

STATE OF WISCONSIN

PERSONNEL COMMISSION

\*\*\*\*\*

HERBERT KRUSCHE,

Appellant,

v.

Secretary, DEPARTMENT OF JUSTICE,

Respondent.

Case No. 80-152-PC

\*\*\*\*\*

DECISION  
AND  
ORDER

**OFFICIAL**

NATURE OF THE CASE

This is an appeal of the denial of benefits under § 230.36(1), Wis. Stats., for a work related injury. A hearing on this case was held by Commissioner Gordon H. Brehm in Milwaukee on December 19, 1980, and the parties submitted post-hearing briefs.

FINDINGS OF FACT

1. At all times relevant to the matters contained herein, appellant was employed by the Department of Justice's Division of Criminal Investigation.

2. Appellant was injured when he slipped on snow and ice and fell while participating in nighttime target practice for the Department of Justice near Baraboo on November 12, 1979.

3. Appellant worked the following day and reported the injury to his employer. He began treatment with Dr. Bruce Brewer on November 16, 1979 and was under the care of Dr. Brewer from that date up to and including the date of hearing on the case.

4. Appellant was treated by Dr. Brewer on November 16, December 11, and December 24, 1979 when Dr. Brewer released him to return to work on December 27, 1979 (Appellant's Exhibits 1,2,3).

5. Appellant returned to work on December 27, 1979 and worked until February 14, 1980. Following a 30-day suspension and voluntary demotion to the position of special agent, Krusche returned to work as a special agent with the DOJ General Investigations Bureau on March 17, 1980 (Resp. Exh. 7).

6. Appellant was examined by Dr. Brewer on February 21, 1980. As a result of that examination, Dr. Brewer found, "I am not able to document the degree of disability that the patient manifests on objective examination. There is, however, no doubt in my mind that the patient is disabled." (App. Exh. 4).

7. Appellant was examined by Dr. David S. Haskell on April 9, 1980. Dr. Haskell reported, "We feel the patient is capable of continuing to work as an investigator." (Resp. Exh. 5)

8. On April 22, 1980, appellant was advised by Richard Brainerd, DOJ personnel director, that future benefit requests under § 230.36 would be denied. On April 24, 1980, Krusche was advised that respondent had scheduled him to be examined by Dr. Thomas E. Ryan on June 3, 1980. Appellant's last day of work for respondent was on May 28, 1980. (Resp. Exh. 7)

9. In a letter received by the Commission on May 20, 1980, appellant filed an appeal of the denial of benefits under §230.36, Wis. Stats.

10. At the beginning of the hearing, the parties agreed to the following issue for this appeal: "Whether appellant is eligible for benefits under § 230.36 for a work related injury suffered on November 12, 1979 from May 29, 1980 and thereafter."

11. Appellant was examined by Dr. Thomas E. Ryan on June 3, 1980 (Resp. Exh. 2,3).

12. Appellant was examined by Dr. Brewer on May 15, July 16, and August 21, 1980 (Appellant's Exh. 5,6,7).

13. Appellant offered to return to work in September, 1980, but was not permitted to do so by respondent when Dr. Brewer refused to sign a medical release form (Appellant's Exh. 10,11).

14. Appellant had a CT scan of the lumbar spine on September 11, 1980. Dr. Katherine A. Shaffer, who interpreted the CT scan, reported that Krusche had "a probable lateral disc herniation on the right at L-4,5 and bulging discs at L-3,4 and L-5 S1." (Appellant's Exh. 8,9)

15. On November 17, 1980, Dr. Ryan informed respondent in a letter that "I continue to feel that Mr. Krusche could resume his duties at the Department of Justice." (Resp. Exh. 4)

16. On December 1, 1980, Frank A. Meyers, administrator of the DOJ Division of Criminal Investigation, sent a letter to appellant stating, "Based upon Dr. Ryan's letter I expect you to return to work on Monday, December 8, 1980." (Resp. Exh. 6)

17. On December 11, 1980, Dr. Brewer sent a letter to Paul Gossens, an attorney representing appellant, in which he stated, "It is my opinion that the patient is incapable of resuming his duties in the Department of Justice as a special agent given the criteria set forth by Mr. Meyers." (Appellant's Exh. 12)

18. Appellant's injury from the fall on November 12, 1979, which occurred during the line of duty, has resulted in him suffering from a herniated disc and aggravation of degenerative arthritis.

