CONNIE M. POWERS, Employee/Appellant, v. ITASCA NURSING HOME and AM. COMP./RTW, Employer-Insurer, and ITASCA NURSING HOME and LUMBERMEN'S UNDERWRITING ALL., Employer-Insurer, and BLUE CROSS/BLUE SHIELD OF MINN., ITASCA MED. CTR., and ITASCA PHYSICAL THERAPY, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 30, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF FEES. The compensation judge erred in denying Roraff attorney fees on the basis that the self-insured employer's refusal to pay medical expenses was based on its denial of primary liability rather than the reasonableness and necessity of the claimed medical expenses, and the matter is remanded for redetermination.

Vacated and Remanded.

Determined by Wheeler, C.J.,Wilson, J., and Pederson, J.
Compensation Judge: Donald C. Erickson

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's denial of a petition for Roraff fees. We vacate and remand.

BACKGROUND

The employee, Connie M. Powers, sustained a work-related injury to her low back on September 8, 1989 when she slipped and fell at work as a nursing assistant for the employer, Itasca Nursing Home, then insured by the Lumbermen's Underwriting Alliance, hereinafter "Lumbermen's". The employee had a prior low back condition which had been surgically treated by a hemilaminectomy at the L5-S1 level in 1981, to remove a disc fragment which impacted the nerve root on the right. Following the 1989 injury, the employee required further surgery, again at the L5-S1 level, for removal of a disc fragment. (5/19/97 F&O: Findings 3-6.)

Following the 1989 work injury the employee was paid medical expenses, wage loss benefits, and permanent partial disability for a 9 percent whole-body disability by the employer and its insurer Lumbermen's. She was able to return to work at full duties without restrictions and continued in her job with the employer as a nursing assistant and LPN through January 31, 1995. (5/19/97 F&O: Findings 7-9.)

On January 31, 1995 the employee sustained a work related injury to her low back when she was lifting a 200-pound patient. She had an onset of low back pain and pain radiating into her right leg. The pain progressively worsened and the employee was hospitalized from April 28, 1995 to May 3, 1995 for pain management and physical therapy treatment. An MRI subsequently revealed a new disc herniation at L4-5 impinging on the right L5 nerve root. The employee underwent another surgical procedure on May 10, 1995 which removed a disc fragment at the L4-5 level. No new fragmented disc material was found at the L5-S1 level. (5/19/97 F&O: Findings 12, 13, 15.)

The employer's workers' compensation insurer for periods relevant to this matter on and after the employee's injury on January 31, 1995 was American Compensation Insurance Company, hereinafter "American". (5/19/97 F&O: Findings 11, 23.)

The employee was temporarily totally disabled from April 27, 1995 until July 10, 1995. She was subsequently released to return to work with permanent restrictions consisting of no lifting or transferring of patients, stooping or bending limited to infrequently, and sitting limited to 20 to 30 minute periods. (5/19/97 F&O: Findings 17, 21.)

On November 3, 1995 the employee filed a claim petition alleging injury dates of September 9, 1989 [sic] and January 31, 1995 and seeking temporary total disability benefits, payment of medical expenses, and permanent partial disability compensation in an amount yet to be determined. The employer and American answered by denying liability and alleging that the employee's disability and need for medical treatment was the result of her preexisting low back condition. The employer and Lumbermen's answered denying that the employee's disability and need for medical treatment were related to the 1989 work injury and alleging that her problems were the result of conditions preexisting that injury and/or of the injury on January 31, 1995. (Judgment Roll.)

On November 22, 1995 a motion to intervene was filed by staff counsel for Blue Cross and Blue Shield of Minnesota, which had paid for medical care for the employee's low back condition. Further motions to intervene were filed by medical providers Itasca Medical Center and Itasca Physical Therapy, on June 10, 1996 and June 13, 1996, respectively. All three motions were granted. (Judgment Roll.)

The employee returned to work with the employer but was taken off work between May 21 and May 31, 1996 when her back "went out" at work and her condition required a period of hospitalization. The employee subsequently returned to work for the employer at full wages. (5/19/97 F&O: Findings 22, 24-27.)

A hearing was held on the employee's claim petition before a compensation judge of the Office of Administrative Hearings on March 19, 1997. The reasonableness and necessity of the employee's medical treatment was not contested at the hearing and the intervenors were not represented by counsel at the hearing. The compensation judge's memorandum discloses that "[t]he primary issue in this case is which insurer is liable for the benefits sought by the employee." (5/19/97 F&O: Mem. at 7.)

The compensation judge found that the employee had sustained a new injury on January 31, 1995, and that all benefits sought in the employee's claim petition were causally related solely to that injury. The employer and American were ordered to pay the employee $4,338.78 for temporary total disability from April 27, 1995 to July 10, 1995, $592.31 for temporary total disability from May 21 to May 31, 1996, and $12,000.00 as permanent partial disability compensation for a 16 percent whole-body disability. Contingency fees from these benefits were ordered withheld and paid to the employee's attorney. The employer and American were further ordered to pay the employee's medical expenses. (5/19/97 F&O: Order 1.) No appeal was taken from this decision by any party. (Judgment Roll.)

