BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAUREL KULM, Claimant, v. MERCY MEDICAL CENTER, Employer, and INDUSTRIAL CLAIMS MANAGEMENT, Surety, Defendants.	)	**IC 2006-012770** **ORDER ON CLAIMANT'S MOTION FOR RECONSIDERATION** filed July 26, 2010

On May 20, 2010, the Industrial Commission issued its Findings of Fact and Conclusions of Law relating to Counsel's Request for Approval of Attorney's Fees. Counsel filed a timely Motion for Reconsideration pursuant to Idaho Code § 72-718. Counsel's motion is supported by the Affidavit of Andrew C. Marsh and Counsel's Supplemental Memorandum in Support of Motion to Reconsider, filed June 16, 2010.

I.

Counsel first takes issue with the statement made by the Commission in footnote 1 at page 34 of the opinion which reads as follows:

> "Interestingly, in a companion case, treating a similar demand for approval of a requested fee, Counsel offered a Form 1022 that contained language identical to that quoted above. At hearing on the motion to approve the requested fee in that case, 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 entitled 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."

Counsel argues that the footnote contains an incorrect statement of fact which demands a

correction, inasmuch as it denigrates his reputation in the community. As Counsel has noted, the companion case referenced in the footnote is the case of *Drotzman v. Coors Brewing Company and Zurich American Insurance Company*, I.C. 2006-006711, a case involving a similar request for approval of a claimed attorney's fee. In that case, Counsel testified:

> "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. With respect to the TTD benefits that you asked about, there was, as I understand it, a dispute and - - with respect to the IME consultation - - ."

Although it is arguably permissible to conclude that if certain language is considered "boilerplate", it is included in all documents of the type at issue, Counsel's point is well taken. Counsel has explained that although the language in question <u>is</u> boilerplate in his template, it is his practice to revise his template to meet the circumstances of a particular case. Counsel asserts that the fact that the language at issue is contained in the subject contingent agreement is simply the result of excusable error, and <u>not</u> any conscious intent to mischaracterize the nature of what was and was not in dispute at the time of the contingent fee agreement. We are aware of no facts that would controvert Counsel's explanation and accept the same, although it is worth noting that in each of three separate cases that have recently come before the Commission on the issue of Counsel's entitlement to an attorney's fee, the attorney fee memoranda have contained representations almost identical to those at issue in the instant mater. As well, there is a lack of evidence in these cases supporting the proposition that at the time of Counsel's retention, the surety had denied or disputed the injured worker's entitlement to PPI benefits. *See*, *Kulm v. Mercy Medical Center*, Findings of Fact and Conclusions of Law Relating to Counsel's Request for Approval of Attorney's Fees, I.C. 2006-012770 (filed May 20, 2010); *Drotzman v. Coors Brewing Company and Zurich American Insurance Company*, Order on Attorney's Fees, I.C.

2006-006711 (filed June 8, 2010); *Gomez v. Nampa Lodging Investors Inc.*, Order on Attorney's Fees, I.C. 2005-510285 (filed July 22, 2010).

II.

As noted in the original opinion, the Commission found it important to address the applicability of the provisions of the relevant IDAPA regulations to the claim for attorney's fees notwithstanding that Counsel stipulated that his efforts were neither primarily nor substantially responsible for securing the fund from which he hopes to be paid. Following the Commission's determination, Counsel now raises a number of arguments in support of his position that even if the regulation is applicable, his efforts were clearly either primarily or substantially responsible for securing the fund from which he expects to be paid.

