OPINION ENTERED: November 16, 2012

CLAIM NO. 200682631

FOX KNOB COAL CO., INC. PETITIONER

VS. **APPEAL FROM HON. STEPHEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

RAY TURNER;
HON. JOHNNIE L. TURNER;
CLOVER FORK OUTPATIENT MEDICAL PROJECT, INC.;
HON. STEPHEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE;
and HON. JOSEPH JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Petitioner, Fox Knob Coal Co., Inc. ("Fox Knob"), appeals the August 22, 2012 order entered by Hon. Stephen G. Bolton, Administrative Law Judge ("ALJ Bolton") rescinding and vacating the order entered on July 10, 2012

by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ Justice"), and reinstating ALJ Justice's previous order entered May 15, 2012 awarding attorney fees to Hon. Johnnie L. Turner ("Attorney Turner"), for his representation of Respondent Ray Turner ("Turner").

It is necessary to detail the procedural history of this claim. Turner was injured in a work-related motor vehicle accident on June 30, 2006, while he was employed by Fox Knob. As a result of the accident, Turner alleged the injuries to his lower back and left shoulder, as well as depression rendered him permanently and totally disabled. In an opinion, order and award dated July 16, 2007, Hon. R. Scott Borders, Administrative Law Judge, ("ALJ Borders") awarded permanent partial disability ("PPD") benefits based on a 14% impairment rating assessed by Dr. Hoskins pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Of the 14% impairment rating, Dr. Hoskins apportioned 7% to the lumbar spine injury and 7% to the left upper extremity injury. ALJ Borders found Turner was not permanently totally disabled.

On December 4, 2009, Turner filed a motion to reopen alleging a worsening of condition. The claim was subsequently reopened and assigned to Howard E. Frasier,

Jr., Administrative Law Judge ("ALJ Frasier"). In an opinion rendered July 6, 2010, ALJ Frasier found Turner had not sustained a worsening of condition and dismissed the reopening. Turner appealed to this Board which affirmed ALJ Frasier's decision in an opinion entered October 26, 2010. Turner then appealed this Board's decision to the Court of Appeals. The Court of Appeals rendered a decision affirming this Board on May 6, 2011. No further appeal was pursued.

On April 20, 2011, Fox Knob filed a motion to reopen to challenge medical treatment recommendations consisting of referrals to a neurosurgeon and a pain clinic. On July 26, 2011, ALJ Frasier entered an order granting the motion to reopen and joining the medical providers. The claim was subsequently reassigned to ALJ Justice by order entered October 12, 2011. A benefit review conference ("BRC") was held on November 1, 2011. At the BRC, the only issues preserved were the compensability of the referrals to a neurosurgeon and a pain clinic. No specific medical bills were ever challenged, although both parties subsequently filed various documents evidencing payments made to providers.

A hearing was held on November 28, 2011, and the parties subsequently filed briefs. In a decision rendered January 27, 2012, ALJ Justice noted the contested issues

concerned referrals to a neurosurgeon and pain management, and the reasonableness and necessity of narcotic medications and Benzodiazepines[1]. He specifically found as follows:

> The ALJ has thoroughly reviewed the record, including the medical reports relied on by the parties in this medical fee dispute. In the original claim filed by Plaintiff, ALJ Borders awarded Plaintiff benefits of 7% for shoulder impairment, following surgery, and 7% for a lumbar impairment. Claims for injuries to his right shoulder, bilateral knees, and psychological injury were dismissed. He was also awarded medical benefits pursuant to KRS 342.020(1) "for the cure and relief from the effects of the injury … as may reasonably be required at the time for the injury and thereafter during disability … ." That opinion and award is *res judicata* as to medical treatment for the shoulder and low back "reasonably required for relief from the effects of the injury. There is no order in the record changing that disability found by Judge Borders, although it was found subsequently that Plaintiff had not had a worsening of condition.
>
> Plaintiff is entitled to reasonable medical treatment for his shoulder and low back as may be required to obtain relief from the effects of the injuries. The burden to prove that the medical treatment is not reasonable is upon the movant, Defendant/Employer. Plaintiff has been receiving medical treatment for his shoulder and low back condition since the award. The reports of Defendant, together with the UR report

[1] Although the file does not reflect the reopening was ever amended to include this issue, a discussion was held at the hearing regarding the compensability of narcotic pain medication and Valium.

of Dr. Kirsch, do not challenge medical treatment for Plaintiff's shoulder, and they do not state that the medical treatment for the shoulder is unreasonable.