19. Appellant was disabled on May 29, 1980 and is still disabled as of the date of this hearing and therefore unable to return to work as a result of the fall which occurred on November 12, 1979, and the resulting injuries.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter in accordance with § 230.36(4) and § 230.45(1), Wis. Stats.

2. Appellant has the burden of proving by the greater weight of credible evidence that respondent violated § 230.36, Wis. Stats., in denying him hazardous pay benefits since May 29, 1980, because of injuries he suffered in a work related accident.

3. Appellant has met his burden of proving by greater weight of credible evidence that respondent violated § 230.36 by denying him hazardous pay benefits since May 29, 1980.

4. Appellant is entitled to be provided his hazardous pay benefits under § 230.36, Wis. Stats., from May 29, 1980, until he is able to return to work.

OPINION

Appellant has been employed by the Department of Justice for the past 16 years. He was injured November 12, 1979, when he slipped and fell on some ice while taking part in firearms training. He has been treated for a back injury resulting from the fall from November 16, 1979, until the date of hearing by Dr. Bruce Brewer.

Appellant attempted to perform his job as a special investigator for respondent from December 27, 1979, when he was released to return to work by Dr. Brewer, until May 28, 1980, his last day of work. Appellant worked from December 27, 1979, until February 15, 1980, missing only 4 hours because of illness. Following a suspension he returned to work March 17 and worked until May 28, 1980, missing 12 days because of illness during this period.

Krusche testified that he wanted to return to work in September, 1980, but was advised in a letter dated August 29, 1980, signed by Frank A. Meyers, administrator of the Division of Criminal Investigation, that it would be necessary for him to have "all physicians, including psychiatrists, under whose care and treatment you have been..." sign medical releases. Dr. Brewer subsequently refused to sign the release form.

The medical release form, which was sent to Dr. Brewer along with appellant's position description, states in part:

"I believe that Herbert L. Krusche has no abnormality that might interfere with his participating completely and freely in extreme physical and mental pressure without the danger of undesirable reaction or effect on his health."

"I have examined Herbert L. Krusche and would rate him as physically and mentally fit to perform the work of a law enforcement officer under all weather conditions and under situations of tension dealing with individuals or groups of people in the field and/or at public meetings."

Dr. Brewer testified that appellant's injury and disability consisted of a herniated disc and aggravation of degenerative arthritis. The herniated disc was not diagnosed until Krusche underwent a CAT scan on September 11, 1980. Dr. Brewer said that his opinion to a reasonable degree of medical certainty is that Krusche was unable to perform his duties as a special investigator for respondent from May 29, 1980, up to the date of the hearing.

Dr. Brewer further testified that appellant was presently undergoing steroid treatments and may have to have surgery if these treatments are not successful. He said that Krusche should not engage in any heavy physical activity.

Dr. Brewer said that "It is not my wish that he return to the activities as described" in the medical release form. He said that Krusche could perform sedentary administrative work.

Dr. Brewer stated that "it is possible, but not probable" that Krusche's condition would improve enough to return to duty as a special investigator if he lost weight and moved to Madison. Krusche lives in the Milwaukee area and commutes to work in Madison.

Appellant testified that he has had almost constant pain in his back and legs since the accident. He said that he had two steroid treatments which relieved the pain, but only for a few days.

Krusche also testified that he had fallen three times in July, August and September, 1980, when his legs buckled under him after prolonged periods of sitting. He has been using a cane part of the time since these falls.

Appellant concluded that he did not believe that he could "turn fast enough, run fast enough, or fight good enough" to conduct his duties as a special investigator for the Department of Justice.

Dr. Ryan, who examined appellant only once at the request of respondent on June 3, 1980, although he also reviewed the findings of Dr. Brewer and the results of the CAT scan, testified that in his opinion to a reasonable degree of medical probability Krusche could perform his duties as a special investigator for the Department of Justice. He admitted that he did not diagnose the herniated disc during his June 3, 1980, examination.

