CRAIG L. FRISCH, Employee/Appellant, v. S & S CARPET DESIGNS and STATE FARM INS. CO., Employer-Insurer, and COMM'R, MN DEP'T OF LABOR & INDUS., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 1, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. Where the compensation judge failed to consider all of the seven factors articulated in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), when determining the reasonableness of the employee's attorney's claim for Roraff fees, the matter will be remanded to the compensation judge for a full reconsideration.

Remanded.

Determined *en banc*.
Compensation Judge: Janice M. Culnane

OPINION

STEVEN D. WHEELER, Judge

This matter is before the Workers' Compensation Court of Appeals [WCCA] "to review the compensation judge's determination of reasonable attorney fees." Frisch v. S & S Carpet Designs, 599 N.W.2d 132, 142, 59 W.C.D. 319, 336 (Minn. 1999). We remand the matter to the trial judge for consideration.

BACKGROUND

The employee sustained an admitted work injury on November 20, 1995, while employed by S & S Carpet Designs as an apprentice carpet layer. When injured, the employee was 18 years of age and had a weekly wage of $315.50. The employer and insurer voluntarily paid temporary total disability benefits to the employee from the date of injury through January 15, 1996. After that date, the employee moved to Hutchinson, Minnesota, where he was employed as an assistant manager-in-training in a retail athletic clothing store. His wages at this employer ranged from $5.25 an hour at the outset to $6.00 per hour in August 1996. After August 15, 1996, the employee was promoted to a job with his new employer in which his wages exceeded his pre-injury weekly wage.

After his injury, the employee sought medical attention from a number of chiropractors, including Dr. Joel Wulff of Brooklyn Park and Dr. Randy Anderson of Hutchinson. The employer and insurer voluntarily paid the employee's chiropractic bills until early 1996, when they began to challenge these expenses. Nevertheless, the employer and insurer paid the employee's medical expenses through August 5, 1996, when the employee was examined by

Dr. David Gottlieb, D.C., at the request of the employer and insurer. Dr. Gottlieb opined that no further chiropractic expenses need be incurred in the treatment of the employee's condition. Through the date of hearing, the unpaid bills submitted by Drs. Wulff and Anderson totaled $684.90. (Exs. G and H, from the 12/11/97 hearing.)

Sometime in the latter part of January or early February 1996, the employer contacted the employee and offered him an opportunity to return to work for the employer, apparently at no wage loss. The employee indicated that he had moved to Hutchinson, Minnesota, started a new job and was unwilling to accept the proffered position. As a result of the employee's refusal of the offer of employment, the employer and insurer refused to pay the employee temporary partial disability based on his wages as an assistant manager at the clothing store after January 15, 1996.

On March 1, 1996, the employee consulted with Attorney David C. Wulff. At the attorney's fee hearing, Mr. Wulff stated that one of the employee's primary concerns was protecting his need for ongoing medical and chiropractic treatment. (T. 47.) On January 17, 1997, the employee filed a claim petition in which he alleged a thoracic/lumbar strain/sprain, entitlement to temporary partial disability benefits from January 16, 1996, through August 15, 1996, permanent partial disability in the amount of 5% as impairment compensation and payment of medical expenses of Dr. Anderson and Dr. Wulff, plus mileage reimbursement.

The matter came on for hearing before Compensation Judge Janice M. Culnane on December 11, 1997. In her Findings and Order issued on February 5, 1998, Judge Culnane awarded temporary partial disability benefits for periods during 1996, payment of chiropractic expenses, subject to the limitations in the medical fee schedule, and reimbursement of contingent attorney fees pursuant to Minn. Stat. § 176.081, subd. 7. The compensation judge's decision failed to mention an award of contingency fees to be paid by the employee from the stream of temporary partial disability benefits, medical mileage reimbursement or statutory interest. The compensation judge denied the employee's claim for the 5% permanent partial disability rating. No appeal was taken from the compensation judge's findings and order.

