

MATTIE J. WILLIAMS, Employee, v. HOLIDAY STATION STORES and RELIANCE GRP./CRAWFORD & CO., Employer-Insurer/Appellants, and DRS.' DIAGNOSTICS CTR., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS  
MARCH 12, 1999

No. [REDACTED SSN]

HEADNOTES

**MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY.** Under the particular facts of this case, substantial evidence, including the opinions of the employee's family physician and treating surgeon, supported the compensation judge's conclusion that gastric bypass surgery was reasonable and necessary to treat the employee's work-related low back strain.

**MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE.** Substantial evidence supported the compensation judge's conclusion that further significant improvement in the employee's work-related low back condition could be reasonably anticipated through the employee's expected continued weight loss, following gastric bypass surgery, and her resulting ability to participate in rehabilitative exercises.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.  
Compensation Judge: Bradley J. Behr.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's findings as to maximum medical improvement and the reasonableness and necessity of gastric bypass surgery. We affirm.

BACKGROUND

The employee began working as a cashier for Holiday Station Stores [the employer]<sup>1</sup> in October of 1990. Between 1992 and 1994, the employee sought occasional treatment for low back symptoms, but she apparently missed little or no time from work as a result

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<sup>1</sup> The employer is also referred to in the record as Holiday Companies.

of her back condition until September 8, 1995, when she sustained a work-related low back injury while unloading or scanning a bag of cat litter.<sup>2</sup> Following that injury, the employee sought treatment for low back symptoms from Dr. Robert Johnson, her usual family physician, who diagnosed sprain/strain and tried various conservative treatment measures, including physical therapy, aquatic therapy, and medication. The employee's symptoms continued, however, and she began to have difficulty performing her job.

In addition to the other treatment directed toward her back symptoms, Dr. Johnson advised the employee to lose weight. The employee, who is 4'10" or 4'11", has been obese virtually all of her adult life, with her weight ranging from 260 to nearly 350 pounds. At some point prior to her work injury, the employee tried the Weight Watchers diet program, and she apparently lost 30 or 40 pounds before quitting the program due to cost. Following her work injury, Dr. Johnson gave the employee a prescription for Redux, which also resulted in a 40-pound weight loss, but the employee had to discontinue the medication due to health concerns. Neither Weight Watchers nor Redux produced permanent weight control; the employee regained the weight she had lost, and more. As Dr. Johnson explained in his deposition, the employee's severe obesity both contributed to her back symptoms and prevented her from engaging in the kind of exercise program necessary to strengthen her back and allow the sprain/strain to heal.

In August of 1997, after Dr. Johnson recommended a 10-pound lifting restriction for the employee, the employer placed the employee on a temporary leave of absence "pending improvement of [her] condition."

On December 3, 1997, the employee filed a claim petition seeking authorization for gastric bypass surgery, which Dr. Johnson had advised her to investigate to treat her obesity. About a month later, the employer and insurer, which had been paying the employee temporary total disability benefits, filed a petition to discontinue,<sup>3</sup> alleging that the employee's current back problems were related not to the work injury but to her obesity, that the employee had completely recovered from the work injury, that the employee had reached maximum medical improvement [MMI], and that the employee had not performed a diligent job search. At about the same time, the employee began receiving rehabilitation assistance from QRC Thomas Saby.

On January 26, 1998, after preoperative evaluations but prior to hearing on her claim petition, the employee proceeded with the gastric bypass operation. The surgery was

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<sup>2</sup> The employee testified that the injury occurred while "unloading bags to be stocked"; the First Report of Injury indicates that the employee had been scanning merchandise and strained her back when she "turned over 25 lb bag of cat litter for UPC code." The exact circumstances of the injury are not important to the issues here.

<sup>3</sup> The employer and insurer had previously filed a NOID but, following a conference, a judge of the Department of Labor and Industry disallowed discontinuance of temporary total disability benefits. The employer and insurer responded by filing the petition to discontinue.

performed by Dr. Michael Schwartz.

