JANICE M. GAFFKE, Employee, v. SURF & SAND NURSING HOME and ASSIGNED RISK PLAN/EMPLOYERS INS. OF WAUSAU, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 23, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - MOTIONS; PRACTICE & PROCEDURE - DISCOVERY. Under the somewhat unusual circumstances of this case, the compensation judge erred in applying Minn. R. 1415.2200, subd. 5, to order that the employee's claimed weekly wage be deemed "admitted" by the employer and insurer, for alleged failure to comply with discovery requests, where the employer and insurer had no reasonable opportunity to be heard on the matter.

Vacated.

Determined by Wilson, J., Wheeler, C.J., and Hefte, J.
Compensation Judge: Karen C. Shimon.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's order deeming the employee's claimed weekly wage admitted. We vacate the judge's order to this effect.

BACKGROUND

On November 10, 1992, the employee sustained an admitted injury to her leg while employed by Surf & Sand Nursing Home [the employer]. The employer and its insurer paid the employee various benefits following the injury, basing wage loss benefit payments on a weekly wage of $354.67. On January 12, 1998, the employee filed a claim petition alleging entitlement to additional benefits, including temporary partial disability benefits, and asserting a weekly wage of $390.00. In its answer, the employer and insurer admitted liability for the injury but alleged, among other things, that the employee's disability, if any, was unrelated to her work injury. With regard to the employee's claimed weekly wage, the employer and insurer indicated that they lacked sufficient information to answer or otherwise respond. During the discovery process, the employer and insurer allegedly provided the employee with a complete copy of the employee's personnel file, among other items.[1]

[1] Many of the background facts have been taken from an affidavit and supporting documentation, from the employer and insurer's attorney, submitted in connection with the

On June 23, 1998, a settlement conference was held, by telephone, before Judge Jerome Arnold, who then referred the matter to the Office of Administrative Hearings. About three months later, on September 16, 1998, the employer and insurer received a Notice of Settlement Conference, indicating that a settlement conference before Judge Karen Shimon was scheduled for 9:00 a.m., on October 7, 1998, and giving the address of the Office of Administrative Hearings in Duluth, including a suite number. According to Michael Tierney, the attorney for the employer and insurer, the notice consisted of a single piece of paper, which included proof of service.

By letter dated September 24, 1998, the employee's attorney, Louis Stockman, asked Mr. Tierney for more specific wage information, including the employee's wage history for the twenty-six week pre-injury period. Mr. Tierney was unavailable due to a death in the family, but another attorney in Mr. Tierney's office allegedly contacted the employer to obtain additional information, and the employer apparently responded by providing first reports of injury showing the employee's hourly rates at various points prior to the November 10, 1992, injury. This information and two communications from the employer were transmitted to Mr. Stockman by facsimile on October 5, 1998, when Mr. Tierney returned to his office. In a letter attached to the wage information, Mr. Tierney informed Mr. Stockman as follows: "We understand from the employer that this is all the information they have regarding the employee's wages." Mr. Tierney asserts that the employer was purchased by another entity in 1995 and that little information exists as to the employee's wage in 1992.

Due to a scheduling conflict, another attorney from Mr. Tierney's office was assigned to cover the October 7, 1998, settlement conference. Because Mr. Tierney's office is located in St. Paul, the substitute attorney apparently prepared to participate in the conference by telephone. On the day of the conference, a clerk from the Office of Administrative Hearings in Duluth contacted that attorney to indicate that Judge Shimon expected the attorneys to be present at the conference and that she would not proceed by telephone. Mr. Stockman, the employee's attorney, apparently attended the conference in person.