Dr. Ryan testified under cross-examination that he would not recommend that someone who is suffering from a herniated disc should engage in such strenuous activity as jumping, running, or wrestling. He also said he normally defers to the treating physician to determine what activities a patient may engage in.

Dr. Ryan further testified that he had not seen the medical release form that Dr. Brewer had been requested to sign prior to the hearing in this matter.

The relevant statutes in this matter are as follows:

Section 230.36(1), Stats., states in part:

"Whenever a ... investigator employed by the division of criminal investigation of the department of justice ... suffers injury while in the performance of his or her duties, as defined in subs. (2) and (3) ... the employe shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury with no deduction from sick leave credits, compensatory time for overtime accumulations or vacation. Such full pay shall continue, while the employe is unable to return to work as the result of the injury. ..."

Section 230.36(3), Stats., states in part:

"As used in this section 'performance of duties' means duties performed in line of duty by ... (b) a ... investigator employed by the division of criminal investigation of the department of justice at all times while ... 4. engaged in ... training exercises provided such ... training exercises are authorized by the appointing authority."

Section 230.36(4), Stats., states:

"An employe denied benefits under this section may appeal to the commission under s. 230.45(1)(d)."

Section 230.45(1), Stats., states in part:

"The commission shall ... (d) hear appeals under s. 230.36(4)."

There is no disagreement between the parties here regarding the fact that appellant was injured while covered by § 230.36. There is also no dispute between Drs. Brewer and Ryan concerning what the extent of appellant's injuries were and his current medical condition. The two doctors do disagree, however, on the ability of appellant to perform his job as a special investigator for respondent.

Both physicians are undisputably competent, experienced, orthopedic surgeons. The Commission believes that Dr. Brewer's testimony that Krusche is not able to return to work in his present condition



must be given greater weight. Dr. Brewer is the treating physician who has been treating appellant continuously since the accident while Dr. Ryan examined Krusche only once. Even Dr. Ryan agreed under cross-examination that the treating physician is in a better position to determine the extent of physical activity that a patient under his or her care should engage in.

Under cross-examination by appellant's attorney, Dr. Ryan testified:

"Q: Doctor, you would not advocate Mr. Krusche engaging in extreme physical activity in his present condition, would you?"

A: No.

Q: In fact, you wouldn't recommend him to engage in employment of extreme physical activity in his present condition, would you?

A: I might let him try it but if it didn't work then that's a new set of things.

Q: If he thought he couldn't do it, you wouldn't force him to do it, would you, doctor?

A: I'm not the treating physician on that."

The Commission also finds no reason to question appellant's own testimony regarding his present medical condition. Krusche has a record of 16 years of successful employment with the Department of Justice during which he has apparently missed very few days of work because of illness or injury preceding his November 12, 1979, accident.

Therefore, on the basis of the entire record, the Commission finds that appellant should be granted hazardous pay benefits under s. 230.36, Wis. Stats., until such time as he is able to return to work as a special investigator for respondent.

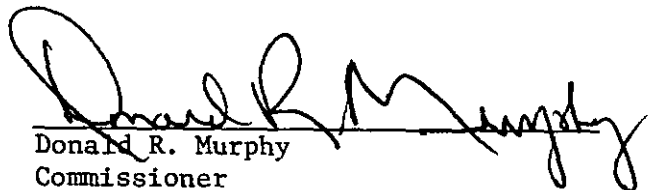
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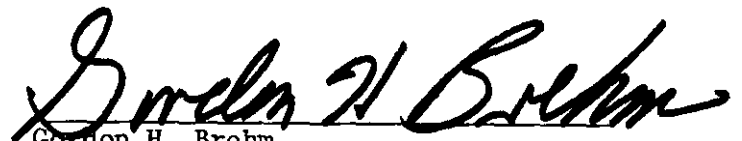
ORDER

The action of respondent in refusing to provide hazardous pay benefits under s. 230.36, Wis. Stats., to appellant is rejected and this matter is remanded to respondent for action in accordance with this decision.

Dated April 10, 1981

STATE PERSONNEL COMMISSION

  
Donald R. Murphy  
Commissioner

  
Gordon H. Brehm  
Commissioner

GHB:mek

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