

MACKENZIE COLE, Employee, v. KRUEGER CONSTR., UNINSURED, Employer, and SPECIAL COMP. FUND, Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 16, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - NOTICE OF HEARING. Although notice of the telephone attorney fees hearing was served only 28 days before the scheduled hearing rather than the 30 days required by statute and rule, no remand for rehearing is necessary where the fund did not object to the notice or request a continuance during the hearing, participated in the hearing and stipulated to certain facts, and made no argument that it was prejudiced by any misunderstanding regarding the nature of the hearing. Similarly, where the matter was submitted on stipulated facts, and neither party sought to call any witness or introduce any evidence, the judge's failure to record the hearing does not require a remand for another hearing.

ATTORNEY FEES - RORAFF FEES. Substantial evidence supports the compensation judge's determination that the employee's medical expenses, although ultimately admitted, were not paid in a timely manner, and her award of Roraff-type fees consistent with Minn. R. 5220.2920, subp. 5.

Affirmed.

Determined by: Johnson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Peggy A. Brenden

OPINION

THOMAS L. JOHNSON, Judge

The Special Compensation Fund appeals from the compensation judge's order that it pay \$1,323.54 in Roraff-type attorney fees pursuant to Minn. Stat. § 176.081, subd. 1(a)(1). We affirm.

BACKGROUND

Mackenzie Cole, the employee, sustained a personal injury to his right eye on May 7, 1997, while employed by Krueger Construction, the employer.¹ The employee was seen

¹ The telephone hearing in this case was not recorded. Apparently, no witnesses testified and no exhibits were received in evidence. The factual background is taken from the stipulated facts in the compensation judge's Findings and Order, the pleadings contained in the Judgment

at the emergency room of St. Mary's Hospital in Rochester, Minnesota, on May 7, 1997, and underwent surgery that same day to repair a corneal laceration of his eye. The employee was seen in follow-up at the ophthalmology clinic at the Mayo Clinic. The employer had statutory notice of the personal injury but was uninsured for workers' compensation liability. The employee's unpaid medical expenses at the Mayo Clinic for the care and treatment of his eye were \$8,292.60.

On August 20, 1998, the employee signed a Retainer Agreement retaining Thomas R. Patterson, Esquire, to represent him. On October 13, 1998, Mr. Patterson served a claim petition on the uninsured employer and the Special Compensation Fund seeking temporary total disability benefits from May 7 through May 12, 1997 and payment of his medical expenses. On October 15, 1998, Blaine E. Cooper, Senior Claims Manager of the Special Compensation Fund (the Fund), wrote to Krueger Construction advising the employer of the employee's claim for workers' compensation benefits. In his letter, Mr. Cooper provided the employer with a copy of the claim petition and a First Report of Injury filed with the Department of Labor and Industry on October 15, 1998. Mr. Cooper also contacted Mr. Patterson and requested documentation of the employee's medical treatment costs and wage loss claim. By letter dated October 22, 1998, Mr. Patterson provided Mr. Cooper with copies of the medical records and bills he had in his file. Mr. Cooper submitted the employee's medical bills to CompCost for review.

The Fund's Answer to the employee's claim petition was filed on December 3, 1998. In its Answer, the Fund admitted liability for the employee's personal injury of May 7, 1997 but denied the employee was entitled to temporary total disability benefits. The Fund further stated in its Answer "that reasonable and necessary medical treat[ment] is due and owed pursuant to MN Statute 176 and the Permanent Treatment Parameters." On December 7, 1998, CompCost, Inc., paid medical expenses in the amount of \$5,617.70. Sometime thereafter, the Fund also paid one week of wage loss benefits totaling \$213.34. On January 13, 1999, the employee's attorney wrote to Judge O'Gorman advising the case was settled and requesting the employee's claim petition be withdrawn. An order dismissing the claim petition was filed January 15, 1999. On March 19, 1999, the employee's attorney filed a Statement of Attorney Fees seeking payment of fees based on his recovery of medical expenses. The Special Compensation Fund filed an Objection to Attorney Fees.

