

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 15, 2008

CLAIM NO. 04-73617

COPY

MOHAMMED ZINEDDIN, M.D.

PETITIONER

VS.

APPEAL FROM HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE

THE NEILSEN COMPANY;
HON. RONALD MCDERMOTT; SHAHEEDA BAMBA
and HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

REVERSING AND REMANDING

* * * * *

BEFORE: GARDNER, Chairman; COWDEN and STIVERS, Members.

GARDNER, Chairman. Dr. Mohamed Zineddin ("Dr. Zineddin"), a third party medical provider, appeals from an order issued April 4, 2008, by Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ"), holding him liable for the attorney fee granted Hon. Ronald L. McDermott ("McDermott") for McDermott's successful representation of

Shaheeda Bamba ("Bamba") in a post award medical fee dispute brought by Bamba's former employer, The Nielson Company ("Nielson"), contesting payment of outstanding medical charges incurred by Bamba in treatment with Dr. Zineddin for her work-related injuries. Dr. Zineddin also appeals from an order issued May 8, 2008, denying his petition for reconsideration.

On appeal, Dr. Zineddin argues that based on the express language of KRS 342.320, the provision authorizing payment of attorney fees in matters of workers' compensation, the ALJ's order holding him liable for payment to McDermott is erroneous as a matter of law. Dr. Zineddin maintains that KRS Chapter 342 makes absolutely no provision for the assessment of attorney fees payable in medical fee disputes to the claimant's legal counsel against the medical provider affording the contested treatment. Dr. Zineddin further charges that he is not now nor has ever been McDermott's client. Consequently, Dr. Zineddin requests that the April 4, 2008 order be "held for naught." We reverse.

On May 20, 2005, Bamba, represented by McDermott, filed a claim for benefits against Nielson alleging work-related injuries to her hands, neck and left shoulder that occurred or became manifest in 2003 and 2004. By agreement

approved by ALJ Donna H. Terry on December 15, 2005, the claim was settled between the parties. Under the terms of the settlement, Bamba received a lump sum payment of \$25,000.00. The settlement did not include a waiver of Bamba's right to receive future medical treatment pursuant to KRS 342.020. McDermott was paid an attorney fee from the proceeds of the settlement in the amount of \$5,000.00 approved by order of the ALJ issued January 10, 2006.

On September 18, 2006, Nielson filed a motion to reopen and medical fee dispute contesting charges incurred by Bamba at St. Elizabeth Medical Care Center and for treatment proposed and provided by Dr. Zineddin. In a decision on the merits rendered May 11, 2007, the ALJ ruled in Bamba's favor finding the contested treatment reasonable, necessary, and work-related. The matter then lay dormant for eleven months.

On March 4, 2008, McDermott filed an unverified motion seeking an attorney fee with regard to his representation of Bamba in defending against Nielson's medical fee dispute on reopening. The motion in its entirety stated as follows:

Comes now the Hon. Ronald L. McDermott, and hereby moves the Court to enter an order requiring D. Mohamed Zineddin, M.D. to pay him 20% of \$8,475.00 or \$1,695.00, which was

computed by taking the \$9,100.00 awarded to Dr. Zineddin less the costs of his medical report of \$625.00. Said amount awarded to him by the Administrative Law Judge's Order rendered on or about May 11, 2007.

No "Attorney Fee Election Form" (Form 109), or any other requisite attachments mandated by KRS 342.320(3), (5) and (7), and 803 KAR 25:010 § 4(7) accompanied McDermott's motion.

On April 4, 2008, the ALJ issued the following order granting McDermott's request for payment:

The Hon. Ronald L. McDermott's Motion for Attorney Fees shall be sustained, and the medical provider, Dr. Mohamed Zineddin, M.D., shall pay the sum of \$1,695.00 to the Hon. Ronald L. McDermott forthwith.

In response to the above order, Dr. Zineddin filed a petition for reconsideration essentially setting out the same arguments now raised on appeal. The petition was subsequently denied by the ALJ and this appeal ensued.

Whether a third party medical provider can be held liable for an attorney fee awarded the claimant's attorney in a medical fee dispute is a question of law. Concerning the authorization and payment of an attorney fee to the claimant's lawyer, KRS 342.320 provides 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.

(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.

. . . .

(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 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 his attorney's fee is to be paid. His selection and statement that he fully understands the method to be used shall be submitted by his attorney, on a notarized form signed by the employee, at the time the motion for approval of the attorney's fee is submitted.

. . . .

(7) In a claim that has been reopened pursuant to the provisions of this chapter, an attorney's fee may be awarded by the administrative law judge subject to the limits set forth in subsection (2) of this section. In awarding the attorney's fee, the administrative law judge shall consider

the factors set forth in subsection (3) of this section. If no additional amount is recovered upon reopening, no attorney's fee shall be awarded. No attorney's fee shall be allowed or approved exceeding the amounts provided in subsection (2)(a) of this section applicable to any additional amount recovered.

