OPINION ENTERED: MARCH 8, 2012

CLAIM NO. 200684241

LORETTA LANGFORD
and JACKSON W. WATTS PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

DANVILLE HOUSING AUTHORITY
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Loretta Langford ("Langford") and her attorney Hon. Jackson W. Watts ("Watts") seek review of the August 17, 2011 order rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), denying Watts' request for approval of an attorney's fee. Langford and Watts also appeal from the CALJ's September 12, 2011 order overruling their petition for reconsideration. The sole question on appeal is whether the CALJ erred in denying an attorney fee to Watts based upon benefits granted pursuant to an interlocutory order where the CALJ granted the maximum

attorney fee for benefits pursuant to a settlement agreement in the same claim.

Langford injured her low back on March 21, 2005 when lifting a five gallon paint can. When her treating physician, Dr. Vaughn, proposed fusion surgery at L4/5, the employer, Danville Housing Authority ("Danville") denied the recommendation based upon a utilization review opinion by Dr. Nicholas T. Tsourmas. Thereafter, on January 2, 2007, Langford filed a medical fee dispute. Langford then filed her Form 101 Application for Resolution of Injury Claim on June 28, 2007. Then, pursuant to Langford's motion, the ALJ bifurcated the claim on August 13, 2007 for decision first on issues relating to the proposed surgery.

Litigation proceeded on the bifurcated issue resulting in the CALJ issuing an Opinion, Award and Order on February 20, 2008 finding:

> 2. The surgery recommended by Dr. Vaughn, a lumbar decompression and fusion of the L 4-L5 disc space with instrumentation, is medical treatment which is reasonably necessary for the cure and relief from the effects of the plaintiff's March 21, 2005 work-related injury and, pursuant to KRS 342.020, is compensable.
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> 3. The medical dispute concerning the surgery recommended by Dr. Vaughn is resolved in favor of Plaintiff and Defendant Employer shall be responsible

> for medical expenses relating to that surgery pursuant to KRS 342.020.

The CALJ then ordered the defendant-employer and/or its insurance carrier to pay for the medical treatment "and specifically, all expenses payable pursuant to KRS 342.020 for the lumbar decompression and fusion recommended by Dr. Vaughn". He then placed the claim in abeyance "pending the surgical treatment of the plaintiff and her attainment of maximum medical improvement". His order did not address any other issues.

On September 18, 2008, Langford filed a motion for temporary total disability ("TTD") benefits. In support, Langford noted Danville had been ordered to pay for the proposed lumbar decompression and fusion surgery, but surgery was postponed when she suffered a heart attack on May 28, 2008. Her surgery had been delayed for six months and Danville's counsel had indicated TTD benefits would be suspended as of August 27, 2008. Danville filed a response, but the record does not indicate an order was entered on that issue.

The parties thereafter filed numerous status reports including a July 17, 2009 report indicating surgery was performed on June 12, 2009 and Langford would remain off work through September 1, 2009. A November 12, 2009 status

report indicated Danville was paying TTD benefits and Langford would remain off work through February 1, 2010. Langford filed a motion to remove the claim from abeyance on December 6, 2010, noting Danville suspended TTD payments based upon the report of Dr. Travis.

The parties continued to develop proof and were eventually able to reach agreement on all remaining issues. They submitted a Form 110-I, Agreement As to Compensation and Order Approving Settlement to the CALJ who approved the agreement on August 8, 2011. The agreement noted an injury occurred on March 21, 2005 and dismissed an additional claim for carpal tunnel syndrome manifesting April 1, 2005. The agreement noted TTD benefits were paid from January 4, 2005 through January 10, 2005 and June 21, 2005 through June 20, 2006 at a rate of $325.88 per week. Additionally, TTD benefits were paid from June 21, 2006 through August 26, 2008 and June 12, 2009 through December 9, 2010 at a rate of $310.28 per week. The agreement stated Langford's average weekly wage was $465.39. The monetary terms of the settlement required that Langford be paid $25,000.00 lump sum and $150.00 weekly thereafter for 1,000 weeks.

