

ABDIRAHMAN A. MOHAMED, Employee/Appellant, v. THE TURKEY STORE and WAUSAU INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 2, 2001

No. [REDACTED SSN]

HEADNOTES

RORAFF FEES - CHANGE OF PHYSICIANS. The compensation judge's award of \$500 under Minn. Stat. § 176.081, subd. 1(a)(2), is inappropriate because the arbitrary \$500 limit under that statute is unconstitutional per the supreme court's decision in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). The employee's attorney is entitled to reasonable fees for successful representation of the employee in a change of physician dispute using the seven factors set forth in Irwin.

COSTS & DISBURSEMENTS - CHANGE OF PHYSICIANS. Where the only dispute is a request for a change of physician, and the reason for the request is a change of residence by the employee, the compensation judge was not unreasonable in refusing to tax the cost of obtaining copies of medical records from the employee's physicians. This cost, however, may be taxed in connection with an issue on which the employee prevails where the records are useful.

Affirmed in part and reversed in part.

Determined by Wheeler, C.J., Wilson, J., and Pederson, J.
Compensation Judge: James R. Otto

OPINION

STEVEN D. WHEELER, Judge

The employee's attorney appeals from the compensation judge's determination that his attorney fees for representing the employee in connection with a medical request was limited by Minn. Stat. § 176.081, subd. 1(a)(2), to \$500.00, and also that he was not entitled to reimbursement for costs in the amount of \$111.01. We reverse the compensation judge's determination with respect to attorney fees and award attorney fees in the amount of \$1,900.00. We affirm the compensation judge's denial of costs.

BACKGROUND¹

The employee, Abdirahman Mohamed, sustained admitted right shoulder and right wrist Gillette injuries² as a result of his employment at The Turkey Store in Faribault, Minnesota, on December 16, 1998. (ER/INS brief at 1, Notice of Insurer's Primary Liability Determination filed 5/3/99.) At the time of the injury, the employee was almost 50 years old. He had been hired by the employer in 1997 as a production worker. The employee was first treated on February 18, 1999, at the Faribault Clinic, at which time he gave a history of right shoulder and right wrist pain for the prior three months. The employee continued to treat with Dr. Anjala Bharadwaj, with a diagnosis of right shoulder tendinitis, which, on March 10, 1999, was noted to be somewhat improving. Dr. Bharadwaj referred the employee to Dr. Christopher Daley, M.D., at the Orthopedic and Fracture Clinic for an evaluation on April 21, 1999. In his report of the same date, Dr. Daley indicated that the employee had full range of motion of his cervical spine, some tenderness with slight muscle spasm on the left side of the neck and full shoulder range of motion. No evidence of shoulder impingement was noted at that time. Dr. Daley indicated that the employee had "resolved impingement syndrome" of the shoulder. He did apparently prescribe additional physical therapy for the employee's neck. On May 3, 1999, the employer and insurer filed a notice of acceptance of primary liability and indicated that temporary partial disability benefits had been paid. On May 21, 1999, a discharge note from physical therapist B. John Ellingworth indicated that the employee had reached his rehabilitation goal of independent self-management of his neck condition and was released to continue working on a program at home.

On June 8, 1999, the employee was apparently involved in a motor vehicle accident. He was initially treated at Queen of Peace Hospital in New Prague, where he complained of "left lower back discomfort, mild diffuse frontal headache, some posterior chest wall discomfort of diffuse nature and mild posterior neck pain also of diffused nature." The physician's diagnosis was multiple contusions and posterior cervical strain.

On June 9, 1999, Dr. Michael Czichray, D.C., diagnosed whiplash of the neck, strain and sprain of the upper middle back, strain and sprain of the lower back, along with right and left shoulder strains. Dr. Czichray initiated treatment. His notes apparently make no reference to an injury while working at the employer. The employee also sustained a knee injury in the automobile accident and was referred to Dr. Donald Becker, an orthopedic surgeon, located in the Twin Cities area. An MRI of the knee was done, which indicated a torn medial meniscus, which was repaired by a medial and lateral meniscal excision.

