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NO. 365638-III

**COURT OF APPEAL, DIVISION III
OF THE STATE OF WASHINGTON**

LEONARD ELLERBROEK and
DEPARTMENT OF LABOR AND INDUSTRIES

Respondents.

v.

CHS, INC.,

Appellant.

**BRIEF OF RESPONDENT
LEONARD ELLERBROEK**

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I. INTRODUCTION

This is an industrial insurance claim. The Respondent, Leonard Ellerbroek, sustained an injury in the course of his employment with the Appellant, CHS, Inc. (hereinafter CHS).

CHS is a “self-insured” employer in the State of Washington. This means that they qualify for “self-insured” status that allows them to administer their employees’ industrial insurance claims rather than having them administered by state employees/claims managers employed by the Department of Labor and Industries.

It is usual for self-insured employers to hire “third party” private companies to manage and handle these claims for them. Self-insured employers and the third-party companies they retain are not without oversight in the administration of industrial insurance claims.

The Department of Labor and Industries has a special department or “section” dedicated to overseeing claims filed and administered by self-insured employers. It is called the “Self-Insurance Section”. This section, in addition to other things, handles disputes that arise between injured workers, their doctors,

and employers. The section strives to hold all parties to the law including compliance with the Department's rules and regulations, especially as they pertain to benefit entitlement claimed by injured workers.

Self-insured employers are required to act promptly in administering benefits owed to injured workers. The Industrial Insurance Act requires the Department of Labor and Industries to penalize self-insurers who unreasonably delay or refuse to pay benefits when they are due.

On February 2, 2015, the Self-Insured Section of the Department of Labor and Industries issued an order directing CHS to pay to Mr. Ellerbroek wage loss benefits.

RCW 51.52.050(2)(b) expressly states that where the Department issues an order awarding benefits to a worker, those benefits are effective and due on the date the order is issued.

CHS delayed the payment of these benefits. The Department determined their delay to be unreasonable and assessed a penalty against them.

CHS appealed the penalty order to the Board of Industrial

Insurance Appeals. Hearings were held and the Board found favorably for CHS and reversed the penalty order. In doing so, no reference or reliance to RCW 51.52.050(2)(b) was ever mentioned or considered as part of the Board's decision.

Mr. Ellerbroek joined with the Department of Labor and Industries to appeal the Board's decision to Superior Court, Spokane County. The appeal from the Board's final decision to Superior Court for Spokane County was assigned to the Honorable Timothy B. Fennessy, Superior Court Judge.

The appeal was tried to the Court by way of a bench trial. After receiving oral argument and considering certain hearing testimony from the Certified Board Record, Judge Fennessy issued his decision.

On September 14, 2018, Judge Fennessy issued his decision by reversing the Board's decision and reinstating the penalty order issued by the Department. The rationale and authorities relied upon by Judge Fennessy are clearly and fully stated in a letter to counsel dated September 14, 2018. Formal presentment for an order was encouraged at that time.

On November 5, 2018, this writer filed a motion with the Court for an award of attorney fees, having successfully reversed the Board of Industrial Insurance Appeals by way of the bench decision rendered on September 14, 2018, by Judge Fennessy. A Lodestar enhancement was sought as being reasonable. Ultimately, Findings of Fact, Conclusions of Law and Judgment was rendered and entered by the Court on December 17, 2018. Judge Fennessy accompanied the formal order and judgment with a letter dated December 18, 2018, in which he provides in part his rationale and reasoning that went into his decision in arriving at the award for attorney fees.

CHS appeals Judge Fennessy's judgment and order alleging that the penalty assessed by the Department should be reversed, and appealing the award of attorney fees, believing them to be excessive and that the Court abused its discretion in making the attorney fee award to Mr. Ellerbroek's counsel.

II. ISSUES

Respondent Ellerbroek joins with the Brief of Respondent Department of Labor and Industries addressing the issues in this case. The Department of Labor and Industries is addressing those

exceptions raised by the Appellant as they concern a Department order that assessed a penalty against CHS for the unreasonable delay in the payment of a benefit. They also identify an issue that requires the Court's interpretation of the meaning of the plain language of RCW 51.52.050(2)(b) as more recently found in *Masco Corp. v. Suarez*, 7 Wn. App. 2d 342, 433 P.3d 824, 830, *review denied*, 441 P.3d 1194 (2019). Respondent Ellerbroek joins with the Respondent Department of Labor and Industries' brief in all respects as it concerns any discussion about the "penalty" issues.

