Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 31, 2014

CLAIM NO. 200891193

JEREMY CHAD WILSON, ADMINISTRATOR FOR
THE ESTATE OF ROY GEORGE WILSON and
JACKSON W. WATTS PETITIONERS

VS. **APPEAL FROM HON. CHRISTOPHER DAVIS,**
ADMINISTRATIVE LAW JUDGE

PRO SERVICES, INC.,
BUDDY HUGHES, d/b/a TRI COUNTY BUILDERS
and HON CHRISTOPHER DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING and REMANDING

* * * * * *

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

RECHTER, Member. In this case, we are asked to determine whether a claim for death benefits is an original action for purposes of awarding attorney's fees. Under the facts of this case, we believe it is. Though the issue raised on

appeal is narrow, a detailed recitation of the complicated procedural history of the case is necessary.

On March 28, 2008, George Wilson ("Mr. Wilson") was critically injured when he fell through the sub-floor of a partially-constructed home where he was working as a carpenter. At the time, he was employed by Respondent, Buddy Hughes d/b/a Tri-County Builders ("Hughes"), who in turn was a subcontractor on the project for Pro Services, Inc ("Pro Services"). As a result of this injury, he was awarded permanent total disability benefits at the minimum rate. In pursuing this claim, Mr. Wilson was represented by the present real-party-in-interest, Hon. Jackson W. Watts ("Watts").

Both parties appealed to this Board. In an Opinion rendered June 9, 2010, this Board vacated and remanded the award for recalculation of Mr. Wilson's average weekly wage ("AWW") and for further findings of fact regarding concurrent employment. Both parties appealed the Board's decision to the Kentucky Court of Appeals.

On November 23, 2010, while the appeal was pending, Mr. Wilson died. Watts moved to substitute Mr. Wilson's son, Chad Wilson, as a party to the appeal in his

capacity as administrator of Mr. Wilson's estate. He further stated:

> The issue on appeal in this proceeding relates to the average weekly wage of [Wilson] and if his arguments are ultimately successful, back due benefits based on a higher average weekly wage will be due to the estate from the date of his injury on March 29, 2008 until the date of his death. The Administrator believes that the death resulted from the work related injury and that the estate is entitled to benefits under KRS 342.750(6).

Watts also requested "that on resolution of the average weekly wage issue that the case be remanded for amendment of the Award for past due benefits and the case further be remanded for further proceedings under KRS 342.750(6)." Pro Services did not object to the substitution of parties. However, Pro Services asked a partial remand take place immediately: "This request for a partial remand will not affect the average weekly wage issue presently pending before this Court and the issue on appeal can be decided concurrently."

The Court of Appeals granted the motion, including Pro Services' request the remand take place immediately. The primary appeal, concerning the AWW issue, was placed in abeyance. The Court partially remanded the case to Hon. Chris Davis, Administrative Law Judge ("ALJ")

for “proceedings consistent with KRS 342.750(6).” The Court of Appeals’ Order does not mention past due benefits or survivor’s benefits.

In a July 24, 2012 Order, the ALJ found Mr. Wilson’s death work-related and awarded the lump sum death benefit pursuant to KRS 342.750(6). That Order was not appealed. Shortly thereafter, Watts moved for attorney’s fees based upon the award of death benefits. The ALJ awarded fees in the amount of $8,245.83, based upon the award of death benefits in the amount of $69,916.52.

Following the ALJ’s determination Mr. Wilson’s death was caused by the work accident, the Court of Appeals removed the primary appeal from abeyance. Upon consideration, the Court affirmed the Board decision regarding the AWW issue and remanded the case to the ALJ. No further appeal was taken.

Upon remand of the primary appeal, the ALJ reconsidered the issues of concurrent employment and the proper AWW. With respect to survivor’s benefits, the ALJ ordered only that “benefits shall be paid according to KRS 342.750, if and where applicable.” Neither party appealed this order.

Thereafter, Watts again moved for attorney’s fees based on his work in Mr. Wilson’s claim for income

benefits, in the amount of $8,777.65. The ALJ determined Watts' maximum total fee is controlled and limited by KRS 342.320(2)(a). Accordingly, having already awarded fees in the amount of $8,245.83, the ALJ approved $3,754.17 in fees. Watts' subsequent petition for reconsideration on this issue was denied.