On June 8, 1999, the Office of Administrative Hearing served upon the parties a "Notice of: Hearing on Attorney Fees" setting the matter for a telephone hearing on July 6, 1999. On that date, a compensation judge at the Office of Administrative Hearings conducted a telephone hearing. Apparently, no witnesses were sworn or testified at the hearing and no evidence was offered or received. The parties, however, did stipulate to certain facts. The telephone hearing was not recorded. In a Findings and Order on Attorney's Fees filed July 13, 1999, the compensation judge set forth the stipulated facts, found the Special Compensation Fund's Answer to the employee's claim petition was not timely, found medical benefits were not paid in a timely

Roll, the briefs of the parties and the Affidavits of Julie K. Swedback and Blaine E. Cooper, being part of Exhibit A to the appellant's brief.

manner and found attorney fees on the wage loss benefits were inadequate to compensate the employee's attorney for his representation of the employee. The compensation judge ordered the Special Compensation Fund to pay Roraff-type attorney fees in the amount of \$1,323.54 pursuant to the 25/20 formula of Minn. Stat. § 176.081, subd. 1(a)(1) (1995). The Special Compensation Fund appeals.

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

Due Process Arguments

The Fund argues the Attorney General's office was not provided with timely and proper notice of the July 6, 1999 hearing, the Fund was denied an opportunity to call witnesses and submit evidence at the hearing and the hearing was not recorded as required by Minn. R. 1415.2900, subp. 9.A. and B.(2). These failures, the Fund asserts, violated its due process rights and require a remand for a record hearing. We disagree.

Minn. Stat. § 176.341, subd. 3, and Minn. R. 1415.2900, subp. 1, require written notice of a hearing be given at least 30 days prior to the date of the hearing. Notice of the hearing was served on June 8, 1999, scheduling the hearing for July 6, 1999. While this is less than the 30 days provided for in the statute, the Fund filed no written objection to the scheduled hearing. Nor is there any evidence or indication that the Fund objected to proceeding with the hearing on July 6, 1999. Finally, the Fund does not assert it was somehow prejudiced by OAH's failure to comply with the 30-day requirement. Accordingly, the Fund waived any right it may have had to object to the notice deficiency.

The Fund next argues that its counsel, the Attorney General's office, did not receive a notice of hearing, but rather received a "notice of prehearing referenced on an OAH record book summary which noted a telephone prehearing scheduled for July 6, 1999." See: Ex. A-31 to App. Brief; Affidavit of Julie K. Swedback. Ms. Swedback, the Fund's counsel, contends there was a misunderstanding as to whether the July 6, 1999 telephone conference was a prehearing or a hearing. Procedural due process dictates that parties receive proper notice and an opportunity to be heard which, the appellant contends, did not occur in this case. Accordingly, the Fund requests the case be remanded for a record hearing. We find no lack of due process.

The notice scheduling the hearing on attorney fees is contained in the Judgment Roll and reflects service on the Office of the Attorney General and the Special Compensation Fund on June 8, 1999. Even assuming the Attorney General's office did not receive notice of the

hearing, we find no basis to reverse or vacate the compensation judge's order. There is no indication the Fund or its counsel requested a continuance or raised any objection to the notice at the telephone hearing. The Fund participated in the hearing and stipulated to certain facts. The Fund offers no argument that it was prejudiced by any misunderstanding regarding the nature of the hearing. Absent any prejudice, we find no reason to remand the case for another hearing.

The Fund next argues its procedural due process rights were violated because it did not have the opportunity to call witnesses and submit evidence and because the hearing was not tape-recorded as required by Minn. R. 1415.2900, subp. 9.A. and B. Accordingly, the Fund contends due process requires a remand to OAH for a formal hearing, on the record. We disagree.

The official record of a hearing includes the pleadings, the evidence received by the compensation judge and the tapes used to record the hearing, if any. Minn. R. 1415.2900, subp. 7. Any evidence that a party wants the compensation judge to consider must be offered and made a part of the record. Minn. R. 1415.2900, subp. 6.B. After the first witness is sworn, all of the proceedings must be on the record. Minn. R. 1415.2900, subp. 9.A. In this case, neither party apparently sought to introduce any evidence or to call any witnesses to testify. The compensation judge made five findings of fact which the Fund appealed. The Fund does not, however, contend any of the factual findings are incorrect or clearly erroneous. Rather, the Fund makes a legal argument that, based on the stipulated and admitted facts, it does not owe attorney fees. This case, therefore, involves the application of Minn. Stat. § 176.081, subd. 1a, to essentially undisputed facts. The Workers' Compensation Court of Appeals can review that issue without a transcript. Accordingly, the failure of the compensation judge to record the hearing does not require vacation of the compensation judge's findings and order and a remand for another hearing.

