BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CODY DROTZMAN, Claimant, v. COORS BREWING COMPANY, Employer, and ZURICH AMERICAN INSURANCE CO., Surety, Defendants.	)	**IC 2006-006711** **ORDER ON ATTORNEY'S FEES** filed June 8, 2010

This matter came before the Commission for hearing at the request of Seiniger Law Offices (hereinafter, Counsel) following an informal determination by Commission staff on the issue of attorney's fees payable to Counsel from the proceeds of a lump sum settlement. Hearing was held on February 3, 2010, at which time the Industrial Commission entertained argument from Counsel in support of Counsel's claim for attorney's fees. As well, the Commission received and considered the affidavits of Counsel and Claimant, and the various attachments thereto, offered in support of Counsel's claim for attorney's fees. Counsel declined a briefing schedule.

Per the October 28, 2009 Notice of Hearing, the following issue is before the Commission for determination:

"Attorney's entitlement to attorney's fees pursuant to IDAPA 17.02.08.033."

I.

FINDINGS OF FACT

1. At all times relevant hereto Claimant, Cody Drotzman, was an employee of Coors Brewing Company, Employer herein.

2. Coors Brewing Company insured its workers' compensation obligations under a policy issued by Zurich American Insurance Company (hereinafter, Surety). Intermountain Claims was the third party administrator for Surety in the state of Idaho. Surety accepted the claim and began paying benefits.

3. On or about June 2, 2006, Claimant suffered an industrial accident arising out of and in the course of his employment with Employer.

4. As a consequence of the subject accident, Claimant contended that he suffered a low back injury. Claimant attempted conservative measures to alleviate his symptoms.

5. On September 26, 2006, Dr. Montalbano performed a L4-5 microdiskectomy. At a post-operative appointment, Claimant reported left thigh and calf pain radiating into his left foot. Dr. Montalbano ordered a MRI and after reviewing the study, stated that there was no clear anatomic explanation for Claimant's left leg pain. Dr. Montalbano believed Claimant was reluctant to return to work. Dr. Montalbano referred Claimant to physical therapy and opined that Claimant could return to sedentary work two weeks after starting physical therapy.

6. On or about November 21, 2006, Claimant executed a contingent fee agreement with Seiniger Law Offices, P.A., which provided, *inter alia*:

> i) "2) For their representation of Client, Attorneys will be paid a fee which will be in lien upon the cause of action and will be equal to a portion of all amounts recovered by way of settlement, or award including attorney fees, and including sums recovered in satisfaction thereof from any third party. That portion will be as follows:

ii) Twenty-five percent (**25%**) of all amounts obtained for Client after execution of this agreement if the case is settled **before a hearing.** If Client is receiving temporary disability benefits at the time of the execution of this agreement, Attorney will not take a percentage of that benefit until such time as the surety discontinues or threatens to discontinue payment of said benefit; if Client has received an impairment rating which has been admitted and is being paid, Attorney will not take a percentage of the balance of the impairment rating unless it is later disputed.

iii) Thirty percent (**30%**) of such amounts **after a hearing** and the claim is resolved without the filing of an appeal by either party;

iv) Forty percent (**40%**) of such amounts if the claim is resolved **after an appeal** has been filed by either party;

a. **Attorney will take a percentage of any benefits obtained by Client with respect to permanent partial impairment if a rating is given after the parties execute this agreement.** In the event that there are attorney fees awarded against the defendant(s) by the commission Attorney shall be entitled to be paid those attorney fees or the percentage calculated above, whichever is greater."

7. On December 20, 2006, Dr. Montalbano placed Claimant on off-work status, pending examination by Nancy Greenwald, M.D. On December 26, 2009, Dr. Montalbano explained that this referral was due to Claimant's left leg pain, a condition he felt was unrelated to Claimant's industrial accident.

