

SHERI L. MAKI, Employee, v. LEISURE HILLS CARE CTR. and AM. COMP. INS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 19, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where the dispute surrounding the employee's termination of employment with the employer went to proving the second element of the 'qualified employee' definition, that the employee could not reasonably be expected to return to suitable gainful employment with the date-of-injury employer, and where the employer and insurer had repeatedly insisted on the voluntariness of the employee's resignation as a basis for denying the rehabilitation benefits at issue, the compensation judge's suggestion that the employee's termination from employment might have been less than voluntary was not subject to vacation for being beyond the judge's scope of authority.

PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where the only issues at hearing were the employee's entitlement to rehabilitation benefits and certain medical benefits, the 3e suitability of the employee's job offer from the employer was not at issue, and the judge's finding that the employee did not refuse a suitable 3e job offer was modified to indicate only that the employee's refusal of the job was not unreasonable.

REHABILITATION - SUBSTANTIAL EVIDENCE. Where the employer and insurer did not appeal from the compensation judge's conclusion that the employee was a "qualified employee" for rehabilitation purposes, where the employee's chiropractor had concluded that the employee "will require a varying degree of care indefinitely for her lower back pain" and "will likely be limited now and in the future to light duty type of employment," and where the chiropractor had noted several physical activities that currently triggered the employee's pain, the compensation judge's conclusion that the pain-triggering activities listed by the chiropractor constituted "permanent" was vacated, and the the judge's finding was modified to retain the conclusion that the employee was permanently precluded from returning to her pre-injury occupation while eliminating the judge's direct attribution of that preclusion to the pain-triggering activities specified.

Affirmed in part and modified in part.

Determined by Pederson, J., Wheeler, C. J., and Wilson, J.
Compensation Judge: Donald C. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from three of the compensation judge's findings, on grounds that they do not relate to issues before the judge for determination. We affirm in part and modify in part.

BACKGROUND

On January 4, 1995, Sheri Maki [the employee] sustained a work-related injury to her low back while employed full time as a nursing assistant with Leisure Hills Care Center [the employer]. The employee was in her seventh month of pregnancy at the time of her injury. On January 6, 1995, the employee saw Dr. Jennifer Cornell regarding the injury. Dr. Cornell diagnosed low back strain and released the employee to return to light duty. The employee's back pain continued, and on January 24, 1995, she was examined in Dr. Cornell's absence by Dr. T. R. Edwards. Dr. Edwards took the employee off work for another week, and the employer and its insurer commenced payment of benefits.

At the employee's next appointment, on January 31, 1995, Dr. Cornell spent half an hour with an agent of the insurer, ultimately agreeing on a work-hardening plan for the employee.¹ Under that plan, the employee was to do no bending or lifting over twenty pounds, was to alternate between sitting and standing, and was to rest for fifteen to thirty minutes every two hours. Also under the plan, the employee was to perform only "[d]uties as comfortable" and was to "vary work based on how she feels." Notwithstanding this plan, three days later the employer placed the employee on maternity leave. Two months after that, the employee delivered her child. The employee had planned to return to her job in mid July, but on July 23, 1995, she resigned from her job to stay home with her new baby, explaining on her resignation notice that she did "not want changing shifts on Part time position."

On October 9, 1995, the employee commenced treatment for her low back with chiropractor Dr. Scott McBride, upon recommendation of her doctors. On April 22, 1996, after treating the employee for about six months, Dr. McBride completed a Health Care Provider Report, indicating that the employee had reached maximum medical improvement [MMI] from her work injury on March 22, 1996. Dr. McBride also concluded that the employee was subject to a 3.5% whole body permanent impairment as a result of her injury, and he released her to return to work without restrictions.

On January 6, 1997, the employee filed a Rehabilitation Request, seeking a consultation for rehabilitation assistance. In her request, the employee explained that the work plan devised for her at the end of January 1995 had been physically intolerable for her. She went on to state that, when she had indicated that intolerance to the employer, she

¹ The employer's Director of Nursing Services had written a letter to Dr. Edwards, carbon copied to Dr. Cornell, questioning the employee's credibility as to her physical capacity.

was advised by my employer to either take maternity leave or lose my job. Rather than lose my job, I took maternity leave from February 1, 1995 until August, 1995. At the end of my maternity leave, the employer called and asked me to return to work. I requested to be allowed to return to work on an on-call basis but was advised that I would need to return to part-time work or no work at all.

