

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRY CAVAZOS,

Claimant,

v.

DIAMOND PEAK PROVISIONS,

Employer,

and

AUTO-OWNERS INSURANCE
COMPANY,

Surety,
Defendants.

IC 2021-000314

ORDER ON ATTORNEY FEES

FILED

FEB 26 2024

INDUSTRIAL COMMISSION

This matter is before the Idaho Industrial Commission ("Commission") upon Claimant's Attorney Fee Memorandum and accompanying Affidavit of Bradford S. Eidam in support of attorney fees, both filed on January 11, 2024. Defendants filed its Opposition to Claimant's Memorandum on January 19, 2024, and Claimant replied on January 22, 2024.

Claimant was previously awarded attorney fees against Defendants per the Commission's Findings of Fact, Conclusion of Law, and Order ("Decision") of December 26, 2023. In the Decision, the Commission ordered the following:

1. Claimant is entitled to imaging and potentially medical treatment for his hamstring injury.
2. Claimant is entitled to imaging and potentially medical treatment for his lumbar spine injury.
3. Claimant's gluteal tear was caused by the accident, and Claimant is in a period of recovery and entitled to medical treatment for his gluteal tear.

4. Claimant's cervical spine injury is a compensable consequence of the original accident and injury, and Claimant is in a period of recovery and entitled to medical treatment for his cervical spine injury.
5. Claimant is entitled to partial temporary disability benefits from March 7, 2022, until August 11, 2022.
6. Claimant is entitled to total temporary disability from August 11, 2022 until he reaches maximum medical improvement or Defendants meet the requirements of *Roberts* and Idaho Code §72-403.
7. Claimant is entitled to attorney's fees for Defendants' unreasonable denial of his cervical spine injury; Claimant is also entitled to attorney's fees incurred as a result of Defendants' unreasonable cessation of disability benefits on March 7, 2022.
8. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one days of the entry of the Commission's decision, file with the Commission a memorandum of attorney's fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney's fees in this matter. Within fourteen days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.
9. Pursuant to Idaho Code §72-718, this decision is final and conclusive as to all matters adjudicated.

Decision pp. 40-41.

ARGUMENTS OF THE PARTIES

Claimant's counsel ("Eidam") requests that the Commission award attorney fees based on an hourly rate rather than on a contingency basis. Eidam requests a total of \$27,857.50, consisting of 101.3 hours worked charged at a rate of \$275 an hour.

Defendants argue that the requested total of \$27,857.50 is unreasonable. Defendants argue that everything done on the case prior to October 20, 2022 – the date Eidam prepared Claimant’s request for emergency hearing – were all normal activities of any worker’s compensation litigation and not specifically related to the issues for which fees were awarded. Claimant’s references to “telephone conferences with client” in his ledger contain no description whether those telephone conferences relate to the cervical injury or the cessation of time loss benefits, Eidam made no attempt to apportion time spent in depositions and briefing to the issues for which attorney fees were awarded as compared to issues in which attorney fees were not awarded, and Eidam’s requested fees on time spent composing the opening brief (28 hours = \$7,700) and the reply brief (15 hours = \$4,125) are unreasonable.

DISCUSSION

Idaho Code § 72-804 provides:

If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

Our Decision determined that Claimant was entitled to an award of attorney fees due to: (1) Defendants’ unreasonable denial of the claim for a cervical spine injury; and (2) Defendants’ unreasonable cessation of disability benefits on March 7, 2022, which was based on Claimant’s refusal to accede to the terms of the noncompete clause contained in the offer of employment. *See* Decision, pp. 33-40, ¶ 97-115.

Certain charges are presumed reasonable in a worker's compensation case: a twenty-five (25%) contingent fee in a case without a hearing on the merits, a thirty percent (30%) contingent fee in a case in which there was a hearing on the merits and briefs submitted (or waived) under JRP 10 and 11, and a fee of fifteen (15%) of total permanent disability payments for ten years after the payments commence. IDAPA 17.01.01.802.02. The proponent of a fee which is greater than these presumed reasonable fees "shall have the burden of establishing by clear and convincing evidence entitlement to the greater fee." IDAPA 17.01.01.802.04(d).