On June 21, 1999, the employer and insurer filed a notice of intention to discontinue benefits because the employee had returned to work on May 24, 1999, at full wages. (Judgment

¹ The facts contained in the background are mainly derived from documents found in the Judgment Roll and are accurate only to the extent the underlying documents are accurate. The facts presented in the background should not be accepted as a finding since there has been no determination by a compensation judge concerning the employee's injury. They are provided to give some factual context for this decision.

² Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

Roll: NOID of 6/21/99.) The employee's attorney, Mr. Robichaud, filed a retainer agreement and notice of representation with the Department of Labor and Industry on September 2, 1999. On September 27, 1999, the insurer served and filed a letter to the employee indicating that in accordance with the healthcare provider report of Dr. Daley, dated in September 1999, the employee had reached maximum medical improvement on April 21, 1999. Dr. Daley's report indicated that the employee had reached MMI and had not sustained any permanent partial disability and was able to return to his former employment.

On November 18, 1999, the employee filed a request for certification of dispute. The description of the dispute was as follows: "Mr. Mohamed is requesting he be allowed to see an orthopedist for his shoulder as his condition has not improved, in fact it has become increasingly worse." In a letter dated November 29, 1999, a dispute prevention resolution specialist at the Department of Labor and Industry wrote to the employee's attorney, advising him that the matter would not be certified as the employer and insurer had agreed to the request for a change of doctor to Dr. LaPrada. Apparently that approval was retracted and on December 1, 1999, the Department of Labor and Industry issued a certificate of dispute concerning the employee's request to change physicians.

On December 20, 1999, the employee's attorney filed a medical request seeking authorization for a change of treating physician from the Rice County Hospital in Faribault to Dr. LaPrada in Minneapolis. On January 11, 2000, the employer and insurer filed a medical response in which it stated as follows:

The employee has received reasonable and necessary medical care from Faribault Clinic, Rice County Hospital and Rehab One. The employee was returned to full-time work following his right wrist and right shoulder strain in late April, 1999. Subsequently, the employee was terminated for reason unrelated to his work injury. All medical bills have been paid and the employee has not treated with any physician since his termination. There is no justifiable reason for the employee's request to change physicians and the same should be denied.

The matter was considered at an administrative conference before a representative of the Commissioner of the Department of Labor and Industry on February 15, 2000. As a result of that conference, a decision was issued on February 23, 2000. This decision indicates that at the conference the employee amended his request for a change of physician to designate Dr. Becker, who was apparently the employee's treating orthopedic surgeon for injuries to his knee sustained in an automobile accident in June 1999. The order states that "the employee's request for a change of treating physicians is reasonable."

On March 15, 2000, the employer and insurer filed a request for a formal hearing at the Office of Administrative Hearings, and also served a discovery request on the employee. In the request for formal hearing, the employer and insurer stated the following as reasons for disputing the Commissioner's designee's order:

The employee filed a Medical Request seeking a change of doctors to Dr. LaPrada. At the time of the medical conference, the employee changed his request to seek treatment with Dr. Becker. Specialist Donna Olson allowed the change of physicians but did not specifically allow any course of treatment. The employer and insurer seek review of the decision to change treating doctors as the employee was returned to full-time work following his admitted right wrist and right shoulder injury in late April of 1999. The employee reached maximum medical improvement and did not treat with any physician relative to those injuries since that date. The employee has had subsequent intervening and superceding accidents causing need for various medical treatment, not causally related to the admitted work injury. The employer and insurer assert that there is no justifiable reason for the employee's request to change physicians and seek further review of the same.

On April 21, 2000, the employee was examined by Dr. Paul Yellin, M.D., at the request of the employer and insurer. Dr. Yellin concluded that the employee had a resolved cervical strain, resolved right shoulder tendinitis and resolved right wrist tendinitis. He indicated that the employee had reached maximum medical improvement as of May 21, 1999, when he was discharged from physical therapy. He stated that the employee's current medical treatment being received from Dr. Becker was not related to any injuries which culminated on December 16, 1998. He further observed that the employee "has no unusual objective findings to substantiate any residual problems with his right shoulder or related to his alleged work activities up to and including December 16, 1998." He further indicated that the employee required no additional treatment, had a zero percent permanent partial disability rating and had no work restrictions relating to his alleged injuries at the employer. (Report of IME Dr. Paul Yellin, dated 4/21/2000.)

