

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID JOSLIN,  
and  
MERIDIAN INSURANCE COMPANY,  
Petitioners,  
vs.  
TERI HIGGINS, widow of  
TIMOTHY J. HIGGINS,  
Respondent.

File No. 5009837

A P P E A L  
D E C I S I O N

Head Note No.: 3400

**FILED**  
JUL 23 2009  
WORKERS' COMPENSATION

This is an appeal by the employer, David Joslin, and Meridian Insurance Company from an attorney fee decision filed July 30, 2008 and a subsequent ruling on motion for reconsideration filed September 3, 2008. In the decision and ruling, the presiding deputy commissioner ordered appellants to pay attorney fees to Teri Higgins for collecting defendants' share of settlement moneys from a third-party tortfeasor.

The record, including the transcript of the hearing before the presiding deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

ISSUES ON APPEAL

I. Whether the presiding deputy erred in awarding attorney fees to claimant for indemnity recovered by claimant's attorney in a third-party settlement over and above an amount previously allocated by this agency for attorney fees and deducted from the indemnity amount.

II. Whether the presiding deputy erred in denying a request to lower weekly benefits to allow for payment of appellants share of the settlement proceeds.

## ISSUE ON CROSS APPEAL

- A. Whether the presiding deputy erred in failing to award interest.

### FINDINGS OF FACT

Timothy J. Higgins died as a result of an injury arising out of and in the course of his employment with David Joslin, defendant-appellant on November 15, 1999. Joslin's workers' compensation insurance carrier at that time was defendant-appellant, Meridian Insurance Company. Since his death the decedent's surviving spouse, Teri Higgins, claimant, has received weekly benefits in the amount of \$411.54 from defendants.

Teri Higgins also received the proceeds of a third-party settlement. On July 28, 2000, the Iowa District Court approved the settlement of a wrongful death suit by claimant against a third party for \$525,000.00. Under the terms of this settlement, \$400,000.00 was allocated for loss of consortium, \$5,906.49 was allocated for funeral and burial expenses, and the remainder of \$119,093.51 was allocated to the estate of the decedent. The payment terms consisted of an initial \$225,000.00 cash payment to Teri Higgins and the balance paid in a structured payment with the purchase of an annuity that paid \$1,835.63 to her each month beginning September 15, 2000 and continuing each month thereafter until Teri Higgins reached the age of 65, at which time she would receive a final lump sum payment of \$300,000.00.

This record does not show that defendants participated in the third-party suit or the resulting settlement. Apparently, claimant and defendants could not agree to payment of the employer's lien upon the settlement proceeds and a proceeding to allocate the proceeds was initiated. What is unclear in the record of this case is how the claimant was able to get the third-party insurer to pay the settlement without approval by Joslin and Meridian. Regardless, claimant paid the attorney fees (30 percent) to her counsel on the entire settlement of \$525,000.00 from the first lump sum amount and received a net amount of \$67,500.00 from the initial \$225,000.00 cash payment.

On March 31, 2006, the same deputy that issued the attorney fee decision now on appeal issued a decision to allocate the proceeds of the third-party settlement to defendants. The deputy ruled at that time that absent any evidence to the contrary, the amount of defendants' indemnification from the settlement proceeds shall be \$83,356.76 plus interest. The deputy also ruled that in light of this allocation, claimant was not entitled to weekly benefits from the date of death to July 13, 2003 and weekly benefits would begin again on July 14, 2003. The deputy arrived at the allocated amount by deducting the 30 percent for attorney fees (\$35,735.75) from the amount allocated in the settlement to the estate or \$119,093.51. The deputy did not perform any interest calculations despite awarding interest on the allocated amount.

Despite reducing claimant's liability for the indemnity amount allocated to defendants by the amount of the fees paid by claimant to her attorney for collecting that amount, the deputy went on to state in that decision that attorney fees will still be owing on the allocated amount, \$83,356.76. However, the deputy was not asked to determine the fees. There was no further explanation for this statement in that decision. This allocation decision was not appealed by either party and no rehearing request was filed to seek explanation for the language concerning attorney fees.

The defendants then sought a judgment against claimant based on the final allocation decision. The district court on March 19, 2007 ordered claimant to pay the \$83,356.76 plus interest as specified. The court declined to address the attorney fee issue stating as follows:

Finally, Defendants raise the issue of applicable attorneys' fees in this case. The agency decision explicitly stated that the "parties did not ask the deputy to determine the amount of those fees. Thus no decision is made on this question." See Deputy's Decision, p. 8. Consequently, the Deputy's Order does not address the attorney fee issue at all. Id., p. 9. Without a ruling on this issue by the agency, the Court is without authority to enforce or construe the Deputy's ruling under Iowa Code section 86.42. Entering an award of attorney fees which the parties did not ask the Deputy to determine would, in effect, be modifying or amending the Deputy's decision. Section 68.42's [sic] directive that the "court shall render a decree or judgment" does not allow the court to decide issues not decided by the agency.

(Ruling, Pages 4-5)

Again, claimant refused to pay or at least agree to payment terms and defendants apparently did not pursue collection proceedings against her. Claimant then filed an application with this agency to determine attorney fees due and owing and defendants filed an application for special order to reduce the amount of weekly benefits being paid to the claimant as a means to receive their allocated share of the settlement proceeds.

