DAVID E. BROWN, Employee, v. FMC CORP./NORTHERN ORDINANCE, SELF-INSURED/AMERICAN INT'L GROUP/CRAWFORD & CO., Employer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 19, 1998

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony, medical and vocational records, and expert medical and vocational opinion, supports the finding of permanent total disability.

PERMANENT PARTIAL DISABILITY - KNEE. Substantial evidence, including the employee's testimony, medical records, and expert medical opinion, supports the determination that the work-related March 12, 1993 aggravation to the employee's preexisting knee condition resulted in an additional one percent permanent partial disability.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Substantial evidence supported the finding that proposed pain clinic treatment was reasonable and necessary, notwithstanding that the treatment is unlikely to increase the employee's ability to return to work.

CAUSATION - PSYCHOLOGICAL CONDITION. Substantial evidence, including the employee's testimony, medical and psychiatric records, and expert psychiatric and psychological opinion, supported the finding that the employee's 1987 low back injury was a substantial contributing cause of his depression, panic disorder, agoraphobia and chronic pain syndrome.

Affirmed.

Determined by Wilson, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Gary P. Mesna

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's determinations that the employee's psychological condition is causally related to his admitted April 1987 work injury to the low back, that the employee sustained a one percent permanent partial disability as a result of a knee injury in the course and scope of work for the employer in March 1993, that the employee has been permanently and totally disabled since December 2, 1994 as a result of his work injuries, and that a proposed course of pain clinic treatment is reasonable and necessary. We affirm.

BACKGROUND

The employee, David E. Brown, sustained a work-related low back injury on April 30, 1987, while employed as a machinist for the employer, Northern Ordnance/FMC Corporation. In January 1988, he underwent a laminectomy conducted by his treating physician, Dr. Richard Salib. Subsequent to the low back surgery, the employee developed a nonwork-related cervical strain and degenerative disc disease of the cervical spine. He returned to work for the employer, largely in a supervisory capacity, on April 25, 1988, and was able to tolerate this work despite ongoing and increasing back pain. He was laid off by the employer as part of a mass layoff on December 1, 1988, after which he conducted a diligent job search with the assistance of the Minnesota Department of Rehabilitation Services, but received no meaningful job offers through the date of the first hearing in this case, February 13, 1990. (Findings 1-2; 4/20/90 Findings & Order: Findings 1-8; Brown v. Northern Ordnance/FMC Corp., slip op. (W.C.C.A. Oct. 23, 1990).

Sometime in 1990, the employee began to experience emotional problems, including anxiety attacks, which he attributed to the effects of his work injury and disability. In January 1991, he began treating with a psychiatrist, Dr. William Dorsey, who diagnosed a major depressive disorder and a panic disorder involving panic attacks with agoraphobia.[1] The employee was treated with desipramine and then with xanax. Dr. Dorsey's records and the employee's testimony reveal that the employee's depression had abated considerably by May 1991. On July 22, 1992, Dr. Dorsey stated that he considered the employee's panic attacks to be under satisfactory control with medication. In Dr. Dorsey's opinion, these conditions were causally related to the 1987 work injury. The employee has remained on medications through the date of the hearing in this case and has periodically followed up with Dr. Dorsey for monitoring of his panic disorder. (T. 43-51; Exh. A.)

The employee underwent a one-level fusion at L5-S1 in September 1991. In May 1992 he underwent a further surgical procedure to remove fusion hardware. (T. 32-36.) In November 1992, the employee returned to work for the employer, initially in a part-time work-hardening program, but later on a full-time schedule. However, this job lasted only until June 30, 1993, when the employee again became unemployed as the result of an economic layoff. The employee testified that, while working for the employer during this period, he sustained an injury to his right knee. (T. 32-37.)

The employee had previously treated with Dr. John R. Kearns for a nonwork-related right knee problem in the form of a tear to the meniscus in 1991, which was treated with arthroscopic surgery with good results. On April 16, 1993, the employee returned to Dr. Kearns and reported that he had reinjured his knee at work on March 12, 1993. He advised Dr. Kearns that he was experiencing persistent discomfort as well as an occasional locking sensation in the knee, but that he had been able to continue working. Dr. Kearns' initial impression was that the employee had sustained a contusion to the anterior aspect of the right knee. When the employee next saw Dr. Kearns on June 11, 1993, he reported that the pain in the knee had slowly continued

[1] Agoraphophia is an abnormal fear of being in open or public places.

to increase rather than improving. Dr. Kearns recommended an MRI scan, which revealed a tear involving the inferior articular surface of the posterior horn of the medial meniscus. The employee was treated nonoperatively with an exercise program. (Exh. B.)

