Stephen T. Kessman

Public Reprimand No. 2014–5
Order (public reprimand) entered by the Board May 16, 2014.

Summary[1]

In April 2003, an impartial medical examiner (IME) examined the respondent's client, who had been receiving permanent and total disability payments since 1998. The IME wrote in his report that with continued treatment the client could "hopefully return to some form of employment in the future." In September 2003, based on the IME's report, the client's insurer filed a complaint with the Department of Industrial Accidents (DIA) seeking to discontinue the client's total and permanent disability payments. The complaint alleged that the client was capable of working part-time and was no longer totally disabled. The respondent represented the client in the matter.

On September 29, 2003, after hearing, an administrative judge issued a decision that the client could perform part time work and therefore had some earning capacity. He ordered that the client's total disability payments be discontinued retroactive to April 29, 2003. Based on the respondent's advice, the client appealed the decision.

On October 22, 2003, the respondent and the client entered into a written contingent-fee agreement that identified the matter for which the services were to be provided as the "prosecution of an appeal to the Reviewing Board of the Massachusetts Department of Industrial Accidents" of the September 29th decision discontinuing the client's total disability payments. The fee agreement required the payment of $200 an hour contingent upon the client prevailing in the appeal.

On July 28, 2005, after the parties had filed their respective appeal briefs, a DIA reviewing board found that the decision to terminate the client's total disability payments was error and reinstated the client's benefits retroactive to April 29, 2003.

Under G.L. c. 152, § 13(A)(7) when an "employee appeals a decision of an administrative judge and the employee prevails in the decision of the reviewing board, the employer shall pay an attorney's fee sufficient to defray the reasonable costs of counsel retained by said employee. Subject to the approval of the reviewing board, such fee shall be an amount agreed to by the employee and the attorney." The respondent, who had represented employees in workers compensation matters, should have known that he had to obtain the approval of his fee from a DIA reviewing board.

[1] Compiled by the Board of Bar Overseers based on the record of proceedings before the board.

By letter dated August 16, 2005, the respondent sent the client an itemized bill for work done on the matter. The respondent's bill identified slightly more than 215 hours of work at the rate of $200 an hour, for a total fee plus expenses of $43,173.36. The respondent did not submit his bill to a reviewing board for approval.

Between August 22, 2005 and March 30, 2012, the client paid the respondent a total of $21,883.36. By letter dated July 24, 2012, the client's new counsel wrote to the respondent that because the respondent had failed to obtain the approval of his fee by a DIA reviewing board, the client intended to seek reimbursement of the payments made to the respondent.

On August 15, 2012, the respondent filed with the DIA a pleading captioned "Motion for Approval of Attorney Fees." The respondent claimed that it was through "inadvertence" that he had failed to seek approval of his fee. On August 24, 2012, the client's counsel filed with the DIA an opposition to the respondent's motion. A hearing was held before a panel of three administrative judges on September 4, 2012.

On September 6, 2012, a decision was filed with the DIA in which the judges found that the respondent's fee was "wildly beyond any reasonable expectation for the billing of similar tasks before the board, and also the request is untimely (i.e. seven years later) and that the total amount billed is exorbitant and unconscionable." The respondent was ordered to reimburse the client within fourteen days of all amounts paid to him, plus interest of 10% per annum from July 24, 2012 to the date of payment. On September 20, 2012, the respondent sent the client a check in the amount of $24,704.78.

The respondent's failure to know that he was required to file for approval of his fee with the DIA violated Mass. R. Prof. C. 1.1, 1.2 and 1.3. The respondent's charging and collecting an excessive fee violated Mass. R. Prof. C. 1.5(a).

The matter came before the Board of Bar Overseers on a stipulation of facts and rules violations and a joint recommendation that a sanction of a public reprimand be imposed. On April 28, 2014, the board voted to accept the stipulation of the parties and to administer a public reprimand to the respondent.