BEVERLY OTIS, Employee, v. BELCORP, INC., and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 17, 1999

No. [REDACTED SSN]

HEADNOTES

APPEALS - INTERLOCUTORY ORDER. Appeals of two interlocutory orders, dismissing a motion to strike claim petition and denying admission of an independent medical examination report, are not appealable as they do not affect the merits of the case or do not prevent a later determination of the case on the merits.

Dismissed.

Determined by Hefte, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Paul D. Vallant

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal the compensation judge's order, dated June 24, 1998, that no evidence relating to an independent medical examination shall be received or considered in determining the issues raised in the employee's claim petition; and appeal the compensation judge's order dated June 29, 1998, denying the employer and insurer's motion to strike the employee's claim petition. We dismiss both appeals.

BACKGROUND

Beverly Otis, the employee, sustained a bilateral hand injury on December 16, 1994, which resulted in multiple finger amputations on both of her hands. When this injury occurred, the employee was working for Belcorp, Inc., the employer, who was insured by State Fund Mutual Insurance Company for workers' compensation insurance coverage. The employer and insurer admitted that both the employee's physical injury and the psychological injury from the employee's hand injury of December 16, 1994, were work-related. At the request of the employer and insurer, prior to the filing of the employee's claim petition, the employee underwent a psychiatric independent medical evaluation (IME) by Dr. Thomas Gratzer on July 23, 1997. The report of Dr. Gratzer's examination of this date was served and filed on August 21, 1997. This IME report did not address whether the employee had sustained a permanent injury for a work-related psychological condition, or whether the employee was entitled to a permanent partial disability rating.

On November 14, 1997, the employee served and filed a claim petition alleging the employer to be liable for permanent partial disability benefits to both her hands and for a psychological injury as a result of her December 16, 1994, work injury. The claim petition maintained that the employee sustained a permanent psychological disability in the nature of an injury to her central nervous system, brain dysfunction, resulting in a permanent partial disability rating of 75% pursuant to Minn. R. 5223.0360, subp. 7.D.(4). The employee attached a copy of Dr. Susan Albrecht's medical report of October 7, 1997 to support the allegations made in the employee's claim petition.

A follow-up independent psychiatric medical evaluation of the employee was done for the employer and insurer on February 23, 1998, by Dr. Glatzer; however, apparently no report of this examination was written or filed. On March 26, 1998, the employee served and filed a motion to preclude all evidence at the hearing "relating to the employer and insurer's adverse medical examination." The basis for said motion was the employer and insurer's failure to serve and file the report of this examination within 120 days of the service of the claim petition. The employer and insurer objected to said motion. On June 12, 1998, the employer and insurer moved to strike the employee's claim petition because it did not comply with the applicable rules and statutes. The employee objected to the motion.

On June 24, 1998, the compensation judge ordered that no evidence relating to the February 23, 1998, independent medical examination by Dr. Gratzer or any report generated as a result of that examination shall be received or considered in evidence by the compensation judge determining the issues raised by the employee's claim petition because no examination report was served within 120 days.[1] Subsequently, on June 29, 1998, Compensation Judge Paul D. Vallant issued his order denying the employer and insurer's motion to strike the employee's claim petition, concluding that pursuant to Minn. Stat. § 176.291, subd. 5, the employee had attached "copies of written medical reports or other information in support of the claim." The employer and insurer have appealed both of these orders which have been consolidated for consideration in this appeal.[2]

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

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[1] The order to exclude evidence did not apply to Dr. Gratzer's independent medical examination and report following his examination of the employee on July 23, 1997.

[2] With these appeals pending, a hearing date on the merits before a compensation judge has not been set in this case.

Employer and Insurer's Motion to Strike

The employer and insurer appeal the compensation judge's order denying their motion to strike or dismiss the employee's pending claim petition which seeks benefits for permanent partial disability (PPD). The motion to strike is based on the allegation that the claim petition is defective in that the attached medical report of Dr. Albrecht does not set forth any evidence that psychometric tests have been done and these tests are required to substantiate the employee's claim of a 75% PPD rating under Minn. R. 5223.0360, subp. 7.D.(4). This specific rule in the disability schedules is set forth in the claim petition by number only and the medical report does not state whether psychometric tests were done or not; or if they were done, how they support the doctor's PPD opinion and rating of 75%.

"Except for a commissioner's decision which may be heard de novo in another proceeding . . ., or a summary decision under section 176.305, any decision or determination of the commissioner affecting the right, privilege, benefit or duty which is composed or conferred under this chapter is subject to review by the Workers' Compensation Court of Appeals." Minn. Stat. § 176.442. Minn. Stat. § 176.421, subd. 1, has a similar provision, allowing a party to appeal from an order of a compensation judge at the Office of Administrative Hearings if the order "affect[s] the merits of the case." Orders which do not affect the merits of the case, or do not prevent a later determination of the case on the merits, are not appealable to this court. Mierau v. Alcon Industries, Inc., 386 N.W.2d 741, 38 W.C.D. 652 (Minn. 1986). As a general rule, interlocutory orders are not appealable. We conclude the motion to strike the claim petition in the present case is not an appealable order.

The employer and insurer claim that the order in this case is appealable and argue that should this court reverse the compensation judge's order and strike or dismiss the claim petition, it would then affect the merits of the case. We disagree. If the claim petition in the present matter were dismissed or stricken and there was no determination on the merits, the result is the same as if the claim petition had never been filed and the statute of limitations had never been tolled. See DeMars v. Robinson King Floors, Inc., 256 N.W.2d 501, 30 W.C.D. 109 (Minn. 1977); Becerra v. Pine Valley Meats, slip op. (W.C.C.A. Jan. 9, 1996). As the employer and insurer in the present case admitted liability and has also paid the employee workers' compensation benefits, the statute of limitations has already been tolled. Thus if the employee's claim petition were dismissed or stricken, the employee could again commence her case with the filing of a new claim petition which would not be subject to the statute of limitations. The employee would not be prevented from having her claims determined and the issues raised by the motion to strike are reviewable at the conclusion of the hearing on the merits.

Therefore, considering the circumstances of the case, we conclude that the order denying the employer and insurer's motion to strike is not an appealable order. The appeal of the employer and insurer is dismissed.

Order Precluding Evidence

The compensation judge granted the motion of the employee to preclude any evidence at the hearing of or relating to the employer and insurer's February 23, 1998, independent medical examination. Initially, the employer and insurer had obtained an independent psychiatric examination report of Dr. Gratzer prior to the filing of the employee's claim petition. This examination was performed on July 23, 1997, and Dr. Gratzer's report of this examination was filed on August 22, 1997. Then, after the employee's claim petition was filed on November 17, 1997, the employer and insurer arranged an additional independent medical examination by Dr. Gratzer on February 23, 1998. No report of this examination was served on the employee and filed with the commissioner within the 120 days of the service of the claim petition as required by Minn. Stat. § 176.155, subd. 1. The employer and insurer argued that no IME report was completed or filed because the employee's medical report did not reveal whether the necessary tests of the employee had been completed to substantiate her claim for permanent psychological disability. However, the compensation judge granted the employee's motion for the failure to serve and file the IME report within the time limit set forth in the statute. The order of the compensation judge here is a pre-hearing order which at this point does not prevent a later determination on the merits and which determination would be reviewable subsequent to the hearing herein.[3]

The employer and insurer claim that the 120-day limit does not apply to the examination conducted in February 1998 because it is a "follow-up" independent medical examination. We do not address this issue. We conclude that the appeal of the order to exclude evidence is not an appealable order and the appeal is dismissed.

[3] Prior to, or at the time of the motion to exclude certain evidence herein, the employer and insurer apparently made no motion to extend the time for completing the examination and filing the report. Under Minn. Stat. § 176.155, subd. 1, the compensation judge in his or her discretion may extend the 120-day period of time for completing the examination and filing the IME report on good cause shown. It is noted that the provisions of the statute do not require an application for an extension of time to serve and file the IME be made within the 120-day statutory limit. See Rowinski v. Target Stores, 52 W.C.D. (W.C.C.A. 1995), summarily aff'd, (Minn. June 14, 1995).