Between November 1992 and June 1993, vocational rehabilitation services were focused on monitoring the employee's return to work with the employer. After the June 1993 layoff, the employee began a job search with the assistance of his QRC, Steve Bosch. As the job search process got underway, the employee and his QRC were both quite optimistic about the employee's prospects for reemployment as a machinist. The QRC noted that many employers required overtime work, which was beyond the employee's current capacities, but believed that the employee's limitations could be accommodated by the right employer. Over the next three months the employee made about 180 contacts but obtained only 12 interviews and received no job offers. (Exh. L: 10/28/92 - 9/21/93.)

In October 1993, a placement vendor was brought into the process to assist in job development. A job placement plan was prepared which expanded the occupational areas being considered. Between October 11 and October 22, 1993, the employee made 76 job contacts, again obtaining some interviews but no job offers. The placement vendor initiated an additional 60 contacts. Between November 1 and December 3, 1993, the employee made about 119 job contacts and the placement vendor initiated an additional 125 calls. (Exh. L: 10/8/93 - 12/3/93.)

Job search and placement efforts continued at similar levels over the next several months, and on March 11, 1994, the employee's QRC reported that all of the resources in the employee's primary occupational area had been exhausted in the Twin Cities area, and that efforts were now being made to recontact the potential employers previously contacted. In this same period, the QRC noted that the employee was becoming frustrated, because he believed that some prospective employers had apparently discriminated against him because of his work injury. Although the employee had exhausted his entitlement to temporary total disability benefits, the insurer agreed to continue job placement efforts for at least another 90 days. (Exh. L: 12/20/93 - 3/11/94.)

In April, May and June 1994, the employee's QRC reported that few additional job leads for machinist work were being found in the market, and that the positions that were available were either outside the employee's restrictions or required specific experience that the employee did not have. Job placement activities continued in the additional vocational areas previously identified, including driving, security work, building material sales, and property management. The employee did obtain a week of temporary employment shuttling autos for a relative who owned an auto detailing shop. (Exh. L: 3/11/94 - 7/12/94.)

In July 1994 the employee obtained a job as a truck driver for Goodwill Industries, but resigned after two days because the job was not as originally represented and would probably require overtime work. In October 1994 the QRC reported that the employee had requested that rehabilitation assistance not end and that the insurer had agreed to authorize the employee's file to remain open so that the employee could be apprised of jobs that might come up within his restrictions and interests, although intensive job development services would no longer be provided. (Exh. L: 7/12/94 - 10/4/94.)

The employee obtained a job offer for work as a cargo van delivery driver, but concluded he would be unable to accept the job because its work schedule would have necessitated substantial daycare for his children. Instead, on October 27, 1994, the employee accepted a job with Johnson Meats lifting packages of meat products and moving them with a two-wheeled cart. The employee believed that this job was at least borderline physically appropriate, but the lifting required proved to be too great and the employee stayed at this job only through December 2, 1994. Job placement efforts were subsequently placed on hold, as it was noted that the employee was diligently seeking work on his own and his efforts in pursuing his own job leads had been effective. However, the QRC continued in the role of monitoring the employee's job search activities and providing support services as appropriate. The employee continued seeking work on his own in this manner until some time in late 1995, when he experienced medical flareups. (Exh. L: 10/11/94 - 12/11/94.)

On September 13, 1995, the employee returned to Dr. Salib for a review of his work-related symptoms. The employee had continued to have essentially the same degree of pain in his back and thigh that he had experienced since his 1992 fusion surgery, but was becoming less able to tolerate the pain. Dr. Salib suggested that the employee undergo facet joint injections, to assist the doctor in distinguishing whether the pain resulted from further facet degeneration or from scar tissue formation, the former being potentially treatable and the latter being untreatable. By February 12, 1996, the doctor had concluded that the employee's pain resulted from postoperative myofascial scarring, and recommended that the employee undergo a chronic pain program. On that date, Dr. Salib also restricted the employee from performing any work. (Exh. I: 9/13/95 - 2/12/96.)

On January 16, 1996, the QRC reported that the employee was concerned about aggressive job search because of a four-hour per day work limitation imposed by Dr. Salib, and because of his nonwork-related cervical and thoracic difficulties, for which he was utilizing a cervical traction device on a daily basis. On April 5, 1996, Dr. Salib opined that the employee, then with a 24-pound lifting restriction, was, for all practical purposes, functionally permanently and totally disabled. On April 11, 1996, the QRC stated that there were currently no prospects for the employee to return to employment, and expressed concern that the employee would not be able to be employed on a consistent basis in the competitive labor market. He recommended that consideration be given to closure of the placement file. (Exh. L: 2/10/95 - 4/11/96; Exh. I: 4/5/96.)

