RONALD K. BINNING, Employee, v. DONOHUE & ASSOCS. and CNA INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 17, 1998

HEADNOTES

EARNING CAPACITY - SUBSTANTIAL EVIDENCE; TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee was subject to several restricting conditions in addition to his work-related low-back injury, where his long-term treating physician had steadfastly maintained that the employee was physically unable to work more than four hours a day, and where, over a year and a half subsequent to the employee's attaining maximum medical improvement, both a compensation judge and an occupational therapist had reached similar conclusions, since which conclusions the employee's condition had not substantially improved, the compensation judge's conclusion that the employee was entitled to temporary partial disability benefits without searching for work alternative to his current half-time job, at which his hourly wages were near to those argued to be elsewhere available, was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Johnson, J.
Compensation Judge: Bernard Dinner

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's conclusions that the employee is restricted from working more than four hours a day and is not a qualified employee for vocational rehabilitation services. We affirm.

BACKGROUND

The employee sustained a work-related injury to his low back on August 15, 1989. He was working at the time as a survey crew chief for Donohue & Associates [the employer]. At the time of his injury his weekly wage was $596.00. A CT scan was ordered and was performed on September 7, 1989. The scan revealed a probable herniated disc at L5-S1, a prominent soft tissue defect at L4-5, and a herniated disc with calcification at L3-4.

The employee was referred to orthopedic surgeon Dr. Paul Cederberg. After reviewing the employee's CT scan, Dr. Cederberg recommended a weight-loss program and physical therapy. The employee was off work with back pain and some radicular leg pain until

October 9, 1989. He returned on that date to his pre-injury job. His pain increased, however, and he was taken back off work on November 21, 1989. On December 19, 1989, Dr. Cederberg indicated that the employee's long term problems are ones related to his weight. He referred the employee to a weight loss program of his choice for six months.

The employee was scheduled to return to his job on January 2, 1990, but on that date he was laid off for economic reasons. By October 9, 1990, he still had not returned to work. On October 9, 1990, Dr. Cederberg certified that the employee was able to work with restrictions against lifting over twenty-five pounds and against doing more than essential bending and twisting. He indicated that the employee had reached maximum medical improvement [MMI] with regard to his work injury. He indicated also that in his opinion the employee was subject to a 9% whole body permanent partial disability rating as a result of his 1989 injury, based on the herniated disc at L5-S1. On January 7, 1991, the employee filed a claim petition alleging entitlement to wage replacement benefits continuing from January 2, 1990. The employer and insurer denied liability for the benefits claimed.

On July 3, 1991, the employee was hospitalized to undergo an endoscopy. The procedure was part of a course of treatment for gastrointestinal bleeding secondary to moderately severe alcoholic gastritis. Simultaneously, the employee was being treated for a high blood pressure condition. Two months later, on September 3, 1991, the employee became employed as a custodian with American Building Maintenance [ABM]. The job entailed light vacuuming, dusting, and emptying trash. The employee's starting hourly wage at the job was $5.40. On November 7, 1991, two months after taking the job, the employee indicated to Dr. Cederberg that he was unable to work more than four hours a day. Dr. Cederberg agreed and so certified on a functional capacities evaluation form [R-33] on that date.

The employee's claim petition came on for hearing on February 4, 1992. Issues included the employee's entitlement to temporary total benefits from January 2, 1990, through February 11, 1991, the nature of the employee's current restrictions and whether or not the employee's earnings at his current job were an accurate reflection of his earning capacity. The parties stipulated that the employee had reached MMI from the effects of his August 1989 work injury effective November 14, 1990. They also stipulated that the employee was subject to a permanent partial disability of 9% of his whole body as a result of that same work injury. By a decision filed April 15, 1992, compensation judge Janice Culnane concluded that the employee had been physically unable to return to his pre-injury job with the employer when he was laid off in January of 1990. She found that he had subsequently conducted a reasonable and diligent job search, resulting in his employment at ABM. The judge also concluded that the employee had been and continued to be physically unable to work more than four hours each day. She concluded also that the employee's earnings at ABM were an accurate reflection of his current earning capacity. She found also, however, that it was anticipated in the very near future [that the employee's] doctor would increase the number of hours per day which the employee can work. The employer and insurer subsequently appealed from the judge's decision that the employee's job search had been reasonably diligent, and this court affirmed.

When he next saw Dr. Cederberg on March 23, 1992, the employee complained of dysesthesia in both big toes and pain in both legs and buttocks. Dr. Cederberg found the employee to be neurologically intact but ordered another CT scan. On March 31, 1992, Dr. Cederberg reported that the scan had revealed a herniated disc at spinal level L4-5, in addition to that previously noted at L5-S1. On this basis Dr. Cederberg raised his permanency rating from 9% to 14%. When Dr. Cederberg saw the employee again on April 7, 1992, the employee had lost weight but continued to complain of back and leg symptoms. On an R-33 completed on that date and revised two days later, Dr. Cederberg recommended that the employee be limited to only four hours of work a day for another year. He also restricted the employee to no more than twenty-four pounds lifting and only occasional performance of other back-stressful activity.

On May 11, 1992, the employee's QRC filed a rehabilitation request, seeking closure of the employee's file on grounds that the employee was working to capacity. The employer and insurer contested the request. The request was heard in administrative conference on July 28, 1992. By a decision filed August 13, 1992, termination of services was denied and a functional capacities assessment [FCA] was ordered. On September 1 and 2, 1992, the employee underwent the ordered FCA at Coplin Physical Therapy. In her September 10, 1992, report, occupational medicine specialist Susie Ahlborn indicated in part that the employee was capable of working from four to five hours a day. She recommended also, however, that the employee should be able to increase hours as tolerated and as physical condition improves. On September 22, 1992, the employee saw Dr. Cederberg again. Dr. Cederberg completed another R-33, relaxing the employee's lifting restriction from twenty-four to thirty-four pounds but confirming his previous restriction against working more than four hours a day.

On March 29, 1993, the employee filed another claim petition, alleging entitlement to an additional 5% permanent partial disability of the body as a whole. On April 8, 1993, radiologist Dr. George Young conducted an evaluation of the employee's medical records for the employer and insurer. Dr. Young concluded in part that the employee was subject to no disc protrusions sufficient to constitute herniation. He also concluded, however, that the employee was subject to three-level degenerative disc disease, manifested by partially calcified bulges, which he opined had preexisted the employee's work injury. The employer and insurer denied the employee's claim petition on April 8, 1993. On May 12, 1993, Dr. Cederberg indicated that Dr. Young's report gave him no reason to change my opinions regarding [the employee's] permanent partial disability and his current physical restrictions.

On June 2, 1993, the employee underwent the second of four independent medical examinations conducted by orthopedic surgeon Dr. Joseph M. Tambornino. A year earlier, in June of 1992, Dr. Tambornino had found no specific objective evidence of a lumbar disc problem except for the CT scan report. Although he had rated the employee's permanent whole body impairment at 9%, apparently based on that report, he had concluded that the employee was capable of working eight hours a day with a twenty-five pound lifting restriction. In June of 1993, Dr. Tambornino concluded that much of the employee's physical restriction was self-based,

possibly consequent to depression.[1] He indicated that he believed that the employee was able to work eight hours a day at his current job and that, with proper exercise, weight control, and body mechanics, he might even return to his pre-injury surveyor work. After reviewing Dr. Tambornino's report and seeing the employee again on July 8, 1993, Dr. Cederberg indicated that he had not changed his opinion as to the number of hours the employee could work, nor had the employee's condition changed. On that same date, the employee's QRC filed another rehabilitation request seeking termination of the employee's rehabilitation plan. The employer and insurer again disagreed, based on the opinions of Drs. Tambornino and Young.

The employee commenced a QRC-assisted job search in the fall of 1993. On January 4, 1994, Dr. Cederberg consented to the employee's pursuing a full-time security job, but the opening had been filled before the employee could apply. On January 20, 1994, Dr. Cederberg again recommended that the employee continue to work only four to five hours a day. He also declined to order a work hardening regimen, based on concern that the employee's current job would be put at risk. On March 28, 1994, the parties settled the employee's March 1993 claim to benefits for additional permanency benefits. Terms of the settlement included the employer and insurer's payment of benefits for an additional 3% whole body impairment, together with withdrawal of objection to the request for closure of the employee's rehabilitation plan, in exchange for a close-out of permanency benefits up to 14% of the whole body. An award on this stipulation was filed March 30, 1994. Apparently the employee subsequently discontinued his job search.

On November 8, 1995, the employee was examined a third time by Dr. Tambornino. Dr. Tambornino again concluded that the employee could perform his current maintenance job forty hours a week, with restrictions only against lifting over fifty pounds.

On July 19, 22, and 30, 1996, rehabilitation consultant David D. Berdahl conducted a labor market survey relative to job opportunities for the employee in the Twin Cities. The survey took into consideration the recommendations of Dr. Cederberg, occupational therapist Ahlborn, and Dr. Tambornino and various other medical and rehabilitation records and reports. The survey acknowledged the employee's experience as a surveyor, custodian, machine operator, and truck driver and that he had served in supervisory capacities. Finally, the survey acknowledged that the employee was fifty-two years old, was a high school graduate, and had taken some courses in architectural drafting. In his August 5, 1996, report, Mr. Berdahl concluded that there were several different good employment options open to the employee. These included in particular various forms of retail sales work, unarmed security work, manufacturing work, and better janitorial work. Much of the work identified in the report as being currently available was physically lighter work than that of the employee's current custodial job. Mr. Berdahl estimated that the employee's starting earning capacity at such work would range between $5.50 and $8.00 an hour. All the work opportunities assumed that the employee was capable of working forty hours per week.

