FRANK DOBSON, Employee, v. NW MECH. SERVS. and FEDERATED INS. CO., Employer-Insurer/Appellants, and N. COUNTRY PHYSICAL THERAPY, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 9, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - SUBSTANTIAL EVIDENCE. The employee's unrebutted testimony of the number of hours he worked and the hourly rate he was paid in his bartending job substantially supported the judge's determination of his weekly wage in this job. Nothing in the employee's testimony compelled a finding that any part of the employee's claimed earnings in this job were derived from tip income.

REHABILITATION - CONSULTATION. The employee's testimony and evidence in the medical records adequately support the finding that the employee's work injury continues to cause the employee difficulty in working and that restrictions are appropriate, so that the compensation judge did not err in finding the employee eligible for a rehabilitation consultation despite an unrestricted return to work by his treating physician without wage loss.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Pederson, J.
Compensation Judge: Gary P. Mesna

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's finding setting the employee's weekly wage at $442.15, and from the determination that the employee is entitled to a rehabilitation consultation. We affirm.

BACKGROUND

The employee, Frank Dobson, was born in November 1969 and is 30 years old. On December 13, 1995, he sustained a work injury when his legs were run over by a tractor while working for the employer, Northwest Mechanical as a hydraulic technician. The employee was seen at the North Country Regional Hospital on the date of the work injury and was diagnosed with a medial collateral ligament tear of the left knee. He was subsequently referred to Dr. Thomas E. Miller, an orthopedic surgeon, who first saw the employee on December 21, 1995. Dr. Miller diagnosed a grade II medial collateral ligament injury to the left knee without joint

involvement. The employee was off work on Dr. Miller's orders following the injury until January 29, 1996 when he was released to return to work without restrictions. He returned to work in his regular job for the employer. This work required significant lifting, bending, squatting, twisting and kneeling. (T. 13, 19, 22-28; Exh. C; Exh. E: 12/21/95 - 1/29/96; Finding 3 [unappealed].)

The employee returned to Dr. Miller on March 6, 1996 with right knee pain, but x-rays showed no abnormalities. The employee testified that over the next several months the pain in his knees continued to worsen, his knees would "give out," and he had difficulty with kneeling, twisting and squatting at work. In October 1996 the employee again returned to Dr. Miller reporting that his knee pain on the left side had become worse. X-rays of the left knee showed an enlarging osteophyte in the distal femur. Dr. Miller recommended that the employee undergo arthroscopic excision of the osteophyte. The employee underwent this surgical procedure on October 31, 1996. (T. 35 - 37; Exh. E: 3/6/96 - 10/31/96.)

Following the arthroscopic surgery, the employee was released to return to work on December 4, 1996 with restrictions against kneeling and squatting. He returned to work for the employer for a brief period in December but quit to accept a similar job with employer Catco, which he considered a more established company with greater advancement opportunities. On January 15, 1997 the employee was again released to work on an unrestricted basis. (T. 42-45; Exh. E: 12/4/96 - 1/15/97; Findings 5, 6.)

The job at Catco similarly required significant climbing, kneeling, lifting, squatting and twisting. The employee testified that it is difficult for him to sustain a squatting position at work and that squatting, bending at the knees and twisting cause pain in the knees, that his knees "pop" and "crack" while at work, and that his knee pain progressively increased during the work day. On April 21, 1997 the employee returned to Dr. Miller reporting "achy pain" in the anterior aspect of the left knee and also in the right knee. Patellofemoral crepitation was noted on examination, with the right knee worse than the left. Dr. Miller suspected chondromalacial problems with the kneecaps, and recommended an outpatient course of physical therapy. However, the employee was seen only for an initial therapy session. He testified that the employer's workers' compensation insurer denied payment for the therapy and he did not return for the remaining sessions because he was not able to pay for the treatment. (T. 50, 52-54, 56-57, 69, 81-83; Exh. E: 4/21/97; Exh. D.)

On December 9, 1997 the employee experienced a sudden pop and pain in his right knee after jumping out of his pickup truck. He was seen by Dr. Miller on December 10, 1997, and an MRI scan of the employee's right knee was performed on December 11, 1997. The radiologist read the scan as showing joint space effusion and that the posterior end of the anterior cruciate ligament was detached from the distal femur. On December 15, 1997, Dr. Miller advised non-operative treatment but warned the employee that "he may develop some late instability, in which case he may require ligament reconstruction." (Exh. C: 12/11/97; Exh. E: 12/10/97-12/15/97.)

In a letter report dated December 4, 1997, Dr. Miller expressed the following opinion:

> I do not feel that Mr. Dobson's objective diagnoses fit any current Workmen's Compensation Guidelines for permanent partial disability. I do think that his repetitive squatting and kneeling activities aggravate his patellofemoral joint and are a contributing factor to his current complaints of knee pain which cannot be substantiated by any objective findings. . . Given the paucity of objective findings on clinical exam, x-rays and arthroscopy, I do not think I am justified in putting specific restrictions on this man's activities on a permanent basis. However, if he continues to have the anterior knee pain symptoms that cannot be controlled with a quadriceps exercise program, I think he would be wise to consider vocational change to jobs that do not involve squatting and kneeling repetitive activities. It seems to me that it would be appropriate to at least have a Q.R.C. review this man's situation in the hopes of modifying his workplace activities to avoid repetitive kneeling and squatting activities.

