

LISA CANOY, Employee/Appellant, v. ST. MARY'S REGIONAL HEALTHCARE CTR. and BERKLEY ADMIN'RS, Employer-Insurer, and MN DEP'T OF LABOR & INDUS./VRU and WEUM CHIROPRACTIC CLINIC, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 19, 1998

No. *[redacted to remove social security number]*

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supported the compensation judge's conclusion that the record contained inadequate evidence of objective findings to warrant an award of permanent partial disability benefits for the employee's thoracic and/or cervical condition.

PRACTICE & PROCEDURE - REMAND. Where the basis for the compensation judge's decision was not entirely clear, where the judge did not specifically resolve one of the employer's defenses, and where it appears that the judge did not adequately consider factors relevant to the employee's claim for various benefits, the matter would be remanded for reconsideration and further findings.

Affirmed in part, reversed in part, and remanded.

Determined by Wilson, J., Hefte, J., and Johnson, J.
Compensation Judge: Bonnie A. Peterson

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of benefits for wage loss, permanent partial disability, and chiropractic treatment. We affirm the denial of benefits for permanent partial disability, but we reverse and remand the matter for reconsideration and additional findings as to the other benefit claims.

BACKGROUND

The employee began working part-time as a nursing assistant for St. Mary's Regional Health Care Center [the employer] in 1989. On about November 21, 1991, the employee allegedly sustained an injury to her neck and thoracic spine while transferring a patient from a wheelchair. The employee was seen by a physician, who recommended temporary restrictions, but the employee did not miss any time from work and eventually returned to her usual pre-injury job. The employee testified that, following this injury, she was more careful lifting and asked for more assistance in her work. She also testified that, while she felt she had recovered from the injury, she tended to experience occasional soreness in her back and shoulders thereafter.

On September 22, 1993, the employee allegedly sustained another work-related injury to her neck and mid-back while pushing a patient in a Geri chair up a hill in the employer's parking lot. The employee finished her shift but consulted a physician three days later. After undergoing physical therapy, the employee decided to try another form of treatment, chiropractic care, and consulted Dr. Ryan Weum, D.C., who in October of 1993 recommended that the employee observe lifting restrictions. The employer then offered the employee modified work, as a resident assistant, which the employee accepted. After about January of 1994, the employee began seeing Dr. Weum on an as-needed, rather than scheduled, basis. At some point, the employee again returned to her usual pre-injury job.

On April 25, 1995, Dr. Weum issued a report indicating that the employee had reached maximum medical improvement [MMI], with no restrictions and no permanent partial disability, but that she would need treatment on a prn basis to control symptoms and prevent additional problems. At about the same time, the employer apparently declined to pay for additional chiropractic care. Several months later, in August of 1995, Dr. Weum reinstituted restrictions, based on the employee's complaints of ongoing symptoms. Shortly thereafter, the employer again offered and the employee accepted lighter work that required little or no lifting.

In March of 1996, the employee was examined on the employer's behalf by Dr. Gilbert Westreich, who reported that the employee was well, with no permanent injury and no need for restrictions. Dr. Westreich also reported that further chiropractic care was unwarranted and even probably detrimental. After issuance of Dr. Westreich's report, the employer informed the employee that she would be expected to return to her usual duties as a nursing assistant. The employee performed this work for a few days but then claimed that she was unable to continue at this job because of her symptoms. As a result, the employer took the employee off the schedule indefinitely.

At some point the employee began searching for alternate work, and in December of 1996 she obtained a part-time front desk/night auditor job at the Holiday Inn. At about the same time, the employee obtained a second part-time cleaning job at a ski resort called Maplegag. Both jobs paid less, on an hourly basis, than the employee had earned in her job with the employer. Also in December of 1996, the employer offered the employee a temporary position within the restrictions that had been recommended by Dr. Weum. The employee declined the employer's offer because she had already accepted the position at the Holiday Inn, and the employer formally terminated her. On about January 30, 1997, the employee quit her Holiday Inn job for personal reasons, but she apparently continued her part-time job at Maplegag until the ski season ended that spring. Also in 1996 and into 1997, the employee babysat for her brother's children, receiving \$2.50 an hour while watching two children and \$1.25 an hour while watching only one.

