

CURT DAVEY, Employee/Appellant, v. NELS NELSON & SONS, INC., SELF-INSURED/E.C. FACKLER, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 24, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081. Where the compensation judge expressly concluded by an unappealed finding that the Roraff fee requested by the employee's attorney was a reasonable one, but where the judge nevertheless limited the attorney's fee to an amount less than that reasonable amount solely on the basis of the 25/20% formula provided for in the 1995 legislative amendments to Minn. Stat. § 176.081, where the employer and insurer did not appeal from the finding that the requested fee was a reasonable one, where constitutional challenges to the 1995 amendment had been preserved "for future determination," and because the supreme court has now found the 1995 amendments' limiting provisions to be unconstitutional, the compensation judge's denial of the claimed Roraff fee was reversed.

COSTS & DISBURSEMENTS. Pursuant to Minn. R. 5220.2610, subp. 10, the compensation judge's denial of reimbursement of an expert witness fee for the "testimony" of the employee's treating chiropractor at a Commissioner's Review conference pursuant to Minn. Stat. § 176.106, subd. 7, is affirmed.

Affirmed in part and reversed in part.

Determined by Pederson, J., Wilson, J. and Rykken, J.
Compensation Judge: Jerome G. Arnold

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's limitation of attorney fees and denial of costs claimed for expert witness testimony. We reverse in part and affirm in part.

BACKGROUND

On about November 10, 1995, Curt Davey sustained a work-related injury to his back in the course of his employment as a laborer with Nels Nelson & Sons. In a consequent Medical Request filed June 15, 1998, Mr. Davey [the employee] alleged entitlement to payment of \$931.11 in bills for chiropractic treatment that he had received from Dr. Robert Torgrimson.

An administrative conference was held before a representative of the Department of Labor and Industry on August 27, 1998. Pursuant to an administrative decision filed September 17, 1998, the chiropractic expenses at issue were found to be reasonable and necessary treatment for the employee's work injury, and Nels Nelson & Sons [the employer] and its insurer were held liable for their payment. On September 29, 1998, the employee's attorney served on the employer's insurer a Statement of Attorney's Fees, in which he claimed entitlement to \$330.00 in fees, for 1.2 hours of attorney work and 2.6 hours of paralegal work expended in obtaining the September 17, 1998, award of \$931.11 for the employee. The employee's attorney indicated, by tacit agreement with language on the request form, that he had "utilized the 25/20% statutory formula in calculating these fees." On October 6, 1998, Nels Nelson & Sons [the employer] and its insurer filed a Request for Formal Hearing on the matter decided in the September 17, 1998, administrative decision, noting also in their cover letter that the total amount of attorney fees permissible on the \$931.11 in benefits awarded was at most \$232.78 by application of the statutory formula. The Request for Formal Hearing was treated by the Department of Labor and Industry as a Request for a Commissioner's Review under Minn. Stat. § 176.106, subd. 7, which provides that, instead of a formal hearing, "the commissioner shall review a decision of the commissioner's designee regarding a claim for a medical benefit of \$1,500 or less and the commissioner's decision shall be final."

The Commissioner's Review conference was held on November 17, 1998, at the Office of Administrative Hearings. At issue at that conference were the \$931.11 in bills at issue at the August 27, 1998, administrative conference plus about five hundred dollars in additional chiropractic expenses, for a total now in the amount of \$1,431.20. According to the compensation judge's eventual Commissioner's Review and Order in the matter, filed December 17, 1998, Dr. Torgrimson "was also present" at the conference. Prior to the issuance of any decision pursuant to this Commissioner's Review, by an Order Determining Attorney Fees filed November 25, 1998, the employee's attorney was awarded the \$330.00 in attorney fees that he had requested on September 29, 1998, with the notation that "[n]o objection to the requested fees has been filed by the employer or insurer." The fees were ordered payable by the employer and insurer in addition to any benefits due, pursuant to Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980). Subsequently, by a Commissioner's Review and Order filed December 17, 1998, the employee was held to be entitled to all chiropractic expenses at issue at the November 17, 1998, Commissioner's Review hearing, "subject to fee schedule limitations."

Four days later, on December 21, 1998, the employer and insurer were served with the employee's attorney's Statement of Attorney's Fees, wherein the employee's attorney sought \$500.00 for his representation of the employee at the November 17, 1998, Commissioner's Review hearing, in addition to the \$330.00 awarded him on November 25, 1998, for his work at the August 27, 1998, administrative conference. The employee's attorney's request was based on 3.6 additional hours of work by the attorney, asserted to be billable at \$175.00 an hour, and 2.5 additional hours of work by a paralegal, claimed to be billable at \$50.00 an hour. The employee's attorney again indicated, by tacit agreement with language on the request form, that he had utilized the 25/20% statutory formula in calculating these fees. The employee's attorney also sought costs of \$1,286.75-\$86.75 for retrieval of medical records and \$1,200.00 for an expert witness fee for

the testimony of Dr. Torgrimson at the Commissioner's Review Hearing.

