

NO. A07-1033

State of Minnesota
 In Supreme Court

Mark J. Jeffrey,

Relator,

v.

The Gap, Inc., d/b/a Banana Republic,

Respondent,

and

American Home Assurance with claims administered by
 AIG Domestic Claims, Inc.,*Respondent.*

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE

- I. UNDER *IRWIN*, THE COMPENSATION JUDGE FOUND THAT THE EMPLOYEE'S ATTORNEY WAS ENTITLED TO A \$5,000.00 ATTORNEY FEE. THE COMPENSATION JUDGE AWARDED \$303.16 IN WAGE LOSS BENEFITS AND \$1,746.87 IN MEDICAL EXPENSES. THE EMPLOYEE'S ATTORNEY CLAIMED A \$9,008.39 ATTORNEY FEE. BOTH PARTIES AGREED THAT THE AMOUNT IN DISPUTE WAS SMALL AND THE ISSUES WERE NOT DIFFICULT OR COMPLEX. DID THE COMPENSATION JUDGE ABUSE HIS DISCRETION IN HIS AWARD OF \$5,000.00 IN *RORAFF* ATTORNEYS' FEES.

STATEMENT OF THE FACTS

This dispute arises out of an underlying work-related injury on September 17, 2004, when Mark J. Jeffrey ("the Employee") claimed that he injured his mid-back when a co-worker poked him in the side with a finger. The Employee missed 2.2 weeks from work and incurred \$1,746.87 in medical expenses (after application of the workers' compensation Fee Schedule) as an alleged result of the injury. (AA at 33). The Employer, The Gap, Inc., d/b/a Banana Republic ("The Employer"), and its Insurer, American Home Assurance with claims administered by AIG Domestic Claims, Inc., ("the Insurer") admitted that the incident occurred but denied that the Employee was injured.

Following the denial, the Employee filed an Employee's Claim Petition alleging that he sustained an injury to his back on September 17, 2004. (*See* RA at 1). He claimed entitlement to temporary total disability from September 17, 2004, through October 2, 2004, temporary partial disability benefits from October 3, 2004, through the present and continuing (he withdrew the claim for temporary partial disability benefits before the hearing), and various medical expense benefits. (*Id.*) The Employee also claimed an average weekly wage of \$139.30, which qualified him for the minimum compensation rate.

On January 18, 2006, the Employee's Claim Petition proceeded to hearing. At the hearing, the Employee's attorney ("Attorney Wulff") withdrew a portion of his claimed fee because he admitted that it was not compensable. (AA at 29-30). The compensation judge served and filed his Findings and Order on March 20, 2006. (AA at 32-34). The

compensation judge found that the Employee sustained a temporary injury and that he was temporarily and totally disabled for 2.2 weeks. (RA at 3-4). He awarded temporary total disability benefits and medical expense benefits. (*Id.*) He also indicated that Attorney Wulff could file a Statement of Attorney's Fees.

On May 8, 2006, Attorney Wulff filed his Statement of Attorney's Fees wherein he claimed that he spent 39.5 hours on the case and that his hourly fee was \$225.00 in 2004, \$235.00 in 2005, and \$250.00 in 2006. (AA at 1-5). He alleged that he was, therefore, entitled to \$8,881.50 in fees and \$731.95 in costs and disbursements, though in his current brief, he alleges entitlement to \$9,008.39 in fees. (AA at 5; Relator's Brief at 3). The Employer and Insurer denied the claimed fees as unreasonable and the issue proceeded to hearing on August 14, 2006. (AA at 8-9, 33).

At the hearing, the compensation judge found that \$5,000.00 was a reasonable fee because the issues were not difficult or complex and the amount in dispute was small. (AA at 34). Attorney Wulff appealed to the Workers' Compensation Court of Appeals in a timely manner. The Workers' Compensation Court of Appeals affirmed the compensation judge's decision.

STANDARD OF REVIEW

Where the sufficiency of a compensation judge's findings of fact are in dispute, a reviewing court must determine whether they are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, Subd.

1. Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." *Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54, 59 (Minn. 1984). To the contrary, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Northern States Power Co. v. Lyon Food Prods., Inc.*, 229 N.W.2d 521, 524 (1975).

When attorney fees are in dispute, a determination of the amount of the fees lies within the discretion of the compensation judge. *Newman v. Graceville Health Center*, 52 W.C.D. 194, 197 (W.C.C.A. 1994). Since each case is factually different, the reviewing court will give deference to the compensation judge's judgement and discretion in determining a reasonable fee. *Dimon v. Metz Baking*, 64 W.C.D. 143, 147 (W.C.C.A. 2003). In reviewing the award of fees, the reviewing court will not reverse a determination absent an abuse of discretion. *Id.* A compensation judge abuses his or her discretion only when the award of fees is based upon a clearly erroneous conclusion given the record. *Johnson v. VCI Asbestos Abatement*, slip op. at 5 (W.C.C.A. Sept. 15, 2005).

ARGUMENT

I. THE COMPENSATION JUDGE'S AWARD OF ATTORNEYS' FEES WAS NOT CLEARLY ERRONEOUS.

An employee's attorney is only allowed a reasonable attorney fee, whether contingent or otherwise. *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 142 (Minn. 1999); see e.g.,

McCarthy v. Al Baker's, 61 W.C.D. 805 (W.C.C.A. 2001). If a contingent fee is reasonable and adequately compensates an attorney for the work he put into the case, then he is not entitled to any further fees. *See Irwin*. If, however, the contingent fees do not adequately compensate him for his work, then he is entitled to an additional reasonable fee that will. *Id.* In determining the reasonableness of the additional fee, the Minnesota Supreme Court set forth a seven-factor balancing test. *Irwin* held that to determine what is reasonable, a court must weigh the amount involved in the dispute, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulty of the issues, the nature of the proof involved, and the results obtained. *Irwin* at 142 (emphasis added).

A. Judge Vallant Did Not Abuse His Discretion in Analyzing the *Irwin* Factors.

The Employee recovered \$303.16 in wage loss benefits and \$1,746.87 in medical expenses following the hearing. The Employer and Insurer paid Attorney Wulff a contingent fee in the amount of \$75.79 for the wage loss benefits he recovered for the Employee. The Employer and Insurer do not dispute that this is inadequate to compensate Attorney Wulff. But so too is Attorney Wulff's claimed \$9,008.39 fee unreasonable.

In attorney fee cases, the ultimate question is reasonableness. *Lanhart v. Bureau of Engraving*, slip op. (W.C.C.A. May 7, 2001). The express purpose of the *Irwin* decision is to afford a reasonable fee to an attorney for legal services provided to the employee. *McCarthy*, 61 W.C.D. at 810. Indeed, the compensation judge agreed that the claimed fee

was unreasonable. Applying the factors set forth in *Irwin*, the compensation judge decided that \$5,000.00 is a reasonable fee. He did not abuse his discretion.

Only three factors are currently in dispute here: (1) the amount involved, (2) the difficulty or complexity of the issues, and (3) the nature of the proof involved. The other factors, time and expense necessary to prepare for trial, responsibility assumed by counsel, experience of counsel, and the results obtained, are conceded by the Employer and Insurer. Although rejected by the compensation judge, the Employer and Insurer argued at the attorney fee hearing that Attorney Wulff's time and expense in preparing for trial was excessive because he took unnecessary depositions of fact witnesses.

The first factor, the amount involved, is perhaps the most important since it goes hand-in-hand with the reasonableness of the fee. For example, while a \$10,000.00 fee will certainly be reasonable for an award of permanent total disability benefits, it would not be reasonable in a recovery of \$250.00 in chiropractic bills. Here, the compensation judge indicated that the amount in dispute was "very small." This dispute only involved \$303.16 in wage loss including interest and \$1,746.87 in medical bills. All told, there was only a little over \$2,000.00 at stake. Even Attorney Wulff admitted that the amount involved was quite small. (See AA at 9, 21-22). Under *Irwin*, the court must look to the amount in controversy. The fact that an amount may not seem small to a specific employee is irrelevant under *Irwin*. So, when one views the amount in controversy, about \$2,000.00, with the over \$9,000.00 fee, the unreasonableness is self-evident.

