

VICKIE L. CAHOW, Employee, v. BROOKDALE MOTORS and MADA INS. EXCH./BERKLEY ADM'RS, Employer-Insurer/Appellants and BEVERAGE DRIVERS LOCAL 792, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 10, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. Where there are no contingent fees for monetary benefits involved, Roraff fees based upon the statutory 25/20 formula in Minn. Stat. § 176.081, subd. 1(a) are awarded without consideration of the factors articulated in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999).

ATTORNEY FEES - RORAFF FEES. Substantial evidence supports the compensation judge's finding that the cost of the employee's entire surgery was at issue where the employer and insurer had indicated they would approve a less extensive surgery, but after the surgery continued to deny the employee's entire claim.

Affirmed.

Determined by: Rykken, J., Wilson, J., and Pederson, J.
Compensation Judge: William R. Johnson

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's award of Roraff fees based upon the statutory 25/20 formula in Minn. Stat. § 176.081, subd. 1(a) without consideration of the factors articulated in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999) and the compensation judge's finding that the entire cost of the surgery was in dispute. We affirm.

BACKGROUND

On January 14, 1998, Vickie Cahow, the employee, sustained a work-related injury to her low back while working for Brookdale Motors, the employer, which was insured for workers' compensation liability by MADA Insurance Exchange. The employer and insurer paid temporary total disability benefits and medical expenses. In 1999, the employee's treating orthopedic surgeon, Dr. Manuel Pinto, recommended a three-level anterior/posterior fusion from

L3 to S1 and an additional anterior fusion from T11 to T12. At the request of the employer and insurer, the employee was referred to Dr. Gaylan Rockswold, who opined that a two-level fusion at L3-L5 could possibly be recommended, and Dr. John Dowdle, who opined that only a one-level fusion at L4-L5 was necessary. The employer and insurer denied the employee's request for the procedures recommended by Dr. Pinto, and indicated that only a one-level fusion at L4-L5 would be approved. The insurer advised by letter dated August 12, 1999, that they would pay for a one-level fusion.

On September 24, 1999, the employee filed a medical request for approval of the surgical procedures recommended by Dr. Pinto. The employer and insurer's response filed October 13, 1999, indicated that they would approve a one-level fusion at L4-L5 as recommended by Dr. Dowdle or a two-level fusion as recommended by Dr. Rockswold, but refused to pay for a three-level lumbar fusion and a one-level thoracic fusion as recommended by Dr. Pinto. On November 1, 1999, while this dispute was pending, the employee proceeded to undergo the thoracic and lumbar surgeries as recommended by Dr. Pinto. The employee developed complications after the surgery, an abdominal hernia, which required additional hospitalization and treatment. After the surgery, the employer and insurer denied requests for payment of medical expenses. By letters sent to three medical providers on December 8, 14 and 30, 1999, the insurer denied payment entirely. The intervenor, the employee's medical insurer, paid for part of the surgical expense. A hearing was held before a compensation judge on April 4, 2000. No payment for surgical expenses was made by the employer and insurer before the initial hearing. In a Findings and Order served and filed May 2, 2000, the compensation judge found that the thoracic and lumbar surgeries performed by Dr. Pinto were reasonable and necessary and ordered the employer and insurer to pay all medical expenses incurred as a result of the surgeries and any subsequent complications. The employer and insurer did not appeal from this decision.

On May 4, 2000, the employee's attorney filed a statement of attorney fees claiming attorney fees under the 25/20 statutory formula for Roraff¹ fees up to the maximum guideline of \$13,000.00,² plus costs and disbursements. The employer and insurer objected, arguing that they

¹ Before the 1995 amendments to Minn. Stat. § 176.081, the terms "Roraff fees" and "Heaton fees" were commonly used to refer to fees awarded to compensate the employee's attorney for obtaining medical and rehabilitation benefits, based upon the cases which established them, Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980) (medical benefits), and Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983) (rehabilitation benefits), and these terms continue to be used.

