RALPH CARLSON, Employee, v. DONOVAN CONSTR. CO. and TWIN CITY FIRE INS. CO./ITT SPECIALTY RISK, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 2, 2001

No. [REDACTED SSN]

HEADNOTES

APPLICABLE LAW. There is no provision in the workers' compensation act for assessing payment of interest against an attorney. Therefore, this court does not have jurisdiction to order the employee's former attorney to pay interest on attorney fees erroneously withheld by the insurer and paid to the employee's former attorney.

APPEALS; PRACTICE & PROCEDURE - RIPENESS. Where the employer and insurer had not yet actually paid interest to the employee, where the employee was neither present nor represented at the hearing, and where but for an exhibit of proposed interest calculations, the applicable rate of interest was not argued by counsel during the hearing, the issue of the proper interest rate to apply was not ripe and it was premature to determine the applicable interest rate. The portion of the decision relative to the applicable interest rate is therefore vacated.

Affirmed in part and vacated in part.

Determined by: Rykken, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Rolf G. Hagen

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's refusal to compel the employee's former attorney to pay interest on attorney fees erroneously withheld by the insurer and paid to the employee's former attorney. We affirm in part and vacate in part.

BACKGROUND

On May 22, 1962, Ralph Carlson, the employee, was injured while working for Havir Manufacturing Company, which was insured for workers' compensation liability by Liberty Mutual Insurance Company. The employee was paid temporary total disability and permanent partial disability benefits. On October 27, 1970, the employee injured his back while working for Donovan Construction Company, the employer, which was insured for workers' compensation liability by Twin City Fire Insurance Company, the insurer. Claims related to that injury were litigated by the parties, and the employee was represented by attorney Gerald B. Forrette. This litigation was resolved on May 27, 1975, by decision of a predecessor to this court, the Workmen's

Compensation Commission. This decision awarded attorney fees of 25% of the amount payable to the employee, not to exceed $6,250.00, to the employee's attorney. Carlson v. Havir Mfg. Co., 27 W.C.D. 923 (W.C.C.A. 1975) (prior employer at time of earlier injury no longer involved). After an initial payment, attorney fees of $70.00 per four-week period were withheld by the insurer and paid to the employee's attorney. As of October 9, 1978, the employee's attorney had received the full amount awarded by the decision. The insurer, however, continued to withhold attorney fees from its payments to the employee, and paid those amounts to the employee's former attorney, until the error was discovered by the insurer in September 1998. As a result, the employee was underpaid a total of at least $17,477.50.[1] The insurer requested that the attorney refund the amount mistakenly paid to him. The attorney, who had retired from the active practice of law in 1988, did not comply, and the insurer paid the employee the full amount of the underpayment.

On July 29, 1999, the employer and insurer filed a "Petition for Recovery of Attorney Fees Wrongfully Received by Gerald Forrette." There is no claim petition in the record for the underpayment or for interest filed by the employee. A hearing was held on November 30, 2000. At the hearing, the employer and insurer agreed that Mr. Forrette was no longer record counsel for the employee and had not been since approximately December 14, 1999. (T. 5.) Mr. Forrette appeared pro se. There was no appearance at the hearing by the employee or on behalf of the employee. The compensation judge ordered Mr. Forrette to reimburse the employer and insurer $17,477.50 for overpayment of attorney fees. Mr. Forrette did not appeal. The compensation judge also ordered the employer and insurer to pay the employee interest accrued on the underpayment, for the period commencing October 9, 1978, through the date the underpayment was issued, January 6, 2000. The employer and insurer appeal, arguing that the employee's attorney should be responsible for the interest paid to the employee.

STANDARD OF REVIEW

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).

DECISION

Determination of Entity Liable to Pay Interest to Employee

The compensation judge found that the employer and insurer had a duty to make proper and timely payment of benefits, and were negligent in their handling of this file, resulting in an underpayment to the employee. The compensation judge ordered the employer and insurer

[1] Although the compensation judge found that the employer had underpaid the employee in the amount of $17,477.50, (Finding No. 5) there apparently remains a dispute as to the exact amount of underpayment owed to the employee. The employee's former attorney asserts that the employee is actually owed more than the $17,477.50 already reimbursed to him. (T. 33, 57-58.)

to pay interest on the underpayment to the employee. The compensation judge also found that the employee's former attorney was negligent in accepting attorney fees over the amount awarded, and ordered the attorney to repay the overpayment of attorney fees to the employer and insurer. Mr. Forrette did not appeal from that order. The compensation judge also found that there was no statutory basis to impose liability for the interest on the employee's former attorney. On appeal, the employer and insurer argue that any interest payable to the employee is owed by his former attorney. We affirm.

