

BENGT V. THULIN, Employee/Appellant, v. ANDERSON LOG HOMES and HERITAGE MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 7, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - CONTINGENT FEES. Substantial evidence supports the compensation judge's award of \$963.39 in contingent fees for representation of the employee by his former attorney at two administrative conferences, resulting in reinstatement and ongoing payment of temporary total disability benefits.

Affirmed.

Determined by: Johnson, J., Pederson, J. and Wheeler, C.J.
Compensation Judge: Gregory A. Bonovetz

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's award of \$963.39 in contingent fees to the employee's former attorney. We affirm.

BACKGROUND

The employee, Bengt V. Thulin, injured his left knee on March 16, 1999, while working for Anderson Log Homes, the employer, insured by Heritage Mutual Insurance Company. The employer and insurer admitted liability for the employee's personal injury and paid various workers' compensation benefits to the employee.

On June 10, 1999, the employer and insurer served a Notice of Intention to Discontinue temporary total disability benefits (NOID) on the employee. The employee retained attorney James B. Peterson on July 12, 1999. Mr. Peterson filed an Objection to Discontinuance, and an administrative conference was held on July 22, 1999 before a compensation judge at the Settlement Division of the Office of Administrative Hearings (OAH). Mr. Peterson appeared at the conference on behalf of the employee. In an Order on Discontinuance, served and filed July 27, 1999, the judge suspended payment of the employee's benefits from June 7 to June 14, 1999, but found the employee was entitled to temporary total benefits thereafter. The employer and insurer resumed payment of weekly compensation benefits to the employee.

On August 17, 1999, attorney Peterson filed a Claim Petition, signed by the employee, alleging an average weekly wage substantially greater than the \$340.00 per week claimed by the employer and insurer, asserting that temporary total disability benefits had been

underpaid, and seeking retraining, permanent partial disability benefits, and payment of medical expenses.

On October 8, 1999, the employer and insurer served a second NOID, discontinuing temporary total disability benefits on the basis that the employee had reached maximum medical improvement (MMI) and had fully recovered from the effects of his injury with no residual restrictions. In response, Mr. Peterson filed an objection to discontinuance. An administrative conference was held on October 27, 1999 at which the employee was represented by attorney Peterson. In an Order served and filed November 1, 1999, the compensation judge denied the discontinuance, concluding the employee was not at MMI and continued to have work-related limitations as a result of his personal injury. As a result of the order, the employer and insurer again reinstated temporary total disability benefits to the employee.

By letter dated December 15, 1999, attorney Peterson advised OAH he was withdrawing from his representation of the employee. On January 18, 2000, Mr. Peterson filed a Statement of Attorney's Fees, seeking contingent fees of \$963.39 based on obtaining continuing temporary total disability benefits as a result of his representation of the employee in two administrative conferences, as well as taxation of costs and disbursements in the amount of \$91.70. The employee filed a response to the Statement of Attorney's Fees on January 25, 2000, objecting to the payment of any fees to Mr. Peterson.

A hearing was held by telephone conference call on August 14, 2000 before a compensation judge at OAH. Both Mr. Peterson and the employee presented their arguments to the judge. In a Findings and Order served and filed August 21, 2000, the compensation judge awarded Mr. Peterson the claimed attorney's fees of \$963.39 and reimbursement of \$91.70 in costs and disbursements, and ordered the employer and insurer to pay the employee \$214.02 representing partial reimbursement of attorney's fees under Minn. Stat. § 176.081, subd. 7. The employee appeals.

STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

The employee maintains that his primary concern, and the reason he hired Mr. Peterson, was the employer and insurer's contention that his weekly wage was no more than

\$340.00, rather than the \$682.50 per week claimed by the employee. The employee asserts that, as of July 15, 1999, Mr. Peterson had evidence establishing his actual wage but refused to raise the issue at the July 22, 1999 administrative conference. The employee contends that on October 27, 1999, Mr. Peterson again informed him that the dispute over his weekly wage could not be brought up at the administrative conference that day. The employee argues that Mr. Peterson lied to him and misrepresented him in court and is not, therefore, entitled to attorney fees.

The NOIDs of June 10, 1999 and October 8, 1999 were set on for hearing pursuant to a Notice and Order for Administrative Conference under Minn. Stat. § 176.239. This court has stated many times that where the expedited hearing procedures under Minn. Stat. §§ 176.238 or 176.239 apply, the compensation judge may properly consider and determine *only* the issues specifically listed in the NOID. *See, e.g., Thu v. Befort Roofing, Inc.*, slip op. (W.C.C.A. Oct. 24, 2000); *Rauer v. Chrysler Corp.*, slip op. (W.C.C.A. Aug. 31, 1999); *Putnam v. Yellow Freight Systems*, slip op. (Oct. 26, 1995). The June 10, 1999 NOID listed as grounds for discontinuance the employer and insurer's claim that the employee failed to attend scheduled and recommended medical treatment. The October 8, 1999 NOID stated as grounds for discontinuance the employer and insurer's assertion that the employee had reached MMI and had no residual restrictions or disability. The issue of the amount of the employee's average weekly wage was not before the compensation judge at either of the administrative conferences, and Mr. Peterson properly advised the employee that the wage dispute could not be addressed or resolved at these hearings. Mr. Peterson, instead, appropriately and promptly filed a claim petition alleging an underpayment of temporary total disability benefits, claiming a much higher weekly wage than the weekly wage at which the employer and insurer had calculated the employee's temporary total benefits.¹

Attorney Peterson sought attorney's fees only for recovery of ongoing temporary total disability benefits as a result of the two administrative conferences. The employee agreed that Mr. Peterson represented him at the discontinuance hearings on July 22 and October 27, 1999, and that attorney Peterson was successful in obtaining reinstatement of his weekly workers' compensation benefits in both instances. (T. 7.) The compensation judge properly held that, given these facts, Mr. Peterson was entitled to contingent attorney fees of 25 percent of the first \$4,000.00 of the compensation obtained for the employee and 20 percent of the balance under Minn. Stat. § 176.081, subd. 1.

The compensation judge found that, as of attorney Peterson's withdrawal from representation of the employee in mid-December 1999, the insurer was withholding attorney fees in the amount of \$963.39. The employee contends the insurer has withheld more than the amount claimed by Mr. Peterson. At the hearing, the employee represented that, adding up the amounts withheld from his checks, \$1,388.29 had been withheld by the insurer. On appeal, the employee asserts the amount withheld is \$2,068.30. No documentary evidence has been submitted to support these assertions. The compensation judge accepted the testimony of attorney Peterson that \$963.39 was withheld for attorney fees by the insurer between mid-June and October 1999. The amount claimed by Mr. Peterson is, in any event, less than the amount the employee claims has been

¹ The employee later settled this claim. (See Stipulation for Settlement and Apr. 5, 2000 Award on Stipulation.)

withheld. There is substantial evidence to support the award of \$963.39 in attorney fees to Mr. Peterson for his representation of the employee between June and December 1999, and we, accordingly, affirm.