EDITH M. BEAM, Employee/Appellant, v. BEMIDJI MGMT., INC., and AM. FAMILY INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 3, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - EXCESS FEES. Substantial evidence supported the compensation judge's determination that $13,000.00 in fees was reasonable and that the employee's attorney was not entitled to excess attorney fees.

Affirmed.

Determined by Rykken, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: Danny P. Kelly

OPINION

The employee's attorney appeals the compensation judge's denial of excess attorney fees under Minn. Stat. § 176.081. We affirm.

BACKGROUND

On August 4, 1994, Edith Beam, the employee, sustained a personal injury to her low back and right leg while working for Bemidji Management, Inc., the employer, which was insured for workers' compensation liability by American Family Mutual Insurance Company, the insurer. On September 16, 1994, the employee retained Gary Hazelton, an attorney from the law firm of Cann, Haskell, D'Albani, Schueppert, Hazelton & Rodgers, to represent her for a workers' compensation claim, and signed a retainer agreement. A claim petition was filed November 21, 1996, alleging entitlement to temporary partial disability benefits. On November 22, 1996, a medical dispute was certified. The employee's claim petition was amended on February 3, 1997, to claim permanent total disability from and after November 15, 1996. A hearing was held on October 1, 1997, before Compensation Judge Bonnie Peterson. In a Findings and Order served and filed November 6, 1997, the compensation judge denied the employee's claim for temporary partial disability and permanent total disability benefits, and awarded economic recovery compensation and medical expenses. The employee's attorney, Mr. Hazelton, was awarded Roraff fees of $1,876.00 and contingent fees of $7,060.05, for a total of $8,936.05.

At some point, Mr. Hazelton and another attorney, Mr. Mark Rodgers, left the firm and started a new firm, Hazelton & Rodgers, P.C. They did not ask their clients to sign a new retainer at the time they started the new firm. On April 22, 1998, the employee signed another retainer agreement with Mr. Rodgers since Mr. Hazelton had decided to discontinue practicing workers' compensation law. The employee filed another claim petition on May 11, 1998, alleging

permanent total disability. The parties settled the employee's claims on a full, final and complete basis, and submitted a stipulation for settlement to the Office of Administrative Hearings. An award on stipulation was filed on September 14, 1999. The parties agreed that the employee was permanently and totally disabled, and the employee received lump sum payments totaling $100,000.00. The parties agreed that a lump sum payment of $20,000.00 would immediately be paid to the employee, with $4,200.00 in attorney fees deducted and paid to attorney Mark Rodgers. The parties also outlined an agreement that an additional lump sum payment of $80,000.00 would be issued so long as certain conditions applied.[1] From that lump sum of $80,000.00, an additional fee of $6,330.00 was to be paid to Attorney Rodgers, and a fee of $2,470.00 was to be withheld and paid to Attorney Rodgers only upon approval of an excess attorney fee petition. The employee's claims for medical expenses remain open under the stipulation.

On October 19, 1999, Mr. Rodgers filed a statement of attorney fees claiming excess fees of $7,060.00. The employee filed an objection to the attorney's claim for excess fees on January 31, 2000. A telephone hearing was held on May 8, 2000, before compensation judge Danny Kelly. The compensation judge denied the attorney's petition for excess fees, finding that the attorney did not file an exhibit showing the specific legal services performed, the date performed, and the time spent, and that the attorney had failed to establish entitlement to an excess fee. The compensation judge also found that an award of contingent fees in the amount of $4,063.95, together with the previously paid fees, would meet the limitation of $13,000.00, and was a reasonable attorney fee for the representation of the employee from April 22, 1998, through the award on stipulation on September 14, 1999. Since contingent fees of $4,200.00 already had been paid to the attorney after service and filing of the award on stipulation, the fees received by Mr. Hazelton and Mr. Rodgers totaled $13,136.05, exceeding the $13,000.00 limit under Minn. Stat. § 176.081 by $136.05. The compensation judge therefore ordered that the $2,470.00 in withheld attorney fees be released and paid to the employee, and that the employee's attorney, Mr. Rodgers, pay the employee $136.05 representing non-awarded excess fees. The employee's attorney appeals.

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[1] The procedure for paying the lump sum of $80,000 was delineated in the stipulation for settlement as follows:

> 2. The employee and insurer shall pay an additional lump sum of $80,000.00 so long as the following conditions, limitations and contingencies apply:
>
> a. Said payment will not be issued before December 24, 1999;
> b. Said payment will not be issued after December 31, 1999;
> c. The employee must be alive as of 12:01 a.m. on December 24, 1999.

(Judgment Roll.)

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 (1998). 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, "[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 employee's attorney argues that the compensation judge erred by denying the excess fee claim based upon his findings that the attorney failed to submit an exhibit showing the specific legal services performed, the date performed, and the time spent, without notifying the attorney that an itemized summary was not in the record and without allowing the attorney to supplement the record. The attorney argues that at the time of the hearing, he erroneously believed that an itemized summary of his billings was included with the fee petition. The attorney requests that the matter be remanded to the compensation judge for amendment of the record and reconsideration based upon the additional documentation.

The employee argues that the compensation judge based his decision upon the entire record and that the attorney had sufficient time to submit an itemized summary at the hearing.

Before fees in excess of $13,000.00 may be awarded, the compensation judge must determine what is a reasonable fee considering the statutory guidelines and the seven factors adopted in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). Clark v. Dick's Sanitation, slip op. (W.C.C.A. May 16, 2000) (holding that the $13,000.00 attorney fee limit under Minn. Stat. § 176.081, subd. 1(b) was unconstitutional). The determination of a reasonable fee is within the discretion of the compensation judge. Dally v. ConAgra, slip op. (W.C.C.A. Oct. 18, 2000). In Irwin, the supreme court adopted the seven factors for determining a reasonable attorney fee previously set forth in Minn. Stat. § 176.081, subd. 5, (repealed in 1995) which are:

> The amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the expertise of counsel in the workers' compensation field, the difficulties of the issues

involved, the nature of proof needed to be adduced and the results obtained.

Irwin, 599 N.W.2d at 139, 59 W.C.D. at 330.

The compensation judge questioned the attorney regarding these factors at the hearing. The attorney orally described the services provided, the hours worked, and his standard fee. The attorney has 18 years of experience in the workers' compensation field and estimates that approximately 80% of his practice is in workers' compensation. The attorney asserted that from April 1998 through March 2000, he spent approximately 80 hours on the matter. His hourly rate was $166.00 and his paralegal assistant's hourly rate was $83.00. The total amount claimed was $10,789.75.[2] In response to the compensation judge's questions at hearing, the attorney indicated that Mr. Hazelton also had spent 101 hours on the file, incurring a total fee of $12,689.00. By the time of the hearing, attorney fees in the amount of $8,936.05 had been paid to Attorney Hazelton. An additional $4,200.00 in fees had been deducted from the employee's settlement proceeds and paid to Mr. Rodgers. Additional fees were still withheld by the insurer.

The compensation judge also questioned the attorney about the nature and complexity of the employee's claims. The employee's initial claim was for permanent total disability benefits; that claim earlier was addressed at a hearing and was denied. There was an issue regarding an alleged potential intervening cause of the employee's disability; the employer and insurer alleged that the employee's weight and lack of weight control were superseding, intervening causes of her disability. The employer and insurer's vocational expert determined that the employee was capable of working forty hours per week at a sedentary level. The attorney testified that he obtained expert medical and vocational evidence on whether the employee was employable including medical evidence from the treating physician, another medical expert and a functional capacities evaluation conducted by a physical therapist. The attorney also described the time required and the extent of settlement negotiations necessary to ultimately settle the claim.

At the hearing, the employee presented her argument in explanation of her objection to the claimed excess fees. She argued that a fee of over $7,000.00 had already been paid to Mr. Rodgers's partner after an earlier hearing was held, that her file was already compiled for Mr. Rodgers, and that he had not needed to attend court appearances on her behalf. The employee also referred to the Special Compensation Fund, presumably referring to supplementary benefits, and argued that she and Mr. Rodgers had simply needed to wait until four years post-injury for the Special Compensation Fund to "kick in." She also argued that she performed much of the contacts and gathering of medical and rehabilitation records on her file, including contacting her QRC and doctors. The employee also argued that her attorneys (while at their former and current firm) had already received $13,000.00 in attorney's fees, and that she did not "see where they put in that much more time. I didn't have that many meetings with [Mr. Rodgers], I realized he was on the phone with - - with [counsel for the employer and insurer] and other people setting up things, but

[2] At the hearing, the attorney advised the compensation judge that his and his paralegal assistant's fees totaled $10,789.75 through March 2000, and that he had incurred some additional since then, but he verbally reduced his claim to $10,600.00.

I just don't - - I can't for the life of me think why it would run to $13,000.00 for what Mr. Rodgers has done for me."

(T. 28.)

In response, the employee's attorney argued that "As it ended up I did have to put in a lot of time and effort," that he tried to explain the complex law to his client, and that both he and Attorney Hazelton played an important role in reaching settlement of the employee's claim. He also argued that he asked the employee to obtain records directly as he has "a lot better luck with doctors and QRC's" if his client contacts them. (T. 31-32.)

The compensation judge considered the employee's and the attorney's arguments and the evidence they presented while determining that an award of contingent fees in the amount of $4,063.95, which in combination with the $8,936.05 already paid would meet the limitation of $13,000.00, was a reasonable attorney fee for the representation of the employee from April 22, 1998, through the award on stipulation on September 14, 1999. The compensation judge also found that an "excess fee of any amount would result in an unreasonable attorney fee to [the attorney] in representation of the employee from April 22, 1998 through September 14, 1999." Substantial evidence supports these findings.

The compensation judge found that the employee's attorney failed to submit an exhibit showing specific legal services performed, the date performed and the time spent, and that he failed to provide with specificity the number of hours spent in the employee's representation and the attorney's hourly fee. (Findings No. 23 and 24.) As a result, the compensation judge found that an award of $4,063.95, which would meet the limitation of $13,000.00, is "conclusively presumed reasonable." (Finding No. 25.) The compensation judge also found that the file contained "fully adequate information to justify the contingent fee of $4,063.95." (Finding No. 27.) While we do not agree that the lack of an itemization of hours results in a conclusive presumption that the statutory $13,000.00 fee is reasonable, we hold that in this particular case, the fee of $13,000.00 was reasonable, and that the compensation judge did not err by failing to notify the attorney of the lack of an itemized summary. It is an attorney's responsibility to present information in support of his claim for excess attorney fees. In this case, the attorney failed to submit such information to the compensation judge, for example an itemization of time spent on legal services, prior to or at the time of the hearing. It was therefore within the discretion of the compensation judge to determine that the attorney failed to establish entitlement to an excess fee. The compensation judge questioned the employee's attorney to obtain information evaluated under the Irwin factors, and also questioned the employee about her specific objections to the fee claim. The judge found the employee's various objections to the excess attorney fees claimed to be valid and well reasoned. The compensation judge had adequate evidence in the record to make his findings, and considered that evidence in view of the Irwin factors. The judge could reasonably conclude that the employee's attorney was not entitled to excess attorney fees under the circumstances of this case, and we affirm.