

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 8, 2015

CLAIM NO. 201398656

MARGIE MULLINS

PETITIONER

VS.

APPEAL FROM HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE

LEGGETT & PLATT

CCMSI

and HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION

AFFIRMING

* * * * *

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

STIVERS, Member. Margie Mullins ("Mullins") appeals from the January 16, 2015, Order of Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ") finding the statute and regulation grant Leggett & Platt an attorney fee discount for paying Mullins' full attorney fee up front.

Mullins also appeals from the February 20, 2015, Order overruling her petition for reconsideration.

The facts in this case are undisputed. Mullins sustained a work-related injury on December 17, 2012. The parties entered into an agreement as to compensation which was approved by Hon. J. Landon Overfield, former Chief Administrative Law Judge ("CALJ Overfield") on November 4, 2014.¹ The Form 110 reflects Mullins received three different periods of temporary total disability benefits totaling approximately 17 weeks and 4 days. She settled for \$93,028.59 to be paid at the rate of \$218.89 per week for 425 weeks. Mullins did not waive her right to past and future medical benefits, vocational rehabilitation, or right to reopen.

On November 19, 2014, CALJ Overfield granted Mullins' attorney an attorney fee of \$9,401.41.²

On December 15, 2014, Mullins filed a "Motion for Determination Under 803 KAR 25:075." Mullins asserted the parties had settled the claim for a weekly benefit of \$218.89 for 425 weeks and an attorney fee had been awarded. Mullins' counsel represented that on November 18, 2014, he

¹ CALJ Overfield retired in 2014.

² The order states the attorney fee "will be payable in a lump sum to plaintiff's attorney by the employer who will take credit for such payment out of the claimant's weekly benefits."

received correspondence from Leggett & Platt's insurance company announcing it would take credit for a purported attorney fee discount. The correspondence received from the insurance company was attached as an exhibit to the motion. The correspondence states Mullins' first permanent partial disability benefit check had been issued in the amount of \$11,382.28 covering the period from November 27, 2013, through November 26, 2014 (52 weeks). The letter also stated that after deduction of the attorney fee discount Mullins would be receiving \$191.36 per week beginning November 27, 2014, until the payout date of January 19, 2022. Attached on a separate sheet were the calculations of the attorney fee discount. The attachment recited the formula used for determining the discount set forth in 803 KAR 25:075 Section 1. The calculations were as follows:

Margie Mullins 12C97C443282

1. 425 weeks - 52 = 373 remaining weeks
2. 373 R weeks = P weeks 341.4748
3. \$9,401.41/341.4748 = 27.53 Y rate
4. 373 R weeks x 27.53 Y rate =
\$10,268.69 EMP atty fee and discount
5. \$10,268.69 EMP atty fee and discount
- \$9401.41 EMP atty fee = \$867.28 EMP
discount

6. \$218.89 Weekly Rate - \$27.53 Y rate
= \$191.36 Employer Reduced Rate

Mullins took the position the alleged discount was not authorized by the Workers' Compensation Act or the regulations. She attached a previous order from CALJ Overfield regarding the same issue in Timothy Brandenburg v. City of Beattyville, Claim No. 2012-00837, in which CALJ Overfield only allowed a deduction from the weekly benefits of an amount sufficient to recoup the actual attorney fee paid to Brandenburg's attorney and no additional amount. This led CALJ Swisher to enter the January 16, 2015, Order which reads as follows:

This matter comes before the Chief Administrative Law Judge on the Frankfort Motion Docket for consideration of plaintiff's motion for an order prohibiting the employer from "attempting to unilaterally reduce" her benefits. Therein plaintiff submits that the defendant/employer is calculating the weekly amount required to recoup attorney's fees paid to plaintiff's counsel by taking into consideration an "attorney fee discount" instead of simply dividing the attorney fee awarded by the absolute number of weeks remaining in the compensable period without any consideration of a present value discount. Plaintiff argues that the discount is not authorized in the Workers' Compensation Act nor its regulations, and she has attached to her motion a copy of an order issued by former CALJ J. Landon Overfield which, in essence, confirms plaintiff's

position. Plaintiff seeks a determination that the defendant/employer is not entitled to an attorney fee discount pursuant to 803 KAR 25:075.

