

DENISE M. GILBERTSON, Employee, v. CITY OF ST. PAUL, SELF-INSURED,  
Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS  
NOVEMBER 10, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES; COSTS & DISBURSEMENTS; PRACTICE & PROCEDURE - REMAND.  
Where there was no hearing or record sufficient to establish whether or not the employee's entitlement to permanent partial disability benefits was ever in dispute, the matter would be remanded for hearing on the issue of the propriety of an award of contingency fees, subdivision 7 fees, and costs and disbursements.

Vacated and remanded.

Determined by Wilson, J., Pederson, J., and Rykken, J.  
Compensation Judge: Karen C. Shimon

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the judge's award of Minn. Stat. §176.081, subd. 7, fees and costs and disbursements. We vacate the judge's order in its entirety and remand for a hearing.

BACKGROUND

The employee apparently sustained an admitted work-related injury to her back on December 4, 1995, while working for the City of St. Paul [the employer].<sup>1</sup> On May 15, 1998, the self-insured employer filed a Notice of Benefit Payment, stating that \$7,500 was being paid to the employee in a lump sum, representing payment for a 10% whole body impairment, based on the April 8, 1998, medical report of Dr. Thomas Rieser. From that amount, the employer withheld \$1,550 as attorney fees.

On June 9, 1999, attorney Loren Dorshow filed a Statement of Attorney Fees, claiming attorney fees in the amount of \$1,550, attorney fees pursuant to Minn. Stat. §176.081,

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<sup>1</sup> This information is contained in the First Report of Injury and subsequent Notice of Benefit Payment. This file is imaged and contains very little information.

subd. 7 (subdivision 7 fees), and costs and disbursements totaling \$478.72, contending that he had “[r]ecovered report from physician regarding 10% PPD as well as medical and some wage loss benefit payments.” On June 18, 1999, the employer filed a Response to Attorney Fees, indicating that “[w]e will pay attorney’s fees on award. Claim was not in dispute. We do not owe costs and disbursements.”

No hearing was requested or held in the matter, and, in an order filed June 28, 1999, a judge from the Settlement Division of the Office of Administrative Hearings issued an Order Determining Attorney’s Fees, wherein she stated that “[n]o objection to the requested fees has been filed but, however, the employer has filed an Objection to Taxation of costs on June 18, 1999.” The judge went on to order the employer to pay \$1,500 to Attorney Dorshow as attorney fees; to pay \$325.00 to the employee, representing 25% of attorney fees awarded in excess of \$250.00, as set forth in Minn. Stat. §176.081, subd. 7; and to pay \$478.72 to Attorney Dorshow in taxable costs. The employer appeals from the award of subdivision 7 fees and costs and disbursements.

## 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

The employer contends that subdivision 7 fees and costs and disbursements are not awardable in the absence of a dispute as to payment of benefits. We agree and note that contingency fees are also payable only on disputed claims.

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

In no case shall fees 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 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. Neither the holding of a hearing nor the filing of an application for a hearing alone may determine the existence of a dispute.

Subdivision 7 fees are addressed in Minn. Stat. §176.081, subd. 7, which states in part:

If the employer or insurer files a denial of liability, notice of discontinuance, or fails to make payment of compensation or medical expenses within the statutory period after notice of injury or occupational disease, or otherwise unsuccessfully resists the payment of compensation or medical expenses, . . . and the injured person has employed an attorney at law, who successfully procures payment on behalf of the employee . . . the compensation judge, commissioner, or the workers' compensation court of appeals upon appeal, upon application, shall award to the employee against the insurer or self-insured employer or uninsured employer, in addition to the compensation benefits paid or awarded to the employee, an amount equal to 30 percent of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of \$250.

Minn. Stat. §176.511, subd. 2, addressing reimbursement of disbursements, provides that “[t]he commissioner or compensation judge, or on appeal the workers' compensation court of appeals, may award the prevailing party reimbursement for actual and necessary disbursements.”

The employee contends that “the existence and amount of permanent partial disability was in dispute.” In his Statement of Attorney Fees, Mr. Dorshow suggested that he also recovered wage loss benefits for the employee. Both parties made representations in their briefs as to the facts of this case, and the employer attached several exhibits to its brief. However, there was no hearing on the claim for attorney fees, subdivision 7 fees, or costs and disbursements, and we have no record to review. The matter is therefore remanded to a compensation judge for a hearing on the issue of attorney fees,<sup>2</sup> subdivision 7 fees, and costs and disbursements. The compensation judge should specifically address the issue of whether permanency benefits were a

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<sup>2</sup> Neither the employee nor the employer objected to Mr. Dorshow's claim for contingency fees. However, this court retains continuing jurisdiction over attorney fees and has authority to raise the issue of attorney fees at any time upon its own motion. See Minn. Stat. §176.081, subd. 3. Because the claims here for subdivision 7 fees and reimbursement of disbursements are linked to contingency fees, we deem it appropriate to review that aspect of the matter also.

disputed claim that would entitle Mr. Dorshow to the claimed contingency fee, and, if so, whether the employee is entitled to subdivision 7 fees, and, also, whether the employee is a “prevailing party” so as to entitle Mr. Dorshow to reimbursement of disbursements under the applicable statute.