The ALJ has completely discounted the medical reports filed by Defendant to sustain its burden of proving the medical treatment provided by Dr. Eubank is unreasonable. The UR physician, Dr. Kirsch, in rejecting the request for referral to a neurosurgeon, relied on the report of Dr. Muffly, who examined Plaintiff in the original claim for Defendant, and who found no impairment to the low back, awarded 0% WPI, and said any sprain or strain had resolved. The ALJ completely discounts the report of Dr. Kirsch.

. . .

The ALJ finds that Defendant has failed to prove that the requested referral to Dr. Bean, and the medical treatment provided by Dr. Eubank, other than is hereinafter mentioned, is unreasonable, or that those reports placed into issue causation.

The opinion of Judge Borders did not find a psychiatric impairment related to the injuries. Dr. Granacher, found Plaintiff was a continuous user of Valium for the past 15 years. The ALJ finds that Defendant is not responsible for any prescriptions of Valium or other medication for the treatment of any psychological condition Plaintiff has as this was longstanding and not work-related.

The ALJ further finds that Defendant is responsible for the medical treatment provided by Dr. Eubanks, and the medications prescribed by her, other than Valium or other medications for a

> Psychological condition. Plaintiff was referred to a pain management clinic when she had issues with Plaintiff's use of medication, and Defendant is responsible for that treatment and the medications prescribed.
>
> Defendant, having failed to prove that the requested referral to Dr. Bean for Plaintiff's low back condition is unreasonable, the referral is approved. There being legitimate issues raised by Plaintiff's treating physician as to the use or abuse of his medications, and Dr. Bean being a renowned neurosurgeon, any referral to him shall include a request that he also review Plaintiff's medication regimen and make any recommendations as to what medications are reasonable for Plaintiff's low back and shoulder conditions.
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> **ORDER AND AWARD**
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> Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND ADJUDGED**:
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> 1. Defendant, Fox Knob Coal Co. Inc.'s, medical fee dispute of Plaintiff's medical treatment, and specifically prescription of narcotic pain medication is **OVERRULED**. Fox Knob Coal Co. Inc. is liable for payment for the contested expenses.
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> 2. Defendant, Fox Knob Coal Co. Inc.'s medical fee dispute of Plaintiff's prescription of benzodiazepines is **SUSTAINED**. Fox Knob Coal Co. Inc. is relieved from liability for payment for the contested expenses.

The award did not address payment or compensability of specific unpaid medical bills or reimbursements. No issue was raised at the BRC or at the

hearing regarding reimbursement or payment of unpaid bills.

On February 20, 2012, Attorney Turner filed a motion requesting an attorney fee be approved in the amount of $531.37 based upon medical billings from the Clover Fork Clinic in the amount of $2,656.84. In support of the motion, Attorney Turner filed an affidavit, but he did not set forth the hours expended on the case, nor did he provide an hourly rate. Also attached to the motion was a Form 109-Standard Form for Attorney Fee Election wherein Turner elected to pay his attorney out of his personal funds.

On February 29, 2012, Fox Knob filed a response to the motion for attorney fee. Fox Knob noted Attorney Turner requested a fee to be paid from the recovery of out-of-pocket medical expenses Turner had paid to Clover Fork Clinic. Fox Knob noted Turner had not filed any evidence of amounts he had paid to obtain treatment. Fox Knob argued ALJ Justice entered no order for reimbursement, he merely found certain treatment to be compensable.

In an order entered on April 2, 2012, ALJ Justice stated a ruling on Attorney Turner's requested fee would be "held" pending the submission of the total medical bills.

On April 17, 2012, Turner filed copies of medical bills in his possession. Fox Knob responded on April 30, 2012, requesting ALJ Justice to specifically outline the

attorney fee awarded in order to apprise the medical providers of the basis for reduction of payment of their bills.

On May 15, 2012, ALJ Justice issued an order awarding a fee to Attorney Turner in the amount of $531.37. ALJ Justice further ordered the reductions be made, “proportionately from payments due Plaintiff, Medicare and Plaintiff’s health insurance provider”.

