

JOHN L. WINQUIST, Employee/Appellant, v. HANSEN GRAVEL, INC., SELF-INSURED/EEP WORKERS' COMP. FUND/E.C. FACKLER, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 30, 2001

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - RORAFF. A compensation judge's award of some of the Roraff fees requested by employee's attorney is vacated and the matter remanded for hearing where the compensation judge did not hold a hearing although the employee's attorney requested a hearing at the time he filed his petition.

Vacated and remanded.

Determined by Johnson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Peggy A. Brenden

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's determination on the issue of Roraff¹ fees. We vacate and remand.

BACKGROUND

The employee, John Winquist, sustained an admitted injury to his cervical spine on September 10, 1997 in the employ of Hansen Gravel, the self-insured employer.

The employee began treating with a chiropractor, Dr. J. W. Kuehl, D.C., on September 24, 1997. He was off work on September 24, from September 29 through October 5, 1997, and from October 14 through October 21, 1997, and was paid temporary total disability benefits. From October 22 through December 11, the employee received some temporary partial disability payments. The employee continued to treat extensively with Dr. Kuehl for his cervical injury from September 24 through December 5, 1997.

During November and December 1997 the employee also received physical therapy treatment at the direction of Dr. Dennis L. Murphy, M.D. The employee testified that the physical therapy treatments aggravated his cervical problems and after the December 5, 1997 session he noticed the onset of low back problems, which became more severe shortly thereafter. On December 8, 1997 the employee saw Dr. Kuehl, who recommended cancellation of further

¹ Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).

physical therapy. Dr. Kuehl released the employee from work as a result of an aggravation to his cervical condition and radiation into the lumbar and cervical back which he attributed to the physical therapy treatments.

On December 15, 1997, the self-insured employer filed a NOID, indicating that temporary partial disability benefits would be discontinued on December 11, 1997 because the "Employee was apparently taken off work for a low back injury. We have only admitted an injury to the neck and upper back."

On December 19, 1997 the employee received his last treatment for his lumbar spine from Dr. Kuehl. He received treatment for the cervical and thoracic spine from Dr. Kuehl on five occasions between December 24, 1997 and January 9, 1998. Thereafter, the only treatment was to the employee's cervical spine.

On January 7, 1998, a claims representative for the self-insurer's administrator wrote to Dr. Kuehl stating that no payment would be made for chiropractic treatment of the low back injury based on a causation defense, and that no payment would be made for prior and future treatment to the cervical injury because the past treatment had been ineffective and no treatment plan had been provided as required by the treatment parameters.

On January 8, 1998, an administrative conference on the NOID was held before a settlement judge at the Department of Labor and Industry. In his order of January 12, 1998, the settlement judge found that temporary partial disability benefits could be discontinued because the employee was not working.

A cervical MRI scan was performed on January 25, 1998, and showed minimal central disc bulging at the C4-5 level and left-sided foraminal posterior osteophyte formation and disc deformity at the C5-6 level which resulted in joint space narrowing and narrowing of the left neuroforamen. In a subsequent report, on May 14, 1998, Dr. Kuehl offered a permanent partial disability rating of a seven percent whole body disability related to the cervical spine injury. On January 28, 1998, the employee filed a claim petition seeking payment of wage loss and medical expense benefits.

The employee was returned to work in January 1998 and continued to treat with Dr. Kuehl. This treatment decreased in frequency into February 1998 because the employee was showing improvement, but the employee had several exacerbations which required additional treatment. Dr. Kuehl's note of February 2, 1998 indicates that the employee experienced an exacerbation of cervical pain as a result of his activities greasing a truck on January 30, 1998. As a result of this exacerbation, Dr. Kuehl released the employee from work from February 5 through February 22, 1998, during which time he increased the frequency of the employee's treatment. As a result of his treatment, the employee recovered and was able to return to full time work with the employer. Until released from active treatment by Dr. Kuehl on May 1, 1998, the employee experienced several more exacerbations of his cervical problems as a result of his work activities. In each case the employee was treated on an episodic basis but was never removed from work by Dr. Kuehl for any period of time.

The employee was examined for the employer and insurer by Dr. Mark Friedland, an orthopedic specialist, on May 7, 1998. Dr. Friedland's diagnosis was "[r]esolved cervical strain/sprain" and "[c]hronic intermittent low back pain associated with chronic multilevel lumbar degenerative disc disease." He stated that the employee had reached maximum medical improvement from his cervical injury by at least April 15, 1998 and had a zero percent permanent partial disability rating. He indicated that the employee had no restrictions on his ability to work as a result of the cervical strain. He further opined that chiropractic treatment for three months after the injury was reasonable and necessary, but that thereafter it was unnecessary. He stated that the employee's cervical injury did not justify his complete removal from work after December 8, 1997. He opined that the employee's low back pain in December 1997 was the result of a flare-up of chronic pre-existing degenerative disc disease and could not have been caused or contributed to by the September 10, 1997 cervical injury or physical therapy treatment for the cervical injury.

