WILLIAM C. THEISS, Employee, v. ALEXANDRIA CONCRETE CO. and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 1, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - HEATON FEES. Where the compensation judge determined that hourly Heaton fees were payable to the employee's attorney for services provided on a rehabilitation issue but made no reference to the fact that contingent fees were currently being paid on ongoing temporary partial disability benefits, and where the judge's order that the employer and insurer pay Heaton fees made no reference to the statutory requirement that attorney fees for recovery of rehabilitation benefits be assessed against the employer and insurer only if contingent fees are inadequate to reasonably compensate the attorney for his representation in the rehabilitation dispute, and where the record before the Workers' Compensation Court of Appeals was inadequate to determine the adequacy of a normal contingent fee to compensate the employee's attorney for his work, the compensation judge's award of an additional add-on fee under the Heaton criteria was vacated and the matter remanded to the Office of Administrative Hearings for a hearing.

Vacated and Remanded.

Determined by Pederson, J., Johnson, J. and Wilson, J.
Compensation Judge: John Ellefson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's award of attorney fees pursuant to Heaton v. J.W. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983). We vacate the judge's order and remand the case to the Office of Administrative Hearings for a hearing on the merits.

BACKGROUND[1]

William C. Theiss [the employee] sustained an injury to his back on July 12, 1999, while employed as a truck driver for Alexandria Concrete Company [the employer]. On that date, the employer was insured against workers' compensation liability by State Fund Mutual Insurance Company [the insurer]. According to documents contained in the file of the Department of Labor

[1] The facts as presented here are drawn from the judgment roll and, in the absence of any brief by the employee, adopted from the submissions of the employer and insurer. No hearing was held in this matter, and therefore no transcript has been generated.

and Industry, the employer and insurer evidently admitted liability for the injury and paid certain temporary total disability, temporary partial disability, and medical expense benefits. The parties entered into a compromise settlement of some of the employee's claims, and an Award on Stipulation was issued on July 13, 2000.

On October 30, 2000, the employee's attorney filed a Statement of Attorney's Fees with the Office of Administrative Hearings, seeking a fee pursuant to Minn. Stat. § 176.102 and this court's decision in Heaton v. J.W. Fryer & Co., 36 W.C.D. 316 (W.C.C.A. 1983). The attorney contended that, on behalf of his client, he had obtained disputed rehabilitation benefits and has spent 3.8 hours of time at his hourly rate of $150.00. He indicated that part of his charges were for preparation for and attendance at a mediation conference held on July 28, 2000.

In a letter dated November 2, 2000, the attorney for the employer and insurer filed an objection to the claimed fees and requested that the matter be placed on for a hearing. The employer and insurer's attorney stated that he did not object to the time the employee's attorney had spent, to his hourly rate, or to his right to a fee. He argued, however, that, in light of the 1995 amendments to Minnesota Statutes § 176.081, it was appropriate for the employee's attorney's payment to be part of a contingent fee paid from ongoing temporary partial disability benefits.

On November 8, 2000, a compensation judge at the Office of Administrative Hearings issued an Order Determining Attorney's Fees, ordering payment to the employee's attorney of "add-on" Heaton fees rather than contingent fees. The compensation judge concluded that, given the employer and insurer's letter of November 2, 2000, there was essentially no factual dispute before him. The judge found that, pursuant to Minnesota Statutes § 176.102 and Minnesota Statutes § 176.081, subdivision 1, as interpreted in Heaton and Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), the fees at issue were appropriately payable to the employee's attorney. The employer and insurer appeal.

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

Minnesota Statutes § 176.081, subdivision 1 (1995), provides in pertinent part as follows:

> **Subdivision 1. Limitation of fees.** (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 employee is the maximum permissible fee and does not require approval by the commissioner, compensation judge, or any other party. All fees, including fees for obtaining medical or

> rehabilitation benefits, must be calculated according to the formula under this subdivision, except as otherwise provided in clause (1) or (2).
>
> (1) The contingent attorney fee for recovery of monetary benefits according to the formula in this section is presumed to be adequate to cover recovery of medical and rehabilitation benefit or services concurrently in dispute. Attorney fees for recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute. In cases where the contingent fee is inadequate the employer or insurer is liable for attorney fees based on the formula in this subdivision or in clause (2).

In the case before us, the compensation judge determined that hourly Heaton fees were payable to the employee's attorney for services provided on a rehabilitation issue. The judge makes no reference to the fact that contingency fees are evidently being currently paid on ongoing temporary partial disability benefits. The statute provides that attorney fees for recovery of rehabilitation benefits or services shall be assessed against the employer and insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for his representation in the rehabilitation dispute. The judge's Order makes no reference to the statutory requirement. Nor, given the record, can we determine its applicability. Without a more adequate record before us, we cannot determine whether the acknowledged attorney fee in this case should be paid as a contingent fee or as an additional add-on fee under the Heaton criteria. On appeal, the employer and insurer contend that there are numerous issues of fact and law which bear on the outcome of this issue. They contend that a hearing is necessary to clarify the issue and that the compensation judge committed an error of law by failing to set the matter for a hearing. We agree and vacate the Order Determining Attorney's Fees and remand the matter to the Office of Administrative Hearings for a hearing.