Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 23, 2013

CLAIM NO. 201096674

LARRY D. ASHLOCK,
real party in interest
as attorney for claimant,
CYNTHIA SIPES PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER,**
ADMINISTRATIVE LAW JUDGE

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF JUVENILE JUSTICE;
CYNTHIA SIPES;
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND DISMISSING

* * * * * *

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

ALVEY, Chairman. Larry D. Ashlock ("Ashlock") seeks review of the decision rendered April 23, 2013 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), awarding him an attorney fee to be paid by his former client, Cynthia Sipes

("Sipes"). Ashlock also appeals from the May 28, 2013 order denying in part his petition for reconsideration, and awarding an attorney fee in the amount of three thousand ($3,000.00) dollars.

On appeal, Ashlock argues the ALJ abused her discretion in reducing the amount of attorney fee requested to three thousand ($3,000.00) dollars. In the alternative, he argues the ALJ was required to award fees based upon the rate of four hundred ($400.00) dollars per hour for the twenty hours he expended on Sipes' behalf. Finally, Ashlock argues the ALJ erred in requiring the awarded fee paid by Sipes. He asserts the Commonwealth of Kentucky, Department of Juvenile Justice's (DDJ) third party administrator should be sanctioned and ordered to pay the attorney fee.

Ashlock was never joined as a party to this claim. At no time did Ashlock file a motion to intervene pursuant to Kentucky Civil Rule 24 and therefore had no standing to pursue a reopening. The motion to reopen was deficient *ab initio,* and we vacate the order entered August 23, 2012 by the Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), finding Ashlock presented a *prima facie* case. Because we determine the reopening was invalid, the claim was improperly assigned to the ALJ. Therefore, we vacate the opinion rendered on April 23, 2013, and the order on

reconsideration issued May 28, 2013. This appeal is dismissed in its entirety.

No Form 101 was ever filed on Sipes' behalf. The ALJ extensively outlined the timeline of events in her opinion rendered April 23, 2013, and we will only discuss those significant to this appeal.

Sipes sustained an injury to her right shoulder on February 4, 2010 while participating in Aikido training in the course of her employment as a Youth Worker II, and subsequently underwent surgery.[1] On February 28, 2011, Sipes hired Ashlock to represent her in her workers' compensation claim. The one page contract submitted as evidence contains the following provision:

> In the event the client discontinues the services of the attorney prior to the conclusion of the claim, the parties agree that attorney will have a valid lien against any proceeds of the claim for reasonable attorney fees for time incurred working on the claim as well as reimbursement for expenses.

Ashlock subsequently placed Cannon Cochran Management Services, Inc. ("CCMSI"), the third party administrator for the DJJ, on notice of his representation, and requested records from the Department of Workers' Claims. There is no

[1] Information obtained from the Form 110-I settlement agreement approved by the CALJ on August 19, 2011.

evidence CCMSI was ever provided with a copy of the contract containing the lien language.

Sipes testified at the hearing held February 22, 2012. She hired Ashlock to represent her on February 28, 2011, at which time she was already receiving temporary total disability ("TTD") benefits. On May 16, 2011, Kara Smith ("Smith"), senior adjuster with CCMSI, sent a letter to Sipes advising her TTD benefits had been terminated. Sipes received the letter on May 20, 2011, and contacted Ashlock, who she stated provided no assistance or recommendations other than to suggest she apply for unemployment benefits. She then contacted Smith who reinstated her TTD benefits, which she continued to receive until July 28, 2011. Sipes was emphatic the additional TTD benefits were secured through her efforts, not Ashlock.

As a result of Ashlock's lack of assistance in reinstating her TTD benefits, Sipes stated she telephonically discharged him on May 20, 2011, which she confirmed in a letter to him on May 23, 2011.[2] She received no response from Ashlock.

Sipes had no further communication with Ashlock until July 29, 2011. CCMSI forwarded a settlement offer to

[2] No copy of the May 23, 2011 letter was submitted into evidence.

