JEFFREY L. CAMPBELL, Employee, v. INDEP. SCH. DIST. #191, SELF-INSURED/BERKLEY RISK ADMIN. CO., Employer/Appellants, and HEALTHPARTNERS, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 15, 2001

No. [REDACTED SSN]

HEADNOTES

PETITION TO DISCONTINUE; PERMANENT TOTAL DISABILITY. A petition to discontinue permanent total disability benefits paid pursuant to an award on stipulation, like a petition to vacate an award on stipulation, must be filed with the Workers' Compensation Court of Appeals. The compensation judge properly dismissed the self-insured employer's petition to discontinue permanent total disability benefits for lack of subject matter jurisdiction.

Affirmed.

Determined by: Johnson, J., Rykken, J., and Pederson, J.
Compensation Judge: Bernard Dinner

OPINION

THOMAS L. JOHNSON, Judge

Independent School District #191, self-insured, with claims administered by Berkley Risk Administration Company, appeals the compensation judge's order denying its petition to discontinue payment of permanent total disability benefits to the employee. We affirm.

BACKGROUND

Jeffrey L. Campbell, the employee, sustained an injury to his low back while working as a janitor for Independent School District #191 on August 2, 1989. The employee was earning a weekly wage of $521.08. The self-insured employer accepted liability for the employee's personal injury and paid wage loss and medical benefits. Thereafter, the employee sustained a claimed consequential psychological injury. The self-insured employer paid medical benefits for the care and treatment of that injury as well.

In December 1993, the parties entered into a Stipulation for Settlement. The employee contended he was permanently and totally disabled from the effects of his August 2, 1989 low back injury and consequential psychological condition. The self-insured employer contended the employee was not permanently and totally disabled but was capable of gainful employment. In the settlement, the self-insured employer and the Special Compensation Fund admitted the employee was permanently and totally disabled as of August 2, 1989. The parties

acknowledged the employee had received Social Security disability benefits since February 1990, and that the self-insured employer would be entitled to an offset after $25,000.00 in permanent total disability benefits had been paid to the employee, which they stipulated occurred as of December 1990. The parties further stipulated the employee was entitled to supplementary benefits at the rate of $299.00 a week commencing August 2, 1993. The self-insured employer then agreed it would "continue to pay the employee appropriate reduced permanent total disability and supplementary benefits from and after December 1, 1993 as his disability shall warrant." (Stip. ¶ VIII.4.) At paragraph VIII.8. the parties agreed as follows:

> In addition, notwithstanding the stipulated facts that the employee is permanently and totally disabled from August 2, 1989, any significant improvement in the employee's medical or psychological condition will constitute prima facia evidence that he is no longer permanently and totally disabled and may be grounds on which to vacate this Stipulation for Settlement.
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> An Award on Stipulation was filed on December 10, 1993.

On May 5, 2000, the self-insured employer filed a Petition to Discontinue Workers' Compensation Benefits at the Department of Labor and Industry, seeking to discontinue permanent total disability benefits being paid to the employee pursuant to the Award on Stipulation. In support of its petition, the self-insured employer attached a report of an independent medical examination conducted by Dr. Mark E. Friedland in which the doctor concluded the employee was capable of full-time employment. The petitioner also included the report of an examination of Dr. J.M. Rauenhorst who opined the employee's psychological condition had improved to the point that he was no longer permanently and totally disabled.

The self-insured employer's petition to discontinue was heard by a compensation judge at the Office of Administrative Hearings on August 9, 2000. In a Findings and Order filed August 28, 2000, the compensation judge dismissed the petition to discontinue benefits, concluding the self-insured employer was required to file a petition to vacate with the Worker's Compensation Court of Appeals to discontinue permanent total disability benefits. The self-insured employer appeals.

STANDARD OF REVIEW

"[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 self-insured employer appeals the compensation judge's dismissal of its petition to discontinue permanent total disability benefits. The appellant argues the compensation

judge erroneously concluded the judge lacked jurisdiction to grant or deny its petition to discontinue. The appellant therefore requests this court remand the case to the Office of Administrative Hearings to decide the underlying issue of entitlement to permanent total benefits.

The appellant contends the compensation judge has jurisdiction to consider its petition under either Minn. Stat. § 176.238 or Minn. Stat. § 176.291. Minn. Stat. § 176.238, subd. 1, provides, in part: "Except as provided in section 176.221, subdivision 1, 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 statute provides two procedures for discontinuing benefits, a notice of intention to discontinue (NOID) or a petition to discontinue. The statute then details the procedures for resolution of requests by the employer and insurer to discontinue benefits. Subdivision 11 of the statute, however, explicitly states: "This section shall not apply to those employees who have been adjudicated permanently totally disabled, or to those employees who have been administratively determined pursuant to division rules to be permanently totally disabled."[1] In Cook v. J. Mark, Inc., No. [REDACTED SSN] (W.C.C.A. Oct. 11, 1994) this court held an award on stipulation constitutes an "adjudication" within the meaning of Minn. Stat. § 176.238, rendering that provision inapplicable for the purpose of discontinuing permanent total disability benefits to an employee receiving those benefits pursuant to an award on stipulation.

