PAUL J. MARTIN, Employee, v. RED OWL STORES and CNA - RSKCO, Employer-Insurer/Petitioners.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 28, 2000

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - DEFAULT AWARD. Where the employer and insurer did not have a reasonable excuse for their failure to respond to the employee's claims for medical care, where they did not act with due diligence to address those claims after notice of entry of the default award, and where they failed to show that no substantial prejudice would result to the employee by setting aside the default award to permit litigation on the merits, the employer and insurer's application to set aside the compensation judge's default award was denied, pursuant to criteria established in Betts v. M. I. L. Realty Corp., 269 N.W.2d 42, 31 W.C.D. 40 (Minn. 1978).

VACATION OF AWARD - MISTAKE. Where there was no indication that the compensation judge based his conclusion in any way on, or otherwise relied on, any presumption as to the causation opinion of a treating doctor whose records were not submitted for review at the hearing at which the employer and insurer did not appear, and where facts contained in those treatment records were not dispositive as to the employee's claims for the medical benefits at issue, the employer and insurer did not show cause to vacate the compensation judge's default award of medical benefits on grounds of mutual mistake of fact.

VACATION OF AWARD - FRAUD. Where the employee's attorney had stated in an affidavit that she had not yet received for even her own review, at the time of the hearing before the compensation judge, the treatment records that were alleged to have been fraudulently withheld, where the employee was always available for cross-examination by the employer and insurer with regard to his condition, the history that he reported to his doctor, and his understanding as to the nature of his doctor's opinion, and where the employer and insurer had been repeatedly invited, and in fact affirmatively asked, to participate in the litigation process but had elected not to, the employer and insurer did not show cause to vacate the compensation judge's default award of medical benefits on grounds of fraud.

Application to set aside default order denied.
Petition to vacate denied.

Determined by: Pederson, J., Johnson, J., and Rykken, J.

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer apply to and petition this court to set aside and vacate a Decision and Order Pursuant to Minn. Stat. § 176.106 served and filed November 1, 1999. Concluding that they have not shown good cause to set aside and/or vacate the decision and order at issue, we deny the employer and insurer's application and petition.

BACKGROUND

On October 17, 1984, Paul Martin sustained a work-related back injury in the course of his employment with Red Owl Stores, which was insured at the time against workers' compensation liability by Continental Insurance Company. Mr. Martin [the employee] was twenty-seven years old at the time and was earning a claimed weekly wage of $340.78.[1] He returned to work and was treated conservatively for several years, but his pain apparently continued intermittently. Finally, in June of 1989, the employee underwent an MRI scan of the lumbar spine, which was read to reveal in part a small right-sided herniation of the L4-5 disc encroaching upon the thecal sac at the origin of the right L5 nerve root. The employee filed a Claim Petition on October 26, 1989, and Red Owl Stores [the employer] and its insurer subsequently admitted liability and paid workers' compensation benefits, including certain medical and chiropractic expenses and permanent partial disability compensation, pursuant to an Award on Stipulation filed April 17, 1990. The approved stipulation for settlement closed out permanency claims to the extent of 24% of the whole body and all claims for chiropractic care after February 27, 1990. A claim for payment of past chiropractic expenses in the amount of $2,120.00 was initially left unsettled, but those expenses, too, were ordered paid by a Summary Decision Pursuant to Minn. Stat. § 176.305 issued February 22, 1991. In the mid 1990s, Continental Insurance Company apparently moved to Florida, and in about 1996 it was taken over by CNA Risk Management, which was subsequently reorganized and became CNA-RSKCo [the insurer].

Subsequent to his settlement, the employee evidently continued to experience flare-ups in his low back condition, for which he continued to obtain chiropractic and other treatment, including physical therapy at HealthSouth in the spring of 1998. On April 22, 1998, the employee's physical therapist reported "To Whom it may concern" that the employee had recently completed sixteen physical therapy sessions "to 1) decrease pain, 2) abolish radicular symptoms, 3) increase strength, and 4) instruct neutral posture and body mechanics." In that same report, the therapist recommended that the employee continue to strengthen his trunk muscles through a weight training program and that he obtain instruction from a personal trainer at the beginning of that program.

