

RAUL HERNANDEZ, Employee/Appellant, v. BERGERSON CASWELL, INC., and HARTFORD INS. GROUP, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 6, 2001

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - DISMISSAL; NOTICE OF DISCONTINUANCE. Although the NOID was statutorily deficient, the compensation judge did not err in denying the employee's motion to dismiss the NOID/Employee's Objection to Discontinuance where the NOID provided sufficient notice to the employee and his attorney of the claimed basis for the discontinuance allowing the employee to assert any entitlement claimed to continuing wage loss benefits.

TEMPORARY TOTAL DISABILITY - REFUSAL OF JOB OFFER. The evidence and law does not support the judge's determination that reasonable grounds existed to discontinue the employee's temporary total disability benefits based on an unreasonable refusal of an offer of gainful employment from the employer.

Affirmed in part and reversed in part.

Determined by: Johnson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Janice M. Culnane

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's decision discontinuing temporary total disability benefits after November 7, 2000. We reverse.

BACKGROUND

Raul Hernandez, the employee, was injured in a motor vehicle accident on July 26, 2000, while working for Bergerson Caswell, Inc., the employer. The employer and its insurer admitted liability for the employee's personal injury and commenced payment of temporary total disability benefits effective July 27, 2000.

Following the injury, the employee received chiropractic treatment to his cervical, thoracic and lumbar spine. On July 28, 2000, his treating chiropractor, Marshall A. Harris, D.C., took the employee off work through August 26, 2000. On September 25, 2000, Dr. Harris noted the employee was moving to Arizona and would be starting treatment there. He completed a report of work ability indicating the employee remained unable to work through September 26, 2000.

On September 7, 2000, John M. Wildenauer, D.C., examined the employee at the request of the employer and insurer. The doctor diagnosed soft tissue injuries to the employee's cervical, thoracic and lumbar spine secondary to the July 26, 2000 motor vehicle accident. Dr. Wildenauer opined the employee was able to return to work in a light-duty capacity subject to restrictions, including no lifting over 25 pounds, no repetitive bending, and frequent position changes. The doctor stated further chiropractic care was neither reasonable nor necessary, but opined the employee had not yet reached maximum medical improvement.

At the time of his injury, the employee was living in Minnesota with his brother. On September 21, 2000, the employee had a telephone conversation with James Kautio, the adjustor handling the employee's claim at Hartford Insurance Group. The employee told Mr. Kautio that he was moving to Arizona. Mr. Kautio advised the employee that the employer was reviewing work restrictions and might possibly have work for him. They also discussed establishing an account at the Wells Fargo Bank in Arizona for direct deposit of checks.

John Henrich, the president of the employer, testified he received Dr. Wildenauer's report from James Kautio on September 21 or 22, 2000. Mr. Kautio also advised Mr. Henrich the employee was planning to move back to Arizona. Mr. Henrich discussed Dr. Wildenauer's report with Rick Nash, the employee's supervisor, and they identified light-duty work that was available. Mr. Nash telephoned the employee on Sunday, September 24, 2000, and told him to come in on Monday morning. On Monday, September 25, the employee's brother told Mr. Nash the employee's doctor had not released him to return to work and the employee was leaving for Arizona the next day. The employee came in on Tuesday, September 26, and spoke to Mr. Nash. They discussed light-duty work but the employee told Mr. Nash he was going back to Arizona. The employee testified he actually left for Mesa, Arizona, on September 27, 2000.

On September 26, 2000, Mr. Kautio prepared and mailed to the employee a Notice of Intention to Discontinue Workers' Compensation Benefits (NOID). The stated basis for the respondent's NOID was: "Employee released from care with work restrictions. Employer had work available within the medical restrictions effective 09/25/00 and advised the employee. He has not contacted the employer nor has he come to work 9/25/00 or 9/26/00. Overpay TTD \$279.47." On October 16, 2000, the employee retained Scot P. Heins & Associates to represent him.

