

ANTHONY V. GERULLI, Employee/Appellant, v. USX CORP., SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS  
NOVEMBER 14, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - EDQUIST FEES. The compensation judge properly awarded Edquist attorney fees of 20 percent of the amount reimbursed to the intervenor. DeBreto v. U.S. Steel Corp. slip op. (W.C.C.A. May 9, 2000).

PENALTIES. The compensation judge properly denied penalties for assertion of a frivolous defense, where the opinion of the independent medical examiner unequivocally supported the self-insured employer's denial of the employee's claim of a work-related left inguinal hernia on the basis that the hernia was not causally related to his employment.

ATTORNEY FEES - RORAFF FEES. The compensation judge erred in denying Roraff attorney fees on the basis that the self-insured employer's refusal to pay medical expenses was based on its denial of primary liability rather than the reasonableness and necessity of the claimed medical expenses, and the matter is remanded for redetermination in accordance with Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999).

Affirmed in part and remanded in part.

Determined by: Johnson, J., Rykken, J., and Pederson, J.  
Compensation Judge: Donald C. Erickson

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's award of Edquist<sup>1</sup> fees and the judge's denial of a penalty and denial of an award of Roraff<sup>2</sup> fees. We affirm the award of Edquist fees and the denial of a penalty against the self-insured employer. We remand the case to the compensation judge for further findings on the issue of Roraff fees.

BACKGROUND

Anthony V. Gerulli, the employee, developed a right inguinal hernia in 1994 while working for USX Corporation, the employer. (T. 38-39.) The employee contended the hernia

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<sup>1</sup> Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986).

<sup>2</sup> Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

arose out of and in the course of his employment activities. The self-insured employer denied this allegation based, in part, upon a medical report of Dr. McClelland dated March 12, 1997 and a medical report of Dr. Fleeson dated April 29, 1997. The parties settled this claim and an award on stipulation was filed on July 21, 1997. (Judgment Roll.)

The employee was working for USX Corporation, then self-insured, on May 15, 1998. On that date, the employee was standing up, pulling a plug on a rougher feed box when he felt a pull or burning sensation in his left groin. The employee reported the incident to Warren Line, his supervisor. (T. 24-28.) Mr. Line prepared an Accident Report describing the injury as a "pulled groin." (Pet. Ex. D.) A First Report of Injury was prepared on May 29, 1998. (Pet. Ex. E.)

On May 18, 1998, the employee saw Dr. R.W. McBride at the employer's dispensary. The employee gave a history of pulling on a plug on a rougher feed box when he felt a pull in the left groin area. Dr. McBride diagnosed a left inguinal hernia and advised the employee to see his own physician. (T. 30; Pet. Ex. H.) The employee saw Dr. John M. Van Etta on May 20, 1998 complaining of pressure and discomfort after heavy lifting at work on May 15, 1998. On examination, Dr. Van Etta found evidence of an inguinal hernia and referred the employee to Dr. Richard Adams for a surgical repair. (Pet. Ex. G.) Dr. Adams also examined the employee on May 20, 1998, diagnosed a left inguinal hernia and recommended a surgical repair.

The employee spoke with Maureen Sadar, a staff supervisor in the employer's personnel department and asked that his hernia claim be processed under workers' compensation. The employee testified Ms. Sadar stated the employer was denying his injury was work-related because the employer denied all claims and some people would not fight it. (T. 30-31.) Ms. Sadar denied making this statement and testified she would review medical records and have discussions with her supervisor and the dispensary physician before determining whether a claim was work-related or nonoccupational. (T. 50-51.) On June 2, 1998, the employee signed an Agreement to Reimburse making him eligible for sickness and accident benefits. (Resp. Ex. 9.)

Surgery was performed on June 3, 1998, at St. Mary's Medical Center. Dr. Adams released the employee to return to work on July 6, 1998, with restrictions against all lifting, climbing and pulling. The doctor released the employee to return to work without restrictions as of July 15, 1998. (Pet. Ex. F.) The employee was off work from June 3 through July 15, 1998 following his hernia repair. The employee received sickness and accident benefits from the employer during that period of time in the amount of \$1,872.00.

On June 8, 1998, the self-insured employer filed a Notice of Primary Liability Determination denying primary liability for the claimed May 15, 1998 personal injury. Attached to the notice was the following statement:

The claimed hernia did not arise out of or within the scope of employment. The employee had been previously diagnosed with a right inguinal hernia. Given this history and the general medical

opinion that hernias develop because of inherent or constitutional tissue weakness, U.S. Steel denies liability for expenses or lost wages arising from claimant's left inguinal hernia repair.

(Resp. Ex. 4.)

