

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

SAMUEL RODRIGUEZ, )  
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 Claimant, )  
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 v. )  
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 SEBS CORPORATION INC., )  
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 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
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 Surety, )  
 Defendants. )  
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IC 2006-503175

**ORDER ON ATTORNEY'S FEES**

Filed April 28, 2011

This matter came before the Industrial Commission pursuant to the Commission's February 25, 2011, Order on Reconsideration, and pursuant to IDAPA 17.02.08.033.03(b), for the purpose of entertaining evidence and argument of Counsel in support of his claim for an award of attorney's fees in the amount of \$20,000.00 on an approved lump sum settlement. This Order supersedes the Commission's December 13, 2010, Order Approving In Part Modified Lump Sum Agreement, and the January 19, 2011, Order Releasing Final Proceeds to the extent those orders treat the issue of Counsel's entitlement to attorney's fees. For the reasons set forth below, we approve Counsel's request for attorney's fees on the lump sum settlement.

On or about January 23, 2006, Claimant suffered a severe urethral injury as the result of a compensable accident/injury. The claim was accepted and benefits were paid. On or about February 16, 2006, Claimant retained the services of Breck Barton, Counsel herein. Claimant

eventually underwent urethral reconstruction surgery performed by Dr. Taylor. This surgery was not successful. Claimant continued to have pain and difficulty urinating. As well, he developed erectile dysfunction. However, on or about September 27, 2006, and in response to inquiries that had been put to him by Surety, Dr. Taylor declared Claimant medically stable, and entitled to a 34% of whole person rating. Surety accepted Dr. Taylor's opinion, and began payment of Claimant's PPI rating. At 2006 rates, a 34% impairment rating equates to \$52,827.50. Over the course of the payment of this rating, Counsel took attorney's fees in the amount \$10,341.41. As well, he took costs in the amount of \$3,000.00. From the record before the Commission, as confirmed by Counsel's comments during the video conference hearing on this matter, Counsel's efforts were neither primarily, nor substantially, responsible for securing the PPI award within the meaning of IDAPA 17.02.08.033.01.c.ii: Dr. Taylor rendered his opinion on Claimant's impairment at the request of Surety. Surety accepted Dr. Taylor's opinion, and commenced the payment of the rating. Although Counsel requested a rating from Dr. Taylor, that request was not made until after Dr. Taylor had already rated Claimant.

Shortly after Surety commenced the payment of the PPI rating, Claimant and Counsel met with Dr. Taylor. Claimant does not speak English. Counsel is fluent in Spanish. Claimant and Counsel explained to Dr. Taylor that Claimant continued to have severe urethral discomfort, incontinence and testicular pain. Dr. Taylor was evidently impressed enough with these complaints, which he had apparently not fully comprehended, that he arranged for additional medical consultation/treatment for Claimant, notwithstanding that he had only recently declared Claimant medically stable. Claimant eventually underwent further surgical therapy, to include treatment by a noted regional expert on urethral reconstruction. Claimant obtained an excellent surgical result. It is clear that because of Counsel's efforts in meeting with Claimant and Dr.

Taylor, Claimant received additional successful medical therapy valued in excess of \$125,000.00, along with attendant TTD and travel benefits. In total, Counsel was primarily or substantially responsible for securing additional medical, travel and TTD benefits valued at \$139,570.94. By far, the largest portion of these additional benefits was paid directly to Claimant's medical providers by Surety, after Surety agreed to provide the prospective care that had been recommended by Dr. Taylor and the experts with whom he consulted.

These facts set up an interesting conundrum. Counsel took a \$10,341.41 attorney fee on a PPI award which he did not "primarily or substantially" secure, yet he is unable to take a fee on the over \$125,000.00 of medical benefits he secured for Claimant following Dr. Taylor's premature pronouncement of Claimant's medical stability in September 2006. Although Counsel was primarily and/or substantially responsible for securing this treatment, there is no way for Counsel to obtain payment following Surety's agreement to provide the requested care: Payment for services goes directly to the providers who can, perhaps, be forgiven for insisting that they receive full payment for the services that they intend to provide, without deduction by Claimant's Counsel for the services that he provided in obtaining Surety's agreement to provide the care in question. In short, having provided a valuable service, Counsel is left with no means to be paid. However, closer scrutiny of the provisions of the applicable regulation reveals that under the peculiar circumstances of this case, it was appropriate for Counsel to take a fee against the non-disputed PPI award, in order that Counsel should obtain compensation for the service he rendered in connection with the prospective medical care eventually authorized by Surety.