An administrative conference was held on November 7, 2000, before Compensation Judge James F. Cannon at the Settlement Division of the Office of Administrative Hearings. In an Order on Discontinuance filed November 15, 2000, the compensation judge stated the employee contended he was not served with a copy of Dr. Wildenauer's medical report when he was served with the NOID. The judge further stated "a review of the Division file supported the employee's contention that the IME report had not been attached to the NOID, as required pursuant to Minn. Stat. § 176.238, subd. 1." The judge then stated he made "no determination as to whether or not the employee should have returned to work for the employer within Dr. Wildenauer's work restrictions, or whether or not the employee removed himself from the labor market by not attempting to return to work for the employer and moving to Mesa, Arizona." The compensation judge, however, concluded the employee failed to establish he had work

restrictions or was disabled from returning to work due to his personal injury. Accordingly, the compensation judge discontinued the employee's benefits citing Kautz v. Setterlin, 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987).

The employee then filed an Objection to Discontinuance which was heard by Compensation Judge Janice M. Culnane on February 1, 2001.¹ In a Findings and Order filed March 21, 2001, the compensation judge found the NOID was served on the employee on September 26, 2000, without medical reports attached. The judge found, however, the medical report of Dr. Wildenauer was presented and discussed at the administrative conference held on November 7, 2000. The compensation judge further found the employer had work available for the employee within his restrictions from September 24, 2000 through the date of the hearing. The compensation judge also found the employee moved to Arizona on or about September 27, 2000. The compensation judge determined that reasonable grounds existed to discontinue the employee's workers' compensation benefits effective November 7, 2000. Finally, the compensation judge concluded she lacked jurisdiction to determine whether Judge Cannon had jurisdiction to discontinue the employee's benefits.

DECISION

NOID - Failure to Attach Medical Report

The employee asserts that Compensation Judge Cannon lacked jurisdiction to issue an administrative decision under Minn. Stat. § 176.239. The employee argues that because the medical report of Dr. Wildenauer was not attached to the NOID, contrary to Minn. Stat. § 176.238, subd. 1,² the NOID was defective and of no force and effect. Thus, appellant argues, Judge Cannon should have dismissed the employer's NOID.

Following service of the NOID, the employee requested an administrative conference under Minn. Stat. § 176.239. An administrative conference is "a meeting conducted by a commissioner's designee where parties can discuss on an expedited basis and in an informal setting their viewpoints concerning disputed issues arising under sections 176.102, 176.103, 176.135, 176.136, or 176.239." Minn. Stat. § 176.011, subd. 27. An administrative conference is not the equivalent of an evidentiary hearing and is not intended to be a forum for the adjudication of disputed questions of fact or law. See Alberts v. Midwest Nat'l, 57 W.C.D. 189 (W.C.C.A. 1997). Accordingly, a party who disagrees with the commissioner's decision regarding a discontinuance of benefits is entitled to an evidentiary hearing before a compensation judge under Minn. Stat. § 176.238, subd. 4(d).

¹ The employee's testimony was taken by telephone with the assistance of a Spanish interpreter. (T. 5, 18.)

² Minn. Stat. § 176.238, subd. 1 states, in part: "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."

Following the administrative decision, the employee did file an Objection to Discontinuance seeking a *de novo* hearing to determine entitlement to further compensation. At the hearing before Compensation Judge Culnane, the employee again moved to dismiss the NOID contending it was null and void because the report of Dr. Wildenauer was not attached as required by statute. On appeal, the employee argues the compensation judge erroneously failed to dismiss the NOID. We disagree.

The discontinuance provisions are designed to ensure that employers and insurers do not discontinue payment of compensation without giving the employee notice of their intended action and an adequate explanation of the reasons for it. Even though statutorily deficient, an NOID is not fatally defective, so long as the employee and his attorney have sufficient notice to allow them to take the necessary steps to protect the employee's claim to ongoing wage loss benefits. Woelfel v. Plastics, Inc., 371 N.W.2d 215, 38 W.C.D. 43 (Minn. 1985); Barlau v. Prudential Ins. Co., 60 W.C.D. 426 (W.C.C.A. 2000); Leininger v. Dayton Hudson Corp., slip op. (W.C.C.A. Aug. 9, 2000). Basic fairness requires that parties be afforded reasonable notice and an opportunity to be heard before decisions concerning entitlement to benefits are made. Kulankamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). What constitutes the provision of adequate notice of a proposed discontinuance is generally a question of fact.

