

MICHAEL A. JOHNSON, Employee/Appellant, v. FINGERHUT CORP. and WAUSAU INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 25, 1999

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - CHANGE OF PHYSICIAN. Substantial evidence supports the compensation judge's finding that the employee had not shown good reason to change physicians where, in an unappealed finding, the compensation judge had found that the employee was in need of no further treatment other than check ups once or twice per year.

TEMPORARY PARTIAL DISABILITY - EARNING CAPACITY. While the employer and insurer had shown that they were entitled to suspend the employee's temporary partial disability benefits after the employee's hours were reduced for poor performance by his new employer, the compensation judge erred by not considering whether the employee had established that the resulting wage loss was causally related to the work injury by an inability to find work within his restrictions after a diligent job search or by the employee otherwise cooperating with rehabilitation, and therefore we remand for consideration of this issue.

Affirmed in part and remanded in part.

Determined by Hefte, J., Johnson, J., and Pederson, J.
Compensation Judge: Jennifer Patterson

OPINION

RICHARD C. HEFTE, Judge

The employee appeals the compensation judge's denial of his request to change physicians and the determination of his earning capacity for temporary partial disability benefits. We affirm in part and remand in part.

BACKGROUND

On January 14, 1988, Michael Johnson (employee) sustained an admitted low back injury while working as a cutter for Fingerhut Corporation (employer), which was insured for workers' compensation liability by Wausau Insurance Company (insurer). The employee was diagnosed as having traumatic L5 spondylolysis with resultant left sided foraminal encroachment upon the exiting L5 nerve root. The parties entered into a stipulation for settlement in February 1990 whereby the employee was compensated for a 17 percent permanent partial disability with a

closeout of claims to 19 percent.

Dr. John Cragg, an orthopedic surgeon, has been the employee's treating physician since September 1989. In October 1992, Dr. Cragg recommended restrictions of no repetitive lumbar bending, no lifting greater than 10 to 15 pounds more than 6 to 8 times an hour, no prolonged sitting more than 4 hours in an 8 hour period, with frequent breaks. In June 1993, Dr. Cragg indicated that these restrictions should continue indefinitely. The employee received rehabilitation assistance. On November 18, 1993, the employee began working at a light duty position 4 hours per day at Gunderson Motors as a light mechanic in their service department. In March 1994, Dr. Cragg noted that the employee was having difficulty working more than 4 hours per day and opined that the employee could work 4 hours per day regular duty or 8 hours with restrictions.

The employee underwent a functional capacities evaluation in January 1995, which recommended that the employee avoid vibration tasks, ladder/stair climbing, bending backwards, limit twisting and balance tasks to rarely, perform seated repetitive foot movements with upper extremity support, alternate sitting after 30 minutes, standing as needed, walking 5 minutes just briefly, limit driving to 45 minutes at a time, utilize a lumbar roll when seated, and continue working 4 hours per day at the medium work demand level with the above restrictions. Also in January 1995, the employee's QRC performed an on site job analysis of the employee's position at Gunderson Motors. The QRC concluded that the employee was performing a wide variety of duties, within and without his restrictions, and that Gunderson Motors did not have more than 4 hours of work available per day that the employee could do.

On January 27, 1995, the employer and insurer filed a petition to discontinue the employee's temporary partial disability benefits. A hearing was held on April 25, 1995, and May 11, 1995. In a Findings and Order served and filed June 26, 1995, Compensation Judge David Barnett found the employee continued to have significant limitations on his ability to perform physical work activity as a result of his 1988 work injury and that the employee should not increase his work beyond the 20 hours per week which he was working at Gunderson Motors because some of the work exceeded his restrictions and Gunderson Motors did not have more hours of work available which the employee could safely perform, and denied the employer and insurer's petition to discontinue. This decision was not appealed.