In support of her motion, plaintiff has submitted a position paper prepared by her counsel for consideration by the former CALJ in a different claim but involving the same issue. In that position paper plaintiff cites the appropriate statute, KRS 342.320(4) and potentially applicable regulation, 803 KAR 25:070 as well as the legislative history pertaining to the statute.

The current version of KRS 342.320(4) provides in pertinent part as follows:

(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) ...This fee shall be paid **by the employee** from the proceeds of the award or settlement; (emphasis added).

. . .

(4) ...Except when the attorney's fee is to be paid by the employer or carrier, the attorney's fee shall be paid in one 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 of the duration of the award or until the attorney's fee has been paid, **commuting sufficient sums to pay the fee.** (emphasis added).

As plaintiff notes in counsel's prior position paper, the attorney fee statute, KRS 342.320 has been amended from time to time with respect to the method by which the amount to be recouped through the reduction of either weekly benefits or, in earlier versions of the statute, by reduction of the number of weeks in a compensable period, is calculated, taking into consideration the concept of "commuting." The term "commute" is defined, in relevant context, as "to substitute (payment in the lump sum) for payment in installments." [footnote omitted] Further, the term "commutation of payments" is defined as "a substitution of lump-sum compensation for periodic payments. The lump sum is equal to the present value of the future periodic payments." [footnote omitted]

The present version of KRS 342.320 provides that except when an attorney's fee is to be paid by the employer or carrier, one of two payment methods is appropriate: (a) the employee may pay attorney's fees out of his or her personal funds or (b) attorney's fees

shall be paid in a lump sum from the claimant's weekly benefits "commuting sufficient sums to pay the fee." Plaintiff contends that the language "except when the attorney's fee is to be paid by the employer or carrier" precludes the commutation process in her case since the attorney fee is being paid "by" the carrier. Plaintiff misreads the statute, however. It is clear that the phrase "except when the attorney's fee is to be paid by the employer or carrier" refers to those instances in which it is the carrier or employer, and not the claimant, who is responsible for payment of an attorney's fee. Specifically, KRS 342.040(2) provides that if overdue TTD benefits are recovered, the award of attorney's fees shall be paid by the employer if the ALJ determines that the denial or delay in payment was without reasonable foundation. "No part of the fee for representing the employee in connection with the recovery of overdue temporary total disability benefits withheld without reasonable foundation shall be charged against or deducted from benefits otherwise due the employee." Likewise, KRS 342.310 allows an administrative law judge to assess the cost of an unreasonably prosecuted or defended proceeding, including attorney's fees, against the offending party. These are instances in which the attorney's fee is to be paid by the employer or carrier, and not by the claimant. Otherwise, it is clear that it is the obligation of the claimant to pay his or her own attorney's fee: it is the claimant who has the contractual agreement with the attorney to provide legal services and he/she, therefore, owes a fee if benefits are recovered. KRS 342.320(4) does nothing more than provide statutorily approved mechanisms for

payment of plaintiff's attorney fee obligation. Except in circumstances such as described in KRS 342.040 and KRS 342.310, attorney's fees are not paid "by" employers or carriers, but are paid "by" claimants. KRS 342.320(4)(b) simply provides a mechanism by which a claimant may request that his contractual obligation to pay an attorney's fee can be satisfied by having the employer, in essence, made the payment on his behalf out of future periodic benefits. A review of the documents attached to plaintiff's motion in this claim establishes that the attorney's fee in the amount of \$9,401.41 is the obligation of plaintiff, not the obligation of the employer or its workers' compensation carrier. The claimant has simply elected to satisfy her contractual obligation to her attorney by directing that her attorney's fee be paid from her future periodic benefits.

