Colbo, Edith

ATTORNEY FEES FIXED BY BOARD (RCW 51.52.120)

Factors to be considered

The size of the pension reserve is only one of the factors to be considered in arriving at the amount of the fee. Other factors which may be taken into consideration are: the time involved in litigation and the controverted nature of the case; the amount of the retroactive pension; the financial status of the worker; and the humanitarian social objectives of the Industrial Insurance Act. **….*In re Edith Colbo*, BIIA Dec., 16,117 (1968)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EDITH COLBO	**)**	**DOCKET NOS. 16,117 & 21,329**
	)	
CLAIM NO. C-203968	**)**	**ORDER FIXING ATTORNEYS' FEES**

On April 16, 1968, the above-named claimant filed with this Board a written application requesting the Board to fix a reasonable fee to be paid by the claimant for her attorneys' services in the above-entitled matters, pursuant to RCW 51.52.120 and Rule 9.1 of the Board's Rules of Practice and Procedure.

Attached to this application was a copy of a letter to claimant from her attorneys dated March 21, 1968, indicating that they propose to charge her a fee in the amount of $5,077.87 for legal services in connection with the appeal under Docket No. 21,329, in which this Board found her to be permanently totally disabled and entitled to a pension.

In response to a request from this Board to submit whatever comments and information they desired regarding the reasonableness of the fee in the matter, claimant's attorneys, by letter of April 20, 1968, set forth generally the services they had rendered and the recovery obtained as a result thereof, and urged that the fee charged was not unreasonable or unlawful. Secondly, in this letter, the attorneys raise a legal argument. They point out that they were retained to represent claimant under a contract entered into in October of 1961; that under the holding of Bodine v. Department of Labor and Industries, 29 Wn.2d 879, said contract is subject only to the fee-fixing statutes in effect at that time, and any amendments to such statutes enacted later cannot apply to this case; that the statute (RCW 51.52.120) as it existed at that time only provided for fixing of fees by this Board if written application was made therefor by the attorney; and that this Board thus has no authority to fix an attorneys' fee in this case based on the application of the claimant.

This Board thereupon requested the attorneys to supply a copy of the alleged contract entered into in October of 1961. In response, by letter of April 26, 1968, the attorneys enclosed a copy of the initial document prepared for their office use at the time claimant requested that they represent her. This document is a printed form entitled "Case Capsule" obviously intended for internal office use only. It is dated October 12, 1961, and gives the claimant's name as client. The only reference thereon to fees to be charged are the handwritten words "Contingent - 1/3" in a box headed "Fees and Costs." The document is not signed, either by claimant or by her attorneys. It may be that the attorneys simply orally advised the claimant that the charge for their services would be one-third of any amount recovered, and that the claimant understood this. The attorneys' letter of April 26, 1968, further

referred to the services which had been rendered, the extent of benefits recovered, and the highly controverted and time-consuming nature of the case insofar as the permanent total disability issue was concerned, and argued that the fees charged are "more than reasonable."

Turning first to the contention that this Board has no jurisdiction to fix the attorneys' fees in this matter because of the fee contract entered into in 1961, we emphatically reject such contention on several grounds:

First, it is highly doubtful that a legally-valid contract regarding attorneys' fees was entered into in October of 1961. Certainly the "Case Capsule" form constituted no contract, and if there was any agreement or "meeting of the minds" regarding fees it must have been strictly oral. Furthermore, it should be noted that when the attorneys first entered their appearance in October of 1961, claimant's first appeal (Docket No. 16,117) from the Department's prior closing order was already pending. That appeal was settled by a conference on February 1, 1962, and the Board's order in accordance with the settlement agreement was entered on February 28, 1962; and, after payment by the Department of retroactive time-loss compensation called for by the settlement, the attorneys' withdrew from the case and on May 18, 1962, requested the Department to again send all orders and correspondence on the claim directly to claimant's home. They did not again become her attorneys until the time of filing the last appeal (Docket No. 21,329) from the Department's final closing order of October 23, 1963. It cannot be said that the "contract," even if it was actually consummated in October of 1961 and applied to the appeal then pending, could also be applicable to the last appeal filed in December of 1963, which was a separate cause of action involving a completely different issue. Just because a particular attorney-client relationship existed in one appeal before this Board, we cannot assume that the same relationship necessarily existed in a subsequent and separate appeal.