On May 29, 2012, Fox Knob filed a petition for reconsideration noting the only issues raised in the medical fee dispute preserved for decision at the BRC were referral to a neurosurgeon, referral to pain management, and the use of narcotic pain medication. Fox Knob also specifically requested ALJ Justice determine the actual amount, if any, due and owing to Turner. Turner filed a response on June 6, 2012 asserting Fox Knob was merely re-arguing the case.

On July 10, 2012, ALJ Justice entered an order which stated as follows:

> Defendant/Employer has filed a Petition for Reconsideration of the attorney fee ordered by the ALJ. It has protested that there was no finding of the unpaid medical bills. The ALJ will state that Defendant had terminated certain medical payments for and on behalf of Plaintiff; that it should bear the responsibility of sorting through the bills that it has paid and those that have not been paid. It is obvious

> that some of these bills have been paid by Medicare and an insurance carrier. It should pay no more on the allowed attorney fee than what is owed Plaintiff, Medicare or other provider.
>
> **IT IS HEREBY ORDERED** that Defendant's Petition for Reconsideration is **GRANTED** to the extent that it is relieved of payment of attorney fee in excess of such medical expense sum as owed by Defendant and delinquent to Plaintiff, Medicare, Clover Fork Clinic, and other providers.

On July 23, 2012, Turner filed a petition for reconsideration asking ALJ Justice to reconsider the July 10, 2012 order. Turner argued his attorney was entitled to the award of a fee from "the contested medical expenses".

On July 11, 2012, ALJ Justice entered an order reassigning the claim to ALJ Bolton effective July 16, 2012. On August 22, 2012, ALJ Bolton issued an order granting Turner's petition for reconsideration. ALJ Bolton found ALJ Justice's order entered May 15, 2012 was reasonable, and he vacated the order entered July 10, 2012, reinstating the May 15, 2012 order. Fox Knob filed a notice of appeal to this Board on September 17, 2012.

On appeal, Fox Knob argues ALJ Bolton's order vacating ALJ Justice's order is erroneous as a matter of law. Fox Knob also argues the fee awarded to Attorney Turner is not supported by substantial evidence or any evidence of record. We vacate and remand.

803 KAR 25:010 § 13(14) provides only those issues preserved at the BRC for determination by the ALJ "shall be the subject of further proceedings." In the case *sub judice*, the only issues raised at the BRC concerned compensability of referral to a neurosurgeon and pain management. Although some discussion was held at the hearing, the claim was not amended to include compensability of any specific contested medical bills. Neither party subsequently moved to amend or supplement the listed contested issues to be decided. In his decision rendered January 27, 2012, ALJ Justice found in Turner's favor regarding the issues preserved for decision. Since issues regarding the compensability of specific medical bills and reimbursements were never listed as contested issues by motion, at the BRC, or at the hearing, it was inappropriate for ALJ Justice to make such finding. We therefore vacate that portion of the ALJ Justice's decision, and subsequent orders, as well as the August 22, 2012 order issued by ALJ Bolton pertaining to reimbursements or payment of medical bills. While neither party has raised this issue, it may be raised *sua sponte* by this Board.

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.

. . .

(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.

The above sections set forth the manner of calculating the attorney fee for representing an employee in an original claim and on reopening of a claim seeking additional income benefits. Those sections do not relate to entitlement to an attorney fee for representing a claimant in a proceeding initiated by the employer or a party similarly situated. The law is clear in such situations, entitlement to an attorney fee is not based on the award of additional income benefits.

Since Turner was responding to Fox Knob's motion to reopen and medical fee dispute, Attorney Turner may be entitled to an attorney fee based on the work he performed in this reopening. In Duff Truck Lines, Inc. v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999), the Court of Appeals held an attorney representing a claimant in response to a motion to reopen is entitled to be compensated even though no additional funds were obtained in the proceedings. In Duff

Truck Lines, Inc., supra, as in this case, the attorney who sought an attorney fee was representing the employee in response to a motion filed by the employer. The Court of Appeals identified the issue as follows:

> The issue in this appeal is whether an attorney who successfully defended an employee's claim for medical expenses in a reopening of a workers' compensation settlement is entitled to an attorney fee. We have reviewed the applicable law, and affirm the opinion of the Workers' Compensation Board (hereinafter the Board) which held that the award of attorney fees was appropriate for a medical fee dispute.

