

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REX ALAN CROAN)
Claimant)
V.)
AUSTIN'S BAR & GRILL)
Respondent)
AND)
MID CENTURY INSURANCE COMPANY)
Insurance Carrier)

Docket No. 1,049,582

ORDER

Claimant sought review of Administrative Law Judge Steven J. Howard's February 27, 2014 Order for attorney fees. The Board heard oral argument on June 3, 2014.

APPEARANCES

Claimant appeared pro se. Mark Kolich, of Lenexa, Kansas, appeared on behalf of Eppright Law Office (Eppright). There were no other appearances.

RECORD AND STIPULATIONS

The Board has considered the June 11, 2013 motion hearing transcript, the June 13, 2013 settlement hearing transcript and exhibits thereto, the August 13, 2013 motion hearing transcript and exhibits thereto, and the February 25, 2014 preliminary hearing transcript, in addition to the pleadings contained in the administrative file.

ISSUES

This is the second time this matter has been before the Board concerning claimant's contentions regarding attorney fees. The Board previously reversed and remanded Judge Howard's August 14, 2013 Order for attorney fees. On remand, Judge Howard ordered payment of attorney fees to Eppright in the amount of \$300 for two hours of attorney time at the rate of \$150 per hour, plus \$351.44 for expenses, or a total of \$651.44.

Pro se claimant requests the Order be reversed, arguing Eppright is not entitled to fees and expenses because no settlement was reached or offered prior to what he calls the termination of the attorney fee contract he entered with Eppright. Claimant also argues Eppright cannot recover in quantum meruit for services rendered during a period of time when there was a binding contract. Eppright maintains the Order should be affirmed.

The only issue for the Board's review is: Did the judge commit any error in awarding Eppright attorney fees and expenses?

FINDINGS OF FACT

The Board adopts and incorporates by reference the facts listed in its December 20, 2013 Order. Important facts include:

- Claimant and Eppright, through Eppright's employee, attorney Christopher R. Smith, entered into an attorney fee contract on February 15, 2010, stemming from a March 15, 2009 workplace injury.
- Attorney Frank Eppright became terminally ill and Eppright ceased operations on February 28, 2011. Thereafter, Smith began working for Krigel & Krigel, P.C. (Krigel).
- Claimant never signed a separate contract of employment with Smith or Krigel.
- On April 9, 2012, Smith, on behalf of Krigel, and Elaine Eppright, an attorney, on behalf of Eppright, filed a Motion to Withdraw and Notice of Attorney's Lien in the amount of \$1,746.44. They claimed liens totaling \$1,746.44, which represented 25% of a prior offer ($\$5,580.02 \times 25\% \approx \$1,395$), plus expenses (\$351.44) incurred by Eppright.¹
- The hearing on the motion to withdraw was held June 11, 2013. The judge issued a June 12, 2013 Order allowing Smith to withdraw. The Board did not consider such order as pertaining to Eppright, as the order only referenced Smith. The order was not sent to Eppright.
- On June 13, 2013, claimant and respondent reached a settlement in the amount of \$14,551.45. Respondent withheld \$3,637.86, pending determination of the value of the attorney's lien.

¹ M.H. Trans. (Aug. 13, 2013), Cl. Ex. 1 at 6 (which is also Ex. D to the Motion to Withdraw and Notice of Attorney's Lien).

- Respondent's counsel filed a Motion for Determination of Attorney Lien on June 14, 2013. Eppright was not provided a copy of this motion.
- The hearing concerning attorney fees was held August 13, 2013. Eppright was not advised of the hearing. In an August 14, 2013 Order, the judge found Smith was entitled to \$1,463.94, including reimbursement of \$351.44 in expenses, as well as attorney fees in the amount of \$1,112.50 for 5.95 hours of attorney work at the rate of \$150 per hour and 4.4 hours of paralegal work at the rate of \$50 per hour.²
- Claimant appealed. In a December 20, 2013 Order, the Board reversed the judge's decision and remanded the matter with instructions, including to allow Eppright notice of and participation in a new hearing concerning attorney fees and costs.

As a result, a new hearing was scheduled by Bren Abbott, respondent's attorney, with notice sent to claimant, Mr. Smith and Mark Kolich, who entered his appearance on behalf of Eppright. Subsequently, Mr. Abbott and Mr. Smith notified the judge they would not be attending the preliminary hearing.