The employee explained further that she “would like to return to work but I cannot lift.” On July 1, 1997, the employee underwent a rehabilitation consultation with QRC Dan Ohrwall. QRC Ohrwall concluded that the employee was a “qualified employee” for rehabilitation services, although he expressed uncertainty as to whether or not the employee could be expected to return to her preinjury employer or occupation.² On August 13, 1997, the employer and insurer filed a Rehabilitation Request objecting to the provision of rehabilitation services, on grounds that “[t]he employee was released to return to work without restrictions. The employee chose to terminate her employment due to personal reasons.”

On October 17, 1997, Dr. McBride issued an opinion revising his earlier prognosis as to the employee’s ability to work, indicating now that any repetitive bending or twisting of the low back, any repetitive lifting, any lifting in excess of twenty-five pounds, any repetitive pushing or pulling, or any static posture for more than sixty minutes “all tend to increase [the employee’s] low back pain.” Dr. McBride went on in his letter to state that the employee “will require a varying degree of care indefinitely for her lower back pain” and “will likely be limited now and in the future to light duty type of employment.”

An administrative conference was held on October 30, 1997, to consider the employee’s entitlement to rehabilitation. By order of the settlement judge filed November 6, 1997, the employee was found to be a “qualified employee” for rehabilitation services, based on a finding that “Dr. McBride has recently restricted the employee in her activities such as to preclude the employee from returning to her pre-injury work without accommodation.” On December 4, 1997, the employer and insurer filed a Request for Formal Hearing.

On February 17, 1998, the employee was examined for the employer and insurer by Dr. Paul Yellin. It was Dr. Yellin’s opinion that the employee was not in need of any continuing physical work restrictions or chiropractic or medical treatment and had not been in need of any such restrictions or treatment since reaching MMI on March 22, 1996. It was also Dr. Yellin’s opinion that the employee was not subject to any permanent whole body impairment due to her work-related low back injury.

² QRC Ohrwall expressed uncertainty as to both the employee’s medical restrictions and the availability of any permanent work for the employee at the employer within those restrictions.

The matter was heard on April 17, 1998. The principal issues at hearing were the employee's entitlement to rehabilitation benefits and to payment of certain chiropractic expenses incurred after December 2, 1996, which were arguably outside the Treatment Parameters. By findings and order filed June 16, 1998, the compensation judge concluded that the employee was entitled to the benefits claimed. While not contesting the judge's awards of those benefits, the employer and insurer appeal from three specific findings of the compensation judge, contending that the judge exceeded his authority in making the findings and concerned that the findings may have adverse future implications.

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 (1996). 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. However, "a decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Although a compensation judge's decision must include "[a] determination of each contested issue of fact or law" (emphasis added), Minn. R. 1415.3000, subp. 2.E., this court has several times indicated that a judge's decision may not resolve matters not at issue. See, e.g., Carroll v. Honeywell, Inc., slip op. (W.C.C.A. Mar. 31, 1992) (where the employee was seeking permanency benefits in the form of impairment compensation and the employer contested permanency benefits but not the form of them, the compensation judge was without authority to award economic recovery compensation); see also Deryke v. Pet Food Warehouse, slip op. (W.C.C.A. Sep. 18, 1997) (where the employee's temporary aggravation was found to have ended in June 1996, the compensation judge's finding that the employee "effectively resigned" from work with the employer in August 1996 had no bearing on the employee's entitlement to benefits and therefore was vacated). The employer and insurer contend that elements of Findings 13, 14,

and 17 do not relate to issues in dispute at the hearing and therefore constitute errors of law.³ We conclude that the essential substance of all three of these findings was reasonably relevant to the judge's resolution of issues reasonably before him with regard to whether or not the employee was a "qualified employee" for rehabilitation services, pursuant to the requirements of Minn. R. 5220.0100, subp. 22.⁴ However, we agree that certain elements of Findings 14 and 17 were not litigated and were not essential to the judge's decision.

Findings 13 and 14

At Findings 13 and 14, which interrelate for purposes of our discussion, the compensation judge concluded the following:

13. On or about July 23, 1995, the employer advised the employee that her maternity leave was to expire and requested that she return to work on a part time basis. The employee informed the employer that she did not care to return to work on a part time basis as that would involve changing shifts and she [] did not have day care assistance for all shifts. The employer, thereafter, informed the employee that it would deem her inability to return to work to be a voluntary resignation.

