

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 1, 2019

CLAIM NO. 201671779

DAVIS BUSSEY and
LINDA POLLEY

PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE**

KCTCS and
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Hon. Davis Bussey (“Bussey”), attorney for Linda Polley (“Polley”), appeals from the November 7, 2018 order from Hon. John H. McCracken, Administrative Law Judge (“ALJ”), limiting his attorney fee to \$11,794.59. Bussey also appeals from the November 27, 2018 order denying his petition for reconsideration.

On appeal, Bussey argues the ALJ erred by limiting his attorney fee to \$11,794.59. He argues that despite filing a Form 101 on Polley's behalf on December 19, 2017, and the fact he submitted a Form 109 Attorney Fee Election form executed on December 6, 2017, he did not enter into a contract with her for representation until August 31, 2018. He argues KRS 342.320, as amended July 14, 2018, entitles him to an attorney fee in the amount of \$17,839.00 from Polley's award. We disagree, and affirm.

Bussey filed a Form 101 on Polley's behalf on December 19, 2017. Polley alleged she injured her lumbar and thoracic spines on August 10, 2016. In the Form 101, Polley specifically stated, "I stopped to pull a funeral parking sign out of the ground. When I turned to get back in the car, it was rolling backward, so I tried to get my foot on the brake, but the car door dragged me down & I was pinned by the car door & curb when the car stopped."

In the Opinion, Award and Order entered October 15, 2018, the ALJ noted the parties agreed Polley sustained a work-related low back injury on August 10, 2016. The ALJ found Polley was not totally disabled, but was entitled to an award of permanent partial disability benefits. The ALJ relied upon the 23% impairment rating assessed by Dr. Michael Best, which resulted in the application of the 1.5 statutory factor. The ALJ also determined Polley was entitled to an enhancement of her award by 3.6% pursuant to KRS 342.730(1)(c)1 due to a combination of her inability to return to her employment and her age. The ALJ also determined Polley was entitled to temporary total disability benefits from August 11, 2016 through June 30, 2017.

Bussey filed a motion for approval of an attorney fee in the amount of \$17,839.00 based upon the total payout of Polley's award in the amount of \$140,891.75. In support of the motion, Bussey filed Polley's affidavit, the Form 109 executed on December 6, 2017, and the contract dated August 31, 2018. The ALJ declined to approve the attorney fee amount requested by Bussey. In the alternative, he awarded an attorney fee of \$11,794.59, based upon the KRS 342.320(2) as it existed at the time the claim was filed.

Bussey filed a petition for reconsideration on November 16, 2018, arguing the statute was amended on July 14, 2018, and his contract with Polley was not executed until after that date. He argued the July 14, 2018 statutory changes are applicable because of the date of the contract, and he should not be constrained by the law in effect when the claim was filed. In denying the petition, the ALJ determined Bussey had at least an implied contract with Polley at the time the claim was filed. The ALJ specifically referenced that the claim was filed on December 19, 2017, and the Form 109 was signed on December 6, 2017.

As noted above, on appeal, Bussey argues as follows:

It is the Petitioner's contention that workers' compensation law is strictly based on statute and that there is no basis for implied contract and or interpretation of law, contrary to the actual statute. The letter of the law speaks to fees allowed for contracts signed on or after July 14, 2018, which is the case here. (See KRS 342.320(2)(b)). The operative word is "signed"; no provision for implied contract, and no reference to an effective date to be determined by date of filing of the claim or any form or document for attorney fee.

...

Petitioner is entitled to the maximum fee allowed under the law based on the statute requiring a signed contract dated after July 14, 2018. There is no other basis under the law for determination and calculation of the fee.

We initially note that approval of attorney fees falls within the discretion of the ALJ. KRS 342.320(1) specifically states that, “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.” (Emphasis added). An administrative law judge is therefore afforded the discretion to award attorney fees subject to the statutory cap, but is not required to award the full amount requested.

We note that prior to July 14, 2018, KRS 342.320(2) limited attorney fees to a maximum of \$12,000.00. On July 14, 2018, the cap on fees was raised to \$18,000.00. We additionally note that both versions of the statute allow an award of up to 20% of the first \$25,000.00 recovered, however the July 14, 2018 version of the statute allows for up to 15% of the next \$25,000.00, rather than 15% of the next \$10,000.00 contained in the previous version of the statute. We also note the revised version of the statute allows for a fee of up to 10% of the remainder of the award, rather than the 5% in the previous version.

