[Redacted to remove Social Security Numbers.]

LORENZO H. REID, Employee, v. RYDER TRUCK RENTAL, SELF-INSURED, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 2, 1989

No. [Redacted to remove SSN.]

Determined by Rieke, C.J., Cervantes, J., and Pranke, J.
Compensation Judge: Harold W. Schultz

Affirmed.

OPINION

MANUEL J. CERVANTES, Judge

Self-insured employer appeals from an order of the compensation judge denying a post-hearing deposition of employee asserting improper expansion of the scope of the discontinuance hearing, lack of substantial evidence to support the findings, and denial of due process. We affirm.

Scope of Expedited Hearing

Self-insured employer asserts that the compensation judge exceeded his authority by considering the issues of temporary partial disability and primary liability. It is the position of employer, that under Minn. Stat. § 176.238, subd. 6, the discontinuance hearing was limited to the issue of whether self-insured employer properly discontinued temporary total disability benefits upon employee's return to work.

Employee alleged a work-related injury on September 9, 1987. On October 13, 1987, self-insured employer filed a Notice of Denial of Liability. Employee then filed a Claim Petition, on November 2, 1987, claiming temporary total compensation from September 10, 1987 and continuing. On November 12, 1987, self-insured employer filed a NOID, rescinding its denial of liability, stating that employee had been released to return to light-duty work on November 9, 1987, and noting that temporary total disability benefits had been paid from September 10, 1987 through November 9, 1987. On November 23, 1987, self-insured employer filed a notice of discontinuance indicating that temporary total compensation had been discontinued effective November 9, 1987, based upon employee's return to work. The following day, November 24, 1987, self-insured employer filed an answer to employee's claim petition denying primary liability, stating that their previous acceptance of liability and payment of benefits

was based on a mistake of fact. On December 4, 1987, employee filed an Objection to Discontinuance, claiming temporary partial disability benefits from November 9, 1987, and continuing.

The matter was placed on the expedited hearings calendar, on the basis of employee's objection to discontinuance. On December 31, 1987, self-insured employer filed a motionto remove the case from priority status which was denied by an order of Assistant Chief Administrative Law Judge Wallraff on January 5, 1988. At the hearing on January 15, 1988, self-insured employer objected to consideration of employee's temporary partial disability claim or any other issue other than whether employee's temporary total disability benefits were properly discontinued upon his return to work. The compensation judge indicated his intent to go forward with all issues before him, including employee's temporary partial disability claim, but at the close of the hearing, left the record open for 30 days to allow self-insured employer to obtain an independent medical examination (IME) and conduct other discovery.

The parties were apparently unable to agree on post-hearing discovery, and on January 21, 1988, the compensation judge issued an order allowing a post-hearing IME on January 25, 1988, and ordering the parties to appear before him on the same day to take employee's testimony on the issue of primary liability. Both parties appealed the compensation judge's order. This court dismissed the appeals for lack of jurisdiction to consider appeals of interlocutory orders prior to a decision on the merits. (Reid v. Ryder Truck Rental, W.C.C.A., April 27, 1988.)

Following dismissal of the appeals, by notice served May 12, 1988, the parties were advised that an expedited hearing was set for May 23, 1988 before Compensation Judge Schultz. The notice specifically stated that primary liability and the additional issue of temporary partial disability from January 15, 1988 to the third week in March 1988 would be considered at the hearing. At the end of the May 23 hearing, the compensation judge left the record open for an additional 30 days to allow employer to obtain an IME of employee and to depose employee's treating physician if employer so chose. Employer's motion for a post-hearing deposition of employee was denied.

Consideration of an employee's temporary partial compensation claim is not an improper expansion of issues in contravention of Minn. Stat. § 176.238, subd. 6 where temporary total compensation has been discontinued based on the employee's return to work. Meline v. Tekcom, Inc., 41 W.C.D. 52 (W.C.C.A. 1988); Violette v. Midwest Printing Co., 415 N.W.2d 318, 40 W.C.D. 445 (Minn. 1987).

In the Violette case, employer-insurer filed a NOID to discontinue temporary total benefits on the basis that employee had returned to work. Employee then filed a claim petition for temporary partial disability benefits. Employer-insurer appealed the compensation judge's award of temporary partial benefits asserting that the compensation judge improperly considered

any issue other than whether temporary total disability benefits should be discontinued. Noting that under Minn. Stat. § 176.101, subds. 3e, 3f, and 3h, an employee who returns to work in a 3e or 3f job, is entitled to temporary partial compensation, the supreme court concluded that these sections work in tandem and could not be viewed separately. In light of this statutory directive, and employee's claim petition for temporary partial benefits, the court upheld the award, holding that the issue of temporary partial disability benefits was properly before the compensation judge.

Similarly, the supreme court in Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 860 (Minn. 1988) held that consideration of primary liability was proper in an expedited hearing. In Kulenkamp, employer-insurer filed a NOID on the ground that employee had left suitable work. Employee filed an objection to discontinuance and the matter was scheduled for an expedited hearing. Ten days before the hearing, employer-insurer notified employee of its intent to deny primary liability. The court held that so long as a party has reasonable notice, a compensation judge may properly consider the issue of primary liability in an expedited hearing.

