

KEVIN ESPING, Employee/Appellant v. OLYMPIC WALL SYS. and CNA INS. CO.,
Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 30, 1998

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

HEADNOTES

TEMPORARY TOTAL DISABILITY. Denial of temporary total benefits affirmed where employee capable of full-time work without restrictions, but compensation judge's determination modified and temporary total benefits awarded for three-day period between imposition of restrictions and employee's return to work.

Affirmed as modified.

Determined by Johnson, J., Wheeler, C.J., and Olsen, J.
Compensation Judge: Danny P. Kelly

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's denial of temporary total disability benefits for the period from January 3, 1997 through March 19, 1997.

BACKGROUND

The facts in this case are essentially undisputed. Kevin Esping, the employee, worked for the employer, Olympic Wall Systems, Inc. On November 26, 1996, the employee was performing sanding work in preparation for painting walls at Apple Valley High School. He was wearing four and one-half foot stilts when he lost his balance and fell on a concrete floor, landing on his left side. On that date, the employer was insured by CNA Insurance Company, the insurer. The employee sought no medical treatment and continued to work for the employer. On January 3, 1997, the employee was laid off.

The employee first sought medical treatment on January 15, 1997, from Dr. John A. Beall. The employee complained of left knee and left hip pain. An x-ray of the hip showed some degenerative changes on examination. Dr. Beall noted decreased range of motion of the left hip and left knee pain. The balance of the examination was normal. Dr. Beall diagnosed chondromalacia of the left knee and left hip pain and referred the employee to Summit Orthopedics. On January 24, 1997, the employee was seen by Dr. Lloyd L. Leider at Summit Orthopedics. The doctor diagnosed a strain injury of the left hip secondary to his fall at work.

Dr. Leider noted the employee was employable and unrestricted in his activities. (Pet. Ex. B). The doctor prescribed physical therapy. The employee decided not to partake in physical therapy. (T. 71-72).

On January 30, 1997, Dr. Beall responded to a letter from the employee's attorney and stated: From my written visit [Jan. 15, 1997] I would recommend avoiding kneeling, avoid going up and down stairs and avoid prolonged standing. (Pet. Ex. B). The employee returned to see Dr. Beall on March 18, 1997. The doctor noted his examination was unremarkable other than mild discomfort in the knee and hip areas. The doctor allowed the employee to return to work effective March 19, 1997. The employee was instructed to avoid kneeling on his left knee, standing for prolonged periods and to rest 15 minutes out of every hour. (Pet. Ex. B).

The employee made a search for employment from and after January 3, 1997. He returned to work on March 21, 1997, and remained employed through the date of hearing. The employee earned less than his weekly wage with the employer.

On May 21, 1997, the employee was examined by Dr. Richard C. Strand at the request of the employer and insurer. The doctor diagnosed (1) degenerative arthrosis of the hips probable old Legg-Perthes disease, healed, and (2) a healed strain of the left wrist and knee. Dr. Strand concluded the wrist, knee and hip injuries were temporary in nature and resolved. Dr. Strand opined the employee could work without restrictions and needed no further medical treatment. (Pet. Ex. A).

The employee filed a claim petition seeking temporary total disability benefits from January 3, 1997, through March 19, 1997, and temporary partial disability benefits from March 21, 1997, through the date of hearing. The employer and insurer denied liability. The matter came on for hearing before Compensation Judge Danny P. Kelly on July 9, 1997. In Findings and Order served and filed September 5, 1997, the compensation judge found the employee sustained a temporary aggravation to his left hip and knee on November 26, 1996, and found this condition resolved no later than May 21, 1997, the date of the independent medical examination performed by Dr. Strand. (Finding No. 14). The compensation judge found the employee conducted a diligent search for employment from January 3, 1997, through March 19, 1997. The compensation judge further found the employee was temporarily and partially disabled from March 21, 1997, through May 21, 1997, and that his actual earnings during this period constituted a fair measure of his earning capacity. (Finding No. 16). The compensation judge found Dr. Beall lacked foundation for his opinions regarding the restrictions set forth in his letter of January 30, 1997. (Finding No. 10). These findings are unappealed. In Finding 15, the compensation judge found the employee failed to prove entitlement to temporary total disability benefits from January 3 through March 19, 1997, because he was capable of full-time employment without restriction. The employee appeals this finding and the denial of temporary total disability benefits.

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 employee asserts the compensation judge's findings are inherently inconsistent. He argues that an award of temporary partial disability benefits from and after March 21, 1997, is inconsistent with a denial of temporary total disability benefits prior to that date. Further, the employee asserts the compensation judge erroneously denied total disability benefits based upon a mistaken conclusion as to the legal effect of the employee's layoff on January 3, 1997. The employee seeks a reversal of the denial of temporary total disability. We are not persuaded.

The compensation judge found the employee failed to prove a causal relationship between the January 3, 1997, layoff and the personal injury. (Finding No. 5). The employee argues that whether or not there is a causal relationship between the layoff and the personal injury is irrelevant to a determination of whether the employee is entitled to temporary total disability benefits. We agree. Entitlement to temporary total disability benefits is dependent upon the employee's ability to find work in the community given the employee's physical condition, age, training, and experience. Schulte v. C.H. Peterson Constr. Co., 24 W.C.D. 290, 153 N.W.2d 130 (Minn. 1967). Resolution of this issue is not, however, dispositive of this appeal.

To establish entitlement to temporary total disability benefits, the employee must prove that he has an impairment from the work injury which contributes to the unemployment. Id. The issue in this case is whether the employee sustained his burden of proving he had restrictions resulting from the work injury. Between January 13 and March 17, 1997, the only restrictions were those imposed by Dr. Beall in his report of January 30, 1997. (Pet. Ex. B). The compensation judge found: Dr. Beall did not examine the employee on January 30, 1997, but based his restrictions on the January 15, 1997 examination. Dr. Beall lacked foundation for the

determination of accurate physical restrictions. (Finding No. 10). This finding was unappealed.¹ The only other medical report during this period of time dealing with restrictions was that of Dr. Leider who opined on January 24, 1997, the employee was employable and unrestricted in his activities. (Pet. Ex. B). The compensation judge thus concluded the employee failed to prove that he was subject to restrictions between January 3 and March 19, 1997, and denied temporary total disability.² Absent proof of restrictions, the employee failed to prove entitlement to temporary total disability benefits. Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987).

However, Dr. Beall issued physical restrictions on March 18, 1997, three days before the employee returned to work. The compensation judge accepted this opinion (Finding No. 16). His award of temporary partial disability benefits was based on these restrictions from Dr. Beall. The judge therefore awarded temporary partial disability benefits from March 21 until the resolution of the temporary aggravation on May 21, 1997. Since the compensation judge found the employee had restrictions as of March 18, 1997, the employee is entitled to temporary total disability benefits from March 18 through March 20, 1997. We, therefore, modify the compensation judge's decision and award temporary total disability benefits from March 18 through March 20, 1997. The decision of the compensation judge is affirmed, as modified.

¹ We, therefore, take no position on whether Dr. Beall had adequate foundation for his opinion.

² This conclusion is not accurate since Dr. Beall provided restrictions on March 18, 1997.