Peabody Coal Co. v. Goforth, 857 S.W.2d 167 (Ky. 1993), involved a post award medical fee dispute initiated by the claimant with assistance of counsel. After nearly two years of litigation involving numerous depositions and several independent medical evaluations, the ALJ ruled in the claimant's favor. The ALJ further found the employer's refusal to pay medical benefits and defense of the medical fee dispute unreasonable under KRS 342.310 and awarded the claimant costs and attorney fees to be paid by the employer. The employer appealed. The Supreme Court ultimately dismissed the appeal on other grounds. In dicta, however, the Supreme Court briefly touched on the issue now raised before the Board, stating:

KRS 342.320 governs the payment of fees to attorneys representing injured workers. The ALJ awards such fees to the attorney pursuant to a motion filed within 30 days following finality of the ALJ's last appealable order. KRS 342.320(2) provides that no fee shall be paid absent the approval of an award by an ALJ. An attorney's fee is specifically authorized only for the successful prosecution of the original

claim for income benefits, pursuant to KRS 342.320(1), or for a reopening in which the worker's award is increased, pursuant to KRS 342.320(6) [now KRS 342.320(7)].

. . . .

While KRS 342.320 authorizes a fee to the worker's attorney for successfully prosecuting a claim for income benefits or a reopening, it is silent regarding other instances in which a worker may be required to employ an attorney to protect his interests, for example: for prosecuting a claim for medical expenses where the worker seeks no award of temporary or permanent occupational disability benefits; for prosecuting an action to recover unpaid or disputed medical expenses, such as in the instant case; or for defending the claimant's interest when the employer or Special Fund moves to reopen to challenge such bills or to reduce the award. Furthermore, KRS 342.320(2) states that 'any contract for the payment of attorney's fees otherwise than as provided in this section shall be void.' We are aware of no case in which this provision has been interpreted either by this Court or by the Court of Appeals. There is a question, therefore, of whether KRS 342.320 prevents an attorney from enforcing a contract regarding a fee for representing a worker in any action other than the original claim or a successful motion to reopen and increase benefits.

. . . .

The parties have not raised, and we do not reach the issue of whether KRS 342.320 prohibits the award of an

attorney's fee for representing a worker in any but the two enumerated instances. We only recognize that such a question exists.

Id. at 169-170.

The question was subsequently addressed by the Court of Appeals in Duff Truck Lines, Inc. v. Vezolles, 999 S.W. 224 (Ky.App. 1999). In that case, the claimant's lawyer successfully defended an employee's claim for medical expenses in a post award reopening of a workers' compensation settlement. As in Peabody Coal Co. v. Goforth, supra, the claimant's entitlement to increased income benefits was not at issue and none were awarded. Following a resolution favorable to his client, the claimant's lawyer filed a motion for an attorney fee in the amount of \$500. The ALJ denied the motion on the ground that an attorney fee cannot be granted pursuant to KRS 342.320(7) when no additional income benefits have been recovered. The claimant and his lawyer appealed to the Board which found "no prohibition in Kentucky against the award of attorney fees in a claim such as this." The Board held that the attorney was entitled to an "appropriate recompense to be taken from the amount recovered," and reversed and remanded the case for the ALJ to determine the amount of the attorney fee award. On further review, the

Court of Appeals affirmed the Board's decision. Referencing the remarks by the Supreme Court in Peabody Coal Co. v. Goforth, supra, the Court of Appeals reasoned as follows:

In subsection (2)(b), the statute expresses the maximum limit of the amount of the award in terms of income benefits, but the statute does not confine the award of attorney fees to actions involving income benefits. Furthermore, the statute read as a whole expresses no reason to require an award of income benefits before attorney fees may be awarded. Moreover, the legislative purpose of this subsection authorizing an attorney fee for the reopening of a claim is to encourage attorneys to undertake such representation and to ensure an opportunity for injured workers to exercise their rights.

. . . .

Thus, we affirm the opinion of the Board granting an award of attorney fees and remanding to an administrative law judge for a determination of the amount of an appropriate award and the method of payment.

Duff Truck Lines, Inc. v. Vezolles at 226-227. The court did not, however, designate the source from which the attorney fee was to be paid.

Thereafter, the Board was again faced with the issue in Cetrulo v. Overhead Door, WCB Claim No. 08-08721 (November 15, 2000). In that case, as in Duff Truck Lines,

Inc. v. Vezolles, supra, the claimant's lawyer successfully defended an employee's claim for medical expenses in a post award reopening. As in the earlier cases cited above, the claimant's entitlement to increased income benefits was not at issue, nevertheless the matter was hotly contested by the parties. After a series of appeals and cross-appeals entailing a significant amount of legal work performed by the claimant's attorney, the medical issues contested by the employer were finally decided in the claimant's favor by the Supreme Court. See, Overhead Door v. Patricia Kuhn, et al., 98-SC-993-WC (Ky. 1999). Following the Supreme Court's ruling, the claimant's attorney filed a motion for an attorney fee in the amount of \$6,758.18. As grounds, the attorney argued by affidavit that after expending four years of legal work he had secured recovery of \$45,163.68 in additional medical benefits on the claimant's behalf. The ALJ denied the attorney's motion. The Board in a fractured opinion, however, citing to the Court of Appeals decision in Duff Truck Lines, Inc. v. Vezolles, supra, reversed and remanded the matter to the ALJ for determination of a fee and the method of payment. Regarding potential sources for payment of the fee, a majority of the Board agreed:

In this case, [claimant's counsel] undertook to represent [the claimant] in order to prevent [the employer] from denying payment of past and future medical expenses involving her need for knee replacement surgery. Having reviewed the statute and the law, we believe an attorney who, in representing an injured worker, through his skill, expertise, and training, protects that worker's benefits, is entitled to appropriate recompense. While this award of attorney fees may appear troublesome to some, we believe the retention of a qualified attorney such as [claimant's counsel] offers a level of expertise that is needed in the presentation of a claim before an Administrative Law Judge, this Board, the Court of Appeals, and ultimately the Kentucky Supreme Court.

Certainly, in such circumstances, [the employer] has an absolute right, pursuant to statute, to legal counsel and the payment of attorney fees for representation in such matters. Thus, it is our belief that so should the employee have the same rights and privileges. We also believe [the attorney's] entitlement to a reasonable fee is supported by the doctrine of *quantum meruit*. That doctrine allows for payment of services performed for another on the basis of a contract implied in law or based on an implied promise to pay the performer for what the services were reasonably worth. Here, [the claimant's attorney] performed valuable services on [the claimant's] behalf. [The claimant] requested those services and is now enjoying the results of [her attorney's] skillful representation.

Of course, the looming question that must be addressed by the [ALJ] on

remand is where shall the monies be derived in order to pay [the claimant's attorney] for his time and services since the [ALJ] specifically determined that all contested medical expenses have been paid to the medical providers. We note with interest that although the Court of Appeals, in Duff, supra, held that Vezolles' attorney was entitled to a fee, it did not designate the source of the fee. Rather, the Court remanded the matter to the ALJ 'for determination of the amount of an appropriate award and the method of payment.' Id. at 227.

Under the provisions of KRS 342.320, the approval of an award for an attorney fee is solely the function of the ALJ, and we, too, are without authority to approve an attorney fee for any specific amount or to designate the source of the award. However, we believe the [ALJ], in rendering an attorney fee on remand, has the authority to pay [the attorney's] fee through one of two potential means. First, given [employer's] admission in its brief before us that past medical expenses may yet remain outstanding, the [ALJ] can order [the employer] to deduct any fees awarded from payments to medical providers yet to be issued.

Secondly, we believe another logical source of payment of [the attorney's] fee is [the claimant]. KRS 342.320(4)(a) specifically states that an employee may pay her attorney fee out of her personal funds. Therefore, if on remand, [the claimant and her attorney] proffer to the [ALJ] a properly executed Attorney Fee Election, Form 109, reflecting [the claimant's] election to pay [her attorney] from her personal funds, we believe the [ALJ] would be within her

authority to grant a reasonable fee on
[the attorney's] behalf.

It is now apparent that the majority's opinion in Cetrulo v. Overhead Door, supra, was off beam concerning the proper scope and application of KRS 342.320. As pointed out by Dr. Zineddin, the Supreme Court in Rager v. Crawford & Co., ___ S.W.3d ___, (Ky. 2008) (2008 WL 2484189) has recently directed that KRS 342.320(7) permits an ALJ to grant the claimant's attorney a fee in a medical reopening, but absent the imposition of sanctions against the employer under KRS 342.310, the claimant's assets and personal expectancies are the only sources of payment from which the fee may be garnered. Specifically, the court instructed:

Chapter 342 holds an injured worker responsible for his or her own attorney's fee. KRS 342.320(2)(a) authorizes a fee for legal services performed in an initial claim and states that the fee 'shall be paid by the employee from the proceeds of the award or settlement.' KRS 342.320(7) authorizes an attorney's fee for obtaining an additional recovery at reopening. The court explained In Duff Truck Lines, Inc. v. Vezolles, 999 S.W. 224 (Ky.App. 1999), that the provision encourages attorneys to represent workers in reopening proceedings and applies whether a reopening is for income benefits, medical benefits, or both. KRS 342.320(5) requires a worker to select a method for paying the attorney's fee at the commencement of

the attorney-client relationship. 'Except when the attorney's fee is to be paid by the employer or carrier,' KRS 342.320(4) offers two methods for payment. KRS 342.320(4)(a) permits the worker to pay the fee from personal funds. KRS 342.320(4)(b) permits the worker to request an order requiring the employer to pay the fee and then deduct it from weekly benefits.

Slip op. at 2.

Hence, the ALJ, as a matter of law, committed error by awarding McDermott an attorney fee to be paid by Dr. Zineddin. While McDermott may yet be entitled to an attorney fee for his services to Bamba in successfully defending against Nielson's post award medical fee dispute, under the facts of this case the source of payment of any fee approved is exclusively the responsibility of his client alone.

Accordingly, the order issued April 4, 2008, by Hon. Lawrence F. Smith, Administrative Law Judge, is **REVERSED** and **REMANDED** for further proceedings in consistent with the views expressed in this opinion.

ALL CONCUR.

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