

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

RUSSELL HANNAH)	
Deceased Claimant)	
VS.)	
HODGDON POWDER COMPANY, INC.)	
Respondent)	Docket No. 187,907
AND)	
WAUSAU INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Robert A. Martinez, counsel for Anthony J. Durkin, one of decedent's minor children, requested review of the Order by Administrative Law Judge (ALJ) Steven J. Howard issued on July 16, 2003. The Appeals Board (Board) placed this matter on the summary docket and it was deemed submitted as of October 7, 2003.

APPEARANCES

Robert A. Martinez of Overland Park, Kansas, appeared on his own behalf. There were no other appearances.

RECORD AND STIPULATIONS

The Board has considered the record and the ALJ's findings as set forth in the Order.

ISSUES

Russell Hannah (Decedent) died in a compensable accident that occurred on February 23, 1994. Decedent left three minor children, each wholly dependent upon him. One of those children, Anthony J. Durkin, is represented by Robert A. Martinez, an attorney

duly licensed to practice law in Kansas. Mr. Martinez requests review of the ALJ's determination that the attorney fees due him for work performed in connection with his representation in this matter should be reduced. Mr. Martinez requested a fee of \$8,250 for services rendered from March 5, 1994, through September 11, 1996. When that issue was submitted to the ALJ on May 13, 2003, the ALJ, by virtue of his Order dated July 16, 2003, reduced Mr. Martinez' fee to \$5,250.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Upon his death, Decedent was survived by three minor children. Michael C. Durkin resided with his maternal grandmother, Linda Durkin. Anthony J. Durkin resided with his natural mother, Barbara Durkin. Jacob R. Hannah resided with his natural mother, Nicole Hannah, a/k/a Nicole Hampton. On April 1, 1994, an Application for Hearing (E-2) was filed by J. Paul Maurin, III, on behalf of Jacob R. Hannah.¹ On April 4, 1994, a separate E-2 was filed by Mr. Martinez on behalf of Michael C. Durkin and Anthony J. Durkin.² At some point, Michael C. Durkin was thereafter represented by Michael Wallace. Mr. Martinez remained counsel for Anthony J. Durkin pursuant to a written contract signed by Barbara Durkin, his natural mother.

At no point was the compensability of the underlying claim disputed. The only issues to be resolved in this claim stemmed from the parentage of the minor children. On September 26, 1995, with full participation of each of the parties' counsel, a regular hearing was held. Thereafter, an award was entered by the ALJ granting benefits to Michael C. Durkin and Jacob R. Hannah on October 18, 1995. Both minors were awarded a lump sum of \$8,555.33,³ representing the 82-week period from the date of death up to September 21, 1995. Thereafter, both of them were awarded weekly benefits in the sum of \$104.33⁴ per week until such time as they were no longer eligible as provided under the Kansas Workers Compensation Act⁵ (Act). In addition, counsel for each of these minors was granted a fee. Mr. Wallace was awarded \$5,425 plus expenses for his services and Mr. Maurin was awarded \$2,685 plus expenses.

¹ The October 18, 1995 Award entered in this matter refers to both Jacob R. Hannah and Jacob Ryan Hampton. They are apparently the same minor individual.

² The E-2 lists Barbara Durkin as wife and an additional child, Julia. However, it was later determined that the Decedent was not married to Barbara Durkin nor was Decedent the father of Julia.

³ Michael C. Durkin was awarded \$8,555.34.

⁴ Michael C. Durkin was awarded \$104.34 per week.

⁵ K.S.A. 44-501 *et seq.*

No award was made for Anthony J. Durkin following the regular hearing. According to the record, no award was entered at the time because Mr. Martinez could not produce either Anthony J. Durkin nor the minor's natural mother, Barbara Durkin. Moreover, there is no evidence that any guardianship had been established for Anthony as of the date of the regular hearing. After that date, Mr. Martinez reported to the ALJ that he had lost contact with Ms. Durkin.⁶

On May 3, 1996, Linda Durkin, Anthony J. Durkin's maternal grandmother, was granted custody of her grandson Anthony. Then, on April 28, 1997, a settlement was effectuated on the wrongful death third party action filed in federal court in Pennsylvania. Anthony J. Durkin's portion of the settlement was tendered to Linda Durkin, as his conservator and guardian. Those monies are not to be distributed until Anthony J. Durkin turns 18 years old.

On April 20, 2000, Mr. Martinez entered into a contract for legal services with Linda Durkin as the legal guardian for Anthony J. Durkin. According to the contract, Linda Durkin, in her capacity as a representative for Anthony J. Durkin, agreed to pay Mr. Martinez the sum of \$8,250 for all work performed on the child's behalf up to September 11, 1996. This sum apparently recognized the work Mr. Martinez had done on the claim up to September 11, 1996, and he was not requesting compensation for any time spent beyond that date.

The issue languished until March 25, 2003, when a second award was issued. That document awarded Anthony J. Durkin the monies accrued from the date of accident (\$49,556.75) plus \$104.33 per week until such time as he is no longer eligible for benefits under the Act. No award was made for attorney fees at that time.