Furthermore, the proposition that, "in cases where I do get a hundred percent of the benefits it seems to me that I ought to get paid a hundred percent of the fees" is contrary to the law. (See AA at 23). In *Borgan v. Bob Hegland, Incorporated*, the Workers' Compensation Court of Appeals cautioned that "a determination of a claim for *Roraff* fees is not merely a matter of multiplying the attorney's hourly rate times the amount of time spent on the case less the contingent fee award." Slip op. at 15-16 (W.C.C.A. June 12, 2002). And as announced in one of Attorney Wulff's many appealed attorney fee disputes, "even if all of the time spent by Mr. Wulff on this case was reasonable and necessary, the compensation judge is not legally compelled to award the full fee sought. Rather, the issue is what fee is reasonable considering all of the *Irwin* factors." *Id.* at 12. The Court of Appeals also announced in another of Mr. Wulff's cases that, "we find no basis in case law or elsewhere for concluding that an employee's attorney's entitlement to a reasonable *Roraff* fee . . . should be in any way conditioned upon the proportionate relationship between those owed benefits and other benefits found to be not owed." *Keller v. Quick Silver Express Courier*, slip op. at 8 (W.C.C.A. June 30, 2005). In other words, the Court should focus on the overall amount of the claim in dispute, not the percentage of the amount recovered.

Additionally, Attorney Wulff's argument presupposes that all of the claimed fees are compensable. They are not always so. In this case, for example, Attorney Wulff withdrew some of his claimed fees because they were not compensable; they were incurred in dealing with the Employee's error. (See AA at 29-30). Further, the very nature of a contingent fee

is that attorneys are not always able to recoup the time that they put into a case. Perhaps on some cases the fee will be insufficient to cover the time in the case; but on other cases, the contingent fee will more than cover, and sometimes double or triple, the time in the case. That is why the contingent fee is presumed to be adequate unless shown otherwise and why the court focuses on the reasonableness of the fee rather than resorting to mathematical equations. Attorney Wulff does not object to the fees in those cases where he recovers more in fees than the time he spent on the files.

Although the amount in dispute is certainly a major factor, it is not the only determinative factor. There are other factors in this case that demonstrate the fee is unreasonable, and the compensation judge considered those as well. One of the factors is the difficulty or complexity of the issues involved. Here, the issue was quite simple. The Employee claimed that a poke in the side caused his injury. The only issue was whether the act of poking the Employee in the side could have caused the alleged injury. There were no peripheral issues. There was an independent medical exam, but the examiner was not deposed. There were four witnesses at trial, but their testimony both at trial and at the depositions lasted no more than 15 minutes for each witness. More experienced attorneys should take less time preparing for simple cases. Thus, a large fee on a simple claim cannot be justified if the attorney is as experienced as Attorney Wulff. When one compares the over \$9,000.00 fee claimed to the complexity of the issues, the fee is extremely unreasonable.

Additionally, the Employer's and Insurer's defense of the claim did not add to the difficulty or complexity. Attorney Wulff claimed that the Employer and Insurer's "vigorous defense" justified the huge fee that he claimed. But the Employer's and Insurer's defense of the case was no more vigorous than any other case. The defense included a denial of primary liability, a deposition of the Employee, and an independent medical examination. Again, there were no other peripheral issues or proceedings outside of the hearing other than short depositions. This case involved the simplest of matters.

Finally, though not implicated by the compensation judge as providing support for his determination, the fact that the nature of proof only involved "the testimony of the Employee, cross examination of the Employer and Insurer's witnesses, and presentation of medical records and bills" also demonstrates how unreasonable the claimed fee is. (See AA at 33). The nature-of-proof factor shows how little work was needed to prove up the Employee's case. Here it consisted only of routine tasks. The Employee had no medical expert testimony, the matter involved no evidentiary issues, there were no vocational examiners or QRCs, there were no depositions that were taken in lieu of live testimony, and the Employee did not call any witnesses other than himself. In other words, there were no peripheral issues that could escalate the amount of time needed to present the case. When the simple amount of proof submitted is compared to the exorbitant fee Attorney Wulff is claiming, it is easy to see that the fee is unreasonable.

