TIMOTHY L. CLARK, Employee/Appellant, v. DICK'S SANITATION and AM. COMP. INS. CO./RTW, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 16, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - EXCESS FEES; STATUTES CONSTRUED - MINN. STAT. § 176.081, SUBD. 1(b)(1995). The absolute cap on attorney fees over $13,000.00 per injury is unconstitutional pursuant to Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). The compensation judge's denial of the employee's attorney's petition for fees in excess of $13,0000.00 is reversed, and the case remanded to the compensation judge for determination of a reasonable fee taking into account the statutory guidelines and the Irwin seven factor test.

Reversed and remanded.

Determined by: Johnson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's denial of his claim for Roraff [1] attorney fees. We reverse and remand for further consideration.

BACKGROUND

On January 3, 1997, Timothy L. Clark, the employee, sustained a personal injury to his neck and shoulder which arose out of and in the course of his employment with Dick's Sanitation, the employer, insured by American Compensation Insurance Company/RTW, Inc. The employee was then earning a weekly wage of $936.50. The employer and insurer initially denied liability for the employee's personal injury. On April 7, 1997, the employee retained Catherine R. Caitlin to represent him. (T. 54.) At some point, the employer and insurer admitted liability and paid certain wage loss and medical benefits.

The employee later filed a claim petition alleging an underpayment of temporary total and temporary partial disability benefits and seeking payment of penalties under Minn. Stat. § 176.225, permanent partial disability benefits and medical expenses. The case was ultimately settled and the employee agreed to accept $74,000.00 in full, final and complete settlement of any and all claims for workers' compensation benefits except non-chiropractic medical expenses

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

reasonably necessary to cure and relieve the employee from the effects of the work injury. The employee paid attorney fees to Catherine Caitlin in the sum of $13,000.00. An Award on Stipulation was filed on April 14, 1998.

Following his injury, the employee received conservative, non-surgical care but his symptoms did not resolve. An MRI scan on March 18, 1997 showed C5-6 and C6-7 disc herniations with probable compression of the left C6 and right C7 nerve roots. An EMG confirmed a C7 radiculopathy. The employee underwent an anterior fusion at C6-7 with discectomy and foraminotomy on July 3, 1997. Thereafter, the employee's symptoms initially resolved but then reappeared. An MRI scan on December 11, 1997 suggested the cervical fusion was not solid. The employee continued to suffer neck pain, headaches and numbness in his right arm. An EMG demonstrated chronic radiculopathy of the right C7 myotome. Dr. Richard Gregory of Neurosurgery Associates, Ltd. examined the employee on July 24, 1998 and recommended a repeat MRI scan or CT/myelogram to evaluate the employee's condition and determine a treatment plan. (F&O Jan. 29, 1999: findings 2, 3, 4.)

In August 1998, the employee filed a Medical Request seeking payment of a $63.00 charge by Dr. Gregory and payment for the cervical MRI scan recommended by Dr. Gregory. (Pet. Ex. F.) The employer and insurer filed a Medical Response asserting Dr. Gregory's treatment and the MRI scan were not reasonable or necessary medical expenses. By Decision and Order filed October 15, 1998, a representative of the Commissioner of the Department of Labor and Industry concluded Dr. Gregory's charge was reasonable and necessary but the recommended MRI scan was not a reasonable or necessary medical expense. (Pet. Ex. H.) The employee filed a Request for Formal Hearing which came on for hearing before Judge Bradley J. Behr at the Office of Administrative Hearings. In a Findings and Order filed January 29, 1999, the compensation judge found a repeat MRI scan or CT/myelogram as recommended by Dr. Gregory was reasonable and necessary and ordered the employer and insurer to pay the costs for the study. There was no appeal from the judge's Findings and Order.

Thereafter, Ms. Caitlin filed a petition for Roraff attorney fees in the amount of $3,123.00 based on 19.3 attorney hours at $150.00 per hour and 5.6 paralegal hours at $60.00 per hour. (Pet. Ex. N.) The employer and insurer objected to the claimed fee. The case came on for hearing before Judge Behr. At the hearing, the employer and insurer stipulated the number of hours claimed by Ms. Caitlin and the hourly rate were reasonable. In a Findings and Order filed August 17, 1999, the compensation judge found Attorney Caitlin had been paid the statutory maximum fee of $13,000.00 for services rendered prior to April 9, 1998. The judge found Minn. Stat. § 176.081, subd. 1(b)[2] precluded payment of additional attorney fees for claims related to the employee's January 3, 1997 injury. Accordingly, the compensation judge denied the petition for Roraff attorney fees.

STANDARD OF REVIEW

[2] Minn. Stat. § 176.081, subd. 1(b) provides, "All fees for legal services related to the same injury are cumulative and may not exceed $13,000."

"[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

Constitutionality of Minn. Stat. § 176.081, subd. 1(b)

Contingent attorney fees in workers' compensation cases are governed by Minn. Stat. § 176.081, subd. 1. Prior to its amendment in 1992, the statute stated: "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 $27,500 of compensation awarded to the employee[3] is permissible and does not require approval by the commissioner, compensation judge or any other party except as provided in clause (b)."[4] Prior to the 1992 amendments to section 176.081, contingent fees were computed on a "per case" basis. Where successive claims were asserted by an employee for monetary benefits due to a single injury, the 25/20 formula was used to compute the contingency fee in each successive case. In 1992, § 176.081, subd. 1(b), was amended to limit all fees for legal services to $13,000.00 "per injury." Under the 1992 amendment, however, an employee's attorney could petition for what are commonly referred to as "excess fees" under § 176.081, subd. 2. The 1995 amendments eliminated the words "except as provided by subdivision 2" from subdivision 1(b) of the statute, and repealed the excess fee statute. The legislature also amended subdivision 1 to provide that $13,000.00 is the "maximum permissible fee" for all legal services related to the same injury. The 1995 amendments further require that retainer agreements contain language notifying the employee that the cumulative maximum fee is $13,000.00 for "fees related to the same injury" and that an employee "is under no legal or moral obligation to pay any fee for legal services in excess of the foregoing maximum fee."[5]

Minn. Stat. § 176.081, subd. 1(b) (1995) states that "all fees for legal services related to the same injury are cumulative and may not exceed $13,000." The plain language of the statute limits attorney fees which an employee may pay to a total of $13,000.00 for all cases arising out of the same injury. The employee here paid his attorney $13,000.00 in 1998 for legal services arising out of the January 3, 1997 injury. Thereafter, the employee again retained Ms. Caitlin to represent him to obtain payment of disputed medical expenses allegedly necessitated by the January 3, 1997 injury. Although the employee prevailed in that proceeding, Minn. Stat. § 176.081, subd. 1(b) prohibits payment of any additional fees to the employee's attorney. The

[3] For purposes of brevity, this will be referred to as the 25/20 formula.

[4] Minn. Stat. § 176.081, subd. 1(b) provided for a review of attorney fees upon objection of the employee or insurer. This review was based on the criteria set forth at Minn. Stat. § 176.081, subd. 5. This provision was repealed in 1992.

[5] See Minn. Stat. § 176.081, subd. 9.

employee contends this statutory limitation violates the separation of powers doctrine, the equal protection clause and due process clause of the Minnesota Constitution.

In Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), the supreme court addressed the issue of whether the legislature could constitutionally limit an award of Roraff fees to a 25/20 percentage of the medical bills awarded. The court stated the "legislature has been vested with wide discretion in making laws and determining issues of public policy, even when those issues involve establishing attorney fee guidelines. However, in order for the legislative guidelines to be constitutionally permissible, we must retain final authority over attorney fee determinations." Id. at 141, 59 W.C.D. at 333. The court went on to hold:

> Even as here, where there was a finding that the fees awarded were inadequate to reasonably compensate relators' attorney, the legislature has prohibited any deviation from the statutory maximum. Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers of Minn. Const. art. III, § 1. Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.

Id. at 141-42, 59 W.C.D. at 334.

The $13,000 per injury statutory limit on attorney fees is absolute. Where, as here, the employee previously paid $13,000.00 in attorney fees, Minn. Stat. § 176.081, subd. 1(b) (1995) bars payment of any attorney fee to the employee's attorney for her services in this case. Such a result clearly deprives the court of a final, independent review of attorney fees. Based on Irwin, we conclude the limit on attorney fees of $13,000.00 per injury established by Minn. Stat. § 176.081, subd. 1(b) is unconstitutional.

Computation of Attorney Fees

The employee's attorney was awarded $13,000.00 in contingent attorney fees in the April 1998 Award. Thereafter, the employee prevailed in a second proceeding obtaining payment of medical expenses. Ms. Caitlin now requests additional attorney fees to compensate her for the legal work required to obtain payment of the medical benefits. The employer and insurer object to the fee request and assert, Irwin notwithstanding, that the $13,000.00 attorney fee cap must still be considered. They contend any payment to the employee's attorney of fees greater than $13,000.00 requires a retroactive determination, on an hourly basis, of all fees earned by counsel

relative to the January 3, 1997 injury. The respondents argue the court must first compute, on an hourly basis, the fee earned by employee's counsel in the April 1998 settlement. If this hourly fee is less than the contingent fee actually paid, the respondents assert the excess constitutes an overpayment of fees or a "windfall" to the employee's attorney.[6] The employee's attorney is entitled to no additional attorney fees in this case, the respondents argue, until the total fees, computed on an hourly basis, exceed $13,000.00. We reject this argument.

An employee's attorney claiming attorney fees must file a statement of attorney fees, itemizing the total hours spent on the case. Minn. Stat. § 176.081, subd. 1(d). The statute's purpose in requiring such a filing in the context of contingent attorney fees is less than clear. Minn. Stat. § 176.081, subd. 1(a) provides that a fee for legal services under the 25/20 formula is permissible and does not require approval by the commissioner, a compensation judge or any other party. Assuming a valid retainer agreement,[7] contingent fees up to $13,000.00 are payable without regard to the amount of time the employee's attorney devotes to the case. This statute governs the fee award under the April 1998 Award. That Ms. Caitlin now seeks fees in excess of the $13,000.00 contingency fee previously awarded does not mandate a re-calculation of the contingency fee awarded under the April 1998 Award on Stipulation. The respondents' position would require Ms. Caitlin to represent the employee without charge until the "windfall" fees have been used up. Such a result is contrary to the principles stated in Irwin and inconsistent with Minn. Stat. § 176.081, subd. 1(a).

Reasonable Attorney Fee

The compensation judge concluded the employee's fee petition must be denied because Minn. Stat. § 176.081, subd. 1(b) precluded an award of attorney fees in excess of the $13,000.00 previously paid in the April 14, 1998 Award. Accordingly, the compensation judge did not determine what constituted a reasonable attorney fee in this case. We therefore remand the case to the compensation judge to determine a reasonable attorney fee considering the statutory guidelines and the seven-factor Irwin test.[8] The compensation judge may, in his discretion, take additional evidence.

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[6] The employee's attorney prepared an exhibit documenting the time spent on the employee's case from April 7, 1997 through March 18, 1999. (Pet. Ex. N.) The employer and insurer compute the hourly fees earned by counsel through the date of the award on stipulation in April 1998 were $11,106.00. The attorney was paid $13,000.00 under the 25/20 formula. Accordingly, the respondents contend Ms. Caitlin received a "windfall of $1,894.00." (Resp. Brief, p. 6.)

[7] Contingent attorney fees are not payable without a signed retainer agreement. See Minn. Stat. § 176.081, subd. 9.

[8] In Irwin, the supreme court adopted the now repealed seven factors for determining a reasonable attorney fee previously set forth in Minn. Stat. § 176.081, subd. 5 which are:

The amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the expertise of counsel in the workers' compensation field, the difficulties of the issues involved, the nature of proof needed to be adduced and the results obtained. Id. at 139, 59 W.C.D. at 330.