

CONTENTIONS OF THE PARTIES

Claimant contends Party Defendants Brit Groom and M. Lynn Dunlap (Groom/Dunlap) should disgorge themselves of attorney fees they wrongfully withheld from a settlement reached with Employer Larry Webb (Webb). She argues Groom/Dunlap failed to comply with statutes and rules concerning attorney fees in contested workers' compensation cases. The fees should be disgorged pending a final determination regarding whether Groom/Dunlap should be allowed any fees at all under a fee agreement with Claimant and, if so, in what amount.

Groom/Dunlap contend that while they may not have followed the proper procedure for effectuating a settlement and obtaining Commission approval regarding attorney fees, they, nonetheless, provided a valuable service to Claimant in obtaining a favorable decision after a hearing regarding compensability and their settlement with Webb was the best they could do in that Webb was uninsured and their ability to collect on any final award was in doubt. Finally, Claimant received more money in the settlement than she requested and they should not be required to disgorge the fees at this time.

Webb contends he "does not have a dog in this fight" regarding attorney fees and considers the settlement to be valid and binding on Claimant.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Eugene Fredericksen, M. Lynn Dunlap, Brit Groom, and Larry Webb taken at the hearing; and,
2. Exhibits 1-11 admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant first met with attorney Dunlap on August 5, 2001, regarding an injury she allegedly suffered at Webb's Northside Club in Jerome on April 15, 2001. On August 10, 2001, Claimant entered into an "Attorney-Client Agreement" with Dunlap, the particulars of which will be discussed later. Shortly after his initial meeting with Claimant, Dunlap associated Groom to assist him with the case as Groom had more experience in workers' compensation matters.

2. Dunlap/Groom determined that Webb was uninsured for workers' compensation purposes on the date of Claimant's alleged accident, and Groom researched the collectability of any judgment or award they might eventually obtain, and found that collecting such might prove difficult.

3. Webb denied that Claimant was injured at work and the matter proceeded to hearing on the sole issue of compensability on November 4, 2003. On April 5, 2004, the Commission entered its decision finding Claimant's claim to be compensable.

4. Post-decision, Groom/Dunlap and Eugene Fredericksen, Webb's attorney, entered into settlement negotiations that resulted in a \$40,000 new money settlement on all remaining issues. The "settlement agreement" was never presented to the Commission for approval and was never intended to be, nor was it ever signed by Claimant. The "plan" was to do nothing for six months, fail to respond to the Commission's Notice of Intent to Recommend Dismissal for failure to prosecute and have the case dismissed without prejudice without the Commission ever being aware of the "settlement" or the amount of attorney fees taken.

5. When Claimant was unable to get satisfactory answers from Groom/Dunlap regarding the amount of attorney fees (\$10,000 each) they retained from the “settlement,” she retained L.Clyel Berry¹ to look into the matter.

DISCUSSION AND FURTHER FINDINGS

The Idaho Industrial Commission has jurisdiction over attorney fee issues and such are subject to approval by the Commission. Idaho Code § 72-803. The Commission also has statutory authority to promulgate rules and regulations regarding attorney fees. Idaho Code § 72-508. In response to that authority, the Commission promulgated IDAPA 17.02.08.04:

Disclosure. Upon retention, the attorney **shall** provide to claimant a copy of a disclosure statement. **No fee shall be taken** from a claimant by an attorney on a contingency basis unless the claimant acknowledges receipt of the disclosure by signing it. Upon request by the Commission, an attorney shall provide a copy of the signed disclosure statement to the Commission. The terms of the disclosure may be contained in the fee agreement, so long as it contains the text of the numbered paragraphs one (1) and two (2) of the disclosure. A copy of the agreement **must** be given to the client. The disclosure statement **shall** be in a format substantially similar to the following:

State of Idaho

Industrial Commission

Claimant’s name printed or typed

Attorney’s name and address

Printed or typed

DISCLOSURE STATEMENT

1. In workers’ compensation matters, attorney’s fees normally do not exceed twenty-five percent (25%) of the benefits your attorney obtains for you in a case in which no hearing on the merits has been completed. In a case in which a hearing on the merits has been completed, attorney’s fees normally do not exceed thirty percent (30%) of the benefits your attorney obtains from you.

¹ Claimant had contacted Mr. Berry prior to retaining Dunlap to see about representing her in the underlying action; he declined.

