

ROBERT G. DURAN, Employee, v. BONGARDS' CREAMERIES, SELF-INSURED/BERKLEY ADM'RS, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 12, 1999

No. [REDACTED]

HEADNOTES

APPEALS - INTERLOCUTORY ORDER; JURISDICTION - SUBJECT MATTER. The Workers' Compensation Court of Appeals lacked subject matter jurisdiction to consider an appeal from an order restricting the employer's right to an independent examination.

Appeal dismissed.

Determined by Wilson, J., Johnson, J., and Rykken, J.
Compensation Judge: Gary P. Mesna.

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the compensation judge's order as to its entitlement to an independent medical examination. We dismiss the appeal.

BACKGROUND

On March 1, 1999, the employee filed a claim petition seeking penalties and approval of surgery due to a right foot injury allegedly sustained in the course and scope of his employment with Bongards' Creameries [the employer] on October 22, 1997.¹ The employer filed a timely answer to the claim petition and not long after served and filed both a motion for an extension of time to complete an independent medical examination and a motion to compel discovery. By letter dated May 4, 1999, the employee's attorney objected to the employer's motions, alleging that the employer had not shown good cause for an extension of time and that the employee had already complied with a request by the employer's claims examiner to have her right foot examined by Dr. Lowell Lutter.

In an order issued on May 24, 1999, apparently without hearing, the compensation

¹ According to the briefs on appeal, the right foot injury alleged in the claim petition was the consequence of a left foot injury for which benefits had been paid pursuant to a stipulation for settlement.

judge determined that no extension of time was necessary and that the employer “must use Dr. Lowell Lutter for its Independent Medical Examination.” The employer then filed a motion, along with affidavits and certain documentation, asking the judge to reconsider his ruling. On June 30, 1999, following a telephone conference, the judge issued an order denying the employer’s motion to reconsider. The order indicated that the judge had “determined that the employer has had the employee examined by its physician and that the request for an independent medical evaluation should be denied.” In the memorandum attached to this order, the judge explained that the dispute was over whether Dr. Lutter should be considered “ ‘the employer’s physician’ ” or the employee’s choice of doctor for a second opinion. The judge apparently reasoned that, because the employer would not approve the employee’s request for a second opinion unless the employee chose one of four doctors from the employer’s managed care plan, including Dr. Lutter, Dr. Lutter “was the employer’s physician and the employer is not entitled to have the employee examined again by another employer’s physician.” The employer appeals.

DECISION

The preliminary question in this case is whether the compensation judge’s order is presently appealable. Pursuant to Minn. Stat. § 176.421,

Subdivision 1. Time for taking; grounds. When a petition has been heard before a compensation judge, within 30 days after a party in interest has been served with notice of an award or disallowance of compensation, or other order affecting the merits of the case, the party may appeal to the workers’ compensation court of appeals

(Emphasis added.) In Mierau v. Alcon Industries, Inc., 386 N.W.2d 741, 38 W.C.D. 652 (Minn. 1986), the Minnesota Supreme Court determined that the Workers’ Compensation Court of Appeals lacked subject matter jurisdiction over an appeal from an order requiring the employee to attend a discovery deposition, because the order did not affect the merits of the case nor did it prevent a later determination on the merits. Id. at 742, 38 W.C.D. at 653.

In the present case, the employer argues that the judge’s order restricting its right to an independent medical examination is appealable because “the case will rise or fall on the medical testimony,” contending that the judge’s order “is capable of deciding the case itself.” We are not persuaded. Pre-trial orders, including orders as to discovery, arguably always have the potential to affect the outcome of litigation. However, this court has on several occasions ruled that orders concerning an employee’s attendance at an independent medical examination are not appealable. See, e.g., Miles v. United Parcel Servs., Inc., slip op. (W.C.C.A. June 6, 1997); Woitas v. Rochester Moving & Storage, slip op. (W.C.C.A. Apr. 16, 1992); Neyens v. Campbell Soup Co., slip op. (W.C.C.A. Feb. 25, 1992). See also Meyer v. Ultra Painting & Paper Hanging Co., slip op. (W.C.C.A. Mar. 11, 1999) (order denying joinder not appealable); Dauids v. Johnson Grain and Feeds, slip op. (W.C.C.A. Apr. 21, 1992) (order denying appointment of a neutral physician not appealable). The employer has offered no legal basis to treat the order now before

us any differently.

As a general rule, an order is appealable only if it “finally determines the rights of the parties and concludes the action.” Hagen v. Hoffman Aseptic Packaging, slip op. (W.C.C.A. May 8, 1997), citing Zizak v. Despatch Indus., Inc., 386 N.W.2d 741, 38 W.C.D. 652 (Minn. Ct. App. 1988). But see Glapa v. Fraser Shipyards, slip op. (W.C.C.A. May 11, 1999) (order denying motion to dismiss for lack of subject matter jurisdiction is an appealable order). The rule is intended in part to avoid piecemeal appeals. While this court currently lacks subject matter jurisdiction to consider the propriety of the order in question, the employer may raise this issue again, if necessary, in any appeal from the judge’s decision on the merits in the underlying action. See Davids v. Johnson Grain and Feeds, slip op. (W.C.C.A. Apr. 21, 1992). The present appeal must, however, be dismissed.