

DIANNE HAUSKNECHT, Employee, v. ABBOTT NORTHWESTERN HOSP., SELF-INSURED, admin'd by BERKLEY ADM'RS, Employer-Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 6, 1995

No. [SSN REDACTED]

HEADNOTES

ATTORNEY FEES - SUBD. 7 FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 7. Award of subdivision 7 fees is inappropriate where no application for these fees has been made.

Affirmed in part and vacated in part.

Determined by Wheeler, C.J., Johnson, J., and Olsen, J.
Compensation Judge: Jacob E. Forsman

OPINION

R.V. (SALLY) OLSEN, Judge

The self-insured employer, Abbott Northwestern Hospital, appeals from the settlement judge's order determining attorney fees, arguing the award of Minn. Stat. § 176.081, subd. 7, attorney fees to the employee is inappropriate where the employee did not make application for such fees. We agree and vacate that portion of the settlement judge's order.

BACKGROUND

The facts of this case are not disputed. The employee, Dianne Hausknecht, sustained an admitted work-related injury to her lumbar spine on February 20, 1989, while working for the self-insured employer. The employer has paid various workers' compensation benefits to the employee. (Judgment Roll.)

The self-insured employer served the employee with Dr. Richard Salib's report of maximum medical improvement on or about May 13, 1994. (Judgment Roll.) Shortly thereafter, the self-insured employer offered the employee a light-duty position doing child care. The employee refused the job, and the employer filed a Notice of Intention to Discontinue temporary benefits (NOID) on or about June 1, 1994, alleging that the employee had failed to cooperate with her own rehabilitation plan by refusing the light-duty position. (Order on Discontinuance, 7/8/94.)

An administrative conference was held on June 29, 1994, after which the settlement judge served and filed an Order on Discontinuance Pursuant to Minn. Stat. § 176.239. The judge denied the self-insured employer's request to discontinue benefits, concluding that insufficient evidence was presented to demonstrate that the job the employee refused was within her physical limitations. (Id.)

On July 28, 1994, the employee's attorney filed a Statement of Attorney's Fees Under Minn. Stat. § 176.081, subd. 1, requesting \$690.00 for representing the employee regarding the NOID hearing. With respect to item 8, the statement reads: "Application is not made for payment of attorney fees pursuant to M.S. 176.081, Subd. 7." (Emphasis added.) (Judgment Roll.)

On September 21, 1994, a settlement judge at the Department of Labor and Industry issued an Order Determining Attorney Fees, wherein he ordered the self-insured employer to pay the \$690.00 fee sought by the employee's attorney. He further ordered the self-insured employer to pay "a sum representing 25% of attorney fees awarded in excess of \$250.00 as set forth in Minnesota Statutes § 176.081, subd. 7." The self-insured employer appeals from that part of the order.

DECISION

The self-insured employer essentially argues that the settlement judge exceeded his authority in awarding partial reimbursement of attorney fees pursuant to Minn. Stat. § 176.081, subd. 7, where the employee's attorney did not make application for such fees. We agree.

Minn. Stat. § 176.081, subd. 7, governs the award of attorney fees, as in this case, where an employer files a notice of discontinuance or otherwise unsuccessfully resists the payment of compensation benefits or medical expenses and the employee's attorney successfully obtains payment on behalf of the employee. Where these conditions precedent have been met, subdivision 7 provides:

The compensation judge . . . , upon application, shall award to the employee against the insurer . . . , in addition to the compensation benefits paid or awarded to the employee, an amount equal to 25 percent of that portion of the attorney's fees which has been awarded pursuant to this section that is in excess of \$250.

Id. (emphasis added); see Minn. Rules 1415.3200, subp. 3(A)(10) (party claiming fees shall file statement of attorney's fees indicating whether application for subdivision 7 attorney fees is being made).

The employee's attorney in this case, however, did not make application for attorney fees under subdivision 7. In the statement of attorney fees, the employee's attorney explicitly stated application was not being made for subdivision 7 attorney fees.

The employee argues that her attorney "inadvertently requested" attorney fees pursuant to Minn. Stat. § 176.081, subd. 8, and that the settlement judge "realized the typographical error and ordered that Attorney Fees be awarded pursuant to MS 176.081, Subdivision 7." (Ee's brief at unnumbered page 2.) We are not persuaded.

It is true that the employee's attorney requested subdivision 8 fees on his Statement of Attorney Fees under item 9. However, this Statement was filed on July 28, 1994. The record does not show that an amended statement or any other application for such attorney fees was filed before the settlement judge issued his order, or before the appeal was filed with this court.

Under these circumstances, where no application has been made, award of subdivision 7 attorney fees is not appropriate. Lue v. Brookdale Plastics, slip op. (W.C.C.A. Aug. 17, 1992). We, accordingly, vacate that part of the settlement judge's order pertaining to Minn. Stat. § 176.081, subd. 7, attorney fees.