Because this is not a situation in which the attorney's fee was ordered to be paid by the employer or carrier, the commutation provision of the statute (i.e., "commuting sufficient funds to pay the fee") is applicable. This issue, albeit under a prior version of the statute, was addressed by the Attorney General in OAG 78-672. Therein, the Attorney General expressed the opinion that the payment of the attorney's fee was a "partial lump sum for a particular purpose" and is, therefore, to be commuted in the same fashion as any other lump sum. If the attorney fee discount were not taken into consideration, the attorney's fees would, in essence, be paid in addition to the award, and not out of the award. Granted, the situation presented addressed by the Attorney General in

the aforementioned opinion dealt with the former practice of commuting a number of weeks at the end of the compensable period in order to allow proper recoupment of an up-front payment of attorney's fees by ending the compensable period earlier than it otherwise would. In the present statutory scheme no such "end of the award" commutation is permitted. What is permitted, however, is commuting "sufficient sums to pay the fee" from plaintiff's ongoing periodic benefits.

That the attorney fee discount applies and results in commutation of a lump sum payment of plaintiff's attorney's fees to present value and reduction in weekly income benefits taking into consideration the attorney fee discount is confirmed in 803 KAR 25:075 aptly named "attorney fee discount." The preamble to that regulation indicates,

The function of this administrative regulation is to establish a mechanism for crediting the employer, the employer's insurance carrier, and the Special Fund for the payment of attorney's fees for injuries occurring and disabilities arising after April 4, 1994, when the claimant elects to repay an attorney fee through the reduction of weekly benefits.

Section 1 of the regulation deals with the method by which the employer calculates the discount to which it is entitled by virtue of the up-front payment of attorney's fees and resulting in a reduction in weekly benefits otherwise payable to the claimant over the compensable period.

Although the former CALJ was of the opinion, as expressed in the order attached to plaintiff's motion, that the calculation in 803 KAR 25:075 was intended for use in claims in which both an employer and the Special Fund were responsible for payment of an award of attorney's fees, the undersigned disagrees. Further, the former CALJ made the "legal conclusion" that the specific language in Section 1 of the cited regulation that the "term 'P week (present worth)' in paragraph (2) of 803 KAR 25:075 is not a reference to a discounted present worth... it is rather simply the present mathematical number of remaining weeks of a defendant/employer's responsibility for payment of permanent partial disability benefits." The undersigned believes this interpretation to be legally incorrect. In fact, the regulation specifically provides in (1) that "employer weeks-awarded minus weeks pain = remaining weeks." While the regulation is not the model of clarity, subsection (2) provides "R weeks = P weeks (present worth)." The undersigned Chief Administrative Law Judge finds as a matter of law that the term "R weeks" of subsection (2) refers to the term "remaining weeks" in subsection (1). Further, there is simply no way to interpret the language "P weeks (present worth)" as standing for anything other than requiring a present value calculation of the remaining number of weeks in the benefit period.

The CALJ finds and concludes that both the statute and the regulation clearly provide for the calculation of a reduction in a claimant's periodic future benefits for the purpose of recouping the attorney fee paid on the claimant's behalf by application of the

attorney fee discount. Accepting plaintiff's contention that it is a straight mathematical calculation dividing the attorney fee awarded by the actual number of weeks remaining in the benefit period renders the language in the statute "commuting sufficient sums to pay the fee" nugatory. Likewise, were that the case the cited regulation becomes, in effect, meaningless. It is abundantly clear that the General Assembly intends that the attorney fee recoupment be calculated by reference to the prevailing discount rate (for workers' compensation purposes), and the provisions of 803 KAR 25:075 § 1 provide a mechanism to carry out that legislative intent. Otherwise, and without the attorney fee discount, the employer is compelled to pay a benefit not awarded, a partial lump sum payment without present value discounting. The statute and the regulation are clear and the attorney fee discount is applicable as a matter of law.

