TOSHA ENGSTROM, Employee/Appellant, v. ULTRA PAC, INC., and SAFECO INS. CO., Employer-Insurer, and ULTRA PAC, INC., and NORTHBROOK INS./ST. PAUL COS., Employer-Insurer/Cross-Appellants, and MEDICA/HEALTHCARE RECOVERIES, INC.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 16, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. Under the circumstances of this medical request, the employee's attorney's fees are not limited to $13,000.00 since the dispute involves multiple injuries under Minn. Stat. § 176.081, subd. 1(b). Also, contingent fees on benefits not concurrently in dispute or from potential future disputes need not be considered in determining the attorney's fee for the medical request.

APPEALS - TRANSCRIPT; COSTS & DISBURSEMENTS. The appellant is not required to pay the cost of preparing a transcript in an appeal involving attorneys' fees where the cross-appellant requested the transcript instead of the appellant and the transcript was not necessary for this court to fairly consider the appellant's appeal.

Affirmed in part and vacated in part.

Determined by Hefte, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Jeanne E. Knight

OPINION

RICHARD C. HEFTE, Judge

The employee appeals the compensation judge's decision that the employee's attorney's fees are limited to $13,000.00 in a medical request dispute where the employee sustained one condition substantially caused by two separate injuries. The employer and Northbrook cross-appeal the compensation judge's finding that contingent fees on monetary benefits were inadequate to compensate the employee's attorney. We vacate in part and affirm in part.

BACKGROUND

On April 10, 1995, Tosha Engstrom (employee) injured her low back while working as a line leader for Ultra Pac (employer). On October 26, 1995, the employee experienced significant back pain and shooting pain down her legs which she could not relate to any specific incident. The employee underwent physical therapy and was placed on restrictions of no bending, stooping, twisting, or lifting greater than 20 pounds. The employee was placed in

a light duty labeling job to accommodate these restrictions. The April 1995 and the October 1995 injuries are not involved in this proceeding. On January 9, 1996, the employee sustained an admitted work related injury to her low back when she slipped on icy stairs, at which time the employer was insured for workers' compensation liability by Northbrook Insurance/St. Paul Companies (Northbrook). The employee experienced increased pain in her back and legs after this incident. The employee continued to work at her light duty position. On February 5, 1996, the employee sustained another low back injury after a fall while working for the employer, which was insured at that time for workers' compensation liability by Safeco Insurance (Safeco). After this incident, the employee experienced excruciating pain in the low back and both legs. The employee was off work for 5.8 weeks, returned to work part time for one month, then again went off work and has not been able to return to work since. The employee received temporary total disability benefits.

The employee was referred to Dr. Gary Banks, who recommended a two-level anterior-posterior fusion with instrumentation. The employer and Safeco objected to the surgery and, on October 8, 1996, filed a notice of intention to discontinue benefits based on an independent medical examination by Dr. Mark Gregerson. In a September 30, 1996, report, Dr. Gregerson opined that the employee was at maximum medical improvement effective March 18, 1996, and could return to work with restrictions, and that the proposed surgery by Dr. Banks was not reasonable and necessary. The employer and Safeco also claimed that the employee had been offered a job within those restrictions. A conference was held on the notice of intention to discontinue benefits on November 27, 1996. A decision denying discontinuance was served and filed December 2, 1996, concluding that Dr. Gregerson's report was not adequate foundation for discontinuance of benefits. The employer and insurer did not object to this decision. The employee was awarded attorney fees for this award. On July 31, 1997, the employee filed a medical request. On August 7, 1997, the employee filed a claim petition for a minimum of ten percent permanent partial disability. A hearing was held on October 28, 1997, on the issues of the whether the surgery was reasonable and necessary, whether the employee's low back injuries were substantial contributing factors to the employee's need for surgery, and apportionment. The compensation judge found that the proposed surgery was reasonable and necessary, that both the January 1996 and the February 1996 injuries were substantial contributing factors to the employee's need for surgery, and that liability should be apportioned 50/50 between the two insurers. This decision was not appealed.

