

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2001-CA-001988-WC

ERIC M. LAMB

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-74159

REUBEN LITTRELL; SAFETY KLEEN
CORPORATION; ROBERT WHITAKER,
DIRECTOR OF SPECIAL FUND;
HON. KEVIN KING, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEE

OPINION

REVERSING AND REMANDING

** **

BEFORE: EMBERTON, CHIEF JUDGE; HUDDLESTON AND McANULTY, JUDGES.
McANULTY, JUDGE. This is a petition for review of a decision by
the Workers' Compensation Board affirming an order issued by the
administrative law judge limiting Appellant to attorney fees in
the amount of \$10,000.00. We reverse and remand.

Appellant represented Rueben Littrell in a workers'
compensation claim against Safety Kleen Corporation (Safety
Kleen) and the Special Fund. On June 14, 1996, Littrell

suffered a work-related injury to his back while employed by Safety Kleen. Littrell took a few months off, but returned to work on August 10, 1996. On September 15, 1998, Littrell suffered an onset of increased symptoms and sought medical treatment. Littrell was not able to continue working after this time. Littrell employed Appellant as his attorney on September 29, 1999. With Lamb's assistance, Littrell filed an Application for Resolution of Injury Claim with the Department of Workers' Claims on June 30, 2000.

Beginning December 12, 1996, an arbitrator preliminarily handled all workers' compensation claims, but, during the regular session of the General Assembly in 2000, the legislature repealed all statutory references in the Workers' Compensation Act to arbitrators and abolished Kentucky's four-year experiment requiring binding mediation. See KRS¹ 342.270(2) effective December 12, 1996. The amendments eliminating arbitration became effective July 14, 2000.

As stated in the opinion rendered by the Workers' Compensation Board on August 15, 2001, pertaining to Appellant's appeal on the issue of attorney fees,

[i]n April 2000, in order to assure an efficient procedural transition between the old and new systems, Commissioner Walter W. Turner by executive action ordered all further claims to be directly assigned to

¹ Kentucky Revised Statutes.

administrative law judges, bypassing all additional proceedings involving arbitrators. Littrell's cause of action was one of those claims.

Eventually, Littrell and Safety Kleen settled the claim for payments with a total value of \$165,185.80. The administrative law judge approved the settlement on February 9, 2001. Appellant sought attorney fees in the amount of \$13,009.29, the amount of recovery specified in Appellant's contract with Littrell (20% of the first \$25,000 recovered, 15% of the next \$10,000 and 5% of the excess). On February 9, 2001, the administrative law judge rendered an order limiting the attorney fees to \$10,000 based on his interpretation of KRS 342.320(2)(b), as in effect from December 12, 1996 to July 14, 2000. In support, the administrative law judge made the following notations:

The Administrative Law Judge notes that the contract for representation was entered into between the Plaintiff and counsel on 9/29/99. Therefore, the 1996 amendments to the Act apply to this motion for attorney's fees. Furthermore, the Administrative Law Judge notes that this claim was never practiced before an Arbitrator, being assigned directly to an Administrative Law Judge.

KRS 342.320 provides that an attorney is limited to a maximum fee of \$2,000 for practice before an Arbitrator and, upon appeal to an Administrative Law Judge, to a maximum of \$10,000 for any additional amount recovered before the Administrative Law Judge. The Administrative Law Judge

believes that, reading paragraphs (2)(a) and (2)(b) together, it was the legislature's intent to limit a Plaintiff's attorney who practiced only before an Administrative Law Judge to a maximum fee of \$10,000. In doing so, the Administrative Law Judge notes that paragraph (2)(b) states that the amount awarded by the Administrative Law Judge shall be "in addition to the fee, if any, awarded" at the arbitration level. Since no fee was awarded at the arbitration level, the \$10,000.00 fee cap must apply.

On February 23, 2001, Appellant filed a petition for reconsideration requesting a finding of fact that the administrative law judge would have awarded Appellant attorney fees of \$13,009.29, but for the cap of \$10,000 in the 1996 Amendments of KRS 342.320(2)(b). On March 9, 2001, the administrative law judge made a finding that he would have awarded the fee requested (\$13,009.29) had the amount not exceeded the \$10,000 cap.

