

MERRILL A. JORGENSEN, Employee, v. NOVAK-FLECK, INC., and REGENT INS. CO./GEN. CAS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 31, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. Where the only issue before the compensation judge was a claim for medical benefits under Minn. Stat. § 176.135, the fact that the employer and insurer had added a primary liability disclaimer did not alter the nature of the claim or constitute "other litigation pending" as contemplated by Minn. Stat. § 176.081, subd. 1(c); the employee's attorney's failure to seek the Department's certification of the dispute prior to his filing of a claim petition, as required by Minn. Stat. § 176.081, subd. 1(c), was grounds for reversal of the compensation judge's award of Roraff-type attorney fees pursuant to Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). The statute places a minimal burden on the employee to consult with the Department, and the dispute certification procedures are not a mere technicality that may be ignored.

Reversed.

Determined by: Pederson, J., Johnson, J., and Wilson, J.
Compensation Judge: Jennifer Patterson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's award of hourly Roraff-type¹ attorney fees pursuant to Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). We reverse.

BACKGROUND

Merrill Jorgenson [the employee] sustained a work-related injury on December 13, 1994, while working for Novak-Fleck, Inc. [the employer], which was insured against workers' compensation liability by Heritage Mutual Insurance Company [Heritage]. On February 13, 1997, the employee filed a claim petition for certain benefits arising out of his 1994 injury. On January 16, 1998, Heritage filed a petition for contribution/reimbursement against Regent Insurance Company [the insurer], alleging that a second injury in the nature of a minute trauma injury had occurred in 1997. A hearing on the two petitions was held before Compensation Judge Carol A. Eckersen on June 25, 1998. The employee claimed entitlement to permanent partial

¹ Roraff v. State of Minn., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

disability benefits and chiropractic care provided by Dr. Paul Lemke between October 2, 1996, and March 14, 1998, as a result of his 1994 injury. In an unappealed Findings of Fact, Conclusions of Law and Order issued August 24, 1998, the judge denied the employee's claims for permanent partial disability benefits and chiropractic care. She determined also that there was no minute trauma injury in 1997 and therefore denied the claim for contribution or reimbursement.

On February 24, 2000, the employee retained the services of attorney David C. Wulff relative to a claimed injury of April 23, 1998, while working for the employer. On March 20, 2000, Mr. Wulff filed a claim petition on behalf of the employee, seeking payment for chiropractic treatment provided between April and October 1998, a period bracketing the hearing before Judge Eckersen. The employer and insurer responded by denying liability for the alleged injury and consequent chiropractic treatment. Shortly thereafter, the parties entered into a settlement whereby the medical expense benefits were paid in return for an agreement by the employee that his injury of April 23, 1998, was a temporary aggravation. The Stipulation for Settlement provided that the employee's attorney would file a separate petition for attorney fees.

On November 6, 2000, Mr. Wulff filed his Statement of Attorney's Fees, setting forth a claim for 8.6 hours of time at his hourly rate of \$175.00. The employer and insurer objected to the claimed fees on grounds that (1) the Department of Labor and Industry [the Department] did not certify the medical dispute as required under Minn. Stat. § 176.081, subd. 1(c), and (2) the issues could have been raised and litigated at the 1998 hearing as contemplated by Minn. Stat. § 176.081, subd. 1(a)(3).

The attorney fee request was heard by a compensation judge at the Office of Administrative Hearings on February 26, 2001. At the hearing, the parties stipulated that the employee failed to consult with the Department and obtain certification of a medical expenses dispute prior to filing his claim petition. It was further stipulated that the 8.6 hours of time the employee's attorney devoted to resolving issues raised by the 2000 claim petition were necessary to resolving those issues and that the employee's attorney's hourly rate of \$175.00 was reasonable. In a Findings and Order issued on April 26, 2001, the compensation judge determined that, because primary liability was disputed by the employer and insurer, the Department's certification procedure did not apply. She also concluded that it had been too late to add the employee's April 1998 injury claim and its issues to the hearing scheduled for June 1998. Therefore, the judge concluded, Minn. Stat. § 176.081, subd. 1(a)(3), did not prohibit the award of Roraff fees in this case. The employer and insurer appeal.

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 (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, "[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.

“[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

Certification of Dispute

The employer and insurer argue that, pursuant to the plain and unambiguous language of Minn. Stat. § 176.081, subd. 1(c), no attorney fee may be charged for services performed with respect to a medical issue under Minn. Stat. § 176.135 until the employee has consulted with the Department and the Department has certified that a dispute exists. They argue further that no other litigation was pending at the time the claim petition was filed and that, by arguing that a denial of primary liability somehow changes that fact, the employee is merely trying to circumvent the statute. The only benefits claimed in this litigation were medical expenses.

Minn. Stat. § 176.081, subd. 1(c), provides in pertinent part as follows:

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 services 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.

