

OPINION ENTERED: August 6, 2012

CLAIM NO. 200572577

FRANK FALKENSTEIN  
STEPHANIE N. WOLFINBARGER  
and TAMARA TODD COTTON

PETITIONERS

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE

WEST BRECK CORPORATION  
and HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART, AND REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

**STIVERS, Member.** Frank Falkenstein ("Falkenstein") and his counsel, Hon. Stephanie Wolfinbarger and Hon. Tamara Todd Cotton, ("Petitioners") seek review of the February 6, 2012, order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") setting aside his December 30, 2011, order

approving an attorney fee of \$3,884.39 and ordering "no fee can be awarded." The Petitioners also appeal from the March 7, 2012, order overruling their petition for reconsideration.

Because of the issue on appeal, a brief recitation of the procedural history in this case is necessary.

On April 7, 2008, Hon. R. Scott Borders, Administrative Law Judge ("ALJ Borders") rendered an opinion, order, and award finding Falkenstein to have a 13% occupational disability. Finding Falkenstein did not retain the physical capacity to return to the type of work performed at the time of the injury and because Falkenstein was fifty-five years old, ALJ Borders enhanced his income benefits by a 3.4 factor pursuant to KRS 342.730(1)(c)(1) and (3). ALJ Borders awarded temporary total disability ("TTD") benefits of \$607.23 beginning September 1, 2005, through May 23, 2007, and permanent partial disability ("PPD") benefits in the amount of \$201.31 per week beginning May 24, 2007, for 425 weeks. During the original litigation, Falkenstein was represented by his current counsel. The Petitioners sought an attorney fee of \$9,027.84 which was based on \$85,556.75, the total amount

of PPD benefits awarded over 425 weeks. On June 10, 2008, ALJ Borders approved the requested attorney fee.

On December 2, 2010, West Breck Corporation ("West Breck") filed a motion to reopen requesting the claim be reopened and assigned to an Administrative Law Judge "to determine whether the application of the 3.4 multiplier to [Falkenstein's] permanent income benefits remains appropriate." West Breck attached a copy of the September 21, 2009, office note and physical capabilities report of Falkenstein's treating physician, Dr. Amitava Gupta, which returned Falkenstein to regular activities on October 1, 2009. West Breck also attached the November 29, 2010, affidavit of its president, James R. Madison, in which he stated Falkenstein had returned to full duty as a stagehand for at least the last six months. The Petitioners filed a response objecting to the motion. On January 14, 2011, the motion to reopen was sustained by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ Overfield") to the extent the claim was to be assigned to an Administrative Law Judge for further adjudication.

On April 4, 2011, West Breck filed a motion to suspend the proceedings because Falkenstein had not been cooperative and had not submitted to the independent

medical examination ("IME") to be performed by Dr. Robert Jacob. On April 7, 2011, Falkenstein filed a response to West Breck's motion and a motion to dismiss the motion to reopen. On April 19, 2011, the ALJ overruled West Breck's motion to suspend the proceedings, but ordered its motion for reimbursement of a no show fee would be "added to the issues." Various medical records were filed in the record and West Breck deposed Falkenstein on March 3, 2011.

On June 24, 2011, Falkenstein filed a "Motion to Reopen for Change of Condition/Increased Impairment and Motion to Consolidate with Pending Motion to Reopen Filed by [West Breck]." The motion was sustained by order dated July 20, 2011.

ALJ Gott conducted a Benefit Review Conference ("BRC") on June 8, 2011, and a hearing on August 17, 2011.

After West Breck filed its brief on September 6, 2011, a Form 110-1 Agreement as to Compensation was filed in the record reflecting the parties had reached a settlement agreement regarding the remaining unpaid PPD benefits due Falkenstein. The agreement reflects 195 weeks of PPD benefits remained to be paid. The settlement computation was based on the following:  $\$455.52 \times .13 \times 1.75 \times 187.4163 = \$19,421.95$ . The agreement reflects Falkenstein did not waive his right to past, present, and

future income benefits, past and future medical benefits, vocational rehabilitation, and right to reopen. The agreement signed by Falkenstein, his counsel, and West Breck's counsel was approved by ALJ Gott on November 15, 2011.

