JOHN ENGER, Employee/Cross-Appellant, v. GENERAL SEC. SERVS. and ZURICH INS. GROUP (ADMIN'D BY RISK ENTER. MANAGEMENT), Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 28, 1998

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

HEADNOTES

PRACTICE & PROCEDURE - EXPEDITED HEARING. Where one of the grounds listed on the employer and insurer's petition to discontinue benefits was that the employee had no permanent injury or restrictions, and where the compensation judge's refusal to consider the issue might have deprived the employee of any defense to the petition, the employee's claim that he sustained a traumatic brain injury, in addition to other work-related injuries, was not beyond the scope of the issues presented to the compensation judge. However, because the compensation judge erred in treating the traumatic brain injury as admitted, rather than making a finding on the issue based on the evidence, and because resolution of the issue was not in fact necessary given the basis for the judge's order for discontinuance, the judge's finding that the employee sustained a work-related traumatic brain injury would be vacated.

MAXIMUM MEDICAL IMPROVEMENT - SERVICE OF MMI REPORT. Where, contrary to the employee's claim on appeal, evidence in both the judgment roll and in the employer and insurer's exhibits indicated that both the employee and his former attorney had been served with notice of MMI on the date alleged, the compensation judge did not err in concluding that that service was sufficient to commence the 90-day post-MMI period.

ATTORNEY FEES. Where the employee's attorney had been at least partially successful in representing the employee in connection with an employer and insurer's petition to discontinue benefits, and where the compensation judge failed to make any findings or orders concerning attorney fees, the matter would be remanded to allow the judge to remedy the apparent oversight.

Affirmed in part, vacated in part, and remanded.

Determined by Wilson, J., Hefte, J., and Johnson, J.
Compensation Judge: Donald C. Erickson.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's finding that the employee sustained a work-related traumatic brain injury. The employee cross appeals from the

compensation judge's finding as to maximum medical improvement and from the judge's failure to award attorney fees. We affirm in part, reverse in part, and remand for further findings.

BACKGROUND

On January 29, 1996, the employee was conditionally hired, pending a criminal background check, to work as a security guard for General Security Services [the employer]. About three weeks later, on February 19, 1996, the employee sustained work-related injuries when he slipped and fell on ice, striking his head on the ground. By June of 1996, symptoms noted in the employee's medical records included neck and back pain, headaches, dizziness, ringing in the ears, nausea, depression, and problems with thinking, memory, maintaining train of thought, and reading. The employer's insurer evidently assigned the employee a QRC or disability case manager[1] and paid the employee various benefits.

The employer and insurer filed at least two Notices of Intention to Discontinue Benefits [NOIDs], alleging first that the employee had failed to follow prescribed treatment, thereby delaying his recovery, and next that he was disabled due to a personal medical condition. In response to the second NOID, the employee filed a request for administrative conference, alleging that he was disabled due to a brain injury. The employer and insurer apparently withdrew both NOIDs and continued or resumed payment of benefits without formal order.

On September 22, 1997, the employer and insurer filed a petition to discontinue benefits, alleging the three following grounds for discontinuance:

> 1. The Employee has been released to return to work within restrictions. The Employer herein is cognoscente [sic] of the restrictions and has work available within those restrictions. However, the Employee lied to the Employer upon initial employment stating that he did not have any prior felony convictions, thus, fabricated his job application . . . . The Employer has work available, but due to prior felony convictions and lies to the Employer on his application, the Employee can not accept this work. There is no further workers' compensation liability on the part of the Employer and Insurer. Temporary total disability benefits and all benefits under Minnesota Statute § 176 immediately cease. Employer and Insurer rely on the attached Affidavit of William J. Leoni of the Employer.
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> 2. That Employee has not been cooperating with rehabilitation efforts and benefits cease under Mayer v. Erickson

[1] Some rehabilitation records are signed by a certified case manager, some by a QRC.

Decorators and Redgate v. Srogas. Employer and Insurer based these contentions on the attached rehabilitation reports.

