

MICHAEL J. BIEDERMAN, Employee/Petitioner, v. WIN STEPHENS BUICK and GENERAL CASUALTY INS. CO., Employer-Insurer, and CARL J. SOMMERER, SOMMERER & SCHULTZ, Attorney/Respondent.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 22, 1998

HEADNOTES

ATTORNEY FEES - APPLICATION FOR REVIEW. Where the employee alleged that his former attorney had done no work for him and did not contribute to recovery of additional benefits, but neither party submitted evidence in support of their assertions, a hearing is required, and the case is referred to the Office of Administrative Hearings for an evidentiary hearing and findings of fact by a compensation judge, pursuant to Minn. Stat. §§ 176.081, subd. 3, and 176.381, subd. 1.

Referred to OAH for hearing.

Determined by: Johnson, J. Wilson, J., and Wheeler, C.J.

OPINION

THOMAS L. JOHNSON, Judge

The employee has filed an Application for Review of Attorney Fees awarded by Judge John Ellefson at the Department of Labor and Industry in an Order Determining Attorney's Fees, served and filed February 13, 1998. We refer the matter to the Office of Administrative Hearings for further proceedings in accordance with Minn. Stat. §§ 176.081 subd. 3, and 176.381, subd. 1.

BACKGROUND

The employee, Michael J. Biederman, sustained an admitted, work-related injury to his right eye on May 17, 1994, while working as a service technician for the employer, Win Stephens Buick. On that date, a drill bit or socket extension broke off, ricocheting into the employee's eye, lacerating the cornea. Surgery was performed by Dr. Paul Bruer, but the employee was left with a scar on the cornea and some lost vision. The employer and insurer paid temporary total disability benefits and the employee's medical expenses following the injury.

The employee contacted Carl J. Sommerer, an attorney with the firm of Sommerer & Schultz, to represent him with respect to his workers' compensation claim. A retainer agreement, dated September 2, 1994, was executed by the employee and Mr. Sommerer. A Notice of Appearance of Attorney was filed at the Department of Labor and Industry (DOLI) by attorney

Sommerer on December 9, 1994.¹ On December 12, 1994, the employer and insurer paid the employee \$3,000 for a 4% permanent partial disability, pursuant to Minn. R. 5223.0330, subps. 1-3, based on an (undated) Health Care Provider Report completed by Dr. Bruer.

On August 24, 1995, an independent medical examination (IME) was performed by Dr. James R. Householder, on behalf of the employer and insurer. The doctor diagnosed a corneal scar and sector cataract in the right eye, along with astigmatism and presbyopia in both eyes. In his September 1, 1995 report, Dr. Householder calculated a 6.5% disability of the visual system, or a 6% whole body permanency, based on factors outlined in Minn. R. 5223.0330, subp. 3. According to the IME report, the employee had previously been seen by Dr. William Bourne at the Mayo Clinic, and by Dr. Robert Campbell at Park Nicollet Medical Center. Dr. Campbell apparently provided a 9% permanent partial disability rating. On about September 26, 1995, the employer and insurer paid the employee \$1,500 for an additional 2% permanent partial disability, based on Dr. Householder's IME report. Attorney fees of \$375.00 were withheld by the insurer at that time.

On January 28, 1998, attorney Sommerer filed a Statement of Attorney Fees, seeking contingency fees of \$375.00 pursuant to Minn. Stat. § 176.081, subd. 1(a)(1994), for obtaining payment of the additional 2% permanency. The statement was served on the employee and the employer and insurer on about January 26, 1998. No objection was received, and an order awarding the requested fees was issued by Judge John Ellefson at the Department of Labor & Industry on February 13, 1998.

On April 28, 1998, the employee filed an Application for Review of Attorney Fees, seeking review of Mr. Sommerer's fees by the Workers' Compensation Court of Appeals, pursuant to Minn. Stat. § 176.081, subd. 3. A copy of a letter to Judge Ellefson, dated March 17, 1998, was attached. The employee asserted that Mr. Sommerer had been disinterested, unresponsive, and had done no work on the case. He requested that Judge Ellefson withdraw or that Mr. Sommerer return the fee to the insurance company. The employee filed a letter with this court on June 17, 1998, stating he wished to appeal Judge Ellefson's decision. He alleged that he had fired Mr. Sommerer in the summer of 1994 because he did no work for me. He again requested that the attorney fees be returned to the insurance company. Mr. Sommerer filed a letter in response on July 17, 1998, asserting that he was instrumental in obtaining an additional 2% payment by the insurance company, and was entitled to the contingency fee paid.