On November 28, 2011, West Breck's counsel sought approval of an attorney fee of \$6,820.00. West Breck's counsel set out the number of hours spent representing West Breck, the hourly rate for his services, and attached an "Activity Description" indicating the nature of the services rendered. On December 5, 2011, ALJ Gott approved West Breck's counsel's motion for attorney fee and awarded the amount requested.

On December 15, 2011, the Petitioners filed a "Petition and Affidavit to Obtain Attorney Fee Approval." The petition itemized the work performed by the Petitioners on behalf of Falkenstein and the hours spent representing Falkenstein. After providing the above information, counsel stated as follows:

Pursuant to Settlement Agreement, Plaintiff shall recover of the Defendant-Employer a lump sum in the amount of \$19,421.95.

WHEREFORE, counsel for Plaintiff respectfully moves to approve an attorney fee in the amount of \$3,884.39

calculated pursuant to KRS 342.320 as follows:

$$\$19,421.95 \times 20\% = \$3,884.39$$

On December 30, 2011, ALJ Gott sustained the petition for approval of attorney fee and granted an attorney fee of \$3,884.39. Based on Falkenstein's election, ALJ Gott directed the attorney fee be paid in a lump sum and deducted from the lump sum settlement payable to Falkenstein.

On January 6, 2012, West Breck filed a petition for reconsideration. West Breck's counsel asserted he felt ethically compelled to file a petition for reconsideration to determine whether Falkenstein's counsel is entitled to the additional fee awarded. He pointed out Falkenstein's counsel had been previously awarded an attorney fee of \$9,027.84. Further, he asserted pursuant to the settlement agreement Falkenstein had agreed to accept less income benefits than originally awarded by ALJ Borders. Counsel questioned the entitlement to an additional fee since it appeared the Petitioners have "effectively received two fees based on the same income benefits."

On February 6, 2012, ALJ Gott set aside his December 30, 2011, order awarding Hon. Tamara Todd Cotton an attorney fee stating as follows:

The Administrative Law Judge orders that the December 30, 2011 Order awarding a Plaintiff's attorney fee in this reopening is set aside. While counsel for Plaintiff provided exemplary representation for her client in resisting the Defendant's efforts to reduce his benefits, and achieved a lump sum settlement in a case where benefits were being paid periodically, the attorney's fee statute prevents approval of a fee unless a recovery has been made. KRS 342.320. No additional recovery was made in this reopening, so no fee can be awarded.

On February 21, 2012, the Petitioners filed a petition for reconsideration making the same arguments asserted on appeal. By order dated March 7, 2012, the ALJ overruled the petition or reconsideration stating as follows:

Upon Petition for Reconsideration by counsel for Plaintiff, the Administrative Law Judge overrules the Petition. As indicated in the February 6, 2012 Order, the ALJ believed he was constrained against awarding a fee because no additional recovery was made. The ALJ further notes that the Petition erroneously stated that there was no objection to the motion for fee; the Defendant did not file an objection, and that is what caused the ALJ to recognize the error in his original order that approved an award of a fee.

On appeal, the Petitioners assert the ALJ overlooked or misconstrued controlling precedent and erred in denying an attorney fee. The Petitioners maintain the

language in KRS 342.320, cited by the ALJ, applies in situations where a claimant's attorney attempts to obtain additional benefits and fails. Citing Duff Truck Lines v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999), the Petitioners argue an attorney representing a claimant in response to a motion is entitled to an attorney fee notwithstanding the language of KRS 342.320. The Petitioners contend the Court in Vezolles "recognized an award of indemnity benefits in an original claim is a separate matter and an attorney is not confined to an award of attorney fees involving income benefits in a different proceeding." In Collazo, et al. v. Reliable Residential Guttering, et al., WCB Claim No. 2004-92067, rendered July 17, 2009, the Petitioners maintain the Board recognized KRS 342.320 specifically authorizes a fee for prosecuting the original claim and on reopening where additional income benefits are sought, "but the statute is silent regarding other instances in which a worker [sic] may be required to employ an attorney to protect his interests." The Petitioners submit this claim is akin to the other instances in which a worker is "required to employ an attorney to protect his interests." The Petitioners conclude by arguing as follows:

