COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 000456-94

Regina Morin Brancheau	Employee
Bowes, Inc.	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Fabricant)
The case was heard by Administrative Judge Koziol.

APPEARANCES

Rickie T. Weiner, Esq., for third party claimant, James N. Ellis & Associates, at hearing
James N. Ellis, Esq., for third party claimant, James N. Ellis & Associates, on appeal
Richard C. Hyman, Esq., for third party claimant, Yellin and Hyman, P.C.
John F. Trefethen, Jr., Esq., third party claimant, pro se
William R. Trainor, Esq., for the employee on appeal

McCARTHY, J. In this attorney's fee dispute among three law firms, third party claimants, James N. Ellis & Associates, P.C., (Ellis), and Yellin and Hyman, P.C., (Hyman), appeal from a judge's decision rejecting their claims for a portion of the $35,000 attorney's fee held in escrow following approval of a lump sum settlement agreement. In the decision on appeal, the judge ordered Ellis and Hyman, another of employee's prior counsel, to pay to the employee $10,500 in attorney's fees which they had been awarded at conference. We hold the judge was without authority to reform the approved lump sum settlement agreement by reducing the amount of the attorney's fee. However, we see no error in the judge's finding that neither Ellis nor Hyman were entitled to any portion of the attorney's fee. Accordingly, we award the entire fee to the attorney who last represented the employee and negotiated the lump sum settlement, Attorney John F. Trefethen, Jr.

At various times from the occurrence of his industrial injury on January 18, 1994 until the approval of his lump sum settlement agreement on December 1, 2006, the employee was represented by three law firms. Ellis and Ellis, the predecessor of the claimant, James N. Ellis &

Associates, P.C.,[1] initially represented the employee from 1994 until approximately August 1997. During that time, Ellis secured benefits for the employee through two § 19 agreements to pay compensation, a conference order, a hearing decision in which the insurer's complaint to modify or discontinue benefits was denied, and a reviewing board decision. In each instance, Ellis received an attorney's fee plus expenses. (Dec. 5-6.)

On July 30, 1997, Ellis and Ellis filed a lien[2] with the department, and on August 1, 1997, Attorney Richard C. Hyman, of Yellin & Hyman, P.C., began representing the employee.[3] (Dec. 6.) Hyman represented the employee in her § 34A claim through a § 10A conference, for which the firm received an attorney's fee, and through two days of hearing and four depositions, for which the firm also received a fee. (Dec. 10-11.)

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[1] The judge credited testimony of James N. Ellis, Jr., in finding that James N. Ellis & Associates, P.C., succeeded to the interests of the law firm of Ellis and Ellis. (Dec. 6, 16.) Cf. Rodriguez v. Carilorz Corp., 23 Mass. Workers' Comp. Rep. 89 (2009)(no evidence presented that law firm of James N. Ellis & Associates was successor in interest to Ellis & Ellis or James N. Ellis, Jr.).

[2] Liens for attorneys' fees arise, not under c. 152, but under G.L. c. 221, § 50, which 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 there from. 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.

[3] Attorney Hyman had initially begun work on the employee's case in April 1997, while Ellis & Ellis were still the attorneys of record, by filing the employee's claim for § 34A benefits, though his relationship with Ellis & Ellis at that time remains a "mystery." (Dec. 8, 9.)

On November 11, 1998, the employee discharged Yellin & Hyman, and retained James N. Ellis & Associates, P.C., as his attorneys. (Dec. 10-11.) Yellin & Hyman filed an attorneys' lien on December 10, 1998. (Dec. 1.) Attorney Trefethen, as an associate with James N. Ellis & Associates, represented the employee through two more days of hearing and an additional deposition. (Dec. 12.) On February 4, 2000, a hearing decision issued awarding the employee § 34A benefits, and awarding Attorney Hyman and Attorney Trefethen enhanced attorneys' fees for their representation of the employee at the § 34A hearing. The decision also awarded both law firms reasonable and necessary expenses. (Dec. 11-12.)

