

JACOB D. ZIMMERMAN, JR., Employee, v. MOLINE MACH., LTD., and TRAVELERS INS. CO., Employer-Insurer/Appellants, and MOLINE MACH., LTD. HEALTH PLAN, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 22, 1999

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. Under Minn. Stat. § 176.081, subd. 1(a)(1), the compensation judge improperly awarded payment of contingent attorney fees on the amount of medical expenses billed by the providers rather than the amount "awarded," that is, the amount of medical benefits payable under the Minnesota medical fee schedule.

ATTORNEY FEES - RORAFF FEES. Where the compensation judge dismissed the employee's claim for permanent partial disability benefits, and the employer and insurer subsequently paid permanency after issuance of the findings and order, the judge properly included only the amount withheld from temporary total disability benefits awarded in the proceeding at issue, and did not err in refusing to include \$2,300.00 withheld from the permanent partial disability benefits paid after the fact in determining the award of contingent attorney fees.

ATTORNEY FEES - RORAFF FEES. Substantial evidence supports the finding that the contingent fee on indemnity benefits was inadequate to reasonably compensate the employee's attorney. Having so found, the compensation judge properly calculated fees for the recovery of medical benefits based on the 25/20 contingent fee formula set forth in Minn. Stat. § 176.081, subd. 1(a).

Affirmed as modified.

Determined by: Johnson, J., Wilson, J. and Wheeler, C.J.
Compensation Judge: Donald C. Erickson

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's award of \$5,983.17 in contingent attorney fees for recovery of medical benefits pursuant to Minn. Stat. § 176.081, subd. 1(a) (1995). We affirm as modified.

BACKGROUND

Jacob D. Zimmerman, Jr., the employee, sustained an admitted personal injury to his back and left leg on September 2, 1997, while employed by Moline Machinery, Ltd., the employer. The employer and its insurer, Travelers Insurance Company, initially accepted liability and paid various workers' compensation benefits.

On October 27, 1997, an MRI scan was performed at the request of the employee's treating physician, Dr. Carl J. Sjoding. The scan showed an intradural tumor at the L5-S1 level, and on October 31, 1997, Dr. Robert Donley performed a decompressive laminectomy and medial facetectomy at L5 with removal of the tumor. Subsequently, on January 7, 1998, the employer and insurer served a Notice of Intention to Discontinue Benefits (NOID), asserting the employee's lost time and medical expenses resulted from a non-work-related condition, the intradural tumor, and were not causally related to the September 2, 1997 work injury.

On February 10, 1998, a settlement judge concluded the employer and insurer had established reasonable grounds to discontinue benefits. The employee then filed an Objection to Discontinuance on April 3, 1998, alleging entitlement to temporary total disability benefits from January 7 through February 23, 1998. The employee also filed a claim petition on April 8, 1998, seeking permanent partial disability of 14 percent and payment of medical expenses. The matter was heard by a compensation judge at the Office of Administrative Hearings on July 31, 1998. In a decision served and filed October 6, 1998, the compensation judge found the September 2, 1997 work accident aggravated the employee's pre-existing tumor and substantially contributed to the need for surgery. The judge awarded temporary total disability benefits for a period of 6.86 weeks, amounting to \$2,846.42, and ordered that \$711.61 in attorney fees be withheld from the temporary total disability benefits payable. The judge also ordered payment of \$32,474.24 in medical bills from various providers, subject to the medical fee schedule. The compensation judge further concluded that Minn. R. 5223.0390, subp. 4.D., under which permanency was claimed, did not apply, and dismissed the employee's claim for permanent partial disability benefits. (10/6/98 Findings and Order, finding 24, order 8.) Neither party appealed from this decision.

