

ROBERT SEPPO, Employee, v. KOLAR BUICK, INC., Employer, and W. NAT'L INS. GRP., Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 7, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - CONTINUANCE. Where the employee's testimony at the hearing was inconsistent with earlier representations regarding the work the employee was engaged in at the time of injury raising questions with respect to primary liability for previously admitted injuries, the scope of employment with the employer, and insurance coverage issues, the compensation judge erred in denying a continuance, and the matter is vacated and remanded for redetermination.

Vacated and remanded.

Determined by Pederson, J., Wilson, J. and Wheeler, C.J.
Compensation Judge: Gregory A. Bonovetz

OPINION

WILLIAM R. PEDERSON, Judge

The insurer, Western National Insurance Group, appeals from the compensation judge's denial of a continuance for the purpose of permitting the employer and the insurer to each obtain separate counsel and to litigate the issues of scope of employment and insurance coverage for three of the employee's four alleged work injuries.¹ We vacate the compensation judge's findings and order and remand the matter for redetermination in accordance with this decision.

BACKGROUND

The employee, Robert Seppo, began working for the employer, Kolar Buick, Inc., in 1969. On September 5, 1990, the employee sustained an injury to his low back. Accepting liability for the injury, the employer and insurer paid 4.8 weeks of temporary total disability benefits as well as medical and chiropractic expenses. The employee returned to work with the employer in October 1990.

The employee testified that sometime in 1991, he suffered an injury to his mid-

¹ The employer, Kolar Buick, Inc., did not submit a brief on appeal or appear at oral argument before this court.

back.² He lost no time from work following this incident, and continued to work for the employer. On May 19, 1993, the employee sustained a second injury to his mid-back. Accepting liability for this injury, the employer and insurer paid temporary total disability benefits from May 19 through June 7, 1993, along with medical expenses. The employer and insurer subsequently paid a 2.5% permanent partial disability for the thoracic spine pursuant to Minn. R. 5223.0380, subp. 3.B.(1993).

On March 8, 1994, the employee injured his left shoulder while removing a wheel from a four-wheel drive vehicle. The employer and insurer admitted liability for the left shoulder injury and paid temporary total disability benefits from March 8, 1994 through November 10, 1996, along with medical expenses. The employee was treated concurrently for both right and left shoulder problems, eventually undergoing surgery for the right shoulder in July 1995 and the left shoulder in January 1996.

The employee was released to return to work in the summer of 1996 with restrictions. He was unable to return to work with the employer, and began a job search with the assistance of a series of qualified rehabilitation consultants (QRCs). The employee obtained employment as a clerk at Ace Hardware, beginning November 11, 1996. He initially worked full time, eight hours a day, but after three to four weeks on the job, reduced his hours of work to four hours a day, gradually increasing to six hours per day. The employer and insurer paid temporary partial disability benefits following the employee's return to work.

On February 14, 1997, the employee filed a claim petition, alleging an injury to the lumbar spine on September 5, 1990 and an injury to the shoulders on March 8, 1994. The employee sought permanent partial disability of 10.5% for the lumbar spine and 6% for each shoulder. The employer and insurer admitted the alleged shoulder injuries, admitted a temporary low back injury on September 5, 1990, and admitted a back injury on May 19, 1993 for which a 2.5% permanency was paid. In May 1997, the employer and insurer paid permanency of 11.64%, as impairment compensation (IC), for the right and left shoulders. On July 22, 1997, the employee filed an amended claim petition seeking additional permanency for the shoulders payable as economic recovery compensation (ERC) rather than IC.

Following an October 1, 1997 independent medical report by Dr. Richard Galbraith, the employer and insurer denied primary liability for a right shoulder injury, and claimed permanency had been mistakenly paid for the right shoulder and the thoracic spine. On February 9, 1998, the employer and insurer served a notice of intent to discontinue benefits (NOID) seeking to discontinue temporary partial disability benefits after January 17, 1998, asserting the employee had reduced his hours of work for non-work-related reasons. The employee objected, and an administrative conference was held before Settlement Judge James Cannon on March 16,

² The employee did not plead a 1991 injury. However, at the beginning of the hearing on July 28, 1998, counsel for the employee claimed work-related injuries on September 5, 1990, July 22, 1991, May 19, 1993 and March 8, 1994.

1998. In an Order on Discontinuance, served and filed March 20, 1998, the judge allowed the employer and insurer to reduce the employee's temporary partial disability benefits based on an imputed forty-hour a week wage. On April 9, 1998, the employee filed an Objection to Discontinuance, seeking *de novo* review of Judge Cannon's order.

