DIVISION ONE
FILED: 01/20/2011
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID CHRISTIAN, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, RICHARD E. TAYLOR, Respondent Attorney, SCF ARIZONA, Respondent Carrier.	)	1 CA-IC 10-0036 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action--Industrial Commission

ICA CLAIM NO. 20061-250217

CARRIER NO. 0614256

Joseph L. Moore, Administrative Law Judge

AWARD SET ASIDE

David Christian, Petitioner — Marble Falls, Texas
In Propria Persona

Andrew F. Wade, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

James B. Stabler, Chief Counsel SCF Arizona — Phoenix
by John W. Main
Attorneys for Respondent Carrier

Taylor & Associates, P.L.L.C. Phoenix
by Roger A. Schwartz
Attorneys for Respondent Attorney

W E I S B E R G, Judge

¶1 David A. Christian ("Claimant") appeals from an award of attorney's fees to his attorneys, Richard E. Taylor and Peter Van Baalan, of 25% of his workers' compensation award for a five-year period. For reasons that follow, we set aside the award.

BACKGROUND

¶2 Claimant was injured while working for Rock Solid, Inc. and hired Van Baalan, an attorney, to represent him in September 2006. Van Baalan joined Taylor & Associates in 2007, and Taylor began representing Claimant in mid-2007. The claim was closed in September 2007, but in February 2009, Claimant filed a petition to reopen, which was denied. Claimant then filed a timely request for hearing, at which time he was no longer represented by counsel.

¶3 During the process of seeking to reopen his claim, in April 2009 Claimant asked Taylor and his firm to withdraw from further representation. Taylor and Van Baalan promptly filed a petition requesting attorney's fees incurred while representing Claimant and requested 25% of Claimant's proceeds over a five-year period. In the fee petition, Taylor listed his accomplishments, which included merging a later injury with the first one so that

all benefits were payable from the earlier date of April 18, 2006; handling the administrative processing of the claim; establishing a permanent impairment and loss of earning capacity ("LEC") by stipulation; and persuading the Special Fund to provide vocational rehabilitation training even though Claimant had moved to Texas. Taylor stated that he had begun receiving fees in September 2007 based on the LEC award.

¶4 The Industrial Commission entered its Findings and Award. The Commission noted that pursuant to Arizona Revised Statutes ("A.R.S.") section 23-1069(B), an attorney may receive up to 25% for a period of up to 5 years from the date of the award. It found that none of the tasks required litigation or significant discovery, that counsel had not provided an hourly breakdown of time spent, but that the claims file showed thirty hours of attorney time had been devoted to the case, for which the firm already had received $4,316.55. The Commission then considered a reasonable hourly fee for a certified specialist in workers' compensation law to be $125.00 and calculated a total reasonable fee of $3,750.00. Because counsel had already received $4,316.55 and given "no indication of additional expenditure of time on this case, no additional attorneys' fees, on an hourly basis, [were] warranted." The Commission declined to award any additional attorney's fees.

¶5 Taylor and Van Baalan requested a hearing in protest of the Findings and Award. Joseph L. Moore, an administrative law judge ("ALJ"), conducted a hearing on December 14, 2009. Taylor explained that his protest of the LEC award led to an increase from $385.80 to $557.34 and that he had sought approval for a change of doctors when Claimant moved to Texas; obtained supportive medical care and a labor market report; attempted (unsuccessfully) to secure a lump sum settlement; requested home exercise equipment; obtained out-of-state vocational rehabilitation in the amount of $28,568; filed a petition to reopen in order to obtain additional surgery; arranged for an independent medical examination in Phoenix and a re-evaluation by Claimant's orthopedic surgeon who found no need to reopen; and finally, moved to withdraw when no ground for reopening existed. Taylor stated that he did not document telephone calls or bill for his time but that he had had "frequent and lengthy" conversations with Claimant and as well as conversations with other parties on Claimant's behalf. Because of the contingent fee arrangement with Claimant, his request could not "accurately reflect the number of hours because there's no records kept."

¶6 Claimant testified that long periods of time had passed without any activity on this case and that counsel had misinformed him about his ability to obtain medical care in Texas so that he had had to return to Phoenix for surgery and therapy and to pay for

his living expenses while doing so. He noted that the vocational rehabilitation was for a school an hour's drive away and that without a vehicle, he had no means to attend school. He added that Taylor had offered to cease representation so that Claimant could receive his "whole check." When Taylor informed Claimant that he did not have "a connected back injury," even though Claimant's chiropractor thought so, Claimant decided that Taylor should not represent him if Taylor did not believe Claimant.