Following approval of the agreement, Watts filed two motions and affidavits for attorney fees. He first moved for the maximum attorney's fee of $12,000.00 for his

representation of Langford which resulted in a total PPD settlement of $175,000.00. Watts also sought a fee of $8,369.19 for services related to securing interlocutory benefits.

By order dated August 17, 2011, the CALJ noted Watts had filed two motions for attorney's fees seeking an aggregate attorney fee of $20,369.19 for the resolution of the claim. However, the CALJ limited the fee to $12,000.00 pursuant to KRS 342.320(2)(a). He approved the motion for a $12,000.00 fee based upon the settlement and overruled the motion for a fee based upon the interlocutory benefits.

Watts filed a petition for reconsideration arguing 803 KAR 25:010, Section 12(6) should be construed as permitting a fee for interlocutory benefits in addition to the $12,000.00 maximum fee permitted for a final award. He noted medical fee disputes and motions for interlocutory relief were filed in addition to a Form 101. Watts argued a request for interlocutory relief should be viewed as a separate proceeding from the original claim.

In his order on reconsideration dated September 12, 2011, the CALJ reviewed the administrative history of the claim noting through Watts's efforts, the Plaintiff had recovered more than $72,000.00 in TTD benefits and had settled the claim with Danville for $175,000.00 which

included a waiver of future medical expense benefits. He also stated:

> As a former workers' compensation practitioner, I agree with the theory and sentiment set forth in the motions for approval of two separate fees and the argument advanced in the petition for reconsideration. As Abraham Lincoln once astutely observed, "A lawyer's stock in trade is his time and advice." Plaintiff's counsel has worked long, hard and effectively in his representation of the plaintiff in this very complex and time-consuming litigation. In most other forums in Kentucky and in workers' compensation forums in most of our surrounding states, counsel for plaintiff would be entitled to a much more appropriate award for recovering several hundred thousand dollars in medical and wage loss benefits for this plaintiff. Where [sic] the decision to award a higher fee solely to my discretion, counsel for plaintiff would be more appropriately rewarded. However, I do not have such discretion as I am sworn to observe statutory and case law of the Commonwealth.

The CALJ opined 803 KAR 25:010 was intended to provide counsel the means to obtain an attorney fee immediately upon recovery of interlocutory benefits regardless of whether the litigation continued. He noted the regulation could not "trump" the limitation set forth in KRS 342.320. The CALJ, in overruling the petition for reconsideration, indicated he

awarded the fee for one "original claim" and it must be limited to $12,000.00.

On appeal, Watts argues that, if the $12,000.00 cap on the attorney fee is applied to the combined awards for interlocutory benefits and the settlement, Section 12(6) of the regulation would be rendered "superfluous and meaningless." Watts asserts the regulation was created with the purpose of giving attorneys an incentive and compensation for filing requests for interlocutory relief. Watts notes the section does not limit itself to requests made in any particular form. He states:

> "The real question regarding an interlocutory fee authorized pursuant to Section 12(6) is if it is in addition to the fee in the claim for income benefits or is it only part of the fee which may be obtained in an original action pursuant to KRS 342.320."

Watts argues the provision regarding the statutory cap should be interpreted strictly. He notes KRS 342.320 limits the attorney fee to an original claim and the term "an" should be interpreted strictly since statutes in derogation of common-law rights are to be interpreted strictly. He asserts the right of counsel to an attorney fee pursuant to contract is a common-law right. Watts notes the term "original claim" is not defined in the statute. He contends

it is generally held to mean the filing of a Form 101. He further contends it is clear that medical fee disputes and motions for interlocutory relief "are not the same as filing a Form 101." He notes the regulations require a medical fee dispute or motion for interlocutory relief to be filed in addition to the Form 101. Both are authorized to be filed even after the claim has been resolved.