Plaintiff finally contends that the defendant/employer is attempting to "unilaterally reduce" her benefits. The regulation specific [sic] sets forth the mechanism for calculating the appropriate weekly reduction in benefits to recoup payment of plaintiff's attorney fee. The provision is self-executing and it is not necessary for an administrative law judge to specifically order the reduction. The CALJ acknowledges that Section 3 of 803 KAR 25:075 sets forth a procedure calling for the calculations to be performed by the Division of Workers' Compensation Funds with any disagreement as to the application of the formula to be resolved by an administrative law judge upon motion of any party. In this case,

however, the Special Fund is not involved and, in any event, plaintiff does not contend that the mathematical calculation made by the employer in the present case is incorrect. In the absence of liability on the part of and, therefore, involvement by the Division of Workers' Compensation Funds, the defendant/employer is entitled to make the attorney fee discount calculation with the proviso that should there be any disagreement as to the application of the formula, such disagreement is to be resolved by an administrative law judge upon motion by any party.

Accordingly, **IT IS HEREBY ORDERED** that plaintiff's motion to determination under 803 KAR 25:075 is **SUSTAINED** to the extent that the CALJ specifically finds that the defendant/employer is entitled to an attorney fee discount with respect to recoupment of attorney's fees paid on behalf of plaintiff pursuant to 803 KAR 25:075.

Mullins filed a petition for reconsideration making substantially the same arguments she now makes on appeal. The CALJ overruled the motion by order dated February 20, 2015, which reads, in relevant part, as follows:

Therein, plaintiff contends that the undersigned erred in allowing the attorney fee discount pursuant to KRS 342.320(4)(b) and 803 KAR 25:070 and :075 in the order of January 16, 2015. Specifically, plaintiff contends that the undersigned "did not fully appreciate the history nor the specific language of the Act." Thereafter,

plaintiff makes the same essential arguments that she made in the original motion in support of her contention that no discount is available to the defendant/employer and/or its insurance carrier in reducing her future periodic benefits to recoup attorney's fees paid to plaintiff's counsel.

While the undersigned acknowledges the scholarship of the argument, when all is said and done, KRS 342.320(4)(b) could (to borrow plaintiff's description) scarcely be less ambiguous. The statute specifically calls for a commutation of "sufficient sums to pay the fee." Had the General Assembly intended that no discount be taken, subsection (b) would end after the phrase "or until the attorney's fee has been paid..." The order of January 16, 2015, is completely consistent with the applicable statute and regulations. As there is no patent error on the face of the order, plaintiff's petition for reconsideration is **OVERRULED**.

On appeal, Mullins challenges the CALJ's order on four grounds. Citing KRS 342.320 and KRS 342.265, Mullins first contends Leggett & Platt's insurance company has violated the law by taking an attorney fee discount. She notes KRS 342.150 once empowered the Board to commute payments at the end of the claimant's award to a present lump sum. Further, Hicks v. General Refractories Co., 405 S.W.2d 734 (Ky. 1966) held the employer was allowed to discount an attorney fee pursuant to KRS 342.150 which set a 5% present value discount for commutation of lump sum

awards. In addition, in Beale v. Wright, 801 S.W.2d 319, 320 (Ky. 1990) the Kentucky Supreme Court held KRS 342.320(2), as amended in 1987, did not permit the Special Fund to discount the employee's income benefits due to a lump sum payment of the attorney fee. Mullins concedes the word "commute" was omitted from the 1987 version of KRS 342.320(2). She again notes the Act as amended in 1994 and 1996 is now the current statute in effect. Mullins asserts that in 1996 the legislature also repealed KRS 342.150 which she contends was only intended to allow the Special Fund to take a discount for up-front payment of an attorney fee in cases where it shared liability. She argues there is no authority for a discount in the current Act as the Special Fund was virtually eliminated. Mullins concludes by arguing:

