RICHARD A. STELLMACH, Employee, v. NEW MECH COS. and GENERAL CASUALTY INS. CO., Employer-Insurer/Appellants, and INTEGRACARE and WILLIAMS CHIROPRACTIC CLINIC, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 23, 1999

No. [REDACTED SSN]

HEADNOTES

JOB OFFER - PHYSICAL SUITABILITY; TEMPORARY TOTAL DISABILITY. Where the actual work duties of the job offered by the employer were within the employee's restrictions but would have required one-way daily commutes of 88 miles, which exceeded his doctor's restrictions of 30 minutes, or relocation of his family, the compensation judge was supported by substantial evidence in finding that the job was not physically suitable, even though the employee would have received a higher wage and a subsistence per diem payment.

Affirmed.

Determined by Wheeler, C.J., Pederson, J., and Wilson, J.
Compensation Judge: Janice M. Culnane.

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's award of temporary total disability benefits to the employee. The employer and insurer contest the compensation judge's finding that the job offered to the employee was not physically suitable. We affirm.

BACKGROUND

The employee, Richard Stellmach, first started work in the construction field when he joined the laborers' union in 1982. By 1988, he joined the millwrights' union. He was first employed by New Mech Companies, Inc., the employer, in 1993 or 1994 as a union millwright. The employee has resided in the St. Cloud, Minnesota area since 1984. He is currently married and has one small child. He regularly commuted to his job with the employer in the Twin Cities metro area. (T. 23.) On or about June 20, 1997, the employee sustained an injury to his low back while working on a job site in Newport, Minnesota. (T. 23.) At the time, the employee was 36 years old and was earning $22.40 per hour with an approximate weekly wage of $900.00.

At the time of the injury, the employee experienced an immediate onset of low back

pain with radiation into the left leg. The employee was referred to Dr. Thomas Kraemer, a physiatrist at IntegraCare in St. Cloud. An MRI taken on June 24, 1997 revealed a "bulge and tear" in the disc at L4-5 and a "conjoined nerve root," consistent with grade I spondylolisthesis. (Res. Ex. 1.) Initial post-injury treatment was conservative, and included electric muscle stimulation, trigger point therapy and activator method adjusting. (Resp. Ex. 1.) Physical therapy was deemed unsuccessful and the employee was referred to Dr. Hames, a neurosurgeon. Dr. Hames' diagnosis was "stable spondylolisthesis at L5-S1 as well as an S1 radiculopathy." The employee underwent posterior decompressive surgery at L4-5 on August 11, 1997. (Resp. Ex. 1.)

Following a period of recuperation from surgery, a functional capacities evaluation (FCE) was performed on November 17, 1997, by Physicians Diagnostic and Rehabilitation Clinic. As a result of the evaluation, restrictions for an eight-hour work day were placed on the employee's activities, which included "a sitting limit of four hours, providing the employee should be able to reposition frequently and take breaks every 20 to 30 minutes." (Resp. Ex. 1.) Subsequently, the employee returned to light-duty work for the employer on December 4, 1997. However, six days later the employee was told to stop work by Dr. Kraemer after reporting substantial pain in the lower back. (T. 61.)

A second MRI was ordered by Dr. Kraemer on December 12, 1997. Dr. Kraemer interpreted this MRI to show "post partial left hemilaminectomy at L5-S1 and grade I spondylolisthesis with moderate to severe up and down neuroforaminal stenosis, bilateral with ganglionic impingement." Additionally, Dr. Kraemer opined "there has been no significant change when compared with the previous study and I failed to mention that the up and down foraminal narrowing is worse on the left." (Pet. Ex. F.) The employee was treated with two diagnostic therapeutic lumbar epidural steroid injections on October 29, 1997 and January 7, 1998. The employee reported minimal improvement from each injection.

The employee was re-examined by Dr. Kraemer on January 9, 1998. Dr. Kraemer reported the employee had reached maximum medical improvement (MMI) from conservative treatment. On January 12, 1998, the employee was again evaluated by Dr. Kraemer, who recommended the employee seek a surgical opinion with Dr. James Ogilvie, an orthopedic spine surgeon at the University of Minnesota. Additionally, Dr. Kraemer recommended the employee return to work within the restrictions of the November 17, 1997 FCE. (Pet. Ex. D.)

