BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JASSON STRYKER, Claimant, v. IDAHO PACIFIC HOLDINGS, INC., Employer, and GENERAL CASUALTY COMPANY OF WISCONSIN, Surety, Defendants.	**IC 2023-012738** **ORDER ON ATTORNEY FEES** FILED FEB 13 2024 INDUSTRIAL COMMISSION

This matter is before the Idaho Industrial Commission upon *Claimant's Memorandum In Support of Attorney Fees*, filed January 2, 2024. Claimant was previously awarded attorney fees against Employer for an unreasonable suspension of benefits pursuant to I.C. § 72-804. Employer and Defendant did not respond.

Now, Claimant's attorney has moved for attorney fees to be awarded against Employer under Idaho Code § 72-804 at an hourly rate of $250 for work of 53.4 hours, for a total of $13,350. In the alternative, Claimant requests a fee equal to 30% of the compensation award. The Commission finds the contingent fee more accurately reflects the value and legal complexity of the case. Attorney fees are awarded in the amount of 30% of the award to Claimant. Based on that award as calculated in a separate order, attorney fees are awarded in the sum of $5,833.70.

FACTS

Claimant was awarded attorney fees against Defendants in the Order of the Commission issued on December 11, 2023. To briefly summarize the case, Claimant was injured in a compensable accident on May 8, 2023, when a drill bit entered his left forearm. *Findings of Fact, Conclusions of Law, and Recommendation*, December 11, 2023 ("FOF) ¶ 1. Claimant required hospitalization for a secondary infection, but Defendants refused to pay citing injurious practices. Defendants also suspended temporary disability benefits citing a refusal to participate in light duty work. Both decisions were found unreasonable.

As for the hospitalization, Defendants refused to pay the bill citing that Claimant's delay in hospital admission constituted "injurious practices" under I.C. § 72-435 which aggravated the infection and resulted in a longer stay. However, the delay in admission had largely been caused by Defendants repeated failure to respond to Claimant's inquiries as to whether the visit would be financially covered. FOF ¶ 6, 7. Employer did not even move Claimant's case from "pending" to "open" until the wound clinic was able to contact Employer and learn that Employer would not open the file until work restrictions were filed. The clinic promptly did so, and Claimant was admitted to the hospital the same day. FOF ¶ 11. To a lesser extent, the delay was impacted by Claimant's need to assist his wife and a miscommunication with the ER doctor. FOF ¶ 7, 8, 9, 30.

As for the suspension of temporary disability benefits, Defendants argued that Claimant refused to accept a suitable offer of light duty work, permitting suspension of benefits under I.C. § 72-403. However, Defendants filed a complaint with the Commission alleging refusal to take work *before* issuing the offer, and the offer was made while Claimant was taken off work per doctor's orders. FOF ¶ 16, 18, 20, 43, 49. Defendants ignored multiple documents showing the work release, and ultimately suspended benefits counting from June 8, 2023, without obtaining an order from the Industrial Commission. FOF ¶ 19, 20, 49, 51. Although Claimant was later released to light duty work on July 31, 2023, the surety failed to provide an offer in response. FOF ¶ 46.

The Commission found that Defendants' suspension of temporary disability benefits and denial of the requested medical benefits were unreasonable and warranted the imposition of attorney fees under I.C. § 72-804. FOF ¶ 48, 52; *Order*, December 11, 2023, ¶ 2-4.

Claimant's attorney, Jonathan W. Harris, has now submitted a memorandum and affidavit in support of attorney fees. Counsel typically bills $250.00 an hour in his non-contingent fee work. *Affidavit In Support of Attorney Fees* ("Harris Aff.") ¶ 3, 4. According to his knowledge, this fee is consistent with fees charged by attorneys with comparable skill and experience. Harris Aff. ¶. 5. Counsel has practiced worker's compensation since 2004 and spends approximately 50% of his time in worker's compensation law; he has taken relevant CLE courses and seminars. Harris Aff. ¶ 6.C. For business purposes, Counsel maintained contemporaneous billing records of the time spent on this case through the firm's software, although the case was taken on a contingent fee basis. Harris Aff. ¶ 2, 4. Itemized entries record a total of 53.4 hours spent on the case. Harris. Aff. ¶ 5. In support of the requested fee, Counsel points out that this case went to hearing, required a physician's deposition, legal research, legal analysis, and legal briefing. Harris Aff. ¶ 6.A, 6.B. Counsel has explained that success was not guaranteed and the necessity of proceeding to hearing makes the case less desirable. Harris Aff. ¶ 6.H.

ARGUMENTS OF THE PARTIES

Claimant's attorney requests $13,350.00 in fees, or in the alternative a 30% contingent fee of the award of temporary disability benefits. As the case went to hearing, a 30% contingent fee would be presumed reasonable, but fees may be requested on an hourly basis where a penalty is awarded. The requested hourly fee is reasonable given counsel's qualifications, the undesirability of the case, the time limitations imposed, and the time and labor required to prosecute the case.

Defendants have not filed a response to this motion, and the time for filing has expired.

ATTORNEY FEES STANDARD

Idaho Code § 72-804 provides that "

> If the commission . . . determines that the 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.

The right to attorney's fees was previously decided in the worker's compensation award. Therefore, the only issue in the present matter is what fee is reasonable.

Certain charges are presumed reasonable in a worker's compensation case: twenty-five (25%) contingent fee in a case without a hearing on the merits, thirty percent (30%) contingent fee in a case with a hearing on the merits, and 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 the percentage of recovery stated in Subsection 802.02 shall have the burden of establishing by clear and convincing evidence entitlement to the greater fee. The attorney shall always bear the burden of proving by a preponderance of the evidence his or her assertion of a Charging Lien and reasonableness of his or her fee.