Minn. Stat. § 176.221, subd. 7, which mandates the payment of interest on compensation awards, became effective on October 1, 1977. The date of injury controls as to the applicability of Minn. Stat. § 176.221, subd. 7. Bassel v. Brown Welding, 48 W.C.D. 38 (W.C.C.A. 1992), summarily aff'd, (Minn. Jan. 19, 1993). In this case, the employee was injured before 1977. In the absence of a statutory provision mandating payment of interest, however, interest is still payable for this injury date, under case law. Hop v. Northern States Power Co., 56 W.C.D. 73 (W.C.C.A. 1996), summarily aff'd, (Minn. Jan. 7, 1997), citing Pederson v. East Central Elec. Ass'n, 24 W.C.D. 707 (W.C.C.A. 1968); Bourdeaux v. Gilbert Motor Co., 220 Minn. 538, 20 N.W.2d 393, 14 W.C.D. 46 (1945); Brown v. City of Pipestone, 186 Minn. 540, 245 N.W. 145, 7 W.C.D. 212 (1932). See also Bliss v. Consolidated Paper Grading Co., slip op., (W.C.C.A. Feb. 15, 1989) (award of interest on medical expenses affirmed even though there was no specific statutory provision allowing such interest in effect on the date of injury).

The employer and insurer do not dispute that they are obligated by the workers' compensation statute to pay the employee the correct benefits, and that the employee is due interest in this case, but argue that the compensation judge should have imposed liability on the employee's former attorney to pay the interest. Citing the cases listed above, the employer and insurer argue that the compensation judge erred by concluding that there is no statutory authority to impose liability for the interest on the employee's former attorney. However, those cases all imposed liability for interest on an employer and insurer, not another person or entity, such as an attorney for an employee.

The employer and insurer do not cite to any statutory authority for imposition of interest on the employee's former attorney. They argue for application of common law theories of unjust enrichment or requirements of payment of prejudgment interest by any party who owes a liquidated indebtedness. The employer and insurer also argue that since Minn. Stat. § 176.081 controls an attorney's right to collect attorney's fees in a workers' compensation case, this court should require the employee's former attorney to pay interest on those monies mistakenly paid to him as attorney fees, "as a function of the courts' regulation of the legal profession and the workers' compensation bar specifically." (Er. Brief, p. 10.)

Provisions in the Minnesota workers' compensation statute relative to payment of interest on late payments of benefits are contained in Minn. Stat. § 176.221, subd. 7,[2] which

[2] Minn. Stat. § 176.221, subd. 7, states, in part, that

requires an employer and insurer to pay interest on delayed payment of benefits; Minn. Stat. § 176.191,[3] which requires interest to be paid to a prevailing party in a contribution action brought between two or more employers, two or more insurers, or the special compensation fund as long as a temporary order is in place (see Blixt v. McDonald's Store, 52 W.C.D. 440 (1995)); and Minn. Stat. § 176.225,[4] which requires payment of interest on any delayed penalty payment that was ordered under that section. Those provisions, and related cases interpreting those provisions, impose liability for interest payments on an employer, insurer or the special compensation fund, and not on an attorney.

There is no provision in the workers' compensation statute, Minn. Stat. § 176 et seq., for assessing interest against an attorney. The compensation judge correctly concluded that Mr. Forrette does not owe interest to the employer or insurer; therefore we affirm.

> Any payment of compensation, charges for treatment under section 176.135, rehabilitation expenses under section 176.102, subdivision 9, or penalties assessed under this chapter not made when due shall bear interest from the due date to the date the payment is made at the rate set by section 549.09, subdivision 1.
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> If the claim of the employee or dependent for compensation is contested in a proceeding before a compensation judge or the commissioner, the decision of the judge or commissioner shall provide for the payment of unpaid interest on all compensation awarded, including interest accruing both before and after the filing of the decision.

[3] Minn. Stat. § 176.191, subd. 1, states, in part, that

> Where compensation benefits are payable under this chapter, and a dispute exists between two or more employers or two or more insurers or the special compensation fund as to which is liable for payment, the commissioner, compensation judge, or court of appeals upon appeal shall direct that one or more of the employers or insurers or the special compensation fund make payment of the benefits pending a determination of which has liability. * * * When liability has been determined, the party held liable for the benefits shall be ordered to reimburse any other party for payments which the latter has made, including interest at the rate of 12 percent a year..."

[4] Minn. Stat. § 176.225, subd. 5, refers to interest due for delayed penalty payments and states, in part, that

> If any sum [penalty] ordered by the department to be paid is not paid when due, and no appeal of the order is made, the sum shall bear interest at the rate of 12 percent per annum.

Calculation of Interest Due to Employee

On appeal, the employer and insurer also request clarification of the compensation judge's order regarding the payment of interest. The compensation judge ordered payment of interest "at the statutory rate in effect on August 10, 1999, as adjusted." At hearing, the employer and insurer submitted an exhibit listing the rate of interest as being 8%; in their brief, the employer and insurer state that the calculations in that exhibit mistakenly used an interest rate of 8% and instead should have listed the rate of 6%, pursuant to Minn. Stat. § 334.01.

Although the employer and insurer requested a determination concerning liability for interest, and the amount owed, the employee has not claimed interest through a claim petition, nor has the employer and insurer yet paid any interest to the employee. Accordingly, there is no justiciable controversy for this court to decide at this time. The existence of a justiciable controversy is essential to a court's exercise of jurisdiction, therefore the issue may be raised on the court's own motion. Izaak Walton League of Am. Endowment, Inc. v. State, Dep't of Natural Resources, 312 Minn. 587, 589, 252 N.W.2d 852, 854 (1977). "The existence of a justiciable controversy is prerequisite to adjudication. The judicial function does not comprehend the giving of advisory opinions. No controversy is presented, absent a genuine conflict in the tangible interests of opposing litigants." Id. An issue presented for decision must "(a) involve definite and concrete assertions of right by parties with adverse interests, (b) involve a genuine conflict in tangible interests of opposing litigants, and (c) be capable of relief by decree or judgment." Graham v. Crow Wing County Bd. of Comm'rs, 515 N.W.2d 81, 84 (Minn. App. 1994) (citing St. Paul Area Chamber of Commerce v. Marzitelli, 258 N.W.2d 585, 587-88 (Minn. 1977)), pet. for rev. denied (Minn. June 2, 1994).

At the time the employer and insurer instituted this claim through the Office of Administrative Hearings, they had reimbursed the employee for an underpayment, but had not yet paid interest to the employee on that underpayment. As a result, the employer and insurer claimed reimbursement for interest that they anticipated owing to the employee. See Hop v. Northern States Power Co., 56 W.C.D. 73 (W.C.C.A. 1996), summarily aff'd, (Minn. Jan. 7, 1997), citing Pederson v. East Central Elec. Ass'n, 24 W.C.D. 707 (W.C.C.A. 1968). At hearing, the employer and insurer submitted a claim itemization into evidence outlining their initial calculations of interest using a rate of 8 percent per year. In their post-hearing brief, the employer and insurer asserted that an interest rate of six percent per year was due. Beyond that, the amount of interest owed was not litigated; the employee was neither present nor represented at the hearing to contest the amount of interest asserted by the employer and insurer, and the actual rate of interest was not argued by counsel during the hearing.[5]

While interest is payable to the employee in this case, and while it is understandable for the employer and insurer to want guidance as to how the requirements of the workers' compensation act relative to interest may be satisfied, nothing in that act allows for either advisory

[5] Furthermore, there apparently remains a dispute as to the exact amount of underpayment owed to the employee (the amount on which interest would be calculated), although the employee himself has not asserted this claim.

opinions or declaratory judgments. The issue is not ripe; no benefits are yet at stake, and this court has no jurisdiction to decide these issues. Cf. Davidson v. Northshore Mfg., 60 W.C.D. 69 (W.C.C.A. 1999) (where the employee had not yet actually sought approval of retraining, it was premature to determine whether the employee's filing of a rehabilitation request for retraining satisfied the statutory requirements); see also Makitalo v. Sears, Roebuck & Co., slip op. (W.C.C.A. May 9, 1995) (the issue of whether a justiciable controversy exists may be raised on the court's own motion). Accordingly, we vacate those portions of Finding No. 5 and Order No. 1 that refer to the specific rate of interest applicable to the payment made by the employer and insurer.