On May 13, 2003, the request for attorney fees finally came before the ALJ. After some discussion, the matter was taken under advisement. On July 16, 2003, an Order was issued. After discussing the background of the claim, the ALJ concluded that the contract upon which Mr. Martinez relied was contrary to the mandates of K.S.A. 44-536. Specifically, the ALJ concluded that "there's no indication that Ms Linda Durkin was aware of the provisions of KSA 44-536, [or] the reasonableness of said fee, when entering into such."⁷ The ALJ went on to find "[u]nder the terms of this contract, it does not consistently comply with the language set forth in KSA 44-536 and as such is not enforceable upon the terms set forth."⁸

⁶ M.H. Trans. at 4.

⁷ ALJ Order (July 16, 2003) at 2.

⁸ *Id.*

After reviewing the record as a whole, particularly the transcript relating to the motion for attorney fees, the Board finds the ALJ's findings should be affirmed in part and modified in part.

With regard to attorney fees, K.S.A. 44-536 (Furse 1993) sets forth the following requirement:

(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 statute goes on to set out eight criteria to consider in determining whether a fee is appropriate and reasonable. Generally speaking, an attorney's fee is limited to a reasonable amount or percentage of the claimant's recovery not to exceed a statutory percentage, whichever is less.⁹ At the time of the date of accident involved in this claim, the statute set forth a graduated schedule for an attorney's fee.¹⁰

The contract Mr. Martinez entered into with Linda Durkin does not comply with the mandates of K.S.A. 44-536 (Furse 1993). That contract provides for a lump sum payment of \$8,250 for work performed between March 5, 1994, and September 11, 1996.¹¹ There is no explanation why it took four years for Linda Durkin to hire Mr. Martinez when she had apparently been Anthony J. Durkin's conservator and guardian for quite some time and had previously hired Michael Wallace to pursue benefits on behalf of her other grandson, Michael. Regardless, the ALJ was correct in his assessment that the contract between Mr. Martinez and Ms. Durkin is unenforceable in this forum. It is inconsistent with the principles set forth in K.S.A. 44-536 (Furse 1993).

Although the contract is unenforceable, the Board is compelled to address the attorney fee claim because Mr. Martinez is nevertheless entitled to a fee based upon *quantum meruit*.¹² The Board has considered the work performed by Mr. Martinez, based

⁹ K.S.A. 44-536 (Furse 1993).

¹⁰ This statutory scheme has since been revised.

¹¹ The terms of the contract are internally inconsistent. In one section it says Mr. Martinez is waiving any fees incurred after September 3, 1996, and in another it says September 11, 1996. There is no explanation offered for this inconsistency.

¹² See generally, *Serrano v. Modern Air Conditioning Company*, No. 176,402, 1999 WL 1314834 (Kan. WCAB Dec. 28, 1999), *aff'd in part, rev'd in part, and remanded with directions*, No. 84,651 (Kansas Court of Appeals Feb. 16, 2001) (unpublished opinion).

upon his itemized billing statement and compared that to the fees awarded for the services performed by the attorneys who represented the other two dependents, and concludes that he is entitled to something less than \$8,250.

As noted by the ALJ, there were no novel issues present in this claim nor was the nature of Mr. Martinez' representation of the minor such that he was precluded from taking on any other cases. In fact, respondent and its insurance carrier never denied compensability of this claim. The lawyers who represented the other two dependent children (who were in an identical legal position) performed their duties in rather short order thus enabling the insurance carrier to commence weekly payments. Anthony J. Durkin saw no monetary benefits until 2003, nine years after his father's death.

In addition to these considerations, the Board finds that there are entries within Mr. Martinez' billing statements that call into question the reasonableness and/or accuracy of the hours he spent in this matter. For example, there are several entries regarding the "finalization of settlement" beginning in September 1996 yet no hearing apparently took place. There is no satisfactory explanation of this inconsistency and the obvious delay in the resolution of the claim.

After considering the factors delineated by the statute, the Board finds a reasonable fee in this matter is 35 hours which is nothing more than an approximate average of the time spent by the other two lawyers who resolved their clients' claims in 1995. The Board further finds that \$75 per hour is a reasonable hourly rate for Mr. Martinez' services in this matter. Accordingly, the ALJ's Order is modified and Mr. Martinez is hereby granted a fee in the sum of \$2,625 for his services in this matter.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated July 16, 2003, is affirmed in part and modified in part. The contract between Mr. Martinez and Linda Durkin is found to be contrary to the mandates of K.S.A. 44-536 (Furse 1993) and therefore unenforceable. Based upon the principles of *quantum meruit*, Mr. Martinez is granted a fee in the sum of \$2,625 for his services in this matter.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Robert A. Martinez, Attorney for Anthony J. Durkin, minor
J. Paul Maurin, III, Attorney for Jacob R. Hannah, minor
Michael Wallace, Attorney for Michael C. Durkin, minor
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director