BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEREMY HARRIS, Claimant, vs. CRST EXPEDITED, INC., Employer, and AIG INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5051280 ATTORNEY FEE DECISION

STATEMENT OF THE CASE

This is a contested case proceeding brought by Martin Ozga, attorney of Jeremy Harris, against Erik Luthens, a former attorney who represented Mr. Harris, to resolve a dispute over attorneys' fees between both of these attorneys arising from a claim for Iowa workers' compensation benefits by Jeremy Harris against CRST Expedited, Inc., employer, and its insurer, AIG Insurance Company, for an alleged work injury on July 3, 2014.

Prior to hearing, attorney for CRST Expedited filed a Motion for Summary Judgment. While the Motion for Summary Judgment was denied, the parties agreed and I ruled that the employer and insurance carrier are not involved in this attorney fee dispute and were not required to appear for hearing. On September 6, 2018, a hearing was held on this attorney fee dispute.

Oral testimony was received at hearing from both attorneys. The claimant did not participate. The record in this matter is voluminous. Attorney Luthens submitted Exhibits AA through KK. Attorney Ozga submitted Exhibits 1 through 43. Attorney Luthens sought to submit records of various communications with the claimant which were excluded. Administrative notice was taken of the agency file. Following hearing, Attorney Ozga retired from the practice of law and a partner, Jason Neifert filed an appearance.

The parties in interest, Jeremy Harris, Martin Ozga and Erik Luthens will be referred to in this decision by their last names.

ISSUE

Reasonable apportionment of attorney fees under Iowa Code section 86.39 (2017).

FINDINGS OF FACT

Harris suffered an injury to his low back and right knee on July 3, 2014, in a serious trucking accident. Claimant was a passenger in a truck which was rolled by his co-driver. Defendants provided treatment to Harris. Eric Loney filed a petition on behalf of Harris and hearing was set. Prior to hearing, the case was voluntarily dismissed and then refiled in January 2016. Loney withdrew from the case in March 2016, and Luthens subsequently appeared in the same month.

Luthens and Harris entered into a one-third contingent fee contract for attorney fees. (Luthens Exhibit A-A) The contract specified that if Harris terminated Luthens:

> Client agrees to pay Office a fee based on the fair and reasonable value of the services performed by the Office before termination at the greater of: (1) Office's time involved billed at the rate of two hundred fifty dollars ($250.00) per hour; or, (2) contingency fee of the last settlement offer at applicable percentage identified in paragraph 1 herein: "FEE (contingent)."

(Luthens Ex. A-A, p. 3)

Hearing was then set for April 12, 2017. The matter proceeded, although Harris did not reach maximum medical improvement (MMI) and was still in an active healing period during this time. In reality, Luthens could perform very little meaningful work during this period of time because the case was not ripe. On March 13, 2017, Luthens moved to continue the hearing because Harris was not at MMI. The motion was granted and the parties were instructed to appear before the deputy commissioner for a prehearing status conference in July 2017. On June 7, 2018, Harris terminated Luthens as counsel. (Luthens, Ex. B-B, p. 1588) On June 8, 2018, Luthens notified defense counsel that he had been terminated as well as Luthens's attorney fee lien under Iowa Code section 602.10116 approximating $75,000.00. (Luthens Ex. B-B, p. 1600) On June 20, 2017, Luthens filed a motion to withdraw, indicating that the claimant wished to terminate his services. (Ozga Exhibit 1; Luthens Ex. B-B, p. 1588) The motion was granted on June 26, 2017.

Ozga and Harris entered into a contingent attorney fee agreement on June 30, 2018, wherein Ozga agreed to accept 30 percent of the recovery. (Ozga Ex. 4) On July 5, 2017, Ozga filed an appearance on behalf of Harris. (Ozga Ex. 3) Hearing was set for June 25, 2018. On July 7, 2018, Luthens provided Ozga with Harris's complete file as well as the notice of attorney fee lien in the amount of $42,125.00 (plus costs). (Luthens Ex. D-D, pp. 1-5)

In March 2018, Ozga filed a motion to allow the claimant to appear through CourtCall, the agency's videoconference provider. The motion was granted on April 16,

2018. In June 2018, defendants moved to compel the deposition of claimant's vocational expert or alternatively to continue the hearing. Ozga timely resisted. The agency denied the continuance and ruled that the record would be left open to take the vocational expert's deposition. In May 2018, Luthens wrote Ozga again, inquiring as to the status of his attorney fee lien. (Luthens Ex. D-D, p. 9-11)