8. Dr. Greenwald examined Claimant on February 7, 2007, and concluded that Claimant was suffering from an acute S1 radiculopathy. Dr. Greenwald declined to relate the radiculopathy to Claimant's industrial accident. Pursuant to Surety's request, Dr. Greenwald issued a permanent partial impairment (PPI) rating of 12% whole person with 2% of that total apportioned to pre-existing conditions. Dr. Greenwald then used the "reversed combined values chart" and converted the 2% preexisting to 6% preexisting, and determined that Claimant was due 6% permanent partial impairment (PPI) for the effects of the subject accident. Dr. Greenwald based her analysis on the *5th Guide of the AMA Guides to the Evaluation of*

Permanent Impairment. Surety paid Claimant the 6% PPI rating, amount to $9,322.50, without question. From the PPI award Counsel took fees in the amount of $2,330.62. Claimant was given permanent work restrictions of no lifting over 75 pounds occasionally and avoidance of torque-like maneuvers.

9. Claimant starting working in May of 2007 with the U.S. Postal Service earning $8.49 an hour.

10. On August 22, 2008, Mary Barros-Bailey performed a disability evaluation and found that Claimant had an 11% permanent partial disability (PPD), inclusive of his impairment.

11. Claimant completed physical therapy on January 26, 2007, and sought no further medical treatment. An itemization of medical payments provided to Counsel, shows Surety's payment of all medical treatment Claimant received through January 26, 2007.

12. At some point prior to May 5, 2009, the parties agreed to resolve remaining extant issues by way of a Lump Sum Settlement Agreement (LSSA). Pursuant to the terms of the Lump Sum Settlement Agreement filed with the Industrial Commission on May 11, 2009, Claimant agreed to resolve all remaining issues for the additional sum of $7,476.88 as consideration. As noted, Counsel had previously taken attorney's fees of $2,330.62 prior to the Lump Sum Settlement Agreement. Counsel proposed taking an additional $1,869.22 in attorney's fees and costs of $688.42 from the Lump Sum Settlement Agreement consideration. The net amount to Claimant would be $4,919.24.

13. Counsel submitted a Form 1022, Report of Expenses and Statement of Claimant's Counsel (hereinafter "Form 1022 Report"). In Counsel's Form 1022 Report, Counsel also stated, *inter alia*: "Before Counsel was retained, Defendants denied, discontinued, or disputed Claimant's right to additional medical benefits and treatment, time loss benefits, and impairment

compensation, and disability beyond impairment, retraining and attorney fees. Subsequent to retaining Counsel, Claimant received additional medical treatment and time loss benefits and impairment compensation and disability beyond impairment compensation. Counsel made written demand upon Defendants to pay time loss benefits in full and in a timely fashion. Counsel made written demand upon Defendants for workers compensation benefits that Counsel believed were due."

14. Counsel's Form 1022 Report also contained an itemization of attorney's fees and costs, and benefits to Claimant, as follows:

a. Benefits, paid prior to Lump Sum, subjected to attorney fees: $9,322.50

b. Attorney fee, paid prior to Lump Sun, on the above: $2,330.62

c. Costs, incurred in litigation, previously reimbursed to attorney: $0.00

d. Lump Sum Amount, New Money: $7,476.88

e. Attorney Fees and Costs to be paid from LSS: $1,869.22 in fees; $688.42 in costs.

f. Total, Attorney Fees and Costs, to be paid from LSS: $2,557.64

g. Medical Bills, to be paid from Lump Sum: $0.00

h. Net Lump Sum Amount to Claimant: $4,919.24

15. In connection with Counsel's Form 1022 Report, Counsel submitted a Memorandum of Law in Support of Form 1022, filed with the Commission on June 26, 2009, along with the supporting affidavit of Andrew Marsh, also filed with the Commission on June 26, 2009.

