MARLIN (MIKE) ROY, Employee, v. GAS SUPPLY, INC. and OLD REPUBLIC INS. CO., Employer-Insurer, and COMM'R, MN DEP'T OF LABOR & INDUS., Petitioner.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 6, 2001

No. [REDACTED SSN]

HEADNOTES

JURISDICTION - MOOTNESS. Where the employer and insurer and the employee settled their dispute after the matter was returned to the Workers' Compensation Court of Appeals from the Minnesota Supreme Court, the issue raised by the Department of Labor and Industry is moot.

Petition of DOLI denied; vacates prior WCCA decision.

Determined en banc.

OPINION

STEVEN D. WHEELER, Judge

On remand from the Minnesota Supreme Court, the Commissioner of the Department of Labor and Industry, hereinafter "the Commissioner" and "the Department," requests that this court's November 29, 2000 decision be reversed and that we hold that the Commissioner may delegate to a Department mediator/arbitrator the authority to conduct administrative conferences and to issue determinations under Minn. Stat. § 176.106 (2000). We vacate our earlier decision and determine that the issue raised by the Department is moot as a result of the recent settlement of all disputes between the employee and the employer in this matter.

BACKGROUND

The employee, Marlin (Mike) Roy, sustained an admitted low back injury and burns on November 26, 1994, while employed by Gas Supply, Inc., the employer, as a construction laborer. At the time of the injury, the employee was 56 years of age. An MRI was performed in early 1995 which disclosed a bulging disc at the employee's spinal level L5-S1 and a herniated disc at level L4-5. The employee was treated by Dr. Thomas Rieser, an orthopedist, who placed him on various lifting restrictions. The employee apparently last worked for the employer in May of 1995.

In August 1999, the employee returned to see Dr. Rieser on a referral from his family physician because he was experiencing an increase in low back pain. Dr. Rieser recommended that conservative treatment in the form of epidural injections and a TENS unit be tried before considering the possibility of surgery.

The employer and insurer refused to approve the proposed treatment and on October 27, 1999, the employee filed a medical request seeking payment. The employer and insurer filed a response, questioning whether there was a causal relationship between the November 26, 1994 injury and the proposed treatment, alleging that the employee had not sought any treatment for his low back between 1995 and 1999 and that possibly other work activities may have caused his flare-up.

The Department scheduled an administrative conference pursuant to Minn. Stat. § 176.106 on January 19, 2000, to consider the dispute. The Commissioner designated mediator/arbitrator Mark McCrea, an employee of the Department, to preside over the conference as her representative. Following the conference, Mr. McCrea issued a decision and order in which he found that the treatment recommended by Dr. Rieser was reasonable and necessary and causally related to the 1994 admitted injury and ordered payment. The employer and insurer filed a request for a formal hearing at the Office of Administrative Hearings. The request was filed with the Department. The Department's date stamp indicates that the request was received by them on March 10, 2000. On May 18, 2000, Compensation Judge Catherine A. Dallner, at the Office of Administrative Hearings, issued an order dismissing the request for formal hearing on the basis that "the Request for Formal Hearing was received on March 10, 2000 by the Department of Labor & Industry," which was "greater than 30 days from the date of the Decision and Order and is untimely." The employer and insurer appealed from the compensation judge's order dismissing the request on the basis that the request had actually been received on a timely basis on March 9, 2000.

On September 15, 2000, this court issued an order stating that the issue of "[w]hether a Mediator/Arbitrator with the Minnesota Department of Labor and Industry had jurisdiction to issue a Decision and Order under Minn. Stat. § 176.106 may be an issue in this case" and indicating that the Commissioner may wish to submit a brief on the issue. The order indicated that "[w]ithin 30 days of the date of this Order, any party and the Commissioner of the Department of Labor and Industry may file with the court a brief on the issue of jurisdiction." A copy of the order was served on each of the parties and on the Department of Labor and Industry. No brief or other correspondence was received from the Commissioner or the Department, and the matter was set for oral argument on November 16, 2000. A copy of the notice of oral argument was also served on the Department on October 9, 2000. At oral argument, only the employer and insurer were represented by counsel. No appearance was made by the Department. The court considered the issues of (1) whether the original decision by mediator/arbitrator McCrea was void because he did not have jurisdiction to issue a decision on behalf of the Commissioner and (2) whether the employer and insurer's request for formal hearing was filed with the Department within 30 days after the issuance of the mediator/arbitrator's decision. This court found it unnecessary to resolve the question of whether the request had been filed in a timely fashion because it determined that the original order by the mediator/arbitrator was void.

In our decision, we relied on the language contained in Minn. Stat. § 176.445, which indicated that the Commissioner could delegate the authority to make determinations under Minn. Stat. § 176.106 only to compensation judges.

