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1. ATTORNEYS' FEES—TAXED AS COSTS—AGAINST INDUSTRIAL COMMISSION OF OHIO—SUCCESSFUL APPEALS, SECTION 1465-90 GENERAL CODE—FIXED BY COURT OF COMMON PLEAS — WHERE TRIAL JUDGE FIXES FEE ON PERCENTAGE BASIS—ONLY DUTY OF COMMISSION IS TO COMPUTE AMOUNT OF FEE BASED ON AWARD MADE TO PLAINTIFF.
2. CLAIM FILED UNDER SECTION 1465-82 GENERAL CODE— WHERE FINAL JUDGMENT ALLOWING PARTICIPATION IN STATE INSURANCE FUND CERTIFIED TO COMMISSION, DUTY OF COMMISSION IMMEDIATELY TO COMPUTE AND PAY ATTORNEY FEE WHICH IS PART OF JUDGMENT—AMOUNT COMPUTED ON TOTAL AWARD PAYABLE NOT SUBSEQUENTLY AFFECTED IF TOTAL AWARD NOT FULLY PAID, DUE TO DEATH OF DEPENDENT PRIOR TO EXPIRATION OF FULL PAYMENT PERIOD.

SYLLABUS:

1. Attorneys' fees, taxed as costs, against the Industrial Commission in successful appeals under the provisions of Section 1465-90, General Code, are fixed by the court of common pleas. In cases where the trial judge fixes a fee on a percentage basis, as provided in Section 1465-90, General Code, the only duty which the Industrial Commission has with respect thereto is to compute the amount of the fee based on the award made to the plaintiff therein.

2. Upon certification to the Industrial Commission of a final judgment allowing participation in the state insurance fund by virtue of a claim filed under the provisions of Section 1465-82, General Code, it is the duty of said Commission immediately to compute and pay the attorney fee which is a part of the judgment. The amount of said fee is to be computed on the total award payable and is not subsequently affected by the fact that such total award is not fully paid, due to the death of the dependent prior to the expiration of the full payment period.

Columbus, Ohio, November 27, 1943

The Industrial Commission of Ohio,
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion which reads as follows:

"The Common Pleas Court of Cuyahoga County held that the Industrial Commission had jurisdiction of a death claim, and on the basis of that finding the Commission made a total award to the dependent in the case of \$5,871.58.

The dependent died when only \$2,891.70 of the total award of \$5,871.58 had been paid.

The question developing out of this situation is one involving payment of a proper attorney fee.

Should the fee to the attorney be allowed on the total amount of the award—\$5,871.58, or should it be allowed only on the amount of compensation actually paid to the dependent up to the time of such dependent's death; namely \$2,891.70.

The fee permissible in the first instance would be \$500.00.

The fee permissible in the second instance would be \$339.17.

We are requesting your opinion on the foregoing matter as a guide for settlement of future attorney fee questions in

death claims, in which the jurisdiction of The Industrial Commission of Ohio is specifically determined by court action.”

In addition to the facts set forth in your request, the claim file reveals that the judgment of the Court of Common Pleas provided that the attorneys for claimant should receive as compensation for their work performed in court, attorney fees in accordance with the laws of Ohio.

The situation presented by your inquiry involves that part of Section 1465-90, General Code, which provides :

“* * * The *cost* of any legal proceedings, authorized by this section, includes an attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be *taxed* against the unsuccessful party; provided, however, that such attorney fee shall not exceed twenty per cent of any award up to the sum of five hundred dollars, and 10 per cent on all amounts in excess thereof, but in no event shall such fee exceed the sum of five hundred dollars. * * *” (Emphasis mine.)

As stated in your request, by reason of a final judgment from the Court of Common Pleas of Cuyahoga County, the Industrial Commission on October 27, 1942, made an award in the amount of \$5,871.58, payable to the claimant (who was the widow of the deceased employee) for 345 weeks (plus) at \$17.01 per week. After making said award, the Industrial Commission proceeded to make the weekly payments and continued the same until the death of the claimant on March 19, 1943, said payments totaling \$2,891.70.

When the original award was made on October 27, 1942, there was included, pursuant to the judgment, an award for an attorney's fee to be paid to claimant's counsel in the sum of \$500.00, which was computed on the total award of \$5,871.58, under the percentage schedule contained in Section 1465-90, above quoted.

Section 1465-90, General Code, generally provides for the manner and procedure of appeals from a jurisdictional disallowance of claims filed with the Industrial Commission. In the event there is a final judgment in favor of the claimant's participation in the state insurance fund, such judgment is certified to the Industrial Commission which then makes the award in the manner provided for by the Workmen's Compensation Act. In this particular claim the award was made under the provisions of Section 1465-82, General Code, relative to death awards.

