OPINION ENTERED: FEBRUARY 8, 2013

CLAIM NO. 201095383

SCOTTY WAYNE FERGERSON
and WESLEY G. LILE PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

WOOSLEY BROTHERS PAINTING CO.,
ANDREW GREGORY-MABREY
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Scotty Wayne Fergerson ("Fergerson") and his attorney, Wesley G. Lile ("Lile") appeal from the September 6, 2012 order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") directing Lile to pay $750.00 to Andrew Gregory-Mabrey ("Mabrey"), Fergerson's former counsel, for an attorney fee for his prior representation. Lile argues the ALJ failed to make findings

regarding whether the service provided by the previous counsel’s attorney fee claim was reasonable and of value to the claimant. He further argues the ALJ violated KRS 342.320(4) in granting a fee since the fee petition was not filed within thirty days of the approval of the settlement agreement and by ordering Lile to pay the previous attorney’s fee out of the fee awarded for the subsequent representation.

Fergerson was injured on December 2, 2009, when he fell from a ladder while employed by Woosley Brothers Painting Company (“Woosley Brothers”). Fergerson entered into a contingent fee agreement with the offices of Flora Templeton Stuart and Natalie Talmadge Stuart on November 23, 2010, for representation in his workers' compensation claim. In return, Fergerson agreed to pay the firm for services rendered in accordance with the applicable provisions of the Kentucky Workers' Compensation Act. Mabrey provided services on behalf of the firm.

Mabrey secured an offer from the workers' compensation carrier to settle Fergerson’s claim for a lump sum of $22,449.51 based upon a 5% permanent impairment rating enhanced by a 3.4x multiplier. The offer contained no waivers or buyouts. Although Fergerson signed an authorization on April 19, 2011 permitting Mabrey to demand

a $22,449.52 lump sum settlement, he rejected the offer and did not sign the agreement.

On May 24, 2011, Fergerson entered into a contract with Lile to represent him in his workers' compensation claim against Woosley Brothers on a contingent fee basis in accordance with the Kentucky Workers' Compensation Act. Lile sent a notice of representation to the carrier on May 23, 2011.

Mabrey filed a notice of attorney fee lien on June 15, 2011, asserting entitlement to a fee in the amount of $4,489.90.

Lile filed a Form 101, Application for Resolution of Injury Claim, on Fergerson’s behalf on June 17, 2011. On March 13, 2012, with the assistance of Lile, Fergerson executed a settlement agreement which was approved by the ALJ on March 14, 2012. Pursuant to the terms of the agreement, Fergerson received a lump sum of $225,000.00 representing various waivers and buyouts, as well as income benefits of $132,326.77 based on a 25% permanent impairment rating enhanced by the 2x multiplier pursuant to KRS 342.730(1)(c)2. Of the proceeds, $75,000.00 represented a waiver or buyout of future medical benefits, $5,000.00 represented a waiver or buyout of vocational rehabilitation, and $12,673.23 represented a waiver or buyout of the right

to reopen. The agreement specifically provided “Wes Lile will be responsible for paying any attorney fee to Plaintiff’s prior attorney, Andrew Mabrey, should any such fee be awarded by the ALJ.”

On March 26, 2012, Lile filed a motion and affidavit seeking the maximum attorney fee of $12.000.00. Lile’s motion was silent regarding the attorney fee lien issue.

By order dated March 29, 2012, ALJ Wolff granted the motion and awarded a fee of $12,000.00 using the proposed order tendered by Lile.

On July 25, 2012, Mabrey filed a motion for attorney fee seeking a $2,500.00 fee to be paid by Lile based upon the theory of *quantum meruit*.

By order dated August 16, 2012, the ALJ granted Mabrey’s motion, but limited the fee to $750.00, and was directed to be paid by Fergerson and/or his attorney within thirty days for Mabrey’s services.

Lile filed a petition for reconsideration on August 24, 2012, arguing Mabrey filed his motion outside the time allowed and the fee was not justified.

In his September 6, 2012 order, the ALJ confirmed his August 16, 2012 order and directed Lile to make payment to “The Law Firm of Flora Templeton Stuart” within thirty days of the date of the order.

We begin by noting the settlement agreement, once approved by the ALJ, became a binding award, including the requirement that Lile pay any attorney fee awarded to Mabrey. Despite knowledge of his liability for any fee payable to Mabrey, the record contains nothing to indicate Lile communicated with Mabrey to inform him of the resolution of the claim. Instead, it appears, as Mabrey alleges in his motion to dismiss, he learned of the resolution through his own efforts and immediately filed for his fee upon learning of the settlement.

There is legal precedent for the award of a fee in *quantum meruit* where an attorney performs substantial work under a contingent fee contract, but is then discharged without good cause before a recovery is secured. The weight of legal authority favors Mabrey in this matter, and we affirm.

The relevant statutory language is 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.
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> (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.
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> (3) In approving an allowance of attorney's fees, the administrative law judge shall consider the extent, complexity, and quality of services rendered. . . .
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> (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.

In Henry v. Vance, 111 Ky. 72, 63 S.W. 273 (Ky. 1901), the court held the proper measure for the allowance of a fee to an attorney employed under a contingent contract who is discharged without good cause before completion of the contract is upon the basis of *quantum meruit*. More specifically, the recovery should be the amount of the contingent fee less that portion of the sum reasonably represented by the "labor and attention and expense that would have been required of plaintiffs to complete their

undertaking, but which they did not do." Id. at 275-6. In Gilbert v. Walbeck, 339 S.W.2d 450 (Ky. 1960), the Court opined the contingent fee contract was of no consequence because the attorney was discharged before completion of the contract, but cited Henry, supra, as authority for a recovery on the basis of *quantum meruit*.