The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on May 2, 2000. The sole issue before the compensation judge was "[w]hether Mr. Mohamed is entitled under the Workers' Compensation Law to be treated by a doctor of his choice in Minneapolis, Minnesota." (Findings and Order of 5/24/00.) The compensation judge issued his decision on May 24, 2000, rejecting the employer and insurer's objection to the change in physicians. He made the following findings:

- I. The above-named employer and its workers' compensation insurer has denied responsibility for any future treatment to Mr. Mohamed as a result of his personal injury of December 16, 1998 on the grounds that any further treatment is not reasonably required to cure or relieve from the effects of said personal injury of December 16, 1998.
- II. Under the terms and provisions of the Minnesota Workers' Compensation Law (and case decisions) when the employer and insurer denies further responsibility for future medical treatment an employee does not have to file a request to change treating

physicians or obtain permission from a Compensation Judge to change treating physicians, and may be treated by a doctor of his choice.

On June 19, 2000, the employee's attorney filed a Statement of Attorney's Fees, requesting Roraff fees³ for his successful representation of the employee against the employer and insurer's objection to a the change of physician. The attorney's claim was for \$3,997.50 in fees based on 20.5 hours of work at \$195.00 per hour and costs and disbursements in the amount of \$111.01. Attached to the Statement of Attorney's Fees was a listing of services provided by the employee's attorney, from the initial meeting on August 30, 1999 through services rendered on June 5, 2000. In addition, copies of bills incurred to obtain medical records from three medical providers, totaling \$111.01, were attached as costs.

The employer and insurer objected to the attorney fees and costs and the matter came on for hearing before a compensation judge at the Office of Administrative Hearings on August 14, 2000. In his Findings and Order served and filed August 17, 2000, the compensation judge determined that the employee's attorney was entitled to only \$500.00 in attorney fees pursuant to the limitations contained in Minn. Stat. § 176.081, subd. 1(a)(2), because the only matter in controversy was the change of physician. In addition, the judge stated that the employee's attorney was not entitled to reimbursement for the costs claimed because there was no proof that the costs related to the matter and controversy heard on May 2, 2000. The employee's attorney appeals from the denial of attorney fees in excess of \$500.00 and reimbursement for costs claimed.

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.

³ Roraff v. State of Minn., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

DECISION

Appealable Order

The first issue raised by the employer and insurer on appeal is whether the August 17, 2000 decision of the compensation judge is an order from which an appeal may be taken. The employer and insurer argue that pursuant to Minn. Stat. § 176.421, subd. 1, an appeal is not available because the May 24, 2000 decision does not affect the merits of the case. (ER/INS brief at 4.) The basis of their position is that as of the date that attorney fees were awarded in the August 17, 2000 Findings and Order, no actual benefits had ever been awarded to the employee. As a result, they contend that a finding of liability for attorney fees would be premature. The employer and insurer argue that should the employee subsequently be successful in establishing that the treatment provided by his new doctor was causally related to his work injury, he may then be entitled to Roraff fees for having successfully obtained the services of that physician.

While the employer and insurer's argument is interesting and creative, we are not persuaded that the August 17, 2000 decision was an interlocutory order. The compensation judge's decision of that date resolved a controversy which had been created by the refusal of the employer and insurer to withdraw its objection to the employee's request to change his treating orthopedic physician. Had the employer and insurer not filed that objection, the employee would not have had to retain the services of his attorney. As a result of the employer and insurer's litigation position, there was a real controversy which needed to be resolved. In addition, Minn. Stat. § 176.081, subd. 1(a)(2), which states that attorney fees are appropriate for representing an employee in a change of physician dispute, does not predicate the award of fees on an award of other benefits. Even though the employee may never obtain any actual benefit as a result of the services of the physician who is going to be treating him in the future, he is entitled to Roraff fees. Since the case before the compensation judge was whether the employee could select a new physician, his decision of August 17, 2000 did effect the merits of that case and therefore it was not an interlocutory order.