3. The Employee has no permanent injuries, he is not in need of further medical treatment and has no permanent partial disability and no restrictions, thus, under Kautz v. Setterlin, he is not entitled to any additional benefits. Employer and Insurer base these contentions on the attached 6/7/97 report of Dr. Larry Stern.

When the petition to discontinue came on for hearing before a compensation judge on December 5, 1997, the employer and insurer alleged, in addition to the grounds specified in the petition, that the employee had reached maximum medical improvement [MMI], in accordance with the June 13, 1997, report of Dr. Edward E. Martinson, effective with service on June 24, 1997. The employee alleged that he had not reached MMI with respect to his traumatic brain injury, that his purported noncooperation with rehabilitation was due in part to his traumatic brain injury, and that he continued to have restrictions due to his work-related conditions.

Following the employee's opening statement, counsel for the employer and insurer clarified for the judge that there has never been an admission, and there is not an admission as we sit here today of any alleged traumatic brain injury. On further questioning by the judge, counsel acknowledged that the employer and insurer had admitted liability for a personal injury on February 19, 1996, but explained that that does not mean that we admit any and all claimed diagnoses when there are bases that these diagnoses either do not exist or are not causally related, and we have never admitted any alleged traumatic brain injury. The judge indicated to the employer and insurer's counsel that he under[stood] that's your position.

In a decision issued on January 27, 1998, the compensation judge concluded in part that the employee had received a traumatic brain injury, and a strain to his neck and back, as a result of his February 19, 1996, slip and fall; that the employer and insurer had accepted primary liability for the employee's traumatic brain injury; that the employer and insurer had not proven that the employee had failed to cooperate with rehabilitation; and that the employer and insurer had not proven that the employee was able to work without restrictions. The compensation judge also found, however, that the employee had reached MMI, in accordance with Dr. Martinson's opinion, effective on June 24, 1997, with service of Dr. Martinson's report, and the judge allowed discontinuance of wage loss benefits as of the date of his decision.[2] Both parties appeal.

[2] The 90-day period following service of Dr. Martinson's report expired well prior to hearing. Because, however, the employer and insurer never filed an NOID seeking to discontinue benefits based on MMI, the compensation judge declined to allow discontinuance prior to the filing of his decision. The employer and insurer did not appeal on this issue, and the employee's appeal as to MMI concerns only notice of MMI. We express no opinion as to the judge's rationale.

STANDARD OF REVIEW

[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

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

Traumatic Brain Injury

Petitions to discontinue benefits are governed by Minn. Stat. § 176.238, and related rules.[3] Pursuant to Minn. Stat. § 176.238, subd. 6, [t]he hearing [on a petition to discontinue] shall be limited to the issues raised by the . . . petition unless all parties agree to expanding the issues. On appeal, the employer and insurer contend that the compensation judge impermissibly expanded the issues, in contravention of the statute, by finding that the employee sustained a traumatic brain injury. The employer and insurer also maintain that they lacked adequate notice and opportunity to be heard on the issue, in violation of the principles expressed in Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988).

We are not convinced by the employer and insurer's arguments as to the proper scope of the hearing. One of the designated grounds for the employer and insurer's proposed discontinuance was that the employee ha[d] no permanent injuries, no permanent partial disability, and no restrictions. We fail to see how the compensation judge could reasonably and adequately evaluate this basis for discontinuance without considering all conditions purportedly resulting from the employee's fall. We also note that the employer and insurer had clearly been aware for some

[3] See Minn. R. 5220.2630.

time, from the employee's medical records and some previous pleadings, that the employee was asserting the occurrence of a traumatic brain injury, and the employer and insurer even elicited testimony at hearing as to whether the employee's alleged brain injury had been taken into account in the QRC's provision of rehabilitation services. In addition, the employer and insurer themselves expanded the issues, as contemplated by Minn. Stat. § 176.238, subd. 6, by raising for the first time at hearing whether discontinuance was warranted based on the employee's attainment of MMI. This basis for discontinuance also potentially required resolution of the employee's brain injury claim.[4] Finally, we note that the employee repeatedly raised the issue of his alleged traumatic brain injury, without objection by the employer and insurer, in defense to the asserted grounds for discontinuance. A compensation judge need not consider discontinuance issues in a vacuum,[5] and any refusal to consider the traumatic brain injury issue here could potentially have deprived the employee of the opportunity to present a meaningful response to the employer and insurer's petition.

