

REX G. MUGGLI, Employee, v. MARVIN WINDOWS, SELF-INSURED/HELMSMAN MGMT. SERVS., Employer/Appellant, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 10, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where there was expert medical opinion that the employee was subject to permanent physical restrictions related to his work injury, and where the compensation judge reasonably concluded that the employee's request for transfer to a lesser paying and lighter duty job at the employer was not unrelated to the employee's work injury and that the employee was unaware of the potential consequences of his transfer request on his entitlement to benefits, the compensation judge's award of temporary partial disability benefits was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Hefte, J., and Wheeler, C.J.
Compensation Judge: William R. Johnson.

OPINION

WILLIAM R. PEDERSON, Judge

The self-insured employer appeals from the compensation judge's award of temporary partial disability benefits. We affirm.

BACKGROUND

The employee, Rex G. Muggli, sustained an admitted work injury to his back on February 9, 1995, while working as an over-the-road truck driver for Marvin Windows, which is self-insured against workers' compensation liability. At the time of injury, Mr. Muggli [the employee] was thirty years old and earning an average weekly wage of \$808.52. Mr. Muggli had worked for Marvin Windows since 1984 and as a truck driver since 1987. The injury occurred while the employee was unloading a shipment of windows in Connecticut. While pushing a large window out of the truck's trailer, he slipped and bent his back backward. The employee reported the injury, completed his trip, and sought medical treatment when he returned to Minnesota.

The employee was seen by Dr. Randy Rice at the Baudette Clinic on February 13, 1995. At that time the employee complained of upper lumbar and lower thoracic pain, with a

“little bit” of pain in the neck as well. Dr. Rice removed the employee from his truck driving duties, recommended restrictions that included changing positions every forty-five to sixty minutes, and prescribed Ibuprophen and Norflex, with the caution not to use Norflex when driving. The employer accommodated the employee’s restrictions with light duty work in the plant, eventually in the “grids department,” where he worked at constructing the wooden dividers that are used in French doors and windows, which generally weighed less than a pound apiece. After a brief regimen of physical therapy without improvement, the employee was referred to osteopath Dr. Michael Clark on March 13, 1995. Dr. Clark ordered x-rays that revealed compression fractures at T10 and T11. On March 30, 1995, a bone scan was performed and interpreted as being consistent with healing compression fractures in these two vertebrae. During April and May 1995, the employee received additional physical therapy, a back brace, and manipulation by Dr. Clark, without significant relief.

On May 23, 1995, the employee was seen in neurosurgical consultation by Dr. Stuart Rice¹ at the Grand Forks Clinic. At that time, the employee complained of persistent mid and lower back pain, as well as left leg pain and some paresthasias in his upper extremities. His principal complaint, however, was severe mid back pain that was sharp and stabbing, generally worse when changing positions. Dr. Stuart Rice’s impression was severe mid back pain secondary to traumatic T10 and T11 fractures, severe left leg pain with possible S1 radiculopathy, bilateral upper extremity paresthasias, and mild left upper extremity weakness. Additional thoracic spine films taken on that date were interpreted by the radiologist as showing wedging deformities in the T10 and T11 vertebrae, with each having lost about 33% of its anterior vertical height. Dr. Stuart Rice also recommended an MRI of the lumbar spine and a neurologic evaluation that would include an EMG and nerve conduction studies.

On June 13, 1995, the employee underwent an MRI scan of the lumbar spine, including the T11 level. The scan was essentially normal, except for evidence of the compression fracture at T11. On June 23, 1995, the employee was seen in consultation by neurologist Dr. Nader Antonios, also at the Grand Forks Clinic. Complaints to the neurologist included continuous neck pain, mid back pain, and low back pain. The employee informed the doctor that, during the preceding six weeks, his neck pain had radiated to his left upper arm and his left upper arm had felt “tired.” He also reported experiencing intermittent tingling and numbness of the second and third digits of the left hand. His mid back pain was not radicular, but his low back pain went to his left hip and down to his left knee, with intermittent tingling and numbness of his left thigh. Dr. Antonios administered nerve conduction studies and an EMG of the left upper extremity, which were interpreted as “totally unremarkable.” The doctor recommended neurosurgical re-evaluation to address the need for an MRI scan of the cervical spine and the need for a CT scan of the T10 and T11 areas, to rule out the possibility of bony fragments in the spinal canal.

