BASHIR WAGED, Employee, v. BUDGET RENTAL GRP. and RSKCO/CNA INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 30, 1999

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - CONSULTATION; PRACTICE & PROCEDURE - DISMISSAL; RULES CONSTRUED - MINN. R. 5220.0110, SUBP. 8; STATUTES CONSTRUED - MINN. STAT. § 176.102, SUBD. 4. Where the commissioner's Order for Rehabilitation Consultation, pursuant to Minn. Stat. § 176.102, subd. 4, and Minn. R. 5220.0110, subp. 8, had clearly provided that any party aggrieved by the decision could request a formal hearing on the matter by filing a request for one within thirty days, and where the employer and insurer had filed a Rehabilitation Request within fifteen days, requesting a contrary order and explaining their "position" regarding the employee's entitlement to a consultation but not actually requesting a formal hearing on the matter, the compensation judge properly dismissed the employer and insurer's Rehabilitation Request and a Request for a Formal Hearing filed after expiration of the thirty-day time limit, primarily for reasons of notice.

Affirmed.

Determined by Pederson, J., Wilson, J., and Johnson, J.
Compensation Judge: Cheryl LeClair-Sommer

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's Order dismissing their Request for Formal Hearing and their Rehabilitation Request. We affirm.

BACKGROUND

On November 19, 1998, Bashir Waged sustained apparent injuries to his neck, left shoulder, upper back, and low back, when he was involved in a motor vehicle accident in the course of his employment as a service agent with Budget Rental Group, at a weekly wage of $310.00. Following the incident, Mr. Waged [the employee] went off work, and Budget Rental Group [the employer] and its workers' compensation insurer accepted liability and commenced payment of benefits.

On February 23, 1999, the Rehabilitation and Medical Affairs Unit at the Department of Labor and Industry [DOLI] wrote to the employer's insurer, requesting that the insurer file either a Notice of Intention to Discontinue Benefits [NOID], indicating that the employee had returned to work, or a Disability Status Report, indicating either that the employee had had or was scheduled for a rehabilitation consultation or that the insurer was requesting a waiver of a rehabilitation consultation. The request indicated that, unless the requested documentation was filed within fifteen days, the commissioner was authorized under Minn. R. 5220.0110, subp. 8, to order a rehabilitation consultation for the employee. On April 7, 1999, an agent for the commissioner at DOLI filed an Order for Rehabilitation Consultation on grounds that "at least 90 days have passed since the date of injury, the employee has not returned to work, [and] there is no evidence that a rehabilitation consultation has taken place or that a waiver or renewal of waiver of rehabilitation services has been granted." "Under these circumstances," it concluded, "a rehabilitation consultation may be ordered under M. S. § 176.102, subd. 4 and Minn. Rule, part 5220.0110, subp. 8." The Order expressly provided that "[a]ny party aggrieved by this decision may request a formal hearing by filing a Request with the Commissioner no later than 30 day after the date of the decision."

On April 12, 1999, the employer and insurer filed an NOID, asserting that the employee had returned to work December 28, 1998. In their NOID, the employer and insurer indicated that they had paid $1,033.40 in temporary total disability benefits for the period November 23, 1998, through December 27, 1998, together with $1,441.25 in medical expenses. Three days later, on April 15, 1999, a compliance specialist at the Workers' Compensation Division at DOLI issued a Notice of Penalty Assessment, indicating that the insurer was being assessed a penalty of $125.00 for failure to file a Disability Status Report or an NOID within twenty-one days of a commissioner's request, pursuant to authority under Minn. Stat. § 176.231, subds. 4 and 10, and Minn. R. 5220.2830, subp. 1.B.

On April 26, 1999, Budget Rental Group [the employer] and its workers' compensation insurer filed a Rehabilitation Request, requesting "[t]hat it be ordered that no Rehabilitation Consultation need be provided to the employee." In an attached Addendum to Rehabilitation Request, the employer and insurer cited Judnick v. Solom Home, slip op. (W.C.C.A. Aug. 4, 1995), as authority for asserting "threshold liability issues, such as refusal of suitable employment, in response to a request for a rehabilitation consultation." They argued that "subsequent to the employee's injury, he made absolutely no contact with either the employer or [the] insurer," although "[the employer] was willing to make other, light-duty work available" and had "attempted to make contact with the employee to discuss his possible return to work." The employer and insurer emphasized that "the employee himself has not requested either a rehabilitation consultation or rehabilitation services" and that "[t]his Order for rehabilitation consultation was ordered *sua sponte* by [DOLI]." They suggested that "[u]pon information and belief, the employee is not interested in undergoing any rehabilitation services," that "[i]t could very well be that the employee has returned to work at some different employer," and that "[m]edical records indicate that the employee discontinued treatment with all treating providers no later than December 7, 1998." "Moreover," they argued, "the employee is not a 'qualified employee' for purposes of rehabilitation assistance" under Minn. R. 5220.0100, subp. 22.

On May 21, 1999, four days after filing an Objection to Penalty Assessment,[1] the employer and insurer filed a Request for Formal Hearing on the commissioner's April 7, 1999, Order for Rehabilitation Consultation. In that Request, they reasserted by attachment the arguments made in their April 26, 1999, Rehabilitation Request. They contended there also that, by filing that Rehabilitation Request some fifteen days before any appeal from that Order for Consultation was due, "the employer and insurer in good faith substantially complied with the requirement that a "Request for Formal Hearing" be filed within thirty days following issuance of the Order." Arguing that "[a] Request for Formal Hearing requires no additional information than was provided in the Rehabilitation Request," they contended that their Rehabilitation Request had "provided all parties with an ample basis to evaluate the position of the employer and insurer." Moreover, they emphasized, although that Rehabilitation Request had been filed two weeks before the deadline for objecting to the Order at issue, they were not informed of any deficiency in their filing until May 17, 1999, ten days after expiration of the appeal deadline. For these reasons, they argued, they "should not be penalized [with denial of a formal hearing] for filing what is, in essence, a mislabeled pleading."

The employer and insurer's April 26, 1999, Rehabilitation Request and their May 21, 1999, Request for Formal Hearing were apparently consolidated for hearing at the Office of Administrative Hearings. On June 18, 1999, Compensation Judge Cheryl LeClair-Sommer issued an Order Dismissing Request for Formal Hearing and Rehabilitation Request. In her order, the judge indicated that her decision was based on the following conclusions: (1) "the Request for Formal Hearing was filed greater than 30 days subsequent to the service and filing of the Order for Rehabilitation Consultation, and is untimely"; (2) "the Rehabilitation Request received April 26, 1999 is the incorrect pleading and did not provide sufficient notice to the opposing party that the employer and insurer intended to appeal the Order for Rehabilitation Consultation"; and (3) "the Order for Rehabilitation Consultation is res judicata on the issues presented by the Rehabilitation Request received on April 26, 1999." The employer and insurer appeal.

STANDARD OF REVIEW

[1] The penalty is not at issue before us in this appeal. In their May 17, 1999, Objection to the assessment, the employer and insurer argued that they had been "unable to advise the commissioner as to the status of the employee's claims within the 21-day period mandated by the February 23, 1999, correspondence" because of the employee's lack of cooperation or even contact with the employer and insurer following his injury. According to their brief here on appeal, the employer and insurer were eventually informed by the employee's attorney of record, on June 14, 1999, that that attorney no longer represented the employee and had no information regarding the employee's future plans. By a subsequent letter to this court dated August 31, 1999, the employer and insurer have indicated that they were contacted by the employee himself by telephone on August 26, 1999, and informed by the employee that his lawyer had died in an automobile accident and that he was currently in the process of obtaining a different attorney to assist him in this matter.

"[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 Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

The employer and insurer do not contest the conclusion that their May 21, 1999, Request for Formal Hearing was not filed within the required thirty days subsequent to service and filing of the April 7, 1999, Order for Rehabilitation Consultation. They argue, however, that their April 26, 1999, Rehabilitation Request was filed within thirty days after that order, that that request demonstrated a good faith effort to comply with ambiguous rules regarding appeal from such orders, that it did provide sufficient notice to the employee of the employer and insurer's intention to appeal from the order, and that the judge erred in concluding that the April 7, 1999, Order for Rehabilitation Consultation was res judicata on the issues presented in the April 26, 1999, Rehabilitation Request. We are not persuaded.

The commissioner's agent indicated at Item 2 of her April 7, 1999, Order for Rehabilitation Consultation that her order was issued pursuant to authority granted her in Minn. Stat. § 176.102, subd. 4, and Minn. R. 5220.0110, subp. 8. Minnesota Rule 5220.0110, subp. 8, provides that, "[i]f a disability status report is not filed according to this part, the commissioner may order a rehabilitation consultation by a qualified rehabilitation consultant at the insurer's expense, according to Minnesota Statutes, section 176.102, subdivision 4, paragraphs (b) and (f)." Minnesota Stat. § 176.102, subd. 4(a), provides in part that "[a] rehabilitation consultation must be provided by the employer to an injured employee upon request of the employee, the employer, or the commissioner." That same statute at subdivision 4(b) provides as follows:

> In order to assist the commissioner in determining whether or not to request [a] rehabilitation consultation for an injured employee, an employer shall notify the commissioner whenever the employee's temporary total disability will likely exceed 13 weeks. The notification must be made within 90 days from the date of the injury or when the likelihood of at least a 13-week disability can be determined, whichever is earlier, and must include a current physician's report.

Subdivision 4(f) of that statute provides as follows:

> If the employer does not provide rehabilitation consultation requested under paragraph (a), the commissioner or compensation judge shall notify the employer that if the employer fails to provide a qualified rehabilitation consultant within 15 days . . . , the commissioner or compensation judge shall appoint a qualified rehabilitation consultant to provide the consultation at the expense

of the employer unless the commissioner or compensation judge determines the consultation is not required.

The employer and insurer assert initially that none of the provisions cited by the commissioner's agent in her order sets forth a procedure to be used if any party disagrees with an order issued by DOLI. "As such," they contend, "the exact procedure for appealing an Order of the Department of Labor and Industry under these circumstances is not absolutely clear." However, although the cited rule and statute may not outline such a procedure, the commissioner's order itself does make "absolutely clear" on its face, at Item 4, that "[a]ny party aggrieved by this decision may request a formal hearing by filing a Request with the Commissioner no later than 30 days after the date of the decision." We see little ambiguity in the order's instruction that any objection to the order should be registered as a timely request for a "formal hearing" on the matter, not merely for a different order based on an attached addendum.

Perhaps more material than the title of the pleading submitted is the action that it gave notice of. In her Order Dismissing Request for Formal Hearing and Rehabilitation Request, the compensation judge found that the employer and insurer's April 26, 1999, Rehabilitation Request "did not provide sufficient notice to the opposing party that the employer and insurer intended to appeal the Order for Rehabilitation Consultation." The employer and insurer suggest repeatedly that their Rehabilitation Request gave timely notice of their "intent to appeal" simply by virtue of the fact that it "clearly explained the employer and insurer's position with regard to the provision of a Rehabilitation Consultation" (emphasis added). They argue that "[a] Request for Formal Hearing requires absolutely no additional information than was provided in the Rehabilitation Request." That Rehabilitation Request, however, appears in effect to have been more a request for reconsideration than a notice of "intent to appeal." As such, it did not, as a Request for Formal Hearing would have done, put the employee on notice that an actual full and in-person evidentiary hearing was in the offing. The compensation judge's conclusion that the April 26, 1999, Rehabilitation Request did not provide the employee with sufficient notice of the employer and insurer's intent to formally appeal was neither unreasonable nor improper.

In her Order Dismissing Request for Formal Hearing and Rehabilitation Request, the compensation judge also indicated that "the Order for Rehabilitation Consultation is res judicata on the issues presented by the Rehabilitation Request received on April 26, 1999." Citing case law, the employer and insurer argue finally that "the doctrine of res judicata does not bar litigation of issues not specifically litigated previously." They contend that "the issue of the employee's entitlement to a rehabilitation consultation has not been previously litigated," noting that "[t]he employee himself has never requested a rehabilitation consultation." They contend that "the employer and insurer have been afforded absolutely no opportunity to litigate the issue of whether the employee is entitled to a rehabilitation consultation." We acknowledge that there was no direct adversarial proceeding on the issue of the employee's entitlement to a rehabilitation consultation. However, that issue appears to us to have been nevertheless conclusively determined under the statute.

Initially, we would note that Minnesota Stat. § 176.102, subd. 4(a), clearly provides

in part that "[a] rehabilitation consultation must be provided by the employer to an injured employee upon request of the employee, the employer, or the commissioner" (emphasis added). The fact that the employee himself did not apparently request the consultation is not dispositive; it is sufficient that the commissioner requested it. Subdivision 4(b) of that same section requires an employer to notify the commissioner whenever an employee's temporary total disability is likely to exceed thirteen weeks, "[i]n order to assist the commissioner in determining whether or not to request [a] rehabilitation consultation" (emphasis added). Neither that nor any other subdivision of the statute, however, places any prerequisites on a commissioner's request or order of a rehabilitation consultation for an injured worker. The commissioner's order in this case properly and clearly provided that any party aggrieved by the order could request a formal hearing on the issue within thirty days. The employer and insurer did submit a written argument explaining their "position" on the matter addressed in the order, but neither party actually requested a hearing on the matter within the time period specified on the order. Thus, although perhaps not litigated in the sense proposed by the employer and insurer, the issue was nevertheless conclusively determined under the statute.

The employer and insurer have asserted that these are circumstances where "no prejudice accrues to any party" and where "there has been good faith, substantial compliance with the filing requirements." In such circumstances, they argue, "a party should not be penalized for what is, in essence, a mislabeled pleading."[2] Even were it not legally required, however, we cannot construe a rehabilitation consultation in this case as a "penalty" against the employer and insurer. If, as the employer and insurer have contended ever since their April Rehabilitation Request, the employee is not after all a "qualified employee" for rehabilitation assistance, certainly the ordered rehabilitation consultation will be a more efficient and less costly means of demonstrating that fact than a formal hearing on the matter would be. If, on the other hand, the employee is after all determined to be a "qualified employee" for rehabilitation purposes as a result of a rehabilitation consultation, clearly he would be prejudiced by any further delay in execution of the commissioner's order contrary to what appear to be statutory requirements. The compensation judge's Order Dismissing Request for Formal Hearing and Rehabilitation Request is affirmed.

[2] In support of this assertion, the employer and insurer cite Aune v. Conagra, Inc., slip op. (W.C.C.A. Oct. 25, 1996). That case is clearly distinguishable, however. In Aune, this court reversed a compensation judge's conclusion that an NOID was defective for not having attached an MMI report pursuant to statute. The court's holding was based on the fact that the NOID at issue had clearly referenced a proper MMI report that had been previously been served on the employee and his attorney and had been submitted into evidence in a previous proceeding.