

addition, the record includes the following hearing and deposition transcripts that occurred up to and including the September 18, 2008, settlement hearing: the July 24, 2003, preliminary hearing transcript; the March 10, 2005, preliminary hearing transcript; the May 15, 2007 regular hearing transcript; the May 29, 2007, deposition transcript of Michael J. Poppa, D.O.; the May 29, 2007, deposition transcript of Richard W. Santner; the July 20, 2007, deposition transcript of Steven L. Hendler, M.D.; the July 31, 2007, deposition transcript of Terry Cordray; the August 8, 2007, deposition transcript of Leif Eric Leaf, Ph.D.; the August 29, 2007, deposition transcript of Kathleen Keenan, Ph.D.; and the September 18, 2008, settlement hearing transcript.

ISSUES

The only issue on this appeal is the division of attorney fees between claimant's former attorney, Mr. Horner, and her most recent attorneys, Mr. Lowe and Ms. Marsha Friedman. The underlying claim was settled at a September 18, 2008, settlement hearing before Special Administrative Law Judge Stacy Parkinson. Judge Parkinson approved attorney fees at that hearing in the sum of \$18,750.

In the November 21, 2008, Preliminary Decision, Judge Yates Roberts ruled that Mr. Horner was entitled to receive \$4,478.74 in attorney fees out of the \$18,750 in attorney fees approved by Judge Parkinson at the settlement hearing. This sum was in addition to attorney fees Mr. Horner had already received from temporary total disability compensation. In the Preliminary Decision Judge Yates Roberts held:

Claimant was first represented by Dennis Horner who is claiming an attorney fee of \$4,808.74 (\$5,426.38 less \$617.64 received). Claimant's subsequent counsel, Jon Lowe and Marsha Friedman, argue that Mr. Horner's attorney fee should [not] be deducted from Claimant's portion of the lump sum settlement. The claimant testified at the motion hearing that she felt Mr. Horner was entitled to a fee of \$1,000.00. The court finds that the attorney fee awarded by the Special Administrative Law Judge Parkinson in the amount of \$18,750.00 should be divided between the respective attorneys as follows:

Dennis Horner	\$4,478.74
Jon Lowe/Marsha Friedman	\$14,271.26 ²

² ALJ Preliminary Decision (Nov. 21, 2008).

Judge Yates Roberts did not determine the amount of fees Mr. Horner was entitled to receive, if any, from the temporary total disability compensation paid by respondent and its insurance carrier.

In the application for review, Mr. Lowe states the issues for Board review are the amount awarded for Mr. Horner's fee and whether that fee should be deducted from the attorney's portion of the settlement or claimant's portion. In his brief to the Board Mr. Lowe argues the fee awarded Mr. Horner is excessive. In addition, Mr. Lowe argues the total amount of attorney fees awarded should not be limited to 25 percent of the \$75,000 lump sum settlement as claimant received an additional \$31,135.08 in temporary total disability compensation, a significant portion of which was obtained through Mr. Horner's efforts and for which little to no fee was paid. Accordingly, Mr. Lowe maintains that he and Ms. Friedman should receive as their fee 25 percent of the \$75,000 lump sum payment and that Mr. Horner should receive his attorney fees from claimant's portion of the settlement.³

Mr. Lowe also argues the apportionment of attorney fees was not reasonable based upon the hours the attorneys expended. Mr. Lowe argues the attorney fees awarded Mr. Horner, plus the \$617.64 fee he previously received, equates to 6.87 percent of claimant's \$75,000 lump sum payment and 94.9 percent of the amount Mr. Horner claimed. Conversely, Mr. Lowe notes the attorney fees awarded to Ms. Friedman and him comprise only 76 percent of their request. In addition, Mr. Lowe maintains that the 33 hours Mr. Horner expended in representing claimant comprise only 14 percent of the total hours the three attorneys expended in this claim as compared to Mr. Lowe and Ms. Friedman's 86 percent. And based upon the eight factors set forth in K.S.A. 44-536(b), Mr. Lowe contends the Board should grant Ms. Friedman and him 86 percent of the attorney fees awarded at the settlement hearing.

In short, Mr. Lowe requests attorney fees in the sum of \$18,750 or, in the alternative, attorney fees that equate to 86 percent of that amount or \$16,125.