Based on Dr. Friedland's report, the self-insured employer filed a Notice of Intention to Discontinue benefits (NOID) on May 28, 1998, indicating that no further temporary partial disability benefits would be paid after May 27, 1998. The NOID stated that temporary partial disability benefits had been paid at various times from October 22, 1997 through May 27, 1998.

Thereafter, the employee saw Dr. Kuehl for treatment on August 3, October 5, October 30, November 9, December 23, December 28, 1998 and January 15, 1999. Each of these treatments were allegedly related to an exacerbation of his cervical spine condition caused by work activity for the employer.²

The dispute came on for hearing before a compensation judge at the Office of Administrative Hearings on April 9, 1999. The employee testified that he experienced progressive improvement in his condition as a result of his treatment by Dr. Kuehl. He stated that Dr. Kuehl's treatment permitted him to return to full time employment and that after December 5, 1997, he only sought treatment as a result of the aggravation caused by the physical therapy and exacerbations caused by episodic work difficulties. In his Findings and Order of June 28, 1999, Compensation Judge John E. Jansen found that as a result of the September 10, 1997 work incident the employee had sustained a seven percent permanent partial disability rating as a result of the injury to his cervical spine. The judge denied the employee's claim for temporary total disability from December 9, 1997 through January 4, 1998 and February 5, 1998 through February 22, 1998, and denied his claim for reimbursement for the expenses associated with his treatment by Dr. Kuehl from December 17, 1997 through January 15, 1999. The compensation judge awarded reimbursement for the January 25, 1998 MRI scan.

The employee appealed to this court from the denial of the temporary total disability benefits and medical expense claims. On December 6, 1999 this court issued an opinion vacating and remanding the appealed findings for reconsideration and for more explicit findings. Winqvist v. Hansen Gravel, Inc., slip op. (W.C.C.A. Dec. 6, 1999).

² The facts contained here and above were taken from our earlier decision of December 6, 1999.

On remand, a pretrial conference was held on May 22, 2000, but no additional evidentiary hearing was held by agreement of the parties. On July 28, 2000, the compensation judge served and filed his Findings and Order on Remand. The compensation judge again denied reimbursement for the expenses of chiropractic treatment to the employee's lumbar spine, but awarded reimbursement for the chiropractic care to the cervical spine which had been denied in the original Findings and Order. The judge also awarded part of the temporary total disability claim previously denied in the original findings and order. The self-insured employer was ordered to withhold and pay to the employee's attorney contingency fees from the temporary total disability and permanent partial disability benefits awarded, subject to partial reimbursement of the employee's attorney fees awarded pursuant to Minn. Stat. § 176.081, subd. 7. (Judgment Roll.)

On October 19, 2000 the employee's attorney filed a Statement of Attorney's Fees seeking Roraff fees for successful representation of the employee in the resolution of a medical issue, alleging that contingency fees were insufficient to adequately compensate him for his work in the matter. Attached to the Statement was a summary of the attorney's hours and costs. The summary itemizes hours totaling 96.3 attorney hours at \$175.00 per hour and 2.6 legal assistant hours at \$65.00 per hour. The total fee alleged was \$17,021.50. Accompanying the Statement of Attorney Fees was a cover letter in which the employee's attorney requested that the compensation judge "place this matter on the calendar for hearing at your earliest convenience." (Judgment Roll.)

The self-insured employer filed an Objection to Petition for Attorney's Fees on October 27, 2000, arguing that the employee's attorney had been adequately compensated by the contingency fee awarded in the amount of \$2,125.92, and that the amount requested was excessive, included time expended in pursuing non-medical issues, appeal work and on issues not in controversy, and exceeded the statutory limit awardable for a single injury.

Because the original compensation judge had retired, the fee request was assigned to another compensation judge, who apparently scheduled no hearing on the matter. On December 1, 2000 the compensation judge served and filed her Order Determining Attorney Fees. In her Memorandum accompanying the Order, the judge stated her conclusion that recovery of charges for the MRI and chiropractic care were issues of primary importance to the employee. Noting six factors she considered in an award of attorney fees, the judge went on to discuss her analysis of the fee request:

The medical benefits at issue in the case totaled less than \$5000. On review of Attorney Wulff's Fee Petition, it would appear roughly 15 hours are reasonably traceable to the medical benefit claims. The case was relatively routine in terms of the nature of proof required to establish the employee's entitlement to medical benefits. There were no novel or complicated factual/legal issues. The employee was only partially successful in his claim--chiropractic expenses related to his low back were denied.

