

PATRICIA ERICKSON, Employee, v. MISSION FARMS and AM. COMP. INS./RTW, Employer-Insurer/Appellants, and FAIRVIEW and the INST. FOR ATHLETIC MEDICINE, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 6, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY BENEFITS - SUBSTANTIAL EVIDENCE. Substantial evidence, including medical opinion, medical records and the employee's testimony about her symptoms and work duties, supported the compensation judge's determination that the employee continued to be partially disabled and under medical restrictions related to her work injury during the period for which benefits were sought.

JOB SEARCH - SUBSTANTIAL EVIDENCE. While the employee's job search did not begin for about two weeks after she lost her job with the employer, and involved only about ten to fifteen hours of active job search activities per week, we cannot say that the search was so perfunctory that the compensation judge committed clear error in determining that the job search was minimally adequate to support the award of benefits.

EARNING CAPACITY - SUBSTANTIAL EVIDENCE. The presumption of earning capacity from actual post-injury earnings was not rebutted by a greater income offered by the employee's pre-injury job where the compensation judge found that the employee was unable to perform this job without restrictions and the employer would permit the employee to work in the job only without restrictions.

Affirmed.

Determined by Pederson, J., Johnson, J., and Hefte, J.
Compensation Judge: Cheryl LeClair-Sommer

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from an award of temporary benefits and from the compensation judge's findings that the employee sustained a loss of earning capacity related to her work injury with the employer, that the employee did not refuse an offer of gainful employment within her restrictions, that the employee conducted a reasonably diligent job search for certain periods, and that the employer and insurer failed to rebut the presumption of earning capacity arising from the employee's actual post-injury wages. We affirm.

BACKGROUND

The employee, Patricia Erickson, then age 49, began working for Mission Farms, the employer, as a nursing home housekeeper in October 1995. Her duties included vacuuming, dusting, mopping, and cleaning bathrooms. The job required considerable bending and stooping and occasional lifting of mop buckets and moving of beds and nightstands. In October 1996 the employee began to experience shooting pains in the low back at work, particularly when performing repetitive bending and stooping. (T. 21-24.)

She was seen medically for her low back pain on December 18, 1996 by Dr. G. S. Watkins, M.D. at the Camden Physicians clinic. On examination, the employee was noted to have tenderness over the lumbar region from L3 to L5 along the paraspinal muscles. Her back range of motion was full, straight leg raising was negative, and there were no sensory deficits. She was diagnosed with an acute work-related lumbar strain and taken off work until December 23, after which she was released to return to work with limitations which included a 20-pound limitation on lifting, pushing and pulling. The employee was restricted from any squatting, kneeling or reaching below the knees, and twisting, turning and reaching above the shoulders was limited to three times per hour. (Joint Exh. 1: 12/18/96.)

In unappealed findings, the date of injury has been determined to be December 18, 1996, when the employee was taken off work by Dr. Watkins. The employee's weekly wage on the date of injury was \$318.23 and the employee reached and was served with notice of maximum medical improvement on February 2, 1998, with the report of Dr. Elmer Salovich. (Findings 1, 2 and 4 [unappealed].)

The employee continued under the care of Dr. Glenn Schiffler at Camden Physicians through February 13, 1997, when he recommended that the employee be referred to a specialist because of the chronicity of her symptoms. She remained medically restricted in her work duties throughout the period of treatment with Dr. Schiffler. (Joint Exh. 1: 12/30/96 - 2/13/97.)

The employee began treating with Dr. Brian T. O'Neill, M.D., at Northwest Orthopedic Surgeons, P.A., on March 3, 1997, and Dr. O'Neill remained the employee's treating physician through the date of hearing, July 28, 1998. Dr. O'Neill continued the employee on similar work restrictions to those which had been in effect under Dr. Schiffler, although the employee was now permitted occasional squatting, kneeling and bending. The employee underwent 12 sessions of physical therapy at the Institute for Athletic Medicine in March and April 1997. She made some progress in her symptoms and Dr. O'Neill loosened the restrictions slightly on April 21, 1997, allowing frequent, rather than occasional kneeling and balancing. (Exh. C: 3/3/97 - 4/21/97; Joint Exh. 4.)

