SCOTT K. DALLY, Employee/Cross-Appellant, v. CONAGRA/PEAVY CO., SELF-INSURED/SEDGWICK CLAIMS MGMT., Employer-Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 18, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - IRWIN FEES. The compensation judge properly applied and considered the seven factors set forth in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). On the facts of this case, the compensation judge's award of Roraff-type attorney fees, pursuant to Irwin, was not unreasonable or clearly erroneous and must be affirmed.

ATTORNEY FEES - CERTIFICATION OF DISPUTE. The compensation judge properly found the department's certification procedure under Minn. Stat. § 176.081, subd. 1(c) did not apply or bar a claim for attorney fees, where the employee was represented by an attorney who filed a contemporaneous claim petition and a medical request.

Affirmed.

Determined by: Johnson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Jennifer Patterson

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer and the employee appeal from the compensation judge's award of $7,282.50 in hourly Roraff-type[1] attorney fees pursuant to Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). We affirm.

BACKGROUND

Scott K. Dally, the employee, sustained personal injuries on September 17, 1996 and June 5, 1998, while employed by the self-insured employer, ConAgra/Peavey Company. The employer admitted the employee sustained a permanent neck injury and a temporary low back injury as a result of the 1996 injury, and admitted a temporary aggravation of the neck as a result of the 1998 work injury. On August 12, 1998, the employee retained Darrell M. Hart, Esq. to represent him. On October 13, 1998, the employee, through his attorney, filed a claim petition and a medical request, alleging injuries to his neck, right shoulder and right arm as a result of the 1996 and 1998 work injuries. The employee sought a change of treating physicians, a psychiatric evaluation, treatment for consequential depression, and an additional seven percent permanent

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

partial disability for the neck.[2] In its answer and medical response, the employer disputed the weekly wage alleged by the employee, refused the request to change physicians, denied liability for a right shoulder/arm injury, and denied liability for additional permanency to the neck. The employee later withdrew his request for a change of physicians. On March 16, 1999, the Department of Labor and Industry certified a medical dispute, listing entitlement to medical and psychological treatment recommended by Dr. Ormiston (the employee's treating neurologist), including physical therapy and MRI scans of the right shoulder and low back. The employee filed an amended claim petition on April 8, 1999, further alleging a permanent injury to the low back, and seeking payment of medical expenses and wage loss benefits, including temporary total disability benefits from December 31, 1998 to January 17, 1999 and intermittent temporary partial disability from and after September 17, 1996. The employer and insurer continued to dispute weekly wage, and denied any causal connection between the employee's alleged disabilities, need for medical treatment and the work injuries.

The case was heard by a compensation judge at the Office of Administrative Hearings on August 27 and September 3, 1999. Disputed issues at the time of hearing included: (1) whether the employee's 1996 injury caused permanent injuries to his right arm and low back; (2) whether the employee developed reflex sympathetic dystrophy (RSD) of the right arm as a consequence of his 1996 or 1998 work injuries; (3) whether the employee sustained a permanent aggravation of his 1996 neck injury and an injury to the right arm as a result of the 1998 injury; (4) whether the employee developed a consequential emotional injury (depression) as a result of one or both work injuries; (5) whether the employee reached maximum medical improvement for the orthopedic neck, low back and right arm conditions, and his claimed emotional and neurologic injuries; (6) whether the employee sustained an additional seven percent permanent partial disability to the neck; (7) whether the employee was entitled to temporary partial disability benefits from and after August 13, 1998 or whether the employer rebutted the presumption that his post-injury earnings established a loss of earning capacity; (8) whether the employee was entitled to temporary total disability benefits from December 31, 1998 to January 17, 1999; (9) whether the employee needed MRI scans of his right shoulder and low back as a result of his work injuries; (10) whether the employee needed treatment recommended by Dr. Ormiston for RSD as a result of his work injuries; and (11) whether the employee needed the psychiatric evaluation performed by Dr. Chua as a result of his work injuries. At the start of the hearing, the parties stipulated to average weekly wage, and stipulated that, to the extent the employee prevailed in proving he needed the disputed health care to cure or relieve from the effects of his work injuries, the employer would pay for the care awarded, subject to the fee schedule. (11/1/99 Findings & Order: Statement of Issues 1-11; Findings 2a, 2j.)

In a Findings and Order served and filed November 1, 1999, the compensation judge found for the employee on all of the causation issues relating to the claimed injuries, but denied the employee's claim for additional permanent partial disability and denied his claim for temporary partial disability benefits. The judge ordered the employer to pay the temporary total disability benefits claimed, to pay for medical treatment related to the employee's neck, headaches,

[2] The employer and insurer had previously paid permanent partial disability of 13.5 percent for the neck as a result of the September 17, 1996 injury.

right shoulder, low back, depression, and symptoms caused by his shoulder/hand syndrome or RSD, and specifically awarded payment of the psychiatric evaluation of Dr. Chua and the tests and medical care recommended by Dr. Ormiston, including physical therapy and MRI scans of the employee's right shoulder and low back. The employer was further ordered to withhold contingent attorney fees from the temporary total disability due the employee and to pay partial reimbursement of attorney fees to the employee pursuant to Minn. Stat. § 176.081, subd. 7. Neither party appealed the November 1, 1999 Findings and Order.

