PAMELA STANISLAV, Employee, v. ASPEN MED. GRP. and MICHIGAN PHYSICIAN'S MUT. INS., Employer-Insurer/Appellants, and INSTITUTE FOR ATHLETIC MED., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 21, 1999

No. [REDACTED SSN]

HEADNOTES

EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the records of the employee's treating doctor, supported the conclusion that the employee was limited to part-time work as a result of her work injury and that her earnings were representative of her injury-related loss of earning capacity.

Affirmed as modified.

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

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's award of temporary partial disability benefits and permanent partial disability benefits for a 10.5% whole body impairment.[1] We modify the judge's award of permanency to 10.3% and affirm the remainder of his decision.

BACKGROUND

The employee sustained an injury to her cervical and lumbar spine on January 24, 1996, while working as an LPN at the Bandana Square clinic of the Aspen Medical Group [the employer]. The employee was off work from January 25, 1996, through January 26, 1996, and from February 19, 1996, to March 17, 1996. The employer's workers' compensation insurer accepted liability for the injury and paid temporary total disability benefits during these periods.

The employee initially treated at the Bandana Square clinic but on February 19, 1996, began receiving care from Dr. Thomas McPartlin. Dr. McPartlin released the employee to return to work on March 18, 1996, with restrictions against lifting, stooping, bending, and working

[1] While the employer appealed from the judge's award of rehabilitation assistance, that issue was not briefed and is therefore deemed waived. Minn. R. 9800.0900, subp.1.

more than three hours a day. The employee returned to work for the employer within those restrictions and was eventually able to increase her hours to four a day. The insurer voluntarily made payment of temporary partial disability benefits.

On May 20, 1996, Dr. McPartlin restricted the employee to working four hours per day, four days per week and on July 16, 1996, changed the restrictions to five hours per day, four days per week. Sometime thereafter, the employee asked to be transferred, and on October 1, 1996, she did transfer to the employer's clinic in West St. Paul, to a permanent four-hour per day, four-day per week schedule. At that time, the employer and insurer filed a notice of intention to discontinue workers' compensation benefits, alleging that the "[e]mployee has voluntarily reduced her hours to 16 hours per week effective 10/01/96. We no longer have an exposure for TPD benefits." The employee did not file an objection to discontinuance at that time and continued to work at the West St. Paul clinic.

On March 25, 1997, Dr. McPartlin stated that the employee had reached maximum medical improvement [MMI] from the effects of her work injury, and two months later, on May 29, 1997, he issued a report indicating that the employee's restrictions included limited lifting, sitting and standing and working only four hours per day. Dr. McPartlin also rated the employee as having a 7% whole body impairment pursuant to Minn. R. 5223.0390, subp. 4C(1), and a 3.5% impairment pursuant to Minn. R. 5223.0370, subp. 3B. From February through April of 1998 the employee was on a leave of absence from her job for reasons unrelated to her work injury.

On May 14, 1998, Dr. McPartlin again stated that the employee should be limited to four hours of work per day. Two weeks later, on May 28, 1998, an independent medical examination was performed by Dr. Gary Wyard.[2] Dr. Wyard noted that the employee had no objective findings on examination and opined that the employee had no restrictions on her work activities and no permanent partial disability. On June 23, 1998, Dr. McPartlin stated that the employee's restrictions as an LPN included no repeated lifting more than fifteen pounds, no stooping, no standing for more than one hour without sitting down, no double assignments,[3] and working only four hours per day, four days per week.

On June 25, 1998, an employer representative, Karen Keller, met with the employee and presented her with a written job offer for her LPN job without restrictions. The job offer specifically stated that the employee could be required to perform double assignments and that lifting of patients and equipment was required.[4] The employee declined the job because it was outside of the restrictions imposed by Dr. McPartlin, and she has not worked for the employer

[2] Dr. Wyard had earlier examined the employee on August 22, 1996.

[3] Working with more than one provider at a time.

[4] Although the written job offer does not state that the job was to be four hours per day, four days per week, both the employee and Ms. Keller testified that that was the intent.

since that time. On July 16, 1998, the employer wrote to the employee informing her that, since they had not heard from her regarding the job offer, they were considering her voluntarily terminated.

On January 5, 1998, the employee filed a claim petition seeking, in part, temporary total and temporary partial disability benefits and permanent partial disability benefits for a 10.3% whole body impairment. The matter proceeded to hearing, and on October 20, 1998, the compensation judge issued his decision wherein he denied the employee's claim for temporary total disability benefits but awarded temporary partial disability benefits and permanent partial disability benefits for a 10.5% whole body impairment. 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

The employer contends that, because the employee voluntarily terminated her job at the Bandana Square clinic and accepted another position for less pay at the West St. Paul clinic, the employee's earnings in the West St. Paul clinic are not presumptive of the employee's earning capacity. We are not persuaded.

Dr. McPartlin's office notes from May 20, 1996, reflect that the employee was working four hours per day, four days per week at that time and that the treatment plan was to "gradually increase hours as tolerated according to her pain level." The next office note, dated July 16, 1996, reflects that the employee was working five hours a day, four days per week and was by the end of a week "fairly sore and fatigued." Dr. McPartlin, however, recommended at that time that the employee keep her work hours the same. When the employee returned to him on August 27, 1996, Dr. McPartlin noted that the employee's back pain had been worsening and that symptoms were worse by later in the day with increased numbness in the right leg and foot. The doctor noted that the employee was working five hours a day, four days a week and had put

in for a transfer to a clinic where she would work less. The employee was restricted to part-time work at the time she applied for a transfer to the West St. Paul clinic, and she has never been released to full-time work by her treating doctor. The employee testified that she requested the job transfer because her supervisor at Bandana Square was continually questioning her as to when she could return to full-time work.[5] The employee also testified that she never intended to remain permanently at the part-time job at the West St. Paul clinic and hoped that, without the pressure to work more hours, her back would be "fine" and she could increase her hours. The compensation judge found the employee to be a credible witness. Assessment of a witness' credibility is the unique function of a trier of fact. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976).

While Dr. McPartlin's August 27, 1996, office note does not make a clear recommendation regarding work hours, it is not unreasonable to infer that Dr. McPartlin supported the employee's move to a job with fewer hours. Dr. McPartlin has subsequently never released the employee to work more than four hours per day, four days per week as an LPN. The employee's testimony and the records of Dr. McPartlin support the judge's finding that from October 1, 1996, to February 8, 1998, Dr. McPartlin had restricted the employee to four hours of work per day, four days per week. The employee was, therefore, working as many hours and days per week as her treating doctor allowed.[6]

The judge also awarded temporary partial disability benefits from May 11, 1998, to June 24, 1998.[7] This award is clearly supported by substantial evidence. All of

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[5] The rehabilitation plan, at that time, was apparently directed towards returning the employee to full-time work with the employer. Rehabilitation records, however, were not introduced as exhibits at the hearing.

[6] The employer contends that the compensation judge did not address "the termination issue" as it relates to the Bandana Square job. We do not see this as a voluntary termination from a job within her restrictions and a move to a lesser-paying job. There was no evidence that the West St. Paul job paid less on an hourly basis. The employer's argument seems to be that the Bandana Square job was a full-time job that was temporarily modified to meet the employee's need for part-time hours, while the West St. Paul job was a permanent part-time job. Both jobs were with the date-of-injury employer. If the employer wanted the employee to be more active in moving back to full-time employment or had concerns regarding Dr. McPartlin's continuing restriction on hours, the employer could have provided rehabilitation assistance or requested a rehabilitation conference. Instead, they apparently terminated rehabilitation assistance when temporary partial disability benefits were discontinued in October of 1996. The employer argues that "[t]he decision, which retroactively held that the 16 hour per week job was appropriate under circumstances where the employer had been denied the opportunity to find a more economically suitable position, unfairly prejudices and penalizes the employer." However, nothing precluded the employer from providing rehabilitation assistance to the employee.

[7] The judge's findings indicate that the employee was temporarily partially disabled from

Dr. McPartlin's records during this period clearly restrict the employee to four hours per day, four days per week of LPN work. The employer appears to contend that the employee had an obligation to look for non-LPN work that she could do on a more full-time basis. Again, however, the employer did not provide rehabilitation assistance during this period and, apparently, when rehabilitation was provided, all efforts were directed toward returning the employee to LPN work with the employer. We therefore affirm the judge's award of temporary partial disability benefits.[8]

Both parties agree that the compensation judge mistakenly failed to apply Minn. Stat. §176.105, subd. 4, to the permanent partial disability award and that the employee is entitled to benefits for a 10.3% impairment rather than the 10.5% awarded. The judge's decision is modified accordingly.

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May 11, 1998, to June 24, 1998, but his order states June 14, 1998. The reference to June 14 in the order is considered a typographical error and is changed to June 24, 1998.

[8] The employer also contends that the employee failed to cooperate with rehabilitation assistance when she requested a transfer to the West St. Paul Clinic. However, there is no evidence that the employee's decision to transfer was motivated in any way by a desire to thwart rehabilitation efforts.