CHERYL ENGSTROM, Employee, vs. JENNIE O FOODS and SENTRY INSURANCE CO., Employer & Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 20, 1998

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

HEADNOTES

TEMPORARY PARTIAL DISABILITY. Where goals set by the parties in an Order on Agreement were met - i.e., the employee returned to work full time at a suitable job and quit the waitressing job the employer and insurer felt was physically inappropriate and causing flare-ups of her neck and right upper extremity condition - denial of Petition to Discontinue temporary partial benefits for failure to comply with the Agreement is affirmed.

Stayed in part and affirmed.

Determined by Johnson, J., Hefte, J. and Olsen, J.
Compensation Judge: Harold W. Schultz, II

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's award of medical benefits for the employee's chiropractic treatment and the determination that she is entitled to temporary partial benefits from February 19 through June 3, 1996. We stay consideration of the award of medical benefits and affirm the award of temporary partial benefits.

BACKGROUND

The employee, Cheryl Engstrom, began working for the employer, Jennie-O Foods, in February 1992. On April 21, 1992, she sustained personal injuries to the neck and right upper extremity that were determined to have arisen out of and in the course of her employment. (Judgment Roll, Findings and Order of 5/28/93.) Since that time, the employer and its insurer, Sentry Insurance Company, have paid workers' compensation benefits to the employee, including wage loss, permanent partial disability, rehabilitation and medical benefits. The employee cannot return to her date-of-injury job. Rather, she appears to have worked at a variety of jobs, often part-time and/or for fairly short periods of time. Many of these jobs have been as a waitress or cashier, employments which the employer and insurer believe are not physically suitable in light of the employee's neck and right upper extremity condition.

During the summer of 1996 the employee held a part-time position as a cashier at K-Mart. She was unemployed during most of the month of August, but in September began two part-time jobs, the first as a Title I teacher's aide for approximately two hours per day, and the second as a waitress at the Chatter Box Cafe. An administrative conference was held on September 30, 1996, pursuant to a Notice of Intention to Discontinue Benefits (NOID) filed by the employer and insurer. (See Judgment Roll, NOID filed 8/26/96.) During the conference the parties made the following agreements:

> (1) If the employee became employed full-time by the school district within the next 30 days, as anticipated by the parties, rehabilitation shall be immediately closed and the employee agrees to quit her job at the Chatterbox.
>
> (2) If the employee did not become employed full-time by the district, rehabilitation services, including job placement services, shall be resumed . . . [and] the employee will job search 40 hours per week less her part-time hours at the school district.

(Judgment Roll, Order on Agreement served and filed 10/21/96, && 5 and 6a.) In late November, the employee was offered a 35-hours-per-week job with the school district, working Monday through Friday from 8:00 a.m. until 3:00 p.m. She testified she quit her job at the Chatterbox (Tr. at 27) and worked only for the school district from December 9, 1996, until the end of the school year, approximately June 3, 1997. She did not perform any job search activities from October 21, 1996 (the date the Order on Agreement was served and filed), until the end of the school year. (Tr. at 45.)

The employer and insurer filed a NOID on February 19, 1997, stating the employee had failed to provide evidence of her employment status. After a settlement conference, the proposed discontinuance was denied. (Judgment Roll, Order of 5/13/97.) The employer and insurer filed a Petition to Discontinue and the employee objected.[1] This matter was consolidated for hearing with the employee's request for medical benefits for chiropractic treatment from April 15 through December 9, 1996. (Judgment Roll, Medical Request filed 5/30/97.) The case came on for hearing before a compensation judge of the Office of Administrative Hearings on July 29, 1997.

In Findings and Order served and filed September 29, 1997, the compensation judge found the majority of the chiropractic treatment received between August and December 1996 was reasonable and necessary, although he stated in his memorandum that the employee

[1] In her objection to the Petition to Discontinue, the employee also requested temporary partial benefits from and after June 3, 1997, when her contract with the school district ended. (Judgment Roll, Objection to Discontinuance filed 6/19/97.) The issue was resolved at hearing and is not relevant to this appeal.

