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Comments on the Workers' Compensation Board's Proposed Amendment to 12 NYCRR 300.17

By
Torts, Insurance and Compensation Law Section's
Workers' Compensation Division

TICL Workers' Comp #1 June 29, 2017
(Re: proposed rule, I.D No. WCB-20-17-00012-P)
Submitted to Heather MacMaster
Workers' Compensation Board, Office of General Counsel

The proposed rules in connection for the awarding of fees to attorneys are in some aspects impractical and in others beyond any authority granted to the Workers' Compensation Board by the legislature and an attempt to usurp the authority of the four Appellate Divisions of the Supreme Court of the State of New York and their respective Attorney Grievance Committees. To some extent the new rules will make it impossible for attorneys to retain clients in a workers' compensation case without violating the Rules of Professional Conduct. The Workers' Compensation Board's proposed rules could also be deemed to be too onerous to obtain fees for services rendered and thereby result in fewer injured workers being able to obtain counsel in effect "closing the door to the courthouse" to them.

It goes without saying that all fees in workers' compensation cases are contingent fees. In a case where the attorney is not successful in obtaining additional benefits for their client they will not be able to obtain a fee for services rendered. When a client retains an attorney they are now told that the attorneys' fee will be an approximate percentage of the benefits obtained for the client. The range is based upon the custom and practice of the Workers' Compensation Board in awarding fees over more than 100 years.

The Rules of Professional Conduct in Rule 1.5 require that a client be advised if a fee is contingent or fixed. A fixed fee is one that is either a set price for representation in the matter for which the attorney is retained or one based upon a fee for an hourly basis. The proposed rule from the Workers' Compensation Board seeks to create a hybrid fee that would be in violation of the Rules of Professional Conduct. The Workers' Compensation Board has used an undetermined hourly rate in judging what an attorney can be paid in cases. If an attorney were to be retained by a client on an hourly basis, the hourly rate would be set by the parties at the time of retention. That rate could not be changed by the Workers' Compensation Board without running afoul of the Contract Clause of the United States Constitution. Also if there is an hourly rate in a case there would be no cap in the amount of a fee to any percentage of the additional benefits

obtained by the attorney. This could lead to a situation where the fee would be larger than the benefits obtained and require a claimant, with approval of the Workers' Compensation Board, to pay additional money to their attorney. This would run contrary to the contingency basis for attorney fees in the Workers' Compensation Law.

The proposed rule would require that a fee application be mailed to a client 10 days prior to the hearing at which a fee in excess of $1,000.00 would be requested. In most situations this may not be possible. It may not be possible because many times the attorney becomes aware that their client cannot be present at hearing until fewer than 10 days prior to the hearing. In that situation either the attorney may not be awarded the fee commensurate with the work performed or it would require the Law Judge at the Workers' Compensation Board to continue the case for another date in order for either the claimant to be present at the next hearing or to allow enough time for the fee application to be mailed to them. This is either prejudicial to the attorney, a waste of judicial resources by the Workers' Compensation Board or will prevent the making of the award if the claimant passes away (although not often, but every year most attorneys who practice before the Workers' Compensation Board on a regular basis will have a client pass away awaiting a final hearing and then none of the agreed upon award would be payable to them and then available to their estate). Also the Workers' Compensation Board fails to define what it means for the client to be present at the hearing. Over the last few years the Workers' Compensation Board has allowed injured workers to appear at their hearings by telephone. Is a claimant who is called by a Law Judge for their hearing "present at the hearing" for the purposes of awarding a fee?

The Workers' Compensation Board, under the proposed regulation, would require that a client sign the fee application indicating whether they agree with the fee. Requiring the client's signature for that purpose would result in unwarranted delay. Also under Workers' Compensation Law §24 the authority for granting a fee in a workers' compensation case is solely with the Workers' Compensation Board. The relevant part of the section states "Claims of attorneys and counselors-at-law for legal services in connection with any claim arising under this chapter … shall not be enforceable unless approved by the board." At no point does the Workers' Compensation Law give any right of approval to the client as to the amount of the fee. We submit that to do so, would be an unauthorized delegation of the authority of the Workers' Compensation Board.

In the Subject Number issued by the Workers' Compensation Board concerning the new procedures for fees the Workers' Compensation Board for completing a fee application based upon its proposed new rule, the Workers' Compensation Board gives little guidance as to how much information must be supplied in the application. The Workers' Compensation Board is seeking "detailed and specific" information about the service provided to the client. This requirement may require an attorney to violate attorney client privilege as defined in Rule 1.6 of the Rules of Professional Conduct. If a client has either a telephone conference or an in or office conference with their attorney everything discussed is subject to the attorney client privilege. Nothing more than the holding of a telephone conference or office conference can be revealed. Neither the Workers' Compensation Board nor any other entity or person has any right to know what

was discussed. If the attorney fails to explain what was discussed do they risk having their fee reduced or violating attorney-client privilege? Both options are wrong. Further information about efforts to resolve the case is included in the application would be requested. As the tribunal that would be making a decision, it is not entitled to know what occurred during negotiations to resolve a case.

