Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 18, 2014

CLAIM NO. 201280340

HON. JEFFERY A. ROBERTS PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

LAURIE STICKLEN, Individually as Surviving Spouse, as Administratrix for the ESTATE OF JAMES STICKLEN, and as Natural Guardian of the Minor Child ANDREW STICKLEN, MARY STICKLEN, EMILY STICKLEN, the CITY OF ALEXANDRIA, and HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
AND ORDER

* * * * * *

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

ALVEY, Chairman. Hon. Jeffrey A. Roberts ("Roberts") appeals from the November 13, 2013 order entered by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ") awarding him an attorney fee in the amount of $12,000.00. Roberts

also appeals from the January 9, 2014 order denying his petition for reconsideration.

Roberts argues because he represented the decedent's estate, the widow, and each of the three dependent children, he is entitled to up to a $12,000.00 attorney fee for each for a potential total of $60,000.00. However, he seeks only a fee in the amount of $29,673.12. Because the ALJ did not err in limiting the attorney fee to $12,000.00 pursuant to KRS 342.320(2)(a), we affirm.

James P. Sticklen ("Sticklen") was a police officer for the City of Alexandria, Kentucky ("Alexandria"). On March 4, 2011, he collapsed near his cruiser en route to a Crisis Intervention Course. He was treated at the Baptist Regional Medical Center in Corbin, Kentucky, where he subsequently died. A week prior to collapsing, Sticklen was engaged in an altercation with a student at which time he was kicked in the left leg.

Sticklen's widow, Laurie Sticklen ("Laurie"), filed a Form 101 on March 4, 2013, alleging the March 4, 2011 injury and death. The Form 101 was filed in Sticklen's name. Laurie asserted Sticklen sustained injuries to his left leg and lung. Regarding how the injury occurred, Laurie specifically stated as follows:

> After going to police cruiser to attend morning session of Crisis Intervention Course, plaintiff collapsed beside cruiser in hotel parking lot. Immediate medical attention provided; one of first responders was course instructor who reported plaintiff with shallow respirations and a weak, rapid pulse. EMS transported to local emergency room. (Police memo from previous week notes that at the high school school [sic], plaintiff involved in altercation with a student during which he was kicked in the leg.)

The Form 101 was later amended to reflect the claimants are Emily Sticklen, Mary Sticklen, and Laurie Sticklen (individually, and in her capacity as Administratrix of the Estate of James Sticklen, and as mother and natural guardian of Andrew Sticklen, a minor child).

The claim was initially contested by Alexandria, but later accepted based upon the reports of Drs. Brian Curd, Bruce Broudy, and John Mendez. These physicians noted Sticklen developed a pulmonary embolism which resulted from the kick to his left leg which caused his death. In the alternative, the physicians noted a period of inactivity while attending classes for work which also contributed to the development of the condition. In any event, the determination was the condition which caused his death was work-related. The parties agreed to settle the claim, and a

Form 110, Agreement As to Compensation and Order Approving Settlement, was approved by the ALJ on September 17, 2013.

Subsequent to approval of the Form 110, Roberts filed five separate motions for approval of attorney fee. He asserted he was entitled to approval of up to $12,000.00 for representation of each of the five entities, and asked for approval of a total attorney fee of $29,673.12 to be paid by the estate, Laurie, and each of the children. The ALJ entered an order approving a total attorney fee of $12,000.00, noting the limitation set forth in KRS 342.320(2)(a) since this was an original claim. The ALJ extensively reviewed the facts of the case and the applicable law. Specifically, the ALJ found as follows:

> While counsel has requested a separate fee for his representation of the estate, the widow, and the children the ALJ believes that KRS 342.320 limits the fee to $12,000 as set forth above. In support of this finding, the ALJ notes that KRS 342.320(2) states "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; 20% of first $25,000 of the award, 15% of the next $10,000 and 5% of the remainder of the award, not to exceed a maximum fee of $12,000…."
>
> The statute makes reference to "an original claim" and the ALJ believes that there was only one original claim in this matter, that being the unfortunate fatal injury suffered by

James Sticklen and therefore counsel is limited to the $12,000 statutory maximum for an original claim. In further support of this determination the ALJ notes that this claim concerned only one injury, that being the fatal embolism suffered by Mr. Sticklen on March 4, 2011 and given that injury resulted in the death the claimant, KRS 342.730 provides that in such a case benefits can be paid to the estate, the widow, and surviving dependent children. As such, all settlement benefits in this claim flowed from one single injury and the ALJ believes that in such circumstances there is only one original claim and hence only one attorney fee is appropriate.

. . .

In considering the instant claim in light of the above case law, the ALJ notes that counsel performed no additional legal work in representing the multiple parties as the benefits that flowed to each were dependent upon his success in achieving a settlement of the overall claim. The key issue in the underlying claim was the work relatedness/causation of the fatal embolism and the development of medical proof in the claim supporting a causal relationship led to the parties decision to resolve the claim by way of settlement. Counsel was essentially required to prove one claim only, that the claimant's fatal embolism was related to his work activities. Once this was accomplished, it was simply a matter of calculating the exact amount of benefits to the estate, the widow, and the dependent children. Considering these facts in light of KRS 342.320 and the case law cited above, the ALJ concludes that counsel represented the multiple parties on one original claim

> and henceforth his attorney fee is limited by KRS 342.320(2) to the statutory maximum of $12,000. Based upon the election of the plaintiff, said attorney's fee shall be paid in a lump sum to Hon. Jeffrey A. Roberts from the lump sum settlement.

