ROLLAND CADY, Employee, v. OLD DUTCH FOODS and CNA INS. CO., Employer-Insurer/Appellants, and TWIN CITIES BAKERY DRIVERS HEALTH & WELFARE FUND, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 10, 1998

HEADNOTES

TEMPORARY TOTAL DISABILITY - MEDICALLY UNABLE TO CONTINUE. A claim that an employee has become medically unable to continue working, within the meaning of Minn. Stat. § 176.101, subd. 3j (repealed 1995), need not be supported by objective medical documentation of a worsening of the employee's condition. Substantial evidence, including the employee's testimony and the reports of his treating physician, supported the compensation judge's conclusion that the employee had become medically unable to continue working within the meaning of the statute.

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Where additional treatment, including acupuncture and possibly traction, had been recommended, substantial evidence supported the compensation judge's conclusion that the employee had not reached MMI again following his medical inability to continue working under Minn. Stat. § 176.101, subd. 3j.

REHABILITATION. Substantial evidence supported the compensation judge's decision that the employee was physically unable to continue working at his preinjury job and that he was entitled to a rehabilitation consultation.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Janice M. Culnane.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's findings that the employee became medically unable to continue working, that the employee had not reached maximum medical improvement, and that the employee was entitled to a rehabilitation consultation. We affirm.

BACKGROUND

The employee sustained a work-related injury to his low back and cervical spine on March 13, 1989, while working for Old Dutch Foods [the employer] as a route sales driver. The

employee missed no time from work but began treating with Dr. Roger Perreault, D.C., on March 22, 1989. Dr. Perreault diagnosed cervical and low back strain/sprain syndrome. Dr. Perreault eventually recommended an MRI of the lumbar spine when parasthesias in the right posterior thigh and right leg pain continued. The MRI, conducted on July 7, 1989, revealed juvenile discogenic disease with diffuse degenerative dehydration from T12-L1 through L3-4; mild to moderate dehydration of the L4-5 and L5-S1 discs; small contained central disc herniation at L1-2; and a large hemangioma of the L1 vertebral body. In a referral letter to orthopedist Dr. Stephen Kuslich dated October 30, 1989, Dr. Perreault stated that the employee continued to complain of increased right leg radiation and low back discomfort with bending and rotary motion. Dr. Perreault also indicated that he had suggested to the employee that he look for other employment.

When Dr. Kuslich examined the employee on November 9, 1989, he took a history that the employee's job involved repetitive bending, twisting, and maximum lifting of fifteen pounds. Dr. Kuslich found that, while the employee had some symptoms suggestive of L4 nerve root irritation, he did not have loss of reflexes, muscle strength, sensation, or motion. An office note of November 24, 1989, reflects that Dr. Kuslich reviewed the employee's MRI and opined that the back pain was due to wear and tear in the upper lumbar discs and there is no significant danger of seriously injuring yourself by the usual use of your back either at home, or at work. Dr. Kuslich rated the employee as having a 3.5% permanent partial disability due to his lumbar condition, and on April 2, 1990, the doctor opined that maximum medical improvement [MMI] would have been reached as of November 24, 1989. The employer and insurer made voluntary payment to the employee of benefits for a 3.5% whole body impairment.

Despite ongoing symptoms, the employee continued to perform his job duties as a route driver for the employer without losing time from work. He also continued to treat with Dr. Perreault, and in November of 1990, Dr. Perreault referred him to neurologist Dr. Richard Koller. Dr. Koller examined the employee on December 4, 1990, and recorded an ongoing history of low back pain into the right buttock and down the lateral aspect of the right leg and calf, into the lateral ankle; numbness and tingling on the top of the thighs; and neck pain. Dr. Koller diagnosed sprains of the cervical and lumbar spine but ordered a myelogram to eliminate the possibility of a herniated disc. In a letter to Dr. Perreault dated December 12, 1990, Dr. Koller stated that while the myelogram showed some degenerative disease it looks basically normal. He further indicated that he had discussed with the employee that the employee's job was likely to aggravate his back. Dr. Koller examined the employee again on April 26, 1991, at which time the employee was still having significant discomfort, and noted that bending, lifting, and twisting seem to aggravate things. On exam the doctor noted slight loss of lordosis, that flexion was 80% of normal, and that extension was 60% of normal. Dr. Koller suggested that the employee continue with chiropractic care and opined that the employee should consider getting out of his job as a route sales driver and into an occupation that required less twisting and bending. In a letter dated July 22, 1992, Dr. Koller rated the employee as having a 10.5% whole body impairment due to a healed lumbar sprain with degenerative changes at multiple vertebral levels and a 3.5% whole body impairment due to a healed cervical sprain with pain associated with rigidity or chronic muscle spasm.

