DAVID A. TURAN, Employee, v. PARK CONSTR. and TRAVELERS INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 17, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF. Where the employee's attorney filed a medical request for surgery, which was resisted based on alleged lack of causal relationship with the admitted injury, and where a question of entitlement to an extension of temporary total disability was not raised at the administrative conference on the medical request, the compensation judge was not unreasonable in concluding that there was no dispute in the temporary total disability and could award Roraff fees for the successful representation on the medical request. Even though the resolution of the causation issue and award of surgery resolved the extension of temporary total disability claim, they were separate matters and the employee's attorney was not entitled to attorney fees.

Affirmed.

Determined by: Wheeler, C.J., Pederson, J., and Rykken, J.
Compensation Judge: Jerome G. Arnold

OPINION

STEVEN D. WHEELER, Judge

The employer and its insurer appeal from the compensation judge's award of attorney fees to the employee's attorney based on the 25/20 percent contingency fee formula contained in Minn. Stat. § 176.081, subd. 1.

BACKGROUND

The employee, David A. Turan, sustained several admitted injuries, including an injury to his left knee and left shoulder on May 7, 1999, while employed as a heavy equipment operator by Park Construction, hereinafter the employer. (Finding 2.)[1] At the time of injury, the employee was 56 years old and had a weekly wage of $608.53. (First Report of Injury; Notice of Insurer's Primary Liability Determination.)

[1] Most of the factual information contained in this background section comes from unappealed findings contained in the compensation judge's March 9, 2001 Findings and Order. Reference is to the finding in that decision.

In June 1999, an MRI of the employee's left knee showed a medial meniscus tear which necessitated surgery on July 12, 1999. (Medical records from Duluth MRI and St. Luke's Hospital.) Following the surgery, the employee continued to have difficulties with his left knee, in spite of physical therapy and conservative care. As a result, his physicians recommended that he have a total left knee replacement. (Finding 3.) The employer and insurer refused to voluntarily pay for this surgery, and, on March 21, 2000, a medical request seeking approval for the surgery was filed by the employee. (Finding 4.) The employer and insurer filed a medical response, objecting to the surgical procedure pending the completion of a medical examination by its expert on April 28, 2000. The employer and insurer's medical expert, Dr. Jack Drogt, M.D., filed a report in which he indicated that the need for a left knee replacement, while reasonable and necessary, was not causally related to the May 7, 1999 left knee injury at the employer. Dr. Drogt stated that the employee had reached maximum medical improvement from the May 7, 1999 injury. (4/28/00 report of Dr. Drogt.) On June 7, 2000, the employer and insurer served the employee with a Notice of Intention to Discontinue Benefits [NOID] effective August 28, 2000, ninety days after the IME's medical report had been served on the employee. From the date of injury until August 28, 2000, the employer and insurer voluntarily paid temporary total disability benefits to the employee. Attorney fees were not deducted from these benefits. In November 1999, when Mr. Falsani was retained, he wrote to the insurer and advised them of his representation of the employee and directed that attorney fees not be withheld from the employee's temporary total disability benefits. (Finding 10.)

The matter of the employee's request for approval of the surgical procedure was the subject of an administrative conference on June 27, 2000. Following the conference, Compensation Judge Jerome Arnold issued a decision in which he found that the employee's May 7, 1999 work injury was a substantial contributing cause of the employee's need for total knee replacement surgery. (Finding 7.) None of the issues listed in the decision, and no part of the order or memorandum, referred to entitlement to wage loss benefits. (Order of 7/10/00.) This decision was not appealed and the employer subsequently paid for the surgical procedure, which was apparently completed in late September or early October 2000.

