ROXANNE RAUER, Employee/Appellant, v. CHRYSLER CORP. and WAUSAU INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 31, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - EXPEDITED HEARING; STATUTES CONSTRUED - MINN. STAT. § 176.238, SUBD. 6; EVIDENCE - BURDEN OF PROOF. Pursuant to Minn. Stat. § 176.238, subd. 6, an expedited hearing pursuant to a Petition to Discontinue benefits "shall be limited to the issues raised by the [NOID] or petition [to discontinue benefits] unless all parties agree to expanding the issues." Where the employer and insurer's NOID and Petition to Discontinue benefits had never alleged a preexisting condition as a basis for discontinuance, and where there was virtually no evidence that the employer and insurer were affirmatively asserting anything but the employee's ability to work overtime as a basis for discontinuing benefits for lost overtime earnings, the compensation judge erred in concluding that the employer and insurer had established entitlement to discontinue benefits on grounds that the employee's inability to work overtime was due to a preexisting condition, notwithstanding the judge's brief and unpursued identification of the "nature" of the employee's injury as an issue, and notwithstanding the independent medical examiner's passing and also unpursued identification of a preexisting condition.

Reversed.

Determined by Pederson, J., Johnson, J. and Wilson, J.
Compensation Judge: James R. Otto

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's conclusion that the employee's work injury was only a temporary exacerbation of a preexisting condition and that the employee's inability to work overtime is due to that preexisting condition and not to her work injury. We reverse.

BACKGROUND

On February 27, 1997, Roxanne Rauer sustained a work-related injury to her low back while twisting in her chair at the "exception desk" at the Chrysler Corporation in the course of her work as a "pick-packer." On the date of her injury, Ms. Rauer [the employee] was fifty-

five years old and was earning an average weekly wage of $976.07 for working an average of 44.6 hours a week. She received emergency treatment the following day, when her past medical history was noted to be "[e]ssentially unremarkable although, a long time [ago], she had some back problems," though "[s]he has had no surgeries and has had no hernia." The employee was taken off work, and the Chrysler Corporation [the employer] accepted liability for the injury and commenced payment of temporary total disability benefits.

On March 3, 1997, the employee commenced treatment with Dr. Jeffrey Elbers, who noted that her pain was radiating down into her right leg and prescribed steroids. The employee's pain increased, and X-rays on March 4, 1997, indicated mild joint space narrowing at the L5-S1 level, and the employee was hospitalized for further observation. On March 5, 1997, Dr. Elbers' partner Dr. Jeffrey Herickhoff identified several previous work-related episodes of low back pain in the employee's medical records, noting however that the employee "has never had a surgery for herniated disc." By March 26, 1997, Dr. Elbers' notes indicate that the employee's right leg pain was down into her foot, and Dr. Elbers prescribed physical therapy. The employee commenced rehabilitation services on May 28, 1997, with QRC Kay Ness, to whom she reported that her back pain seven or eight years ago did not involve leg pain and resolved quickly. On June 27, 1997, upon conclusion of her physical therapy, the employee returned to work with restrictions, including a restriction against working more than six hours a day. The employee subsequently transferred her rehabilitation assistance to QRC Steven Hollander, whose report on July 7, 1997, contains no reference to any previous or preexisting low back problems. On September 23, 1997, Dr. Elbers issued a Report of Work Ability, in which he reiterated ultimately permanent restrictions issued about a week earlier, against working more than eight hours a day, doing any ladder climbing or repetitive bending, or operating a "Taylor-Dunn picking machine," normally used in the employee's work.

On January 12, 1998, the employee experienced a mild flare-up in her low back pain, and the following day Dr. Elbers, having apparently reviewed a videotape of the employee's job at the employer, took her back off work for three days and continued her existing restrictions. On March 5, 1998, Dr. Elbers completed a Health Care Provider Report on which he certified that the employee had reached maximum medical improvement [MMI] on January 15, 1998, from her work injury of February 27, 1997, which he diagnosed as a herniated lumbar disc with right sciatica. Dr. Elbers indicated expressly on that report that there was no "evidence of preexisting or other conditions that affect this disability" and that the employee was not "unable to return to former employment for medical reasons attributable to the injury."

