

DIANE S. LANHART, Employee/Appellant, v. BUREAU OF ENGRAVING, SELF-INSURED/RSKCO, Employer, and GRAPHIC COMMCS and HEALTHPARTNERS, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
MAY 7, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. Where the compensation judge failed to analyze counsel's fee request under the factors set forth in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), the matter would be remanded for redetermination.

ATTORNEY FEES - SUBD. 7 FEES. Pursuant to Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), subdivision 7 fees are payable on all contingent and Roraff fees awarded to the employee's attorney.

Reverses in part, vacates in part and remands.

Determined by Wilson, J., Johnson, J., and Rykken, J.  
Compensation Judge: Harold W. Schultz II

OPINION

DEBRA A. WILSON, Judge

The employee's attorney appeals from the compensation judge's award of \$6,400 out of a requested \$9,865 in attorney fees. We reverse in part, vacate in part, and remand the matter to the judge for additional findings.

BACKGROUND

The employee filed a claim petition and an amended claim petition, seeking temporary total disability and rehabilitation benefits as a result of "respiratory distress" arising out of her work for the Bureau of Engraving [the employer] in November of 1998. The self-insured employer denied liability for the injury. Graphic Communications Local 1B Health and Welfare Fund intervened for disability benefits paid, and HealthPartners intervened for medical expenses.

The case proceeded to hearing on May 11, 2000, at which time issues included whether the employee had sustained a personal injury or occupational disease in November of 1998, whether the employee was entitled to the claimed benefits, and whether the intervenors were

entitled to reimbursement.<sup>1</sup> In an eight-page decision filed on August 8, 2000, the compensation judge found that the employee had developed an occupational disease, in the form of occupational asthma, which culminated in November of 1998 and which was a substantial contributing cause of the employee's time loss from work and need for medical treatment. The judge went on to award temporary total disability benefits, medical expenses,<sup>2</sup> and reimbursement to the intervenors. The employee's attorney was ordered to submit a statement of attorney fees and to address liability for payment for a missed independent medical examination [IME].

On August 10, 2000, Friedrich A. Reeker, attorney for the employee, filed a statement of attorney fees, seeking a total of \$9,865.00 in attorney fees, for 50.5 hours of service,<sup>3</sup> together with subdivision 7 fees,<sup>4</sup> and stating that he would "accede to whatever the Court believes is an appropriate charge under the circumstances" with regard to the missed IME.

The employer filed an objection to the petition for attorney fees, contending that the employee's attorney was entitled only to contingent fees on the temporary total disability benefits paid, that the attorney's work on the file after April of 2000 was unnecessary because the employee had been offered a settlement that would have eliminated the need for a hearing, that the employee's attorney did not prove entitlement to or the reasonableness of the requested fee using the Irwin factors, see Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), and that the claimed hours and hourly charges were excessive. The employer also disputed the employee's entitlement to subdivision 7 fees.

In findings and order on attorney fees filed on December 26, 2000, the compensation judge found that Mr. Reeker was entitled to a contingent fee of \$689.31, from the award of temporary total disability benefits and reimbursement to Graphic Communications, and that that fee was not adequate to compensate him for his work. The judge also found that Mr. Reeker's hourly fee was not excessive, that the settlement offer did not serve as a bar to an award of fees, and that Mr. Reeker was entitled to a total of \$6,400.00 in attorney fees,<sup>5</sup> less

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<sup>1</sup> Average weekly wage was also listed as an issue, but the judge made no finding on that point.

<sup>2</sup> It is unclear which specific medical bills were at issue at hearing, aside from those paid by HealthPartners.

<sup>3</sup> On pages 6 and 7 of his fee petition, Mr. Reeker claimed 16.25 attorney hours in 1999 at \$175 an hour and 34.25 hours in 2000 at \$205 an hour. The itemized fee petition itself listed 17.25 hours in 1999 and 35.25 hours in 2000. The compensation judge relied on Mr. Reeker's assertion that his hours totaled 50.5.

<sup>4</sup> Minn. Stat. §176.081, subd. 7.

<sup>5</sup> The judge awarded \$1,321.96 "in fees under Minn. Stat. §176.081, subd. 1 (a) (and Edquist out of the intervention portion of that) . . . ." We assume this figure was arrived at by adding the \$2,757.25 in temporary total benefits and reimbursement to the intervenor to the

\$464.20 for the reserve charge for the failed IME. The judge further ordered that subdivision 7 fees were payable on all fees awarded under Minn. Stat. §176.081, subd. 1(a), but not on “fees paid in excess of that.” The employee’s attorney appeals from the amount of the award and from the partial denial of subdivision 7 fees.

## 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 (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, 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).

## DECISION

### Attorney Fees

Attorney Reeker requests that this matter be remanded to the compensation judge because the judge did not explain his decision to reduce the requested attorney fees. We agree that a remand is necessary.

The compensation judge made a finding outlining the employer’s objections to the fee petition, including the allegation that “fees are not billed in increments of one-tenth of an hour but instead are billed on the basis of one-quarter of an hour which is not the proper local standard.” In his memorandum, the judge stated that he found “merit in the defense position that the itemization of fees would be more accurate at tenths of an hour rather than quarter hours that was used as the basis for recording the billing.” However, nowhere did the judge make a finding that one-tenth of an hour is the local standard or even that Mr. Reeker’s billings of .25 hour were minimum billings rather than actual billings. We would also note that the transcript does not indicate that this issue was ever raised on the record, there is no testimony or evidence in this regard, and this defense was not specifically raised in the employer’s objection to the fee petition.