¶7 When asked about a $125 hourly rate, Taylor said that while representing employers for an hourly fee, he had charged $225.00, that he had thirty-nine years of experience, and that he was board-certified. He added that he had spent far more than thirty hours on this case over a three-year period. He stated that his offer to withdraw had occurred a year before he actually withdrew. In his opening brief, however, Claimant states that Taylor's offer to withdraw occurred during Claimant's attempt to reopen his claim and that neither party has conclusive proof of the offer's date.

¶8 In his award, Judge Moore observed that counsel had enlarged the work injury to include both shoulders and Claimant's neck, and thus the potential compensation; had increased the permanent partial disability entitlement ("PPDE") from $385.50 to $557.34 and had avoided any reduction due to "tip" earnings; and that Claimant did not dispute that counsel had spent "considerable

time in telephonic communication" and that such calls were "frequent and lengthy." The ALJ found that pursuant to A.R.S. § 23-1069(B) and the fee agreement, counsel would be entitled to 25% of Claimant's PPDE for five years, or a total maximum of $8,360.40.[1] The ALJ further found that the "award's estimate of the number of hours that should have been necessary to effect the results that were obtained . . . through [counsel's] efforts appears to be wholly arbitrary [and] . . . did not take into account the considerable efforts expended by [counsel] or the considerable expertise that [he] brought to the effort." Furthermore, "the Award failed to provide any insight as to how the Commissioners came to determine 'a reasonable hourly fee to be $125.00.'" Instead, the ALJ found a 25% fee award for five years to be "eminently reasonable, particularly when assessed in light of the present value of the current" disability award. The ALJ found that under the Commission's table of present values, the current capital value of all of the future disability awards if Claimant were to receive them and including those beyond five years, would be $142,000. An attorney's fee of $8,360.40 was less than 6% of that present value.

¶9 On April 21, 2010, the ALJ issued a Decision Upon Review pursuant to A.R.S. § 23-943(F) in which he clarified that the

[1]Twenty-five percent of Claimant's monthly $557.34 award would be $139.34. If counsel received $139.34 for sixty months, the fee would amount to $8,360.40.

$8,360.40 in attorney's fees was in addition to the $4,316.55 already paid to counsel, in which case the total fees would amount to $12,676.95 and exceed 25% of the PPDE for sixty months. Without acknowledgement that the award exceeded an award of 25% for five years, the ALJ affirmed the Decision Upon Hearing and the attorney's fee award.

¶10 Claimant seeks our review of the ALJ's initial Decision Upon Hearing award setting attorney's fees and the Decision Upon Review. We have jurisdiction pursuant to A.R.S. § 23-948 (1995).

DISCUSSION

¶11 On appeal, Claimant essentially asks for a refund of all of the attorney's fees he has paid to date because he is "still injured and the attorney [is] telling me that my doctor can't touch my back because that's not my injury." He also states that "[t]he job isn't finished yet he wanted to call it done." Claimant cites no law or case that permits us to order a refund of attorney's fees when counsel has performed numerous services over a substantial period of time and when those services resulted in a significant increase in the disability award.

¶12 Claimant also asserts that the ALJ stated at the hearing that Taylor had done "very little and was overpaid." The hearing transcript, however, does not reflect these remarks. At the beginning of the hearing, the ALJ did summarize the law authorizing

an attorney's fee award and the decision of the Commissioners. Thus, we cannot overturn the fee award on this basis.

¶13 Nevertheless, it is well established that because counsel sought the Commission's authority to impose a fee award, "the Commission is not bound by any contractual arrangement between attorney and client." *Sanchez v. Indus. Comm'n*, 137 Ariz. 518, 520, 672 P.2d 183, 185 (1983). It is also well established that when this court reviews an Industrial Commission award, we view the evidence "in a light most favorable to sustaining the award." *Univ. of Ariz. v. Indus. Comm'n*, 136 Ariz. 365, 367, 666 P.2d 465, 467 (1983). Here, however, the attorney's request for an award asked only for 25% for five years. Thus, there is an inconsistency between the ALJ's finding that the requested fee award of 25% for five years was "eminently reasonable" and his later finding that counsel should receive $8,360.40 in addition to the $4,316.55 already received, which would result in a fee award in excess of 25% for five years. Only one possible inference may be drawn from the ALJ's finding that, consistent with § 23-1069(B), counsel should receive an award of 25% of Claimant's PPDE for five years, and that is an attorney's fee award that totals $8,360.40. *See Micucci v. Indus. Comm'n*, 108 Ariz. 194, 195, 494 P.2d 1324, 1325 (1972) ("[T]his court will not negate a fact finding of the Commission unless the evidence is such that there is but one possible inference to be drawn.").

¶14 Accordingly, we set aside the Decision Upon Review Affirming, as Supplemented, Decision Upon Hearing and Findings and Award, and Order Setting Attorney's Fees.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

/s/_____
DIANE M. JOHNSEN, Judge