Secondly, the alleged contract of October 1961 is not in fact the basis for the fee charged by the attorneys for their services in Docket No. 21,329. Their proposed fee of $5,077.87 is not one-third of anything. It is clear from their letter to claimant dated March 21, 1968, that this figure was unilaterally arrived at simply be deducting from claimant's retroactive pension money in the amount of $5,422.17, the total of medical witness fees and litigation costs advanced on claimant's behalf in the amount of $344.30, and proposing that the balance of $5,077.87 be considered as the attorneys' fee. Since the alleged 1961 contract is not being used as the basis for the proposed fee, said contract and the Bodine case, supra (in which a valid binding contract was entered into and was the precise basis for

the fee the attorney charged therein), cannot be relied upon in attempting to prohibit this Board's jurisdiction here.

Thirdly, even assuming, as claimant's attorneys argue, that the Board's fee-fixing authority here is governed by the statutes as they existed in 1961, it is very clear that those statutes provide us with the necessary authority. It is true that RCW 51.52.120 at that time provided for fixing of fees for services before this Board only on written application for such fee-fixing by the attorney. However, this section must be considered in conjunction with RCW 51.52.132, which provided in pertinent part that:

> "It shall be unlawful for any attorney representing a workman before ... the board ... to charge or receive either directly or indirectly any fee, unless the same has been previously fixed as provided in RCW 51.52.120 ..., or to charge or receive either directly or indirectly any fee or fees greater in amount than the fee or fees so fixed." (Emphasis supplied)

Clearly, the two sections taken together make it plain that a positive duty was placed on an attorney to apply to the Board for fixing of his fee, so that such could be done by us pursuant to RCW 51.52.120; and, if any attorney did not comply with this positive duty, and charged any fee without asking this Board to fix it, RCW 51.52.132 made it clear that such fee was unlawful.

That the foregoing is a correct view of the intent of Secs. 51.52.120 and 51.52.132, as they existed in 1961, is made very plain by the amendments to those sections made by the 1965 Legislature. (Secs. 1 and 2, Chap. 64, Laws of 1965 Extraordinary Session). By the amendments, two basic things were accomplished: (1) workmen and beneficiaries, in addition to attorneys, were given the right to apply to either the Department or this Board for fixing of their attorney's fees; and (2) the unlawfulness of fees was limited only to fees charged in excess of fees fixed by the Board pursuant to written application for such fee-fixing. In other words, since the 1965 amendments, if no written application from either a claimant or an attorney is received by this Board, and we therefore do not fix a fee, any fee charged by an attorney is lawful. This was obviously a significant change in intent concerning the attorney's fee statutes, and to accomplish it, the Legislature found it necessary to amend the prior law. Obviously, this was because the Legislature viewed the pre-1965 statutes as we do, namely, that any attorney's fee charged a workman, without this Board having fixed it, was unlawful.

We are sure that claimant's attorneys have no intention of being in a position where they are charging unlawful fees, and it seems clear that this is the reason they set forth in their letters of April 20 and April 26, 1968, the general nature of the entire services rendered for the claimant, and the

nature and extent of the benefits recovered for her, in justification of the fees they propose should be charge. We accept the statutory requirement to fix the fees for the entire representation of claimant; and we will proceed to do so.

As to Docket No. 16,117, which as an appeal from a closing order of June 15, 1961, we find that said appeal was settled at a conference on February 1, 1962, based on two reports the attorneys had obtained from claimant's attending physician, by remanding the claim to the Department of Labor and Industries for reopening for further surgical treatment, for payment of retroactive time-loss compensation, and for further action as indicated. As a result of this disposition, claimant received retroactive time-loss from November 24, 1960 to April 16, 1962, in the sum of $1,260.00; current monthly time-loss was then paid for the period from April 16, 1962 to September 19, 1963; and the claim was finally closed on October 23, 1963, with an additional permanent partial disability award in the sum of $450.00; and bills for medical and surgical treatment, prescriptions, and hospitalization were paid in the total sum of $2,391.41. Based on the sum of these benefits, $4,101.41, we believe that a fee of 20% of the recovery is reasonable and fair for services in Docket No. 16,117. We will accordingly set that fee at $820.00. The Board has no knowledge whether the attorneys have previously charged a fee in Docket No. 16,117, but if so, it must be deducted from the $820.00 now set and if in excess of said amount, a credit must be given on the fee fixed for Docket No. 21,329.

