

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-035092

Employee: Donna Rader
Employer: Amerisafe, Inc.
Insurer: Federal Insurance Co. c/o Chubb Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 2, 2009. The award and decision of Administrative Law Judge Maureen T. Tilley, issued June 2, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 23rd day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Donna Rader

Injury No. 04-035092

Dependents: N/A

Employer: Amerisafe, Inc.

Additional Party: Lienor attorneys: Gordon Neilson and Gary Matheny

Insurer: Federal Insurance Co. c/o Chubb Services

Hearing Date: April 6, 2009

Checked by: MT/kh

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease? March 25, 2004
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment?
Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident happened or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: low back and mental injury
14. Nature and extent of any permanent disability: See findings
15. Compensation paid to date for temporary total disability: \$5,892.38
16. Value necessary medical aid paid to date by employer-insurer: \$36,518.18
17. Value necessary medical aid not furnished by employer-insurer: none
18. Employee's average weekly wage: \$409.73
19. Weekly compensation rate: \$273.15
20. Method wages computation: By agreement
21. Amount of compensation payable: See findings
22. Second Injury Fund liability: Left open
23. Future requirements awarded: None

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: 90% of the 25% shall be awarded to attorney Daniel Roddy. 10% of the 25% shall be awarded to attorneys Gordon Neilson and Gary Matheny

FINDINGS OF FACT AND RULINGS OF LAW

On March 25, 2004, the employee, Donna Rader, appeared in person and by her attorney, Daniel Roddy, for a hearing for a final award. The employer was represented at the hearing by its attorney, John Kafoury. An additional party consisting of Lienor attorneys Gordon Neilson and Gary Matheny were also present. The Second Injury Fund did not have an attorney because the Second Injury Fund was left open. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Covered employer: Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Federal Insurance Company c/o Chubb Services.
2. Covered employee: On or about the date of the alleged accident or occupational disease the employee was an employee of Amerisafe Inc., and was working under the Workers' Compensation Act.
3. Accident: On or about March 25, 2004, the employee sustained an accident arising out of and in the course of her employment.
4. Notice: Employer had notice of employee's accident.
5. Statute of limitations: Employee's claim was filed within the time allowed by law.
6. Average weekly wage and rate:
Average weekly wage: \$409.73
Rate for temporary total and permanent partial disability: \$273.15
7. Medical causation
8. Medical aid furnished by employer-insurer: \$36,518.18
9. Temporary disability paid by employer-insurer
Amount paid: \$5,892.38 for the time periods of May 10, 2004 through May 7, 2004
10. There is no claim for additional medical aid
11. Nature and extent of disability:
Permanent partial disability: 27% of the body regarding the low back and 5% of the body for alleged mental injury. This is a total compensation amount of \$35,000
12. The employer-insurer has made a \$3,000 cash advance against the settlement.
13. The parties stipulate to the information contained in Exhibit A.

ISSUES

1. The amount that the employee's attorney and the lienor are entitled to from the settlement.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- Exhibit A: The Stipulation for Compromise Settlement in the case signed by employee, employee's attorney and the attorney for the employer.
- Exhibit B: November 10, 2004 correspondence from Nielson to Mr. Kriegel.
- Exhibit C: November 23, 2004 correspondence from Mr. Kriegel to Nielson.
- Exhibit D: November 18, 2004 correspondence from employee to Nielson, with certified mail return receipt.
- Exhibit E: A list of some of the documents contained in the file of Dan Roddy.
- Exhibit F: A summary of the costs incurred on behalf of employee by Dan Roddy.
- Exhibit G: Nielson's document log.
- Exhibit H: Subpoena Duces Tecum.
- Exhibit I: December 20, 2005 correspondence from Mr. Roddy to Nielson.
- Exhibit J: February 6, 2009 correspondence from Mr. Roddy to Mr. Matheny.
- Exhibit K: March 12, 2009 correspondence from Mr. Roddy to Mr. Matheny.
- Exhibit L: March 17, 2009 correspondence from Mr. Roddy to Mr. Matheny.
- Exhibit M: November 10, 2004 correspondence from Nielson to Chubb Insurance.
- Exhibit N: Correspondence from Nielson to Rader regarding inability to reach her.

The following exhibits were offered by Lienor and admitted into evidence:

- Exhibit 1: Nielson's Contract with employee.
- Exhibit 2: November 15, 2004 correspondence from Mr. Kriegel to Nielson.
- Exhibit 3: November 23, 2004 correspondence from Mr. Kriegel to Nielson.
- Exhibit 4: December 9, 2004 correspondence from Mr. Kriegel to Nielson.
- Exhibit 6: Letter to the employee from Wallach and Associates dated February 24, 2005.
- Exhibit 7: Letter from Gary Matheny to Daniel Roddy.

Lienor offered exhibit 5, into evidence. This exhibit was taken under advisement. On May 24, 2009, the administrative law judge ruled that exhibit 5 is not to be admitted into evidence. Exhibit 5 will remain with the file for appellate purposes only.

Employer-Insurer did not offer any exhibits

FINDINGS OF FACT

- The employee, Donna Rader, and lienor, Attorney Gordon Neilson, were unable to resolve the amount claimed by Mr. Neilson as his lien for attorney's fees on employee's claim against the employer. A settlement was agreed to on the claim for compensation between employee and employer in the fall of 2008. (Exhibit A). However, that

settlement could not be approved, because of the dispute as to the amount of Mr. Neilson's lien.

