BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA GOMEZ, Claimant, v. NAMPA LODGING INVESTORS, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2005-510285** **ORDER ON ATTORNEY'S FEES** filed July 22, 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 April 12, 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 requested and was granted a briefing schedule.

Per the February 11, 2010 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, Maria Gomez, was an employee of Nampa Lodging Investors, LLC, Employer herein.

2. Employer insured its workers' compensation obligations under a policy issued by Liberty Northwest (hereinafter, Surety).

3. On or about February 3, 2005, Claimant suffered an industrial accident arising out of and in the course of her employment with Employer. Surety accepted the claim and began paying benefits.

4. As a consequence of the subject accident, Claimant contended that she suffered an injury to her right knee. Claimant attempted conservative measures to alleviate her symptoms.

5. On or about October 5, 2005, 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."

6. At some point prior to October 2, 2009, the parties agreed to resolve remaining extant issues by way of a Lump Sum Settlement Agreement (LSSA). Pursuant to the terms of the Agreement filed with the Industrial Commission on October 2, 2009, Claimant agreed to resolve all remaining issues for the additional sum of $13,442.57 as consideration. Counsel had previously taken attorney's fees of $933.28 against a PPI award of $3,733.13 prior to the Lump Sum Settlement Agreement. Counsel proposed taking an additional $3,051.53 in attorney's fees and costs of $606.72 from the Lump Sum Settlement Agreement consideration. The net amount to Claimant would be $8,547.88, with Claimant's outstanding medical bill of $1,236.44 being taken into account.

7. 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 stated, *inter alia*: "Before Counsel was retained, Defendants denied, discontinued, or disputed Claimant's right to additional medical benefits and treatment, time loss benefits, impairment compensation, and disability beyond impairment. Subsequent to retaining Counsel, Claimant received additional medical treatment and other benefits."

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

Prior to Lump Sum Settlement (PPI)

a. **Benefits, paid prior to LSS, subjected to atty fees**: $3,733.13

b. **Attorney Fees, paid prior to LSS on the above**: $933.28

c. **Costs, incurred prior to LSS and reimbursed to atty**: $0.00

Lump Sum Settlement

d. **Benefits, subject to atty fees**: $1,236.44 (**Meds**), $12,206.13 **(LS Consideration, including PPD**), **Total,** $13,442.57

e. **Attorney fee, on the above**: **Waived on Meds**, $3051.53 on **LS Consideration, including PPD**, **Total**, $3,051.53.

f. **Costs, reimbursable to atty**: $606.72

g. **Total atty fee and costs, from LSS**: $3,658.25

h. **Medical bills, to be paid from LSS**: $1236.44

i. **Net Lump Sum Amt. to Claimant**: $8,547.88

9. In connection with Counsel's Form 1022 Report, Counsel submitted a Memorandum of Law in Support of Form 1022, filed with the Commission on October 23, 2009, along with the supporting affidavit of Andrew Marsh, also filed with the Commission on October 23, 2009.

10. On December 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.

11. On January 11, 2010, Counsel requested a hearing before the Commission. The Commission sent out a notice of hearing for April 12, 2009.

II.

COUNSEL'S CONTENTIONS

Counsel has reiterated many of the constitutional and policy arguments he 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. Ultimately, Counsel argues that the Commission's reasoning in *Kulm v. Mercy Medical Center*, *supra*, contradicts *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993), and is unconstitutional. Counsel insists that this case is not a companion case to *Drotzman v. Coors Brewing Company*, IC 2006-006711 (filed June 8, 2010) or *Kulm v. Mercy Medical Center*, *Supra.* Further, Counsel argues that the Commission's regulations regarding attorney fees are inappropriate, and create many ethical problems for attorneys.

Counsel acknowledges that he cannot prove that he was "primarily or substantially" responsible for obtaining Claimant's PPI rating or the LSSA benefits, if the Commission applies a "but-for" test. Further, Counsel presents that he cannot prove that the benefits were "disputed" by Defendants. Counsel argues that the IDAPA regulations concerning attorneys' fees are vague. Counsel argues that he should receive compensation for his valuable contributions to Claimant's case, under his reasonable fee agreement with Claimant and controlling case law.

III.

CONSTITUTIONAL CHALLENGES

Counsel implies that an error in the dating of the *Curr v. Curr* decision in *Kulm v. Mercy Medical Center*, IC 2006-012770 (filed May 20, 2010), indicates that the Commission ignores

the legal significance of *Curr v. Curr*, or considers it overruled by *Rhodes v. Industrial Commission*, 125 Idaho 139, 868 P.2d 467 (1993). The Commission's *Curr v. Curr* decision that was appealed to the Supreme Court was issued in 1991, and treats the regulatory scheme, or lack thereof, that was in place at that time. The legislative history of the IDAPA regulations indicate the Commission and members of the workers' compensation bar were struggling with the issue of attorneys' fees in workers' compensation cases before the Court issued its decision in *Curr v. Curr*. By 1992, the Commission had promulgated regulations on attorneys' fees, which the *Rhodes* Court evaluated.

Contrary to the assertions made by Counsel, the Commission has not determined that *Curr v. Curr*, *supra*, has been overruled by *Rhodes*, *Mancilla* and/or *Johnson*. The Commission maintains that its adopted regulatory scheme hews to the direction given by the Supreme Court in *Curr v. Curr*, as evidenced by the Court's subsequent approval of those rules in *Rhodes*. While those cases were issued by the Court closely in time, *Curr* was issued based on the absence of duly enacted regulations or standards on attorneys' fees in workers' compensation cases, which was the case in 1991, whereas *Rhodes* involved a review of the regulations adopted by the Commission in response to *Curr*. As discussed in *Kulm*, the regulations issued after the Commission's decision in *Curr v.* Curr, are the predecessors of the current regulations.

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 not in the disjunctive. Per the language of the regulation, all 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, the record reflects that the insurance adjuster assigned to this claim requested of Dr. Nicola that he provide an impairment rating for Claimant. Dr. Nicola determined that Claimant was medically stable, and on December 19, 2006, issued a 5% PPI rating which he apportioned on a 50/50 basis between Claimant's pre-existing conditions, and the subject accident. Surety paid the 2.5% PPI rating to Claimant and her attorney. Thereafter, Counsel took fees of $933.28 from the Claimant's 2.5% PPI rating. At

hearing, the Commission questioned Counsel about how the PPI rating was generated:

> Commissioner Baskin: My information—and I may be wrong about this, Mr. Marsh—is that there was a December 11, 2006, letter that was written by the adjuster to Dr. Nicola and that on 12/19/06 Dr. Nicola, responding to that letter, generated a five percent impairment rating, half of which he attributed to the work-related incident and half of which he attributed to a preexisting condition and that, in turn, led the surety to pay a 2.5 percent PPI rating of $3,733.13. Am I mistaken about that?
>
> Mr. Marsh: No. You're correct.
>
> Hr. Tr., p. 6.

The record is otherwise devoid of evidence that Counsel primarily or substantially secured Claimant's PPI rating from Dr. Nicola or how his actions influenced the PPI rating. As such, the Commission is unable to conclude that Counsel primarily or substantially secured the PPI rating, and he is not entitled to take fees on the PPI rating. The lump sum consideration in this case is $13,442.57, which the Commission finds that Counsel is entitled to $3,360.64 in fees.

CONCLUSION OF 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 _22nd__ day of July, 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 _22nd_ day of ___July___, 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/_____