MARILYN MORK, Employee/Appellant, v. HEALTHSYSTEM MINN./METHODIST HOSP., SELF-INSURED/BERKLEY ADM'RS, Employer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 24, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the judge's denial of benefits during the period at issue was ultimately supportable by minimally sufficient evidence in the record as a whole, including expert medical opinion, the judge's denial of temporary total disability benefits was not clearly erroneous and unsupported by substantial evidence, although the judge appeared to have focused on the reasonableness of the employee's refusal of a job offer rather than, as would have been more appropriate, on the employee's medical authority to work at any job during the period at issue.

PENALTIES; STATUTES CONSTRUED - MINN. STAT. § 176.225, SUBD. 1. Pursuant to Minn. Stat. § 176.225, subd. 1 (1995), the Workers' Compensation Court of Appeals "shall" award a penalty of up to 30 percent of the total compensation awarded where an employer or insurer has interposed a defense for the purpose of delay. Where there was substantial evidence, including ample medical evidence, that the employee's disability was work related and no evidence at all that it was not, the compensation judge erred in denying penalties on the temporary partial disability benefits awarded to the employee, and penalties were accordingly awarded by the Workers' Compensation Court of Appeals on those benefits.

Affirmed in part and reversed in part.

Determined by Pederson, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: John E. Jansen

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of temporary total disability benefits from July 7, 1998, to September 22, 1998, and of penalties pursuant to Minn. Stat. § 176.225. We affirm the judge's denial of the temporary total disability benefits here at issue, and we reverse the denial of penalties and award penalties as indicated below.

BACKGROUND

Marilyn Mork began working as a registered nurse in the Labor and Delivery areas

of Methodist Hospital in 1985. Her medical records reflect a history of dry skin with patches of apparent eczema on her arms, legs, and hands. In 1993 her hands evidently started breaking out in a rash, resulting in open sores and intense itching. In December of that year, Ms. Mork [the employee] reported to the Employee Health Service at Methodist Hospital [the employer], where she was prescribed various lotions and creams that evidently controlled her rash and permitted her to keep working.

On April 18, 1997, the employee returned to the Health Service, presenting with a severe worsening of her rash, "all over body itching," and periods of hoarseness. She was sixty-two years old on that date and was earning a weekly wage of $734.34. She evidently had been noticing improvement in her symptoms whenever she took a few days off work, but upon her return to work her hands would break out again. The employee was referred for an evaluation by allergist Dr. William Schoenwetter. When she saw Dr. Schoenwetter on May 1, 1997, the employee reported that she had noticed a worsening of her hand dermatitis coincident with her spending increased time in the Obstetrics delivery area, where she was required to wear latex gloves. Her work there also required her to wash her hands thirty or more times a day with a germicidal soap. Dr. Schoenwetter's impression was that the employee was subject to a multifactorial hand dermatitis, due in part to frequent hand washing and use of germicidal soaps. He also diagnosed a latex sensitivity. The doctor stated as follows:

> Because at times her hands bleed and crack and because in the course of a day's work she handles many other products containing latex, often without wearing gloves, I don't believe that it will be in her best interest to remain in the Ob delivery unit. I believe this nurse requires a job change to an area where she is not required to have frequent glove changes, to require frequent hand-washing with germicidal soaps or to handle products containing latex.

The employer immediately complied with Dr. Schoenwetter's recommendations and transferred the employee to an office position in Employee Health Services. On May 20, 1997, the employer, which was self-insured for workers' compensation liability at the time, served a Notice of Insurer's Primary Liability Determination, accepting liability for an injury to the employee's hands on April 18, 1997, but indicating that wage loss benefits would not be paid because "[t]here is no medically lost time on this file. The employee has been re-assigned to a position that will not agg[ra]vate her condition." The employee returned to Dr. Schoenwetter on June 10, 1997, and reported that her hands had healed nicely, "the best in years." She did advise the doctor, however, that she continued to develop a rash when she handled lots of medical records and that sometimes toward the end of the day she would also lose her voice. She indicated that these symptoms would always disappear again over the weekend. Dr. Schoenwetter continued to diagnose latex hypersensitivity with allergic contact dermatitis.