Unlike in the repealed KRS 342.150, the ALJ cannot award indemnity benefits in a lump sum. Lump sums can only arise by settlement. There is no provision similar to KRS 342.150. KRS 342.265(3) is the only relevant statute that addresses lump sums, and, as noted above, it only provides for a discount in cases of lump sum settlement. The statute merely places a maximum value that can apply to lump sum settlements and does not require that all lump sums be subject to a discount. "[I]t is within the province of the General Assembly to legislate, and we may not add words or meaning to a statute." Beale v. Wright, 801 S.W.2d 319, 321

(Ky. 1990). There is no statutory authorization for a discount of any kind, except in the case of lump sum settlements. Therefore, any possible authority for an attorney fee discount via the regulations can only apply when the Special Fund shares liability.

Mullins' second argument is an extension of her first argument in that she argues the regulations do not authorize an attorney fee discount when the insurance company is solely liable for payment of income benefits. She contends the attorney fee discount described in 803 KAR 25:070 and 803 KAR 25:075 are not applicable in the case *sub judice*. Mullins argues in cases pending after the passage of the 1996 Act, for injuries occurring before December 31, 1996, the Special Fund was entitled to a discount. However, after 1996 there is no discount for anything but lump sum settlements. She argues the regulations in question apply only to the Special Fund. In support of her argument, Mullins cites to Section 3 of 803 KAR 25:075 which reads:

Section 3. 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. Any disagreements as to the application of the formula shall be

resolved by the administrative law judge upon motion by any party.

Hence, after 1996, there is no discount for anything but lump sum settlements. As a result, the insurance carrier and/or the Special Fund cannot perform their own calculations and improperly deduct Mullins' benefits. She asserts as follows: "If an insurance company/employer has not received the calculation when the award becomes final, it is without recourse." Mullins also cites to 803 KAR 25:070, Section 2 which indicates the Special Fund shall calculate the employer's credit for attorney's fees based on the "number of weeks due from employer or insurance carrier in future pursuant to KRS 342.120."

Consequently, Mullins argues the ramifications of KRS 342.120 are as follows:

KRS 342.120 is the statute giving rise to Special Fund and insurance company shared liability. There is no mention of an attorney fee paid when the Special Fund is not involved. Further, the statutory authority given is [sic] "KRS Chapter 342.120 provides the method by which an employer or its insurance carrier and the Special Fund share liability for award for injuries occurring and disabilities arising on or after July 15, 1982. The function of this administrative regulation is to establish a mechanism for crediting the above reference parties for the payment of attorneys' fees in these cases." 803

KAR 25:070. The authority given in 803 KAR 25:075 is similar. So, even if there was statutory authority for granting a discount to just the employer on its face, this regulation does not do so. Only when you read specific provisions in isolation and out of context can you reach that conclusion.

Third, Mullins argues by deducting additional funds beyond what is agreed, the insurance company is in breach of the settlement agreement. She notes the Form 110 contains no mention of reducing her benefits to take a discount for payment of an attorney fee. Therefore, by unilaterally reducing her benefits, the insurance company breached the agreement and is not entitled to take a discount of any kind that reduces her benefits beyond what the insurance company agreed to pay.

Finally, Mullins argues Leggett & Platt is not empowered to unilaterally take any discount. She argues that assuming the law provides for a discount, the insurance company is not allowed to engage in the calculations. Citing Hicks, supra, Mullins maintains the statute is plain "the ALJ must approve fees and commute awards."³ Mullins again argues that even though the Special Fund is virtually non-existent, the above regulations

³Hicks, supra, held the statute requires the Board to make commutations.

clearly only apply in situations where it shares liability, and in these cases the Special Fund must perform the calculation. She insists there is no scenario which allows the insurance company to unilaterally perform the calculation. We affirm.

The primary statute implicated in this controversy is KRS 342.320 which reads, in relevant part, as follows:

(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 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.