The employee's right knee symptoms also flared up in early 1996, and he underwent arthroscopic surgery on May 13, 1996 with debridement of the torn medial meniscus. On September 5, 1996, Dr. Kearns stated that the employee's first, nonwork-related injury had resulted in loss of about 50 percent of the medial meniscus, and that 25 percent remained following the work injury and second surgery. He rated the employee's knee with a two percent permanent partial disability under Minn. R. 5223.0510, subp. 3B. (Exh. B.)

The employee filed a claim petition on December 18, 1996, seeking permanent total disability benefits from and after December 2, 1994, permanent partial disability compensation for an alleged two percent whole-body disability to the right knee, and the payment of various medical expenses. The employer and insurer answered, denying the employee's eligibility for these benefits. (Judgment Roll.)

On February 27, 1997, the employee underwent an independent medical examination by Dr. Larry Stern. Dr. Stern did not consider the employee to be permanently and totally disabled by the effects of his low back and right knee conditions. (Exh. 2.) An independent psychiatric examination was conducted by Dr. John Rauenhorst. Dr. Rauenhorst agreed with the diagnosis of a panic disorder, largely in remission on medications, but opined that this condition was not causally related to the employee's low back injury. He did not believe that the employee was psychiatrically disabled from working. (Exh. 1.) Finally, the employee underwent an independent vocational evaluation by Richard VanWagner, who opined that the employee was not permanently and totally disabled, and suggested that the employee should be able to work in a sedentary position in light assembly. (Exh. 4.)

On April 4, 1997, the employee was determined to be eligible for federal social security disability benefits, based on a finding that he was unable to make a vocational adjustment to work which exists in significant numbers in the national economy. (Exh. 6.)

A hearing on the employee's claim petition was held before a compensation judge of the Office of Administrative Hearings on July 8, 1997. At the hearing, the parties agreed that the judge should also consider the issue of whether pain clinic treatment would be approved. (T. 93-95.) Following the hearing, the compensation judge determined that the employee was permanently and totally disabled from and after December 2, 1994, that he had sustained a one percent permanent partial disability to the right knee resulting from an injury at work for the employer on March 12, 1993, that the employee's psychological condition was causally related to his work-related low-back injury and that the proposed pain clinic treatment was reasonable and necessary. The employer and insurer appeal.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

Permanent Total Disability

The compensation judge determined that the employee was permanently and totally disabled as the result of the combination of all of his work and nonwork-related medical and psychological conditions, relying principally upon the employee's testimony, the vocational opinion of the employee's QRC Steven Bosch, and the medical opinion of Dr. Salib, as well as on the employee's failure to find appropriate post-injury employment despite an extensive and prolonged job search with rehabilitation assistance. The employer advances various arguments to support its contention that the compensation judge's determination was unsupported by substantial evidence.

An employee is totally disabled if his physical condition, in combination with his age, training and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967). Generally, an injured employee proves total disability by showing that work the employee is capable of doing is unavailable, which, in turn, is shown by a diligent job search to no avail. Redgate v. Sroga's Standard Service, 421 N.W.2d 729, 40 W.C.D. 948 (Minn. l988).

The employer argues that the employee's job search was insufficient to support a finding of total disability because the employee did obtain some job offers and did work for brief periods during his search, and because he had not actively searched for work during the entire period following December 2, 1994. The employer further contends that the employee's failure to continue working in certain jobs, or to accept some job offers, was unjustifiable. The employer argues that, as a result, the employee's job search was insufficient to support the finding of total disability. We conclude that the job search in this case was sufficient to support the compensation judge's findings. In addition, we note that, where other evidence relevant to the Schulte factors indicates that an employee is incapable of anything but sporadic work with insubstantial income, a job search is not necessary, as a matter of law, to establish permanent total disability status. Redgate; see also Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 30 W.C.D. 426 (Minn. 1978), and Mertes v. Mortenson, 47 W.C.D. 147 (1992), summarily aff'd. (Minn. Aug. 10, 1992). Here, the compensation judge's determination was also supported by expert medical and vocational opinion.

The employer argues that the vocational opinion of the employee's QRC was without adequate foundation, noting that the QRC based his opinion in part upon limitations related to the employee's medical condition which were not specifically incorporated into express medical restrictions. The employee, however, testified about how his medical condition limited his ability to work. The compensation judge accepted this testimony. Thus, the QRC's opinion was based upon facts consistent with those accepted by the compensation judge, and, accordingly, had adequate foundation. Dr. Salib was the employee's treating physician and the employee's QRC had provided rehabilitation services to the employee for several years. Each based their opinions upon their experience and observations gained in providing these expert services, and we see no clear defects in the foundational basis for their opinions. Although the employer's experts reached different conclusions, this court must affirm the compensation judge's choice between

divergent expert opinions unless the opinions relied upon are without adequate foundation. We, therefore, affirm. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985); Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

