

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000704-WC

LARRY D. ASHLOCK, REAL PARTY
IN INTEREST, AS ATTORNEY FOR
CLAIMANT PHILLIP MOORE.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-81535

JESSE JAMES RIDING STABLES, INC.;
PHILLIP MOORE; CHED JENNINGS;
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Larry D. Ashlock (Ashlock) petitions for review of an Opinion by the Workers' Compensation Board (Board) that affirmed an order by the Administrative Law Judge (ALJ) awarding attorney fees in a claim brought by Phillip Moore and apportioning those fees between Ashlock, Moore's former counsel, and Ched Jennings, Moore's current counsel. We agree with the Board that the ALJ is not required to make specific findings concerning the value of services provided by a discharged attorney, but may apportion the total award upon finding that the prior attorney was not discharged for cause. We further conclude that the ALJ's findings were sufficient to support the total award and that the apportionment of attorney fees was within the ALJ's discretion. Hence we affirm.

The relevant and undisputed facts of this matter are set forth in the Board's opinion as follows:

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.

In its opinion, the Board first found that the ALJ did not err by ruling on this matter without a hearing. Turning to the substantive question, the Board then considered whether Ashlock was entitled to attorney fees pursuant to KRS 342.040(2). That provision permits a claimant's attorney to collect a fee from the employer for recovery of overdue TTD benefits. Such an award is permitted "if the administrative law judge determines that the delay was without reasonable foundation." The Board found no evidence the record to support the allegation that any TTD payments were withheld without reasonable foundation. Consequently, the Board determined that Ashlock was not entitled to any additional fee paid by Moore's employer. This petition for review followed.

Ashlock argues that attorney fee disputes in Workers' Compensation claims should be governed by the standard set out in *Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006). In *Baker*, the Kentucky Supreme Court held that, when an attorney employed under a contingency fee contract is discharged without cause before completion of the contract, he or she is entitled to fee recovery on a *quantum meruit* basis only, and not on the terms of the contract. *Id.* at 699. The ALJ expressly found that Ashlock was not discharged for cause. Consequently, Ashlock contends that he was entitled to present evidence showing the value of the services which he provided to Moore.

But as the Board noted, the right to attorney fees in workers' compensation cases is governed by the provisions of KRS 342.320. Under the statute, all attorney fees are subject to the approval of the ALJ and any contract provision for attorney fees are subject to the ALJ's discretion and the statutory caps. KRS 342.320(1)-(2). Given this statutory framework, the ALJ was entitled to enter a total award of attorney fees and then apportion that amount between the two counsel. Furthermore, we agree with the Board that the ALJ was not required to determine the value of the services provided. Moreover, Ashlock does not allege that he was denied an opportunity to present relevant evidence to the ALJ concerning the amount of time which he worked on the claim and the value of those services in relation to the benefits that Moore received. Therefore, we find no error.

Ashlock next argues that the ALJ failed to specify whether the attorney fees must be paid by the employer, as required by KRS 342.040(2), or by Moore. However, KRS 342.040(2) specifies that the employer is responsible for payment of attorney fees if the ALJ determines that the denial or delay of TTD benefits was "without reasonable foundation." The ALJ found that the delay was not without reasonable foundation. Since the employer was not responsible for payment of attorney fees, Moore remained responsible for payment of his own attorneys' fees. *Rager v. Crawford & Co.*, 256 S.W.3d 4, 6 (Ky. 2008).

Finally, Jennings argues that Ashlock's arguments are so lacking in merit that they warrant imposition of sanctions under KRS 342.310. But given the

limited authority concerning apportionment of attorney fees under 342.320, we cannot say that Ashlock's petition for review was patently frivolous. Therefore, we agree with the Board that sanctions are not appropriate at this stage in the proceedings.

Accordingly, we affirm the March 28, 2014 Opinion of the Board which affirmed the October 17, 2013 Order of the ALJ.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry D. Ashlock
Lexington, Kentucky

BRIEF FOR APPELLEES:

Ched Jennings
Louisville, Kentucky