On October 16, 1998, Mr. Tierney received a copy of a request by Mr. Stockman, dated October 15, 1998, that sought Judge Shimon's signature on two proposed orders regarding attorney fees, evidence, and discovery. In response, on the same day, Mr. Tierney faxed a letter to Judge Shimon, requesting the opportunity to be heard on the two orders. Mr. Tierney also allegedly left a voice mail message for Judge Shimon to this effect. The judge did not respond immediately, but, on October 21, 1998, she issued the orders requested by Mr. Stockman, awarding Mr. Stockman $432.00 in attorneys fees, for the employer and insurer's failure to appear at the settlement conference, ordering that the employee's claimed weekly wage of $390.00 was "deemed admitted" by the employer and insurer, and ordering that the employer and insurer's right

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proceedings before the compensation judge. The record in this matter is minimal, the employee submitted no brief on appeal, and we find no evidence in the file that the employee contested the assertions in the affidavit below.

to further discovery was "terminated." In the order as to weekly wage and discovery, Judge Shimon indicated that the employer and insurer had "failed to provide employee's average weekly wage history to employee's counsel." Accompanying the orders was a letter from Judge Shimon to Mr. Tierney, in which the judge characterized Mr. Tierney's October 16, 1998, request to be heard on the proposed orders as "untimely" and in which the judge referred Mr. Tierney to "Chief Judge Nickolai's Order (on the goldenrod sheet) which accompanied your Notice of Settlement Conference in regard to the matter, and, specifically paragraph 4 therein and the concluding paragraph regarding 'Failure to Comply.'"

On October 23, 1998, the employer and insurer served and filed a motion asking Judge Shimon to vacate her earlier orders. Attached to the motion was an affidavit from Mr. Tierney, explaining his position as to the background of the matter, contending that there were few available records regarding the employee's weekly wage, asserting that the notice of settlement conference consisted of a single page with no attachments or special notification as to attendance at the conference, and indicating that the employer and insurer had never received any notice of motion of any kind regarding discovery or the employee's weekly wage. There is no evidence in the file as to any response by Mr. Stockman. However, in an order issued November 10, 1998, Judge Shimon indicated that other Twin Cities attorneys had been scheduled to appear in Duluth for settlement conferences the week of October 7, 1998, and that all requests by those attorneys to appear by telephone had been denied. The judge also indicated that there was no telephone in the room in which the conference had been held, and she concluded, after having reviewed the file, that the previous orders "were appropriate to be entered and should not be vacated."

The employer and insurer appeal.

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

On appeal, the employer and insurer contend that the compensation judge erred in concluding that the employee's claimed $390.00 weekly wage should be "deemed admitted."[2]

[2] The employer and insurer do not, however, challenge the judge's award of attorney fees or her order terminating the employer and insurer's right to further discovery. We therefore need not address those orders.

[2] But see Minn. Stat. § 176.305, subd. 1a (if a party fails to appear at a conference scheduled by the commissioner, "all issues may be determined contrary to the absent party's

We agree.

It is apparent that the judge was heavily influenced by her conclusion that the employer and insurer's failure to attend the October 7, 1998, settlement conference, in person, was inexcusable. The evidence supporting the judge's conclusion in this regard is questionable. As previously noted, Mr. Tierney's affidavit indicates that the Notice of Settlement Conference contained no attachments or special instructions regarding attendance requirements for the conference, and Mr. Tierney also asserted that, in his thirteen years of workers' compensation practice, he has never been required to attend a settlement conference in Duluth in person. Perhaps more importantly, the division file in this matter, including the judgment roll, contains no evidence of any order of Judge Nickolai or of the "goldenrod" sheet referenced in Judge Shimon's letter to Mr. Tierney. Given his experience, and without notification of special requirements for this particular settlement conference, it is perhaps understandable that Mr. Tierney assumed that the conference would be conducted by telephone. Moreover, we note that deeming a matter admitted is not a sanction specified by statute for failure to attend a conference or hearing.[3] Rather, Minn. Stat. § 176.081, subd. 12, indicates that a judge may award attorney fees under these circumstances.[4] Therefore, in any event, the judge's order regarding weekly wage cannot be justified based on the employer and insurer's failure to attend the settlement conference.

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interest, provided the party in attendance presents a prima facie case"). A party dissatisfied with a decision of the commissioner's respresentative under Minn. Stat. § 176.305 may request a de novo hearing before a compensation judge of the Office of Administrative Hearings.

[2] The statute also permits the division or Office of Administrative Hearings to "by rule establish additional sanctions for failure of a party or the party's attorney to appear, prepare for, or participate in a conference or hearing." Minn. Stat. § 176.081, subd. 12. The judge cited no such rule.

[2] The majority in Jaeger decided that case on substantial evidence grounds, without reference to this rule, and the majority decision is irrelevant to the further discovery. We therefore need not address those orders.

[3] But see Minn. Stat. § 176.305, subd. 1a (if a party fails to appear at a conference scheduled by the commissioner, "all issues may be determined contrary to the absent party's interest, provided the party in attendance presents a prima facie case"). A party dissatisfied with a decision of the commissioner's respresentative under Minn. Stat. § 176.305 may request a de novo hearing before a compensation judge of the Office of Administrative Hearings.

[4] The statute also permits the division or Office of Administrative Hearings to "by rule establish additional sanctions for failure of a party or the party's attorney to appear, prepare for, or participate in a conference or hearing." Minn. Stat. § 176.081, subd. 12. The judge cited no such rule.

As legal grounds for her original order deeming the employee's claimed weekly wage admitted, the compensation judge cited only Jaeger v. Twin City Bottling, Inc., 42 W.C.D. 485 (W.C.C.A. 1989), a case in which the judge, then a member of this court, wrote a separate concurring opinion relying on Minn. R. 1415.2200, subp. 5.[5] That rule provides as follows:

> Subp. 5. Penalties. Upon the failure of a party to reasonably comply with discovery or a judge's order under this part, the following orders of the compensation judge are allowed upon a party's motion:
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> A. an order that the subject matter of the order for discovery or other relevant facts is established in accordance with the moving party's claim; or
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> B. an order prohibiting the party failing to comply to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

Minn. R. 1415.2200, subp. 5. However, while the rule may provide surface justification for the judge's order, the facts in this matter, at least on the record before us, do not in fact warrant the judge's application of the rule here.

Basic fairness requires reasonable notice and the opportunity to be heard before decisions as to benefit entitlement may be made. Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). In the present case, these requirements were not sufficiently satisfied. There is no evidence in the file that the employer and insurer were aware of the employee's apparent dissatisfaction with the employer and insurer's October 5, 1998, discovery responses prior to the settlement conference, and the employee at no time ever served and filed any motion to compel discovery or for a penalty under the rule cited by the judge. Following the settlement conference, after receiving copies of the orders proposed by the employee, the employer and insurer promptly requested an opportunity to be heard on the matter, which the compensation judge either ignored or denied. It is true that the employer and insurer submitted an affidavit, outlining their position as to wage, in connection with their motion to vacate the compensation judge's previous order. However, in her November 10, 1998, order denying that motion, the compensation judge again focused entirely on her reasons for finding the employer and insurer's nonattendance at the settlement conference to be unjustified. As previously indicated, whether or not an award of attorney fees may have been appropriate, nonattendance does not provide adequate grounds for the judge's decision as to the disputed issue of the employee's weekly wage.

This case again illustrates the need for creation of some kind of record before sanctions are imposed. Had the employer and insurer not submitted an affidavit in connection with their motion to Judge Shimon, the matter would have been virtually unreviewable, perhaps

[5] The majority in Jaeger decided that case on substantial evidence grounds, without reference to this rule, and the majority decision is irrelevant to the present matter.

necessitating a remand and further delaying disposition of the underlying claims. See, e.g., Ritacco v. Malmborg & Sons, slip op. (W.C.C.A. May 12, 1997). As it is, given all the circumstances in this case, we are compelled to conclude that the compensation judge erred in deeming the employee's claimed weekly wage admitted by the employer and insurer. Accordingly, we vacate that portion of the judge's order. The employee may, if she so chooses, and with proper notice, bring a motion to compel discovery or to impose sanctions pursuant to Minn. R. 1415.2200, subp. 5, before the judge assigned to hear the matter on the merits.