² The employee's attorney indicated in the cover letter to the statement of attorney fees:

I am requesting an Order that the employer/insurer pay attorney's fees pursuant to the statutory formula of 25/20% of all medical bills paid pursuant to your Findings and Order served and filed on May 2, 2000, up to a maximum of \$13,000, or a total of \$64,000 in medical expenses. Many of the medical vendors who have provided services relating to the more recent complications have not as yet sent out

should only be required to pay attorney fees based on a portion of the surgery expenses, as the entire amount of the surgery was not in dispute since they had indicated they would pay for a less extensive surgery. They also asserted that the employee's attorney had not adequately supported his claimed time with an itemization and that the time claimed was excessive, far exceeding the amount of time that would have been necessary to pursue the disputed issues.

A hearing on attorney fees was held before a compensation judge on July 17, 2000. At the time of this hearing, according to arguments presented by the employee's attorney, the employer and insurer apparently had still not made payments for any portion of the employee's surgical expenses.

By Findings and Order served and filed on August 21, 2000, the compensation judge found that the employee's attorney was entitled to the maximum statutory fee under the 25/20 formula in Minn. Stat. § 176.081, subd. 1(a). The employer and insurer appeal.

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 (2000). 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).

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 Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

their statements. While total medical expenditures will far exceed \$64,000, I am limiting my fee to the \$13,000 guideline.

At the attorney fee hearing on July 17, 2000, the employee's attorney indicated that the medical expenses totaled \$56,368.00 at that time, which was the amount paid by the intervenor by then, and that this amount could increase.

DECISION

Attorney Fees - Background

Before addressing the issue in this case, it is important to understand the historical background of the determination of attorney fees awarded for recovery of monetary benefits, pursuant to Minn. Stat. §§ 176.081 and .135 and Roraff.³ The principle mechanism for payment of an injured employee's attorney fees in workers' compensation cases historically has been a contingent fee computed on a percentage of the monetary compensation awarded to the employee as a result of the attorney's representation. The current formula is 25 percent of the first \$4,000.00 and 20 percent of the next \$60,000.00 of compensation awarded to the employee. Minn. Stat. § 176.081, subd. 1(a). Prior to 1995, an employee's attorney could also receive a reasonable attorney fee under Minn. Stat. § 176.135, payable by the employer and insurer, in proceedings brought solely to obtain payment for medical expenses. Roraff v. State, Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980). The same principle was later extended to proceedings brought solely to recover rehabilitation benefits. Weisser v. Country Club Mkts., 397 N.W.2d 891, 39 W.C.D. 282 (Minn. 1987); Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983). In Kopish v. Sivertson Fisheries, 39 W.C.D. 627 (W.C.C.A. 1995), this court held an attorney may be entitled to both contingent and Roraff or Heaton fees if the contingent fee alone was inadequate to reasonably compensate the attorney for representing the employee on medical or rehabilitation issues.

In 1992, Minn. Stat. § 176.081 was amended to provide:

All fees must be calculated according to the [25-20] formula under this subdivision or earned in hourly fees for representation . . . on rehabilitation or medical issues under § 176.102, 176.135, or 176.136. Attorney fees for the recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer if these fees exceed the contingent fee under this section in connection with the benefits currently in dispute. The amount of the fee that the employer or insurer is liable for is the amount determined under subdivision 5, minus the contingent fee.

Minn. Stat. § 176.081, subd. 1(a) (1992). This language essentially codified the Roraff, Heaton, and Kopish doctrines.

Prior to 1995, an attorney could also apply for fees in excess of the contingent fee authorized in subdivision 1. See Minn. Stat. § 176.081, subd. 2. Determination of an award of excess fees was governed by the principles set forth in Minn. Stat. § 176.081, subd. 5. See, e.g., Kahn v. State, Univ. of Minn., 327 N.W.2d 21, 35 W.C.D. 425, 429 (Minn. 1982). Determination

³ See, Irwin v. Surdyk's Liquor, 59 W.C.D. 295 (W.C.C.A. 1998) (rev'd in part), Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999).

of the amount of Roraff or Heaton fees to be awarded was also based on the factors set forth in subdivision 5(d). Weisser, 397 N.W.2d at 893, 39 W.C.D. at 285.