On March 4, 1992, the employee filed a rehabilitation request seeking rehabilitation services. In a rehabilitation response filed March 13, 1992, the employer and insurer agreed only to have a qualified rehabilitation consultant [QRC] conduct a job analysis. The employee apparently agreed, and an on-site job analysis was prepared on June 23, 1992, which showed that the employee's job required constant twisting of the trunk; frequent twisting of the neck; frequent repetitive forward bending; occasional stooping, bending, and squatting; lifting of up to twenty-four pounds 275 times a day; and occasional to frequent reaching above the head. The QRC conducting the evaluation made several recommendations to help the employee tolerate his job better, including purchase of a new two-wheeler, repair of a garage door, assignment of a shorter route, training in body mechanics, and reorganization of the warehouse. All recommendations were instigated with the exception of the shorter route. The employee continued to treat with Dr. Perreault through September 30, 1992. On October 13, 1992, the employee filed a claim petition seeking benefits for 14% permanent partial disability and medical expenses incurred with Dr. Perreault and Dr. Koller.

The employee was examined by independent medical examiner Dr. David Boxall on January 6, 1993. Dr. Boxall rated the employee at 3.5% whole body impairment for injury to the lumbar spine and 0% for injury to the cervical spine, and he opined that the employee should be restricted from prolonged sitting/standing, extensive bending, twisting, or lifting, and lifting of more than fifty pounds on a one-time basis or thirty-five pounds intermittently. On January 29, 1993, Dr. Koller prescribed a Nordic Track for the employee's low back and right leg pain.

In November of 1993, the parties entered into a stipulation for settlement. Pursuant to the stipulation, the employer and insurer paid the employee benefits for an additional 7% permanency related to the lumbar spine to close out permanency to the extent of 3.5% related to the cervical spine and 10.5% related to the lumbar spine. The employer and insurer also paid the outstanding medical and chiropractic expenses, with a full, final, and complete closeout on chiropractic expenses, and $1,000 in a lump sum in full, final and complete satisfaction of claims for home health care exercise equipment, including any and all Nordic Track machines. An award on stipulation was filed on December 13, 1993.

On February 4, 1997, the employee returned to see Dr. Koller, who found that range of motion of the employee's neck was mildly limited on flexion, extension, and lateral rotation. Flexion and extension were mildly limited in the lumbar spine as well. Dr. Koller's assessment was [o]n-going problems with chronic musculoskeletal neck and back pain. Chronicity was well-recognized in the past. Again, I do not feel this patient should continue in his job as a route driver for Old Dutch. There is too much bending, twisting, and awkward positioning. Dr. Koller recommended restrictions that the employee be allowed to change positions every 25-30 minutes, to avoid lifting more than 25 pounds from waist level, and to avoid lifting from floor level.

On March 10, 1997, the employee filed a rehabilitation request, seeking a rehabilitation consultation, attaching to it a note from Dr. Koller that the employee could no longer continue to perform his job as a route driver. On or about March 12, 1997, the employer informed

the employee that he was being placed on a medical leave of absence since his doctor had restricted him from doing his route sales driver job. The employer and insurer responded to the rehabilitation request on March 26, 1997, stating, in part, that the employee had the ability to perform his job and attaching the January 6, 1993, report of Dr. Boxall in support of their claim.

The employee filed a claim petition on March 31, 1997, seeking temporary total disability benefits continuing from March 12, 1997. On June 20, 1997, the rehabilitation request and the claim petition were consolidated for purposes of hearing. In findings and order filed after the hearing, a compensation judge found that the employee was medically unable to continue working as of March 12, 1997, that he had not yet reached MMI after March 12, 1997, and that he was entitled to a rehabilitation consultation. The judge awarded temporary total disability benefits pursuant to Minn. Stat. § 176.101, subd. 3j (repealed 1995). 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 (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, 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

Medically Unable to Continue

The employer and insurer contend that the employee has not met his burden of proving he was medically unable to continue working because there was no change in the employee's medical condition based upon objective testing, there was no flare-up of the employee's condition as of the last date worked, there was no recommendation for surgery or other treatment, and the only recommendation was for the employee to change his occupation. In addition, the employer and insurer assert that the judge's determination that the employee was medically unable to continue was clearly erroneous and that the medical opinion relied upon was lacking in foundation. We are not persuaded.

