RICHARD DZIUK, Employee, v. UNIV. OF MINN., SELF-INSURED, adm'd by SEDGWICK CLAIMS MGM'T SERVS., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 15, 1999

No. [REDACTED SSN]

HEADNOTES

JOB OFFER - PHYSICAL SUITABILITY. Substantial evidence supports the compensation judge's determination that the transitional recycling job exceeded the employee's physical restrictions. The compensation judge's determination that the recycling job was not physically suitable renders irrelevant the question of the employee's good or bad faith in attempting the job.

REHABILITATION - COOPERATION; JOB SEARCH - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee cooperated with rehabilitation assistance and conducted a reasonably diligent job search.

Affirmed.

Determined by Johnson, J., Wilson, J. and Wheeler, C.J.
Compensation Judge: Janice M. Culnane

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's determination that the employee's transitional job in the employer's recycling center was not physically suitable, and that the employee made a good faith effort to perform the recycling job. The self-insured employer further appeals from the compensation judge's finding that the employee made a diligent search for employment and cooperated in good faith with rehabilitation efforts, and from her award of temporary total and temporary partial disability benefits. We affirm.

BACKGROUND

The employee, Richard Dziuk, had been employed as a building and grounds worker by the self-insured employer, the University of Minnesota, for ten years. On July 29, 1997, the employee was cleaning up after flooding on the 18th floor of Moos Tower. He sustained an admitted, work-related injury to his low back while emptying a barrel filled with wet acoustical ceiling tile into a dumpster. The employee was seen at Fairview Riverside Hospital the following morning complaining of stabbing pain in the right low back. He was given pain and anti-inflammatory medications and was taken off work.

The employee was then treated by Dr. Thomas Chester at HealthWorks. Dr. Chester diagnosed an acute lumbar sprain/strain, prescribed medications, and referred the employee to physical therapy. The employee continued to experience low back pain and stiffness, and in October 1997, Dr. Chester referred the employee to an orthopedist, Dr. David Boxall. The employee was first examined by Dr. Boxall on November 14, 1997. The employee reported persistent low back pain and intermittent pain radiating down the right leg. On examination, the doctor noted restricted range of motion and normal neurological findings. Dr. Boxall diagnosed a Grade I spondylolisthesis at L5-S1 and recommended a trial with a lumbar corset.

At about this same time, the self-insured employer assigned a qualified rehabilitation consultant (QRC), Patrick Wilder, who initially met with the employee on November 5, 1997. On November 17, 1997, QRC Wilder sent to Dr. Boxall a description of a job in the employer's recycling center. (See Exs. E, M; Ex. 1.) Dr. Boxall replied it was "ok to start," four hours a day, with no twisting, stooping, bending or climbing ladders. Apparently no light-duty work was available within Dr. Boxall's restrictions at that time. (See Ex. E: 12/10/97 chart note.) On December 1, 1997, the employee requested a change of QRC to Thomas Saby. (Judgment Roll.)

The employee returned to Dr. Boxall on December 10, 1997, reporting persistent low back pain radiating to the right buttock. On exam, the doctor noted muscle spasm and limited range of motion. Dr. Boxall prescribed a rigid brace and referred the employee to physical therapy for instruction in back stabilization and trunk strengthening. He released the employee to return to work with restrictions of no lifting over 20 pounds, avoid prolonged sitting or standing, and avoid repetitive bending or lifting.

On December 23, 1997, the employer sent a letter to the employee confirming a temporary assignment to the recycling center, starting December 29, 1997. (Ex. H.) On December 26, 1997, Dr. Boxall increased the employee's lifting restriction to 25 pounds, and indicated the employee could work full time. That same day, the employee filed a Rehabilitation Request seeking approval of the requested change to QRC Saby. The self-insured employer agreed to the requested change in a Rehabilitation Response filed January 5, 1998. (Judgment Roll.)

