

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-2495

(Summary Calendar)

PEGGY J. LEE,

Plaintiff-Appellee,

versus

BENEFITS PLANS ADMINISTRATOR OF ARMCO, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CA H 90 3642)

April 27, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

The Benefits Plans Administrator of Armco, Inc. ("Administrator") appeals the district court's award of attorney's fees under 29 U.S.C. § 1132(g)(1) (1988), and Peggy Lee motions this Court to dismiss the appeal for want of jurisdiction, pursuant to Fed. R. App. P. 4(a). Finding that the Administrator's notice of appeal of the fee award was timely filed, we deny the motion to dismiss. However, because the district court abused its discretion

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

by awarding attorney's fees to Lee without determining which of the claimed hours were reasonably spent by Lee's counsel, we vacate the award of attorney's fees, and remand for further proceedings not inconsistent with this opinion.

Lee brought the underlying suit, claiming that the Administrator had violated her right to employee benefit information pursuant to the Employee Retirement Security Income Act of 1974, 29 U.S.C. § 1132 et seq. ("ERISA"). At the conclusion of the non-jury trial, the district court found that the Administrator acted with deliberate indifference to its duties under ERISA. The court awarded Lee the sum of \$7,800.00, the amount of the statutory penalty recoverable under 29 U.S.C. § 1132(c). Citing the testimony of Lee's counsel, Phyllis Finger, as to the hours spent on the case, the court also awarded Lee attorney's fees in the amount of \$25,000.00.

On appeal, the Administrator argues that the district court abused its discretion by awarding fees to Lee, due to the absence of evidence establishing the hours reasonably expended by Finger in litigation of the case. Lee contends, both in her motion to dismiss the appeal and her brief on appeal, that this Court is without jurisdiction to hear the appeal.

We first determine the jurisdictional issue. Under Fed. R. App. P. 4(a)(1), a notice of appeal must be filed within 30 days after judgment is entered. Judgment against the Administrator was entered on May 5, 1992. The Administrator's notice of appeal of the fee award was not filed until June 26, 1992, more than 30 days

after entry of the judgment. Consequently, Lee contends that the Administrator failed to timely file a notice of appeal, thereby depriving this Court of jurisdiction. We disagree.

On May 14, 1992, Lee filed a motion to "Amend the Final Judgment to include an appropriate award of attorney's fees." The motion requested that the district court redirect the payment of attorney's fees to Finger, so that Lee would not have to pay taxes on the fee award. The district court entered a final order denying Lee's motion to amend the award of attorney's fees on June 1, 1992. We have previously held that a party need not file a notice of appeal regarding an attorney's fees judgment until the amount of the award is determined and any motions to alter that judgment are resolved. See *Echols v. Parker*, 909 F.2d 795, 798 (5th Cir. 1990) ("[T]he State was not required to file its notice of appeal of the March 7 fee liability judgment until the amount of the award was determined and the State's motion to reconsider that judgment was denied."). Since Lee's motion to amend the award of attorney's fees was not resolved until June 1, 1992, the Administrator had thirty days from that date to file a timely notice of appeal of the fee award. See Fed. R. App. P. 4(a)(1); 28 U.S.C. § 1291 (1988) (providing that courts of appeals shall have jurisdiction "from all final decisions of the district courts"); see also *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 197-98, 108 S. Ct. 1717, 1719, 100 L. Ed. 2d 178 (1988) (affirming appellate court's conclusion that notice of appeal concerning attorney's fees, which was filed within 30 days of final order concerning same, was timely

filed under Fed. R. App. P. 4(a)). Because the Administrator's notice of appeal of the fee award was filed on June 26, 1992, we conclude that the requirements of Fed. R. App. P. 4(a) were satisfied,¹ and that the fee award issue is properly before us.

We next consider whether the district court abused its discretion in its calculation of attorney's fees.² See *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990) (reviewing the district court's award of attorney fees for abuse of discretion and its finding of fact supporting the award for clear error). In determining the amount of an attorney's fee award, the district court "should consider the twelve *Johnson*³ factors in light of the following three-step process: it should (1) ascertain the nature and extent of the services supplied by the attorney; (2) determine the value of the services according to the customary fee and the quality of legal work; and, (3) adjust the compensation on the

¹ Had the Administrator's notice of appeal gone to the merits of the district court's judgment, rather than to the issue of attorney's fees, we would have reached a different result. See *Budinich*, 486 U.S. at 198-200, 108 S. Ct. at 1719-21 (affirming appellate court's dismissal of all issues on appeal except the issue of attorney's fees, where notice of appeal attacking merits of district court's judgment filed more than thirty days after final order denying new-trial motions, but within thirty days of final order concerning attorney's fees). Despite Lee's assertion to the contrary, her motion to amend the award of attorney's fees did not reach the merits of the district court's judgment. See *id.* at 200, 108 S. Ct. at 1720 ("[A] request for attorney's fee . . . does not seek `reconsideration of matters properly encompassed in a decision on the merits.'" (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, 102 S. Ct. 1162, 1166, 71 L. Ed. 2d 325 (1982))).

