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JOHN IRWIN, Employee/Appellant, v. SURDYK'S LIQUOR and AMERICAN COMPENSATION INS./RTW, INC., Employer-Insurer/Cross-Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 21, 1998

No. *Redacted to remove SSN*

HEADNOTES

ATTORNEY FEES - RORAFF FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 1(a)(1)(1995). The factors previously set forth in Minn. Stat. § 176.081, subd. 5(d) are adopted as the standard for determining whether a contingent fee adequately compensates an attorney for representing the employee in recovering disputed medical or rehabilitation benefits.

CONSTITUTIONAL ISSUES. Although this court acknowledges some merit to the employee's arguments that the 1995 amendment violates the separation of powers guaranteed by the Minnesota Constitution, and that the amendment will likely prevent employees from obtaining representation in medical or rehabilitation cases involving small dollar amounts, this court does not have jurisdiction to determine the constitutionality of a statute. Nor does this court have the power to suspend the operation of a statute. The employee's constitutional claims are preserved for determination by the supreme court.

ATTORNEY FEES - RORAFF FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 1(a)(1995). In determining the ascertainable dollar value, the compensation judge properly based the attorney fee on the amounts set forth in the applicable medical fee schedules for the medical benefits awarded.

ATTORNEY FEES - RORAFF FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 1(a)(1995). The phrase benefits awarded limits the attorney fees awarded pursuant to § 176.081, subd. 1(a)(1)(1995) to the dollar amount of the medical benefits awarded by the compensation judge in that proceeding.

ATTORNEY FEES - SUBD. 7. The compensation judge improperly awarded subdivision 7 fees against the Roraff fees paid by the employer and insurer to the employee's attorney.

Affirmed in part, and reversed in part.

Determined en banc.
Compensation Judge: Kathleen Nicol Behounek

MAJORITY OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's application of Minn. Stat. § 176.081, subd. 1 (1995) to limit the award of fees to the employee's attorney in this case. The employer and insurer cross-appeal from the compensation judge's findings regarding the reasonableness of the claimed attorney fees, the finding on future attorney fees, and the award of fees under Minn. Stat. § 176.081, subd. 7. We affirm in part, and reverse in part.

BACKGROUND

John Irwin, the employee, was employed by Surdyk's Liquor on September 13, 1996. The employer was then insured by American Compensation Insurance/RTW, Inc. The employee contended he was injured in a work-related motor vehicle accident on that date. The employer and insurer filed a Denial of Primary Liability on November 19, 1996. The employee then hired attorney David C. Wulff to represent him and signed a retainer agreement.

The employee filed a claim petition in January 1997 seeking payment of medical expenses. The claim petition was later amended to assert claims for permanent partial disability of the jaw and the cervical spine. The case came on for hearing before Compensation Judge Behounek on December 17, 1997. The employer and insurer then stipulated the September 13, 1996 motor vehicle accident arose out of and in the course of the employee's work activities with the employer. In a Findings and Order served and filed January 29, 1998, the compensation judge ordered the employer and insurer to pay certain medical expenses[1] and medical mileage of $15.12, and awarded an eight percent permanent partial disability for the employee's temporomandibular joint (TMJ) condition. The compensation judge denied the claim for permanent disability for the cervical spine. The court ordered the insurer to withhold attorney fees from the permanency awarded based on the 25/20 formula of Minn. Stat. § 176.081, subd. 1(a) and to pay the same to Attorney Wulff. The contingent fee was $1,400.00. No appeal was taken from the January 29, 1998 Findings and Order.

[1] The employee treated with Dr. Haukala from February 17 through September 17, 1997. The claimed amount of the bill was $4,955.12. The compensation judge ordered the insurer to pay for this treatment, subject to the fee schedule. (Findings 12, 13 and Order 3, F&O Jan. 29, 1998.) The employee treated with Dr. Koslowski from November 5, 1996 through October 30, 1997. The claimed amount of the bill was $4,612.53. The compensation judge ordered the employer and insurer to pay for Dr. Koslowski's treatment from November 5, 1996 through May 12, 1997 and found the treatment thereafter not reasonable or necessary. (Finding 16 and Order 4, F&O Jan. 29, 1998.)

In February 1998, the employee's attorney filed a Statement of Attorney's Fees seeking Roraff fees[2] on the medical benefits awarded by the compensation judge. The employer and insurer filed an objection. The matter came on for hearing before Judge Behounek on March 9, 1998. In a Findings and Order served and filed April 17, 1998, the compensation judge concluded the contingent fee of $1,400.00 was inadequate to reasonably compensate Mr. Wulff for representing the employee in the case. The judge further found the claim for $5,550.00 in attorney fees set forth in the fee petition was reasonable in light of the issues in the case. In accordance with Minn. Stat. § 176.081, subd. 1(a) (1995), however, the compensation judge awarded Attorney Wulff fees based on a percentage of the actual medical expenses and medical mileage paid by the employer and insurer.[3] The compensation judge also found the employee's attorney may be entitled to future Roraff fees, but that such a claim was premature. Finally, the compensation judge awarded attorney fees to the employee under Minn. Stat. § 176.081, subd. 7. The employee appeals the compensation judge's award of attorney's fees under Minn. Stat. § 176.081, subd. 1(a)(1995). The employer and insurer appeal the compensation judge's finding that $5,550.00 is a reasonable fee, the finding regarding future fees, and the award of attorney fees under subdivision 7.

STANDARD OF REVIEW

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Attorney Fees - Background

The principle mechanism for payment of an injured employee's attorney fees in workers' compensation cases has historically been a contingent fee computed on a percentage of the monetary compensation awarded to the employee as a result of the attorney's representation.

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[2] Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

[3] The compensation judge made no finding of the actual dollar value of the medical expenses awarded and made no finding of the amount of Roraff fees awarded. The total claim for medical expenses was $9,582.77. In his Statement of Attorney's Fees, Mr. Wulff stated the medical expenses awarded were $8,414.94. The Roraff-type fee on this award would be $8,414.94 x 20%=$1,682.99. For purposes of this opinion, we will assume the total fee awarded Mr. Wulff was the contingency fee of $1,400.00 plus a Roraff fee of $1,682.99 for a total fee of $3,082.99.

The current formula is 25 percent of the first $4,000.00 and 20 percent of the next $60,000.00 of compensation awarded to the employee. Minn. Stat. § 176.081, subd. 1(a). Prior to 1995, an employee's attorney could also receive a reasonable attorney fee under Minn. Stat. § 176.135, payable by the employer and insurer, in proceedings brought solely to obtain payment for medical expenses. Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980). The same principle was later extended to proceedings brought solely to recover rehabilitation benefits. Weisser v. Country Club Mkts., 397 N.W.2d 891, 39 W.C.D. 282 (Minn. 1987); Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983). In Kopish v. Sivertson Fisheries, 39 W.C.D. 627 (W.C.C.A. 1995), this court held an attorney may be entitled to both contingent and Roraff or Heaton fees if the contingent fee alone was inadequate to reasonably compensate the attorney for representing the employee on medical or rehabilitation issues.

In 1992, Minn. Stat. § 176.081 was amended to provide:

> All fees must be calculated according to the [25-20] formula under this subdivision or earned in hourly fees for representation . . . on rehabilitation or medical issues under § 176.102, 176.135, or 176.136. Attorney fees for the recovery of medical or rehabilitation benefits or services shall be assessed against employer or insurer if these fees exceed the contingent fee under this section in connection with the benefits currently in dispute. The amount of the fee that the employer or insurer is liable for is the amount determined under subdivision 5, minus the contingent fee.

Minn. Stat. § 176.081, subd. 1(a) (1992). This language essentially codifies the Roraff, Heaton, and Sivertson doctrine.