On January 9, 1998, Dr. Boxall met with the employee and with QRC Saby. The employee and his wife reported some difficulty with the recycling job due to the cold and cement floors. Dr. Boxall believed, however, that "his current job is reasonable and appropriate for him," stating that "the main issue here was putting him on some reasonable restrictions which we have already done." (Ex. E: 1/9/98.) Dr. Boxall also prescribed additional physical therapy to work on low back strengthening.

On the morning of January 16, 1998, the employee was asked fill out his time card for the previous day. The employee's attempt to comply was not satisfactory, and he was asked by John Sundsmo, the supervisor of the recycling facility, to go to the break room with him for instruction in filling out the time card. The employee testified that during the discussion,

Mr. Sundsmo picked up a white-handled butcher knife and used it in a threatening and intimidating manner. He reported the alleged incident to the campus police. Mr. Sundsmo denied handling or having any kind of knife during the incident, and the police investigation was inconclusive. (Compare T. 69-77, 164, 190-92, 195, 212-13.) The employee completed work that day, but did not return to work at the recycling center thereafter, opting to use his sick and vacation leave.

Following the incident, the employee contacted QRC Saby, filed a grievance with his union, and contacted human resources and disability services at the University. He stated he would be extremely uncomfortable returning to the recycling center and preferred a different light-duty assignment with the employer. On January 30, 1998, Mr. Saby completed a Vocational Report stating "QRC to coordinate with the University of Minnesota to explore work opportunities there." (Ex. C: 1/30/98 report.)

On February 5, 1998, the self-insured employer served a notice of intention to discontinue benefits (NOID) asserting that the employee was not entitled to temporary partial disability benefits as he was no longer working. The employee objected, and the matter was set on for an administrative conference. On February 12, 1998, at the insurer's request, QRC Saby met with the employer at the recycling center. The employer showed Mr. Saby the job site and described the work assigned to the employee. Mr. Saby noted the job shown him by the employer "seemed very light and flexible and within the restrictions recommended by Dr. Boxall," observing, however, that the employee "did not understand the job to be the way it was described by the employer." (Ex. C: 2/26/98 report.) That same day, the employee was seen for a second opinion by Dr. Manuel Pinto, an orthopedic surgeon. Dr. Pinto observed that the recycling job, as described by the employee, "does not truly fit his light duty restrictions as outlined by Dr. Boxall," and recommended a functional capacities assessment. (Ex. B: 2/12/98.)

An administrative conference was held before Settlement Judge James Cannon on February 17, 1998. In an order on discontinuance, served and filed February 27, 1998, the judge denied the employer's request to discontinue benefits, and ordered payment of temporary total disability benefits from and after January 16, 1998. Following the conference, QRC Saby anticipated the recycling job would be modified and re-offered to the employee, but continued to explore other return to work options with the University as well.

With the agreement of all parties, a functional capacities assessment was scheduled for March 3 to 5, 1998 at Saunders Therapy Centers. The employee fully participated the first two days, but left the clinic early the third day, prior to completion of the assessment. The therapist completed a functional abilities form recommending restrictions not significantly different from those imposed by Dr. Boxall. The therapist observed, however, that the employee had demonstrated inconsistent pain behaviors, and noted that since the assessment was incomplete, he had no objective comparisons on which to base the restrictions.

On March 23, 1998, the self-insured employer filed a Petition for Discontinuance, seeking *de novo* review by a compensation judge of Judge Cannon's February 27, 1998 order. The self-insured employer also served a NOID on March 30, 1998, seeking discontinuance of

workers' compensation benefits alleging the employee had refused an offer of light-duty work within his physical restrictions. An administrative conference was held on April 20, 1998 before Judge Cannon on the March 30, 1998 NOID. In an order on discontinuance, issued April 28, 1998, the judge allowed discontinuance of temporary total disability benefits effective April 20, 1998, concluding the recycling job was within the employee's restrictions, and further determining that the employee had failed to cooperate with rehabilitation assistance. The employee filed an Objection to Discontinuance on May 11, 1998, appealing from the April 29, 1998 decision of Judge Cannon.