In Labach v. Hampton, 585 S.W.2d 434 (Ky. 1979), the equitable doctrine was applied to a case in which representation of the claimant on a contingent fee basis was undertaken with respect to a workers' compensation claim and a third-party civil action, both arising from a single industrial accident. There the claimant discharged two attorneys before settling the litigation with the assistance of a third. Citing Henry, supra, and Gilbert, supra, the Labach Court stated,

> "We conclude from this that our courts have used the term *quantum meruit* to indicate that the discharged attorney cannot rely upon the contract to collect a full fee but must deduct from the contract fee the reasonable cost of services of other attorneys required to complete the contract."

Thus, the attorney-petitioner in Labach, supra, was permitted a fee of one-third "of the amount later recovered less the value of the services reasonably required of others to complete the contract." Id. at 436. Notably,

the attorney-petitioner in Labach, supra, requested a fee based upon the $10,000.00 settlement offer he had procured for the claimant, whereas the Court ruled that his fee should be determined with reference to the $20,000.00 settlement eventually recovered by the claimant with the assistance of her third attorney. Thus, it was of no consequence that the attorney-petitioner's services resulted in an offer that was only one-half of the ultimate recovery.

It is clear the alleged inadequacy of the offer secured by Mabrey, as charged by Lile, is not sufficient, in and of itself, to establish "good cause" for Mabrey's termination. Moreover, by operation of the above-quoted statutory provisions, the legislature has given the ALJ broad discretion in assessing the reasonableness of attorney fees in workers' compensation claims. *See* Combs v. Hubb Coal Corp., 934 S.W.2d 250 (Ky. 1996), ("Applying these principles to KRS 342.320, we are persuaded that the legislature intended to make the reasonableness of *all* fees subject to review by the ALJ.")

Mabrey represents in his brief before this Board that he made Fergerson aware at all times that the impairment rating was probably wrong and he was ready and willing to

file a Form 101 in the event Fergerson was not satisfied with the carrier's offer of settlement.

His notice of attorney fee lien was filed prior to the filing of the Form 101. A status conference was held November 2, 2011 and the ALJ's order on that date indicated the attorney fee lien issue would be "passed to post merits of case." Thus, Lile was aware of the lien and that the matter would be resolved at the conclusion of the case. Further, when the settlement was reached, the agreement unequivocally provided Lile would pay any fee awarded to Mabrey.

The statute provides for a maximum fee of $12,000.00 for representation of a claimant in an original action. Contrary to Lile's assertions that his client would be the party responsible for any fee awarded to Mabrey, Fergerson cannot be directed to pay an additional fee since the maximum fee was already awarded to Lile for his representation.

Mabrey stated in his "Reply to Plaintiff's Response to the Motion for Attorney Fee Lien as Filed by the Law Firm of Flora Stuart" filed December 8, 2011 that he expended forty hours in legal time and services on behalf of Fergerson, including obtaining and reviewing records from and consultation with numerous physicians and medical providers,

communicating on numerous occasions with the carrier, and with Fergerson's explicit authorization and direction, negotiating a lump sum settlement. We believe the minimal fee awarded by the ALJ speaks for itself and no further findings are necessary. Based on the entire record, we cannot say the ALJ's award of a $750.00 fee to Mabrey for his representation was clearly erroneous or an abuse of discretion.

During pendency of this appeal, Mabrey filed a motion to dismiss the appeal. Mabrey argued Lile did not respond to his motion for attorney fee and failed to assert any defense. Mabrey noted that, despite the parties being aware of the lien, no one advised him of the settlement. Thus it was not possible to file his motion within thirty days of the approval of the agreement. Mabrey argued Lile's appeal was in bad faith since the agreement specifically provided Lile was to pay any fee awarded to Mabrey. Mabrey argues Lile's appeal is a waste of the Board's time. By order dated November 28, 2012, the Board passed ruling on the motion to the merits of the appeal. Inasmuch as we have decided to address the merits of the appeal, Mabrey's motion to dismiss is **DENIED**.

However, in light of Lile's knowledge of the lien and the explicit provision of the settlement agreement that Lile

would be responsible for payment of Mabrey's fee, we believe Lile was under an obligation to promptly inform Mabrey of the resolution of the claim. Lile may not now be heard to object to the timeliness of Mabrey's filing of his motion for an attorney fee. In light of the explicit provision of the agreement, we are concerned with Lile's intransigence regarding payment of the minimal fee awarded to Mabrey. We note Lile filed no response to Mabrey's motion to dismiss. Further, Lile filed no reply brief. Thus, Lile never refuted the allegations in the motion to dismiss. While Mabrey alleges Lile's appeal was made in bad faith, Mabrey's motion does not ask for sanctions. Had Mabrey requested sanctions, we would be inclined to impose them. As an officer of the Court, Lile's actions are highly unprofessional and are hereby strongly condemned.

Accordingly, the September 6, 2012 order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge is hereby **AFFIRMED**.

ALL CONCUR.

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LAWRENCE F. SMITH, MEMBER
WORKERS' COMPENSATION BOARD

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