Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 4, 2014

CLAIM NO. 200682631

FOX KNOB COAL CO., INC. PETITIONER

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

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

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Fox Knob Coal Co., Inc. ("Fox Knob") appeals from the January 22, 2014, Amended Order on Remand and the April 16, 2014, Order denying its petition for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ Bolton").

We adopt the factual background as set forth in our November 16, 2012, Opinion Vacating and Remanding as follows:

> 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.
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> 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.

Approximately two weeks before the Court of Appeals rendered its decision, Fox Knob filed a motion to reopen challenging referrals to a neurosurgeon and pain management. The motion was sustained and the claim was ultimately assigned to Hon. Joseph Justice, Administrative Law Judge ("ALJ Justice"). A benefit review conference was held on November 1, 2011, at which the parties identified the following contested issues: "compensability of referrals to neurosurgeon and pain management; reasonable and necessity of narcotic medications and Benzodiazepines."

In a January 27, 2012, Opinion and Order, ALJ Justice determined Fox Knob had failed to prove the requested referral to Dr. Bean and pain management was unreasonable. ALJ Justice also determined Fox Knob was responsible for the medications prescribed by Dr. Rachel Eubanks except for Valium and other medications prescribed for the treatment of the psychological condition. Accordingly, ALJ Justice ordered as follows:

> 1. Defendant, Fox Knob Coal Co. Inc.'s medical fee dispute of Plaintiff's medical treatment, and specifically prescription of narcotic 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 [sic] medical fee dispute of Plaintiff's prescription of

> benzodiazepines is **SUSTAINED**. Fox Knob Coal Co. Inc. is relieved from liability of payment for the contested expenses.
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> 3. Defendant, Fox Knob Coal Co. Inc.'s medical fee dispute contesting the referral to Dr. Bean for a neurological consultation is **OVERRULED** and the request is **APPROVED**, with the provision that Dr. Bean review Plaintiff's medication regimen and make recommendations as to recommended medications and dosage.

We adopt our summary of the relevant events occurring after ALJ Justice rendered his opinion:

> 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.
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> 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.
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> **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.

We vacated and remanded stating as follows:

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:

. . .

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. [emphasis added].**
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> . . .
>
> 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.

For reasons which are unclear, almost one year later on November 26, 2013, ALJ Bolton entered an order directing Johnnie L. Turner ("Attorney Turner") to submit an itemized statement of his hours expended and rates. The order did not provide a timeframe in which Attorney Turner was to file this itemization.

On December 13, 2013, ALJ Bolton entered the following order:

> This matter is before the ALJ on remand from the full Board with direction to issue a decision solely addressing the issues raised and litigated by the parties, and to determine whether Attorney Johnnie L. Turner is entitled to an attorney fee based upon the factors cited in the Board's opinion.

As noted by the Board in its Opinion Vacating and Remanding, the award did not address payment or compensability of specific unpaid medical bills or reimbursements. Further, no issue was raised at the BRC or at the hearing regarding reimbursement or payment of unpaid bills. Further, there was no factual basis presented to the ALJ supporting an award of an attorney fee. Thus, the ALJ order of August 22 has been set aside.

On remand, there is no issue remaining as to unpaid medical bills, and so that issue will not be considered.

As to the issue as to whether Attorney Johnnie L. Turner is entitled to an attorney's fee, the Board has set aside ALJ Justice' [sic] order awarding him $531.37. Its Order specifically allowed him leave to submit to the ALJ a supplement to his motion by setting forth his hourly rate and time expended. Despite a lengthy passage of time, no such submission has been made.

By order of November 26, 2013, Attorney Turner was ordered to submit an itemized statement of his hours and rates expended on the claim. No response has been received.

Based upon the foregoing, I find that Attorney Johnnie L. Turner has abandoned his claim for attorney's fees in this matter by failing to comply with the Board's grant of authority and my direct order to supplement the record with information in support of his motion.

IT IS THEREFORE ORDERED that his motion for Attorney Fee be, and it is hereby, **DENIED** and **DISMISSED**.

On December 23, 2013, Attorney Turner served a "Motion for Attorney Fees Pursuant to 11/26/13 Order" which was not filed until January 2, 2014.

On December 27, 2013, Ray Turner ("Turner") served a petition for reconsideration stating his attorney did not receive the December 13, 2013, order until December 19, 2013. Turner's attorney represented that on November 30, 2013, he received the November 26, 2013, order directing him to submit an itemized statement of his hours. Attorney Turner represented he prepared the statement but he was out of his office and unable to review and sign the itemized statement until December 23, 2013. A copy of the motion was attached to the petition for reconsideration. Accordingly, he requested reconsideration of the December 13, 2013, order. The petition for reconsideration was also filed on January 2, 2014.

On January 6, 2014, Fox Knob filed a response and objection to the motion for attorney's fee and a response and objection to the petition for reconsideration. With respect to the motion for an attorney's fee, it asserted the motion was untimely as evidenced by the fact ALJ Bolton had previously entered an order denying an attorney's fee. Fox Knob contended the attorney's fee motion was deficient as it did not include a Form 109 election identifying the

personal funds of Turner as the source for any attorney's fee which might be approved by ALJ Bolton. In its response and objection to the petition for reconsideration, Fox Knob asserted the petition for reconsideration was untimely. It also adopted a portion of its arguments made in its objection to the attorney's fee.

On January 22, 2014, ALJ Bolton entered the following order:

> This matter is before the ALJ on remand from the full Board with direction to issue a decision solely addressing the issues raised and litigated by the parties, and to determine whether Attorney Johnnie L. Turner is entitled to an attorney fee based upon the factors cited in the Board's opinion.
>
> An order was entered directing Attorney Johnnie L. Turner to submit to the ALJ a supplement to his motion by setting forth his hourly rate and time expended. By order of November 26, 2013, Attorney Turner was ordered to submit an itemized statement of his hours and rates expended on the claim. No response was received and an Order on Remand was rendered dismissing the motion for attorney's fee.
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> Subsequently, a Petition for Reconsideration was filed that points out certain extenuating circumstances that delayed filing, to which a reponse [sic] has been filed.
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> Based upon the foregoing, I find that Attorney Johnnie L. Turner has abandoned his claim for attorney's fees in this matter by failing to comply with

> the Board's grant of authority and my direct order to supplement the record with information in support of his motion.
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> Having considered the Motion for Attorney Fees filed by counsel for the Plaintiff, the Petition for Reconsideration and Response thereto, I am of the opinion that there is error patently appearing on the face of the Order of December 13, 2013 in that considering the delays inevitably caused by the Thanksgiving, Christmas, New Years [sic] holidays [sic] The period of time between the order of November 26, 2013 and December 13, 2013 was probably insufficient to allow the counsel for the plaintiff to comply.
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> **IT IS THEREFORE ORDERED** that the Order on Remand of December 13, 2013 be, and it is hereby set aside. Plaintiff's Motion for Attorney Fees is hereby **GRANTED.** Counsel for the Plaintiff is hereby awarded an attorney's fee in the amount of $531.37 for his services rendered on behalf of the Plaintiff, which shall be paid to counsel for the Plaintiff by the Defendant/Employer and/or its insurer out of personal funds awarded to Plaintiff.

On January 31, 2014, Fox Knob filed a petition for reconsideration pointing out that in its opinion vacating and remanding, the Board stated any attorney's fee award should be paid by Turner. It argued in spite of this language, ALJ Bolton awarded an attorney's fee in the amount of $531.37 to be paid by Fox Knob or its insured out of personal funds awarded to Turner. Consequently, it argued there was a patent error in the language of the

amended order on remand and it should be corrected to provide the approved fee is payable from the personal funds of Turner.[1]

In an order dated April 16, 2014, ALJ Bolton concluded there was no patent error appearing on the face of the order and denied the petition for reconsideration and the renewed petition for reconsideration.

On appeal, Fox Knob contends the Board remanded directing that any attorney's fee approved for representation of Turner in the medical fee dispute was to come from Turner's personal funds. Therefore, it insists the language in ALJ Bolton's January 22, 2014, order clearly gives rise to an argument that the attorney's fee is payable by Fox Knob or its insurer and is an abuse of discretion. Fox Knob notes ALJ Bolton was given the opportunity to correct this patent error and refused. Accordingly, it requests reversal of the January 22, 2014, order with directions that Fox Knob and its insurer are not responsible for paying the attorney's fee and any attorney's fee must come from the personal funds of Turner. We agree and vacate that portion of ALJ Bolton's January

[1] On March 31, 2014, Fox Knob filed a renewed petition for reconsideration which mirrored the initial petition for reconsideration filed on January 31, 2014.

22, 2014, order on remand which directs the "attorney fee shall be paid to counsel for the plaintiff by the defendant-employer or its insurer out of the personal funds awarded the plaintiff."

Attorney Turner's representation of Turner pertained to the defense of a medical fee dispute. Clearly, Turner was not awarded an additional amount in the proceeding. However, the Courts have recognized that Attorney Turner is entitled to an attorney's fee in such cases, but the fee must be paid by the claimant from his own funds. *See* Duff Truck Lines, Inc. v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999). In the case *sub judice*, since there were no additional funds recovered, there were no funds available to be paid to Attorney Turner by Fox Knob or its insurer out of personal funds awarded to Turner. Therefore, ALJ Bolton's order on remand regarding the funds to be used to pay the attorney's fee is clearly erroneous.

In addition, in our November 16, 2012, opinion we noted the funds to pay an attorney's fee could not come from those sums due the medical providers for unpaid medical bills. The Supreme Court in Rager v. Crawford & Co., 256 S.W.3d 4, 6 (Ky. 2008) and this Board in Zineddin v. The Neilsen Company, WCB Claim No. 200473617, rendered August 15, 2008, emphasized the funds due a third party

medical provider cannot be used to pay an attorney's fee. Thus, no portion of the sums to be paid by Fox Knob to a medical provider can be paid in satisfaction of the attorney's fee awarded to Attorney Turner.

Finally, we feel compelled to address what occurred after our November 16, 2012, opinion became final. The record reflects on December 20, 2012, a memo was sent to ALJ Bolton indicating the matter had been remanded pursuant to a Board opinion. Thereafter, no action was taken until the November 26, 2013, order was entered. Significantly, in that order ALJ Bolton did not provide the time within which Attorney Turner was to file his motion for approval of an attorney's fee. Pursuant to KRS 342.320(4), the order should have allowed Attorney Turner at least thirty days from the date of the order in which to file an itemized statement in support of his request for approval of an attorney's fee.

Our opinion vacating and remanding became final in December 2012. On November 26, 2013, ALJ Bolton entered an order directing Attorney Turner to submit an itemized statement of his hours expended and his rates. Seventeen days later, ALJ Bolton entered the December 13, 2013, order in which he specifically found that by his actions Attorney Turner had abandoned his claim for an attorney's fee. He

ordered Attorney Turner's previous motion for an attorney's fee be denied. On December 23, 2013, Attorney Turner served a "Motion for Attorney Fees Pursuant to 11/26/13 Order" which was not filed until January 2, 2014. On December 27, 2013, Turner served a petition for reconsideration stating his attorney did not receive the December 13, 2013, order until December 19, 2013. Attorney Turner provided the reason he did not serve the itemized statement until December 23, 2013. Accordingly, he moved the ALJ to reconsider the December 13, 2013, order. The petition for reconsideration was filed on January 2, 2014.

Pursuant to 803 KAR 25:010, Section 1(4)(a)1 and 2, the ALJ's November 26, 2013, order was deemed filed on December 2, 2013.[2] Since KRS 342.320(4) provides the attorney has thirty days to file a motion for approval of an attorney's fee, the motion for approval of an attorney's fee was timely filed as the thirtieth day from December 2, 2013, would have fallen on January 1, 2014, a holiday. Therefore, January 2, 2014, became the last day to file the motion for approval of an attorney's fee. Consequently, the motion for approval of an attorney's fee was filed within thirty days of the November 26, 2013, order.

[2] November 29, 2013, was the Friday after Thanksgiving and was a state holiday. Thus, Monday, December 2, 2013, was the date of filing.

We note pursuant to 803 KAR 25:010, Section 1(4)(a), the December 13, 2013, order was deemed filed on December 16, 2013. The fourteenth day from December 16, 2013, fell on January 30, 2014, a Monday, which was not a holiday causing the petition for reconsideration to be untimely.

Even though the petition for reconsideration was not timely filed, the motion for approval of an attorney's fee was timely filed. Therefore, the ALJ properly set aside his December 16, 2013, order as an abuse of discretion. Attorney Turner had thirty days from the November 26, 2013, order in which to file a motion for an attorney fee. His motion for approval of an attorney's fee was timely filed pursuant to the statute. Therefore, the ALJ had the authority to rule upon the motion for an attorney's fee and set aside his December 16, 2013, order.

This claim was remanded to ALJ Bolton for entry of an order clarifying the compensability of medical bills was not an issue and deciding only the contested issues preserved by the parties. ALJ Bolton was also to determine the attorney's fee to be awarded to Attorney Turner. This necessarily entailed ALJ Bolton entering an order directing Attorney Turner to file a motion for approval of an attorney's fee and designating the timeframe in which the

motion should have been filed. Therefore, the first and only appealable order was the amended order on remand of January 22, 2014.

Accordingly, that portion of the January 22, 2014, amended order on remand directing the attorney fee of $531.37 to be paid by Fox Knob or its insurer out of personal funds awarded to Turner and the April 16, 2014, order reaffirming that provision of the January 22, 2014, amended order are **VACATED**. Pursuant to our previous opinion of November 16, 2012, this claim is **REMANDED** for entry of an order amending ALJ Justice's opinion, award, and order in conformity with our opinion. Specifically, the amended order shall state the compensability and reimbursement of unpaid medical bills was not preserved as a contested issue and will not be addressed in the amended opinion and order.

The amended order shall also award an attorney's fee to be paid from the private funds of Turner and not from funds, if any, to be paid by Fox Knob or its insurer to Turner.

ALL CONCUR.

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