LINDA J. OLIVER, Employee, v. AXMAN SURPLUS and FARMERS INS. GROUP, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 1, 1999

No. [REDACTED SSN]

HEADNOTES

JOB OFFER - REFUSAL; STATUTES CONSTRUED - MINN. STAT. § 176. 101, SUBD. 1(i). Minn. Stat. § 176.101, subd. 1(i) applies to "the cessation and recommencement" of temporary total disability benefits, and does not apply where an offer of continuing employment was made *prior to* commencement of the employee's temporary total disability. Substantial evidence supports the compensation judge's determination that the employee did not refuse an offer of gainful employment within the meaning of the statute.

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee had not yet reached maximum medical improvement, based on the judge's acceptance of the employee's treating physician's opinion.

Affirmed.

Determined by: Johnson, J., Pederson, J., and Wilson, J.
Compensation Judge: Bernard J. Dinner

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's finding that the employee did not refuse an offer of gainful employment within the meaning of Minn. Stat. § 176.101, subd. 1(i), and had not reached maximum medical improvement. We affirm.

BACKGROUND

Linda J. Oliver, the employee, sustained a personal injury to her left knee on April 17, 1998, while employed by Axman Surplus, the employer, insured by Farmers Insurance Group. The employee was earning a weekly wage of $323.26 a week. The employer and insurer admitted liability for the employee's injury.

The employee first sought medical attention on April 29, 1998 at the Mork Clinic. Dr. Zownirowycz diagnosed a possible meniscal tear, but allowed the employee to return to work

without restrictions. The employee returned to the Mork Clinic on May 5, 1998 with continued complaints of knee pain. The doctor prescribed an immobilizer, a leg brace running from the employee's thigh to her ankle that prevented bending of the knee. (T. 63.) The doctor allowed the employee to continue working, but instructed her to avoid stooping, squatting and bending. The doctor also referred the employee to Dr. Joseph Flake, an orthopedic surgeon. (Pet. Ex. A.)

The employee underwent an MRI scan, then saw Dr. Flake on May 11, 1998. The doctor reviewed the MRI scan which showed fraying or edema in the periphery of the medial meniscus but no frank tear and a small tear in the lateral meniscus with some bone edema in the tibia. The doctor diagnosed pes anserinus bursitis and a bone contusion in the tibia. Dr. Flake injected the bursa with Depo-Medrol and Lidocaine and instructed the employee to continue wearing the knee immobilizer. The employee returned for follow-up of her left knee on May 20, 1998. Dr. Flake recommended further immobilization of the knee and modified activities at work.

The employee was seen by Dr. Jeffrey Nipper on July 17, 1998 at the request of the employer and insurer. Dr. Nipper examined the employee, reviewed the May 11, 1998 MRI scan, and diagnosed an acute knee injury consisting of bone marrow edema and contusion with medial and lateral meniscus pathology consistent with small tears. The doctor concluded these conditions were a direct result of the employee's injury of April 17, 1998. The doctor recommended arthroscopic surgery for the meniscus pathology followed by a short course of physical therapy. (Resp. Ex. 2.) On August 3, 1998, Dr. Flake also recommended arthroscopic surgery to repair medial meniscus tearing.

On August 24, 1998, David A. Gray, the owner of Axman Surplus, wrote to Dr. Flake asking him to outline the restrictions the doctor would impose following the employee's surgery on September 8, 1998. Mr. Gray advised Dr. Flake he intended to provide a job for the employee within the restrictions the doctor established. (Resp. Ex. 1.) By a report of work status, dated August 24, 1998, Dr. Flake replied the employee would be off work from September 8 to September 15. He stated the employee would be able to return to work on September 15, 1998 at a sitting position with her leg elevated for one week with no prolonged standing or walking. (Pet. Ex. B.) On September 1, 1998, Mr. Gray, Kathi Adams, the supervisor and store manager, and Barbara Jones, a supervisor, met with the employee. The employee was told she could maintain her position as an Assistant Manager when she returned to work after surgery and work would be made available for her within Dr. Flake's restrictions.