On December 23, 1997, the employee's attorney filed a statement of attorney fees requesting fees under Minn. Stat. § 176.081, subd. 1(a)(1). The employer and insurers objected, arguing that the employee's attorney should have obtained additional contingent fees for defending the discontinuance of temporary total disability benefits or from the permanent partial disability claim, which should be considered in determining whether a contingent fee was adequate, and that the available attorney fees should be limited to $13,000 even though two injuries contributed to the employee's condition. A hearing was held on February 23, 1998. The compensation judge found that there was no stream of benefits available from which to pay the employee's attorney for representation in the medical request, therefore a contingent fee was not adequate compensation. The compensation judge awarded the employee's attorney "fees in the amount of 25% of the first

$4000.00 of the amount paid pursuant to the fee schedule for the employee's medical expense connected to her surgery, and 20% of the following $60,000.00, up to a maximum fee of $13,000.00." This appeal followed.

The employee filed an appeal on May 21, 1998, and the employer and insurer Northbrook filed a cross-appeal on June 2, 1998. The employee did not request a transcript. On June 2, 1998, the employer and Northbrook requested that a transcript be prepared and the cost divided between the parties. By order served and filed June 25, 1998, this court ordered that a transcript be prepared and that the employer and insurer pay for the original cost of the transcript, but allowed the employer and Northbrook to argue that the employee should be liable for the cost of the transcript in their brief.

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 (1998). 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.

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

Attorneys' Fees Limitation

The employee appeals the compensation judge's conclusion that the attorneys' fees for the employee's attorney are limited to $13,000.00 for all representation for the recovery of benefits related to the employee's low back condition, which was substantially caused by two separate injuries.

The compensation judge concluded that "although there are two dates of injury, the

employee argued the combined result of those two injuries led to the need for surgery. Merely because there are two dates of injury does not entitle the employee's attorney to double the statutory fee. Therefore, the maximum fee recoverable by Attorney Studer is $13,000." (Memo. at 4.) 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). 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). Under the 1995 amendments to Minn. Stat. § 176.081, fees for obtaining disputed medical benefits must be calculated by applying the 25/20 formula to the dollar value of the medical or rehabilitation benefits awarded, where ascertainable. Minn. Stat. § 176.081, subd. 1(a)(1) (1998).

Minn. Stat. § 176.081, subd. 1(b) provides that: "All fees for legal services related to the same injury are cumulative and may not exceed $13,000. If multiple injuries are the subject of a dispute, the commissioner, compensation judge, or court of appeals shall specify the attorney fee attributable to each injury." The statute does not state that fees for legal services related to the same condition, where multiple injuries are involved, may not exceed $13,000.00. There is no statutory basis for limiting the employee's attorney's fees for obtaining disputed medical benefits to $13,000.00 where multiple injuries are involved. Under the statute, the compensation judge must specify the attorney fee attributable to each injury, but is not required to limit the total amount of fees awarded to $13,000.00. Therefore, under the unique circumstances of this case, we vacate that part of the compensation judge's order which limits the employee's attorney's fee for recovery of medical expenses for the employee's surgery to a maximum fee of $13,000.00.

Attorneys' Fees - Availability of Contingent Fees

The employer and Northbrook[1] also argue that the employee's attorney's fees for the medical request should be reduced or denied based upon contingency fees available on monetary benefits. 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 "concurrently in dispute." Minn. Stat § 176.081, subd. 1(a)(1). A Roraff-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." Id. The employer and Northbrook first argue that employee's attorney should have received contingency fees for defending the employer and Safeco's attempt to discontinue the employee's temporary total disability benefits, instead of the $750 claimed by the employee's attorney based upon an hourly fee, and that those fees should be

[1] In their response brief to the cross-appellant's brief, the employer and Safeco joined in the arguments advanced by the employer and Northbrook's cross-appeal.

considered in determining whether a contingency fee was adequate.