Roraff Fees

The compensation judge found medical benefits were not paid in a timely manner and awarded Roraff attorney fees on the basis that the Fund's answer was not timely filed. Minn. Stat. § 176.321, subd. 1, requires the adverse party to serve and file an answer to the claim petition within 20 days after service. The employee's claim petition was served on the Fund on October 13, 1998, and the Fund did not file its answer until December 3, 1998. The Fund contends that untimely filing of an answer is not dispositive of the question of whether the Fund timely paid the medical benefits. While there is some merit to this argument, the undisputed facts support the compensation judge's finding that medical benefits were not paid in a timely manner.

Minn. Stat. § 176.221, subd. 7, provides in part "charges for treatment under section 176.135 are due 30 calendar days after receiving the bill and necessary medical data." Minn. Stat. § 176.135, subd. 6, states in part, "no later than 30 calendar days after receiving the bill, the employer or insurer shall pay the charge or any portion of the charge which is not denied, or deny all or part of the charge with written notification to the employee and the provider explaining the basis for denial." Attached to the employee's claim petition on the Judgment Roll are medical records describing treatment provided to the employee for his personal injury and bills from the

Mayo Medical Center. Arguably, the Fund was in possession of the bills and necessary medical data required by Minn. Stat. § 176.221, subd. 7, on October 13, 1998. On October 22, 1998, Mr. Patterson forwarded to Mr. Cooper copies of the employee's medical records and bills. The Fund's date stamp on the letter reflects it was received by the Fund on October 26, 1998. Under Minn. Stat. §§ 176.221, subd. 7, and 176.135, subd. 6, the Fund had 30 calendar days, until November 25, 1998, within which to pay the employee's medical expenses. The bills in question were not paid until December 7, 1998. There is no dispute the Fund failed to pay the medical expenses within 30 days after receipt of the bills and supporting data. The compensation judge's finding that the medical benefits were not paid in a timely manner is supported by the evidence, and is affirmed.

Minn. Stat. § 176.081, subd. 1(c), provides in part that attorney fees shall not "be calculated on the basis of any undisputed portion of compensation awards. Allowable fees under this chapter shall be based solely upon genuinely disputed claims or portions of claims . . ." The statute further provides the "existence of a dispute is dependent upon a disagreement after the employer or insurer has had adequate time and information to take a position on liability." The Fund argues the medical benefits in question were not genuinely disputed and contends the compensation judge's award of attorney fees is contrary to the statute. We disagree. Minn. R. 5220.2920, subp. 5, sets forth "principles applicable to determine whether a benefit was genuinely disputed." Subparagraph (7) provides: "Benefits allegedly admitted but not timely paid may be used to compute the fee." The medical bills were not paid within the 30-day period provided by Minn. Stat. § 176.221, subd. 7, and 176.135, subd. 6. Accordingly, the compensation judge properly awarded Roraff-type attorneys fees on the unpaid benefits.

The Fund also contends the employee failed to consult with the department about the medical expenses and the department did not certify that there was a dispute. Accordingly, the Fund argues the compensation judge erroneously awarded attorney fees. We are not persuaded.

Minn. Stat. § 176.081, subd. 1(c), provides in part:

Except where the employee is represented by an attorney in other litigation pending at the department or at the office of administrative hearings, a fee may not be charged after June 1, 1996, for services with respect to a medical or rehabilitation issue arising under section 176.102, 176.135, or 176.136 performed before the employee has consulted with the department and the department certifies that there is a dispute and that it has tried to resolve the dispute.

The employee claimed wage loss benefits in addition to his claim for medical expenses under § 176.135. Accordingly, there was "other litigation" pending so the department's certification procedure is not applicable in this case. The Findings and Order of the compensation judge are affirmed.