The employee continued to work at Gunderson Motors and began working with placement specialist Trudy Peterson, who worked with Gunderson Motors to identify job duties within the employee's restrictions which he could perform more than 4 hours per day on a regular basis. In early 1996, the employee's hours were increased from 4 hours to 7 hours per shift. A typical day for the employee consisted of 4 hours of light mechanic's work, a long lunch break, and 3 hours of general duties including cleaning floors, emptying trash cans, and general clean up activities. Gunderson Motors' owner thought that the employee was not as efficient when he worked 7 hours per shift, and as a result, reduced the employee's hours back to 4 hours per day as of June 4, 1997.

The employer and insurer filed a petition to discontinue temporary partial disability benefits, arguing that the employee's benefits should be calculated based on an imputed 8 hour shift. The employee filed a request to change physicians, and the matters were consolidated for hearing. At the hearing, the parties agreed that the employee was able to work 8 hours per day within his restrictions. The employee argued that his benefits should continue to be based on 4 hours per shift because Gunderson Motors did not have appropriate work available for him more than 4 hours per day. A hearing was held on April 10, 1998. The compensation judge adopted by reference the June 26, 1995, Findings and Order, and found that the employee had not shown a good reason for changing health care providers and that the employee's temporary partial disability benefits should be based on an imputed earning capacity of 7 hours per day. The employee 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 (1998). 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

Change of Physicians

The employee claims that the compensation judge erred by denying his request to change physicians. The employee claimed that he had lost confidence in Dr. Cragg and that he had found a doctor closer to his home. An employee is permitted to change treating physicians, or primary health care providers, "once within the first 60 days after initiation of medical treatment for the injury without the need for approval from the insurer, the department, or a workers' compensation judge." Minn. R. 5221.0430, subp. 2. "After the first 60 days following initiation of medical treatment for the injury, any further changes of primary provider must be approved by the insurer, the department, or a workers' compensation judge." Id.

The rules also provide that a compensation judge may not approve a request to change primary providers where "a significant reason underlying the request is an attempt to block

reasonable treatment or to avoid acting on the provider's opinion concerning the employee's ability to return to work." Minn. R. 5221.0430, subp. 4.A. In other words, a change in physicians is not appropriate where the employee is "doctor shopping." Whether a request to change physicians is an attempt at "doctor shopping" is a question of reasonableness under the circumstances of each case. See Stucky v. Crystal Cabinet Works, slip op. (W.C.C.A. May 1, 1996). This determination is a question of fact for the compensation judge. Id. The employer and insurer argue that the employee requested a change of physicians not for the purpose of medical treatment but for the purpose of finding medical support for retaining a 4 hour work restriction. The compensation judge, however, did not mention this as a basis for her determination.

The compensation judge found that the employee had not shown a good reason for changing health care providers. According to unappealed finding 5, the employee has seen Dr. Cragg at his Rice Lake, Wisconsin, office, which is over 100 miles from the employee's home, since 1989. Dr. Cragg is very familiar with the employee's medical condition as his treating physician since 1989. Further, in an unappealed finding, the compensation judge found that the employee, as of the date of the hearing, was not in further need of treatment beyond checkups once or twice per year. After the expiration of the period during which an employee may change treating physicians without approval, "a compensation judge shall not approve a party's request to change primary providers, where . . . at the time of the employee's request, no further treatment is needed" Minn. R. 5221.0430, subp. 4.E. Substantial evidence supports the compensation judge's finding that the employee had not shown a good reason for changing providers. Accordingly, we affirm the compensation judge's denial of the employee's request to change physicians.