On December 28, 1998, the employee filed a claim petition seeking payment of temporary total disability benefits from June 3 through July 15, 1998 and payment of outstanding medical bills and medical mileage.<sup>3</sup> In its answer, the employer denied the employee sustained a personal injury arising out of his employment. On April 23, 1999, Dr. Philemon C. Roy, Jr., at the request of the self-insured employer, reviewed the employee's medical records regarding the 1994 and 1998 hernias. The doctor described the employee's 1998 injury as a left indirect inguinal hernia. Dr. Roy stated a "high majority of hernias relate to weakness of the soft tissues when they are indirect inguinal hernias." The doctor found no evidence the employee's indirect inguinal hernia was of an acute nature or caused by his work activities on May 15, 1998. Thereafter, Dr. Roy reviewed a letter from counsel for the self-insured employer providing some factual background on the employee together with a description of his job duties on May 15, 1998. (Resp. Ex. 3.) By report dated February 18, 2000, Dr. Roy again opined the employee's 1994 and 1998 hernias were not work-related events. (Pet. Ex. 1.)

The employee's claim was heard by a compensation judge at the Office of Administrative Hearings on March 23, 2000. In a Findings and Order filed May 22, 2000, the compensation judge found the employee sustained a personal injury on May 15, 1998. The judge found the employee was totally disabled from June 3, 1998 through July 15, 1998 and awarded temporary total disability benefits. From this award of benefits, the compensation judge ordered the sickness and accident benefits received by the employee be reimbursed to the employer less Edquist attorney fees of 20 percent. The judge also ordered the self-insured employer to pay the unpaid portion of the bill of the Duluth Clinic, subject to the fee schedule and pay the employee \$148.20 for medical mileage. Finally, the compensation judge denied the employee's claim for penalties for a bad faith defense and denied the employee's claim for Roraff fees. The employee appeals the compensation judge's award of Edquist fees and the denial of penalties and Roraff fees.

#### 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). 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

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<sup>3</sup> Most of the employee's medical bills were paid by Blue Cross/Blue Shield which chose not to intervene in this proceeding. (T. 37.) The employee sought payment of a medical bill from the Duluth Clinic of \$66.67 (Pet. Ex. K) and medical mileage of \$148.20.

one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. 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

### Edquist Fees

The compensation judge found the employee was temporarily and totally disabled from June 3 through July 15, 1998, a period of seven weeks. During this period, the employer paid the employee sickness and accident benefits in the amount of \$1,872.00. From the temporary total disability benefits awarded the employee, the compensation judge ordered the employer be reimbursed for the sickness and accident benefits, less Edquist attorney fees of 20 percent. The employee appeals the 20 percent limitation on the award of Edquist fees.

Minn. Stat. § 176.081, subd. 1(a) provides for a "fee for legal services of 25 percent of the first \$4,000.00 of compensation awarded to the employee and 20 percent of the next \$60,000.00 of compensation awarded to the employee." Limiting Edquist fees solely to 20 percent, the employee contends, produces an unfair and illogical result. The employee requests the court of appeals deal with this inequity.

In DeBreto v. U.S. Steel Corp., slip op. (W.C.C.A. May 9, 2000), the compensation judge awarded Edquist fees based on the 25/20 formula set forth in Minn. Stat. § 176.081, subd. 1. This court reversed that decision and held that Edquist fees are limited to 20 percent of the amount reimbursed, stating:

In Edquist, the Minnesota Supreme Court reversed a decision of the Workers' Compensation Court of Appeals and reinstated the findings and determination of a compensation judge, who had ordered that 20% be deducted for fees to the employee's attorney from the amount to be reimbursed to an intervenor. That case contained no explanation for the supreme court's use of the 20% figure, rather than the 25/20 formula set forth in Minn. Stat. § 176.081, subd.1, or some other percentage. However, subsequent to Edquist, the supreme court has continued to use the 20% figure when determining fees to be paid out of reimbursement awarded to an intervenor. See Mann v. Unity Medical Ctr., 442 N.W.2d 291, 41 W.C.D. 1171 (Minn. 1989); Ransom v. Ford Motor Co., 472 N.W.2d 134, 45 W.C.D. 45 (Minn. 1991). Accordingly, we reverse the judge's award of "aliquot share of attorneys fees" and order that, from the award of reimbursement to the employer of

\$2,321.43 for sickness and accident benefits, 20% be deducted and paid to the employee's attorney as and for Edquist fees.

We see no reason to distinguish this case. The compensation judge's award of 20 percent Edquist attorney fees is, accordingly, affirmed.

