

BRET SCOTT, Employee/Appellant, v. GREATER ANOKA HUMANE SOC'Y and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 22, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - HEATON FEES; STATUTES CONSTRUED - MINN. STAT. §176.081, SUBD. 1. Where weekly retraining benefits are likely to provide a sufficient contingency fee to adequately compensate the employee's attorney for representing the employee in obtaining approval for retraining, an award of Heaton-type fees against the employer and insurer is improper pursuant to Minn. Stat. §176.081, subd. 1.

Affirmed.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: William R. Johnson

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's order awarding attorney's fees on a contingent basis rather than pursuant to Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983). We affirm.

DECISION

No appeal has been taken from any factual determination of the compensation judge and there is no apparent dispute over the factual background of this case. The issue on appeal involves 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*.

The employee, Bret Scott, sustained work-related injuries on October 4, 1995 and December 7, 1995 while working for the employer, the Greater Anoka County Humane Society. The employer and its insurer paid various benefits including temporary total disability compensation (TTD). As of January 23, 1998 the employee had received 104 weeks of TTD and his entitlement to further TTD ended pursuant to Minn. Stat. §176.101, subd. 1(k). (Judgment

Roll: 9/11/98 F&O: Finding 1; 3/9/98 Order on Discontinuance.)

The employee sought approval of a retraining plan which involved 84 weeks of training in information management systems at the NEI College of Technology. Following a hearing before a compensation judge of the Office of Administrative Hearings on July 28, 1998 the judge approved the proposed retraining plan in an unappealed Findings and Order served and filed on September 11, 1998. (Judgment Roll: 9/11/98 F&O: Finding 3; 7/28/98 Hearing Exh. A.)

On September 28, 1998 the employee filed a Statement of Attorney's Fees seeking \$2,960.00 from the employer and insurer in hourly Heaton fees¹ for the services of his attorney on the rehabilitation issue. Following a hearing on November 2, 1998 the compensation judge found that the employee's attorney would receive at least \$4,286.86 in contingency fees from retraining benefits payable to the employee during the course of the retraining. Accordingly, the judge held that a separate award of Heaton fees was not permissible pursuant to Minn. Stat. §176.081. The employee appeals from the compensation judge's determination of law.

We affirm. In Heaton, this court held that an award of hourly attorney fees paid by the employer and insurer was permissible under certain circumstances to compensate an employee's attorney for work performed in the successful resolution of a rehabilitation issue. The right of employees to reimbursement for attorney fees in rehabilitation cases was subsequently addressed by various amendments to the workers' compensation statute and it is the version of Minn. Stat. §176.081 in effect on the date of the employee's injury rather than the Heaton decision which is controlling in this case. The term "Heaton fees" remains in common use for the statutory fees which may be assessed against the employer and insurer in rehabilitation matters, however. While it is the statutory entitlement for attorney fees for rehabilitation services which the employee here seeks to assert, we will also here use the term "Heaton" fees for purposes of simplicity.

Minn. Stat. §176.081, subd. 1(1), provides, in pertinent part, that

[a]ttorney fees for the 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.

Here, as the result of the approval of the rehabilitation plan, the employee also became eligible for weekly compensation payments in the form of retraining benefits during the period of anticipated participation in the retraining program. In Burger v. Coca Cola Bottling Co., 47 W.C.D. 263 (W.C.C.A. 1992), this court held that retraining benefits were a monetary benefit from which contingent fees are to be withdrawn, and that if the contingent fees generated by the retraining

¹ Heaton v. J. E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983).

benefits are adequate to compensate the employee's attorney for his work on the retraining issue, an award of Heaton fees would be improper.

In the present case, the compensation judge found that the contingency fees potentially available to the employee's attorney from the stream of retraining benefits were at least \$4,286.86, an amount which exceeds the claimed \$2,960.00 hourly value of the employee's attorney's time on the rehabilitation issue. At the hearing before the compensation judge, the employee's attorney conceded that "from a purely monetary standpoint" he "would probably be better off under a contingency fee." (T. 21-22.)

The employee argues that a determination that the contingency fee adequately compensates his attorney for representation on the rehabilitation dispute is merely speculative since the contingency fee on the retraining benefits depends upon the employee's full participation in the retraining awarded. While this is true, we do not believe that this factor here permits an award of hourly fees against the employer and insurer. Contingency fees from a future stream of weekly benefits are always inherently speculative in some degree. Should the stream of retraining benefits in this case cease before producing sufficient contingency fees to compensate the employee's attorney for representing the employee in the rehabilitation dispute, the employee is free to seek a partial award of Heaton-type fees pursuant to Minn. Stat. §176.081, subd. 1, at such time as it may be established that the contingent fee was in fact inadequate.