

GEORGE HERBST, Employee, v. JONES TRUCK LINES and NATIONAL UNION/GAB BUSINESS SERVS., Employer-Insurer, and LEWIS TRUCKING and W. NAT'L INS. CO., Employer-Insurer/Appellants, and BLUE CROSS & BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 20, 1999

No. [REDACTED SSN]

HEADNOTES

APPEALS - INTERLOCUTORY ORDER. As a general rule, orders granting or refusing discovery are interlocutory and are not appealable. This court lacks jurisdiction under Minn. Stat. § 176.421, subd. 1, to consider or determine the employer and insurer's appeal from the compensation judge's order requiring the employer and insurer to provide to the employee's attorney copies of surveillance reports and an opportunity to view surveillance videotapes of the employee prepared at the request of the employer and insurer. The appeal is, therefore, dismissed.

Appeal dismissed.

Determined by: Johnson, J., Wilson, J. and Wheeler, C.J.
Compensation Judge: Nancy Olson

OPINION

THOMAS L. JOHNSON, Judge

The employee has filed a motion to dismiss the appeal of the employer and insurer, Lewis Trucking/Western National, for lack of subject matter jurisdiction, pursuant to Minn. § 176.421, subd. 1. We agree, and dismiss the appeal.

BACKGROUND

On July 2, 1999, George Herbst, the employee, filed a claim petition against the employers and insurers herein, seeking permanent total disability and permanent partial disability benefits. The employee was aware, by this time, of surveillance activities conducted at the request of the employer and insurer, Lewis Trucking/Western National. A Demand for Discovery was served on Lewis Trucking/Western National with the claim petition seeking, among other things, "[a]ny and all videotapes . . . and other surveillance or investigation information relevant to [the employee's] claim, including any field notes or other written materials." (Judgment Roll: 7/2/99 Demand for Discovery.) Lewis Trucking/Western National served and filed a timely Response to Demand for Discovery objecting to the demand on the ground that it was beyond the scope of discovery permitted under Minn. R. 1415.2200. A Motion to Compel Discovery was filed by the employee on July 16, 1999. On July 21, 1999, the employer and insurer, Lewis Trucking/Western

National, voluntarily provided copies of three investigative reports to the compensation judge and to counsel for the employee and Jones Truck Lines/GAB. These reports indicate that surveillance videotapes of the employee were made in the course of the investigation.

Following a hearing on August 2, 1999, a compensation judge at the Office of Administrative Hearings issued an Order for Discovery requiring Lewis Trucking/Western National to provide the employee's attorney an "opportunity to view the videotapes and copies of the surveillance reports within 30 days." (Judgement Roll.) On August 30, 1999, Lewis Trucking/Western National filed, with this court, an appeal from the discovery order. On October 8, 1999, the employee filed a motion to dismiss the appeal of Lewis Trucking/Western National contending that the order of Compensation Judge Olson was not an appealable order. Lewis Trucking/Western National filed a timely objection to the employee's motion.

DECISION

Appeals to this court may be taken from "an award or disallowance of compensation, or other order affecting the merits of the case." Minn. Stat. § 176.421, subd. 1. Generally, orders granting or refusing discovery are interlocutory and are not appealable. In re: William's Estate, 254 Minn. 272, 95 N.W.2d 91, 100 (1959); see, e.g., Mierau v. Alcon Indus. Inc., 386 N.W.2d 741, 38 W.C.D. 652 (Minn. 1986)(discovery order requiring employee's attendance at deposition not appealable).

The employer and insurer, Lewis Trucking/Western National, argue that, in this case, the judge's order is appealable because it requires the production of videotapes and reports that, if introduced at hearing, would directly affect the outcome of the case. They assert that as part of the record reviewed by the compensation judge, the reports and videotapes would have a direct effect on "the merits of the case," and the order is, therefore, appealable. We disagree. As a general rule, an order "affecting the merits of the case" is one that "finally determines the rights of the parties or 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), "preventing a later determination on the merits." Mierau, 386 N.W.2d at 742, 38 W.C.D. at 653; compare Andor v. Buhler Mfg. Co., 56 W.C.D. 1 (W.C.C.A. 1996)(an order determining a motion to dismiss on jurisdictional grounds is appealable). Such is not the case here.¹ There is nothing in the Order for Discovery that finally determines the action, and we see no reason to distinguish this case from the numerous decisions holding that interlocutory orders granting or refusing discovery are not appealable.

We make no determination on the merits of the employer and insurer's appeal. While the present appeal must be dismissed for lack of subject matter jurisdiction, the employer

¹ As noted in Duran v. Bongard's Creameries, slip op. (W.C.C.A. October 12, 1999), "[p]re-trial orders, including orders as to discovery, arguably always have the potential to affect the outcome of litigation."

and insurer may properly raise the issue on appeal from the compensation judge's decision on the merits in the underlying action. See Duran v. Bongard's Creameries, slip op. (W.C.C.A. Oct. 12, 1999).