JOHN IRWIN, Employee/Appellant, v. SURDYK'S LIQUOR and AMERICAN COMP. INS./RTW, INC., Employer-Insurer, and COMMISSIONER, DEP'T OF LABOR & INDUS., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 25, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. In a claim for Roraff fees, to determine whether a contingent fee is inadequate, the court 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. Both the inadequacy of the contingent fee and the reasonableness of the fee requested require the same analysis, applying the factors set forth in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). Applying the Irwin factors in this case, we affirm the compensation judge's determination that a reasonable fee is $5,550.00.

Affirmed.

Determined *en banc*.
Compensation Judge: Kathleen Nicol Behounek

OPINION

This matter is before the Workers' Compensation Court of Appeals (WCCA), en banc, "to review the compensation judges' determination of reasonable attorney fees." Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 142, 59 W.C.D. 319, 336 (Minn. 1999). We affirm.

BACKGROUND

John Irwin, the employee, was employed by Surdyk's Liquor, the employer, on September 13, 1996. The employer was then insured by American Compensation Insurance/RTW, Inc. The employee contended he was injured in a work-related motor vehicle accident on that date. The employer and insurer filed a Denial of Primary Liability on November 19, 1996. The employee then hired attorney David C. Wulff to represent him and signed a retainer agreement.

The employee filed a claim petition in January 1997 seeking payment of medical expenses for treatment with Dennis Koslowski, D.C., and at Healthworks Clinic. The claim petition was later amended to assert claims for permanent partial disability of the jaw and the cervical spine. In their Answer, the employer and insurer denied the claimed personal injury arose out of and in the course of employment and asserted any disability was personal to the employee and unrelated to his employment. The employer and insurer scheduled an independent medical evaluation with Dr. Charles Hall, and later deposed the employee. In July 1997, the parties

attended a settlement conference before a judge at the Department of Labor and Industry. The parties were unable to settle the case, and it was certified to the Office of Administrative Hearings.

The case was heard by Compensation Judge Behounek on December 17, 1997. At the hearing, the employer and insurer stipulated the September 13, 1996 motor vehicle accident arose out of and in the course of the employee's work activities with the employer. Remaining at issue was whether the employee sustained an injury to his cervical spine and jaw, the extent of any permanent partial disability and reimbursement of medical expenses. In a Findings and Order served and filed January 29, 1998, the compensation judge ordered the employer and insurer to pay certain medical expenses[1] and medical mileage of $15.12, and awarded an eight percent permanent partial disability for the employee's temporomandibular joint (TMJ) condition. The compensation judge denied the claim for permanent disability for the cervical spine. The court ordered the insurer to withhold attorney fees from the permanency awarded based on the 25/20 formula of Minn. Stat. § 176.081, subd. 1(a) and to pay the same to Attorney Wulff. The contingent fee was $1,400.00. No appeal was taken from the January 29, 1998 Findings and Order.

In February 1998, the employee's attorney filed a Statement of Attorney's Fees seeking payment of Roraff fees[2] on the medical benefits awarded by the compensation judge. The Statement of Attorney Fees included an itemization of the services rendered. Mr. Wulff asserted he spent 37 hours on the employee's case, and his hourly rate was $150.00. Mr. Wulff sought payment of the $1,400.00 contingent fee plus Roraff fees of $4,150.00 for a total fee of $5,550.00 (37 hours times $150/hr.). The employer and insurer filed an objection. The matter was heard by Judge Behounek on March 9, 1998. In a Findings and Order served and filed April 17, 1998, the compensation judge found the contingent fee of $1,400.00 was inadequate to reasonably compensate Mr. Wulff for representing the employee in the case, and that Mr. Wulff was entitled to Roraff fees. The judge further found the claim for $5,550.00 in attorney fees set forth in the fee petition was reasonable in light of the issues in the case. In accordance with Minn. Stat. § 176.081, subd. 1(a) (1995), however, the compensation judge awarded fees based solely on a percentage of the actual medical expenses and medical mileage paid by the employer and insurer.[3] The

[1] The employee treated with Dr. Hakala from February 17 through September 17, 1997. The claimed amount of the bill was $4,955.12. The compensation judge ordered the insurer to pay for this treatment, subject to the fee schedule. (Findings 12, 13 and Order 3, F&O Jan. 29, 1998.) The employee treated with Dr. Koslowski from November 5, 1996 through October 30, 1997. The claimed amount of the bill was $4,612.53. The compensation judge ordered the employer and insurer to pay for Dr. Koslowski's treatment from November 5, 1996 through May 12, 1997 and found the treatment thereafter not reasonable or necessary. (Finding 16 and Order 4, F&O Jan. 29, 1998.)