On February 2, 1998, the employee and his qualified rehabilitation consultant (QRC), Julie Quanrud, met with Dr. Kraemer. A job opportunity with New Mech Companies, Inc. was discussed which would require a one-way commute of 110 miles. Dr. Kraemer amended the employee's original restrictions from the November 17, 1997 FCE to "limit driving time to 30 minutes" and "limit lifting to no more than 20 pounds on an occasional basis." (Pet. Ex. D.)

On February 5, 1998, the employee was examined by Dr. James Ogilvie at the Twin Cities Spine Center. Dr. Ogilvie diagnosed the employee with an "unstable spondylolisthesis that is grade I." Dr. Ogilvie recommended a surgical fusion of "L5-S1 using a TIFS procedure." On

April 30, 1998, a second opinion was obtained when the employee was examined by Dr. Kirkham B. Wood, also at the Twin Cities Spine Center. Dr. Wood diagnosed "L5-S1 isthmic spondylolisthesis with radiculopathy" and recommended the fusion surgery. (Pet. Ex. E.)

On May 8, 1998, the employee was examined by Dr. William Akins, an orthopedic surgeon, at the request of the employer and insurer. Dr. Akins diagnosed a "pre-existing spondylolisthesis segment of the spine with a congenitally conjoined nerve root at L5-S1 on the left and a torn L4-5 disc," which he opined contributed to the employee's low back pain. Dr. Akins also recommended the employee undergo a fusion at spinal levels L4-5 and L5-S1. Dr. Akins also stated that after the fusion surgery, the employee would not reach MMI for approximately a year. He further indicated that if the employee did not elect surgery, MMI had been reached from the June 20, 1997 injury. As of the date of the hearing, the employee was scheduled to have Dr. Ogilvie perform the fusion surgery on November 13, 1998. (Pet. Ex. C.)

On July 21, 1998, the employer offered the employee a job starting July 27, 1998. The offer was contained in a letter from the employer's representative, Mr. Osterbaur, which stated in part:

> You will be employed as a non-working foreman earning union scale. Since you are limited to 30 minutes of drive time, we are offering payment of subsistence per the union contract. Your hours will be 7:00 a.m. to 3:30 p.m. and you will be working at Grist Mill Company located at 21340 Hayes Avenue, Lakeville, Minnesota. You will be working at this location for the next 8 to 12 months. The job is within the November 17, 1997 limitations set forth in the R-33 as revised by Dr. Kraemer in his report of February 9, 1998.

The employee refused the job offer. He testified that he felt the job was outside his physical restrictions because it would have required a commute of greater than 30 minutes or would have essentially required him to relocate his residence or to live away from his family during the work week. The employer and insurer then filed a Notice of Intention to Discontinue Workers' Compensation Benefits on August 13, 1998. The basis for the discontinuance was "the employee had refused gainful employment and MMI had been reached as of June 10, 1998." (Judgment Roll: NOID of 8/13/98.) The employee filed an objection to the discontinuance on August 14, 1998.

The matter came on for hearing before Compensation Judge Janice Culnane on October 13, 1998. In Findings and Order, dated December 8, 1998, the compensation judge found the job offered by the employer was not physically suitable because it would have required a commute which exceeded Dr. Kraemer's 30 minute driving restriction. The compensation judge determined that the employee reasonably refused the job and denied the request to discontinue temporary total disability benefits.[1] The employer and insurer appeal from this finding.

[1] In her memorandum the compensation judge indicated that the employee had not reached

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 compensation judge found, with respect to the employer and insurer's July 1998 job offer, that: (1) "A job as a new nonworking foreman offered to the employee in July of 1998 was not a physically suitable job" (Finding 5) and (2); "The employee reasonably refused the job as a nonworking foreman" (Finding 6). In her memorandum she stated:

> The employee indicated his family commitments would make it not possible or desirable for him to live in the Twin Cities; therefore, the employee would be forced to commute. Offering the employee a job in the Twin Cities for eight to twelve months and offering to pay a portion of his living expenses is, in effect, requiring that this employee relocate. If the employee is being asked to relocate, it is reasonable for him to refuse a job which requires that he relocate.

Consequently, the compensation judge ordered the employer and insurer to pay temporary total disability benefits from and after August 14, 1998.

The employer and insurer argue that the compensation judge's finding that the nonworking foreman job offered to the employee was not physically suitable is clearly erroneous. They observe that it is uncontested that the actual job duties were within the employee's original restrictions and point out that the position constituted a promotion, with a significant pay increase. They argue that the location of the job, in Lakeville, was reasonable because it was in the Twin

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MMI because he was scheduled for fusion surgery in November. She made no specific finding on this issue and it was not contested by the appellants on appeal.

