GRANT W. DEJOODE, Employee, v. ALL-PLY ROOFING, UNINSURED, Employer, and WITT MILLER, INC., and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants, and NORTH MEM'L HEALTH CARE and MN DEP'T OF HUM. SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 6, 2000

No. [REDACTED SSN]

HEADNOTES

PENALTIES - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's award of penalties under Minn. Stat.§ 176.225, subds. 1(b) and 1(e) and subd. 5, where the contractor who subcontracted with the uninsured employer, and its insurer maintained a denial of liability from the time they were properly joined in the proceeding until the date of hearing, over one year later, without offering any viable liability defense.

ATTORNEY FEES - SUBD. 7 FEES. The compensation judge properly awarded subdivision 7 fees on permanency benefits where the insurer filed a denial of liability and the employee's attorney successfully obtained payment of permanent partial disability benefits by agreement of the insurer on the day of hearing.

Affirmed.

Determined by: Johnson, J., Pederson, J., and Rykken, J.
Compensation Judge: Peggy A. Brenden

OPINION

THOMAS L. JOHNSON, Judge

Witt Miller, Inc., and its insurer, State Fund Mutual Insurance Company, appeal from the compensation judge's award of penalties pursuant to Minn. Stat. § 176.225, subds. 1(b) and 1(e) and subd. 5, and from the compensation judge's award of subdivision 7 fees on permanent partial disability benefits. We affirm.

BACKGROUND

Grant W. DeJoode, the employee, worked as a roofer for All-Ply Roofing, the employer. On June 3, 1997, while working on the roof of a new Walgreens store in Brooklyn Center, the employee missed a rung on a ladder and fell, fracturing his left ankle. A First Report of Injury was received at the Department of Labor and Industry, Special Compensation Fund, on June 12, 1997. The Fund concluded All-Ply was uninsured for workers' compensation purposes on the date of injury. On June 30, 1997, the Fund prepared and served a Primary Liability Determination denying liability pursuant to Minn. Stat. § 176.215, asserting Witt Miller, Inc., insured for workers' compensation purposes by State Fund Mutual Insurance Company, had

subcontracted with All-Ply on the Walgreens roofing job.[1] The notice was served on the employee, Witt Miller, State Fund Mutual and Ancon, Inc., the general contractor on the construction project.

The employee obtained an attorney, and on July 9, 1997, filed a Claim Petition naming All-Ply Roofing and Farm Bureau Insurance as defendants,[2] alleging a weekly wage of $750.00 and seeking temporary total disability benefits and rehabilitation assistance. During this same time, State Fund Mutual conducted an investigation, concluded that All-Ply was uninsured, and on July 17, 1997 completed a Notice of Insurer's Primary Liability Determination accepting liability for the employee's claim. A check was issued to the employee for $1,920.00 representing temporary total disability from June 4 to July 15, 1997, at a compensation rate of $320.00. Shortly thereafter, State Fund Mutual discovered the employee had received some payments from All-Ply following the injury. An amended notice was filed on July 24, 1997, again accepting liability, but alleging the employee was receiving "[f]ull wage continuation by the employer." The check issued to the employee was voided.

On about August 5, 1997, the employee's attorney contacted Tami Carlson, the State Fund Mutual claims representative assigned to the employee's claim. He advised Ms. Carlson that All-Ply appeared to have workers' compensation coverage with the Minnesota Assigned Risk Plan, administered by Berkley Administrators, and that he would be filing a Claim Petition against All-Ply and MARP/Berkley seeking payment of workers' compensation benefits from them. A copy of the employee's new claim petition was subsequently mailed to State Fund Mutual.

MARP/Berkley denied coverage of All-Ply on the date of injury, and on November 17, 1997, moved for a determination of coverage pursuant to Minn. R. 5220.2605. An evidentiary hearing was held before Compensation Judge Brendan on March 24, 1998. In a Findings and Order, served and filed March 25, 1998, the judge found All-Ply Roofing was uninsured at the time of the employee's injury. MARP/Berkley was dismissed as a party, and the judge ordered the employee to amend his pleadings to join the Special Compensation Fund.

The employee filed an amended claim petition, in accordance with the order, on March 30, 1998. On April 8, 1998, the Special Compensation Fund filed an answer along with a petition seeking joinder of Witt Miller and State Fund Mutual. The Fund alleged Witt Miller had subcontracted with the uninsured employer, All-Ply, to do the roofing on the Brooklyn Center

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[1] Minn. Stat. § 176.215, subd. 1, provides in pertinent part:

> Where a subcontractor fails to comply with this chapter, the general contractor, or intermediate contractor, or subcontractor is liable for payment of all compensation due an employee of a subsequent subcontractor who is engaged in work upon the subject matter of the contract.

[2] The First Report of Injury faxed to the Department of Labor and Industry on June 12, 1997, showed Farm Bureau as the source of the fax, although Farm Bureau was not listed as the insurer.

