OPINION ENTERED: JULY 23, 2012

CLAIM NO. 200996039

HON. C. PHILLIP WHEELER, JR.
and KIRK LAW FIRM PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

DAVIS THOMAS,
PAULY BUILDING CENTER, INC.
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. C. Phillip Wheeler, Jr. ("Wheeler"), attorney for Davis Thomas ("Thomas"), appeals from the January 20, 2012 Order rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), ruling on an attorney's fee petition. Wheeler also appeals from the CALJ's February 27, 2012 Order denying his petition for reconsideration. On appeal, Wheeler argues the CALJ erred

in disallowing an attorney's fee for the portion of a settlement agreement consisting of a lump sum payment for previously awarded permanent partial disability ("PPD") benefits.

Thomas sustained a low back injury on February 20, 2009, in the course and scope of his employment with Pauley Building Center, Inc. The claim was litigated, resulting in a July 23, 2010 Opinion, Order and Award rendered by Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ Clark"). Thomas received a 425 week award of PPD benefits based upon a 22% impairment rating with application of the three multiplier pursuant to KRS 342.730(1)(c) for his low back injury and resulting psychological condition. On July 30, 2010, Wheeler filed a petition for attorney fee in the amount of $9,238.43. By order dated August 17, 2010, ALJ Clark granted the petition.

On December 14, 2011, the CALJ approved a post-award settlement agreement. Specifically, the portions relevant to this appeal are as follows:

> Monetary terms of settlement: to be paid as follows: lump sum:
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> Total settlement amount: $70,000.00
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> Percent of permanent disability compromise settlement:
>
> Settlement computation: Remainder of

> PPD benefits (previously awarded via Opinion & Award): $182.74 x 302 weeks (discounted 284.1008) = $51,916.58.
>
> In full and final settlement of Plaintiff's work injury of 2/20/09, plaintiff and his counsel have agreed to a compromise lump sum settlement in the amount of $70,000.00. Of the $70,000.00 lump sum payment, $51,916.58 represents the remaining PPD benefits (302 weeks discounted to 284.1008) previously awarded to the plaintiff on 7/23/10 (DWC Claim No. 2009-96039). Of the $70,000 being paid to plaintiff the following waivers have been agreed to by all parties and consideration for each wavier is outlined as follows: $6,000.00 is being paid to the plaintiff in consideration of plaintiff's waiver of any and all future medical expenses associated with this injury (physical and psychiatric conditions); $6,000.00 is being paid to plaintiff in consideration of his waiver of vocational rehabilitation expenses; and $6,083.42 is being paid to plaintiff in consideration of his waiver to future right to reopen this claim in the future for additional PPD, PTD or TTD benefits.

Thereafter, on December 27, 2011, Wheeler filed another petition for attorney's fees requesting an additional $6,212.15. In support of his petition, Wheeler indicated the matter had been resolved by settlement whereby Thomas would receive a lump sum payment of $70,000.00. Wheeler then itemized the legal

work performed and certified that the fee was fair and reasonable as had been agreed upon by the parties.

In response to Wheeler's fee request, the CALJ on January 20, 2012 rendered the following order:

> This matter comes before the undersigned Administrative Law Judge (ALJ) upon motion by counsel for Plaintiff, Honorable C. Phillip Wheeler, Jr., for approval of an attorney's fee in the amount of $6,215.15;
>
> Pursuant to K.R.S. 342.320(1), an ALJ is required to consider certain factors in approving a reasonable fee for legal services rendered. These factors include nature, scope, quality of legal services rendered, level of skill and competence exhibited by the attorney, the result achieved and the contingent nature of the case. In the instant case, it is found that 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 were not rendered, all mitigate in favor of the approval of the maximum attorney's fee allowable.
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> In an Opinion and Award rendered July 23, 2010, Plaintiff received weekly PPD benefits of $211.22 per week for 425 weeks beginning June 27, 2009. On December 14, 2011, Plaintiff settled his remaining benefits for $70,000.00 of which $51,916.58 is for a lump sum pay out of his remaining PPD benefits. This amount has

> previously been subjected to attorney's fees. A copy of that order is attached for the convenience of the parties. Therefore, only $18,083.42 of the total lump sum payment in the December 14, 2011 settlement agreement can be considered “new money" or additional money that has not been subjected to an attorney fee. Pursuant to KRS 342.320, it is from this amount that attorney fees must be calculated as 20% of the first $25,000.00, 15% of the next $10,000.00, and 5% of the remainder not to exceed a maximum fee of $12,000.00.
>
> Therefore, being otherwise duly and sufficiently advised, an attorney's fee in the amount of $3,616.68 is hereby APPROVED for the services rendered.
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> Pursuant to the election of the Plaintiff, said attorney's fee shall be paid in a lump sum out of the settlement.

In his petition for reconsideration, Wheeler disagreed that KRS 342.320(2) prohibited a levy of an attorney fee on post-award PPD benefits that were subjected to an attorney fee in the original award. He pointed out that although $51,916.58 was paid as consideration of Thomas' right to receive future PPD benefits he was able to utilize his skills to obtain the cash value in lump sum of future benefits Thomas may or may not have received in which Thomas had no "right" to receiving a lump sum. Wheeler

also argued that in obtaining these benefits in a lump sum, the he used his negotiating skills to obtain a benefit immediately for which there was no guarantee Thomas would receive in the future.