In the fall of 1997, the employee began working with QRC David Aarhus of the state vocational rehabilitation unit. The employee and the QRC signed an R-2, Rehabilitation Plan, on September 30, 1997, which focused on finding the employee suitable work with another employer.

In early September 1997, the employee was examined again by Dr. Westreich, who essentially reiterated his previous conclusion that the employee had no ongoing disability. In about December of 1997, the employee apparently again resumed seasonal part-time work at Maplelag.

On February 12, 1998, the employee was examined by Dr. D.F. Person, who diagnosed cervical and thoracic strain, with degenerative arthritis, and concluded that both conditions had been substantially aggravated by the employee's September 1993 work injury. Dr. Person also indicated that the employee had a 7% whole body impairment due to her cervical condition and a 2.5% whole body impairment due to her thoracic condition,¹ that the employee had reached MMI, that the employee was unable to return to her usual job as a nursing assistant due to her work-related condition, and that the employee should be seen periodically for follow-up care by a caregiver of her choice. Dr. Person also recommended an MRI scan to help better diagnose the employee's cervical condition.

On May 6, 1998, a hearing was held on the employee's claim petition, filed June 9, 1997, as amended by letter dated March 30, 1998. Claims listed in the claim petition included claims for temporary total disability benefits from April 24, 1996, to December 11, 1996; temporary partial disability benefits after December 11, 1996; either permanent partial disability benefits for a 3.5% impairment, pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), or twenty-six weeks of economic recovery compensation [ERC] under Minn. Stat. § 176.101, subd. 3t(b) (repealed 1995), relative to the employee's alleged thoracic condition;² rehabilitation services, including retraining; and expenses related to Dr. Weum's chiropractic care. In her March 30, 1998, letter, the employee had amended her claim to include permanency benefits consistent with Dr. Person's ratings.

At the commencement of the hearing, the compensation judge summarized the employee's claims for wage loss, permanent partial disability, and chiropractic care and noted that it was the employer's position that the 1991 and 1993 work injuries were merely temporary. The judge also noted that the parties had stipulated that the employee had reached MMI effective no later than April 17, 1996, and that the employee's weekly wage, for benefit calculation purposes, was \$168.48. Evidence submitted at hearing included the employee's medical and chiropractic records, the reports and deposition testimony of Dr. Westreich, and the testimony of the employee, QRC Aarhus, and several other witnesses.

¹ Under the schedules applicable to injuries occurring after July 1, 1993. See Minn. R. 5223.0370, subp. 4.C.(1) (applicable to cervical radicular syndromes), and Minn. R. 5223.0380, subp. 3.B (applicable to thoracic pain syndrome).

² It was noted in the claim petition that the employer had already paid the employee benefits for a 3.5% impairment relative to her cervical condition.

In a decision issued on June 10, 1998, the compensation judge listed the following issues for determination: whether the employee had injured her thoracic spine in the 1991 or 1993 incidents³; whether the employee had suffer[ed] permanent partial disability to the cervical or thoracic spine; whether the employee had been temporarily totally or temporarily partially disabled as a result of her injuries, with subissues of job search and whether the injuries were a temporary aggravation or temporary injury; and whether the treatment expenses were reasonable and necessary to treat the alleged injuries.

