

Workers' Compensation

Can Discharged Attorney Assert a Quantum Meruit Lien for Attorney's Fees Under Revised 2003 Statute? by *David S. Gold, WC Practice Partner*



David S. Gold

Rosenthal, Levy & Simon v. Mary Louise Scott - Is a discharged attorney entitled to assert a quantum meruit lien for attorney's fees under the 2003 statute which expressly prohibits the payment of hourly fees?

One of the many unanswered questions about the 2003 revisions to F.S. 440.34(1) was whether a discharged attorney retains the right to claim a lien against the file under the theory of quantum meruit for the time exerted representing the claimant prior to being discharged. Historically, these liens are favored by the courts and are based on the amount of time that was spent in representing the claimant prior to being terminated. However, the 2003 revisions to F.S. 440.34(1) eliminate the jurisdiction of the Judge of Compensation Claims to award such a fee. In this opinion, the First District seeks to reconcile the right of the discharged attorney to assert a lien and the provisions of F.S.440.34(1) that preclude the payment of hourly attorney's fees.

The claimant had been represented by Rosenthal, Levy & Simon from September 2007 to May 2008 for a repetitive trauma claim that the Employer/Carrier had denied. On May 16, 2008 the Employer/Carrier offered the claimant \$7,500 to settle the claim. However, rather than accepting the settlement, the claimant terminated the representation of Rosenthal, Levy & Simon and hired a new attorney, Michael Celeste. Two days later, Michael Celeste settled the claim for \$10,000. Rosenthal, Levy & Simon asserted a lien under quantum meruit for the value of their services provided to the claimant prior to their termination. At an evidentiary hearing, Judge of Compensation Claims Timothy Basquill held the 2003 revisions to F.S. 440.34(1) specifically prohibits the payment of any hourly fees and

limits entitlement to fees to an attorney who secures benefits. Because Rosenthal, Levy & Simon had not secured a benefit for the claimant prior to being terminated, the Judge held that there was no basis to award a fee and as such, no entitlement to a lien. The Judge further reasoned that the 2003 revisions to F.S.440.34(1) served to overrule any earlier case law that allowed for the calculation of a quantum meruit lien for fees based on an attorney's hours.

On appeal, the First District noted that there are several conflicting interests at play in this case. The Court noted that it is in the injured employee's best interests to be able to terminate an attorney in which they have lost confidence without incurring a severe monetary penalty. However, it is also in an attorney's best interests to know they will be paid for the work performed for a client. By enacting the revisions to F.S. 440.34(1), the First District acknowledged that the Legislature specifically intended to limit fees to the value of the benefits that were secured and that this change now meant the total fees awardable are limited to the statutory formula. On appeal Rosenthal, Levy & Simon argued that they should be awarded a statutory fee based on the offer of \$7,500 they had secured. The First District rejected this argument and concluded that the only reasonable means of accommodating both principles is to have a Judge of Compensation Claims act as a finder of fact and to take evidence in order to apportion the statutory fee between the former and current attorneys.

While the First District did not put forward a formula to be used, the Court specifically warned any attorney that accepts a Workers' Compensation case to first review the efforts of any prior attorney so as to avoid any duplication of effort. Taken in another way, the First District was warning attorney's to be aware that the majority of a fee made be awarded to the former attorney if

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their efforts were primarily responsible for the securing of the fee.

The ruling in this case is somewhat fact specific given that Michael Celeste only represented the claimant for two days prior to securing the settlement. However, given the limited nature of attorney's fees under the statutory formula, this ruling could cause a fair amount of litigation as each attorney argues they spent more effort in the case and so are entitled to a larger a portion of the statutory fee. This will be especially true in those cases where the claimant has hired multiple attorneys in the past as the Judge will need to take evidence as to each of the prior attorney's role in securing benefits.

Liability cont.

Cooperative Leasing, Inc. v. Johnson, a Second District Court of Appeal case. Both cases found that only those amounts that had been paid by Medicare/Medicaid were admissible evidence. These cases were discussed in the Goble case in Justice Bell's concurring opinion. They were not discussed in the majority opinion. Therefore, both cases stand as law in their districts. Argument can and should be made in the other district court's jurisdictions that these two cases are good law and are persuasive authority. However, these decisions were limited to Medicare/Medicaid.

Nevertheless, argument will be made that the Plaintiff's medical expenses for the amounts billed is inadmissible when the Plaintiff has no legal responsibility to pay those medical bills. They cannot be "balance billed". Allowing the full amounts of what the courts have called "phantom damages", even with the post-trial set-off, might persuade a jury to extend those large amounts to future medical expenses, over-inflating the amount that the Plaintiff will claim they will ultimately have

to pay. Some Judges are reluctant to rule the amount billed is excluded as a matter of evidence in cases with private insurance. However, many Judges are ruling in such a manner, and we believe that pressure by way of the motion in limine may turn the course. As the Second District of Appeal wrote in the lower court's Gobel v. Frohman opinion, which was approved by the Florida Supreme Court, "awarding an injured party damages that include a contractual discount ... results in a windfall to the injured party for damages that have not been incurred,' undermining the purpose of the collateral source statute."

It is our opinion that the set-off is not sufficient and that as a rule of evidence those amounts are irrelevant and should be excluded from the jury. Further, the relevant evidence of bills that will never be paid, and, reality shows were never meant to be paid, will prejudice the Defendant because a jury may increase the amount of future medical damages as well as bloating the pain and suffering award. It is the intent of this firm to actively move the trial courts towards denying the plaintiffs such artificially increased damages.

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