

RENDERED: JUNE 17, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000814-WC

MARGIE MULLINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-98656

LEGGETT & PLATT; CCSMI;
HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Margie Mullins appeals from an opinion of the Workers'
Compensation Board affirming an order of the Administrative Law Judge (ALJ).

The ALJ concluded that Kentucky Revised Statutes (KRS) 342.320(4) and Kentucky Administrative 803 Regulation (KAR) 25:075(1) permit Mullins's employer's workers' compensation insurance carrier to reduce her permanent partial disability benefits to recoup the present day value of the lump sum payment of attorney fees. We affirm.

Mullins was injured on December 17, 2012, while acting within the course and scope of her employment with Leggett & Platt. With the assistance of counsel, Mullins settled her workers' compensation claim after negotiating with Leggett's workers' compensation carrier, CCMSI. Mullins agreed to accept a periodic (weekly) permanent partial disability payment of \$218.89 to be paid for 425 weeks with accrued back due benefits to be paid in a lump sum. The Form 110, Agreement as to Compensation and Order Approving Settlement, did not make any provision for an attorney fee to be paid to Mullins's counsel.

Following the approval of the settlement agreement by the ALJ, Mullins's counsel moved for and was awarded an attorney fee of \$9,401.41. In the Form 109, Attorney Fee Election, Mullins elected to pay the attorney fee in a lump sum with her remaining weekly permanent partial disability benefits to be reduced on a pro-rata basis.

On November 18, 2015, counsel received a cover letter and calculation sheet from CCMSI stating that it would take a credit for an "attorney fee discount" pursuant to 803 KAR 25:075. That regulation, entitled "Attorney fee discounts," provides as follows:

Employer's Calculation. For injuries occurring and disabilities arising on or after April 4, 1994, the employer or the insurance carrier making payment on behalf of the employer shall be entitled to credit for the lump sum value of any attorney's fee paid. The following formula shall be used:

(1) Employer weeks awarded - weeks paid = remaining weeks.

(2) R weeks = P weeks (present worth).

(3) EMP % Attorney fee / P weeks = Y rate.

(4) R weeks x Y rate = employer attorney fee and discount.

(5) EMP attorney fee and discount - EMP attorney fee = EMP discount.

(6) Weekly rate - Y rate = Employer reduced rate.

803 KAR 25:075 Section 1. Section 3 of the regulation provides that “the calculations set forth in Sections 1 and 2 of this administrative regulation shall be completed by the Division of Workers’ Compensation Funds and the results forwarded to the other payers, as well as to the plaintiff, when the plaintiff elects to repay an attorney's fee through the reduction of weekly benefits.”¹ *Id.* It further provides that the ALJ resolve “[a]ny disagreements as to the application of the formula [.]” *Id.*

Using the formula in the regulation, Mullins would receive \$191.36 per week over the 373 weeks remaining in the payment benefit period. Without the discount, Mullins’s payment would be \$193.69.

Mullins filed a “motion for determination” under 803 KAR 25:075 to preclude CCMSI from taking the discount. The ALJ denied the motion and, after

¹ Section 2 pertains to the calculation of an attorney fee discount when the Special Fund is involved.

her petition for reconsideration was denied, Mullins appealed to the Board. The Board affirmed and this appeal followed.

Mullins argues that KRS 342.320 does not authorize an attorney fee discount when benefits are paid periodically. The statute provides that the claimant is responsible for the payment of his or her attorney fees. KRS 342.320 (4). It further provides:

Except when the attorney's fee is to be paid by the employer or carrier, the attorney's fee shall be paid in one (1) of the following ways:

- (a) The employee may pay the attorney's fee out of his or her personal funds or from the proceeds of a lump-sum settlement; or
- (b) The administrative law judge, upon request of the employee, may order 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 employee in equal installments over the duration of the award or until the attorney's fee has been paid, commuting sufficient sums to pay the fee.

Id.

Mullins acknowledges that our Supreme Court has held an attorney fee discount was appropriate when an employer or its carrier pays a lump sum commuted from an award for payment of the claimant's attorney fee. *Hicks v. General Refectories Co.*, 405 S.W.2d 734 (Ky. 1966). She argues that decision was based on the now-repealed KRS 342.150, which authorized the Board to

commute payments at the end of the claimant's award to a present lump sum and a 5% discount for commuting a lump sum. Mullins argues the only statute that permits a present discount rate is KRS 342.265, which applies only to the lump-sum settlements of future periodic payments. The history of KRS 342.320 dispels Mullins's argument.

The version of KRS 342.320 considered in *Hicks* contained similar language to the current version proving that an attorney fee paid as lump sum shall be paid directly to the attorney "commuting sufficient sums of the final payments of compensation for that purpose." *Hicks*, 405 S.W.2d at 735 (internal quotations omitted). Like the current version, the statute did not specifically authorize an attorney fee discount. *Id.* However, the Court concluded the phrase "commuting sufficient sums" meant such a discount was authorized. As used in the statute, the Court concluded commute refers "to an exchange of a series of greater, future payments for a lesser, immediate payment." *Id.*

In addition to finding authority in the statutory language authorized the attorney fee discount, it also found the discount to be "economically sound." *Id.*

The Court reasoned as follows:

[U]nder the award General Refractories was entitled to the use of the money until it was due and payable to Hicks. To require General Refractories to prepay a portion of Hicks' compensation award without the allowance of a discount would have the effect of increasing the amount of the award, without the benefit of legislative sanction, to the extent that the payment exceeded the present value of the future payments.

Id.