¹ Hereafter in our decision, references to “Dr. Rice” should always be understood as references to the employee’s principal treating physician, Dr. Randy Rice; references to Dr. Stuart Rice will always employ that doctor’s first name as well as last name.

An additional MRI examination of the employee's lower thoracic spine on July 22, 1995, revealed anterior compression of the T10 and T11 vertebrae, with slight posterior disc bulging at the T10-T11 level. There was no evidence of central spinal stenosis, disc herniation, neural impingement, or displaced fracture fragment. The employee continued to be followed by Dr. Randy Rice throughout the summer, who encouraged the employee to push himself and his activity level in spite of the pain. The employee reported ups and downs in his symptoms. On August 1, 1995, Dr. Rice added "adjustment disorder with depressed mood" to his diagnosis and prescribed Elavil for the pain and depression. On August 24 the doctor concluded that "somewhat of a chronic pain syndrome" was also part of the picture. During this period of time, the employee was also being treated by Dr. David Verworn at the Warroad Chiropractic Clinic. The employee received about eleven treatments between June 2 and November 3, 1995. In a "Medical Authorization Report" prepared for the employer on November 3, 1995, Dr. Verworn checked the box marked "work restrictions" but did not complete the lower portion of the form describing the restrictions.

On October 26, 1995, the employee complained to Dr. Rice of increasing problems with his back, including muscle spasm. Norflex was again added to the Daypro and Elavil that the employee was taking. Additional x-rays of the thoracic spine were ordered, which showed the old compression fractures. On his November 9, 1995 visit, Dr. Rice commented on the employee's slow progress and apparent anxiety. He continued to restrict the employee to light duty that permitted him to change positions every thirty to forty-five minutes. In a Health Care Provider Report dated November 21, 1995, Dr. Rice recommended a further evaluation by Dr. Stuart Rice and, if appropriate, a work hardening program. The doctor did not believe the employee had reached maximum medical improvement [MMI].

On December 1, 1995, the employee was seen by orthopedist Dr. Gary Wyard at the request of the employer. Dr. Wyard concluded that the employee had minimal compression fractures at T10 and T11 and was neurologically intact. Further, Dr. Wyard reported that the employee had reached MMI with a zero percent permanent partial disability rating. Finally, the doctor opined that the employee did not require additional medical care and did not need any restrictions or limitations at that time. On December 4, 1995, Dr. Wyard's report was sent by the employer's third-party administrator to Dr. Randy Rice, advising him that, based on Dr. Wyard's opinion, further medical treatment would be contested.

The employee returned to see Dr. Stuart Rice on December 7, 1995, who diagnosed persistent myofascial pain syndrome. The doctor agreed that a work hardening program was indicated and that evaluation by a chronic pain specialist may be helpful. Finally, in a Medical Authorization Report issued to the employer on that date, the doctor restricted the employee to light work, eight hours a day, forty hours a week.

On December 20, 1995, the employer sent a letter to the employee, offering him a return to his previous job as an "over-the-road truck driver." The letter indicated that the employer was willing to allow the employee to return to this position on a gradual basis, with

shorter runs and no unloading until February 1, 1996. The mailing included an Employer Job Description (R-31), a job description for truck driver, an Employer Job Offer (R-34), a form on which the employee could accept or decline the job offer, and a copy of Dr. Wyard's report dated December 1, 1995.

An over-the-road truck driving position with the employer may evidently involve deliveries from coast to coast. In a two-person operation, each driver would drive four to five hours, while his partner either sits in the passenger seat or lies in the berth in the truck. The drivers continue to switch off until they reach their destination, usually in twenty-four to thirty-six hours but on occasion not for up to forty-eight hours. Upon reaching their destination, the drivers unload the windows by hand, with the heavier windows requiring both drivers. The employee testified that he would average between seventy and seventy-five hours a week in the truck.

The employer's job offer and attachments were also provided to Dr. Randy Rice by letter dated December 21, 1995, from Mr. Jack Palmquist, the employer's workers' compensation claims specialist supervisor. In his letter to Dr. Rice, Mr. Palmquist thanked the doctor for his assistance in helping the employee to "recover so that he can resume driving truck if he so desires, or to transfer into the production part of the plant."