KRS 342.320(2) provides:

> **(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.

On appeal, Watts contests the application of the statutory cap in this case. He argues the death benefit awarded to the estate is a claim separate and distinct from Mr. Wilson's original claim. He also asks this Board to strictly interpret the phrase "an original claim" because it derogates from an attorney's common-law contract rights.

Because workers' compensation is a creature of statute, any right to attorney fees is governed by the specific provisions of KRS Chapter 342. KRS 342.320

enumerates just two instances when an attorney's fee is authorized. KRS 342.320(2) permits an award of attorney's fees "in an original claim for services under this chapter on behalf of an employee", subject to the statutory limitations set forth in subsection (a). KRS 342.320(7) allows an award of attorney's fees when a claim has been reopened, though fees are awarded only if an additional amount is recovered upon reopening. *See also* Duff Truck Lines v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999)(separate attorney's fees may be awarded in a claim that has been reopened pursuant KRS 342.320, regardless of any fees earned in the original claim).

As Watts correctly points out, the Act does not define the term "original claim" as used in KRS 342.320(2). Therefore, we look first to the plain meaning of the statute which, if unambiguous, controls. Wheeler v. Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). A claim is a "cause of action", or "a demand for money or property as of right." Black's Law Dictionary, 247 (6th ed. 1990). The claim is "original" if it is not derivative. Id. at 1099. The characterization of a claim as "original" is necessarily subjective, and depends on the unique circumstances of the particular case.

For this reason, we look to prior appellate decisions interpreting KRS 342.320(2).

Interpreting the phrase "original claim" narrowly, the Kentucky Court of Appeals allowed separate attorney fees for distinct claims arising out of distinct injuries, even though the two claims had been consolidated and litigated together for procedural purposes. Lamb v. Fuller, 32 S.W.3d 518 (Ky. App. 2000). By contrast, a medical fee dispute resolved pursuant to an interlocutory order prior to the resolution of the employee's claim for income benefits is part of the "original claim" for purposes of KRS 342.320. Langford v. Danville Housing Authority, 2013 WL 1776025 (Ky. App. 2013)[1]. In Langford, the Kentucky Court of Appeals explained "[a]ll interlocutory proceedings leading up to the final and appealable award must be considered part of the original claim." Slip op. at 4. Also, where benefits are pursued against multiple defendants, the claimant's attorney is entitled to one fee. Curry v. Toyota Motor Mfg. Ky., Inc., 91 S.W.3d 557 (Ky. 2002). Distinguishing Lamb v. Fuller, the Kentucky Supreme Court's reasoning in Curry turned on the fact the claim arose from a single alleged injury:

[1] This unpublished case is cited pursuant to CR 76.28(4)(c).

"Although the claimant named two defendants, she had only one claim for the effects of the work-related accident, and her attorney had already been awarded the maximum fee out of the settlement proceeds." Id. at 559.

In the context of this case, the Estate's demand is undoubtedly original and independent from Mr. Wilson's claim for income and medical benefits. Most important to this conclusion is the fact the Estate's entitlement to this lump sum death benefit did not exist at the time Mr. Wilson initiated his injury claim. It is an independent right which vested upon determination Mr. Wilson's death was caused by his work injury, and was not derived from his *inter vivos* claim for income and medical benefits.

Furthermore, a claim for a lump sum death benefit is qualitatively different than an *inter vivos* claim for income or medical benefits. A lump sum death benefit is paid to the claimant's estate, is of a statutorily defined amount, and is warranted only when death occurs as a direct result of a work-injury and within four years of that work-related injury. A claim for income benefits, by contrast, involves a detailed analysis of, among other factors, the extent and cause of the claimant's injury, his average weekly wage, and his future ability to work. *See generally* KRS 342.730. These are independent causes of action

brought by distinct parties, and awarded to distinct parties. *See* Hammons v. Tremco, 887 S.W.2d 336 (Ky. 1994)(a lump sum death benefit paid to an estate is a separate claim from dependent's claims and appearances must be separately entered). *See also* Bradley v. Commonwealth, 301 S.W.3d 27 (Ky. 2009).

