OPINION ENTERED: January 18, 2013

CLAIM NO. 201100131

MEGAN LYON,
NORMAN E. HARNED,
and HARNED BACHERT & MCGEHEE, PSC PETITIONERS

VS. **APPEAL FROM HON. DOUGLAS W. GOTT,**
ADMINISTRATIVE LAW JUDGE

NHC HEALTHCARE
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Megan Lyon ("Lyon") and her attorney Norman E. Harned, of the law firm of Harned, Bachert & McGehee, PSC ("Harned") appeal from the June 11, 2012 order entered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") awarding attorney fees.

In the order, the ALJ awarded Harned an attorney fee of $2,681.49 based upon $13,407.45, which reflects the sum awarded in the opinion rendered March 23, 2010, for temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits. The ALJ denied Harned's request for an additional attorney fee based upon vocational rehabilitation benefits awarded. We affirm.

A review of the procedural history of this case is necessary. Lyon sustained a left knee injury on March 23, 2010, when she slipped and fell while assisting a resident in the course and scope of her employment with NHC Healthcare ("NHC"). On January 3, 2011, Lyon filed a motion for interlocutory relief requesting payment of TTD benefits and vocational rehabilitation benefits. She supported the motion with an affidavit regarding rehabilitation services. She filed a supplemental motion for interlocutory relief on January 12, 2011. NHC responded to both motions. On February 1, 2011, Hon. J. Landon Overfield, Chief Administrative Law Judge, ("CALJ") entered an order denying Lyon's request.

Lyon filed a Form 101 – Application for Resolution of Injury Claim on August 24, 2011. On August 31, 2011, NHC filed a Form 111 – Claim Denial or Acceptance, accepting the claim as compensable, but noted a dispute existed concerning

the amount of compensation owed. On September 20, 2011, a scheduling order was issued assigning the claim to the ALJ, and setting a benefit review conference ("BRC") for January 11, 2012. The parties subsequently introduced medical reports and records, and Lyon was deposed.

On January 3, 2012, Lyon again filed a motion for interlocutory relief requesting payment of TTD benefits and vocational rehabilitation. She estimated the vocational rehabilitation required a two year program, at a cost of $42,000.00. At the BRC held January 11, 2012, the issues preserved for adjudication included benefits per KRS 342.730, TTD benefits, average weekly wage, medical benefits, vocational rehabilitation benefits, travel reimbursement, 18% interest on past due TTD benefits, fees and costs to be paid for sanctions against NHC, and whether NHC had engaged in unfair claims practices. On January 20, 2012, Lyon filed a notice of filing of motion for interlocutory relief, and a supplemental motion for interlocutory relief. Lyon testified at the hearing held January 25, 2012, and briefs were filed by the parties.

On March 23, 2012, the ALJ rendered a decision awarding TTD benefits from March 25, 2010 to September 25, 2010, at the rate of $226.65 per week, and PPD benefits at the rate of $22.10 per week for 425 weeks based upon a 3.25%

disability enhanced by the three multiplier contained in KRS 342.730(1)(c)1. The ALJ also granted Lyon's request for expense reimbursement, along with interest at the rate of 12%. The ALJ also awarded medical benefits related to the left knee injury. Additionally, the ALJ awarded the following:

> Plaintiff shall further recover vocational rehabilitation expenses in the form of costs attendant to Lyon's pursuing the applicable diploma or certificate at Bowling Green Technical College for an ultrasound technician or a coding and billing clerk. The Defendant's liability shall not exceed 52 school weeks.

Regarding the request for sanctions, the ALJ found as follows:

> Clearly there was a good faith dispute over entitlement to TTD in this case such that there is no basis for the claims for costs, sanctions, unfair claims practices, and attorney's fees.

NHC filed a petition for reconsideration on March 30, 2012, requesting the ALJ enter an order allowing credit for TTD benefits paid, wages paid, and an advance payment of $2,500.00 previously paid to Lyon. Lyon objected to credit being awarded for wages paid. Lyon also filed a petition for reconsideration challenging the ALJ's reliance upon certain medical reports.

In an order entered April 24, 2012, the ALJ denied Lyon's petition for reconsideration, and granted NHC's petition requesting credit for payments made against the award.

On May 29, 2012, Harned filed a motion seeking approval of an attorney fee in the amount of $6,399.11 based upon recovery of a total amount of $34,327.45, which he requested to be paid by NHC, although the ALJ did not assess sanctions pursuant to KRS 342.310. Of the $34,327.45, $13,407.45 is the total amount of TTD benefits and PPD benefits awarded, for which the ALJ approved an attorney fee in the amount of $2,681.49. The balance of the requested attorney fee, or $3,717.62, would be assessed from the vocational rehabilitation expenses, expected to be $20,920.00. In support of the motion, Harned filed a listing of services rendered, along with a copy of the fee agreement he entered into with Lyon on April 2, 2010. He also attached a copy of the Form 109 Standard Form for Attorney Fee Election signed by Lyon on May 18, 2012, indicating she elected to have any attorney's fee paid in a lump sum, and to have each of her weekly benefits equally reduced until NHC had recouped the amount of her attorney fee.

The parties subsequently executed a Form 110-I settlement agreement resolving the payment of income benefits, which was approved by the CALJ on July 6, 2012.