16. During Commission staff review of the proposed settlement, staff discovered a potential underpayment in the calculation of Claimant's permanent partial impairment (PPI)

benefits and the temporary total disability (TTD) benefits. On August 24, 2009, Commission staff notified Counsel that they were investigating these issues, and would need to resolve these concerns, prior to the Lump Sum Settlement Agreement being considered for Commission approval or non-approval. Commission staff noted that Dr. Greenwald based Claimant's preexisting PPI rating on a "reversed combined values chart." Commission staff investigated and found that there was no "reversed combined values chart" in the 5th edition of the *AMA Guides to the Evaluation of Permanent Impairment* to support Dr. Greenwald's adjustment of Claimant's preexisting condition PPI rating from 2% to 6% PPI. As such, the 2% PPI rating for preexisting conditions should not have been converted to a 6% PPI rating. Following the standard convention, Claimant's preexisting PPI rating is subtracted from his current PPI rating to determine the amount of PPI benefits due to Claimant. Without the spurious "reversed combined values chart," Claimant was entitled to a 10% PPI rating (12% PPI – 2% preexisting PPI), rather than a 6% PPI rating (12% PPI – 6% preexisting PPI). As such, the Claimant was underpaid his impairment benefits, and Surety owed him an additional 4% PPI rating (10% PPI calculation without the "reversed combined values chart"– 6% PPI already paid) or an additional $6,215.00 in impairment benefits. Commission staff asked the insurance adjuster to address this discrepancy, as well as Claimant's potential claim for total temporary disability (TTD) benefits from December 20, 2006 through February 6, 2007. Surety paid Claimant the additional $6,215.00 in PPI benefits, but denied that they were responsible for paying Claimant TTD benefits from December 20, 2006 through February 6, 2007. Counsel declined to take attorney's fees from the additional 4% in PPI rating benefits.

17. On September 24, 2009, Commission staff sent Counsel an initial determination that the proposed Lump Sum Settlement Agreement was in the best interest of the parties, except

for the portion of the requested fees related to permanent partial impairment (PPI) benefits. Commission staff notified Counsel that this was an initial determination, and that Counsel could request a hearing on this matter, in accordance with IDAPA 17.02.08.033.

18. On October 9, 2009, Counsel requested a hearing before the Commission. The Commission sent out a notice of hearing for February 3, 2010.

19. Counsel made a request for a statement of reasons for denial in regard to certain attorney fees. On October 22, 2009, Commission staff notified Counsel that it was unclear, from the information he provided, that he was entitled to take attorney's fees from Claimant's PPI benefits. In addition, Commission staff noted that Counsel's Form 1022 Report claimed that "Counsel made written demand upon Defendants for workers compensation benefits that Counsel believed were due." However, Counsel did not provide copies of these documents to the Commission, and thus, it was premature to evaluate whether the documents had any impact on the case. Further, Counsel's statements regarding Surety's conduct in the case, including that Surety disputed or denied Claimant benefits, were not supported by documentation.

20. Counsel filed a Motion to Vacate Order approving in part on November 12, 2009. The Commission interpreted Counsel's Motion to Vacate Order as a request for reconsideration. The Commission denied Counsel's request for reconsideration on December 18, 2009.

21. On December 24, 2009, Counsel filed an affidavit and attached the hearing transcript from the attorney fee hearing held in the manner of *Kulm v. Mercy Medical Center*, I.C. 2006-012770 (filed May 20, 2010) for the purposes of incorporating the Counsel's constitutional challenges to the attorney fee regulations.

22. Claimant and Counsel developed a conflict over Counsel's entitlement to attorney's fees. On January 13, 2010, Counsel filed a motion to withdraw as Counsel for

Claimant, and a motion to reschedule the attorney fee hearing. Following a telephone conference, the Commission determined that the attorney fee hearing could go forward as scheduled. On February 10, 2010, the Commission issued the Order allowing Counsel's withdrawal as Claimant's Counsel in the underlying workers' compensation manner.

