

JULIE MUNSTERMANN, Employee/Appellant, v. APPLETON MUN. HOSP., SELF-INSURED/BERKLEY ADM'RS, Employer-Insurer, and APPLETON MUN. HOSP. and AM. COMP. INS./RTW, INC., Employer-Insurer, and BLUE CROSS and BLUE SHIELD OF MINN. and ALEXANDRIA ORTHOPAEDIC ASSOCS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 16, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - .191 FEES. Where the primary dispute is between the employers or the insurers, an employee is entitled to attorney fees under Minn. Stat. §176.191, subd. 1, as amended effective July 1, 1995, whether or not a temporary order was issued.

Reversed.

Determined by Johnson, J., Hefte, J., and Wheeler, C.J.
Compensation Judge: Jennifer Patterson

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's denial of a request for attorney fees under Minn. Stat. § 176.191, subd. 1, and Minn. Stat. § 176.081, subd. 8. We reverse the denial of attorney fees under Minn. Stat. § 176.191.

BACKGROUND

The facts essential to this appeal are undisputed. On November 8, 1991, Julie Munstermann, the employee, sustained a personal injury to her left knee while employed by Appleton Municipal Hospital, the employer, then self-insured with claims administered by Berkley Administrators. Her weekly wage was \$303.12. The self-insured employer admitted liability and paid wage loss and medical benefits to the employee.

Dr. Terence Kennedy, an orthopedic surgeon, treated the employee's left knee. In December 1991, Dr. Kennedy performed arthroscopic surgery to repair a tear of the medial meniscus and cartilage damage to the lateral medial femoral condyle. In April 1992, the employee was released to return to work with the employer. The self-insured employer paid the employee a 3 percent permanent partial impairment secondary to her left knee injury. The employee reached maximum medical improvement (MMI) from the 1991 knee injury on August 14, 1992.

On February 2, 1996, the employee sustained a second injury to the left knee while working for the employer. On this date, the employer was insured by American Compensation Insurance/RTW, Inc. (American). The employee's weekly wage was \$448.91. The employer and insurer admitted liability and commenced payment of temporary total disability benefits. In May, the employee returned to a part-time job with the employer. On July 2, 1996, the employer and American filed a Notice of Intention to Discontinue Benefits (NOID) seeking discontinuance of temporary partial disability benefits contending the employee returned to full-time work. By order dated July 31, 1996, a settlement judge with the Department of Labor and Industry allowed the employer and American to discontinue benefits effective June 26, 1996

In April 1997, the employee filed a claim petition seeking additional wage loss benefits from and after March 10, 1997,¹ based on her injuries of November 8, 1991, and February 2, 1996. In their answers, both insurers admitted liability for their respective personal injuries but denied liability for temporary total disability benefits. Neither the employee, the employer or either insurer petitioned for a temporary order under Minn. Stat. § 176.191, subd. 1. The case came on for hearing before Judge Patterson at the Office of Administrative Hearings on March 31, 1998. The parties then agreed all benefits claimed by the employee from and after March 10, 1997 were due and payable. The only issues remaining for trial were whether the February 2, 1996 injury was a temporary or permanent injury and whether equitable apportionment of liability between the two injuries was appropriate. In a findings and order served and filed May 5, 1998, the compensation judge found the February 2, 1996 injury was a permanent aggravation of the pre-existing knee injury and apportioned liability equally between the two injuries. No party filed an appeal from the compensation judge's findings and order.

On May 14, 1998, the employee filed an Amended Statement of Attorney Fees. The employee claimed entitlement to fees of \$4,470.00 pursuant to Minn. Stat. § 176.081, subd. 8, and/or Minn. Stat. § 176.191, subd. 1.² The self-insured employer and American filed an objection to the employee's fee petition. The case came on for hearing before Judge Patterson on July 6, 1998. The self-insured employer and American contended fees were not payable under either Minn. Stat. § 176.081, subd. 8, or § 176.191, subd. 1. Neither insurer, however, objected to the amount of the fee claimed by the employee's attorney after July 30, 1996. In a findings and order served and filed August 7, 1998, the compensation judge found the employee's claim for attorney fees of \$4,470.00 was reasonable³ and determined that apportionment was a primary

¹ On March 10, 1997, the employee underwent knee surgery at the Mayo Clinic. She was off work entirely until April 1997. Between April 1997 and June 1997 the employee worked part-time for the employer. In June 1997, the employee returned to work for the employer on a full-time basis.

² The employee also sought reimbursement of certain expenses which are not at issue herein.

³ The compensation judge found the employee's attorney earned total fees of \$4,470.00

issue at the March 1997 hearing. These findings were not appealed. The compensation judge further found, however, that the workers' compensation statutes contain no provision "for an award of attorney fees to be paid by employers and insurers after the resolution of an equitable apportionment case in the absence of either arbitration or temporary order." (Finding 10.) Accordingly, the compensation judge denied the employee's claim for payment of fees of \$3,670.00. The employee appeals this finding and the denial of her claim for attorney fees.

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

Minn. Stat. § 176.191 was amended effective July 1, 1995.⁴ Subdivision 1 was revised to include within its provisions the Special Compensation Fund, and subdivision 2 of the statute was repealed. The legislature also added subdivision 1a creating new requirements for equitable apportionment of liability between employers and insurers. Contemporaneously, Minn. Stat. § 176.081, subd. 8, was repealed. As a result of these amendments, the compensation judge concluded, an employee may be awarded attorney fees under Minn. Stat. § 176.191, subd. 1, only if a temporary order was issued under subdivision 1 or, if the employee is represented by counsel in an arbitration proceeding, under subdivision 8. Accordingly, the compensation judge denied the employee's claim for attorney fees. The employee asserts the compensation judge's conclusion is incorrect as a matter of law. Rather, the employee argues Minn. Stat. § 176.191, subd. 1, permits an award of attorney fees whether or not a temporary order is issued. We agree.

In Lease v. Pemtom, Inc., 305 Minn. 6, 232 N.W.2d 424, 28 W.C.D. 11 (1975), the employee sustained an admitted personal injury in 1967 while working for Pemtom and alleged a second injury in 1971 while working for Pierson. The employee filed a claim petition in 1971 seeking benefits from both Pemtom and Pierson, both of which denied liability. No temporary order was sought or issued. The compensation judge awarded benefits to the employee and apportioned liability for the benefits 80 percent to Pemtom and 20 percent to Pierson. The compensation judge also assessed attorney fees against both employers under Minn. Stat. § 176.191. Pemtom appealed the award of fees. On appeal, the supreme court noted that the issue

for legal services provided to the employee. The total fees included a contingent fee of \$800.00 relating to the 1996 discontinuance issues which the judge ordered be paid to the employee's attorney. The unpaid fees equaled $\$4,470 - \$800 = \$3,670.00$.

⁴ Minn. Stat. § 176.191 was again amended effective May 10, 1997. Minn. Laws 1997, ch. 128, § § 4, 5, 6. No party contends the 1997 amendments are applicable in this case.

was one of first impression under Minn. Stat. § 176.191 which then provided, in part:

Where compensation benefits are payable under this chapter, and a dispute exists between two or more employers or two or more insurers as to which is liable for payment, the commissioner of the department of labor and industry, compensation judge, or commission upon appeal may direct that one or more of the employers or insurers make payment of the benefits pending a determination of liability.

When liability has been determined, the party held liable for the benefits shall be ordered to reimburse any other party for payments which the latter has made, including interest at the rate of five percent per annum. *The claimant may also be awarded a reasonable attorney fee, to be paid by the party held liable for the benefits.* (Emphasis added.)

In affirming the award of attorney fees payable to the employee under Minn. Stat. § 176.191 the court explained the policy behind its decision: “The manifest weakness of Pentom’s argument is the practical necessity, under our adversary system of justice, of an employee’s representation where both employers unconditionally deny liability, for when that occurs he becomes an involuntary participant in what may not be solely an employers’ dispute.” *Id.* at 428, 28 W.C.D. at 18. The court went on to state:

Thus, as it is not uncommon that an employee sustains successive work-related injuries while employed by two or more employers, the legislature concluded that, if successive employers want to pursue their rights to litigate liability for payment of benefits, the commission in its discretion shall be empowered to assess attorney’s fees payable to the employee to reimburse the employee for costs incurred for the attorneys’ services in protecting not only his right to but the amount of benefits owed by the disputing employers.

Id. at 429, 28 W.C.D. at 20-21. Therefore, under Lease, an award of attorney fees under Minn. Stat. § 176.191 may be proper whether or not the employee was paid benefits under a temporary order.