### Penalties

Minn. Stat. § 176.225, subd. 1(a), provides for a penalty of up to 30 percent of compensation awarded where an employer or insurer has "instituted a proceeding or interposed a defense which does not present a real controversy but which is frivolous or for the purposes of delay." The compensation judge found that, although the self-insured employer's denial of primary liability had a "very suspect basis" in fact it had a "putative defense." (Findings 17, 29.) In his memorandum, the compensation judge commented that although the employer's denial "is very suspect because it did not address causation under the applicable law," penalties were not appropriate under the statute. The employee argues this conclusion is erroneous and unsupported by substantial evidence.

The employee contends the employer's Notice of Primary Liability Determination filed on June 8, 1998 justifies a penalty. He asserts the employer's stated reasons for denying liability were frivolous and without any basis in fact. That he had previously been diagnosed with a right inguinal hernia, the employee contends, is irrelevant to a determination of whether the work activities on May 15, 1998 caused a left inguinal hernia. Further, the notice contains no medical support for the employer's statement that it is "general medical opinion that hernias develop because of inherent or constitutional tissue weakness." These deficiencies, the employee contends, together with his testimony that the employer routinely denies all claims compel a conclusion that a penalty was appropriate. We are not persuaded.

In Hines v. Kobiela, 308 Minn. 20, 241 N.W.2d 814, 28 W.C.D. 400 (1976), the supreme court held that a penalty under Minn. Stat. § 176.225, subs. 1(a) and (c) may be imposed where "the reason for [the] neglect and refusal to pay compensation [is] patently ill-founded and unwarranted." However, the assertion of a defense is not frivolous where the question of legal causation is close enough to warrant review. See, Jolly v. Jesco, Inc., 283 Minn. 139, 166 N.W.2d 708, 24 W.C.D. 801 (1969). In general, a defense is frivolous when it is unsupported by any positive evidence. Jackson v. Eveleth Mines, 49 W.C.D. 591 (W.C.C.A. 1993). An award of penalties is not appropriate, however, where the employer and insurer interpose a good-faith defense. Heise v. Honeywell, Inc., 48 W.C.D. 523 (W.C.C.A. 1993). The fact that the employer and insurer do not ultimately prevail on their defense does not necessarily create a basis for the imposition of penalties. Greene v. Independent Sch. Dist. #202, 36 W.C.D. 601 (W.C.C.A. 1984). In his medical reports, Dr. Roy unequivocally opined the employee's left inguinal hernia was not caused by his work activities on May 15, 1998. These reports provide clear support for the employer and insurer's denial of primary liability. Accordingly, its defense was not frivolous within the meaning of Minn. Stat. § 176.225, subd. 1(a). The compensation judge's denial of a penalty is, therefore, affirmed.

## Roraff Fees

The compensation judge found the self-insured employer's refusal to pay the claimed medical expenses was based on its denial of primary liability rather than a denial of the reasonableness and necessity of the medical expenses. Accordingly, the judge concluded the employee's attorney was not entitled to Roraff fees. In support of this decision, the compensation cited Collyard v. Hennepin County Medical Ctr., 45 W.C.D. 13 (W.C.C.A. 1991). The employee appeals this determination, and seeks a remand to the compensation judge for further findings.

In Collyard, this court reversed an award of Roraff fees based upon the facts peculiar to that case. One of the bases for the court's reversal was that the employee's attorney was compensated by payment of a contingent fee from an award of temporary benefits and impairment compensation. The Collyard case does not stand for the proposition that Roraff fees are never appropriate when the only issue at the hearing is primary liability. In Peterson v. Everything Clean, Inc., 55 W.C.D. 126 (W.C.C.A. 1996), for example, this court affirmed an award of Roraff fees where the principle issue at hearing was whether the employee's injury arose out of and in the scope of her employment.<sup>4</sup> This court stated:

It makes no difference, under the circumstances of this case, that there was no issue of the reasonableness and necessity of the medical treatment or that the only issue in dispute was primary liability. The critical element was that the contingency fees were so low that but for the possibility of receiving Roraff fees, it would have been difficult for the employee to obtain assistance of counsel.

“Attorney fees for recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute.” Minn. Stat. § 176.081, subd. 1(a)(1). In deciding a request for Roraff fees, the compensation judge must consider 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 nature of the proof involved and the results obtained. Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999); see also Irwin v. Surdyk's Liquor (Irwin II) 60 W.C.D. 150 (W.C.C.A. 2000).

The employee's attorney received a contingent fee in this case. The compensation judge failed, however, to determine whether the contingency fee paid to the employee's attorney reasonably compensated him for his representation of the employee. The case is remanded to the compensation judge to make appropriate findings of fact on the employee's claim for Roraff fees.

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<sup>4</sup> See also Hruby v. Signature Flight Support, 52 W.C.D. 191 (W.C.C.A. 1994); Dally v. Con Agra/Peavy Co., slip op. (W.C.C.A. Oct. 18, 2000) (and cases cited therein).