On July 14, 1998, the employee was examined for the employer and insurer by Dr. Jack Drogt, who noted that the employee had "had a similar [to her work injury] episode seven years ago performing pretty much the same activity while employed at [the employer]." Dr. Drogt diagnosed "[o]besity," "[d]egenerative changes of the lumbosacral spine; preexisting," and a "work-related injury February 27, 1997, with right sacroiliac joint sprain, lumbosacral strain/sprain and temporary aggravation of [the preexisting lumbosacral degenerative changes]." Having reviewed apparently the same videotape as that reviewed by Dr. Elbers, Dr. Drogt concluded that the employee, with certain modifications of her work chair, was able to work full

time as well as overtime and had no further need of medical treatment related to her work injury.

On August 4, 1998, the employer and insurer filed a Notice of Intention to Discontinue [NOID] the employee's temporary partial disability benefits. The sole reason asserted on the NOID was that, "[p]er the attached medical report of Dr. Drogt dated 07-14-98, the employee can work full time, including overtime. The employee was previously limited from overtime. This caused her wage loss. With a release to overtime work, there will no longer be a wage loss." The matter was heard at an administrative conference pursuant to Minn. Stat. § 176.239 on September 10, 1998. By Order on Discontinuance filed September 16, 1998, the settlement judge ordered the employer and insurer to continue payment of temporary partial disability benefits. On that Order, the sole issue identified in the settlement judge's "Statement of the Case" was the employer and insurer had filed a NOID "alleging that Jack Drogt, M.D. released employee to work full time including overtime," and the judge's only "Conclusions" were that "Employee remains under the restrictions placed on her work activities by Dr. Jeffrey Elbers." On October 21, 1998, the employer and insurer filed a Petition to Discontinue the temporary partial disability benefits for the lost overtime income here at issue. The Petition was made expressly and solely "on the following basis: Pursuant to the report of Dr. Jack Drogt dated July 14, 1998, the Employee can return to work on a full-time basis, including overtime. With a release to overtime work, there will no longer be a loss of earning capacity."

The employer and insurer's Petition came on for hearing on December 18, 1998. Near the beginning of the hearing, the compensation judge indicated that "[t]he first issue" before him was "the nature of [the employee's] personal injury in February 27, 1997." The attorney for the employer and insurer agreed to stipulate to a low back strain/sprain, but when the attorney for the employee would not so stipulate, contending instead that the injury was a herniated disc, the judge indicated, "So we'll leave it an issue then." This first issue was never thereafter further defined at the hearing, to establish, for instance, whether the "nature" referred to was the duration of the injury or the diagnosis of the injury, or both, or neither, nor was the "nature" of the employee's injury ever thereafter addressed by the parties. The judge then went on to state, "The second issue I have is whether the employer and insurer is entitled to discontinue payment of benefits for temporary partial disability." When the judge asked if he could have "a reason why you believe you're entitled to discontinue," the employer and insurer's attorney responded, "Certainly. We have a report from Dr. Jack Drogt, . . . , who saw [the employee] on behalf of [the employer and insurer], and he has a different opinion than the treating doctor regarding the appropriate restrictions [the employee] needs to follow as a result of her injury." Late in the hearing, directly pursuant to the employer and insurer's attorney's cross-examination of the employee regarding her willingness to work overtime on Saturdays, the employee's attorney requested and was granted permission from the judge to obtain a post-hearing supplementary report from Dr. Elbers. Subsequent to the hearing, the employee's attorney requested from Dr. Elbers clarification "[w]ith respect to the permanent restrictions you provided for [the employee] on September 15, 1997," and "relative to the nature and diagnosis of [the employee's] low back injury." In his response on January 13, 1999, Dr. Elbers indicated that he had placed the employee on permanent work restrictions including a restriction against working over "40 hours per week (8 hours per day)" and that the employee's low back work injury was "an acute

exacerbation of a chronically deconditioned lumbar spine."

By Findings and Order filed January 20, 1999, the compensation judge concluded in part that the employee was not physically able to work in excess of eight hours a day at her job with the employer or to perform the 4.6 hours of overtime work that might be available to her on Saturdays. Nevertheless, although the employee had been performing an average of 4.6 hours of overtime work each week prior to her work injury, the judge granted the employer and insurer's Petition to Discontinue compensation for the employee's loss of income from such work. The judge's decision was based on a conclusion that the employee's work injury was only a temporary exacerbation of a chronically deconditioned lumbar spine and of a preexisting degenerative lumbosacral disc condition and that the employee's current inability to work overtime was due not to her work injury but to those preexisting conditions. 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. On the other hand, "a decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

The compensation judge's allowance of discontinuance in this case was based on a conclusion that the employee's current inability to work overtime is due to preexisting conditions and is not causally related to the employee's work injury. The employee contends on appeal that primary liability has been admitted and that at the hearing below "[c]ausation was not an issue in dispute, it was not raised, pled, or litigated by the parties, and the parties did not agree to expand the issues . . . raised by the Petition to Discontinue." The employee argues that the judge therefore exceeded his authority in ruling as he did and that his conclusion that the employee's disability from working overtime was due to preexisting conditions should therefore be vacated and his grant of discontinuance be reversed. We agree.