In findings relevant to this appeal, the judge concluded that the employee had suffered an aggravation of her neck injury on [September 22,] 1993; that the employee may have aggravated some problems in her thoracic spine; that the record [was] devoid of any objective findings in regards to the thoracic or the cervical spine; and that the employee had not sustained any permanent partial disability as a result of either work injury. The judge also concluded that the employer had offered the employee suitable employment within the employee's perceived restrictions; that the employee's employment at Maplelag was not reflective of her earning capacity; that the employee's job search had not been reasonable or diligent; and that the employee had not been temporarily disabled as claimed. With regard to the claimed chiropractic care, the judge found that the employee was over five years post injury, that the employee had experienced little or no relief, and that the treatment had not assisted the employee in returning to sustained gainful employment, and the judge denied that claim as well. In her order, the judge denied the claimed wage loss, permanency, chiropractic expenses, and any and all claims contained in the Claim Petition filed June 9, 1997. The employee appeals.

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.

³ Throughout her decision, the compensation judge designated the 1993 injury date as February 5, 1993, rather than September 22, 1993. We presume that this is a clerical error, as there is no dispute as to the date of that injury.

DECISION

Permanent Partial Disability

The employee contends that the compensation judge erred in denying her claim for permanent partial disability benefits, arguing that, contrary to the compensation judge's finding, the record is not devoid of any objective findings in regards to the thoracic spine or cervical spine. In support of this contention, the employee points to the physical therapy records, the objective findings set forth in Dr. Weum's reports, the employee's Functional Capacities Evaluation [FCE], and Dr. Person's reports. It is true that x-rays have been interpreted to show degenerative changes in the employee's cervical spine and perhaps her thoracic spine, which constitute objective findings of a sort. However, it is evident to us that the compensation judge was referring in her finding to the lack of objective findings noted on examination.

While Dr. Weum indicated in his narrative reports that he found hypertonicity, that is, abnormal, increased muscle tone, his office notes contain few if any such findings, and Dr. Westreich specifically testified that, upon his review, Dr. Weum's treatment records contain no objective findings at all. Similarly, Dr. Person's report notes only limitations of range of motion, with no indications of spasm or any neurological findings. As for the FCE, the report of that evaluation offers little or nothing in support of the employee's claim for permanent partial disability benefits, and the physical therapy records, which only cover a brief period immediately after the 1993 injury, have little bearing on whether the employee has any permanent injury to her cervical or thoracic spine.

Dr. Westreich examined the employee twice and reviewed her medical and chiropractic records. In his deposition, Dr. Westreich testified that he found no abnormalities on examination, that the employee's x-rays were normal for a woman her age, and that there was no evidence of hypertonicity or spasm noted in the employee's medical or chiropractic records. While the record might not be completely devoid of objective findings, substantial evidence nevertheless supports the compensation judge's conclusion that the employee has no ratable permanent partial disability relative to either her cervical or her thoracic spine. We therefore affirm the judge's finding on this issue.

Remaining Issues

The employer's primary defense was that any injury that the employee had sustained at work in 1991 and 1993 was merely temporary, and the compensation judge specifically designated that defense as an issue to be determined. The judge made no specific findings of fact in this regard, but, in her memorandum, the judge wrote as follows:

The employee worked as a nursing assistant at St. Mary's Regional Health Center in Detroit Lakes in 1991 and 1993 when she suffered temporary aggravations to her neck area. It is her claim that she

suffered permanent aggravations to her neck and thoracic area.
This is not supported by the medical reports or objective findings.

Apparently relying on the statements quoted above, the employer, in its respondent's brief, contends primarily that the judge denied benefits based on a conclusion that the employee's injury was merely temporary. In her brief, the employee essentially ignores the memorandum excerpt quoted above, focussing instead on the judge's findings and other rationales for denying the employee's claims, including the findings relating to job search, the employer's job offer, the employee's earning capacity, and the evidence regarding the efficacy of the chiropractic care provided by Dr. Weum.