At Finding 6, the compensation judge concluded that the issue of primary liability, in addition to the medical issue arising under Minn. Stat. § 176.135, constituted “other litigation pending” under subdivision 1(c). Therefore, she concluded, citing Cole v. Krueger Constr., slip op. (W.C.C.A. Nov. 16, 1999), that the Department did not have to certify that there was a dispute

before a claim petition could be filed. The judge also pointed out in a memorandum accompanying her Findings and Order that the Department did not even have jurisdiction to resolve primary liability issues. See Minn. Stat. §§ 176.103, subd. 2, and 176.106, subd. 8; Minn. R. 5220.2620, subp. 5. The judge noted the Department's lack of jurisdiction as further support for "the conclusion that a primary liability issue is 'other litigation pending' sufficient to constitute an exception to the requirement that a medical dispute be certified by the department before the filing of formal paperwork starting litigation." We do not agree.

The apparent intent of the dispute certification procedure under Minn. Stat. § 176.081, subd. 1(c), is to promote the prompt and economical resolution of medical and rehabilitation disputes without the need for attorney involvement. The statute requires the employee to consult with the Department and the Department to intervene to resolve the dispute. If the Department is unable to resolve the dispute, the dispute is certified and the employee may proceed as necessary. The Department's authority to act in such cases is clearly provided by Minn. Stat. § 176.261, which reads as follows:

When requested by an employer or an employee or an employee's dependent, the commissioner of the department of labor and industry may designate one or more of the division employees to advise that party of rights under this chapter, and as far as possible to assist in adjusting differences between the parties. The person so designated may appear in person in any proceedings under this chapter as the representative or adviser of the party. In such case, the party need not be represented by an attorney at law.

Prior to advising an employee or employer to seek assistance outside of the department, the department must refer employers and employees seeking advice or requesting assistance in resolving a dispute to an attorney or other technical, paraprofessional, or professional workers' compensation division employee, whichever is appropriate.

The department must make efforts to settle problems of employees and employers by contacting third parties, including attorneys, insurers, and health care providers, on behalf of employers and employees and using the department's persuasion to settle issues quickly and cooperatively. The obligation to make efforts to settle problems exists whether or not a formal claim has been filed with the department.^[2]

(Emphasis added.) Both Minn. Stat. §§ 176.081, subd. 1(c), and 176.261 clearly establish that the legislature intended for the Department to provide early and informal assistance to all parties in

² We note that Minn. Stat. § 176.081, subd. 1, and Minn. Stat. § 176.261 were both amended in 1995. The 1995 amendment to section 176.261 added the provision requiring the Department to make efforts to settle a claim regardless of whether a formal claim has been filed.

resolving disputes, including medical disputes, and neither statute limits the Department's authority to cases in which primary liability has been admitted. The Department's authority in cases such as this one comes not from Minn. Stat. § 176.106, but from Minn. Stat. §§ 176.081, subd. 1(c), and 176.261. No decision from the Department is called for or expected -- under Minn. Stat. § 176.106 or otherwise -- only assistance. As such, the fact that the Department may lack jurisdiction to issue a decision under Minn. Stat. § 176.106 is simply irrelevant to the contemplated dispute resolution process.

In the instant case, the only issue in dispute before the compensation judge was a claim for medical benefits under Minn. Stat. § 176.135. This is the very type of claim that is apparently anticipated by the statute in question. The addition of a primary liability dispute to this claim does not alter the nature of the claim and does not constitute "other litigation pending" as contemplated by Minn. Stat. § 176.081, subd. 1(c). The employee retained Attorney Wulff on February 24, 2000. Litigation was commenced with the filing of a claim petition on March 20, 2000. The Department was not asked to and did not certify the dispute prior to the filing of the petition. The statute places a minimal burden on the employee to consult with the Department, and we do not view the dispute certification procedures as a mere technicality that may be ignored. Under the facts of this case, we reverse the judge's award of Roraff fees.³

Concurrent Filing of Outstanding Issues

The employer and insurer also argue that Roraff attorney fees in this case are prohibited by Minn. Stat. § 176.081, subd. 1(a)(3). Because we have reversed the compensation judge on the application of Minn. Stat. § 176.081, subd. 1(c), we need not address the issue.

DISSENTING OPINION

THOMAS L. JOHNSON, Judge

I respectfully dissent. The statute in question requires the commissioner to attempt to resolve disputes over medical and rehabilitation issues. If the dispute cannot be resolved, the commissioner certifies that there is a dispute. The commissioner's jurisdiction to resolve disputes concerning medical treatment is contained at Minn. Stat. § 176.106.⁴ Subdivision 8 of the statute states the "commissioner does not have authority to make determinations relating to medical or rehabilitation benefits when there is a genuine dispute over whether the initial injury arose out of and in the course of employment" The employee here filed a claim petition seeking payment of medical expenses. In their answer, the employer and insurer denied the employee sustained an

³ At the hearing, and on appeal before this court, the employee raised the issue of whether the requirement of Minn. Stat. § 176.081, subd. 1(c), is constitutional. Because this court does not have jurisdiction to rule on constitutional questions, the employee's argument is preserved for further appeal.

⁴ Minn. Stat. § 176.106, subd. 1, provides: "All determinations by the commissioner pursuant to § 176.102, .103, .135, or .136 shall be in accordance with the procedures contained in this section."

injury arising out of and in the course of his employment. Accordingly, the commissioner had no jurisdiction under Minn. Stat. § 176.106 to resolve this dispute. Since the commissioner had no statutory authority to resolve the dispute, the certification of a dispute under Minn. Stat. § 176.081, subd. 1(c), is a meaningless requirement. Accordingly, I would affirm the decision of the compensation judge.