On May 16, 1997, the employee reported to Dr. O'Neill that she was not doing well and that her back pain was now radiating into the buttock area. On examination, straight leg raising caused some buttock pain, and the employee's lumbar range of motion was mildly

diminished. Dr. O'Neill thought that the employee's back pain was probably mechanical in origin, but considered it advisable that a lumbar MRI scan be performed. The MRI was performed on June 6, 1997 and revealed mild bilateral facet arthropathy at the L4-5 and L5-S1 levels with mild ligamentous hypertrophy. On June 11, 1997, when seen by Dr. O'Neill to review the MRI results, the employee reported that her symptoms had remained similar, with low back pain radiating into the buttocks. Low back range of motion was still mildly restricted on examination. Dr. O'Neill recommended that the employee be evaluated for facet injections. (Exh. C: 5/16/97 - 6/11/97 chart notes, 6/6/97 MRI report.)

The employee was seen at Minnesota Anesthesiology Pain Specialists by Dr. David Schultz, M.D., on June 17, 1997. The employee reported that the strenuous duties in her housekeeping job were difficult and were aggravating her pain. Dr. Schultz noted that the employee exhibited significant tenderness to palpation over the bilateral paraspinous musculature and lumbosacral region. Straight leg raising was negative, and lower extremity strength and sensation were intact. Dr. Schultz opined that the employee's pain pattern was consistent with facet arthropathy, and recommended that the employee undergo diagnostic facet joint block injections. (Joint Exh. 3: 6/17/97.)

The employee underwent bilateral facet joint blocks at L3-4, L4-5 and L5-S1 on June 24, 1997. She was taken off work at that time. The injections gave the employee significant relief for more than six hours, after which her pain returned on the following day. She returned in follow-up to Dr. Schultz on July 7, 1997. Dr. Schultz opined that the relief from the injections for more than six hours suggested that the predominant cause of the employee's low back pain was facet arthropathy. He recommended that the employee undergo a repeat injection with medial branch blocks to the facet joints to confirm this diagnosis, and, if confirmed, that the employee then undergo a radio frequency ablation of the medial branches to the facet joints which Dr. Schultz thought would give her essentially permanent relief of pain. (Joint Exh. 3: 6/24/97 - 7/7/97.)

The employee underwent an examination by Dr. John E. Sherman, M.D., at the request of the insurer, on August 6, 1997. The employee reported that she continued to experience low back pain with periodic right groin pain, but that her symptoms had improved since she was taken off work. On examination, there was tenderness in the low back but none in the sciatic notch. The employee had pain with flexion and extension, but not with right and left lateral bending. Dr. Sherman thought that her pain probably arose from muscle or ligamentous strain rather than from degenerative changes to the lumbar spine. He recommended that the employee try to return to work without restrictions and thought that her symptoms would gradually diminish, albeit over a rather long time line. (Resp. Exh. 2)

The insurer denied coverage for the facet joint treatment recommended by Dr. Schultz, and the employee next was seen medically on August 22, 1997 by Dr. Alison J. Coulter at the Physician's Neck and Back Clinic. The employee's range of motion was seen to be limited in lumbar extension and right and left side bend. Low lumbar tenderness was present, and there was local pain without radiation on percussion of the lumbar back. Dr. Coulter diagnosed mechanical low back pain, a deconditioning syndrome, and sacroiliac inflammation. The doctor

recommended an active reconditioning program. The employee was continued in a disabled from work status. (T. 28, 61; Joint Exh. 2: 8/22/97.)

The employee participated in the reconditioning program, which lasted for 20 sessions and ended in late November 1997. Shortly after the program began, Dr. Coulter released the employee to return to work as of September 2, 1997 with similar restrictions to those formerly in place but on a four-hour per day basis, to increase two hours per day each week until back to eight-hour days. However, the restrictions were changed by Dr. Coulter on September 24, 1997 to reflect that the employee should still work only a four-hour day, and then advance one hour per day each week to a maximum of six hours per day. After 12 sessions of reconditioning had been completed, Dr. Coulter noted on October 17, 1997 that the employee still had significant low back pain radiating into the right groin, although there had been some subjective improvement in the employee's pain. Dr. Coulter noted that the employee's job with the employer "is quite demanding physically and I am not sure at this point in time if she will be able to return to that." The doctor noted that it might be necessary to consider permanent restrictions after completion of the rehabilitation program. (Joint Exh. 2.)

