GREGORY G. PAYNE, Employee, v. POHLIG MFG., INC., SELF-INSURED/E.C. FACKLER, INC., Employer/Appellant, and MEDICA CHOICE/HRI and POHLIG MFG., INC., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 17, 1999

No. [REDACTED SSN]

HEADNOTES

INTERVENORS; PRACTICE & PROCEDURE - REMAND. Where the employer/intervenor sought intervention after the hearing but prior to close of the record, and the issues presented by the intervention were not fully explored or litigated, the compensation judge's awards of temporary total disability benefits to the employee and reimbursement of short term disability benefits paid by the employer/intervenor are vacated and the matter is remanded for further consideration and findings.

Vacated and remanded.

Determined by: Johnson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Joan G. Hallock

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's order that it pay temporary total disability benefits to the employee for the period of July 3 through August 25, 1997, and that the self-insured employer reimburse the employer for short-term disability benefits paid to the employee during the same period of time. We vacate both orders and remand the case to the compensation judge to make further findings consistent with this opinion.

BACKGROUND

On October 9, 1997, the employee, Gregory G. Payne, filed a claim petition seeking temporary total disability benefits as a result of an injury on May 15, 1997. In its answer, the self-insured employer denied the employee sustained a personal injury and denied liability for any benefits. By Order dated December 4, 1997, Medica Choice/HRI was allowed to intervene. The case ultimately came on for hearing before a compensation judge at the Office of Administrative Hearings on October 9, 1998. At some point during the hearing, the parties apparently became aware the employee had received short-term disability benefits. At the close of the hearing, the compensation judge stated, "The record in this matter will be held open through the close of business on November 11, 1998 for the sole purpose of allowing the potential intervenor, EBA, who apparently paid short-term disability benefits to intervene." (T. 90.)

On October 12, 1998, counsel for the self-insured employer sent an intervention notice to Tony Schneider, the controller of Pohlig Manufacturing, Inc., advising the company of its right to intervene. By letter dated October 30, 1998, Mr. Schneider wrote to the compensation judge seeking intervention. Attached to the letter was the employee's signed request for short-term disability benefits listing the reason as a herniated disc commencing on May 15, 1997. The intervention claim enclosed a schedule of the short-term disability benefits paid to the employee and asked the judge to reimburse the short-term disability benefits to Pohlig Manufacturing, Inc., should the judge find the employee's injury was work-related. Finally, Mr. Schneider asked the judge to contact him if further information was required.[1]

In a Findings and Order, filed December 21, 1998, the compensation judge found the self-insured employer had primary liability for a herniated disc occurring on May 15, 1997. (Finding 20.) The compensation judge further found the employee was off work for six weeks and received short-term disability benefits from the employer's short-term disability plan. (Finding 10.) Finally, the compensation judge found Pohlig Manufacturing, Inc. had paid short-term disability benefits for the weeks of July 7 through August 22, 1998 and found Pohlig Manufacturing, Inc. properly intervened in the case. (Finding 11.)[2] The compensation judge ordered the self-insured employer pay temporary total disability benefits to the employee for the period July 3 through August 25, 1997. The compensation judge further ordered the self-insured employer to reimburse the intervenor, Pohlig Manufacturing, Inc., for the short-term disability benefits paid to the employee from July 7 through August 22, 1997, plus interest.

By letter dated December 28, 1998, counsel for the self-insured employer requested the compensation judge amend her order to reduce the temporary total disability benefits awarded to the employee by the amount of the short-term disability benefits paid to the employee by the employer. Counsel for the employee filed a written objection to the employer's request. By letter dated December 31, 1998, Judge Hallock stated: "The intervenor failed to provide the court with a copy of the contract which would define the parameters for reimbursement, if any. Further, there was no discussion at the hearing about whether short-term disability benefits would reduce the employee's potential wage loss benefits. As there was no issue at the time of the hearing, I do not now have jurisdiction to amend the Findings and Order to deal with that issue." The self-insured employer now appeals.

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

[1] Although not marked as exhibits, these documents are contained with the trial exhibits.

[2] The compensation judge did not amend the caption of the case. We hereby amend the caption to include Pohlig Manufacturing, Inc. as an intervenor.

(W.C.C.A. 1993).

DECISION

The employee received short-term disability benefits from the employer's disability plan for the weeks of July 7 through August 22, 1998. The employee was also awarded temporary total disability benefits during the same period of time. The appellant argues the compensation judge's failure to allow the self-insured employer to offset the short-term disability benefits paid against the temporary total disability benefits awarded results in a double recovery of benefits for the employee contrary to Lemmer v. Batzli Electric Co., 267 Minn. 8, 125 N.W.2d 434, 23 W.C.D. 77 (1963). The employee agrees he received short-term disability benefits but argues the employer failed to provide the court with a copy of the disability contract as part of its intervention claim. Accordingly, the employee argues, the employer/intervenor failed to prove entitlement to an offset and the compensation judge properly denied the employer the right to offset the short-term disability benefits paid against the temporary total disability benefits awarded the employee. Given the circumstances in this case, we conclude the case should be remanded to the compensation judge for further findings.

It is well-settled that an intervenor can only intervene in a proceeding commenced by the employee. Tatro v. Hertmann's Store, 295 Minn. 282, 204 N.W.2d 125, 26 W.C.D. 576 (1973). Once the proceedings have been commenced, however, they must be conducted in a manner so as to protect a health carrier's right of reimbursement. Johnson v. Blue Cross and Blue Shield of Minn., 329 N.W.2d 49 (Minn. 1983). We believe that principal is equally applicable to an intervenor that has paid short-term disability benefits. In the Lemmer case, the court permitted a disability insurer to intervene after an award of benefits had been made based upon general principals of practical administration of justice and elimination of a double recovery by the employee. The court stated, "Clearly, any reasonable interpretation of the pertinent sections of the Workmen's Compensation Act, considered as supplementary to each other, requires the conclusion that the legislature empowered the commission to permit intervention by an insurer under § 176.361 to obtain reimbursement of payments to which an employee was not entitled in which he used in lieu of compensation." Lemmer at 442, 26 W.C.D. at 94; see also Braun v. PPG Indus., 48 W.C.D. 502 (W.C.C.A. 1993).

Minn. R. 1415.1100, subp. 1, requires all attorneys to ask their clients whether any third party has paid monetary benefits to the employee. We see no evidence that either attorney did so here. Minn. Stat. § 176.361, subd. 2(b)(5), requires the "intervenor to include in the intervention application a copy of the relevant policy or contract provisions upon which the claim for reimbursement is based." The employer apparently failed to do so in this case. However, there is no evidence the employee objected at the hearing to the intervention claim of the employer. Nor did the employee file a written objection to the employer's intervention claim. See Minn. Stat. § 176.361, subd. 3.[3] Minn. Stat. § 176.361, subd. 7, provides that the failure to comply with

[3] Minn. Stat. § 176.361, subd. 3, provides in part, "If a party has not returned the signed stipulation or filed objections within 30 days of service of the application, the intervenor's right to

the intervention statute is not grounds for denial of the reimbursement claim unless the compensation judge finds "the noncompliance has materially prejudiced the interests of the other parties."

The reimbursement claim of the employer was not raised until after the hearing. As a result, the matter was never fully explored or litigated. The provisions and safeguards of Minn. Stat. § 176.361 were not fully complied with. Given all of the circumstances in this case, we conclude the interests of all parties and the interests of justice are best served by remanding the case to the compensation judge for further consideration and findings. We, accordingly, vacate orders 3 and 5. On remand, the compensation judge should reopen the record and allow the employer/intervenor to present further evidence regarding its claim for reimbursement and allow the employee to file objections, if any. The compensation judge should make further findings and order regarding the self-insured employer's entitlement, if any, to reduce the temporary total disability benefits due the employee by the amount of the short-term disability benefits paid to the employee.

In his responsive brief, the employee seeks payment of Edquist fees,[4] Roraff fees under Minn. Stat. § 176.081, subd. 1(a)(1) (1995), and reimbursement of costs and disbursements. None of these matters were at issue at the hearing and were not resolved by the December 21, 1998 findings and order. Such issues are not, therefore, presently before the court. Minn. Stat. § 176.421. We note the employee filed a petition for fees and disbursements on January 15, 1999. On remand, the compensation judge may wish to consolidate these matters.

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reimbursement for the amount sought is deemed established provided that the petitioner's claim is determined to be compensable."

[4] Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D 411 (Minn. 1986).