2. Depending upon the circumstances of your case, you and your attorney may agree to a higher or lower percentage which would be **subject to Commission approval**. Further, if you and your attorney have a dispute regarding attorney fees, either of you may petition the Commission to resolve the dispute.

I certify that I have read and understand this disclosure statement.

Client's signature Date

Attorney's signature Date

(Emphases added).

6. On August 10, 2001, Claimant and Dunlap signed the second page of a document entitled "Attorney-Client Agreement." The first page of the agreement indicates that Dunlap will receive 25% of any recovery. Claimant testified that she did not even see the first page of the document until the day before the February 2, 2005, hearing:

Q. (By Mr. Berry): When I reviewed page 1 of this document with you yesterday, was that the first occasion that you had to know that this provision was in this agreement?

A. Yes.

Q. At the time that you retained Mr. Dunlap, did Mr. Dunlap have any conversation with you as to the fact that attorney fees are regulated per Industrial Commission guidelines?

A. No.

Q. At the point in time that you signed this agreement, were you provided with a copy of the agreement?

A. No.

Hearing Transcript, p. 48.

7. Dunlap testified that he went over each paragraph of the fee agreement with Claimant and gave her a copy. However, he further testified that while it was his common practice to provide clients copies of his fee agreements, he could not testify that he specifically remembered giving Claimant a copy.

8. The Referee finds that the August 10, 2001, fee agreement does not substantially comply with IDAPA requirements regarding the disclosure statement. Further, it is undisputed that Groom/Dunlap took 50% of the settlement proceeds and not the 25% stated in the fee agreement without seeking Commission approval.

9. The Commission, sitting *en banc* recently heard and decided an attorney fee case on all fours with the case at bar. In *Cheung v. Raymundo Pena*, IC 15-000070 filed October 18, 2004, the Commission decided in a declaratory ruling that failure to provide and have Claimant acknowledge receipt of a disclosure statement prevented Mr. Pena from taking any fees. The Referee is mindful that *Cheung* is an unpublished opinion, was decided after the fee agreement was drafted here, and is currently on appeal to the Idaho Supreme Court. However, the IDAPA rule upon which the opinion was based was in effect at the time of the fee agreement at issue here, and until and unless *Cheung* is overturned on appeal, it is the law of the case.

10. The Referee finds that Claimant has established a *prima facie* case that Groom/Dunlap should disgorge all of the attorney fees taken in this case pending a final resolution. Because the Commission does not have the capability to accept the fees and there is no surety in this matter, James Meservy, Webb's attorney, has agreed to accept tender of those fees and place them in his firm's trust account pending further order of the Commission. Groom/Dunlap are given credit for any portion of the attorney fees already deposited in Mr. Meservy's trust account pursuant to previous negotiations between the parties.

CONCLUSION OF LAW

Groom/Dunlap should be ordered to immediately tender any remaining balance of the attorney fees taken from Claimant’s settlement to James Meservy for placement in his firm’s trust account pending further order of the Commission.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __17th __ day of November, 2005.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _23rd_ day of __November__, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

L CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303-0302

JAMES C MESERVY
PO BOX 168
JEROME ID 83338

M LYNN DUNLAP
PO BOX 2754
TWIN FALLS ID 83303-2754

BRIT D GROOM
PO BOX 227
COTTONWOOD ID 83522-0227

ge _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLY J. CORONADO,)	
)	
Claimant,)	IC 01-012316
)	
v.)	
)	ORDER
NORTHSIDE CLUB,)	
)	
Employer,)	Filed November 23, 2005
)	
and)	
)	
M. LYNN DUNLAP and BRIT D. GROOM,)	
)	
Party Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusion of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Party Defendants Brit Groom and M. Lynn Dunlap are ordered to tender within 15 days of this order the remaining balance of \$20,000.00 in attorney fees taken from Claimant's settlement with Employer. Such funds shall be delivered to attorney James Meservy for placement in his law firm's trust account pending further order of the Commission.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __23rd__ day of __November__, 2005.

INDUSTRIAL COMMISSION

____/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
James F. Kile, Commissioner

____/s/_____
R. D. Maynard, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __23rd__ day of __November__, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

L CLYEL BERRY
PO BOX 302
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PO BOX 168
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____/s/_____

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