However, there is the additional issue raised by the Appellant asserting that the Court's award of attorney fees were unreasonable, excessive and based upon untenable grounds. Respondent Ellerbroek limits this Brief to addressing those claims.

III. STATEMENT OF THE CASE

Respondent Ellerbroek joins with the Brief of Respondent, Department of Labor and Industries, as set forth in their Statement of the Case.

IV. STANDARD OF REVIEW

Respondent Ellerbroek joins with the Brief of Respondent, Department of Labor and Industries, with respect to the Court's Standard of Review for appeals brought pursuant to the Industrial Insurance Act.

Attorney fee awards are reviewed for an abuse of discretion by the trial court. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

V. ATTORNEY FEES

RCW 51.52.130 authorizes an award of reasonable attorney fees if the decision and the order of the Board of Industrial Insurance Appeals is reversed and additional relief is granted to the worker. Should Mr. Ellerbroek prevail on his appeal to the Court of Appeals, he is entitled to an award of reasonable attorney fees. *Boeing Co. v. Lee*, 102 Wn. App. 552, 558, 8 P.3d 1064 (2000). Respondent Ellerbroek is requesting attorney fees should the Superior Court's decision be affirmed. This request is also brought pursuant to RAP 18.1(a)(b).

VI. SUMMARY

Appellant contends that the attorney fees awarded to Mr. Ellerbroek were unreasonable.

They assert the fees awarded were unreasonable for two reasons. First, the number of hours claimed by Mr. Ellerbroek's counsel were excessive and second, that the Court applied a Lodestar multiplier on untenable grounds. AB 10.

The Superior Court carefully considered and explained its reasons for awarding attorney fees to Respondent's counsel. The reasons were set forth in a letter that accompanied the Court's Order of Judgment dated December 18, 2018. AR 210.

The Court's award was reasonable. There was no abuse of discretion and the Lodestar multiplier was reasonable and properly calculated. The award for attorney fees should be affirmed.

VII. ARGUMENT

Attorney fee awards are reviewed for an abuse of discretion by the trial court. *Scott Fetzer Co., supra*. Appellant contends that the fee awarded by the Court to Respondent Ellerbroek's counsel was based upon an excessive number of hours claimed. Appellant's

brief expressly states:

“. . . Ellerbroek’s counsel admitted in his reply to co-mingling time entries for the time loss and penalty portions of this case.” CP 59 (quotation from AB 11)

They go on to cite particular time entries they feel support this contention. They are mistaken. Note that they contend an excessive time claim for entries dated February 7, 2018 and February 8, 2018. AB 11. This writer addressed both of those entries in advance of the Court’s consideration of its request for fees. This writer stated, “I believe that the defendant’s counsel does have a legitimate question with respect to the time asserted on February 7 and February 8, 2018. Although that is time spent, it was with respect to the time loss case and should not have been included in a request for fees on the penalty issue. I am, therefore, withdrawing that time and apologize to all concerned for any inconvenience in doing so.” CP 180.

To be sure, the Court in the letter that accompanied the formal order of judgment made note of the withdrawal of both of those entries. CP 211. For reasons that are entirely unclear, the Appellant continues to assert that those entries are “excessive”. Appellant goes on to assert that the fees requested were excessive because this writer

should “read faster”. CP 12. They feel that a phone call to this writer’s office should have been promptly returned and wasn’t. They go on to allege that the Court considered “irrelevant factors” in applying a lodestar multiplier to its ultimate award for attorney fees. CP 13.

While attorney fee awards are reviewed for an abuse of discretion by the trial court when a lodestar multiplier is applied, additional considerations must be reviewed. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-67, 312 P.3d 745 (2013). Our Supreme Court has specifically approved the “lodestar” method of determining reasonable fees in contingent fee cases. In *Bowers v. Transamerica Title Insurance*, 100 Wn.2d 581, 675 P.2d 193 (1983), the Court held that the reasonableness of an award for attorney fees must be determined on a case-by-case basis. In the case of *Brand v. Department of Labor and Industries*, 139 Wn.2d 659 (1999), the Court reiterated the standard for applying the lodestar method in industrial insurance cases. The Court stated:

“A court arrives at the lodestar award by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter.” *Scott Fetzer Co.*

v. Weeks, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993). The lodestar amount may be adjusted to account for subjective factors such as the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case."