Prior to 1995, an attorney could also apply for fees in excess of the contingent fee authorized in subdivision 1. See Minn. Stat. § 176.081, subd. 2. Determination of an award of excess fees was governed by the principles set forth in Minn. Stat. § 176.081, subd. 5. See, e.g., Kahn v. State, Univ. of Minn., 327 N.W.2d 21, 35 W.C.D. 425, 429 (Minn. 1982). Determination of the amount of Roraff or Heaton fees to be awarded was also based on the factors set forth in subdivision 5(d). Weisser, 397 N.W.2d at 893, 39 W.C.D. at 285.

In 1995, the legislature substantially amended Minn. Stat. § 176.081. In cases governed by the amendment,[4] the method of calculating Roraff and Heaton fees was changed.

[4] In Senjem v. Ind. School Dist. #625, 55 W.C.D. 656 (W.C.C.A. 1996), this court held the amendments to Minn. Stat. § 176.081 apply only to injuries which occur after the October 1, 1995 effective date of the revised statute.

Under the 1995 statute, an attorney representing an employee in a claim for payment of medical expenses or for rehabilitation benefits is no longer entitled to a fee determined under Minn. Stat. § 176.081, subd. 5(d) . Rather, fees for obtaining disputed medical and rehabilitation benefits must be calculated by applying the 25/20 formula to the dollar value of the medical or rehabilitation benefits awarded. Minn. Stat. § 176.081, subd. 1(a)(1) (1995).[5] If the dollar value is not reasonably ascertainable, the maximum fee for which the employer and insurer may be liable is the lesser of the amount charged in hourly fees or $500. Id. at subd. 1(a)(2). These provisions apply both to cases in which the sole issue is medical or rehabilitation benefits and to cases previously governed by the Kopish decision.

Inadequacy of Contingency Fee

The compensation judge awarded the employee permanent partial disability benefits in the amount of $6,000.00. From this award, Attorney Wulff was awarded a contingent fee of $1,400.00 pursuant to the 25/20 formula of Minn. Stat. § 176.081, subd. 1(a). Under the 1995 statute, the contingent fee for the recovery of monetary benefits is presumed to be adequate to compensate the attorney for the recovery of medical or rehabilitation benefits or services. A Roraff or Heaton-type fee may be assessed against the employer and insurer only if the attorney establishes the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute. Minn. Stat. § 176.081, subd. 1(a)(1). In an unappealed finding, the compensation judge found the contingent fee award was inadequate to reasonably compensate Mr. Wulff for representing the employee in the medical dispute. (Finding 6, F&O Apr. 17, 1998.)

With the repeal of Minn. Stat. § 176.081, subd. 5(d), the current statute provides no standards for determining whether a contingent fee award is inadequate to reasonably compensate an attorney for representing an employee in a medical or rehabilitation dispute. The compensation judge apparently based her decision on the factors previously set forth in subdivision 5(d). We agree that application of these factors is reasonable, and adopt the former subdivision 5(d) factors as the standard for determining whether a contingent fee reasonably compensates an attorney for representing an employee in a medical or rehabilitation dispute under Minn. Stat. § 176.081, subd. 1(a)(1) (1995).

Suspension of Operation of Minn. Stat. ' 176.081, subd. 1 (1995)

The employee asks this court to suspend the operation of Minn. Stat. § 176.081, subd. 1, contending the 1995 amendment violates the separation of powers guaranteed by the Minnesota Constitution. He argues the authority to regulate the legal profession, including

[5] See Ramirez v. Dee, Inc., 58 W.C.D. 437 (W.C.C.A. 1998, summarily aff'd 582 N.W.2d 927 (Minn. 1998).

regulation of fees, rests with the judicial branch of government, not the legislative branch. The employee asserts there is no process under the 1995 amendment to Minn. Stat. § 176.081, subd. 1, by which his attorney can obtain a reasonable fee in those cases where the contingent fee is inadequate. He contends that since the statute specifies the amount of the fee, judicial review of an award of attorney fees is meaningless. This failure of the statute, the employee argues, violates the separation of powers provision of the constitution. Accordingly, the employee asks this court to suspend operation of the statute pending final review by the supreme court.[6]

We acknowledge there is some merit to the employee's position. In Roraff, the supreme court held that the obligation to provide medical care under Minn. Stat. § 176.135 also imposes upon the employer and insurer the obligation to pay reasonable attorney fees necessarily incurred by an employee who is required to commence a proceeding to obtain payment of the cost of his medical treatment and supplies. Roraff, 288 N.W.2d at 16, 32 W.C.D. at 298. Under the amended statute, the Roraff fee is limited to a percentage of the medical or rehabilitation benefits awarded, rather than a reasonable fee on the facts of that particular proceeding. In practice, the smaller the dollar value of the medical benefit awarded, the less likely it is the employee's attorney will be reasonably compensated, especially in more complex cases. As amended, the statute may conflict with the holding of the Roraff case.

The employee further contends the 1995 limitation on Roraff and Heaton fees will, in practice, effectively prevent employees from obtaining representation in cases in which the dollar value of the medical or rehabilitation dispute is small or not ascertainable. In Kahn, 327 N.W.2d at 24, 35 W.C.D. at 429, the supreme court stated the purpose of Minn. Stat. § 176.081 was two-fold. First, to protect compensation claimants from excessive legal charges. Second, the statute is designed to ensure that attorneys who represent compensation claimants will receive reasonable compensation for their efforts, and is in furtherance of the public policy of this state that injured employees have access to representation by competent counsel knowledgeable of the intricacies of the workers' compensation law. See also: In re Matter of Award of Attorney's Fees, 269 N.W.2d 360 (Minn. 1978). It is not unreasonable to assume that injured employees with medical or rehabilitation disputes involving a small dollar amount will find it difficult to obtain experienced counsel since it is likely the attorney would not be reasonably compensated for the services rendered. We further note there is no similar limitation on the employer and insurer's ability to pay retained counsel to defend the employee's claim for medical or rehabilitation benefits. These arguments, however, derive from the due process and equal protection clauses of the constitution.

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[6] The employee also contends the 1995 amendments to Minn. Stat. § 176.081 are unconstitutional in that they violate the due process and equal protection clauses of the Minnesota Constitution. The compensation judge found she lacked jurisdiction to consider these issues.

The Workers' Compensation Court of Appeals is not a court of general jurisdiction. We can act only within the parameters of the authority granted under the Workers' Compensation Act. Minn. Stat. § 175A.01, subd. 5. The act does not give this court authority to determine the constitutionality of a provision of the act. Neither does this court have the power to suspend operation of a statute. We, therefore, take no position on the merits of the employee's constitutional arguments. The employee's constitutional claims are preserved for determination by the supreme court.

Ascertainable Dollar Value

Minn. Stat. § 176.081, subd. 1(a)(1) (1995) states:

> For the purposes of applying the formula where the employer or insurer is liable for attorney fees, the amount of compensation awarded for obtaining disputed medical and rehabilitation benefits under sections 176.102, 176.135 and 176.136 shall be the dollar value of the medical or rehabilitation benefit awarded, where ascertainable.

The employee argues the calculation of attorney fees for recovery of disputed medical expenses should be based on the actual charges of the health care provider rather than the amount payable under the fee schedule of Minn. Stat. § 176.136. We find no merit in this argument.

The amended statute expressly states the attorney fee shall be based on the dollar value of the benefit awarded. Under Minn. Stat. § 176.136, subd. 1(a), the liability of an employer for services included in the medical fee schedule is limited to the maximum fee allowed by the schedule in effect on the date of the medical service, or the provider's actual fee, whichever is lower. The medical services in this case apparently were included in the applicable medical fee schedule. Accordingly, the compensation judge could not award a medical benefit in excess of that provided in this schedule. The compensation judge properly based the attorney fee on the dollar value of the medical services as set forth in the applicable fee schedule.

Future Roraff Fees

The compensation judge found the employee's attorney may be entitled to additional Roraff fees but any claim for such fees was presently premature. (Finding 9.) In her memorandum, the compensation judge noted the employee's attorney established a stream of benefits to the employee, including entitlement to future medical treatment, by proving primary liability for the work injury.[7] The compensation judge further noted the employee's attorney should be:

[7] The employer and insurer initially denied liability for the employee's claimed injury of

> . . . compensated for any future medical treatment incurred by the employee, related to the work injury, and paid by the employer and insurer. Future fees are limited to the total hourly fee of Attorney Wulff in representing the employee in this case. The claim is premature at this time, since no further medical bills have been incurred by the employee (or at least presented to the court) since the date of hearing. Once the bills have been incurred and paid by the employer and insurer, the employee's attorney may file a new fee statement for the claimed fees. (Mem. at 5.)

The employer and insurer appeal the compensation judge's conclusion that they are liable for Roraff fees on medical benefits paid in the future. They argue the compensation judge has no jurisdiction or statutory authority to award attorney fees on future medical expenses. The employee's attorney responds that he was successful in establishing the employer and insurer's primary liability for his client's injury. As a result, the employee will be entitled to medical benefits in the future. Accordingly, Mr. Wulff argues he is entitled to a Roraff fee on all future medical benefits. We disagree.

Under the amended statute, payment of Roraff or Heaton fees is limited to a percentage of the dollar value of the medical or rehabilitation benefit awarded. Minn. Stat. § 176.081, subd. 1(a)(1). We believe the phrase benefit awarded is plain and unambiguous and limits the attorney fees to the dollar amount of the benefits awarded in the proceeding. Whether the employee may be entitled to additional medical benefits in the future is speculative. Receipt of future medical benefits is dependent upon proof that the medical expenses claimed were reasonably necessary to cure and relieve the employee from the effects of the personal injury. If a dispute arises with respect to future medical expenses, the employee's attorney may be entitled to additional fees based on the amount of the benefits ultimately awarded. We, therefore, modify the compensation judge's finding and order to the extent inconsistent with this decision.

Subdivision 7 Attorney Fees

The compensation judge additionally ordered the employer and insurer to pay to the employee 30 percent of all Roraff attorney fees paid to Mr. Wulff, pursuant to Minn. Stat. § 176.081, subd. 7.[8] The employer and insurer appeal from the award of subdivision 7 fees

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September 13, 1996. After the employee retained counsel, the employer and insurer stipulated the injury arose out of and in the course of the employee=s work activities.

[8] Minn. Stat. § 176.081, subd. 7 (1995) states:

> If the employer or insurer files a denial of liability, notice of discontinuance, or fails

against Roraff fees paid by the employer and insurer. They argue that payment of subdivision 7 attorney fees has always been considered reimbursement to the employee for attorney fees paid by the employee. Since the employee did not pay his attorney a fee for the attorney's services in recovering medical benefits, there is nothing to reimburse. Accordingly, they ask that the portion of the award assessed against Roraff fees be reversed.

Minn. Stat. § 176.081, subd. 7 was first enacted effective August 1, 1975. The statute then provided:

> If the employer or insurer shall file a denial of liability, notice of discontinuance, or shall fail to make payment of compensation or medical expenses within the statutory period after notice of injury or occupational disease, or shall otherwise resist unsuccessfully the payment of compensation or medical expenses, and the injured person shall have employed an attorney at law, who successfully procures payment of behalf of the employee, the compensation judge, commissioner of the department of labor and industry, or the workers' compensation court of appeals upon appeal, upon application, shall award to the employee against the insurer or self-insured employer or uninsured employer, in addition to the compensation benefits paid or awarded to the employee, an amount equal to 25% of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of $250.