In addition, KRS 342.260 permits the Commissioner of the Office of Workers' Claims to promulgate administrative regulations necessary for the computation of attorney fees pursuant to KRS 342.320. It reads, in relevant part, as follows:

(1) The commissioner shall promulgate administrative regulations as he or she considers necessary to carry on the work of the department and the work of the administrative law judges and may promulgate administrative regulations not inconsistent with this chapter and KRS Chapter 13A for carrying out the provisions of this chapter.

. . .

(3) The commissioner shall develop or adopt life expectancy tables for use in making computations for the apportionment of benefits under KRS 342.120, computation of attorneys' fees under KRS 342.320, and for use in all other situations arising under this chapter...

Promulgated pursuant to those statutes, 803 KAR

25:075 Sections 1 and 2 read as follows:

Section 1. 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) $R \text{ weeks} = P \text{ weeks (present worth)}$.

(3) $EMP \% \text{ Attorney fee} / P \text{ weeks} = Y \text{ rate}$.

(4) $R \text{ weeks} \times Y \text{ rate} = \text{employer attorney fee and discount}$.

(5) $EMP \text{ attorney fee and discount} - EMP \text{ attorney fee} = EMP \text{ discount}$.

(6) $\text{Weekly rate} - Y \text{ rate} = \text{Employer reduced rate}$.

Section 2. Special Fund Credit. The Department of Labor, Office of Workplace Standards, Division of Workers' Compensation Funds shall calculate its lump sum credit for attorney's fees in cases involving injuries occurring and disabilities arising on or after April 4, 1994, as follows:

(1) $\text{Employer weeks awarded} - \text{weeks paid} = \text{remaining weeks}$.

(2) $R \text{ weeks} = P \text{ weeks (present worth)}$.

(3) $\text{Total weeks awarded} - \text{weeks paid} = \text{total remaining weeks}$.

(4) $TR \text{ weeks} = PW \text{ weeks (present worth)}$.

(5) $PW \text{ weeks} - P \text{ weeks} = SF \text{ (special fund) weeks}$.

(6) $SF \% \text{ Attorney fee} / SF \text{ weeks} = SF \text{ rate reduction}$.

(7) $SF \text{ rate reduction} \times SF \text{ weeks owed} = SF \text{ attorney fee and discount}$.

(8) $SF \text{ attorney fee and discount} - SF \text{ attorney fee} = SF \text{ discount}$.

The above-cited statutes and regulations clearly permit Leggett & Platt to deduct from Mullins' weekly benefits more than an amount sufficient to pay the \$9,401.04 attorney fee. Thus, Leggett & Platt did not violate the law by taking the attorney fee discount.

This controversy centers solely upon the interpretation of the phrase "commuting sufficient sums to pay the fee." More specifically, the definition provided by the case law of "commute" is central to this issue. In that respect, the language in Hicks, supra, is controlling. In Hicks, the claimant contended "since KRS 342.320(2) did not specifically authorize a discount of the amount to be commuted it indicates a legislative intent that no discount be allowed and that the provisions of KRS 342.150 allowing a 5% discount for commuting of a lump sum are not applicable to an attorney's fee." Id. at 735. The former Court of Appeals, now Supreme Court, disagreed. There, the Court of Appeals defined "commute" as follows:

The provisions of KRS 342.320(2) direct that the attorney's fee be paid as a lump sum and that the Board shall pay it directly to the attorney 'commuting sufficient of the final payments of compensation' for that purpose. To 'commute' is to 'exchange' or 'alter.' Webster's Third International Dictionary. As used here we believe the word refers to an exchange of a series of greater, future

payments for a lesser, immediate payment. [citation omitted]

Id. at 735.

The above definition of "commute" permits Leggett & Platt to deduct more than an amount sufficient to recoup the amount of the attorney fee paid up-front to Mullins' attorney. In Hicks, the Court of Appeals explained the logic for allowing the employer to deduct more than an amount sufficient to recoup the attorney's fee as follows:

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.