It is in the interest of Kentucky workers their attorneys be given an incentive to perform the work necessary

in cases such as Mr. Falkenstein's. The voluminous pleadings and the time expended as verified in the undersigned's affidavit for an attorney fee show the work done for her client on a contingency fee arrangement. In this claim the undersigned was successful in avoiding a significant reduction of her client's benefits and in securing a lump sum payment of benefits which the client would not have otherwise personally received. If attorneys are not properly compensated for diligent and efficient representation, workers will be at a disadvantage.

Denying attorney fees for the two separate proceedings, the second of which was not initiated by Mr. Falkenstein and required representation to protect his interests, would frustrate and defeat the purposes of the statute and discourage attorneys from accepting cases of injured workers.

Accordingly, Petitioners request the Petition and Affidavit for Approval of Attorney Fee be remanded to ALJ Gott for approval of their motion for an attorney fee.<sup>1</sup>

Because the ALJ correctly determined he could not award an attorney fee as calculated by the Petitioners, but the Petitioners are entitled to an attorney fee in this matter; we affirm in part, vacate in part, and remand. KRS 342.320 reads, in relevant part, as follows:

---

<sup>1</sup> The Kentucky AFL-CIO sought and was granted permission to file an *Amicus Curiae* brief. It argues the prevailing case law holds the Petitioners are entitled to an attorney fee.

(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 pursuant to the statutes and administrative regulations.

(2) In an original claim, 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 first twenty-five thousand dollars (\$25,000) of the award, fifteen percent (15%) of the next ten thousand dollars (\$10,000), and five percent (5%) of the remainder of the award, not to exceed a maximum fee of twelve thousand dollars (\$12,000). This fee shall be paid by the employee from the proceeds of the award or settlement.

(b) Attorney-client employment contracts entered into and signed after July 14, 2000, shall be subject to the conditions of paragraph (a) of this subsection.

. . .

(7) In a claim that has been reopened pursuant to the provisions of this chapter, an attorney's fee may be awarded by the administrative law judge subject to the limits set forth in subsection (2) of this section. In awarding the attorney's fee, the administrative law judge shall consider the factors set forth in subsection (3) of this section. If no additional amount is recovered upon reopening, no attorney's fee shall be awarded. No attorney's fee shall be allowed or approved exceeding the amounts provided in subsection (2)(a) of this section

applicable to any additional amount recovered.

The above sections set forth the manner of calculating the attorney fee for representing the employee in the original claim and on reopening of the claim seeking additional income benefits. Those sections do not relate to entitlement to an attorney fee for representing a claimant in a proceeding initiated by the employer or a party similarly situated. The law is clear that in such situations, entitlement to an attorney fee is not based on the award of additional income benefits.

In the case *sub judice*, the Petitioners were initially awarded an attorney fee based on the total amount of the PPD benefits to be paid over a 425 week period. As a result of West Breck's motion to reopen, the parties agreed the remaining PPD benefits due Falkenstein pursuant to the initial award would be reduced and paid to Falkenstein in a lump sum of \$19,421.95. Thus, there were no new funds awarded to Falkenstein on reopening. Rather, the total PPD benefits awarded by ALJ Borders, upon which the attorney fee of \$9,027.84 was based, were reduced by this settlement agreement. Consequently, the Petitioners were not entitled to an attorney fee based on the lump sum

payment since an "additional amount" was not recovered on reopening. See KRS 342.320(7).

Collazo v. Reliable Residential Guttering and Roofing, Claim NO. 2004-92067, rendered July 17, 2009, is not applicable. In that case, Collazo settled his initial claim for a lump sum of \$32,759.00. Based on this lump sum, Collazo's attorney, Hon. Davis Bussey, was awarded an attorney fee of \$6,163.00. Shortly thereafter, Collazo filed a motion to re-open alleging a worsening of condition, which was sustained. The ALJ determined since the time of settlement, Collazo's impairment had increased and awarded additional PPD benefits. Based on this new award of benefits, Bussey was granted an additional attorney fee of \$6,546.00. Seventeen months after the ALJ's award on re-opening, Collazo and Reliable negotiated and entered into an agreement settling Collazo's entitlement to future benefits. The settlement agreement provided the following breakdown:

Previously settled indemnity portion of claim to be paid weekly. Will pay the remaining 235 weeks of PPD in a lump sum at the 3.50% present value discount  
= 217.3355 weeks x \$121.52 =  
\$26,410.61.

