CURTISS J. DEROSIER, Employee/Appellant, v. ALBRECHT CO. and GEN. ACCIDENT INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 5, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES. The employee's attorney was not entitled to contingent attorney fees for temporary total disability benefits paid or for fees for a rehabilitation consultation to which the compensation judge had determined that the employee was not entitled.

Affirmed.

Determined by: Hefte, J., Wilson, J., and Pederson, J.
Compensation Judge: Danny P. Kelly

OPINION

RICHARD C. HEFTE, Judge

This appeal is from the compensation judge's denial of attorney fees for the employee's attorney's representation of the employee regarding a rehabilitation request and for temporary total disability benefits paid through the date of the compensation judge's decision to allow discontinuance of the employee's temporary total disability benefits. We affirm.

BACKGROUND

Curtiss J. DeRosier (employee) sustained an admitted, work-related injury to the thoracic and lumbar back on September 25, 1996, while working as a mechanic for Albrecht Company (employer), which was insured for workers' compensation liability by General Accident Insurance Company (insurer). The employee received temporary total disability benefits. On November 18, 1996, the employer and insurer filed a notice of intention to discontinue workers' compensation benefits, arguing that the employee had reached maximum medical improvement and did not require restrictions or further medical or chiropractic treatment. On November 20, 1996, the employee filed a rehabilitation request for a rehabilitation consultation. On December 19, 1996, an administrative conference was held at the Department of Labor and Industry on these issues. An order was served and filed on December 31, 1996, denying the discontinuance and granting the employee's request for a rehabilitation consultation. The rehabilitation dispute was certified at the Department of Labor and Industry on December 23, 1996. On January 15, 1997, Donna Olson for Gary Bastian, Commissioner, Department of Labor and Industry, served and filed a decision determining that no administrative or settlement

conference would be held on the rehabilitation issue and ordering a rehabilitation consultation. A rehabilitation consultation report was completed on January 27, 1997.

On February 28, 1997, the employer and insurer filed a petition to discontinue compensation requesting a formal hearing. A hearing was held on April 18, 1997. In a Findings and Order served and filed May 5, 1997, the compensation judge found that the employee's September 25, 1996, work injury was a temporary aggravation that resolved no later than November 5, 1996; that the employee sustained zero percent permanent partial disability; that the employee was in no further need of medical or chiropractic treatment and that the employee could return to work without restrictions as of November 5, 1996; and that the employee had reached maximum medical improvement pursuant to a November 5, 1996, report served on the employee on November 14, 1996. Therefore, the compensation judge granted the employer and insurer's petition to discontinue temporary total disability benefits. The employee appealed. This court affirmed the compensation judge's findings that the employee had reached maximum medical improvement and was capable of working without restrictions or residual disability on November 5, 1996, and the compensation judge's discontinuance of temporary total disability benefits. This court vacated the compensation judge's finding that the employee was in no further need of medical or chiropractic treatment as of November 5, 1996, as being outside the compensation judge's jurisdiction since that issue was not raised by the parties. DeRosier v. Albrecht Co., 57 W.C.D. 231 (W.C.C.A. 1997).

The employer and insurer paid temporary total disability benefits from November 20, 1996, through May 5, 1997, but did not withhold or pay attorney fees on the temporary total disability benefits paid during that time. By letter dated March 18, 1997, the employee's attorney requested that the employer and insurer withhold attorney fees, but they did not do so. After this court's October 14, 1997, decision, the employee's attorney requested contingent fees on the temporary total disability benefits paid from November 24, 1996, through May 5, 1997, and $500.00 in attorney fees for the recovery of rehabilitation benefits. The compensation judge denied the employee's claim for attorney fees in a Findings and Order served and filed June 17, 1998. This appeal followed.

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

Payment of an injured employee’s attorney fees in workers’ compensation cases is generally a contingent fee computed on a percentage of the monetary compensation awarded to the employee as a result of the attorney’s representation. 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).

