SCOTT K. ABERNATHY, Employee, v. ASPLUNDH TREE EXPERT and RELIANCE NAT'L INS. CO., adm'd by CRAWFORD & CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 15, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. Substantial evidence supports the compensation judge's finding that the contingent fees awarded were inadequate to reasonably compensate the employee's attorney for medical expenses involved.

ATTORNEY FEES - RORAFF FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, subd. 1(c). Substantial evidence supports the compensation judge's finding that a medical dispute was created regarding the employee's proposed surgery.

Affirmed.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's award of attorney fees under Minn. Stat. § 176.081 based upon a percentage of the dollar value of the medical benefits. We affirm.

BACKGROUND

On November 21, 1996, Scott Abernathy, the employee, sustained a right knee injury while working as a tree trimmer for Asplundh Tree Expert Company, the employer, which was insured for workers' compensation liability by Reliance National Insurance Company, the insurer. The employer and insurer accepted primary liability. The employee first consulted a physician in Duluth, Minnesota, and by November 25, 1996, consulted Dr. J. W. Burnett, Northern Pines Orthopedic Clinic, Grand Rapids, Minnesota. Dr. Burnett ordered an MRI scan for further evaluation of the employee's condition. The chart notes from a follow-up appointment with Dr. Burnett on December 11, 1996, state the following:

> The patient is seen for a follow up of his knee injury. He's having mechanical symptoms within the knee to complement the symptoms

> he had at the time of injury. His work comp insurance has not yet authorized the MRI scan. I think with his continued symptoms it's obvious that he has a torn meniscus to go along with his other pathology but I would like to confirm this with an MRI scan before considering surgery. We will contact his insurance company to encourage them to approve the MRI.

According to the employee's medical chart, these December 11, 1996 chart notes were sent to the insurance administrator by facsimile "as requested for preauthorization of MRI." The medical chart notes on January 7, 1997, indicate that the insurance administrator notified the doctor's office that no prior authorization would be provided for the recommended MRI scan. The chart notes state that

> the insurer may decide to cover these costs, but not until after the results of the MRI are known. The patient is notified. He will proceed with MRI scanning using his regular insurance. He is scheduled for Thursday, 9 January, at 12:15 p.m. . . .

The January 9, 1997 chart notes state that the employee brought to his physician's office a letter from the Minnesota Department of Labor and Industry indicating that the MRI had been approved even though the insurance administrator had previously indicated "in no uncertain terms that they would not preapprove this MRI." The chart further notes that the employee proceeded with the MRI scan on January 9, 1997, but provides no further indication concerning payment for these MRI charges. The chart further shows, however, that the employee was diagnosed with a complete tear of the posterior cruciate ligament, a probable tear to the medial meniscus, and a possible tear to the lateral collateral ligament.

On February 6, 1997, the employee's attorney filed a notice of appearance of attorney, along with a copy of a retainer agreement which had been signed by the employee on January 23, 1997. (Judgment Roll)

On March 3, 1997, copies of office notes were again sent by Dr. Burnett's office to the insurance administrator, to request preauthorization for surgery. Preauthorization was granted; on March 7, 1997, the employee underwent surgery on his right knee in the nature of a posterior cruciate ligament reconstruction, conducted by Dr. J.W. Burnett.

On April 11, 1997, the employee served and filed a claim petition, claiming entitlement to a period of temporary total disability benefits from December 19, 1995, forward. The employer and insurer filed an answer to the claim petition on May 7, 1997, denying the employee's claimed wage rate and admitting the employee's entitlement to temporary total disability benefits from March 7, 1997 forward (the employer and insurer ultimately paid temporary total disability benefits to the employee from March 7 through June 8, 1997), but denying entitlement to benefits claimed for an earlier period.