On at least one occasion, this Board has similarly characterized a claim for benefits under KRS 342.750. In Harding v. Union Carbide Corp., WCB 0958359 (April 19, 1996), a widow's petition for death benefits was dismissed by the ALJ as an untimely reopening of a previously dismissed, *inter vivos* claim for income benefits. In rejecting the notion a claim for survivor's benefits is a reopening of the original claim, the Board opined: "Clara Harding's claim is a claim for benefits under KRS 342.750 for death resulting from a work-related injury or disease. It is a new and distinct claim from that filed by her late husband in 1972. Petitioner's new application for survivor's benefits is in no sense a reopening of the original claim for disability benefits." Though the Board in Harding's case was not interpreting the term "original claim" as used in KRS 342.320, we find the characterization of the claim compelling.

For these reasons, we are persuaded that the Estate's claim for a lump sum death benefit pursuant to KRS 342.750(6) is an "original claim" within the meaning of KRS 342.320. This conclusion, however, is complicated when applied to the peculiar facts of this case, particularly the fact that Mr. Wilson died while his original appeal was pending. In response to this circumstance, Watts moved to substitute the Estate and acknowledged the necessity "for further proceedings under KRS 342.750(6)." While Watts believed this issue should be litigated following resolution of the AWW issue, Pro Services suggested the remand take place immediately. The Court of Appeals granted this request by abating the primary appeal and remanding the matter to the ALJ for "proceedings consistent with KRS 342.750(6)." This language can only be interpreted as a directive to determine the estate's entitlement to the lump sum death benefit.

"The filing of [a] motion to abate merely gives notice to the appellate court that it might be prudent to stay consideration of the case because the trial court's decision could affect the outcome." Young v. Richardson, 267 S.W.3d 690, 695 (Ky. App. 2008). *See e.g.* Heard v. Commonwealth, 172 S.W.3d 372 (Ky. 2005). Here, the appeal pending before the Court of Appeals concerned only Mr.

Wilson's award of PTD benefits. The issue was not rendered moot by Mr. Wilson's death, as any past due benefits based on a higher AWW would be due to the Estate. However, the Estate's entitlement to the lump sum death benefit authorized by KRS 342.750(6) has no bearing on the award of income benefits, or an appeal therefrom.

Thus, the Estate's distinct and independent claim to the lump sum death benefit was rendered an interlocutory matter. It is unsurprising, then, the ALJ applied the statutory cap on the attorney's fees, as all interlocutory matters are considered part of an original claim. Langford v. Danville Housing Authority, 2013 WL 1776025 (Ky. App. 2013). Nonetheless, do not believe Watts should be penalized by this unusual circumstance. To deny him an award of separate attorney fees for his work on two distinct claims, based solely on the unique procedural posture of the case, would elevate form over substance.

For the foregoing reasons, the June 3, 2013 Order rendered by Hon. Chris Davis is hereby **REVERSED**. This matter is **REMANDED** to the ALJ for recalculation of the award of attorney fees without consideration of any fees previously awarded.

STIVERS, MEMBER, CONCURS AND FILES A SEPARATE OPINION.

STIVERS, Member. While I agree with the majority opinion, I write to address portions of the dissent and to emphasize several points.

The dissent observes that even though the petitioner argues two different claims existed, there was only one date of injury, one claim filed, and no motion to reopen. That observation misses the point. The initial proceeding dealt with Roy George Wilson's entitlement to income benefits during his life. The second proceeding concerned the estate's right to a death benefit pursuant to KRS 342.750(6) and possibly the continuation of all or a portion of income benefits awarded. In this case, the proper procedural steps were taken in that Jeremy Chad Wilson was substituted as a party in place of Roy George Wilson, the decedent. A motion to reopen was unnecessary, as the Court of Appeals, at the request of Pro Services, remanded the claim to the ALJ for proceedings relating to benefits due pursuant to KRS 342.750(6). The Court of Appeals actually instituted the second proceeding in remanding the claim to the ALJ.