After hearing on the two applications, the presiding deputy ordered Meridian to pay to claimant attorney fees in the amount of 30 percent of \$83,356.76 and 30 percent of the interest on accrued weekly benefits for the time period of the reimbursement. This was done despite the fact that claimant had not paid any portion of defendants' allocated portion of the settlement proceeds. The deputy declined to lower the weekly benefits on ground that the agency lacks authority to enforce the lien in that manner.

From review of the transcript it is apparent that counsel for both parties have remained professional and cooperative in relationship to the seriousness of the legal

questions at issue. The parties appear to want a resolution that is in accordance with the subrogation rights of defendants and within the financial ability of Ms. Higgins. That resolution may need to come from an agreement between the parties, not an order of this agency as this agency ruled on the rights and obligations of the parties in March 2006. From the time of that decision, the agency has no discretion in terms of dictating how the judgment is ultimately repaid. Although I ultimately disagree with the findings of the presiding deputy, the deputy did more than an admirable job with tough legal questions. As the deputy stated on page 28 of the transcript, there is a range of potential risk in this matter. Her advice to counsel to find a workable solution between their clients is shared by the undersigned.

### CONCLUSIONS OF LAW

The presiding deputy was correct in the attorney fee decision that Iowa Code section 86.39 on its face does not provide authority to this agency to approve attorney fees in third party lawsuits in the district court. That authority is within the sole province of the district court. The only authority of the agency concerning such fees would arise from our authority to allocate monetary recoveries from third party lawsuits to enforce the indemnity provisions of Iowa Code section 85.22. Mata v. Clarion Farmers Elevator Coop., 380 N.W.2d 425, 429 (Iowa 1986); Allen v. Allen Water & Wastewater, 549 N.W.2d 516, 619 (Iowa 1996). Workers' compensation insurers are to be indemnified from third party lawsuit proceeds for the weekly benefits paid to an injured worker or the worker's dependants to the extent the payment was made, less any attorney fees as may be allowed by the district court. Iowa Code section 85.22(1). If this agency is asked to determine the amount of the indemnity under that Code section, then Iowa Code section 86.39 subjects the indemnity amount to this agency's approval of any attorney fees charged in connection with amounts allocated by the agency to the employer or its workers' compensation carrier.

It is ultimately concluded in this matter that the presiding deputy erred in awarding to claimant additional attorney fees, over and above the amount already deducted from the allocated indemnity sum for attorney fees in the March 31, 2006 decision.

First, this agency lacks authority to issue a decision that is subject to review and change at a later date other than a review and reopening of an award of weekly compensation payments pursuant to Iowa Code section 86.14 or agreement for settlement as provided by section 86.13. In this case, the March 31, 2006 decision determined the amount claimant was to pay to defendants out of the proceeds of the settlement pursuant to the indemnity provisions of Iowa Code section 85.22(1). That amount was arrived at reducing from the amount allocated to the decedent's estate by the attorney fees already paid. That decision, after 20 days, became final and not subject to review or reopening, despite the language in the decision that this amount could be subject to further attorney fees. This was in essence the decision of the district

court of March 19, 2007, in not considering any further reduction in the allocated amount in the final decision of March 31, 2006 because the agency did not issue any ruling on the attorney fees. The court went on to enter a final judgment for that amount plus interest. The deputy's decision to further reduce that allocation with additional attorney fees is improper as it attempts to amend that final allocation decision and the final judgment of the district court. The district court judgment is the law of this case and this agency has no authority to change it.

Second, even if this agency should have some sort of additional authority to approve new fees, it is simply unreasonable to require defendants to pay a double attorney fee on their allocated share of the settlement proceeds and to provide claimant with a double recovery of attorney fees. The prevention of double recovery is one of the primary reasons for enacting Iowa Code section 85.22(1) Lawyer & Higgs, Iowa Practice-Workers' Compensation, 2008-2009, Section 29.1, p. 334 and cases cited therein.

Finally, I agree with the presiding deputy that this agency does not have authority to suspend or reduce weekly benefits to enforce the indemnity provisions of Iowa Code section 85.22(1). Shirley v. Pothast, 508 N.W.2d 712, 718 (Iowa 1993). Arguably, there has been an overpayment of weekly benefits to claimant. However, Iowa Code section 85.34(5) provides that the only credit that can be given to an employer for overpayments is on future weekly benefits for a subsequent injury to the same employee. Obviously that is not possible in this case. The parties can mutually agree on provisions for repayment, but such an agreement must be voluntary and cannot be mandated by the employer or this agency. Additionally, weekly compensation benefits are exempt from execution. Iowa Code section 627.13.

This agency appreciates the frustration of the employer in obtaining payment from claimant for the indemnity amount. While there may be other collection options, this agency is not charged with the responsibility of assisting parties in collecting a district court judgment.

#### ORDER

IT IS THEREFORE ORDERED THAT the attorney fee decision of July 30, 2008 is REVERSED and the following is ordered:

The request for attorney fees is denied.

The request for a special order to suspend or reduce weekly benefits to claimant is denied.

Each party shall pay its own costs of this matter, including sharing equally in the costs of preparing the hearing transcript.

Signed and filed this 23<sup>rd</sup> day of July, 2009.

  
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CHRISTOPHER J. GODFREY  
WORKERS' COMPENSATION  
COMMISSIONER

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