The Commission directed Claimant to address the factors identified in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984) in connection with the award of attorney fees. These factors are to be considered by the Commission in making its determination of reasonable compensation once the determination of an award of attorney fees has been made. These relevant, non-exhaustive factors are: "(1) the anticipated time and labor required to perform the legal services properly; (2) the novelty and difficulty of the legal issues involved in the matter; (3) the fees customarily charged for similar legal services; (4) the possible total recovery if successful; (5) the time limitations imposed by the client or circumstances of the case; (6) the nature and length of the attorney-client relationship; (7) the experience, skill, and reputation of the attorney; (8) the ability of the client to pay for the legal services to be rendered; and (9) the risk of no recovery." *Hogaboom*, 107 Idaho at 15, 684 P.2d at 992 (citing *Clark v. Sage*, 102 Idaho 261, 265, 629 P.2d 657, 661 (1981)). By analyzing these factors, the Court sought to further the legislative intent to encourage attorneys to represent claimants whose cases may not otherwise prove financially lucrative, while also discouraging employers and sureties from delaying or denying their obligations to an injured worker. The Commission is not, however, required to specifically address each factor, nor is it required to make specific findings showing how each

factor entered into its decision. *Swett v. St. Alphonsus Regional Medical Center*, 136 Idaho 74, 29 P.3d 585 (2001).

In his Memorandum, Claimant requests that the Commission order Defendant to pay attorney fees pursuant to Idaho Code § 72-804 in the amount of \$27,857.50. Eidam avers that he provided 101.3 hours of his legal services¹, over the course of approximately one-and-a-half years, related to the pursuit of the compensability of the cervical spine injury and reinstatement of temporary disability benefits at a rate of \$275 per hour, for a total of \$27,857.50.

Attached to the accompanying Affidavit of Bradford S. Eidam is a copy of the Attorney/Client Contract and Disclosure Statement, signed by both Eidam and Claimant on September 10, 2021, which provided for a contingent fee of 30% of any amounts recovered if a hearing is held, or “attorney fees awarded by the Court or Commission, whichever is greater.” Eidam Aff. Ex. A. The contract also provided that “[i]n the event the case is litigated and an award of attorney fees is rendered, attorney reserves the right to charge a fee based upon the above percentages or, at his election, a fee based upon an hourly rate of \$275.00 for time spent on the case.” *Id.* The Commission is not constrained by the contingent fee agreement between a claimant and his attorney in the presence of a clause providing for the alternative of awarded attorney fees. *Hogaboom*, 107 Idaho at 18, 684 P.2d at 995. Rather, the Commission must arrive at a reasonable award considering both the factors listed above and also the legislative intent behind worker’s compensation laws and Idaho Code § 72-804. *See id.*

Eidam requests that the Commission award attorney fees on his hourly rate of \$275 instead of on a contingency basis. The request is understandable. The Commission concluded, *inter alia*, that Claimant was still in a period of recovery and entitled to future medical treatment for his

¹ As detailed in a chart contained in Eidam’s affidavit. *See* Eidam Aff. pp. 3-5.

cervical spine injury. The only indemnity benefits awarded by the Decision was for temporary disability benefits. Therefore, a contingency fee of thirty percent (30%) at this point would be relatively low compared to the time Eidam spent in obtaining a Commission order finding the cervical spine injury compensable and that Claimant was entitled to temporary disability benefits.

As the *Hogaboom* Court noted, attorney fees should not be kept artificially low:

... [W]e believe that the legislature meant to encourage attorneys to represent clients and take on claims which would otherwise not be in their best financial interests due to their relative financial insignificance. In this way, an attorney might represent a claimant in a claim which the attorney believes to have been unreasonably contested by the employer despite the fact that such claim may be worth only an amount which may well be exceeded by the attorney's fees of pursuing the claim. It is our belief that this legislative intention to insure adequate representation and claim prosecution requires the award of *reasonable* attorney's fees. Were the fees of attorneys to be kept artificially low, i.e., below market value on a per hour basis, the result would be a migration of legal talent away from this crucial area and a chilling effect on the ability of claimants to obtain representation.

Hogaboom, 107 Idaho at 17, 684 P.2d at 994 (internal footnote omitted, italics in original). Upon analyzing the arguments of the parties and relevant factors, we find that Eidam's request that he be awarded attorney fees on an hourly basis rather than a contingent basis is reasonable.