The dissent asserts Jeremy Chad Wilson, the Administrator of the estate, an indispensible party, was not joined as a respondent nor served with the petitioner's brief necessitating dismissal of the appeal. I believe

this assertion also misses the point as the Administrator is a party to the appeal as one of the petitioners. As to this issue, it is irrelevant whether the Administrator is named as a petitioner or respondent in the appeal.

Clearly, failure to name an indispensible party in the notice of appeal is a jurisdictional defect which results in dismissal of the appeal. City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990). *See also* Tippett v. Switch Energy, WCB 199300757 (June 21, 2013). However, CR 73.02(2), as amended in 1985, sets out a policy of substantial compliance: "Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion."

The Kentucky Supreme Court recently reaffirmed its adherence to this policy. In Flick v. Estate of Wittich, 396 S.W.3d 816 (Ky. 2013), a notice of appeal was filed employing the case style used in the trial court proceedings. Thus, the caption named the Estate of Wittich as the "plaintiff" and Flick as the "defendant". The body of the document correctly identified the judgment from which the appeal was taken, but did not designate any appellant or appellee. The Court refused to dismiss the appeal, determining that no prejudice had resulted and all parties had fair notice of the appeal. "[O]ur policy of

substantial compliance ensures the survival of an appeal despite clerical errors when no prejudice results from those errors and notice is sufficiently conveyed to the necessary parties." Id. at 824. *See also* Commonwealth v. Maynard, 294 S.W.3d 43, 46 (Ky. App. 2009)("[P]oorly drafted notices of appeal can meet the jurisdictional mandate … so long as the court is satisfied that the notice of appeal, when reasonably read in its entirety is sufficient to confer fair notice to all indispensable parties of their status as a party to the appeal.").

Here, Jeremy Chad Wilson is a named party to the appeal, and a reasonable reading of the notice of appeal indicates Jeremy Chad Wilson had notice of the appeal since he was one of the parties appealing. The dissent's complaint regarding failure to name the Administrator as a respondent can be easily rectified by realigning the parties if it is determined the Administrator and Watts' interests are antagonistic. Based on the notice of appeal and the fact the Administrator executed a separate Form 109, the Board can reasonably conclude the Administrator and Watts' interests are not antagonistic.

Several additional points need to be emphasized. First, the initial proceeding related to Roy George Wilson's entitlement to income and medical benefits. The

second proceeding pertained to the estate's entitlement to death benefits. As such the claimants are completely different.

Second, the awards in both proceedings were based on two different sections of the statute; KRS 342.730 and KRS 342.750. Both awards were mutually exclusive since the benefits awarded in the proceeding initiated after Watts' death could not have been recovered in the initial proceeding. Significantly, Watts sought an attorney fee based solely on the estate's entitlement to death benefits pursuant to KRS 342.750(6). The record is silent as to whether income benefits are to be paid pursuant to KRS 342.750(1).

Third, in almost all situations involving this factual scenario, the initial claim for income benefits would have been finally decided when the second claim for death benefits arose. Consequently, a motion to reopen in order to substitute the Administrator as a party would be filed, and thereafter, the proceedings would have focused on whether Roy George Wilson's death resulted from the work-related injury. As previously noted, a motion to reopen was unnecessary as the Court of Appeals entered an order substituting Jeremy Chad Wilson, the Administrator, as a party to the appeal and remanded the claim to the ALJ

for a determination of entitlement to benefits pursuant to KRS 342.750. The Court of Appeals' order obviated the necessity of a motion to reopen.

Finally, the fact we have a hybrid situation does not change the fact the two proceedings are totally separate and each proceeding requires the claimant to establish a completely different set of facts. Had Roy George Wilson and the Administrator been represented by separate attorneys, I question whether this issue would have arisen.

ALVEY, CHAIRMAN, DISSENTS AND FILES SEPARATE OPINION.