Roraff Fees

The issue of the appropriateness of a Roraff fee in this case is governed by Minn. Stat. § 176.081, subd. 1 (1995). In cases involving a change of change of physician, subdivision 1(a)(2) provides as follows:

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 or insurer.

The supreme court's decision in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), set forth principles which would require a finding that the \$500.00 limitation on attorney fees is unconstitutional.

In cases where the employee's attorney claims that the actual services rendered would have required a fee in excess of \$500.00, the compensation judge is required to determine what a reasonable fee would be under the circumstances of the case. In order to make that determination, the compensation judge is required to analyze the facts pursuant to seven factors set forth in the Irwin decision. These factors are as follows: (1) the amount of time 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. (Id., 599 N.W.2d at 142, 59 W.C.D. at 336.)

In the case at hand, the compensation judge did determine that a reasonable fee for the services provided by the employee's attorney in representing the employee on his request for a change in physician was \$1,900.00. He stated, however, that he was unable to award the attorney this amount because of the \$500.00 cap contained in Minn. Stat. § 176.081, subd. 1(a)(2). As we have reversed the compensation judge's application of the statute and have indicated that the employee is entitled to a reasonable attorney fee as determined by the application of the seven Irwin factors, the issue before us is whether the compensation judge's determination that \$1,900.00 was a reasonable fee should be accepted.

Because the compensation judge did not make specific findings for each of the factors, we would normally be inclined to remand the matter. In this case, however, because at the oral argument hearing before this court both parties agreed that the \$1,900.00 fee was reasonable, we see no reason to delay the matter further. As a result, we modify the compensation judge's findings to award Roraff fees to the employee's attorney of \$1,900.00.

Costs

“The commissioner or compensation judge or on appeal the workers' compensation court of appeals, may award the prevailing party reimbursement for actual and necessary disbursements.” Minn. Stat. § 176.511, subd. 2. A party is entitled to be reimbursed only for those actual and necessary disbursements that relate to an issue on which that party prevailed. Hodgin v. Ford Motor Co., 341 N.W.2d 567, 679-70, 36 W.C.D. 423, 426 (Minn. 1983). It is within the compensation judge's discretion to make a factual determination regarding which individual disbursement are necessary and directly related to the issues on which the party prevailed. Id.

In this case, the compensation judge indicated that “the evidence is insufficient to support a finding that the claimed costs were relevant to a change in doctors dispute.” The costs claimed by the employee were expenses related to obtaining photocopies of medical records. The total cost for the photocopies was \$111.01. The employee's attorney argues that it is the standard practice, in cases of this sort, to obtain photocopies of the medical records of the employee, so that a proper evaluation of the case may be made. He states that a failure to obtain such records would arguably be malfeasance. (EE brief at 6.)

The employee's attorney misses the point of the statute concerning reimbursement for expenses. The primary position taken by the employee in the dispute concerning change of physicians was that the employee was entitled to change physicians because he had moved from

the town in which his previous healthcare providers were located and they were no longer convenient to him. The employee argued that since he had changed his residence to Minneapolis that he should be entitled to consult with a physician who practiced relatively near to his residence. The compensation judge concluded that the employee did not need to obtain approval of a compensation judge for a change of physician and therefore did not admit any evidence at the May 2, 2000 hearing. He found that the medical records obtained from his healthcare providers in Faribault were not relevant to the issue of whether the employee was entitled to a change of physicians. We cannot fault this determination. The compensation judge is in the best position to determine whether particular pieces of evidence are important in assisting the trier of fact in determining an issue upon which the employee prevailed. In this case, the compensation judge indicated that the medical records did not assist in supporting the employee's case for change of physicians. This is not to say that those same medical records may not be relevant and important in helping the employee to prevail in some other aspect of his claim in the future. If the employee is successful in the future, then he would be entitled to be reimbursed for those expenses in the context of issues in which they assisted the employee in prevailing. As a result, the compensation judge's denial of the claim for reimbursement of these costs at this time is affirmed.