In September 2000, Attorney Trefethen opened his own law practice, and filed a notice of appearance, coinciding with Ellis's notice of withdrawal and its filing of another lien for attorneys' fees. Attorney Trefethen represented the employee for the next six years and performed the remainder of the work on the employee's claim, including the lengthy and complex negotiation of the structured lump sum settlement, which was approved by an administrative law judge on December 1, 2006. (Dec. 13-15.) The amount of the settlement was $206,000, of which $35,000 was designated as attorney's fees, after § 36 allocations were made.[4] Because Ellis and Hyman had filed liens for attorneys' fees, the administrative law judge ordered the insurer to hold the $35,000 attorney's fee in escrow pending the resolution of those liens. (Dec. 2.)

When the parties were unable to resolve the lien issue, Attorney Trefethen filed a third party claim seeking release of the attorney's fee. Following a § 10A conference on this claim, the

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[4] General Laws c. 152, § 13A, provides, in relevant part:

> (8) Whenever an insurer and an employee agree to a settlement under section forty-eight, the attorney's fee shall be paid from the settlement in accordance with the following provisions:
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> . . .
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> (b) when the insurer and employee reach such settlement subsequent to insurer acceptance of liability or subsequent to a decision of an administrative judge, the reviewing board, or the appeals court of the commonwealth finding insurer liability which is in effect at the time such agreement is entered into, such fee shall be no more than twenty percent of amount of such settlement.

administrative judge ordered the insurer to pay the $35,000 attorney's fee held in escrow as follows: $24,500 (70%) to Attorney Trefethen; $5,250 (15%) to Hyman; and $5,250 (15%) to Ellis. Only Ellis appealed to a hearing de novo. (Dec. 2.)

At hearing, the parties stipulated that "[t]he employee's claim was settled by a lump sum agreement that was approved on December 1, 2006, and the total attorney's fee set forth in that agreement is $35,000.00." (Dec. 3.) The judge framed the issue at hearing as "the proper division of the $35,000 attorney's fee that was withheld from the employee's settlement proceeds pursuant to G. L. c. 152, § 13A(8)(b)[.]" Id.

Applying principles of quantum meruit, the judge found that both Hyman and Ellis had failed to prove entitlement to *any* portion of the fee set aside in the lump sum settlement agreement. (Dec. 15-17.) The judge found that neither firm had any role in negotiating the settlement with the insurer, and both firms had been adequately compensated for their representation of the employee prior to the execution of the agreement. (Dec. 16-17.) The judge further found that an award of a portion of the attorney's fee withheld from the lump sum settlement to either firm would be "tantamount to a windfall," and would be based on "mere conjecture and speculation." (Dec. 16-17.) To the extent the efforts of both Ellis and Hyman helped secure the employee's § 34A benefits and thereby paved the way for the settlement, the judge found the attorneys had been adequately compensated. Id. By contrast, Attorney Trefethen, who represented the employee for the six years leading up to the settlement, had "expended a great deal of effort on the employee's case for which he had not already been compensated by the insurer and . . . [had] met his burden of proving entitlement to the fee as claimed." (Dec. 18.) Despite his "lengthy and productive representation of the employee," and his right to claim more under the statute, Trefethen claimed only $24,500 of the $35,000 attorney's fee set aside in escrow. Id. Reasoning that, where "too much money is deducted from the settlement to pay for [attorneys'] fees, then the excess should inure to the employee as it belonged to the employee in the first place," (Dec. 18), the judge denied and dismissed the third party claims of both Ellis and Hyman and ordered each firm to pay the employee the $5,250 "erroneously disbursed to it under the Section 10A conference order." (Dec. 19.)

Ellis and Hyman appeal, arguing the only issue before the judge was the proper distribution of the $35,000 attorney's fee, not the amount of the fee itself, and that the judge had no authority to reduce the fee by awarding a portion of it to the employee. Ellis argues that it is entitled to a larger share of the $10,500 the judge ordered paid to the employee, than is Hyman. (Ellis br. 13.) Alternatively, Ellis argues that the $10,500 the judge ordered it and Hyman to repay the

employee should be paid to Attorney Trefethen. (Ellis br. 14.) We agree that the judge erroneously reformed the lump sum agreement, and we hold that the appropriate remedy is to award the entire attorney's fee to Attorney Trefethen.