IDAPA 17.01.01.802.04(d). A reasonable attorney fee in a contingent case is determined through a balancing process considering various factors.

> (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 v. Economy Mattress, 107 Idaho 13, 15, 684 P.2d 990, 992 (Idaho 1984) citing *Clark* *v. Sage*, 629 P.2d 657, 102 Idaho 261 (Idaho 1981). These factors are not exhaustive, and the Commission is not required to specifically address each factor or "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 385, 389 (2001).

The fees of attorneys are not 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. Policies guiding the application of these factors include 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. *See id.* (citing *Clark v. Sage*, 102 Idaho 261, 265, 629 P.2d 657, 661 (1981)). The Commission is not restrained by the contingent fee agreement between a claimant and his attorney in the presence of a clause providing for the alternative of awarded attorney's fees. *Id.* at 18, 995.

DISCUSSION

Given that a hearing occurred in this matter, per IDAPA and the agreement made between Claimant and counsel, the presumed fee in this case would be thirty (30%) of the benefits awarded to Claimant. Claimant has argued that a higher fee based on an hourly calculation is justified. Upon analyzing the arguments for a greater fee, the totality of all relevant factors do not support a higher fee.

First, there are the factors related to the anticipated time and labor required to perform the legal services properly, and the time limitations imposed by the client or circumstances of the case. Defendants continually acted in an unreasonable manner, requiring Counsel to devote immediate attention to attempt to provide his client with temporary disability. Other cases had to be deprioritized, and informal attempts at resolution were unsuccessful. Resolving the case took more time than would ordinarily have been expected under these facts. Defendants continued to contest issues where the evidence did not support an alternative decision. Counsel's time entries for the related work are supported by contemporaneous billing records and do not appear facially unreasonable, nor is there other information that would call the records into question. These factors weigh slightly in favor of a higher fee.

Second, there is the factor of the novelty and difficulty of the legal issues involved in the matter. This weighs heavily against Claimant. The case presented legal issues typically encountered in worker's compensation and required standard review of medical and employment records. This case did not require novel research or extensive analysis of statutes and caselaw, and was straightforward in factual application.

Third, the factor of the possible total recovery if successful weighs against a higher fee, but only slightly so. The hourly fee requested in this case is higher than the contingent fee would amount to. [1] It is noted that counsel was hired on June 12, 2023; at this date Defendants' unreasonable conduct was underway and the potential for attorney fees would be evident to a competent attorney. Harris Aff. ¶ 3. It cannot be said that the possibility of the higher award of attorney fees was not considered as a potential incentive in taking the case. Harris Aff. ¶ H. Overall, the requested fee remains much higher than what otherwise would be expected. This factor continues to weigh against the award of an hourly fee.

Fourth, factors of the experience, skill and reputation of the attorney and the fees

[1] Under IDAPA 17.01.01.010.17(a) "attorney's fees . . . are to be satisfied from Available Funds." IDAPA 17.01.01.010.03 defines available funds to mean "a sum of money to which a Charging Lien may attach. It does not include any compensation paid or not disputed to be owed prior to Claimant's agreement to retain the attorney. Under IDAPA 17.01.01.802.03(b), the calculation of "available funds" for the contingent fee is calculated using compensation. Under I.C. § 72-102(6), "'Compensation' used collectively means any or all of the income benefits and the medical and related benefits and medical services."

customarily charged for similar legal services do not support the award of a greater fee. Claimant's attorney is qualified and an excellent representative, but this does not warrant an unusual fee in and of itself. Workers' compensation law on the claimant's side is typically on a contingent basis and an hourly rate is generally seen only where attorney fees are awarded, making it difficult to determine if such requests are representative of ordinary cases. Comparison to attorney fees that are approved based on contingency agreements is also difficult, as each case will only award fees for the value obtained in that decision. While counsel typically charges $250 for his services in other areas of law, that is not the representative practice area for comparison. In sum, these factors weigh against a higher fee.

Finally, factors regarding the nature and length of the attorney-client relationship and the risk of no recovery weigh against a higher fee. A higher fee is consistent with the purpose of incentivizing and encouraging counsel to take on cases to ensure the availability of representation for injured workers. However, all cases carry the potential of failure. There is no indication that this case was especially high risk or that there was any difficulty in finding an attorney to take the case. Employer was insured, the facts of the case were unusually strong in Claimant's favor, and causation of the injury was straightforward. This weighs against a higher fee.

In totality, the analysis weighs against the requested hourly fee rather than a standard thirty-percent (30%) contingent fee.

ORDER

Based upon the foregoing reasons, the undersigned Commissioners award attorney fees in the amount of 30% of the award to Claimant. As determined by separate order, the award of temporary disability benefits as of December 11, 2023, was worth $19,548.56. Claimant's attorney is awarded the corresponding sum of $5,833.70 in fees.

DATED this __13th__ day of February, 2024.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION
SEAL
STATE OF IDAHO

Thomas E. Limbaugh

Thomas E. Limbaugh, Chairman

Claire Sharp

Claire E. Sharp, Commissioner

Aaron White, Commissioner

Attest:

Christina Nelson

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on _13th__ day of February, 2024 a true and correct copy of the foregoing **ORDER ON ATTORNEY FEES** was served by email upon each of the following:

Jonathan W. Harris
Baker and Harris
266 W. Bridge Street
Blackfoot, ID 83221
efiling@bakerharrislaw.com

Eric S. Bailey
Bowen & Bailey, LLP
PO Box 1007
Boise, ID 83701
bperkins@bowen-bailey.com

mm Mary McMenomey