Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 3, 2014

CLAIM NO. 201280059

MATTHEW CECIL
and HAL D. FRIEDMAN PETITIONERS

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

DAUENHAUER PLUMBING
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Counsel for Matthew Cecil ("Cecil"), Hal D. Friedman ("Friedman"), appeals from the March 12, 2014, Order awarding him an attorney's fee in the above-styled claim and the March 31, 2014, Order on Reconsideration.

Cecil's workers' compensation claim against Dauenhauer Plumbing, filed October 5, 2012, as a result of

a June 29, 2012, motor vehicle accident ("MVA") was settled for a lump sum of $57,500 as reflected in the Form 110 Agreement as to Compensation and Order Approving Settlement dated February 14, 2014. The Form 110, under the heading of "Other Information" contains the following:

> Plaintiff filed this claim against the Defendant/Employer to recover workers' compensation benefits attributable to the alleged work injury of June 29, 2012. The functional impairment ratings of record range from 0% to 27%. Due to the risk and costs of further litigation, Plaintiff and the Defendant/Employer have agreed to compromise and settle this claim for $57,500 (plus lien waiver of $16,331.88) in a lump sum. Settlement is for a complete and total dismissal of all claims for any monetary, income or indemnity benefits, including a waiver of vocational rehabilitation, waiver of future medical, and waiver of the right to reopen. Past medical expenses will remain open. All claims are waived in consideration of the settlement proceeds.
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> Defendant/Employer agrees to satisfy its liability as follows: The Defendant/Employer is to pay to the Plaintiff $57,500 (plus lien waiver) in a lump sum. This amount is inclusive of interest, attorney fees, vocational rehabilitation, temporary total disability, permanent total disability, permanent partial disability, waiver of the right to reopen, and waiver of future medicals....

On February 14, 2014, Friedman filed a "Motion for Attorney Fees" in which he asserted as follows:

> Comes, Hal D. Friedman, and the law firm of Cooper & Friedman, PLLC, attorneys for Plaintiff, and move the Board for an award of attorney's fee in the sum of $8,436.09 for benefits recovered on behalf of the claimant, Matthew Cecil. This Motion is made pursuant to the provisions of KRS 342.320(6) and (7). In support of said motion there is filed herewith the affidavit of Hal Friedman, a Form 109 and the attorney/client contract of representation.
>
> A Settlement Agreement has been negotiated and approved by the parties, and is being filed herewith granting claimant PPD benefits in the amount of $73,721.88 with past medicals to remain open. This figure is composed of a lump sum payment to be made by the Defendant/Employer in the amount of $57,500.00 along with the Employer's agreement to waive its statutory lien under law against the $16,221.88 currently held in Plaintiff's attorney's escrow account which was recovered on behalf of the Plaintiff from the original tort feasor in the initial liability claim which arose from the collision on June 29th, 2012.

In the March 12, 2014, Order the ALJ ordered as follows:

> This matter comes before the Administrative Law Judge on the Plaintiff's Attorney's Motion for Attorney's Fees. The Movant has used, in part, as the total recovery basis, the amount of the civil subrogation lien waived by the Defendant. This is

> not an appropriate basis for a fee. The correct total recovery for the purposes of this Motion and Order is those sums recovered directly pursuant to the Act, KRS 342 et. seq., $57,500. Therefore, a fee is Ordered in the amount of $7625.00, to be deducted from the lump sum payment to the Plaintiff.

In his petition for reconsideration, Friedman sought reconsideration of the March 12, 2014, Order and approval of the full amount of the requested fee or for the ALJ to provide additional findings of fact and conclusions of law explaining the reasoning behind the denial of his requested fee.

In the March 31, 2014, Order on Reconsideration, the ALJ set forth the following:

> I can still find no statutory or *stare decisis* authority for the awarding of Kentucky Workers' Compensation Attorney's Fees for benefits or recovery not awarded under the Act. Inasmuch as Workers' Compensation used to be, and still is largely, entirely a creature of statute I can see no reason for this Administrative Law Judge to create a new basis for recovery of an attorney fee.
>
> As far as any argument regarding equity I would note that the argument that Plaintiff's Attorney/Movant makes has sound facts. However, that is more than countered by the rationale as set forth in AIK Selective Self Insurance Fund v. Bush, 74 S.W.3d 251 (Ky. 2002). While that case did not addresses [sic] Plaintiff's attorney's fees directly it

> did address that in a claim wherein an injured worker has both a valid civil claim and a valid workers' compensation claim his overall recovery shall not be jeopardized or diminished by various subrogation rights, liens and fees. Unless the Movant is arguing that the attorney who obtained the civil recovery did not obtain a fee then an award of a fee herein, based on that recovery, would penalize the Plaintiff.