provided minimal evidence in support of this claim. (Finding 21; memorandum at 6.) He found further that the employee in substance complied with the October 21, 1996, Order on Agreement, finding full-time work with the school district by December 9, 1996 (Finding 18), and found the employee entitled to temporary partial benefits from February 19 through June 3, 1997. The employer and insurer's Petition to Discontinue and their request for a credit for overpayment of temporary partial benefits were, accordingly, denied. 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

The employer and insurer first contest the compensation judge's award of medical benefits for the employee's chiropractic treatment with Dr. James Gudgel. They argue that the employee failed to submit sufficient evidence to support the award, failing to prove either that the treatment was reasonable and necessary or in compliance with the permanent treatment parameters. The permanent treatment parameters promulgated by the Department of Labor and Industry (see Minn. R. 5221.6010 to 5221.6600) were effective January 4, 1995, and state they are applicable to all treatment provided after the effective date of the rules, regardless of the date of injury. Minn. R. 5221.6020, subp. 2. The interpretation and applicability of the permanent treatment parameters are questions that have been certified to the Minnesota Supreme Court in the consolidated cases of Jacka v. Coca Cola Bottling Co., No. *[redacted to remove social security number]*, and Kelley v. Viking Auto Salvage, No. *[redacted to remove social security number]*. We therefore stay consideration of the employer and insurer's appeal of the award of medical benefits pending resolution of the issue by the supreme court. See Elmquist v. Green Acres Country Care Ctr., No. *[redacted to remove social security number]* (W.C.C.A. November 6, 1997).

The employer and insurer also claim they are entitled to a credit for overpayment of temporary partial benefits from February 19, 1997 (when the NOID was filed), until June 3,

1997 (when the employee's contract with the school district ended), due to the employee's failure to comply with the October 21, 1996, Order on Agreement. They maintain the employee failed to comply with the terms of the Agreement in two ways: (1) she failed to obtain full-time work for the district because the job obtained was not a 40-hour-per-week job, and (2) she failed to comply with the job search requirements of the Agreement, which were invoked when she failed to become employed full-time by November 20, 1996, i.e., within 30 days of the Agreement, as agreed by the parties. As a consequence, they argue the compensation judge erred in denying their petition to discontinue temporary partial benefits and award a credit to recover benefits paid. We are not persuaded.

The compensation judge found the employee in substance complied with the Order on Agreement because she was employed full-time with the district from December 9, 1996. (Finding 18.) There is substantial evidence to support this finding. The parties anticipated the employee would obtain full-time employment with the district within thirty days of the Order on Agreement. While this goal was not obtained by the designated date, i.e., by November 20, 1996, there is some evidence that the employee's hours may have increased somewhat after the Agreement in October was made but before she began full-time employment in early December. (Tr. 27-29.) The employee also testified she was offered full-time employment around Thanksgiving time, and began working full-time on December 9, 1996. There is no evidence the employee was able to control the timing or otherwise delay the offer of full-time employment, or that she entered into the Agreement in bad faith. Although the employee did not begin full-time employment precisely on the November 20th date set in the Agreement, the compensation judge could reasonably find that the more significant goals set by the parties were met: the employee returned to work full-time at a suitable job and, in accordance with the Agreement, quit the waitressing job that the employer and insurer felt was physically inappropriate and causing flare-ups of her neck and right upper extremity conditions.

The employer and insurer also argue, however, that the Agreement defines full-time work as 40 hours per week. From November 20th, therefore, the employee was obligated to perform job search activities as long as she was working less than 40 hours per week. We disagree. Full-time is not defined in the Agreement, and is used only in reference to a position with the school district. Paragraph 6a, cited by the employer and insurer, states only that the employee will job search 40 hours per week, less her part-time hours with the school district, **if** she does not begin working full-time for the district. We do not read this section to constitute an agreement that **only** a 40-hour-per-week job with the district will qualify as full-time under the Agreement. No evidence was submitted to support a finding that a full-time position with the school district consists of a 40-hour week. Rather, the employee testified she worked Monday through Friday from 8:00 a.m. until 3:00 p.m., the hours in school that school was in progress. (Tr. 30.) She testified also that this position was advertised as full-time, and that she understood it to be full-time. (Tr. 30-31, 48.) The compensation judge accepted this testimony. As the compensation judge's determination is supported by the evidence, we affirm the denial of the employer and insurer's Petition to Discontinue and their request for a credit for overpayment of benefits.