After weighing all the factors, the compensation judge felt that they favored reducing Attorney Wulff's fee to \$5,000.00. The reduction does not constitute an abuse of his discretion, and he did not apply the factors in an arbitrary and capricious manner. It is clear from the compensation judge's decision that he weighted the factors that favored reducing the fee, that is, the amount involved and the difficulty of the issues, more heavily than he did the remaining factors. But this is neither an abuse of discretion nor arbitrary and capricious. Nothing in *Irwin* or the cases that follow indicates that the factors must be weighted evenly. *Wilmes v. Wal-Mart Stores, Inc.*, 61 W.C.D. 548, 552-53 (W.C.C.A. 2001). Thus, a compensation judge is allowed to give whatever weight is necessary to each factor depending on the circumstances of the particular case. In this case, it was prudent for the compensation judge to give more weight to the amount involved and the difficulty or complexity of the issues. These two factors really go toward the essence of a reasonable fee: the amount involved and the complexity of the case. The other factors, those which favor attorneys such as Attorney Wulff—experience and responsibility over the case—are really more peripheral factors. If the factors needed to be weighted evenly, then with two factors automatically favoring an experienced attorney, awarding a fee would be more an exercise in mathematics rather than a balancing test.

Although large attorney fee awards on small amounts in controversy occur, the facts surrounding those awards are different than those here. For example, in *Dimon v. Metz Baking*, 64 W.C.D. 143 (W.C.C.A. 2003), the employee's attorney (Attorney Wulff) was

awarded \$5,209.81 in *Roraff* fees on top of a \$792.19 contingent fee he received. *Id.* at 145-46. The amount in controversy there was only \$2,625.00 in permanent partial disability and roughly \$1,000.00 in chiropractic bills. But unlike here, the facts and issues in *Dimon* were somewhat complex, requiring additional time. For example, Attorney Wulff spent a substantial amount of time sorting out the billings from one of the providers. Also, the hearing was continued after Attorney Wulff prepared for it once, mandating that he prepare for it a second time. Here, however, the issues were simple. There were no mitigating circumstances that could justify Attorney Wulff's exorbitant fee.

Whether this Court may have decided the issue differently is not the question. Rather, the question is whether the compensation judge abused his discretion given the facts and circumstances of this particular case. Deference is to be given to the compensation judge's finding unless there is a clearly erroneous conclusion in the record. Though Attorney Wulff may disagree with the judge's findings, he did not point to any clearly erroneous conclusions. Indeed, an independent review of the compensation judge's decision does not reveal any clearly erroneous conclusions. Therefore, the compensation judge's award of attorneys' fees must be affirmed.

B. The Compensation Judge's Finding Does Not Violate Public Policy.

A stated purpose in allowing attorneys' fees in workers' compensation cases is to ensure that all injured employees are provided with competent counsel. The argument is that without fees, counsel would not be available. But this public policy does not allow an

employee's attorney unfettered control over what he claims as his fee. The claimed attorney fee is only compensable if "reasonable." *Irwin*, 599 N.W.2d at 142. The argument that limiting fees would prevent attorneys from taking on cases with small amounts in dispute has no merit. This Court took this issue into account when it limited fees to only those that are reasonable. There is no evidence that reducing unreasonable fees to those that are reasonable will stem the tide of employees seeking compensation for their injuries, regardless of the amount of their claims. Conclusory statements without factual background are insufficient to make the statement true.

II. ATTORNEY WULFF IS NOT ENTITLED TO ATTORNEYS' FEES ON THIS APPEAL.

Minnesota Rules 9800.0900 deals with briefs upon appeal to the Workers' Compensation Court of Appeals and the Minnesota Supreme Court. Specifically it holds that, "the brief may address only issues raised in that party's notice of appeal." Minn. R. 9800.0900, Subp. 1. Here, Attorney Wulff claims that he is entitled to additional attorneys' fees for the appeal. But he did not address the issue in his Notice of Appeal and Statement of the Case. Therefore, he is not entitled to address the issue in his brief and is not entitled to recover attorneys' fees for his appeal.

