MARK D. LINDSAY, Employee, v. WASTE MGMT. and RELIANCE NAT'L INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 14, 2000

No. [REDACTED SSN]

HEADNOTES

TERMINATION OF EMPLOYMENT - MISCONDUCT; STATUTES CONSTRUED - MINN. STAT. § 176.101, SUBD. 1(e)(1). Substantial evidence supports the compensation judge's finding that the employee's refusal to submit to a random drug test did not constitute misconduct pursuant to Minn. Stat. § 176.101, subd. 1(e)(1).

Affirmed in part and modified in part.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's finding and order that the employee's refusal to take a drug test, an action which led to termination of his employment, did not constitute misconduct. We affirm in part and modify in part.

BACKGROUND

The employee began working for Waste Management, the employer, in June 1999, as a roll-off operator. As an operator, he drove a truck to deliver and remove waste containers from construction sites and haul them to a landfill; as a job requirement he held a Class B commercial driver's license. On July 18, 1999, the employee sustained an admitted work-related low back injury while working as a roll-off operator. On that date, the employer was insured for workers' compensation liability by Reliance National Insurance Company. The employee remained off work until August 1999, when he returned to a part-time, light duty position which did not require driving.

This matter involves the termination of the employee's employment, in part, for his refusal to undergo a random drug test. Testimony at the hearing and information in the record provided background information about the employer's drug testing policy and the information provided to employees concerning the related policies and procedures. Roger Kern, the employer's environmental safety and health manager, testified that he routinely conducts orientation sessions for new employees in which company policies and federal Department of Transportation (DOT) and Occupational Safety and Health Administration (OSHA) regulations

are discussed, including policies and procedures for drug and alcohol testing. A dispute exists as to whether the employee attended a safety orientation meeting after he was hired by the employer. Mr. Kern testified that he personally conducted orientation training for the employee. (T. 17.) The employee testified that he did not attend such an orientation or safety meeting prior to his injury, but he did recall asking Mr. Kern about having a safety meeting, and did receive an employee handbook. (T. 56.)

Mr. Kern testified that an independent company conducts the drug tests for the employer and outlined the procedures followed for the testing. Employees who hold commercial vehicle licenses are randomly selected, and are tested by a technician on-site. Mr. Kern testified that he advises employees that these drug tests only test for five substances: marijuana, cocaine, opiates, pencyclomine and amphetamines. (T. 23.) He advises employees that pencyclomine and amphetamines can be found in prescription medications, and that a positive test result for these two substances will result in a medical review officer contacting the employee before contacting the employer to obtain documentation of any prescription medications that could have caused the positive test result. (T. 23-24.) Mr. Kern testified that the DOT considers a refusal to be a "positive" result. According to Mr. Kern, the employee handbook indicates that if an employee refuses a test, the employee's employment could be terminated.

On November 4, 1999, the employee was working a light duty job at the employee's Inver Grove Heights Reclamation Center. At that time, the employee was restricted to working four hours per day, and no lifting over 10 pounds. His limitations caused by his work injury restricted him from driving trucks. (Pet. Ex. E.) On November 4, 1999, the employee was considered by the employer to be a driver, even though he was not working in that capacity post-injury; along with other employees located at other job sites, the employee was chosen to undergo a random drug test. The testing technician appeared at the job site alone. The employee was asked to come to the employer's office and to give a urine sample. The employee testified that the technician did not present any identification. The employee apparently asked why he needed to undergo a drug test even though he was not currently driving trucks for the employer. The employee also testified that he requested the opportunity to contact his attorney before taking the test. The employee was taking prescription medication for his low back injury on that day, Flexeril and Naprolyn, and was concerned about the effect of this medication on the testing; he therefore wanted to contact his attorney about that concern. (T. 59.) The employee testified that he was not allowed to contact his attorney and refused to take the test. The employer then told him he was excused for the day. Mr. Kern testified that "there was a ruckus" concerning the request for testing. (T. 32.) The employee testified that "the gentleman which was giving the test had gotten very upset with me." (T. 59.)

The employee contacted his QRC, Norman Mastbaum, who testified that he spoke with Mr. Kern on November 5, advising that the employee was willing to take the test. (Pet. Ex. A, Depo. of Norman Mastbaum, p. 16-17.) Mr. Kern declined, advising the QRC that federal DOT regulations require the test to be taken within two hours of notification of the test. Mr. Mastbaum also testified that Mr. Kern advised him that the employee "had been terminated as of the day of

his refusal, that it was policy that anybody not taking the drug test would be terminated on the spot regardless of mitigation or circumstance." (Ee. Ex. A, p. 16-17.)

On November 5, 1999, the employee was terminated from his employment for refusal to take the drug test. A warning notice, dated November 4, 1999, states that the employee was "threatening and abusive in behavior after being informed to leave the Inver Grove Heights facility;" the notice also referred to an earlier warning provided to the employee in September 1999, concerning threatening and abusive behavior.[1] (Er. Exh. 1.) The employer provided the employee with help-line telephone numbers for information on rehabilitation, as required by the DOT. The employee continued to receive medical management and vocational rehabilitation assistance from his QRC, and conducted a job search. The employee found a job with another employer, within his restrictions, which began February 1, 2000.

On November 15, 1999, the employer and insurer filed a notice of intention to discontinue benefits stating that they were discontinuing temporary partial disability benefits as of November 10, 1999, and would not pay temporary total disability benefits because the employee had been terminated from his employment "as part of a disciplinary action" and his "wage loss is unrelated to his injury."[2] An administrative conference was held on December 15, 1999. A December 21, 1999, order on discontinuance allowed discontinuance of temporary partial disability benefits since the employee was no longer working and indicated that the employee's claim for temporary total disability benefits was beyond the scope of the interim decision and should be made by claim petition. On January 3, 2000, the employee filed an objection to discontinuance. A hearing was held on February 10, 2000. The compensation judge found that the employee's refusal to take the drug test did not constitute misconduct and that benefits should not have been discontinued on that basis. The employer and insurer appeal.

STANDARD OF REVIEW

In reviewing cases 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 (1998). 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, "[f]act findings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). 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

[1] The record does not include a copy of any earlier written warning notice.

[2] The disputed period of temporary total disability was from November 10, 1999, until the employee's return to work on February 1, 2000.

manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id. 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 (W.C.C.A. 1993).

DECISION

The employer and insurer argue that the compensation judge erred by finding that the employee's refusal to take the drug test did not constitute misconduct in this case.

We first note that the compensation judge's findings and order refer to Minn. Stat. § 268.095, subd. 6. At hearing, the compensation judge outlined the issue to be addressed as "[w]hether the employee was terminated for misconduct as defined by Minnesota Stat. Section 268.095, Subdivision 6." (T. 5.) Counsel for both parties agreed that this was the sole issue. On appeal, neither party has contested this description of the issue.

Minn. Stat. § 268.095, subd. 6, contains the statutory definition of "employment misconduct" utilized by the Minnesota Department of Economic Security, which pertains to termination of unemployment compensation (also referred to as reemployment insurance). Neither the compensation judge nor this court has jurisdiction to address a claim under Minn. Stat. § 268.095. However, it is obvious that the compensation judge and counsel agreed that the issue to be addressed at hearing involved application of a corresponding section of the Minnesota workers' compensation statute, Minn. Stat. §176.101, subd. 1(e)(1), which cites misconduct as a basis for termination of temporary total disability benefits. Our analysis therefore refers to Minn. Stat. § 176.101, subd. 1(e)(1), and we modify the compensation judge's finding and order accordingly, as further explained below.

Minn. Stat. §176.101, subd. 1(e)(1), was added to the statute in 1995 to provide that, where an employee's temporary total disability compensation has ceased because the employee has returned to work and the employee's employment is later terminated for misconduct, the right to receive temporary total disability benefits following termination is forfeited. Minn. Stat. § 176.101, subd. 1(e)(1), (effective for injuries occurring on or after October 1, 1995) states that

> If temporary total disability compensation ceased because the employee returned to work, it may be recommenced if the employee is laid off or terminated for reasons other than misconduct within one year after returning to work if the layoff or termination occurs prior to 90 days after the employee has reached maximum medical improvement.

(Emphasis added.)

The term "misconduct" is not defined in chapter 176 of the Minnesota Statutes. The misconduct definition applicable to unemployment benefit cases, as set forth in Tilseth v. Midwest Lumber Co., 295 Minn. 372, 204 N.W.2d 644 (1973), was later adopted by this court in Langworthy v. Signature Flight Support, slip op. (W.C.C.A. July 8, 1998), when construing the definition of misconduct in Minn. Stat. § 176.101, subd. 1(e)(1). In Langworthy, this court held that, for purposes of Minn. Stat. § 176.101, subd. 1(e)(1), misconduct

> is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of [the] employer's interest or of the employee's duties and obligations to the employer.

Id. at 3, citing Tilseth, 295 Minn. at 374-75, 204 N.W.2d at 646 (quoting Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259, 296 N.W. 636, 640 (1941).

This court specifically declined to adopt a "just cause" standard as a basis for termination of benefits, noting that the legislature had not precluded commencement of temporary total disability benefits in cases where an employee had been terminated for "just cause" but for misconduct only. Determining whether the employee's actions constituted misconduct is a mixed question of fact and law. Colburn v. Pine Portage Madden Bros., 346 N.W.2d 159, 161 (Minn. 1984). The substantial evidence standard applies for reviewing the compensation judge's factual findings. Whether the established facts, supported by substantial evidence, constitute misconduct is a question of law which this court may review de novo. See Ress v. Abbott Northwestern Hosp., Inc. 448 N.W.2d 519, 523 (Minn. 1989).

The employer and insurer cite Hein v. Gresen Division, 552 N.W.2d 41 (Minn. App. 1996), an unemployment compensation case in which the Minnesota Court of Appeals found that the employee's positive drug test constituted misconduct. This court has rejected the use of unemployment compensation-related decisions to define misconduct in workers' compensation situations. In Hughes v. Versa/Northern Iron, 58 W.C.D. 520 (W.C.C.A. 1998), we stated that:

> Our general adoption of the same definition of misconduct used in Minnesota unemployment law cases does not constitute an adoption of unemployment case law as meaningful or precedential to the specific application of the definition. Where an employee is disabled by a workplace injury, different factors are involved in determining what needs and expectations are reasonable on the part both of employers and employees than are present in unemployment law cases.

Hughes, 58 W.C.D. at 529-530 (W.C.C.A. 1998). Further, even if the reasoning in Hein was applicable, the case is distinguishable because the case at hand involved a refusal to take a test, not a positive test result.

The employer argues that it is heavily regulated by the federal Department of Transportation, and that adherence to DOT regulations is an essential requirement of the employer's business. The employer further argues that in refusing to take a drug test, and in acting in an abusive and threatening manner, the employee wilfully acted in a manner adverse to the interests of the employer and violated the standards of behavior which the employer had a right to expect of its employees, as outlined in the employee handbook. Mr. Kern testified that the decision to terminate Mr. Lindsay's employment was based upon a violation of company policy which was in the handbook and also because the employee argued when he was advised of his need for testing. (T. 44.) He further testified that representatives from the corporate office "advised that it was within our rights to terminate under the rules of the DOT" (T. 42) but that to the best of his knowledge there is no state or federal guideline to require termination of employment for refusal to take a drug test. (T. 52.)

The employee admitted at hearing that he understood he was held to the employer's rules as outlined in the handbook, and that he was subject to termination for refusing to take a drug test. (T. 62-62.) He also testified that he was concerned that a positive urine test, resulting from his prescription medication, would jeopardize his employment. (T. 59.)

It appears that, based upon the testimony presented by Mr. Kern, the company policy concerning the effect of refusing a drug test is subject to various interpretations. For example, when explaining the information contained in the employee handbook regarding this policy, Mr. Kern testified on direct examination that "it's in the company handbook that if [employees] refuse to take a test, that would be grounds for termination." (T. 24.) However, on cross-examination he testified that the employee handbook states that an employee who refuses to take a drug test *could* be subject to termination (T. 41) (emphasis added).[3] He further explained that an employee with a positive drug test result would not necessarily be fired, but "could go through a rehabilitation program" or "whatever the medical review officer deemed appropriate." (T. 43.) Even though refusal to take such a test is deemed to be a positive result, it appears that such an imputed positive test result is still handled differently from an actual positive test result. Mr. Kern explained that if an employee tests positively, that person remains employed, and state guidelines require follow-up by a medical review officer and provision of an opportunity for rehabilitation. However, refusal to take a test results in termination of employment, at least under the interpretation of company policy utilized in this particular case.

In this case, the employee was approached to take a drug test by a person he did not know, who was not accompanied by the employer's environmental safety and health manager and who purportedly did not present identification. Further, the employee was the only employee being tested at that facility that day, was not working as a commercial driver on the day he was asked to take a test, was not allowed to speak to his attorney, and was concerned about the effect

[3] The record does not contain a copy of the employee handbook.

of the prescription drugs he was taking for a work-related injury. The employee's testimony and explanation of the circumstances surrounding the drug test substantially support the judge's finding that the employee's conduct did not show a "disregard of the employer's interest, the standards of behavior expected by the employer, or the employee's duties and obligations to the employer." (Finding No. 13.) It therefore was reasonable for the judge to rely on that testimony in making her determinations. As the judge stated in her memorandum:

> The employee had no motive to refuse the test: if he had taken it and failed, he would have been asked for an explanation which could have cleared his record. Since he refused, he was fired, a result he clearly did not want.
>
> The employee's refusal to take the drug test may have been bad judgement, however it was done in good faith and with appropriate concern under the circumstances. It does not rise to the level of termination for misconduct. Benefits should not have been discontinued.

Under these circumstances, the compensation judge did not err in finding that the employee's refusal to submit to a drug test did not constitute misconduct. Accordingly, we affirm.

For the reasons outlined above, we also modify Finding No. 13 and Order No. 1 to substitute Minn. Stat. § 176.101, subd. 1(e)(1), for the references to Minn. Stat. § 268.095.