On January 6, 1999, the employer and insurer filed an Objection to Attorney's Fees, asserting that the fee claimed was inappropriate on three bases. First, the employer and insurer asserted that Minn. Stat. § 176.081, subd. 1(a), requires attorney fees on disputed medical benefits to be based on the statutory 25/20% formula applied to the dollar value of the benefits awarded and that this would entitle the employee's attorney to a maximum fee of \$357.80, which fee would then be subject to reduction if the disputed chiropractic charges should be found to be not in accordance with the schedules. Second, the employer and insurer asserted that the employee's attorney has already received contingent attorney fees in connection with his representation of the employee pursuant to a Findings and Order filed June 2, 1997, and attorney fees continue to be withheld from ongoing benefits. Finally, the employer and insurer contended that the claimed taxable costs were excessive and unreasonable, particularly the expert witness fee for Dr. Torgrimson, in view of the total amount of benefits claimed - - \$1,431.20 - - and in view of the relatively brief duration of Dr. Torgrimson's appearance. The employer and insurer argued further on this issue that Dr. Torgrimson was not an independent medical examiner and that his appearance in an informal "Commissioner Review Hearing" did not constitute a "court appearance" such as might otherwise authorize payment of the witness fee at issue.

The matter came on for hearing on February 5, 1999, before a compensation judge in the settlement division at the Office of Administrative Hearings. No record was evidently made of the proceeding, but according to the judge's March 8, 1999, Findings and Order on Attorney Fees, the employee's attorney was asserting that he was entitled to fees in addition to fees calculated pursuant to the statutory 25/20% formula, in that he was required to appear at an additional hearing pursuant to the employer and insurer's request for a formal Commissioner's Review of matters already resolved earlier. The judge indicated in his Findings and Order that the employee's attorney was also asserting "that the statutory formula based upon a contingency fee rather than a reasonable hourly fee under Roraff . . . is unconstitutional as the 1995 amendments violate the due process and equal protection clauses and infringe upon the judiciary powers in violation of the separation of powers doctrine."

By Findings 9 and 8, respectively, in the March 8, 1999, Findings and Order on Attorney Fees, the compensation judge concluded that "[t]here exists an inadequate flow of benefits to employee upon which employee's attorney can be reasonably compensated for his time and efforts in securing payment of the chiropractic treatment represented by charges of \$1,431.20" and that "[b]ased upon the time expended by employee's attorney at customary rates by his office, the sum of \$1,095.00 would represent a reasonable fee." Notwithstanding these findings, however, the judge limited the employee's attorney's fee to "a total sum equivalent to the application of the 25/20 statutory formula to the amount paid for the disputed chiropractic treatment under the fee schedule," having concluded in Finding 10 that he was compelled to do so "[p]ursuant to the 1995 legislative amendments as interpreted by the Workers' Compensation Court of Appeals." While awarding the \$86.75 in costs for retrieval of medical records, the judge also disallowed payment of the \$1,200.00 in costs claimed for the testimony of Dr. Torgrimson, based on conclusions that (1) Dr. Torgrimson "was the medical provider herein and as such is a

party in interest,” parties being excluded from awards of costs under Minn. Stat. § 176.511, subd. 1, and in that (2) Dr. Torgrimson “as the medical provider is not entitled to a witness fee wherein he is a witness and the dispute involves allegations of excessive treatment” (sic). With regard to this disallowance of a witness fee to Dr. Torgrimson, the judge explained in his Memorandum that “[w]hile Dr. Torgrimson did not intervene in these proceedings he was free to do so under Minn. Rule 1415.1200” and that “as the defense to his charges involved allegations of excessive treatment charges Dr. Torgrimson could have brought the proceedings himself under Minn. Rule 5220.2620, sub[p]. 2.” Finally, at Order 4 of his decision, the judge “preserved for future determination” the employee’s attorney’s constitutional claims. The employee appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers’ Compensation Court of Appeals must determine whether “the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, “they are supported by evidence that a reasonable mind might accept as adequate.” Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, “[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.” Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, “unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id.

DECISION

Attorney’s Fees

In addition to asserting arguments based on the statute as amended in 1995, the employee has appealed from the judge’s limitation of his attorney’s fees on grounds that the 1995 amendments to Minn. Stat. § 176.081 “violate the principles of due process and equal protection and [in]fringe upon the judicial powers in violation of the separation of powers doctrine.” In its recent decision in the cases of Irwin v. Surdyk’s Liquor and Frisch v. S & S Carpet Designs, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), filed subsequent to the employee’s appeal in this case, the supreme court has concluded that the 1995 amendments to Minn. Stat. § 176.081, to the extent that they impinge upon the supreme court’s power to oversee attorneys and attorney fees, are unconstitutional. The compensation judge in this case expressly found the flow of benefits to the employee to be inadequate from a mere contingency fee basis for reasonable compensation of the employee’s attorney for his work in securing the chiropractic benefits awarded, and he therefore found the \$1,095.00 fee apparently requested by the employee’s attorney to be a reasonable one. Nevertheless, he limited his award of fees to an amount less than that amount evidently solely on

the basis of the 1995 legislative amendments to the attorney fee provisions in Minn. Stat. § 176.081, preserving constitutional challenges to those amendments “for future determination” by the supreme court. Because the supreme court has now found the 1995 amendments’ limiting provisions to be unconstitutional, and given the compensation judge’s unappealed finding that the employee’s attorney’s request for fees was otherwise reasonable absent those limiting provisions,¹ we reverse the judge’s limitation of the employee’s attorney’s claim to less than the amount found reasonable.