Conversely, Mr. Horner requests the Board to adopt the findings and conclusions of Judge Yates Roberts. Mr. Horner states he does not know how much temporary total disability benefits claimant received due to his efforts. And he also asserts he did not collect a fee out of that compensation, except for \$617.64. In addition to the temporary total disability compensation, Mr. Horner contends his efforts also resulted in claimant receiving medical benefits.

³ M.H. Trans. at 12.

Mr. Horner noted in his brief that he was concerned about Mr. Lowe's attorney fees request and whether it was fair to claimant. Mr. Horner wrote, in part:

It is of concern that appellant's [*sic*] contend they are entitled to a 25% fee on the entire settlement when they knew of an outstanding attorney lien of record and knew the funds to satisfy the lien were included within the lump sum. The settlement clearly resolved all issues as [to] the parties at the settlement hearing. To now contend that claimant may owe monies for fees outside the \$18,750 allowed by Special Administrative Law Judge Parkinson seems misplaced and perhaps unfair to claimant. . . .

It is disturbing that at the hearing to apportion fees, appellants claim their fees are based upon the lump sum and that any fees due appellee [Mr. Horner] should be paid from temporary total benefits received during treatment. . . .⁴

Finally, Mr. Horner questions the 200 hours that Mr. Lowe and Ms. Friedman allegedly expended in this claim in light of the fact that Mr. Lowe and Ms. Friedman did not itemize their time and expenses. In short, Mr. Horner suggests that Judge Yates Roberts' apportionment was appropriate given the lack of an itemized statement from Mr. Lowe and Ms. Friedman.

Claimant testified at the November 20, 2008, hearing before Judge Yates Roberts. Claimant stated she believed Mr. Horner had been paid the attorney fees that he was entitled to receive out of her temporary total disability benefits as she tendered to him one of every four temporary total disability checks that she received. Accordingly, claimant maintains an additional \$1,000 would be a reasonable attorney fee to award Mr. Horner.

The sole issue now before the Board is what is a reasonable division of attorney fees between Mr. Horner and Mr. Lowe and Ms. Friedman for their services in this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the attorneys' arguments, the Board finds this matter should be remanded to the Judge for further proceedings.

The unresolved issue in this claim is how to divide attorney fees between claimant's former attorney, Mr. Horner, and her later counsel, Mr. Lowe and Ms. Friedman.

⁴ Horner's Brief at 4, 5 (filed Jan. 7, 2009).

The Workers Compensation Act provides that all attorney fees pertaining to an initial claim for compensation shall be fixed pursuant to a written contract, which is subject to approval by the Director of the Division of Workers Compensation. K.S.A. 44-536(b) provides:

All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents, which shall be subject to approval by the director in accordance with this section. Every attorney, whether the disposition of the original claim is by agreement, settlement, award, judgment or otherwise, shall file the attorney contract with the director for review in accordance with this section. The director shall review each such contract and the fees claimed thereunder as provided in this section and shall approve such contract and fees only if both are in accordance with all provisions of this section. *Any claims for attorney fees not in excess of the limits provided in this section and approved by the director shall be enforceable as a lien on the compensation due or to become due.* The director shall specifically and individually review each claim of an attorney for services rendered under the workers compensation act in each case of a settlement agreement under K.S.A. 44-521 and amendments thereto or a lump-sum payment under K.S.A. 44-531 and amendments thereto as to the reasonableness thereof. In reviewing the reasonableness of such claims for attorney fees, the director shall consider the other provisions of this section and the following:

- (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney; the employer shall attach to the settlement worksheet copies of any written offers of settlement which were sent to the employee before the employer was aware that the employee had hired an attorney;
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;
- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and
- (8) the experience, reputation and ability of the attorney or attorneys performing the services. (Emphasis added.)

Moreover, the Act provides that attorney fees in the initial claim for compensation shall not exceed a reasonable sum for the services rendered or 25 percent of the compensation recovered and paid, whichever is less. K.S.A. 44-536(a) provides, in part:

With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award or a judgment in any court shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. . . .

But no attorney fees may be charged for the recovery of medical benefits, except where an allowance is made for proposed future medical treatment or as part of a compromise settlement.⁵ *And no fee may be charged for temporary total disability benefits unless the payment of such compensation was first refused and such compensation was obtained by the attorney's efforts.*⁶

Furthermore, when there is a dispute regarding the division of attorney fees among the attorneys who have represented the injured worker, the Act provides that an administrative law judge shall conduct a hearing and resolve the dispute. K.S.A. 44-536(h) provides:

Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

There are few appellate decisions that address the apportionment of attorney fees. But in *Madison v. Goodyear Tire & Rubber Co.*,⁷ the Kansas Court of Appeals ruled that an attorney who is discharged before accomplishing the contingency that is the subject of a contingency fee contract may not, generally, recover the contingency fee. Instead, the discharged attorney should receive a fee based upon the reasonable value of the services rendered, or under *quantum meruit*. In that same opinion, the Court of Appeals cited both

⁵ K.S.A. 44-536(c).

