KERMIT SCHLEICHER, Employee/Cross-Appellant, v DULUTH READY MIX CONCRETE CO. and TRAVELERS INS. CO., Employer-Insurer/Appellants, and MN DEP'T OF HUMAN SERVS., MN DEP'T OF ECON. SEC., and MN DEP'T OF LABOR & INDUS./VRU, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 9, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - HEATON FEES. Pursuant to Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), and under the circumstances of this case, the compensation judge did not err in awarding the employee's attorney $3,500 in Heaton fees for work performed in connection with rehabilitation issues.

ATTORNEY FEES - HEATON FEES. Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), is applicable to Heaton fee claims

ATTORNEY FEES - SUBD. 7 FEES. An award pursuant to Minn. Stat. § 176.081, subd. 7, is payable on attorney fees ordered pursuant to Heaton v. J.W. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983), and Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999).

Affirmed as modified.

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

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's award of Heaton fees.[1] The employee cross appeals from the compensation judge's failure to award fees pursuant to Minn. Stat. § 176.081, subd. 7. We affirm the award of Heaton fees and modify the judge's decision to include subdivision 7 fees.

[1] Fees payable for legal services rendered in connection with rehabilitation issues. See Heaton v. J.W. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983); Minn. Stat. § 176.081, subd. 1(a)(1) (1998).

BACKGROUND[2]

On July 2, 1998, the employee sustained an admitted injury to his low back while employed as a truck driver by Duluth Ready Mix Concrete [the employer]. Eventually, following an independent medical examination, the employer and insurer took the position that the employee's ongoing symptoms were not related to his work injury but rather to a preexisting, nonwork-related condition. On May 14, 1999, the employee filed a claim petition alleging entitlement to temporary total disability benefits, "undetermined" permanent partial disability benefits, and penalties. The claim petition also indicated that the employee was "in need of a QRC and herewith makes a request for retraining." In their answer, the employer and insurer asserted in part that the employee had fully recovered from the effects of the admitted injury.

The matter came on for hearing before a compensation judge in January of 2000. Several issues were disputed, including whether the employee's work injury was temporary or permanent; the employee's entitlement to temporary total disability benefits from December 15, 1998, through the date of hearing; whether the employee had reached maximum medical improvement; whether the employer and insurer were liable for penalties due to their failure to pay temporary total disability benefits; the extent of the employee's work-related permanent impairment, if any; and the compensability of rehabilitation services that had been provided by the Department of Labor and Industry. The employee apparently also sought a ruling as to whether his "request" for retraining satisfied the requirements of Minn. Stat. § 176.102, subd. 11(c) (1998), which sets certain time limits for retraining claims. The employee was not actually seeking retraining at that time.

In a decision issued on April 18, 2000, the compensation judge determined, in relevant part, that the employee's July 2, 1998, work injury had permanently aggravated his preexisting low back condition, and the judge awarded the employee benefits for a 10.255% whole body impairment and for temporary total disability from December 21, 1998, to January 5, 1999, and March 17, 1999, to August 25, 1999. The employer and insurer were also ordered to reimburse the Department of Labor and Industry for rehabilitation services provided to the employee, but the employee's claim for penalties was denied, and the judge declined to rule on the effect of the employee's retraining request. Neither party appealed, and, following the judge's decision, the employer and insurer paid the benefits awarded by the judge as well as commencing payment of temporary partial disability benefits, based on wages that the employee was earning from a job he had obtained after the hearing but prior to issuance of the judge's decision.

On May 10, 2000, the employee's attorney filed a petition for attorney fees, claiming total fees in the amount of $9,879.00, which included a $3,432.61 contingent fee withheld from the employee's benefit award and already paid to counsel. In his petition, counsel alleged that, because rehabilitation benefits were of primary importance at hearing, and the contingent fee was inadequate to compensate him for his services, additional fees were payable, by the employer and insurer, pursuant to Heaton, Kopish v. Sivertson Fisheries, 53 W.C.D. 107 (W.C.C.A. 1995),

[2] The background facts in this decision have been taken from the pleadings, orders by the compensation judge, and correspondence and other documents in the file, including imaged documents. There are no hearing transcripts.

and Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999). The fee petition also contained a request for fees pursuant to Minn. Stat. § 176.081, subd. 7.

The employer and insurer objected to the fee petition, alleging that the fee claim was not reasonable, that the claim was not supported by adequate information, and that a significant portion of counsel's time had been spent on claims that were ultimately denied. The employer and insurer also asserted that the employee's future right to retraining was speculative, meaning that no attorney fee was currently payable, or, in the alternative, that a future award would produce a stream of benefits from which a contingent fee would be available. Accordingly, the employer and insurer alleged, no Heaton fees were payable. Both parties waived hearing on the attorney fee claim, but the employee sent correspondence to the judge in response to the employer and insurer's objections.