On November 12, 1998, counsel for the employee filed a Statement of Attorney Fees seeking contingent and Roraff¹ fees totaling \$6,694.85. The employer and insurer objected. Shortly thereafter, the employer and insurer paid the employee for a 14 percent permanent partial disability, withholding \$2,300.00 in attorney fees.² A telephone conference was held on the attorney fees claim on December 21 and 28, 1998. In a decision issued January 7, 1999, the compensation judge concluded the contingent fee of \$711.61, payable from the temporary total

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

² Documents in the Department of Labor and Industry's optically imaged file indicate the employer and insurer issued a check paying the employee for a 14 percent permanent partial disability on December 2, 1998. (12/3/98 Notice of Benefit Payment [NOBP]; 12/17/98 Amended NOBP; 2/16/99 letter from Travelers.)

disability benefits awarded, was inadequate to reasonably compensate counsel for the employee, and awarded \$5,983.17 in Roraff fees on the medical benefits in dispute, pursuant to Minn. Stat. § 176.081, subd. 1(a). 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 may 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). A decision which rests upon the application of a statute to essentially undisputed facts 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

Pursuant to Minn. Stat. § 176.081, subd. 1(a)(1), as amended in 1995, the contingent fee for recovery of indemnity benefits is presumed adequate to compensate the employee's attorney for recovery of medical benefits concurrently in dispute. Additional fees may be assessed against the employer and insurer for recovery of medical benefits "only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical . . . dispute." Id. Where the contingent fee is found inadequate, the employer and insurer are liable for attorney fees calculated according to the 25/20 contingent fee formula, based on the "dollar value of the medical . . . benefit awarded." Id.

Ascertainable Dollar Value

The employer and insurer argue the compensation judge improperly awarded payment of attorney fees based on the \$32,474.24 billed by the employee's medical providers rather than the amount payable pursuant to the Minnesota medical fee schedule. We agree. This issue has been addressed by this court in previous decisions. Specifically, the court has held that fees on medical expenses are to be calculated based on the amount "awarded," that is, the amount of medical expenses payable under the fee schedule, *not* the amount charged by the provider(s). Irwin v. Surdyk's Liquor, slip op. (W.C.C.A. Dec. 21, 1998);³ see also Friedges v. Independent Sch. Dist. #719, slip op. (W.C.C.A. May 17, 1999); Frisch v. S&S Carpet Designs, slip op.

³ Irwin is presently on appeal to the Minnesota Supreme Court. Oral argument was heard by the court on June 1, 1999.

(W.C.C.A. Jan. 19, 1999). We modify the award of attorney fees accordingly.

Consideration of Amounts Withheld on PPD Benefits

The employer and insurer also contend the compensation judge committed an error of law by failing to include \$2,300.00 withheld from permanent partial disability benefits paid to the employee after issuance of the October 6, 1997 Findings and Order. They argue that if the \$2,300.00 is taken into account, the resulting \$3,011.61 contingent fee payable on indemnity benefits⁴ adequately and reasonably compensates the employee's attorney for his representation of the employee. The employer and insurer further argue that even if a fee of \$3,011.61 is deemed inadequate, the \$2,300.00 must be included in calculating the amount of additional contingent fees payable on medical benefits, reducing the amount due.

The compensation judge did not include the \$2,300.00 in determining the contingent fee payable on medical benefits, observing that “[w]hile permanent partial disability was in dispute at the former hearing, it was not awarded.” (Order Determining Attorney’s Fees, memorandum.) Minn. Stat. § 176.081, subd. 1(a), permits 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.” (Emphasis added.) We believe the phrase “compensation awarded” is plain and unambiguous, and limits attorney fees to the amount of monetary benefits actually awarded in the proceeding. While the compensation judge may have erred in dismissing, rather than determining, the employee’s permanency claim,⁵ neither party appealed that determination and no permanency benefits were awarded in the proceeding. It was not until several months after the service and filing of the October 6, 1997 Findings and Order, and after the employee’s attorney obtained an opinion from Dr. Donley providing a Weber rating,⁶ that the employer and insurer paid a 14 percent permanent partial disability to the employee.⁷

⁴ That is, $\$711.61 + 2,300.00 = \$3,011.61$.

⁵ The employer and insurer cite case law arguably contrary to the apparent reasoning of the compensation judge. See, e.g., Bell v. Flower City, slip op. (W.C.C.A. Apr. 20, 1993); see also Deneen v. Franklin Mfg. Co., 40 W.C.D. 57 (W.C.C.A. 1987); Shannon v. Special Sch. Dist. #1, slip op. (W.C.C.A. Mar. 19, 1996); Peglow v. C&M Heating & Air Conditioning, slip op. (W.C.C.A. Aug. 11, 1994).

⁶ Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

⁷ The employer and insurer cite Minn. Stat. § 176.081, subd. 1(a)(c), which requires counsel to concurrently file all outstanding disputed issues, and prohibits attorney fees for representation on any issue which could reasonably have been addressed during the pendency of other issues for the same injury. The employer and insurer admit, however, that the employee’s attorney timely raised and litigated the permanency claim.

We, accordingly, affirm the compensation judge's inclusion solely of \$711.61 in contingent fees from temporary total benefits awarded in the proceeding at issue in determining entitlement to, and the amount of, contingent fees payable for obtaining disputed medical benefits.

Consideration of Hourly Fee

The employer and insurer also contend the compensation judge erred in calculating the 25/20 contingent fee on the medical expenses awarded without reference to or consideration of the actual time spent and the hourly fees of the employee's attorney. The appellants cite Minn. Stat. § 176.081, subd. 1(d) which requires an attorney claiming legal fees to file a statement of attorney fees, including an accounting of the number of hours spent on the case, and argue the legislature must have intended that the fact-finder review the hours actually expended in determining the reasonableness of the attorney fees claimed.

In Irwin, this court noted that the statute, as amended in 1995, provides no criteria for determining whether the contingent fee on monetary benefits is "inadequate to reasonably compensate" the employee's attorney. The court, therefore, adopted the factors formerly set forth in Minn. Stat. § 176.081, subd. 5(d), to determine a "reasonable fee." Irwin, at p. 5. These factors include: the amount involved, the time expended, the responsibility assumed by counsel and the expertise of counsel, the issues involved, and the results obtained. Although normally we would remand for specific findings applying the former 5(d) factors, we do not believe a remand is necessary or useful given the facts and circumstances in this case.⁸

The claim involved a significant medical causation dispute, and the amount of medical benefits involved was considerable - - \$34,474.25 in medical bills from various providers. The employee's attorney obtained a favorable result for his client. Contrary to the appellants' assertion, the compensation judge referred to and considered the time expended in the case, specifically noting the "employee's counsel filed a statement of hours of time incurred on the matter that totaled \$4,001.50," and the appellant's argument "[t]hat employee's counsel's fee should be limited to \$4,001.50." The compensation judge compared the \$711.61 previously awarded for recovery of indemnity benefits, and reasonably concluded that this amount was "inadequate to reasonably compensate the attorney for representing the employee in the medical . . . dispute." (10/6/98 Order Determining Attorney's Fees.) The compensation judge's determination is supported by the evidence and we, accordingly, affirm.

The employer and insurer further contend that any contingent fee payable pursuant to Minn. Stat. § 176.081, subd. 1(a)(1) should be limited to \$4,001.50, based on the hours expended times the usual hourly fee of the employee's attorney. Where the contingent fee payable on indemnity benefits is inadequate to reasonably compensate the employee's attorney, "the employer or insurer is liable for attorney fees based on the formula in this subdivision." Minn. Stat. §

⁸ Compare, e.g., Smith v. City of Sauk Centre, 578 N.W.2d 755, 58 W.C.D. 209 (Minn. 1998).

176.081, subd. 1(a)(1). Minn. Stat. § 176.081, subd. 1(a) provides for a *contingent* fee based on “25 percent of the first \$4,000 . . . and 20 percent of the next \$60,000 of compensation awarded to the employee.” As noted by the compensation judge, the use of the contingent fee formula will result in a fee that in some circumstances favors the employer and insurer, and in others the employee.⁹ Compare Moreno v. Billy Graham Evangelistic Ass’n, slip op. (W.C.C.A. Aug. 12, 1998). The compensation judge properly determined the attorney fee payable based on the 25/20 contingent fee formula set forth in Minn. Stat. § 176.081, subd. 1(a). We affirm.

⁹ In the 1995 amendments, the legislature essentially abolished all hourly fees under Minn. Stat. § 176.081, instead requiring calculation of attorney fees on a contingency basis on all benefits awarded, including medical and rehabilitation benefits. See Ramirez v. Dee, Inc., 58 W.C.D. 437 (W.C.C.A. 1998), *summarily aff’d*. 582 N.W.2d 927 (Minn. 1998).