In 1983, subdivision 7 was amended by adding language providing for payment of subdivision 7 fees to an employee in the event the employer and insurer unsuccessfully disputed rehabilitation benefits or aspects of a rehabilitation plan. In 1995, the percentage was increased from 25 to

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> to make payment of compensation or medical expenses within the statutory period after notice of injury or occupational disease, or otherwise unsuccessfully resists the payment of compensation or medical expenses, or unsuccessfully disputes the payment of rehabilitation benefits or other aspects of a rehabilitation plan, and the injured person has employed an attorney at law, who successfully procures payment on behalf of the employee or who enables the resolution of a dispute with respect to a rehabilitation plan, the compensation judge, commissioner, or the workers= compensation court of appeals upon appeal, upon application, shall award to the employee against the insurer or self-insured employer or uninsured employer, in addition to the compensation benefits paid or awarded to the employee, an amount equal to 30 percent of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of $250.

30 percent. However, the principle provisions of the statute have remained the same from 1975 to 1995.

The courts have traditionally treated subdivision 7 fees as reimbursement to the employee of a portion of the attorney fees paid by the employee. The supreme court stated in Kahn that § 176.081, subd. 7, requires an employer or its insurer to pay a portion of the employee's attorney fees if it unsuccessfully resists the payment of compensation. Kahn, 327 N.W.2d at 27, 35 W.C.D. at 434; see also Robinson v. Minnesota Valley Improvement Co., 401 N.W.2d 68, 39 W.C.D. 446 (Minn. 1987). In Mack v. City of Minneapolis, 333 N.W.2d 744, 35 W.C.D. 875 (Minn. 1983) the court again stated that subdivision 7 fees are intended to reimburse an injured employee for a portion of his attorney fees. This court has also stated that [s]ubdivision 7 provides for partial reimbursement by the employer/insurer of the employee's attorneys' fees where an employer or insurer fails to make payment of compensation when due or otherwise unsuccessfully resists the payment of compensation. Solam v. Sysco Minnesota, 54 W.C.D. 423 (W.C.C.A. 1996).

In Bednar v. Interior Wood Prods., No. *Redacted to remove SSN* (W.C.C.A. Feb. 26, 1991), this court reversed an award of subdivision 7 fees on Edquist fees[9] paid out of an intervenor's interest. The court explained that subdivision 7 fees Aare awarded . . . to reduce the impact of withholding reasonable attorney fees from the compensation benefits to which the employee is entitled. In Sailes v. Ford Motor Co., No. *Redacted to remove SSN* (W.C.C.A. Nov. 18, 1992) this court reversed an award of subdivision 7 fees on an award of Roraff and Heaton fees. The court concluded that since Roraff and Heaton fees are paid by the employer and insurer and no fees are withheld from the employee's benefits, subdivision 7 is inapplicable.

In 1975, Minn. Stat. § 176.081, subd. 7, would have, on its face, allowed an award of fees to the employee in cases in which the employer and insurer unsuccessfully resisted payment of medical expenses. However, in 1975, the employer and insurer had no liability for payment of attorney fees to the employee's attorney for recovery of medical benefits. That principle was not established until 1980 in Roraff v. Dep't of Transp., supra. Clearly then, in 1975, the legislature could not have intended the employee receive an award of subdivision 7 fees in a claim involving medical expenses only. Since the current statute is essentially unchanged since 1975, we see no reason to conclude the legislature intended a different result under the 1995 statute.

In Roraff, the court held that Minn. Stat. § 176.081 was intended to govern awards of attorney's fees in proceedings in which an employee is awarded disability compensation but was not meant to apply to awards of attorney's fees in proceedings brought solely to recover medical expenses. Roraff, 288 N.W.2d at 15-16, 32 W.C.D. at 297. Rather, the court concluded, the authority to award attorney fees in medical-only cases is reasonably to be inferred from the

[9] Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986).

language of Minn. Stat. § 176.135, subd. 1. Thus, prior to 1995, an employee had no claim under Minn. Stat. § 176.081, subd. 7, for a percentage of Roraff fees paid by the employer and insurer.

