LUANN MARTIN, Employee, v. XEROX CORP. and CNA INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 15, 1999

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - SURGERY; MEDICAL TREAMENT & EXPENSE - TREATMENT PARAMETERS. Substantial evidence, including evidence regarding the employee's extensive and ineffective conservative treatment, her continued worsening symptoms, and her level of difficulty functioning, supported the compensation judge's factual conclusion that proposed carpal tunnel surgery was reasonable and necessary. Similarly, under the facts of this case, the compensation judge did not clearly err in concluding that the case qualified as a "rare case," under Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), in which departure from the permanent treatment parameters was necessary to allow the employee to receive proper treatment for her work injury.

APPEALS - STANDARD OF REVIEW. The Workers' Compensation Court of Appeals will review application of the "rare case" exception to the permanent treatment parameters, established by Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), under the Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984), substantial evidence standard.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Cheryl LeClair-Sommer.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's approval of proposed carpal tunnel surgery. We affirm.

BACKGROUND

The employee began working for Xerox Corporation [the employer] in 1994. Her job as an "account associate" involved performing miscellaneous mailroom duties and refilling photocopiers and fax machines with paper. On February 17, 1998, the employee sustained a work-related injury to her right hand while loading a cart with five-pound boxes of paper. One

of the boxes slipped out of her hand; as she tried to catch it, the weight of the box caused her to fall, and she struck her right hand on the corner of the cart and then on the cement floor.

The day after her injury, the employee sought treatment from Dr. Ronald Huser, in the urgent care department of Park Nicollet Hospital, complaining of pain and numbness in her right index finger and at the base of her right thumb. Examination revealed some general fullness in the area of the first MCP joint of the index finger, some tenderness over the navicular area of the wrist, and diminished sensation to touch. Dr. Huser assessed "[c]ontusion with a possible mild neuropraxia," recommended temporary restrictions, and advised the employee to use ibuprofen.

Over the next eleven months, the employee was treated or evaluated by several other physicians, including Drs. Scott McPherson, Robert Gorman, Ramon Sotto, Douglas Becker, and Chris Tountas, the employer and insurer's independent examiner. Diagnoses included right index finger flexor tendinitis and metacarpophalangeal strain with parasthesia; right index finger digital neuropathy with median nerve symptoms, complex regional pain syndrome;[1] myofascial syndrome; de Quervain's tenosynovitis; and carpal tunnel syndrome. The employee underwent extensive conservative care, including physical therapy, use of a wrist brace and finger splint, use of anti-inflammatories, and steroid injections. She testified that medication helped "to a certain point" but that other treatment did little or nothing to alleviate her continuing right hand and wrist pain and numbness. The employee also testified that she became unable to drive a stick shift and began dropping things, even on one occasion burning her right hand without knowing it when she dropped a pan of water from her stove.

The employee was unable to perform her usual job duties at the employer due to the symptoms and restrictions caused by her hand condition. At hearing, she testified initially that the employer accommodated her condition and provided her with work that she could actually perform; however, she testified later in the proceeding that the employer does not "follow rules very well . . . so it's like you either have to do it or that's it . . . you'll get terminated from the job." She also testified that she was forced to quit two part-time jobs with other employers due to the pain. In September of 1998, she evidently began receiving rehabilitation assistance.

The employee has had an EMG, which was normal, and, for this or other reasons, at least three physicians, Drs. Sotto, McPherson, and Tountas, have indicated that she is not a candidate for surgery. Dr. Becker, on the other hand, has reported that the employee's symptoms and findings are quite consistent with carpal tunnel syndrome, despite the negative EMG, and he has recommended carpal tunnel release surgery.

The matter came on before a compensation judge on January 27, 1999, for resolution of the parties' dispute over the reasonableness and necessity of the carpal tunnel surgery proposed by Dr. Becker. The compensation judge ruled in the employee's favor. The employer

[1] This specific diagnosis was eventually ruled out.

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 (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

The compensation judge determined that the carpal tunnel procedure proposed by Dr. Becker was reasonable and necessary and that, although the treatment was not consistent with the applicable permanent treatment parameter,[2] this was a "rare instance," pursuant to Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), in which departure from the parameters was necessary to allow the employee to obtain proper treatment for her work injury.

On appeal, the employer and insurer contend in part that substantial evidence does not support the compensation judge's decision that the proposed surgery is reasonable and necessary. In support of this argument, they point to the employee's negative EMG, the several medical opinions against surgical intervention, the varied nature of physicians' diagnoses, and the subjective nature of many of the employee's symptoms and examination findings. The judge, however, obviously took these factors into consideration when evaluating the employee's request for surgery, as she discussed the evidence supporting the employer and insurer's position in some

[2] Minn. R. 5221.6300, subp. 13, is entitled "[s]pecific treatment parameters for nerve entrapment syndromes." Pursuant to this rule, surgery for such a condition is indicated "if an EMG confirms the diagnosis," "if there has been temporary resolution of symptoms lasting at least seven days with local injection," or if "a second opinion confirms the need for surgery." Id., subp. 13B(2) and (3). It is undisputed that none of these criterion has been satisfied: the employee's EMG was negative; a cortisone injection provided no significant symptom relief; and Dr. Becker is the only physician recommending surgery. We also note that there is no evidence or argument that the requirements for a departure under Minn. R. 5221.6050, subp. 8, have been met.

detail. In any event, the judge was entitled to accept both the employee's testimony as to the severity of her symptoms and Dr. Becker's opinion that surgery is necessary to treat those symptoms. See, e.g., Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989); Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Therefore, while another factfinder might well have resolved the issue differently, we cannot say that the judge's decision as to reasonableness and necessity is clearly erroneous and unsupported by substantial evidence in the record as a whole. The more difficult question is whether the judge erred in concluding that a departure from the treatment parameters is warranted here.

In Jacka, the Minnesota Supreme Court held that the permanent treatment parameters, Minn. R. 5221.6010, et. seq. (1995), have "the force and effect of law." 580 N.W.2d at 35, 58 W.C.D. at 408. "However, in recognition of the fact that the treatment parameters cannot anticipate every exceptional circumstance," the court acknowledged that "a compensation judge may depart from the rules in those rare instances in which departure is necessary to obtain proper treatment." Id. In the present case, the employer and insurer argue at some length that the departure criteria contained in the treatment parameters, Minn. R. 5221.6050, subp. 8, have not been satisfied. However, the compensation judge based her award not on any finding that subpart 8 was applicable but on her conclusion that the proposed surgery should be approved despite the rules. Treatment not qualifying for a departure under subpart 8 may nevertheless qualify as a compensable "rare case" under Jacka, as is evident from the supreme court's decision in Asti v. Northwest Airlines, 588 N.W.2d 737, 59 W.C.D. 59 (Minn. 1999).

In Asti, the employee, a flight attendant with substantial work-related permanent partial disability, was seeking payment for a one-year health club membership prescribed by his treating physician, who had indicated that the employee might well be unable to continue working if he were not able to participate in a health club exercise program. Following hearing on the issue, a compensation judge concluded that the membership was both reasonable and necessary and that it met the requirements for a departure pursuant to Minn. R. 5221.6050, subp. 8, which allows additional passive treatment beyond the 13-week limitation ordinarily applicable under Minn. R. 5221.6600, subp. 2B(3), if certain criteria are met. More specifically, the judge found that the membership was necessary to assist in "the employee's initial return to work," as specified by Minn. R. 5221.6050, subp. 8C. On appeal, a panel of this court affirmed the judge's finding of reasonableness and necessity, but we reversed his conclusion that the requirements of subpart 8C had been satisfied,[3] and we found "no evidence in this record that would allow a reasonable fact finder to conclude that this is one of those 'rare cases' specified in Jacka" that would allow for a departure. Asti v. Northwest Airlines, 59 W.C.D. 53, 56 (W.C.C.A. 1998). Accordingly, we reversed the judge's award.

On appeal from this court's decision, the supreme court affirmed our affirmance of the compensation judge's conclusion as to reasonableness and necessity under case law standards,

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[3] After a stay of proceedings pending the anticipated release of the supreme court's decision in Jacka.

and they also agreed that the employee had not satisfied the specific requirements for a departure under subpart 8C. However, the court went on to analyze whether Asti represented one of "those rare cases" in which departure was necessary, under Jacka, to allow the employee to receive proper treatment. After noting the compensation judge's factual conclusion that the employee in Asti would be unable to continue working as a flight attendant without the requested health club membership, the supreme court wrote as follows:

> It cannot be legitimately asserted that the drafters of the treatment parameter rules considered every possible scenario, yet determined that the wiser choice was to require the employee's health to decline to the point of inability to work rather than to continue an inexpensive treatment that allows continued employment. We thus conclude that this is indeed one of those rare cases where a departure from the treatment parameter rules is necessary, and reverse the holding of the WCCA.

Asti, 588 N.W.2d at 740, 59 W.C.D. at 64. Thus, the "rare case" departure contemplated by Jacka is a departure from the treatment parameters in their entirety, including the departure provisions in Minn. R. 5221.6050, subp. 8.

We acknowledge that neither Jacka nor Asti resolves the question of the applicable standard of review on this issue. The compensation judge's decision in Asti was issued prior to the supreme court's decision in Jacka, so the judge had no "rare case" exception standard to consider or apply; it was the supreme court itself that concluded that the "rare case" exception standard had been satisfied, reversing this court's decision to the contrary. Given, however, that most reasonableness and necessity questions are factual in nature, we will review Jacka "rare case" medical treatment disputes under Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984), and Minn. Stat. § 176.421, subd. 1(3). In other words, the question for us on appeal is whether the compensation judge's decision is clearly erroneous and unsupported by substantial evidence in view of the entire record. See id.

The compensation judge explained her decision on the issue in part as follows:

> The employee has exhausted all other forms of conservative treatment over the last year including braces, anti-inflammatory medications and pain medications yet symptoms have continued despite the normal EMG, taken on June 22, 1998.
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> This case is one of those "rare" exceptions to the permanent medical treatment parameters when despite the guidelines of the parameters, the proposed treatment is reasonable and necessary when considering the severity of the symptoms, ineffective conservative treatment, chronicity of the condition, and level of difficulty with functioning.

> The employee experiences difficulty with the activities of daily living with the right hand including employment activities, discontinuing lifting boxes and carrying paper one ream at a time with the left hand only. Writing causes difficulty. The brace cannot be used when the hand is too swollen. At home, the employee drops items and has experienced a burn when hot items were dropped. The right hand experiences numbness and shooting pains into the thumb. Driving a stick shift has caused difficulties due to the pressure on the palm of the hand. The hand experiences numbness and tingling, shooting pain, turns blue, and swells. The employee has discontinued her part-time employment due to the restrictions and intensity of the pain. The symptoms are worsening.
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> No other treatment has been recommended except surgery. Dr. Becker on August 26, 1998 diagnosed right carpal tunnel syndrome explaining that although the EMG is negative, the symptoms are consistent with carpal tunnel syndrome and the surgery is necessary to diminish the symptoms. This opinion was given greater weight considering the severity of the condition, prior unsuccessful medical treatment, medical records, and the hearing testimony.

Unlike Asti, the present case involves invasive and potentially expensive treatment, and there exists a wide diversity of medical opinions as to both the employee's diagnosis and her need for surgery. These factors clearly weigh against the conclusion that the case is "rare" enough to justify complete departure from the parameters. On the other hand, the compensation judge was clearly persuaded that the employee is experiencing severe symptoms, which are worsening and which limit both her activities of daily living and her ability to perform her job. Moreover, it is very evident from her memorandum as a whole that the compensation judge considered and weighed all of the pertinent evidence carefully. Therefore, on balance, while we might not have reached the same conclusion had we been in the judge's place, we have not been "left with a definite and firm conviction that a mistake has been committed." Northern States Power Co., 304 Minn. at 201, 229 N.W.2d at 524.

Our decision here should not be taken as encouragement for compensation judges to resort to the Jacka "rare case" exception simply to avoid application of the permanent treatment parameters. Rather, the rare case exception is just that. Furthermore, an award under that exception should not be considered unless the judge first determines that the proposed treatment is otherwise reasonable and necessary under case law criteria and that the treatment is not consistent with any treatment parameters raised by the parties, including the departure parameters. Reviewable findings in this regard should be made in every case where the parameters are placed in issue, and any decisions applying the "rare case" exception of Jacka should be carefully considered and explained in detail.

The judge's decision here, being thoughtfully considered and supported by evidence that a reasonable mind might accept as adequate, is affirmed.