Waiver or buyout of past medical benefits Yes \$3772.35

Waiver or buyout of future medical benefits Yes \$3772.35

Waiver or buyout of vocational rehabilitation Yes \$3772.35

Waiver or right to reopen Yes \$3772.35

Significantly, Bussey then sought approval of an attorney fee of \$3,018.00, which was based solely upon the additional sum he had procured for the buyout or waiver of various benefits. In an April 22, 2009, order the ALJ denied the attorney fee stating, in relevant part, as follows:

Pursuant to KRS 342.320 § 2(a), attorney's fees for services on behalf of an employee shall not exceed a maximum fee of twelve thousand dollars (\$12,000). Department of Workers' Claims records indicate that Plaintiff's counsel had received approval for attorney's fees of \$6,163.00 in October 2005 and \$6,546.00 in December 2007. The amount of fees awarded to date for Plaintiff's counsel exceed \$12,000.00, the maximum amount allowed; therefore, counsel is not entitled to receive an additional fee.

This Board reversed stating as follows:

Hence, contrary to the ruling of the ALJ, we believe, when read as a whole, KRS 342.320 clearly contemplates and authorizes supplementary fees to attorneys for new services rendered on reopening in excess of the original maximum fee - with the added stipulation that any additional fee approved be calculated in accordance with the statutory scheme under

subsection 2(a). Lewis v. Jackson Energy Co-Op Corp., 189 S.W.3d 87, 92 (Ky. 2005). We further conclude that had the General Assembly intended to limit the maximum fee in the original claim and on reopening to a total of \$12,000.00, it would have stated so clearly and unambiguously and included such language within the confines of KRS 342.320(7).

. . .

What is more, under the terms of the settlement, Bussey was successful at securing on Collazo's behalf an additional payment of \$15,089.40 in a lump sum for his waiver of past and future medical benefits, vocational rehabilitation, and the right to reopen, which Collazo would not have otherwise personally received. Under these circumstances, we conclude it was an abuse of discretion for the ALJ to reject outright Bussey and Collazo's request for approval of a reasonable attorney's fee. The ALJ's order of April 22, 2009 must, therefore, be reversed as a matter of law. On remand, the ALJ is instructed to reconsider the attorney's fee motion filed by Collazo and Bussey on March 30, 2009, and to issue a new order approving payment to Bussey of an appropriate fee in accordance with the formula set out under KRS 342.320 as specified herein.

Unlike this case, since Bussey was successful in procuring additional benefits for Collazo he was entitled to an attorney fee. In addition, this Board held the statute did not provide for an aggregate maximum limit on attorney fees of \$12,000.00 per claim. In this case, the

facts are different. Falkenstein was awarded PPD benefits to be paid over 425 weeks totaling \$85,556.75. However, as a result of West Breck's motion to reopen, Falkenstein settled his right to receive the balance of those PPD benefits for a lump sum of \$19,421.95. Stated another way, the settlement agreement changed the amount of PPD benefits to which Falkenstein was entitled pursuant to the original award and provided no increase in income benefits. In the February 6, 2012, order the ALJ correctly ruled Falkenstein's counsel had not obtained additional funds over and above those originally awarded, and therefore an attorney fee could not be awarded based on the negotiated lump sum payment.

That said, since the Petitioners were responding to West Breck's motion to reopen, we hold the Petitioners are entitled to an attorney fee based on the work performed in representing Falkenstein in this reopening. In Duff Truck Lines, Inc. v. Vezolles, supra, the Court of Appeals held an attorney representing a claimant in response to a motion to re-open is entitled to be compensated even though no additional funds were obtained by the claimant in the proceedings. In Duff Truck Lines, Inc., as in this case, the attorney who sought an attorney fee was representing

the employee in response to a motion filed by the employer.