In 1995, the legislature substantially amended Minn. Stat. § 176.081.⁴ In cases governed by the amendment,⁵ the method of calculating Roraff and Heaton fees was changed. Under the 1995 statute, an attorney representing an employee in a claim for payment of medical expenses or for rehabilitation benefits was no longer entitled to a fee determined under Minn.

⁴ Minn. Stat. § 176.081, subd. 1(a), provides in part:

Subdivision 1. Limitation of Fees. (a) A fee for legal services of 25 percent of the first \$4,000 of compensation awarded to the employee and 20 percent of the next \$60,000 of compensation awarded to the employee is the maximum permissible fee and does not require approval by the commissioner, compensation judge, or any other party. All fees, including fees for obtaining medical or rehabilitation benefits, must be calculated according to the formula under this subdivision, except as otherwise provided in clause (1) or (2).

(1) The contingent attorney fee for recovery of monetary benefits according to the formula in this section 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 and 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. In cases where the contingent fee is inadequate the employer or insurer is liable for attorney fees based on the formula in this subdivision or in clause (2).

For the purposes of applying the formula where the employer or insurer is liable for attorney fees, the amount of compensation awarded for obtaining disputed medical or rehabilitation benefits under sections 176.102, 176.135, and 176.136 shall be the dollar value of the medical or rehabilitation benefit awarded, where ascertainable.

(2) The maximum attorney fee for obtaining a change of doctor or qualified rehabilitation consultant, or any other disputed medical or rehabilitation benefit for which a dollar value is not reasonably ascertainable, is the amount charged in hourly fees for the representation or \$500, whichever is less, to be paid by the employer and insurer.

⁵ In Senjem v. Independent School Dist. No. 625, 55 W.C.D. 656 (W.C.C.A. 1996), this court held the amendments to Minn. Stat. § 176.081 apply only to injuries which occur after the October 1, 1995, effective date of the revised statute.

Stat. § 176.081, subd. 5(d). Rather, fees for obtaining disputed medical and rehabilitation benefits would be calculated by applying the 25/20 formula to the dollar value of the medical or rehabilitation benefits awarded. Minn. Stat. § 176.081, subd. 1(a)(1) (1995).⁶ If the dollar value was not reasonably ascertainable, the maximum fee for which the employer and insurer may be liable was the lesser of the amount charged in hourly fees or \$500. *Id.*, subd. 1(a)(2). These provisions applied both to cases in which the sole issue was medical or rehabilitation benefits and to cases previously governed by the Kopish decision.

The Minnesota Supreme Court has addressed the issue of whether the legislature could constitutionally limit an award of Roraff fees to a 25/20 percentage of the medical bills awarded in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). The court held:

Even as here, where there was a finding that the fees awarded were inadequate to reasonably compensate relators' attorney, the legislature has prohibited any deviation from the statutory maximum. Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers of Minn. Const. art. III, § 1. Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.

Id. at 141-42, 59 W.C.D. at 334. In order to determine a reasonable attorney fee, the supreme court indicated that 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 difficulties of the issues, the nature of the proof involved, and the results obtained should be considered.⁷ Id. at 142, 59 W.C.D. at 336. The primary issue in the Irwin case involved whether the employee's attorney's fee was limited to the fee calculated under the statutory 25/20 formula. In Irwin, the supreme court held that these factors should be considered in determining whether additional fees beyond the amount generated by the 25/20 formula should be awarded.

The Irwin factors are applied in various situations. In cases where contingent attorney fees are available for recovery of monetary benefits, as in Irwin, Minn. Stat. § 176.081, subd. 1(a), provides that the contingent attorney fee is presumed to be adequate to cover recovery

⁶ See Ramirez v. Dee, Inc., 58 W.C.D. 437 (W.C.C.A. 1998), summarily aff'd 582 N.W.2d 927 (Minn. 1998).

