

Allen, Floyd

ATTORNEY FEES FIXED BY BOARD (RCW 51.52.120)

Attorney fees not allowed on interest award

INTEREST (RCW 51.52.135)

Attorney fees not allowed on interest award

It is unlawful to charge an attorney fee from interest awarded pursuant to RCW 51.52.135. ...*In re Floyd Allen*, BIIA Dec., 69 533 (1988) [Editor's Note: The Board's decision was appealed to superior court under Skagit County Cause No. 88-2-00124-6.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: FLOYD H. ALLEN) **DOCKET NO. 69,533**
)
CLAIM NO. G-998118) **ORDER FIXING ATTORNEY'S FEE**

This matter is before the Board on the application of the claimant, Floyd H. Allen, requesting that a reasonable fee be fixed to be paid to William H. Taylor, his attorney, for legal services rendered on the claimant's behalf in the above-referenced appeal, pursuant to RCW 51.52.120 and WAC 263-12-165 of the Board's Rules of Practice and Procedure.

Mr. Allen filed an appeal from an order of the Department of Labor and Industries dated November 7, 1984 which adhered to the provisions of an order dated February 2, 1984. The February 2, 1984 order denied Mr. Allen's application to reopen his claim for aggravation of condition.

As a result of the appeal, on February 21, 1986, the Board issued an Order Adopting a Proposed Decision and Order dated January 16, 1986, which reversed the Department's order of November 7, 1984 and remanded the claim to the Department with directions to reopen the claim and to take such further action as was necessary or required by law.

On August 14, 1987, this Board received a letter from Mr. Allen, requesting that we respond to his March 31, 1987 request that we set a reasonable fee to be paid to Mr. Taylor for his representation of Mr. Allen in his appeal. Our record does not contain the original of Mr. Allen's March 31, 1987 application, a copy of which he later provided to us. Even had we received Mr. Allen's March 31, 1987 letter on or about that date, it would have been filed beyond the time limit enunciated in WAC 263-12-165 which provides that a written application for the Board to fix a reasonable attorney fee is to be filed within one year after the Board's final decision and order or in the event of a superior court appeal, within one year from the date judgment becomes final.

Setting a statute of limitation requires striking a balance between the harm of being deprived of a remedy and the harm of being sued. Only the legislature has the constitutional power to establish a clear line of demarcation to fix a time certain beyond which no remedy will be available. Ruthe V. Dight, 75 Wn.2d 660, 453 P.2d 631 (1969).

Since it is not a legislative enactment, a provision of the Washington Administrative Code cannot establish a statute of limitation. RCW 51.52.120 is silent with respect to any time limitation imposed for filing an application to the Board to set a reasonable attorney fee. We conclude, therefore, that we have jurisdiction to consider Mr. Allen's request and to issue an Order Fixing Attorney's Fee.

As a result of his appeal, Mr. Allen recovered time loss compensation for the period between October 28, 1983 and March 26, 1986, totaling \$29,025.54. On August 7, 1986, this Board issued an Order Fixing Interest on the unpaid amount of that recovery, after deducting the amount of attorney fees pursuant to RCW 51.52.135, as a result of which interest of \$2,281.55 was paid to Mr. Allen. He also received reimbursement of \$533.39 for travel expenses and of \$757.28 for medical expenses incurred as a result of his industrial injury.

Mr. Taylor proposes that he be allowed to collect fees as follows:

<u>RECOVERY</u>	<u>ITEM</u>	<u>PERCENTAGE OF ATTORNEY FEE</u>	<u>MONETARY AMOUNT OF ATTORNEY FEE</u>
\$29,025.54	Time loss compensation between 10/28/83 & 3/26/86	30%	\$9,672.23
2,381.55	Interest	30%	500.12
533.39	Reimbursed Travel Expenses	30%	149.81
757.28	Reimbursed Medical Expenses	0%	<u>0.00</u>
\$32,697.76			Total: \$10,322.16

WAC 263-12-165(3) identifies compensation which may become payable to an injured worker, crime victim or beneficiary as the result of an appeal to this Board and sets forth parameters of attorney fees which may be deducted from such compensation. Since neither that WAC provision nor RCW 51.52.120 identify reimbursement of travel expenses as compensation from which an attorney fee may be deducted, we believe no such fee is authorized.

Additionally, we are convinced that it is unlawful to charge an attorney fee from interest awarded pursuant to RCW 51.52.135 on the unpaid amount of the award made as a result of the Board's final decision and order. The statute specifically requires that in calculating interest to be paid, the amount of attorney fees charged first be deducted from the amount of the unpaid award. Pursuant to our inquiry, on February 21, 1986, Mr. Taylor informed us that he would charge Mr. Allen a fee of 30% of time loss compensation recovered as a result of the appeal and we deducted a sum consistent with that fee from the gross time loss compensation recovery in calculating the amount on which interest would be paid. To allow a deduction for attorney fees from the interest actually paid would result in fees being twice charged from the same recovery.

1 That such a result was not the intent of the legislature is clearly illustrated by the following
2 exchange which occurred during the second reading of the bill which eventually became RCW
3 51.52.135:

4 SENATOR NEWHOUSE: "For the record, Senator Vognild, does the
5 attorney share in the interest amount that is provided on awards in either
6 the interest itself or in the award?"

7 SENATOR VOGNILD: "No, Senator Newhouse, the attorney fees are
8 deducted before the interest is computed and the interest goes to the
9 beneficiary or the employee."

10 Senate Journal, 48th Legislature (1983) at 987-988.

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13 In regulating execution of RCW 51.52.135, WAC 263-12-160(5) provides, in part: "Such interest shall
14 be paid in full to the worker or beneficiary." (Emphasis added.)

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16 We believe that the prohibition against charging a fee from interest paid pursuant to RCW
17 51.52.135 is clear and unambiguous.

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19 Having fully reviewed the record in this matter and having considered the nature of the appeal,
20 the novelty and complexity of the issues, the time and labor expended by Mr. Taylor in prosecuting the
21 appeal, the skill and diligence with which he conducted it, the extent and nature of the relief obtained
22 by Mr. Allen, the prevalent practice of charging contingency fees, Mr. Allen's circumstances and the
23 remedial nature of the Industrial Insurance Act, it is ORDERED that the sum of \$8,060.20 be, and the
24 same is hereby fixed as the fee payable by Floyd H. Allen to William H. Taylor for all legal services
25 rendered on the claimant's behalf before the Board in this appeal.
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29 It is so ORDERED.

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31 Dated this 2nd day of February, 1988

32 BOARD OF INDUSTRIAL INSURANCE APPEALS

33
34 /s/ _____
35 SARA T. HARMON Chairperson

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37 /s/ _____
38 FRANK E. FENNERTY, JR. Member

39
40 /s/ _____
41 PHILLIP T. BORK Member