At some point, the employee contacted a prior employer, E-Z Shop, regarding employment and filled out a job application.[1] On September 4, 1998, a representative of E-Z Shop called the employee and told her they had an assistant manager position open. The employee testified she was to start work at E-Z Shop on September 21, 1998, but she did not tell E-Z Shop about her upcoming surgery. (T. 78.) On September 5, 1998, the employee left a letter

[1] The employee was an assistant manager at E-Z Shop, a gas station/convenience store from October 1994 through December 1997. (T. 51.)

on Kathi Adams' desk stating her last day at the employer would be September 18, 1998, and that she had been offered a job elsewhere for more money. (Resp. Ex. 1.) The employee testified at the time she wrote the letter she intended to accept the position with E-Z Shop. (T. 121.) By letter dated September 14, 1998, Mr. Gray advised Dr. Flake the employee was no longer employed by Axman Surplus. (Pet. Ex. C.) The employee received a copy of Mr. Gray's September 14, 1998 letter from Dr. Flake. (T. 80-82.)

The employee underwent a left knee arthroscopy on September 8, 1998. Dr. Flake performed debridement of loose articular cartilage of the patella and debridement of a fibrotic fat pad. (Resp. Ex. 4.) The employee followed up with Dr. Flake on September 14, 1998. The doctor ordered physical therapy and kept the employee off work through September 28, 1998. The employee then told E-Z Shop about her surgery and that she would be in physical therapy for two weeks. The employee testified she was told the job would be available only if she could work without restrictions. (T. 79.) On September 28, 1998, Dr. Flake released the employee to return to work with restrictions including no stooping, squatting or kneeling, limited lifting and the ability to sit as needed. On September 29, 1998, the employee learned E-Z Shop would not hire her because of her restrictions. Thereafter, the employee did not contact the employer about employment. (T. 84-85.)

In October, Dr. Flake ordered further physical therapy for the employee's left knee. In January, he recommended a functional capacity evaluation and continued the employee's restrictions. On February 17, 1999, Dr. Flake opined the employee had not yet reached maximum medical improvement (MMI) and continued the employee's restrictions indefinitely. (Pet. Ex. B.)

Dr. Nipper re-examined the employee on November 20, 1998. By report dated December 28, 1998, the doctor rated a one percent permanent partial disability for the knee injury, and stated the employee did not require any formal restrictions. Dr. Nipper opined the employee would reach MMI four to six months post surgery. (Resp. Ex. 2.) The parties stipulated that Dr. Nipper's report was served on the employee on January 15, 1999. (T. 43.)

On January 15, 1999, the employer and insurer filed a Notice of Intention to Discontinue Benefits contending the employee could return to work without restrictions, the employee had reached maximum medical improvement, and the employee had refused an offer of gainful employment under Minn. Stat. § 176.101, subd. 1(i). By Order on Discontinuance dated February 24, 1999, a compensation judge at the Office of Administrative Hearings, St. Paul Settlement Division, granted the discontinuance. The employee filed an objection to discontinuance, and the case was heard by a compensation judge at the Office of Administrative Hearings. In a Findings and Order served and filed June 25, 1999, the compensation judge found the employer and insurer failed to prove the employee was released to return to work without restrictions, found the employee had not yet reached maximum medical improvement, and found the employee did not refuse an offer of gainful employment. The employer and insurer appeal the findings regarding maximum medical improvement and refusal of an offer of gainful employment.