In Behrens v. City of Fairmont, 53 W.C.D. 20 (W.C.C.A. 1995), *reversed on other grounds*, 533 N.W.2d 854, 53 W.C.D. 41 (Minn. 1995), this court again held that where an employee has been found permanently and totally disabled through an adjudication, including an award on stipulation, an employer and insurer may not discontinue benefits under Minn. Stat. § 176.238 or § 176.239. The court noted prior case law indicated a petition to vacate under Minn. Stat. § 176.461 was the proper procedure for discontinuing permanent total disability benefits where there has been an adjudication of permanent total disability status. The court acknowledged, however, that discontinuance cases do not fit neatly within the statutory definitions of "cause" contained in Minn. Stat. § 176.461, and referred the case to the Office of Administrative Hearings for a factual determination of whether the employee remained permanently and totally disabled.[2]

The court returned to this issue in Ramsey v. Frigidaire Co. Freezer Prods., 58 W.C.D. 411 (W.C.C.A. 1998) and Haberle v. Erickson Mills, Inc., 58 W.C.D. 478 (W.C.C.A. 1998). In these cases, the court reiterated that because the discontinuance procedures in Minn. Stat. §§ 176.238 and 176.239 do not apply in permanent total disability cases, the employer and insurer's sole recourse is a petition to the Workers' Compensation Court of Appeals. The court determined, however, that a petition to vacate the award on stipulation, for cause, under Minn. Stat. § 176.461 is not the sole remedy, holding that where the stipulation for settlement contains language demonstrating the parties intended that benefits would be continued only so long as the

[1] See also Minn. Stat. § 176.239, subd. 10.

[2] In the Behrens case, the two dissenting judges suggested the employer and insurer could, in some instances, file a petition under Minn. Stat. § 176.291 to raise the issue of an employee's entitlement to ongoing permanent total disability benefits.

employee remained permanently and totally disabled, the court could consider a petition to discontinue permanent total disability benefits. As in a petition to vacate, this court may grant or deny the petition for discontinuance, without setting aside the entire award on stipulation, based on the documents submitted in support of, or opposition to, the petition.[3] Or the court may refer the petition to the Office of Administrative Hearings for a factual hearing if sufficient evidence of the employee's ability to work is presented by the employer and insurer, and not rebutted by the employee, raising substantial questions about the employee's ability or inability to work at the present time. Compare, e.g., Haberle, id., Ramsey, id., Moe v. DIDD, Inc., No. [REDACTED SSN] (W.C.C.A. Oct. 10, 2000).

The appellant here asks this court to reverse its holdings in Behrens, Ramsey and Haberle, arguing a petition to this court constitutes an extra, unnecessary step in the process. Rather, the appellant contends it should be able to directly petition to discontinue and litigate the issue of the employee's continuing right to permanent total benefits at the Office of Administrative Hearings. We are not persuaded.

In their settlement agreement, the parties stipulated the employee was permanently and totally disabled as of August 2, 1989. They further agreed the self-insured employer would pay permanent total disability benefits to the employee "as his disability shall warrant." Clearly, the parties intended the employee would receive benefits only for so long as he remained permanently and totally disabled. The self-insured employer contends the employee's medical condition has improved to the point that he is now able to work. The appellant does not seek to vacate the award under Minn. Stat. § 176.461, rather it petitions only to discontinue the employee's permanent total disability pursuant to the terms of the settlement agreement.

We find no compelling reason to adopt the appellant's position and permit an employer or insurer to initiate a petition to discontinue benefits at the Office of Administrative Hearings under Minn. Stat. § 176.291. In most instances, a petition to vacate the award on stipulation is the proper mechanism by which to challenge permanent total disability paid pursuant to a stipulation for settlement. See, Behrens, 53 W.C.D. 20. A petition to discontinue permanent total disability benefits, such as the case now before us, frequently involves an assertion of misrepresentation of the employee's ability to work or a claim that the employee's condition has improved such that the employee is now able to work. Such claims are similar to "cause" for setting aside and vacating an award: mistake of fact, newly discovered evidence, fraud or a substantial change in medical condition since the time of the award. See Minn. Stat. § 176.461. Similarly, in a petition to discontinue permanent total disability benefits, the employer or insurer is, in essence, seeking a vacation or setting aside of that portion of the parties' stipulation for settlement requiring payment of permanent total disability benefits. This court, not the Office of Administrative Hearings, has jurisdiction over petitions to vacate and set aside an award.

With either procedure before this court - whether a petition to vacate the award on stipulation or a petition to discontinue permanent total disability benefits - this court first considers,

[3] See Minn. R. 9800.1400, Applications, Petitions, and Motions. Compare Minn. R. 9800.1100, Application to Set Award Aside and Grant a New Hearing.

based on documentation submitted by the parties with the petition, whether the employer or insurer has established sufficient evidence that the employee's ability to work is different from that accepted by the parties at the time of the stipulation. If the petition is granted or denied, no further hearing is required. This court will refer the case for a hearing at the Office of Administrative Hearings *only* if the documentation "rais[es] substantial questions about the employee's ability or inability to work at the present time." Moe at 2; Haberle at 484. There is nothing in this process that makes consideration of the petition by this court merely an "extra, unnecessary step" prior to an evidentiary hearing on the claim.

Finally, we recognize the potential impact on an employee of a petition to discontinue permanent total disability benefits. Not only are future benefits at issue, but - if the appellant's procedure was adopted - the employee would also bear the cost of defending each and every petition, and possibly multiple petitions to discontinue permanent total disability benefits at an evidentiary hearing at the Office of Administrative Hearings. Accordingly, we affirm the compensation judge's dismissal of the self-insurer's petition to discontinue, and hold petitions to discontinue permanent total disability benefits must be filed with the Workers' Compensation Court of Appeals.