After 17 sessions Dr. Coulter noted that the employee's pain had greatly improved, but she was still at less than an optimal level. She was authorized to work six hours per day under the same restrictions. The employee was anxious to resume her regular work duties, and Dr. Coulter authorized gradually increasing her work activities at the employee's discretion "to get an idea of how that will work for her." Dr. Coulter anticipated authorizing an unrestricted return to work "at least on a trial basis" at the close of the rehabilitation program. On November 26, 1997 Dr. Coulter noted that the employee had pretty much resumed her normal activities at work other than not working eight-hour days, but had noted a marked increase in her low back pain as she had increased her work activities. Dr. Coulter was unsure whether this represented a transition period or an inability to continue in the employee's former line of work, and recommended that the issue of the employee's work ability be further addressed in follow up with Dr. O'Neill. (Joint Exh. 2.)

The employee was seen by Dr. O'Neill on December 3, 1997. She reported that she had experienced a great deal of pain after returning to work without restrictions. On examination, her range of motion was again mildly limited. Dr. O'Neill placed the employee back on some medical work restrictions. (Exh. C: 12/3/97.)

The employee was examined by Dr. Loran F. Pilling, M.D., on December 10, 1997. Dr. Pilling considered the most significant finding on his examination to be that the employee was depressed, angry and frustrated. He opined that the employee had sustained a lumbar strain which had resolved months ago leaving a somatoform disorder secondary to emotional distress, in turn secondary to the work injury. He proposed that the employee undergo treatment in his pain clinic. He suggested that if the employee's somatoform disorder could be successfully treated she might be able to return to her former employment, but if not, a modified job with the employer or new employment would be necessary. (Resp. Exh. 3.)

The employee was next seen by Dr. O'Neill on December 17, 1997 and again on January 21, 1998. Dr. O'Neill recommended that the employee return to Dr. Schultz for further consideration of the facet injections, although these treatments had not been approved by the insurer. He thought that the employee might not be able to do her job for the employer in the long run if it continued to give her a fair amount of discomfort. He continued her current restrictions. On the second of these visits, the employee reported increasing lower back pain radiating into the groin. On examination, some lumbar spasm was present and forward flexion was resisted and painful. She told Dr. O'Neill that she would lose her job unless she could do more. (Exh. C: 12/17/97 - 1/21/98.)

The employee was examined by Dr. Elmer R. Salovich on behalf of the employer and insurer on February 2, 1998. In Dr. Salovich's opinion, the employee had a low back syndrome which was the result of the aging process, accompanied by a somatoform disorder. Dr. Salovich noted that the employee was presently working under restrictions on a six-hour per day basis. He opined that the employee could work eight hours per day without restrictions so long as she avoided activities of the type that any person of her age and body build should avoid. (Resp. Exh. 1.)

Based upon Dr. Salovich's opinion, the employer informed the employee that she would be required to perform her duties without restrictions on an eight-hour per day basis. The employee testified that she tried to do this but that she was unable to work full days for the employer without restrictions due to pain. Her separation date from the employer was February 7, 1998. (T. 32-34, 41.)

The employee returned to Dr. O'Neill on February 27, 1998. She told Dr. O'Neill that she had tried her job with the employer without restrictions based upon the opinion of Dr. Salovich but had experienced a great deal of pain and had essentially been let go from her job. Dr. O'Neill expressed the opinion that the employee was unable to do her job due to her work-related injury. He thought restrictions were needed, and suggested that a functional capacities evaluation might be appropriate. He again recommended consideration of the procedures outlined by Dr. Schultz. (Exh C: 2/27/98.)

About two weeks after termination from the job with the employer, the employee began looking for other work, using the newspaper and networking with friends. She spent about ten to fifteen hours per week on her job search. She made telephone calls and did some interviewing. On May 7, 1998, the employee began working part-time twice a week for Rogers Municipal, selling pull tabs at an hourly rate of \$6.00 for an average of about fifteen hours per week. She continued to look for work elsewhere and eventually obtained a second part-time job bagging at American Institutional Supply at \$7.50 per hour for sixteen hours per week. The employee did not continue searching for work after beginning the job with American Institutional Supply. She testified that she attempted increasing her hours for that employer but was unable to work more than four hours per day due to her pain and the repetitive nature of the work. However, working both jobs bothered her upper back and, on the recommendation of Dr. O'Neill, the employee decided to continue only with the higher-paying of the two jobs, at American

Institutional Supply. Her last day at Rogers Municipal was July 7, 1998. The employee continues to be restricted from performing certain activities as recommended by Dr. O'Neill as a result of her low back injury. (T. 34-55; Exh. C: 7/8/98.)

The employer and insurer had paid the employee various benefits including temporary total and temporary partial disability. On April 20, 1998, the employer and insurer filed a Petition to Discontinue Benefits. On April 23, 1998, the employee filed a claim petition seeking temporary disability compensation from February 7, 1998 and continuing. Hearing on the Petition to Discontinue and the claim petition was consolidated by an order served and filed on May 26, 1998. A hearing was held before a compensation judge of the Office of Administrative Hearings on July 28, 1998. Following the hearing, the judge awarded temporary total disability compensation from March 2, 1998 through May 6, 1998, temporary partial disability compensation from February 16, 1998 through March 1, 1998 and May 7, 1998 through July 7, 1998 calculated based on the employee's actual post injury earnings, and temporary partial disability compensation from July 8, 1998 through the date of hearing calculated based on an imputed weekly wage of \$141.21. The employer and insurer appeal.

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

Disability and Restrictions

The employer and insurer first argue that the compensation judge erred in failing to deny temporary benefits to the employee pursuant to Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987). In Kautz, our supreme court held that "[w]here the employee is found medically able to return to work without restrictions, having suffered no residual disability from [the] work injury," the employee is ineligible for temporary benefits. Id., 410 N.W.2d at 845, 40 W.C.D. at 208. This doctrine has been codified in part in Minn. Stat. § 176.101, subd. 1(h), which provides, in pertinent part, that "[t]emporary total disability compensation shall cease if the

employee has been released to work without any physical restrictions caused by the work injury.”

The employer and insurer point to the opinions of Drs. Salovich, Sherman and Pilling and argue that these opinions refute the conclusion that the employee remained in any way disabled from her 1996 work injury, or appropriately subject work restrictions, by the inception of the period of claimed eligibility for temporary benefits in 1998.

In a related argument, the employer and insurer cite Minn. Stat. § 176.101, subd. 1(i), which provides in pertinent part that temporary total compensation shall cease “if the employee refuses an offer of gainful employment that the employee can do in the employee’s physical condition.” They argue that the employee refused a job within her physical limitations by failing to continue to work for the employer in her regular duties on an unrestricted basis when they required her to do so in February 1998. This contention also depends upon whether the compensation judge erred in determining that the employee was under medical restrictions at that time and therefore still disabled from the work injury.

We are not persuaded that the compensation judge committed reversible error. The question of what restrictions are appropriate for the employee is a question of fact, and the compensation judge’s findings on that issue may not be overturned by this court where the findings are supported by substantial evidence.

Here, substantial evidence supports the compensation judge’s findings that the employee continued to be disabled from the work injury through the date of hearing and that the employee’s disability and restrictions were such as prevented her from working for the employer in the job she held on the date of injury on an unrestricted basis. Dr. Coulter, who managed the employee’s reconditioning program in the fall of 1997, did permit the employee to attempt to increase her work duties and hours to see if she could perform her job with the employer without restrictions. However, Dr. Coulter expressed concern whether the employee would in fact be able to return to this physically demanding job. She opined that it might be necessary to consider permanent restrictions, and ultimately left it up to the employee’s treating physician, Dr. O’Neill, to decide whether the employee’s trial of working without restrictions should become permanent.

Dr. O’Neill saw the employee on December 3, 1997 after the employee had been released to try the work for the employer without restrictions by Dr. Coulter. Based on his experience with this patient’s treatment, his examination findings, and the employee’s report of pain on attempting to work without restrictions, Dr. O’Neill placed her back on medical restrictions. He saw her again on January 21, 1998 and continued her work restrictions. The employee again attempted to do the pre-injury job for the employer without restrictions for two days in February 1998 after the employer told her that she must do so based upon the opinions of their examiner Dr. Salovich. She testified that she experienced significant pain and was unable to continue in the job on this unrestricted basis. Dr. O’Neill saw her again on February 27, 1998 and expressed the medical opinion that the employee was unable to do the unrestricted job due to her work injury. He continued her restrictions during the period of claimed temporary benefits.

