

ROSEMARY J. PETERSON, Employee, v. PINE CNTY., INC. and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 26, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. The compensation judge's determination that the employee's attorney would not be reasonably compensated by an award of contingency fees alone, and his award of Roraff fees is supported by substantial evidence and is not clearly erroneous on the facts of this case.

ATTORNEY FEES - SUBD. 7. The compensation judge erred in awarding partial reimbursement of fees pursuant to Minn. Stat. § 176.081, subd. 7 (1993), against Roraff fees to be paid by the employer and insurer.

Affirmed in part and reversed in part.

Determined by Johnson, J., Wilson, J., and Pederson, J.
Compensation Judge: Rolf G. Hagen

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's Findings and Order on Attorney's Fees awarding hourly attorney fees to the employee's attorney pursuant to Minn. Stat. § 176.081, subd. 1(a)(1993), § 176.135 (1993) and Roraff,¹ and § 176.239 (1993). The employer and insurer also appeal from the compensation judge's award of fees pursuant to Minn. Stat. § 176.081, subd. 7, on the entire amount of attorney's fees awarded. We affirm in part, and reverse in part.

BACKGROUND

The employee, Rosemary J. Peterson, worked as a seamstress for the employer, Pine County, Inc., for approximately 17 years. The employer was insured by State Fund Mutual

¹ Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

Insurance Company. On August 10, 1992, the employee sustained admitted, Gillette² work injuries to her cervical spine, left shoulder and wrists (bilateral carpal tunnel syndrome). The employee was seen by her family physician, Dr. Peterson, who referred the employee to Dr. Bardolph, an orthopedic surgeon. Carpal tunnel release surgery was performed in late 1992 on both wrists. The employee continued to have neck, left shoulder and hand/wrist symptoms, and referrals were made to a number of physicians for evaluation and treatment in early 1993. An independent medical opinion (IME) was also completed at the request of the employer and insurer. Surgery was proposed for the cervical spine, but was not performed.

On August 3, 1993, the employee returned to Dr. Bardolph. He additionally diagnosed trigger finger syndrome, and eventually recommended surgical release. The employer and insurer denied primary liability and refused to pay for treatment related to the trigger finger syndrome. Additional referrals were made to various medical specialists in 1994 and early 1995, resulting in contradictory opinions regarding the nature and extent of the employee's injuries and the treatment proposed. In April 1995, Dr. Bardolph requested approval for manipulation of the employee's left shoulder under anesthesia and trigger finger release surgery. The request was denied.

On April 24, 1995, the employee retained attorney James Michael Gallagher to represent her with respect to her workers' compensation claims. The attorney provided services primarily related to the employee's medical care through January 1997. On February 13, 1997, the employer and insurer served a notice of intent to discontinue temporary total disability benefits (NOID), asserting the employee failed to follow through with recommended medical care and had reached maximum medical improvement (MMI) for her admitted work injuries. On February 24, 1997, the employer and insurer filed a Medical Request seeking an order directing completion of a Functional Capacities Evaluation (FCE). Dr. Bardolph was opposed to an FCE as he believed the employee needed surgery. An administrative conference was held on March 13, 1997. In a decision issued March 19, 1997, a settlement judge concluded the employee had reached MMI, and allowed discontinuance of her temporary total disability benefits. The parties agreed an FCE would be premature, and the medical request was dismissed.

On March 26, 1997, the employee filed an Objection to Discontinuance appealing the settlement judge's decision. On May 23, 1997, the employee filed a Claim Petition, alleging an injury to the hands and fingers on August 10, 1992 in addition to the admitted injuries, and seeking temporary total disability or permanent total disability benefits, permanent partial disability, medical expenses, rehabilitation assistance and penalties. On June 6, 1997, the claims were consolidated for hearing.

A two day hearing was held before a compensation judge at the Office of Administrative Hearings on May 22 and July 17, 1997. In a Findings and Order served and filed September 12, 1997, the compensation judge found the employee had sustained a Gillette injury

² Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

in the nature of a trigger finger syndrome as a result of her work activities for the employer, culminating in disability on August 3, 1993. The judge ordered the employer and insurer to pay temporary total disability benefits from March 17 through July 17, 1997 and continuing, and permanent partial disability benefits of 15.74%, not including permanency for the trigger finger syndrome. He further directed the employer and insurer to pay all reasonable and necessary medical costs incurred in connection with treatment of the employee's trigger finger syndrome, including proposed surgery. Neither party appealed this decision.

On January 29, 1998, the employee's attorney filed a Statement of Attorney's Fees seeking \$11,450.50 in attorney's fees, including \$7,075.97 in contingency fees and hourly fees for representation in a discontinuance proceeding, and \$4,374.53 representing Heaton³ and Roraff fees. In a findings and order issued on July 24, 1998, the compensation judge concluded that contingency fees alone were inadequate to reasonably compensate the employee's attorney for his representation of the employee. The judge determined certain fees were not awardable and that others were duplicative, and deducted the amounts claimed. The judge denied Heaton fees concluding that rehabilitation benefits were not a primary issue in dispute. The judge further determined a reasonable total attorney's fee for the services provided by the employee's attorney was \$7,844.31, of which \$4,859.90 represented contingency fees withheld from the employee's temporary total and permanent partial disability benefits. The compensation judge ordered the employer and insurer to pay the remainder, \$2,984.41, to the employee's attorney as Roraff fees and hourly fees pursuant to Minn. Stat. § 176.239. Finally, the judge awarded partial reimbursement of fees pursuant to Minn. Stat. § 176.081, subd. 7, on the entire amount of attorney's fees awarded. The employer and insurer appeal.

STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Hourly Fees Pursuant to Minn. Stat. § 176.135 and Roraff

³ Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983).

The employer and insurer contend the compensation judge erred in awarding Roraff fees for services provided prior to February 13, 1997, asserting there were no disputed claims until service of the NOID on that date.⁴ They further contend the time records offered by the employee's attorney overcompensate for the actual time spent. Accordingly, the employer and insurer contend, the employee's attorney has been adequately compensated by the award of \$4,859.90 in contingency fees for his representation of the employee.

In a proceeding to recover medical benefits, a successful claimant may be awarded reasonable attorney fees to be paid by the employer and insurer. Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980); Minn. Stat. § 176.135 (1993). Such fees may be awarded only on genuinely disputed claims. Minn. Stat. § 176.081, subd. 1 (1993). In cases where both indemnity and medical benefits are disputed, Roraff fees may be awarded if the contingency fee alone is inadequate to reasonably compensate the employee's attorney for the services rendered. Kopish v. Sivertson Fisheries, 39 W.C.D. 627, 629 (W.C.C.A. 1987). The determination of an award of Roraff fees falls within the discretion of the compensation judge. Neumann v. Graceville Health Ctr., 52 W.C.D. 194 (W.C.C.A. 1995).

The employee's attorney testified the employee contacted him in April 1995 because of issues involving the employee's medical care and treatment. The employer and insurer denied liability for the employee's trigger finger syndrome, and disputes had arisen with respect to treatment for her neck, left shoulder and hand/wrist conditions. These disputes continued from the time the employee signed the retainer with Mr. Gallagher through February 13, 1997 when the NOID was filed. That no formal pleadings were filed between May 1, 1995 and January 1997, does not abrogate the fact that there were genuine disputes with respect to the nature and extent of the employee's work-related injuries and appropriate medical care. While these disputes were resolved amicably, it is clear the employee's attorney facilitated the resolution of these medical issues through negotiation and intervention to obtain appropriate medical referrals for the employee. Compare, e.g., Weisser v. Country Club Mkts., 397 N.W.2d 891, 39 W.C.D. 282 (Minn. 1987). The disagreements between the parties regarding the employee's trigger finger syndrome and appropriate ongoing medical treatment ultimately resulted in the filing, by the employer and insurer, of the February 13, 1997 NOID and March 22, 1997 Medical Request. The compensation judge properly awarded Roraff fees to the employee's attorney for his services between May 1, 1995 and February 13, 1997.

The employer and insurer further assert the employee's attorney's practice of using a default minimum of .25 hour per activity does not accurately reflect the time spent by the employee's attorney and results in an inflated fee. They contend the judge should have disallowed all .25 hour entries and when computed in this manner, the contingency fee reasonably compensates the attorney for his representation of the employee.

⁴ The parties stipulated the dispute before the compensation judge was limited to fees for the period from May 1, 1995 through September 17, 1997.

The compensation judge accepted the employee's attorney's testimony that the fee statement, if anything, understates the time spent. The attorney explained, for example, the .25 hour entered for returning a phone call and leaving a message would include time for taking the call or message, obtaining and familiarizing himself with the file, making the call and leaving an appropriate return message. He observed that in some cases the .25 hour may be generous but in others it is not enough. The attorney further testified that not every activity was documented, and there were some activities which appear in the action notes that simply never got entered in the fee statement and were not billed. The compensation judge found Mr. Gallagher's testimony credible. As a general rule, this court may not disturb a finding based on the compensation judge's assessment of credibility. See Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989).

The compensation judge clearly reviewed the documentation submitted by the employee's attorney, and properly considered the attorney's fee claim in view of the factors set forth in Minn. Stat. § 176.081, subd. 5(d). A reasonable mind could award Roraff fees in the amount determined by the compensation judge. Because the award is not clearly erroneous, we must affirm. Minn. Stat. § 176.421, subd. 1(3).

Minn. Stat. § 176.081, subd. 7 Fees

The employer and insurer also appeal from the compensation judge's award of partial reimbursement of fees pursuant to Minn. Stat. § 176.081, subd. 7, "upon the entire amount of attorney's fees awarded." (Order 3.) Subdivision 7 fees are intended to "reimburse an injured employee for a portion of [her] attorney's fees." Mack v. City of Minneapolis, 333 N.W.2d 744, 747, 35 W.C.D. 875, 879 (Minn. 1983). Roraff fees are payable by the employer and insurer. Unlike contingency fees, nothing is withheld from the employee's benefits. Thus, subdivision 7 is not applicable to Roraff fee awards. Salahud-Din v. Compassionate Care Group, slip op. (W.C.C.A. Dec. 16, 1997); Sailes v. Ford Motor Co., slip op. (W.C.C.A. Nov. 18, 1992); see Irwin v. Surdyk's Liquor, slip op. (Dec. 21, 1998). The compensation judge's award of Minn. Stat. § 176.081, subd. 7 fees computed on the Roraff fees awarded was improper and is, accordingly, reversed.