COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033990-07**

Maria Zurawski	Employee
Atlas Box and Crating Co. Inc.	Employer
James N. Ellis, Esq.	Appellant
Allen Rubin, Esq.	Appellee
Travelers Indemnity	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for James N. Ellis, Esq., at hearing
James N. Ellis, Esq., pro se, on appeal
James Riley Hodder, Esq., for Allen Rubin, Esq., at hearing
William J. Mason, Esq., for Allen Rubin, Esq., on appeal
Donna Gully Brown, Esq., for the insurer

HORAN, J. The employee's successor counsel, attorney James Ellis (Ellis), appeals from a decision ordering the equal division of an attorney's fee between him and the employee's prior counsel, Allen Rubin (Rubin), which fee resulted from an approved lump sum settlement agreement between the employee and the insurer. We affirm Rubin's right to a lien on the fee, but recommit the case for a quantum meruit[1] determination of the amount due him.

On February 22, 2008, Rubin was retained by the employee. On May 27, 2008, Rubin filed a Notice of Appearance (appearance) with the board, and the insurer.[2] He subsequently obtained a $50,000 settlement offer from the insurer,

[1] Quantum meruit means "as much as deserved," and measures recovery based upon the reasonable value of services rendered. Black's Law Dictionary, 1243 (6th ed. 1990).

[2] We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

which the employee rejected. Pursuant to G. L. c. 221, § 50,[3] Rubin filed a lien for legal services with the department in December, 2009, and was discharged by the employee two months later. Ellis undertook representation of the employee, and on March 18, 2010, filed a § 34A claim on her behalf.[4] Thereafter, the employee accepted a settlement offer of $100,000. On September 14, 2011, that lump sum settlement was approved by the board. However, the judge ordered the insurer to hold the $18,500 attorney's fee in escrow, in the hope that Rubin and Ellis could later agree on an equitable split of the proceeds. As should be clear by now, they did not. (Dec. 4.)

Rubin filed a claim for his fair share of the escrowed attorney's fee, which Ellis denied. The dispute proceeded to conference, where the judge ordered the insurer to pay each counsel one-half of the escrowed $18,500. Only Ellis appealed the conference order.[5] (Dec. 3.)

Two issues were addressed at the hearing. First, was Rubin's appearance sufficient to entitle him to assert a lien under G. L. c. 221, § 50? Second, if so, what amount was he entitled to receive from the escrowed fee? (Dec. 1.)

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[3] General Laws c. 221, § 50, provides, in pertinent part:

> From the authorized commencement of an action . . . or other proceeding in any court, or appearance in any proceeding before any state . . . board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's . . . claim . . . and upon the proceeds derived therefrom.

[4] As a threshold matter, we note Ellis does not dispute the employee retained Rubin to represent her, and Rubin does not dispute that Ellis was subsequently retained by the employee. Compare Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 249 (1993)("a mere appearance without a right to recover fees from the client directly does not support a lien against the proceeds of the client's recovery").

[5] By failing to appeal, Rubin conceded Ellis's entitlement to at least $9,250 of the total fee of $18,500. G. L. c. 152, § 10A(3). See Brancheau's Case, 78 Mass.App.Ct. 1116 (2010)(Memorandum and Order Pursuant to Rule 1:28)(failure of attorneys to appeal limited the nature of the dispute concerning entitlement to fee proceeds).

At the two-day hearing, Rubin and Dennis Dunn, an adjuster for the insurer, testified, and over forty exhibits were offered into evidence.[6] (Dec. 1-2.) Ellis did not testify. The judge took judicial notice of the terms of the $100,000 settlement that he had approved on September 14, 2011. (Dec. 3.)

Relying on Boswell, supra, the judge concluded that Rubin's authorized representation of the employee, and his filing of an appearance, "was sufficient to entitle him to assert a lien for his services in [this] case." (Dec. 6.)

The judge then concluded,

> [a]s this dispute involves a total fee whose genesis is the lump sum settlement . . . the approach most faithful to the terms of the statute[7] is to base the allocation of the total attorney's fee on the highest settlement offer that each attorney was able to elicit from the Insurer. Rubin obtained an offer of $50,000.00, and Ellis obtained an offer that was twice that. I find that the total attorney's fee is therefore most properly allocated to the attorneys on an equal-share basis. Each attorney is entitled to one-half of the $18,500.00 total, or $9,250.00.[8]

(Dec. 7.)

On appeal, Ellis first argues the judge erred in concluding that Rubin had a "valid attorney's lien." (Ellis br. 1.) We disagree. Rubin's authorized representation of the employee, and his filing of an appearance, entitled him to file a lien for legal services. Boswell, supra at 248.

Next, Ellis argues the judge erred by basing Rubin's recovery solely on the highest settlement amounts received by each counsel prior to the lump sum

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[6] The judge did not make findings of fact based on this evidence. He must do so on recommittal.

[7] General Laws c. 152, § 13A(1-9), governs the payment of attorney's fees and expenses under the act. These statutory provisions do not provide a method for the division of fees between competing attorneys.

[8] This simple approach has some surface appeal, but proves unworkable in instances where the eventual approved settlement amount obtained by successor counsel is less than the highest offer of settlement solicited by the employee's prior counsel. It also falls short of a proper quantum meruit analysis. See discussion, infra.

settlement approval. Rather, Ellis argues that Rubin's claim should have been more thoroughly evaluated on a quantum meruit basis. (Ellis br. 12.) Rubin agrees that a quantum meruit analysis is required, and relies on Elbaum v. Sullivan, 344 Mass. 662 (1962), for the proposition that "[w]hen making such an analysis, the determination of the [amount due under the] lien should be based on the value of the case in its entirety." The Elbaum court also recognized that "ordinarily *one of the factors* to be considered in fixing a fee is the result secured." Id. at 667. (Emphasis added.) Indeed, when assessing the value of an attorney's services, a proper quantum meruit analysis is multifactorial.

> Other factors to be considered are the customary ones applicable in measuring a legal fee: the special skills which may have been brought to bear, the complexity of the case, the size of the case in terms of dollars, the caliber of the services, the fees usually charged for work of the kind involved, the time spent, and the success achieved.

Salem Realty v. Matera, 10 Mass.App.Ct. 571, 576 (1980)(and cases cited); see also Hug v. Gargano & Assoc., P.C., 76 Mass.App.Ct. 520, 526 (2010)(listing similar factors to be considered). And the weight of each factor may vary with the circumstances of each case. Mulhern v. Roach, 398 Mass. 18, 30 (1986).

Accordingly, we recommit the case for the judge to determine, on established quantum meruit principles, the value of Rubin's valid lien for legal services. See footnote 5, supra.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **May 16, 2014**