

CRAIG L. FRISCH, Employee/Appellant, v. S & S CARPET DESIGNS and STATE FARM INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 19, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 1(a)(1) (1995). Roraff fees on medical services are limited to a percentage of the value of the services, plus interest, as limited by the fee schedule, even if a reasonable fee for the employee's attorney would be substantially greater. The value of the services need not be ascertainable on the date of hearing.

Affirmed as modified.

Determined *en banc*.

Compensation Judge: Janice M. Culnane.

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's application of Minn. Stat. § 176.081, subd. 1(a)(1) (1995), limiting the award of Roraff fees,¹ to be paid by the employer and insurer, as a result of successfully obtaining an award of medical expenses. The employee argues that his attorney is entitled to a reasonable fee, which the compensation judge found would be \$6,510, consisting of a contingent fee of \$392.46 and a Roraff fee of \$6,117.54, rather than the aggregate fee of only \$571.94, resulting from the Roraff fee of \$179.48 actually awarded by the compensation judge.

BACKGROUND

The employee sustained an admitted work injury on November 20, 1995, while

¹ See Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980). For the purposes of this decision we adopt the generally accepted practice of referring to fees paid by the employer and insurer to the employee's attorney for services rendered to assist the employee in obtaining payment of medical benefits as Roraff fees even though the statute bases the amount of the fee on the contingency percentages used to calculate the amount of attorney fees paid from the wage loss or permanency benefits awarded to an employee.

employed by S & S Carpet Designs as an apprentice carpet layer. When injured, the employee was 18 years old and had a weekly wage of \$315.50. The employer and insurer voluntarily paid temporary total disability benefits to the employee from the date of injury through January 15, 1996. After that date, the employee moved to Hutchinson, Minnesota, where he was employed as an assistant manager in training in a retail athletic clothing store. His wages at this employer ranged from \$5.25 an hour at the outset to \$6.00 per hour in August 1996. After August 15, 1996, the employee was promoted to a position in which his wages exceeded his preinjury weekly wage.

After his injury, the employee sought medical attention from a number of chiropractors, including Dr. Joel Wulff of Brooklyn Park and Dr. Randy Anderson of Hutchinson. The employer and insurer voluntarily paid the employee's chiropractic bills until early 1996 when they began to challenge these expenses. (Exh. A.) Nevertheless, the employer and insurer paid the employee's medical expenses through August 5, 1996, when the employee was examined by Dr. David Gottlieb, D.C., at the request of the employer and insurer. Through the date of hearing, the unpaid bills submitted by Drs. Wulff and Anderson totaled \$684.90. (Exhs. G and H from the 12/11/97 hearing.)

On March 1, 1996, the employee consulted with attorney David C. Wulff. At the hearing, Mr. Wulff indicated that one of the employee's primary concerns was protecting his need for ongoing medical and chiropractic treatment to alleviate his pain and disability. (T. 47.) On January 17, 1997, the employee filed a claim petition in which he claimed a thoracic-lumbar strain/sprain, entitlement to temporary partial disability benefits from January 16, 1996 through August 15, 1996, permanent partial disability in the amount of 5% as impairment compensation and payment of medical expenses of Dr. Anderson and Dr. Wulff, plus mileage reimbursement.

The matter came on for hearing before Compensation Judge Janice M. Culnane on December 11, 1997. In her Findings and Order issued on February 5, 1998, Judge Culnane awarded temporary partial disability benefits for periods during 1996, payment of chiropractic expenses, subject to the limitations in the medical fee schedule, and reimbursement of contingent attorney fees pursuant to Minn. Stat. § 176.081, subd. 7. The compensation judge's decision failed to mention an award of contingent fees to be paid by the employee from his stream of temporary partial disability benefits, medical mileage reimbursement or statutory interest. The compensation judge denied the employee's claim for a 5% permanent partial disability rating. No appeal was taken from the compensation judge's Findings and Order.

On February 19, 1998, the employee's attorney filed a statement of attorney fees in which he sought payment of Roraff fees by the employer and insurer in the amount of \$6,108.84, contingency fees of \$401.16, to be paid as a percentage of the temporary partial disability benefits awarded, for a total fee of \$6,510.² The employee's attorney claimed entitlement to costs of

² At the May 4, 1998 hearing, the parties stipulated that the actual total of temporary partial disability benefits awarded was \$1,569.82, of which 25%, or \$392.46, would be payable to the employee's attorney as contingent fees under Minn. Stat. § 176.081, subd. 1(a).

\$387.32. The request for fees also stated, “I am also requesting an award to Mr. Frisch of subd. 7 fees.” Since those fees had already been awarded, it is unclear if the employee was requesting the subdivision 7 fees on the contingency paid on the temporary partial disability recovery and/or on the Roraff fees. The employer and insurer, on February 24, 1998, filed an objection to the employee’s attorney’s statement of attorney fees. They maintained that if the employee was entitled to any Roraff fees they should be limited to 25% of the value of the chiropractic services paid to Drs. Wulff and Anderson, as limited by the fee schedule. As application of the fee schedule resulted in payment of only \$470.59 of the \$684.90 billed, the employer and insurer argued that the employee was, at most, entitled to a Roraff fee of \$117.65.

The dispute concerning the claim for attorney fees was heard by Compensation Judge Culnane on May 4, 1998. In her Findings and Order, served and filed July 2, 1998, the compensation judge awarded a contingency fee of \$392.46, representing 25% of the temporary partial disability wage loss benefits awarded to the employee, and a Roraff fee of \$179.48. The Roraff fee was equivalent to 25% of the sum of the actual payments made to Drs. Wulff and Anderson under the fee schedule and the employee’s award for reimbursement for medical mileage expenses.³ The compensation judge also awarded the employee’s attorney his claim for costs in the amount of \$387.32. Again, the compensation judge omitted any reference to statutory interest.

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

The employee’s claim for attorney fees to be paid by the employer and insurer for the successful award of chiropractic expenses in the compensation judge’s February 5, 1998 decision is controlled by Minn. Stat. § 176.081, subd. 1(a)(1) (1995), which provides as follows:

(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

³ The compensation judge awarded medical mileage to the employee of \$247.32.

inadequate the employer or insurer is liable for attorney fees based on the formula in this subdivision or in clause

(2). 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.

In the case at hand, the compensation judge found that the contingency fee paid as a percentage of the temporary partial disability benefits awarded was inadequate to compensate the employee's attorney and therefore the employee's attorney was entitled to additional Roraff fees, to be paid by the employer and insurer. Although she found that the employee's attorney reasonably spent 43.4 hours representing the employee, that the employee's attorney's reasonable compensation rate was \$150.00 per hour and that a reasonable fee for the attorney's services was \$6,510, she found that the maximum amount of additional attorney fees that could be awarded, payable by the employer and insurer, was strictly limited by Minn. Stat. § 176.081, subd. 1(a)(1) (1995). As a result, she awarded additional Roraff fees in the amount of 25% of the total of the actual payments made to Drs. Wulff and Anderson and the total award of mileage reimbursement to the employee. The amounts paid to Drs. Wulff and Anderson, pursuant to the fee schedule, totaled \$470.59. The total mileage reimbursement was \$247.32. The total aggregate of medical benefits paid was \$717.91, which generated a Roraff fee payable to the employee's attorney of \$179.48. (Finding 7.)

On appeal, the employee's principal arguments are that the 1995 amendments to Minn. Stat. § 176.081, controlling the payment of Roraff fees by the employer and insurer, violate the doctrine of separation of powers and the Minnesota Constitution's due process and equal protection clauses. The employee raises as additional issues, under the terms of the statute, the question of whether the ascertainable dollar value, to which the contingency fee percentage would be applied, should be the dollar value charged by the medical provider or the maximum fee allowed by the medical fee schedule applicable to the provision of medical services in workers' compensation cases. The employee also appeals from the compensation judge's failure to award contingency fees as a percentage of any interest that would have been due on the unpaid medical or mileage expense awards. The employee further appeals from the compensation judge's failure to award attorney fees based on a percentage of future medical expense benefits which would be paid to the employee as a result of injuries sustained on November 20, 1995.

Constitutional Issues

The Workers' Compensation Court of Appeals is not a court of general jurisdiction. We can act only within the parameters of the authority granted under the Workers' Compensation Act. Minn. Stat. § 175A.01, subd. 5. The Act does not give this court authority to determine the constitutionality of a provision of the Act. This court takes no position on the merits of the employee's constitutional arguments. These claims, however, are preserved for determination by

an appeal to the Minnesota Supreme Court.

Ascertainable Dollar Value

The issue of whether the calculation of attorney fees for recovery of disputed medical expenses, generally referred to as Roraff fees, should be based on the amounts billed by the healthcare provider rather than the amount payable under the fee schedule required by Minn. Stat. § 176.136 has recently been decided by this court. In our decision in Irwin v. Surdyk Liquor, slip op. (W.C.C.A. Dec. 21, 1998), we pointed out that under the statute Roraff fees should be based on the dollar value of the benefits “awarded.” Under Minn. Stat. § 176.136, subd. 1(a), the maximum amount of benefit that can be awarded is limited by the medical fee schedule. As a result, we affirm the compensation judge’s decision to base the contingency fee on the amount of medical benefits available in the fee schedule.

The issue of whether the amount to which the contingency fee percentage should be applied could include interest has not been resolved by this court. As interest is an amount that could be “awarded,” we believe that the statute would provide a Roraff fee based on any interest awarded. Minn. R. 5220.2920, subp. 5(10)(c); Lynch v. Boise Co., slip op. (W.C.C.A. July 8, 1988); Schmatz v. City of Richfield, slip op. (W.C.C.A. July 25, 1989). The compensation judge’s failure to award interest or fees on interest and the employee’s failure to appeal the oversight does not preclude the employee’s right to receive payment. Moseychuk v. Holzer’s Imported Car Serv., 44 W.C.D. 441 (W.C.C.A. 1991); Helquist v. Kentucky Fried Chicken, slip op. (W.C.C.A. Oct. 19, 1993). As a result, we modify the compensation judge’s decision to award statutory interest on the medical benefits and require a recalculation of the Roraff fee.

Future Roraff Fees

The issue of whether the employee’s attorney is entitled to contingency fees based on future medical benefits paid on behalf of the employee was also resolved by this court in its Irwin decision. In that decision we determined that the amount of Roraff fees is limited to a percentage of the “dollar value of the medical or rehabilitation benefit awarded.” Minn. Stat. § 176.081, subd. 1(a)(1). We stated:

We believe the phrase “benefit awarded” is plain and unambiguous and limits the attorney fees to the dollar amount of the benefits awarded in the proceeding. Whether the employee may be entitled to additional medical benefits in the future is speculative. Receipt of future medical benefits is dependent upon proof that the medical expenses claimed were reasonably necessary to cure and relieve the employee from the effects of the personal injury. If a dispute arises with respect to future medical expenses, the employee’s attorney may be entitled to additional fees based upon the amount of the benefits ultimately awarded.

As a result, we affirm the compensation judge’s decision to not address the employee’s entitlement

to Roraff fees based on medical expenses which might be paid in the future.