The judge expressly relied on the opinion of Dr. Koller. The employer and insurer contend that Dr. Koller did not have detailed information of the employee's job requirements prior to issuing his opinion that the employee could not continue in his route sales position. However, in his report of February 4, 1997, Dr. Koller opined that the employee's job involved too much bending, twisting, and awkward positioning for him to continue. The job site analysis summary dated December 7, 1992, confirms that the employee's job involved frequent bending, twisting, and working in awkward positions. A trier of fact's choice between expert witnesses is usually upheld, unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). In the instant case, the relevant facts assumed by Dr. Koller are supported by the evidence.

The employer and insurer also contend that there is no objective medical documentation that the employee was physically unable to continue in his position with the employer. However, objective medical documentation of a change in the employee's condition is not a prerequisite to eligibility for benefits under subdivision 3j.[1] The employee testified that his symptoms increased in the degree of intensity, just more painful in the winter of 1996-97. He further testified that by that time he would rest at night after long hours, and, again, my whole weekends was spent resting and just reviving, getting ready for the following week. The compensation judge noted in her memorandum that she found the employee's testimony credible. Dr. Koller opined on February 4, 1997, that the employee should not continue in his job, and we have found that the compensation judge reasonably relied on that opinion. We also note that there is no evidence that Dr. Koller ever placed specific restrictions on the employee's activities before March 12, 1997. This is not an employee who has no objective findings of disability; he has been rated as having a 10.5% whole body impairment related to the lumbar spine and a 3.5% whole body impairment related to the cervical spine, and the employer and insurer have paid the employee benefits for a 10.5 % impairment, with a close out to 14%.

Substantial evidence supports the compensation judge's finding that the employee was medically unable to continue working in his job as a route sales driver as of March 12, 1997.[2] We therefore affirm the judge's decision on this issue.

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[1] While the permanent partial disability schedule requires objective clinical or neurological findings for whole body impairment ratings to the lumbar and cervical spine, Minn. Stat. § 176.101, subd. 3j, contains no corresponding requirement.

[2] The compensation judge found that the employee worked many years in this job, in pain, without time loss or medical treatment. The employee's actions did not alter his eligibility for temporary total disability benefits but merely postponed them. The fact that the employee would have continued to work in pain in this job, had the employer not placed him on unpaid medical leave, does not alter the fact that Dr. Koller opined that the employee should not continue in that job.

Maximum Medical Improvement [MMI]

The employer and insurer contend that MMI was effective with service of Dr. Boxall's report on January 21, 1993. However, given the employee's medical inability to continue working on March 12, 1997, temporary total disability benefits may not be discontinued, based on MMI, until the employee again attains and is served with notice of MMI a second time. See, e.g., Tait v. Minnesota Lift Truck, No. *[redacted to remove social security number]* (W.C.C.A. Feb. 23, 1996). In the alternative, the employer and insurer contend that MMI was reached effective July 24, 1997, with service of Dr. Boxall's June 27, 1997, report. We are not persuaded.

MMI is defined as the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability. Minn. Stat. § 176.011, subd. 25. In her memorandum, the compensation judge indicated that Dr. Koller had suggested in February of 1997 that the employee obtain chiropractic treatment, physical therapy, or massage therapy, and that the employee should be given the opportunity to explore those types of treatment before MMI can be determined. It appears true, as the employer and insurer contend, that the compensation judge may have misinterpreted Dr. Koller's records in this regard. At the same time, however, October 13, 1997, notes from Noran Neurological Clinic, only about a month prior to hearing, indicate that the employee may . . . benefit from acupuncture treatment, and the record also indicates that traction is under consideration as a treatment option. MMI is a finding of ultimate fact, see Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989), and, given the recent recommendations as to additional treatment--after service of Dr. Boxall's 1997 MMI report--we cannot conclude that the compensation judge's decision on this issue is clearly erroneous and unsupported by substantial evidence.

Rehabilitation Consultation

The employer and insurer contend that a rehabilitation consultation is not warranted because the employee is physically able to perform the route sales driver position, that the medical opinions relied upon by the judge were lacking in foundation, and that the employee simply preferred to take a different direction in his life rather than to continue working for the employer. We are not convinced.

The first two arguments of the employer and insurer have been addressed above, and the third argument has no merit whatsoever. The employee testified that he could no longer physically perform the work required of him at the employer. However, the employee intended to continue working, despite the pain, until he found other employment, but when he requested rehabilitation services, the employer placed him on unpaid medical leave. There is no evidence that the employee was seeking to change jobs for any reason other than the physical difficulties he was experiencing in the position.

An employee is generally entitled to a rehabilitation consultation, as a matter of right, unless the employer or insurer has filed a timely request for a waiver. Wagner v. Bethesda Hospital, No. *[redacted to remove social security number]* (W.C.C.A. Jan. 5, 1995). The compensation judge found no grounds for a waiver, and neither do we. The judge's award is affirmed.