

DEBRA E. RAMSEY, Employee, v. FRIGIDAIRE CO. FREEZER PRODS. and CNA RISK MGMT., Employer-Insurer/Appellants

WORKERS' COMPENSATION COURT OF APPEALS
JULY 22, 1999

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - FRAUD. In a petition to vacate a stipulation for fraud in the inducement, post-award surveillance evidence may be relevant to the issue of fraudulent misrepresentation at the time of settlement. The compensation judge properly considered the employer and insurer's surveillance evidence in resolving the fraud issue. Substantial evidence supports the compensation judge's determination that the employee did not knowingly misrepresent her physical condition at the time of the settlement.

PERMANENT TOTAL DISABILITY - DISCONTINUANCE. This court has jurisdiction to enforce the terms of a settlement agreement and to allow discontinuance of permanent total disability benefits. The employer and insurer may discontinue payment of permanent total disability where the stipulation provided that permanent total disability benefits would be paid "for so long as warranted," and the compensation judge found, in unappealed findings, that the employee's condition had improved by June 11, 1996, the employee had failed to prove that gainful employment was unavailable to her in her labor market, and the employee had failed to prove she was permanently and totally disabled after June 12, 1996.

Affirmed.

Determined by Johnson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Peggy A. Brenden

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal from the compensation judge's findings contending they are erroneous as a matter of law and unsupported by substantial evidence. We affirm.

BACKGROUND

Debra E. Ramsey, the employee, sustained a personal injury on November 20, 1991, while employed by Frigidaire Company Freezer Products, the employer, then insured by CNA Risk Management. The injury consisted of a blunt trauma/contusion to the employee's left

hand. The employee was later diagnosed with reflex sympathetic dystrophy (RSD) affecting all four extremities secondary to the personal injury on November 20, 1991. The employer and insurer admitted liability and commenced payment of workers' compensation benefits to the employee, including temporary total disability benefits from and after June 8, 1992, and a 30 percent whole body disability for the left arm condition.

In March 1996, the parties entered into a stipulation for settlement. At that time the employee claimed entitlement to permanent total disability benefits, remodeling expenses and permanent partial disability benefits of 35 percent for each upper extremity and 6 percent for each lower extremity. The employer and insurer contended the employee had been permanently and totally disabled since June 8, 1992. They also contended they had paid in excess of \$25,000.00 in permanent total disability benefits entitling them to a Social Security offset.¹ Finally, they denied the claim for home remodeling expenses and alleged the employee had no more than a 30 percent permanent disability of the left arm and sustained no permanent partial disability of the right arm. To settle their claims, the parties stipulated the employee sustained an injury in the nature of RSD to all four extremities. The parties agreed the employee sustained a 32.5 percent permanent partial disability of the left arm and 3 percent whole body disability of each lower extremity for a combined rating of 36.49 percent payable as impairment compensation. They further agreed the employee was permanently and totally disabled from and after November 20, 1992, and that the offset provisions of Minn. Stat. § 176.101 became effective by December 7, 1994. The parties agreed the employer and insurer had overpaid compensation in the sum of \$12,263.40, entitling them to a credit. Finally, the parties "stipulated and agreed the employer and insurer shall continue to pay weekly permanent total disability benefits from and after March 2, 1996, for so long as warranted . . ." A partial award on stipulation was served and filed on April 4, 1996.²

On April 12, 1996, the employer and insurer initiated surveillance of the employee's activities. The surveillance continued periodically until July 9, 1997. As a part of the surveillance, the employee was occasionally recorded on videotape. On July 9, 1997, the employee was examined by Dr. William H. Lohman. The employee was recorded on videotape in the doctor's waiting room. Dr. Lohman concluded the employee remained totally disabled from gainful employment because of severe impairment of her left arm and mild to moderate impairments of the other extremities. Thereafter, Dr. Lohman reviewed the videotapes of the employee and concluded the employee deliberately misrepresented her physical capabilities to him on July 9, 1997. He further concluded the employee is capable of gainful employment.