Roberts filed a petition for reconsideration, arguing as he does on appeal he represented five entities, and should not have been restricted to a total attorney fee of $12,000.00. The ALJ denied the petition for reconsideration, and ordered half the attorney fee to be paid from the estate, and the remaining half to be paid from Laurie's share.

Regarding the award of an attorney fee, KRS 342.320 reads, in relevant part, as follows:

> (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;
>
> . . .
>
> 3) In approving an allowance of attorney's fees, the administrative law judge shall consider the extent, complexity, and quality of services rendered, and in the case of death, the Remarriage Tables of the Dutch Royal Insurance Institute. An attorney's fee may be denied or reduced upon proof of solicitation by the attorney. However, this provision shall not be construed to preclude advertising in conformity with standards prescribed by the Kentucky Supreme Court.
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> (Emphasis added)

The above-cited statute sets forth the manner of calculating the attorney fee for representation in an original claim, and provides the factors to be considered by the ALJ in awarding such fee. In our view, "original claim" refers to all proceedings prior to the rendition of a decision or approval of a settlement agreement. Here there was one decedent, and all benefits paid were derivative of his death. Only one claim was filed, and that was before Roberts entered into contracts with the beneficiaries, or entered an appearance, although he subsequently moved to amend the claim.

Roberts cites to numerous cases including Lamb v. Fuller, 32 S.W.3d 518 (Ky. App. 2000), and Duff Truck Lines v. Vezolles, 999 S.W.3d 224 (Ky. App. 1999), which are

distinguishable and have no bearing on this claim. In Lamb, the claimant filed a single Form 101 alleging injuries to her shoulders, arms, neck, back and hands arising from incidents occurring in 1988, 1989, 1992, and 1993. All those claims were eventually settled based upon the occurrence of two injuries. In addition, the court noted the version of the statute applied contained no explicit provision limiting attorney fees in consolidated cases. Vezolles involved an attorney fee for representing a client in a reopening regarding reimbursement for chiropractic bills. Neither is applicable to this claim. Roberts also cites to Chad Wilson, Administrator for the Estate of Roy George Wilson v. Pro Services, Inc., Claim No. 2008-91193, rendered by this Board on January 13, 2014. Wilson, the decedent, filed a claim against his employer, and died after the claim was decided and while it was pending on appeal. The estate filed a motion to remand the appeal from the Kentucky Court of Appeals, and filed an interim claim for the death benefit pursuant to KRS 342.730(6).

Here it is noted Laurie initiated the claim, by filing a Form 101 without counsel. It was only later that Roberts entered an appearance and amended the Form 101. No additional claims were filed, and the original action was not resolved until the settlement agreement was approved in

September 2013. Here, all benefits paid were derivative of Sticklen's death. This includes both the death benefit pursuant to KRS 342.730(6), and the survivor benefits as outlined in KRS 342.750(1)(b)&(e). We note the ALJ considered the cases cited by Roberts, and provided a detailed explanation regarding their applicability, and the attorney fee awarded. The ALJ did not err in limiting the attorney fee award to $12,000.00 rather than the $29,673.12 requested by Roberts, and his determination shall not be disturbed.

Finally, Roberts requested an oral argument be held. After having reviewed the record, **IT IS HEREBY ORDERED AND ADJUDGED** an oral argument is unnecessary in arriving at a decision, and therefore the request is **DENIED**.

Accordingly, the November 13, 2013 order approving attorney fee rendered by Hon. Thomas G. Polites, Administrative Law Judge awarding Roberts a $12,000.00 attorney fee and the order on petition for reconsideration entered January 9, 2014 are hereby **AFFIRMED**.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

STIVERS, MEMBER, CONCURS IN RESULT ONLY AND JOINS IN THE CONCURRING OPINION OF RECHTER, MEMBER.

RECHTER, MEMBER, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

RECHTER, Member. I concur in the result reached by the majority, but write separately to address the arguments raised by Roberts in his brief. Roberts relies heavily on this Board's recent opinion in Wilson v. Pro Services, Inc., Claim No. 2008-91193 (WCB January 13, 2014). In that opinion, we noted *Wilson*'s claim for income and medical benefits was distinct from his *Estate*'s claim for the lump sum death benefit. However, the primary distinguishing factor is the procedural posture of that case. Wilson's claim for medical and income benefits had been fully litigated before the ALJ and this Board, and was pending review by the Court of Appeals when he died. Thus, the Estate's claim, filed nearly two years later, was essentially a reopening of Wilson's original claim, notwithstanding the Court of Appeals' abatement of the pending appeal.

In this case, the claims of the Estate and the claims of Sticklen's statutorily-designated beneficiaries were filed and litigated simultaneously, as a single claim. In the absence of a more clear definition of "original claim"

from the General Assembly, we necessarily must analyze the particular circumstances of the case in determining whether a claim is "original" for purposes of KRS 342.320. Here, the ALJ did just that. He noted the "outstanding" legal counsel Roberts provided, exhibiting a "high degree of competence." However, this Board, like the ALJ, is bound by the plain language of KRS 342.320(2), and we cannot ignore the reality this case was litigated as a single, original claim.

Furthermore, because the statute requires a look at the particular circumstances of a claim, I disagree with the majority's statement that "an 'original' claim refers to all proceedings prior to the rendition of a decision or approval of a settlement agreement." Lamb v. Fuller, 23 S.W.3d 518 (Ky. App. 2000), unequivocally illustrates this is not always the case. In Lamb, separate attorney fees were awarded where two distinct injuries were alleged in a single Form 101. The claims were settled in a single agreement.

I otherwise concur in the result reached.

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