(Exh. E: 12/4/97 letter.)

Beginning in July 1995 the employee had a second job working as a bartender for the Wilton Liquor Store two nights per week, working at least sixteen hours each week. The employee testified that he was paid $8.00 per hour in this job. He was paid in cash and did not include this income in his state and local tax returns. With the exception of periods for which he was medically off work following the December 13, 1995 work injury, the employee continued to work in the job for the Wilton Liquor Store at the same rate of pay and hours through the date of hearing. The employer and insurer did not include any earnings from Wilton Liquor in calculating the employee's weekly wage on the date of injury or in calculating temporary disability compensation payments. (T. 62-66; Findings 1, 13.)

The employee filed a claim petition on March 6, 1998 alleging underpayment of temporary benefits paid by the employer and insurer and requesting that rehabilitation services be provided. A hearing was held before a compensation judge of the Office of Administrative Hearings on March 3, 1999. The judge determined that the employee's weekly wage on the date of injury was $442.15 and that the employer and insurer had underpaid temporary benefits. The judge further found that the employee's work injury continued to cause the employee difficulty in working and that restrictions are appropriate, and concluded that the employee is entitled to a rehabilitation consultation. The employer and insurer appeal both findings.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings

and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

Restrictions and Rehabilitation Consultation

The appellants argue on appeal that the compensation judge erred in awarding a rehabilitation consultation where the employee has returned to work without wage loss after an unrestricted return to work by his treating physician. The compensation judge, however, found that restrictions were appropriate based primarily on the employee's testimony.

The question of whether an employee has sufficient restrictions on his activities to justify the need for a rehabilitation consultation is a fact question that is left to the compensation judge. Generally the compensation judge can rely on evidence from a physician or other health care provider who has issued formal restrictions on the employee's ability to work, however those formal restrictions are not absolutely necessary in order to support a compensation judge's award of a rehabilitation consult. The compensation judge may rely on the testimony of the employee and the employee's ability to perform work following the injury in support of the finding that he has restrictions on his ability to work as a result of the original injury. See, e.g., Carlson v. Northland Paper Supply, slip op. (W.C.C.A. January 8, 1999) (an employee's testimony constitutes substantial evidence to support finding of restrictions and entitlement to rehabilitation consultation); Nelson v. Northern Milk Prods., slip op. (W.C.C.A. Dec. 11, 1998) (an employee's testimony constitutes substantial evidence to support finding that the employee has a disability which affects his ability to work and which limits his earning capacity); see generally Brening v. Roto-Press, Inc., 237 N.W.2d 383, 28 W.C.D. 225 (Minn. 1975) (an employee's testimony alone may serve as a sufficient basis for determination of the physical demands of a job and their relationship to specific symptoms.)

We conclude that substantial evidence supports the compensation judge's determination that the employee is entitled to a rehabilitation consultation, and affirm.

Weekly Wage

Relying entirely on the employee's testimony, the compensation judge found that

the employee's weekly wage from his employment with the Wilton Liquor Store was $128.00, representing 16 hours work at $8.00 per hour. The compensation judge then added this to the admitted weekly earnings of $314.15 from the job with the employer to obtain an overall weekly wage at the time of injury of $442.15. (Findings 1, 12.)

On appeal, the sole argument raised by the employer and insurer is that the employee's earnings from the Wilton Liquor Store represented, in whole or in part, tip income, and that such income may not be included in an employee's weekly wage calculation in the absence of documentary evidence of the amount earned. The employer and insurer cite various cases for this proposition.

We agree with the principle of law offered by the employer. Pursuant to Minn. Stat. § 176.011, subd. 3, an employee's daily wage "does not include tips and gratuities paid directly to an employee by a customer of the employer and not accounted for by the employee to the employer."
However, where the employee has offered evidence to establish non-tip wages, it is the employer and insurer's burden to show that some or all of the wages were in fact derived from tips, and to what extent. We note that there was no testimony either on direct or cross-examination directly establishing that any part of the employee's Wilton Liquor earnings as included by the compensation judge was derived from tip income. The employee testified that he was paid $8.00 as an hourly wage, not as an average of tips received.

The employer and insurer assert that the employee's earnings must be deemed to have been derived from tips, since the employee testified that his earnings on a given evening at Wilton Liquor might be greater "depending on how busy it is." They argue that only tip income would vary depending on whether the bar was busy.

The only evidence at the hearing on this subject was during the direct examination of the employee, who testified as follows:

Q. Okay. And would you always put in at least eight hours?

A. Oh, yeah.

Q. Okay.

A. Yeah.

Q. Sometimes it would be more than eight?

A. Yeah.

Q. And then you would get paid more?

A. Depending on how busy it was.

Q. Okay. And the hourly wage that you were getting at that time as I understand it was $8.00 per hour, is that correct?

A. Yeah.

(T. 64-65.) While this evidence could support an inference that the employee's wages included some tip income and thereby increased during busier times at the bar, the evidence also supports another inference, that the employee's wages were greater when it was busy because it was on such occasions that he might be required to work more than eight hours. The resolution of this issue was one of fact. We do not believe that the compensation judge clearly erred in failing to conclude that the employee's testimony would compel a finding that tips constituted any part of the $8.00 figure used by the judge to calculate weekly wage in this employment, and affirm.