DENNIS L. ONDRACHEK, Employee, v. COURIER DISPATCH GRP., SELF-INSURED, adm'd by MERITCLAIM GEN. SERVS., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 19, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES; ATTORNEY FEES - HEATON FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 1(a)(1995). The value of medical or rehabilitation services awarded to an employee is "reasonably ascertainable" within the meaning of Minn. Stat. § 176.081, subd. 1(a) (1995), and attorneys' fees thus are calculated as a contingent percentage of the value of the services, whenever the services ordered are of the type rendered by a provider for payment and will result in a payment to a provider. Although such fees are limited to a percentage of the specific services awarded, the amount of the eventual payments to the health care or rehabilitation provider need not be known at the time that the compensation judge decides the employee's request for attorney fees for obtaining medical or disputed rehabilitation services. Where awarded, such fees should be calculated and paid by the employer and insurer to the employee's attorney when the medical and rehabilitation bills are paid.

Reversed.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Bradley J. Behr

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's calculation of attorney fees awarded to the employee's attorney against the employer and insurer for the recovery of medical and rehabilitation benefits (generally referred to as Roraff and Heaton fees[1]) under

[1] Prior to the 1995 amendments to Minn. Stat. § 176.081, an employee's right to reimbursement by an employer and insurer for the employee's attorney's fees for obtaining medical or rehabilitation benefits were first judicially established in Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980) (medical benefits) and Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983) (rehabilitation benefits). Although, for injuries after the effective date of the 1995 statutory amendments, an employee's right to reimbursement for such fees is governed by the statute rather than these cases, the terms "Roraff fees" and "Heaton fees" remain in common usage as a convenient means of referring to fees awarded to compensate the

subdivision 1(a)(2), rather than subdivision 1(a)(1) of Minn. Stat. §176.081 (1995). We reverse.

BACKGROUND

The employee, Dennis L. Ondrachek, sustained admitted work-related injuries on July 25, 1994 and January 9, 1996, while working for the self-insured employer, Courier Dispatch Group. In February 1997 the parties entered into a partial Stipulation for Settlement in which they agreed, among other things not here at issue, that the law in effect on January 9, 1996 controlled the employee's entitlement to further workers' compensation benefits from these injuries. The Stipulation for Settlement was approved by an Award on Stipulation on February 20, 1997. (Stipulations 1, 4; Judgment Roll.)

On October 6, 1997, the employee filed a medical request seeking approval for a pain clinic evaluation by Dr. Matthew Monsein, recommended by the employee's treating physician. The employee also filed a rehabilitation request on the same day seeking an extension of his rehabilitation plan, which had been completed on August 12, 1997, to permit medical and vocational monitoring. The employer responded to the medical request by a medical response filed on October 14, 1997 denying that the pain clinic evaluation recommended by his treating physician was reasonable, necessary, and causally related to the injuries. The employer responded to the rehabilitation request on the same day denying responsibility for further rehabilitation services on the basis that the employee had been released to return to work without restrictions. An administrative conference at the Department of Labor and Industry on November 24, 1997 resulted in a decision and order favorable to the employee, which was served and filed on December 18, 1997. The self-insured employer requested a formal hearing, and the matter was heard before a compensation judge of the Office of Administrative Hearings on March 25, 1998. (Judgment Roll; DOLI File: 8/14/97 R-8 Notice of Rehab. Plan Closure.)

At the hearing, the employer stipulated that, if a pain clinic evaluation were awarded, ongoing rehabilitation would also be appropriate. The employee requested an award of Roraff and Heaton fees for the recovery of medical and rehabilitation benefits in the event such were awarded. The compensation judge indicated that the record would be held open until April 8, 1998 to permit the filing of a fee petition by the employee's attorney and any response by the employer. (T. 5-6, 11-12.) The employee's attorney submitted a fee request seeking an award against the employer for attorneys' fees in the amount of $870.00, representing 5.8 hours itemized attorney hours at $150.00 per hour.

In his Findings and Order, served and filed June 10, 1998, the compensation judge determined the medical and rehabilitation issues in favor of the employee, ordering (1) that the employer "pay charges connected with the pain clinic evaluation requested by the employee . . ." (Order 1); and (2) that "the employer and insurer shall continue to provide rehabilitation assistance pending completion of the chronic pain evaluation" (Order 2). The compensation judge granted

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employee's attorney for obtaining medical and rehabilitation benefits.

the employee's request for Roraff and Heaton fees in the aggregate amount of $870.00. The self-insured employer appeals only from the calculation of attorney fees.

STANDARD OF REVIEW

Question of law. The issues on appeal in this matter involve the interpretation and application of case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*.

DECISION

The self-insured employer does not appeal from the awards of a pain clinic evaluation or the extension of rehabilitation services, nor from the determination that the employee is entitled to an award of attorneys' fees associated with obtaining these benefits. The sole question presented by the employer in this appeal is whether the compensation judge erred in awarding the fees on the basis of the amount charged by the employee's attorney in hourly fees, rather than as a contingent percentage of the dollar value of the medical and rehabilitation benefits awarded.

The applicable statute, Minn. Stat. §176.081, subd. 1(a), requires that fees for obtaining disputed medical and rehabilitation services be calculated as a percentage of the dollar value of the services awarded, under the formula provided therein, unless the benefit obtained is "a change of doctor or qualified rehabilitation consultant, or any other disputed medical or rehabilitation benefit for which a dollar amount is not reasonably ascertainable." In such cases, the compensation judge may award a fee for obtaining the disputed medical or rehabilitation benefit amounting to the lesser of $500.00 or the amount charged in hourly fees.[2]

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[2] Minn. Stat. § 176.081, subd. 1, provides, in pertinent 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 and insurer only if the attorney establishes that the contingent

The issue thus resolves simply to one of whether the monetary value of the benefits awarded was reasonably ascertainable. It is not disputed that the pain clinic consultation will ultimately result in a bill for specific charges by the provider. Nor is it disputed that the employer will eventually receive a specific bill itemizing the charges of the employee's rehabilitation provider for any further rehabilitation services provided through the date of completion of the evaluation.

The employee, however, essentially argues that, in order to apply the contingency percentage to determine Roraff and Heaton fees, the dollar value of the medical and rehabilitation benefits must be fully ascertainable *at the time* that the compensation judge considers the fee petition. He argues that since no evidence was presented to establish the dollar value of these benefits, the compensation judge correctly determined that the dollar value was not ascertainable and ordered fees determined by actual hourly charges, subject only to a $500 maximum award applicable to each of the rehabilitation and medical benefits in dispute. Although the compensation judge does not explain the basis for selecting the hourly fee method of calculation rather than the contingency method, it appears that the compensation judge simply adopted the employee's reasoning.

We disagree that the hourly fee method of calculation was permissible here, and reverse. We conclude that in listing the specific terms "a change of doctor or qualified rehabilitation consultant" before the more general "any other disputed medical or rehabilitation benefit for which a dollar value is not reasonably ascertainable," Minn. Stat. § 176.081, subd. 1(a)(2), must be construed by the rule of *ejusdem generis*[3] as limiting the class of "benefits for which a dollar value is not reasonably ascertainable" to those that share with a change of physician

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> 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 or 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 and insurer.

[3] See Minn. Stat. § 645.08(3); see, e.g., Kaiser v. Memorial Blood Center, 486 N.W.2d 762 (Minn. 1992).

or a rehabilitation consultant the common characteristic that their resolution may "benefit" the employee but does not directly result in an order for specific billable services by a medical or rehabilitation provider. The pain clinic consultation and rehabilitation services here awarded are unlike a change of physician or rehabilitation consultant in that specific dollar charges will be incurred to providers.

Thus, we conclude that the value of medical or rehabilitation services awarded to an employee is "reasonably ascertainable" within the meaning of Minn. Stat. § 176.081, subd. (1)(a) (1995), and attorneys' fees thus are calculated as a contingent percentage of the eventual cost of those specific services ordered by the compensation judge, whenever the services ordered are of the type rendered by a provider for payment and will result in a payment to a provider. Although such fees are limited to a percentage of the specific services awarded, the amount of the eventual payments to the health care or rehabilitation provider need not be known at the time that the compensation judge decides the employee's request for attorney fees for obtaining disputed medical or rehabilitation services. Where awarded, such fees should be calculated and paid by the employer and insurer to the employee's attorney when the medical and rehabilitation bills are paid.

Reversed.