After carefully weighing the factors set out above, my assessment is this: Mr. Wulff spent roughly 15 hours preparing and presenting the employee's medical claims. The dollar value of the employee's claim for medical benefits was relatively small. His claim for medical benefits was only partially successful. Based on these factors, I consider a Roraff fee of \$2000 reasonable.

(Judgment Roll.) The employee appeals from the compensation judge's determination.

STANDARD OF REVIEW

The issues on appeal in this matter involve the interpretation and application of case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607 (W.C.C.A. 1993).

DECISION

Attorney fees for the recovery of medical benefits may be assessed against an employer and insurer if the employee's attorney establishes that the contingent fee on indemnity benefits "is inadequate to reasonably compensate the attorney for representing the employee in the medical . . . dispute." Minn. Stat. § 176.081, subd. 1(a)(1). In Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 59 W.C.D. 319 (Minn. 1999), the supreme court held that a statutory limit of a 25/20 contingent fee on the medical benefits awarded was unconstitutional. The court, accordingly, remanded the case to this court for an award of "reasonable attorney fees," taking into consideration the following factors: the statutory guidelines, the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulties of the issues, the nature of the proof involved, and the results obtained. Irwin, 599 N.W.2d at 142, 59 W.C.D. at 335-36.

To decide whether a contingent fee is inadequate, the compensation judge must determine what would constitute a reasonable fee given the facts peculiar to the case, and compare it to the amount of the contingent fee awarded. Thus, both the inadequacy of the contingent fee and the reasonableness of the fee requested require the same analysis, applying the Irwin factors. Irwin v. Surdyk's Liquor (II), 60 W.C.D. 150 (W.C.C.A. 2000) (decision on remand).

In this case, the compensation judge appears to have found that the contingent fee based on the award of temporary total disability and permanent partial disability benefits was inadequate to reasonably compensate the employee's attorney, although no explicit finding was made to this effect. The judge indicated that she analyzed the claim in light of all but one of the

factors required by Irwin, and concluded that \$2,000.00 would be a reasonable fee for Mr. Hart's representation of the employee in the medical dispute.³

On appeal, the employee argues that the dispute should be remanded to the compensation judge for redetermination following a hearing, as the matter was decided by the judge without affording the hearing requested by the employee at the time of the submission of his fee petition. We agree.

This court has previously held that a compensation judge, when reviewing a Roraff fee request to which objection has been taken, should provide the parties with an opportunity for a hearing on the issues involved in the objection. The parties may waive this right, but a hearing is not to be denied where timely requested and not so waived. See, e.g., Carlson v. RDO Frozen Foods, 55 W.C.D. 500 (W.C.C.A. 1996); Swenson v. Quality Checked Plastics, slip op. (W.C.C.A. April 23, 1997). Similarly, if the employee requests a hearing on a Roraff or Heaton fee claim, even if there has been no objection, the employee is entitled to a hearing. "Basic fairness requires that the parties in a workers' compensation proceeding be afforded reasonable notice and an opportunity to be heard before decisions concerning entitlement to benefits can be made." Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988); see Lauer v. Tri-Mont Coop. Creamery, 287 Minn. 221, 178 N.W.2d 248, 25 W.C.D. 164 (1970). The hearing may be conducted in person, by telephone conference or in any other manner reasonably preserving the rights of the parties to present evidence and argument, but it must be recorded or transcribed and a record must be maintained regarding the evidence offered and considered by the compensation judge, so that this court has the capacity to review any appeal that may be taken from the judge's decision.

Misconstruing dicta in prior cases regarding protecting the rights of an objecting party, the employer and insurer argue in their brief that the right to request a hearing vests solely in the party objecting to a fee petition, and that if the objecting party has waived a hearing, none is required. This assertion is without merit.

In the present case, the employee clearly and unambiguously submitted a request for a hearing on his fee petition. The request was contained in the transmittal letter accompanying the employee's fee petition. It appears that by some inadvertency the compensation judge either was not provided with the letter when the petition was assigned to her, or she may simply have overlooked the request. Since the employee's right to a hearing on the fee petition was not effectuated, we vacate and remand the compensation judge's Order Determining Attorney Fees for reconsideration following an opportunity for the employee to be heard.

The employee on appeal has also raised objections to the specific determinations reached by the compensation judge. As we have vacated the judge's determination for de novo consideration with an opportunity for the employee to address these concerns, we decline to reach the employee's arguments on the substance of the decision as that issue is not ripe for our review.

³ The compensation judge listed as factors six areas set forth in Minn. Stat. § 176.081, subd. 5, before it was repealed in 1995. The factors listed did not include consideration of the statutory guidelines or the difficulties of the issues involved, as were set forth in the Irwin decision.