IDAPA 17.02.08.033.01.a defines available funds 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.

Accordingly, per this section, “available funds” are the only funds to which a charging lien may attach. Available funds do not include, inter alia, workers’ compensation benefits that were not disputed prior to Counsel’s retention. Here, Counsel was retained on February 16, 2006. At that point, Claimant was still receiving medical treatment and was still in a period of recovery. Whether Claimant would be entitled to an impairment rating, much less, the extent and degree of that impairment rating, were not at issue at the time of Counsel’s retention. Therefore, it cannot be said that Claimant’s entitlement to a PPI award was “not disputed” as of February 16, 2006. Of course, Claimant did become medically stable in September 2006, at least per Dr. Taylor, and Surety did accept, without dispute, the impairment rating given by Dr. Taylor. However, the definition of “available funds” quoted above makes it clear that is only where the entitlement to a benefit was “not disputed” prior to the time of counsel’s retention, that such funds are taken out of the category of “available funds.” To reiterate, at the time of Counsel’s retention in February 2006, it could not be said that Claimant’s entitlement to a PPI award was “not disputed” by Surety. That issue had not yet come into existence. Therefore, we conclude that the PPI award of \$52,827.50 does, indeed , constitute “available funds” under the applicable regulation.

Next, we must ascertain whether Counsel’s charging lien can attach to those available funds in order to satisfy Counsel’s claim for attorneys fees. Like the term “available funds,” the term “charging lien” is a term of art, and 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.

For purposes of the instant inquiry, attention is first directed to the provisions of subpart (c)(ii). A charging lien may be asserted by counsel against claimant's right to any compensation where it is shown that . . . the services of the attorney operated "primarily or substantially to secure the fund out of which the attorney seeks to be paid." Assuredly, Counsel's actions were initially, and in the main, responsible for securing over \$125,000.00 in medical benefits for his client. See, *Kulm v. Mercy Medical Center*, IC 2006-012770 (filed May 20, 2010). As well, Counsel certainly "seeks" to be paid out of the medical benefits he obtained for Claimant. The problem, of course, is that Counsel can "seek" payment from these benefits, yet never obtain a nickel. Again, those benefits were paid directly by Surety to Claimant's medical providers who, themselves, have an interest in being paid. Counsel is entitled to a fee on medical benefits, but cannot obtain payment from that source. However, the charging lien that has been established by Counsel, attaches to "available funds," in this case, the PPI award previously paid to Claimant, and from which Counsel has previously taken fees. This outcome is well supported by other provisions of IDAPA 17.02.08.033.1.c., including subparts i and v, which require the Commission to take into account equitable considerations relating to Counsel's right to assert an attorney's fee.

We hasten to point out that if the only matter under consideration was Counsel's entitlement to a fee on the PPI award, his claim would be denied. Although the PPI award does constitute "available funds," Counsel did nothing to "primarily or substantially" to secure that award. Therefore, if the only issue before us was Counsel's entitlement to a fee on that award, we would be constrained to deny Counsel's claim. However, here, Counsel "seeks" to be paid from a class of benefits which do not afford him any opportunity for payment, and it is appropriate to burden other "available funds" with the charging lien, as authorized by regulation, so that Counsel may be compensated for the services he provided.

In accordance with the forgoing, the fees that Counsel has previously taken against the PPI award, in the amount of \$10,341.41, along with previously taken costs in the amount of \$3,000.00, are approved. As well, Counsel's request for fees in the amount of \$8,658.59, proposed to be taken against lump sum consideration of \$24,000.00, is likewise approved, as are costs of \$928.42. We note that Counsel's efforts were primarily and/or substantially responsible for securing benefits with a value of \$139,570.94. At the allowed 25% rate, Counsel is actually entitled to an award of \$37,892.74. However, his past and current fees total only \$20,000.00, well within the amount of the allowed charging lien.

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In accordance with the foregoing, the sum of \$9,587.01, which was the subject of the Commission's January 19, 2011, Order Releasing Final Proceeds, is hereby released to Counsel, in accordance with this opinion.

IT IS SO ORDERED.

DATED this 28th day of April, 2011.

INDUSTRIAL COMMISSION

/s/  
Thomas E. Limbaugh, Chairman

/s/  
Thomas P. Baskin, Commissioner

/s/  
R.D. Maynard, Commissioner

Attest:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of April, 2011 a true and correct copy of the **Notice of Video Conference on Attorney's Fees** was served by regular United States upon the following:

BRECK H BARTON  
PO BOX 100  
REXBURG ID 83440

amw

/s/