On April 30, 1998, an outside job search was initiated at the request of the insurer. The employee obtained work, beginning on about June 15, 1998, as a painter's helper for Bell Painting, at a wage loss. The employee remained in this job through the date of hearing, but continued to search for higher paying work with the assistance of QRC Saby.

The self-insured employer's Petition to Discontinue and the employee's Objection to Discontinuance were consolidated and came on for hearing before a compensation judge at the Office of Administrative Hearings on July 8, 1995. In a findings and order, served and filed September 22, 1998, the compensation judge found the recycling job exceeded the employee's physical restrictions; the employee made a good faith effort to perform the recycling job; and the employee made a diligent search for employment and cooperated in good faith with rehabilitation efforts. The judge, accordingly, awarded temporary total disability and temporary partial disability benefits through the date of hearing and continuing. The self-insured employer appeals.

STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Physical Suitability of Recycling Job

The self-insured employer argues that substantial evidence does not support the compensation judge's finding that the recycling center job exceeded the employee's physical restrictions, and contends the employee is not entitled to temporary total disability benefits after

January 16, 1998, pursuant to Minn. Stat. § 176.101, subd. 1(I)(1995).[1] We are not persuaded.

The self-insured employer asserts that Dr. Boxall and QRC Saby agreed that the recycling job, as described by QRC Wilder and by the employer, was within the employee's restrictions and was reasonable and appropriate. The employee testified, however, that the work he in fact performed included activities outside his restrictions. The parties acknowledged that the employee's job at the recycling center was not the same as the job described in the "On-Site Job Analysis/Job Description" prepared by QRC Wilder.[2] (Ex. M; Ex. 1.) Specifically, the employee and Mr. Sundsmo agreed the employee spent a significant portion of time doing "metals breakdown," including dismantling office furniture, a task that was not included in the on-site job analysis. The employee testified that the dismantling job required him to lift and maneuver chairs, desks and metal tables weighing 30 to 50 pounds or more. (T. 51, 54-55, 59, 64-65, 169-71, 181-82, 206; Hovde Dep. at 54.) The employee was also assigned paper sorting/separating and cutting book bindings, tasks which, according to the employee, required standing for extended periods of time, as well as repetitive bending and twisting. The employee also described pushing and manipulating containers of recyclable material weighing 60 to 100 pounds or more. (T. 51-52, 56, 58.) Mr. Sundsmo testified he told the employee not to exceed his restrictions, and told other employees to assist the employee with lifting and other activities as needed. However, no one was specifically assigned to assist the employee, and the employee testified that he worked by himself and did not get help when he needed it. Mr. Sundsmo conceded that if the employee was lifting chairs, metal tables or desks during disassembly, it would have exceeded Dr. Boxall's restrictions. (T. 215-16.) QRC Saby observed the employee "did not understand the job to be the way it was described by the employer," and testified that if the employee's description of the recycling job was accepted, the job exceeded the employee's work restrictions. (Ex. C: 2/26/98 report; Ex. L at 15-16.) Dr. Pinto also believed that recycling job, as described by the employee, did not conform to the light-duty restrictions provided by Dr. Boxall.

It is apparent, although unstated, that the compensation judge found the employee a credible witness and accepted his testimony regarding the nature of the recycling job. (See Mem. at 4-5.) Assessment of witnesses' credibility is the unique function of the trier of fact. A finding based on the credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). Although a different conclusion could have been reached, we cannot say the compensation judge's reliance on the employee's testimony was clearly erroneous. Whether a particular job is physically suitable for an employee is a question of fact. See Nelson v. Dahlen Transp., 43

[1] Minn. Stat. § 176.101, subd. 1(i)(1995) provides, in pertinent part, that "[t]emporary total disability compensation shall cease if . . . the employee refuses an offer of gainful employment that the employee can do in the employee's physical condition."