On December 17, 1998, the employee sought treatment for low back and radicular problems with neurologist Dr. Linda Goldman. In her treatment notes for that date, Dr. Goldman recounts a history of the employee's low back and radicular leg pain dating back to his 1984 work

[1] In their November 14, 1989, Answer to the employee's Claim Petition, the employer and insurer specifically denied the employee's claim to this weekly wage. We find no evidence in the record that the issue was ever litigated or resolved by stipulation.

injury,[2] noting in part that "over the years since [the employee's settlement] he has had intermittent flares of symptoms" which "seem to occur yearly." Dr. Goldman reports that the employee's "low back pain and radicular leg pain have usually been around a 2 [on a scale of 1 to 10], except during times of acute flares when he would have pain up to a 6." In subsequent notes, Dr. Goldman also states the following:

> Last summer, [the employee] re-injured his back in July when playing softball. He recalls twisting his back on a particular play, and 2 or 3 days later developing a 10 out of 10 radicular pain. He had an MRI scan done on October 1, 1998 that shows a 9mm extruded disc fragment at the right L4-5 space, with a moderate amount of compression from the right L5 nerve root. This is described as significantly increased in size compared to the previous study from 1989. In addition, there are some left-sided disc findings involving the left S1 nerve root and some bulges without disc herniation at L2-3 and L3-4. . . . . His symptoms have improved now so that they are a 4 to 5 out of 10. He has been using Relafen, which helps somewhat. This decreases the pain level down to a 3 out of 10.

Dr. Goldman then goes on to state in those notes, "At this time, it does appear that [the employee] has re-injured his back," and she indicates that she has recommended an EMG, "to see if there is on-going nerve damage." The EMG, conducted on December 23, 1998, was read as normal.

Dr. Goldman referred the employee to neurosurgeon Dr. Richard Gregory at Neurosurgery Associates, whom the employee saw on February 10, 1999. In his chart note, Dr. Gregory indicates that the employee has "had back and right leg pain for about 15 years," noting that "[h]e was injured at work in October of 1984" and making no mention of any reinjury in the summer of 1998. Dr. Gregory's physical examination of the employee was "unremarkable," and he concluded that the employee "does not fit the criteria for surgery because of his negative neurologic examination and negative EMG." On February 16, 1999, the employee's physical therapist at HealthSouth wrote to Dr. Gregory, reiterating her recommendation of an assisted weight training program for the employee and requesting the doctor's referral.

On April 27, 1999, the employee's attorney addressed a letter to the workers' compensation claims division of "Risco Claims" at the insurer's Atlanta address, requesting payment for the employee's physical therapy at HealthSouth, together with approval of a weight training program and the assistance of a personal trainer. The insurer evidently did not respond. About a month later, on May 26, 1999, the employee's attorney addressed a letter to CNA Insurance [CNA] at its Minneapolis address, enclosing physical therapy billings that had apparently been submitted by HealthSouth to CNA in Atlanta and returned therefrom to the

[2] Dr. Goldman's history traces the employee's low back pain back to "1994" (emphasis added) rather than 1984; it is clear from the subsequent context of the doctor's notes that this is a typographical error.

employee because, according to the employee's attorney, "the claims file could not be found." Evidently there was again no response. About a month after that, on June 28, 1999, the employee's attorney addressed another letter to CNA at its Minneapolis address, again requesting payment of the unpaid HealthSouth therapy bills and requesting also payment of a bill from Neurosurgery Associates and approval of the recommended weight training program and personal trainer assistance. A copy of the employee's physical therapist's recommendation of the latter was enclosed. On July 1, 1999, paralegal Devin Murphy at the employee's attorney's office evidently conversed with agent Elaine Eidem at CNA's Minnetonka office, who evidently confirmed CNA's Minneapolis address, provided Mr. Murphy with CNA's Minnetonka mailing address, and assured Mr. Murphy that CNA would try to expedite the return of the employee's claims file to Minneapolis. On July 6, 1999, Mr. Murphy forwarded to Ms. Eidem the correspondence that had earlier been mailed to CNA's Minneapolis address. On July 13, 1999, Mr. Murphy wrote to CNA at its Minneapolis address, outlining yet again the employee's various medical claims. Again there was no response.