Although Dr. Salovich and Dr. Sherman both opined that the employee could work without medical restrictions, the choice between the divergent medical views in this case was for the compensation judge as finder of fact, and this court may not reverse unless the medical opinions relied upon by the judge were without adequate foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

The employer and insurer make the argument that it was unreasonable for the compensation judge to adopt Dr. O'Neill's view that the employee was subject to medical restrictions because, they contend, the employee's disability was not supported by objective medical findings and rests solely upon the employee's subjective pain complaints. This is really an objection to the medical basis of Dr. O'Neill's medical opinion, rather than to its foundation. While objective findings are a statutory prerequisite to the rating of permanent partial disability, it has never been the law that objective medical findings are required to sustain a finding that the employee is temporarily disabled or that the employee's disability restricts the employee from the performance of certain work activities. See, e.g., Thorsig v. Boyer's Distributing, 43 W.C.D. 627 (W.C.C.A. 1990). In addition, we note that the medical records here do in fact exhibit objective medical findings, including MRI scan results showing bilateral facet arthropathy at the L4-5 and L5-S1 levels, and intermittent examination findings of a diminished lumbar range of motion.

No foundational defect is apparent in the medical opinions relied upon by the judge in this case, and we affirm the determinations that the employee was partially disabled as a result of the work injury during through the date of hearing, and that the employee's disability rendered her unable to perform her pre-injury job without restrictions.

Job Search

Temporary total disability benefits can be discontinued if the employee does not conduct a diligent job search. E.g., Hanmer v. Wes Barrette Masonry, 403 N.W.2d 839, 840, 39 W.C.D. 758, 759 (Minn. 1987). The employer and insurer contend that the compensation judge here erred as a matter of law in finding that the employee's job search was sufficiently diligent to sustain the award of benefits. We disagree, and affirm. A job search must be evaluated in light of all the facts and circumstances of a case. Redgate, 421 N.W.2d at 734, 40 W.C.D. at 956. The determination of whether or not an employee's job search is diligent is a question of fact for the compensation judge to resolve. Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989).

Here, while the employee's job search did not begin for about two weeks after she lost her job with the employer, and involved only about ten to fifteen hours of active job search activities per week, we cannot say that the search was so perfunctory that the compensation judge committed clear error in determining that the job search was minimally adequate to support the award of benefits. We note further that the employee's job search did result in a part-time job at Rogers Municipal after shortly more than two months of searching for employment. The employee continued to search for additional work, and found another part-time job at American Institutional Supply. The fact that employee successfully secured part-time work also evidences a diligent job search for those periods of time. See, e.g. Fielding v. George A. Hormel Co., 439

N.W.2d 12, 41 W.C.D. 942 (Minn. 1989); Marsolek v. Geo. A. Hormel Co., 438 N.W.2d 922, 41 W.C.D. 964 (Minn. 1989).

Presumption of Earning Capacity from Actual Earnings

An employee demonstrates entitlement to temporary partial disability benefits by showing a work-related physical disability, an ability to work subject to the disability, and an actual loss of earning capacity that is causally related to the disability. See Krotzer v. Browning-Ferris, 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). Actual earnings are presumed to be a fair measure of earning capacity. While the presumption of earning capacity may be rebutted, the presumption of actual earnings constituting earning capacity is "a rule of law dictating decision on unopposed facts." Jerabek v. Teleprompter Corp., 255 N.W.2d 377, 29 W.C.D. 621 (Minn. 1977).

The employer and insurer argue that, even if the employee was otherwise eligible for temporary partial disability benefits, the compensation judge erred in failing to find that the presumption of earning capacity from actual earnings was rebutted by the employee's alleged ability to continue working in her pre-injury job at full wages.

We have already affirmed the compensation judge's conclusion that the employee was unable to continue working in the pre-injury job on an unrestricted basis. The employee testified that the employer insisted in February 1998 that she work that job without any restrictions and that she was not permitted to continue in her pre-injury job with restrictions. This testimony was unrebutted. Since the compensation judge could reasonably find that the pre-injury job was no longer available to the employee, it had at best only limited value as evidence of the employee's earning capacity. See, e.g., Tottenham v. Eaton Char-Lynn Corp., 43 W.C.D. 71 (W.C.C.A. 1990).

The employer and insurer further argue that, in any event, the employee was not restricted to part-time work and the presumption of earning capacity from actual wages should not apply. Our supreme court has held, however, that an employee who is released to work full-time, but who only works part-time, may be eligible for temporary partial disability benefits if the part-time position is all the employee is able to obtain. See De Nardo v. Divine Redeemer Memorial Hosp., 450 N.W.2d 290, 293, 42 W.C.D. 626, 631-32 (Minn. 1990).

The compensation judge did not err in failing to find that the presumption of earning capacity from actual earnings was rebutted in this case, and we affirm.