

GLORIA CARREON, Employee, v. SWIFT & CO., SELF-INSURED/CONAGRA, Employer,
and MN DEP'T OF LABOR & INDUS. and U.S. BENEFIT & RISK MGMT., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS

APRIL 7, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - CONTINGENT FEES; STAUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 9. The requirements of Minn. Stat. § 176.081, subd. 9, that "no fee shall be awarded pursuant to this section in the absence of a signed retainer agreement" may be satisfied even if the retainer agreement has been lost. Where the employee's attorney testified to the existence of the signed retainer agreement and there was other evidence of its existence and the employee did not testify that she had not signed a retainer agreement, the compensation judge's finding of an agreement and award of attorney fees was supported by substantial evidence.

Affirmed.

Determined by Wheeler, J., Wilson, C.J., and Johnson, J.
Compensation Judge: Danny P. Kelly

OPINION

STEVEN D. WHEELER, Judge

The employee's second attorney, Catherine R. Caitlin, appeals from the compensation judge's decision to split the attorney fees paid in the case equally between attorney Caitlin and the employee's first attorney, Debra J. Heisick. We affirm.

BACKGROUND

The employee, Gloria L. Carreon, was injured on several occasions while employed by Swift & Company, the self-insured employer. In August of 1995 she was in contact with attorney Debra J. Heisick. Attorney Heisick testified that on August 24, 1997, she sent a retainer agreement to the employee. (T. 10.) She also testified that she would not have commenced work for the employee without a signed agreement. (T. 20.) Attorney Heisick filed a Notice of Appearance of Attorney with the Department of Labor and Industry [DOLI] on April 15, 1996, which was signed by the employee, stating that "I have engaged the services of Debra J. Heisick . . . to represent my interests . . ." A retainer agreement was not attached to that notice. Attorney Heisick stated that her office "did not make a practice of serving retainer agreements, simply the notice of appearance." Attorney Heisick filed a medical request on the employee's behalf on September 10, 1997, which proceeded to an administrative conference. The employee prevailed

at the conference, and Heisick was awarded \$500 in Roraff attorney fees,¹ which were paid by the self-insured employer. Heisick filed a second medical request on March 25, 1998, and a claim petition on July 28, 1998. The employee's deposition was taken on July 17, 1998, and was attended by attorney Heisick. On July 28, 1998, attorney Heisick wrote to counsel for the employer, making a demand for settlement of \$55,000, leaving future medical expenses open. She also wrote to the employee and explained the strengths and weaknesses of her claim and suggesting that a settlement of approximately one-half the demand would be an amount the employee "would do well to consider." She worked on the employee's case from August 23, 1995, through September 3, 1998, at which time she left her private law practice and informed the employee that she would need to find another attorney to represent her. In her final letter, attorney Heisick indicated that because the employee was claiming the need for two-level fusion surgery, a claim which the self-insured employer was resisting, that the matter would likely require a hearing and would best be handled by obtaining a new attorney. She provided the employee with a list of attorneys who could carry on her case. (Heisick Exh. A.) Heisick's time records document that she provided 33.7 hours of legal services during the three years of representation.

On September 10, 1998, the employee signed a retainer agreement with Catherine Caitlin, to represent her regarding work-related injuries. (Caitlin Exh. 1.) Attorney Caitlin filed that retainer agreement with DOLI on September 23, 1998.

Attorney Heisick filed a notice of attorney lien on September 22, 1998, stating a potential claim, based on hours worked, of \$5,055.00 in attorney fees and \$263.54 in costs. On October 1, 1998, attorney Caitlin filed an objection to the attorney lien on behalf of the employee on the basis that attorney Heisick had "discharged the employee." She also objected to the amount of the lien.

Based on attorney Caitlin's time records, it appears that shortly after she assumed representation settlement negotiations were resumed and resulted in an agreement in principle in December 1998. (T. 9.) In that process, attorney Caitlin attended a mediation session, held conversations with her client and the self-insured employer's counsel and worked to clarify and settle possible intervenors' claims. Attorney Caitlin's office records were not introduced into evidence. At some point, it apparently was concluded that the need for low back fusion surgery, contemplated in August 1998, was not causally related to the injuries sustained by the employee while working for the employer. (T. 9.) In late February and early March of 1999, the stipulation for settlement was circulated and signed by the parties and intervenors. The stipulation for settlement extinguished the employee's claims on a full, final and complete basis, with the exception of future medical expenses related to her upper extremities and abdominal wound. The employee specifically released any claims for injuries to her low back and neck. (Para. XII.G.) Under the terms of the settlement, the employee was to receive, in part, a lump sum payment of \$21,263.84, from which \$4,452.77 was withheld in attorney fees "pending further Order determining the allocation of fees between Attorney Heisick and Attorney Caitlin." Paragraph VIII of the stipulation acknowledged that "the employee had a contingent fee arrangement with Attorney Debra J. Heisick" and that the "Employee now has a contingent fee arrangement with

¹ See Roraff v. State of Minn., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

Attorney Catherine R. Caitlin.” With respect to the “arrangement” with Ms. Caitlin the stipulation stated that it provided that she shall receive the percentage fees provided in Minn. Stat. § 176.081 (25/20 formula). This paragraph further provided that “the Employee and the self-insured Employer waive any objection to the claim for attorney fees in the amount of \$4,452.77 and agree the claimed fee is reasonable and in accordance with the Workers’ Compensation Law.” This paragraph also stated that “Attorney Heisick and Attorney Caitlin have not agreed to an allocation of fees.” In Paragraph XII.C., the stipulation provided “the self-insured employer has withheld \$4,452.77 as and for attorney fees, pending further order determining the allocation of fees between Attorney Heisick and Attorney Caitlin.” The self-insured employer agreed to pay Caitlin \$280.00 in costs. An award on stipulation was filed on March 12, 1999.²

The issue of the proper allocation of the withheld attorney fees between the two attorneys proceeded to a hearing on September 7, 1999. Attorney Heisick testified that she had sent a retainer agreement to the employee on August 24, 1995, and that she would not have continued to work on the employee’s case if a signed retainer agreement had not been returned to her.³ She did not keep the employee’s file, having given the original to attorney Caitlin without retaining a copy. (T. 18.) She was unable to produce a signed retainer. She took the position that the signed retainer agreement could not be found and should be considered lost. (T. 24.) Attorney Heisick indicated that an equal allocation of the attorney fees would be appropriate.

Attorney Caitlin provided time records which indicated that in the several months she had the case she provided 37.5 hours of services to the employee, for a total fee, based on hours worked, of \$4,962.00. Initially she argued that she should receive all of the fee except for \$1,500.00, which could be paid to attorney Heisick. She stated to the compensation judge:

So I think an equitable way to split it would be look at the time devoted to the claim petition and the discovery and the deposition. Obviously, neither one of us is going to get fully reimbursed for our time, but if you look at that time, I think that’s fair, and then discount it to some extent because I am discounting mine as well.

(T. 9; emphasis added.) The compensation judge specifically asked attorney Caitlin if she was claiming entitlement to all the fees that had been withheld. She responded “No,” “what I am trying to say is the time she [Heisick] devoted to the claim petition, the discovery and the deposition, I think is fair time, and that amounts to about \$1,500.00.” Later, after attorney Heisick indicated that she could not produce a retainer agreement, attorney Caitlin took the position that attorney Heisick should not receive any portion of the attorney fees which had been set aside in the settlement. (T. 23.) While not so stated, implicit in this position is the conclusion that she should receive the entire fee. Attorney Caitlin never suggested that if attorney Heisick were ineligible to

² Most of the information contained in the background portion of this decision came from the judgment roll of the imaged division file.

³ Attorney Heisick also testified that she sent a second retainer agreement to the employee on January 1, 1996, after the employee identified an additional date of injury. (T. 19.)

receive a fee that consideration be given to returning the portion earned by attorney Heisick to the employee.

In findings and order filed on November 4, 1999, the compensation judge found that the stipulation for settlement “notes that the employee had a contingent attorney fee arrangement with Attorney Debra J. Heisick” The judge went on to find that Heisick and Caitlin had both assumed great responsibility in the representation of the employee, that both had expertise in the area of workers’ compensation law, that the issues of the case were of great difficulty and complexity, and that the attorney fees should be split on a 50/50 basis.⁴ Caitlin appeals.

STANDARD OF REVIEW

“[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

This is a case of first impression. The legal issue is whether an attorney who has provided services may receive a contingent fee when their retainer agreement has been lost or misplaced. Attorney Caitlin argues that attorney Heisick cannot recover attorney fees that she earned unless she produced the signed retainer agreement at the time of her claim. We disagree with this position. While production of the signed retainer agreement is obviously preferable, we believe that the statutory requirement may be met even though the document has been lost or destroyed. While Minn. Stat. §176.081, subd. 9, provides, in part, “[n]o fee shall be awarded pursuant to this section in the absence of a signed retainer agreement,” the existence of the agreement may be established by other evidence sufficient to satisfy a compensation judge. Here, one of the attorneys vying for a share of the fees withheld from the employee’s recovery was unable to produce a signed retainer agreement, contending that it had existed but had been lost. We interpret the compensation judge’s decision to be that he accepted attorney Heisick’s testimony. As a result, he implicitly found that the statute had been satisfied, excused the attorney’s inability to introduce the actual agreement and awarded her a share of the withheld fees.

The only remaining issue on appeal is whether there is substantial evidence to support the compensation judge’s finding that the employee agreed to pay Ms. Heisick a contingent fee pursuant to a signed retainer agreement and that such finding is not clearly erroneous. We believe there is substantial evidence in the record to support the compensation judge’s decision, specifically:

⁴ The compensation judge included the \$500.00 in attorney fees that Heisick had already been awarded in calculating a 50/50 split. Heisick was therefore awarded \$1,976.38 and Caitlin was awarded \$2,476.38 from the withheld amount of \$4,452.77.

(1) The testimony of attorney Heisick that “there was a signed retainer agreement. Again, this is a file that I handed over. I don’t know where that retainer agreement went . . . I don’t think there is any dispute here but that one was signed and I proceeded according to the signed retainer agreement on this matter, and if it’s lost, it is lost.” (T. 23.)

(2) The Notice of Appearance filed on January 16, 1996 by attorney Heisick was signed by the employee. It specifically acknowledges that the employee had “engaged the services of Debra J. Heisick . . . to represent my interests in the above-entitled matter.” (Judgment Roll.)

(3) The settlement agreement specifically characterized the signed retainer agreement with Ms. Caitlin as a “contingent fee arrangement,” the same phrase used in the settlement agreement to describe the relationship between the employee and attorney Heisick. (Judgment Roll, Para. VIII.) The compensation judge was free to infer that both the employee and attorney Caitlin acknowledged, by signing the stipulation, that the employee had the same “arrangement” with attorney Heisick that she did with attorney Caitlin.

(4) The terms of the settlement agreement signed by the employee and attorney Caitlin contemplate that the fee would be split between the two attorneys - - not that one would receive the entire fee.

(5) The employee never testified at the attorney fee hearing to deny that she signed a retainer agreement.

Based on this evidence, the compensation judge was reasonable in finding it was more likely than not that the employee had signed a retainer agreement with attorney Heisick sufficient to satisfy the requirements of Minn. Stat. § 176.081, subd. 9. We therefore affirm the compensation judge’s allocation of attorney fees.^{5 6}

⁵ In her notice of appeal, attorney Caitlin appealed from the judge’s findings as to the reasonable value of attorney Heisick’s services, but the issue was not briefed. An issue raised but not briefed is deemed waived. Minn. R. 9800.0900, subp. 2.

⁶ The issue presented in this case could have been avoided if attorney Heisick had attached a copy of the retainer agreement to the Notice of Appearance filed with DOLI as required by Minn. R. 1415.0800, subp. 1A.