23. At the February 3, 2010 hearing, the Commission questioned Counsel regarding his representations in the Form 1022 Report that Surety had denied or disputed workers' compensation benefits. At hearing, Counsel acknowledged that the quoted paragraph is "boilerplate" and goes into all of his Form 1022 recitations even where, in a particular case, surety had not denied or disputed Claimant's entitlement to a PPI rating prior to Counsel's retention. This may explain why staff was unable to obtain a satisfactory explanation for the averments made in the quoted paragraph.

24. The Commission also heard testimony from Claimant at the attorney fee hearing. Claimant indicated that he supported Counsel's entitlement to attorney's fees. In addition, Claimant testified that he did not know that there was any dispute regarding his entitlement to the permanent partial impairment that he received in the case. Hr. Tr., p. 33. Claimant did not recall Surety taking a position that Claimant was not entitled to benefits at the time Claimant retained Counsel. Hr. Tr., pp. 33-34.

25. Counsel declined a briefing schedule, and indicated that nothing further would be submitted in this case.

26. On February 10, 2010, Counsel delivered a letter to the Commission to address his Form 1022 Report statement that the benefits were "denied, discontinued, or disputed." Counsel explaining that he frequently uses boilerplate to create his Form 1022 report, and stated that there was "some controversy" between the parties concerning Claimant's entitlement to

permanent partial impairment benefits, temporary total disability benefits, and permanent partial disability (PPD) benefits. Counsel submitted a letter from the Reed Group, Ltd., to Claimant that indicated "his medical restrictions/disability are denied beginning September 18, 2006." Counsel argues that this letter substantiates his Form 1022 representations that there was a denial on the claim. The Commission notes that Reed Group was administering Coors Brewing Company Short Term Disability (STD) policy, a non-industrial insurance policy. The Reed Group is not, in any way related, to the Surety, Zurich American Insurance Company, with responsibility for administering Employer's workers' compensation obligations.

II.

COUNSEL'S CONTENTIONS

Counsel has focused on his arguments on the constitutionality of IDAPA 17.02.08.033. Counsel has incorporated the constitutional and policy arguments made in the attorney fee hearing of the case *Kulm v. Mercy Medical Center*, IC 2006-012770 (filed May 20, 2010), to support his entitlement to attorney's fees. Counsel also maintains that he is entitled to receive attorney's fees, because there was a dispute between the parties concerning Claimant's entitlement to certain workers' compensation benefits. Counsel finds support for his belief that Surety was denying or disputing benefits in the letter from Employer's non-industrial insurance carrier.

III.

CONSTITUTIONAL CHALLENGES

Again, Counsel raises the same constitutional challenges in this case as he did in *Kulm v. Mercy Medical Center*, IC 2006-012770 (filed May 20, 2010), through the submission of the *Kulm* attorney fee hearing transcript. The Commission provided an in-depth response to

Counsel's constitutional challenges, with extensive analysis of its interpretation of the relevant regulations in its recent decision in that case, filed May 10, 2010. In that decision the Commission's analysis led it to conclude that the current attorney fee regulation is not unconstitutional.

IV.

APPLICATION OF THE PROVISIONS OF IDAPA 17.02.08.033 TO THE FACTS OF THIS CASE

With an effective date of July 1, 1994, the Industrial Commission adopted the current IDAPA 17.02.08.033 *et seq,* pursuant to the provisions of Idaho Code § 72-508. The current regulation preserves the notion of a 25% cap on attorney's fees, contained in the former IDAPA 17.01.01.803.D (1992), but instead of applying that cap to "new money" the current regulation allows attorneys to take a 25% fee on "available funds". Per IDAPA 17.02.08.033(a) "available funds" is defined as follows:

> "Available funds" means a sum of money to which a charging lien may attach. It shall not include any compensation paid or not disputed to be owed prior to claimant's agreement to retain the attorney.

Therefore, available funds do not include (a) compensation paid to Claimant prior to the retention of Counsel or (b) compensation which is not disputed to be owed prior to the retention of Counsel.