Ozga settled Harris's claims with the defendants on June 22, 2018. Ozga compromised his contractual attorney fee, and agreed to accept less than the 30 percent amount set forth in the agreement. He compromised his contractual fee by an additional $12,500.00, in order to ensure that the matter was resolved. (Luthens Ex. D-D, p. 12) He notified Luthens of the settlement on June 26, 2018. (Luthens Ex. D-D, p. 12) In that email, Ozga attempted to open discussions to resolve the issues of Luthens' attorney fees. "Please provide me with a reasonable fee demand in light of the circumstances and we will try to determine if there is a means of settling this without having to go before the commissioner." (Luthens Ex. DD, p. 12) Luthens responded the same day and inquired as to whether Harris would voluntarily satisfy the outstanding attorney fees owed. (Luthens Ex. D-D, pp. 13-19) It appears Luthens had no interest in compromising the amount of his hourly attorney fees at all. Based upon the record before the agency, Ozga did not respond to any of these inquiries, other than providing the notice of the settlement on June 26, 2018.

The settlement was approved by the agency on July 17, 2018. The settlement provided that claimant would receive $173,920.20 and that defendants would request approval of a Medicare Set Aside and either fund the MSA or continue paying for medical treatment. (Ozga Ex. 6) On July 6, 2018, Luthens filed a notice of attorney fee lien in the amount of $41,125.00. On July 23, 2019, Ozga filed a petition for equitable apportionment of attorney fees.

Luthens represented Harris from March 2016 through June 2017. Ozga represented Harris from July 2017 through the July 2018, settlement. Both attorneys provided itemized attorney fee statements which document the time they put into this case. (*Compare* Luthens Ex. H-H to Ozga Exs. 7-8)[1] Both attorneys undoubtedly spent significant and substantial time on this file.

Based upon the testimony from both attorneys, as well as the remaining record in this case, it is evident that Harris was a challenging client. Harris did not testify at hearing and I do not wish to unfairly disparage him, however, this is likely an understatement. Harris, who resided in Florida, would often email his attorney multiple times per day. He was obviously frustrated with his entire situation. His injuries were significant and his treatment was lengthy. His tone was demanding and, it appears, often unreasonable. This created a situation where both attorneys, during their

[1] Luthens documented 164.5 hours on the claim, while Ozga documented 253.6 hours. Much of both attorneys' time was spent communicating with the client. This is particularly true for Luthens who was unable to fully work the case up during his representation due to the fact that Harris was not at MMI.

respective periods of representation, put in many more hours than were probably ordinarily necessary to pursue such a claim.

CONCLUSIONS OF LAW

When attorney fees are at issue due to a dispute, attorneys, not their clients, have the burden of establishing before this agency by a preponderance of the evidence that their fees are reasonable and should be approved. This burden arises from the ethical requirements of the legal profession. Attorneys may only charge and assert reasonable fees for their services. Iowa Rules of Professional Conduct, rule 32:1.5. This agency's authority over such disputes arises from Iowa Code section 86.39 which provides as follows:

> All fees or claims for legal, medical, hospital, and burial services rendered under this chapter and chapters 85, 85A, 85B, and 87 are subject to the approval of the workers' compensation commissioner.

Resolution of an attorney fee dispute involves two inquiries into the reasonableness of an attorney's activity. The first consideration is the reasonableness fee agreement. The second consideration involves the reasonableness of the fee charged pursuant to that agreement.

We are dealing with two contingency fee arrangements by two separate attorneys in which the fee is based upon a percentage of the recovery, rather than upon time expended by the attorney. What makes this case challenging is that Luthens had an additional provision in his contract entitling him to a fee based upon his hours worked in the event of his termination. Luthens likely included this provision in his contract for difficult or unreasonable clients. Harris did terminate Luthens after the attorney-client relationship broke down. Luthens then demanded his entire hourly fees and even prepared an attorney fee lien under Iowa Code section 602.10116.[2]

Contingency fees have been long accepted in proceedings before the courts and administrative agencies as a means to provide representation to people who may not have the financial resources to retain an attorney on an hourly basis. Rules of Professional Conduct, rule 32.1.5(c). Such contingent fees are still subject the reasonableness standard set forth in Section 86.39. Rules of Professional Conduct rule 32.1.5, comment [5]. However, despite ethical acceptance of such fee agreements and regardless of the embodiment of the fee agreement in written form, such agreements are not binding upon a tribunal reviewing of the appropriateness of the resulting fee. Kirkpatrick v Patterson, 172 N.W.2d 259, 261 (Iowa 1969). In Kirkpatrick, the Court stated that a one-third contingent fee contract may be reasonable but any determination

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[2] Prior to 2000, the agency used to require attorneys to secure pre-approval of the amount of a lien before it could be enforceable. Iowa Code section 86.39 was amended in 2000, eliminating the requirement of prior approval. Thus, under Section 86.39, attorney fees are awarded at the discretion of the agency.

must be based upon the facts and circumstances of a particular case. The court listed the appropriate factors, which have a bearing on the reasonableness of the fee. These factors are time spent, the nature and extent of the services, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and the result obtained, as well as the professional standing and experience of the attorney. Id at 261.