Finally, Watts argues the statute and regulation should be interpreted in light of the recognized need for claimants to be represented by counsel in all compensation proceedings. He notes the Court of Appeals in Lamb v. Fuller, 32 S.W.3d 518 (KY. App. 2000) held an attorney representing a workers' compensation claimant on two separate claims for injuries on two separate dates is entitled to two separate fees, even when those claims are litigated together. Counsel further notes the Court of Appeals in Duff Truck Lines v. Vezolles, 999 S.W.3d 224 (Ky. App. 1999) held a workers' compensation attorney representing a client in a motion regarding reimbursement for chiropractic expenses was entitled to an attorney fee in such proceedings notwithstanding the language of KRS 342.320. More recently in Collazo et al. v. Reliable Residential Guttering et al., Claim No. 2004-92067 rendered July 17, 2009, the Board held a separate attorney fee was

proper in a reopening in addition to amounts obtained in an original claim. Watts notes the Board recognized KRS 342.320 specifically authorizes a fee for prosecuting the original claim or for a reopening, but is silent regarding other instances in which a worker may be required to employ an attorney to protect his interests.

We believe the ALJ correctly limited the attorney fee to a maximum of $12,000.00 pursuant to KRS 342.320. The ALJ correctly determined benefits received pursuant to the interlocutory order and those received in the settlement agreement constituted resolution of one claim. We therefore affirm.

The relevant portion of KRS 342.320 provides in part:

> **(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:
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> **(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.

(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.

(4) No attorney's fee in any case involving benefits under this chapter shall be paid until the fee is approved by the administrative law judge and any contract for the payment of attorney's fees otherwise than as provided in this section shall be void. The motion for approval of an attorney's fee shall be submitted within thirty (30) days following finality of the claim. 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 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.

As the Supreme Court noted in Curry v. Toyota, 915 S.W.3d 557 (Ky. 2002), a motion for attorney's fee is premature under KRS 342.320 until finality of the ALJ's last appealable order. Except as authorized by 803 KAR 25:010 section 12(6), an ALJ is not authorized to award an attorney fee based upon an interlocutory award. The regulation specifically states the attorney fee for securing interlocutory benefits is limited to the amount authorized by KRS 342.320 that does not exceed 20% of the weekly income benefits awarded pursuant to the request for interlocutory relief.

Contrary to counsel's arguments, interpreting the provisions of the regulation and KRS 342.320 as limiting the attorney's fee to a maximum combined fee of $12,000.00 does not render the regulation meaningless or superfluous since the regulation provides a means for claimant's counsel to obtain a fee immediately upon recovery of the interlocutory award rather than waiting for the conclusion of the claim. Conceivably, an attorney may be reluctant to pursue a claim if the attorney cannot receive a portion of the fee prior to

the final resolution of the claim in cases involving prolonged litigation.

We disagree with counsel's argument that medical fee disputes and motions for interlocutory relief are separate claims. It is important to note an order granting interlocutory benefits is not a final and appealable order and is subject to change upon presentation of additional evidence. Thus, interlocutory motions are part of ongoing litigation and not a distinct claim. Any TTD benefits awarded pursuant to an interlocutory order are part of the award of TTD benefits in the final opinion in the claim.

Watts notes the Act does not define “original claim”. We disagree with his interpretation of the term. In our view, “original claim” refers to all proceedings prior to the rendition of a decision or approval of a settlement agreement. Although Watts cites the holdings in Lamb v. Fuller *supra*, and Duff Truck Lines v. Vezolles, *supra*, as support for his argument, those cases are clearly distinguishable from the case *sub judice*. 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. In this matter the claimant argues one general injury claim augmented by an intervening medical dispute and controlled by limiting provisions of the statute.

In Duff Truck Lines, *supra* the issue was whether an attorney who successfully defended an employee's claim for medical expenses in a reopening was entitled to an attorney's fee. The question in that case clearly did not involve an original claim and was distinctly different from the question before this Board. Finally, we also note our opinion in Collazo, *supra*, involved a re-opening which is clearly not an original claim.

Although we agree with the sentiments of the Chief Administrative Law Judge, an appeal to the Workers' Compensation Board is not the proper forum for this issue. Watts's arguments are better addressed to the legislature.

Accordingly, the August 17, 2011 and September 12, 2011 orders rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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