Following the issuance of this court's decision on November 29, 2000, the Department, on December 14, 2000, filed a writ of certiorari with the Minnesota Supreme Court, requesting that this court's decision be reviewed as it was not in conformity with the terms of the workers' compensation act and was unwarranted by the evidence. In its order of January 12, 2001, the supreme court stated as follows:

> IT IS HEREBY ORDERED that the writ of certiorari in the above-entitled matter be, and the same is, discharged and the matter remanded for reconsideration. The Commissioner, Minnesota Department of Labor and Industry, has sought review of certiorari of a decision of the Workers' Compensation Court of Appeals filed November 29, 2000. The employer and insurer in this workers' compensation matter had appealed to the Workers' Compensation Court of Appeals from a compensation judge's order dismissing a request for a formal hearing. By order dated September 15, 2000, the Workers' Compensation Court of Appeals notified the commissioner of its interest in the matter and allowed 30 days in which to intervene and file a brief, but the commissioner failed to do so. The commissioner asserts that neither the department nor the commissioner received the Workers' Compensation Court of Appeals' order of September 15, 2000. Given the assertion of nonreceipt, we conclude that the matter ought to be remanded to the Workers' Compensation Court of Appeals for purposes of permitting submission of evidence concerning nonreceipt of the order giving the commissioner notice of its interest and thereafter permitting, in light of such evidence, the Workers' Compensation Court of Appeals to reconsider the decision under review. *See Fuller v. Farmers' Coop. Oil Ass'n,* 322 N.W.2d 359, 361 (Minn. 1982); Minn. Stat. § 176.285 (2000). If the Workers' Compensation Court of Appeals, after doing so, adheres to its earlier ruling, then the commissioner may, if it chooses, reinstate the writ of certiorari.

On the basis of the supreme court's order, the Commissioner filed, with this court, a notice of motion and motion to intervene in the dispute between the employee and the employer and insurer. This court ordered that the Commissioner may submit evidence to the Workers' Compensation Court of Appeals concerning non-receipt of the court's September 15, 2000 order.

The Commissioner submitted evidence along with a brief in support of the evidence. Following review of the Commissioner's evidence and the brief, this court determined that the Commissioner's petition to intervene should be granted and that the Commissioner be made a party to the dispute between the employee and the employer and its insurer.

On March 13, 2001, the employer and insurer and the employee submitted an executed Stipulation for Settlement, in which the employee fully, finally and completely released the employer and insurer of any and all claims that he may have under the workers' compensation act, except for the right to "reasonable and necessary causally related non-chiropractic and non-

psychiatric/non-psychological medical treatment and expense" in the future. The settlement specifically released the employer and its insurer from any obligation for the payment of past medical expenses. On March 15, 2001, the court issued an Award on Stipulation, in which it found that the settlement was fair, reasonable and in conformity with the workers' compensation act. The court ordered that the stipulation be approved and that payments set forth by the terms of the stipulation be made, and that the appeal of the employer and insurer be dismissed.

Because the Award on Stipulation did not reverse this court's November 29, 2000 decision, the Commissioner requested that she be permitted to present arguments to the court concerning why the court should reconsider its decision. The Commissioner contended that as a party/intervenor she had the right to present arguments to the court pursuant to the order of the Minnesota Supreme Court. The court determined that the Commissioner be permitted to file an appellate brief and the matter was heard before the full court in oral argument on May 9, 2001.

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 Commissioner has requested that this court reconsider its November 29, 2000 decision on the merits of the issue of whether Minn. Stat. § 176.445 limits the Commissioner to assign only compensation judges to preside over administrative conferences held under Minn. Stat. § 176.106. The Commissioner argues that Minn. Stat. § 176.445, upon which this court relied in its earlier decision, was superseded by Minn. Stat. § 175.16 (1996).

It would be inappropriate for the court to rule on the jurisdictional issue raised in our earlier decision. Since the underlying dispute between the employee and the employer and insurer has been settled, there is no further basis for this court to assume jurisdiction over this case. Black v. Honeywell, Inc., (W.C.C.A. 2/28/96) citing Izaak Walton League of Am. Endowment, Inc. v. State, Dep't of Natural Resources, 252 N.W.2d 852, 854 (Minn. 1977). The court has refrained from issuing advisory opinions in the past and chooses not to do so at this time. Herrly v. Walser Buick, Inc., 47 W.C.D. 670,675 (W.C.C.A. 1992), Froland v. Am. Hardware Ins. Co., (W.C.C.A. 10/10/96). As a result, we conclude that the issue considered in our earlier decision and the one which the Commissioner has requested we revisit is moot. Makitalo v. Sears, Roebuck & Co., (W.C.C.A. 5/9/95). Our earlier decision of November 29, 2000 is hereby vacated and has no force and effect. The Commissioner's request that we revisit and reconsider the issue and make a ruling is denied, as there is no longer a dispute concerning an employee's entitlement to benefits.