

New Directive from Chief Judge on Counsel Fees

What the appropriate counsel fee is in a workers' compensation claim has long been an issue. Section 64 of the Workers' Compensation Statute states: "The official conducting any hearing under this chapter may allow to the party in whose favor judgment is entered, costs of witness fees and a reasonable attorney fee, not exceeding 20 percent of the judgment." Each year a directive was issued by the Director and Chief Judge of Compensation setting forth a cap amount on the overall counsel fee based on a fee committee review. This put a maximum fee that a petitioner's counsel could receive for obtaining an award or judgment in favor of the petitioner. As of 2015, the capped counsel fee award was \$45,000. In order to obtain a fee greater than \$45,000, counsel needed to present proof as to why the fee should be greater.

As of December 11, 2015, the new Director and Chief Judge Russell Wojtenko eliminated the cap on any counsel fee awarded. The new memorandum specifically provides that counsel fees are solely governed by Section 64 and therefore, when awarding a counsel fee, the Judge has full discretion to award a fee up to 20 percent of the award entered. No reference was made by the Director and Chief Judge to the previously imposed fee cap. The only further reference is to a requirement that the Court must consider all circumstances of the case and the value of the services performed. If necessary, the Court can consider affidavit of services, testimony or other information to determine what is "reasonable."

While there is no specific reference to the effective date of this new fee approach, it is expected that it has gone into effect as of the date of the memorandum. Therefore, any matter resolving after December 11, 2015, is subject to an unrestricted potential counsel fee up to 20 percent of any given award or judgment.

Comment: It should also be noted that we have seen several different Judges use discretion in different ways in determining counsel fees. For example, typically the Courts have always (at least since the 1980 amendment of the Statute) split counsel fees 60 percent for the respondent and 40 percent for the petitioner so that the petitioner gets a little more of the award and the attorney still gets a 20 percent fee. More recently, some Judges have gone to a 70/30 split of fees. It is too soon to tell if this is only individuality being expressed or a trend to change the system.

For more information, please contact Robert R. Hanneman Jr. at rhanneman@wglaw.com or 856.667.9111