[1] From December 1992 through April 1993, the employee's care had included psychiatric treatment for depression and anger.

On September 20, 1996, the employer and insurer filed a rehabilitation request for renewal of job search assistance and a notice of intention to discontinue temporary partial disability benefits. These filings were based on the contention that the employee was capable of working forty hours a week at $8.00 an hour. In an order on discontinuance filed October 28, 1996, settlement judge Jacob E. Forsman ordered that the employer and insurer continue to pay benefits based on the employee's actual earnings. The judge indicated that [a]ny conclusion drawn from David Berdahl's labor market survey and report would be purely speculative regarding employee's earning capacity. He also concluded, however, that Dr. Cederberg's 1992 restrictions were out of date, that rehabilitation benefits had not been closed out fully and finally by the parties' stipulation for and award on settlement, and that the employee must engage in a job search twenty hours a week unless relieved of that obligation by a current medical report.

On November 14, 1996, the employee returned to see Dr. Cederberg with complaints of intermittent right and left leg pain. Noting the employee's history of herniated discs at L3-4, L4-5, and L5-S1, Dr. Cederberg diagnosed three-level degenerative disc disease of the lumbar spine, with possible bony stenosis. He recommended that the employee continue working four hours per day which he has done in the past, adding, These should be permanent restrictions. Five months later, on April 9, 1997, he reiterated this recommendation. He stated further, It is my opinion that [the employee's] part-time employment is his maximum capacity, given the condition of his low back.

On May 13, 1997, the employee filed another request that his rehabilitation plan and job search be terminated. He attached to his request Dr. Cederberg's April 1997 recommendation. He contended that this recommendation satisfied Judge's Forsman's October 1996 condition for relief from the job search. On May 27, 1997, the employer and insurer disagreed, contending that Dr. Cederberg's recommendation lacked medical support.

On June 14, 1997, the employee was hospitalized for alcohol detoxification. He was discharged on June 27, 1997, after treatment for thirteen days for withdrawal symptoms and gastrointestinal bleeding. On July 22, 1997, he was examined once again by Dr. Tambornino. Dr. Tambornino found the employee's prognosis the same as before. He concluded that the employee has been restricting himself in activities ever since 1989 and his motivation to change does not appear to be present. He noted that the employee does not seem to be exaggerating, but there are no objective findings to corroborate his symptoms. In support of his conclusion, he noted that the employee's reduced work schedule and work load were a secondary gain for his continuing to have symptoms.

An administrative conference was held on August 11, 1997, to consider the employee's May 1997 request for termination of his job search. By a decision filed August 22, 1997, the employee was ordered to actively search for additional work twenty hours a week while employed by ABM. The search was to take into account the employee's treating doctor's restrictions except that it was to be open to full-time employment. The employee subsequently requested a formal hearing.

On October 6 and 7, 1997, vocational expert Berdahl conducted a second labor market survey of the employee's Twin Cities employment options. By this time the employee was earning $6.70 an hour at his job with ABM. In his report, Mr. Berdahl suggested that the employee continued to have access to numerous jobs as a security guard, manufacturing or assembly worker, store clerk, or higher paying janitor or custodian. Mr. Berdahl indicated that these jobs were paying from $7.00 to $9.00 an hour.

The matter came on for hearing before compensation judge Bernard Dinner on October 22, 1997. The single issue at hearing, as identified in the judge's subsequent decision, was Is employee capable of working full time within his physical restrictions?[2] By findings and order filed November 17, 1997, Judge Dinner concluded in part that the employee's current wages at ABM, earned by performing custodial work twenty hours a week at $6.70 an hour, properly reflect the employee's injury-diminished earning capacity. Judge Dinner also concluded in part that, given this diminished earning capacity and the restrictions of Dr. Cederberg on which it is based, rehabilitation and/or job placement activity is not reasonable and/or necessary where the employee cannot >reasonably be expected to return to suitable, gainful employment through the provision of rehabilitation services considering the treating physician's opinion of the employee's workability.' Minn. Rule 5220.0100, Subp. 22 C. On those findings, Judge Dinner ordered the employer and insurer to pay temporary partial disability benefits based on the employee's actual earnings from his work at ABM. The judge also granted the employee relief from searching half time for full time employment. In his memorandum, the judge explained that his decision was based [o]n review of the entire evidence and adoption of the treating physician's opinion, that employee is restricted to a four-hour work day, and within the restrictions as set forth by Dr. Cederberg. Judge Dinner also noted his reliance on Mr. Berdahl's testimony that, had Dr. Cederberg approved the employee for full time employment, the employee's present earnings of $6.70 an hour would be not out of the ballpark of what the employee could earn in the current labor market. The employer and insurer appeal.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1996). 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