Minn. Stat. § 176.081, subd. 1 (1998), provides in relevant part:

> **Subdivision 1. Limitation of fees**. (a) A fee for legal services of 25 percent of the first $4,000 of compensation awarded to the employee and 20 percent of the next $60,000 of compensation awarded to the employee is the maximum permissible fee and does not require approval by the commissioner, compensation judge, or any other party. All fees, including fees for obtaining medical or rehabilitation benefits, must be calculated according to the formula under this subdivision, except as otherwise provided in clause (1) or (2).
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> (1) The contingent attorney fee for recovery of monetary benefits according to the formula in this section is presumed to be adequate to cover recovery of medical and rehabilitation benefit or services concurrently in dispute. Attorney fees for recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute. In cases where the contingent fee is inadequate the employer or insurer is liable for attorney fees based on the formula in this subdivision or in clause (2).
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> 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.
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> (2) The maximum attorney fee for obtaining a change of doctor or qualified rehabilitation consultant, or any other disputed medical or rehabilitation benefit for which a dollar value is not reasonably ascertainable, is the amount charged in hourly fees for the representation or $500, whichever is less, to be paid by the employer or insurer.

The compensation judge denied the employee's claim for contingent attorney fees because the employee was not entitled to the benefits paid by the employer and insurer from November 24, 1996, through May 5, 1997. The employee's attorney claims that he is entitled to contingent fees for these benefits since they were disputed and paid to the employee. Minn.

Stat. § 176.081, subd. 1 states that the fee for legal services is calculated as a percentage of "compensation awarded to the employee." In this case, the temporary total disability benefits paid to the employee were not "awarded" to the employee since the compensation judge ultimately determined that the employee was not entitled to these benefits. The employer and insurer are entitled to a credit for an overpayment, which the compensation judge declined to award since the disposition of the case as a temporary injury that had resolved results in no future benefits being available to which the employer and insurer could apply the credit. The employee's attorney is not entitled to contingent fees for the benefits paid to the employee from November 24, 1996, through May 5, 1997.

The employee also claims $500 for recovery of rehabilitation benefits for obtaining a rehabilitation consultation. Under the 1995 amendments to Minn. Stat. § 176.081, 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). 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).

An employee is entitled to a rehabilitation consultation, as a matter of law, upon request. Minn. Stat. § 176.102, subd. 4(a). The purpose of a rehabilitation consultation is to make the determination of whether an employee is a "qualified employee" entitled to rehabilitation services. Minn. R. 5220.0100, subp. 26. Generally, an employer and insurer may not challenge an employee's right to a rehabilitation consultation on the basis that an employee is not qualified for rehabilitation services. See, e.g., Goodwin v. Byerly's, Inc., 52 W.C.D. 90 (W.C.C.A. 1994); Wagner v. Bethesda Hosp., slip op. (W.C.C.A. Jan. 4, 1995). However, an employee's request for a rehabilitation consultation may be challenged on the basis that the employee has no underlying entitlement to benefits. Cf. Kautz v. Setterlin, 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987). Possible defenses and threshold liability issues include allegations of complete recovery from injury, lack of notice, and the expiration of the statute of limitations. Judnick v. Sholom Home West, slip op. (W.C.C.A. Aug. 4, 1995). The employer and insurer's contention that the employee has fully recovered from a temporary injury, and has been released to return to work with no residual disability or restrictions, is such a defense. See West v. Rie Coatings, Inc., slip op. (W.C.C.A. May 20, 1997). The compensation judge found that the employee had sustained a temporary injury which had resolved by November 5, 1996. The employee was no longer entitled to any workers' compensation benefits as a result of that injury, including rehabilitation benefits, as of that date. The employee's rehabilitation consultation took place after January 15, 1997. The employee's attorney is not entitled to attorney fees for benefits to which the compensation judge ultimately determined that the employee was not entitled. Therefore, we affirm the compensation judge's denial of attorney fees.