Id. at 225.

The Court noted the claim had been settled in June 1989, with Vezolles receiving a lump-sum disability payment. In April 1997, Duff Truck Lines filed a motion to reopen in order to contest its obligation to pay chiropractic expenses incurred by Vezolles. Duff Truck Lines was unsuccessful and was ordered to pay the contested expenses. Thereafter, Vezolles' attorney sought approval of an attorney fee for representing Vezolles. The Chief Administrative Law Judge ("CALJ") denied the motion on the ground that an attorney fee could not be granted pursuant to KRS 342.320(7) when no additional income benefits were recovered. The Board held the attorney is entitled to an "appropriate recompense to be taken from the amount recovered" and reversed and remanded

for the CALJ to determine the amount of the attorney fee award. In affirming the Board, the Court of Appeals stated 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. *Napier v. Scotia Coal Co.*, Ky., 874 S.W.2d 377 (1993).
>
> . . .
>
> 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.

Id. at 226-227.

Based on the above language, we find no error in a determination finding Attorney Turner may be entitled to the award of an attorney fee despite the fact no additional income benefits were recovered on reopening. To hold otherwise would place the employee in the position of being virtually unable to obtain legal representation in post-

award proceedings initiated by the employer or a party similarly situated. 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, in the case *sub judice*, Attorney Turner did not itemize his hourly rate or the time expended for services rendered in the petition and affidavit to obtain approval of an attorney fee. We remand to the ALJ for determination of the whether Attorney Turner may be entitled to the award of an appropriate attorney fee for the work he performed in this reopening, considering the services provided. Attorney Turner should be allowed to supplement his motion by setting forth his hourly rate and time expended. Thereafter, ALJ Bolton, if he so determines Attorney Turner is entitled to a reasonable attorney fee, shall enter an order consistent with the provisions of KRS 342.320(4)(a). Any reasonable attorney fee awarded shall be paid by Turner who has elected to do so from his own funds.

Next we address ALJ Justice's assessment of the attorney fee to be deducted from amounts reimbursed to

Turner, Medicare and Turner's health insurer by order dated May 15, 2012. There simply is no authority to do so. 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., supra. Additionally, this Board addressed the same question in Zineddin v The Neilsen Company, WCB Claim No. 2004-73617 (August 15, 2008). KRS 342.320 establishes the only authorized means by which an attorney can be paid a fee in any workers' compensation action whether it is during the original claim, on reopening for additional benefits, or a medical fee dispute.

Zineddin, supra, dealt with the same factual situation as in the case *sub judice*. In that case, the attorney was ordered to be paid his attorney fee out of the funds due Zineddin, the third party medical provider, for services it had 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. 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. This is true whether the deduction is to come from payments or reimbursements due to a medical provider, health insurer, or Medicare. Therefore, while an attorney fee may be payable to Attorney Turner, it can only be paid by Turner.

On remand, ALJ Bolton shall issue a decision solely addressing the issues raised and litigated by the parties. ALJ Bolton shall further determine whether Attorney Turner is entitled to an attorney fee based upon the factors cited above. If he so determines Attorney Turner is entitled to an attorney fee award, ALJ Bolton shall determine the amount of such award, which shall be paid from Turner's funds. Finally, compensability of unpaid medical bills and reimbursement were not preserved as issues for determination at the BRC or at the final hearing, and were not addressed in the ALJ's opinion issued on January 27, 2012, and therefore subsequent orders addressing those concerns are hereby **VACATED**.

Accordingly, the August 22, 2012 decision by ALJ Bolton, vacating the July 10, 2012 order, and reinstating the May 15, 2012 order entered by ALJ Justice is hereby **VACATED** and this matter is **REMANDED** to the ALJ for entry of an opinion deciding only the contested issues properly

preserved by the parties, and for determination of an attorney fee to be awarded to Attorney Turner to be paid by Turner in conformity with the views expressed in this opinion.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON J GREGORY ALLEN
P O BOX 1350
PRESTONSBURG, KY 41653

COUNSEL FOR RESPONDENT:

HON JOHNNIE L TURNER
P O BOX 351
HARLAN, KY 40831

RESPONDENT:

CLOVER FORK OUTPATIENT MEDICAL PROJECT, INC.
P O BOX 39
EVARTS, KY 40828

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G BOLTON
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601