While we are not persuaded that primary liability for the employee's alleged traumatic brain injury was necessarily beyond the scope of the issues presented to the compensation judge, we are nevertheless compelled to vacate the judge's findings on that issue. In Finding 13, the judge determined that the employee received a traumatic brain injury, and a strain to his neck and back, as a result of his February 19, 1996, slip and fall. However, from subsequent findings, it appears that the judge's finding of primary liability for traumatic brain injury was based not on the evidence but on his conclusion that the employer and insurer had admitted or accepted liability for the condition.[6] This was error, in that the employer and insurer

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[4] At least in theory, the compensation judge could have determined that the employee had reached MMI with regard to his back and neck conditions but that he had not reached MMI with regard to his alleged brain injury. Had the compensation judge so concluded, the employer and insurer's right to discontinue benefits based on MMI could not have been properly determined without consideration and resolution of the issue of primary liability for the alleged traumatic brain injury. See, e.g., Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989) (discontinuance based on MMI is not appropriate unless the employee has reached MMI from all compensable conditions).

[5] See, e.g., Reid v. Ryder Truck Rental, 42 W.C.D. 677 (W.C.C.A. 1989).

[6] Findings 16 and 18 read as follows:

> 16. At the hearing, counsel for the employer and insurer contended that the employer and insurer had not accepted primary liability for the traumatic brain injury. This is a ludicrous position that is without factual basis in light of the extensive medical management services provided by the QRC.
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> * * *
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> 18. At the hearing, counsel for the employer and insurer contended, apparently based on an orthopedic IME, that the employee had no restrictions. This position has no merit or factual basis in light of the Functional Capacities

specifically advised the judge that liability for the alleged traumatic brain injury was disputed. Moreover, whether or not the employer and insurer had in the past voluntarily treated the condition as work-related, they were within their rights to change their position. To hold otherwise would discourage voluntary payment of benefits.

As we have concluded that primary liability for the employee's alleged traumatic brain injury was properly before the judge but that the judge erred in treating the injury as admitted, we might under other circumstances have remanded the issue for reconsideration and additional findings of fact. However, as it turned out, a finding as to primary liability for the employee's alleged traumatic brain injury was not necessary to the judge's discontinuance of benefits based on MMI.[7] Therefore, all that is required at this time is to vacate the judge's findings as to liability for the employee's alleged traumatic brain injury. A claim petition is currently pending, and the issue can be litigated, if need be, in connection with that proceeding.

MMI

In his appeal on the issue of MMI, the employee contends that there was no service of Notice of MMI made upon the Employee and his attorney prior to the Hearing of December 5, 1997. Accordingly, the employee contends that the 90-day post-MMI period could not begin to run until the date of hearing. This argument has no merit. Both the judgment roll and the employer and insurer's exhibits indicate that both the employee and his former attorney[8] were served with Dr. Martinson's report on June 24, 1997. As the employee does not argue that he has not yet reached MMI as a matter of fact, we affirm the judge's decision that the employee reached MMI effective June 24, 1997.

Attorney Fees

It is evident that the employee's attorney was at least partially successful in his representation of the employee, but the compensation judge neglected to make any findings or order concerning attorney fees. We therefore remand the matter to the judge to remedy the apparent oversight.

> Assessment and the failure of any IME to address the admitted traumatic brain injury of the employee.

Nowhere did the judge discuss any evidence as to causation of the condition.

[7] In contrast to the scenario in footnote 4, once the judge concluded that the employee had reached MMI from all potentially work-related conditions, it became irrelevant, for discontinuance purposes, whether those conditions were in fact work-related.

[8] Robert Kaner.