Ashlock on July 28, 2011. On July 29, 2011, Sipes contacted Smith to inquire about her TTD benefits which had again stopped. Smith advised a settlement proposal had been sent to Ashlock. Sipes advised Smith she had discharged Ashlock as her attorney. Smith informed Sipes she needed written documentation of the termination. Sipes then sent an e-mail to Ashlock on July 29, 2011 which stated as follows:

> July 29, 2011
>
> Mr. Ashlock,
> I am writing because I have learned from CCMSI that they have sent you a packet for me because they showed that you were my attorney. I sent you a letter on May 23, 2011 expressing that I no longer needed your services. Could you please fax a letter to Kara Smith at CCMSI at 502-426-7737 as soon as possible to let her know that you are not representing me.
> Thank You,
> Cynthia Sipes

Ashlock acknowledged receiving the e-mail. Despite the e-mail discharging him as her attorney, on August 3, 2011, Ashlock sent a letter to Sipes which stated as follows:

> Please allow this letter to serve as a follow-up to our recent telephone conversation concerning your claim. As I stated to you, I do not have any letter from you in my file from May 23, 2011 nor was I ever contacted by the insurance carrier until receiving this letter of July 28, 2011 that I have

> enclosed herewith for your review. I have also enclosed herewith the impairment rating report from Dr. Bonnarens. I am attempting to contact the insurance adjustor, Ms. Kara D. Smith, in an attempt to understand the status of your claim. As soon as I receive that information you and I can discuss any further representation of you in this matter.
>
> Such is the status of your claim, if you have any questions, comments or concerns, please do not hesitate to write or call. Thank you.

On August 4, 2011, Sipes faxed a note to Smith advising she was no longer represented, and settlement options could be discussed directly with her. Despite clearly being terminated as Sipes' attorney on July 29, 2011, Ashlock did not file a lien for his attorney fee with the Department of Worker's Claims. Likewise, there is no evidence he notified either Sipes or Smith of his intent to assert such a lien, other than the language contained in the contract. Sipes proceeded to settle her claim directly with Smith. A Form 110-I settlement agreement was signed by Sipes and Smith on August 18, 2011, and approved by the CALJ on August 19, 2011. Despite the termination of his services, Ashlock wrote to Sipes on February 1, 2012; March 7, 2012; and July 10, 2012 inquiring as to the status of her claim.

In the July 10, 2012 letter Ashlock sent to Smith, he stated as follows:

> Dear Ms. Smith:
>
> Please allow this letter to serve as a follow-up in this claim. I would ask that upon receipt of this letter that you contact our office so we can discuss moving this claim towards a resolution.
>
> If you have any questions, comments or concerns please do not hesitate to write or call. Thank you.

On July 27, 2012, almost a year after Ashlock's representation was terminated, with no apparent consultation with his former client, Ashlock filed a motion to reopen Sipes' claim. In the motion to reopen, Ashlock alleged the grounds for reopening were based upon, "KRS 342.125(a) and (c), for fraud and mistake in the entry of the Form 110 Settlement Agreement." Ashlock also stated, "Further, counsel seeks sanctions against the carrier and the employer for improperly settling this matter and for having to bring said motion to reopen in violation of KRS 342.310." In addition to the motion to reopen, Ashlock filed a "Motion for Attorney Fees," requesting a fee of $6,161.35, based upon twenty hours of work he had expended representing Sipes. He subsequently filed a motion to amend his request for attorney fee to include additional TTD benefits received

by Sipes, and requested a fee of $7,521.32. As noted by the DJJ, Ashlock did not file a Form 109 with his motion for approval of attorney fee as required by KRS 342.320(5). Likewise, at no time did Ashlock move to be joined as a party to the action.

On August 23, 2012, the CALJ entered an order finding Ashlock had set forth a *prima facie* case for reopening, and ordered the claim assigned to an administrative law judge for further adjudication. The claim was assigned to the ALJ by scheduling order issued September 19, 2012. The parties submitted evidence including correspondence, and copies of e-mails.

