BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRUCE BRAMMANN, Claimant, vs. DONOHUE & ASSOCIATES, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	:	File No. 5055815 ARBITRATION DECISION Head Note No.: 3400

FILED
JUL 26 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

This matter was scheduled for hearing on March 15, 2018. Given the issues and dispute in this case, the undersigned requested the case be submitted on the record.

The parties submitted a joint statement of the case. Defendants' exhibits were lettered A and B for clarity of the record. The record in this case consists of Joint Exhibits 1 through 26, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A and B. This matter was fully submitted on April 16, 2018.

ISSUES

1. Should the settlement agreement between claimant and the third-party be approved; and if so,

2. The extent of defendants' entitlement to indemnification.

FINDINGS OF FACT

Claimant was employed as an inspector with Donohue & Associates (Donohue). On July 15, 2014, claimant was required by Donohue to inspect and document work performed at a job site. (Joint Exhibit 1, Defendants' Exhibit A)

On July 15, 2014, K.E. Flatwork was the primary contractor on the job site where claimant was working. K.E. Flatwork was performing concrete work. (Jt. Ex. 2) The work performed at a job site at Stagecoach Trail in LeClaire, Iowa. The work being performed was repaving. (Ex. A)

On July 15, 2014, claimant fell into a sanitary manhole that was covered with filter fabric, dirt, and gravel. Claimant went through the opening of the manhole with both feet, but caught himself with his arms. (Jt. Ex. 22)

Claimant injured his left shin, right rib, right shoulder, right ankle, and back. (Jt. Ex. 23) Claimant received medical treatment from providers including, but not limited to, Genesis Occupational Health, Bergthold Chiropractic, Medrisk, Inc., Physical Rehabilitation, and ORA Orthopaedics. (Jt. Ex. 20)

Claimant was reimbursed with workers' compensation benefits for his work injury of $63,519.57 in indemnity benefits. $20,568.65 was also paid in medical payments to claimant and medical providers. (Jt. Ex. 20)

Claimant and the workers' compensation carrier reached an agreement for settlement filed on May 2, 2017. A copy of that agreement for settlement is found at Joint Exhibit 10.

On June 15, 2016, claimant filed a third-party lawsuit against K.E. Flatwork, Inc. (Jt. Ex. 1) Hartford, defendant insurer, served a notice of lien on claimant on or about July 15, 2016. (Jt. Ex. 17)

On September 9, 2016, the third party suit was set for trial on October 2, 2017 in Iowa District Court in Scott County. (Jt. Ex. 13)

On April 7, 2017, claimant's counsel was notified that Hartford would agree to waive their subrogation lien for a full and final closed file settlement. The notice indicated that if claimant was paid any additional monies and damages, Hartford would not waive the lien. The offer was not accepted by claimant. (Jt. Ex. 18)

On June 6, 2017, claimant's counsel sent a demand to K.E. Flatwork to settle the third-party lawsuit for $207,204.00. (Jt. Ex. 2)

On August 8, 2017, K.E. Flatwork's countered with an offer of $30,000.00. Claimant countered with an offer of settlement of $175,000.00. (Jt. Ex. 4)

In August 2017, counsel for claimant and K.E. Flatwork continued to discuss settlement. By the end of August 2017, K.E. Flatwork had offered $34,000.00 to settle the third-party action. Claimant had made an offer of $150,000.00 to settle the third-party case. (Jt. Ex. 5, 6, 7)

On September 17, 2017, a court ordered settlement conference was held. At the settlement conference, K.E. Flatwork offered to settle the third-party action for $55,000.00. On or about September 15, 2017, K.E. Flatwork served an offer to confess for $55,000.00 to claimant. (Jt. Ex. 8)

On September 18, 2017, claimant accepted the offer to confess contingent on the release of the lien by the Hartford Insurance Company. (Jt. Ex. 9)

On September 20, 2017, claimant filed an application to adjudicate the lien in district court. (Jt. Ex. 14) On October 19, 2017, the district court granted Hartford's application to intervene in the third-party action. (Jt. Ex. 15) Claimant's application to adjudicate the lien was continued as it was found not ripe for ruling by the district court. The case remained open in district court and no dismissal has been filed. (Jt. Ex. 16, 26)

Claimant and counsel for the third-party action, Heather Carlson, entered into a fee agreement indicating claimant would reimburse Ms. Carlson 33 1/3 percent of any settlement amounts. (Jt. Ex. 11) At the time of submission of this matter, Ms. Carlson had spent 77.5 hours on the third-party case and had incurred $1,309.60 in expenses. (Jt. Ex. 12)

CONCLUSIONS OF LAW

The first issue to be determined is should the settlement agreement between claimant and the third-party tort fees be approved.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code section 85.22(3)(2011), provides:

Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the industrial commissioner.

The power to approve settlements in this case is exclusively with the industrial commissioner, and not with the court. Shirley v. Pothast, 508 N.W.2d 712 (Iowa 1993).

The workers' compensation commissioner has authority to grant written approval of a settlement between an employee and a potential third party tort-feasor in situations such as this, i.e., where the employer/workers' compensation insurer refuses to give its consent to a settlement reached between the employee and the third party tort-feasor. Iowa Code section 85.22(3)(2011); Shirley v. Potast, 508 N.W.2d 712, 717 (Iowa 1993).

A purpose of section 85.22 is to encourage employers and their insurers to pay workers' compensation benefits with the expectation that they will be reimbursed in the event of any recovery by the employee from a third party. Sladek v. K-Mart Corp., 493 N.W.2d 838, 840 (Iowa 1992). The section is also designed to prevent "double recovery" by the employee, who would otherwise be compensated by both the tort-feasor and the workers' compensation insurer for the same injuries. Liberty Mut. Ins. Co. v. Winter, 385 N.W.2d 529, 531 (Iowa 1986).

Settlements which avoid prolonged, extensive and uncertain litigation are encouraged by the law. White v. Flood, 138 N.W.2d 863, 867 (Iowa 1965); Moore v. Bailey, 163 N.W.2d 435 (Iowa 1968). In this context, the Iowa Supreme Court has said that the workers' compensation commissioner's responsibility is to protect the rights of both employers/insurers and employees from unfair and inadequate settlements of claims. Shirley v. Pothast, 508 N.W.2d 712, 717 (Iowa 1993).

Claimant contends the settlement offer in the third-party action is fair and reasonable for several reasons. First, claimant indicates the risks involved with litigating claimant's injury concerning the fall through the manhole is problematic. The issue of K.E. Flatwork's liability for claimant's injury is fairly undisputed. The issue regarding damages, however, is less clear.

Claimant does have approximately $17,000.00 in chiropractic bills from Bergthold Chiropractic. These expenses were not approved by Hartford as they were not authorized. Claimant has had chiropractic treatment for a number of injuries dating all the way back to 2000. Claimant also had chiropractic treatment up to six months before the fall. Claimant's right to any damages to reimburse him for chiropractic care could be limited because of claimant's pre-existing need for chiropractic care, as detailed by Flatwork's counsel. (Jt. Ex. 5)

Second, arguably, most of claimant's injuries were not of a permanent and serious nature. Claimant had injuries to his right ankle, right shoulder, right hip, and right ribs. Claimant did not sustain a fracture to the hip or ribs, and the injuries resolved after conservative care. Claimant was able to drive himself after the accident. Medical records indicate claimant first complained of a right ankle injury two months after his fall. These factors, and others detailed in Flatwork's counsel's letter, suggest claimant might have a difficult time convincing a jury of the severe and permanent nature of his injury. (Jt. Ex. 5)

Claimant also contends the $55,000.00 in settlement is a fair and reasonable settlement given his total medical costs. The Hartford claims medical bills of $20,568.65. The claimant argues this amount is actually $15,371.71. Claimant contends that the additional $5,000.00 Hartford seeks for medical bills are actually administrative costs and for payment of medical records. (Claimant's Brief, pages 7-9) Claimant contends that a jury would consider the $55,000.00 settlement a fair amount as this amount represents approximately three and one-half times the amount of actual medical bills. ($15,371.71 x 3.5) (Jt. Ex. 5)

The record suggests claimant's chiropractic charges would not be considered as a medical charge in a third-party action. The record indicates a jury may believe claimant's injuries are not severe and permanent given the facts as detailed above. Records also suggest that $55,000.00 in settlement is roughly three and one-half times the amount of claimant's total medical expenses. Given this record, it is found that the $55,000.00 in settlement for claimant's third-party tort action is fair and reasonable.

The next issue to be determined is the extent of defendants' entitlement to the settlement.

Iowa Code section 85.22(1) provides:

> If compensation is paid the employee ... under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed... and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

[T]he purpose of ... section 85.22(1) is to permit the employer to recoup monies it has been required to pay under the provisions of chapter 85 from a tortious third party whose conduct has produced the injury which necessitated such payments." Johnson v. Harlan Community Sch. Dist., 427 N.W.2d 460 462 (Iowa 1988). The statutory scheme of section 85.22(1) is intended "to prevent double recovery by the injured worker in compensation in a law action as well as workers' compensation for the same injury." Liberty Mutual Ins. Co. v. Winter, 385 N.W.2d 529, 532 (Iowa 1986).

Under Iowa law, a workers' compensation carrier is required to pay attorney's fees, to the employee's attorney in a third-party action, even if the amount settled for is less than the total of the workers' compensation insurer's lien. Ahlers v Emcasco Ins. Co., 548 N.W. 2d 892, 894 (Iowa 1996).

In determining the amount of the fee award, the agency is guided by the Supreme court decision in Kirkpatrick v. Patterson, 172 N.W.2d 259, (Iowa 1969). The Court indicated that the fee allowed to the claimant's attorney is not necessarily measured by the contingent fee contract between the claimant and the claimant's attorney. The agency should consider all the elements which have a bearing on the amount of attorney fees allowed in any given case including the time spent, the nature and extent of the services, the amount involved, the difficulty of handling the case, the importance of the issues, the responsibility assumed and the results obtained as well as the professional standing and experience of the attorney. Kirkpatrick, 172 N.W.2d at 261.

Defendants indicate in their brief they do not dispute the fee agreement between claimant, his attorney, and the third-party action. (Defendants' Brief, page 8) As a result, claimant's attorney, for the third-party action, should receive a third of the settlement amount. ($18,333.33) This would leave the defendant lien holder, Hartford, with the amount of $36,666.67 to satisfy their lien.

Claimant's counsel argues that the Hartford should not be allowed, under Iowa Code section 85.22(1) to receive reimbursement for the approximately $5,000.00 in administrative costs. (Claimant's Brief, pp. 7-9) This issue is moot given that the distributed amount of the settlement defendant Hartford is collecting is less than the total lien.

ORDER

THEREFORE, IT IS ORDERED:

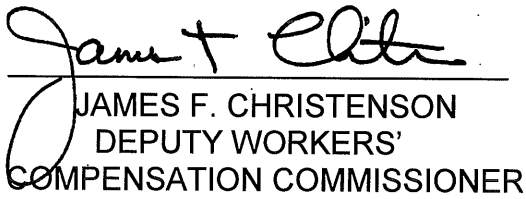
That settlement between claimant and K.E. Flatworks concerning claimant's third-party action of fifty-five thousand and no/100 dollars ($55,000.00) is approved.

That claimant's counsel shall receive eighteen thousand three hundred thirty-three and 33/100 dollars ($18,333.33) in fees.

That defendants' Hartford shall receive thirty six thousand six hundred sixty-six and 67/100 dollars ($36,666.67) for satisfaction of the lien.

Defendants shall pay costs.

Signed and filed this 26th day of July, 2018.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Heather L. Carlson
Attorney at Law
3432 Jersey Ridge Road
Davenport, IA 52807
hcarlson@mwilawyers.com

Maggie R. Boesen
Attorney at Law
100 E. Kimberly Rd., Ste. 400
Davenport, IA 52806
mboesen@hhlawpc.com

JFC/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.