Appellant appealed the decision of the administrative law judge to the Workers' Compensation Board. The Board affirmed the decision, precipitating this appeal.

Appellant presents several issues on appeal, all pertaining to one fundamental question which is, "what law governing attorney fees for workers' compensation cases applies to this claim?" Specifically, the issue is whether the 1994, 1996, or 2000 amendments to KRS 342.320 determine the maximum amount of attorney fees to which Appellant is entitled.

The standard employed by this Court when reviewing a workers' compensation decision is set forth in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992):

The function of further review of the [Workers' Compensation Board] in the Court of Appeals is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

In this case, we believe that KRS 342.0015 and Daub v. Baker Concrete, Ky., 25 S.W.3d 124 (2000) are dispositive of the issues on appeal. KRS 342.0015 is entitled "Application of 1996 (1st Extra Sess.) Ky. Acts ch. 1" and reads as follows:

The substantive provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to any claim arising from an injury or last exposure to the hazards of an occupational disease occurring on or after December 12, 1996. Procedural provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to all claims irrespective of the date of injury or last exposure, including, but not exclusively, the mechanisms by which claims are decided and workers are referred for medical evaluations. The provisions of KRS 342.120(3), 342.125(8), 342.213(2)(e), 342.265, 342.270(3), **342.320**, 342.610(3), 342.760(4), and 342.990(11) are remedial.

(emphasis added).

In Daub, the Kentucky Supreme Court addressed the application of the 1996 Act to the allowable attorney fees for proceedings practiced before an arbitrator. See Daub, Ky., 25

S.W.3d 124 (2000). The court noted that the attorney fees statute in effect at the time was enacted, at least in part, to correspond to the changes in the mechanism or procedure by which claims were decided. See id. at 127. "Consistent with the different types of procedure which were employed when litigating a claim before an arbitrator and before and ALJ, the amended version of KRS 342.320 contained different provisions with regard to attorney's fees." Id.

KRS 342.0015 makes it clear that the legislature intended for the changes in procedure by which claims were decided to apply to all claims pending on or after July 14, 2000, irrespective of the date upon which they arose. See Daub, 25 S.W.3d at 128. Accordingly, as the 2000 amendments to the Workers' Compensation Act eliminated the arbitration level and assigned claims directly to an administrative law judge, the commissioner ordered Littrell's claim to be assigned directly to an administrative law judge. KRS 342.270(2).

KRS 342.0015 also makes it clear that the legislature considers the amendments of KRS 342.320 to be remedial. See Daub, 25 S.W.3d at 128. Moreover, the 2000 amendments to KRS 342.320 are consistent with the procedural amendments to KRS 342.270(2) because they eliminate all provisions for proceedings practiced before an arbitrator. In pertinent part, KRS 342.320(2) is 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:

(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.

In view of the legislature's express declaration that the 2000 amendments to KRS 342.320 are remedial and the procedure followed in this case, we conclude that the amendments to KRS 342.320 apply to all claims pending on or after July 14, 2000, the effective date of the 2000 amendments. See Daub, 25 S.W.3d at 128. Appellant was not limited to attorney fees of \$10,000, but was limited to attorney fees of \$12,000 under the 2000 amendments. Therefore, we reverse the board.

In concluding the above, we are aware that KRS 342.320(b) goes on to state, "[a]ttorney-client employment contracts entered into and signed after July 14, 2000, shall be subject to the conditions of paragraph (a) of this subsection." However, we do not find that the 2000 amendments only apply to attorney-client employment contracts entered into and signed after July 14, 2000, when a pending claim filed June 30, 2000, is assigned directly to an administrative law judge pursuant to the 2000 amendments. Thus, even though the Appellant and

Littrell signed the employment contract on September 29, 1999, we believe the 2000 amendments to KRS 342.320 on the issue of Appellant's attorney fees are applicable.

Since the administrative law judge has indicated that he would have awarded Appellant the fee requested of \$13,009.29, we remand for entry of an order awarding him the sum of \$12,000, the maximum fee allowed under the 2000 amendments to KRS 342.320(2).

EMBERTON, CHIEF JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Eric M. Lamb
Lamb & Lamb
Louisville, Kentucky

BRIEF FOR APPELLEE SPECIAL
FUND:

Zoel D. Zakem
Frankfort, Kentucky