation on attorney's fees imposed by the legislature in workers' compensation cases is an infringement upon said powers. Gambrell and Schabell have offered little guidance, and we are unable to find any supporting authority. We, therefore, view this contention as being without merit.

Last, Gambrell and Schabell make a general assortment of unsupported allegations pertaining to the constitutionality of the amendment. We perceive them, likewise, to be without merit. We believe it is generally within the legislature's power to

place limitations upon attorney's fees incident to social legislation, such as the Workers' Compensation Act.

We have reviewed the record and contentions of Gambrell and Schabell, and are of the opinion the board did not err. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

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

ALL CONCUR.

BRIEF FOR APPELLANTS:

Gregory N. Schabell  
Florence Kentucky

BRIEF FOR APPELLEE, SPECIAL  
FUND:

Joel D. Zakem  
Frankfort, Kentucky

NO BRIEF FILED BY APPELLEE,  
LEVI STRAUSS AND CO.