ALVEY, Chairman. I respectfully dissent from the majority, and would affirm the ALJ. In the alternative, I would dismiss the appeal for failure to name an indispensable party. At the time the ALJ issued the opinion regarding payment of the death benefit pursuant to KRS 342.750(6), the claim was on appeal at the Kentucky Court of Appeals, and never finalized. Therefore, the "original action" was still ongoing, and never terminated. In this instance, the death benefit paid to the Estate should be construed as part of the original award, and the attorney fee should not exceed the $12,000.00 dollars authorized by KRS 342.320. It is noted the death benefit involves the Estate which

filed no new Form 101 or motion to reopen, and at all times the issue was litigated under the same claim number.

Mr. Wilson was injured on March 28, 2008. The claim was litigated, and the ALJ issued a decision on December 9, 2009. Mr. Wilson did not file a motion for approval of attorney fee. The claim was appealed to this Board, and an opinion was entered on June 9, 2010. Our decision was then appealed to the Court of Appeals. While on appeal, Mr. Wilson passed away. A motion was filed with the Court of Appeals to substitute Chad Wilson as a party in his capacity of administrator of Mr. Wilson's Estate. Again, Chad Wilson filed no motion to reopen, and no new claim. The Court of Appeals placed the appeal in abeyance, and remanded for a decision for a determination regarding entitlement to death benefits pursuant to KRS 342.750.

On remand, in an opinion issued July 24, 2012, the ALJ determined Mr. Wilson's death was connected to his work injury, and awarded the death benefit in the amount of $69,916.52. This amount was apparently paid by Hughes, and no appeal was taken from the ALJ's determination. A motion was filed for approval of attorney fee for petitioner from those proceeds in the amount of $8,245.83, which was approved by the ALJ in an order entered September 21, 2012.

On January 14, 2013, the Court of Appeals rendered a decision affirming in part, vacating in part and remanding. The ALJ issued an opinion on remand on March 25, 2013. Petitioner then filed another motion for attorney fee in the amount of $8,777.65, based upon $80,553.14, presumably the sum of the weekly PTD benefits Mr. Wilson would have received had he lived long enough to qualify for Social Security retirement benefits pursuant to KRS 342.730(4). In an order issued May 16, 2013, the ALJ awarded an additional attorney fee in the amount of $3,754.17, which is $12,000.00 less the fee previously awarded. Petitioner appealed from this award.

It is noted the amount requested in the second petition for fee is based upon the total benefits Mr. Wilson would have received if he had survived, not the amount he was actually entitled to receive through the date of his death. Interestingly, petitioner argues two separate claims existed despite only one date of injury, one claim filing, and no motion to reopen. The fact of the matter is Mr. Wilson filed a claim while he was alive, and was awarded benefits. The claim was appealed, and unfortunately he died before the “original” action was concluded. Chad Wilson was substituted for Mr. Wilson. Because the original action had never concluded, the death

benefit awarded by the ALJ pursuant to KRS 342.750(6) was part of the original action. Therefore, the ALJ appropriately reduced the second requested fee so Mr. Wilson's attorney would receive no more than $12,000.00 as authorized by KRS 342.320. To rule to the contrary would reach an improper result.

The majority cites to Duff Truck Lines v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999), which has no application to the case *sub judice* since it involved a reopening. Likewise, Lamb v. Fuller, 32 S.W.3d 518 (Ky. App. 2000) has no application since it involved separate injuries, and separate injury dates litigated together for judicial economy.

Finally, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). It is noted Chad Wilson, administrator for the Estate of Mr. Wilson, was not joined as a respondent, nor served with Petitioner's brief. As such, an indispensable party was not joined, and this appeal should be dismissed. An indispensable party to an appeal is one whose absence prevents the tribunal from granting complete relief among those already listed as parties. *See* CR 19.01; CR 19.02; Braden v. Republic-

Vanguard Life Ins. Co., 657 S.W.2d 241 (Ky. 1983); Milligan v. Schenley Distillers, Inc., 584 S.W.2d 751 (Ky. App. 1979). As a matter of law, the failure to name an indispensable party is a jurisdictional defect fatal to an appeal — even one to this Board. Id. Since petitioner seeks approval of an attorney fee which could potentially reduce benefits payable to the Estate, all parties potentially adversely affected by the attorney fee award who should have been named as a party to the appeal, were not.

Therefore, I would affirm the ALJ's award, and in the alternative dismiss the appeal for failure to join an indispensable party.

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