COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 026064-04

Eduardo Cordeiro	Employee
New England Specialized Concrete	Employer
Meadowbrook Insurance Co.	Insurer
Ellis & Associates	Third Party Claimant/Appellant
Law Offices of Alan S. Pierce & Associates	Respondent

REVIEWING BOARD DECISION

(Judges Fabricant and McCarthy)[1]

APPEARANCES

Judson Pierce, Esq., for Law Offices of Alan S. Pierce & Associates
Jonathan Harris, Esq., for Ellis & Associates at hearing
James N. Ellis, Esq., for Ellis & Associates on brief
Matthew Gendreau, Esq., for Ellis & Associates at oral argument

FABRICANT, J. Employee's successor counsel, Ellis & Associates (Attorney Ellis), appeals from an administrative judge's decision ordering the insurer to distribute a portion of the attorney's fee, held in escrow from a § 48 lump sum settlement, to employee's prior counsel, the Law Offices of Alan S. Pierce & Associates (Attorney Pierce). For the following reasons, we affirm the decision.

The relevant facts do not appear to be in dispute.[2] Following his industrial injury on August 18, 2004, the employee retained the Law Offices of Alan S. Pierce & Associates.

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[1] Administrative Law Judge Horan presided over the lump sum settlement conference on this matter and has recused himself from the panel deliberations on this appeal.

[2] Although at hearing the parties entered into no stipulations, and no testimony was taken, their hearing briefs reflect no fundamental disagreement on the facts. See Maxwell v. North Berkshire Mental Health, 16 Mass. Workers' Comp. Rep. 108, 110 (2002)(judge took no testimony at hearing in attorney's lien case); McCafferty v. P.J. O'Donnell Co., 9 Mass. Workers' Comp. Rep. 46 (1995)(judge recognized no facts in dispute and issued decision without taking testimony).

Attorneys from that firm performed certain legal services on behalf of the employee, including meeting and corresponding with the client, corresponding with the insurer, submitting prescriptions to the insurer for reimbursement on the employee's behalf, and writing to OSHA with respect to potential third party or double compensation claims. (Dec. 9-10; 3-4; Attorney Ellis br. 1; Attorney Pierce br. 2.) However, Attorney Pierce does not maintain that his firm filed any claims on behalf of the employee or otherwise "appeared" for him at the Board.[3] (Dec. 9-12.)

On or about December 30, 2004, the employee discharged Alan S. Pierce and Associates, and retained Ellis and Associates to represent him. On or about February 17, 2005, Attorney Pierce filed a notice of lien for legal representation of the employee.[4] (Third Party Claim/Notice of Lien, [D.I.A. Form 115], dated February 17, 2005.) Ellis and Associates filed claims for § 36 specific compensation and for § 30 medical benefits. The employee and the insurer subsequently agreed to a lump sum settlement in the amount of $100,000. At the lump sum conference on February 21, 2006, Attorney Ellis presented a settlement agreement which allocated $10,000 for an attorney's fee, with $9,500 to go to Attorney Ellis, and $500 to go to Attorney Pierce pursuant to his lien. Attorney Ellis had not received Attorney Pierce's assent to allocate this sum, nor did he claim or argue either that Attorney Pierce did not have a valid lien, or that he was not entitled to any part of the attorney's fee set aside from the settlement proceeds. Indeed Attorney Ellis's drafting of the settlement papers with a $500 allocation to Attorney Pierce is directly contrary to both arguments. Moreover, Attorney Ellis did not object to the administrative law judge's order that the fee be held in escrow pending the resolution of the dispute, nor did he argue that it was improper to do so. Accordingly, the administrative law judge approved the

[3] The Board file reflects that the insurer paid the employee § 34 total incapacity benefits pursuant to a Form 103, Insurer's Notification of Payment, which was received by the Board on September 3, 2004. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in the board file). Attorney Pierce does not argue that his office was instrumental in securing this initial weekly payment.

[4] Attorney Pierce does not now argue, nor did he argue at hearing, that he is entitled to an attorney's fee pursuant to c. 221, § 50. Rather, he argues he is entitled to compensation for the reasonable value of the services rendered to the employee prior to his discharge. Cf. In the Matter of the Discipline of an Attorney, 451Mass. 131 (2008)(public assertion of a lien on a client's potential recovery when lawyer knows he has no right to assert such lien because he has not appeared in any action or initiated any other type of legal proceeding on behalf of clients, is a misrepresentation and is dishonest).

settlement, but the attorney's fee of $10,000 was held in escrow pending resolution of the attorney's fee issue.

Subsequent to the approval of the lump sum settlement, Attorney Ellis filed a third party claim asserting entitlement to 100% of the $10,000 fee being held in escrow. (Third Party Claim/Notice of Lien, [Form 115], dated March 7, 2006.) Following a § 10A conference, the administrative judge ordered the insurer to pay Attorney Pierce $1,500, and Attorney Ellis $8,500, from the escrowed fee. Only Attorney Ellis appealed to a hearing de novo. (Dec. 2.) Without taking testimony, but following the submission of briefs, the judge issued a decision adopting the "facts as set out in prior counsel's memorandum." (Dec. 12; see footnote 1, *supra*.) Attorney Pierce did not argue that he fulfilled the statutory requirements for filing an attorney's lien, but rather that he is entitled to a fee for the reasonable value of his services on a quantum meruit basis. The judge ordered the insurer to distribute the $10,000 fee, with $8,000 going to Attorney Ellis, and $2,000 to Attorney Pierce. (Dec. 13.)

