

KENNETH KALENDA, Employee, v. THE WORK CONNECTION and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurers/Appellants, and STATE, DEP'T OF LABOR AND INDUS.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 14, 2000

No. [REDACTED SSN]

HEADNOTES

PENALTIES; STATUTES CONSTRUED - MINN. STAT. § 176.194, SUBD. 3(6). Substantial evidence supports the compensation judge's determination that the insurer failed to reasonably respond to the Department of Labor and Industry's written inquiry regarding payments of temporary partial disability benefits to the employee and the imposition of a \$6,000.00 penalty.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Pederson, J.
Compensation Judge: Carol A. Eckersen

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's award of a penalty under Minn. Stat. § 176.194, subd. 3(6). We affirm.

BACKGROUND

Kenneth Kalenda, the employee, sustained a personal injury to his low back on September 28, 1994, while working for The Work Connection, insured by Minnesota Assigned Risk Plan/Berkley Risk Administrators. The employee's weekly wage was \$220.00. Following a hearing, the employer and insurer were ordered to pay temporary total and temporary partial disability benefits to the employee. (F & O: April 10, 1996.)

Ms. Libby Collins was employed in Customer Assistance at the Department of Labor and Industry. Her duties included responding to employee inquiries and assisting employees in determining whether benefit payments were timely and in the correct amounts. (T. 30.) In July 1998, Ms. Collins spoke with the employee who complained of late payment of temporary partial disability benefits by the insurer. To determine whether the temporary partial payments were late, Ms. Collins called Berkley Administrators and asked for the date each payment was made, the amount of each payment, the time period covered by each payment and the date when the insurer received the employee's wage loss information. (T. 14-16.)

Martha C. Weissenburger, a senior examiner with Berkley with 25 years experience, handled the Kalenda file. Ms. Weissenburger acknowledge she received a call from the department regarding Mr. Kalenda in July 1998. In reviewing the file, she noted she did not have recent temporary partial information or check stubs from the employee and had not received them for more than a year. Thereafter, Ms. Weissenburger called the employee to request wage information and was told the employee's home was burned in a fire and he had no records. Ms. Weissenburger told the employee Berkley needed information from his employer. (T. 104-107.) On July 13, 1998, Ms. Weissenburger received two canceled checks and a statement from the employee's employer, Joel Gaarsland. This information, together with a Report of Work Ability, was faxed to the department on July 24, 1998. (Pet. Ex. A.) The fax stated it consisted of five pages but Ms. Collins testified she received only four pages. Ms. Collins did not contact Ms. Weissenburger to obtain the page missing from the fax transmission. (T. 37, 107-112.)

The fax included a statement from Joel Gaarsland stating the employee had worked for Mr. Gaarsland since August 13, 1997, two hours a day, five days a week for which he was paid \$6.00 an hour. Also included were copies of two checks from Mr. Gaarsland to the employee in the amount of \$120.00 each, a copy of a Report of Work Ability setting out the employee's restrictions and an envelope self-addressed to Berkley date stamped by Berkley as received on July 13, 1998. (Pet. Ex. A.) Ms. Collins testified the information provided in the fax was insufficient to determine whether payments were timely because the date of the checks was illegible. Nor did the faxed information establish when the employee was paid the temporary partial disability benefits. (T. 16-17.) She acknowledged, however, one check was dated July 1998 and a memo on the check stated June 15, July 1. (T. 38-39.)¹ Ms. Collins did not have any further contact with Berkley until August 25, 1998. (T. 18.)

On August 25, 1998, Ms. Collins wrote Ms. Weissenburger stating the department had received a complaint about possible late payment of benefits on Mr. Kalenda's claim. Ms. Collins requested a breakdown of payments of benefits from August 1997, the date each payment was made, the amount of each payment and the time period covered by the payment. Ms. Collins also requested Berkley state the date it received the employee's wage loss information and asked for the weekly wage being used to determine the temporary partial disability benefits. (Resp. Ex. 3.) By letter dated September 24, 1998, Ms. Weissenburger sent the department a copy of Berkley's "comp card"² and a computer generated claim summary report reflecting benefit payments to Mr. Kalenda. (Resp. Ex. 1.) Berkley's claim summary report documents a payment of temporary partial disability benefits to the employee on June 24, 1998 in the amount of \$2,289.02. The document thereafter reflects payments on July 27, August 7, August 31, 1998 and

¹ Although the copy is poor, the second check is clearly dated June 15, 1998. (Pet. Ex. A.)

² Ms. Weissenburger testified the comp card is a hand-written record of payments of wage loss benefits to the employee. The card sets out the number of weeks, the applicable pay period, the employee's gross earnings for the period and the amount and date of the check. Ms. Weissenburger testified the information on the comp card is entered each time a payment is made. The comp card was the missing page from Berkley's July 24, 1998 fax. (Pet. Ex. A; T. 109-111.)

October 1, 1998, including number of days lost and the amount of the payment. The comp card reflects a weekly wage of \$220.00, and includes the number of weeks and gross earnings for each period, the amount of the check, the date of the check and the check number for payments of wage loss benefits. (T. 126-127.) (See Pet. Exs. B, C; Resp. Ex. 1.) However, neither of the exhibits states when the insurer received the wage information from the employee. Ms. Collins testified the information received was insufficient to determine whether temporary partial benefits were timely paid to the employee. (T. 20-23.)

On September 28, 1998, Ms. Collins left a telephone message with Berkley. (T. 23.) By fax dated October 6, 1998, Ms. Weissenburger sent Ms. Collins a copy of her letter of September 24, 1998 together with another copy of the computer generated claims summary and another copy of the information included in the July 24, 1998 fax sent to Ms. Collins. (Pet. Ex. B.) On October 7, 1998, Ms. Collins again called Berkley and left a message for Ms. Weissenburger. Ms. Collins testified she requested more of a breakdown from Berkley. (T. 23-24.) Thereafter, Ms. Collins sent to Ms. Weissenburger a second copy of the letter dated August 25, 1998. Ms. Collins scratched out the August 25 date and wrote in October 8, 1998. Stamped on this copy of the letter was the statement:

Please respond within 30 days of this request. Failure to do so may subject you to the penalties per M.S. 176.194, subd. 3(6) of the prohibited practices. (Resp. Ex. 3.)

Berkley did not respond to this letter within 30 days. (T. 24.) Ms. Weissenburger acknowledged receiving the October 8, 1998 letter, but did not respond because she had already responded on two occasions and testified she had already provided the department with all the information Berkley had in its possession. Ms. Weissenburger concluded she had already complied with the department's request. (T. 113-115.)

Patricia Leider, a compliance officer with the department, reviewed the Kalenda file at the request of Ms. Collins. Ms. Leider concluded the information received from Berkley was not sufficiently responsive to the department's requests. Neither Exhibits A or B answered the department's questions regarding the periods of time covered by Berkley's payments or when Berkley received wage information from the employee. A penalty assessment notice was then prepared at Ms. Leider's request. (T. 60-67.)

On November 13, 1998, the department filed a Notice of Penalty Assessment contending Berkley violated the requirements of Minn. Stat. § 176.194, subd. 3(6). (Resp. Ex. 2.) On November 16, 1998, Ms. Collins wrote to Robert Farber with Berkley and attached a copy of a schedule of temporary benefits the department computed were owed the employee. Mr. Farber was asked to advise whether Berkley agreed with the department's calculations. (Pet. Ex. D.) On November 18, 1998, Ms. Weissenburger faxed to Ms. Leider another copy of Berkley's comp card. Ms. Weissenburger asked Ms. Leider to contact her to discuss this further. (Pet. Ex. C.)

Ms. Weissenburger testified the department never communicated to her that the department was concerned about the amount of temporary partial disability payments made to the employee. Rather, she concluded the department was concerned only about whether payments had been timely made. At no point prior to the penalty assessment notice was she made aware of the department's position that the information Berkley provided was insufficient. The insurer filed an Objection to Penalty Assessment on November 25, 1998.

The matter was heard by a compensation judge at the Office of Administrative Hearings on February 15, 2000. The parties stipulated that should the court assess a penalty, the amount of the penalty would be \$6,000.00. In a findings and order served and filed April 25, 2000, the compensation judge found the insurer did not respond to the department's October 8, 1998 request in violation of Minn. Stat. § 176.194. The judge then ordered the insurer pay \$6,000.00 to the department. The employer and insurer appeal.

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. § 176.194, subd. 3(6) provides a penalty for "failing to respond to the department within 30 calendar days after receipt of a written inquiry from the department about a claim." The appellant contends the plain meaning of the statute together with the facts of the case do not support the compensation judge's finding that the insurer failed to respond to the department's request. Berkley asserts Ms. Weissenburger supplied the department with information about the amount of benefits paid to the employee, the date of the payments, the period covered by the payments, the type of payments made by the insurer and the employee's weekly wage. Ms. Weissenburger believed she had responded to the department's requests since neither Ms. Collins or Ms. Leider sought to clarify Berkley's responses. Berkley therefore contends it provided an adequate and reasonable response to the department's inquiry. Accordingly, the appellant argues the penalty assessment must be dismissed.

Although Berkley failed to respond to the department's October 8, 1998 request, it did provide timely responses to the department's previous inquiries. Therefore, the issue in this case is whether the information provided by Berkley was an adequate and reasonable response to the department's requests. If so, Berkley's failure to respond to the department's October 8, 1998 letter is moot. If not, Berkley should have responded to the October 8, 1998 letter. Although this is a close case, we conclude the compensation judge's penalty assessment is supported by substantial evidence.

In its letter of August 25, 1998, resent on October 8, 1998, the department requested specific information from Berkley, including a breakdown of Berkley's payments from and after August 1997, the date each payment was made, the amount of each payment and the time period covered by each payment. On September 24, 1998, Ms. Weissenburger provided to the department a copy of Berkley's comp card and the claim summary report. (Resp. Ex. 1.) These documents provide a breakdown of wage loss payments made on the claim through August 31, 1998, the date each payment was made, the amount of each payment and the time period covered by the payment. To this extent, Berkley provided a complete response to the department's request. The department's August 25, 1998 letter, however, went on to state: "If this involved payment of temporary partial disability benefits provide the dates that your company received the employee's wage loss information." (Resp. Ex. 3.) To determine whether temporary partial disability payments were timely made, the department needed to know when the insurer received wage verification from the employee. Thus, the department sought this information to determine whether Berkley had made late payments of temporary partial disability benefits to the employee.³

Berkley's claim summary report reflects a first payment of temporary partial disability benefits to the employee on June 24, 1998, representing 155 days for a total payment of \$2,289.02. Berkley's comp card indicates this payment was for a 31-week period from November 1, 1997 through June 12, 1998, during which time the employee earned \$3,720.00. Apparently, this payment was based on earnings of \$120.00 a week. (Resp. Ex. 1.)⁴ Ms. Weissenburger testified Berkley received wage information from the employee and the statement from the employee's employer on July 13, 1998. (See Pet. Ex. A.) Thus, the information in Exhibit A might be responsive with respect to temporary partial disability payments on July 27, 1998 and thereafter.⁵ Exhibit A does not, however, explain the basis for the June 24, 1998 payment. Nor does any of the documentation provided by Berkley identify any wage loss information from the employee upon which the June 1998 payment was based. Berkley's responses do not state when Berkley received the employee's wage loss information upon which

³ Minn. R. 5220.2540, subp. 1 states: "If the current wage varies so that wage documentation for calculation of temporary partial disability benefits is necessary, payment is due ten days following the date the employee or employer sends wage verification to the insurer."

⁴ \$3,720.00 divided by 31 weeks equals \$120.00 per week.

⁵ We note, however, even those payments of temporary partial disability benefits were based on gross earnings of \$120.00 a week. The information provided by the employee on July 13, 1998 stated he was earning \$60.00 a week.

the June 24, 1998 payment was based. Nor does any of the information supplied by Berkley explain why the June 24, 1998 payment covered a period of 31 weeks rather than being paid bi-weekly or monthly. Berkley also failed to explain how it determined the employee earned \$120.00 a week between November 1, 1997 and June 12, 1998. Finally, Berkley provided no information to explain why the employee was not paid temporary partial disability benefits for the period from August 1997 through October 31, 1997.

There is evidence here of miscommunication by both Berkley and the department. Certainly, the department could have acknowledged receipt of Berkley's information and replied by explaining why the department felt the provided information was insufficient. Absent such an explanation, Berkley might assume the provided information was responsive. On the other hand, Berkley should have realized that none of the information it supplied the department was totally responsive with respect to its receipt of wage information any time prior to July 13, 1998. Although the evidence in the case is somewhat equivocal, the compensation judge could conclude Berkley failed to reasonably respond to the department's written inquiry. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). The compensation judge's decision is affirmed.