Walgreens store, and again denied liability under Minn. Stat. § 176.215. Attached to the petition were copies of the June 12, 1997 first report of injury, the June 30, 1997 primary liability determination of the Fund, insurance verification reports for Witt Miller, the employee's amended claim petition and attached medical records, and a copy of the March 25, 1998 Findings and Order. The petition was properly served on Witt Miller and State Fund Mutual.

Witt Miller and State Fund Mutual filed an Objection to Joinder on April 20, 1998. They acknowledged receipt of the petition for joinder and attachments, but denied Minn. Stat. § 176.215 applied to them, asserted that Oppidan Investments, the developer, and Ancon, Inc., the general contractor, were necessary parties, and denied any liability for workers' compensation benefits to the employee. An Order for Joinder was properly served and filed on October 1, 1998, joining Witt Miller and State Fund Mutual as parties to the proceeding.

On October 19, 1998, Witt Miller and State Fund Mutual filed a petition seeking joinder of Oppidan, Ancon and MARP/Berkley. Witt Miller and State Fund Mutual asserted they were not bound by the March 25, 1998 Findings and Order determining the uninsured status of All-Ply, again denied that Minn. Stat. § 176.215 was applicable, asserted a determination was necessary regarding the contractual relationships between Oppidan, Ancon, Witt Miller and All-Ply, and specifically denied primary liability for the benefits claimed by the employee. An Order for Joinder was issued on November 10, 1998, adding Oppidan, Ancon, and their insurers as parties.

On February 25, 1999, the Fund requested dismissal from the proceeding, attaching a copy of the subcontract agreement between Witt Miller and All-Ply for the roofing job at the Brooklyn Center Walgreens store. On March 15, 1999, Ancon moved for dismissal, stating Witt Miller had directly subcontracted with All-Ply, and as the first contractor in the "hierarchy" with insurance, Witt Miller and State Fund Mutual were liable under § 176.215. On March 17, 1999, Oppidan also moved for dismissal, asserting it was merely a conduit for the sale of the property and was neither a general contractor or subcontractor, and did not fall within § 176.215. Following a pretrial on April 19, 1999, the compensation judge issued an Order on April 21, 1999, dismissing all three parties.

Witt Miller and State Fund Mutual then filed a Petition for Temporary Order agreeing to pay certain temporary total and temporary partial disability benefits to the employee, along with medical expenses, provided the payments made "will not be taken as an admission of liability." A Temporary Order was served and filed April 28, 1999. State Fund Mutual issued a check for $7,983.39 on April 30, 1999, representing temporary total disability benefits and attorney fees, but made no further payments under the order.

Just prior to a hearing scheduled for May 4 and 5, 1999, the parties negotiated a settlement. Counsel for Witt Miller and State Fund Mutual was unable to obtain commitment from All-Ply to the settlement, and the case was re-set for hearing on November 30, 1999. At the hearing Witt Miller and State Fund Mutual stipulated that the employee had sustained a work-related injury to his left ankle on June 3, 1997; All-Ply Roofing was uninsured for workers' compensation

purposes at the time of the injury; and, pursuant to Minn. Stat. § 176.215, Witt Miller and State Fund Mutual assumed liability for the employee's injury. (Stips. 1, 3; T. 5-6.) Witt Miller and State Fund Mutual agreed to pay the employee's wage loss benefits,[3] certain future medical benefits, and permanent partial disability benefits of four percent. They further agreed to pay the intervention interests of the Minnesota Department of Human Services and North Memorial Health Care. The sole remaining issues for trial were the employee's claim for penalties, interest, and subdivision 7 fees. The compensation judge awarded subdivision 7 fees to the employee based on the benefits awarded, including wage loss benefits of $7,591.91, the Department of Human Services' intervention claim amounting to $2,443.00, permanent partial disability benefits of $3,000.00 and interest. The judge found Witt Miller and State Fund Mutual had failed to establish any colorable defenses to the employee's claims and had unreasonably and inexcusably failed to pay the employee's wage loss benefits when due. The judge, accordingly, awarded penalties of 30 percent under Minn. Stat. § 176.225, subds. 1(b) and 1(e), and 25 percent under Minn. Stat. § 176.225, subd. 5 on the temporary total and temporary partial disability benefits remaining due. Witt Miller and State Fund Mutual 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

Penalties

Under Minn. Stat. § 176.225, subd. 1, a penalty of up to 30 percent of the total compensation awarded "shall" be awarded where an employer or insurer has "(b) unreasonably . . . delayed payment; or . . . (e) frivolously denied a claim." In addition, pursuant to Minn. Stat. § 176.225, subd. 5, when an employer has inexcusably delayed payment, "the payments which are found to be delayed shall be increased by 25 percent." Generally, an award of penalties pursuant to Minn. Stat. § 176.225 rests within the sound discretion of the compensation judge. Borchert v. American Spirits Graphics, 58 W.C.D. 304, 312 (W.C.C.A. 1998).