DECISION

The employee's former attorney claimed \$375.00 in attorney fees for obtaining payment of additional permanent partial disability benefits to the employee, pursuant to Minn.

¹ On about November 10, 1994, a notice of intent to discontinue benefits (NOID) was served on the employee, discontinuing temporary total disability benefits effective November 14, 1994, with the employee's return to work at full wages.

Stat. § 176.081, subd. 1 (1994).² The employee has filed an application for review with this court asserting that the *attorney* did nothing to earn the fees. He seeks an order directing the attorney to return the money to the insurance company.

Contingency fees may be paid solely upon genuinely disputed claims or portions of claims, and may not be calculated based on any undisputed portion of the compensation recovered. Minn. Stat. § 176.081, subd. 1(d). Neither the employee nor the employee's former attorney submitted any affidavits, documents, or other evidence establishing the facts underlying their opposing claims. The evidence in the file is insufficient for this court to determine whether there was a genuine dispute regarding the extent of the employee's permanent partial disability, or whether services performed by the attorney contributed to recovery of the additional 2% permanent paid by the employer and insurer as claimed. See, e.g., Weisser v. Country Club Mkt., 397 N.W.2d 891, 39 W.C.D. 282 (Minn. 1987); compare, e.g., Copeland v. Ford Motor Co., 47 W.C.D. 164 (W.C.C.A. 1992); MIarnik v. Normandy Motor Hotel, No. [redacted to remove social security number] (W.C.C.A. Aug. 2, 1996).³

We believe that proper consideration of the employee's application for review of attorney's fees requires an evidentiary hearing and factual findings.⁴ There is no provision for evidentiary hearings before this court, but we may refer factual questions to a compensation judge at the Office of Administrative Hearings. See Minn. Stat. § 176.381, subd. 1; compare Skwarek v. U.S. West Communications, 56 W.C.D. 252, 259 (Sup. Ct. Mem. Op., Mar. 3, 1997); Boys v. Camp Snoopy Knott's Berry Farm, 56 W.C.D. 172 (W.C.C.A. 1997). We, accordingly, refer the

² Amended effective October 1, 1995. Act of May 25, 1995, ch. 231, art. 2, " 45, 110, 112, 1995 Minn. Laws 1977, 2035-37, 2072. The 1995 amendments effected a radical change in the Minnesota attorney fee statutes, significantly altering both the availability of attorney fees, and the manner in which attorney fees are to be determined and paid. The process for approval of fees has been repealed, including provisions for objecting to attorney fees requests. See, Smith v. City of Sauk Centre, 578 N.W.2d 755, 756 n.5, 58 W.C.D. 209, 211 n.5 (Minn. 1998); Ramirez v. Dee, Inc., 58 W.C.D. ____ n.10 (W.C.C.A. 1998). The 1995 amendments do not apply to cases involving a date of injury prior to the October 1, 1995 effective date of the amendments. See e.g., Smith, id.; Senjem v. Independent School Dist. # 625, 55 W.C.D. 656 (W.C.C.A. 1996). Minn. Stat. § 176.081, subd. 3, was not altered by the 1995 attorney fees amendments.

³ This matter involves a claim for *contingency* fees, that is, a percentage of the benefits recovered by the employee. Minn. Stat. § 176.081, subd. 1(a) (1994)(permitting a fee for legal services of 25% of the first \$4,000 and 20% of the next \$60,000 from the benefits obtained by the employee.) Thus, the reasonableness of Attorney Sommerer's hourly charges is not an issue.

⁴ Minn. Stat. ' 176.081, subd. 3, requires a hearing if requested by either party. The employee has requested a hearing in this matter. Compare, Minn. Stat. § 176.081, subd. 2 (1994), repealed Act of May 25, 1995, ch. 231, art. 2, ' 110, 1995 Minn. Laws 2072.

case to the Office of Administrative Hearings for a hearing and findings of fact by a compensation judge in accordance with this opinion.