In the order issued June 11, 2012, which is the subject of this appeal, the ALJ stated as follows:

> This matter is before the Administrative law Judge on the motion from Plaintiff's counsel for an attorney's fee. As to the income benefits recovered for his client in the amount of $13,407.45, an award of $2,681.49 is approved. As to the request for a fee on the award of vocational rehabilitation, such is denied as it is requested to be paid by the Defendant/employer. Under the circumstances of this claim, there clearly is no authority requiring the Defendant to pay attorney's fees in any manner other than as part of the indemnity award made to Plaintiff, from which her attorney's fees are to be paid. The ALJ acknowledges the efforts of Plaintiff's counsel in this case, and does not quarrel with the fact that his recovery may not be commensurate with the value of those efforts, but there is no provision in KRS 342.320 for an attorney's fee for an award of vocational rehabilitation. Such is no different than if a request for attorney's fees was sought for the value of an award of future medical benefits.

Neither Lyon nor Harned filed a petition for reconsideration of the attorney fee award.

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**; and

(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 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.

(5) At the commencement of the attorney-client relationship, the attorney shall explain to the employee the methods by which this section provides for the payment of the attorney's fee, and the employee shall select the method in which the attorney's fee is to be paid. His or her selection and statement that he or she fully understands the method to be used shall be submitted by his or her attorney, on a notarized form signed by the employee, at the time the motion for approval of the attorney's fee is submitted. The commissioner shall develop the format and content of the form to be used pursuant to this section. The form to be used shall list on its face all options permitted in this section for the payment of an attorney's fees and contain an explanation in nontechnical language of each method.

(Emphasis added)

The above-cited sections set forth the manner of calculating the attorney fee for representing an employee in an original claim. While not specifically addressing an attorney fee for vocational rehabilitation as requested by Harned, KRS 342.320(3) above states the attorney fee shall be paid from the award or settlement. Section 4 provides the manner of payment of attorney fees, if not to be paid by the employer.

While the cost of the proceeding could be assessed against an employer for unreasonable proceedings pursuant to KRS 342.310, the ALJ found such was not applicable in the case *sub judice.* The ALJ determined NHC is not responsible for the payment of attorney fees other than as part of the indemnity award made to Lyon.

In support of his appeal, Harned relies upon this Board's opinion which was appealed to the Kentucky Court of Appeals in Franks v. Lone Mountain Processing, Inc., 2006 WL 1360881 (Ky. App. 2006). In that claim, the Court of Appeals affirmed this Board's decision, which had denied the claimant's attorney's request for approval of an attorney fee for vocational rehabilitation benefits. There the claimant did not request sanctions pursuant to KRS 342.310. Here the ALJ found such sanctions inapplicable.

While we acknowledge an award of attorney fees is not confined to income benefits, Duff Truck Lines, Inc. v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999), based on the language in both the ALJ's opinion and the applicable statute, we find no error in limiting the award of attorney fees to $2,618.49. While securing vocational rehabilitation is a significant benefit obtained for Lyon, it is apparent here the fees are to be paid directly to the vocational rehabilitation provider, not directly to Lyon. This situation is unlike Wheeler v. Overfield, WCB Claim No. 2009-96309 (July 23, 2012), where the injured worker actually received a monetary benefit for the waiver of a right.

The ALJ found sanctions were not applicable. KRS 342.320(2)(a) states the "fee shall be paid by the employee from the proceeds of the award or settlement". Specifically, KRS 342.320(4) identifies those sources as the employees own personal funds, the proceeds of a lump sum settlement, or from the benefits due the employee. We believe this situation to be no different. Lyon would be responsible for the payment of any attorney fee awarded for procuring vocational rehabilitation benefits from her own funds. Since she did not and will not actually receive

those funds, it would be manifestly unfair for her to pay an attorney fee for payments to a third party provider.

An award of vocational rehabilitation services is akin to an award of medical benefits. Therefore, the sums paid to the vocational rehabilitation provider cannot be reduced to pay an attorney fee. The issue of whether the funds due a third party medical provider can be used to pay an attorney fee was resolved by the Kentucky Supreme Court in Rager v. Crawford & Co., 256 S.W.2d 4 (Ky. 2008). Additionally, this Board addressed the same question in Zineddin v. The Neilsen Company, WCB Claim No. 2004-73617 (August 15, 2008).

In Zineddin, supra, an attorney was ordered to be paid from funds due Zineddin, the third party medical provider, for services rendered to the claimant. That order was erroneous since KRS 342.320(7) does not permit the funds of third party medical providers to be used to pay claimant's attorney fees. Accordingly, the order of the ALJ was reversed. As pointed out in Zineddin, supra, KRS 342.320 establishes the only sources of funds which may be used to pay an attorney fee.

Finally, as noted by Harned, our courts have repeatedly recognized the legislative purpose underlying KRS 342.320 is to encourage attorneys to undertake

representation of injured workers and to ensure an opportunity for injured workers to exercise their rights. *See* Rager v. Crawford & Co., supra; Napier v. Scotia Coal Co., 874 S.W.2d 377, 378 (Ky. 1993). Harned's assertion in his motion for approval of attorney fee that attorneys who have undertaken representation of clients may provide less than adequate services, because of the lack of incentive to do so is not well taken.

Accordingly, the June 11, 2012 decision by Hon. Douglas W. Gott, Administrative Law Judge awarding Harned an attorney fee in the amount of $2,681.49 is hereby **AFFIRMED**.

ALL CONCUR.

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