On February 19, 1998, the employee's attorney filed a Statement of Attorney's Fees in which he sought payment of Roraff fees[1] from the employer and insurer in the amount of $6,108.84 and contingent fees of $401.16, to be paid as a percentage of the temporary partial disability benefits awarded, for a total fee of $6,510.00.[2] The employee's attorney claimed entitlement to costs of $387.32. The employer and insurer, on February 24, 1998, filed an

[1] See Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980). For the purposes of this decision, we adopt the generally accepted practice of referring to fees paid by the employer and insurer to the employee's attorney for services rendered to assist the employee in obtaining payment of medical expenses as "Roraff fees."

[2] At the May 4, 1998 hearing, the parties stipulated that the actual total of temporary partial disability benefits awarded was $1,569.82, of which 25%, or $392.46, would be payable to the employee's attorney as contingent fees under Minn. Stat. § 176.081, subd. 1(a).

objection to the employee's attorney's Statement of Attorney's Fees. They maintained that if the employee was entitled to any Roraff fees that they should be limited to 25% of the value of the chiropractic services provided by Drs. Wulff and Anderson, as limited by the fee schedule.

The claim for attorney fees was heard by Compensation Judge Culnane on May 4, 1998. In her Findings and Order, served and filed July 2, 1998, she awarded a contingent fee of $392.46, representing 25% of the temporary partial disability wage loss benefits awarded to the employee and a Roraff fee of $179.48. The Roraff fee was equivalent to 25% of the sum of the actual payments made to Drs. Wulff and Anderson under the fee schedule and the employee's award for reimbursement for medical mileage expenses.[3] The compensation judge also awarded the employee's attorney his claim for costs in the amount of $387.32. The compensation judge found the claimed fees to be reasonable but reluctantly denied based on the restrictions contained in Minn. Stat. § 176.081, subd. 1(a) (1995).

The employee appealed from Compensation Judge Culnane's decision on July 10, 1998. This appeal was heard by the WCCA en banc, and in its decision of January 19, 1999, the compensation judge's decision was affirmed, with a slight modification with respect to interest. The employee's challenge to the constitutionality of Minn. Stat. § 176.081, subd. 1, was reserved for the supreme court. The court did not address the reasonableness of the requested attorney fees in excess of the statutory percentage formula. The employee appealed to the Minnesota Supreme Court on January 26, 1999.[4] In a decision filed December 2, 1999, the court held that, to the extent of Minn. Stat. § 176.081 "impinges on our inherit power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorneys fees," the statute is unconstitutional. Irwin at 142, 59 W.C.D. at 334. The court then remanded the case to the WCCA to review the compensation judge's determination of reasonable attorney fees. On November 8, 1999, the Commissioner of the Department of Labor and Industry moved to intervene. By order dated November 19, 1999, the motion was granted and the caption of the case was amended. The remanded case was heard by the WCCA en banc on April 19, 2000.

STANDARD OF REVIEW

In reviewing cases 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

[3] In this decision, the compensation judge awarded medical mileage expenses to the employee of $247.32, to correct an oversight from her findings of February 5, 1998.

[4] By order filed March 3, 1999, the supreme court consolidated the Frisch case with the case of Irwin v. Surdyk's Liquor, 59 W.C.D. 319 (W.C.C.A. 1999). On remand, the WCCA assigned each case for separate determination.

affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). 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." Id.