On October 2, 1997, the employer and insurer petitioned the Workers'

¹ See Minn. Stat. § 176.101, subd. 4.

² The employee's claim for remodeling expenses was not settled. That case came on for hearing before a compensation judge on April 16, 1996. In a Findings and Order served and filed July 15, 1996, the compensation judge denied the employee's claim for remodeling benefits.

Compensation Court of Appeals to set aside the April 4, 1996 Award on Stipulation on the basis of newly discovered evidence, fraud and substantial change in medical condition. The case came on for oral argument before the court on January 21, 1998. In a decision filed April 20, 1998, the court denied the request to vacate the award on stipulation based on newly discovered evidence or a substantial change in medical condition. The court referred the case to the Office of Administrative Hearings for a hearing on the issue of fraud. The court further requested the compensation judge to make findings of fact as to whether the employee continued to be totally disabled.

The case was heard on November 19 and 20, 1998, by a compensation judge at the Office of Administrative Hearings. In a Findings and Order served and filed December 29, 1998, the compensation judge found the employee did not knowingly misrepresent her physical condition at the time of the settlement and found the employee was permanently and totally disabled as of April 4, 1996. The compensation judge further found the fraud issue was of primary importance in the hearing and since the employee prevailed she was entitled to attorney fees pursuant to Gruber v. ISD #625, 57 W.C.D. 284 (W.C.C.A. 1997). The employer and insurer appeal these findings and request reimbursement of benefits paid from and after April 4, 1996 pursuant to Minn. Stat. § 176.179. The compensation judge further found the employee failed to prove that she was permanently and totally disabled from June 12, 1996 to the date of the hearing. (Finding 8.) This finding is unappealed.

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

Fraud - Relevance of Surveillance Evidence

The compensation judge found the employee did not knowingly misrepresent her physical condition to the health care providers or the employer and insurer in the spring of 1996,

and concluded the employee did not commit fraud. In her memorandum, the compensation judge cited Mehta v. Meldisco, slip op. (W.C.C.A. Oct. 26, 1995) for the proposition that “events and activities occurring after an agreement is reached do not provide a basis for a finding of fraud at the time the stipulation was executed.” (Memo at 4.) The employer and insurer argue the compensation judge, based on the judge’s interpretation of the Mehta case, improperly failed to consider the videotapes and surveillance reports obtained by the employer and insurer. The appellants contend this omission was legally erroneous. The employee argues the Mehta case holds that any evidence of conduct after the date of the award is irrelevant to the question of the employee’s alleged fraudulent misrepresentation prior to the award. We disagree with both arguments.

In the Mehta case, the parties agreed in a mediation session the employee was permanently and totally disabled and the employer and insurer agreed to pay permanent total disability benefits to the employee. A Mediation Award was filed on February 5, 1993. In the summer of 1994, the insurer performed an activity check on the employee which resulted in information indicating the employee might be working. The employer and insurer then filed a Motion to Vacate the Mediation Award on the grounds of fraud. The court concluded that evidence the employee might be working in 1994 was insufficient to establish that fraud was committed in February 1993. In Crouley v. Oscar J. Boldt Constr., 55 W.C.D. 301 (W.C.C.A. 1996), the employee settled, on a full, final and complete basis, all claims, including the claim for permanent total disability benefits for a lump sum payment. An Award on Stipulation was filed on November 3, 1995. On December 1, 1995, the employee started a job as an iron worker foreman. The employer and insurer then sought to vacate the award based on fraud. The employer and insurer argued the employee’s representations about his condition at the time of the settlement were contradicted by his work activities in December 1995 as demonstrated on the surveillance videotapes. The court denied the petition to vacate and concluded the evidence presented was insufficient to establish a fraudulent misrepresentation by the employee.

