VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Jan. 23, 2015

DONITA BAILEY v. VCU HEALTH SYSTEM AUTHORITY - WC
VCU HEALTH SYSTEM AUTHORITY, Insurance Carrier
VCU HEALTH SYSTEM AUTHORITY, Claim Administrator
Jurisdiction Claim No. VA00000717731
Claim Administrator File No. C2012-0935
Date of Injury: December 20, 2012

Lauren Carroll, Esquire
Claimant's counsel of record.

Geoff McDonald, Esquire
Claimant's former counsel.

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

Former counsel for the claimant requests review of the Deputy Commissioner's October 10, 2014 Order jointly awarding $30,000 in legal fees and $202.32 in costs to claimant's counsel of record and former counsel. We AFFIRM.[1]

I. Material Proceedings

On October 10, 2014, Deputy Commissioner Bruner entered an Order Approving Compromise Settlement awarding the claimant $150,000 less attorney's fees as compensation for a workplace injury sustained on December 20, 2012. The order included the following statement regarding attorney's fees and costs:

> IT IS FURTHER ORDERED that from the proceeds of this settlement, $30,000 for legal services rendered and $202.32 for legal expenses expended are

[1] Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is unnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; see Barnes v. Wise Fashions, 16 Va. App. 108, 112, 428 S.E.2d 301, 303 (1993).

> awarded jointly to Lauren Carroll, Esquire, and Geoffrey R. McDonald, Esquire. This amount shall be paid directly to Lauren Carroll, Esquire, to be apportioned pursuant to the agreement of the attorneys [or] as determined by a court of competent jurisdiction.

On October 14, 2014, Geoff McDonald, claimant's former counsel, filed a request for review by the full Commission of the portion of the award dealing with attorney's fees. He argues the Deputy Commissioner erred by finding attorney's fees were to be jointly awarded and mailed to Lauren Carroll, claimant's current counsel of record. He also argues that, as former counsel, he is entitled to an attorney's lien for fees and costs. In support of these arguments, he contends that the Commission's recent precedent regarding fee disputes can be distinguished from the circumstances of this case. Claimant's counsel of record argues, "the Commission is without jurisdiction to resolve the civil dispute regarding the apportionment of these jointly awarded fees." (Cl.'s Counsel of Record's W.S. 4.)

II. Findings of Fact and Rulings of Law

The award of attorney's fees is subject to the Commission's approval, and the Commission has "exclusive jurisdiction over all disputes concerning such fees." Va. Code § 65.2-714(A). However, the statute does not grant the Commission the authority "to resolve what essentially is a civil dispute between counsel for the claimant as to the division of that fee." Moore v. Sec. Storage Co., 76 O.W.C. 163, 165 (1997). In Moore, a claimant was awarded a supplemental award of permanent partial disability benefits and counsel was awarded $500 in attorney's fees. The claimant initially sought representation with a law firm and an associate was assigned to his case. The associate subsequently left the firm and opened his own office while continuing to represent the claimant. After fees were awarded, a claims examiner apportioned

the fee between the firm and the former associate. On review, the Commission found it lacked jurisdiction to adjudicate a fee dispute between two attorneys that had both represented the claimant and the apportionment was vacated.

The Commission has consistently followed the reasoning of Moore regarding disputes relating to "the appropriate division of a fee in situations where the attorney who performed all or a portion of the work before us did so as part of her employment as an associate of a law firm." Rose v. Bristol Compressors, VWC File No. 214-98-83 (Feb. 15, 2005). The Commission was granted authority over attorney's fees "to prevent excessive charges to the claimant, . . . not to resolve disputes between two or more attorneys over their respective interests in a fee that the Commission approves and awards." Id. If such a dispute arises, the Commission makes the award payable to both attorneys jointly and remits the amount to counsel of record. It is then "up to those attorneys to resolve the negotiation and division of that payment either amicably by agreement, or through the appropriate civil proceeding." Id.

The Commission followed this policy in Robinson v. State Police, JCN 2163237 (Nov. 15, 2012), when it awarded fees jointly "with the check to be tendered to . . . counsel of record." In that case, the Commission noted the "dispute is between an attorney who represented a claimant before the Commission and the law firm of which that lawyer was a member during a portion of his representation" rather than one where "two attorneys who worked on a claim are asking for a determination of their respective fees." Id.