The term "charging lien" is defined at IDAPA 17.02.08.033.01.c as follows:

> "Charging lien" means a lien, against a claimant's right to any compensation under the Workers' Compensation laws, which may be asserted by an attorney who is able to demonstrate that:
>
> i. There are compensation benefits available for distribution on equitable principles;
>
> ii. The services of the attorney operated primarily or substantially to secure the fund out of which the attorney seeks to be paid;

iii. It was agreed that counsel anticipated payment from compensation funds rather than from the client;

iv. The claim is limited to costs, fees, or other disbursements incurred in the case through which the fund was raised; and

v. There are equitable considerations that necessitate the recognition and application of the charging lien.

Although IDAPA 17.02.08.033.01.a, specifies that a charging lien may attach to "available funds," it is apparent from a review of the definition of "charging lien" that that term further constrains the available funds that may be subject to a claim of attorney's fees. Importantly, a charging lien can only attach to available funds where it is demonstrated that the services of the attorney operated "primarily or substantially" to secure the fund out of which the attorney seeks to be paid. (*See,* IDAPA 17.02.08.033.01.c.ii.) This is but one of five requirements that must be satisfied before a charging lien can be said to exist against "available funds." As important is the fact that these requirements are <u>not</u> in the disjunctive. Per the language of the regulation, <u>all</u> of these requirements must be satisfied before a charging lien can be said to exist.

As discussed above, an attorney's charging lien can only attach to available funds. However, a charging lien can only attach where attorney is able to demonstrate, *inter alia*, that:

"ii. The services of the attorney operated primarily or substantially to secure the fund out of which the attorney seeks to be paid;"

In the recent case of *Kulm v. Mercy Medical Center, supra,* a case involving a claim for attorney's fees brought by the same attorney involved in the instant matter, the Commission had occasion to consider what the Legislature intended in adopting the "primarily or substantially" language of the regulation. In that case, we concluded that in order to meet his burden of proving that his efforts were "primarily or substantially" responsible for securing the fund from

which he hopes to be paid, Counsel bears the burden of proving, by a preponderance of the evidence, that he originally, or initially, took action that secured the fund, or that his efforts essentially, or in the main, were responsible for securing the fund, *i.e.* that his efforts were such that a reasonable person would conclude that he was responsible for securing the fund from which he hoped to be paid.

Turning to the facts of the instant matter, it appears that prior to the filing of the Lump Sum Settlement Agreement (LSSA) Counsel took fees of $2,330.62 on the $9,322.50 6% PPI rating Claimant was paid as a result of Dr. Greenwald's evaluation.

Based on the information provided, Commission staff was unable to determine that fees previously taken on Claimant's 6% PPI rating were reasonable. Per *Kulm*, Counsel has the burden of proving that his efforts were "primarily or substantially" responsible for securing the fund from which he hopes to be paid. Counsel bears the burden of proving, by a preponderance of the evidence, that he originally, or initially, took action that secured the fund, or that his efforts essentially, or in the main, were responsible for securing the fund, i.e. that his efforts were such that a reasonable person would conclude that he was responsible for securing the fund from which he hopes to be paid.

Counsel has made inconsistent representations about how his actions secured the 6% PPI rating from which Counsel has taken a fee. First, Counsel represented in his Form 1022 Report that "Before Counsel was retained, Defendants denied, discontinued, or disputed Claimant's right to additional medical benefits and treatment, time loss benefits, and impairment compensation, and disability beyond impairment, retraining and attorney fees." *See*, Counsel's Form 1022 Report. Commission staff could not find support for Counsel's averments regarding a dispute or denial by Surety concerning the PPI rating. As discussed above, Surety arranged for

Dr. Greenwald to evaluate Claimant. Dr. Greenwald issued a 6% PPI rating, which Surety promptly paid to Claimant.

At hearing on Counsel's entitlement to attorney's fees, the testimony from Claimant did not support the conclusion that Defendants had "denied, discontinued, or disputed" Claimant's right to the 6% PPI rating. After reading portions of Counsel's Form 1022 Report, the Commission questioned Claimant on his understanding on the case.