After his first surgery on March 7, 1997, the employee's symptoms persisted. By the time of his consultation with Dr. Burnett on June 3, 1997, Dr. Burnett recommended an MRI "to see what's become of the reconstructed ligament." As was done in the past, Dr. Burnett's office sent a copy of his chart notes to the insurance administrator, in order to obtain approval to proceed with the recommended MRI scan. These notes were sent by facsimile on June 9. On July 1, 1997, those notes were re-sent to the insurance administrator; information in the record indicates that the medical notes sent on June 9 were inadvertently sent to a representative other than the one with responsibility to pre-authorize the MRI. By July 2, the insurance administrator notified the doctor's office that this second MRI was approved. The MRI, taken on July 7, 1997, was read to show, among other findings, that the "anterior cruciate ligament is not well seen, and therefore may be torn."

The employee was referred by Dr. Burnett to Dr. Michael Gibbons at the Duluth Clinic. Dr. Gibbons indicated that additional surgery might be needed, and referred the employee to Dr. Robert LaPrade at the University of Minnesota to obtain a second opinion. On August 21, 1997, Dr. LaPrade examined the employee, and recommended additional surgery. His examination report outlines his examination of the employee and his diagnosis of the employee's condition, and also explains the need for an additional surgery and pre-surgery MRI, "to aid in preoperative planning of this complex instability patten because of the poor visualization of the posterolateral knee structures on his current MRI."

On August 21, 1997, Dr. LaPrade wrote to the insurer's administrator requesting authorization for the surgery and for a pre-operative MRI, specifically for:

> a repeat MRI scan to include our specific posterolateral knee protocol with coroneal oblique cuts at the University of Minnesota. This will give me a better idea of what remaining tissue we have to work with in this patient preoperatively. In addition, I am requesting a letter of medical necessity for an allograft reconstruction of both the posterior cruciate ligament and the posterolateral corner.

On August 25 and 27, 1997, Dr. Burnett's office also submitted additional chart notes and the July 7th MRI report to the insurance administrator.

On August 27, 1997, the insurer's administrator responded by letter to Dr. LaPrade's request for pre-authorization, stating:

> In regards to your requests for another MRI scan and preapproval of surgery of the above captioned workers compensation claim, this will be denied at this time. Pursuant to MN Statute §176.155, the Employer and Insurer will be scheduling Mr. Abernathy for an

> Independent Exam. This will be scheduled as soon as we can arrange an appointment with a specialist.
>
> Upon receipt of the Independent Exam, the request for another MRI and surgery will be reevaluated.

On September 11, 1997, counsel for the employer and insurer sent a letter to counsel for the employee, advising of a medical examination scheduled with Dr. Gary Wyard for October 9, 1997. The employee filed a request for certification of a medical dispute on September 16, 1997, with the Department of Labor and Industry, Workers' Compensation Division, pursuant to Minn. Stat. § 176.081, subd. 1(c) (1996), "requesting authorization to continue treating with Dr. LaPrade and preauthorization of the MRI." The request did not specifically mention the proposed surgery. On September 19, 1997, the Department of Labor and Industry certified there was a medical dispute for the "employee's request for follow up treatment with Dr. LaPrade and recommended MRI." Again, the proposed surgery was not specifically mentioned in the Certification of Dispute document.

On October 9, 1997, the employee underwent an examination with Dr. Wyard. Dr. Wyard issued a medical report following his examination of the employee, in which he recommended further consideration of surgical intervention as the initial ligament reconstruction had failed, but stated that, "I do not feel there is any additional benefit from a third MRI." Dr. Wyard's report is stamped as "Date Issued: Oct. 20, 1997," but the record does not indicate when that report was received by the insurance administrator or the attorney for the employer and insurer.

The employee filed a medical request with the Department of Labor and Industry on October 21, 1997, requesting "follow up treatment with Dr. LaPrade, recommended MRI and possible surgery." The employer and insurer's medical response dated November 13, 1997, stated only that the "[e]mployer and insurer deny the employee's request to change physicians, and any treatment subsequent to the unauthorized change of physician, pursuant to Minn. Rule 5221.0430." As the employee had not filed a request to change physicians, but instead had been referred to Dr. Gibbons and Dr. LaPrade by his treating physicians, the medical response was the first time the employer and insurer had raised the defense of unauthorized change of physicians.