Cities metro area, the area in which the employee had customarily worked for the employer before he was injured. They point out that under the union's collective bargaining agreement covering the employee, he would be entitled to a per diem payment of $27.00 which could be used to defray the cost of staying near the job site and/or the cost of the commute from his home near St. Cloud, Minnesota. The employer and insurer argue that they have reasonably accommodated the employee's physical restrictions and the employee should have at least attempted the job.

The determination of whether post-injury employment is physically suitable is a question of fact. Jerde v. Adolphson & Peterson, 484 N.W.2d 793, 46 W.C.D. 620 (Minn. 1992). The determination of suitability must be based on a review of the circumstances existing at the time of the job offer. Collier v. Septran, Inc., 42 W.C.D. 32 (W.C.C.A. 1989). In order to be physically suitable, the job must be one the employee can perform with all of his existing physical restrictions. DeGroat v. Swift-Eckrich, 44 W.C.D. 110 (W.C.C.A. 1990). The employer has the burden of proving that the job offered to the employee is physically suitable and the employee's refusal to accept the job offer was unreasonable in light of the job suitability. Nelson v. Dahlen Transp., Inc., 43 W.C.D. 479 (W.C.C.A. 1990).

The only reason that the compensation judge found the offer of a nonworking foreman job to be physically unsuitable was that the employee's home near St. Cloud was 88 miles from the job site and a commute would have exceeded Dr. Kraemer's 30-minute driving restriction. (Finding 5.) The employer and insurer do not dispute that the commute to the job in Lakeville would have exceeded Dr. Kraemer's restrictions. As a result, the factual basis for the compensation judge's decision is uncontested. The employer and insurer contend that this fact, however, can be ignored because the job duties were acceptable, the pay was increased and the employee was to be given a per diem to compensate him for staying in a motel. We believe that the compensation judge was correct in not accepting these arguments.

This court has clearly established that an employee is not required to seek employment an unreasonable distance from his or her residence. Fredenburg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 572 (Minn. 1981). In Fredenburg, a job search in the Twin Cities' job market, 60 miles from the employee's home, was not required in light of evidence of driving and sitting restrictions. We have consistently followed Fredenburg in considering driving and sitting restrictions. See also Jones v. Continental Tel. Co., 40 W.C.D. 368 (W.C.C.A. 1987); Sorenson v. George W. Olson Constr. Co., 37 W.C.D. 765 (W.C.C.A. 1984). See also Saldana v. Pueringer Dist., 45 W.C.D. 76 (W.C.C.A. 1981). This court has recognized that it is reasonable for a compensation judge to consider the employee's ability to withstand a commute to work in her determination of the physical suitability of a job. Gowell v. Aitkin Community Hosp., slip op. (W.C.C.A. Aug. 9, 1994). In Gowell, the compensation judge upheld the employee's refusal of a light-duty position based on her physician's opinion that she was unable to withstand a one-way commute of 36 miles.

The employer and insurer specifically cite our decision in Pawlenty v. Cub Foods, 56 W.C.D. 11 (W.C.C.A. 1996), in support of its appeal. They argue that, like in Pawlenty, a more flexible view of an employee's restrictions must be taken. They contend that where the

employer and insurer make a strong equitable argument based on its good faith efforts to assist the employee, that it would not be unreasonable to require the employee to make certain accommodations with respect to his restrictions or living arrangements. Their reliance on Pawlenty is misplaced, as an employee need not trade off his right to not exceed his restrictions for some other benefit from the employer and insurer. In Pawlenty the court found the employee's job as a loan processor was physically suitable although the employee's medical restrictions were occasionally exceeded. However, in the present case, if the employee commuted daily he would be exceeding his medical restrictions on a consistent rather than occasional basis. If he commuted only on weekends he would have effectively been relocated. In addition, the employer and insurer's argument fails to recognize that our decision in Pawlenty was an affirmance of the compensation judge's decision on a different issue.

In this case, the compensation judge reasonably concluded that the Lakeville job would have required the employee to relocate or exceed his restrictions. While the additional pay certainly made the job economically suitable it did not change the principle that the employee could not be required to relocate or exceed his restrictions. As a result, we affirm the compensation judge's award of benefits.