> "Commissioner Baskin: Mr. Drotzman, at the time that you retained the services of Mr. Seiniger and Mr. Marsh, were there some benefits that you thought you were entitled to that you had been denied by surety?
>
> Drotzman: No. I was retaining a lawyer just to cover myself, protect the right of the employee.
>
> Q: The section that I just read alludes to certain demands that were made by counsel to the defendants for workers' compensation benefits that were due. Do you know what those demands were?
>
> A: I do not recall.
>
> Q: Okay. Concerning the PPI award that was paid in this case—and I appreciate your testimony concerning the two checks that were issued and also Mr. Seiniger and Mr. Marsh's intercession with the surety to obtain the payment of most of that in a lump sum. I understand that that was at your request?
>
> A: Yes.
>
> Q: To your knowledge was there any other dispute concerning the . . . your entitlement to the PPI rating?
>
> A: Not to my knowledge.
>
> Q. Mr. Seiniger and Mr. Marsh in their report to the Industrial Commission, which we call a 1022 Report, which accompanies the lump sum, it says in part, quote: "Before counsel was retained defendants denied, discontinued, or disputed claimant's rights to additional benefits, time loss benefits, impairment compensation, disability beyond impairment, retraining and attorney's fees." End quote. At the time that you retained the services of Mr. Marsh and Mr. Seiniger were you aware that the surety—or had it ever been communicated to you that the surety was taking a position that there were things that you were not entitled to?

A. No.

Q. Do you recall meeting with Mr. Seiniger and/or Mr. Marsh before you went to see Dr. Greenwald for your independent medical evaluation?

A. I do.

Q. And with counsel's permission can you tell me what you and Mr. Seiniger and/or Mr. Marsh discussed prepatory to that independent medical evaluation?

A. Well, that was a long time ago.

Q. Did they, for example, give you any advice on how to conduct yourself, things you should or should not say or things that you should or should not do, anything along those lines?

A. I don't think so.

Q. Did Mr. Seiniger and/or Mr. Marsh say anything to you prior to the IME that affected the way you presented yourself or conducted yourself at the IME?

A. No. I have kept it all in the hands of my attorney, so I just trust them to do the right thing.

Q. There is a statement at paragraph 12 of the 1022 form that says, quote: "Counsel made written demand upon defendants for workers' compensation benefits that counsel believed were due." End quote. At any point subsequent to your retention of Mr. Marsha and Mr. Seiniger were there disputes that arose about your entitlement to certain benefits?

A. No.

Q. For example, was there any denial by the surety of some type of medical treatment that you thought you were entitled to that they helped you obtain?

A. I don't know so, no. Actually, the employer just wanted me to get back to work—the employer just wanted me to get back to work as soon as I could and just to go through all the rehab and all that stuff. That I was a vital employee."

Hr. Tr., pp. 32-35

Claimant's testimony at hearing does not lend support to Counsel's Form 1022 Report averments about Surety's conduct in the manner.

As well, at hearing Counsel candidly acknowledged that his Form 1022 averments about

the existence of a denial or a dispute over PPI benefits may have been inadvertently included as boilerplate.

> "Mr. Seiniger: And, secondly, with respect to the questions that you had about Mr. Marsh's affidavit or declaration, I didn't prepare that, but I can tell you that I'm responsible, essentially, for the boilerplate language about things being disputed and it sounds to me like either that was just completely incorrect or there was a misunderstanding on Mr. Marsh's part."
>
> Hr. Tr., p. 42, ll. 15-21.

Following the February 3, 2010 hearing, Counsel supplemented his evidence with a letter from Employer's non-industrial short term disability carrier, which purportedly lends support to the proposition that Employer disputed Claimant's entitlement to income benefits. However, the September 26, 2006 letter from the Reed Group does not address, in any way, Claimant's entitlement to any class of workers' compensation benefits. Rather, that letter deals with Claimant's entitlement to non-occupational short term disability benefits.

After reviewing the evidence, the Commission is unable to conclude that Counsel was either primarily or substantially responsible for securing the 6% PPI rating from which he hopes to be paid. There is no showing that Counsel's efforts were responsible for "initiating" or "originating" the PPI award. The record demonstrates that Surety arranged for the evaluation by Dr. Greenwald and promptly initiated payment of the PPI rating to claimant. That Counsel may have been responsible for obtaining Surety's agreement to pay the PPI rating as a lump sum, as opposed to a periodic payment, does not persuade us that Counsel's efforts were responsible for originating or initiating the PPI rating. While it is true that Counsel was responsible for obtaining Surety's agreement to pay the balance of the 6% PPI rating as a lump sum, as opposed to a series of periodic payments, to endorse a 25% fee on Claimant's 6% PPI rating for this service, would be to endorse a fee that is disproportionate to the service rendered; Claimant

would, as a matter of course, receive the entire 6% PPI rating as a series of periodic payments. Counsel was only responsible for obtaining Surety's agreement to make that payment in one, as opposed to many, payments. This was, in all likelihood, accomplished by a single phone call, or short letter.

Nor does the evidence support a conclusion that Counsel's efforts were "in the main," or "essentially," responsible for securing the PPI award. There is a lack of evidence supporting the proposition that a reasonable person would conclude that it was as a result of Counsel's efforts that Surety paid the 6% PPI rating. Surety ordered the medical evaluation that resulted in the creation of the PPI rating, and voluntarily commenced payment of this rating, all without the intercession of Counsel.

We appreciate that Claimant retained Counsel because he was unsure of his rights under the Workers' Compensation Laws. Claimant has testified that he wanted to be assured that he was receiving the benefits to which he was entitled. It is not at all surprising that a lay person, unfamiliar with the intricacies of the Idaho Workers' Compensation Laws would desire the assistance of a capable attorney to explain the lay of the land. However, as respects the 6% PPI rating, there is a dearth of evidence that Counsel obtained for Claimant anything that he was not already going to get absent the retention of Counsel's services. Assuredly, there are cases in which the presence of retained Counsel persuades the Surety to "toe the line" when it might not have otherwise acted so quickly, or appropriately, in the case of a non-represented worker. However, it is Counsel who bears the burden of proving, by a preponderance of the evidence, that his efforts were primarily or substantially responsible for securing the fund from which he hopes to be paid. Counsel does not meet this burden by speculating that Surety might not have acted appropriately in his absence. *See, Mancilla v. Gregg*, 131 Idaho 685, 963 P.2d 368 (1998).

In the final analysis, Counsel contends that he is entitled to a fee on the 6% PPI rating simply because he entered into a contingent fee contract with Claimant which authorized such a fee. However, the provisions of IDAPA 17.02.08.033 restrict the type of contract that an attorney and a client may make. *Rhodes v. Industrial Commission*, 125 Idaho 139, 868 P.2d 467 (1993). While we do not doubt that Counsel provided Claimant with a service that Claimant desired, Counsel has failed to prove, by a preponderance of the evidence, that his efforts were either primarily, or substantially, responsible for securing the 6% PPI rating from which he has previously taken fees.

CONCLUSION OR LAW AND ORDER

IT IS HEREBY ORDERED that Counsel has not shown that he is entitled to fees taken on the PPI benefits paid to Claimant.

IT IS SO ORDERED.

DATED this _8th___ day of June, 2010.

INDUSTRIAL COMMISSION

_/s/_____
R.D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __8th__ day of _____June___, 2010 a true and correct copy of **Order on Attorney's Fees** was served by regular United States Mail upon each of the following persons:

WM BRECK SEINIGER
942 W MYRTLE STREET
BOISE ID 83702

cs-m/cjh __/s/_____