⁶ K.S.A. 44-536(d).

⁷ *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

*In re Phelps*⁸ and *Shouse v. Consolidated Flour Mills Co.*⁹ as establishing a similar rule when attorneys are discharged before completing contracted services for a fixed amount.

As indicated above, the Workers Compensation Act requires the judge to apportion attorney fees when a worker has been represented by more than one attorney. There are limited funds that can be used to compensate the attorneys who assisted claimant in this proceeding and that amount may not exceed 25 percent of the compensation paid to claimant. For every dollar in attorney fees that one attorney receives, the amount available to the other attorneys is reduced. And none should receive a fee that is more than reasonable under the circumstances.

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.¹⁰

In short, the objective is first to determine the amount of reasonable attorney fees that claimant should pay and next to divide those fees in a manner that is fair to both Mr. Horner and to Mr. Lowe and Ms. Friedman.

At this juncture there is no question that Mr. Horner assisted claimant in obtaining some of the temporary total disability benefits that she received. But it is unknown if Mr. Horner's efforts garnered her only eight weeks of those benefits or a more significant amount. Whatever the amount, that amount is needed to determine the maximum attorney fees that are payable in this claim. Moreover, that amount is relevant in determining the value of Mr. Horner's services. Consequently, the amount of temporary total disability benefits that claimant obtained through Mr. Horner's efforts should be determined.

The Board is aware that at the November 20, 2008, hearing Mr. Horner stated he did not know how much temporary total disability compensation he obtained for claimant. But the Board is also aware that Mr. Horner should have some record of when claimant received her temporary total disability benefit payments which he can compare with the contents of his file and his itemized statement to arrive at such an amount.

⁸ *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), cert. denied 397 U.S. 916 (1970).

⁹ *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 Pac. 657 (1931); See also *Hernandez v. Tyson Fresh Meats, Inc.*, No. 258,902, 2007 WL 1041037 (Kan. WCAB Mar. 30, 2007).

¹⁰ *Madison*, 8 Kan. App. 2d 575, Syl. ¶ 5.

Next, at the November 2008 hearing claimant seemed to dispute the amount of attorney fees Mr. Horner received from her. But that is not clear. The Board finds that claimant should state on the record whether she is disputing that Mr. Horner has received only \$617.64 in attorney fees. Claimant should state how many weeks of temporary total disability benefits she believes Mr. Horner obtained for her and the basis for her belief. In short, claimant's contentions should be clarified and she should provide the basis of her opinions. Needless to say, the testimony from claimant regarding the amount of temporary total disability compensation that she received from Mr. Horner's efforts goes not only to the maximum amount of attorney fees that may be divided among the attorneys but also to the finding of how much in attorney fees Mr. Horner has already received.

Third, as the attorney fees for Mr. Lowe and Ms. Friedman are likewise under scrutiny for purposes of determining a reasonable and fair division of all the attorney fees to be paid, the Board finds Mr. Lowe and Ms. Friedman should also provide an itemized statement of the services and expenses they provided claimant in this proceeding. Mr. Horner's itemized statement was introduced at the November 2008 hearing and is already part of the record. According to that document Mr. Horner expended 33 hours representing claimant and requests payment at \$160 per hour.

Fourth, upon determining the amount of temporary total disability compensation that was obtained through Mr. Horner's efforts, the Judge should add that amount to the \$75,000 lump sum settlement and determine the maximum fee that could potentially be awarded in this claim based upon a 25 percent contingency fee. The Judge should then consider the additional evidence mentioned above, along with any other relevant evidence and information, and determine a fair and reasonable division of attorney fees.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹¹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

WHEREFORE, the Board sets aside the November 21, 2008, Preliminary Decision and remands this proceeding to the Judge for further proceedings as set forth above. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

¹¹ K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of March, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Jon K. Lowe, Attorney for Claimant
Marsha Friedman, Attorney for Claimant
Dennis L. Horner, Former Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge