MARTHA J. STANEK, Employee, v. FANNY FARMER CANDY SHOPS and CNA/CONTINENTAL INS. CO., Employer-Insurer/Appellants, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 24, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - MEDICALLY UNABLE TO CONTINUE. Substantial evidence, including the employee's testimony and her treating doctors' records, supported the compensation judge's conclusion that the employee had become medically unable to continue working, within the meaning of Minn. Stat. § 176.101, subd. 3j (repealed 1995), as claimed, despite the absence of any objective evidence that the employee's condition had worsened.

MAXIMUM MEDICAL IMPROVEMENT; PRACTICE & PROCEDURE - REMAND. Remand was required where the compensation judge failed to make any decision as to whether the employee had reached MMI again, as the employer and insurer claimed, after having become medically unable to continue working under Minn. Stat. § 176.101, subd. 3j (repealed 1995).

Affirmed in part and remanded.

Determined by Wilson, J., Johnson, J., and Pederson, J.
Compensation Judge: Bonnie A. Peterson.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's finding that the employee became medically unable to continue working in November of 1997 and from the judge's failure to make a finding as to maximum medical improvement. We affirm in part and remand the matter for further proceedings.

BACKGROUND

On July 23, 1988, the employee sustained work-related injuries to her cervical and lumbar spine while employed by Fanny Farmer Candy Shops [the employer]. Diagnostic scans ultimately disclosed multiple-level degenerative changes and/or herniations in both the employee's neck and low back. The employee underwent a laminectomy and microdiscectomy at L3-4 in November of 1988. The employer and its insurer admitted liability for the employee's injuries and paid various workers' compensation benefits, including permanent partial disability benefits

for significant neck and low back impairments.[1]

The employee was unable to return to her pre-injury job but worked for several other employers in the years following her injury, including Eye Lab, Brookdale Eye Clinic, and Group Health. It is undisputed that these jobs were compatible with the restrictions recommended by physicians due to the employee's work injury. However, the employee continued to receive treatment, at least intermittently, for flareups of her condition, missing work when her symptoms were especially severe. Between May of 1996 and May of 1997, while working for Group Health, the employee allegedly missed 530 hours of work due to her work injuries. At some point during this period, the employee requested leave from work under the Family Medical Leave Act.

The employee began treating with Dr. Judith Easely in mid-September of 1997. About six weeks later, on about November 6, 1997, the employee went off work from her Group Health job and remained totally off work for more than nine months. During this period the employee continued to see Dr. Easely as well as several other providers. Although Dr. Easely's office notes make several references to the employee being unable to work, the doctor later explained that she never actually took the employee off work but rather accepted the employee's statements about the extent of her symptoms and disability. Michelle Greenman, D.C.,[2] who resumed the employee's care in late April of 1998, indicated that the employee was complaining of severe symptoms, but she nevertheless urged the employee to return to work as soon as possible, noting that inactivity only made things worse.

The employee was officially terminated by Group Health in August of 1998.[3] Shortly thereafter, on about August 24, 1998, the employee began working for Allina Health Systems. She left this job on about September 2, 1998, allegedly due to a recurrence of symptoms,

---

[1] The employer and insurer apparently voluntarily paid the employee benefits for a 14% whole body impairment relative to her lumbar condition and for a 3.5% whole body impairment relative to her cervical condition. When the employee subsequently claimed cervical permanency of 10.5%, the employer and insurer alleged that they had overpaid for the lumbar permanency, which was, they argued, only 11% after surgery. In July of 1995, the parties settled the employee's permanency claims for her cervical condition to the extent of a 10.5% rating, and the employer and insurer agreed to forego any overpayment claim relative to the employee's lumbar condition. Other settlements were reached with regard to chiropractic care and certain wage loss benefits. Pursuant to a stipulation reached in 1990, the employer and insurer agreed to pay for 24 chiropractic treatments a year.

[2] The employee had also treated with Dr. Greenman in the past, prior to Greenman's marriage, when the doctor was known by her maiden name, Michelle Hussong. In some treatment records, the doctor is referred to as Hussong, in others, Greenman.

[3] The employee had, however, apparently been told, informally, of her discharge prior to her official termination date.

and a few weeks later obtained a job with the optical department of J. C. Penney. The employee quit this job after a short period over concerns about that employer's pricing policies.

The matter came on for hearing on October 27, 1998, for resolution of the employee's claims for various medical expenses and for temporary total disability benefits for various periods beginning in May 1996. One of the primary issues was whether, and if so, when, the employee had become medically unable to continue working, due to her injury, within the meaning of Minn. Stat. § 176.101, subd. 3j (repealed 1995). The parties stipulated that the employee had originally reached maximum medical improvement [MMI] from the effects of her injury effective December 12, 1994. The employer and insurer asserted that the employee had never been medically unable to work during the claimed periods of disability but that, even if she had been medically disabled, she had again reached MMI effective with service of Dr. Mark Friedland's report on June 3, 1998.

In a decision issued on January 11, 1999, as amended on January 25, 1999, the compensation judge denied the employee's claims for certain medical expenses and for temporary total disability benefits prior to November 20, 1997. The judge did, however, conclude that the employee had become medically unable to continue working as of November 20, 1997, and she awarded the employee temporary total disability benefits from November 20, 1997, through August 24, 1998, and from September 3, 1998, through September 28, 1998. The employer and insurer appeal.

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

Medically Unable to Continue Working

Minn. Stat. § 176.101, subd. 3j (repealed 1995), provides for renewed eligibility for

temporary total disability benefits, beyond 90 days post MMI, if an employee is "medically unable to continue" working as a result of a work-related injury. See also O'Mara v. State, Univ. of Minn., 501 N.W.2d 603, 48 W.C.D. 483 (Minn. 1993). In the present case, the compensation judge concluded that the employee had become medically unable to continue working on November 20, 1997, and she awarded temporary total disability benefits thereafter through August 24, 1998, when the employee obtained her job at Allina Health Systems, and from September 3, 1998, after she left Allina, through September 28, 1998, when she obtained her job with J. C. Penney.[4] On appeal, the employer and insurer contend that substantial evidence does not support the judge's decision on this issue. More specifically, they argue that, contrary to the compensation judge's conclusion, the records of Drs. Easely and Greenman will not reasonably support a determination that the employee was medically unable to work. We acknowledge that this evidence is equivocal. However, after review of the entire record, we cannot conclude that the judge's decision is clearly erroneous and unsupported by the record as a whole.

In a report dated December 8, 1997, Dr. Easely indicated that the employee had "really been unable to work for the past month" due to worsening symptoms, and subsequent reports of December 11, 1997, February 9, 1998, and April 20, 1998, use similar language. However, in a longer narrative report dated May 28, 1998, written in response to a letter from the employee's attorney, Dr. Easely indicated that she had not taken the employee off work "but simply wrote a letter at her request stating that she had been unable to work since November of 1997." Dr. Easely then went on to write as follows:

> I do not recall discussing her work schedule prior to that and there is no mention of it in my progress notes. She first contacted my nurse on 12-10-97 requesting a letter stating she had been out of work since 11-1-97. Since I did believe that she had significant, legitimate chronic pain, I did dictate the letter of 12-11-97. However, it was not my suggestion that she be off work simply my belief in her when she told me she could not work. Upon reviewing the letter of 12-11-97 I do note that I did mention that a more acute back injury had occurred, however I can find no evidence in my progress notes that a new injury occurred, and I believe that I meant to say that she had had a more acute flair-up of her chronic pain.

In other words, Dr. Easely accepted her patient's account of worsening, disabling symptoms that caused her to miss work. Similarly, Dr. Greenman wrote on June 9, 1998, as follows:

> Since I have begun working with Martha on April 27, 1998, she has been temporarily totally disabled. As stated above, she is improving and her symptoms are subsiding, however, she is not

[4] The employee did not seek temporary total disability benefits after she terminated her employment with J. C. Penney.

> ready to return to work yet. It is my goal and Martha's to return her to work on a trial basis, with restrictions, beginning June 29, 1998.[5] My opinion as to the effects of Martha being off work for greater than 6 months are somewhat negative. I believe that her level of pain is such that it makes working difficult, if not impossible. However, the increased inactivity associated with being off work has a tendency to cause more stiffness and pain. I have strongly urged Martha to return to work as soon as possible, but I would place her on restrictions, as follows: 1) No lifting > 10 pounds; 2) No prolonged periods of sitting for more than one consecutive hour; 3) No prolonged periods of standing or walking; 4) No bending; 5) No twisting; 6) No overhead or above shoulder-level work with her arms; 7) No prolonged periods of neck flexion or extension; 8) Initially, no working > 4 hours per day, with a gradual increase in her hours back to full time; and, 9) Must allow changing positions frequently.

The compensation judge clearly recognized that Dr. Easely had not formally removed the employee from her job; however, the judge reasonably concluded, from all of the records, that Dr. Easely "would support lost time beginning November 20, 1997." Dr. Greenman's report also supports the judge's conclusion - - that is, while concerned about the employee's time off work in the spring of 1998, Dr. Greenman nevertheless believed that the employee had been temporarily totally disabled and that her symptoms were so severe that work was difficult "if not impossible."

An absolute prohibition on working, issued by a doctor, has never been a legal prerequisite to eligibility for temporary total disability benefits under subdivision 3j. The record in the present case is replete with references to significant intermittent symptom flareups since the employee's 1988 injury. The employee's treating physicians accepted that her symptoms were so severe as to disable her from work, and the compensation judge obviously found those opinions, as well as the employee's testimony, credible. It may well be, as the compensation judge noted, that there is some emotional component to the employee's complaints. However, despite the absence of any real objective evidence of a worsening of the employee's medical condition, we find no basis to reverse the judge's decision on this issue.

MMI

The employer and insurer contend that the compensation judge erred in awarding temporary total disability benefits after September 2, 1998, because the employee reached MMI again effective with service of Dr. Friedland's report on June 3, 1998. See Sabby v. Copasan,

[5] Apparently by the time Dr. Greenman released the employee to work, the Group Health job was no longer available. The employer and insurer do not argue that the employee failed to make a diligent job search prior to obtaining work at Allina Health Systems in late August of 1998.

Inc., 462 N.W.2d 603, 43 W.C.D. 509 (Minn. 1990). While the employer and insurer raised this as an alternative defense at the commencement of the hearing, the compensation judge made no finding on this issue. MMI is a finding of ultimate fact, for the compensation judge, not this court, to determine in the first instance. See Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989). We therefore remand the matter to the judge for resolution of this issue. Depending on her determination, the judge may also need to consider whether the employee again became medically unable to continue working due to the effects of her work injury when she left her job with Allina Health Systems on about September 3, 1998.