Brand, 139 Wn.2d at 666, citing *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); Rule of Professional Conduct (RPC) 1.5(a).

The Superior Court judge in the instant case took into consideration plaintiff's motion and memorandum for award of attorney fees and entry of judgment. CP 133-148. The Court considered the defendant's response to plaintiff's motion and memorandum for award of attorney fees and entry of judgment. CP 149-157. Further consideration was given to Plaintiff's reply to the Defendant/Appellant's response. CP 175-190. The Court also considered the argument of counsel as it pertained strictly to attorney fees and which is contained in the Verbatim Report of Proceedings as part of this record. See VRP 59-75. Perhaps the most concise evidence to support the Court's award for attorney fees and the discretion utilized by the Court in doing so is contained in the

Court's letter dated December 18, 2018, which accompanied the judgment and order that reflected the findings of fact and conclusions of law in this matter. There, the Court considered the reasonableness of the hourly rate charged. The Court considered the differences between contingent fee work vs. hourly work. The Court considered the affidavit of this writer in stating the amount of time spent on the case. Finally, the Court expressly considered the factors expressed in *Bowers, supra*, that included the novelty and difficulty of the questions posed by this case; the skills requisite to perform the services properly; the preclusion of other employment; the contingent nature of the fee; time limitations imposed by the client or circumstances; the results obtained; the experience, reputation and ability of counsel (including the opposition); the undesirability of the case; and, awards in similar cases. The Court determined that a multiplier of 1.2 was appropriate and we would urge the Court to find that it was reasonable given consideration of the above factors, considered by Judge Fennessy.

Finally, Appellant urges this Court to give "vital consideration" whenever the fee awarded "grossly exceeds" the

amount in controversy. *Public Utils. Dist. No. 1 v. Crea*, 88 Wn. App. 390, 397, 945 P.2d 722 (1997), citing *Scott Fetzer Co.*, 122 Wn.2d at 150. In the previously-cited case of *Brand v. Department of Labor and Industries*, our Supreme Court made the following holding:

“The amount of recovery may be a relevant consideration in determining the reasonableness of a fee award, but is not conclusive. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632, 966 P.2d 305 (1998).”

“We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.” *Mahler*, 135 Wn.2d at 433. In the context of workers’ compensation, this court has approved a \$300 award of attorney fees in a case in which the worker recovered only \$1,092, noting that, ‘[i]n these cases, the amount of recovery is but little, if any, guide.’ *Rehberger v. Department of Labor and Industries*, 154 Wash. 659, 662, 283 P. 185 (1929).”

The Court gave that careful consideration as more fully set forth in the December 18, 2018, letter. Beyond that, it is important for this Court to recognize how frequently injured workers across this state have been affected by self-insured employers wrongfully terminating wage-loss benefits, even when ordered to pay them. What happened to Leonard Ellerbroek is by no means a “unique” or

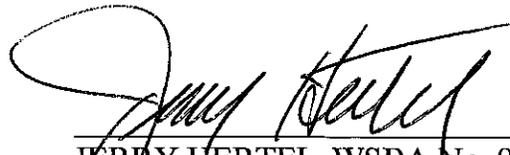
“solitary” instance. The outcome of this case along with the outcome expressed in *Masco Corp. v. Suarez, supra*, should bring to an end the excessive delay in paying critical benefits to the worker.

VIII. CONCLUSION

The Superior Court gave full and appropriate consideration to the relevant factors that have been identified by our courts in determining whether or not attorney fees are “reasonable” or not. The exercise of the Court’s discretion in making its award was well founded and in keeping with all relevant factors addressing the reasonableness of the award made. This Court should affirm the attorneys fee award in all respects.

RESPECTFULLY SUBMITTED this 24th day of July, 2019.

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OF THE STATE OF WASHINGTON

CHS, INC.,)	
)	
Appellant,)	
)	
v.)	DECLARATION OF
)	MAILING
LEONARD ELLERBROEK, and)	
DEPARTMENT OF LABOR)	
AND INDUSTRIES,)	
)	
Respondents.)	

DATED at Spokane, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent Leonard Ellerbroek to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. Postal Service addressed as follows:

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