The Court of Appeals also clarified it was Hicks who was charged with paying the attorney fee and not the employer explaining:

Since he received an award from the Board, Hicks' financial obligation to his attorney was paid as a lump sum in accordance with KRS 342.320. Moreover, KRS 342.150 provides that a lump sum award be discounted at 5% per annum. If Hicks' 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. The attorney's fee was commuted on behalf of Hicks and was properly discounted. Cf. Citation

Coal Company v. Lewis, Ky., 365 S.W.2d 730, 731, involving the payment of an attorney's fee and tacitly approving a 5% discount of the award.

Id.

Although Hicks, supra, does not specifically deal with the question before us, it clearly delineates that commuting sufficient funds to pay the attorney's fee encompasses more deducting from each installment an amount sufficient to pay just the amount of the attorney's fee awarded. Significantly, we note the computations employed by Leggett & Platt pursuant to 803 KAR 25:075 Section 1 are not in question.⁴

Beale v. Wright, supra, firmly supports our decision. In 1987, the General Assembly revised KRS 342.320 to the extent it read as follows:

"(2) No attorney's fee in any case involving benefits under this chapter shall be paid until the fee is approved by the board, and any contract for the payment of attorney's fees otherwise than is provided in this section shall be void. The entire attorney's fee in a lump sum shall be paid directly to the attorney of record, and the board in allowing or approving an attorney's fee, as provided in this section, shall order payment of same directly to the attorney, commuting sufficient of the final payments of compensation payable

⁴ We note that even though Mullins was injured on December 17, 2012, she was paid a lump sum covering the period from November 27, 2013, to November 26, 2014, and the remaining weeks were reduced to a present worth in accordance with the regulation.

under the award to a lump sum for that purpose."

Id. at 320.

Since the relevant section of the statute no longer contained the word "commute," the Supreme Court determined the Special Fund was not entitled to an attorney fee discount when it paid part of the claimant's future benefits to satisfy the attorney's fee. The Supreme Court explained:

In 1987 the General Assembly revised KRS 342.320 by dividing Section 2 into three subsections, (a)-(c), creating three methods by which to distribute attorney fees. Subsection (a) retains pre-1987 law. Subsection (b) provides that the claimant may pay the fee from personal funds. Subsection (c), the method of distribution elected in this case, provides as follows:

"(2)(c) 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."

While subsection (a) deducts the fee from claimant's final award payments, thereby cutting them off completely, subsection (c) permits equal deductions throughout the

duration of the award payments. The legislature did not specifically categorize the method in subsection (c) as a commutation, which forms the crux of the problem in this case.

The Special Fund contends that it should not be necessary that the statute use the word "commute" for it to deduct a discount when the Special Fund is required to pay out presently part of a claimant's future benefits in order to pay an attorney fee. However, it is the word "commute" as used in KRS 342.320 and KRS 342.150 that formed the basis of the *Hicks* opinion justifying a lump-sum attorney fee discount. Regardless of the fact that future payments are being used to compensate the attorney under subsection (c), the legislature clearly set up a separate system of distribution, and the judiciary may not speculate as to the legislature's intentions.

As the Court of Appeals noted, it is within the province of the General Assembly to legislate, and we may not add words or meaning to a statute. 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. at 320-321.

Since the word "commute" was not used in the statute in 1987, no discount was allowed. The statute was subsequently amended and KRS 342.320(4) now allows the employer to commute sufficient sums to pay the attorney's

fee. Based on the reinsertion of the phrase "commuting sufficient sums to pay the fee" in KRS 342.320(4)(b) and the Supreme Court's holding in Hicks, supra, and Beale v. Wright, supra, we hold Leggett & Platt was permitted to reduce Mullins' weekly benefits by more than just an amount sufficient to recoup the actual amount of the attorney fee.