After consideration of Bussey’s motion for approval of an attorney fee, the ALJ specifically found as follows:

This matter is before the Administrative Law Judge on motion by Davis Bussey, counsel for the plaintiff, for approval of an attorney fee in the amount of \$17,839 based upon the settlement value of \$140,891.75. This is based upon the change in law in the calculation of attorney fees. A review of the file indicates that a form 101 was filed July 14, 2017. The attorney agreement was

executed in August 2018. The ALJ believes that it is appropriate to apply the law for attorney fees in existence at the time of the filing of the form 101. The ALJ approves an attorney fee in the amount of \$11,794.59.

Pursuant to KRS 342.320(1), an Administrative Law Judge is required to consider certain factors in fixing a reasonable fee for the legal services rendered. These factors include the nature, scope, and quality of legal services, level of skill and competence exhibited by the attorney, the result achieved and the contingent nature of this case. In the instant case, it is found that the plaintiff's claim has been practiced with a high level of skill and competence and an excellent result has been achieved. These factors, together with recognition that the attorney's fee was contingent in nature and no fee would have been payable in the event an award or settlement was not achieved, all mitigate in favor of the approval of the maximum attorney's fee allowable.

Therefore, after full review of the above factors and of the record in this claim, and further exercising the discretion afforded an Administrative Law Judge to balance the competing interests of the injured worker and those of his/her legal counsel, an attorney's fee in the amount of \$11,794.59 is approved for the services rendered.

In his order on reconsideration the ALJ found as follows:

Counsel for Ms. Polley filed a Petition for Reconsideration requesting the ALJ to award an attorney's fee of \$17,839, instead of the \$11,794.59 provided in the order awarding a fee. Her Form 101 was filed December 19, 2017. The original order awarding an attorney fee stated the Form 101 was fied[sic] in July 2017. This was incorrect and that order is amended to reflect the correct date of filing. The attorney fee agreement was signed August 31, 2018.

KRS 342.320(2)(a) states "for attorney-client employment contracts entered into and signed after July 14, 2000, but before July 14, 2018...." The ALJ finds that Ms. Polley and Mr. Bussey entered into an implied

contract for services, at a minimum, when the Form 101 Application for Benefits was filed on December 19, 2017. The form 109 was signed by Ms. Polley on December 6, 2017.

The ALJ overrules the Petition for Reconsideration.

We agree with Bussey that workers' compensation is a creature of statute. The issue as to whether, when, and in what amount an attorney fee is payable to an attorney representing an injured worker in a workers' compensation proceeding is likewise a creature of statute, specifically KRS 342.320. KRS 342.320(2)(a) states, in relevant part, the attorney fees "shall be paid by the employee from the proceeds of the award or settlement." It has long been recognized that the function of KRS 342.320 "is to allow the attorney a fee for services performed his client." Jerry's Drive In, Inc. v. Young, 335 S.W.2d 321, 322 (Ky. 1960); Rue v. Kentucky Retirement Systems, 32 S.W.3d 87, 89 (Ky. App. 2000). Moreover, 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. Rager v. Crawford & Co., 256 S.W.3d 4, 6 (Ky. 2008); Napier v. Scotia Coal Co., 874 S.W.2d 377, 378 (Ky. 1993).

However, that said, we find the ALJ did not err in determining there was an implied contract for services between Bussey and Polley in effect at the time the claim was filed in December 2017, long before KRS 342.320(2) was amended. This is bolstered by the fact that Polley executed the Form 109 on December 6, 2017. The ALJ acted within the discretion afforded to him in making this determination.

We also note that the amended version of KRS 342.320(2) does not specifically state it is either remedial, or retroactive. We follow the direction of the Kentucky Supreme Court in Hamilton v. Desparado Fuels, Inc., 868 S.W.2d 95, 97 (Ky. 1993).

There the Court held:

Accordingly, we believe that what constitutes an authorized attorney's fee for prosecuting a claim for those particular benefits also should be determined by the law in effect on the date of the injury. A contract that provides otherwise is void. KRS 342.320(2).

Although the contract submitted with the motion for attorney fee was not executed until August 31, 2018, the ALJ determined a contractual relationship existed when the claim was filed. We believe it was within his discretion to do so. We additionally note SCR 3.130(1.5)(b) which outlines that the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible “shall be communicated to the client, preferably in writing before or within a reasonable time after commencing the representation.” Based upon the totality of the circumstances, we find no error in the ALJ’s limitation of Bussey’s attorney fee in accordance with KRS 342.320(2) as it existed at the time of Polley’s injury, when the claim was filed, and when she executed the Form 109.

For the foregoing reasons, the Order entered November 7, 2018, by Hon. John H. McCracken, Administrative Law Judge, approving an attorney fee for Hon. Davis Bussey in the amount of \$11,794.59, and the November 27, 2018 Order denying the petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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