⁷ Factors previously outlined in Minn. Stat. § 176.081, subd. 5, repealed in 1995.

of medical and rehabilitation benefit or services concurrently in dispute. Additional Roraff fees for recovery of medical benefits are assessed against the employer and insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical dispute. In such cases, the Irwin factors are considered in determining whether the contingent fee was inadequate to reasonably compensate the employee's attorney. Abernathy v. Asplundh Tree Expert, 60 W.C.D. 310 (W.C.C.A. 2000). In addition, the Irwin factors are to be considered in determining a reasonable fee for successful representation of the employee in a change of physician dispute. Mohamed v. The Turkey Store, slip op. (W.C.C.A. Mar. 2, 2001) (under Irwin, the \$500 limit for change of physician cases in Minn. Stat. § 176.081, subd. 1(a)(2), is unconstitutional).

Application of Irwin factors

The compensation judge found that in this case where a medical issue is disputed and is the sole issue, and where the cost of the medical benefits is ascertainable, the employee's attorney is entitled to attorney fees under the 25/20 statutory formula, up to the statutory maximum. The employer and insurer argue that the compensation judge erred by awarding the employee's attorney Roraff fees in the amount of the maximum statutory fee under the 25/20 formula in Minn. Stat. § 176.081, subd. 1(a), without consideration of the Irwin factors. The employer and insurer assert that in cases where there is no contingent fee for recovery of monetary benefits, the employee's attorney is entitled to only a reasonable fee computed under Irwin. The employer and insurer argue that the issue of reasonableness cannot be limited to those situations where counsel for the employee believes that application of the statutory formula in Minn. Stat. § 176.081, subd. 1(a), fails to provide a reasonable attorney fee. The employer and insurer argue that application of Irwin also requires a determination of the reasonableness of the claimed attorney fees where the employer and insurer, as the parties responsible for payment of that fee, object to the claimed fee being excessive. To do otherwise, they argue, deprives the judiciary of its inherent power to oversee attorney fees by failing to provide a final independent review of attorney fees, as found unconstitutional in Irwin, and violates the due process rights of the employer and insurer.

The employer and insurer argue that in this case, the maximum fee pursuant to the formula outlined in Minn. Stat. § 176.081 is simply "permissible" but by no means mandatory or even presumptively reasonable. They assert that once they challenged the reasonableness of the claimed fees, the compensation judge was required to evaluate the evidence pursuant to not only the statutory guidelines, but also the Irwin factors, and to issue appropriate findings of fact supporting a determination of reasonable attorney fees. The employer and insurer seem to be arguing for an invalidation of the 1995 amendment to Minn. Stat. § 176.081, and for a return to a pre-1995 evaluation of Roraff attorney fee claims.

The objective of the appellant in Irwin was to obtain a fee that would reasonably compensate the attorney for representing the employee in a medical dispute. While there may be equity in the arguments presented by the employer and insurer, whether there is an equitable basis for distinguishing between the objective of obtaining a reasonable fee and the objective of paying

a reasonable fee is a concern that the legislature did not specifically address in the 1995 amendments, as the 1995 amendments imposed a limit on all attorney fees and removed opportunities for judicial review of attorney fee claims previously provided in Minn. Stat. § 176.081. Neither was this issue raised in Irwin. The supreme court expressly did “not take issue with the actual percentage or dollar limitations adopted by the legislature in Minn. Stat. § 176.081.” Irwin, 599 N.W.2d at 141, 59 W.C.D. at 333. Irwin invalidated the “maximum permissible fee” portion of the statute, but did not invalidate the remaining language of the statute. Minn. Stat. § 176.081, subd. 1(a), provides in part that:

A fee for legal services of 25 percent of the first \$4,000 of compensation awarded to the employee and 20 percent of the next \$60,000 of compensation awarded to the employee is the maximum permissible fee and does not require approval by the commissioner, compensation judge, or any other party. All fees, including fees for obtaining medical or rehabilitation benefits, must be calculated according to the formula under this subdivision, except as otherwise provided in clause (1) or (2).