By letter dated August 21, 2000, the employee's attorney, Mr. Falsani, wrote to the employer and insurer asking the insurer's position concerning discontinuing benefits per the NOID filed on June 7, 2000, in light of the lack of appeal of the July 10, 2000 administrative decision approving further knee surgery. (Finding 8.) The employer and insurer did not respond to Mr. Falsani's letter directly but thereafter did not discontinue the employee's temporary total disability benefits. As of August 28, 2000, the employer and insurer did, however, commence withholding attorney fees from the temporary total disability benefits, based on the 25/20 percent formula contained in Minn. Stat. § 176.081, subd. 1. (Finding 9.) On September 27, 2000, Mr. Falsani wrote to the employer and insurer's attorney protesting the withholding of attorney fees from the employee's temporary total disability benefits. He also notified the employer and insurer that the employee had terminated Mr. Falsani's services and was seeking other counsel.[2] Mr. Falsani stated that no attorney fees would be claimed against the temporary total disability

[2] Based on the text of a September 27, 2000 letter contained in the judgment roll, from Mr. Falsani to the employee, it appears that one of the reasons for the termination of Mr. Falsani was the employee's upset concerning the withholding of attorney fees.

benefits, as Mr. Falsani had only represented the employee in his efforts to obtain approval for the knee replacement surgery. (Finding 10.) On October 4, 2000, the employer and insurer's attorney wrote to Mr. Falsani indicating that because the employee had prevailed on his medical request his temporary total disability benefits were extended, creating a stream of benefits which could be used as a source of attorney fees. The insurer indicated that it would continue to withhold fees. (Finding 12.) In a letter dated October 23, 2000, the insurer's attorney advised that only if the contingency fees from the stream of temporary total disability benefits were insufficient to compensate Mr. Falsani for his services would he be entitled to a Roraff fee from the insurer.

On November 22, 2000, Mr. Falsani filed a statement of attorney fees in which he requested Roraff fees in the amount of 25/20 percent of the total cost of the employee's left knee replacement, together with subdivision 7 fees, to be paid to the employee, along with his costs and disbursements of $477.73. Shortly thereafter, the employer and insurer's attorney filed an objection to the request for Roraff fees in a letter dated November 28, 2000. The employer and insurer contended that Mr. Falsani would only be entitled to Roraff fees if the contingency fees which he could have claimed, had he not elected to waive them, were found to be inadequate to compensate him for services rendered in connection with obtaining approval of the knee replacement surgery and the resulting period of temporary total disability after August 28, 2000. It was the employer and insurer's position that the entitlement to temporary total disability benefits was established as a result of Mr. Falsani's efforts on behalf of the employee in obtaining approval for the surgery. In the alternative, the employer and insurer contended that even if Mr. Falsani was not entitled to receive contingency fees from the stream of temporary total disability benefits that he would not be entitled to receive a 25/20 contingency fee based on the medical expenses paid by the insurer and would only be entitled to the value of the services he and his firm provided representing the employee in obtaining approval for the surgery, based on the factors set forth in the Irwin[3] decision.

The employee's attorney's statement of attorney fees came on for hearing before Compensation Judge Jerome Arnold at the Office of Administrative Hearings on February 9, 2001. All evidence and argument was provided in the form of written submissions and stipulations. In his decision, served and filed March 9, 2001, the compensation judge determined that Mr. Falsani was entitled to Roraff attorney fees in the amount of $4,265.00, representing contingent fees using the 25/20 percent formula in Minn. Stat. § 176.081, subd. 1, on the total cost of the surgical procedure, which was $20,325.03. In addition, the compensation judge ordered that the employee receive subdivision 7 fees of $1,204.50. The employer and insurer appeal from this decision.

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

[3] Irwin v. Surdyk's Liquor, 599 N.W.2d 59, W.C.D. 319 (Minn. 1999).

