

RENEE A. BARLAU, Employee/Appellant, v. PRUDENTIAL INS. CO. and TRAVELERS INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 14, 2000

No. [REDACTED SSN]

HEADNOTES

DISCONTINUANCE - NOTICE OF INTENT TO DISCONTINUE; PRACTICE & PROCEDURE - SERVICE. Substantial evidence supports the compensation judge's determination that the employee was not prejudiced by the employer and insurer's failure to personally serve a copy of the NOID on the employee, instead properly serving the NOID on the employee's attorney, and five days later sending the employee's attorney a copy of the NOID for the employee with a note indicating the employee's copy had been returned by the postal service. Although service of the NOID was statutorily deficient, it provided sufficient notice to the employee and her attorney to protect any right she had to continuing wage loss benefits.

Affirmed.

Determined by: Johnson, J., Pederson, J., and Rykken, J.
Compensation Judge: Bradley J. Behr

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's denial of her claim for temporary total disability benefits from February 5 through November 3, 1999. We affirm.

BACKGROUND

Renee A. Barlau, the employee, sustained a personal injury to her neck, shoulders, arms, hands and wrists on July 1, 1991, while working for Prudential Insurance Company, the employer. In a prior hearing, the employer and its insurer, Travelers Insurance Company, were found liable for the employee's personal injuries and benefits were awarded.¹

The employee was examined by Dr. Christopher Tountas on October 22, 1998, at the request of the employer and insurer. Dr. Tountas prepared a written medical report concluding the employee had reached maximum medical improvement (MMI) by October 22, 1998. (Resp. Ex. 1.) Dr. Tountas' report was properly served on the employee and her attorney and filed with the Department of Labor and Industry on November 3, 1998.

¹ See Findings and Order of Judge David S. Barnett, filed March 30, 1998, affirmed by this court by decision filed December 11, 1998.

On November 6, 1998, the insurer served and filed a notice of intention to discontinue benefits (NOID), asserting the employee had reached MMI on October 22, 1998, and any entitlement to temporary total disability benefits would end 90 days thereafter. The NOID was served upon the employee's attorney, Duane E. Arndt, by United States mail. The employee's copy was mailed to an out-dated address and was returned to the insurer as undeliverable. The NOID was not served upon the employee by mail at her home address.

On November 11, 1998, Mr. John Robb, an adjustor with Travelers Insurance Company, mailed to Mr. Arndt a copy of the NOID. In a memorandum addressed to "Duane," Mr. Robb stated: "Attached is your client's copy of the 'provisional' NOID which was returned by the postal service. Mac." Mr. Robb's memo, together with the NOID, was date stamped received by Arndt & Benton on November 12, 1998. (Pet. Ex. D.)

The employee's attorney filed an objection to discontinuance on February 5, 1999. The objection was treated as a claim petition because it was filed more than 60 days after the filing of the NOID. The case was heard by Compensation Judge Bradley Behr on November 3, 1999. In a Findings and Order filed December 30, 1999, the compensation judge found the employee reached maximum medical improvement by November 3, 1998, and found the employee's entitlement to temporary total disability benefits expired 90 days thereafter on February 4, 1999. (Finding 5.) This finding was not appealed. The compensation judge further found that although the employee was not personally served with a copy of the NOID, the employee was not prejudiced by the lack of service. The judge found that service on the employee's attorney, although statutorily deficient, "provided sufficient notice to allow the employee and her attorney to take the necessary steps to protect her claim to ongoing wage loss benefits." (Finding 4.) The compensation judge granted the requested discontinuance of temporary total disability benefits effective February 4, 1999, and denied the employee's claim for benefits from February 5, 1999 to the date of the hearing. The employee appeals.

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). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. 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

Minn. Stat. § 176.238, subd. 1, provides, in relevant part:

. . . once the employer has commenced payment of benefits, the employer may not discontinue payment of compensation until it provides the employee with notice in writing of intention to do so. . . . The notice to the employee and the copy to the division shall state the date of intended discontinuance and set forth a statement of facts clearly indicating the reason for action. Copies of whatever medical reports or other written reports in the employer's possession which are relied on for the discontinuance shall be attached to the notice.

Minn. R. 5220.2630, subp. 4.A., provides that to discontinue wage loss benefits, the employer and insurer "must serve upon the employee and file with the division a notice of intention to discontinue benefits. . . ." Subpart 4.C. states:

The liability of the insurer to make compensation payments continues at least until the notice of intention to discontinue benefits is received by the division and served on the employee and the employee's attorney, except that benefits may be discontinued on the date the employee returned to work and temporary partial benefits may be discontinued as of the date the employee ceased employment.

There is no dispute the employee was never personally served with a copy of the NOID as required by Minn. R. 5220.2630. Accordingly, the employee contends the NOID was fatally defective and the compensation judge erroneously allowed the employer and insurer to discontinue temporary total disability benefits. We disagree.

Minn. Stat. §§ 176.238 establishes the procedure for discontinuing wage loss benefits. The statute requires the employee be provided notice, in writing, of the proposed discontinuance. The statute sets forth the information and documentation which must be incorporated in the notice. Minn. Stats. §§ 176.238, subd. 3, and 176.239, subd. 2, give the employee the right to request an administrative conference to protect the employee's right to continuing benefits. If the employee fails to request an administrative conference, the employer may discontinue wage loss benefits.² Obviously, an employee cannot request a conference until

² Minn. Stat. § 176.238, subd. 2 states:

If the reason for the discontinuance is for other than that the employee has returned to work, the liability of the employer to make payment of compensation continues until the copy of the notice and reports have been filed with the division. When the division has received a copy of the notice of discontinuance, the statement of facts

the employee has been provided notice of the proposed discontinuance. Adequate notice to the employee is, therefore, essential to the entire statutory discontinuance scheme. We do not agree, however, that adequate notice to the employee always mandates service of the NOID on the employee. Minn. Stat. § 176.238, subd. 1, requires only that the employer “provides the employee with notice in writing” of the proposed discontinuance. The statute does not require the employer serve the NOID on the employee.³ What constitutes provision of adequate notice of a proposed discontinuance is generally a question of fact.

In Woelfel v. Plastics, Inc., 371 N.W.2d 215, 38 W.C.D. 43 (Minn. 1985), the employer provided the employee with a notice of intention to discontinue benefits. The NOID, however, failed to include all the documents relied upon by the employer for the discontinuance as required by the statute.⁴ On appeal, the employee asserted the improper NOID entitled the employee, as a matter of law, to receive ongoing wage loss benefits. In rejecting this argument, the supreme court noted that the policy underlying the statute does not impose indeterminate liability on an employer and insurer who file a statutorily deficient notice. The court stated:

[W]e cannot ascribe to the legislature an intent to require an employer who has attempted to comply with Minn. Stat. § 176.241 to remain under a continuing liability to pay compensation to an employee who is found to be no longer disabled or to be no longer disabled because of his work injury. 371 N.W.2d at 218, 38 W.C.D. at 46.

In Mellema v. Tool Prod., 49 W.C.D. 487 (W.C.C.A. 1993), the insurer’s claim supervisor wrote a letter to the employee and the employee’s attorney stating the employee’s temporary partial benefits were stopped because the employee was not working. The employee contended the insurer’s failure to provide a NOID to the employee and file it with the division as required by Minn. Stat. § 176.238 legally obligated the insurer to continue paying benefits until a NOID was provided and filed. This court affirmed the compensation judge’s denial of the

and available medical reports, the duty of the employer to pay compensation is suspended, except as provided in the following subdivisions and in section 176.239.

³ Minn. R. 5220.2630, subps. 4.A. and C., both require service of the NOID on the employee as a condition of a discontinuance of wage loss benefits. To this extent, the rules conflict with Minn. Stat. § 176.238, subd. 1. Where there is a conflict between a statute and an administrative rule, the statute prevails. See Green v. Whirlpool Corp., 389 N.W.2d 504, 506, 38 W.C.D. 713, 716 (Minn. 1986) (“while administrative agencies may adopt regulations to implement or make specific the language of a statute, they cannot adopt a conflicting rule”).

⁴ Minn. Stat. § 176.241, subd. 1 (1980), now repealed, was the predecessor to Minn. Stat. § 176.238. That statute required the NOID be accompanied by “a statement of facts in support of the discontinuance of compensation payments and whatever medical reports are in the possession of the employer bearing on the physical condition of the employee.”

employee's claim for continuing wage loss benefits despite the insurer's failure to provide and file a NOID as required by statute. The court stated:

The purpose of the form [NOID] and the filing is to ensure that the employee is aware that the insurer intends to stop paying benefits prior to the discontinuance, and on what basis, and to notify the employee of the procedures available to her to protect any right she may have to continuing benefits.

The court went on to note that "the employee was not prejudiced as she and her attorney acted promptly upon receipt of the insurer's letter to file an Objection to Discontinuance." Id. at 496.

The compensation judge here found the employee was not prejudiced by the insurer's method of service of the NOID. The judge further found that, although statutorily deficient, the NOID provided sufficient notice to the employee and her attorney to allow the employee to protect any right she had to continuing wage loss benefits. In making this determination, the compensation judge specifically relied on Woelfel and Mellema. We conclude the compensation judge's decision is supported by substantial evidence.

In an unappealed finding, the compensation judge found the employee reached maximum medical improvement on November 3, 1998 and found the employee's eligibility for temporary total disability benefits expired 90 days thereafter on February 4, 1999. Accordingly, the employer and insurer had no continuing liability to pay compensation benefits to the employee after February 4, 1999 due to any disability resulting from the work injury. When the insurer realized the employee had not received the NOID, Mr. Robb wrote a memo to Mr. Arndt, the employee's attorney, stating the employee's copy was returned by the postal service and attaching a copy of the NOID. Mr. Arndt received the memo on November 12, 1998. Mr. Arndt did not request an administrative conference, but rather filed an objection to discontinuance⁵ on February 5, 1999. There is no evidence the insurer's failure to provide the employee with the NOID prevented the employee from requesting a conference. There is no evidence the employee was prejudiced by the insurer's failure to comply with Minn. Stat. § 176.238. The employee had

⁵ See Minn. Stat. § 176.238, subd. 4 which provides, in part:

Subd. 4. Objection to discontinuance. An employee may serve on the employer and file with the commissioner an objection to discontinuance if:

- (a) the employee elects not to request an administrative conference under section 176.239;
- (b) if the employee fails to timely proceed under that section.

sufficient notice of the proposed discontinuance to enable the employee to protect her legal rights. We are satisfied the underlying intent of the statute was accomplished in this case. The decision of the compensation judge is, therefore, affirmed.