Again, only Attorney Ellis appealed. In his brief, he argues the judge's decision is contrary to law because Attorney Pierce did not satisfy the requirements of the attorney's lien statute, G. L. c. 221, § 50.[5] Notwithstanding his initial challenge of the award on the ground that the amount ordered paid to Attorney Pierce was inconsistent with the work

[5] General Laws c. 221, § 50 provides:

> *From the* authorized commencement of an action, counterclaim or other proceeding in any court, or *appearance in any proceeding before any state* or federal department, *board* or commission, the attorney who appears for a client in such a proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the *provisions of this sentence shall not apply to any case where the method of determination of attorneys' fees is otherwise expressly provided by statute*.

(Emphasis added.)

performed by him, at oral argument both parties stipulated that $2,000 was the fair value of the services rendered by Attorney Pierce's office. Therefore, the only issue remaining is whether the judge's decision awarding *any* portion of the legal fee to Attorney Pierce is contrary to law.

In Maxwell, *supra*, we held that G. L. c. 221, § 50, applies to proceedings before the board. It "gives an attorney the right to assert a lien, and, when read in conjunction with c. 152, § 13A, gives jurisdiction to the board to determine its amount. . . ." Id. at 113-114. To satisfy the prerequisites for the assertion of a lien under this statute, an attorney must make an "appearance in [a] proceeding before [the] . . . . board." Id. at 111, n.4.

The statutory grant of the right to file a lien to the attorney "appearing for a client" reflects a legislative judgment that such an appearance indicates that the attorney is expending services and skills in furtherance of the client's interest. Both the signing of motions and the filing of a notice of appearance indicate that an attorney is participating in the litigation of the case.

Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 248 (1993).

There is no dispute that Attorney Pierce did not satisfy the prerequisites for asserting a lien under c. 221, § 50, as he did not file a claim or otherwise make an appearance before the board. Nonetheless, Attorney Ellis's argument fails to consider the procedural posture of this case. First, and foremost, this claim was not brought by Attorney Pierce. At the time of the execution and approval of the lump sum settlement agreement, Attorney Ellis not only failed to raise the argument that any "lien" filed by Attorney Pierce was not legally cognizable, but acted in a completely contrary manner by setting aside money for Attorney Pierce in the lump sum agreement. Attorney Ellis signed that agreement without any input from Attorney Pierce. By doing so, Attorney Ellis acknowledged that Attorney Pierce had a right to a portion of the money set aside for attorneys' fees in the lump sum settlement agreement. As a result, despite Attorney Pierce's inability to assert a statutory lien, the lump sum settlement agreement established Attorney Pierce's right to pursue a claim for a portion of the attorneys' fee. Once signed by the parties, and approved by the judge, the document could not be altered without reformation. Maxwell, supra. Notably, Attorney Ellis never sought reformation of that agreement.

The department has full authority to adjudicate issues arising out of the § 48 lump sum settlement agreement. Indeed, Attorney Ellis does not argue the administrative judge

lacked the authority to award him money from the lump sum settlement. The amount of the attorney's fee recoverable in a lump sum settlement agreement is capped by the statute, G. L. c. 13A, §8(a)-(b), and that fee was reduced to a specific dollar amount when the parties executed the lump sum settlement agreement. Moreover, "[t]he attorneys' fees specified in this section shall be the only fees for any services provided to employees under this chapter unless otherwise provided by an arbitration agreement pursuant to section ten B." G. L. c. 152, §13A(10). Thus, when Attorney Ellis filed this claim with the department seeking the release of 100% of the fee being held in escrow, the only issue before the administrative judge was the proper allocation of that discrete amount of money. Because the lump sum settlement agreement established that Attorney Pierce was entitled to some of the fee set aside in that settlement agreement, Attorney Pierce properly was a party in interest in Attorney Ellis's subsequent third party claim.[6] Accordingly, the administrative judge had full authority to resolve the issue. See G. L. c. 152, § 10(1)(providing for the filing of "a complaint from any party requesting resolution of any other issue arising under this chapter. . . .").

Our limited holding here is that in light of the terms of the lump sum settlement agreement drafted by Attorney Ellis, allocating a portion of the fee to Attorney Pierce despite his failure to have a cognizable lien under G. L. c. 221, § 50, once Attorney Ellis chose to pursue his own remedy under that agreement at the department, his claim could not be fully and fairly adjudicated without consideration of Attorney Pierce's claim. As such Attorney Pierce was a de facto third party claimant in the action, not a lienholder per se.

Under these circumstances, and in light of the parties' stipulation regarding the fair value of the services rendered by Attorney Pierce's office, our analysis need go no further. Therefore, we affirm the judge's decision as to the distribution of the $10,000 attorney's fee.[7]

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[6] Of course, Attorney Pierce has always had a right to file an action in quantum meruit in the superior court.

[7] In Malonis v. Harrington, 442 Mass. 692 (2004), relied on by both parties, the court addressed the question of who pays the discharged attorney the fair value of legal services and expenses --the client or the successor attorney. The court emphasized the "highly fiduciary nature of the attorney-client relationship" and concluded that the reasonable expectation of all the parties was that the successor attorney had assumed the

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **December 18, 2008**

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responsibility to pay the prior attorney out of the contingent fee he received on the settlement. Rather than setting out a hard and fast rule, however, the court advised that the issue was best resolved through express agreement of the client and successor counsel.

In this case, neither Attorney Ellis nor Attorney Pierce maintains that the employee is responsible for an attorney's fee in excess of the $10,000 fee provided in the lump sum agreement. Indeed, since an administrative law judge has approved the lump sum settlement as in the best interest of the employee, see § 48, it cannot be reformed by the board. See Maxwell, *supra* at 114, and cases cited.