We reject Mullins' assertion that there is no statutory authorization for an attorney fee discount of any kind, as we believe the language in KRS 342.320(4)(b) specifically allows Leggett & Platt to take an attorney fee discount and reduce the weekly installments by more than an amount sufficient to recoup just the amount of the attorney fee it paid utilizing funds due Mullins in the future. Further, we reject the argument the discount only applies when the Special Fund shares liability, as the amendment to the statute in 1996 abolished the Special Fund's liability. To interpret the statute as Mullins requests would completely eviscerate the purpose of KRS 342.320(4)(b). Further, the fact Section 3 of 803 KAR 25:075 requires the Special Fund to perform the calculations is of no significance as the Special Fund no longer has any involvement or liability in injury cases. Thus, it would be wholly illogical to direct the Special Fund to make the calculations required by Sections 1 and 2 of the regulation

when it has no involvement in the claim and it is not responsible for paying the benefits to the employee or forwarding the attorney fee to the employee's attorney. Although the section is outdated, it cannot alter the provisions of KRS 342.320(4) which permit the employer to take a discount for paying the attorney's fee up front prior to initiation of payment of the weekly income benefits.

Mullins' reliance upon the language in 803 KAR 25:070 Section 1 is also misplaced. That section reads 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." It then directs the Special Fund shall calculate the credit for attorney fees. That regulation specifically grants the defendant a credit for the lump sum value of any attorney fee paid. The fact the Special Fund was required to calculate the credit is of no import.

Similarly, we find no merit in Mullins' reliance upon KRS 342.120(2) which directs the Special Fund shall have no liability upon any claim for injury or occupational disease if the date of injury or last exposure occurred after December 12, 1996. KRS 342.120(2) removed the Special Fund from the picture as far as liability for

employee benefits. That being the case, since it had no financial responsibility for income benefits due the employee, the Special Fund clearly had no further responsibility to compute and/or deduct amounts from benefits due an employee in order to pay an attorney's fee awarded by an ALJ.

We reject Mullins' third argument that by taking additional funds beyond what was agreed in the settlement agreement, the insurance company is in breach of the signed contract. That argument cuts two ways, as the agreement contains no provision for the payment of attorney fees. Applying Mullins' argument, any payment of the attorney fee would be in breach of the agreement as Leggett & Platt is contractually bound to pay \$218.89 weekly and cannot deduct an attorney's fee from this amount. KRS 342.320(4)(b) trumps any language in this settlement agreement since there is no question Mullins' attorney is entitled to a fee in accordance with the provision of KRS 342.320(4)(b) and 803 KAR 25:075 Sections 1 and 2.

Finally, Leggett & Platt's argument that Hicks, supra, requires the ALJ or Board to make the computation has no merit as the holding in Hicks does not alter the fact the employer is entitled to a discount pursuant to KRS 342.320(4)(b) for paying the employee's attorney's fee

utilizing his future income benefits. Further, as previously noted, Mullins' reliance upon Section 3 of 803 KAR 25:075 is misplaced as that section cannot defeat the employer's statutory entitlement to a discount for commuting sufficient funds to pay the employee's attorney's fee. As noted by the CALJ in his initial order, if there is a dispute regarding the computations, Section 3 specifically directs any disagreements as to the application of the formula to be resolved by the Administrative Law Judge upon motion by any party. Pursuant to that statute, the CALJ resolved the dispute regarding Leggett & Platt's entitlement to a discount for paying the attorney fee up-front in accordance with KRS 342.320(4)(b). As Mullins does not find fault in the amount of Leggett & Platt's discount computed pursuant to KRS 342.320 and 803 KAR 25:075 Sections 1 and 2, the CALJ's decision must be affirmed.

Accordingly, the January 16, 2015, Order and the February 20, 2015, Order overruling Mullins' petition for reconsideration of CALJ Swisher are **AFFIRMED**.

ALL CONCUR.

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