JANICE M. KAPPELHOFF, Employee, v. TOM THUMB FOOD MKTS. and GEN. CAS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 22, 1999

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - SURGERY. Where the employee had a substantial history of unsuccessful conservative treatment for her low back injury, and where the judge's decision was amply supported by sufficiently founded expert medical opinion and by the testimony of the employee, the compensation judge's conclusion that recommended fusion surgery was reasonable treatment for the employee's work injury was not clearly erroneous and unsupported by substantial evidence.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; RULES CONSTRUED - MINN. R. 5221.6500, SUBP. 2.C.(1)(d). Where the employer and insurer brought to their argument no authoritative definition of "incapacitating" for the court to use as a standard, and where available dictionary definitions were not dispositive as to the issue, Minn. R. 5221.6500, subp. 2.C.(1)(d), was construed to be permissive of less than total disability on the part of the employee claiming disability under that rule.

Affirmed.

Determined by Pederson, J., Johnson, J. and Rykken, J.
Compensation Judge: Catherine A. Dallner

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that recommended low back surgery is reasonable and not outside Minn. R. 5221.6500, subp. 2.C.(1)(d), of the Treatment Parameters. We affirm.

BACKGROUND

In June of 1990, Janice Kappelhoff became employed part time as a rural letter carrier for the U. S. Postal Service. In November of 1995, Ms. Kappelhoff became employed part time also by Tom Thumb Food Markets. On January 8, 1996, in the course of her work in the Deli Department at Tom Thumb Food Markets [the employer], Ms. Kappelhoff [the employee] sustained a work-related injury to her low back. At the time of her injury, the employee was

thirty-two years old and was earning a total average weekly wage of $454.47. The employee was initially treated by chiropractor Dr. J. R. Brandt, who subsequently referred the employee to occupational medical specialist Dr. James Lee. The employee first saw Dr. Lee regarding her injury on January 29, 1996. Dr. Lee diagnosed acute low back pain with possible left lower extremity radicular pain, issued lifting restrictions, and prescribed physical therapy. On February 16, 1996, the employee complained to Dr. Lee of increased and moderately severe left low back pain radiating into her left thigh, leg, and foot, aggravated by sitting and forward bending. Dr. Lee increased the employee's restrictions, and on February 29, 1996, he ordered a CT scan. The scan was read to reveal a small broad-based disc herniation at L4-5, possibly impinging on either or both of the L5 nerve roots, especially the left one, and a small central left disc herniation at L5-S1, read to be causing very minimal displacement of the left S1 nerve root. The employer and insurer admitted liability for a work injury and commenced payment of benefits.

The employee's symptoms continued and worsened over the next several months, and by June 27, 1996, Dr. Lee had restricted the employee to a total of twenty hours of work a week. He eventually tried releasing the employee to begin working six hours a day beginning August 1, 1996, but on August 15, 1996, she returned reporting marked symptomatic worsening. Dr. Lee restricted her back to two hours of work a day and referred her for intensive physical conditioning, still concluding that, "[b]ased on today's exam, this does not seem to be a surgical case." By November 1, 1996, however, Dr. Lee and the employee's rehabilitation physician, Dr. Joseph Wegner, had referred the employee for a surgical evaluation by Dr. Gregg Dyste. The employee complained to Dr. Dyste of toothache-like back, left buttock, and left leg pain. She indicated to him that her pain was constant, that it was at a level six or seven on a scale of ten, that it was intensified by bending, lifting, and sitting, that the left leg and buttock pain came on if she sat or walked for longer than fifteen minutes at a time, and that the pain had increased since her February CT scan. Concluding that the employee's pain "seems to have increased in its intensity over the past few months," Dr. Dyste recommended an MRI scan.