In both Mehta and Crouley, the court concluded only that the petitioner’s evidence was insufficient to establish fraud in the inducement under Minn. Stat. § 176.461. In neither case did the court hold that an employee’s conduct or activities occurring after an award on stipulation are irrelevant or inadmissible to prove fraud at the time of the award. In many cases, fraud can only be proven circumstantially by evidence of conduct subsequent to the settlement. In other cases, this court has affirmed a compensation judge’s finding of fraud based on evidence of subsequent conduct. See, e.g., Tran v. Bystrom Bros., Inc., 51 W.C.D. 63 (W.C.C.A. 1994); Pitsenburger v. Jeff Belzer Chevrolet, 56 W.C.D. 427 (W.C.C.A. 1997). Accordingly, we reject the employee’s argument that post-award surveillance evidence is never relevant to the issue of fraudulent misrepresentation.

The judge’s comments about the Mehta case notwithstanding, it is apparent the compensation judge did consider the employer and insurer’s surveillance evidence. In the memorandum, the compensation judge specifically described certain of the employee’s activities reflected on the videotape. The judge stated:

Her activity level as captured on video tape - in addition to revealing physical capacities unknown to her physicians - also confirms ongoing limitations, (i.e. protecting left hand - pulling it into her sleeve, putting it in her pocket, pushing a grocery cart with right hand only, consistent use of AFO's, frequent labored gait, use of motorized grocery cart; difficulty writing.)

Each of these activities enumerated by the compensation judge are contained in the surveillance tapes. Further, the compensation judge noted the surveillance video tapes suggest the employee is physically capable of working. Clearly, the compensation judge did consider the employer and insurer's surveillance evidence in resolving the fraud issue.

Fraud - Substantial Evidence

The employer and insurer next argue substantial evidence does not support the compensation judge's findings on the issue of fraud. They assert the medical records of Dr. Balfanz and Dr. Lohman regarding the employee's clinical presentation and complaints of symptoms differ dramatically from the employee's physical abilities as reflected on the videotapes. The evidence, the appellants argue, establishes the employee knowingly misrepresented her physical condition at the time of the settlement. Accordingly, they request we reverse the compensation judge's findings. We are not persuaded.

The parties agree the employee has reflex sympathetic dystrophy affecting all four extremities secondary to her personal injury. The employer and insurer paid a 32.5 percent permanent disability for the left arm and a 3 percent whole body disability for each leg, for a combined rating of 36.49 percent. There is no dispute the employee is physically impaired as a result of her injury. The compensation judge noted the videotapes confirm the employee has physical disabilities and limitations, including: protecting her left hand and arm, pushing a grocery cart with her right hand only, frequent labored gait, use of a motorized grocery cart, and difficulty writing. Dr. Balfanz acknowledged that the employee's appearance on the videotape was "surprisingly normal" and not consistent with her clinical presentation. (ER Ex. 1, p. 23.) However, Dr. Balfanz testified he found objective signs of reflex sympathetic dystrophy when he examined the employee. On examination, Dr. Balfanz noted atrophy in the employee's legs, discoloration in the left leg, flaking of the skin of the left arm and leg, discoloration of the left leg, and swelling and hair loss on the left arm. (EE Ex. A: 11/3/95; 12/31/93; 2/19/96; 9/9/98.) The doctor stated the employee consistently demonstrated impaired range of motion of the left arm, spasm in the left leg when the employee removed her brace, deviation of both feet downward and inward, atrophy of the left forearm, discoloration of the skin of her left leg, brittleness of the nails of the extremities, hair loss in the extremities, and a cooler skin temperature of the left leg as opposed to the right. (ER Ex. 1, pp. 35-39.)

The employee testified her symptoms worsen in cold weather which increases her spasms and burning sensation. Dr. Balfanz agreed that cold weather aggravates the symptoms of RSD. The employee complained of continuing significant pain in her left arm, particularly when

touched. Consequently, she guarded her left arm when people were around her. (T. 44-45.) The employee testified she noticed her left arm and leg were cooler than the right side and observed her feet and legs often were a purple color. (T. 46.) The employee testified she continually wore an AFO³ on both legs which she removed only to shower and to sleep because they help her walk. (T. 51-52.) The surveillance videotapes show the employee wearing her AFOs. The compensation judge found credible the employee's testimony that "her symptoms have ups and downs, that she does her best to stay as active as possible, and she is sincerely motivated to return to appropriate work." (Memo at 5.)

