RILEY BRAFORD, Employee, v. U.S. PIPELINE, INC. and NAT'L UNION FIRE INS. CO./AIG CLAIM SERVS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 1, 2001

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - SERVICE; STATUTES CONSTRUED; JURISDICTION. Where there are unresolved factual issues regarding the insurer's receipt or nonreceipt of the employee's statement of attorney's fees, this court lacks jurisdiction to consider the merits of the case. The matter is therefore remanded to the compensation judge for a factual determination of whether the insurer received the statement of attorney's fees, for a determination of whether an allowance should be made under Minn. Stat. § 176.285 for delayed receipt or nonreceipt of the statement, and for continuation of the proceedings based upon those findings.

STATUTES CONSTRUED; JURISDICTION. Where there are unresolved factual issues regarding whether the rehabilitation and retraining benefits represented genuinely disputed claims, this court lacks jurisdiction to consider the merits of the case. The matter is therefore remanded to the compensation judge for a factual determination of whether the benefits received by the employee, and which form the basis for the claim for attorney fees, represented genuinely disputed claims as required by Minn. Stat. § 176.081, subd. 1(c) and Minn. R. 5220.2920, subp. 3(b).

ATTORNEY FEES. Where there are unresolved factual issues regarding whether the rehabilitation and retraining benefits represented genuinely disputed claims, the matter is remanded to the compensation judge for a factual determination of whether the benefits received by the employee, and which form the basis for the claim for attorney fees, represented genuinely disputed claims as required by Minn. Stat. § 176.081, subd. 1(c) and Minn. R. 5220.2920, subp. 3(b).

Vacated and remanded.

Determined by: Rykken, J., Pederson, J., and Johnson, J.
Compensation Judge: Jerome G. Arnold

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's Order Determining Attorney's Fees. We vacate and remand for a factual determination of whether there was a genuinely disputed claim and a certification of dispute filed for the rehabilitation issue as required by Minn. Stat.§ 176.081, subd. 1(c). We also remand for a factual determination of whether the

insurer received the statement of attorney's fees and whether an allowance should be made under Minn. Stat. § 176.285 for delayed receipt or nonreceipt of the statement.

BACKGROUND

On August 17, 1998, Riley J. Braford, the employee, sustained a work-related injury to his right knee while working for U.S. Pipeline Inc./AGRA, Inc., the employer, which was insured for workers' compensation liability by National Union Fire Insurance Company, the insurer. The employee was 45 years old at the time of his injury, and earned a weekly wage of approximately $928.00. Claims were administered by AIG Claim Services, Inc. The employer and insurer admitted liability and paid various workers' compensation benefits, including temporary total disability, medical benefits, and rehabilitation services. In November 1998, the employer and insurer referred the employee for a rehabilitation consultation, and the employee was found to be a qualified employee for rehabilitation services. On December 1, 1998, the employee underwent surgery on his right knee. The employee was released to work on January 25, 1999, but no light duty work was available with the employer. On March 13, 1999, Thomas R. Longfellow filed a Notice of Appearance of Attorney for Employee indicating his representation of the employee.

In May 1999, the employee's treating physician, Dr. Leo Hise, opined that the employee would need a total knee replacement sometime in the future. On July 26, 1999, Dr. Hise indicated that the employee had reached maximum medical improvement and was released to light-duty work with restrictions. Based upon this report, the employer and insurer filed a notice of intention to discontinue benefits (NOID) on August 10, 1999. The employee requested an administrative conference, which was held on September 13, 1999. The employee's attorney argued that the employee's knee had deteriorated since Dr. Hise's July 1999 report and that, since Dr. Hise had recommended total knee replacement, the employee was not at maximum medical improvement. The compensation judge postponed ruling until after the employee had seen Dr. Hise, and a reset administrative conference was set for November 4, 1999.

Rehabilitation services continued. The employee needed an unrestricted work release to return to work through his union, which was not likely to be issued, and therefore a vocational evaluation was recommended. The parties agreed that the QRC would explore retraining options for a heavy equipment operator. At the reset administrative conference on November 4, 1999, the employee's attorney continued to argue that the employee needed a total knee replacement and therefore had not reached maximum medical improvement. Dr. Hise's September 30, 1999, report indicated that the employee would ultimately need a total knee replacement, but that the total knee arthroplasty should be put off as long as possible, and that the employee could operate heavy equipment. Dr. Hise also recommended that after a total knee replacement, the employee should consider working at a fixed site. The compensation judge found that the employee had reached maximum medical improvement as of the date of the NOID, August 10, 1999, and that there were reasonable grounds to discontinue the employee's temporary total disability benefits effective November 7, 1999, even though the employee may need additional surgery at some time in the future.

The employee continued to explore retraining as a heavy equipment operator, but on March 6, 2000, Dr. Hise concluded that heavy equipment operation would fall outside of the employee's permanent restrictions, and so this retraining plan was discontinued. Other retraining areas were explored. On May 19, 2000, a retraining program in gunsmithing was approved by a representative of the insurer.

On July 11, 2000, the employee's attorney filed a statement of attorney's fees claiming $1,068.10 for Heaton fees for recovery of rehabilitation services. No objection was received. An order determining attorney fees was served and filed on August 2, 2000, ordering the insurer to pay $1,068.10 to the employee's attorney. The employer and insurer appeal the order determining attorney's fees, arguing that neither they nor their attorney was properly served with the statement of attorney fees, and also contending that no attorney fees are due as there was no genuinely disputed claim as required by Minn. Stat. § 176.081, subd. 1(c).