However, the Commission's "policy does not apply to fee disputes where two or more attorneys have represented a claimant at distinct periods in the litigation (e.g. where one attorney withdraws from the representation and is replaced by another attorney of the claimant's

choosing). In such circumstances, it is the Commission's obligation . . . to determine the fee that is properly attributable to each individual attorney's work on the case such that the claimant is not excessively charged." Rose, VWC File No. 214-98-83. For example, in Powers v. A & G Coal Corporation, VWC File No. 209-01-13 (Apr. 6, 2006), the Commission found apportionment between an attorney and her former law firm rather than a joint award was appropriate because there was no matter "pending adjudication" when the former associate left the firm nor was there "evidence that any settlement negotiations were underway" at the time. Furthermore, the efforts of the former associate while she was employed by the firm were limited to five and a half hours of discovery. She did not file a claim nor did she secure an award for the claimant until after she left the firm's employ.

The claimant in this case sustained injuries on December 20, 2012. Lauren Carroll, then working for the law firm of Geoff McDonald & Associates, P.C. (the "Firm"), noted her representation on April 30, 2013 and filed a claim for benefits on behalf of her client on May 1, 2013. The claim alleged injuries to the left leg and back and sought medical and wage loss benefits. The claimant also requested permanent partial disability benefits for statutory purposes. The defendants accepted the claim as compensable, and on July 8, 2013, an order was entered providing for an open and continuing period of temporary total disability benefits and awarding Ms. Carroll $1,250 in attorney's fees.

Ms. Carroll ended her business relationship with the Firm in January of 2014. On January 18, 2014, the claimant signed a letter indicating she wished the Firm, rather than Ms. Carroll, to continue representing her. On February 10, 2014, the Commission entered an

Order substituting Michael J. Beste of Geoff McDonald & Associates, P.C., for Ms. Carroll as counsel of record.

The employer filed an application to terminate benefits on March 19, 2014 which was referred to the docket on April 4, 2014. The employer alleged the claimant had been released to work. The matter was settled without a hearing, and on April 15, 2014, an Award Order was entered providing for a week of temporary partial disability benefits and a resumption of temporary total disability benefits. Mr. Beste was awarded $250 for legal services rendered to the claimant.

After July 15, 2014, Mr. McDonald filed a request for a hearing requesting the assessment of a 20 percent penalty against the defendants due to late payments, resulting in a Penalty Order being entered on July 20, 2014. Mr. McDonald has also stated that he remained in regular contact with the claimant during the period where her benefits were suspended and contends he made an offer to settle the case on January 28, 2014.

On August 13, 2014, the claimant, filing *pro se*, indicated she was no longer represented by Mr. McDonald and his Firm. An Order removing him as counsel was entered on August 14, 2014, and on the same day, Lauren Carroll noted her representation of the claimant. The defendants contacted Mr. McDonald in an attempt to settle the case on August 22, 2014. At the time, he was not aware of Ms. Carroll's representation, and he informed the claimant of the offer. The claimant accepted the offer, and an Order Approving Compromise Settlement was entered on October 10, 2014.

Ms. Carroll and Mr. Beste both performed services which resulted in an award of benefits to the claimant. The defendants were made aware of the strength of the claim through both the

initial award of benefits secured by Ms. Carroll and the resumption of benefits achieved by Mr. Beste. In addition, the claim for permanent partial disability filed by Ms. Carroll was not withdrawn even though it was not docketed for a hearing. It was pending jurisdiction at the time Ms. Carroll left the Firm. It is reasonable to conclude that potential liability for the claimant's permanent partial impairment, as well as lost wages, were considered by the defendants when they made their settlement offer.

Work performed by Ms. Carroll, Mr. Beste, and Mr. McDonald on behalf of the claimant all contributed to the defendants' offer of $150,000 to settle the case. In addition, Ms. Carroll represented the claimant both as an associate of Mr. McDonald and as partner for another law practice. We find Mr. McDonald's argument that he "did all the work" as well as Ms. Carroll's contention that Mr. McDonald's "*quantum meruit*" contribution to the settlement was *de minimis* equally unpersuasive. However, because the defendants' settlement offer was influenced by a pending claim that was unresolved at the time of Ms. Carroll's departure from the Firm, we need not, and in fact we may not, apportion the awarded fee. The civil dispute between Ms. Carroll and the Firm must be decided by mutual agreement of the parties, through mediation, or by a Court of competent jurisdiction.

III. Conclusion

The October 10, 2014 Order is AFFIRMED.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of

Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.