The employee asserts the 1995 amendment to Minn. Stat. § 176.081 brought Roraff fees within the purview of Minn. Stat. § 176.081 rather than Minn. Stat. § 176.135. Since subdivision 7 applies to attorney fees awarded pursuant to this section, the employee contends the compensation judge's award of subdivision 7 fees on the Roraff fees should be affirmed. We disagree.

> Minn. Stat. § 176.135, subd. 1(d) (1995) provides in relevant part:
>
> In case of the employer's inability or refusal seasonably to provide the items required to be provided under this paragraph, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing the same, . . . and attorney fees incurred by the employee.

To be eligible for an award of Roraff fees the employee must first establish entitlement to medical benefits under Minn. Stat. § 176.135. If entitlement is established, the employer and insurer are liable for the attorney fees incurred by the employee under subd. 1(d) of the statute. Thus, authority for awarding attorney fees in medical only cases remains in Minn. Stat. § 176.135. It is only the method of calculating Roraff fees that is governed by Minn. Stat. § 176.081, subd. 1. Since Roraff fees are awarded pursuant to Minn. Stat. § 176.135 rather than under Minn. Stat. § 176.081, the compensation judge's award of subdivision 7 fees computed on the Roraff fee was improper. See Salahud-Din v. Compassionate Care Group, No. *Redacted to remove SSN* (W.C.C.A. 1997).

Finally, we see no purpose to be served in applying Minn. Stat. § 176.081, subd. 7, to an award of Roraff or Heaton fees. Such an application would result in a windfall to the employee by creating a new benefit payable to the employee in medical and/or rehabilitation cases. We do not believe the legislature intended the employee be paid an additional benefit in the form of attorney fees assessed against attorney fees which the employee did not pay. In addition, applying subdivision 7 fees to an award of Roraff or Heaton fees would penalize the employer and insurer. We find no sound reason to order the employer and insurer to pay both Roraff or Heaton fees and then pay another fee to the employee. We therefore reverse the award of fees under Minn. Stat. § 176.081, subd. 7, to the extent that the award is assessed against Roraff fees paid to attorney Wulff by the employer and insurer.

Reasonableness of Attorney Fees

The compensation judge applied the subdivision 5(d) factors and found that a reasonable fee for Mr. Wulff's representation of the employee was $5,550.00 as claimed in his fee

petition. (Findings 4, 5.) The cross-appellants appeal this finding and cite several instances in the fee petition where they claim the amount billed by Mr. Wulff was excessive for the work involved. In view of our decision herein, we need not decide this issue.

The employer and insurer did not appeal the compensation judge's finding that the contingent fee award was inadequate to reasonably compensate Mr. Wulff for representing the employee in the medical dispute. We have affirmed the compensation judge's award of Roraff fees based on a percentage of the medical benefits awarded. We have also concluded Mr. Wulff is not presently entitled to an award of Roraff fees on future medical benefits paid by the employer and insurer. Accordingly, the reasonable value of the time expended by Mr. Wulff on the case is irrelevant.

SEPARATE OPINION

DEBRA A. WILSON, Judge

I concur with the majority's resolution of most of the issues raised by this case. However, I must disagree with the majority on two points. In the section dealing with the inadequacy of the contingent fee, the majority notes that the judge's finding on this issue was not appealed but then nevertheless goes on to adopt the factors formerly contained in Minn. Stat. § 176.081, subd. 5(d), as the applicable standard. In my opinion, the majority's action here is premature given the lack of any current controversy. Similarly, I find it inappropriate, at this point, to address the compensation judge's conclusion that the employee's attorney may be entitled to additional Roraff fees for medical benefits paid by the employer and insurer in the future. The judge's decision merely suggests that such fees may be payable, without making any award or binding order to that effect. Under these circumstances, the employee's entitlement to future Roraff fees is not properly before this court.