The matter came on for hearing before a compensation judge on March 11, 1998, about six weeks after the employee's surgery, by which time the employee had lost about 30 pounds. At issue were the reasonableness and necessity of the gastric bypass operation and the employer and insurer's right to discontinue wage loss benefits on the grounds alleged in the petition to discontinue. At the commencement of the hearing, the parties stipulated that the employee had originally reached MMI from the effects of her work-related low back injury effective October 23, 1996, but that she had become medically unable to continue working as a result of her low back condition on about August 4, 1997.<sup>4</sup> The parties also stipulated that the MMI report of Dr. Robert Hartman, one of the employer and insurer's independent examiners, had been served on the employee and her attorney on November 12, 1997. Evidence submitted at hearing included Dr. Hartman's report, the reports of Dr. Ronald Vessey, the employer and insurer's other independent examiner, the records and post-hearing deposition testimony of Dr. Johnson, and reports from Dr. Schwartz.

In a decision issued on July 15, 1998, the compensation judge concluded, in relevant part, that the employee's gastric bypass operation was reasonable and necessary to treat her September 8, 1995, injury<sup>5</sup> and that the employee had not reached MMI again following her medical inability to continue working. 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

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<sup>4</sup> See Minn. Stat. § 176.101, subd. 3j (repealed effective October 1, 1995), concerning eligibility for temporary total disability benefits following a medical inability to continue working. See also Sabby v. Copasan, Inc., 462 N.W.2d 603, 43 W.C.D. 509 (Minn. 1990).

<sup>5</sup> Although the surgery was found compensable, the employer and insurer were not ordered to reimburse Mail Handlers' Benefit Plan, which had apparently paid for the procedure, because Mail Handlers' failed to intervene in the matter after proper notice of its right to do so.

manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id.

## DECISION

### Reasonableness and Necessity - Gastric Bypass

In their brief, the employer and insurer argue, almost exclusively, that the employee’s gastric bypass surgery was not reasonably necessary pursuant to Adkins v. University Health Care Center, 405 N.W.2d 231, 39 W.C.D. 898 (Minn. 1987), and they urge this court to adopt the Adkins “criteria” for purposes of evaluating the compensability of this particular kind of surgical procedure. The employer and insurer’s arguments in this regard are not persuasive.

In Adkins, the Medical Services Review Board denied the employee’s request for authorization of gastric bypass surgery for weight reduction, concluding that there was no need for rapid weight loss as a prerequisite to any low back surgery, that conservative treatment methods for weight loss had not been exhausted, and that gastric bypass entailed recognized risks and was unsupported by conclusive proof of long-term effectiveness in weight control. On appeal from the Board’s decision, a panel of the Workers’ Compensation Court of Appeals reversed, in a 2-1 decision, concluding that the procedure was reasonably required to cure or relieve the employee’s work-related low back condition. On appeal from that decision, a divided Minnesota Supreme Court in turn reversed the Workers’ Compensation Court of Appeals, concluding that, because the Board’s decision was supported by substantial evidence, the Workers’ Compensation Court of Appeals erred in overturning it. Adkins, 405 N.W.2d at 233, 39 W.C.D. at 900-01. In reaching its conclusion, the supreme court explained as follows:

The propriety and necessity of the requested medical treatment were questions of fact, and the employee had the burden of proving her case. *Casey v. Northern States Power Co.*, 247 Minn. 295, 313, 77 N.W.2d 67, 78 (1956). The Medical Services Review Board concluded that employee had not met her burden, and it was not the function of the WCCA to review that determination on a *de novo* basis. Based on the record in this case, we conclude that the decision of the Medical Services Review Board was supported by substantial evidence. The WCCA therefore erred in reversing that decision.

Id.

It is apparent from its decision that the supreme court was not adopting the Board’s rationale as establishing “the” criteria to be used in evaluating disputes over the compensability of gastric bypass; rather, the court simply judged that the Workers’ Compensation Court of Appeals had erred in overturning the Board’s decision where that decision had reasonable support in the

record.<sup>6</sup> In fact, in Hopp v. Grist Mill, 499 N.W.2d 812, 48 W.C.D. 450 (Minn. 1993), a later case, the supreme court reviewed a dispute over gastric bypass without any reference to the Adkins “criteria” and merely cited Adkins as a case in which the “denial of authorization for gastric bypass affirmed on certiorari where finding that procedure was not reasonable or necessary had evidentiary support.” Hopp, 499 N.W.2d at 815, 48 W.C.D. at 453. The reasonableness and necessity of gastric bypass surgery, like other medical treatment, is a factual issue dependent on the evidence presented in any given case. As the employer and insurer have advanced no compelling reason for this court to adopt compensability standards applicable solely to gastric bypass procedures, we decline to do so. For our purposes, the determinative question is whether the judge’s decision is supported by evidence that a reasonable mind could accept as adequate.

In his post-hearing deposition, Dr. Johnson, the employee’s family physician, testified in some detail as to his reasons for advising the employee to investigate gastric bypass to lose weight. As previously noted, Dr. Johnson indicated that the employee’s weight served as an obstacle to participation in an exercise program that would help to alleviate her back symptoms, creating a “vicious cycle” and preventing the employee from losing weight through exercise. In fact, Dr. Johnson testified that the employee’s extreme obesity was “the most significant impediment” to the employee’s ability to exercise. Dr. Johnson also indicated that the employee had not been able to lose the necessary weight through other means, that the employee was the very first patient he had ever referred for a gastric bypass, and that, had there been a good alternative, he would have recommended it. Dr. Schwartz, the employee’s surgeon, reported that “the success rate for weight loss by dietary means for patients [in the ‘super’ obese] category is essentially zero,” with “[f]ewer than 5% of the patients hav[ing] a weight lower than their starting weight 5 years after undertaking any dietary weight loss program.” In contrast, surgical treatment has a much higher success rate, according to Dr. Schwartz, who concluded that “[t]here was no logical reason to request that [the employee] attempt another dietary means of controlling her weight.” Even Dr. Hartman, one of the employer and insurer’s experts, reported that “[a]ny medically safe method for weight reduction should be employed” because, “[c]learly, if [the employee] lost weight, this would have a profound beneficial effect in reducing her low back pain.”<sup>7</sup> Finally, the excerpt from the American Journal of Surgery attached to the report of Dr. Vessey, the employer and insurer’s other independent examiner, indicates that there is “a lack of any significant data to demonstrate that the conservative approach to treating [severe obesity] has any effect” and that a “major improvement in musculoskeletal disability . . . almost always accompanies surgical weight control.”

We acknowledge some concerns about the judge’s conclusion. Gastric bypass is

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<sup>6</sup> Indeed, reading the supreme court’s decision in conjunction with the decision of the Workers’ Compensation Court of Appeals, it appears that the supreme court wrote to clarify the standard of review applicable to appeals from the Medical Services Review Board.

<sup>7</sup> However, it was Dr. Hartman’s opinion that the employee’s low back pain was not related to her work injury.

still considered a drastic surgery with potentially serious side effects. Moreover, the surgery was performed to induce weight loss in treatment of a strain/sprain for which no doctor has ever reported objective findings on examination. Still, after careful review of the entire record, we are satisfied that the judge's decision is adequately supported by substantial evidence, and we therefore affirm his conclusion that the employee's gastric bypass surgery was reasonably required to treat her work-related low back condition.

### MMI

The employer and insurer also argue that substantial evidence does not support the judge's decision that the employee has not reached MMI effective with service of Dr. Hartman's report. We disagree. The same evidence supporting the judge's conclusion as to the reasonableness and necessity of the gastric bypass operation also supports the judge's conclusion that further significant improvement in the employee's low back condition may reasonably be anticipated through the employee's expected continuing weight loss and resulting ability to participate in exercises to rehabilitate her low back. We therefore also affirm this decision. Minn. Stat. § 176.011, subd. 25; Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989).