

11/28/00

SUPREME COURT OF LOUISIANA

00-CC-1123

JIM M. MCCARROLL

versus

AIRPORT SHUTTLE, INC.

KNOLL, J., dissenting.

Contrary to the majority's determination, I find that the attorney's fee awarded under LA. REV. STAT. ANN. § 23:1201(F) complements the very low contingency fee rate dictated by LA. REV. STAT. ANN. § 23:1141, and is not subject to reduction by the amount of contractual attorney's fees. To rule otherwise diminishes the role of the attorney in worker's compensation proceedings when an employer and/or insurer are being arbitrary and capricious, and makes short shrift of the integral part that attorneys play in securing just compensation from recalcitrant employers. See Lucas v. Ins. Co. of North America, 342 So. 2d 591, 598-99 (La. 1977).

From the outset, I note that the contingency fee contract entered into between the parties referenced only the contractual fee without any mention of statutory attorney fees that may be awardable. The contingency fee contract is based only on the *compensation* awarded. As noted in the majority opinion, this contractual fee, tracking LA. REV. STAT. ANN. § 23:1141, marks the maximum amount payable. McCarroll v. Airport Shuttle, Inc., 00-1123 (La. __/__/00), slip op. at 4. Such constraints fit neatly into the scheme of this social legislation and its goal to provide for the injured worker. However, I note that if the attorney is paid the contractual fee from the client portion of the obligation and the statutory fee owed by the employer/insurer, the client is no worse off because he receives no less compensation than he would have had the insurer/employer not been found liable for not reasonably

controverting the worker's claim. Moreover, because of the diligence of his attorney, the claimant receives penalties and sums which had heretofore been denied him. LA. REV. STATS. ANN. §§ 23:1201, 1201.2. It is only if the claim is not reasonably controverted by the employer or insurer (or both) that one or both of these entities may be assessed with an attorney's fee; however, unlike the contractual fee, this statutorily created attorney fee must be reasonable and is not tempered by the restraints of LA. REV. STAT. ANN. § 23:1141. McCarroll, slip op. at 5, 9. Thus, it is readily apparent that these attorney fees differ drastically in origin and in application.

It is because of this drastic difference that I disagree with the majority's conclusion that the attorney receives double recovery (to the extent of the contractual fee) if the attorney is allowed to collect the contractual attorney fee and the award of the statutory attorney fee. It is well accepted that an obligation (in this case, the payment of attorney fees) may arise from different acts and sources. In the present case, McCarroll's obligation to pay attorney fees to the Worker's Compensation Legal Clinic of Louisiana arises from their contract. On the other hand, the obligation of Airport Shuttle, Inc. ("Airport Shuttle") to pay attorney fees is in the nature of a statutorily created penalty that arises from the finding of the Office of Workers' Compensation that Airport Shuttle did not reasonably controvert McCarroll's entitlement to workers' compensation benefits. Accordingly, the fixing of attorney's fees primarily focuses on factors peculiar to the attorney, namely: the degree of skill and ability the attorney exercised, the amount of the claim, the amount that the attorney recovered for the employee, and the amount of time the attorney devoted to the case. See H. ALSTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE: WORKERS' COMPENSATION LAW AND PRACTICE § 389.

It is illogical to find, as does the majority, that a portion of the attorney fee obligation is extinguished because both McCarroll and Airport Shuttle are obligated to pay attorney fees. The majority notes “that the statutory fees were intended to benefit the employee . . . and were not intended to provide additional fees to the employee’s attorney.” I disagree with this interpretation. The policy behind the award of attorney’s fees was to discourage arbitrary and capricious conduct by an employer or insurer. If a worker’s compensation case reaches this level, the case is unpleasant, and more often than not, aggressively prosecuted and defended by both sides. The work of the claimant’s attorney at this stage is vital, hard, and important. The attorney’s fee award, if made, is well deserved. The majority’s interpretation takes this emphasis away, and the extra “pat on the back” the claimant’s attorney earns in the form of an award of attorney’s fees is diminished. The intended “benefit the employee” the majority relies upon for its interpretation is found in the penalties granted the claimant tied to the unpaid compensation and unpaid medical expenses, rather than the award of attorney’s fees. See LA. REV. STATS. ANN. §§ 23:1201, 1201.2. In the present case, the worker received both -- penalties of \$2,000 for unpaid benefits and \$2,000 for unpaid medical expenses. The employee still owes his or her lawyer attorney’s fees for the compensation restored and the insurer/employer owes attorney’s fees for their recalcitrant conduct. In essence, the majority is rewriting the contingency fee contract between the claimant and his attorney, and making provisions not called for in the statute. If the award of attorney’s fees under LA. REV. STAT. ANN. § 23:1201(F) was to relieve a claimant of his contingency fee contract with his lawyer, the Legislature would have provided for this. It has not and the majority should not.

For these reasons, I respectfully dissent.