On a Petition to Discontinue benefits, the employer and insurer have the burden of proving by a preponderance of the evidence that the discontinuance of benefits is warranted. Violette v. Midwest Printing, 415 N.W.2d 318, 322, 40 W.C.D. 445, 453 (Minn. 1987). That burden of proof may properly shift to the employee to show entitlement to ongoing benefits once an employer and insurer have sustained their initial burden by showing that employee's work injury was only a temporary aggravation. See Larson v. Hauenstein and Burmeister, slip op. (W.C.C.A. June 24, 1992). However, pursuant to Minn. Stat. § 176.238, subd. 6, an expedited hearing pursuant to a Petition to Discontinue benefits "shall be limited to the issues raised by the [NOID] or petition [to discontinue benefits] unless all parties agree to expanding the issues." Cf. Putnam v. Yellow Freight Systems, slip op. (W.C.C.A. Oct. 26, 1995) (pursuant to Minn. Stat. § 176.239, subd. 6, unless the parties agree otherwise, the scope of an administrative decision on discontinuance of benefits is to be limited to the issues presented in the NOID).

In this case, there is insufficient evidence that the employer and insurer were affirmatively asserting anything but the employee's ability to work overtime as a basis for discontinuing payment of benefits. Although the "nature" of the employee's injury was initially identified by the judge as an issue before him, that issue was never defined beyond a very brief assertion by the employer and insurer that the injury was a strain/sprain rather than a herniated disc. Perhaps more importantly, there was never any indication by the employer and insurer, either in their opening argument or in their subsequent examination of witnesses, that either of those alternative diagnoses might be due to a preexisting condition.[1] Nor was a preexisting condition alleged as a basis for discontinuance in their August 1998 NOID or in their October 1998 Petition to Discontinue. Nor was the possibility of such a condition referenced in the settlement judge's September 1998 Order on Discontinuance or by the compensation judge himself or any other party at the hearing. Finally, and perhaps most telling, is the employer and insurer's attorney's own express response to the judge's question "And can I have a reason why you believe you're entitled to discontinue [payments of benefits for temporary partial disability]." To this question counsel responded, "Certainly. We have a report from Dr. Jack Drogt [who] has a different opinion than the treating doctor regarding the appropriate restrictions [the employee] needs to follow as a result of her injury." A few moments later the judge clarified, "Okay. So your position is that she can work the same number of hours that she worked prior to her - - ," and here the employer and insurer's attorney interrupted, "Correct." There is no qualification of these statements in their context to suggest that the employee might nevertheless be restricted from working overtime by other than her work injury, nor is there any suggestion to that effect in the July 14, 1998, opinion of Dr. Drogt upon which the employer and insurer rely.[2]

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[1] Indeed, when the employee's attorney attempted on direct examination to elicit testimony on the experience and events of the injury itself, which might have shed some light on the "nature" of the injury, the employer and insurer's attorney objected on grounds of relevancy, and, while not excluding the testimony, the judge agreed and discouraged the line of questioning.

[2] Nor is there any indication in the January 13, 1999, post-hearing report of Dr. Elbers that

In light of these facts, we can only conclude that the causal relationship of any preexisting condition to the employee's inability to work overtime was either not an issue reasonably litigated or not one affirmatively proven by the employer and insurer. The presence in evidence of Dr. Drogt's mere mention of such a condition, unpursued by the employer and insurer in either their argument or their witness examination at hearing, does not diminish that conclusion. Nor does the compensation judge's own identification of the "nature" of the employee's injury as an issue, unpursued as it was by the employer and insurer.[3] If the employer and insurer understood such a preexisting condition to be materially at issue in their case for discontinuance, they had a burden of more expressly asserting and proving it as a basis for their petition. Therefore we reverse the judge's grant of discontinuance of the employee's temporary partial disability benefits.

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the "acute" exacerbation there referenced was only a temporary one.

[3] Indeed, the numerous references at hearing to numerous recastings of the overtime restriction question as "the" issue before the court, by the judge as well as by the parties, render ambiguous whether even the judge himself was at all times during the progress of the hearing still contemplating the "nature of the injury" as an issue actually being litigated, particularly in the absence of any discussion of preexisting conditions or of the proposed alternative diagnoses.