DOUGLAS AUNE, Employee/Appellant, v. CONAGRA, INC., and ITT HARTFORD INS. CO., Employer-Insurer/Cross-Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 19, 1999

No. [REDACTED SSN]

HEADNOTES

PENALTIES - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that there was a lack of medical support for the employer and insurer's denial of payment for medical expenses on the grounds that the treatment was not causally related or necessary, justifying imposition of a 30% penalty under Minn. Stat. § 176.225 for interposing a frivolous defense.

PENALTIES; SETTLEMENTS - INTERPRETATION. The compensation judge erroneously concluded the inclusion of "penalties" in the list of benefits closed out in the parties' June 20, 1997 Stipulation for Settlement, foreclosed a subsequent claim for penalties based on the employer and insurer's post-settlement refusal to pay medical/psychological expenses left open by the stipulation.

Affirmed in part and reversed in part.

Determined by: Johnson, J., Wilson, J., and Pederson, J.
Compensation Judge: Jennifer Patterson

OPINION

THOMAS L. JOHNSON, Judge

The employee and the employer and insurer appeal the compensation judge's finding that an award of penalties under Minn. Stat.§ 176.225 was appropriate based on the lack of medical support for the employer and insurer's assertion that disputed medical treatment was not causally related or necessary, but that penalties could not be imposed because the employee closed out any claim for penalties in the June 20, 1997 Stipulation for Settlement. We affirm in part and reverse in part.

BACKGROUND

The employee, Douglas Aune, began working for the employer, ConAgra, Inc., at its durum mill in Hastings, Minnesota, in October 1973. On June 15, 1985, the employee sustained a work-related injury to his neck and back. The employer and its insurer, ITT Hartford Insurance Company, admitted liability for the employee's injury.

The employee returned to light-duty work with the employer about five weeks after the injury. Sometime thereafter, the employee began experiencing anxiety attacks. He initially received treatment from Dr. James Noreen, his physician for the work injury. In 1988, Dr. Noreen referred the employee to Dr. Silvia Romero, a psychiatrist, for further treatment. Dr. Romero diagnosed major depression and a panic disorder secondary to chronic pain resulting from the work accident. She prescribed anti-depressant and anti-anxiety medications and provided crisis counseling and coordination of care with the employee's other doctors. In 1989 and 1990, the employee received counseling from Dr. Thomas McKenna, a psychologist, on referral from Dr. Romero, for his depression and panic disorder. In October 1995, the employee began treating with Dr. Barbara Martin, a licensed psychologist, again at the request of Dr. Romero. The employee continued to receive treatment from Dr. Romero and Dr. Martin for major depression and recurrent panic attacks through the April 22, 1999 hearing.

Over the years, the employee was also seen for a number of independent medical examinations (IMEs) at the request of the employer and insurer. These included a psychiatric IME by Dr. Lee H. Beecher on June 5, 1990; an orthopedic IME by Dr. Gilbert Westreich on August 21, 1992; two IMEs by Dr. Loren F. Pilling, a psychiatrist and pain management specialist, on May 5, 1993 and December 18, 1996; and a neurological IME by Dr. Miles Belgrade on February 2, 1995. All of these physicians, with the exception of Dr. Westreich, acknowledged the employee was experiencing depression and anxiety or panic attacks related in part to his chronic pain. All, except Dr. Westreich, agreed that Dr. Romero's treatment, including the medications prescribed, was appropriate, reasonable and necessary. Dr. Pilling anticipated, however, that future medical care would not be necessary once the "workers' compensation power struggle" was resolved.

Since 1989, there has been nearly constant litigation in this case, including ongoing disputes regarding causation and medical treatment for the employee's physical and psychological conditions. (See Judgment Roll.) On June 20, 1997, the employee, in an attempt to finally resolve the matter, entered into a full, final and complete Stipulation for Settlement. (T. 25.) The employee agreed to accept a lump sum payment of $145,000.00 in return for a complete closeout of all workers' compensation claims relating to his June 15, 1985 work injury, except reasonable and necessary medical and psychological care. The employer and insurer admitted primary liability for the employee's psychological conditions, but reserved all defenses to the employee's claims for future medical and psychological benefits, "excluding a denial of liability." (Pet. Ex. A: see ¶ III, X.1, X.7.) An Award on Stipulation was issued that same day.

The employee returned to see Dr. Romero on June 23, 1997. A bill for $135.00 was submitted to the insurer who refused payment stating the bill had not been submitted on the proper form. The employee next saw Dr. Romero on September 4, 1997, for crisis management and medication review. On September 23, 1997, the insurer again denied payment. The invoice was resubmitted and on September 25, 1997, the insurer paid $76.07 of the $135.00 charge submitted for the September 4th visit, but continued to refuse payment for the June 23rd visit. On November 17, 1997, Dr. Romero resubmitted the June 23 bill, on the new form, and submitted a new bill for treatment on November 13, 1997. In a letter to the insurer, Dr. Romero noted the bill

for August 10, 1996 had been paid in full, but since then she had been paid varying lesser amounts for the same code and the same amount charged. On November 26, the insurer paid $76.07 for the June 23rd visit, and on November 28, paid $80.28 for the November 13th visit. On March 16 and April 20, 1998, the insurer made payments in varying amounts on charges for treatment on December 31, 1997, February 9, 1998, and March 11, 1998. The employer and insurer then refused to pay for any of the employee's treatment with Dr. Romero or Dr. Martin or for the employee's prescriptions after April 1998, asserting the employee's treatment was not causally related to the admitted work injury.

On May 1, 1998, the employee filed a Medical Request seeking an order requiring the employer and insurer to continue payment for his treatment with Dr. Romero and Dr. Martin. The employer and insurer refused payment, contending "there is no causal relationship between this treatment and the employee's work injury. This treatment is not reasonable or necessary to the cure or relief of the employee's work injury." (Judgment Roll: 7/2/98 Medical Response.) The employee later amended his claim, seeking penalties under Minn. Stat. § 176.225 for assertion of a frivolous defense.

The case was heard by a compensation judge at the Office of Administrative Hearings on April 22, 1999. In her decision, served and filed May 19, 1999, the compensation judge found that after June 20, 1997, the employee continued to receive treatment from Dr. Romero and Dr. Martin, including prescription medications, for his depression, anxiety and panic attacks. The judge further found, based on the opinion of Dr. Romero, that the employee's chronic pain and consequential psychological injury continued to be a substantial contributing factor to the employee's need for treatment from and after June 20, 1997. The judge also concluded there was no medical support for the employer and insurer's assertion that the treatment received by the employee after June 20, 1997 was not causally related to his work injury and was not necessary. (Findings 3, 4, 5, 8.)[1]

The compensation judge concluded, given the lack of medical support for the employer and insurer's position, that a 30% penalty was appropriate pursuant to Minn. Stat. § 176.225, but that penalties could not be imposed because the employee had closed out his claim for penalties in the June 20, 1997 Stipulation for Settlement. (Finding 9.) Both the employee and the employer and insurer appeal this finding.

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

[1] None of these findings were specifically appealed by the employee or the employer and insurer.

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

Assertion of Frivolous Defense

The employer and insurer argue the imposition of a 30% penalty under Minn. Stat. § 176.225 for assertion of a frivolous defense is unsupported by and is manifestly contrary to the evidence. They contend that the records of Dr. Romero, Dr. Martin and Dr. Pilling support their position that the employee's psychological care was not related to his 1985 work injury, but was caused by stressors in his personal life and his anger and frustration with the employer and insurer and the workers' compensation system.

The employer and insurer's defense at issue here is no different from the position taken by the employer and insurer prior to the parties' June 20, 1997 Stipulation for Settlement. And, with the exception of Dr. Martin's post-June 20, 1997 treatment records,[2] the employer and insurer submitted *no* new evidence, relying instead on medical reports in existence at the time of the stipulation, and relied upon by the employer and insurer in entering into the stipulation, including the IME reports of Dr. Pilling. (See, e.g., Pet. Ex. A: ¶ VI, VIII.) The employer and insurer submitted no new medical opinion evidence indicating the employee's treatment after the stipulated settlement was not causally related to his work injury, relying instead on the post-June 20, 1997 treatment records of Dr. Martin.

A careful review of Dr. Romero's and Dr. Martin's records show the same diagnosis and treatment for the same psychological problems before and after June 20, 1997. The employer and insurer assert, however, that Dr. Martin's post-stipulation counseling records "are replete" with references to the employee's personal problems and the employee's anger and frustration with the employer and insurer over workers' compensation. None of these issues were new. The employee had discussed the same or similar issues with Dr. Romero and Dr. Martin since the inception of his treatment with them. And although the employee's symptoms were clearly exacerbated, in particular, by stress resulting from the ongoing dispute over workers' compensation and by various non-work-related problems and issues, Dr. Romero's and Dr. Martin's records and testimony unquestionably indicate that the employee's work-related chronic pain, and the cycle of depression, anxiety and panic attacks related to his pain, remained a

[2] The employer and insurer also submitted three brief chart notes of Dr. Noreen dated 8/4/97, 9/2/97 and 10/20/97, which are consistent with the records of Dr. Romero and Dr. Martin for this period.

substantial contributing cause of his psychological condition and his need for psychiatric and psychological treatment after June 20, 1997.

Whether a penalty is appropriate under Minn. Stat. § 176.225 is a question of fact for the compensation judge. Maxfield v. Stremel Mfg. Co., slip op. at 5, 7 (W.C.C.A. Jan. 6, 1999). There is more than adequate evidence to support the compensation judge's determination that there was a "lack of medical support for the [employer and insurer's] position that the disputed treatment was not causally related or necessary." (Finding 9.) We, therefore, affirm the finding that an additional award of penalties, pursuant to Minn. Stat. § 176.225, for the assertion of a frivolous defense is appropriate in this case, and justifies a 30% penalty based on the medical expenses awarded.

Stipulation for Settlement - Closeout of Penalties on Future Benefits

The employee appeals from the compensation judge's determination that the employee closed out all claims for penalties in the June 20, 1997 Stipulation for Settlement, and the consequent denial of his claim for an award of penalties under Minn. Stat. § 176.225. The June 20, 1997 stipulation provides, in pertinent part,

> [F]or a full, final and complete settlement of all claims for workers' compensation benefits . . . for physical injuries sustained on 6-15-85, and related psychological injuries, including . . . penalties, . . . except for reasonable and necessary medical/psychological care.

(Pet. Ex. A: ¶ X.1.)

The employer and insurer argue the compensation judge properly denied penalties, citing Paulson v. Holiday Inn, slip op. (W.C.C.A. July 24, 1995) for the proposition that any and all claims for penalties asserted subsequent to a settlement are barred where the stipulation for settlement includes a close-out of "penalties." The employee contends that penalty claims are derivative, and cannot exist independent from an enforceable claim for benefits. Thus, he argues, penalties for a future failure to pay benefits on claims that remain open cannot be, and are not, foreclosed. We agree.

Although the penalty statute refers to an award of compensation, it is well established that the purpose of the statute is punitive, rather than compensatory, being intended to deter employers and insurers from pursuing dilatory tactics, including a "frivolous" or unreasonable denial of benefits due the employee. The basis for the award is not the work injury, but the employer and insurer's failure or refusal to pay benefits that are due. Bergeson v. U.S. Fidelity & Guar. Co., 4l4 N.W.2d 724, 726-27, 40 W.C.D. 409, 413-14 (Minn. l987); Stoecker v. Moeglein, 269 Minn. 19, 120 N.W.2d, 793, 797 (Minn. 1964); Hop v. Northern States Power Co., 56 W.C.D. 73, 79 (W.C.C.A. 1996).

The employer and insurer's reliance on Paulson is misplaced. In Paulson, the conduct giving rise to the employee's claim occurred *prior to* the execution of the settlement agreement. There was no dispute that the employee was fully aware of his potential claim for penalties at the time of the stipulation and voluntarily signed the stipulation knowing it contained a provision foreclosing his claim.

The employer and insurer are certainly entitled to protect themselves from existing or potential penalty claims arising from conduct prior to the settlement agreement. Penalty claims arising from conduct after an Award on Stipulation are, however, a different matter. There is no good reason to shield an employer and insurer from the imposition of a penalty based on unreasonable neglect or a refusal to pay compensation due under the stipulation and for which they have a continuing obligation. Such an interpretation would be contrary to the purpose of the workers' compensation act - - that is, prompt payment of benefits due an injured employee, Minn. Stat. § 176.001 - - and would defeat the deterrent purpose of the penalties provision.

We, therefore, reverse the compensation judge's denial of penalties based on the finding that the employee closed out his claim for penalties (for future non-payment of medical/psychological expenses) in the June 20, 1997 Stipulation for Settlement, and order the employer and insurer to pay a 30% penalty on the medical expenses awarded, pursuant to Minn. Stat. § 176.225.[3]

[3] The current statute *requires* imposition of a penalty of up to 30% of the total amount of compensation awarded where the employer or insurer interpose a defense which is found to be frivolous or interposed for the purpose of delay. Minn. Stat. § 176.225, subd. 1(a)(1995).