As Mullins points out, the Court found a third reason for approving the discount. It stated: “KRS 342.150 provides that a lump sum award be discounted at 5% per annum. If Hicks’s award had been commuted to a lump sum and his attorney’s fee then paid from such sum, the financial effect on Hicks would be the same as what actually occurred.” *Id.* Mullins contends that after the repeal of KRS 342.150, the holding in *Hicks* that an attorney fee discount is authorized by statute is no longer the law. We disagree.

First, the *Hicks* Court did not exclusively rely on KRS 342.150. Rather, it primarily relied on the use of the word “commute” in KRS 342.320 and the economic sense of permitting the discount. The reference to KRS 342.150 was additional authority, not the sole authority. We conclude the subsequent case law and statutory amendments to the KRS 342.320, establish legislative approval of the attorney fee discount.

Two decades after *Hicks*, in 1987, KRS 342.320 was amended to provide as follows:

The administrative law judge, upon request of the claimant, may order 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.

Beale v. Wright, 801 S.W.2d 319, 321 (Ky. 1990).

In *Beale*, the Court addressed whether under that version of the statute, the Special Fund could discount a lump-sum payment of attorney fees. The Court held it could not. Unlike the version under which *Hicks* was decided, the statute no longer specifically categorized “the method under subsection (c) as a commutation[.]” *Id.* Noting that the use of the word “commute” was pivotal to the *Hicks* decision, the Court held:

By the 1987 legislative session, the 1966 judicial interpretation of ‘commute’ was long-standing. The statute, on its face, is clear, and there exists no provision for an attorney fee lump-sum payment discount under KRS 342.320(2)(c). If a discount is warranted in that instance, it is left to the legislature to so provide.

Id.

After the *Beale* decision, KRS 342.320 was again amended to include language that the fee may be deducted from the weekly benefits payable to the claimant in equal installments “commuting sufficient sums to pay the fee.” When the statute was amended in 1996, the phrase “commuting sums to pay the fee” was retained and remains in the current version. KRS 342.320(4)(b).

Mullins contends that even if an attorney fee discount is statutorily authorized, it may only be applied when the Special Fund shares liability. She argues that the phrase “except when the attorney’s fee is to be paid by the employer or carrier” added in the 1996 amendment and contained in the current KRS 342.320(4), limits the attorney fee discount to cases where the Special Fund shares liability. We disagree.

Mullins's reliance on the above quoted phrase is misplaced. With exceptions not applicable here, *see* KRS 342.040 and KRS 342.310, under the Workers' Compensation Act, the claimant is required to pay the attorney fee. Under the terms of the settlement agreement, Leggett or CCMSI was not obligated to pay the fee. Instead, when the fee was approved, Mullins chose to have her obligation to pay the fee satisfied from her future periodic benefits. Mullins, not her employer or its carrier, remained responsible for the attorney fee.

Moreover, when interpreting statutes, there are applicable rules of construction that must be applied. First, "[t]he legislature is presumed to be aware of existing laws when enacting a new statute." *Pearce v. Univ. of Louisville, by & through its Bd. of Trustees*, 448 S.W.3d 746, 760 (Ky. 2014). That presumption includes "judicial construction of prior enactments." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004). Therefore, we must presume that the legislature was aware of the holding in *Beale* when it amended KRS 342.320 in 1996 and returned the language "commuting sufficient sums to pay the fee" to authorize the attorney fee discount.

We are also guided by the rules that statutes are "presumed to be enacted for the furtherance of a purpose on the part of the legislature and should be construed so as to accomplish that end rather than to render them nugatory." *Reyes v. Hardin Cty.*, 55 S.W.3d 337, 342 (Ky. 2001) (quoting *Commonwealth ex rel. Martin v. Tom Moore Distillery Co.*, 287 Ky. 125, 152 S.W.2d 962, 967 (1939)). Because the 1996 amendments also abolished the Special Fund's liability for claims arising

after December 12, 1996, it would make little sense for the legislature to amend the attorney fee discount provision to limit its application to cases where the Special Fund is a party. KRS 342.120(2).

In a related argument, Mullins relies on the language in 803 KAR 25:075 Section 3 that directs the Special Fund to perform the calculations. Mullins also relies on 803 KAR 25:070 Section 1 which provides as follows: “A party defendant shall be entitled, without further order of the board, to credit for the lump sum value of any attorney’s fee paid.” Section 2 directs that the “Department of Labor, Office of Workers’ Claims, Division of Workers’ Compensation Funds, shall calculate the employer’s credit for attorney fees[.]” *Id.*

Although the regulations continue to reference the Special Fund, that language is now superfluous and outdated. The regulations cannot alter the plain wording of KRS 342.320(4), which permits the employer to take a discount for paying the lump sum attorney fee.

Mullins argues that even if the statutory and regulatory law permit an attorney fee discount, CCMSI could not withhold additional funds beyond what was agreed to in the settlement agreement. As the Board noted, “[t]hat argument cuts two ways, as the agreement contains no provision for the payment of attorney fees. Applying Mullins’s argument, any payment of the attorney fee would be in breach of the agreement[.]” Moreover, to not allow the discount would, in effect, increase the amount Mullins agreed to receive. *Hicks*, 405 S.W.2d at 735.

Mullins's final contention is that the ALJ was required to make the computation under 803 KAR 25:075. Again, we are not persuaded that the reference to the Division of Workers' Compensation Fund is relevant when the Special Fund is not involved. Even if there is merit to her argument, Mullins does not challenge the accuracy of the actual figure calculated by CCMSI under 803 KAR 25:075. CCMSI was entitled to take the discount for paying the attorney fee up-front under KRS 342.320. Moreover, the matter was submitted to and resolved by the ALJ. *Hicks*, 405 S.W.2d at 735.

Based on the foregoing, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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