About the beginning of July 1997, the employee was transferred to the employer's Quality Resources department, where she reviewed patient records and compiled data for various studies. Despite her removal from the Obstetrics area, the employee continued to experience

numerous symptoms while working in Quality Resources. When she saw Dr. Schoenwetter again on August 19, 1997, the doctor noted that the employee had undergone a negative RAST test on May 1, 1997, a serum test alternative to skin tests for determining sensitivity to suspected allergens, but he recommended latex allergy skin testing in addition. Because of the employee's ongoing problems in Quality Resources, Dr. Schoenwetter concluded, "I see no alternative but to take her out of that job." The employer removed the employee from the Quality Resources department, and she remained off work until February 27, 1998. The employer evidently attempted to find other work for her but was unsuccessful.

On October 1, 1997, the employee filed a Claim Petition, alleging entitlement to temporary total and temporary partial disability benefits continuing from August 19, 1997, as a result of a latex allergy occurring in the course of her employment on April 18, 1997. In an Answer filed on October 17, 1997, the employer again admitted that the employee sustained a personal injury or disease on April 18, 1997, but now asserted that that injury was not work related. The employer claimed that it had had suitable work available to the employee but that she had chosen to reject the employer's offer of such work. By letter dated October 23, 1997, the employee amended her Claim Petition to allege penalties pursuant to Minn. Stat. § 176.225, subd. 1, as well as to assert a claim for temporary partial disability benefits from May 1, 1997, to August 17, 1997.

On December 11, 1997, the employee saw Dr. Paul Steinberg for a second opinion regarding her diagnosed latex allergy. Dr. Steinberg concluded that the employee's history was compatible with occupationally-induced latex allergy, and he recommended that the employee not return to any of her previous work stations and that she work only in environments certain to be free of latex aerosols.

On December 30, 1997, the employee underwent an independent medical evaluation by Dr. Beth Baker, a specialist in occupational medicine and toxicology. Although there was no active rash present at the time of her exam, Dr. Baker recommended that skin testing be performed to confirm whether the employee had a latex allergy. She further concluded as follows:

> I do think that some of Ms. Mork's hand dermatitis may be due to the various soaps she has used in the past. She was washing her hands up to thirty or forty times a day when she worked in OB-Gyn and that would very easily cause a hand dermatitis in someone who has dry skin to begin with.
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> I think the cause of her hand dermatitis may be multifactorial . . . . At this point I do think that some of the hand dermatitis may be due to soaps and frequent hand washing or water exposure. It is also possible that some of the hand dermatitis may be due to a latex allergy or glove allergy. She has never been tested for other components of gloves such as the thirams, carbamates and other

> additives that may be in the glove and cause contact dermatitis not due to the latex itself.

Dr. Baker further indicated that, even if the employee's skin tests proved positive, she thought the employee would be capable of returning to work for the employer if the entire hospital began using low allergy, non-powdered gloves and if the employee avoided direct skin contact with latex. If the employee's latex skin test proved negative, however, the doctor indicated that the employee did not need these restrictions, although further work-up would be needed to determine what the employee was actually allergic to.

On February 27, 1998, free of any evidence of dermatitis and prior to undergoing any skin testing, the employee returned to work again as a labor and delivery nurse for the employer. Upon her return to work, she again noted the return of a rash over her hands with her frequent hand washing between patient contacts and whenever she changed her gloves. On March 12, 1998, the employee underwent latex skin testing at the Mayo Clinic under the direction of Dr. Loren Hunt. The results of that testing were negative, but Dr. Hunt suggested that there probably was an "additional component of irritant dermatitis of the hand also caused by gloves." He recommended that the employee use cotton glove liners to reduce the need for re-scrubbing and rewashing.

On May 5, 1998, the employee returned to see Dr. Schoenwetter, who observed "extensive hand dermatitis with typical features including fissuring of some areas of the palms and the tip of the fingers." Following a six-day absence from work, the employee returned to see Dr. Schoenwetter on May 11, 1998, "with almost complete clearing of both hands." Dr. Schoenwetter stated, "I don't believe that latex is involved, based on history and negative RAST and skin tests (Mayo) to latex. Rather, this is a chemical irritant and water-induced hand dermatitis." When the employee returned to see Dr. Schoenwetter on May 18, 1998, the doctor noted that she had a rash over her hands and forearms, with tiny apparent pustules in several areas of the hands. He reported that "[b]ecause the dermatitis is active and because there are pustules, I don't think that she can be safely involved in patient care until the rash heals further."

On that same date, May 18, 1998, Dr. Schoenwetter obtained a dermatologic consultation with Dr. Edwin Rice, who concluded that

> the irritating repetitive effect of wet-dry and work led to re-provocation of the eczema. The intensity, the edema, and the dissemination, however, suggest that there is an undetected allergen present and that it behooves us to obtain clearing of the skin with her away from work and a patch test later as I think true contact allergy of the allergic type is still the prevalent diagnosis.

Subsequent patch testing revealed sensitivities to certain chemical products used in the manufacture of rubber, as well as to quaternium-15 [Q-15], a preservative found commonly in a variety of moisturizers, cleansers, creams, lotions, soaps, and other skin care products. Despite

care taken by the employer to provide a safe work environment for the employee, upon her return to work in early July the employee again experienced an eruption of her dermatitis, and Dr. Rice took her off work on July 7, 1998.

In a narrative report directed to the employee's attorney on July 7, 1998, Dr. Rice reported that the employee's only chance of returning to work with some degree of confidence and comfort would be to take a month or two off from work, "allowing a period of very thorough healing of the skin to occur." On that same date, the employer sent a written job offer to the employee for a part-time position as Medical Information Nurse in the Ob/Gyn department at its Carlson Clinic. The employer indicated that the job involved only answering care questions for Ob/Gyn patients and would eliminate the need for hand washing with harsh cleansing agents. Responding on behalf of his client on July 9, 1998, the employee's attorney refused the employer's offer of employment, contending that "Dr. Rice has advised the employee to stay off work through August 11 in the hopes that perhaps her condition will heal completely, sufficient to permit her to return to her usual and customary work."

On July 14, 1998, the employee filed a Second Amended Claim Petition, now alleging dermatitis or other allergy as her work injury and alleging entitlement to temporary total disability benefits from August 19, 1997, to February 26, 1998, and from July 7, 1998, to the present and continuing. The petition also alleged entitlement to temporary partial disability benefits from May 1, 1997, to August 17, 1997, and again from February 27, 1998, to July 6, 1998. The employee also reasserted her claim for penalties.

On July 29, 1998, the employee returned for a re-evaluation with Dr. Baker. The employee reported to Dr. Baker that she had noted complete resolution of her rash since she had been taken off work, and Dr. Baker noted no current rash. In her report, Dr. Baker concluded that, based on the employee's several negative tests for latex allergy, the employee was not allergic to latex. She also reported, however, that the employee was allergic to at least two chemicals used in gloves and rubber products, mercapto-benzothiazol and carbomex, chemicals possibly present in both latex and non-latex gloves. The doctor concluded that, while the majority of the employee's allergies were not work-related, it was possible that her allergies to mercapto-benzothiazol and carbomex were related to glove exposure at work and that her Q-15 allergy was also work-related. While recommending that the employee work only in environments where she is not required to wear gloves, Dr. Baker was of the opinion that the Medical Information Nurse job offered to the employee, which only involved providing information over the telephone, would be an appropriate job.

On July 31, 1998, the employer filed an Answer to the employee's Second Amended Claim Petition, asserting again that the employee's claimed injury or disease sustained on April 18, 1997, was not work related. The employer also asserted that, pursuant to Dr. Baker's report of January 2, 1998,

> the Employee's hand dermatitis is multi-factorial and the Employee is predisposed to hand dermatitis or contact dermatitis due to long

> history of dry skin and eczema. Also, Dr. Baker opined that the employee was capable of returning to work at Methodist Hospital and Park Nicolet Medical Center if they were converted to a latex-safe environment.

In a letter to the employee about two weeks later, dated August 12, 1998, Dr. Rice stated,

> I do not feel that you can continue in your present work because of the intensity of your allergic response and because of the immediate recurrence of the inflammatory dermatitis after multiple attempts of returning to work . . . . It is also worthy of note that each attempt to return to work was done with in place every protective measure known to be feasible in this type of contact allergy environment.

In response to this letter, the employer provided Dr. Rice with a copy of the job description for the Medical Information Nurse position. In his response to the employer on September 2, 1998, Dr. Rice indicated that the employee was "currently physically capable of working as a Medical Information Nurse."

The employee's claims came on for hearing before a compensation judge on September 22, 1998. At the hearing, the employer withdrew its denial of primary liability and accepted liability for the employee's contact dermatitis hand condition. The employer also accepted liability for the employee's temporary partial disability claim for the periods May 1, 1997, to August 17, 1997, and February 27, 1998, to July 6, 1998, but continued to deny the employee's temporary total disability claims. Also at the hearing, the employee accepted the job as a Medical Information Nurse that had previously been offered to her on July 7, 1998. In a Findings and Order issued December 11, 1998, the compensation judge awarded the employee temporary total disability benefits for the period August 18, 1997, through February 26, 1998. He denied the employee's claim for temporary total disability benefits from July 7, 1998, to September 22, 1998, and he also denied the employee's claim for penalties. 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 (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

1. Temporary Total Disability Benefits

> In Finding 11, the compensation judge concluded as follows:
>
> On or about July 7, 1998, the employer offered to the employee work within her restrictions (the same job she accepted on the date of hearing, September 22, 1998), which she unreasonably declined at that time. Accordingly, she is not entitled to temporary total disability compensation benefits for the period from July 7, 1998, until the date of hearing, September 22, 1998.

On appeal, the employee contends that Dr. Rice had medically taken her off of work as of July 7, 1998, indicating that a month or two away from work was necessary to allow for thorough healing of her skin. She argues that Dr. Rice had also issued a letter on August 12, 1998, indicating that the employee's sensitivity to allergens in the work environment was too great to permit a return to the work environment at that time. Moreover, the employee contends, the job as offered by the employer was not suitable in either hours or pay, was not appropriate for the employee's skill and experience level, and was unlikely to be in a work environment free of the allergens to which the employee was reacting. Since the doctor had not cleared her to even attempt to return to work until September 2, she contends, the compensation judge's finding that the employee "unreasonably declined at that time" the employer's job offer is clearly erroneous and unsupported by substantial evidence. She argues that this is especially true in view of the compensation judge's observation in his memorandum that "it is clear that the employee has severe allergies which were undoubtedly aggravated by her work activities." Although we are concerned that the judge may have focused to an extent on the wrong issue in addressing the reasonableness of the employee's job offer refusal, we are not persuaded that the judge's denial of the benefits at issue was ultimately improper or unsupported by the evidence.

The immediate question before the judge with regard to the benefits period commencing July 7, 1998, was whether the employee was medically unable to work as of that date, not whether she had refused a suitable job. It is clear that the employee had an exacerbation of her dermatitis condition in early July of 1998. In his report of July 7, 1998, Dr. Rice was clearly suggesting a period of time away from work to allow for a thorough healing of the employee's skin. It is not at all clear whether Dr. Rice would have released the employee to perform the job as a Medical Information Nurse as of July 7, 1998. He was not asked to comment on that job until almost two months later, after the period of thorough healing that he initially recommended had expired. In addition, when he wrote his letter of August 12, 1998, Dr. Rice was still of the

opinion that the employee's time off from work had been necessary. Moreover, Dr. Baker, who opined that the employee could return to work as a Medical Information Nurse, did not examine the employee until July 29, 1998, over three weeks after Dr. Rice's recommendation that she go off work. If the employee was medically unable to perform any job as of July 7, 1998, the reasonableness or unreasonableness of her refusal of the employer's offer is irrelevant. Had we been the fact finder in this case, we may well have reached a decision contrary to that reached by the judge. However, in that the judge's denial of benefits is ultimately supportable by sufficient evidence in the record as a whole, including the expert medical opinion of Dr. Baker and the fact that Dr. Rice's restriction may not have contemplated the possible availability of work in an office environment as opposed to direct patient care, we affirm the judge's denial of the temporary total disability benefits here at issue. 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); Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

2. Penalties Pursuant to Minn. Stat. § 176.225, Subd. 1

> Minn. Stat. § 176.225, subd. 1 (1995), provides that,
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> Upon reasonable notice and hearing or opportunity to be heard, the commissioner, a compensation judge, or upon appeal, the court of appeals or the supreme court shall award compensation, in addition to the total amount of compensation award, of up to 30 percent of that total amount where an employer or insurer has:
>
> (a) instituted a proceeding or interposed a defense which does not present a real controversy but which is frivolous or for the purpose of delay . . . .

(Emphasis added.) The compensation judge determined that the self-insured employer had an arguable position with regard to its denial of primary liability, based on disputed facts and differing medical opinions. We cannot totally agree. We believe there is a clear difference on this issue between the periods of claimed entitlement to temporary total disability benefits and those of claimed entitlement to temporary partial disability benefits, concluding that penalties are in order for the employer's extended delay in paying the latter.

On the day of the hearing, the employer conceded liability for the employee's temporary partial disability benefits between May 1, 1997, and August 19, 1997. It is undisputed that, during this period of time, the employer had referred the employee to allergy specialist Dr. Schoenwetter. We acknowledge that Dr. Schoenwetter diagnosed the employee's hand dermatitis as multifactorial in origin. However, Dr. Schoenwetter also found specifically that the employee's irritant dermatitis was related to her frequent hand-washing, use of germicidal soaps, and latex sensitivity. He specifically recommended that the employee be transferred from the Labor and Delivery unit to a position where she was not required to change gloves frequently or to wash her hands with germicidal soaps. In direct response to Dr. Schoenwetter's

recommendations, the employer transferred the employee to positions first in the Employee Health Service and then in Quality Resources. On May 20, 1997, the self-insured employer filed a Notice of Insurer's Primary Liability Determination, expressly accepting liability for a work injury to the employee on April 18, 1997. There is simply no factual dispute and no differing medical opinion relative to the employee's entitlement to benefits during this period of time.

After she returned to work as a labor and delivery nurse on February 27, 1998, the employee reported a recurrence of her dermatitis as a result of the frequent hand-washing and glove changing required in her job. Shortly after that return to work, the employee underwent latex allergy skin testing at the Mayo Clinic. Although those tests were reported to be negative, Dr. Hunt at the Clinic, while ruling out a latex allergy, specifically noted the employee's need for frequent glove changes and hand washing and accepted the diagnosis of irritant dermatitis. Moreover, the office records of Drs. Schoenwetter and Rice during May and June of 1998 clearly reflect a cause and effect relationship between the employee's work environment and the inflammatory reaction the employee was experiencing during this period of time. As a result of skin patch testing performed by Dr. Rice, it became apparent that the employee was allergic to some of the compounds included in the manufacture of rubber gloves, as well as to the germicidal soaps that she used at work. Again, we see no medical evidence at all in the record that would suggest that the employee's wage loss during the period of February 27, 1998, to July 6, 1998, was unrelated to her employment. As the compensation judge notes in his memorandum, "it is clear that the employee has severe allergies which were undoubtedly aggravated by her work activities" (emphasis added).

With regard to the periods of temporary total disability benefits at issue in the case, the employer's delay in paying benefits was more justified. It has been apparent throughout this claim that the employee's dermatitis condition improves when she is away from work. On several of her visits to the doctor during and after those periods she had no identifiable skin rash. Part of the difficulty for the employer in providing alternative work for the employee was the uncertainty of her complete diagnosis. During the period the employee was claiming entitlement to temporary total disability benefits, August 18, 1997, to February 26, 1998, both Dr. Schoenwetter and Dr. Baker had recommended latex allergy skin testing. Both physicians had agreed that such testing was necessary for a determinative diagnosis of latex allergy. The employee was reluctant to undergo the skin testing, and, in fact, it was not performed until the employee's visit to the Mayo Clinic on March 12, 1998. It was not until after Dr. Hunt reported the results of the latex skin testing that the employee underwent the additional skin patch testing by Dr. Rice. The ability of the employer to tailor an offer of employment under circumstances of such an uncertain medical diagnosis supports the compensation judge's denial of a penalty during the period of claimed temporary total disability.

While substantial evidence in the record supports the compensation judge's conclusion that the employee failed to prove that she suffers from a latex allergy, and while the absence of this specific diagnosis mitigates the employer's failure to pay temporary total disability benefits, we conclude that the employer had no legitimate defense to the employee's claim for temporary partial disability benefits. Accordingly, in addition to the employee's benefits, we

award a penalty in the amount of thirty percent of the temporary partial disability benefits awarded pursuant to the compensation judge's Finding 1(e).