In Patnode v. Lyon’s Food Prods., Inc., 296 Minn. 570, 251 N.W.2d 692, 29 W.C.D. 392 (1977), the employee instituted proceedings against Lyon’s and its two insurers seeking compensation as a result of two injuries. Both insurers denied liability and no temporary order was issued. A compensation judge apportioned liability between the insurers and awarded attorney fees under Minn. Stat. § 176.191. Both insurers appealed the award of attorney fees. In affirming the award, the court stated that, “Lyon’s and the insurers ignored employee’s right to compensation, requiring her to initiate the proceeding in which they have litigated their liability

for the benefits due her. Consequently, we find the assessment of attorney's fees consistent with the purposes of § 176.191." Id. at 693, 29 W.C.D. at 394. See also Marsden v. Village of Mabel, 253 N.W.2d 275, 29 W.C.D. 514 (Minn. 1977); Kirchner v. County of Anoka, 410 N.W.2d 825, 40 W.C.D. 197 (Minn. 1987); O'Connor v. Data Card Corp., 44 W.C.D. 176 (W.C.C.A. 1990).

In each of the cases cited above, the employee was awarded attorney fees under Minn. Stat. § 176.191 despite the fact that no temporary order was issued. Such a result is consistent with the policy underlying the statute as set forth by the supreme court in Lease v. Pentom, Inc., id. Where, as here, two insurers dispute liability for the payment of benefits, the employee becomes an unwilling participant in the litigation. The supreme court in Lease and Patnode recognized that while the dispute may be primarily between the employers and insurers, the employee's benefit entitlement may be affected as well. In such situations, the supreme court has held the employer or insurers may be ordered to reimburse the employee's legal costs under Minn. Stat. § 176.191. In the case before us, the primary issues at the March 31, 1998 hearing were claims between American and the self-insured employer. The employee retained counsel to represent her interests in the litigation. Thus, under these cases, the employee is entitled to an award of fees under Minn. Stat. § 176.191, subd. 1, for the costs incurred in protecting her rights in that litigation.

However, the respondents argue Minn. Stat. § 176.191, subd. 1 (1995) describes the procedure for issuance of a temporary order. Accordingly, they argue, the language regarding attorney fees must be read in light of the language preceding it. Taken in context, the respondents assert, subdivision 1 must be construed to limit an award of attorney fees solely to those cases in which a temporary order was issued. We disagree. The essential provisions of Minn. Stat. § 176.191, subd. 1, changed little between the version in effect in 1975 and the 1995 amendment. Both versions set forth the legal requirements for a temporary order. The paragraph permitting an award of a reasonable attorney fee to the claimant is contained in both the 1975 and 1995 statute and is essentially unchanged. Beginning with Lease v. Pentom, Inc. in 1975, the supreme court and this court have consistently held an award of fees to the employee may be appropriate under § 176.191 whether or not a temporary order was issued. We see absolutely no basis to conclude the 1995 amendment overruled Lease v. Pentom, Inc. and its progeny.

The respondents further contend the repeal of Minn. Stat. § 176.081, subd. 8, in 1995 is significant in construing Minn. Stat. § 176.191, subd. 1. Respondents argue Minn. Stat. § 176.081, subd. 8, governed when there was no temporary order and § 176.191 governed when a temporary order was issued. The repeal of the latter statute, the respondents contend, requires that the employee's claim for attorney fees be denied. This argument is unfounded. The Lease v. Pentom, Inc. case involved a 1967 and a 1971 injury. Minn. Stat. § 176.081, subd. 8, was not enacted until 1975. The court awarded attorney fees under § 176.191 although no temporary order was in effect. In Sundquist v. Kaiser Engineers, Inc., 456 N.W.2d 86, 42 W.C.D. 1101 (Minn. 1990), the court held that where apportionment of liability between employers or insurers is a primary issue, attorney fees may be assessed under either Minn. Stat. § 176.081, subd. 8, or § 176.191, subd. 1. See also Stewart v. Riviera Cabinets, 50 W.C.D. 483 (W.C.C.A. 1994). The repeal of § 176.081, subd. 8, does not, therefore, deprive a compensation judge of the jurisdiction

to award fees against employer and insurers under Minn. Stat. § 176.191. Accordingly, we hold the compensation judge's denial of attorney fees was in error and reverse.

In the May 5, 1998 findings and order, the compensation judge apportioned liability for benefits equally between American and the self-insured employer. In the August 7, 1998 findings and order, the compensation judge found the employee's attorney earned fees of \$3,670.00 (see footnote 3). Appleton Municipal Hospital/American and Appleton Municipal Hospital, self-insured are each ordered to pay \$1,835.00 to the employee's attorney for attorney fees pursuant to Minn. Stat. §176.191, subd. 1.