On December 22, 1995, the employee was served with Dr. Wyard's MMI opinion, as well as a Notice of Intention to Discontinue Workers' Compensation Benefits [NOID]. The basis for the discontinuance notice was that "Mr. Muggli has been offered a suitable job, full time and permanent." Attached to the NOID was the employer's December 20, 1995, letter to the employee, the Employer Job Offer (R-34), and Dr. Wyard's report. In accordance with the NOID, the employee was paid temporary partial disability benefits through December 16, 1995.

On December 26, 1995, the employee accepted the employer's job offer but noted on the acceptance letter that he was unsure about driving while taking prescription medication. The employee noted in his letter that he was currently taking 600 mg. of Daypro and 100 mg. of Norflex in the morning and at noon each day, as well as 100 mg. of Amitriptyline at bedtime. On December 26, 1995, the employee requested an administrative conference, indicating that the December 20, 1995, job offer was not suitable, in that his medication made driving too dangerous.

The employee returned to the Baudette Clinic to see Dr. Randy Rice on December 28, 1995. At this visit, the employee continued to complain of intermittent swelling in the mid thoracic back, as well as soreness if he stayed in one position too long. He also raised the issue of driving while taking his medications. Dr. Rice attempted to reassure the employee that it was reasonable to step up his activity and to push himself to the limit of his pain tolerance. He advised the employee that he was about at the point of making recommendations similar to those of Dr. Wyard. He recommended that the employee refrain from taking Norflex in an eight to twelve hour period before driving and from taking Elavil in a six to eight hour period before driving. Dr. Rice's diagnosis on this date was of compression fractures at T10 and T11 that should be fully healed, along with chronic myofascial pain secondary to those fractures. The doctor further advised the employee that he did not feel that the employee's condition had reached

MMI and that he anticipated improvement over time.

On January 2, 1996, the employee met with Mr. Palmquist regarding the truck driving position and his concern over the medication issues. Mr. Palmquist immediately sent a letter to Dr. Rice, requesting further information about the impact of the medications on driving and asking whether the employee could discontinue their use. Mr. Palmquist advised the employee's supervisor not to dispatch the employee to drive the truck until the issue could be clarified. At about this same time, the employee had a conversation with Ms. Renae Dybedahl, his supervisor in the grids department, regarding a permanent transfer to her department. The employee advised her that he liked the department and the people and would rather stay there than go back to truck driving. As a result, the necessary paperwork was prepared, and the employee was permanently transferred to the grids department effective January 8, 1996.

On January 9, 1996, Mr. Palmquist sent an interoffice memo regarding the employee's transfer to the employee's former truck driving supervisor, Carl Olson. Mr. Palmquist advised Mr. Olson that "Rex understands that this means that he will discontinue receiving TPD benefits since we have an IME that states he is physically capable to return to truck driving but it is his personal choice not to."

In the meantime, the administrative conference on the NOID had been scheduled for January 19, 1996. On January 16, 1996, the employee's attorney wrote to the court indicating that the employee "has been offered a 3-E job by Marvin Windows and Doors and he has elected to take that job." Therefore, the request for a conference was withdrawn.

On February 8, 1996, the employee returned to see Dr. Randy Rice for a follow-up examination. He reported that he had elected not to go back to driving, as he was offered a position in the plant that allowed him some freedom to shift around frequently and preferred to work there. On examination, Dr. Rice noted some spasm over the left low thoracic spine and some tenderness in that same area related to a myofascial pain syndrome. Dr. Rice reported that the employee was at MMI and had a 0% disability. The doctor also prepared a Medical Authorization Report for the employer on that date, restricting the employee to light medium work, recommending that he avoid lifting over thirty pounds, or over twenty pounds frequently. He also continued to recommend a frequent change of position at least every hour, noting that the employee continued to use Daypro, Norflex, and Elavil.

The employee saw Dr. Rice again on August 1, 1996, at which time the doctor recommended that the employee be permanently restricted to light medium work eight hours a day, five days a week, with limited lifting, bending, and twisting. "Any standing and sitting or walking should all be allowed to be changed frequently and preferably at least every hour."