The Court of Appeals identified the issue as follows:

The issue in this appeal is whether an attorney who successfully defended an employee's claim for medical expenses in a reopening of a workers' compensation settlement is entitled to an attorney fee. We have reviewed the applicable law, and affirm the opinion of the Workers' Compensation Board (hereinafter, the Board) which held that the award of attorney fees was appropriate for a medical fee dispute.

Id. at 225.

The Court noted the claim had been settled in June 1989, with Vezolles receiving a lump-sum disability payment. In April 1997, Duff Truck Lines filed a motion to reopen in order to contest its obligation to pay chiropractic expenses incurred by Vezolles. Duff Truck Lines was not successful and was ordered to pay the contested expenses. Thereafter, Vezolles' attorney sought approval of an attorney fee for representing Vezolles. The CALJ denied the motion on the ground that an attorney fee cannot be granted pursuant to KRS 342.320(7) when no additional income benefits have been recovered. The Board held the attorney is entitled to an "appropriate recompense to be taken from the amount recovered" and reversed and remanded for the CALJ to determine the amount of the attorney fee

award. In affirming, the Court of Appeals stated as follows:

In subsection (2)(b), the statute expresses the maximum limit of the amount of the award in terms of income benefits, but the statute does not confine the award of attorney fees to actions involving income benefits. Furthermore, the statute read as a whole expresses no reason to require an award of income benefits before attorney fees may be awarded. Moreover, the legislative purpose of this subsection authorizing an attorney fee for the reopening of a claim is to encourage attorneys to undertake such representation and to ensure an opportunity for injured workers to exercise their rights. Napier v. Scotia Coal Co., Ky., 874 S.W.2d 377 (1993).

. . .

Thus, we affirm the opinion of the Board granting an award of attorney fees and remanding to an administrative law judge for a determination of the amount of an appropriate award and the method of payment.

Id. at 226-227.

Based on the above language, we hold the ALJ erred in determining the Petitioners were not entitled to an attorney fee solely because additional income benefits were not recovered on reopening. To hold otherwise would place the employee in the position of being virtually unable to obtain legal representation in post-award

proceedings initiated by the employer or a party similarly situated.

Accordingly, since the Petitioners itemized their time in the petition and affidavit to obtain approval of an attorney fee, we remand to the ALJ for determination of the appropriate attorney fee to be paid to the Petitioners for their representation of Falkenstein on reopening. The Petitioners should be allowed to supplement the motion by setting forth their hourly rate. Thereafter, the ALJ shall enter an order granting the Petitioners an attorney fee. Consistent with the provisions of KRS 342.320(4)(a), Falkenstein may elect to pay the attorney fee from the proceeds of the lump sum settlement.

Accordingly, the decision of the ALJ denying the Petitioners an attorney fee based on the lump sum settlement of \$19,421.95 which represents a buyout of Falkenstein's remaining PPD benefits is **AFFIRMED**. That portion of the February 6, 2012, order denying the Petitioners an attorney fee because there was no additional recovery of income benefits and the March 7, 2012, order ruling on the Petitioner's petition for reconsideration are **VACATED** and this matter is **REMANDED** to the ALJ for determination of the attorney fee to be awarded to the

Petitioners in conformity with the views expressed in this opinion.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON STEPHANIE N WOLFINBARGER  
HON TAMARA TODD COTTON  
429 W MUHAMMAD ALI BLVD  
1102 REPUBLIC BUILDING  
LOUISVILLE KY 40202

**COUNSEL FOR RESPONDENT:**

HON BRIAN GANNON  
1315 HERR LANE STE 210  
LOUISVILLE KY 40222

**COUNSEL FOR KENTUCKY AFL-CIO:**

HON ERIC M LAMB  
P O BOX 34275  
LOUISVILLE KY 40232-4275

**ADMINISTRATIVE LAW JUDGE:**

HON DOUGLAS W GOTT  
400 E MAIN ST STE 300  
BOWLING GREEN KY 42101