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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002644-WC

GREGORY N. SCHABELL APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-00771

LEVI STRAUSS & COMPANY; MICHELLE PRUITT; ROBERT L. WHITAKER, DIRECTOR OF SPECIAL FUND; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM & MILLER, JUDGES.

BARBER, JUDGE: This is a workers' compensation case. The issue on appeal is whether KRS 342.320(1)(a), as amended effective December 12, 1996, limiting attorney fees to $2,000.00 applies where the date of injury was prior to December 12, 1996, and where the attorney was retained after December 12, 1996.

The facts are not in dispute. The injury dates are June 19, 1996 and sometime in September 1996. The claimant retained the appellant's, Gregory N. Schabell (Schabell) services

on February 15, 1997. The fee awarded was limited to $2,000.00 under KRS 342.320(1)(a), as amended effective December 12, 1996. Schabell, the claimant's former attorney, contends that: (1) the amended version of KRS 342.320(1)(a)[1] does not apply because the law on the date of injury controls; and (2) the statute is unconstitutional.

The issues raised on this appeal were very recently resolved by the Kentucky Supreme Court in Daub v. Baker Concrete, Ky., 25 S.W.3d 124 (2000). The Court held that the amended version of the statute applies to attorney fee contracts entered into and signed after December 12, 1996:

> KRS 342.0015 made it clear that the legislature intended for the changes in the procedure by which claims were decided to apply to all claims pending on or after December 12, 1996, without regard to the date upon which they arose. KRS 342.0015 also made it clear that the legislature considered the amendments to KRS 342.320 to be remedial. In view of the legislature's express declaration, we conclude that the amendments to KRS 342.320 apply to all claims pending on or after December 12, 1996. KRS 342.320(2)(d) specifically addresses claims which arose before December 12, 1996, and, therefore, we conclude that it takes precedence over the more general provision of KRS 342.320(3) with regard to such claims. [citations omitted]. KRS 342.320(2)(d) explicitly provides that attorney-client employment contracts entered into and signed before December 12, 1996, shall not be subject to paragraph (a) of KRS

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[1] House Bill 992 eliminated the arbitrator level of adjudication and authorized an attorney fee of up to $12,000 for representation before an ALJ. Thus, the $ 2,000.00 limitation which is presently at issue applied from December 12, 1996, until the effective date of the 2000 amendments.

> 342.320(2). By implication, KRS 342.320(2)(d) provides that attorney-client employment contracts entered into and signed after December 12, 1996, shall be subject to paragraph (a) of KRS 342.320(2).

The Supreme Court held that the statute did not impermissibly encroach upon its authority in violation of the separation of powers doctrine:

> The first constitutional argument raised by claimant and his attorney is that, to the extent that they regulate attorney fees and discipline attorneys for charging or receiving fees in excess of the statutory limitation, the 1996 amendments to KRS 342.320 represent an unconstitutional attempt by the legislature to encroach upon the Supreme Court's exclusive authority to regulate the practice of law. Ky. Const. §§ 28, 116; See also, Foster v. Overstreet, Ky., 905 S.W.2d 504, 506 (1995); O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571, 576 (1995); Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990); Ex Parte Auditor of Public Accounts, Ky., 609 S.W.2d 682, 684 (1980). Claimant and his attorney argue that the Court has adopted SCR 3.130-1.5, a specific rule which controls the amount and reasonableness of attorney fees, and has prohibited a third party from setting maximum attorney fees. They argue that the fee arrangement imposed by KRS 342.320 creates that same ethical problem as the set fee arrangements which were proposed by the insurance industry and declared unethical and void by this Court in American Insurance Association v. Kentucky Bar Association, Ky., 917 S.W.2d 568 (1996).
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> We begin by noting that the attorney fee which is presently at issue relates to a workers' compensation claim and not to a common law civil action. 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. For that reason, to the extent that they prohibit encroachment by the legislature on the powers of the Supreme Court with regard to attorney's fees, the cases cited by the appellants are inapplicable to the present facts. We are not persuaded that KRS 342.320 represents an unconstitutional interference in the attorney-client relationship with regard to a workers' compensation claim.

Schabell also contends that the statute is arbitrary, capricious and unconstitutional, because it sets the same $2,000.00 cap for attorneys who take a case on a contingent basis, as it does for attorneys who is paid hourly, regardless of outcome; deprives injured workers' access to "many attorneys"; and impairs the obligation of contracts. The Supreme Court addressed essentially the same arguments in Daub:

> [Appellant] . . . argue[s] that it is arbitrary and capricious for the same maximum to apply to the worker's attorney as to the employer's attorney in view of the fact that the claimant bears the burden of persuasion and the fact that his attorney's fee is contingent in nature. We would point out, however, that this argument ignores the fact that the pre-December 12, 1996, law which they seek to have applied placed no limit whatsoever on the fee paid to the employer's attorney and, following their rationale, would be even more arbitrary and capricious.
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> . . .
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> Any right which an attorney has to a fee accrues from the date upon which the worker and the attorney enter into a contract for the representation. It is undisputed that the attorney undertook the representation of the claimant . . . after the effective date of the 1996 amendments; therefore, no vested right was impaired by applying the limitations imposed by the 1996 amendments when determining the maximum attorney's fee. Although the 1996 amendments create two

> classes of attorneys who represent workers with regard to claims which arose before December 12, 1996, the classes are based on the date upon which the representation commenced, i.e., the date from which the attorney's right to a fee vested. Under those circumstances, we are not persuaded that applying the amendments to determine the maximum attorney's fee violated any constitutional right of this attorney.
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> [Appellant] does not explain how . . . [the client's] right to competent representation was impaired by the $ 2,000.00 limitation or how the limitation deprived him of a remedy, particularly in view of the fact that he was able to obtain competent counsel and was awarded benefits. . . .In return, he was required to pay a maximum attorney's fee which was substantially less than the maximum in effect on the date of injury. Under those circumstances, we are not persuaded that applying the amendments in order to determine the maximum attorney's fee violated any constitutional right of the claimant.

Therefore, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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