On November 18, 1996, the employee was examined for the employer and insurer by Dr. Steven Lebow. Dr. Lebow saw no radicular compression revealed on the employee's MRI[1] and saw no basis for recommending any surgery. He did, however, "certainly" recommend aggressive back stabilization exercises for a period of three months, and he recommended that the employee do no repetitive bending, that she do no lifting of over twenty-five pounds, and, if her job should involve standing or sitting, that she have the ability to change positions at least once each hour. On December 19, 1996, Dr. Lebow reviewed certain surveillance videotapes of the employee involved in various activities in August, September, and November 1996. He found the employee on the tapes to be someone "who is more functional than the subjective story she gave me when I saw her on November 18, 1996." Dr. Lebow noted that the woman in the videotapes "was able to do normal activities with no apparent pain behavior" and that "[t]his certainly supports the statement I made that this patient is not in my opinion a surgical candidate."

[1] Dr. Lebow's records indicate that the MRI was completed on November 4, 1996. We cannot find a copy of an MRI report in the record.

About the same time as Dr. Lebow's review of these tapes, the employee quit her position with the employer, preparatory to beginning full time work for the Postal Service in February 1997.

In June 1997, Dr. Dyste reported that he had prescribed a lumbar epidural steroid injection for the employee, and on August 6, 1997, he noted to his file that payment for epidural steroid injections had been denied by the insurer. Dr. Dyste indicated that the employee had continuing pain, and he scheduled the employee for a lumbar discography. Plain films of the employee's lumbar spine on August 12, 1997, were read to reveal multilevel disc space narrowing, most severe at L5-S1, L4-5, and L2-3 and less severe at L3-4 and L1-2. A three-level lumbar discography on that same date revealed abnormal morphology at the L5-S1 and L4-5 levels. On August 20, 1997, based on those results, Dr. Dyste recommended a two-level lumbar interbody fusion at the L4-5 and L5-S1 interspaces.

On August 21, 1997, the employee was examined by orthopedist Dr. Robert Wengler for a second opinion. Dr. Wengler diagnosed two-level lumbar disc disease, concluding that both L4-5 and L5-S1 showed evidence of a herniation. While declining to recommend spinal fusion, Dr. Wengler found the employee to be a candidate for "definitive" treatment at both levels, suggesting that she was an excellent candidate for chemonucleolysis. Dr. Wengler also rated the employee's whole-body permanent partial disability at 21%, under Minn. R. 5223.0390, subp. 4.D.(1) and (4). On October 2, 1997, the employee was examined again for the employer and insurer by Dr. Lebow, who instead rated the employee's permanency at 10%, under subpart 4.C.(2) of that same rule. On October 20, 1997, Dr. Lebow also reviewed additional videotape furnished by the employer and insurer and reiterated his recommendation against fusion surgery, and he reiterated that opinion again on May 6, 1998. On July 7, 1998, the parties executed a Stipulation for full, final, and complete settlement of any claims for compensation for permanent partial disability up to 21% of the whole body, regardless of whether or not the employee should elect to undergo the fusion surgery recommended by Dr. Dyste. In that Stipulation, the employer and insurer expressly preserved all defenses against any future claim by the employee to surgery. An Award on that Stipulation was issued August 3, 1998.

On July 22, 1998, the employee had returned to see Dr. Dyste. In his treatment notes, Dr. Dyste indicated that "[i]t sounds as if the strongest evidence [supporting Dr. Lebow's opinion] was the video tape," which Dr. Dyste suggested revealed the employee "after she had had an epidural steroid injection" and so "was quite functional." On August 12, 1998, Dr. Dyste wrote to the employee's attorney, indicating that he was still recommending fusion surgery, "not . . . because of herniated disc with nerve root injury" but "because of two-level disc space injury with pain as a result of that." The doctor noted near his conclusion that "[t]he severity of the symptoms [is] dependent on the level of activity which [the employee] performs" but that "[s]tooping, twisting, carrying, lifting[,] etc.[,] all cause incapacitating back pain which, at their wors[t], do make activities of daily living difficult for her." On September 10, 1998, the employee filed a Medical Request, seeking payment for the two-level fusion surgery recommended by Dr. Dyste. Four days later the employer and insurer filed a Medical Response denying that request based on the reports of Drs. Lebow and Wengler.