First, Counsel argues that even if his efforts were not responsible for securing the PPI award at issue, he provided other valuable services to Claimant that did not result in the creation of any fund from which Counsel might otherwise expect to be paid. To compensate him for these services, Counsel should be entitled to assert a claim against the PPI award, a fund which the Commission has concluded was not secured as a result of Counsel's efforts. Again, we are guided by the provisions of the applicable regulation, which unambiguously states that among the things counsel must demonstrate before a fund of money can be considered "available funds", is that his efforts were either primarily or substantially responsible for securing that fund. By its specific language, the provisions of the applicable regulation do not admit Counsel's argument. Having said this, we recognize that in this, and many other cases, attorneys may provide valuable services to injured workers which do not result in the creation of any fund from which they might expect to be paid. In such cases, why not allow an attorney to charge a fee against an undisputed PPI award? Regardless of whether or not the regulation could be beneficially refined by allowing such a practice, the simple answer is that the current regulation

does not anticipate a PPI award which was not secured through counsel's efforts can fund an attorney's fee on other services, which, though valuable, result in the creation of no fund of money.

Finally, Counsel argues that there is, in fact, undisputed competent evidence of record which requires the Commission to rule that Counsel's efforts were primarily or substantially responsible for securing the PPI award. In this regard, Counsel draws upon the testimony of Alan Hull, defense counsel for Surety. In his *Supplemental Memorandum in Support of Motion for Reconsideration*, Counsel states:

> Nowhere in the *Kulm* Decision is any mention made of the testimony of defense counsel, Alan Hull:
>
> "Until Dr. Radnovich's rating came aboard there was no effort to get a rating by the surety and as you know from practice, oftentimes that's the case. Claimant's Counsel will force the surety to get them a rating.
>
> Having done that, it seems me that big fund of money that came about, at least partially and probably significantly because of the result of Claimant's Counsel. I mean a lot of times the adjuster will not get a rating until they are forced into doing that and, certainly, it would appear that that was the case here."
>
> *Supplemental Memorandum in Support of Motion for Reconsideration*, p. 7.

From the foregoing, it would appear that Counsel's efforts were, indeed, important to obtaining the eventual 6% PPI award given by Dr. Rogers. As quoted by Counsel, Mr. Hull's testimony would reasonably lead one to conclude that the only reason Surety obtained an impairment rating from Dr. Rogers is because it knew it had to deal with the 12% PPI rating previously awarded by Dr. Radnovich. If Mr. Hull's testimony is competent on this point, it would support a conclusion that Counsel's efforts were either primarily or substantially responsible for securing the award. However, it is important to understand the <u>full</u> context in which Mr. Hull made these comments, a context that is ignored by Mr. Seiniger in advancing his argument. In full, Mr. Hull stated:

> As I told the Commission in our telephone conference, we were hired only to draft this and, unfortunately, the adjuster is no longer in the country, so I don't know what their all thought process is, but let me suggest to you the following: Until Dr. Radnovich's rating came aboard there was no effort to get a rating by the surety and as you know from practice, oftentimes that's the case. Claimant's counsel will force the surety to get them a rating.
>
> Having done that, it seems [to] me that big fund of money that came about, at least partially and probably significantly because of the result of claimant's counsel. I mean a lot of times the adjuster will not get a rating until they are forced into doing that and, certainly, it would appear that that was the case here.
>
> *Kulm Hrg. Tr.*, pp. 12/13-13/2.

Mr. Hull's comments are entirely speculative. He has no knowledge why Surety did what it did, when it did. Again, as in *Mancilla v. Greg*, 131 Idaho 685, 963 P.2d 368 (1998), to rely on Mr. Hull's testimony to support the claim for attorney's fees would require the Commission to engage in speculation of the type that was found objectionable in that case. In short, Mr. Hull's speculations have no evidentiary value, and lend no support to the proposition for which they are offered by Mr. Seiniger.

Except as specifically corrected herein, the Commission stands by its original Findings of Fact and Conclusions of Law Relating to Counsel's Request for Approval of Attorney's Fees, I.C. 2006-012770 (filed May 20, 2010).

DATED this __26th__ 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 _26th_ day of July, 2010, a true and correct copy of the foregoing **Order on Claimant's Motion for Reconsideration** was served by regular United States Mail upon each of the following:

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csm/cjh __/s/_____