CHRISTINE FRITZ, Employee/Appellant, v. TSUMURA INT'L and TRAVELERS INS. CO, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 6, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - GRUBER FEES. Where the employee's attorney had successfully defended the employee against a claim of fraud in 1995, where contingency fees were insufficient to reasonably compensate him for his work but he had not appealed from the compensation judge's assessment of hourly fees against the employee's future benefits instead of against the employer and insurer, and where legal grounds available to him for doing so in 1995 had been little different from the legal grounds later available to, and successfully argued by, the employee's attorney in Gruber v. Indep. Sch. Dist. #625, 57 W.C.D. 284 (W.C.C.A. 1997), the Workers' Compensation Court of Appeals would not in 1999 reverse the compensation judge's refusal to modify her 1995 attorney fees order after expiration of the statutory thirty-day period in which to appeal, although the court might have had jurisdiction to do so under Minn. Stat. § 176.081, subd. 3.

Affirmed.

Determined by Pederson, J., Johnson, J., and Rykken, J.
Compensation Judge: Nancy Olson

OPINION

WILLIAM R. PEDERSON, Judge

The employee's attorney appeals from the compensation judge's denial of attorney fees pursuant to Gruber v. Indep. Sch. Dist. #625, 57 W.C.D. 284 (W.C.C.A. 1997). We affirm.

BACKGROUND

In August of 1994, Tsumura International [the employer] and its insurer filed a Petition to Discontinue Compensation in this matter. On October 17, 1994, they amended that petition to allege that the recipient of the compensation, Christine Fritz [the employee], had obtained compensation by fraud and should be ordered to reimburse all benefits paid since June 28, 1994. Hearing was held on October 19, 1994, before Compensation Judge Nancy Olson. By Findings and Order filed November 9, 1994, Judge Olson granted the petition to discontinue, preserving the fraud issue for a later hearing since its allegation only two days prior to hearing had not permitted adequate time for defense. The fraud issue was heard on February 23, 1995. By Findings and Order filed March 24, 1995, Judge Olson denied the employer and insurer's claim for reimbursement of benefits based on fraud. In Order 3, Judge Olson indicated that "provided this decision is not appealed and [the employee's attorney] wishes to have an attorney lien for

services provided to obtain this decision, [the employee's attorney] should file a statement of attorney's fees indicating the attorney's fees he is claiming herein to the attention of this Compensation Judge."

On August 31, 1995, the employee's attorney filed a Statement of Attorney's Fee, alleging that he was entitled to $1,493.25 in hourly fees for successful work done in defeating the employer and insurer's claim that the employee committed fraud. On September 20, 1995, Judge Olson issued an Order Awarding Attorney Fees from Future Benefits, indicating that she found

> that it is fair and reasonable for the employee's attorney to have a lien for attorney fees against future benefits payable to the employee because, had the employer and insurer been successful in proving that the employee obtained benefits fraudulently, the employee's ability to obtain future benefits would have been severely compromised.

Based on that finding, the judge ordered

> that the employer and insurer shall pay to [the employee's attorney] the amount of $1,493.25 for attorney fees from any future benefits payable to the employee using the 25/20 formula contained in M.S. 176.081 if payable from weekly benefits or a full credit if payable from permanent partial disability paid as a lump sum.

There was no appeal from the September 20, 1995, order within thirty days after its service on the employee's attorney.

On April 25, 1996, the employee filed a Claim Petition alleging entitlement to temporary partial disability benefits continuing from September 19, 1995, and to compensation for a permanent partial disability to 2% of her whole body. The matter did not come on for hearing until May of 1997, and by Findings and Order filed August 7, 1997, Judge Olson denied the employee's claim in its entirety. On May 20, 1999, the employee's attorney filed a Statement of Attorney's Fee, alleging entitlement again to $1,493.25 in hourly attorney fees, to be paid now by the insurer pursuant to this court's decision in Gruber v. Indep. Sch. Dist. # 625, slip op. (W.C.C.A. Aug. 15, 1997). Gruber holds that the statute permits hourly fees to be assessed against an employer and insurer in cases where the attorney has successfully defended the employee against an allegation of fraud and where available contingency fees are insufficient to reasonably compensate the employee's attorney for his work. The employer and insurer objected.