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\$2,852.55 in medical bills (for a total of \$5,609.80) and then applying the 25/20 formula to that sum.

In his memorandum, the judge also stated that “it is evident that no paralegal time was broken down and recorded. . . . Obviously paralegal time is less expensive than attorney’s time and had that been reflected in the itemization of billable hours, the bill for fees would be less.” Again, however, the transcript does not indicate that the employer ever raised this objection to the requested fee, and there was no testimony or evidence at hearing that Mr. Reeker utilized the services of a paralegal.

In unappealed findings, the compensation judge determined that Mr. Reeker’s hourly fee was not excessive and that the contingent fees were insufficient to adequately compensate him for his services. In his memorandum, he further found that Mr. Reeker “did a commendable job in representing his client. The employee won her claim in its entirety.” As such, the judge’s award of a reduced fees is somewhat confusing.

In cases involving a request for Roraff fees,<sup>6</sup> the ultimate question is reasonableness. In making that determination, a compensation judge is generally required to explicitly analyze the fee request in light of the seven Irwin factors.<sup>7</sup> Those factors are: (1) the amount involved; (2) the time and expense necessary to prepare for trial; (3) the responsibility assumed by counsel; (4) the experience of counsel; (5) the difficulties of the issues; (6) the nature of the proof involved; and (7) the results obtained. Irwin, 599 at 142, 59 W.C.D. at 336. Because the compensation judge did not address these specific factors, we vacate the judge’s award and remand for findings on the Irwin factors and for a redetermination, based on those factors, of the reasonable fee to be paid to Mr. Reeker.<sup>8 9</sup> The judge should make his findings based on the existing record.

#### Subdivision 7 Fees

Mr. Reeker contends that subdivision 7 fees are payable on all attorney fees awarded pursuant to the Irwin decision, in which the supreme court held that “subdivision 7 awards should be made on all attorney fees awarded under section 176.081, even those fees paid by the employer.” Irwin, 599 N.W.2d at 144, 59 W.C.D. at 339. We agree that subdivision 7 fees are payable on contingent fees withheld from temporary total disability benefits payable to the employee **and** on Roraff fees paid to Mr. Reeker.

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<sup>6</sup> Attorney fees for the recovery of medical expenses are commonly called Roraff fees. See Roraff v. State Dept. of Transportation, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

<sup>7</sup> Frisch v. S &S Carpet Designs, 60 W.C.D. 181 (W.C.C.A. 2000).

<sup>8</sup> Mr. Reeker did not appeal from the judge’s order that \$464.20 should be withheld from attorney fees due him for the employee’s failure to attend an IME.

<sup>9</sup> We would note that our decision to this effect in no way precludes the judge from concluding again that \$6,400 is a reasonable fee.

The employer's primary argument in support of the compensation judge's decision is that Mr. Reeker was seeking excess hourly attorney fees for the procurement of monetary benefits, not Roraff fees, and that Irwin provided for subdivision 7 fees only on Roraff fees. The evidence in no way suggests that Mr. Reeker was seeking excess fees on indemnity benefits. Excess fees, as once set forth in Minn. Stat. §176.081, are fees awarded out of monetary benefits awarded to an employee. In this case, Mr. Reeker was seeking attorney fees of \$9,865.00, while the employee was awarded only \$2,757.25 in indemnity benefits; clearly, the employee did not receive sufficient benefits to generate an "excess" fee of \$9,865.00. Counsel's other argument -- that Mr. Reeker was seeking Kopish<sup>10</sup> and Irwin fees, not Roraff fees -- is also without merit. Kopish fees are merely Roraff fees payable in addition to contingent fees awarded on monetary benefits. Irwin fees are Roraff fees payable in excess of the 25/20 percentage allowed by statute. Therefore, whatever Mr. Reeker called his fee request, that request was in essence a request for Roraff fees.

We reverse the compensation judge's order that subdivision 7 fees "shall be paid on all fees made under Minn. Stat. §176.081, subd. 1 (a) but not fees paid in excess of that" and order that, once the judge has made a determination as to the amount of Roraff fees, subdivision 7 fees be awarded on all of those Roraff fees.<sup>11</sup>

Finally, the employer contends that the employee is not entitled to subdivision 7 fees on the Edquist<sup>12</sup> fee that was withheld from the intervention claim of Graphic Communications Local. We note, however, that the employer did not appeal from the compensation judge's decision. Moreover, because the judge's order first addresses subdivision 7 fees to be paid out of fees payable under Minn. Stat. §176.081, subd. 1 (a), and then specifies that reimbursement be made to the intervenor minus Edquist fees, we do not think that the judge intended to award subdivision 7 fees on Edquist fees. Under these circumstances, we will not address the issue further.

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<sup>10</sup> Kopish v. Sivertson Fisheries, 39 W.C.D. 627 (W.C.C.A. 1987).

<sup>11</sup> The compensation judge's reliance on Salahud-Din v. Compassionate Care Group, No. [REDACTED SSN] (W.C.C.A. Dec. 16, 1997), was clear error, as that case held that subdivision 7 fees were not payable on Roraff fees where those fees were awarded under Minn. Stat. §176.135. In the current case, with an injury date of November 1998, authority for Roraff fees is found in Minn. Stat. §176.081. See Irwin, 599 N.W.2d at 144, 59 W.C.D. at 339.

<sup>12</sup> See Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986), in which the supreme court held that an intervenor is obligated to pay a pro-rata share of the employee's attorney fees, based on the amount of the intervenor's reimbursement.