After careful review of the compensation judge's decision as a whole, we conclude that the matter must be remanded for further findings. The memorandum excerpt, standing alone, would support the employer's position as to the ultimate basis for the judge's decision. Other findings, however, tend to suggest that the judge may not have been persuaded that the work injuries had resolved.⁴ Moreover, even if the judge did conclude that the injury was merely temporary, she made no findings or statements to indicate any conclusion as to whether, and if so when, any temporary injury had ended. As this was the employer's primary defense, and because a finding on the issue may well have an impact on the employer's future liability for benefits, the judge must make specific findings in this regard.

If the judge concludes on remand that the employee sustained only temporary injuries that had resolved prior to any period for which benefits were at issue in this proceeding, no further findings will be required. However, if the judge instead concludes that the injury was not temporary, or that the effects of the injury, even if temporary, extended into a period in which benefits are at issue, several issues will require reconsideration and/or further findings, as it does not appear that the judge considered all the factors that may have been relevant to the employee's claims.

With regard to the employee's claim for both temporary total and temporary partial disability benefits,⁵ it is not at all clear that the judge took into account the fact that the employee

⁴ For example, the compensation judge's statement that chiropractic care had not helped the employee to return to suitable employment suggests that the judge was not convinced that the injury was temporary. Similarly, in her memorandum, the judge indicated that the employee's decision to work at Maplelag was a personal choice unrelated to her disabilities. It may be that the compensation judge was simply making findings to cover alternative theories, but her decision in this regard is ambiguous.

⁵ The parties' agreement as to MMI may also limit the employee's eligibility for temporary total disability benefits, unless the employee became medically unable to continue working, under Minn. Stat. § 176.101, subd. 3j (repealed 1995). The employee appears to raise this claim in her brief.

had rehabilitation assistance for some of the period in question, which is an important consideration in a wage loss benefit claim. Strictly speaking, the issue is not so much the diligence of the employee's job search but whether the employee made a good faith effort to cooperate with rehabilitation efforts. See, e.g., Bauer v. Winco/Energex, 42 W.C.D. 762 (W.C.C.A. November 14, 1989). With regard to the issue of temporary partial disability and earning capacity, we think that the judge may have misinterpreted QRC Aarhus's testimony; it appears to us that the QRC was not saying, contrary to the compensation judge's conclusion, that the employee should be able to earn at least her pre-injury wage, but rather that the employee would be able to earn that much with some training. Also, while the employee may be able to exceed her pre-injury wage if she works full-time, an employee who is only working part-time on the date of injury is not required to work additional hours post injury in order to reduce or eliminate her wage loss. On the issue of the compensability of chiropractic care, it may be true, as the compensation judge noted, that the employee was five years post-injury by the time of hearing, but the claim for chiropractic treatment expenses extends back several years prior to hearing, and the total length of treatment (five years) does not explain the denial of benefits for the entire period at issue. Also, it is not evident from her decision that the judge considered more than one or two of the numerous factors that may be relevant in evaluating a treatment expense claim.⁶ See, e.g., Fuller v. Naegle, No. [redacted to remove social security number], (W.C.C.A. April 14, 1993); Field-Siefert v. Goodhue County, No. [redacted to remove social security number] (W.C.C.A. March 5, 1990). While a compensation judge need not list or consider every factor in every case, we require more explanation here for adequate review. Finally, we note that the judge did not specifically address the employee's claim for rehabilitation benefits or benefits pursuant to Minn. Stat. § 176.101, subd. 3t(b). We see no evidence in the record that these claims, raised on the employee's claim petition, were waived or deferred.

The only claim currently resolved by our decision here is the employee's claim for permanent partial disability benefits under the schedules; we have affirmed the judge's denial of that claim. All other benefits raised by the employee's claim petition should be reconsidered, with further findings, in the event the judge resolves the temporary injury issue in the employee's favor. On remand the judge must make whatever findings are necessary to resolve the employee's claims and the employer's defenses and to provide adequate basis for review. She may, in her discretion, require further submissions from the parties in order to help define the issues. Any party may of course appeal to this court from the judge's decision.

⁶ We note that the treatment parameters were apparently not raised as a defense at hearing.