DECISION

Certification of Dispute

The employer and insurer argue that the rehabilitation benefits, including retraining, were not genuinely disputed claims, and therefore that attorney fees should not be awarded for legal services rendered relative to those benefits received. Minn. Stat. § 176.081, subd. 1(c), specifies that fees are to be based solely on genuinely disputed claims, and provides in part:

> In no case shall fees be calculated on the basis of any undisputed portion of compensation awards. Allowable fees under this chapter shall be based solely upon genuinely disputed claims or portions of claims, including disputes related to the payment of rehabilitation benefits or to other aspects of a rehabilitation plan. The existence of a dispute is dependent upon a disagreement after the employer or insurer has had adequate time and information to take a position on liability. Neither the holding of a hearing nor the filing of an application for a hearing alone may determine the existence of a dispute. Except where the employee is represented by an attorney in other litigation pending at the department or at the office of administrative hearings, a fee may not be charged after June 1, 1996, for service with respect to a medical or rehabilitation issue arising under section 176.102, 176.135, or 176.136 performed before the employee has consulted with the department and the department certifies that there is a dispute and that it has tried to resolve the dispute.

In his statement of Attorney's Fees, the employee's attorney indicated that the rehabilitation services and retraining were genuinely disputed benefits. In its brief on appeal, the employer and insurer argue that no evidence has been offered which shows a genuine dispute

regarding rehabilitation and retraining, other than the indication on the statement of attorney's fees. They argue that there was no recovery of benefits which would not have been provided by the employer and insurer without the employee's attorney's involvement. The employer and insurer also contend that the statement of Attorney's Fees does not include a complete description of issues in dispute nor "a list of benefits obtained which were genuinely in dispute and which would not have been recovered without the attorney's involvement." Minn. R. 5220.2920, subp. 3(b).

This threshold issue was not addressed by the judge in his Order Determining Attorney Fees. The record does not include evidence that a certification of dispute was filed by the Department of Labor and Industry. We therefore remand this matter to the compensation judge to determine whether the statement of attorney's fees on which the order was based evinces a genuinely disputed claim or portions of a claim as is required by Minn. Stat. § 176.081, subd. 1(c) and Minn. R. 5220.2920, subp. 3(b).

Service of Statement of Attorney's Fees

The employer and insurer also argue that they were denied an opportunity to object to the statement of attorney's fees due to the lack of effective service of the statement. A statement of attorney's fees must be filed and "the employer and insurer shall receive a copy of the statement." Minn. Stat. § 176.081, subd. 1(d). By affidavit and through their brief on appeal, the employer and insurer indicated that their attorney was not served with the statement of attorney's fees, and that the claims adjuster for AIG Claim Services had not received a copy of the statement. The statement of attorney's fees filed with the Department of Labor and Industry indicates that the statement was served by mail on AIG Claim Services at 2602 Coolidge Road, East Lansing, Michigan, 48823. The employer and insurer indicate that the correct address is 2601 Coolidge Road, East Lansing, Michigan, 48823. The employee's attorney indicated that he had previously used the first address when mailing an earlier letter to the insurer, dated March 25, 1999, that the insurer acknowledged receiving the earlier letter, and that the original address had not been corrected by the insurer.

The employee's attorney attempted to serve the statement of attorney's fees on the insurer by mail; the workers' compensation statute allows service by mail, as stated below:

> Service of papers and notice shall be by mail or otherwise as the commissioner or the chief administrative law judge may by rule direct. Where service is by mail, service is effected at the time mailed if properly addressed and stamped. If it is so mailed, it is presumed the paper or notice reached the party to be served. However, a party may show by competent evidence that that party did not receive it or that it had been delayed in transit for an unusual or unreasonable period of time. In case of nonreceipt or delay, an allowance shall be made for the party's failure to assert a right within the prescribed time.

Minn. Stat. § 176.285 (emphasis added). The employer and insurer bear the burden of proving the applicability of Minn. Stat. § 176.285. See Fuller v. Farmers' Coop. Oil Ass'n, 322 N.W.2d 359, 362, 35 W.C.D. 133, 136 (Minn. 1982). "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) (citations omitted).

The employer and insurer filed an affidavit and documents to support their argument that the statement of attorney's fees was mailed to an incorrect address and was not received. It is not the function of this court, however, to make the factual determination of whether the employer and insurer received the statement. See Duvall v. Anderson Trucking, No. [REDACTED SSN], slip op. at 3 (W.C.C.A. Aug. 23, 1993); see also Minn. Stat. § 176.421, subd. 1 (listing the powers of the Workers' Compensation Court of Appeals on appeal).

Therefore, we vacate the award of attorney's fees and remand to the Office of Administrative Hearings for assignment to a compensation judge to make a factual determination of whether the statement of attorney's fees was received by the insurer, and to decide whether an allowance should be made under Minn. Stat. § 176.285 for delayed receipt or nonreceipt of the statement. The compensation judge may receive evidence to make this determination. See Anderson v. Apple Valley Medical Ctr., No. [REDACTED SSN] (W.C.C.A. Sept. 2, 1994) (remand to Office of Administrative Hearings for factual determination of whether the employer and insurer had received a decision and order) and cases cited therein.

If the compensation judge finds that the employer and insurer received the statement, the compensation judge should address whether, under the specifics facts of this case, the employer and insurer's attorney also should have been served as required by Minn. R. 1415.0770, subp. 2.