Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 28, 2014

CLAIM NO. 201081535

LARRY D. ASHLOCK,
PHILLIP MOORE PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

JESSE JAMES RIDING STABLES, INC;
PHILLIP MOORE; CHED JENNINGS; and
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Petitioner, Hon. Larry D. Ashlock ("Ashlock"), appeals from an October 17, 2013 Order and November 25, 2013 Order on Petition for Reconsideration rendered by Hon. Thomas G. Polities, Administrative Law

Judge ("ALJ"), awarding him $2,500 in attorney's fees. Ashlock and Respondent, Hon. Ched Jennings, dispute the apportionment of the attorney fee awarded for their representation of Philip Moore. For the reasons set forth herein, we affirm.

Ashlock agreed to represent Moore in a workers' compensation claim arising from an August 3, 2010 injury. On August 10, 2010, Moore signed an attorney fee agreement with a contingency fee amount to be paid pursuant to KRS 342.320. Ashlock filed Moore's claim on September 17, 2010. The employer voluntarily paid temporary total disability ("TTD") and medical benefits beginning August 4, 2010, the day after Moore's injury. However, a dispute arose over the proper average weekly wage and Ashlock filed a motion for interlocutory relief on October 25, 2010. The motion was overruled.

Thereafter, the claim was placed in abeyance on February 25, 2011 because Moore continued to be treated for his injury. Moore's employer filed a medical fee dispute during the period of abeyance, to which Ashlock responded. Nearly a year later, on January 6, 2012, the claim was removed from abeyance. Between January and July of 2012, Ashlock attended a benefit review conference, litigated a second medical fee dispute, and submitted medical evidence.

At some point in July of 2012, Moore discharged Ashlock as his attorney. Ashlock filed an attorney lien requesting an attorney fee for his representation as well as expenses. On August 20, 2012, Hon. Ched Jennings ("Jennings") filed a notice of representation. Thereafter, a second benefit review conference was conducted and a final hearing was scheduled. At the final hearing, the parties reached a settlement of the claim and a form 110 was submitted. By the terms of the agreement, Moore received a lump sum of $55,000 and retained his rights to future medical benefits. The agreement was approved on June 11, 2013.

Jennings filed a motion for approval of attorneys' fees in the amount of $7,500, which was approved. Thereafter, Ashlock filed a petition for reconsideration of the attorney fee approval order, which was sustained. The ALJ amended the attorney fee order to reflect that the previously approved attorney fee was subject to Ashlock's lien.

The parties then litigated whether Ashlock is entitled to any portion of the $7,500 attorney fee award. Ashlock asserted he is entitled to an attorney fee for his representation on a *quantum meruit* basis and for obtaining wrongfully denied TTD benefits pursuant to KRS 342.040(2).

Additionally, Ashlock requested a hearing. Jennings responded Ashlock was discharged for cause, and therefore not entitled to any portion of the award, even under a theory of *quantum meruit*.

The ALJ denied Ashlock's request for a hearing, noting the parties had been afforded the opportunity to file briefs and a hearing is not required by KRS 342.320. Further, the ALJ rejected Ashlock's claim he is entitled to an attorney fee for obtaining wrongfully denied TTD benefits, reasoning any allegation TTD benefits were wrongfully denied was waived by virtue of the settlement agreement. The ALJ then analyzed the work Ashlock contributed to the matter, and awarded him an attorney fee of $2,500 plus expenses.

Ashlock petitioned for reconsideration, arguing he was entitled to a hearing before the ALJ on the issue. Additionally, he claimed he is entitled to a larger portion of the overall attorney fee award because he contributed more to the overall litigation than Jennings. The ALJ overruled the petition.

On appeal, Ashlock continues to argue he was entitled to a hearing on the attorney fee issue. Additionally, he asserts an entitlement to attorney's fees

pursuant to KRS 342.020 because he secured overdue TTD benefits on Moore's behalf.

We do not believe the ALJ erred by ruling on this matter without a hearing. There is nothing in the plain language of KRS 342.320(2) which mandates a hearing. Rather, the provision refers only to a motion for attorney's fees. In this case, the ALJ conducted a telephonic conference to discuss the matter, and permitted the parties to file attorney fee petitions and briefs addressing the issue of apportionment. On appeal, Ashlock contends he must be given the opportunity to present evidence of "the representation and hours worked on Moore's behalf for nearly two years." However, there is nothing in the record to indicate he was prevented from filing a record of his hours worked on Moore's case. Further, as evidenced in the ALJ's order recounting his work in the matter, it is clear the ALJ understood the quality and quantity of work Ashlock contributed. In short, we are unconvinced Ashlock's rights were derogated in any way by the ALJ's refusal to conduct a hearing on the issue of apportionment of attorney's fees.

Ashlock also argues he is entitled to attorney's fees pursuant to KRS 342.040(2). That provision permits a claimant's attorney to collect a fee for the recovery of

overdue TTD benefits under certain circumstances. The ALJ rejected this assertion, reasoning any allegation of overdue TTD benefits was waived by virtue of the settlement agreement. We agree with the ALJ's conclusions, but for a different reason.

Ashlock focuses his argument solely on whether overdue TTD benefits were paid to Moore as part of his settlement agreement. However, he overlooks that portion of the statute which permits an award of attorney's fees only upon a finding the delay or denial of TTD benefits was "without reasonable foundation." The record is devoid of indication Moore's employer denied or delayed TTD benefits without reasonable foundation. Rather, the employer voluntarily paid TTD benefits starting the day after Moore's injury. Later, a dispute arose over Moore's average weekly wage, not surprisingly given his status as a seasonal worker who earned tips. This dispute was ultimately resolved by virtue of the settlement agreement. There is nothing in the record to support the allegation any TTD payments were withheld without reasonable foundation.

In his responsive pleading, Jennings asserts Ashlock is not entitled to any portion of the award of attorney's fees because he was discharged for cause.

Indeed, Kentucky law seems to indicate an attorney who is discharged for cause is not entitled to any attorney fee, even under a theory of *quantum meruit*. *See* Lofton v. Fairmont Specialty Insurance Managers, Inc., 367 S.W.3d 593 (Ky. 2012)(attorney who withdrew without good cause forfeited fee under contingency contract). Jennings raised this issue before the ALJ; however, the ALJ made no specific findings of fact as to whether Ashlock was discharged by Moore for cause. Jennings did not file a petition for reconsideration requesting additional findings of fact, nor did he appeal to this Board. As such, to the extent Jennings raises this issue on appeal, it is not properly preserved for review by this Board. *See* Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007)(failure to make statutorily-required findings of fact is a patent error which must be requested in a petition for reconsideration in order to preserve further judicial review).

Finally, Jennings requests the imposition of sanctions pursuant to KRS 342.310, arguing Ashlock's appeal is frivolous, without evidentiary basis, and retaliatory. As detailed above, we agree Ashlock's arguments on appeal lack merit. However, we do not believe it rises to the level of having been brought "without reasonable ground",

particularly in light of Ashlock's valid claim to a portion of the attorney fee award.

For the foregoing reasons, the October 17, 2013 Order and November 25, 2013 Order on Petition for Reconsideration rendered by Hon. Thomas G. Polities are hereby **AFFIRMED**.

IT IS HEREBY ORDERED AND ADJUDGED Respondent's request for sanctions is hereby **DENIED**.

ALL CONCUR.

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REBEKKAH B. RECHTER, MEMBER
WORKERS' COMPENSATION BOARD

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