Although the various evaluating factors are different for each case, this agency has in the past-approved one-third contingency fee arrangements when appropriate. See Francis v Ryder Truck Rental, IV Iowa Industrial Comm'r Reports 129 (App. September 30, 1983). This agency, based upon my research, has never specifically affirmed the reasonableness of a contingency fee contract which transforms into an hourly agreement upon the termination of the attorney by the client.

I am sympathetic with the positions of both attorneys and, for this reason, I find this case challenging. At hearing and in his brief, Ozga argues that the fees should be apportioned primarily based upon the hours put into the case. He is not arguing that Luthens should be paid nothing for the work he performed on the case, he simply argues that it would be unreasonable to allow Luthens to collect his entire hourly fee. Ozga requested a 60/40 split of the compromised fee. This argument is sound and logical. Luthens, on the other hand, demanded his entire fee on an hourly basis, which is more than the total fee collected by Ozga. Unfortunately, Luthens never attempted to engage in reasonable negotiations to resolve the matter. The reason I am sympathetic to Luthens' position, is that I believe him that he performed the work he claimed. He appears to have responded timely to Harris's communications. For a year he almost constantly advised and counseled Harris. This is tiresome, necessary work of an attorney for injured workers. Counsel for injured workers must spend significant time, even in the easiest cases, reassuring their clients and answering their inquiries. This type of work can be emotionally exhausting and professionally frustrating when addressing more challenging or less reasonable clients. Dealing with demanding, difficult and needy clients is a significant challenge for those who represent injured workers. It, however, comes with the territory. It, however, would be particularly unfair to allow an injured worker to exhaust an attorney with difficult and unreasonable legal work for a year, terminate his services, and not pay the fair value of his services. The question is, what is the fair value of Luthens' services for his year of representation?

I reject the assertion of Luthens that he is entitled to his fully hourly rate for all the hours he worked on the case. I find this assertion to be unreasonable. I find the fee to be unreasonable, utilizing the factors set forth in the law cited above, including the ultimate outcome of the settlement. While there is no doubt with this record that Harris was a challenging client, Luthens must accept some responsibility in the breakdown of the attorney-client relationship.

While I appreciate Ozga's position, I am primarily concerned about his failure to keep Luthens informed about the settlement. Ozga, without consulting Luthens (who was claiming a $41,500.00 attorney fee lien), agreed to compromise his fee by $12,500.00 (more than 20 percent). He did not notify Luthens of this development until

after the settlement was completed. While Ozga did not specifically state it, he likely agreed to this in order to bring the claim to resolution in order to satisfy his difficult client. Nevertheless, this boxed Luthens (and the agency) in on his claim for attorney fees. In other words, Ozga effectively attempted to cap the amount of attorney fees which could be recovered by either attorney. On the one hand, this was undoubtedly in his client's best interest.[3] On the other, it likely contributed to the increased distrust between counsel which led to the inability to resolve the fee issues without the involvement of the agency.

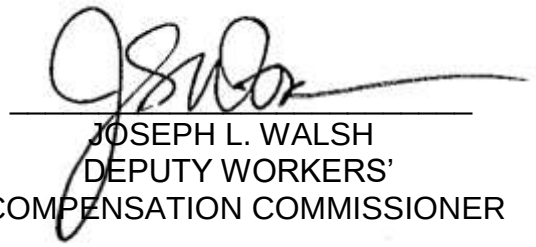
Utilizing all of the appropriate factors to determine the reasonableness of the attorney fees, I find that the reasonable total attorney fee which should be awarded is 30 percent of the amount of the total settlement, or $52,176.06. This attorney fee should be split between the attorneys. I agree with Ozga's assertion that a reasonable split of the attorney fees, based upon the work performed, including the amount of time the work was performed and the ultimate outcome of the case is 60 percent to Ozga and 40 percent to Luthens. This would entitle Ozga to a fee of $31,305.64 and Luthens to a fee of $20,870.42.

ORDER

1. Ozga is entitled to a reasonable fee of thirty-one thousand three hundred five and 64/100 dollars ($31,305.64).

2. Luthens is entitled to a reasonable fee of twenty thousand eight hundred seventy and 42/100 dollars ($20,870.42).

Signed and filed this __9th___ day of January, 2020.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason Neifert (via WCES)

Erik Luthens (via WCES)

[3] Ozga has indicated, both at hearing and in his brief, that he will be reducing his fees by the amount of whatever fee is awarded to Luthens.

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.