

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 15, 2022

CLAIM NO. 201790399

COVINGTON PUBLIC SCHOOLS

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

BRENDA DORNACHER and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING & REMANDING**

* * * * *

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

MILLER, Member. Covington Public Schools (“Covington Public”) appeals from the February 4, 2022 Order and the March 22, 2022 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”). The sole issue on appeal concerns the method of payment of attorney fees. The ALJ sustained Brenda Dornacher’s (“Dornacher”) attorney’s motion for an attorney’s fee but ordered it to be paid in a lump sum and to have each of her future weekly benefits reduced equally

to account for the attorney's fee. In this claim, all indemnity benefits had been paid prior to the attorney's fee Order being issued. Covington Public argues it cannot be required to pay the fee. Dornacher argues Covington Public should still pay her attorney's fee while conceding all owed indemnity benefits have been paid.

The Board vacates the February 4, 2022 attorney fee Order and the March 22, 2022 Order denying Covington Public's Motion to Reconsider and Amend Order. We remand this claim to the ALJ to make any directives, including a request for Dornacher and her counsel to file a new Form 109.

BACKGROUND

Brenda Dornacher began working for Covington Public as a bus driver on December 1, 2016. She sustained a work injury on March 9, 2017 due to a motor vehicle accident which occurred in the course and scope of her employment. She underwent right shoulder surgery for treatment of her injury. Proof was taken and the ALJ issued an Opinion, Award, and Order on November 12, 2020. Dornacher was awarded temporary total disability ("TTD") benefits from April 17, 2017, through February 15, 2019, and permanent partial disability ("PPD") benefits, including the three multiplier pursuant to KRS 342.730(1)(c)1 because she did not retain the capacity to return to her pre-injury work as a bus driver. The ALJ denied the request for permanent total disability ("PTD") benefits. The benefits were subject to the age limitation contained in KRS 342.730(4). Dornacher was born on January 11, 1944. She was 73 years old at the time of injury.

Dornacher filed a Petition for Reconsideration arguing she is permanently totally disabled, and the ALJ should have found her cervical injury

compensable. Dornacher further argued KRS 342.730(4) is unconstitutional and should not be applied retroactively to her case.

The ALJ denied the Petition for Reconsideration in an Order issued on November 25, 2020. The ALJ explained why she denied benefits for the cervical injury. She also stated, “This ALJ does not have the discretion or authority to address constitutional issues. Thus, she must defer to the appellate courts.”

Dornacher appealed to the Board arguing she is permanently totally disabled, and that KRS 342.730(4) is unconstitutional. The Board affirmed the ALJ on February 19, 2021. The Board cited to Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), in stating the Kentucky Supreme Court has determined that KRS 342.730(4) regarding the termination of benefits at age 70 has retroactive applicability. The Board also found the ALJ conducted the correct analysis when determining whether Dornacher was entitled to PTD benefits. Dornacher appealed to the Kentucky Court of Appeals, which affirmed the Board on December 3, 2021.

Dornacher filed a Motion for Attorney Fee on December 13, 2021. The Form 109, signed by Dornacher, elected Option B: “I elect to have any attorney’s fee paid in a lump sum and to have each of my weekly benefits equally reduced until the defendants have recouped the amount of my attorney fee.” It was signed on December 9, 2021.

Covington Public filed a response. It did not object to the amount of the fee; however, it argued the period for which PPD benefits must be paid pursuant to the Opinion, Award, and Order rendered on November 12, 2020 had already ended. The award commenced on March 9, 2017 and included both TTD benefits

payments and PPD benefits, subject to the limitation contained in KRS 342.730(4). Covington Public has paid all benefits it owed. It stated, “No further PPD benefits are owed. Dornacher’s attorney fee should be taken from the lump sum payment for accrued and past due PPD benefits.”

On February 4, 2022, the ALJ approved Dornacher’s attorney’s fee in the amount of \$3,541.94 and stated, “the fee shall be paid in a lump sum with Plaintiff’s **future** weekly benefits reduced equally to account for Counsel’s attorney fee.”

Covington Public filed a Motion to Reconsider and Amend Order. It again argued there are no future benefits owed and that the fee should be taken from the lump sum payment for accrued and past due benefits.

In a supplemental motion, Covington Public attached a copy of a check made payable to Gregory N. Schabell, Dornacher’s counsel, and Brenda Dornacher, dated November 24, 2020, in the amount of \$9,727.95. KEMI insurance company issued the check. The back of the check was endorsed by Schabell and Dornacher.

Dornacher filed a response stating Covington Public should pay the fee. Several cases were cited in support of the position that an employer can be required to pay the attorney’s fee, even though an award has been extinguished.

On March 22, 2022, the ALJ issued an Order. She acknowledged Covington Public paid the lump sum of \$9,727.95 in a check made payable to Schabell and Dornacher, and it was mailed to Dornacher’s counsel. The check was endorsed by Dornacher and her counsel. The ALJ also noted Covington Public paid

PPD benefits through March 9, 2021 in an additional amount of \$2,363.40. The ALJ discussed all cases cited by Dornacher but found them inapplicable, stating those cases involved awards of income benefits that were extinguished through credits or other scenarios where the full award was not paid.

In the present case, the complete award of income benefits was paid by Covington Public. However, the ALJ did not think she had the authority to correct a mistake as there was no filing of the appropriate Form 109, which is required under 803 KAR 25:010 Sec. 6(7)(d)2 and KRS 342.320(5). Hence, the ALJ denied the Motion to Reconsider and Amend the Order.