The matter came on for hearing before Judge Olson on August 9, 1999. The employer and insurer contended at the hearing that the judge's September 20, 1995, Order Awarding Attorney Fees from Future Benefits was res judicata with regard to the issue before the judge. By Findings and Order on Attorney Fees filed August 12, 1999, the compensation judge concluded that the fees requested in the May 20, 1999, Statement of Attorney fees were in fact the

same fees as those resolved by the September 20, 1995, order and that therefore the issue was res judicata as contended by the employer and insurer. On those findings, the judge denied the employee's attorney's May 20, 1999, claim for fees and dismissed it with prejudice. In her Memorandum, the judge indicated that, had the $1,493.25 in fees requested and ordered in 1995 been requested subsequent to the 1997 Gruber decision, she would have awarded the fees against the employer and insurer instead of against the employee's future benefits. She concluded, however, that she did not believe that she had jurisdiction to modify her 1995 order now, after expiration of the statutory period for appeal, so as to assess the $1,493.25 in fees against the employer and insurer instead of against the employee. "The 1995 order was an unappealed final order," she stated; "[o]nly the Workers Compensation Court of Appeals has jurisdiction to vacate it." The employee's attorney 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 Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Minn. Stat. § 176.421, subd. 1, provides that an appeal of a party in interest from an order of a compensation judge must be filed within thirty days after its service on the party. The employee's attorney, the applicable party in interest in this case, did not file an appeal from Judge Olson's September 20, 1995, Order Awarding Attorney Fees from Future Benefits within thirty days, either on behalf of his client or on his own behalf. The statutory restriction on time to appeal is in most cases jurisdictional, precluding either a compensation judge or this court from reviewing a judge's order, except on a petition to vacate, once the statutory thirty-day period has expired. See, e.g., Porter v. Mercy Medical Ctr., slip op. (W.C.C.A. Feb. 14, 2000) (where the employer's Notice of Appeal was not filed within thirty days of the service and filing of the compensation judge's Findings and Order, the Workers' Compensation Court of Appeals lacked subject matter jurisdiction over the appeal, despite the fact that the notice of appeal had apparently been mislaid by the post office through no fault of the employer). In such cases, the decision that has not been appealed within the statutory period becomes res judicata. Without citing clearly the basis for his assertion, the employee's attorney contends that, "for a claim to be barred by this doctrine [of res judicata], the parties, the basis for the claim and the facts and **law** must be the same in the first hearing as they were in the second hearing" (emphasis in original). He contends that, in this case, although the parties, the facts, and the basis for the claim may remain the same, the law changed with the issuance of the Gruber decision. We are not persuaded.

This court has indicated, in Lambert Defiel v. Bauer Welding & Metal Fabrication, slip op. (W.C.C.A. June 22, 1998), that, notwithstanding the time restriction on appeals from other orders provided for in Minn. Stat. § 176.421, subd. 1, we are not convinced that a party may never obtain review of attorney fees orders after expiration of the normal appeal period, in light of

statutory language in Minn. Stat. § 176.081, subd. 3.[1] As was also our holding in Lambert, however, we will not in the present case exercise any potential authority to review the September 1995 attorney fees order at issue, given the employee's attorney's failure to timely appeal from it or to present any persuasive justification for that failure. Nor are we persuaded by the employee's attorney's argument that he was without legal basis or precedent for a timely appeal at the time the 1995 order was issued. The employee's attorney in Gruber opted in 1997 to file a timely appeal in similar circumstances without any clearer legal basis or precedent. This court was persuaded in that case that the statute permitted the requested assessment of fees against the employer and insurer instead of against the employee's potential benefits. We see no reason why the employee's attorney in this case could not have conceived of and asserted the same request in 1995. Had the employee's attorney in the present case appealed from his September 20, 1995, fees award as did the attorney in Gruber from his award, he may well have obtained the same result. His legal basis for appealing was little different from the legal basis available to, and successfully argued by, the employee's attorney in Gruber.

Having based our decision on principles other than the doctrine of res judicata, we needn't address the employee's attorney's argument that res judicata does not pertain in circumstances where the law has changed since the order at issue.[2] We affirm the compensation judge's refusal to assess against the employer and insurer the attorney fees that she had previously assessed against the employee's future benefits.

[1] Minn. Stat. § 176.081, subd. 3, provides, "The workers' compensation court of appeals shall have the authority to raise the issue of the attorney fees at any time upon its own motion and shall have continuing jurisdiction over attorney fees."

[2] Were we to address the argument, however, we would find merit in the employer and insurer's contention that the Gruber decision merely interpreted the applicable statute in effect at the time of the employee's attorney's service, which was the same statute as that that had been applicable in 1995; the decision did not actually modify applicable law.