As to Docket No. 21,329, it is quite obvious that it was a controversial and hotly-contested matter. The record of testimony totaled almost 350 pages, and seven different doctors testified. In addition to several hearings in Tacoma, it was necessary for claimant's attorneys to attend at lease four separate hearings in Seattle. It is also obvious that substantial preparation of this case was performed by the attorneys, and they did a competent and thorough job in presenting medical evidence (particularly testimony of specialists in psychiatry and orthopedics) which persuaded our hearing examiner and the majority of this Board to find claimant to be permanently totally disable.

However, in spite of this effort and the ultimate recovery obtained, we firmly believe that a fee consisting of the entire amount of claimant's retroactive pension (after reimbursement to counsel of litigation costs and witness fees advanced) is excessive and unconscionable. The claimant unfortunately had to wait a very long time for her pension status to be established, and to then have her entire retroactive pension taken from her as a fee obviously works an extreme financial hardship on a person who has not worked for several years. As stated by the Utah court in Ellis v. Industrial Commission, 91 Utah 432, 64 P.2d 363, a different measure of reasonableness of attorney's fees

should be applied in workmen's compensation cases than in contingent fee cases in court, and the "workman's station" must be considered. This observation is particularly true in a permanent total disability pension case. We also refer to the U. S. Department of Labor's Bulletin 220, dated September 1960, entitled Attorneys' Fees in Workmen's Compensation, particularly pgs. 8 and 9 thereof, setting forth factors which should be considered in determining amounts of fees, and giving a number of reasons why criteria as to reasonableness of fees are markedly different in compensation cases than in typical civil negligence cases brought before the courts. Some of these differences are not applicable under our particular appellate structure, but many of them are. See also, on this same subject, Cox v. State Industrial Accident Commission, 168 Ore. 508, 123 P.2d 800.

It is apparent that the attorneys rely to a considerable degree onthe allegation that this case requires a reserve of approximately $40,000.00 to pay claimant's pension for the rest of her life expectancy. This figure is at substantial variance with our calculation of the necessary pension reserve. The tentative pension reserve, set up as of September 20, 1963 (the effective date of the pension) was $14,430.75, less prior awards, totaling $4,350.00, which was set off against the reserve and the monthly payments reduced accordingly. This resulted in a monthly pension, out of the reserve fund, of $52.39. The lump sum payment out of this fund for the period September 20, 1963 to March 15, 1968 equalled $2,822.17. The reserve necessary to fund life expectancy at $52.39 monthly, from March 15, 1968, onward, is $8,891.63.

Effective July 1, 1965, claimant was also entitled to an additional $80.00 per month out of the general fund pursuant to RCW 51.32.070. From this fund, a lump sum payment was made for the period from July 1, 1965 to March 15, 1968, of $2,600.00; this together with the $2,822.17, provided the retroactive total of $5,422.17 paid by the Department. A pension reserve computed for the general fund payments on the same ratio as the regular pension reserve, equals $13,577.60. It may then be fairly stated that the remaining "pension fund" after the lump sum payment of the $5,422.17, is $8,891.63 plus $13,577.60, or a total of $22,469.23.

In any event, we are convinced that size of the pension reserve, although proper to be considered, should only be one of the factors in arriving at the amount of the fee, and certainly it is not the controlling factor. Payment of a fee based only on the reserve could well be, in part at least, payment for something the claimant may never receive. Conversion of the pension into a lump-sum payment, pursuant to RCW 51.32.130, would amount to a maximum of $8,500.00. The fee the attorneys are seeking is clearly excessive and unreasonable in our opinion.

After taking all factors into consideration, including the length of time taken and controverted nature of the case; the extent of the recovery, including both pension reserve and amount of retroactive pension; the financial status of the claimant; and the humanitarian social objectives of the workmen's compensation law, we conclude that a fee of $2,500.00 is adequate and reasonable for the attorneys' services in Docket No. 21,329.

Now, therefore, it is hereby ORDERED that the sum of $820.00 be hereby fixed as a reasonable fee to be paid by the claimant for the services of her attorneys before this Board in the appeal under Docket No. 16,117; and it is further ORDERED that the sum of $2,500.00 be hereby fixed as a reasonable fee to be paid by the claimant for the services of her attorneys before this Board in the appeal under Docket No. 21,329: and it is further ORDERED that any attorneys' fee heretofore collected on Docket Nos. 16,117 and/or 21,329 be deducted from said total of $3,320.00.

Dated this 21st day of May, 1968.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
ROBERT C. WETHERHOLT Chairperson

/s/_____
R.H. POWELL Member

/s/_____
R.M. GILMORE Member