The matter came on for hearing on February 23, 1999. Issues at hearing included (1) whether the two-level lumbar fusion recommended by Dr. Dyste was reasonable and necessary to cure or relieve the effects of the employee's work injury and (2) whether that surgery was outside the treatment parameter provided for in Minn. R. 5221.6500, subp. 2.C.(1)(d), on grounds that the employee had been working full time for the Post Office without any significant loss of work time since February 1997 and so had not been suffering from "incapacitating" low back pain for more than three months. At the hearing, the employer and insurer submitted into evidence four video surveillance tapes, taken of the employee's activities on four days in August, September, and November of 1996 and one day in August of 1997. By Findings and Order filed March 18, 1999, the compensation judge concluded in part that the fusion surgery at issue was reasonable and necessary treatment for the employee's work injury, that the employee had been suffering from incapacitating low back pain for significantly longer than three months, and that therefore the surgery at issue was not outside the treatment parameter provided for in Minn. Rule 5221.6500, subp. 2.C.(1)(d). The employer and insurer appeal.

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

Reasonableness and Necessity

The compensation judge found that the fusion surgery recommended by Dr. Dyste was reasonable treatment for the work injury here at issue. The employer and insurer contend that the employee's condition does not warrant surgery, in that the employee has worked since January 1996 without significant loss of work time, without using all of her vacation or sick time, and without requesting a medical leave of absence. They argue further that Dr. Dyste's opinion that the surgery is warranted lacks adequate foundation, whereas Dr. Lebow's opinion to the contrary does not. They argue that Dr. Dyste's opinion is "importantly flawed" in that Dr. Dyste has never observed, as Dr. Lebow has, the lack of distress exhibited by the employee on the

surveillance videotapes as she performed various physical tasks. We are not persuaded.

Most of the compensation judge's findings are devoted to documenting medical and testimonial evidence of the severity of the employee's low back symptoms since the date of her work injury. The judge notes, for instance, that, since that injury in January 1996, the employee has undergone extensive and varying conservative treatment modalities and diagnostic testing, none of which has provided her with any significant, long-term relief. Modalities and testing listed by the judge include chiropractic care, physical therapy, work conditioning, active rehabilitation, supervised home exercise, prescription medications, epidural steroid injections, a CT scan, an MRI scan, and a lumbar discography. Notwithstanding these measures, the employee remained, at the time of hearing, normally at a pain level of seven on a scale to ten, escalating sometimes up to nine or ten. The judge notes in her findings that the employee has been forced to give up essentially all of her recreational and sports activities and many of her family activities in order to continue performing her job at the Post Office. This, in turn, she does only with accommodations that she has made in her work station, with help from her coworkers, and with the assistance of pain-relief medications, including narcotics. Her use of these medications, the judge finds, has significantly increased during the past year. The judge emphasizes also that "[t]he employee is currently the primary wage earner for her family" and evidently credits the employee's "adaman[ce] that she wants to keep her job," which the employee testified was the best she could ever hope for, particularly in the excellent benefits that it provides for her and her family. The judge notes also that the employee has missed several days from work due to her work injury and would apparently have missed others had she not been not been precluded, by provisions of her employment, from doing so for lack of a substitute to perform her mail route for her.

In light of the employee's extensive history of unrelieved symptoms and the employee's particular employment circumstances, the compensation judge expressly relied on the opinion of neurosurgeon Dr. Dyste, that fusion surgery is reasonably likely to relieve the employee's pain. The judge credited Dr. Dyste's opinion over the contrary opinions of Drs. Lebow and Wengler "for a number of reasons." These included the fact that Dr. Dyste had been treating the employee since November of 1996 and had examined her several times and monitored her responses to various conservative treatment modalities over the period of time since that date, whereas Dr. Lebow had seen her only twice and Dr. Wengler only once. Although she is not required to do so, a finder of fact may, in appropriate circumstances, as she did here, choose to afford greater weight to the opinion of a treating physician. See Caven v. Ag-Chem Equip. Co., Inc., slip op. (W.C.C.A. Sept. 14, 1993). With regard to the videotape evidence upon which Dr. Lebow appears to have placed substantial weight, the judge found credible and apparently persuasive the employee's testimony that her lower back and lower extremity pain had become much more frequent since the last of those films was made. The judge viewed all four of the films at hearing, and she listened to the employee's testimony regarding them. That Dr. Dyste may not have personally viewed the films is not dispositive. See Bossey v. Parker Hannifin, slip op. (W.C.C.A. Mar. 14, 1994) (while adequate foundation is necessary for a medical opinion to be afforded evidentiary value, the expert need not have been made aware of every relevant fact).

