

MICHAEL A. BALMA, Employee/Appellant v. ANOKA-HENNEPIN INDEP. SCH. DIST. #11, SELF-INSURED/PREFERRED WORKS, INC., Employer, and MN DEP'T OF ECONOMIC SEC. and LEE MEMORIAL HOSP., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
MAY 6, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - DISMISSAL. The employee supplied sufficient medical information to support a claim for a specific work injury to the right shoulder on September 26, 1991, under Minn. Stat. § 176.291, subd. 5, and the compensation judge erred in dismissing the employee's claim petition. Although this court cannot tell whether other medical evidence may support the employee's claim of a Gillette injury to the right shoulder on December 16, 1991, or his claim of a consequential depression, the compensation judge exceeded his authority in dismissing the employee's claim petition with prejudice. See Minn. Stat. § 176.305, subd. 4. The judge's order is, accordingly, reversed and the case remanded for further proceedings.

Reversed and remanded.

Determined by Johnson, J., Pederson, J., and Wilson, J.  
Compensation Judge: James R. Otto

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's order dismissing his claim petition, with prejudice. We reverse and remand the case for further proceedings.

BACKGROUND

The employee, Michael A. Balma, was employed by Anoka-Hennepin Independent School District #11, the employer, on September 26, 1991. The employer was self-insured for workers' compensation liability with claims administered by Preferred Works, Inc. On August 11, 1997, the employee, through counsel, filed a claim petition alleging he sustained a right shoulder injury and psychological injury on September 26, 1991 arising out of his employment. The employee claimed entitlement to temporary total, temporary partial, and permanent total disability benefits together with medical expenses and rehabilitation benefits. Filed with the claim petition were medical records and reports from Dr. Abbott Kagan II, Dr. Mark E. Farmer and an MRI report dated June 27, 1997. (Judgment Roll.) In its answer to the claim petition, the employer denied the employee sustained a personal injury arising out of his employment, denied

entitlement to workers' compensation benefits and alleged the employee's claim petition failed to provide adequate medical support for a psychological injury. The employer further stated that an independent medical examination was scheduled with Dr. Douglas Becker and the employer reserved its right to schedule a psychiatric/psychological examination of the employee.

On October 14, 1997, the employee's original counsel filed a Notice of Withdrawal of Counsel. By order filed November 25, 1997, the case was stricken from the trial calendar pending completion of all necessary discovery. The employee retained Ronald F. Meuser, Jr. on December 27, 1997. On January 14, 1998, the employee was seen by Dr. Becker for an independent medical evaluation at the request of the self-insured employer. Dr. Becker's report was served on the employee's counsel and filed with the court on February 5, 1998. On June 17, 1998, Lee Memorial Hospital and the Minnesota Department of Economic Security, Reemployment Insurance Division, were named as party intervenors. On August 10, 1998, the employee filed a motion requesting the case be reinstated on the trial calendar. The case was reinstated on the calendar and scheduled for a pretrial and a hearing by notice dated August 11, 1998.

The case came on for hearing before a compensation judge at the Office of Administrative Hearings on November 12, 1998. The employee's counsel, in his opening statement, claimed a specific injury to the right shoulder on September 26, 1991, a Gillette-type<sup>1</sup> personal injury to the right shoulder which culminated in disability on or about December 16, 1991, and a consequential injury on September 26, 1991 or December 16, 1991 in the nature of mental depression resulting from the September 26, 1991 personal injury. (T. 3-4.) In response, the self-insured employer's counsel moved for dismissal of the employee's claim petition alleging there was no medical support for the employee's claim of a work-related injury to the right shoulder or his psychological injury claim. (T. 7-8.) In response, Mr. Meuser made an offer of proof in which he referred to "contemporaneous medical records at the time of the examination, specifically, four dates of treatment in 1991 through a Dr. Schumacher." Mr. Meuser included in his offer of proof the records of Dr. Farber<sup>2</sup> and the employee's testimony that he sustained a shoulder injury at work with ongoing symptoms. (T. 9.) Later in the proceeding, Mr. Meuser made an "offer of judgment with respect to the medical records as they exist." Mr. Meuser stated "I do wish to introduce the exhibits to protect Mr. Balma's rights on appeal and, you know, I'll make an offer of proof for purposes of what Mr. Balma would be expected to testify if he were and go from there." (T. 24.) The compensation judge stated he would review the medical records. (T. 24.) Following a recess to review the medical records, the court stated:

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<sup>1</sup> Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

<sup>2</sup> Dr. Mark E. Farmer of the Sports Medicine & Orthopedic Specialists in Fort Myers, Florida examined the employee on several occasions and prepared reports dated June 18, October 2, and October 19, 1998. Mr. Meuser referred to the records of "Dr. Farber" but we assume he was referring to Dr. Farmer.

I've reviewed the medical reports in evidence, and in my opinion that the evidence is not sufficient for the employee to sustain his burden of proof that his right shoulder condition or his - - any mental depression he might have is causally related to his employment, and in particular, the injury that he's claiming. And, therefore, without any medical proof, I think at this time I'll just dismiss the claim petition, and I'll advise the employee he does have the right to appeal my decision, and I'll do that formally. (T. 28.)

On November 18, 1998, the compensation judge issued a findings and order in which the court found the employee's claim petition lacked medical support as required by Minn. Stat. § 176.291, subd. 5. (Finding 1.) The court further found the medical records were insufficient to support the employee's claim that any injury sustained at the employer was a cause of, or a contributing cause to any of his claimed benefits. (Finding 2.) The compensation judge dismissed the employee's claim petition, with prejudice. The employee appeals from the compensation judge's findings and order.

#### 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

The pro se employee argues the compensation judge erroneously dismissed his claim petition. He asserts he provided adequate medical support for his claim and points specifically to the medical records of Dr. Kagan and his report of July 31, 1997. The self-insured employer argues the compensation judge carefully reviewed the medical records and properly concluded the evidence was insufficient to sustain the employee's burden of proof. They further contend the employee has failed to prove the medical evidence provided to the compensation judge was sufficient to support an award of compensation. Finally, the self-insured employer argues the employee has failed to prove the findings of fact of the compensation judge were clearly erroneous and unsupported by substantial evidence. The respondent, therefore, asks this court to affirm the findings and order of the compensation judge.

Minn. Stat. § 176.291, subd. 5, requires a claim petition include, where applicable, "written medical reports or other information in support of the claim." Filed with the claim petition were various medical records including a report of a consultation with Dr. Abbott Kagan II on June 20 and July 3, 1997 and a report dated July 31, 1997 in which the doctor said "the assault which allegedly took place on 9/26/91 significantly contributed to the need for Michael's shoulder surgery." Also attached to the claim petition was a report of Dr. Farmer dated July 23, 1997 and an MRI scan report dated June 27, 1997. It is apparent from the transcript and

the employee's offer of proof that numerous other medical records exist bearing on the employee's claims, most of which are not contained on the judgment roll or in the file.<sup>3</sup> The compensation judge stated he reviewed certain medical records prior to dismissing the employee's claim petition. The compensation judge did not, however, mark these medical records as exhibits or admit them into evidence. This procedure must be followed when the employee makes an offer of proof so that this court can properly review the matter on appeal. Given the current record, we have no idea what medical evidence the compensation judge reviewed. Based, however, upon the medical records filed with the claim petition, we conclude the employee did file sufficient information to support his claim of a shoulder injury on September 26, 1991.

The report of Dr. Kagan opined a causal connection between the alleged incident on September 26, 1991 and the employee's need for right shoulder surgery. Contrary to the compensation judge's suggestion, the employee is not required to file with his claim petition medical evidence or reports which comply with Minn. R. 1415.2900, subp. 3. That rule governs medical evidence at trial. Neither is the employee required to file with the claim petition medical evidence sufficient to sustain the employee's burden of proof. Preponderance of the evidence is the employee's burden at trial. See Minn. Stat. § 176.021, subd. 1a. Minn. Stat. § 176.291, subd. 5 requires only information that supports the claim. The employee did supply adequate information to support a claim of a specific injury on September 26, 1991. Accordingly, the compensation judge improperly dismissed that claim.

In addition to the claim of a specific injury on September 26, 1991, the employee also alleged a Gillette injury on or about December 16, 1991 and a mental depression injury on September 26, 1991 or on December 16, 1991. The medical information filed with the claim petition does not support a claim for either a Gillette injury or a consequential depression. We cannot tell whether the other medical evidence reviewed by the compensation judge does support these claims. Even assuming, however, the employee failed to provide adequate medical or other information in support of the Gillette and depression claims, a dismissal with prejudice is an improper sanction. If an employee fails to provide adequate information in support of a claim, a compensation judge may strike the case from the active trial calendar after the employee has been given 30 days to correct the deficiency. Minn. Stat. § 176.305, subd. 4. The statute does not give

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<sup>3</sup> The transcript and the employee's offer of proof contain reference to records of Dr. Farmer and Dr. Schumacher. Dr. Becker in his independent medical evaluation filed on February 5, 1998, stated that he reviewed approximately "2 inches of medical records" which dated back to July 31, 1991. Dr. Becker stated the medical records evidence the employee was seen for right shoulder pain on October 11, 1991 and stated the records of February 7 and September 28, 1992 make reference to depression and anxiety. On November 16, 1998, counsel for the self-insured employer filed two supplemental reports from Dr. Becker which reference medical records from Fairview Southdale Hospital, Mork Clinic, Cub Pharmacy, Nystrom and Associates, Kagan Orthopedics, Lee Memorial Hospital, Medical Associates in Internal Medicine, Aspen Medical Group and Sports Medicine and Orthopedic Specialists.

the compensation judge authority to dismiss the employee's claim petition.<sup>4</sup> The compensation judge here exceeded his authority in dismissing the employee's claim petition with prejudice. Accordingly, the findings and order of November 18, 1998 are reversed in their entirety and the case is remanded to the Office of Administrative Hearings for further proceedings.

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<sup>4</sup> A compensation judge may dismiss an action "on the judge's own motion or upon motion of a party with notice to the parties, dismiss an action or claim for a failure to prosecute; or to substantially comply with this chapter, the act, or an order of a judge. Minn. R. 1415.1700, subp. 2. See also Michaelson v. Hamline Twin City Real Estate Co., 42 W.C.D. 964 (W.C.C.A. 1990).