On October 8, 1996, the employer and Safeco filed a notice of intention to discontinue benefits based on an independent medical examination by Dr. Mark Gregerson. In a September 30, 1996, report, Dr. Gregerson opined that the employee was at maximum medical improvement effective March 18, 1996, could return to work with restrictions, and that the proposed surgery by Dr. Banks was not reasonable and necessary. The employer and Safeco also claimed that the employee had been offered a job within those restrictions. A conference was held on the notice of intention to discontinue benefits on November 27, 1996. A decision denying discontinuance was served and filed December 2, 1996, concluding that Dr. Gregerson's report was not adequate foundation for discontinuance of benefits. The employer and insurer did not object to this decision, and did not object to the amount of attorney fees claimed after the hearing at that time. While Dr. Banks had made his recommendation that the employee undergo surgery before the notice of intention to discontinue was filed, the employee's medical request was not filed until July 1997, six months after the discontinuance hearing. The proposed surgery was not mentioned as a factor in the decision to deny discontinuance. Determining whether there is a stream of benefits available or whether the contingent fee on an available stream of monetary benefits is adequate compensation are questions of fact for the compensation judge. The compensation judge reasonably determined that the discontinuance conference was not a dispute which was concurrent with the dispute over the surgery and therefore should not be considered in determining the attorneys' fee for the surgery.

The employer and Northbrook also argue that the compensation judge erred by failing to consider fees to be generated by the employee's claim for permanent partial disability benefits. The employee filed the claim for permanent partial disability benefits on August 7, 1997, only a week after the medical request was filed. "The fees for obtaining disputed medical . . . benefits are included in the $13,000 limit in paragraph (b). An attorney must concurrently file all outstanding disputed issues. An attorney is not entitled to attorney fees for representation in any issue which could reasonably have been addressed during the pendency of other issues for the same injury." Minn. Stat. § 176.081, subd. 1(a)(3). The employer and Northbrook argue that the permanent partial disability claim should have been filed at the same time as the medical request, that the potential contingent fee from the employee's permanent partial disability claim should be considered in determining whether an adequate fee is available from contingent fees for monetary benefits, and that the employee's attorney's fees should not be determined until the extent of the employee's permanent partial disability can be determined. The compensation judge declined to consider any potential fees from the permanent partial disability claim since the permanent partial disability will not be ratable until after the employee reaches maximum medical improvement from her surgery. In addition, the compensation judge noted that there may not be a dispute over the amount of permanent partial disability payable when the employee reaches maximum medical improvement. The compensation judge concluded that to "hold that any future speculative contingent fees will be reasonable to compensate Attorney Studer would be equivalent to requiring him to wait until all possible future claims for this employee were resolved before he could be paid for his representation of the employee in this medical dispute." We agree. Under the circumstances of this case, the compensation judge did not err by not considering the employee's

permanent partial disability claim in determining the employee's attorney's fee for representing the employee in the medical dispute.

Substantial evidence supports the compensation judge's finding that there was no stream of monetary benefits from which the employee's attorney could receive contingent fees and therefore the contingent fee was inadequate to compensate him. Accordingly, we affirm the compensation judge's award of fees based on the employee's medical expenses.

Transcript

The employee filed an appeal on May 21, 1998, and the employer and insurer Northbrook filed a cross-appeal on June 2, 1998. The employee did not request a transcript. On June 2, 1998, the employer and Northbrook requested that a transcript be prepared and the cost divided between the parties. By order served and filed June 25, 1998, this court ordered that a transcript be prepared and that the employer and Northbrook pay for the original cost of the transcript, but allowed the employer and Northbrook to argue that the employee should be liable for the cost of the transcript in their brief.

The employer and insurer point to Minn. Stat. § 176.421, subd. 4, which provides that, "The first party to file an appeal is liable for the original cost of preparation of the transcript." In addition, Minn. Stat. § 176.421, subd. 3 states that

> An appeal initiates the preparation of a typewritten transcript of the entire record unless the appeal is solely from an award of attorney's fees or an award of costs and disbursements or unless otherwise ordered by the court of appeals. On appeals from an award of attorney's fees or an award of costs and disbursements, the appellant must specifically delineate in the notice of appeal the portions of the record to be transcribed in order for the court of appeals to consider the appeal.

The employer and Northbrook argue that the employee did not indicate which portion of the record was to be transcribed as required by the statute. We disagree. The statute states that a transcript may be limited in appeals involving only attorneys' fees or costs and disbursements, but does not state that a transcript is required in all attorneys' fees appeals. A transcript is only required if needed for this court to fairly consider the appeal. The transcript at issue contains no testimony, but only arguments of counsel. In this case, the transcript was not required for this court to fairly consider the employee's appeal. The employer and Northbrook requested the transcript on cross-appeal, and are liable for the cost of the transcript.