The anticipated time and labor required to perform the legal services properly. Defendants suspended temporary disability benefits on March 7, 2022, when Claimant refused the job offer containing the non-compete provision. On March 30, 2022, Claimant filed his complaint that included the noticed issues of whether Claimant's refusal of the job offer was reasonable and whether Defendants' cessation of temporary disability benefits was reasonable. Eidam anticipated that the recovery of those temporary disability benefits would be small, particularly when Dr. Spelich deemed Claimant at MMI on April 26, 2022. But then, in August 2022, Dr. Lawler questioned whether Claimant was at MMI and ordered additional diagnostic tests and recommended further treatment. Additionally, Claimant injured his cervical spine during physical

therapy treatment for his compensable lumbar spine injury. On September 7, 2022, Dr. Lawler diagnosed a cervical spine injury and referred Claimant to a neurosurgeon for evaluation. This series of events prompted Eidam to request an emergency hearing with the Commission on October 20, 2022, which was granted. Defendants denied authorization of treatment on the cervical spine as recommended by Dr. Lawler. This prompted Eidam to file a motion on November 7, 2022, to add to the noticed issues of the emergency hearing “whether Defendants are responsible for medical benefits to include evaluation and treatment of injuries to Claimant’s cervical spine.” Clt. Motion to Add Issue, p. 1. The hearing on these bifurcated issues, including the compensability of the cervical spine injury and the entitlement of temporary disability benefits, was held on November 30, 2022.

Defendants argue that Eidam’s requested fees from March 2, 2022, to October 20, 2022, – the day Claimant filed his motion for an emergency hearing – are for activities that are a normal part of worker’s compensation litigation, such as preparing the complaint and discovery, and thus are not related to the matters on which the Commission based its award of attorney fees. Defendants’ argument is unpersuasive. The Commission awarded attorney fees “incurred as a result of Defendants’ unreasonable cessation of disability benefits on March 7, 2022.” Decision, p. 41. Per Eidam’s affidavit, the first entry in his time spent obtaining benefits in this case is “3/2/2022 Review proposed contract of employment and Change of Claims Status; Telephone conference with Client; Prepare email to adjuster” for 1.5 hours. Eidam Aff. p. 3. The Claimant’s refusal of the employment offer, and Defendants’ subsequent cessation of temporary disability benefits, is what directly led to Claimant’s filing of the complaint in an attempt to restore Claimant’s entitlement to those benefits. Defendants’ cessation of benefits on March 7, 2022, initiated the complaint. Eidam’s subsequent actions on the case stem largely from the Defendants’

cessation of temporary disability benefits. The Defendants' refusal to authorize Dr. Lawler's recommended treatment on the cervical spine also directly led to Claimant's motion for an emergency hearing. Although it may be true that preparing the complaint and discovery are normal activities of any worker's compensation litigation, in this case those activities were incurred as a result of Defendants' unreasonable offer of employment and unreasonable cessation of disability benefits on March 7, 2022.

Defendants object that Claimant's counsel made no attempt to apportion time spent in depositions and time spent in briefing the issues for which attorney fees were awarded as compared to issues in which attorney fees were not awarded. Defendants also object that Eidam's claim for fees included multiple entries of "telephone conference with client" that contain no description whether those telephone conferences relate to the cervical spine injury or the cessation of disability benefits. Defendants' argument ignores the fact that Claimant's counsel *did* make an attempt to apportion time spent in depositions and briefing involving issues in which attorney fees were not awarded. The affidavit contains a chart that lists "Legal Services Provided" and the time spent on those services in "pursuit of the benefits obtained through the litigation." Eidam Aff. pp. 3-5. The total hours amounted to 104.55 hours. Eidam reduced that total by the time spent specifically related to the compensability of the gluteus medius injury – an issue for which attorney fees were not awarded. *Id.* at p. 6. Eidam asserts that he spent approximately .75 hours preparing for and during the deposition of Dr. Lawler, .5 hours preparing for and during the deposition of Dr. Doerr, 1.5 hours during the preparation of Claimant's opening brief, and .5 hours during preparation of the reply brief solely related to the pursuit of compensability of the gluteus medius injury. Eidam avers that the remaining time spent (101.30 hours) – including his telephone conferences with Claimant – related to the pursuit of the compensability of the cervical spine injury and

reinstatement of temporary disability benefits – issues in which attorney fees were requested and awarded.