We have held, as have the courts, that once a lump sum settlement agreement is approved, it has the same status as other agreements approved by the board, and cannot be reformed by the board.[5] If any party wishes to challenge an approved agreement on grounds of fraud or mistake, it must do so by filing a complaint in superior court. Maxwell, supra and cases cited. Thus, when a lump sum settlement agreement has been approved, the board has no authority to increase or decrease the total amount of attorney's fees payable. Maxwell, supra. See also Cordeiro v. New England Specialized Concrete, 22 Mass. Workers' Comp. Rep. 349, 353 (2008)(once signed by parties and approved by judge, lump sum agreement could not be altered without reformation). Nonetheless, when an attorney's lien is filed pursuant to G.L. c. 221, § 50, *prior to* the approval of the lump sum settlement, and a judge has ordered the attorney's fee held in escrow pending resolution of the fee dispute, the judge has authority to determine the lien. Keegan v. August A. Busch & Co., 18 Mass. Workers' Comp. Rep. 27 (2004).[6] However, the only issue before the judge is the proper allocation among the attorneys of the amount of money designated as an attorney's fee. See Cordeiro, supra at 353-354.

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[5] A § 48 lump sum agreement is, by definition, "an agreement pursuant to section nineteen." See G. L. c. 152, § 19 and Maxwell v. North Berkshire Mental Health, 16 Mass. Workers' Comp. Rep. 108, 114 n.7 (2002).

[6] In Keegan, the employee's prior counsel filed a notice of lien for attorney's fees pursuant to G. L. c. 221, § 50. Successor counsel then negotiated a lump sum settlement with the insurer, which agreement was approved by an administrative judge, with the twenty percent statutory attorney's fee of $9,000 placed in escrow pending resolution of the dispute between the two law firms. The reviewing board held that the board had jurisdiction to determine the lien, and recommitted the case to the judge "to determine *what share of the fee, if any*, is due to [prior counsel], based solely on the equitable doctrine of quantum meruit," (id. at 28, emphasis added), "i.e., the reasonable value of the legal services rendered by the firm." Id. at 31-32, citing Elba v. Sullivan, 344 Mass. 662, 665-666 (1962)(determination of lien based on equitable accounting of fair value of services rendered by lien holder, with view toward case in its entirety).

The legal obligation to compensate an attorney for the fair and reasonable value of services and skills expended on behalf of a client "is derived from principles of equity and fairness, to prevent unjust enrichment of one party (the windfall of free legal services to the client) at the expense of another (the discharged attorney who expended time and resources for the client's benefit)." Malonis v. Harrington, 442 Mass. 692, 697 (2004). "The question of what is fair and reasonable compensation for legal services rendered is one of fact for a trial judge to decide." Malonis, supra at 699, quoting Mulhern v. Roach, 398 Mass. 18, 23 (1986).

As in Keegan, supra, the judge here had the authority to determine, based on principles of quantum meruit, "what share of the [$35,000] fee, if any" was due to prior counsel, Ellis and/or Hyman. Id. at 28. Her detailed factual findings based on the evidence support her conclusion that neither firm was due *any* portion of the escrowed fee and that, in fact, an award to either would be "tantamount to a windfall." (Dec. 16, 18.) We do not disturb those findings. See Malonis, supra at 699.

However, the judge had no authority to award the employee any amount previously approved as attorney's fees in the lump sum agreement. By doing so, she reformed the approved lump sum settlement agreement, which the board may not do. Maxwell, supra; Cordeiro, supra. The judge's decision to award $10,500 allocated as attorneys' fees to the employee appears to stem from the fact that Attorney Trefethen stated he was satisfied with the $24,500 fee he had been awarded at conference, and did not claim more than that.[7] However, by appealing the conference order, Ellis put at issue the entire $35,000 fee and its distribution among all three law offices. The issue, as the judge acknowledged in her decision, was the "proper division of the $35,000 attorney's fee that was withheld from the employee's settlement proceeds." (Dec. 17.)

Accordingly, we reverse the decision of the administrative judge insofar as it orders James N. Ellis & Associates, P.C., and Yellin & Hyman, P.C., to pay the employee the $10,500 disbursed to them under the § 10A conference order. That sum is due and payable to Attorney Trefethen only. If necessary, Attorney Trefethen may file a complaint pursuant to § 10(1)("a complaint

[7] In his third party claim, Attorney Trefethen claimed a "portion" of the attorney's fee. 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). He did not appeal the conference order awarding him $24,500, and at hearing stated, "I'm not claming more than that." (Tr. 22.)

from any party requesting resolution of any other issue arising under this chapter") to recoup those funds from the employee. In all other respects, the decision is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***November 10, 2009***