KENNETH J. HOULE, Employee, v. NORTHERN STATES POWER CO., SELF-INSURED/ASU RISK MGMT.T SERVS., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 9, 1999

No. [REDACTED SSN]

HEADNOTES

JOB OFFER - PHYSICAL SUITABILITY. Substantial evidence, including the employee's testimony and the records of his treating physician, supported the compensation judge's decision that two jobs offered by the employer were not physically suitable and that the employee therefore did not unreasonably refuse them.

Affirmed.

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

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the compensation judge's finding that the employer's job offers exceeded the employee's restrictions and from the judge's award of temporary partial disability benefits based on wages earned in a job that the employee secured on his own. We affirm.

BACKGROUND

The employee sustained work-related injuries to his low back in 1976, 1983, and on January 19, 1992, while working for Northern States Power Company [the employer], and he has had multiple surgeries on his back at two levels. An MRI taken in June of 1992 revealed multi-level advanced degenerative disc disease in the employee's lumbar spine.[1] The employee was unable to return to the type of work he performed at the time of his injuries.

The employee began treating with orthopedic surgeon James Ogilvie on June 17, 1992. At that time, the employee was complaining of persistent left leg numbness, right leg pain, and right flank pain. Dr. Ogilvie investigated the possibility of a lesion but eventually opined that

[1] Employee's counsel indicated at oral argument that the employee has been paid permanent partial disability benefits for either an 18 or 21% whole body impairment.

surgery was not indicated. On January 13, 1993, the doctor noted that the employee had "activity related chronic left sciatica and virtually continual back pain." He also opined that the employee had reached maximum medical improvement [MMI]. On April 21, 1993, Dr. Ogilvie signed a Functional Capacities Evaluation, indicating that the employee could return to part-time work, working into full-time, with an "[a]bsolute wt. lifting limit of 20#." QRC Donald Dickerson began working with the employee on a job search in April of 1993. The employee tried various jobs without success.

In June and September of 1993, the employer had the employee placed under surveillance. That surveillance, performed over four days, resulted in videotapes depicting the employee performing work on his house.

In April of 1994, Dr. Ogilvie completed a Report of Work Ability in which he indicated that the employee was able to work three days per week, with a twenty-pound lifting limit and no bending or twisting. The employee worked for Minneapolis Auto Auction for approximately two years, from mid 1994 until December of 1996. His job there was part-time, three ten-hour days per week, and involved driving cars from one point to another.

In November of 1994, the employer provided the 1993 videotapes to Dr. Ogilvie. After the employee's visit on November 16, 1994, Dr. Ogilvie changed the employee's restrictions to allow the employee to lift no more than fifty pounds, with "only occasional lifting, bending and twisting." The doctor also opined, however, that "it's unlikely that his endurance will allow him to work for more than 30-32 hours per week. To exceed these limits places him at risk for recurrent injury that might precipitate the need for additional medical and/or surgical treatment."

In February of 1995, the employee returned to Dr. Ogilvie, complaining of difficulties with getting into and out of cars as part of his work. Dr. Ogilvie opined at that time that the employee's restrictions should be thirty to thirty-two hours of work each week and lifting of not more than twenty-five pounds. About a year later, on March 27, 1996, the employee returned to Dr. Ogilvie, complaining of a flare-up in his back symptoms, with pain radiating around from his mid lumbar area and considerable trunk and thigh pain. X-rays taken at that time showed "a continuation of progressive collapse, particularly at 3-4 and 4-5, but with significant disc changes at multiple levels in his back." Dr. Ogilvie changed the employee's medications and opined that "[t]he ultimate treatment for Mr. Houle is going to be activity modification . . . ."

In November of 1996, the employer offered the employee work as an inspector at Sherco, a plant in Becker, Minnesota. The employee testified that there were few physical activities connected with this job[2] and that he did not ask Dr. Ogilvie to review the job because, "I thought maybe I could handle it. I had been an inspector before and I thought, well, I could probably handle it." The employee accepted the job and worked thirty-two hours in the first week and forty hours a week thereafter. The employee testified that, the more he stood on his feet, the

[2] No written job description was offered as an exhibit at the hearing.

"sorer" his back would get, but that he "thought [he] could still handle it." QRC Dickerson closed his file at the end of January 1997.

At some point in early February of 1997, the employer sent the employee to the Riverside plant to do inspection work for a two-week period. While at Riverside, the employee worked six days a week, eleven hours per day. The employee testified that he had to do more climbing, bending, and twisting with that job and that his pain increased. When he returned to Sherco, he was originally to work a forty-hour work week.[3] His symptoms never improved and eventually worsened, interfering with his ability to sleep.

The employee did not report for work on March 31, 1997 and did not notify the employer but called QRC Dickerson, reporting problems sleeping and increased pain with minimal activity. QRC Dickerson called Dr. Ogilvie's office but was unable to obtain an appointment for the employee prior to April 23, 1997. The QRC also called the employer to "[s]ee if we could modify his work, keep him working, hopefully until we saw Dr. Ogilvie." The employee worked April 3, 4, 6 and 7, had April 8 off, and was scheduled to work on April 9, 1997, but called in and told Byron Nordell, superintendent of the job, that he would not be in because he was sore and had not slept the night before. The employee did not report for work on April 10, 1997, and did not call in. When the QRC met with the employee on April 10, the employee expressed concern that he could not perform his work. The QRC also spoke with Mr. Nordell on April 10, 1997, and Mr. Nordell reported that he needed an inspector he could count on and that he would not take the employee back.

The employee was examined by Dr. Ogilvie on April 23, 1997. In a Report of Work Ability prepared that day, the doctor indicated that the employee was restricted to lifting no more than twenty pounds, occasional bending or twisting, and a thirty-hour work week. Without rehabilitation assistance, the employee found employment with Carlson Machine and Tool in late May of 1997, working three days a week, eight hours a day, at a wage loss.

The employer prepared an on-site job analysis [R-32] for a general laborer job on December 16, 1997. That job involved a forty-hour work week and primarily required standing, walking, and sweeping. The R-32 indicated that the job could be modified. On December 17, 1997, Dr. Ogilvie reviewed the job description and advised "no contraindication to part time work trial. 3 days/week." The employee refused the offered job. The employer has never made the job available to the employee on a part-time basis.[4]

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[3] The employee testified that the hours increased after the first week to 66 hours per week. Mr. Nordell testified that the increase in hours occurred no earlier than the week of March 29, 1997.

[4] The general laborer job would also require the employee to occasionally work as a tool warehouseman and fire watcher.

The employee filed a claim petition on October 23, 1997, seeking temporary partial disability benefits from May 31, 1997, and continuing. The employer answered, denying entitlement to temporary partial disability benefits, contending, in part, that the employee had refused to maintain or accept suitable employment. The matter proceeded to hearing on September 30, 1998. In findings filed on December 22, 1998, the compensation judge found that the inspector job and general laborer job were outside the employee's physical restrictions, that the employee had reasonably refused those jobs, and that the employee was entitled to temporary partial disability and rehabilitation benefits. The self-insured employer appeals.

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 contends that the inspector job at Sherco was not beyond the employee's restrictions, that "his refusal/termination of and from it in April of 1997 was not reasonable," and that, pursuant to Minn. Stat. § 176.101, subd. 3n (repealed in 1995), the employee is not entitled to temporary partial disability benefits thereafter. We are not convinced.

The employee did not refuse the inspector job at Sherco that was offered to him in December of 1996. Although the hours exceeded the known restriction on hours imposed by his treating doctor, the employee chose to accept the job because he had done the job before and thought that he could do it again. In fact, the employee worked at the job at Sherco, without lost time from work, without complaint, and without medical treatment, for almost three months.

The employee testified that, after he was asked to work at Riverside for two weeks, his increased hours and change in physical activities aggravated his symptoms. The employee testified that his symptoms did not improve, even after he returned to the Sherco job.

When the employee left the Sherco job on April 10,1997, he was still working at

least forty hours per week in violation of the last known restrictions from Dr. Ogilvie. At that time, he had an appointment to see Dr. Ogilvie but had not yet been examined by him. When Dr. Ogilvie did examine the employee on April 23, 1997, the doctor again restricted the employee to working a thirty-hour work week. Mr. Nordell testified that by April 10, 1997, he had already decided that he did not want the employee back in the inspector job.

The employee's testimony and the records of Dr. Ogilvie provide substantial evidence to support the compensation judge's finding that the inspector job was outside of the employee's physical restrictions at the time that he left that job in April of 1997.[5] The employee was restricted to part-time work and the inspector job was never available on anything but a full-time basis. The fact that the employee worked outside of his restrictions for a period of time does not obligate him to work outside of his restrictions forever.

The employer also contends that the general laborer job, which was apparently offered to the employee in December of 1997, was not beyond the employee's restrictions.[6] In this regard, the employer relies on the testimony of Dr. Ogilvie, indicating that a work trial of forty hours a week in the general laborer job would not be contraindicated, and the reports of independent medical examiner Dr. Wayne W. Thompson, indicating that the employee can perform that job on a full-time basis. Again, we are unpersuaded.

Dr. Ogilvie did respond on cross examination, during his deposition, that a trial of work at forty hours a week was not contraindicated. However, he also stated throughout that deposition that he had not released the employee to return to work on a forty-hour per week basis and that he recommended that the employee try the general laborer job three days a week to start. Dr. Ogilvie further testified that he doubted that the employee would be able to tolerate the general laborer job on a forty-hour per week basis, even after a work trial. The employer did not dispute that this job has never been offered to the employee on anything but a forty-hour per week basis. This testimony, coupled with the testimony of the employee, provides substantial evidence to support the judge's finding that the general laborer job was outside the employee's physical limitations and that the employee reasonably refused that job offer.[7] In that the employer does

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[5] In its brief, the employer indicates that it disputes that the employee's two weeks at Riverside made him physically worse. However, they point to no evidence to support this position other than the fact that the employee did not complain about the work at that time and did not seek medical treatment at that time. The compensation judge obviously found the employee's testimony to be credible. Assessment of a witness' credibility is the function of the judge. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989).

[6] Neither party disputes that the physical requirements of the job are within the employee's restrictions. The only dispute is whether the employee can perform the job on a full-time basis.

[7] While Dr. Thompson opined that the offered job was within the employee's physical restrictions, the compensation judge rejected that opinion. She noted in her memorandum that "[i]t is unclear whether or not Dr. Thompson considered the worsening of this employee's

not dispute that the employee's earnings at Carlson Machine and Tool represent his earning capacity, we affirm the compensation judge's findings in their entirety.

condition which occurred in 1997 when stating the employee could be working full time." Dr. Thompson's March 2, 1998, report states, "I have reviewed the updated medical records." However, the only records cited are a December 17, 1997, office note of Dr. Ogilvie, from when he reviewed the job offer with the QRC, and the R-32 form describing the general laborer job. Dr. Thompson went on to state that the employee could perform the general laborer job on a full-time basis, but the doctor did not provide any explanation. The judge could reasonably reject Dr. Thompson's opinion. A judge's choice between expert opinions is generally upheld, unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The employer has raised no concerns about foundation for Dr. Ogilvie's opinion.