In an order issued on December 27, 2000, the compensation judge concluded that employee's counsel was entitled to $3,500.00 in Heaton fees. Both parties appeal.

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.

"[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

1. Heaton Fees

At the hearing on the employee's claim petition, the employer and insurer agreed that, if the employee proved that his work injury was permanent, the employee's QRC could investigate all rehabilitation options, including retraining. The judge ruled in the employee's favor, and the employer and insurer did not appeal from the judge's decision. Subsequently, in his

decision on attorney fees, the compensation judge concluded that the employee's attorney was entitled to $3,500.00 in Heaton fees for his work in securing rehabilitation services for the employee. In so finding, the judge determined that the contingent fee from the employee's benefit award did not adequately compensate the attorney in view of the time involved, the nature of the claims, and other factors.

On appeal, the employer and insurer argue initially that, pursuant to Minn. Stat. § 176.081, subd. 1(a)(2) (1998), the employee's counsel is limited to a $500.00 fee for services performed in connection with rehabilitation issues.[3] We are not persuaded. In Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), the Minnesota Supreme Court struck down similar statutory limits on Roraff fees,[4] and the rationale of Irwin is equally applicable to Heaton fee claims. Accordingly, the compensation judge did not err by awarding a fee exceeding the statutory maximum.

The employer and insurer also argue that the compensation judge erred by failing to consider the contingent fee available from any future retraining award and from their payment of temporary partial disability benefits following the hearing. Again, we are unpersuaded. There was no actual claim for retraining before the compensation judge,[5] and the employee's need for retraining has not yet been established. As such, there are no retraining benefits to be considered in evaluating counsel's current Heaton fee claim. We are similarly unconvinced that the employer and insurer's payment of temporary partial disability benefits is a factor that should affect the Heaton fee request here. The employee's entitlement to temporary partial disability benefits was not raised or litigated at the hearing before the compensation judge; the employee in fact did not even obtain work until after the hearing, and the employer and insurer voluntarily commenced payment of temporary partial disability benefits after the compensation judge issued his decision. We also see no indication that the employee's attorney asked the employer and insurer to withhold any fees from those benefits. Therefore, under the particular circumstance of this case, we cannot conclude that the judge erred in determining counsel's entitlement to Heaton fees without reference to temporary partial disability payments. We therefore affirm the judge's Heaton fee award.

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[3] Minn. Stat. § 176.081, subd. 1(a)(2), provides as follows:

> (2) 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.

[4] Fees payable for legal work to secure medical benefits. See Roraff v. State of Minn., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

[5] The compensation judge properly declined to rule on whether the request for retraining on the employee's claim petition satisfied the requirements of Minn. Stat. § 176.102, subd. 11(c). See Davidson v. Northshore Mfg. Co., 60 W.C.D. 69 (W.C.C.A. 1999).

2. Subdivision 7 Fees

Counsel's fee petition included a request for an award pursuant to Minn. Stat. § 176.081, subd. 7 (1998), which provides as follows:

> Subd. 7. Award; additional amount. If the employer or insurer files a denial of liability, notice of discontinuance, or fails to make payment of compensation or medical expenses within the statutory period after notice of injury or occupational disease, or otherwise unsuccessfully resists the payment of compensation or medical expenses, or unsuccessfully disputes the payment of rehabilitation benefits or other aspects of a rehabilitation plan, and the injured person has employed an attorney at law, who successfully procures payment on behalf of the employee or who enables the resolution of a dispute with respect to a rehabilitation plan, the compensation judge, commissioner, or the workers' compensation court of appeals upon appeal, upon application, shall award to the employee against the insurer or self-insured employer or uninsured employer, in addition to the compensation benefits paid or awarded to the employee, an amount equal to 30 percent of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of $250.

In Irwin, the supreme court indicated that an award under subdivision 7 is available on all fees awarded under Minn. Stat. § 176.081, which would include fees for work on rehabilitation issues. See Minn. Stat. § 176.081, subd. 1. The compensation judge in the present case neglected to rule on counsel's subdivision 7 request, but, because such fees are clearly payable, we see no need to remand the matter, and we modify the judge's decision to include subdivision 7 fees, calculated on the Heaton fee award.[6]

[6] The judge already awarded subdivision 7 fees on the contingent fees payable from the employee's benefit award.