The matters were consolidated and came on for hearing before a compensation judge at the Office of Administrative Hearings on July 28, 1998. Near the end of the hearing, James Wade, counsel for the employer and insurer, advised the court that he believed there was a conflict of interest between the employer and the insurer regarding the scope of employment and a dispute regarding insurance coverage for the three back injuries, and requested a continuance to allow the employer and the insurer to each obtain separate counsel before proceeding further. The compensation judge denied the request, concluding the insurer had ample time to investigate, the dispute was between the employer and insurer and did not affect the employee, and that a delay would cause undue hardship for the employee. In his findings and order, the compensation judge found the employee had sustained a compensable low back injury on September 5, 1990 and compensable thoracic injuries on July 22, 1991 and May 19, 1993 "arising out of and in the course and scope of his employment with the employer herein." (See findings 10, 26.) The judge also found a work-related left shoulder injury on March 8, 1994, but concluded the employee had failed to prove a work-related right shoulder injury. The compensation judge further concluded the employee's work for the employer, Kolar Buick, Inc., included both work as an auto and truck mechanic and construction work, and that the employee's injuries occurred while the employee was performing duties assigned to him by the employer and at the direction of the employer. The insurer, through separate counsel, appeals from the denial of a continuance, and from the compensation judge's findings regarding the scope of employment and the compensability of the three back injuries.

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

The employer in this matter, Kolar Buick, Inc., is a new and used automobile dealership. (T. 37.) According to the employee, the dealership was owned by Joe and Bernie Kolar. (T.70) The employee was hired in 1969 as a mechanic in the employer's service and

parts department, and continued to work as a mechanic for the employer through March 8, 1994. The employee was also, apparently, a skilled carpenter and construction worker. Following a fire at the dealership in 1984, the employee did increasing amounts of construction work for the Kolars. (T. 69-70, 74-77.)

A First Report of Injury was completed following the September 5, 1990 injury and the May 19, 1993 injury.³ (Judgment Roll; Aff. of Larry J. Peterson, Exh. A.) These reports identify the employer as Kolar Buick and list the employee's job title as mechanic and service department technician, respectively. The 1990 report indicates that the injury occurred while pulling a "car pusher." The 1993 report states the injury occurred in the import shop. The records of Dr. Fisher, the employee's chiropractor, similarly record treatment for low back problems on September 6, 1990 after the employee "[p]ush[ed] a car up a grade and slipped." The chart note for May 19, 1993 relates sudden, severe mid-back pain that morning at work while bending over working on an engine. Dr. Fisher also recorded an incident on July 22, 1991, in which the employee experienced severe, burning mid-back pain at Woodruff Lumber while loading 1 x 6 x 12s into a van.

At the hearing, however, the employee testified that on September 5, 1990, he was building a house for Peter Kolar at Park Point and injured his low back while pushing a wheelbarrow full of top soil up some planks. The planks separated, the tire went down between, and he wrenched his back. (T. 78, 138.) He further testified that his first mid-back injury occurred in 1991 while loading materials into a construction truck at Woodruff Lumber. He stated he injured his mid-back again in 1993 while remodeling Mary Kolar's kitchen.⁴ (T. 84-85, 143-144.) On cross-examination, the employee agreed the September 5, 1990 injury did not occur in the shop. (T. 107-114.) Mr. Wade did not pursue this line of questioning further, and continued with examination on other points.

After the employee had completed his testimony, Mr. Wade advised the judge that a question of coverage had arisen between the employer and the insurer, Western National Insurance Group, based on the employee's hearing testimony regarding the circumstances in which

³ The First Report of Injury for the September 5, 1990 injury is contained in the Judgment Roll. The First Report of Injury for the May 19, 1993 injury is not included, and was not submitted at the hearing. Nor is there any First Report for a July 22, 1991 injury in the record.

⁴ The employee had been deposed on July 31, 1997 by Mr. Wade. It does not appear that a separate representative from the insurer was present. During the deposition, the employee testified that he also did construction for Kolar Buick and was actually pushing a wheelbarrow at the time of the September 5, 1990 injury. The employee also described an injury to his mid-back while loading framing lumber into a company truck. He was not sure when the incident occurred and guessed it might have been in 1993. The employee recalled another mid-back injury in mid-summer 1993 while installing kitchen cabinets in Mary Kolar's house. This line of questioning was not pursued further. (Court Exh. 1 at 29-30, 37-38, 40-41, 44, 46-47, 73-74, 76-77.)

the back injuries had occurred. He, accordingly, requested a continuance to allow the employer and the insurer to retain separate counsel before proceeding further. David Clark, a representative of the insurer present at the hearing, represented that the employer, Kolar Buick, Inc., was insured for automotive sales and service, and he did not believe the policy covered construction work performed at the owners' private residences. Although recognizing that the situation was "unique," (T. 151, 157) the compensation judge, apparently accepting the premise that the employee performed construction work as part of his work for Kolar Buick, concluded the dispute was solely between the employer and Western National and denied a continuance. (T. 167; see 146-67.) In his findings and order, the compensation judge additionally determined that the employer had ample time to investigate the claim, and a continuance would impose undue hardship on the employee. (Finding 56.)

A continuance may be granted upon a showing of good cause. Good cause is established "when the underlying eventuality is unforeseen, is not due to lack of preparation, is relevant, is brought to the . . . [compensation] judge's attention in a timely manner and does not prejudice the adversary." Minn. Stat. § 176.341, subd. 4. "If it appears in the interests of justice that further testimony should be received, the compensation judge may continue the hearing to a future date." Minn. R. 1415.2900, subp. 8.

Here, the 1990 and 1993 injuries were admitted. The employer and insurer accepted primary liability for the back injuries based upon the First Reports of Injury for the incidents. The contemporaneous medical histories are not inconsistent with these reports. Although the employer denied liability for permanent partial disability and temporary partial disability for the lumbar and thoracic spine injuries, its denial was based on Dr. Galbraith's opinion that the injuries had resolved and had not resulted in any permanent disability. It was not until the hearing that the employee testified the September 5, 1990 injury had occurred while building a house for Peter Kolar, and appeared to claim the 1993 injury occurred while remodeling Mary Kolar's's kitchen. At the close of the employee's testimony, the insurer advised the employer that, given the employee's testimony, they did not believe the back injuries were covered, and asked Mr. Wade to request a continuance. Although the July 1997 deposition "provided a hint," it was not, as Mr. Wade observed, in his client's interest to vigorously pursue the issue.⁵ It appears that the employee's hearing testimony was a surprise to the insurer, at least, and the conflict was promptly called to the judge's attention.

The underlying issue of primary liability is unquestionably relevant. None of the parties anticipated litigating primary liability for the back injuries, the scope of employment or coverage issues at the start of the hearing. Nevertheless, the employee's testimony raises questions about whether any of the injuries are work-related. None of the particulars surrounding

⁵ An attorney hired by an worker's compensation carrier to represent the insured, owes his or her allegiance to the employer/insured to best represent the employer's interests. See Miller v. Shugart, 316 N.W.2d 729, 733 (Minn. 1982); Woulfe v. Lakeside Medical Ctr., Inc., 53 W.C.D. 274, 281 (W.C.C.A. 1995)

the employee's various injuries were seriously investigated or developed because the injuries were admitted. The dispute raises questions about the identity of the "employer" and the scope of the employee's employment with Kolar Buick. These questions create a conflict of interest between the employer and the insurer. If the employee's activities were within the scope of his employment with Kolar Buick, but not covered, or if the employee was working for the Kolars individually, the Kolars may be uninsured for the back injuries.

Finally, while we are sympathetic to the employee, we do not believe that the employee will be unduly prejudiced by a continuance on the facts in this case. The employer and insurer have continued to pay temporary partial disability benefits, albeit at a somewhat reduced rate. The employee has been paid some permanent partial disability benefits, and the issues underlying the request for a continuance calls the liability of the employer and insurer for additional permanency benefits into question. While it seems unfair to require the employee to retry the case, it is equally unfair to impose liability on the employer or the insurer without full development of the facts giving rise to primary liability for the back injuries.

"Not every coverage question is the same, and the procedures to use in resolving the question may vary. [However,] it is of first importance to proceed in a manner to avoid conflicts of interest and prejudice to the parties. It is also important to consider judicial economy, the need to save court time and litigation expense." Miller, 316 N.W.2d at 733 n.3. Here, on balance, we believe the compensation judge erred in denying a continuance, and believe the interests of justice require that further testimony be received and the facts fully developed on the scope of employment question. We, therefore, vacate the compensation judge's September 22, 1998 findings and order, and remand for further development of the record and redetermination of the issues presented.