The employee’s attorney is not claiming any additional attorney fees over \$13,000.00. The compensation judge rejected the employer and insurer’s argument that the decision in Irwin somehow modifies or supersedes the statute, and rejected the argument that the compensation judge must perform an analysis of the hours involved to arrive at a reasonable fee instead of relying on the plain language of the statute. In his memorandum, the compensation judge stated:

There is nothing in the statute requiring an hour by hour or factor by factor analysis if the fees being claimed are within the presumption of reasonableness. The medical benefits were ascertainable and the formula applies to set the fees.

(Memo., p. 3.) Accordingly, the specific calculation of attorney fees awarded for the recovery of medical and rehabilitation benefits remains as articulated by the statute, that is, by application of the 25/20 formula. To read the statute in any other way would void the plain meaning of this statutory section, to which this court is required to adhere. “Because the statute is clear and unambiguous, no further argument should be necessary.” Schlotz v. Hyundai Motor Co., 557 N.W.2d 613 (Minn. 1997); Homart Development Co. v. Co. of Hennepin, 538 N.W.2d 907 (Minn. 1995).

The amount awarded under the statutory formula is not limited by the amount of hours worked or the other Irwin factors. See Zimmerman v. Moline Machinery, Ltd., slip op. (W.C.C.A. June 22, 1999) (contingent fee for medical benefits not limited by the number of hours expended by the employee’s attorney times the usual hourly fee of the employee’s attorney) (decision served and filed before the supreme court’s decision in Irwin was issued in September 1999). “Assuming a valid retainer agreement, contingent fees up to \$13,000.00 are payable without regard to the amount of time the employee’s attorney devotes to the case.” Clark v. Dick’s Sanitation, slip op. (W.C.C.A. May 16, 2000) (footnote omitted). The compensation judge did not

err by failing to apply the Irwin factors in this case. In this case, no issue was raised as to whether the employee's attorney would be entitled to attorney fees based on any other benefits. Therefore there is no other attorney fee to which the Irwin factors could be applied to determine whether the employee's attorney was reasonably compensated for representation on a medical dispute. In this case, Roraff fees based upon the statutory 25/20 formula in Minn. Stat. § 176.081, subd. 1(a), are appropriately awarded without consideration of the factors articulated in Irwin. Accordingly, we affirm.

Genuine Dispute

Minn. Stat. § 176.081, subd. 1, allows attorney fees based “solely upon genuinely disputed claims or portions of claims.” At the hearing, the employer and insurer argued that a portion of the employee's claim was not disputed since they had agreed to pay for a surgical procedure as recommended by Dr. Rockswold or Dr. Dowdle, up to a two-level fusion. The compensation judge disagreed, stating:

The employer and insurer in this case appear to have opposed the employee's request for a 3-level fusion by Dr. Pinto. Even if it were possible to apportion this cost the employer has given the Compensation Judge no information on which to base such an apportionment. Ultimately we are comparing apples to oranges because the fusion surgery proposed by the adverse doctors and that performed by Dr. Pinto are radically different in type and kind.

The compensation judge concluded that the employer and insurer put the entire issue into dispute by only approving a different, less extensive surgery. On appeal, the employer and insurer argue that the employee's attorney had the burden of establishing the basis for the attorney fee claim, in other words, the amount of medical expenses in dispute, and that he had not done so. While the employer and insurer may have indicated that they would approve a less extensive surgery in their medical response, after the employee's surgery they denied the entire claim and no payments were made for any portion of the surgical expenses. The employer and insurer did not request information on which to establish the cost of the less extensive surgery which they had indicated they would approve.⁸ Substantial evidence supports the compensation judge's finding that the cost of the entire surgery was at issue in this case, and we affirm.

⁸ We take no position as to whether the employer and insurer could have reduced their exposure for attorney fees by paying a portion of the surgical expenses, or by offering to pay up to a certain amount of medical expenses, thereby reducing the amount of medical expenses in dispute. However, we note that the employer and insurer offered no evidence as to the cost of the alternative, previously-approved surgery. In addition, following the initial hearing and the determination by a compensation judge that the surgery, as performed, was reasonable and necessary, and at the time of the hearing on attorney fees, the employer and insurer apparently had

not yet offered to pay any portion of the surgical expenses based on the cost of the limited surgery they had earlier approved.