In the event that a claimant is successful on appeal, then, as stated in the above quoted portion of Section 1465-90, the costs of the legal pro-

ceedings are taxed against the unsuccessful party, the Industrial Commission of Ohio. As part of these costs there is included an attorney's fee to claimant's attorney, to be fixed by the trial judge.

It will be noted that this attorney's fee shall not exceed 20% of an award up to \$500.00 and 10% of the award in excess of \$500.00, nor exceed a total fee of \$500.00. In other words, the schedule provides for maximum, computed on the amount of the award, but not for minimum.

Since, in the case presented by your inquiry, the claimant or plaintiff was successful, the attorney's fee under the provisions of Section 1465-90, would be taxed against the defendant, the Industrial Commission of Ohio, and would become a part of the final judgment which was certified to the Industrial Commission of Ohio for payment.

In the case of *Fisher Body v. Cheflo*, 122 O. S. 142, in the opinion by Judge Jones, it is stated at page 146:

"* * * In a *per curiam* by this court, in *Industrial Commission v. Tripsansky*, 119 Ohio St., 594, 165 N. E., 297, it was suggested that the amount of the attorney fee could be fixed by the commission. The language there employed was *obiter*. The section of the statute, 1465-90, General Code, pertaining to this feature of the case reads as follows: 'The cost of any legal proceedings, authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party; provided, however, that such attorney fee shall not exceed twenty per cent of any award up to the sum of five hundred dollars, and ten per cent on all amounts in excess thereof, but in no event shall such fee exceed the sum of five hundred dollars.'

It is clear that this section of the Workmen's Compensation Law empowers the judge, and not the commission, to fix the attorney fee. Furthermore it reposes in the judge, and not in the commission, the discretion as to the percentage amounts which the attorney may receive upon any future award. * * *

See also *Industrial Commission v. Nelson*, 127 O. S. 41, and *Adkins v. Staker*, 130 O. S. 198.

We can, therefore, see that the power for fixing an attorney's fee is left solely with the trial judge in the Court of Common Pleas.

Although in the body of the opinion of *Industrial Commission v. Tripsansky*, 119 O. S. 594, it was stated:

“* * * It was argued that the judge could not know exactly what the amount of the award would be, and that he should not have fixed the amount of the fee. It is clear, however, that the amount of the award in this case would call for the maximum attorney fee, which the court in fact awarded. While it might be better practice for the court to leave the amount indefinite, and to be fixed by the commission, we find no error, since the court fixed the correct amount.”

Judge Jones, in *Fisher Body v. Cheflo*, supra, referred to that language as *obiter*, and pointed out that clearly the Workmen's Compensation Law empowers the judge, and not the commission, to fix the attorney fee, and further that the discretion as to the percentage amounts which the attorney may receive rests with the court and not with the commission.

Although Section 1465-90 provides that the attorney's fee shall be included as part of the costs of the legal proceedings, to be taxed against the unsuccessful party, as a matter of practical expediency the commission has always paid the attorney's fee to the attorney direct and not to the clerk of courts.

It may be argued that since a judgment provides only that a claimant is entitled to participate in the state insurance fund, that the trial court in fixing the attorney's fee only sets forth in the judgment entry the schedule provided for in Section 1465-90, and that the determination of the amount of the fee is left with the commission. However, in the case of *State, ex rel. The Willys-Overland Co. v. Clark, et al.*, 112 O. S. 263, Judge Kinkade, speaking for the court, at page 267, says:

“Manifestly, the jurisdiction resting in the Commission by virtue of Section 1465-86, General Code, pending an appeal, is only a jurisdiction to be exercised in carrying into effect the final judgment of the court entered on appeal or on error, and such jurisdiction can have no force until set in operation by a remanding of the cause or a certifying of the result in court to the Commission, in order that the judgment as finally entered in court may be carried into execution by the agencies under the command of the Commission in more convenient form than this can be done by the officers of the court entering the judgment.”

It, therefore, follows that the manner in which attorneys' fees are paid by the commission is a more convenient form of carrying into effect the judgment of the court, and is in no way jurisdiction over the amount.

In the case of a death award, Section 1465-82, General Code, very clearly sets forth the amount and manner in which the judgment shall

be paid. At the time the judgment becomes final in favor of the claimant in a death case all of the facts necessary to a determination of the amount of the award are known to the commission. In other words, the rate based on the average weekly wage is known or may be determined, the date of the injury is known, the date of death is known, and the time for which the payments shall continue is known. It then becomes only a mechanical or mathematical function to determine the amount of the award and thereupon to compute the attorney's fee in accordance with the judgment of the court.

Your inquiry is based upon a situation wherein the claimant-dependent dies before the total amount of the award has been paid out on the weekly basis and whether or not the attorney's fee should then be figured and paid on the amount of the original award or on the portion of the award actually paid prior to the death of the claimant.

It is to be remembered that the provision for attorneys' fees to be paid in addition to the award came about from the intent and purpose of the Legislature that an injured employee or his dependents should not be made to bear the burden of attorneys' fees. *Read v. Marty*, 6 O. L. Aba., 199. In other words, whatever award is due an injured employee or his dependents should be entirely free from any expense or deduction when it is necessary to appeal to the court to substantiate their claim.

This is further borne out by the fact that the Workmen's Compensation Act has, since its inception, provided for an attorney fee, to be taxed as costs, when the claimant was successful on an appeal from the disallowance of a claim.

From 1913 until 1925 the provision under discussion provided for a "reasonable attorney fee" to be fixed by the court, and it was not until after the trial of the appeal of claims was changed from de novo to the testimony contained in the rehearing transcript, that a limitation was fixed on the amount of the fees allowed.

In the instant case, the attorney representing the claimant successfully prosecuted her claim; and when the original award was made on October 27, 1942, all of the services of the attorney which were needed to bring the matter to its ultimate successful conclusion, had been performed. Furthermore, when the judgment became final and was certified to the commission, the widow-claimant then had a vested right to an award based on the provisions of Section 1465-82, General Code, which, since all of the facts were before the Industrial Commission, need only be made in one award of compensation which could not be split into several awards from time to time. In other words, in our opinion, under Section

1465-82, the Industrial Commission would have no right to make awards from time to time for 345 weeks but, as before stated, claimant had a vested right to one award for the total period and amount, namely, \$5,871.58 for 345 weeks (plus) at \$17.01 per week, which award the commission correctly made on October 27, 1942.

For the commission to make an award in this claimant's case, for example, fifty-two weeks at \$17.01 per week and then at the expiration of that time, another award for fifty-two weeks and so on, until the total of three hundred and forty-five weeks had elapsed, would not be in compliance with Section 1465-82. While in the ordinary injury claims of living employees, it is necessary from time to time to have re-examination and change the awards to properly reflect wage impairment and extent of disability, in a death claim it is no concern of the Commission how long the dependent is going to live, and when the dependent's decedent dies as the result of an injury in the course of his employment, the dependent's rights are definitely and unalterably fixed.

When the judgment of the court is in favor of the right of a dependent claimant of a deceased employee to participate in the state insurance fund the Industrial Commission has no further discretion in the matter but must proceed in accordance with such judgment under the statutes applicable thereto. *State, ex rel. Moore v. Industrial Commission*, 141 O. S. 241; *State, ex rel. Morand v. Industrial Commission*, 141 O. S. 252. The Industrial Commission cannot change the amount of an award in any respect; likewise, the amount of the attorney's fee cannot be changed. The commission must determine the amount of the award and of the attorney's fee based on the facts as then known, and the only right it then has is to determine the amount of the award and of the fee based on the percentages fixed by the trial court. Thereafter, this attorney fee is payable the same as court costs in the case, as provided in Section 1465-90, and once such costs are properly taxed they are not subject to reduction, cancellation or installment payment.

The gist of your inquiry lies in the fact that the Industrial Commission does not fix the attorney's fee; it only computes it under the percentages set forth in the judgment as part of the costs taxed by the trial court.

It is, therefore, my opinion that attorneys' fees, taxed as costs, against the Industrial Commission in successful appeals under the provisions of Section 1465-90, General Code. are fixed by the court of common pleas. In cases where the trial judge fixes a fee on a percentage basis, as provided in Section 1465-90, General Code, the only duty which the Indus-

trial Commission has with respect thereto is to compute the amount of the fee based on the award made to the plaintiff therein.

Upon certification to the Industrial Commission of a final judgment allowing participation in the state insurance fund by virtue of a claim filed under the provisions of Section 1465-82, General Code, it is the duty of said Commission immediately to compute and pay the attorney fee which is a part of the judgment. The amount of said fee is to be computed on the total award payable and is not subsequently affected by the fact that such total award is not fully paid, due to the death of the dependent prior to the expiration of the full payment period.

Respectfully,

THOMAS J. HERBERT,
Attorney General.