By order dated February 27, 2012, the CALJ denied the petition for reconsideration stating in part as follows:

> Plaintiff's counsel moved for an award of attorney's fee and about [sic] $6,215.15 for the December 14, 2011 settlement. The CALJ, in the in the [sic] January 20, 2012 order for which reconsideration is now requested, limited the fee approved for plaintiff's counsel's representation in the most recent settlement to a fee of $3,616.68 based on the $18,083.42 portion of the $70,000 settlement. The CALJ explained that the fee was limited to a fee on the $18,083.42 portion of the settlement as the $51,960.58 portion of the award had already been subjected to attorney's fees.
>
> Plaintiff's counsel now petitions for reconsideration of the order. Plaintiff's counsel argues that his representation of Plaintiff in obtaining a lump sum benefit entitled him to an additional fee even though he had previously been awarded on what the CALJ believes was essentially "the same money". Plaintiff's counsel stated his disagreement with the ALJ's conclusion that KRS 342.320(2) prohibited an additional fee and the CALJ certainly understands this disagreement. However, the CALJ continues to believe a fee cannot be charged twice on the same benefits and, in spite of Plaintiff's counsel's disagreement over the CALJ's interpretation of the law,

> finds that there is no error patently appearing on the face of the order sought to be reconsidered.
>
> Review pursuant to a Petition for Reconsideration is limited by KRS 342.281 and 803 KAR 25:010§19 to the correction of errors patently appearing on the face of an award, order, or decision and does not allow reconsideration of the merits of a claim or defense. A review of the above order indicates no error patently appearing on the face thereof.

On appeal, Wheeler argues the CALJ erred in reducing the requested attorney fee. Wheeler contends nothing in KRS 342.320(7) prohibits counsel from charging a fee for previously awarded benefits if additional money is obtained. Wheeler notes, for purposes of attorney fees, a post-award settlement is treated as akin to a reopening and therefore subject to the restrictions in KRS 342.320(7). Wheeler notes the Court of Appeals in Duff Truck Lines v. Vezolles, 999 S.W.2d 224 (Ky. App. 1999) stated the legislative purpose in awarding fees when workers' compensation claims are reopened is to encourage attorneys to undertake such representation and to ensure an opportunity for injured workers to exercise their rights. Wheeler notes he undertook representation of Thomas, who desired a final resolution of the claim and employed Wheeler on a contingency fee basis. Wheeler notes he was able to achieve

a final resolution which satisfied his client. Thomas agreed to pay a fee including a percentage of any future PPD due that was obtained in a lump sum.

Wheeler acknowledges KRS 342.320(7) states that if no additional amount is recovered on reopening, no fee shall be paid. However, Wheeler notes the statute is silent as to what constitutes an "additional amount." Wheeler argues "additional amount" should mean any result obtained by counsel and desired by the claimant including, but not limited to, obtaining a future entitlement to weekly benefits in a lump sum. Wheeler argues that, by securing a lump sum payment of the future PPD benefits, he has in fact obtained additional money by getting the plaintiff "cash in hand" sooner rather than later. Wheeler notes "cash in hand" is a valuable consideration for giving up a right to receive weekly benefits that may or may not in fact be paid since the plaintiff could die or have his benefits reduced in the future. Wheeler asserts nothing in the statute or regulations expressly prohibits him from charging the requested fee related to the lump sum for future PPD benefits. Wheeler requests that the Board reverse the CALJ's reduction of the fee and remand this matter for entry of an order granting the entire fee sought in the petition.

We agree a post-award settlement agreement should be treated the same as a motion to reopen with regard to the award of an attorney fee. KRS 342.320(7) provides:

> 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 CALJ properly reduced the requested fee, limiting it to the "new money" secured by the settlement agreement. We therefore affirm. KRS 342.320 is unambiguous as it relates to the payment of attorney fees in original claims and on reopening. Where a statute is unambiguous, it must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 786 (Ky. 2008); Griffin v. City of Bowling Green, 458 S.W.2d 456, 457 (Ky. 1970). By enacting KRS 342.320, the legislature established the maximum amount of an attorney's fee to be paid by an employee. KRS 342.320(7) plainly allows for an additional attorney's fee

on reopening to be taken from “any additional amount recovered” subject to the method of calculation set forth in subsection (2) controlling the percentages applied to the various dollar values.

Wheeler received compensation for securing the future PPD benefits in the original action, and his fee was awarded based on the maximum rate allowed in KRS 342.320(2). To allow any additional fee when the PPD benefits were later paid in a lump sum would result in a total fee for those benefits in excess of the statutory maximum in clear violation of the provision. KRS 342.320(7) states the fee is “subject to the limits set forth in subsection (2)” and provides that, if no additional amount is recovered on reopening, no attorney’s fee shall be awarded.

Here, the settlement agreement changed only the time of payment for the previously awarded future income benefits, but provided no increase in benefits. Thus, no increased fee could be awarded related to those income benefits for which an attorney fee had previously been awarded. The only additional recovery in the agreement was compensation for waivers and buyouts. Unlike the lump sum payment for previously awarded PPD benefits, payment for the waivers and buyouts in the settlement agreement are separate and not a part of the original claim. Under these circumstances, we

conclude the CALJ properly limited the award of an attorney's fee to the amounts paid for the waivers and buyouts in the settlement agreement.

Accordingly, the January 10, 2012 Order and the February 27, 2012 Order denying the petition for reconsideration rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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