

JUDITH D. LUCKING, Employee, v. EPC LOUDON/COOKSON PLASTIC MOLDING CORP.
and ACE U.S.A., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 26, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - HEATON FEES. The compensation judge's award of attorney fees to the employee's attorney for his representation of the employee in a claim seeking rehabilitation assistance and retraining was not clearly erroneous and not an abuse of discretion on the facts of this case, and must, therefore, be affirmed.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Paul V. Rieke

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's award of attorney fees.
We affirm.

BACKGROUND

Judith D. Lucking, the employee, sustained an injury to her left shoulder on January 6, 1998, while working for EPC Loudon/Cookson Plastic Molding Corporation, the employer. The employer and its insurer admitted liability for the employee's injury and commenced payment of temporary total disability benefits. Kristen Peterson, a qualified rehabilitation consultant (QRC), met with the employee on June 23, 1999 for a rehabilitation consultation and concluded the employee was eligible for rehabilitation services. A rehabilitation plan was filed on August 3, 1999 with a goal of returning the employee to work with a different employer.

On June 20, 2000, the employee retained Thomas D. Mottaz, Esquire, to represent her. On July 26, 2000, the employee, through her attorney, filed a rehabilitation request seeking vocational testing and retraining. In their response, the employer and insurer stated they disagreed with the requested rehabilitation services. The Minnesota Department of Labor and Industry served a Notice for an Administrative Conference which was held on September 13, 2000. In a Decision and Order filed September 21, 2000, a representative of the department ordered the rehabilitation plan be changed to include the development of a job placement plan by the QRC, job placement services, vocational testing and the exploration of retraining. The employer and

insurer then filed a Request for Formal Hearing. Prior to the hearing, the parties reached a settlement of the rehabilitation dispute. In a Stipulation for Settlement, the parties agreed the employer and insurer had withdrawn its Request for Formal Hearing but did not concede the employee was entitled to retraining benefits. An Award on Stipulation was filed on February 14, 2001.

The employee's attorney filed a Statement of Attorney Fees on January 18, 2001, seeking payment of \$5,651.90 in fees under Minn. Stat. § 176.081, subd. 1(a)(1), for the recovery of rehabilitation benefits.¹ Mr. Mottaz sought payment for 23.5 hours of legal services at \$215.00 per hour, 0.2 hours of legal services at \$162.00 per hour and 8.1 hours for his legal assistant at \$70.00 per hour. In support of his claim for services, Mr. Mottaz attached an affidavit summarizing the legal services provided and his experience and expertise in workers' compensation cases, as well as a Billing Rate Survey of Minnesota law firms dated September 2000 prepared by Robert Hayden, a management consultant in Minneapolis, Minnesota. The employer and insurer filed an objection to the employee's claim for Heaton fees. The employer first objected to the \$215.00 hourly rate claimed by Mr. Mottaz and asserted an hourly rate of \$150.00 per hour was more reasonable. The employer further objected to numerous individual charges by Mr. Mottaz claiming they were excessive and not reasonably necessary to prepare for a trial on the rehabilitation dispute. The employer contended a reasonable attorney fee in this case was \$3,432.40.

The employee's claim for attorney fees was heard at the Office of Administrative Hearings on June 1, 2001. At the hearing, Mr. Mottaz withdrew from his attorney fee statement several itemized charges totaling 0.9 hours and added a charge for an additional 0.5 hours. In an Order Determining Attorney Fees filed May 14, 2001, the compensation judge awarded Heaton fees to Mr. Mottaz based on his amended fee petition. The employer and insurer appeal.

DECISION

The appellants first argue an award of attorney fees at a rate of \$215.00 per hour for a rehabilitation dispute is excessive. They assert this hourly rate is nearly 80 percent more than the hourly rate charged by attorneys who represent employers in similar cases. The appellants ask this court to reduce the employee's hourly rate to \$150.00 per hour which they contend is a reasonable hourly charge given the contingent nature of rehabilitation disputes. The appellants further object to the inclusion of the employee's time in gathering Social Security Administration earnings records, his time meeting with the employee's ADA attorney and the six minute minimum charge for leaving messages, reading documents and reading correspondence without taking any action. The appellants assert these charges are excessive and were unnecessary to advance the employee's retraining claim, and requests that this court subtract them from the award of attorney fees.

A determination of the amount of Roraff or Heaton fees lies within the discretion of the compensation judge. Neuman v. Graceville Health Center, 52 W.C.D. 194 (W.C.C.A.

¹ Attorney fees for the recovery of rehabilitation benefits are commonly know as Heaton fees. See Heaton v. J.E. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983).

1994). As each case is factually unique, this court will give deference to the compensation judge's judgment and discretion in determining an award of Roraff or Heaton fees. In reviewing an award of Heaton attorney fees, this court will not reverse a compensation judge's award or denial of attorney fees absent an abuse of discretion. See Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997); Kuller v. Kuller, 109 N.W.2d 561, 260 Minn. 256 (1961). A compensation judge abuses his or her discretion only when the award of fees is based upon a clearly erroneous conclusion given the record.

The underlying rehabilitation dispute in this case was the employee's request to consider retraining as part of the employee's rehabilitation plan. On the morning of the scheduled hearing, the employer and insurer agreed to withdraw its Request for Formal Hearing and the parties entered into a Stipulation for Settlement. No monetary benefits were paid the employee as a result of the Rehabilitation Request. Minn. Stat. § 176.081, subd. 1(a)(2), states the maximum attorney fee for obtaining any "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." Such a limitation on attorney Heaton fees violates the doctrine of separation of powers. Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999).

In Irwin v. Surdyk's Liquor, the supreme court held the determination of a reasonable attorney fee in medical disputes is to be based upon the statutory guidelines² together with the seven so-called Irwin factors.³ Id. The express purpose of the Irwin decision is to afford a reasonable fee to the employee's attorney. A reasonable attorney fee may not be based solely on a simple mathematical calculation of the time expended or the hourly rate. The time necessary to prepare for trial is but one of the Irwin factors. Rather, a reasonable fee must be determined based on all seven of the Irwin factors.

The compensation judge made specific factual findings regarding the Irwin factors: the responsibility assumed by counsel was significant and the employee acquired a significant benefit; Mr. Mottaz has extensive experience in workers' compensation matters and is a highly qualified attorney; the difficulty of the issues presented by the rehabilitation request was of normal difficulty; the nature of the proof needed to be adduced was extensive; the results obtained for the employee were excellent. The compensation judge further found it was reasonable for Mr. Mottaz to obtain the employee's Social Security records and review the employee's file at the Department of Labor and Industry. The court also found the attorney's charges for leaving messages, reviewing letters and obtaining medical records were reasonable and necessary to fully represent the employee. Finally, the compensation judge found it was reasonable for Mr. Mottaz to contact the employee's ADA attorney to fully prepare for litigation. The compensation judge then found that under all of the circumstances, the hourly charges and hourly rate asserted by Mr. Mottaz were reasonable in this case. Based upon our review of the files and records herein, we conclude the

² The 25/20 formula set forth at Minn. Stat. § 176.081, subd. 1.

³ In determining a reasonable fee, the compensation judge shall consider the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the expertise of counsel in the workers' compensation field, the difficulties of the issues involved, the nature of the proof needed to be adduced and the results obtained.

compensation judge's award of Heaton fees was reasonable and not an abuse of the judge's discretion. Accordingly, the award of Heaton fees is affirmed.