In making his determination, the compensation judge made the following findings which have been appealed by the employer and insurer:

> 16. There exists no stream of benefits from which employee's attorney would be entitled to a contingency fee for time and effort expended in obtaining the medical benefits placed into issue by the medical request prior to the administrative decision on the surgical issue. The favorable decision to employee on the surgical issue resulting in continuing weekly indemnity benefits due to the surgery and recovery period did not subsequently represent disputed weekly indemnity benefits from which employee's attorney would be entitled to a contingency fee.
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> 17. The application of the 25/20 statutory formula to medical payments of $20,325.03 directly resulting from employee's surgical expense and care generating an attorney fee of $4,265.00 is reasonable compensation of employee's attorney in representing employee in the medical dispute. In finding that the fee is reasonable compensation for employee's attorney the court finds, 1) the attorney's time expended as shown by the Workers' Compensation records and file, is reasonable in relation to the attorney fees sought; 2) employee's attorney's expertise in workers' compensation matters and litigation is substantial; 3) the responsibility assumed by counsel for employee in this matter was substantial, involving a contested knee replacement surgery; and 4) the issues presented, when reducing the same to a dollar amount, were substantial and employee received an excellent result with excellent legal representation.

On appeal the employer and insurer present two issues: (1) whether the July 10, 2000 decision and order resulted in a continuing stream of benefits for the employee from which attorney fees could have been paid; and (2) whether strict adherence to the 25/20 attorney fee formula in cases regarding medical benefits is appropriate if it results in the employee's attorney being over compensated.

Entitlement to Contingency Fees From the Employee's TTD Benefits

The employer and insurer argue that as a result of the employee's attorney's efforts the employee became entitled to an extension of temporary total disability benefits after August 28, 2000. They contend that the employee's attorney would therefore be eligible to receive a contingent fee from the extended stream of benefits. The principal argument made is that "the general rule in workers' compensation cases is that the employee pays attorney fees from the

proceeds of any recovery of indemnity benefits (wage loss or permanency payments)." Peterson v. Everything Clean, Inc., 55 W.C.D. 126, 129 (W.C.C.A. 1996). (ER/IN brief at 6.) The employer and insurer point out that the paramount issue in the medical request, whether there was a causal relationship between the admitted May 7, 1999 injury and the need for surgery, was the same issue which resolved the question of the employee's entitlement to temporary total disability benefits after August 28, 2000. They contend that the medical and temporary total disability issues were intertwined and would undoubtedly have been consolidated for hearing. If consolidated, the employee's attorney would have been entitled to fees from the employee's temporary total disability recovery. In addition, the employer and insurer point out that it could have appealed the July 10, 2000 order, refused to pay temporary total disability after August 28, 2000, and eventually had the matters consolidated for hearing. This would result in the employee paying attorney fees from his temporary total disability recovery. They argue these attorney fees would have been adequate to reasonably compensate Mr. Falsani for his services, which would disqualify him from entitlement to Roraff fees under Minn. Stat. § 176.081, subd. 1(a)(1). They contend that Mr. Falsani cannot claim that he was inadequately compensated simply because he voluntarily waived fees to which he was entitled.

Minn. Stat. § 176.081, subd. 1(a)(1), (3), 1(c), provides:

> **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).
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> (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).
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> For the purposes of applying the formula where the employer or insurer is liable for attorney fees, the amount of compensation awarded for obtaining disputed medical or rehabilitation benefits under sections 176.102, 176.135, and 176.136 shall be the dollar

value of the medical or rehabilitation benefit awarded, where ascertainable.

* * *

(3) The fees for obtaining disputed medical or rehabilitation benefits are included in the $13,000 limit in paragraph (b). An attorney must concurrently file all outstanding disputed issues. An attorney is not entitled to attorney fees for representation in any issue which could reasonably have been addressed during the pendency of other issue for the same injury.