Dr. Balfanz further testified in his experience people with RSD tend to improve functionally over a period of months and years. (ER Ex. 1, p. 43.) The compensation judge concluded the employee's condition improved by June 11, 1996. A significant portion of the surveillance of the employee was accomplished after June 11, 1996. Finally, the compensation judge noted that during the course of 200 hours of surveillance the employee spent most of the time at home and her activity outside the home was primarily in the company of others and for brief periods only.

We acknowledge there is evidence of record which, if accepted by the compensation judge, could be sufficient to establish fraud. The issue before this court, however, is whether substantial evidence supports the compensation judge's decision. We conclude the evidence summarized above, together with the inferences drawn from the evidence by the judge, adequately support the compensation judge's findings. Accordingly, the compensation judge's findings are affirmed.

Permanent Total Disability Benefits

In their stipulation for settlement, the parties agreed the employer and insurer would pay permanent total disability benefits to the employee "for so long as warranted." In our decision filed April 20, 1998, the court stated, "Clearly, the parties intended the employee would receive benefits only for so long as she remains permanently and totally disabled." We then referred the case to the Office of Administrative Hearings for a hearing on the issue of whether the employee was totally disabled within the meaning of Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967).

The compensation judge found the employee's condition improved by June 11, 1996. (Finding 5.) The compensation judge further found the employee failed to prove that suitable, substantial, gainful employment was unavailable in her labor market and failed to prove she was permanently and totally disabled from and after June 12, 1996 to the date of hearing. (Findings 7, 8.) These findings were unappealed. Based on these findings, the employer and

³ An AFO is an ankle/foot orthosis made of hard plastic and designed to keep the employee's foot in a functional position so that she does not deviate her foot downward and inward. (ER Ex. 1, p. 11.)

insurer seek to discontinue the payment of permanent total disability benefits to the employee. The employee contends this court is without jurisdiction to discontinue permanent total disability benefits unless the award on stipulation is vacated. We disagree.

The parties explicitly provided in the settlement agreement that permanent total disability benefits were payable only so long as the employee remained permanently and totally disabled. The parties contemplated the employee's vocational status or ability might change after the Award on Stipulation and provided for such an occurrence in the settlement agreement. This court has jurisdiction to enforce the terms of a settlement agreement and discontinue permanent total disability benefits. Minn. Stat. § 175A.01, subd. 5; Behrens v. City of Fairmont, 533 N.W.2d 854, 53 W.C.D. 41 (Minn. 1995). The compensation judge found the employee failed to prove she was permanently and totally disabled from and after June 12, 1996. Accordingly, the employer and insurer may discontinue payment of permanent total disability benefits.

Credit Under Minn. Stat. § 176.179

The employer and insurer seek a credit under Minn. Stat. § 176.179 for the permanent total disability benefits paid the employee from June 12, 1996 to date. Whether the appellants are entitled to a credit was not an issue presented to the compensation judge so the judge made no findings. Issues not raised or litigated before the compensation judge will not be considered on appeal. Trueter v. Drapery Services of Austin, 49 W.C.D. 74 (W.C.C.A. 1993).

Gruber Attorney Fees

The employer and insurer appeal the compensation judge's findings that fraud was an issue of primary importance at the hearing, the employee prevailed on the fraud issue and the employee is entitled to a reasonable attorney fee and costs pursuant to Gruber v. Independent Sch. Dist. #625, 57 W.C.D. 284 (W.C.C.A. 1997). (Finding 9.) In their brief, the appellants did not specifically address this issue. At oral argument, counsel for the appellants conceded that if the compensation judge's findings regarding fraud were affirmed, their appeal of Gruber fees was withdrawn. Finding 9. is, therefore, affirmed.