² The Administrator apparently does not contest)and the record does not reflect otherwise))that Lee was entitled to receive attorney's fees, pursuant to 29 U.S.C. § 1132(g)(1). See Brief for Administrator at 14-22; Record Excerpts tab. 2, at 7-9 (order of district court) (citing factors enumerated in *Iron Workers Local #272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980)). Rather, the Administrator's only argument seems to be that the district court fee award was an abuse of discretion, due to the absence of evidence establishing the hours reasonably expended by Lee's counsel.

³ *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).

basis of the other *Johnson* factors that may be of significance in the petitioner's case." *Butler*, 916 F.2d at 258; see also *South Cent. United Food & Commercial Workers Unions v. C & G Markets*, 836 F.2d 221, 226 (5th Cir. 1987) (applying *Johnson* factors to fee award made pursuant to § 1132(g)(1)), *cert. denied*, 486 U.S. 1056, 108 S. Ct. 2833, 100 L. Ed. 2d 924 (1988).

The Administrator only challenges the district court's application of the first step, which requires the district court to "determine[] compensable hours from the attorney's time records, including only hours reasonably spent." *Alberti v. Klevenhagen*, 896 F.2d 927, 930 (5th Cir.), *vacated in part on other grounds*, 903 F.2d 352 (5th Cir. 1990); see *Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983) ("The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.'"). "The burden is on the fee petitioner to prove that the hours claimed were reasonably expended." *Klevenhagen*, 896 F.2d at 930. Although Finger testified at trial that she had expended "over 150 hours" on her client's case, the district court did not determine which of the claimed hours were reasonably spent.⁴ Moreover, assuming

⁴ The court stated that:

Finger further testified about her 166.6 hours of legal efforts in this cause including legal research concerning service of process when the Administrator failed to acknowledge service of Lee's complaint and preparation and filing of a motion for summary judgment when the Administrator failed to timely respond to requests for admissions.

Record Excerpts tab. 2, at 8.

arguendo that the court implicitly found that Finger had reasonably spent more than 150 hours on Lee's case, this finding has no support in the record. The rest of Finger's testimony merely touched upon some of the work she had performed for Lee,⁵ and did not offer any specific periods, or even rough approximations, of time expended on each project. See Record Excerpts tab. 7, at 42-48. At best, Finger's testimony constituted a summary of work performed, which would have been inadequate proof of compensable hours. See *Butler*, 916 F.2d at 259 (holding that summaries of timesheets inadequate to meet fee applicant's burden of establishing reasonableness of hours expended). Based upon this scanty evidence, the district court could not have fulfilled its duty to examine for non-compensable hours by relying solely upon Finger's testimony.⁶ See *Bode v. United States*, 919 F.2d 1044, 1047 (5th Cir. 1990) ("In determining the amount of an attorney fee award, courts customarily require the applicant to produce contemporaneous billing records or other sufficient documentation

⁵ For example, in explaining why she spent over 150 hours on Lee's case, Finger testified that: (1) she "had to figure out what to do when [the Administrator] didn't acknowledge service," Record Excerpts tab. 7, at 42; (2) she had to research Rule 11 sanctions, see *id.* at 44; and (3) she had to research supplementation of discovery. See *id.*

⁶ The record indicates that Lee's counsel submitted a Bill of Costs in support of the fee award *after* the district court had entered judgment awarding \$25,000.00 in attorney's fees to Lee. See Record Excerpts tab. 1, at 4. Thus, in deciding the amount of the fee award, the court apparently relied only upon the trial testimony of Lee's counsel. See *id.* tab. 7, at 38-58.

Lee maintains that besides Finger's testimony, the district court also relied upon Finger's affidavit in support of attorney's fees, which was submitted with Lee's motion for summary judgment. See Brief for Lee at 21. Because Finger's affidavit merely summarized the work she had done for Lee up through the time that summary judgment was filed, see Record Excerpts tab. 5 (affidavit of Finger), we conclude that this document was inadequate for the district court to have determined the total number of hours Finger reasonably spent on her client's case. See *Butler*, 916 F.2d at 259.

so that the district court can fulfill its duty to examine the application for non-compensable hours.").

Although we held in *Klevenhagen* that an application for attorney's fees can succeed even if it is unsupported by the preferred method of contemporaneous time records, see *id.* at 931, we further stated that their absence can only be excused where the applicant submits "an abundance of other evidence" supporting the number of hours claimed. *Id.* Because the district court based its calculation of hours reasonably spent solely upon Finger's testimony, we find *Klevenhagen* distinguishable. Accordingly, we hold that the court abused its discretion by awarding attorney's fees to Lee.

For the foregoing reasons, we **DENY** the motion to dismiss for want of jurisdiction, but **VACATE** the award of attorney's fees and **REMAND** to the district court to examine the reasonableness of the hours claimed by Finger, in the context of contemporaneous billing records or other documentation sufficiently detailed to allow the court to examine for non-compensable hours.