GARY ASTI, Employee/Cross-Appellant, v. NORTHWEST AIRLINES and KEMPER GROUP, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 8, 1998

HEADNOTES

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Where the evidence submitted to the compensation judge was insufficient to meet the requirements for a departure under the permanent treatment parameters, the judge's award of treatment, a one-year health club membership, was reversed.

Reversed.

Determined by Wilson, J., Pederson, J., and Hefte. J.
Compensation Judge: Bernard Dinner.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's award of expenses for the employee's health club membership. We reverse.

BACKGROUND

The employee began working as a flight attendant in 1976, and over the course of his employment in that job, he sustained at least three significant work-related injuries to his low back. The first injury occurred while the employee was employed by Republic Airlines, the other two while he was employed by Northwest Airlines [the employer]. Treatment for the employee's work-related low back condition has included three surgical procedures: a hemilaminectomy at L4-5 in 1987; a decompressive laminectomy at L3-4 and L4-5, with fusion of L3 through L5, in 1993; and a decompressive laminectomy at L2-3 and L3-4, facetectomies at L2-3 and L3-4, and fusion from L2 through L4, in late 1995. Both Republic and the employer have paid various benefits as a result of the employee's injuries.

In June of 1996, the employee and the employer and insurer entered into a stipulation for settlement, in which the employer and insurer agreed, in part, to pay the employee's health club membership fees through the end of 1996. Shortly after the settlement, on about July 1, 1996, the employee returned to his usual job as a flight attendant with no particular

restrictions on his work activities.[1] About a year later, on June 25, 1997, the matter came on for hearing before a compensation judge for resolution of a dispute over permanent partial disability and the compensability of the employee's health club membership after January 1, 1997. The compensation judge issued his decision on August 12, 1997, and the matter was then appealed to the Workers' Compensation Court of Appeals.

In a decision issued on February 10, 1998, this court affirmed the compensation judge's decisions as to permanent partial disability and as to the reasonableness and necessity of the health club membership under usual case law standards. Asti v. Northwest Airlines, No. *[redacted to remove SSN]* (W.C.C.A. Feb. 10, 1998). However, we modified the judge's decision as to the duration of the membership,[2] and we stayed consideration of the permanent treatment parameters, Minn. R. 5221.6010, et. seq., in anticipation of a decision in a treatment parameters case then pending before the Minnesota Supreme Court. Id. Four months later, in June of 1998, the supreme court issued its decision in Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), in which it answered several certified questions concerning the applicability and scope of the parameters. Subsequently, by order issued July 13, 1998, this court invited the parties to submit additional arguments concerning the employee's disputed health club membership, in light of Jacka. This matter is thus before the court again for consideration of the employee's health club membership costs under the applicable treatment parameters. A fuller discussion of the underlying factual background in this case may be found in our previous decision.

The relevant record in this matter includes the employee's testimony; certain treatment records; the reports and deposition testimony of Dr. Bruce Idelkope, the employee's treating neurologist, who first prescribed a health club membership for the employee in 1987; and the reports of Dr. H. William Park, the employer and insurer's independent examiner. After considering the evidence, the compensation judge concluded that the employee's health club membership after January 1, 1997, was compensable under Minn. R. 5221.6050, subp. 8C. The employer and insurer appeal.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether Athe findings of fact and order [are] clearly erroneous and unsupported by

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[1] However, as later explained by Dr. Idelkope, restrictions would have been set had the employee been employed at a job involving more physical labor. As it was, Dr. Idelkope was satisfied that the employee knew what activities to avoid.

[2] The compensation judge ordered the employer and insurer to reimburse the employee beginning with dues paid for January 1997 and to continue reimbursing the employee until such time as the employee is able to continue working as a flight attendant without such treatment. In our decision, we indicated that the judge should have limited his order to coincide with the employee's claim, that is, to a one-year membership beginning January of 1997.

substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, they are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, [f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, Aunless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Id.

DECISION

Dr. Idelkope first prescribed a health club exercise program for the employee in 1987, and the employee has engaged in such a program more or less continuously since that time. In his supplemental brief on appeal, the employee contends that his health club membership after January 1, 1997, is a permissible Achronic management modality@ pursuant to Minn. R. 5221.6600, subp. 2B. However, Minn. R. 5221.6600, subp. 2B(3), provides in part as follows:

> (3) Treatment period, 13 weeks. Additional periods of treatment require additional prior notification of the insurer. Additional periods of treatment at a health club are not indicated unless there is documentation of attendance and progression in activities during the preceding period of treatment. . . .

Whether or not the employee might satisfy the other requirements for a health club membership under the chronic management parameter, there is no evidence whatsoever of any progression in activities during the preceding period of treatment. Therefore, Minn. R. 5221.6600, subp. 2B, may not be used as justification for the judge's award. Similarly, we find no evidence in this record that would allow a reasonable factfinder to conclude that this is one of those Arare cases, specified in Jacka, Awhere departure is necessary to obtain proper treatment. Jacka, 580 N.W.2d at 36, 58 W.C.D. at 408. Rather, the compensability of the disputed expense hinges on whether the compensation judge erred in concluding that the membership qualified for a departure from the parameters under Minn. R. 5221.6050, subp. 8C, which provides as follows:

> Subp. 8. Departures from parameters. A departure from a parameter that limits the duration or type of treatment in parts 5221.6050 to 5221.6600 may be appropriate in any one of the circumstances specified in items A to E. The health care provider must provide prior notification of the departure as required by subpart 9.

* * *

> C. Where the treatment is necessary to assist the employee in the initial return to work where the employee's work activities place stress on the part of the body affected by the work injury. The health care provider must document in the medical record the specific work activities that place stress on the affected body part, the details of the treatment plan and treatment delivered on each visit, the employee's response to the treatment, and efforts to promote employee independence in the employee's own care to the extent possible so that prolonged or repeated use of health care providers and medical facilities is minimized.

The employer and insurer contend initially that Dr. Idelkope's records do not satisfy the documentation requirements of the rule, but we are not persuaded that any deficiencies in this regard are significant enough to justify reversal.[3] The more difficult question in this case is whether the treatment at issue was necessary to assist the employee in the initial return to work. Minn. R. 5221.6050, subp. 8C (emphasis added). Whether any specific parts of any given treatment parameter have been met is a fact issue for the compensation judge, and we are not inclined to draw any arbitrary line as to the limits of the language quoted above. At the same time, however, there is no evidence in this record that would support the conclusion that a health club membership beginning in January of 1997, more than six months after the employee's unrestricted return to his job, could qualify as assisting the employee in his initial return to work. Therefore, we are compelled to conclude that the compensation judge's application of Minn. R. 5221.6050, subp. 8C, is clearly erroneous and unsupported by substantial evidence in the record as a whole.

The employee in this matter has sustained several significant work-related injuries and has undergone three extensive surgical procedures, leaving him with most of his lumbar spine fused, continuing symptoms, and a 28% whole body impairment. The record easily supports the compensation judge's conclusion that the employee's continued participation in a health club exercise program is essential to maintaining function and enabling the employee to continue in his job, and the yearly fee for membership is less than $600.00. However, despite the substantial evidence indicating that a health club membership is a reasonable, cost-effective treatment for the employee's significant impairment, the record will not support a finding that the health club

[3] In his deposition, Dr. Idelkope testified as to the work activities that he was concerned might aggravate the employee's condition; a 1995 proposed workout program specifies, in some detail, the type and purpose of the employee's exercises; both the employee's testimony and the testimony of Dr. Idelkope adequately describe the employee's response to treatment; and the record indicates that the health club membership was itself prescribed in part to promote employee independence in the employee's own care to the extent possible, by avoiding the need for other, more expensive treatment.

membership is compensable under the permanent treatment parameters. Under these circumstances, we have no option but to reverse the judge's award.