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

Refusal of Gainful Employment

At the September 1, 1998 meeting with the employer, the employee was told that upon her return from surgery she would maintain her assistant manager position and would be given work within the restrictions that were placed on her by Dr. Flake. On September 5, 1998, the employee left a letter on Kathi Adams' desk stating that her last day at Axman Surplus would be Friday, September 18, 1998. The appellants cite Thompson v. Electric Cords, slip op. (W.C.C.A. Mar. 12, 1998), which states that Minn. Stat. § 176.101, subd. 1(i), imposes "an obligation on the employee to accept gainful employment if offered by the employer." Here, the appellants argue, the employee failed in her obligation because she refused an offer of gainful employment. Accordingly, the appellants contend the employee is barred from receiving temporary total disability benefits pursuant to Minn. Stat. § 176.101, subd. 1(i), and assert the compensation judge's decision to the contrary is legally erroneous.

Minn. Stat. § 176.101, subd. 1(d) (1995), provides that "[t]emporary total compensation shall be paid during the period of disability subject to the cessation and recommencement conditions in paragraphs (e) to (l)." A refusal of gainful employment under subdivision 1(i) is one of those "cessation events." Specifically, Minn. Stat. § 176.101, subd. 1(i), states "[t]emporary total compensation shall cease if . . . the employee refuses an offer of gainful employment that the employee can do in the employee's physical condition." The plain language of the statute limits its application to situations in which the employee's entitlement to temporary total disability benefits commenced prior to the offer of gainful employment. Clearly, benefits which never commenced cannot cease. See, Griffin v. Fabcon, Inc., slip op. (W.C.C.A. July 20, 1999).

On September 1, 1998, the employer offered the employee a modified position upon her return to work. The employee submitted her resignation from her position with the employer on September 5, 1998. On neither of these dates was the employee receiving or entitled to temporary total disability benefits. Rather, the employee was first paid temporary total disability benefits commencing September 8, 1998, the day of her surgery. Since temporary total disability compensation had never commenced, it could not cease on September 1 or September 5, 1998. There is no evidence the employer made an offer of gainful employment after temporary total disability compensation did commence on September 8, 1998. Minn. Stat. § 176.101, subd. 1(i), is therefore inapplicable. The compensation judge's finding that the employee did not refuse an offer of gainful employment is affirmed.

Maximum Medical Improvement

The appellants next argue the compensation judge's finding that the employee had not reached maximum medical improvement is unsupported by substantial evidence. Dr. Nipper opined the employee had reached MMI following his re-examination of the employee on November 20, 1998. The parties stipulated Dr. Nipper's report was served and filed on January 15, 1999. The appellants point out that on November 30, 1998, Dr. Flake reported no effusion, redness, warmth or swelling of the employee's right knee. The doctor noted flexion to 110° and full extension with no ligamentous instability or joint line tenderness. At hearing, the employee testified her knee has pretty much stayed the same since the first of the year (T. 125-26). No further treatment recommendations were made by Dr. Flake after November 28, 1998, the date of Dr. Nipper's examination. Appellant contends the evidence establishes the employee reached MMI by January 15, 1999. Accordingly, the appellants argue the compensation judge's determination that the employee had not reached MMI is clearly erroneous. We disagree.

Some three months after service of Dr. Nipper's IME report, on April 29, 1999, Dr. Flake recommended a functional capacities evaluation to assist in determining the employee's long term work ability. The doctor opined that future medical treatment would be needed, involving "infrequent office visits and perhaps a course of physical therapy at some point." Finally, Dr. Flake stated the employee would reach maximum medical improvement in another four to six months. (Pet. Ex. B.)

Maximum medical improvement is defined as "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability." Minn. Stat. § 176.011, subd. 25. Maximum medical improvement "occurs upon medical proof that the employee's condition has stabilized and will likely show little further improvement." Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740, 742 (W.C.C.A. 1987). Maximum medical improvement is an issue of ultimate fact to be determined by the compensation judge after considering medical records, medical opinions, and other relevant evidence. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989).

The compensation judge accepted the opinions of Dr. Flake over those of

Dr. Nipper. (Finding 8.) It is the compensation judge's responsibility, as the trier of fact, to resolve conflicts in expert testimony. See, Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). We conclude substantial evidence supports the finding of the compensation judge that the employee has not reached maximum medical improvement. Affirmed.