On appeal, Friedman argues he is entitled to an attorney's fee based on the full amount recovered on behalf of Cecil, which includes the amount placed in escrow secured in the civil settlement.

We affirm both the March 12, 2014, Order and the March 31, 2014, Order on Reconsideration.

KRS 342.320 is the statute pertaining to attorney's fees in Kentucky workers' compensation claims. Section (2) of the statute reads, in part, as follows: "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." (emphasis added). KRS 342.320(4) reads, in part, as follows: "**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." (emphasis added). Additionally, 803 KAR 25:070, the regulation

relating to KRS 342.320, states, in relevant part, as follows: "KRS 342.320 requires the Workers' Compensation Board [now, the ALJ] to approve the payment of the attorney's fee in any case **involving benefits under KRS Chapter 342**...." (emphasis added).

Being unambiguous on its face, a rule of statutory construction long accepted by Kentucky courts is that unambiguous statutes must be applied as written. "[A]bsent an ambiguity, 'there is no need to resort to the rules of statutory construction in interpreting it.'" Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008). The legislature's intent must be inferred "from words used in enacting statutes rather than surmising what may have been intended but was not expressed." Hall v. Hospitality Resources, Inc., supra.

Therefore, by explicitly limiting its language to those "attorney's fees for services under this chapter on behalf of an employee," KRS 342.320, and by extension 803 KAR 25:070, pertains only to those sums recovered pursuant to the Workers' Compensation Act. Thus, only those sums recovered pursuant to the Act are subject to an attorney's fee. If that were not that case, the Act would have additional language and instruction on how to calculate attorney's fees for those sums recovered in proceedings

outside of the Act. Here, the only amount recovered in the above-styled claim was $57,500.00. The sum held in the escrow account had already been recovered in the tort action, not in the case *sub judice*. The fact Friedman secured a release of the lien against the escrowed sum does not entitle him to recover an attorney fee in the case *sub judice* based in part on the amount of the funds held in escrow.

Additionally, and as expressed by the ALJ in the March 31, 2014, Order on Reconsideration, there is "no statutory or *stare decisis* authority for the awarding of Kentucky Workers' Compensation Attorney's Fees for benefits or recovery not awarded under the Act." In other words, there is no legal authority supporting the argument made by Friedman that he is entitled to an attorney's fee which in part takes into account the amount of the funds held in escrow.

Based on language in Friedman's brief, it appears a portion of the amount collected in settlement of Cecil's tort claim was $25,000.00. Of that amount, $16,331.88 or $16,221.88 was held in escrow, the balance remaining after

deduction of the attorney's fee.[1] We are unable to discern the exact amount held in escrow as the Form 110 represents $16,331.88 was placed in escrow, and in his brief Friedman represents $16,221.88 was placed in escrow. Should Friedman wish to collect an *additional* attorney's fee relative to this amount, he cannot do so within the workers' compensation process.

Accordingly, the March 12, 2014, Order and the March 31, 2014, Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

PETITIONER:

MATTHEW CECIL
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[1] In his brief, Friedman represented as follows: "Eventually, after over a year of representation by his counsel he was able to settle the tort claim against Kentucky Commercial Gases for policy limits of $25,000.00. [footnote: Additional insurance was located by Petitioner's counsel including an underinsured motorist policy. Those policies were also tendered. As a result, Mr. Cecil was able to collect a good deal more than the first $25,000 in liability proceeds on the tort claim. However, as those additional funds recovered were paid for underinsured motorist benefits by a UIM carrier, KEMI as the workers [sic] Compensation Carrier had no claim to them and therefore the issues related to Mr. Cecil's recovery of funds, which are not liability funds, are not relevant to this appeal.] *See*, Appendix 3, Check copy for $25,000.00 from Cincinnati Insurance.

Recognizing that under KRS 342.700 KEMI would have a statutory lien claim for monies paid in the Workers Compensation claim against the liability funds recovered on Mr. Cecil's behalf, Plaintiff's counsel escrowed those funds (**after payment of attorney fees**) pending ultimate resolution of the Workers Compensation Claim. The amount escrowed was $16,221.88."

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