DECISION

The supreme court held Minn. Stat. § 176.081, subd. 1(a) (1995), is unconstitutional to the extent that it impinges on the inherent power of the court to oversee attorneys and attorney fees. The court then remanded the consolidated cases to the Workers' Compensation Court of Appeals, stating:

> The compensation judges made a finding of reasonable fees in both cases under consideration. However, because the WCCA in both cases determined that it had no authority to exceed the maximum amount allowed by the statute, the WCCA declined to address the reasonableness of the requested attorney fees. Those portions of section 176.081 that do not violate the doctrine of separation of powers remain valid. *See* Minn. Stat. § 176.651 (1998). Therefore, we remand to the WCCA to review the compensation judges' determination of reasonable attorney fees. In its review, the WCCA should not only consider the statutory guidelines, but also 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 at 142, 59 W.C.D. at 335-36. The compensation judge in this case found $6,510.00 was a reasonable fee for the employee's attorney. The sole issue on remand is whether there is adequate evidence in the record to support the compensation judge's conclusion as to the reasonableness of the fees that would have been awarded by the compensation judge but for the limitations of Minn. Stat. § 176.081, subd. 1.

In the case at hand, the attorney provided the compensation judge with a detailed statement of the services provided to the employee from the commencement of his representation on March 1, 1996, through the date of hearing. He indicated that he had spent 43.4 hours representing the employee and that his customary hourly rate of compensation was $150.00. The compensation judge determined that "[t]he amount of 43.4 hours is a reasonable amount of time for the services provided to the employee and an hourly rate of $150.00 is reasonable, given Attorney Wulff's experience and expertise." (Finding 5.) In her memorandum, the compensation judge also stated as follows:

> Attorney Wulff charges an hourly rate of $150.00 which is reasonable given his experience and expertise. A review of the time sheets provided, itemizing the specific records, was reviewed at a hearing held before the undersigned, on the issue of attorney's fees, on May 4, 1998. Given the Statement of Attorney's Fees and the explanation provided at the hearing, the services provided to the employee which total 43.4 hours, was certainly reasonable given the necessary steps which Attorney Wulff was obligated to perform in order to adequately assert the rights of his client, Craig L. Frisch, the employee in this matter. . . .

She specifically found that "[g]iven the services provided and the hourly rate charged by Attorney Wulff, $6,510.00 would be a reasonable attorney fee." (Finding 6.) In her memorandum she stated that she would have awarded $6,510.00 as a combination of contingency fees and Roraff fees but for the limitations found in Minn. Stat. § 176.081, subd. 1(a).

On review, the employee argues that adequate evidence was presented to the compensation judge at the attorney fee hearing to support the employee's claim for Roraff fees in excess of $6,000.00. The employee contends that the compensation judge applied all seven of the factors outlined by the supreme court in Irwin in making her decision. As a result, the employee argues that there is adequate evidence in the record to support the compensation judge's decision that he is entitled to a contingency fee in the amount of $392.46 and a Roraff fee of $6,117.54, for an aggregate total fee of $6,510.00, together with subdivision 7 fees to be awarded to the employee. The employer and insurer contend, based on the factors set forth in Irwin, that the compensation judge has made an inadequate review of the employee's attorney's request for attorney fees. They specifically point out that the compensation judge has failed to consider the amount involved in the medical dispute, the difficulties of the issues and the results obtained. We agree.

In cases involving a request for Roraff fees, the ultimate question is the reasonableness of fees. In making that determination, the compensation judge is required to explicitly analyze the fee request in light of the seven Irwin factors. These factors are as follows: (1) the amount of time involved; (2) the time and expense necessary to prepare for trial; (3) the responsibility assumed by counsel; (4) the experience of counsel; (5) the difficulties of the issues; (6) the nature of the proof involved; and (7) the results obtained.

Based on our reading of her findings and memorandum, it appears that the only factors which the compensation judge considered in making her decision were the amount of time spent by the employee's attorney and the experience of counsel.[5]

[5] We do not fault the compensation judge's failure to consider other factors because at the time she considered the matter no guidelines for making such a determination were known, since subdivision 5 of Minn. Stat. § 176.081 had been repealed and the supreme court's decision had not been issued.

On remand, the compensation judge is to also consider the other five Irwin factors in making a determination of a total fee which would have been reasonable to compensate the employee's attorney for representation of the employee in the matter through the trial on December 17, 1997.