[3] The parties agreed the employer and insurer were entitled to a "credit" of $900.00 for payments made by All-Ply to the employee in June 1997 plus the $7,983.39 paid under the Temporary Order, for a total of $8,883.31 in wage loss benefits previously paid.

In July 1997, after an initial investigation, the appellants concluded Witt Miller's subcontractor, All-Ply Roofing, was uninsured and liability was accepted for the employee's workers' compensation benefits under Minn. Stat. § 176.215. All-Ply asserted, however, that it had workers' compensation coverage through MARP/ Berkley. The employee's attorney, accordingly, filed a claim petition seeking benefits from the employer and MARP/Berkley. Following an evidentiary hearing, a compensation judge found All-Ply was, in fact, uninsured at the time of the employee's injury. MARP/Berkley was then dismissed from the proceeding, and the judge ordered the employee to amend his claim petition to join the Special Compensation Fund.

Ordinarily, when an employee is injured while working for an uninsured employer, the Special Compensation Fund is responsible for payment of workers' compensation benefits, except "[t]here shall be no payment from the special compensation fund if there is liability for the injury under the provisions of section 176.215." Minn. Stat. § 176.183, subd. 1. The Fund, therefore, properly moved to join the appellants as necessary parties to the proceeding. After issuance of the Order for Joinder on October 1, 1998, however, the appellants challenged the validity of the determination that All-Ply was uninsured, denied the applicability of § 176.215, and denied primary liability for the employee's claim. The appellants maintained a denial of liability until the day of hearing.

At the hearing, counsel for the appellants acknowledged that had the employee's attorney not initiated the action against All-Ply and MARP/Berkley, "payments would have been picked up and made in a timely fashion. . . . [T]here was no genuine dispute." (T. 17, 20.) The sole witness for the appellants, Tami Carlson, similarly testified at the hearing:

> Q. . . . Did you have any reason to believe in April of 1998 when the judge found no coverage on All-Ply Roofing that you didn't owe the benefits to my client?
> A. No, we never disputed that.
> Q. When we sued this case out against you for these benefits, did you have any reason to believe that you didn't owe these benefits to my client?
> A. No.
> Q. They've been owed all along.
> A. Correct.
> Q. And you understood that you owed them.
> A. Well, from the beginning it wasn't understood who owed them. We assumed we owed the benefits because we determined there wasn't insurance coverage.
> Q. Maybe I should make my question more clear. From the time that you [were] brought into this lawsuit, you understood that you owed these benefits?
> A. After the judge's order?
> Q. Yes.
> A. Yes.

Q. And yet, you didn't pay them, correct?
A. There aren't any payments to my knowledge, no.

(T. 60-61.) As noted by the compensation judge, the appellants failed to offer or demonstrate any basis for the alleged defenses to the employee's claims after the October 1, 1998 joinder. As the intermediate contractor or subcontractor who directly subcontracted with the uninsured employer for the roofing job on which the employee was injured, Witt Miller and State Fund Mutual were clearly responsible, under Minn. Stat. § 176.215, for payment of any workers' compensation benefits due the employee, regardless of whether other contractors or subcontractors on the project had any potential liability. See Trent v. Transport Corp. of America, 56 W.C.D. 207 (W.C.C.A. 1996); 1C Arthur Larson, The Law of Workmens' Compensation, § 49.14 (1991).

It is the employer and insurer's obligation to "commence payment of compensation [due] . . . without the necessity of any agreement or any order of the division." Minn. Stat. § 176.021. Witt Miller and State Fund Mutual, nonetheless, continued to deny liability from the time of joinder through the date of hearing - - a period of more than a year - - requiring the issuance of a decision ordering them to pay benefits for which they offered no viable liability defense. There is substantial evidence to support the compensation judge's findings and award of penalties in this matter, and we affirm.

Subdivision 7 Fees

Witt Miller and State Fund Mutual also appeal from the award of subdivision 7 attorney fees on the four percent permanent partial disability awarded to the employee, asserting that payment was voluntary, and that permanency was neither disputed nor clearly owed. Minn. Stat. § 176.081, subd. 7, states that,

> If the employer or insurer files a denial of liability . . . , and the injured person has employed an attorney at law, who successfully procures payment on behalf of the employee . . ., the compensation judge . . . shall award to the employee against the insurer . . . an amount equal to 30 percent of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of $250.00.

Here, the appellants disputed liability for any workers' compensation benefits from the time the Special Compensation Fund moved to join them to the proceeding until the day of the hearing. (See Mem. at 5.) The fact that the appellants "voluntarily" agreed to pay permanency benefits to the employee on the day of hearing does not make their previous denial of liability null or of no import or effect. Under the statute, when an employer or insurer files a denial of liability and the employee's attorney successfully obtains payment of benefits on behalf of the employee, the compensation judge "shall" order subdivision 7 fees against the insurer based on the benefits awarded. We, accordingly, affirm.