The employee, who under terms of her July 1998 settlement has nothing to gain from the surgery at issue except relief from her pain, testified that she desires the surgery because "I don't want to live with this pain anymore," because "I feel like a vegetable stuck at home. The only thing I can do and basically live with . . . is work[,] and I have to do that," and because, with surgery, " I expect my life to come back . . . ." In her memorandum, the compensation judge expressly credited this testimony as well as Dr. Dyste's opinion. After consideration of the full record as a whole, we cannot find unreasonable the judge's conclusion that the surgery at issue was reasonable and necessary. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence); Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978).

Minn. R. 5221.6500, subp. 2.C.(1)(d), of the Treatment Parameters

Minn. R. 5221.6500, subp. 2.C.(1), of the Treatment Parameters requires that at least one of four conditions must be satisfied in order for lumbar fusion to be indicated. The only one of these four that is potentially applicable to the employee is that described in subpart 2.C.(1)(d), which requires in part that the employee have had "incapacitating" low back pain for longer than three months. The compensation judge found in Finding 11 that "[t]he employee has been suffering from incapacitating low back pain for significantly longer than three months." The employer and insurer contend that the threshold of "incapacitating" low back pain "must, at the very least, require a showing of an inability to work" and that the employee in this case has been able "to continue working at the post office on a full time basis for more than two years while never having to exhaust all of the sick time and vacation time available to her." They argue that, since beginning full-time work for the Post Office in 1997, the employee has missed less than a month from work, has continued to work without any objective indication of any physical difficulties, and has not availed herself of the medical leave of absence to which she would be entitled without jeopardizing her position. We are not persuaded.

The compensation judge appears to have based her conclusion that the employee's pain has been "incapacitating" on the evidence cited above of sustained and chronic low back problems since the date of the injury. The employer and insurer have brought to their argument no case-law-supported or other authoritative definition of "incapacitating" for this court to use as a standard in construing the meaning of that term in Minn. R. 5221.6500, subp. 2.C.(1)(d). Nor have we discovered any case-law construction of the term as it is employed in that or any other context in our jurisdiction. The first definition of "incapacitate" in The American Heritage Dictionary is "[t]o deprive of strength or ability; disable." The American Heritage Dictionary 650 (Second College Edition 1985). "Incapacity" is defined in Black's Law Dictionary as follows:

> Want of capacity; want of power or ability to take or dispose; want of legal ability to act. Inefficiency; incompetency; lack of adequate

> power. The quality or state of being incapable, want of capacity, lack of physical or intellectual power, or natural or legal qualification; inability, incapability, disability, incompetence.

Black's Law Dictionary 685 (5th ed. 1979). Neither of these definitions is of dispositive assistance in determining whether "incapacitated" should be construed to mean only totally unable to perform or whether it may also be construed to mean merely restricted in the ability to perform. Therefore, absent more definitive evidence to the contrary, and noting that "incapacitates" in the statute has been expressly modified by "totally" when it is intended to imply total disability, see Minn. Stat. Minn. Stat. § 176.101, subd. 5(2), we construe the word "incapacitating" standing alone in Minn. R. 5221.6500, subp. 2.C.(1)(d), to be permissive of less than total disability on the part of the employee claiming disability under that rule.

Because it was not unreasonable for the judge to conclude that the surgery at issue was reasonable and necessary, and because the surgery at issue was not outside the treatment parameter provided for in Minn. R. 5221.6500, subp. 2.C.(1)(d), we affirm the judge's award of the fusion surgery recommended by Dr. Dyste. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.