On February 25, 2014, the hearing was held. Claimant was afforded notice, but for unknown reasons, he did not appear. Eppright argued for payment of two hours of attorney time, waived the paralegal time, and requested expense reimbursement.³

Judge Howard issued a February 27, 2014 Order stating:

Eppright Law Office is entitled to 2 hours of attorney time at the rate of \$150.00 per hour for a total of \$300.00, plus \$351.44 in expenses.

Hence, the Eppright Law Office is entitled to expenses and fees of \$651.44 to be paid from the proceeds held by the Respondent/Insurance Carrier.⁴

Claimant filed a timely appeal.⁵

PRINCIPLES OF LAW

² The Board's December 20, 2013 Order incorrectly indicated the judge awarded \$1,463.94 for attorney fees and paralegal fees, in addition to \$351.44 in costs, instead of the total of \$1,463.94.

³ *Id.*, Cl. Ex. 1 at 6.

⁴ ALJ Order (Feb, 27, 2014) at 1.

⁵ Claimant stated at oral argument that he received the February 27, 2014 Order the following Monday, March 3, 2014. Therefore, his appeal was filed within the 10 day deadline.

K.S.A. 44-536 states:

(a) 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. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases, the amount of attorney fees shall not exceed 25% of the sum which would be due under the workers compensation act beyond 415 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in K.S.A. 44-510c, and amendments thereto.

(b) 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.

. . .

(h) Any and all disputes regarding attorney fees, . . . shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

(i) After reasonable notice and hearing before the administrative law judge, any attorney found to be in violation of any provision of this section shall be required to make restitution of any excess fees charged.

A client may discharge an attorney at any time, but cannot simply rid himself of the attorney-client contract.⁶ "Generally, an attorney who is discharged before the occurrence of the contingency provided for in a contingency fee contract may not recover compensation on the basis of the contract, but rather the attorney is entitled only to the reasonable value of the services rendered based upon quantum meruit."⁷

"Unjust enrichment/quantum meruit is an equitable doctrine. Unjust enrichment is the modern designation for the older doctrine of quasi-contract. The theory of quasi-contract was raised by the law on the basis of justice and equity regardless of the assent of the parties. The substance of an action for unjust enrichment lies in a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to that person."⁸

⁶ See *Bryant v. El Dorado Nat. Bank*, 189 Kan. 486, 490, 370 P.2d 85 (1962) and *Carter v. McPherson*, 104 Kan. 59, 177 P. 533 (1919).

⁷ *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 904, 220 P.3d 333 (2009); see also *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 579, 663 P.2d 663 (1983).

⁸ *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166, Syl. ¶ 5, 910 P.2d 839 (1996).

“Courts applying Kansas law have concluded that quantum meruit and restitution are not available theories of recovery when a valid, written contract addressing the issue exists.”⁹ Even in the absence of a written agreement, the law will imply a contract as necessary in equity and good conscience to prevent the client from being unjustly enriched by the work of the attorney.¹⁰

The Kansas Court of Appeals noted in *Tucker* that when an attorney withdraws from representation for good cause, he or she is entitled to compensation for services upon a showing that their services contributed to the settlement obtained by the former client.¹¹ The Kansas Supreme Court noted in *Matter of Harris* that, in general, a lawyer who was discharged by a client or who withdraws for good cause would lose the right to recover under the attorney fee contract and instead would be entitled to the reasonable value of services rendered under quantum meruit.¹²

Work performed by an attorney-agent of a firm entitles the firm to the compensation earned during such attorney’s employment with the firm.¹³

ANALYSIS

As an initial matter, the Board does not know why claimant did not appear at the February 25, 2014 hearing.

Turning to the merits, claimant’s current argument is largely a rehashing of the argument he previously made to the Board, i.e., he was not satisfied with Smith’s services, especially after Smith obtained new employment. Claimant complained that Smith did not act quickly enough in prosecuting the case. Claimant restated that Smith advised him on March 30, 2011 that injuries to teeth are not covered under the Kansas Workers Compensation Act and advised him on July 29, 2011 that medical mileage was not covered. Claimant states Smith’s advice was contrary to Kansas law. Without commenting as to the legitimacy of claimant’s assertions, these events occurred after Eppright ceased operations and have no bearing on work Eppright performed on claimant’s behalf before Smith left Eppright’s employment.

⁹ *Fusion, Inc. v. Nebraska Aluminum Castings, Inc.*, 934 F.Supp. 1270, 1275 (D.Kan.1996).

¹⁰ See *Matter of Marriage of Wageman*, 25 Kan. App. 2d 682, 687-88, 968 P.2d 1114 (1998).

¹¹ See *Tucker v. Rio Optical Corp.*, 20 Kan. App. 2d 233, 237, 885 P.2d 1270 (1994).

¹² See *Matter of Harris*, 261 Kan. 1063, 1073, 934 P.2d 965 (1997).

¹³ See *Shamberg*, 289 Kan. at 908-09.

Claimant makes no appreciable argument regarding the reasonableness of the judge's award of attorney fees. He does not dispute that Eppright performed the work associated with time entries associated with the hours listed in Claimant Ex. 2 of the August 13, 2013 Motion Hearing Transcript. Claimant does not argue the \$150 rate awarded was unjust. Instead, claimant simply asserts Eppright should get nothing.

The Board rejects claimant's arguments that Eppright is entitled to no fee whatsoever based on claimant's perception that Smith provided inadequate representation. Claimant's satisfaction with an attorney's performance is not one of the factors listed in K.S.A. 44-536 for determining the reasonableness of an attorney fee. Such consideration would prove troublesome: why would a client ever pay a lawyer if he or she could merely voice displeasure with the lawyer's services?

Claimant admits to having a contract with Eppright, but assumes the contract expired when Eppright ceased operations. It is true that Eppright ceased working on claimant's case.¹⁴ However, the contract still existed. Eppright and Smith filed a joint motion to withdraw, but such motion was never granted as to Eppright, only Smith. Eppright was, and still is, a viable legal entity.¹⁵

The contract claimant signed with Eppright did not address what would occur if Eppright stopped working on client cases. The contract did not dictate how or if Eppright would be compensated for past work. Insofar as the terms of the contract do not apply, quantum meruit applies to determine Eppright's fees.

The Board finds Eppright's work on claimant's case benefitted claimant, unjustly enriched him and contributed toward settlement. The billing records establish Eppright gathered claimant's medical records, obtained causation and future medical opinions and engaged in settlement negotiations with the insurance carrier claim adjuster. Eppright was still entitled to the reasonable value of these services rendered based upon quantum meruit, as based on *Shamberg* and *Madison*. Even if claimant were to have fired Eppright, which did not occur, the law firm was still entitled to fees based on quantum meruit. Unfortunately, it appears claimant is simply trying to rid himself of an attorney contract, which *Shamberg* and *Madison* prohibit.

Claimant also states Smith did not make a settlement demand on respondent until after Eppright ceased operations. Even if true, this is irrelevant.

¹⁴ To the extent necessary, the Board finds the terminal illness of Frank Eppright was good cause for the firm to discontinue working on claimant's case.

¹⁵ See <https://www.sos.mo.gov/BusinessEntity/soskb/Corp.asp?581571> (Missouri Secretary of State website).

At oral argument before the Board, claimant stated that if he buys a loaf of bread, he expects to get a loaf of bread, not something different. It appears, under his rationale, that the loaf of bread was a contingency contract and the something else was the possibility of having to pay an attorney based on quantum meruit. Claimant asserted Eppright was entitled to nothing unless the contingency in the contingency contract was met. In other words, Eppright gets nothing unless Eppright negotiated a settlement and got the contingency fee. Perhaps claimant is contending an attorney fee contract must include a provision for quantum meruit if the contingency does not occur. While this argument may hold weight in other jurisdictions,¹⁶ the Board is unaware of any such binding Kansas appellate precedent. Additionally, under claimant's theory, an injured worker could allow a lawyer to litigate a case and even negotiate a settlement, but so long as the injured worker terminates the lawyer's services just prior to getting the settlement check, the lawyer gets nothing and has essentially worked for free.

Additionally, claimant suspects Smith (and thus Eppright) double-billed him for medical record copy expenses totaling \$78.40. Claimant stated the number of copies billed exceeds the number of copies of records Smith sent him. Based on Eppright's time entries, Eppright sent medical records to the insurance adjuster. While claimant makes allegations of being overcharged, there is no evidence that Smith double-charged claimant for copy expense. The copy expenses are reasonable.

The award of fees and expenses is reasonable and appropriate. The Board sees no reason to disturb the award.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the February 27, 2014 Order.

AWARD

WHEREFORE, the Board affirms the February 27, 2014 Order.

IT IS SO ORDERED.

Dated this _____ day of June 2014.

¹⁶ See *Elliott v. Joyce*, 889 P.2d 43 (Colo. 1994) (Colorado statute ; see also Annot., 53 A.L.R. 5th 287 ("Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal From Case").

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Honorable Steven J. Howard