14. As the employee was working at a full time position at the time of her injury, her inability to return to work to a part time position with variable shifts is not the refusal of a suitable "3e" job. Accordingly, the employee's inability to return to part time work

³ With regard to certain issues here before us that are not ones resting "solely on the application of a statute or rule to essentially undisputed facts," see Krovchuk, 48 W.C.D. at 608, we continue to apply the Hengemuhle standard.

⁴ Minn. R. 5220.0100, subp. 22, reads as follows:

Qualified employee. "Qualified employee" means an employee who, because of the effects of a work-related injury or disease, whether or not combined with the effects of a prior injury or disability:

A. is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job the employee held at the time of injury;

B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and

C. can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician's opinion of the employee's work ability.

does not disqualify the employee from further rehabilitation benefits.

The employer and insurer contend that Finding 13, with its focus on the parties' "difference of opinion . . . regarding the Employee's maternity leave and her resignation," has no relevance to the issues before the judge at hearing and that, had they understood that the voluntariness of the employee's termination was at issue, they would have offered additional evidence in that regard. We are not persuaded. In their August 13, 1997, Rehabilitation Request, the employer and insurer objected to providing rehabilitation services in part expressly on grounds that "[t]he employee chose to terminate her employment due to personal reasons." Similarly, in their December 4, 1997, Request for Formal Hearing, they contended expressly that the employee was not a qualified employee for rehabilitation assistance "as she was released to return to work without restrictions, having reached MMI. Furthermore, the Employee voluntarily terminated her position with the Employer for maternity reasons. There is no adequate evidence that the Employee's alleged present disability is causally related to her January 4, 1995 injury" (emphasis added). Yet again at hearing, their attorney reasserted that "the employee voluntarily terminated her employment," arguing also that the employee had "expressed uncertainty about returning to work until her children are in school." From the employer and insurer's perspective, these arguments all appear to have been intended as affirmative defenses to any contention that the employee was precluded from returning to her job "because of the effects of a work-related injury," as is required for rehabilitation eligibility under Minn. R. 5220.0100, subp. 22. Indeed, we see little basis for the employer and insurer's submission of Exhibit 4, the employee's July 23, 1995, Resignation Notice, into evidence except to support that rationale. Moreover, the employer and insurer concede that "the transcript documents that the attorneys disputed the facts underlying the Employee's maternity leave and ultimate resignation or termination from [the employer]," arguing only that that dispute did not render the issue "ripe for hearing."

From the employee's perspective, we agree essentially with the employee's argument that "[t]he entire issue surrounding the employee's termination of employment with the employer goes directly to proving the second prong of [the 'qualified employee'] definition." That "prong" is the requirement that, in order to receive rehabilitation assistance, an injured employee "cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer." Minn. R. 5220.0100, subp. 22(B). Given the employer and insurer's repeated insistence on the voluntariness of the employee's resignation as a basis for denying rehabilitation, and given also the relevance of the issue to the employee's proof regarding subpart 22(B) of Rule 5220.0100, we conclude that the characterization of the employee's termination in Finding 13 was reasonably relevant to the judge's determination of the employee's entitlement to ongoing rehabilitation benefits. On that basis we decline to vacate Finding 13 as requested by the employer and insurer.

With regard to Finding 14, the employer and insurer do not object to the judge's conclusion that the employee is not disqualified from further rehabilitation benefits. They contend, however, that the compensation judge exceeded his authority in concluding that the employee's election not to return to work did not constitute a refusal of a "3e" job. They argue

that the 3e suitability of the job open to the employee at the employer “was never even discussed by the attorneys on the morning of the hearing (according to the transcript)” and that “[t]here was no testimony as to whether the job was a suitable 3e job, or whether the Employee had, in fact, refused a suitable 3e job.” We agree that the parties did not apparently litigate or intend to litigate the 3e suitability of the employee’s post-maternity invitation from the employer to return to work.

As noted above, the employer and insurer have repeatedly contested the employee’s entitlement to rehabilitation benefits in part on grounds that the employee voluntarily terminated her position with the Employer. In his memorandum, the compensation judge concluded that this defense “is not a defense to the employee’s eligibility for rehabilitation, unless the employee voluntarily refused a suitable ‘3e’ job after all judicial review was completed.” As we suggested above, however, the employer and insurer may simply have intended this defense as a defense to the argument that the employee’s failure to return to her job was “because of the effects of a work-related injury,” that causal relationship being a requirement for rehabilitation eligibility under Minn. R. 52220.0100, subp. 22, even before any of the three “prongs” of that rule are reached. For purposes of rehabilitation eligibility only, the judge could have, and we conclude should have, determined the reasonableness of the employee’s refusal of the post-maternity job offer without implying whether or not that offer satisfied or was intended to satisfy all of the requirements of Minn. Stat. § 176.101, subd. 3e. Accordingly, we modify Finding 14 to read “As the employee was working at a full time position at the time of her injury, her decision not to return to work to a part time position with variable shifts was not unreasonable and did not disqualify her from further rehabilitation benefits.”

Finding 17

In his report of October 17, 1997, Dr. McBride stated as follows:

It has become apparent that my initial prognosis of [the employee’s] injury as well as her ability to return to her previous type of employment (nurses aid) was inaccurate. It was my opinion that [the employee] suffered a permanent injury and subsequent disability as a result of her injury on January 4, 1995. Her ability to work has been significantly limited as a result. Any activity requiring repetitive bending or twisting of the low back, any repetitive light lifting or lifting in excess of 25 lbs., any repetitive push-pull type activities or any prolonged static posture (i.e. sitting, standing, walking) for more than sixty minutes all tend to increase [the employee’s] low back pain.

In Finding 17, the compensation judge concluded as follows:

Based on subsequent visits, on October 17, 1997, Dr. McBride provided permanent restrictions for the employee’s work restricting the employee from bending or twisting her low back, lifting more

than 25 pounds, performing repetitive push-pull activities or holding a static position for more than 60 minutes. Dr. McBride's records of March 19, 1997 document an ongoing loss of lumbar range of motion. These restrictions are reasonable and likely [to] preclude the employee from ever returning to work as a certified nursing assistant.

The employer and insurer contend that the word "permanent" in the first sentence and word "ever" in the final sentence of Finding 17 "exceeded the issues" for determination before the judge, in that neither the permanency of the employee's restrictions nor the permanency of her preclusion from returning to work as a nursing assistant was ever at issue at hearing. For that reason they request that we vacate those portions of Finding 17 that refer to Dr. McBride's statements as constituting permanent restrictions. We agree that Dr. McBride's observations as to the employee's pain tolerance do not sufficiently define permanent restrictions. However, we nevertheless conclude that it was both reasonable and proper for the judge to rely on Dr. McBride's report in its entirety as expert opinion that the employee was permanently precluded from returning to the type of work that she had been doing at the time of her work injury.

The compensation judge concluded that the employee was a "qualified employee" for rehabilitation purposes, and the employer and insurer have not appealed from that conclusion. In order to have drawn that conclusion, the compensation judge must have concluded first that the employee "is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job the employee held at the time of injury." Minn. R. 5220.0100, subp. 22(A). The judge's conclusion to that effect was reasonable, not only in light of the general implications of the statement of Dr. McBride quoted above but also in light of Dr. McBride's statements elsewhere in the same report that the employee "will require a varying degree of care indefinitely for her lower back pain" and "will likely be limited now and in the future to light duty type of employment" (emphasis added). Given the entire context of Dr. McBride's report, it was not improper or unreasonable for the judge to conclude that the employee was permanently restricted from ever returning to the kind of work at which she was injured. And because the requirements of Minnesota Rule 5220.0100 were very much at issue at the hearing before the judge, we conclude that the judge's finding of permanent preclusion from nurse's aid work was neither improper nor unreasonable. At the same time, however, we agree with the employer and insurer's suggestion that the specific physical activities noted by Dr. McBride as currently triggering pain in the employee are insufficiently identified as permanent restrictions to found the judge's conclusion that they constitute permanent restrictions. In light of these conclusions, we vacate the word "permanent" in the first sentence of Finding 17 and we modify the final sentence of Finding 17 to read "Dr. McBride's records as a whole indicate that the employee is likely to be precluded from ever returning to work as a certified nursing assistant."