On December 8, 1999, Mr. Hart filed a Statement of Attorney Fees, requesting Roraff fees of $14,565.00, pursuant to Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). Mr. Hart's fee petition itemized 82.8 hours of attorney time and 28.6 hours of paralegal time spent on the employee's case between September 1, 1998 and November 2, 1999. The employee was compensated for 2.8 weeks of temporary total disability benefits resulting in a contingent fee of $410.27. The attorney fee request was heard by a compensation judge at the Office of Administrative Hearings on January 18, 2000. In a Findings and Order served and filed February 17, 2000, the compensation judge found the contingent fee of $410.27 was inadequate to compensate Mr. Hart for his representation of the employee, and found Roraff fees were appropriate. The judge further found the issues were intertwined and that specific allocation could not be made of the attorney and paralegal hours attributable to the medical issues on which the employee prevailed versus the indemnity claims which were denied. The compensation judge found the medical and indemnity issues were of equal importance in the case, and found a reasonable attorney fee would be one-half the amount claimed, or $7,282.50. Both the self-insured employer and the employee 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 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).

DECISION

Attorney fees for the recovery of medical benefits may be assessed against an employer and insurer if the employee's attorney establishes that the contingent fee on indemnity benefits "is inadequate to reasonably compensate the attorney for representing the employee in the medical . . . dispute." Minn. Stat. § 176.081, subd. 1(a)(1). In Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), the supreme court held the statutory limit of a

25/20 contingent fee on the medical benefits awarded was unconstitutional. The court, accordingly, remanded the case to this court for an award of "reasonable attorney fees," taking into consideration the statutory guidelines, 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 335-36. To decide whether a contingent fee is inadequate, the compensation judge must determine what would constitute a reasonable fee given the facts peculiar to the case, and compare it to the amount of the contingent fee awarded. Thus, both the inadequacy of the contingent fee and the reasonableness of the fee requested require the same analysis, applying the Irwin factors. Irwin v. Surdyk's Liquor (II), 60 W.C.D. 150 (W.C.C.A. 2000) (decision on remand).

In this case, the compensation judge found the contingent fee of $410.27, based on the award of temporary total disability benefits, was inadequate to reasonably compensate the employee's attorney. The self-insured employer does not dispute this finding. The judge further analyzed the claim in light of the Irwin factors, concluding that $7,282.50 would be a reasonable fee for Mr. Hart's representation of the employee in the medical dispute. Both parties appeal.

Future Medical Benefits; Medical Benefits Awarded

The crux of the self-insured employer's appeal is its contention that the compensation judge improperly awarded attorney fees based on the employee's right to claim future medical benefits. (See Finding 10(f).) Citing Irwin, the employer asserts that an award of attorney fees may not be based on any unlitigated liability for possible future medical treatment and expenses, but must be limited to the dollar value of the medical expenses actually awarded. We disagree.

In Irwin, the employee's attorney claimed entitlement to payment of ongoing contingent attorney fees under Minn. Stat. § 176.081, subd. 1(a). That claim to fees was based on the theory that by proving primary liability for a work injury, the employer and insurer were liable for contingent attorney fees on any future medical benefits awarded. This court denied contingent fees payable on future, as yet unawarded, medical expenses, holding that, unlike an award of ongoing weekly indemnity benefits, entitlement to future medical expenses was speculative and uncertain. Irwin v. Surdyk's Liquor (I), 59 W.C.D. 295, 304-05 (W.C.C.A. 1998). The supreme court agreed concluding an award of "additional" attorney fees based on speculative future medical benefits was inappropriate. Irwin, 599 N.W.2d at 143, 59 W.C.D. at 337-38.

Similarly, this court held that an award of *contingent* fees was specifically limited by the terms of the statute to the dollar value of the medical benefits awarded. Irwin I, 59 W.C.D. at 303-04, *affirmed* Irwin, 599 N.W.2d at 142-43, 59 W.C.D. at 336. The supreme court, however, while it did "not take issue with the . . . percentage . . . adopted by the legislature," held the prohibition of any deviation from the statutory contingent fee was unconstitutional. Thus, an employee's attorney may be entitled to a reasonable hourly fee, taking into account the seven Irwin factors. Irwin, 599 N.W.2d at 141-42.

In this case, there was no claim for or award of contingent fees on future medical benefits. Rather, the employee's attorney was awarded Roraff attorney fees, payable by the employer and insurer, based solely on time actually expended in the current litigation. In analyzing the results obtained, one of the required Irwin factors, the judge properly observed that the employee's attorney achieved a good result for his client by establishing liability for a second permanent injury to the neck, headaches, a right shoulder injury, a low back injury, RSD, and an emotional injury. As a consequence of proving primary liability for these conditions, the employee established the right to receive payment of reasonable and necessary medical expenses for treatment of these conditions in the future. We reject the self-insured employer's argument that a compensation judge may not consider establishment of liability for potential future medical treatment in analyzing the results achieved.