Moreover, even if Attorney Wulff did properly appeal the issue, he is still not entitled to attorneys' fees for his appeal if he is ultimately successful. The case law is well settled that time expended by an attorney in recovering attorneys' fees is part of the cost of doing business and is not compensable. *Fredrickson v. Posey Miller Florists*, 46 W.C.D. 116, 123

(W.C.C.A. 1991); *Bloomfield v. Popple Bar*, 43 W.C.D. 519, 520 (W.C.C.A. 1990). All of the cases that Attorney Wulff cites, in addition to being his own, involved both substantive issues and attorney fee issues. None were disputes solely over attorneys' fee. If Attorney Wulff was awarded fees for the appeal in those cases, then it was for the substantive issues, not the attorney fee issue because time spent recovering attorneys' fees is not compensable. Here, the sole issue is attorneys' fees. There are no substantive issues. Since time spent solely recovering fees is not compensable, then time spent on an appeal solely of attorneys' fees is not compensable either. And even if some amount was compensable, \$1,200.00 is not reasonable. For example, in one of his own cases that he cited, *Jorgenson v. Novak Fleck, Inc.*, 638 N.W.2d 760, 763 (Minn. 2002), this Court only awarded Attorney Wulff \$600.00 for an appeal.

III. THE APPLICATION OF THE *IRWIN* FACTORS NEEDS NO CLARIFICATION.

In 1999, this Court handed down the decision in *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132. There, this Court provided several factors that the workers' compensation systems must consider when determining a reasonable attorney fee. In the eight years since *Irwin*, the balancing test espoused worked remarkably well. There has been no mass confusion about how to apply the factors, what the factors mean, or how to balance them. Attorney Wulff asks this Court to use this case as an opportunity to review *Irwin* and provide "guidance" on the application of the factors. But no guidance is needed. Essentially, Attorney Wulff asks this Court to give bright-line rules on the application of the factors. This would, however,

defeat the entire purpose behind *Irwin*. The test announced in *Irwin* is a balancing test. It gives discretion to the compensation judge to review the facts as a whole and make a determination about the reasonableness of the fee.

Giving broad discretion to compensation judges to determine these sorts of issues is the only reasonable solution. These attorney fee disputes are factually intensive. Each case is different. A compensation judge needs latitude to be able to determine what a reasonable fee is in a given circumstance. And as *Irwin* stands now, it provides just that latitude. Turning *Irwin* into a series of bright-line rules would do nothing but turn an award of attorneys' fees into a mathematical equation. The courts have cautioned against such a practice.

CONCLUSION

There is no evidence in the record that the compensation judge abused his discretion when awarding Attorney Wulff \$5,000.00 in fees in this simple matter. His Findings and Order clearly indicate that he considered all of the *Irwin* factors and that he felt that they weighed in favor of a fee reduction. The compensation judge carefully reviewed the attorney fee claim and addressed the *Irwin* factors in awarding fees. The compensation judge was free to weigh the factors as he saw appropriate, so he did not abuse his discretion in giving more weight to some factors over others. In fact, it was prudent for him to do so. Since there is no clearly erroneous conclusion in the record, the compensation judge's Findings and Order must be affirmed.

Respectfully submitted,

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Dated: July 2, 2007

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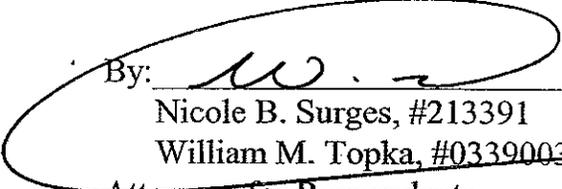
Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minnesota Rules of Appellate procedure 132.01, subdivisions 1 and 3 for a brief produced with a proportional font. The length of this brief is 280 lines and 3,591 words. This brief was prepared using WordPerfect 9.

ERSTAD & RIEMER, P.A.

Dated: July 2, 2007

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).