Finally, on August 19, 1999, the employee requested certification of a medical dispute from the Department of Labor and Industry, resubmitting that request on August 30, 1999. On the latter date, the Workers' Compensation Division at the Department of Labor and Industry issued a Certification of Dispute, indicating that there had been no response to an attempt to resolve the dispute by calling and leaving voicemail on August 25, 1999, with one Marilyn Hotaling at the insurer's Atlanta address. On September 7, 1999, the employee filed and served on the employer and insurer at its Atlanta address a Medical Request, seeking payment of medical expenses in excess of $4000.00 incurred with Neurosurgery Associates, HealthSouth, the Center for Diagnostic Imaging, and Dr. Goldman and seeking approval of instruction from a personal trainer as recommended by the employee's therapist. No response to the medical request was apparently ever filed.

Pursuant to due notice and order dated October 6, 1999, the matter came on for hearing at an administrative conference on Thursday October 28, 1999. The employee's attorney and the compensation judge appeared at the conference, but no one appeared on behalf of the employer and insurer. In support of the employee's claim, the employee's attorney submitted to the judge Dr. Gregory's February 10, 1999, examination report to supplement other records available to the judge in the employee's Workers' Compensation Division file. Dr. Goldman's treatment notes for December 17, 1998, were not among materials submitted to the judge. In his Decision and Order Pursuant to Minn. Stat. § 176.106, filed November 1, 1999, the compensation judge indicated in part as follows:

> The record indicated that the Certificate of Dispute issued by the Department of Labor and Industry on August 30, 1999 listed Marilyn Hotaling as the insurer representative regarding the medical dispute in this matter. The Certificate of Dispute also revealed that Ms. Hotaling had not responded to an August 25, 1999 call/voice mail from the Department prior to the certification of the medical dispute. In regard to the Administrative Conference on the medical

> dispute, the undersigned Compensation Judge telephoned Ms. Hotaling at the time of the conference, and when she was unavailable by telephone the undersigned Compensation Judge left a telephone message by voice mail.
>
> As of the date of this Order, there has been no response received from Ms. Hotaling or any other employer or insurer representative, to the telephone call regarding the medical conference in this matter.

Thereupon, "based upon a review of the Workers' Compensation Division's file, the documents contained therein and submitted, the information adduced at the conference, and the employer and insurer's failure to appear or to be available for the conference," the compensation judge issued a Default Order against the employer and insurer. The order awarded payment of all of the medical benefits at issue excluding without prejudice the bill of Dr. Goldman and the cost of assistance by a personal trainer. The judge found the employee's claims for both of these insufficiently supported "at this time" by evidence submitted. The employer and insurer apply to set aside the judge's default order pursuant to case law and petition for vacation of the judge's award under Minn. Stat. § 176.461.

DECISION

The employer and insurer contend primarily that the default order here at issue should be set aside pursuant to principles articulated in Betts v. M. I. L. Realty Corp., 269 N.W.2d 42, 31 W.C.D. 40 (Minn. 1978). They also contend "[a]lternatively" that this court should vacate the award at issue pursuant to its authority to do so "for cause" under Minn. Stat. § 176.461. Under provisions of that statute, cause to vacate an award exists where the petitioning party can demonstrate that (1) the award was based on "a mutual mistake of fact," (2) there is "newly discovered evidence," (3) the award was obtained by "fraud," or (4) there has been "a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award." Minn. Stat. § 176.461. The employer and insurer contend that the award at issue either was based on a mutual mistake of fact or, if not, was obtained by fraud.