Reasonableness of Fee

The self-insured employer contends the award of $7,282.50 in attorney fees was unreasonable and should be reduced, asserting the employee lost or withdrew the majority of his claims and the only medical benefit actually awarded was limited to two MRI scans for the right shoulder and low back.[3] We are not persuaded. Although the self-insured employer accepted primary liability for the employee's 1996 and 1998 work injuries, the extent of the employee's injuries was disputed. Of primary importance in this litigation was the employee's claim of a permanent aggravation to his neck in 1998, a right shoulder injury, a low back injury, RSD or shoulder/hand syndrome and a consequential emotional injury. The compensation judge listed eleven contested issues in her November 1, 1999 Findings and Order. The judge found for the employee on all but two of these issues. The judge specifically noted in her February 17, 2000 Findings and Order and memorandum that the employee had prevailed on all of the complex medical liability and causation issues in the case. (Findings 8, 9, 10(a), 10(c), 10(e); mem. at 7-8.) Recovery of the medical expenses claimed by the employee was dependent upon proof of liability for the disputed conditions. In such cases, the time and effort expended in establishing liability is directly related to the recovery of medical expenses and is properly included in considering a reasonable amount of attorney fees. See, e.g., Peterson v. Everything Clean, Inc., 55 W.C.D. 126 (W.C.C.A. 1996); Hruby v. Signature Flight Support, 52 W.C.D. 191 (W.C.C.A. 1994); Becker v. Lund Boat Co., slip op. (W.C.C.A. Jan. 22, 1998); Coffey v. Carleton College, slip op. (W.C.C.A., May 6, 1997).

The employee's attorney asserts that since all issues in the case were interrelated, and all the issues ultimately hinged on proof of primary liability, the issues could not have been handled in a segregated matter. The employee, accordingly, argues that he should have been awarded the full $14,565.00 claimed in his attorney fee petition, based on all the hours expended on the employee's claim. We do not agree. To award less than the amount claimed, the employee's theory would require the compensation judge to dissect the time spent by the employee's attorney,

[3] In fact, the compensation judge awarded payment of the psychiatric evaluation of Dr. Chua and payment for the tests and medical care recommended by Dr. Ormiston, including physical therapy and the MRI scans of the right shoulder and back. (1/11/99 Findings & Order: findings 21, 23, 29; orders 9, 10.)

detailing which hours she accepted, which she didn't, and the reasons for her acceptance or rejection of specific hours claimed. In this case, this would be an impossible task. The determination of the amount of attorney fees is not based on a simple mathematical calculation. Rather, this court must give some deference to the compensation judge who tried the case to determine a reasonable award of attorney fees. Peterson, 55 W.C.D. at 132-33.

As noted by the compensation judge, payment of medical expenses was only one of the employee's claims. A significant portion of time was also necessarily expended on the permanent partial disability and temporary partial disability issues. In a well-reasoned and thorough decision, the compensation judge reviewed the issues and evidence presented in the case. The judge also carefully reviewed the attorney's fee claim, and specifically addressed each of the Irwin factors. She concluded the medical issues, on which the employee prevailed, and the permanent partial and temporary partial disability issues, which he lost, were of equal importance to the parties, and should be given equal weight in determining attorney fees. The judge, accordingly, awarded one-half of the attorney fees claimed, or $7,282.50. The determination of a reasonable fee is largely within the discretion of the compensation judge. Compare, e.g., Chinander v. Carl Bolander & Sons, 49 W.C.D. 251 (W.C.C.A. 1993); Everist v. Special School Dist. No. 1, slip op. (W.C.C.A., Nov. 23, 1992). On the facts of this case, we cannot say that the compensation judge's award of attorney fees was unreasonable or clearly erroneous, and we, therefore, affirm.

Certification of Dispute

Finally, the self-insured employer contends that, pursuant to Minn. Stat. § 176.081, subd. 1(c), time spent by the employee's attorney between December 30, 1998 and March 15, 1999 is not compensable because the department did not certify a medical dispute until March 16, 1999. Minn. Stat. § 176.081, subd. 1(c) provides in pertinent part:

> *Except* where the employee is represented by an attorney in other litigation pending at the department or at the office of administrative hearings, a fee may not be charged . . . for services with respect to a medical . . . issue arising under section 176.102, 176.135, or 176.136 performed before the employee has consulted with the department and the department certifies that there is a dispute and that it has tried to resolve the dispute. (Emphasis added.)

The employee retained Mr. Hart on August 12, 1998 to represent him with respect to workers' compensation claims against the employer. On October 13, 1998, Mr. Hart filed both a claim petition and a medical request at the Department of Labor and Industry. In his claim petition, the employee alleged injuries to his neck, right shoulder and right arm and sought additional permanent partial disability benefits. The compensation judge properly found the employee was "represented by an attorney in other litigation pending at the department" and that the department's certification procedure did not apply and did not bar a claim for attorney fees in this case. See, e.g., Cole v. Krueger Constr., 59 W.C.D. 562, 568-69 (W.C.C.A. 1999).

Affirmed.