In the same Subject Number the Workers' Compensation Board lists factors that are to be considered in deciding the amount of the fee awarded. One of the factors listed is did the attorney "fostered a finding of permanency, or hindered it". When the Workers' Compensation Law was amended in 2007 it put a time limit on how long a claimant who has been found to have a permanent partial disability will receive weekly benefits after the finding of a permanent partial disability. Prior to those amendments such a finding would entitle an injured working weekly benefits for life, if they did not return to work earning more than their pre-accident earnings. Since the law has been amended it is the obligation of an attorney who is representing an injured worker to obtain benefits as long as possible and therefore in compliance with Rule 3.1 of the Rules of Professional Conduct maintain for as long as possible that their client has failed to reach maximum medical improvement, which is a prerequisite to a finding of permanency. Therefore, as long as medical evidence supports a finding that maximum medical improvement has not been reached it is the attorney's obligation to take that position. The Workers' Compensation Board is seeking to punish attorneys for fulfilling their ethical obligations to their clients.

Along these lines the Workers' Compensation Board indicates that it would deem certain actions by an attorney to be a violation of the Rules of Professional Conduct. However, the Workers' Compensation Board does not have any authority to make rulings against attorneys for any possible violation. The authority to sanction attorneys is contained in §90 of Judiciary Law of the State of New York. Under this section the four Appellate Divisions have been granted the authority to discipline attorneys for possible violations of the Rules of Professional Conduct (22 NYCRR §1200).

Under the law, the Appellate Division issued a joint resolution 22 NYCRR §1240 effective October 1, 2016, which sets up the procedures for the adjudication of charges brought against an attorney in the state of New York. That rule sets up an extensive procedure for discipline attorneys for violation of the Rules of Professional Conduct. These procedures allow for due process with a multi-level review of the charges with eventual hearings before the Character and Fitness Committee with final say on discipline with the Appellate Division. The procedures have four preliminary stages:

1. Initial Complaint
2. Investigation of Complaint
3. Response to the Complaint
4. Initial Determination on the Complaint

If the proceeding goes further there are full evidentiary hearings with the right of cross examination of accusers and eventually proceedings before the appropriate Appellate Division for final resolution of the complaint. At all phases of the procedure there is a different person or persons who act the accuser, prosecutor and decider of fact.

None of the protections afforded attorneys under §90 of the Judiciary Law are contained in the proposed rule, which seeks to usurp the role of the Appellate Division in sanctioning attorneys for violations of the Rules of Professional Conduct.

The Workers' Compensation Board in its Subject Number talks about a "deferred fee" until a "milestone" event occurs in the case. Does this mean that at every hearing the attorney should ask for a fee commensurate with the services rendered without regard to the additional benefits actually awarded at the hearing? Should an attorney ask for a fee in the thousands of dollars at a hearing when a fee that might appropriately be awarded for under $100.00 be appropriate and ask that any portion of that fee be determined to be "deferred" until the "milestone" event occurs? This would require the attorney to ask for a fee that "a reasonable lawyer would [believe to be] definite[ly] and firm conviction that the fee is excessive" in violation of Rules of Professional Conduct Rule 1.5.

Every service performed by the attorney on behalf of their client from the time that the client walks into their office until the case is ultimately resolved sets up the case for the final resolution and the final fee awarded in the case. What should be looked at is the total benefits obtained from the beginning of the case until it is ultimately resolved, either by an award for lost time, a "scheduled loss of use award", a "permanent partial disability award", a "permanent total disability award" or a "§32 resolution." Without the filing of a C-3 or a C-62 the case never gets to the end result and that each and every award and finding as the case progresses also contributes to the ultimate resolution and that the awarding of fees as the case progresses are only interim fees for services that have been performed to fully resolve the case.

The proposed addition to the rules and regulations of the Workers' Compensation Board to be codified at §300.17(b)(2) also fails to take into account when an attorney is dismissed by a client. Additional language should be added to state that when an attorney has been discharged by a client the attorney has no further obligation to the client. Also the proposed rule is silent about the right of an attorney to withdraw from the representation when retained to represent a client who is either a potential or adjudicated uninsured employer, an employer who is accused of or been found to have violated Workers' Compensation Law §120, or an employer accused of or found to have violated §14-a of the Workers' Compensation Law and a related section of the Labor Law of the State of New York.

Regulatory Impacts

The statement that there are no costs to any parties regulated by the Workers' Compensation Board is incorrect. Under "Needs and Benefits" the Workers' Compensation Board indicates that the Workers' Compensation Board will now be able to mandate that attorneys who have online access to the Workers' Compensation Board's Electronic Case Folder system will be required to receive notices from the Workers' Compensation Board using an electronic mailbox. This would cost all who are required to now receive their notices electronically to be require to pay for the cost of printing the notices. For attorneys the proposed regulation would increase administrative and printing cost in their offices.

This requirement may also be adding similar costs to local municipalities and government entities if they have similar access as attorneys have to the Workers' Compensation Board's Electronic Case Folder system.