Application to Set Aside the Default Order pursuant to Betts

In determining whether to grant an application to set aside a default award, a Minnesota workers' compensation court exercises judicial discretion of the same kind a trial court exercises in determining whether to vacate a default judgment pursuant to Rule 60.02 of the Minnesota Rules of Civil Procedure. Betts, 269 N.W.2d at 45, 31 W.C.D. at 44. Defining this discretion, the supreme court in Betts quoted an earlier decision to the effect that, in circumstances where an award has been issued by default order, the appellate court

> should relieve a defendant from the consequences of his attorney's neglect in those cases where defendant (a) is possessed of a

> reasonable defense on the merits, (b) has a reasonable excuse for his failure or neglect to answer, (c) has acted with due diligence after notice of the entry of judgment, and (d) shows that no substantial prejudice will result to the other party.

Betts, 269 N.W.2d at 45, 31 W.C.D. at 44, quoting Kosloski v. Jones, 295 Minn. 173, 179, 203 N.W.2d 401, 403 (1972). The employer and insurer contend that they have a reasonable defense on the merits by virtue of Dr. Goldman's conclusion that the employee sustained a reinjury of his back in a softball game in the summer of 1998, which they argue constituted a superseding intervening cause of the employee's current low back condition. They argue that they had a reasonable excuse for their failures to respond and participate by virtue of an innocent misplacement of the employee's records in the long interim between the employee's February 1991 Summary Decision award and his 1999 default award, during which interim the insurer was in the process of undergoing both reorganization and relocation. They argue also that they eventually did respond with due diligence after receiving notice of the order at issue, and they contend that "[a]ny prejudice to the employee for vacating the award . . . for a period of approximately another six months is minimal and seriously outweighed [by] the prejudice to the employer and insurer if they are required to pay medical bills relating to substantial disc herniation caused by a superseding, intervening cause." We are not persuaded.

To begin with, as the employee has argued, this is not, as was the case in Betts, a case in which the appellate court must consider stepping in to ensure that a party's right to a hearing on the merits is not lost as a consequence of neglect on the part of its attorney. In this case, the party itself was repeatedly contacted, and not just by the opposing party but also first apparently by the Department of Labor and Industry and then by the judge himself who finally issued the Default Order, and who issued the order only after giving the party itself direct and personal notice that a default order would be forthcoming in the event of further failure to respond and participate. The employer and insurer have argued with some merit that, in Ford v. Cal Inland, Inc., 49 W.C.D. 122 (W.C.C.A. 1993), this court has previously applied the Betts principles even where the party itself was directly responsible for the failure precipitating the default order. We would emphasize, however, that a party is still less positioned to argue actionable injustice the more direct its notice has been and that the court in Ford, after all, also denied the insurer's motion to set aside the default award, on grounds that it could offer no reasonable excuse for its failure to answer.

With regard to the specific criteria for vacation identified in Betts, we note, as the employee has also argued, that the language in that decision suggests that the moving party must qualify under all four criteria there listed for vacation to be appropriate. The employee essentially concedes that the employer and insurer may have had a reasonable defense on the merits. The employee argues, however, that the employer and insurer had no reasonable excuse for their several failures to participate and sometimes even to offer a good faith response to communications regarding the matters here at issue. He argues also, moreover, that the employer and insurer did not act with due diligence even after issuance of the order here at issue and that substantial prejudice would result from vacation of that order. We agree.

The insurer in this case, or an arguable relative of the insurer - - CNA, was evidently contacted by personnel from the employee's attorney's office regarding these claims no fewer than seven times over the course of the more than four-month period between April 27, 1999, and the employee's September 7, 1999, filing of the medical request here at issue. Only one of those contacts, a telephone contact with CNA, elicited anything resembling a good faith intention to address the employee's claims. Moreover, even the query of the Minnesota Department of Labor and Industry on August 25, 1999, was evidently ignored by the insurer, as essentially were even the several telephone calls by the compensation judge to the insurer and to related agents on the date of the scheduled hearing at which the employer and insurer did not appear.[3] That the insurer when it was contacted in these instances might have expressly deferred participation pending fuller access to the employee's records might not have been unreasonable. But we find very little if any evidence that the insurer was making a good faith effort even to explain its reasons for not participating. Indeed, had any explanation such as the employer and insurer are now making been made to the judge on or immediately after the date of the hearing, or had the judge been asked by the insurer for an extension of time in which to locate the employee's file and other potentially material evidence, the judge may well have refrained at least temporarily from issuing the default order at issue. But no such good faith reply was apparently forthcoming. Moreover, in her affidavit, the employee's attorney asserts that she has now received confirmation from a Carrie at the Center for Diagnostic Imaging that the latter had earlier spoken with a Donna Martin in the insurer's Atlanta office regarding this case. The employee's attorney's affidavit to this effect is evidence that the Atlanta office may have been aware of and handling the matter all along without responding.

With regard to the due diligence and prejudice criteria, we conclude that the insurer had more than ample time even prior to the judge's default order to pursue and perhaps to locate the employee's records and certainly to respond to the employee's claim to medical benefits. That the insurer still did not respond for over two months even after that order negates any claim that it acted with due diligence following the order. Moreover, that same delay in formally appealing from or otherwise responding to the order has only made more substantial the prejudice that will be incurred by the employee by further prolongation through vacation of the order and fuller litigation on the merits. The employer and insurer's argument that prejudice toward <u>their</u> interests exceeds any prejudice toward the employee's interests in this case is not applicable; while the

[3] In an Affidavit submitted together with the Employee's Memorandum Opposing Employer/Insurer's Petition to Vacate, the employee's attorney asserts that, at the medical conference on October 28, 1999, Compensation Judge Cannon personally called and left a detailed voicemail for Ms. Hotaling at the insurer's Atlanta office and also talked personally to Ms. Eidem at CNA's Minnetonka office. Ms Eidem in turn evidently directed the judge to talk with one Pat Savely, who in turn evidently confirmed that Ms. Hotaling was handling the matter and advised the judge to contact Ms. Hotaling's supervisor in Illinois, William Rohan, providing Mr. Rohan's telephone number. Mr. Rohan was evidently not available, but the employee's attorney asserts that the judge left a voicemail message also for Mr. Rohan, advising him that he or one of his representatives should contact the judge regarding the matter or risk issuance of a default decision against the insurer. Nor was any individual to whom the judge spoke apparently willing to handle the conference on behalf of the insurer.

policy underlying the option of vacation of a default order under Betts obviously favors resolution of issues on their merits, potential prejudice toward the petitioning party is not among considerations embraced by the Betts criteria.

In circumstances such as exist in this case, it was certainly within the judge's discretion to issue, particularly upon fair warning, a default judgment against the employer and insurer. Given these circumstances, we cannot conclude that the employer and insurer had "a reasonable excuse for [their] failure or neglect to answer, . . . acted with due diligence after notice of the entry of judgment, and . . . [have shown] that no substantial prejudice will result to the other party." Betts, 269 N.W.2d at 45, 31 W.C.D. at 44.

Mutual Mistake of Fact

The employer and insurer contend also that they are entitled to vacation of the default order here at issue pursuant to authority of Minn. Stat. § 176.461, on grounds that the order was issued based on a mutual mistake of fact. They suggest that Dr. Goldman's conclusion that the employee sustained a reinjury of his low back while playing softball in July of 1998 constitutes an opinion that the employee's low back problems subsequent to July 1998 were not causally related to his 1984 work injury. If that was Dr. Goldman's opinion, if that opinion was not known to the parties and to the judge at the time of the default order here at issue, and if the judge based his decision on a conclusion that Dr. Goldman was of a contrary opinion, an effective argument could certainly be made that the judge's default order was based on a mistake of fact. These three premises, however, are not at all certain.