[2] This identification of the issue is not contested on appeal.

reviewing court might disagree with them, unless 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

The compensation judge accepted Dr. Cederberg's opinion that the employee is not physically capable of working more than four hours a day. Because the employee is already working to the limit of that restriction at what the judge determined to be a suitable hourly wage, the judge also concluded that the employee is not a qualified employee for vocational rehabilitation. The employer and insurer contend that these conclusions are unsupported by substantial evidence. They argue that there is absolutely no credible evidence to support a contention that the Employee could not work a sedentary job, which involved no lifting, bending or stooping, and which allowed the Employee the discretion to sit or stand or to move about, on a full-time basis.

The employer and insurer acknowledge in their brief that Dr. Cederberg's restriction of the employee to no more than twenty hours of work a week is a blanket limitation, . . . apparently regardless of the nature and duties of the prospective employment. Contesting this apparently blanket nature of the restriction, the employer and insurer assert that Dr. Cederberg . . . fails to even broach the possibility that available employment opportunities [that] are far more sedentary and physically less demanding than the Employee's current job could be performed by the Employee more than four hours per day. They contend that there is no evidence in the record that Dr. Cederberg fully considered all relevant facts concerning the Employee's physical restrictions and ability to work before offering his opinion. For that reason, they argue, his opinion lacks foundation and cannot be considered substantial evidence. In addition, they argue that Dr. Cederberg's opinion does not explain why the employee should be limited to four hours of work per day.

We believe that Dr. Cederberg's various opinions are based on adequate foundation and adequately explain the need for the employee's restrictions. He has been the employee's treating physician and appears to have been fully aware of the employee's physical condition and capabilities. While adequate foundation is necessary for a medical opinion to be afforded evidentiary value, the expert need not have been made aware of every relevant fact. Bossey v. Parker Hannifin, No. 001-30-5461 (W.C.C.A. Mar. 14, 1994). In his April 1997 opinion, Dr. Cederberg explained that the employee's hourly limitation was due to the condition of the employee's back. The compensation judge was free to interpret this conclusion to mean that working more than four hours per day would aggravate the employee's condition, cause pain and make the employee totally unable to work. For the doctor's opinion to be valid it is not necessary for him to explain exactly what would happen to the employee if he exceeded his restrictions. Had the employer and insurer wanted Dr. Cederberg to more fully broach the possibility that the employee could perform a specific more sedentary job for more than four hours a day or to provide additional explanation for his conclusions, they might well have obtained Dr. Cederberg's

testimony on those issues. They did not. Absent such testimony, it was not unreasonable for the compensation judge to accept the treating doctor's opinion as being adequately founded.

The employer and insurer also argue that the compensation judge should not have relied on Dr. Cederberg's opinion because Dr. Cederberg clearly reached a conclusion not supported by the record. They primarily rely on the testimony of their vocational expert and the results of four examinations by Dr. Tambornino to support their position. It is true that both experts opined that there was sedentary work the employee could perform on a full time basis which would not aggravate his condition. We note, however, that in addition to his back condition, the employee also suffers from weight problems, from problematic hypertension, from occasional clinical depression, and from periodically severe gastrointestinal problems. In April 1992, Judge Culnane concluded that the employee was then not able to work more than half time. In September of 1992, the employee underwent a functional capacities assessment at Coplin Physical Therapy. Here, too, fully three years after the work injury and nearly two years after MMI, the employee was found to be unable to work much more than half time. Moreover, as the employer and insurer apparently concede, there is no evidence that the employee's condition significantly improved or otherwise changed subsequent to either of these conclusions. Indeed, it is arguable that the employee's condition has deteriorated since then, both physically and psychologically.

In summary, there is evidence that the employee is subject to a combination of restricting medical conditions in addition to his work-related low back problems. For compensation to be due, an employee's work need not be the sole cause of his disability, only a substantial contributing cause. Salmon v. Wheelbrator Frye, 409 N.W.2d 495, 497-98, 40 W.C.D. 117, 122 (Minn. 1987). Furthermore, the employee has earlier been found unable to work more than half time by a compensation judge and an occupational therapist, and there is no evidence that the employee's condition has substantially improved since those decisions were issued. Particularly in light of this evidence, it was not unreasonable for the compensation judge to rely on the similar conclusion of the employee's long-term treating physician, Dr. Cederberg, whose opinion was not shown to be based on any false premises. Because this reliance was not unreasonable, and in light of the other evidence of record, we affirm the compensation judge's decision granting the employee relief from further job search and continuance of wage replacement benefits. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; see also Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence).