JOHN R. DOOLEY, Employee/Appellant, v. WINTZ DISTRIB. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 10, 1998

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

HEADNOTES

JOB SEARCH - SUBSTANTIAL EVIDENCE; TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Even where rehabilitation assistance is not provided, the employee must still make a reasonably diligent effort to find employment on his own. Where, for the year-long period at issue, the employee sought work only by making a few general and undocumented inquiries of his residential neighbors and of his associates in the National Guard, the compensation judge's denial of temporary total disability benefits for lack of a reasonable and diligent job search was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the employee was without rehabilitation assistance.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Where there was expert medical opinion that there was no reason for further EMG testing and that the employee had reached maximum medical improvement with 0% permanent partial disability, and where there was no appeal from the judge's finding that further treatment had not been shown to be reasonably promising, the compensation judge's denial of payment for a requested EMG was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Johnson, J. and Hefte, J.
Compensation Judge: Bradley J. Behr

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of compensation for a one-year period of alleged temporary total disability and of payment for a repeat EMG.[1] We affirm.

[1] The employee also filed notice of an appeal from the judge's denial of temporary total disability benefits for a period beginning two days before the hearing. This denial was based on a finding that the period of at issue commenced more than ninety days after the employee had been served with a medical opinion that he had reached maximum medical improvement. Any issue with regard to this denial, however, was not addressed in the employee's brief and therefore will

BACKGROUND

On March 16, 1995, the employee sustained an injury to his left upper extremity in the course of his employment as a truck driver for Wintz Distribution [the employer]. The employee's condition was diagnosed as left medial epicondylitis, and the employer and its insurer accepted liability for the injury and commenced payment of various workers' compensation benefits. After about two months of conservative treatment, the employee was released to return to work at light duty, and in August of 1995 he attempted a return to his pre-injury work as a driver. The manual unloading part of the job apparently caused his condition to flare up, however, and the employee abandoned his attempt after only about two weeks. Finally, about a year later, in September of 1996, the employee underwent surgical decompression of the ulnar nerve at the left elbow and a carpal tunnel release in the left hand. On October 28, 1996, the employee's surgeon, Dr. Charles MacDonald, released the employee to return to normal work activities as of November 4, 1996.

On October 30, 1996, the employer and insurer filed a Notice of Intention to Discontinue [NOID] the employee's temporary total disability benefits on grounds that the employee had been released to work without restrictions. The employee requested an administrative conference, on grounds that he had not yet reached maximum medical improvement. On December 2, 1996, in a letter to the employee's attorney, Dr. MacDonald reiterated that he had indicated on October 28, 1996, that the employee could resume normal work activities on November 4, 1996, which date, he indicated, would be the date of [MMI]. However, he added, I did ask the [employee] to return to see me in approximately two months following that last visit for re-evaluation which would probably be his last visit to this office.

The requested administrative conference was held on December 4, 1996. On December 9, 1996, an Order on Discontinuance Pursuant to Minn. Stat. § 176.239 was issued, discontinuing the employee's benefits. In her memorandum, the judge asserted that, under Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987), the employee is not entitled to a continuation of temporary total disability benefits if he has been released to return to work without restrictions and without permanent partial disability and that this was true even if the employee has not reached MMI. The employee did not appeal from this decision by requesting a formal hearing.

On December 26, 1996, the employee returned to see Dr. MacDonald, who ordered a functional capacities evaluation [FCE]. The employee underwent the FCE on January 16 and 17, 1997. The FCE indicated that the employee was capable of working eight hours a day, with restrictions against heavy lifting and against repetitive, or more than occasional firm, gripping with his left hand.

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not be addressed by the court. See Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992) (issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court).

On February 27, 1997, the employee filed a Rehabilitation Request, requesting that rehabilitation services be provided. Three months later, on May 27, 1997, the employee underwent a rehabilitation consultation with QRC Richard VanWagner. In a report on June 2, 1997, QRC VanWagner concluded that the employee was eligible for rehabilitation services, [i]n consideration of the [FCE] signed by Dr. M[a]cDonald, the fact that the employer has no plan of action to return [the employee] to suitable gainful employment, and given the apparent difficulty that [the employee] is going to have in returning to his pre-injury occupation. There is no evidence that any rehabilitation plan was executed for several months following this report. On August 6, 1997, the employee filed a second Rehabilitation Request, requesting in part that the rehabilitation plan be signed by the insurer and that rehabilitation benefits be reopened commencing November 4, 1996. On August 25, 1997, the employer and insurer filed a Rehabilitation Response, denying liability on grounds that the employee had been released to work without restrictions, had lost on this same issue at the December 1996 administrative conference, and had nevertheless undergone additional treatment without the insurer's approval. The employer and insurer requested that the matter be certified to the Office of Administrative Hearings for formal hearing, but the matter was heard instead, on September 23, 1997, at an administrative conference under Minn. Stat. § 176.106. On September 24, 1997, a Decision and Order was issued, in part granting the employee vocational rehabilitation services pursuant to an approved plan and ordering the employee's QRC to develop and file a rehabilitation plan within forty-five days.

On October 27, 1997, an R-2 Rehabilitation Plan was executed by the employee, QRC Intern [QRCI] Susan Luce, and QRC Kate Schrot.[2] The Rehabilitation Plan indicated in part a history of [s]ome work from [date of injury] to start of rehabilitation, not working at start of rehabilitation. By November 10, 1997, a Rehabilitation Job Placement Plan and Agreement [JPPA] had been executed by the employee, QRCI Luce, and Job Placement Specialist Andrew Leverenz.

On November 12, 1997, the employee filed a Claim Petition, alleging entitlement to temporary total disability benefits continuing from November 4, 1996, together with certain medical benefits. On December 10, 1997, the employer and insurer filed their Answer to the employee's Claim Petition, denying liability for the temporary total disability alleged. In that Answer, the employer and insurer also affirmatively alleged in part the following: that the employee had been released to work without restrictions pursuant to Dr. MacDonald's report dated December 2, 1996, and therefore, pursuant to Kautz, was not entitled to further benefits; that the employee had failed to make a reasonable and diligent search for work within his restrictions during the period of claimed disability; and that the employee had reached MMI pursuant to

[2] The employee's rehabilitation activities were evidently supervised by QRCI Luce, who had also been present at the employee's rehabilitation consultation with QRC VanWagner in June of 1997. QRC Schrot's name also frequently appears, as it does on the October 27, 1997, Rehabilitation Plan, beside Ms. Luce's in QRC signature block, apparently rubber-stamped.

Dr. MacDonald's report dated December 2, 1996, a copy of which was therewith served on the employee. On the following day, December 11, 1997, a return receipt was signed by the employee's wife for a copy of Dr. McDonald's December 2, 1996, report of MMI, which had been served on the employee by mail two days earlier.

On December 15, 1997, Dr. MacDonald indicated in a chart note that his previous recommendations still stand, adding, Unfortunately the EMG study which was requested has not been obtained apparently by refusal of the insurance company.[3] In a chart note dated one week later, December 22, 1997, Dr. McDonald issued an opinion that, based on an evaluation of the employee conducted by OTR/CHT Mary Kraling, the employee had reached MMI, subject to a 0% permanent partial whole-body impairment.[4] On January 26, 1998, the employee took a job working full time as an electronics installer, at wages that were less than his date-of-injury wages, and the employer and insurer commenced payment of temporary partial disability benefits.

On February 13, 1998, the employee was examined for the employer and insurer by Dr. Christopher Tountas. It was Dr. Tountas's opinion that the employee had reached MMI as of December 22, 1997, that he was capable of working without restrictions based on objective clinical findings, that there was no indication for any further medical care or treatment, that it was not reasonable for the employee to have another EMG, and that there was no basis to conclude that the employee had any residual permanent partial disability due to his work injury. On February 21, 1998, Dr. Tountas reiterated most of these conclusions on a Maximum Medical Improvement Physician's Report, modifying the employee's MMI date to November 4, 1996. On March 3, 1998, Dr. Tountas's February 13, 1998, report was served on the employee.

The job that the employee had taken in January 1998 lasted until March 17, 1998, and two days later, on March 19, 1998, the employee's Claim Petition came on for hearing. Issues at hearing included whether the employee had reached MMI from his work injury, whether a repeat EMG was reasonable and necessary to cure and relieve the effects of the employee's work injury, and whether the employee was entitled to temporary total disability benefits from November 5, 1996, to January 25, 1998, and continuing from March 18, 1998.[5] By Findings and Order filed March 27, 1998, the compensation judge concluded in part that from October 27, 1997, to January 25, 1998, the employee had conducted a reasonable and diligent job search and had cooperated fully with rehabilitation efforts and so was entitled to temporary total disability benefits

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[3] Any original request for the referenced EMG does not appear to be in evidence.

[4] We do not find a report of Ms. Kraling's evaluation in evidence. Dr. MacDonald's opinion was served on the employee on February 18, 1998.

[5] In his memorandum, the compensation judge suggests that temporary partial disability from January 26, 1998, to March 17, 1998, was also part of the claim presented by the employee at hearing. However, in the judge's decision proper, such temporary partial benefits are neither listed under the statement of issues nor addressed under the findings and order.

for that period. The judge denied, however, the employee's claim to benefits for the period November 5, 1996, to October 27, 1997, on grounds that the employee had failed to perform a reasonable and diligent job search during that period. The judge also denied the employee's claim to temporary total disability benefits continuing from March 18, 1998, based on his conclusions that the employee had reached MMI on November 4, 1996, pursuant to Dr. MacDonald's December 2, 1996, report to that effect, and that any entitlement that the employee might otherwise have had to those benefits would therefore have terminated on March 9, 1998, ninety days after service of Dr. MacDonald's report on December 9, 1997. Having found also that the employee's physical condition had not changed significantly since November 4, 1996, and that the evidence failed to show that further treatment might reasonably be expected to offer significant improvement, the judge also concluded that the proposed repeat EMG testing of the employee's left upper extremity had not been shown to be reasonable and necessary. 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 (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 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

Temporary Total Disability November 5, 1996, to October 27, 1997

In unappealed Finding 4, the compensation judge reiterated that, subsequent to his November 4, 1996, release of the employee to work without restrictions, Dr. MacDonald adopted restrictions for the employee recommended by functional capacity evaluators. Pursuant to that finding, the compensation judge found in unappealed Finding 5 that Dr. MacDonald's November 1996 unrestricted release had been only tentative and was not a basis for discontinuance of benefits pursuant to Kautz. Moreover, in unappealed Finding 6, the judge also concluded that the employer and insurer had not provided the employee with rehabilitation services from November 5, 1996, to October 27, 1997. Notwithstanding these findings favorable to the employee, however, the judge concluded also that the employee had failed to perform a reasonable

and diligent job search during that same period, November 5, 1996, to October 27, 1997, and therefore was not entitled to temporary total disability benefits during that period. Citing this court's decision in Meier v. Cuyuna Regional Medical Ctr., No. *[redacted to remove social security number]* (W.C.C.A. Feb. 2, 1996), the employee contends that employees seeking work without rehabilitation assistance are held to a lesser standard of diligence, that in light of that lesser standard the employee did conduct an adequate search for work during the period at issue, and that [a]s a matter of public policy the employer should be estopped, and be denied any reward for refusing to permit [the employee] what the court finally awarded him. We are not persuaded.

We acknowledge that the employer initially may have dragged its feet and ultimately contested the employee's entitlement to rehabilitation assistance. However, aside from his filed requests in February and August 1997, there is no evidence of any real urgency on the employee's part either to commence work with a professional assistant during the nearly twelve-month period here at issue, contrary to suggestions by the employee.[6] While the absence of professional rehabilitation assistance is an element to be considered in evaluating the diligence of a job search, see Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 956 (Minn. 1988), that absence of assistance does not relieve the employee of his burden of proving the diligence of his effort. See Mattson v. State Dept. of Public Safety, 48 W.C.D. 77, 80 (W.C.C.A. 1992), rev'd on other grounds, 494 N.W.2d 884, 48 W.C.D. 84 (Minn. 1993) ("even where rehabilitation assistance is not provided, the employee must still make a reasonably diligent effort to find employment as best he can on his own); see also Barrientos v. Heartland Foods, Inc., No. *[redacted to remove social security number]* (W.C.C.A. Jan. 27, 1995).

In this case, the only evidence that the employee searched for work during the year in question is the employee's own testimony that he sometimes discussed employment with his residential neighbors and his associates in the National Guard. The employee could not, however, furnish the names of any individual neighbors with whom he had spoken about employment, his only specific example of such a discussion being a talk he had with a window deliverer, a butcher, and a carpenter at a neighborhood bonfire. Moreover, the only National Guard associate identified by the employee as someone he consulted concerning employment was a corrections officer named Rich Coney, who, since November 1996, had according to the employee been Akeeping an eye [out for me] for the postings whenever the postings came out.[7] In light of this evidence, it was not unreasonable for the compensation judge to conclude that the

[6] At the hearing, the employee agreed with his attorney on direct examination that the employee had requested QRC assistance right away early off but had been denied it, that he would have worked with a QRC had the employer and insurer voluntarily agreed to provide one prior to September 1997, and that rehabilitation assistance has ultimately been a critical factor in his ability to find employment.

[7] The employee indicated that it was in part due to Mr. Coney's help that the employee had obtained an interview with the Department of Corrections scheduled for the afternoon of the hearing.

employee had not demonstrated that his loss of earnings during the year at issue was causally related to his work injury. Nor is the reasonableness of the judge's decision compromised by the testimony of QRCI Luce, that the employee complied with the rehabilitation plan and with the placement plan fully. Notwithstanding QRCI Luce's presence at the employee's rehabilitation consultation, there is no evidence, aside from one insubstantial grammatical reference in the second Rehabilitation Request,[8] that there even existed a rehabilitation or placement plan for the employee to be cooperating with prior to the end of the benefits period here at issue, nor are there any rehabilitation records documenting any professional services to the employee prior to October 27, 1997.[9] In light of this evidence, we affirm the compensation judge's denial of temporary total disability benefits from November 5, 1996, to October 27, 1997. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Reasonableness and Necessity of the Repeat EMG

In unappealed Finding 2, the compensation judge concluded that the employee's physical condition had not changed significantly since November 4, 1996, and that the evidence failed to show that further treatment might reasonably be expected to offer significant improvement. Consistent with that finding, the compensation judge found that the repeat EMG proposed by Dr. MacDonald was not reasonable and necessary to evaluate the effects of the employee's work injury. The judge's memorandum suggests that he based this conclusion primarily on the opinion of Dr. Tountas and on the fact that the employee offered no opinions from Dr. M[a]cDonald or any other physician explaining the basis for the requested EMG. The employee contends that [w]ithout the EMG, the employee remains in a Catch 22, that he needs the EMG to medically understand his limitations, and to determine to what extent he has a permanent partial disability. The employee's own surgeon has already concluded, however, by his report dated December 22, 1997, unnoted by the compensation judge, that the employee has 0% permanent partial disability. In light of the opinions of Drs. Tountas and MacDonald and the judge's unappealed finding that further treatment has not been shown to be reasonably promising, we conclude that it was not unreasonable for the compensation judge to conclude also that the requested EMG was not reasonable and necessary to cure, relieve or evaluate the effects of the employee's work injury. Therefore, we affirm the judge's denial of payment for the requested EMG. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

[8] In his August 6, 1997, Rehabilitation Request, the employee requested that the rehabilitation plan be signed by the insurer (emphasis added). No evidence was offered by either party to corroborate the existence of any rehabilitation plan on August 6, 1997.

[9] QRCI Luce in fact testified that she did not provide any rehabilitation services to the employee prior to October 1997.