On January 31, 2000 the employee's attorney filed a Statement of Attorney's Fees requesting an award of $8,532.52 for the successful representation of the employee resulting in an award of medical expenses[1]. In a letter dated February 23, 2000 the employer and American objected to the request for fees, and the matter was heard by a compensation judge by telephonic hearing on May 8, 2000. Following the hearing, the judge issued an Order on Petition for Roraff Fees, served and filed on May 11, 2000, denying the fee petition. The employee appeals. (Judgment Roll.)

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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.

DECISION

Reasonable attorney fees to be paid by the employer and insurer may be awarded to a successful claimant's attorney in a proceeding solely related to the recovery of medical expenses or benefits, where no monetary indemnity benefits are concurrently payable to the employee. Roraff v. MN Dep't of Transp., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980); Minn. Stat. § 176.135, subd. 1(d). In cases where both medical expenses and wage and permanency benefits are awarded, it is possible that an employee's attorney is also entitled to Roraff fees paid

[1] Such fees are generally referred to as "Roraff" fees. *See* Roraff v. MN Dep't of Transportation, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

in addition to contingency fees paid by the employee from benefits received, pursuant to Minn. Stat. § 176.081, subd. 1[2], where such statutory contingency fee alone would not reasonably compensate the attorney for her services.

In determining what constitutes a reasonable fee, consideration must be given to the criteria of Minnesota Statutes section 176.081, subdivision 5(d), as in effect on the date of the employee's January 1995 work injury.[3] Lindahl v. Thomas Chevrolet & Cadillac, Inc., No. [READCTED SSN] (W.C.C.A. Mar. 15, 1994). The factors to be considered under subdivision 5(d) include: (1) the amount involved, (2) the time and expense necessary to prepare for trial, (3) the responsibility and expertise of counsel, (4) the difficulty of the issues, (5) the nature of the proof needed and (6) the results obtained.

The employee's attorney received a contingent fee in this case which the parties agree amounted to $3,586.00. The compensation judge, however, apparently failed to consider the subdivision 5(d) factors or to determine whether the contingency fee paid to the employee's attorney reasonably compensated him for his representation of the employee. Instead, the compensation judge's Order recites merely that

> the Petition for Roraff fees is denied in its entirety pursuant to Collyard v. Hennepin County Medical Center, 45 WCD 13 (1991) as the only major dispute was primary liability, not the reasonableness and necessity of the medical expenses.

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[2] This subdivision as in effect on the date of injury provides

> Subdivision 1. Approval. (a) A fee for legal services of 25 percent of the first $4,000 of compensation awarded to the employee and 20 percent of the next $60,000 of compensation awarded to the emplyee is permissible and does not require approval by the commissioner, compensation judge, or any other party except as provided in paragraph (d). All fees must be calculated according to the formula under this subdivision, or earned in hourly fees for representation at discontinuance conferences under section 176.239, or earned in hourly fees for representation on rehabilitation or medical issues under section 176.102, 176.135, or 176.136. Attorney fees for recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer if these fees exceed the contingent fee under this section in conection with benefits currently in dispute. The amount of the fee that the employer or insurer is liable for is the amount determined under subdivision 5, minus the contingent fee.

[3] Minn. Stat. § 176.081 was amended effective October 1, 1995 deleting Subdivision 5 and making other changes regarding attorney's fees, including Roraff Fees. The 1995 amendments, however, apply only to fee awards in cases where the employee's injury occurred on or after their effective date. Senjem v. Independent School Dist. #625, slip op (W.C.C.A. Dec. 3, 1996).

The employee appeals seeking a remand to the compensation judge for further findings, arguing that the compensation judge erred in his application of Collyard. We agree. In a recent case, Gerulli v. USX Corp., slip op. (W.C.C.A. Nov. 14, 2000), this court considered this precise issue. In Gerulli, we reviewed Collyard and concluded that "[t]he Collyard case does not stand for the proposition that Roraff fees are never appropriate when the only issue at the hearing is primary liability." As we previously stated in Peterson v. Everything Clean, Inc., 55 W.C.D. 126 (W.C.C.A. 1996), where we affirmed an award of Roraff fees where the principle issue at hearing was whether the employee's injury arose out of and in the scope of her employment:

> It makes no difference, under the circumstances of this case, that there was no issue of the reasonableness and necessity of the medical treatment or that the only issue in dispute was primary liability. The critical element was that the contingency fees were so low that but for the possibility of receiving Roraff fees, it would have been difficult for the employee to obtain assistance of counsel.

Since it cannot be determined whether the compensation judge reached the issue of whether the employee's attorney was adequately compensated by the contingency fee obtained, we vacate the compensation judge's Order on Petition for Roraff Fees, served and filed May 11, 2000, and remand for reconsideration under the appropriate factors.