Here, the NOID clearly indicated the basis for the discontinuance was the employer's assertion that the employee had been released with work restrictions and that the employer had work available for the employee within these restrictions as of September 25, 2000. Although the NOID did not specifically refer to Dr. Wildenauer's report, nor was a copy of the report attached, the employee's attorney received a copy of Dr. Wildenauer's report on November 6, 2000. The report was presented and discussed at the administrative conference on November 7, 2000. The employee filed his Objection to Discontinuance November 22, 2000, and the hearing before Judge Culnane was held on February 1, 2001. The employee and his attorney had reasonable notice of the proposed discontinuance and ample time to prepare for the hearing before the compensation judge. We are satisfied that the compensation judge's denial of the employee's motion to dismiss the NOID was not legally erroneous on the facts of this case.

Temporary Total Disability - Discontinuance

The compensation judge found the employer had work available within the employee's restrictions, from September 24, 2000 through the date of hearing, and discontinued the employee's temporary total disability benefits effective November 7, 2000. The judge concluded that because the employer had work available that was within the employee's restrictions, the employee had to either accept the job offered by the employer or have his benefits discontinued. (Findings 6, 9, Mem. at 4.) Based on the facts in this case we cannot agree.

Minn. Stat. § 176.101, subd. 1(i) provides that "[t]emporary total disability compensation shall cease if the employee refuses an offer of . . . gainful employment that the employee can do in the employee's physical condition. Once temporary total disability compensation has ceased under this paragraph, it may not be recommenced." However, an employee's refusal of employment does not invariably bar receipt of temporary total disability benefits if the refusal or

failure to accept employment is reasonable under the circumstances. See Shogren v. Bethesda Lutheran Medical Ctr., 359 N.W.2d 595, 37 W.C.D. 302 (Minn. 1984); Volner v. Cub Foods, 41 W.C.D. 319 (W.C.C.A. 1988); Leigh v. Dolphin Temporary Staffing, slip op. (W.C.C.A. Sept. 3, 1998).

The employee's move to Mesa, Arizona is a key factor in this case. The employee was not originally from Minnesota. He testified that his children, mother and grandmother lived in Arizona, the cold weather in Minnesota was aggravating the problems with his back, and he wanted to return to Arizona to continue his treatment close to his family.

John Henrich, the president of the employer, testified he received a copy of Dr. Wildenauer's report on September 21 or 22 from Mr. Kautio, who also advised him of the employee's plan to return to Arizona. Mr. Henrich testified that it was their policy to return injured employees to light duty work "as outlined by the treating physician," and indicated they always have a lot of "light-duty work" available.

On Sunday, September 24, the employee's supervisor, Rick Nash, telephoned the employee. He told the employee to come in on Monday morning and that they had a release form allowing him to come back to light-duty work. The employee's brother spoke to Mr. Nash on Monday, September 25, and told Mr. Nash that the employee's doctor had not released him to return to work and the employee was leaving for Arizona the next day. The employee appeared at the employer's offices on Tuesday, September 26, and spoke to Mr. Nash. Although they discussed light-duty work generally, Mr. Nash testified he did **not** talk about or describe the type of work they had available because the employee intended to go back to Arizona. At the time of the employee's discussions with the employer, the employee's treating chiropractor had continued him off work. There is no evidence that Dr. Wildenauer's restrictions were discussed with or provided to the employee at that time, and the employee did not become aware of the contents of Dr. Wildenauer's report until at least November 7, 2000, well after the employee's return to Mesa, Arizona, on September 27, 2000.³

On these facts, we conclude the employee did not unreasonably "refuse[] an offer of . . . gainful employment." Compare, e.g., Volner, *id.* The compensation judge's discontinuance of benefits is, therefore, reversed.

³ The compensation judge found there was no evidence of a job search after the employee's move to Arizona. (Finding 7.) Issues in an expedited hearing under Minn. Stat. § 176.238, subd. 6, are limited to those raised in the NOID or objection to discontinuance. Job search was never an issue in this case and the compensation judge lacked jurisdiction to raise or determine the issue. The finding is, accordingly, vacated.