Minn. Stat. § 176.238 establishes an expedited procedure for the resolution of disputes regarding entitlement to ongoing weekly benefits, including both temporary total and temporary partial compensation. To discontinue temporary total benefits without consideration of temporary partial benefits, where an employee has returned to work, frustrates the intent of the statute. Meline, id. So, too, the issue of primary liability, where raised, is a necessary and integral part of such decision. A compensation judge is not required to make decisions in a vacuum or attempt to deal with interrelated issues in isolation. There is little point in ordering benefits to continue, if, upon further consideration, employee may not be entitled to benefits at all.

Denial of Post-Hearing Deposition

Self-insured employer asserts that given the scope of the hearing, the compensation judge's denial of a post-hearing deposition, combined with employee's refusals to respond to employer's discovery requests, deprived employer of an opportunity to adequately defend its claim.

The answer of self-insured employer, filed November 24, 1987, noticed an independent medical examination (IME) of employee on December 8, 1987. The employer also served a Demand for Discovery requesting the names and addresses of any doctors who had treated employee for injuries or conditions similar to those alleged in the petition, and requesting medical authorizations from employee.

Employee's attorney refused employer's request for an IME, and on December 31, 1987, following the scheduling of an expedited hearing, self-insured employer moved for an order removing the case from priority status, compelling responses to its demand for discovery, compelling employee's attendance at an IME, and ordering the taking of employee's deposition. By order filed January 5, 1988, Assistant Chief Administrative Law Judge Wallraff denied

employer's request for a continuance, but directed that employee immediately respond to employer's demand for discovery, and ordered employee to submit to an IME (after the hearing on January 15, 1988 if necessary.) The motion to compel the deposition of employee was not addressed. In the meantime, employer had scheduled an IME for January 5, 1988 which was cancelled as the parties had not yet received the judge's order. Employee's responses to employer's Demand for Discovery were served on January 7, 1988. New medical authorizations were provided on January 12, 1988. The attorney for employer scheduled a deposition of employee for January 12, 1988, but was advised by employee's attorney that he was not available due to scheduling conflicts.

At the hearing on January 15, 1988, self-insured employer renewed its request for an IME and deposition of employee. At the end of the hearing, the compensation judge left the record open for 30 days to allow employer to schedule an IME and "do some other discovery." The compensation judge directed the attorneys to get back to him if they could not work things out. On January 21, 1988, the compensation judge issued a post-hearing order on January 21, 1988, allowing an IME scheduled for January 25, 1988, and directing the parties to appear before the judge on that same date "prepared to take the testimony of the employee on the issue of the denial of primary liability." Both parties appealed the January 21, 1988 order; this court dismissed the appeals (without determining the issues in dispute) on April 27, 1988.

A second expedited hearing was set for May 23, 1988. At the May 23 hearing, self-insured employer stated for the record that an IME had been requested and scheduled for May 19, 1988 and depositions of employee were scheduled for May 6, and May 20, 1988, all of which requests were refused by employee's attorney. At the end of the second hearing, the compensation judge again left the record open to allow an IME of employee and to allow employer to depose employee's treating doctor. The court denied self-insured employer's request for a post-hearing deposition, stating that employer had the opportunity to cross-examine employee at the hearing.

Employer alleges that the court's order denying a post-hearing deposition effectively prevented employer from rebutting the evidence presented by employee. Self-insured employer apparently denied primary liability based on Dr. Bromer's September 22, 1987 letter giving a history different from that given by employee. Employer asserts that a deposition of employee was necessary in order to adequately investigate employee's condition and past medical history.

As noted by the compensation judge, there is ample if not overwhelming support for employee's claim. With the exception of the history provided in Dr. Bromer's September 22, 1987 report, the evidence is completely consistent with employee's version of the September 9, 1987 incident, including the First Notice of Injury signed by employer's safety manager on September 14, 1987, Dr. Hirt's records of September 16, 1987, the history taken by employee's

physical therapist at Noran Clinic on September 30, 1987, and the report of the adverse physician, Dr. Westreich. A co-employee who witnessed the near accident completely corroborated employee's version of what happened. Employer was notified of the injury on the day it occurred, and knew that Terry Frye, employee's co-worker, had witnessed the incident. Employer had an opportunity to cross-examine both employee and Mr. Frye at the January 15, 1988 hearing, and obviously knew what their stories were as of that date.

It is also clear, that although employer states that it was unable to obtain employee's medical records, it had actually obtained them as early as October 1987. A letter to Noran Neurological Clinic from Ryder Truck Rental, St. Paul, on September 30, 1987 notes that employee was being treated by Dr. Bromer for a worker's compensation injury and requests all records. A notation indicates that the records were sent on October 2, 1987. A second letter from Ryder Services Corporation, Brighton, Michigan, dated October 21, 1987, also requests all records relating to employee's history, treatment and condition. These were sent on October 27, 1987. Dr. Bromer's note of November 3, 1987 releasing employee to return to work was attached to employee's objection to discontinuance filed December 4, 1987. The names of three doctors who had treated employee and medical authorizations were provided to employer prior to the first hearing. All of Dr. Hirt's and Dr. Bromer's medical records (except the chart note of May 2, 1988) were admitted at the first hearing. the employer had the same records that employee did.