- The employee entered into a written fee agreement with Mr. Neilson in September 2004 at a meeting that employee testified lasted half an hour. (Exhibit 1).
- At some point in time Ms. Rader expressed a desire to see another doctor. The employee testified that Mr. Neilson sent her to a chiropractor. She saw Dr. Dennis Daily during December 2004 and January 2005 for several examinations and physical therapy sessions. She listed Gordon Neilson as her attorney and signed authorizations for Dr. Daily to release his full medical records to her attorney, Gordon Neilson.
- Mr. Neilson testified that he initially met with employee for about 3 ½ hours.
- On November 15, 2004, the employer's attorney mailed medical records to Mr. Nielson attorney (Exhibit 2), and Mr. Neilson testified that he spent about 13 ½ hours reviewing those records.
- Employee testified that she soon became unhappy with Mr. Neilson's performance as her attorney, expressed this displeasure to him and told him that she wanted to terminate their attorney-client relationship. She testified that she appeared on a docket for her case that Mr. Neilson did not appear. She then sent a certified letter, return receipt requested, to Mr. Neilson dated November 18, 2004, in which she discharged Mr. Neilson as her attorney, told him to take no further actions on her behalf and asked for her file. (Exhibit D). The green return receipt showed that Mr. Neilson's office received and signed for that letter on November 19, 2004. (Exhibit D).
- Mr. Neilson testified that he had seen the certified letter before he telephoned employer's attorney on or about November 22 or 23, 2004.
- Mr. Neilson testified that no other written agreement was entered into between employee and Mr. Neilson after Mr. Neilson received the termination letter from employee on November 19, 2004.
- Employee testified that in November of 2004: she was not ready to settle the case; she did not give authorization to Mr. Neilson to try to settle the case and that she needed additional medical care.
- Mr. Neilson testified that even though he had already received the November 18, 2004 termination letter, he called employer's attorney on either November 22 or November 23. Mr. Neilson testified that in that conversation he did not mention he was fired as employee's attorney. He also testified that during that conversation an unsolicited offer was made by the employer.
- Lienor's Exhibit 4 is a letter from the employer's attorney to Mr. Neilson in which the employer's attorney extends an offer to the employee. This letter was dated December 9, 2004.
- Mr. Neilson testified that he was in contact with the employee and that he relayed that offer by telephone to her that day or the next day. However, in a letter dated shortly thereafter from Mr. Neilson to employee, Mr. Neilson stated that he had been trying to call employee for weeks, but had not been able to reach her. (Exhibit N).
- John Kafoury, an attorney for the employer, testified that in February 2005 the employer withdrew the offer made on November 23, 2004.
- The employee testified that she tried to retain Wallach and Associates to take over her case in February of 2005, however they did not take over her case.

- Attorney Gordon Neilson withdrew as Ms. Rader's attorney by letter, dated March 23, 2005, in which he requested a fee of 25 per cent of the amount generated as his lien.
- Mr. Neilson testified that he never appeared on a docket for the employee, that he had no records of incurring any costs for the employee, that he took no depositions in the case, that he kept no time records.
- Mr. Neilson testified that his hourly rate in 2004 was \$175.00 an hour.
- Employee's exhibit E lists correspondence dates that the employee had with Mr. Roddy and medical treatment that the employee received. This list begins on November 11, 2005 through March 6, 2009. The list contains extensive correspondence and dates of medical treatment.
- Mr. Neilson filed an original Claim for Compensation for the employee on September 24, 2004, this did not include the Second Injury Fund. Attorney William Holland filed an amended Claim for Compensation for the employee on August 25, 2005, which included the Second Injury Fund. Mr. Roddy filed an amended Claim for Compensation for the employee on May 30, 2006.

APPLICABLE LAW

- V.A.M.S. Section 287.260 states that an attorney representing a workers' compensation claimant may be entitled to a lien for the work the attorney performs.
- V.A.M.S. Section 287.260 states that all attorney's fees for services connected with this chapter shall be subject to regulation by the division or the commission and shall be limited to such charges as are fair and reasonable and the division or the commission shall have jurisdiction to hear and determine all disputes concerning the same.

RULINGS OF LAW:

Issue 1. The amount that the employee's attorney and the lienor attorneys are entitled to from the settlement.

Based on the stipulation regarding permanent partial disability, I find that the employee sustained 27% permanent partial disability of the body regarding the low back and 5% of the body for mental injury. This is a total compensation amount of \$35,000.00. I direct the employer-insurer to pay the employee a total of \$35,000.00 for the permanent partial disability to her back and her mental injury.

The original attorney, Gordon Neilson, originally worked on the employee's case a minimal amount which included initially meeting with the employee, filing a Claim for Compensation, reviewing some medical records, and sending the employee to a chiropractor. The vast majority of the case was performed by Daniel Roddy which included filing an amended Claim for Compensation, extensive communication with the employee, and representing the employee as she received extensive medical care. After reviewing all of the evidence, I find that Mr. Neilson is entitled to a limited recovery based on quantum meruit.

The employee agreed on a settlement of \$35,000.00 from the employer-insurer. In a Workers' Compensation case, the total amount that attorneys are entitled to is 25% of a settlement or award. In this case, 25% equals \$8,750.00. After reviewing all of the evidence, I find that the employee's attorney, Daniel Roddy, is entitled to a fee of 90% of \$8,750.00 which equals \$7,875.00. Lienor attorney Gordon Neilson is entitled to a fee of 10% of \$8,750.00 which equals \$875.00. I therefore order that Mr. Roddy is to receive \$7,875.00 of the amount of compensation awarded to the employee. I also order that Mr. Neilson is to receive \$875.00 of the amount of compensation awarded to the employee.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____ Made by:

Maureen T. Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation