

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

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 3, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - CONTINGENT FEES. Based upon the compensation judge's unappealed finding determining that an additional 2% permanent partial disability had been obtained solely through the efforts of the employee and not through the efforts of his attorney, the settlement judge's Order Determining Attorney's Fees awarding contingency fees to the employee's attorney is vacated.

Vacated.

Determined by Johnson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Gary P. Mesna

OPINION

THOMAS L. JOHNSON, Judge

The employee filed an application for review of attorney fees awarded by Settlement Judge Ellefson at the Department of Labor and Industry by an Order Determining Attorney's Fees, served and filed February 13, 1998. We vacate the settlement judge's order.

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 in 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 was executed on September 2, 1994 by the employee and Mr. Sommerer. A Notice of Appearance was filed at the Department of Labor and Industry (DOLI) by attorney Sommerer on December 9, 1994. 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 April 13, 1995, Dr. Robert Campbell at Park Nicollet Medical Center completed a Health Care Provider report at the request of the employee, assigning a 9% permanent partial disability rating. An independent medical examination (IME) was performed by Dr. James R. Householder on August 24, 1995. Dr. Householder 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. 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 and 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. By decision filed September 22, 1998, a panel of this court referred the employee's application to the Office of Administrative Hearings for a hearing before a compensation judge pursuant to Minn. Stat. § 176.081, subd. 3 and § 176.381, subd. 1.¹ The case was heard before Compensation Judge Gary P. Mesna on December 7, 1998. In Findings of Fact on Attorney Fees, served and filed December 15, 1998, the compensation judge found the payment for the additional 2% permanent partial disability was obtained solely through the efforts of the employee and not through the efforts of his attorney, Carl J. Sommerer. Neither the employee nor Mr. Sommerer appealed the compensation judge's findings. The compensation judge referred the matter back to the Workers' Compensation Court of Appeals for further proceedings pursuant to Minn. Stat. § 176.381.

DECISION

The employee's former attorney claimed \$375.00 withheld from the additional 2% permanent partial disability paid to the employee, as attorney fees pursuant to Minn. Stat. § 176.081, subd. 1 (1994). On February 13, 1998, Judge Ellefson issued an order directing General Casualty Insurance Company to pay the \$375.00 to Mr. Sommerer. The employee filed an Application for Review asserting his attorney did not earn the fee and seeking an order from this

¹ See Biederman v. Win Stephens Buick, 58 W.C.D. 497 (W.C.C.A. 1998).

court directing Mr. Sommerer to return the money to the employee.

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). In an unappealed finding, the compensation judge found the additional 2% permanent partial disability was recovered solely through the efforts of the employee rather than his attorney. Accordingly, Mr. Sommerer was not entitled to a contingency fee of \$375.00 on the additional 2% permanent partial disability benefit. It appears from the file that General Casualty Insurance Company paid the withheld fees to Mr. Sommerer. It is hereby ordered that Mr. Sommerer refund to the employee the \$375.00 paid as attorney fees in this matter.