Permanent Partial Disability to Right Knee

The employee's treating physician for his right knee was Dr. John R. Kearns, who treated both the employee's initial, nonwork-related right knee condition and the knee condition after the employee's March 12, 1993 work injury. Dr. Kearns opined that the initial surgery following the employee's first, nonwork injury had resulted in loss of about 50 percent of the medial meniscus, that the work injury was the cause of an aggravation to the knee resulting in the eventual need for the second arthroscopic procedure, and that 25 percent of the meniscus remained following this second surgery. (Exh. B.) Based on this opinion, the compensation judge determined that the employee had a three percent permanent partial disability to the right knee, of which two percent was attributable to the initial injury and of which the remaining one percent was the result of the 1993 work injury. The compensation judge, accordingly, awarded a one percent whole-body permanency rating for that portion of the employee's right knee disability attributable to the work injury.[2]

The employer argues that the employee was not subjected to additional medical restrictions as a result of the work aggravation to the knee condition, and, they argue, accordingly sustained no functional loss justifying an award of permanent partial disability. We believe that the compensation judge's rejection of this argument was reasonable. The employee sustained the loss of an additional portion of the meniscus following the surgery necessitated by the work aggravation of his preexisting knee condition. The greater rating provided for this degree of meniscal loss reflects the recognition in the permanency schedules of a greater degree of functional loss. The permanency schedules do not require that additional damage to the meniscus be accompanied by additional medical restrictions for a higher rating of permanency.

We affirm the award of a one percent permanent partial disability to the right knee, as it is supported by substantial evidence. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

Psychological Condition

The compensation judge found that employee's 1986 work-related low back injury was a substantial contributing cause of the severe depression, panic attacks, and agoraphobia which the employee began experiencing some time in 1990. This finding has substantial support in the employee's testimony and in the expert opinions of the employee's treating psychiatrist,

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[2] Minn. R. 5223.0170, subp. 5B, the rule applicable for the employee=s date of injury, provides, in pertinent part, the following ratings for a knee condition or procedure:

> (1) surgical removal of medial or lateral semilunar cartilage, more than 50 percent of cartilage removed, no complications, 3 percent;
> (2) partial meniscectomy, up to 50 percent of the meniscus removed, 2 percent;

Dr. Dorsey (Exh. A), and of John Patrick Cronin, a psychologist who evaluated the employee at the request of the employee's attorney (Exh. F). The employer relies upon the opinion of their examining expert, Dr. Patrick Rauenhorst, who considered the employee's panic disorder likely of genetic origin (Exh. 1). Although the employer and insurer argue that Dr. Cronin's opinion is foundationally defective because he did not have information about MMPI testing conducted in 1991, no evidence was presented to suggest that the results of this testing were such as would have affected Dr. Cronin's opinion. Further, no foundational defect is alleged with respect to the opinions of Dr. Dorsey, and none is apparent. As the compensation judge's determination here rests upon his resolution of divergent expert opinion, we must affirm. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Pain Clinic Treatment

The employer argues that the compensation judge's determination that proposed pain clinic treatment is reasonable and necessary should be reversed because there was conflicting testimony over the advisability of such treatment. It is however, the compensation judge's role to resolve conflicting testimony and reach a determination, and this court must affirm the compensation judge's findings unless unsupported by substantial evidence. There is substantial support for the compensation judge's determination in the medical records and the employee's testimony, and we affirm. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

The employer next argues, in essence, that a finding that the pain clinic treatment is reasonable and necessary must be seen as inconsistent with a determination of permanent total disability, on the theory that, if pain clinic treatment may improve the employee's disability such that he might be more capable of a return to work, a finding of permanent total disability would be premature. We note, however, that the test of whether medical treatment is reasonable and necessary is not limited to whether that treatment enhances an employee's prospects of returning to work. Minn. Stat. § 176.135, subd. 1, provides that "[t]he employer shall furnish any medical . . . treatment, . . . as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." The phrase "cure and relieve" is interpreted to mean cure or relieve, and treatment which is noncurative but palliative may be compensable. Eberle v. Miller, 170 Minn. 207, 212 N.W. 190, 4 W.C.D. 272 (1927).

In addition, we note that the compensation judge did not find that the pain clinic treatment would likely increase the employee's prospects for employment. In his memorandum, the compensation judge stated that he was not persuaded that further treatment, either physical or psychological, is reasonably likely to improve the employee's condition enough to get him back to work. (Mem. at 5.) Instead, the judge concluded that [e]ven though the pain clinic is unlikely to allow the employee to return to work, it is still likely to offer some improvement in his ability to deal with his pain and disability and improve his life to some extent. (Mem. at 6.) There is no inherent contradiction between the finding of permanent total disability and the finding that pain clinic treatment here is reasonable and necessary.