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

[3] The compensation judge made no finding of the actual dollar value of the medical expenses awarded and made no finding of the amount of Roraff fees awarded. The total claim for medical expenses was $9,582.77. In his Statement of Attorney's Fees, Mr. Wulff stated the medical expenses awarded were $8,414.94. The Roraff fee on this award would be $8,414.94 x

compensation judge also found the employee's attorney may be entitled to future Roraff fees, but that such a claim was premature. Finally, the compensation judge awarded attorney fees to the employee under Minn. Stat. § 176.081, subd. 7. The employee appealed the compensation judge's award of attorney's fees under Minn. Stat. § 176.081, subd. 1(a) (1995). The employer and insurer appealed the compensation judge's finding that $5,550.00 was a reasonable fee, the finding regarding future fees, and the award of attorney fees under subdivision 7.

The case was heard by the Workers' Compensation Court of Appeal en banc. In a decision filed December 21, 1998, this court affirmed the award of Roraff fees on medical benefits based solely on the percentage formula of Minn. Stat. § 176.081, subd. 1(a), and adopted the factors set forth in the now repealed Minn. Stat. § 176.081, subd. 5(d) as the standard for determining whether the contingent fee reasonably compensates an attorney for representing an employee in a medical or rehabilitation dispute. The employee's challenge to the constitutionality of Minn. Stat. § 176.081 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 court further held the percentage attorney fee must be calculated on the medical fee schedule amount rather than the amount billed by the medical provider. Finally, the court concluded the compensation judge erred in awarding to the employee 30 percent of all attorney fees paid under Minn. Stat. § 176.081, subd. 7.

The employee appealed to the Supreme Court.[4] In a decision filed September 2, 1999, the court held "the statutorily imposed limitation on attorney fees violates the doctrine of separation of powers insofar as it is not subject to review by a duly established court . . ." Irwin at 134, 59 W.C.D. at 320. The court further stated that to the extent Minn. Stat. § 176.081 "impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees" the statute is unconstitutional. Irwin, at 142, 59 W.C.D. at 334. The Supreme Court further held the Workers' Compensation Court of Appeals correctly determined that an award of attorney fees must be based on the dollar amount of the benefit awarded and held any award of attorney fees on future medical expenses was inappropriate. Finally, the court held subdivision 7 attorney fees are payable on all attorney fees payable pursuant to Minn. Stat. § 176.081. The court then remanded the case to the Workers' Compensation Court of Appeals 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 court en banc on April 19, 2000.

20%=$1,682.99. For the purpose of this opinion, we will assume the total fee awarded Mr. Wulff was the contingency fee of $1,400.00 plus a Roraff fee of $1,682.99 for a total fee of $3,082.99.

[4] By order filed March 30, 1999, the supreme court consolidated the Irwin case with the case of Frisch v. S&S Carpet Designs, 59 W.C.D. 311 (W.C.C.A. 1999). On remand, the Workers' Compensation Court of Appeals assigned each case for separate determination.

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 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

The Supreme Court held Minn. Stat. § 176.081 (1995) is unconstitutional to the extent 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 $5,550.00 was a reasonable fee. The sole issue on remand is the reasonableness of the fees awarded by the compensation judge.

Burden of Proof/Application of Statutory Requirements

The Commissioner contends that to give full effect to Minn. Stat. § 176.081 (1998) and the factors set out by the Supreme Court in Irwin, the WCCA must start with the statutory presumption that the statutorily established maximum contingency fee is reasonable in the ordinary case. When an attorney seeks fees in excess of the maximum, the Commissioner argues, the court must determine whether "the case is so extraordinary as to make the statutory maximums unreasonable." (Commissioner's Brief, p. 8.) The Commissioner cites Lennartson v. Fairway Foods, Inc., 310 N.W.2d 673, 674, 34 W.C.D. 191, 193 (Minn. 1981) in which the supreme court noted that "fees in excess of [the statutory maximum] are to be awarded only in extraordinary situations." The employee asserts the standard proposed by the Commissioner would impose a higher burden of proof than that expressed by the legislature or established by the supreme court. The plain language of the statute requires, the employee argues, rejection of the Commissioner's argument.

Minn. Stat. § 176.081, subd. 1(a)(1) provides, in part:

> The contingent attorney fee for recovery of monetary benefits according to the formula in this section[5] is presumed to be adequate to cover recovery of medical and rehabilitation benefit or services concurrently in dispute. 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.

The statutory requirements are clear. The contingent fee recovered on the monetary benefits must be presumed adequate. This presumption may, however, be rebutted. An attorney requesting fees in excess of the 25/20 statutory formula has the burden of proving the contingent fee is inadequate to reasonably compensate the attorney for representing the employee. The burden of proof required is "a preponderance of the evidence." Minn. Stat. § 176.021, subd. 1a. A requirement that an attorney requesting fees prove the case is "rare" or "extraordinary" adds nothing to the legal or factual analysis. In a claim for Roraff fees, to decide whether the contingent fee is inadequate, the court 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 factors set forth by the Supreme Court in Irwin at 142, 59 W.C.D. at 336.

Procedural Guidelines

The Commissioner sought intervention to "assist the Workers' Compensation Court of Appeals in clarifying the procedures for calculating and determining attorney fees in

[5] Minn. Stat. § 176.081, subd. 1(a) provides for fees of 25 percent of the first $4,000 of compensation awarded to the employee and 20 percent of the next $60,000 of compensation. This is the so-called 25/20 formula.

workers' compensation matters post-Irwin/Frisch." (Motion to Intervene.) The Commissioner asserts this court must evaluate whether "the attorney requesting excess fees has set forth a detailed explanation of why the presumptively reasonable statutory maximum should be exceeded and whether the compensation judge has first applied the statutory maximums, and then set forth sufficient findings of fact for each of the seven factors to support his or her determination that excess fees should be awarded." (Commissioner's Brief, p. 10.) The Commissioner further contends an attorney requesting excess fees must comply with Minn. R. 1415.3200, subp. 3 and/or Minn. R. 5220.2920, subp. 3.B. Finally, the Commissioner asks this court to establish a procedure giving the employee and the employer and insurer an opportunity to object to the requested attorney fees and to present their objections at a hearing.

The procedure governing requests for attorney fees in excess of the statutory maximum is not before the court in this case. The employer and insurer were afforded an evidentiary hearing on their objection to the attorney fee claim. The respondents do not contend their due process rights were in any way violated by the procedure followed in this case. We, therefore, decline to accept the Commissioner's request to establish procedural guidelines governing requests for attorney fees in excess of the statutory maximum. We do note, however, due process and basic fairness requires that both the employee and employer and insurer be served with a request or petition for attorney fees in excess of the statutory contingency fee, the employee or employer and insurer be given adequate time to file an objection to the requested attorney fee and that an objecting party be afforded an evidentiary hearing. "Basic fairness requires that the parties in a workers' compensation proceeding be afforded reasonable notice and an opportunity to be heard before decisions concerning entitlement to benefits can be made." Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 894, 40 W.C.D. 869, 872 (Minn. 1988). Whether or not an objection is filed by the employee or employer and insurer, the requesting party must prove, by a preponderance of the evidence, entitlement to the requested attorney fee. In all such cases, the compensation judge should make factual findings determining a reasonable fee in the case considering the presumptive statutory maximum and the Irwin factors.

Reasonable Attorney Fees

On remand, the Supreme Court directed this court to review the compensation judges' determination of reasonable attorney's fees considering "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 336. The compensation judge in this case awarded permanent partial disability benefits of $6,000.00 and medical benefits of $8,414.94. To recover these benefits, Mr. Wulff was required to establish the employee's injury arose out of his employment, prove the extent of permanent disability and prove the claimed medical expenses were reasonable and necessary to treat the employee's injury. Mr. Wulff documented 37 hours expended in representing the employee. Although the employer and insurer conceded at hearing that the employee's car accident arose out of his employment, Mr. Wulff still had to prepare to litigate that issue. The employer and insurer also contended the car accident caused no injury based on the delayed onset of symptoms. To prove a causal connection between the employee's car accident

and his neck and jaw symptoms, Mr. Wulff obtained the opinions of Dr. Hakala and Dennis Koslowski, D.C. Finally, expert testimony was necessary to prove the treatment of Dr. Hakala and Dr. Koslowski was reasonable and necessary to cure and relieve the effects of the work injury. The compensation judge could reasonably conclude the issues in the case were difficult and required complex medical testimony. Mr. Wulff, an experienced attorney in the workers' compensation field, obtained a good result for his client. The compensation judge's finding that a reasonable attorney fee is $5,550.00 is, accordingly, affirmed.