MELISSA A. PROKOSCH, Employee, v. SPRINGFIELD CMTY. HOSP. and FARM BUREAU MUT. INS. CO., Employer-Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 26, 2001

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE. Where the compensation judge did not consider the employer and insurer's objection to the statement of attorney fees before issuing an order determining attorney fees, the order is vacated and the matter remanded to the compensation judge for reconsideration.

Vacated and remanded.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal from the Order Determining Attorney Fees, served and filed on October 30, 2000. We vacate and remand to the compensation judge for reconsideration.

BACKGROUND

On September 25, 1997, Melissa A. Pokosch, the employee, sustained an injury which arose out of and in the course of her employment with Springfield Community Hospital, the employer. On that date, the employer was insured for workers' compensation liability by Farm Bureau Mutual Insurance Company, the insurer. The employer and insurer accepted primary liability for the employee's work injury and have paid various workers' compensation benefits to and on behalf of the employee. Following her injury, the employee underwent conservative medical treatment, including hospitalization, therapy, injections and medications. She was diagnosed with degenerative disc disease, and ultimately was recommended to undergo fusion surgery by her treating physician, Dr. James R. Schwartz.

On May 24, 2000, the Department of Labor and Industry filed a certification of dispute regarding this medical issue. On June 5, 2000, the employee filed a medical request, requesting payment of prescribed fusion surgery at the L4-5 level, as recommended by Dr. Schwartz. The employer and insurer denied liability for the proposed surgery. On August 25, 2000, a hearing was held before a compensation judge on the medical dispute. In unappealed Findings and Order served and filed August 30, 2000, the compensation judge found in relevant

part that the employee's injury was permanent in nature and that the recommended fusion surgery proposed by Dr. Schwartz was reasonable and necessary to cure or relieve the effects of the employee's September 25, 1997 injury. In his findings and order, the compensation judge also found as follows:

> The employee has been represented in these proceedings by Attorney Timothy McCoy who is entitled to a reasonable "Roraff-type" attorney fee. Within 20 days of these Findings and Order Attorney McCoy should file a Petition for Attorney Fees with the Court and serve same upon the employer and insurer and their attorney Jerome Vehanen. Any response to the attorney fees should be made within 10 days of service.

(Finding No. 11.)

On September 20, 2000, the attorney for the employee filed a Statement of Attorney Fees, claiming entitlement to payment of Roraff fees pursuant to Minn. Stat. § 176.135. In the Statement of Attorney Fees, the employee claimed a minimum amount of attorney fees pursuant to a Roraff hourly allotment of $4,275.00 based upon 22.5 hours at $190.00 per hour. The employee's attorney also stated that he was "actually claiming attorney fees which are a contingent fee on the amount of eventual medical benefits received by the employee for her fusion surgery . . ." and was "requesting that attorney's fees be determined on the statutory contingent fee on the amount of eventual medical benefits paid by the employer and insurer." The employee's attorney also made application for payment of attorney fees pursuant to Minn. Stat. § 176.081, subd. 7. (Judgment Roll.)

On October 30, 2000, the compensation judge served and filed an Order Determining Attorney Fees. That order stated that the Office of Administrative Hearings had received the statement of attorney fees, but had received no response to the statement. The compensation judge determined that the employee's attorney should receive a reasonable attorney fee for representation of the employee concerning the matter in dispute on August 25, 2000, and ordered payment of Roraff fees. The compensation judge ordered the following:

> NOW, THEREFORE, IT IS HEREBY ORDERED that the employer/insurer shall pay Roraff fees to Attorney McCoy. The amount of the fee shall be 25% of the first $4,000.00 in medical treatment expenses paid pursuant to the aforestated Findings and Order of the Compensation Judge and 20% of charges in excess of $4,000.00 to a maximum fee of $13,000.00. This fee should be paid by the employer and insurer in addition to the medical treatment expenses relating to the awarded surgery.

The employer and insurer appealed from that Order Determining Attorney Fees, arguing that they were denied due process since the compensation judge did not review their Objection to Statement of Attorney Fees.

STANDARD OF REVIEW

"[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

The compensation judge ordered the employee's attorney to file a petition for attorney fees and to serve the same upon the employer and insurer, within 20 days of the Findings and Order. The compensation judge further ordered that any response to the attorney fee petition should be made within ten days of service, a deadline which comports with requirements of Minn. Stat. § 176.081, subd. 1(d) and Minn. R. 1415.3200, subp. 3. The employer and insurer followed this directive, and filed an objection to attorney fees with the Office of Administrative Hearings on September 29, 2000, filing by facsimile transmission. They also apparently mailed a hard copy on that date.

The record does not indicate why the compensation judge was not provided with a copy of the objection to attorney fees. Review of this file's documents stored within the Office of Administrative Hearings computer filing system shows that an Objection to Attorney Fees was filed by facsimile transmission on September 29, 2000.[1]

As the compensation judge did not consider the objection of the employer and insurer, we vacate the Order Determining Attorney Fees, and remand the matter to the compensation judge for reconsideration. Upon reconsideration, the compensation judge should allow the parties an opportunity to be heard. As stated by this court in Carlson v. RDO Frozen Foods, 55 W.C.D. 500 (W.C.C.A. 1996), wherein an objection to a fee statement had been filed but no hearing was held to determine all issues:

> A compensation judge at the Office of Administrative Hearings, when in receipt of an objection to an employee's attorney's request for Roraff fees pursuant to a Statement of Attorney Fees and a request for taxation of costs and disbursements, should generally

[1] This file is an imaged file. On July 5, 2000, the Office of Administrative Hearings served a Notice of Certification of Imaged File which stated that only the pleadings and orders in the file were printed. Unprinted documents are accessible through the computerized Daedalus system. A cover letter from counsel for the employer and insurer, dated September 29, 2000, and an objection to statement of attorney fees, were not a part of the printed file but are part of the unprinted file available through Daedalus. The facsimile copy of this letter and objection to statement of attorney fees were both date-stamped as "received" on September 29, 2000, at the Office of Administrative Hearings.

> provide the parties with an opportunity for a hearing on all of the issues involved in the objection. Such hearing could be held in person, by telephone, or by the submission of written evidence and memoranda.

In their appellate briefs, the parties address issues pertinent to the compensability of and the amount of attorney fees. Since those issues have not yet been addressed by the compensation judge they will not be addressed on appeal.