On November 24, 1997, counsel for the employer and insurer served Dr. Wyard's IME report, stating in the service letter that the employer and insurer would agree to the surgical procedure recommended by Dr. LaPrade, but not the MRI scan. An administrative conference was held before a compensation judge on December 15, 1997. At the conference, the employer and insurer apparently confirmed that they consented to the change of physicians to Dr. LaPrade and to the proposed surgery, but not the MRI. On January 8, 1998, the compensation judge issued an administrative decision approving the proposed MRI. The employee underwent an MRI on January 29, 1998; the record does not indicate the results of the MRI scan, but does show that the employee underwent a second reconstructive surgery on January 30, 1998.

In February 1998, the parties agreed to settle the claim set forth in the employee's April 11, 1997, claim petition by closing out the employee's claim for temporary total disability benefits through January 30, 1998 for $1,430.28. Out of this sum, $357.57 in contingency fees were deducted and paid. Under the settlement, the parties agreed that the employee's attorney would make a claim for Roraff fees as authorized by statute relative to the medical issues. By letter dated February 7, 1997, the employee's attorney advised that he would request $600.00 in attorney fees based upon four hours of billable time at the rate of $150.00 per hour; he attached an itemization of hours to his letter. Later, but before the award on stipulation was filed on February 19, 1998, the attorney indicated that, "based upon the injury date, my Roraff fee on this case would more appropriately be a percentage of the medical benefits recovered."

On March 23, 1998, the employee's attorney filed a petition for fees, claiming attorney fees in the sum of $5,800.38. This fee was calculated as a contingency fee based on $28,001.91 incurred for medical expenses, pursuant to Minn. Stat. § 176.081, subd. 1(a)(1) (1995). The employee received medical services billed by the providers for prescriptions and the MRI as $951.62, surgery admission as $18,686.79, and physicians' services of $8,363.50, for a total of $28,001.91. The employer and insurer objected, citing alternative bases: (1) "The employee's attorney has not demonstrated that the contingency fee previously paid in this matter was inadequate for this concurrent medical dispute." (2) That "if a 'contingent' fee is to be assessed on the basis of recovery of medical expenses, it should be based solely on the MRI scan expense [$951.62] that was disputed." (3) That "the attorney fee awarded should be $500.00, pursuant to Minn. Stat. § 176.081, subd. 1(a)(2) for successfully obtaining a change of physicians." A hearing on attorney's fees was held before a compensation judge at the Department of Labor and Industry on May 11, 1998. The judge awarded attorney fees of $5,729.07, apparently applying the statutory contingency formula to the total indemnity benefits and medical expenses recovered and then subtracting the agreed upon indemnity-related fees of $357.37 to arrive at the sum of $5,729.07.

The employer and insurer requested review, and the matter was therefore submitted to the Office of Administrative Hearings, where a compensation judge decided the matter without a hearing, pursuant to the parties' waiver of their right to a hearing. The compensation judge found that the indemnity-related contingency fees of $357.57 were inadequate to reasonably compensate the employee's attorney, that there was a genuine dispute involving the proposed MRI and the proposed surgery recommended by Dr. LaPrade, and that the employee's attorney was entitled to fees based upon a percentage of the medical expenses recovered for the MRI, surgery, and related medical expenses. 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). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by

evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. 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).

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

The employer and insurer claim that the compensation judge erred by awarding attorney fees based upon the medical expenses for the employee's second knee surgery, arguing that attorney fees should be based solely on the expenses related to the disputed MRI.

Adequacy of Contingency Fees Paid

The employer and insurer first argue that the compensation judge erred by not considering all the factors formerly contained in Minn. Stat. § 176.081, subd. 5(d) (repealed 1995), but later cited as guidelines in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 142, 59 W.C.D. 319, 336 (Minn. 1999), to determine whether the contingency fees of $357.57 were adequate to compensate the employee's attorney. In 1995, Minn. Stat. § 176.081 was amended to provide that an attorney representing an employee in a claim for payment of medical expenses is entitled to fees based upon application of the 25/20 contingency fee formula for the dollar value of the medical benefits awarded. The amended statute reads, in part, as follows:

> 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 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. 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).

> 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 and 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.

Minn. Stat. § 176.081, subd. 1(a)(1) (1995).

Under the 1995 amendments, the contingent fee for the recovery of indemnity benefits is presumed to be adequate to compensate the attorney for the recovery of medical or rehabilitation benefits or services. A Roraff-type fee may be assessed against the employer and insurer only if the attorney establishes "the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute." Minn. Stat. § 176.081, subd. 1(a)(1). The current statute provides no criteria for determining whether the contingent fee on indemnity benefits is "inadequate to reasonably compensate" the employee's attorney. However, the supreme court cited to the previous statutory criteria in Irwin, stating that factors to be considered in determining a reasonable attorney fee are:

> the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulties of the issues, the nature of the proof involved, and the results obtained.

Irwin, 599 N.W.2d at 142, 59 W.C.D. at 336 (these factors are to be used in determining a reasonable attorney fee without considering the maximum limits found unconstitutional in that case and were also considered by this court in determining whether the contingent fee was inadequate to reasonably compensate the employee's attorney).

In this case the compensation judge determined that "the contingent fee of $357.57 is clearly inadequate to compensate the employee's attorney for his time spent representing the employee on medical issues. The amount does not adequately cover fees based on the most reasonable hourly rate of $150.00." (Memo. at 8.) The $357.57 in contingency fees were based upon $1,430.28, paid as a compromise of indemnity benefits. At the time of the settlement, the parties agreed to this contingency fee, but did not agree to a particular additional amount for Roraff-type fees related to the employee's attorney's representation of the employee for recovery of medical expenses.

Taking into consideration these contingency fees of $357.57, plus the initially claimed Roraff-type fees of $600.00, or a contingency fee calculated solely on the MRI scan expenses as alternatively argued by the employer and insurer (25% of $951.62 which calculates to $237.91), it appears that the employee's attorney could be entitled to a minimum of $595.48 or $957.57 in attorney fees. In view of the discrepancy between $357.57 paid and the potentially

higher fees, it was reasonable for the compensation judge to conclude, as a threshold decision, that the $357.57 awarded in contingency fees were inadequate to compensate the employee's attorney for representation on both indemnity and medical issues. Therefore, we affirm the compensation judge's finding that the contingency fees awarded in the amount of $357.57 were inadequate to compensate the employee's attorney.

Attorney Fees Based on Surgery Expenses

The employer and insurer also argue that the proposed surgery was not a genuinely disputed claim, and therefore that attorney fees should not be based on charges for the surgery. Minn. Stat. § 176.081, subd. 1(c), specifies that fees are to be based solely on genuinely disputed claims, and provides in part:

> Allowable fees under this chapter shall be based solely upon genuinely disputed claims or portions of claims . . . . The existence of a dispute is dependent upon a disagreement after the employer or insurer has had adequate time and information to take a position on liability. Neither the holding of a hearing nor the filing of an application for a hearing alone may determine the existence of a dispute.

The employer and insurer argue that the request for the proposed surgery did not rise to the level of a "dispute" and that the surgery was never "awarded." The employee argues that the employer and insurer's denial of Dr. LaPrade's preauthorization request created a dispute.

The compensation judge found that a genuine dispute existed regarding the employee's entitlement to the surgery recommended by Dr. LaPrade, based on three factors or concerns: (1) the insurance administrator's responsive letter to Dr. LaPrade, dated August 27; (2) subsequent actions of the employer and insurance administrator following the employee's request for certification and medical request; and (3) the scheduling of an independent medical examination.