Employer could have, at any time, cross-examined Dr. Bromer by deposition, Minn. Stat. § 176.155, subd. 5, but did not. The compensation judge gave employer ample opportunity to do so, allowing 30 days following the May 23, 1988 hearing for employer to depose Dr. Bromer if employer so chose.

Employer also asserts that because of a lack of a pre-hearing IME and deposition they were unable to defend against employee's assertions with respect to his restrictions and ability to work.

Employee was released to return to light duty work with employer on November 9, 1987. At the beginning of the January 15, 1988 hearing, employer's attorney agreed that employee had not returned to full-time work, and that employee's post-injury wages were as listed in the schedule submitted by employee. At the January hearing, employee testified with respect to his release to return to work, his restrictions, and his previous position and hours of work. Dr. Bromer's November 3, 1987 and January 14, 1988 records releasing employee to return to clerical work were submitted at that hearing. Employer obviously had access to its own records regarding employee's work history following his return to work, and had access to further discovery through employee's supervisors and co-workers regarding his ability to do the work. Employer also had the opportunity to cross-examine employee at each of the two hearings. The IME report is consistent with the symptoms related by employee and Dr. Bromer, and, in fact, states that employee should not return to work based on the abnormalities observed by

Dr. Westreich at the adverse exam. That employer did not know about employee's later employments is irrelevant as employee was working full-time and making more than he had prior to his injury. Employee made no claim for benefits during that period.

In summary, it appears that employer failed to do the discovery that it could, and already had a substantial portion of the information it needed. It does not appear that employer was prejudiced by the compensation judge's denial of a post-hearing deposition under these circumstances, and that employer had ample opportunity to present its defense.

We do not mean to condone the behavior of employee's attorney, however. Minn. Stat. § 176.155, subd. 1 requires an employee to submit to an examination by employer's physician if requested by the employer. By making a claim for benefits, employee placed his medical condition in dispute. We do not read the statute to be limited to actions initiated by a claim petition. Judge Wallraff also specifically ordered that employee submit to an IME in his order of January 5, 1988, to be conducted after the first hearing if necessary. This order was not appealed nor rescinded and remained in effect during the course of the case. Employee's attorney's refusal to allow an IME was in clear violation of both the statute and Judge Wallraff's order.

Although there is no equivalent statutory requirement requiring employee to attend a deposition, such depositions are generally allowed, without an order, pursuant to Minn. Stat. § 176.411, subd. 2. Although it does not appear that there was an outstanding order requiring employee's attendance at a deposition, the employer's request for a deposition was not unreasonable, and it could easily have been accommodated.[1]

Employee's attorney refused to cooperate with reasonable discovery requests or an order of the compensation judge. Pursuant to Minn. Stat. § 176.155, subd. 3, a compensation judge may suspend benefits where an employee refuses to comply with any reasonable request for an IME.[2] Employer would also have been well within its rights to move for an order that the issue of primary liability be considered established in accordance with employer's denial of liability, or an order prohibiting employee's introduction of related evidence, pursuant to Worker's Compensation Litigation Procedures, Rule 1415.220, subp. 5.

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[1] Judge Wallraff's order does not address the issue, and Compensation Judge Schultz's January 21, 1988 order, although denominated an order for employee's "deposition," in fact, orders the parties to appear before the judge to take additional testimony.

[2] Employer made a motion for such an order at the close of the May 23, 1988 hearing, which was denied. The compensation judge acted within his discretion in denying the motion as employee had agreed at that point to attend an IME to be scheduled within the next 3 weeks.

It nevertheless appears that any impropriety in the procedures was not prejudicial to self-insured employer. We, therefore, hold that the compensation judge did not abuse his discretion in denying employer's request for a post-hearing deposition, and properly heard and considered the case. The compensation judge did not commit reversible error on these facts, and we affirm.

Due Process

Self-insured employer also argues that the compensation judge's denial of a post-hearing deposition of employee was a violation of employer's right to due process. This court has no jurisdiction to determine constitutional issues. Frandrup v. Al Smisek Builders, Inc., 41 W.C.D. 459 (WCCA 1988). The issue is preserved for appeal.

CONCURRING OPINION

RICHARD C. PRANKE, Judge

I concur with the result reached by the majority. Under the circumstances, the compensation judge did not err by considering employee's claim for temporary partial benefits or by denying employer's request for a post-hearing deposition of employee. Although the procedural history of the matter is atypical, employer had adequate notice and opportunity to obtain and submit evidence on the disputed issues. The compensation judge's decision is supported by substantial evidence in the record as a whole, and as such merits affirmance. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).