Smith testified by deposition on December 13, 2012. Smith confirmed TTD benefits were reinstated in May 2011 after she received a call from Sipes. On July 29, 2011, Sipes called and was advised a settlement proposal had been sent to Ashlock. Sipes stated she was no longer represented, and Smith advised she needed documentation to that effect. Smith stated she did not negotiate with Sipes until she received the note faxed on August 4, 2011. Smith stated she never received a response from Ashlock regarding the settlement offer. Approximately nine months later, Ashlock inquired if the claim had settled.

A benefit review conference was held on January 17, 2013, at which time the parties preserved the following issues: whether Ashlock has a cause of action against the defendant; whether Ashlock represented plaintiff at the time of settlement; whether Ashlock is entitled to an attorney fee; amount of fee, if any; who is responsible for payment of any fee; and, sanctions against the defendant and application of unfair settlement claims.

Ashlock testified at the hearing. He confirmed he began representing Sipes on February 28, 2011. He denied he received notice his services were terminated in May 2011, but acknowledged receiving the July 29, 2011 e-mail from Sipes. He stated he was unaware of the settlement until July 2012, and because of this, no attorney fee lien was filed.

In her decision rendered April 23, 2012, the ALJ stated it is undisputed, “Sipes emailed Ashlock on July 29, 2011 indicating she had fired him on May 23, 2011 and requested he send a statement to Smith acknowledging that termination.” The ALJ specifically found, “What is clear is Ashlock’s representation was terminated on July 29, 2011 by e-mail from Sipes.” The ALJ determined Ashlock was entitled to an attorney fee to be paid by Sipes, for the twenty hours of service expended on her behalf. The ALJ left the record

open for twenty days for the parties to submit evidence of a reasonable hourly rate from which an attorney fee award could be determined.

In the Order on Petition for Reconsideration and Final Order on Attorney Fee rendered May 28, 2013, the ALJ explained the basis of her decision. She also found as follows:

> Ashlock avers the only "reasonable hourly rate" is $400.00 per hour per the findings in Combs vs. Hubb Coal Corporation, 934 SW2d 250 (Ky. 1996). The undersigned disagrees. Based upon the undersigned's experience in awarding attorney's fees in several hundred workers' compensation cases over the last three and a half years as an ALJ, I find a reasonable hourly rate for the legal services performed in the case at bar to be $150.00 per hour. In making this finding the undersigned relies upon her experience in the review of numerous attorney fee pleadings by attorneys with the same or similar experience as Ashlock in workers' compensation cases.
>
> Therefore, it is **ORDERED** Larry Ashlock shall be awarded three thousand dollars ($3,000.00) for his attorney fee in this case. This fee represented 20 hours of legal work performed, multiplied by $150.00 per hour, which equals $3,000.00 for Ashlock's representation of Ms. Sipes in the above-referenced claim.

We first note KRS 342.125(1)(a) & (c) state as follows:

> (1) Upon motion by any **party** or upon an **administrative law judge's own motion**, an administrative law judge may reopen and review any award or order on any of the following grounds:
>
> (a) Fraud;
>
> (c) Mistake;
>
> (Emphasis added)

When Ashlock filed the motion to reopen, he was not a party as required by the statute, nor has he ever filed a motion to be joined. His representation of Sipes terminated no later than July 29, 2011, as determined by the ALJ, and as evidenced by the copy of the e-mail Ashlock admittedly received. Because Ashlock is not now, nor has he ever been joined as a party to the claim *sub judice*, he had no standing to file the motion to reopen. The CALJ therefore erred in ordering the claim reopened. We therefore vacate and set aside the CALJ's August 23, 2012 order reopening the claim. Because we determine the motion to reopen is invalid, we will not address the merits of the appeal.

Therefore, for the foregoing reasons, the August 23, 2011 order reopening the claim issued by Hon. J. Landon Overfield, Chief Administrative Law Judge, as well as the April 23, 2013 opinion rendered by Hon. Jeanie Owen Miller,

and the order on reconsideration issued May 28, 2013 are **VACATED. IT IS HEREBY ORDERED** this appeal is **DISMISSED** in its entirety. Since oral argument, as requested by Ashlock, is unnecessary, the request is hereby **DENIED**.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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