

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2006-CA-001325-WC

CHESTER BAKER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01514

UNICORN MINING;
HON. SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE;
AND THE WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

ABRAMSON, JUDGE: Kentucky Revised Statute (KRS) 342.732(1)(a) provides that coal miners who have contracted pneumoconiosis but who have not been disabled by the disease are eligible for an award of RIB's. To receive the benefits, the miner must "enroll[] and actively and successfully participat[e]" in a qualified retraining or general equivalency diploma (GED) program. Attorney's fees in RIB cases are calculated pursuant to 803 KAR 25:125, which limits the award of fees to those cases

in which the miner enrolls in a program and receives benefits. The attorney's fee is based on the number of weeks the miner remains in the program. If an eligible miner opts not to enroll in a qualified retraining or GED program within the limitations period, his eligibility for RIB's lapses and with it, under the regulation, his attorney's entitlement to a fee.

Pursuant to KRS 342.732(1)(a), in August 2003 an administrative law judge (ALJ) deemed Chester Baker, a career coal miner, eligible for RIB's. Baker did not seek retraining, however, and so his eligibility eventually lapsed with no payments having been made. Nevertheless, in August 2004, Baker's attorney, Johnnie Turner, successfully moved for a lump-sum attorney fee apparently based on what originally was Baker's potential award under the statute. The Kentucky Coal Workers' Pneumoconiosis Fund moved for reconsideration of that award on the ground that under the regulation Baker's waiver of RIB's precluded Turner's fee. The ALJ agreed that the fee award to Turner had been a mistake and rescinded it. Baker and Turner then appealed that decision to the Workers' Compensation Board, which, by order entered May 31, 2006, unanimously affirmed. The Board, relying on *Howard v. Peabody Coal Company*, 185 S.W.3d 165 (Ky. 2006), rejected Baker's contention that 803 KAR 25:125 conflicts with KRS 342.320, the statute providing for the payment of attorney's fees in workers' compensation cases, and

ruled that because Baker had received no RIB's from which an attorney fee could be deducted, Turner's fee request was properly denied.

Petitioning for review of that ruling, Baker merely reiterates his argument that because lump-sum attorney fees based on *disability* benefit awards that are to some extent still potential and undetermined are common under KRS 342.320, 803 KAR 25:125's preclusion of such lump-sum fees based on potential RIB awards is inconsistent with the statute. He has not, however, addressed *Howard v. Peabody Coal Company*, in which, as the Board correctly noted, the Supreme Court there addressed this very issue and rejected Baker's position. As the *Howard* court explained,

[a]lthough the present version of KRS 342.320(2)(a) bases the attorney's fee for a workers' compensation claim on the amount of the "award," it clearly requires the fee to be "paid by the employee from the proceeds of the award or settlement." . . . As a result, a worker who receives a RIB award must also demonstrate that he is entitled to receive benefits under the award for there to be a recovery or proceeds from which to determine the amount of an attorney's fee and from which to deduct the fee.

185 S.W.3d at 170.

Because Baker never enrolled in a training or GED program and so never became entitled to receive benefits under his RIB award, the ALJ and the Board correctly determined that

Turner never became entitled to an attorney fee. Accordingly,
we affirm the Board's May 31, 2006, order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Turner Landis
Johnnie L. Turner, P.S.C.
Harlan, Kentucky

BRIEF FOR APPELLEE:

Sarah K. McGuire
Jeffrey D. Damron
Baird & Baird, P.S.C.
Pikeville, Kentucky