The appeal to this Board followed.

ANALYSIS

Covington Public states it has paid all income benefits per the Opinion, Award, and Order in this claim. It argues there are no future monies owed to pay Dornacher's attorney fee and then *pro rata* reduce future benefits.

Dornacher argues case law supports a payment by Covington Public of her attorney's fee even if no future payments will occur. The case law cited by Dornacher concerns cases where an award of benefits was made by an ALJ, but due to extenuating circumstances, the payments were extinguished.

In Elkhorn Stone Co. v. Webb, 478 S.W.2d 720 (Ky. 1972), the claimant died in a manner that extinguished the benefits before the 425-week award was paid. The Court of Appeals concluded the attorney's fee vested at the time the award was made.

In Ford Motor Company v. Stewart, 762 S.W.2d 817 (Ky. App. 1988), the employer was granted a credit from a disability plan which extinguished future payments awarded to the injured worker.

Neither of these cases state an employer owes any monies above and beyond the award. They stand for the proposition that, if the award is not paid, the claimant's counsel should not be denied a fee.

Dornacher cites a Board Opinion wherein the employer had to pay an attorney's fee even though a subrogation credit from a personal injury claim extinguished future benefits. Even though the employer was incapable of recovering the attorney's fee payment, the employer was required to pay the fee. Hall and Deskins v. J.E. Allen Drilling & Construction Co., Inc., Claim No. 2007-99207. Once again, the pertinent fact was the attorney's fee vested at the time of the award. In these cases, an award had been entered, the worker's attorney's fee had been based on the award, and for outside reasons, the award did not have to be paid in full. The facts in the present case do not square with the cited cases, as Covington Public paid all benefits due.

Dornacher states that subsequent events affecting the claimant's future benefits may not be applied in such a way as to defeat the attorney's right to a fee from the workers' compensation award, as opposed to the claimant's own back pocket. While the theory is correct, the facts in the present claim do not fit the scenario. The ALJ rightly concluded the cases cited by Dornacher do not govern the instant facts, as here, all benefits due her were paid by Covington Public. There was

no extinguishment of any benefit, hence the cases cited do not shed light on the current dispute.

There is no statutory authority for the payment of an attorney's fee in addition to the award absent an Order for sanctions per KRS 342.310. Rager v. Crawford, 256 S.W.3d 4 (Ky. 2008). There were no sanctions ordered in this claim. It is not contested that Covington Public paid all benefits due per the ALJ's Opinion, Award, and Order.

The claimant was age 73 at the time of the injury. One of the issues appealed by Dornacher to the Board and the Court of Appeals was that KRS 342.730(4) should not be enforced retroactively. KRS 342.730(4) states, "All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever lasts occurs." There were many appeals regarding the constitutionality of the statute and its retroactive effect, but the Supreme Court definitively held the statute to be constitutional and that it applied retroactively in Holcim v. Swinford, *supra*.

The ALJ's Opinion awarding Dornacher PPD benefits was issued on November 12, 2020. Soon thereafter, Covington Public paid past due benefits with a check made payable to Dornacher and her counsel. The check, dated November 24, 2020, was endorsed by Dornacher and her counsel. The check for past due PPD benefits was mailed to Dornacher's counsel's address pursuant to 803 KAR 25:010 Sec. 25(1)(c).

Covington Public continued paying income benefits per the ALJ's award, while Dornacher appealed several issues including permanent total disability and the retroactivity of the termination of benefit statute. Thereafter, the Board and the Court of Appeals affirmed the ALJ in an Opinion rendered on January 13, 2022.

Dornacher, through her counsel, filed a petition for an attorney's fee. After Dornacher's attorney's fee Order was issued on February 4, 2022, Covington Public notified the ALJ immediately that all benefits had been paid. The benefits ceased on March 9, 2021, four years after the injury. Dornacher has never contested the receipt of all monies due her pursuant to the ALJ's award.

Why Dornacher's counsel did not escrow part of her fee or petition for a fee pending the appeal is not known. What is known is after all the appeals were decided, and well after income benefits had ceased to be paid, Dornacher and her counsel submitted a Petition for a fee with the Form 109, requesting a lump sum attorney's fee, checking Box B. Certainly, Dornacher knew she was not continuing to receive benefits and the fact that counsel was apparently unaware there were no additional income benefits to be paid cannot be laid at the steps of the employer. Since there are no future weekly benefits to be paid, there are no income benefits to recoup the fee, so Petitioner need not pay it.

Certainly, we recognize counsel wished to place money in the hands of his client as quickly as possible, but four years from the date of injury, March 9, 2021, was closely approaching when the past due check was paid on November 24, 2020. If KRS 342.730(4) was found unconstitutional, a cure would have been found, but the statute has been deemed constitutional and retroactive. Counsel chose not to

escrow monies for a fee to be requested, and this decision can only be corrected through the filing of a new Form 109.

The agreement between an injured worker and his or her attorney is a contingency contract, whereby the attorney fee is calculated based on a percentage of the benefits recovered. There are different manners for the attorney's fee to be paid so as not to hinder the claimant, yet all fees are paid by the claimant. Payment can occur by reducing future income benefits, being taken from a lump sum payment or from the worker's personal funds. The Form 109 specifically allows for the claimant to pay the attorney's fee out of her personal funds, and in this case the worker's compensation benefits have been paid.

Accordingly, the February 4, 2022 and March 22, 2022 Orders rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **VACATED**. This claim is **REMANDED** to the ALJ with directions to proceed in a manner consistent with this Opinion.

ALL CONCUR.

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