[2] The copy of the On-Site Job Analysis/Job Description submitted by the employee indicates that the document was prepared in June 1997, prior to the employee's injury. (See Ex. M.)

W.C.D. 479, 484-85 (W.C.C.A. 1990). There is adequate evidence, in the record as a whole, to support the compensation judge's determination that the recycling job was not physically suitable. We, accordingly, affirm.

Good Faith Effort to Attempt the Job

The self-insured employer further contends the compensation judge's finding that the employee made a good faith effort to perform the recycling job is clearly erroneous, arguing the employee's testimony regarding the "knife-wielding incident" is simply not credible. The employer contends the judge's finding of a lack of effective communication is nothing more than an unwarranted and inappropriate attempt to avoid resolving the disputed January 16, 1998 incident leading to termination of the employee's work at the recycling center. We disagree.

As acknowledged by the employer, the issue is one of credibility. The compensation judge accepted the employee's testimony that the recycling job, as performed, exceeded his restrictions, and concluded that resolution of the disputed facts surrounding the January 16, 1998 incident was not necessary. First, we note that there is more than adequate evidence to conclude that clear communication between the parties was lacking in this case. More importantly, while an employee has an obligation to attempt physically suitable work, see e.g., Mayer v. Erickson Decorators, 372 N.W.2d 729, 38 W.C.D. 107 (Minn. 1985), an employee has no obligation to attempt to perform work that exceeds his restrictions or is not physically appropriate. See, Arnebeck v. City of Minneapolis, slip op. (W.C.C.A. May 6, 1997). The compensation judge's determination that the recycling job was not physically suitable, which we have affirmed, renders irrelevant the question of the employee's good or bad faith in attempting the job, and we need not address the issue further.

Cooperation with Rehabilitation/Job Search

Finally, the self-insured employer asserts the compensation judge's finding that the employee made a good faith effort to cooperate with rehabilitation and made a diligent search for employment is unsupported by substantial evidence and is clearly erroneous. When the employee has a QRC, the question is not so much whether the employee made a reasonable and diligent search for work, but rather whether the employee cooperated with rehabilitation assistance. See, e.g., Schreiner v. Alexander Constr., 48 W.C.D. 469, 476 (W.C.C.A. 1993); Bauer v. Winco/Energex, 42 W.C.D. 762 (W.C.C.A. 1989). An employee's workers' compensation benefits may be discontinued if the employee does not make a good faith effort to cooperate with rehabilitation. See Minn. Stat. § 176.102, subd. 13. Here, the employee, on his own, contacted the employer's human resources department and disability services, filed a union grievance, and submitted medical reports to Facilities Management in an attempt to maintain employment at the University. The employee also worked with his QRC, Mr. Saby, whose efforts focused on returning the employee to work in some capacity with the employer. On April 30, 1998, at the request of the insurer, QRC Saby initiated a search for employment outside the University. The employee obtained a job, approved by his QRC, beginning about June 15, 1998. QRC Saby testified that the employee cooperated with job search efforts.

The employer and insurer point, however, to the employee's absence from the February 12, 1998, on-site meeting between the employer and QRC Saby, and his failure to complete the last day of the functional capacities assessment, and argue these incidents compel a finding the employee failed to cooperate with rehabilitation efforts. To discontinue workers' compensation benefits based on a lack of cooperation with rehabilitation, the employer must establish a persistent pattern of noncooperation or bad faith conduct on the part of the employee. See, e.g., Redenius v. Gorter & Snell Constr., slip op. (W.C.C.A. Sept. 1, 1998); Cheney v. City of Minnetonka, slip op. (W.C.C.A. Feb. 23, 1994). Such evidence is lacking here.

The compensation judge reasonably concluded that the employee was motivated to continue his employment with the employer, and cooperated with Mr. Saby's efforts to return him to employment with the University. There is no evidence whatsoever the employee failed to cooperate after initiation of an outside job search on about April 30, 1998. We, therefore, affirm.