First, the compensation judge found that a genuine dispute existed as early as August 27, 1997, when the insurer's administrator sent a responsive letter to Dr. LaPrade, denying the proposed surgery and MRI, even though the insurer scheduled an independent medical examination and indicated that upon receipt of the independent examination, "the request for another MRI and surgery will be reevaluated." The compensation judge stated

> The insurer's administrator's August 27, 1997 response to Dr. LaPrade indicates the existence of a genuine dispute between the parties at a time when the insurer had *"adequate time and information to take a position on liability."* [See Minn. Stat. § 176.081, subd. 1(c).] As the Department of Labor and Industry

> thereafter, on September 19, 1997, certified there was a dispute and that it had tried to resolve it, the Compensation Judge finds that the dispute involved both the surgical procedures requested by Dr. LaPrade and the MRI requested by Dr. LaPrade.

(Finding No. 27; emphasis in original.) The compensation judge also stated that

> [T]he specific facts of this case indicate that the insurer's administrator took a position on liability after considering Dr. LaPrade's request for preapproval of surgery and a third MRI....While it is true that the administrator indicated the position would be reevaluated after the receipt of the IME, that does not change the fact that she created a genuine dispute between the parties regarding entitlement to surgery by her denial of the proposed surgery.

(Memo. at 7.)

The compensation judge expressed concern that "[w]hen the employee filed a request for certification of dispute, the employer and insurer did not indicate that it would not contest the surgery," and that when the employee filed a medical request, "the employer and insurer expanded the issues to contest an alleged change of physicians, in addition to contesting the proposed surgery."[1] In addition, the compensation judge also concluded that the employer and insurer's scheduled independent medical examination indicated that a dispute existed. The compensation judge's memorandum states:

> Finally, as commonly understood by the workers' compensation bar, an insurer obtains an IME only when there is a dispute. Otherwise, there is no need to obtain an IME to attempt to obtain support for a denial that has already been made.

(Memo. at 7.)

We are not necessarily convinced by the compensation judge's reasoning on this point; we note that the employer and insurer have a statutory right to an independent medical examination for non-emergency surgical request. Minn. Stat. § 176.135, subd. 1a, provides in part:

[1] As noted by the compensation judge, the employee never filed a request to change treating physicians in his medical request. The employer and insurer first raised this additional defense of an unauthorized change of physicians in their medical response.

> Except in cases of emergency surgery, the employer or insurer may require the employee to obtain a second opinion on the necessity of the surgery, at the expense of the employer, before the employee undergoes surgery.

In addition, Minn. Stat. § 176.081, subd. 1(c), provides that attorney fees are based "solely upon genuinely disputed claims or portions of claims" after the employer or insurer has had "adequate time or information to take a position on liability." Further, the treatment parameters require the employer and insurer to respond to a request for preauthorization within seven days of the request, and allow the employer and insurer to request a medical examination. Minn. R. 5221.6050, subp. 9C.

The employer and insurer timely responded to a request for preauthorization, and expeditiously exercised its right to schedule an independent medical examination. Nevertheless, the evidence in the record supports the compensation judge's finding that a dispute existed concerning the surgery. Even though the compensation judge cited the insurance administrator's denial letter of August 27, 1997 and the request for an IME as indicia of a dispute, he also listed other factors in determining that a dispute had been created, such as the nature of the insurer's denial of the preauthorization request on August 27, 1997, the language used in denying the request, the amount of time that had passed between the request and the final approval of surgery, that the matter had been certified as a medical dispute by the Department of Labor and Industry, and the expansion of issues outlined in the employer's medical response. In view of the circumstances of this particular case, substantial evidence supports the compensation judge's finding that a medical dispute was created regarding the employee's proposed surgery. Accordingly, we affirm the compensation judge's award of contingency fees based on the cost of both the surgery and related MRI.

The employer and insurer also argue that the compensation judge committed an error of law in ordering payment of attorney's fees based upon benefits which were not "awarded." However, the compensation judge specifically ordered fees payable based upon medical expenses "recovered" as a result of the employee's attorney's representation. Even though the surgery-related medical expenses were not technically "awarded," those particular medical expenses were disputed and were ultimately paid. We therefore find no distinction between the terms "awarded" and "recovered" in this fact situation. We do, however, note that the attorney fees are to be calculated on the amount of medical expenses payable pursuant to the commissioner's medical fee schedule. See Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 143, 59 W.C.D. 319, 336 (Minn. 1999).