Costs

The compensation judge denied the employee’s request for payment of an expert witness fee of \$1,200.00 to Dr. Torgrimson on grounds that the doctor was a party in interest in the matter and so was precluded from a witness fee under Minn. Stat. § 176.511, subd. 1. The judge asserted in his Memorandum, in support of his denial of the witness fee, that Dr. Torgrimson, although not a formal intervenor, was a party in interest by virtue of the mere fact that he had been “free to” intervene in the matter and “could have” brought a proceeding himself, under Minn. R. 5220.2620, subd. 2, for payment for any treatment that might have been alleged to be “excessive.” The judge does not address the two arguments raised by the employer and insurer in their Objection to Attorney’s Fees - - that the proceeding at which Dr. Torgrimson testified was not a “court appearance” such as might authorize his receipt of a \$1200.00 fee under Minn. R. 5219.0500, subp. 3H(4), and that the fee requested was at any rate excessive in light of the amount of the expenses at issue and the duration of the doctor’s appearance.² The employee argues that, while Dr. Torgrimson may well have been “free to” intervene in the case, the doctor clearly had not intervened in the case at the time of his appearance and clearly was not a party in any legal sense. Without addressing whether or not the doctor’s testimony at issue constituted a “court appearance” as contemplated by Minn. R. 5219.0500, subp. 3H(4), the employee argues further that disallowing Dr. Torgrimson’s fee request would not only deny Dr. Torgrimson a fee reasonable under the rules but would directly affect the rights of employees to vigorously pursue payment of their treatment expenses. We are not persuaded.

¹ The employer and insurer have not cross-appealed from the judge’s conclusion in Findings 8 and 9 that “the sum of \$1,095.00 would represent a reasonable fee” to the employee’s attorney. They argue in their responsive brief only that the judge “had no option” but to award fees pursuant to the formula in the statute as amended in 1995 and that, because the Commissioner’s Review Hearing was not an “appeal” under the law, the additional \$500.00 “appellate” fee requested in the alternative by the employee for his attorney’s work at the hearing is not appropriate. Nor do the employer and insurer contest Findings 8 and 9 in their response to the employee’s policy arguments.

² Minn. R. 5219.0500, subp. 3H(4), provides that the fee charged by a health care provider for a “court appearance” “must not exceed” “\$400 per hour” but must be paid “for a minimum of three hours” (emphasis added).

Initially, we would concede to the employee that the mere fact that Dr. Torgrimson might have become a party in this case does not automatically render him a party under the law. Nor is it necessarily inappropriate to compensate a treating health care provider, as opposed to an independent medical examiner, for his testimony in proceedings where testimonial evidence is contemplated and appropriate. The proceeding at issue in this case, however, at which Dr. Torgrimson appeared, was clearly an informal administrative proceeding,³ a proceeding provided for under Minn. Stat. § 176.106, subd. 7, quite evidently to avoid some of the expenses of a formal hearing.⁴ Among the expenses to be avoided by such an informal proceeding is the expense of in-person expert testimony, which is normally accompanied not only by witness fees such as are here at issue but also by the costs of preparing a transcript such as normally documents such testimony. Moreover, Minn. R. 5220.2610, subp. 10, provides expressly that “[t]he division shall not order reimbursement of costs for testimony at an administrative conference” (emphasis added). Therefore, we affirm the compensation judge’s denial of reimbursement for any disbursements made to Dr. Torgrimson for his appearance at the Commissioner’s Review conference. See Minn. R. 5220.2610, inclusive, regarding general procedural and protocol matters pertaining to the presentation of evidence at administrative conferences conducted under Minn. Stat. §§ 176.106 and 176.239.

³ The Notice and Order for the Commissioner’s Review Conference, served on October 22, 1998, indicated that the conference would begin at 3:30 p.m., that the employee need not attend but must be available by telephone, and that the employer and insurer’s attorney would be participating only by telephone. While noting expressly that the employee and his attorney appeared “in person” at the conference and that Dr. Torgrimson “was also present,” the Judge’s December 17, 1998, Commissioner’s Review and Order indicates only that the employer and insurer’s attorney “appeared” on his clients’ behalf, suggesting that the appearance was, pursuant to the Notice, by telephone. No transcript was evidently made of the conference, and no exhibits are attached to the judge’s decision.

⁴ Minn. Stat. § 176.106, subd. 7, provides as follows:

Any party aggrieved by the decision of the commissioner’s designee may request a formal hearing by filing the request with the commissioner and serving the request on all parties no later than 30 days after the decision; provided, however, that the commissioner shall review a decision of the commissioner’s designee regarding a claim for a medical benefit of \$1,500 or less and the commissioner’s decision shall be final.