* * *

(c) If the employer or the insurer or the defendant is given written notice of claims for legal services or disbursements, the claim shall be a lien against the amount paid or payable as compensation. Subject to the foregoing maximum amount for attorney fees, up to 25 percent of the first $4,000 of periodic compensation awarded to the employee and 20 percent of the next $60,000 of periodic compensation awarded to the employee may be withheld from the periodic payments for attorney fees or disbursements if the payor of the funds clearly indicates on the check or draft issued to the employee for payment the purpose of the withholding, the name of the attorney, the amount withheld, and the gross amount of the compensation payment before withholding. In no case shall fees be calculated on the basis of any undisputed portion of compensation awards. Allowable fees under this chapter shall be based solely upon genuinely disputed claims or portions of claims, including disputes related to the payment of rehabilitation benefits or to other aspects of a rehabilitation plan. The existence of a dispute is dependent upon a disagreement after the employer or insurer has had adequate time and information to take a position on liability. Neither the holding of a hearing nor the filing of an application for a hearing alone may determine the existence of a dispute. Except where the employee is represented by an attorney in other litigation pending at the department or at the office of administrative hearings, a fee may not be charged after June 1, 1996, for services with respect to a medical or rehabilitation issue arising under section 176.102, 176.135, or 176.136 performed before the employee has consulted with the department and the department certifies that there is a dispute and that it has tried to resolve the dispute.

(Emphasis added.)

The issue before the compensation judge was whether there was a genuine dispute presented over the employee's entitlement to temporary total disability benefits after August 28, 2000, in connection with the dispute resulting from the employee's medical request for payment for medical expenses for the total knee replacement. The compensation judge essentially found that the stream of temporary total disability benefits which continued after August 28, 2000 were not the subject of the dispute resolved by his July 10, 2000 order. He concluded that this period of temporary total disability benefits, while affected by the July 10, 2000 decision, were not "disputed weekly indemnity benefits." (Finding 16.)

Based on the record before us, we find the compensation judge's conclusion reasonable under the unique circumstances of this case. At the time the medical request was pending and until the time for appeal from the July 10, 2000 order had expired in early August 2000, there was no dispute presented concerning the employee's entitlement to temporary total disability after August 28, 2000. In fact, no dispute ever arose concerning the employee's entitlement to these benefits. Mr. Falsani limited his representation at the administrative conference to the question of the employee's entitlement to the total knee replacement. The issue of extending temporary total disability benefits was not addressed at that time. The question of the employee's temporary total disability benefits after August 28, 2000 did not arise in any form until Mr. Falsani's August 21, 2000 letter. It is unclear if Mr. Falsani's letter had any effect on the employer and insurer's decision to continue the employee's temporary total disability benefits. Even if the letter had some effect, the compensation judge was not unreasonable in concluding that it would have arisen as a new dispute, outside the context of the medical dispute which had first started five months earlier. The result here may have been as the employer and insurer suggest had the matter of the need for surgery and entitlement to ongoing temporary total disability benefits been consolidated for hearing. In this case, the matters were treated separately and the employer and insurer never requested that they be consolidated. Based on the facts in this case, the compensation judge's determination is affirmed.

Contingent Fees Versus Irwin Factors

The alternative argument made by the employer and insurer was recently resolved by this court. In Cahow v. Brookdale Motors, slip op. (W.C.C.A. May 10, 2001), the court determined that pursuant to Minn. Stat. § 176.081, subd. 1(a), in cases where the only matter in dispute was a medical treatment expense, the employee's attorney was permitted to claim a Roraff fee in the amount of 25/20 percent of the cost of the surgical or medical procedures which had been in controversy or to request a review of the request for attorney fees in light of the factors outlined by the supreme court in Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), at the option of the employee's attorney. If the employee's attorney selected the contingency fee method of calculating his Roraff fees, it was not necessary for the employee's attorney to justify the fee on the basis of services rendered. In Cahow, the only dispute involving the need for counsel was a medical request seeking approval for multi-level fusion surgery. There was no dispute concerning the adequacy of contingency fees paid from the employee's recovery of indemnity benefits. Since we have affirmed the compensation judge's decision that the employee's attorney was not entitled to attorney fees as a percentage of the employee's ongoing temporary total disability benefits, this case is identical to Cahow. As a result, the employer and insurer's alternative argument, that the amount of the employee's attorney's fees should have been

considered on the basis of the Irwin factors, is rejected and the compensation judge's award of attorney fees is affirmed.