Defendants also object to the length of time that Eidam claims for his work on preparing and writing Claimant's opening brief (28.75 hours) and the reply brief (15 hours). Defendants argue that length of time is unreasonable. As stated above, Eidam did account for 1.5 hours of preparation on the opening brief, and .5 hours of preparation of the reply brief, that was spent solely on the compensability of the gluteus medius injury issue and is not seeking attorney fees for that period of time. Eidam counters Defendants' arguments by stating that preparing a legal brief involves much more than simply writing. We find Claimant's request for time spent on briefing to be reasonable. This case involved a number of issues at hearing, but the most primary ones were the issues in which attorney fees were awarded: (1) the compensability of the cervical spine; and (2) Claimant's entitlement to temporary disability benefits. Claimant's opening brief was well-organized, thoroughly analyzed, and persuasive. Likewise, Claimant's reply brief deftly responded to the arguments raised in the Defendants' response and was not merely a restatement of points made in the opening brief.

In summary, the time and labor involved in attaining the award weighs in favor of awarding fees in the amount of an hourly rate rather than on a contingency basis.

The novelty and difficulty of the legal issues involved in the matter. This case involved the somewhat novel issue of whether Claimant's refusal to accede to the non-compete clause in the employment contract justified Claimant's cessation of temporary disability benefits under Idaho Code §§ 72-403 and 72-804. Additionally, the cervical spine injury that occurred during Claimant's physical therapy made the case somewhat more unique and complex and was one of

the reasons that led counsel to file a request for an emergency hearing. This factor weighs in favor of a higher fee.

The fees customarily charged for similar legal services/Experience, skill and reputation of the attorney. Eidam is requesting an hourly rate of \$275. Eidam has been a licensed lawyer actively practicing in Boise, Idaho since 1982. Eidam Aff. p. 6. His practice has focused primarily on representing injured workers in workers' compensation cases since 1988, and Eidam has been certified by the Idaho Trial Lawyers Association as a specialist in workers' compensation law since 1998. *Id.* Based on his knowledge, Eidam asserts that his Attorney/Client contract with Claimant is in line with customary charges in workers' compensation proceedings, and that his hourly rate of \$275 is lower than the customary hourly rate of \$400 that similar attorneys in the Boise area charge. Eidam Aff. pp. 6-7. These factors weigh in favor of a higher fee.

Other factors. We find that the other *Hogaboom* factors support a higher fee. The possible total recovery if Claimant's case was successful is not ascertainable at this time, because medical benefits and temporary disability benefits are ongoing, and Claimant is still in a period of recovery for his compensable injuries. Time limitations were imposed by the client in that the emergency hearing was in part necessitated due to Claimant's financial difficulty, his inability to work because of his injuries, and the Defendant's cessation of temporary disability benefits and their refusal to authorize the cervical spine injury. Likewise, Claimant does not currently have the financial ability to pay for such legal services. There was a risk of no recovery because the Attorney/Client Contract provided that no fee would be owed to counsel if the claim was not successful.

Based on the foregoing, we conclude that Claimant's request to award attorney fees based on an hourly rate rather than a contingency fee basis is reasonable. Furthermore, we find that Eidam's hourly rate of \$275 and hours worked on the case in pursuit of benefits on issues related

to the award of attorney fees (101.3 hours) is also reasonable. Accordingly, we find that an award of attorney fees to Mr. Eidam in the amount of \$27,857.50 is appropriate and is hereby GRANTED.

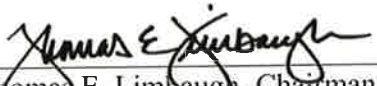
Therefore, the Commission awards \$27,857.50 in attorney fees to Claimant's counsel.

IT IS SO ORDERED.

DATED this 26th day of February, 2024.

INDUSTRIAL COMMISSION

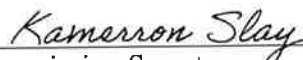



Thomas E. Limbaugh, Chairman


Claire Sharp, Commissioner


Aaron White, Commissioner

ATTEST:


Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February 2024, a true and correct copy of **ORDER ON ATTORNEY FEES** served by Electronic Mail upon each of the following:

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