Earning Capacity

The employee claims that the compensation judge erred by determining that the employer and insurer had rebutted the presumption that his actual earnings from June 4, 1997, through April 10, 1998, were an accurate measure of the employee's earning capacity. In order for temporary partial disability benefits to be due, the employee must be subject to an actual loss of earning capacity that is causally related to the work-related disability. See Morehouse v. George A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981) (citing Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976)). An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101, subd. 2(a). "[T]emporary partial benefit awards are generally based on post-injury wages because post-injury wages are presumptively representative of an employee's reduced earning capacity. In appropriate circumstances, however, this presumption can be rebutted with evidence indicating that employee's ability to earn is different than the post-injury wage." Einberger v. 3M Co., 41 W.C.D. 727, 739 (W.C.C.A. 1989) (citation omitted). A determination of earning capacity is a factual decision for the compensation judge. Noll v. Ceco Corp., 42 W.C.D. 553, 557 (W.C.C.A. 1989).

The compensation judge found that the employee's hours were reduced from 7 hours per day to 4 hours per day because of poor performance during his afternoon hours. There was conflicting evidence on this issue. The employee claimed that there was often nothing to do within his restrictions during the afternoon shift, and that he felt uncomfortable standing around doing nothing. The QRC testified that he did not believe there was more than 4 hours per day of adequate light duty work available for the employee. (T. 189.) The employee's supervisor at Gunderson Motors, however, testified that the work the employee was asked to perform was not "make work" but was actual work that has been absorbed into the duties of other employees in the service department since the employee has left. Gunderson Motors' owner testified that he had noticed that the employee was not very productive in the afternoon hours, and he thought it best that the employee go back to working only 4 hours per day. (T. 158.) The employee's job placement consultant verified that the employee's hours had been cut, and her report indicated that the employee's hours were reduced because Gunderson Motors's management indicated that he was not productive 7 hours per day and that they would get more work out of him if he went back to 4 hours per day.¹ Resolution of conflicting evidence is a factual determination for the compensation judge. We agree that the employer and insurer have shown that they were entitled to suspend that portion of the employee's temporary partial disability benefits correlating to the reduction in hours, but only temporarily if the employee has established that the resulting wage loss was still causally related to the employee's work injury. Loss of a post-injury job for reasons not related to the injury, such as layoff or discharge for cause, may suspend entitlement to wage loss benefits, but this entitlement can be renewed by a finding that underemployment or unemployment thereafter is due to the work injury. See Marsolek v. George A. Hormel & Co., 438 N.W.2d 922, 41 W.C.D. 964 (Minn. 1989).² Such a conclusion is supported by a showing of the inability of the employee to find work within his restrictions following a diligent search for employment or by the employee otherwise cooperating with a rehabilitation plan. The compensation judge did not address this issue.

In the record of this case, Exhibit B contains evidence of the employee's job search after his hours were cut at Gunderson Motors as of June 4, 1997. The employee worked with

¹ There is no evidence in the record that the afternoon hours at Gunderson Motors remained available to the employee.

² In 1995, Minn. Stat. § 176.101, subd. 1(e)(1) was amended, effective for injuries occurring on or after October 1, 1995, to provide that where an employee's temporary total disability compensation has ceased because the employee had returned to work and the employee was later terminated for misconduct, his right to receive temporary total disability benefits following termination was forfeited. In Langworthy v. Signature Flight Support, slip op. (W.C.C.A. July 8, 1998), this court adopted a definition of misconduct set forth by our supreme court in Tilseth v. Midwest Lumber Co., 295 Minn. 372, 204 N.W.2d 644 (1973). The employee's 1988 injury in this case preceded the amendment and therefore the amendment is not applicable on that basis, but we also note that the 1995 amendment did not mention temporary partial disability benefits, only temporary total disability benefits.

vocational placement consultant Trudy Petersen to reinstate his job search very soon after the reduction in hours. A new job placement plan and agreement was completed on June 25, 1997. The record indicates that the employee submitted job logs, followed up on job leads provided by the consultant, and visited the local job service office on a weekly basis. The consultant's reports continue through March 1998, a month before the hearing. Therefore, we remand for consideration of whether the employee's job search and cooperation with rehabilitation efforts after June 4, 1997 had established that his wage loss was causally related to his work injury, and if so, on what date the employee had reestablished his entitlement to temporary partial disability benefits.