That Dr. Goldman may have diagnosed a reinjury of the employee's spine at L4-5 in July 1998 does not at all establish that Dr. Goldman was of the opinion that the employee's 1984 work injury was not still a substantial contributing factor in the employee's request for treatment in 1999. Nor is it necessarily clear from the records of Dr. Goldman that were absent at the hearing that the softball reinjury diagnosed by Dr. Goldman was a particularly critical one. The employee had evidently been symptomatic enough with pain and radicular symptoms to be requiring physical therapy for his back as late as April 22, 1998, about three months before the softball reinjury. At the time of that April 1998 therapy, the employee's therapist was also recommending further treatment in the form of continuing trunk-strengthening. According to Dr. Goldman's history, the employee's pain was apparently ranging at that time from about a level 2 to about a level 6 on a scale of 1 to 10. Although the employee's pain level apparently spiked up to about a level 10 at the time of the softball incident in July 1998, by the time of Dr. Goldman's examination in December 1998 the employee's pain had once again receded to a range of about a level 4 to about a level 5 and even down to a level 3 with medication. Although the employee's October 1998 MRI revealed substantial changes in his spine since his 1989 MRI, the history of the employee's symptomology as reported by Dr. Goldman does not necessarily compel relating all or even any of these changes to an event in July 1998, given the similarity between the employee's range of pain in April 1998 and his range of pain in December 1998. Nor, in fact, does Dr. Goldman presume to opine expressly such a specific correlation.

Whatever the parties may or may not have known about Dr. Goldman's opinion at the time of the default order, there is no indication that the compensation judge based his conclusion in any way on, or otherwise relied on, any presumption as to Dr. Goldman's opinion. Indeed, the judge denied the employee's claim to payment for Dr. Goldman's treatment expressly because the judge had no records of Dr. Goldman to review. Moreover, although the judge may have made his decision absent not only the opinion of Dr. Goldman but also the facts as to the July 1998 softball reinjury, we find no evidence that the judge was actually mistaken as to any potentially dispositive matters of fact.

Fraud

Finally, the employer and insurer contend that, if the employee was not mistaken about the substance of Dr. Goldman's opinion, then his failure to present records manifesting that opinion or to report that substance to the judge constituted fraud. We do not agree.

Although legal opponents may have an ethical obligation to acknowledge the existence of law that is clearly contrary to their position, legal opponents are not obligated to develop their opposition's case by identifying and offering in their opponent's stead every piece of evidence potentially useful to defend against their own position. This is particularly true where, as is here the case, the referenced factual evidence is far less than dispositive. Moreover, and here very importantly, the employee's attorney has stated definitively in her Affidavit that she had not yet received for even her own review, at the time of the hearing before the compensation judge, the records of Dr. Goldman that are here alleged to have been fraudulently withheld. This sworn statement of the employee's attorney is itself evidence that the attorney was not intentionally withholding presentation of the evidence at issue, even if it might not have been improper for her to do so. And we accept and credit that evidence. Moreover, the employee was always available for cross-examination by the employer and insurer with regard to his condition, the history that he reported to Dr. Goldman, and his understanding as to the nature of Dr. Goldman's opinion. The employer and insurer were repeatedly invited, and in fact affirmatively asked, to participate in the litigation process, which would have facilitated such cross-examination, but they elected not to. In these circumstances, we find no evidence that either the employee or his attorney was involved in any attempt to defraud the workers' compensation system.

Concluding that the employer and insurer have not met the criteria for vacation of a default order as outlined in Betts v. M. I. L. Realty Corp., 269 N.W.2d 42, 31 W.C.D. 40 (Minn. 1978), and concluding also that they have not demonstrated sufficient cause for vacating the judge's decision on grounds of either mutual mistake of fact or fraud pursuant to Minn. Stat. § 176.141, we deny the employer and insurer's Application to Set Aside and Petition to Vacate the Decision and Order pursuant to Minn. Stat. § 176.106 served and filed in this matter on November 1, 1999.