On July 7, 1997, the employee filed a Claim Petition seeking temporary partial disability benefits continuing from February 9, 1995, as well as certain medical expenses.² The

² The employee's claim petition also asserted a claim for a shoulder injury occurring on or

employer admitted that the employee sustained compression fractures on February 9, 1995, but asserted that the employee had achieved MMI and was released to return to work without restrictions. Further, the employer contended that employee had voluntarily sought reassignment to a lower paying position for reasons unrelated to his injuries of February 9, 1995. The matter was heard by Compensation Judge William R. Johnson at the Office of Administrative Hearings on April 9, 1998, and the record closed on April 30, 1998, upon receipt of the deposition of Dr. Wyard. In a decision issued on June 2, 1998, the compensation judge concluded that the employee had permanent restrictions which precluded his return to the truck driving position offered by the employer, and awarded temporary partial disability benefits continuing from December 15, 1995. The employer 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

An injured employee demonstrates entitlement to temporary partial disability benefits by showing that he has sustained a work-related physical disability, an ability to work subject to the disability, and an actual loss of earning capacity that is causally related to the disability. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 43 W.C.D. 254, (Minn. 1990); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). However, "where the employee is found medically able to return to work without restrictions, having suffered no residual disability from his work injury," there is no basis for payment of temporary wage loss benefits or rehabilitation services after that date. Kautz v. Setterlin Co., 410 N.W.2d 843, 845, 40 W.C.D. 206, 108 (Minn. 1987). The dispositive issue in this case is whether substantial evidence supports the compensation judge's conclusion that the employee was physically precluded from returning to his job as an over-the-road truck driver as a

about January 22, 1997. That claim was withdrawn at the time of hearing.

result of his injury of February 9, 1995. The employer contends that the employee has fully recovered from the effects of the injury and was released to return to work without restrictions by December 1, 1995. The employer further contends that the employee's desire to work in the grids department was wholly personal, and that, by requesting such a transfer, the employee voluntarily reduced his earning capacity. Moreover, the employer argues, the medications prescribed by Dr. Rice did not prohibit the employee from performing his truck driving duties, and therefore the employee refused a suitable job offer when he requested reassignment to the grids department. The employer argues finally that the employee's alleged restrictions are based solely on his subjective complaints. We are not persuaded.

At Finding 5, the compensation judge concluded expressly that "the employee does have permanent restrictions which would have made a return to work in the truck driving position impossible." In support of this conclusion, the judge expressly rejected the opinion of Dr. Wyard and expressly adopted the restrictions recommended by Dr. Rice at the Baudette Clinic on August 1, 1996. Those restrictions were as follows:

Placed him on light medium work with no lifting over 30 pounds maximum and 20 pounds frequently. Restrict him to eight hours per day, five days per week. No more than two to four hours of bending and twisting of the back but to try and avoid whenever possible and bend the knees and turn the body instead of the other maneuvers. Placed him on a little shy of no restrictions for reaching, although again advised him whenever possible to try and keep the elbow at the side. No more than four to six hours a day intermittently with reaching. Any standing and sitting or walking should be allowed to be changed frequently and preferably at least every hour.

The compensation judge determined that these restrictions were reasonable given the employee's thoracic compression fractures. In addition to these restrictions set forth in records at the Baudette Clinic, the compensation judge relied also upon restrictions set forth in the April 6, 1998, report of David A. Verworn, D.C. The judge also commented on the employee's October 31, 1997, visit to Dr. Clark, at which time the doctor reported continued muscle tightness and tenderness at the location of the employee's compression fractures. It is the responsibility of the compensation judge, as trier of fact, to resolve conflicts in expert testimony, and a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering the opinion are not supported by the evidence. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The compensation judge specifically accepted the opinions of the treating physicians, and there is no evidence that those opinions were based on any false premises or were otherwise without proper foundation.

The employer argues that, by accepting the restrictions set forth by Dr. Rice on August 1, 1996, the compensation judge completely ignored the time frame between December 15, 1995, and August 1, 1996. The employer argues that there is no evidence showing that the

employee had any restrictions on his work activities during this period of time. We disagree. It is clear from the office notes at the Baudette Clinic between February 13, 1995, and August 1, 1996, that the employee was never released from restrictions by his treating physicians. It is certainly arguable that Dr. Rice was encouraging the employee to attempt a return to truck driving at the time of the December 28, 1995, visit; however, one only need look to the medical records immediately preceding and following that visit to conclude that restrictions were still in place. On December 7, 1995, Dr. Stuart Rice limited the employee to light work, defined on the employer's Medical Authorization Report as lifting twenty pounds maximum, with frequent lifting and/or carrying of objects weighing up to ten pounds. On February 8, 1996, Dr. Randy Rice released the employee to light medium work, defined on the employer's form as lifting thirty pounds maximum, with frequent lifting and/or carrying of objects weighing up to twenty pounds. Dr. Rice continued to recommend a frequent change of position at least every hour. The restrictions set forth by Dr. Rice on February 8, 1996, were essentially the same as those set forth as permanent in his office note of August 1, 1996. Although Dr. Rice's December 28, 1995, office note seems to suggest that the prescription medications would not be a problem for the employee, it is clear that the employee's taking of those medications at the intervals suggested by the doctor, in combination with his recommended restrictions, would not be compatible with the duties of an over-the-road truck driver for the employer. We note also that the employee's treating physicians continued to prescribe those medications for the employee through at least the date of their last office note, November 3, 1997.

The employer also argues that the employee's alleged restrictions are based solely on his subjective complaints. Even if we accepted that argument as true, there is no requirement in the law that a physician's work restrictions be based on objective findings. See, e.g., Thompson v. Waco Scaffolding & Equip., slip op. (W.C.C.A. Feb. 7, 1994); Stender v. Maid of Scandinavia, slip op. (W.C.C.A. Mar. 4, 1993); Shoultz v. Natco Automatic Transmission, slip op. (W.C.C.A. Apr. 14, 1993).

The compensation judge's medically supported conclusion that the employee was subject to permanent restrictions at the time he was transferred to the grids department is essentially dispositive of the temporary partial disability issue. The employer essentially argues further, however, that the employee voluntarily transferred into the grids department primarily for personal reasons unrelated to his work injury and that therefore the wage replacement benefits claimed by the employee are not due, because the employee's post-injury wage loss is not causally related to his work injury. The employer bases its argument on the judge's lengthy discussion, also in Finding 5, of evidence indicating that the employee was ignorant of the benefits implications of any "voluntary" transfer to grids that he may have made. They suggest that the judge committed errors of law in supporting his conclusion by questioning the sufficiency of the employee's legal and rehabilitational representation at the time of his transfer and by noting the absence of any signed indication that the employee understood the consequences of any "voluntary" choice that he might be making. We conclude, however, that, to the extent it may pertain to the judge's ultimate award of benefits, the judge's conclusion as to the employee's state of mind at the time of his transfer was factually, rather than legally, based and reasonable.

At the beginning of his analysis of the employee's state of mind at the time of the transfer, in the second two-thirds of Finding 5, the compensation judge states that "[i]t is really at this point that the two stories start to differ and the Compensation Judge is persuaded that the employee's version of events is more credible" (emphasis added). Subsequently the judge indicates that he "adopts [the employee's] testimony" that the employee "accepted the [truck driving] job but had some concerns about his using his pain medications and driving at the same time," that "the pain pills helped but . . . he was having trouble sleeping and . . . his pain never fully went away," and that "there were concerns about the employee driving and taking these medications." The judge goes on to note also that "[t]he employee indicated at the hearing that he was never told that [returning to grids] meant that he would be getting less pay" and "testified he never was told the full impact this move would have on his benefits." It is clear from these statements that the judge's conclusion as to the employee's state of mind at the time of the transfer was based primarily on the employee's credibility. Assessment of a witness's credibility is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978).

We conclude that the compensation judge's finding of permanent restrictions, based as it is on expert medical testimony, might well have been dispositive without the judge's further analysis of the employee's state of mind and motivation at the time he transferred jobs. The judge's analysis of the latter issue, however, appears to have participated in his decision and so might render it subject to further scrutiny. To the extent that that is the case, however, we conclude that the judge's additional findings on that latter issue are reasonable factual conclusions that do not jeopardize, and indeed only support, the judge's award of benefits based on evidence of permanent restrictions. Therefore, we affirm the award of temporary partial disability benefits at issue. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.